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## Second Mode Inclusion Claims in the Law Schools

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## SECOND MODE INCLUSION CLAIMS IN THE LAW SCHOOLS

*Kenneth W. Mack\**

### INTRODUCTION

In October 2015, a group of Harvard Law School (HLS) students calling themselves “Royall Must Fall” announced their presence on both Facebook and Twitter, declaring their solidarity with the Rhodes Must Fall movement<sup>1</sup>—which had called for the removal of a statue of Cecil Rhodes at the University of Cape Town.<sup>2</sup> While the immediate concern of the Royall Must Fall students was the Law School’s shield—HLS’s symbolic crest was taken from the family crest of Isaac Royall Jr., an eighteenth-century slaveholder<sup>3</sup>—they had a much broader agenda. The student protesters argued that removal of the existing shield would focus institutional memory on the “clear connection between the slave trade and the present” in the form of “structural racism” within modern institutions.<sup>4</sup> “The Royall crest is

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1. Harvard: Royall Must Fall, *RED Friday, Wear RED*, FACEBOOK (Oct. 20, 2015), <https://www.facebook.com/pg/RoyallMustFall/posts/> [https://perma.cc/X3CJ-KRG8] (marking the first post of Royall Must Fall, which promotes an event to inspire solidarity among students to protest the HLS seal); RoyallMustFall (@RoyallMustFall), TWITTER (Oct. 21, 2015), <https://twitter.com/RoyallMustFall> [https://perma.cc/4EGF-MH6X].

2. Don Borroughs, *Why South African Students Say the Statue of Rhodes Must Fall*, NPR (Mar. 28, 2015, 7:03 AM), <https://www.npr.org/sections/goatsandsoda/2015/03/28/395608605/why-south-african-students-say-the-statue-of-rhodes-must-fall> [https://perma.cc/R37B-8ZV8]. “Rhodes bequeathed the land on which the university was built, but he also slaughtered Africans by the thousands in colonial conquest and helped lay the foundations of apartheid in South Africa.” *Id.*

3. Isaac Royall Jr.’s family wealth helped endow Harvard College’s first professorship in law. *The Royall Bequest and Harvard Law School*, ROYALL HOUSE & SLAVE QUARTERS, <http://www.royallhouse.org/the-royall-bequest-and-harvard-law-school/> [https://perma.cc/R367-9AAW] (last visited Nov. 15, 2018); see also Liz Mineo, *At Law School, Honor for the Enslaved*, HARV. GAZETTE (Sept. 6, 2017), <https://news.harvard.edu/gazette/story/2017/09/harvard-law-school-plaque-honors-those-enslaved-by-royall-family/> [https://perma.cc/8HP3-QUTV].

4. Royall Must Fall, Opinion, *An Open Letter to Dean Minow from Students of Harvard Law School: Royall Must Fall*, HARV. L. REC. (Nov. 18, 2015), <http://hlrecord.org/2015/11/an-open-letter-to-dean-minow-from-students-of-harvard-law-school-royall-must-fall/> [https://perma.cc/W3ZX-G3QD].

merely one aspect of this broader justice project in creating an inclusive community,” the students wrote.<sup>5</sup>

By early December 2015, the protesters had broadened their demands to include a Critical Race Theory Program; an Office of Diversity and Inclusion; a curriculum that includes marginalized voices and discussions of racism; “financial access to HLS”; a diversity committee composed of students; and greater retention—and later recruitment—of faculty and staff of color.<sup>6</sup> The students formed a new group, “Reclaim Harvard Law School,” to press their expanded demands.<sup>7</sup> The students occupied the school’s student lounge, renaming it Belinda Hall<sup>8</sup> in honor of Belinda Sutton, the formerly enslaved woman who had successfully petitioned for a pension from the Royall estate.<sup>9</sup> For the next four months, the lounge was the scene of teach-ins, study sessions, and discussions among the students.<sup>10</sup> That spring, an HLS committee, which was established “to study the shield and to recommend to the President and Fellows whether or not to retain it for use by the Law School,” recommended that the shield be replaced.<sup>11</sup> The university accepted its recommendation.<sup>12</sup>

In the fall of 2016, the Law School convened a student-faculty-alumni task force charged with studying the conditions under which “people of different backgrounds, identities, and affiliations” would be able to “learn from one another as well as alongside one another.”<sup>13</sup> In the spring of 2017, the task force issued its report, which made recommendations for improving the

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5. Antuan Johnson, Alexander Clayborne & Sean Cuddihy, Opinion, *Royall Must Fall*, HARV. CRIMSON (Nov. 20, 2015), <https://www.thecrimson.com/article/2015/11/20/hls-royall-must-fall/> [https://perma.cc/Q8EJ-GCWN].

6. *Reclaim Harvard Law Demands*, RECLAIM HARV. L. SCH. (Dec. 4, 2015), <https://reclaimharvardlaw.wordpress.com/demands/> [perma.cc/4SP6-9CVF].

7. *We Reclaim Harvard Law Because...*, RECLAIM HARV. L. SCH., <https://reclaimharvardlaw.wordpress.com/why/> [https://perma.cc/X8GM-26GC] (last visited Nov. 15, 2018).

8. Claire E. Parker, *Law School Activists Occupy Student Center*, HARV. CRIMSON (Feb. 17, 2016, 9:43 PM), <https://www.thecrimson.com/article/2016/2/17/activists-occupy-wasserstein/> [https://perma.cc/2U7A-TAHS].

9. *Belinda Sutton and Her Petitions*, ROYALL HOUSE & SLAVE QUARTERS, <http://www.royallhouse.org/slavery/belinda-sutton-and-her-petitions/> [https://perma.cc/JK9H-E7AU] (last visited Nov. 15, 2018).

10. *See Past Events Gallery*, RECLAIM HARV. L. SCH., <https://reclaimharvardlaw.wordpress.com/gallery/> [https://perma.cc/2YM7-MG2R] (last visited Nov. 15, 2018).

11. Bruce H. Mann et al., *Recommendation to the President and Fellows of Harvard College on the Shield Approved for the Law School*, HARV. L. TODAY, at 1 (Mar. 3, 2016), <https://today.law.harvard.edu/wp-content/uploads/2016/03/Shield-Committee-Report.pdf> [https://perma.cc/Y6QA-8SQE].

12. Letter from Drew Faust, President, Harvard Univ., and William F. Lee, Senior Fellow, Harvard Univ., to Martha Minow, Dean, Harvard Law Sch. (Mar. 14, 2016), [https://today.law.harvard.edu/wp-content/uploads/2016/03/Harvard\\_Corp\\_letter\\_shield.pdf](https://today.law.harvard.edu/wp-content/uploads/2016/03/Harvard_Corp_letter_shield.pdf) [https://perma.cc/G56A-EL9T].

13. Bruce H. Mann et al., *Report of the Task Force on Academic Community and Student Engagement*, HARV. L. SCH., at 1 (June 29, 2017), <https://hls.harvard.edu/content/uploads/2017/07/Task-Force-on-Academic-Community-Student-Engagement-Report-Addendum.pdf> [https://perma.cc/36Q4-4MHJ].

campus climate.<sup>14</sup> Its student members chose to issue their own separate, partially dissenting report.<sup>15</sup>

In February 2018, first-year students at Stanford Law School unveiled a banner that read: “Racism Lives Here Too,”<sup>16</sup> invoking the language of the anti-racist protests held at the University of Missouri in 2015.<sup>17</sup> In addition, the Stanford Law students unveiled posters exhibiting what they argued was harmful language that had been uttered in the classroom by their fellow students.<sup>18</sup> Calling themselves “A Coalition of Students of Color,” the students held a series of town hall meetings followed by a “community working session.”<sup>19</sup> Those actions prompted solidarity actions at a number of other law schools, including the University of Chicago; New York University; University of California, Berkeley; and Harvard University.<sup>20</sup> The Stanford Law students issued an open letter responding to what they called “a legal education that does not address race.”<sup>21</sup> They called for the hiring of more “Black, Latinx, Asian and Native faculty”; student participation in faculty hiring; the hiring of a law school diversity officer; a fellowship to support “diverse students interested in academia”; “training to empower our faculty to address” racist comments in the classroom; a “social/racial justice graduation requirement”; a “Critical Race Studies chair”; and transparency and reporting on the Law School’s “progress on issues of diversity and inclusion.”<sup>22</sup> The Law School responded by establishing a “Working Group on Diversity and Inclusion” in February 2018, which released its own report in July that same year.<sup>23</sup>

The student organization at HLS and at Stanford Law School are but two of many examples that illustrate a salient fact: during the past half-decade, law school student demands for changes in legal education to address issues

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14. See generally *id.*

15. See generally Tshidiso Ramogale et al., *Addendum to the Report of the Harvard Law School Task Force on Academic Community and Student Engagement*, HARV. L. SCH. (June 29, 2017), <https://hls.harvard.edu/content/uploads/2017/07/Task-Force-on-Academic-Community-Student-Engagement-Report-Addendum.pdf> [<https://perma.cc/36Q4-4MHJ>].

16. Thomas Pfeiffer, “*Racism Lives Here*”: *What’s Happening at Stanford Law*, STAN. POL. (Feb. 20, 2018), <https://stanfordpolitics.org/2018/02/20/racism-lives-here-stanford-law/> [<https://perma.cc/2CKB-XJBF>].

17. Ryan Dailey, *Students Rally for Mizzou, Int’l Students Day*, TALLAHASSEE DEMOCRAT (Nov. 18, 2015, 11:51 AM), <https://www.tallahassee.com/story/news/2015/11/17/students-rally-mizzou-intl-students-day/75956794/> [<https://perma.cc/5A8V-PKE2>].

18. Pfeiffer, *supra* note 16. The posters contained harmful language including “Mexicans are diluting our country” and “Minority students are just not as intelligent as white students.” *Id.*

19. Olamide Abiose, Opinion, *Dear SLS, from a Coalition of Students of Color*, STAN. DAILY (Mar. 12, 2018), <https://www.stanforddaily.com/2018/03/12/dear-sls-from-a-coalition-of-students-of-color/> [<https://perma.cc/HW9J-FAFD>].

20. *Id.*

21. *Id.*

22. *Id.*

23. Letter from M. Elizabeth Magill, Dean & Richard E. Lang Professor of Law, Stanford Law Sch., to Stanford Law School Students and Wider Stanford Law School Community (July 3, 2018), <https://www-cdn.law.stanford.edu/wp-content/uploads/2018/07/Letter-to-SLS-Community-7318.pdf> [<https://perma.cc/M8DJ-QY2X>] (summarizing the Working Group’s recommendations in the final report).

of diversity and inclusion have both proliferated and grown insistent. Although the demands are somewhat varied, they have sometimes stretched far beyond the admission and hiring of more students and faculty from minority groups.<sup>24</sup> Students have advocated for basic changes in the way that law schools operate in order to make them more inclusive of groups that have been historically marginalized within these institutions.

“Diversity” as a general proposition (and in its most common use today) is associated with the simultaneous presence of elements that are different from one another. Today, diversity often connotes the presence of racial and ethnic minorities, persons who identify as LGBTQIA, and women within institutions that once marginalized or excluded them—although political conservatives have also asserted that the term applies to them as well.<sup>25</sup> It is worth remembering that, historically, racial and ethnic pluralism have been regarded by many Americans as a problematic feature of society, although presently it has taken on a more positive set of associations.<sup>26</sup> “Inclusion” could mean essentially the same thing—the presence of those once excluded.<sup>27</sup> But for the student protesters, “inclusion” has a more demanding meaning—law schools must alter fundamental assumptions about how they operate in order for previously excluded groups to participate in these institutions on a par with others.<sup>28</sup>

Elsewhere, I have outlined at length what I call the “two modes of inclusion”—particularly when inclusion claims are directed at educational institutions.<sup>29</sup> Mode one inclusion claims are those that demand simple removal of barriers to the participation of those who were previously excluded and good treatment once the previously excluded are admitted to an institution.<sup>30</sup> For example, a mode one claim would ask a law school that once excluded women (as many did), to consider applications made by women and to admit women using the same criteria used to consider applications made by men. Mode one might also require that the school engage in some compensatory practices to correct for its past exclusionary practices and for the exclusionary practices of institutions like it—such as outreach to ensure that sufficient numbers of women apply; removing certain practices like “ladies’ days” (i.e., where only women were called on in class); pairing admitted students with mentors in the school and in the profession; and even instituting affirmative action programs. But, for the most part, the institution would not necessarily have to change its teaching practices,

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24. See, e.g., *supra* text accompanying notes 6, 22.

25. See *infra* text accompanying notes 139–41.

26. For the history of racial and ethnic pluralism and diversity in the United States, see generally THE COLUMBIA DOCUMENTARY HISTORY OF RACE AND ETHNICITY IN AMERICA (Ronald H. Bayor ed., 2004).

27. See *Inclusion*, OXFORD ENG. DICTIONARY ONLINE, <http://www.oed.com/view/Entry/93579> [<https://perma.cc/UN65-NRS2>] (last visited Nov. 15, 2018).

28. See, e.g., Abiose, *supra* note 19; *Reclaim Harvard Law Demands*, *supra* note 6.

29. See generally Kenneth W. Mack, *The Two Modes of Inclusion*, 129 HARV. L. REV. F. 290 (2016).

30. *Id.* at 291.

research agenda, or other elements that make up its core culture and regular practices.

But there is another type of inclusionary claim that has historically accompanied mode one claims—which I call “mode two.” Mode two claims are far more controversial; they require alteration of some of the basic rules of the educational institution itself, and of the social context in which it is located.<sup>31</sup> Perhaps it is insufficient to alter rules of admission, institute mentoring programs, or other compensatory practices. Perhaps the very way that the school operates—through hidden assumptions that are taken for granted and remain unquestioned—still functions to exclude women from full participation even though they are admitted and seemingly participate on the same terms as men. Perhaps diversity—having different groups of people within the institution—does not lead to full inclusion unless the institution itself is altered in some fundamental, and generally controversial, way. Articulated as a mode two claim, inclusion means that the basic, purportedly neutral ground rules under which the school operates must be rethought.<sup>32</sup>

There is, however, no sharp distinction between mode one and mode two claims. Mode one claims—which call for the removal of barriers to entry—have a way of morphing into the more demanding type of claim that characterizes mode two. When previously excluded groups make claims on the excluding institutions, it is often difficult to disentangle the two modes of argument.<sup>33</sup> These are the kinds of inclusionary claims that law school students have made in recent years, and the overlap between mode one and two claims is the reason why their claims sometimes remain difficult to describe, diagnose, and remedy. It is for the same reason that these claims have been particularly challenging for the diversity and inclusion committees that have been convened to respond to them. The students are questioning the basic ways that law schools operate.

#### I. THE RECENT HISTORY OF SECOND MODE INCLUSION CLAIMS

Bracing inclusionary claims proliferated widely among universities in 2015, although they have a much longer history.<sup>34</sup> In 2015, racial minority students across a number of college campuses began a series of controversial protest actions. They criticized campus atmosphere as being hostile toward minorities in ways that provoked further protest actions, counterprotests, and claims that the protests stifle free speech.<sup>35</sup> In September 2015, the African American president of the Missouri Student Association at the University of Missouri posted on his Facebook page a description of an incident where a group of men in a pickup truck yelled racial slurs at him.<sup>36</sup> He wrote: “I

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31. *See infra* Part I.

32. *See Mack, supra* note 29, at 301–02.

33. *See generally id.*

34. *See infra* Part II.

35. *See supra* notes 1–2, 4, 6–8, 10, 17.

36. Ruth Serven, *MSA President Speaks Out About Racist Incident*, COLUM. MISSOURIAN (Sept. 14, 2015), [https://www.columbiamissourian.com/news/higher\\_education/msa-](https://www.columbiamissourian.com/news/higher_education/msa-)

really just want to know why my simple existence is such a threat to society. . . . It's time to wake up Mizzou.”<sup>37</sup> The post quickly spread through social media, and other racial minority students made public statements describing their experiences of racial hostility or insensitivity at the hands of their fellow students.<sup>38</sup> In a well-chronicled narrative that was picked up by the national media, students organized a series of “Racism Lives Here” rallies,<sup>39</sup> more incidents of racial slurs were reported,<sup>40</sup> a “Concerned Student 1950” group was organized,<sup>41</sup> a swastika was drawn with feces on a wall,<sup>42</sup> one student began a hunger strike,<sup>43</sup> and the black football players pledged to boycott practices and games.<sup>44</sup> These events culminated in the resignation of the University of Missouri’s president and the chancellor of its Columbia, Missouri campus.<sup>45</sup>

From the spring of 2014 continuing into the fall of 2015, campus after campus erupted in controversy, each inspired by incidents of racial hostility reported by students of color. At the University of Oklahoma, a video

president-speaks-out-about-racist-incident/article\_ac4ebc2c-5b3e-11e5-b4bd-af55f13bae45.html [https://perma.cc/6XE8-RN2Y].

37. Susan Svrluga, *What the Student Body President Did After He Was Called the N-Word—Again*, WASH. POST (Sept. 16, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/09/16/what-the-student-body-president-did-after-he-was-called-the-n-word-again/> [https://perma.cc/XG59-YVKX].

38. Claire Landsbaum & Greta Weber, *What Happened at the University of Missouri?*, SLATE: THE SLATEST (Nov. 9, 2015, 7:06 PM), [http://www.slate.com/blogs/the\\_slatest/2015/11/09/timeline\\_of\\_u\\_of\\_missouri\\_protests\\_and\\_president\\_resignation.html](http://www.slate.com/blogs/the_slatest/2015/11/09/timeline_of_u_of_missouri_protests_and_president_resignation.html) [http://perma.cc/36QH-KKES].

39. *Id.* On September 24, 2015, about one hundred students gathered for the first rally. *Id.* The second rally was held on October 1, 2015. *Id.*

40. *Id.* On October 5, 2015, the Legion of Black Collegians wrote a letter regarding the racial slurs that students were yelling at them. Legion of Black Collegians (@MizzouLBC), TWITTER (Oct. 5, 2015, 8:18 AM), <https://twitter.com/MizzouLBC/status/651053968483704832> [https://perma.cc/EFY9-8CTM].

41. Michael Pearson, *A Timeline of the University of Missouri Protests*, CNN (Nov. 10, 2015, 8:21 AM), <https://www.cnn.com/2015/11/09/us/missouri-protest-timeline/index.html> [https://perma.cc/8HU8-PT2Y]. The “1950” designation commemorated the year that the first black student was admitted to the previously segregated university.

42. Emily Teoh & Sarah Wynn, *UPDATE: Swastika Drawn with Human Feces Found in MU Residence Hall*, COLUM. MISSOURIAN (Oct. 30, 2015), [https://www.columbiainmissourian.com/news/higher\\_education/update-swastika-drawn-with-human-feces-found-in-mu-residence/article\\_4f9c57f0-7f4c-11e5-9f88-a324bf705d1d.html](https://www.columbiainmissourian.com/news/higher_education/update-swastika-drawn-with-human-feces-found-in-mu-residence/article_4f9c57f0-7f4c-11e5-9f88-a324bf705d1d.html) [https://perma.cc/778Q-FYB2].

43. Kasia Kovacs, *UPDATE: MU Student Embarks on Hunger Strike, Demands Wolfe’s Removal from Office*, COLUM. MISSOURIAN (Nov. 2, 2015), [https://www.columbiainmissourian.com/news/higher\\_education/update-mu-student-embarks-on-hunger-strike-demands-wolfe-s/article\\_35ab864a-8186-11e5-902b-6f136a45260b.html](https://www.columbiainmissourian.com/news/higher_education/update-mu-student-embarks-on-hunger-strike-demands-wolfe-s/article_35ab864a-8186-11e5-902b-6f136a45260b.html) [https://perma.cc/P4LU-2886].

44. Missouriian Staff, *UPDATE: Black Missouri Football Players Plan to Join Wolfe Protest Through Boycott*, COLUM. MISSOURIAN (Nov. 7, 2015), [https://www.columbiainmissourian.com/sports/mizzou\\_football/update-black-missouri-football-players-plan-to-join-wolfe-protest/article\\_3af86734-85c4-11e5-95a7-b7f5cd4cfb9e.html](https://www.columbiainmissourian.com/sports/mizzou_football/update-black-missouri-football-players-plan-to-join-wolfe-protest/article_3af86734-85c4-11e5-95a7-b7f5cd4cfb9e.html) [https://perma.cc/2TMQ-YVEU].

45. Daniel Arkin, Alex Johnson & Jon Schuppe, *University of Missouri President Tim Wolfe Resigns Amid Racial Unrest*, NBC NEWS (Nov. 12, 2015, 11:51 AM), <https://www.nbcnews.com/news/us-news/tim-wolfe-university-missouri-president-says-hes-resigning-amid-racial-n459941> [https://perma.cc/JY4E-7PDR].

surfaced showing two fraternity members singing a song with racial epithets, referring to lynching, and stating that the group would never admit a black member.<sup>46</sup> At Yale University, allegations that black students were refused admission to a campus “white girls only” party were followed by a controversy over Halloween costumes alleged to be insensitive to racial minorities.<sup>47</sup> Both controversies erupted in the context of a call to remove the name of John C. Calhoun, a well-known antebellum statesman and defender of slavery and white supremacy, from Yale University’s Calhoun College.<sup>48</sup> At the University of California, Los Angeles (UCLA), a fraternity and sorority held a “Kanye Western”-themed party, with some attendees wearing oversized lips, padded buttocks, and baggy clothes associated with rappers.<sup>49</sup> The year before, two men at the University of Mississippi placed a noose around the neck of a statue of James Meredith (whose 1962 desegregation of the university sparked a riot) and left a flag with the Confederate battle pennant nearby.<sup>50</sup> That same year at Arizona State University, allegations surfaced that a fraternity commemorated Dr. Martin Luther King’s birthday with a party where attendees drank from watermelons, wore loose clothing, and imitated gang signs.<sup>51</sup>

Several years before these controversies erupted, minority students at the University of Michigan, University of Wisconsin, Harvard University, and elsewhere had begun to use Twitter hashtags to organize and document

46. Tobias Salinger, *Sigma Alpha Epsilon Closes University of Oklahoma Chapter Following Release of Racist Chant Video*, N.Y. DAILY NEWS (Mar. 25, 2015, 8:05 PM), <http://www.nydailynews.com/news/national/video-shows-sae-fraternity-members-university-oklaho-article-1.2142389> [<https://perma.cc/5XBQ-ZKXV>].

47. Neema Githere, FACEBOOK (Oct. 31, 2015), <https://www.facebook.com/neema.githere/posts/10206646920764460> [<https://perma.cc/6Q82-BS2G>]; see also Liam Stack, *Yale’s Halloween Advice Stokes a Racially Charged Debate*, N.Y. TIMES (Nov. 8, 2015), <https://www.nytimes.com/2015/11/09/nyregion/yale-culturally-insensitive-halloween-costumes-free-speech.html> [<https://perma.cc/VL9W-NWBG>].

48. Carole Bass, *What’s in a Name? Looking for Answers at Calhoun College*, YALE ALUMNI MAG. (Mar. 19, 2014, 5:09 PM), [https://yalealumnimagazine.com/blog\\_posts/1740](https://yalealumnimagazine.com/blog_posts/1740) [<https://perma.cc/D8A4-XQF6>]. See generally Jacqueline Thomsen, *The Power of Names*, INSIDE HIGHER ED (July 1, 2015), <https://www.insidehighered.com/news/2015/07/01/debate-confederate-flag-emerges-institutions-named-after-controversial-figures-also> [<https://perma.cc/ABK9-V6RW>].

49. Jillian Frankel, *Sig Ep and Alpha Phi Draw Criticism After “Kanye Western” Themed Raid*, DAILY BRUIN (Oct. 7, 2015, 5:10 PM), <http://dailybruin.com/2015/10/07/students-upset-after-sig-ep-hosts-kanye-western-themed-party/> [<https://perma.cc/794T-96RK>]. UCLA students protesting these actions and others created a hashtag: #BlackBruinsMatter. #BlackBruinsMatter, FACEBOOK, <https://www.facebook.com/search/top/?q=BlackBruinsMatter> [<https://perma.cc/2GCU-GY57>] (last visited Nov. 15, 2018); #BlackBruinsMatter, TWITTER, <https://twitter.com/hashtag/BlackBruinsMatter?src=hash> [<https://perma.cc/YD9M-SH9S>] (last visited Nov. 15, 2018).

50. Susan Svrluga, *Former Ole Miss Student Pleads Guilty to Hanging Noose Around Statue Honoring the First Black Student*, WASH. POST (Mar. 24, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/03/24/former-ole-miss-student-pleads-guilty-to-hanging-noose-around-statue-honoring-the-first-black-student/> [<https://perma.cc/QV5B-DNWX>].

51. Fernanda Santos, *Arizona Fraternity Party Stirs Concerns of Racism*, N.Y. TIMES (Jan. 22, 2014), <https://www.nytimes.com/2014/01/23/us/arizona-fraternity-party-stirs-concerns-of-racism.html> [<https://perma.cc/J26A-K264>].

allegations of racism in campus culture. Twitter hashtags such as #BBUM (Being Black at the University of Michigan)<sup>52</sup> and #ITooAmHarvard<sup>53</sup> seemed to capture the mood of many students and garnered attention in mainstream media. The social media campaigns sparked solidarity actions that spread across the United States and beyond its borders.<sup>54</sup> The law school student protest actions thus took place amidst a wider background of racial controversies, often involving images spread through social media, in which minority students called upon universities to take action to promote their full inclusion on campuses.<sup>55</sup>

Although many of the protests took place at universities that had historically practiced racial exclusion (e.g., University of Missouri, University of Oklahoma, University of Mississippi) or had their racial composition altered by political mobilizations against affirmative action (e.g., UCLA, University of Michigan), it is notable that the protests, for the most part, did not focus on the formal admission of racial minorities to campus. Nor did these protests, in the main, claim that minority students were ill- or differentially treated by university personnel. In other words, the protests, for the most part, did not involve mode one claims for inclusion. Instead, the controversies and protest actions were sparked by explicit racist language used by students or other persons;<sup>56</sup> by language or imagery alleged to be racially derogatory;<sup>57</sup> by classroom instruction that was alleged to be deficient in preparing students to live, study, and work in a multiracial environment; and by other factors that go far beyond university officials' explicit hostility to or exclusion of minority students.

Many of the protests centered on what the HLS students called “structural racism”—exclusionary practices that are alleged to exist in the very fabric of the university, often embedded in difficult-to-discern ways in what are assumed to be its ordinary operations.<sup>58</sup> Indeed, the Twitter hashtag campaigns that preceded the protests acquired their force from the individual stories of minority students who pointed to symbols, actions, and language that—in subtle and unsubtle ways—conveyed the message that the minority students did not belong. These students charged that simple and everyday life at the university was often filled with racist messages. Both the substance

52. #BBUM, TWITTER, <https://twitter.com/search?q=%23BBUM> [<https://perma.cc/7DBJ-9GMF>] (last visited Nov. 15, 2018).

53. #ITooAmHarvard, TWITTER, <https://twitter.com/search?q=%23ITooAmHarvard> [<https://perma.cc/XDA2-DHU5>] (last visited Nov. 15, 2018). This hashtag invoked the poet Langston Hughes's famous poem, “I, Too,” which was about belonging in America. See LANGSTON HUGHES, I, TOO (1925), *reprinted in* THE COLLECTED POEMS OF LANGSTON HUGHES 46 (Arnold Rampersad ed., 1994).

54. See, e.g., #BBUW, TWITTER, <https://twitter.com/search?q=%23BBUW> [<https://perma.cc/2TXT-GUL2>] (last visited Nov. 15, 2018); ITooAmOxford, TUMBLR, <https://www.tumblr.com/search/ITooAmOxford> [<https://perma.cc/PQW2-ELJE>] (last visited Nov. 15, 2018).

55. See, e.g., *supra* notes 1, 40, 47, 49, 52–54 and accompanying text.

56. See, e.g., *supra* notes 36, 40 and accompanying text.

57. See, e.g., Teoh & Wynn, *supra* note 42.

58. See Royall Must Fall, *supra* note 4.

of the critiques of university operations and the manner of the protests have caused some observers to respond with skepticism or assert that the claims endanger the fundamental values of the university communities.<sup>59</sup> Thus, the recent student protests on law school campuses and elsewhere are very much in the manner of what I call “mode two inclusion claims.”

## II. A GENEALOGY OF MODE TWO INCLUSION CLAIMS

Inclusion claims in the style of mode two are not simply a product of recent history, but in fact date all the way back to the beginning of the civil rights era. It is a long and controversial story, and one in which first mode inclusionary claims have almost inevitably transformed into the second mode. This process was already happening as far back as the mid-1930s, when the National Association for the Advancement of Colored People (NAACP) began to build the chain of litigation that would eventually lead to the victory in *Brown v. Board of Education*.<sup>60</sup>

The lawyers of the NAACP started with cases involving law schools, notably *Pearson v. Murray*,<sup>61</sup> the lawsuit that desegregated the University of Maryland School of Law.<sup>62</sup> The University of Maryland refused admission to black applicants and instead offered them scholarships to study law at integrated out-of-state law schools.<sup>63</sup> Charles Houston, the NAACP’s lead lawyer, along with his protégé, Thurgood Marshall, brought and won the *Murray* case in 1935.<sup>64</sup> They then prevailed in the appeal to the Maryland Court of Appeals the following year.<sup>65</sup> By that time, the plaintiff, a black man named Donald G. Murray, was finishing his first year at the Law School where he reportedly received respectful treatment by his peers and school officials.<sup>66</sup> Two years after the appellate victory, the NAACP won a U.S. Supreme Court victory in the case that challenged the policy of racial exclusion at the University of Missouri.<sup>67</sup> The lead plaintiff in that case, Lloyd L. Gaines, subsequently disappeared,<sup>68</sup> and the University of Missouri

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59. At the University of Oklahoma and Yale University, in particular, some have argued that the protests and university responses endanger free speech traditions embodied in campus culture or, at public universities, in constitutional law. See Abby Ohlheiser, *Sigma Alpha Epsilon “Not Ruling Out a Lawsuit” Against Oklahoma University, Says Lawyer*, WASH. POST (Mar. 13, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/03/13/reports-sigma-alpha-epsilon-fraternity-plans-to-sue-the-university/> [https://perma.cc/B4N8-95KX]; Stack, *supra* note 47.

60. 347 U.S. 483 (1954).

61. 182 A. 590 (Md. 1936).

62. *Id.* at 594.

63. See *id.* at 591; Scott Jaschik, *Race on Campus: The Latest*, INSIDE HIGHER ED (Dec. 8, 2015), <https://www.insidehighered.com/news/2015/12/08/maryland-will-rename-stadium-art-distress-illinois-harvard-law-students-demands> [https://perma.cc/H2RV-NX35].

64. See generally Writ of Mandamus, *Murray v. Pearson*, Balt. City Ct. (1935).

65. *Murray*, 182 A. at 590.

66. LARRY S. GIBSON, *YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE* 257 (2012).

67. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938).

68. MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 74 (1987).

did not desegregate until 1950<sup>69</sup>—a fact prominently cited by the 2015 protesters at the University of Missouri who designated themselves “Concerned Student 1950.”<sup>70</sup>

In 1936, Charles Houston published an article that grappled with exactly what he was trying to accomplish with the law school exclusion cases.<sup>71</sup> In explaining his objectives for including Murray and others like him in previously all-white institutions, he slipped easily and effortlessly between mode one and mode two. “Perhaps when the students realize that Lloyd Gaines’s presence will not interfere with their ordinary routine . . . the spirit of fair play will prevail, and they will willingly consent to Lloyd Gaines’s having his chance,” he wrote.<sup>72</sup>

In both the litigation that desegregated the University of Maryland’s Law School, and in Murray’s treatment once he was admitted, the state’s lawyers had gone out of their way to signal that they were committed to treating black students well once the formal barriers for admission came down. Even the judge and the opposing lawyers in the litigation strongly signaled their sympathy for Charles Houston and his client during the trial. After the NAACP’s victory, the state’s assistant attorney general shook Murray’s hand in court and stated: “I wish to be quoted as saying that I hope that Mr. Murray leads the class in law school.”<sup>73</sup> The message that Charles Houston, Marshall, and their opposing lawyers seemed to be communicating to the world was that the case was simply about whether the school could maintain the formal barrier to Murray’s entry. If the formal barrier was removed and Murray showed up on campus and went about his ordinary routine as a law student, then the controversy would end. This, at least, was the message that the lawyers most wanted to send to white Marylanders who were concerned that what seemed like a simple inclusionary claim would require them to change more fundamental things about their schools and their society.

Nevertheless, the concerns of Maryland’s white citizens were well-founded. In that same 1936 article, Charles Houston admitted to a much broader agenda, stating: “The University of Maryland Case is a wedge . . . .”<sup>74</sup> The case, he argued, was part of a much broader effort to change the fundamental assumptions on which institutions such as the University of Maryland’s Law School operated, and those of the society surrounding them.<sup>75</sup> Getting Murray into law school was part of a campaign that connected seamlessly, he argued, to the effort to ban lynching, to defeat the present political leadership of the South by changing voting rights law

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69. Angela Chen, *Desegregating Mizzou*, JSTOR DAILY (Nov. 23, 2015), <https://daily.jstor.org/desegregating-mizzou/> [<https://perma.cc/5FG9-HVPR>].

70. See generally #ConcernedStudent1950, TWITTER, <https://twitter.com/hashtag/ConcernedStudent1950?src=hash> [<http://perma.cc/FS3U-Q9XL>] (last visited Nov. 15, 2018).

71. See generally Charles H. Houston, *Don't Shout Too Soon*, CRISIS, Mar. 1936, at 79.

72. *Id.* at 79, 91.

73. *Court Ends Md. U.'s Color Bar*, BALT. AFRO-AM., June 22, 1935, at 1, <https://newspaperarchive.com/baltimore-afro-american-jun-22-1935-p-1/> [<https://perma.cc/FUR7-UALP>].

74. See Houston, *supra* note 71, at 91.

75. See *id.*

and enfranchising African Americans, as well as a nationwide effort to end “[d]iscrimination in employment and in organized labor” and to “break down the color bar in federal, state and municipal employment.”<sup>76</sup> Charles Houston sketched out an agenda that extended not only to institutions that were segregated through explicit state action (e.g., the University of Maryland’s Law School), but to all areas of the country and to institutions—places and organizations that contained no formal legal bars to the inclusion of African Americans.<sup>77</sup>

Even if limited to educational institutions, Charles Houston argued, true inclusion would require these institutions to fundamentally alter the rules under which they operated.<sup>78</sup> “At a recent conference held at Ohio State University,” he noted, “three students wanted to know why Negroes aspired to study law in southern state universities, because they had been informed that Negro lawyers could not practice in the South.”<sup>79</sup> “We must accept the chance to address white audiences on the race question,” he argued.<sup>80</sup> Charles Houston continued:

We must see that the proper type of Negro literature, pamphlets, newspapers and other material gets the widest possible distribution among white people. We must cooperate in public forums and make ourselves felt in the white press as regular commentators on public affairs. We must persistently agitate for more truth about the Negro in the history, economic and sociology courses in the schools, colleges and universities.<sup>81</sup>

He argued that even the basic curriculum would have to be changed at schools and universities in all parts of the country before the institutions would be made fully inclusive of racial groups that historically excluded them.<sup>82</sup>

As they confronted the first of the cases that would lead to the civil rights victories of the 1950s and 1960s, the NAACP’s lawyers struggled with the question of what exactly desegregation would require. Strategically, it often made sense to present their claims in the manner of mode one. “Lloyd Gaines’s presence will not interfere with their ordinary routine” was the kind of rhetoric that Charles Houston sometimes offered to sympathetic whites.<sup>83</sup> However, when he described his objectives in full—for instance, in the pages of *Crisis*,<sup>84</sup> the NAACP’s magazine, where anyone could read them—he slipped easily into mode two.

What would true inclusion of African Americans in institutions that did not welcome them really require? No one quite knew—a fact illustrated by one of the NAACP’s last desegregation cases that preceded the ultimate

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76. *Id.*

77. *Id.*

78. *See id.*

79. *Id.* at 79.

80. *Id.* at 79, 91.

81. *Id.* at 91.

82. *Id.*

83. *Id.*

84. *See generally id.*

victory in *Brown*. This case involved the University of Oklahoma, which had grudgingly conceded to the civil rights organization's early victories by offering only a token form of inclusion to its black applicants—and only after it became clear that recent U.S. Supreme Court precedents made it likely that they would have to be admitted.<sup>85</sup> The University of Oklahoma decided to admit a black man named George W. McLaurin to its Graduate School of Education, but required him to sit in a separate section of the classroom, library, and cafeteria.<sup>86</sup> The NAACP brought a lawsuit challenging this form of partial inclusion and won in the Supreme Court in 1950.<sup>87</sup> The principal issue that Chief Justice Fred M. Vinson's short opinion had to explain was why the university's admission practice was not full inclusion, taking into account that McLaurin was able to use all the same facilities as his white classmates.<sup>88</sup> Chief Justice Vinson's opinion simply noted that "[s]uch restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession" before concluding that the restrictions were unconstitutional.<sup>89</sup>

Yet, Chief Justice Vinson studiously avoided the actual question of why exactly the university's internal segregation was less than full inclusion of McLaurin into the life of the university. Of course, university authorities were preventing him from learning things from his classmates, as the Court explained—but they were doing far more than just that.<sup>90</sup> The university authorities were sending a clear, symbolic message that McLaurin was inferior to his white peers, and everyone knew that this is what the university was saying. What would happen when the formal barriers came down? Obviously, much more would need to be done to integrate black students fully into the life of the university that had been built on segregation as a core principle, but Chief Justice Vinson wanted to avoid all such questions and, in particular, whether they were cognizable legal claims. He did, briefly, engage with the argument that white classmates would still isolate someone like McLaurin even if the university allowed him to sit, eat, and conduct research alongside them.<sup>91</sup> But the Court's opinion simply noted that "[t]here is a vast difference . . . between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar."<sup>92</sup>

Understandably, Chief Justice Vinson wanted to wall off the vast, unexamined questions of what full inclusion would mean and instead to focus on the immediate implications of his opinion. By the time cases like McLaurin's reached the Court, the justices were fully aware that what they were really deciding was whether segregation at a host of southern

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85. *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 638–40 (1950).

86. *See id.* at 640–41; TUSHNET, *supra* note 68, at 125.

87. *McLaurin*, 339 U.S. at 642.

88. *See id.* at 638.

89. *Id.* at 641.

90. *Id.*

91. *See id.* at 640–41.

92. *Id.* at 641.

institutions was unconstitutional.<sup>93</sup> The Court was struggling with the question of what desegregation of southern institutions might mean, and what it might take to achieve full inclusion. For now, it was enough simply to remove the formal barriers that had kept someone like McLaurin from interacting with his classmates. By the time the University of Oklahoma was confronted with the lynching video that surfaced in 2015,<sup>94</sup> the school and the society that surrounded it were vastly different than the institution that McLaurin had encountered. By then, the kind of mode two inclusion claims that Charles Houston, Marshall, and other lawyers had suppressed in the service of presenting desegregation as a simple formal process were now articulated by a new generation of racial minority students.

Even in Maryland, questions of inclusion remained far more complicated than they often appeared. Although the NAACP touted Murray's allegedly "fair" treatment while he attended law school, his wife later reported that the university's first black student received "a cool reception" from his white peers.<sup>95</sup> While the University of Maryland's Law School dropped its formal color bar, state officials continued to try to keep black students out. Maryland still offered African American applicants scholarships to attend out-of-state law schools if they chose to forgo their newly established right to attend the previously whites-only school,<sup>96</sup> and black-white interactions in public and private spaces across the state continued to be both rare and controversial.<sup>97</sup> Fifteen years after the trial court ordered his admission to the University of Maryland's Law School, Murray himself, along with his former lawyer, Thurgood Marshall, had to sue to get black students admitted to the university's School of Nursing.<sup>98</sup> Even as Murray was making his way through law school and practicing as a lawyer, the state still had laws on the books requiring segregation in rail, ship, and streetcar travel.<sup>99</sup> Department stores, lunch counters, restaurants, and movie theaters remained segregated or whites-only until a concerted effort was made to integrate them in the late 1950s and early 1960s.<sup>100</sup>

Murray lived into the 1980s,<sup>101</sup> by which time the University of Maryland and the larger society around it had been transformed. Today, the university ranks high on a prestigious college-ranking service's list of the most

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93. TUSHNET, *supra* note 68, at 131.

94. Jake New, *Fraternity Caught on Video Singing Racist Song*, INSIDE HIGHER ED (Mar. 9, 2015), <https://www.insidehighered.com/quicktakes/2015/03/09/fraternity-caught-video-singing-racist-song> [<https://perma.cc/PJ6N-UEQS>]; *see also* Salinger, *supra* note 46.

95. *Donald Gaines Murray Sr. Dies at 72; Sued, Entered UM Law School in 1935*, BALTIMORE SUN, Apr. 10, 1986, at 4B, <https://www.newspapers.com/image/378043065/> [<http://perma.cc/L68J-TLZC>].

96. *See* David S. Bogen, *Race and the Law in Maryland 198–200* (unpublished manuscript) (on file with author).

97. *See, e.g., id.* at 199–200, 207–15.

98. *See* TUSHNET, *supra* note 68, at 221 n.52.

99. *See* RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 188–89 (2017).

100. *Slack v. Atl. White Tower Sys.*, 181 F. Supp. 124, 126 n.1 (D. Md. 1960).

101. *See Donald Gaines Murray Sr. Dies at 72; Sued, Entered UM Law School in 1935*, *supra* note 95.

ethnically diverse national universities in the United States.<sup>102</sup> Yet, in 2017, the university confronted the stabbing death of a visiting African American by a white student who belonged to an alt-right white supremacist Facebook group.<sup>103</sup> The tragic event produced a new round of complaints that the university needed to do more to promote full inclusion of racial minorities and inevitably spurred another round of diversity reports the following year.<sup>104</sup>

In the years preceding the *Brown* decision, mode two inclusion claims came most explicitly to the fore in northern school desegregation fights. By the 1920s, black students and parents were engaging in boycotts and walkouts to protest the sometimes-explicit assignment policies and rules that kept black students from attending school alongside whites in many northern communities, particularly in elementary schools.<sup>105</sup> In the early part of the twentieth century, northern schools were sometimes segregated through explicit school district policies, and at other times through manipulations of the informal rules concerning attendance zones and the like that governed school composition.<sup>106</sup> By the 1940s, as civil rights advocates gained additional impetus in attacking these practices in the context of World War II,<sup>107</sup> their claims became more insistent. For example, in 1943 in Hillburn, New York, black parents initiated a boycott of the black elementary school, the Brook School, which had only recently been outfitted with indoor plumbing.<sup>108</sup> They asked that their children be allowed to attend the recently constructed Main School, which was the school that white students attended.<sup>109</sup> The protest had the look of a perfectly conventional mode one claim that asked for alteration of the rules that the community used to ensure that black and white children attended separate schools. But the protest quickly took on more radical dimensions.

It soon became evident that what looked like a claim about school assignments was, in fact, a petition to reorganize almost every aspect of the

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102. See *Campus Ethnic Diversity: National Universities*, U.S. NEWS, <https://www.usnews.com/best-colleges/rankings/national-universities/campus-ethnic-diversity> [<https://perma.cc/6HET-F4KN>] (last visited Nov. 15, 2018) (reporting that the University of Maryland, Baltimore County has a diversity index of 0.69 and the University of Maryland, College Park has a diversity index of 0.65, where the closer the number is to one indicates that the student population is more diverse).

103. Christina Tkacik, *Bowie State Student's Stabbing Death at University of Maryland to Be Prosecuted as a Hate Crime*, BALT. SUN (Oct. 17, 2017, 4:00 PM), <http://www.baltimoresun.com/news/maryland/crime/bs-md-bowie-state-death-ruled-hate-crime-20171017-story.html> [<https://perma.cc/PD82-VE9T>].

104. See generally, e.g., Jennifer A. Hubbard, *Preliminary Report: Comprehensive Campus Climate Assessment for Equity, Diversity, and Inclusion at the University of Maryland*, U. MD. (Apr. 2018), [https://diversity.umd.edu/documents/Campus\\_Climate\\_Study\\_Preliminary\\_Report.pdf](https://diversity.umd.edu/documents/Campus_Climate_Study_Preliminary_Report.pdf) [<https://perma.cc/K523-PK98>].

105. DAVISON M. DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954*, at 167–218 (2005).

106. *Id.*

107. *Id.*

108. See THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 163 (2008).

109. *Id.* at 164–68.

schools and the surrounding community. Hillburn was, in fact, two communities—with a state highway providing the boundary line that separated blacks from whites.<sup>110</sup> This was no accident. As federal policy was both underwriting and requiring the establishment of segregated neighborhoods across the country, local governments were busy establishing a myriad of zoning and property rules that ensured that many whites were coming to expect that racially homogeneous neighborhoods were the norm.<sup>111</sup> Hillburn was also a company town; the owner of the town factory served as head of the school board.<sup>112</sup> The boycotting parents started a “Freedom School” to challenge what they considered the semifudal control of whites over their children’s education, and they organized protest marches, analogized their actions to the struggle against Nazism, and organized supporters nationally to endorse their cause.<sup>113</sup> The noted poet Countee Cullen composed a poem honoring their struggle.<sup>114</sup>

And they succeeded. The state board of education eventually ordered the schools to be integrated, after which it became clear what the real issues in the protest had been.<sup>115</sup> Rather than integrate, nearly all of the white parents withdrew their children from the public schools and enrolled them in local Catholic schools instead.<sup>116</sup> It had all been a fight over what inclusion really meant. The protest had begun seemingly as a mode one request for the formal assignment rules to be changed, but once they started, the black parents proceeded to challenge everything about the baseline social organization of the town and its schools. Only when that was changed could full inclusion of the black students be achieved, they believed.<sup>117</sup> Recognizing the stakes, the town’s whites withdrew almost entirely from the school system.<sup>118</sup>

Those stakes became clear even before the Supreme Court handed down the *Brown* decision. The noted psychologist Kenneth B. Clark served as an expert witness at the *Brown* trial; his research was cited by the Court as a justification for its decision.<sup>119</sup> At trial, Clark had testified, based on his now-controversial “doll studies,” that legal segregation harmed the self-image of southern black children.<sup>120</sup> African American children in the North, who presumably attended school with whites, he concluded, exhibited no such

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110. See Mack, *supra* note 29, at 292.

111. See *id.*

112. See *id.* at 292–93; see also SUGRUE, *supra* note 108, at 164–68.

113. SUGRUE, *supra* note 108, at 164–68.

114. *Id.* at 167–68.

115. *Id.* at 168.

116. *Id.*

117. *Id.*

118. *Id.*

119. See GERALD MARKOWITZ & DAVID ROSNER, CHILDREN, RACE, AND POWER: KENNETH AND MAMIE CLARK’S NORTHSIDE CENTER 92 (2000); Joe Holley, *Kenneth Clark Dies; Helped Desegregate Schools*, WASH. POST (May 3, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/02/AR2005050201523.html> [<https://perma.cc/DZ95-2775>].

120. See MARKOWITZ & ROSNER, *supra* note 119, at 91–92; DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880–1996, at 119–36 (1997).

harms.<sup>121</sup> The message that Clark sent was that the case was simply about the legal rules that kept black children out of white schools and the necessity of removing those rules.<sup>122</sup>

Yet, three months before the Supreme Court decided *Brown*, Clark admitted that the case had been about far more than the legal rules that kept black children out of white schools.<sup>123</sup> In February of 1954, Clark delivered a forceful speech in New York City to an audience that included the city's mayor and the president of its board of education.<sup>124</sup> Clark directly challenged the distinction between northern and southern racially homogeneous schools, arguing that the city's educational system was "in . . . decline" and harmed black children just as surely as legally mandated segregation did in the South.<sup>125</sup> In response, the board commissioned a study that showed that, in almost every objective measure, the city provided black and white children with vastly unequal resources and that it spent more than three times as much to educate each white child as it did for each African American.<sup>126</sup> The city board formulated a plan that involved redrawing school assignment zones and reassigning teachers, which in turn produced an angry white backlash.<sup>127</sup> Rumors circulated that the board would institute a busing plan to achieve its goals, including busing white children from Staten Island to Harlem.<sup>128</sup> In the face of massive resistance, the board backed down and chose not to implement the recommended plan.<sup>129</sup>

Clark had done as much as anyone to lend empirical support to the proposition that school integration was a simple matter of changing the legal rules that kept black children from being included in white schools. However, even before the Court ruled in *Brown*, Clark was arguing for a more demanding mode of inclusion.

Robert L. Carter, the NAACP's second-in-command during the *Brown* litigation, and the person who had advocated for Clark's inclusion in the case, was traveling much the same path. By the late 1950s, as general counsel to the NAACP, Carter was mapping out a plan to challenge racially separate schools throughout the North. "The problem was vast and mirrored the kind of challenge[s] Charles Houston had faced nearly three decades earlier," Carter later recalled.<sup>130</sup> By the early 1960s, Carter and his staff had

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121. SCOTT, *supra* note 120, at 124–25.

122. *Id.*

123. *See generally id.* at 119–36.

124. MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* 246 (2003).

125. *Id.* at 246–47; MARKOWITZ & ROSNER, *supra* note 119, at 94–95; Patricia Sullivan, *Beyond Jim Crow: The NAACP and Northern School Desegregation, 1954–1968*, at 1 (unpublished manuscript) (on file with author).

126. MARKOWITZ & ROSNER, *supra* note 119, at 97; Sullivan, *supra* note 125, at 2–3.

127. MARKOWITZ & ROSNER, *supra* note 119, at 98; Sullivan, *supra* note 125, at 3.

128. MARKOWITZ & ROSNER, *supra* note 119, at 98; Sullivan, *supra* note 125, at 3.

129. MARKOWITZ & ROSNER, *supra* note 119, at 102; Sullivan, *supra* note 125, at 3.

130. ROBERT L. CARTER, *A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS* 172 (2005).

formulated a plan that required a fundamental reworking of how schools were organized throughout the North, requiring

rezoning to cut across black and white neighborhood schools; the Princeton plan, or paired schools, which assigned students by grade to two or three schools in a single attendance area; eliminating permissive transfers, which enabled white students to avoid attending predominately black schools; closing segregated schools and reassigning teachers and students to existing schools; and selecting school sites to achieve desegregation.<sup>131</sup>

Rebuffed by school boards, the NAACP filed lawsuits in a number of cities including “Cleveland; Milwaukee; Gary, Indiana; Denver; Pasadena, California; Springfield, Massachusetts; East Orange, New Jersey; and Manhasset, New York.”<sup>132</sup> Carter and his staff achieved limited results, both in the courts and in convincing northern communities to implement their plans. “I was shocked at the vehemence of white resistance,” he later wrote.<sup>133</sup> By the end of the 1970s, Carter, then a federal judge, was publicly stating that the true problem of inclusion extended far beyond the legal rules that he and Clark had attacked in *Brown*; the real problem was a set of deeply embedded assumptions, practices, and understandings that he called “white supremacy.”<sup>134</sup>

By the time Carter had reached that conclusion, mode two inclusionary claims had expanded far beyond cases like *Brown*. In the late 1960s, racial minority students at universities such as San Francisco State,<sup>135</sup> City University of New York,<sup>136</sup> and Harvard University<sup>137</sup> began calling for the inclusion of more minority students. However, these students quickly expanded their claims to a complete reorientation of how these institutions operated, including the creation of black studies departments and university engagement with social problems that seemingly lay far outside their usual mandate.<sup>138</sup> Although *Brown* remained the case most likely to be invoked in the new struggles for inclusion, by the 1970s the claims were taken up far beyond the context of race and ethnicity. English-language learners, advocates of education for girls and women, lawyers for the disabled, and educational reformers across the world began to argue for radical ways that those previously excluded groups should be accommodated by existing

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131. *Id.*

132. *Id.* at 176.

133. *Id.*

134. Robert L. Carter, *A Reassessment of Brown v. Board*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 20, 21–23 (Derrick Bell ed., 1980).

135. See MARTHA BIONDI, *THE BLACK REVOLUTION ON CAMPUS* 43–73 (2012).

136. See *id.* at 114–34; see also Karen W. Arenson, *Returning to City College to Revisit a 1969 Struggle*, N.Y. TIMES (Oct. 29, 1999), <https://www.nytimes.com/1999/10/29/nyregion/returning-to-city-college-to-revisit-a-1969-struggle.html> [<https://perma.cc/PA78-2M3D>].

137. See Archie C. Epps III, *The Harvard Student Rebellion of 1969: Through Change and Through Storm*, 107 MASS. HIST. SOC’Y 1 (1995).

138. See, e.g., BIONDI, *supra* note 135, at 43–73, 114–34; DEPARTMENT OF AFRO-AMERICAN STUDIES, HARVARD UNIVERSITY: THIRTIETH ANNIVERSARY CELEBRATION 15–16 (Karen C. C. Dalton ed., 2000).

institutions.<sup>139</sup> More recently, inclusionary claims have been made in the language of sexual orientation.<sup>140</sup> Even more recently, political conservatives have joined in and articulated inclusionary claims in the language of “intellectual diversity.”<sup>141</sup> As I have explained more fully elsewhere, most of these claims call for a fundamental reorientation in the basic assumptions about how institutions work in order to include previously marginalized or excluded groups.<sup>142</sup> For that reason, most of the claims have been rightly regarded as controversial, although all are worthy of serious engagement.

### III. RECENT INCLUSION CLAIMS CONSIDERED IN CONTEXT

At stake in the long-running battle over the two modes of inclusion is whether educational institutions will continue to operate as they have before—with their assumptions about instruction and what we might call their “educational culture” intact—or whether inclusion of outsiders requires a fundamental alteration of the running of the institution and the society around it. These were the stakes when Charles Houston, Marshall, and their opponents wondered about the implications of admitting one black student to the University of Maryland’s Law School; they unconsciously slipped between mode one and mode two before finally pretending that Murray’s admission required only the removal of a simple barrier. These were the stakes when activists and black parents in places like Hillburn and New York City demanded that entire educational systems be transformed to fully include their children in the opportunities that municipalities distributed to residents. Clark saw some of this, and apparently suppressed it in his testimony in *Brown*, as did the Supreme Court justices who had to decide the case and order the appropriate remedy.

The debate over first and second mode inclusion claims, and realization of the impossibility of separating them, has spread far beyond these contexts. It did so in the debates over school desegregation and race-conscious integration that have raged from the 1970s to today. It did so as *Brown* became a template for claims of accommodation of the disabled, minority-language speakers, political conservatives, and many others in educational institutions. Second mode claims are deservedly controversial, but also unavoidable once an inclusionary claim begins to travel the path laid out by the NAACP’s lawyers so many years ago. We will continue to grapple with them wherever we debate the meaning of inclusion.

With that genealogy in mind, we can return to the recent inclusion claims that have been made by racial minority students at a number of law schools.

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139. See generally MARTHA MINOW, IN *BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* (2010).

140. See generally *id.*

141. *Academic Bill of Rights*, STUDENTS FOR ACAD. FREEDOM, <http://www.studentsforacademicfreedom.org/documents/1925/abor.html> [https://perma.cc/Q5X8-LFM8] (last visited Nov. 15, 2018).

142. See Mack, *supra* note 29, at 298–300.

They are self-evidently mode two claims in that they describe law schools as places where minority students receive the message that they are unwelcome in a variety of both explicit and implicit ways. Institutions have been asked to rethink the ways that they operate and to do so via controversial and often difficult-to-implement methods. For that reason, these claims are rightly regarded as controversial. These claims, however, have also been articulated in a context stretching back to the beginning of the civil rights era; a context that is related to other challenging inclusionary claims made on behalf of a variety of groups in recent years in educational contexts.

What context, exactly, has produced the latest round of claims? Questions regarding the origins of particular phenomena are always contested, and it will be up to future historians to engage with them fully. But it seems clear that 2014 and 2015, when the latest round of protests seemed to crest, was a period that saw increased interest in scholarly and popular culture concerning the hidden features of law and American life that perpetuate racial inequality. Prominent among them was the growing, and later controversial, popularity of the writings of the journalist and commentator Ta-Nehisi Coates.<sup>143</sup> Another example is the Black Lives Matter movement, which was born following the August 2014 shooting of an African American youth, Michael Brown, by a white police officer, Darren Wilson, in Ferguson, Missouri.<sup>144</sup> The protests following the shooting prompted a wave of new inquiries into the manner in which little-noticed features of society are used to write racial inequality into the fabric of American life.<sup>145</sup> The Black Lives Matter movement, in particular, employed many of the techniques that have become common among student protesters, including the use of social media as both a communication and an organization tool, the analysis of American institutions as employing hidden techniques to perpetuate racial inequality, and the employment of confrontational politics centered on the bodies and experiences of racial minorities.<sup>146</sup> Some of the student protests have also

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143. See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/PNM6-382M>].

144. Megan Carpentier, Opinion, “*Things Will Never Be the Same: The Oral History of a New Civil Rights Movement*,” GUARDIAN (Aug. 9, 2015), <https://www.theguardian.com/commentisfree/2015/aug/09/oral-history-civil-rights-movement-ferguson> [<https://perma.cc/KL4P-NQLX>]; Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015, 5:00 AM), <https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement> [<https://perma.cc/3DS3-XGDG>]; Alicia Garza, *A Herstory of the #BlackLivesMatter Movement*, FEMINIST WIRE (Oct. 7, 2014), <https://www.thefeministwire.com/2014/10/blacklivesmatter-2> [<https://perma.cc/M4NZ-SCXD>].

145. See, e.g., RICHARD ROTHSTEIN, ECON. POLICY INST., *THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* (2014), <https://www.epi.org/publication/making-ferguson/> [<https://perma.cc/9VH2-4VCR>]; U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1–9*, 71–76, 90 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/FP2V-ZRGK>].

146. Jay Caspian Kang, *Our Demand Is Simple: Stop Killing Us*, N.Y. TIMES MAG. (Mar. 4, 2015), <https://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html> [<https://perma.cc/2KN4-4YM7>]; Brandon M. Terry, *After Ferguson*, POINT

been notable for making one of their core demands that law schools teach critical race theory.<sup>147</sup>

The renewed interest in critical race theory is notable. Even its proponents have acknowledged that many of its foundational texts were written some time ago, although vibrant programs remain at the UCLA School of Law and elsewhere.<sup>148</sup> Nonetheless, student protesters have found critical race theory to speak to many of their current concerns. Critical race theory's tenets remain contested among scholars in the field, but students seem attracted to its claims that race-thinking and racial inequality suffuse American law and society, that structural racial subordination remains endemic, and that mainstream educational institutions marginalize the voices of racial minorities.<sup>149</sup>

The recent protests have produced a response from the law schools and the universities at which the protests are directed. There is already an existing diversity and inclusion bureaucratic structure at many universities, and the students' calls for new and better-resourced diversity offices have produced a new round of diversity task forces and reports. For instance, at HLS, the Task Force on Academic Community and Student Engagement was charged with studying and making recommendations for improving "the conditions that allow us to learn from one another and study with and alongside one another."<sup>150</sup> After months of study, the task force issued a report and a number of recommendations which include encouraging affinity groups to put on cooperative programs and initiatives,<sup>151</sup> creating a school-wide directory of students with photographs to facilitate better and more creative connections among students,<sup>152</sup> encouraging students "of diverse backgrounds and identities to consider academic careers,"<sup>153</sup> fostering additional opportunities to discuss issues of diversity and difficult topics starting with first-year orientation,<sup>154</sup> and making available to faculty materials that "raise issues of social, racial, and economic justice,"<sup>155</sup> as well as creating initiatives focusing on mentoring, advising, counseling, classroom participation, disability accommodation, examinations and grades, and transparency about available Law School resources in these areas.<sup>156</sup>

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MAG. (2015), <https://thepointmag.com/2015/politics/after-ferguson> [<https://perma.cc/9ZB6-YRVB>].

147. See, e.g., *supra* notes 6, 19 and accompanying text.

148. See, e.g., Adrien K. Wing, *Is There a Future for Critical Race Theory?*, 66 J. LEGAL EDUC. 44, 51 (2016).

149. For contrasting views of critical race theory's tenets, see *Introduction to CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT* xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995), and *Introduction to CRITICAL RACE THEORY: THE CUTTING EDGE 1* (Richard Delgado & Jean Stefancic eds., 3d ed. 2013).

150. Mann et al., *supra* note 13, at 1–2.

151. *Id.* at 21.

152. *Id.* at 5.

153. *Id.* at 6.

154. *Id.* at 7.

155. *Id.* at 10.

156. *Id.* at 11–17.

Yale Law School's student-faculty committee engaged in an intensive set of deliberations before issuing its own report in March 2016.<sup>157</sup> Its recommendations included revamping the Law School's admissions and recruiting procedures, improving its process for tracking the admission of conservative students and "First Generation Professionals," creating new strategies tailored to the recruitment and inclusion of particular affinity groups on campus, and hiring a diversity consultant, as well as a number of initiatives structured around faculty hiring, mentoring, classroom atmosphere, alumni affairs, and the systematic collection of data regarding diversity at the Law School.<sup>158</sup> At Stanford Law School, the Working Group on Diversity and Inclusion released its own report in March 2018.<sup>159</sup> Its recommendations included a "standing cabinet on diversity and inclusion," an "identity and bias" lecture series, "cultural competence training" for the school's pro bono program, and other initiatives centering on new staffing, recruitment, the admissions weekend, and new course offerings.<sup>160</sup>

What of the students' claims about "structural racism" in legal education? What of the calls for a restructuring of authority in law schools—with students gaining increased authority over matters that faculty claim for themselves, such as hiring and classroom instruction? What of the students' descriptions of law school classrooms and atmosphere as tangibly disadvantaging racial minorities? Much of this can be found in the partial dissent of the Harvard students from their school's task force report.<sup>161</sup> In an addendum to the main report, the dissenters charged that, often, "student concerns were not heard or considered" in the task force's deliberations or its recommendations.<sup>162</sup> The dissenters wanted to assert authority over additional matters that the structure of the school normally shields from their authority—such as concerns of the Law School's staff and the composition of its faculty.<sup>163</sup> They asked that critical race theory be integrated into the curriculum in the same manner as Constitutional Law<sup>164</sup> and questioned whether a drop in the number of minority students was a deliberate response to minority student protests.<sup>165</sup> They sought changes in the funding structure for affinity student organizations, support and mental health services, financial aid, and many other school matters that are partly shielded from

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157. See generally James Forman, Jr. et al., *Report of the Committee on Diversity and Inclusion*, YALE L. SCH. (Mar. 18, 2016), [https://law.yale.edu/system/files/documents/pdf/Deans\\_Office/diversity\\_inclusion\\_report\\_3\\_23\\_2016\\_to\\_community.pdf](https://law.yale.edu/system/files/documents/pdf/Deans_Office/diversity_inclusion_report_3_23_2016_to_community.pdf) [https://perma.cc/7YE2-44QF].

158. See generally *id.*

159. Letter from M. Elizabeth Magill, Dean & Richard E. Lang Professor of Law, Stanford Law Sch., to Stanford Law School Students and Wider Stanford Law School Community, *supra* note 23.

160. *Id.*

161. See generally Ramogale et al., *supra* note 15.

162. *Id.* at 1.

163. *Id.* at 4.

164. Constitutional Law is a highly recommended course that most law school students are required to take.

165. Ramogale et al., *supra* note 15, at 5.

student participation and authority.<sup>166</sup> The dissenters wanted changes in the structure of authority at the school, beginning with the composition and deliberations of the task force itself.<sup>167</sup>

#### CONCLUSION

Recent years have seen the proliferation of a particularly bracing and challenging round of diversity and inclusion claims in law schools across the United States, often articulated by racial and ethnic minority students. These claims are one manifestation of a much wider set of controversies that have spread across many university campuses in this period and across the wider culture of which those campuses are a part. On campus, and in the larger culture, the minority students' claims are often seen as new, radical, and difficult to accurately describe and adequately remedy.

Part of the difficulty lies in the mix of mode one and mode two claims that has characterized the recent student protests. Claims that seem like calls for simple removal of barriers to participation seem inseparable from claims that assert that the core culture of the law schools needs to be reoriented for full inclusion to take place. As always, inclusion claims slide easily from one mode to another. Some of what the protests have called for seems cognizable within the kinds of reforms that now constitute the normal functioning of universities, such as adding or supplementing diversity and inclusion offices. At other times, the protesters have described classroom and campus environments where language, symbols, and other forms of diffuse power operate to the systematic disadvantage of racial minorities, and these students have also asserted the desire to redistribute power and authority within the university.

The diversity and inclusion task forces, understandably, have proposed changes—many of them creative—that nonetheless exist within the normal and expected way of doing business within a university. To describe a law school as an institution that perpetuates something like “white supremacy” and “systemic racism” is probably beyond their mandate, and perhaps even beyond the mandates of the deans who have appointed them. To describe legal education in that manner would require changes in the functioning of law schools that would correctly be regarded as controversial, even revolutionary. Nonetheless, these are the true stakes behind the most recent round of inclusion claims, just as they have been ever since the beginnings of the civil rights era.

#### APPENDIX: TRANSCRIPT\*

PROFESSOR WILLIAM NELSON: I have had an ongoing battle with John Sexton, who insists that I talk about affirmative action in terms of

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166. *See generally id.*

167. *Id.* at 1.

\* This discussion followed the author's presentation of this Article at the Symposium. The transcript has been lightly edited. For a list of the Symposium participants, see Matthew

diversity and inclusion, and I understand the value of Judge Guido Calabresi's brilliant legal argument that personal-identification diversity is the same as other sorts of diversity and should be left to academic institutions to work it out. There is a recent book by Anders Walker<sup>168</sup> that suggests that Justice Powell in *Regents of the University of California v. Bakke*<sup>169</sup> decided to address the issue as one of diversity because it would not require any fundamental changes, whereas talking about affirmative action in a different way might involve fundamental change. I want to talk about affirmative action as reparations not primarily for past discrimination but for current ongoing discrimination. Racism remains alive and well and has terrible impacts, especially in the context of public education. Affirmative action is a remedy for those impacts.

PROFESSOR KENNETH MACK: Firstly, should I even use the word "diversity"? I am picking up on the words other people have used—three terms: "diversity," "inclusion," and "belonging." The shift from diversity to inclusion and belonging is an attempt to address the problem by doing as little of the work you are talking about as possible. Even these words do not really capture what is at stake, because it is not really whether people are included and belong; it is how should institutions respond to long-term discrimination, exclusion, and structural inequality in which the institutions themselves are partly implicated. These have been the stakes ever since the early to mid-1970s. The Supreme Court's Fifth and Fourteenth Amendment cases from those years were all about putting some bounds around discrimination so that it does not reach these issues.<sup>170</sup>

JUDGE GUIDO CALABRESI: Focusing solely on institutions, ultimately, is not enough. When my father died, they had a memorial service for him at the medical school, and I noticed for the first time how many of the people who were working with him were African Americans. And I asked, "Why?" And they looked at me and they said because he is the only person we have met in this country who treats us exactly as he treats white people. The reason for that is that he was an Italian, he came from a different world. In Italy, at the time, race was not an issue, and it was not an issue for him. People were people; he could be very rude, equal-opportunity mad—but totally equal opportunity—and people saw that. And I realized that would never be true of me because I had grown up almost entirely in America, so I was always reacting—however much I might have tried not to—to a person's race. I do not think focusing on institutions is enough if we do not find some ways of thinking about our inherent racism and how we try to cope. I was reminded by Justice Black, who thought intermarriage

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Diller, *Foreword: Legal Education in Twentieth-Century America*, 87 *FORDHAM L. REV.* 859 (2018).

168. ANDERS WALKER, *THE BURNING HOUSE: JIM CROW AND THE MAKING OF MODERN AMERICA* (2018).

169. 438 U.S. 265 (1978).

170. See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

ultimately was the only way to end racism and who told me, “If I go to a dance and I see a black man dancing with a white woman, I wince. I wish the reaction wasn’t like that, and I hate myself because I know it is wrong, but it is something I was brought up with and I am still fighting it. And I am aware of it and I have got to keep fighting all my life.”

PROFESSOR MACK: I think I talk about institutions mostly because that is the context in which claims are usually made, and these kinds of institutional claims are familiar to me. You can think structurally in terms of defining problems, but in terms of appropriate responses, we almost always think about institutions.

PROFESSOR ROBIN WEST: The difficulty with the word “diversity” is that it tames anything resembling antisubordination; “reparation” sounds a lot more powerful. I have always thought the words “inclusion” and “belonging” are extremely spiritually powerful, as far as just the power of language goes. To “belong” and to be “included” societally is to be included in workplaces and neighborhoods, in significant ways. So, I resist bashing words without actually trying them. We have not tried integration—really, we have not tried diversity. So we should give them a shot before we toss them. On the other hand, I do think that in Chief Justice Roberts’s Court diversity will lose out to individual fairness, which to Chief Justice Roberts sounds like the essence of equal protection. So, I do agree that we need to talk about these issues in a more powerful way that makes the actual stakes clear.

PRESIDENT EMERITUS JOHN SEXTON: Be careful about this argument about intellectual diversity. Be very careful about accepting the argument made in critiquing universities that they are bastions of particular thought. The data contradicts that. There is data—that I will be citing in my forthcoming book—that 66 percent of conservatives on campus report satisfaction with their ability to thrive on campus, but only 56 percent of liberals report a capacity to thrive. When one looks at speakers being excluded from campus, it is much more the right excluding the left than vice versa. There is an organization called Turning Point USA,<sup>171</sup> which has an annual budget of \$8 million a year,<sup>172</sup> with the purpose of seizing control of student governments on campuses, which in the aggregate allocate \$500 million a year to clubs and things like that.<sup>173</sup>

How should we think about affirmative action? Not as a zero-sum game, which is how it looked with some people jumping up the ladder over other people. This is where Justice Powell’s opinion in some ways was brilliant:

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171. *See About Turning Point USA*, TURNING POINT USA, <https://www.tpusa.com/aboutus/> [https://perma.cc/CK24-BQPK] (last visited Nov. 15, 2018).

172. Lachlan Markay, *Exclusive: Pro-Trump Group, Turning Point USA, Has Finances Revealed*, DAILY BEAST (June 28, 2018, 12:18 PM), <https://www.thedailybeast.com/exclusive-pro-trump-group-turning-point-usa-has-finances-revealed> [https://perma.cc/76NV-PQGH].

173. Michael Vasquez, *5 Takeaways from Turning Point’s Plan to ‘Commandeer’ Campus Elections*, CHRON. HIGHER EDUC. (Apr. 6, 2018), <https://www.chronicle.com/article/5-Takeaways-From-Turning/243064> [https://perma.cc/5N6Q-RNFA].

there was a zone of qualification and within that zone different voices became an affirmative value.<sup>174</sup> So, it was not that anybody who did not get in got in—what I call a zero-sum game—but a positive-sum game.

PROFESSOR NELSON: I totally agree; except that by talking about reality and seeking reparations, maybe one has some chance of changing the consciousness of large numbers of people. Talking about diversity does not make people who are unaware of the realities of ongoing racism aware of them.

PROFESSOR MACK: I am with Bill Nelson in thinking that we need some language other than “diversity.” But a lot of academics and other people are doing that work of pushing us in that direction. Our job as academics is to make sure, as I do when I teach Property, that students understand things like the fact that the federal government subsidized white housing and kept black people out of the white neighborhoods for decades, and that is why we are where we are today. And the claim that we need to be making is that the issue is not diversity, but lots of structural phenomena that have measurable impacts in the world, much of which is attributable to public policy. So, I think that is the game.

JUDGE CALABRESI: I want to say something about the Federalist Society<sup>175</sup> in relation to what you have said about the number of African Americans from Harvard University who have gone out and done things in the world. My nephew, Steven Calabresi, founded the Federalist Society because he wanted to have intellectual discussion with other conservatives. And I said, “that is fine, but the society has become a career society where people go to get career things and is that not terrible?” Steven looked at me and smiled and said, “What is the difference between that and Yale Law School, where people go for intellectual reasons, but it also becomes career enhancing?” And it makes me think of what you said about African Americans from Harvard University who have done so many great things, so that even with all of their flaws, these places provide a career opportunity for people who can make the world better. We have something going for us even though we are not anywhere near where we should be. If a Federalist Society scares us—and it should—the Yale Law School, Harvard Law School, and other places turning out people to do things to make the world better should make us a little bit optimistic.

PROFESSOR ROBERT KACZOROWSKI: I teach the school-segregation cases in Constitutional Law, and I am always left with the idea that we are being too legalistic about the problem of racism. We have been fairly effective in removing legal barriers but relatively ineffective in changing the structure of society. And the connecting point between the school-segregation cases and the structure of society goes not only to federal public policy, but to local public policies, zoning laws, and the like, which are often motivated by racial animus. I am struck how property is the single

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174. *Bakke*, 438 U.S. at 317–18 (opinion of Powell, J.).

175. See generally FEDERALIST SOCIETY, <https://fedsoc.org> [<https://perma.cc/B743-4N7Z>] (last visited Nov. 15, 2018).

most important determiner of economic inequality and how economic inequality is directly correlated with racial inequality. The wealthier an area, the better the schools, and the better the schools the more likely the children will go to college and end up doing something worthwhile in the world. So, it seems to me that in thinking about the problem of racism and inequality we must think more broadly about public policy at the local level and about structural barriers to inclusion that have been created since the New Deal to exclude racial minorities and low-income people. The legal doctrine of race discrimination is a major problem to achieving inclusion because it is so narrowly focused.

JUDGE CALABRESI: As a judge, I can tell you that there is almost no case we deal with that is not permeated with racial discrimination. It is in almost every area we decide, and it is at a level we cannot do anything about because it is so inherent. It is one of the most frustrating things. The great thing about being a judge is when the law is wrong and you can find a way around it; that is what I dedicate myself to doing, to be clever enough to find a way to make the law right. But the overwhelming nature of America's racial structure is such that when I go to bed at night, I cry.

PROFESSOR KACZOROWSKI: Part of my Constitutional Law final this semester was about a suburban school district, with one neighborhood school attended by economically impoverished racial minorities, which was underperforming, and another neighborhood school attended by children of affluent white families, which was performing well. The question is whether there is a remedy for that segregation, and in the facts in the exam question, I put in the discrimination in zoning that was adopted years earlier, thinking bright students might make a connection.

PROFESSOR WEST: My guess is not that many made the connection.

PROFESSOR KACZOROWSKI: That is the point. We are thinking too narrowly.

PROFESSOR MACK: The real problem is always structural, and the question is what obligations institutions have to respond to structural problems. What I am saying goes all the way back. That is what the NAACP and Charles Houston were asking. They were asking to do things that were beyond imagination in the 1930s. But I feel hopeful in the sense that if I look at the list that Charles Houston made in 1936, it was a wild fantasy then. Now, we have not done as much as we should be doing, and structural problems still remain. But by 1968, we actually did have a legal response to almost everything he listed. You have to push for it.

JUDGE CALABRESI: We have made progress. My mother could not be appointed to the Yale College faculty because the corporation said we have no women students, so how can we have a woman teacher. My wife could not go to Yale College, even though every male member of her family had gone there. There is still so much to do, but because we have made progress, there is hope, and because there is so much to do, we should tell not just the kids, but the old ones how much there is to do. That is what we should do:

every day we preach, every day we teach, and that is what we should be about every day.