

# Seattle University School of Law Digital Commons

---

Faculty Scholarship

---

2016

## Campus Racial Unrest and the Diversity Bargain

Steven W. Bender

Follow this and additional works at: <http://digitalcommons.law.seattleu.edu/faculty>

 Part of the [Law Commons](#)

---

### Recommended Citation

Steven W. Bender, Campus Racial Unrest and the Diversity Bargain, 5 Ind. J.L. & Soc. Equality 47 (2016).

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons.



## Campus Racial Unrest and the Diversity Bargain

Steven W. Bender\*

### INTRODUCTION

Coinciding with the Supreme Court's consideration of a significant challenge to affirmative action,<sup>1</sup> campus racial unrest across the United States during the 2015–16 academic year drew national attention. Encompassing elite institutions such as Yale, Harvard, and Princeton and sometimes aligning with broader movements for racial justice such as Black Lives Matter, protests over hostile racial climates on campus challenged the status quo of unwelcoming environments for students of color.<sup>2</sup> I moderated the Society of American Law Teachers's annual Cover Workshop, held in early 2016 at Fordham University School of Law. This workshop engaged these racial protests as entry points for improving race relations on campus.<sup>3</sup> Racial activism on campus, of course, is not a new development, as campus protest reaches back throughout the 1900s as it coincided and connected with broader racial unrest confronting entrenched segregation and discrimination.<sup>4</sup>

While achieving some short-term victories,<sup>5</sup> the current wave of campus protests also prompted backlash and even threats of violence from some White students, as well as media attacks, such as Fox News's labeling of university

---

\* Associate Dean for Research and Faculty Development and Professor, Seattle University School of Law. I appreciate the comments and guidance of Richard Delgado in writing this piece, following the trail he illuminated with his many prior insights and published works.

1 Fisher v. Univ. of Tex., 758 F.3d 633 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198 (2016).

2 Alia Wong & Adrienne Green, *Campus Politics: A Cheat Sheet*, THE ATLANTIC (Apr. 4, 2016), <http://www.theatlantic.com/education/archive/2016/04/campus-protest-roundup/417570/> (detailing some of the high-profile protests including the most newsworthy outcome when University of Missouri President Tim Wolfe resigned in response to a strike of the university's football team and mass student demonstrations protesting his response to racial incidents on campus).

3 2016 SALT Cover Workshop, *Race Matters: Creative Entry Points for Impacting Race Relations on Campus*. Panelists included a Yale law student and other presenters who addressed the role of oppressive symbols, contextualized the current struggles within a history of racialized oppression, and connected the protests to Black Lives Matter and other movements. SALT Cover Workshop, Jan. 9, 2016, Fordham Law School, SOC'Y OF AM. LAW TEACHERS, <https://www.saltlaw.org/events/salt-cover-workshop/> (last accessed Sept. 13, 2016).

4 See Stefan M. Bradley, *Black Activism on Campus*, N.Y. TIMES (Feb. 1, 2016), <http://www.nytimes.com/interactive/2016/02/07/education/edlife/Black-History-Activism-on-Campus-Timeline.html> (supplying a timeline of significant Black activism on campus since 1900).

5 See Wong & Green, *supra* note 2 (detailing the aftermath of high-profile protests).

protestors as anarchists.<sup>6</sup> This backlash exposes the sinister and sobering foundations of racism on college campuses that connect to the seeming permanence of racism embedded in U.S. institutions and law. In this Article, I suggest that despite the window dressing of diversity that claims to open the campus doors to racial minorities, society fears an educated and activist minority population that sets out to change the status quo of systemic racism. As I posit, activist minority students, whether in law or other disciplines, have violated their covenant of admission and tolerance on the college campus.<sup>7</sup> So long as activist minority students are subservient students who stick to the classroom, honor campus legacies, and, once educated in mainstream Anglo-centric curriculum, enter the job market well-dressed and with cultivated accents intending to support the university financially in producing the next crop of graduates, university officials will talk the talk of diversity and its fruits. But should the students, as angry products of working-class families of color, learn the nature of their oppression and its sources and aim to change that world, starting with their own campus, they violate their tacit bargain, long enforced by a variety of policies and strategies detailed below.

## I. DIVERSITY'S BARGAIN

Colleges now routinely celebrate and trumpet their commitment to diversity.<sup>8</sup> Corporate America also champions the virtues of a diverse workforce and, concomitantly, a diverse and educated supply chain of student bodies. Best evidencing this support, more than sixty major companies signed an amicus brief in the University of Michigan affirmative action litigation before the Supreme Court in the early 2000s.<sup>9</sup> But the implementation of affirmative action admission policies

---

6 Olivia Kittel, *Fox News: Where Protests Against Racial Discrimination Are Anarchy but Armed Protests Against Federal Law Are "Patriotic,"* MEDIA MATTERS FOR AM. (Nov. 12, 2015, 3:02 PM), <http://mediamatters.org/blog/2015/11/12/fox-news-where-protests-against-racial-discrimi/206819> (comparing negative characterizations on Fox News of racial justice protestors with its praise for White rancher protestors in Nevada: "Only on Fox News are armed militia members protesting federal law 'patriotic,' while university students and faculty speaking out against racism are labeled as anarchists."); See also Wong & Green, *supra* note 2 (reporting threats of murder and violence in the aftermath of racial protests at the University of Missouri).

7 See also Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness as Property and Racial Performance as Political Speech*, 31 HARV. J. RACIAL & ETHNIC JUST. 7, 25 (2015) (describing the "I, Too, Am Harvard" play which addresses the campus racial environment that excludes Blacks while simultaneously granting admission to those Blacks whose academic credentials and articulateness allow access to the privileged club of assimilation and complicity in ongoing oppressions: "[T]his offer of admission requires black students' silence, requires that they not speak of the continued ideology, institutions, and structures that injure their people, that require them to deny their own people and participate in their continued oppression.").

8 Most White residents, however, oppose government efforts to diversify schools, at least at the K-12 level. See Rebecca Klein, *Surprise! White People Really Don't Care About School Diversity* (Jan. 21, 2016), [http://www.huffingtonpost.com/entry/racial-diversity-schools-poll\\_us\\_56830224e4b0b958f65ab2d6](http://www.huffingtonpost.com/entry/racial-diversity-schools-poll_us_56830224e4b0b958f65ab2d6) (reporting result of new poll finding only 28 percent of White Americans thought government should increase school diversity, in contrast to 61 percent of Blacks and 55 percent of Latino/as).

9 Jonathan D. Glater, *Affirmative Action: A Corporate Diary*, N.Y. TIMES (June 29, 2003), <http://www.nytimes.com/2003/06/29/business/affirmative-action-a-corporate-diary.html> (discussing a brief supporting affirmative action joined by 65 companies such as Coca-Cola and Microsoft). The Supreme Court ultimately recognized the constitutional underpinning of affirmative action programs

and, more broadly, the tolerance of racial minorities on campus, whether or not admitted through affirmative action, are constrained by the terms of the diversity bargain of assimilation and complicity. To honor this bargain requires minority students to accept that the numbers of their diverse classmates will be few and diluted even more by their respective majors, that most of their professors will not look like them and that their required and elective curriculum will not engage their own histories of oppression or their cultures of expression. Students must be willing to kiss the ring of slaveholders and segregationists when surrounded by buildings named for racial oppressors and by statues and other symbols honoring these leaders.<sup>10</sup> Once minority students graduate, they must return the favor of their admission and tolerance of their presence on campus by tamping down impending racial insurrections and feeding the system that sends back donations to their alma mater to support another generation of docile students, who they commit to mentor to the same positions of grandeur and comfort.

The university is not the only venue where racial docility is prized—the workplace equally values submission.<sup>11</sup> Poor and working-class Mexicans, for example, were long praised for their perceived subservience to the master’s orders.<sup>12</sup> One writer lauded the shift to a Mexican labor force in the early-1900s United States as inviting “a great reservoir of the cheapest and most docile labor.”<sup>13</sup> He went on to describe the Mexican “peon” as “a poverty-stricken, ignorant, primitive creature, with strong muscles and with just enough brains to obey orders and produce profits under competent [Anglo] direction.”<sup>14</sup> My point is that the university is no haven from the societal expectation of racial docility. Whether in the workplace, on campus, or on the streets, society expects minorities to know their place and be thankful for whatever scraps of the American dream are tossed their way.<sup>15</sup>

Racial protests on campus in the last year shook the historic foundations of racism and assimilation, breaching the covenant of tolerance of minorities on

sourced in the compelling justification of diversity. *See* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (finding law school had compelling government interest in attaining a diverse student body). Ironically, the corporatization of universities in recent decades does not suggest a breakthrough for racial justice, as corporations also value docility of their diverse workforce.

10 *See generally* CRAIG STEVENS WILDER, *EBONY AND IVORY: RACE, SLAVERY, AND THE TROUBLED HISTORY OF AMERICA’S UNIVERSITIES* (2013) (describing how universities used slave labor).

11 One of the tensions of affirmative action has been this duality of insisting on docility of recipients, while at the same time critiquing their supposed laziness. This critique is explained as one of the strategies deployed to keep minority entrants (whether or not admitted through affirmative action programs) in their place by communicating they are ill-deserving of the opportunity and best avoid causing any trouble. *See infra* notes 28–30 discussion and accompanying text.

12 LOTHROP STODDARD, *RE-FORGING AMERICA: THE STORY OF OUR NATIONHOOD* 214 (1927).

13 *Id.*

14 *Id.* *See* STEVEN W. BENDER, *ONE NIGHT IN AMERICA: ROBERT KENNEDY, CÉSAR CHÁVEZ, AND THE DREAM OF DIGNITY* (2008) (detailing the decades-long activism of César Chávez to bring decent working conditions to field workers).

15 We also expect them, as immigrants, to leave the country when their labor is no longer needed. *See* Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in *THE LATINO/A CONDITION: A CRITICAL READER* 77 (Richard Delgado & Jean Stefancic eds., 1998) (addressing our history of inviting Mexican labor, particularly under the wartime Bracero Program, and then forcibly ousting Mexicans during economic downturns).

campus by other students, university administration, and society in general. Evident in the demands articulated in many of the recent protests are common themes of developing a curriculum that better speaks to the students, recruiting minority faculty, and admitting a critical mass of minority students.<sup>16</sup> Imagine what university administrators and wealthy donors must think about the prospect of a faculty member of color teaching students of color about their oppression, with those students graduating and causing even more trouble for the status quo.<sup>17</sup> These leaders no doubt anticipated the risk of an uprising by minority students at some point but relied on a variety of structures and pressures to temper any revolution. The Article's next section briefly surveys those repressive strategies.

## II. ENFORCING DIVERSITY'S BARGAIN

Current calls for meaningful curriculum, such as the demand in the fall of 2015 by petitioners at the University of Cincinnati for curriculum focusing on "racial awareness,"<sup>18</sup> expose how current university courses serve the interests of assimilation into the prevailing norms of racial subordination. Reinforcing the settled expectations of White students and faculty, the existing college curriculum, and even whole academic disciplines, reifies white supremacy despite the diversification of the student body.<sup>19</sup> Graduate programs inculcate the same culture of assimilation and suppression. Law schools, for example, failed to change their curriculum when affirmative action brought substantial numbers of Latino/as, Blacks, and Asian students to the classroom in the late 1960s.<sup>20</sup> Instead, it was those law students who needed to adapt to the existing curriculum and its reliance on the classic cases. This reliance is akin to an undergraduate literature course teaching the same classics. In turn, as law school graduates, the minority students

---

16 See Wong & Green, *supra* note 2 (reporting students at 60 schools have submitted racial demands to their schools; also describing the demands of Claremont McKenna College minority students seeking greater faculty diversity and multicultural services funding, and the reaction of the since resigned dean of students who pledged to support these students who didn't fit "our . . . mold," prompting a campus-wide protest to her characterization of minority students as outside the model of Claremont students). Other campus demands addressed violence against minority, particularly Black, students. *E.g.*, Matt Coker, *UC Irvine Black Student Union Demands End to Campus Police Department*, OCWEEKLY (Jan. 28, 2016, 7:03 AM), <http://www.ocweekly.com/news/uc-irvine-black-student-union-demands-end-to-campus-police-department-6927075>.

17 See generally Richard Delgado, *Transcendence: Conservative Wealth and Intergenerational Succession*, 59 UCLA L. REV. 42 (2011) (discussing the competitive threat affirmative action poses to plutocratic, wealth-based succession).

18 See Wong & Green, *supra* note 2.

19 David Shih, *Campus Protests and Whiteness as Property*, *BLOGGER* (Jan. 25, 2016, 8:20 AM), <http://professorshih.blogspot.com/2016/01/campus-protests-and-whiteness-as.html> (explaining the relationship between the racist status quo and college curriculum).

20 Richard Delgado, *Delgado's Darkroom: Critical Reflections on Land Titles and Latino Legal Education*, 45 N.M. L. REV. 275, 292–93 (2014); see also Steven W. Bender, *From Sandoval to Subprime: Excluding Latinos from Property Ownership and Property Casebooks*, in *VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER* 111 (Society of Am. Law Teachers & Golden Gate Univ. Sch. of Law eds., 2011) (discussing that at the same time law school property casebooks expand their subject base to include intellectual property and other materials, they ignore the Latino/a property experience of exclusion and loss).

educated in the traditional classroom for the most part become lawyers with careers indistinguishable from White lawyers—handling the work-a-day representation of small business, procuring divorces, and writing wills for individuals—while reinforcing the existing social order.<sup>21</sup>

To ensure minorities are not adequately educated in their oppressions requires complicity not just of the university and its graduate programs, but of K–12 education as well. This complicity was one of the reasons (along with the rousing academic success of program participants) that Arizona legislators were threatened by the Tucson high school Ethnic Studies curriculum, which relied on critical race theory and race texts.<sup>22</sup> With few such exceptions, K–12 curriculum has long stayed true to the classics, deploying watered-down versions of racial history or simply ignoring oppressions altogether.<sup>23</sup> Even in predominantly minority districts, students must adapt to the curriculum rather than the reverse. Occasionally students see through the façade of a curriculum that aims not to startle, anger, or engage them, as did Chicano high school students in East Los Angeles in 1968 who walked out of their classrooms voicing demands for bilingual education and teachers more aware of the community’s pressing social and economic problems.<sup>24</sup>

Given the role of White curriculum in protecting the status quo, it is not surprising that school officials and White faculty will argue for its preservation. Among the weapons used to attack any calls to racialize and diversify college curriculum is to dismiss those proposed courses and, more broadly, Ethnic Studies degrees, as marginal and lacking intellectual rigor.<sup>25</sup> Some faculty will also attack the scholarly work of teachers of color in similarly dismissive tones.<sup>26</sup>

In the same way that racial justice curriculum is marginalized, assimilation and whiteness norms are enforced by reminding minority college students that they

---

21 Delgado, *supra* note 20, at 293–94.

22 See generally Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013) (discussing lawsuits filed after ethnic education book bans); Jean Stefancic, *Reflections on Reform Litigation: Strategic Intervention in Arizona’s Ethnic Studies Ban*, 47 J. MARSHALL L. REV. 1181 (2014) (discussing the resultant ban on Mexican American studies and the lawsuit challenging the ban).

23 See Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297 (2009) (supplying a history of Latino lynchings, particularly of Mexican Americans in the Southwest, that few schoolchildren learn); Emma Brown, *Texas Officials: Schools Should Teach that Slavery was “Side Issue” to Civil War*, WASH. POST (July 5, 2015), [https://www.washingtonpost.com/local/education/150-years-later-schools-are-still-a-battlefield-for-interpreting-civil-war/2015/07/05/e8fbd57e-2001-11e5-bf41-c23f5d3face1\\_story.html](https://www.washingtonpost.com/local/education/150-years-later-schools-are-still-a-battlefield-for-interpreting-civil-war/2015/07/05/e8fbd57e-2001-11e5-bf41-c23f5d3face1_story.html) (discussing the manipulation of history with Texas public schoolchildren learning states’ rights rather than slavery as primarily causing the Civil War).

24 BENDER, *supra* note 14, at 70, 198 (detailing demands that connected to the broader Chicano Movement and included more Mexican teachers and renaming the present schools from historic figures such as Garfield, Roosevelt, and Lincoln to names better establishing community identity); see also IAN F. HANEY-LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 22–27* (2003) (discussing the aftermath of the walkouts when trumped up criminal charges were brought against the strike organizers).

25 See Shih, *supra* note 19 (suggesting that the faculty in the academy making these attacks are the biggest beneficiaries of “a curriculum that reifies whiteness as logical, cultured, or professional.”).

26 See Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992).

are guests in the master's house, in some cases only present by the grace of affirmative action programs that are voluntary and not constitutionally compelled. Reminding minority students of their subordinate status and the bargain they struck can take several forms; for some of these strategies, university officials are the catalyst, while for others they are at least complicit.<sup>27</sup> As an example, symbols reflected in campus statues, building names, seals, and other settings remind students of the White origins and influences at the school that still define the institution. Often these symbols are those of the wealthy who built their fortunes on the backs of slaves.<sup>28</sup>

So-called "microaggressions" work in concert with symbols to ensure minority students understand their subordinate position as barely tolerated outsiders. The term describes a host of incidents that comprise a hostile racial climate on many campuses, including hate speech and hostility toward minorities. For example, portraits of African American law professors at Harvard were defaced with black tape.<sup>29</sup>

Both scholars and White students will help quell any campus revolt by attacking the credentials of minority students as unworthy for admission and graduation at the particular school. Presumably their targets will think twice about speaking out, as their voices have been marginalized. Although university officials might reject or not join in these appeals to reduce minority admissions, these officials nonetheless benefit from this demeaning backlash, which helps diminish any pressure to admit more students of color, hire more faculty of color to teach them, or to change the curriculum. Examples of student attacks on affirmative action include a *Harvard Crimson* piece suggesting employers would justifiably regard all minority candidates with skepticism if their alma mater used affirmative

---

27 Consider a more overt strategy to deter protest proposed and ultimately withdrawn by a Missouri legislator who introduced legislation to revoke scholarships of student athletes who support or participate in a strike. Rodger Sherman, *Everything About that Missouri Bill to Ban College Athletes from Protesting was Stupid*, SB NATION (Dec. 16, 2015, 1:06 PM), <http://www.sbnation.com/2015/12/16/10214874/missouri-bill-athletes-protest-rick-brattin> (discussing proposal made in response to the Missouri football team's protest of university administration's handling of racial discrimination complaints).

28 Recent campus activism has targeted these symbols of oppression, such as Harvard law school's seal with the family crest of a "wealthy and ruthless slaveholder," Wong & Green, *supra* note 2, and Yale's Calhoun College, a residential housing complex named after a notorious slavery advocate and Yale graduate. Backlash from the Harvard protest, in which the law school's seal was covered with black tape, resulted in a defacement of portraits of Harvard's Black law professor portraits with similar tape. Symbols of racial oppression are far reaching, as in the case of school mascots mocking Native American culture, whether through commodification of Native American images, perpetuating derogatory stereotypes, or by glorifying oppressors. *See id.* (discussing Amherst College protest calling for changing unofficial college mascot who allegedly gave Native Americans smallpox-infected blankets).

29 *See* Wong & Green, *supra* note 2 (discussing that the U.S. Education Department's Office for Civil Rights received more than 1,000 complaints of campus racial harassment during a seven-year period). *See generally* SOC'Y OF AM. LAW TEACHERS, *SALT Condemns Harvard Law School Hate Crime and Racially Hostile Environments Across the Country*, SOC'Y OF AM. LAW TEACHERS (Nov. 24, 2015), <https://www.saltlaw.org/salt-condemns-harvard-law-school-hate-crime-and-racially-hostile-learning-environments-across-the-country/>; *see generally* Tanzina Vega, *Students See Many Sights as Racial "Microaggressions"*, N.Y. TIMES (Mar. 21, 2014), <http://www.nytimes.com/2014/03/22/us/as-diversity-increases-slights-get-subtler-but-still-sting.html>.

action and arguing it would be better for society to refuse admission to race-based affirmative action students: “Helping those with primarily low academic qualifications into primarily academic institutions makes as much sense as helping the visually impaired become pilots.”<sup>30</sup> Some scholars have added their voice to disparage Black and Latino/a applicants. For example, a University of Texas law professor, Lino Graglia, remarked on the formation of an anti-affirmative action student group:

Blacks and Mexican-Americans are not academically competitive with whites in selective institutions. It is the result primarily of cultural effects. They have a culture that seems not to encourage achievement. Failure is not looked upon with disgrace.<sup>31</sup>

Apparently, many students agree with this cultural assessment that connects to longstanding stereotypes of laziness and unintelligence. A study released in 2016 found White students in elite colleges lumped their Latino/a and Black peers together, believing they “need to work harder to move up.”<sup>32</sup>

Other academic critics of affirmative action take a deceptively more compassionate, tough-love approach, arguing that race-based affirmative action admittees are in over their heads and to their own detriment—they would be more successful attending a lesser ranked school. Written by a UCLA law professor and a Brookings Institution fellow, the book *Mismatch: How Affirmative Action Hurts Students It’s Intended to Help, and Why Universities Won’t Admit It*,<sup>33</sup> argues Black and Latino/a students are not competitive at the more selective schools they attend. Becoming bitter and overmatched, their personal struggles transform into collective, racialized campaigns. Pointing to the despair of these student “victims” of affirmative action, one of the authors argued in a separate piece that the resultant dissatisfaction explains “the over-the-top demands now roiling our campuses for still more racial admissions preferences; more preferentially hired, underqualified professors; more grievance-focused courses and university bureaucrats; more university-sponsored racial enclaves; and more apologies for ‘white privilege.’”<sup>34</sup>

---

30 Sarah R. Siskind, *Affirmative Dissatisfaction: Affirmative Action Does More Harm Than Good*, HARV. CRIMSON (Nov. 2, 2012), <http://www.thecrimson.com/column/the-snollygoster/article/2012/11/2/Siskind-affirmative-action/>.

31 Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89, 97 (2000).

32 Natalie Gross, *Do White College Students Believe Stereotypes About Minorities?* ATLANTIC (Jan. 25, 2016), <http://www.theatlantic.com/education/archive/2016/01/white-college-students-buy-in-to-stereotypes-of-minority-peers/426813/> (finding in contrast that White students at elite schools felt Asian American classmates were “cold but competent.”).

33 RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (2012).

34 Stuart Taylor, Jr., *A Little Understood Engine of Campus Unrest: Racial Admissions Preferences*, AM. SPECTATOR (Nov. 23, 2015, 9:00 AM), [http://spectator.org/64739\\_little-understood-engine-campus-unrest-racial-admissions-preferences/](http://spectator.org/64739_little-understood-engine-campus-unrest-racial-admissions-preferences/). Other scholars offer different explanations for the racial unrest on campus, connecting to the racist roots of most U.S. universities. See Kalpana Jain, *Unsurprised by Missouri – Scholars on the Roots of Racial Unrest on Campus*, THE CONVERSATION (Nov. 12, 2015, 9:08 PM), <http://theconversation.com/unsurprised-by-missouri-scholars-on-the-roots-of-racial-unrest-on-campus-50636> (quoting argument of Emory University historian Leslie Harris that the roots of today’s



Presumably racial minorities, if already enrolled, should blame themselves and accept their dissatisfaction on campus without protest, or better yet, they should have applied to some lesser-ranked institution more of their speed, reserving the elite institutions for White entrants. This argument for the exclusion of racial minorities resonates with those who would deny angry minority students the right to protest racial injustices on campus and in broader society. In this way, the college campus continues as a venue where the right to exclude, as a common nucleus of both property and whiteness, controls.<sup>35</sup>

Yet another strategy to police compliance with the diversity bargain is to ensure that minority students act individually and not collectively in ways that can more readily connect to larger community and societal campaigns.<sup>36</sup> In the austerity age of tight university budgets,<sup>37</sup> campus officials routinely fend off requests to adequately fund minority groups, characterized disparagingly above as “university-sponsored racial enclaves.”<sup>38</sup> Students also think twice about membership in racial identity-based organizations when they see how often those affiliations are attacked, as when California gubernatorial candidate Cruz Bustamante was vilified for his involvement with the Chicano student empowerment group, MEChA, while a student at Fresno State.<sup>39</sup> For minority students, then, the campus is a venue for rugged individualism, rather than a place for bonding with the few others on campus who come from their background.

### III. FACULTY OF COLOR’S COMPLICITY IN DIVERSITY’S BARGAIN

Demands for improving the campus racial environment tend to be directed at university administration, but too often professors are complicit in the hostile climate. Richard Delgado remarked on the shift in aspiration of many law students of color from rebellious lawyering to conventional careers: “We did little to dissuade them; some of us might even have quietly cheered the prospect of minorities tracing

---

racial unrest connect to the roots of universities in the slave trade: “[C]olleges and universities historically have supported hierarchies of race and other forms of difference from their founding in the colonial era through the civil rights struggles of the late-20th century.”)

35 See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714, 1789 (1993) (suggesting that affirmative action programs might dismantle the right to exclude applicants through identity by challenging the property interest of whiteness, thus breaking the link between White identity and property).

36 A historical example is the 1968 East Los Angeles school walkouts that connected to the Chicano Movement, *see supra* note 24 discussion, and current examples are those fusing campus racial activism to the Black Lives Matter movement.

37 Austerity can also be deployed to resist demands for new teachers of color and for new curriculum that requires new instructors to teach it. Even those faculty of color hired in response to student pressure are vulnerable to being the last hired, first fired if revenues dip.

38 Taylor, *supra* note 34.

39 See Steven Bender, Sylvia R. Lazos Vargas & Keith Aoki, *Race and the California Recall: A Top Ten List of Ironies*, 16 BERKELEY LA RAZA L.J. 11, 12 (2005) (noting even respected mainstream media questioned Bustamante’s fitness for office given his involvement with the student group, and that conservative media likened the organization to terrorist groups). As a long-time faculty advisor to the University of Oregon MEChA organization, I was routinely forced to defend an organization that cared little for excluding others, and most about diverse students surviving in an often hostile climate of higher education.

conventional career paths, mirroring, perhaps, our own.”<sup>40</sup> Could the White curriculum most of us teach be serving the same function as campus symbols of slaveholders and segregationists to enforce the diversity bargain? Do law professors of color, and university professors generally, encounter similar pressures that students face to be docile and thereby honor the “classics” in their teaching and writing?<sup>41</sup>

Evident in the current tumult of student activism is the idea that professors can and should do more to actively promote an inclusive campus environment. Professors collectively wield considerable power in their academic freedom to shape the content of the courses they teach, in their role in the hiring process, and in promoting a favorable campus climate. The suggestions that follow connect to the most articulated demands of current campus racial activists in promoting courses and course content that relate to the struggles for racial justice, as well as critical masses of students of color and professors of color who teach them.<sup>42</sup>

Law professors rarely take racial risks. Among those who did is Michael Olivas, who for years managed the Hispanic National Bar Association’s annual list, *The Dirty Dozen*, of law schools in areas with large Latino/a populations that nonetheless failed to hire a single Latino/a faculty member. Prompting backlash from deans, the list may have generated several Latino/a hires,<sup>43</sup> but years after the list ceased publication, many law schools still lack any Latino/a tenure-track faculty, and just a handful are managed by Latino/a deans.<sup>44</sup> Rather than shaming law

---

40 Delgado, *supra* note 20, at 293.

41 A current example of an activist professor, and the backlash that resulted, is University of Missouri’s Melissa Click, an assistant professor of communication. Indefinitely suspended after she tried to remove a student journalist from documenting a racial protest, Republican lawmakers wanted more and called for her discharge. Tajha Chappellet-Lanier, *A Suspension for Melissa Click*, THE ATLANTIC (Jan. 28, 2016), <http://www.theatlantic.com/education/archive/2016/01/melissa-click-suspended-mizzou/432564/>. The school responded by firing her in early 2016. Outcry accompanied her hiring as a lecturer by Gonzaga University in mid-2016.

42 Racial demands often include additional funding for campus diversity initiatives and organizations, as well as funding embedded in demands for additional minority students accomplished through need-based scholarships, and new faculty positions to immediately bring in faculty of color rather than through attrition over time of existing faculty. The suggestions below emphasize non-revenue dependent approaches, mindful that revenue-raising is often outside of individual faculty control and in the hands of law school (or other department heads) and main campus administration. *See, e.g., Reclaim Harvard Law Demands*, RECLAIM HARVARD LAW SCH. (Dec. 4, 2015), <https://reclaimharvardlaw.wordpress.com/demands/> (demanding, among other things, that the school: “Reform the existing mandatory legal curriculum at Harvard Law School, through meaningful student input and transparency, to ensure the integration of marginalized narratives and a serious study into the implications of racism, white supremacy, and imperialism in creating and perpetuating legal analysis and thought.”).

43 Marie McCullough, *A Hispanic Plea for Law Teachers*, PHILA. INQUIRER (May 7, 1993), [http://articles.philly.com/1993-05-07/business/25963705\\_1\\_hispanic-students-law-schools-olivas](http://articles.philly.com/1993-05-07/business/25963705_1_hispanic-students-law-schools-olivas) (noting 10 of the 22 schools that once appeared on the list hired Latino/a law professors by 1993).

44 *See* Jennifer L. Rosato, 48 Cal. W. L. Rev. 445 (2012) (Latina dean situates herself as one of hour U.S. Latino/a law school deans at the time); *see also* Ediberto Roman, *Whites Only . . . Perhaps More Than Just at the Oscars*, HUFFINGTON POST: BLOG (Feb. 4, 2016, 4:30 PM), [http://www.huffingtonpost.com/ediberto-roman/whites-onlyperhaps-more-t\\_b\\_9114768.html](http://www.huffingtonpost.com/ediberto-roman/whites-onlyperhaps-more-t_b_9114768.html). Across campus things are little better. *See* Ben Myers, *Where Are the Minority Professors?*, CHRONICLE OF HIGHER EDUC. (Feb. 14, 2016), <http://chronicle.com/interactives/where-are-the-minority-professors> (finding that of more than 400,000

schools, efforts such as the joint annual LatCrit/SALT junior faculty development workshop<sup>45</sup> aim to mentor prospective and newly hired diverse faculty members in the academy. Although the reward system for law professors within their home institutions fails to fully appreciate the considerable time spent in mentoring junior faculty, I am proud to have earned recognition for my mentoring by receiving the AALS Minority Groups Section C. Clyde Ferguson, Jr. award.<sup>46</sup>

Faculty can have the most impact in the curriculum they teach. Law professors can elect to teach law's active role in creating and sustaining systemic racial injustice.<sup>47</sup> They can write critical histories that link identity to unequal justice. These critical histories, when local or regional, are best written by those minority professors from local venues who gain a special credibility by their willingness to breach their own diversity bargain of hiring and tolerance by exposing the injustice rooted in their own institutions and states to both students in their classrooms and a scholarly audience.<sup>48</sup>

Faculty of color, both writing and teaching about subjects that engage students of color, can serve as a welcoming mat for those prospective students who feel that university curriculum does not respect their backgrounds or honor their struggles. As the author of texts used in college classes outside of law school, I aim to reach beyond college into high schools and earlier education to inform students that exposing and challenging systemic injustice is a shared goal, and that the educational assembly line can be recalibrated from the current bargain of tolerance and assimilation to a new environment of respect and honor.

Students of color<sup>49</sup> protesting racial injustice on their own campus and in broader society are taking a risk by breaching their diversity covenant. Faculty

- U.S. professors, three-quarters were White, five out of one hundred were Black, and even fewer were Latino/a, and the more elite schools were even less diverse).
- 45 See generally *LatCrit/SALT Junior Faculty Development Workshop*, LATINO & LATINA CRITICAL LEGAL THEORY, INC., [http://www.latecrit.org/content/teaching\\_resources/junior-faculty-development-workshop-fdw/](http://www.latecrit.org/content/teaching_resources/junior-faculty-development-workshop-fdw/) (last visited Sept. 9, 2016).
- 46 See *Professor Steven Bender Recognized for Teaching and Service*, SEATTLE U. SCH. L. (Jan. 10, 2014), <https://law.seattleu.edu/newsroom/2014-news/professor-steven-bender-receives-ferguson-award-for-teaching-and-service> (describing the AALS Minority Groups Section C. Clyde Ferguson, Jr. award as an annual award recognizing law professors who provide support and mentoring to students, colleagues, and aspiring educators).
- 47 As a current example of teachers connecting systemic injustice to their classroom, see Symposium, *Ferguson and its Impacts on Legal Education*, 65 J. LEGAL EDUC. 261–413 (Nov. 2015). I am part of a team of legal scholars developing a coursebook that includes and situates law among the instruments of systemic injustice. SOCIAL IMPACT ADVOCACY: POWER, IDENTITY, AND SYSTEMS IN LAW AND SOCIETY (forthcoming 2017).
- 48 E.g., Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—And Denial—Of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703 (1999) (written while its author was an endowed chair holder at the University of Colorado law school); Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000) (Richard Delgado taught previously at UCLA law school). These critical histories serve another goal of laying the foundation for an affirmative action program sourced in repair or reparation for past discrimination at the institution and in the region.
- 49 In focusing on students of color, I do not mean to marginalize the experience and role of other initiators and supporters of campus protests, particularly those within the LGBT community who may be of any race and who often face a similar “don't ask, don't tell” expectation of campus silence and subordination.

members too must be willing to support and contribute to the campaign to improve the racial climate on campus. In so doing, we help build a better world for others instead of a comfortable haven for the fortunate academics of color who successfully navigated diversity's bargain.