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Rule of Law, Activism and Equality: Growing Antisubordination Norms Within the University, 50 J. Marshall L. Rev. 249 (2017)

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RULE OF LAW, ACTIVISM, AND EQUALITY: GROWING ANTISUBORDINATION NORMS WITHIN THE NEOLIBERAL UNIVERSITY

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If there is no struggle, there is no progress. Those who profess to favor freedom and yet deprecate agitation are men who want crops without plowing up the ground; they want rain without thunder and lightning. They want the ocean without the awful roar of its many waters. . . . Power concedes nothing without a demand. It never did and it never will.¹

I. INTRODUCTION

College and university students have found much to protest in recent years. The University of Missouri was rocked by student protests in 2015 over the failure of university administration to respond effectively to racist incidents on campus, culminating in the resignation of the university president.² Yale University experienced sustained protests against the university's reaction to off campus racist incidents against students, against college administrators who had publicly criticized a university email urging students to wear non-offensive Halloween costumes, and in favor of renaming a Yale residential college named after 19th century white supremacist John Calhoun.³ Ithaca College, Oberlin,

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1. Frederick Douglass, *West India Emancipation, speech delivered at Canadaigua, New York, August 3, 1857*, in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 367 (Philip S. Foner and Yuval Taylor eds., 1999).

2. Susan Svrluga, *U. Missouri President, Chancellor Resigns Over Handling of Racial Incidents*, WASH. POST (Nov. 9, 2015), www.washingtonpost.com/news/grade-point/wp/2015/11/09/missouris-student-government-calls-for-university-presidents-removal/?utm_term=.1176eda82cfc.

3. After much prevarication, signaling a victory for campus activism, the university announced in February 2017 that it would indeed rename the college. Monica Wang & Susan Svrluga, *Yale Renames Calhoun College Because of Historical Ties to White Supremacy and Slavery*, WASH. POST (Feb. 12, 2017), www.washington

Amherst, and others were all sites of student protest over administrative responses to campus racism and racial climate.⁴ In January 2017, UC Berkeley was rocked by protests against a scheduled campus speech by Milos Yiannopoulos, then a Breitbart News conservative commentator.⁵ President Trump responded with a tweet threatening to withhold federal funding from the university on a putative “free speech” rationale.⁶ His response was measured compared to that of a Republican Party official in Michigan who called for “another Kent State” as a solution.⁷

Many of these protests have been met with criticism by both liberal and conservative commentators who suggest that the protests are motivated by trivial concerns, that they will be ineffective in creating change, or that the student protestors are too coddled and entitled and their demands should not be taken seriously. A common theme found in many of these critiques centers around the fragility and entitlement of millennials—that students today are easily offended by off-hand remarks, that they do not have the grit to deal with challenging circumstances, and that they lack the maturity to react appropriately to dissimilar viewpoints encountered on campus and in classes.⁸

post.com/news/grade-point/wp/2017/02/11/yale-renames-calhoun-college-because-of-historic-ties-to-white-supremacy-and-slavery/?utm_term=.99247f55b4a5.

4. See Conor Friedersdorf, *The Illiberal Demands of the Amherst Uprising*, THE ATLANTIC (Nov. 18, 2015), www.theatlantic.com/politics/archive/2015/11/the-illiberal-demands-of-amherst-uprising/416079/; Peter Halewood, *Campus Activism and Competing Racial Narratives*, AM. ASS’N UNIV. PROFESSORS, www.aaup.org/article/campus-activism-and-competing-racial-narratives#.WKS_J2_yu00 (last visited Aug. 23, 2017); Katie Rogers, *Oberlin Students Take Culture War to the Dining Hall*, N.Y. TIMES (Dec. 21, 2015), www.nytimes.com/2015/12/22/us/oberlin-takes-culture-war-to-the-dining-hall.html.

5. James Doubek, *Breitbart Editor’s Event Canceled as Protests Turn Violent at UC Berkeley*, NPR (Feb. 2, 2017), www.npr.org/sections/thetwo-way/2017/02/02/512992000/breitbart-editors-event-canceled-as-protests-turn-violent-at-uc-berkeley. In February 2017, Yiannopoulos resigned from Breitbart news after a video surfaced in which he appeared to defend pedophilia. Paul Farhi, *Breitbart’s Milo Yiannopoulos Resigns Following Outrage Over His Past Comments About Pedophilia*, WASH. POST (Feb. 21, 2017), www.washingtonpost.com/lifestyle/style/milo-yiannopoulos-resigns-from-breitbart-art-news/2017/02/21/0217c128-f7cc-11e6-be05-1a3817ac21a5_story.html?utm_term=.a18386f5311e. Some have argued that it is the campus right that is naive and gullible for embracing opportunistic right-wing infants terribles such as Yiannopoulos whose only real value is in taunting the campus left, whose basic values of care and humanism are vastly favorable even if occasionally naive. Alyssa Rosenberg, *If college liberals are so naïve, why did the campus right fall for Yiannopoulos*, WASH. POST (Feb. 21, 2017), www.washingtonpost.com/news/act-four/wp/2017/02/21/if-college-liberals-are-so-naive-why-did-the-campus-right-fall-for-yiannopoulos/?utm_term=.219d8e406354.

6. Donald Trump (@realDonaldTrump), Twitter (Feb. 2, 2017, 5:13 AM) <https://twitter.com/realDonaldTrump/status/827112633224544256>.

7. Mary Papenfuss, *Michigan GOP Official Calls for ‘Another Kent State’ for Campus Protesters*, HUFFINGTON POST (Feb. 4, 2017), www.huffingtonpost.com/entry/michigan-gop-official-kent-state_us_58952eafe4b09bd304bb86f0.

8. Peter Halewood, *Campus Activism and Competing Racial Narratives*, AM. ASS’N UNIV. PROFESSORS, www.aaup.org/article/campus-activism-and-competing-

It appears, however, that many of these commentators have failed to address some of the nuances of the protests. Of course, protests are not meant to be nuanced and are instead designed to be in-your-face statements of grievance. Yet there are some important aspects of protestors' grievances that are lost in the reporting. There seems to be a significant disconnect between what the protesters think they are protesting and what the critics think they are protesting.⁹ These critiques often fail to appreciate the structural or systemic significance of protests which the critics characterize as concerning only discrete and innocuous matters. The protesters, on the other hand, believe that they are protesting systemic, entrenched problems of racism, sexism, and homophobia on campus and in society. The students argue that these problems of bias affect the educational environment of all students and may even run afoul of federal civil rights laws if left unaddressed.

Though recent campus protests have taken many forms, they all point in some way to tangible threats to higher education's traditional role of serving the public good.¹⁰ The public benefits when its members are educated and equipped for the demands of participatory citizenship, and when knowledge in the arts and sciences is advanced. American universities are especially important in our current political context where President Trump attacks legitimate reporting on his administration, rejects universally accepted climate science, attacks the judiciary and the rule of law, demonstrates indifference to expertise or even experience in his cabinet choices, and assaults the basic premises of liberal pluralism with overt nativism and embrace of the alt-right.¹¹ His message is

racial-narratives#.WKS_J2_yu00 (last visited Aug. 21, 2017).

9. See Karin Agness, *The Ten Most Ridiculous College Protests of 2015*, FORBES (Dec. 30, 2015), www.forbes.com/sites/karinagness/2015/12/30/ten-most-ridiculous-college-protests-of-2015/#4467fd201379 (exemplifying how people misperceiving the meaning of various university protests).

10. Donna Young, *From the Editor: Race on Campus*, ACADEME (Nov.–Dec. 2016), www.aaup.org/article/editor-race-campus#.WCNHBmorJQI. See also AAUP, *Mission*, www.aaup.org/about/mission-1 (last visited Mar. 25, 2017). The AAUP's Policy Documents and Reports and other AAUP publications establish a rich body of research, policy and case analysis, and investigations undertaken over the last one hundred years by the American Association of University Professors (AAUP) supporting the idea that "higher education is a fundamental human right to which freedom of inquiry and expression are integral." *Id.*

11. See Fred Barbash, *Appeals Court Judges Rebuke Trump for 'Personal Attacks' on Judiciary, 'Intimidation'*, WASH. POST (Mar. 16, 2017), www.washingtonpost.com/news/morning-mix/wp/2017/03/16/appeals-court-judges-rebuke-trump-for-personal-attacks-on-judiciary-intimidation/?utm_term=.9f76f2f162a2; Coral Davenport, *Climate Change Denialists in Charge*, N.Y. TIMES (Mar. 27, 2017), www.nytimes.com/2017/03/27/us/politics/climate-change-denialists-in-charge.html; Tamara Keith, *Trump's Cabinet Picks 'Take the Establishment and Shake It Upside Down'*, NPR (Dec. 13, 2016), www.npr.org/2016/12/13/505442914/trumps-cabinet-picks-take-the-establishment-and-shake-it-upside-down; also, that Trump probably defrauded investors with his "Trump University" scam indicates his callow understanding of higher education and his bottomless cynicism about the value of universities. See Steve Eder, *Donald*

being taken further with unprecedented legislative approaches. For example, one Iowa Republican state senator introduced a bill that would require “partisan balance” by prohibiting “the hiring of a person as a professor or instructor member of the faculty . . . if the person’s political party affiliation on the date of hire would cause the percentage of the faculty belonging to one political party to exceed by ten percent the percentage of the faculty belonging to the other political party.”¹² Given other recent attacks by Republican lawmakers on tenure, campus activism, and collective bargaining rights of faculty members at public institutions, one could characterize this bill as a further attack on faculty members perceived by conservatives as too liberal.¹³

It is important to note that many of the campus protests over the last several years occurred under the Obama administration. Corporatization of universities, and the neoliberalism which drives it, has been an ongoing, decades-long process. Their effects are now being exposed by campus activism and might force university administrations and boards to reassess the current direction of higher education given the fundamental threats posed to it by Trumpism.¹⁴ An existential crisis faces academia and universities, and although one would never welcome such a crisis, now that it is upon us perhaps it can be harnessed to alter the neoliberal trajectory of the contemporary university.

But even before this particular political moment, the intrinsic value of higher education as a public good has been undermined by a corporate model that sees higher education primarily as a personal investment strategy, a job-training endeavor, a pathway towards individual success and wealth, while at the same time saddling students with an increased share of the cost of that education. In this model, educational opportunities are designed primarily to produce workers and consumers rather than reflective citizens and critical thinkers.¹⁵ Higher education under this model is viewed as a private commodity rather than a public good, a vision which is used to justify defunding public universities nationwide,

Trump Agrees to Pay \$25 Million in Trump University Settlement, N.Y. TIMES (Nov. 18, 2016), www.nytimes.com/2016/11/19/us/politics/trump-university.html?_r=0.

12. S.F. 288, 7th Gen. Assemb. (Iowa 2017).

13. See Nicole Hemmer, *Eternally frustrated by “liberal” universities, conservatives now want to tear them down*, VOX (Mar. 8, 2017), www.vox.com/the-big-idea/2017/3/7/14841292/liberal-universities-conservative-faculty-sizzler-pc; see Jessie Daniels & Arlene Stein, *Protect Scholars Against Attacks from the Right*, INSIDE HIGHER ED (June 26, 2017), www.insidehighered.com/views/2017/06/26/why-institutions-should-shield-academics-who-are-being-attacked-conservative-groups.

14. *Trumpism Definition*, COLLINS DICTIONARY.COM, www.collinsdictionary.com/dictionary/english/trumpism (last visited Mar. 23, 2017).

15. See Henry Giroux, *The Public Intellectual: Henry A. Giroux*, TRUTH OUT (July 25, 2017), www.truth-out.org/index.php?option=com_k2&view=item&id=4327:the-public-intellectual-henry-a-giroux.

downsize full time faculty and massively increase the numbers of contingent faculty.

Just as people of color are gaining access to higher education at greater rates than ever before,¹⁶ these changes threaten to disrupt critical inquiry (indispensable to the proper functioning of democratic institutions and to rectifying social injustices) while at the same time increasing the debt burden of graduates. “In a corporate model, equality, dignity, access, and critical thinking too often must yield to market imperatives. Perhaps it is not surprising, then, that student activism is resurgent on predominantly white campuses around the country and that it is driven by frustration with institutional failures to address matters of race on campus.”¹⁷

This article examines this recent surge of student activism to determine how it fits within larger social movements and to evaluate how receptive courts and legislatures may be to some of the claims raised by the protests. Significant changes in civil rights laws have often been driven by significant shifts in societal perceptions of and engagement with social justice issues. And importantly, social movements have often fostered the political pressure necessary for social, legal, and political reform. There is the potential for these protests to influence courts and legislatures and shape their interpretations of legal rules in ways that recognize the poverty of colorblindness and instead incorporate race-conscious analysis. Part I examines some of the student protests, their aims, their demands, the circumstances that led to them, and identifies the cleavages and contradictions they expose in university administration and public policy debates. Part II critically examines some of the laws implicated by these protests, for example, affirmative action, Title VI, and the First Amendment, and explores expanded interpretations of those laws which might be prompted by further activism. Part III argues that the student protests, reflecting larger social movements, have the potential to counter the neoliberal restructuring of higher education so that universities can reorient themselves towards serving the public good. Campus activism can play a critical role in protecting civil rights and liberties in the current political climate.

II. CAMPUS PROTEST AS CATALYST FOR SOCIAL CHANGE

Campus protest has a long and illustrious history in the United States. In the 1930s the American Youth Congress lobbied the Congress to oppose war and racial discrimination and in favor of youth programs.¹⁸ In the 1960s and 1970s groups such as the Students for a

16. *Fast Facts*, NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=372> (last visited Mar. 23, 2017).

17. Young, *supra* note 10.

18. *American Youth Congress*, THE ELEANOR ROOSEVELT PAPERS PROJECT, www2.gwu.edu/~erpapers/teaching/glossary/american-youth-congress.cfm (last visited

Democratic Society (SDS), and the Student Nonviolent Coordinating Committee (SNCC) vigorously opposed the Vietnam War and racism.¹⁹ In 1968 and 1969 students held protests at San Francisco State and at Cornell University demanding more meaningful educational opportunities for students of color and inclusion of black and ethnic studies courses in the curriculum.²⁰ These groups of students not only embraced resistance but also a program of liberation that recognized the role of higher education in organizing and implementing progressive social transformation. After the Kent State University shootings of protesting students by the National Guard and the invasion of Cambodia, over four million students protested.²¹ In the 1980s campuses saw protests for divestment from apartheid South Africa, the rise of critical theory on campuses, notably including Critical Legal Studies and Critical Race Theory, and mounting concern about women's inequality on campus and in society broadly.²² Campuses in the 1990s continued some of these themes but now through the lens of identity and identity politics—the discursive construction of group identity and difference, the othering of groups on campus, the increasing recognition of the agency of historically marginalized groups on campus—all changed the tenor and approach of campus organizing and activism.²³ The 2000s saw the rise of the Occupy movement both on campus and beyond, protests against the wars in Iraq and Afghanistan, against drone attacks in Yemen and Pakistan, for university divestment from fossil fuels, and against mass incarceration and police violence.²⁴ In the US, Black Lives Matter is a prime example of a

Apr. 6, 2017).

19. See Nella van Dyke, *Hotbeds of Activism: Locations of Student Protest*, 45 *Social Problems*, no. 2, May 1998, at 209; Emily Stoper, *The Student Nonviolent Coordinating Committee: Rise and Fall of a Redemptive Organization*, 8 *J. OF BLACK STUDIES*, no. 1, Sept. 1977, at 14, 29.

20. See *Agents of Change* (Films with a Purpose 2016), www.agentsofchange.com (a documentary about the student protests at San Francisco State and Cornell University).

21. See *Kent State Shooting Divided Campus and Country*, NPR (May 3, 2010), www.npr.org/templates/story/story.php?storyId=126480349.

22. See Philip G. Altbach & Robert Cohen, *American Student Activism: The Post-Sixties Transformation*, 61 *J. OF HIGHER EDUC.*, no. 1, Jan.–Feb. 1990, at 32; Gary Minda, *Jurisprudential Movements of the 1980s*, 50 *OHIO ST. L. J.* 599, 600, 638–41 (1989); Gary Minda, *Neil Gotanda and the Critical Legal Studies Movement*, 4 *ASIAN AMERICAN L. J.* 7, 15 (1997).

23. See Robert A. Rhoads, *Student Protest and Multicultural Reform: Making Sense of Campus Unrest in the 1990s*, 69 *J. OF HIGHER EDUC.*, no. 6, Nov.–Dec. 1998, at 621, 628–42.

24. See, e.g., Rich Barlow, *Student's Rally for Fossil Fuel Divestment*, *BU TODAY* (Sept. 15, 2016), www.bu.edu/today/2016/students-rally-for-fossil-fuel-divestment; David Kupfer, *Peace Activists Arrested in Anti-Drone Protests*, *THE PROGRESSIVE* (Apr. 7, 2016), <http://progressive.org/dispatches/peace-activists-arrested-anti-drone-protests>; Jeong Park, *Students Gather to Protest Mass Incarceration and Police Brutality*, *THE DAILY BRUIN* (Oct. 23, 2014), <http://dailybruin.com/2014/10/23/students-gather-to-protest-mass-incarceration-and-police-brutality>; Malia Wollan &

movement that links campus activism with community organizing in a new and effective method for focusing public attention on police killings of African American men and women, mass incarceration, and the “New Jim Crow” that has destabilized and damaged communities of color.²⁵ Since the 2016 presidential election, campus activism has mirrored national protests against President Trump’s executive order on immigration, his authoritarianism and nativism, and his ties to white nationalism.²⁶ Colleges and universities around the country also hosted Women’s Marches to coincide with the January 20, 2017 Women’s March in Washington, D.C.²⁷ Campus marches and protests have also been organized to support science in the face of Trump administration attempts to undermine the science of climate change.²⁸

Campus protests concerning racism in recent years have addressed various issues but have been centered around a few core demands including:

- increased racial diversity in the curriculum and among full time and tenured faculty;²⁹
- increased diversity training for faculty, staff, and students;

Elizabeth A. Harris, *Occupy Wall Street Protesters Shifting to College Campuses*, N.Y. TIMES (Nov. 13, 2011), www.nytimes.com/2011/11/14/us/occupy-wall-street-protests-shifting-to-college-campuses.html.

25. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 14-15, 55-56 (2010).

26. See Lauren Camera, *Universities Push Back Against Trump on Immigration*, U.S. NEWS (Jan. 30, 2017), www.usnews.com/news/education-news/articles/2017-01-30/colleges-universities-academics-push-back-against-trump-immigration-orders; Alla E. Dastagir, *How the Internet Reacted to Steve Bannon’s Growing Power in the White House*, USA TODAY (Jan. 29, 2017), www.usatoday.com/story/news/politics/on-politics/2017/01/29/steve-bannon-national-security-council-stop-president-bannon/97214654; Jeremy Diamond & Cheri Mossburg, *Protesters Take to Streets After Trump Rally in California*, CNN (Apr. 29, 2016), www.cnn.com/2016/04/29/politics/donald-trump-california-protest/; Rob Hunter, *Don’t Rely on the Courts to Fight the New Travel Ban. We Need Protest*, THE GUARDIAN (Mar. 15, 2017), www.theguardian.com/commentisfree/2017/mar/15/battle-over-new-travel-ban-here-protest.

27. See, e.g., Elisha Anderson & Ashley Zlatopolsky, *Thousands Participate in Women’s Marches Across Michigan in Solidarity*, DETROIT FREE PRESS (Jan. 21, 2017), www.freep.com/story/news/local/michigan/detroit/2017/01/21/womens-march-on-washington-detroit/96882130.

28. See, e.g., Akshitha Rmachandran & William L. Wang, *Harvard Affiliates Organize Marches for Science*, HARV. CRIMSON (Mar. 30, 2017), www.thecrimson.com/article/2017/3/30/harvard-march-for-science.

29. Diversity among faculty has not kept up with the growing numbers of student of color on campus. Amit Mrig, *Improving Diversity in Higher Education—Beyond the Moral Imperative*, FORBES (Nov. 23, 2015), www.forbes.com/sites/amitmrig/2015/11/23/improving-diversity-in-higher-education-beyond-the-moral-imperative/#6181e221fedc. “According to the National Center for Education Statistics (NCES), the percentage of Black college students rose from 11.7% in 2000 to 14.7% in 2013. The percentage of Hispanic students increased from 9.9% to 15.8% over the same time period. However, in 2013, only 6% of all full-time faculty were Black and 5% were Hispanic. Among full professors, the numbers drop to 4% for Blacks and 3% for Hispanics.” *Id.*

- increased recruitment and retention of students of color and first-generation college students;
- better financial aid for low income students, crackdowns on racist harassment on campus;
- better institutional supports for students of color such as cultural houses, better student mental health services;
- improving university relations with neighboring communities of color and/or poor communities; and
- renaming of campus buildings or programs associated with racist or white supremacist historical figures.³⁰

Faculty of color without tenure face risks in this environment when they try to support student demands concerning campus racism. They are frequently perceived as trouble-makers, as agitators, and as overstepping polite collegial discourse.³¹ The scholarship and teaching of faculty of color are more likely to offer diverse, critical, or controversial perspectives on subjects intersecting with race and thus offer a test of the standards protecting academic freedom. Such faculty clearly should not face discipline or dismissal for engaging in the critical inquiry in teaching and scholarship that is necessary for effective advocacy and policy-making, and which may contribute to the framework inside which campus activism takes place.

III. THE NEXUS OF CAMPUS ACTIVISM TO LAW REFORM

Though the Supreme Court in *Brown v. Board of Education*³² reinforced the importance of equal educational opportunities for all children, unlike all other western democracies, the United States has not recognized education as a fundamental right.³³ Though individual state constitutions contain language of a right to education, the United States Supreme Court has held that under the federal constitution, states are only required to provide “basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process.”³⁴ The United States’ failure to recognize a right to education stands in contrast to international treaties and most other countries’ laws.³⁵

30. *Our Demands*, BLACK LIBERATION COLLECTIVE, www.blackliberationcollective.org/our-demands (last visited Mar. 23, 2017); see also Leah Libresco, *Here Are The Demands from Students Protesting Racism at 51 Colleges*, FIVETHIRTYEIGHT (Dec. 3, 2015), <https://fivethirtyeight.com/features/here-are-the-demands-from-students-protesting-racism-at-51-colleges>.

31. See Jeni Hart et. al., *Agents of Change: Faculty Leadership in Initiating and Sustaining Diversity at the University of Arizona*, in *DOING DIVERSITY IN EDUCATION: FACULTY LEADERS SHARE CHALLENGES AND STRATEGIES* 180 (Winnifred R. Brown-Glaude ed., 2009).

32. *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty, Kan.*, 347 U.S. 483 (1954).

33. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

34. *Id.* at 37.

35. See generally *International Law*, THE RIGHT TO EDUCATION PROJECT, www

Nonetheless, education is widely recognized in the United States as the basic building block for a strong democracy and essential for a healthy society. Frederick Douglass wrote:

Without education he lives within the narrow, dark and grimy walls of ignorance. . . . Education, on the other hand, means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free. To deny education to any people is one of the greatest crimes against human nature. It is easy to deny them the means of freedom and the rightful pursuit of happiness and to defeat the very end of their being.³⁶

A survey of laws implicated by some of the campus protests will provide critical background revealing both the impotence of conventional legal approaches to social injustice and the potential that student activism has for pushing legal reform.

A. Affirmative Action and Diversity

Though it is unclear when the term “affirmative action” was first infused with political meaning, John F. Kennedy was the first president to use it to describe a policy meant to ensure racial equality.³⁷ But it was President Lyndon Johnson in his commencement address at Howard University who provided the first and strongest rationale for affirmative action.³⁸ He began his address by stating, “Our earth is the home of revolution. In every corner of every continent men charged with hope contend with ancient ways in the pursuit of justice. They reach for the newest of weapons to realize the oldest of dreams, that each may walk in

.right-to-education.org/page/international-law (last visited Mar. 23, 2017). International law protecting the right to education is contained primarily in the Universal Declaration of Human Rights and in two conventions: the Covenant on Economic, Social, and Cultural Rights, and the Convention on the Rights of the Child. *Id.* See also Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. The US is party to neither of those conventions, nor has it ratified other conventions related to the right to education such as the UNESCO Convention against Discrimination in Education and the Convention on the Elimination of All Forms of Discrimination against Women. THE RIGHT TO EDUCATION PROJECT, *supra* note 22.

36. Frederick Douglas, *The Blessings of Liberty and Education*, in THE ESSENTIAL DOUGLASS: SELECTED WRITINGS AND SPEECHES 355 (Nicholas Buccola, ed., 2016).

37. Jackie Mansky, *The Origins of the Term “Affirmative Action,”* SMITHSONIAN .COM (June 22, 2016), www.smithsonianmag.com/history/learn-origins-term-affirmative-action-180959531.

38. Lyndon B. Johnson, *Commencement Address at Howard University: To Fulfill These Rights, June 4, 1965*, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1965, VOL. 1 635–40 (1965).

freedom and pride, stretching his talents, enjoying the fruits of the earth.”³⁹ He continues:

Nothing is more freighted with meaning for our own destiny than the revolution of the Negro American. . . . In far too many ways American Negroes have been another nation: deprived of freedom, crippled by hatred, the doors of opportunity closed to hope. . . . But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair. . . . This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result. . . . To this end equal opportunity is essential, but not enough, not enough.

Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in—by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.⁴⁰

With that commencement address, President Johnson provided critical political support for the idea of race-based affirmative action.⁴¹ But it was not until *Regents of the University of California v. Bakke* case in 1978 that the Supreme Court ruled on the constitutionality of affirmative action in public education.⁴² Proponents were hoping for a decision that recognized the value of affirmative action not simply as vehicle for achieving diversity, but also as a measure that would recognize existing inequality and address it with substantive measures rather than through the lens of formal equality. Since then, the Supreme Court has reluctantly upheld affirmative action in various forms, but only to the extent that such programs promote diversity, relegating to the margins

39. *Id.*

40. *Id.*

41. Still, Attitudes about affirmative action vary depending on political party, race, and age. Polls tell a conflicting story. A 2014 pew research poll showed that a majority of Americans approved of race-based affirmative action in college admissions. Bruce Drake, *Public strongly backs affirmative action programs on campus*, PEW RESEARCH CENTER (Apr. 22, 2014), www.pewresearch.org/fact-tank/2014/04/22/public-strongly-backs-affirmative-action-programs-on-campus. However, a poll taken immediately after the more recent Supreme Court decision on affirmative action found that most American adults disapproved of the Court’s decision. Scott Jaschik, *Poll: Public Opposes Affirmative Action*, INSIDE HIGHER ED (July 8, 2016), www.insidehighered.com/news/2016/07/08/poll-finds-public-opposition-considering-race-and-ethnicity-college-admissions. Both polls found differences based on age, race, gender, etc.

42. *Regents of the University of California v. Bakke*, 438 US 265 (1978).

other arguments in favor of it, notably its capacity to redress inequality. At this point, affirmative action in public schools is hanging by a thread despite the recent 4-3 Supreme Court decision upholding affirmative action. In *Fisher v. University of Texas*, the Supreme Court held that “[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”⁴³ But writing for the majority, Justice Kennedy left open the possibility of future changes, stating that “it is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admission policies.”⁴⁴ But as Peter Halewood has noted:

By some measures, diversity is increasing on many campuses. But the discourse of diversity is an impoverished one that often focuses on how white students benefit from exposure to the diverse perspectives offered by students of color. Deeper questions of remedying past racial injustices, of reparations or substantive equality, are left untouched in this soft quest for a corporatized ‘cultural competence.’⁴⁵

Higher education remains in many respects still racially segregated, and instead of using harsh but honest language to describe that problem and couching the solution in terms of redressing segregation and substantive inequality, our courts have opted instead for the softer and inclusive language of diversity, perhaps to persuade whites who may be reluctant to see inequality here. Whatever one’s views are about race-based affirmative action, it is clear for now that, at least according to the Supreme Court, diversity on campus serves a compelling governmental interest. And it is also clear that admissions processes that take account of the race of applicants do contribute to diversity of college campuses. But with diversity comes responsibility. Campuses must ensure that all students receive equal educational opportunities, free from harassment and threats.

There is reason to believe, however, that black students and other students of color are not benefiting to the same extent as white students on campus. For example, a 2014 study found that “when considering requests from prospective students seeking mentoring in the future, faculty were significantly more responsive to Caucasian males than to all other categories of students, collectively, particularly in higher-paying disciplines and private institutions.”⁴⁶ Other studies report that black students in

43. *Fisher v. Uni. of Tex. at Austin*, 136 S. Ct. 2198, 2214 (2016).

44. *Id.* at 2215.

45. Peter Halewood, *Campus Activism and Competing Racial Narratives*, AM. ASS’N UNIV. PROFESSORS, www.aaup.org/article/campus-activism-and-competing-racial-narratives#.WK5V9m8rK01.

46. Katherine L. Milkman, Modupe Akinola, and Dolly Chugh, *What Happens Before? A Field Experiment Exploring How Pay and Representation Differently Shape Bias on the Pathway into Organizations*, J. APPLIED PSYCHOL. (forthcoming), <https://>

predominantly white colleges feel psychological pressure that white students are unlikely to feel about having to represent their race by succeeding in everything.⁴⁷ This same pressure applies to black students who feel judged by others who believe that their admission to college was not based on merit. This sort of judgment may lead to feelings of inferiority that affects school performance.⁴⁸ In addition, one study found that Blacks are less likely to seek mental health services because white mental health providers are seen to be unresponsive or ill-equipped to deal with anxieties related to race or ethnicity.⁴⁹ Graduation rates of Blacks and Hispanics are lower than Whites, and after graduation, salaries are lower for Blacks and Hispanics than those of Whites.⁵⁰ And though colleges and universities often highlight their efforts at diversifying the faculty “the actual number of underrepresented minorities in tenured and tenure-track positions remains small.”⁵¹ This is important since there is some indication that African American students at predominantly white institutions have less contact with faculty outside the classroom, are less academically integrated on campus than white students, and are more likely to seek academic help from family, friends and academic advisors who were minorities than from white faculty.⁵²

Given these figures, student protesters indeed have something to protest about. It is important to understand, then, whether or how the law can be used to support student demands. Legal approaches to some of the political issues targeted by campus action is often ineffective. In fact, nonlegal approaches (community organizing, political pressure, media coverage), sometimes in conjunction with legal action, must be employed. Campus activism and political pressure has some advantages over legal strategies

papers.ssrn.com/sol3/papers2.cfm?abstract_id=2063742.

47. THE RIGHT TO EDUCATION PROJECT, *supra* note 35.

48. AM. PSYCHOL. ASS'N, *Stereotype Threat Widens Achievement Gap*, www.apa.org/research/action/stereotype.aspx (last visited Mar. 23, 2017). These negative stereotypes “raise inhibiting doubts and high-pressure anxieties in a test-taker's mind, resulting in the phenomenon of ‘stereotype threat.’” *Id.*

49. Sarah Brown, *Many Black Students Don't Seek Help for Mental-Health Concerns, Survey Finds*, THE CHRONICLE OF HIGHER EDUCATION (Jan. 13, 2016), www.chronicle.com/article/Many-Black-Students-Don-t/234892?cid=rc_right.

50. See Eileen Patten, *Racial, gender wage gaps persist in U.S. despite some progress*, PEW RESEARCH CENTER (July 1, 2016), www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress (“[c]ollege-educated black and Hispanic men earn roughly 80% the hourly wages of white college educated men” and “black and Hispanic women with a college degree earn only about 70% the hourly wages of similarly educated white men.”).

51. Martin Finkelstein, Valerie Martin Conley, Jack H. Schuster, *Taking the Measure of Faculty Diversity*, TIAA INSTITUTE (Apr. 2016), www.tiaainstitute.org/publication/taking-measure-faculty-diversity.

52. Douglas Guiffrida, *Othermothering as a Framework for Understanding African American Students Definitions of Student-Centered Faculty*, 76 J. HIGHER EDUC. 701 (2005).

that are often confined within rigid legal parameters, all or nothing, and resistant to change. Examples from the last year prove the point. For instance, campus protests resulted in the resignation of a university president who was widely seen as ineffective, promises by colleges and universities to increase funding for faculty and curricular diversity, increased funding for cultural houses and mental health staff, and the decision to rename a residential college on Yale's campus—outcomes that certainly could not have been achieved by legal action alone.⁵³

B. Does Title VI Address Student Concerns?

All institutions of higher education that receive federal financial assistance, are subject to the proscription of Title VI of the Civil Rights Act which covers elementary schools, secondary schools, and colleges and universities, both public and private. It applies to all aspects of an institution's activities and programs including prohibiting the "denial of access to college- and career-preparatory courses and programs and other educational opportunities, discriminatory discipline, harassment, and barriers to education for English learners."⁵⁴ It states "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."⁵⁵

Though Title VI is not a panacea, it does provide at least rhetorical support for students who argue that campus life is full of daily indignities, hurtful comments, microaggressions, all of which detracts from their educational opportunities because of their race, color or national origin. Of course, racial harassment can also escalate into racial violence. But the Supreme Court has set a high bar for plaintiffs, who must show that the harassment was "so severe, pervasive, and objectively offensive that it effectively bars

53. See Elahe Izadi, *The Incidents that Led to the University of Missouri President's Resignation*, WASH. POST (Nov. 9, 2015), www.washingtonpost.com/news/grade-point/wp/2015/11/09/the-incidents-that-led-to-the-university-of-missouri-presidents-resignation/?utm_term=.b61a7e7e6182; Isaac Stanley-Becker, *Yale's President Responds to Protesters' Demands, Announces New Initiatives to Ease Racial Tension*, WASH. POST (Nov. 18, 2015), www.washingtonpost.com/news/grade-point/wp/2015/11/18/yales-president-responds-to-protesters-demands-announces-new-initiatives-to-ease-racial-tension/?utm_term=.7b0f29d90312; Monica Wang & Susan Svrluga, *Yale Renames Calhoun College Because of Historical Ties to White Supremacy and Slavery*, WASH. POST (Feb. 12, 2017), www.washingtonpost.com/news/grade-point/wp/2017/02/11/yale-renames-calhoun-college-because-of-historic-ties-to-white-supremacy-and-slavery/?utm_term=.99247f55b4a5.

54. U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, TITLE VI ENFORCEMENT HIGHLIGHTS (2012), www.2.ed.gov/documents/press-releases/title-vi-enforcement.pdf.

55. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000D et. seq. (2012).

the victim's access to an educational opportunity or benefit."⁵⁶ In addition, plaintiffs must show that officials acting on behalf of institutional recipients of federal funds acted with *deliberate indifference* to known acts of harassment in programs or activities. Ironically, this standard provides less protection to student victims of harassment than it does to employees, who must only show that the employers knew or should have known of the harassment and failed to take prompt remedial action.⁵⁷ Moreover, Title VI, unlike Title VII that covers employment, does not recognize disparate impact theory or punitive damages.

C. The Failure of Antidiscrimination Doctrine

Structurally, Title VI is not as protective for plaintiffs as is Title VII and yet it suffers from some of the same weaknesses as other antidiscrimination laws in the United States. The approach taken by the United States Supreme Court to equality reflects the Aristotelian proposition that "[e]quality consists in the same treatment of similar persons."⁵⁸ However, as Donna Young has stated elsewhere:

[I]nequality manifests itself differently from the way it is contemplated in the legal framework. The approach that developed in [the US Supreme Court's] landmark cases required that an actionable claim identify a victim who has suffered an identifiable form of discrimination by an identifiable actor. But inequality does not always fit within this framework. Systemic discrimination and social inequality are broader problems that call for a form of redress that is unavailable in the US civil rights structure. The equal protection of the law does not encompass economic, social and cultural rights that are embodied in international treaties and national constitutions found in Canada, South Africa, Germany and India, for example. Nonetheless, US Supreme Court precedent will only recognize that a wrong has been committed if all of the parts of its narrow framework are in place. In some of the most significant civil rights cases in the last quarter of the twentieth century and into 2010s a series of decisions by the Supreme Court does little to disrupt the formal approach to equality of an earlier generation of cases. Thus, the formula requiring a wrong, a wrongdoer and a victim of the wrong, has been maintained.⁵⁹

The problem in relying on Title VI then is that it is unlikely to address what the students are asking for. Only in the type of specific

56. *Davis Next Friend LaShonda v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

57. D. Frank Vinik, *Title VI*, LAW AND HIGHER EDUC., http://lawhigheredu.com/128-title-vi.html#Student_Harassment_and_Discrimination_Suits.

58. ARISTOTLE, 1 THE POLITICS OF ARISTOTLE 232 (B. Jowett ed., 1885).

59. Donna Young, *Domains of Policy: Law & Society Perspectives on Anti-Discrimination*, in THE WILEY HANDBOOK OF LAW AND SOCIETY 218-219 (Austin Sarat and Patty Ewick, eds. 2015).

and relatively narrow case in which there is some discriminatory harm done by an identifiable wrongdoer does the student's demand for redress achieve legal significance. But most student demands center around systemic problems on college campuses that do not fit within the civil rights paradigm. That is why student protest may be the most effective means for changing what amounts to structural barriers to equal educational opportunities. Of course, student activism may invoke legal rights as a strategic organizing measure but that need not and probably should not mean that legal rights and legal language become the primary drivers of that activism.

The principles of the "Black Liberation Collective" sets out, among other things, the list of demands from over 50 student groups from around the country.⁶⁰ Their statement of principles address anti-blackness, anti-sexism, queer liberation, trans liberation, anti-capitalism, the state, anti-ableism, internationalism, violence and solidarity.⁶¹ It reflects an impressive and thoughtful agenda. It is clear from much of the statement of principles that what these students are calling for is radical social change—not something that the law has been particularly adept at accomplishing. For example, the following passage about anti-blackness demonstrates a deep understanding of the problem:

Anti-Black racism is woven in the fabric of our global society. It is an interlocking paradigm of institutions, attitudes, practices and behaviors that work to dehumanize and oppress black people in order to benefit non-black people, and specifically, to benefit and maintain white supremacy. When social systems are racialized by white supremacy, whiteness becomes the default of humanity and blackness is stripped of its humanity, becoming a commodity, becoming disposable.

Anti-blackness then is the depreciation of black humanity, denial of black pain, and the obstruction of black agency, in a perpetual process of dehumanization. Anti-black racism isn't merely ideology or overt prejudice and discrimination, but consists of mechanisms and practices that reproduce white advantage and black disadvantages. Black children are three times more likely to be suspended than white children. Black college graduates are twice as likely as whites to struggle to find employment. Among black transgender people, nearly half have been incarcerated at some point. Anti-black racist patterns push black people to the bottom and attempt to keep them there.

We oppose anti-black racism in all forms.

We seek to build institutions that not only recognize black humanity, but maximize the individual and collective liberties of black people.⁶²

60. BLACK LIBERATION COLLECTIVE, www.blackliberationcollective.org (last visited Mar. 24, 2017).

61. BLACK LIBERATION COLLECTIVE, *Our Beliefs*, *supra* note 19.

62. *Id.*

This statement, and others, reflect an agenda profoundly outside the antidiscrimination paradigm found in our civil rights laws, which appear tepid and structurally incapable of addressing such deep systemic inequities. Instead of criticizing these student activists, we should be encouraging them. They have identified weaknesses in the language of reform, and of the legal framework that facilitates reform, and are calling for something deeper, for radical transformation of our modes of thought and action concerning inequality and subordination, in a language much richer than that provided by civil rights law. They are going well beyond identifying unfairness and calling for it to be rectified by an application of civil rights principles—they are identifying the corrosive ideology of white supremacy which scaffolds the system of racial oppression and calling for its abolition. Civil rights law is merely a floor, not a ceiling, in the attempting to achieve social justice. Campus activism is often an attempt to raise the ceiling—or raise the roof—altogether.

D. *The Battle over the First Amendment*

Campus protests have sprung up in response to controversial figures invited to campus as guest speakers, often offensive, hardline conservatives such as former Breitbart commentator Milo Yiannopoulos.⁶³ Sometimes the protests have resulted in the invitations being rescinded. The response, from liberals and conservatives alike, is to condemn the activists as insufficiently respectful of freedom of expression.⁶⁴ Obviously, that is a real concern, especially for public universities bound by the First Amendment. But that critique, for starters, does not respect the equally compelling free speech rights of those protesting. And in any event, the view that all offensive speech, no matter how vulnerable its targets are, is entitled to an audience at the very least lacks compassion and at worst is disingenuous. As Jelani Cobb puts it:

[A]nd this is where the arguments about the freedom of speech become most tone deaf. The freedom to offend the powerful is not equivalent to the freedom to bully the relatively disempowered. The enlightenment principles that undergird free speech also prescribed

63. See Doubek, *supra* note 5; see Tessa Berenson, *11 Arrested While Protesting Conservative Comedian Speaking at New York University*, TIME (Feb. 3, 2017), <http://time.com/4659339/new-york-university-protests-arrests-gavin-mcinnis>; Emma G. Fitzsimmons, *Condoleezza Rice Backs Out of Rutgers Speech After Student Protests*, N.Y. TIMES (May 3, 2014), www.nytimes.com/2014/05/04/nyregion/rice-backs-out-of-rutgers-speech-after-student-protests.html.

64. See Kate Abbey-Lambertz, *Right-Wing Troll Milo Yiannopoulos Inspires Free Speech Bill*, HUFFINGTON POST (Feb. 9, 2017), www.huffingtonpost.com/entry/milo-yiannopoulos-free-speech-bill-tennessee_us_589ce406e4b0ab2d2b138e3a; Matt Teitelbaum, *I'm a Liberal, and I Want Milo Yiannopoulos on My Campus*, HUFFINGTON POST (Feb. 13, 2017), www.huffingtonpost.com/entry/im-a-liberal-and-i-want-milo-yiannopoulos-on-my-campus_us_5898a3dbe4b061551b3e011c.

that the natural limits of one's liberty lie at the precise point at which it begins to impose upon the liberty of another.⁶⁵

But apart from that tricky set of issues, much of which is beyond the scope of this paper, campus activists protesting offensive speech are often accused by critics and the media of being overly sensitive, "coddled," or "snowflakes" concerned more by their hurt feelings than with trying to make an honest attempt to grapple with strongly held opposing views.⁶⁶ These critics sometimes charge activists with being more concerned by their own feelings and comfort than with robust exchange of ideas.⁶⁷ Liberals sometimes view such protests as betrayals of an earlier phase of student activism, in the 1960s and early '70s, which centered freedom of speech in its agenda;⁶⁸ conservatives often object to these protests as just more "political correctness" and thin skinned liberal self-pity.⁶⁹ The PEN America Principles on Campus Free Speech address this objection:

At times protests and forms of expression are treated as if they are incursions on free speech when in fact they are manifestations of free speech. Some entreaties for or against the use of particular language (even if the terms sound neologistic, overly politically correct, or otherwise distasteful to some ears) should be recognized as adaptations to students whose ethnic and racial backgrounds, upbringing, and priorities may bear scant resemblance to the populations that dominated the university campus during the second half of the 20th century. While liberal values and principles remain fundamental, the implications of these precepts necessarily evolve from generation to generation, reflecting social changes and new norms. No cohort has the power to freeze the interpretation of values such as liberalism, academic freedom, or even free expression, and new ways of thinking deserve to be understood and considered, rather than dismissed.⁷⁰

65. Jelani Cobb, *Race and the Free-Speech Diversion*, THE NEW YORKER (Nov. 10, 2015), www.newyorker.com/news/news-desk/race-and-the-free-speech-diversion.

66. See Conor Friedersdorf, *Middlebury Reckons with a Protest Gone Wrong*, THE ATLANTIC (Mar. 6, 2017), www.theatlantic.com/politics/archive/2017/03/middleburys-liberals-respond-to-an-protest-gone-wrong/518652; Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC (Sept. 2015), www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356.

67. See Lukianoff, *supra* note 66.

68. Editorial, *The Death of Free Speech*, OBSERVER (Feb. 7, 2017), <http://observer.com/2017/02/the-death-of-free-speech>.

69. See Peter Beinart, *Milo Yiannopoulos Tested Progressives—And They Failed*, THE ATLANTIC (Feb. 3, 2017), www.theatlantic.com/politics/archive/2017/02/every-one-has-a-right-to-free-speech-even-milo/515565; Jonah Goldberg, *The Delicate Little Flowers on Today's College Campuses*, L.A. TIMES (Nov. 10, 2015), www.latimes.com/opinion/op-ed/la-oe-1110-goldberg-yale-campuses-political-correctness-20151110-column.html.

70. PEN AMERICA, PEN AMERICA PRINCIPLES ON CAMPUS FREE SPEECH 1 (2016), <https://pen.org/sites/default/files/PEN%20America%20Principles%20on%20Campus%20Free%20Speech.pdf>.

But perhaps the more substantial threat to academic freedom and free speech is from legislators, not activists: those legislators who are openly hostile to (and sometimes attempt to ban) aspects of curriculum that explores facets of inequality, injustice, racism or sexism which they deride as “political correctness.”⁷¹ Their focus is not always on how to address structural inequalities in education, but rather on limiting the ability of faculty members and students to address them. For example, proposed legislation in Arizona would have banned the teaching of ethnic studies not only in public high schools but in public colleges and universities too.⁷² This represents a very blatant attempt to restrict academic freedom and freedom of inquiry and curtail educational opportunities for students. Ironically, those who teach about and fight against intolerance are the ones who are often accused of being intolerant and find their speech suppressed by legislative regulation.⁷³ And, perhaps most troubling, some state legislatures see no threat to campus freedom of expression when they require public universities to allow guns on campus.⁷⁴

IV. ACTIVISM, NEOLIBERALISM, AND THE PUBLIC GOOD

It is important to see that colleges and universities today have become a component of neoliberalism—an ideological system which equates free markets with freedom and democracy, inside which universities have become closely identified with market discourse, faculty employment precarity, and highly individuated understandings of social phenomena such as racism. Thus, campus racism, or racism in society more broadly, is cast in this model as aberrational, the product of evil or backward minds, and thus no institutional responsibility exists for addressing it. Systemic racism, encoded in the very structure of the modern corporate university and in employment relations, housing, and the criminal justice system across society, is rendered invisible as both racism and the experience of its harms are individuated, disaggregated, and ultimately dissipated and dismissed as a series of personal and

71. Donald P. Moynihan, *Who's Really Placing Limits on Free Speech?*, N.Y. TIMES (Jan. 9, 2017), www.nytimes.com/2017/01/09/opinion/whos-really-placing-limits-on-free-speech.html.

72. Howard Fischer, *Lawmaker seeks to expand limits on ethnic-studies at Arizona schools*, TUCSON.COM (Jan. 12, 2017), http://tucson.com/news/local/education/lawmaker-seeks-to-expand-limits-on-ethnic-studies-at-arizona/article_35c1e97e-31a1-537b-9c7d-d8adc0527703.html.

73. Jelani Cobb, *The Mistake the Berkeley Protesters Made About Milo Yiannopoulos*, THE NEW YORKER (Feb. 15, 2017), www.newyorker.com/news/daily-comment/the-mistake-the-berkeley-protesters-made-about-milo-yiannopoulos.

74. Alex Samuels, *Lawmaker seeks to pass “constitutional carry” gun bill in 2017*, THE TEXAS TRIBUNE (Jan. 3, 2017), www.texastribune.org/2017/01/03/lawmaker-hopes-passing-constitutional-carry-bill-2.

individual perceptions of slights rather than being understood as actual subordination. As Angela Davis puts it:

When obvious examples of racism appear to the public, they are considered to be isolated aberrations, to be addressed as anachronistic attributes of individual behavior The inability to recognize the contemporary persistence of racisms within institutions and other social structures results in the attribution of responsibility for the effects of racisms to the individuals who are its casualties, thus further exacerbating the problem of failing to identify the economic, social, and ideological work of racism.⁷⁵

Campus protest has the potential to meaningfully push back against neoliberalism and corporatization of the university. Students have realized that corporatization and the contingent employment status of most of their professors serves the interests of power and privilege but not the public.⁷⁶ The “free college” campaign begun by Bernie Sanders and picked up recently by Governor Cuomo of New York is but one example of the dynamism and public interest in higher education reform which emerged during the last Presidential election.⁷⁷ For the moment at least, very early on in the Trump administration, university administrations, faculty, and students seem to be acting in concert to address at least some concerns—e.g., opposing President Trump’s executive order barring immigration and refugees from seven majority-Muslim nations,⁷⁸ or collaborating to change the name of Calhoun College at Yale.⁷⁹ Leon Botstein, President of Bard College, recently called in *The New York Times* for university presidents to speak out

75. Angela Davis, *Recognizing Racism in the Era of Neoliberalism*, TRUTHOUT (May 6, 2013), www.truth-out.org/news/item/16188-recognizing-racism-in-the-era-of-neoliberalism (excerpt from ANGELA DAVIS, *THE MEANING OF FREEDOM* (2012)).

76. Richard Moser, *Overuse and Abuse of Adjunct Faculty Members Threaten Core Academic Values*, THE CHRONICAL OF HIGHER EDUC. (Jan. 13, 2014), www.chronicle.com/article/OveruseAbuse-of-Adjuncts/143951; Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 CORNELL J. OF L. AND PUB. POL’Y, no. 2, Spring 2007; Rudy Fichtenbaum, *Who’s Teaching University Classes—And Why It Matters*, THE BROOKLYN QUARTERLY, (Apr. 9, 2017), <http://brooklynquarterly.org/whos-teaching-university-classes-and-why-it-matters>.

77. See Maureen Sullivan, *Governor Andrew Cuomo Enlists Bernie Sanders to Announce ‘Free’ College for More New Yorkers*, FORBES (Jan. 4, 2017), www.forbes.com/sites/maureensullivan/2017/01/04/gov-andrew-cuomo-enlists-bernie-sanders-to-announce-free-college-for-more-new-yorkers/#23579edd45b9.

78. See Lauren Camera, *Universities Push Back Against Trump on Immigration*, U.S. NEWS (Jan. 30, 2017), www.usnews.com/news/education-news/articles/2017-01-30/colleges-universities-academics-push-back-against-trump-immigration-orders.

79. Noah Remnick, *Yale Will Drop John Calhoun’s Name from Building*, THE NY TIMES (Feb. 11, 2017), www.nytimes.com/2017/02/11/us/yale-protests-john-calhoun-grace-murray-hopper.html?_r=0. Jelani Cobb put it, “[t]o understand the real complexities of these students’ situation, free-speech purists would have to grapple with what it means to live in a building named for a man who dedicated himself to the principle of white supremacy and to the ownership of your ancestors.” Cobb, *supra* note 65.

forcefully against the Trump administration agenda of undermining science and objectivity, curtailing the immigration that has made US higher education the envy of the world, and generally excoriating education and expertise.⁸⁰ The deans of both Harvard and Yale Law Schools condemned President Trump's attacks on the judiciary and the rule of law in a recent editorial.⁸¹ In addition to statements from university administrators, faculty teach ins, organizing contingent faculty, faculty union public awareness campaigns, student demonstrations—all have a part in raising campus awareness of the structural impediments neoliberal reorganization of our universities has placed before education and research for the public good. The time is ripe for raising consciousness around these issues both within and without our universities and campus activism is a prime driver of this dynamic.

V. CONCLUSION

It is unlikely that the recent momentum behind the campus protest movement will lessen any time soon—the Trump administration continues to raise the stakes and decades of neoliberal transformation of our universities leaves them increasingly exposed as mere service providers rather than the scientific and moral centers of influence that our times demand. The opportunity created by the new constellation of forces further threatening the relevance of the university is real and urgent. Campus activism has always led public opinion and the law on the tough issues: racism, sexism, inequality, war and neo-imperialism, gay rights, climate change, apartheid, etc. The essential sense of legitimacy and power of civil rights and the Constitution has been nourished by campus activism, and not in generations has it been so tested by well-orchestrated right-wing challenges to the post war liberal consensus. Universities were perhaps not designed to be the primary incubators of the flickering flame of the Constitution but they may turn out to be just that. We are seeing, already early in this new Administration, that long cherished political and constitutional values are ephemeral and vulnerable and need vigilant reinforcement by the active engagement of mobilized citizens, constantly interpreting and reinterpreting law and rights to give them daily force in our democracy. Rights on paper are nothing without life breathed into them by the passion and commitment of a citizen resistance. This cannot and will not originate from the vast middle of American society—at least not at

80. Leon Botstein, *American Universities Must Take a Stand*, N.Y. TIMES (Feb. 8, 2017), www.nytimes.com/2017/02/08/opinion/american-universities-must-take-a-stand.html.

81. Martha Minow and Robert Post, *Standing up for 'so-called' law*, THE BOSTON GLOBE (Feb. 10, 2017), www.bostonglobe.com/opinion/2017/02/10/standing-for-called-law/VLbDYmrwpdjCn8qs5FPJaK/story.html.

this point in history—where docility and fear, bred of deliberate policy choices to individuate us and make the middle class permanently economically vulnerable and politically malleable, are the order of the day. It has and will originate with campus and community activists steeped in and committed to non-hegemonic thinking—the critical thinking that colleges and universities are intended to promote and instill. The very process of resistance and protest gives content to the rights, laws, and constitutional values that will be our tools in developing a strategy to defeat authoritarianism.

