RACE AND HIGHER EDUCATION COMMENTARY SERIES

THE TWO MODES OF INCLUSION

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In early 1936, the NAACP's chief lawyer, Charles H. Houston, paused in his busy schedule of activities to take stock of the association's campaign for the inclusion of African Americans in institutions of higher education. The previous year, Houston, along with his former student, Thurgood Marshall, had convinced a Baltimore judge to invalidate the ban on black students at the University of Maryland Law School.[1] Donald Murray, the plaintiff in that case, was now studying law there amid some racial tension, but he was reportedly treated well. An additional lawsuit, also filed by Houston, to get a black man named Lloyd Gaines admitted to the University of Missouri Law School, was wending its way through the courts.[2] Alongside the university suits, another campaign had emerged against segregated school systems in Virginia and Maryland. Both streams of litigation would eventually result in the victory in *Brown v. Board of Education* nearly two decades later.[3] It was exhausting work, and it would contribute to Houston's premature death four years before that milestone decision. Houston was worried about the future, so he set out his thoughts on exactly what he hoped to accomplish in an article entitled, appropriately enough, *Don't Shout Too Soon*.[4] It had a simple message: removing the barriers to Murray's enrollment in law school was cause for hope, but not celebration. It was only the first step in a longer, broader, and ultimately frustrating struggle to define what full inclusion really meant. In fact, as I will argue below, we are still grappling with the questions that bedeviled Houston eight decades ago.

Houston had two messages for the mostly black readers of *The Crisis*, the NAACP's journal, and he constantly mixed them up. One was that integration was a simple matter of letting people like Murray and Gaines into institutions that excluded them and of treating them

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[1] *See* Pearson v. Murray, 182 A. 590, 590 (Md. 1936) (affirming the Baltimore City Court's 1935 grant of mandamus ordering the University of Maryland to admit Donald Murray).

[2] *See* State *ex rel.* Gaines v. Canada, 113 S.W.2d 783 (Mo. 1937), *rev'd*, 305 U.S. 337 (1938).

[3] *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 49–81 (1987).

[4] Charles H. Houston, *Don't Shout Too Soon*, 43 THE CRISIS 79 (1936).

well once they arrived. "Perhaps when the students realize that Lloyd Gaines' presence will not interfere with their ordinary routine . . . the spirit of fair play will prevail, and they will willingly consent to Lloyd Gaines having his chance," he mused.[5] But, to "interfere with their ordinary routine" was precisely what Houston had in mind. "The University of Maryland case is a wedge," he freely admitted, and Houston went on to list other efforts that were inextricably tied to the effort to get students like Murray and Gaines into school: campaigns to eradicate lynching, to enfranchise African Americans across the South and thus to defeat "reactionaries" at the polls, to end "[d]iscrimination in employment and in organized labor" in all parts of the country, and to "break down the color bar in federal, state and municipal employment" nationwide.[6] This was a tall order, envisioning the transformation of many of the core institutions of American life — North and South — and Houston had not even gotten around to the subject of housing discrimination. Could this really be just a matter of admitting a few students like the solidly middle-class Murray and Gaines, and convincing alarmed Southern whites that their institutions would not fall? Houston knew better. Including them was merely a first step, and no one knew where it would lead. There was ample reason for whites, including Murray's classmates at Maryland, to be worried.

The thesis I would like to advance in this essay is that, as the civil rights movement emerged and began to make its claims for inclusion of African Americans in institutions of higher education, two modes of inclusion quickly emerged — two ideas of what it might mean to "include" previously excluded groups within educational institutions. The first mode of inclusion is captured neatly by the message that Houston tried to send to whites who were anxious about integration: that inclusion meant simple participation in, rather than alteration of, mainstream institutions of life. While inclusion might require the removal of certain formal barriers to participation and good treatment of the included persons, Houston seemed to be saying that inclusion would not threaten the larger community's basic social organization. Yet, lurking in the background was a second, far more disruptive idea: that inclusion required the transformation of some of the fundamental rules that governed educational institutions themselves and of the larger society that surrounded them. Civil rights claims often styled themselves in the language of the first mode, but when they were done being articulated and defined by those who pushed for inclusion, they often, subtly but inexorably, slid into the second.

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[5] *Id.* at 91.
[6] *Id.*

Indeed, I will suggest that this has been a recurring problem with claims for inclusion of outsider groups in mainstream institutions. It was present when black parents sought school integration, when radical 1960s-era students sought social change, when public interest lawyers sought inclusion of the disabled and English-language learners in education, and more recently in the push for "intellectual diversity" within educational institutions. In all these cases, proponents of inclusion explicitly embedded themselves in a history that stretched back to *Brown* and to Houston's petition on behalf of Donald Murray. In all these cases, claimants began by asking for participation in, rather than alteration of, mainstream institutions — usually by changing a few formal rules that kept them out. But, in all these cases, they wound up asking for much more than a simple opportunity to participate. They asked for radical changes in the basic rules that governed the operation of educational institutions. I would like to suggest that it is in the nature of claims for inclusion that ground themselves in the mandate of *Brown* to slip easily from what I call mode one to mode two, and that this slippage has also manifested itself in more recent campus protests seeking inclusion.

The slippage from the first to the second mode of inclusion was underway less than a decade after Houston set out his thoughts on Murray's case, and it was on display not in the South, where schools were segregated by law, but in Northern communities where state law often prohibited it. One of those communities was Hillburn, New York, a town less than thirty miles from New York City. There public officials deliberately segregated black children at the dilapidated Brook School, which in 1943 had only recently been outfitted with indoor toilets.[7] Blacks and whites in Hillburn lived in two separate communities, separated by Route 17. That was no accident. A myriad of federal and state laws and policies had long encouraged, and even mandated, the construction of separate black and white neighborhoods in all parts of the country. Indeed, the Federal Housing Administration both required and subsidized the creation of whites-only neighborhoods when underwriting suburban development, as it would continue to do for decades.[8] In Hillburn, the local economy was dominated by one factory, which employed most of the town's black

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

[8] *See* Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy Between* Shelley *and* Brown, *in* FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 206, 206–25 (John F. Bauman et al. eds., 2000). For an analysis of how these legal and policy developments affected one important community, see generally RICHARD ROTHSTEIN, ECON. POLICY INST., THE MAKING OF FERGUSON (2014), http://www.epi.org/files/2014/making-of-ferguson-final.pdf [http://perma.cc/M8TF-R3VA].

residents, and whose owner, J. Edgar Davidson, also served as the head of the school board. In 1943, black parents boycotted the school, asking school officials to send their children to the recently constructed Main School.[9]

But what exactly were the black parents demanding? On its face, the black parents' claim appeared to be merely for mode one inclusion — for access to mainstream educational institutions rather than for a more fundamental alteration of the social order. However, white reaction to the boycott betrayed how what seemed like a simple call to alter the rules that kept black children out of the Main School was actually a claim for the alteration of the basic rules that organized Hillburn as a community. Davidson's wife, for example, reacted to their claim with confusion and defensiveness: "I've been nice to these people . . . . I've fed them when they're sick and given them money when they needed it."[10] She had good reason to be alarmed because, despite the seeming modesty of the demands, what the black parents really wanted would upset the entire way Hillburn had been organized — as a paternalistic racial hierarchy. That is exactly what the parents proceeded to do. They started a "Freedom School," which although it was still segregated, at least was not under control of town authorities. They marched to the Main School and had themselves photographed next to a World War II poster with the title "Democracy at Home" — thus invoking the struggle against Nazism. They enlisted allies as far away as Tennessee's Highlander Folk School (where both Martin Luther King, Jr., and Rosa Parks would train), and in Harlem where the NAACP held a mass rally to drum up support. Harlem Renaissance poet Countee Cullen composed a poem in their honor. White Hillburn residents were bewildered by the protests. When the state commissioner of education finally ordered local schools to integrate, all but one of the white children were withdrawn from the Main School and enrolled in two Catholic schools. One white resident called for the formation of a "National Association for the Advancement of White People."[11] Whites experienced the call for simple inclusion as an assault on the basic social organization of the town, and in fact it was.

This slippage from mode one to mode two occurred not only in semi-feudal communities like Hillburn, but also wherever blacks asked for inclusion in white primary and secondary educational institutions, both South and North. The first federal school–desegregation decree in the North, involving New Rochelle, New York, sketched the problem neatly. In New Rochelle, local school authorities created a segre-

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[9] *See* SUGRUE, *supra* note 7, at 165–69.
[10] *Id.* at 167 (alteration in original).
[11] *See id.* at 164–68.

gated school by allowing white parents to transfer their children out of the Lincoln School, which was located in the community's black neighborhood. When the policy ended in 1949, white parents reacted by sending their children to private schools, or by moving out of the Lincoln district.[12] A 1956 proposal to upgrade Lincoln's facilities prompted protests from black parents, and eventually a lawsuit in 1960. Again, the impossible-to-answer question of what black parents were demanding arose, because to undo school segregation at Lincoln would require the black parents to undo just about everything about how the town had been organized. That is exactly what the black parents demanded in their lawsuit. They claimed that the continued existence of *any* school that was nearly all black was unconstitutional under the Supreme Court's holding in *Brown*.[13] That, of course, would mean that any action the city took that resulted in an all-black school would be unconstitutional. They were asking for the city to change the basic rules about school assignments, neighborhood boundaries, housing construction, and the like to ensure integration.

Judge Irving Kaufman was able to avoid all the difficult questions that the case presented by ruling in favor of the plaintiffs on the narrower grounds that local authorities had acted intentionally in creating Lincoln as a segregated school, but the difficult questions still remained.[14] To ask for inclusion was essentially to challenge a host of local, state, and federal policies and social practices that had created whites-only neighborhoods and schools. It was to challenge the expectations of New Rochelle's whites — in part created by decades of legal and policy decisions — that they would continue to live in whites-only neighborhoods, and that to live otherwise was to experience a decline in the quality of their neighborhoods and schools. It was also to challenge the story these citizens told about themselves — that their city presented no barriers to the participation of black citizens in the full life of the community. Almost any remedy the plaintiffs might have sought, including making Lincoln truly "equal" to the white schools, would have required a massive reorientation of the way that the city was organized, a change in the fundamental rules that governed how the community had been built and operated. The need for, and appropriateness of, that precise reorientation is what Americans have been debating during the succeeding six decades of argument and action about racial inequality in schooling.

The slippage from the first to the second mode of inclusion can be seen in many other contexts. Recent scholarship has shown, for in-

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[12] *See id.* at 190–92.
[13] *See id.* at 192–96.
[14] *See id.* at 196–98.

stance, just how expansive the desegregation mandate of *Brown* became, as activists, parents, and students in the United States, and around the world, picked up on this product of the NAACP's efforts and fashioned new agendas for inclusion out of it. Beginning in the 1960s, new claims for inclusion of English-language learners, girls and boys, disabled students, and others were articulated, debated, and litigated. As far away as Northern Ireland and South Africa, reformers sought to carry forward the mandate of *Brown* and to apply it to difficult questions of educational inclusion in the aftermath of conflict, violence, and reconciliation.[15] What is important about these new types of claims is not their proliferation but the nearly impossible-to-define questions of inclusion that they have raised. What exactly would it mean to fully include English-language learners, or girls, or boys, or transgender students? These questions are still hotly debated, with diametrically opposed answers being offered. Many of these claims involve novel kinds of inclusion — such as exactly what it means to "accommodate" the disabled.

The inevitable move from the first to the second mode of inclusion was present, as well, in the university exclusion cases that preceded *Brown*. After Murray's and Gaines's successful cases, the higher education litigation proceeded along a well-chronicled route. At first, Southern states tried to pay black students to study out of state. Later, they created separate black graduate schools. Finally, some chose to admit black students to whites-only schools but keep them separate. Each segregationist strategy was, in turn, held unconstitutional.[16] The Supreme Court, for instance, invalidated the University of Oklahoma's decision to admit George McLaurin to its graduate school of education but to require him to sit in a separate section of the classroom, library, and cafeteria.[17] Chief Justice Vinson's short opinion stated simply that "[s]uch restrictions impair and inhibit his ability to study, to engage in discussion and exchange views with other students, and, in general, to learn his profession."[18]

However, the reason McLaurin was still less-than-fully included remained slightly opaque, given that Oklahoma's white citizenry were doing far more than preventing him from learning the things from his classmates that he would need to complete his education. They were subordinating him — but exactly how remained difficult to state. Responding to the argument that white students would still isolate him

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[15] *See generally* MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK (2010).

[16] *See* TUSHNET, *supra* note 3, at 82–137.

[17] *See* McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); *see also* TUSHNET, *supra* note 3, at 125–32.

[18] *McLaurin*, 339 U.S. at 641.

even without these official restrictions, Chief Justice Vinson wrote that "there is a vast difference . . . between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar," citing *Shelley v. Kraemer*[19] for that proposition.[20] But even this was a revealing citation. *Shelley*, of course, dealt exactly with the question of whites agreeing privately to exclude black citizens from their neighborhoods, and the Court held that enforcement of such agreements was unconstitutional.[21] The decision, and the decades of fair housing law, policy, and advocacy that succeeded it, led to a morass of questions involving laws, public policies, and an entire social and legal system dedicated to ensuring that most white Americans continued to live in whites-only neighborhoods. George McLaurin was asking to participate fully in the life of the university. But what exactly would that mean? Would making good on that claim require, as it would in the housing context, a fundamental alteration in the way that the institution operated?

Houston himself had wondered as much back in 1936, when he questioned whether white Northerners would truly get behind the project of inclusion, regardless of Donald Murray's admission to the University of Maryland. "At a recent conference at Ohio State University," he noted, "three students wanted to know why Negroes aspired to study law in southern state universities, because they had been informed that Negro lawyers could not practice in the South."[22] White Americans, he concluded, simply did not understand the basic nature of African American claims for inclusion, and a serious effort would be needed to educate them. "We must accept the chance to address white audiences on the race question," he proposed:

> We must see that the proper type of Negro literature, pamphlets, newspapers and other material gets the widest possible distribution among white people. We must cooperate in public forums and make ourselves felt in the white press as regular commentators on public affairs. We must persistently agitate for more truth about the Negro in history, economic and sociology courses in the schools, colleges and universities.[23]

"Lastly," he concluded, "we have a problem to educate many of our own race brethren to proper American practices and ideals."[24] What Houston was proposing was a massive reorientation in the way that racial questions and problems were taught (or not taught) in the col-

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[19] 334 U.S. 1 (1948).
[20] *McLaurin*, 339 U.S. at 641.
[21] *See Shelley*, 334 U.S. at 23.
[22] Houston, *supra* note 4, at 79.
[23] *Id.* at 79, 91.
[24] *Id.* at 91.

leges and universities — in order for whites to understand race questions from the perspective of African Americans — as well as an effort to improve the quality of black schooling.

Houston was facing up to the self-evident problem that it would be extremely difficult, if not impossible, to make this kind of inclusionary claim and limit it to mode one. There was no way of ensuring full participation of Donald Murray in the life of the University of Maryland, or later of George McLaurin in the life of his university community, or even later of New Rochelle's black children in the life and institutions of their community, without altering the ground rules that governed the institutions themselves. On the surface, it may have seemed that full participation was simply a matter of altering a few formal rules to ensure access and good treatment, but the real barriers to participation were something more fundamental about the social organization of the institutions themselves. It might be rhetorically useful to frame inclusion questions as mode one claims, but what was really at stake from the moment those claims were articulated was something much more fundamental. This inevitable slippage from mode one to mode two was exactly what Chief Justice Vinson no doubt realized but tried to mask, and what Houston was willing to admit — at least to the black readership of *The Crisis*. The full acknowledgement of that slippage, however, would be put off in the aftermath of the *McLaurin* victory, as a new generation of Southern segregationist populists, such as Alabama Governor George Wallace, made the question of university integration into the frontline of a war in which white Southerners sensed their entire world slipping away.

Second-mode inclusion claims emerged at a fast clip beginning in 1968, when black students, now attending majority-white universities in substantial numbers, organized more than two hundred protest actions. As in the primary- and secondary-school cases, the fiercest challenges came in places with no formal racial barriers to participation in university life. At San Francisco State University, students called for the abolition of Air Force ROTC, the rehiring of a sympathetic professor whose employment contract had not been renewed, the admission of four hundred "ghetto students" in the fall of 1968, and the hiring of nine minority professors. They eventually demanded, and helped create, a Black Studies program.[25] At Harvard University, students asked for the creation of a chair in Black Studies, the admission of more black students, and the creation of an African-American Research Center. Law students added a demand for black workers at a

[25] *See* MARTHA BIONDI, THE BLACK REVOLUTION ON CAMPUS 1, 43–73 (2012).

law school dormitory construction project.[26] At the City University of New York, black and Puerto Rican students issued a series of radical demands calling for a reorientation of the university to serve the needs of a larger, poorer, and less white population of city students, resulting in the university's creation of its controversial open admissions policy.[27]

For our present purposes, it is not important whether some or all of these demands were well- or ill-founded, but rather that it was nearly impossible to discern exactly what manner of inclusion the students sought in these various protests. Some of the demands seemed to be for the creation of a less exclusionary environment for minority students. Others seemed to address social and political issues far outside the university's official mandate. Future California member of Congress Ron Dellums perhaps summed it up when he argued that the objective of the San Francisco protests was "to change the institution."[28] Many of the protests began by focusing on the barriers to the admission and retention of minority students, but they quickly refocused on more radical questions — who should be admitted, what was "merit," what should be taught, how should the university relate to the society around it, and how should it be governed? These claims were rightly regarded as controversial, for the students were challenging the fundamental rules that governed the operation of the university.

In the years since that contentious moment, inclusion claims in higher education have centered on what is now called "diversity." The advocates of this new idea have grounded their own claims in a historical narrative that goes back to Murray's petition to attend the University of Maryland. Supreme Court Justices have also invoked that history as they have struggled to evaluate the constitutionality of this particular idea of inclusion.[29] Diversity's claims are now inscribed on the bodies of individuals very different from those whom the students at San Francisco State, for instance, imagined as the object of their inclusionary protests.[30] We live in an era in which racial categories themselves seem to be in flux, but at the same time familiar issues such as police violence seem as doggedly entrenched as ever.

Diversity's claims have been picked up by even newer entrants to the debate over inclusion, among them political conservatives. Intel-

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[26] *See* DEP'T OF AFRO-AMERICAN STUDIES, HARVARD UNIV., THIRTIETH ANNIVERSARY CELEBRATION 15–16 (Karen C.C. Dalton ed., 2000).

[27] BIONDI, *supra* note 25, at 114–34.

[28] *Id.* at 49.

[29] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[30] *See* Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES (June 24, 2004), http://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html.

lectual diversity is a prominent novel claim to be made on inclusion's behalf, and here, as one might expect, there has been an inevitable slippage between the first and the second mode. Like past claims for inclusion, this claim is directly connected to the admission of groups that once had only a token presence in many institutions of higher education. With regard to law schools, one professor remembered that "I had my first authentic right-wing student in about 1974, and felt sorry for him in his loneliness and isolation."[31] There were, of course, no formal barriers to political conservatives attending and participating in law school life but, as with Murray at the University of Maryland, this student would have felt both tangible hostility as well as many hard-to-define barriers to his full inclusion in the institution. Full inclusion would require something much more than the formal participation of this student, and others like him, in the life of the university. Within a decade, political conservatives were a significant number among, for instance, law student bodies, and, naturally, there were calls for the hiring of more conservative professors.

Intellectual diversity, as a term, means that universities should appoint more conservative professors, assuming that the majority of the professoriate is liberal. One of its proponents, for instance, criticized an academic gathering for lack of intellectual diversity, charging that "none [of those assembled] is associated predominantly with the Republican Party, but eleven are associated with the Democratic Party. Many are prominent liberals. None is a conservative or libertarian."[32] If the claim is that there is hostility to, or discrimination against, professors with certain political orientations in the hiring process, this would be an entirely conventional inclusion claim in the form of the first mode. But when articulated as a claim for intellectual diversity, the claim inevitably shifts into the second mode.

The call for diversity is, fundamentally, a call for the inclusion of more kinds of people within the university, and it is hard to keep arguments for intellectual diversity from slipping into arguments that political beliefs should play a role in definitions of academic merit. For instance, with regard to the complaint described above that an academic gathering did not include members of one of the two major American political parties, there appears to be no claim of active dis-

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[31] LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 77 (1996). The professor's use of the term "right-wing" raises the recurring question of how to define the term "political conservative" in arguments about intellectual diversity.

[32] John O. McGinnis, *The Association of American Law Schools Needs More Political Diversity*, LIBR. L. & LIBERTY (Sept. 26, 2015), http://www.libertylawsite.org/2015/09/26/the-association-of-american-law-schools-needs-more-political-diversity [http://perma.cc/R7F6-R94H]. Advocates of intellectual diversity sometimes use other terms such as "ideological diversity" and "political diversity," but these terms tend to be used somewhat interchangeably. *See, e.g.*, HETERODOX ACAD., http://heterodoxacademy.org [http://perma.cc/5Z6B-2747].

crimination by the organizers of the conference. Instead, the argument is that among the selection criteria for participation should be an explicit consideration of the party affiliations of those selected. This is also true of the much-debated Academic Bill of Rights, proposed by advocates for intellectual diversity and which would have universities mandate that "[a]ll faculty shall be hired, fired, promoted and granted tenure on the basis of their competence and appropriate knowledge in the field of their expertise and, in the humanities, the social sciences, and the arts, with a view toward fostering a plurality of methodologies and perspectives."[33] Its proponents believe this language will foster the hiring of more political conservatives onto university faculties. But this language has been criticized for calling for political beliefs to be incorporated into the measure of academic merit.[34] The same criticism has been launched at proposals considered by various legislative bodies to mandate that universities promote intellectual diversity.[35]

The basic problem is the same one faced by the black students at San Francisco State, or many other groups that make inclusionary claims in the first mode. While particular instances of overt hostility or explicit exclusion can be found, most of the evidence for exclusion tends to rest upon the simple fact that members of the excluded group are not well represented within the institution. The reasons for this nonrepresentation are often hard to demonstrate — at least if the inclusionary argument styles itself as a mode one claim. That is, when the claim for inclusion is articulated as one for intellectual diversity, it is difficult to keep the argument that political beliefs should be kept *out* of the hiring process from shading into the argument that political beliefs should be *part* of the hiring process and should be incorporated into our definition of academic merit. None of this is intended to assess the merits of the call for intellectual diversity. Like other second-mode projects, its claimants are no doubt protesting against something that is in fact real. It is just to say that it inevitably shades into a second-mode claim and presents a fundamental challenge to the basic rules of operation of the modern American university, which are intended to keep political beliefs and assessments of academic merit separate from one another.[36] As such, it has much company in the long history of inclusion.

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[33] STUDENTS FOR ACAD. FREEDOM, ACADEMIC BILL OF RIGHTS, http://www.studentsforacademicfreedom.org/documents/1925/abor.html [http://perma.cc/L8TR-JXRF].

[34] *See* AM. ASS'N OF UNIV. PROFESSORS, COMM. ON ACAD. FREEDOM & TENURE, REPORT ON ACADEMIC BILL OF RIGHTS (2003), http://www.aaup.org/report/academic-bill-rights [http://perma.cc/YCD4-XQRN].

[35] *See id.* (criticizing Colorado's proposal for the Academic Bill of Rights).

[36] *See* AM. ASS'N OF UNIV. PROFESSORS, COMM. ON ACAD. FREEDOM & TENURE, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1970), http://www

One might argue that the above-mentioned cases are, in fact, a diversion from the original understanding of inclusion — an understanding grounded in the simple request of students like Donald Murray to be admitted to whites-only institutions and to be treated like white students when they arrived. It is true that many recent inclusionary claims — made on behalf of disabled students, political conservatives, and others — have raised novel and challenging issues. However, it should be clear by now that there is simply no original, pristine, and noncontroversial version of inclusion where second-mode issues do not present themselves. There is no originary mode of inclusion that we can or should recapture.[37] Houston said as much in his 1936 essay, where the movement from the first to the second mode of inclusion was already underway. That type of slippage is built into the nature of making this type of claim.

The preceding discussion provides some context for considering an even more recent effort to promote inclusion of outsiders in higher education. At a number of universities across the United States, students — disproportionately minority students — have complained of microaggressions at the university, an always hard-to-define concept, as well as specific acts of mode one exclusion. They have called for changes in the ways that universities operate. At Harvard Law School, for instance, protesting students have demanded a mandatory curriculum requiring that students learn about marginalized narratives and the effects of white supremacy on the law.[38] Some have criticized these demands for their seeming disregard for the fundamental rules that govern the university.[39] By now, such criticisms should be familiar. They are similar to the critiques that black parents, 1960s university students, advocates for the disabled, non-English speakers, and political conservatives have prompted for their willingness to challenge the ground rules that govern the institutions of our society.

.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure [http://perma.cc/4LF5-R34H].

[37] For an attempt to engage in such a project, see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) (plurality opinion) (arguing that the original meaning of the desegregation arguments that produced the *Brown* decision should be limited to first-mode claims). For a critique of that enterprise, see Kenneth W. Mack, *Which Side Is* Brown v. Board *On? Its Legal History Can't Provide Absolutes in the Search for Racial Justice*, L.A. TIMES (July 4, 2007), http://articles.latimes.com/2007/jul/04/opinion/oe-mack4 [http://perma.cc/PD8E-QPY8].

[38] *See* RECLAIM HARVARD LAW SCHOOL, https://reclaimharvardlaw.wordpress.com [http://perma.cc/N8ET-CFQF].

[39] For instance, the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors reads: "Teachers are entitled to freedom in the classroom in discussing their subject . . . ." AM. ASS'N OF UNIV. PROFESSORS, *supra* note 36. While admittedly vague, this statement is taken to mean that teachers are entitled to wide latitude in planning course content, approach, and methodology without mandates from the university or other entities.

The most important legacy of these various movements for inclusion is not necessarily the specific demands that these various advocates have sought. Some of these demands have continued to engage us, while others have faded with the passage of time. We still debate and reconsider the rules that govern local educational systems, for instance, even though the prospects for restructuring neighborhoods, municipal boundaries, and housing patterns seem more remote with each passing year. Moreover, it would also be a mistake to focus on the mode one claims that these movements have made. What they have really asked us to question, debate, and reconsider are things that are often left unquestioned as we go about our daily routines — the basic rules that govern the operation of an educational institution. That, it would seem, is a request that is entirely worthy of serious engagement.