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WAITING FOR A SECOND CARGO SHIPMENT: PUBLIC EDUCATION AS A GREAT EQUALIZER

Richard Delgado*

INTRODUCTION

In his reply essay,¹ Steven Ramirez takes issue with an earlier article of mine that appeared in these pages. In *Rodrigo's Equation: Race, Capitalism, and the Search for Reform* ("Rodrigo's Equation"),² I argued that reforming capitalism, or any central feature of it, by legal means is a virtual impossibility, since law and capitalism are essentially the same thing, and a thing cannot reform itself.³ Professor Ramirez believes that my analysis is unduly dire because it overlooks a key feature of American life—namely economic inequality—that is the major roadblock in the way of reform.⁴

In short, the principal barrier to reform is not conceptual, but practical. The huge gap that separates the average Americans from the richest few makes potential activists insecure and fearful of losing their jobs.⁵ It also allows the richest few to deploy a formidable army of lobbyists, publicists, think tanks, and lawyers to fortify their position.⁶ Mitigating the extreme inequality that

* John J. Sparkman Chair of Law, University of Alabama School of Law. J.D., University of California-Berkeley (Boalt Hall), 1974.

1. Steven A. Ramirez, *Rodrigo's Abstraction: Capitalism, Inequality, and Reform over Time and Space*, 50 WAKE FOREST L. REV. 187 (2015).

2. Richard Delgado, *Rodrigo's Equation: Race, Capitalism, and the Search for Reform*, 49 WAKE FOREST L. REV. 87, 93 (2014) (comparing the hope of reforming corporate capitalism through law to a cargo cult). With areas lying close to the heart of corporate capitalism, legal change is bound to fail, since, in the United States at least, law and capitalism are essentially the same thing. Law can change relatively minor features of social life, smoothing some of its rough edges. But the odds weigh heavily against any thoroughgoing reform of capitalism, immigration, or any other areas that come close to the core of American identity, which is corporate capitalism. Changes are possible at the margins. But anything more far reaching tends to end up sidetracked, obstructed, or whittled away by subsequent amendments. *Id.*

3. *Id.* at 92–94.

4. Ramirez, *supra* note 1, at 193 ("A foundational disagreement remains. I identify soaring economic inequality as the culprit.").

5. *See id.* at 197, 214 (noting that the moneyed class is immune from this form of fear).

6. *See generally* JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996); *see also* Ramirez, *supra* note 1, at 189 (noting that the rich

afflicts American life would thus enable many types of reform to proceed that are otherwise unlikely to gain ground.

To loosen the grip of the oligarchs, Ramirez proposes increasing the minimum wage, reforming the income tax, and improving public education.⁷ With these measures in place, citizens will be able to exert pressure on Congress and the courts for reform, including changes in the very system of corporate capitalism that I deemed beyond reach.⁸ Nothing prevents us from undertaking these measures, Ramirez writes, except, perhaps, weakness of will.⁹

One should, of course, support Ramirez's measures.¹⁰ Income tax reform and increases in the minimum wage could put more money in the pockets of workers and the middle class. Even if their impact turns out to be too slight to turn our unequal society into Denmark¹¹—in part because the wealthy fight these measures tooth and nail—they are worth pursuing.

Faith in education, however, deserves closer attention, if only because it is practically a defining element of the liberal creed. This is so in several respects. Those on the moderate left tend to believe that education can enable those stuck at the bottom of the occupational ladder to rise and occupy jobs higher up.¹² They also note that education benefits society as a whole; an educated workforce is more productive than one with a lower level of education.¹³ And even when it does not bring extrinsic rewards, education can make lives richer and more fulfilling.

"opportunistically work to regain their power"), 191 n.22, 192 n.26 (noting how moneyed interests capture the reins of power); *id.* at 214.

7. Ramirez, *supra* note 1, at 193 (noting that "reforming capitalism" requires "raising the minimum wage, massively recapitalizing universal education . . . and re-imposing traditional notions of progressive taxation in the United States").

8. Delgado, *supra* note 2 (positing that corporate reform cannot arrive through law because the two are opposite sides of the same coin).

9. Ramirez, *supra* note 1, at 193.

10. To wit, increase the minimum wage, reform the income tax to make it fairer, and improve public education.

11. Denmark is Ramirez's example of a well-functioning society with a stout safety net and little economic inequality. See Ramirez, *supra* note 1, at 201–04. Japan is another. See *id.* at 204–07.

12. This assumes, of course, that openings are available. Often, they are not. Sometimes, jobs will have moved away or relocated to another country where the cost of labor is lower. Sometimes, jobs are lost when automation renders human workers unnecessary. Sometimes, the economy is simply stagnating and creating few if any new jobs.

13. See, e.g., STEVEN A. RAMIREZ, LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW 135, 196–97 (2013); see also, e.g., Ramirez, *supra* note 1, at 191 n.18 ("I argue that the rule of law . . . can [arrive] through . . . broad educational entitlement to expand the effective labor pool to force meritocratic competition, and constitutional protection of economic human rights for the full development of the nation's human resources.").

Finally, education can enable the young to understand their oppression and one day resist it.¹⁴ As I have pointed out elsewhere, if you teach a young farmworker to read the label on a bag of fertilizer, he is likely to read the warnings, too, and to file a class suit against you some day for poisoning him and his people.¹⁵ Teaching the young how to read gives them access to the world of ideas, including ones that will enable them to resist inequality.

The problem is that those with the power to influence curricula know this too. Accordingly, (i) they examine the content of education, particularly that of schools in working class communities, with an eagle eye, suppressing any course of instruction that threatens the status quo;¹⁶ (ii) they heighten vigilance at times of special danger to the establishment and its way of doing business;¹⁷ (iii) mainstream scholars exclude insurgent minorities from their citations and footnotes, especially in the law;¹⁸ and (iv) legal educators, operating in a field close to the heart of social power, are especially careful not to educate minorities who might turn the status quo upside down.¹⁹

Each of these observations is not merely hypothetical, but occurs time and again. In combination, they comprise a formidable counterforce to the use of education to effect fundamental social change. Education can help a talented few get ahead. But it is unlikely to enable an entire sector of the populace to supplant those who start out ahead of them. And it is even less likely to transform the entire system in which they vie for position.²⁰

In short, education is unlikely to mitigate economic inequality, which Ramirez believes is the major stumbling block in the way of reforming corporate capitalism.²¹ Let us take a brief look at why this is so.

14. See Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1509–10 (2009).

15. *Id.* at 1509.

16. See *infra* notes 30–50 and accompanying text.

17. See *infra* notes 51–61 and accompanying text.

18. See *infra* notes 62–67 and accompanying text.

19. See *infra* notes 68–85 and accompanying text.

20. It is also unlikely to reduce the gap between the haves and the have-nots that Ramirez deplors. See Ramirez, *supra* note 1, at 192–93. If, as liberals believe, it can improve productivity society wide, it will also increase profits for owners of the means of production even more. Just as workers' salaries grow, the pocketbooks of capitalists will fatten even more, so that the gap between the two groups will remain the same or widen.

21. I do not believe that it is. But for now, I shall remain content with showing that education is no sure cure for that evil.

CARGO CULTS THAT DID NOT DELIVER THE GOODS: FOUR RECENT
EXAMPLES

In *Rodrigo's Equation*, I compared the hope of reforming corporate capitalism *through law* to a cargo cult.²² Reviewing recent works urging reform of the nation's financial system, immigration policy, civil rights laws, and the First Amendment, I noticed a common structure. The author would typically begin by pointing out how earlier reform efforts in each of these fields have failed.²³ The author would then go on to propose a new approach, or "model," that would avoid the obstacles that had frustrated previous efforts.²⁴ The author would extol the virtues of the new system and point out that it is free from the defects that caused earlier efforts to founder.²⁵ I showed that each of these authors ignored a common hurdle. Their areas lay close to the heart of corporate capitalism, so that efforts that took the form of legal change were destined to fail, since, in the United States, law and capitalism are essentially the same thing.²⁶

Law can change minor features of social life, smoothing some of its rough edges. But the odds weigh heavily against any thoroughgoing reform of capitalism, immigration, or any other central feature of America's identity and way of doing business that proceeds via legal means. Changes are possible at the margins. But anything more far reaching tends to end up sidetracked, obstructed, or whittled away by a series of silent retreats. A thing cannot transform itself, at least without outside intervention, which in the case of corporate capitalism means unremitting public pressure, street activism, and the like—not a few tame laws requiring corporate actors to behave better.²⁷

What about educational innovation? Professor Ramirez believes that this is a promising way to challenge structural inequality.²⁸ I do not. It is a step that society is rarely, if ever, prepared to take, and when we do take it, we inevitably shrink from its full implications. Consider the following examples, each illustrating one of the limitations enumerated above.²⁹

A. Curricular Reform in Tucson, Arizona: Banned Books and Conservative Backlash

In Arizona, Latino immigrants have been under siege by private vigilantes who guard the state's Mexican border with shotguns and

22. See Delgado, *supra* note 2, at 92–102.

23. See *id.* at 94, 101.

24. See *id.* at 94–96, 101.

25. See *id.* at 96.

26. See *id.* at 93.

27. To wit, the four enumerated immediately above.

28. See Delgado, *supra* note 2, at 96.

29. See *supra* text accompanying notes 16–19.

pickup trucks, adding a further level of enforcement to a federal effort that they consider lacking in zeal.³⁰ The sheriff of Pima County, many miles inland, concocted a number of imaginative measures to make life miserable for those suspected of illegal entry.³¹ Recently, conservative legislators in the same state managed to pass a wide-ranging bill (SB 1070) that criminalized practically everything an unauthorized entrant might want to do, including find a job, rent an apartment, get a ride from a friend, go to an emergency room for medical treatment, or send his kids to school.³² Other states quickly followed suit.³³

But it is another chapter of Arizona's campaign against Latinos that sounds a cautionary note for Ramirez's hope of reform through education. In Tucson, Arizona, school authorities have been waging war against a popular Mexican American Studies ("MAS") program in public high schools with high enrollments of schoolchildren of Mexican descent.³⁴ Established a few years ago pursuant to a desegregation decree and taught by charismatic young teachers, some of them graduates of University of Arizona's ethnic studies department, the program had increased the graduation rate of Mexican American schoolchildren from about fifty percent to near ninety.³⁵ Since the Tucson school district is heavily Latino, the program enabled many students to learn about their history, feel excited about school, and aspire to attend college, often the first ones in their families to do so.

The authorities decided that the program was un-American and divisive because it taught schoolchildren about the great empires of Mesoamerica, the Mexican-American War, struggles for school desegregation, and Jim Crow laws under which black people had to sit in the balconies of movie theatres and take a back seat in restaurants, and could swim in public pools on only one day of the

30. See JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 350–351, 392–95 (2d ed. 2007).

31. See *Arizona Sheriff Faces Civil Rights Probe, Allegations of Undermining Law Enforcement with Controversial Focus on Immigration*, DEMOCRACY NOW! (Feb. 18, 2009), http://www.democracynow.org/2009/2/18/arizona_sheriff_faces_civil_rights_probe.

32. See Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450, *invalidated in part by Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

33. See Robbie Brown, *Georgia Gives Police Added Power to Seek Out Illegal Immigrants*, N.Y. TIMES, May 14, 2011, at A12, available at <http://www.nytimes.com/2011/05/14/us/14georgia.html>.

34. See generally *Acosta v. Huppenthal*, No. CV 10-623-TUC-AWT, 2013 WL 871892 (D. Ariz. Mar. 8, 2013); Richard Delgado, *Precious Knowledge: State Bans of Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013).

35. See Delgado, *supra* note 34, at 1527 n.61, 1528, 1551; Richard Delgado & Jean Stefancic, *Book Banning in Arizona*, ACADEME BLOG (Jan. 24, 2012), <http://academeblog.org/2012/01/24/book-banning-in-arizona/>.

week, after which the pool would be drained and cleaned.³⁶ The students also read Latino novelists like Rodolfo Anaya, Sandra Cisneros, and critical race theorists discussing how to frame and interpret America's racial past.³⁷ The program, the authorities decided, violated a second Arizona law (HB 2281) that forbade teaching ethnic division and anti-American attitudes.³⁸

Even though an outside audit gave the program a favorable review, the school board ended it anyway and, for good measure, banned certain texts that had formerly found an eager readership of Latino teenagers.³⁹ To make sure that everyone got the message, the authorities boxed up the books in front of crying students and loaded them onto trucks bound for a warehouse outside of town.⁴⁰ It also fired or transferred the young teachers who had filled the students with zeal for learning.⁴¹

All this might remind readers of other episodes of book banning and censorship, and carrying it out in front of the weeping schoolchildren might strike one as a type of psychological torture. But the authorities explained their action in different terms, including age appropriateness and curricular fit, even though the kids had been staying up late at night devouring the books and discussing them with their parents and friends.⁴² They also justified it by the need to inculcate patriotic attitudes among the young and reduce ethnic resentment and separatism.⁴³ When the case reaches

36. *Acosta*, 2013 WL 871892, at *16 (“[T]he Court concludes in the exercise of its discretion that a declaratory judgement that § 15-122(A)(3) is unconstitutional . . .” (citing *Ariz. Rev. Stat. Ann.* § 15-122-A(3) (2014))); see *Delgado*, *supra* note 34, at 1528; *Delgado & Stefancic*, *supra* note 35.

37. See *Delgado*, *supra* note 34, at 1523 n.48 (discussing RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2012)).

38. *ARIZ. REV. STAT. ANN.* § 15-112-A(3) (2014); *Acosta*, 2013 WL 871892, at *1.

39. See *Acosta*, 2013 WL 871892, at *15; *Delgado*, *supra* note 34, at 1523 n.48 (noting that the books included RODOLFO ACUNA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (1981) (describing U.S. history from the viewpoint of the Mexicans); RODOLFO ANAYA, *BLESS ME ULTIMA* (1972) (describing the relationship of a little boy to a local *curandera*, or folk doctor); HOWARD ZINN, *PEOPLE'S HISTORY OF THE UNITED STATES* (2005); a book by two critical race theorists, DELGADO & STEFANCIC, *supra* note 37; and WILLIAM SHAKESPEARE, *THE TEMPEST* (discussing colonialism)); *Delgado & Stefancic*, *supra* note 35.

40. See, e.g., Jeff Biggers, *Who's Afraid of "The Tempest"?*, SALON (Jan. 13, 2012, 5:47pm), http://www.salon.com/2012/01/13/whos_afraid_of_the_tempest/; see Dennis J. Bernstein, *Banning Books in Tucson*, CONSORTIUMNEWS.COM (Jan. 21, 2012), <http://consortiumnews.com/2012/01/21/banning-books-in-tucson/>; *Delgado & Stefancic*, *supra* note 35.

41. *Class Dismissed*, PHOENIX (Sept. 2012), <http://www.phoenixmag.com/Hot-Topics/class-dismissed.html>.

42. See PRECIOUS KNOWLEDGE (Dos Vatos Prod. 2012).

43. *Id.*

the Ninth Circuit,⁴⁴ that court will have to choose between two ways of looking at the aforementioned events. It could select a First Amendment prism, employing cases like *Meyer v. Nebraska*⁴⁵ and *Tinker v. Des Moines*.⁴⁶ Alternatively, it could select a deference-to-authority model that draws from a host of cases and statutes giving school authorities broad discretion over curriculum and book selection.⁴⁷

In short, there are always two or more ways of looking at such matters and, if history is any guide, the deference-to-authority model is apt to prevail. In the Arizona case, it did in the court of public opinion—the anti-MAS law was very popular with white citizens—as well as in federal district court, which upheld most of it in the face of a challenge.⁴⁸ The case was recently argued in front of the Ninth Circuit, and observers have predicted that the students will lose again.⁴⁹ Case law invests adults with wide discretion to determine what schoolchildren learn.⁵⁰ And what the authorities want them to learn does not include material that can fill them with righteous indignation and a desire to change a system that oppressed their ancestors and dims their chances.⁵¹

B. *Hyper Vigilance During Times of Social Change and Ferment*

If this is so with relatively young students, like those in Tucson, what about with slightly older ones? With them, a natural experiment took place during the early 1970s when a large wave of black and Latino applicants, seventeen or eighteen years old, began knocking at the doors of America's colleges and universities in the wake of *Brown v. Board of Education*.⁵² This cohort of

44. *Acosta*, 2013 WL 871892, *appeal docketed*, No. 13-15657 (9th Cir. Apr. 8, 2013).

45. 262 U.S. 390 (1923) (reversing the dismissal of a World War I-era teacher who taught German in a parochial elementary school and was fired under a state law prohibiting the teaching of that language).

46. 393 U.S. 503 (1969) (upholding the right of students to wear black armbands protesting the Vietnam War).

47. See Delgado, *supra* note 34, at 1548 n.167.

48. *Acosta*, (denying all but one of the plaintiffs' claims regarding the unconstitutionality of the anti-MAS law).

49. *Acosta*, 2013 WL 871892, *appeal argued sub nom.* Arce v. Huppenthal, No. 13-15657 (9th Cir. Jan. 12, 2015), available at www.ca9.courts.gov/media (follow "Search by Case No." hyperlink and enter No. 13-157657; see Jean Stefancic, *Reflections on Reform Litigation: Strategic Intervention in Arizona's Ethnic Studies Ban*, 46 J. MARSHALL L. REV. (forthcoming 2015)).

50. See generally Delgado, *supra* note 34.

51. See Dolores Calderon, *Herbert Marcuse, Critical Race Theory, and Multicultural Education: Transformative Educational Practices*, in MARCUSE'S CHALLENGE TO EDUCATION 159, 168–69 (David Kellner et al., eds., 2009).

52. See 347 U.S. 483, 495 (1947) (holding that separate educational facilities were inherently unequal and opening the door for racial desegregation in education).

undergraduates of color, who had entered the nation's newly desegregated schools following the 1954 decision, their ranks swollen by affirmative action, seemed poised to become the nation's first large generation of black and brown schoolteachers, social workers, mayors, college professors, lawyers, executives, and doctors.⁵³

Establishment figures were not at all eager for these future leaders to learn social analysis from far-left professors of law, history, criminology, and political science, many of whom taught at elite schools like Harvard, Yale, and Berkeley. Having just lived through the turbulent sixties, academic visionaries such as Kingman Brewster, James Conant, Clark Kerr, and Albert Bowker wished that the new cohort of minorities would turn out to be moderate, responsible, and above all, not angry. Accordingly, elite schools quietly removed white radical professors in a series of tenure denials that spread across the country during this period.⁵⁴

Culling from newspaper reports, personal interviews, and archival material, I showed how several of these professors were forced out of their positions at elite universities and remade their careers in lower-level jobs.⁵⁵

A key qualification of an elite university president is the ability to spot a trend—to grasp large social currents, appreciate their relevance for the university, and act accordingly. Will the next generation of students want to live in dorms or off campus? Will the adjunct faculty unionize and demand higher salaries? Will alumni giving be down or up? Will molecular biology be the hot new field, or will it be nanotechnology? Will enrollment of minorities be up, or down—and of what kind? What is the Supreme Court going to do in the wake of the *Fisher v. University of Texas*⁵⁶ case? University presidents live or die by their ability to form accurate answers to questions like these.

By the early and mid-1960s, leading educational authorities could foresee the arrival of substantial numbers of post-*Brown* students of color beginning about a dozen years after that decision. Of course, the nation always had its share of talented minority youth. But many attended historically black colleges like Morehouse or Howard; the few who attended predominantly white

53. See Delgado, *supra* note 14, at 1508–09, 1515–16.

54. See *id.* at 1532–42 (providing background information regarding this phenomenon and describing it through four individual examples).

55. *Id.* at 1533–43.

56. See 133 S. Ct. 2411 (2013) (permitting the consideration of race in undergraduate admissions under a standard of strict scrutiny).

colleges and universities did so in such small numbers that their impact was relatively slight.⁵⁷

By the period in question, however, those numbers were rising and showed every sign of continuing to swell. What would the new cohort of minority students be like? Would they be as clamorous as the largely white student protesters who had roiled Berkeley, Michigan, and Yale just a few years earlier?⁵⁸ Would they endorse violence and spout Mao, Marx, and Guevara, as the Black Panthers and Brown Berets had done during this period, as well?⁵⁹ Or would they be studious, latter-day versions of Booker T. Washington, leading their communities responsibly and peacefully into an era of harmony with whites?

The speeches, personal writings, oral interviews, and memoirs of four prominent university officials show that these questions were very much on their minds during this period.⁶⁰ They spoke about the *shape and orientation* of the new wave of minority students and hoped that they would integrate peacefully into the campus scene, devote themselves to their studies, mix with white students, and move easily into leadership positions while serving as role models for the next generation of black and brown youth.⁶¹ And they were especially wary of the role that young white radical professors might play in socializing them.

This is not to assert that each of these towering figures consciously aimed to rid their campuses of leftist professors to avoid corrupting minority youth, much less that they conspired together in a smoke-filled room. Much of their participation was indirect. But they set an example and tone and communicated, directly or indirectly, to their underlings the kind of campus they wanted, leaving it to the department heads, deans, and chancellors who ran the campus on a day-to-day basis and supervised personnel decisions emanating from below to act accordingly.⁶²

And the kind of campus those top leaders wanted was peaceful, with students of all types working together to create the kind of society that high-level technocrats adore, with everything operating smoothly like a well-oiled machine. This meant that these figures,

57. See David Karen, *The Politics of Class, Race, and Gender: Access to Higher Education in the United States, 1960–1986*, 99 AM. J. EDUC. 208, 212–14 (1991).

58. I mean, of course, Berkeley's Free Speech Movement and the anti-war campaigns that spread to Michigan, Kent State, and many other campuses during this period. See Christopher J. Broadhurst, *Campus Activism in the 21st Century: A Historical Framing*, 167 NEW DIRECTIONS FOR HIGHER EDUC. 3, 7 (2014).

59. See, e.g., Max Elbaum, *What Legacy from the Radical Internationalism of 1968?*, 82 RADICAL HIST. REV. 37 (2002).

60. Delgado, *supra* note 14, at 1516–33.

61. *Id.*

62. *Id.* at 1517.

praised for their educational vision, readily sacrificed intellectual diversity (by firing Marxists and socialists) for the outward appearance of it in the form of students of color. Hard-core Marxists have long written that race divides the working class. Whether that is true or not, a generation of promising left-wing professors lost their jobs, their security, and their opportunity to participate in elite academic marketplaces in order that America's decision makers might buy a short-lived racial peace.

Interested readers may examine the full story of this era, which I have described elsewhere. In sum, even at the college level, administrators keep a close watch on who is delivering instruction and to whom. When the combination of teacher, content, and learner promises a combustible mix, the establishment invariably intervenes. The purge of the early 1970s (which swept Canada as well), is but one example of this mechanism in action.

C. *Legal Education: When the Stakes Rise*

When the students are old enough to attend law school, the stakes are even higher. Lawyers wield real influence. Their actions shape what happens in the worlds of business, corporate finance, investment, banking, regulation, government, and crime. In this sector of higher education, we see power replicating itself even more surely than it does in the lower grades. I have time and space for only two examples, but could have chosen many more.

1. *Legal Citations and What They Tell About the Shape of Legal Knowledge*

In an early article,⁶³ I pondered a curious feature of civil rights scholarship in the nation's top law reviews. The leading scholars in this area—all of them white, male, and staunch supporters of minority causes—cited mainly each other and not the growing number of black and Latino scholars who were beginning to write in this area, generally in lesser reviews.⁶⁴ I demonstrated that this pattern of neglect has real consequences, including distortions in the shape of legal knowledge and impoverishment of the discourse on this vital subject.⁶⁵

My assistant and I prepared an informal sociogram showing who cited whom in the civil rights literature. It was illuminating. Paul Brest cited Laurence Tribe. Laurence Tribe cited Paul Brest and Owen Fiss. Owen Fiss cited Bruce Ackerman, who cited Paul

63. See generally Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

64. *Id.* at 561-62.

65. *Id.* at 566-73.

Brest and Frank Michelman, who cited Owen Fiss and Laurence Tribe and Kenneth Karst, and so on.⁶⁶

It did not matter where one entered this universe; one came to the same result: an inner circle of about a dozen white male writers who commented on, took polite issue with, and expanded on each other's ideas. The failure to acknowledge minority scholarship extended even to nonlegal propositions and assertions of fact, such as the extent and nature of the psychological harm of racism.⁶⁷

I posited reasons why we might look with concern on a situation in which the scholarship about one group is written by members of another and how the prominent scholars, all of whom were staunch liberals, could have unwittingly perpetrated these practices. I also replicated the study ten years later, showing that a younger generation of legal scholars were following much the same practice as their elders.⁶⁸

Legal scholarship, of course, is only one part of what goes on in the legal academy. Teaching is another.

Consider, now, how informal controls on the ideology and content of legal instruction shape the distribution of social power and influence.

2. *Ideology and the Legal Classroom*

I had occasion to consider the role of legal education in connection with major land-reform cases that recently came down in two continents, three countries, and two American states. In *Mabo v. Queensland*,⁶⁹ the Australian High Court in 1992 overruled the longstanding doctrine of *terra nullius*, under which Australia had assumed ownership of the entire subcontinent, which had until the arrival of the white settlers been home to the Aborigines alone.⁷⁰

Around this same time, in Canada, *Calder v. British Columbia*⁷¹ came to very much the same conclusion. As a result, commissions are now returning large stretches of land in the two countries to the native people, on the ground that the basis of the original appropriation was flawed.

In the United States, Lopes Reies Tijerina, an itinerant preacher, initiated a land revolt in New Mexico that prompted

66. *Id.* at 563.

67. *Id.*

68. See Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1361–62 (1992).

69. *Mabo v. Queensland (No. 2)* (1992) 107 ALR 1 (Austl.), reprinted in part in Juan Perea et al., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 268 (2nd ed. 2007), available at <http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html>.

70. *Id.* at 2.

71. *Calder v. British Columbia*, [1973] S.C.R. 313 (Can.) (reconsidering the basis for native land titles in Canada).

Congress and the Government Accountability Office ("GAO") to ponder whether large tracts of government land in the Southwest were improperly taken from Mexican people in the wake of the Mexican-American War and the Treaty of Guadalupe Hidalgo.⁷² One of five options the GAO proposed for Congress's consideration was return of improperly seized land, now transformed by the government into national parks and forests.⁷³

Finally, in the neighboring state of Colorado, the Colorado Supreme Court in *Lobato v. Taylor*⁷⁴ upheld an ancient land grant by Carlos Beaubien that provided for communal use of his property by Mexican villagers and their descendants for gathering firewood and water, as well as hunting and fishing.⁷⁵ The grant, which dated back to the days immediately following the war with Mexico, set out features that were common in those days, such as collective ownership and use.⁷⁶ When a lumberman from North Carolina purchased the Taylor Ranch a century later and began closing it off to the nearby villagers, the Colorado court system was required to determine the legal effect due the original Beaubien document.⁷⁷ When it did, it affirmed an early form of native possession and land use in the face of advancing freemarket interests and values.

Remarkably, lawyers played very little role in all these landmark decisions. In *Mabo*, the driving force was Eddie Mabo, an indigenous gardener who enlisted the aid of a friendly history professor who began researching the origins of the doctrine of terra nullius.⁷⁸ It was only after Henry Reynolds wrote a book, *Law of the Land*,⁷⁹ and convened a student conference on land rights in Australia that lawyers entered in.⁸⁰

In *Calder*, the driving force for the decision was a council of elders who began petitioning the Canadian government nearly a century earlier.⁸¹ In the New Mexico land revolt, Tijerina was an itinerant preacher with very little formal education who researched land titles in the county law library and another in Mexico City.⁸² And in *Lobato*, the attorneys of record were pro bono lawyers with Jewish-sounding surnames, not Latino-sounding ones.⁸³

72. Richard Delgado, *Delgado's Darkroom: Critical Reflections on Land Titles and Latino Legal Education*, 44 N.M. L. REV. (forthcoming 2015) (manuscript at 13–14), available at <http://ssrn.com/abstract=2517429>.

73. *Id.*

74. 71 P.3d 938, 957 (Colo. 2002).

75. *Id.* at 946–50.

76. *Id.*

77. *Id.* at 943, 946.

78. Delgado, *supra* note 72 (manuscript at 9).

79. HENRY REYNOLDS, *LAW OF THE LAND* (1987).

80. Delgado, *supra* note 72 (manuscript at 11).

81. *Id.* (manuscript at 12).

82. *Id.* (manuscript at 13).

83. *Id.* (manuscript at 17).

Why so few lawyers—especially ones of indigenous or minority background—in these landmark cases? By the time the decisions came down, American law schools, including those in Arizona and New Mexico, had been graduating Indian and Mexican American lawyers for several years.⁸⁴ Yet, not a one seems to have played a part in either of the American cases, nor did an Australian or Canadian lawyer play an early or definitive role in either of those proceedings.

Minority lawyers during this period were busy writing wills, filing divorces, and defending clients in criminal cases. But few, if any, took part in these cases that changed land rights in large regions of the world. Why not? A number of possibilities come to mind. The young Latino or native lawyers may have thought the cases unattractive or unlikely to prevail. They might have preferred that the land remain in Anglo hands, since development of the Taylor Ranch as a ski resort, for example, would have brought them more business than would returning it to small local farmers.

But I believe the reason lies elsewhere. We simply taught them white people's—that is, Western or Euro-American—law. We envisioned roles for them in much the way university presidents did for the black and Latino undergraduates washing up on their shores in the early 1970s.⁸⁵ We quietly cheered when one of them made partner in a firm or secured a position on an important state or federal commission. We did not teach them to use their legal skills imaginatively and in the cause of social reform, for their people or anyone else. We were pleased when most of them went on to careers indistinguishable from those of their classmates—as most of them did.⁸⁶

CONCLUSION

If, as I argued, the American system of corporate capitalism will not yield readily to legal reform, education is no magic talisman either. A review of failures ranging across three countries and several age sectors shows that the establishment prefers education that trains students for niches in the current system rather than as reformers transforming that system into a different one. Basic reform of entrenched patterns will only yield to outside pressure, such as that accompanying a crisis or concerted popular mobilization. Self-education, critical writing, teaching, and scholarship can certainly play roles in instigating these events. Public education supervised and overseen by watchful bodies beholden to a conservative citizenry in the thrall of moneyed interests is very unlikely to do so. Social reform requires effort and

84. *Id.*

85. See *supra* Subpart I.B.

86. Delgado, *supra* note 72 (manuscript at 23).

will; one cannot delegate it to another profession (teachers) or expect it to happen by enacting a few measures that spread the tax burden more equitably or boost wages for those at the bottom. Those measures may be entirely commendable. But they will not transform an economic system that perpetuates inequality by its own weight.