# "ANTI-WOKEISM" & AUTHORITARIANISM: A RENEWED CALL FOR CONSTITUTIONAL PROTECTIONS FOR EDUCATION

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## INTRODUCTION

*Fellow citizens, we cannot escape history.*
– Abraham Lincoln[1]

Billed by Florida legislators as the "strongest legislation of its kind," the Stop the Wrongs to Our Children and Employees Act (commonly referred to as the "Stop W.O.K.E. Act")[2] purports to "protect" students and teachers from "discrimination and woke indoctrination" by prohibiting the substantive teaching of topics related to unconscious bias or systemic racism.[3] This law was one of numerous restrictive state measures enacted in the wake of the murder of George Floyd, as well as the growing prominence and power of the Black Lives Movement, aimed at censoring educational and historical topics deemed "divisive" by predominantly conservative legislators.[4] As this Article seeks to illustrate, anti-literacy laws, such as those memorialized in the Stop W.O.K.E. Act and similar "anti-critical race theory"

1. President Abraham Lincoln's Second Annual Message to Congress, H.R. REC. GROUP 233 (Dec. 1, 1862).

2. H.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022). The Stop W.O.K.E. Act broadly applies to the educational and business spheres and prohibits open dialogue of topics pertaining to race, gender, and sexual identity and orientation. The focus of this Article, however, is limited to restrictions on race and racism primarily within the K–12 educational context. For a detailed discussion and analysis of the effects on the Stop W.O.K.E. Act on post-secondary education, see generally Katheryn Russell-Brown, *"The Stop WOKE Act": HB 7, Race, and Florida's 21st Century Anti-Literacy Campaign*, 47 NYU REV. L. & SOC. CHANGE 338 (2023).

3. Press Release, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/ [https://perma.cc/U55E-VFUY]; 2022 Fla. Sess. Law Serv. Ch. 2022-72 (C.S.H.B. 7); *see also* PUBLIC HANDOUT FROM THE OFFICE OF GOVERNOR RON DESANTIS (Dec. 2021), https://www.flgov.com/wp-content/uploads/2021/12/Stop-Woke-Handout.pdf; Press Release, Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (Apr. 22, 2022), https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/.

4. *See* Taifha Alexander et al., *Tracking the Attack on Critical Race Theory*, CRT FORWARD 7–9 (2023), https://crtforward.law.ucla.edu/new-crt-forward-report-highlights-trends-in-2021-2022-anti-crt-measures/ [https://perma.cc/RZ6K-6QAC]; Tim Craig, *Florida Legislature Passes Bill that Limits How Schools and Workplaces Teach About Race and Identity*, WASH. POST (Mar. 10, 2022, 7:48 PM), https://www.washingtonpost.com/nation/2022/03/10/florida-legislature-passes-anti-woke-bill/ [https://perma.cc/L6UT-5ZUB].

("anti-CRT") measures,[5] are emblematic of a protracted legacy of restricting the acquisition of knowledge as a means of instantiating legal norms that reinforce multi-layered forms racial subordination.[6]

Critically, the Stop W.O.K.E. Act is not an anathema, nor have the countless constitutional challenges that have plagued it since its inception discouraged other state and local governments from enacting similar anti-literacy measures. Since September 2020, more than 200 local, state, and federal entities have introduced over 750 policies specifically aimed at restricting educational access to truthful content surrounding race and structural racism.[7] With the exception of Delaware, "anti-CRT" policies have been introduced in every state.[8] Between 2021 and 2022 alone, governments proposed a total of 563 "anti-CRT" measures, with nearly half enacted into law.[9] The vigor of "anti-wokeism" has continued its momentum seemingly unabated. The number of "anti-CRT" measures in 2023 has been greater or equal to those proposed in 2021 and 2022, with states dominated by conservative legislatures accounting for more than 63% of the proffered bills.[10]

Notably, the vast majority of these measures have targeted the educational and speech freedoms of public school youths and their teachers.[11] According to data compiled by the UCLA School of Law,

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5. This Article uses the terms "anti-CRT" and "anti-woke" interchangeably to recognize that the socio-political motivations and actors promoting these terms are indistinguishable. This Article also adopts the Anti-CRT Measures Report's intentional use of quotations when referring to "CRT" in the context of legislation to highlight that this inaccurate, misinformative use of the term is not recognized by critical race theory academia. *See* Alexander, *supra* note 4, at 9.

6. *See* Benjamin Wallace-Wells, *How A Conservative Activist Invented the Conflict Over Critical Race Theory*, NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory [https://perma.cc/CJ22-RYD2] (quoting Christopher Rufo, a proponent of so-called "anti-woke" and "anti-CRT" legislation, who describes critical race theory as the "perfect villain").

7. *CRT Forward*, UCLA SCH. OF L. CRITICAL RACE STUD. PROGRAM (CRS), https://crtforward.law.ucla.edu/ [https://perma.cc/KV55-FHGX].

8. Alexander, *supra* note 4, at 5. In reacting to the Anti-CRT Measures Report, Delaware Secretary of Education Mark Holodick felt a renewed sense of urgency for implementing CRT instruction into Delaware's public secondary school curriculum. *See* Mark Holodick, *The Importance of House Bill 198, from a Former Educator* (May 8, 2023), https://news.delaware.gov/2023/05/08/the-importance-of-house-bill-198-from-a-former-educator/ [https://perma.cc/4FZ3-LJ3J].

9. Alexander, *supra* note 4, at 4.

10. *Id.* at 5.

11. *See, e.g.*, N.D. CENT. CODE § 15.1-21-05.1 (2024) (prohibiting public school instruction "that racism is systemically embedded in American society and the American legal system").

more than 91% of introduced and 94% of enacted "anti-CRT" measures have been specifically directed at K–12 schools.[12] Consequently, more than 22 million children—almost half of all public school students—are subjected to state-censored education that explicitly prohibits inclusive pedagogy, a factually accurate teaching of American history, and ultimately, a high-quality public education essential to a functioning democratic society.[13]

This Article situates the Stop W.O.K.E. Act and its progeny within a dual framework of authoritarian governance and a history and tradition of racially motivated anti-literacy legislation.[14] Part I begins with a historic overview of the weaponization of educational restrictions as a means of deterring civic engagement, highlighting the ensuing resolve of enslaved and oppressed individuals to conquer the extreme anti-literacy barriers that were pervasive across the United States for the majority of the nation's history. Part II then discusses the antidemocratic means and motivations that have undergirded such state actions, drawing parallels to modern anti-literacy laws that are merely disguised as "anti-woke" or "anti-CRT" laws yet embody the same authoritarian rationales as antecedent educational restrictions. Part III observes the present consequences of modern anti-literacy efforts, identifying both practical repercussions, such as the demoralization of educators who must learn to navigate through frustratingly ambiguous curricula, and theoretical repercussions, such as the obstruction of roughly fifty years of academic progress in discerning the relationship between race and law.

The Article concludes with a discussion of several constitutional pathways for enhancing federal protections for education to remedy the social regression caused by "anti-woke" and "anti-CRT" efforts. In documenting a national history and tradition of anti-literacy, this Article does not presuppose a judicial disposition on the part of the

12. Alexander, *supra* note 4 at 5.

13. *Id.* at 6.

14. *See* JUAN J. LINZ, TOTALITARIAN AND AUTHORITARIAN REGIMES 70 (2000) (identifying the characteristics of authoritarian governments as involving the rejection of political plurality, the use of central power to preserve the political status quo, the suppression of anti-regime sentiments, and the dilution of the rule of law, separation of powers, and democratic voting). Authoritarian regimes additionally lack civil liberties and are typified by nominally democratic institutions that entrench, rather than challenge, authoritarian rule. *See id.* at 293 (observing traditional authoritarian tactics that have immobilized socially repressed groups). Authoritarian leaders may adopt political strategies that include disseminating false information, expanding executive power, targeting vulnerable communities, and politicizing independent institutions. *See id.* at 91–92 (examining various indirect measures aimed at legitimizing existing social caste systems).

current Supreme Court to enshrine a public right to education. However, it nonetheless advances the argument that socio-political and historical conditions necessitate and justify more robust educational protections.

## I. THE HISTORY OF THE WEAPONIZATION OF EDUCATION

*A people without the knowledge of their past history, origin, and culture is like a tree without its roots.*
— Marcus Garvey[15]

Anti-literacy laws, such as those memorialized in the Stop W.O.K.E. Act, are illustrative of a prolonged legacy of prohibiting and criminalizing the acquisition of knowledge by minoritized communities.[16] For the first 250 years of the American experience, educational opportunities were entirely nonexistent or strictly limited for Black Americans.[17] Black literacy was considered an existential threat to institutional slavery in that it could be used to facilitate escape, organize uprisings, forge documents to secure freedom, build community and collaboration amongst enslaved people, and perhaps most dangerously, conceive of "a world beyond bondage."[18] Consequently, anti-

15. *See* Robin N. Hamilton, *The Story of Marcus Garvey*, AROUND ROBIN PROD. CO. (July 24, 2023), https://www.aroundrobin.com/marcus-garvey/#marcus-garveys-speech [https://perma.cc/9BB5-5GMG] (quoting Marcus Garvey's famous proverb).

16. *See generally* Christopher M. Span, *Learning in Spite of Opposition: African Americans and Their History of Educational Exclusion in Antebellum America*, 131 COUNTERPOINTS 26 (2005) (citing historical data that indicates that enslaved individuals who were able to escape bondage had a high literacy rate); Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. REV. 1031 (2022) (exploring the historical racialization and criminalization of educational freedoms in the United States).

17. Span, *supra* note 16, at 27–28; *see also* JARVIS GIVENS, FUGITIVE PEDAGOGY: CARTER G. WOODSON AND THE ART OF BLACK TEACHING 11 (2021) (discussing the formal and informal suppression of Black education during the antebellum era). While Black persons were not deemed "Americans" in terms of citizenship until 1868, this Article uses the term "Black Americans" to generally refer to Black persons living in America since the country's inception in 1776. Unlike the first- or second-generation slaves of the early 1600s, who communicated almost entirely in their native African dialects and maintained their traditional African cultural practices, their descendants acquired uniquely "American" aspects that certainly rendered them as "Americans" in terms of culture, regardless of citizenship. For an overview of the cultural shifts between first-generation African slaves and their descendants, see LEROI JONES (AMIRI BARAKA), BLUES PEOPLE: NEGRO MUSIC IN WHITE AMERICA 17–18 (1999).

18. HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM, 7 (2005); *see also* Span, *supra* note 16, at

literacy laws were among the most effective tools for legitimizing the false narrative of Black intellectual inferiority and inhumanity on which chattel slavery as an institution was built and sustained.[19]

While every U.S. colony and subsequent state banned or heavily regulated basic literacy until the ratification of the Reconstruction Era Amendments, laws banning learning were most restrictive in the American South.[20] In 1740, South Carolina passed the first form of colonial legislation criminalizing Black literacy, sparking a trend in southern states of enacting and aggressively enforcing compulsory illiteracy laws.[21]

Alabama's 1833 Slave Code, for example, criminalized the speech, assembly, and learning of enslaved people, and empowered civilians to arrest any "slave so offending."[22] The Alabama Slave Code charged slaveowners with enforcing its provisions and levied fines against them for enslaved people in their possession who violated Alabama's anti-literacy laws.[23] White persons convicted of attempting to teach Black persons to spell, read, or write could face a fine of $250–$500 per offense (the modern equivalent of approximately $9,000–$18,000).[24]

By contrast, a free Black person convicted of facilitating the literacy of another Black person faced punishment that included thirty-nine lashes for each offense, banishment from the state, and the possibility of enslavement.[25] An enslaved person found guilty of the same

37 (discussing the story of an enslaved individual who hoped "he would be able to use his acquired learning to escape enslavement and help others eager to do the same").

19. Span, *supra* note 16, at 27; *see also* Kim Tolley, *Slavery*, *in* MISEDUCATION: A HISTORY OF IGNORANCE- MAKING IN AMERICA AND ABROAD 13–29 (2016) (analyzing the legitimization of antiliteracy legislation).

20. Span, *supra* note 16, at 27. Georgia, North Carolina, Mississippi, Virginia, Florida, Louisiana, and Alabama were among the southern states that enacted and aggressively enforced anti-literacy laws. *See* Tolley, *supra* note 19, at 14 (providing data of states that anti-literacy legislation between 1740 and 1834).

21. An Act for the Better Ordering and Governing of Negroes and Other Slaves in This Province (Negro Act), 1740 S.C. Acts 23, *superseded by constitutional amendment*, U.S. CONST. amend XIII, § 1; *see also* Span, *supra* note 16, at 27; Tolley, *supra* note 19, at 14.

22. Slaves, and Free Persons of Color, 1833 Ala. Laws 397–98, *superseded by constitutional amendment*, U.S. CONST. amend XIII, § 1.

23. *Id.*

24. *Id.*

25. *Id.* "39 lashes," meaning, 39 whips to the slave's bare back. *See* State of Alabama, *Selections from Alabama's Laws Governing Slaves*, AM. SOC. HIST. PROJECT (Jan. 15, 2024), https://shec.ashp.cuny.edu/items/show/1640 [https://perma.cc/FC6Y-2FMV].

crime was subject to even more severe sanctions. Enslaved persons who attempted to become literate or taught other enslaved persons to read faced fifty lashes for the first offense, and 100 lashes for each subsequent offense.[26] Indeed, torture, in all its pernicious forms, was the most common enforcement mechanism for ensuring the denial of basic literacy to Black Americans.[27] Beatings, maiming, and even death had been considered reasonable responses to attempts by Black Americans to become literate.[28]

The criminalization of knowledge extended well beyond restrictions of basic reading and writing skills. Though modern anti-literacy laws (disguised as "anti-woke" legislation) mandate the instruction of the "benefits" of slavery, historical records demonstrate that enslaved individuals were limited from learning the most fundamental aspects of their lives and identities, including their date of birth and family lineage.[29] Interconnected with the denial of learning is an equally destructive dual quality of anti-literacy laws that functions to destroy enslaved people's culture and kinship, denying them the most fundamental knowledge of their history and ancestry.[30]

Notwithstanding the unique harm of racialized anti-literacy laws spanning millennia, the collective educational ambitions of Black Americans demonstrate an enduring dedication to the acquisition of knowledge that is characteristic of a remarkable resilience and appreciation of both learning and freedom.[31] Despite the grave risks sanctioned by anti-literacy legislation, enslaved people employed ingenuity and courage to circumvent learning restrictions and the severe

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26. 1833 Ala. Laws 397–98.

27. Carissa McCray & Harley Campbell, *Literacy is Freedom*, 7 NEW RAY BRADBURY REV. 89, 92 (2023).

28. Span, *supra* note 16, at 47–48.

29. *See, e.g.*, FLA. DEP'T OF EDUC., ACAD. STANDARDS—SOCIAL STUDIES 2023: ANALYZE EVENTS THAT INVOLVED OR AFFECTED AFRICANS FROM THE FOUNDING OF THE NATION THROUGH RECONSTRUCTION 6 (2023) ("Instruction includes how slaves developed skills which, in some instances, could be applied for their personal benefit.").

30. *See* Nicole Ellis, *Lost Lineage: The Quest to Identify Black Americans' Roots*, WASH. POST (Oct. 19, 2021, 4:06 PM) https://www.washingtonpost.com/nation/2020/02/25/lost-lineage-quest-identify-black-americans-roots/ [https://perma.cc/89C2-8FTZ]. The personhood and familial connections of enslaved individuals had been assigned such limited value in post-Civil War America that the U.S. Census did not begin recording Black Americans until 1870. *Id.*

31. Span, *supra* note 16, at 47–48; *see also* HILARY GREEN & KEITH S. HÉBERT, HISTORIC RESOURCE STUDY OF AFRICAN AMERICAN SCHOOLS IN THE SOUTH, 1865–1900, 3–13 (2022).

punishments accompanying their enforcement.[32] Indeed, a "shared communal desire to become educated proved widespread and enduring."[33] Impassioned and empowered by a yearning for knowledge and the power it bestowed, Black communities created an informal educational network using underground schools.[34] Enslaved individuals clandestinely circulated disguised textbooks throughout the South.[35] Black children bartered with white children for the knowledge they possessed, exchanging marbles or fruit for an opportunity to learn the alphabet.[36] Adults and children alike leveraged any available opportunity to covertly learn, often at great risk.[37] Despite these valiant efforts and the tremendous amount of respect that Black Americans harbored for learning, on the eve of the Civil War, only an estimated 5% of enslaved Black Americans in the Antebellum South were literate.[38]

Following the Civil War, formerly enslaved Black Americans exercised their new constitutional freedoms with a fastidious zeal to harness an education.[39] During the short-lived Reconstruction Era, the Black community established a sophisticated educational infrastructure, leveraging community resources to create freedom schools to

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32. Span, *supra* note 16, at 38; *see also* WILLIAMS, *supra* note 18, at 7 (acknowledging the ingenuity and will of enslaved people to attain literacy during the antebellum period); Black, *supra* note 16, at 1031, 1040–44 (describing "extraordinary lengths" employed by Black Americans to educate themselves and share their knowledge with others).

33. GREEN & HÉBERT, *supra* note 31, at 2.

34. *Confronting Anti-Black Racism Resource: Education*, HARV. LIB. https://library.harvard.edu/confronting-anti-black-racism/education [https://perma.cc/DD2E-UYT7] last visited Feb. 24, 2024); *see also* Span, *supra* note 16, at 43; SUSIE KING TAYLOR, REMINISCENCES OF MY LIFE IN CAMP WITH THE 33D UNITED STATES COLORED TROOPS LATE 1ST S. C. VOLUNTEERS 5 (1902) (recounting the first-hand experiences of the extreme challenges faced by enslaved people as they learned to read and write via underground schools in Georgia). Susie King Taylor was also the first Black Civil War nurse, as well as the first Black woman to publish a Civil War memoir. *See* Amira Dehmani, *Education in Enslaved Communitees*, STATES NEWS SERV. (Aug. 16, 2022), https://blogs.loc.gov/teachers/2022/08/education-in-enslaved-communities [https://perma.cc/5XZH-UA27].

35. Jon Hale, *A Pathway to Liberation: A History of the Freedom Schools and the Long Struggle for Justice Since 1865*, URBAN EDUC., July 7, 2023, at 1, 3.

36. Span, *supra* note 16, at 42.

37. *See id.*

38. *Id.* at 39.

39. *See* Span, supra note 16, at 38; *see also* GREEN & HÉBERT, *supra* note 31, at 15–36; *Literacy as Freedom*, SMITHSONIAN AM. ART MUSEUM (Sept. 2014), https://americanexperience.si.edu/wp-content/uploads/2014/09/Literacy-as-Freedom.pdf [https://perma.cc/ZK5M-FPGB].

educate Black children.[40] These efforts resulted in a staggering increase in literacy rates from 20% in 1870 to 70% percent by 1910.[41]

From this lens, literacy and freedom have long been understood as synonymous by both the oppressed and their oppressors.[42] As such, literacy restrictions were—and continue to be—intrinsic to racial oppression.[43] Following the Civil War, former slave states, including Florida, swiftly acted to reconstitute their slavocracy using new peonage systems that would satisfy lax federal standards.[44] Once Southern leaders understood that the only requirement for re-entry into the Union was the ratification of the 13th Amendment, "Black codes" relegating newly freed Black Americans to second-class citizenship quickly proliferated.[45]

For example, in Florida—the birth place of modern "anti-woke" laws—the state's post-Civil War legislature was described as the most "bigoted and short-sighted of all southern legislatures."[46] Indeed, the 1865–1866 Florida Legislature that oversaw the state's constitutional convention was comprised of the very same former enslavers and ex-Confederates who had fought to preserve slavery.[47] The state

40. Span, supra note 16, at 44–45; Erin M. Carr, *Crisis as a Catalyst for Rebirth: Disrupting Entrenched Educational Inequality in the COVID Era*, TOURO J. RACE, GENDER & ETHNICITY 164, 173 (2022).

41. *Literacy from 1870 to 1979*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/naal/lit_history.asp [https://perma.cc/SJP7-R58Q].

42. *See generally* JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860–1935 (1988) (arguing that the structure, ideology, and content of African-American education in the South from the end of the Civil War to the early 20th century was part of a larger effort to maintain Black subordination); *see also* Hale, *supra* note 35, at 3 (offering a detailed historical account of the role of education in providing "a counternarrative to white supremacy and racist policy through education grounded in the needs, aspirations, and wisdom of local community organizing").

43. *See* Span, *supra* note 16, at 27–35 (discussing the underlying ideological motives behind anti-literacy laws); Tolley, *supra* note 19, at 13 ("Through [anti-literacy laws] . . . governments purposefully fostered, maintained, and regulated the structural production of ignorance.").

44. ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 9 (1964) ("Once it had become certain that the Southerners were not to suffer wide-scale reprisals and that summary punishment was not to fall upon their leaders . . . . There was a margin of doubt wide enough that they were encouraged to experiment with the spirit of the requirements.").

45. Joe M. Richardson, *Florida Black Codes*, 47 FLA. HIST. Q. 365, 368–71 (1986).

46. *Id.* at 372.

47. *Id*. at 371–73.

constitutional convention's asserted goal was to recommend legislation to "preserve as many as possible" of the "good" features of slavery.[48]

Unsurprisingly, it was these former Confederate Florida state legislators who were also responsible for devising some of the nation's harshest Black codes, resulting in the near complete disenfranchisement of Black Floridians.[49] Under Florida's new state constitution, Black Floridians enjoyed virtually no rights.[50] They could not carry firearms.[51] They could not participate in most legal proceedings.[52] They faced humiliating and violent physical punishment, such as public lashing, and were subject to vague vagrancy laws designed to return them to a permanent state of servitude.[53] Paramount to these laws was the erasure of the significant progress that Black educational aspirations had achieved.[54]

As represented in Florida's revised state constitution, racial separation was central to southern states' post-Civil War legal and social structures.[55] Although the 13th Amendment formally abolished institutional slavery, states quickly reconfigured former slaveholding-serving arrangements to ensure that constitutional protections afforded to newly enfranchised Black Americans did not translate into actual equality under the law.[56] Through a collection of state and local statutes designed to institutionalize legal segregation, authoritarian devices functionally nullified Reconstruction Era and denied Black Americans their most basic civil rights.[57]

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48. *Id.* at 373; THEODORE B. WILSON, THE BLACK CODES OF THE SOUTH 96 (1965); *see also* H.R. Gen. Assemb., 14th Sess., (Fla. 1865), at 58–59 (statements of reps. C.H. DuPont & A.J. Peeler).

49. *See* WILSON, *supra* note 48, at 96–100.

50. *See* H.R., Gen. Assemb., 14th Sess. (Fla. 1865).

51. *See* WILSON, *supra* note 48, at 98.

52. *Id.* at 99–100.

53. *See* WILSON, *supra* note 48, at 99; Richardson, *supra* note 45, at 373–74.

54. *See* GREEN & HÉBERT, *supra* note 31, at 67.

55. The 14th Amendment and the resulting Florida Constitution of 1868 overturned Black codes in theory, but had little practical impact on the legal, social, and political status of Black Floridians. *See generally* Jerrell H. Shofner, *The Constitution of 1868*, 41 FLA. HIST. Q. 356 (1963) (analyzing the racialized constitutional drafting tactics used to maintain political and social control over newly enfranchised Black persons in Florida).

56. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 46 (6th ed. 2008).

57. *See, e.g.*, *id.* at 47–51 (arguing that the Supreme Court's reluctance to strike down post-Reconstruction state racial regulations prolonged the systemic subjugation of formerly enslaved persons).

Additionally, states hastily erected new educational barriers to further limit the ability of newly freed Black Americans to become educated, thereby limiting full political and civic participation.[58] Undeterred, newly freed African-Americans created, financed, and sustained a vibrant educational network of Freedmen's schools with limited state or federal support.[59] Though the frequent target of vandalization and violence, Black schools served as a powerful and visible testament of the endurance of a Black educational and civil rights movement.[60]

Evolving from the legacy of Freedmen's schools, freedom schools have proven to be a powerful stalwart to the prevalence and permanence of educational restrictions. Although the Freedom School Movement "originated at the nexus of the struggles for liberation and full citizenship predicated upon an emancipatory literacy evident since the earliest days of enslavement," the operations of freedom schools have not been confined to a particular era in time.[61] During the 1960s Civil Rights Movement, youth leaders of the Student Nonviolent Coordinating Committee reinvigorated the notion of freedom schools to boycott segregated, underfunded schools and to educate themselves while incarcerated for protesting systemic discrimination.[62] Decades later, when their hard-fought gains earned the ire of legislators intent on reversing the educational progress following the *Brown v. Board of Education* ruling, freedom schools were again revived as a tool of resistance.[63]

Throughout the 1990s, Marian Wright Edelman shepherded the invigoration of the freedom-school model that focused on Black history, child growth and development, and education.[64] As the first Black woman to pass the bar exam in Mississippi, Edelman worked tirelessly to continue the tradition of liberatory education endemic to the freedom-school tradition by actively participating in the Mississippi Freedom Summer Project, a campaign responsible for spawning the first network of freedom schools in 1964.[65] In 2023, freedom

58. *See, e.g.*, *id.* at 81–85 (summarizing post-Reconstruction jurisprudence that legitimized race-based classifications in educational spheres).

59. GREEN & HÉBERT, *supra* note 31, at 15–32; Hale, *supra* note 35, at 3–4.

60. *See, e.g.*, Hale, *supra* note 35, at 7 (commenting on the 1964 bombing of a freedom school).

61. *Id.* at 1.

62. *Id.* at 2.

63. *Id*.

64. *Id*. at 7–11.

65. *Id*. at 7–8.

schools have again been resurrected in the wake of "anti-woke" educational restrictions to counter resurgent impediments to learning.[66]

Literacy has long served as a form of resistance, as well as an avenue to freedom. Accordingly, Black literacy has historically been considered dangerous, provoking a cyclical pattern of state-sanctioned censorship. Whereas anti-Black racism has been a consistent feature of the American experience, to which the educational context is no exception, so too has the extraordinary desire by Black Americans to defy antidemocratic efforts aimed at suppressing the access to knowledge.[67] The authoritarian motivations that animated antebellum and Jim Crow anti-literacy prohibitions remain ever-present in modern-day "anti-woke" laws. The following section examines contemporary iterations of anti-literacy laws as represented by "anti-woke" legislation, exploring how revitalized efforts to limit educational access and obstruct the truthful dissemination of information have re-emerged as a pressing civil rights issue.

## II. "ANTI-WOKEISM" AS MODERN-DAY ANTI-LITERACY LAWS

*History, despite its wrenching pain, cannot be unlived, but if faced with courage, need not be lived again.*
– Maya Angelou[68]

As explained by Professor Katheryn Russell-Brown, modern anti-literacy laws such as the Stop W.O.K.E. Act should be understood on a historical continuum.[69] Much as the earlier iterations of anti-literacy laws and restrictions on educational knowledge were a structural response to the advancement of civil rights and the end of legalized

66. Ileana Najarro, *Amid Public School Restrictions, 'Freedom Schools' in Florida Will Teach Black History*, EDUC. WEEK (June 5, 2023), https://www.edweek.org/teaching-learning/amid-public-school-restrictions-freedom-schools-in-florida-will-teach-black-history/2023/06.

67. GREEN & HÉBERT, *supra* note 31, at 2.

68. *Maya Angelou: 'On the Pulse of Morning*,*'* N.Y. TIMES, Jan. 21, 1993, at A14 (quoting Maya Angelou's speech at President Bill Clinton's inauguration in 1993). Well-respected for her bravery and literary excellence, Maya Angelou also bore the title of "most banned author in the US" as several conservative legislatures, like Alabama and Florida, banned her 1969 autobiography, *I Know Why the Caged Bird Sings*, from public school libraries and reading lists due to fears that her first-hand retelling of the racial oppression she faced throughout her life was "likely to corrupt minors." *See* New African, *Maya Angelou—The Most Banned Author in the US*, NEW AFR., (Aug. 5, 2014), https://herstroynewafricanmagazine.com/6173/ [https://perma.cc/FMH5-9GWN].

69. Katheryn Russell-Brown, *"The Stop WOKE Act": HB 7, Race, and Florida's 21st Century Anti-literacy Campaign*, UNIV. OF FLA. FAC. PUBL'N, 1, 2 (2022).

slavery, the enthusiasm and expediency of current "anti-woke" legislation mirrors earlier patterns of racial retrenchment.[70] The prominence and popularity of federal, state, and local actions broadly classified as "anti-CRT" or "anti-woke" measures are a response to the murder of George Floyd, the national protests and dialogue that followed, and the success of the Black Lives Movement.[71] The public outrage and racial reckoning that characterized the summer of 2020 saw unprecedented crowds taking to the streets.[72] In the two weeks following George Floyd's death, protestors held an average of 140 demonstrations a day across the United States as upward of 15 million Americans condemned the normalization of police brutality against Black individuals.[73]

As the nation began to confront its history of systemic racism, educators and school administrators engaged in parallel discussions interrogating the roles and responsibilities of teachers in preparing

70. *See, e.g.*, GREEN & HÉBERT, *supra* note 31, at 32–36 (discussing the white Southern opposition of freedom schools between 1865–1870).

71. *See* Wallace-Wells, *supra* note 6 (citing a conversation with UCLA and Columbia Law Professor Kimberlé Crenshaw in which she describes the growth in "anti-CRT" measures as "a post-George Floyd backlash"); Sarah Schwartz, *Who's Really Driving Critical Race Theory Legislation? An Investigation*, EDUC. WEEK (July 19, 2021), https://www.edweek.org/policy-politics/whos-really-driving-critical-race-theory-legislation-an-investigation/2021/07 [https://perma.cc/EZ45-DDHV] (quoting former Main State Representative Larry Lockman who stated that George Floyd's killing in Minnesota "was the spark" that prompted states to draft bans on critical race theory education). The Black Lives Matter movement predates the murder of George Floyd by seven years. In 2013, following the acquittal of George Zimmerman—the neighborhood watchman who shot and killed 17-year-old Trayvon Martin for looking "suspicious"—organizers created the Black Lives Matter movement as "an ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise." *Herstory,* BLACK LIVES MATTER (2024), https://blacklivesmatter.com/herstory/ [https://perma.cc/QVM3-EAFH]; *see also Trayvon Martin Shooting Fast Facts*, CNN (Feb. 14, 2024), https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html [https://perma.cc/Q7V9-HM9D].

72. *See* Larry Buchana et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/2WPH-TZL4].

73. *Id.* In the United States, Black people are killed by police at a rate that is double that of white people; in the twelve months preceding the publication of this article, 1,100 people—predominantly Black and Brown—have been killed by on-duty police officers. *See 1,137 People Have Been Shot and Killed by the Police in the Past 12 Months*, WASH. POST (Feb. 14, 2024), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/D9X4-472T].

students for a critical approach to race, social justice, and history.[74] Educators across the country curated new educational materials, developing new pedagogical strategies that emphasized the contributions of historically overlooked Black Americans and more robustly addressed topics related to diversity, equity, and inclusion (DEI).[75] Dr. Michael McFarland, President of the National Alliance of Black School Educators and superintendent of the Crowley Independent School District in Texas, stated at the time, "We can't control what happens with the police, but we can control what happens in our school systems."[76]

Sadly, Dr. McFarland's statement no longer holds true. Increasingly, educational decisions are not being exercised by teachers or those most vested in the welfare of children, but rather by lawmakers and lobbyists whose interests are less concerned with the accurate teaching of history.[77] The ability to exercise control over educational decisions on behalf of public school children has become a contentious political issue situated in a broader "culture war."[78] As with most wars,

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74. *See* Ernest Scheyder, *U.S. Schools Revamp Curricula in Response to Black Lives Matter*, REUTERS (Aug. 23, 2020), https://www.reuters.com/article/idUSKBN25H1EV/ [https://perma.cc/R5WJ-7HD2]; Gavin Furrey, *Political Responses to Black Lives Matter in Education*, 46 ETHNIC STUD. REV. 3, 3 (2023).

75. Scheyder, *supra* note 74; *see also* Furrey, *supra* note 74, at 8 (describing educators' attempts at integrating critical-race elements into pedagogical standards).

76. Scheyder, *supra* note 74.

77. *See* Press Release, Governor Ron DeSantis Appoints Six to the New College of Florida Board of Trustees (Jan. 6, 2023), https://www.flgov.com/2023/01/06/governor-ron-desantis-appoints-six-to-the-new-college-of-florida-board-of-trustees/ [https://perma.cc/T6BP-Q2JW]. Leading up to the launch of his presidential campaign, Florida Governor Ron DeSantis appointed Christopher Rufo, one of the most visible proponents of the "anti-wokeism" movement and author of the model bill for the Stop W.O.K.E. Act, to the Board of Trustees of the New College of Florida, a public liberal arts college. Rufo, a conservative activist with no experience in education policy, has been described as having "invented the conflict over critical race theory." *Id.*; *see also* Wallace-Wells, *supra* note 6 (quoting Christopher Rufo); Stephanie Saul et al., *DeSantis Takes On the Education Establishment, and Builds His Brand*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/us/governor-desantis-higher-education-chris-rufo.html [https://perma.cc/8GFX-6GD3] (discussing Governor DeSantis's long-term goal of eliminating diversity and equity programs at all education levels); Jocelyn Gecker, *How Ron DeSantis used Florida schools to become a culture warrior*, ASSOCIATED PRESS (Aug. 23, 2023), https://apnews.com/article/ron-desantis-education-gop-debate-723e18d19912b97696f3ad2c9d77e099 [https://perma.cc/NE4V-FVQN] (describing several other controversial policies endorsed by Governor DeSantis).

78. *See* Danielle Kurtzleben, *How Schools (But Not Necessarily Education) Became Central to the Republican Primary*, NPR (Dec. 20, 2023), https://www.npr.org/2023/12/20/1219337716/republican-candidates-education-schools-culture-war-issues [https://perma.cc/PRP6-HBEF]; *Vice President Harris Speaks Out*

the most vulnerable tend to suffer most and civic society struggles to survive.

At the most fundamental level, the true cost of these artificially created "culture wars" has been borne by both the students whose quality education has been sacrificed and the collective well-being of our democratic society. Ideals and instructions surrounding democratic citizenship are transmitted through political socialization—a process largely determined by an individual's experience and interactions with government authority.[79] The process, therefore, of becoming and perceiving oneself as a citizen is influenced as much by laws governing citizenship rights as an individual's social interactions with the state.[80] Neither political participation nor equal status under the law alone is capable of conferring an authentic sense of citizenship. The unequal treatment of citizens—whether through legalized racial segregation or the denial and delegitimization of a community's history and experiences—is a powerful form of pervasive, intergenerational personal and structural violence that has cotemporally undermined core democratic ideals of national citizenship and equality.[81] The proceeding section examines the authoritarianism inherent to "anti-woke" laws, specifically exploring how antidemocratic means have advanced the autocratic aims of prohibiting and punishing the acquisition of knowledge.

### *A. The Prohibition and Punishment of Knowledge*

The genesis of the Stop W.O.K.E. Act, which claims to give businesses, employees, children and families "tools to fight back against woke indoctrination," falsely intimates that educational restrictions and white-centered narratives of history promote democratic values and personal freedoms.[82] Though entitled the "Individual Freedom

*Against Florida Board of Education Over New Curriculum*, NBC NIGHTLY NEWS, (July 22, 2023), https://www.nbcnews.com/nightly-news/video/vice-president-harris-speaks-out-against-florida-board-of-education-over-new-curriculum-189072965863 [https://perma.cc/49VU-5ZNJ]; Tim Walker, *The Culture War's Impact on Public Schools*, NAT'L EDUC. ASS'N (Feb. 17, 2023), https://www.nea.org/nea-today/all-news-articles/culture-wars-impact-public-schools [https://perma.cc/C8Y2-CPXF].

79. *See* Danieli Evans, *Carceral Socialization as Voter Suppression*, 28 MICH. J. RACE & L. 39, 43 (2023).

80. *Id.* at 52.

81. *Id.* at 54–55.

82. Tom Hudson, *Behind Gov. DeSantis' Effort to 'Fight Back Against Woke Indoctrination,'* FLA. ROUNDUP (Dec. 17, 2021), https://www.wlrn.org/2021-12-17/behind-gov-desantis-effort-to-fight-back-against-woke-indoctrination [https://perma.cc/8WCY-AJF5]; Florida Governor Ron DeSantis, who has based his presidential campaign and largely staked his political future on his reputation as an

Act," both the history and contemporary consequences of anti-literacy laws and state-mandated limitations on learning demonstrate that such legislation advances neither societal nor personal progress.[83]

The Act draws inspiration from Executive Order (EO) 13950, which former President Donald Trump promulgated in late 2020.[84] Relying on EO 13950's list of "divisive" concepts, the Stop W.O.K.E. Act redefines unlawful discrimination and amends Florida's Educational Equity Act to prohibit all instruction that "espouses, promotes, advances, inculcates, or compels" any student to believe disfavored concepts, as listed by the state legislature, relating to systemic inequality, racial colorblindness, diversity and inclusivity, power and privilege, critical race theory, and historical oppression.[85] Many of these prohibited concepts are central to the ongoing national dialogue regarding the role of race in American society. Yet under these anti-literacy laws 3 million children and youth enrolled in Florida's K–12 public schools, nearly 65% of whom are non-white, are deprived of the opportunity to study racial discrimination.[86]

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"anti-woke" crusader, has referred to CRT as a "pernicious" ideology and "crap." *See* Brendan Farrington, *Florida Gov. DeSantis Signs Bill to Limit Discussion of Race*, ASSOCIATED PRESS, (Apr. 22, 2022), https://apnews.com/article/education-florida-discrimination-campaigns-presidential-elections-942f021c3070e7d1cdfb59d2351b6a75 [https://perma.cc/72MK-PBK4 ]; Brendan Farrington, *Desantis: Critical Race Theory Is "Crap," Vows to Fight It*, ASSOCIATED PRESS (Dec. 15, 2021), https://apnews.com/article/business-florida-race-and-ethnicity-racial-injustice-ron-desantis-e394f2e734729bce696dca90775835d2 [https://perma.cc/3H2N-C2EA].

83. *See* H.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022).

84. *See* Exec. Order No. 13950, 85 Fed. Reg. 60683, 60685 (Sept. 22, 2020). After its promulgation, a federal judge partially enjoined EO 13950 upon finding that the order was unconstitutionally vague and impermissibly infringed upon the First Amendment rights of advocacy groups. *See* Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 543 (N.D. Cal. 2020) ("[T]he Court agrees . . . that Sections 4 and 5 of the Executive Order are so vague that it is impossible for Plaintiffs to determine what conduct is prohibited."). Upon assuming office in January 2021, President Joe Biden immediately rescinded EO 13950 and replaced it with Executive Order 13985. *See* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

85. FLA. STAT. ANN § 1000.05(4)(a) (West 2022); H.B. 7, 2022 Leg. (Fla. 2022). Section 2(a) of the Executive Order lists a total of nine "divisive" topics related to race and sex, including, for example, that "the United States is fundamentally racist or sexist." Exec. Order No. 13950, 85 Fed. Reg. 60683, 60685 (Sept. 22, 2020).

86. *See* H.B. 7, 2022 Leg. (Fla. 2022); *see also* FLA. DEP'T OF PUB. EDUC., *Course Enrollment State Report, Survey 3, 2022-23*, https://www.fldoe.org/accountability/data-sys/edu-info-accountability-services/pk-12-public-school-data-pubs-reports/students.stml [https://perma.cc/K993-N627] (linking to demographic data about K–12 students in Florida).

The suppression of knowledge that has resulted from the Stop W.O.K.E. Act has primarily been achieved through two legal mechanisms: (1) creating a private right of action that permits employees, parents, and students to seek legal redress in the form of equitable relief, attorneys' fees, and costs and (2) strengthening the enforcement powers of the Florida Department of Education by granting it the authority to withhold funding from institutions that violate the Act.[87]

A third unofficial yet equally potent enforcement mechanism is the highly effective chilling effect that the law has had on educators and academic institutions.[88] The vague statutory language, in tandem with the punitive nature of the law, has prompted the wholesale removal of race-related educational content and material deemed controversial under the new legislation.[89] Fearful of attracting the ire of the Florida Board of Education or "anti-woke" parents, schools have swiftly moved to shutter or greatly reduce their diversity and inclusion programs.[90]

In June 2023, as schools were preparing for the start of the new academic year, Florida educators anxiously anticipated the effects of the state's most recent "anti-woke" law, Senate Bill (SB) 266.[91] Building upon the state's earlier anti-literacy efforts, SB 266 explicitly prohibits the use of state or federal funds "to promote, support, or maintain any programs or campus activities that. . . . advocate for diversity, equity, and inclusion."[92] The law provides little clarity in defining key terms of the provision, instead delegating to the State Board of Education and the Board of Governors the authority to enact rules and regulations.[93]

The same month that SB 266 went into effect, the State Board of Education approved revised academic standards governing the

87. § 1000.05(7)–(9).

88. *See* Daniel Golden, *Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching*, PROPUBLICA (Jan. 3, 2023), https://www.propublica.org/article/desantis-critical-race-theory-florida-college-professors [https://perma.cc/L6E9-UF62].

89. *See infra* Part III.A.

90. Janelle Griffith, *Florida Teachers Are Worried New Policies Could Get Them Fired—or Even Criminally Charged*, NBC NEWS (Aug. 16, 2023), https://www.nbcnews.com/news/us-news/florida-teachers-start-school-year-uncertainty-new-policies-take-effec-rcna99243 [https://perma.cc/XM9L-Y4JQ].

91. Peter Fleischer, *Florida Educators Wait for Change After Bill Defunds Diversity Programs*, WINK NEWS (May 22, 2023), https://winknews.com/2023/05/19/florida-educators-await-change-after-sb266/ [https://perma.cc/6SMJ-5V85].

92. S.B. 266, 125th Reg. Sess. § 4(2)(b) (Fla. 2023).

93. *Id.*

teaching of African American History.[94] The new standards were authorized over the objections of educators and civil rights organizations, including the NAACP Florida State Conference, which criticized the instructional changes as "omit[ting] or rewrit[ing] key historical facts about the Black experience."[95] The state's teacher union, representing approximately 150,000 teachers, characterized the revised educational standards as "a disservice to Florida's students."[96]

Among the most controversial aspects of revised instructional standards is the requirement that educational materials include "how slaves developed skills which, in some instances, could be applied for their personal benefit."[97] In accordance with the revised standards, Florida students will now also be taught that race massacres, such as the 1920 Ocoee Massacre (considered one of the state's deadliest examples of anti-black violence), involved "acts of violence perpetrated against and by African Americans."[98]

Outside of the passage of SB 266, the Florida Department of Education correspondingly sought to influence the development of an AP African American History course to align with the state's "anti-woke" policies.[99] The pilot course had been developed over a one-year period and "shaped only by the input of experts and long-standing AP principles and practices."[100] However, prior to its official release, Florida

94. News Serv. of Fla., *Florida's Black History Education Standards Were Approved Amid Criticism*, WUFT (July 19, 2023), https://www.wuft.org/news/2023/07/19/floridas-black-history-education-standards-were-approved-amid-criticism/ [https://perma.cc/8GD6-ZQZW]; *see also* Antonio Planas, *New Florida Standards Teach Students that Some Black People Benefited from Slavery Because It Taught Useful Skills*, NBC NEWS (July 20, 2023), https://www.nbcnews.com/news/us-news/new-florida-standards-teach-black-people-benefited-slavery-taught-usef-rcna95418 [https://perma.cc/3KTN-KGXC] (stating that African American history has only been part of Florida's curriculum since 1994).

95. News Serv. of Fla, *supra* note 94.

96. Antonio Planas, *supra*, note 94.

97. FLA. DEP'T OF EDUC., *supra* note 29, at 6.

98. *Id.* at 17; Isis Davis-Marks, *The Little-Known Story of America's Deadliest Election Day Massacre*, SMITHSONIAN MAG. (Nov. 13, 2020), https://www.smithsonianmag.com/smart-news/new-exhibition-florida-honors-victims-bloodiest-election-massacre-american-history-180976283 / [https://perma.cc/HJU9-XYJC].

99. Coll. Bd., *Advanced Placement Program Releases Official AP African American Studies Framework*, NEWSROOM (Feb. 1, 2023), https://newsroom.collegeboard.org/advanced-placement-program-releases-official-ap-african-american-studies-framework [https://perma.cc/MB4D-TJ98].

100. *Id.* Hundreds of college professors of African-American studies and high school social studies teachers from across the country actively participated in designing the framework for the pilot course. *Id.*

officials spent months privately pressuring the College Board to reconfigure the course to conform with state law, advising that the course's content "may not be permissible" in light of the state's "anti-woke" legislation.[101]

Despite reassurances by the College Board that the AP African-American History course had been developed free of government intrusion, the Florida Department of Education praised the Board for removing over a dozen topics that the state characterized "as conflicting with Florida law, including discriminatory and historically fictional topics."[102] Notwithstanding these significant changes, many state officials remained dissatisfied with the final proposed curriculum. After its official release, the Department described the content of the course as "inexplicably contrary to Florida law and significantly lack[ing] educational value," refusing to adopt the curriculum for Florida's nearly 900,000 high school-aged students.[103] The Department did, however, invite the College Board to "come back to the table" should they decide to revise the course to include "lawful, historically accurate content."[104]

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101. *See* Laura Meckler, *Florida Details Months of Complaints about AP African American Studies Course*, WASH. POST (Feb. 9, 2023), https://www.washingtonpost.com/education/2023/02/09/florida-ap-african-american-studies-complaints-college-board/ [https://perma.cc/3E7P-8WPT]; Letter from the Fla. Dep't of Educ. to Brian Barnes, Senior Dir. of the Coll. Bd. P'ship (Feb. 3, 2023) https://www.washingtonpost.com/documents/e7b20594-aae4-497c-8743-8cbeb83d4b1b.pdf?itid=lk_inline_manual_2 [https://perma.cc/4NXB-QD92].

102. Letter from the Fla Bd. of Educ. to Brian Barnes, Senior Dir. of the Coll. Bd. Fla. P'ship 3 (Feb. 7, 2023), https://www.washingtonpost.com/documents/e7b20594-aae4-497c-8743-8cbeb83d4b1b.pdf?itid=lk_inline_manual [https://perma.cc/SK8D-TWJJ]. At the urging of the Florida Department of Education, eliminated topics included "The Social Construct of Race," "African American Women's History and the Metalanguage of Race," "Intersectionality," "Afrocentricity," "Tools of Black Studies Scholars," "Incarceration, Abolition, and the New Jim Crow," "Reparations," "The Movement for Black Lives," and "Black Study and Black Struggle in the 21st Century." *Id.* at 4.

103. Letter from the Fla Bd. of Educ. to Brian Barnes, Senior Dir. of the Coll. Bd. Fla. P'ship 1 (Jan. 12, 2023), https://drive.google.com/file/d/1A7ooiX-5pyiCxxLbmrvyPKcD9rpo1u3H/view [https://perma.cc/V5KQ-866R]; *see also* Associated Press, *Florida Blocks High School AP African American Studies Class*, NBC NEWS (Jan. 19, 2023), https://www.nbcnews.com/politics/politics-news/florida-blocks-high-school-ap-african-american-studies-class-rcna66654 []. For Florida public high school enrollment data, see Fla Dep't of Public Educ., *Membership by School by Grade, Survey 2, 2022-23*, https://www.fldoe.org/accountability/data-sys/edu-info-accountability-services/pk-12-public-school-data-pubs-reports/students.stml [https://perma.cc/F2ZE-BQ65].

104. Letter from the Fla Bd. Of Educ. To Brian Barnes (Jan. 12, 2023), *supra* note 103, at 1.

This type of explicit anti-literacy legislation that denies students the learning of factual historical events has not been limited to K–12 educational settings, nor have the prohibited subjects been limited only to areas of race.[105] Legislation and policies targeting "divisive" topics have permeated the entire public educational system, spanning from elementary schools to higher education institutions.[106] The educational topics prohibited under these laws are broad and often so vague as to offer little guidance as to the specific type of conduct or speech that is regulated under the legislation.[107]

Forced to navigate the amorphous contours and vague language of "anti-woke" laws, administrators and educators have been placed in a near impossible situation in an already challenging environment.[108] Educators who fail to comply with the new academic requirements—which are so opaque as to be virtually indecipherable—face strict penalties, including possible termination.[109] Teachers and professors have responded to "anti-woke" educational prohibitions by leaving the profession and, in some cases, the state.[110] The mass

105. *See* Schwartz, *supra* note 71. An analysis of these laws broadly identifies five general categories of literary restrictions: (1) laws that prohibit the teaching of some or all of the "divisive" or "racist or sexist" concepts referenced in Executive Order 13950; (2) laws that impose restrictions on discussing race, gender, or other social identities without relying on the language from the executive order; (3) bans on "action civics" that prohibits students from participating in advocacy for course credit and limits how educators can teach current events; (4) "curriculum transparency" mandates that require schools to make teaching curriculum publicly available; and (5) explicit requirements that prohibit educators from expressing political or partisan views in the classroom. *Id.*

106. *See, e.g.*, Russell-Brown, *supra* note 69, at 19–30 (focusing on anti-woke legislation in higher education).

107. *See, e.g.*, Linda K. Wertheimer, *The 'Anti Woke' Legislation Making K–12 Teachers in New Hampshire Nervous*, BOS. GLOBE (Sept. 28, 2023), https://www.bostonglobe.com/2023/09/28/magazine/anti-woke-legislation-in-nh-schools [https://perma.cc/NR7Y-982S] (stating that one of teachers' biggest concerns about divisive concepts laws is vagueness).

108. *See id.*; *see also* Reshma Kirpalani & Hannah Natanson, *The Lives Upended by Florida's School Book Wars*, WASH. POST, (Dec. 21, 2023, 6:00 AM); Megan Zahneis & Audrey Williams June, *In These Red States, Professors Are Eyeing the Exits*, CHRON. HIGHER EDUC. (Sept. 7, 2023); Greg Sargent, *Fed-up Teachers in Tennessee Find a Novel Answer to Anti-Woke Hysteria*, WASH. POST (July 27, 2023), https://www.washingtonpost.com/opinions/2023/07/27/tennessee-teachers-lawsuit-antiwoke-restrictions-race-slavery/ [https://perma.cc/DST8-K9PJ].

109. *See* Juliet Dee, *Teaching "Divisive Concepts" Interfere with Students' Right to Know?*, 13 AAUP J. ACAD. FREEDOM 1, 8 (2022).

110. *See* Khaleda Rahman, *Florida Combats Colossal Teacher Shortage*, NEWSWEEK (Apr. 12, 2023), https://www.newsweek.com/florida-combats-colossal-teacher-shortage-1793928 [https://perma.cc/QW6F-4DG3] (citing data from the Florida Education Association that the number of teacher vacancies in Florida has more

exodus of educators from their professions and respective communities ultimately contributes to the decay, delegitimization, and the hyper politicization of teaching.

### *B. The Authoritarianism Inherent to Anti-Literacy Legislation*

The right to access an equal and adequate education free of government interference is central to the very foundation of a constitutional democracy.[111] However, imbued in anti-literacy laws is a desire to use democratic institutions and processes to advance patently anti-democratic ambitions. Anti-literacy laws are both a function of and a mechanism for minority rule. Much as the United States was founded as a racial oligarchy in which only 6% of the population enjoyed citizenship rights,[112] state legislators today are hardly representative of their constituents.[113] Uncontrolled gerrymandering,[114] the proliferation of voter suppression laws,[115] the systematic neutering of voter rights protections,[116] and an influx of nearly uncontrolled and unregulated spending in elections by powerful individuals and

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than doubled since Governor DeSantis took office, leading to the "worst shortage that Florida has ever seen"); *see also* Margot Susca et al., *Why Faculty Members Are Fleeing Florida: Dismay Over the Academic Climate Has Led to a Wave of Resignations*, CHRON. OF HIGHER EDUC. (Dec. 6, 2023), https://www.chronicle.com/article/why-faculty-members-are-fleeing-florida [https://perma.cc/P2PH-59ZU] (describing data from the State University System of Florida that indicates that nine of the twelve public institutions in the state experienced "significant spikes" in faculty resignations in 2022); Stephanie Saul, *In Florida's Hot Political Climate, Some Faculty Have Had Enough*, N.Y. TIMES (Dec. 3, 2023), https://www.nytimes.com/2023/12/03/us/florida-professors-education-desantis.html [https://perma.cc/3DH7-4Y2S] (describing the recruitment and retention challenges of Florida universities, particularly with respect to faculty of color).

111. Black, *supra* note 16, at 1031 (describing how "the right to education permeates the very fabric of our constitutional democracy").

112. Steven A. Ramirez & Neil G. Williams, *Deracialization and Democracy*, 70 CASE W. RSRV. L. REV. 81, 88 (2019).

113. George Ingram & Annababette Wils, *Misrepresentation in the House of Representatives*, BROOKING INST., (Feb. 22, 2017), https://www.brookings.edu/articles/misrepresentation-in-the-house/ [https://perma.cc/XC7A-FF4F] (finding that in red states, for example, Republicans garnered 56% of the vote but 74.6% of representation).

114. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (concluding that partisan gerrymandering is a nonjusticiable political question).

115. *See* NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA 231 (2017) (noting over 180 voter suppression laws introduced after the 2010 mid-term elections).

116. Shelby County v. Holder, 570 U.S. 529, 557 (2013) (invalidating a key provision of the Voting Rights Act).

corporations[117] have all ensured that representative democracy is absent from most state houses.[118]

Florida lawmakers, for example, are 71% Republican, despite Republicans making up only about one-third of state voters.[119] The Florida House and Senate are 66% and 71% white, respectively, although the state has one of the most racially and ethnically diverse electorates in the nation.[120] Yet these very same state officials are responsible for the proliferation of anti-literacy laws that target the suppression of knowledge and dilute the educational quality of public school students.

Further skewing the participatory democratic framework is the exploitation of parental rights arguments to justify "anti-woke" educational restrictions. Such arguments have operated to elevate the parental rights of a few over the whole, often manifesting in educational policy decisions that disadvantage and disempower children of color.[121] For example, although the 14th Amendment has been interpreted to require states that establish a public school system to guarantee children equal access to education, "anti-woke" legislation operates to functionally require children and their families to meet a high burden of proof to demonstrate a constitutional violation demanding judicial intervention.[122] Despite having been promoted as advancing parental rights, such anti-literacy laws have the effect of disadvantaging children and families by requiring them to expend significant

117. *See* Citizens United v. FEC, 558 U.S. 310, 342 (2010) (holding that corporations enjoy the same free-speech rights as individuals; overruling earlier precedent that allowed prohibitions on independent expenditures by corporations); McCutcheon v. FEC, 572 U.S. 185, 227 (2014) (ruling that limits on aggregate federal campaign contributions violate the First Amendment).

118. *See generally* GILDA DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA (2020) (exploring traditional and modern methods of quelling democratic participation via state voter suppression and dilution).

119. Mark Harper, *Despite Minority Gains, 2023 Florida Legislature Remains Overrepresented by White Males*, DAYTONA BEACH NEWS-J. (Jan. 3, 2023), https://www.news-journalonline.com/story/news/state/2023/01/03/florida-legislature-remains-majority-white-male/69740069007/ [https://perma.cc/6G8Y-P7SQ].

120. *Id.*; Susan MacManus, *Florida's Changing Electorate: More Racially/Ethnically and Age Diverse*, J. JAMES MADISON INST., Fall/Winter 2017, at 12, 12.

121. *See* Taylorann Vibert, *UConn Law Symposium Explores the Role of Parental Rights*, UCONN TODAY, (Apr. 7, 2023), https://today.uconn.edu/2023/04/uconn-law-symposium-explores-the-role-of-parental-rights/# [https://perma.cc/U796-GK4Z] (explaining that parental rights must be assessed not only within the context of the best interest of the children, but also within the interests of society more broadly).

122. *See infra* Part IV (discussing the existing legal barriers to challenging educational restrictions, including "anti-woke" laws, under the Fourteenth Amendment).

resources to navigate a cumbersome legal process to ensure they receive the high-quality public education to which they are entitled.[123] For school-aged children, where time is of the essence, the denial of their constitutional "right to receive information and ideas"—for which no satisfactory or timely legal remedy may exist—can have enormous short and long-term consequences.[124]

While erecting barriers to students and families, the elected officials responsible for enacting anti-literacy legislation have simultaneously been shielded from accountability through the invocation of legislative immunity.[125] For example, in *Pernell v. Florida Board of Governors of the State Univ*ersity *System*, the Eleventh Circuit Court of Appeals quashed the discovery requests of challengers of the Stop W.O.K.E. Act who sought to subpoena legislators and compel evidence of their motivations in enacting the law.[126] In contradicting decades of legal precedent by holding that legislative privilege is absolute, the court precluded the challengers from relying on evidence of legislative intent and historical background analysis to demonstrate the Act's discriminatory purpose, such as drawing analogies to a nineteenth-century felon disenfranchisement law that had the specific purpose of denying Black citizens the ability to vote.[127] The court justified its decision on the grounds that the judiciary should refrain from interfering with matters considered to be traditionally within the domain

123. *See* Gecker, *supra* note 77 (describing how state lawmakers, including Florida Governor Ron DeSantis, have framed "anti-woke" educational policies within a supposed "parental rights" movement).

124. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969).

125. *See, e.g.*, Pernell v. Fla. Bd. of Governors of the State Univ. Sys., 84 F.4th 1339, 1341 (11th Cir. 2023) (involving a First Amendment challenge to the Stop W.O.K.E. Act).

126. *Id.* The challengers are a group of educators and students from Florida public universities, including one constitutional law professor and several race and gender studies professors. Complaint at 1–2, Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218 (N.D. Fla. 2022) (No. 4:22-cv-304). The challengers allege that the Stop W.O.K.E Act is a form of "racially motivated censorship," a civil rights violation under 42 U.S.C. § 1983, with the purpose and effect of stifling "widespread demands to discuss, study, and address systemic inequalities, following the nationwide protests that provoked discussions about race and racism in the aftermath of the murder of George Floyd." *Id.*

127. *See Pernell*, 83 F.4th at 1343–44; *but see* United States v. Gillock, 445 U.S. 360, 373 (1980) (holding that legislative privilege is qualified and must yield in the face of "important federal interests"); *see also* Hassan Kanu, *Lawmakers Get Broad Shield in Challenge to Florida's 'Anti-Woke' Law*, REUTERS (Nov. 2, 2023, 4:27 PM), https://www.reuters.com/legal/government/column-lawmakers-get-broad-shield-challenge-floridas-anti-woke-law-2023-11-02/ [https://perma.cc/JBQ6-6YUC].

of state legislatures.[128] This ruling elevates an already steep bar for the plaintiffs by hindering their ability to employ the discovery mechanisms typically used to obtain probative evidence to establish the discriminatory nature of laws.[129]

While pending litigation has caused the many "divisive concepts" laws to at least be partially enjoined, these anti-literacy measures have proven to be both divisive and deeply destructive to the democratic fabric of our society.[130] The litigation surrounding the Stop W.O.K.E. Act and analogous legislation has sowed chaos, confusion, and generalized fear by implanting authoritarian policies in school districts across the county that precipitate speech censorship and intellectual suppression. As alleged by students and teachers in states with enacted "anti-woke" restrictions, the inherent anti-literacy design of these laws deprives public school youth of "the information, ideas, and skills—analytical thinking, reasoned analysis, historical understanding, debate—that are central to any concept of civic education in a democratic system."[131]

Indicative of the authoritarian aspects of "anti-woke" laws are their design to broadly censor speech and limit knowledge.[132] Deliberative democracy requires that decisions be the product of fair and

128. *Pernell*, 84 F.4th at 1345; Kanu, *supra* note 127.

129. *See Pernell*, 84 F.4th at 1352–54 (Pryor, J., dissenting) (noting that evidence from the historic record, including the state's lengthy histories of Jim Crow and other government-sanctioned discrimination, may very well be inadmissible under these new legal standards). Unlike the educational restrictions challenged in *Pernell*, the 11th Circuit has been far less tolerable of "anti-woke" censorship that targets companies instead of schools. *See* Honeyfund.com v. DeSantis, No. 22-13135, 2024 U.S. App. LEXIS 5193, at *6 (11th Cir. Mar. 4, 2024). In *Honeycomb.com*, the court issued a preliminary injunction halting enforcement of the Stop W.O.K.E. Act against companies engaged in DEI trainings. *Id.* at *4, *21. In rejecting Florida's "latest attempt to control speech by recharacterizing it as conduct," the court found that the Act's unconstitutional viewpoint-based restriction on ideas deemed divisive by the State (e.g., race, sex, etc.) amounted to "the greatest First Amendment sin." *Id.* at *3–4, *7. At the time of writing, the injunction remains in place pending a final judgment on the merits of the complaint. *Id.* at *3, *23.

130. *See, e.g.*, *Pernell*, 641 F. Supp. 3d at 1218, 1290 (halting enforcement of the Stop W.O.K.E. Act against post-secondary professors because "the First Amendment does not permit the State of Florida to muzzle its university professors, impose its own orthodoxy of viewpoints, and cast us all into the dark").

131. Complaint at 4, Tenn. Educ. Ass'n. v. Reynolds, No. 3:23-cv-00751 (M.D. Tenn. July 25, 2023).

132. *See Pernell*, 641 F.Supp.3d at 1218, 1229 (describing the Stop W.O.K.E. Act as "positively dystopian").

reasonable discussion and debate amongst all citizens.[133] In particular, dialogue and tolerance are critical to a pluralistic and inclusive democracy, therefore making the freedom of expression an essential condition for both political liberalism and human dignity and a core principle of liberal constitutionalism.[134] The rise of legislation that suppresses knowledge of disfavored viewpoints also engenders an intolerance for divergent thoughts and ideas, denigrating the "marketplace of ideas" on which democracies have historically thrived and augmenting the unprecedented global experience of democratic decline.[135]

Furthermore, social intolerance is strongly correlated to antidemocratic values and cultural, ethnic, and racial prejudice have significant political implications.[136] Resistance to pluralism, as expressed through exclusionary rhetoric directed toward non-white groups, is connected to lower baseline support for democracy.[137] Social prejudice produces greater receptivity to nondemocratic alternatives of governance, resulting in greater acceptance of antidemocratic values such as limits on free speech, support for political violence, restricted access to political representation, and the curtailment of the rights of disfavored community members.[138]

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133. *See* Joseph Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102, 105 (Robert A. Goldwin & William A. Schambra eds., 1980).

134. In his 1941 State of the Union Address, President Franklin D. Roosevelt described four "fundamental freedoms" that should govern the post-War period and be available to all; "Freedom of speech and expression everywhere in the world" was the first fundamental freedom referenced in his speech. Franklin D. Roosevelt, President, State of the Union Address to Congress (Jan. 6, 1951).

135. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes. J., dissenting). Justice Holmes is credited with the "marketplace of ideas" concept that has become the dominant theory for free-speech analysis. *See also* McCreary County v. Am. Civ. Liberties Union of Ky., 545 U.S. 844, 883 (invoking the phrase the "marketplace of ideas" to strike down a religious display of the Ten Commandments in front of a courthouse); SARAH REPUCCI & AMY SLIPOWITZ, THE GLOBAL EXPANSION OF AUTHORITARIAN RULE 1 (2022) (observing global democratic decline).

136. *See* Steven Miller & Nicholas Davis, *The Effect of White Social Prejudice on Support for American Democracy*, 6 J. RACE, ETHNICITY, & POLS. 1, 8 (2020) (noting the correlation between tolerance and democratic support); Peter Kivisto & Andrey Rezaev, *Racial Democracy, Multiculturalism, and Inequality*, *in* HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS 171, 172 (Pinar Batur & Joe R. Feagin eds., 2018) (denoting class, gender, and race as the three principal fault lines used to define the boundaries of inclusion in Western democracies),

137. *See* Miller & Davis, *supra* note 136, at 3–4.

138. *See id.* at 14–15.

Central to democratic governance is the principle that the freedom of thought and speech are "indispensable to the discovery and spread of political truth."[139] Government-sanctioned suppressions of knowledge are patently antithetical to democratic values and notions of state and national citizenship. Fundamentally, democratic citizenship demands political equality.[140] Political equality, in turn, requires that all members of a democratic society be entitled to equal respect and concern—an essential quality of social and political belonging.[141] Importantly, political equality is what differentiates democratic government from authoritarian domination.[142]

## III. MEASURING THE EARLY EFFECTS OF THE STOP W.O.K.E. ACT

The Stop W.O.K.E Act, though still in its nascency, has inspired a proliferation of similar anti-literacy laws across the country. This section examines the pernicious and contagious effects of the Stop W.O.K.E. Act within its broader significance in galvanizing racial retrenchment efforts in both law and society.

### *A. The Contagion Effect*

Critically, the harmful effects of Stop W.O.K.E. Act have not been limited within the borders of Florida, serving as a model for other states eager to enact similar measures.[143] Within the last three years, eighteen state legislatures have successfully passed laws prohibiting instruction on topics related to race and racism.[144]

To circumvent allegations of blatant censorship, states have employed a tactic of passing "anti-woke" measures jointly with other forms of legislation or as "emergency" measures. For example, Oklahoma initially proposed House Bill (HB) 1775 in 2021 as an

139. Whitney v. California, 274 U.S. 357, 375 (1927).

140. Evans, *supra* note 79, at 43; *see also* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 9–10 (1994) (arguing that minority interests are not adequately represented in democratic systems).

141. *See* Evans, *supra* note 79, at 50–52.

142. *See* Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 609–10 (2007).

143. Eric Kelderman, *The Plan to Dismantle DEI: Conservatives Take on Colleges' "Illiberal" Bureaucracy*, CHRON. OF HIGHER EDUC. (Jan. 20, 2023), https://www.chronicle.com/article/the-plan-to-dismantle-dei. [https://perma.cc/5DVN-AQM3].

144. *Critical Race Theory Ban States 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/critical-race-theory-ban-states [https://perma.cc/LME5-DFW2].

emergency measure to provide medical preparedness for schools.[145] However, an eleventh-hour revision of the bill substantively altered its purpose to prohibit the teaching of "divisive concepts" related to race and sex.[146] When questioned about the law's dramatic revisions, bill sponsor Senator David Bullard referenced similar legislative measures in Florida, Texas, and Iowa but offered no pedagogical evidence of the "enormous effects" of "indoctrination" cited to justify the revisions.[147] During debate and discussion before the Oklahoma Senate, Senator Bullard further confirmed that the substitution was not made at the behest of parents.[148] Oklahoma City Public Schools Superintendent Sean McDaniel requested that Governor Kevin Stitt veto the bill, describing it as "a solution looking for a problem which does not exist."[149] Despite the concerns voiced about the process and content of HB 1775, Governor Stitt swiftly signed the bill into law in May 2021.[150]

New Hampshire quickly followed suit by passing its own "divisive" concepts law in 2021, HB 2.[151] Unable to pass "anti-woke" legislation as a standalone bill, the state enacted the "Right to Freedom from Discrimination in Public Workplaces and Education" as an

145. H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021). For a comprehensive discussion surrounding the legislative process involving the enactment of HB 1775 and its orientation within the broader national movement against the teaching of critical race theory, see generally Jennie A. Hill, *Legitimate State Interest or Educational Censorship: The Chilling Effect of Oklahoma House Bill 1775*, 75 OKLA. L. REV. 385 (2023).

146. Hill, *supra* note 145, at 385.

147. *Id.* at 386 (quoting statement of Sen. Bullard).

148. *Id*. at 387 (citing statement of Sen. Bullard).

149. Nuria Martinez-Keel & Carmen Forman, *Bill Forbidding Schools from Teaching Critical Race Theory Divides Oklahoma Educators, Politicians*, OKLAHOMAN (May 6, 2021), https://www.oklahoman.com/story/news/education/2021/05/06/Oklahoma-bill-banning-critical-race-theory-in-schools-divides-educators/4944150001/ [https://perma.cc/P2PE-AGUV].

150. Storme Jones, *Gov. Stitt Signs Bill Limiting Race Curriculum from Kindergarten to College into Law*, NEWS ON 6 (May 7, 2021), https://www.newson6.com/story/6095b2398bc26a0bb7202d6b/gov-stitt-signs- bill-limiting-race-curriculum-from-kindergarten-to-college-into-law [https://perma.cc/S725-YLR5]. The Lawyers' Committee for Civil Rights Under Law, the American Civil. Liberties Union, and the American Civ. Liberties Union of Oklahoma have challenged the constitutionality of HB1775 as an impermissible restriction on speech and as discriminate on the basis of race in violation of the First and Fourteenth Amendments, respectively. Black Emergency Response Team v. Drummond, No. CIV-21-1022-G, 2023 U.S. Dist. LEXIS 185261, at *1 (W.D. Okla. 2023).

151. Right to Freedom from Discrimination in Public Workplaces and Education, H.B. 2, 2021 Leg., Reg. Sess §§ 297–98 (N.H. 2021); *see also* Wertheimer, *supra* note 107 (assessing the effects of H.B. 2 on K–12 teachers).

unrelated provision attached to the state's budget bill.[152] Within months of HB 2's enactment, the New Hampshire Education Department established an online reporting system for parents to file complaints against teachers.[153] Moms for Liberty, a conservative parental group, immediately offered a $500 bounty to the first person to catch a teacher violating the new law.[154]

Tennessee legislators also enacted their own "anti-woke" law in 2021 that broadly prohibits undefined "divisive" concepts, as modeled by former President Trump's Executive Order.[155] State representative and cosponsor of the bill, John Ragan, defended the legislation as necessary to prevent "seditious charlatans" and "useful idiots peddling identity politics" from "destroy[ing] our heritage of ordered, individual liberty under the rule of law, before our very eyes."[156] In support of these stated policy aims, the law dramatically alters the state's educational standards and empowers the Tennessee Education Commissioner to sanction schools and districts that promote concepts about racism, sexism, and other social issues inherent in our nation's history.[157] As with similar analog "anti-woke" legislation passed in other

152. N.H. DEP'T EDUC., Right to Freedom from Discrimination in Public Workplaces and Education, https://www.education.nh.gov/who-we-are/deputy-commissioner/office-of-governance/right-to-freedom-from-discrimination [https://perma.cc/RL5R-6947]. The representative who unsuccessfully cosponsored the state's initial "anti-woke" law cited former President Trump's Executive Order as the impetus for the failed legislation. *See* Wertheimer, *supra* note 107 (sharing the details of a breakfast meeting with N.H. Rep. Glenn Cordelli).

153. *See* N.H. DEP'T EDUC., *supra* note 152 (linking to the state's complaint-filing system); Sarah Gibson, *N.H Education Department Launches System for Parents to Lodge Discrimination Complaints Against Teachers,* N.H. PUB. RADIO (Nov. 10, 2021), https://www.nhpr.org/nh-news/2021-11-10/nh-discrimination-teachers-system# [https://perma.cc/9FPD-FB4R] (discussing the HB 2 reporting system following the website's launch).

154. Moms for Liberty NH (@Moms4LibertyNH), TWITTER (Nov. 12, 2021, 6:28 AM), https://twitter.com/Moms4LibertyNH/status/1459166253084467205 [https://perma.cc/AEM7-UC68].

155. Prohibited Concepts in Instruction, TENN. CODE ANN. § 49-6-1019 (2021); *see also* Marta W. Aldrich, *Tennessee Governor Signs Bill Restricting How Race and Bias Can Be Taught in Schools*, TENNESSEAN (May 25, 2021), https://www.tennessean.com/story/news/education/2021/05/25/tennessee-critical-race-theory-governor-signs-bill-restricting-how-race-and-bias-can-taught-schools/7427131002/ [https://perma.cc/Q8QF-RDJV]; Sargent, *supra* note 108.

156. John Ragan, *House Education Administration Committee: HB0580*, TENN. GEN. ASSEMB. (Apr. 3, 2021), https://tnga.granicus.com/player/clip/24828.

157. *See* Tennessee Department of Education Rule 0520-12-04 (2021) (effectuating the enforcement of TENN. CODE ANN. § 49-6-1019 (2021)).

states, the Tennessee law has also been challenged as patently unconstitutional.[158]

Likewise, Texas Governor Greg Abbott publicly vowed to "abolish" critical race theory in public classrooms, prompting the passage of SB 3 in 2021.[159] The law prevents teachers from being compelled to discuss any "widely debated and currently controversial issue of public policy or social affairs."[160] And, although the law fails to define the criteria that actually qualify an issue as "controversial," the legislative intent makes clear that any topics related to race or racism are to be struck from the public school curriculum.[161] This includes discussion related to the institution of slavery, the eugenics movement, and even the accomplishments of Dr. Martin Luther King Jr.[162] Instructors who reference such "controversial" topics are legally bound to present the information neutrally without any "deference to any one point of view."[163] In 2023, the Texas legislature further expanded the state's "anti-woke" legislation to extend to higher education institutions within the state.[164] Lieutenant Governor Dan Patrick praised the passage of the legislation as "the strongest pushback on woke policies in higher education nationwide."[165]

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158. *See* Complaint at 2, Tenn. Educ. Ass'n v. Reynolds, No. 3:23-cv-00751 (M.D. Tenn. July 25, 2023) (alleging that the State's "Prohibited Concepts Ban" is unconstitutionally vague in violation of the Fourteenth Amendment).

159. S.B. 3, 87th Leg., 2d Spec. Sess. (Tex. 2021); Brian Lopez, *Republican Bill That Limits How Race, Slavery and History Are Taught in Texas Schools Becomes Law*, TEX. TRIB. (Dec. 2, 2021), https://www.texastribune.org/2021/12/02/texas-critical-race-theory-law/ [https://perma.cc/5MLW-NUWA].

160. S.B. 3, 87th Leg., 2d Spec. Sess. (Tex. 2021), § 5 (codified as amended at TEX. EDUC. CODE §28.0022).

161. *See id.*; *see also* Kate McGee, *Texas" Critical Race Theory" Bill Limiting Teaching of Current Events Signed into Law*, TEX. TRIB. (June 15, 2021), https://www.texastribune.org/2021/06/15/abbott-critical-race-theory-law/ [https://perma.cc/MB86-ZQCY] (citing the reactions of educators who starkly oppose the legislation).

162. *See* Sharon Zhang, *Texas Senate Passes Bill Removing MLK, Suffrage from Required Curriculum*, TRUTHOUT (July 19, 2021), https://truthout.org/articles/texas-senate-passes-bill-removing-mlk-suffrage-from-required-curriculum/ [https://perma.cc/SSB2-HT95].

163. *Id.*

164. *See* S.B. 16, 88th Leg., Reg. Sess. (Tex. 2023), § 1 (codified as amended at TEX. EDUC. CODE § ch.50) (extending "anti-woke" policies to post-secondary institutions), S.B. 17, 88th Leg., Reg. Sess. (Tex. 2023) (codified as amended at TEX. EDUC. CODE 51.3525) (outlawing DEI policies in higher education).

165. *See* Jonathan Richie, *Slate of 'Anti-Woke' Bills Passes TX Senate*, DALL. EXPRESS (Apr. 22, 2023), https://dallasexpress.com/state/slate-of-anti-woke-bills-passes-tx-senate/ [https://perma.cc/ZG4J-BEBD] (quoting Lieutenant Governor Patrick). In contrast to conservative government officials, those actually affected by

Antithetically, proponents of "anti-woke" and "anti-CRT" measures insist that race-related educational restrictions are the most effective means for promoting "the search for truth and knowledge."[166] Yet at the same, these laws severely skew the factual accuracy of American history's most pivotal events, prohibit students from learning the accomplishments of its most influential figures, and bar dialogue concerning how these events have shaped our modern culture. Despite the contentions of lawmakers who wish to deny that the most critical components of the nation's existence have been heavily racialized, most American adults maintain a race-conscious cultural awareness and understand that "the legacy of slavery continues to have an impact of the position of [B]lack people in American society today."[167] Indeed, the most common justification for placing history in public school curricula is that it necessarily informs the concept of national identity, thereby making the subject foundational to the preservation of good citizenship and democratic functionality.[168] Thus, "anti-woke" measures that seek to deter future generations from learning race-related concepts deprive Americans of their right to maintain and exercise their status as informed democratic citizens.

### *B. Racial Retrenchment Realized*

Consistent among the contagion of proposed and enacted "anti-woke" laws is a palpable hostility towards racial justice imperatives broadly and CRT more specifically.[169] Developed in the late 1970s

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Texas's new policies believe that state legislators make "Texas dumber each legislative session" and that "Texas is trying to outdo Florida and Tennessee for the absolute worst number of garbage bills passed in a year". *Id.*

166. *See* NFC Freedom v. Diaz, No. 4:23cv360-MW/MAF, 2023 U.S. Dist. LEXIS 197500, at *25 (N.D. Fla. Nov. 3, 2023) (referencing Florida's motives in prohibiting DEI in higher education institutions).

167. Juliana Menasce Horowitz et al., *Race in America 2019*, PEW RSCH. CTR. (Apr. 9, 2019), https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019/ [https://perma.cc/N74P-7R3W].

168. *See* Peter N. Stearns, *Why Study History*, AM. HIST. ASS'N. (1998), https://www.historians.org/about-aha-and-membership/aha-history-and-archives/historical-archives/why-study-history-(1998) [https://perma.cc/BBL3-5SUZ].

169. This Article is not able to do justice to the impressive body of CRT scholarship that has been developed over a period of decades. Only brief context is offered here to refute the distortion and disinformation of CRT propagated by "anti-woke" lawmakers. For further discussion about the misappropriation of the term "CRT" for political aims, see Kimberlé Williams Crenshaw, *This Is Not a Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. REV. 1702, 1706–07 (2022) (describing the attack on critical race theory as a concerted disinformation campaign situated within a broader attempt to discredit and undermine the project of antiracism

and early 1980s in response to the rise in prominence of colorblindness, critical race theory offers a legal framework that recognizes the endemic qualities of racism.[170] Though not susceptible to a singular or simplistic definition, it has been generally used to describe a genre of critical-legal scholarship that focuses on the relationship between law and subordination in American society.[171] Critical race theory holds that the law is more than simply a reflection of pre-existing racialized relations and encourages the interrogation of race and racism to potency and privilege through the law.[172] As described by Law Professor Francisco Valdes, CRT involves a "cross-disciplinary re/evaluation of historic group experiences with, and struggles against, varied but similar forms of privilege and prejudice."[173] From this perspective, the law is intrinsic to a broader social fabric that functions to fortify existing racial structures.[174] In positing that law is not race-neutral, CRT scholars acknowledge that the law can facilitate racialized policies that

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and social justice); Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1253–1352 (2011) (explaining the history of CRT to understand its relationship to the current discourse on race and racism); KEVIN D. BROWN, NEPC REVIEW: HOW TO REGULATE CRITICAL RACE THEORY IN SCHOOLS: A PRIMER AND MODEL LEGISLATION 6–8 (2021) (finding that misleading right-wing talking points have led to a generalized fear of "widespread forced indoctrination," even though such indoctrination does not exist in fact); Khiara M. Bridges, *Language on the Move: "Cancel Culture," "Critical Race Theory," and the Digital Public Sphere*, YALE L. J. F. (2022) (examining the manipulation of the term "critical race theory" by political actors in the digital-public sphere).

170. *See* KIMBERLÉ CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xvi–ii (1995); Kevin Brown, *Critical Race Theory Explained by One of the Original Participants*, 98 N.Y.U. L. REV. ONLINE 91, 99 (2023); *see also* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3–13 (2017) (summarizing the foundational and historical aspects of CRT).

171. KIMBERLÉ CRENSHAW ET AL., *supra* note 170 at xiii–xxxii, at 9–31 (crediting Kimberlé Crenshaw with coining the term "critical race theory," who has described CRT as a verb, and not a noun); *see also* Brown, *supra* note 170, at 97 (defining CRT as "a framework that helps us understand how, as a result of our society's history of racial discrimination, race and racism continue to shape the meaning of racial inequality in our dominant culture, our concepts of equality in law, and our institutional, governmental, and private practices").

172. Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1216–17; Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333–36 (2006).

173. Francisco Valdes, *Outsider Scholars, Legal Theory & Outcrit Perspectivity: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831, 835 (2000).

174. *See* Harris, *supra* note 172, at 1216–17; Mutua, *supra* note 172, at 335–36.

are often typified by a predictable pattern of racial reform and racial retrenchment.[175]

Indeed, the vigor and success of the recent "anti-woke" movement fits squarely within the traditional paradigm for diluting civil rights gains at the very moment they begin to alter existing social hierarchies.[176] That is, much as earlier iterations of anti-literacy laws were a structural response to educational advancements during the historical fight for racial equality under the law, contemporary "anti-woke" laws are systematic retaliations against the social and academic achievements of peripheral groups made during the twenty-first century. These reanimated educational restrictions synchronize with classic patterns of racial retrenchment, made possible by a modern Supreme Court that remains keen on rejecting race-conscious remedies and that is eager to embrace colorblind constitutionalism in spite of its racialized history and tradition.[177]

The jurisprudential shift toward colorblindness as the preferred method for addressing racial discrimination began during the Burger Court (1969–1986), accelerated rapidly under the Rehnquist Court (1986–2005), and even more so under the Roberts Court (2005–Present).[178] Conceptually, colorblindness privileges individual self-

175. *See, e.g.*, Harris, *supra* note 172, at 1216 (stating that racialized policies have "always been directed at the entire edifice of American law and legal culture."); Mutua, *supra* note 172, at 336 (arguing that modern legal colorblindness reanimates the law's traditionally "blunted efforts to dismantle the racial caste system"); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 17 (1992) (rejecting a theory of "racial neutrality" because it presumes that discrimination is but "a thing of the past"); Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 113–15 (2004) (using historical attitudes toward racial literacy to inform contemporary versions of racialized hierarchies).

176. *See* Erin M. Carr, *The "History and Tradition" of the Sanctification of Structural Violence: A Review of the Cyclical Corrosion of Constitutional Protections*, 27 J. GENDER, RACE & JUST. 1, 5 (2024).

177. *See id.* at 85–86 (describing the Court's reluctance "to consider the nation's history and traditions from the perspective of those peripheral groups who have been most harmed"); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 68 (1991) (explaining how a colorblind interpretation of the Constitution perpetuates the advantage of white people over others); *see also, e.g.*, Washington v. Davis, 426 U.S. 229, 248 (1976) (upholding a facially race-neutral test for police recruiting despite its disparate racial impact); Arlington Heights v. Metro. Hous. Dev., 429 U.S. 252, 270 (1977) (holding that racially disparate impact of a zoning denial does not violate the Equal Protection Clause); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1978) (invalidating the race-conscious admissions program of a medical school).

178. *See Supreme Court Nominations (1789–Present)*, U.S. SENATE (2024), senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm

determination, operating as a form of erasure for systemic racism.[179] By cloaking adjudications of racial discrimination claims in a protective veil of race-neutral biases, those individuals and entities who are responsible for and benefit from racially discriminatory policies are implicitly advantaged in securing a more favorable resolution.[180] Consequently, state actions that generate racial disparities without explicit considerations of race are generally *permissible*.[181] In contrast, because colorblindness falsely equates color consciousness directed at furthering racial subordination with color consciousness designed to dismantle the continuing effects of the history of racial subordination, race-conscious remedial measures required to ameliorate racial discrimination are generally *impermissible*.[182] Therefore, the application of colorblindness to issues of economic, educational, legal, political, and social importance functions to preserve existing racial inequalities and further instantiates the accumulated disadvantages derived from America's history of racial oppression.[183] Professor Kevin Brown summarizes the most significant deficiencies of colorblindness:

- Colorblindness discounts the importance of the impact of history on the present. A belief in people's self-determination, and of colorblindness, makes history less important in the context of explaining the conditions of the present. As a result, while America's history of racial subordination is conceded, its impact on present racial disparities is generally underappreciated.
- Colorblindness denies the lived experiences of people of color that are shaped by race.
- Colorblindness generates a narrow definition of racial discrimination that is limited to the conscious failure to treat

[perma.cc/6C78-QBYL]; *see also, e.g.*, Milliken v. Bradley, 418 U.S. 717, 806 (1974) (limiting school desegregation remedies to the boundaries of existing school districts, effectively precluding many residentially segregated urban areas from creating integrated schools); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989) (rejecting the use of quotas for awarding public contracts as a means of remedying past racial discrimination); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788–89 (2007) (endorsing race-neutral strategies for racially integrating public schools).

179. *See* Brown, *supra* note 170, at 119; *see also* Christopher M. Federico, *Race, Education, and Individualism Revisited*, 68 J. POL. 600, 607 (2006) (finding that white targets' attitudes toward welfare programs became more hostile when beneficiaries were Black, suggesting a link between individualism and racialization).

180. *See* Brown, *supra* note 170, at 119.

181. *Id.*

182. *Id.* at 120.

183. *Id.*

> a person as an individual. The effects of other, more important forms of racism, including unconscious, institutional, and cultural racism, as well as stereotyping, are obscured.
>
> - The color consciousness of many people of color gets labeled as racist.
> - Colorblindness generates huge resistance to people being labeled as racist, because such a determination means that the person has acted in an immoral manner.
> - Colorblindness can also function to institutionalize the experiences of the majority as the norm across societal measures, including proper behavior, intelligence, meritocratic considerations, and standards of beauty.[184]

Despite—or perhaps because of—the problematic aspects of colorblindness, colorblind constitutionalism has found renewed fervor with the Roberts Court, particularly in the area of education law and policy.[185] For example, in 2023, the Court expanded its application of colorblindness to strike down the use of race-conscious classifications in college admissions.[186] Since 1978, these programs have served as constitutionally viable pathways for rectifying past legal impairments to accessing equal educational opportunities, such as chattel slavery and strict racial segregation in schools, by affirmatively addressing the lingering disparate underrepresentation of racial minorities in higher education.[187] But in suggesting that forty-five years of modest racial-

184. *Id.* at 120–21.

185. Although the Supreme Court has been historically ambivalent of colorblind arguments, the principle draws on Justice Harlan's dissent in *Plessy v. Ferguson*. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."). While Justin Harlan invoked this principle to condemn the legal enforcement of white supremacy, the modern Court has since reconceptualized his words to limit the efficacy of race-conscious remedial measures. *See, e.g.*, Students for Fair Admissions v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2175 (2023).

186. *See Students for Fair Admissions*, 143 S. Ct. at 2175; *see also* Ralph Capio & Erin M. Carr, *Assessing the Potential Consequences of* Students for Fair Admissions, Inc. *on the Small Business Development Program*, CASE W. RSRV. L. REV. (forthcoming May 2024) (discussing the Roberts Court's commitment to colorblindness and the potential ramifications for race-based federal programs, such as the Small Business Development Program).

187. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978) (upholding race-based classifications in university admissions); *id.* at 370–71 (Brennan, J., dissenting) (citing past forms of racism as evidence warranting race-conscious admissions practices to address the underrepresentation of racial minorities); Sonja B. Starr, *The Next Battle Over Colorblindness Has Begun*, N.Y. TIMES (Jul. 10, 2023), https://www.nytimes.com/2023/07/10/opinion/su

justice initiatives were sufficient to remedy 200-years-worth of grossly racist educational barriers, the Court held that "all racial classifications, however compelling their goals, [are] dangerous" and that all must end "at some point."[188]

In applying the ahistorical colorblindness doctrine to the equitable objectives of affirmative action programs, the Court fictitiously presumed that college admissions are "zero-sum games" where race-based admissions enable selected racial minorities to deprive nonminority applicants of their would-be acceptance.[189] Not only does this conclusion hinge on the fallacy that nonminority applicants are more qualified and entitled to acceptance by default, but the deficiencies of colorblindness become even clearer as it functionally frames the acknowledgment of systemic racial inequities as an attack "against" nonminority students rather than an attempt to level the playing field.[190] As the dissenting opinions point out, "from this Nation's birth, the freedom to learn was neither colorblind nor equal."[191] Massive race-education disparities continue to define our present reality *especially* because our laws have denied those freedoms for far longer than they have been afforded.[192] But despite these intentional, persistent

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preme-court-high-school-admissions.html [https://perma.cc/XE32-Y6WG] (noting the persistent racial gaps that "characterize nearly every dimension of U.S. life").

188. *See Students for Fair Admissions*, 143 S. Ct. at 2164–66 (citing Grutter v. Bollinger, 539 U.S. 306, 342–43 (2003) (predicting that "the use of racial preferences will no longer be necessary" by 2028)).

189. *See id.* at 2154; *see also Zero-Sum Game*, https://www.merriam-webster.com/dictionary/zero-sum%20game [https://perma.cc/Z2MV-9YB6] ("[A] situation in which one person or group can win something only by causing another person or group to lose it."); Fisher v. Univ. of Tex., 570 U.S. 297, 331 (2013) ("There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race. . . . Blacks and Hispanics admitted to the University as a result racial discrimination are, on average, far less prepared than their white and Asian classmates.").

190. *Id.* at 2168 (holding that such race-based admissions systems would expressly violate the Equal Protection Clause because "an individual's race may never be used against him"); *see* also Brown, *supra* note 170, at 120–21 (summarizing the deficiencies of colorblindness in the law); Brennan Barnard, College Admission: Shaping Salami and Slicing Sausage, FORBES (Jun. 29, 2023), https://www.forbes.com/sites/brennanbarnard/2023/06/29/college-admission-shaping-sausage-and-slicing-salami/?sh=52f342f67e65 [https://perma.cc/G237-AXLD] ("I urge you not to approach admission as a zero-sum game wherein if you are not granted an acceptance, it means someone else "took your spot." It was not yours (or theirs) to begin with and to view these decisions in such a narrow frame is destructive all around.").

191. *Id.* at 2226 (Sotomayor, J., dissenting).

192. *Id.* at 2276–78 (Jackson, J., dissenting); *see also* Ana Hernández Kent & Lowell R. Ricketts, *The State of U.S. Wealth Inequality*, FED. RSRV. ST. LOUIS (Feb. 5, 2024), https://www.stlouisfed.org/institute-for-economic-equity/the-state-of-us-

systemic barriers, the Court's colorblindness principle operates to preserve the status quo by maintaining the underrepresentation of racial minorities in academic institutions.[193]

This same strategic application of colorblindness is precisely how "anti-woke" legislators have justified the attack on racial awareness in K–12 schools across the nation. In paralleling the backlash to the Civil Rights Movement and the desegregation of public schools, states intent on maintaining racial hierarchies have enacted regressive policies under the guise that, because they are outwardly race-neutral and regulate an area typically reserved for the states, they are entirely immunized from judicial scrutiny.[194] The modern Court's uncritical adoption of colorblindness to evaluate constitutional questions that implicate

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wealth-inequality# [https://perma.cc/56V8-5CMY] (providing data on race and educational disparities, recent as of September 30, 2023).

193. *See id.* at 2278 (Jackson, J., dissenting). In her dissent, Justice Ketanji Brown Jackson eloquently exposes the shortcomings of colorblind approaches to education:

> With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not make it so in life. And in having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that [colleges] are doing to solve America's real-world problems.
>
> No one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in unnumerable ways, and today's ruling makes thing worse, not better. The best that can be said of the majority's perspective is that it proceeds (ostrich-like) from the hope that preventing consideration of race will end racism. But if that is its motivation, the majority proceeds in vain. If the colleges of this country are required to ignore a thing that matters, it will not just go away. It will take *longer* for racism to leave us. And, ultimately, ignoring race just makes it matter more.
>
> The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly and then do what. . . is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.

*Id.* (Jackson, J., dissenting).

194. *See, e.g.*, Pernell v. Fla. Bd. of Governors of the State Univ. Sys., 84 F.4th 1339, 1341 (11th Cir. 2023) (invoking legislative immunity to quash subpoena requests for evidence that would demonstrate the State's racially discriminatory motivations for enacting the Stop W.O.K.E. Act).

racial justice have thus far proven quite generous to these policies, inviting yet further racial retrenchment.[195] The targeting of critical race concepts by "anti-woke" legislation reinforces the racial reform/retrenchment thesis espoused by legal scholars.[196] The response that is needed most—and that has also proven most elusive—is the recognition of robust constitutional protections for public education. The proceeding section will consider constitutional avenues that, if the courts were so inclined, may offer stronger federal oversight to curtail state anti-literacy legislation.

## IV. STRENGTHENED FEDERAL PROTECTIONS FOR EDUCATION AS AN ANTIDOTE TO "ANTI-WOKE" AUTHORITARIANISM

*The way to right wrongs is to turn the light of truth upon them.*
– Ida B. Wells[197]

With over 750 proposals of "anti-woke" and "anti-CRT" measures introduced nationwide in the span of three years, the resulting detriments to the intellectual growth of K–12 youths and the broader public educational sphere deserves no kinder description than "positively dystopian."[198] These relentless efforts aimed at diluting decades of social and civil rights progress have sparked a renewed sense of urgency in revisiting the feasibility of uniform federal protections for educational rights. But in a time when the Supreme Court shows an aversion for substantive due process as a mechanism for recognizing implicit fundamental rights, promoting a theory of a right to education premised solely on the Due Process Clause of the 14th Amendment has little likelihood of success. Nonetheless, other constitutional mechanisms are available that would permit the Court—if it were so willing—to protect public education from arbitrary

195. *See, e.g.*, *id.* at 1354 (Pryor, J., dissenting) ("In essence, the majority opinion forces a whole category of plaintiffs, tasked with an already difficult standard of proof, to make their cases without the tools ordinarily available to civil litigants.").

196. *See* Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1345–65 (describing how the second decade of CRT has been characterized by racial retrenchment that necessitates proactive and strategic public intervention).

197. IDA B. WELLS, THE LIGHT OF TRUTH, THE WRITINGS OF AN ANTI-LYNCHING CRUSADER xix (Mia Bay & Henry Louis Gates, Jr. eds., 2014).

198. *CRT Forward, supra* note 7; Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F.Supp.3d 1218, 1230 (N.D. Fla. 2022) (describing the Stop W.O.K.E Act as "positively dystopian").

government infringement.[199] The need for greater federal protections for public education, particularly for children of color, is morally, legally, and politically desirable and defensible.

### *A. The Court's Inconsistent Protection for Equal Education Under the Law*

Despite education's vital importance to an effective democracy, robust economy, and just society, education has long served a prime example of racial inequality in the United States.[200] For nearly a century, the Court held firmly to the legal fallacy of "separate of equal."[201] Then, in *Brown v. Board of Education*, the Court finally confronted the question of whether "separate but equal" racially segregated schools deprived racial minority children of equal education opportunities.[202] In invalidating its earlier precedent in *Plessy v. Ferguson* and requiring an end to state-sanctioned racial discrimination in public schools, the Court premised its reasoning on the importance of education as a citizenship imperative:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a

199. *See e.g.*, Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334–35 (2006) (arguing for educational protections under the 14th Amendment Citizenship Clause); Kip M. Hustace, *Education, Antidomination, and the Republican Guarantee*, 30 WM. & MARY BILL RTS. J. 91, 97–104 (2021) (arguing for educational protection under the Article IV Republican Guarantee Clause); Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHIC. L. REV. 1179, 1206–25 (2022) (arguing for educational protections under the 14th Amendment Due Process Clause); *see also* Robert S. Chang, *The 14th Amendment and Me: How I Learned Not to Give Up on the 14th Amendment*, 64 HOW. L.J. 53, 81 (2020) (advancing the inspiring argument that we ought not to give up on the 14th Amendment because it is "what we make of it").

200. *See* Jason P. Nance, *The Justifications for a Stronger Federal Response to Address Educational Inequalities, in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 35 (Kimberly Jenkins Robinson ed., 2019).

201. Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that the Equal Protection Clause of the 14th Amendment allowed the "separate but equal treatment" of racialized people, thereby legalizing Jim Crow segregation laws and practices); *see also* Chang, *supra* note 197, at 56 (describing how the Plessy decision "robbed the 14th Amendment of its meaning and power").

202. Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954).

> principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[203]

Though this landmark decision permanently changed the landscape of American public education, the *Brown* opinion was far from a preordained outcome or an inevitable result of racial progress.[204] Rather, *Brown* was the apex of over a century of legal challenges to segregated schooling made possible, in part, due to "interest convergence."[205] As explained by the late Derrick Bell, the 14th Amendment alone has never proven sufficient to offer an effective legal remedy to the imposition of second-class citizenship of Black persons absent a convergence of interests deemed important by the courts and by policymakers that "will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites."[206]

Consequently, racial segregation and its harmful effects on children of color was not, in fact, the Court's primary concern. During the post-WWII era when *Brown* was decided, the immorality of racial discrimination risked undermining America's international credibility.[207] The Court's repudiation of its "separate but equal" doctrine allowed for the United States to maintain a veneer of democratic legitimacy abroad while and reassure returning Black veterans (many of whom had been rewarded for their service with violence and vitriol upon their return to the South) that the freedom for which they had risked their lives overseas may be afforded to them at home.[208]

Though the *Brown* decision advanced important national interests, many nonetheless perceived it, including poor whites in the South, as an affront to their social status and sense of self.[209]

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203. *Id.* at 493.

204. *See* Janel George, *A Lesson on Critical Race Theory*, 46 HUM. RTS., 2, 4 (2021).

205. Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

206. *Id.* (describing the principle of interest convergence as "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

207. *See id.* at 525 (noting that this argument was advanced by both the federal government and the NAACP in the *Brown* case).

208. *Id.* at 524–525.

209. *Id.* at 525–526.

Moreover, because the *Brown* decision was a result of interest convergence—as opposed to a dedicated legal commitment to racial justice under the law the equality revolution initiated by *Brown* was quickly stymied by judicial indifference, the precipitation of white flight to the suburbs, and the advent of disparate school financing.[210] These combined factors led to the reconstitution of racially re-segregated, inequitable educational experiences and opportunities for students.[211] Ultimately, the pragmatism that undergirded the *Brown* decision translated into a tepid judicial commitment to the values espoused by the Court that evolved into apathy for calls for greater constitutional protections for the right to education.

As a result, *Brown*'s promise that all children, irrespective of race, receive an equal education has been largely unrealized.[212] For nearly a decade following the *Brown* decision, the Supreme Court demonstrated scant enthusiasm to enforce its own desegregation decree.[213] In subsequent cases, the Court's further reticence to find inequities in school funding unconstitutional, in combination with making it more difficult to prove a constitutional violation for de facto segregated school systems, would result in a reversal of the limited progress that had been made to desegregate public schools.[214]

Ultimately, between 1988 and 1998, most of the gains following the *Brown* decision had been almost entirely erased.[215] The number of

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210. *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1602–14 (2003).

211. *Id.*

212. *Id.* at 1598 (2003); *see also* LaToya Baldwin Clark, *Barbed Wire Fences: The Structural Violence of Education Law*, 89 U. CHI. L. REV. 499, 501 (2021); Erin M. Carr, *Educational Equality and the Dream That Never Was: The Confluence of Race-Based Institutional Harm and Adverse Childhood Experiences (ACEs) in Post-Brown America*, 12 GEO. J. L. & MOD. CRITICAL RACE PERSP. 115, 115–141 (2020).

213. Chemerinsky, *supra* note 210 at 1603.

214. *See id.* at 1598–1601 (describing the failures of the Supreme Court over the past three decades to ensure the mandate of *Brown* translates into the desegregation of public schools and equal educational access for all students); *see also* Students for Fair Admissions v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2234 (2023) (Sotomayor, J., dissenting) ("About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment. The share of intensely segregated minority schools (*i.e.*, schools that enroll 90% to 100% racial minorities) has sharply increased."); Robert Chang, *supra* note 199, at 60 (recounting how the Burger Court systematically dismantled the 14th Amendment in the 1970s and, in doing so, curtailed civil rights progress in the area of educational equality).

215. GARY ORFIELD, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 2 (2021), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/schools-more-separate-consequences-of-a-decade-

Black students attending majority white public schools have steadily decreased since 1986,[216] leaving education in the United States both segregated and grossly unequal.[217] While inequalities within state public school systems exist on multiple levels with respect to disadvantaged groups, those pertaining to race and poverty are the most apparent.[218] Because public education funding in the United States is predominantly determined by local property taxes, the prominence of residential segregation equates to gross educational inequities in which poor school districts are majority Black and severely under-resourced.[219] Well-established research in this area demonstrates that low-income and racially minoritized students are statistically more likely to attend schools that lack access to higher-level courses and music, arts, and athletic programs and are more likely to find themselves in classroom environments marred by deplorable physical conditions where they are taught by less-experienced and lower paid teachers.[220]

The locally focused nature of U.S. educational policy has also created a divide between different demographics regarding their awareness of the existence of such inequalities.[221] For example, one nationwide survey found that 81% of white parents believed that students of color are afforded the same educational opportunities as their peers, while only 43% of African-American parents believed the same.[222] These differing perceptions are backed by empirical data as well. For example, recent national studies show that districts who serve the highest number of students of color receive about thirteen percent less state and local funding in comparison to districts who

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of-resegregation/orfield-schools-more-separate-2001.pdf [https://perma.cc/CS4L-ZKVJ].

216. *Id*. at 29; *see also* Chemerinsky, *supra* note 210, at 1598.*'*

217. *See* Chemerinsky, *supra* note 210, at 1599.

218. Nance, *supra* note 200, at 35.

219. David Martínez & Julian Heilig, *An Opportunity to Learn: Engaging in the Praxis of School Finance Policy and Civil Rights*, 40 MINN. J. LAW & INEQ. 311, 315–16 (2022). These inequities, often based on local factors such as zip codes and school district boundaries, are mirrored in the disproportionate funding of schools, the disproportionate student-per-teacher ratios of schools within the same states, the quality and rigor of curriculums, and the adequate maintenance of facilities. *see* Kimberly Jenkins Robinson*, Introduction: The Essential Questions Regarding a Federal Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 1 (Kimberly Jenkins Robinson ed., 2019).

220. Robinson, *supra* note 219, at 5–6.

221. *See id.* at 4.

222. *Id.*

serve the fewest number of students of color.[223] Such gaps based on racial lines have also been well-documented in the realms of academic achievement, access to current academic resources (e.g., textbooks, libraries, etc.), and student mental health.[224]

The cumulative effects of the Court's waning commitment to educational equality, including its toleration of inequitable school funding schemes,[225] has largely operated to replicate the segregation of racial inequities of the pre-*Brown* period.[226] Some states have implemented measures to reduce these inequities, but such initiatives have only demonstrated short-term success at best.[227] Other states have elected to simply turn a "blind eye to these disparities and have imposed high standards on students despite inequitable disparities in educational opportunity that disadvantage many low-income, minority, rural, and other children from reaching those standards."[228] Nonetheless, it is within this educational landscape that children are now also contending with the modern equivalency of anti-literacy laws in the form of "anti-woke" restrictions.

### *B. The Court's Reluctance to Recognize a Right to Education*

Although the Court has spoken frequently of the "importance" of education, it has held staunchly for over half a century to the position that education is not among the fundamental rights or liberties explicitly or implicitly protected by the federal Constitution.[229] In declining to recognize a constitutionally protected right to education, the Court has demonstrated inordinate deference to states under the 10th Amendment to determine educational policy in a manner that has contributed to existing racial inequities and further disadvantaged

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223. *Id.*

224. *Id.* at 6–9.

225. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973); *see also* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457–58 (1988) (reaffirming *San Antonio Indep. Sch. Distr.*).

226. *See* Chemerinsky, *supra* note 210, at 1600; Martínez & Heilig, *supra* note 219, at 316; GARY ORFIELD & & CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 5 (2007), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf [https://perma.cc/4JPH-R7SB].

227. Robinson, *supra* note 219, at 2.

228. *Id.*

229. *Rodriguez*, 411 U.S. at 35; *see also Kadrmas*, 487 U.S. at 457–58 (reaffirming *Rodriguez*).

minoritized students.[230] Concomitantly, the Court has also created significant and, in some areas of educational jurisprudence, insurmountable obstacles to remedying racial inequity in schools.[231]

The Court's discomfort in recognizing a federal right to education is, in part, premised on prudential concerns.[232] In the seminal case of *San Antonio Independent School District v. Rodriguez*, the Court communicated its reluctance in acting as a "super-legislature" to drive its conclusion that educational inequalities caused by state redlining practices did not violate the Constitution.[233] The Court declined to distinguish education from other forms of "social and economic" services and benefits traditionally offered by states and reasoned that judicial intrusion would be improper in matters concerning the allocation of state tax revenue.[234] The Court also expressed that education, while arguably essential to the effective exercise of First Amendment freedoms and the right to vote, "involves the most persistent and difficult questions of educational policy," which the Court concluded it lacked the specialized knowledge to resolve.[235] The Court further justified the need for judicial restraint in educational policy decisions by reasoning that holding otherwise may lead to a slippery slope in which other nontextual personal interests, such as decent food and shelter, could dare to invite enhanced constitutional protections as well.[236]

In the decades following *Rodriguez*, the Court has demonstrated scant desire to revisit its constitutional jurisprudence in this area. This refusal to find a constitutional basis for a right to education is consistent with the Court's general unwillingness to do so for affirmative services provided by states.[237] At the same time, the Court has since clarified that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare."[238] Rather,

230. *See id.* at 44 (declining to find a right to education because of federalism principles).

231. Chemerinsky, *supra* note 210, at 1600.

232. *See Rodriguez*, 411 U.S. at 44.

233. *Id.* at 31–35 (quoting Shapiro v. Thompson, 394 U.S. 618, 661 (1969)).

234. *Id.* at 31–35.

235. *Id.* 35–42. This assertion is questionable because Justice Powell, who wrote for the majority, is renowned as a top expert in the field of educational policy. *See generally* Victoria J. Dodd, *The Education Justice: The Honorable Lewis Franklin Powell, Jr.*, 29 FORDHAM URBAN L.J. 683 (2001) (discussing J. Powell's expertise and influence in educational law and policy).

236. *Rodriguez*, 411 U.S. at 37.

237. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1128 (6th ed., 2020).

238. Plyler v. Doe, 457 U.S. 202, 221–222 (1982).

education is different in that it is essential for the exercise of constitutional rights, economic opportunity, and achieving ultimate equality.[239]

For example, in *Plyler v. Doe*, the Court relied on *Brown*'s emphasis on education's fundamental role in supporting a healthy democratic society to hold that states could not deny public education opportunities to undocumented children.[240] While simultaneously reaffirming that "[p]ublic education is not a 'right' granted to individuals by the Constitution," the Court also strongly acknowledged education as matter of civic importance:

> The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government, . . ." "[A]s . . . pointed out early in our history. . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.[241]

More recently, litigation spearheaded by youths is ambitiously seeking to secure federal protection of adequate learning opportunities.[242] In the 2020 case of *Gary B. v. Whitmer*, students alleged that the state denied them their fundamental right to literacy by subjecting them to outdated academic materials, instruction from unqualified teachers, and unsafe physical conditions such as "vermin" infestation,

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239. *See id.* at 221; *see also* CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 237, at 1228 (explaining that while education is an affirmative government service, strong arguments suggest that it should be a fundamental right).

240. *Plyler*, 457 U.S. at 223 (quoting *Brown*, 347 U.S. at 493).

241. *Id.* at 221 (first quoting *Rodriguez*, 411 U.S. at 35; Meyer v. Nebraska, 262 U.S. 390, 400 (1923); then Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 230 (1963); and then Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); and then Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

242. A.C. v. Raimondo, 494 F. Supp. 3d 170 (D.R.I. 2020), *aff'd*, A.C. *ex rel.* Waithe v. McKee, 23 F.4th 37 (1st Cir. 2022); Gary B. v. Snyder, 329 F.Supp. 3d. 344, 348 (E.D. Mich. 2018).

"extreme" temperatures, and "overcrowding."[243] The students also claimed that this functional exclusion was a product of intentional racial discrimination by the state.[244]

The district court rejected these arguments on the grounds that the Constitution does not require states to offer students "a defined, minimum level of education by which the child can attain literacy."[245] However, the Sixth Circuit disagreed and held that a deprivation of basic literacy at this level denied the students' right to "a basic minimum education," which the court defined as the students' entitlement to the minimum requirement of learning to read.[246] The appellate court's decision in *Gary B.* was the first time that a federal court asserted a minimum standard for public education: "without the literacy provided by a basic minimum education, it is impossible to participate in our democracy."[247] This win for a federal right to education, however, was short-lived when the decision was vacated and granted a rehearing en banc.[248] Ultimately, the parties reached a settlement agreement before the rehearing, rendering the case moot.[249]

Plaintiffs in other cases have sought to rely on the Sixth Circuit's reasoning to persuade courts to find a minimum level of federation protection for educational adequacy.[250] In the 2022 First Circuit case of *A.C. v. McKee*, the plaintiffs relied on *Gary B.* to argue that the "Constitution protects the specific rights to a civics education that prepares them to participate effectively in these important aspects of public life (e.g., voting or other civic participation)."[251] However, the court found that *Rodriguez* precluded this interpretation because the plaintiffs had failed to state the deprivation of a recognized fundamental right.[252] Given that *Gary B.* was vacated and never reheard, the First Circuit found little persuasive value in the plaintiffs' argument.[253]

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243. Gary B. v. Whitmer, 957 F.3d 616, 620–26 (6th Cir. 2020), *reh'g en banc granted, opinion vacated*, 958 F.3d. 1216 (6th Cir. 2020).

244. *Id.* at 628.

245. *Gary B.*, 329 F. Supp. 3d. at 366.

246. *Gary B.*, 957 F.3d at 642.

247. *Id.*

248. *Gary B.*, 958 F.3d. at 1216.

249. *See* Franz v. Oxford Cmty. Sch. Dist., 2023 U.S. Dist. LEXIS 848008 at *33 (E.D. Mich. 2023) (explaining the procedural context that followed the Sixth Circuit's initial decision).

250. *See* A.C. v. McKee, 23 F.4th 37, 44 (1st Cir. 2022) (distinguishing *Gary B.*, 957 F.3d at 648–49).

251. *Id.* at 43.

252. *Id.*

253. *Id.* at 44.

As it stands, multi-generational litigation efforts to secure a constitutionally cognizable right to education have proven unsuccessful. There is little basis to harbor optimism that the current Supreme Court will be more amenable to such arguments. Although the Court has all but foreclosed the possibility of recognizing a right to education as an unenumerated fundamental right or liberty interest, other viable constitutional pathways for greater federal protections may exist in the recognition of education as a guarantee of national citizenship.

### *C. Education as a Citizenship Imperative*

Despite having repeatedly declined to recognize education as a guaranteed fundamental right with accompanying constitutional protections, the Court has simultaneously expressed that education is an indispensable feature of national citizenship.[254] As recently as 2021, the Court emphasized that public schools are "the nurseries of democracy" and that "our representative democracy only works if we protect the 'marketplace of ideas."[255] This language and sentiment is consistent with half a century of legal precedent in which the Court has frequently lauded the importance of public education in cultivating a competitive workforce and responsible citizenry.[256] In stark contrast to the censorship mechanisms employed by "anti-woke" and "anti-CRT" efforts, the Court has emphasized that the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[257]

Historians and jurists alike largely agree on the importance of education to a free and functioning representative democracy. Education—and more precisely, the study of history—is the "very foundation of good citizenship."[258] As described by Professor Peter Stearns, the importance of the study of history is a function of the development of "habits of mind that are vital for responsible public behavior, whether as a national or community leader, an informed voter, a

254. *E.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 469 (1988) (Marshall, J., dissenting); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

255. Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046 (2021).

256. *See e.g.*, *id.*; Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969); Plyler v. Doe, 457 U.S. 202, 221 (1982).

257. *Tinker*, 393 U.S. 503 at 512 (alteration in original) (citation omitted).

258. *Brown*, 347 U.S. 483 at 493; *see also* Stearns, *supra* note 168.

petitioner, or a simple observer."[259] Consequently, public education is "perhaps the most important function of state and local governments."[260]

In fact, a compelling argument for a public right to education could be anchored in the guarantee of national citizenship rooted in the 14th Amendment.[261] As persuasively argued by California Supreme Court Justice Goodwin Liu, the 14th Amendment's Citizenship Clause encompasses protections for educational rights.[262] Taken as a whole, the purpose of the 14th Amendment—a centerpiece of the Reconstruction Era Amendments—was to guarantee national citizenship for all.[263] Because federal citizenship encompasses substantive rights essential to the full and equal standing of members of the national political community, the 14th Amendment could be interpreted and applied as imposing a constitutional duty to address the ubiquitous educational inequities that destabilize and undermine national citizenship ideals.[264] This interpretation, in turn, would sufficiently remedy the harms caused by the multitude of "anti-woke" bills that deter civic political engagement by spurring disinformation amongst voters.

Section 1 of the 14th Amendment consists of four distinct clauses: The Citizenship Clause, the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause.[265] Section 5 explicitly provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[266] Although written in affirmative language, the Court has long interpreted Congress's enforcement powers as "no longer plenary but remedial" because litigation often arises in the context of those provisions that restrain state powers.[267] That is, the Privileges and Immunities Clause ("No State shall. . ."), the Due Process Clause ("nor shall any State. . ."), and the Equal Protection Clause ("nor

259. Stearns, *supra* note 168.

260. *Brown*, 347 U.S. 483 at 493.

261. *See* Liu, *supra* note 199, at 334–35.

262. *Id.*; Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 741 (2018) (arguing that education is an implicit right of the 14th Amendment's Citizenship Clause, but that it has been obscured by the 14th Amendment's complex ratification process).

263. *See* Liu, *supra* note 199, at 357.

264. *See id.* at 334–41.

265. U.S. CONST. amend. XIV, § 1.

266. U.S. CONST. amend. XIV, § 5.

267. City of Boerne v. Flores, 521 U.S. 507, 522 (1997).

deny. . ."), were all written and understood as restraints on state powers as opposed to affirmative assertions of congressional power.[268]

But as Justice Liu points out, the 14th Amendment's opening text (i.e., the Citizenship Clause) starkly contrasts the text of the other Section 1 provisions: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[269] By its own terms, the Citizenship Clause does little more than designate a legal status to those born or naturalized in the U.S.[270] However, Justice Liu argues that the Citizenship Clause cannot be subjected to the general interpretation of the other Section 1 provisions because it does not merely posit a federal reactionary power to remedy the state abridgment of a right.[271] Therefore, when taken with Congress's Section 5 enforcement power, the Citizenship Clause "obligates the national government to secure the full membership, effective participation, and equal dignity of all citizens in the national community."[272] This obligation, as Justice Liu contends, encompasses a legislative duty to ensure an adequate education as necessarily inherent to the concept of equal national citizenship.[273]

In the relatively scarce case law interpreting the Citizenship Clause, the Supreme Court has largely diluted its potential to serve as a substantive source of constitutional rights.[274] Prior to the institutional acceptance of civil rights, common law provided that "free persons" were the citizens of the respective nations or states in which they were born or naturalized.[275] However, the Court's decision in *Dred Scott* infamously refused to extend national citizenship status to freed slaves because they were not white.[276] Congress effectively overturned this limited understanding of citizenship through the Civil Rights Act of 1866, which served as a precursor for the ratification of the 14th Amendment in 1868.[277]

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268. *Id*. at 522–23.
269. U.S. CONST. amend. XIV, § 1; Liu, *supra* note 199, at 334–35.
270. U.S. CONST. amend. XIV, §, cl. 1.
271. Liu, *supra* note 199, at 335.
272. *Id.*
273. *See id.*
274. *Id.*
275. Scott v. Stanford, 60 U.S. 393, 417 (1857).
276. *Id*. at 393, 426–27, 452.
277. Civil Rights Act of 1866, Sess. 1, ch. 31, 14 Stat. 27 (1866) ("That all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right.").

Given the events leading up to its enactment, the Citizenship Clause has generally been interpreted as a repudiation of *Dred Scott*'s narrow definition of "citizenship" that excluded Black people, enslaved or not, from its scope.[278] For example, in the *Slaughterhouse Cases*, the Court stated that the Citizenship Clause "overturns the *Dred Scott* decision. . . That its main purpose was to establish the citizenship of the negro can admit of no doubt."[279] Then, a decade later in the *Civil Rights Cases*, the Court, while ignoring the Citizenship Clause, generally asserted that Section 1 of the 14th Amendment is "prohibitory in its character, and prohibitory upon the States."[280] Thus, the Court held that Congress's Section 5 enforcement power solely allowed it to "enforce the prohibition" of state actions.[281]

Justice Liu's primary support for the argument that the Citizenship Clause should not be clumped together with the other Section 1 provisions stems from Justice Harlan's dissent in the *Civil Rights Cases*.[282] There, Justice Harlan wrote that the Court erred in assuming that Congress could only enforce prohibitions on state actions when the Citizenship Clause is "of a distinctly affirmative character."[283] Furthermore, no part of Section 5 limits congressional enforcement only to the 14th Amendment's prohibitive provisions; rather, it provides that Congress shall have the power to enforce *all* of its provisions, regardless of whether those provisions are prohibitive or affirmative in nature.[284] Therefore, to guarantee the "equality of civil rights" as inherent to the definition of national citizenship is within the scope of congressional authority.[285]

This broad interpretation of the Citizenship Clause is aptly supported by its legislative history.[286] Senator Lyman Trumbull, the primary author of the Civil Rights Act of 1866, explained that the "right of American citizenship means something" and that it "carries with it some rights. . . [including] those inherent, fundamental rights which

278. Liu, *supra* note 199, at 349; *see also, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 668 (1898) ("[I]t is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.").

279. Slaughter-House Cases, 83 U.S. 36, 73 (1872).

280. Civil Rights Cases, 109 U.S. 3, 10 (1883).

281. *Id.* at 11.

282. Liu, *supra* note 199, at 355; *see Civil Rights Cases*, 109 U.S. at 57–60 (Harlan, J., dissenting).

283. *Civil Rights Cases*, 109 U.S. at 46–47.

284. *Id.*

285. *Id.* at 48.

286. *See* Liu, *supra* note 199, at 355.

belong to free citizens or free men in all countries, such as the rights enumerated in this bill."[287] Therefore, while the right to national citizenship encompasses at least those rights specifically enumerated 1866 Civil Rights Act, the Framers of the 14th Amendment "understood that citizenship was an evolving concept" and avoided specific language that would prevent a future Congress from using Section 5 to enforce new unenumerated rights inherent to the concept of national citizenship.[288]

Justice Liu further argues that such a broad interpretation of the Citizenship Clause in relation to Section 5 parallels the language the 13th Amendment, which provides that "neither slavery nor involuntary servitude. . . shall exist within the United States, or any place subject to their jurisdiction" and empowers Congress to enforce these rights by "appropriate legislation."[289] According to the Supreme Court, the 13th Amendment is "not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."[290] That is, it "denounces a status or condition, irrespective of the manner or authority by which it is created."[291] The same may be said for the Citizenship Clause. Much as the 13th Amendment authorizes federal legislation to secure "those fundamental rights which are the essence of civil freedom," the 14th Amendment similarly authorizes analogous legislation to secure "fundamental rights in American citizenship."[292]

Specifically considering education as a citizenship imperative within this constitutional framework, post-Reconstruction congressional legislation was proposed to harness Congress's power to ensure that citizens have an education sufficient to participate in democratic self-governance.[293] The clearest example of this is an 1882 bill that sought to provide direct federal aid to public schools, which gained significant traction in the Senate for eight years until it eventually died in 1890.[294] New Hampshire Senator Henry Blair, the sponsor of the

287. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

288. *See* Liu, *supra* note 199, at 357–58.

289. *Id.* at 358; U.S. CONST. amend. XIII, §§ 1–2.

290. Liu, *supra* note 199, at 358; *Civil Rights Cases*, 109 U.S. at 21 (majority opinion).

291. Liu, *supra* note 199, at 358; Clyatt v. United States, 197 U.S. 207, 216 (1905).

292. Liu, *supra* note 199, at 358; United States v Stanley, 109 U.S. 3, 37 (1883).

293. *See* Liu, *supra* note 199, at 371–394.

294. 13 CONG. REC. at 4820 (1882).

legislation, premised the federal protection of educational adequacy on the grounds that "the nation has the power, which implies the duty of its exercise when necessary, to educate the children who are to become its citizens."[295] Senator Blair envisioned a concept of education that would "enable the citizen sovereign to obtain and interchange ideas and knowledge of affairs as well as to transact intelligently and safely all matters of business in the avocations of life."[296] Georgia Senator Joseph Brown drew a similar parallel between the Blair Bill and Congress's enforcement of voting rights, expressing that:

> If Congress has power to protect the voter in the free exercise of the use of the ballot, it must have power to aid in preparing him for its intelligent use. And without educating the voter . . . without, in other words, preparing him for the duty of citizenship, he cannot be a citizen, at least not a useful citizen.[297]

Other senators also saw no need to anchor the bill in Congress's spending power and instead viewed the Citizenship Clause as its own source of substantive power that encompassed education. For example, Florida Senator Charles Williams Jones found that, if Congress had the power to make citizens and voters out of five million formerly enslaved people, thereby casting upon states the "duty of educating them for the exercise of political power, surely there can be nothing unreasonable in [Congress] aiding the States in educating these people."[298] Senator Jones also invoked the Supreme Court's *Slaughterhouse* decision to argue that because the Court recognized a person could be a citizen of the United States without being a citizen of a State, this necessarily implied the primacy of national citizenship.[299] Senator Blair, without referencing the *Slaughterhouse* decision, similarly argued that this bill did not infringe on state rights:

> The fact that the same individual child is to become a citizen of both governments does not deprive the National Government of its power to qualify that child to be its own citizen, to vote and act intelligently so far as the creation or the maintenance of the national powers is concerned.[300]

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295. 17 CONG. REC. at 1248 (1886).

296. 15 CONG. REC. at 2000 (1884) (statement of Sen. Blair); *see also* Allen J. Going, *The South and the Blair Bill Education Bill*, 44 MISS. VALLEY HIST. REV. 267, 267 (1957).

297. 15 CONG. REC. at 2251 (1884) (statement of Sen. Brown).

298. *Id.* at 2151–52 (statement of Sen. Jones).

299. *Id.*

300. *Id.* at 2063 (statement of Sen. Blair).

In contrast to the support for the Blair Bill, its opposition largely echoed the prudential concerns reflected in the *Civil Rights* and *Rodriguez* cases. For example, Louisiana Senator Randall Lee Gibson argued that the Civil War Amendment were collectively "limitations and restraints upon the power of States" rather than a basis for affirmative legislation.[301] Delaware Senator, Eli Saulsbury, raised a familiar slippery-slope argument in that if Congress had the authority to "educate for the purpose of qualification of citizenship," such an authority would have no limit and Congress could eventually deem "moral and perhaps religious training" necessary to citizenship.[302] Eventually, the Blair Bill failed in 1890 after receiving immense pushback by Southern Democrats who argued that federal aid and intrusion in the realm of education would undermine the fruits of laissez-faire economics—another all-too-frequently entreated prudential principle in the context of restraining affirmative government powers.[303]

Over a century has passed since the Blair Bill's demise yet the nation's transition to a primarily information-based economy has made the link between education and the qualities of national citizenship even more translucent. Indeed, the *Rodriguez* Court itself recognized that public education was a form of "economic and social" welfare legislation, and the *Plyler* Court asserted that its "fundamental role in maintaining the fabric of our society" demanded the special considerations of at least some federal uniformity.[304] If the Citizenship Clause's history has any virtue in its guarantee of equal civic participation, the meaning of national "citizenship" must be informed by the nation's economic and social context, to which educational adequacy plays a vital role in their formulations.

Importantly, Justice Liu's proposed pathway to the recognition of greater federal protections for education need not result in an infringement of states' 10th Amendment rights, nor does his argument attempt to remove states' constitutional authority to administer education systems for their citizens. Rather, this constitutional argument simply requires that where states elect to provide a public right to education, they do so in a manner that properly comports with constitutional requirements of due process and non-discrimination. Critically, this

301. 15 CONG. REC. at 2589 (1884) (statement of Sen. Gibson).

302. *Id.* at 2467 (statement of Sen. Saulsbury).

303. Liu, *supra* note 199, at 394; For an understanding of the tension between free-market theories and economic liberties, see Lochner v. New York, 198 U.S. 45 and progeny.

304. San Antonio Indep. Sch. Dist. v. Rodriguez, 441 U.S. 1, 33 (1973); Plyler v. Doe, 457 U.S. 202, 221 (1982).

approach imposes a heightened responsibility upon federal courts to ensure that all children—irrespective of their race or state of residence—receive an adequate education that may allow them to reap the full benefits of citizenship to which they are owed.

Moreover, education as a citizenship imperative lends itself to a potentially cognizable right that could be located in the Guarantee Clause found in Article IV, Section 4 of the Constitution, which requires that the "United States guarantees to every State. . . a Republican Form of Government."[305] Several notable constitutional scholars have posited that the republican guarantee offers the "most obvious constitutional right provision to anchor a right to education."[306] For example, scholars have argued that "education, as a form of antidomination, is a necessary component of the republican guarantee."[307] Reflective of the view of the constitutional framers and reframers that universal education is paramount to the survivability of a republican form of governance, the Guarantee Clause operates as an antidomination duty on the federal government to ensure both equity and adequacy in the public education afforded to all of our nation's citizens.[308]

Connecting the federal protections for education to the guarantee of national citizenship and the republican guarantee could provide an effective mechanism for addressing persistent educational disparities that exist amongst states. Under this argument, the federal government's guarantee of citizenship for all individuals born or naturalized in the United States— "citizens" being those individuals that necessarily dictate the nation's economic prosperity—must also be guaranteed a minimum level of educational proficiency in order actively contribute to the nation's general welfare. Nowadays, education is intrinsically linked to national economic growth, and investment in quality education is essential to maintain the country's global competitiveness.[309] Education is currently perceived as an investment in

305. Hustace, *supra* note 199, at 97–104 (describing at length the history and scholarship surrounding the interpretation of the republican guarantee).

306. *E.g.*, Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1072 (2019); Hustace, *supra* note 197, at 94; Peggy Cooper Davis, *Education for Sovereign People*, *in* FEDERAL RIGHT TO EDUCATION, 164, 179–80 (Kimberly Jenkins Robinson ed., 2019); Kara A, Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment,* 81 N.C. L. REV. 1286, 1303–09 (2003);

307. Hustace, *supra* note 199, at 97.

308. *See id.* at 139; CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867).

309. *See* GGI Insights, *Education and Economic Development*, GRAY GRP. INT'L (Feb. 25, 2024), https://www.graygroupintl.com/blog/education-and-

human capital, and by providing individuals with the skills and access necessary for the pursuit of an adequate education, returns in educational investments are mirrored in both personal salaries and national gross domestic product (GDP).[310]

For example, one recent economic study found that for every 1% increase in the proportion of a state's population that holds at least a bachelor's degree, the state's real GDP increased by about .08%.[311] Converting this to a national scale, if all states attained this 1% increase over the last decade, the nation's economy would have increased by approximately $130.5 billion.[312]

In addition to education's fundamental role in the production of tangible assets, such as wealth creation and technological advancement, education is also valued for its social utility in promoting intangible assets, such as equality and the free exchange of ideas—both of which are required for a democracy to function.[313] In a time where "a high school diploma is no longer enough to ensure a foothold in the middle class, and the wage premium for more and better education has increased significantly," a well-educated citizen has become synonymous with an useful citizen.[314] The ability to receive an adequate education has become so intertwined with social mobility in that it provides all individuals an equal opportunity to climb the socioeconomic ladder through merit rather than birth or sheer luck.[315]

As a function of both a democracy and a republican form of government, citizens should not be subject to a socio-economic caste system that restricts their ability to fully participate in matters of public concern.[316] Therefore, a federal "guarantee" of national citizenship

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economic-development [https://perma.cc/6A56-3MVN]; 15 CONG. REC. 2251 (1884) (statement of Sen. Brown) (arguing that the Citizenship Clause encompasses educational rights to guarantee the democratic duties of "useful" citizens).

310. *See, e.g.*, Ruth Brooks, *What Is the Relationship Between Education and the Economy*, N. WALES MGMT. SCH. WREXHAM UNIV. (Feb. 20, 2023), https://online.wrexham.ac.uk/what-is-the-relationship-between-education-and-the-economy/ [https://perma.cc/BQE8-UNNW].

311. Douglass Holtz-Eakin, *The Economic Benefits of Educational Attainment*, AM. ACTION F. (Jun. 4, 2019), https://www.americanactionforum.org/project/economic-benefits-educational-attainment/ [https://perma.cc/Y56M-2WLG].

312. *Id.*

313. *See* GGI Insights, *supra* note 309.

314. Liu*, supra* note 199, at 397.

315. *Id.*; *see also* John N. Friedman, *School Is for Social Mobility*, N.Y. TIMES (Sept. 1, 2022), https://www.nytimes.com/2022/09/01/opinion/us-school-social-mobility.html [https://perma.cc/8DNL-JZ9F].

316. *See* Sylvia Allegretto et al., *Public Education Funding in the U.S. Needs an Overhaul*, ECON. POL'Y INST.

must encompass the right of citizens to receive an adequate education—that is, an education that does not censor the teaching of factual, historical events merely because it would incidentally promote one political party's agenda at the expense of another's. To nullify this conception of citizenship would firmly chill the anti-majoritarian principles that allow for open political dialogue.

If, in fact, our "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection,'"[317] the same robust constitutional protections that are afforded to other rights deemed essential to our democracy must likewise be extended to protect educational rights. The classroom has long been considered a "marketplace of ideas" that spurs critical thinking, inquiry, and dialogue.[318] The proliferation of "anti-woke" legislation represents a national failure to protect education. The absence of meaningful constitutional safeguards for education, which is so vital to our most basic constitutional freedoms, ultimately threatens the democratic values and institutions on which our country depends.[319]

## CONCLUSION

*People are trapped in history, and history is trapped in them.*
– James Baldwin[320]

Pluralistic, representative democracies demand diverse perspectives, an educated and well-informed citizenry, and a free and open exchange of knowledge. A resurgence of anti-literacy restrictions has assumed renewed virulence in the form of modern "anti-woke" laws that threaten the functioning of our democracy and the learning of future generations. Though these educational suppression measures represent a novel challenge to educational and racial equality, they must also be appreciated and understood within a broader historical

(Jul. 12, 2022), https://www.epi.org/publication/public-education-funding-in-the-us-needs-an-overhaul/ [https://perma.cc/TT8K-TBPS] (assessing the U.S. public education system on the basis of equitable access to adequate education).

317. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (alteration in original) (citation omitted).

318. *Id.*

319. Plyler v. Doe, 457 U.S. 202, 221 (1982) (Marshall, J., concurring).

320. JAMES BALDWIN, NOTES OF A NATIVE SON, A QUESTION OF IDENTITY 129 (1955).

continuum of racially oppressive state action designed to limit the full civic and economic participation of minoritized communities.

As argued in this Article, antidemocratic state actions in the form of "anti-woke laws" are antithetical to constitutional guarantees of national citizenship and undermine a republican form of governance. These laws contribute to educational inequities, undermine state and national citizenship, and pose significant risks to the health of a modern, multicultural democracy. The vague goal of preventing "indoctrination" by prohibiting the teaching of "woke" concepts represents both an oxymoron and an abuse of power. "American history" and "African-American history" are one and the same, and neither can be taught accurately without discussing the race-related topics that have influenced the laws and political processes that are now being weaponized to limit this centrally important knowledge.

Consequently, there is both a need and a constitutional basis for the recognition of more robust federal protections for education. Building on the earlier work of legal scholars, this project offers several potential pathways to bolster legal protections for public education. Central to the constitutional theories presented in support of stronger federal protections for public education is the notion of a citizenship-based theory of education. Though this Article does not presuppose a judicial disposition on the part of the modern Supreme Court to enshrine a public right to education, it nonetheless advances the position that socio-political and historical conditions necessitate and justify more robust educational protections.

All children—but especially racially minoritized children—are failed when federal courts exercise excessive deference to state legislatures on matters of educational adequacy. Acceding to states' antagonism to educational access to protect the citizenship and educational rights of students is the functional equivalent of allowing the fox to guard the hen house. The antidote to "anti-woke" authoritarianism is, in fact, greater constitutional protections for education.