

MAPPING AND MOBILIZING LEGAL CRITICALITIES:  
MAKING THE MOVE FROM DIASPORA TO COLLECTIVE  
OR  
LEGAL SCHOLARS MAKING A DIFFERENCE AS  
CULTURAL WARRIORS

FRANCISCO VALDES<sup>†</sup>

TABLE OF CONTENTS

INTRODUCTION .....	625
I. IDENTITY, IDEOLOGY, INEQUALITY: MOUNTING CULTURAL WARFARE BY FORCE OF LAW—AND BY UNLAWFUL FORCE .....	634
II. RACIAL TOTALITARIANISM: USING HISTORY, KNOWLEDGE, AND EDUCATION FOR MIND CONTROL—AND FOR GROUP DOMINANCE .....	644
III. RECENT DEVELOPMENTS IN U.S. ACADEMIA: THE CRITICAL (LEGAL) COLLECTIVE COALESCES.....	654
<i>A. The Critical (Legal) Collective:         Context, Mission, and Starting Points .....</i>	<i>656</i>
<i>B. Mapping Critical Resources and Diasporas:         Process, Methods, and Prospects .....</i>	<i>657</i>
<i>C. The Critical Legal Diaspora: Schools,         Faculty, Students, Deanships, and Centers.....</i>	<i>658</i>
CONCLUSION.....	660

INTRODUCTION

What happens when truth doesn't matter anymore?

—Barack Obama<sup>1</sup>

As the *Denver Law Review* celebrates its centennial, the continuity of American fundamentals is truly sobering. In the 2020s, as in the 1920s, Americans are dealing with rapacious economic elites defined by race, gender, and religion. Today, as a century ago, the “rule of law” meant the rule of those elites’ collective might. Today, as then, social groups traditionally subordinated and exploited by this top-down rule of law continue to struggle for equal justice, oftentimes using the law itself. As when this

---

<sup>†</sup> Professor of Law and Dean’s Distinguished Scholar, University of Miami. Many thanks to the editors of the *Denver Law Review* for inviting and supporting my participation in this centennial commemorative edition, and to the generations of critical scholars—including present and rising generations—that have made possible the progress sketched in this Article, and that is exemplified by the formation of the Critical (Legal) Collective in 2021–2022. All errors are mine.

1. Barack Obama, Address at Phoenix, Arizona Campaign Rally (Nov. 2, 2022).

publication began, America's original compromises still torment the country and its people daily.

Despite the remarkable continuity of American fundamentals, many details of import differ. One key difference—both for law and for society—is the persistence and expansion of the “culture wars” examined in the 1998 precursor to this short Article.<sup>2</sup> Those culture wars, formally declared as such from the podium of the 1992 Republican National Convention, claimed the nation's very “soul” to be at stake.<sup>3</sup> Three decades after their formal declaration, the sitting U.S. President agreed, declaring in November 2022 that those conflicts had become “a struggle for the very soul of America itself.”<sup>4</sup> In the quarter century since the 1998 precursor article, those social aggressions indeed had expanded, deepened, and focused in various poisonous ways, as outlined below.

The national devolution wrought through these culture wars used to be thought unthinkable, and the ambition behind it was breathtaking when finally candidly revealed. By 2022, and by their own account, the very same forces proclaiming cultural warfare in 1992 fiercely and audaciously sought to enplace themselves as the one and only power over American law and society.<sup>5</sup> The accumulating accounts of cultural warfare during these recent pivotal years depicted combined, coordinated, sustained, and

---

2. Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1412–15 (1998).

3. *Id.* at 1427.

4. See Joe Biden, President, Remarks by President Biden on Standing up For Democracy (Nov. 2, 2022) (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/11/03/remarks-by-president-biden-on-standing-up-for-democracy/>).

5. Wisconsin is only one case in point where the Republican nominee for governor, Tim Michels, publicly promised that if elected, “[Republicans] ‘will never lose another election.’” See Martin Pengelly, *Republican Says Party ‘Will Never Lose Another Election’ in Wisconsin If He Wins*, GUARDIAN (Nov. 2, 2022, 11:34 AM), <https://www.theguardian.com/us-news/2022/nov/02/wisconsin-republican-gubernatorial-candidate-tim-michels>. Although he lost that election, the ambition was made public and explicit and is reflected more broadly in the strategy driving that party in that state. For an in-depth analysis of factional entrenchment to defeat democracy and impose one-party rule, see Ari Berman, *How Wisconsin Became the GOP's Laboratory for Dismantling Democracy*, MOTHER JONES (Oct. 25, 2022), <https://www.motherjones.com/politics/2022/10/wisconsin-2022-midterms-gerrymandering-redistricting-evers-michels/>. This playbook reflected the larger Republican refusal to commit to respect election outcomes unless they were declared the winners and given power. See, e.g., Maggie Astor, *Lake Won't Pledge to Accept Election Results, and More News from the Sunday Shows*, N.Y. TIMES (Oct. 17, 2022), <https://www.nytimes.com/2022/10/16/us/politics/kari-lake-election-results-az.html>; Laura King, *Trump Won't Commit to Accepting Result If He Loses Election*, L.A. TIMES (July 19, 2020), <https://www.latimes.com/world-nation/story/2020-07-19/trump-wont-commit-to-accepting-election-result>.

determined efforts to dismantle democracy from within,<sup>6</sup> as well as to demolish majoritarianism as a democratic norm or even a pretense.<sup>7</sup> To impose minority rule in the here and now, as recent years have repeatedly shown, cultural warfare arrayed, orchestrated, and exploited techniques

---

6. For in an-depth study of the internal institutional picture, see DAVID ROTHKOPF, *AMERICAN RESISTANCE: THE INSIDE STORY OF HOW THE DEEP STATE SAVED THE NATION* (2022).

7. For the most extensive exploration, see FINAL REP. OF THE SELECT COMM. TO INVESTIGATE THE JAN. SIXTH ATTACK ON THE U.S. CAPITOL, H.R. DOC. NO. 117-663 (2d Sess. 2022) [hereinafter SELECT COMMITTEE REPORT]. Despite the thousands of videotape and other documentary evidence detailing that riotous attack and exposing the efforts to plan it and then to cover up its planning, the culture wars of the 2020s now include a concerted campaign to erase that memory and replace it with a patently false Orwellian revision. Though perhaps outlandish on its face, precisely the same epistemic offensive was launched by the vanquished Confederacy of the 1860s, which eventually managed to overcome known knowledge and replace it with today's racist mythologies, which in turn help to arm cultural warfare today. See DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* (2001). The capacity to alter memory can translate into real-world inversions, as the American experience with civil war politics thus teaches. See C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1966). This current campaign to rewrite already-documented history is part and parcel of the epistemic, or knowledge-centric, new "prong" of attack that has become so salient in the 2020s culture wars. See *infra* notes 28 & 80 and accompanying text.

invented or refined in recent decades, including computer-generated gerrymandering,<sup>8</sup> precise and pervasive voter suppression,<sup>9</sup> ideologically vetted judges,<sup>10</sup> vitriolic nonstop propaganda,<sup>11</sup> unrelenting political intimidation,<sup>12</sup> gutted public schooling,<sup>13</sup> race-based mass incarcerations,<sup>14</sup> and,

8. See Julian E. Zelizer, *The Power That Gerrymandering Has Brought to Republicans*, WASH. POST (June 17, 2016), [https://www.washingtonpost.com/opinions/the-power-that-gerrymandering-has-brought-to-republicans/2016/06/17/045264ac-2903-11e6-ac4a-3cdd5fe74204\\_story.html](https://www.washingtonpost.com/opinions/the-power-that-gerrymandering-has-brought-to-republicans/2016/06/17/045264ac-2903-11e6-ac4a-3cdd5fe74204_story.html). The “Red Map Project” exemplifies this long-standing Republican campaign. For a detailed account, see HUGH HEWITT, *PAINTING THE MAP RED: THE FIGHT TO CREATE A PERMANENT REPUBLICAN MAJORITY* (2006).

9. See Edward Lempinen, *Stacking the Deck: How the GOP Works to Suppress Minority Voting*, BERKELEY NEWS (Sept. 29, 2020), <https://news.berkeley.edu/2020/09/29/stacking-the-deck-how-the-gop-works-to-suppress-minority-voting/>. Georgia is an apt case in point: after Georgians voted for Democrats in 2020, Georgia Republicans reacted with a massive overhaul of election laws to inflict “a thousand cuts” that would inhibit specifically Democratic voting. For example, in just those two years, these new Republican laws helped to suppress absentee voting from 26% in 2020 to 4% in 2022. See Mark Niesse, *Georgia Voting Access Slips Under New Laws, Research Shows*, ATLANTA J. CONST. (Sept. 15, 2022). But that cut is only one among a thousand: “Georgia has had mass challenges to voter registrations, Florida has a new police force that has engaged in voter intimidation, Michigan is battling rogue election workers, and many states have experienced harassment of elections officials, restrictions on voting drop boxes, and more.” See Dana Milbank, *In Nevada, Election Deniers Prepare to Sabotage the Midterms*, WASH. POST (Oct. 21, 2022, 2:45 PM), <https://www.washingtonpost.com/opinions/2022/10/21/nevada-republicans-election-denier-sabotage-midterms/>. For a timely and comprehensive compilation of the tactics that selectively suppressed access to or exercise of voting rights during these times, see N.Y. TIMES ED. STAFF, *VOTER SUPPRESSION: BLOCKING THE BALLOT BOX* (2020).

10. See Ilya Shapiro, *The Politics of Supreme Court Confirmations and Recommendations for Reform*, CATO INST. (July 20, 2021), <https://www.cato.org/testimony/perspectives-supreme-court-practitioners-views-confirmation-process>. Packing the judiciary with reactionary ideologues has been central to rightist backlash and cultural warfare, as noted in the 1998 article, see Valdes, *supra* note 2, at 1440–42, and as further or still demonstrated in the 2020s, see *infra* sources in note 50 and accompanying text. For a more in depth and updated account, see SHELDON WHITEHOUSE & JENNIFER MUELLER, *THE SCHEME: HOW THE RIGHT WING USED DARK MONEY TO CAPTURE THE SUPREME COURT* (2022).

11. Renée DiResta, *The Misinformation Campaign Was Distinctly One-Sided*, ATLANTIC (Mar. 15, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/right-wing-propagandists-were-doing-something-unique/618267/>. The ambient propaganda of the decade perhaps is best exemplified by the “Big Lie” (and related multiplicity of other lies) relating to Donald Trump’s loss of the 2020 election pushed principally by Republican partisans and allied operatives or celebrities. For a real-time in-depth account, see JONATHAN LEMIRE, *THE BIG LIE: ELECTION CHAOS, POLITICAL OPPORTUNISM, AND THE STATE OF AMERICAN POLITICS AFTER 2020* (2022).

12. See Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160 (2021). The spiked targeting of elected officials since 2016 illustrates the much larger point of intensifying and increasing violence or threats designed to intimidate elected officials, especially those who resist or refuse rightist demands. See, e.g., Stephanie Lai, Luke Broadwater, & Carl Hulse, *Lawmakers Confront Rise in Threats and Intimidation, and Fear Worse*, N.Y. TIMES (Oct. 1, 2022, 2:47 PM), <https://www.nytimes.com/2022/10/01/us/politics/violent-threats-lawmakers.html>; Trish Turner & Alexandra Hutzler, *Threats to Pelosi, Other Lawmakers Have Surged Exponentially, Police Say*, ABC NEWS (Oct. 28, 2022, 1:34 PM), <https://abcnews.go.com/Politics/threats-pelosi-lawmakers-surged-exponentially-police/story?id=92289962>. This bottom line was underscored by U.S. Capitol Police statistics that track threats to or attacks against congressional officials, which were under 4,000 annually in 2017 and nearly 10,000 just four years later, in 2021. Joan E. Greve & Lauren Gambino, *US Faces New Era of Political Violence as Threats Against Lawmakers Rise*, GUARDIAN (July 31, 2022, 9:17 AM), <https://www.theguardian.com/us-news/2022/jul/31/us-political-violence-threats-against-lawmakers>.

13. See Laura Meckler, *Public Schools Facing a Crisis of Epic Proportions*, THE WASH. POST (Jan. 31, 2022) <https://www.washingtonpost.com/education/2022/01/30/public-education-crisis-enrollment-violence/>. For a systemic overview of the problem’s racialized root causes on the fiftieth anniversary of the celebrated modern precedent, see Robert S. Chang & Jerome M. Culp, Jr., *Business as Usual? Brown and the Continuing Conundrum of Race in America*, 2004 U. ILL. L. REV. 1181

most recently, open violence and its constant, growing, and ambient threat. By decade's dawn, threats and acts of physical violence, both organized and random, had become a staple of cultural warfare.<sup>15</sup> All these momentous collective acts and their corrosive, compounding social ramifications can be only sketched here.

But, notably, confirming this new era of domestic terror as political technique, from January 2021 onward multiple federal agencies repeatedly singled out the mounting torrent of threats and acts of “domestic terrorism” from “extremist white supremacist” groups as the country’s principal national security threat.<sup>16</sup> As if to prove those multiple assessments correct,

---

(2005). For an in-depth assessment, also on that fiftieth anniversary, see DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004). See also *infra* notes 73, 81, & 83 and sources cited therein (generally on racialized material inequality).

14. See Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 2021). Ironically, the country claiming to be the world’s freest also incarcerates the greatest proportion of its people of any on Earth, and in ways that reflect and reinforce white supremacy, privilege, profits, and power. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2016). By 2022, a University of Chicago Law School study reported that “US prison[] [labor programs] violate the most fundamental human rights” due to wholesale corporate exploitation of imprisoned populations. Law School Communications, *New Global Human Rights Clinic Report Finds Coercion and Exploitation at the Center of Prison Labor Programs Nationwide*, U. CHI. L. SCH. (June 15, 2022), <https://www.law.uchicago.edu/news/new-global-human-rights-clinic-report-finds-coercion-and-exploitation-center-prison-labor>.

15. Zack Stanton, *How the ‘Culture War’ Could Break Democracy*, POLITICO (May 20, 2021, 5:30 PM), <https://www.politico.com/news/magazine/2021/05/20/culture-war-politics-2021-democracy-analysis-489900>. This zeitgeist of potential political violence anywhere at any time was crystallized by two interconnected events separated only by time and place: first, the January 6, 2021, attack on the U.S. Capitol, with videotaped mobs searching and chanting for the Speaker of the House and the Vice President while proclaiming deadly intentions and defacing the premises, which caused the entire building’s hasty and unprecedented evacuation, followed secondly, the very next year, by the midnight hammer attack on the Speaker’s husband while asleep at home, which fractured his skull among other serious injuries. Like the culture wars of the 2020s, see *infra* notes 73 & 77 and accompanying text, this “cult of violence” too is one-sided—a unilateral practice of Republican politicians, activists, operatives, and other partisans. See David Frum, *Only the GOP Celebrates Political Violence*, ATLANTIC (Oct. 29, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/pelosi-republicans-partisan-political-violence/671934/>. “No Democratic equivalent exists of Donald Trump, who regularly praises and encourages violence as a normal tool of politics . . . Paul Pelosi is the latest to pay a blood price for the cult of violence . . . but he won’t be the last victim of the cult. It won’t stop, but it must stop.” *Id.* For contemporaneous news accounts, see George Petras, Janet Loehrke, Ramon Padilla, Javier Zarracina, & Jennifer Borresen, *Timeline: How the Storming of the U.S. Capital Unfolded on Jan. 6*, USA TODAY (Feb. 9, 2021, 6:33 AM), <https://www.usatoday.com/in-depth/news/2021/01/06/dc-protests-capitol-riot-trump-supporters-electoral-college-stolen-election/6568305002/>; Amanda Holpuch, *What We Know About the Attack on Nancy Pelosi’s Husband*, N.Y. TIMES (Oct. 31 2022), <https://www.nytimes.com/2022/10/28/us/politics/nancy-pelosi-husband-assaulted.html>.

16. See U.S. DEP’T HOMELAND SEC., NAT’L TERRORISM ADVISORY SYS. BULL., SUMMARY (Jan. 27, 2021) [hereinafter Jan. BULL.]; U.S. DEP’T HOMELAND SEC., NAT’L TERRORISM ADVISORY SYS. BULL., SUMMARY OF THE TERRORISM THREAT TO THE UNITED STATES (Feb. 7, 2022) [hereinafter Feb. BULL.]; U.S. DEP’T HOMELAND SEC., NAT’L TERRORISM ADVISORY SYS. BULL., SUMMARY OF THE TERRORISM THREAT TO THE UNITED STATES (June 7, 2022) [hereinafter June BULL.]. The warnings from the Department of Homeland Security and FBI became public and pointed immediately after the January 6, 2021 attack on the U.S. Capitol, and by 2022 various federal intelligence agencies were issuing a “joint bulletin”—in each instance singling out violent white, rightist extremism as the proximate national danger. As a response to the threat of domestic violent extremists, the Department

self-righteous supremacist talk of “civil war” was thick in the air and nightly on the news. Taking note of the palpable climate, the country’s celebrated historians had been gathered presidentially at the White House, who likewise confirmed that, in their studied estimation, the nation in fact seemed thusly poised.<sup>17</sup> The 2020s in the United States somehow had become like the 1850s.<sup>18</sup>

Internet searches and social media during that same time showed millions of Americans similarly were comparing this historical moment to the 1850s in American history, which led to the Civil War of 1861–1865—but also to German history during the 1930s, which occasioned the Nazi’s fascist Third Reich and necessitated a second World War between 1939–1945.<sup>19</sup> As inquiring Americans of the 2020s then found out, and as this Article briefly sketches, the very same supremacist identity-based politics, themes, ideologies, and agendas of those two periods are unmistakably manifest in the culture wars of today and of recent decades—and not just coincidentally so.<sup>20</sup> Thus, the response then is instructive now.

Facing analogous domestic dangers in January 1944, and even as Nazi Germany tottered toward unconditional surrender, Franklin D. Roosevelt warned all Americans of “the grave dangers ‘of rightist reaction’ in this nation.”<sup>21</sup> Putting the matter plainly, as was his known way in one of

of Homeland Security established a new domestic terrorism branch and designated domestic violent extremism as a “National Priority Area.” Jan. BULL., *supra* note 16; Feb. BULL., *supra* note 16; June BULL., *supra* note 16.

17. See Michael Scherer, Ashley Parker, & Tyler Pager, *Historians Privately Warn Biden that America’s Democracy Is Teetering*, WASH. POST (Aug. 10, 2022), <https://www.washingtonpost.com/politics/2022/08/10/biden-us-historians-democracy-threat/> (outlining press accounts of that meeting). For a historical exploration of the themes discussed there, as elaborated by one of that meeting’s participants, see JON MEACHAM, *AND THERE WAS LIGHT: ABRAHAM LINCOLN AND THE AMERICAN STRUGGLE* (2022).

18. See Scherer et al., *supra* note 17; Kelsey Vlamis, *Biden Met With Historians Who Warned Him About Threats to Democracy and Compared the Current Moment to the Pre-Civil War Era, Report Says*, BUS. INSIDER (Aug. 10, 2022, 8:18 PM), <https://www.businessinsider.com/biden-met-historians-warned-threats-to-democracy-civil-war-2022-8>. In this way, the 2020s perhaps epitomizes “preservation-through-transformation”—the curious systemic phenomenon whereby pro-equality legal reforms are followed by other legal adjustments that help to reconfigure the restoration of identity-inflected social conditions—and power relationships—that prevailed before the reforms. See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–80, 2184 (1996). In common terms, this phenomenon recalls that old axiom: the more things change, the more they stay the same. In culture war terms, this phenomenon effectively resembles the desired “resurrection” of repudiated hierarchies in U.S. law and society. See *infra* source cited in note 34 and accompanying text (on resurrection of past social and legal arrangements as a culture war agenda).

19. Jason Stanley, *America Is Now in Fascism’s Legal Phase*, GUARDIAN (Dec. 22, 2021), <https://www.theguardian.com/world/2021/dec/22/america-fascism-legal-phase>. For classic and comprehensive accounts, see WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH; A HISTORY OF NAZI GERMANY* (1960) and RICHARD J. EVANS, *THE COMING OF THE THIRD REICH* (2004).

20. The similarities between the American version and the Hitlerian version of racial group supremacy are not coincidental: Third Reich jurists carefully studied the American legal architecture justifying the historical conquest and genocide of Indigenous peoples, and the U.S. Jim Crow laws of the 1930s, in order to structure and craft their own analogs, known as the 1937 Nuremberg Laws, which established the expressly white supremacist, anti-Semitic, and homophobic legal blueprint for the Nazification of Germany and the lands it conquered. See JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* (2017).

21. President Franklin D. Roosevelt, *Fireside Chat #28—State of the Union* (Jan. 11, 1944).

his famed Fireside Chats, Roosevelt cautioned and predicted: “[I]f such reaction should develop,” he continued, “then it is certain that even though we shall have conquered our enemies on the battlefields abroad, we shall have yielded to the spirit of fascism here at home.”<sup>22</sup> After decades of rightist cultural warfare, this pointed warning hung over America heavier than any time since 1944.<sup>23</sup>

In this still fraught and unfolding context, the 1998 precursor article had urged that, “as legal scholars in a legalistic society,” we “must employ our skills and resources to imagine and help assemble collectivities” capable of making a difference in that very context:

[A]s legal *scholars*, we possess a unique structural capacity for theorizing social reality and law’s relationship to it: as *critical* legal scholars devoted to social justice, we have the responsibility to exercise that capacity to articulate frameworks of effective antisubordination resistance. . . . [A] responsibility to practice and promote the lessons and insights of our scholarship.<sup>24</sup>

Thus, equally key is the remarkable emergence and salutary expansion since the 1990s of overlapping “critical networks” of legal scholars jointly developing today’s bodies of “critical outsider jurisprudence”<sup>25</sup>—a critical knowledge base in law and about law that never before had existed as such. This knowledge base, built up by generations of scholarly and activist networks, now provides a coherent worldview and practical framework for exposing and combatting the systemic riddles and webs that entrench injustice despite contrary laws and proclamations.<sup>26</sup> This relatively recent critical legal knowledge and diaspora, and the resulting possibilities for collective action that they enable now, also are not just coincidence. Over time, the compelling truth, power, and potential of this knowledge has proven undeniable.

Confirming and reacting to the cumulative social power of this legal knowledge, Donald Trump announced in September 2020 a new executive order attacking this very knowledge—attempting to undercut this critical

22. *Id.* (quoting “one of the great American industrialists of [his] day”).

23. See Josh Zeitz, *The Speech That Set Off the Debate About America’s Role in the World*, POLITICO (Dec. 29, 2015), <https://www.politico.com/magazine/story/2015/12/roosevelt-arsenal-of-democracy-speech-213483/>. To review some of the repeated wide-ranging, deeply informed, real-time alarms, see CULLEN MURPHY, *ARE WE ROME?: THE FALL OF AN EMPIRE AND THE FATE OF AMERICA* (2007); TIMOTHY SNYDER, *ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY* (2017); ANNE APPLEBAUM, *TWILIGHT OF DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM* (2020); RUTH BEN-GHIAT, *STRONGMEN: MUSSOLINI TO THE PRESENT* (2021).

24. Valdes, *supra* note 2, at 1415.

25. Francisco Valdes, *City and Citizen: Community-Making as Legal Theory and Social Struggle*, 52 CLEV. STATE L. REV. 1, 3 n.4 (2005) [hereinafter *City and Citizen*]. The term “critical outsider jurisprudence” was coined by Mari Matsuda in the late 1980s to refer to the various then-emergent genres or branches of legal scholarship that were both critical and outsider in their analyses of social problems and legal systems. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323 (1989) [hereinafter *Public Response to Racist Speech*].

26. See *infra* text accompanying note 110. See also CRITICAL JUSTICE, *infra* note 110 (a comprehensive historical, legal, and systemic overview).

stance, this fact-based perspective, this bottom-up worldview. In effect, that Orwellian order commanded state suppression of critical knowledge about law, about history, about society, and, most of all, about the intersecting identity castes that saturated 2020s American society in every way despite the solemn, longstanding prohibitions against the same. That 2020 order—and its many copycats banning iconic books and policing library shelves, censoring basic ideas about human existence and re-criminalizing their expression, and stigmatizing minority cultures, histories, traditions or identities based on supremacist ideology—confirmed (again) that law itself remained the spearhead of this deliberate, historical, structural, and epistemic racist violence.<sup>27</sup> The combination and coordination of legal, social, physical, material, informational, and cognitive attack, which had become so salient in the 2020s culture wars, increasingly showed, tracked, and built upon the constitutionally repudiated vestiges and legacies of the 1850s *and* of the 1930s.

This charged detail points to the elephant in the culture wars of the 2020s, which any current analysis must acknowledge. Ever since his filmed, choreographed escalator descent in 2016 on his way to declaring himself a Republican presidential candidate while calling “Mexicans” “rapists,” Donald Trump has embodied—and has played like no one else—the reactionary “identity politics” of the culture wars.<sup>28</sup> Since 2016, he has accelerated cultural warfare in every way, including, as sketched below, an unprecedented concentration and coalescence within the modern-day Republican Party of white supremacist, misogynistic, anti-Semitic, Islamophobic, xenophobic, homophobic, transphobic, and most recently, fascist elements of American society.<sup>29</sup> Under Trump’s tutelage, these reactionary elements were congealing into a shared rightist ideology rallying under the banner of the so-called “Great Replacement” theory, in which Jewish and nonwhite people were cast as threats to the group supremacy of Anglo whites through sheer numbers<sup>30</sup>—a literal “replacement” that had to be stopped even if domestic terror, political violence,

---

27. See, e.g., Charles R. Lawrence III, “Justice” or “Just Us”: *Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983). On its face, this Order sought to reimpose with new viciousness the same top-down kinds of “epistemic injustice” that colonial societies and settler systems developed to suppress non-conforming knowledge with whatever systemic violence—cognitive, cultural, material, and physical—was necessary to enforce “original” castes. See Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133 (2012); see also Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1 (2014); Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219 (1999); Sally Engle Merry, *Law and Colonialism*, L. & SOC’Y REV. 889 (1991).

28. Valdes, *supra* note 2, at 1429–30.

29. For two incisive accounts among many, see BOB WOODWARD & ROBERT COSTA, *PERIL* (2021); PETER BAKER & SUSAN GLASSER, *THE DIVIDER: TRUMP IN THE WHITE HOUSE, 2017–2021* (2022). Perhaps most revelatory is the audiobook of Trump tapes—extended, unedited conversations from the White House with Bob Woodward spanning multiple years. See BOB WOODWARD, *THE TRUMP TAPES: BOB WOODWARD’S TWENTY INTERVIEWS WITH PRESIDENT DONALD TRUMP* (2022).

30. See Exec. Order No. 13950, 85 Fed. Reg. 60,683 (Sept. 22, 2020). For a current rendition of this “Great Replacement Theory” from the United States, see the Buffalo mass murderer’s May



and mass murder became the only means of resurrecting or imposing white Christian nationalism.<sup>31</sup> Any updated analysis must reflect these new, post-1998 facts while also recognizing how the terrorist violence of this extremist concoction has been long, long in the Republican making.<sup>32</sup> Within the party that declared, launched, and waged these culture wars for consecutive decades, Trump is just their grossest symptom or outgrowth, and perhaps their most destructive operative; but to critical observers, he himself is not the systemic problem. As outlined below, this bigger picture history also underscores the pronounced partisan unilateralism of the culture wars during the quarter century of political and recently physical aggression seen throughout the United States since the publication of the precursor article—and signals for all alert observers the heightened dangers of intentionally or inadvertently false analogies and equivalencies in this particular historical moment.

To help make sense of this gnawing systemic derangement, and to help mobilize effective responses from legal scholars and allies in these times of extended, expanding cultural warfare, this brief centennial Article updates the 1998 article in two key ways. First, by highlighting some key developments during the intervening quarter century that outline the targeted expansions of cultural warfare as they threatened to spill over into civil chaos. And second, by concluding with a brief sketch that maps the critical diaspora emerging within U.S. legal academia during those very same recent decades. This cautionary yet celebratory sketch shows how bottom-up knowledge and critical networks respond actively and collectively to the spreading racist malevolence and social damage of abiding cultural warfare, even as rightist reaction and its “spirit of Fascism here at home” continue to escalate the culture wars, attempting to erase, suppress, or punish what we—as critical legal scholars with social responsibility—know, do, and represent.

---

2022 white supremacist “manifesto.” Nicholas Confessore & Karen Yourish, *A Fringe Conspiracy Theory, Fostered Online, Is Refashioned by the G.O.P.*, N.Y. TIMES (May 15, 2022), <https://www.nytimes.com/2022/05/15/us/replacement-theory-shooting-tucker-carlson.html>. As that manifesto manifests, this Great Replacement is a reworked assemblage of white supremacist beliefs drawn from the Jim Crow and Nazi eras. For an authoritative “legal” articulation of this underlying worldview from a U.S. lawmaking perspective, see the 1956 “Southern Manifesto” issued by members of Congress after *Brown v. Board of Education*, 102 CONG. REC. H3948, 4004 (daily ed. Mar. 12, 1956). Comparison of the two manifestos shows how each repeats the same racialized ideological worldview; *see also infra* notes 55–57 and accompanying text (on white Christian nationalism and 2020s cultural warfare).

31. During these years, the rise of white Christian evangelism and then nationalism helped to fuel these rightist culture wars. *See generally* MICHELLE GOLDBERG, KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM (2007); *see also infra* sources cited in notes 54–56 and accompanying text (on white Christian nationalism and cultural warfare).

32. For insightful insider autopsies from now-former Republican strategists, see STUART STEVENS, IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP (2020); TIM MILLER, WHY WE DID IT: A TRAVELOGUE FROM THE REPUBLICAN ROAD TO HELL (2022). For journalistic first-hand accounts, see DAVID CORN, AMERICAN PSYCHOSIS: A HISTORICAL INVESTIGATION OF HOW THE REPUBLICAN PARTY WENT CRAZY (2022); MARK LEBOVICH, THANK YOU FOR YOUR SERVITUDE: DONALD TRUMP’S WASHINGTON AND THE PRICE OF SUBMISSION (2022).

I. IDENTITY, IDEOLOGY, INEQUALITY: MOUNTING CULTURAL WARFARE  
BY FORCE OF LAW—AND BY UNLAWFUL FORCE

Ever since the New Deal's rescue of American capitalism in the 1930s and 1940s, traditionally dominant elites have been demanding and engineering a return to, or "resurrection"<sup>33</sup> of, their previously constitutionalized privileges and, as the 1998 precursor article notes, this indignant reaction became only more hysterical during the civil rights gains of the 1950s and 1960s that measurably had loosened the bonds of Black people in America and other domestic racial-ethnic minorities, especially under Lyndon B. Johnson's Great Society.<sup>34</sup> By 1968, this racialized (and gendered) sense of identity-based entitlement, grievance, and reaction prompted a Republican politician named Richard Nixon to fashion what his strategists called a "southern strategy."<sup>35</sup> As noted in 1998, this strategy quite cynically prioritized ideological exploitation of judicial appointments to achieve partisan political agendas shaped by race and other social identities; this strategy centered law in politics, and vice versa, both rhetorically and practically.<sup>36</sup> Simultaneously, this strategy centered identity ideologies both in law and in politics.

Ideologically and operationally, this strategy also built upon the emergent Republican "base" that Barry Goldwater had helped to congeal four years earlier, chiefly from the remnants of 1950s McCarthyism, named after Republican Senator Joe McCarthy.<sup>37</sup> As the 1964 Republican presidential nominee, Goldwater famously declared that "[e]xtremism in defense of liberty is no vice," a since infamous cry that nonetheless has

33. Resurrection is the specific term used by proponents. *See, e.g.*, William W. Van Alstyne, *The Constitution in Exile: Is It Time to Bring It In From the Cold?*, 51 DUKE L.J. 1 (2001).

34. For the personal account of the principal, see LYNDON BAINES JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY, 1963–1969* (1971); *see also* ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* (1990).

35. For the chief architect's contemporaneous account of this "southern strategy" and its long-term impact, see KEVIN PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (1969). Shortly after the turn of the century, Mr. Phillips, now a former Republican strategist, was publicly rueful of the social conditions and political rearrangements that he previously had helped to strategize and propel. *See* KEVIN PHILLIPS, *AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY* (2006).

36. *See* Valdes, *supra* note 2, at 1440–42. For scandalous in-depth contemporary accounts, see DAVID ENRICH, *SERVANTS OF THE DAMNED: GIANT LAW FIRMS, DONALD TRUMP, AND THE CORRUPTION OF JUSTICE* (2022); GEOFFREY BERMAN, *HOLDING THE LINE: INSIDE THE NATION'S PREEMINENT US ATTORNEY'S OFFICE AND ITS BATTLE WITH THE TRUMP JUSTICE DEPARTMENT* (2022).

37. For a comprehensive account of those pivotal political developments, see RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* (2001). For a critical outsider assessment of some resulting issues for law and justice, see Mari J. Matsuda, *Foreword: McCarthysim, the Internment and the Contradictions of Power*, 40 B.C. L. REV. 9 (1998) [hereinafter *Forward*].

bootstrapped itself among successful Republican partisans, thereby helping to propel that political faction, and the whole of the country, toward today's evermore hyperbolic, incendiary culture wars.<sup>38</sup>

Following Nixon's 1968 success with that racist electoral strategy, generations of Republican presidential politicians since then—from Presidents Reagan through Trump—have played with the supremacist fires of domestic rightist reaction, frequently stoking “the spirit of Fascism here at home” *with and through the culture wars that they themselves declared and have waged*.<sup>39</sup> In 2008, with Barack Obama's election and, four years later, his reelection, this rightist, racist, and fascist brew crystallized within the Republican Party as the “Tea Party”—which, in retrospect, served as Donald Trump's petri dish. By and through Trump's 2017 occupancy of the White House, culminating in January 6, 2021, and the violent transfer of power to Joe Biden, deception, corruption, extremism, and criminality had become commonplace as partisan political practice in the culture wars, all the way from the Oval Office to the local school board.

But even before spawning Trump, and only fifty years after President Roosevelt's 1944 warning, that fascist spirit also had spread from presidential to congressional politics, when the “angry white male” vote was sufficiently mobilized for the 1994 midterm elections that installed Newt Gingrich in power at the House of Representatives.<sup>40</sup> Quickly normalizing an even more strident Republican adoption of ideological extremism, that entire Congress was then consumed with partisan scorched-earth politics featuring a nonstop carnival of lies and smears, costly trumped-up scandals, repeated governmental shutdowns, and performative witch hunts in pursuit of “personal destruction”—all of which blueprinted the 2020s culture wars.<sup>41</sup>

Thus, even back then, the partisan contours of these “racialized culture wars” were cognizable as such—as a young Barack Obama also was writing contemporaneously in a recently released 1992 manuscript.<sup>42</sup> But what everyone must understand finally is how these culture wars fuse the imperatives of 1930s fascism with the antecedent but aligned ideologies

38. Will Wilkinson, *On the Saying that “Extremism in Defense of Liberty is No Vice”*, NISKANEN CTR. (Jan. 5, 2016), <https://www.niskanencenter.org/on-the-saying-that-extremism-in-defense-of-liberty-is-no-vice/>.

39. President Franklin D. Roosevelt, State of the Union Address to Congress (Jan. 11, 1944) [hereinafter FDR's State of the Union Address] (transcript available at <https://www.fdrlibrary.org/address-text>); see also Annie Karni, *Trump Uses Mount Rushmore Speech to Deliver Divisive Culture War Message*, N.Y. TIMES (Mar. 20, 2021), <https://www.nytimes.com/2020/07/03/us/politics/trump-coronavirus-mount-rushmore.html>.

40. See *City and Citizen*, *supra* note 25, at 15 n.41.

41. For a deep study, see JOHN F. HARRIS, *THE SURVIVOR: BILL CLINTON IN THE WHITE HOUSE* (2005). See also *City and Citizen*, *supra* note 25, at 15.

42. See Timothy Shenk, *A Lost Manuscript Shows the Fire Barack Obama Couldn't Reveal on the Campaign Trail*, N.Y. TIMES (Oct. 7, 2022), <https://www.nytimes.com/2022/10/07/opinion/obama-lost-book-manuscript.html>. In Obama's 1990s analysis, “cynical Republicans outmaneuvered feckless Democrats” in those “racialized culture war[s].” *Id.*

of colonialism.<sup>43</sup> Three decades after Obama's correct framing, the American culture wars had become a cauldron of old and new hates boiling over to scald all of society.

Understanding this morphing framing—understanding these culture wars as an interconnected set of multifaceted, dynamic, coordinated partisan moves, driven by racialized ideological agendas and designed literally to resurrect original identity-based castes,<sup>44</sup> rather than as just some random or idiosyncratic phenomena—is crucial to comprehending “what is going on” around you, and around all of us, *and why*; and then, this disturbing-by-liberating knowledge is critical to strategizing what to do about it. Understanding the dynamics of the culture wars shows how they continue the same identity-inflected contestations that led to, unfolded during, and then followed the American Civil War and its upheavals and reforms.<sup>45</sup> Understanding the culture wars for what they deliberately are allows critical analysis of democracy and adjudication as contested, double-edged instruments of systemic change to create and recreate in-groups and out-groups—the collectivized haves and have nots, or the tops and bottoms—that define now-entrenched American caste systems based on the interplay of race, sex, class, religion and other social identities—and that also define the historical, continuing struggles against those systems. Tracking the identity-inflected campaigns and battles of these U.S. culture wars points structurally to three mutually reinforcing “prongs” of historical and continuing cross-group aggression, as well as their increasingly political partisanship, that require critical diagnosis, engagement, and resistance.

These three prongs, mapped previously in the 1998 article, combine formal democracy, judicial review, and economic power to assert and reassert elite control of law in order to dominate society by using and manipulating social identities.<sup>46</sup> The first prong, focused on continually reengineering the ground rules of formal democracy to assure control of elec-

---

43. For an exceptional examination of colonial identity castes enforced systemically as American law during the country's formative period, see A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978). For the pressing notion of a legalized “resurrection” thereof, despite the intervening Civil War and Reconstruction, see *supra* source cited in 34.

44. See generally ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020); see also *supra* sources cited in note 28 and accompanying text (on colonialism, law, and identity-based castes). For an insightful recounting of American identity castes in legal action, see Kitty Calavita, *Collisions at the Intersection of Gender, Race, and Class: Enforcing the Chinese Exclusion Laws*, 40 L. & SOC'Y REV. 249 (2006).

45. Valdes, *supra* note 2, at 1412. For an excellent examination of this continuity as a feat of social, cultural, and epistemological engineering, in which the Confederate South's military and legal losses in war and Reconstruction effectively were reversed, see BLIGHT, *supra* note 7; see also sources cited *infra* note 104 (on “compromise” as a noble theme and base expedient in U.S. racial and national history).

46. Valdes, *supra* note 2, at 1434 (sketching the three prongs).

toral politics and their outcomes, already had put ruling elites in firm control of public policy,<sup>47</sup> but by 2020 rightist partisans aimed to “skip the voting and get right to the violence,” as key planners of the January 6th attack on the U.S. Capitol acknowledged on tape before that day’s profane violence unfolded, partially as planned.<sup>48</sup> The second prong, focused on packing the entire federal judiciary with reliable ideologues to control constitutional interpretation and its outcomes,<sup>49</sup> has succeeded spectacularly, as everyone has been forced to acknowledge since the nakedly lawless attack on constitutional liberties of the six appointees who signed onto the 2022 *Dobbs v. Jackson Women’s Health Organization*<sup>50</sup> opinion, who declared as simply incorrect the generations of precedent by appointees of both parties acknowledging that bodily “liberty” as substantive due process cannot help but include reproductive healthcare choices, including those of women deciding whether or not to beget a child.<sup>51</sup> The third prong,

---

47. *Id.* Elite domination of national policymaking outcomes had become so complete by the end of the 20th Century that a contemporary empirical study of 1779 issues and outcomes found that “average” citizens never see their policy preferences enacted into law unless corporate elites agree. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POLS. 564, 565 (2014). This bottom line persists because ruling elites organize to use their wealth year-round to dominate all lawmaking activities in order to further maximize their political power and economic profits for ongoing redeployments in future policy contests. See, e.g., BROOKE HARRINGTON, CAPITAL WITHOUT BORDERS: WEALTH MANAGERS AND THE ONE PERCENT 221–22 (2016); Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981, 1021 (2020). These ruling economic elites, of course, are predominantly white and male as a result of legal exclusions and privileges starting before the country’s formal founding, and continuing through today. See, e.g., DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT 17–21 (2021); see also generally EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS (2005).

48. Charlie Sykes, *Denver Riggleman: Why I Wrote It*, BULWARK (Oct. 14, 2022, 3:28 PM), <https://www.thebulwark.com/podcast-episode/denver-riggleman-why-i-wrote-it-2/#>. Longtime Trump confidante Roger Stone on camera: “Fuck the voting. Let’s get right to the violence. Shoot to kill.” See Luke Broadwater, Alan Feuer, & Maggie Haberman, *Roger Stone Promoted Violence, Then Sought Pardon After Jan. 6, Evidence Shows*, N.Y. TIMES (Sept. 27, 2022), <https://www.nytimes.com/2022/09/27/us/jan-6-house-committee-delays-hearing.html>. Steve Bannon stated, “What Trump’s going to do is just declare victory right? . . . He’s gonna declare victory. But that doesn’t mean he’s a winner.” See Aaron Blake, *The Significance of the New Steve Bannon Tape*, WASH. POST (July 13, 2022, 4:42 PM), <https://www.washingtonpost.com/politics/2022/07/13/significance-new-steve-bannon-tape/>.

49. Valdes, *supra* note 2, at 1434. For pointed repeated analyses of the resulting jurisprudential outcomes over recent decades, see Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court’s Role*, 81 N.C. L. REV. 1597 (2003); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). This ongoing judicial misconduct in turn reflects and projects a long history of the same, which explains the anti-equality, anti-democracy, and anti-freedom functions that judicial review has played throughout American history. See sources cited *infra* note 84.

50. 142 S. Ct. 2228 (2022).

51. See Maddy Cittadino, *Dobbs v. Jackson: The Overturning of Roe v. Wade and Its Implications on Substantive Due Process*, SYRACUSE L. REV. LEGAL PULSE (June 30, 2022), <https://lawreview.syr.edu/dobbs-v-jackson-the-overturning-of-roe-v-wade-and-its-implications-on-substantive-due-process/>. The six justices are: Alito, Roberts, Kavanaugh, Barrett, Gorsuch, and Thomas. *Dobbs*, 142 S. Ct. at 2239. Their *Dobbs* opinions echo the culture war themes and agendas manifest in rightist reactionary politics generally under prong one, and like other culture war opinions before, these also function as “political practice” under the guise of principled interpretation. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV.

focused on control of the spending power and taxation to starve public programs including education and to arrogate material and social goods in perpetuity, has legislated mind-boggling Republican tax cuts and other structural perks for the superrich that, in turn, have enabled ruling elites to hoard more money—and power—than any generation of humans had ever before been able even to fathom.<sup>52</sup> Under this scheme, first-prong success leads to second-prong success, which jointly “lock in” evermore extreme, partisan, and minoritarian control both of democracy and of its judicial appointees. For good measure, the third prong weaponizes public taxing and spending to “take out” elite adversaries and fund elites’ own perpetual enrichment and entrenchment through the public purse.<sup>53</sup>

Alongside the nonstop parade of scandal, grift, violence, and crime, these most recent years and rounds of cultural warfare have brought four

---

545, 545–48 (2006). This political practice as cultural warfare accounts in recent years for adjudicative results in fields ranging from democracy to religion to equality. *See, e.g.*, *County of Shelby v. Holder*, 570 U.S. 529 (2013) (demolishing the Voting Rights Act of 1965, *id.* at 2648 (Ginsburg, J. dissenting)); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (asserting that “the Muslim Ban” had nothing to do with Muslims, a preposterous assertion on its face, as exhaustively documented in Justice Sotomayor and Justice Ginsburg’s dissents); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (setting up “religious liberty” as a right to discriminate at least on the basis of sexual orientation and gender identity, and perhaps beyond, as widely noted). For decades, scholars have wondered aloud whether rightist reaction as jurisprudence thus amounts to an “anti-antidiscrimination agenda” carried out by appointees controlling judicial review for this ideological purpose. *See, e.g.*, Rubenfeld, *supra* note 50. For institutional context and historical background, see THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004). During this time, these results have been literally procured with billions of dollars directed deliberately at influencing the nominations and confirmations of particular appointees, as well as the outcomes that they generate once installed in power. *See, e.g.*, Hailey Fuchs, *Two Anonymous \$425 Million Donations Give Dark Money Conservative Group a Massive Haul*, POLITICO (Nov. 16, 2022, 10:32 AM), <https://www.politico.com/news/2022/11/16/two-anonymous-425-million-donations-gives-dark-money-conservative-group-a-massive-haul-00067493>.

52. Valdes, *supra* note 2, at 1434. Illustrating the point, the stock wealth of Amazon’s Jeff Bezos rose by \$75 billion in a single year, prompting him to order a “superyacht” that “is so big it needs its own yacht.” Allison Morrow, *Jeff Bezos’ Superyacht Is So Big It Needs Its Own Yacht*, CNN (May 10, 2021, 1:32 PM), <https://edition.cnn.com/2021/05/10/business/jeff-bezos-yacht>. But the historic extravagance extends all the way from new technologies to old industries. *See, e.g.*, Oliver Milman, *Exclusive: Oil Companies’ Profits Soared to \$174bn This Year as US Gas Prices Rose*, GUARDIAN (Dec. 6, 2021), <https://www.theguardian.com/business/2021/dec/06/oil-companies-profits-exxon-chevron-shell-exclusive>; *Oil Giants Rake in Record Profits as Energy Prices Remain High*, CBS (Oct. 28, 2022, 12:21 PM), <https://www.cbsnews.com/news/big-oil-profits-2022-joe-biden-exxon-chevron-soaring-gas-energy-prices/>. “In fact, the latest data from the U.S. Commerce Department shows that the last time corporate profit margins were so large was December 1950.” *See* Dominick Reuter & Andy Kiersz, *Companies Are Pocketing Their Fattest Profits in More Than 70 Years, Even as They Complain About Inflation*, INSIDER (Dec. 2, 2021, 11:56 AM), <https://www.businessinsider.com/companies-pocket-largest-profits-in-70-years-amid-inflation-complaints-2021-12>. For an explanation of the racialized systemic conditions enabling this level of sustained widespread profiteering and its identity-inflected architecture, see Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127 (2022); *see also generally* DAVID M. KOTZ, *THE RISE AND FALL OF NEOLIBERAL CAPITALISM* (2017); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005).

53. For one law-justice related example, see David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CAL. L. REV. 209, 209–10 (2003). For a systemic analysis of economics in public policy and their racialized social consequences, see RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

structural developments into sharp relief. The first is the in-your-face salience of white Christian evangelism within the politics of rightist reaction and cultural warfare<sup>54</sup>—a salience that Reagan was the first to fuel and exploit in the 1980s, which helps to explain the fixation with reproductive justice and marriage equality in the subsequent decades,<sup>55</sup> as well as the recent proclamation of white “Christian nationalism” as the banner and ideology of rightist reaction.<sup>56</sup> The second is the digitalization of social and economic life through technologies enabling a new “social media” ecosystem driven by algorithms that, in turn, are driven by sensationalism, bigotry, and hate, thereby bringing to life a machine that proliferates the same, and the resulting divisiveness, 24/7.<sup>57</sup> The third is the internationalization of America’s culture wars, as evidenced by the common parallels and ideological alignments that connect rightist cultural warfare in the United States to their functional equivalents in locales ranging from Hungary to Brazil, an expansion that signals a more menacing transnational threading of fascist agendas and forces going forward.<sup>58</sup> And fourth is the

---

54. ANTHEA BUTLER, *WHITE EVANGELICAL RACISM: THE POLITICS OF MORALITY IN AMERICA* 97–98, 107 (2021). Organized white Christian evangelicals became adjunctive to Nixon’s southern strategy when Ronald Reagan tweaked the strategy for his own ends in 1980, and in subsequent years this adhesion became not only permanent but also ever more salient within Republican politicking. For a comprehensive account, see RICK PERLSTEIN, *THE INVISIBLE BRIDGE: THE FALL OF NIXON AND THE RISE OF REAGAN* (2014).

55. See Butler, *supra* note 55, at 71, 76.

56. *Id.* at 54. As with the declaration of cultural warfare itself in 1992, see Valdes, *supra* note 2, at 1427 n.70, the declaration of white Christian nationalism as the avowed ideology and goal of rightist cultural warfare came directly from leading Republican partisans. See Ella Lee, *Marjorie Taylor Greene, Other Conservatives Lean into Christian Nationalism. What Is It?*, USA TODAY (Aug. 9, 2022, 5:01 AM), <https://www.usatoday.com/story/news/politics/2022/08/09/what-is-christian-nationalism/10211671002/?gnt-cfr=1>. For contemporary accounts and analyses of white Christian evangelism and nationalism as key elements of rightist political reaction, see PHILIP S. GORSKI & SAMUEL L. PERRY, *THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY* (2022); Michael Luo, *How White Christian Nationalists Seek to Transform America*, NEW YORKER (July 21, 2022), <https://www.newyorker.com/podcast/politics-and-more/how-white-christian-nationalists-seek-to-transform-america>. See also *supra* note 55 and sources cited therein (on white Christian nationalism and cultural warfare). For contemporary folk definitions of this resurrected ideological identity, see *In Their Own Words: How Americans Describe ‘Christian nationalism’*, PEW RSCH. CTR. (Oct. 27, 2022), <https://www.pewresearch.org/religion/2022/10/27/in-their-own-words-how-americans-describe-christian-nationalism/>.

57. Megan A. Brown, Jonathan Nagler, James Bisbee, Angela Lai, & Joshua A. Tucker, *Echo Chambers, Rabbit Holes, and Ideological Bias: How YouTube Recommends Content to Real Users*, BROOKINGS (Oct. 13, 2022), <https://www.brookings.edu/research/echo-chambers-rabbit-holes-and-ideological-bias-how-youtube-recommends-content-to-real-users/>. As a result, and reflecting the tenor of the times, in late 2022 the U.S. Senate issued a formal report expressly identifying this ecosystem—and the hate-filled disinformation free-for-all it houses and breeds—as a prime threat (among many) to the United States as a viable society in the future. See Ken Dilanian, *FBI, DHS and Social Media Firms Like Meta, TikTok Aren’t Adequately Addressing Threat of Domestic Extremists, Senate Report Says*, NBC (Nov. 16, 2022, 1:00 PM), <https://www.nbcnews.com/politics/national-security/fbi-dhs-meta-tiktok-threat-domestic-extremists-rcna57458>. Similarly, the House of Representatives produced, but did not publish, similar findings as part of the Select Committee’s investigation. See Cat Zakrzewski, Cristiano Lima, & Drew Harwell, *What the Jan. 6 Probe Found Out About Social Media, But Didn’t Report*, WASH. POST (Jan. 17, 2023, 5:43 PM), <https://www.washingtonpost.com/technology/2023/01/17/jan6-committee-report-social-media/>.

58. See, e.g., Benjamin Novak & Michael Grynbaum, *Conservative Fellow Travelers: Tucker Carlson Drops in on Viktor Orban*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/08/07/world/europe/tucker-carlson-hungary.html>; Kate Linthicum, *Echoing Trump*,

decidedly one-sided nature of these rightist conflicts—a conspicuous unilateralism that cautions against casual assertion or critical acceptance of any false analogies or equivalencies. In the United States today, there is no evidence-based analog or equivalent to the white Christian nationalism rooted in supremacist fascist ideology, draped with dramatic calls to civil chaos or war, that rightist Republican politicians and partisans openly espoused in the early 2020s, and which they positively have sought, in those very terms, to impose—both by law and by might—on the rest of us. For this very reason, multiple the federal warnings also became unequivocal: the mushrooming violence of the culture wars stemmed unilaterally and directly from white supremacist, right-wing extremism<sup>59</sup>—a partisan extremism valorized loudly and repeatedly by Republican politicians ever since Barry Goldwater’s 1964 cry,<sup>60</sup> and which thus far has not shown its destructive limits.

As *Dobbs* vividly clarified for many in the summer of 2022, this unilateral factional stridency is now undeniably reaction on the offense—a partisan *and* identitarian ideological reaction designed to “take back” by law what previously had been denied to some while arrogated by others, also by law—frequently based on identity and in direct or functional contravention of that “Equal Justice Under Law” promise, which ironically,

---

*Brazil’s President Prepares for Election Loss by Declaring Vote Rigged*, L.A. TIMES (Sept. 8, 2022, 3:00 AM), <https://www.latimes.com/world-nation/story/2022-09-08/bolsonaro-brazil-election-lula>. The comparisons between rightist reaction in the United States and the politics of these and other countries had become so obvious by the 2020s as to be publicly commonplace. *See id.* In Brazil’s presidential election, Trump cronies pushed the same “election denial” playbook there as they had pushed in the United States so that the rightist incumbent, Bolsonaro, could remain in power despite losing the election. *See, e.g.*, Alexandra Berzon & Ken Bensinger, *Election Deniers in the U.S. Are Pushing the Idea That Brazil’s Voting Was Tainted*, N.Y. TIMES (Nov. 12, 2022, 9:16 AM), <https://www.nytimes.com/live/2022/10/03/us/elections-midterms#election-deniers-brazil-midterms>. After the election, copycatting Trump forces in the United States, violent mobs waving banners for the losing candidate stormed and defaced public buildings in Brasilia, the capital. *See, e.g.*, Diane Jeantet & David Biller, *Pro-Bolsonaro Rioters Storm Brazil’s Top Government Offices*, ASSOCIATED PRESS (Jan. 8, 2023), <https://apnews.com/article/jair-bolsonaro-brazil-government-caribbean-0c03c098a5e2a09ac534412c30ae8355>. It bears emphasis: this copycatting was not coincidental, but rather the product of intentional rightist “consultation” and collaboration across national borders. *See, e.g.*, Elizabeth Dwoskin & Gabriela Sá Pessoa, *Trump Aides Bannon, Miller Advising Bolsonaro on Next Steps*, WASH. POST (Nov. 23, 2022, 1:09 PM), <https://www.washingtonpost.com/world/2022/11/23/brazil-bolsonaro-bannon/>.

Of course, even this “new” cross-border power dynamic had its varied yet repeated historical antecedents. *See, e.g.*, SCOTT NEARING & JOSEPH FREEMAN, *DOLLAR DIPLOMACY: A STUDY IN AMERICAN IMPERIALISM* (1925); RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946* xiii–xv (1972); PETER CHAPMAN, *BANANAS: HOW THE UNITED FRUIT COMPANY SHAPED THE WORLD* 103–11 (2007); H. BRUCE FRANKLIN, *VIETNAM AND OTHER AMERICAN FANTASIES* 2–4 (2000). This historical pattern and bottom line thus affects “international law” more generally as a system of rights as much as it does the “domestic” identity politics of rightist cultural warfare. *See, e.g.*, Makau Mutua, *Terrorism and Human Rights: Power, Culture, and Subordination*, 8 BUFF. HUM. RTS. L. REV. 1, 2–3 (2002); B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT’L L. 1, 2–5 (2004).

59. *See supra* sources cited in note 16 and accompanying text (on federal warnings highlighting right wing domestic terrorism).

60. *See supra* source cited in note 39 and accompanying text (on Goldwater’s 1964 call on Republicans for rightist extremism).



long has been (and still is) self-righteously proclaimed from the U.S. Supreme Court's own portico.<sup>61</sup> As *Dobbs* confirmed, rightist reaction in law, politics, and society positively seeks affirmatively to roll back specifically the (partial) fulfillment of formal promises made in the 1860s, and still proclaimed in the 2020s, and thus long overdue. Consequently, a false equivalency of the first order in this context would be to equate lawful vindication of legal promises (like enactment of civil right or affirmative action laws) with their unlawful breaches (through enactment of invidious laws and practices that prop up identity castes); as Martin Luther King Jr. himself pointed out nearly half a century ago in his 1963 "I Have a Dream" speech,<sup>62</sup> even if (or when) posited, such an equivalency would be as false as any attempting to equate an injury with a remedy or mistaking the latter for the former—as the same *Dobbs* appointees already seem poised to do next in exercising their operational control of the current Supreme Court and its judicial review power.<sup>63</sup>

Incredibly, therefore, from a 1998 perspective, today's radicalized culture wars effectively seek to cannibalize, not simply to control, dominant systems and their legal, social, material, and informational outputs. Rightist reaction as cultural warfare increasingly sought to dispense with politics *and* with law, skipping the need to persuade voters—or anyone

---

61. See, e.g., Nina Totenberg & Sarah McCammon, *Supreme Court Overturns Roe v. Wade, Ending Right to Abortion Upheld for Decades*, NAT'L PUB. RADIO (June 24, 2022, 10:43 AM), <https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overtun>; John Fritze, *Supreme Court Overturns Roe v. Wade, Eliminating Constitutional Right to Abortion*, USA TODAY (June 24, 2022, 2:29 PM), <https://www.usatoday.com/story/news/politics/2022/06/24/supreme-court-abortion-mississippi-roe-wade-decision/9357361002/>. As many commentators have noted, *Dobbs* is the first instance in American legal history where judicial appointees contravened multiple settled precedent to "take back" an individual constitutional right long held and accepted as "fundamental" in American law and society. See *id.* However, proponents of rightist reaction have long used the language of "taking back"—as in "their country"—as part of their culture war rhetoric. See, e.g., Philip Rucker & Robert Costa, *Donald Trump: 'We Have to Take Back the Heart of our Country'*, WASH. POST (July 11, 2015), [https://www.washingtonpost.com/politics/trump-tells-supporters-we-need-to-take-back-the-heart-of-our-country/2015/07/11/066aef2-27dd-11e5-b77f-eb13a215f593\\_story.html](https://www.washingtonpost.com/politics/trump-tells-supporters-we-need-to-take-back-the-heart-of-our-country/2015/07/11/066aef2-27dd-11e5-b77f-eb13a215f593_story.html); Yelena Dzhanova, *Trump Tells Rallygoers to 'Get Ready to Work' and 'Fight' to 'Take Back our Country' in 2024*, INSIDER (May 15, 2022, 9:29 AM), <https://www.businessinsider.com/trump-tells-supporters-rally-work-take-back-white-house-2024-2022-5>.

62. MARTIN LUTHER KING, JR., *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 102 (James Melvin Washington ed., 1992). For this very reason, and presaging Derrick Bell's 2004 assessment on the fiftieth anniversary of *Brown*, Martin Luther King, Jr. was framing his 1960s civil rights claims as a "demand" for fulfillment of a long overdue "promissory note"—or, that America fulfill the constitutionally promised "riches of freedom" and deliver the wrongfully withheld "security of justice" that supposedly "guaranteed the unalienable rights of life, liberty, and the pursuit of happiness" that the original Americans had declared as universal in 1776. See *id.*; BELL, *supra* note 13. But as colonial and imperial history then showed, and as King emphasized in 1963, that original promise also has been systematically contravened in the lands now known as the United States since at least 1619 and replaced with the original identity-based castes of settler colonialism and the slave trade. See *A NEW ORIGIN STORY: THE 1619 PROJECT* vii–xi (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman, & Jake Silverstein eds., 2021). See generally HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440–1870* (1997) (discussing the origin, internationalization, abolition, and illegal era of the Atlantic slave trade); DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* (2006) (discussing the ancient foundations of modern slavery, rise of the Atlantic slave trade, and slavery in North America up through abolitionism and the U.S. Civil War).

63. See Barnes, *infra* note 83 and accompanying text (on the pending affirmative action case).

else, for that matter—with verified or verifiable facts while improvising legal impunity for high crimes and misdemeanors, and instead inciting, protecting, and celebrating brute force, including civil chaos.<sup>64</sup> In this “post-truth” straightjacket, the Orwellian bottom line returned always to hypocrisy, fear mongering, intimidation, chaos, and terror. This recurrent bottom line thus recalls and perhaps answers the question asked by the opening quote of this essay: “What happens when truth doesn’t matter anymore?”<sup>65</sup>

That question remains open, its answer contingent. But the continuing capacity for expansion and radicalization of cultural warfare in the twenty-first century already has made clear that little has changed in American fundamentals since the 1787 compromises in Philadelphia, or since the toxic brews of the 1850s, or since the first publication of this *Review* in the 1920s, or since the Jim Crow and Fascist eras of the 1930s. Against this larger backdrop, and as 2022 closed, the coast-to-coast voting records of the midterm elections made one bottom line crystal clear yet again: America’s battered soul was numb and might be reaching exhaustion, but not so the culture wars.

As Abraham Lincoln warned in 1863, even as that first Civil War already raged, “[A]mong free men, there can be no successful appeal from the ballot to the bullet; and . . . they who take such appeal are sure to lose their case, and pay the cost.”<sup>66</sup> The same is likely to hold true now, as then, in untold lives lost or derailed. And yet, by all indications, the supremacist extremism, fascist violence, and identity-based bigotry of these rightist culture wars are all unlikely to abate any time soon.<sup>67</sup> But, also as in the 1860s, the Republic is not yet ready to be toppled or cast aside.

---

64. See, e.g., Melanie Mason & David Lauter, *We Are in a Tinderbox: Political Violence Is Ramping Up, Experts Warn*, L.A. TIMES (Oct. 30, 2022, 6:00 AM), <https://www.latimes.com/politics/story/2022-10-30/paul-pelosi-attack-in-california-political-violence>. “Incidents now range from the unprecedented—the Jan. 6, 2021, siege of the U.S. Capitol . . . to the more quotidian malice of telephone and email death threats.” *Id.*

65. See Obama, *supra* note 1.

66. Letter from Abraham Lincoln, President of the U.S., to Hon. James C. Conkling (Aug. 26, 1863) (on file with the University of Virginia Miller Center).

67. See, e.g., Isaac Arnsdorf & Michael Scherer, *Trump, Who as President Fomented an Insurrection, Says He Is Running Again*, WASH. POST (Nov. 15, 2022, 11:00 PM), <https://www.washingtonpost.com/politics/2022/11/15/trump-2024-announcement-running-president/>. If one is looking, the signs of redoubled rightist reaction abound. For instance, and not coincidentally, shortly after the midterm elections Trump himself announced formally that he would be a candidate for the Republican nomination again in 2024. *Id.* During this time his “Stop the Steal” big-lie campaign also proceeded full-steam ahead. See, e.g., Elaine Godfrey, *‘Stop the Steal’ Isn’t Conceding*, ATLANTIC (Nov 17, 2022, 11:47 AM), <https://www.theatlantic.com/politics/archive/2022/11/election-denial-midterms-arizona-kari-lake/672129/>. It was time, Trump declared in late 2022 after the midterm election results, to “terminate” parts of the Constitution in order to accommodate his lies, greed, and ambition. See, e.g., Amy B. Wang, *GOP Lawmakers Largely Silent After Trump Suggests ‘Termination’ of Constitution*, ANCHORAGE DAILY NEWS (Dec. 4, 2022), <https://www.adn.com/nation-world/2022/12/04/trump-rebuked-for-call-to-suspend-constitution-over-election/>. And it wasn’t just Trump, but also the now-sprawling train of local, state, and national Republican politicians using public office, like he did, to stoke cultural warfare, to corrupt law, to trump democracy, and to arrogate

Instead, as the 2022 midterm election results indicated to many that November, it seemed likely that nothing tectonic would transpire until, perhaps, the next electoral inflection points two years hence. In their inconclusive aftermath,<sup>68</sup> the noise about “civil war” seemed somehow less inevitable. The loudest proponents of rightist reaction, including the Republican leadership, seemed baffled and disoriented by electoral results that on the whole contradicted their sense or pose of self-righteousness and for the most part repudiated their candidates and slogans in open view of

---

public power for private self-aggrandizement, self-enrichment, or both—a party-line practice before and after the 2022 midterm elections. See, e.g., Azeen Ghorayshi, *Texas Governor Pushes to Investigate Medical Treatments for Trans Youth as ‘Child Abuse’*, N.Y. TIMES (Feb. 23, 2022), <https://www.nytimes.com/2022/02/23/science/texas-abbott-transgender-child-abuse.html>; News Service of Florida, *DeSantis to Scrutinize Diversity Programs at Florida Colleges, Universities*, TAMPA BAY TIMES (Jan. 5, 2023), <https://www.tampabay.com/news/education/2023/01/04/desantis-scrutinize-diversity-programs-florida-colleges-universities/>; Haley BeMiller, *Groups Sue Ohio Over New Election Law That Requires Photo ID, Tightens Mail-In Voting*, COLUMBUS DISPATCH (Jan. 10, 2023, 10:11 AM), <https://www.dispatch.com/story/news/politics/2023/01/09/ohio-election-law-faces-law-suit-from-democratic-attorney/69790208007/>.

68. See, e.g., Christina Wilkie, *Trump’s Favorite Candidates Disappoint on Election Day, Raising Questions About His 2024 Pitch*, CNBC (Nov. 9, 2022, 5:54 PM), <https://www.cnbc.com/2022/11/09/midterm-election-results-trump-candidates-disappoint-on-election-day.html>. On the whole, the 2022 midterm elections were widely interpreted as a rejection of rightist reaction because candidates most associated with its Trumpian rhetoric and backslashing agendas had lost elections for offices ranging across the entire spectrum of government. See *id.* In the end, Democrats barely retained the Senate but (also barely) had lost the House, thus ensuring the ability to confirm judicial appointees (crucial to resistance in the culture war’s second prong), but simultaneously signaling a likely inability to govern effectively. See *supra* note 50 and accompanying text. This prospective new McCarthyism—so named because formally led by Kevin McCarthy, the new Republican House Speaker—perhaps may echo in substance and ideology the McCarthyism of the 1950s. See *Forward, supra* note 37 and accompanying text. At minimum, this new McCarthyism probably will resemble the costly carnivals of 1994. See, e.g., Jeff Stein & Marianna Sotomayor, *GOP Debt Ceiling Threats Set to Revive Brinkmanship with White House*, WASH. POST (Oct. 25, 2022), <https://www.washingtonpost.com/us-policy/2022/10/25/gop-debt-ceiling-threats-set-revive-brinkmanship-with-white-house/>; Lisa Mascaro & Mary Clare Jalonick, *GOP in Grinding Push to Break Democrats’ Hold on Congress*, ASSOCIATED PRESS (Nov. 9, 2022), <https://apnews.com/article/2022-midterm-elections-congress-b8394711a1b0550da394ed06b32263d3>; see also *supra* note 41 and accompanying text (on the House under Newt Gingrich after the 1994 midterms). In these circumstances, the new McCarthyism of the 2020s, like the original of the 1950s, will feature multiple three-ring investigations as ongoing public circus and, as usual, at the expense of the public interest and individual lives or careers. See, e.g., Charlie Savage & Luke Broadwater, *House Republicans Preparing Broad Inquiry into F.B.I. and Security Agencies*, N.Y. TIMES (Jan. 8, 2023), <https://www.nytimes.com/2023/01/08/us/politics/house-republicans-fbi-investigation.html>. But one consequential, and perhaps catastrophic, difference between now and 1950s McCarthyism is the wholesale conversion of the Republican Party into an organized fascist machine with playbooks, networks, and resources to stoke continual “slow-motion” subversion, chaos, and violence until a full social explosion is achieved, and then ideologically exploited. This key difference makes today’s Kevin McCarthy one among a pack—unlike the lashing lone wolf of the 1950s Senate belatedly rebuked by other, more senior, fellow Republicans; unlike the abuses of Joe McCarthy and his aides in the 1950s, this difference means the Republic certainly will be subjected to coordinated, sustained attacks from multiple organized sources for as far as the eye can see. For in-depth analyses of the Republic’s “slow-burn” predicament as the 2020s unfolded, see JEFF SHARLET, *THE UNDERTOW: SCENES FROM A SLOW CIVIL WAR* (2023); JASON STANLEY, *HOW FASCISM WORKS: THE POLITICS OF US AND THEM* (2018). For an insider account, see, JASON VAN TATENHOVE, *THE PERILS OF EXTREMISM: HOW I LEFT THE OATH KEEPERS AND WHY WE SHOULD BE CONCERNED ABOUT A FUTURE CIVIL WAR* (2023). For an internationalized account, see CYNTHIA MILLER-IDRISS, *HATE IN THE HOMELAND: THE NEW GLOBAL FAR RIGHT* (2020). Cumulatively, these and similar accounts counsel against any post-midterm complacency, even if those fraught elections seem to have postponed a hard reckoning with the nation’s worst fears over its “soul” and its future.

the entire world.<sup>69</sup> But history teaches that this top-down game of domination and self-enrichment is “for as long as it takes”—with the “rules of the game” always subject to change for the sake of one-way advantage. No matter what, repose now or anytime in sight would be premature and improvident.

Though the country’s immediate trajectory seemed less on a precipice after November 2022, nonetheless the stage continued to be set for more of the same: in the days and weeks after those elections, rightist reaction persisted with their press of Goldwater’s call for ideological extremism at all costs as if those results meant nothing.<sup>70</sup> Going forward, then, the existential question ultimately must focus on: How fascistic will expanding rightist extremism be willing and able to go in the United States in order to impose its warped minority will on us all—or how far will the rest of us let those cruel belligerents go with their racialized totalitarian project?

In this precarious momentary balance, the country’s original fundamentals remained stubbornly in place—as well as (still) sharply contested. Reliant on and vulnerable to new technologies that it barely understood, the country (still) recycled its old invidious identity-based habits yet again, thereby seeming to teeter on the brink of a third Jim Crow based violently, this time, on post-truth versions of white Christian nationalism—even as many, many Americans renewed the country’s historical struggle for a third Reconstruction based on the liberatory, egalitarian premises, promises, and lessons of the first and second ones. While the 2022 midterms relieved immediate anxieties for many, a growing majority of Americans *knew* their country might be reaching a dangerous point of no return, and many even wondered (sometimes aloud) if that point already had passed. Much of the difficulty in discerning “the truth” was in the pervasive manipulation of information and knowledge to engineer perceptions and behaviors, and, over time, to construct and emplace rightist realities by law and as culture regardless of fact, history, reality, or dissent.<sup>71</sup>

## II. RACIAL TOTALITARIANISM: USING HISTORY, KNOWLEDGE, AND EDUCATION FOR MIND CONTROL—AND FOR GROUP DOMINANCE

Even as they expanded, the culture wars of the early 2020s also became more targeted—trained not only on political, legal, and material control of society but also on mind control. Systemically and politically, this

---

69. See, e.g., Amy Gardner, Reis Thebault, & Robert Klemko, *Election Deniers Lose Races for Key State Offices in Every 2020 Battleground*, WASH. POST (Nov. 13, 2022), <https://www.washingtonpost.com/elections/2022/11/13/election-deniers-defeated-state-races/>; Will Bunch, *The Far-Right Is Losing. That’s Why America Has Never Been So Dangerous.*, PHILA. INQUIRER (Nov. 27, 2022), <https://www.inquirer.com/opinion/commentary/trump-fuentes-right-wing-violence-20221127.html>; David A. Graham, *America Has an Anti-MAGA Majority*, ATLANTIC (Nov. 9, 2022), <https://www.theatlantic.com/ideas/archive/2022/11/america-has-anti-maga-majority/672047/>.

70. Wilkinson, *supra* note 38.

71. See generally MAJOR GARRETT & DAVID BECKER, *THE BIG TRUTH: UPHOLDING DEMOCRACY IN THE AGE OF THE BIG LIE* (2022).

targeted expansion concentrated on increasing rightist control over information, perception, and education to embolden some and terrorize others in the continuing, coordinated reassertion of political and economic domination writ large.<sup>72</sup> Much of this epistemological warfare focused on manipulating the telling and teaching of history from the earliest of educational grades onward, but these efforts also stretched far beyond that one system, venue, or discipline, too.

This targeted expansion of the culture wars—including decades of defunding and decimating public education—advance multiple overlapping aims that jointly construct and orchestrate social conditions, and cumulatively enable new “permission structures” for the mass proliferation of identity bigotries that reinforce original colonial castes both in learning and in society.<sup>73</sup> These overlapping agendas aim to: indoctrinate youth and shape consciousness for conformance even before they mature; manipulate the means of communication constantly to mold society and policy; steer social beliefs and behaviors ideologically; and propagate or suppress information in order to advance a rightist worldview, even if (or because) it entails that supremacist “spirit of Fascism here at home,” which seems so elemental to white Christian nationalism in a post-truth United States.<sup>74</sup> As with 1930s German fascism,<sup>75</sup> this current American version of fascism seeks to control consciousness and impose group thinking in order to impose and ensure their own dominance over all else—but, for that very reason, also “stands by” equally ready, and perhaps itching for, raw violence in order to coerce group control of and ideological hegemony over law and society. As with all forms of fascism, these culture wars combine strategically the physical and moral force of formal law with corporate influence and the social pressures of culture and acculturation, and then reenforce that combination with the brute force of political violence, personal intimidation, and organized thuggery.<sup>76</sup>

---

72. See, e.g., Hannah Natanson, *Virginia Is Changing the Way It Teaches History, Social Studies. Here's How.*, WASH. POST (Nov. 16, 2022, 7:00 AM), [washingtonpost.com/education/2022/11/16/virginia-school-history-standards-youngkin/](https://www.washingtonpost.com/education/2022/11/16/virginia-school-history-standards-youngkin/); Andrew Atterbury, *DeSantis-Backed School Boards Begin Ousting Florida Educators*, POLITICO (Nov. 30, 2022, 4:30 AM), [politico.com/news/2022/11/30/desantis-school-board-covid-00071305](https://www.politico.com/news/2022/11/30/desantis-school-board-covid-00071305).

73. See, e.g., Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982); Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow, & Deborah Lee Stachel, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449 (1997) and 10 LA RAZA L.J. 363 (1998); Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155 (2008).

74. FDR's State of the Union Address, *supra* note 39.

75. Andrew C. Michaels, *The Patent Lawyer's Guide to Fascism on Individual Autonomy and Private Law*, 49 N.M. L. REV. 169 (2019).

76. Christian Goeschel, *The Criminal Underworld in Weimar and Nazi Berlin*, 75 HIST. WORKSHOP J. 58 (2013). In 2020s America, the paragon of militarized rightist gangs akin to those of 1930s Germany is known as the “Proud Boys,” who Donald Trump publicly ordered to “stand by” in the months leading up to the 2020 election, and which later become principal instigators of the January 6, 2021 attack on the U.S. Capitol to overturn Trump's electoral losses. See ANDY B. CAMPBELL, WE

Although part of a larger, longer, and ongoing history,<sup>77</sup> by the 2020s these targeted, systemic assaults on knowledge and education—or consciousness writ large—could be seen as a fourth prong of the expanding, intensifying culture wars. During this time, critical knowledge that might make original elites or their heirs “uncomfortable” (including critical race theory) was singled out for legal banning in public education while distorted versions of history and reality were force-fed to children through formal schooling like never before, despite everyone knowing better.<sup>78</sup> As those flagrant suppression efforts confirmed, the violent relationship of law, race, education, and knowledge throughout the nation’s history also exemplifies the epistemic focus of this fourth prong in the latest iteration of the U.S. culture wars.<sup>79</sup> Today, as before, this top-down political project, focused on social control through mind control, strives to “whitewash”<sup>80</sup> a well-documented history and legacy of unjust enrichment for a few and systemic injustice for the rest, oftentimes based on social identities and supremacist ideologies taught and transmitted through schools, families, churches, media outlets, and the whole of “mainstream” culture and society.<sup>81</sup> For this reason, access to “higher” education—and control over it—is deemed so special in rightist circles, agendas, and projects.<sup>82</sup>

Not coincidentally, therefore, in 2022 “race conscious affirmative action” in higher education once again was put on the judicial chopping block—as with *Roe v. Wade*’s reversal that same year, this new jurisprudential deathwatch was the direct and intended result of long-term and well-funded rightist campaigns seeking to reassert their ideological control

---

ARE THE PROUD BOYS: HOW A RIGHT-WING STREET GANG USHERED IN A NEW ERA OF AMERICAN EXTREMISM (2022); SELECT COMMITTEE REPORT, *supra* note 7.

77. See *infra* note 98 and sources cited therein (on education and inequality).

78. See, e.g., 2022 Fla. Sess. Law Serv. Ch. 2022-22 (C.S.C.S.H.B. 1557). Florida during 2022 provides just one among many case studies. See Parental Rights in Education, H.B. 1557, 2022 Sess. (Fla. 2022) (enacted); Individual Freedom, SB 148, 2022 Sess. (Fla. 2022).

79. See, e.g., Ronald L. Mize, *The Contemporary Assault on Ethnic Studies*, 47 JOHN MARSHALL L. REV. 1189 (2014); Jean Stefancic, *Reflections on Reform Litigation: Strategic Intervention in Arizona’s Ethnic Studies Ban*, 47 JOHN MARSHALL L. REV. 1181 (2014).

80. See Nick Reynolds, *Schools Revise Curriculum, Still Under Fire for ‘Whitewashing’ History*, NEWSWEEK (Nov. 17, 2022, 6:12 PM), <https://www.newsweek.com/schools-revise-curriculum-still-under-fire-whitewashing-history-1760497>.

81. Abena B. Boateng, Ida B. Casey, Jamie C. Klupe, Julie C. Moonman, & Angeline Williams-Jackson, *An Education System Built on the Pillars of White Supremacy and Anti-Blackness: A Collection of Autoethnographic Studies Depicting How Black Kids Never Had a Chance*, 50–54 (May 2021) (Ph.D. dissertation, University of Missouri-St. Louis) (available at <https://irl.umsl.edu/cgi/view-content.cgi?article=2080&context=dissertation>).

82. The original chief architect of what became the culture wars, Lewis Powell, specifically had named universities as a key enemy of the “free enterprise system,” as he called it in his infamous memorandum just shortly before Richard Nixon had him appointed to the Supreme Court in order to keep a key campaign promise of his 1968 “southern strategy”—a strategy that became a Republican template for using judicial appointments as “red meat” in electoral contests, and which over the decades has increasingly and improperly politicized the process, the institution, and its outcomes. See *infra* note 83 and sources cited therein (on the Powell Memo).

of law and, through it, of society.<sup>83</sup> Although established precedents had long settled the constitutional issues still being revived in 2022, enough culture war appointees were interested in creating the pathway for invalidation, much as they did with *Roe* the previous term, and thus granted certiorari where none was justifiable.<sup>84</sup> In 2023, the long sought-after invalidation of affirmative action, much like the long-sought invalidation of *Roe* in 2022, will be the unilateral handiwork of a few judicial appointees nakedly delivering on their patrons' big political campaign promises—despite the piercing, shaming dissents of their supreme counterparts. This reactionary culmination crisply illustrates not only the interplay among the three prongs of rightist cultural warfare outlined in 1998 to control democracy and adjudication in the service of original identity castes but also how those prongs now operate in tandem with this heightened targeting of knowledge, education, information, and consciousness.

As in other times and places, this fourth line of attack is waged not only via control of formal education and access to knowledge and consciousness through it but also is backed up by the incessant flooding of society with fraudulent information designed to make everyone's head spin constantly. Accordingly, today's culture wars increasingly include the omnipresent "information wars" waged through the professionalized manufacture and dissemination of misinformation and disinformation.<sup>85</sup> As

---

83. See Robert Barnes, *How One Man Brought Affirmative Action to the Supreme Court. Again and Again*, WASH. POST (Oct. 24, 2022, 2:00 PM), <https://www.washingtonpost.com/politics/2022/10/24/edward-blum-supreme-court-harvard-unc/>. However, that "one man" was backed by a complex of organizations and donors willing to pour millions of hours and dollars into shutting down the attempted diversification of higher education in part to help remedy past and present discrimination. See also JEAN STEFANIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996) (for a helpful mapping of this reactionary institutional web). That sprawling, lavishly funded infrastructure in turn was devised and urged by Lewis Powell in 1971, as a Virginia corporate lawyer working for the American Chamber of Commerce, just before Richard Nixon had him appointed to the U.S. Supreme Court in order to "represent" the South and thus satisfy the campaign promises of the southern strategy in 1968. See generally Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., *Attack on American Free Enterprise System* (Aug. 23, 1971) (transcript available at <https://www.reuters.com/investigates/special-report/assets/usa-courts-secrecy-lobbyist/powell-memo.pdf>); Charlie Cray, *The Lewis Powell Memo: Corporate Blueprint to Dominate Democracy*, GREENPEACE (Aug. 23, 2011), [www.greenpeace.org/us/the-lewis-powell-memo-corporate-blueprint-to-dominate-democracy/](http://www.greenpeace.org/us/the-lewis-powell-memo-corporate-blueprint-to-dominate-democracy/). That memorandum cast the dominant "American free enterprise system" as under "attack" from traditionally subordinated groups claiming equality and other civil rights promised by law, and outlined a strategy for a corporate take-back of American law and society that highlighted universities specifically as a prime target. That memo therefore was not only a blueprint for corporate domination of democracy, but also for control of adjudication, as corporate interests quickly saw a marked and sustained rise in their successful efforts to make law by judicial decree. In the coming decades, the results of the Powell memorandum and strategy were starkly clear to anyone paying attention. See, e.g., Brian R. Frazelle, *A Banner Year for Business as the Supreme Court's Conservative Majority is Restored, 2017-2018 Term*, CONST. ACCOUNTABILITY CTR. (July 17, 2018), [https://www.theusconstitution.org/think\\_tank/a-banner-year-for-business-as-the-supreme-courts-conservative-majority-is-restored/](https://www.theusconstitution.org/think_tank/a-banner-year-for-business-as-the-supreme-courts-conservative-majority-is-restored/). Since the 1970s, the culture wars have tracked Powell's recommended strategy, as recounted here and in the 1998 precursor article.

84. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

85. Will Duffield, *Information Wars: How We Lost the Global Battle Against Disinformation and What We Can Do About It*, CATO INST.: CATO J. (2021), <https://www.cato.org/cato-journal/spring/summer-2021/information-wars-how-we-lost-global-battle-against-disinformation-what-we-can-do-about>.

widely lamented in 2020s America, relentless campaigns for mind control were funded continuously, year-round, with obscene amounts of “big money” (often “dark money”) to push avalanches of “big lies”—and countless little lies laced with outlandish “conspiracy theories” that frequently contradicted each other—through conventional as well as social media.<sup>86</sup> In turn, this ongoing avalanche of big, dark money to fund racialized partisan propaganda was invited and is protected as cultural warfare by the same kind of judicial appointees responsible for *Dobbs* and other activist rightist opinions, including, notoriously, two five–four opinions helping mightily to engineer *Dobbs* itself: *Citizens United v. Federal Election Commission* in 2010<sup>87</sup> and *Bush v. Gore* a decade earlier in 2000.<sup>88</sup>

In *Citizens United*, a bare majority of the appointees declared corporations vested with the right to flood electoral processes with secret “donations” or dark money because, according to those five Republican appointees and their political patrons or partisan allies, corporations are “persons” just like you and me.<sup>89</sup> Therefore, their money is “speech”—just like for you and me. Since then, corporate persons have spent billions of corporate profits to “push” the votes of actual persons, as the 2022 midterm elections most recently confirmed yet again.<sup>90</sup>

In *Bush*, the same Republican quintet overruled the Florida Supreme Court and declared an immediate stop to all vote counting—just as the Republican candidate’s lead had dwindled to 537 votes of millions cast and before it could disappear altogether.<sup>91</sup> Despite a mass poll purge by the candidate’s brother and campaign manager that was revealed publicly only after the election,<sup>92</sup> and notwithstanding numerous other “irregularities” documented by the U.S. Civil Rights Commission in the election’s

86. See MAX FISHER, *THE CHAOS MACHINE: THE INSIDE STORY OF HOW SOCIAL MEDIA REWIRED OUR MINDS AND OUR WORLD* (2022) (for an in-depth analysis of this informational disorder and its human and social consequences).

87. See 558 U.S. 310, 318–19 (2010).

88. See 531 U.S. 98, 100 (2000).

89. See JOHN NICHOLS & ROBERT W. MCCHESENEY, *DOLLAROCRACY: HOW THE MONEY-AND-MEDIA ELECTION COMPLEX IS DESTROYING AMERICA* (2013). Within a thousand days, the avalanche of secretive corporate dollars had all but fully captured American democracy.

90. See, e.g., Brian Schwartz, *Federal and State Spending on 2022 Elections Set to Top \$16.7 Billion, Making Them the Most Expensive Midterms Ever* (Nov. 3, 2022, 2:18 PM), <https://www.cnn.com/2022/11/03/2022-midterm-election-spending-set-to-break-record.html>; Jonathan Weisman & Rachel Shorey, *Fueled by Billionaires, Political Spending Shatters Records Again*, N.Y. TIMES, (Nov. 3, 2022), <https://www.nytimes.com/2022/11/03/us/politics/midterm-money-billionaires.html>. Post-election news reports concluded that 16.7 billion dollars were invested in controlling the 2022 midterm results—the most expensive ever, until the next round of American elections. As in the recent past, big and dark money controlled by billionaires is at the center of this never-ending escalation.

91. Michael Levy, *United States Presidential Election of 2000*, ENCYCLOPEDIA BRITANNICA (Dec. 15, 2022), <https://www.britannica.com/event/United-States-presidential-election-of-2000>.

92. See, e.g., Julian Borger, *US Inquiry into Claims Black Voters Were Stripped of Rights*, GUARDIAN (Dec. 4, 2000), <https://www.theguardian.com/world/2000/dec/04/uselections2000.usa1>; Ron Elving, *The Florida Recount of 2000: A Nightmare that Goes on Haunting*, NPR (Nov. 12, 2018, 5:00 AM), <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting>.



immediate aftermath,<sup>93</sup> the candidate selected by those five appointees was handed the Executive powers of the United States in January 2001.<sup>94</sup> Over the next eight years, he used those powers to further pack the judiciary with appointees committed to repeating and growing this cross-branch entrenchment of partisan minority rule in, and as part of, racialized cultural warfare<sup>95</sup>—which they have done, as today’s recent or imminent opinions on liberty and equality continue to demonstrate.

The facts, outcomes, and ramifications of both *Citizens United* and *Bush* exemplify the culture wars’ prongs and their mutually reinforcing interplay. Each spans and binds control of electoral democracy, judicial review, and taxing or spending as cross-branch lawmaking to produce consistent top-down results that delineate and reproduce the ins and outs, the haves and have-nots, in the United States politically, materially, culturally, and socially. Rather than separated powers checking and balancing dueling factions or branches—as every generation of law student is trained to believe—this collusive, gerrymandered, and money-swamped scheme has bred and entrenched a predatory, kleptocratic economic elite, or oligarchy, based systemically on social group identities and colonial-era castes that today’s culture wars perpetuate.

In this self-reproducing scheme, as *Bush* especially made clear, each branch packs the other with partisan rightist zealots in order to then pack itself—and jointly to rewrite constitutional law, revamp American culture, and resurrect minority tyranny.<sup>96</sup> Each rendered by just a handful of appointees, successive reactionary opinions like *Citizens United*, *Bush*, *Dobbs*, and others have put into sharp relief how many of today’s judicial appointees are there precisely to tilt and shove not only legal doctrine but also formal democracy in their partisan, ideological direction<sup>97</sup>—even

93. See U.S. Comm. on C.R., *Voting Irregularities in Florida During the 2000 Presidential Election*, (Jan. 1, 2001), <https://www.usccr.gov/files/pubs/vote2000/report/ch9.htm>.

94. See *Bush v. Gore*, 531 U.S. 98, 100, 110–11 (2000).

95. See, e.g., Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, (Oct. 28, 2008), <https://www.nytimes.com/2008/10/29/us/29judges.html>; David G. Savage, *Conservative Courts Likely Bush Legacy*, L.A. TIMES (Jan. 2, 2008, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2008-jan-02-na-judges2-story.html>.

96. See, e.g., Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT (Dec. 4, 2001), <https://prospect.org/features/court-packs/>.

97. See David Kairys, *A Brief History of Race and the Supreme Court*, 79 TEMP. L. REV. 751, 764–65 (2006). To achieve the resulting “dual system” of equality adjudication and “law” that now prevails in the United States, “the Court has essentially established two distinct sets of rules, assumptions, and approaches that depend on whether whites or minorities are claiming discrimination.” See generally Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). This dual system, of course, had long been known to willfully contravene the equal protection command of the Fourteenth Amendment. See Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952). This modern-day dual system of equality adjudication thus projected and protected a longstanding racialized hierarchy that deliberately and repeatedly had been hard-wired into law and society despite the loudly professed judicial commitments to majoritarian democracy. See Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. CR-CL L. REV. 65 (2008). It also upheld the original colonial linkage of identity to personal property, material profits, and political power. See, e.g., Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335

trumping it when democracy fails to produce the demanded electoral results.<sup>98</sup> The current viral spread and unprecedented thunder of the 2020s epistemic blitzkrieg was thus enabled by a decades-long convergence of rightist jurisprudential backlash with a myriad of new information technologies. The latter—coincidentally also taking social and economic hold at just about the same time as the culture wars were being formally proclaimed, expanded, and targeted—leveraged data, communication, wealth, and power beyond all previous human capacity.

Though unbeknownst to most at the time, from the start of that “high-tech” industry the heady rush for platforms and algorithms designed zealously and exclusively to maximize corporate profits was connecting

---

(1989); Mary Anne Franks, *Where the Law Lies: Constitutional Fictions and Their Discontents*, in *LAW AND LIES: DECEPTIONS AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM* (Austin Sarat ed. 2015). Two centuries later, identity-based privilege itself had consequently become a protected form of property. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); see generally JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990). This much may have been the colonial intentions of the 1787 elite white men crafting the original constitution in Philadelphia, but those cliquish intentions were repudiated fundamentally, pointedly, and repeatedly since then, and despite the generations of judicial obstruction, denial, and nullification. See *infra* note 104 and sources cited therein (on the obvious and insistent judicial constriction of the Reconstruction Amendments since the 1860s).

98. During the past year, reproductive freedom seems the most notable example. See, e.g., *Analysis Reveals How Abortion Boosted Democratic Candidates in Tuesday's Midterm Election*, KAISER FAM. FOUND. (Nov. 11, 2022), <https://www.kff.org/other/press-release/analysis-reveals-how-abortion-boosted-democratic-candidates-in-tuesdays-midterm-election/>. Accordingly, a corollary point of the 2022 midterm electoral results was heightened popular awareness of judicial review as weapon of rightist reaction and resurrection through sustained, expanding cultural warfare. Although decades of “southern strategy” politicking had permeated Republican partisans with this very awareness, see *supra* note 55, public sentiments about “democracy” and its threatened American survival in 2022, see *supra* note 5, showed that opinions like *Citizens United*, *Bush*, and now *Dobbs* cumulatively had galvanized a more widespread sensitivity to the deep judicial complicity in this rightist reaction. The illicit and secretive connection thereby created between democracy’s suppression and judicial review revealed for many how the judicial legalization of inequality steadily has enabled the march toward white Christian nationalism enforceable today only through the formal and informal violence of minority rule. However, and equally important, these contemporary deployments of minority rule, including physical violence, amount to an extension of a longer and equally egregious history—a domestic legal history underpinned by generations of anti-equality judging to back-up (white) mob rule in the name of law. This complicitous set-up between white mobs and formal law was obvious from its start as part of Reconstruction’s systemic dismantlement after the Civil War in order to enable the local imposition of Jim Crow’s racial rule in the later 1800s. As the Librarian of Congress noted way back in 1908, “the Supreme Court of the United States . . . have given to the Fourteenth Amendment a meaning quite different from that which many who participated in its drafting and ratification intended it to have.” See HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 7 (1908). Numerous analyses since then—spanning each of the many following decades—have reached similar conclusions, calling the doctrinal result “a colossal historic irony that, after three times adopting a program to nationalize the natural rights of men” the intended transformations could be undone “particularly through the instrumentality of the Supreme Court . . . reject[ing] the program by a refusal to carry it out.” See JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 204 (1951); see also generally DONALD L. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765–1820* (1971); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848* (1977); ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876* (1985); PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* (1999); LEONARD L. RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1860* (2000); ALEXANDER TESIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND LAW* (2008).

and synergizing with the abiding American appetite for bigotry, violence, and spectacle—an intersectional appetite that also demanded endless supplies of America’s “traditional” bigotries alongside racism: misogyny, anti-Semitism, Islamophobia, xenophobia, homophobia, and other forms of identity-based hate.<sup>99</sup> These four prongs, as a set, recycle and feed on this appetite. Consequently, this multifaceted appetite for supremacist prejudice, though rebuffed in armed civil war and kept at bay by multiple legal reconstructions and reforms since then, still shapes and sustains today’s rightist culture wars, and their obsession with the resurrection of repudiated identity caste systems, through concerted manipulation of information and its technologies that cross all borders of human knowledge, individual cognition, and social relationships. As such, these prongs or aspects of the culture wars are not only mutually reinforcing in structural terms to achieve resurrection of an outlawed past but also, as outlined above, foster the social conditions—the permission structures—for the growing intergroup hate and political violence of contemporary society.<sup>100</sup>

In effect, if not on purpose, these expanding and deepening culture wars thereby amount to a larger rightist subversion aiming simultaneously not only at the legal pillars of constitutional democracy but also at the intellectual, epistemic, and cognitive pillars of civil society itself. These radicalized culture wars help to explain why educators, election administrators, healthcare professionals, and other skilled, experienced workers are draining away from those core social systems, all at once, during precisely these times.<sup>101</sup> Now constructed and well-oiled with big, dark money, the extremist juggernaut driving rightist violence can be pointed in the direc-

---

99. See, e.g., Frum, *supra* note 15.

100. James Piazza & Natalia Van Doren, *It’s About Hate: Approval of Donald Trump, Racism, Xenophobia and Support for Political Violence*, AM. POL. RSCH. 1–2, 10 (2022). Consequently, as noted earlier, the U.S. Senate was prompted in late 2022 to issue a formal report finding that public and private failures had enabled trafficking in fraudulent information at a scale and volume that social media as an industry had become a national threat of the first order. See *supra* note 58; *Eurasia Group’s Top Risks for 2023*, EURASIA GRP. (Jan. 3, 2023), <https://www.eurasiagroup.net/issues/top-risks-2023>. At the same time, private information analysts advising global economic elites were doing the same: “the leading exporter of tools that undermine democracy” is “the result of algorithms and social media platforms that rip at the fabric of civil society while maximizing profit, creating unprecedented political division, disruption, and dysfunction.” EURASIA GRP., *supra* note 100. Moreover, “that trend is accelerating fast—not driven by governments but by a small collection of individuals with little understanding of the social and political impact of their actions.” *Id.*

101. See, e.g., Hannah Natanson, ‘Never Seen It This Bad’: America Faces Catastrophic Teacher Shortage, WASH. POST (Aug. 4, 2022, 8:15 AM), <https://www.washingtonpost.com/education/2022/08/03/school-teacher-shortage/>; Ines Kagubare, US Faces Election Worker Shortage Ahead of Midterms Due to Rise in Threats, THE HILL (Oct. 2, 2022, 8:30 AM), <https://thehill.com/policy/cybersecurity/3669329-us-faces-election-worker-shortage-ahead-of-midterms-due-to-rise-in-threats/>; Joseph Choi, Biden Warned Staffing Shortages Sparking Exodus of Emergency Room Physicians, Nurses, THE HILL (Nov. 8, 2022, 12:55 PM), <https://thehill.com/policy/healthcare/3724960-biden-warned-staffing-shortages-sparking-exodus-of-emergency-room-physicians-nurses/>. The lawlessness of opinions like *Dobbs* similarly are driving experienced law teachers to leave the profession rather than have to present false pretenses to incoming students. See, e.g., Mark Joseph Stern, *The Supreme Court Is Blowing Up Law School, Too*, SLATE (Oct. 2, 2022, 7:00 PM), <https://slate.com/news-and-politics/2022/10/supreme-court-scotus-decisions-law-school-professors.html>.

tion of any person, group, institution, or system that is caught in its ideological or profit-seeking crosshairs—including civil society and the constitutional order itself, as is the evident case today.<sup>102</sup>

Despite the palpable sense of reprieve after the 2022 midterm results, the unrelenting extremism of rightist reaction during these many decades already has made one point manifestly, unavoidably plain: the post-truth imperatives of white Christian nationalism and its fascist Great Replacement agenda of the 2020s simply, functionally, and ultimately cannot co-exist with history, democracy, or the rule of law. This existential reckoning is inevitable because the ideological imperatives driving rightist reaction to civil rights ensures it—just as slavers’ insistence on dominating the entire country after the original compromises of Philadelphia necessitated always more compromises and, ultimately, ensured open conflagration.<sup>103</sup> Then as now, this ideological worldview defines “liberty” as the right to subordinate, exploit, and arrogate everything and anything on the planet—if you can—including the “right” not only to discriminate invidiously at will but also the right to formally enslave others based on race in perpetuity; and, as a postbellum corollary, this worldview casts “freedom” as white resistance to federal enforcement of the Fourteenth Amendment or to any action that may curb or threaten this one-way definition of original white (and male) liberty, thus compromising any progress at all times.<sup>104</sup> These self-serving propositions have constructed the identity politics and obstinate agendas of white supremacy in the United States both before and

---

102. See *Cross-Tabs for October 2022 Times/Siena Poll of Registered Voters*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/interactive/2022/10/18/upshot/times-siena-poll-registered-voters-crosstabs.html> (finding that a majority of Americans believed in 2022, and 71% of polled Americans agreed, that “American democracy [was] currently under threat”).

103. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. The facts and outcome in *Dred Scott*’s case for emancipation are paradigmatic of this historical supremacist expansionism. In that case, the slave owner insisted on traveling with his human chattel into states that explicitly outlawed enslavement while remaining constitutionally immune to any and all of such local laws, and the Supreme Court effectively agreed. This case marks the second occasion—fifty years after *Marbury v. Madison*—that judges used their review power to invalidate an act of Congress, nullifying the Missouri Compromise of 1830, one of many serial compromises that slavers’ strident expansionism had required since Philadelphia’s original compromises. See generally WOODWARD, *supra* note 7.

104. WOODWARD, *supra* note 7, at 1 (“Five times in the course of the nineteenth century there arose political crises of such gravity as to call forth all the celebrated American genius for compromise. Four of these crises involved the threat of disunion or violence, if not war. In only one of them did the customary way of compromise fail, the threats materialize, and the crisis end in tragedy. All the others were settled by compromises that form some of the most important chapters in American history.”). All of these compromises were agreements between white, male, propertied elites over slavery, segregation, and equal protection based on race: “So far as the historical Negro question was concerned, the Compromise of 1877 [dismantling Reconstruction] proved to be a more lasting settlement than had the Compromise of 1850 and those that had preceded it . . . There were no serious infringements of the basic agreements of 1877— . . . respect for state rights, and the renunciation of Federal responsibility for the protection of the Negro. In 1883 the Supreme Court pronounced the Civil Rights Act unconstitutional. The decision constituted a sort of validation of the Compromise of 1877, and it was appropriate that it should have been written by Justice Joseph P. Bradley, the ‘Fifth Judge’ [or tie-breaking vote] of the Electoral Commission” that had been empowered to broker a deal in the deadlocked 1876 Hayes-Tilden contest for the U.S. presidency. *Id.* at 245. For a detailed account of the commission—and of judges’ role in it—to dismantle Reconstruction and pave the way for Jim Crow through it, see WOODWARD, *supra* note 7, at 150–65.

after the Civil War—despite emancipation, abolition, and two Reconstructions—due precisely to eighteenth and nineteenth century compromises, followed by a century of Jim Crow laws and now their present-day equivalents.<sup>105</sup> After two-plus centuries of “preservation-through-transformation,”<sup>106</sup> it turns out that democracy or majoritarianism are useful in the United States’ rightist quarters only insofar as they front for minority rule under white supremacy.

To most sentient observers, the past thirty years of ever escalating and polarizing cultural warfare have made clear beyond any reasonable doubt that, in America, it has to be one or the other—plural democracy under the rule of law enforced by a reconstructed constitutional republic, or racial totalitarianism under a one-party kleptocracy enforced by the resurrected racial state.<sup>107</sup> Each presents and promises a starkly, even diametrically different future—a future that, as the recent midterms excruciatingly displayed, remains as yet not fully decided. Whatever else the “soul of the nation” might otherwise come to mean, *these* are the evident stakes that hang heavy in the balance as the culture wars continue and continue to grow.

Crucially, however, critical knowledge—and networks—in the United States also have not stood still during these tempestuous times. As a result, U.S. legal scholars in the 2020s were better situated than ever before to make a difference as cultural warriors. Indeed, by that decade’s first year, they already had begun positively doing so based on the collective work and steady gains of previous decades and generations. As that decade dawned, the overlapping bodies of legal knowledge and critical networks that previously had emerged, evolved, and organized in U.S. academia had become a notable diaspora of students, faculty, deanships, and centers on campuses from coast to coast situated within surrounding communities likely dotted with already organized, off-campus collaborators.

---

105. See JEFFERSON COWIE, *FREEDOM’S DOMINION: A SAGA OF WHITE RESISTANCE TO FEDERAL POWER* (2022) (providing an in-depth U.S. study of the history and consequences of this worldview and its ideological imperatives regarding identity, liberty, and freedom).

106. See Siegel, *supra* note 18, at 2179–80, 2184 (explaining the well-known concept of why and how “the more things change, the more they stay the same.”).

107. ANNE RICHARDSON OAKES, *CONTROVERSIES IN EQUAL PROTECTION CASES IN AMERICA: RACE, GENDER AND SEXUAL ORIENTATION CONTROVERSIES IN AMERICAN CONSTITUTIONAL LAW* (2015) (“[R]acial state[s], which ‘employ[] physical force, violence, coercion, manipulation, deceit, cajoling, incentives, law[], taxes, penalties, surveillance, military force, repressive apparatuses, ideological mechanisms, and media—in short, all the means at a state’s disposal—ultimately to the ends of racial rule . . . which is to say, to the ends of reproducing the racial order, and so representing for the most part the interest of the racial ruling class.’”). DAVID THEO GOLDBERG, *THE RACIAL STATE* 112 (2002) (“[T]he racial ruling class” is one and the same as “ruling economic elites.”). See *supra* note 48 (on the systemic interconnections of identity, wealth, and power that construct ruling elites within the United States) Thus, in the historical and current context of actual world history, racial states most often have been built and deployed in the service of white supremacy and its interrelated identity castes based on race/color/ethnicity/nationality, on sex/gender/sexuality, on class/property/wealth, on religious theisms/atheism, and on other invidious classifications used as law to skew society along identity castes. In “free-market” racial states like the United States, law and other means are used to structure economic relations and castes according to the imperatives and biases of racial capitalism. See Gonzalez & Mutua, *supra* note 52, at 127.

Going forward, the pockets and clusters of this diaspora can become partners and allies in new collaborations, connecting critical resources on campuses to organized social justice groups in surrounding communities in order to generate new projects, formations, networks, and alignments designed for these momentous, contentious, contingent times.

### III. RECENT DEVELOPMENTS IN U.S. ACADEMIA: THE CRITICAL (LEGAL) COLLECTIVE COALESCES

As the opening events of this decade quickly confirmed to many, rightist reaction was alive and aggressive not only in social, political, and economic backlash but also manifest in the ongoing, quickening erosion and subversion of academic freedom and public education generally.<sup>108</sup> The 2020 executive order and incessant public attacks from rightist politicians and operatives on critical race theory as a political vehicle for suppression of critical knowledge and thinking more generally—followed by new statutes in 2021 and 2022 banning books and ideas—had put law and education squarely at the center of the expanding culture wars.<sup>109</sup> Therefore, in April and May of 2021,<sup>110</sup> a diverse group of critical scholars and

108. See, e.g., GARY B. NASH, CHARLOTTE CRABTREE, AND ROSS E. DUNN, HISTORY ON TRIAL: CULTURE WARS AND THE TEACHING OF THE PAST (2000); JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY (2d ed. 2005); EDUCATION, INC.: TURNING LEARNING INTO A BUSINESS (Alfie Kohn and Patrick Shannon eds. rev. ed. 2002); see also Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI. KENT L. REV. 543 (2004).

109. See Exec. Order No. 13950, 85 Fed. Reg. 60,683 (Sept. 22, 2020).

110. CRITICAL LEGAL COLLECTIVE, <https://www.criticallegalcollective.org/outreach-and-networking> (last visited Mar. 29, 2023). Serendipitously—or tellingly—Jennifer Hill, a labor lawyer, community organizer, and part-time law teacher in South Florida, sparked Critical Legal Collective’s (CLC) conception and creation in conversations during spring and summer 2021. The earliest conversations were focused on ways to spread awareness of the forthcoming course book dedicated to critical knowledge and systemic problem solving—CRITICAL JUSTICE: SYSTEMIC ADVOCACY IN LAW AND SOCIETY—that Jennifer, Steve Bender, and Frank Valdes co-edited, and which was published in May 2021. But that original focus was only an impetus for larger ambitions, as those early conversations soon aimed for “something more” beyond the jurisprudential status quo: as Jennifer put it, devising “practical ways of building strategically on the various existing networks or critically-minded formations” already in place—ranging from legal feminism, clinical networks, and critical race theory to Queer legal studies, LatCrit theory, and ClassCrits—as well as reaching out to allied organizations like the Society of American Law Teachers (SALT). These origins and stirrings are notable because they teach two important lessons: first, the importance of including perspectives and input from the “outside” of any given campus, community, or group—including critical academic circles—in strategic planning for collective action; and, second, the necessity of organized (academic) networks capable of collaborating with each other, along with allied actors or communities, as a predicate for the formation of a functional, sustainable “critical legal collective.” As recounted briefly here, these ingredients were coming together in CLC’s initial forging, as those initial conversations of spring 2021 expanded relationally but steadily during the following weeks and months. To do so, those initial conversations concluded with a plan for each of those three persons to begin reaching out to other potential allies, beginning with ClassCrits, LatCrit, and SALT. To start, Jennifer would reach out to ClassCrits through Athena Mutua and, from there, during the next several weeks, these informal conversations would branch out further to Lucy Jewel, Rebecca Tsosie, Duncan Kennedy, Makau Mutua, Angela Harris, and other critical scholars associated with varied, overlapping critical networks. The point of that informal concentric outreach was to gauge interest in the concrete possibility of some practical coalescence that somehow cohered pre-existing critical formations, especially folks from the more relatively institutionalized networks already organized and active throughout legal academia (like LatCrit, ClassCrits, SALT, and others), in order specifically to defend and promote critical knowledge, scholarship, and teaching, both now and for the long term, through organized academic activism in

community organizers began conversations to consider how existing critical networks, scholarship, teaching, and activism could be strengthened—for the long haul and rooted substantively and structurally where we collectively then stood.<sup>111</sup> As the growing group discussions and preliminary mapping exercise of that year jointly suggested, we stood sturdily on the cumulative lessons and bottom-up methods of critical outsider jurisprudence, and we were scattered (mostly) within and throughout the nooks and crannies of U.S. legal academia.<sup>112</sup>

During that spring of 2022, amid the growing frenzies of this zeitgeist, those ad hoc conversations among a few critical scholars and activists became summer monthly Zoom sessions with broadened participation devoted to planning collective actions that would reinforce and supplement the vigorous ongoing efforts of allied groups, like the African American Policy Forum (AAPF)<sup>113</sup> and dozens of other local or national groups, but that also would focus on building a collective infrastructure to advance and defend critical studies in legal education specifically and throughout higher education more generally. During this time, we discussed and celebrated the various critical schools of legal scholarship, from critical legal studies and critical race theory to Queer scholarship and Law & Society, and the interrelated “tribes” of scholars and activists that help to create and sustain today’s vital nodes and networks of critical and outsider studies<sup>114</sup>—gains of the past that structurally and substantively provide the

---

higher education, starting with law. Therefore, over the next several weeks, we similarly reached out to scholars associated with various and overlapping critically minded groups or networks, including Saru Matambanadzo, Margaret Montoya, Gerald Torres, Laura Gomez, Sumi Cho, Marc Tizoc-Gonzalez, and others. By the end of summer 2021, a small “core” group agreed to monthly Zoom sessions devoted to developing the concept of a “critical legal collective,” which commenced that summer of 2021 and which, facilitated usually (at least for now) by Athena or Jennifer, continued convening on the third Friday of every month in fall 2022, thereby continually reconnecting multiple generations of active participants in new collaborations designed for these and coming times. During its first operational year, as a result of these collectivizing conversations and regularized meetings, CLC had multiple projects underway, with a hybridized inauguration event also in planning for spring 2023. For more information on CLC and its projects or plans, see [www.criticallegalcollective.org](http://www.criticallegalcollective.org).

111. *Our Mission*, CRITICAL LEGAL COLLECTIVE, <https://www.criticallegalcollective.org/our-mission> (last visited Mar. 29, 2023).

112. See Francisco Valdes, *Recent Developments in Critical Legal Networks: From Diaspora to Collective?* (2022) (unpublished manuscript) (on file with author).

113. For more and current information on AAPF and its activities, see <https://www.aapf.org/>.

114. *Public Response to Racist Speech*, *supra* note 25. In addition to the critical diaspora already in place, see *supra* notes 24 and 25, the three autonomous formations spread throughout U.S. legal academia that seemed in 2021 most disposed to critical, outsider, or progressive projects, and that also seemed the most organized, provided handy springboards for the initial efforts to coalesce the CLC: ClassCrits, SALT, and LatCrit. See, e.g., Athena D. Mutua, *Framing Elite Consensus, Ideology and Theory & a ClassCrits Response*, 44 SW. L. REV. 635 (2015); FRANCISCO VALDES & STEVEN W. BENDER, *LATCRIT: FROM CRITICAL LEGAL THEORY TO ACADEMIC ACTIVISM* (2021); see also generally Margaret E. Montoya & Francisco Valdes, “Latinas/os” and Latina/o Legal Studies: A Critical and Self-Critical Review of LatCrit Theory and Legal Models of Knowledge Production, 4 FIU L. REV. 187 (2008). As expressed through the CLC, these formations also have a shared interest in the defense and advancement of critical knowledge and pedagogy, including critical race theory, which since 2020 had come under constant rightist attack. See *supra* notes 20–28 and accompanying text (on anti-critical attacks). For an overview of critical race theory, see RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (3d ed. 2017).

starting points for any new collective efforts that might expand on them.<sup>115</sup> During that time, we also oscillated, and sometimes lurched, between our bandwidths and our aspirations and convictions—between the focus on the United States and law as starting points for our thinking and doing due to our situated limitations, and our ideals, aspirations, and commitments to think and do beyond those limited terms in social, material, cross-disciplinary, and local–global framings. Both the limitations and the aspirations of 2022 are evident in the findings and follow-ups sketched below.

*A. The Critical (Legal) Collective: Context, Mission, and Starting Points*

That first year—from May 2021 to May 2022—was all about assessing the context, honing a mission, and coalescing ourselves as a diverse, purposeful, action-oriented collective designed to build on the gains of previous labors and generations.<sup>116</sup> At the end of that year, our twin key aims, as reflected in the Mission Statement adopted by consensus in May 2022, therefore became:

- (1) To expand community building, networks, and mutual aid among individuals who participate in the production, expression, and application of critical knowledge in higher education; and to combat censorship, intimidation, or retaliation that targets critical viewpoints.
- (2) To support and expand teaching, learning, research, scholarship, advocacy, activism, and other forms of creative expression, grounded in critical knowledge, which includes making critical knowledge more practical, accessible, and actionable in efforts to strengthen communities and their democratic decision-making on campuses, in workplaces, and in other communities.<sup>117</sup>

Through the activities of this new formation—this Critical (Legal) Collective (CLC)—we aim to help connect individuals within or across various institutions of higher learning to build knowledge, cohesion, and power.<sup>118</sup>

---

115. Fortunately, but not coincidentally, these three jurisprudential formations already shared a history and custom of programmatic collaboration. Thus, while other well-organized groups, like Law & Society and clinical educators, also were likely allies in our evolving sense of mission, SALT, LatCrit, and ClassCrits already were co-sponsoring the annual Faculty Development Workshop (FDW) dedicated to critical outsider jurisprudence and pedagogy. Originally embedded in the LatCrit conferences, this FDW later began to alternate between the LatCrit and SALT conferences, and today it rotates among those two plus the ClassCrits conference. Now approaching its twentieth anniversary, the FDW is planned and conducted annually by members of all three formations, and is therefore a regular, longstanding, intentional exercise in coalitional collaboration. This shared norm among these overlapping jurisprudential networks (or “tribes”) provided a practical, programmatic, and relational baseline for the “next steps” that CLC represents and can help to conduce. For more information on the FDW, visit [www.latercrit.org](http://www.latercrit.org).

116. The Critical (Legal) Collective, Final Report 2022 (last viewed Mar. 29, 2023) (unpublished data set) (on file with author).

117. To read the full Mission Statement, or for more information about the Critical (Legal) Collective, see <https://www.criticallegalcollective.org/our-mission>.

118. Critical (Legal) Collective, *supra* note 116.



As part of these first-year efforts, we thus undertook a project to (1) *map*, (2) *reach*, and (3) *connect* far-flung “crits” and friends of various stripes located (mostly) across the United States in their “home” law schools.<sup>119</sup> To undertake this initial research project during that first year, we improvised a process combining readily accessible public information with the collection of community knowledge to produce the most comprehensive *mapping* of critical scholars and teachers in U.S. law schools that we could then muster.<sup>120</sup> This effort to map—to identify and include for contact and collaboration—is incomplete and ongoing, always a work in progress as circumstances and folks inevitably shift from year to year. Continuing this collective process, the following results provide a preliminary overview of the critical landscape in legal academia as of mid-2022—as the CLC starts up. Going forward, this database additionally should enable other mapping exercises tailored to specific projects or aims.

*B. Mapping Critical Resources and Diasporas: Process, Methods, and Prospects*

Our first step in this initial mapping exercise was to rank schools based on student population sizes.<sup>121</sup> This ranking (or mapping) was completely instrumental; it allowed us to spot where most students were already concentrated, and within which institutions, across the country. To conduct this initial exercise, we used student numbers from the 2022–2023 U.S. News & World Report (USNWR) data; doing so allowed us to focus attention on making critical knowledge as accessible as possible to the largest numbers of students in the educational institutions that we call the workplace.<sup>122</sup> In sum, the student numbers used for the CLC “rankings” are based on the most recent USNWR data—but to yield different maps.

After that step, we were able to begin the collective process of initially identifying critically minded scholars and teachers (and other folks) based at those 200 schools—a process involving both generally public sources as well as those from our own critical networks and academic communities.<sup>123</sup> These individuals and cohorts are the likeliest repositories, generators, and conduits of critical outsider jurisprudence within U.S. legal academia based on their research interests and curricular slotting, and thus provide CLC’s most likely “base” in the short term. We then supplemented this faculty-centric information with research into the establishment of deanships at each school for diversity, equity, and inclusion (DEI) or for clinical and experiential education (C-E).<sup>124</sup> Both of these institutional positions are designed to address issues of most concern to critically

---

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

minded students and faculty, and thus to the CLC, because they are designed to redress traditional systemic biases that help to explain the palpable hierarchies in legal education that “reproduce” entrenched social caste systems more broadly. These deanships also can help coordinate efforts that involve not only faculty but also students and other campus or community actors.

Finally, to complete this initial first-year exercise, we mapped university-based centers with the words “race” or “equality” or “justice” in their titles (or mission statements).<sup>125</sup> The presence of such centers in a particular university or law school may be another indicant of institutional interest in, or resources available for, CLC partnerships. Along the way, we incorporated various other “allied” organizations and individuals (students and other persons) with critically minded missions based purely on idiosyncratic or preexisting connections—a focus we therefore must prioritize in the coming rounds of this ongoing mapping if we are to *reach* and *connect* as well.<sup>126</sup>

As indicated, this methodology (which is as much as we could accomplish at this time) is inferential; for instance, additional research into recurrent course offerings and enrollments in and across law school curriculums would help us to better assess the actual reach and accessibility of critical studies in U.S. formal legal education today. But even already, these starting points are promising: the information we have been able to gather and review during the past year shows critical faculty are present throughout most of U.S. legal academia—specifically, 778 contacts in 200 schools, or *nearly 4 contacts on average per school*.<sup>127</sup> These individuals conduct all kinds of activities year-round—events, projects, and programs—frequently through overlapping networks that cumulatively represent a diaspora of knowledge and other critical resources.<sup>128</sup> These individuals, or clusters of them within a school or campus, frequently are complemented by the two kinds of “dedicated” deanships noted above and, at most law schools, also by one or more on-campus “justice” center.<sup>129</sup> This diaspora, as mapped in the following overview, is the point of departure for CLC’s next steps.

### *C. The Critical Legal Diaspora: Schools, Faculty, Students, Deanships, and Centers*

The summary overview below provides a sense of this existing infrastructure, mostly within U.S. legal academia, but also extending beyond its confines:<sup>130</sup>

---

125. *Id.*

126. *Id.*

127. *See infra* Table 1.

128. Critical (Legal) Collective, *supra* note 116.

129. *Id.*

130. For a copy of the findings, contact the author.

	Count	Percent
<b>Sum Totals Arranged by Schools, Students, Faculty, and Organizations</b>		
Total Schools	200	
Total Students	100,295	
Total Faculty	798*	
Total Allied Organizations	17	
<b>School Categories Arranged by Faculty Contacts</b>		
Total Schools with 0 Contacts, out of 200 Schools	34	17.0
Total Schools with 1 Contacts, out of 200 Schools	36	18.0
Total Schools with 2–4 Contacts, out of 200 Schools	67	33.5
Total Schools with 5+ Contacts, out of 200 Schools	63	31.5
<b>School Numbers Arranged by School Categories and Faculty Contacts</b>		
Total Students in 0 Contact Schools, out of 100,295 Students	9,587	6.9
Total Students in 1 Contact Schools, out of 100,295 Students	13,404	13.4
Total Students in 2–4 Contact Schools, out of 100,295 Students	33,653	33.5
Total Students in 5+ Contact Schools, out of 100,295 Students	43,651	43.5
<b>Faculty Contacts Totals Arranged by School Categories</b>		
Total Contacts in 2–4 Contact Schools	193	
Total Contacts in 5+ Contact Schools	538	
<b>Schools &amp; Dedicated (DEI/C-E) Deanships</b>		
Total Schools with DEI Deanships	47	
Total Schools with C-E Deanships	68	
Total Schools with Both	23	
Total Schools with Neither	108	
<b>Schools &amp; On-Campus “Justice” Centers</b>		
Total Schools with 0 On-Campus Justice Centers	68	
Total Schools with 1 On-Campus Justice Centers	76	
Total Schools with 2 On-Campus Justice Centers	36	
Total Schools with 3+ On-Campus Justice Centers	20	

\*778 in U.S. law schools and 20 in allied organizations

TABLE 1. *Overview—Critical Legal America, 2022–2023.*

The existing landscape pictured by these data indicates a solid baseline for CLC development of new, synergistic collaborations designed to connect and mobilize these resources in new ways that enable greater coordination, cohesion, and capacity.

The dispersed but substantial nature of this critical diaspora points to a basic approach: at least initially, CLC should serve as a fulcrum, incubator, spearhead, and booster of what already exists. But to do so, we must imagine and conduce new forms of collaborative partnerships that intentionally unite critically minded students, faculty, deans, schools, centers, community groups, and other potential allies in ways not already occurring. We must innovate and organize to bring the elements of this diaspora together through “systemic advocacy projects” that build intentional bridges connecting campuses to their surrounding communities, and to each other in critical networks and coalitions that support both local and national advancement of Equal Justice Under Law.<sup>131</sup>

#### CONCLUSION

As the 2022 midterm election results and their aftermath showed again, the Republic’s troubles are likely to persist through continued cultural warfare. As the ongoing exacerbation and devolution of relentless rightist reaction made clear during the first two decades of the twenty-first century, little has budged in American fundamentals since the 1787 compromises in Philadelphia, or since the antebellum brews of the toxic 1850s, or since the first publication of this *Review* in the 1920s, or since the threats of “Fascism here at home” in the 1930s, 1940s, 1950s, or after. By the 2020s, the riptides of rightist cultural warfare therefore highlighted the structural need for a cohesive critical counterbalance embedded in the institutions and frameworks of academia—a counterbalance designed not only to help counteract the moment but also to serve as a long-term incubator, promoter, and reservoir of critical knowledge, research, and pedagogy through systemic advocacy projects geared both for these times and dangers as well as for the long haul. As the diaspora sketched above shows, this next step is possible in the 2020s due to the cumulative labors and gains of previous critical generations and networks.

The (very) limited research of 2021–2022 cannot and does not purport to map criticality across U.S. law schools scientifically or comprehensively. However, this preliminary research does provide a substantial snapshot from which we can draw some reliable observations to help inform our choices, agendas, and actions. The findings summarized above show nearly four known critical contacts per school in the CLC list of 200.<sup>132</sup> In addition, dozens of schools have in place at least one deanship dedicated to concerns that overlap with critical scholarship, education, and

---

131. For a fuller elaboration of “systemic advocacy projects” designed specifically for the 2020s and beyond, see Francisco Valdes, Steven W. Bender, & Jennifer J. Hill, *Afterword: LatCrit at Twenty-Five and Beyond—Organized Academic Activism and the Long Haul: Designing “Hybridized” Advocacy Projects for an Age of Global Disruption, Systemic Injustice, and Bottom-Up Progress*, 99 DENV. L. REV. 773, 778–80 (2022); Francisco Valdes, Steven W. Bender, & Jennifer J. Hill, *Afterword: LatCrit@25 and Beyond, Part II—Challenges and/as Opportunities: Centering “Hybridized” Advocacy Projects in Antisubordination Praxis to Connect Campuses and Communities for Material Long-Term Progress*, 20 SEATTLE J. SOC. JUST. 1053, 1062–63 (2022).

132. Critical (Legal) Collective, *supra* note 116.

literacy. Similarly, all but 68 of the 200 schools are on campuses with at least one established justice-related center. As a whole, this bottom line points to a somewhat variegated yet relatively well-populated critical ecosystem in legal academia, at least on paper.

This tentative bottom line is both promising and challenging. This summary indicates that the stage is set to go from diaspora to collective—if enough parts (persons and groups) of this critical diaspora are ready, willing, and able to stitch together from these solid beginnings an array of flexible and sustainable collaborations designed for the long run and, for that reason, organized as networks with coequal community partners.<sup>133</sup> What comes next, both for better and for worse, we soon shall see: A preservation and reconstruction of democracy, or a resurrection and imposition of racial totalitarianism? Inevitably, *everyone* is complicit in shaping the outcomes of this pivotal historical moment, either through action or inaction. In this fraught and volatile context, the 2021–2022 coalescence of the CLC shows how legal scholars and networks have innovated and *continue* to innovate collaboratively in order to make a systemic difference as cultural warriors, even as—or precisely because—the spiraling uncivil chaos of the culture wars continues to explode all around us, and our loved ones, exponentially.

---

133. *Id.* In some key and basic ways, this bottom line recalls—and beckons us to “bring home”—the lessons of “critical race praxis.” See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997). This framework of critical praxis provides a rich backdrop—and a critical tradition—of actionable legal knowledge. See, e.g., Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 751 (1988); Gerald P. López, *Changing Systems, Changing Ourselves*, 12 HARV. LATINO L. REV. 15, 23 (2000); Bill Ong Hing, *Coolies, James Yen, and Rebellious Advocacy*, 14 ASIAN AM. L.J. 1, 1–3 (2007). The substantive and practical insights of these and similar scholars have helped to define in critical terms the role of this praxis in fomenting social “motion” and protecting legal progress. See Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797, 1798 (1990).