

## REFLECTIONS ON CRITICAL RACE THEORY IN A TIME OF BACKLASH

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### ABSTRACT

Reviewing my article on critical race theory (CRT), written over fifteen years ago, this Article revisits CRT and its fortunes in this moment of backlash. CRT has become a principal target for erasure in a raging political campaign that seeks to suppress discussions about racial and gender justice. It does so, in part, by using law to compel the miseducation of the American populace, including its children. The campaign suggests, in the case of race, that efforts to promote racial justice, combat racism, and employ race as an analytical lens—antiracism—is racist. That is, the right-wing argument has shifted from the colorblind assertion that race is irrelevant, to one in which consideration of race is illegitimate. It is not simply illegitimate because it is irrelevant, but because, incredulously, it is racist and racism no longer exists in America, if it ever did.

I argue this miseducation campaign arose to divert attention from the demands for a racial reckoning triggered by the police murder of Mr. George Floyd. This reckoning portended consolidation of a multiracial, multiethnic democratic majority and progress in racial justice, among other changes; changes apparently perceived as threatening to the privileged status of whiteness in the United States' racial hierarchy. As such, I contend, the campaign's goals are not merely to silence the voices of those seeking justice and therefore change that includes fuller and truer accounts of American history. Rather, it seeks to control, or if necessary, destroy, the educational and other institutions that house justice voices and to remove the people representing these voices from participation in institutions and other public spaces. I note that the campaign also supports and facilitates efforts to privatize education. In other words, in contextualizing the campaign, I suggest that it is part of a broader, larger, and multifaceted antidemocratic backlash movement that reactionary forces are advancing to limit access to voting, education, healthcare, and processes that might protect the economic interests of people of color, poor people, nonbinary people, and women, among others. In short, this broader movement seeks to undermine democracy and re-impose—dare I say—elite white male

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minority rule. The conservative majority on the Supreme Court, I suggest, is facilitating this effort.

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#### INTRODUCTION

“Democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore, is education.”

—Franklin D. Roosevelt<sup>1</sup>

Critical race theory (CRT) has recently come under considerable political attack by a widespread, well-funded, and sophisticated campaign that seeks to both erase and block the transmission of fuller accounts and understandings of American history and the ongoing social practices that continue to perpetuate racial, gender, and economic injustice.<sup>2</sup> The attack is so well-funded and widespread that CRT Forward, an organization that

1. President Franklin D. Roosevelt, Message for American Education Week (Sept. 27, 1938) (available in The American Presidency Project).

2. See, e.g., Zach Goldberg & Eric Kaufmann, *Yes, Critical Race Theory Is Being Taught in Schools*, CITY J. (Oct. 20, 2022), <https://www.city-journal.org/yes-critical-race-theory-is-being-taught-in-schools>. But see Ivory A. Toldson, *New Study Reveals the Anti-CRT Agenda Is Really About Denying Racism and Revising History*, DIVERSE ISSUES IN HIGHER EDUC. (Oct. 25, 2022), <https://www.diverseeducation.com/opinion/article/15302120/new-study-reveals-the-anticrt-agenda-is-really-about-denying-racism-and-revising-history> (noting that some of the concepts to which Goldberg and Kaufmann refer to predate CRT).

tracks state and local legislative efforts in this regard,<sup>3</sup> reports that “over 500 laws, legislative bills, and resolutions” restricting state public school instruction on race were “introduced or passed in 49 of the 50 states.”<sup>4</sup> And, they were introduced within the span of about eighteen months. The campaign, and the forces behind it, characterize and promote the idea that working to eliminate racial oppression and racism, or “‘antiracism’ is a form of ‘racism,’ and that concepts associated with racial justice are ‘divisive.’”<sup>5</sup> Many of the laws follow the language of the now-repealed executive order and agency explanations issued by former President Trump and his Administration, in which CRT was specifically named a target.<sup>6</sup>

Fifteen or so years ago, the *Denver Law Review* published my article on CRT entitled *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*.<sup>7</sup> Today, I would like to thank the *Review* for providing me an opportunity to briefly reflect on the article, my continued participation in the development and promotion of CRT, and to comment on the theory’s insights and place in this moment of backlash.

In Part I, I contextualize this campaign by briefly sketching the forces behind the current backlash and larger antidemocratic movement,<sup>8</sup> paying particular attention to the ways in which the conservative Supreme Court facilitates them. I suggest the campaign’s demonizing of CRT served to divert, distract, and turn the conversation away from the demands for a racial reckoning triggered by George Floyd’s murder, one that portended change. Backlash forces diverted attention from this potentiality by first

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3. *CRT Forward Tracking Project – Tracking Anti-CRT Efforts Introduced at the Local, State, and Federal Levels*, UCLA SCH. L., <https://crtforward.law.ucla.edu/> (last visited Apr. 4, 2023).

4. Memorandum from the Critical Legal Collective, U.S.A. to Irene Kahn, UN Special Rapporteur on the Freedom of Op. & Expression 2 (Oct. 31, 2022) (on file with author) [hereinafter Critical Legal Collective Memorandum]. See, e.g., Taifha Natalee Alexander, *CRT Forward Tracking Project Trends as of 8/22/22*, CRT FORWARD TRACKING PROJECT BLOG (Aug. 22, 2022), <https://crtforward.law.ucla.edu/crt-forward-tracking-project-trends-as-of-8-22-22/>. The official report issued in April 2023 has higher numbers. See CRT Forward Tracking Project, *CRT Forward: Tracking the Attack on Critical Race Theory* (Apr. 6, 2023), [https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law\\_CRT-Report\\_Final.pdf](https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf).

5. Critical Legal Collective Memorandum, *supra* note 4, at 1.

6. Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020) (This order targeted an ideology described as “rooted in the pernicious and false belief that America is an irredeemably racist and sexist country . . . .”); Exec. Order No. 13,958, 85 Fed. Reg. 70951 (Nov. 2, 2020); Memorandum from Russull T. Vought, OMB Dir. Exec. Off. of the President to the Heads of Exec. Dep’t & Agencies 2 (Sept. 28, 2020) [hereinafter Memorandum] (to determine whether DEI materials teach, advocate or promote the divisive concepts specified in the executive order, keywords to aid in the search “includ[e], but [are] not limited to: ‘critical race theory,’ ‘white privilege,’ ‘intersectionality,’ ‘systemic racism,’ ‘positionality,’ ‘racial humility,’ and ‘unconscious bias.’”).

7. Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006) [hereinafter *The Rise of CRT*].

8. See, e.g., Rachel Kleinfeld, *Five Strategies to Support U.S. Democracy*, CARNEGIE ENDOWMENT FOR INT’L PEACE (2022), <https://carnegieendowment.org/2022/09/15/fivestrategies-to-support-u.s.-democracy-pub-87918> (noting that American democracy is in decline and noting a number of markers that evidence that decline); STEVE PHILLIPS, *HOW WE WIN THE CIVIL WAR: SECURING A MULTIRACIAL DEMOCRACY AND ENDING WHITE SUPREMACY FOR GOOD* (2022) (arguing in part that the forces of white supremacy that propelled the Civil War have never stopped fighting, form the backbone of the current antidemocratic movement, and implying that given the choice between whiteness and democracy, many whites would likely choose whiteness).

building on distortions of CRT insights and then cultivating predictable white racial panic and resentment around the claim that CRT was being taught to white children in K–12 classrooms. In Part II, I turn to my original article, reviewing and updating it in today’s terms of structural and systemic racism. It also explores the article’s contribution to the development of ClassCrits, Inc., with its focus on law and economic inequality, and introduces the newly developing Critical (Legal) Collective. The latter is a formation meant to both promote critical theory and combat the CRT attack.<sup>9</sup> Finally, in Part III, I briefly turn to the campaign itself, what I term the “Miseducation of America” campaign,<sup>10</sup> arguing that it seeks to silence voices of those seeking justice; to render white supremacist views legitimate; to control, if necessary, destroy, the educational and other institutions that have begun to house such voices; and to remove the people representing these voices from participation in various institutions and other public spaces.

### I. BACKLASH AND THE TRUMPING OF RACIAL RECKONING

Progress in racial justice in the United States has always been accompanied by parallel progress in the rearticulation of the forces, policies, structures, and discourses of white supremacy.<sup>11</sup> Thus, while the intensity of the campaign has been triggered by particular events, it is part of a much broader effort.

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9. *Our Mission*, CRITICAL (LEGAL) COLLECTIVE, <https://www.criticallegalcollective.org/our-mission> (last visited Apr. 4, 2023) (“The Critical (Legal) Collective is a group of scholars and activists who have come together to protect and advance critical studies in the wake of continuing attacks on critical knowledge and multiracial democracy.”); *see generally Our Vision*, CRITICAL (LEGAL) COLLECTIVE, <https://www.criticallegalcollective.org/> (last visited Jan. 25, 2023) (“The Critical (Legal) Collective is a group of legal scholars representing some of the many intellectual formations affiliated with critical legal theory—including, Critical Race Theory, Asian American Legal Scholarship, ClassCrits, Critical Legal Studies, Feminist Legal Theory, eCRT, Indigenous Law and Policy, Jurisprudence of Distribution, LatCrit, Law & Political Economy, Third World Approaches to International Law, and more.”).

10. This is a play on Carter Godwin Woodson’s book, *The Mis-Education of the Negro* (1933), and inspired by William Horne, *Towards an Unpatriotic Education: Du Bois, Woodson, and the Threat of Nationalist Mythologies*, 13 AAUP J. ACAD. FREEDOM 1 (2022).

11. *See, e.g.*, IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 9 (2016); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 162–63, 171–72 (3d ed. 2014); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 6–8 (1992). For instance, after abolitionists helped defeat the coerced labor of African Americans during slavery, Southern forces enacted Black codes and convict leasing to perpetuate the forced labor or slavery by another name. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 138 (2012). *See, e.g.*, Brief for the Honorable Congressman John Lewis as Amicus Curiae in Support of Respondents and Intervenor-Respondents at 5, 12, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96) [hereinafter Lawyer’s Committee Brief] (making a similar point regarding voting rights).

### A. *The Structure and Drivers of the Broader Backlash Shaping the Campaign*

The current backlash is shaped by the violent reactions to the 1960s movements,<sup>12</sup> particularly the Civil Rights Movement and its goals of Black *empowerment* and economic *egalitarianism*.<sup>13</sup> Those reactions included, among cross burnings, bombings, and jailings, mass white resistance to efforts to desegregate schools; the ultimately successful Southern Strategy of the Republican Party (GOP), which sought to increase political support among white voters by appeals to white racism and resentment;<sup>14</sup> as well as the founding of institutions, such as the Manhattan Institute, the Heritage Foundation, the Cato Institute, and the American Legislative Exchange Council (ALEC), among others.<sup>15</sup>

These think tanks and associations were largely funded by wealthy individuals such as the Koch brothers,<sup>16</sup> conservative foundations, and a sizable share of corporate America funds.<sup>17</sup> They seek to preserve and promote the so-called free market<sup>18</sup> while generally promoting colorblind

12. These movements included the second wave feminist movement, the anti-war (Vietnam) movement, student activism, and the Black Power and related Movements such as Brown Power, Red Power, etc. *See, e.g.*, TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63* 395, 914 (1988).

13. OMI & WINANT, *supra* note 11, at 46.

14. *See, e.g.*, ANGIE MAXWELL & TODD SHIELDS, *THE LONG SOUTHERN STRATEGY: HOW CHASING WHITE VOTERS IN THE SOUTH CHANGED AMERICAN POLITICS* 43 (2019).

15. *About Heritage: Mission*, THE HERITAGE FOUND., <https://www.heritage.org/about-heritage/mission> (last visited Apr. 4, 2023) (explaining its mission “to formulate and promote public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.”); *About*, MANHATTAN INST., <https://www.manhattan-institute.org/about> (last visited Apr. 4, 2023) (describing its mission to be “a leading voice of free-market ideas, shaping political culture” and “to develop and disseminate new ideas that foster greater economic choice and individual responsibility.”); *About Cato*, CATO INST., <https://www.cato.org/about> (last visited Apr. 4, 2023) (“promot[ing] libertarian ideas in policy debates[,]” with its mission “to originate, disseminate, and advance solutions based on the principles of individual liberty, limited government, free markets, and peace.”); *About ALEC*, AM. LEGIS. EXCH. COUNCIL, <https://alec.org/about> (last Apr. 4, 2023) (“The American Legislative Exchange Council is America’s largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism.”); *see also About*, AM. ENTER. INST., <https://www.aei.org/about/> (last visited Apr. 4, 2023) (another think tank part of the right-wing network, but it was established in 1938).

16. *See* Joseph Zeballos-Roig, *How the Koch Brothers Used Their Massive Fortune to Power a Conservative Crusade that Reshaped American Politics*, BUS. INSIDER (Nov. 13, 2020, 2:06 PM), <https://www.businessinsider.com/koch-brothers-fortune-power-conservative-crusade-american-politics-2019-8>.

17. *See, e.g.*, ALEXANDER HERTEL-FERNANDEZ, *STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION* 14–15, 26, 32, 37, 41–42, 148, 163, 243–44 (2019) (discussing many of these organizations but focusing on ALEC and the later formed right-wing organizations of Americans for Prosperity and State Policy Network and discussing donors and foundations such as the Koch brothers, the Scaife Foundation, the Freedom Foundation, and the Bradley Foundation, among others); *see also* DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 43–44 (2005) (suggesting that powerful corporations that funded many of these efforts generated revenues that constituted about half of the United States’ gross national product (GNP) in the 1970s); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 155–164 (2016) (chronicling the business movement, which she controversially attributes to the Powell memorandum).

18. *See* OMI & WINANT, *supra* note 11, at 162, 164.

racism.<sup>19</sup> Apparently, Black empowerment and egalitarianism challenged the prerogatives and status of both the white business elite and the white majority. And then there are think tanks, such as the Claremont Institute, which seem poised to call for an authoritarian, white nationalist Christian inflected coup.<sup>20</sup> These institutions, among others, including right-wing media outlets,<sup>21</sup> legal and legislative associations,<sup>22</sup> and various state administrations,<sup>23</sup> all form part of the infrastructure of right-wing reaction. Thus, it is unsurprising that they support and platform anti-CRT messages.<sup>24</sup>

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19. See generally Iseult McNulty, *Denial of Denial: Color-Blind Racism and Academic Silencing in France*, 13 AAUP J. ACAD. FREEDOM 1, 3–4 (2022); EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA 137–66 (2001); LESLIE G. CARR, “COLOR-BLIND” RACISM 107–170 (1997). These texts suggest that colorblindness perpetuates the status quo by ignoring structured racial realities, suggesting that race should not be taken into account because it is irrelevant and sometimes denying that racism exists and has always existed in the United States (and since colonialism in France). They pretend there is a level playing field today or a colorblind society exists now. Consequently, colorblindness as a perpetuator of the racist status quo is a form of racism.

20. See, e.g., Ian Ward, *Critics Call It Theocratic and Authoritarian. Young Conservatives Call It an Exciting New Legal Theory*, POLITICO (Dec. 12, 2022, 11:12 AM), <https://www.politico.com/news/magazine/2022/12/09/revolutionary-conservative-legal-philosophy-courts-00069201> (reporting on a conference in which Adrian Vermeule’s book, *Common Good Constitutionalism*, a previous article of his in the *Atlantic*, and writers associated with Claremont, support the view that a more aggressive, authoritarian, and Christian religiously inflected conservatism may need to replace originalism as method of constitutional interpretation, among other things); Brynn Tannehill, *Sleepwalking Toward a Post Democracy America*, DAME MAG. (Oct. 18, 2021), <https://www.damemagazine.com/2021/10/18/sleepwalking-toward-a-post-democracy-america/> (describing Claremont Institute supporting GOP efforts to institute a “competitive authoritarian coup,” where elections are held but are meaningless); Laura K. Field, *What the Hell Happened to the Claremont Institute?*, THE BULWARK (July 13, 2021), <https://www.thebulwark.com/what-the-hell-happened-to-the-claremont-institute/> (describing the almost unqualified support of Claremont Institute leaders for Trump and MAGA positions around the lie of the stolen 2020 election, among other points, and noting the Institute’s uncritical fealty to the Founders); Zack Beauchamp, *The Conservative Movement Is Rejecting America*, VOX (Apr. 1, 2021, 1:40 PM), <https://www.vox.com/policy-and-politics/2021/4/1/22356594/conservatives-right-wing-democracy-claremont-ellmers>; see also CLAREMONT INST., <https://www.claremont.org/> (last visited Apr. 4, 2023).

21. See, e.g., *Media Bias Ratings*, ALLSIDES, <https://www.allsides.com/media-bias/ratings> (last visited Apr. 4, 2023) (listing “right-wing” media outlets such as: Fox News, Breitbart, and Newsmax); Lis Power, *Fox News’ Obsession with Critical Race Theory, by the Numbers*, MEDIA MATTERS FOR AM. (June 15, 2021, 9:02 AM), <https://www.mediamatters.org/fox-news/fox-news-obsession-critical-race-theory-numbers>.

22. See VIRGINIA A. GREIMAN & ANDREW CHAN, OPIA’S GUIDE TO CONSERVATIVE/LIBERTARIAN PUBLIC INTEREST LAW 30, 35, 40 (President and Fellows of Harvard College 2007) (providing examples of conservative legal and legislative associations such as: Federalist Society, the American Center for Law and Justice (ACLJ), and the American Legislative Exchange Council (ALEC)).

23. For example, both Florida and Oklahoma are defending cases for anti-divisive language laws. See, e.g., *Pernell v. Florida Board of Governors*, AM. CIV. LIBERTIES UNION (Jan. 12, 2023), <https://www.aclu.org/cases/pernell-v-florida-board-governors> (citing *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, No. 4:22cv304-MW/MAF, 2022 U.S. Dist. LEXIS 208374 (N.D. Fla. Nov. 17, 2022)); *Bert v. O’Connor*, AM. CIV. LIBERTIES UNION (Oct. 29, 2021), <https://www.aclu.org/cases/bert-v-oconnor> (citing Complaint, Black Emergency Response Team v. O’Connor, No. CIV-21-1022-G (W.D. Okla. filed Oct. 19, 2021)). See also *NEA-NH, et al. v. N.H. Commissioner of Education, et al.*, AM. CIV. LIBERTIES UNION N.H., <https://www.aclu-nh.org/en/cases/nea-nh-et-al-v-nh-commissioner-education-et-al> (last visited Apr. 4, 2023) (citing Complaint, *Mejia v. Edelblut*, No. 1:21-cv-01077 (D.N.H. filed Dec. 20, 2021)).

24. See, e.g., Goldberg & Kaufmann, *supra* note 2; sources cited *supra* note 21. In its “parents toolbox” the Manhattan Institute asserts color-blindness is a target of CRT, and that the parents who

The current Supreme Court is advancing the goals of this broader backlash. Although the Supreme Court briefly advanced decisions in support of racial, economic, and gender justice and progress,<sup>25</sup> it quickly reverted back to its historical role of perpetuating white supremacy, among other systems of domination and oppression. First grounded in explicit theories of elite, white male superiority, today it has been rearticulated and is grounded in a colorblind, neoliberal, and increasingly Christian patriarchal jurisprudence—with dizzying shifts between the Fourteenth and First Amendments.<sup>26</sup>

The current backlash is also shaped by the reaction to the first Black president, Barack Obama. “[W]hile many wistful Americans had hailed Barack Obama’s election as the end of the *ancien régime* [Jim Crow], almost an equal number woke up the following morning in shock.”<sup>27</sup> For the latter, as Donald Yacovone notes, “[t]he election of an African American president became the harbinger of profound change, one that jeopardized white identity and supremacy. The number of white Americans feeling overwhelmed, disparaged, and dispossessed only increased with each passing day.”<sup>28</sup>

Elected in 2008 by a multiracial and multiethnic voting majority, President Obama’s election manifested racial progress.<sup>29</sup> Although the

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object to CRT “believe, as Martin Luther King, Jr., said, that people should be judged not by the color of their skin but by the content of their character.” *Woke Schooling: A Toolkit for Concerned Parents*, MANHATTAN INST. (June 17, 2021), <https://www.manhattan-institute.org/woke-schooling-toolkit-for-concerned-parents>. Perhaps they *should*, but the perspective fails to acknowledge that King’s words were aspirational at best, while he died fighting for racial justice. The goal of the Parent’s Toolkit in the context of a deeply unequal and racialized society is not to fight for racial justice but to fight to maintain the current status quo of white privilege.

25. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 555–57, 577 (1964) (mandating equal population size districts on the principle of one man, one vote, building on a series of cases such as *Baker v. Carr*, 369 U.S. 186 (1962), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), to undo a series of older cases that approved laws that disenfranchised Black people, among others, such as *Giles v. Teasley*, 193 U.S. 146 (1904), *Giles v. Harris*, 189 U.S. 475 (1903), and *Williams v. Miss.* 170 U.S. 213 (1898), among others). But today the Court appears to be winding the clock back. See discussion *infra* Section III.B (discussing the impact of *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013)). Or consider *Roe v. Wade*, 410 U.S. 113 (1973), which in essence repudiated a host of state abortion laws on a theory of privacy, now itself overturned by *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). And there is *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937), repudiating *Lochner v. N.Y.*, 198 U.S. 45 (1905), which struck down a state’s economic regulation of workers’ hours—here a bakers’ employee hours. Today again, we see the Court enhancing corporate power and the power of the wealthy generally or at the expense of workers and other less powerful groups. See *Citizens United v. FEC*, 558 U.S. 310 (2010); *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018) (eliminating union’s agency fees for non-union members); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (the latter two cases dealing with contract clauses compelling arbitration); and see *infra* Section III.A.

26. See *infra* text accompanying notes 215–16.

27. DONALD YACOVONE, *TEACHING WHITE SUPREMACY: AMERICA’S DEMOCRATIC ORDEAL AND THE FORGING OF OUR NATIONAL IDENTITY* 311 (2022).

28. *Id.*

29. In fact, the political right-wing (and the Court) enthusiastically proclaims President Obama’s election as progress and as evidence that racism no longer exists, even though the majority of white people voted against his election. See Thomas Edge, *Southern Strategy 2.0: Conservatives, White Voters, and the Election of Barack Obama*, 40 J. BLACK STUD. 426, 434–40 (2010). *But see*

majority of the white electorate voted against him, Obama's election was the result of a multiracial coalition, capturing forty-three percent of white votes (marking a shift in some white attitudes) and a substantial majority of the nonwhite vote.<sup>30</sup>

In reaction to this election, various state legislators immediately deepened their efforts to suppress voting by Black and other nonwhite people.<sup>31</sup> And, the conservative Supreme Court subsequently weighed in, gutting the Voting Rights Act,<sup>32</sup> heralded as one of the most progressive pieces of civil rights legislation ever enacted, largely responsible for expanding the franchise to those historically disenfranchised,<sup>33</sup> and thus crucial to President Obama's election. The Court did so by stripping the coverage section of the Act and thereby nullifying preclearance.<sup>34</sup> Preclearance required the Attorney General or a three-judge court to review proposed changes in voting structures in states with historical and continuing practices of abridging the voting rights of people, particularly people of color and poor people.<sup>35</sup>

The Court struck down the section even though the Act provides a mechanism for states, municipalities, districts, etc., to bail out of the preclearance system by engaging in fair voting practices over a period of years.<sup>36</sup> The Court, nonetheless held that the information on which the Act relied was stale<sup>37</sup> without ever engaging the evidence in some 15,000 pages of information Congress compiled in 2006, demonstrating continued attempts to suppress voting in these covered districts.<sup>38</sup> The Court did so while regaling the country with notions that the coverage section also

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C.K., *Racist Behaviour Is Declining in America*, *ECONOMIST* (Sept. 1, 2017), <https://www.economist.com/democracy-in-america/2017/09/01/racist-behaviour-is-declining-in-america> (the authors correctly argue racists attitudes over the long-term are declining (using the example of attitudes about interracial marriage), even though racism remains pervasive (focusing on employment discrimination)).

30. See, e.g., *For Most Trump Voters, 'Very Warm' Feelings for Him Endured: An Examination of the 2016 Electorate, based on Validated Voters*, PEW RSCH. CTR. (Aug. 9, 2018), <http://www.people-press.org/2018/08/09/for-most-trump-voters-very-warm-feelings-for-him-endured/>; Chris Cillizza & Jon Cohen, *President Obama and the White Vote? No Problem.*, *WASH. POST* (Nov. 8, 2012, 4:08 PM), <https://www.washingtonpost.com/news/the-fix/wp/2012/11/08/president-obama-and-the-white-vote-no-problem/> (demonstrating that while Obama received 43% of the white vote in 2008, he only received 39% of it in 2012).

31. See, e.g., Ryan P. Haygood, *The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections*, 64 *RUTGERS L. REV.* 1019, 1021, 1028 (2012); Lawyer's Committee Brief, *supra* note 11, at 21–29 (describing these efforts).

32. *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

33. See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Pathological Racism, Chronic Racism & Targeted Universalism*, 109 *CAL. L. REV.* 1107, 1115 (2021); *Shelby*, 570 U.S. at 562, 564 (Ginsburg, J., dissenting).

34. *Shelby Cnty. v. Holder*, 570 U.S. 529, 554, 556–57 (2013).

35. *Id.* at 537; see also 52 U.S.C. § 10304 (formerly 42 U.S.C. § 1973(c)).

36. *Shelby*, 570 U.S. at 537.

37. *Shelby*, 570 U.S. at 530–31.

38. *Id.* at 565 (Ginsburg, J., dissenting). See also Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 *HARV. L. & POL'Y REV.* 131, 141 (2019) (arguing that the Roberts Court's decisions in the area of voting and the economy undermine democracy).



violated the “sovereignty, dignity, and equality of the states,”<sup>39</sup> a “principle” the conservative majority largely made up.<sup>40</sup> With this decision, the Court facilitated the broader backlash’s goal of undermining democracy. It “opened the floodgates [that] enable[ed] states and local governments with the most egregious histories of discriminating against the voting rights of minorities to start discriminating all over again.”<sup>41</sup> They began the next day.<sup>42</sup>

More disturbing, having already tilted the electoral process toward control by the (overwhelmingly white) wealthy through its campaign finance decisions, including *Citizens United v. FEC*<sup>43</sup> (to which I will return), the Court proceeded to further curtail voting rights. It not only upheld various state voter suppression schemes,<sup>44</sup> it permitted (racialized) partisan gerrymandering.<sup>45</sup> Instead of simply barring all forms of gerrymandering, which allow state legislatures to create voting districts with the “predominate intent of ensuring a desired political makeup,”<sup>46</sup> the Court held that partisan gerrymandering involved a nonjusticiable *political question* (not reviewable by federal courts, thereby rendering such courts powerless to prohibit them). The Court claimed it lacked ascertainable and manageable standards by which to assess the political question, even though, as Justice Kagan pointed out, federal courts across the country had largely converged on a standard for doing precisely this.<sup>47</sup> The Court’s holding seemed disingenuous, not only because the Court has decided, what appeared, to be “political questions” in the past, but it actually

39. Adelman, *supra* note 38, at 142 (discussing the holding in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), which involved a Texas gerrymandering scheme).

40. *Shelby*, 570 U.S. at 588 (Ginsburg, J., dissenting). The Court did so referencing the equal footing doctrine used for admitting new states into the Union. See Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1252 (2016); Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1090 (2016) (describing Justice Ginsburg’s analysis that the new doctrine was “utterly made up”); Vik Kanwar, *A Fugitive From the Camp of the Conquerors: The Revival of Equal Sovereignty Doctrine in Shelby County v. Holder*, 7 TOURO L.J. RACE, GENDER, & ETHNICITY & 17 BERKELEY J. AFR.-AM. L. & POL’Y 272, 276 (2015).

41. Adelman, *supra* note 38, at 142.

42. The enthusiasm with which over half of the jurisdictions covered by the section immediately passed voter suppression laws belies the Court’s assessment that the information was stale. See Orson Aguilar, *U.S. Supreme Court Was Progressive at One Time*, GREAT FALLS TRIB. (Dec. 7, 2014, 9:42 PM), <https://www.greatfallstribune.com/story/opinion/guest-opinions/2014/12/07/us-supreme-court-progressive-one-time/20077451/>.

43. 558 U.S. 310 (2010).

44. See Ciara Torres-Spelliscy, *One of the Oldest Problems in America Persists: How to Protect the Voting Rights of Non-white Citizens*, SCOTUS BLOG (July 6, 2021, 11:04 a.m.), <https://www.scotusblog.com/2021/07/one-of-the-oldest-problems-in-america-persists-how-to-protect-the-voting-rights-of-non-white-citizens/> (discussing *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021), in which the Supreme Court reversed the Ninth Circuit decision striking down Arizona out-of-precinct and ballot collection laws that disproportionately and negatively impacted voting rights of Native Americans and other people of color); Adelman, *supra* note 38, at 142–146 (discussing *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018), which involved a massive purge by the Ohio legislature, and *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), a case where the Court upheld Indiana voter ID law).

45. *Rucho v. Common Clause*, 139 S. Ct. 2484 (2019).

46. *Id.* at 2506–07.

47. *Id.* at 2516 (Kagan, J., dissenting).

stopped the Florida vote count in favor of the GOP in *Bush v. Gore* in 2000!<sup>48</sup>

Even more problematic, as Girardeau Spann argues,<sup>49</sup> the Court reserved for itself the discretion to characterize whether a particular gerrymandering scheme constitutes racial gerrymandering, which *is* justiciable and unconstitutional, or partisan gerrymandering, which is nonjusticiable. In doing so, it seemed to ignore its own determination that racial and partisan gerrymandering is largely indistinguishable<sup>50</sup> in a country where the politics and party structure are racialized and in which one party is multi-racial while the other is overwhelmingly white. The decision leaves the current hard-right Supreme Court majority with unrestrained discretion and power to characterize a gerrymander in a way that advances its own politically preferred outcomes. And it does so in a context, in which, on balance, partisan gerrymandering favors the GOP.<sup>51</sup>

And then there was Trump. That is, Donald Trump's election as President of the United States not only shaped and promoted the broader backlash within which the miseducation campaign operates, but President Trump, himself, elevated and instituted the campaign nationally through his executive order.

As a political matter, President Trump was the response to President Obama's election.<sup>52</sup> He rode into office on insults to Black and Brown people, women, immigrants, and the disabled, after having instigated the "birther movement," which challenged President Obama's birth and

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48. 531 U.S. 98 (2000).

49. Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 982 (2020).

50. *Id.* at 996 (discussing *Easley v. Cromartie*, 532 U.S. 234 (2001), and noting that: "The correlation between race and politics is so high that no judicially manageable standard is available to distinguish between the two. Nevertheless, the Court must be doing something when it rules on the constitutionality of particular gerrymanders."). Spann argues the standards and considerations can be easily inverted. *Id.* at 983.

51. *Id.* at 996. *See also* David Landau & Rosalind Dixon, *Dobbs, Democracy, and Dysfunction* 12–14 (unpublished working paper) (on file with the FSU College of Law) ("[G]errymandering in the last two cycles has raised concerns about asymmetry, with Republicans benefitting more than Democrats. There is little question about this in the prior cycle (that sparked by the 2010 census), where Republicans used their unified control over a number of right-wing and swing states to instantiate aggressive partisan gerrymanders. . . . The redistricting that will govern future elections, and occurred after the 2020 census, was somewhat less uneven, as Democrats were in a slightly stronger position to gerrymander some states themselves. . . . Bolstered by the partisan gerrymanders of the last cycle, Republicans were in position in key states to win a majority of state legislative seats with a minority of votes. And protected by the gerrymander, they were also in a position to legislate in an unpopular way while having less fear that they would get voted out of office as a consequence.").

52. YACOVONE, *supra* note 27, at 311–12 (noting that "[a]nxious whites rose up in 2016 to elect someone who would re-empower them, even if only symbolically. White men in America believed that 'their voice wasn't being heard,' Vanderbilt University professor of sociology and medicine Jonathan Metzl observed. 'Trump gave them their voice back.' In the fall of 2016, as the former president of the Organization of American Historians Earl Lewis related, the prospect of a Donald Trump victory had inspired those whites suffering from a perceived sense of lost dignity, status, and respect with new hope. They saw in him a renewal of white supremacy and Black subordination.") (citing JONATHAN M. METZL, *DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA'S HEARTLAND* 264 (2019) & Earl Lewis, *History Lesson* 1–2, AM. HISTORIAN (Feb. 2019)).

citizenship several years earlier.<sup>53</sup> One of his first acts in office was to ban Muslims from certain countries from entering the United States.<sup>54</sup> And, although he ran on an economic platform that promised promotion of ordinary American's interests, his most significant economic policy was a massive tax cut, the lion's share of which went to those already wealthy, while failing to deliver the wider benefits promised.<sup>55</sup> Seen as an authoritarian populist by many,<sup>56</sup> he will likely be remembered as a twice-impeached president who exposed the fragility of United States' democratic institutions, exposed the maliciousness of a segment of the American public, and falsely claimed that the 2020 election was stolen from him, to great effect.

However, the most immediate and substantial impact of the Trump presidency was his appointment of three Supreme Court Justices, occasioned by the GOP's unprincipled seizure of two of three of those seats.<sup>57</sup> The GOP, like the Court, has been moving in an antidemocratic direction for some time. Its declining support for democracy and increasing promotion of minority rule and neofascism,<sup>58</sup> may be attributable to the fact that except for a single election in 2004, it has not won the popular vote in a presidential election in over thirty years.<sup>59</sup> That is, GOP policies have largely failed to resonate with a majority of Americans. These include neoliberal policies meant to "slash business regulations and the taxes that support social welfare programs [and efforts] to privatize infrastructure

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53. Ta-Nehisi Coates, *The First White President*, THE ATL. (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/>.

54. *See id.*

55. *See* David Frum, *13 Things Trump Got Right: Nobody Does Nothing as President, Not Even Someone Who Watches Television for Five or Six Hours a Day.*, THE ATL. (Dec. 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/12/the-things-trump-got-right/617424/>.

56. *See, e.g.*, Yascha Mounk, *After Trump, Is American Democracy Doomed by Populism?*, COUNCIL ON FOREIGN AFF. (Jan. 14, 2021), <https://www.cfr.org/in-brief/after-trump-american-democracy-doomed-populism/>; Pippa Norris, *It's Not Just Trump. Authoritarian Populism Is Rising Across the West. Here's Why*, WASH. POST (Mar. 11, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/11/its-not-just-trump-authoritarian-populism-is-rising-across-the-west-heres-why/>.

57. *See, e.g.*, Jackie Calmes, *How Republicans Have Packed the Courts for Years*, TIME (June 22, 2021, 10:40 AM), <https://time.com/6074707/republicans-courts-congress-mcconnell/>; Russell Wheeler, *McConnell's Fabricated History to Justify a 2020 Supreme Court Vote*, BROOKINGS (Sept. 24, 2020), <https://www.brookings.edu/blog/fixgov/2020/09/24/mcconnells-fabricated-history-to-justify-a-2020-supreme-court-vote/>; Editorial Board, *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), <https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html>.

58. *See* Robert Reich, *The Rise of Republican Fascism*, SUBSTACK (Apr. 29, 2023) (using the term); Prabhat Patnaik, *Why Neoliberalism Needs Neofascists*, BOS. REV. (July 19, 2021), <https://www.bostonreview.net/articles/why-neoliberalism-needs-neofascists/> (noting that neofascist groups exist on the fringes of all modern societies, taking center stage during crises only with the support of corporate capital which finances their operations; describing their methods, similar to classic fascism, as demonizing the Other on basis of cultivated grievance, instilling fear, lying, and the subversion of social institutions, but differing from classical fascism in that because of the policies of globalized neoliberal capital on which neofascism relies, it cannot solve the basic problems of unemployment and social deterioration).

59. *See, e.g.*, Heather Cox Richardson, *June 24, 2022*, LETTERS FROM AN AM. (June 25, 2022), <https://heathercoxrichardson.substack.com/p/june-24-2022>; Philip Bump, *A Remarkable GOP Admission: Undermining the Electoral College Threatens Our Best Path to the White House*, WASH. POST (Jan. 4, 2021, 4:58 PM), <https://www.washingtonpost.com/politics/2021/01/04/remarkable-gop-admission-undermining-electoral-college-threatens-our-best-path-white-house/>.

projects,”<sup>60</sup> policies deeply popular with its donor class to which many of the benefits accrue, but also efforts “to end the federal protection of civil rights.”<sup>61</sup>

Instead, a majority of Americans, inclusive of GOP voters, “support prominent progressive economic policies such as raising the minimum wage,”<sup>62</sup> paid parental leave, investments in infrastructure, and universal health care.<sup>63</sup> And, they have done so for decades.<sup>64</sup> Further, the majority supports legalized abortion in most cases (61–64%); same sex marriage (70%); commonsense gun control (63–89%); the full panoply of existing social welfare programs (67–79%); protection of elections, including making voting easier (60–81%); higher taxes on the wealthiest two percent of Americans (71%); legalized cannabis use (68%); and the recognition that racism is a problem (86% (at its high point)), including disapproval of bans on books that discuss race or slavery (87%).<sup>65</sup>

The GOP opposes all these policies, among others, and has been successful in frustrating their accomplishment. It does so arguing that these policies are inconsistent with their current interpretations of “American values” and the Constitution.<sup>66</sup> In any event, its seizure of two Supreme Court seats has rendered a Court, whose majority (now 6–3) seems demonstrably unperturbed by their harm to American democracy and its people, as evidenced in part by their decisions racially curtailing voting and enhancing the economic power of corporations in the face of wealth concentration at the top and a declining middle class.<sup>67</sup>

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60. Richardson, *supra* note 59.

61. *Id.*

62. Jan G. Voelkel & Robb Willer, *Resolving the Progressive Paradox: Conservative Value Framing of Progressive Economic Policies Increases Candidate Support* 3–5 (unpublished working paper) (on file with the Stanford Center on Philanthropy and Civil Society) (noting this support does not necessarily translate into electoral victory for progressive candidates, and positing that this is because these policies not situated in a moral or values “frame,” while noting other studies that contemplate factors such as the racialization of workers and the dominant influence of wealthy donors). This paper has now been revised and is in press: Voelkel, J. G., Mernyk, J., & Willer, R. Moral reframing increases support for economically progressive candidates. PNAS Nexus.

63. *Id.*

64. *Id.*

65. See Steve Corbin, *Americans Largely Agree on Several Key Issues and Congress Should Pay Attention*, THE PULSE (Aug. 19, 2022), <https://pulse.npolicywatch.org/2022/08/19/will-of-the-people-vs-congressional-actions/#sthash.WtyAHfNQ.tKtWH6qi.dpbs>; *Americans Actually Agree on Far More than We Disagree*, BEN&JERRY’S (June 30, 2022), <https://www.benjerry.com/whats-new/2022/06/americans-agree-on-issues>; Jennifer Martin, *50 Surprising Things Americans Actually Agree on*, CBS NEWS (Sept. 27, 2022, 4:12 PM), <https://www.cbsnews.com/pictures/surprising-things-americans-actually-agree-on/>. But see *Public’s Top Priority for 2022: Strengthening the Nation’s Economy*, PEW RSCH. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/politics/2022/02/16/publics-top-priority-for-2022-strengthening-the-nations-economy/> (indicating a decrease of individuals from both parties who believe that “issues around race and poverty should be top policy priorities”).

66. See REPUBLICAN NAT’L COMM., REPUBLICAN PLATFORM 2016 2, 9, 12–13, 16, 31–32, 40 (2016).

67. See Adelman, *supra* note 38, at 133–37 (describing the concentration of wealth and other factors influencing the turn of the GOP to the right, including its reliance on corporate and wealthy donors who “are mostly interested in tax cuts, fewer regulations and less spending on anything benefiting ordinary Americans.”).

Few cases seem to capture this disregard as fully as the decision in *Dobbs v. Jackson Women's Health Organization*.<sup>68</sup> And yet, the decision fits squarely within the ethos of this broader backlash, both in terms of its target, *women and girls*, and the draconian effects it shall bring upon them, including the possible negative effects on their participation in politics.<sup>69</sup> In the decision, the Court in a nearly unprecedented move stripped women, and other people capable of pregnancy, of a fifty-year old constitutional right, the right to terminate an unwanted pregnancy. In doing so, the right-wing Court majority overturned *Roe v. Wade* and *Planned Parenthood v. Casey*.<sup>70</sup>

Justice Alito, writing for the majority, casually dismisses the fact that women could not vote when the Fourteenth Amendment was ratified in 1868.<sup>71</sup> Presumably, if abortion was legal in and subsequent to 1868, it is part of the country's history and traditions and thus constitutionally protected. Noting that women can vote now, they vote in larger numbers than men, and are not a powerless group, Justice Alito cavalierly ignores the disadvantages women faced then and continue to face today.

Then, in a sop to democracy, the conservative majority disingenuously claims that it is returning the decision back to the states and state democratic processes.<sup>72</sup> Of course, given there is almost no state that has a majority of people supporting abortion bans and severe restrictions, any implementation of the decision relies on the partisan gerrymandering that the Court, itself, has approved and which results in GOP control. Unsurprisingly, "high levels of partisan gerrymandering are also often correlated with draconian—and anti-majoritarian—restrictions on access to abortion[,]”<sup>73</sup> such as those without exceptions for rape and incest. Further, those states “closely aligned with the antiabortion movement tend to be the most conservative, have the weakest social safety nets, and record the worst outcomes for children.”<sup>74</sup>

Ultimately, a white man wearing a NYFD (New York Fire Department) sweatshirt standing on the front steps of New York City's Old St. Patrick's Cathedral captures, as I have argued elsewhere, the real meaning of *Dobbs*, including its callousness.<sup>75</sup> Protesters in front of the church chanted: “Not the church, not the state, the people must decide their fate.” The man's response: “I am the people, I am the people, I am the people, the people have decided, the court has decided, you lose . . . . You have no

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68. 142 S. Ct. 2228 (2022).

69. Landau & Dixon, *supra* note 51, at 14–16.

70. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

71. *Dobbs*, 142 S. Ct. at 2252–53.

72. *Id.* at 2283–84.

73. Landau & Dixon, *supra* note 51, at 14.

74. Mary Ziegler, *The End of Roe v. Wade*, 22 AM. J. BIOETHICS 16, 17 (2022).

75. See Athena D. Mutua, *The Meaning of Dobbs & the Fight Mifepristone: Despotism, Servitude and Forced Birth*, (on file with author) (for a fuller discussion of the case along these lines and from which this section is taken).

choice. Not your body, not your choice, your body is mine and you're having my baby."<sup>76</sup>

While the man's response is despicable, it is nonetheless deeply intuitive about the meaning of the decision and the society in which it operates. It intuitively and raises questions about who the "We the People" are, to whom the Court has delegated the abortion decision, and whether they include those who have suppressed voting and gerrymandered themselves into being "in control." Further, this man is correct, the women protesting lose. The winners are those, like the Court, who have "a theory of life,"<sup>77</sup> that supports forced birth and believes "pregnant people's plans, desires, dreams, ambitions, aspirations, and prayers" are less significant than fetal life; that their lives "can be subordinated to the fetuses that they carry . . . [and] that it is legitimate to force birth."<sup>78</sup> And, though the Court has given pregnant people few choices under the Fourteenth Amendment Due Process Clause, the question becomes whether there is protection for women's bodily integrity and decisional autonomy under other constitutional provisions, including the Thirteenth Amendment,<sup>79</sup> the Fourteenth Amendment Equal Protection Clause,<sup>80</sup> and the First Amendment.<sup>81</sup>

The case raises serious concerns about police and others' now increased authority to surveil women and girls, as well as concerns about whether women, girls, and others capable of pregnancy are prohibited from accessing modern medicine and technology to enhance their lives unlike other members of society, including religious leaders. More disturbing is the man's intuition and exclamation: "[A]nd you're having my baby."<sup>82</sup> This man knows his society. It is one in which both incest and

76. Khaleda Rahman, *Man Tells Abortion Rights Activists 'Your Body Is Mine' in Viral Video*, Newsweek, May 9, 2022, <https://www.newsweek.com/man-tells-abortion-rights-activists-your-body-mine-viral-video-1704667>.

77. Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 41 (2022).

78. *Id.*

79. See Andrew Koppelman, *Forced Labor Revisited: The Thirteenth Amendment and Abortion*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 226, 227 (Alexander Tsesis ed., 2010); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 484 (1990); Michele B. Goodwin, *Involuntary Servitude: Pregnancy, Abortion, and the Thirteenth Amendment*, UNIV. CHI. LEGAL F., <https://legal-forum.uchicago.edu/print-archive/involuntary-reproductive-servitude-forced-pregnancy-abortion-and-thirteenth-amendment>.

80. See Louise Melling, *For Justice Ginsburg, Abortion Was About Equality*, ACLU NEWS & COMMENT, (Sept. 23, 2020), <https://www.aclu.org/news/reproductive-freedom/for-justice-ginsburg-abortion-was-about-equality> (discussing equality between men and women); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 304 (2d ed. 2017) (discussing in part equality between Black and white people and how the reproductive capacity of Black women raises these issues).

81. See Rachel Kranson, *History Shows That the First Amendment Should Protect Abortion*, WASH. POST (May 12, 2022, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/05/12/first-amendment-could-save-abortion-rights/>; John R. Vile, *Abortion, Privacy Rights and Religion*, MIDDLE TENN. STATE UNIV. FREE SPEECH CTR. (Jul 21, 2022), <https://www.mtsu.edu/first-amendment/article/2140/abortion-privacy-rights-and-religion>.

82. Rahman, *supra* note 76.

rape are greatly underreported,<sup>83</sup> and “rarely investigated or prosecuted, making sexual assault the easiest violent crime to get away with.”<sup>84</sup> He is aware that he can likely get away with forcing himself and pregnancy on women. In other words, the Court has contributed to conditions of potential rape, forced pregnancy, forced birth, and possibly even forced family separation that are eerily reminiscent of the conditions historically imposed on enslaved Black women. It is now extended to include all women.

And, finally, the campaign to miseducate America is shaped by the successive, often well-funded “grassroots” efforts that recently emerged<sup>85</sup> with different but overlapping agendas including various amounts of white nationalist fervor. Though smaller in membership, these efforts are akin to the pro-segregation mass movement of the past. These recent movements, include the Tea Party, emerging right after President Obama’s election and in opposition to his 2008 Great Recession policies, among other things;<sup>86</sup> the anti-mask movement, arising during the 2020 COVID-19 pandemic;<sup>87</sup> and recently, Moms for Liberty and Parents Defending Education, who oppose teaching “divisive” topics and CRT in schools.<sup>88</sup>

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83. See generally Peggy Phelan, *The Dobbs Decision: Abortion, Adoption, and the Supreme Court*, 10 ADOPTION & CULTURE 171, 172 (2022) (making this point and the role illusions of adoption played in the case).

84. Barbara Bradley Hagerty, *American Law Does Not Take Rape Seriously*, THE ATL. (Jan. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/american-law-rape/605620/>.

85. It is difficult to tell what truly local grassroots ideas are, given the media environment, resource-sharing, and direct links (although starting with the American for Prosperity organization might be a good beginning). See HERTEL-FERNANDEZ, *supra* note 17, at 4. For example, the Hamilton County, Tennessee chapter of Moms for Liberty lists its concerns about CRT alongside links to vaccine-skeptical organizations like America’s Frontline Doctors (a group founded in part by Tea Party co-founder Jenny Beth Martin). See MOMS FOR LIBERTY, HAMILTON CNTY. TN., <https://www.momsforliberty.org/chapters/hamilton-county-tn/> (last visited Apr. 4, 2023); Brandy Zadrozny & Ben Collins, *Dark Money and PAC’s Coordinated ‘Reopen’ Push are Behind Doctors’ Viral Hydroxychloroquine Video*, NBC NEWS (Jul. 28, 2020, 1:06 PM), <https://www.nbcnews.com/tech/social-media/dark-money-pac-s-coordinated-reopen-push-are-behind-doctors-n1235100>. Their “learn more” page on CRT simply links to the resources page for Citizens for Renewing America, whose President, Russ Vought, was the author of memo M-20-27 discussed above. *What Is Critical Race Theory?*, MOMS FOR LIBERTY, HAMILTON CNTY., TN. (Sept. 4, 2021), <https://sites.google.com/view/momsforlibertyhamilton/critical-race-theory?authuser=0>; see *Our Staff*, CITIZENS FOR RENEWING AM., <https://citizensrenewingamerica.com/about/> (last visited Apr. 4, 2023); Memorandum, *supra* note 6, at 1.

86. See, e.g., JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* 3 (2010); LAWRENCE ROSENTHAL & CHRISTINE TROST, *STEEP: THE PRECIPITOUS RISE OF THE TEA PARTY* 9 (2012).

87. Some of these focused exclusively on school closings, mandatory masking, and “parental rights.” See, e.g., *Our Team*, LET THEM BREATHE, <https://www.letthembreathe.net/our-team> (last visited Apr. 4, 2023); REOPEN CALIFORNIA SCHOOLS, <http://www.reopencaliforniaschools.com/> (last visited Apr. 4, 2023). See generally Anya Kamenetz, *A Look at the Groups Supporting School Board Protesters Nationwide*, NPR (Oct. 26, 2021, 6:02 AM), <https://www.npr.org/2021/10/26/1049078199/a-look-at-the-groups-supporting-school-board-protesters-nationwide>.

88. Moms for Liberty also focuses on “parental rights,” but has also been in the media in numerous “book ban” and CRT stories. See, e.g., Gabriella Borter, *‘Critical Race Theory’ Roils a Tennessee School District*, REUTERS (Sept. 21, 2021, 11:42 AM), <https://www.reuters.com/world/us/critical-race-theory-roils-tennessee-school-district-2021-09-21/>; Kelly Weill, *Far-Right Group Wants to Ban Kids From Reading Books on Male Seahorses, Galileo, and MLK*, DAILY BEAST (Sept. 24, 2021, 8:30 AM), <https://www.thedailybeast.com/far-right-group-wants-to-ban-kids-from-reading-books->

*B. Triggered: 1619, George Floyd's Murder, and a Racial Reckoning Delayed*

The specific attack on CRT is attributed to the early efforts of Christopher Rufo,<sup>89</sup> currently a fellow at the Manhattan Institute. Rufo publicly admitted that his goal was to tarnish the CRT brand and he conflated trainings for diversity, equity, and inclusion with CRT.<sup>90</sup> Despite Rufo's conflation, the study of and fight against racialization and racism is bigger than either CRT or DEI efforts. Yet, he attempted to make a distorted and demonized CRT stand in for them all. The anti-CRT meme,<sup>91</sup> portraying CRT as a destructive force to the feelings of white children<sup>92</sup> (underestimating both their and their teachers' capacities for discernment)<sup>93</sup> and

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on-male-seahorses-galileo-and-martin-luther-king-jr. Parents Defending Education are concerned that "activists have targeted public, private, and charter schools across the country with a campaign to impose ideologically driven curriculum with a concerning and often divisive emphasis on students' group identities: race, ethnicity, religion, sexual orientation and gender." *About Us*, PARENTS DEFENDING EDUC., <https://defendinged.org/about/> (last visited Apr. 4, 2023).

89. Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, THE NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>.

90. *Id.*; see also Christopher F. Rufo (@realchrisrufo), TWITTER: (Mar. 15, 2021, 1:17 PM), <https://twitter.com/realchrisrufo/status/1371541044592996352?lang=en> ("The goal is to have the public read something crazy in the newspaper and immediately think 'critical race theory.' We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans.").

91. Atiba R. Ellis, *Voter Fraud as an Epistemic Crisis for the Right to Vote*, 71 MERCER L. REV. 757, 761–62 (2020) (defining the meme "as an idea or a narrative that replicates and evolves because of its persuasive power, without regard for its truthfulness. Memes in popular culture are considered creatures of the Internet, but that is a limited sense of the meaning of a meme. A meme is a piece of culture that in itself can replicate, transmit, and evolve." And further noting: "A meme also survives through connection with other memes, thus forming a "memeplex"—or a worldview—to aid in replication. As such, the particular memes survive or evolve because of their appeal to a worldview and their ability to empower believers of the worldview through re-enforcing the core beliefs. In this sense, memes take the appearance of truth without needing to be true to replicate. And because it fits and re-enforces the worldview of those who become invested in it, it galvanizes extreme responses in line with the meme—not the truth—and that runs the risk of leading people to endanger rights.").

92. The 1776 Project Political Action Committee defines CRT as teaching that "white Americans are stained with the original sin of racism for which they can never be cleansed. Their solution is to remake the U.S., abandoning our founding documents and the capitalist system." *Overturing Critical Race Theory and the 1619 Project*, 1776 PROJECT PAC, <https://1776projectpac.com/> [hereinafter *Overturing Critical Race Theory*] (last visited Apr. 4, 2023).

93. I am profoundly saddened by what may come and what may happen to all our children. The forces of reaction will sacrifice them and their futures on the altar of greed, selfishness, and self-aggrandizement without a second thought, as is already evident and as I partially attempt to convey in this essay. The inversion of the meanings of CRT and the claim that these distortions are being taught to children, in my estimation, are meant to both scare white parents and to cultivate their support for the aims of reaction. Their cultivated and unsurprising reactions to these efforts, I am told, is grounded in the purported age-old belief that white folks are scared that people of color will do to them and their children what they (complacency in the face of ongoing harm) and their ancestors (outright violence and genocide) have done to people of color here and around the world. It is a myth. People of color, particularly Black people, have demonstrated a profound capacity for forgiveness and a profound commitment to democracy and the few edifying ideas embodied in the Constitution. This is so even as they/we demand and will continue to demand repair and reconciliation and even as we recognize the vast depth of harm real reconciliation must address including arrangements around the fact that the country is constructed on others' land. And as I learned of 'aggrieved' whites spreading shit on the walls of the Capitol, I was reminded of a prophecy I have long held: The United States will not be destroyed by others—"the Blacks," Mexicans, immigrants, Trans people, the Russians, the Chinese.



adults alike, is central to the campaign. But other issues, such as the demonization of Trans rights and lives have also emerged as a central target. Despite these pursuits, however, the campaign was primarily triggered by two events: the *New York Times*'s publication of the 1619 Project and the global, multiracial and multiethnic protests condemning the police murder of Mr. George Floyd and demanding a racial reckoning.

### 1. The 1619 Project: Sparks for the Miseducation of America Campaign

In 2019, the *New York Times* published the 1619 Project, an account of American slavery and its aftermath, centering slavery as foundational to American history and life.<sup>94</sup> The project was the brainchild of journalist Nikole Hannah-Jones, who authored the opening essay (of ten initial essays) which garnered a Pulitzer Prize.<sup>95</sup> Viewed accessible and appropriate for educational purposes, the Project was nonetheless controversial, with some left-leaning historians criticizing Hannah-Jones's essay in part for asserting that the Revolutionary War was fought (by some) to protect slavery.<sup>96</sup> But the political right wing loudly denounced it.<sup>97</sup> Elevating the role of slavery as foundational in shaping American life proved anathema to their view that slavery was a minor unfortunate incident in the life of the nation that had no lasting effects.

Later, President Trump issued his executive order prohibiting divisive language and instituted the 1776 Commission to combat "anti-American historical revisionism," "critical race theorists," "cancel culture adherents," and "flag-burning mobs" by promoting "patriotic education."<sup>98</sup>

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Rather it will be destroyed by obtuse American white folks across class, gender, and sexuality, among other identity characteristics. These Americans will toss democracy, its institutions, and what remains inspiring about them for maintaining five minutes and two cents worth of unearned privilege. And their kids will be condemned by their own hands. Such a sad thought . . .

94. See *About the 1619 Project*, PULITZER CTR., <https://1619education.org/about-1619-project> (last visited Apr. 4, 2023).

95. See Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html>; Jeff Barrus, *Nikole Hannah-Jones Wins Pulitzer Prize for 1619 Project*, PULITZER CTR. (May 4, 2020), <https://pulitzer-center.org/blog/nikole-hannah-jones-wins-pulitzer-prize-1619-project>.

96. Hannah-Jones explained and had evidence for the claim that some had fought the Revolutionary War in order to preserve slavery, but the original publication made the broader generalization. The piece was heavily criticized for this point despite the clarification and was used to try to discredit the entire effort. Jake Silverstein, *We Respond to the Historians Who Critiqued the 1619 Project*, N.Y. TIMES MAG. (Jan. 19, 2021), <https://www.nytimes.com/2019/12/20/magazine/we-respond-to-the-historians-who-critiqued-the-1619-project.html>; But see, e.g., Alex Lichtenstein, *From the Editor's Desk: 1619 and All That*, 125 AM. HIST. REV. xv, xviii (2020); Timothy Messer-Kruse, *What the 1619 Project Really Means: Its Liberal and Conservative Critics Both Miss the Point*, CHRON. HIGHER EDUC. (Mar. 5, 2020), <https://www.chronicle.com/article/what-the-1619-project-really-means/>.

97. See, e.g., Lipton Matthews, *How to Disprove the 6 Most Outrageous Myths of the 1619 Project*, THE FEDERALIST (July 27, 2020), <https://thefederalist.com/2020/07/27/how-to-disprove-the-6-most-outrageous-myths-of-the-1619-project/>.

98. Konstantin McKenna, *The 1776 Project Is a Desperate Search for the Right Enemies*, FOREIGN POL'Y (Jan. 21, 2021, 3:12 PM), <https://foreignpolicy.com/2021/01/21/1776-project-desperate-search-enemies-identity-politics-unamerican/> (referring to Donald J. Trump, *Proclamation on the Birthday of Founding Father Caesar Rodney*, TRUMP WHITE HOUSE ARCHIVES (Oct. 6, 2020),

This set off a frenzy of legislation, model legislation, and resolutions banning or restricting the teaching of CRT and “divisive language,” the latter a vague concept meant to chill public discussion of racial injustice in the United States. These efforts also initiated book bans, the majority of which targeted texts featuring women, minoritized, and LGBTQ+ people as protagonists.<sup>99</sup> Further, right-wing media fanned the flames. A study found that in an approximately three-and-one-half-month period, “critical race theory” was mentioned (and demonized) some 1,300 times on Fox News, the major right-wing cable channel news outlet that would later promote the “Big Lie” that the 2020 election was stolen.<sup>100</sup> And, right-wing entities such as ALEC, the Heritage Foundation, and the American Enterprise Institute led the way by providing model legislation or workshops to spread these anti-CRT actions, among others.<sup>101</sup>

However, this legislative and media frenzy took place well over a year after the publication of the 1619 Project. The intervening event—the immediate and most important trigger of backlash—was the racial reckoning demanded by the multiracial and multiethnic global protests of the police murder of George Floyd.<sup>102</sup> Protesters chanted: “I can’t breathe,” “enough is enough,” “Justice for George Floyd,” “Black Lives Matter,” and “defund the police,” among other chants.<sup>103</sup> The latter chant and idea of “defund the police” posed a challenge to current government spending on institutions of violence as well as corporate profiteering on the backs

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<https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-birthday-founding-father-caesar-rodney/>). See also Donald J. Trump, *Remarks by President Trump at the White House Conference on American History* (Sept. 17, 2020, 2:54 PM) (transcript available at <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-white-house-conference-american-history/>).

99. See PEN AMERICA, EDUCATIONAL GAG ORDERS: LEGISLATIVE RESTRICTIONS ON THE FREEDOM TO READ, LEARN, AND TEACH 4–5; *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/>; see also Hannah Nightingale, *Moms for Liberty SLAMS PEN America Over False Allegations of Book Banning*, THE POST MILLENNIAL (Sept. 28, 2022), <https://thepostmillennial.com/moms-for-liberty-slams-pen-america-over-false-allegations-of-book-banning> (discussing a single book); Elizabeth A. Harris & Alexandra Alter, *A Fast-Growing Network of Conservative Groups Is Fueling a Surge in Book Bans*, N.Y. TIMES (Jan. 10, 2023), <https://www.nytimes.com/2022/12/12/books/book-bans-libraries.html>.

100. Jake Lahut, *Fox News Has Mentioned ‘Critical Race Theory’ Nearly 1300 Times Since March, According to Watchdog Study*, INSIDER (June 15, 2021), <https://www.businessinsider.com/fox-news-critical-race-theory-mentions-thousand-study-2021-6>. See e.g., Julia Carrie Wong, *From Viral Videos to Fox News: How Rightwing Media Fueled the Critical Race Theory Panic*, THE GUARDIAN (June 30, 2021), <https://www.theguardian.com/education/2021/jun/30/critical-race-theory-rightwing-social-media-viral-video>.

101. Alex Kotch, *ALEC Inspires Lawmakers to File Anti-Critical Race Theory Bills*, COMMON DREAMS (Jul. 28, 2021), <https://www.commondreams.org/views/2021/07/28/alec-inspires-lawmakers-file-anti-critical-race-theory-bills>.

102. See, e.g., *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/article/george-floyd.html> [hereinafter *How George Floyd Died*]; *This Day in History: May 25, 2020: George Floyd Is Killed by a Police Officer, Igniting Historic Protests*, HIST. (June 25, 2021), <https://www.history.com/this-day-in-history/george-floyd-killed-by-police-officer> [hereinafter *This Day in History*]; Richard A. Oppel, Jr. & Kim Barker, *New Transcripts Detail Last Moments for George Floyd*, N.Y. TIMES (Apr. 1, 2021), <https://www.nytimes.com/2020/07/08/us/george-floyd-body-camera-transcripts.html?action=click&module=RelatedLinks&pgtype=Article>.

103. See *This Day in History*, *supra* note 102.

of incarcerated people. It demanded that these monies be used for investment in communities instead, proposing a change in the government's social and economic priorities and distributions.<sup>104</sup> Further, the term “systemic racism” surfaced widely during the protests, apparently in rejection of the “few bad apples” mainstream explanation about police killing Black and Brown people and captured in a never-ending succession of videos that continue to this day.<sup>105</sup>

## 2. Triggered: The Police Murder of Mr. George Floyd and Global Protests

On May 5, 2020, mere weeks before Floyd's death, a video surfaced documenting the February murder of Ahmaud Arbery, a twenty-five-year-old Black man, by a white father and son who saw him jogging in “their” Atlanta neighborhood.<sup>106</sup> The father, a former police officer, and son, not yet arrested, almost got away with murder, save the video.<sup>107</sup> Around the same time, the broader public began to learn about the March police killing of Breonna Taylor in Louisville, Kentucky.<sup>108</sup> She and her boyfriend were awakened by—what turned out to be—plain-clothes police executing an inappropriately issued warrant by ramming through her apartment door sometime after midnight.<sup>109</sup> The boyfriend called 911, believing a home invasion was in progress, and fired a warning shot.<sup>110</sup> Police responded by showering the apartment with a hail of bullets, killing twenty-six-year-old Breonna, a Black medical technician.<sup>111</sup>

And on the same day Floyd was killed, Amy Cooper was caught on video.<sup>112</sup> She angrily threatened to call the police on a Black man bird-watching, Christian Cooper (not related) because he refused to stop videotaping their encounter after he asked her to kindly leash her dog pursuant

104. See e.g., Andrea J. Ritchie, *The Demand Is Still Defund the Police*, ABOLITIONIST (2021), [https://criticalresistance.org/wp-content/uploads/2022/04/abby\\_issue\\_35\\_english-web-1.pdf](https://criticalresistance.org/wp-content/uploads/2022/04/abby_issue_35_english-web-1.pdf).

105. Shayanne Gal, Andy Kiersz, Michelle Mark, Marguerite Ward, Katie Balevic, Yoonji Han, & Annie Fu, *25 Simple Charts to Show Friends and Family Who Aren't Convinced Racism Is Still a Problem in America*, BUS. INSIDER (Dec. 31, 2022, 11:03 AM), <https://www.businessinsider.com/us-systemic-racism-in-charts-graphs-data-2020-6>.

106. *Ahmaud Arbery Shooting: A Timeline of the Case*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/article/ahmaud-arbery-timeline.html>.

107. *Id.*; see also Char Adams, *'They Almost Got Away with It': How a Leaked Video Led to Convictions in the Ahmaud Arbery Case*, NBC NEWS (Nov. 24, 2021, 4:57 PM), <https://www.nbcnews.com/news/nbcblk/-almost-got-away-leaked-video-led-convictions-ahmaud-arbery-case-rcna6690>.

108. Richard A. Oppel, Jr., Derrick Bryson Taylor, & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Dec. 12, 2022), <https://www.nytimes.com/article/breonna-taylor-police.html>.

109. *Id.*; Theresa Waldrop, *Breonna Taylor Killing: A Timeline of the Police Raid and Its Aftermath*, CNN (Mar. 3, 2022, 5:46 PM), <https://www.cnn.com/2022/02/22/us/no-knock-raid-breonna-taylor-timeline/index.html>.

110. Waldrop, *supra* note 109.

111. *Id.*

112. See, e.g., Sarah Maslin Nir, *How 2 Lives Collided in Central Park, Rattling the Nation*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/06/14/nyregion/central-park-amy-cooper-christian-racism.html>.

to New York City park rules.<sup>113</sup> Infuriated, Amy Cooper threatened: “I’m calling the cops . . . I’m going to tell them there is an African American man threatening my life.”<sup>114</sup> She called the police, feigning distress and intimating that she was in immediate danger (repeatedly stating there was “an African American . . . threatening myself and my dog”).<sup>115</sup> She knew, as did many of us viewing the footage, that the police were likely to believe her, a white woman, and that Christian Cooper’s potential encounter with police could leave him at best seriously inconvenienced, if not dead.<sup>116</sup> The video went viral, but not before—at least in my mind—the world witnessed the video of George Floyd’s murder.<sup>117</sup>

On May 25, 2020, police killed Mr. George Floyd.<sup>118</sup> The police arrived at a Minneapolis convenience store after the manager reported that Floyd had purchased a pack of cigarettes with a suspected counterfeit \$20 bill.<sup>119</sup> The encounter resulted in Floyd on the ground, hands handcuffed behind his back, and the lead police officer, Derek Chauvin, kneeling on Floyd’s neck while two other police officers secured the rest of his body.<sup>120</sup> A fourth officer monitored the increasingly agitated onlookers.<sup>121</sup> Chauvin leaned on Floyd’s neck for over eight minutes, during which time Floyd cried out some twenty times that he could not breathe, said that they (the police) would kill him, and, as he lost consciousness, called out to his (deceased) mom and expressed love for his children.<sup>122</sup> Chauvin, with his hands in his pant pockets and demonstrably unperturbed by Floyd’s condition or the bystanders’ protests, remained positioned with his knee on Floyd’s neck even after his fellow officer failed to detect George Floyd’s pulse.<sup>123</sup> Floyd was later pronounced dead.<sup>124</sup>

A Black teenager, Darnella Frazier, cried at the criminal trial of Chauvin, expressing remorse that she could not or did not help Floyd.<sup>125</sup> She commented: “When I look at George Floyd, I look at my dad, I look at my brothers, I look at my cousins, my uncles, because they’re all

113. *Id.*

114. *Video Shows White Woman Calling Police on Black Man in Central Park*, N.Y. TIMES (May 27, 2020).

115. *Id.*

116. See Ayana Archie, *The Woman who Called 911 on a Black Bird Watcher Wasn’t Wrongfully Fired, Judge Rules*, NPR (Sept. 23, 2022, 3:00 AM), <https://www.npr.org/2022/09/23/1124657916/amy-cooper-central-park-job> (dismissing the seriousness of her conduct, Cooper blamed her subsequent job loss on her employer discriminating against her as a white woman).

117. Nir, *supra* note 112.

118. *This Day in History*, *supra* note 102.

119. *Id.*

120. *How George Floyd Died*, *supra* note 102.

121. *Id.*

122. Opper & Barker, *supra* note 102.

123. *How George Floyd Died*, *supra* note 102.

124. *Id.*

125. Nicholas Bogel-Burroughs & Tim Arango, *Darnella Frazier, the Teenager Who Filmed George Floyd’s Arrest, Testifies at the Trial*, N.Y. TIMES (Jul. 7, 2021), <https://www.nytimes.com/2021/03/30/us/darnella-frazier-video-george-floyd.html#:~:text=Darnella%20Frazier%2C%20who%20was%2017,Floyd's%20death>.

Black . . . I have Black friends . . . that could have been one of them.”<sup>126</sup> But at seventeen years old, she had stood and bore witness, videotaping Floyd’s murder on her cell phone and later posting it on Facebook.<sup>127</sup> The protests in Minneapolis began almost immediately but spread to “more than 2,000 cities and towns in all 50 states”<sup>128</sup> and then went global. The protest continued for months. It “may have been the largest protest movement in U.S. history . . . .”<sup>129</sup>

Visibly multiracial, multicultural, and massive,<sup>130</sup> the protests promised to consolidate an already multivalent majority,<sup>131</sup> and threatened to persuade other Americans—including Republicans—that a serious problem of racialized police violence existed.<sup>132</sup> Thus while the protest generated hundreds of (largely ineffective) police reform measures across the country,<sup>133</sup> it also generated a backlash. Republicans felt the pressure to react,<sup>134</sup> they introduced a host of anti-protest bills,<sup>135</sup> intensified efforts to suppress voting, President Trump seized on Fox news reports about CRT in crafting his executive order, and others pushed into high gear efforts to “overturn” CRT and the 1619 Project.<sup>136</sup>

The miseducation campaign, including its broad-based censorship, fully emerged. It served to turn the conversation from the demand for racial justice, reckoning, and possible remedies for police violence and injustice more generally, to a conversation of the CRT boogeyman claimed to be hurting the minds of white children. The move cultivated predictable white panic and resentment and truncated possibilities for a racial

126. *Id.*

127. *Id.*

128. *This Day in History*, *supra* note 102.

129. *Id.*

130. Zak Cheney-Rice, *The New Coalition for Criminal-Justice Reform Is Multiracial and Bipartisan. It’s Also Fragile*, NY MAG. INTELLIGENCER (June 24, 2020), <https://nymag.com/intelligencer/2020/06/george-floyd-protest-coalition-is-multiracial-and-fragile.html>; Leila Miller, *George Floyd Protests Have Created a Multicultural Movement That’s Making History*, L.A. TIMES (June 7, 2020, 6 AM), <https://www.latimes.com/california/story/2020-06-07/george-floyd-protests-unite-black-activists-new-allies>; Dana R. Fisher, *The Diversity of the Recent Black Lives Matter Protests Is a Good Sign for Racial Equity*, BROOKINGS (July 8, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/07/08/the-diversity-of-the-recent-black-lives-matter-protests-is-a-good-sign-for-racial-equity/>.

131. I thank Emily Houh for this term to capture the many diversities of people and movements the protest involved.

132. Audra D. S. Burch, Amy Harmon, Sabrina Tavernise, & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html>.

133. Noreen O’Donnell & Amy O’Kruk, *States Raced to Pass Police Reform Bills After George Floyd’s Murder. Advocates Say Not Enough*, NBC DFW (May 25, 2021), <https://www.nbcdfw.com/news/national-international/since-george-floyds-murder-states-have-raced-to-pass-police-reform-bills-but-advocates-say-not-enough/2640889/>.

134. Burch et al., *supra* note 132; see also Olivia B. Waxman, ‘Critical Race Theory Is Simply the Latest Bogeyman.’ *Inside the Fight Over What Kids Learn About America’s History*, TIME (July 16, 2021, 7:42 PM), <https://time.com/6075193/critical-race-theory-debate/>.

135. Devin Dwyer, *George Floyd Protests Trigger Wave of GOP ‘Anti-Riot’ Laws*, ABC NEWS (Apr. 29, 2021, 9:07 PM), <https://abcnews.go.com/Politics/george-floyd-protests-trigger-wave-gop-anti-riot/story?id=77365229>.

136. *Overturning Critical Race Theory*, *supra* note 92.

reckoning. Apparently, the intractable problems of racial violence and injustice in the United States are the result of antiracism talk in professional diversity trainings and an obscure academic legal theory that few had even heard of prior to 2020.

## II. CRT ARTICLE REVIEW: OLD AND NEW FORMULATIONS AND INSTITUTIONAL DEVELOPMENT

In *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, I suggested that the goal of CRT is “to excavate the relationship between the law, legal doctrine, ideology, and [white] racial power,” quoting Cheryl Harris.<sup>137</sup> CRT emerged after the enactment of a bevy of historic civil right laws. However, the actual lived experiences and material conditions of many Black people and other people of color had barely improved,<sup>138</sup> even as “the structural and discursive meanings of race” had begun to shift.<sup>139</sup> Further the law and legal-political institutions were retreating from racial justice efforts, asserting in their place colorblindness and a colorblind jurisprudence.<sup>140</sup> CRT rises then, I suggested, in part to challenge the ascendance of colorblindness in law. Colorblindness, at best, is a normative aspiration—people should be judged by their character rather than the color of their skin—that color *should* be irrelevant. Colorblindness in law and practice, however, asserts that “race” (not limited to color) *is* irrelevant and then, on the basis of this myth, proceeds to “ignore[] and cement[] the racial caste system” and hierarchical racial relations partially created by law in the first place.<sup>141</sup> It does so by assuming an imagined level playing field between white and Black people, among others, even though Black people continue to fare significantly worse than white folks on almost all social and economic indicia of

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137. *The Rise of CRT*, *supra* note 7, at 334 (citing Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1218 (2002)).

138. See, e.g., Meghan Roos, *School Segregation Still Common 68 Years After Brown v. Board: Report*, NEWSWEEK (May 17, 2022, 5:50 PM), <https://www.newsweek.com/school-segregation-still-common-68-years-after-brown-v-board-report-1707588>.

139. *The Rise of CRT*, *supra* note 7, at 330. One of these shifts, includes the casual use of the term “race,” which is often used to refer to Black people and other people of color but now may include whites, from their own point of view, for certain purposes. White identity, white consciousness and white dominance, the backbone of white supremacy, often understands itself as raceless until confronted with the Other—people perceived as nonwhite. See, e.g., BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* (1998). This is so particularly where efforts and remedies are undertaken to undo the white supremacist harms to people of color. Then whites see themselves as a “race.” That is, they are a race for purposes of challenging racial justice remedies such as affirmative action through which they seek to maintain the privileges of seeing themselves as raceless and universal and their superior access to resources due to racial dominance as transparent, normal, meritorious, and neutral. This use of the term “race” where white people include themselves as a race but refuse to acknowledge society’s racial hierarchy, undergirds ideas of colorblindness, which pretends that equality already exists—there is level playing field, and that the groups are similarly situated. Some white people may be increasingly seeing themselves as a race in the face changing demographics and the cultivation of white racial resentment and grievance.

140. See *The Rise of CRT*, *supra* note 7, at 358–69.

141. *Id.* at 334.

well-being.<sup>142</sup> As such, CRT did not arise and does not simply seek to *understand* the relations between law and white supremacy but to *change* it.<sup>143</sup> Its ultimate goal is to move law toward justice, toward the elimination of racial and other forms of oppression, and to work for the liberation of all oppressed people.<sup>144</sup>

In terms of outlook and method, I contended that CRT often honors and grounds its arguments in the recurring ideas and perspectives of marginalized groups. (Today we would probably term this perspective as arising from “those who are directly impacted.”)<sup>145</sup> That is, it recognizes and employs “both the experiential knowledge and *critical consciousness* of people of color in understanding law and society.”<sup>146</sup> And while CRT draws on an eclectic and interdisciplinary body of knowledge, it “insists on [a] contextual, historical analysis of law,”<sup>147</sup> employing a broad range of analytical tools, including the use of narrative and storytelling.

Finally, I charted the development of CRT through the intellectual insights of different racial, ethnic, and other marginalized groups, arguing that these deepened and broadened CRT scholarship and knowledge base, and did so often through conflict and contestation. So, for instance, CRT initially grounded much of its analysis in the African American experience, the white over Black paradigm, and anti-Black racism.<sup>148</sup> However, the emergence of LatCrit (and legal analysis of experiences of other marginalized groups such as Asian Americans, Indigenous, and LGBTQ peoples) broadened its lens to include the history and experiences of others, who often interrogated legal fields that were not necessarily highlighted in the modern-day experiences of descendants of enslaved people.<sup>149</sup> These additional foci included legal areas, such as immigration and law, and transnational relations between regions, such as South America, Africa, and Asia.<sup>150</sup> The interactions of racism and other oppressive social structures around class, gender, and sexuality captured in the notion of intersectionality rendered CRT expansive in its analytical frame and reach.<sup>151</sup>

I concluded the Article proposing that CRT deepen its excavation of the roots of marginalized communities’ material conditions from the

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142. See generally THE COUNCIL OF ECON. ADVISERS FOR THE PRESIDENT’S INITIATIVE ON RACE, CHANGING AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING BY RACE AND HISPANIC ORIGIN 2 (1998) (compiling data showing the social well-being of racial minorities in America).

143. *The Rise of CRT*, *supra* note 7, at 333–34.

144. *Id.* at 336.

145. *Id.* at 355.

146. *Id.* at 354 (emphasis added).

147. *Id.*

148. *Id.* at 336–38.

149. *The Rise of CRT*, *supra* note 7, at 338–39.

150. *Id.*

151. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296 (1991).

perspective of the relationship between and the intersections of the economics of class and race.

*A. CRT in the Modern Moment: Structural and Systemic Racism*

Today, CRT insights, perspectives and practices are captured in the analyses of structural and systemic racism. As CRT suggests, “Policies, practices and norms created to maintain white supremacy” construct, shape, and inform structural racism.<sup>152</sup> “Racism is the practice of creating and[] reproducing *structures of domination*, based on [stigmatized or stigmatizing] racial significations and identities.”<sup>153</sup> And, *structural racism*, as Zinzi Bailey explains, “involves interconnected institutions, whose linkages are *historically rooted* and *culturally reinforced*.”<sup>154</sup> She continues, “[s]tructural racism . . . refers to the totality of ways in which societies foster racial discrimination, through mutually reinforcing *inequitable systems* (in housing, education, employment, earnings, benefits, credit, media, health care, criminal justice, and so on) . . . .”<sup>155</sup> These in turn, she notes, “reinforce discriminatory beliefs, values, and [the] distribution of resources . . . .”<sup>156</sup> CRT recognizes that “[r]ace is not biological, cultural, or even a set of fixed traits consistently assigned to groups. Rather, [it] is an organizing principle of social stratification and extraction.”<sup>157</sup> It “involves a complex social process of categorizing people by singling out certain physical traits,”<sup>158</sup> imbuing them with meaning that stigmatizes some traits in comparison to others, and which results in a social hierarchy of ranked groups with whites at the top.<sup>159</sup> This racialized social hierarchy serves “the purpose of distributing and justifying social benefits and burdens, including roles, risks, opportunities, and resources.”<sup>160</sup>

For example, neighborhood segregation is both a product and generator of structural racism. It embeds race in space.<sup>161</sup> Our built and lived environment is deeply racialized. Segregation in the United States is the product of intentional practices and policies institutionalized in the early

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152. *What Is Structural Racism*, AM. MED. ASS’N (Nov. 9, 2021), <https://www.ama-assn.org/delivering-care/health-equity/what-structural-racism>.

153. Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J. L. & POL. ECON. 127, 161 (2022) (emphasis added) (citing OMI & WINANT, *supra* note 11, at 128).

154. Zinzi D. Bailey, Nancy Krieger, Madina Agénor, Jasmine Graves, Natalia Linos, & Mary T. Bassett, *Structural Racism and Health Inequities in the USA: Evidence and Interventions*, 389 LANCET 1453, 1454 (2017) (emphasis added). *See also*, Jonathan Rosa & Vanessa Díaz, *Raciontologies: Rethinking Anthropological Accounts of Institutional Racism and Enactments of White Supremacy in the United States*, 122 AM. ANTH. 120, 121 (2020) (discussing institutions as actors that structure race and racism).

155. *Id.* (emphasis added).

156. *Id.*

157. Gonzalez & Mutua, *supra* note 153, at 128.

158. *Id.* at 160.

159. *Id.* In other words, race is a socially constructed phenomenon.

160. *Id.*

161. *Id.* at 165; *see generally* John A. Powell & Stephen Menendian, *The Problem of Othering: Towards Inclusiveness and Belonging*, OTHERING & BELONGING (Jun. 29, 2017), <http://www.otheringandbelonging.org/the-problem-of-othering/>.



part of the twentieth century. Its general purpose was and continues to be to separate whites and nonwhites into different neighborhoods, along with resources, in order to isolate and exclude people of color from spaces of opportunity while facilitating their exploitation, expropriation, and the dispossession of their assets (consider land, predatory lending).<sup>162</sup> These policies did not simply involve processes of racialized housing valuation, redlining, and zoning. They also involved policies on transportation, infrastructure (water, sewage utility provision), park construction, and placement of polluting industry, among an array of other policies that discriminated against and devalued the intergenerational lives, capacities, and asset accumulation of people of color.<sup>163</sup>

At the same time, segregation is a self-perpetuating social arrangement that serves as a linchpin for structural racism.<sup>164</sup> Segregated neighborhoods connect or fail to connect people to good jobs, schools, health care providers, nutritious food, decent housing, and access to financial institutions.<sup>165</sup> Poorly resourced neighborhoods tend to deteriorate more quickly during economic downturns and harbor more crime.<sup>166</sup> In this vein, public health and medical scholars and practitioners are doing some of the most interesting work on demonstrating the structural, institutional, and systemic links that affect health. For instance, people of color, particularly those living in segregated neighborhoods had much higher incidences of COVID-19.<sup>167</sup> They were more likely to have preexisting conditions, particularly breathing issues, because they often live in older housing with lead exposure and in neighborhoods subject to pollution.<sup>168</sup> They were also more likely to work in low-wage jobs classified as *essential*, which meant they had to perform in-person work and were more exposed to the virus.<sup>169</sup> Finally, they tended to be poor and thus had to go to work even when they were sick and, in any event, had limited access to health care.<sup>170</sup>

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162. Gonzalez & Mutua, *supra* note 153, at 165–66. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

163. Gonzalez & Mutua, *supra* note 153, at 165–68, 170–71; see also WILLIAM A. DARITY, JR. & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* 222, 225 (2020).

164. See, e.g., MARIA KRYSAN & KYLE CROWDER, *CYCLE OF SEGREGATION: SOCIAL PROCESSES AND RESIDENTIAL STRATIFICATION* 5–6 (2017) (on segregation as self-perpetuating); Powell & Menendian, *supra* note 161.

165. Stephen Menendian, Samir Gambhir, & Arthur Gaiels, *The Roots of Structural Racism Project: Twenty-First Century Racial Residential Segregation in the United States*, OTHERING & BELONGING INST. (June 30, 2021), <https://belonging.berkeley.edu/roots-structural-racism>; Powell & Menendian, *supra* note 161.

166. See KRYSAN & CROWDER, *supra* note 164, at 4–5; Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOCIO. 329, 329, 341 (1990); Gonzalez & Mutua, *supra* note 153, at 169.

167. Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J.L. & BIOSCIENCES, Jan.–June 2020, at 1, 3, 7–8. See also Katie Moran-McCabe & Scott Burris, *Eviction and the Necessary Conditions for Health*, 385 N. ENGL. J. MED. 1443, 1443 (2021).

168. Yearby & Mohapatra, *supra* note 167, at 8.

169. *Id.* at 7.

170. *Id.* at 3, 5.

For another example, Devon Carbado has demonstrated the ways in which the Supreme Court through its Fourth Amendment jurisprudence has structurally enhanced police power and perpetuated African Americans' historical vulnerability to police encounters, surveillance, harassment, control, and violence.<sup>171</sup> The Fourth Amendment is supposed to protect Americans from unreasonable search and seizure (including "stops").<sup>172</sup> In the Jim Crow era, it appears the Fourth Amendment barely applied to African Americans.<sup>173</sup> Today, it applies but the Court has increasingly narrowed what constitutes an actual search or seizure and expanded what constitutes a *reasonable* or a *justifiable* search or seizure, including those that turn violent. It has done so in part by ruling that evidentiary standards lower than *probable cause* may motivate police action.<sup>174</sup> But additionally, the Court has permitted racial discrimination to motivate police action where a police-civilian encounter is found not to constitute a search or seizure (if there is no search or seizure, then it supposedly does not matter what motivated the police encounter) or where race motivates a seizure that would be legal in any event, such as a traffic violation.<sup>175</sup> These interpretations of the Fourth Amendment have contributed to the institutionalized practice of racial profiling within policing.

Further, Carbado argues that while the Court's Fourth Amendment jurisprudence renders African Americans particularly vulnerable to police harassment and violence, it is not the only configuring force. These conditions are also shaped by other structural factors including, the "frequency" of police encounters with African Americans, which are boosted in part by the heavy police presence (occupation) in segregated African American space, as well as broken windows policing policies.<sup>176</sup> He suggests these conditions are further structured by police culture and training, justification practices, immunity and indemnification, and discretion, among others.<sup>177</sup> And, he argues that "individualized assessments of state violence that ask whether individual police officers are 'good' or 'bad' cops," etc., "obscures [these] structural dimensions of the problem."<sup>178</sup>

It is not surprising that many of CRT's original insights shaped emerging structural and systemic analyses of racism. CRT was born in law, and its initial focus was on examining the racism and racialized policies and outcomes of the legal regime as a system, one with its own institutions (legislatures, courts, etc.), processes and norms. But law also

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171. See generally DEVON CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT (2022).

172. U.S. CONST. amend. IV.

173. See generally CARBADO, *supra* note 171.

174. See *id.* at 101–26; *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

175. See *id.* at 77–100.

176. *Id.* at 15 (explaining "'proactive policing,' [as] predicated on the belief that police officers should rigorously enforce minor infractions and surveil communities for signs of disorder to deter future, more serious crime. Although evidence on proactive policing's efficacy is mixed at best . . .").

177. *Id.*

178. *Id.* at 14.

partially shapes most other social systems, including those that deal with food, health, education, and crime, among others, and including the political and economic systems writ large and vice versa.<sup>179</sup> CRT examines these various institutions, relations, and their outcomes by analyzing how law shapes power relations and the balance of powers within and among individuals, institutions, and systems through concepts, doctrines, rules, standards, and norms such as property, at-will employment, qualified immunity, disclosure, entry or immigration rules, housing availability and eviction procedures, agricultural standards, and wetlands' definitions, etc. As such, CRT in part developed these structural analyses through its practice.<sup>180</sup>

Further, CRT practices were informed by the insight of “intersectionality.” It observed that structures and processes of racism, sexism, class oppression, homophobia, transmisia, etc., intersect, shape, and mutually reinforce each other in ways that create unique experiences for individuals and groups. For example, Black women have experiences at the intersection of race and gender that are often different from those experienced by white women though Black women are women, but also often different from those of Black men, though Black women are also Black. For example, Black women often earn wages lower than either white women or Black men.<sup>181</sup> Finally, CRT scholars also began to employ system analyses. These analyses focus on relationships and processes within and across multiple systems and domains, and understand causation as multiple and cumulative over time as opposed to linear and simply the product of an individual's intent, for example.<sup>182</sup> These and other efforts contributed to the emergence of structural and systemic analyses generally, and to analyses of structural racism and institutional/systemic racism more specifically.

One would think that a structural approach to analyzing social inequities and unjust outcomes would find greater acceptance among the U.S. population as compared to analyses that seek to identify a bad individual actor or group. However, this is not the case.<sup>183</sup> At bottom, rejection of structural and systemic analyses allows beneficiaries of the current social formation to pretend that its social arrangements, such as in the criminal justice, health care, and educational systems, are fair and just. This then allows them to believe that their superior access to opportunities and resources through these systems, such as to higher education, is the result of

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179. See *The Rise of CRT*, *supra* note 7, at 333–34, 340.

180. See Janel George, *A Lesson on Critical Race Theory*, ABA HUM. RTS. MAG. (Jan. 11, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/).

181. Mathilde Roux, *5 Facts About Black Women in the Labor Force*, U.S. DOL BLOG (Aug. 3, 2021), <https://blog.dol.gov/2021/08/03/5-facts-about-black-women-in-the-labor-force>.

182. See, e.g., John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 793 (2008).

183. See generally MAXWELL & SHIELDS, *supra* note 14.

transparent, normal, meritorious, and neutral processes.<sup>184</sup> In doing so, they can assume that current systems and processes present no obstacles to “success,” and that, for example, poor people are poor because they fail as individuals to work hard.<sup>185</sup> In other words, structural analyses challenge the idea that individual choice and “personal responsibility” constitute the sole source and cause (or even primary cause) of the social outcomes like poverty that we see.

The events leading up to the police murder of George Floyd, its aftermath, as well as the continued police killings of Black and Brown people across the country, prompted broader public conversations about the systemic nature of police violence.<sup>186</sup> In backlash, it also served to intensify rejections of “systemic racism” as a concept and mode of analysis,<sup>187</sup> and marked an emphatic call and shift in the justifications for colorblindness. Colorblindness, as both a theory and (judicial) practice always included the idea that race-consciousness was illegitimate. But it was illegitimate, at least sometimes, because it was irrelevant. The campaign and backlash shifted this justification, arguing that race-consciousness (to see, talk about, analyze race, or to use race as an analytical lens) is illegitimate because it is racist and is racist against white people (the old claim of reverse discrimination). Erasing race as a lens of analysis conveniently makes it difficult to see, analyze, and understand U.S. society and the white monopolization and hoarding of both material and expressive resources under the continuing reign of white dominance and supremacy as a sociopolitical system.<sup>188</sup>

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184. Structural analyses also cut against the “personal responsibility” narrative, which embodies the myth that the United States offers exceptional opportunities and that if you simply work hard, you will be successful. However, children born into persistent poverty, of which minoritized people are disproportionately represented, have far fewer chances of moving out of poverty as teenagers and adults. See, e.g., *Exceptional Upward Mobility in the U.S. Is a Myth*, *International Studies Show*, U. MICH. INST. FOR SOC. RSCH., <https://isr.umich.edu/news-events/insights-newsletter/article/exceptional-upward-mobility-in-the-us-is-a-myth-international-studies-show/> (last visited Apr. 4, 2023) (noting that parental wealth plays a major role in the upward mobility of children).

185. *Id.*; see, e.g., MATTHEW DESMOND, *POVERTY, BY AMERICA* (2023); Raj Chetty, David Grusky, Maximilian Hell, Nathaniel Hendren, Robert Manduca, & Jimmy Narang, *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, (Nat'l Bureau Econ. Rsch., Working Paper No. 22910, 2016) (attributing most of the decline in absolute mobility to more unequal distribution of economic growth rather than slow growth rates).

186. See, e.g., Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), <https://time.com/5851855/systemic-racism-america/>.

187. Systemic racism was considered a “divisive” term according to the Trump Administration. See Memorandum, *supra* note 6.

188. See Gonzalez & Mutua, *supra* note 153, at 164; CHARLES MILLS, *FROM CLASS TO RACE: ESSAYS IN WHITE MARXISM AND BLACK RADICALISM* 177 (2003) (discussing white supremacy as a socio-political system).

*B. Out of Article to Fighting Backlash: ClassCrits and the Critical (Legal) Collective*

ClassCrits, Inc.<sup>189</sup> emerged in part out of the ideas of my article on CRT, including its very name.<sup>190</sup> CLC arose to combat the claims of the campaign, and more generally, to fight the backlash.

1. ClassCrits, Democracy, and Plutocracy

ClassCrits was formed in 2007 in two workshops held at the University at Buffalo.<sup>191</sup> Its goal was to bring together a network of progressive scholars to explore issues of economic justice in a time of rising economic inequality.<sup>192</sup> It drew on the institutional and organizational insights of earlier critical legal formations, such as LatCrit.<sup>193</sup> In the process of its growth and development, it established the *Journal of Law and Political Economy*.<sup>194</sup> Relatively isolated initially in its efforts to both excavate the relations that underpin injustice and the intersections of class, race, and gender, ClassCrits is now part of a much larger ecosystem of “Law and Political Economy” institutions and scholarship.<sup>195</sup>

ClassCrits’ analyses were grounded on critical legal scholarship demonstrating that law was fundamental in constituting the economy and the market,<sup>196</sup> as well as the knowledge that the role of law is generally to support, shape, and reinforce the social arrangements and structures of the society of which it is a part.<sup>197</sup> Members believed (and hoped) that law could be used to alleviate many of the inequities that the market was permitted to produce through an understanding of it (the market) as a self-regulating entity impervious to human action and intention.<sup>198</sup> The ClassCrits view held that the market was in fact allowed to produce injustices (by law, among other social institutions) and these included not only economic inequities and injustices but also underwrote racial and gender inequalities, among others.<sup>199</sup>

Though ClassCrits members employ a variety of different economic approaches, the ways in which law facilitates inequality, enhancing the

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189. CLASSCRITS, INC., <https://www.classcrits.org/> (last visited Apr. 4, 2023).

190. See *The Rise of CRT*, *supra* note 7, at 331 n.8, 388.

191. See generally Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859, 859 (2008) [hereinafter *Introducing ClassCrits*].

192. See *id.*

193. *Id.* at 864–65.

194. *Past ClassCrits Conferences*, CLASSCRITS, INC., [https://www.classcrits.org/content.aspx?page\\_id=22&club\\_id=459418&module\\_id=273352](https://www.classcrits.org/content.aspx?page_id=22&club_id=459418&module_id=273352) (last visited Apr. 4, 2023).

195. See Athena D. Mutua, *ClassCrits Time? Building Institutions, Building Frameworks*, 1 J.L. & POL. ECON. 333, 336 (2021).

196. See *id.* at 863; see also Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 939, 942–43 (1985).

197. See *Introducing ClassCrits*, *supra* note 191, at 866.

198. See *id.* at 861–62, 868.

199. *The Rise of CRT*, *supra* note 7, at 377–79.

power of the wealthy at the expense of ordinary Americans, has been a central question. For example, Timothy Kuhner, an early participant in ClassCrits, has argued that the Supreme Court has allowed corporations to transfer their economic power into political power through its campaign finance cases. It has helped to construct an electoral context where money rules—maintaining disproportionate electoral advantages for the privileged few. In doing so, the “pro-business” Court, he argues, is not just undermining democracy, but enabling the emergence of the third reincarnation of American plutocracy<sup>200</sup>—“government of, by and for the wealthy . . . .”<sup>201</sup>

Kuhner argues that the nation has failed to address “democracy’s systemic vulnerability to” financial power and “government capture by the wealthy.”<sup>202</sup> Consequently, “extreme levels of economic and political exclusion keep resurfacing.”<sup>203</sup> He suggests that the nation overcame the “slave republic of white, property-owning males” and formal disenfranchisement—the first plutocracy—“only to arrive at [the] monopoly power and Jim Crow” republic of the Gilded Age’s industrial plutocracy, the second.<sup>204</sup> Monopoly power was then leveled by a combination of executive and congressional action as well as the Great Depression, and the Civil Rights Movement was vindicated, only for the nation to arrive forty or so years later at our current “neoliberal republic of wealthy donors, interest groups, and lobbyists.”<sup>205</sup>

For example, he suggests that in *Citizens United* the Court blocked a more equality-based vision of electoral politics. In the case, the conservative Supreme Court majority struck down a statutory prohibition on corporate general treasury spending for political advertising in the weeks immediately before an election.<sup>206</sup> The Court found that limiting the use of money for most campaign expenditures was unconstitutional under the First Amendment’s freedom of expression clause, because money, the

200. Timothy K. Kuhner, *The Third Coming of American Plutocracy: What Campaign Finance Reformers Are up Against*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 19, 53–54 (Eugene D. Mazo & Timothy K. Kuhner eds. 2018) [hereinafter *The Third Coming*]; see also Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL’Y & L. 395, 465–67 (2011) [hereinafter *Neoliberal Jurisprudence*] (discussing the adverse effects of the *Citizens United* decision to democratic integrity).

201. Timothy K. Kuhner, *Plutocracy and Partyocracy: Oligarchies Born of Constitutional Interpretation*, 21 REV. CONST. STUD. 115, 115 (2016).

202. *The Third Coming*, supra note 200, at 21.

203. *Id.*

204. *Id.* at 21–22 (emphasis omitted).

205. *Id.* at 21, 28 (emphasis omitted).

206. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275, 277–79 (D.D.C. 2008), as amended (Jan. 16., 2008), *aff’d in part, vacated in part, remanded*, 558 U.S. 310 (2010) (involving the conservative nonprofit corporation, *Citizens United*, which sought to show a film about Hillary Clinton and brought the suit arguing that the spending prohibition was both facially unconstitutional and unconstitutional as applied to the film in part because it did not meet certain definitions under the statute). Though the facial challenge to the statute was dropped on appeal, the conservative majority, contrary to the Court’s normal procedures, engineered consideration of the facially unconstitutional claim, providing the majority the opportunity to impose their preferred vision of electoral politics and to strike down the law on free speech grounds. *Neoliberal Jurisprudence*, supra note 200, at 395–97.

means for advancing expression, is itself speech.<sup>207</sup> Second, the Court held that the (corporate) identity of the speaker is irrelevant in the electoral context for First Amendment purposes.<sup>208</sup> In so holding, the Court allowed money to be determinate of political power, blocking a vision in which electoral politics is a process for facilitating “liberty, political participation, and self-governance for all,”<sup>209</sup> such that “those similarly endowed and motivated . . . have roughly the same chance of attaining positions of political authority irrespective of their economic and social class.”<sup>210</sup>

The Court’s majority in *Citizens United* was unperturbed by the fact that a corporate manager’s political spending of general corporate treasury funds may not represent the views of the corporation’s shareholders and is unlikely to represent or promote the views of the general public.<sup>211</sup> The Court’s response to this concern was simply that everyone uses money amassed in the economic marketplace to effectuate expression in the political realm.<sup>212</sup> It did so, ignoring the fact that the corporate form, a legal creation, was created in part to aggregate large sums of, often other people’s, money to carry on economic projects; and ignoring the reality that different classes of people have different means (levels of money) to effectuate expression. Ultimately, the Court converted “the currency of the economic sphere—money—into the currency of the political sphere;”<sup>213</sup> and “validat[ed] a[n] [economic] market for political power . . . .”<sup>214</sup>

I suggest that in many ways, the Court, through its First Amendment jurisprudence, has helped the right wing to partially secure its goal of a constitutional right to “economic liberty,” a goal the right failed to maintain through the dismantling of the second plutocracy of the early 1900s and the repudiation of *Lochner v. New York*.<sup>215</sup> Economic liberty turns out to be a “right” through which the realities of unequal bargaining power, unequal access to money, opportunity, and power, concentrated wealth, inequality, as well as, the dangers to democracy, can be conveniently

207. *Neoliberal Jurisprudence*, *supra* note 200, at 415–19 (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

208. *Id.* at 449, 451–52 (discussing *First Nat.’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978)).

209. *The Third Coming*, *supra* note 200, at 39–41.

210. *Id.* at 40 (citing JOHN RAWLS, A THEORY OF JUSTICE 224–25 (1971) & JOHN RAWLS, POLITICAL LIBERALISM 327 (1996) (elaborating a “fair value” of political liberties)).

211. *Citizens United v. FEC*, 558 U.S. 310, 351, 361–62 (2010); see *The Third Coming*, *supra* note 200, at 35–36 (discussing the work of Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564 (2014), among others, and noting that the wealthy donors are “highly unrepresentative of the general public.”). Kuhner continues: “Beyond being overwhelmingly white and wealthy, and mostly male, the donor class does not want the same things from government as average citizens do. Indeed, studies suggest that conservative economic views are what most distinguish campaign donors from the rest of the population . . . .” *Id.* at 36 (footnote omitted).

212. *Citizens United*, 558 U.S. at 351; see *The Third Coming*, *supra* note 200, at 48 (discussing this passage from *Citizens United*).

213. *Neoliberal Jurisprudence*, *supra* note 200, at 415.

214. *Id.* at 441.

215. *The Third Coming*, *supra* note 200, at 21, 31–32, 53–54; Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 *CORNELL L. REV.* 527, 529 (2015) (discussing *Lochner v. New York*, 198 U.S. 45 (1905)).

ignored. The Court then naturalizes and justifies the resulting distributions through concepts like contract, property rights, and recently, the freedom of expression. This form of “class-blindness” operates similarly to color-blindness where unequal power is cemented and enhanced by ignoring the reality that inequalities, which have severe impacts, exist. And finally, the Court has interpreted and used the First Amendment freedom of religion doctrines to permit closed corporations, no matter how large, to discriminate against certain groups on the basis of the corporate owners’ religion, thereby contravening traditional corporate doctrines prohibiting the unity of interests between owners and the separate corporate entity. Thus, the Court has not only enhanced corporate power to dictate social policy on the corporation’s own terms but also permitted discrimination against groups, limiting the spirit of civil rights’ public accommodations law.<sup>216</sup>

However, one need not be a member of ClassCrits to see that the Court is enhancing corporate power and the power of the wealthy at the expense of ordinary Americans and democracy. For instance, reviewing several cases, Judge Adelman suggests, the Court is not simply enhancing corporate power through its campaign finance cases but expanding it throughout the economy.<sup>217</sup> In *Sorrell v. IMS Health, Inc.*,<sup>218</sup> the Court held that a company maintaining and selling prescription data about patients’ prescriptions was speech protected by the First Amendment and struck down legislation meant to protect patients’ privacy.<sup>219</sup> In, *Janus v. American Federation of State, County, & Municipal Employees, Council 31*,<sup>220</sup> the Court reduced the ability of unions, which represent ordinary Americans, to raise funds for union activities.<sup>221</sup> It did so by eliminating the agency fee charged to nonunion workers who are entitled to benefits secured by collective bargaining.<sup>222</sup> Commenting that the Supreme Court is no more fond of non-unionized workers than they are of unionized workers, Judge Adelman notes in another example that the Court permitted corporations to restrict the use of the class action suit for non-union workers and consumers alike to sue corporations for wrongdoing.<sup>223</sup> The class action suit allows workers, consumers, and others to combine their numerous (similar) claims in a single suit, potentially demonstrating systematic corporate wrongdoing, and potentially inflicting the kind of penalties that deter future wrongdoing.<sup>224</sup> Instead, the Court permitted corporations to

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216. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018); *Masterpiece Cakeshop, Ltd v. Colorado, Civil Rights Commission*, Brief of Amici Curiae Corp. Law Professors in Support of Respondents.

217. See Adelman, *supra* note 38, at 156–57.

218. 564 U.S. 552 (2011).

219. *Id.* at 557.

220. 138 S. Ct. 2448 (2018).

221. Adelman, *supra* note 38, at 151–53.

222. *Id.* at 151–52.

223. *Id.* at 152–53 (discussing *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) & *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015), respectively).

224. See generally Evan Schaeffer, *Class Actions Deter Corporate Wrongdoing*, THE ROANOKE TIMES (Feb. 23, 2001), <https://www.evanschaeffer.com/class-actions-deter-corporate-wrongdoing.html> (highlighting the importance of class action lawsuits).



force these claimants into individual arbitration actions through contractual clauses that are often unread or incomprehensible and as a condition of employment or purchase.<sup>225</sup>

Finally, the Court struck down the incentive plan of the American Care Act (Obama Care), meant to expand healthcare insurance coverage (Medicaid) to adults who are poor. The Court held that the Act exceeded Congress' spending power.<sup>226</sup> As a result of the decision, Judge Adelman notes, nineteen states, "including every state of the former confederacy except Arkansas and, as of 2016, Louisiana,"<sup>227</sup> refused the Medicaid expansion. The decision was a greenlight for them to engage in their "longstanding tradition . . . of severely restricting social-service benefits to their poorest citizens, most of whom are African American."<sup>228</sup>

## 2. The Critical (Legal) Collective

The Critical (Legal) Collective (CLC) was recently organized both to respond to the backlash effort to censor and silence the discussion of racism in the United States and to ensure that access to critical thought remains widely available.<sup>229</sup> Thus, it also draws on some of the same critical ideas, bodies of work, and institutional formations as ClassCrits, LatCrit, and CRT. Scholars, who would eventually form CLC in the summer of 2021, began their activities by working to aid the African American Policy Forum (AAPF).<sup>230</sup> AAPF had taken the lead in responding to the campaign discussed in this Article, particularly the censorship campaign against CRT. CLC is committed to telling a fuller, truer account of U.S. history.<sup>231</sup> And though the impetus for CLC's organization was the CRT backlash, these scholars, like supporters of AAPF, recognize the indivisibility of justice.

The CLC partnered with and is officially hosted by the Duke Center on Law, Race & Policy (CLRP).<sup>232</sup> It has also established partnerships with a number of research and other institutions.<sup>233</sup> CLC has prepared pedagogical materials to facilitate the teaching of critical theory at universities, has gotten involved in some of the litigation challenging censorship

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225. See Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/> (discussing the impact that boilerplate terms have on employees and consumers who have no ability to negotiate their own terms of the clause).

226. Adelman, *supra* note 38, at 154 (discussing the decision in *NFIB v. Sebelius*, 567 U.S. 519, 585 (2012)).

227. *Id.* at 155 (discussing the consequences following the decision in *Sebelius*).

228. *Id.* at 155–56.

229. See *Our Mission*, CRITICAL (LEGAL) COLLECTIVE, <https://www.criticallegalcollective.org/our-mission> (last visited Apr. 4, 2023).

230. *Work with Us*, AFR. AM. POL'Y F., <https://www.aapf.org/> (last visited Apr. 4, 2023).

231. See *Welcome to the #Truthbetold Campaign*, AFR. AM. POL'Y F., <https://www.aapf.org/truthbetold> (last visited Apr. 4, 2023).

232. *Critical (Legal) Collective*, THE DUKE CTR. ON L., RACE & POL'Y, <https://racelaw.duke.edu/areas-of-focus/critical-legal-collective/> (last visited Apr. 4, 2023).

233. See *Rapid Response*, CRITICAL (LEGAL) COLLECTIVE, <https://www.criticallegalcollective.org/rapid-response> (last visited Apr. 4, 2023).

laws, and has proposed that the United Nations Special Rapporteur on the Protection of Freedom of Expression and Opinion investigate and report on the campaign to ban and restrict discussions on racial (in)justice in the United States.<sup>234</sup> Additionally CLC is investigating what it might mean for legal education to be viewed as an industry and for academics to be more fully involved in the labor movement as a counterweight to corporate power generally and specifically the corporate power funding the backlash.

### III. THE CAMPAIGN TO MISEDUCATE AMERICA

The former President Donald Trump once declared: “I love the poorly educated.”<sup>235</sup>

Thomas Jefferson, a founding father, perhaps in contrast, believed that education was a necessary condition for the success of democracy.<sup>236</sup> He supported education—public education in particular.<sup>237</sup> He believed education not only prepared young people for the necessary role of citizenship, but it also helped citizens identify the hallmarks of tyranny.<sup>238</sup> In his bill to the Virginia legislature in 1779, titled, *A Bill for the More General Diffusion of Knowledge*, he explains that while some governments protect individual freedom better than others, all are prone to tyranny.<sup>239</sup> Education generally, and historical knowledge in particular, may aid the public in identifying it. He notes:

[Y]et experience has shown, that even under the best forms, those entrusted with power have, in time, and by slow operations, perverted it into tyranny; and it is believed that the most effectual means of preventing this would be, to illuminate, as far as practicable, the minds of the people at large, and especially to give them knowledge of those facts, which history exhibiteth, that possessed thereby of the experience of other ages and countries, they may be enabled to know ambition under all its shapes, and prompt to exert their natural powers to defeat its purposes . . . .<sup>240</sup>

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234. See *Outreach, Support, and Networking*, CRITICAL (LEGAL) COLLECTIVE, <https://www.criticallegalcollective.org/outreach-and-networking> (last visited Apr. 4, 2023); Critical Legal Collective Memorandum, *supra* note 4.

235. Josh Hafner, *Donald Trump Loves the ‘Poorly Educated’—and They Love Him*, USA TODAY (Feb. 24, 2016), <https://www.usatoday.com/story/news/politics/onpolitics/2016/02/24/donald-trump-nevada-poorly-educated/80860078/>.

236. See Derek W. Black, *America’s Founders Recognized the Need for Public Education. Democracy Requires Maintaining that Commitment*, TIME (Sep. 22, 2020), <https://time.com/5891261/early-american-education-history/>.

237. See, e.g., *Thomas Jefferson’s Bill for Establishing a System of Public Education*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-12-02-0095> (last visited May 12, 2023).

238. See Black, *supra* note 236.

239. See *A Bill for the More General Diffusion of Knowledge*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079> (last visited May 12, 2023).

240. See Martin D. Carciari, *Democracy and Education in the Thought of Jefferson and Madison*, 26 J.L. & EDUC. 1, 8 (1997).

Martin Carcieri argues that Jefferson's bill makes clear that he believed "[o]nly those liberated from fear and ignorance can discharge the responsibilities necessary to sustain democracy."<sup>241</sup> While other founders and subsequent presidents have indicated similar understandings regarding the link between education and democracy,<sup>242</sup> the philosopher John Dewey posited that education is necessary to democracy because it is the process through which a democratic disposition, a social spirit, can be developed.<sup>243</sup> Recently, the education scholar Derek Black has observed, "American public education is one of the two foundational elements of our democracy. The other is the ballot itself."<sup>244</sup> Both are under attack.

But a fair interpretation of U.S. history is that it did not become a de jure democratic representative republic until 1965 with passage of the Voting Rights Act.<sup>245</sup> Prior to that, one interpretation might argue, the country was simply a white racial dictatorship governing over an apartheid state, supported by a white majority, full of democratic ideas and pretenses. Another interpretation might be that the United States was a democratic republic of sorts, a white supremacist exclusionary democracy, for sure, but one that governed over what has always been a multiracial, multiethnic, multicultural, and multilingual country—not the white country some of its founders imagined. Still another interpretation could be that the state and country was both fully white supremacist and democratic, as well as classed and sexist, among other features. However one characterizes the U.S. democratic practices of the past, white supremacy informed it and the educational system put in place taught it.

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241. *Id.* at 9.

242. President Roosevelt's thoughts open this article, *supra* note 1. See Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 *Geo. L.J.* 529, 544 (2023) (noting that John Adams cautioned that the education of "every rank and class of people, down to the lowest and the poorest," had to be "the care of the public," "maintained at the public expense," and George Washington believed that the "prospect of [a] permanent union" depended on education in the science of government.""). Three twentieth century presidents made similar comments. "There is an old saying that the course of civilization is a race between catastrophe and education. In a democracy such as ours, we must make sure that education wins the race." John F. Kennedy, Senator, Speech at Valley Forge Country Club, Valley Forge, PA (Oct. 29, 1960). "In our democracy every young person should have an equal opportunity to obtain a higher education, regardless of his station in life or financial means." John F. Kennedy, President of the United States, Special Message to the Congress on Education (Feb. 6, 1962). "Education is 'the guardian genius of our democracy.' Nothing really means more to our future—not our military defenses, not our missiles or our bombers, not our production economy, not even our democratic system of government, for all of these are worthless if we lack the brain power to support and sustain them." Lyndon B. Johnson, President of the United States, The Educational Message to Congress (Jan. 12, 1965). "America is a melting pot, and education has been a mainspring for our democracy and freedom, a means of providing gifts of knowledge and opportunity to all citizens, no matter how humble their background, so they could climb higher, help build the American dream, and leave a better life for those who follow." Ronald Reagan, President of the United States, Radio Address to the Nation on Education (Mar. 12, 1983).

243. JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 94–102 (The MacMillan Company, 1922) (1916).

244. See Millat, *supra* note 242, at 544 (citing Derek W. Black, *America's Founders Recognized the Need for Public Education. Democracy Requires Maintaining That Commitment*, TIME (Sept. 22, 2020, 11:00 AM), <https://time.com/5891261/early-american-education-history/>).

245. Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437 (1965).

Donald Yacovone notes that “the ideology of white supremacy, not slavery, proved the more ubiquitous and more enduring institution” in the United States.<sup>246</sup> As the superstructure of democratic society, it guaranteed white racial alignment over old-style “European” class dissension by imparting to “even the poorest of its adherents . . . a sense of uncontested identity and . . . ‘dignity, simply for belonging to a [supposed] higher race.’”<sup>247</sup> Surveying school American history textbooks from the early 1800s, when textbook production grew increasingly profitable, to the 1980s, Yacovone argues that white supremacy and Black and indigenous inferiority has been taught more or less consistently in the country’s educational system.<sup>248</sup> This system was meant to build shared interests based on relative white equality. That is, public education is white centered and white triumphant, featuring white “heroes” of “progress” with regard to democracy, among other things—some earned, others dishonestly co-opted. I submit it continues to be so, as does higher education, particularly legal education.<sup>249</sup>

If I am correct and U.S. education remains white centered and white triumphant, then what is the right-wing complaint? Triggered by demands for a racial reckoning and stumbled upon in the search to halt such a reckoning, the complaint is the small measure of racial progress in what is taught in schools. This progress is evidenced by hard-fought inclusion in the university of, largely underfunded and marginalized, Black studies, ethnic studies, and women studies departments; commitments to affirmative action; as well as space for other critical studies. In public education, this includes a small space for a fuller, truer account of the United States, its history, its multivalent population, and its multiple cultures and practices as well as—similar in the university context—an increasing commitment to diversity, inclusion, and equity. In short, in the United States racial progress has always been accompanied by parallel progress in the rearticulation of the forces, policies, structures, and discourses of white supremacy. Further, this progress might lead to more opportunities for students to build shared interest based on equality and equal access *for all* while providing the kinds of analyses that allow them to connect the dots to properly diagnose the real and concrete problems that the country faces, including threats to its relatively new but disappearing democracy. These problems are connected to the past and will shape the future.

Supporters of the campaign to miseducate the United States appear determined to ensure that the majority of Americans remain poorly educated, fearful, and relatively ignorant about United States history writ large

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246. YACOVONE, *supra* note 27, at 5.

247. *Id.* at 6.

248. *See id.* at xii–xxxiii.

249. *See, e.g.*, CARBADO, *supra* note 171, at 30–31 (noting that criminal law teaching, presumably based on the casebooks, obscures the race and racism in it); James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 385, 399 (2014).

and the nature of society. White supremacy has always stoked the fear about various segments of the multivalent population, such as Black people and including its white allies (currently taunted as “liberals”). Today the campaign engenders white panic and fear by insinuating that liberals, educators, and others are telling children they are racist or oppressors because they are white,<sup>250</sup> are “grooming” children for sexual abuse, or “recruiting” them to become LGBTQ+ or Trans people, an old scare tactic.<sup>251</sup>

The campaign seeks to keep the general public relatively ignorant by employing four distinct strategies, which together undermine democracy and support white supremacy, among other oppression systems. It also lends support to long-standing efforts to privatize public education, which will further undermine democracy by continuing to enhance corporate power and advance plutocracy. And, again, the Supreme Court is paving the road for these efforts through upcoming decisions on affirmative action and those made over the last few decades, including cases such as *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>252</sup>

First, the supporters of the campaign seek to silence the voices teaching or advocating for racial, gender, and economic justice. Their primary tool has been to use law to compel this silence by banning, restricting, or discouraging examinations of these topics, including the very vocabulary these analyses employ. These include words such as “gay” and concepts such as systemic racism, intersectionality, and diversity.<sup>253</sup> Supporters of the campaign also seek to outright ban teaching and learning about and through the 1619 project.<sup>254</sup> Further, they label critics as “communists” and “Marxists.”<sup>255</sup> Meant to be epithets, these specific labeling tactics grow out of McCarthyism, a very successful 1950s campaign to discourage public awareness of and engagement with class analyses and critiques of capitalism.<sup>256</sup>

250. See, e.g., Waxman, *supra* note 134.

251. Melissa Block, *Accusations of ‘Grooming’ Are the Latest Political Attack—with Homophobic Origins*, NPR (May 11, 2022), <https://www.npr.org/2022/05/11/1096623939/accusations-grooming-political-attack-homophobic-origins>.

252. 551 U.S. 701, 722 (2007) (prohibiting use of race as a factor in assigning students to schools in order to reflect the composition of the district, except where the school district was remedying a past of government-imposed segregation). *But see generally* ROTHSTEIN, *supra* note 162 (demonstrating that government at the federal, state, and local level is usually involved in promoting segregation even in the absence of a state law).

253. See, e.g., H.B. 1557, 2022 Leg., 124th Sess. (Fla. 2022) (“Don’t Say Gay” bill). See also Katheryn Russell-Brown, “The Stop WOKE Act”: HB 7, Race, and Florida’s 21<sup>st</sup> Century Anti-Literacy Campaign, N.Y. U. REV. L. & SOC. CHANGE (forthcoming Sept. 2022); Neal H. Hutchens & Vanessa Miller, *Florida’s Stop WOKE Act: A Wake-Up Call for Faculty Academic Freedom*, 48 J. Coll. & U. L. (forthcoming 2023).

254. See discussion *supra* Section I.B.

255. Maroosha Muzaffar, *Trump Goes on All-Caps Rant Ahead of Expected Arrest by Blaming ‘Communists, Marxists, Rinos and Losers’*, INDEP. (Mar. 20, 2023), <https://www.independent.co.uk/news/world/americas/us-politics/trump-truth-social-all-caps-rant-b2304102.html>.

256. See, e.g., Landon R.Y. Storrs, *McCarthyism and the Second Red Scare*, OXFORD RSCH. ENCYCLOPEDIA AM. HIST. (July 2, 2015), <https://oxfordre.com/americanhistorical/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e->

But campaign supporters have employed a host of other tactics to accomplish their goal of silencing these voices and ideas. For instance, states have established or threatened to establish disciplinary tools to silence educators who might provide a fuller account of American history or teach on these subjects.<sup>257</sup> The tools include simply firing teachers,<sup>258</sup> potentially instituting (disciplinary) “reviews” of educators,<sup>259</sup> and in some cases trying to eliminate tenure in the context of higher education.<sup>260</sup> Further, having cultivated public panic, the campaign has unleashed both students and parents to act as vigilantes reporting on or suing educators and others who they believe have transgressed their politics or stimulated their fears.<sup>261</sup> Additionally, the campaign has fostered, either directly or through fear, parent groups to storm school board meetings to demand books be banned or certain ideas be removed from the curricula. In some cases, an individual parent has been allowed to prohibit access to books, art, or information, not simply for their own child but for entire classrooms, schools, and districts.<sup>262</sup>

Moreover, supporters have pressured other organizations into compliance with their views, a compliance easily extracted. For instance, the College Board, a billion-dollar non-profit organization responsible for developing and administering the SAT and PSAT standardized college entry tests, and the administer of the Advanced Placement (AP) course program for high schools across the country,<sup>263</sup> stripped its new African American AP course requirements of engagement with many modern race-related

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6;jsessionid=6D1D8E720B291A4930EEDA8C6B8764; *Introducing ClassCrits*, *supra* note 191, at 897–898 (commenting on some of the effects of this earlier campaign).

257. See, e.g., Scott Jaschik, *Professor’s Job Endangered for Teaching about Race*, INSIDE HIGHER ED (Feb. 20, 2023), <https://www.insidehighered.com/news/2023/02/20/professors-job-endangered-teaching-about-race>.

258. See, e.g., Hannah Natanson, *A White Teacher Taught White Students About White Privilege. It Cost Him His Job*, WASH. POST (Dec. 6, 2021), <https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory/>.

259. See, e.g., Josh Moody, *A Tale of 3 Governors*, INSIDE HIGHER ED (Mar. 7, 2023), <https://www.insidehighered.com/news/2023/03/08/three-governors-are-driving-gops-higher-ed-agenda>.

260. See, e.g., Ryan Quinn, *A Texas Trilogy of Anti-DEI, Tenure Bills*, INSIDE HIGHER ED (Apr. 14, 2023), <https://www.insidehighered.com/news/faculty-issues/tenure/2023/04/14/texas-trilogy-anti-dei-tenure-bills>.

261. See, e.g., Ed Kilgore, *DeSantis Enlists Litigious Parents for Anti-Woke Crusade*, NY MAG. INTELLIGENCER (Dec. 15, 2021), <https://nymag.com/intelligencer/2021/12/desantis-stop-woke-act-lets-parents-sue-schools-for-crt.html>.

262. See, e.g., Claire Woodcock, *It Only Takes One Parent to Get All the Graphic Novels Removed from a School Library*, VICE (Nov. 23, 2022, 10:29 am), <https://www.vice.com/en/article/g5vnbq/it-only-takes-one-parent-to-get-all-the-graphic-novels-removed-from-a-school-library>; Juliana Kim, *A Principal Is Fired, Invited to Italy After Students Are Shown Michelangelo’s ‘David’*, NPR (Mar. 27, 2023, 10:48 AM ET), <https://www.npr.org/2023/03/27/1166079167/tallahassee-classical-michelangelo-david-principal-fired>.

263. *About Us*, THE COLLEGE BOARD, <https://about.collegeboard.org/> (last visited May 12, 2023); Susan Paterno, *Dropping SAT Won’t Diminish College Board Clout*, FORBES (May 21, 2021), <https://www.forbes.com/sites/susanpaterno/2021/05/21/dropping-sat-wont-diminish-college-board-clout/?sh=619584be13cd>; *About Us*, THE REAL COLLEGE BOARD, <https://www.therealcollegeboard.org/> (last visited May 12, 2023) (created by students).

issues.<sup>264</sup> These issues included materials on mass incarceration, the Black Lives Matter movement, intersectionality and reparations, as well as eliminated from the course prominent Black scholars, such as bell hooks, Ta-Nehisi Coates, Kimberlé Crenshaw, etc.<sup>265</sup> They did so in response to right-wing governor Ron DeSantis' criticisms and threat to prohibit Florida schools from offering the course.

Second, the campaign seeks not only to render voices in support of racial justice silent but to render race consciousness on behalf of marginalized groups illegitimate while striving to reinstate the public legitimacy of white supremacist ideas. The campaign asserts that racial justice efforts that value racial diversity, inclusion, and equity are illegitimate because they are race-conscious, and race-conscious on behalf of people of color. Race-consciousness generally but particularly among people of color, as explored earlier, violates the notion of colorblindness and therefore is racist and illegitimate.<sup>266</sup> This assertion is made in the context of a country built on white supremacist foundations and which has systemically, institutionally, and culturally enshrined whiteness as privilege in every social sphere.

But more stunning is the simultaneous attempt to reassert white supremacist views and white racism as a valid and legitimate perspective, despite the country having decided otherwise, at least at the level of rhetoric. The campaign seeks to do this primarily through asserting that the conservative right-wing position of white superiority, among other anti-Black, anti-Indigenous, anti-Latinx, and even anti-immigrant sentiments, simply constitutes another point of view that should be *publicly* respected. The campaign pushes this idea through its rhetoric of free speech, which is generally understood as protecting individual speech from *government* suppression, with others free to disassociate from such beliefs and language. That is, as Patricia Collins points out, in the past, what can be referred to as hate speech has been tolerated in part based on a public (government)/private distinction.<sup>267</sup> Here, both the "public" and "private" are understood as non-governmental actors and space where racist thought and speech is allowed to reside (despite its residence in most social institutions).

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264. N'dea Yancey-Bragg, *College Board Announces More Changes for AP African American Studies Course Amid Controversy*, USA TODAY (Apr. 25, 2023), <https://www.usatoday.com/story/news/education/2023/04/25/college-board-more-changes-ap-african-american-studies/11733657002/>; Anemona Hartocollis & Eliza Fawcett, *The College Board Strips Down Its A.P. Curriculum for African American Studies*, NY TIMES (Feb. 1, 2023), <https://www.nytimes.com/2023/02/01/us/college-board-advanced-placement-african-american-studies.html>; *Open Letter on Fighting "Anti-Woke" Censorship of Intersectionality and Black Feminism*, AAPF, <https://www.aapf.org/freedomtolearn> (last visited May 18, 2023).

265. See Yancey-Bragg, *supra* note 264; Hartocollis & Fawcett, *supra* note 264.

266. See discussion *supra* Section II.

267. PATRICIA HILL COLLINS, *ANOTHER KIND OF PUBLIC EDUCATION: RACE, SCHOOLS, THE MEDIA AND DEMOCRATIC POSSIBILITIES* (2009).

In other words, she suggests that because racial discrimination is generally prohibited, public hate speech, while legally protected in part because it is based on privately held racist or other discriminating views, can nonetheless be and is condemned by the public and protested. For example, when a comedian repeatedly used the N-word and a sportscaster referred to black female athletes as “Hos,” the public response was to loudly condemn the speakers for this public act, to hold them accountable, to push for public dissociation from the speakers, and to even press for other private actors to sanction them.<sup>268</sup> These other actors could do so on a theory that, for example, such public acts are bad for business, a determination private business actors are entitled to make.<sup>269</sup>

The right wing has referred to this public treatment as cancel culture.<sup>270</sup> It suggests that because this public speech is legally protected, anyone who believes in free speech should accept it as valid—as simply another point of view, and that it should be respected and immune from non-governmental public or private protests, consequences, or sanctions. Further the right-wing pushes this agenda through speech-making at a host of locations but particularly at higher education institutions. Here, right-wing speakers arrange college invitations in order to assert their often-hateful white male supremacist speech and provoke outrage. They then use the outrage to suggest that students and others who contest their speech should be disallowed from protesting it or punished where college free speech norms are seen as violated because, of course, theirs is just another valid and presumably respectable point of view. The recent incidents at Stanford University<sup>271</sup> and the SUNY University at Buffalo are excellent examples of this.<sup>272</sup> And the Buffalo example demonstrates that this tactic is not limited to racist speech. The Knowles speech attacked both Trans people and women who are feminist.<sup>273</sup>

The Free Speech ruse, together with the race-consciousness on behalf of non-white people trope, is also employed in advancing the third goal of the campaign. This goal is to control, and, if need be, to destroy,

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268. *Id.* at 70.

269. *Id.* at 70–74.

270. Emily A. Vogels, Monica Anderson, Margaret Porteus, Chris Baronavski, Sara Atske, Colleen McClain, Brooke Auxier, Andrew Perrin, & Meera Ramshankar, *Americans and ‘Cancel Culture’: Where Some See Calls For Accountability, Others See Censorship, Punishment*, PEW RSCH. CTR. (May 19, 2021), <https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/>.

271. *See, e.g.*, Greta Reich, *Judge Kyle Duncan’s Visit to Stanford and the Aftermath, Explained*, STANFORD DAILY (Apr. 5, 2023, 11:39 p.m.), <https://stanforddaily.com/2023/04/05/judge-duncan-stanford-law-school-explained/>.

272. *See, e.g.*, Harold McNeil, *Protesters Call for Eradicating Bigotry as Michael Knowles Speaks at University at Buffalo*, BUFFALO NEWS (Mar 9, 2023), [https://buffalonews.com/news/local/protesters-call-for-eradicating-bigotry-as-michael-knowles-speaks-at-university-at-buffalo/article\\_61fcbca0-bebe-11ed-97c7-87c8f284e6b9.html](https://buffalonews.com/news/local/protesters-call-for-eradicating-bigotry-as-michael-knowles-speaks-at-university-at-buffalo/article_61fcbca0-bebe-11ed-97c7-87c8f284e6b9.html).

273. *Id.*



educational institutions.<sup>274</sup> The campaign seeks to control or destroy higher education institutions in particular because they represent an independent voice, they protect the independent voices of faculty, and they protect and house the voices of students of color, feminists, nonbinary and Trans people, among others. The independence of the university, itself, is threatening to the campaign because, as Ronald Daniels notes, it often operates as “a bedrock of objective fact,” which can counter the disinformation on which autocrats and plutocrats rely.<sup>275</sup> Further, their mission, in part, is to “preserve and interrogate the nation’s collective past, to cultivate diverse and pluralistic communities, and to educate students in the skills necessary for active and engaged citizenship.”<sup>276</sup> If the campaign can control these institutions, then the only message the public will hear is the campaign’s supporters’ message. That only one voice should prevail is evident in Ron DeSantis’ retaliation against Disney for speaking out against the legislation that prohibited the use of the word “gay.”<sup>277</sup> Only DeSantis’ views, as governor and representative of the state of Florida, are allowed to stand. His government takeover of the New College of Florida testifies to this and the overall intent of controlling these institutions,<sup>278</sup> as do other state governmental actions with regard to universities in North Carolina<sup>279</sup> and Texas,<sup>280</sup> among others.

As for the corporate supporters of the campaign, in this context, college students can be reduced to workers in training instead of having an opportunity to become fully flourishing well-rounded people, with other demands. At the same time, in undermining public education, the campaign supports the efforts of wealthy and corporate interests, which have long sought to privatize public education.<sup>281</sup> Where many see a one trillion-dollar public good, these forces see a one trillion-dollar market that

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274. Christopher F. Rufo, *Laying Siege to the Institutions*, 51 IMPRIMIS (2022), <https://imprimis.hillsdale.edu/laying-siege-to-the-institutions/>; Randi Weingarten & Jonah Edelman, *Extremists Are Using Lies to Undermine America’s Public Schools: We Need to Take a Stand*, TIME (Apr. 29, 2022, 2:12 PM EDT), <https://time.com/6172216/public-schools-extremists/>; Zack Beauchamp, *The Intellectual Right’s War on America’s Institutions*, VOX (Nov. 19, 2021, 11:00 a.m. EST), <https://www.vox.com/policy-and-politics/2021/11/19/22787269/conservatives-america-chris-rufo-patrick-deneen>.

275. Ronald Daniels, *Why Authoritarian Regimes Attack Independent Universities*, WASH. POST (Sept. 28, 2021, 12:46 p.m. EDT), <https://www.washingtonpost.com/opinions/2021/09/28/why-authoritarian-regimes-attack-independent-universities/>.

276. *Id.*

277. See Andrew Atterbury, *DeSantis Revokes Disney’s Special Status After ‘Don’t Say Gay’ Opposition*, POLITICO (Apr. 22, 2022), <https://www.politico.com/news/2022/04/22/desantis-disney-special-status-dont-say-gay-00027302>.

278. Patricia Mazzei, *DeSantis’s Latest Target: A Small College of ‘Free Thinkers’*, N.Y. TIMES (Feb. 14, 2023), <https://www.nytimes.com/2023/02/14/us/ron-desantis-new-college-florida.html>.

279. See, e.g., *Report of a Special Committee: Governance, Academic Freedom, and Institutional Racism in the University of North Carolina System*, AAUP (Apr. 2022), <https://www.aaup.org/report/governance-academic-freedom-and-institutional-racism-university-north-carolina-system>.

280. See, e.g., Quinn, *supra* note 260.

281. See generally Weingarten & Edelman, *supra* note 274; JIM FREEMAN, RICH THANKS TO RACISM: HOW THE ULTRA-WEALTHY PROFIT FROM RACIAL INJUSTICE (2021); DIANE RAVITCH, SLAYING GOLIATH: THE PASSIONATE RESISTANCE TO PRIVATIZATION AND THE FIGHT TO SAVE AMERICA’S PUBLIC SCHOOLS (2020).

they might have an opportunity to monopolize, limiting access to education to only those who can pay.

Finally, the campaign seeks to remove the troublemakers—what Judges James Ho and Elizabeth Branch might refer to as the disrupters<sup>282</sup>—from educational institutions in the same way that the right wing has attempted to remove poor people and people of color from the voting booth. By removing those fighting for racial, gender, and economic justice, among others from these institutions, reactionaries can minimize their disruptions, their demands, and their impact.

The conservative Supreme Court may be particularly helpful to the campaign here. The Court has recently agreed to review affirmative action in the higher education context.<sup>283</sup> It is likely to find race consciousness in admissions an irrelevant and illegitimate factor for consideration. As in California after passage of Proposition 209, the numbers of students of color are likely to decline, removing from this space some of the voices the right seeks to silence, and thereby limiting any impact they may have.<sup>284</sup>

In the public education context, Caitlin Millat, in analyzing a series of education cases since *San Antonio Independent School District v. Rodriguez*,<sup>285</sup> argues, that “though the Court has routinely deployed language lauding public education, it has rarely acted substantively in accordance with those principles.”<sup>286</sup> She continues, “[i]nstead, the Court has most robustly intervened in its education jurisprudence to safeguard religious autonomy, honor parental choice, and stifle student speech.”<sup>287</sup>

In other words, the Court has rejected education as a place where students build shared interests based on equality and equal access, prepare for self-government, learn how to engage with others, and develop critical thinking skills that help them sort news from propaganda.<sup>288</sup> These skills, in addition to cultivating career and other life competencies, are the skills that support and reinforce democracy. They embed, as Millat notes, the “two primary characteristics of ‘democracy’”: ‘citizen participation in governance’ and, in return, ‘accountability of government’ to citizens.”<sup>289</sup> Democracy requires both “institutionalized state capacity,” or the ability

282. James C. Ho & Elizabeth L. Branch, *Stop the Chaos: Law Schools Need to Crack Down on Student Disrupters Now*, NAT'L REV. (Mar. 15, 2023, 6:30 AM), <https://www.nationalreview.com/2023/03/stop-the-chaos-law-schools-need-to-crack-down-on-student-disrupters-now/>.

283. Molly Callahan, *The Supreme Court Cases that Could End Affirmative Action*, B.U. TODAY (Oct. 28, 2022), <https://www.bu.edu/articles/2022/the-supreme-court-cases-that-could-end-affirmative-action/>; *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 980 F.3d 157 (1st Cir. 2020); *Students for Fair Admissions, Inc. v. Univ. N. Carolina*, 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted before judgment*, 142 S. Ct. 896 (2022).

284. Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1222–25 (2002) (discussing Proposition 209 and the decline of diversity at UCLA).

285. 411 U.S. 1 (1973).

286. Millat, *supra* note 242, at 593.

287. *Id.*

288. *Id.* at 577.

289. *Id.* at 572.

of the state to act on citizens' demands, as well as "civic capacity," or the ability of a citizenry to "mobilize, levy demands of, and interact with the state."<sup>290</sup>

And, it is this education–democracy nexus to which the Court in *Brown v. Board of Education*,<sup>291</sup> though unfulfilled, promised and alludes:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>292</sup>

#### CONCLUSION

This Article argues that the campaign to miseducate the American public was triggered in part by the 1619 Project, the police murder of George Floyd, and the multivalent democratic protests that followed. It seeks to silence and remove the more marginalized members of this multivalent majority from two important spaces where they have had some small margin of success: schools and the voting booth. The campaign in doing so also seeks to control these spaces, deepening colorblindness ideology in the process by suggesting that race-consciousness is illegitimate while asserting that white bigotry is simply another point of view deserving of respect.

The campaign, however, is part of a broader backlash supported by the majority on the Supreme Court and the forces that helped to place the current occupants on it. The Supreme Court supports and facilitates the backlash through its decisions in the areas of campaign finance, voting rights, a pregnant person's right to bodily integrity, and education. The campaign forces comprise a sophisticated right-wing movement and infrastructure that is economically exploitative, racist, and misogynist, promoting policies that reinforce structures of domination based on stigmatized and marginalized identity as well as economic vulnerability. It seeks to undermine democracy in an effort to reinstitute minority rule, where wealthy white men dominate and control the country, perhaps under a hapless autocrat.

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290. *Id.*

291. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

292. *Id.* at 493.

It is unsurprising, then, that these forces seek to suppress talking, teaching, learning, and reading about issues of race, gender (including women and LGBTQ+ issues), and class, the objects of the campaign. To make these types of CRT issues readily accessible, as the 1619 Project did with regard to slavery, might lead ordinary people to connect the dots and resist the many efforts and goals of backlash.