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Reclaiming CRT: How Regressive Laws Can Advance Progressive Ends

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RECLAIMING CRT: HOW REGRESSIVE LAWS CAN ADVANCE PROGRESSIVE ENDS

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Since the fall of 2020, rightwing forces have targeted Critical Race Theory ("CRT") through a sustained disinformation campaign. This offensive has deployed anti-CRT rhetoric to justify a host of "Backlash Bills" designed to chill conversations about race and racism in the classroom. Concerned stakeholders have assailed these laws as morally bankrupt and legally suspect. These responses are natural and appropriate. But challenging a bill's moral or legal mooring is insufficient to counter a primary purpose of this legislative onslaught: to further erode, within our public discourse and collective consciousness, the ability to distinguish between racism and antiracism. To meet this threat, advocates should reappropriate these regressive laws, and the language of equality they harness, for progressive ends. More concretely, stakeholders should wield Backlash Bills to defend CRT in schools. Albeit counterintuitive, many "anti-CRT" laws—if we take seriously their text—support this rhetorical and legal turn.

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I. INTRODUCTION

Critical Race Theory ("CRT") is an academic framework that interrogates the relationship between race, racism, and the law.[1] For decades, CRT existed in relative obscurity. Everything changed in the fall of 2020, when the GOP launched a sustained anti-CRT disinformation campaign.[2] This well-funded offensive, which brought "CRT" into the mainstream, has occurred across two primary fronts: one discursive, the other legislative.[3]

On the discrusive front, right-wing think tanks, media, and politicians have deployed a coordinated communications campaign to discredit CRT (and antiracism more broadly) as the new, anti-White racism.[4] The goal was straightforward but multifaceted: through calculated caricature and

1. *See generally* Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011). There exists a robust literature on CRT's origins, commitments, and concerns. Albeit far from exhaustive, Professor Crenshaw's lead article in the *Connecticut Law Review*'s June 2011 issue, *see id.*, and the ten responses that accompanied it, offer a rich point of entry for any interested reader.

2. JONATHAN FREIDMAN & JAMES TAGER, PEN AMERICA, EDUCATIONAL GAG ORDERS 4–5 (2021) (cataloguing Backlash Bills).

3. Here, I use the term "legislative" to capture formal efforts to codify positive law (e.g., state laws, executive orders, or local rules) designed to delegitimize antiracist projects and chill speech about race and racism. The legislative "war on CRT" complements a broader rightwing, antidemocratic campaign targeting voting rights and public education. *See generally* Jennifer Berkshire & Jack Schneider, *Democracy and Public Education: A Future in Peril*, HAVE YOU HEARD PODCAST (Aug. 12, 2021), https://www.haveyouheardpodcast.com/episodes/118-democracy-peril [https://perma.cc/BN8A-8DZE] (discussing the link between voting rights, public education, and multiracial democracy).

4. *See* Kimberlé Williams Crenshaw, *Op-Ed: King Was a Critical Race Theorist Before There Was a Name for It*, L.A. TIMES (Jan. 17. 2022, 4:15 AM), https://www.latimes.com/opinion/story/2022-01-17/critical-race-theory-martin-luther-king [https://perma.cc/273E-294W] ("The right has rebranded [CRT] as the new racism, as wokeness run amok, as a threat to innocent schoolchildren and as a stalking-horse for the demise of 'Western civilization' itself."); Judd Legum & Tesnim Zekeria, *The Obscure Foundation Funding "Critical Race Theory" Hysteria*, POPULAR INFO. (July 13, 2021), https://popular.info/p/the-obscure-foundation-funding-critical [https://perma.cc/VC8Q-226L]. As an example of anti-CRT disinformation, see *Critical Race Theory*, HERITAGE FOUND. (2022), https://www.heritage.org/crt [https://perma.cc/XYG5-KUA8] (creating an anti-CRT disinformation clearing house).

distortion,[5] weaponize an unfamiliar term to sow racial division, galvanize voters, undermine public education, and shield economic and political elites—and the systems that benefit them—from critique.[6] Early indicators suggest that anti-CRT messaging is working.[7]

On the legislative front, Republican officials have employed the same anti-CRT rhetoric to justify over 180 "Backlash Bills"[8] that regulate how

5. *See* Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory [https://perma.cc/HR73-UYWD] ("'Critical race theory' is the perfect villain . . . Its connotations are all negative to most middle-class Americans, including racial minorities . . . .")

6. *See* Cheryl Harris, *What Is Critical Race Theory and Why Is Trump Afraid of It*, NATION (Sept. 17, 2020), https://www.thenation.com/article/politics/trump-critical-race-theory/ [https://perma.cc/9PTQ-U6MA]; Kathryn Joyce, *Republicans Don't Want to Reform Education. They Want to End It*, NEW REPUBLIC (Sept. 30, 2021), https://newrepublic.com/article/163817/desantis-republicans-end-public-education [https://perma.cc/88MD-MW74].

7. Jonathan Feingold, *What the Public Doesn't Get: Anti-CRT Lawmakers Are Passing Pro-CRT Laws*, CONVERSATION (Nov. 30, 2021, 8:28 AM), https://theconversation.com/what-the-public-doesnt-get-anti-crt-lawmakers-are-passing-pro-crt-laws-171356 [https://perma.cc/GGX3-JJ66]; Liz Crampton, *GOP Sees 'Huge Red Wave' Potential by Targeting Critical Race Theory*, POLITICO (Jan. 5, 2022, 4:31 AM), https://www.politico.com/news/2022/01/05/gop-red-wave-critical-race-theory-526523 [https://perma.cc/2KYQ-VWA4].

8. In this essay, I avoid terms such as "CRT Ban" or "anti-CRT" to describe these bills. Although these terms enjoy certain appeal (e.g., bill proponents traffic in calculated anti-CRT rhetoric and the bills are designed to stifle candid conversations about race and racism), the preceding terms create two risks. First, they suggest that the bills entail substantive, good faith critiques of CRT. This is inaccurate. Far from good faith engagements with CRT, the bills further an intentional disinformation campaign. *See* Wallace-Wells, *supra* note 5. Second, the preceding terms obscure a critical insight: many of these laws—if we take seriously their text—invite *more* CRT in schools, not less. *See infra* Part IV. Accordingly, I employ the term "Backlash Bill," a phrase that locates this body of legislation as one front in the coordinated backlash that followed our national turn toward antiracism in the summer of 2020. *Cf.* FRIEDMAN & TAGER, *supra* note 2, at 4 (employing the term "educational gag orders" to describe bills that "appear designed to chill academic and educational discussions and impose government dictates on teaching and learning"). For an overview of America's tradition of racial backlash following moments of racial progress, see generally Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334 (1988).

educators—among others—may discuss topics such as race and racism in the classroom.[9] At least sixteen Backlash Bills are now law.[10]

With minor exception, the media has described these bills as "CRT Bans."[11] This portrayal is understandable. Bill proponents identify CRT as the supposed ill that necessitates a legislative cure.[12] Moreover, the bills buttress broader efforts to defuse and discredit the multiracial embrace of antiracism that emerged during 2020's global uprisings for racial justice.[13] In this regard, the bills complement longstanding rightwing campaigns to control how (or, more precisely, limit what) students learn about race and racism in school.[14]

Even if undestandable, the standard framing—that these "anti-CRT" bills constitute "CRT Bans"—is problematic. Above all, this framing misrepresents the actual text of many Backlash Bills. Many bills—if we take seriously their actual text—call for *more* CRT in the classroom, not less. Put differently, anti-CRT lawmakers are passing pro-CRT laws.[15]

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9. *See PEN America Index of Educational Gag Orders* ("Backlash Bill Index"), PEN AMERICA (Apr. 25, 2022), https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=267763711 (identifying 182 bills filed since January 2021); *see also* Jeffrey Sachs, *Scope and Speed of Educational Gag Orders Worsening Across the Country*, PEN AMERICA (Dec. 13, 2021), https://pen.org/scope-speed-educational-gag-orders-worsening-across-country/ [https://perma.cc/TX5M-P98E] (identifying sixty-six Backlash Bills across twenty-six states as of Dec. 2021).

10. *See* Backlash Bill Index, *supra* note 9. The most recent addition is Florida's HB7, which Governor Ron DeSantis signed into law on April 22, 2022. *See id*.

11. *E.g.*, Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2022), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/ [https://perma.cc/2GXK-3YZD].

12. *See* Crampton, *supra* note 7 (describing various anti-CRT bill proponents' goals to eliminate CRT).

13. *See* Ryan Cooper, *Why are Conservatives Throwing a Tantrum About Anti-Racism? The George Floyd Protests*, THE WEEK (June 24, 2021), https://theweek.com/politics/1001865/critical-race-theory-george-floyd-protests [https://perma.cc/C8ZV-LAR4] ("This panic . . . has nothing to do with the actual arguments of critical race theory scholars. But that raises the question of what it really is about. The answer is the George Floyd protests of last summer and the ongoing surge of anti-racist activism.").

14. Stephanie Saul, *A College Fights 'Leftist Academics' by Expanding Into Charter Schools*, N.Y. TIMES (Apr. 10, 2022), https://www.nytimes.com/2022/04/10/us/hillsdale-college-charter-schools.html [https://perma.cc/PXA9-Y5TH].

15. From a different angle, Professor Keith Whittington has observed that Backlash Bills could prohibit instruction that conservatives want in the classroom. Keith E. Wittington, *Banning 'Critical Race Theory' Would Be Bad for Conservatives, Too*, WASH. POST (June 30, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/06/30/racism-academic-discussions-pennsylvania-law/ [https://perma.cc/EH9A-QK3X] ("Consider, too, what it would mean to take seriously the idea that no assigned texts may 'espouse' racist views. The bill could make it unlawful for instructors to assign their students to read certain writings of Thomas Jefferson or Abraham Lincoln, to read works of literature by Mark Twain or William Faulkner.").

I unpack this counter-intuitive dynamic in Part IV. For now, consider a brief example. Multiple Backlash Bills prohibit "race stereotyping," often defined as "ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race . . . or to an individual because of his or her race."[16] Now, imagine a high school class explores education in America. To enhance the lesson, the teacher shares statistics about racial disparities across educational domains.[17] Once exposed to the bare facts, many students will wonder what causes those disparities.

The question, then, is how the "race stereotyping" ban shapes the teacher's response. Could they attribute disparities to "culture"—that is, supposed differences in work ethic or values across racial groups? The short answer is no. On its face, the "race stereotyping" provision bans explanations that "ascribe character traits" or "values" to "a race."

In contrast, the same language invites explanations that tether disparate outcomes to structural forces that, *inter alia*, unevenly distribute social, political, and economic resources. In other words, text common to Backlash Bills (a) invites an explanation (structural racism) inseparable from CRT and (b) prohibits an explanation (cultural difference) that CRT proponents would denounce as predicated on unfounded racist tropes.[18] This insight is key. But it never has a chance to surface when the media and public reflexively characterize these bills as "CRT Bans."

My concern with the prevailing characterization, however, transcends questions of descriptive accuracy. As the above example reflects, Backlash Bills often include standard antidiscrimination mandates. This is by design, and consistent with broader efforts to delegitimize antiracism as an unAmerican "racist" project that contravenes our nation's core equality commitments. By conceding that such laws prohibit CRT (or other antiracist projects), racial justice advocates enable this narrative and cede a critical site of discursive resistance. This dynamic has already shaped (and constrained)

16. This definition tracks language in President Trump's September 2020 Executive Order. *See* Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020), https://www.govinfo.gov/content/pkg/FR-2020-09-28/pdf/2020-21534.pdf [https://perma.cc/AWH4-5YP5].

17. *See, e.g.*, *Racial Disparities in Education and the Role of Government*, U.S. GOV'T ACCOUNT. OFF. (June 29, 2020), (identifying racial disparities in school discipline, access, and resources), https://www.gao.gov/blog/racial-disparities-education-and-role-government [https://perma.cc/CX5Q-8AZ2].

18. *See, e.g.*, Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1601 (1996) ("Frantz Fanon has described this shift from biological to cultural explanations for racial subordination as a progression from vulgar to cultural racism. With the latter, the culture of certain communities is posited as either inferior or incompatible with the values of the dominant community.").

counter efforts.[19] In the past year, resistance to Backlash Bills has taken one of two primary forms: (1) *contestation* (e.g., challenging a law as unlawful or immoral) or (2) *evasion* (e.g., claiming that: "We do not teach CRT in our schools.").[20] Advocates have been slow, in contrast, to wield Backlash Bills—and the ever-intederminate language of equality[21] they employ—to make the affirmative case for CRT. One might think of this as a counter-offensive that reclaims the language of equality by appropriating regressive bills for progessive ends.[22] But to get there, advocates must resist the instinct to equate Backlash Bills with "CRT bans" or to distance themselves from CRT altogether.

To be clear, a principled textual analysis does not guarantee more CRT in the classroom.[23] Nor does it insulate well-meaning students, teachers, or adminstrators from targeted harassment, intimidation, or discipline.[24] Nonetheless, it would be a mistake to leave uncontested the prevailing presumption that Backlash Bills ban CRT. Doing so forfeits a potent site of resistance necessary to counter a campaign designed to defuse the nation's appetite to reckon with racism in America.

This Article proceeds as follows. In Part II, I catalogue existing Backlash Bills. This review highlights key points of commonality and divergence across a still-growing body of law.

In Part III, I locate Backlash Bills within an American tradition of racial backlash and retrenchment. This overview reveals that contestation and evasion are insufficient to counter the full force of ongoing legislative efforts.

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19. *See* Feingold, *supra* note 7 (positing that the text of many "anti-CRT" bills call for more CRT).

20. *See* FREIDMAN & TAGER, *supra* note 2, 61–69 (observing that Backlash Bills face Constitutional challenges); *see also* Sachs, *supra* note 9 (identifying Backlash Bill proponents who concede that CRT is not taught in their schools).

21. *See* Crenshaw, *supra* note 8, at 1335 ("Rather, antidiscrimination law represents an ongoing ideological struggle in which the occasional winners harness the moral, coercive, consensual power of law.").

22. For decades, the Right has employed a similar strategy to coopt antidiscrimination law for regressive ends. *See infra* Section III.C (outlining how conservative jurists, drawing on public discourse, have appropriated antidiscrimination law as a tool to entrench, rather than remedy, racial inequality).

23. PEN America, a free-speech advocacy organization tracking Backlash Bills, has observed that even when a bill does not become law, it "send[s] a potent message that educators are being watched and that ideological redlines exist." FREIDMAN & TAGER, *supra* note 2, at 9; *see also* Annie Gowen, *Censorship Battles' New Frontier: Your Public Library*, WASH. POST (Apr. 17, 2022, 7:00 AM), https://www.washingtonpost.com/nation/2022/04/17/public-libraries-books-censorship/ [https://perma.cc/Z79E-GPD2] (documenting self-censorship by school districts and librarians who preemptively remove books from library shelves).

24. *See* African American Policy Forum, *Educators Ungagged: Teaching Truth in the Era of Racial Backlash*, YOUTUBE (Nov. 3, 2021, 8:00 PM), https://www.youtube.com/watch?v=-WVjPWBqI64 [https://perma.cc/AE8K-YC2U] (highlighting educators who faced backlash for talking about race and racism in the classroom).

In Part IV, I explain why many Backlash Bills promote, if not compel, more CRT in the classroom. By leaning into the (often vague) language embedded within many of these laws, this exercise reveals an under-utilized but crucial front in the battle over racial justice in America's classrooms and beyond.

II. THE STATE OF PLAY: BACKLASH BILLS

Over the past year, GOP officials have proposed nearly 200 bills designed to chill classroom discussion of race, racism and related topics.[25] At least sixteen are now law.[26] Although moored to a common political project, the bills diverge in various respects.[27] One distinction, which I highlight below, is the relative presence of "Critical Race Theory" within in a given bill. By this metric, one can divide the bills into three broad categories: (1) bills that expressly prohibit CRT ("Facial CRT Bans"); (2) bills that reference but do not explicitly prohibit CRT ("CRT Gestures"); and (3) bills that do not mention CRT ("CRT Silent" bills).

The argument that Backlash Bills permit, or even compel, CRT applies with greatest force to CRT Silent bills. Still, as I detail in Part IV, similar reasoning applies to many CRT Gestures and certain Facial CRT Bans.

A. Facial CRT Bans

Between January 2021 and April 2022, GOP lawmakers proposed at least fifteen bills that expressly prohibit "Critical Race Theory."[28] Although many

25. *See* Backlash Bill Index, *supra* note 9 (identifying 182 bills filed since January 2021). For an early review of Backlash Bills, see FREIDMAN & TAGER, *supra* note 2, at 8 (analyzing the 54 state bills proposed or pre-filed as of October 1, 2021). My focus on state-level legislation understates GOP efforts to chill discussion of racism in the classroom. Multiple executive officials (e.g., governors and attorneys general) and local bodies (e.g., school boards) have also targeted CRT, the 1619 Project, and other antiracist projects. *See, e.g.*, Aris Folley, *Noem Takes Pledge to Restore 'Patriotic Education' in Schools*, HILL (May 4, 2021, 5:34 PM), https://thehill.com/homenews/state-watch/551799-noem-takes-pledge-to-restore-patriotic-education-in-schools [https://perma.cc/9KEC-Y2ZN]; Stephen Sawchuk, *Local School Boards are Banning Critical Race Theory. Here's How That Looks in 7 Districts*, EDUC. WEEK (Aug. 25, 2021), https://www.edweek.org/leadership/local-school-boards-are-also-banning-lessons-on-race-heres-how-that-looks-in-7-districts/2021/08 [https://perma.cc/MND6-85YJ].

26. Sachs, *supra* note 9.

27. One could categorize these bills as a function of, *inter alia*, (a) the domain they regulate (e.g., K-12, higher education, employment settings), (b) the substantive content they regulate (e.g., race, gender, sexual orientation, American history), and (c) whether they explicitly prohibit CRT or other named content such as the 1619 Project. *See* FREIDMAN & TAGER, *supra* note 2, at 7–11, 42–43.

28. *See* Backlash Bill Index, *supra* note 9. This represents roughly 8% of all Backlash Bills to date. *See id*.

Facial CRT Bans died in session or were withdrawn,[29] at least two have become law.[30]

One example is North Dakota House Bill 1508, which Governor Doug Burgum signed into law on November 12, 2021.[31] The Bill, which regulates K-12 instruction, includes the following mandate under the heading "Curriculum – Critical race theory – Prohibited":

> Each school district and public school shall ensure instruction of its curriculum is factual, objective, and aligned to the kindergarten through grade twelve state content standards. A school . . . *may not include instruction relating to critical race theory* in any . . . curriculum offered by the district or school. For purposes of this section, "critical race theory" means the theory that racism is not merely the product of learned individual bias or prejudice, but that racism is systemically embedded in American society and the American legal system to facilitate racial inequality.[32]

A second example is Michigan Senate Bill 460.[33] The Bill would require schools to "ensure that the curriculum provided to all pupils . . . *does not include coverage of the* [sic] *critical race theory*, the 1619 project, or any of the following anti-American and racist theories."[34]

One final example warrants mention. In May 2021, Florida's Department of Education issued a rule that prohibits instruction that "suppress[es] or distort[s] significant historical events, such as . . . slavery, the Civil War and Reconstruction, the Civil Rights Movement and the contributions of women, African American and Hispanic people to our country."[35] The Rule proceeds

29. *See id.*

30. *See id.* This figure includes the May 2021 rule promulgated by Florida's Department of Education. *See infra* note 35.

31. 2021 N.D. Laws, 1st Sp. Sess., Ch. 554 (H.B. 1508) (codified as N.D. CENT. CODE § 15.1-21-05.1 (2021), https://ndlegis.gov/cencode/t15-1c21.pdf [https://perma.cc/JXB8-52KY]).

32. N.D. CENT. CODE § 05.1 (emphasis added). Others have explained how the Bill text, specifically the ban against instruction "*relating to*" CRT renders the legislation susceptible to constitutional vagueness and overbreath challenges. *See, e.g.*, Judd Legum, *New North Dakota Law Can't be Discussed in North Dakota Schools*, POPULAR INFO. (Nov. 15, 2021), https://popular.info/p/new-north-dakota-law-cant-be-discussed?s=r [https://perma.cc/Q42S-7TYX].

33. S.B. 460, 2021 Leg., 2021-2022 Legis. Sess. (Mich. 2021).

34. *Id.* (emphasis added). The so-called "anti-American and racist theories" identified in the bill track many of the "divisive concepts" common to Backlash Bills.

35. 47 Fla. Admin. Reg. 2706 § III(3)(b) (June 14, 2021). In a technical sense, the Florida rule does not constitute anti-CRT legislation because the rule comes from an executive agency. Nonetheless, I mention the rule because it reflects the breath of state action that targets CRT.

to identify "the teaching of Critical Race Theory"[36] as instruction that would distort history, and thereby violate the preceding mandate.[37]

The foregoing captures a selection of Facial CRT Bans. Three broad observations are warranted. First, these explicit bans perform regulatory functions (e.g., regulating what may be discussed in the classroom) and discursive functions (e.g., communicating descriptive claims and moral values). Consider North Dakota's Bill, which (accurately) associates "critical race theory" with "the theory . . . that racism is systemically embedded in American society."[38] The legislation *regulates* speech by prohibiting instruction that brings a "systemic" lens to questions of racial inequality. But the legislation does more than regulate speech. It also *communicates* that structural theories of racism are inappropriate because they (purportedly) lack a "factual" or "objective" basis—criteria that the law simultaneously requires.

Second, and reflected in the above, Facial CRT Bans often suffer from internal contradiction. Consider Florida's recent rule. If CRT actually "suppress[ed] or distort[ed]"[39] history—as Florida's Department of Education claims—it would be consistent to (a) prohibit instruction that distorted the past and (b) ban CRT. But CRT neither "suppress[es]" nor "distorts" the past. To the contrary, CRT seeks a more layered and comprehensive historical accounting that counters traditions of erasure, suppression, and distortion.[40] Accordingly, if we value facts over sloganeering, a rule that demands historical accuracy cannot also prohibit CRT.

Third, textual ambiguity and internal contradiction is a common feature of Backlash Bills—including Facial CRT Bans. As noted above, a primary purpose of this legislative assault is to erode—within our national discourse—our ability to distinguish between racism and antiracism. This project is neither based on, nor bound by, fact. To the contrary, it requires abandoning any principled distinction between a history of legalized racial subordination

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36. The full language is as follows:

> Examples of theories that distort historical events and are inconsistent with State Board approved standards include the denial or minimization of the Holocaust, and the teaching of Critical Race Theory, meaning the theory that racism is not merely the product of prejudice, but that racism is embedded in American society and its legal systems in order to uphold the supremacy of white persons.

Id.

37. *See id.* (restricting instruction which "suppress[es] or distort[s] significant historical events").

39. 47 Fla. Admin. Reg., § III(3)(b).

40. *See generally* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L. J. 1062 (2022) (critiquing how curriculum and pedagogy common in the first year Property Law class tends to obscure the historical and contemporary relevance of slavery and conquest to our modern real property system).

and race-conscious efforts to undo that legacy. Facial CRT Bans advance that goal because of their internal tension, not in spite of it.

B. CRT Gestures

A second subset of Backlash Bills mention CRT—often within introductory language or gestural clauses—but do not expressly prohibit educators or others from teaching it.[41] Idaho House Bill 377, which Governor Brad Little signed into law on April 28, 2021,[42] is illustrative. The relevant language reads as follows:

> The Idaho legislature finds that [the prohibited] tenets outlined [below], *often found in* "*critical race theory*," undermine the objectives outlined [above] and exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria in ways contrary to the unity of the nation and the well-being of the state of Idaho and its citizens.[43]

Another example, which Alabama Representative Danny Crawford pre-filed ahead of the January 2022 session, contains near-identical language:

> The Legislature finds that [the prohibited] tenets outlined [below], *often found in critical race theory*, undermine the objectives outlined [above] and exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria in ways contrary to the unity of the nation and the well-being of this state and its residents.[44]

Similar to Facial CRT Bans, CRT Gestures perform regulatory and discursive functions. That is, they are designed to (a) chill conversation about race and racism in the classroom (the regulatory function) and (b) malign CRT as unAmerican and inconsistent with basic equality norms (the discursive function). As to the latter, the above examples marshal standard rightwing talking points that denounce CRT as divisive and "contrary to" national unity. This claim invokes the trope—common to projects of racial backlash—that talking about race and racism is the source of racial division (which, in turn, suggests that race and racism are not relevant until named and discussed).

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41. *See, e.g.*, IDAHO CODE § 33–138 (2021) (providing that prohibited acts may parallel CRT).
42. Act of April 28, 2021, ch. 293, sec. 1, 2021 Idaho Laws 885.
43. § 33–138(2) (emphasis added).
44. H.B. 11, 2022 Legis. Sess., Reg. Sess. (Ala. 2022) (emphasis added).

C. CRT Silent

Most Backlash Bills do not mention CRT.[45] This is not to say CRT is absent from the legislative process or public perception of the legislation. Even when bills are silent on CRT, bill proponents often center CRT and its supposed malevolence throughout the lawmaking process.[46] It is, accordingly, understandable that the media and public often view and portray these bills as"CRT Bans" or "anti-CRT."[47]

Although CRT Silent bills vary, many share common elements. This includes language that prohibits educators from promoting[48] a series of "divisive concepts."[49] The initial list of "divisive concepts," enumerated below, first appeared in an Executive Order then-President Trump issued in September of 2020:

> (1) one race or sex is inherently superior to another race or sex;
>
> (2) the United States is fundamentally racist or sexist;
>
> (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

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45. *See* Backlash Bill Index, *supra* note 9..

46. *E.g.*, Jeffrey Collins, *SC Lawmakers Vow to Take Time on Critical Race Theory Rules*, CHARLOTTE OBSERVER (Jan. 27, 2022, 4:29 PM), https://www.charlotteobserver.com/news/nation-world/national/article257749438.html [https://perma.cc/55TH-AJEJ] ("Other Republicans like Rep. Melissa Oremus said that if they wanted teachers to share personal opinions, they would invite them to dinner. '[F]or us to go into a classroom and tell our children that this happened because of your terrible [W]hite grandfather or great-grandfather, that is just wrong.'").

47. *See, e.g.*, Scott Bauer, *Wisconsin Assembly Passes Critical Race Theory Ban*, ASSOCIATED PRESS (Sept. 28, 2021), https://apnews.com/article/business-wisconsin-education-race-and-ethnicity-racial-injustice-dc73ee7fd8962ea52f56eae2319055d5 [https://perma.cc/656M-45XN]; Joseph Mendola, *My Turn: HB544 Embraces the Values of New Hampshire Residents*, CONCORD MONITOR (Apr. 21, 2021, 9:00 AM), https://www.concordmonitor.com/My-Turn-HB-544-embraces-the-values-of-NH-residents-40054309 [https://perma.cc/5VVJ-LV9S].

48. The specific conduct prohibited vis-à-vis "divisive concepts" differs across bills but tends to include iterations of the following: "teach," "act upon," "promote," and "encourage." *See, e.g.*, S.B. 377, 156th Gen. Assemb., Reg. Sess. (Ga. 2021–2022), https://www.legis.ga.gov/api/legislation/document/20212022/203938 [https://perma.cc/CY4Z-BH98].

49. Cathryn Stout & Thomas Wilburn, *CRT Map: Efforts to Restrict Teaching Racism and Bias Have Multiplied Across the U.S.*, CHALKBEAT (Feb. 1, 2022, 7:20 PM), https://www.chalkbeat.org/22525983/map-critical-race-theory-legislation-teaching-racism [https://perma.cc/SMY2-6HNG].

> (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
>
> (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
>
> (6) an individual's moral character is necessarily determined by his or her race or sex;
>
> (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
>
> (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
>
> (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.[50]

Trump's Executive Order also referenced "race or sex stereotyping" and "race or sex scapegoating" as specific "divisive concepts" defined as follows:

> "Race or sex stereotyping" means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.[51]
>
> "Race or sex scapegoating" means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.[52]

Over the past year, GOP legislators have expanded upon, or otherwise modified, the initial "divisive concepts." More recent bills, for example,

50. Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020), https://www.govinfo.gov/content/pkg/FR-2020-09-28/pdf/2020-21534.pdf [https://perma.cc/AWH4-5YP5].

51. *Id.*

52. *Id.*

include social categories beyond "race" and "sex."[53] Indiana Senate Bill 167, which garnered national attention earlier this year, is illustrative. The Bill expanded upon President Trump's language by prohibiting covered entities from promoting the concept that "any sex, race, *ethnicity, religion, color, national origin, or political affiliation* is inherently superior or inferior to another."[54]

The foregoing, albeit brief, outlines three subsets of Backlash Bills. In the next Part, I locate this regressive lawmaking within a broader, multifaceted campaign to defuse and discredit moments of racial progress and possibility.

III. THREE SITES OF CONTESTATION; THREE FRONTS OF RACIAL RETRENCHMENT

CRT might be the GOP's current object of derision,[55] but calculated efforts to malign and rollback even modest antiracist endeavors are nothing new.[56] To the contrary, Backlash Bills follow a longstanding tradition of coordinated racial backlash and retrenchment.[57] Albeit somewhat reductionist, one can disaggregate the fight for racial justice, and the backlash that follows, into three sites of contestation: (1) the legislative (that is, whether we pass laws designed to ameliorate or entrench racial inequality), (2) the discursive (that is, the stories we tell to explain racial inequality), and (3) the

53. Eesha Pendharker, *How Will Bans On 'Divisive' Classroom Topics Be Enforced? Here's What 10 States Plan to Do*, EDUCATIONWEEK (Jul. 14, 2021), https://www.edweek.org/policy-politics/how-will-bans-on-divisive-classroom-topics-be-enforced-heres-what-10-states-plan-to-do/2021/07 [https://perma.cc/2P8A-H7EV].

54. S.B. 167, 122nd Gen. Assemb., 2nd Reg. Sess., § 9 (Ind. 2022) (emphasis added); *see also* H. 4605, 124th Gen. Assemb., Reg. Sess. (S.C. 2022) (prohibiting covered entities from promoting the view that "a group or an individual, by virtue of his or her race, ethnicity, sex, sexual orientation, national origin, heritage, culture, religion, or political belief is inherently racist, sexist, bigoted, ignorant, biased, fragile, oppressive, or contributive to any oppression, whether consciously or unconsciously").

55. CRT is not alone. Other targets include The 1619 Project, trans youth, and other communities out of the "American mainstream." *See Educational Gag Order Target Speech About LGBTQ+ Identities with New Prohibitions and Punishments*, PEN AMERICA (Feb. 15, 2022), https://pen.org/educational-gag-orders-target-speech-about-lgbtq-identities-with-new-prohibitions-and-punishments/ [https://perma.cc/N2T9-UKG3]; Alice Marwick & Daniel Kreiss, *The Conservative Disinformation Campaign Against Nikole Hannah-Jones*, SLATE (June 02, 2021, 12:04 PM), https://slate.com/technology/2021/06/nikole-hannah-jones-unc-1619-project-disinformation-campaign.html [https://perma.cc/B2UL-5GQ7]. Still, CRT remains a primary target of right-wing legislation and talking points.

56. *See* Ibram X. Kendi, *The Mantra of White Supremacy*, ATLANTIC (Nov. 30, 2021), https://www.theatlantic.com/ideas/archive/2021/11/white-supremacy-mantra-anti-racism/620832/ [https://perma.cc/R72Z-VFRN] (quoting Nikole Hannah-Jones, saying, "this idea that racial reckoning has gone too far and now [W]hite people are the ones suffering is the most predictable thing in the world if you understand American history.").

57. *See* Crenshaw, *supra* note 8, at 1334.

interpretive (that is, how courts interpret our laws, based in part on the stories we tell).[58] I discuss each below.

A. The Legislative Front: The Laws We Pass (To Entrench or Ameliorate Racial Inequality)

The first site of contestation is the legislative—that is, whether public officials adopt laws (e.g., state laws, executive orders, agency rules) designed to remedy or entrench existing racial inequities. In this vein, Backlash Bills can be viewed as a modern manifestation of *racially regressive* lawmaking—a term I employ to describe legislative efforts intended to stymie, roll-back, or otherwise obstruct efforts to realize a more racially egalitarian society.

"Black Codes" offer a poignant historical example. The Civil War left southern states "physically and economically devastated."[59] Beyond suffering massive casualties and military defeat, former Confederate states—and the political elites who governed them—lost their primary source of cheap (free) labor: enslaved people.[60] Black Codes, in turn, "provided an urgent legal solution to the demand for low[] or no-wage labor after the ratification of the Thirteenth Amendment."[61] These laws, which varied by state, "declared a black person to be vagrant if unemployed and without permanent residence; a person so defined could be arrested, fined, and bound out for a term of [labor] if unable to pay the fine."[62] In purpose and effect, Black Codes criminalized

58. Albeit discrete, these fronts are often reinforcing. For example, regressive lawmaking (the legislative front) benefits from, and offers a platform for legislators to disseminate, regressive narratives that rationalize the status quo as fair and just (the discursive), which in turn reifies narratives that judges can employ to coopt antidiscrimination law for regressive purposes (the interpretive front).

59. Cecil J. Hunt II, *Feeding the Machine: The Commodification of Black Bodies from Slavery to Mass Incarceration*, 49 U. BALT. L. REV. 313, 325 (2020).

60. *Id.* at 317, 319, 325.

61. Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 936 (2019). *See* Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 AM. CRIM. L. REV. 1685, 1688 (2021) ("At the beginning of this post-war period, during President Andrew Johnson's administration, Southern state legislatures passed Black Codes to maintain white supremacy and to continue their pre-war control of Black people's labor and behavior.").

62. *Black Code*, ENCYC. BRITANNICA (Aug. 20, 2019), https://www.britannica.com/topic/black-code [https://perma.cc/Q7RU-U5HY]; *see also* David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 72 (2013) ("Following the Civil War, the Black Codes were either amended or new ones implemented to ostensibly comply with the Reconstruction Era Amendments while maintaining blacks in a subservient role.").

blackness itself—thereby enabling the South to "reimpos[e] slavery on the freeman in every way but in name."[63]

Black Codes foreshadowed Jim Crow—an era of racially regressive lawmaking that proliferated across the South following Reconstruction.[64] Although varied, many Jim Crow laws regulated how Black Americans, among other individuals racialized as non-white, could travel through public and private space.[65] In a recent piece, Andrew Pegoda explains that segregationist laws were not principally designed to physically separate different racialized groups.[66] Rather, this regime facilitated and amplified a broader set of social norms, cultural expectations, and legal rules that re-inscribed racial hierarchy and white supremacy into American society.[67]

As a formal matter, Black Codes and Jim Crow now reside in an ignoble past.[68] But racially regressive lawmaking remains a present-day reality. Backlash Bills—alongside voter suppression laws, anti-trans laws, and book bans—offer the modern analogue. To be sure, twenty-first century regressive lawmaking differs from its twentieth century and nineteenth century antecedents. But common features unite these bodies of law. Just as lawmakers passed Black Codes and Jim Crow to reassert a pre-Civil War racial order, today's Backlash Bills are designed, in part, to counter the appetite for antiracist reform that emerged following 2020's summer of protest.[69]

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63. Hunt, *supra* note 59, at 326 (describing Black Codes).

64. Although most prominent in the former Confederate states, Jim Crow laws were not limited to the South. Steve Luxenberg, *The Forgotten Northern Origins of Jim Crow*, TIME (Feb. 19, 2019, 10:35 AM), https://time.com/5527029/jim-crow-plessy-history/ [https://perma.cc/7W7Q-HZGF].

65. Frances L. Edwards & Grayson Bennett Thompson, *The Legal Creation of Raced Space: The Subtle and Ongoing Discrimination Created Through Jim Crow Laws*, 12 BERKELEY J. AFR. AM. L. & POL'Y 145, 145 (2010) ("Jim Crow Laws defined property rights and restricted the use of architectural space for both White and African Americans. As a result, these laws intentionally, yet subtly, created a kind of 'raced space.'").

66. Andrew Joseph Pegoda, *What People Still Get Wrong About Segregation*, TIME (Feb. 3, 2020, 1:00 PM), https://time.com/5775300/segregation-separation/ [https://perma.cc/D4F5-7L5D].

67. *Id.*

68. Responding to a range of social, political, and legal pressure, the federal government—through judicial, legislative, and executive action—prohibited many of the laws that anchored American Apartheid. *See* Theodore M. Shaw, *The Race Convention and Civil Rights in the United States*, 3 N.Y. CITY L. REV. 19, 35 (1998) ("Civil rights lawyers and other[s] who believe the *Brown* paradigm would be a model for social change may be unduly optimistic if they ignore the contextual conditions, including international pressure, that made the school desegregation decision possible.").

69. *See, e.g.*, Jeffrey Sachs, *New Stop W.O.K.E. Act Fits Disturbing Pattern in Education Culture War*, PEN AMERICA (Dec. 23, 2021), https://pen.org/stop-woke-act-fits-disturbing-pattern-education-culture-war/ [https://perma.cc/9GCV-8K8G].

Accordingly, when states pass racially regressive laws, it makes sense to challenge the laws' validity (through strategies of *contestation*) and avoid their force (through strategies of *evasion*). For this reason, one can understand why contestation[70] and evasion[71] have constituted the primary counterstrategies stakeholders have deployed to resist Backlash Bills. Contestation and evasion are not without merit. But they are often ill-suited to address the laws' discursive function. As noted above, the legislative process surrounding Backlash Bills offers a platform to seed and spread potent narratives that malign antiracism itself. To better appreciate this threat, and identify how stakeholders might meet it, I now turn to the second site of contestation: the narratives we tell about race, racism, racial inequality in America.

B. The Discursive Front: The Stories We Tell (To Explain Racial Inequality)

The second site of contestation is the discursive—that is, the competing stories we tell about contemporary inequality in America. Regressive racial projects, from enslavement through mass incarceration, have always involved a discursive—or narrative—dimension.[72] This often involves two distinct but reinforcing threads. From one end, anti-egalitarian forces coopt the language of equality to shield regressive projects from moral or historical critique.[73]

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70. In Oklahoma, for example, civil rights groups and local stakeholders have sued to strike down a law that "severely restricts public school teachers and students from learning and talking about race and gender in the classroom." *See, e.g.*, Press Release, ACLU, Lawyers Committee File Lawsuit Challenging Oklahoma Classroom Censorship Bill Banning Race and Gender Discourse (Oct. 19, 2021), https://www.aclu.org/press-releases/aclu-aclu-oklahoma-lawyers-committee-file-lawsuit-challenging-oklahoma-classroom [https://perma.cc/3CHR-4ETX]. *See also* Ethan Dewitt, *ACLU Joins NEA to File Second Lawsuit Against 'Divisive Concepts' Law*, N.H. BULLETIN (Dec. 20, 2021, 2:10 PM), https://newhampshirebulletin.com/briefs/aclu-joins-nea-to-file-second-lawsuit-against-divisive-concepts-law/ [https://perma.cc/CDV4-ZCAM].

71. Former Virginia Governor Terry McAuliffe, for example, characterized "outrage over [CRT] as a 'made up, racist dog whistle' that has never been taught in Virginia schools." *See* Crampton, *supra* note 7; *see also* Devyani Chhetri, *SC Will Not Give Money to Teach Critical Race Theory. But We Never Taught It, Says Schools*, GREENVILLE NEWS (Jul. 1, 2021, 7:51 A.M.), https://www.greenvilleonline.com/story/news/local/south-carolina/2021/07/01/critical-race-theory-sc-schools-not-taught-what-is-budget/5303357001/ [https://perma.cc/8YS7-FUA2] (reporting a similar response in South Carolina).

72. *See Scientific Racism*, HARV. LIBR., https://library.harvard.edu/confronting-anti-black-racism/scientific-racism [https://perma.cc/7FQQ-J6M9].

73. A salient example includes the claim that Backlash Bills further Martin Luther King, Jr.'s vision of a society that judges children by the content of their character, not the color of their skin. *See* Sherronda J. Brown, *The Endless Appropriation of MLK and White Supremacy's Need to Rewrite Historical Narratives*, BLACK YOUTH PROJECT (Mar. 13, 2020),

From the other end, the Right deploys theories of race and racism that justify and rationalize racial inequality.[74] These converging narratives do more than insulate the status quo from critique. They also delegitimize—as "reverse racism," "preferential treatment," or "anti-[W]hite discrimination"—affirmative (and often race-conscious) efforts to ameliorate enduring inequality.[75]

The precise talking points that facilitate backlash narratives have evolved over time. A century ago, segregationists marshaled biological theories of racial inferiority/superiority to defend Jim Crow (among other facially discriminatory laws).[76] Today, biological arguments—now largely condemned as racist—have fallen out of favor.[77] In their place, status quo defenders often rationalize inequality by pointing to alleged cultural differences or individual deficits.[78] These narratives, albeit invoking different causal stories, serve a common purpose. Once one rationalizes the status quo as fair, just, and necessary—whether via biologal or cultural theories of race—it becomes easier to delegitimize efforts to redistribute social, political and economic resources.[79] Today, this causal story animates resurgent narratives that portray antiracism as racist, and caricature CRT as anti-White.[80]

The specific targets might be new, but the underlying script has anchored anti-reform efforts since at least the nineteenth century. The *Civil Rights*

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http://blackyouthproject.com/the-endless-appropriation-of-mlk-and-white-supremacys-need-to-rewrite-historical-narratives/ [https://perma.cc/82PJ-RMMA]; Mendola, *supra* note 47.

74. *See, e.g.*, Michael E. Ruane, *A brief history of the enduring phony science that perpetuates white supremacy*, WASH. POST (Apr. 30, 2019), https://www.washingtonpost.com/local/a-brief-history-of-the-enduring-phony-science-that-perpetuates-white-supremacy/2019/04/29/20e6aef0-5aeb-11e9-a00e-050dc7b82693_story.html [https://perma.cc/LK5L-JUEK].

75. For a more textured account of the conceptions of race and racism that often animate regressive racial projects, see Jonathan Feingold, *Colorblind Capture*, 102 B.U. L. REV. (forthcoming 2022) (manuscript at 5) (on file with author).

76. *See, e.g.*, Dorothy E. Roberts, *Race and the Enlightenment*, *in* FOUR HUNDRED SOULS 119 (Ibraham X. Kendi & Keisha N. Blain eds., 2021).

77. *See* Robert A. Nye, *The Rise and Fall of the Eugenics Empire: Recent Perspectives on the Impact of Biomedical Thought in Modern Society*, 36 HIST. J. 687, 697–99 (1993).

78. *See* Crenshaw, *supra* note 57, at 1379 ("Thomas Sowell, for example, suggests that underclass Blacks are economically depressed because they have not adopted the values of hard work and discipline.").

79. *See id.* at 1380 ("White race consciousness, which includes the modern belief in cultural inferiority, acts to further Black subordination by justifying all the forms of unofficial racial discrimination, injury, and neglect that flourish in a society that is only formally dedicated to equality.").

80. *See* Kali Holloway, *"Critical Race Theory" is White History*, NATION (Nov. 16, 2021), https://www.thenation.com/article/society/crt-race-history/ [https://perma.cc/WCP5-GAXZ] ("[T]hose behind the current anti-anti-racist movement in education have publicly admitted to repurposing CRT to 'turn it toxic,' as conservative activist Christopher F. Rufo put it, branding it as anti-[W]hite propaganda.").

Cases offer a salient example.[81] In this set of consolidated cases from 1883, the Supreme Court struck down the Civil Rights Act of 1875.[82] The Act, which Congress passed a decade after the Civil War, comprised an early legislative attempt to prohibit racial discrimination in public accommodations—a modest but critical step toward equality for Black Americans.[83]

To appreciate how the Court coopted the language of equality to discredit Congress's antiracist intervention, Justice Bradley's language speaks for itself:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there *must be some stage* in the progress of his elevation when he takes the *rank of a mere citizen*, and *ceases to be the special favorite* of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[84]

In essence, Justice Bradley decried antidiscrimination law as an impermissible "racial preference" that elevated Black Americans above their White counterparts.[85] This "preference" framing implies that race is not relevant, and racism is not present, until the moment an actor (here Congress)

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81. *See The Civil Rights Cases*, 109 U.S. 3 (1883).

82. *See id.* at 26.

83. See Civil Rights Act of 1875, 18 Stat. 335 (1875) § 1, which provided:
> That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

84. *Id.* at 31 (majority opinion) (emphasis added). Writing in dissent, Justice Harlan chastised the majority for ignoring the social reality that necessitated federal antidscrimination law in the wake of the Civil War:
> The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take that rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.

Id. at 61 (Harlan, J., dissenting).

85. Justice Scalia employed similar language when he characterized disparate impact as a "racial thumb on the scale[]." *See* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.").

makes it so. This narrative, which equates facial neutrality with racial neutrality, continues to anchor conservative attacks on a range of remedial efforts.[86]

Affirmative action is a notable example. In the mid-twentieth century, institutions across the United States (often spurred by grassroots mobilization, the Civil Rights Act of 1964, and judicial mandates) instituted a range of race- and gender-conscious practices to ameliorate legacies of racial and gender exclusion.[87] As soon as these initiatives took effect, they encountered resistance—often anchored to rhetorical attacks that denounced race- or gender-attentive policies as unlawful and immoral discrimination.[88] With echoes of Justice Bradley, regressive forces coopted the language of equality to reposition White men as innocent victims, the collateral damage of "reverse racism" and "preferences" that benefitted "unqualified" women and people of color.[89]

The Right's ability to rebrand remedies (for past and present discrimination) as discrimination, or what I term discursive appropriation, is integral to projects of racial backlash. This narrative maneuvering shrouds regressive efforts under a veil of racial neutrality and renders racial reform—even antidiscrimination itself—a target of public scorn. The success of discursive appropriation continues to shape—and impoverish—our national affirmative action debates. From stark critics to staunch defenders, all sides tend to equate affirmative action with "racial preferences" that contravene an otherwise racially neutral baseline—a framing that invites predictable legal and moral critique.[90]

This "affirmative action-as-preference" framing is ubiquitous. But it is not inevitable. To the contrary, the Left could reclaim affirmative action as a modest countermeasure that mitigates racial, gender, and class

86. *See* Feingold, *supra* note 75.

87. The term "affirmative action" appeared alongside related policies and programs as early as 1935 in the National Labor Relations Act of the same year. Jackie Mansky, *The Origins of the Term 'Affirmative Action'*, SMITHSONIAN MAG. (June 22, 2016), https://www.smithsonianmag.com/history/learn-origins-term-affirmative-action-180959531/ [https://perma.cc/ZHM6-M9TM].

88. *See* Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 84–85 (1986).

89. *See* David Simson, *Whiteness As Innocence*, 96 DENV. L. REV. 635, 695 (2019).

90. *See, e.g.*, Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1129 (2019) ("[L]iberals themselves too often defend affirmative action from the perspective that the policy is a preference. Indeed . . . the difference between liberal and conservative views on affirmative action is that liberals think the 'preference' is justified . . . while conservatives think affirmative action is never justified because it effectuates reverse discrimination.").

(dis)advantages embedded within facially neutral selection regimes.[91] In practice, this rarely occurs.[92] Instead, advocates tend to defend affirmative action as justifiable discrimination—rather than, for instance, championing such policies as modest *anti*discrimination measures necessary to promote a more racially neutral process.[93]

As a result, the Left fails to counter a conservative story that decouples existing racial stratification from racism past and present. This, in turn, invites false equivalencies between race-conscious policies designed to entrench racial hierarchy (e.g., Jim Crow) and those designed to undo that legacy (e.g., affirmative action). The Left, in short, is doing the Right's work for it—by reifying a narrative that renders legible and accessible the potent claim that antiracism (because it sees and attends to race and racism) is the new racism, and that antiracists (because they see and attend to race and racism) are the new racists.

C. The Interpretative Front: The Reasons We Give (To Enforce or Invert Antidiscimination Law)

Above, I outlined legislative and discursive fronts in the enduring fight for racial justice. Both interact with the third front, which I term the *interpretive*—that is, the space where jurists debate the meaning and mandate of existing law. In this space, racial retrenchment has long depended on *judicial capture*, a term that reflects the infusion of conservative racial ideologies into antidiscrimination law.[94] This process has enabled rightwing forces to appropriate racially progressive laws for racially regressive ends.[95]

One can think of judicial capture as a tactical backstop when regressive lawmaking is unviable. That is, when legislatures are unable to pass regressive

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91. *Id.* at 1128–32. At a minimum, advocates could contest the preferencing framing as a "highly contestable claim, not an empirical fact." *Id.* at 1132.

92. *See* Louis Menand, *The Changing Meaning of Affirmative Action*, NEW YORKER (Jan. 13, 2020), https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action [https://perma.cc/F2Z5-G2HY].

93. *See* Feingold, *supra* note 75 (detailing the multiple ways in which race matters in facially race-neutral selection processes).

94. *See* Randall Kennedy, *More Foe Than Friend: The Supreme Court and the Pursuit of Racial Equality*, NATION (Aug. 9, 2021), https://www.thenation.com/article/society/justice-deferred-racial-equality-supreme-court/ [https://perma.cc/XMF5-TANX]; *see also* Ariane de Vogue, *Major 6-3 Rulings Foreshadow a Sharper Supreme Court Right Turn*, CNN (July 1, 2021), https://www.cnn.com/2021/07/01/politics/supreme-court-6-3-conservative-liberal/index.html [https://perma.cc/Y4LP-J6U2].

95. Here, I use the term "racially progressive laws" broadly to encompass constitutional provisions (e.g., the Fourteenth Amendment), statutory law (e.g., Title VI of the Civil Rights Act), and Supreme Court decisions (e.g., *Brown v. Board*) originally intended to counter formal and informal barriers to a racially egalitarian society.

laws, or when legislatures pass racially progressive laws, courts offer a potential backstop to strike down, dilute, or even invert the law's remedial potential.[96] To rationalize such action, jurists often engage in discursive appropriation themselves.

Judicial capture has always accompanied racial retrenchment. The *Civil Rights Cases*, discussed above, offers an early example. This decision, less than two decades after the Civil War, obstructed a key congressional effort to remedy racial hierarchy through antidiscrimination law.[97]

Roughly a decade later, the Supreme Court further undermined the 14th Amendment's liberatory potential in *Plessy v. Ferguson*.[98] Among other questions, the *Plessy* Court asked whether *de jure* racial segregation violated the Fourteenth Amendment's Equal Protection Clause.[99] Justice Brown, writing for the majority, concluded it did not.[100] Rather, the Court enshrined the now-infamous "separate-but-equal" doctrine into constitutional law.[101] As Professors Tendayi Achiume and Devon Carbado recently observed, *Plessy* "constitutionalized Jim Crow and ensured that Black people would be included into citizenship on racially subordinating terms."[102] Through Supreme Court intervention, one might say the federal judiciary accomplished what a Confederacy could not: "amend" the Constitution to legalize an "afterlife [for] slavery."[103]

Judicial capture reemerged in the twentieth century. In the 1950s and 1960s, the Supreme Court struck down "separate but equal" and Congress passed a suite of antidiscrimination legislation.[104] This period marked the most meaningful federal intervention to promote racial equality since

96. For purposes of this Article, I focus on inversion. I do so, in part, because appropriating a remedial law to preserve the status quo reflects the most extreme form of judicial capture.

97. *See* E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 UCLA L. REV. 1462, 1472 (2021) ("Reflecting an express repudiation of *Dred Scott*, the Fourteenth Amendment is one of the Reconstruction Amendments that was designed to facilitate the inclusion of Black people into citizenship.").

98. 163 U.S. 537 (1896).

99. *Id.* at 540–41.

100. *Id.* at 551–52.

101. *See id.* at 540, 551–52.

102. *See* Achiume & Carbado, *supra* note 97.

103. *Id.* (arguing that *Plessy* "carried forward substantive dimensions of the ideological and material apparatus of slavery that, borrowing from Saidiya Hartman, one might describe Jim Crow as an 'afterlife of slavery.'") (quoting SAIDIYA HARTMAN, LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6 (2008)).

104. *See* Simson, *supra* note 89, at 652 ("The 1960s saw the enactment of controversial civil rights legislation including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.").

Emancipation and the Civil War Amendments.[105] And, as before, racial reform spurred racial backlash. This backlash facilitated Richard Nixon's rise to the White House in 1968.[106] Nixon, in turn, appointed four Justices—thereby reshaping the court's ideological composition and opening the door for a new era of judicial capture.[107]

Over the subsequent five decades, an enduring conservative majority has systematically inverted antidiscrimination law's animating principle and purpose.[108] Across domains spanning public education, employment, and voting rights, the Supreme Court has either diluted the force and effect of progressive laws or coopted those laws for regressive ends.[109] Laws intended to spur integration and inclusion now incentivize segregation and exclusion,[110] while laws designed to break down racial barriers now proscribe race-conscious remedies.[111] Paralleling the Supreme Court's post-Civil War interventions, in the years following the Civil Rights Movement, the judiciary did what stalwart segregationists could not: "enshrine" into law the right to maintain racially segregated schools and communities.[112]

Judicial capture is, in part, a story of raw power. For half-a-century, right-of-center Justices have enjoyed a Supreme Court majority. And with that majority, conservative jurists have the power to declare what the law means.

It is important to note, however, that judicial capture has never turned on raw power alone.[113] A range of considerations from institutional legitimacy to public opinion often incentivize Justices—or other actors—to shroud ideologically-driven outcomes under a veil of neutrality and objectivity.[114] To

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105. *See* David Alan Horowitz, *White Southerners' Alienation and Civil Rights: The Response to Corporate Liberalism, 1956-1965*, 54 J. S. HIST. 173, 173 (1988) ("It was during this period that the federal government used unprecedented power and influence to strive for equal opportunity for the nation's racial minorities.").

106. Simson, *supra* note 89, at 652–53.

107. *Id.* ("Nixon ran on a platform that promised conservative judges, and he appointed four Justices with conservative records . . . .").

108. *See* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1781 (2012) ("Since the end of the civil rights era in the early 1970s, the emancipatory potential of the Fourteenth Amendment has been thoroughly undone. Today, its guarantee of 'equal protection' no longer promotes reform but rather protects the racial status quo.").

109. *See id.*

110. *See, e.g.*, Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2414 (2021).

111. *See* Haney-Lopez, *supra* note 108, at 1815–19.

112. Kennedy, *supra* note 94.

113. Even with a current majority that exhibits little interest in even the appearance of non-partisan neutrality, the Court's conservative Justices have not abandoned a project of discursive appropriation.

114 *See, e.g.*, Atiba R. Ellis, *The Dignity Problem of American Election Integrity*, 62 HOW. L.J. 739, 763 (2019) ("To accomplish this end of creating a political social order that reflected

this end, Justices routinely trade on the language of equality and neutrality—often employing phrases such as "originalism," "colorblindness," "localism," and "merit" to mask what are, in essence, political projects.[115] It is here that discursive appropriation and judicial capture meet. When racially regressive narratives dominate public discourse, they provide a vocabulary and framework to rationalize interpretive and adjudicative practices that defang or invert the promise and potential of racially progressive laws.

In the next year, decades of judicial capture will reach a new milestone. Specifically, the Supreme Court is poised to prohibit race-conscious admissions in higher education.[116] As recently as 2016, the Supreme Court reaffirmed the right of universities to consider applicant race—even as the Court has otherwise eroded the rights of public and private actors to employ race-conscious practices.[117]

When the conservative majority declares affirmative action unlawful, the Justices will point to two legal sources: the Fourteenth Amendment and Title VI of the Civil Rights Act. To justify how these laws—controversial at their inception for threatening a racial order defined by legalized white supremacy—could command this result, the majority will harness a well-worn script that equates race-conscious remedies with the discriminatory regimes they are meant to undo. We can, for example, expect the Court to locate its holding in the spirit and legacy of Martin Luther King, Jr.—"a process [of appropriation] that has been underway since the first" federal MLK holiday.[118] This distortion of MLK's legacy mirrors the rhetoric of anti-CRT and anti-antiracist proponents across the country.[119] When those same talking points enter Supreme Court caselaw striking down affirmative action, we will witness how discursive appropriation and judicial capture produce and reinforce, and are produced and reinforced by, the other.

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ideological social order of white supremacy and degraded the identity dignity and status dignity of African Americans, the ex-Confederate states formulated barriers of exclusion that targeted minorities without explicitly using racial considerations.").

115. *See* Simson, *supra* note 89, at 656, 680–81, 687; Kathryn Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 B.C. L. REV. 1251, 1299, 1305 (2021).

116. Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. Times (Jan. 24, 2002), https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html [https://perma.cc/D8J8-UMAB]; *see also* Feingold, *supra* note 75, at 6–7.

117. Fisher v. Univ. of Texas (Fisher II), 133 S.Ct. 2411 (2016); *see also* Crenshaw, *supra* note 53, at 1348–49.

118. Crenshaw, *supra* note 4; *see also* Gary Younge, *The Misremembering of 'I Have a Dream'*, NATION (Aug. 14, 2013), https://www.thenation.com/article/archive/misremembering-i-have-dream/ [https://perma.cc/Z3DT-PCBF].

119. *See infra* notes 124–125 and accompanying text (describing lawmakers' efforts to ban "CRT" and "antiracist programming" on the grounds that they promote racial discrimination).

Before proceeding to the final Part, it is worth observing how the three fronts of racial retrenchment are currently converging. First, Backlash Bills represent a new manifestation of racially regressive lawmaking. Second, the underlying legislative process offers a platform to seed and reify narratives that malign remedial projects attentive to race and racism. Third, this coordinated communications campaign renders more legible and accessible a vocabulary that conservative judges can employ to further erode, if not invert, existing antidiscrimination laws.[120] In other words, the proliferation of Backlash Bills represents more than regressive lawmaking. It also comprises a site of potent discourse productive and discursive appropriation—both of which facilitate judicial capture.

The prospect that federal courts will further coopt antidiscrimination laws for regressive ends is not far-fetched. To the contrary, public officials and interest groups have broadcast this very plan.[121] For example, a coalition of rightwing think tanks and advocacy groups has argued that antiracist pedagogy violates the Civil Rights Act of 1964[122]—a talking point that has now entered Republican stump speeches.[123] In a similar vein, a district court in Virginia struck down a school admissions policy because the district considered the plan's racial impact—even though the school did not consider the race of individual students.[124] Multiple attorneys general have also foreshadowed a desire to repurpose Title VI as a tool to prohibit antiracist

120. *See* Charles M. Blow, *The G.O.P. is Making 'Critical Race Theory' the New 'Shariah Law'*, N.Y. TIMES (Jan. 5, 2022), https://www.nytimes.com/2022/01/05/opinion/critical-race-theory-gop.html [https://perma.cc/LK3P-VE46] ("The truth is that critical race theory is generally not taught in grade school, but that was never the point, in the same way that in the 2010s conservative lawmakers were never really concerned about what they called the threat of Shariah law in the United States when they introduced bills to ban it in American courts; what they wanted was to advance a racist, Islamophobic agenda.").

121. *See infra* notes 123–125 and accompanying text.

122. *See Coalition Calls on States to Increase Transparency, End Critical Race Theory in Schools*, HERITAGE FOUND. (Dec. 2, 2021), https://www.heritage.org/article/coalition-calls-states-increase-transparency-end-critical-race-theory-schools [https://perma.cc/CTK4-TYDC].

123. *See e.g.*, Kevin Nicholson (@KevinMNicholson), TWITTER (Apr. 18, 2022, 9:13AM), https://twitter.com/KevinMNicholson/status/1516042338346360835?s=20&t=mFmql4KvMeOARagsT0LlEA [https://perma.cc/EMQ7-4HC6].

124. *See* Denise Lavoie, *Dispute School Admissions Policy OK'd Pending Appeal*, AP News (Apr. 1, 2022), https://apnews.com/article/science-education-race-and-ethnicity-racial-injustice-virginia-234f6fe84887338a6e7bb6037537251e [https://perma.cc/SP2B-4YVV] (reporting that the Fourth Circuit Court of Appeals granted the school district's request to maintain its admissions policy pending appeal). The Supreme Court upheld the stay pending appeal, but at least three Justices appear amendable to the plaintiff's argument and district court's reasoning. *See* Coalition for TJ v. Fairfax Cty. School Bd. (Mon., Apr. 25, 2022), https://www.supremecourt.gov/orders/courtorders/042522zr_3fb4.pdf.

pedagogy and instruction.[125] And within Congress, Senator Marco Rubio has authored a bill that would revitalize Title VI's racially-hostile environment provision for similar ends.[126]

Were such an Act to pass—and enshrine legal protection for White students who experience discomfort discussing race—the law would do more than enlist a progressive law (Title VI) in a regressive project. It would accomplish this feat by appropriating a theory of harm (disparate impact) that racial justice advocates have long championed and conservative judges have long dismissed.

This recursive dynamic that binds legislative, discursive, and interpretive battles suggests that strategies of contestation and evasion, even if useful, are incomplete. They are incomplete, in large part, because they leave uncontested regressive efforts to appropriate the language of equality. To reclaim antiracism's moral authority, stakeholders should invoke Backlash Bills to unapologetically champion CRT (as an ingredient necessary to realize our highest egalitarian aspirations) and challenge mainstream curriculum that privileges the comfort, experience, and perspectives of white-identifying students. The Right has long recognized the power narratives hold to justify or discredit competing racial projects in America.[127] It is no surprise, therefore, that recent backlash has deployed the language of equality to stigmatize even modest antiracist efforts. Here, stakeholders on the Left might learn from the Right and reappropriate racially regressive laws for racially progressive ends. This begins, but does not end, with the argument that Backlash Bills support, if not compel, more CRT in the classroom.

IV. CRT OFFENSE: REGRESSIVE LAWS FOR PROGRESSIVE ENDS

Above, I surveyed existing Backlash Bills and located regressive lawmaking within a broader campaign of racial retrenchment. Below, I explore how stakeholders could harness Backlash Bills for racially progressive causes. To do so, I suggest that students, parents, or advocates might invoke such laws to challenge the absence, or justify the presence, of CRT in the classroom.

125. ATT'Y GENERAL'S OFFICE, MONT. DEPT. OF JUSTICE, VOL. 51, OPINION NO. 1 (May 27, 2021), https://media.dojmt.gov/wp-content/uploads/AGO-V58-O1-5.27.21-FINAL.pdf [https://perma.cc/9FHE-4YJ6].

126. Protecting Students from Racial Hostility Act, S. 2574, 117th Cong. (2021).

127. *See, e.g.*, Wallace-Wells, *supra* note 4 (observing how the Right has weaponized the term "critical race theory" to rally its base).

A. Wisconsin's Backlash Bill would Mandate More CRT

We can begin with Assembly Bill 411, a CRT Silent bill that Wisconsin's Republican-dominated Assembly passed in September 2021.[128] Among other provisions, the bill prohibits "teach[ing]" a series of banned "concepts."[129] These concepts include the proposition that "[o]ne race or sex is inherently superior to another race or sex."[130]

Wisconsin Democrats denounced the bill.[131] Gordon Hinz, the Assembly's Democratic minority leader, criticized the Bill as part of "a national movement to create a new boogeyman in the culture wars to use fear and resentment to motivate base voters."[132] LaKeshia Myers, a Democratic assembly member from Milwaukee, added that the Bill buttressed broader efforts to "defund education" and "sow seeds of division."[133] She also emphasized that CRT was not taught in Wisconsin's public K-12 schools.[134]

The Democrats are not wrong. But they could expand upon this strategy of contestation and evasion. Building on their own remarks, Hinz and Myers could have concluded as follows:

> Everyone knows the bill is meant to intimidate teachers who want to teach the truth—albeit uncomfortable—about our country and our state. Everyone knows the bill is part of a well-funded effort to defund public schools. Everyone knows our colleagues caricature Critical Race Theory to divide regular Wisconsinites. And they know that CRT is rarely, if ever, taught in our schools. *But what they don't appreciate is that their own bill—because it lauds core American commitments to antidiscrimination and racial equality—calls for more CRT in our schools, not less. And this is an outcome we should celebrate—because it will empower all of our students to improve the world in which they live and move use closer to the aspirations we, as Americans and Wisconsinites, hold most dear.*[135]

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128. Assemb. B. 411, 2021 Leg., 105th Sess. (Wis. 2021) (vetoed by Governor, Feb. 4, 2022); Journal of the Assembly, 105th Sess. 733 (Wis. 2021).

129. Wis. Assemb. B. 411 § 1; *see also* Feingold, *supra* note 7.

130. Wis. Assemb. B. 411 § 1(a); *see also* Feingold, *supra* note 7.

131. *See* Bauer, *supra* note 47.

132. *Id.*

133. *Id.*

134. *Id.*

135. The entire block quote is fictional. The non-italicized portion captures the essence of Hinz and Myers' actual statements. The italicized portion constitutes the rhetorical move I argue they could have, and should have, made. In all likelihood, Hinz and Myers denounced the bill because it was part of nationwide GOP efforts to chill even modest antiracist endeavors and

This rhetorical turn departs from common accounts that characterized the Wisconsin bill as a "CRT Ban." The Associated Press (AP) exemplifies this standard portrayal. In an article titled "Wisconsin Assembly passes critical race theory ban," the AP stated that AB411 would prohibit public schools "from teaching students and training employees about concepts such as systemic racism and implicit bias."[136] The Bill's proponents might embrace this framing and outcome. The Bill's opponents might concede it. But it betrays AB411's actual text.[137]

Consider, for example, a high school social studies class that begins a unit on corporate America.[138] The teacher provides basic facts about Fortune 500 CEOs: 92.6% are white, 1% are Black, 3.4% are Latinx, and 2.4% are Asian.[139] These disparities exist against a backdrop in which roughly 60% of the U.S. population is white, 14.2% is Black, 18.7% is Latinx and 7.2% is Asian.[140]

The teacher shares two additional facts. First, white men—roughly 35% of the population—hold 85.8% of CEO posts.[141] Second, of the eighty-three women who have become CEOs since 2000, seventy-two were white, thereby comprising 86% of all female CEOs this century.[142] As in our opening

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create a legal basis to target disfavored speech. Still, the bill's language invited this rhetorical response—which, at a minimum, could have further exposed its proponents' racial motivations.

136. *See id.*

137. *See* Feingold, *supra* note 7. As noted above, I am not suggesting that a well-grounded textual analysis determines how a bill like AB411 would shape conversations about racism in the classroom. *See* [cite] My point, rather, is that highlighting how AB411's text supports CRT can defuse regressive narratives that malign CRT and seek to discredit antracism as the new racism.

138. One could imagine many distinct but comparable examples in which students confront racial and gender disparities in domains spanning health outcomes, home ownership, the criminal legal system, and beyond.

139. *See* Richard L. Zweigenhaft, *Diversity Among Fortune 500 CEOs from 2000 to 2020*, WHO RULES AMERICA? (Jan. 2021), https://whorulesamerica.ucsc.edu/power/diversity_update_2020.html [https://perma.cc/UFW2-9VLV].

140. *See 2020 Census Illumninates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html. Neither the above figures, nor the methods the federal government employs to categorize (by race and/or ethnicity) or count the population is free from critique. *See, e.g.*, Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1703 (2003) (analyzing the "constitutive power of the census with respect to race); Tara Bahrampour, *2020 Census may have undercounted Black Americans*, new analyses say, THE WASHINGTON POST (Oct. 13, 2021), https://www.washingtonpost.com/dc-md-va/2021/10/13/2020-census-black-undercount/ (identitying concerns about inaccurate counts). Even if fraught, census data provides a useful metric and baseline for purposes of the above hypothetical.

141. *See* Zweigenhaft, *supra* note 139.

142. *Id.*

example, the statistics invite an inescapable question: Why do such glaring disparities exist?

One answer assumes that today's CEOs are the product of fair and unbiased systems that reward talent and hard work. Per this account, white men (relative to everyone else) and white women (relative to women of color) are over-represented as CEOs because they happen to possess more talent and work harder. This story, in other words, attributes the near-absence of CEOs of color to group-based differences. Some groups have what it takes; others do not.[143]

This explanation, albeit common to public discourse,[144] would concern many students and parents. Why? Because it implies that white men are inherently superior to all other groups (and white women inherently superior to women of color). Put differently, the message trades on racial and gender-based stereotypes to explain—and thereby legitimize—the status quo. This message also contravenes AB411, which prohibits educators from "teach[ing]" that "[o]ne race or sex is inherently superior to another race or sex."[145]

A question, therefore, is how the teacher could explain CEO demographics without violating the Republican bill. One path runs through CRT, an analytical framework that has long asked a similar question: why do profound racial disparities persist even when the law prohibits racial discrimination? Our teacher, in other words, could supplement the statistics with CRT scholarship that illuminates the myriad racial and gender (dis)advantages that render the CEO "tournament" far from fair and unbiased. Doing so would satisfy AB411 and, importantly, enrich the students' learning and enhance their ability to design a fairer and less-biased system.

More concretely, our teacher could assign Professor Cheryl Harris's seminal writings on the "whiteness of property"—work that exposes the often-invisible benefits whiteness confers, even to poor White people.[146] Professor Harris provides a useful point of entry, in part, because she identifies the benefits and limitations of whiteness.[147] Our teacher can surface white

143. Given pervasive racial stereotypes and dominant cultural narratives, exposure to bare statistics of racial or gender disparities can activate this "merit" story for many students. *See infra* note 78–79 and accompanying text; Jonathan P. Feingold, *Civil Rights Catch 22's*, 43 CARDOZO L. REV. (forthcoming 2022).

144. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1280 (2000).

145. Feingold, *supra* note 7. Note how a similar conclusion flows from language that prohibits race or sex "stereotyping." *See supra* notes 15–20 and accompanying text.

146. *See* Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1710-11 (1993)

147. Cheryl I. Harris, *Reflections on Whiteness As Property*, 134 HARV. L. REV. F. 1, 6 (2020) ("Whiteness does not confer immunity from disaster on all white bodies, however. Poor and working-class [W]hites suffer greatly in all areas; the gap between them and wealthier [W]hites is profound, and, by all metrics, growing.").

racial advantage without obscuring the structural barriers that prevent most Americans, regardless of their racial identity, from ever dreaming about a corner office.

From here, our teacher could invoke professor Kimberlé Crenshaw's pathbreaking work on intersectionality.[148] In so doing, she could invite her students to consider how racism interacts with sexism, classism and homophobia—among other structures of oppression.[149] She might also turn to Jerry Kang's work on implicit biases.[150] By folding in this scholarship, the teacher and students can explore how individuals and institutions often engage in race- and gender-based disparate treatment—even when they hold earnest egalitarian commitments.[151]

In short, AB411's text invites CRT into the classroom. And CRT's presence would empower our teacher to disrupt a causal story that assumes CEO white/male overrepresentation derives from some inherent white/male superiority. This includes introducing "concepts such as systemic racism and implicit bias"—the specific content that mainstream media suggests AB411 would ban.

B. New Hampshire's Backlash Bill Bans Teachers from Condoning Racial Profiling

In June 2021, New Hampshire's Republican-controlled legislature embedded a Backlash Bill within its annual budget bill ("HB2").[152] The backlash provisions, contained in sections titled "Right to Freedom From Discrimination in Public Workplaces and Education"[153] and "Prohibition on

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

149. Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2200 (2019).

150. *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

151. *See id.* at 1141 (describing research finding that even defense attorneys, "often ideologically committed to racial equality," show implicit biases similar to the general population).

152. *See* H.B. 2 § 297, 2021 Gen. Ct., Reg. Sess. (N.H. 2021).

153 *See* N.H. REV. STAT. ANN. § 354–A:29 (Westlaw through Ch. 18 of 2022 Reg. Sess.). Anti-CRT rhetoric took center stage in debates preceding its passage. As one example, Frank Edelbut, the Commissioner of New Hampshire's Department of Education, rehearsed anti-CRT talking points in an op-ed supporting the bill. *See* Frank Edelblut, *Teach Children About Racism, Not to be Racists*, N.H. UNION LEADER (June 13, 2021), https://www.education.nh.gov/news/teach-children-about-racism-not-be-racists [https://perma.cc/9DQ3-4RBS] ("Of course, it is Critical Race Theory that would distort our history, limit our speech through its cancel culture and divide us up by immutable characteristics, ignoring the inherent humanity of each individual.").

Teaching Discrimination"[154] do not explicitly mention CRT. Rather, as with other CRT Silent legislation, the text mandates that no public school student "shall be taught, instructed, inculcated or compelled to express belief in, or support for" four banned concepts.[155] To bolster these mandates, the legislature created private rights of action to enforce the prohibitions and attached severe penalties to violations.[156]

154. *See* N.H. REV. STAT. ANN. § 193:40 (Westlaw through Ch. 18 of 2022 Reg. Sess.)..

155. *See, e.g.*, *id.* at § 193:40(I)(a)-(d). The four banned concepts include:

> "I. That one's age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion or national origin is inherently superior to people of another age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin;
>
> II. That an individual, by virtue of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
>
> III. That an individual should be discriminated against or receive adverse treatment solely or partly because of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin; or
>
> IV. That people of one age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin cannot and should not attempt to treat others without regard to age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin."

Id.

156. *See, e.g.*, *id.* ("Any person claiming to be aggrieved by a violation of this section, including the attorney general, may initiate a civil action against a school or school district in superior court for legal or equitable relief, or with the New Hampshire commission for human rights as provided in RSA 354-A:34."); *see also* Complaint For Injunctive Relief at 4–5, Mejia v. Edelblut, No. 1:21-cv-01077 (D. N.H. Dec. 20, 2021) [hereinafter ACLU Complaint]. The Department of Education also created a webpage to facilitate complaints from parents "who believe that they, or their child, was [sic] discriminated against because their child's school was teaching and/or advocating" any of the banned concepts. *See Right to Freedom from Discrimination in Public Workplaces and Education*, N.H. DEP'T OF EDUC., https://www.education.nh.gov/who-we-are/deputy-commissioner/office-of-governance/right-to-freedom-from-discrimination [https://perma.cc/4MVE-7NF6]. Similar reporting forms are unavailable for violations of other antidiscrimination laws that apply to public schools. *See* ACLU Complaint, *supra*, at 5. A New Hampshire affiliate of the group Moms for Liberty subsequently offered a "CRT Bounty" for "the first person that successfully catches a public school teacher breaking this law." *See* Moms for Liberty NH (@Moms4LibertyNH), TWITTER (Nov. 12, 2021, 9:28 AM), https://twitter.com/Moms4LibertyNH/status/1459166253084467205 [https://perma.cc/UH8K-4YA6]; Moms for Liberty NH (@Moms4LibertyNH), TWITTER (Nov. 12, 2021, 11:27 AM), https://twitter.com/Moms4LibertyNH/status/1459196198951264264 [https://perma.cc/9Q4V-K2ZG].

Even if the budget did not name CRT, bill proponents made clear that CRT was on trial.[157] Concerned stakeholders responded in kind. James Morse, Sr., a school superintendent, countered with a combination of contestation and evasion.[158] He denied New Hampshire teachers teach CRT,[159] he flagged the bill's chilling effect,[160] and he suggested the bill "forbids teaching about discrimination."[161]

Other stakeholders took legal action. A coalition of educators, advocacy groups, and law firms reiterated similar concerns in a December 2021 lawsuit.[162] On the law, the complaint alleges that HB2 is unconstitutionally vague.[163] To support the claim, the plaintiffs contend that the banned concepts language "fails to provide fair notice of what educators can and cannot include in their course, and . . . invites arbitrary and discriminatory enforcement."[164] This characterization is not wrong. In all likelihood, the indeterminate text is by design. Since its enactment, private and public actors in New Hampshire have weaponized the bill to dissuade teachers from even basic conversations about race and racism.[165]

Still, the complaint could go further. Specifically, the plaintiffs could emphasize that their concern is not just that GOP officials will engage in arbitrary or discriminatory enforcement that targets disfavored speech. Beyond abandoning norms of neutral enforcement, GOP officials are likely to target the precise type of instruction that HB2, per its text, requires.

To appreciate this dynamic, consider New Hampshire's third banned concept, which mandates that "[n]o pupil . . . shall be taught . . . that an individual *should be discriminated against or receive adverse treatment solely*

157. This legislation is intertwined with rightwing efforts across the state to defund public education and defuse antiracist commitments. *See Lawmakers Pass Budget with Significant Implications for Public Education in New Hampshire*, REACHING HIGHER NH (June 25, 2021), https://reachinghighernh.org/2021/06/25/lawmakers-pass-budget-with-significant-implications-for-public-education-in-new-hampshire/ [https://perma.cc/YY24-DUSP]; Marjorie Porter, *Rep. Porter Is Upset at What's Happening to Public Schools*, InDepthNH.org (March 9, 2022), https://indepthnh.org/2022/03/09/op-ed-rep-porter-is-upset-at-whats-happening-to-public-schools/.

158. *See* James C. Morse Sr., Opinion, *NH's 'Divisive Concepts' Bill Designed to Hide and Deny Racism and Prejudice*, SEACOASTONLINE (Portsmouth), (June 4, 2021, 7:21 AM), https://www.seacoastonline.com/story/opinion/columns/2021/06/04/morse-nhs-divisive-concepts-bill-designed-hide-and-deny-racism/7504040002/ [https://perma.cc/4TBT-JGQU].

159. *Id.* ("Rather than pass a bill that addresses a problem that does not exist in New Hampshire, critical race theory, let's create a state where everyone's voice is heard in order to learn and grow.").

160. *Id.* ("HB 544 is designed to hide, obscure[,] and deny racism and prejudice.").

161. *Id.*

162. *See* ACLU Complaint, *supra* note 156, at 1–2.

163. *See id.* at 7.

164. *Id.* at 60.

165. *See id.* at 53–55.

or partly because of his or her . . . sex, gender identity, . . . race . . . religion, or national origin."[166]

The plaintiffs predict this provision will chill educators from teaching about reparations and affirmative action.[167] They also argue that this "concept may demand race neutrality and colorblindness."[168] The latter proposition is debatable.[169] But if one accepts that HB2 demands race neutrality and colorblindness, there is no apparent reason why that command would not cover all "discriminat[ion]" and "adverse treatment"—including forms of discrimination and adverse treatment that conservative lawmakers might support.[170] This would include, for example, racial or religious profiling, national origin discrimination, and anti-trans policies—that is, a range of policies that rightwing politicians tend to endorse. To get more concrete, HB2 appears to prohibit our social studies teacher from instructing that (a) it is appropriate for the police to profile Black men; (b) President Trump was right to target Muslim majority countries in his travel ban; or (c) sports teams should exclude trans athletes.

One could extend this argument even further. When read as a whole, HB2 invites a broad reading of discrimination that transcends the "intent" standard embedded in federal antidiscrimination law.[171] To begin, the relevant section opens by identifying "practices of discrimination" as a "matter of state

166. N.H. REV. STAT. ANN. § 193:40(1)(c) (Westlaw through Ch. 18 of 2022 Reg. Sess.) (emphasis added).

167. *See* ACLU complaint, *supra* note 156, at 52–53.

168. *Id.* at 37.

169. As I note above, *supra* text accompanying note 90, the notion that affirmative action comprises racial discrimination is a "highly contestable claim, not an empirical fact." Carbado, *supra* note 90, at 1132. For reasons I and others have outlined, affirmative interventions that attend to racism and sexism (among other structures of power) mitigate racial and gender (dis)advantages embedded within facially neutral processes. *See, e.g.*, Feingold, *supra* note 75, at 7; *see also* Carbado, *supra* note 90, at 1129; Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1066 (2006). For this reason, a more empirically grounded characterization would frame affirmative action as a prophylactic countermeasure that, on net, reduces discrimination and adverse treatment. *See* Kang & Banaji, *supra*, at 1066.

170. N.H. REV. STAT. ANN. § 193:40(I)(c) (Westlaw through Ch. 18 of 2022 Reg. Sess.); *see also* Wittington, *supra* note 15.

171. The Supreme Court has infused a discriminatory "intent" requirement into significant bodies of federal constitutional and statutory antidiscrimination law. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); Pers. Adm'r of Mass. V. Feeney, 442 U.S. 256, 279 (1979) ("['Discriminatory purpose'] implies . . . that the decision maker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."). *But see* Amelia M. Wirts, *Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination*, 58 B.C. L. REV. 809, 824–25, 827 (2017) (recognizing that "intent" does not require proof of a specific mental state if it embraces a causation-based model of discrimination).

concern."[172] The law further states that HB2 does not "prohibit racial, sexual, religious, or other workplace sensitivity training on the inherent humanity and equality of all persons and the ideal that all persons are entitled to be treated with equality, dignity, and respect."[173]

The plaintiffs contend this language adds ambiguity to the law.[174] On the one hand, HB2 appears ambiguous *if* one interprets it to ban instruction of *un*intentional discrimination. But if one interprets "discriminat[ion]" and "adverse treatment" to include all forms of disparate treatment (regardless of conscious intent), the preceding language bolsters the claim that New Hampshire is concerned with, and permits instruction of, discrimination regardless of its source. The GOP's Backlash Bill, in other words, supports—if not requires—teaching students about implicit biases. In practice, this suggests that HB2 prohibits teachers from advocating for a range of practices that produce a racially disparate impact, even absent discriminatory intent.

To be clear, much of HB2's language is subject to competing interpretations.[175] But ambiguity, even when present, is not a reason to forego the argument that bills like HB2 call for more CRT in the classroom. Nor does it render HB2's text materially different than other antidiscrimination mandates that proscribe or require conduct (e.g., "discrimination" or "equal protection of the laws"[176]) subject to competing interpretations. In fact, ambiguity makes such arguments more important; doing so is necessary to counter rightwing attempts to narrowly define and coopt indeterminate—but critical—concepts like "racism" and "discrimination." In other words, without asserting the textual and moral case for CRT, it becomes difficult to defuse the politically potent but factually unmoored claim that CRT (and antiracism more broadly) contravenes basic antidiscrimination norms.

Last, a comprehensive "legal" response requires more than adversarial litigation that challenges the law. To further weaponize HB2 (as a tool to chill antiracist speech), New Hampshire's GOP erected an enforcement

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172. N.H. REV. STAT. ANN. § 354–A:29(I) (Westlaw through Ch. 18 of 2022 Reg. Sess.). Teaching about implicit biases also furthers the goal of Banned Concept 2, which prohibits teaching that anyone "by virtue of his or her . . . race . . . is inherently racist . . . whether consciously or unconsciously." § 354–A:31(II). The implicit bias literature reveals that our biases are not inherent to us, but rather the product of environments in which we live and the cultural messages we consume. *See* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 511, 514–15 (2010).

173. § 354–A:29(II).

174. ACLU Complaint, *supra* note 156, at 37.

175. *See* Haley Yamada, *Teachers in New Hampshire Face New Legal Threats for Teaching So-called 'Divisive Concepts on Race: 'It's Psychological Warfare'*, ABC NEWS (Nov. 16, 2021, 7:45 PM), https://abcnews.go.com/US/teachers-hampshire-face-legal-threats-teaching-called-divisive/story?id=81213142 [https://perma.cc/DC9D-HYET] (describing how the law's ambigious language is problematic for teachers).

176. U.S. CONST. amend. IX, § 1.

infrastructure to augment the law's private right of action and penalties.[177] These provisions are meant for parents (among others) who would wield HB2 to intimidate and harass educators that teach about race and racism.[178] But the enforcement provisions are available to all—including advocates who believe schools should embrace antiracist and culturally competent instruction.[179] Concerned stakeholders, in turn, could invoke HB2 to challenge instruction, lesson plans, or curriculum that, *inter alia*, condones racial profiling, defends Muslim travel bans, or justifies anti-trans policies.

As a practical matter, there are downsides to such a strategy. Given New Hampshire's political landscape, it is unclear whether credible claims (that advance progressive values) could even prevail.[180] Moreover, Backlash Bills—in New Hampshire and elsewhere—are part of a broader campaign to dismantle public education. Invoking HB2, even if done to promote a more inclusive classroom, could—in a perverse way—further a regressive educational agenda. Still, the current moment—defined by unrelenting attacks on antiracism itself—calls for an equally committed response. That response should include what might appear an unconventional strategy: wield "anti-CRT" laws for pro-CRT ends.

V. CONCLUSION

On January 19, 2022, multiple outlets published headlines stating that Florida might ban lessons that "make [W]hite students feel 'discomfort.'"[181] The news went viral.[182] Most critical responses condemned the bill's design

177. *See* Ethan Dewitt, *Uproar over Form to Report Teachers Puts State's Commission for Human Rights in the Spotlight*, N.H. BULL. (Nov. 18, 2021, 5:15 AM), https://newhampshirebulletin.com/2021/11/18/uproar-over-form-to-report-teachers-puts-states-commission-for-human-rights-in-the-spotlight/ [https://perma.cc/NP5H-Z4UC].

178. *See* Yamada, *supra* note 175 ("If someone believes that a teacher has violated the law, they can sue the school district[,] and the New Hampshire State Board of Education can discipline a teacher by terminating their position or stripping their teaching license.").

179. *See* Dewitt, *supra* note 177; N.H. REV. STAT. ANN. § 354–A:34.

180. *See* Valerie Strauss, *He Home-Schooled His 7 Kids. Now He's Tapped as Education Commissioner of New Hampshire*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/26/he-home-schooled-his-7-kids-now-hes-tapped-as-education-commissioner-of-new-hampshire/ [https://perma.cc/EW2S-DYP4]. Frank Edelblut, New Hampshire's Education Commissioner, has trafficked in anti-CRT rhetoric and implemented policies that erode New Hampshire's public education system. *Id.*

181. *See, e.g.*, John Kennedy, *Florida Could Ban Lessons About Discrimination That Make White Students Feel 'Discomfort'*, USA TODAY (Jan. 19, 2022, 5:32 PM), https://www.usatoday.com/story/news/education/2022/01/19/florida-bill-could-restrict-lessons-on-discrimination-at-school/6583928001/ [https://perma.cc/7KFL-Y95R].

182. *See* Bess Levin, *Florida Advances Bill That Would Ban Making White People Feel Bad About Racism, and No, That's Not A Joke*, VANITY FAIR (Jan. 21, 2022),

and desired effect.[183] One reaction, from Nikole Hannah-Jones, took a different turn.[184] Specifically, Hannah-Jones tweeted the following:

> The bill prohibits lessons that make kids feel 'discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race.' I imagine lessons that glorify enslavers and colonizers and downplay the contributions of POC would do just that. So, ok, sure![185]
>
> To test how race-neutral the DeSantis bill and others like it are, Black, Latino[,] and Indigenous parents should flood these states with lawsuits about lessons that make their children feel discomfort, or that one race is superior to another and see how it goes.[186]

Hannah-Jones did not name it as such, but her Tweet advanced the same message I offer here. To meet this moment and counter the anti-antiracist onslaught, concerned stakeholders should take a page from the racial retrenchment playbook. Simply put, they should reappropriate racially regressive laws for racially progressive ends.[187]

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https://www.vanityfair.com/news/2022/01/florida-sb-148-racism-discomfort [https://perma.cc/4FMX-3QMZ].

183. *See, e.g.*, *id.*

184. *See* Nikole Hannah-Jones (@NHannahJones), TWITTER (Jan. 19, 2022, 5:42 PM), https://twitter.com/nhannahjones/status/1483929906732011524/ [https://perma.cc/59CF-FKBL].

185. *See id.*

186. *See* Nikole Hannah-Jones (@NHannahJones), TWITTER (Jan. 19, 2022, 5:30 PM), https://twitter.com/nhannahjones/status/1483929906732011524/ [https://perma.cc/59CF-FKBL].

187. A recent Washington Post opinion piece raised a similar idea. Greg Sargent, Opinion, *Florida's Vile 'Groomer' Law May Soon Blow Up in DeSantis's Face*, WASH. POST (Apr. 18, 2022, 10:22 AM) (https://www.washingtonpost.com/opinions/2022/04/18/desantis-dont-say-gay-anti-groomer-lawsuit) [https://perma.cc/YW4Q-RC4E] ("The Florida law that Republican Gov. Ron DeSantis signed last month empowers parents to take actions against offending school boards. But lawyers challenging it now tell me they think liberal parents might use this same tool to wage guerrilla legal resistance designed to expose its true intentions, making it more legally vulnerable."); *see also* Matthew S. Schwartz, *Florida man asks schools to ban Bible following state's efforts to remove books*, NPR (Apr. 26, 2022), https://www.npr.org/2022/04/26/1094740651/florida-man-asks-schools-to-ban-the-bible-following-the-states-efforts-to-remove (describing petitions sent by Florida resident that invoked a Florida Backlash Bill to request school superintendents remove the bible from school libraries, classrooms, and other instructional materials).