"THE STOP WOKE ACT": HB 7, RACE, AND FLORIDA'S 21ST CENTURY ANTI-LITERACY CAMPAIGN

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ABSTRACT

Florida's Stop the Wrongs to Our Kids and Employees Act (Stop WOKE) took effect July 1, 2022. The new law, known as House Bill 7 (HB 7), regulates how race issues can be taught in the K-20 educational system and imposes stiff sanctions for violations. This Article provides an incisive analysis of HB 7. With a particular focus on the law school classroom, the Article argues that HB 7 is a modern-day anti-literacy law. It begins with a discussion of anti-literacy laws adopted during slavery and how these laws prohibited enslaved Blacks from learning to read and write. The historical analysis establishes that HB 7 is a twenty-first century iteration of antebellum anti-literacy laws. While early anti-literacy laws prohibited basic literacy, HB 7 prohibits teaching substantive literacy about race. Anti-literacy provides a framework for understanding the breadth and impact of HB 7. This Article investigates HB 7 through the lenses of racial threat and critical race theory and consequently helps predict and explain legislative responses such as HB 7. Through a series of hypotheticals, the far-reaching problems of HB 7 are revealed. At full bore, HB 7 will drastically reduce race-related instruction and in doing so, disempower race scholarship and race scholars in the state of Florida.

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INTRODUCTION

Nine months before Rosa Parks refused to give up her seat on a Montgomery, Alabama city bus, Claudette Colvin, a 15-year-old Black high school student refused to change her seat on a different Montgomery bus. On March 2, 1955, after school ended early, Claudette walked to the bus stop. When the number 64 bus arrived, she walked onto the bus and found a seat. When more White[1] passengers boarded the bus, the driver ordered Claudette to relinquish her seat and move to the back of the bus. Claudette did not move.[2] The driver phoned the Montgomery Police Department. When they arrived, the officers dragged the teenage girl off the bus, handcuffed her, and took her to jail, where she remained in a cell for hours. When Claudette was later asked why she refused to move to another seat, as Montgomery's segregation laws required, she responded that she had been taught that Blacks had protections as citizens. She said that in school, "We had been studying

1. The author has chosen to capitalize the W in White throughout this article. As such, some quotes have been changed to reflect that stylistic decision.

2. Colvin says that in that moment it felt as if Harriet Tubman and Sojourner Truth had pinned her to her seat and dared her to move. *March 2, 1955: Claudette Colvin Refuses to Give Up Her Bus Seat*, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/claudette-colvin/ [https://perma.cc/P8WJ-TZG8]. *See generally* PHILIP HOOSE, CLAUDETTE COLVIN: TWICE TOWARD JUSTICE (2009).

the Constitution . . . I knew I had rights."[3] Claudette's response underscores the value of schooling that exposes students to history and rights: the freedom in learning.

Claudette Colvin's story serves as a touchstone for this Article. It symbolizes the power of education to enlighten and expose students to myriad understandings and perspectives on individuals, groups of people, and systems. Her experience dramatizes the connection between education and democratic participatory action. Her story provides one of the many threads that links state action with anti-literacy. For centuries, legislation has been enacted to disappear educational curricula that centers on the history and rights of African American people. Anti-literacy laws fueled an underground literacy economy that saw enslaved Blacks risk their lives and limbs for education and possible freedom. Out of public view, Black people who learned to read and write had to hide this knowledge. Contemporary state laws that restrict educational knowledge have a deep and troubling connection to this history.

The central goal of this Article is to establish anti-literacy as a framework for understanding Florida's Stop the Wrongs to Our Kids and Employees Act (Stop WOKE), also known as House Bill 7 (HB 7), which prohibits certain forms of race-related teaching and training in the state of Florida.[4] This Article demonstrates the clear nexus between antebellum anti-literacy laws and HB 7, the modern-era counterpart. Anti-literacy laws have been an essential way that Black people have been denied educational access. These laws, which were initially aimed at prohibiting enslaved Blacks from learning core literacy skills, have had several iterations, including the Black codes and Jim Crow laws.

This Article charts a broad historical timeline for anti-literacy legislation. At the outset, it is important to state that there are different types of literacies. This Article uses the term *basic literacy* to refer to reading and writing skills.[5] Historically, anti-literacy laws began as explicit prohibitions that made it unlawful for enslaved Blacks to learn to read or write. These laws were directed at the foundational skills necessary for a person to be considered literate. White enslavers believed that Black literacy posed a potent threat to slavery. They converted this fear into anti-literacy legislation. Examples include the slave codes and Black codes. This Article also focuses on another form of literacy, *substantive literacy*. Substantive literacy refers to teaching and learning about specific curricula subjects and perspectives. Laws that ban or control exposure to this type of knowledge are attacks on substantive literacy. These laws are a modern-day iteration of basic

3. *Id.* Notably, the sit ins by both Claudette Colvin and Rosa Parks took place a year after the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which unanimously held that separate but equal facilities were inherently unequal and violated the Equal Protection Clause of the Fourteenth Amendment.

4. H.R. 7, 124th Leg. Reg. Sess. (Fla. 2022) (amending FLA. STAT. §§ 760.10, 1000.05, 1003.42, 1006.31, 1012.98, 1002.20, 1006.40 (2022) (hereinafter cited in statutory form)). The law is detailed in Part III of the Article.

5. *See* discussion *infra* Part I.

literacy bans. Notably, their expanse is broader—these laws apply to all races. Florida's HB 7 legislation is an example of a substantive literacy ban.[6]

While the format and focus of anti-literacy laws have evolved over time, in all relevant ways, the contemporary manifestations of these laws operate to achieve the same goals as their predecessors. Their shared objective is to minimize educational access to the truth about U.S. racial history and, in doing so, to reduce Black people's access to political and social power. Teasing out the common anti-literacy threads that connect past and contemporary laws enables and invites a more rigorous analysis of HB 7 and related laws. These new laws do not constitute a new problem. They are not simply a reaction to Black Lives Matter and the social protests that erupted in 2020 after George Floyd's murder. By identifying the integral connections between HB 7 and its legislative predecessors, this Article unpacks the legal framework and particular racialized harms of anti-literacy laws.

An anti-literacy framework reveals that bans on educational access are forms of state orthodoxy. They do not promote "individual freedom."[7] Today, "anti-literacy" refers not to slave code prohibitions against learning rudimentary skills (e.g., how to read, how to write), but instead to laws like HB 7 that are designed to keep critical histories and rigorous racial critiques at bay. This process is done by assigning the label "racist" or "Marxist" to classes, assignments, and reading materials that investigate racial issues using non-mainstream paradigms. By contrast, theories and concepts that endorse racelessness, such as "colorblindness," are promoted as objective and thus preferable.[8]

A critical part of understanding the anti-literacy framework is observing its trajectory. In its initial forms, exemplified by the slave codes, anti-literacy laws were primarily focused on outlawing the education of enslaved Blacks.[9] Over the centuries, anti-literacy was reflected in the postbellum era as separate-but-equal legislation, the underfunding of Black schools, and literacy tests for Black voters.[10] The laws were designed to block Black literacy and, in this way, to strengthen the White racial hierarchy. Today, anti-literacy laws have been expanded to include the educational curriculum taught to White children. The angry, volatile, and sometimes physically threatening responses to critical race theory

6. *See infra* text accompanying note 85–88.

7. The title of HB 7 is the "Individual Freedom" Act.

8. *See* H.R. 7, 124th Leg. Reg. Sess. (Fla. 2022) (amending FLA. STAT. §§ 760.10, 1000.05, 1003.42, 1006.31, 1012.98, 1002.20, 1006.40 (2022)).

9. Throughout the article, references are made to slave codes, Black Laws, Black codes, and Jim Crow. Slave codes refer to the laws that regulated the movement and punishment of enslaved Blacks during the period of U.S. chattel slavery. Black Laws refer to the laws that regulated the movement and economic access of Black people in non-slave states. Black codes refer to laws that regulated Black lives, in the post-bellum period. Jim Crow refers to a system of laws and customs that imposed strict racial segregation in public life, from water fountains and swimming pools to chain gangs and cemeteries. *See, e.g.*, RUSSELL-BROWN, THE COLOR OF CRIME: RACIAL HOAXES, WHITE CRIME, MEDIA MESSAGES, POLICE VIOLENCE AND OTHER RACE-BASED HARMS 51–71 (3d ed. 2021).

10. *See infra* notes 18 (Jim Crow, literacy tests) and 31 (underfunding of Black schools).

(CRT) provide an example.[11] In 2021, across the nation, mostly White politicians, parents, educators, and school boards sounded alarms regarding what their children were learning about race, racism, U.S. history, the founders, and the workings of state systems.[12] One goal of the anti-CRT pushback has been to mute curricula that use a critical lens to evaluate American history. The aim is to keep this material away from White children, thereby maintaining the racialized status quo. While the focus has shifted and expanded to include White students, the bans which deny specific forms of educational knowledge and exposure impact students of all races.

While HB 7 applies much more broadly, the primary focus of this Article is on HB 7's impact on race-related instruction in undergraduate, graduate and professional school classrooms, with particular attention to the law school classroom. The article also examines how this law impacts law professors and legal instruction.[13] As HB 7's focus on post-secondary instruction makes it distinctive, its particular role in higher education is important to analyze.[14] While the Article makes references throughout to the First Amendment,[15] the free speech limitations of HB

11. *See, e.g.*, Gabriella Borter, Joseph Ax & Joseph Tanfani, *School Boards Get Death Threats Amid Rage Over Race, Gender, Mask Policies*, REUTERS (Feb. 15, 2022, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-education-threats/ [https://perma.cc/P9TQ-3VAG].

12. *See, e.g.*, Katie Reilly, *Culture Wars Could be Coming to a School Board Near You*, TIME (Mar. 23, 2022, 6:00 AM), https://time.com/6159177/school-board-elections-covid-19-critical-race-theory [https://perma.cc/Y8BY-MMGT]; Daniel Payne, *Critical Race Theory Turning School Boards Into GOP Proving Grounds*, POLITICO (Sept. 8, 2021, 4:30 AM), https://www.politico.com/news/2021/09/08/critical-race-theory-school-boards-510381 [https://perma.cc/U3PF-NSNB].

13. Throughout the Article "professor" and "instructor" are used interchangeably.

14. The public debate about race-related instruction has largely centered on grades K-12. Notably, however, the reach of HB 7 also includes teaching and learning in undergraduate and professional school programs. This Article's focus on college and law school instruction reflects HB 7's range. It is also noted that HB 7 is not limited to classroom instruction. It also covers "employee training."

15. Florida Statute Section 1004.097(3)(a) states the following regarding the right to free speech:

> Expressive activities protected under the First Amendment to the United States Constitution and Art. I of the State Constitution include, but are not limited to, any lawful oral or written communication of ideas, including all forms of peaceful assembly, protests, and speeches; distributing literature; carrying signs; circulating petitions; faculty research, lectures, writings, and commentary, whether published or unpublished; and the recording and publication, including the Internet publication, of video or audio recorded in outdoor areas of campus. Expressive activities protected by this section do not include defamatory or commercial speech.

FLA. STAT. § 1004.097(3)(a) (2022).

7 are not a main focal point.[16] HB 7 does, however, raise a host of First Amendment issues and concerns.[17]

This Article is presented in five Parts. Part I focuses on the history of anti-literacy laws. The discussion reviews the evolution of anti-literacy laws, beginning with the slave codes. During slavery, these slave codes prohibited teaching enslaved Black people to read and write; they also punished the publication and transportation of abolitionist literature that would stir enslaved Blacks to seek freedom.[18] These anti-literacy laws punished enslaved Blacks, free people of color, and Whites.[19] Over time, the seeds of these early literacy bans could also be seen in the Black codes and in other postbellum attempts to deny equal school funding for Black children, which caused low Black literacy rates. After the Thirteenth Amendment was passed, literacy tests were used to minimize the number of Black voters. Anti-literacy campaigns also flourished in the Jim Crow era.[20]

Part II uses two theoretical approaches to analyze the anti-literacy laws. The first is the racial threat hypothesis.[21] At its core, this theory predicts that the increase in size of the Black population will impact how Whites view punitive criminal legal policies.[22] That is, there is a positive correlation between an expanding Black demographic and the popularity of White support for harsh criminal sanctions. The second theoretical lens is CRT. The discussion is a consideration of the role of interest-convergence and interest-divergence in the passage of anti-literacy laws. As the discussion establishes, over time anti-literacy laws developed beyond basic prohibitions against learning to read and write. They expanded to regulate classroom subject-matter and remove or reduce certain historical and political perspectives. This section examines CRT scholarship that investigates how race

16. For a discussion of HB 7 and free speech issues, see Keith E. Whittington, *Professorial Speech, the First Amendment, and Legislative Restrictions on Classroom Discussions*, 58.2 WAKE FOREST L. REV. (forthcoming), https://ssrn.com/abstract=4188926 [https://perma.cc/C67B-LHGB].

17. Minutes after the bill was signed into law, five plaintiffs filed a lawsuit arguing that it violates the First and Fourteenth Amendments. Ana Goñi Lessan, *Minutes After Bill is Signed, Lawsuit Filed Against DeSantis for 'Stop WOKE Act*, TALLAHASSEE DEMOCRAT (Apr. 22, 2022, 3:31 PM), https://www.tallahassee.com/story/news/2022/04/22/stop-woke-act-lawsuit-desantis-florida-teachers/7412909001 [https://perma.cc/Q39B-698B]; Complaint at 1, Falls v. DeSantis, 609 F. Supp. 3d 1273 (N.D. Fla. 2022) (No. 22CV166-MW/MJF).

18. *See* RUSSELL-BROWN, *supra* note 9, at 51–71; E. Jennifer Monaghan, *Reading for the Enslaved, Writing for the Free: Reflections on Liberty and Literacy*, 108 PROCEEDINGS AM. ANTIQUARIAN SOC'Y 309 (2000).

19. Monaghan, *supra* note 18, at 333.

20. *See, e.g.*, Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HISTORY (May 13, 2021), https://www.history.com/news/jim-crow-laws-black-vote [https://perma.cc/H4AZ-F7R9]; *Separate is Not Equal: Brown v. Board of Education*, SMITHSONIAN NAT'L MUSEUM OF AM. HIST., https://americanhistory.si.edu/brown/history/1-segregated/white-only-1.html [https://perma.cc/37S4-YNMH] (last visited Feb. 25, 2023).

21. *See Generally* HUBERT BLALOCK, TOWARD A THEORY OF MINORITY-GROUP RELATIONS (1967).

22. *Id.* at 2.

impacts educational policy.[23] It also examines backlash[24] and "frontlash,"[25] as explanations for contemporary educational bans.

Part III identifies the sections of HB 7 that focus on college and university instruction. Seven hypothetical scenarios are presented to highlight both the ambiguity and problematic breadth of HB 7. These hypotheticals raise questions that are particularly relevant to law school professors and the law school classroom. This Part also addresses the broad range of sanctions—against individuals and universities—put in place for violations of the law. The litigation sparked by HB 7 is noted in this section. The discussion examines the wide web of Florida laws that support HB 7 and enhance its power to expand the anti-literacy climate.

Part IV explores the potentially long-term and far-reaching impact of HB 7 on the educational curriculum available at Florida universities. Specifically, this Part looks at how the presence of HB 7 exists as a threat to instructors who teach courses that address subjects within its legislative bullseye. These threats may manifest in a rising decline by instructors to teach these subjects and, most worrying, the ultimate removal of "controversial" race-related courses from the university curriculum. HB 7 is a legislative attempt to delegitimize race scholars and race scholarship. Thus, the law determines not only which courses are offered, but whether professors who teach particular subjects remain at Florida universities.

Part V, the final section, considers the role of alternative and supplemental educational spaces as channels for learning and sharing the histories of marginalized racial groups, outside of the formal educational context. Over generations, these spaces have played a vital role in keeping these histories alive. These spaces have a notable contemporary resonance—in view of the legislative attempts to ban racial history from the public school and university classroom.

I.
HISTORY OF ANTI-LITERACY LAWS

In *Fugitive Pedagogy*, education professor Jarvis Givens examines the lengths to which White society went to minimize and, in effect, outlaw the teaching of African American history.[26] Across the South in particular, these efforts were met with strong pushback from Black educators who dedicated themselves to teaching their students a counter Black history narrative—a history not centered

23. *See Generally* David Gillborn, *Racism as Policy: A Critical Race Analysis of Education Reforms in the United States and England*, 78 EDUC. F. 26 (2014).

24. *See Generally* Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER, SOC. JUST. 61 (2021).

25. *See generally* Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230 (2007).

26. JARVIS R. GIVENS, FUGITIVE PEDAGOGY: CARTER G. WOODSON AND THE ART OF BLACK TEACHING (2021).

on White people and Whiteness.[27] State boards of education mandated preapproved K-12 curriculum for classroom instruction.[28] These required lessons sought to quell any attempts by teachers to teach American history in ways that would include the input and stories of Black people and Black cultural life. These state laws reflected the deeply held belief that educated Black people posed a radical threat to the maintenance of a White supremacist society.

Responses to this threat took many forms. One reaction was the passage of legislation that required teachers to sign an anti-NAACP oath.[29] Teachers who refused to sign the oath would lose their jobs.[30] Another reaction by states was to refuse to fund Black schools.[31] There was virulent opposition to Black education. In many instances, there was a vigilante retort to Black education: White people burned down Black schools.[32]

Professor Givens details how Black educators responded to these restrictive laws by carving out Black-centered educational spaces and practices—a "fugitive pedagogy."[33] African Americans developed systems of learning and education that worked around the existing oppressive political and educational framework,

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27. *See, e.g.*, VANESSA SIDDLE WALKER, THE LOST EDUCATION OF HORACE TATE: UNCOVERING THE HIDDEN HEROES WHO FOUGHT FOR JUSTICE IN SCHOOLS (2018); GLENDA GILMORE, GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920 (1st ed. 1996); Diedre Houchen, *An "Organized Body of Intelligent Agents," Black Activism during De Jure Segregation: A Historical Case Study of The Florida State Teachers Association*, 89 J. NEGRO EDUC. 267 (2020).

28. GIVENS, *supra* note 26, at 1; STATE DEP'T EDUC. OF LOUISIANA, LOUISIANA HIGH SCHOOL STANDARDS MANUAL OF ORGANIZATION AND ADMINISTRATION 67–74 (1929) (section XI on Social Sciences).

29. *See* Walter F. Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371, 380 n.40 (1959) (citing the 1956 Session Laws of South Carolina, Act No. 741).

30. Candace Cunningham, *"Hell is Popping Here in South Carolina": Orangeburg County Teachers and Their Community in the Immediate Post-Brown Era*, 61 HIST. OF EDUC. Q. 35, 45 (2021). For instance, applications to teach in South Carolina's Elloree school district included the following questions:

> Do you belong to the NAACP?
>
> Do you support the NAAACP in any way (money or attendance at meetings)?
>
> Do you favor integration of races in schools? […]
>
> Do you believe in the aims of the NAACP?

It also states, "If you should join the NAACP while employed in this school, please notify the Superintendent and Chairman of the Board of Trustees." *Id*. at 46. *See also*, Murphy, *supra* note 29, at 371–90.

31. *See, e.g.*, ADAM HARRIS, THE STATE MUST PROVIDE: WHY AMERICA'S COLLEGES HAVE ALWAYS BEEN UNEQUAL—AND HOW TO SET THEM RIGHT 4, 211–13 (2021) (arguing that Historically Black Colleges and Universities are entitled to reparations for centuries of underfunding).

32. These practices occurred during slavery and post-bellum. For instance, some states, such as South Carolina, had laws that rewarded informants who told authorities of schools for enslaved Blacks. *See, e.g.*, E. Jennifer Monaghan, *Reading for the Enslaved, Writing for the Free: Reflection on Liberty and Literacy*, 108 PROC. AMER. ANTIQUARIAN SOC'Y 309, 335 (1998), https://www.americanantiquarian.org/proceedings/44525153.pdf [https://perma.cc/G9SH-4TUJ]. From 1866 to 1876, more than 600 Black schools in the South were burned down. GIVENS, *supra* note 26, at 4.

33. GIVENS, *supra* note 26, at 2–3.

one that demeaned and minimized Black people's intelligence,[34] Black people's contributions to American life,[35] and Black life in general. In this hostile environment, Black people had to "snatch"[36] their education—a concept to which this article returns in Part V. This metaphor captures the laws that made literacy a crime for Blacks, which meant they had to hide their attempts to learn to read and write. It also captures the reality that education Blacks had access to was often fragmented and piecemeal. Further, to "snatch" describes how Black people have had to fight to learn and fight to tell the full history of race in America. Over centuries, the law has been used to disable Black literacy and minimize Black perspectives on American history.

A. Slave Codes & Black Laws as Prologue

Educational practices that both minimize the role of Black people in the formation and building of the United States and deny Black literacy are legacies of the slave codes. The slave codes are the starting point for analyzing how laws limited opportunities for Black literacy. Often, these laws were tied to religion and other social forces. Under the slave codes, state laws prescribed punishment for anyone engaged in activity that promoted literacy for enslaved Blacks. Punishment targeted enslaved Black people, free Black people, and White people.[37] Slave code legislation in eleven states and the District of Columbia demonstrates how laws were used to segregate and punish people who helped Blacks learn to

34. *See generally id*.

35. GIVENS, *supra* note 26, at 134–37 (discussing the "American Curriculum" that minimized Black contributions, for example, "[t]hat Negro music and other contributions to culture in America were copied from the white man for the Negro has no background worthwhile and is mentally inferior to other races").

36. GIVENS, *supra* note 26, at 27 (quoting Carter G. Woodson, stating that the enslaved got their education by "snatching learning in forbidden fields"). The snatching metaphor is also found in the writings of Francis Ellen Watkins Harper, an abolitionist and teacher. She states that some enslaved Blacks "tried to steal a little from the book. And put words together, and learn by hook or crook." *Id.*

37. *See, e.g.*, *The Anti-Slavery Bugle*, *reprinted in* J. Clay Smith, *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077 app. at 1107, 1108, 1111 (1994) (quoting state laws prohibiting literacy instruction for enslaved people from Mississippi, Louisiana, and Virginia). *See also* Ala. Slavery Code of 1833 § 31, *reprinted in* A DIGEST OF THE LAWS OF THE STATE OF ALABAMA: CONTAINING ALL THE STATUTES OF A PUBLIC AND GENERAL NATURE, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY, IN JANUARY 1833 at 397 (John G. Aikin ed., 2d ed. 1836) ("Any person who shall attempt to teach any free person of color, or slave, to spell, read or write, shall, upon conviction thereof by indictment, be fined in a sum not less than two hundred fifty dollars, nor more than five hundred dollars."); *Judge Jay's Inquiry*, 1 ANTI-SLAVERY RECORD 52, 54 (1835) ("In Virginia, should free negroes or their children assemble at a school to learn reading and writing, any justice of the peace may dismiss the school, with twenty stripes on the back of each pupil."); *id* at 54–55 ("In Louisiana, the penalty for instructing a free black in a *Sunday School*, is, for the first offence, five hundred dollars; for the second offence, DEATH!!").

read and write.[38] Black literacy was a threat to the institution of slavery.[39] It held the potential to fill a person up with thoughts of freedom, rights, and justice.

In the 1700s, reading and writing, the core components of literacy, were viewed as separate and distinct skills.[40] During colonial times, it was lawful in some places for enslaved persons to learn to read.[41] In fact, "reading instruction" was viewed as an important way to spread Christianity.[42] The more people there were who could read, the more people there were who would have access to the Bible and its teachings.[43] Further, many Southern Christians believed that the Bible authorized slavery[44] and facilitated docility.[45] In contrast, it was unlawful to teach an enslaved person how to write.[46] This prohibition was viewed as a security measure to ensure that enslaved people would not be able to write their own passes to leave the plantation and thereby enable their own escape.[47]

In time, however, slave holders voiced louder objections to allowing any form of literacy for enslaved people. By the 1820s, slave-holding states began to view reading as a subversive activity.[48] This shift in perspective is explained by four interrelated factors: (1) Fears that enslaved persons would work together and plan their escape; (2) Concerns about the increased calls for abolition; (3) Fears that enslaved Black Christians would lead anti-slavery revolts;[49] and (4) Concerns about published writings by free Black people speaking out against slavery.[50] The enslavers' responses were unequivocal and certain. Beyond legislation that prohibited teaching enslaved persons to read or write, some states adopted laws that prohibited the writing, printing, and circulating of material that would "excite disaffection"[51]—material that might encourage enslaved persons to seek freedom or

38. Smith, *supra* note 37, at 1105–13.

39. *See, e.g.*, Monaghan, *supra* note 32, at 326 ("From roughly 1820 on, the conviction that on the part of slaveholders that reading was a subversive activity would become the dominant one[.]").

40. *Id.* at 316.

41. *Id*. at 316–18. Nonetheless, there were many other laws restricting the freedom-seeking actions of enslaved people. For instance, in response to the 1739 Stono Rebellion, which took place in South Carolina, both South Carolina and Georgia enacted laws that limited enslaved Black peoples' access to canoes and horses (as possible means of escape). *Id.*

42. *Id.* at 314–16.

43. *Id.* at 321.

44. *Id.* at 324.

45. *Id.* at 321.

46. *Id.*

47. *Id.* at 317.

48. *Id.* at 326.

49. *Id.* at 326. *See, e.g*., HERBERT APTHEKER, NAT TURNER'S SLAVE REBELLION: INCLUDING THE 1831 "CONFESSIONS" (2006). Other Black people, some of whom had not been enslaved, initiated rebellions. *See also* DAVID ROBERTSON, DENMARK VESEY: THE BURIED STORY OF AMERICA'S LARGEST SLAVE REBELLION AND THE MAN WHO LED IT (2000).

50. *Id.* at 326. *See, e.g*., DAVID WALKER, APPEAL TO THE COLOURED CITIZENS OF THE WORLD (1829).

51. *Id.* at 331–32.

otherwise denounce slavery.[52] Notably these objections were anchored in concerns that enslaved Black people would gain knowledge, directly or indirectly,[53] that would alter their worldviews. These laws are early examples of bans against substantive literacy.

Additional rationales were proffered to discourage and outlaw Black literacy. One narrative claimed that anti-literacy benefitted Black people.[54] In 1831, an official of the American Colonization Society said that free and enslaved Black people should be held "in the lowest state of degradation and ignorance," because any attempts to acquire literacy and education would inevitably fail.[55] Even as some people suggested that degradation was in the best interests of enslaved people, degradation was an integral and intentional part of the maintenance of slavery. By design, enslaved persons were mistreated and denied rights so they could not ably fight against the chattel slavery system.

In 1829, Georgia made it unlawful for "any slave, negro, or free person of colour or any white person" to teach "any slave, negro, or free person of colour to read or write either written or printed characters."[56] In 1830, Louisiana and North Carolina passed laws banning literacy instruction for enslaved people.[57] In 1834, South Carolina passed legislation making it unlawful for anyone to teach an enslaved person how to read or write.[58] Under South Carolina's law, free people of color who violated the law could receive a punishment of fifty lashes as well as a $50 fine; White people could be fined up to $100 or up to six months in prison.[59]

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52. Louisiana enacted a very broad and punitive anti-literacy law. Beyond punishing anyone who taught reading and writing skills to enslaved people, the law stated that "any person using language in any public discourse from the bar, bench, stage, or pulpit, or any other place, or in any private conversation, or making use of any sign or actions having a tendency to produce discontent among the free colored population or insubordination among the slaves, or who shall be knowingly instrumental in bringing into the state any paper, book, or pamphlet having a like tendency, shall, *on conviction, be punishable with imprisonment or death, at the discretion of the court*" (emphasis added). U.S. v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (No. 16,151).

53. In addition to gaining direct knowledge (e.g., reading), enslaved persons received information from preachers and from one another. Monaghan observes that slaveholders feared any gathering of enslaved persons could lead to revolt. Monaghan, *supra* note 32, at 327 ("Any congregation of slaves in one place was considered was considered a potential bonfire, and laws had long been passed that legislated against 'unlawful assembly.' As time passed . . . the definition of 'unlawful assembly' was increasingly stretched to include the meeting of pupils in school settings.").

54. *See* Chris Span, *Learning in Spite of Opposition: African Americans and their History of Educational Exclusion in Antebellum America*, 131 COUNTERPOINTS 26, 30 (2005).

55. *Id.*

56. Act of Dec. 22, 1829 § 11, Ga. Gen. Assembly (1829). Under the law, a Black teacher could be whipped or fined while a White person could face a $500 fine and possible imprisonment. *Id.* For a detailed look at the impetus for this law, *see* Kim Tolley, *Slavery*, *in* MISEDUCATION: A HISTORY OF IGNORANCE-MAKING IN AMERICA AND ABROAD 13–33 (A.J. Angulo ed., 2016).

57. Tolley, *supra* note 56, at 14.

58. *Id*.

59. *See, e.g.*, Acts of 1834, P 13 P. L. 174 45th sec. of 1740 (1834), *reprinted in* JOHN BELTON O'NEALL, THE NEGRO LAW OF SOUTH CAROLINA, http://genealogytrails.com/scar/negro_law2.htm [https://perma.cc/W9MV-XQWE].

Anti-literacy efforts did not only target enslaved Black people in southern states. In free states, anti-literacy took effect through Black laws[60] that erected barriers for free Black people to attain education.[61] In some instances, philanthropic organizations provided funding for schools and educational programs for free Blacks with the ostensible purpose of promoting Black equality. But these projects were often a ploy. For instance, the American Colonization Society, in coordination with other organizations, supported a large-scale project to educate free Blacks. Schools would be constructed for free Blacks to attend. But, once they were educated, the students would be required to emigrate to Africa.[62]

A number of states did not enact explicit anti-literacy laws.[63] Even in those states, however, enslaved Black people were still routinely punished for attempting to learn to read or write, or for being found with implements of literacy.[64] Historian E. Jennifer Monaghan observes, "[N]o matter where slaves lived, they invariably believed, and were encouraged to believe, that pursuing literacy skills was illegal."[65] Even if a state did not have legislation prohibiting teaching and learning literacy, slave holders could still exact punishment against Blacks for

60. Black Laws are laws, rules and regulations adopted to control the economic and social access of Black people who lived in free states. *Black Codes*, HISTORY (Jan. 26, 2022), https://www.history.com/topics/black-history/black-codes [https://perma.cc/2XPW-EETC]. In 1804, Ohio was the first state to adopt a series of legal codes known as Black Laws. *Encyclopedia of Cleveland History: Black Laws*, CASE W. RSRV. UNIV., https://case.edu/ech/articles/b/black-laws [https://perma.cc/847J-UG7U]. These laws set forth requirements for Blacks to live and work in the state, such as a $500 bond to live in the state. *Id.*

61. *See, e.g.*, An Act to Provide for the Support and Better Regulation of Common Schools, Laws of Ohio (approved Feb. 10, 1829), *reprinted in* STEPHEN MIDDLETON, THE BLACK LAWS IN THE OLD NORTHWEST: A DOCUMENTARY HISTORY (1993):

> [N]othing in this act contained shall be so construed as to permit black or mulatto persons to attend the schools hereby established, or compel them to pay any tax for the support of such schools; but all taxes assessed on their property, for school purposes, in the several counties in this state, shall be appropriated as the Trustees of the several townships may direct, for the education of said black and mulatto persons therein, and for no other purpose whatever.

62. *See, e.g.*, Vincent P. Franklin, *Education for Colonization: Attempts to Educate Free Blacks in the United States for Emigration to Africa, 1823–1833*, 43 J. NEGRO EDUC. 91 (1974).

63. Monaghan, *supra* note 32, at 338 (including Florida, Kentucky, Maryland, Missouri, and Mississippi).

64. *See, e.g.*, John Russell, *The Free Negro in Virginia, 1619–1865*, JOHNS HOPKINS STUD. IN HIST. AND POL. SCI., series XXXVI, no. 3, 1913, at 143–44, https://www.ancestraltrackers.net/va/resources/free-negro-virginia.pdf [https://perma.cc/6LYV-XMKB] ("[T]he friends of the institution of slavery became apprehensive of the evil which might result from the reading of [anti-slavery tracts] by free negroes, and in consequence brought about legislation to prevent free negroes from acquiring a knowledge of books.").

65. *Id.*

engaging in actions believed to threaten the institution of slavery.[66] Regardless of the law on the books, Whites had the ultimate authority to determine whether activities by Blacks were lawful or subject to sanction.[67]

Despite the harsh punishments, enslaved Black people continued to pursue literacy.[68] They stealthily and defiantly sought education[69] because they knew it was a pathway to freedom and eventually citizenship.[70] Being able to read and write gave enslaved Blacks a language for expressing their living conditions. The inability to read or write meant enslaved people did not have words that gave voice to the breadth and depth of slavery's harms. Illiteracy also made it less likely that they had a conceptual understanding of the depravity of enslavement.[71]

If the number of laws that punish a particular behavior is any indication of what a society fears, Black literacy has always been considered a threat to the status quo. Since the institution of the slave codes, laws have regulated all manner of African American literacy. The law has controlled both the education of Black people and education about Black people. The law has been both a shield and a sword. These slave codes offer a historical lens—a legislative mirror to hold up and assess the role of law in Black progress.

B. The Law as a Tool of Literacy and Oppression

After the Civil War, newly freed Black people initiated a movement for public school education and began opening schools and colleges for Black students. During Reconstruction they sought support from the Freedman's Bureau[72] and Northern philanthropic groups. They were also aligned with Radical Republican lawmakers who favored public education.[73] The push for universal education for Black people was not just to ensure that they could learn to read and write.

66. Scholars have noted that there were relatively few court cases against White people for teaching Black people how to read. *Id.* at 337. See, for example, the Case of Margaret Douglass. *Id*. at n.54. Douglass, a White woman, was fined for paying her daughter to teach free African Americans. *Id.* Under the Virginia code, punishment was imprisonment up to six months and a maximum $100 fine, but the jury fined Douglass only one dollar and the judge sentenced her to a month in prison. *Id*.

67. In Dred Scott v. Sandford, Chief Justice Roger Taney stated that Black people "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." 60 U.S. 393, 407 (1857).

68. *See, e.g.*, Janet Cornelius, '*We Slipped and Learned to Read': Slave Accounts of the Literacy Process, 1830–1865*, 44 PHYLON 171 (1983).

69. *See, e.g.*, Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U.L. REV. 1031, 1042–44 (2022) (noting that Blacks went to "extraordinary lengths" to secretly learn and share their literacy with other Blacks).

70. *Id.* at 1040.

71. *Id.* at 1042.

72. *See, e.g.*, Alton Hornsby, *The Freedmen's Bureau Schools in Texas, 1865–1870*, 76 SW. HIST. Q. 397 (1973).

73. *See generally* David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. EDUC. 236 (1986).

Importantly, it also made re-enslavement much harder for Southern Whites to accomplish.[74] It would be more difficult to deny rights to an educated Black community.

More than 100,000 Black people took steps to educate themselves following the Civil War.[75] Newly-freed Blacks did what was necessary to ensure that members of their family, particularly their children, could attend school.[76] At least one scholar has described the schoolhouse as a "fundamental vehicle."[77] As a vehicle, education allowed Black students (children and adults) to navigate themselves away from slavery and closer towards freedom. However, on the heels of the Civil War, Black freedom was met with a new series of laws—Black codes—designed to thwart Black advancement. These codes, passed in some states, circumscribed all aspects of Black life.[78] For instance, Black codes limited employment opportunities for Black people, limited their ability to own property, and limited their ability to vote. Regarding education, Black codes spelled out whether, when, and with whom Black people could attend school.[79]

Even as Black codes were adopted in several states, newly freed Black people worked to improve their lives. Following emancipation, Reconstruction efforts brought the promise of new possibilities for Black life. Reconstruction saw the establishment of The Freedmen's Bureau, which addressed the needs of newly freed people. During this time, Black people engaged in widespread political organizing and activism. For instance, by 1868, over 80 percent of eligible Black men were registered to vote.[80] Reconstruction, however, was short-lived, and laws designed to abolish Black literacy (and thus Black education) again ruled the

74. W.E.B. Du Bois stated, "Had it not been for the Negro school and college, the Negro would, to all intents and purposes, have been driven back to slavery." W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARDS THE HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880 at 667 (2021).

75. *See* Black, *supra* note 69, at 1048.

76. *Id*. at 1046.

77. *Id.*

78. VIRGINIA WRITERS PROJECT, THE NEGRO IN VIRGINIA 237–47 (1940), https://babel.hathitrust.org/cgi/pt?id=mdp.39015009063051&view=2up&seq=262 [https://perma.cc/V3WF-PT6J] (explaining "Black Laws," an alternate term used to describe the post-slavery racial segregation laws described as Black codes herein).

79. *See, e.g.*, OHIO STATE JOURNAL, THE BLACK LAWS! SPEECH OF HON. B.W. ARNETT OF GREENE COUNTY, AND HON. J.A. BROWN OF CUYAHOGA COUNTY, IN THE OHIO HOUSE OF REPRESENTATIVES, MARCH 10, 1886, at 39–40 (1886), https://lccn.loc.gov/91898104 [https://perma.cc/3HZ4-89CC] (discussing an 1864 Ohio law that laid out a comprehensive scheme to educate "colored children" in different institutions than White children).

80. *See, e.g.*, EQUAL JUSTICE INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876, at 6 (2020), https://eji.org/wp-content/uploads/2005/11/reconstruction-in-america-rev-111521.pdf [https://perma.cc/E22V-U96F].

day.[81] Following Reconstruction, the Black codes were revived.[82] Removing any doubt that Black literacy was once again under attack, the U.S. Supreme Court's decision in *Plessy v. Ferguson* made "separate but equal" legal and enforceable.[83]

The above discussion offers examples of formal and informal laws and practices that collectively comprise centuries of legislation against basic and substantive forms of literacy for African American people. The slave codes, Black laws, Black codes, and their twentieth century iteration, Jim Crow legislation, included regulations that limited or prohibited Black people's access to education.[84] Each of these represent variations on a theme—the criminalization of education for Black people.

While these laws reflect bygone eras, newer versions of these laws have emerged to take their place. These contemporary versions are also anti-literacy laws. They determine which racial histories are allowable within the educational curriculum, how they may be taught, and *who* may be taught these histories. For instance, HB 7 dismisses the study of race and race-based theories as racist.[85]

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81. *See, e.g.*, Ronald G. Shafer, *The 'Mississippi Plan' to Keep Blacks From Voting in 1890: 'We Came Here to Exclude the Negro'* WASH. POST (May 1, 2021, 7:00 AM), https://www.washingtonpost.com/history/2021/05/01/mississippi-constitution-voting-rights-jim-crow/ [https://perma.cc/N7KM-2FKZ] (discussing the "Mississippi Plan," which was put in place to deny Black suffrage). Literacy tests like the Mississippi Plan disenfranchised Black voters. Anti-literacy and disenfranchisement worked together to disable the Black vote.

82. *Black Codes and Pig Laws, Slavery By Another Name*, PBS, https://www.pbs.org/tpt/slavery-by-another-name/themes/black-codes-and-pig-laws/#:~:text=Black%20Codes%20and%20Pig%20Laws&text=Harsh%20contract%20laws%20penalized%20anyone,a%20crime%20to%20be%20unemployed [https://perma.cc/AL5S-HVAK].

83. 163 U.S. 537 (1896).

84. "Jim Crow" legislation refers to a broad system of laws that managed Black access and movement across society. Jim Crow existed in various forms. This included facially neutral laws (e.g., separate but equal) that were applied in racially discriminatory ways. Jim Crow also refers to established racialized practices and social norms (how Whites referred to Black men and women by first name or how Black men were expected to step off the sidewalk when they encountered a White person on the street). As well, Jim Crow regulated Black people's access to education. This included, among other things, which schools they could attend, which books they could use, who could teach Black students, and the curriculum that could be taught.

For an extensive compilation of race-related rules and laws by state, *see* PAULI MURRAY, STATES' LAWS ON RACE AND COLOR (1950). The text includes a wide range of legislative material for forty-eight states (except Alaska and Hawaii) and the District of Columbia. It includes the text of state constitutions, state statutes, court decisions, state senate resolutions, and state compacts. The text features state laws that uphold racial separation as well as laws that prohibit racial discrimination.

85. *See* H.R. 7, 124th Leg. Reg. Sess. (Fla. 2022) (amending FLA. STAT. §§ 760.10, 1000.05, 1003.42, 1006.31, 1012.98, 1002.20, 1006.40 (2022)); *see also* Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723, 724–25, 725 n.10 (2022). Feingold observes that bills such as HB 7 (which he labels "Backlash Bills") constitute "a modern manifestation of racially regressive lawmaking." *Id.* at 736 (emphasis omitted). He continues, "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." *Id.* at 737.

Historical anti-literacy laws limited not only the ideas and concepts that enslaved people were exposed to, but also limited the types of literature that Whites were allowed to read. For instance, material that was critical of slavery, such as the writings of abolitionists, was banned.[86] Thus, the criminalization of literacy to maintain the institution of slavery "pose[d] a pall of orthodoxy."[87] Today's anti-literacy laws are modern-day examples of how legislative restrictions on educational curricula may be misused to inculcate rather than educate students.

Historically, the law has restricted Black peoples' access to information.[88] Described by Professor William Chin as "lawfare"—a combination of warfare and law—states have used the law to diminish the rights of Black people[89] and as state tools of counterinsurgency against Black Americans.[90] Anti-literacy laws exemplify how the law can function as a form of social control and repression. Such laws ensured that a disproportionately high percentage of Black people were illiterate compared with Whites.[91] These laws are part of the foundation that enabled the use of literacy tests for voting, and in doing so, made it practically impossible for Black men to exercise their newly granted right to vote under the Thirteenth Amendment.[92]

In contemporary times, an evaluation of whether a law acts to enhance or impede literacy requires consideration of its text and its stated goals, as well as the surrounding socio-legal-political conditions in which it exists. Laws that facially purport to promote literacy may do just the opposite. Historian E. Jennifer Monaghan says this:

> [F]rom the perspective of history . . . governments promoting literacy through campaigns—or even just through universal education—have not necessarily done so with the view of promoting individual freedom. Rather, they have wished to inculcate their own political or religious agenda and promote social control.[93]

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86. Black, *supra* note 69, at 1061 (noting that post offices in South Carolina were required to turn over abolitionist writings, which were later burned).

87. *Id.*

88. *See id.*

89. William Y. Chin, *Legal Inequality: Law, the Legal System, and the Lessons of the Black Experience in America,* 16 HASTINGS RACE & POVERTY L.J. 109, 110 (2019).

90. *See* William Y. Chin, *Domestic Counterinsurgency: How Counterinsurgency Tactics Combined with Laws Were Deployed Against Blacks Throughout U.S. History*, 3 U. MIAMI RACE & SOC. JUST. L. REV. 31, 32 (2013).

91. For a discussion of Black and White literacy rates post-Civil War, see ROBERT A. MARGO, RACE AND SCHOOLING IN THE SOUTH, 1880–1950: AN ECONOMIC HISTORY 1–32 (1991).

92. *See* South Carolina v. Katzenbach, 383 U.S. 301, 310–11 (1966), where the Supreme Court notes that beginning in 1890, many southern states made the ability to read and write a requirement to vote. The Supreme Court states, "These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult [W]hites were unable to read or write." *Id*. at 311.

93. Monaghan, *supra* note 32, at 310.

Professor Monaghan's perspective offers a reflection point for evaluating Florida's HB 7 and related laws. Anti-literacy laws and campaigns are, by design, geared to limit some groups' exposure to forms of information and knowledge. Anti-literacy laws may vary in their target. While in most instances they function to control Black education, they may also focus on other students of color and White students. To analyze HB 7, we must examine the language of the law, the targets of the law, the beneficiaries of the law, and the actions the law prohibits and mandates. Unpacking the law will allow us to determine whether it is in fact a tool that advances literacy.

Understanding the historical background of anti-literacy laws is essential to seeing how this past is tied to twenty-first century laws that deny the value of race-related knowledge. At both ends of the timeline, laws have been used to create voids in knowledge. In describing these laws, Kim Tolley writes that they represent government actions that foster the "structural production of ignorance."[94]

A key premise of this Article is that since the 1600s there have been state-supported campaigns that outlawed education and learning for enslaved Black people. These campaigns are properly labeled "anti-literacy" because their primary goal has been to make it unlawful for Black people to learn to read and write, and to gain the fruits of those skills (e.g., comprehension, critical thought). We can think of anti-literacy campaigns as having two separate—but inextricably linked—parts. The first part refers to bans on basic literacy, such as reading and writing. For instance, slave codes that made it unlawful for enslaved Blacks to learn to read or write are examples of basic anti-literacy laws. The second part involves bans on substantive literacy. For instance, laws such as HB 7, which ban certain subjects, material, and perspectives from the public-school classroom, are examples of substantive anti-literacy laws. Overall, while basic anti-literacy campaigns focus on barring specific racial groups from education, substantive anti-literacy campaigns focus on banning particular subjects from the classroom. The thread which connects basic and substantive anti-literacy laws is their goal to prevent Black people and others from accessing knowledge that will enable racial equality.

II.
APPLYING THEORETICAL FRAMEWORKS TO ANTI-LITERACY LAWS

This Part provides theoretical frameworks for examining how race impacts the enactment of education laws and policies related to race. The focus is on theories or approaches that explain how legislation is enacted to "answer"–either through silence or amplification—Black voices that question or reject mainstream analyses of history. The racial threat hypothesis and CRT allow for a broad legal, sociological, and political assessment of HB 7. Through critique and investigation,

94. Tolley, *supra* note 56, at 13.

each framework creates space for a deeper understanding of the values and concerns that are reflected in HB 7.

A. Racial Threat

Over decades, the racial threat hypothesis has been a sociological mainstay. This theoretical paradigm, developed by sociologist Hubert Blalock, has been used to analyze whether an increase in the size of the Black population causes Whites to perceive Blacks as more threatening and make them more likely to support harsher criminal sanctions.[95] Racial threat predicts that White people will interpret an increase in the number of Black people (and other people of color) as a challenge to their social and economic positions.[96] Further, when White people believe that Black people and other people of color pose a threat to dominant White interests, they respond by adopting and supporting harsher criminal sanctions and policies.[97] The increased support for criminal punishment is designed to reduce the socio-political power of groups of color.[98]

Racial threat theory offers an expansive, though not perfect, framework for asking how Whites' perceptions of Blacks' presence as a threat may impact the passage of anti-literacy legislation.[99] The application of racial threat to anti-Black education laws is a reasonable and important extension of the racial threat hypothesis. First, this expanded analysis allows for a more comprehensive look at White perceptions that Black people pose a threat to White interests. The impact of these perceptions is not confined to the criminal legal system.[100] Second, it allows the racial threat thesis to encompass legislation on education policy, which, like

95. *See* BLALOCK, *supra* note 21; *see also* Ryan D. King & Darren Wheelock, *Group Threat and Social Control: Race, Perceptions of Minorities and the Desire to Punish*, 85 SOC. FORCES 1255, 1272 (2007) (finding that White individuals' perception that Black people pose an economic threat is predictive of increased punitive attitudes, and increases in size of the Black population predict greater perception of racial threat).

96. *Id.* at 147.

97. King & Wheelock, *supra* note 95, at 1272. For an incisive and broad examination of how White political power has been used to reduce Black access to goods and services, even when it impedes White success, *see* HEATHER MCGHEE, THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER (2021).

98. *Id.*

99. It is important to note that the systemic responses to racial threat are varied. Reactions may include changes to educational structures (the focus of this Article), or may involve substantive political changes. For instance, in law professor Pamela Karlan's analysis of the "new countermajoritarian difficulty," she argues that in the face of a growing non-White population, the U.S. Senate and the Electoral college "are assisting a shrinking [W]hite conservative, exurban numerical minority to exert substantial control over the national government and its policies," thereby working to maintain the status quo. Pamela Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2325 (2021).

100. The three constituent parts of the criminal legal system are police, courts, and corrections. With the goal of broadening and linking understandings of punishment, many researchers and practitioners use the term "carceral." *See, e.g.*, Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695 (2019).

criminal punishment, is a form of state control. Sociologist Cindy Brooks Dollar describes racial threat theory as follows:

> [It] . . . proposes that racialization occurs when Whites use their disproportionate power to implement state-control over minorities and, in the face of a growing minority population, encourage more rigorous, racialized practices in order to protect their existing power and privileges.[101]

Third, while analyses of the racial threat hypothesis have primarily operationalized racial threat as the fear of an increasing Black demographic, this understanding is not the only articulation of racial threat. Notably, not all understandings of racial threat are based on an increase in the number of Black people in a particular demographic area. Some researchers have analyzed racial threat based on the relative size of the Black population.[102] For instance, in his research on racial threat, sociologist Scott Duxbury notes that where there is a large Black population, the strength of that population alone—regardless of whether it increases in size over time—may lead to the passage of harsher sentencing outcomes:

> Despite little substantial growth in the black population during mass incarceration, the political and economic empowerment of black populations via Civil Rights progress, combined with large black populations in many states, likely posed a pronounced threat to white populations, driving states to adopt punitive sentencing laws.[103]

This theory is an important reconsideration of how perceptions of Black racial threat manifest in White action. Duxbury expands the definition of "threat" beyond an increase in the Black population in a particular geographical area. Instead, the perception of Black racial threat may be measured by the increased presence of Black people in traditionally White spaces. These spaces include television programs, movies, commercials, books, videos, videos games, billboard advertisements, newspaper stories, awards programs, magazine covers, and social media sites. Importantly, this heightened Black presence shows up in many forms. Beyond entertainment, Blackness is visible in the form of legal and journalistic expertise, as representative of social protest (e.g., Black Lives Matter), as a

101. Cindy Brooks Dollar, *Racial Threat Theory: Assessing the Evidence, Requesting Redesign,* 2014 J. CRIMINOLOGY 1, 1 (2014).

102. *See, e.g.*, Kelly Welch & Allison Anne Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS., Feb. 2010, at 25–48; King & Wheelock, *supra* note 95, at 1255; Michael M. O'Hair, *A Tale of Three States, Part 4: The Racial Threat Hypothesis*, MARQUETTE UNIV. L. SCH. (Dec. 24, 2011), https://law.marquette.edu/facultyblog/2011/12/a-tale-of-three-states-part-4-the-racial-threat-hypothesis/ [https://perma.cc/P8EC-B83M].

103. Scott W. Duxbury, *Who Controls Criminal Law? Racial Threat and the Adoption of State Sentencing Law, 1975–2012*, 86 AM. SOCIO. REV. 123, 129 (2021) (examining 230 state-level sentencing policy changes that took place from 1975 to 2012).

nationally recognized holiday (e.g., Juneteenth), and as a period of celebrating Black achievement (e.g., Black History Month).

Overall, the racial threat thesis offers an insightful approach for analyzing how laws are used to respond to perceived racial threats.[104] The political, social, and economic empowerment of Black citizens and their increasingly public voice, via social protest movements, combined with a sizeable Black population,[105] poses a threat to mainstream narratives. The perception that Black people constitute a social threat reflects both the hyper-visibility of Black people in the mainstream media and their hyper-invisibility in sanctuaries of power (e.g., politics, business).

HB 7 replicates this dynamic. HB 7 and related laws arrived on the heels of massive national and international protests in the wake of George Floyd's murder,[106] the rise of the Black Lives Matter movement,[107] and demands for corporations and universities[108] to address and teach about explicit and implicit forms of racial bias and anti-Black racism. As the visibility of the Black presence in education grew as a result of these movements, HB 7 was drafted, in part as a legislative response to a perceived Black threat—a Black insurgency into previously all-White domains, including the schoolhouse curriculum.

104. Researchers have identified criticisms of the research on racial threat. One critique is that the research has not adequately established (1) that White and Black people have different punitive philosophies (e.g., different political preferences and social policy beliefs) and (2) that the philosophy Whites adopt rules the day. As well, some researchers have noted that few studies articulate the connection between a state's criminal punishment laws and the size of its African American population. *See id.* at 124–26.

105. For 2021, the U.S. Census estimates Florida's Black population at seventeen percent. *Quick Facts: Florida*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/FL [https://perma.cc/9494-XLK3] (last visited Nov. 9, 2022).

106. *See* Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html [https://perma.cc/BWZ4-5CET].

107. *See* Char Adams, *A Movement, a Slogan, a Rallying Cry: How Black Lives Matter Changes America's View on Race*, NBC NEWS (Dec. 29, 2020, 10:04 AM), https://www.nbcnews.com/news/nbcblk/movement-slogan-rallying-cry-how-black-lives-matter-changed-america-n1252434 [https://perma.cc/JTQ9-BF5M].

108. *See* Janice Gassam Asare, *Dear Companies: Your BLM Posts Are Cute but We Want to See Policy Change*, Forbes (Jun. 6, 2020, 12:36 AM), https://www.forbes.com/sites/janicegassam/2020/06/06/dear-companies-your-blm-posts-are-cute-but-we-want-to-see-policy-change/?sh=7f868c601b9c [https://perma.cc/WYL7-S95A]

B. Critical Race Theory[109]

Law professor Derrick Bell, one of the founders of CRT, identified the concept of interest-convergence.[110] Interest-convergence describes the conditions that are minimally necessary for racial progress to take place: "The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[111] In contrast, interest-divergence takes place when powerful groups of White people decide that racial retrenchment is preferable and want to unravel previous advances.[112] Professor Bell concluded that the law is not always an elixir for racial oppression.[113] Instead, depending on racialized interests, the law can act as either an ally or an enemy of Black progress.[114] The concepts of interest-convergence and interest-divergence provide contextualization for laws such as HB 7. They mark the swinging of the legal pendulum between racial reform and racial retrenchment. A look at how scholars have applied CRT and other critical approaches to race and educational policies provides important grounding for evaluating anti-literacy laws.

Sociologist David Gillborn's research examines how changes in education policy are influenced by race.[115] He uses a CRT lens to discuss the sources of education policy and how these policies are designed to reinforce the status quo.[116] Professor Gillborn analyzes the 2010 Arizona law that imposed a state-wide ban on teaching ethnic studies.[117] He argues that the challenges to the ethnic studies

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109. For general background and foundational CRT scholarship, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas eds., 1995), and RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (3d ed. 2017).

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

111. *Id.* at 523.

112. *See id.* at 525–28.

113. DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 4–8, 130–37 (2004) (analyzing the long-term impact of court victories, notably *Brown v. Board of Education,* and concluding that legislation has not secured a permanent guarantee of civil rights protections for African Americans).

114. Law professor Lani Guinier's work expounds on the concept of "interest-divergence." Lani Guinier, *From Racial Liberalism*, 91 J. AM. HIST. 92 (2004) (noting that differences in background (e.g., race and class) may make some groups less likely to join together).

115. *See, e.g.*, Gillborn, *supra* note 23.

116. *Id*. Gillborn summarizes sociologist Stephen Ball's expansive conception of education policy this way:

> [It includes] multiple sites or contexts where policy is produced, contested, or reshaped and forms discourse, including texts and ways of speaking about particular issues and possibilities for action. This perspective, therefore, includes the widest possible spectrum of policy, from pieces of national (and international) legislation through to informal institutional practices.

Id. at 27–28.

117. *Id.* at 30–32. Gillborn's article also analyzes the English baccalaureate degree and how it reinforced existing racial inequalities. *Id.* at 32–36.

program reflect a rejection of viewing people as part of an ethnic group.[118] The ban demanded an educational focus on individuals.[119] Ironically, the anti-ethnic studies law was designed to protect Whites—as a group—from resentment and guilt.[120] Professor Gillborn determines that education policy is best understood, "not as a mechanism that delivers progressively greater degrees of equity, but a process shaped by the interests of the dominant white population."[121] He uses interest-divergence to explain how political progress for Blacks (and other people of color) are reframed as a threat to White racial interests. Using this lens, HB 7 and other legal changes to education policies that support racially diverse perspectives and histories are best viewed as part of an ongoing campaign to thwart racial progress, as those policies are not in the interest of White people seeking to maintain their dominant status.

Applying CRT to anti-CRT and anti-literacy laws such as HB 7 enables a nuanced understanding of how anti-CRT efforts have been employed to divert steps toward racial equity and equality. Scholars have used the principles of CRT to uncover the structures and narratives that support anti-CRT efforts. This research examines the mechanisms and patterns of racial progress, including positive reform efforts that are typically followed by retrenchment: one step forward and two steps back.

Law professor Vivian Hamilton provides a trenchant analysis of the anti-CRT movement.[122] She explores the CRT/anti-CRT debate as a recent example of the "reform/retrenchment dialectic."[123] Beyond a detailed look at the spark for the anti-CRT movement,[124] she shows how anti-CRT advocates reframed CRT as a racist educational movement. In that vein, anti-CRT advocates view any discussions of race as problematic, preferring instead to focus on "colorblindness" and equal opportunity. As Professor Hamilton notes, "[O]pponents of reform equate race consciousness in the service of advancing racial equity with race consciousness used to oppress."[125] Put another way, colorblindness is good; race

118. *Id.* at 31–32 ("The supremacy of an individualistic and 'colour-blind' perspective is guaranteed by law, where advocating 'ethnic solidarity' is prohibited.").

119. *Id.* The legislation prohibited courses that "advocate ethnic solidarity instead of the treatment of pupils as individuals." H.R. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (codified as ARIZ. REV. STAT. § 15-112).

120. Gillborn, *supra* note 23, at 32 ("[R]eference to 'resentment toward a race or class of people' has been widely interpreted as an explicit attempt to protect White people as a group and individually from accusations of bias and
race discrimination.").

121. *Id.* at 28.

122. *See* Hamilton, *supra* note 24.

123. *Id.* at 65.

124. *Id.* at 72–76.

125. *Id.* at 64.

consciousness is bad. Opponents of CRT say that law is needed to prohibit the "indoctrination" or inculcation of students.[126]

However, claims that there are instructors explicitly telling students how and what they should think are purely anecdotal.[127] There does not appear to be empirical research to validate these claims. Further, none of the incidents cited involve a university or college level classroom.[128]

After civil rights victories or other steps denoting racial progress,[129] there is often a "backlash." The term applies to legal actions designed to rollback advances in racial justice, with the goal of retrenchment. Legislative bills that target and condemn any educational focus on race that is critical of the country's founding documents and practices are a part of these actions. Law professor Jonathan Feingold refers to these collectively as "Backlash Bills."[130] Approximately 200 of these bills have been proposed since 2021.[131] While there are different types of Backlash Bills, Professor Feingold determines that as a group they can be classified as "racially regressive lawmaking."[132] He defines Backlash Bills as legislative efforts intended to "stymie, roll-back, or otherwise obstruct efforts to realize a more racially egalitarian society."[133] Thus, Backlash Bills can be understood as a contemporary iteration of the slave codes, Black laws, Black codes, and Jim Crow laws—all of which criminalized Blackness. These laws controlled racial movement, racial etiquette, and racial order. Current Backlash Bills were intentionally written as counterattacks to the 2020 racial protests around the nation.[134]

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126. *See, e.g.*, Press Release, Office of Governor Ron DeSantis of Florida, Governor DeSantis Announces Legislative Proposals to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/ [https://perma.cc/SC5X-2N6X] (describing Critical Race Theory repeatedly as "indoctrination").

127. Notably, Florida Governor Ron DeSantis's press release celebrating the passage of HB 7 and condemning CRT lists very few examples of CRT being taught in schools, none of which take place in Florida. Press Release, Office of Governor Ron DeSantis of Florida, Governor DeSantis Emphasizes Importance of Keeping Critical Race Theory Out of Schools at State Board of Education Meeting (June 10, 2021), https://www.flgov.com/2021/06/10/governor-desantis-emphasizes-importance-of-keeping-critical-race-theory-out-of-schools-at-state-board-of-education-meeting/ [https://perma.cc/WQ4E-A78W].

128. *Id.*

129. Examples include the naming of a federal holiday, passage of progressive civil rights legislation, a presidential executive order, or a U.S. Supreme Court decision.

130. *See* Feingold, *supra* note 85, at 3. Feingold states that since 2020, "GOP officials have proposed nearly 200 bills designed to chill classroom discussion of race, racism and related topics." *Id*.

131. *See id.* at 729. For updated numbers on these bills, *see* UCLA's CRT Forward Tracking Project, https://crtforward.law.ucla.edu/ [https://perma.cc/G8SH-SVKK].

132. *See* Feingold, *supra* note 85, at 736.

133. *Id.*

134. *Id.* at 737.

In contrast to the concept of backlash, political scientist Vesla Weaver identifies a concept she labels "frontlash."[135] Frontlash presents an important vantage point for observing and understanding the political responses to racial threats. Her focus is on understanding the widespread adoption of punitive policies in the U.S. criminal legal system—which have had a racially-disproportionate impact on Black people. Professor Weaver states:

> Frontlash is preemptive, innovative, proactive, and, above all, strategic. Here, elites aim to control the agenda and resist changes through the development of a new issue and appropriation and redeployment of an accepted language of norms.[136]

As an example of frontlash, Professor Weaver cites the 1930s rise in anti-communism following the popularity of unions. The groups most threatened by this allegiance (conservative legislators and business leaders) worked together to disable the labor movement by linking it to communism.[137]

It is not clear whether laws such as HB 7 should be classified as frontlash. Legislation proposed in response to a handful of incidents[138] appears to fit squarely within the traditional backlash narrative. It may be, however, that the tsunami of anti-CRT bills introduced within the same legislative period could be categorized as frontlash to the extent that the perceived "threat" of CRT had not yet been realized, and these bills preemptively curtailed its integration into school curricula. The concept of frontlash is a valuable interpretive tool for evaluating the range of proactive, dynamic, and systemic processes that are energized by threats of racial change. The feared change could be an increase in a particular racial group's population size, an increase in political power, an increase in their media presence, or an increase in their cultural relevance. While Professor Weaver's discussion does not explicitly reference CRT, her frontlash concept fits within a CRT analytical framework. Frontlash gives a name to a socio-political-legal process that holds racial progress at bay by presenting a narrative that it poses a social threat.[139] Incorporating the ideas of frontlash and backlash allows for an evaluation of whether HB 7 is more accurately categorized as a reaction to racially

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135. *See* Weaver, *supra* note 25, at 230, 237–39.

136. *Id.* at 238.

137. *Id.* at 238–39.

138. *See, e.g.*, Press Release, Office of Governor Ron DeSantis of Florida, *supra* note 126 (listing "national examples of Critical Race Theory").

139. For another example of categorization of that might be considered frontlash, *see* Jon D. Michaels & David L. Noll, *Vigilante Federalism,* 108 CORNELL L. REV. 1187. They state:

> Rights suppressing laws are more than simply the conservative counterpart to progressive private enforcement regimes. And they're more than a way to insulate attacks on fundamental rights from constitutional scrutiny. They are also, if not centrally, an effort to reframe power in America, restructure intergovernmental, intergroup, and interpersonal relations, and advance an illiberal partisan political agenda.

Id. at 25.

progressive movements (e.g., Black Lives Matter) or as a preemptive action designed to maintain the status quo.[140]

Notably, frontlash and the racial threat hypothesis discussed in the previous section exist at opposite ends of the analytical continuum. Frontlash examines how the law is used as a proactive measure to ensure racial order in the criminal legal system. In contrast, the racial threat thesis examines whether Whites' perceptions of an increase in the Black population is perceived as a threat and activates harsher criminal punishments.

The goals of HB 7 and its legislative kin,[141] whether characterized as frontlash or backlash, are clear. These laws can be said to exemplify what scholar W.E.B. Du Bois identified as the problem of the twentieth century: the color-line.[142] HB 7 and related laws have spawned the curriculum version of a "law and order" campaign. In this campaign, the main characters have been identified: the threatened harm (CRT indoctrination), the victims (students, taxpayers), and the hero (tough state laws). Further, CRT opponents have attempted to repackage CRT so that it appears to be a racial threat—seemingly akin to a hate crime—that the law must punish. With the above context in mind, the next Part provides a detailed look at HB 7.

140. The better view may be that HB 7 and related laws are both reactive and preemptive.

141. *See infra* notes 206–20 and accompanying text.

142. Du Bois' concept of "the color-line" captures the struggle of American society to restructure race relations in the wake of slavery, as Black people continue to fight for the freedom sought but not secured during reconstruction. W.E.B. Du Bois, *The Souls of Black Folk*, *in* THREE NEGRO CLASSICS X, 221 (1965) ("The problem of the twentieth century is the problem of the color–line, — the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea.").

III.
THE STOP WOKE ACT:[143] LEGISLATION, SANCTIONS, QUESTIONS, AND COMPANION LEGISLATION

This Part examines the sections of HB 7 that address post-secondary classroom learning related to race. After a look at the pertinent sections, there is a presentation of seven hypothetical scenarios. These scenarios draw out the ambiguity and problematic dictates of the Act. This section is followed by a discussion of who may pursue legal or administrative action under the law and the range of punishments available for HB 7 violations. The final section places the Stop WOKE law into a larger legislative context. It examines other Florida laws that complement and bolster the force of HB 7. Together, these laws create a web of reinforcement around HB 7 and strengthen its power as an anti-literacy law.

On July 1, 2022, HB 7, the Stop WOKE Act, became law in the state of Florida.[144] The law rewrites a wide swath of the state's educational curriculum, from kindergarten through higher education. The bill has a two-prong focus, instruction and employment in the state of Florida. HB 7, formerly titled, "An act relating to individual freedom," states:

> [S]ubjecting any individual, as a condition of employment, membership, certification, licensing, credentialing, or passing an

143. The expression, "woke," is rooted in a metaphor that assesses how "awake" a person is based on their awareness and understanding of an issue—typically one involving racial or social justice. Thus, if a person is particularly knowledgeable and socially aware about a topic, they may be described as "woke." Being "woke" may also refer to someone who knows that there is more to a news story than what has been reported in the news. Examples could include the conclusion that the 1980s inner-city crack problem was a function of both local community actors and the infiltration of crack cocaine into those communities from outside forces. Being "woke" could also refer to the conclusion that police killings of African Americans are not simply a problem of "bad apples."

This terminology has longstanding cultural resonance in African American communities. Harold Melvin and the Blue Notes' 1975 song, "Wake Up Everybody," begins with lyrics, "Wake up everybody no more sleeping in bed. No more backward thinking, time for thinking ahead." Harold Melvin and the Blue Notes, Wake Up Everybody (Philadelphia International 1975). Spike Lee's 1988 movie School Daze closes with a main character yelling "Wake Up!" School Daze (40 Acres and a Mule Filmworks, 1988). In each of his subsequent films, Lee has had a character say, "Wake up." Black leader Malcolm X had an exhortation, "Wake up, clean up and stand up." Malcom Disciples, Malcolm X: Wake Up, Clean Up, Stand Up, YouTube (Mar. 11, 2017), https://www.youtube.com/watch?v=z5JEhmrJcJs [https://perma.cc/3CQA-99Q2].

The Stop WOKE Act uses "woke" to mean "anti-woke." The legislation transforms "woke" into an acronym to challenge its intended target. This is a kind of legislative gauntlet throwing—attempting to disappear a term by ridiculing and redefining the term. A statement by Florida's governor Ron DeSantis underscores this assessment, "I . . . want Florida to be known as a brick wall against all things 'woke'. . .. This is where 'woke' goes to die." Tim Craig, *Florida Legislature Passes Bill that Limits How Schools and Workplaces Teach About Race and Identity*, WASH. POST. (Mar. 10, 2022, 11:44 AM), https://www.washingtonpost.com/nation/2022/03/10/florida-legislature-passes-anti-woke-bill/ [https://perma.cc/6FEK-MHUT].

144. The legislation, proposed by Governor Ron DeSantis was passed by a 24-15 state senate vote. H.R. 7, 124th Leg. Reg. Sess. (Fla. 2022) (amending FLA. STAT. §§ 760.10, 1000.05, 1003.42, 1006.31, 1012.98, 1002.20, 1006.40 (2022)).

> examination, to training, instruction, or any other required activity that espouses, promotes, advances, inculcates, or compels such individual to believe specified concepts constitutes discrimination based on race, color, sex, or national origin.[145]

As to post-secondary education, the Act identifies and prohibits the teaching of specific race-related concepts.[146] These concepts are detailed and analyzed in this section, with a particular focus on university-level instruction. The Florida Board of Governors defines "instruction" as "the process of teaching or engaging students with content about a particular subject by a university employee or person authorized to provide instruction by the university within a course."[147]

A. HB 7 Prohibitions & Sanctions

Under HB 7, it constitutes discrimination to subject any student or employee to instruction or training that "espouses, promotes, advances, inculcates, or compels such student or employee to believe any of the following concepts:"

1. Members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex.
2. A person, by virtue of his or her race, color, national origin, or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
3. A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex.
4. Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex.
5. A person, by virtue of his or her race, color, national origin, or sex bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex.
6. A person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.

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145. FLA. STAT. § 760.10(8)(a) (2022).

146. HB 7 includes language stating it is applicable to "K-20." This means the law covers kindergarten through postsecondary education. *See* FLA. STAT. §§ 1000.04 (definitions and scope), 1000.06(4)(a) (prohibition on teaching specific race-related concepts) (2022).

147. *See* Notice of Proposed New Regulation, Florida Board of Governors, 10.005, Prohibition of Discrimination in University Training or Instruction (July 1, 2022), https://www.flbog.edu/wp-content/uploads/2022/07/10.005NoticeofNewProposedRegulationJune2022.pdf [https://perma.cc/8HB2-D964]. The definition of "instruction" is relevant to understanding the full scope of HB 7, discussed in Part III(B), *infra*.

> 7. A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin or sex.
> 8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.[148]

After listing the above eight sections, the text includes the following proviso regarding the above prohibitions:

> [It] may not be construed to prohibit discussion of the concepts listed therein as part of a larger course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts.[149]

A wide range of punishments is available for HB 7 violations. Sanctions include both administrative relief and court action.[150] Violations constitute actionable discrimination under the Florida Civil Rights Act (FCRA)[151] and the Florida Educational Equity Act. A complaint can be filed with the Florida Commission on Human Relations (FCHR).[152]

The law allows for a private cause of action that could entitle a successful complainant to injunctive relief, back pay, and compensatory damages up to $100,000.[153] This amount covers loss of dignity, mental anguish, and punitive damages. Further, the Attorney General may initiate a civil action for injunctive relief, damages, or civil penalties of up to $10,000 per violation when they have reasonable cause to believe that an individual or a group has engaged in or been

148. FLA. STAT. §§ 760.10(8)(A)(4), (8), 1000.05(4)(a) (2022).

149. FLA. STAT. §§ 760.10(8)(a)(8), 1000.5(4)(a)(8)(b) (2022).

150. FLA. STAT. § 760.11 (2022).

151. The Florida Civil Rights Act, FLA. STAT. §§ 760.01–760.11 (2022).

152. A complaint can also be initiated by the state Attorney General, the Florida Commission on Human Relations (FCHR) or the FCHR commissioner. *See generally What We Do*, FLA. COMM'N ON HUM. RELS., https://fchr.myflorida.com/what-we-do [https://perma.cc/6GMH-JRLB] (explaining the FCHR's role in addressing discrimination in Florida); FLA. STAT. § 760.021 (2022) (authorizing the Attorney General to enforce the provisions of the Florida Civil Rights Act).

153. FLA. STAT. § 760.021 (2022)

subjected to discrimination under HB 7.[154] Where a state employee is found to have violated the law, they may be discharged from their position.[155]

At the end of the 2022 legislative session, Florida lawmakers introduced a "conforming" bill[156] which renders universities ineligible for performance funding if they have a "substantiated violation" of HB 7.[157] A violation could cost a university or college tens of millions of dollars in annual funding. Violations are determined by a "court of law, a standing committee of the legislature, or the Board of Governors."[158] A violation renders the institution ineligible for performance funding in the subsequent fiscal year.[159]

The Florida Board of Governors' regulations for HB 7 establish a new institutional infrastructure designed to monitor and punish alleged violations of the law. This framework makes clear that HB 7 represents a dramatic institutional shift in how race is managed in college and university classrooms in the state of Florida. The Board's regulations require that each university adopt a regulation that prohibits the forms of discrimination delineated in HB 7.[160] Universities are also required to post the regulation on their websites (with other regulations).[161] Further, the Board regulations require that when administrators receive complaints, they must be forwarded to the office designated for these complaints.[162] It will then be determined whether the complaint is credible. If it is found that there has been instruction (or training) in violation of the university regulation, the university must notify the Board of Governors (through the Inspector General's Office). Following this, it must be decided whether the instruction can be modified

154. *Id.* In December 2021, Florida governor Ron DeSantis stated that the Stop WOKE Act would allow parents to sue school districts that taught critical race theory. Andrew Atterbury, *DeSantis Pushes Bill that Allows Parent To Sue Schools Over Critical Race Theory*, POLITICO (Dec. 15, 2021), https://www.politico.com/states/florida/story/2021/12/15/desantis-targets-critical-race-theory-with-bill-that-evokes-texas-abortion-bounties-1400102 [https://perma.cc/WV5U-SAMG].

155. FLA. STAT. § 760.11(15) (2022).

156. A conforming bill is a bill that amends the Florida Statutes to provide for specific changes in the general appropriations bill.

157. FLA. STAT. § 10001.92(5). In the summary section of the Florida Board of Governors' proposed regulation, reference is made to the need to determine whether there is a "substantial" violation. This document addresses definitional issues related to the application of HB 7. Florida Board of Governors, Notice of Proposed New Regulation, *supra* note 147. It is noted that definitions section states that a determination must be made as to whether there has been a "substantiated" violation. FLA. STAT. § 10001.92(5) (2022). "Substantial" and "substantiated" have distinctly different meanings. Given that the regulations use the term "substantiate" in its definitions' section [(1)(d)], it is likely this is the intended term.

158. FLA. STAT. § 10001.92(5) (2022).

159. *Id.*

160. FLA. ADMIN. CODE ANN r. 10.005(2) (2022) (noting that "[u]ntil further judicial action, compliance with or the enforcement of this regulation has been enjoined pursuant to a Federal Court Order in case number 4:22cv304-MW/MAF and 4:22cv324MW/MAFF").

161. *Id.* § (2)(c).

162. *Id.* § 3(a). Per the regulations, a complaint may be sent directly to the Board of Governors. *Id.* § (3)(c). When this happens, the Board may refer the complaint to the university's Chief Audit Executive. *Id.* § 3(d).

so that it is consistent with HB 7. If not, disciplinary measures or termination are possible. The Board of Governors' regulations outline the multi-step process for handling alleged violations of the university regulation.[163] Much of the alarm about the law is rooted in its ambiguity.[164]

With its uncertain and potentially widespread application, HB 7 has not gone unchallenged in the courts. In *Pernell v. Florida Board of Governors*, the plaintiffs, university professors and students, argued that the law violates constitutional guarantees, including the First and Fourteenth Amendments. The plaintiffs motioned for a preliminary injunction. U.S. District Court Judge Mark Walker issued a preliminary injunction.[165] On appeal, the Eleventh Circuit Court of Appeals upheld Judge Walker's ruling and denied the Florida Board of Governors' request to stay the injunction.[166]

B. HB 7 In the Law School Classroom

This section offers a look at the day-to-day impact of HB 7. It explores the meaning and language of the bill and evaluates the expectations it places on instructors who teach courses that address concepts, topics, and language explicitly highlighted in the bill. Seven scenarios are offered here that contextualize the potential applications of HB 7. Each one exposes the breadth of the legislative gray area of HB 7. Together, the scenarios highlight the many problematic aspects of the law.[167] These uncertainties leave individual professors to navigate unsafe educational terrain. This uncertainty can lead to severe sanctions, hefty fines, and loss of employment.

Scenario One

> Professor X teaches a Death Penalty course at a law school. Students have been assigned a range of reading material on capital punishment, including demographic data on death row inmates

163. *Id*. at (3).

164. For instance, noticeably absent from the law is a public reporting requirement, which would reduce uncertainty about how the law will be applied and how widespread its application will be. It should be required that students, faculty, staff, and members of the public can easily find out the number of complaints, nature of complaints (which type of HB 7 violation), outcomes for complaints, and sanctions for substantiated complaints have been filed. This data should include demographic data on the targets of complaints (e.g., race and sex). This concern could be addressed by requiring that the state produce a quarterly report of HB 7 complaints and actions.

165. Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 22CV304(MW/MAF), No. 22CV324(MW/MAF), 2022 WL 16985720 (N. D. Fla. Nov 17, 2022).

166. Pernell v. Fla. Bd. of Governors of State Univ., No. 22-13992-J, 2023 WL 2543659 (11th Cir. Mar. 16, 2023).

167. For a list of questions about the application of the law in the K-12 classroom, see Brief for Learning for Justice and Florida Freedom to Read Project as Amicus Curiae at 108–12, Falls v. DeSantis, 609 F. Supp. 3d 1273 (N. D. Fla. 2022) (No. 22CV166-MW/MJF), https://www.splcenter.org/sites/default/files/falls_v._desantis_22-cv-00166_ecf_no._35-1_proposed_amicus_of_lfj_and_ffrp.pdf [https://perma.cc/BB94-TGVC].

> and victims,[168] philosophical perspectives (e.g., Cesare Beccaria[169]), and an examination of various rationales for the death penalty (including deterrence, retribution, and rehabilitation). In addition, students have been assigned a series of death penalty cases, including Furman v. Georgia,[170] Gregg v. Georgia,[171] McCleskey v. Kemp,[172] and Hurst v. Florida.[173] As part of class discussion, students state their varied opinions on death penalty, including whether it should be constitutional. A student asks the professor "What's your opinion about whether the death penalty operates in a racially-discriminatory and unconstitutional manner?"

Under HB 7, it appears that only a limited range of responses is permissible. Can the professor, a death penalty scholar, give her students her informed opinion, which is based on data and facts?

HB 7 appears to say that it is acceptable for professors to give students "information," however, "knowledge"—the synthesis and logical conclusions drawn from that empirical information—is a bridge too far. The prohibition against sharing opinions strikes at the core of professors' expertise. The legislation gives clear pause to opinion sharing by professors. Most notably, a professor's opinion that supports the existence of structural racial bias is problematic under the law, while a professor's opinion that rejects the existence of structural racial bias is presumably acceptable. The reach of HB 7 is not content-neutral. Other questions are raised as well. If not in the classroom (or during office hours), where are the spaces on campus that allow faculty opinions to breathe? HB 7 is silent on these questions.

It is noted that HB 7's restrictions apply to guest lecturers.[174] The law's ambiguity makes it likely that if a professor invites a guest lecturer, say a death

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168. *See, e.g.*, DEBORAH FINS, NAACP LEGAL DEF.& EDUC. FUND, DEATH ROW U.S.A (Winter 2022), https://www.naacpldf.org/wp-content/uploads/DRUSAWinter2022.pdf [https://perma.cc/M4UZ-VKBX].

169. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENT (Georg Koopman ed., Graeme R. Newman & Pietro Maraongiu trans., Taylor & Francis Grp., 5th ed. 2017) (1872).

170. *See* Furman v. Georgia, 408 U.S. 238 (1972).

171. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

172. *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

173. *See* Hurst v. Florida, 577 U.S. 92 (2016).

174. *See, e.g.*, *Introduction to HB 7*, CHIEF DIVERSITY OFFICER, UNIV. OF FLA., https://cdo.ufl.edu/hb-7/ [https://perma.cc/7W3F-L8AN] (last visited Nov. 10, 2022). The webpage for the University of Florida's Chief Diversity Officer states:

> If a guest speaker is providing instruction or training with the authorization of the University or any of its employees, that guest speaker may be considered a University instructor or trainer under the HB 7 laws.
>
> The University recommends that when a guest lecturer is invited into instruction or training, the inviting employee provide the guest lecturer a copy of the HB 7

penalty defense attorney, that person might run afoul of the law for sharing their practice-informed opinions regarding capital punishment. Can the dictates of HB 7 only be met if the professor also invites a pro-death penalty attorney to speak with his class?[175]

Another legislative oddity arises. It appears that HB 7 allows students to share their opinions, but not faculty members. This is a peculiar educational outcome, that instructors' voices are silenced in the very area of their expertise, while students' voices and opinions are amplified. As a result, HB 7 may also reinforce existing biases in classroom participation.[176] HB 7 does not address how "inculcation" works. It presumes it is a unidirectional phenomenon—instructor to student.

> *Scenario Two*
>
> In advance of a discussion and analysis of reparations in her Remedies course, Professor B assigns an article by writer Ta-Nehisi Coates.[177] It is the only reading she assigns on the topic. The article argues in favor of specific forms of reparations for African

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> laws, which can be found here, and these FAQs to be read before the speaking engagement. The guest speaker should be asked if their presentation and materials are consistent with the HB 7 laws. If they are not, the guest speaker must modify them or the presentation should be canceled.
>
> If a guest speaker acts inconsistent with the HB 7 laws, the employee that has authorized the guest speaker must take action to remedy situation. If it can be done without causing a greater disruption to the instruction or training, the employee is encouraged to make an immediate statement to remind the speaker against endorsement or promotion of the concepts and confirm to students and trainees that they are not required adopt any of the views of the guest speaker. Otherwise, the employee should take steps to remedy the guest speaker's statements at the next available opportunity.

Id.

175. There are additional issues regarding guest lecturers. For instance, in a situation where a student organization invites a speaker to the university, is that person enveloped within HB 7? Is a talk by a guest lecturer "instruction" under HB 7? Further, does it matter whether the student organization is publicly or privately funded?

176. Research indicates that men are more likely to speak out in classroom settings than women. *See e.g.*, Jennifer J. Lee & Janice M. McCabe, *Who Speaks and Who Listens: Revisiting the Chilly Climate in College Classrooms*, 35 GENDER & SOC'Y 32, 35 (2021), https://journals.sagepub.com/doi/epub/10.1177/0891243220977141 [https://perma.cc/N8HG-C6AK]. Studies further show that college students of color in college in predominantly White classrooms are less likely to raise their hands to participate than their White peers. *See, e.g.*, Jay Howard, Aimee Zoeller, & Yale Pratt, *Students' Race and Participation in Sociology Classroom Discussion: A Preliminary Investigation*, 5 J. SCHOLARSHIP TEACHING & LEARNING, Dec. 2006, at 14, https://files.eric.ed.gov/fulltext/EJ854909.pdf [https://perma.cc/F66W-QHH3]; *see also* John Wesley White, *Resistance to Classroom Participation: Minority Students, Academic Discourse, Cultural Conflicts, and Issues of Representation in Whole Class Discussions*, 10 J. LANGUAGE, IDENTITY & EDUC. 250 (2011).

177. *See* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ [https://perma.cc/4U8U-LTDG].

> Americans whose ancestors were kidnapped from Africa and shipped to the United States.

A variety of questions are raised by this scenario which appears to trigger both sections five and six, listed above.[178] First, does HB 7 prohibit a classroom discussion about a reparations article that supports affirmative action as a method to achieve racial equity? Does this pedagogical approach violate the Act's prohibition against teaching that someone who is White, by virtue of their race, should be discriminated against due to actions committed by White people in the past?[179] Further, can the assignment of this article, which has a particular viewpoint, be interpreted as "inculcating, espousing, promoting, advancing, or compelling" students to favor reparations for African Americans? If so, then who decides where the line between teaching and inculcating falls?

> *Scenario Three*
>
> Professor R teaches a sociology of law course. The course includes a section on race-related terminology and its impact on politics and state policies. As part of the reading and analysis of this topic, Professor R has her students read works by several scholars who discuss the origins and applications of terms such as "colorblind," "objectivity," "neutrality," and "merit." These scholars conclude that these terms are problematic because they lionize the concepts of impartiality and universal truths.

The above scenario addresses a topic that has sparked robust scholarly debate[180] and pertains to section eight of HB 7.[181] Is Professor R permitted to assign these readings and facilitate a discussion with her students about the role of language, law, and race? If Professor R additionally assigns reading that argues in favor of using these terms, does that satisfy the HR 7 mandate? What if, instead, she only assigns material that supports using these terms? If the lattermost scenario is permissible under HB 7, but the first is not, then the law itself appears to espouse and advance particular perspectives.

> *Scenario Four*
>
> Professor G teaches a law course that includes a section on the state action doctrine. The course, which examines the role of criminal legal institutions in the United States, focuses on policing, courts, and prisons. The assigned readings and lectures

178. *See* FLA. STAT. § 1000.05(4)(a)(5)– (6) (2022).

179. *See* FLA. STAT. § 1000.05(4)(a)(5) (2022).

180. *See, e.g.*, Jonathan Feingold, *Racing Towards Colorblindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J. L. MOD. CRITICAL RACE PERSP. 231 (2011); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (2018); Adia Harvey Wingfield, *Color-Blindness is Counterproductive*, ATLANTIC (Sept. 15, 2015), https://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037/ [https://perma.cc/742V-URQ6].

181. *See* FLA. STAT. § 1000.05(4)(a)(8) (2022).

> examine the history of these institutions. This includes some articles and cases used to discuss how institutionalized White supremacy has operated to oppress people of color, particularly Indigenous people and African Americans. The assigned reading includes material on historical policing practices, such as the slave patrols and their present-day manifestations.[182]

The official title of HB 7, the "Individual Freedom Act," along with its text, suggests that it is designed to protect and uphold individual rights. Given this, does HB 7 punish classroom instruction on how state or federal actions help some racial groups and harm others? More specifically, does it prohibit discussing the role racism plays in understanding how state institutions function—are discussions of White supremacy barred by the law?

> *Scenario Five*
>
> Professor D teaches a race, crime, and law course. She has compiled a list of terms, names, concepts, narratives, foundational approaches, books, policies, cases, and incidents. The professor believes these topics are essential to understanding U.S. criminal legal structures and how law, crime, and race intersect.[183] The list includes a diverse range of material, including the Chicago school of criminology, Rockefeller drug laws, Marion Sims (physician), the Patriot Act, and the 1619 Project. Professor D has her students review and discuss this "race and crime literacy" list and draws heavily on its subject matter for the course.

Under HB 7, can the professor assign a list of terms? Does a requirement that students familiarize themselves with the list constitute "espousing," "promoting," or "compelling" them to believe the concepts included on the list? The text of the legislation offers little guidance in delineating between exposing students to critical ideas and promoting critical ideas. The law makes clear that some theoretical approaches to race and history are welcome while others are not. In this way, the enactment of HB 7 indicates that courses explicitly focused on race will receive special scrutiny. Indeed, based on the sweep of HB 7, it is reasonable to conclude that courses focused on race are no longer welcome in the curriculum of Florida colleges and universities.

> *Scenario Six*
>
> Professor T directs a center at the university where he teaches. The Center focuses on issues of race. As part of the Center's work, Professor T runs a research lab with a group of five graduate students. During their weekly meetings, the group discusses

182. *See, e.g.*, RUSSELL-BROWN, supra note 9, at 57–58 (discussing slave patrols as the first uniquely American form of policing).

183. *See, e.g.*, *id.* at 153–60 (listing over one hundred and fifty terms necessary for developing race and crime literacy).

> material that the students have selected to read. The lab group also researches and prepares white papers on race-related topics. Some research topics include qualified immunity for police officers, children with incarcerated parents, and juvenile waivers.

Academic work involving an instructor and students that takes place outside of the standard classroom appears to fit under HB 7's broad language. The definition of instruction as, "the process of teaching or engaging students with content about a particular subject by a university employee or a person authorized to provide instruction by the university within a course" [184] is broad enough to include teaching labs. The law does not seem to differentiate based on whether the students receive academic credit or pay for their participation.

> *Scenario Seven*
>
> Professor J teaches Criminal Law, a required course for first-year law students. Professor J typically arrives to class fifteen minutes ahead of class time. He is in the room when students arrive. Often, students will approach him before class and ask him questions about the material, his opinion on the holding in a particular case, or his thoughts on a national news story involving issues of crime and race. Likewise, after class, students approach Professor J to ask questions about the class, including his opinion on criminal law matters and news stories involving criminal law issues.

Do these pre- and post-class periods fall within the ambit of HB 7? Under the law, what are the temporal and pedagogical boundaries around "instruction"? Allowing HB 7 to act as a broad net that covers pre- and post-instruction periods may discourage professor-student interactions. Extending this scenario further, how does HB 7 classify a professor stating her opinion about class-related issues during her office hours? Are office hours considered "instruction"?

These seven hypotheticals prompt important and realistic questions about the reach and potential harms of HB 7. The scenarios underscore that the language of HB 7 is vague and subject to multiple interpretations. Further, because the law does not appear to be rooted in empirical research findings,[185] it is impossible to know where the line is drawn between "inculcating" and simply teaching.

HB 7 will likely diminish the power of Florida's educators. An example of this is how the law impacts how an instructor may respond to student commentary in the classroom. For instance, in a situation where a student makes a racially-charged remark in the classroom, HB 7 seems to diminish the instructor's

184. Under Florida Board of Governors Regulations 10.005 (1)(c), "instruction" is defined as "the process of teaching or engaging students with content about a particular subject by a university employee or a person authorized to provide instruction by the university within a course." FLA. ADMIN. CODE ANN r. 10.005(1)(c) (2022).

185. *See, e.g.*, Press Release, Office of Governor Ron DeSantis of Florida, *supra* note 127 (citing only anecdotal evidence of CRT being taught in schools, and identifying zero examples of CRT being taught in Florida schools).

authority, and discourages the instructor from engaging with the student and directly addressing the comment. What if a law student in a constitutional law or property course raises his hand and says, "Slavery was a necessary evil." Some professors would seek to use this instance as a "teachable moment." Many professors, however, will not know how to effectively respond and will seek to quickly move on from the comment. For many instructors, HB 7's existence would discourage their engagement with tough issues. What are the range of responses that are safe per HB 7? Does this comment fall directly under one of HB 7's eight provisions defining discrimination? For example, is this statement an example of someone of one race teaching that members of another race are morally superior? If so, if the instructor then acknowledges the racism within the comment by saying, "That's a racist comment" and goes on to explain why, is that permissible under HB 7? If, in fact, HB 7 prohibits an instructor's corrective response, this prohibition would be directly at odds with the goals of creating a classroom climate in which all students are respected. This indicates that HB 7 operates as a bar against substantive literacy on specific race-related subjects.

HB 7 lays out a new academic order—one with the power to substantially upend K-20 education in Florida. The bottom-line query is this: Who is in charge? Who gets to determine the subject matter, format, and substance of what is taught in the college classroom? The state's Board of Governors, the Board of Trustees at individual universities and colleges, the governor, students, parents, or professors? One of the more troubling aspects of the implementation of HB 7 is that one of the constituencies most affected by the law—instructors—was not invited to weigh in on the problem that HB 7 is ostensibly designed to solve.

Beyond questions about specific sections of HB 7, the law raises larger issues of pedagogy and content neutrality. The Act could reasonably be understood to mandate a "both sides" approach when teaching certain academic subjects. Does this pedagogical framework mean that a classroom lecture and discussion of U.S. chattel slavery would require a discussion of both its "bad" and so-called "good" aspects? If so, it appears that education and instruction under HB 7 compels professors to present opposing viewpoints for every topic of study and at the same time does not allow them to offer their interpretation of empirical conclusions (which could be interpreted as "espousing" or "inculcating" students). If this understanding is an accurate interpretation, HB 7 reduces the work of professors to professional academic interpreters—ones who can discuss the research findings and precedents in a particular area. However, they are not permitted to inform students that, in their opinion, some legal findings are justifiable or unjust.[186] These strictures are particularly concerning for legal education. Long embedded

186. One question that arises is how this edict applies to settled law. For instance, under HB 7 is it permissible for an instructor to say that Brown v. Board of Education, 347 U.S. 483 (1954) was properly decided? Alternatively, what about a professor who tells her law class that Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022) was wrongfully decided?

in legal education pedagogy is the goal of honing students' critical thinking capabilities.[187]

HB 7 sounds alarm bells about government orthodoxy. In *West Virginia State Board of Education v. Barnette*,[188] the U.S. Supreme Court identified some of the dangers of government overreach in the classroom:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[189]

As the hypothetical scenarios show, HB 7 has the power to rewrite statewide curriculum and undermine the work of a sizeable branch of the professoriate. Its orthodox prescriptions attack substantive literacy, preventing students from developing critical analytical tools. Under HB 7, professors are no longer treated as leaders in guiding the state's educational curriculum. Under HB 7, professors are relegated to figuring out the rules of compliance. The harm caused by this shift could be substantial. At one end of the continuum, it may be business as usual, so long as the professor does not share her opinions with students and does not teach any of the identified subject areas. Midway along the continuum would be a professor who concludes that she should have senior administrators review her lecture notes in advance. The latter approach might be particularly attractive to untenured and non-tenure-track faculty members.[190] At the other end of the continuum, a professor could decide she no longer wants to teach race-related subject matter because she does not want to run the risk of violating HB 7. She may feel that

187. In a wide-ranging talk on what skills are essential for legal education, Darby Dickerson, the President of the Association of American Law Schools states, "Professors must ensure that they are teaching students to think critically. Critical thinking is deep thinking that helps us question whether information presented is reliable, fact-based, evidence-based, and unbiased." Darby Dickerson, *President's Message: Promoting Candor*, ASSOC. OF AM. L. SCH.'S, https://www.aals.org/about/publications/newsletters/aals-news-spring-2020/presidents-message-promoting-candor/ [https://perma.cc/WU7B-CZ7N] (last visited Nov. 21, 2022).

188. 319 U.S. 624 (1943).

189. *Id.* at 642.

190. Only a few Florida colleges and universities have published online statements or guidance regarding HB 7. Universities with posted information include the University of Florida, *Understanding House Bill 7*, UNIV. OF FLA., https://media.coip.aa.ufl.edu/public_live/hb7/presentation_html5.html [https://perma.cc/FMX3-RY59] (last visited Nov. 9, 2022), the University of West Florida, Update from George Ellenberg, Provost and Senior Vice President, University of West Florida (May 6, 2022), https://uwf.edu/media/university-of-west-florida/academic-affairs/departments/division-of-academic-affairs/provost-communications/2022/05-06-2022_update_from_the_provost.pdf [https://perma.cc/9H8Q-B39R], and the University of North Florida, *Florida House Bill 7 & Civil Discourse*, UNIV. OF N. FLA., https://www.unf.edu/ofe/HB7.html [https://perma.cc/3AQM-S5VT] (last visited Feb. 12, 2023).

teaching about race is a red flag, one that will bring unwanted scrutiny and threaten her position.[191]

C. Companion Legislation

Appreciating the full force of HB 7 requires looking beyond the law itself. HB 7 is but one law in a large, expanding unit of interrelated Florida laws and regulations. This legislative bundle was passed in the early 2020s. One example is the viewpoint survey mandated by Florida House Bill 233. The "Intellectual Freedom and Viewpoint Diversity," survey is an annual questionnaire administered to students, staff, and faculty throughout Florida's State University System and Florida College System.[192] The questionnaire is designed to measure the degree to which students are exposed to ideas they may disagree with and whether they are exposed to a range of perspectives.[193] The survey appears to provide professors with a clear directive as to how they should handle race-related material in their courses. The mandate that professors teach material in an "objective manner without endorsement of the concepts"[194] may sound benign. However, if part of the state's evaluation of how classrooms operate is the degree to which they employ a "point/counterpoint" approach, this mandate constitutes a sharp reformulation of educational curricula. Thus, it is fair to conclude that HB 7 rewrites the classroom syllabus. Governor DeSantis has stated that viewpoint surveys are

191. *See, e.g.*, Hamilton, *supra* note 24, at 79. Professor Hamilton discusses the story of an Oklahoma middle school social studies teacher who became concerned about what she could teach after the passage of an anti-CRT law. *Id.* The teacher assigned narratives of formerly enslaved people. During class discussions, many students were moved to tears. *Id.* Though the goal of the assignment was to sharpen their understanding of history and create empathy, the teacher worried that she might face discipline or retaliation. *Id.*

192. *See Intellectual Freedom and Viewpoint Diversity: Employee Survey*, STATE UNIV. SYS. OF FLA. (Apr. 4, 2022, 3:47 PM), https://s3.documentcloud.org/documents/21574590/combined-intellectual-freedom-and-viewpoint-diversity-employee-survey.pdf [https://perma.cc/9TA2-33YP]. Per HB 233, the Florida Board of Governors and the Florida State Board of Education will conduct an annual assessment on intellectual freedom and viewpoint diversity at the state universities and colleges. FLA. STAT. § 1001.03(19)(a)(2)(b) (2022).

193. The questionnaire states that it "attempts to discover the extent to which all viewpoints – conservative, liberal, and otherwise – are welcomed and provided appropriate attention on [] campus and in the classroom." Intellectual Freedom and Viewpoint Diversity: Employee Survey, *supra* note 192. The survey has twenty-four questions. Here are four items that appeared on the 2022 survey: (1) "Students at my institution are encouraged to consider a wide variety of viewpoints and perspectives"; (2) "Students at my institution are not shielded from ideas and opinions they find unwelcome, disagreeable or even deeply offensive"; (3) "I have felt intimidated to share my ideas or political opinions because they were different from those of my colleagues"; (4) "My institution is equally tolerant and welcoming of both liberal and conservative ideas and beliefs." *Id.* Respondents are instructed to rank statements using a five-point Likert scale. *Id.*

194. FLA. STAT. § 760.10(8)(b) (2022).

necessary to prevent state universities from becoming "hotbeds for stale ideologies" and "intellectually repressive environments."[195]

A second example is that HB 233 allows students to surreptitiously record (audiotape or videotape) class lectures for the purpose of substantiating or investigating an alleged violation of HB 7.[196] Senate Bill 7044 provides a third example. It authorizes the Board of Governors to require post-tenure reviews for all tenured professors who teach at a state university.[197] This postsecondary education bill, passed in 2022, allows the Board of Governors to impose extensive interim evaluations of tenured faculty members.[198] The fourth example is that House Bill 1467 allows for greater state control and increased parental and community involvement in the educational materials that may be purchased by Florida public schools for inclusion in K-12 media centers.[199] This legislation mandates that school districts provide parents with a formal process to challenge library books and instructional materials.[200] A fifth action is the Florida legislature's passage of revised voter districting maps.[201] These new maps weaken the voting power of

195. Susan Svrluga & Lori Rozsa, *In Florida, DeSantis's Plans for Colleges Rattle Some Academics*, WASH. POST (July 1, 2022, 2:26 PM), https://www.washingtonpost.com/education/2022/07/01/desantis-florida-universities-laws/ [https://perma.cc/TCH4-3JE7].

196. Under HB 233, recording may be for a student's "own personal educational use, in connection with a complaint to the public institution of higher education where the recording was made, or as evidence in, or in preparation for, a criminal or civil proceeding." FLA. STAT. § 1004.097(3)(g) (2022). Notably, the Bill's language does not say that a student must have the professor's permission to record (video or audiotape) lectures. *Id.* Permission is only required if the student seeks to "publish" the recording (e.g., send it to a media outlet). *Id.* Student recordings may be done openly or in secret regardless of whether the professor consents. The permission given to students to secretly record a lecture runs contrary to state law. In Florida, a two-party consent state, it is a third-degree felony for someone to record a conversation with another person without permission. *See* FLA. STAT. § 934.03 (2022). In effect, HB 233 overrides the state recording law.

197. FLA. STAT. § 1001.706(6)(b) (2022).

198. *Id*. If the review process is adopted by the Board of Governors, every five years, "each tenured state university faculty member" is required to take part in a substantial post-tenure review process. *Id.* The post-tenure review will address, "accomplishments and productivity; assigned duties in research, teaching and service; performance metrics, evaluations and ratings; and recognition and compensation considerations, as well as improvement plans and consequences for underperformance." *Id.*

199. *See* FLA. STAT. § 1006.28(2)(a)(4) (2022).

200. *See id.*; Press Release, Office of Fla. Governor Ron DeSantis, Governor Ron DeSantis Signs Bill that Requires Curriculum Transparency (Mar. 25, 2022), https://www.flgov.com/2022/03/25/governor-ron-desantis-signs-bill-that-requires-curriculum-transparency/ [https://perma.cc/6PUD-28QL].

201. *See* S. 2C, 124th Leg. Reg. Sess. (Fla. 2022), (codified as FLA. STAT. §§ 8.0001, 8.0002. 8.0111, 8.031, 8.051, 8.0611, 8.062, 8.063, 8.08, 8.081, 8.082, 8.083, 8.084, 8.085, 8.086, 8.087, 8.088) (2022)).

Black citizens.[202] Reduced political power means that Black citizens will be less able to effectuate change in their communities, which includes their schools. Sixth, in 2022, the Florida legislature passed House Bill 1557. The bill establishes grade specifications as to when educators can discuss sexual orientation in the classroom.[203] A seventh example is the Florida Board of Education's adoption of an explicit prohibition against CRT instruction (codified within HB 7).[204] Last, in spring 2022, Governor DeSantis prepared a seventy-page document delineating the ways in which he would wrest control and completely overhaul K-20 education in Florida.[205]

When viewed as a unit, the sheer scope and power of these laws is manifest. Working together, HB 7 and these companion laws, regulations, and documents, are poised to transform Florida's educational system. Together, they represent legal retrenchment—a systemic approach to dismantling curriculum that is rooted and race-inclusive. By design, these laws work to silence and punish the teaching of marginalized histories—thereby instituting and promoting a 21st century version of anti-literacy laws.

IV.
THE DOMINO EFFECT OF HB 7

It will take time to assess the full impact of HB 7, including, in particular, the various ways that professors adapt their curriculum to meet the requirements of the Stop WOKE law. However, the impact of HB 7 is not limited to professors who currently teach courses that address racial issues. The law's reach is potentially quite extensive and could upend how professors across disciplines teach particular subjects in Florida college classrooms. HB 7 places instructors in its bullseye. As the central targets, instructors must decide whether and how to reframe

202. Zac Anderson & Mark Harper, *Will Black Voters Punch Back at the Polls Against Gov. Ron DeSantis Over Redistricting Map?*, TALLAHASSEE DEMOCRAT (Apr. 24, 2022, 9:06 PM), https://www.tallahassee.com/story/news/politics/2022/04/24/desantis-redistricting-florida-congressional-map-impact-black-voters/7371062001/ [https://perma.cc/7AHM-X54G] (discussing how the new maps reduce the strength of Black Americans' voting power); Andrew Witherspoon & Sam Levine, *'A Racist Move': Florida's DeSantis Threatens Black Voter Power With Electoral Maps*, GUARDIAN (Apr. 20, 2022, 9:00 PM), https://www.theguardian.com/us-news/ng-interactive/2022/apr/20/ron-desantis-florida-electoral-map-gerrymandering-republican-advantage [https://perma.cc/2EMH-93QS].

203. An Act Relating to Parental Rights ("Don't Say Gay" Bill), H.R. 1557, 124th Leg., Reg. Sess. (Fla. 2022) (codified as FLA. STAT. § 1001.42(8)(c)(3) (2022)).

204. *See* FLA. ADMIN. CODE ANN. r. 6A-01.094124 (2022). Notably, the rule bans the use of material from the 1619 Project and states that CRT is akin to the "denial or minimization of the Holocaust." *Id.*

205. Draft Bill 05-01233-22 for Florida Senate (2022), https://jasongarcia.substack.com/api/v1/file/dbf4ae45-4be9-47c3-9ca8-fa577157983c.pdf [https://perma.cc/8GXY-HH88]; for an analysis of this plan, see Jason Garcia, *Ron DeSantis Plotted an All-out Assault on Public Universities*, SEEKING RENTS (June 1, 2022), https://jasongarcia.substack.com/p/ron-desantis-plotted-an-all-out-assault [https://perma.cc/XTX8-N9U8]. Only some of the imperatives in DeSantis's draft ultimately became part of HB 7 and the related legislation.

their course material to comport with the new law. This discussion identifies HB 7's myriad potential impacts on race and post-secondary education in Florida.

A. In the Classroom and Beyond

HB 7 may impact, and, in some instances, drive how courses are taught. As noted in the above discussion of scenarios, professors will have to determine whether they can continue to teach their classes the way they have in previous semesters.[206] If not, then they will have to assess what changes they need to make to ensure their instruction complies with HB 7. This will be a hit-or-miss calculation in the early period of the legislation.

Professors who teach courses on topics that are not traditionally viewed as race-centered (e.g., constitutional law, property, contracts, tax, zoning), might reasonably decide to avoid or minimize any race-related material or issues in those courses. These instructors may determine that HB 7 makes teaching about race at best unattractive and at worst dangerous, as it would bring unwanted scrutiny to their classroom and threaten their tenure.[207] Issues of race, race relations, and racism are part of wide swath of historical and contemporary practices across a range of fields, including medicine, law, anthropology, English, and education. If HB 7 creates such a chilling effect, the minimization of discussions of race will have a significant impact across disciplines.[208]

However, the outcome may be different for courses focused on race-related issues (e.g., a course on race and law or on race, gender, and law) or courses that include a sizeable section on race issues (e.g., criminal law, police practices). Some professors are undaunted by the law.[209] Professor Feingold argues, for example, that the seemingly race-neutral language of these laws (in contrast to the language of the slave codes, Black codes, and Jim Crow laws) can be invoked for racially progressive ends. For instance, he says, CRT writings can be used to address and contextualize race-related course subjects, in ways that comply with the

206. It is difficult to determine exactly how many race-related courses are offered at a university, particularly if they are not expressly identified as race-related courses in their title. However, it appears that there are relatively few race-focused courses offered at the University of Florida (fewer than two dozen courses for the Fall 2022 semester, by the author's count).

207. *See, e.g.*, KATHERYN RUSSELL-BROWN & RYAN MORINI, UNIV. OF FLA. LAW, A WAY FORWARD: UF RACE SCHOLARS ON SUPPORT, OBSTACLES, AND THE NEED FOR INSTITUTIONAL ENGAGEMENT (Fall 2021), https://www.law.ufl.edu/law/wp-content/uploads/UFRaceScholarshipReport-2021.pdf [https://perma.cc/A33Z-TWUL]. Several UF faculty respondents expressed fear and about teaching race-related courses and engaging in race-related scholarship. One stated, "Scholars conducting work on racism are being heavily surveilled and I do not get the sense that the school will protect them." *Id*. at 20.

208. While HB 7 includes language stating that race has a role in the curriculum, just what that role is—and where the line is drawn—is unclear.

209. *See, e.g.*, Paul Ortiz, '*Stop WOKE Act' Won't Stop Me From Teaching Challenging Topics*, GAINESVILLE SUN (July 3, 2022, 6:00 AM), https://www.gainesville.com/story/opinion/2022/06/28/paul-ortiz-stop-woke-act-meant-silence-discussions-race/7711167001/ [https://perma.cc/BHC4-TG7M].

language of anti-CRT laws.[210] Regardless, the amount of work required to restructure a course to ensure it comports with HB 7's requirements may cause many professors to decline to teach particular courses altogether.

If a professor declines to teach a course due to HB 7 constraints, and another instructor is unavailable to teach the course, the course will not be offered. The long-term impact is that the course may be removed from the curriculum. This is one of the possible ripple effects of HB 7. There is great potential that it will adversely affect which college courses are available for students to take. More specifically, it will likely limit the number of courses that explicitly center on race-related subjects. In an attempt to comply with HB 7, some academic administrators (e.g., deans) will seek to remove courses that focus on race or, at a minimum, change course titles so they do not include "race" or "critical" (or other language highlighted in the legislation). Further, fewer instructors will risk teaching a race-centered course. As a result, HB 7's rules will impact the education of thousands of Florida college students.[211]

B. Delegitimization of Race Scholarship, Race Scholars, and DEI[212]

In addition to forcing a reconsideration of what is taught, HB 7 appears to be aimed at diminishing the value of race-related majors, such as African American Studies, Latin American Studies, and Ethnic Studies. By making race and racism third rail topics, the law may cause some undergraduates who were planning to select a race-related major (or minor) to reconsider their choice. This may also make race-related disciplines less attractive to graduate students. If this happens, the viability of these academic programs is at stake.

If HB 7 impacts which programs are offered by university departments and in turn which programs are available to students, it will also impact the prevalence of race scholars. In its focus and tenor, HB 7 denigrates race-related scholarship

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210. *Id.* at 749–51. Feingold presents a hypothetical involving a social studies class studying the race/gender data of Fortune 500 CEOs. *Id.* To contextualize disparities and correct assumptions that "CEO White male overrepresentation derives from some inherent White male superiority," Feingold suggests that the instructor could assign, for example, Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). *Id.* This would be in compliance with a bill that prohibits "teaching that one race or sex is inherently superior to another race or sex." *Id.*

211. The National Center for Education Statistics projects that in 2021–2022 there were nearly 175,000 public high school graduates in the state of Florida. Notably, the total number of high school students (grades 9 to 12) would be much higher. National Center for Education Statistics, *Public High School Graduates, By Region, State, and Jurisdiction: Selected Years 1980–81 through 2026–27*, https://nces.ed.gov/programs/digest/d16/tables/dt16_219.20.asp [https://perma.cc/H822-T453] (last visited Mar. 27, 2023).

Further, some have argued that laws such as HB 7 will discourage students from attending college in Florida. *See e.g.*, Suzanne Lynch, *The 'Stop WOKE' Act Will Send Some of Our Best Students Out of Florida,* TAMPA BAY TIMES (Aug. 30, 2022), https://www.tampabay.com/opinion/2022/08/30/the-stop-woke-act-will-send-some-of-our-best-students-out-of-florida-column/ [https://perma.cc/8VJV-U6FU].

212. DEI is the acronym for Diversity, Equity, and Inclusion.

and race scholars.[213] HB 7 can be interpreted as categorizing race scholarship, particularly when it addresses the history of U.S. race relations, as racist, biased, and even as a kind of indoctrination.[214] It exemplifies how Black thought and specifically Black critiques of U.S. systems are marginalized as somehow different, inappropriate, and ultimately deviant. Once a theoretical perspective, such as CRT, is classified as deviant, it triggers mainstream concerns that the perspective also poses a threat to larger society beyond academia. This supposed threat then opens the door for legislation such as HB 7—legislation designed to prevent the evils of an educational curriculum that includes race. While HB 7 fundamentally questions the value of race and critical race scholarship, it applies a limited definition of what constitutes race scholarship. For instance, mainstream teaching and scholarship about U.S. history could also be classified as "race-related" or "racial" in that it centers on dominant White perspectives and theoretical approaches. For instance, courses on Western civilization are not typically considered "race" or "race-related" subject matter.

The impact of HB 7 may be particularly harsh for faculty of color who are disproportionately engaged in race-related scholarship and teaching. Furthermore, as allegations of HB 7 violations are brought forward and sanctions are imposed, it may be that faculty of color will be disproportionately accused and sanctioned under the law. Another potential response to the realities of HB 7 is academic flight from Florida's post-secondary institutions. This is most likely for faculty members who are likely to face claims, or those who see HB 7 as a harbinger of future legislative and curricular directives, particularly ones directed at race scholars and faculty of color.[215] The potential loss is not only in instructors, but in students' exposure to race-related subjects and exposure to how these topics connect to other disciplines (e.g., economics). The inability to study race without fear, suspicion, or repercussion may lead to an exodus of race scholars in the state of Florida.

Beyond its impact on race scholarship and race scholars, enforcement of HB 7 is poised to diminish university work done to promote DEI work. The law provides little clarity as to which types of DEI activities and discussions violate the law. The text's ambiguity makes it likely that instructors and administrators will err on the side of caution. In the week after the bill went into effect, this hypothesis

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213. Whittington, *supra* note 16, at 26 observes that limitations placed on CRT classroom instruction may extend to CRT scholarship:

> The anti-CRT proposals have thus far focused particularly on classroom speech (whether oral or discussion or classroom materials), but it is not hard to imagine those restrictions being extended to other academic contexts and the core academic freedom questions would be the same whether dealing with scholarship or teaching.

Id. at 26 n.214.

214. H.R. 7, 124th Leg., Reg. Sess. (Fla. 2022) (codified as FLA. STAT. § 760.10 (2022)).

215. Since 2021, several faculty members with race-related expertise have left to teach at other universities or retired from the University of Florida.

played out in real time. Following George Floyd's murder in 2020, hundreds of colleges across the U.S. posted statements on their websites expressing solidarity and support for racial justice.[216] The English department at the University of Central Florida (UCF) posted an anti-racism statement on its webpage.[217] After HB 7 went into effect, the department removed the statement, which included the following language:

> We are tasked with developing the next generation of writers, thinkers, and citizens who will carry out this message until there is no longer a need to remind others that Black Lives Matter.[218]

Because of HB 7's vague language, it is not clear whether the anti-racism statement runs afoul of HB 7. However, less than one week later, UCF removed the anti-racism statements of several departments, including anthropology,[219] philosophy, sociology,[220] and physics.[221] The UCF spokesperson stated that some of the department postings "could be seen as inconsistent with our commitment to creating a welcoming environment."[222] HB 7 has bred a climate of fear. It is not possible to nurture an inclusive educational atmosphere where members of the academic community are threatened with punishment for expressing their opinions and viewpoints.

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216. *See, e.g.*, *CWC's Statement on George Floyd*, UNIV. FLA. COUNSELING & WELLNESS CTR., https://counseling.ufl.edu/response-floyd/ [https://perma.cc/Q2ZF-HUNB] (last visited July 29, 2022); *A Message from NYU President Andrew Hamilton*, OUR NYU NEWSLETTER (May 31, 2020), https://www.nyu.edu/about/leadership-university-administration/office-of-the-president/communications/a-message-from-andrew-hamilton-5-31-20.html [https://perma.cc/S22L-JZ7G]; *Solidarity Statement,* UNIV. TEX. AUSTIN DEP'T INTEGRATIVE BIOLOGY, https://integrativebio.utexas.edu/about/diversity-inclusivity-mission-statement/solidarity-statement [https://perma.cc/VJK2-HPUV] (last visited July 29, 2022).

217. *See, e.g.*, Anne Martin, *UCF Removes Anti-racism Statements*, ORLANDO SENTINEL (July 13, 2022, 5:46 PM), https://www.orlandosentinel.com/news/education/os-ne-ucf-antiracism-statements-20220713-b4xehqjn3jdppdia6znuvhvpyy-story.html [https://perma.cc/9953-Q5ZH]; Nicolle Osorio, *UCF's English Department Suspends Anti-racism Statement Following the Passage of Stop WOKE Act in Florida*, ORLANDO WKLY. (July 7, 2022, 4:08 PM), https://www.orlandoweekly.com/news/ucfs-english-department-suspends-anti-racism-statement-following-the-passage-of-stop-woke-act-in-florida-31978303 [https://perma.cc/C36U-KNNS].

218. *Id.*

219. The UCF Anthropology Dept. initially posted an anti-racism statement, but the link has since been disabled. Susan Svrluga, *Florida University Removes Some Anti-racism Statements, Worrying Faculty*, WASH. POST (July 14, 2022, 3:51 AM), https://www.washingtonpost.com/education/2022/07/14/ucf-anti-racism-statements-removed/ [https://perma.cc/5TBB-EXPW]. The relevant language in HB 7 states that instructors are prohibited from promoting the idea that a person, based on her race is inherently racist or oppressive, whether consciously or unconsciously. *See* FLA. STAT. § 1000.05(4)(a) (2022). For a discussion of this statement, *see* Svrluga, *supra* note 258.

220. *Id.*

221. *Id.* The following statement was removed from the UCF sociology website, "We stand in solidarity with the many people across the world who are deeply saddened by the tragic loss of the lives of Black people at the hand of police and vigilantes in the US. Recent events have once again laid bare the longstanding and pervasive legacy of anti-Blackness at the heart of US white-supremacist culture." *Id.*

222. *Id.*

It appears that DEI efforts are on a collision course with HB 7 prohibitions.[223] The law may immobilize—or temporarily pause[224]—the work of university staff members who have been tasked with addressing academic climate issues. The broad and general legislative language combined with fears of violating the law means that DEI efforts will be at most sanitized, feel-good events.

C. Widespread Ignorance

Studies consistently show that students graduating from high school receive inadequate formal instruction or engagement on issues of race, racism, and U.S. racial history.[225] Broadscale ignorance of U.S. race-related history likely means lack of knowledge on subjects such as the Middle Passage, alien land laws, slavery, genocide, lynching, the Chinese Exclusion Act, sundown towns, redlining, or Indian removal.[226] This information void underscores the value of core racial literacy.[227] Enforcement of HB 7 increases the likelihood that even fewer students will be exposed to race and history subjects as part of their undergraduate or professional school education.[228]

The American Psychological Association's Division of Educational Psychology filed an *amicus curiae* brief in *Falls v. DeSanti*s.[229] The brief reviews the

223. *See, e.g.*, Katie Clarey, *The Stop WOKE Act May Put a 'Strategic Pause' on DEI Efforts*, HR DIVE (May 17, 2022), https://www.hrdive.com/news/the-stop-woke-act-may-put-a-strategic-pause-on-dei-efforts/623750/ [https://perma.cc/EW9K-6KPZ].

224. *Id.*

225. *See, e.g.*, Adrienne Van Der Valk, *Teaching Hard History*, LEARNING FOR JUSTICE (Spring 2018), https://www.learningforjustice.org/magazine/spring-2018/teaching-hard-history [https://perma.cc/2EF3-KUR3]. A national survey of high school seniors found that less than one-half knew that slavery was legal in all thirteen colonies during time of American Revolution, less than one-quarter were able to identify how the Constitution protected slavery (as it was initially ratified), and less than ten percent identified slavery as the central cause of the Civil War. *Id.*

226. *See, e.g.*, Jessica C. Nelson, Glenn Adams & Phia S. Salter, *The Marley Hypothesis: Denial of Racism Reflects Ignorance of History*, 24 PSYCH. SCI. 213 (2012) (study of White and Black college students); Courtney M. Bonam, Vinoadharen Nair Das, Brett R. Coleman, & Phia Salter, *Ignoring History, Denying Racism: Mounting Evidence for the Marley Hypothesis and Epistemologies of Ignorance*, 10 SOC. PSYCH. & PERSONALITY SCI. 257 (2018), https://journals.sagepub.com/doi/10.1177/1948550617751583 [https://perma.cc/B4UP-BKZC]; Emily Guskin, Scott Clement & Joe Heim., *Americans Show Spotty Knowledge About the History of Slavery*, WASH. POST (Aug. 28, 2019), https://www.washingtonpost.com/education/2019/08/28/americans-show-spotty-knowledge-about-history-slavery-acknowledge-its-enduring-effects/ [https://perma.cc/6S4U-8SVH].

227. For a "racial literacy" list of terms, concepts, names, and incidents, see RUSSELL-BROWN, *supra* note 9, at 153–66.

228. *See* discussion *supra* Part IV(a). For additional theoretical background on the racial ignorance, see Jennifer C. Mueller, *Advancing a Sociology of Ignorance in the Study of Racism and Racial Non-knowing*, 12 SOCIO. COMPASS, Aug. 2018, at 1–22 (addressing emerging "sociology of ignorance" in context of knowledge about race).

229. Brief of Division 15 of The American Psychology Association as Amicus Curiae at 13, Falls v. DeSantis, 609 F. Supp. 3d 1273 (N. D. Fla. 2022) (No. 22CV166-MW/MJF), https://s3.documentcloud.org/documents/22038277/34-1-apa-div-15-amicus-in-supp-of-pls-mot-for-prelim-inj.pdf [https://perma.cc/UD58-XAYN].

research that examines how diversity studies impact college students.[230] It shows that college students who take courses that examine issues of racism and diversity have higher levels of racial understanding.[231] Further, the research establishes that students who have classroom engagements with diversity-related issues are more likely to become active participants in a deliberative democracy.[232] The brief concludes:

> Given the importance of curricular diversity experiences in college for students' ability to become informed citizens, laws that would censor important discussions of racism and sexism on campus are likely to inflict significant damage on students' prospects as engaged citizens in a multiracial democracy.[233]

Examples of this include attempts to downplay rather than acknowledge historical facts. This can lead to the curation of problematic frameworks and ideas for educational policy. For instance, a group of Texas educators sought to remove the word "slavery" from the curriculum for second graders.[234] This attempted change was part of a larger effort to avoid topics and language that might make some students feel "discomfort."[235] In its place, the educators recommended slavery be called "involuntary relocation."[236] Such a rebranding of slavery would fundamentally deny the centuries and generations of horror that affected millions of people and minimize its impact on today's society. Law professor Virginia Hamilton warns of the harms of legislation that curtails race-related education, "[T]he laws increase the chances that the next generation of students will remain uninformed of the racial history of the United States and its legacy and will thus come of age unmotivated—and unequipped—to improve upon it."[237]

As a substantive anti-literacy law, HB 7 makes it harder for all students to learn about and act on this country's history. HB 7's force is that it does not operate at the margins. It draws its power from its thick legislative coat, which includes

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230. The brief also reviews research on teaching race in the K-12 curriculum. It states:
> In addition to improving academic outcomes, when teachers explicitly engage with issues of race and racism in the classroom, this improves the levels of racial tolerance among students, no matter the race of the student…A study examining white and Black children's responses to learning about racism found an improvement in racial attitudes.

Id. at 13.

231. *Id.* at 19–21.

232. *Id.* at 21–22.

233. *Id.* at 22 (citations omitted).

234. *See* Brian Lopez, *State Education Board Members Push Back on Proposal to Use "Involuntary Relocation*," TEXAS TRIB. (June 30, 2022, 6:00 PM), https://www.texastribune.org/2022/06/30/texas-slavery-involuntary-relocation/ [https://perma.cc/PHD2-XHAA]. The Texas State Board of Education declined to adopt the proposal.

235. *Id.*

236. *Id.*

237. *See* Hamilton, *supra* note 24, at 61.

its legislative kin,[238] its multi-layered sanctions, along with unequivocal support from Florida officials.[239] As a result, HB 7 may effectively demonize, diminish, and disappear whole areas of race-related scholarship and race scholars in Florida's post-secondary educational system. The law has the potential to impact hundreds of instructors and thousands of students throughout the state. Because HB 7 creates a no-net academic tightrope, many instructors will do whatever is necessary to avoid its wrath and hold onto their jobs.

V.
ALTERNATIVE & SUPPLEMENTAL EDUCATIONAL SPACES

Whether HB 7 remains the law or not, members of racially marginalized communities will continue to build supplemental and alternative educational spaces. In these spaces, the histories and narratives of the group are shared and passed down to successive generations. These histories are understood and told through the eyes of group members. The books, the lesson plans, and other curricula material used in these locations reflect the little-known stories and triumphs from these communities. This form of learning, which exists outside of traditional educational structures, has been a mainstay within Black communities in particular and in other marginalized communities.[240]

These learning spaces have a variety of structures. The more formal of these include schools (e.g., private and charter), weekend schools (e.g., "Saturday schools"[241]), summer school programs,[242] and church programs. The instructors may be community members, such as church members and educators. Some teach basic literacy skills. Some highlight art, science, and technology. Other programs

238. *See supra* notes 206–20 and accompanying discussion.

239. *See* Press Release, Office of Fla. Governor Ron DeSantis, *supra* note 138 ("In Florida we are taking a stand against the state-sanctioned racism that is critical race theory . . .. We won't allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other. We also have a responsibility to ensure that parents have the means to vindicate their rights when it comes to enforcing state standards.").

240. *See, e.g.*, Deborah Menkart & Jenice L. View, *Exploring the History of Freedom Schools*, C. R. TEACHING, https://www.civilrightsteaching.org/exploring-history-freedom-schools [https://perma.cc/Y7QU-EWZ9] (last visited Mar. 27, 2023).

241. *See, e.g.*, statements made by high school student Maya Arce in litigation challenging TUSD's ban of Mexican American Studies courses. Amended Transcript of Proceedings at 148:8–149:8, Gonzalez v. Douglas, No. 4:10-cv-00623-AWT (D. Ariz. 2017). Following the Arizona state ban on Mexican-American Studies programs (ARIZ. REV. STAT. § 15-112 (2022)), Arce, took a course on Mexican American literature that was offered on weekends and taught at a community center. *Id.*; *see also* Karlos K. Hill, *The University Cannot Be Colonized*, NATION (Mar. 16, 2022), https://www.thenation.com/article/society/kehinde-andrews-interview/ [https://perma.cc/QW6Z-BRGD] (discussing the history of Britain's Saturday school movement).

242. *See, e.g.*, *CDF Freedom Schools*, CHILDS. DEF. FUND (last visited July 29, 2022), https://www.childrensdefense.org/programs/cdf-freedom-schools/ [https://perma.cc/28AF-MPQR].

focus on history, traditions, and culture. These programs instill pride[243] by highlighting the successes of Black educators, artists, lawyers, scientists, politicians, inventors, and entrepreneurs.[244] Overall, these programs supplement mainstream public education.

The learning spaces where race-centered education takes place may be a set physical location, such as libraries, bookstores, churches, community members' basements. It may also take place at gatherings such as book clubs, library talks, church programs, sorority and fraternity meetings, and family reunions. Alternative learning spaces may also be virtual.[245] These spaces, which take on different forms, exemplify the potential of communities to resist this anti-literacy legislation as they have for centuries.

If history is prologue, no legislation can thwart learning. People will continue to find ways to learn and pass it on. Even if they have to "snatch" it.[246] The history of African Americans is replete with stories of learning history away from formal classrooms and sanctioned textbooks. Supplemental and alternative learning spaces are a bulwark against attempts to erase full accountings of history. They represent a community's strong but decisive pushback against laws and practices that would deny Black literacy.

CONCLUSION

A fully operational HB 7 will enable a purge of race scholarship and race scholars in Florida's colleges and universities, as a result of the law's targeting of these scholars and their scholarship. This attrition will also impact university scholars who do not teach race-related issues in their courses—scholars who believe that, if state orthodoxy is allowed to substitute for rigorous academic inquiry, the mission of the university cannot be met. The harm extends beyond any punishments received by individual instructors. HB 7 determines which race-related knowledge students will carry with them out into the world. There is great danger when the state unilaterally decides to ban the teaching of certain types of knowledge. HB 7 is anti-literacy masquerading in freedom's clothing.

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243. *See, e.g.*, Subira Kifano, *Afrocentric Education in Supplementary Schools: Paradigm and Practice at the Mary McLeod Bethune Institute*, 65 J. NEGRO EDUC. 209, 209–218 (1996), https://www.jstor.org/stable/2967314 [https://perma.cc/2FE2-GL2J] (citing a sense of pride as one of the strongest indicators of success in the program).

244. On a much larger scale, Historically Black Colleges and Universities (HBCUs) could be categorized as alternative educational spaces.

245. *See* Knarrative, which includes Knubia, an online class and discussion with Sirius XM Radio talk show host Karen Hunter, a journalism professor at Hunter College and Dr. Greg Carr, Department Chair of African American Studies at Howard University. Knarrative, https://www.knarrative.com [https://perma.cc/238N-ZJZL]. Professor Hunter and Dr. Carr discuss readings and delve deeply into a range of topics, including book discussions, histories of Black scholars, freedom fighters, racial terror incidents, how structural institutions impact Black people, and media narratives. *Id.*

246. *See supra* notes 37–40 and accompanying text for a definition of "snatch."

This article identifies a critical throughline. HB 7, which dictates whether and how race issues can be taught in college classrooms in Florida, is a legacy of antebellum prohibitions against literacy for Black people. This revelation uncovers the deep, historical roots of anti-literacy legislation. It also highlights the myriad forms of anti-literacy laws and the common rationales offered to sustain them. Most importantly, it establishes a holistic framework for understanding the intersection of anti-literacy and race.

Hopefully the analysis undertaken in this Article will be of value to both practitioners and academics. For legal practitioners, being able to evaluate HB 7 and similar laws within the larger historical context of anti-literacy laws may create an opportunity for richer and stronger pleadings that incorporate a review of law, history, and theory. Understanding HB 7 as the most recent iteration of generations of anti-literacy efforts may also aid practitioners in developing novel legal challenges or defenses. A broad examination avoids a constrained look at how race is treated under a current law. It allows for an analysis that connects the dots between a contemporary law on race and its legal predecessors. Academics may also benefit from the approach taken in this article by incorporating similar socio-legal-historical frameworks in their scholarship. The author particularly hopes this piece will prompt other legal scholars to consider applying racial threat theory in their analysis of race-related legislation.

When fifteen-year-old Claudette Colvin asserted her right to remain in the seat of her choosing on a segregated public bus in 1955, she relied on her school lessons. The bus driver who instructed her to move from her seat represented one narrative of the American racial order. However, one of her high school teachers had presented Claudette with a compelling, alternative narrative. She was a citizen and she had rights under the United States Constitution. It was Claudette's exposure to the U.S. Constitution and American history that motivated her to challenge Jim Crow rules requiring racial segregation in public transportation. This exposure illuminated an essential fact: Education is an instrument of freedom.