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Osamudia James
University of North Carolina School of Law, ojames@unc.edu

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WHITE INJURY AND INNOCENCE: ON THE LEGAL FUTURE OF ANTIRACISM EDUCATION

*Osamudia James**

In the wake of the "racial reckoning" of 2020, antiracism education attracted intense attention and prompted renewed educator commitments to teach more explicitly about the function, operation, and harm of racism in the United States. The increased visibility of antiracism education engendered sustained critique and opposition, resulting in executive orders prohibiting its adoption in the federal government, the introduction or adoption of over sixty state-level bills attempting to control how race is taught in schools, and a round of lawsuits challenging antiracism education as racially discriminatory. Because antiracism so directly runs afoul of norms underlying American antidiscrimination law, including anticlassification, colorblindness, and white innocence, antiracism education is vulnerable to legal challenge in a way that precursors like multiculturalism were not. The vulnerability of antiracism education to constitutional censure is the most recent illustration of how far antidiscrimination law has gone not in undercutting, but further entrenching, racial hierarchy in the United States. The legislative,

* Professor of Law, University of North Carolina School of Law. This Article benefitted from thoughtful feedback from Tristin Greene, Yuvraj Joshi, Holning Lau, Eric Mueller, Shaun Ossei-Owusu, and Erika Wilson, students in Dean Onwuachi-Willig's Spring 2022 Critical Race Theory course at Boston University, and all participants at the UNC School of Law internal paper workshop. Thank you, also, to Elisabeth Baldwin and Elisa Sturkie for their excellent research assistance, and to the editors of the *Virginia Law Review*, especially Holly Chaisson and Caroline Hardie, for thoughtful feedback and edits.

litigation, and curricular wars surrounding antiracism education also remind us that race is significant for reasons that go beyond materiality. Rather, legal and social discourse about racism shapes notions of racial injury and ultimately impedes efforts to respond to even the material consequences of enduring racial inequality. Tracking and analyzing the anti-antiracism legislation and lawsuits provides those who are willing to follow it a map both to where antidiscrimination law must be changed, and to where antiracism education is most needed.

INTRODUCTION

In June of 2021, a student testified before his school board in Lakeville, Minnesota. In what surely was stirring testimony coming from a child so young, nine-year-old N.W. stated:

> I do not judge people by the color of their skin, I don't really care what color their hair, skin, or eyes is [sic]. I judge by the way they treat me . . . I do not care or look at the color of skin, *but you make me think of it.* I have Asian, Mexican, white, Chinese, black [sic] friends and I don't care . . . They are just my friends. You have lied to me and I am very disappointed in all of you.[1]

The "lies" to which N.W. referred purportedly came from antiracism initiatives adopted in Independent School District 194 and included an "Inclusive Poster Series" which approved the statement "At Lakeville Area Schools we believe Black Lives Matter *and stand with the social justice movement this statement represents*."[2] In the lawsuit parents and students brought challenging these initiatives, plaintiffs focused on the district's efforts to "instruct[] children as young as fifth grade that structural racism dominates" American society.[3]

The Lakeville testimony and accompanying lawsuit are but one flashpoint in a larger movement challenging antiracism (also referred to as "anti-racist") teachings and curricular initiatives in schools across the country. Although antiracism education has a long history, in the wake of George Floyd's murder in the summer of 2020, its teachings attracted intense attention and elicited renewed commitments among educators to teach more explicitly about the function, operation, and harm of racism in the United States. Opposition to antiracism education, however, eventually became a political rallying cry for conservative politicians and policymakers. Reframing the teachings as the deployment of critical race theory ("CRT") in K–12 curricula, pundits and politicians sounded alarms regarding this sort of education, prompting censure, even, by former President Donald Trump in the fall of 2020.[4]

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[1] Complaint at 3, Cajune v. Indep. Sch. Dist. 194, 2022 WL 179517 (D. Minn. Aug. 6, 2021) (No. 0:21-cv-01812) (first alteration in original).

[2] Id. at 1.

[3] Id. at 3.

[4] Michael Crowley, Trump Calls for 'Patriotic Education' to Defend American History from the Left, N.Y. Times (Sept. 17, 2020), https://www.nytimes.com/2020/09/17/us/politics/trump-patriotic-education.html [https://perma.cc/K56W-F7Z2]; see Evan Gerstmann, Trump Says

That critical race theory is a graduate-level, methodological interrogation of race not taught at the primary and secondary level is of no consequence.[5] The phrase "critical race theory" has become shorthand for education that teaches students about structural or institutional racism, prompts children to consider their social identities, or makes explicit commitments to educational equity—the essential work of antiracism education. And through legislation, parent advocacy, and litigation, antiracism education is under attack.

Observers might be tempted to dismiss the attacks as a temporary political strategy, and indeed, there are suggestions that politicians understand these attacks to be useful for energizing voters. Nevertheless, the scope of the challenges, as well as the issues they raise in litigation, compel parents, policymakers, and legal scholars to consider the nature of antiracist education and the social and legal responses to its inclusion in K–12 education.

Fully considering antiracism education reveals it to be both less and more threatening than supposed. Less because at its core are basic lessons about race and individual responses to injustice that should not conflict with a social[6] and jurisprudential[7] understanding of schools as sites for

He Will Punish Schools that Teach the New York Times' '1619' Project by Withholding Federal Funds, Forbes (Sept. 6, 2020), https://www.forbes.com/sites/evangerstmann/2020/09/06/trump-says-he-will-punish-schools-that-teach-the-new-york-times-1619-project-by-withholding-federal-funds/?sh=4a241ca17cb5 [https://perma.cc/YDN3-8DSM].

[5] Critical race theory is a race-based systemic interrogation of legal reasoning, doctrine, and institutions, taught in law schools but also used in other disciplines. Although it overlaps with other legal subjects that implicate race, it is distinct from subjects like constitutional law, immigration law, and criminal law in its comprehensive examination of the function of race in American law. While CRT considers some of the same issues and problems that civil rights and ethnic studies courses engage, the theory broadens the methodological perspective, bringing in history, economics, and group- and self-interest, among other discourses. In a departure from traditional civil rights work, CRT questions the foundations of liberalism, including legal theories regarding equality, the mechanics of legal reasoning, and principles of constitutional law. Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 3 (2001).

[6] Jennifer L. Hochschild & Nathan Scovronick, The American Dream and the Public Schools 1–2 (2003) (arguing that most Americans understand education as a place where children will reach their full potential and become good citizens).

[7] See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (explaining that schools educate the young for citizenship); New Jersey v. T.L.O., 469 U.S. 325, 373 (1985) (Stevens, J., concurring in part and dissenting in part) (noting that schools are places to inculcate the values essential to meaningful exercise of the rights and responsibilities of a self-governing citizenry); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (recognizing that education is "the very foundation of good citizenship" and "a principal instrument in awakening the child to cultural values"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S.

cultivating citizenship and instilling the practices of democracy. Antiracism education, however, is also more threatening because it attempts to reveal and interrogate racial hierarchies—a problem for those who either deny those hierarchies or believe them to be justified. Further, to the extent that antiracism education explicitly names whites as beneficiaries of racism, it is also a frontal assault on "innocent" white racial identity—a commitment which is implicit throughout equal protection jurisprudence,[8] and is now made explicit in the vociferous challenges to antiracism education.

Ultimately, the reaction to antiracism education illustrates just how deeply invested Americans are, wittingly and unwittingly, in white supremacy, how disorienting it can feel to individuals to destabilize racial hierarchy, and how far antidiscrimination law has gone not in undercutting, but in further entrenching, these attitudes and norms. Because antiracism so directly runs afoul of norms underlying American antidiscrimination law, including anticlassification, colorblindness, and white innocence, antiracism education is vulnerable to legal challenge in a way that precursors like multi-culturalism were not.

Litigation challenges are still developing. Some lawsuits will ultimately be dismissed on account of pleading defects, while other suits may be resolved on freedom of expression grounds. Nevertheless, closely examining the antidiscrimination legal framework within which challenges to antiracism education will play out presents an opportunity not only to reconsider those frameworks, but to think more broadly about the nature of race, particularly as it operates in school settings.

Racial equality work is sometimes critiqued as excessively invested in psychic harm, language, and symbols,[9] instead of more properly focused on the material sources and consequences of racial inequality. Epitomized by the writing of a scholar like Cedric Johnson, the critique maintains that antiracism education and racial affinity movements, despite having brought the marginalization of Black civilians to the forefront of public

1, 35–36 (1973) ("Exercise of the franchise . . . cannot be divorced from the educational foundation of the voter.").

[8] See infra notes 203–08 and accompanying text.

[9] See, e.g., Wendy Brown, Wounded Attachments, 21 Pol. Theory 390, 398, 403 (1993) ("[I]nsofar as [identity politics is] premised on exclusion from a universal ideal, [politicized identities] require that ideal, as well as their exclusion from it, for their own perpetuity as identities. . . . [I]dentity structured by this ethos becomes deeply invested in its own impotence, even while it seeks to assuage the pain of its powerlessness through its vengeful moralizing, through its wide distribution of suffering, through its reproach of power as such.").

consciousness, have moved the United States no closer to "concrete, substantive reform."[10] As Johnson insists, what is needed instead is a "popular, anti-capitalist politics, rooted in situated class experiences."[11] In the context of public education, this critique might demand equalized resources rather than diversity training.

To be sure, the ways in which material inequality informs racial inequality is key to realizing substantive equality for all Americans. That disparities in wealth and income make Black Americans vulnerable to heightened rates of incarceration,[12] abusive policing,[13] more dangerous neighborhoods,[14] and inferior health and social services[15] is well-documented. In education, public school financing, anchored in local tax bases themselves shaped by residential segregation, housing discrimination, redlining, and blockbusting, continues to limit the tax pool from which majority-minority schools can draw. A 2019 study, for example, found that non-white school districts received $23 billion less in funding than did white schools, and that for every student enrolled,

[10] Cedric Johnson, The Panthers Can't Save Us Now, Catalyst: A Journal of Theory & Strategy (Spring 2017), https://catalyst-journal.com/2017/11/panthers-cant-save-us-cedric-johnson#po-fn. [https://perma.cc/737Z-KVU7].

[11] Id.

[12] Nathaniel Lewis, Mass Incarceration: New Jim Crow, Class War, or Both?, People's Pol'y Project (Jan. 30, 2018), https://www.peoplespolicyproject.org/wp-content/uploads/2018/01/MassIncarcerationPaper.pdf [https://perma.cc/TF53-RV5J] (arguing that the primary reason for the large gap between black and white incarceration rates is the differences in class composition of each racial group).

[13] U.S. Dep't of Just. C.R. Div., Investigation of the Ferguson Police Department 3, 42 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/E7MP-8MGH] (documenting municipal court practices that exact harsh penalties and fines in an attempt to sustain the city's budget); Campbell Robertson, A City Where Policing, Discrimination and Raising Revenue Went Hand in Hand, N.Y. Times (Mar. 4, 2015), https://www.nytimes.com/2015/03/05/us/us-details-a-persistent-pattern-of-police-discrimination-in-a-small-missouri-city.html [https://perma.cc/QV4J-DJQL] (documenting the "reflexive and gratuitous hostility [of Ferguson police] toward black residents that goes beyond arrests into routine uses of force").

[14] See, e.g., Chaeyoung Cheon, Yuzhou Lin, David J. Harding, Wei Wang & Dylan S. Small, Neighborhood Racial Composition and Gun Homicides, 3 JAMA Network Open 1, 1–2 (2020) (suggesting that lack of institutional resources and opportunities created by racial wealth gaps and underinvestment subject Black people to higher gun homicide rates in their neighborhoods, even after controlling for individual socioeconomic status).

[15] See, e.g., Tiffiany Howard, Marya Shegog, DeaJiane McNair & Mikale Lowery, Black Health and Black Wealth: Understanding the Intricate Linkages Between Income, Health, and Wealth for African Americans 7–8, 14 (2019) (finding that while income dictates access to high nutrient food and healthier neighborhoods, lack of wealth contributes to intergenerational insecurity that corresponds with negative health outcomes).

non-white school districts received $2,226 less than did white districts.[16] Accordingly, there have long[17] been warranted calls for the redistribution of resources as a solution to the education gap, particularly in the wake of a failed integration project and the resegregation of American public schools by race.[18]

Nevertheless, the curricular wars surrounding antiracism education remind us that the ideology of race still functions in less concrete, but no less powerful, ways. Race and racial disparities are more than just material, more than new classroom supplies and equitable teacher salaries. Rather, race is also about psychic harm. Part of that psychic harm is certainly in the story that material inequalities tell: that children of color deserve less because they are valued less. But harm also stems from the national mythologies we construct about race, and the ways in which those mythologies dictate our responses to inequality, legal and otherwise. Our national story about the end of racism as the result of a victorious civil rights movement has impeded efforts to engage institutional bias and systemic oppression. Our national story about innocent white identity has obstructed efforts to interrogate racial hierarchy and adopt solutions necessary to dismantle racial stratification.

[16] $23 Billion, EdBuild 4, app. A (2019), https://edbuild.org/content/23-billion/full-report.pdf [https://perma.cc/AX8H-R5FL].

[17] See Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 487–92 (1976) (documenting the resistance of civil rights organizations like LDF to strategies that deemphasized integration, even after it became obvious that alternatives to desegregation, like genuinely equal funding for black schools, should have been considered in the face of white resistance and in response to the requests of Black parents).

[18] Proceeding from the assumption that a segregated school is one where less than 40 percent of students are white, the number of schools where less than forty percent of students are white approximately doubled between 1996 and 2016, while the percentage of children of color attending such schools rose from fifty-nine to sixty-six percent. The percentage of Black students, in particular, attending segregated schools rose from fifty-nine to seventy-one percent. Will Stancil, School Segregation Is Not a Myth, The Atlantic (Mar. 14, 2018), https://www.theatlantic.com/education/archive/2018/03/school-segregation-is-not-a-myth/555614/ [https://perma.cc/6ZCF-YWFJ]; Gary Orfield, Erica Frankenberg, Jongyeon Ee & John Kuscera, *Brown* at 60: Great Progress, a Long Retreat and an Uncertain Future, Civil Rights Project 10 tbl.3 (2014), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf [https://perma.cc/86WC-VWY2] (documenting a long-term trend toward resegregation); Alvin Chang, The Data Proves that School Segregation Is Getting Worse, Vox (Mar. 5, 2018), https://www.vox.com/2018/3/5/17080218/school-segregation-getting-worse-data [https://perma.cc/TPK8-EQPM] (explaining that Black students are increasingly isolated in poor, segregated neighborhoods).

Our mythologies about race have also set baselines for the conception of racial harm. Indeed, the ways in which society collectively understands the nature of racial injury will dictate the very remedies we choose to address racialized material disparities if we choose to do so at all. The narrative regarding racial injury dictated by antidiscrimination law tells Americans that the harm of homogenous classrooms for whites is a compelling interest justifying race-conscious remedies, but societal discrimination leveled against Black students is not. Exclusion from elite education in the absence of race-conscious admissions policies is not an equal protection violation, but the de minimis[19] harm to "innocent" whites from affirmative action is. The repeated and consistent exposure of Black students to racial epithets in required reading is not a harm recognized by equal protection.[20] But, as illustrated by the emerging round of legal opposition to antiracism education, teaching students about how whites benefit from whiteness in a racialized society is a cognizable harm because it might make students "feel bad."

These asymmetric narratives regarding injury are central to maintaining racial hierarchy. Accordingly, it is no surprise that politicians and parents are so heavily invested in the outcome, for nothing less than racial status is at stake in the battle for what we teach young people about race. Though dismissal of all *anti*-antiracism education legislation and lawsuits is possible, the opportunity that current antidiscrimination law provides plaintiffs to present antiracism education as racist education is a reminder of the symbolic import of race, a red flag regarding inversions in racial injury, and a troubling sign of equality jurisprudence's instability.

Part I considers the form and function of antiracism education, considering its basic tenets, documenting its rise in prominence, and noting the critiques antiracist education prompts. Part II engages the legal responses to antiracism education, from legislation intended to undermine

[19] See Neil S. Siegel, Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration, 56 Duke L.J. 781, 807 n.112 (2006) (explaining that affirmative action programs lead to a "modest decrease" in white students' chances of being admitted); Goodwin Liu, The Causation Fallacy: *Bakke* and the Basic Arithmetic of Selective Admissions, 100 Mich. L. Rev. 1045, 1046 (2002) (describing the "common yet mistaken" belief that when white applicants are denied admission in preference of minority applicants with equal or lesser qualifications, the cause is affirmative action).

[20] See, e.g., Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1024, 1029, 1032 (9th Cir. 1998) (concluding that the required reading that included over two hundred instances of racial slurs regarding Black people did not run afoul of equal protection).

it to lawsuits that challenge it as an affront to civil rights and equality. Given both conceptual and instrumental differences between antiracism education and the multicultural education curricula that came before it, antiracism education is particularly vulnerable to attack under current antidiscrimination norms and doctrine. Part III considers the ways in which antidiscrimination law creates, protects, and increasingly centers "innocent" white racial identity and closes with a reminder of the importance of K–12 schools as sites for understanding race and racial subordination in the United States.

I. ANTIRACISM EDUCATION

Antiracism education is a theory of learning and action designed and intended to dismantle racism through schooling. Antiracism education is also a set of pedagogies and curricular initiatives that interrogate both the structural and interpersonal nature of race and racism. Antiracism education explicitly highlights, critiques, and challenges institutional racism. It addresses how racist beliefs and ideologies structure one-on-one interactions and personal relationships. It also examines and challenges how institutions support and maintain advantages and disadvantages along racial lines.[21] With precursors dating as far back as progressive education developed in the late 1800s, antiracism education is not new, although a renewed commitment to its tenets has raised its visibility and subjected it to attack.

A. Tenets of Antiracism Education

Antiracism education is one strand in a larger set of pedagogies focused on engaging and addressing interpersonal and structural bias in society. The goals of antiracism—affirming minoritized identities, making visible the workings of inequality and racial injustice, or both—have roots in other pedagogies that have long sought to engage identity and inequality. For example, progressive education, popularized in the late 1800s and early 1900s, focused on building community for the "whole child," facilitating collaboration and active learning, encouraging social justice,

[21] Being Antiracist, Nat'l Museum Afr. Am. Hist. & Culture, https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist [https://perma.cc/4CGZ-XNTU] (last visited Oct. 1, 2022).

a commitment to diversity, and improving the lives of others.[22] Further, as explained by historian Jarvis Givens, Black educators have been modeling an antiracist approach to pedagogy for over 100 years, finding ways to explain the nature of racism to their students while also affirming their agency and dignity in the face of racial domination.[23]

Another precursor to antiracism education is ethnic studies, which became popular in the 1960s. Programs like Chicano/a or Raza studies, more likely to be offered in the Southwest and West, presented students with curricula that better reflected the experiences and contributions of ethnic minorities, including Mexican-Americans. Meant to empower students who would see themselves reflected in what they were learning, often for the first time, the programs were credited with helping to close academic achievement gaps by race in school districts.[24]

In the same vein, multi-cultural education ("MCE") gained popularity in the 1970s as an outgrowth of the civil rights movement. Adopted as a complement to the increased diversity that resulted after the nation's schools began to earnestly integrate, MCE has the dual purpose of addressing racism and the achievement gap. As such, its three primary goals are equivalency in achievement, positive intergroup attitudes, and development of pride in heritage.[25] MCE is focused on affirming and celebrating various racial and ethnic identities while establishing healthy self-esteem among students. A broader conception of MCE contemplates a range of programs and practices related to "educational equity for women, ethnic groups, language minorities, low-income groups, and

[22] Amy Stuart Wells & Diana Cordova-Cobo, The Post-Pandemic Pathway to Anti-Racist Education: Building a Coalition Across Progressive, Multicultural, Culturally Responsive, and Ethnic Studies Advocates, Century Found. (May 24, 2021), https://tcf.org/content/report/post-pandemic-pathway-anti-racist-education-building-coalition-across-progressive-multicultural-culturally-responsive-ethnic-studies-advocates/?session=1 [https://perma.cc/Q7ZV-WAVH].

[23] Jarvis R. Givens, What's Missing From the Discourse About Anti-Racist Teaching, The Atlantic (May 21, 2021), https://www.theatlantic.com/ideas/archive/2021/05/whats-missing-from-the-discourse-about-anti-racist-teaching/618947/ [https://perma.cc/KQ54-SLVS]; see also Russell Rickford, We Are an African People: Independent Education, Black Power, and the Radical Imagination 2, 4–5 (2016) (documenting Pan-African nationalist private schools, designed to transit Black consciousness and foster a regenerative sense of African identity).

[24] See, e.g., González v. Douglas, 269 F. Supp. 3d 948, 951 (D. Ariz. 2017) (citing an "empirically demonstrated, significant, and positive relationship" between Mexican-American studies and increased graduation and state test pass rates).

[25] Paula T. Tanemura Morelli & Michael S. Spencer, Use and Support of Multicultural and Antiracist Education: Research-Informed Interdisciplinary Social Work Practice, 45 Soc. Work 166, 167 (2000).

people with disabilities."[26] In this broader manifestation, MCE works to increase educational equity across cultural, ethnic, and economic groups.[27]

Related to multi-culturalism is the concept of culturally relevant pedagogy. Popularized by prominent education researchers like Gloria Ladson-Billings, culturally responsive pedagogy acknowledged and reinforced the relationship between home and school communities, seeking to affirm students' cultural knowledge and experiences while also developing students' critical consciousness. Focused as it often was on the needs of Black children, it was more often adopted in the Northeast and Midwest regions of the country with larger numbers of Black students.[28]

A primary critique of MCE, however, is that it fails to address the structural policies and practices that support racism.[29] Sometimes derided as a "food and festivals" approach to equality, MCE pays insufficient attention to power and oppression in favor of a superficial and limited awareness of diverse cultures.[30] Other scholars have argued that through its failure to interrogate the differential experiences of white students and students of color, MCE is focused not on emancipation, but on containment.[31] Disconnected from a more liberatory focus on community control, capitalist critique, and representation, MCE is depoliticized and robbed of its transformative potential.[32]

Antiracism is thought to be responsive to the failures of MCE, in particular, going beyond acceptance of multiple cultural traditions to affirmatively teach students about the historical roots of racial oppression, how institutions reproduce racism and racial hierarchy, and how these injustices can be disrupted and dismantled. Unlike MCE, in which race is culturally defined and depoliticized,[33] antiracism education overlaps with CRT in identifying race and racism as an organizing principle of American society. It further overlaps with critical whiteness studies to recognize society as a collective within which the values of the dominant

[26] Id. at 168.
[27] Id. at 167–68.
[28] Wells & Cordova-Cobo, supra note 22.
[29] Morelli & Spencer, supra note 25, at 168.
[30] Id.
[31] Julie Kailin, Antiracist Education: From Theory to Practice 52 (2002).
[32] Id. at 53.
[33] Morelli & Spencer, supra note 25, at 168.

group (whites) are imposed on minoritized groups that are equal in neither power nor status.[34]

Antiracism, therefore, goes further than the pedagogies that came before it, working not only to affirm minoritized identities but also to challenge whiteness as the unstated norm or baseline around which social, political, and education policy is organized. The starting point for antiracism education is "an unequivocal opposition to racism, both among individuals and as part of a pervasive climate which is reinforced and perpetuated by the policies and practices of schools and other social institutions."[35]

One of the earliest pedagogic formulations of antiracist education was developed by two Canadian researchers, Carol Tator and Frances Henry, in the early 1990s. In their book on multicultural education, the authors listed nine major issues and competencies that antiracist teaching addresses in Canada: (1) the historical roots and contemporary manifestations of racial prejudice; (2) the influence of race and culture on one's own personal and professional attitudes and behaviors; (3) identifying and counteracting bias and stereotyping in learning materials; (4) addressing racial tension and conflict; (5) identifying antiracist resources to incorporate across a curriculum; (6) developing new approaches to teaching children using varying cognitive approaches to diverse learning styles; (7) identifying appropriate assessment placement procedures and practices; (8) assessing the hidden curriculum and making it more inclusive; and (9) ensuring that personnel policies and practices are consistent with equity goals and provide managers with the knowledge and skills to implement equity programs.[36]

American educator and researcher Julie Kailin defines antiracist education as "an approach to education that: emphasizes knowledge deconstruction and critique, assumes an overtly political stance, analyzes racial and economic oppression simultaneously, and emphasizes social

[34] Id.; Terry Husband, Ignorance is Not Bliss: Moving Beyond Colorblind Perspectives and Practices in Education, *in* But I Don't See Color: The Perils, Practices, and Possibilities of Antiracist Education 3, 12 (Terry Husband ed., 2016).

[35] David E. Selby, Education for a Multicultural Society: The UK Experience, *in* Canadian Ass'n of Second Language Tchrs., Multicultural Education: The State of the Art National Study, Report #1, at 64, 68 (Keith A. McLeod ed., 1993) (quoting David Houlton, Cultural Diversity in the Primary School (1986)) (describing the advent of antiracist education in the UK).

[36] Carol Tator & Frances Henry, Multicultural Education: Translating Policy into Practice (Multiculturalism and Citizenship Canada 1991).

activism."[37] She further identifies both empowerment—the deconstruction and reconstitution of knowledge in service of conceptualizing new social arrangements that do not reproduce oppression—and oppositional pedagogy—resistance to schooling as a method of reproducing social and racial hierarchy—as central elements of antiracist teaching.[38] Operationalized for the classroom, antiracist education gives students opportunities to discuss racism, stereotyping, and discrimination, to learn the economic and structural roots of inequality, to interrogate power dynamics and unequal social relationships, and to find and confront examples of institutional racism around them.[39] Antiracist education teaches students to not only academically engage racism, but also to take steps themselves to address the problem of race.[40]

Antiracism education further asks educators to not only address race and racial injustice openly and explicitly, but also to reflect a commitment

[37] Husband, supra note 34, at 10.

[38] Kailin, supra note 31, at 55–56.

[39] See John W. Kehoe, Multicultural Education vs. Anti-Racist Education: The Debate in Canada, 58 Soc. Educ. 354, 355 (1994). The related, but broader, set of pedagogies described as anti-bias education might be said to combine the commitments of multi-culturalism with antiracism, extending the lessons not just to race and ethnicity, but to gender, ability, language, body shape, and other minoritized identities. As early as 1989, the National Association for the Education of Young Children ("NAEYC") published a curriculum guide, reproduced in multiple subsequent editions, to anti-bias education, meant to teach educators why an anti-bias curriculum is necessary, and how one should be adopted. Louise Derman-Sparks & the A.B.C. Task Force, Anti-Bias Curriculum: Tools for Empowering Young Children (1989). Anti-bias education in this early childhood context typically has four goals: (1) each child will demonstrate self-awareness, confidence, family pride, and positive social identities; (2) each child will express comfort and joy with human diversity and possess accurate language for human differences; (3) each child will increasingly recognize unfairness, have language to describe it, and understand that unfairness hurts; and (4) each child will demonstrate empowerment and the skills to act, with others or alone, against prejudice or discriminatory actions. Together, those goals illustrate not only a concern for positive social identity development, but an interrogation into the dynamics of inequality (i.e., "unfairness") and a commitment to cultivating student capacity to do something about inequality. Louise Derman-Sparks & Julie Olsen Edwards, Anti-Bias Education for Young Children and Ourselves 3–5 (2010); Louise Derman-Sparks, Julie Olsen Edwards & Catherine M. Goins, Anti-Bias Education for Young Children and Ourselves 19, 30–34 (2020).

[40] Related, but broader, anti-bias education also promotes this norm, teaching, for example, that anti-bias educators must increase their awareness and understanding of their own social identities by examining and interrogating what they have learned about difference. This includes identifying how they have been advantaged by, disadvantaged by, or been complicit in, systems like racism, classism, ableism, and heterosexism in society, and exploring their ideas, feelings, and experiences regarding social justice activism. Derman-Sparks et al., supra note 39, at 19, 30–34.

to antiracist teaching in their curricular materials and pedagogical methods.[41] This includes naming and interrogating whiteness and white privilege, reflecting on and talking about the vocabulary of race, considering teacher social background in an attempt to understand how the assumed "normalcy" of background is used to subordinate students, examining how individual racism is manifested in teacher-student interactions, considering the perspectives of students and parents of color, assessing the damaging effects of racism on white children, and learning about how racism manifests in institutions and organizational structure.[42]

B. The Rise of Antiracism Education

Although not new, antiracist education gained prominence in the wake of George Floyd's death and the historic protests against police brutality in the summer of 2020.[43] In spring of 2021, for example, the Century Foundation published a report calling for changes to education policy and practice, including the development of "overtly *anti-racist*" school systems that can address ongoing inequities along racial, ethnic, and socio-economic lines.[44] Weaving together commitments from progressive education, critical MCE, ethnic studies, and culturally relevant and responsive education, the report's authors called on educators to focus on the whole child, enable students to learn concepts through connection to students' own experiences, and understand how culture and identity inform educational experience.[45]

Today, the lessons of anti-bias and antiracism work inform workshops and trainings for faculty and students at colleges and universities, employees at corporations, and teachers in K–12 schools. Further,

[41] Husband, supra note 34, at 10.

[42] Kailin, supra note 31, at 76–79, 81–86.

[43] Janice Gassam Asare, 4 Anti-Racism Educators Pushing for Change in a Post-George Floyd World, Forbes (May 26, 2022), https://www.forbes.com/sites/janicegassam/2022/05/26/4-anti-racism-educators-pushing-for-change-in-a-post-george-floyd-world/?sh=3e16ab58a5c5 [https://perma.cc/TJ9U-BMNP]; Candice Norwood, Racial Bias Training Surged After George Floyd's Death. A Year Later, Experts Are Still Waiting for 'Bold' Change, PBS NewsHour (May 25, 2021), https://www.pbs.org/newshour/nation/racial-bias-trainings-surged-after-george-floyds-death-a-year-later-experts-are-still-waiting-for-bold-change [https://perma.cc/EWB3-7KX5]; How the Murder of George Floyd Changed K-12 Schooling: A Collection, EducationWeek, https://www.edweek.org/leadership/how-the-murder-of-george-floyd-changed-k-12-schooling-a-collection [https://perma.cc/4HL7-RMBZ] (last visited Oct. 1, 2022).

[44] Wells, supra note 22.

[45] Id.

demand for antiracism books have surged.[46] Scholar Robin DiAngelo's *White Fragility*, for example, which incorporates key antiracism tenets,[47] made appearances on both the Amazon and Barnes & Noble best-sellers lists. With chapters on how race shapes the lives of white people, racial triggers for white people, and the rhetorical devices white people use to avoid or deflect engagement of race, the book takes seriously the centrality of personal reflection in antiracism work.[48] Jason Reynold's *Stamped: Racism, Antiracism and You*, which categorizes racism on the basis of three types of people—segregationists, assimilationists, and antiracists—debuted at number one on *The New York Times* young adult hardcover list.[49] Historian Ibram Kendi's *How to Be an Antiracist*, which translated antiracism teachings for a broad audience,[50] also made appearances on Amazon, Barnes & Nobles, and *N.Y. Times* best-sellers lists. That Kendi was awarded a MacArthur genius grant in 2021 for translating his antiracism work for a diverse audience is only further evidence of how far-reaching antiracism education has become.

There is not necessarily a set curriculum for institutions that want to adopt antiracism education. Rather, using guides, books, and the support of consultants and antiracism education professionals, schools and school districts are instead likely to have the tenets of antiracism education inform teacher development, curricular development, and extracurricular activities. Courageous Conversations, for example, is a training, coaching, and consulting organization focused on achieving racial equity in schools, in part through antiracism education. Targeting school leadership, the company's book of the same name guides teachers, administrators, parents, and community leaders through "psychically difficult"[51] conversations about race, ultimately leading up to lessons about how antiracist leaders close the achievement gap and secure racial

[46] Elizabeth A. Harris, People Are Marching Against Racism. They're Also Reading About It, N.Y. Times, (June 5, 2020), https://www.nytimes.com/2020/06/05/books/antiracism-books-race-racism.html [https://perma.cc/3LAJ-RNTJ] (noting that, as protests against racism and police brutality extended into a second week, seven out of ten of the best-selling books at Amazon and nine out of ten of the best-selling books at Barnes & Noble were about race and antiracism).

[47] Robin DiAngelo, White Fragility: Why It's So Hard to Talk to White People About Racism (2018).

[48] See id. at 4.

[49] Harris, supra note 46.

[50] Ibram X. Kendi, How to Be an Antiracist (2019).

[51] Glenn E. Singleton & Curtis Linton, Courageous Conversations About Race: A Field Guide for Achieving Equity in Schools (2006).

equity in schools. The Courageous Conversations Series presents a set of conditions to which participants should agree in discussion about race,[52] and provides a roadmap for connecting training, discussion, and engagement of race to actual school and district curriculum and educational policies. Using the series as a guide, leadership and employees are taught to reflect on their own racial consciousness (or lack thereof), isolate race, engage multiple perspectives while understanding how knowledge is socially constructed, engage in interracial dialogue, and understand the history and function of both race and whiteness.[53]

Antiracism pedagogy and lesson planning will necessarily differ depending on student age. At the early childhood level, in addition to faculty training and reflection about the impact of race in faculty members' personal and professional development,[54] teachers might be

[52] Stay engaged, experience discomfort, speak your truth, expect and accept non-closure. Id. at 58.

[53] Singleton & Linton, supra note 51.

[54] The book *Roots & Wings*, for example, is written to help teachers understand and put into practice anti-bias education. Part I of the book covers changing demographics in the classroom, how children develop prejudice, racism, culturally responsive care, bilingual education, family and culture, and multicultural education. Part II of the book teaches educators how to organize and arrange a "culturally relevant, anti-bias classroom," which includes establishing an educational orientation, making every child feel welcome using photographs, art, games, and toys that reflect them, their families, and important people from their home cultures, and promoting a positive attitude toward diversity. This section includes a guide to help teachers evaluate classroom materials for common stereotypes of people of color. Part II also includes dozens of anti-bias activities, organized by the four goals of anti-bias education. Stacey York, Roots and Wings: Affirming Culture in Early Childhood Programs 147–57 (2003).

given opportunities to adopt and develop simple lessons about racial identity,[55] diversity,[56] or bias.[57]

As children mature, antiracism education can become more sophisticated. Teachers are still encouraged to reflect and understand the impact of race and racism in their own lives and to review their pedagogical and curricular choices with an eye toward maximum inclusion. Older students, however, can also be taught complex lessons about race and inequality. The Anti-Defamation League ("ADL"), for example, created lesson plans on George Floyd, racism, and law enforcement for students ages eleven and up. After summarizing the murder of George Floyd, the trial of Derek Chauvin, and the nationwide protests that Floyd's death prompted, the lesson goes on to describe systemic racism before offering questions for conversation. In keeping with the antiracist education goal of encouraging activism, questions include, "What can we do to help?" and "What actions might make a difference?"[58] More broadly, ADL maintains a collection of K–12 lesson

[55] Pre-school children, for example, can be asked to notice, name, or draw their faces and physical features—an early lesson in understanding the connection between phenotype and race. Children are invited to describe themselves (e.g., "My hair is curly;" "My skin is brown") or draw a self-portrait using a variety of craft materials along with paints, crayons, and markers that allow them to capture the diversity in human phenotype. In these exercises, children are encouraged to recognize and celebrate their own physical features and those of their classmates. Id. at 208–10.

[56] In a "Draw Me/Draw You" exercise, children are asked to sit across from a partner and draw a picture of their partner's face. Teachers prompt children by asking various questions, including "What color is his skin?" and "What color are her eyes?" and "How long is his hair?" Children can be further asked to describe themselves before drawing begins, and to share the drawings with the class at group time. Another variation involves a guessing game in which students look at the drawing and guess which classmate it is. The goal is to teach students to appreciate the beauty and value of others, to appreciate the physical characteristics of others, and to experience positive interactions with people who are different from them. Id. at 209.

[57] In the "Pick a Friend" exercise, students are shown pictures of children from other cultures and asked to select a child to "be [their] friend." In response to their selections, teachers ask "what makes this child look like a friend to you," noting when students pick children who look like them and affirming students who willingly pick children from other backgrounds or cultures. In the "True or False" exercise, children are shown pictures of both ordinary and stereotypical images of people (e.g., an Asian person presented as a geisha girl, a Black person as a tribal warrior, a Native American presented as a chief, or a Latino person in a sombrero). Children are asked if these pictures are "true or false," providing the teacher an opportunity to reject stereotypes and introduce nuance in representation (e.g., "Not all Native Americans are chiefs. And they only wear headdresses with feathers at special ceremonies"). The goal is to teach children how to recognize stereotypes. Id. at 229.

[58] Questions include the following: "Why do you think it is rare for police officers to get arrested, prosecuted and convicted in these cases?"; "What are your thoughts and ideas about

plans[59] that "promote critical thinking and learning about historical and current events through the lens of diversity, bias and social justice."[60]

Learning for Justice (formerly Teaching Tolerance) also maintains a database of learning plans that are organized by the Learning for Justice Social Justice Standards.[61] Essential questions for a lesson plan regarding race designed for students in grades nine through twelve include, "How are rights understood and valued differently across cultures?," "What is the relationship between diversity and inequality?," and "How do our similarities and differences impact the relationships we have with people inside and outside our own identity groups?"[62] In addition to a set of three texts about CRT, the anti-critical race theory movement, and the need for an "inclusive national narrative," teachers are offered teaching strategies, as well as a list of student tasks to help develop student capacity to engage in argumentative and analytical writing.[63] Another lesson for high school students meant to consider cultural diversity and learning asks, "How does cultural diversity affect the learning of biology and other sciences?" In addition to informational texts, the lesson also suggests tasks meant to engage students in problem-solving around the lesson's essential question.[64]

how we can transform policing and public safety for all?"; and "What are other ways that racism (or other forms of injustice) show up in our institutions (education, government, business, media, etc.) and what can we do about that?" George Floyd, Racism and Law Enforcement, Anti-Defamation League (April 2021), https://www.adl.org/education/resources/tools-and-strategies/george-floyd-racism-and-law-enforcement-in-english-and-en [https://perma.cc/UHB5-TYGK].

[59] Lessons, Anti-Defamation League, https://www.adl.org/education-and-resources/resources-for-educators-parents-families/lessons [https://perma.cc/6FDR-Q7CW] (last visited May 2022).

[60] Racial Justice, Anti-Defamation League, https://www.adl.org/what-we-do/protect-civil-rights/racial-justice [https://perma.cc/84UM-PQ4T] (last visited Oct. 1, 2022).

[61] The Social Justice Standards reflect the fundamental goals of anti-bias education including positive identity development, comfort with and celebration of diversity, recognition of bias and injustice, and capacity for action in response to injustice. Social Justice Standards: The Learning for Justice Anti-Bias Framework, Learning for Justice 3 (2018) https://www.learningforjustice.org/sites/default/files/2021-11/LFJ-2111-Social-Justice-Standards-Anti-bias-framework-November-2021-11172021.pdf [https://perma.cc/9HDB-8NBE]; see also supra notes 39–40 and accompanying text.

[62] Teaching About Rights, Race, and Justice, Learning for Justice, https://www.learningforjustice.org/learning-plan/teaching-about-rights-race-and-justice [https://perma.cc/WDE6-GAQC] (last visited Oct. 1, 2022).

[63] Id.

[64] Exploring Cultural Diversity Through Biology, Learning for Justice, https://www.learningforjustice.org/learning-plan/exploring-cultural-diversity-through-biology [https://perma.cc/YXN8-JT34] (last visited Oct. 1, 2022).

Antiracism education, however, is not limited strictly to formal classroom settings. Rather, schools can have antiracism principles inform extracurricular activities. Often offered on a voluntary basis due to the potentially sensitive nature of self-classification, affinity groups organize students or teachers around a shared identity (e.g., race, gender, veteran status) to engage in discussion and activities regarding their identity. Privilege walks,[65] identity portrait exercises,[66] and facilitated interracial dialogue, although amenable to the classroom setting, can be facilitated in after-school clubs designed to engage race and equality in a school or school district.

Because antiracism education can take so many forms, it can be difficult to isolate parts of it for specific legal challenge. It is no wonder, then, that legislation attempting to prohibit antiracism education often casts a wide net, ranging from bans on critical race theory, to prohibitions on lessons that would make students feel "discomfort, guilt, [or] anguish," to proscriptions against words and phrases, including "unconscious bias," "[d]iversity training," "[e]quity," "[m]ulticulturalism," and "[s]ocial justice."[67]

[65] In a privilege walk, participants stand in a horizontal line, prompted to step forward or step back if a certain statement applies to them (e.g., if you are right-handed, take one step forward; if you were ever discouraged from a personal goal because of your race, class, or gender, take one step back; if your grandparents, or great-grandparents were prevented from voting because of their skin color, take one step back). Privilege walks are designed to teach about privilege by giving participants visceral examples of how privilege impacts individuals in the present and across generations. See, e.g., The Privilege Walk, Penn State Student Affairs, https://studentaffairs.psu.edu/learningmodules/powerworkshop/privilegewalk.shtml [https://perma.cc/29AB-AUYV] (last visited May 2022). But see Meg Bolger, Why I Don't Facilitate Privilege Walks Anymore and What I Do Instead, Medium (Feb. 16, 2018) https://medium.com/@MegB/why-i-dont-won-t-facilitate-privilege-walks-anymore-and-what-i-do-instead-380c95490e10 [https://perma.cc/K9C3-RE3J] (arguing that privilege walks rely on the experiences of people with marginalized identities to create a powerful learning experience for people with privilege).

[66] Identity portrait exercises are often suggested to help individuals reflect on the impact of race as well as other identity markers in their lives. Exercise participants are asked to select identity categories in which they fall (e.g., skin color, race, gender identity, religion, ability, family structure, education, class, language, sexual orientation) and consider whether that identity is considered a societal norm or baseline, enjoying societal advantages, or whether that identity is a target of institutional and societal prejudice and discrimination. Derman-Sparks et al., supra note 39, at 30–33.

[67] See infra notes 90–99 and accompanying text.

C. Critiques of Antiracism Education

Despite its popularity, antiracist education is not immune to critique. The focus in antiracism education on interrogating the structural, social, and economic roots of racial inequality make it necessarily political and thus vulnerable to characterization as "indoctrination" or "propaganda."[68] To the extent that parents and educators believe curricula to be justifiably apolitical, the political nature of antiracist education, no matter how unremarkable,[69] may engender opposition.[70]

In addition, concerns about whether antiracism education is effective have circulated for years. For one, it is not always clear what "success" in response to antiracism training looks like. Some researchers in the early 1990s described success as positive changes in attitudes, decreases in ethnocentrism, an increase in empathy for victims of discrimination, and a willingness to remove institutional barriers, reduce inequality in social power between groups, and attribute a lack of achievement to societal attitudes and policies rather than group characteristics. Early studies at the time, however, produced mixed outcomes depending on the sort of teaching and types of groups that were taught.[71] More recent studies of diversity trainings and other anti-bias programs also suggest, at best, modest improvement, and at worst, reinforced prejudice and resistance. It is worth noting, however, that these studies focus on neither the more confrontational antiracist education nor the long-term impacts of more

[68] Earl Mansfield & John Kehoe, A Critical Examination of Anti-Racist Education, 19 Can. J. Educ. 418, 420 (1994).

[69] "One thing I'd be interested to hear, however, is an alternative approach to teaching the history of America, or the history of anything, quite frankly, that doesn't have an embedded set of political commitments. Any approach to framing history is going to have some political commitments baked into the narrative. The choices we make about what to highlight or omit, all of that reflects certain values and biases. It's just that we often take these for granted when it's the 'preferred' or 'dominant' history." Sean Illing, Is There an Uncontroversial Way to Teach America's Racist History?, Vox (June 11, 2021), https://www.vox.com/policy-and-politics/22464746/critical-race-theory-anti-racism-jarvis-givens [https://perma.cc/6ENV-RBDY] (interviewing Jarvis R. Givens).

[70] Mansfield & Kehoe, supra note 68, at 420 (wondering whether the politically centrist sensibilities of Canada in the 1990s would support a form of education closely aligned with the political left).

[71] Morelli & Spencer, supra note 25, at 168–69 (summarizing studies regarding the impact of MCE and antiracist education on secondary and postsecondary students, police officers, and teachers).

regularly incorporating antiracism lessons and pedagogy into K–12 education.[72]

Critiques from the left suggest that antiracist education still necessarily centers whiteness, thereby further entrenching the racial hierarchy it seeks to dismantle. In the effort to more directly address white supremacy and privilege, the critique goes, significant effort is put into helping white people understand their own racism in ways that are neither threatening nor uncomfortable. This excessive catering to whiteness risks allowing whites to colonize identity politics to their benefit, accruing additional social capital and recentering themselves in the discourse on race all while the serious effects of racism on people of color are ignored.[73] According to a related critique, even antiracism, with its focus on personal work and activism, only reinforces the impulse of white people to act as "savior[s]" to the people of color around them, reinforcing a social dynamic in which white people have power and minoritized people are in perpetual need. Worse yet, white people are afterwards able to cash-in on their hero work, writing books and booking paid speaking engagements to discuss their "journeys to racial self-awareness" in which people of color function as props.[74]

Finally, concerns regarding antiracist education center on its purported attack on merit, individualism, communication styles, and linear thinking as reflections of white culture and tools of white supremacy.[75] Similar arguments were leveled against critical race and gender studies in the late

[72] See, e.g., Frank Dobbin & Alexandra Kalev, Why Doesn't Diversity Training Work? The Challenge for Industry and Academia, 10 Anthropology Now 48, 49–50 (2018) (noting the effects of training are short-lived, most studies do not consider the long-term effects of training, and training can reinforce stereotypes); Elizabeth Levy Paluck & Donald P. Green, Prejudice Reduction: What Works? A Review and Assessment of Research and Practice, 60 Ann. Rev. Psych. 339 (2009) (concluding that the causal effects of prejudice-reduction interventions, including workplace diversity training, remains unknown).

[73] Kailin, supra note 31, at 61–62; see, e.g., Janice Gassam Asare, Why DEI and Anti-Racism Work Needs to Decenter Whiteness, Forbes (Feb. 15, 2021), https://www.forbes.com/sites/janicegassam/2021/02/15/why-dei-and-anti-racism-work-needs-to-decenter-whiteness/?sh=3382f3f85886 [https://perma.cc/9HZL-CNBZ] (arguing that antiracism work can problematically center white people at the cost of uncovering the needs of minoritized groups who need support systems to promote success and well-being).

[74] See Danzy Senna, Robin DiAngelo and the Problem with Anti-Racist Self-Help, Atlantic (Aug. 3, 2021), https://www.theatlantic.com/magazine/archive/2021/09/martin-learning-in-public-diangelo-nice-racism/619497/ [https://perma.cc/8S9U-2TR9].

[75] Daniel Bergner, 'White Fragility' Is Everywhere. But Does Antiracism Training Work?, N.Y. Times Mag. (July 15, 2020), https://www.nytimes.com/2020/07/15/magazine/white-fragility-robin-diangelo.html [https://perma.cc/8JP3-D4T4].

1990s,[76] and its redeployment now is unsurprising given the ways in which antiracism education overlap with CRT and whiteness studies. These aspects of antiracist teaching seek to make transparent how unstated norms, imposed by people in power, will inevitably marginalize groups of people who might have chosen different norms had they been given the opportunity to do so. Still, these teachings can leave even those who acknowledge that there may be "things about the race . . . to change" to wonder whether the focus should not be, instead, on "get[ting] people prepared to run the race that's already scheduled."[77]

II. LEGAL RESPONSES TO ANTIRACISM EDUCATION

Academic or popular critique of the theory or practice of antiracism education is one thing. Legislation and lawsuits mobilized against antiracism education are another. If lawsuits and legislation focused on antiracism education are any indication, the rise of antiracism education has elicited strong and virulent political mobilization in opposition.

A. Political Pressures and Legislation

In September of 2020, conservative activist Christopher Rufo delivered a monologue on the Tucker Carlson show arguing that "critical race theory . . . pervaded every aspect of the federal government," animated antiracism seminars trainings across the country, and warranted a response from the President of the United States.[78] Rufo succeeded in prompting then-President Trump to issue an executive order limiting how contractors providing federal diversity seminars could address race, and promoting "patriotic education."[79] During the same time period, President Trump denounced The 1619 Project, a journalistic effort led by Nikole Hannah-Jones to position race and racial hierarchy as central to America's

[76] See, e.g., Daniel A. Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on Truth in American Law 5, 16 (1997) (characterizing "radical multiculturalism" as attacking "core concepts such as truth, merit, and the rule of law," and decrying their commitment to "overturn the foundations of American legal thought").

[77] Bergner, supra note 75 (quoting Ron Ferguson, a Black economist at Harvard's John F. Kennedy School of Government and director of Harvard's Achievement Gap Initiative).

[78] Benjamin Wallace-Wells, How a Conservative Activist Invented the Conflict Over Critical Race Theory, The New Yorker (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory [https://perma.cc/R7LM-37DT].

[79] Crowley, supra note 4; Wallace-Wells, supra note 78.

founding,[80] and also threatened to punish schools that used the Project in their curriculum.[81]

Soon thereafter, CRT became shorthand for attempts to teach the history of race and racism in the United States,[82] galvanizing opposition from parents and politicians alike in response to antiracist education, and in some cases, any programs focused on equity or LGBTQ-inclusive policies.[83] In June of 2020, the national parent organization No Left Turn in Education was established to support parents in a movement against lessons on systemic racism, often working in coordination with conservative organizations and media outlets. Through thirty chapters in twenty-three states,[84] No Left Turn works to achieve, among other goals, the mobilization of "parents, families, educators, professionals and concerned citizens to push back against radical indoctrination and injection of political agendas in K–12 education."[85]

In May of 2021, a new political action committee, The 1776 Project, was launched to "help raise awareness and campaign on behalf of school board candidates nationwide who reject the divisive philosophy of critical race theory and want to push it out of our public schools."[86] In June of 2021, conservative think tank The Manhattan Institute published "Woke Schooling: A Toolkit for Concerned Parents," a guide for parents wanting to push back against "critical pedagogy." Offering a "critical pedagogy

[80] Wallace-Wells, supra note 78.

[81] Gerstmann, supra note 4.

[82] See Illing, supra note 69 (noting that conservatives have used critical race theory as a catchall to describe "any serious attempt to teach the history of race and racism"); Jarvis R. Givens, What's Missing from the Discourse About Anti-Racist Teaching, Atlantic (May 21, 2021), https://www.theatlantic.com/ideas/archive/2021/05/whats-missing-from-the-discourse-about-anti-racist-teaching/618947/ [https://perma.cc/Q7ZV-WAVH] (noting that critics of antiracist teaching have "irresponsibly clumped together anti-racist teaching, critical race theory, ethnic studies, and anything else involving the systematic study of race and racism").

[83] See, e.g., Jonathan Butcher, Mike Gonzalez, CRT, The New Intolerance, and its Grip on America, The Heritage Found. (Dec. 7, 2020) (attributing LGBTQ awareness, diversity trainings in the federal government, California's ethnic studies curriculum, and alternatives to exclusionary discipline, to CRT).

[84] Tyler Kingkade, Brandy Zadrozny & Ben Collins, Critical Race Theory Battle Invades School Boards—With Help from Conservative Groups, NBC News (June 15, 2021), https://www.nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794 [https://perma.cc/P45T-KW54].

[85] Mission, Goals & Objectives, No Left Turn in Educ., https://www.noleftturn.us/mission-goals-objectives/ [https://perma.cc/WM64-MJ2D] (last visited Aug. 28, 2022).

[86] Stef W. Kight, New Conservative PAC Targets School Board Elections, Axios (May 24, 2021), https://www.axios.com/2021/05/25/pac-critical-race-theory-school-board-election [https://perma.cc/KA67-N95Q].

glossary" explaining the purportedly pernicious meaning behind terms like "achievement gap," "antiracism," "equity," "implicit bias," and "white supremacy," the guide encourages parents to get organized, work with the media, and take legal action.[87] Within a year of Rufo's television appearance in 2020, at least 165 local and national groups, often led by conservative think tanks and law firms, formed to challenge lessons on race and gender across the country.[88]

The anti-CRT and anti-antiracism wave has also resulted in legislative activity. By July of 2021, the number of states considering or adopting legislation banning critical race theory in schools (despite no evidence having existed that CRT was being taught in the K–12 setting[89]) or restricting antiracism teaching was over twenty, and by some measures approaching forty.[90] Legislators behind the ultimately adopted anti-CRT bill in Idaho noted that CRT "tries to make kids feel bad."[91] In Tennessee, legislators asserted that teaching about racism promotes "division."[92] By December of 2021, antiracism legislative activity had metastasized, resulting in the introduction or adoption of fifty-four state level bills that sought to control how race and American history, and also sex and gender, could be taught in American public schools.[93] At least twenty of the bills

[87] Manhattan Inst., Woke Schooling: A Toolkit for Concerned Parents 5–6, 9, 13, 16, 18, 20 (2021), https://www.manhattan-institute.org/woke-schooling-toolkit-for-concerned-parents [https://perma.cc/5UGT-WFEB].

[88] Kingkade et al., supra note 84.

[89] See, e.g., Phil McCausland, Teaching Critical Race Theory Isn't Happening in Classrooms, Teachers Say in Survey, NBC News (July 1, 2021), https://www.nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945 [https://perma.cc/364M-X2JM] (citing to survey conducted by the nonpartisan Association of American Educators).

[90] Char Adams, Allan Smith & Aadit Tambe, Map: See Which States Have Passed Critical Race Theory Bills, NBC News (June 17, 2021), https://www.nbcnews.com/news/nbcblk/map-see-which-states-have-passed-critical-race-theory-bills-n1271215 [https://perma.cc/V5JN-U9UK]; Cathryn Stout & Gabrielle LaMarr LeMee, Efforts to Restrict Teaching About Racism and Bias Have Multiplied Across the U.S., Longmont Leader (June 19, 2021, 8:00 AM), https://www.longmontleader.com/regional-news/efforts-to-restrict-teaching-about-racism-and-bias-have-multiplied-across-the-us-3883122 [https://perma.cc/W53S-T2WP].

[91] Adams et al., supra note 90.

[92] Id.

[93] PEN Am., Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach 28 (2021), https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf [https://perma.cc/94HN-A3VT]; Jeffrey Sachs, Scope and Speed of Educational Gag Orders Worsening Across the Country, PEN Am. (Dec. 13, 2021), https://pen.org/scope-speed-educational-gag-orders-worsening-across-country/ [https://perma.cc/34J7-SWN5].

specifically banned "critical race theory," while seventeen explicitly prohibited teaching or using curricular materials from The 1619 Project.[94]

In South Carolina, the adopted "Freedom From Ideological Coercion and Indoctrination Act" prohibits teaching the idea that any cultural or political belief is inherently racist, sexist, or oppressive, or delivering any lesson that would make an individual feel "discomfort, guilt, anguish, or any other form of psychological distress because of his or her race, ethnicity, sex, sexual orientation, national origin, heritage, culture, religion, or political belief."[95] The bill further characterized as inherently discriminatory and in violation of individual rights the insistence that individuals "affirm, accept, adopt, or adhere to . . . controversial and theoretical concepts" such as the theory of unconscious or implicit bias, or the idea that race is a social construct.[96]

Proposed Wisconsin Bills SB 410 and 411[97] broadly prohibited any teaching or employee training that "promotes race or sex stereotyping." An addendum to SB 411 provided a list of words that, if taught through the framework of "prohibited activities," would have also run afoul of the law, including: Critical Race Theory; Diversity, Equity, and Inclusion; culturally responsive teaching; antiracism; anti-bias training; colorism; unconscious bias; cultural competence; diversity training; equitable; equity; hegemony; implicit bias; under-represented communities; multiculturalism; patriarchy; social justice; structural racism; and white supremacy.[98]

In September of 2021, Texas passed a bill that prohibits any teaching suggesting that "slavery and racism are anything other than deviations from, betrayals of, or failures to live up to, the authentic founding principles of the United States, which include liberty and equality."[99] In January of 2022, the Florida Senate Education Committee approved a bill that prohibits public schools and private businesses from making white people feel "discomfort" when they teach students or train employees about discrimination. The bill, which reads, in part, "[a]n individual

[94] Sachs, supra note 93.

[95] H. 4605, 2021 Gen. Assemb., 124th Sess. (S.C. 2022).

[96] Id.

[97] S.B. 410, 105th Leg., Reg. Sess. (Wis. 2021); A.B. 411, 105th Leg., Reg. Sess. (Wis. 2021).

[98] Hearing on A.B. 411 and S.B. 411 Before the Assemb. Comm. on Educ. and the S. Comm. on Educ., 105th Leg., Reg. Sess. (Wis. 2021) (statement of Rep. Chuck Wichgers, Member, Assemb. Comm. on Educ.).

[99] S.B. 3, 87th Leg., 1st Spec. Sess. (Tex. 2021).

should not be made to feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race," was endorsed by Florida Senator Manny Diaz for "ensuring that people are not blamed for sins of the past."[100]

Intense legislative activity targeting antiracism education has unsurprisingly had election consequences. Conservative school board candidates backed by The 1776 Project, for example, won three-quarters of the fifty-eight races on which the PAC focused in November 2021.[101] Republican Florida Governor Ron DeSantis once asserted that he would get the "political apparatus involved so we can make sure there's not a single school board member who supports critical race theory."[102] Research organizations report that political discord at the local school level is at an all-time high, with at least fifty school districts serving as the scene for local unrest regarding critical race theory.[103]

Election controversy at both the local and state level in Virginia further illuminate the stakes. In response to a 2019 report finding a racial achievement gap, disproportionate disciplining of Black and Hispanic students, and the common use of racial slurs in Loudoun County schools, school district administrators adopted a plan to address systemic racism[104] and apologized for the district's history of discrimination.[105] Parents perceiving the plan as the introduction of critical race theory in classrooms began a petition drive to recall six of the nine school board

[100] Brendan Farrington, Florida Could Shield Whites from 'Discomfort' of Racist Past, Associated Press (Jan. 18, 2022), https://apnews.com/article/business-florida-lawsuits-ron-desantis-racial-injustice-3ec10492b7421543315acf4491813c1b [https://perma.cc/4F6D-WACV].

[101] Stef W. Kight, "Anti-CRT" School Board Candidates Are Winning, Axios (Nov. 4, 2021), https://www.axios.com/2021/11/04/anti-crt-school-board-candidates-are-winning [https://perma.cc/P7FV-H2FA].

[102] Kingkade et al., supra note 84; Ana Ceballos, Gov. Ron DeSantis Targets Critical Race Theory as Florida Examines Academic Standards, Tampa Bay Times (June 7, 2021), https://www.tampabay.com/news/florida-politics/2021/06/07/gov-ron-desantis-targets-critical-race-theory-as-florida-examines-academic-standards/ [https://perma.cc/MK5Q-RQDJ].

[103] Kingkade et al., supra note 84.

[104] Loudoun Cnty. Pub. Sch., Action Plans to Combat Systemic Racism (2020), https://www.lcps.org/cms/lib/VA01000195/Centricity/domain/60/equity_initiative_documents/Detailed_Plan_to_Combat_Systemic_Racism_August_2020.pdf [https://perma.cc/FL8H-ZBHN]; Trip Gabriel & Dana Goldstein, Disputing Racism's Reach, Republicans Rattle American Schools, N.Y. Times (June 1, 2021), https://www.nytimes.com/2021/06/01/us/politics/critical-race-theory.html [https://perma.cc/NTK2-KM48].

[105] Stephanie Saul, How a School District Got Caught in Virginia's Political Maelstrom, N.Y. Times (Nov. 14, 2021), https://www.nytimes.com/2021/11/14/us/loudoun-county-school-board-va.html [https://perma.cc/P52E-ZDRK].

members.[106] The challenge, as well as rising tensions among parents over both equity efforts and the district's handling of the pandemic, attracted national news coverage,[107] resulting in seventy-eight segments on Fox News from March to June of 2021 alone.[108] A parent and former Trump administration official with children in the district launched "Fight for Schools," a political action committee focused on challenging equity training in the district. By September 2021, the committee had raised $300,000 in donations, including from anti-CRT organizations.[109]

Glenn Youngkin, the Republican candidate for state governor, tapped into these dynamics, adopting a "parents matter" slogan and vowing at a "Save Our Schools" rally held in Loudoun County to abolish CRT in Virginia.[110] Youngkin was arguably rewarded for his efforts with a surprise win in the race, contributing to an increasingly coalescing narrative that concerns about antiracism in schools may have led to

[106] Gabriel & Goldstein, supra note 104.

[107] Tyler Kingkade, In Wealthy Loudoun County, Virginia, Parents Face Threats in Battle over Equity in Schools, NBC News (June 1, 2021), https://www.nbcnews.com/news/us-news/wealthy-loudoun-county-virginia-parents-face-threats-battle-over-equity-n1269162 [https://perma.cc/H7YZ-SBK2].

[108] Saul, supra note 105.

[109] Id.

[110] Id.

unexpected Republican election victories in the fall of 2021,[111] and were a defining issue in the 2022 midterm elections.[112]

[111] Lisa Lerer, Rough Night for Democrats Exposes the Party's Weakness, N.Y. Times (Nov. 3, 2021), https://www.nytimes.com/2021/11/03/us/politics/democrats-virginia-governor-race.html [https://perma.cc/V3GC-WU48] (arguing that schools and race became the central battleground of the Virginia governor's race); David Smith, How Did Republicans Turn Critical Race Theory into a Winning Electoral Issue, Guardian (Nov. 3, 2021), https://www.theguardian.com/us-news/2021/nov/03/republicans-critical-race-theory-winning-electoral-issue [https://perma.cc/Z69L-B8FJ] (suggesting that Glenn Youngkin won the Virginia governor's race, in part, by exploiting concerns about teaching race in schools). But see Zack Beauchamp, Did Critical Race Theory Really Swing the Virginia Election?, Vox (Nov. 4, 2021), https://www.vox.com/policy-and-politics/2021/11/4/22761168/virginia-governor-glenn-youngkin-critical-race-theory [https://perma.cc/BN6A-EJ34] (finding election returns suggest that loses were due to expected backlash against an unpopular incumbent governor); Politics of Masks, Critical Race Theory Fueling Heated School Board Elections, PBS NewsHour (Oct. 27, 2021), https://www.pbs.org/newshour/show/politics-of-masks-critical-race-theory-fueling-heated-school-board-elections [https://perma.cc/4JVL-QR5V] (suggesting that CRT, along with the issue of masking in schools, have become "nationalized, cultural hot-button fights" that have impacted local school board races). Nevertheless, polling indicates that the introduction of antiracism education into curricula has not altered parents' overall positive impression of their children's education. See Jessica Grose, Who's Unhappy With Schools? The Answer Surprised Me, N.Y. Times (Mar. 19, 2022), https://www.nytimes.com/2022/03/19/opinion/parents-schools.html [https://perma.cc/CL3D-JVWY] (canvassing polls suggesting that American parents are happy overall with their children's education and that people driving outrage around education might not actually have enrolled children); Anya Kamenetz, The Education Culture War is Raging. But for Most Parents, It's Background Noise, NPR (Apr. 29, 2022), https://www.npr.org/2022/04/29/1094782769/parent-poll-school-culture-wars [https://perma.cc/49LE-SR3L] (finding that polled parents, by wide margins and regardless of political affiliation express satisfaction with their children's schools and curriculum).

[112] Allan Smith, After Virginia Success, Republicans Look to Weaponize School Debates in Midterm Message, NBC News (Nov. 5, 2021), https://www.nbcnews.com/politics/elections/after-virginia-success-republicans-look-weaponize-school-debates-midterm-message-n1283262 [https://perma.cc/653G-NHVR]; Stephanie Saul, Energizing Conservative Voters, One School Board Election at a Time, N.Y. Times (Oct. 21, 2021), https://www.nytimes.com/2021/10/21/us/republicans-schools-critical-race-theory.html [https://perma.cc/Q2JK-5T6V]. But see Ethan DeWitt, Progressive Candidates Prevail in School Board Elections Despite Passionate Campaigns on Right, N.H. Bull. (Mar. 10, 2022), https://newhampshirebulletin.com/2022/03/10/progressive-candidates-prevail-in-school-board-elections-despite-passionate-campaigns-on-right/ [https://perma.cc/6UNT-78RR] (documenting the wins of progressive school board candidates over right-wing candidates in New Hampshire); Jennifer C. Berkshire, How Progressives Won the School Culture War-in New Hampshire!, Nation (Mar. 15, 2022), https://www.thenation.com/article/politics/democrats-school-elections-nh/ [https://perma.cc/855X-3TZA] (documenting the twenty-nine "pro-public education" candidate wins in New Hampshire); Stephanie Wang & Aleksandra Appleton, How Indiana's Anti-CRT Bill Failed Even with a GOP Supermajority, WFYI (Mar. 11, 2022), https://www.wfyi.org/news/articles/indiana-anti-crt-bill-failed-republican-supermajority [https://perma.cc/4TEJ-YF7T] (detailing reasons Indiana's anti-CRT bill failed to pass); Shannon Keating, How a Grassroots Campaign Defeated Conservatives Opposed to Critical

B. Litigation

In addition to political and legislative responses, antiracism education has also prompted lawsuits by parents and educators alleging that equity efforts in schools constitute racial discrimination. These early suits challenge antiracism education's acknowledgment of racial classifications, rejection of colorblindness, and interrogation of white racial identity, suggesting that antidiscrimination law may yet be receptive to plaintiffs' claims. Moreover, because antiracism education is a more direct attack on racial hierarchy and whiteness than ethnic studies or multiculturalism education, previously unsuccessful challenges to curricula that engaged race do not offer dependable precedent for antiracism education advocates.

1. Trends

Antiracism anxiety has manifested as lawsuits filed against schools and school districts intent on incorporating lessons about structural racism and white supremacy in the K–12 curriculum.[113] And with legislators like Florida Governor Ron DeSantis deputizing parents to challenge "sensitivity and racial awareness training," future suits are likely.[114] To be sure, poorly executed lessons about race may justifiably prompt concern.[115] Teaching about race and racism in developmentally

Race Theory, BuzzFeed News (Nov. 5, 2021), https://www.buzzfeednews.com/article/shannonkeating/critical-race-theory-election-results-guilford [https://perma.cc/AB4L-WWCY] (documenting the defeats of school board candidates who ran on an anti-CRT platform in Connecticut).

[113] See infra notes 133–82 and accompanying text.

[114] Tal Axelrod, DeSantis Unveils Legislation to Let Parents Sue Schools that Teach Critical Race Theory, The Hill (Dec. 15, 2021), https://thehill.com/homenews/state-watch/586010-desantis-unveils-legislation-to-let-parents-sue-schools-that-teach/ [https://perma.cc/FE7R-AYA6] (describing the "Stop the Wrongs to Our Kids and Employees (WOKE) Act" bill, introduced by the governor in December of 2021, that gives parents and other individuals the ability to sue schools and companies that promote critical race theory and other sensitivity and racial awareness training).

[115] For example, according to one lawsuit, pre-K through fifth grade students read the book *Not My Idea: A Book About Whiteness (Ordinary Terrible Things)*, which taught, among other lessons, that "[r]acism is a white person's problem and we are all caught up in it" and "White supremacy has been lying to kids for centuries." Although whiteness is a legitimate concept to engage when exploring race, if taught poorly, the idea of whiteness may be developmentally inappropriate, especially for early childhood and elementary learners. Complaint at 24, Deemar v. Bd. of Educ., No. 1:21-cv-03466 (N.D. Ill. Jun. 29, 2021). But see Defendants' Memorandum of Law in Support of Motion to Dismiss at 6, *Deemar*, No. 1:21-cv-03466 (denying that *Not My Idea* was ever taught).

appropriate ways requires skill and technique for which not all teachers have been trained. Litigation, however, is a poor response to inadequate teaching skill given the broad latitude courts have generally granted school leaders and educators in matters of pedagogy and teaching materials selection.[116] Rather, to successfully bring suit, litigants must not oppose topic selection or teaching technique, but must instead frame the fundamental goals of antiracism education as racially discriminatory.[117]

Accordingly, initial lawsuits take two forms when alleging racial discrimination. The first is a straightforward equal protection challenge to any element of antiracism education or curriculum that relies on racial classifications. Courts extend tiered levels of scrutiny to governmental classifications based on identity, engaging in more or less rigorous interrogation of those classifications depending on the identity category. Race, as an identity marker subject to a "history of purposeful unequal treatment"[118] is typically subject to strict scrutiny, and most likely to fail[119] judicial review.[120] U.S. Supreme Court jurisprudence on race is consistent in the conclusion that racial classifications are necessarily harmful.[121]

[116] Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1031–32 (9th Cir. 1998) (affirming school district's broad discretion in managing school affairs in the absence of intentional discrimination); see also Cal. Parents for the Equalization of Educ. Materials v. Torlakson, 973 F.3d 1010, 1018 (9th Cir. 2020) (holding that absent evidence of unlawful intentional discrimination, parents are not entitled to bring equal protection claims challenging curricular content).

[117] See *Monteiro*, 158 F.3d at 1032 (concluding that racist teacher conduct, as well as the adoption of policies that promote racist attitudes or indoctrinate students with racist concepts can constitute racial discrimination).

[118] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 553 (1989) (Marshall, J., dissenting).

[119] In 1972, late legal scholar Gerald Gunther described the strict scrutiny standard of review as "strict in theory and fatal in fact." Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). With a few key exceptions, the application of strict scrutiny to both benign and invidious racial classifications has resulted in the preservation of facially neutral laws with disparate impact on minority groups and the prohibition of race-conscious state action with the intent to ameliorate racial inequality in employment, criminal justice, education, and other spheres of American life. See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–21 (2007) (striking down controlled choice plans meant to integrate schools); *J.A. Croson Co.* 488 U.S. at 505–06 (striking down minority business enterprise program); McCleskey v. Kemp, 481 U.S. 279, 297–99 (1987) (upholding facially neutral death penalty legislation despite conclusive evidence of racial disparities in application).

[120] Bowen v. Gilliard, 483 U.S. 587, 603 (1987).

[121] See, e.g., Shaw v. Reno, 509 U.S. 630, 657 (1993) ("[Racial classifications] balkanize us into competing racial factions . . . [and] carry us further from the goal of a political system in

Several elements of antiracism education may run afoul of anticlassification antipathy. Affinity groups, for example, organize students or teachers around a shared identity (e.g., race, gender, veteran status) to engage in discussion. Similarly, identity portrait exercises require participants to select racial and ethnic identity categories with which they identify. These sorts of exercises are often voluntary, and indeed, litigation disputes often turn on whether or not parties were forced to participate. In contexts where parties can establish that they were forced to classify themselves, or, worse, that school officials classified them, that classification might be considered motivated by prejudice, motivated by an intent to discriminate or segregate, or a basis on which the state attempted to distribute differential benefits.[122]

Admittedly, allegations of racial classification without more in the form of state action on the basis of those classifications might be insufficient to establish equal protection violations. Title VI claims, however, are a second potential avenue for legal challenge to antiracism education. Under Title VI, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[123] Title VI

which race no longer matters."); see also infra notes 203–09 and accompanying text (discussing language from Supreme Court cases stating that racial classifications are inherently harmful).

[122] *J.A. Croson Co.*, 488 U.S. at 493 (explaining how Richmond's minority business enterprise program denied citizens the opportunity to complete for government contracts on the basis of race and how strict scrutiny helps root out when racial classifications are prejudiced or stereotyped).

[123] 42 U.S.C. § 2000d (2018). In the context of education, financial assistance includes federal grants and loans, as well as the sale, lease, or use of federal property, and the prohibition applies to states, political subdivisions thereof, or private agencies, institutions, or organizations to whom federal financial assistance is extended. 34 C.F.R. §§ 100.13(f), (i) (2021). Title VI prohibits only intentional discrimination and permits a private right of action to enforce the prohibition. See Cannon v. Univ. of Chi., 441 U.S. 677, 696, 709 (1979) (concluding that like Title IX, a private right of action is implicit in Title VI). The Supreme Court has held, however, that analysis of those claims is co-extensive with analysis of equal protection claims; as a result, Title VI does not forbid actions that have a racially disproportionate impact. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (holding that Title VI only outlaws racial classifications that violate the Equal Protection Clause or Fourteenth Amendment); Alexander v. Choate, 469 U.S. 287, 293 (1985) (outlining precedent whereby Title VI only proscribed intentional discrimination); Washington v. Davis, 426 U.S. 229, 239 (1976) (explaining how the Court has never found a law to violate the Equal Protection Clause of either the Fifth or Fourteenth Amendment only on the basis that it has a racially disproportionate impact). Further, Title VI does not contain a private right of action

applies to public elementary and secondary schools, universities, as well as private educational entities as long as they receive federal assistance in any capacity.[124] Further, discrimination under Title VI includes racial or national origin harassment that is serious enough to deny or limit a student's ability to participate in or benefit from the recipient's educational programs and activities.[125] Title VI, however, reaches no further than the Constitution, limiting private suits under the statute to allegations of intentional discrimination.[126] Although accompanying regulations do address disparate impact, Title VI's disparate impact regulations are not privately enforceable.[127]

Litigants hoping to challenge anti-bias education under Title VI, then, are limited to claims that curricula were designed or adopted with either an intent to discriminate on the basis of race or that adoption of the curriculum facilitated and maintained a "hostile environment." The legal bar is high for allegations of intentional discrimination.[128] Moreover, successful hostile educational environment claims often target peer-to-peer harassment in response to which educators and administrators demonstrated deliberate indifference.[129] Nevertheless, elements of

for disparate impact claims prohibited by agency regulations adopted to enforce Title VI, thus relegating the burden of enforcing disparate-impact regulations promulgated under § 602 of Title VI exclusively to administrative agencies. Alexander v. Sandoval, 532 U.S. 275, 289 (2001).

[124] 42 U.S.C. § 2000d–4a (2018).

[125] Infra note 129 and accompanying text.

[126] Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 607 (1983); see also Olatunde C.A. Johnson, Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement, 66 Stan. L. Rev. 1293, 1306 n.76 (2014) (explaining that the Guardians decision was highly fractured but ultimately affirmed in *Alexander v. Choate* as reaching only instances of intentional discrimination).

[127] *Sandoval*, 532 U.S. at 293.

[128] The intent standard is often difficult for plaintiffs to meet. A discriminatory motive or purpose does not have to be the "dominant" or "primary" purpose to meet an intent standard. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). Nevertheless, to show that a defendant acted with an intentional discriminatory purpose, a plaintiff must show that the defendant chose to act "because of" the adverse impacts that the action would have on a particular group, and not merely "in spite of" the knowledge that such an impact would occur. Pers. Adm'r. of Mass. v. Feeney, 442 U.S. 256, 279 (1979). Defendants are often able to successfully offer non-discriminatory reasons for their action. But see Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 933 (10th Cir. 2003) ("[W]hen administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and do nothing, they can be held liable under § 601.").

[129] A district may be liable under Title VI for student-on-student harassment if "(1) the harassment [is] 'so severe, pervasive, and objectively offensive that it can be said to deprive

antiracism education that function as climate interventions, including voluntary extracurricular activities, are potentially vulnerable to hostile environment challenges. Anti-bias task forces that recruit students or faculty for participation, training for student leaders on inclusive leadership, the adoption of culturally responsive pedagogy, facilitation of interracial dialogue—these are all initiatives in which students and staff might participate. To the extent that they implicate discussion, consideration, and exploration of the topic of race, they are vulnerable to legal challenge by plaintiffs who consider them manifestations of racial animosity regarding white people.

Indeed, there are signs that legislators and would-be challengers to antiracism education are considering the potential of Title VI suits in response to antiracism education. Senator Marco Rubio, for example, co-sponsored the introduction of a bill that would direct the U.S. Department of Education's Office of Civil Rights ("OCR") to investigate parent and/or student complaints regarding the curriculum, including "teaching, and counseling that promote divisive concepts and foster racially-hostile school environments."[130] The legislation would further require OCR to enforce Title VI when a complaint is brought by parents or students "impacted by critical race theory curriculum."[131] Similarly, the initial round of filed suits challenging antiracism education do, in fact, allege both equal protection and Title VI claims.

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the victim of access to educational opportunities or benefits provided by the school,' . . . and the district (2) had actual knowledge [of the harassment], (3) had 'control over the harasser and the environment in which harassment occurs,' and (4) was deliberately indifferent." Fennell v. Marion Indep. Sch. Dist., 804 F.3d 398, 408 (5th Cir. 2015) (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644, 650 (1999)); see also Doe v. L.A. Unified Sch. Dist., No. 2:16-cv-00305, 2017 WL 797152, at *17 (C.D. Cal. Feb. 27, 2017) ("A violation of title VI may also be found if a recipient has created or is responsible for a racially hostile environment—i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient. A recipient has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice.").

[130] Press Release, Senate Off. of Marco Rubio, Rubio Introduces Bill to Protect Students from Racially-Hostile School Environments Caused by Critical Race Theory, (Jul. 30, 2021), https://www.rubio.senate.gov/public/index.cfm/2021/7/rubio-introduces-bill-to-protect-students-from-racially-hostile-school-environments-caused-by-critical-race-theory [https://perma.cc/2WAU-WE8R].

[131] Id.

Examining proposed legislation and initial suits additionally reveals trends in plaintiff legal strategies. One trend is the language used to describe antiracism teachings and trainings. Phrases like "social justice" and "culturally responsive pedagogy" are characterized as covers for liberal ideology or the suppression of conservative political views. Equity, the commitment to ensure that differently situated children are taught and supported in ways responsive to their needs, is dismissed as a problematic insistence on equality of outcomes. Critical race theory is often invoked as the harmful ideological basis for much of the challenged teachings. And lawsuits repeatedly accuse defendants of teaching students how to be racist under the guise of political correctness.

A second trend is the conflation of the concept of whiteness with individual white people. Repeatedly, lawsuits allege that challenges to systems or cultural patterns that benefit white people or implicitly endorse white culture writ large are actually attacks on white people in their individual capacities. Relatedly, lawsuits often consider attempts to center the experiences or cultural practices of minoritized groups as necessarily exclusionary to white students and faculty. A third trend is the embrace of colorblindness, accompanied by a strict rejection of the acknowledgment or recognition of race when teaching about equality in schools. As a result, objections to affinity groups, even ones in which participation is voluntary, feature prominently in complaints. A key fourth trend is the rejection of what many scholars of race and identity might consider uncontroversial insights regarding race in American society and history.

Defendants will surely contest the veracity of facts as alleged by plaintiffs in these cases, and indeed, in some cases already have.[132] But even if alleged facts are taken as true, the initially filed lawsuits often amount to direct challenges to the project of engaging the nature of race in the United States. As the following case studies illustrate, to the extent that districts believe it necessary to frontally interrogate white supremacy and racial hierarchy, that project is at odds with both the preferred instructional goals of plaintiffs and the fundamental norms underlying antidiscrimination law in the United States.

[132] Defendants' Memorandum of Law in Support of Motion to Dismiss, supra note 115, at 6 (denying that *Not My Idea*, the "Children's March Lesson," and the concept of intersectionality, key factual assertions in plaintiff's complaint, were taught as plaintiff alleged).

2. Case Studies

i. Deemar v. Board of Education

Deemar v. Board of Education was filed in 2021 by Stacy Deemar, a white female drama teacher, against the Evanston/Skokie school district and several of its administrators. The complaint detailed a list of initiatives allegedly adopted by the district to engage race, including a stated commitment to equity,[133] required equity training for district employees,[134] voluntary[135] affinity group trainings offered to district employees and students,[136] engagement of concepts including white fragility and intersectionality,[137] and the district's "Black Lives Matter" week of action.[138] The district's stated commitment of recognizing race as a visible indicator of identity was presented as a factual allegation justifying the complaint.[139] Further, the following ideas about race in the United States were characterized in the complaint as necessarily racist, including: people of color can be under pressure to assimilate into white culture;[140] race is a "political construction created to concentrate power with white people and legitimize dominance over non-white people"; racism advantages groups historically or currently defined as white, while disadvantaging people historically or currently defined as non-white;[141] children as young as five can have already-developed racial preferences in favor of white people;[142] humans have identities, including race, gender, and sexual orientation, that "can contribute to or be hurt by systems of oppression."[143]

Early in the complaint, Deemar alleged that euphemisms like "social justice," "diversity and inclusion," "critical race theory" and "culturally responsive teaching" are actually "code speak" for the dangerous practices of conditioning individuals to take account of skin color and

[133] Complaint, supra note 115, at 9.
[134] Id. at 11.
[135] Defendants' Memorandum of Law in Support of Motion to Dismiss, supra note 115, at 4.
[136] Complaint, supra note 115, at 12–13, 19–20.
[137] Id. at 17–18, 23.
[138] Id. at 21–23.
[139] Id. at 9.
[140] Id. at 4–5.
[141] Id. at 5–6.
[142] Id. at 22.
[143] Id. at 23.

"pitting different racial groups against each other."[144] Similarly, the district's commitment to "equity" was characterized as nothing more than code for the belief that "nothing is more relevant than skin color,"[145] while the teaching that "colorblindness helps racism" was a racist lesson.[146] The complaint further alleged that the district's pre-K-to-8 curriculum teaches that "whiteness is a bad deal," that students must consider what it means to be "white but not part of 'whiteness,'"[147] and that whiteness is inherently racist.[148]

The latter point, in particular, was illustrated in the complaint by an alleged critique of the Western nuclear family as an excessively individualistic model.[149] Other features of white Western culture, including a "pull yourself up by your bootstraps" mentality and minimal focus on collectivism, were allegedly compared unfavorably to African culture.[150] On account of these teachings and initiatives, Deemar alleged that the district's affinity group offerings, "race-based programming," and "focus[] on race as one of the first visible indicators of identity" were racial classifications motivated by prejudice or stereotype in violation of the Fourteenth Amendment and Title VI's prohibition on intentional discrimination.[151]

ii. Cajune v. Independent School District 194

In *Cajune v. Independent School District 194*, Bob Cajune and others filed suit against a Minnesota school district for a hostile educational

[144] Id. at 2, 6.
[145] Id. at 9.
[146] Id. at 4.
[147] Id.
[148] Id. at 5.
[149] Id.
[150] Id. at 27–28.
[151] Id. at 31–32. Deemar also alleged a hostile work environment under Title VI. Id. at 32–33. As argued by defendants, because the district does not receive federal funding specifically in aid of employment practices, Deemar's employment claims are potentially more appropriately filed pursuant to Title VII. Defendants' Memorandum of Law in Support of Motion to Dismiss, supra note 115, at 14–15; see also Johnson v. Transp. Agency, 480 U.S. 616, 627–28, n.6 (1987); Ahern v. Bd. of Educ., 133 F.3d 975, 978 (7th Cir. 1998) (discussing the limits on judicial remedies under Title VI and rejecting the argument that obligations under Title VII are identical to those under the Constitution). Plaintiffs filed a response to Defendant's Motion to Dismiss for lack of standing and failure to state a claim in October of 2021. As of June 2022, the suit is still progressing through the legal system.

environment in violation of Title VI.[152] Although ISD 194 did not pursue curricular innovations as extensively as did the Evanston/Skokie district, the district allegedly: (1) adopted a poster series in which a Black Lives Matter poster was included but an "All Lives Matter" or a "Blue Lives Matter" poster was not[153]; (2) hosted a cultural celebration focusing on the BIPOC community[154]; and (3) screened an online educational video explaining the concept of structural racism.[155] According to the filing, ISD 194 contracted with "equity consultants" who presented "essential tenets of Critical Race Theory," including the idea that race-neutral policies can perpetuate disparate outcomes on the basis of race and that "structural racism" can make life easier for whites and more difficult for Blacks.[156] The complaint also alleged that the district employed an "Equity Coordinator" for district-wide events.[157] Moreover, the district pedagogy plans articulated commitments to "culturally responsive" teaching practices and "anti-racist" classrooms.[158] These initiatives, and the poster series in particular, taught one plaintiff to "think of distinctions between people based on the color of . . . skin, instead of the content of . . . character."[159] Plaintiffs further argued that, in addition to viewpoint discrimination, these acts contributed to a racially hostile school environment that "promotes racism and racial inequality, instead of unity and equality."[160]

In January of 2022, the *Cajune* suit was dismissed. Focusing on the fact that no student named in the case any longer attended any schools in the district (plaintiff N.W. had moved to another school district), the complaint lacked an ongoing injury or immediate threat of injury from the ISD 194.[161] Although plaintiffs requested leave to file an amended complaint adding other children, the district court denied the request for procedural reasons.[162] Moreover, neither municipal taxpayer nor

[152] Plaintiffs also alleged First Amendment violations, the substance of which are outside the scope of this project.

[153] Complaint, supra note 1, at 6–8.

[154] Id. at 9–10.

[155] Id. at 10–11.

[156] Id.

[157] Id. at 3, 9–10.

[158] Id. at 7.

[159] Id. at 6, 14.

[160] Id. at 11–12.

[161] Cajune v. Indep. Sch. Dist. 194, No. 0:21-cv-01812, slip op. at 7 (D Minn. Jan. 19, 2022).

[162] Id. at 8 ("[L]eave to amend is denied here for at least two reasons. First, Plaintiffs failed to comply with the Local Rules in this District governing motions to amend a

organizational status was sufficient to grant standing to alternate named plaintiffs.[163] The district court declined to address plaintiffs' substantive claims, ultimately dismissing the suit without prejudice.[164]

iii. Menders v. Loudoun County

All five families who filed suit in *Menders v. Loudoun County School Board* were careful to note that they did "not describe their views as 'social justice'" as the district understood and used that term.[165] According to plaintiffs, during the summer of 2020, the Loudoun County school district in Virginia adopted an "Action Plan to Combat Systemic Racism," which included prohibitions on hateful ideology, the adoption of a bias reporting system, and the creation of a Student Equity Ambassador ("SEA") program.[166] Plaintiffs described this initiative as an attempt to implement an "ideological orthodoxy" across the district's public schools.[167] Based on their belief that the SEA program would be open only to students of color,[168] and that the bias reporting system would be overinclusive and deny students accused of bias their due process rights,[169] plaintiffs alleged that these initiatives violated the Fourteenth Amendment as discrimination on the basis of race.[170]

Subsequently filed briefs and motions shed further light on the legal theories of the *Menders* plaintiffs. In a response to defendant's motion to dismiss, plaintiffs argued that because the SEA program was conceived

pleading. . . . Second, Plaintiffs' proposed Amended Complaint includes revisions that appear to be made in response to Defendants' substantive arguments for dismissal. . . . The proposed revisions extend beyond the relief requested in Plaintiffs' motion to amend and are improper. Accordingly, Plaintiffs' request for leave to amend the Complaint is denied.").

[163] Id. at 10–11.

[164] Id. at 11.

[165] Complaint at 4–5, Menders v. Loudoun Cnty. Sch. Bd., No. 1:21-cv-00669, 2022 WL 179597 (E.D. Va. Jan. 19, 2022).

[166] Id. at 2, 6.

[167] Id. at 6.

[168] Plaintiffs alleged that the initial publicized selection criterion for the program included being a student of color and that even after the program was opened up to all students, the primary goal remained the amplification of the voices of students of color. Id. at 6–9.

[169] Id. at 11–13.

[170] Id. at 14. Plaintiffs also alleged First Amendment violations, arguing that the term "social justice" was district shorthand for a particular political viewpoint and that the bias reporting system would chill students' free speech. Response of Plaintiffs in Opposition to Defendant's Motion to Dismiss First Amended Complaint at 1, 14, *Menders*, No. 1:21-cv-00669, 2022 WL 179597.

to benefit "students of color," it was intentionally discriminatory.[171] Relying on the factors set out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* to establish discrimination despite a facially neutral policy, plaintiffs further argued that the school district's work to "identify and address deep-seated racial inequities" supported a finding that the history and sequence of events preceding district action were racially discriminatory in purpose.[172] Similarly, consultant suggestions to "combat systemic racism," including the revision of hiring practices to improve diversity, listening sessions with staff of color, and programming to "amplify the voice(s) of Students of Color," all mandated explicit racial discrimination.[173]

In an order granting defendant's motion to dismiss, the district court noted that at the core of plaintiffs' complaint was opposition to the "ideology known as 'Critical Race Theory,'" which plaintiffs alleged teaches that white people are evil and that the nation's institutions are inherently racist.[174] Finding that plaintiffs made conclusory allegations and characterizations about district programming that failed to establish either that the SEA program was adopted with discriminatory intent or that the SEA program had a discriminatory impact, the district court dismissed the complaint.[175] In February of 2022, plaintiffs filed a notice of appeal to the U.S. Court of Appeals for the Fourth Circuit.[176]

iv. B.L. v. Fetherman

Filed in June of 2022 in New Jersey, plaintiff's suit in *B.L. v. Fetherman* targeted district communications and lessons that purportedly facilitated both a hostile educational environment and intentional discrimination.[177] The complaint, for example, alleged that the district's

[171] Response of Plaintiffs in Opposition to Defendant's Motion to Dismiss First Amended Complaint, supra note 170, at 8–12.

[172] Reply Brief of Plaintiffs in Support of Their Motion for a Preliminary Injunction at 4, *Menders*, No. 1:21-cv-00669, 2022 WL 179597.

[173] Id. at 4–6.

[174] *Menders*, 2022 WL 179597, at *2.

[175] Id. at *5–6, *9.

[176] Plaintiffs' Notice of Appeal at 1, *Menders*, No. 1:21-cv-00669, 2022 WL 179597.

[177] Verified Complaint and Jury Demand at 2, B.L. v. Fetherman, No. 2:22-cv-03471 (D.N.J. June 6, 2022). The latter, however, is framed as discrimination against those that did not support the district's views on race rather than discrimination against those *because* of their race. Accordingly, the complaint includes allegations of First Amendment violations under 42 U.S.C. § 1983. Id. at 2–4, 22–23.

educational programming impermissibly suggested that white children have received coded and direct messages about their racial superiority, and directed district employees to "teach about white peoples [sic] roles in perpetuating racism."[178] According to plaintiffs, the objective of these lessons was to promote discrimination on the basis of skin color by foisting an "'anti-racist' educational agenda" on students.[179]

Further, naming concepts like "white privilege," "systemic injustice," and "institutional inequity," and encouraging students to act in response to these problems were characterized in the complaint as "overt[] racial messaging" that treats individuals differently based on their race while promoting hostility towards white people.[180] Similarly, the complaint described the promotion of webinar programming that addressed how to discuss "anti-racism, systemic injustice, and white privilege," while also instructing individuals on how to support "protests and the Black Lives Matter movement," as contributing to a hostile educational environment.[181] Theories related to whiteness and white privilege were specifically framed in the complaint as "racist theories."[182] On the basis of these allegations, plaintiffs alleged equal protection and Title VI violations.[183]

3. Antidiscrimination Norms and Antiracism Education in Conflict

Spanning both classroom and non-classroom activities, many of the activities described in the complaints might be considered curricular. The Supreme Court has defined "curriculum" as activities "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[184] These activities can include teacher classroom speech,[185] as well as optional reading.[186] Public schools

[178] Id. at 2, 15.
[179] Id. at 2–3.
[180] Id. at 8–9.
[181] Id. at 11.
[182] Id. at 14.
[183] Id. at 2, 23.
[184] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).
[185] Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993).
[186] Virgil v. Sch. Bd. of Columbia Cnty., 862 F.2d 1517, 1522 (11th Cir. 1989) (finding that removed textbook materials were part of the curriculum, even though the course was an elective and removed readings optional). But see Bd. of Educ. v. Pico, 457 U.S. 853, 861–62 (1982) (concluding that library books were not part of the curriculum because utilizing the library is completely voluntary and books therein were not required reading).

enjoy broad rights to establish curriculum, a right that is often upheld over parents' more limited right to dictate the curriculum according to their own preferences.[187] The anti-CRT and anti-antiracism suits and curriculum, however, implicate more than frustration about testing regimes or exposure to material that does not align with parents' individual values. Rather, they implicate claims that racial discrimination is deployed through the curriculum itself. Precedent and law by which these sorts of challenges to antiracist education and training might be decided are a diffuse patchwork of statutes and doctrine spanning equal protection, freedom of expression, and statutorily protected civil rights.[188]

Courts have only rarely invalidated curriculum on equal protection grounds. Equal protection is anchored in notions of intentional discrimination, requiring a finding of discrimination, at least in part, "because of" and not merely "in spite of" its adverse effects on an identifiable racial group.[189] Nor will findings of disparate impact suffice for challenges brought under the Fourteenth Amendment.[190] Although evidence of disparate impact can support an inference of invidious discriminatory intent, ultimately parties must establish a purpose to discriminate.[191] Unsurprisingly, changing social norms about explicitly

[187] See, e.g., Davis v. Page, 385 F. Supp. 395, 405 (D.N.H. 1974) (finding that responsibility for the adoption of a curriculum is statutorily vested in the school board); Immediato v. Rye Neck Sch. Dist., 873 F. Supp. 846, 853 (S.D.N.Y. 1995) (holding that parents may not use legal methods to "interpose their own way of life or their own philosophy . . . as a barrier to reasonable state and local regulation of the educational curriculum"); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 533 (1st Cir. 1995) (concluding that parents do not have a constitutional right to dictate the school curriculum).

[188] To the extent that curriculum conveys information, a Supreme Court plurality has established a student's First Amendment right to receive information and ideas—a right that is infringed when the state removes otherwise available classroom materials absent a legitimate pedagogical concern. *Pico*, 457 U.S. at 866–67; *Hazelwood Sch. Dist.*, 484 U.S. at 273. The Court has also twice invalidated curriculum in response to establishment challenges. Edwards v. Aguillard, 482 U.S. 578, 582 (1987) (concluding that Louisiana could not favor the teaching of a subject that advances a particular religious belief); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (striking down Arkansas anti-evolution statute as contrary to the freedom of religion mandates of the First Amendment). This Article intentionally sets to the side the freedom of expression claims raised by some opponents to antiracism, focusing exclusively on the equal protection claims instead.

[189] Pers. Adm'r of Mass. v. Feeney, 442 US. 256, 279 (1979).

[190] Washington v. Davis, 426 U.S. 229, 239 (1976) (deciding that equal protection prohibits only government action with a discriminatory purpose, rather than mere discriminatory impact).

[191] Id. (citing Akins v. Texas, 325 U.S. 398, 403–04 (1945)).

racist behavior render "smoking gun" evidence of intent to discriminate increasingly difficult to find.

When reviewing equal protection challenges to curricula, courts often draw distinctions between teaching racism and teaching *about* racism.[192] In *Monteiro v. Tempe Union High School*, for example, parents of Black students brought an equal protection challenge to the inclusion of *Huckleberry Finn* as a required text.[193] According to the complaint, Black students suffered psychological injuries and lost educational opportunities as a result of required reading[194] that included 215 uses of racial epithets regarding Black people,[195] a burden white students did not have to shoulder as a result of their required reading.[196] Moreover, the literary works containing the epithets triggered increased racial harassment of Black students and contributed to a racially hostile learning environment.[197] Plaintiffs alleged equal protection and Title VI violations.[198]

The court declined to find that either the district's selection of required reading or its refusal to remove reading from the curriculum constituted intentional discrimination as contemplated by the Equal Protection Clause.[199] In assessing the inclusion of works that contain racist ideas or language, the court focused on the school district's broad discretion in managing school affairs, as well as the district's determination of the intrinsic educational value of the book—a determination that cannot constitute the type of discrimination prohibited by either the Fourteenth Amendment or Title VI.[200]

Most relevant to anti-CRT and anti-antiracism claims, however, was the court's description of curricula or teaching that *could* constitute a

[192] Jennifer S. Hendricks & Dawn Marie Howerton, Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools, 13 U. Pa. J. Const. L. 587, 635 (2011).

[193] Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1024 (9th Cir. 1998).

[194] Appellant's Opening Brief at 5–8, Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022 (9th Cir. 1998) (No. 97-15511).

[195] *Monteiro*, 158 F.3d at 1029.

[196] The court does, however, suggest that literary works by authors like Maya Angelou or Toni Morrison might depict whites in a "derogatory fashion," which could be considered "injurious or offensive." Id. at 1030.

[197] Id. at 1032–33.

[198] Id. at 1024.

[199] Id. at 1032.

[200] Id. at 1031–32; see also Cal. Parents v. Torlakson, 973 F.3d 1010, 1018 (9th Cir. 2020) (holding that absent evidence of unlawful intentional discrimination, parents are not entitled to bring equal protection claims challenging curricular content).

violation. Despite explicitly declining to serve as a "literary censor[]" or make judgments about whether assigning particular books "does students more harm than good," the district court nevertheless maintained that racist actions on the part of teachers implementing a curriculum could constitute discriminatory conduct.[201] Furthermore, the court cautioned against school decisions to pursue policies that "serve to promote racist attitudes among their students, or . . . indoctrinate their young charges with racist concepts."[202] Therein lies the vulnerability of antiracism education: more than lessons on particular cultures or ethnicities, or even a recitation of key moments in the civil rights movement, antiracism education seeks to teach students about how race and racism operates, and plaintiffs allege that engagement with race on these terms teaches students racist concepts and promotes animus regarding white people.

Although antiracism education does not contemplate targeting individuals because of their race, it *does* interrogate racial categories and hierarchies. It also acknowledges identity, seeking to inculcate a vocabulary for discussing identities and recognizing the advantages and disadvantages that can accompany different identities. In this sense, antiracism education runs afoul of key antidiscrimination norms and is thus particularly vulnerable to attack in a way that earlier waves of progressive education have not been.

i. Anticlassification

A consistent theme in equality jurisprudence is the aversion to racial classifications. According to Justice Kennedy in *Parents Involved in Community Schools v. Seattle School District No. 1*, reducing "an individual to an assigned racial identity for differential treatment is among the most pernicious actions" a government can take, as our Constitution insists that "the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin."[203] In addition to trading heavily on individualism in American culture, an anticlassification commitment in equal protection jurisprudence also proceeds from the recognition that non-white racial identity is the basis on which individuals have historically been denied quality housing, education, health care, or

[201] *Monteiro*, 158 F.3d at 1032.
[202] Id.
[203] 551 U.S. 701, 795, 797 (2007).

employment opportunities. Accordingly, even benign categorizations on the basis of racial identity are inherently suspect because of the potential suggestion that members of minoritized groups are unfit to receive a state benefit, or that receipt of the benefit reflects erroneous stereotypes regarding incompetency and dependency.[204]

For example, in his dissenting opinion to *Grutter v. Bollinger*, Justice Thomas noted that "[w]hen blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement."[205] Nor is this narrative embedded only in dissenting opinions: the majority opinion in *Grutter* similarly noted that "[e]ven remedial race-based government action generally 'remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.'"[206] Never mind that social science literature undermines the suggestion that Blacks feel stigmatized by affirmative action,[207] or that the Court has yet to engage questions of white stigma on account of unearned privilege and advantage from which white athletes and legacy

[204] See Peter J. Rubin, Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After *Adarand* and *Shaw*, 149 U. Pa. L. Rev. 1, 20 (2000) (arguing that those at the bottom of America's racial hierarchy, especially Black people must contend with stigmatized identities); Paul Gowder, Racial Classifications and Ascriptive Injury, 92 Wash. U. L. Rev. 325, 339–54 (2018) (canvassing social science literature illustrating stigma attached to Black racial identity).

[205] 539 U.S. 306, 373 (2003) (Thomas, J., dissenting).

[206] *Grutter*, 539 U.S. at 341 (majority opinion) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 308 (1978)). Moreover, it increasingly appears that the Court is poised to drastically reign in the parameters of affirmative action, in part, for these reasons.

[207] William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions 265 (1998) (concluding from a forty-year longitudinal study of more than 80,000 undergraduate students that although more than a few felt some degree of discomfort from being beneficiaries of the admissions process, they ultimately do not believe they have been harmed as a result of the policies).

students disproportionately benefit.[208] Rather, stigma is linked only to Black racial identity.[209]

To the extent that antiracism education relies on acknowledgment of, and engagement with, racial hierarchy, it necessarily runs afoul of anticlassification equality norms, rendering the American jurisprudential commitment to anticlassification a potentially potent legal hurdle for advocates of antiracism education. Central to antiracism work, for example, is self-reflection, sometimes facilitated through affinity groups that create spaces for members to discuss distinct challenges related to their race or ethnicity. It is no coincidence that affinity groups were named in the *Deemar* complaint as an equal protection violation committed by the Evanston/Skokie school district.[210] So, too, is the explicit naming of whiteness and the consolidation of power by white people referred to in the complaint as a problem.[211] Similarly, "Black Lives Matter" events that positioned anti-Blackness as a necessary concern of any racial justice project in the United States triggered opposition in the *Cajune* suit, as did explicit acknowledgment that racism can make life easier for whites and more difficult for Blacks.[212] In *Fetherman*, discussion of concepts like "white privilege," and the specific naming of white students as in need of antiracism education are key factual allegations in which the complaint is anchored.[213]

To be sure, these invocations of racial classification in antiracism education might be understood as distinct from the invocations that courts

[208] In higher education, admissions policies that center standardized test scores, and that favor white legacies and student athletes, reinforce racial disparities in admission and enrollment at historically white institutions. See, e.g. Daniel A. Gross, How Elite US Schools Give Preference to Wealthy and White 'Legacy' Applicants, The Guardian (Jan. 23, 2019), https://www.theguardian.com/us-news/2019/jan/23/elite-schools-ivy-league-legacy-admissions-harvard-wealthier-whiter [https://perma.cc/3DC8-GTPR] (reporting that the acceptance rate for legacy students at Harvard is 33%, compared to an overall acceptance rate of under 6%; and that among white applicants who were accepted to Harvard, 21.5% had legacy status, while only 6.6% of accepted Asian students, and 4.8% of accepted African American applicants, enjoyed legacy status); Saahil Desai, College Sports Are Affirmative Action for Rich White Students, The Atlantic, Oct. 23, 2018 (reporting that, according to the estimate of the NCAA, 61% of college athletes in 2017 were white).

[209] Osamudia James, Valuing Identity, 102 Minn. L. Rev. 127, 172–74 (2017).

[210] Complaint for Declaratory and Injunctive Relief at 12–13, 19–20, Deemar v. Bd. of Educ., No. 1:21-cv-03466 (N.D. Ill. Jun. 29, 2021).

[211] Id. at 5–6.

[212] Complaint for Declaratory and Injunctive Relief at 10–11, Cajune v. Indep. Sch. Dist. 194, (D. Minn. Jan. 19, 2022) (No. 0:21-cv-01812).

[213] Verified Complaint and Jury Demand, supra note 177.

have concluded violate equal protection. As highlighted most consistently in challenges to the use of race in education, anticlassification doctrine concerns state action specifically classifying individuals on the basis of race in anticipation of the distribution of a particular state benefit.[214] Only a case like *Menders*, which alleged that SEA participation was reserved only for non-white students, clearly meets this standard.[215]

Nonetheless, there is reason to believe that anticlassification norms are also hostile to mere invocations of racial identity. Judicial pronouncements regarding the salience of race are increasingly jurispathic in nature, rejecting race as the lens through which obstacles to substantive racial justice should be assessed.[216] For example, key desegregation cases convey judicial impatience with ongoing judicial supervision over the project of racial integration.[217]Affirmative action cases in higher education fail to acknowledge societal discrimination against racial minorities.[218] Voting rights cases ignore second generation disenfranchisement of minority voters.[219] This judicial environment should prompt concern about how receptive judges might be to characterizations of antiracism education as lessons that "promote racist attitudes among . . . students, or . . . indoctrinate [students] with racist concepts."[220] Should this happen, it would be a dangerous but unsurprising expansion of anticlassification precedent that threatens to swallow not only antiracism education, but also multiculturalism and other progressive attempts to teach students about race and inequality.

Ultimately, the automatic conclusion that racial classifications are inherently undesirable operate as the starting point for consideration of

[214] See, e.g. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (declaring that a "separate but equal" school system that assigns students on the basis of race is a violation of the Equal Protection Clause of the Fourteenth Amendment); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319–20 (1978) (striking down a "quota" system that reserved places in an entering class for minorities); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (striking down an admissions process that automatically awarded additional points to applicants who were members of an underrepresented racial or ethnic minority); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–11 (2007) (striking down controlled-choice school assignment plans that assigned students, in part, on the basis of race).

[215] Complaint, supra note 165, at 6–9.

[216] James, supra note 209, at 135–38.

[217] Id. at 135–36 (analyzing Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237 (1991), Freeman v. Pitts, 503 U.S. 467 (1992), and *Parents Involved*).

[218] Id. (analyzing *Bakke* and *Grutter*).

[219] Id. at 136–37 (analyzing *Shaw v. Reno*, 509 U.S. 630 (1993) and *Shelby County v. Holder*, 570 U.S. 529 (2013)).

[220] Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1032 (9th Cir. 1998).

race-conscious government action meant to address racial inequality. Unable or unwilling to understand minoritized racial identity as curative,[221] or to recognize continued interrogation of racial hierarchy as a necessary first step in any racial justice project,[222] the Court has consistently refused to draw distinctions between benign and invidious race-conscious state action, steadily narrowing the grounds on which state entities might engage racial disparities. Rhetorically, a commitment to not naming race preserves white racial transparency. Insulated from attempts to address race-neutral policies that inure to the benefit of white people while disadvantaging non-white people, structural discrimination is preserved. Antiracism challenges this dynamic, naming hierarchy and white supremacy as specific problems to be addressed. That antiracism education, unlike multiculturalism, further encourages activism on behalf of this project only further runs afoul of a commitment in antidiscrimination law to rejecting the use of racial classification in the pursuit of racial equality.

ii. Colorblindness

Rather than recognize race, equality jurisprudence trades instead in the rhetoric of colorblindness. Transparency is the failure of whites to recognize their own racial identity, as well as a tendency to assume that the experiences of white people are normative.[223] In contrast to racially minoritized groups in the United States that form racial identities informed by a shared history, racial identity more often becomes salient for white Americans only when juxtaposed against other non-white racial groups.[224] Although white racial identity has, in fact, been salient throughout American political and social history,[225] whites are more

[221] James, supra note 209, at 147–63 (arguing for recognition of the value in minoritized identity as both a political, social, and legal project).

[222] Id. at 135–38.

[223] Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953, 969–73 (1993).

[224] Adrienne D. Davis, Identity Notes Part One: Playing in the Light, 45 Am. U. L. Rev. 695, 701–02 (1996) (discussing the social construction of whiteness, and the tendency of whites to have a limited sense of racial identity).

[225] Theodore W. Allen, Class Struggle and the Origin of Racial Slavery: The Invention of the White Race 11–16 (Jeffrey B. Perry ed., 2006) (arguing that the bourgeoisie response to the potential for black-white labor solidarity in the eighteenth century was to cultivate a white identity to which social privileges could attach); Fred L. Pincus, Reverse Discrimination: Dismantling the Myth 3–4 (2003) (interrogating the rise in discrimination claims brought by whites); Ira Katznelson, When Affirmative Action Was White: An Untold History of Racial

likely to understand race as something that happens to other people and thus perceive white identity politics as simply politics.[226] Against this backdrop, colorblindness is not only presented as a laudable ideal to which society should aspire, but as *the* way to combat racial discrimination.[227]

It is no surprise, then, that colorblindness informs the early lawsuits opposing antiracism education, undergirding arguments that the curriculum encourages plaintiffs to consider skin color in violation of equality norms. *Deemar* accuses district policy of engaging in the dangerous practice of conditioning individuals to take account of skin color, thus pitting them against each other.[228] The *Cajune* suit specifically noted that district initiatives taught plaintiffs to "think of distinctions between people based on the color of their skin, instead of the content of their character."[229] The *Menders* complaint alleged an attempt to specifically engage students of color, which plaintiffs necessarily categorized as racial discrimination.[230] The *Fetherman* complaint repeatedly accuses defendants of promoting discriminatory judgments on the basis of skin color rather than "the content of their characters or the individual diligence of their studies and efforts at self-improvement."[231] Making no distinction between teachings meant to highlight how race shapes policy adoption or implementation, and teachings that encourage students to mistreat others on the basis of race, the lawsuits herald colorblindness, labeling initiatives that discuss race as necessarily racially hostile and divisive.

Like anticlassification commitments in equality law, so too does "colorblindness" undermine racial equality. Colorblindness only promotes the tendency of whites to assume that their experiences are

Inequality in Twentieth-Century America, at ix-xiv (2005) (documenting the origins of affirmative action in the 1920s and '40s in the form of welfare, work, and war policies that benefited whites).

[226] Davis, supra note 224, at 701–02; see Flagg, supra note 223, at 970 ("For most whites, . . . to think or speak about race is to think or speak about people of color, or perhaps . . . to reflect on oneself (or other whites) in relation to people of color. But we tend not to think of ourselves or our racial cohort as racially distinctive.").

[227] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

[228] Complaint, supra note 115, at 2, 6.

[229] Complaint, supra note 1, at 13–14.

[230] Complaint, supra note 165, at 6–9.

[231] Complaint para. 3, B.L. v. Fetherman, No. 2:22-cv-03471 (D.N.J. June 6, 2022).

normative, and that their histories are not informed by race. Race, then, becomes something that impacts only non-white people, absolving white people of any responsibility for addressing, much less recognizing, racial disparities that work to their benefit. Unlike multiculturalism, or even the more pointed teachings of ethnic studies programs, antiracism teachings directly challenge these characterizations and conclusions. Antiracism education in early childhood, for example, can include self-portraits that give children permission to verbalize and celebrate the differences in skin color that they notice but are typically taught never to mention.[232] Similarly, social identity portraits provide adults the opportunity to discuss how a trait like skin color or race[233] has yielded advantage or disadvantage in their lives.[234] For these reasons, they're more likely to prompt judicial skepticism in ways that undermine progressive education and further entrench racial hierarchy.

iii. White Innocence

Colorblindness works in conjunction with the norm of "white innocence" undergirding equality jurisprudence to make antiracism education particularly threatening. The Supreme Court consistently subscribes to a narrative in which whites who mount challenges to affirmative action are "innocent" victims of race-conscious policies. In *Regents of the University of California v. Bakke*, the Court emphasized the tragedy of asking "*innocent* persons…to endure . . . [deprivation as] the price of membership in the dominant majority."[235] The Court further noted that it had "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other *innocent* individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."[236]

[232] Derman-Sparks & Olsen Edwards, supra note 39, at 156; Stacey York, Roots and Wings: Affirming Culture in Early Childhood Programs 208–09 (2003).

[233] Trina Jones, Shades of Brown: The Law of Skin Color, 49 Duke L.J. 1487, 1487 (2000) (examining the historical and contemporary significance of skin color as distinct from race and arguing that the legal system must better account for colorism).

[234] Social identity portraits are charts which list various social identities, including race, ethnicity, gender, age, sexual orientation, and language, giving chart users an opportunity to consider whether they are in the sub-category for each identity that enjoys societal advantages or that are targets for institutional prejudice and discrimination on account of their identity marker.

[235] Regents of the Univ. of. Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (emphasis added).

[236] Id. at 307 (emphasis added).

The Court's subsequent race jurisprudence proceeds in the same register. In *Grutter*, the Court noted that "[e]ven remedial race-based governmental action generally 'remains subject to continuing oversight to assure that it will work the least harm possible to other *innocent* persons competing for the benefit.'"[237] In *Parents Involved in Community Schools v. Seattle*, a case challenging the constitutionality of controlled choice integration plans in Louisville and Seattle, the Court affirmed the innocence of parents who were simply "shocked"[238] that race became so central in the case, or who believed an integration plan was "terribly unfair" to their white children.[239]

As explained by Thomas Ross, the power of the "white innocence" narrative draws its strength from an implicit contrast with guilty, lazy, or undeserving people of color who benefit from affirmative action.[240] Other scholars argue that the rhetoric of white innocence is not only "philosophically inappropriate," but also violative of constitutional guarantees of equal protection and due process.[241] By choosing a particular racial perspective from which to adjudicate claims, the Court denies minoritized litigants the rationality, materiality, and reasonableness that due process guarantees.[242]

Despite these rhetorical and jurisprudential problems, the early lawsuits challenging antiracist education are anchored in the rhetoric of white innocence. The *Deemar* complaint, for example, takes issue with the school district's adoption of teachings suggesting that race is a political construction created to legitimize dominance over non-white people, that racism advantages groups historically or currently defined as white, or even that children as young as five can develop racial

[237] Grutter v. Bollinger, 539 U.S. 306, 341 (2003) (emphasis added) (quoting *Bakke*, 438 U.S. at 308).

[238] Janelle MacDonald, Local Mom Makes National Headlines with Lawsuit Against JCPS, Wave3 News (Oct. 10, 2006), https://www.wave3.com/story/5522206/local-mom-makes-national-headlines-with-lawsuit-against-jcps/ [https://perma.cc/VHX5-UPEB].

[239] Transcript, An Imperfect Revolution Voices from the Desegregation Era, Am. RadioWorks, http://americanradioworks.publicradio.org/features/deseg/transcript.html [https://perma.cc/JZ87-Z8TY] (last visited Nov. 28, 2022).

[240] Thomas Ross, Innocence and Affirmative Action, 43 Vand. L. Rev. 297, 315 (1990) ("The assertion of the innocent white victim draws power from the implicit contrast with the 'defiled taker.' The defiled taker is the black person who undeservedly reaps the advantages of affirmative action.").

[241] Cecil J. Hunt, II, The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence, 11 Mich. J. Race & L. 477, 487–88 (2006).

[242] Id. at 547–48.

preferences.[243] The *Cajune* complaint characterizes as discrimination the idea that structural racism can make life easier for whites and more difficult for Blacks.[244] The *Fetherman* plaintiffs suggest that discussing white privilege is hostile in nature, infringing on the constitutional right of white students not to be discriminated against.[245] In the discourse of antiracism education, whiteness, distinct from individual white people, is raised as a phenomenon inimical to equality. The implication of the plaintiffs' allegations, however, is that to engage whiteness as a negative phenomenon is inherently racist.[246]

Here, anti-antiracism legislation is particularly instructive. A dominant concern animating legislative activity is that children not be made to engage material that makes them "feel bad." To the extent that antiracism education since 2020 increasingly focused on anti-Black racism, the implication is that white children not be made to lose any claims to racial innocence *vis-à-vis* anti-Black racial subordination. A commitment to absolving whites of anti-Black racism is only further illustrated by the attempt of one activist mother's group to remove textbook images featuring white police officers abusing Black civil rights protestors.[247] The impulse to insulate white children from understanding the role of white Americans in maintaining racial hierarchy is strong.

Combined with a jurisprudence that already often shields whites from charges of discrimination, norms regarding white innocence only heighten the vulnerability of antiracism education to legal challenge. Under equal protection, intentional racial discrimination has long been difficult to prove. Plaintiffs must ultimately show that a defendant acted discriminatorily "because of" adverse impacts, and not merely "in spite of" knowledge that such impacts would occur.[248] Although *Arlington Heights* established that circumstantial evidence might be used to

[243] Complaint, supra note 115, at 5–6.

[244] Complaint, supra note 1, at 10–11.

[245] Complaint para. 44, B.L. v. Fetherman, No. 2:22-cv-03471 (D.N.J. June 06, 2022).

[246] Complaint, supra note 115, at 5.

[247] AJ Walker, CBS Reports Documentary Explores Debate Over How and When Race Should Be Taught in Schools, CBS News (Nov. 4, 2021), https://www.cbsnews.com/news/critical-race-theory-teaching-kids-cbsn-originals/ [https://perma.cc/QKL9-PC4N] (documenting the attempts of Moms for Liberty, a nationwide group with over 60,000 members, to remove from the curriculum materials addressing slavery and the civil rights movement).

[248] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

establish intentional discrimination,[249] courts are often unwilling to draw the inferences necessary to find discrimination.

Although this precedent might initially seem to bode well for antiracism educators, an antidiscrimination norm of white innocence necessarily frames explicit attacks on racial hierarchy and the positioning of whites at the top of that hierarchy as a direct attack on white people—a conclusion repeatedly drawn in the earliest anti-antiracism lawsuits. The suspension of innocence that antiracism education demands positions whites, and not people of color, as beneficiaries of unjust enrichment. A significant departure from both legal and social norms, challenges to white innocence may very well trigger heightened judicial scrutiny.

4. Precarious Precedent: González v. Douglas

Despite potential conflicts between established antidiscrimination norms and the pedagogical commitments of antiracism education, defenders of the latter might nonetheless be encouraged by a recent lawsuit resolved in favor of an ethnic studies program in Arizona. That reassurance, however, may be premature.

As part of a desegregation consent decree, in 1998 the Tucson Unified School District adopted a Mexican American Studies ("MAS") program comprised of K–12 courses in art, government, history, and literature. Focused on the historical and contemporary contributions of Mexican-Americans, the program was designed to close the academic gap between Mexican-American and white students in Tucson by allowing the former to see "themselves or their family or their community" in their studies.[250] The program was, by all measures, successful: all students who participated in the program, including those who were not Mexican-American, surpassed and outperformed similarly situated peers. Moreover, the program boasted an "empirically demonstrated, significant, and positive relationship" between MAS classes and increased academic achievement as measured by increased high school graduation rates and state test passing rates.[251]

Despite the program's success and popularity, in 2010 the Arizona legislature took aim at the program by adopting H.B. 2281. The bill prohibited a school district or charter school from including in its program

[249] Village of Arlington Heights v. Metro. Hous. Dev. Corp. 429 U.S. 252, 266–68 (1977).
[250] González v. Douglas, 269 F. Supp. 3d 948, 951 (D. Ariz. 2017).
[251] Id.

of instruction any course that promoted resentment toward a race or class or people, was designed primarily for pupils of a particular ethnic group, or advocated ethnic solidarity instead of the treatment of pupils as individuals.[252] Parents and students ultimately brought suit alleging infringements of their First and Fourteenth Amendment rights by virtue of discriminatory enactment and enforcement of the bill.

In writing his 2017 opinion in the case, Judge Tashima noted that the statute and subsequent enforcement against the MAS program could be unconstitutional if motivated by discriminatory intent or animus.[253] Using factors delineated in *Arlington Heights* as indicative of intentional discrimination, Judge Tashima assessed the impact of the legislation, the historical background of state action, the sequence of events leading up to the conduct challenged, and contemporaneous legislative history that might shed light on the motivations of state officials.

Impact was easily established: enactment of the statute had a disparate impact on Latinos, as approximately ninety percent of students enrolled in MAS at the time of program termination were Latino.[254] Sequence of events and irregular procedures also pointed to discriminatory intent. H.B. 2281 was enacted to target a single school district in Arizona, even though the state's superintendent of instruction believed decisions regarding curriculum should be made at the local level.[255] Moreover, already existing statutes related to textbook approval and material review could have been used to address concerns regarding the MAS program.[256]

Discriminatory intent and animus were also easily established. Legislation-sponsoring state officials, for example, voiced opposition to the use of Spanish in public spaces, analogized the MAS program and its teachers to the Ku Klux Klan, and suggested that the program rejected American values in favor of Mexican values in ways comparable to Hitler's rise to power.[257] State representatives referred to MAS as creating "racial warfare," while others used racialized language to refer to the MAS program.[258] Words like "Raza," "radical," "communist," "Aztlán," and "M.E.Ch.a" operated as derogatory code words for Mexican-

[252] Id. at 957.
[253] Id. at 964.
[254] Id. at 965.
[255] Id. at 966.
[256] Id.
[257] Id. at 965.
[258] Id. at 966–68.

Americans, functioning as a stand-in for a racial group while drawing on negative characterizations about foreignness, subversion, and radicalism.[259]

Having drawn these and other conclusions, Judge Tashima found violations of plaintiffs' rights under the Fourteenth Amendment based on both the commentary of legislators and administrators and the circumstantial evidence suggesting animus.[260] Moreover, Tashima concluded that plaintiffs' First Amendment right to receive information and ideas was also violated, drawing on Supreme Court precedent establishing that furthering partisan, political, or racist ends are impermissible motivations for removing curricular materials.[261]

Three years later, antiracism education in American education came under attack nationwide, prompting opposition from politicians and activists who characterized antiracism education as the actual inculcation of racism and anti-American values. Whether for political gain or as a result of legitimate concern about content, antiracism education has prompted debate, lawsuits, and legislation. And although often described as prohibiting or preventing the teaching of CRT in schools, lawsuits and legislation in fact attack antiracism education more broadly, challenging the ways in which racial inequality is presented and discussed with students, faculty, and staff.

In this sense, antiracism education is similar to the MAS program legislatively attacked in Arizona. Like antiracism education adopted across educational institutions, curricular programming in *González* sought to help students engage and better understand identity in service of equality goals.[262] Both MAS and antiracism education are

[259] Drawing on expert testimony, Judge Tashima explained that as norms about racist speech shift, politicians can resort to racially coded speech as a stand-in for racist ideology. Given tensions associated with rapidly changing demographics in Arizona, including an increase in the state's Latino and Mexican-born immigrant populations, concerns about the foreign-born population contributed to anxieties aired through public discourse about the "Mexicanization" of the state. Drawing on people's fears about illegal immigration and overthrow of the state by foreign invaders, terms like "Raza" became shorthand for communicating with voters. Worse, the suggestion regarding overthrow or anti-American sentiment animating the MAS program was done in bad faith, as key administrators testified that they had no evidence that anyone promoted overthrow. The link, then, served no function other than to reinforce negative stereotypes about Latinos in the state. Id. at 967–68.

[260] Id. at 972.

[261] Id. at 973.

[262] Although Mexican American Studies programs may focus on the history and contributions of Mexicans as a matter of nationality or ethnicity, Latinos, and Mexicans in particular, have been subject to a process of racialization in the United States. Douglas S.

characterized as fomenting resentment against whites and advocating for group solidarity rather than the treatment of pupils as individuals. Although rhetoric surrounding anti-antiracism legislation does not invoke obviously racial stereotypes, the increasingly derogatory use of the word "woke"[263] to describe social, political, and educational engagement of race and the people who do that engaging sounds in the same register as that used to denounce MAS studies. Antiracism education has even been derided as "unpatriotic," and neo-Marxist.[264]

Given those similarities, it might be tempting for those who support antiracism education to understand *González* as useful precedent and predict that legislation and litigation aimed at prohibiting antiracism education might be successfully dismissed on equal protection and First Amendment grounds. Key distinctions, however, render *González* less useful than it initially appears. Most significantly, antiracism education names and interrogates whiteness in a way that the racial and ethnic studies in *González* did not. Meant to close the academic gap between Mexican-Americans and white students by allowing the former to see

Massey, The Racialization of Latinos in the United States, *in* The Oxford Handbook of Ethnicity, Crime, and Immigration 23 (Sandra Bucerius & Michael Tonry eds., 2014); Laura Gómez, Manifest Destinies: The Making of the Mexican American Race 4–5 (2007) (documenting the dynamic process of Mexican-American racialization).

[263] Dana Brownlee, Exhibit A Bill Maher: Why White People Should Stop Using the Term 'Woke'…Immediately, Forbes (Apr 19, 2021), https://www.forbes.com/sites/danabrownlee/2021/04/19/why-white-people-should-stop-using-the-term-wokeimmediately/?sh=4e6be9057779 [https://perma.cc/7XFG-YEDK] (describing how the term "woke" is increasingly weaponized as a way to dismiss or discount racial grievances); Ishena Robinson, How Woke Went From "Black" to "Bad", NAACP Legal Def. Fund (Aug. 26, 2022), https://www.naacpldf.org/woke-black-bad/ [https://perma.cc/E5JF-3WEW] (tracing the etymology of the word "woke" and concluding that it is now used as a "derisive stand-in" for diversity, inclusion and Blackness); Joshua Adams, How "Woke" Became a Slur, Colorlines, (May 5, 2021), https://www.colorlines.com/articles/how-woke-became-slur [https://perma.cc/55F8-VDMS]; see, e.g., John McWhorter, Woke Racism: How a New Religion Has Betrayed Black America, at xi-xv (2021) (arguing that illiberal neo-racism, disguised as antiracism, is hurting Black communities).

[264] See, e.g., Christopher F. Rufo, What Critical Race Theory is Really About*,* N.Y. Post (May 6, 2021, 7:25 PM), https://nypost.com/2021/05/06/what-critical-race-theory-is-really-about/ [https://perma.cc/P8NT-J54J] (arguing that equity, social justice, diversity and inclusion, and culturally responsive teaching are all code words for critical race theory, a movement that uses identity to achieve a Marxist state); William A. Galston, A Deeper Look at Critical Race Theory, Wall St. J. (July 21, 2021), https://www.wsj.com/articles/kimberle-crenshaw-critical-race-theory-woke-marxism-education-11626793272 [https://perma.cc/6BHB-QF5Y] (arguing that critical race theory is a neo-Marxist movement); Complaint for Declaratory and Injunctive Relief, supra note 212, at 6 (alleging that the Black Lives Matter movement is neo-Marxist in nature).

themselves and their communities represented in their studies, MAS focused on the historical and contemporary contributions of Mexican-Americans to American history. Although MAS and other ethnic studies programs can engage racial hierarchy, the programs are more easily defended as affirming the contributions of ethnic minorities in the spirit of multiculturalism.

In this sense, MAS overlaps more readily with a commitment to diversity—the only compelling interest, other than remediation, that the Court has sanctioned as justifying the consideration of race. MAS, then, might be an illustration of the outer limits of acceptable antiracist education. To the extent that the program engaged racial identity without a specific focus on the phenomenon of whiteness in America's racial hierarchy, it was a less direct confrontation to white innocence. Moreover, although obviously acknowledging a minoritized racial group, racial classification and recognition of race in a program like MAS is less threatening when not juxtaposed against the social, political, and economic hegemony of whiteness and white people as a group.

In contrast, antiracism education more directly interrogates and challenges white supremacy and the concept of whiteness itself. In doing so, it more forcefully triggers American equality norms that inform antidiscrimination laws and doctrine—norms that maintain racial hierarchy and preserve white supremacy, including anticlassification, colorblindness, and white innocence. *González* may represent a form of education that still fits comfortably within these equality norms, but antiracism shatters those norms. And while American antidiscrimination law might permit the former, it has thus far eschewed the latter. Even if legislation and lawsuits aimed at preventing antiracism education are ultimately unsuccessful, the potential receptivity of antidiscrimination law to legal challenges serves as an important insight into the limitations of antidiscrimination law and the ease with which it can be co-opted in service of inequality.

III. RACISM AS MORE THAN MATERIALITY

Both antiracism education and the legal backlash in response to it highlight the symbolic and psychic import of race. Although racial inequality does manifest in material ways, narrative and discursive frames regarding race and racism inform notions of racial injury and the law's response to it. The education system is a site of intense contestation regarding how race and racial injury should be taught and understood. It

is also, however, the most appropriate forum in which to engage race given the centrality of education in developing commitments to racial equality and citizenship in a democracy.

A. The Acceleration of "Reverse Discrimination"

That antidiscrimination law as currently developed and deployed is sympathetic, if not outright receptive, to those opposed to antiracism education says as much about the limits of antidiscrimination law as it says about the ways in which Americans have come to understand racial equality (itself a function of antidiscrimination law). To the extent that antiracism education recognizes and embraces identity, rejects colorblindness, and acknowledges the advantages and disadvantages associated with racial status, it is threatening to those invested in racial hierarchy. While multiculturalism and ethnic studies encourage students to look inward to find value, antiracism education encourages students to look outward and recognize systems of oppression. While ethnic studies prioritize knowledge of history and pride in community, antiracism more explicitly interrogates hierarchy and the position of whites at the top of America's racial hierarchy. Although multiculturalism can foster political awareness as a precursor to dismantling systems of oppression, it is made more palatable by the perception that the ultimate goal is to teach students to value their cultures whether or not those systems are taken down. In contrast, antiracism education directly exposes and interrogates racial hierarchy, explicitly teaching students to consider their individual capacity and obligation to challenge racial injustice.

Antidiscrimination law and norms, however, are hostile to such teachings. Instead, equal protection[265] doctrine is used to preserve facially neutral laws with disparate impact on minority groups, while prohibiting race-conscious policies specifically adopted to remediate racial inequality.[266] As has been documented by antidiscrimination scholars, strict scrutiny over the last thirty years has been used as a "principal tool

[265] Ian Haney-López, Intentional Blindness, 87 N.Y.U. L. Rev. 1779, 1828–33 (2012) (explaining two domains of equal protection, one in which all racial classifications merit the highest level of constitutional suspicion regardless of motivation, and a second in which race-neutral laws merit almost complete constitutional deference regardless of impact).

[266] See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007) (striking down controlled-choice plans adopted to broaden access of minority students to high-quality schools because the racial identity of students was used as a tiebreaker in making assignments when schools were oversubscribed by one race).

of civil rights retrenchment," protecting whites instead of Blacks and Latinos.[267]

In education, strict scrutiny review has been used to tightly prescribe race-conscious remedies adopted to integrate institutions and broaden access to elite education. For example, in companion challenges to race-conscious admissions brought by white plaintiffs in *Gratz v. Bollinger* and *Grutter v. Bollinger*, the Supreme Court affirmed a narrow diversity rationale as a compelling interest that might justify race-conscious admissions policies. Although affirming diversity, the Court declined to recognize societal discrimination or social justice as compelling interests, relying instead on the "utilitarian" argument made by Fortune 500 companies and military leaders about a well-educated workforce that can compete in a global labor market, and a competent officer corps unified in military operations.[268] Moreover, narrow tailoring would permit only holistic "individualized review" when considering race and prohibit any policy that awarded a specific number of points to minority applicants.[269]

At the K–12 level, strict scrutiny permitted not even that much. In *Parents Involved in Community Schools v. Seattle School District No. 1*,[270] white parents challenged the use of race in their district's controlled-choice assignment plans after being denied their first choice.[271] Under a strict scrutiny analysis,[272] the Court declined to recognize reducing racial isolation or promoting diversity as compelling interests justifying the use of race in K–12 school assignments. The Court further concluded that the use of race as a factor in making school assignments only when schools became oversubscribed by one race, even in an effort to promote integration and broaden equal educational access, was not narrowly

[267] Russell K. Robinson, Unequal Protection, 68 Stan. L. Rev. 151, 172–73 (2016) (citing to Ian Haney-López's work on colorblindness).

[268] Tomiko Brown-Nagin, Elites, Social Movements, and the Law: The Case of Affirmative Action, 105 Colum. L. Rev. 1436, 1463–65 (2005); see also Gratz v. Bollinger, 539 U.S. 244, 268 (2003); Grutter v. Bollinger, 539 U.S. 306, 327-31 (2003) (relying on the educational benefits of diversity to justify affirmative action programs).

[269] *Gratz*, 539 U.S. at 273–75 (finding an undergraduate admissions policy unconstitutional because race was the sole basis for awarding twenty percent of the minimum points required for admission).

[270] 551 U.S. 701.

[271] Id. at 713–14.

[272] Id. at 720 ("[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.").

tailored because it was tied to racial demographics rather than a particular pedagogic principle.[273]

Worse, still, trends in antidiscrimination jurisprudence suggest that doctrine and laws in this area are used not just to push back against benign race-conscious measures adopted in service of racial equality for minoritized groups. Rather, antidiscrimination law is used to protect those groups historically understood as dominant and powerful. As explained by Professor Melissa Murray, a traditional understanding of animus in equal protection jurisprudence is grounded in a theory of anti-subordination, or the idea that equality law should be used to dismantle social stratification that relegates historically oppressed groups to second-class citizenship.[274] Increasingly, however, the Court is adopting a more malleable conception of animus, capacious enough to regard groups traditionally understood to be in the majority—e.g., white, Protestant males—as minorities in need of protection.[275]

Anti-CRT and anti-antiracism lawsuits operate in the same register, although to potentially more troubling results given the subtlety of the claims. That is, because antiracism education challenges the fundamental norms that constitute equality law in the United States, plaintiffs can more easily challenge antiracism education without positioning themselves as purported minorities, thereby avoiding accusations of inversion. Antiracism's direct invocation of identity, for example, is presented in the suits as contravening colorblindness—an equality framing heralded as the neutral baseline to which society should aspire. Colorblindness, however, has only worked to oppose race-conscious remedies, while preserving facially neutral state action that harms minorities.[276]

Similarly, the use of affinity groupings in antiracism work runs afoul of anticlassification norms. The starting presumption, however, that racial classification is necessarily and inherently pernicious has justified drawing no distinction between benign and invidious uses of race, thus subjecting the former to a typically fatal strict scrutiny review. In education, this knee-jerk reaction to classification has led to the invalidation of affirmative action at colleges and universities and school district integration policies. In legal challenges to antiracism education, a

[273] Id. at 725–29.

[274] Melissa Murray, Inverting Animus: Masterpiece Cakeshop and the New Minorities, 2018 Sup. Ct. Rev. 257, 283–84 (2018).

[275] Id. at 281–82.

[276] Haney-López, supra note 265, at 1828–32.

commitment to anticlassification norms may very well be used to prohibit curricula that engage the reality of racial hierarchy in America.

Finally, in the clearest illustration of equality inversion, the anti-CRT and anti-antiracism suits take issue with antiracism education's commitment to interrogating whiteness and white supremacy.[277] The suits allege that the very invocation of race as a power system is racist and that lessons meant to address power imbalances between white and non-white groups foster hostile workplaces for whites.[278] More than challenges to curricular content, the suits present white plaintiffs as in need of protection from a mob mentality that threatens to engulf and overpower the American tradition of equality. Judicial receptivity to these claims would further entrench equality inversions, maintaining white innocence while positioning people of color and progressive educators as "guilty" for purposes of equal protection.

These inversions are the logical conclusion of a jurisprudence consistently developed in contravention of an anti-subordination commitment that might have been derived from the Fourteenth Amendment.[279] Worse yet, the litigation and legislative victories that antidiscrimination law can potentially provide those opposed to

[277] Nor does white supremacy necessarily advantage all whites in the same way; rather, white supremacy can harm even white people. Camille Gear Rich, Marginal Whiteness, 98 Calif. L. Rev. 1497, 1499 (2010) (arguing that minority-targeted racism also injures white people); Khiara M. Bridges, Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy, 133 Harv. L. Rev. 770, 771 (2020) (arguing that white privilege can lead to both unfavorable and favorable results for white people).

[278] Although whites constituted the majority of plaintiffs in initial suits challenging antiracism education, they are not exclusive challengers. For example, in at least one suit, a Black parent challenged, on First Amendment grounds, antiracism education for submitting her multi-racial son to an exercise which exposed his non-white racial identity. First Amended Complaint for Declaratory and Injunctive Relief at 2–3, 9, Clark v. State Pub. Charter Sch. Auth., No. 2:20-cv-02324 (D. Nev. May 3, 2021). A second suit was brought by a Black teacher claiming discrimination and retaliation for her opposition to the way in which equity work in her school district increased or maintained bias among whites, including through the development of a savior complex. Amended Employment Discrimination Complaint at 1–2, 9, Shannon v. Cherry Creek Sch. Dist., No. 1:20-cv-03469 (D. Colo. Apr. 26, 2021). Both complaints raise related but distinct issues regarding antiracism education outside the scope of this Article, including the question of how antiracism education interacts with the dynamics of access to whiteness and the history of the unique racial ideologies of Black educators.

[279] Mario L. Barnes & Erwin Chemerinsky, The Once and Future Equal Protection Doctrine?, 43 Conn. L. Rev. 1059, 1066–76 (2011) (arguing that to the extent the Reconstruction Amendments both undid the Constitution's textual acceptance of slavery and redefined Blacks as citizens, substantive, and not just formal, equality must inform our understanding of equal protection).

antiracism education serve as more than just reminders of the acceleration of this inversion in equality law. Rather, they also signal a deepening permanence of that inversion in social and political spaces in the United States. As reverse discrimination comes to be understood as the primary form of racial injury in the United States, our commitment to addressing the effects, both psychic and material, of enduring racial discrimination against minoritized racial groups will only wane.

B. A Right to Innocent White Racial Identity

The most visible, and arguably most intense, opposition to antiracism education has been in the context of K–12 schools—no wonder given that early, primary, and secondary education necessarily implicate children and deeply held beliefs about their innocence. We've long known, for example, that white parents are more likely to believe that children do not notice race on their own and will only learn about racism after observing explicitly racist behavior among adults.[280] More central to the issues antiracism education implicates, notions about which children are innocent and which children are not are fundamentally raced.

In her book on the subject, Robin Bernstein argues that childhood, a period considered to be an embodiment of innocence itself, is raced as white, with white children constructed as "tender angels" during the second half of the nineteenth century through media images and literature.[281] White girlhood, in particular, was increasingly represented as pure, angelic, placid, delicate, vulnerable, and even in possession of healing and transformative powers from which non-whites might benefit.[282] In contrast, Black children during this period were increasingly characterized as unfeeling, wicked, and invulnerable to corporal punishment.[283]

[280] Po Bronson & Ashley Merryman, NurtureShock: New Thinking About Children 51–52 (2009).

[281] Robin Bernstein, Racial Innocence: Performing American Childhood from Slavery to Civil Rights 4, 33 (2011).

[282] Id. at 6, 45–48, 65–68.

[283] Id. at 33–35, 49–55. This phenomenon is reflected today in the "adultification" phenomenon experienced by Black children, in which they are viewed as "less innocent and more adult-like" as compared to white children. Rebecca Epstein, Jamilia J. Blake & Thalia González, Georgetown L. Ctr. on Poverty and Ineq., Girlhood Interrupted: The Erasure of Black Girls' Childhood 1 (2017).

The innocence of white children was and is further anchored in a "holy obliviousness" or "active state of repelling [racial] knowledge."[284] Although children do not transcend race, the materials and practices surrounding children, like nursery rhymes or riddles, retain racialized culture that have disappeared or receded from adult culture.[285] In this sense, white childhood innocence, "characterized by the ability to retain racial meanings but hide them under" the cloak of obliviousness, further secures racial hierarchy by maintaining both whiteness as an unstated norm and racial difference as constructed against whiteness.[286]

A desire to maintain the innocence and purity of white children is a common theme in opposition to antiracism education. For example, Moms for Liberty is a group established to eliminate portions of Wit and Wisdom, a curriculum designed to teach grade-school students about the civil rights movement. Robin Steeman, founder of the Moms for Liberty, expresses her stance against antiracism education:

> It's a terrible photo, they're doing harm to children, Black children, they're blasted by fire hoses. And it shows that to these second grade children. Most kids up to that point have idolized the policemen, the firemen. I don't want them to see racism yet—to engage, to learn racism. They can teach history but let's not teach racism.[287]

Nor is the drive to maintain white innocence limited to children. Rather, as the Trump Executive Order illustrates, white adults, too, are to be protected from diversity trainings that do not advance sufficiently positive engagement with race.[288]

The impulse to preserve white innocence and positive white racial identity stands in stark contrast to how often equality law embeds notions of black deficit in case law and doctrine. The *Brown v. Board of Education* Court, for example, readily accepted conclusions of self-hate among Black children, anchoring their integration mandate in that faulty conclusion instead of in the necessity of countering the development of

[284] Bernstein, supra note 281, at 6, 8.

[285] Id. at 7 (using as illustration the riddle "Why did the chicken cross the road?" which originated in nineteenth-century minstrel shows).

[286] Id. at 8.

[287] AJ Walker, CBS Reports Documentary Explores Debate Over How and When Race Should be Taught in Schools, CBS News (Nov 4, 2021, 9:49 PM), https://www.cbsnews.com/news/critical-race-theory-teaching-kids-cbsn-originals/ [https://perma.cc/6LSH-2VAZ].

[288] See supra notes 79–81 and accompanying text.

white superiority among white schoolchildren.[289] Affirmative action jurisprudence consistently features contrasting narratives of explicitly characterized "innocent" whites and implicitly characterized "guilty" Blacks.[290]

That a racial group might be invested in maintaining a positive racial identity is not without precedent. In social and political spaces, minoritized identity is often used as a tool for affirmation and liberation. From Black Girls Rock to Black Lives Matter, there is reason to appreciate the curative and emancipatory potential of identity among minoritized groups.[291] What lawsuits and legislation targeting antiracism education seem to be implicitly claiming, however, is a right to innocent white racial identity, unhampered by recognition of racial hierarchy or the positioning of whites at the top of that hierarchy.

Although plaintiffs often invoke *Brown* in support of maintaining white innocence, the case is misused. Implicit in the Court's ruling in *Brown* was the conclusion that segregated schools were improperly used to symbolize the inferior racial status of Black people in the American South. But hierarchy is relational; if Black people were positioned as inferior, it was only in relation to a group that had been positioned as superior—whites. The reason that cultivating a more positive Black racial identity mattered in *Brown* was because of the need to dismantle white supremacy. In contrast, whites do not currently exist at the bottom of a racial hierarchy in the United States.

In the context of education, the situation is quite the opposite. Despite its rhetoric, *Brown v. Board of Education* and the desegregation cases that followed did too little to actually interrogate racial hierarchy.[292] To long-term deleterious effect, American schools are steadily resegregating,[293] while disparities in expulsion, discipline, and special education persist.[294] In matters of curriculum, educational materials still disproportionately

[289] Osamudia James, Superior Status: Relational Obstacles in the Law to Racial Justice and LGBTQ Equality, 63 B.C. L. Rev. 199, 228–29 (2022).

[290] James, supra note 209, at 141–44 (citing *Bakke*, *Grutter*, and *Parents Involved* as cases characterizing plaintiffs as "innocent," a narrative that derives strength from an implicit comparison to a "guilty" person of color who is unfairly benefiting from affirmative action).

[291] Id. at 182.

[292] Id. at 139; Angela Onwuachi-Willig, Reconceptualizing the Harms of Discrimination: How *Brown v. Board of Education* Helped to Further White Supremacy, 105 Va. L. Rev. 343, 353–61 (2019).

[293] See supra note 18 and accompanying text.

[294] See infra notes 302–04 and accompanying text.

represent and reflect white students, denying students of color opportunities to see themselves reflected in their schooling.[295] The attempts of parents of color to review or remove materials that are denigrating to minoritized groups have been consistently rejected.[296] Accordingly, concerns about enhancing or maintaining positive white identity in light of *Brown*'s mandates amounts to inappropriate appropriation of *Brown*'s legacy (however inadequate).

Antiracism education is poised to take on *Brown*'s unfinished work. Although there are surely missteps in implementation, antiracism education does not aim to denigrate or punish students for past or present inequality, racial or otherwise. What the teachings do endeavor to do, however, is make visible racial hierarchy and the mechanisms by which that hierarchy is maintained. Law and litigation opposed to antiracism teachings conflate that goal with an assault on white innocence. Superior racial status for whites is so fully internalized, so thoroughly understood as unremarkable and even natural, that any attack on that status is considered an attack on white people. Any interrogation of the mechanisms by which that hierarchy is maintained is understood as reverse discrimination.

That antidiscrimination jurisprudence might be more responsive to the complaints of white parents about education that interrogates their superordinate racial status than it is to the parents of color who have tried to eliminate racist hate speech or racial slurs in the curriculum is a problem that legal challenges to antiracism highlight. Challenges to antiracism education, however, also help bring into sharper relief the psychic investments in white innocence that antidiscrimination law has incubated. That incubation presents new and distorted notions of racial injury. Like the phenomenon of reverse discrimination, these distortions divert attention from the work of dismantling racial hierarchy—the work of antiracism education.

C. The Imperative of Antiracism Education

The need for antiracism education is particularly acute at the level of K–12 education. Demographic reports consistently note that the United

[295] See infra notes 305–09 and accompanying text.
[296] See supra notes 192–200 and accompanying text.

States is increasingly multi-racial,[297] with public schools having become majority-minority in 2014 due to higher birth rates in minority communities and ongoing white flight into private schools.[298] At the same time, the concept of race, and of whiteness in particular, is continually in flux, providing opportunities to undercut or further entrench the disproportionate hold on power and resources that those defined as white continue to enjoy in the country.[299] Antiracism education, then, is responsive to a future in which demands for racial justice will still be urgent, especially if whites continue to enjoy consolidated power and status despite constituting a minority of Americans.

In education, the experiences of students of color, and of Black children in particular, demands a response. American schools are continually resegregating, [300] to psychic and material consequence. American public school financing systems ensure that Black school districts receive less in per-pupil spending than white school districts do.[301] Further, second-generation segregation, or the isolation of students of color even within purportedly integrated schools, endures. Black students are less likely to be assigned to gifted programs in math and reading than their white peers

[297] Sandra L. Colby & Jennifer M. Ortman, U.S. Census Bureau, Projections of the Size and Composition of the U.S. Population: 2014 to 2060, Report P25-1143, at 1 (2015) (predicting that by 2044, more than half of all Americans are projected to belong to a minority group). But see Richard Alba, The Great Demographic Illusion: Majority, Minority, and the Expanding American Mainstream 3–5 (2020) (arguing that the "majority-minority" narrative is wrong, and that an increase in multi-racial backgrounds is more accurate).

[298] William J. Hussar & Tabitha M. Bailey, Nat'l Ctr. for Educ. Stats., Projections of Education Statistics to 2022, at 33; Jens Manuel Krogstad & Richard Fry, Dept. of Ed. Projects Public Schools Will be 'Majority-Minority' This Fall, Pew Rsch. Ctr. (Aug. 18, 2014), https://www.pewresearch.org/fact-tank/2014/08/18/u-s-public-schools-expected-to-be-majority-minority-starting-this-fall/ [https://perma.cc/M3Q7-7A65].

[299] See, e.g., Mabinty Quarshie, N'dea Yancey-Bragg, Anne Godlasky, Jim Sergent, & Veronica Bravo, 12 Charts Show How Racial Disparities Persist Across Wealth, Health, Education and Beyond, USA Today (June 18, 2020, 11:06 AM), https://www.usatoday.com/in-depth/news/2020/06/18/12-charts-racial-disparities-persist-across-wealth-health-and-beyond/3201129001/ [https://perma.cc/AF9Y-JQMM] (explaining that systemic racism against Black people in this nation has led to disparities in "wealth, health, criminal justice, employment, housing, political representation and education" outcomes).

[300] The number of schools where white students comprise less than 40% of the student body doubled between 1996 and 2016, while the percentage of children of color attending segregated schools increased from 59% to 66%. The percentage of Black students attending segregated schools grew from 59% to 71% during the same time period. Stancil, supra note 18; see also Orfield et al., supra note 18, at 10 (concluding that Black students in the South are less likely to attend a majority white school than Black students in the South fifty years ago).

[301] See supra notes 16–18 and accompanying text.

are, even after controlling for health, socioeconomic status, and classroom and school characteristics—a phenomenon largely driven by the discretion of white teachers.[302] At the same time, Black children are more likely to be identified for special education programming, even after controlling for factors like poverty, and are overrepresented in stigmatized subjective disability categories.[303] Racial disparities in discipline similarly endure. Black children are overrepresented in public school suspensions and corporal punishment, and schools are more likely to implement extremely punitive discipline and zero-tolerance policies as the percentage of Black students increases.[304]

Even curriculum still fails to serve minoritized communities. In 2020, the NYC Coalition for Justice analyzed 1,200 books across sixteen commonly used curricula and booklists from pre-K through the eighth grade, comparing the racial/ethnic demographics of the book authors and characters to the demographic composition of New York City public schools.[305] In all of the early childhood curricula reviewed, students read many more books featuring animal characters than they did books about all characters of color combined.[306] Across all elementary grades, both white authors and white characters were severely overrepresented.[307] In the middle grades, ten out of eleven curricula featured no Middle Eastern authors, nearly half of the curricula and booklists featured no Native American authors, all 110 authors in a particular sixth grade curriculum were white, and only five of 124 books in one curriculum featured Latinx

[302] Jason A. Grissom & Christopher Redding, Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs, 2 AERA Open 1, 8–10, 14–15 (2016); Julie Kailin, Antiracist Education: From Theory to Practice, 67–69 (2002) (discussing the impact and problem of unrepresentative teaching, which includes a higher likelihood of stereotyping of minority children, a lack of empathy among teachers, and both geographic and social distance between teachers and students that results in student alienation and undercuts effective teaching).

[303] Daniel J. Losen & Kevin G. Welner, Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children, 36 Harv. C.R.-C.L. L. Rev. 407, 415–17 (2001); Theresa Glennon, Race, Education, and the Construction of a Disabled Class, 1995 Wis. L. Rev. 1237, 1251–52.

[304] Kelly Welch & Allison Ann Payne, Racial Threat and Punitive School Discipline, 57 Soc. Probs. 25, 28, 35–40 (2010).

[305] NYC Coal. for Educ. Jus., Diverse City, White Curriculum: The Exclusion of People of Color from English Language Arts in NYC Schools 3 (2020).

[306] Id. at 8.

[307] Id. at 9.

authors.[308] Unsurprisingly, a Eurocentric curriculum is cited as one reason Black parents choose to homeschool their children.[309]

The capacity of schools to respond to these trends will inform both the strength of American democracy and the likelihood of course correction in antidiscrimination law. Although stopping short of declaring education a fundamental right, the Supreme Court in *Brown v. Board of Education* recognized education as "the very foundation of good citizenship" and a "principal instrument in awakening the child to cultural values."[310] Americans understand schools as a place not only for substantive learning, but for internalizing national values and learning to maintain democratic institutions.[311] Public schools operate as a site of engagement between citizens and the state, often serving as a conduit to political participation.[312] Schools are where questions fundamental to democracy, including privacy,[313] freedom of expression,[314] and equality,[315] are considered, interrogated, and addressed. Schools are where we learn about the impact of racism on our society and could yet be the place students are taught about the unfulfilled potential of equality law.

The fights that take place about schools and schooling are never just about schools, but also about the enactment of dreams and visions for

[308] Id. at 13.

[309] Ama Mazama, Racism in Schools is Pushing More Black Families to Homeschool Their Children, Wash. Post (Apr. 10, 2015, 6:01 AM), https://www.washingtonpost.com/posteverything/wp/2015/04/10/racism-in-schools-is-pushing-more-black-families-to-homeschool-their-children/ [https://perma.cc/4GZV-YGL3].

[310] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[311] Jennifer L. Hoshschild & Nathan Scovronick, The American Dream and the Public Schools 1–2 (2003).

[312] Domingo Morel, Takeover: Race, Education, and American Democracy 5–6 (2018) (noting that in minoritized communities, political paths to city council or mayoralty often begin with school board service).

[313] See, e.g., New Jersey v. T.L.O. 469 U.S. 325, 333, 340 (1985) (applying the Constitution's prohibition on unreasonable searches and seizures to school officials but declining to require school officials to have probable cause or obtain a warrant prior to searching).

[314] See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (applying the Constitution's First Amendment protections to students at school "in light of the special characteristics of the school environment"); Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045–46 (2021) (drawing the contours of a school's special interest in regulating off-campus student speech).

[315] See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 711, 747 (2007) (striking down school assignment plans based on the plan's use of race).

one's own children.[316] Children who learn about racial inequality, and who are encouraged to develop a commitment to addressing that inequality, become adults with the potential to make different private and public decisions about race. From white flight to resource hoarding[317] to using race as a heuristic to assess school quality,[318] individuals *do* have opportunities to make decisions that affirm or undercut racial hierarchy.[319] Increased national capacity for the latter will be developed, if anywhere, in American schools. That antidiscrimination law might be so useful a tool in obstructing that development is a problem of law and a problem of democracy.

CONCLUSION

The future of legal responses to antiracism education in the United States is the future of racism in the United States. Waves of legislation and lawsuits in response to attempts to directly confront racism through the school curriculum reflect not just enduring and flawed understandings about race among the public, but also the safe harbor that American antidiscrimination law provides for racial hierarchy. Pushback to antiracism education also serves as a reminder that race is more than materiality, extending into normative and discursive frames that inform

[316] Eve L. Ewing, Ghosts in the Schoolyard: Racism and School Closings on Chicago's South Side 47 (2018); see also Charles R. Lawrence III, Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy), 114 Yale L.J. 1353, 1376–78 (2005) (arguing that education both defines and creates community); Gary Paul Green, School Consolidation and Community Development, 23 Great Plains Rsch. 99, 100–01 (2013) (addressing the negative impact of school closures on social capital and community identity).

[317] Carolyn Sattin-Bajaj & Allison Roda, Opportunity Hoarding in School Choice Contexts: The Role of Policy Design in Promoting Middle-Class Parents' Exclusionary Behaviors, 34 Educ. Pol'y 992, 995–99 (2018) (arguing that white middle-class families are particularly adept at hoarding resources in ways that limit access for others).

[318] Chase M. Billingham & Matthew O. Hunt, School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States, 89 Socio. Educ. 99, 108–10 (2016) (finding that white parents prefer predominantly white schools to predominantly Black schools, even when other factors germane to education quality are equal); Salvatore Saporito & Annette Lareau, School Selection as a Process: The Multiple Dimensions of Race in Framing Educational Choice, 46 Soc. Probs. 418, 424 (1999) (finding that as much as seventy-five percent of the variation in school choice preferences can be explained by the percentage of Black students in schools).

[319] See, e.g., Osamudia James, Risky Education, 89 Geo. Wash. L. Rev. 667, 673, 695 (2021) (arguing that parents manage risk in the school system by shifting that risk to more vulnerable parents).

our conception of the problem of race and the solutions to racism. Tracking and analyzing anti-antiracism legislation and lawsuits provides a map both to where antidiscrimination law must be changed and to where antiracism education is most needed. Our capacity, or lack thereof, to read that map will dictate the democratic viability of a multiracial American future.