

# William & Mary Journal of Race, Gender, and Social Justice

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Volume 28 (2021-2022)

Issue 1 *The Largest Social Movement: Legal  
Lessons from the Black Lives Matter Movement*

Article 5

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10-2021

## Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory

Vivian E. Hamilton

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REFORM, RETRENCH, REPEAT: THE CAMPAIGN AGAINST  
CRITICAL RACE THEORY, THROUGH THE LENS OF  
CRITICAL RACE THEORY

VIVIAN E. HAMILTON\*

ABSTRACT

The protest movement ignited by the 2020 murder of George Floyd was of a scale unprecedented in U.S. history. The movement raised the nation’s consciousness of racial injustices and spurred promises—and the beginnings—of justice-oriented reform. Reform and racial progress, however, have rarely been linear over the course of U.S. history. Instead, they typically engender resistance and retrenchment. The response to the current justice movement is no exception. One manifestation of the retrenchment has been a rush by states to enact legislation curtailing race-related education in government workplaces and in public schools, colleges, and universities.

These legislative measures purport to prevent the teaching of “divisive” tenets of Critical Race Theory (CRT), an intellectual discipline that originated in the legal academy in the 1980s. The proposed bills and enacted statutes, however, will instead prevent educators, for fear of incurring threatened penalties, from teaching about the role of racism in U.S. history and engaging students in meaningful discussions about race. If they remain in place, the laws increase the chances that the next generation of students will remain uninformed of the racial history of the United States and its legacy and will thus come of age unmotivated—and unequipped—to improve upon it.

This Article describes first the racial justice movement that surged after Floyd’s murder, then the resistance and retrenchment that rapidly followed. Next, it draws on CRT to place these events in historical and theoretical context. It describes the intellectual predecessors of CRT, the emergence of CRT as an intellectual and political movement, and its core insights. It explains how the insights of CRT, despite being caricatured by conservative opponents of race reform, instead explain the retrenchment and backlash to the racial

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\* Professor of Law, William & Mary Law School and Director, William & Mary Center for Racial & Social Justice. For insights that helped shape my thinking, I benefitted from the participants of a LatCrit virtual summer session, particularly Lucille Jewel, Ediberto Roman, and Vincent Wong. For helpful comments, I thank Rebecca Green and Laura Shepherd. For their excellent research assistance, I am grateful to Francesca Babetski and Victoria Nauman.

justice movement—including the evolution of the ideologies that anchor it, and the use of institutions, including the law, to entrench the status quo and the racial hierarchies it comprises.

#### INTRODUCTION

- I. FROM RACIAL RECKONING TO REFORM: GEORGE FLOYD, BLACK LIVES MATTER, AND THE RACIAL JUSTICE MOVEMENT
  - II. THE PROCESS OF RETRENCHMENT
    - A. *CRT as Villainous Caricature*
    - B. *Backlash: The Campaign Against Race Education*
      - 1. *In the Federal Workplace: Executive Order 13950*
      - 2. *In the States: Race Education in Public Schools*
  - III. CRITICAL RACE THEORY: EVOLUTION AND CONTINUED SALIENCE
    - A. *Immediate Intellectual Precursors*
      - 1. *Legal Formalism*
      - 2. *Legal Realism*
      - 3. *Critical Legal Studies*
    - B. *The Emergence of CRT*
  - IV. THE CAMPAIGN AGAINST RACE EDUCATION THROUGH THE LENS OF CRT
    - A. *The History and Politics of Retrenchment*
    - B. *The Tropes of Retrenchment*
      - 1. *Systemic Racism Denial*
      - 2. *White Innocence*
      - 3. *Formal Equality and Color-Blindness*
      - 4. *Race Consciousness as Racism*
      - 5. *U.S. Founding Ideals: Equality, Not White Supremacy*
- CONCLUSION

#### INTRODUCTION

The May 2020 murder of George Floyd by a police officer followed the killings of scores of unarmed Black people by U.S. law enforcement and focused the nation's attention on police violence against Black Americans.<sup>1</sup> Floyd's murder also ignited the largest mass protest movement in the nation's history.<sup>2</sup> Led by Black Lives Matter, a loosely organized but highly effective organization, activists brought

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1. Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [<https://perma.cc/WM4J-NHKP>].

2. *Id.*

about what has been referred to as a “racial reckoning.”<sup>3</sup> Topics previously avoided by most, racism and racial injustice, became nearly ubiquitous subjects of conversation, and the nation’s consciousness of issues of race began to shift. Companies and government agencies examined internal inequities and committed to reform.<sup>4</sup> Corporations promised to re-examine their practices and pledged billions of dollars to advance racial justice and reform efforts.<sup>5</sup> And legislators in more than a dozen states expanded race-inclusive education, adding courses in ethnic studies to their curricula or incorporating additional material about people of color into their learning standards.<sup>6</sup>

Ongoing conversations about and growing consciousness of pervasive structural and unexamined individual racism, however, have generated resentment among many white people unaccustomed to (and uncomfortable with) addressing race. Many in the United States, including some who were initially sympathetic to the movement, have rejected the movement’s claims and resisted calls for reform, offended by implications that they might benefit from unearned racial privileges and/or harbor racist sentiments.<sup>7</sup>

Despite the continued existence of social disparities created by centuries of racial oppression, opponents of reform insist that the formal legal equality that displaced the explicit racism of the Jim

3. *About*, BLACK LIVES MATTER (Aug. 16, 2021), <https://blacklivesmatter.com/about> [<https://perma.cc/HK4S-69CV>]. NBC News, for example, has created *America’s Racial Reckoning* within its website, which gathers “[t]he latest news on the protests, boycotts and the fight against systemic racism that is reverberating around the country.” *America’s Racial Reckoning*, NBC NEWS (Aug. 16, 2021), <https://www.nbcnews.com/americas-racial-reckoning> [<https://perma.cc/6C8J-FXF5>].

4. Candice Norwood, *Racial Bias Trainings Surged After George Floyd’s Death. A Year Later, Experts Are Still Waiting for ‘Bold’ Change*, PBS: NEWSHOUR (May 25, 2021 6:38 PM), <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/5A7K-R3WS>]; Paul J. Weber & Farnoush Amiri, *Floyd Killing Has Prompted State Reforms, But Not Everywhere*, AP NEWS (Apr. 22, 2021), <https://apnews.com/article/race-and-ethnicity-legislature-bills-police-racial-injustice-95d3c4db293fa4992afb56497e370961>.

5. *Factbox: Corporations Pledge \$1.7 billion to Address Racism, Injustice*, REUTERS (June 9, 2020, 9:53 PM) [hereinafter *Factbox*], <https://www.reuters.com/article/us-minneapolis-police-pledges-factbox/factbox-corporations-pledge-1-7-billion-to-address-racism-injustice-idUSKBN23H078> [<https://perma.cc/QFK9-QZFD>].

6. Cathryn Stout & Gabrielle LaMarr LeMee, *Efforts to Restrict Teaching About Racism and Bias Have Multiplied Across the U.S.*, CHALKBEAT (updated July 22, 2021, 1:12 PM), <https://www.chalkbeat.org/22525983/map-critical-race-theory-legislation-teaching-racism> [<https://perma.cc/CH3K-RU8V>] (tracking efforts in states to “expand education on racism, bias, the contributions of specific racial or ethnic groups to U.S. history, or related topics”).

7. See Audra D.S. Burch, Amy Harmon, Sabrina Tavernise & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html> [<https://perma.cc/J34U-A9VD>]; see also *infra* Section IV.B.

Crow era has transformed the United States into a color-blind, equal-opportunity society.<sup>8</sup> Wielding this conception of color-blindness as a shield to fend off reform efforts, opponents of reform equate race consciousness in the service of advancing racial equity with race consciousness used to oppress.<sup>9</sup> In other words, they claim that any race consciousness is itself racist.

Opponents of reform propagated a distorted conception of Critical Race Theory (CRT) as a catch-all for ideas with which they disagreed.<sup>10</sup> Some of the claims—like the existence of systemic racism—were ones with which critical scholars of race would agree. Others—like the claim that “[a]n individual’s moral character is determined by the individual’s race or sex”<sup>11</sup>—were manufactured in order to fan embers of racial resentment into flames of outrage and opposition.<sup>12</sup> And the sometimes maladroit efforts of educators and diversity trainers were cherry-picked or misrepresented to provide evidence of indoctrination destructive of national unity.<sup>13</sup>

Racial resentment and retrenchment became government policy in the fall of 2020, when then-President Trump issued an Executive Order that sought to prohibit antiracism and diversity trainings in federal workplaces and the armed forces.<sup>14</sup> Republican-led state legislatures followed suit, taking aim at race-related education in public schools, colleges, and universities.<sup>15</sup> By the spring and summer of 2021, state and federal lawmakers nationwide had introduced largely identical legislative and other policy measures aimed at prohibiting public schools and universities from educating students about race and racism in the United States.<sup>16</sup> Indeed, more than half of all states had introduced some sort of restrictive measure as of August 2021.<sup>17</sup>

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8. See Samuel Hoadley-Brill, *Critical Race Theory’s Opponents Are Sure It’s Bad. Whatever It Is.*, WASH. POST (July 2, 2021), [https://www.washingtonpost.com/outlook/critical-race-theory-law-systemic-racism/2021/07/02/6abe7590-d9f5-11eb-8fb8-aea56b785b00\\_story.html](https://www.washingtonpost.com/outlook/critical-race-theory-law-systemic-racism/2021/07/02/6abe7590-d9f5-11eb-8fb8-aea56b785b00_story.html) [<https://perma.cc/SXR4-4EKN>].

9. See *id.*

10. See Ibram X. Kendi, *There Is No Debate Over Critical Race Theory*, ATLANTIC (July 9, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/opponents-critical-race-theory-are-arguing-themselves/619391> [<https://perma.cc/N4ZT-28UK>].

11. 2021 Pub. Acts 493, S.B. 623, 112th Gen. Assemb., amending Tenn. Code Ann. § 49-5-108(c), § 51(a) (Tenn. 2021).

12. See *infra* notes 101 and 114 and accompanying text.

13. Nathan Cline, *Rally Opposing Critical Race Theory Held In Leesburg*, LOUDOUN TIMES-MIRROR (June 12, 2021), [https://www.loudountimes.com/news/rally-opposing-critical-race-theory-held-in-leesburg/article\\_9cd04bbe-cbac-11eb-be7a-7b34ad16e9d8.html](https://www.loudountimes.com/news/rally-opposing-critical-race-theory-held-in-leesburg/article_9cd04bbe-cbac-11eb-be7a-7b34ad16e9d8.html) [<https://perma.cc/BW76-V9WM>].

14. See *infra* Section II.B.1.

15. See 2021 Pub. Acts 493, S.B. 623, 112th Gen. Assemb., amending TENN. CODE ANN. § 49-5-108(c), § 51(a) (Tenn. 2021).

16. See Stout & LeMee, *supra* note 6.

17. *Id.* (tracking efforts in 28 states “to restrict education on racism, bias, the contributions of specific racial or ethnic groups to U.S. history, or related topics”).

This Article examines this retrenchment, comprising resistance and rhetorical—and legal—backlash to the racial justice movement. It demonstrates how insights from CRT—fairly understood—can, ironically, help illuminate the retrenchment, situating it within historical and ideological context.<sup>18</sup>

CRT scholars have explored the “reform/retrenchment dialectic” that has characterized the halting nature of racial progress over U.S. history.<sup>19</sup> The current retrenchment is consistent with the historical pattern they have identified. Critical scholars of race have also explored at length many of the impulses, beliefs, and political and legal ideologies that now ground and drive the retrenchment. This Article seeks to identify these and understand these.

Part I briefly describes the spring 2020 events that triggered the largest mass protest movement in U.S. history. Demonstrations drew attention to the systemic nature of racial injustice in policing, the carceral system, and across nearly every aspect of U.S. society. The expressions of grief and outrage that dominated the days following Floyd’s murder were soon joined by concrete calls for policy reform.

Part II turns to the retrenchment—“a line of defence used to maintain a position”—underway by the fall.<sup>20</sup> Propelled by individual resentment and undergirded by the rhetoric of color-blindness, the backlash has occurred across various contexts, including measures to constrict access to the ballot. This Article focuses on the campaign to squelch the teaching of race-related issues. State legislatures successfully wielded a specter of CRT bearing only a passing resemblance to the academic discipline as a divisive and dangerous threat to rush through legislation aimed at suppressing education about the racial history of the United States, and its legacy.

In addition to energizing support against reform (and with the hopes that voters would then be motivated to support conservative candidates for political office), these measures capitalize on the notion that a public that continues to be uneducated (or miseducated) about the nation’s racial history and its legacy will continue to resist meaningful reform of the status quo.

The final part of the Article turns to CRT and how it might inform our understanding of the ongoing retrenchment. It describes CRT—its intellectual predecessors, its emergence as an intellectual movement,

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18. Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1607–08 (2011). Carbado terms this cycle, which has repeated throughout the course of U.S. history, the “reform/retrenchment dialectic.” *Id.* at 1607.

19. *See id.*; *see also infra* Section IV.A.

20. *Retrenchment*, n. 1, OED Online, OXFORD UNIV. PRESS, <https://www.oed-com.proxy.wm.edu/view/Entry/164446?rskey=0Gt0X0&result=1&isAdvanced=false> (last visited Nov. 4, 2021).

and its core claims. One of the core claims of CRT is that law is used to entrench racial inequality. State laws banning its teaching in K–12 and postsecondary education exemplify this claim, even while the irony is lost on the proponents of these measures.

This Part then considers the resistance to the racial justice movement (sometimes referred to as a campaign against CRT) through a CRT lens. It describes the U.S. legal and political history that Professor Devon Carbado has termed the “reform/retrenchment dialectic.”<sup>21</sup> It examines claims of white innocence—from responsibility for existing racism, from the likelihood of having received material and psychic benefits by virtue of whiteness, and from harboring racist sentiments—that undergird resistance to the claims of the racial justice movement. It addresses the claim that systemic racism doesn’t exist, clarifying the concept and providing examples. It explains how the political and legal rhetoric of formal equality and color-blindness have evolved. And finally, it explains the weaponizing of color-blindness to argue that all race consciousness is racism.

### I. FROM RACIAL RECKONING TO REFORM: GEORGE FLOYD, BLACK LIVES MATTER, AND THE RACIAL JUSTICE MOVEMENT

This Part describes the swell of protests and calls for racial justice sparked by the murder of George Floyd by a white police officer in Minneapolis, Minnesota. Businesses and other institutions issued statements in favor of the movement and began to implement anti-racist programs.<sup>22</sup> State and local governments and police agencies across the nation adopted measures aimed to address racial injustice.<sup>23</sup>

George Floyd was murdered by then–police officer Derek Chauvin in Minneapolis, Minnesota on May 25, 2020, after having been accused of passing a counterfeit twenty-dollar bill for a pack of cigarettes at a corner market.<sup>24</sup> After Floyd struggled when police tried to put him into a squad car, they forced him to the ground.<sup>25</sup> Chauvin then knelt on Floyd’s neck for more than nine minutes, despite the

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21. Carbado, *supra* note 18, at 1607.

22. See Norwood, *supra* note 4.

23. See *One Year After George Floyd: The Changing Landscape of Policing*, NAACP LDF, <https://www.naacpldf.org/george-floyd-anniversary> [<https://perma.cc/X42Q-3L49>].

24. *Key Events Since George Floyd’s Arrest and Death*, AP NEWS (June 25, 2021) [hereinafter *Key Events*], <https://apnews.com/article/derek-chauvin-trial-timeline-ad67932d2bf727dd4c23e17e63a97224> [<https://perma.cc/XKF5-ZUF9>].

25. Amy Forliti, Steve Karnowski & Tammy Webber, *Chauvin Guilty of Murder and Manslaughter in Floyd’s Death*, AP NEWS (Apr. 20, 2021), <https://apnews.com/article/derek-chauvin-trial-live-updates-04-20-2021-955a78df9a7a51835ad63afb8ce9b5c1> [<https://perma.cc/JHU5-L3K3>].

forty-six-year-old father's dying gasps.<sup>26</sup> Chauvin would later be convicted of third-degree murder, second-degree unintentional murder, and second-degree manslaughter.<sup>27</sup> In June 2021, a judge sentenced Chauvin to twenty-two and a half years in prison.<sup>28</sup>

Floyd's murder, of course, was not an unprecedented incident but instead followed the killings of other unarmed Black civilians, for which police officers were rarely held accountable. Immediately following Mr. Floyd's death, protests erupted in Minneapolis, then spread to other cities.<sup>29</sup> In the weeks and months that followed, somewhere between 15 to 26 million people in the United States participated in Black Lives Matter protests.<sup>30</sup> The level of participation exceeded any in U.S. history and made the protests the largest mass protest movement in the country's history.<sup>31</sup>

The visibility and influence of the Black Lives Matter movement surged after Floyd's murder. Activists Patrisse Cullors, Alicia Garza, and Opal Tometi created the hashtag #BlackLivesMatter in 2013 following the acquittal of George Zimmerman, who shot and killed seventeen-year-old Trayvon Martin for walking down the street.<sup>32</sup> In the intervening years, Black Lives Matter grew into a loosely organized multichapter organization with an emphasis on local organizing.<sup>33</sup>

26. *Key Events*, *supra* note 24.

27. Forliti et al., *supra* note 25.

28. Amy Forliti & Steve Karnowski, *Chauvin Gets 22 ½ Years in Prison for George Floyd's Death*, AP NEWS (June 25, 2021), <https://apnews.com/article/derek-chauvin-sentencing-23c52021812168c579b3886f8139c73d> [<https://perma.cc/HA28-X2K5>].

29. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Mar. 28, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/CM8P-LYZ9>].

30. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/B2R6-YAQR>]; see also Kim Parker, Juliana Menasce Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RSCH. CTR. (June 12, 2020), <https://www.pewresearch.org/social-trends/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement> [<https://perma.cc/7NQM-W6BB>]; Liz Hamel, Audrey Kearney, Ashley Kirzinger, Lunna Lopes, Cailey Muñana & Mollyann Brodie, *KFF Health Tracking Poll—June 2020*, KFF (June 26, 2020), <https://www.kff.org/racial-equity-and-health-policy/report/kff-health-tracking-poll-june-2020> [<https://perma.cc/35JV-SERZ>].

31. Buchanan et al., *supra* note 30.

32. See *Trayvon Martin Shooting Fast Facts*, CNN (Feb. 17, 2021, 9:38 AM), <https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html> [<https://perma.cc/YL8F-DALD>]; Char Adams, *A Movement, a Slogan, a Rallying Cry: How Black Lives Matter Changed America's View on Race*, NBC NEWS (Dec. 29, 2020, 10:04 AM EST), <https://www.nbcnews.com/news/nbcblk/movement-slogan-rallying-cry-how-black-lives-matter-changed-america-n1252434> [<https://perma.cc/Q8XL-3DMN>].

33. Adams, *supra* note 32.



The protests sparked by the May 2020 killing of George Floyd forced to the nation's attention its history of police brutality and racism in the criminal justice system. The murder of Mr. Floyd at the hands of a police officer brought into the mainstream that police violence against people of color was widespread, and generally raised consciousness about the systemic nature of racial injustice. In the months following Mr. Floyd's death, polling showed American views on a range of issues related to racial inequality had shifted significantly.<sup>34</sup>

White Americans in particular were more likely than in the past to express the belief that racial discrimination was a serious problem, that Black people disproportionately suffered from excessive police force, and that they supported the Black Lives Matter movement.<sup>35</sup>

Support for addressing racial injustices crossed party lines and included leading members of the Trump administration. Securities and Exchange Commission Chairman Jay Clayton, for example, said that the agency held "diversity dialogues" to help agency employees "grapple with the profound racial disparities in our society."<sup>36</sup> Some Republicans—traditionally the party of "law and order"—voiced their support for police reform.<sup>37</sup>

The coronavirus pandemic drew attention to disparities in health care and health outcomes, as Black people and other communities of color disproportionately suffered from the virus itself and the economic disruption caused by it.<sup>38</sup>

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34. See Michael Tesler, *The Floyd Protests Have Changed Public Opinion About Race and Policing*, WASH. POST (June 9, 2020), <https://www.washingtonpost.com/politics/2020/06/09/floyd-protests-have-changed-public-opinion-about-race-policing-heres-data/> [<https://perma.cc/A59L-UQNX>].

35. Burch et al., *supra* note 7; Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html> [<https://perma.cc/FQ64-7BTH>]. One poll, for example, showed support for the Black Lives Matter movement increasing among registered voters from approximately 45% in May 2020 to approximately 52% just one month later. See *Do You Support or Oppose the Black Lives Matter Movement?*, CIVIQS, [https://civiqs.com/results/black\\_lives\\_matter?annotations=true&uncertainty=true&zoomIn=true&trendline=true](https://civiqs.com/results/black_lives_matter?annotations=true&uncertainty=true&zoomIn=true&trendline=true) [<https://perma.cc/KR2Z-DWSM>].

36. Paul Kiernan, *Conservative Activist Grabbed Trump's Eye on Diversity Training*, WALL ST. J. (Oct. 9, 2020, 7:18 AM), <https://www.wsj.com/articles/conservative-activist-grabbed-trumps-eye-on-diversity-training-11602242287> [<https://perma.cc/6XZA-5KDH>].

37. Paul Kane, *In Shift, Republicans Talk Openly of Police Reform After George Floyd's Death*, WASH. POST (June 3, 2020), [https://www.washingtonpost.com/powerpost/in-shift-key-republicans-talk-openly-of-police-reforms-after-george-floyds-death/2020/06/03/e6a29454-a5ba-11ea-b619-3f9133bbb482\\_story.html](https://www.washingtonpost.com/powerpost/in-shift-key-republicans-talk-openly-of-police-reforms-after-george-floyds-death/2020/06/03/e6a29454-a5ba-11ea-b619-3f9133bbb482_story.html) [<https://perma.cc/C36Z-RJZY>].

38. Richard A. Oppel, Jr., Robert Gebeloff, K. K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequality of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> [<https://perma.cc/S6ZN-ZV3D>]. Black people are 15% of the

In the months that followed, broader conversations about racial injustices and the institutional structures that have long propped them up entered the mainstream. An increasingly prominent theme became the assertion that the institutions of U.S. society perpetuated racial injustice—in other words, that the principal manifestation of racism was systemic, rather than individual in nature.<sup>39</sup> These conversations in turn led to calls for specific reforms of law and policy—including, for example, to shift public funding away from law enforcement and towards other community services and nonpolice interventions, to address racism within workplaces through educational efforts, and to teach all Americans a more complete and accurate history of the nation rather than the whitewashed version that downplays the less illustrious aspects of that history.<sup>40</sup>

The initial intense period of grief and protest gave way to calls for racial justice across nearly every aspect of life: communities removed Confederate statues and other symbols glorifying the Confederacy.<sup>41</sup> Statements pledging a commitment to racial justice issued from leaders in every quarter including government, higher education, and the private sector.<sup>42</sup> Corporations and foundations pledged

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population but accounted for 39% of COVID-related deaths. *Id.* A number of factors ensured that Black people would contract coronavirus at higher rates, including housing and employment: Black people have the lowest homeownership rates of any racial group and thus live in closer proximity to others, making social distancing more difficult. *Id.* They are over-represented in service sector work, which requires close interaction with people. *Id.* And they are more likely to rely on public transportation. *Id.* Black people also suffer preexisting health conditions that render them more susceptible to becoming seriously ill or dying from the virus, including hypertension, diabetes, and asthma. *Id.* They are more likely to be uninsured, and studies have found that they receive less aggressive treatment by health professionals. *Id.*

39. See John Haltiwanger, *The Trump Administration Does Not Believe in Systemic Racism. But It's So Real That Merriam-Webster Is Changing the Definition of Racism to Include It*, INSIDER (June 11, 2020, 10:02 AM), <https://www.businessinsider.com/trump-administration-doesnt-believe-in-systemic-racism-its-not-debatable-2020-6> [<https://perma.cc/U5FQ-264H>]; Halimah Abdullah, *What Do Terms Like Systemic Racism, Microaggression and White Fragility Mean?*, ABC NEWS (June 14, 2020, 4:11 AM), <https://abcnews.go.com/Politics/terms-systemic-racism-microaggression-white-fragility/story?id=71195820> [<https://perma.cc/ZGY4-7K6M>]; Marshall Terrill, *ASU Professor Says Everybody Has Homework to Do When It Comes to Learning about Racism in Society*, ASU NEWS (June 23, 2020), <https://news.asu.edu/20200614-discoveries-'systemic-racism'-defined-and-deconstructed> [<https://perma.cc/ZL86-Z2SM>].

40. See Burch et al., *supra* note 7; *The Long-Term Impact of CRT: Discussing the Nation's Past*, THE FLAG (June 29, 2021), <https://theflag.org/the-long-term-impact-of-crt> [<https://perma.cc/F84L-446A>].

41. *2020 Confederate Symbol Removals*, S. POVERTY L. CTR., <https://www.splcenter.org/data-projects/2020-confederate-symbol-removals> [<https://perma.cc/BYY8-D6FD>] (last visited Nov. 4, 2021).

42. See Gillian Friedman, *Here's What Companies Are Promising to Do to Fight Racism*, N.Y. TIMES (Aug. 23, 2020), <https://www.nytimes.com/article/companies-racism-george-floyd-protests.html> [<https://perma.cc/8GVN-VX7G>] (select companies within the private sector); Lindsay McKenzie, *Calls for Change*, INSIDE HIGHER ED. (June 2, 2020), <https://www.insidehighered.com/news/2020/06/02/higher-ed-leaders-address-protests-racial-ten>

billions of dollars to support racial equity efforts.<sup>43</sup> And states and cities introduced and adopted dozens of police reform measures.<sup>44</sup> In the year following Floyd's murder, at least 30 states and Washington D.C. enacted various statewide police reforms, ensuring greater uniformity.<sup>45</sup> At least 25 states and DC enacted measures addressing use of force, duty to render aid or to intervene in instances of police misconduct, and/or misconduct reporting and revocation of certification following misconduct.<sup>46</sup> More than a dozen cities, including Los Angeles and Austin, committed to cut police budgets and invest in community services.<sup>47</sup> New York City ended qualified immunity—a controversial doctrine protecting government officials from civil suits—for its police officers.<sup>48</sup>

Government entities and private companies also sought to examine and ameliorate racial inequities within their organizations.<sup>49</sup> Companies hired chief diversity officers, reviewed internal policies, developed programs to promote equity, and offered employees trainings on diversity-, equity-, and inclusion-related topics.<sup>50</sup>

In the words of one optimistic scholar, “It looks . . . like these protests are achieving what very few do: setting in motion a period of significant, sustained, and widespread social, political change . . . . We appear to be experiencing a social change tipping point.”<sup>51</sup>

## II. THE PROCESS OF RETRENCHMENT

Many Americans have been unreceptive to the claims and aims of the racial justice movement. In particular, they resented claims

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sions-and-killing-george-floyd [<https://perma.cc/L6WD-B5B6>] (select higher education institutions); Eliza Relman, *Joe Biden Calls Black Lives Matter Protests A 'Wake Up Call for Our Nation' and Slams Trump for Tear Gassing Peaceful Demonstrators*, INSIDER (June 2, 2020, 10:20 AM), <https://www.businessinsider.com/joe-biden-black-lives-matter-protests-speech-trump-video-2020-6> [<https://perma.cc/63D6-VBGD>].

43. See *Factbox*, *supra* note 5. The extent to which corporations have followed through on their early pledges is unclear. See Marco Quiroz-Gutierrez, *American Companies Pledged \$50 Billion to Black Communities. Most of It Hasn't Materialized*, FORTUNE (May 6, 2021, 2:35 PM), <https://fortune.com/2021/05/06/us-companies-black-communities-money-50-billion> [<https://perma.cc/FD8U-Q645>]; Andrew Edgecliffe-Johnson & Taylor Nicole Rogers, *Are CEOs Living Up to the Pledges They Made After George Floyd's Murder?*, FIN. TIMES (May 5, 2021), <https://www.ft.com/content/67e79b20-bc41-4cb0-992f-a28e3eaa5695> [<https://perma.cc/AG8V-9XN9>].

44. Burch et al., *supra* note 7.

45. Subramanian & Arzy, *supra* note 1.

46. *Id.*

47. *Id.*

48. See Press Release, New York City Council, Council Votes to End Qualified Immunity and Seven Other Measures to Reform NYPD (Mar. 25, 2021), <https://council.nyc.gov/press/2021/03/25/2079> [<https://perma.cc/8LHW-5MXW>].

49. Norwood, *supra* note 4.

50. See *id.*

51. See Buchanon et al., *supra* note 30.

that they benefited from “privilege,” and denied suggestions that they harbored racist beliefs.<sup>52</sup>

Some people argued that the police were held to unfair standards when in reality their work required them to make split-second decisions under great pressure.<sup>53</sup>

In the weeks after Floyd’s murder, high-level officials in then-President Donald’s Trump administration defended the police against charges of brutality and racism. Top economic adviser Larry Kudlow stated simply, “I don’t believe there is systemic racism in the U.S. I’m not going to go into a long riff on it.”<sup>54</sup>

The general response of the Trump administration to calls to address racism in U.S. society was dismissive—despite overwhelming evidence, administration officials denied that systemic racism existed as a U.S. problem. In a June 2020 press conference, Trump emphasized the importance of formal equality and color-blindness, stating that “Equal justice under the law must mean that every American receives equal treatment in every encounter with law enforcement regardless of race, color, gender or creed.”<sup>55</sup>

When reporters asked Trump about his plans to address systemic racism, he effectively conceded that his administration had no intention of tackling issues of race directly. Instead, referring to a strong May 2020 jobs report and improving economy, Trump suggested that a strong economy “is the greatest thing that can happen for race relations.”<sup>56</sup>

As the protests continued into the summer months, moreover, some erupted in violence and looting.<sup>57</sup> Images circulated on television

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52. See Peter DiCaprio, *Why Some White People Don't See White Privilege*, HUFFINGTON POST (July 25, 2017), [https://www.huffpost.com/entry/white-prevalence-why-we-whites-don't-see-white-privilege\\_b\\_5970cb92e4b04dcf308d2aa1](https://www.huffpost.com/entry/white-prevalence-why-we-whites-don't-see-white-privilege_b_5970cb92e4b04dcf308d2aa1) [https://perma.cc/Z6WB-HPBF].

53. See, e.g., Patrick Yoes, *Statement of National FOP President: Split-Second Decision Saves A Life, But Not Without Tragedy*, FRATERNAL ORD. POLICE (Apr. 22, 2021), <https://fop.net/2021/04/statement-of-national-fop-president-split-second-decision-saves-a-life-but-not-without-tragedy> [https://perma.cc/J3WQ-SCVH]; Oliver Wickerd, Letter to the Editor, *Police Face Difficult Split-Second Decisions*, THE DAY (Sept. 7, 2020, 12:01 AM), <https://www.theday.com/article/20200907/OP02/200909695> [https://perma.cc/QHT8-X2Z5]; John Moravecek, Letter to the Editor, *See for Yourself What It's Like to Make a Split-Second Police Decision*, CHI. SUN-TIMES (Apr. 20, 2021, 1:54 PM), <https://chicago.suntimes.com/2021/4/20/22394128/adam-toledo-police-training-fats-chicago-teachers-union-letters-adam-toledo> [https://perma.cc/KN9X-YU8F].

54. Haltiwanger, *supra* note 39.

55. Grace Panetta, *Trump Suggests George Floyd Is 'Looking Down' from Heaven and Appreciating the 'Great Day in Terms of Equality' After an Unexpectedly Strong Jobs Report Was Announced*, INSIDER (June 5, 2020, 11:40 AM), <https://www.businessinsider.com/trump-hopes-george-floyd-is-looking-down-and-admiring-us-economy-2020-6> [https://perma.cc/RAR4-UNGT].

56. *Id.*

57. Roudabeh Kishi, Hampton Stall, Aaron Wolfson & Sam Jones, *A Year of Racial*

and social media.<sup>58</sup> Trump capitalized on footage of chaotic scenes and broadcast them in ads for his reelection campaign.<sup>59</sup> The tactic was effective, and Republican support of the racial justice movement waned.<sup>60</sup> Polls showed growing numbers of white Republicans re-treating from their earlier support and denying that racial discrimination posed a problem in society.<sup>61</sup>

#### A. CRT as Villainous Caricature

The campaign against race in education had an unlikely origin. In July 2020, the *City Journal*, a magazine of the conservative think tank Manhattan Institute, published an article by Christopher F. Rufo that criticized an antibias training offered by the City of Seattle to its white employees.<sup>62</sup> Rufo, then-director of the Center on Wealth and Poverty at the conservative think tank Discovery Institute,<sup>63</sup> had received information about the training—*Interrupting Internalized Racial Superiority and Whiteness*—from a city employee.<sup>64</sup> After obtaining additional documents about the training from Seattle’s Office of Civil Rights, which sponsored the session, Rufo authored the article, provocatively titled *Cult Programming in Seattle*.<sup>65</sup> Rufo’s article described aspects of the training session, where session leaders “explain[ed] that white people have internalized a sense of racial superiority, which . . . [has] caused ‘harm and violence’ to people of color.”<sup>66</sup>

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*Justice Protests: Key Trends in Demonstrations Supporting the BLM Movement*, ACLED (May 25, 2021), <https://acleddata.com/2021/05/25/a-year-of-racial-justice-protests-key-trends-in-demonstrations-supporting-the-blm-movement> [https://perma.cc/HB65-WUQX].

58. See Judy Berman, *Where You Watch the George Floyd Protests Matters. Here’s Why*, TIME (June 5, 2020, 8:05 PM), <https://time.com/5848555/george-floyd-protests-fox-news> [https://perma.cc/JRV8-CKRQ]; Andrew Perrin, *23% of Users in U.S. Say Social Media Led Them to Change Views on an Issue; Some Cite Black Lives Matter*, PEW RSCH. CTR. (Oct. 15, 2020), <https://www.pewresearch.org/fact-tank/2020/10/15/23-of-users-in-us-say-social-media-led-them-to-change-views-on-issue-some-cite-black-lives-matter> [https://perma.cc/K7XZ-T92F].

59. Burch et al., *supra* note 7.

60. Adams, *supra* note 32; Burch et al., *supra* note 7.

61. Burch et al., *supra* note 7.

62. Christopher F. Rufo, *Cult Programming in Seattle*, CITY J. (July 8, 2020), <https://www.city-journal.org/seattle-interrupting-whiteness-training> [https://perma.cc/U8ZA-EYZ9].

63. *Id.*

64. Rufo discussed the genesis of the article in an interview with Benjamin Wallace-Wells. See Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [https://perma.cc/VE4V-2KTT].

65. *Id.*

66. *Id.*; Rufo, *supra* 62.

Given that supporters of American slavery used white racial superiority to justify the practice, and that many Americans who came of age during Jim Crow segregation, the training session statement seems relatively unremarkable. Presumably because the training made generalizations based on membership in a racial group, however, Rufo drew the otherwise unsubstantiated conclusion that “the city frames the discussion around the idea that black Americans are reducible to the essential quality of ‘blackness’ and white Americans are reducible to the essential quality of ‘whiteness’—that is, the new metaphysics of good and evil.”<sup>67</sup>

Rufo’s article generated significant attention and prompted more individuals to share with him materials from antiracism trainings and class sessions across the nation.<sup>68</sup> Over the summer months, Rufo published several more articles in *City Journal*.<sup>69</sup>

In an interview reported in *The New Yorker* magazine, Rufo recalled that the antiracism training materials that he reviewed frequently cited a number of popular antiracism volumes, including works by Ibram X. Kendi and Robin DiAngelo.<sup>70</sup> At the time, Kendi’s *How to be Antiracist* and DiAngelo’s *White Fragility* were national bestsellers.<sup>71</sup> In turn, among the sources cited in those works were the writings of critical race scholars, including Derrick Bell and Kimberlé Crenshaw.<sup>72</sup> Rufo seized upon CRT for two reasons: First, he believed that the term CRT captured the progressive ideals that

67. Rufo, *supra* note 62.

68. See Wallace-Wells, *supra* note 64.

69. See Christopher F. Rufo, *The Courage of Our Convictions*, CITY J. (Apr. 22, 2021), <https://www.city-journal.org/how-to-fight-critical-race-theory> [https://perma.cc/AP5S-YCC7]; Christopher F. Rufo, *Critical Race Capitalism*, CITY J. (Aug. 25, 2021), <https://www.city-journal.org/verizon-critical-race-theory-training> [https://perma.cc/D2PH-DCST]; Christopher F. Rufo, *Going All In*, CITY J. (July 15, 2021), <https://www.city-journal.org/nea-to-promote-critical-race-theory-in-schools> [https://perma.cc/MZ9L-SSHP]; Christopher F. Rufo, *Critical Race Theory’s Chief Marketing Officer*, CITY J. (July 23, 2021), <https://www.city-journal.org/ibram-x-kendi-master-marketer> [https://perma.cc/5QF8-V2L3]; Christopher F. Rufo, *The Woke Defense Contractor*, CITY J. (July 6, 2021), <https://www.city-journal.org/raytheon-adopts-critical-race-theory> [https://perma.cc/HB2F-X8Y8]; Christopher F. Rufo, *The Enablers*, CITY J. (July 10, 2021), <https://www.city-journal.org/the-enablers-of-critical-race-theory> [https://perma.cc/QYR9-ZL5Q]; Christopher F. Rufo, *Critical Race Fragility*, CITY J. (Mar. 2, 2021), <https://www.city-journal.org/the-left-wont-debate-critical-race-theory> [https://perma.cc/9GDJ-95SF]; Christopher F. Rufo, *What Critical Race Theory Has Wrought*, CITY J. (June 16, 2021), <https://www.city-journal.org/theoretical-roots-and-practical-consequences-of-critical-race-theory> [https://perma.cc/7BCV-SZXQ].

70. Wallace-Wells, *supra* note 64.

71. See Barbara VanDenburgh, *Anti-Racist Books Dominate Best-Seller List Amid George Floyd Protests*, USA TODAY (June 10, 2020, 12:12 PM), <https://www.usatoday.com/story/entertainment/books/2020/06/10/anti-racist-books-dominate-best-seller-list-white-fragility-how-to-be-an-antiracist-ta-nehisi-coates/5331188002> [https://perma.cc/5JSX-U5EH].

72. Wallace-Wells, *supra* note 64.

conservatives rejected better than any preexisting term or idea such as “woke” or “political correctness.”<sup>73</sup> Second, it could be used as a politically expedient catch-all phrase to refer to all manner of progressive and antiracist ideas.<sup>74</sup> CRT might thus effectively be marshaled to convince voters in the suburbs (where the Republican Party sought to reestablish political strength) that progressives were embracing a leftist plot to supplant the “categories of bourgeoisie and proletariat with the identity categories of white and black.”<sup>75</sup> In Rufo’s words, “[c]ritical race theory’ is the perfect villain.”<sup>76</sup> He admitted that the term proved sufficiently capacious that it could be manipulated and recast “to annex the entire range of cultural constructions that are unpopular with Americans.”<sup>77</sup>

### *B. Backlash: The Campaign Against Race Education*

Christopher Rufo’s articles circulated widely, but it was not until he gained the ear of then-President Trump that they would form the basis of government policy.<sup>78</sup> This policy first took the form of a far-reaching but short-lived Executive Order that limited race- or diversity-related education in federal workplaces and the armed services. State legislatures soon took up the mantle and have adopted nearly identical measures that also seek to shut down race-related education.

#### *1. In the Federal Workplace: Executive Order 13950*

In September 2020, Rufo appeared as a guest on the conservative opinion show broadcast on the Fox News cable channel, *Tucker Carlson Tonight*.<sup>79</sup> Trump was a frequent viewer of the channel.<sup>80</sup> During the segment, Rufo made the following statement:

73. *Id.*

74. See Jake Bittle, *The Fox News Guest Behind the Republican Frenzy Over Critical Race Theory*, NEW REPUBLIC (June 8, 2021), <https://newrepublic.com/article/162617/christopher-rufo-critical-race-theory-interview> [<https://perma.cc/BZ3T-8QYA>].

75. *Id.*

76. Wallace-Wells, *supra* note 64.

77. Andrew Ujifusa, *Critical Race Theory Puts Educators at Center of a Frustrating Cultural Fight Once Again*, EDUCATIONWEEK (May 26, 2021), <https://www.edweek.org/leadership/critical-race-theory-puts-educators-at-center-of-a-frustrating-cultural-fight-once-again/2021/05> [<https://perma.cc/JPR9-F8HP>].

78. See Kiernan, *supra* note 36.

79. See Wallace-Wells, *supra* note 64.

80. See Carrie Wittmer, *Donald Trump Spends An Excessive Amount Of Time Watching TV—Here Are His Favorite Shows*, INSIDER (Mar. 11, 2017), <https://www.businessinsider.com/donald-trump-favorite-tv-shows-2017-3#tucker-carlson-tonight-4> [<https://perma.cc/M9A4-L6R9>].

[C]ritical race theory . . . has pervaded every aspect of the federal government. . . . Conservatives need to wake up. This is an existential threat to the United States. And the bureaucracy, even under Trump, is being weaponized against core American values. And I'd like to make it explicit: The President and the White House—it's within their authority to immediately issue an executive order to abolish critical-race-theory training from the federal government. And I call on the President to immediately issue this executive order—to stamp out this destructive, divisive, pseudoscientific ideology.<sup>81</sup>

News outlets reported that the morning following the broadcast, Rufo received a phone call from the President's chief of staff, who said that the President had seen the segment and wanted Rufo to share his findings with the White House.<sup>82</sup> Two days later, the White House Office of Management and Budget instructed all federal agencies

to begin to identify all contracts or other agency spending related to any training on 'critical race theory,' 'white privilege,' or any other training or propaganda effort that teaches or suggests . . . that the United States is an inherently racist or evil country or . . . that any race or ethnicity is inherently racist or evil.<sup>83</sup>

Before the month had ended, President Trump had announced a plan to create a "1776 Commission" to promote patriotic education. He declared that "[c]ritical race theory, the 1619 Project, and the crusade against American history is toxic propaganda."<sup>84</sup> (*The 1619 Project* is a *New York Times Magazine* initiative that "aims to reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative.")<sup>85</sup>

On September 22, the White House issued Executive Order 13950, "to combat offensive and anti-American race and sex stereotyping and scapegoating."<sup>86</sup> Taking aim at efforts to combat both gender and racial inequality, the Executive Order asserted that

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81. Wallace-Wells, *supra* note 64.

82. See Kiernan, *supra* note 36.

83. Kiernan, *supra* note 36 (alteration in original).

84. *What Trump Is Saying About 1619 Project, Teaching U.S. History*, PBS NEWS HOUR (Sept. 17, 2020), <https://www.pbs.org/newshour/show/what-trump-is-saying-about-1619-project-teaching-u-s-history> [<https://perma.cc/UY9P-RDZ5>].

85. *The 1619 Project*, N.Y. TIMES MAG. (Aug. 16, 2021), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/C8K3-92R7>].

86. Combating Race and Sex Stereotyping, 85 Fed. Reg. 188, 60683 (Sept. 22, 2020).



certain ideologies falsely claim that “America is an irredeemably racist and sexist country” and that training materials and instructors are “teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist.”<sup>87</sup>

To address these perceived wrongs, the order prohibited the U.S. Armed Forces, federal agencies, and government contractors from using in trainings materials that included “divisive concepts” such as that “an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex.”<sup>88</sup>

Journalist Paul Kiernan, in an article published in the *Wall Street Journal*, pointed out that the Executive Order repeated misleading examples cited by Rufo. The Order claimed, for example, that a Treasury Department seminar had “demand[ed] that white staff members ‘struggle to own their racism,’” citing a document from the seminar allegedly provided by a whistle-blower.<sup>89</sup> Kiernan found that the seminar document, however, contains no such demand, but that it instead included in an appended list of suggested resources a YouTube video in which Robin DiAngelo “talks about how White people struggle to own their racism.”<sup>90</sup> In an interview, Howard Ross, the diversity consultant whose firm created the documents for the Treasury seminar, said that the goal of the trainings was to “teach[] empathy and creat[e] a culture of belonging,” and that the trainings “don’t demonize any particular group.”<sup>91</sup>

Executive Order 13950 caused significant disruptions, and many diversity programs stopped altogether.<sup>92</sup> It remained in effect for only a few months, however—in December 2020, a district court issued a national injunction halting its enforcement as applied to government contractors and federal grant recipients.<sup>93</sup> Newly elected President Joseph Biden then revoked Executive Order 13950 altogether in a January 2021 Order.<sup>94</sup>

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87. See *Executive Order on Combating Race and Sex Stereotyping*, TRUMP WHITE HOUSE: L. & JUST. (Sept. 22, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-race-sex-stereotyping> [<https://perma.cc/Q6LM-MBP9>].

88. *Id.*

89. Kiernan, *supra* note 36.

90. *Id.*

91. *Id.*

92. Tom Spiggle, *Why Biden’s Repeal of the Anti-Bias Training Ban Was So Important for Federal Employees*, FORBES (Feb. 3, 2021, 1:40 PM), <https://www.forbes.com/sites/tomspiggle/2021/02/03/why-bidens-repeal-of-the-anti-bias-training-ban-was-so-important-for-federal-employees/?sh=398c8b9525b6> [<https://perma.cc/782W-HDGP>].

93. *Santa Cruz Lesbian and Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 521–50 (N.D. Cal. 2020).

94. Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

## 2. *In the States: Race Education in Public Schools*

In the months that followed the issuance of Executive Order 13950, eight states have enacted legislation restricting all manner of race-related education in public elementary and secondary schools, as well as colleges and universities.<sup>95</sup> Bills are pending both in Congress<sup>96</sup> and another fourteen states.<sup>97</sup> In other states, mandatory measures have come from school board pronouncements and binding opinions issued by state attorneys general.<sup>98</sup>

Most of the bills contain nearly identical provisions taken from model legislation authored by Stanley Kurtz, a senior fellow at the conservative Ethics and Public Policy Center.<sup>99</sup> Rufo, whose television appearance prompted the issuance of Executive Order 13950, also consulted with state legislatures on at least 10 of the bills.<sup>100</sup>

95. As of July 26, 2021, the following states have enacted legislation: H.B. 2898, 55th Leg., 1st Sess. (Ariz. 2021); S.B. 627, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); H.B. 377, 66th Leg., 1st Sess. (Idaho 2021); H. File 802, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021); H. 400 (S.C. 2021); S.B. 623, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 3979, 87th Leg., Reg. Sess. (Tex. 2021). *See also* Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Aug. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory> [<https://perma.cc/PRW8-XTL2>].

96. *See, e.g.*, Fight Radicalization of Elementary Education Act, H.R. 3157, 117th Cong. 1st Sess. (2021) (proposed to amend the Elementary and Secondary Education Act of 1965 by prohibiting federal employees from providing incentives for states or schools to teach ideas related to CRT); Protect Equality and Civics Education (PEACE) Act, H.R. 3137, 117th Cong. 1st Sess. (2021) (proposes withholding funding from efforts “related to the teaching of Critical Race Theory under any grant, contract, or cooperative agreement.”).

97. As of July 26, 2021, the following states have bills pending: H.B. 11, 2022 Leg., Reg. Sess. (Ala. 2022) (prefiled); S.B. 1532, 55th Leg., 1st Sess. (Ariz. 2021); B. Request 60, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022) (prefiled); B. Request 69, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022) (prefiled); H.B. 564, 47th Leg., Reg. Sess. (La. 2021); S.B. 460, 101st Leg., Reg. Sess. (Mich. 2021); H.B. 544, 167th Gen. Ct., Reg. Sess. (N.H. 2021); H.B. 324, 2021 Leg., Reg. Sess. (N.C. 2021); H.B. 322, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); H.B. 1532, 2021 Leg., Reg. Sess. (Pa. 2021); H.B. 6070, 2021 Leg., Reg. Sess. (R.I. 2021); H.B. 4325, 124th Leg., Reg. Sess. (S.C. 2021); S.B. 3, 87th Leg., Reg. Sess. (Tex. 2021); H.R. Res. 901A, 64th Leg., 1st Spec. Sess. (Utah 2021); S.B. 618, 2021 Leg., Reg. Sess. (W. Va. 2021); H.B. 2595, 2021 Leg., Reg. Sess. (W. Va. 2021); S.B. 411, 105th Leg., Reg. Sess. (Wis. 2021).

98. Ray & Gibbons, *supra* note 95.

99. Stanley Kurtz, *The Partisanship Out of Civics Act*, NAT’L ASS’N SCHOLARS (Feb. 15, 2021), <https://www.nas.org/blogs/article/the-partisanship-out-of-civics-act> [<https://perma.cc/EE3U-6S9S>]; *see also* Stanley Kurtz, *The Partisanship Out of Civics Act: A Proposal*, NAT’L REV. (Feb. 16, 2021, 7:31 AM), <https://www.nationalreview.com/corner/the-partisanship-out-of-civics-act-a-proposal> [<https://perma.cc/RPP2-MXBB>]. The Ethics & Public Policy Center describes itself as “Washington, D.C.’s premier institute working to apply the riches of the Judeo-Christian tradition to contemporary questions of law, culture, and politics.” *About*, ETHICS & PUB. POL’Y CTR., <https://eppc.org/about> [<https://perma.cc/KT6D-YNGS>] (last visited Nov. 4, 2021). It lists among its 2021 priorities “[p]ushing back against the extreme progressive agenda while building a 2024 consensus for conservatives.” *Id.*

100. Jake Bittle, *Critical Failure: How a Filmmaker Created the Frenzy Over ‘Critical*

Tennessee's statute is typical and instructive, reproducing language from the model statute. It states that schools may not "include or promote the following concepts"<sup>101</sup>:

- (1) One (1) race or sex is inherently superior to another race or sex;
- (2) An individual, by virtue of the individual's race or sex, is inherently privileged, racist, sexist, or oppressive, whether consciously or subconsciously;
- (3) An individual should be discriminated against or receive adverse treatment because of the individual's race or sex;
- (4) An individual's moral character is determined by the individual's race or sex;
- (5) An individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- (6) An individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex;
- (7) A meritocracy is inherently racist or sexist, or designed by a particular race or sex to oppress members of another race or sex;
- (8) This state or the United States is fundamentally or irredeemably racist or sexist;
- (9) Promoting or advocating the violent overthrow of the United States government;
- (10) Promoting division between, or resentment of, a race, sex, religion, creed, nonviolent political affiliation, social class, or class of people;
- (11) Ascribing character traits, values, moral or ethical codes, privileges, or beliefs to a race or sex, or to an individual because of the individual's race or sex;
- (12) The rule of law does not exist, but instead is a series of power relationships and struggles among racial or other groups;
- (13) All Americans are not created equal and are not endowed by their Creator with certain unalienable rights, including, life, liberty, and the pursuit of happiness; or
- (14) Governments should deny to any person within the government's jurisdiction the equal protection of the law.<sup>102</sup>

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*Race Theory*, NEW REPUBLIC (2021), <https://newrepublic.com/article/162617/christopher-rufu-critical-race-theory-interview> [<https://perma.cc/BZ3T-8QYA>].

101. Pub. Ch. 493, S.B. 623, 112th Gen. Assemb., amending Tenn. Code Ann. § 49-5-108(c), § 51(a) (Tenn. 2021).

102. Pub. Ch. 493, S.B. 623, 112th Gen. Assemb., amending Tenn. Code Ann. § 49-5-108(c), § 51(a) (Tenn. 2021).

Teachers have said that some of the statutes' provisions misrepresent what is taught in classes. In Oklahoma, whose statute is nearly identical to the Tennessee statute, eighth-grade U.S. history teacher Betty Collins stated that when social studies teachers discuss the racist aspects of U.S. history with students, "Nobody is teaching, 'You, white male, . . . you should feel guilty for the way that you're born.'"<sup>103</sup> Collins, who is white, explained that teaching about racism in U.S. history "doesn't mean that any one person is to blame . . . But it does mean that we as a culture and we as a society have a responsibility to make sure that in further laws and further systems, that is erased."<sup>104</sup>

The Tennessee statute goes on to state, however, that educators are permitted to provide "*impartial discussion* of controversial aspects of history . . . [and of] the historical oppression of a particular group of people based on race, ethnicity, class, nationality, religion, or geographic region."<sup>105</sup>

The language suggests that educators are permitted to teach, for example, the history of the enslavement of Africans and their descendants, and the post-Emancipation adoption of Black Codes and Jim Crow. They must do so, however, in a manner that is "impartial" and does not cause students to feel discomfort.

Collins nonetheless is concerned about continuing to teach aspects of U.S. history that she has included in classes in the past.<sup>106</sup> For example, she typically assigns the narratives of formerly enslaved people recorded by the Federal Writers Project in the 1930s.<sup>107</sup> In an interview, Collins explained that the narratives deeply affect many students, and some have cried during the discussions.<sup>108</sup> The purpose of the assignment, however, is to deepen their understanding of history and help foster empathy. In light of the statute, however, Collins expressed worry that she could face discipline or retaliation if a student were to become upset or report feeling discomfort.<sup>109</sup>

Texas's statute constrains educators even further. Reporters who interviewed more than two dozen Texas teachers reported they

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103. Sarah Schwartz, *Four States Have Placed Legal Limits on How Teachers Can Discuss Race. More May Follow*, EDUCATIONWEEK (May 17, 2021), <https://www.edweek.org/policy-politics/four-states-have-placed-legal-limits-on-how-teachers-can-discuss-race-more-may-follow/2021/05> [https://perma.cc/74WB-32ZQ].

104. *Id.*

105. Pub. Ch. 493, S.B. 623, 112th Gen. Assemb. at § 51(b) (emphasis added).

106. Schwartz, *supra* note 103.

107. *Id.*

108. *Id.*

109. *Id.*

“overwhelmingly” denounced the new law.<sup>110</sup> It provides, for example, that when a teacher introduces “current events or widely debated and currently controversial issue of public policy or social affairs,” the teacher “shall . . . strive to explore such issues from diverse and contending perspectives without giving deference to any one perspective.”<sup>111</sup>

Texas teachers have criticized the requirement, noting that there are situations where giving equal weight to all perspectives would be inappropriate.<sup>112</sup> Andrew Robinson, an eighth-grade U.S. history teacher in Dallas, recalled that when the Capitol insurrection occurred in January 2021, he paused his regular lesson to show his class the events as they unfolded on television.<sup>113</sup> He explained that the law would have interfered with his teaching about the insurrection: “Once the election is over and there is a winner, and the [losing party is] saying that our democracy is fake, that the winner wasn’t really a winner—at that point, I feel like staying neutral is wrong, I feel like no, there’s not two sides to the truth.”<sup>114</sup>

Some of the provisions prohibit teaching concepts that were unlikely to have been part of any curriculum—for example, that “one race, ethnic group or sex is inherently morally or intellectually superior to another,” or that “an individual’s moral character is determined by the individual’s race, ethnicity or sex.”<sup>115</sup> It is possible that the inclusion of these provisions was principally rhetorical; by prohibiting teaching such concepts, the provisions imply that such concepts were in fact being taught to public schoolchildren.

A number of states have adopted similar provisions prohibiting workplace education efforts. Arizona’s statute prohibits the use of public monies for trainings that “present[] any form of blame or judgment on the basis of race, ethnicity or sex.”<sup>116</sup> It goes on to define “blame or judgment” to include many of the concepts listed in the Tennessee and other statutes—for example, that “[a]n individual, by virtue of the individual’s race, ethnicity or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously” and “an

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110. Isabella Zou & Jason Kao, *Texas Teachers Say GOP’s New Social Studies Law Will Hinder How an Entire Generation Understands Race, History and Current Events*, TEXAS TRIB. (Aug. 3, 2021, 5:00 AM), <https://www.texastribune.org/2021/08/03/texas-critical-race-theory-social-studies-teachers> [<https://perma.cc/9DJ2-T3XG>].

111. H.B. 3979, 87th Leg., Reg. Sess. (Tex. 2021).

112. Zou & Kao, *supra* note 110.

113. *Id.*

114. *Id.*

115. AZ H.B. 2898, amending Ariz. Rev. Stat. Title 15, ch. 7, art. 1 15-717.02(B)(1), (B)(4) (2021).

116. AZ H.B. 2898, amending Ariz. Rev. Stat. Title 15, ch. 7, art. 1 15-717.02(A) (2021).

individual, by virtue of the individual's race, ethnicity or sex, bears responsibility for actions committed by other members of the same race, ethnic group or sex."<sup>117</sup>

To date, however, only Idaho's statute explicitly mentions critical race theory. The statute states that "tenets . . . often found in 'critical race theory' . . . exacerbate and inflame divisions on the basis of sex, race, . . . or other criteria in ways contrary to the unity of the nation and the well-being of the state of Idaho and its citizens."<sup>118</sup>

### III. CRITICAL RACE THEORY: EVOLUTION AND CONTINUED SALIENCE

Critical Race Theory (CRT) emerged in the 1980s, evolving in reaction to Critical Legal Studies (CLS), an intellectual movement that itself had emerged only in the previous decade. The following parts describe the evolution of CRT and outline the core principles shared by scholars writing in that tradition.

#### *A. Immediate Intellectual Precursors*

A direct line can be drawn from classical legal formalism to Critical Race Theory.

##### *1. Legal Formalism*

Legal formalism is the classical conception of legal decision-making, as both descriptive and normative theory. In a rough sense, formalism is how much of the public imagines legal decision-making. Formalism posits that judges can—and should—render decisions by mechanically applying preexisting legal principles to the facts of the case before them. Thus, judges can reach the correct decision by drawing exclusively on the law—not on nonlegal moral or political considerations or preferences. Legal principles are identifiable and lead to a single correct result in any given case. Thus judges' decision-making processes could be "scientific, apolitical, principled, objective, logical, and rational."<sup>119</sup>

This formulation is admittedly a simplified one in that it elides the importance of determining both (1) what the applicable rule of law is and (2) what the legally significant facts are—both of which

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117. H.B. 2906, 55th Legis., 1st Reg. Sess., § 41-1494, amending Ariz. Rev. Stat. Title 41, ch. 9, Sec. 4, ch. 427 (2021).

118. H.B. 377, 66th Leg., 1st Sess. (Idaho 2021).

119. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 499 (1988).

are necessary and complex judicial tasks.<sup>120</sup> The simplified formulation nonetheless serves to illustrate the core tenet of formalism: the rule of law, not judicial political ideology or preference, should determine the outcome of cases.

In the formalistic ideal, then, the outcome of any dispute turns on the law and the facts of the case. Not infrequently, however, judges' political and moral commitments do predict how they will decide cases. The predictable alignment of votes of U.S. Supreme Court justices is only the most visible example. The practice of judging thus falls short of the formalist ideal, leading some scholars to argue that the ideal is unattainable.<sup>121</sup>

## 2. *Legal Realism*

American Legal Realists advanced a descriptive account of what they claim judges *actually* do when deciding cases. First, they argued that rather than leading to a unique outcome, legal principles and reasoning are indeterminate and can be marshaled to justify multiple outcomes. In order to reach decisions, then, Realists argued that judges drew on nonlegal norms—fairness, efficiency, etc.<sup>122</sup> The gist of the Realists' account of legal decision-making is that judges can—and do—draw on a whole range of extralegal influences to reach decisions. Thus judges' "own unstated (and often subconscious) psychological, sociological, and economic assumptions," would influence their decisions, but judges would then "rationalize [these] decisions by invoking legal rules and principles."<sup>123</sup>

Realists thus urged judges to abandon the pretense that they simply deduced the right answer to legal disputes. Because how they applied the law ordered society, judges should endeavor to reach outcomes that advanced the best ordering of society and social policy. Thus, "judges should consciously and frankly engage in . . . social science analysis so that they could make better policy."<sup>124</sup>

This last aspect of Realist thought was thus a constructive, reform-oriented—and ultimately influential—one. Realists proposed that sociology and political science could provide organizing concepts

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120. Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 *LEGAL THEORY* 111, 111–12 (2010).

121. See BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 1, 1–3 (2010).

122. Leiter, *supra* note 120, at 119.

123. Richard Michael Fischl, Essay, *Some Realism About Critical Legal Studies*, 41 *UNIV. MIAMI L. REV.* 505, 520 (1987).

124. *Id.* at 20.

for understanding the operation of the legal system.<sup>125</sup> In other words, legal decision-makers (not just judges but also legislators and attorneys rendering legal advice) should engage in systematic policy analysis to reach socially optimal decisions.

Realists advanced a three-step process for decision-making: the first step requires identifying the individual interests at issue in a given controversy and analyzing how different decisions would affect those interests.<sup>126</sup>

Second, while Realists urged abandoning many abstract legal concepts as the purported bases for decisions, they suggested that decisions could aim to advance a small number of fundamental values or abstract social interests, such as the advancement of individual freedom and material well-being.<sup>127</sup> Thus, advancing these broadly shared social commitments could serve as the proper ends for policy.<sup>128</sup>

Once decision-makers have identified the specific interests at stake and their relation to broader social values, they might properly engage in the final step in the Realists' decision-making paradigm—balancing the respective interests to reach the most desirable outcome.<sup>129</sup>

For current (or former) law students, the three-part test summarized above is likely familiar. Indeed, this sort of policy analysis continues to provide a framework for legal thinking today.

### 3. *Critical Legal Studies*

In an introduction to a symposium on Critical Legal Studies (CLS), Professor Mark Tushnet characterized CLS as “the heir to legal realism.”<sup>130</sup> CLS emerged as an academic movement in the late 1970s.<sup>131</sup> Like the Realists, CLS scholars (or Crits) aim to expose what law and legal actors actually do. The Crits aligned with the Realists' critique of classical formalism. But whereas the Realists had tended to focus their critiques on specific legal principles or dogmas, such as “liberty of contract” or “property rights,” the Crits undertook a holistic critique of law and traditional legal thought. Crits aimed to expose the unspoken assumptions and values of dominant legal

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125. Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 507 (1986).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Mark V. Tushnet, *Perspectives on Critical Legal Studies: Introduction*, 52 GEO. WASH. L. REV. 239, 239 (1984).

131. Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 614–15 (1989).



discourse. CLS argued that the law itself, as a system of structuring society, played a critical role in maintaining an inequitable social order.<sup>132</sup> And to Crits' thinking, "the law naturalized the social order, operating so that even the most subordinated individuals believed that the way that society was organized was inevitable and, at a basic level, fair."<sup>133</sup>

The core tenet of CLS is thus that formal legal tradition, while cloaked in a discourse of neutrality, actually serves to justify and perpetuate dominant systems of privilege.<sup>134</sup> A CLS Conference statement asserted that CLS seeks "to explore the manner in which legal doctrine and legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive, inequalitarian relations."<sup>135</sup> Because Crits stemmed from the political left and constituted a broad critique of social structure, it comprised not only an intellectual but also a political movement.<sup>136</sup>

Like the Realists before them, Crits directly challenged the formalists' claim that applying preexisting legal principles to "like cases" constrained outcomes. Instead, as Professor Martha Minow explained, CLS argued "both that legal principles and doctrines are open-textured and capable of yielding contradictory results, and that legal decisions express [a] . . . legal culture contingent on historical preferences for selected assumptions and values."<sup>137</sup> Crits marshalled historical and socioeconomic analysis to demonstrate how traditional legal structures and doctrines operated to benefit certain social classes and economic interests (such as the wealthy and corporations).<sup>138</sup>

Crits also drew on the insights and methods of progressive historians, who argued that the course of American history was better explained by studying interest groups in society than by studying the evolution of the political landscape. Legal historian Morton Horwitz, for example, studied pre-Civil War judicial opinions and found that judges rendered decisions that advanced the interests of corporations and industry.<sup>139</sup> Previous studies had similarly found that legislative

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132. KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 25–26 (2019); Tushnet, *supra* note 125, at 505.

133. BRIDGES, *supra* note 132, at 26.

134. Minda, *supra* note 131, at 614–15. For a chronicling of the dominant methodologies of CLS, see Duncan Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 *NEW ENG. L. REV.* 209 (1985–86).

135. Peter Fitzpatrick & Alan Hunt, *Critical Legal Studies: Introduction*, 14 *J.L. & SOC'Y* 1, 1–2 (1987) (quoting Statement of the Critical Legal Conference).

136. Minda, *supra* note 131, at 614–15.

137. Martha Minow, *Law Turning Outward*, 73 *TELOS* 79, 83 (1986).

138. *Id.* at 84–85.

139. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* 1, 23 (1977).

enactments of the period promoted industrialization.<sup>140</sup> Historians lauded Horwitz's work, and awarded his study the prestigious Bancroft Prize.<sup>141</sup> The legal academy, on the other hand, was much less receptive to the critical approach.<sup>142</sup> Why?

For legal scholars, it was unremarkable that special interests would shape *legislation*—such was the nature of politics. But to suggest that *judges* would render decisions in a manner that advanced special interests was to imply that judges were not much different than legislators. And if that were the case, then a fundamental distinction between law and politics evaporated. Instead, law, just like politics, was susceptible of being interpreted and deployed to serve powerful interests in what Crits came to refer to as an “illegitimate hierarchy” that operated as an ordering institution in society.<sup>143</sup>

The Crits' interest in exposing the ways in which law perpetuated social injustice resonated with the scholars of color who would become the first Critical Race Theorists. But while CLS thus sought to expose the social power imbalances to which law contributed, Crits generally had little interest in analyzing law's role in perpetuating power imbalances between racial groups.<sup>144</sup> Moreover, CLS tended to deny the law's potential utility in redressing social injustice.

Scholars of color, however, while clear-eyed about the law's power to subordinate, also understood law's redemptive potential.<sup>145</sup> In response to Crits' dismissing the goal of winning legal rights, for example, Patricia Williams explained that “[f]or the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity . . . . The concept of rights, both positive and negative is the marker of our citizenship.”<sup>146</sup>

The Crits' wholesale rejection of the pragmatic promise of law and focus on pure critique alienated scholars of color. Another founding critical race theorist, Richard Delgado, explained the increasingly apparent divide:

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140. See, e.g., LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776–1860* 188–89 (1948); OSCAR & MARY HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861* 53–54 (1947).

141. Tushnet, *supra* note 125, at 506.

142. *Id.*

143. *Id.* at 507.

144. BRIDGES, *supra* note 132, at 29.

145. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 743 (1994); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 297, 298 (1989).

146. Patricia J. Williams, *Alchemical Notes: Reconstructing Rights from Deconstructed Ideals*, 22 HARV. C.R.-C.L. L. REV. 401, 416, 431 (1987).

Racism will not go away simply because Crits show that legalisms are indeterminate, that rights are alienating and legitimizing, and that law is a reflection of the interests of the ruling class. Whatever utility these concepts may have in other settings . . . they have limited application in helping to understand, much less cure, racism.<sup>147</sup>

The Crits were not altogether unwilling to engage with scholars of color. The organizers of their annual conference made race and racism the topic of their 1987 event and invited several race theorists to present papers. Nonetheless, the Crits—overwhelmingly white and male—were skeptical about an analytical framework centered around the concept of race.<sup>148</sup> It was apparent to the incipient critical race theorists that, if they were to generate a sustained analysis of the relationship between law and racial subordination, CLS would not be the home for such a project. They would have to establish a home of their own.

### *B. The Emergence of CRT*

In 1988, Kimberlé Crenshaw critiqued the Crits, writing that “racism is a central ideological underpinning of American society. Critical scholars who focus on legal consciousness alone thus fail to address one of the most crucial ideological components of the dominant order.”<sup>149</sup> The following year, twenty-four scholars of color committed to the critical study of race, law, and justice convened a summer workshop at the University of Wisconsin in what came to be regarded as a coalescing of Critical Race Theorists as an academic group and CRT as intellectual movement.<sup>150</sup> Crenshaw coined the term “Critical Race Theory” soon after the gathering, explaining that she sought to “signify the specific political and intellectual location of the project through ‘critical,’ the substantive focus through ‘race,’ and the desire to develop a coherent account of race and law through the term ‘theory.’”<sup>151</sup>

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147. Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 309 (1987).

148. See *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxvii–xviii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

149. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988).

150. Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door,”* 49 UCLA L. REV. 1343, 1361–62 (2002); see also Linda S. Greene, *Critical Race Theory: Origins, Permutations, and Current Queries*, 2021 WIS. L. REV. 259, 259 (2021).

151. Crenshaw, *supra* note 149, at 1361.

CRT is not a “theory” in the narrower, scientific sense of the word—a singular “hypothesis assumed for the sake of argument or investigation.”<sup>152</sup> The scholars thinking and writing critically about race might instead, in the words of Jerome McCristal Culp, be united only by a shared “belief in an opposition to oppression.”<sup>153</sup>

CRT *is* a theory in the broader sense, however—“a plausible . . . general principle or body of principles offered to explain phenomena.”<sup>154</sup> The “phenomenon” that CRT attempts to expose and explain is the persistent presence of Black and other people of color at the bottom of nearly every aspect of social life and measure of social well-being more than a century after the abolition of slavery, and decades after the passage of civil rights legislation. CRT explores how racial disparities are produced and maintained, having been inherited from a time when racism was explicit.

CRT scholarship generally embraces a number of foundational commitments, or premises<sup>155</sup>:

First, race is socially constructed.<sup>156</sup> As critical race scholar Ian Haney López writes:

Yes, small groups of humans when in relative reproductive isolation, for either geographical or cultural reasons, tend to share physical similarities. But this is not the same thing as saying that the overarching categories of white, black, brown, yellow, red, and so on reflect basic biological divisions. Humanity has been sundered into races not by nature but by historically contingent, culturally specific beliefs and practices.<sup>157</sup>

There are no biologically definitive differences between individuals of different races. To be sure, individuals inherit different physical characteristics from their parents, including skin pigmentation, hair texture, etc. But these are no more biologically defining than a

152. *Theory Definition*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/theory> [<https://perma.cc/6EQP-2CJP>] (last visited Nov. 4, 2021).

153. Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1638 (1999).

154. *Theory Definition*, *supra* note 152.

155. See BRIDGES, *supra* note 132, at 9–15 (summarizing four tenets of CRT, while noting that scholars have described CRT as embracing anywhere from two to eight foundational tenets); Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 151 (listing “ten empirical arguments that represent CRT commitments”).

156. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 17 (1994).

157. Ian F. Haney López, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807, 823 (2011).

myriad other inherited characteristics—height, eye color, blood type, etc. Yet societies assign meaning to phenotypes. Social norms identify individuals with pale skin and straight hair as “white,” first creating race, and then making it matter.

The historical treatment of European immigrants to the United States provides further evidence that the notion of “races” is constructed and thus contingent. Despite their phenotypic similarities, immigrants from Germany, Ireland, and Italy were not considered to be “white.”<sup>158</sup> They faced discrimination in employment, housing, and education.<sup>159</sup> In other words, despite race not being a biological reality, the attribution of racial categories was an undeniable social fact. Over time, as these immigrants and their offspring acquired the language and culture of their new homeland and consciously associated with the dominant race, they too came to be seen as “white.”<sup>160</sup>

A second premise of critical race scholarship is that racism is not an aberrational or occasional aspect of U.S. society. Instead, racism permeates society.<sup>161</sup> It is a feature of that society, not a bug, and public and private institutions and laws largely operate to perpetuate that status quo.

An important corollary to the premise that racism permeates society is that the commonly understood definition of racism—prejudiced actions of individuals holding beliefs—is but one form of how racism manifests, and the less consequential.

To the contrary, critical race scholarship understands that laws and institutions can create and perpetuate racism, even absent racist intent of individuals operating within those institutions. In this way, racism is institutionalized, rather than individualized. Moreover, when institutions operate across society, individuals do not experience discrete acts of racism—instead, their lives are affected across time and space by systemwide, or systemic racism.

Finally, a third foundation of CRT is that, in addition to being an explanatory, descriptive endeavor that seeks to explain the pervasiveness of racial inequality, it is also a political project. Critical race scholars hope and intend for their work to advance the goal of racial justice.

The above summary sketches some of the basic claims of CRT. It doesn't address other important tenets and commitments of the

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158. James R. Barrett & David Roediger, *How White People Became White*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* 401, 403 (Richard Delgado & Jean Stefancic eds. 1996).

159. *Id.*

160. *Id.*

161. See BRIDGES, *supra* note 132, at 9–15.

discipline, for example, methodologies, including storytelling,<sup>162</sup> or the importance of centering the voices of people of color.<sup>163</sup>

Critiques of CRT have emerged, even among those otherwise sympathetic to the fundamental project. Early critiques, for example, argued that that CRT focused on the Black experience and centered on a Black/white binary. In doing so, it failed to capture the racial subordination of non-Black people of color. Thus, other identity-focused critiques have since emerged that center the experiences of other marginalized groups, including APACrit, LatCrit, ClassCrit, DisCrit, QueerCrit, and TribalCrit.<sup>164</sup>

#### IV. THE CAMPAIGN AGAINST RACE EDUCATION THROUGH THE LENS OF CRT

How might CRT contribute to our understanding of the campaign against race education? We can broadly view efforts to resist the racial justice movement as the sort of race-specific retrenchment and backlash first noted by Crenshaw in 1988 in her 1988 *Harvard Law Review* article.<sup>165</sup> More than three decades later, asked in an interview to discuss the campaign against CRT, Crenshaw noted that it was consistent with the historical pattern: “Reform itself creates its own backlash, which reconstitutes the problem. . . .”<sup>166</sup>

This Part describes the most significant instances of the race reform/retrenchment dialectic over the course of U.S. history. It shows that the arguments against reform have been remarkably consistent since the mid-twentieth century. These arguments are grounded on the mistaken belief that a handful of legal pronouncements—that all races should receive equal treatment—could dismantle an entire social structure built upon centuries of racial oppression and exploitation. This Part next identifies through a CRT lens the dominant tropes of the current retrenchment.

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162. Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 UNIV. ILL. L. REV. 893, 899 (“Critical race theory writing and lecturing is characterized by frequent use of the first person, storytelling, narrative, allegory, interdisciplinary treatment of law, and the unapologetic use of creativity.”).

163. *Id.* at 898 ([C]ritical race theory is a body of legal scholarship . . . a majority of whose members are both existentially people of color and ideologically committed to the struggle against racism.”). For an early, sustained critique of CRT, see Randall L. Kennedy, *Racial Critiques of Legal Academia*, 192 HARV. L. REV. 1745, 1745–1819 (1989).

164. BRIDGES, *supra* note 132, at 101.

165. Crenshaw, *supra* note 149, at 1331.

166. Wallace-Wells, *supra* note 64.

A. *The History and Politics of Retrenchment*

Critical race scholars have pointed out the halting nature of racial progress over the course of U.S. history. Indeed, critical race scholar Devon Carbado identifies as one of CRT's "core ideas" its rejection of the "narrative that characterizes mainstream civil rights discourse—namely, that the history of race relations in the United States is a history of linear uplift and improvement."<sup>167</sup> Instead, throughout the nation's history, racial progress has almost invariably been followed by racial retrenchment:

The end of legalized slavery and passage of the Reconstruction Amendments, for example, were major reforms. The retrenchment that limited their potential (and reversed some of the progress they had enabled) were the enactment of the Black Codes and the inception of legalized Jim Crow segregation.<sup>168</sup> The U.S. Supreme Court's decision in *Brown* was a reform that signaled the end of legal Jim Crow.<sup>169</sup> The retrenchment was the Supreme Court's own retreat in *Brown II*. Its "with all deliberate speed" decree essentially sanctioned resistance and delayed the actual integration of schools for up to a decade.<sup>170</sup> A "massive resistance" campaign shut down public schools and used taxpayer dollars to finance segregated white private schools and ensured that for years after *Brown*, many schools remained segregated.<sup>171</sup>

The passage of the landmark Civil Rights Act of 1964 and Voting Rights Act of 1965 were far-reaching reforms that promised equal treatment in accommodations, employment, education, and the franchise. The effects of the resulting retrenchment—the so-called "Southern Strategy" that included intentionally harnessing racial grievances to gain political support, the War on Drugs, and the

167. Carbado, *supra* note 18, at 1607.

168. *Id.* at 1607–08.

169. *Brown v. Board of Ed. I*, 347 U.S. 483, 489–96 (1954).

170. *Brown v. Board of Ed. II*, 349 U.S. 294, 301 (1955).

171. *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 218, 221–23, 233–34 (1964). In Virginia, for example, the General Assembly created a program of "tuition grants" to enable students to attend a private school of their choice, thus providing state support for all-white schools founded to evade integrating public schools. *The Closing of Prince Edward County's Schools*, VA. MUSEUM HIST. & CULTURE, <https://virginiahistory.org/learn/historical-book/chapter/closing-prince-edward-countys-schools> [<https://perma.cc/5JZR-8UY6>] (last visited Nov. 4, 2021). Prince Edward County closed all public schools, and the only schools available in the County were private academies funded by the state tuition grants and County tax credits. *See id.* Not until the Supreme Court's 1964 decision in *Griffin v. County School Board of Prince Edward County* holding that the County's actions were unconstitutional did the County comply with the mandate of *Brown. Id.*

political and legal repurposing of the principle of “color-blindness” to block race-conscious remediation efforts—continue into the present.<sup>172</sup> As a result, current antidiscrimination law displays hostility to race-conscious remediation as a tool to ameliorate persistent racial inequity.

While the racial justice movement that began in spring 2020 has not (yet) led to political or legal action on the scale of the Civil Rights Act or *Brown*, it did rapidly focus national attention on matters of race. Police brutality, systemic racism, and unconscious bias became part of mainstream discourse. People sought to become educated on matters of race. Books like Ibram X. Kendi’s *How to Be an Antiracist* and Robin DiAngelo’s *White Fragility* became national bestsellers. The retrenchment has responded accordingly—taking aim at efforts to better educate Americans on matters of race.

### *B. The Tropes of Retrenchment*

This section analyzes, through the lens of CRT, the dominant tropes of Retrenchment: denial of systemic racism; white innocence; formal equality and color-blindness; race consciousness as racism; and the belief that the founding ideal of the United States is equality, not white supremacy.

#### *1. Systemic Racism Denial*

Some dispute the existence of systemic racism. Some might interpret “systemic” racism to refer to “widespread individual” racism. Recent comments suggest this interpretation:

Acting secretary of Homeland Security Chad Wolf stated, “I do not think that we have a systemic racism problem with law enforcement officers across this country.”<sup>173</sup> Attorney General William Barr said, “I think there’s racism in the United States still but I don’t think that the law enforcement system is systemically racist.”<sup>174</sup> National security adviser Robert O’Brien stated in an interview, “I don’t think there’s systemic racism. I think 99.9% of our law enforcement officers are great Americans.”<sup>175</sup> O’Brien then conceded that there

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172. See Carbado, *supra* note 18, at 1607–08; James Boyd, *Nixon’s Southern Strategy: It’s All in the Charts*, N.Y. TIMES (May 17, 1970), at 215.

173. Adam Kelsey, *Acting DHS Secretary Claims No ‘Systemic Racism Problem’ in Law Enforcement, Drawing Rebuke from Potential VP Candidate Demings*, ABC NEWS (June 7, 2020, 10:33 AM), <https://abcnews.go.com/Politics/acting-dhs-secretary-claims-systemic-racism-problem-law/story?id=71110601> [<https://perma.cc/L4R8-GSQZ>].

174. Haltiwanger, *supra* note 39.

175. Devan Cole & Sarah Westwood, *National Security Adviser: ‘I Don’t Think There’s*



are “some bad apples in there. There are some bad cops who are racist. There are cops that maybe don’t have the right straining. [sic]”<sup>176</sup>

These understandings are related to (though not identical to) the suggestion that white people are unaware of the embedded nature of racism in society. In other words, “while most whites see racism as an occasional unfortunate interruption to the institutional and individual commitments to the values of equal opportunity and equal treatment, most blacks see racism as a daily routine by which the lives of black people are systematically and institutionally devalued.”<sup>177</sup>

One of the core insights of CRT is that the institutions across U.S. society benefit white people at the expense of people of color. And these institutions can do so even if those that operate within them do not themselves harbor racist intent. In other words, there can be racism even in the absence of racists.

To give just one example of how systemic racism operates, let us turn to the racial wealth gap. The typical white family has a net worth of just over \$170 thousand.<sup>178</sup> The typical Black family has a net worth of \$17 thousand.<sup>179</sup> What explains the disparity? There is no single factor, but instead a patchwork of factors play a role in creating the wealth gap.

After emancipation, most Black workers remained in the South, working as sharecroppers, agricultural laborers, or domestic servants.<sup>180</sup> Industrialization and labor shortages during World War I lured them North in what would be called the “Great Migration.”<sup>181</sup> Despite fitful efforts by the newly established Labor Department, Black workers suffered discrimination and unequal pay.<sup>182</sup> The 1938 Fair Labor Standards Act did little to improve conditions for women and minority workers, as it excluded from coverage domestic servants and agricultural laborers—the occupations in which Black men and women were concentrated.<sup>183</sup> Local administrators of federal programs

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*Systemic Racism’ in US Police Forces*, CNN (May 31, 2020, 11:39 AM), <https://www.cnn.com/2020/05/31/politics/robert-obrien-systemic-racism-george-floyd-cnntv/index.html> [<https://perma.cc/B7LQ-THYG>].

176. *Id.*

177. Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2255 (1993).

178. Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap> [<https://perma.cc/2FDK-C22F>].

179. McIntosh et al., *supra* note 178.

180. Eileen Boris & Michael Honey, *Gender, Race, and the Policies of the Labor Department*, MONTHLY LAB. REV. 26, 26 (Feb. 1988), <https://www.bls.gov/opub/mlr/1988/02/art4full.pdf> [<https://perma.cc/3VUA-RZ2S>].

181. *Id.*

182. *Id.* at 27–28. Black women, too, “earned less than white women and worked longer hours at the least desirable occupations.” *Id.* at 27.

183. *Id.* at 28.

discriminated against Black workers (and Chicanos in the Southwest), hiring whites before Blacks, assigning Black workers to the lowest-level jobs, supporting wage differentials, and often excluding Black and Chicanos from work altogether.<sup>184</sup>

The 1944 GI Bill helped provide government-guaranteed housing loans to buy homes in the newly developed suburbs.<sup>185</sup> Those homes rose in value over the decades, creating significant household wealth for white families during the postwar era.<sup>186</sup> Black veterans, however, were unable to utilize the housing provisions of the GI Bill; banks generally refused to make loans for mortgages in black neighborhoods, and the Fair Housing Administration refused to subsidize loans in those same neighborhoods.<sup>187</sup> Deed covenants and informal racism excluded Black families from the suburbs.<sup>188</sup> While white families moved to the suburbs (in part to avoid living in mixed-race neighborhoods), Black households became increasingly concentrated in city centers.<sup>189</sup>

The legacy of this history contributes to wealth inequality today because unequal monetary inheritances make up a great deal of current wealth, passed down generation to generation.<sup>190</sup> Moreover, despite the passage of the 1968 Fair Housing Act outlawing racial discrimination in the sale or rental of housing, statistical studies demonstrate that inequality in housing persists.<sup>191</sup> Black and Latine<sup>192</sup>

184. *Id.*

185. David Callahan, *How the GI Bill Left Out African Americans*, DEMOS BLOG (Nov. 11, 2013), <https://www.demos.org/blog/how-gi-bill-left-out-african-americans> [<https://perma.cc/P5G6-XCYN>].

186. *Id.*

187. *Id.*; Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/3QX5-VQPJ>].

188. Bradley L. Hardy, Trevon D. Logan & John Parman, *The Historical Role of Race and Policy for Regional Inequality*, THE HAMILTON PROJECT—BROOKINGS 8 (Sept. 2018), [https://www.hamiltonproject.org/assets/files/PBP\\_HardyLoganParman\\_1009.pdf](https://www.hamiltonproject.org/assets/files/PBP_HardyLoganParman_1009.pdf) [<https://perma.cc/3VEL-WWWZ>].

189. *Id.* As white, wealthier households moved away from urban centers and school districts, the local tax revenue moved away as well. *Id.* The resulting inequality in school quality across districts—the result of local, decentralized school funding systems—contributed to racial inequality in economic opportunity, in another example of race-neutral policy generating racial inequality. *Id.*

190. McIntosh et al., *supra* note 178.

191. Drew Desilver & Kristen Bialik, *Blacks and Hispanics Face Extra Challenges in Getting Home Loans*, PEW RSCH. CTR. (Jan. 10, 2017), <https://www.pewresearch.org/fact-tank/2017/01/10/blacks-and-hispanics-face-extra-challenges-in-getting-home-loans> [<https://perma.cc/MLP7-C7K8>].

192. Latine is used as a non-gendered, more inclusive term to describe communities of Latin American descent. Latine avoids an “English-language modification to Spanish-language grammar.” See Jose A. Del Real, *Latinx’ Hasn’t Even Caught on Among Latinos. It Never Will.*, WASH. POST. (Dec. 18, 2020, 10:31 AM), <https://www.washingtonpost.com>

households are far less likely to own their own homes than are white households (41.3% and 47%, respectively, compared to 71.9% for whites).<sup>193</sup> Black and Latine homebuyers have a more difficult time getting approved for conventional mortgages, and tend to pay higher interest rates.<sup>194</sup> And studies of resumes identical with respect to qualifications but differing in terms of the applicants' perceived race revealed that white job applicants are more likely to be called for interviews than equally qualified Black applicants.<sup>195</sup>

The above recounting demonstrates that no single act or racist actor can account for the racial wealth gap. It nonetheless exists and persists.

## 2. *White Innocence*

Notable among the statutes enacted seek to prevent the teaching “concepts” that anyone should feel “discomfort, guilt, anguish, or any other form of psychological distress on account of the individual’s race or sex.”<sup>196</sup> What explains the perceived need to include this provision in legislation?

The author of the Texas anti-CRT statute, State Representative Steve Toth, said that the bill responded to parents’ complaints that students were being “indoctrinated.”<sup>197</sup> But it also responded to how they were being made to *feel*. “We’ve heard, ‘You should feel guilty for what [white people have] done.’ We have heard, ‘You’re people of privilege, and you should feel guilty for that privilege.’”<sup>198</sup> It was unclear from the context who was communicating those messages, as well as who was hearing them.

First, race talk makes many uncomfortable in large part because prior to 2020 systemic racism was not included in the mainstream, white-dominated national discussion. Because whiteness is the norm, white people tend not to think of themselves in racial terms but instead as individuals who occupy a “racelessness,” being aware of their race only rarely. Second, some white people feel personally—and unfairly—accused of being guilty of various claims. The enacted statutes, as well as statements by opponents of race education, focus on what critical scholars of race have termed “white innocence.”<sup>199</sup>

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/outlook/latinx-latinos-unpopular-gender-term/2020/12/18/bf177c5c-3b41-11eb-9276-ae0ca72729be\_story.html [https://perma.cc/R7B7-TPVR].

193. Desilver & Bialik, *supra* note 191.

194. *Id.*

195. Hardy et al., *supra* note 188, at 10.

196. Tex. Educ. Code Ann. § 28.002(h-3)(4)(B)(vii) (West).

197. Zou & Kao, *supra* note 110.

198. *Id.*

199. David Simson, *Whiteness as Innocence*, 96 DENVER L. REV. 635, 644 (2019).

In addition to skepticism about the claims of the racial justice movement, many people resented that what they felt was a hyper-focus on race-related issues and recurring conversations about race and racism. One company held a virtual town hall for employees to discuss racial inequality and the aftermath of Floyd's killing, for example, and some workers expressed frustration using a chat feature during the meeting.<sup>200</sup> One employee said that “[a]s a non-minority, all this talk makes me feel like I am supposed to feel guilty of my skin color. I feel like I should let someone less qualified fill my position.”<sup>201</sup> The employee concluded, apparently without irony, that “[i]t appears that I am a prisoner of my birth.”<sup>202</sup>

Another criticized the company's efforts to increase diversity in hiring, contending that “giving any racial group privilege over others in a zero-sum game would not get any support,” and inviting others to share their “thoughts on hurting others while giving privileges with the rosy name called diversity?”<sup>203</sup>

There are arguably three types of white innocence: (1) innocence of the charge that they have received unearned benefits by virtue of being white—in other words, that they are the beneficiaries of “white privilege”; (2) that they are innocent of having participated in the nation's history of racial oppression and discrimination and therefore not responsible for the disparate outcomes that history might have caused;<sup>204</sup> and (3) that they themselves are innocent of charges that they harbor racist sentiments, either consciously or unconsciously.<sup>205</sup>

“White privilege” refers to both psychic and material benefits statistically associated with being white.<sup>206</sup> Material benefits refers to the tangible ways in which white people are simply more likely to do better—to have better life outcomes—than people of color.

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200. Maxwell Tani, *LinkedIn Staffers Go All-Lives-Matter During 'Dumpster Fire' Meeting on Racism*, DAILY BEAST (last updated June 5, 2020 3:54 AM), <https://www.the-dailybeast.com/linkedin-staffers-go-all-lives-matter-during-dumpster-fire-meeting-on-racism> [<https://perma.cc/3XRL-H729>].

201. *Id.*

202. *Id.*

203. *Id.*

204. Simson, *supra* note 199, at 644. Simson groups the second and third types of innocence claims together, since they both connote freedom from responsibility—“not being an active participant in the country's widespread and ongoing history of racial discrimination, therefore not sharing responsibility for its individual outcomes.” *Id.* I have separated them, since they tend to serve different purposes. The claim of being innocent of responsibility for past discrimination, for example, has been used to argue against remedial measures like reparations or affirmative action. The claim of being innocent of racist sentiments or actions has been used to reject implications of either intentional or unconscious/unexamined racism.

205. *Id.* at 644–45.

206. BRIDGES, *supra* note 132, at 198–200.

Thus, compared to whites, Black people have “less education, less wealth, poorer health and shorter lifespans.”<sup>207</sup> Disparities exist between whites and non-Black people of color as well:

African-Americans, Hispanics, and Latinx people are more likely than white Americans to be killed by police while unarmed; more likely to be stopped, searched, arrested and incarcerated; less likely to be hired by employers; less likely to be educated by prestigious institutions; and less likely to be protected by adequate healthcare.<sup>208</sup>

Many white people claim innocence of the charge that they benefit from “white privilege.” Some might view that they, or white people in general, legitimately possess greater resources and privileges by virtue of a well-functioning, competitive system. For others, this may reflect a misunderstanding of the term. On its face, “privilege” might suggest wealth or high status, or ease.<sup>209</sup> Many white people, of course, do not feel that their lives are easy, or they might observe that there are people of color who are more educated or better off than they are.

The idea of racial privilege, however, does not suggest that any individual white person will necessarily benefit from structural advantages that are embedded in our social institutions or that any individual white person has an easy, obstacle-free life. Instead, it suggests that they are more likely to benefit from societal advantages and more likely to have better life outcomes than people of color.

The critical concept of white privilege also includes a psychic benefit that white people derive by virtue of their race. Whiteness is the societal norm; as Khiara Bridges describes, it “is the site from which all things are measured and from which everything else deviates.”<sup>210</sup> Students learn the nation’s history, for example, from a perspective that centers the experiences and accomplishments of white people. Peggy McIntosh, whose essay popularized the term “white privilege,” wrote that “[w]hen I am told about our national heritage . . . I am shown that people of my color made it what it is.”<sup>211</sup>

207. *The Race Gap: Black/White*, REUTERS GRAPHICS, <https://graphics.reuters.com/GLOBAL-RACE/USA/nmopajawjva/#0> [<https://perma.cc/LDY4-2KMS>] (last visited Nov. 4, 2021).

208. Jeremy Dunham & Holly Lawford-Smith, *Offsetting Race Privilege*, 11 J. ETHICS & SOC. PHIL. 1, 2 (2017).

209. *Privilege*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/privilege> [<https://perma.cc/9PNB-26N4>] (last visited Nov. 4, 2021). Merriam-Webster defines privilege as “a peculiar benefit, advantage, or favor, . . . especially . . . attached specifically to a position or an office” or “to accord a higher value or superior position to.” *Id.*

210. BRIDGES, *supra* note 132, at 197.

211. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM MAG. (July/Aug. 1989), at 10.

Indeed, characteristically white physical features establish the norm in the professional workplace. Braids, Afros, or dreadlocks—styles that differ from the white norm—have been viewed as unprofessional and prohibited in workplaces.<sup>212</sup>

UCLA Psychologist Tiffany N. Brannon and coauthors observe that efforts to foster inclusion among marginalized group members can be perceived as threatening to dominant group members and can inspire backlash. They identified three sources of backlash: “(1) perceived or actual restriction of independence or autonomy, (2) preference for the status quo and colorblindness, and (3) beliefs that racial and other social equalities have been reached and thus persistent inequalities are not present or are just (reflecting individual factors and not structural problems).”<sup>213</sup>

### 3. *Formal Equality and Color-Blindness*

*Brown* and subsequently enacted civil rights laws eliminated formal barriers to equality.<sup>214</sup> While the most explicit barriers, however, the doctrines of formal equality and color-blindness ironically erected new ones. Indeed, the resulting “race neutrality of the legal system creates the illusion that racism is no longer the primary factor responsible for the condition of the Black underclass.”<sup>215</sup>

Despite the existence of racial disparities across nearly all aspects of social life, formal equality has enabled those who oppose efforts to achieve the goal of substantive equality to argue that the goal has already been reached. Thus, the existence of formal equality enabled Missouri State Senator Rick Brattin, in sponsoring a state bill to prohibit educating about race and racism, to ask with apparent incredulity, “What inequities do we deal with today? Everybody has equal opportunity.”<sup>216</sup>

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212. See Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1086 (2010); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 366 (1991). Carbado discusses backlash to race reform efforts and also examines research in the social sciences on DEI efforts in particular. Carbado & Roithmayr, *supra* note 155, at 158. To be clear, social science research has been used in the past to buttress claims of racial inferiority, leading some critical theorists to retain skepticism of sorts of “disciplinary methodology that purports to describe social facts about race as objective, politically neutral, and unmediated by contemporary social projects.” *Id.*

213. Tiffany N. Brannon, Evelyn R. Carter, Lisel Alice Murdock-Perriera & Gerald D. Higgenbotham, *From Backlash to Inclusion for All: Instituting Diversity Efforts to Maximize Benefits Across Group Lines*, 12 SOC. ISSUES & POLY REV. 57, 66 (2018).

214. Crenshaw, *supra* note 149, at 1378.

215. *Id.* at 1383.

216. Sarah Schwartz, *8 States Debate Bills to Restrict How Teachers Discuss Racism*,

Formal equality and the doctrine of color-blindness in turn permit those who resist reform to go further, advancing the claim that any race consciousness is pernicious racism.

Justice John Marshall Harlan articulated what was an aspirational ideal of color-blindness in his lone dissent in *Plessy v. Ferguson*, the case in which the U.S. Supreme Court announced the doctrine of “separate but equal” that would rationalize decades of Jim Crow segregation and racial oppression.<sup>217</sup> Harlan declared that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>218</sup> Civil Rights activists in the twentieth century also championed the ideal of color-blindness to challenge the pervasive race-based degradation sanctioned by *Plessy*. In his 1947 brief challenging the exclusion of Black students from Oklahoma’s law schools, Thurgood Marshall, as counsel for the NAACP Legal Defense and Educational Fund, echoed Harlan’s dissent, arguing that “[c]lassifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws.”<sup>219</sup>

The Supreme Court rejected *Plessy*’s “separate but equal” doctrine in *Brown v. Board of Education*, which held unconstitutional racial segregation in public education.<sup>220</sup> Professor Reva Siegel explains that many today embrace as the core tenet of *Brown* the “anticlassification” principle—“the constitutional principle that government may not classify on the basis of race.”<sup>221</sup> Siegel explains that modern equal protection law post-*Brown* has largely expressed an anticlassification commitment.<sup>222</sup> That commitment may also have salience for those who value individualism as the fundamental value of the equal protection tradition.

Neither *Brown* nor the adoption of formal equality, however, led to the dismantling of segregation, or the achievement of substantive equality. Instead, as critical race theorist Ian Haney López notes, “[s]egregation readily continued in the presence of formal racial neutrality.”<sup>223</sup>

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Sexism, EDUCATION WEEK (Apr. 15, 2021), <https://www.edweek.org/policy-politics/8-states-debate-bills-to-restrict-how-teachers-discuss-racism-sexism/2021/04> [<https://perma.cc/JC5C-VEBB>].

217. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

218. *Id.*

219. Brief for Petitioner at 27, *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631 (1948) (No. 369), 1947 WL.

220. *Brown v. Board of Ed.*, 347 U.S. 483, 494–95 (1954).

221. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1470 (2004).

222. *Id.*

223. López, *supra* note 157, at 810.

How did segregation continue despite the legal invalidation of Jim Crow? As López explains, “colorblindness as a remedy promised tepid change, for it required only an end to explicitly segregationist laws, not actual remediation of the harms wrought by racial oppression.”<sup>224</sup> A South Carolina court took note of the limits of color-blindness a year after the Supreme Court decided *Brown*, reasoning that “[t]he Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.”<sup>225</sup> Thus, writes López, “the opponents of integration became the new patrons of colorblindness.”<sup>226</sup>

The Supreme Court initially rejected states’ efforts to limit the reach of *Brown*. North Carolina in 1969, for example, passed a law providing that “[n]o student shall be assigned or compelled to attend any school on account of race, creed, color or national origin.”<sup>227</sup> The law sought, of course, to prevent the assigning of students to schools so as to achieve racial integration. The Supreme Court unanimously struck down the law, reasoning that

[T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be ‘color blind’; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education* . . . To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.<sup>228</sup>

Thus, it was appropriate—and necessary—to take race into account in order to remediate the racial harm of segregation and achieve racial integration. Nonetheless, the use of color-blindness had shifted, in the words of López, “from emancipatory to reactionary.”<sup>229</sup>

Reliance on color-blindness as a tool for social progress waned. Congress passed a number of significant civil right acts in the 1960s that took aim at racial hierarchies entrenched in education, the workplace, and housing.<sup>230</sup>

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224. *Id.*

225. *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (*per curiam*).

226. López, *supra* note 157, at 810.

227. *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 44 n.1 (1971) (quoting *N.C. Gen. Stat* § 115-176.1 (Supp. 1969)).

228. *Id.* at 45–46; *see also* *McDaniel v. Barresi*, 402 U.S. 39, 41–42 (1971) (holding unanimously, like the Court in *N.C. State Bd. of Educ. v. Swann*, that a school board could take race into account in an effort to achieve racial balance).

229. López, *supra* note 157, at 811.

230. *Id.* at 813.



Those with an interest in advancing racial equality began to see the need for race-conscious methods. Thus, in 1978, Justice Thurgood Marshall urged the Court, in *Regents of the Univ. of Cal. v. Bakke*, its first affirmative action case, to reject the color-blindness he had once advocated: “It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.”<sup>231</sup>

In the years that followed, the composition of the Court changed, and it embraced the principle of color-blindness. Today, the principle of color-blindness renders presumptively invalid any consideration of race.

#### 4. *Race Consciousness as Racism*

The political and legal doctrine of color-blindness and race consciousness as racism have taken hold in the popular imagination. A conservative Colorado woman interviewed as part of a focus group in the summer of 2020 stated, for example, that “[W]hen you start talking ‘diversity,’ you’re talking about racism. And we keep saying we have systemic racism . . . And the reason we have systemic racism in this country is because we’re seeing it again. We’re seeing color.”<sup>232</sup>

As Justice Clarence Thomas wrote in 1995,

*Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race. . . . At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic or religious groups. *It is for this reason that we must subject all racial classifications to the strictest of scrutiny.*<sup>233</sup>

Republican legislators, too, assert that a commitment to the ideal of color-blindness justifies the statutory prohibition of race-related education. State Representative Jake Hoffman, one of the

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231. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 401 (1978) (Marshall, J., concurring in part and dissenting in part).

232. Patrick Healy, *14 Trump Voters on the Legacy of George Floyd*, N.Y. TIMES (May 21, 2021), <https://www.nytimes.com/2021/05/21/opinion/conservatives-race-blm-floyd.html> [<https://perma.cc/T244-29VE>].

233. *Missouri v. Jenkins*, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) (emphasis added).

sponsors of Arizona’s bill, claimed to “stand[] with Martin Luther King Jr.’s proclamation that people should be judged by the content of their character, not the color of their skin.”<sup>234</sup> In other words, color-blindness was any recognition of race inconsistent with Constitutional ideas of equality. As Justice John Roberts would write in an opinion invalidating Seattle’s efforts to integrate schools that had become segregated due to residential segregation rather than state-ordered *de jure*, state-imposed segregation, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>235</sup>

CRT helps explain that color-blindness, while perhaps an intuitively attractive ideal, ignores the present racial inequities wrought by centuries of race-based subjugation.<sup>236</sup> López also manifests an example of the use of “color blindness” in law and insistence of facially race-neutral practices to prevent people of color from advancing in their quest to attain equality. After centuries in which racial awareness and racially explicit policies effectively locked people of color into a racial caste system, clinging to “race neutrality” merely locks the racial order in place.<sup>237</sup>

### 5. U.S. Founding Ideals: Equality, Not White Supremacy

Statutes have adopted provisions from the template legislation that prohibit teaching that “with respect to their relationship to American values, slavery and racism are anything other than deviations from . . . the authentic founding principles of the United States, which include liberty and equality.”<sup>238</sup> Forbidding teaching that America is a racist country points to ideals of the Declaration of Independence as if they form the foundation of the nation. Instead, Devon Carbado and Rachel Moran explain that

[t]he drafters of the Constitution took a sober second look at the rhetoric of radical egalitarianism in the Declaration, and they

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234. News Release, Office of the Governor Doug Ducey, *Governor Ducey, Legislature Take Strong Action to Stop Critical Race Theory* (July 9, 2021), <https://azgovernor.gov/governor/news/2021/07/governor-ducey-legislature-take-strong-action-stop-critical-race-theory> [<https://perma.cc/ZBK8-H75A>].

235. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

236. López, *supra* note 157, at 826–27.

237. BRIDGES, *supra* 132, at 11.

238. Stanley Kurtz, *The Partisanship Out of Civics Act*, NATL. ASSN. OF SCHOLARS (Feb. 15, 2021), <https://www.nas.org/blogs/article/the-partisanship-out-of-civics-act> [<https://perma.cc/EE3U-6S9S>].

blinked. The adoption of the Constitution in 1787 and its ratification one year later depended on a compromise, one that integrated slavery into the very fabric of American democracy.<sup>239</sup>

Art. I, § 9 carved out a very specific exception to this power. Although Congress otherwise had the power to regulate commerce, Section 9 prohibited Congress from enacting any law to ban the importation of enslaved people until 1808, some 20 years after the Constitution's ratification.<sup>240</sup> So Congress was constitutionally prohibited from interfering with the slave trade.<sup>241</sup> A second example of our Constitution's protecting the institution of slavery appears in the Fugitive Slave Clause, which provided that an enslaved person escaping into a state where slavery was illegal—a free state—would not be automatically freed upon entering that state.<sup>242</sup> Instead, slave-owners' property rights in their human property extended across state borders.<sup>243</sup>

#### CONCLUSION

This Article has endeavored to provide historical and ideological context in which to situate the seemingly exceptional. It shows that reaction is not only unexceptional but was instead predictable. And while the reaction purports to prevent American workers and schoolchildren from being indoctrinated into the unhinged claims of a radical, divisive academic theory, it of course does no such thing. Instead, the retrenchment comprises more basic aims: to stop all talk to the racist aspects of U.S. history and its modern-day legacy.

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239. Devon W. Carbado & Rachel F. Moran, *Introduction*, in RACE LAW STORIES 6 (Rachel F. Moran & Devon W. Carbado eds., 2008).

240. U.S. CONST. Art. I, § 9, cl. 1.

241. U.S. CONST. Art. I, § 9, cl. 1.

242. U.S. CONST. Art. IV, § 2, cl. 3.

243. U.S. CONST. Art. IV, § 2, cl. 3.