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Deny, Defund, and Divert: The Law and American Miseducation

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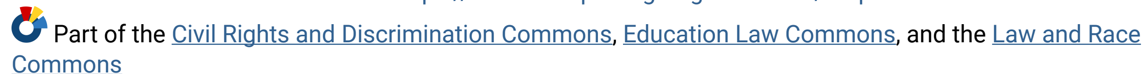

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Deny, Defund, and Divert: The Law and American Miseducation

JANEL A. GEORGE*

Racial inequality in public education is not inevitable, it is constructed. The law has been elemental in crafting racial inequality in public education. In this Article, I posit that lawmakers seeking to entrench racial inequality in and through public education do so by enacting laws designed to deny *Black children access to education,* defund *public schools disproportionately attended by Black children, and* divert *many Black educators away from the public education system. This Article draws a through-line between laws enacted to prevent desegregation in the aftermath of the* Brown v. Board of Education *ruling—an era known as massive resistance—and recently introduced laws that seek to exclude the nation's history of racial inequality and its enduring effects from curriculum. While contemporary laws are cloaked in colorblind language that makes them appear racially neutral, at bottom, they are predicated on the same anti-Black sentiment and white supremacy of Slave Codes, Black Codes, and Jim Crow laws.*

This Article builds upon the critical race theory concept of race, reform, and retrenchment by asserting that education retrenchment laws enacted following periods of racial progress can be characterized by the deny, defund, and divert framework. This framework helps us to understand how lawmakers impose racial inequality in and through education, and it can also inform strategies to thwart such laws.

Racial inequality in education is not intractable. Deny, defund, and divert laws can be thwarted by race-conscious laws that seek to promote culturally inclusive education, to strategically fund under-resourced schools, and to rebuild the pipeline of Black educators. Racial inequality cannot be cured solely through reliance on formal equality; instead, laws

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entrenching racial inequality and white supremacy must be affirmatively dismantled.

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INTRODUCTION

"The paradox of education is precisely this—that as one begins to become conscious one begins to examine the society in which he is being educated."[1]

Like the U.S. public education system, the U.S. legal system poses a paradox. The law can serve a legitimating function for policies that operate to emancipate historically oppressed people, as well as for policies that further entrench oppression and racial inequality. The same admonition against reliance upon racial classification denounced in the seminal case of *Brown v. Board of Education*[2] is paradoxically being used today by lawmakers and jurists to denounce the mention of race in schools and to erase the very memory of massive resistance that followed *Brown*'s condemnation of segregated education. This Article analyzes this paradox and explores how the law has constructed racial inequality in public education by examining two pivotal touchpoints in time: the aftermath of the 1954 *Brown* ruling—a period of southern defiance to school desegregation known as massive resistance[3]—and the current political moment characterized by the passage of state and local laws seeking to obscure the nation's history of racial inequality.

This Article develops a new framework to categorize laws designed to entrench racial inequality in education as those that seek to: (1) *deny* Black children access to quality education and curriculum; (2) *defund* public schools attended predominantly by Black children and funnel money into segregated all-white schools; and/or (3) *divert* Black educators away from the public education system. Laws may operate to perform one, two, or all three functions, but regardless of how many of these consistent features are present, the through-line from massive resistance to present-day is the same.

This Article's assertions rely first upon the recognition by critical race scholars of the vital role that the law plays in constructing race[4] and the recognition that, while the iterations of education laws that entrench racial inequality have changed over time, at bottom they are all predicated upon the same project of white supremacy that reifies racial inequality through education.[5]

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1. JAMES BALDWIN, *A Talk to Teachers*, *in* THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948–1985, at 325, 326 (1985).

2. 347 U.S. 483 (1954).

3. The term "massive resistance" has been attributed to Virginia Senator Harry F. Byrd whose influential group of followers (known as the Byrd Machine) helped to set the policymaking example in the South. *See* KRISTEN GREEN, SOMETHING MUST BE DONE ABOUT PRINCE EDWARD COUNTY: A FAMILY, A VIRGINIA TOWN, A CIVIL RIGHTS BATTLE 59–60 (2015); Mark Golub, *Remembering Massive Resistance to School Desegregation*, 31 LAW & HIST. REV. 491, 516 (2013).

4. *See* Erika K. Wilson, *The Legal Foundations of White Supremacy*, DEPAUL J. FOR SOC. JUST., Aug. 2018, at 1, 2–3 ("American law has historically played a vital role in constructing white supremacy.").

5. This Article uses the definition of white supremacy adopted by scholar Erika K. Wilson: "A political, economic and cultural system in which whites overwhelmingly control power and material resources, and in which white dominance and non-white subordination exists across a broad array of institutions and social settings." *Id.* at 3 (quoting Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989)). Wilson has also noted that "this definition of white supremacy focuses primarily on the institutional arrangements that underlie white supremacy and only secondarily on individual race-based animus. More importantly,

This Article adds to the Critical Race Theory (CRT) scholarship of the moment by building upon scholar Kimberlé Crenshaw's concept of race, reform, and retrenchment[6] to apply this new framework by which to characterize state and local education laws designed to maintain racial stratification in American society. Under this concept, moments of racial progress are closely followed by periods of backlash in which lawmakers seek to reassert a status quo of racial stratification that relegates Black people to the bottom tiers. The concept of race, reform, and retrenchment also recognizes that the Civil Rights Movement's reliance upon the legitimacy of the law to secure formal equality for Black people has its limitations.[7] In particular, civil rights progress has been eroded by lawmakers who are distorting the law's admonition against reliance upon race to discriminate to decry any recognition of historic or current racial inequality.[8] They have distorted the *Brown* ruling's condemnation of using race to exclude students from entering schools to argue that race-conscious efforts to remedy past racial discrimination or to promote diversity are themselves impermissible. The Supreme Court's recent ruling limiting race-conscious admissions in higher education[9] reflects a revisionist, colorblind version of American history that denies its discriminatory past and instead seeks to perpetuate the exclusion of Black people under the cover of colorblindness.[10]

I posit that recently enacted laws designed to censor educational content related to race are efforts to reassert a status quo of racial inequality; this is consistent with Crenshaw's assertion that racial inequality serves a somewhat stabilizing force in America.[11] In response to racial progress in the form of increased race-consciousness following the summer of 2020's widespread condemnation of police killings of Black people, many lawmakers have enacted state and local laws designed to quell curricular content or discussions of race, racism, or racial

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it emphasizes the ways in which white supremacy undergirds the way we organize our society, and the ways in which we distribute resources and power." *Id.*

6. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988) (noting that "racism is a central ideological underpinning of American society").

7. *See id.* at 1348 (recognizing that "the elimination of [formal] barriers was meaningful" but also "that deeper institutional changes are required").

8. *See infra* Section II.D.

9. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230–31 (2023).

10. Colorblindness erases the history of legally sanctioned racial distinctions, such as the Slave Codes, the Black Codes, and Jim Crow laws, and the indelible and inequitable impact they have made upon racial hierarchy in America. *See* Wilson, *supra* note 4, at 11 ("Race no longer carries the history of exclusion and denial for Blacks or the corresponding history of inclusion and benefits for whites."). Colorblindness thus denounces any laws recognizing racial difference, equating Jim Crow laws with affirmative action programs while ignoring the "historical asymmetry" attached to those racial classifications. *Id.* at 11–12 ("On this view, both are invidious because they are based on racial categorizations.").

11. Crenshaw, *supra* note 6, at 1362 ("[T]he relatively subordinate status of Blacks serves a stabilizing function in this society. At least one consequence of this 'stabilizing' function is that special attention is directed toward the status of Blacks so that ideological deviations arising out of racial issues do not evade popular detection.").

inequality in America's classrooms. Consistent with Crenshaw's race, reform, and retrenchment model, laws enacted throughout the nation to silence discussions of racial inequality represent retrenchment that follows moments of racial progress. These laws sought to thwart increasing multiracial solidarity and the desire expressed by many Americans to better understand the nation's history of racial inequality.

In addition to relying upon racial reform and retrenchment as a model for describing what is occurring in state and local legislatures around the country, this Article adopts the CRT concept of colorblindness to argue that colorblindness obfuscates the racial animus underlying many of the recently enacted education laws, which serve to deny, defund, and divert educational opportunities for Black children and to entrench racial inequality.[12] Many colorblind laws are cloaked in facially neutral language and make no mention of race, but nonetheless operate to further entrench racial inequality.

These laws may appear neutral, but they nevertheless aim to maintain racial subordination and further reify the status quo of racial inequality in and through public education. The concept of colorblindness as conceived by critical race scholars like Eduardo Bonilla-Silva casts America as a place of equal opportunity, in which the vestiges of past state-sanctioned racial distinction and discrimination are inconsequential to current social or material realities.[13] Colorblindness discounts the pervasive role that racism plays in American society.[14] Although many liberals have embraced the concept of colorblindness as laudable or aspirational, the historic amnesia of colorblindness disregards the profound impacts that legally sanctioned racial distinctions have wreaked on generations of Black people in this nation. The minimization of racism consistent with colorblindness feeds perceptions that something besides racism must be responsible for racially stratified education and feeds stereotypes about Black people having inherent intellectual limitations or lacking work ethic to rationalize their educational outcomes. The liberal embrace of the concept of colorblindness supports a belief that formal equality under the law was achieved with the passage of civil rights legislation. However, this adherence to formal equality disregards the enduring effects of historic and current racial inequality.[15]

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12. *See* Wilson, *supra* note 4, at 4 ("[T]hough overt race-conscious laws that favored whites were eventually dismantled, the law shifted to a purported 'color blind,' and then later to a 'post-racial,' legal regime without affirmatively dismantling the effects of the previous race-conscious system of resource distribution. This shift has allowed white supremacy to not only continue, but to proliferate."). *See generally* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2d ed. 2006) (discussing the central frames of colorblindness and their significance).

13. *See generally* BONILLA-SILVA, *supra* note 12.

14. LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L.J. 2139, 2155 (2023) ("A commitment to colorblindness ignores the social significance of race as a technology of systemic privilege and disadvantage . . . .").

15. *Id.* at 2191–92 ("[T]he proposition that race is only skin deep, an otherwise irrelevant characteristic . . . is an ahistorical understanding of this nation's race and racial subordination. Given the country's extensive history of subordination, 'Black' and 'White' describe more than skin color; they

Ironically, the current moral panic about CRT and lawmakers' urgency to enact laws to silence discussions about race or racial inequality in America's classrooms are consistent with colorblind ideology that vilifies any mention of race. Furthermore, colorblindness applauds performative gestures toward racial justice, such as black squares on social media posted in solidarity with #BlackLivesMatter demonstrations following the killing of George Floyd,[16] while ensuring that no institutional change is made that upsets the racial order.[17] Policymakers do this by censoring or excluding curricular content related to Black Americans or other historically marginalized groups. I posit that the colorblind language cloaking these retrenchment laws, which I assert are crafted with racial animus, seeks to lend them legitimacy and obscures the racial distinctions they reinforce. The concept of colorblindness underscores how the law has permitted persistence of education laws that deny, defund, and divert educational opportunity for Black children.

The deny, defund, and divert framework also demonstrates the adaptive nature of white supremacy, particularly the forms that education laws can take to advance racial inequality. This builds upon scholars Erika K. Wilson and Reva Seigel's assertions that, when challenged, white supremacy morphs itself into legally permissible forms.[18] I argue that this moment of retrenchment has ushered in education laws cloaked in new language that deny, defund, or divert educational opportunity. Gone is the overt discriminatory language of Jim Crow segregation or massive resistance.[19] Contemporary racial retrenchment education laws are camouflaged in liberatory civil rights language but serve the same discriminatory ends as their massive resistance predecessors.[20] Today, laws that denounce efforts to raise awareness of the roles of white supremacy and slavery in shaping the nation, that seek to shield white children from the guilt of the past actions of their forefathers, or that censor curricular content related to race or racism, serve

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represent material and symbolic normative judgments about types of people. In other words, the categories 'Black' and 'White' have racial meaning; they 'describe relations of oppression and unequal power.'" (footnotes omitted) (quoting Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 40 (1991))).

16. *See* McKenzie Jean-Philippe, *How #BlackoutTuesday Can Empower Black Communities*, OPRAH DAILY (June 2, 2020, 1:00 PM), https://www.oprahdaily.com/life/a32742967/what-is-blackout-tuesday/ ("On Tuesday, June 2, social media feeds around the world became flooded with black boxes in solidarity with the national unrest in the wake of the tragic killing of George Floyd.").

17. Wilson, *supra* note 4, at 12 ("[I]n practice, a colorblind legal regime results in the law failing to dismantle white supremacy and instead preserving the racial status quo.").

18. *See* Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2412 (2021) ("[A] shortcoming of the equal protection doctrine is that it fails to account for the adaptive nature of racial discrimination."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) ("[S]tatus-enforcing state action evolves in form as it is contested.").

19. *See* Wilson, *supra* note 4, at 3 ("While America has eliminated overt race-conscious laws that favor whites, the law continues to play a critical role in maintaining white supremacy today.").

20. Crenshaw predicted this occurrence in her seminal piece on racial reform and retrenchment. Crenshaw, *supra* note 6, at 1335 (cautioning that the "civil rights community . . . must come to terms with the fact that antidiscrimination discourse is fundamentally ambiguous and can accommodate conservative as well as liberal views of race and equality").

the same invidious ends as Jim Crow laws, though cast in civil rights rhetoric.[21] Today's culture wars over how and if race and racial inequality can be discussed in America's classrooms are battles about myth, narrative, and storytelling. This is not new, but in fact has deep roots in this nation's commitment to telling a single story about the country, its founding, and its relationship with racial inequality.[22]

This Article focuses on state and local laws because, while federal lawmakers have been complicit in the current deployment of the law to entrench educational inequality,[23] the most compelling battles of the day are being waged in state legislatures and local policymaking bodies. State and local lawmakers are vilifying CRT,[24] banning books written by authors of color and LGBTQIA+ writers,[25] decrying "wokeness,"[26] and proselytizing a heroic myth of America that obscures its history of racial violence and white supremacy.[27] Massive resistance was also a project of southern state and local lawmaking bodies, which demonstrates another connection between the deployment of education retrenchment laws then and now.

This Article focuses specifically on anti-Black education laws because I posit that anti-Blackness is at the root of educational inequality along racial lines in

21. *See id.*

22. "Since January 2021, 44 states have introduced bills or taken other steps that would restrict teaching critical race theory or limit how teachers can discuss racism and sexism . . . ." Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WK. (June 13, 2023), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06. Eighteen states have implemented these prohibitions, either through legislation or other means, such as budget measures, resolutions, executive orders, and administrative rules. *Id.*

23. Examples of federal measures that have been introduced include bills and resolutions that bar teaching about racism in the military, "protect" First Amendment rights of parents at school board meetings, and bar federal service academies from providing training and education based on critical race theory. *See* Combatting Racist Training in the Military Act of 2021, H.R. 3134, 117th Cong. (1st Sess. 2021); Combatting Racist Training in the Military Act of 2021, S. 968, 117th Cong. (1st Sess. 2021) (Senate companion bill); Military Education and Values Act, H.R. 3754, 117th Cong. (1st Sess. 2021); No CRT for Our Military Kids Act, H.R. 4764, 117th Cong. (1st Sess. 2021); Parents Bill of Rights Act, H.R. 5, 118th Cong. (1st Sess. 2023); No CRT Act, H.R. 5328, 117th Cong. (1st Sess. 2021); Protect Equality and Civics Education (PEACE) Act, H.R. 3137, 117th Cong. (1st Sess. 2021); Fight Radicalization of Elementary Education (FREE) Act, H.R. 3157, 117th Cong. (1st Sess. 2021). Additionally, Senators Cotton and Lankford introduced an amendment to "prohibit[] or limit[] Federal funding from being used to promote critical race theory . . . ." S. Amend. 3680, 167 CONG. REC. S6396 (daily ed. Aug. 10, 2021) (amending S. Con. Res. 14, 2021, 117th Cong. (2021)).

24. *See infra* Part III.

25. *See* Ishena Robinson, *Anti-CRT Mania and Book Bans Are the Latest Tactics to Halt Racial Justice*, LEGAL DEF. FUND, https://www.naacpldf.org/critical-race-theory-banned-books/ [https://perma.cc/XAK9-QHG6] (last visited Jan. 19, 2024).

26. *See* Katheryn Russell-Brown, *"The Stop WOKE Act": HB 7, Race, and Florida's 21st Century Anti-Literacy Campaign*, 47 N.Y.U. REV. L. & SOC. CHANGE 225, 227, 239 (2023) (comparing H.B. 7 to anti-literacy Slave Codes and Black Codes enacted during the antebellum era).

27. As James Baldwin has noted, "What passes for identity in America is a series of myths about one's heroic ancestors." BALDWIN, *supra* note 1, at 330.

America.[28] The project of American public education has been one of the miseducation of Black people—a necessary strategy to sustain racial subordination and justify the institution of slavery, subsequent racial oppression, and the imposition of second-class citizenship upon Black people. Therefore, current measures—called "anti-CRT laws," "anti-truth laws," or "gag laws" by some racial justice advocates and litigators[29]—have proliferated throughout the country, effectively chilling efforts to recognize or discuss racial inequality. Today's "anti-CRT" laws are the progeny of the Slave Codes and Black Codes preceding them that function to uphold white supremacy and subordinate Black people.[30]

This Article begins by chronicling the history of how the law has previously been deployed to deny educational opportunities to Black people, including through the passage of Slave Codes and Black Codes. Part I illustrates how some form of massive resistance to the very idea of educating Black people has always existed in this country. While not novel, this history is foundational to understanding racially inequitable education, in part because the law has evolved and transformed over time to allow this inequality to endure, particularly through reliance on colorblindness. Ironically, this is the very history that many state and local lawmakers are currently striving to erase and exclude from public education.

Part II outlines how the deny, defund, and divert framework was deployed and crystallized during massive resistance in defiance of federal school desegregation mandates. Part III draws a through-line between laws solidified during massive resistance and current laws derived from the deny, defund, and divert framework. Although contemporary laws may not appear as invidious as the Jim Crow laws of yesteryear, this Part analyzes how they are just as harmful and function to undermine the educational futures and life outcomes of too many Black children in America.

Finally, Part IV outlines legal interventions to thwart these state and local laws, including improved federal oversight and accountability, strategic federal funding, and improved cooperation between all levels of education governance. The articulation of this deny, defund, and divert framework in this Article not only exposes the primary ways that the law has been deployed to subvert educational opportunity for Black children, but it also informs potential approaches to thwarting attempts to weaponize the law to undermine educational opportunity.

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28. It is not my intention to overlook or to erase the history and impact that racially discriminatory education laws have had (and continue to have) on other people of color, but I seek to expose the anti-Blackness at the root of the education laws that promote inequities. I center anti-Blackness in this Article and I adopt the conception of anti-Blackness as it is theorized by "Afro-pessimist scholars [who] contend that the Black is socially and culturally positioned as *slave*, dispossessed of human agency, desire, and freedom. This is not meant to suggest that Black people are currently enslaved (by whites or by law), but that slavery marks the ontological position of Black people." Michael J. Dumas, *Against the Dark: Antiblackness in Education Policy and Discourse*, 55 THEORY INTO PRAC. 11, 13 (2016).

29. *See Welcome to the #TruthBeTold Campaign*, AFR. AM. POL'Y F., https://www.aapf.org/truthbetold [https://perma.cc/BR9C-U6H5] (last visited Jan. 19, 2024); Robinson, *supra* note 25.

30. *See* Russell-Brown, *supra* note 26, at 227, 239.

I. THE ALPHABET IS AN ABOLITIONIST:[31] THE ROOTS OF ANTI-BLACK EDUCATION LAW IN AMERICA

This Part outlines the origins of the law's role in perpetuating racial inequality through education. It begins by highlighting how and why denial of education was considered elemental to preserving the institution of slavery. It describes how the Slave Codes and, later, the Black Codes were vital to denying Black people's access to education and quelling insurrection against slavery. This Part then articulates how, in the wake of the Civil War and expansion of public education (which was spearheaded by Black Americans), Jim Crow emerged as a new system to impose second-class citizenship on Black people in the absence of slavery. The *Brown* ruling posed a threat to this racial order, necessitating a new strategy of legal resistance known as massive resistance. Massive resistance crystallized the deny, defund, and divert legal framework for educational inequality, with consequences that reverberate today.

A. THE SLAVE CODES AND BLACK CODES

Contemporary deny, defund, and divert laws are the progeny of early laws, like the Slave Codes and Black Codes, which deployed the law to entrench racial hierarchy.[32] Slave Codes were laws that conscribed the rights, movements, and actions of enslaved Black people.[33] Many of the anti-literacy Slave Codes were enacted to quell insurrection and threats to the institution of slavery.[34] Many Slave Codes imposed fines, imprisonment, and other penalties for both the enslaved Black person who deigned to learn to read or write and the person who

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31. A popular magazine in the 1860s, *Harper's Weekly*, noted, "The alphabet is an abolitionist. If you would keep a people enslaved, refuse to teach them to read." *The Civil War and American Art: "The Alphabet Is an Abolitionist,"* SMITHSONIAN AM. ART MUSEUM (Jan. 29, 2013), https://americanart.si.edu/blog/eye-level/2013/29/648/civil-war-and-american-art-alphabet-abolitionist [https://perma.cc/47HQ-U7CV] ("Literacy allowed former slaves to declare their independence and assert their intellect.").

32. *See* Wilson, *supra* note 4, at 6–7 ("According to CRT scholars, a racial hierarchy exists in which whites occupy the top positions with respect to resources, power, wealth, and status; Blacks occupy the bottom rung, and all other races are slotted somewhere between Black and white, depending upon their ability to approximate whiteness.").

33. Steven L. Nelson & Ray Orlando Williams, *From Slave Codes to Educational Racism: Urban Education Policy in the United States as the Dispossession, Containment, Dehumanization, and Disenfranchisement of Black Peoples*, 19 J.L. SOC'Y 82, 87–88 (2019) ("The Slave Codes were all encompassing and comprehensively invalidated the Black experience, assuring that Black peoples could not enjoy the rights of citizenship in the United States. The Slave Codes banned slaves from assembling in public, receiving an education, owning weapons, etc. . . . The Slave Codes, therefore, created a separate class of offenses that became status crimes: the engagement in otherwise legal actions was illegal simply because of slaves' skin color. Furthermore, all white people (inclusive of women) were enjoined to maintain and uphold the system of chattel slavery by punishing any Black person seen engaging in purportedly illegal behaviors.").

34. *See* Colette Coleman, *How Literacy Became a Powerful Weapon in the Fight to End Slavery*, HISTORY (July 11, 2023), https://www.history.com/news/nat-turner-rebellion-literacy-slavery [https://perma.cc/LSH9-7RS6] (describing the "renewed wave of oppressive legislation prohibiting . . . education" that followed Nat Turner's revolt).

taught them how to read or write.[35] These restrictions proliferated after significant insurrections against slavery, such as the Stono Rebellion and Nat Turner's revolt.[36] Virginia passed laws in 1831 and 1832 that prohibited any meetings or gatherings to teach free Black people to read or write and instituted fines ranging from $10 to $100 for teaching Black people to read.[37] After literate preacher Nat Turner led an insurrection, Virginia increased its penalties—to include the death penalty—for anyone who taught an enslaved person to read or write.[38] What is significant about the Slave Codes is that they "turned racial identity into a legal status."[39] As scholar Erika K. Wilson notes of the Slave Codes, "[T]hey resulted in Black and white racial designations becoming polar constructs, in terms of rights and access to material resources and power."[40] It is also important to note that, although the enforcement of these measures was strong and the penalties high,[41]

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35. *See id.* (describing Virginia and Alabama laws).

36. For example, South Carolina passed a law in 1740 in response to the Stono Rebellion of 1739 in which an estimated twenty-five white people (and an estimated fifty enslaved Black people) were killed. *See The Stono Rebellion*, LIBR. CONG., https://www.loc.gov/item/today-in-history/september-09/ [https://perma.cc/TTW9-39SD] (last visited Jan. 19, 2024) ("More than twenty white Carolinians and nearly twice as many black Carolinians were killed . . . ."). The law bemoaned ever allowing enslaved Black people to read or write, noting "the having of Slaves taught to write or suffering them to be employed in writing may be attended with great Inconveniences," and imposed a fine of one hundred pounds (no small sum at the time) for anyone who taught an enslaved person to read or write. Birgit Brander Rasmussen, *"Attended with Great Inconveniences": Slave Literacy and the 1740 South Carolina Negro Act*, 125 PMLA 201, 201–02 (2010) ("The broad sweep of this passage, its concern with 'all and every Person and Persons whatsoever' and 'any manner of writing whatsoever,' suggests that tight control of and racialized exclusion from the written sphere were seen as crucial to the condition and institution of slavery in the colony and beyond."). After an insurrection led by literate preacher Nat Turner in Virginia in 1831, known as the Southampton Insurrection (which resulted in the deaths of an estimated fifty-five white people and, by some estimates, over one hundred Black people), there was widespread passage of Slave Codes prohibiting teaching enslaved people to read or write in all slaveholding states, with the exception of Maryland, Kentucky, and Tennessee. *See* Coleman, *supra* note 34; DAVID F. ALLMENDINGER JR., NAT TURNER AND THE RISING IN SOUTHAMPTON COUNTY 205 (2014); SMITHSONIAN AM. ART MUSEUM, LITERACY AS FREEDOM, https://americanexperience.si.edu/wp-content/uploads/2014/09/Literacy-as-Freedom.pdf [https://perma.cc/5J9D-AYA8] (last visited Jan. 19, 2024).

37. SMITHSONIAN AM. ART MUSEUM, *supra* note 36.

38. *Compare* An Act Reducing into One, the Several Acts Concerning Slaves, Free Negroes and Mulattoes, ch. 111, 1819 Va. Acts 421, 424–25 (permitting only "corporal punishment . . . not exceeding twenty lashes" for teaching an enslaved person to read or write), *with* Rasmussen, *supra* note 36, at 202 ("Virginia strengthened its antiliteracy legislation so that the death penalty could be imposed for transgressions.").

39. Wilson, *supra* note 4, at 6.

40. *Id.*

41. As one scholar notes, "Masters made every attempt to control their captives' thoughts and imaginations, indeed their hearts and minds." HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM 7 (Waldo E. Martin Jr. & Patricia Sullivan eds., 2005). Furthermore, "[t]he presence of literate slaves threatened to give lie to the entire system. . . . [W]riting foretold the ability to construct an alternative narrative about bondage itself. Literacy among slaves would expose slavery, and masters knew it." *Id.*; *see also* Janet Cornelius, *"We Slipped and Learned to Read:" Slave Accounts of the Literacy Process, 1830-1865*, 44 PHYLON 171, 174 (1983) ("Slaves themselves believed they faced terrible punishments if whites discovered they could read and write. A common punishment for slaves who had attained more skills . . . was amputation . . . .").

enslaved and free Black people still pursued education,[42] highlighting Black people's commitment to education and their understanding of its relationship to liberation.[43] The Slave Codes stand as an early demonstration of how lawmakers seeking to entrench racial hegemony leveraged the law to serve this purpose.[44] The Slave Codes were followed by the Black Codes, which enforced second-class citizenship upon emancipated Black people, sought to restrict their movements, and imposed an inferior legal status upon them in the absence of slavery.[45]

A hidden part of history that current deny, defund, and divert laws seek to cloak is Black Americans' embrace of education as racial progress, including the central role that Black lawmakers played in creating the contemporary public education system.[46] Emancipated Black lawmakers helped to outline constitutional language for the provision of education in their home states.[47] They supported the passage of the nation's first compulsory education laws and the creation of a system for publicly funding schools.[48] Furthermore, the abolishment of the Slave Codes through passage of the Civil Rights Act of 1866—which codified rights for formerly enslaved Black people and invalidated the Black

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42. Russell-Brown, *supra* note 26, at 227 ("Anti-literacy laws fueled an underground literacy economy that saw enslaved Blacks risk their lives and limbs for education and possible freedom.").

43. *See* Cornelius, *supra* note 41, at 171 ("Despite the dangers and difficulties, thousands of slaves learned to read and write in the antebellum South. . . . Slaves who learned to read and write gained privacy, leisure time, and mobility. . . . Literate slaves also taught others and served as conduits for information within a slave communication network."); WILLIAMS, *supra* note 41, at 7 ("Despite laws and custom in slave states prohibiting enslaved people from learning to read and write, a small percentage managed . . . to acquire a degree of literacy in the antebellum period . . . as they fused their desire for literacy with their desire for freedom.").

44. *See* Russell-Brown, *supra* note 26, at 234–35 ("Beyond passing legislation that prohibited teaching enslaved persons to read or write, some states adopted laws that prohibited the writing, printing, and circulating of material that would 'excite disaffection' . . . . [T]hese objections were anchored in concerns that enslaved Black people would gain knowledge, directly or indirectly, that would alter their worldviews." (footnote omitted)).

45. *See* Wilson, *supra* note 4, at 6 ("Black codes had the effect of restricting Black people's freedom, allowing whites to obtain a cheap or free supply of labor (by imprisoning Blacks if they violated a Black code), and generally continuing to consign Blacks to a second-class inferior status.").

46. "Southern Black people won election to southern state governments and even to the U.S. Congress during this period. Among the other achievements of Reconstruction were the South's first state-funded public school systems . . . ." *Reconstruction*, HISTORY (Apr. 24, 2023), https://www.history.com/topics/american-civil-war/reconstruction [https://perma.cc/R97J-F7XW]; *see also* Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 746 (2018) ("[W]hile the Fourteenth Amendment did not require any specific type or level of education, it did require that states provide education and that their processes of delivering it not be subject to political or other manipulations.").

47. *See* David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. EDUC. 236, 238 (1986) ("The creation of public schools that included blacks depended on active collaboration between Southern blacks and their allies in the Congress. In this epochal battle the ex-slaves played a central role . . . . [B]lacks pressed for modern common schools modeled on the best Northern state systems."); *see also* DEREK W. BLACK, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY 111 (2020) (observing that "Congress imposed education as an explicit condition of readmission for the last three Confederate states to reenter the Union," requiring them to amend their constitutions).

48. Tyack & Lowe, *supra* note 47, at 241, 244–45.

Codes[49]—helped to open the doors to literacy among Black people across the South.[50] As a result of Black people's efforts to expand access to education,[51] it became more widely available to all. Education was so revered at this time that the inclusion of an education clause in state constitutional language became a requirement for readmission to the Union,[52] and five years into Reconstruction, every southern state had enshrined a right to education in its state constitution.[53]

B. SLAVERY'S SEQUEL:[54] JIM CROW EDUCATION

Consistent with Crenshaw's pattern of race, reform, and retrenchment, retrenchment followed the racial progress of the Civil War in the form of the de jure legal regime of Jim Crow segregation. Jim Crow, which scholar Carter G. Woodson termed slavery's sequel,[55] was designed to impose second-class citizenship on newly emancipated Black people.[56] Jim Crow laws and customs resulted

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49. Ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144).

50. *See* Louise Seamster & Kasey Henricks, *A Second Redemption? Racism, Backlash Politics, and Public Education*, 39 HUMAN. & SOC'Y 363, 363 (2015).

51. *See id.* at 364 (describing how the federal Freedmen's Bureau supported educational attainment by formerly enslaved Black people by reforming confiscated properties into schools for the newly emancipated and equipping them with resources such as books and furniture). "Meanwhile, other communities and national organizations banded together to establish institutions of higher education like Shaw, Atlanta, Fisk, and Tougaloo, with the purpose of training future generations of black leadership. Taken together, all these trends signify a deep belief that education was a precondition for fuller civic participation." *Id.*

52. In 1870,

> Congress imposed education as an explicit condition of readmission for the last three Confederate states to reenter the Union—Virginia, Texas, and Mississippi. In the legislation readmitting those states, Congress explicitly provided that the constitutions of these final three states "shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State[s]."

BLACK, *supra* note 47, at 111 (alteration in original) (quoting An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870); An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 81 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870)).

53. For example, Florida's constitution noted that it was the state's "paramount duty . . . to make ample provision for the education of all the children residing within its borders, without distinction or preference." Rebekah Barber & Billy Corriher, *Honoring Reconstruction's Legacy: Educating the South's Children*, FACING S. (Oct. 11, 2018) (omission in original), https://www.facingsouth.org/2018/10/honoring-reconstructions-legacy-educating-souths-children [https://perma.cc/X6HB-LBFM]; *see also* Black, *supra* note 46, at 746 ("State constitutions . . . created permanent common school funds and mandated uniform education systems. They also created state superintendents and state boards of education to oversee these systems rather than leaving responsibility for education to typical legislators." (footnotes omitted)).

54. CARTER GODWIN WOODSON, THE MIS-EDUCATION OF THE NEGRO 102 (Afr. World Press, Inc. ed., 1990) (1933) ("And thus goes segregation which is the most far-reaching development in the history of the Negro since the enslavement of the race. In fact, it is a sequel of slavery.").

55. *Id.*

56. The primary purpose of Jim Crow laws and customs, ubiquitous in the South, was to maintain second-class social and economic status for Black people. Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 651 (2017) (quoting JERROLD M. PACKARD, AMERICAN NIGHTMARE: THE

from the inability of former white enslavers to conceive of Black people as human. Jim Crow segregation profoundly affected educational opportunities for Black people. Although Black people were nominally free, Jim Crow laws and customs ensured that they remained the ontological slaves of American society.[57]

The U.S. Supreme Court placed its imprimatur on Jim Crow in the case of *Plessy v. Ferguson*, when it endorsed racial segregation in public facilities.[58] Segregated Jim Crow public education reflected both the adaptive nature of white supremacy post slavery and how the law could be deployed in the public education arena to sustain racial stratification. The second-class education afforded to formerly enslaved Black people has been termed "caste education," as it was designed to relegate Black people to lives of servitude.[59] This education can be characterized as rudimentary and did not include content addressing the history or contributions of Black people.

Black people waged over half a century of legal challenges against the Jim Crow education regime in pursuit of access to quality public education opportunities.[60] It is worth noting that many segregated, all-Black schools provided Black

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HISTORY OF JIM CROW, at vii–viii (2002)); *see* Pamela J. Smith, *Our Children's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOW. L.J. 133, 165 (1999) ("Jim Crow practices, customs and laws ensured that Blacks would be the slaves of society by putting the force and effect of law behind the individual racial actions of whites in the North, South, and West.").

57. *See* Dumas, *supra* note 28, at 13.

58. 163 U.S. 537, 550–51 (1896). The Court noted of the Fourteenth Amendment in its ruling in *Plessy*:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . . .

Id. at 544.

59. *See* Clayton Pierce, *W.E.B. Du Bois and Caste Education: Racial Capitalist Schooling from Reconstruction to Jim Crow*, 54 AM. EDUC. RSCH. J. 23S, 24S (2017) (describing how W.E.B. Du Bois was one of the earliest scholars to write about the education of Black children and to recognize this function of public education, which he termed "caste education"). Pierce noted that for Du Bois, "[a] fundamental goal of caste schooling is the need to teach individuals from both the white and dark worlds how to understand and *live* as caste subjects as well as the value of social life attached to each." *Id.* at 38S. Scholar Carter G. Woodson likewise recognized the role that public schools played in inculcating Black and white children in their respective racially stratified social positions. *See* WOODSON, *supra* note 54, at xiii ("The same educational process which inspires and stimulates the oppressor with the thought that he is everything and has accomplished everything worth while, depresses and crushes at the same time the spark of genius in the Negro by making him feel that his race does not amount to much . . . .").

60. The *Brown* ruling was the culmination of these challenges, which include the cases of Roberts v. City of Boston, 59 Mass. 198, 204–05 (1849) (challenging Boston's segregated school system), Missouri *ex rel*. Gaines v. Canada, 305 U.S. 337, 342–43 (1938) (challenging Missouri's tuition program offering out-of-state tuition to Black students to maintain segregation), Mendez v. Westminster School District, 64 F. Supp. 544, 545, 551 (S.D. Cal. 1946) (challenging California's segregated education system and becoming the first federal decision to invalidate de jure segregation), McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950) (noting that segregation that has the imprimatur of the state constitutes a violation: "[t]here is a vast difference—a Constitutional difference—between

children with superior instruction and learning environments in which they were nurtured by Black educators. Black families seeking desegregated education were not aspiring to be proximate to white children; they were seeking the material resources and quality that segregated, all-white education afforded. They were seeking relief from the legal designation of segregated, all-Black education, which deprived Black schools of vital resources consistent with the "inferior" status the Jim Crow regime imposed.[61] These legal challenges culminated in the seminal case of *Brown v. Board of Education*, in which the Court invalidated the regime of "separate but equal" and signaled the death knell for Jim Crow.[62] The Court's ruling posed a significant threat to the racial order of the South and, while resistance to Black education predated *Brown*, massive resistance to *Brown* revealed the ability of white supremacy to contort itself into new and legally permissible forms.

II. "If We Can Legislate, We Can Segregate": The Birth of Massive Resistance

The groundbreaking *Brown* ruling was followed by a legal campaign of massive resistance to school desegregation waged primarily by southern lawmakers that centered on laws functioning to *deny* Black children access to desegregated schools, *defund* desegregated schools, and *divert* Black educators away from public education.[63] While some scholars have attributed the advent of massive resistance to the shortcomings of the *Brown* ruling and its implementation,[64] the extent

restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar" (quoting Shelley v. Kraemer, 334 U.S. 1, 13–14 (1948))), and Sweatt v. Painter, 339 U.S. 629, 636 (1950) (invalidating segregation at the University of Texas at Austin's law school), among others.

61. *See* Crenshaw, *supra* note 6, at 1378 ("It is not separation *per se* that made segregation subordinating, but the fact that it was enforced and supported by state power, and accompanied by the explicit belief in African-American inferiority.").

62. 347 U.S. 483, 495 (1954).

63. It is important to note that desegregation was not resisted in all southern jurisdictions, particularly immediately following the ruling, but resistance gradually expanded and was impactful enough that defiance to school desegregation dominated state and local legislative agendas throughout the South. *See* WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 65–66 (1981) (describing that in Greensboro, North Carolina, six Black students entered formerly segregated schools with "little public outcry"). Further,

> the Supreme Court's actual ruling in *Brown I* did not come as all that much of a surprise to well-informed southern politicians, and in at least one large southern state, North Carolina, political figures such as Governor William B. Umstead "initially greeted the *Brown* edict with grudging acceptance, and in some cases warm approval."

David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151, 158 (1994) (footnote omitted) (quoting CHAFE, *supra*, at 48).

64. Chief among the critics of *Brown* was NAACP Legal Defense and Educational Fund, Inc. school desegregation litigator and, later, Harvard Law Professor Derrick Bell. Bell's "interest-convergence" theory posited that Black people could only achieve racial progress if it benefited white people. Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). The *Brown* ruling, Bell reasoned, came out the way that it did because America was desperate to save its image amidst increasing international scrutiny of the hypocrisy of espousing democracy abroad while oppressing Black people stateside. *See id.* at 524 ("*Brown* offered much needed

of the resistance to desegregation indicates that resistance would have occurred no matter how the ruling was phrased or how it was implemented. The NAACP Legal Defense and Educational Fund, Inc.'s (LDF's) carefully orchestrated legal campaign[65] left southern lawmakers at a loss for how to challenge a shift in racial relations mandated by the nation's highest court. However, they found a strategy in massive resistance.

Before examining the details of southern lawmakers' deployment of the deny, divert, and defund framework, it is worth exploring how they arrived at this strategy of defiance. It is important to recognize that, while the South played a prominent role in massive resistance, the *Brown* ruling was widely resisted, including by northern states such as California, Iowa, Ohio, Delaware, Maryland, Missouri, and others.[66] Southern lawmakers' initial response to *Brown* was largely characterized as defiance through inaction,[67] even after the Court urged recalcitrant districts to desegregate "with all deliberate speed" in 1955's *Brown II*.[68] However, inaction was simply not sustainable, and southern lawmakers were compelled to devise ways to deploy the law to resist desegregation through "all lawful means."[69] Federal lawmakers were the first to act when over one hundred southern congressmen signed the Southern

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reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home."). Bell's theory holds that remedies achieved through interest convergence have limited efficacy and seldom upend the racial order. *See id.* at 523 (noting that racial remedies, "if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites").

65. Charles Hamilton Houston, co-founder of the NAACP LDF, is often credited with designing the legal strategy to dismantle Jim Crow segregation. *See* Liz Mineo, *The Civil Rights Lawyer Who Paved the Path*, HARV. GAZETTE (May 16, 2018), https://news.harvard.edu/gazette/story/2018/05/reflecting-on-charles-hamilton-houstons-battle-against-jim-crow/ [https://perma.cc/NJ9W-MENC] (interviewing Tomiko Brown-Nagin who described Houston as "the intellectual architect of the NAACP's legal strategy against Jim Crow"). Though *Brown* is the seminal case, a number of cases were consolidated with it. *See Brown*, 347 U.S. at 495 (holding that racially segregated education was a violation of the Equal Protection Clause of the Fourteenth Amendment); Briggs v. Elliott, 342 U.S. 350 (1952) (per curiam); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (ruling that segregated education was a violation of the Fifth Amendment because the Fourteenth Amendment did not apply to the District of Columbia); Davis v. Cnty. Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952) (involving the only student-initiated challenge within the litigation).

66. *See* Leslie T. Fenwick, *The Ugly Backlash to* Brown v. Board of Ed *That No One Talks About*, POLITICO (May 17, 2022, 2:13 PM), https://www.politico.com/news/magazine/2022/05/17/brown-board-education-downside-00032799 [https://perma.cc/8MVX-5EAH] ("At some point in their histories even those non-Southern states that we today categorize as liberal leaning had laws prohibiting the education of Black and white students together. . . . At least 17 states fought with all their might against *Brown* for more than 20 years.").

67. *See* CHAFE, *supra* note 63, at 65–66; Garrow, *supra* note 63, at 158.

68. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955). As one scholar notes, "What the decision and its supporters could not account for was the degree to which White supremacy and racism were instantiated in the U.S. cultural model." Gloria Ladson-Billings, *Landing on the Wrong Note: The Price We Paid for* Brown, EDUC. RSCHR., Oct. 2004, at 3, 5.

69. *The Southern Manifesto of 1956*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/ [https://perma.cc/56HC-HNUY] (last visited Jan. 19, 2024).

Manifesto,[70] which articulated their intentions to defy the ruling.[71] They found legal cover for their defiance in the theory of localism, which has since been relied upon to justify discriminatory state and local education laws.[72]

The groundwork for deny, defund, and divert lawmaking was laid by reliance upon arguments in favor of local control over education. Arguing in favor of local control also enabled southern lawmakers to appeal to moderates by arguing the legal theory known as interposition.[73] Interposition posited that education was under the purview of states and localities because it was omitted from the U.S. Constitution.[74] Under this theory, the Court overstepped its authority by mandating that states desegregate schools in *Brown*.[75] The theory of localism similarly asserted that localities and states knew best how to run their education systems and that any federal intervention was unwarranted and inappropriate.[76] Consistent with assertions of localism, the theory of interposition opposed federal orders regarding desegregation as unwanted federal interference and a betrayal of long-held deference to localism. Relying upon the theories of interposition and localism permitted southern lawmakers to disguise their racially motivated defiance of desegregation in the rhetoric of "states' rights."

Enactment of deny, defund, and divert laws dominated southern legislatures, and by 1957—just three years after *Brown*—lawmakers in southern and border states enacted 136 new laws and state constitutional amendments designed to defy the ruling.[77] Resistance to the *Brown* ruling thus became not only the goal of

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70. NOLIWE ROOKS, CUTTING SCHOOL: PRIVATIZATION, SEGREGATION, AND THE END OF PUBLIC EDUCATION 81 (2017). Only three southern Democrats refused to sign onto the manifesto: Albert Gore, Sr., Estes Kefauver, and Lyndon B. Johnson. *Id.*

71. *See* U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, *supra* note 69; Carol Anderson, *Burning* Brown *to the Ground*, TEACHING TOLERANCE, Fall 2016, at 42, 44, https://www.learningforjustice.org/sites/default/files/2017-07/Teaching_Tolerance_Fall_2016.pdf [https://perma.cc/J7NC-EDJ3] ("The so-called Southern Manifesto . . . was the shot heard around America.").

72. *See* Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 200–01 (2016); *see also* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S 241 (3d ed. 1999) ("States' rights served as a cloak for white supremacy and economic favoritism and an instrument for blunting the threat of an open society . . . .").

73. *See* JILL OGLINE TITUS, BROWN'S BATTLEGROUND: STUDENTS, SEGREGATIONISTS, AND THE STRUGGLE FOR JUSTICE IN PRINCE EDWARD COUNTY, VIRGINIA 17 (2011) (describing how interposition provided "segregationists a language to use in courting support from political conservatives across the nation").

74. *See id.* The theory of interposition originated with James Madison and others and assumes that the Constitution is an agreement between the states and the federal government and that a state has the right "to project (interpose) itself between the Federal government and the citizen whenever the state adjudges a Federal statute or court decision to be unconstitutional or harmful within its specific jurisdiction." Robert Brisbane, *Interposition: Theory and Fact*, 17 PHYLON 12, 12 (1956).

75. *See* TITUS, *supra* note 73, at 17. According to the theory, if the federal government should exceed its powers, then "a state possesses the right to 'interpose' its sovereignty between the federal government and its residents." *Id.* at 225 n.13. "Interposition was [massive resistance's] fundamental element—the means whereby the South would halt the shift away from conventional values . . . . This doctrine formed the base upon which other projects were structured." BARTLEY, *supra* note 72, at 245.

76. *See* Wilson, *supra* note 72, at 201.

77. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 79 (paperback ed. 1993).

southern public policy during this period[78] but the prevailing *way* in which southern law was crafted and articulated during this time. From this period of retrenchment, the components of the modern deny, defund, and divert framework originated (in light of the connections drawn between contemporary anti-Black education laws and pre-*Brown* legal antecedents, as discussed in Sections I.A and I.B).

A. DENYING ACCESS TO DESEGREGATED EDUCATION: CLOSING THE SCHOOLHOUSE DOORS

The *deny* prong of massive resistance is characterized by the passage of laws designed to deny primarily Black children's (and in some instances, white children's) access to desegregated schools. Deny laws ranged from pupil placement laws that permitted local authorities to continue to assign children to segregated schools in violation of *Brown* to measures that threatened to close desegregated schools.

Pupil placement laws were usually facially neutral and operated to deny Black children's access to desegregated education by enabling local authorities to assign children to schools based on race.[79] These laws included two main components: first, they required the individual placement of students to schools and, second, outlined arbitrary "criteria" for local officials to use to determine student placement.[80] These "criteria" often included subterfuge that equated with race—such as "prior education" or "ability to perform on par with other students."[81] Mississippi was the first state to enact a pupil assignment law.[82]

Some states were explicit in their segregative intent to deny Black children's access to desegregated schools in their pupil placement laws. For example,

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78. BARTLEY, *supra* note 72, at 77 ("In public policy, segregation was a goal that took precedence over local democracy, federal law, and public education itself."). Writing about South Carolina, writer Howard H. Quint noted: "The race question is applied to nearly every political issue, either openly or covertly, and all-out attempts have been—and to be sure, still are—made to discredit any proposal or policy that would alter the *status quo*." HOWARD H. QUINT, PROFILE IN BLACK AND WHITE: A FRANK PORTRAIT OF SOUTH CAROLINA 7 (1958).

79. Pupil placement boards were established throughout the South. For example, Alabama enacted H. 296 in 1955, which permitted localities to establish pupil placement boards. Act of Aug. 3, 1955, No. 201, § 4, 1955 Ala. Laws 492, 493 (Reg. Sess.). Florida enacted Senate Bill 124 in 1955, permitting its school board to make placement decisions designed to "avoid tensions and disruption of the public school system of the county by reason of the decisions of the United States Supreme Court relating to public school segregation." Act of May 30, 1955, ch. 29746, § 2, 1955 Fla. Laws 302, 303–04 (Reg. Sess.). Many of these measures were passed on an emergency basis, including through the invocation of state police power.

80. *See* BARTLEY, *supra* note 72, at 78 ("[T]he words 'race' and 'Negro' found no place on the list [of criteria]. . . . Resulting segregation rested not upon an illegal racial classification but nominally upon weighty and responsible concern for individual students.").

81. For example, Alabama enacted Act No. 460, which enables local school boards to separate students who created "disciplinary problems" from their class. Act of Sept. 4, 1963, No. 460, § 1, 1963 Ala. Laws 995, 995 (Reg. Sess.). The state also enacted another pupil placement measure allowing school boards to prescribe methods "for teaching pupils of disparate ability, background and achievement." Act of Sept. 16, 1963, No. 522, § 1, 1963 Ala. Laws 1126, 1126 (Reg. Sess.). Florida enacted a measure enabling its pupil placement board to take into account "the effect of admission of new pupils on the academic progress of the other pupils" in the enrolling school. Act of June 19, 1959, ch. 59-428, § 1, 1959 Fla. Laws 1455, 1457 (Reg. Sess.).

82. *See* Act of Mar. 10, 1954, ch. 260, 1954 Miss. Laws 288 (Reg. Sess.).

Alabama's law (which was widely replicated by other localities) stated: "Any other provisions of law notwithstanding, no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the Board of Education."[83] Other states' laws were more subtle in their wording, but were accompanied by mechanisms which ensured that racially segregated schools were maintained.[84] For example, in Virginia, the Gray Commission[85] proposed a pupil placement law[86] and planned for the event that any Black children were assigned to a white school by recommending a cap on the number of assigned Black children.[87] The Commission also recommended repealing the state's compulsory attendance law so that no white child would be required to attend an integrated school.[88] Florida's pupil placement law, like Virginia's, used a bit more covert language, setting out rules and regulations designed "to avoid tensions and disruption of the public school system of the county by reason of the decisions of the United States Supreme Court relating to public school segregation."[89] Civil rights lawyer and

83. § 8, 1955 Ala. Laws at 495. Arkansas was also explicit, with Act No. 7 providing for "Separate Classes for Instruction . . . for Children of the White and Negro Races." Act of Sept. 12, 1958, No. 7, 1958 Ark. Acts 2009, 2009 (2d Extra. Sess.).

84. *See* Act of July 2, 1958, No. 259, 1958 La. Acts 856, 856 (Reg. Sess.) (placing students based on "aptitudes" and "good will"); Act of July 9, 1964, ch. 24, § 1, 1964 Miss. Laws 56, 56 (Extra. Sess.) (prohibiting persons in charge of student assignments from assigning a student to a class in which "his presence there, because of age differential, mental development, achievement level, or personal habits, would serve to adversely affect, hinder, or retard the academic development of the other pupils in the class").

85. The group, known as the Gray Commission (after state Senator Garland Gray), issued its recommendations in 1955, which closely tracked the deny, defund, and divert framework from which the General Assembly subsequently drew inspiration for its poison policy agenda. *See* Steve Suitts, *Segregationists, Libertarians, and the Modern "School Choice" Movement*, S. SPACES (June 4, 2019), https://southernspaces.org/2019/segregationists-libertarians-and-modern-school-choice-movement/ [https://perma.cc/HS8M-RT6Z].

86. Act of Sept. 29, 1956, ch. 70, 1958 Va. Acts 74 (Extra. Sess.) (creating a Pupil Placement Board); *see* Act of Sept. 29, 1956, ch. 68, 1958 Va. Acts 69 (Extra. Sess.), *amended by* Act of Mar. 29, 1958, ch. 631, 1958 Va. Acts 939 (Reg. Sess.) (creating placement procedures). The original pupil placement law was further altered. *See, e.g.*, Act of Mar. 29, 1958, ch. 500, 1958 Va. Acts 638 (Reg. Sess.) (setting further standards, and authorizing the Pupil Placement Board to issue subpoenas); Act of Apr. 28, 1959, ch. 71, § 1, 1960 Va. Acts 165 (Reg. Sess.) (requiring the State Board of Education to promulgate rules for local jurisdictions to use to place pupils).

87. *See* §§ 3–4, 1958 Va. Acts at 69–70.

88. *See* PUBLIC EDUCATION: REPORT OF THE COMMISSION TO THE GOVERNOR OF VIRGINIA, S. DOC. NO. 1, at 8 (1955), https://olddomuni.access.preservica.com/uncategorized/IO_0c56c0cb-9568-4249-92da-eb25301ea799/ [https://perma.cc/6TER-SCA9].

89. Act of May 30, 1955, ch. 29746, § 2, 1955 Fla. Laws 302, 303–04 (Reg. Sess.). Florida's Chapter 59-428 noted that a pupil placement board could take into consideration when designating which school to assign pupils (1) the request or consent of the pupil's parent or guardian; (2) the effect the admission of new pupils will have "on the academic progress of other pupils enrolled in a particular school"; and (3) "the adequacy of a pupil's academic preparation for admission to a particular school." Act of June 19, 1959, ch. 59-428, § 1, 1959 Fla. Laws 1455, 1456–57 (Reg. Sess.). Alternatively, Florida's Chapter 59-412 was explicit, "providing for the withdrawal of a child from the school in which the races are commingled." Act of June 19, 1959, ch. 59-412, 1959 Fla. Laws 1402 (Reg. Sess.).

advocate Marian A. Wright[90] called North Carolina's pupil placement law "'legalistic horseplay' to keep Negro children out of white schools."[91] These vaguely worded measures establishing pupil placement boards represent some of the early iterations of facially neutral laws that nonetheless operated with the invidious intent to entrench racial inequality in public education. Therefore, even under the cover of neutrality, pupil placement essentially ensured the maintenance of Jim Crow education.

Another set of laws designed to deny Black children's access to desegregated education were those establishing so-called freedom of choice programs.[92] These programs were often proposed as school desegregation remedies[93] and permitted parents to express their preference for their child's school placement. However, like pupil placement schemes, the result was the perpetuation of segregated schools: "[w]hite families almost uniformly selected the historically white schools, and black families almost uniformly chose the black-identified schools."[94] In many cases, such as in New Kent County, Virginia, some Black families selected majority-white schools to enroll their children in,[95] but Black children were not placed in white schools. Freedom of choice programs did little more than delay desegregation and "did nothing to alter entrenched resource inequality, prejudices, and ostracism, enforced through law and vigilante violence."[96] These schemes were finally invalidated by the U.S. Supreme Court in 1968, when it struck down New Kent County's program.[97]

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90. Marian Wright Edelman went on to found the Children's Defense Fund. *Our Founder*, CHILD.'S DEF. FUND, https://www.childrensdefense.org/about-us/our-history/ [https://perma.cc/DPN9-YAH5] (last visited Jan. 19, 2024).

91. Ralph Lee Smith, *The South's Pupil Placement Laws: Newest Weapon Against Integration*, COMMENT. MAG. (Oct. 1960), https://www.commentary.org/articles/ralph-smith/the-souths-pupil-placement-lawsnewest-weapon-against-integration/ [https://perma.cc/EK6G-2DXN]. North Carolina's pupil placement law survived legal challenge in 1957. *Id.*

92. These plans allowed white parents to choose among several schools and provided them with transfer options, including allowing them to move their children out of integrated schools. Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 823 (2011).

93. *Id.* ("Developed ostensibly to implement desegregation within public school systems, 'freedom of choice' plans became a euphemism for resurgent racial separation.").

94. *Id.* at 823–24.

95. Under New Kent County's freedom of choice plan, 115 Black students chose to attend mostly white New Kent High School, but no white children chose to enroll in majority-Black George W. Watkins School. *The* Green *Decision of 1968*, VA. MUSEUM HIST. & CULTURE, https://virginiahistory.org/learn/historical-book/chapter/green-decision-1968 [https://perma.cc/X3QH-PKN7] (last visited Jan. 19, 2024).

96. Minow, *supra* note 92, at 824.

97. Green v. Cnty. Sch. Bd., 391 U.S. 430, 440–41 (1968) ("Where [a freedom of choice plan] offers real promise of aiding a desegregation program" to achieve a "unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation," but "if there are reasonably available other ways, such . . . as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable"). The Court's mandate for localities to remove the vestiges of segregation "root and branch" accelerated integration, and the "percentage of southern black students attending integrated schools jumped from 32 percent in 1968–69 to 79 percent in 1970–71." VA. MUSEUM HIST. & CULTURE, *supra* note 95.

Some of the most effective laws that denied Black children's access to desegregated education were those that threatened to close desegregated schools.[98] For example, following the issuance of a report from the North Carolina Advisory Committee on Education,[99] North Carolina passed a measure to effectively deny Black children in the state access to integrated education by allowing for the governor to close integrated public schools.[100] Virginia's General Assembly passed a similar measure.[101] The threat was not an empty one. In 1958, after the Virginia Supreme Court ordered that public schools under federal desegregation order in Charlottesville, Norfolk, and Warren County desegregate immediately, Virginia Governor Lindsay Almond ordered that the schools be closed.[102] The school

98. A number of southern states passed legislative measures calling for the closure of integrated schools. *See, e.g.*, Act of Sept. 12, 1958, No. 4, § 1, 1958 Ark. Acts 2000, 2000 (2d Extra. Sess.) (outlining a procedure for the Governor to close public schools "to maintain the peace"); Act of Oct. 25, 1957, ch. 57-1975, § 1,1957 Fla. Laws 10, 10 (Extra. Sess.) (requiring the closure of public schools any time federal troops are deployed to address violence); Act of Feb. 3, 1959, No. 7, § 1, 1959 Ga. Laws 15, 15 (Reg. Sess.) (permitting the Governor to close public schools to "preserve the good order"); Act of July 2, 1958, No. 256, § 1, 1958 La. Acts 831, 831–32 (Reg. Sess.) (allowing the closure of "racially mixed" public schools under court order); Act of July 9, 1960, No. 495, § 1, 1960 La. Acts 946, 946 (Reg. Sess.) (authorizing the Governor to close all public schools when any school was threatened with integration), *repealed by* Act of Nov. 8, 1960, No. 6, 1960 La. Acts 13 (Extra. Sess.); Act of July 9, 1960, No. 542, § 1, 1960 La. Acts 1004, 1004 (Reg. Sess.) (directing the Governor to close public schools in case of or to prevent "disorder"); Act of Nov. 8, 1960, No. 12, § 1, 1960 La. Acts 20, 20 (Extra. Sess.) (permitting the governor to close public schools in the state whenever a court order imposes a plan "not consistent with the Constitution and laws of the state, or State Board of Education policy, rules or regulations"); Act of May 6, 1958, ch. 311, § 1, 1958 Miss. Laws 527, 527 (Reg. Sess.) (allowing the Governor to close schools when "in the best interest" of the state); Act of Dec. 10, 1957, ch. 7, § 2, 1957 Tex. Gen. Laws 161, 161 (1st Called Sess.) (ordering the closing of schools by school boards when "violence or the danger thereof cannot be prevented except by resort to military force or occupation").

99. The report warned, "[W]e believe if the schools were integrated in this State, the General Assembly, representing the people, would withhold support to a degree that the result would certainly be the ruin and eventual abandonment of the public schools." REPORT OF THE NORTH CAROLINA COMMITTEE ON EDUCATION 4 (1956), https://ia600706.us.archive.org/6/items/reportofnorthcar00nort_0/reportofnorthcar00nort_0.pdf [https://perma.cc/BHW8-M9W6].

100. *See* Earl Black, *North Carolina Governors and Racial Segregation*, *in* POLITICS AND POLICY IN NORTH CAROLINA 69, 72–73 (Thad L. Beyle & Merle Black eds., 1975) (describing how Governor Hodges did not close integrated schools or deploy the National Guard, but instead tried to convince people that "attendance at segregated schools indicated racial pride").

101. *See* Act of Sept. 29, 1956, ch. 68, § 4, 1958 Va. Acts 69, 70 (Extra. Sess.). Like many other jurisdictions throughout the South, Virginia convened a special session to pass a slate of massive resistance laws. In August of 1956—two years after the *Brown* ruling and one year after *Brown II*'s mandate to desegregate "with all deliberate speed"—the Virginia General Assembly adopted a package of legislation that largely embodied the Gray Commission's recommendations to evade desegregation. *See* James H. Hershman, *Massive Resistance*, ENCYC. VA. (Feb. 7, 2023), https://encyclopediavirginia.org/entries/massive-resistance/ [https://perma.cc/4F8K-2ENE].

102. *See* James H. Hershman Jr., *UVA and the History of Race: The Era of Massive Resistance*, UVA TODAY (Mar. 22, 2021), https://news.virginia.edu/content/uva-and-history-race-era-massive-resistance [https://perma.cc/9WV2-7B3P]; *The Southern Manifesto and "Massive Resistance" to Brown*, LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/ [https://perma.cc/UJK7-FXZJ] (last visited Jan. 19, 2024).

closures effectively locked out more than 10,000 white students in Norfolk alone.[103] In Charlottesville, Judge Paul directed the admission of ten Black students to the white Venable School, and two Black students were assigned to Lane High School, the city's only white secondary school.[104] In response, the school board delayed the beginning of school for a week, and when the schools were scheduled to open, Governor Almond ordered that they be closed.[105] The Governor's closure of the schools, designed to deny twelve Black students' access to integrated schools, also denied education to 1,700 white children[106]—the brief loss of access to education for white students was the price of evading integration. Virginia lawmakers' insistence on denial of desegregated education to Black children, therefore, denied (albeit briefly) white children's access to education.

Even if white children experienced brief school closures as a collateral consequence of school closure laws, they did not experience the prolonged denial of education that many Black children in the South did. Lawmakers passed measures providing for alternative ways for white children to receive education, such as laws providing for grants for families to pursue education when their local schools closed because of desegregation. In Prince Edward County, Virginia, after the closure of the county's public schools in 1959, in defiance of school desegregation orders, lawmakers established the Prince Edward School Foundation to separately fund and maintain "private" schools (funded with public money) for white children—maintaining a segregated scheme of education.[107] As the public schools remained shuttered for five years, Black children were left with few options to continue their education, including crossing district lines, moving in with out-of-state relatives or host families to attend school,[108] receiving tutoring from unemployed Black educators who tutored Black children, or going without education altogether for the five years that the county's schools were shuttered.[109] Georgia's lawmakers passed a similar measure in February

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103. *See* Susan Smith-Richardson & Lauren Burke, *In the 1950s, Rather than Integrate Its Public Schools, Virginia Closed Them*, GUARDIAN (Nov. 27, 2021, 6:00 AM), https://www.theguardian.com/world/2021/nov/27/integration-public-schools-massive-resistance-virginia-1950s [https://perma.cc/322J-UUSS].

104. Hershman Jr., *supra* note 102.

105. *Id.*

106. *Id.*

107. *See* GREEN, *supra* note 3, at 144–45; Verna L. Williams, *Reading, Writing, and Reparations: Systemic Reform of Public Schools as a Matter of Justice*, 11 MICH. J. RACE & L. 419, 437–38 (2006).

108. Williams, *supra* note 107, at 438–39 ("Other Black students left the county altogether to attend school, moving to nearby counties or to places such as Washington, D.C., or New York to live with relatives. Some students had the help of religious organizations, primarily the Quakers, which found host families in places such as Iowa or Massachusetts who would take children into their homes so they could get an education. Some of those students went on to college, attending such institutions as Harvard, Princeton, Howard, Hampton, and Virginia Polytechnic Institute."). Private entities contributed to the creation of the Prince Edward County Free School which operated from the fall of 1963 until June 1964, when public schools in the county re-opened. *Id.* at 439.

109. "When the schools finally reopened in 1964, many students had fallen behind their peers and, unable to catch up, dropped out." *Id.* at 438; *see also* LEGAL DEF. FUND, *supra* note 102.

1956, empowering the Governor to close public schools and providing state grants of public funds to children in the districts where schools had been closed.[110] Although the law did not explicitly state that such grants were only for white children, white children (not Black children) were the recipients of such funds.[111] Therefore, southern lawmakers ensured that white children did not suffer the prolonged effects of educational deprivation that school closure laws imposed on Black children.

Denial laws calling for school closures were often accompanied by laws repealing the very compulsory education provisions that Black lawmakers had fought hard to include in state constitutions. States that enacted laws repealing or suspending constitutional compulsory education provisions included Virginia, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, and Tennessee.[112] These measures were not merely symbolic; southern lawmakers were committed to using legislative power to prevent inevitable school desegregation.

Laws denying Black children's access to desegregation by closing schools or repealing constitutional compulsory attendance provisions capitalized on a flaw in the *Brown* ruling—it did not compel states to affirmatively act to promote school desegregation.[113] Instead, *Brown* invalidated racial inequality in public

110. Act of Feb. 6, 1956, No. 11, § 1, 1956 Ga. Laws 6, 7 (Reg. Sess.) (providing that "whenever the Governor shall ascertain that the public schools of any county, city or independent school district cannot be operated in such manner as shall entitle such schools under the laws of this State to State funds for their maintenance and operation, he shall" issue an executive order stating that "the public authorities of such county, city or independent school district shall no longer be authorized to operate the public schools of such county, city or independent school district").

111. *See* Smith-Richardson & Burke, *supra* note 103 ("[C]ounty officials shuttered the schools to avoid desegregating them, using a tactic to evade the law: they refused to appropriate taxes to pay for the school year. A foundation was created to support private education for white students; later tuition grants were offered. The Black students were on their own.").

112. Act of Sept. 29, 1956, ch. 59, § 1, 1956 Va. Acts 61, 61 (Extra. Sess.) (declaring that there is no compulsory attendance for integrated schools); Act of Jan. 31, 1959, ch. 2, § 1, 1959 Va. Acts 4, 4 (Extra. Sess.) (repealing compulsory school attendance statutes); Act of Apr. 28, 1959, ch. 72, § 4, 1959 Va. Acts 170, 170–71 (Extra. Sess.) (permitting the Board of Education to excuse from attendance "any pupil whose parent [or] guardian . . . conscientiously objects to his attendance"); Act of Feb. 26, 1957, No. 84, § 1, 1957 Ark. Acts 280, 280 (Reg. Sess.) (relieving school children of the requirement of state compulsory attendance for desegregated schools); Act of Feb. 26, 1957, No. 139, sec. 1, § 3A, 1957 Ga. Laws 168, 168–69 (suspending compulsory attendance); Act of June 21, 1956, No. 28, sec. 1, § 221, 1956 La. Acts 68, 68–69 (Reg. Sess.) (amending Title 17 § 221 of the Louisiana Revised Statutes of 1950 to repeal compulsory education in any desegregated public or private school system); Act of Nov. 8, 1960, No. 27, 1960 La. Acts 38, 38 (Extra. Sess.) (repealing provisions of state law requiring compulsory school attendance); Act of June 28, 1962, No. 128, § 1, 1962 La. Acts 299, 299 (Reg. Sess.) (repealing the state compulsory attendance law); Act of July 7, 1962, No. 196, § 1, 1962 La. Acts 441, 441 (Reg. Sess.) (providing that "no child shall be compelled to attend any school in which his race constitutes less than one-half of the total registration of such school"); Act of Feb. 24, 1956, ch. 288, § 1, 1956 Miss. Laws 366, 367 (Reg. Sess.) (repealing compulsory education); Act of July 27, 1956, ch. 5, § 1, 1956 N.C. Sess. Laws 13, 13–14 (Extra. Sess.) (amending compulsory school attendance provision to allow for provision of education expense grants); Act of Mar. 16, 1959, ch. 289, § 1, 1959 Tenn. Pub. Acts 894, 894–95 (amending compulsory education laws to allow local education officials or parents to remove a student from a school and place in another school (public or private)).

113. *See* Wilson, *supra* note 18, at 2409–11 (noting that "[t]he equal protection doctrine that developed because of *Brown* was successful in curtailing state-mandated school segregation that

education as it manifested at the time, in the form of de jure racially segregated schools. Laws enacted throughout the South reflect state and local lawmakers' recognition of the limitations of *Brown*'s reach—namely, an emerging understanding that de facto segregation was not within the reach of the *Brown* ruling.[114]

Closing schoolhouse doors to deny Black children's access to desegregated schools is perhaps one of the most compelling demonstrations of defiance to the *Brown* ruling. These denial laws profoundly undermined the efficacy of *Brown*'s implementation. Deny laws worked in tandem with the other prongs of the framework (defunding and diverting) to stymie racial progress and entrench racial inequality in public education.

B. DEFUNDING DESEGREGATED PUBLIC EDUCATION

The *defunding* of public education was also an elemental component of the massive resistance strategy and one of its most enduring tactics. Defunding laws include those that threatened to defund desegregated schools as well as those that eliminated public school funding to render the provision of public education impossible. Defunding laws also included those that permitted the use of public funds to maintain segregated education by providing white families with tuition grants or vouchers to attend segregated "private" schools. Defunding measures varied slightly by jurisdiction, but the prevailing purpose was to manipulate school funding to deter desegregation. For example, Mississippi legislators approved an amendment (later ratified by voters) that authorized the legislature to abolish the public education system or to permit local authorities to abolish parts of it if schools desegregated.[115] Georgia passed a law that barred appropriations

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allowed whites to monopolize high-quality schools through first-order social closure," which meant essentially enrolling their children in the best schools and relegating children of color to under-resourced schools in majority-segregated neighborhoods composed mainly of other children of color).

114. *Id.* at 2411 ("[T]he Supreme Court, in cases interpreting *Brown*, made it clear that de jure racial segregation — segregation mandated by state law — was the sole focus of *Brown's* holding."). Some policymakers even reasoned that these laws (particularly facially neutral laws that did not mention race explicitly, such as those establishing pupil placement described in this Article) did not defy *Brown*'s mandate. For example,

> Proponents of [voluntary choice] plans cite the words of Judge John Parker that the Supreme Court does not require integration, it merely forbids discrimination, and that "no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches." Judge Parker pointed out, however, that a state may not deny a Negro on account of race the right to attend any school it maintains.

J. W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 131 (1961) (footnote omitted).

115. H.R. Con. Res. 2, 1954 Leg., Extra. Sess., 1954 Miss. Laws 51. A year later, in 1955, Mississippi passed another law explicitly prohibiting funding of integrated education. Act of Apr. 4, 1955, ch. 43, § 1, 1955 Miss. Laws 133, 134 (Extra. Sess.) ("It shall be unlawful for any member of the white or Caucasian race to attend any school of high school level or below wholly or partially supported by funds of the State of Mississippi which is also attended by a member or members of the colored or Negro race.").

for desegregated public schools.[116] The Georgia legislature also adopted a measure recommended by the Georgia Education Commission that made it a felony for any state or local official to spend public funds on an integrated school.[117] Arkansas passed a measure designed to withhold state funds from schools during the time they were closed by the Governor.[118] The South Carolina legislature enacted a measure repealing state funding of public schools upon transfer of students pursuant to a desegregation order[119] and another authorizing the boards of trustees of public school systems to close integrated schools.[120]

By threatening Jim Crow's maintenance of an all-white public sphere, *Brown* prompted white retreat from the public education space once reserved for whites only.[121] Although southern lawmakers did not wholly abandon public education, the lengths taken through legal means to divert children and funds from public education threatened its infrastructure. The willingness of segregationist lawmakers to all but eviscerate the good of public education itself is evidence of the perniciousness of white supremacy. Southern lawmakers knew that private schools were beyond *Brown*'s desegregation mandates and found in school privatization schemes a way to defund public education as well as to deny Black students' access to desegregated schools and preserve school segregation.[122]

These schemes involved creating laws that essentially funneled funds from public schools to segregated private schools (widely known as segregation academies)[123] under the guise of private education. These defunding laws often used more facially neutral language to outline these schemes to support segregated

116. Act of Mar. 14, 1956, No. 454, 1956 Ga. Laws 753, 758 (Reg. Sess.).

117. Act of Feb. 11, 1955, No. 82, § 3, 1955 Ga. Laws 174, 175–76 (Jan.–Feb. Sess.); *see also* STATE L. DEP'T, COMPILATION OF GEORGIA LAWS AND OPINIONS OF THE ATTORNEY GENERAL RELATING TO SEGREGATION OF THE RACES 50–54 (1956) (reprinting the resolution establishing the Georgia Commission on Education).

118. Act of Sept. 12, 1958, No. 5, § 2, 1958 Ark. Acts 2004, 2005 (Extra. Sess.). The next year, the legislature amended the 1958 law, permitting the sharing of funds from closed schools with other schools. Act of Mar. 3, 1959, No. 151, §§ 1–2, 1959 Ark. Acts 936, 937–38 (Reg. Sess.).

119. Act of May 25, 1955, No. 411, § 5, 1955 S.C. Acts 841, 845 (Reg. Sess.).

120. *See* Act of Mar. 9, 1956, No. 676, § 1, 1956 S.C. Acts 1670, 1670 (Reg. Sess.).

121. *See* Seamster & Henricks, *supra* note 50, at 368 ("[T]he very term public has acquired derogatory connotations where institutions or services have become associated with blacks. . . . [T]he reshaping of public institutions like education comes in part from whites' inability to fully include blacks in their conception of the American public.").

122. *See* Mark Keierleber, *Critical Race Theory and the New 'Massive Resistance,'* 74 (Aug. 18, 2021), https://www.the74million.org/article/critical-race-theory-massive-resistance-brown-v-board/ [https://perma.cc/QZ6L-8QWP].

123. Ensuring that white children were able to continue to receive segregated education was contingent upon elaborate tax schemes that provided support to white families to pay nominal tuition amounts to attend all-white, segregated schools, known as segregation academies. *See* Sarah Carr, *In Southern Towns, 'Segregation Academies' Are Still Going Strong*, ATLANTIC (Dec. 13, 2012), https://www.theatlantic.com/national/archive/2012/12/in-southern-towns-segregation-academies-are-still-going-strong/266207/. *See generally* Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973). Segregation academies were ostensibly private schools founded to educate white students in segregated settings so that white families could evade school integration in public schools as required by federal desegregation orders. *See* Carr, *supra*. Louisiana established such schools and called them "educational cooperatives." Educational Cooperative Law, No. 257, 1958 La. Acts 833 (Reg. Sess.). According to one

education consistent with colorblind laws. For example, Alabama passed a law in 1966 noting that no child should be required to attend "any" school and allowing for tuition grants to families for private schools.[124] Arkansas passed a similar measure authorizing school districts or the State Department of Education to grant financial aid to those prohibited from attending public schools "for any reason beyond his or her control."[125]

Defunding measures often required elaborate budgetary arrangements and changes to existing state statutes to allow public funds to be used for private education.[126] For example, the Virginia Assembly passed legislation during its 1956 special session that provided funding for private schools when public school funding was withheld by the state.[127] A few years later, the Commonwealth passed a bill establishing state and local scholarships for private, non-sectarian schools or schools outside the locality in which the recipients lived, including for public schools.[128] Mississippi enacted a measure permitting counties, cities, and towns in the state to levy ad valorem taxes to finance private school tuition grants.[129]

The provision of tuition grants as part of defunding laws proved vital to maintaining segregated schools in *Brown*'s wake. Therefore, laws establishing tuition grant programs were among the most numerous measures passed during the massive resistance era.[130] For example, the Virginia Assembly also passed a measure

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report, "[h]undreds of these schools opened across the country in the 20 years after the *Brown v. Board* decision, particularly in southern states like Mississippi, Arkansas, Alabama, and Virginia." Carr, *supra*.

124. Act of Aug. 19, 1966, No. 170, 1966 Ala. Laws 197, 198 (Spec. Sess.).

125. Act of Feb. 13, 1959, No. 46, § 1, 1959 Ark. Acts 164, 165 (Reg. Sess.).

126. As Professor Steven Nelson put it,

> Segregation academies were typically private in name only. Government officials made every attempt to aid segregation academies, both overtly and covertly. . . . Through tuition grant programs, which served as predecessors to modern school voucher programs, states provided grants in an effort to transfer public funds to private segregation academies. These grants-in-aid were also later found unconstitutional. Other states, such as Mississippi, school districts were selling off assets to segregation academies at alarmingly discounted rates.

Steven L. Nelson, *Still Serving Two Masters? Evaluating the Conflict Between School Choice and Desegregation Under the Lens of Critical Race Theory*, 26 B.U. PUB. INT. L.J. 43, 56–57 (2017) (footnotes omitted).

127. Act of Sept. 29, 1956, ch. 56, § 1, 1956 Va. Acts 56, 56 (Extra. Sess.).

128. Act of Mar. 31, 1960, ch. 448, § 1, 1960 Va. Acts 703, 704 (Reg. Sess.).

129. Act of July 15, 1964, ch. 31, § 1, 1964 Miss. Laws 67, 67 (Extra. Sess.).

130. *See, e.g.*, Act of Sept. 16, 1953, No. 652, § 1, 1953 Ala. Laws 912, 912 (Reg. Sess.) (providing assistance for private school instruction for "handicapped children" when public education is not available); Act of Aug. 19, 1966, No. 170, 1966 Ala. Laws 197, 198 (Spec. Sess.) (providing state tuition grants for private schools and declaring that "no child shall be compelled to attend any school"); Act of Aug. 31, 1967, No. 266, § 1, 1967 Ala. Laws 759, 759 (Reg. Sess.) (establishing a tuition system for students to attend private, non-sectarian schools); § 1, 1959 Ark. Acts at 165 (authorizing the state to provide financial aid to students "prohibited from attending public school" because of reasons beyond their control); H.R.J. Res. 557, 1958 Leg., Reg. Sess., 1958 La. Acts 1391, 1391 (proposing amendment of the state constitution to provide tuition grants to students to attend private schools); Act of July 2, 1958, No. 258, § 2, 1958 La. Acts 850, 851 (Reg. Sess.) (providing education grants to students attending non-sectarian, private schools); Act of July 7, 1962, No. 148, § 1, 1962 La. Acts 344, 344 (Reg. Sess.) (providing funds for the Louisiana Finance Assistance Fund); Act of June 15, 1967, No. 99,

allowing counties without existing levies to establish tax levies to fund grants to students attending private schools[131] and another allowing school boards to transfer and spend public school funds on grants for private education.[132] To ensure that funds were used to maintain segregated schools, Virginia also passed a law limiting the application of funds to "efficient" schools, which were defined as those with little to no racial integration.[133] Georgia similarly passed legislation providing state grants to children whose schools were closed[134] and creating a system of tuition grants for families to send their children to private schools.[135]

Defunding laws significantly impacted not only school desegregation efforts but the entire landscape of public education. Notably, the provision of public funding for private education contributed to the expansion of private education. Defunding laws aided in entrenching racially segregated education, increasing reliance upon private education to evade desegregation. As a result, the public

§ 2, 1967 La. Acts 214, 216 (establishing tuition grants for students attending private schools); Act of July 15, 1964, ch. 27, 1964 Miss. Laws 58, 59 (Extra. Sess.) (establishing a system of state and local tuition grants for private schools); An Act to Provide for Education Expense Grants for Children Attending Non-Public Schools, ch. 3, sec. 1, § 2, 1956 N.C. Sess. Laws 4, 4 (Extra. Sess.) (providing state funds for "education expense grants").

131. Act of Sept. 29, 1956, ch. 57, §§ 1, 7, 1958 Va. Acts 57, 57–58 (Extra. Sess.). Mississippi enacted a similar measure during a special session in 1964. *See* 1964 Miss. Laws at 59.

132. Act of Sept. 29, 1956, ch. 62, § 1, 1956 Va. Acts 62, 62 (Extra. Sess.).

133. *See* Act of Apr. 7, 1958, ch. 642, 1958 Va. Acts 967, 989–90 (Reg. Sess.).

134. Act of Feb. 6, 1956, No. 11, § 1, 1956 Ga. Laws 6, 7 (Reg. Sess.) (providing state grants to places where public schools had been closed).

135. Act of Jan. 31, 1961, No. 14, § 2, 1961 Ga. Laws 35, 35–36 (Reg. Sess.). Georgia also provided funding to teachers who accepted employment in its segregated, all-white schools. Act of Feb. 11, 1957, No. 7, § 1, 1957 Ga. Laws 8, 8 (Reg. Sess.). Legislation providing tuition grants was also crafted in many other southern states, including Alabama, Arkansas, Louisiana, Mississippi, and North Carolina. *See* §1, 1967 Ala. Laws at 759; 1959 Ark. Acts at 165 (authorizing financial aid to persons who are prohibited from attending public schools "for any reason beyond his or her control"); La. H.R.J. Res. 557; § 2, 1958 La. Acts at 851; § 1, 1962 La. Acts at 344; § 2, 1967 La. Acts at 216; Act of July 15, 1964, ch. 31, 1964 Miss. Laws 67, 67 (Extra. Sess.); § 1, 1964 Miss. Laws at 59; § 1, 1956 N.C. Sess. Laws at 4; *see also* Act of Feb. 13, 1957, No. 34, 1957 S.C. Acts 36 (establishing the South Carolina Opportunity School). Although these laws appear racially neutral, the intent was to ensure that lower income white families could send their children to publicly funded "private" and segregated white schools, thereby maintaining segregation. As one historian notes,

> The resistance leaders understood that most Southern White families could not afford private school tuition — and many who could afford it lacked the ideological commitment to segregation to justify the cost. The vouchers, combined with private donations to the new schools in counties facing desegregation mandates, would enable all but a handful of the poorest Whites to evade compliance.

Nancy MacLean, *'School Choice' Developed As a Way to Protect Segregation and Abolish Public Schools*, WASH. POST (Sept. 27, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/09/27/school-choice-developed-way-protect-segregation-abolish-public-schools/. She further notes the covert language of the laws creating voucher programs:

> [T]hey taught defenders of segregation a crucial new tactic — abandon overtly racist rationales and instead tout liberty, competition and market choice while embracing an anti-government stance. These race-neutral rationales for private school subsidies gave segregationists a justification that could survive court review — and did, for more than a decade before the Supreme Court ruled them unconstitutional.

Id.

education system lost large numbers of white students. In the wake of the *Brown* ruling, private school enrollment in the South skyrocketed at unprecedented rates,[136] and "[b]y 1958, the South's private school enrollment had exploded, increasing by more than 250,000 students over an eight-year period, and boasting almost one million students in 1965."[137]

C. DIVERTING BLACK EDUCATORS AWAY FROM DESEGREGATED PUBLIC EDUCATION

Laws that *diverted* Black educators out of the public education system comprise the final prong of the framework. These laws included those that required educators to report their political affiliations, designed to effectively push Black educators who were members of the NAACP or other organizations supportive of desegregation out of the teaching workforce. Defunding tactics, including the funding of private, segregated schools with public money, helped make diversion of Black educators away from the public education system possible.

The Black teaching workforce was so diverted away from the public education system during massive resistance that the public education system has still not recovered from this loss.[138] Legislators responded to white parents' unwillingness to have their children taught by Black educators[139] by enacting laws that effectively purged Black educators from the workforce. For example, Alabama passed a measure allowing parents to state a preference for the race of their child's

136. *A History of Private Schools and Race in the American South*, S. EDUC. FOUND., https://southerneducation.org/publications/history-of-private-schools-and-race-in-the-american-south/ [https://perma.cc/DD9X-Z494] (last visited Jan. 19, 2024) ("From 1950 to 1965, private school enrollment grew at unprecedented rates all over the nation, with the South having the largest growth.").

137. *Id.* The growth of the private education sector "was catalyzed by Southern state legislatures, who enacted as many as 450 laws and resolutions between 1954 and 1964 attempting to block, postpone, limit, or evade the desegregation of public schools, many of which expressly authorized the systematic transfer of public assets and monies to private schools." *Id.*

138. *See* Melinda D. Anderson, *The Secret Network of Black Teachers Behind the Fight for Desegregation*, ATLANTIC (Aug. 9, 2018), https://www.theatlantic.com/education/archive/2018/08/black-educators-hidden-provocateurs/567065/.

139. *See* Irving Joyner, *Pimping* Brown v. Board of Education*: The Destruction of African-American Schools and the Mis-education of African-American Students*, 35 N.C. CENT. L. REV. 160, 193 (2013) ("As was the thinking embraced by many Whites, '[t]eaching [was] a position of authority, and segregation was all about maintaining power and privilege for whites, including white children.' . . . White parents [often] doubt[ed] the competency of African-American teachers and supported their resistance to giving these teachers power over their White children." (first two alterations in original) (quoting Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 12 (2008))); *see also* Adam Fairclough, *The Costs of* Brown*: Black Teachers and School Integration*, 91 J. AM. HIST. 43, 53 (2004) ("Black teachers charged that white-controlled school boards unfairly targeted black teachers for dismissal. Teachers were fired 'for nothing at all,' asserted the Mississippi civil rights activist Winson Hudson. 'They did not want black men working with their white students.'"); Fenwick, *supra* note 66 ("In the years following the Supreme Court ruling, and well into the 1970s, white resistance to the decree decimated the ranks of Black principals and teachers. In large measure, white school boards, superintendents, state legislators — and white parents — did not want Black children attending school with white children. And they certainly did not want Black teachers educating white children and Black principals leading schools and supervising white teachers.").

teacher.[140] A measure passed in Louisiana permitted the removal of public school employees of Orleans Parish who were deemed members of organizations barred from operating in the state, or that advocated "performing any act toward bringing about the integration of the races within the public school system or any public institution of higher learning of the State of Louisiana."[141]

Racial animus was not the only reason for the removal of Black educators; retaliation for their role in school desegregation also factored into efforts to divert them from the workforce. Black teachers played an active role in advocating for school desegregation because they believed that it would provide opportunities for Black children to obtain vital resources they were denied at all-Black, segregated schools.[142] Their vision was what one scholar calls an "additive model," in which the nurturing and support Black teachers provided Black students would be supplemented through desegregation by the provision of vital school resources that segregated Black schools lacked.[143] But that vision did not come to fruition; instead, as desegregation began to take hold, many Black schools were closed[144] and Black educators and school leaders were fired or demoted.[145] States passed laws that permitted schools to give superfluous reasons for firing or demoting educators. For example, Arkansas enacted a law requiring educators to list the

140. Act of Sept. 1, 1967, No. 285, sec. 1, § 6, 1967 Ala. Laws 811, 812 (Reg. Sess.).

141. Act of July 8, 1956, No. 250, § 1, 1956 La. Acts 540, 540 (Reg. Sess.); *see also* Charles A. Reynard, *Legislation Affecting Segregation*, 17 LA. L. REV. 101, 105 (1956) (noting that the act "was obviously intended to apply . . . to supporters of the [NAACP]").

142. Black educators have long engaged in a tradition of activism. Considered the first Civil Rights martyr, Harry T. Moore was a Florida school principal and secretary of his local NAACP who initiated the first lawsuit in Florida seeking pay parity between Black and white educators. *The Legacy of Harry T. Moore*, PBS, https://www.pbs.org/harrymoore/harry/mbio.html [https://perma.cc/Z7R3-2LAK] (last visited Jan. 19, 2024). Moore and his wife were killed by a bomb placed under their home on Christmas day. *Id.*; *see also* Vanessa Siddle Walker, *What Black Educators Built*, ASCD (Apr. 1, 2019), https://www.ascd.org/el/articles/what-black-educators-built [https://perma.cc/YW9B-E935] (describing how Black educators used "networks to create advocacy structures to undermine segregation . . . [and] generated the invisible collaborative activity that supplied money, data, and plaintiffs for the *Brown v. Board of Education* decision").

143. Walker, *supra* note 142. This additive model would "provide for students all the structures [Black educators] had created to sustain those students in segregated schools *plus* providing them the equality and resources they had been denied in the segregated schools." *Id.*

144. As Walker describes,

> Unreprimanded by a federal government that was no longer committed to full equality but just needed the language of equality for international standing, southern school boards that were opposed to integration fired black teachers and hired white teachers in their place. They closed black schools or demoted them to middle or elementary schools.

Id.

145. *Id.* ("Because white school boards seemed to believe that black principals did not have the educational capacity to run a school, especially a school in which they would supervise white teachers and oversee the education of white children, black principals were often forced to forfeit their leadership positions."); William Jefferson, *School Desegregation and The Black Teacher: A Search for Effective Remedies*, 48 TUL. L. REV. 55, 56 (1973) ("Displacement of black educators proceeded apace with desegregation. . . . [B]lack school closings were used as a pretext for the discharge or demotion of black educators. This reduction of the teaching force, rationalized on grounds of economy and efficiency, curtailed the employment opportunities of black teachers and administrators.").

organizations to which they belonged as a condition of employment.[146] Mississippi enacted a similar measure.[147] Such measures enabled districts to deny employment to educators who affiliated with organizations supporting desegregation, such as the NAACP.[148] Arkansas, Georgia, Mississippi, and Louisiana all enacted legislation to allow for the surveillance of public employees' organizational affiliations, and the Georgia Board of Education "voted to revoke the license of any teacher who supported school integration."[149] A particularly powerful demonstration of a state legislative effort to discourage organizational affiliation—and deny Black educators employment—occurred in 1956, when twenty-one Black educators at the Elloree Training School in South Carolina were not rehired for the upcoming school year after refusing to distance themselves from the NAACP.[150] Their teaching applications for the upcoming school year had included a new question about NAACP affiliation that was part of the South Carolina legislature's "anti-NAACP oath."[151] Many of the teachers refused to answer the question, resulting in their dismissals. The Elloree teachers' dismissals led to the case of *Bryan v. Austin*,[152] which the NAACP appealed to the U.S. Supreme Court before the statute was repealed.[153] States also enacted laws to make it easier to fire educators who may have had contractual protections. For example, Florida enacted a measure that allowed for the selection or dismissal of teachers without regard to prior contractual relationship.[154] Louisiana

146. Act of Sept. 12, 1958, No. 10, § 2, 1958 Ark. Acts 2018, 2018–19 (2d Extra. Sess.).

147. Act of Feb. 20, 1956, ch. 265, § 1, 1956 Miss. Laws 326, 326–27 (Reg. Sess.).

148. *See* Candace Cunningham, *"Hell is Popping Here in South Carolina": Orangeburg County Black Teachers and Their Community in the Immediate Post-*Brown *Era*, 61 HIST. EDUC. Q. 35, 45 (2021) (discussing South Carolina's laws prohibiting teacher membership in the NAACP and the resistance of Black educators to such measures).

149. *Id.* at 44.

150. *Id.* at 36; *see also* Bryan v. Austin, 148 F. Supp. 563, 564 (E.D.S.C. 1957) ("When plaintiffs in May of 1956 were given blank applications by the School Superintendent to be filled out and sworn to, which contained questions as to their membership in the Association and their views as to the desirability of segregation in the schools, they declined to answer these questions. Only one of the plaintiffs, however, was a member of the Association. Upon being told that they would have to fill in the answers or tender their resignations, they chose the latter course and were not elected as teachers for the ensuing year.").

151. *See* Act of Apr. 24, 1957, No. 223, § 1, 1957 S.C. Acts 234, 234 (Reg. Sess.) (repealing Act of Mar. 17, 1956, No. 741, 1956 S.C. Acts 1747 (Reg. Sess.), which made it unlawful for the state or any school district to employ a member of the NAACP). The new act, however, required all state and local officers and school authorities to require written applications for employment which must include information as to the applicant's affiliation or membership in associations or organizations. §1, 1957 S.C. Acts at 234. Furthermore, the "legislators not only established that NAACP members would be dismissed from their jobs but also that anyone 'refusing to submit a statement as provided herein, shall be summarily dismissed.'" Cunningham, *supra* note 148, at 45 (quoting § 2, 1956 S.C. Acts at 1748).

152. 148 F. Supp. at 564.

153. Cunningham, *supra* note 148, at 53 ("The NAACP did not go to a lower court as the three-judge panel recommended. On February 20, 1957, they filed an appeal to the US Supreme Court. Two months later, South Carolina, realizing that it was unlikely to win the case if it went to the Supreme Court, repealed the statute. So the case was remanded back to the US district court, where it was dismissed." (footnotes omitted)).

154. Act of Aug. 1, 1956, ch. 31391, sec. 1, § 231.36, 1956 Fla. Laws 45, 46 (Extra. Sess.).

also enacted a measure mandating teacher assignment based on race.[155] As one scholar describes the systematic purging of Black educators and school leaders,

> "Displacement" became the phase which subsumed the many policies and practices of southern school boards, school superintendents, and politicians which sought to undermine the employment and authority of African-American school staff: dismissals, demotions, forced resignations, "nonhiring," token promotions, reduced salaries, diminished responsibility, coercion to teach subjects or grade levels other than those for which individuals were certified or had experience. Under siege, the forces of southern White hegemony, the organized powers of "massive resistance," could not completely undermine the new integration initiatives, but they certainly sought to mold the emerging "unitary" public educational systems in a bleached image that they preferred.[156]

Black educators and school leaders lost their jobs as a consequence of such diversion laws targeting them;[157] "30,000–50,000 of the teachers and principals who understood how to build aspirational climates for all children never entered the desegregated world."[158] Another report found that "there was a ninety percent reduction in the number of black principals in the South between the years 1964 and 1973, dropping from over 2000 to less than 200."[159] Nationwide, scholars have estimated that "38,000 African-American teachers lost their positions as teachers and administrators in 17 states."[160] With this loss also came the loss of aspirational and nurturing models for Black children.[161]

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155. Act of July 13, 1956, No. 319, § 5, 1956 La. Acts 654, 655 (Reg. Sess.) ("Only white teachers shall teach white children in public schools; and only Negro teachers shall teach Negro children in public schools.").

156. Michael Fultz, *The Displacement of Black Educators Post-*Brown*: An Overview and Analysis*, 44 HIST. EDUC. Q. 11, 14 (2004) (footnote omitted).

157. *Id.* at 42 ("The displacement of Black educators was part and parcel of the myriad ways southern White hegemony sought to undermine desegregation and to curtail African-American rights and progress, in order to maintain power and privilege."). One scholar describes the systemic diversion of Black teachers:

> [T]he US Office of Education created the Training Coordination Center for Displaced Teachers (TCCDT). The TCCDT calculated that more than two thousand Black teachers lost their jobs due to southern desegregation in the 1968-1971 school years alone. They also found that Black teacher displacement was carried out not only through outright dismissal but through demotion, unwanted transfers, assigning teachers to subjects/grades outside their area of expertise, pay cuts, and "less satisfying positions."

Cunningham, *supra* note 148, at 60 (footnote omitted).

158. Walker, *supra* note 142.

159. Russell W. Irvine & Jacqueline Jordan Irvine, *The Impact of the Desegregation Process on the Education of Black Students: Key Variables*, 52 J. NEGRO EDUC. 410, 417 (1983).

160. Parker, *supra* note 139, at 15 n.57 (quoting Sabrina Hope King, *The Limited Presence of African-American Teachers*, 63 REV. EDUC. RSCH. 115, 135 (1993)).

161. *See* Walker, *supra* note 142 ("[B]lack educators discovered that they were the victims of an exchange model through which they traded the *aspiration* and *advocacy* that had defined black education for the slim hope of *access* without support or even their own involvement.").

The closure of segregated Black schools in the wake of desegregation also played a significant role in the loss of Black educators. For example, in the Moberly School District in Missouri, the closing of the segregated Black school led to the firing of eleven certified Black teachers, "including at least one who had a Ph.D."[162] The attempt by some of the dismissed Black educators to reclaim their jobs went unheeded by the courts.[163] As one scholar notes, "The main casualties of integration were the black schools and the men who had run them."[164] Another scholar noted of the post-*Brown* era, "black schools all across America were closed or drastically redesigned (for example, a black high school might have been converted into an integrated elementary school). As a result, the safe and sheltering environment of black schools—once the center of the black community—disappeared."[165] Black schools closed across the country in the wake of school desegregation, not only in the South but in northern states such as Illinois, Wisconsin, Missouri, and Rhode Island.[166]

While Black educators and Black schools were negatively impacted by desegregation, white teachers benefitted from it, and many replaced Black educators[167] or were provided salaries through state or local education funding. Some states even enacted laws to ensure that former public school educators who taught in private schools (segregation academies) were able to continue receiving their retirement benefits. For example, Georgia enacted one such measure.[168] The U.S. Department of Health, Education, and Welfare (now the U.S. Department of Education) "reported that only 1.8% of the Black teachers in the eleven states of the former Confederacy taught on a desegregated faculty."[169]

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162. Madeline Will, *65 Years After '*Brown v. Board*,' Where Are All the Black Educators?*, EDUC. WK. (May 14, 2019), https://www.edweek.org/policy-politics/65-years-after-brown-v-board-where-are-all-the-black-educators/2019/05 [https://perma.cc/N7UA-YWNG].

163. *Id.* ("Seven of the dismissed black teachers sued the school district, claiming they lost their jobs because of their race. The courts sided with the district, and the Supreme Court declined to hear the case.").

164. Fairclough, *supra* note 139, at 54 ("Across the South, school boards closed black high schools, or, if they retained the buildings, converted them into junior highs. To add insult to injury, schools that had been named for black teachers or historical figures were given new names. Black principals were then demoted or given meaningless titles.").

165. STUART BUCK, ACTING WHITE: THE IRONIC LEGACY OF DESEGREGATION 74 (2010).

166. *Id.* at 78.

167. This occurred despite the reality that Black educators were often better educated than their white peers. *See* Will, *supra* note 162 ("Though they were barred from attending many Southern, segregated institutions of higher education, many black educators received tuition scholarships to earn master's and doctorate degrees at integrated universities like Columbia, Michigan, and New York . . . ."). "The pattern is clear: white teachers thrived as white enrollment declined; contemporaneously, black teachers suffered as black enrollment flourished." Jefferson, *supra* note 145, at 58.

168. *See* Act of Feb. 11, 1957, No. 7, § 1, 1957 Ga. Laws 8, 8 (Reg. Sess.). Virginia also enacted a similar measure. Act of Sept. 29, 1956, ch. 64, 1958 Va. Acts 63 (Extra. Sess.) (authorizing teachers in private schools to participate in the public school teachers' retirement program).

169. Ladson-Billings, *supra* note 68, at 6. Another scholar emphasized how segregation persisted:

> As late as 1966, not one African-American teacher in the states of Alabama, Mississippi, or Louisiana taught in a de jure white school, even though such schools had admitted by then a few African-American students. The practice was not just a Southern one; Northern schools segregated their teachers as well, although not to the degree found in Southern white schools.

Parker, *supra* note 139, at 9 (footnotes omitted).

Therefore, diversion laws made an indelible impact on the education landscape, most notably through the expungement of Black educators and school leaders from public schools.

D. THE EVOLUTION OF DENY, DEFUND, AND DIVERT LAWS

The deny, defund, and divert laws that crystallized during massive resistance paved the way for colorblind education laws that have operated to further entrench racial inequality in education. Many of these laws have withstood legal challenges, lending them legitimacy. However, these laws have proven just as invidious as the pupil placement boards and school closure measures of massive resistance.

For example, *deny* tactics evolved into more facially neutral laws and practices that deny Black children's access to quality public education. These include exclusionary admissions policies that operate to exclude Black students from "elite" publicly funded and predominantly white schools;[170] tracking practices in otherwise diverse schools that relegate Black students to remedial courses and promote in-school segregation;[171] the drawing of district boundary lines in ways that perpetuate racial segregation;[172] and the prevalence of discriminatory school discipline policies that push Black students out of classrooms and into the criminal legal system,[173] to name just a few. The Court validated white flight and the use of district boundary lines as de facto segregation tools in the 1974 case of *Milliken v. Bradley*, holding that suburban all-white districts (created as a result

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170. *See* Janel A. George, *The Myth of Merit: The Fight of the Fairfax County School Board and the New Front of Massive Resistance*, 49 FORDHAM URB. L.J. 1091, 1093–94 (2022).

171. *See* Seamster & Henricks, *supra* note 50, at 365 ("Even nominally integrated public schools racially divide resources on the basis of tracking, placing white students in 'advanced' classes and black and Latina/Latino students in regular or remedial curricula.").

172. Wilson describes the line-drawing:

> In the aftermath of *Brown*, school district boundary line changes such as municipal secessions, annexations, and consolidations were utilized in some areas as proverbial swords to fend off school desegregation. . . . Absent proof that a boundary line change impedes a school district's ability to meet its obligation under a federal court desegregation order, courts will generally defer to the state's decisionmaking on placement of school district boundary lines. Thus, boundary lines are permitted to serve as impermeable barriers that facilitate white-student segregation and inequality.

Wilson, *supra* note 18, at 2425–26 (footnotes omitted).

173. For example, Black students attend schools with disproportionate police presence, which impacts their educational experiences. According to a report,

> School policing disproportionately drives Black students into the youth and adult punishment systems despite the fact that Black students do not misbehave more than their white peers. School policing also comes with a host of collateral consequences for Black and Latine youth and their families, including lost course credits, the burden of legal costs and court fees, the stress of family separation, and even serious threats to the student's or family's immigration status.

TYLER WHITTENBERG, RUSSELL SKIBA, BRITANY BEAUCHESNE & ANGELA GROVES, #ASSAULTAT SPRINGVALLEY: AN ANALYSIS OF POLICE VIOLENCE AGAINST BLACK AND LATINE STUDENTS IN PUBLIC SCHOOLS 2 (2022) (footnotes omitted), https://advancementproject.org/resources/assaultatreport/ [https://perma.cc/AMD9-JA5H].

of white flight out of Detroit to evade desegregation orders) could not be required to participate in a desegregation plan with the majority-Black Detroit public schools.[174] With the ruling, the Court also effectively sanctioned facially neutral actions, such as the drawing of district boundary lines in segregative ways, placing these de facto measures beyond the reach of equal protection and insulating them from legal scrutiny.[175] Following *Milliken*, lawmakers did not have to concern themselves with the racially disparate impact of their laws, so long as they could demonstrate the absence of racist intent.

Colorblindness and the condemnation of race-conscious policies to cure past discrimination was further advanced by the Reagan Administration, which asserted that formal equality had been won through the enactment of civil rights laws and, therefore, race-conscious laws were not only unnecessary, but discriminatory.[176] This theory was advanced by neoconservative scholar Thomas Sowell.[177] Similarly, this vision of civil rights law is consistent with what Crenshaw calls a "restrictive" vision of civil rights law,[178] which downplays the significance of equitable outcomes and envisions equality as a process rather than a means to advance material changes in the lives of Black people who have been historically subjected to discrimination.[179] Under this restrictive vision, "the goal of antidiscrimination law. . . is to prevent future wrongdoing rather than to redress present manifestations" resulting from historic discrimination.[180] Most significantly, under this vision of antidiscrimination law, the "innocence of whites" weighs more heavily than past wrongs inflicted as a result of legally sanctioned racial inequality and the benefits whites obtained as a result.[181]

I posit that the embracing of this conception of colorblindness and this restrictive view of antidiscrimination law have contributed to the deepening of racial inequality in public education by allowing laws that deny, defund, or divert education to persist so long as they are cloaked in facially neutral language.

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174. 418 U.S. 717, 745 (1974). "The *Milliken* Court's prioritization of district boundary lines over the goal of integration wholly contradicts *Brown*'s constitutional mandate to dismantle segregated school systems, essentially maintaining a system of racial hierarchy by conceding to the desire of white school districts to maintain segregated systems." Janel A. George, *The End of "Performative School Desegregation": Reimagining the Federal Role in Dismantling Segregated Education*, 22 RUTGERS RACE & L. REV. 189, 211 (2021).

175. *See* George, *supra* note 174, at 213 ("By analyzing *de facto* segregation from an ahistorical perspective, the Court failed to acknowledge the evolving nature of racial discrimination and the permutations it takes to maintain racial hierarchy. Essentially, *Milliken* provided cover for covert segregation in the form of white flight, which became the anecdote to compulsory school desegregation." (footnote omitted)).

176. *See* Crenshaw, *supra* note 6, at 1339.

177. *Id.* ("Sowell presents the neoconservative struggle against prevailing civil rights policies as nothing less than an attempt to restore law to its rightful place and to prevent the descent of American society into fascism.").

178. Crenshaw articulates this concept of a "restrictive" vision of civil rights law: "The restrictive vision, which exists side by side with this expansive view, treats equality as a process, downplaying the significance of actual outcomes." *Id.* at 1342.

179. *See id.*

180. *Id.*

181. *Id.*

Consistent with Crenshaw's arguments that formal equality is not enough, I argue that facially neutral laws cannot cure racial hierarchy.[182] Instead, as I detail in this Section, a commitment to colorblindness ushered in a new era of facially neutral education laws that nevertheless functioned to deny, defund, and divert education opportunities.

For example, the Court further sanctioned de facto laws *denying* Black children's access to quality education opportunities by discouraging race-conscious school diversity programs designed to remedy historic exclusion of students of color. Notably, in the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court distorted *Brown*'s admonition of the consideration of race in student assignments by striking down two voluntary, race-conscious school desegregation programs designed to promote racially diverse schools.[183] The ruling reflected the Court's embrace of the concept of colorblindness and its condemnation of the recognition of race, even in the context of voluntary efforts seeking to redress historic discrimination and exclusion.[184] The Court's recent ruling striking down affirmative action in the higher education context echoes this acontextual and historically dishonest conception of colorblindness—equating *Brown*'s condemnation of racially exclusionary segregation to efforts to promote diversity in higher education—to justify the reversal of almost half a century of affirmative action precedent.[185]

Defunding laws that crystallized during massive resistance have also endured, evolving from tuition grant programs to education funding systems reliant upon local property values and income, which perpetuate resource inequities along racial lines.[186] For example, segregation academies have given way to segregative

182. *Id.* at 1378.

183. 551 U.S. 701, 711–12, 716, 733 (2007) (striking down two voluntary school integration programs, one in Seattle, Washington, and one in Jefferson County, Kentucky).

184. Wilson, *supra* note 4, at 12 (underscoring that "[t]he Court relied on the notion that all racial distinctions were problematic, without any consideration of the history of race, and the need to remediate a past history of discrimination"). Originally cast as a positive concept that sought to look beyond racial difference, colorblindness evolved into an ahistorical and acontextual theory that ignores how racism and the consequences of socially constructed racial difference have shaped the lived experiences and outcomes of Black people and other people of color in America. It relies upon ideas of individualism and choice and assumes that inequities along racial lines are not the result of laws, policies, or structural inequality, but are natural and inevitable occurrences. For a more comprehensive explanation of colorblindness, see generally BONILLA-SILVA, *supra* note 12.

185. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 256 (2023) (Thomas, J., concurring) ("[J]ust as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s], see *Brown v. Board of Education*, the alleged educational benefits of diversity cannot justify racial discrimination today." (second alteration in original) (quoting Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 320 (2013) (Thomas, J., concurring))).

186. Racially discriminatory real estate practices, including "redlining" in which realtors ascribed Black communities with lower property values, have contributed to lower property wealth among Black people. *See* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, at 54, 58, https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/. Most state school finance systems generate education revenue from property taxes, which perpetuates this racial inequity. *See* BRUCE D. BAKER, LEARNING POL'Y INST., HOW MONEY MATTERS FOR SCHOOLS 3 (2017),

charters,[187] voucher programs,[188] and school privatization, among other race-neutral mechanisms that draw students and resources away from public education systems. These defunding measures leave too many students of color marooned in dysfunctional and under-resourced public schools. In fact, some sociologists have identified massive resistance as the originating era of contemporary charters—"[r]ooted in a deep but 'hidden' history, charter schools . . . originate from racist legacies of segregation academies."[189] Furthermore, many white families still opt to enroll their children in private schools rather than public schools, particularly in majority-Black urban areas.[190] For example, in Chicago, only half of the white children living in the Chicago public school district attend public schools, compared to eighty percent of the district's Black children.[191] Similarly, in Washington, D.C., white students comprise a little over twelve percent of public school enrollment, while Black students comprise over sixty-four percent.[192]

In addition to privatization, the invocation of localism (invoked first during massive resistance) has been used as a cover to maintain school segregation and

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https://learningpolicyinstitute.org/media/384/download?inline&file=How_Money_Matters_REPORT.pdf [https://perma.cc/D8AN-5WFY] (noting that districts with high property values have an advantage over districts with low property values, because a property-poor district must have a higher tax rate to raise equivalent revenues).

187. *See* Seamster & Henricks, *supra* note 50, at 366 ("Despite rhetoric from school reform advocates about the potential for 'school choice' to remedy racial inequality, the relatively recent expansion of charter schools has not disrupted . . . trends. They have exacerbated them. Several studies show charter schools are even more segregated than traditional public schools and that parents leaving public schools for charters put their children in more segregated environments." (citations omitted)).

188. *See id.* ("Even well-meaning, tolerant whites advance their racial interests in discrete ways when they promote vouchers or oppose funding equalization on market-driven, laissez-faire notions of 'free choice.'").

189. *Id.* ("Though these schools were private and nonsectarian, white public officials who resisted integration siphoned tax dollars to empower white parents to select from a menu of schools and decide which 'products' suited their needs.").

190. The phenomenon known as white flight—the departure of white families from urban centers to flee desegregation and the potential of their children being placed in schools with Black children or other children of color—is largely responsible for the absence of white families in urban public education systems. *Milliken* enabled this mass exodus:

> Essentially, *Milliken* provided cover for covert segregation in the form of white flight, which became the anecdote to compulsory school desegregation. . . .
>
> In the wake of *Milliken*, schools in Detroit and many other urban centers became increasingly Black and underfunded, while surrounding suburbs became increasingly white and well-funded through revenue garnered from higher property values.

George, *supra* note 174, at 213–14 (footnote omitted).

191. Seamster & Henricks, *supra* note 50, at 367.

192. *DC School Report Card - Student Enrollment*, OFF. ST. SUPERINTENDENT EDUC., https://osse.dc.gov/dcschoolreportcard/student-enrollment [https://perma.cc/5TTS-KYYL] (last visited Sept. 11, 2023) (reporting 2021–2022 enrollment); *see also Enrollment*, DC SCH. REP. CARD, https://schoolreportcard.dc.gov/state/report#measure-107 [https://perma.cc/2G6U-B6FR] (last visited Jan. 19, 2024). "At the median school in 2018-19, almost all students represent the same race – 88 percent of students are Black." Chelsea Coffin, *Update: Diversity in D.C.'s Public Schools, 2018-19*, D.C. POL'Y CTR. (July 30, 2020), https://www.dcpolicycenter.org/publications/diversity-in-schools-update/ [https://perma.cc/NR9V-8XGJ]. Further, 102 out of 220 District public schools had student populations that were at least 90 percent Black in the 2018–19 school year. *Id.*

to hoard education resources for white children.[193] School funding demonstrates the consequences of this educational hoarding. The federal government has provided little relief for students of color who are disproportionately impacted by these disparities, including when the Court concluded that no explicit or implicit constitutional right to education exists and that resource disparities along racial lines did not implicate equal protection concerns in *San Antonio Independent School District v. Rodriguez*.[194] The *Rodriguez* Court effectively foreclosed federal relief for students of color relegated to underfunded and resource-starved districts. As a consequence, resource disparities along racial lines have persisted, inequitable state and local school funding schemes have prevailed, and plaintiffs have found little relief in state courts.[195] One report found that non-white school districts received $23 billion less in funding than white districts,[196] amounting to about $2,226 less per-student funding in non-white districts.[197] These disparities have consequences for educational outcomes, as research has demonstrated that resources are positively associated with student outcomes, including smaller class sizes, additional instructional supports, early childhood programs, and competitive teacher compensation to draw experienced and qualified educators.[198]

Instead of addressing these disparities, lawmakers have perpetuated the defunding of schools attended predominantly by Black children through reliance upon inequitable school finance systems. Racially segregated neighborhoods and discriminatory real estate practices[199] have ensured that Black neighborhoods

193. *See* Wilson, *supra* note 72, at 200 ("[W]hether the defensive localism is based on a desire to separate due to racial antipathies or a feeling of powerlessness, the impact is the same.").

194. 411 U.S. 1, 18, 37 (1973) (refusing to apply strict scrutiny, the Court concluded that wealth discrimination within a school system did not infringe upon the rights of a suspect class because education was not a fundamental right protected by the Constitution).

195. As Seamster and Henricks put it,

> Race- and class-based funding inequalities between schools persist, driving inequality in education outcomes. These disparities are not the "natural" outcome of individuals sorting themselves—they must be contextualized historically and as outcomes of political campaigns renegotiating deservingness and public goods. . . . [W]hite pushback has been channeled to the ballot box, effectively cutting off education funds through constitutional limitations on property taxes and institutional barriers to progressive taxation like supermajority requirements.

Seamster & Henricks, *supra* note 50, at 366 (citations omitted).

196. *Nonwhite School Districts Get $23 Billion Less than White Districts Despite Serving the Same Number of Students*, EDBUILD, https://edbuild.org/content/23-billion [https://perma.cc/59UL-XF3F] (last visited Jan. 19, 2024) ("Because our system relies so heavily on community wealth, this gap reflects both the prosperity divide in our country and the fragmented nature of school district borders, designed to exclude outside students and protect internal advantage.").

197. *Id.*

198. BAKER, *supra* note 186, at 5 ("Investments in teacher quality (teacher ability, teacher education, and teacher experience) are particularly effective in raising achievement."); *id.* at 11 ("A significant body of research points to the effectiveness of class-size reduction for improving student outcomes and reducing gaps among students . . . .").

199. One of these practices is redlining, which got its name because the Home Owners' Loan Corporation created a four-color "Residential Security Map to visually represent the desirability of providing mortgage financing." Wilson, *supra* note 4, at 9. Neighborhoods coded as red represented the "least desirable and least likely to receive loan assistance." *Id.* Further, "[n]eighborhoods were downgraded if they were non-white, immigrant, or both. Neighborhoods with large non-white

(and communities that are primarily composed of people of color) are ascribed lower property values,[200] leaving them unable to generate sufficient revenue for education, even when they tax themselves at higher rates.[201] The impact of these racially inequitable school finance systems has been compounded by state legislative reluctance to fully fund education systems and widespread political impotence that has left even favorable litigants without meaningful relief.[202]

Diversion laws have evolved in novel ways. An enduring legacy of the diversion of Black teachers and leaders from public education during massive resistance is their continued and notable absence from the contemporary teaching workforce. Recent data show that the majority (eight in ten) of U.S. teachers identified as white in the 2017–18 school year, and fewer than one in ten teachers were Black.[203] Data show that those Black educators who are in the workforce are often confined to the same segregated and under-resourced schools that too many Black children are confined to.[204]

The current social and political moment reflects the pattern of racial reform and retrenchment. On the heels of a historic racial reckoning in the summer of 2020, conservative policymakers are seeking to further entrench racial inequality in education through control of curricular content and attempts to sanitize and obscure the nation's history of racial inequality. Many of the current laws that vilify CRT and seek to limit discussions of racial inequality or the truth of American history in public school classrooms mirror many of the same *deny*, *defund*, and *divert* laws of massive resistance.

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populations, especially Black populations, were coded in red, in a practice that became known as 'redlining.'" *Id.*

200. *See* Coates, *supra* note 186, at 66.

201. *See* BRUCE D. BAKER WITH MARK WEBER, NEW JERSEY'S SCHOOL FUNDING REFORM ACT AT 10 YEARS 6 (2019), https://www.njpp.org/publications/report/in-brief-new-jerseys-school-funding-reform-act-at-10-years-2/ [https://perma.cc/G23S-82ZQ] ("[D]istricts with high property values have a critical advantage over districts with low property values: to raise equivalent revenues, a property-poor district must have a higher tax rate than a property-rich district.").

202. *See* Marc Levy, *Win in Court Doesn't Assure More Pennsylvania School Funding*, WHYY (Feb. 9, 2023), https://whyy.org/articles/pennsylvania-school-funding-lawsuit-win-doesnt-guarantee-changes/ [https://perma.cc/N4QN-6LDA] ("[T]he experience in other states suggests there's no guarantee of swift, significant or longstanding change for the poorer school districts that sued in hopes of getting billions of dollars more for their budgets."). Litigation has been filed in forty-seven states with varying results. *See Overview of Litigation History*, SCHOOLFUNDING.INFO, https://www.schoolfunding.info/litigation-map/ [https://perma.cc/3RV2-V6QJ] (last visited Jan. 19, 2024). Between 1973 and 2020, plaintiffs won thirty-two school funding cases, states won fifteen cases, and nine cases are still pending. *See id.*

203. Maura Spiegelman, *Race and Ethnicity of Public School Teachers and Their Students*, NAT'L CTR. FOR EDUC. STAT. (Sept. 2020), https://nces.ed.gov/pubs2020/2020103/index.asp [https://perma.cc/WSA8-8ECQ] ("In the 2017–18 school year, 79 percent of public school teachers were White and non-Hispanic."). Further, only seven percent of U.S. public school educators were Black in 2017–18. *Id.*; Katherine Schaeffer, *America's Public School Teachers Are Far Less Racially and Ethnically Diverse than Their Students*, PEW RSCH. CTR. (Dec. 10, 2021), https://www.pewresearch.org/fact-tank/2021/12/10/americas-public-school-teachers-are-far-less-racially-and-ethnically-diverse-than-their-students/ [https://perma.cc/XKC8-YYAK].

204. Schaeffer, *supra* note 203.

III. ERASING THE MEMORY OF MASSIVE RESISTANCE: THE EMERGENCE OF ANTI-CRT LAWS

This Part outlines the current moment of racial retrenchment, evidenced by efforts to advance deny, defund, and divert racial retrenchment education laws throughout the country. The summer of 2020—during which Americans of all backgrounds demonstrated in the streets against police violence in an unprecedented representation of multiracial solidarity—was widely considered a seismic racial reckoning.[205] However, that perceived racial progress was quickly followed by backlash[206] and racial retrenchment[207] in the form of deny, defund, and divert education laws introduced by conservative legislators. According to Education Week, since January 2021, forty-four states have introduced gag laws or taken

205. George, *supra* note 174, at 191 ("Protests and demonstrations that erupted in the summer of 2020 following the killings of unarmed Black Americans by law enforcement . . . appeared to signal a clarion call for America to reckon with its racist past.").

206. *See* Seamster & Henricks, *supra* note 50, at 368 ("The existence of a racial backlash against civil rights-era gains has been posited for decades. Aoki describes it this way: 'there is, of course, the explicit meaning of backlash as "lashing back" at those who have wronged you. There is also a more subtle meaning implicit in the idea of backlash of "getting back to," "returning back to," or "restoring" a real or imaginary status quo ante of a simpler time, before those that prompted one to "lash back" were on the scene.'" (citations omitted) (quoting Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467, 1468 (1996))); *see also* 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 ("Crenshaw was suggesting a deeper historical pattern, in which the campaign against critical race theory was not an aberration but long-lasting retrenchment.").

207. The early rumblings of the backlash included vitriol targeted toward the *New York Times*'s 1619 Project and its originator, Nikole Hannah-Jones, who stated in response, "This idea that racial reckoning has gone too far and now white people are the ones suffering is the most predictable thing in the world if you understand American history." Ibram X. Kendi, *The Mantra of White Supremacy*, ATLANTIC (Nov. 30, 2021), https://www.theatlantic.com/ideas/archive/2021/11/white-supremacy-mantra-anti-racism/620832/; *see also* Kimberlé Crenshaw, *The Panic over Critical Race Theory Is an Attempt to Whitewash U.S. History*, WASH. POST (July 2, 2021, 10:04 AM), https://www.washingtonpost.com/outlook/critical-race-theory-history/2021/07/02/e90bc94a-da75-11eb-9bbb-37c30dcf9363_story.html (noting that anti-CRT laws "do[] not necessarily mention particular historical events, critical race theory or the 1619 project," but only because "[t]hat would be far too obvious"). In addition, backlash against multiracial demonstrations was also contemplated, including by former President Trump when he "invoked an old white supremacist adage from the 1960s: 'When the looting starts, the shooting starts.'" Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy — and the Court*, 134 HARV. L. REV. 1, 33 (2020) (further observing that "[c]ell phone videos have since documented hundreds of instances of police violence against peaceful protestors"); *see also* Charles M. Blow, *The Fraudulence of Investigating the Investigators*, N.Y. TIMES (Jan. 11, 2023), https://www.nytimes.com/2023/01/11/opinion/republicans-investigation-committee.html ("According to New York Times reporter Michael C. Bender's book . . . Trump repeatedly pressed law enforcement officials to crush unrest by American citizens during the Black Lives Matter protests in 2020, saying the way to 'handle these people' was to 'crack their skulls!'"). Some demonstrators have since been successful in efforts to be compensated for injuries incurred during demonstrations. *See* Press Release, Legal Def. Fund, LDF and Co-Counsel Reach Unprecedented Settlement for Protestors and West Philadelphia Residents Who Suffered Police Violence During 2020 Protests (Mar. 20, 2022), https://www.naacpldf.org/wp-content/uploads/2023-03-19-Settlement-in-Philadelphia-Statement-FINAL.pdf [https://perma.cc/9247-T249] (describing the unprecedented settlement between demonstrators and the City of Philadelphia for the Philadelphia Police Department's "excessive, militaristic use of force" during demonstrations in the summer of 2020).

other steps that would restrict how teachers can discuss race or how curricula can address race, racism, and sexism.[208] According to UCLA Law's CRT Forward Tracking Project, over 700 efforts, ranging from legislation to school board policies, executive orders, letters from attorneys general, or resolutions have been introduced at the local, state, and federal levels aimed at CRT and race or racism.[209]

At bottom, the increased racial consciousness that emerged in 2020 posed the same kind of threat to the racial order that *Brown*'s mandate to desegregate schools did in 1954. Despite the expressed desires of many Americans to confront the nation's historic and current racial inequality, many state and local lawmakers moved to enact measures to prevent this acknowledgment.

The following Sections describe in turn the current iterations of deny, defund, and divert laws and the danger they pose to the future possibility of racial equity in education.

A. CONTEMPORARY DENIAL LAWS

The most recent iteration of denial laws emerged as attacks on CRT and laws seeking to silence discussions of racism or race in classrooms. These legislative attacks were the brainchild of conservative activist Christopher Rufo, who saw in CRT a depository in which to focus conservative resentment of all things associated with racial progress, the nation's history of racism, and left-wing, progressive politics.[210] With CRT, Rufo effectively provided conservatives a convenient vehicle through which to channel racial retrenchment efforts. Rufo openly discussed the right's intention to turn CRT into a "toxic" brand among the American public.[211] The campaign to mischaracterize and vilify CRT has nothing to do with CRT as a legal concept; it derives from the same white supremacy that could

208. Schwartz, *supra* note 22. Eighteen states have enacted such restrictions. *Id.* And "[s]ince September 2020, a total of 229 local, state, and federal government entities across the United States have introduced 750 anti-Critical Race Theory bills, resolutions, executive orders, opinion letters, statements, and other measures," according to UCLA Law's CRT Forward Tracking Project. CRT FORWARD, https://crtforward.law.ucla.edu/ [https://perma.cc/C83U-3E9B] (last visited Jan. 19, 2024).

209. *See* CRT FORWARD, *supra* note 208. According to the website, the CRT Forward Tracking Project "identifies, tracks, and analyzes local, state, and federal measures aimed at restricting the ability to speak truthfully about race, racism, and systemic racism through a campaign to reject CRT." *About*, CRT FORWARD, https://crtforward.law.ucla.edu/about/ [https://perma.cc/F5G4-Y6EF] (last visited Jan. 19, 2024). The Tracking Project extends beyond the K–12 education context to include higher education, government agencies, businesses, and non-profits. Therefore, the Project "provides a comprehensive examination of anti-CRT measures limiting teaching, curricula, trainings, access to certain texts and books, and policy alterations." *Id.*

210. *See* Wallace-Wells, *supra* note 206 ("As Rufo eventually came to see it, conservatives engaged in the culture war had been fighting against the same progressive racial ideology since late in the Obama years, without ever being able to describe it effectively. . . . '"Critical race theory" is the perfect villain,' Rufo wrote.").

211. Rufo noted: "We have successfully frozen their brand—'critical race theory'—into the public conversation and are steadily driving up negative perceptions. We will eventually turn it toxic, as we put all of the various cultural insanities under that brand category." Laura Meckler & Josh Dawsey, *Republicans, Spurred by an Unlikely Figure, See Political Promise in Targeting Critical Race Theory*, WASH. POST (June 21, 2021, 6:22 PM), https://www.washingtonpost.com/education/2021/06/19/

not abide desegregation. Like massive resistance, the anti-CRT campaign has stoked whites' fears of racial progress, namely, what racial progress could mean in terms of their children's changing ideologies. The summer of 2020 invoked questions from white children about race,[212] an occurrence that many white parents were unequipped to address.[213]

Recent laws seeking to deny discussions of race or racism in schools replicate the language of Executive Order 13950, issued by former President Trump.[214] The Order excluded from federal contracts any trainings deemed to be "divisive" or that included "divisive concepts."[215] The Order vaguely defined "divisive" as virtually anything related to racial equality, diversity, or inclusion.[216] Like "CRT," the word "divisive" has since become interchangeable with any term correlated with the struggle for racial justice or equality. The Order also prohibits "race or sex stereotyping" or "race or sex scapegoating."[217] Although later invalidated by a federal court[218] and rescinded by the

critical-race-theory-rufo-republicans/. Rufo also claimed that CRT had become, "in essence, the default ideology of the federal bureaucracy and is now being weaponized against the American people." *Id.*

212. *See* Terry Gross, *Uncovering Who Is Driving the Fight Against Critical Race Theory in Schools*, NPR (June 24, 2021, 1:49 PM), https://www.npr.org/2020/06/03/869071246/how-white-parents-can-talk-to-their-kids-about-race [https://perma.cc/39E9-HQ5W] ("I mean, even elementary school kids - they see what's on TV. They hear what parents are talking about, and they need some sort of frame of reference to understand these issues.").

213. *See* Life Kit, *How White Parents Can Talk to Their Kids About Race*, NPR (June 4, 2020, 12:03 AM), https://www.npr.org/2020/06/03/869071246/how-white-parents-can-talk-to-their-kids-about-race [https://perma.cc/9JSE-TY7Z].

214. Combating Race and Sex Stereotyping, Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020) (rescinded 2021).

215. *Id.* at 60685, 60687.

216. So-called divisive concepts under the order include concepts "that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; . . . [or] (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex." *Id.* at 60685. "These divisive concepts are distorted descriptions of systemic racism and efforts to dismantle it. Functionally, divisive concepts have been operationalized and inaccurately attributed to CRT." CRT FORWARD, *supra* note 209. "The Tracking Project goes beyond a focus on state and federal legislation by also including local government measures and non-legislative actions such as regulations, executive directives, and attorney general opinions." *Id.*

217. Exec. Order No. 13950, 85 Fed. Reg. at 60684–85. The Order defines "race or sex scapegoating" as

> assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others . . . .

Id. at 60685.

218. Jessica Guynn, *Donald Trump Executive Order Banning Diversity Training Blocked by Federal Judge*, USA TODAY (Dec. 24, 2020, 5:49 PM), https://www.usatoday.com/story/money/2020/12/23/trump-diversity-training-ban-executive-order-blocked-federal-judge/4033590001/ [https://perma.cc/5BM9-3FLK]. Janai Nelson, associate director-counsel of the NAACP Legal Defense and Educational Fund, exclaimed, "We commend the court for identifying the constitutional infirmities of President Trump's Executive Order 13950, which amounts to a ban on truth and equality, and for providing immediate relief by enjoining enforcement of the Order nationwide." *Id.*

Biden Administration,[219] the Order—like the Southern Manifesto—triggered state and local action in the form of copycat laws pulling directly from the Order's language.[220]

State and local lawmakers have lifted language from the Order to craft laws seeking to deny curricular content or classroom discussions about race. For example, Virginia Governor Glenn Youngkin set about implementing his anti-CRT agenda when he assumed office. His first act as Virginia Governor was the issuance of an Executive Order banning CRT.[221] Echoing the language of Trump's defunct Order, Youngkin's Executive Order decries CRT as a "divisive concept" that teaches students to "only view life through the lens of race" and invokes Martin Luther King Jr.'s vision of a nation in which children are judged by the content of their character.[222] The Order also demands review of the commonwealth's curriculum enacted in the forty-eight months preceding it.[223] Consistent with other anti-CRT laws enacted after the issuance of the rescinded Executive Order 13950, Youngkin's Order reflects a commitment to confining the teaching of American history to a simplified and sanitized version that casts the nation's founders as heroes and rejects a critical analysis of how racial inequality has impacted the nation. Like measures passed in other states, this would deny children a full understanding of the nation's history and how it influences present inequities along racial lines.

Like Virginia, other states and localities have enacted measures mirroring the rescinded Executive Order's language, seeking to deny children's access to education that addresses race or racism.[224] For example, Texas lawmakers enacted a bill creating the 1836 Project, a committee tasked with promoting "patriotic education and increas[ing] awareness of . . . Texas values."[225] The bill promotes

219. Jessica Guynn, *President Joe Biden Rescinds Donald Trump Ban on Diversity Training About Systemic Racism*, USA TODAY (Jan. 26, 2021, 4:10 PM), https://www.usatoday.com/story/money/2021/01/20/biden-executive-order-overturns-trump-diversity-training-ban/4236891001/ [https://perma.cc/2PPM-GG2M]; *see* Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

220. *See* CRT FORWARD, *supra* note 209 ("The language in [Executive Order (EO)] 13950, in combination with subsequent public statements and an Office of Management and Budget Memo (M-20-34) released alongside EO 13950, launched an assault on teaching about systemic racism, CRT, diversity, inclusion, antiracism and antisexism.").

221. *See* Ending the Use of Inherently Divisive Concepts, Including Critical Race Theory, and Restoring Excellence in K-12 Public Education in the Commonwealth, 38 Va. Reg. Regs. 1510 (Jan. 31, 2022). The Order mirrors the language of rescinded Executive Order 13950, including its definition of "divisive concepts." *Id.* at 1511. The Order also eliminated the Virginia Math Pathways Initiative, which critics claimed would place all students on the same level of math instruction up to grade eleven. *Id.*; *see* Audrey Conklin, *Youngkin Drops Virginia Plan That Would Have Eliminated All Accelerated Math Courses Before 11th Grade*, FOX NEWS (Jan. 25, 2022, 1:24 PM), https://www.foxnews.com/politics/youngkin-virginia-mathematics-pathways-initiative [https://perma.cc/4YR6-ZZUP].

222. 38 Va. Reg. Regs. at 1510.

223. *Id.*

224. Some states that have enacted legislation to limit the teaching of the nation's history include Arkansas, Tennessee, and Georgia. *See, e.g.*, ARK. CODE ANN. § 25-1-902 (2021); TENN. CODE ANN. § 49-7-1904 (2023); Protect Students First Act, GA. CODE ANN. § 20-1-11 (2022).

225. TEX. GOV'T CODE ANN. § 451 (2021) (defining "patriotic education" as education that includes the "presentation of the history of this state's founding and foundational principles").

awareness of "Texas history," including the history of indigenous peoples; Black, Spanish, and Mexican heritage; the state's Christian heritage; and the "heritage of keeping and bearing firearms in defense of life and liberty and for use in hunting."[226] However, according to an interview of historians who reviewed the fifteen-page document compiled by the 1836 Project (which will be distributed to driver's license offices in the state), the document "fails to fully hold institutions accountable for slavery and other forms of oppression and shortchange[s] Indigenous Texans, Tejanos, Black Texans and women."[227] One historian noted of the document's recounting of Texas history that it promoted a "traditional mythic version" of the state's history, casting as heroes those who took Indigenous lands and fought to preserve slavery.[228]

A particularly harmful aspect of Texas's 1836 Project is its denial of the significance and impact of slavery in the state and in the country. According to historians who reviewed the document, it gives only cursory acknowledgment of slavery; it "is mentioned only as a complication that delayed annexation by the United States. The [document] never names any enslaved individuals, nor does it describe their fight for freedom . . . ."[229] Texas's 1836 Project promotes an idealized political viewpoint of history shared by conservatives and denies the comprehensive—and complicated—truth of the state's history. Oklahoma similarly enacted a law barring public school teachers from using terms such as "diversity" or "white privilege" in classrooms and banning works of literature such as *To Kill a Mockingbird* or *A Raisin in the Sun* from school libraries.[230] In Kentucky, the state legislature overrode the Governor's veto of a bill that requires teachers to teach that individuals are not responsible for the actions committed by members of the same race and that "defining racial disparities solely on the legacy of [slavery] is destructive to the unification of our nation."[231]

Another example of legislation designed to deny students' access to comprehensive education can be found in Florida. The state enacted the Individual Freedom Act, or the Stop Wrongs Against Our Kids and Employees Act ("Stop

226. *Id.* § 451.003.

227. Sneha Dey, *1836 Project Promotes Sanitized Version of Texas History, Experts Say*, TEX. TRIB. (Sept. 26, 2022, 5:00 AM), https://www.texastribune.org/2022/09/26/texas-1836-project-pamphlet/ [https://perma.cc/6RB7-FXVQ].

228. *Id.*

229. *Id.*

230. Press Release, ACLU, ACLU, ACLU of Oklahoma, Lawyers Committee File Lawsuit Challenging Oklahoma Classroom Censorship Bill Banning Race and Gender Discourse (Oct. 19, 2021), https://www.aclu.org/press-releases/aclu-aclu-oklahoma-lawyers-committee-file-lawsuit-challenging-oklahoma-classroom [https://perma.cc/MW3Q-RCAW]; *see also* Act of May 7, 2021, ch. 426, 2021 Okla. Sess. Laws 1642 (codified at OKLA. STAT. tit. 70, § 24-157 (2021)).

231. Act effective July 14, 2022, ch. 196, 2022 Ky. Acts 1619 (codified at KY. REV. STAT. ANN. § 158.196 (2022)).

WOKE Act"),[232] to restrict the teaching of divisive concepts in public education institutions in the state. The law was challenged by professor-plaintiffs who alleged that the law violated the First and Fourteenth Amendments, was unconstitutionally vague, and discriminated against Black instructors and students.[233] The complainants argued that the law prohibits professors from expressing viewpoints concerning racism and sexism that are disfavored by Florida lawmakers.[234] Furthermore, complainants argued that the law "was enacted with a racially discriminatory purpose and will have a disparate impact on Black educators and students."[235] In response, a federal court issued an injunction preventing the law's enforcement and calling the law "positively dystopian."[236] The court concluded that the plaintiffs had the potential of prevailing on the merits and noted that the law's restrictions on certain viewpoints could effectively chill speech.[237] The injunction issued against Florida's law signals the constitutional issues that arise with other similar laws. Unfortunately, the injunction only prevents its application to higher education provisions in the state. The law still impacts K–12 schools subject to its censorship provisions.[238] Furthermore, even higher education institutions knowledgeable of the injunction may still be chilled by the law's provisions, the uncertainty of the final outcome as the litigation continues to wind its way through the courts, and Governor DeSantis's rhetoric targeting liberal institutions in the state. For example, after DeSantis targeted the New College of Florida, a historically liberal institution, by appointing six political appointees (including anti-CRT activist Christopher Rufo) to the college's thirteen-member board of trustees,[239] the institution reported that thirty-six of its one hundred faculty positions remained vacant.[240] According to one report, this high number of

232. Stop WOKE Act, ch. 2022-72, 2022 Fla. Laws 534 (Reg. Sess.).

233. Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1233, 1249 (N.D. Fla. 2022) (order granting in part and denying in part motions for preliminary injunction); Leah Watson, *Lessons Learned from Our Classroom Censorship Win Against Florida's Stop W.O.K.E. Act*, ACLU (Nov. 29, 2022), https://www.aclu.org/news/free-speech/lessons-learned-from-our-classroom-censorship-win-against-floridas-stop-w-o-k-e-act [https://perma.cc/QDM9-435E].

234. *See Pernell*, 641 F. Supp at 1230, 1233; Press Release, Legal Def. Fund, Judge Blocks Florida's "Stop W.O.K.E." Censorship Bill from Taking Effect in Higher Education (Nov. 17, 2022), https://www.naacpldf.org/press-release/judge-blocks-floridas-stop-w-o-k-e-censorship-bill-from-taking-effect-in-higher-education/ [https://perma.cc/AE4X-MHY2].

235. Press Release, Legal Def. Fund, *supra* note 234.

236. *Pernell*, 641 F. Supp. at 1230.

237. *Id.* at 1266, 1278.

238. Katie Kustura, *What Is Florida's 'Stop WOKE Act?,'* DAYTONA BEACH NEWS-J. (Mar. 21, 2023, 12:24 PM), https://www.news-journalonline.com/story/news/2023/03/20/floridas-stop-woke-act-still-blocked-what-desantis-backed-law-says/70028694007/ ("So far, the bill remains enforceable in K-12 schools.").

239. Joseph Contreras, *'I'm Not Wanted': Florida Universities Hit by Brain Drain as Academics Flee*, GUARDIAN (July 30, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/jul/30/florida-universities-colleges-faculty-leaving-desantis [https://perma.cc/ERW6-AUB3] ("Governor Ron DeSantis opened 2023 with the appointment of six political allies to the college's 13-member board of trustees who vowed to drastically alter the supposedly 'woke'-friendly learning environment on its Sarasota campus.").

240. *Id.*

vacancies is indicative of the "brain drain" impacting institutions of higher education in the state in the wake of DeSantis's political attacks censoring teaching at Florida's higher education institutions.[241]

Measures limiting curricular content may not seem as harmful as massive resistance measures denying access to integrated schools, but like the pupil placement boards and freedom of choice programs enacted to evade desegregation, these measures serve an equally invidious purpose of denying Black children and other children of color quality education. Research confirms that culturally relevant teaching[242] can promote positive student outcomes for students of color, including increased engagement with content, better attendance, and improved perceptions of themselves as capable learners.[243] Despite these findings, conservative lawmakers seek to limit curricular content that reflects the lives and experiences of Black students. This is consistent with early schools' exclusion of the contributions of Black people from Africa and America to culture, literature, and society. Scholar Carter G. Woodson noted in the 1930s of U.S. curriculum:

> In history, of course, the Negro had no place in this curriculum. He was pictured as a human being of the lower order, unable to subject passion to reason, and therefore useful only when made the hewer of wood and the drawer of water for others. No thought was given to the history of Africa except so far as it had been a field of exploitation for the Caucasian.[244]

Exclusion of Black people, their experiences, and the reality of racism from school curricula thus functions to perpetuate stereotypes and misperceptions of Black people as non-contributors to America. Moreover, if we exclude from curricula a true accounting of slavery, then we prevent a full and honest reckoning with it and the damage it has inflicted on America. For example, slavery was not conditional, it was racial; if we fail to acknowledge this, then we fail to recognize how racism not only upheld the institution of slavery but justified it. The legal system reinforced this distinction by attaching legal meaning, namely subordinate status, to Black enslaved people. Like other systems, the legal system—through the creation of laws that treated Black people as subhuman—was complicit in racial subordination. Today's anti-CRT laws are the progeny of these laws that have entrenched racial inequality.

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241. *Id.*

242. Scholar Gloria Ladson-Billings identifies three components of culturally relevant teaching: "(a) [s]tudents must experience academic success; (b) students must develop and/or maintain cultural competence" or the ability to connect their life experiences, languages, and culture to what they are learning; "and (c) students must develop a critical consciousness through which they challenge the status quo of the current social order." Gloria Ladson-Billings, *But That's Just Good Teaching! The Case for Culturally Relevant Pedagogy*, 34 THEORY INTO PRAC. 159, 160 (1995).

243. *See* Linda Darling-Hammond, Lisa Flook, Channa Cook-Harvey, Brigid Barron & David Osher, *Implications for Educational Practice of the Science of Learning and Development*, 24 APPLIED DEV. SCI. 97, 107 (2020).

244. WOODSON, *supra* note 54, at 21.

B. CONTEMPORARY DEFUNDING LAWS

Like the massive resistance laws that preceded them, current anti-CRT laws also incorporate *defunding* as a tactic to advance their goal of restricting discussion of racial inequality in classrooms. For example, a bill introduced in Oklahoma would have permitted money to follow the child to the school of the family's choice, including away from the public education system.[245] This language is reminiscent of the massive resistance *defunding* measures that provided white families options to explore segregated, private schools—with public funds—had public schools desegregated. As a result, public schools stand to lose valuable student funding should families object to curricular content and seek to transfer to other schools.

Many of the anti-CRT laws also include language threatening to withdraw funding or support from non-compliant schools or districts. For example, in Virginia, the Stafford County School Board enacted a resolution denouncing the 1619 Project, CRT, and student pronoun selection in schools and noting that the board would "stringently review all appropriation requests from the School Board to ensure funding is not dedicated to practices specifically denounced in this Resolution."[246] In Tennessee, lawmakers enacted a measure prohibiting the teaching of divisive concepts copied from the rescinded Executive Order 13950; it cautioned that if the commissioner of education finds that a local education agency (LEA) or public charter school knowingly violated the law, then the commissioner "shall withhold state funds" until the LEA or public charter school demonstrates that it is no longer in violation.[247] Mississippi's legislature enacted a bill that would bar the use of state funds for any purpose that would violate the law's prohibitions on teaching about race.[248] Georgia's Board of Education adopted a resolution affirming that it would not support or impart any K–12 public education resources or standards that "(i) indoctrinate students in social, or political, ideology or theory, or (ii) promote one race or sex above another."[249] The resolution also notes that no federal grant should be applied for or accepted if such grant requires or encourages the teaching of the concepts denounced in the resolution.[250] The West Virginia legislature considered three bills (all of which failed to become law) that prohibited state funding for agencies found to promote

245. Oklahoma Empowerment Act, S.B. 1647, 58th Leg., 2d Sess. (Okla. 2022). The measure would have designated, as qualified expenses, tuition at private schools (including costs for uniforms), online schools or contracted services, and fees for transportation. *Id*. The bill was introduced in February 2022, but failed to pass. *See* Nuria Martinez-Keel, *Treat Vows to Fight for School Choice After Oklahoma Voucher Bill Fails*, OKLAHOMAN (Mar. 24, 2022, 5:49 PM), https://www.oklahoman.com/story/news/2022/03/24/oklahoma-senate-republicans-defeat-private-school-voucher-bill-kevin-stitt/9452224002/.

246. Stafford Cnty. Bd. of Supervisors Res. R21-357 (Va. 2021), https://staffordcova.portal.civicclerk.com/event/723/overview [https://perma.cc/C2R9-NFVN].

247. TENN. CODE ANN. § 49-6-1019 (2021).

248. MISS. CODE ANN. § 37-13-2 (2022).

249. State Bd. of Educ. Res. of June 3, 2021 (Ga. 2021), https://simbli.eboardsolutions.com/Meetings/Attachment.aspx?S=1262&AID=1274907&MID=93474 [https://perma.cc/SRL6-TFDW].

250. *Id*.

"race or sex stereotyping," "scapegoating," or other "divisive" concepts.[251] Alabama similarly considered a measure that would have required heads of state agencies to condition the receipt of grants on certification that the state funds would not be used to promote "divisive concepts."[252] A provision introduced in South Carolina would have similarly required entities receiving state funds to pledge that they would not engage in prohibited activities and, if found to have violated the provision, the entities would be required to return funding to the Office of the State Treasurer.[253] Like the massive resistance defunding measures that preceded them, these measures will likely have a chilling effect on schools and districts that may fear running afoul of them. They also demonstrate lawmakers' willingness to use their full legislative power, including the power of the purse, to ensure compliance by public schools.

C. CONTEMPORARY DIVERSION LAWS

Finally, *diversion* has also been incorporated into contemporary efforts to control public school curricula. Like massive resistance laws that negatively impacted Black educators, many current anti-CRT laws have also resulted in the diversion of educators and school leaders from the workforce, including through firing or other forms of removal. However, unlike massive resistance measures, anti-CRT laws have impacted white teachers and school leaders as well as those of color who have worked to raise awareness about racial inequality in their classrooms.

The targeting of white educators is a testament to the potential threat that multiracial alliances and solidarity—demonstrated during the summer of 2020's protests—pose to the existing racial order. This is reminiscent of measures enacted during massive resistance that required educators to report their organizational affiliations so that lawmakers could ensure they were not affiliated with organizations sympathetic to school desegregation.[254] Similarly, many of the anti-CRT laws and proposed amendments include language threatening firing or other punitive actions against educators or school leaders found to violate their provisions.[255] Some localities have made good on promises to take punitive action against educators who violate their provisions, including by teaching "divisive concepts." For example, Tennessee's legislature enacted legislation and the state Department of Education implemented regulations outlining the process for

251. H.B. 2595, 84th Leg., Reg. Sess. (W. Va. 2021); S.B. 558, 84th Leg., Reg. Sess. (W. Va. 2021); S.B. 45, 85th Leg., Reg. Sess. (W. Va. 2022).

252. H.B. 9, 2022 Leg., Reg. Sess. (Ala. 2022).

253. H.B. 4799, 124th Leg., Reg. Sess. (S.C. 2021).

254. *See supra* Section II.C.

255. *See* TENN. CODE ANN. § 49-6-1019 (2021) (withholding state funds for a violation); *see also* TENN. COMP. R. & REGS. 0520-12-04-.05 (2022) (permitting disciplinary action against teachers who teach "Prohibited Concepts"); H.R. Amend. No. 569361, 2021 Leg., Reg. Sess. (Fla. 2021) (amending Act of June 24, 2021, ch. 162, 2021 Fla. Laws 2) (withdrawn Apr. 26, 2021) ("[A] teacher may be dismissed or not be reemployed for teaching, instructing, or training any student to believe any divisive concept.").

investigating and resolving complaints alleging teaching of prohibited concepts.[256] Shortly after the law passed, Matthew Hawn, a white educator of sixteen years in Kingsport, Tennessee, was reprimanded for discussing white privilege and assigning a Ta-Nehisi Coates essay in his Contemporary Issues class.[257] Hawn was fired and, upon his appeal, the school board voted to uphold his termination.[258] In Florida, a teacher eventually settled with a school district after reportedly being fired for hanging a Black Lives Matter flag over her classroom door.[259] A Texas principal was placed on paid administrative leave and his contract was not renewed after he voiced concerns about systemic racism.[260] According to one report, more than 160 educators resigned or were fired from their jobs between 2020 and 2022 due to conflicts regarding classroom teaching content.[261] The report notes that the vague wording of many measures has left many educators uncertain about what curricular content is permissible, creating a chilling effect on teaching about racism and related subjects in the classroom.[262] This uncertainty is taking place at the same time that the teaching workforce is experiencing record vacancies. One 2022 report estimates 36,500 teacher vacancies nationwide, with an estimated 163,650 teachers teaching without full certification or without certification in their teaching subject.[263]

It is difficult to estimate the full impact that contemporary anti-CRT laws—which are operating to deny, defund, and divert public education—will ultimately have on the landscape of public education. An ongoing global pandemic and a looming presidential election also pose considerations and potential threats to

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256. *See* TENN. CODE ANN. § 49-6-1019; TENN. COMP. R. & REGS. 0520-12-04-.05.

257. Hannah Natanson, *A White Teacher Taught White Students About White Privilege. It Cost Him His Job.*, WASH. POST (Dec. 6, 2021, 8:00 AM), https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory/. Hawn received parent complaints after assigning the essay *The First White President* by Coates and received a reprimand from school officials for "one-sided" teaching. *Id.* The school district issued a letter to Hawn reprimanding him for "neglect of duty and insubordination." *Id.*

258. Rick Wagner, *Watch Now: Sullivan School Board Votes to Proceed with Dismissal of Teacher Matthew Hawn*, TIMESNEWS (June 9, 2021), https://www.timesnews.net/news/watch-now-sullivan-school-board-votes-to-proceed-with-dismissal-of-teacher-matthew-hawn/article_89ff760a-c88b-11eb-b11a-7b92401030fc.html [https://perma.cc/7B2X-9VNP].

259. Emily Bloch, *Duval County Teacher Amy Donofrio Terminated, Settles Lawsuit with School District*, FLA. TIMES-UNION (Aug. 6, 2021, 3:31 PM), https://www.jacksonville.com/story/news/education/2021/08/03/duval-schools-agrees-settlement-lawsuit-regarding-teacher-blm-flag/5477872001/ [https://perma.cc/35WA-LNNR].

260. Scott Neuman, *The Culture Wars Are Pushing Some Teachers to Leave the Classroom*, NPR (Nov. 13, 2022, 7:00 AM), https://www.npr.org/2022/11/13/1131872280/teacher-shortage-culture-wars-critical-race-theory [https://perma.cc/8SLR-WYKF].

261. Hannah Natanson & Moriah Balingit, *Caught in the Culture Wars, Teachers are Being Forced from Their Jobs*, WASH. POST (June 16, 2022, 7:42 AM), https://www.washingtonpost.com/education/2022/06/16/teacher-resignations-firings-culture-wars/. Some reported firings have also involved teachers espousing conservative viewpoints, such as opposing mask mandates or criticizing CRT. *See id.*

262. *Id.*

263. Tuan D. Nguyen, Chanh B. Lam & Paul Bruno, *Is There a National Teacher Shortage? A Systematic Examination of Reports of Teacher Shortages in the United States* 21 (Annenberg Inst., Brown Univ., Working Paper No. 22-631, 2022), https://edworkingpapers.com/index.php/ai22-631 [https://perma.cc/E3YM-JF6N].

public education. The next Part explores targeted governmental interventions at different levels of educational governance that may help to thwart anti-CRT laws and future efforts to undermine educational opportunity for Black children.

IV. COUNTERING MISEDUCATION AND ABOLISHING ANTI-CRT LAWS

> It is not really a "Negro revolution" that is upsetting the country. What is upsetting the country is a sense of its own identity. If, for example, one managed to change the curriculum in all the schools so that Negroes learned more about themselves and their real contributions to this culture, you would be liberating not only Negroes, you'd be liberating white people who know nothing about their own history.[264]

Deny, defund, and divert laws have repercussions not only for Black Americans, but also for all Americans who suffer the collateral consequences of miseducation. As this Article describes, deny, defund, and divert laws have negatively impacted the educational experiences and outcomes of Black children. In addition, and as the prescient quote from James Baldwin's 1963 *A Talk to Teachers* testifies, all Americans suffer from miseducation, which deny, defund, and divert laws have fueled.[265] However, there is no easy solution to address the ways that deny, defund, and divert education laws have been deployed for over a century to sustain racial stratification through public education in this nation. While acknowledging the limitations of the law, this Part endeavors to explore legal interventions to deter and dismantle state and local deny, defund, and divert education laws. However unrelenting efforts to deploy the law in service of white supremacy have been, I posit that the work to challenge them must be similarly indefatigable.

One important consideration is that legal remedies that can be responsive to deny, defund, and divert laws must consider the historic and enduring effects of discriminatory, race-conscious laws that imposed second-class citizenship and inequality upon Black people. This is predicated on the reality that anti-CRT laws and their preceding iterations in the forms of Slave Codes, Black Codes, and Jim Crow laws were indeed race-conscious laws.[266] These race-conscious laws created racial categories and bestowed legal status based upon perceived race, with whites being granted "superior" legal status that afforded property rights and other benefits, and Black people being relegated to "inferior" legal status, including first lacking legal status as enslaved "property," and later being relegated to

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264. BALDWIN, *supra* note 1, at 329.

265. *Cf.* GENEVIEVE SIEGEL-HAWLEY, NAT'L COAL. ON SCH. DIVERSITY, RESEARCH BRIEF: HOW NON-MINORITY STUDENTS ALSO BENEFIT FROM RACIALLY DIVERSE SCHOOLS 2 (2012), http://www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf [https://perma.cc/54V9-XNKZ] ("The complex, more flexible thinking that white students develop from these exchanges is an essential academic benefit flowing from diverse classrooms. . . . And in a number of subjects, like math and science, diverse educational settings are consistently linked to higher test scores for whites.").

266. As Wilson has asserted, "[M]uch of American law for much of this country's history was indeed very race-conscious. Race-conscious laws formed the foundation for . . . white supremacy . . . ." Wilson, *supra* note 4, at 7.

substandard facilities under Jim Crow segregation.[267] These discriminatory, race-conscious laws fashioned material realities, the consequences of which have positioned white people at an advantage in terms of property acquisition, educational attainment, and wealth accumulation that still resonates today.[268]

Therefore, consideration of the historic and current effects of discriminatory laws must be factored into race-conscious laws seeking to thwart deny, defund, and divert laws.[269] This Article adopts the definition of race-conscious laws articulated by Wilson, meaning those laws that recognize the social significance of race and historic and current racial inequality and racial hierarchy.[270] Furthermore, I concur with Wilson's conclusion that "[t]o dismantle white supremacy, the law must become more race-conscious."[271] This means recognizing the legal mechanisms that have facilitated racial stratification, such as Jim Crow laws perpetuating segregated neighborhoods and schools, and devising legal interventions that take into account the need to circumvent segregated neighborhoods to facilitate school integration. The adoption of the term "race-conscious" takes on a very different meaning from the contemporary use of the term and the condemnation of any mention of race, even in a remedial context. However, this Article contends that recognizing the ways that the law has been complicit in perpetuating racial stratification through laws favoring whites and disadvantaging Black people is a vital first step in devising legal interventions to thwart deny, defund, and divert laws.

A. DETERRING AND DISMANTLING CONTEMPORARY ANTI-CRT LAWS THAT DENY EDUCATIONAL OPPORTUNITY

The plethora of *deny* laws that seek to restrict curricular content related to race or racism can be thwarted by laws that promote inclusive curricula that address the full range of the nation's history, including the contributions of Black Americans. Oversight over curricula varies by state, with some states providing broad authority to state entities to develop curricula and others providing local entities with roles in curricular development. As described in this Article, a range of states have taken actions to exclude curricular content related to race or racism or that addresses the contributions of Black Americans to this nation. For example, Florida enacted the Stop WOKE Act[272] and officials have condemned the

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267. *Id.* at 6.

268. *See id.* at 13 ("The wealth gap and power distribution, for example, seems neutral — like a fair distribution of resources — when, in fact, it was not, because the hierarchical significance of race generally and whiteness specifically was produced and/or reinforced by race-conscious laws favoring whites.").

269. Indeed, the Court has acknowledged the racist origins of legislation when considering the constitutionality of laws. Notably, in her concurrence in *Ramos v. Louisiana*, Justice Sotomayor observed, "[U]nfortunately, many laws and policies in this country have had some history of racial animus . . . [and] the States' legislatures never truly grappled with the laws' sordid history in reenacting them." 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring in part).

270. *See* Wilson, *supra* note 4, at 4, 13.

271. *Id.* at 13.

272. Ch. 2022-72, 2022 Fla. Laws 534 (Reg. Sess.).

Advanced Placement (A.P.) African-American studies course offering as "lack[ing] educational value,"[273] as Governor DeSantis attempted to secure the Republican presidential nomination.[274] However, other states and localities are expanding curricula to promote inclusive and culturally responsive education.

In contrast to states such as Florida that are enacting laws to deny access to culturally inclusive education, in 2021 California became the first state in the nation to enact a law adopting an ethnic studies requirement for high school graduation.[275] The ethnic studies curriculum is designed to teach students about the struggles and contributions of Black, Asian, Latino, and Indigenous Americans, among others, who have historically been excluded from curricula.[276] California State Superintendent of Public Instruction Tony Thurmond also pointed to students' repeated appeals for curricular content that reflected their histories and experiences as motivation for adopting ethnic studies.[277] Beginning in the 2025–26 school year, the state will require school districts to develop coursework that examines the contributions and struggles of Black Americans, Latinos, Indigenous Americans, and Asian Americans throughout the nation's history.[278] California's adoption of ethnic studies is also predicated on research underscoring the benefits of such curricula. In one study of an ethnic studies curriculum adopted in San Francisco, students participating in the curriculum experienced increased attendance of twenty-one percent and increased cumulative grade point averages by 1.4 points, as well as increased graduation rates and higher

273. Patricia Mazzei & Anemona Hartocollis, *Florida Rejects A.P. African American Studies Class*, N.Y. TIMES (Jan. 19, 2023), https://www.nytimes.com/2023/01/19/us/desantis-florida-ap-african-american-studies.html. In a letter to the College Board, the Florida Department of Education noted that it would not offer the course, underscoring that the course content was "inexplicably contrary to Florida law and significantly lacks educational value." *Id.*

274. Martin Pengelly & Maanvi Singh, *Florida Governor Ron DeSantis Announces 2024 Presidential Bid*, GUARDIAN (May 24, 2023, 9:54 PM), https://www.theguardian.com/us-news/2023/may/24/ron-desantis-announces-2024-presidential-bid [https://perma.cc/X3WD-6EBM] ("As governor of Florida, DeSantis has pursued divisive, culture war-focused policies, including signing a six-week abortion ban and targeting the teaching of LGBTQ+ and race issues in public schools."); *cf.* Steve Peoples, Thomas Beaumont & Holly Ramer, *DeSantis Drops out of the Presidential Race, Leaving Trump and Haley to Face off in New Hampshire*, AP NEWS (Jan. 21, 2024, 7:40 PM), https://apnews.com/article/ron-desantis-250c8ed4b49843350e258f0c2754c8ba.

275. Act of Oct. 8, 2021, ch. 661, 2021 Cal. Stat. 8443 (Reg. Sess.); Meryl Kornfield, *California Becomes First State to Require Ethnic Studies for High School Graduation*, WASH. POST (Oct. 9, 2021, 6:03 PM), https://www.washingtonpost.com/education/2021/10/09/california-ethnic-studies/; *see also* John Fensterwald, *After 8 Hours, 250-Plus Speakers, California Board Adopts Ethnic Studies Model Curriculum*, EDSOURCE (Mar. 19, 2021), https://edsource.org/2021/after-8-hours-250-plus-speakers-california-board-adopts-ethnic-studies-model-curriculum/651641 [https://perma.cc/KQ2L-RH76].

276. Fensterwald, *supra* note 275 ("The goal of ethnic studies is to increase understanding and respect among all students while focusing on the often overlooked history, struggles and cultures of the four racial and ethnic groups that have been the foundation since ethnic studies programs were created five decades ago: Blacks, Latinos, Asians and Indigenous Americans.").

277. *Id.*

278. Kornfield, *supra* note 275.

enrollment in college, with positive impacts continuing after high school.[279] Other states that have passed laws similar to California's include Connecticut,[280] Vermont,[281] Nevada,[282] Nebraska,[283] and Indiana.[284]

Another exemplar of a state law that counters laws designed to deny inclusive curricula is a New Jersey law enacted in 2021 requiring diversity and inclusion courses in K–12 education.[285] The bill seeks to teach students about "economic diversity, equity, inclusion, tolerance, and belonging in connection with gender and sexual orientation, race and ethnicity, disabilities, and religious tolerance."[286] New Jersey Governor Philip Murphy, in response to Florida's criticism of A.P. African-American studies, announced that the state would also expand the A.P. African-American studies course to twenty-five schools across the state.[287] These kinds of laws and practices counter laws and rhetoric designed to deny access to

279. John Fensterwald, *Research Finds Ethnic Studies in San Francisco Had Enduring Impact*, EDSOURCE (Sept. 7, 2021), https://edsource.org/2021/research-finds-ethnic-studies-in-san-francisco-had-enduring-impact/660856 [https://perma.cc/FS6S-RLLQ].

280. *See* An Act Concerning the Inclusion of Black and Latino Studies in the Public School Curriculum, No. 19-12, 2019 Conn. Pub. Acts 35 (Reg. Sess.). Then-Connecticut Education Commissioner (now-Secretary of Education) Miguel Cardona remarked, "Identities matter . . . . This curriculum acknowledges that by connecting the story of people of color in the U.S. to the larger story of American history. The fact is that more inclusive, culturally relevant content in classrooms leads to greater student engagement and better outcomes for all." Leah Asmelash & Anna Sturla, *Connecticut Will Become the First State to Require High Schools to Offer Black and Latino Studies in Fall 2022*, CNN (Dec. 9, 2020, 6:06 PM), https://www.cnn.com/2020/12/09/us/connecticut-high-schools-black-latino-studies-trnd/index.html [https://perma.cc/R25Z-T4J7].

281. *See* An Act Relating to Ethnic and Social Equity Studies Standards for Public Schools, No. 1, § 1, 2019 Vt. Acts & Resolves 1, 2 (Reg. Sess.) (creating the Ethnic and Social Equity Standards Advisory Working Group to advise the State Board of Education on the adoption of ethnic and social equity studies standards into statewide educational standards); *see also* Lola Duffort, *Scott Signs Ethnic Studies Bill into Law*, VTDIGGER (Mar. 29, 2019, 8:56 PM), https://vtdigger.org/2019/03/29/scott-signs-ethnic-studies-bill-law/ [https://perma.cc/EU4Y-EUY2] (reporting that the law had support from the Vermont Coalition on Ethnic and Social Equity in Schools, which noted that the law "would help students get an education that better reflected their history and heritage").

282. *See* Act of May 24, 2017, ch. 102, 2017 Nev. Stat. 451 (Spec. Sess.) (amending Chapter 389 and charging the Nevada Council to Establish Academic Standards for Public Schools to "establish standards of content and performance for ethnic and diversity studies . . . in high school").

283. *See* Act of Mar. 27, 2019, 2019 Neb. Laws 802 (1st Sess.) (noting that "[a]ll social studies courses approved for grade levels as provided by this section shall include and adequately stress contributions of all ethnic groups").

284. *See* An Act to Amend the Indiana Code Concerning Education, 2017 Ind. Acts 2772 (Reg. Sess.).

285. N.J. STAT. § 18A:35-4.36a (2021).

286. *Id.* The law also seeks to include "age-appropriate lessons that examine the effects unconscious biases and economic disparities have on both an individual and societal level." *New Jersey Passes Bill Requiring Diversity and Inclusion Courses for K-12 Education*, INSIGHT INTO DIVERSITY (Apr. 13, 2021), https://www.insightintodiversity.com/new-jersey-passes-bill-requiring-diversity-and-inclusion-courses-for-k-12-education/ [https://perma.cc/HU5Y-ATUC].

287. Kimiko de Freytas-Tamura, *Gov. Murphy Knocks DeSantis and Expands African American Studies*, N.Y. TIMES (Feb. 15, 2023), https://www.nytimes.com/2023/02/15/nyregion/nj-ap-african-american-studies-high-schools.html (quoting Governor Murphy saying about the state's expansion of the course, "[e]nough already of all this nonsense coming out of Florida, we want to expand the story and tell the whole truth and nothing but the truth, even when it hurts").

curricular content that recognizes the nation's rich history and the contributions of Black Americans to shaping the nation.

B. DEFEATING DEFUNDING LAWS BY INVESTING IN HISTORICALLY UNDERSERVED DISTRICTS AND SCHOOLS

New Jersey also provides an instructive lesson on how to counter defunding measures. The state is home to one of the most significant school finance cases, the *Abbott v. Burke* litigation, which began in 1981 with a complaint filed on behalf of students in districts in Camden, East Orange, Irvington, and Jersey City.[288] The plaintiffs (known as the *Abbott* districts) alleged that the state violated its constitution and the federal Constitution by upholding a school finance system that disparately funded urban schools (attended by high numbers of Black students) and suburban schools (disproportionately attended by white students).[289] The litigation spanned decades and has inspired increased investment by the state in preschool, urban districts, and legislation seeking to remedy funding inequities.[290]

In 2008, the state enacted the School Funding Reform Act (SFRA), the goal of which was to address chronic defunding and disinvestment in high-need districts by increasing funding to disadvantaged districts overwhelmingly populated by Black students.[291] As a result of the law, in 2018 New Jersey was ranked as the fourth most progressive school finance system in the nation, meaning that the state provided increased funding to high-need, low-wealth districts.[292] The law addresses chronic defunding in two primary ways: (1) it targets more state funding to high-need districts; and (2) it takes into account local income and wealth in determining the amount of state aid to provide to districts, rather than leaving

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288. Abbott v. Burke, 495 A.2d 376, 380 (N.J. 1985). The Education Law Center filed the complaint, which alleged that the state violated the Public School Education Act of 1975 by its inequitable funding of the plaintiff districts. *The History of* Abbott v. Burke, EDUC. L. CTR., https://edlawcenter.org/litigation/abbott-v-burke/abbott-history.html [https://perma.cc/WS4Q-FBQY] (last visited Jan. 19, 2024).

289. *See Abbott*, 495 A.2d at 380–81; *see also* LINDA DARLING-HAMMOND, LEARNING POL'Y INST., INVESTING FOR STUDENT SUCCESS: LESSONS FROM STATE SCHOOL FINANCE REFORMS 15–16 (2019), https://learningpolicyinstitute.org/media/348/download?inline&file=Investing_Student_Success_REPORT.pdf [https://perma.cc/LPK4-JKTQ].

290. DARLING-HAMMOND, *supra* note 289, at 14–15 ("After [three] decades of litigation . . . the state made a major investment in what it called 'parity' for low-wealth, high-minority districts beginning in 1996–97, an investment in preschool initiated in 2000, and an intensive instructional improvement initiative undertaken in the *Abbott* districts in 2003.").

291. *See* School Funding Reform Act of 2008, ch. 260, 2007 N.J. Laws 1719 (Reg. Sess.). The law also sought to bring all districts to adequacy standards enabling all students to meet state standards. *See id.* at 1742.

292. IVY MORGAN & ARY AMERIKANER, EDUC. TR., FUNDING GAPS: AN ANALYSIS OF SCHOOL FUNDING EQUITY ACROSS THE U.S. AND WITHIN EACH STATE 6 (2018), https://files.eric.ed.gov/fulltext/ED587198.pdf [https://perma.cc/SH7B-MD8D] (identifying New Jersey as one of six states nationwide that provided at least fifteen percent more in funding per student to high-need, high-poverty districts than higher wealth districts).

low-wealth districts unable to generate enough revenue to fund schools.[293] The state steps in to contribute a portion of education funding and, in a process known as equalization, provides a greater contribution to lower wealth districts unable to raise enough revenue (due to lower property values) than to higher wealth districts.[294] This approach recognizes historic discriminatory practices such as redlining, which have contributed to lower property values in communities populated with large proportions of Black people. However, SFRA is not without its critics.[295] Critics of the law note the cuts and freezes to state aid, particularly stemming from the 2008 recession, and the persistent failure of former governor Chris Christie to fully fund the formula.[296] Critics also disapprove of the imposition of local property tax caps, which prevent the districts that would be able to raise additional education revenue from increasing tax rates to meet adequacy targets (and ensure that those districts able to provide their share of local education funding do so).[297]

Although SFRA has not been a flawlessly implemented law, it is illustrative of features that other states seeking to address defunding measures should include in their laws. For example, targeting increased state funding to those districts with the greatest need—chronically defunded districts—is vital to addressing the enduring effects of discriminatory laws and policies that have defunded public schools attended by Black children. In addition, the law considers student characteristics, such as students impacted by concentrated poverty, English learners, students with disabilities, and students living in different geographic areas of the state, recognizing that funding must be responsive to students' unique needs and circumstances.[298]

Like New Jersey, Massachusetts also experienced prolonged school finance litigation, which culminated in the *McDuffy v. Secretary of the Executive Office of Education* decision in 1993, in which the court found the Commonwealth to be in violation of its constitutional obligation to ensure that all children receive quality

293. *See* DARLING-HAMMOND, *supra* note 289, at 16 (noting that the law provides aid progressively based upon student need and considers local wealth in determining state aid contributions to districts).

294. *See* BAKER & WEBER, *supra* note 201, at 6 ("[D]istricts with high property values have a critical advantage over districts with low property values: to raise equivalent revenues, a property-poor district must have a higher tax rate than a property-rich district.").

295. According to one expert, "SFRA, as designed, has never been completely implemented or fully funded." *Id.* at 29. Cuts have resulted in some districts receiving $5,000 per student below their funding as promised by SFRA. *See id.* at 30.

296. *See id.* at 3; *see also Christie's Failure to Fund the Formula Four Years Running*, EDUC. L. CTR. (Apr. 18, 2013), https://edlawcenter.org/news/archives/school-funding/christies-failure-to-fund-the-formula-four-years-running.html [https://perma.cc/7HPS-5CNQ] ("Governor Christie's proposed FY14 school aid budget drastically underfunds schools by ignoring the essential provisions of [SFRA]. According to the Office of Legislative Services' previously released estimates of full funding under SFRA, the Governor proposes underfunding schools in FY14 by approximately $1.2 billion.").

297. BAKER & WEBER, *supra* note 201, at 3.

298. *See id.* at 16–17. SFRA's provision of additional concentration funding "acknowledges that as poverty concentration increases, so too do the costs associated with providing low income children equal educational opportunity." *Id.* at 19.

education.[299] In response to the ruling, the Commonwealth adopted a new funding formula as part of its 1993 Education Reform Act, known as Chapter 70.[300] The law governs funding for traditional public schools in the Commonwealth. Funding for charter schools is determined by a different formula outlined in Chapter 71 of Massachusetts law.[301] Chapter 70 was updated by the Student Opportunity Act (SOA) passed in 2019, which left much of the formula intact.[302] Chapter 70 spurred increased investment in lower wealth schools and required gradual funding increases based on the numbers of students from low-income families and English learners served by a district.[303] The formula also spurred investment in teachers and school staff to keep class sizes smaller (down to class sizes of twenty-two students in elementary schools and twenty-five students in middle schools).[304]

While New Jersey and Massachusetts provide templates for other states to address chronic defunding, they also provide lessons on what is needed to promote school funding equity and adequacy. Namely, the prolonged litigation in both states emphasizes the importance of active judicial oversight to ensure that court orders are being fulfilled. In addition, both states demonstrate the power of continued and sustained advocacy and pressure on state legislatures and governors to ensure that school finance systems are fully funded, and that Black students subjected to persistent defunding receive the constitutionally required standard of education due all children in the state. As one expert notes, "The available evidence leaves little doubt: Sufficient financial resources, equitably distributed in relation to pupil needs, are a necessary underlying condition for providing quality education."[305]

One legal intervention to address defunding of public schools in the form of white children being funneled into private schools is the establishment of magnet schools. Magnet schools are public elementary or secondary schools that seek to achieve voluntary desegregation through parental choice by offering innovative academic experiences designed to draw students to urban centers, like

299. 615 N.E.2d 516, 552 (Mass. 1993) (finding that "fiscal support, or the lack of it, has a significant impact on the quality of education each child may receive," and that the Commonwealth's school finance system was in violation of the state constitution's education clause requiring that the Commonwealth ensure the education of all children).

300. *See* MASS. GEN. LAWS ch. 70, 1993 Mass. Acts 159.

301. MASS. GEN. LAWS ch. 71, § 89 (2019).

302. *See* Student Opportunity Act, ch. 132, 2019 Mass. Acts 687 (Reg. Sess.). The SOA requires districts to publicly post their three-year plans for closing achievement gaps and establishes a special commission to study and make recommendations for sustainability for rural districts. Dialynn Dwyer, *What You Need to Know About the Milestone Education Bill Unanimously Approved by the Legislature*, BOSTON.COM (Nov. 21, 2019), https://www.boston.com/news/education/2019/11/21/student-opportunity-act-spending-education-bill-massachusetts/ [https://perma.cc/E3PE-K2UM].

303. DARLING-HAMMOND, *supra* note 289, at 13.

304. *See* Bianca Vázquez Toness, *How Massachusetts Pays for Its Schools*, GBH (July 31, 2023), https://www.wgbh.org/news/education/2019/03/05/how-massachusetts-pays-for-its-schools [https://perma.cc/Z22S-EZEC].

305. BAKER, *supra* note 186, at 15.

"magnets."[306] That said, like other legal approaches to promoting school integration, magnet schools can be implemented in ways that undermine their purpose and that perpetuate segregation. For example, some magnet programs housed in otherwise diverse schools have instituted exclusionary admissions practices that result in mostly white student enrollment in the magnet program, which perpetuates in-school segregation.[307] Therefore, magnets must consider the ways that discriminatory, race-conscious laws fostered segregation and institute approaches that can instead promote inclusiveness. For example, to address the potential for tracking that excludes Black students from the magnet program, localities can institute whole-school magnets, in which all students in the school are enrolled in the magnet program.[308] To address redlining practices that relegated many Black families to segregated urban neighborhoods, localities can implement magnet school approaches that recognize the impact of segregation, such as the provision of free transportation or strategic siting to ensure that Black children can access magnet schools.[309]

An exemplar of a locality that is implementing inclusive practices to expand access to its magnet school can be found in Fairfax County, Virginia, at Thomas Jefferson High School for Science and Technology (known as TJ).[310] Following the summer of 2020's widespread racial reckoning, the Virginia legislature included language in the fiscal year 2020 budget bill requiring the state's magnet schools to set diversity goals and submit status reports in the fall.[311] That fall, TJ began implementing changes to its admissions practices,[312] including eliminating its $100 application fee and discontinuing the standardized portion of its admissions test.[313] Although these initial changes to its admissions process prompted protests from some white and Asian-American parents, TJ proceeded with implementing additional changes, including expanding its class size by fifteen percent, guaranteeing admission to top students at each public middle school, and giving

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306. JANEL GEORGE & LINDA DARLING-HAMMOND, LEARNING POL'Y INST., ADVANCING INTEGRATION AND EQUITY THROUGH MAGNET SCHOOLS 4 (2021), https://learningpolicyinstitute.org/sites/default/files/product-files/Magnet_Schools_REPORT.pdf [https://perma.cc/EZ28-3CJZ].

307. *See id.* at 18 ("This practice of tracking students into magnet programs is consistent with the widespread practice of tracking in public schools, in which white students are tracked into higher-level courses and Black students and other students of color are relegated to lower-level courses.").

308. *See id.*

309. *See id.*

310. Thomas Jefferson was designated as a magnet school in 1985 and offers a comprehensive college preparatory program for grades 9–12 emphasizing science, technology, engineering, and mathematics (STEM). *TJHSST Freshman Application Process*, FAIRFAX CNTY. PUB. SCHS., https://www.fcps.edu/registration/thomas-jefferson-high-school-science-and-technology-admissions/tjhsst-freshman [https://perma.cc/K93C-NKX8] (last visited Jan. 19, 2024).

311. *See* H.B. 30, 2020 Leg., Reg. Sess. (Va. 2020).

312. TJ had long struggled to promote more diversity in its student body. *See* George, *supra* note 170, at 1103–06.

313. *See* Hannah Natanson, *Fairfax School Board Eliminates Admissions Test at Thomas Jefferson High School*, WASH. POST (Oct. 8, 2020, 11:48 PM), https://www.washingtonpost.com/local/education/thomas-jefferson-high-admissions-change/2020/10/07/0a1f8faa-08a7-11eb-9be6-cf25fb429f1a_story.html; *see also* FAIRFAX CNTY. PUB. SCHS., *supra* note 310 ("A holistic review will be done . . . .").

applicants holistic reviews that examined "experience factors" such as speaking English as a second language, having a disability, or attending a historically underrepresented middle school.[314] The data for the students offered admission in the fall of 2021 reflected increased diversity, with the percentage of Black students increasing from 1% to 7% and Hispanic students increasing from 3% to 11%.[315]

Retrenchment followed these admissions changes in the form of a claim filed by the conservative Pacific Legal Foundation against the Fairfax County School Board. The Asian-American families who were plaintiffs claimed that TJ's admissions changes discriminated against Asian-American students in violation of the Fourteenth Amendment.[316] Although the admissions changes TJ instituted are race-neutral,[317] the challenge nonetheless centered on the increased numbers of Black and Hispanic students admitted to TJ under the revised admissions protocols. In reviewing a district court ruling in favor of the plaintiffs, the Fourth Circuit noted that the "Supreme Court has repeatedly stated that it is constitutionally permissible to seek to increase racial (and other) diversity through race neutral means."[318] The U.S. Supreme Court upheld the appellate court's stay in a 6–3 majority, leaving the admissions process in place for the class of 2026.[319] On May 23, 2023, the Fourth Circuit ruled that TJ's admissions policy did not discriminate against or have a disparate impact on Asian-American applicants.[320] A petition for a writ of certiorari filed by plaintiff–parents backed by the Pacific Legal Foundation—on the heels of the ruling limiting affirmative action in higher education as detailed below—was recently rejected by the Supreme Court.[321]

The U.S. Supreme Court effectively eviscerated race-conscious affirmative action in higher education in the summer of 2023—overturning forty-five years of precedent by invalidating two higher education programs at Harvard College

314. George, *supra* note 170, at 1112–13.

315. *Id.* at 1115.

316. *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 21cv296, 2022 WL 579809, at *1 (E.D. Va. Feb. 25, 2022), *rev'd*, No. 21-cv-00296, 2022 WL 986994 (4th Cir. Mar. 31, 2022). The challenge brought against TJ also represents a new tactic being employed by conservatives opposed to affirmative action—the deployment of Asian-American families to be the new face of opposition to integration. *See* George, *supra* note 170, at 1093–94 ("The images of mobs of angry white parents protesting outside of school houses that signified the era known as 'massive resistance' . . . have been replaced by the faces of mostly Asian American parents who are enlisted as litigants in cases seeking to eviscerate affirmative action and school diversity programs.").

317. The admissions staff evaluating student applications did not have students' demographics or names when they evaluated applications, and none of the admissions criteria was based upon race or ethnicity. *Id.* at 1116.

318. *Coal. for TJ*, 2022 WL 986994, at *4 (Heytens, J., concurring).

319. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672, 2672 (2020) (mem.). Justices Thomas, Alito, and Gorsuch "would grant the application to vacate the stay." *Id.*

320. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 881 (4th Cir. 2023).

321. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 23-179 (U.S. Feb. 20, 2024). However, it is likely that opponents of diversity efforts will continue to challenge K–12 diversity programs.

and the University of North Carolina at Chapel Hill.[322] The cases were orchestrated by conservative Edward Blum, who has long sought to dismantle affirmative action.[323] In striking down the programs, the Court rejected arguments recognizing the educational benefits of diversity it had previously embraced in *Grutter v. Bollinger* as too imprecise to survive strict scrutiny.[324] While the case leaves open the door for race-neutral approaches to foster diversity,[325] it signals the end of contemporary race-conscious approaches to affirmative action in the higher education arena. Justices Sotomayor and Jackson issued dissents highlighting the majority's ahistorical and "colorblind" interpretation of the Fourteenth Amendment, with Justice Sotomayor criticizing the framework for "subvert[ing] the constitutional guarantee of equal protection by further entrenching racial inequality in education."[326] The decision left K–12 education untouched, but will likely be used by opponents of diversity to attack programs like TJ's that focus on removing barriers to admission for many students of color. Despite the Court's recent action, it is still worth recognizing the value that diversity brings to educational environments,[327] as well as the efficacy of TJ's admissions changes in promoting diversity.

322. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2175 (2023). The Court's decision also resolved *Students for Fair Admissions, Inc. v. University of North Carolina* (addressing a constitutional Equal Protection claim & Title VI statutory claim). *Id.*

323. Sarah Hinger, *Meet Edward Blum, the Man Who Wants to Kill Affirmative Action in Higher Education*, ACLU: RACIAL JUST. (Apr. 2023), https://www.aclu.org/news/racial-justice/meet-edward-blum-man-who-wants-kill-affirmative-action-higher [https://perma.cc/4ZFF-8XE6] ("But make no mistake about it — the engineer behind this litigation is intent on sowing divisiveness amongst communities of color in an effort to dismantle diversity programs and civil rights protections that benefit all people of color. Students for Fair Admissions is the creation of Edward Blum. Blum is not a lawyer, but he has a long history of crafting legal attacks on civil rights. . . . Blum was behind *Shelby v. Holder*. That case gutted important protections in the Voting Rights Act with drastic effects for voters of color. . . . Blum also crafted the unsuccessful challenge to race-conscious college admissions programs in *Fisher v. University of Texas*. Failing in Fisher, Blum baldly strategized that he 'needed Asian plaintiffs.' He formed Students for Fair Admissions as a vehicle to file litigation.").

324. *See Students for Fair Admissions, Inc.*, 143 S. Ct. at 2165–66; Grutter v. Bollinger, 539 U.S. 306, 330 (2003); David G. Hinojosa, *K-12 Schools Remain Free to Pursue Diversity Through Race-Neutral Programs*, POVERTY & RACE, Apr.–July 2023, at 5, 6 ("[T]he Court held that both programs lacked sufficiently concrete and measurable objectives in their diversity interests to allow for meaningful judicial review.").

325. Hinojosa, *supra* note 324, at 5 ("The ruling does not implicate or prohibit race-neutral measures enacted by universities, much less K-12 schools, that help ensure greater diversity in their classrooms and campuses.").

326. *Id.* at 6 (alteration in original) (quoting *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2226 (Sotomayor, J., dissenting)).

327. In a recent letter, the Department of Education's Office for Civil Rights reiterated the importance of school diversity as consistent with Title VI of the Civil Rights Act. OFF. FOR C.R., DEP'T OF EDUC., FACT SHEET: DIVERSITY & INCLUSION ACTIVITIES UNDER TITLE VI (2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tvi-dia-202301.pdf [https://perma.cc/SWF3-JBT7] ("Congress has found that it is in the best interest of the United States to support public schools 'that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stages of such students' education.'" (quoting 20 U.S.C. § 7231(a)(4)(A) (2021))).

C. ENDING DIVERSION OF BLACK EDUCATORS OUT OF PUBLIC SCHOOLS

The diversion of Black educators from the teaching workforce can be addressed by state and local efforts to remove obstacles to recruiting and retaining Black educators. Such programs face additional challenges in light of the pandemic's effect on state budgets and projected cuts to the teaching workforce.[328] But the challenge of drawing Black educators back into the teaching workforce is worth addressing, not only to remedy the historic diversion of educators of color out of the public education workforce, but also to promote positive student outcomes, as the recruitment of Black educators has been found to boost the academic performance of Black students.[329] For example, according to one report, studies "suggest that all students, including White students, benefit from having teachers of color because they bring distinctive knowledge, experiences, and role modeling to the student body as a whole."[330]

The pipeline of Black educators into the teaching workforce can be strengthened by lawmakers acting to address barriers to the teaching profession, including by subsidizing the cost of teacher preparation programs.[331] Specifically, "[s]ervice scholarship and loan forgiveness programs cover or reimburse a portion of tuition costs in exchange for a commitment to teach in high-need schools or subject areas, typically for 3 to 5 years."[332] For example, on the federal level, Congress could increase investment in the TEACH Grant, which currently "provides about $4,000 a year in grant aid for educator preparation to those who commit to teaching a high-need subject in a high-need school for four years."[333] On the state level, states can create or increase funding for programs such as the North Carolina Teaching Fellows Program, which "provides fellows up to $8,250

328. The Center on Budget and Policy Priorities projected state budget reductions of 11% in fiscal year 2021 and 10% in fiscal year 2022. MICHAEL LEACHMAN & ELIZABETH MCNICHOL, PANDEMIC'S IMPACT ON STATE REVENUES LESS THAN EARLIER EXPECTED BUT STILL SEVERE 2 (2020), https://www.cbpp.org/sites/default/files/atoms/files/10-30-20sfp.pdf [https://perma.cc/U4KL-UJ8C]; *see also* Michael A. DiNapoli Jr., *Eroding Opportunity: COVID-19's Toll on Student Access to Well-Prepared and Diverse Teachers*, LEARNING POL'Y INST. (Feb. 10, 2021), https://learningpolicyinstitute.org/blog/covid-eroding-opportunity-student-access-prepared-diverse-teachers [https://perma.cc/XS45-B6R6].

329. *See* DESIREE CARVER-THOMAS, LEARNING POL'Y INST., DIVERSIFYING THE TEACHING PROFESSION: HOW TO RECRUIT AND RETAIN TEACHERS OF COLOR 4 (2018), https://learningpolicyinstitute.org/sites/default/files/product-files/Diversifying_Teaching_Profession_REPORT_0.pdf [https://perma.cc/G7HW-NXRZ] ("[T]he benefit of having a Black teacher for just 1 year in elementary school can persist over several years, especially for Black students from low-income families.").

330. *Id.* at 5.

331. "More than two-thirds of educators are weighed down with an average of $20,000 to $50,000 in student loan debt." DiNapoli Jr., *supra* note 328. This debt is particularly significant for Black students seeking to enter the teaching workforce and "contribute[s] to difficulties in attracting and retaining a diverse teaching force." *Id.*

332. CARVER-THOMAS, *supra* note 329, at 18.

333. DiNapoli Jr., *supra* note 328. This award amount has not been increased by Congress in more than a decade. *Id.* "Raising the award amount to $8,000 a year would better align the program with the current cost of comprehensive preparation, [and] lower affordability barriers . . . ." *Id.*

annually for up to 4 years to attend an approved North Carolina university in exchange for a commitment to teach in the state for at least 4 years."[334]

In addition to federal and state support for teacher education programs, colleges can also offer support and mentoring to Black teacher candidates throughout the college and teacher preparation experience to improve their likelihood of successfully completing programs. For example, the program "Call Me MISTER" (Mentors Instructing Students Towards Effective Role Models), located at several colleges throughout the South, works to increase and support the pool of Black male educators through "loan forgiveness, mentorship, academic and peer support, preparation for state licensure exams, and assistance with job placement."[335]

In addition, policies can be implemented to address standardized certification exams which disparately impact Black teaching candidates. Such exams became more commonplace during the massive resistance era, as state licensure exams were employed as another means to exclude Black candidates.[336] According to one report, the number of takers of the National Teacher Examination (NTE) (which later became the Praxis exam) increased nearly sixfold between 1948 and 1962, with eighty percent of test takers residing in the South.[337] "[M]uch of that increase was driven by new exam requirements in southern states."[338] Analysis has shown that cultural bias contributes to the disparate outcomes of Black and white candidates who take the exam.[339] Teacher licensure exams have traditionally resulted in fewer Black candidates passing.[340] To address this disparity, some jurisdictions have started to incorporate performance assessments within their licensure processes, which "are designed to more authentically evaluate candidates' readiness for teaching."[341]

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334. CARVER-THOMAS, *supra* note 329, at 18.

335. *Id.* at 24. The mission of the program is to "increase the pool of available teachers from a broader more diverse background particularly among the State's lowest performing elementary schools." *Call Me MISTER*, CLEMSON: COLL. OF EDUC., https://www.clemson.edu/education/programs/programs/call-me-mister.html [https://perma.cc/8YXF-B2U7] (last visited Jan. 19, 2024). The program launched at Clemson University and has since expanded to other universities. CARVER-THOMAS, *supra* note 329, at 24.

336. CARVER-THOMAS, *supra* note 329, at 13.

337. *Id.*

338. *Id.* ("The NTE director of teacher testing at the time, Arthur Benson, went so far as to point out to southern school officials 'that black and white teachers tended to score differently on the teacher examinations. He suggested that with the use of the exams "the South [could] face its future with confidence."'" (alteration in original) (quoting Walter Haney, George Madaus & Amelia Kreitzer, *Charms Talismanic: Testing Teachers for the Improvement of American Education*, 14 REV. RSCH. EDUC. 169, 181 (1987))).

339. CARVER-THOMAS, *supra* note 329, at 13.

340. *Id.* ("Even after the NTE test makers made several modifications to the exam, studies have continued to find higher fail rates for prospective teachers of color but have not found that the exams accurately and consistently predict their effectiveness as teachers.").

341. *Id.*

CONCLUSION

Our nation is at a critical touch point in which the very future of the public education system—which has long been considered the vital cornerstone of the nation's multiracial democracy—is facing significant assaults. This Article does not concede that thwarting these assaults is insurmountable. History has provided a framework for identifying the way that racial injustice has endured. It has likewise provided a framework to thwart *deny*, *defund*, and *divert* laws that seek to further entrench racial inequality in and through public education. This framework envisions an emancipatory role for the law to play as a vital lever to help ensure that Black children are able to access the quality education opportunities that Black people have fought so long to secure. However, history has also proven that racial progress is not inevitable or even sustainable, but instead must be affirmatively and actively pursued.