The Education–Democracy Nexus and Educational Subordination

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Many believe that American democracy is in critical danger. These heightened concerns about democracy's survival have spurred conversation about the role public education can and should play in American life. At the same time, a wave of legislation has emerged that not only threatens to minimize public education's democratizing and equity-enhancing functions, but also threatens the very franchise of public education itself. These attempts, ranging from the regulation of discussion of racial, gender, and sexual identity to wholesale attempts at privatizing the public education institution, signal a turn toward a private-facing agenda: one that aims to deploy public education in efforts to subordinate non-power groups and entrench social hierarchy.

This is ironic given the ways in which the Supreme Court, and federal courts interpreting its jurisprudence, have long deployed rhetoric that purportedly carves out a special place for public education. Indeed, the Court has routinely lauded education as, for example, a "most vital civic institution for the preservation of a democratic system of government." But a closer examination paints a different picture: rather than bolstering the project of public education, the Court has over the past century worked to hobble the common school enterprise. And even at its high-water marks of protecting education's theoretical democratizing, anti-subordinating, and equalizing functions, the Court's education jurisprudence often has had a subordinating impact—or explicitly been motivated by a subordinating agenda. In this way, over time, the Court has rejected a vision of education as an integrative, public-good-serving investment, and has instead embraced education as a consumer commodity prioritizing private preferences. Rather than work to preserve education's equity-enhancing functions, the Court has, in practice, centered a different set of principles: namely, co-opted ideals of religious liberty, parental autonomy, and school choice. In this way, the classroom has served as a fertile site for debates about authority, indoctrination, and values—debates that have consequences beyond school walls.

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This Article argues that although it has become increasingly clear that public education is essential as a tool of antisubordination, equity, and democracy, federal courts are unlikely to act in accordance with this principle. And for those seeking to make good on education's public-facing functions, there are potentially more viable—or feasible—avenues of relief, in particular, a turn away from judicial supremacy and toward movement lawyering aimed at legislative and curricular reform.

TABLE OF CONTENTS

INTRODUCTION

Living in a democracy is not something that we inherit, it is not something that we inhabit, it is not something that we consume. It is something that we actively build together.[1]

Many claim that American democracy is in peril. The country is gripped by toxic polarization, institutional mistrust, and profound ideological divides. We

1. DePauw University Video Archive, *2001 - Civil Rights Attorney Lani Guinier Speaks at DePauw University*, YOUTUBE (June 4, 2012), https://youtube.com/watch?v=Ur9bk_UlI8Y.

have been marred by violence, corruption, and insurrection, all of which have threatened to destabilize the American social order.

These claims may not be hyperbolic. Ten months after the January 6, 2021 Capitol riot, the United States was listed for the first time as a "backsliding" democracy in danger of slipping into authoritarian rule.[2] Scholars warn that the threats to electoral pillars of American democracy are now so serious that they require urgent legislative action.[3] Americans agree: eighty-one percent believe that democracy is under "serious threat."[4]

Amidst this democratic decline, many have argued that saving the republic must begin in what the Supreme Court has called the "nurser[y] of democracy"[5]—the classroom. As some contend, America's abysmal approach to civics has facilitated mistrust in democratic institutions and contributed to hyperpoliticization.[6] Others argue that America's failures to teach media literacy and critical thinking skills have fueled misinformation campaigns, ill-preparing citizens to sort propaganda from news and fact from fiction.[7] Still others make the case that experiential learning approaches that permit direct engagement in school governance, teamwork, and interaction are necessary to prepare students to engage with those holding divergent views.[8]

Public education, however, is also under threat. At the federal level, the Court has, in its recent Terms, decided a series of education law cases that have taken aim at the line between church and state in public schooling, endorsed similar narratives of the primacy of parental choice, and nodded approvingly toward partial, if not full, privatization of the public education franchise.[9] And contemporaneous

2. INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, THE GLOBAL STATE OF DEMOCRACY 2021: BUILDING RESILIENCE IN A PANDEMIC ERA vii (2021), https://www.idea.int/gsod/sites/default/files/2021-11/the-global-state-of-democracy-2021_1.pdf [https://perma.cc/K2UE-CPBQ]; Miriam Berger, *U.S. Listed as a 'Backsliding' Democracy for First Time in Report by European Think Tank*, WASH. POST (Nov. 22, 2021, 11:18 AM), https://www.washingtonpost.com/world/2021/11/22/united-states-backsliding-democracies-list-first-time/.

3. *See Statement of Concern: The Threats to American Democracy and the Need for National Voting and Election Administration Standards*, NEW AM. (June 1, 2021), https://www.newamerica.org/political-reform/statements/statement-of-concern/ [https://perma.cc/4AR5-5M5B].

4. *NPR/PBS News Hour/Marist National Poll: Trust in Elections, Threat to Democracy, November 2021*, MARIST COLL.: MARIST POLL (Nov. 1, 2021), https://maristpoll.marist.edu/polls/npr-pbs-newshour-marist-national-poll-trust-in-elections-threat-to-democracy-biden-approval-november-2021 [https://perma.cc/ZG3L-N98Z].

5. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021).

6. *See, e.g.*, Ashley Jeffrey & Scott Sargrad, *Strengthening Democracy with a Modern Civics Education*, CTR. FOR AM. PROGRESS (Dec. 14, 2019), https://www.americanprogress.org/article/strengthening-democracy-modern-civics-education/ [https://perma.cc/3RKB-UK2X]; Linda C. McClain & James E. Fleming, *Civic Education in Circumstances of Constitutional Rot and Strong Polarization*, 101 B.U. L. REV. 1771, 1777–78 (2021).

7. *See, e.g.*, Tessa Jolls & Michele Johnsen, *Media Literacy: A Foundational Skill for Democracy in the 21st Century*, 69 HASTINGS L.J. 1379 (2018) (discussing the need for modern education to enable students to navigate a complex media landscape).

8. *See, e.g.*, Joshua E. Weishart, *Democratizing Education Rights*, 29 WM. & MARY BILL. RTS. J. 1 (2020) (arguing that educating for democracy requires education to be democratic in practice).

9. *See infra* Part III.

attempts in lower courts to recognize a fundamental right to education amidst democratic decline too have failed, even as courts have extolled the importance of access to public education.[10] Similarly, a wave of legislation aimed at restricting material pertaining to what has been branded "critical race theory" (CRT)—but, importantly, pertains to everything from accurate historical instruction to any and all mention of race—as well as sexual and gender identity and mental health has proliferated.[11] In the name of parental choice, a "moral" agenda, and an embrace of colorblind education, activists in these states have effectively deployed these initiatives to chill student and teacher speech in the classroom, stifle lines of difference, and limit identity-based discourse.[12]

How, then, does this series of events square with the Court's oft-reiterated proclamations about the positive externalities of public education—for example, that it is the "very foundation of good citizenship"[13]; is "required in the performance of our most basic public responsibilities"; [14] and "inculcates in tomorrow's leaders . . . 'fundamental values necessary to the maintenance of a democratic political system'"?[15] Indeed, the Court's rhetorical endorsement of the "education–democracy nexus" is well-documented across a century of its jurisprudence.[16]

This Article argues that though the Court has rhetorically drawn connections between public education, antisubordination, democracy, and equity, an examination of the Court's education jurisprudence shows instead that, over time, the Court has substantively rejected the concept of public education as an integrative, public-facing good and instead embraced education as a consumer commodity where private preferences and choices are to be advanced. Rather than promote public education as an agent of equal access, it has, over time, chipped away at the franchise, both explicitly endorsing and implicitly contributing to its devolution into a tool of structural subordination.

Part I surfaces the wave of legislation targeting instruction and discussion of CRT, LGBTQIA+ identity, and socioemotional health, locating these efforts against the critical legal theory of antisubordination, or the idea that legal reform must structurally address inequalities that plague disadvantaged groups. Part II elaborates on the Court's endorsement of the "education–democracy nexus" and antisubordination rhetoric and surfaces the permutations the Supreme Court's rhetorical endorsements have taken. Part III exposes the Court's failure to follow

10. *See infra* Part III.

11. *See infra* Section I.A.

12. *See infra* Part III.

13. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

14. *Id.*

15. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

16. *See infra* Part II.A (defining the term). For a historical analysis of the relationship between education and democracy, see Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 65, 84–92 (2002) (discussing the "democratic-educational paradox" arising in First Amendment education jurisprudence), and see generally Martin D. Carcieri, *Democracy and Education in the Thought of Jefferson and Madison*, J.L. & EDUC., Jan. 1997, at 1.

through on these principles, focusing in particular on an "anticanon" line of cases that have undermined public education's antisubordinating, democracy-, and equity-enhancing functions. Part IV offers a radical solution for those seeking to make good on public education's antisubordination and democratizing efforts: a turn away from traditional avenues of legal advocacy and judicial supremacy, and toward a grassroots concept of movement lawyering aimed at reclaiming political and cultural power via legislative reform with an antisubordination agenda. The Article then briefly concludes.

I. SUBORDINATION IN CONTEMPORARY PUBLIC EDUCATION

A wave of "anti"-themed education legislation targeting the teaching of concepts from gender and sexual identity to historical knowledge and socioemotional awareness is sweeping the country. Legislation advancing anti-CRT, anti-socioemotional learning (SEL), anti-LGBTQIA+, or anti-identity agendas has passed or is pending in a supermajority of American states.[17] Many argue that such legislation is racist, sexist, transphobic, and homophobic, aimed at stifling identity and promoting white, cisgender, heteronormative values.[18] Others celebrate this wave of legislation for purportedly keeping "values-based" education out of schools, and in the realm of where they believe such education should take place—the home.[19]

Much of the conversation around this burst of legislation—what I will call the "anti-identity" wave—has framed it as a nascent phenomenon, a response to a confluence of events from media disinformation campaigns to pandemic-related

17. *See* Cathryn Stout & Thomas Wilburn, *CRT Map: Efforts to Restrict Teaching Racism and Bias Have Multiplied Across the U.S.*, CHALKBEAT (Feb. 1, 2022, 7:20 PM), https://www.chalkbeat.org/22525983/map-critical-race-theory-legislation-teaching-racism [https://perma.cc/S8BG-727M]; Anne Branigin, *10 Anti-LGBTQ Laws Just Went into Effect. They All Target Schools.*, WASH. POST (July 8, 2022, 12:27 PM), https://www.washingtonpost.com/nation/2022/07/08/anti-lgbtq-education-laws-in-effect/.

18. *See, e.g.*, Daniel Kreiss, Alice Marwick & Francesca Bolla Tripodi, *The Anti-Critical Race Theory Movement Will Profoundly Affect Public Education*, SCI. AM. (Nov. 10, 2021), https://www.scientificamerican.com/article/the-anti-critical-race-theory-movement-will-profoundly-affect-public-education/ [https://perma.cc/DJ4N-PNWW] (arguing that anti-CRT campaigns are designed in part to "mobilize and exploit anxiety around white status to secure political power"); *Unprecedented Onslaught of State Legislation Targeting Transgender Americans*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/unprecedented-onslaught-of-state-legislation-targeting-transgender-american [https://perma.cc/K7S9-6V8U] (last visited Jan. 27, 2023) (noting, for example, the ways in which anti-trans bills were acts of "fear-mongering"); Emily St. James, *Our Conversation About Anti-Trans Laws Is Broken*, VOX (Apr. 2, 2021, 10:30 AM), https://www.vox.com/identities/22358864/trans-issues-sports-health-care-bills-laws-arkansas-alabama-montana-south-dakota [https://perma.cc/T73Z-8HWN] (arguing that anti-trans bills are acts of bigotry with violent effects).

19. *Cf. Issue Toolkit: Reject Critical Race Theory*, HERITAGE ACTION FOR AM., https://heritageaction.com/toolkit/rejectcrt [https://perma.cc/ZY93-7BLP] (last visited Jan. 27, 2023); *STOP RACIST "Anti-Racism" Curriculums: Critical Race Theory and Black Lives Matter*, PARENTS' RTS. EDUC., https://www.parentsrightsined.org/stop-anti-racism-curriculum.html [https://perma.cc/LZM3-P3Z8] (last visited Jan. 27, 2023); *Parental Rights*, ALL. DEFENDING FREEDOM, https://adflegal.org/issues/parental-rights [https://perma.cc/U2KE-Z25H] (last visited Jan. 27, 2023) (arguing that "the government should never replace parents" in developing students' "moral character").

school closures and social justice efforts such as the Black Lives Matter (BLM) movement.[20] One may view these proposals as individual legislative movements, with their own political and cultural agendas. Others, however, have observed links between and among these legislative movements: those defending such legislation frame it as a backstop defense of parents' rights, while others label it a tool of a modern right-wing agenda aimed at reinforcing systems of white supremacy and Christian ideals.[21] In this way, conversation surrounding the anti-identity wave has, on the surface, centered on a titanic clash of values, one playing out in two dimensions: (1) what children should be taught, and (2) who has the right to teach it.

Analysis of this values debate has been rich and varied, as many have cogently discussed the ways in which anti-identity legislation reflects an embrace of certain values subsets, from white supremacist to heteronormative and traditionally masculine ideals. But just below the surface of the values debate lurks another, perhaps more consequential inquiry, one in large part missing from modern analysis: *why* has this values debate sited itself in public education? And following that, what is the impact of choosing public education as a venue for invocation of this anti-identity regime?

This Part begins to answer that question, arguing that public education itself is increasingly becoming conscripted into what this Part defines as the "subordination agenda," another arm of an extant legal system designed to economically, politically, and socially subordinate non-power groups. As Justin Driver has explained, "the public school has served as the single most significant site of constitutional interpretation within the nation's history," a site where "the cultural anxieties that pervade the larger society" converge.[22] Or, put differently, that questions of identity have permeated public education is no accident; the school has always been a forum for a clash of values. As the following Section argues, this anti-identity wave is merely the tip of the proverbial iceberg; though perhaps the most currently visible part of this conscription campaign, it is endemic of decades of other statutory, judicial, and political actions aimed precisely at this co-option.

A. ANTI-IDENTITY LEGISLATION

Perhaps the education topic most evident in the zeitgeist is discussion purportedly of CRT, or the academic framework that centers race as a systemic, legal, and social construct, and which recognizes that at a structural level, the nation's

20. *See* Liz Crampton, *GOP Sees 'Huge Red Wave' Potential by Targeting Critical Race Theory*, POLITICO (Jan. 5, 2022, 4:31 AM), https://www.politico.com/news/2022/01/05/gop-red-wave-critical-race-theory-526523 [https://perma.cc/N7QN-T3CH].

21. *See* Kiara Alfonseca, *Critical Race Theory Thrust into Spotlight by Misinformation*, ABC NEWS (Feb. 6, 2022, 10:02 AM), https://abcnews.go.com/US/critical-race-theory-thrust-spotlight-misinformation/story?id=82443791 [https://perma.cc/9ACL-U5KP].

22. JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 9–10 (2018).

institutions act to preserve white supremacy.[23] Though discussions of CRT have percolated for decades as an academic point in higher education, talk of CRT of late has exploded into popular consciousness and K–12 schooling. This surge can be traced broadly to the aftermath of George Floyd's murder, which shone a spotlight on police violence against Black citizens and prompted discussion about the ways in which American institutions act against their Black citizens.[24] Coupled with the rise of the BLM movement, Floyd's murder put front and center questions of racism and structural equity. Backlash to BLM and these efforts has been well-documented.[25] And with this also came backlash to what BLM wrought: namely, increased discussion about the state of racial equity and institutional factors facilitating racial injustice. Indeed, many readily took up the anti-"wokeness" mantle, using "CRT" rhetoric as a political tool to transform the term from an academic framework to any discussion about racial inequity, particularly inequity that implicated white people in originating and facilitating racial oppression.[26] And the "engineered . . . panic"[27] engendered by this repackaging of CRT has caught fire in conversations about public schooling. The Trump Administration, for example, launched what it called the "1776 Commission"[28]—a response to the 1619 Project, authored by Nikole Hannah-Jones in partnership with the *New*

23. *See, e.g.*, Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377 (2000). As Kimberlé Crenshaw has explained, CRT "explores how racial inequality was historically structured into the fabric of the republic, reinforced by law, insulated by the founding Constitution and embedded into the infrastructure of American society." Kimberlé Williams Crenshaw, Opinion, *Op-Ed: King Was a Critical Race Theorist Before There Was a Name for It*, L.A. TIMES (Jan. 17, 2022, 4:15 AM), https://www.latimes.com/opinion/story/2022-01-17/critical-race-theory-martin-luther-king. For a modern discussion of the development of CRT and its applicability across legal doctrines, see generally Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011).

24. *See* Valerie Wirtschafter, *How George Floyd Changed the Online Conversation Around BLM*, BROOKINGS: TECH STREAM (June 17, 2021), https://www.brookings.edu/techstream/how-george-floyd-changed-the-online-conversation-around-black-lives-matter/ [https://perma.cc/BJE5-C4BD] (observing the "massive social movement" that followed Floyd's murder going viral); *see also* Jennifer Chudy & Hakeem Jefferson, Opinion, *Support for Black Lives Matter Surged Last Year. Did It Last?*, N.Y. TIMES (May 22, 2021), https://www.nytimes.com/2021/05/22/opinion/blm-movement-protests-support.html (tracing support for BLM since Floyd's death).

25. Then-President Trump, for his part, called those involved in BLM "terrorists," "anarchists," and "thugs," and others painted BLM-affiliated events as violent demonstrations or riots. Safia Samee Ali, *'Not by Accident': False 'Thug' Narratives Have Long Been Used to Discredit Civil Rights Movements*, NBC NEWS (Sept. 27, 2020, 9:19 AM), https://www.nbcnews.com/news/us-news/not-accident-false-thug-narratives-have-long-been-used-discredit-n1240509 [https://perma.cc/4R6C-58KY].

26. *See* Consider This from NPR, *How Critical Race Theory Went from Harvard Law to Fox News*, NPR (July 6, 2021, 5:03 PM), https://www.npr.org/transcripts/1012696188 [https://perma.cc/2KM7-SUN4].

27. Brandon Tensley, *The Engineered Conservative Panic over Critical Race Theory, Explained*, CNN (July 8, 2021, 5:40 PM), https://www.cnn.com/2021/07/08/politics/critical-race-theory-panic-race-deconstructed-newsletter/index.html [https://perma.cc/V9DT-XH27].

28. *See* Moriah Balingit & Laura Meckler, *Trump Alleges 'Left-Wing Indoctrination' in Schools, Says He Will Create National Commission to Push More 'Pro-American' History*, WASH. POST (Sept. 17, 2020, 5:38 PM), https://www.washingtonpost.com/education/trump-history-education/2020/09/17/f40535ec-ee2c-11ea-ab4e-581edb849379_story.html. Ironically, then-President Trump argued that the 1619 Project was itself an example of "left-wing indoctrination" in schools. *See id.*

York Times Magazine, which aimed to recount the origins of American slavery and center Black Americans in a national narrative.[29] And many states have in recent years passed legislation banning the teaching of topics related to race and inequality, with dozens more bills in the works.[30]

Florida, for example, has enacted an "Individual Freedom" law, which prohibits instructors in public schools and universities from causing students to feel "by virtue of his or her race . . . guilt, anguish, or other forms of psychological distress" and effectively bans teachers from discussing the concept that members of "one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin," or that "an individual, by virtue of his or her race, color, sex, or national origin is inherently racist, sexist, or oppressive, whether consciously or unconsciously."[31] Governor Ron DeSantis announced that this law, the "Stop the Wrongs to Our Kids and Employees (W.O.K.E.) Act," would prohibit schools from "hiring woke CRT consultants" and codify the Florida Department of Education's "prohibition on teaching critical race theory in K-12 schools."[32] A similar Arizona bill prohibits discussion during teacher training that "presents any form of blame or judgment on the basis of race, ethnicity or sex,"[33] while four bills are pending in Iowa,[34] including one that forbids negative comments about the Pledge of Allegiance[35] and another that forbids requiring teachers to discuss "controversial" issues.[36] A North Dakota bill prohibits K–12 public schools from teaching the idea "that racism is systemically embedded in American society and the American legal system to facilitate racial inequality."[37] And Oklahoma has introduced the "Students' Religious Belief Protection Act," under which teachers can be fined $10,000 "per incident, per individual" if they offer an opposing view of students "closely held" religious beliefs.[38] As of early 2023,

29. Nikole Hannah-Jones, *The 1619 Project*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html.

30. *See* UCLA SCH. L.: CRT FORWARD TRACKING PROJECT, https://crtforward.law.ucla.edu/ [https://perma.cc/NZD3-NGUX] (last visited Jan. 27, 2023). Under the leadership of many at the UCLA School of Law, including Taifha Natalee Alexander, Ahilan Arulanantham, LaToya Baldwin Clark, Cheryl I. Harris, Jasleen Kohli, and Noah D. Zatz, the school in 2022 launched the CRT Forward Tracking Project, a regularly-updated database which "identifies, tracks, and analyzes local, state, and federal activity aimed at restricting the ability to speak truthfully about race, racism, and systemic racism through a campaign to reject Critical Race Theory (CRT)." *See About*, UCLA SCH. L.: CRT FORWARD TRACKING PROJECT, https://crtforward.law.ucla.edu/about [https://perma.cc/VP9T-SD3C] (last visited Jan. 27, 2023).

31. H.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022) (enacted).

32. *Florida Gov. DeSantis Unveils 'Stop WOKE Act' Targeting Critical Race Theory*, NBC 6 S. FLA. (Dec. 16, 2021, 4:41 PM), https://www.nbcmiami.com/news/local/florida-gov-desantis-unveils-stop-woke-act-targeting-critical-race-theory/2642176/ [https://perma.cc/5CTM-B422].

33. H.B. 2906, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (enacted).

34. S. File 478, 89th Gen. Assemb., Reg. Sess. (Iowa 2022); S. File 2043, 89th Gen. Assemb., Reg. Sess. (Iowa 2022); S. File 2037, 89th Gen. Assemb., Reg. Sess. (Iowa 2022); H. File 2053, 89th Gen. Assemb., Reg. Sess. (Iowa 2022).

35. S. File 2043, 89th Gen. Assemb., Reg. Sess. (Iowa 2022).

36. H. File 2053, 89th Gen. Assemb., Reg. Sess. (Iowa 2022).

37. H.B. 1508, 67th Leg. Assemb., Spec. Sess. (N.D. 2021) (enacted).

38. S.B. 1470, 58th Leg., 2d. Sess. (Okla. 2022).

anti-CRT bills had been proposed in forty-two states and passed in seventeen states.[39] Importantly, there were also a variety of federal bills in committee, such as the "Stop CRT Act," which would prohibit federal funding for any agency or recipient of federal funding to teach CRT,[40] as well as the "Say No to Indoctrination Act," which would prohibit the award of federal funds to schools that promote race-based theories to students.[41]

But these attempts at curricular control have not stopped at the issue of race. More than a dozen states as of mid-2022 were considering legislation, virtually all with conservative sponsors, which would seek to prohibit schools from discussing sexual orientation or gender identity, such as what has been labeled the "Don't Say Gay" law recently signed in Florida.[42] The law, titled "Parental Rights in Education," took effect in July 2022 and prohibits school personnel from discussing "sexual orientation" and "gender identity" with lower-elementary school students.[43] Importantly, the law also requires personnel to notify parents in the event health or support services are offered to their children in school and allow them the chance to deny those services, a requirement that LGBTQIA+ advocates have said effectively amounts to "out[ing]" those children.[44] The bill does not stand alone: Ohio, Louisiana, Alabama, Arizona, and Missouri, among others, have proposed substantially similar legislation.[45] Iowa, for example, has proposed a law that would require that parents opt in, in writing, to instruction "relating to gender identity," while a Tennessee bill would ban instructional materials and texts that "promote, normalize, support, or address lesbian, gay, bi-sexual, or transgender issues or lifestyle."[46] As of 2022, there were more than 300 legislative proposals that harmfully reference LGBTQIA+ identities, with at least 137 targeting trans people specifically.[47]

Lawmakers in some states also have challenged the teaching of SEL, or instruction aimed at developing the social, emotional, and character skills of

39. Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WK. (Jan. 25, 2023), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06.

40. Stop CRT Act, H.R. 3179, 117th Cong. (2021).

41. Say No to Indoctrination Act, H.R. 4698, 117th Cong. § 2 (2021).

42. *See* Dustin Jones & Jonathan Franklin, *Not Just Florida. More than a Dozen States Propose So-Called 'Don't Say Gay' Bills*, NPR (Apr. 10, 2022, 7:01 AM), https://www.npr.org/2022/04/10/1091543359/15-states-dont-say-gay-anti-transgender-bills [https://perma.cc/D4U2-T7AN].

43. H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (enacted).

44. Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay*,' NPR (Mar. 28, 2022, 2:33 PM), https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis [https://perma.cc/5EVH-55DZ].

45. Jones & Franklin, *supra* note 42.

46. *Id*.

47. Arthur Jones II & Aaron Navarro, *This Year on Pace to See Record Anti-Transgender Bills Passed by States, Says Human Rights Campaign*, CBS NEWS (Apr. 22, 2022, 5:07 PM), https://www.cbsnews.com/news/2022-anti-transgender-legislation-record-human-rights-campaign/ [https://perma.cc/C23D-QBTM]; Press Release, Henry Berg-Brousseau, Hum. Rts. Campaign, ICYMI: As Lawmakers Escalate Attacks on Transgender Youth Across the Country, Some GOP Leaders Stand Up for Transgender Youth (Mar. 24, 2022) (available at https://www.hrc.org/press-releases/icymi-as-lawmakers-escalate-attacks-on-transgender-youth-across-the-country-some-gop-leaders-stand-up-for-transgender-youth [https://perma.cc/4ENP-VJZG]).

children, such as self-awareness, social awareness and skills, and ethical development.[48] In Oklahoma, for example, a proposed bill would prohibit all public schools from using "federal, state, or private funds to promote, purchase, or utilize the concepts of social emotional learning for training, instruction, or education of students," while a "Parents' Bill of Rights" in Indiana proclaimed that SEL instruction represented an inappropriate "expan[sion of] the reach of government into domains of the family."[49] Conservative activists who have challenged SEL instruction have argued that it "brings CRT concepts into schools and classrooms" and impermissibly "trains students as activists," claiming that giving students "voice" is not an effective management tool.[50] And as one group claimed, "CRT is the theory, SEL is the delivery system."[51]

But what to make of this wave of anti-CRT, anti-SEL, and anti-LGBTQIA+ bills, and the attempts to regulate the content of public education that they represent? The following Section suggests that these anti-identity bills are evidence of simultaneous—and related—attempts to destabilize the public education franchise and dilute its democratic import. First, these proposals illustrate an increasing attempt to conscript public education into an agenda of subordination, wherein public schools are directed to uphold systems of race-, sex-, gender-, and class-based hierarchies. Second, they emphasize a public–private divide that pits public "indoctrination" against private "choice," a device aimed at depublicizing education. As the following Section argues, the dual aims of increasing public education's subordination function and diminishing its public reach have profound oppressive and antidemocratic consequences.

B. SUBORDINATION AND EDUCATION

Feminist scholar Marilyn Frye defines oppression as "a system of interrelated barriers and forces which reduce, immobilize and mold people who belong to a

48. Zoe Strozewski, *'Social Emotional Learning' Becomes Latest Battleground in School Curriculums*, NEWSWEEK (Jan. 21, 2022, 11:45 AM), https://www.newsweek.com/social-emotional-learning-becomes-latest-battleground-school-curriculums-1671698. Much of what is popularly discussed as "SEL" is derivative of the "transformative SEL" approach pioneered by the Collaborative for Academic, Social, and Emotional Learning (CASEL), a form of SEL "aimed at educational equity" that advocates "examining biases and replacing inequitable practices with those that lend themselves to fertile, inclusive, multicultural learning environments." Blanca S. McGee, Andrea F. Germany, Regina L. Phillips & Liza Barros-Lane, *Utilizing a Critical Race Theory Lens to Reduce Barriers to Social and Emotional Learning: A Call to Action*, 44 CHILD. & SCHS. 39, 40 (2022).

49. Strozewski, *supra* note 48.

50. Jenni White, *Six Reasons Why the Oklahoma State Legislature Should Ban the Use of SEL — Social Emotional Learning — Through SB1442*, RECLAIM OKLA. PARENT EMPOWERMENT (Jan. 25, 2022) (alterations omitted), https://rope2.org/2022/01/25/six-reasons-why-the-oklahoma-state-legislature-should-ban-the-use-of-sel-social-emotional-learning-through-sb1442/ [https://perma.cc/2EV2-GWXR]. Indeed, one Indiana parents group warned that "mindfulness," part of SEL, is a tenet of Buddhism, noting that "Christian parents should be aware of what is happening." Laura Meckler, *In 'Social-Emotional Learning,' Right Sees More Critical Race Theory*, WASH. POST (Mar. 28, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/03/28/social-emotional-learning-critical-race-theory/.

51. Kathryn Joyce, *What is "Social Emotional Learning" — and How Did It Become the Right's New CRT Panic?*, SALON (Apr. 22, 2022, 6:00 AM), https://www.salon.com/2022/04/22/what-is-social-emotional-learning–and-how-did-it-become-the-rights-new-crt-panic/ [http://perma.cc/9CUS-FSV9].

certain group, and effect their subordination to another group."[52] As a formal legal theory, the concepts of "subordination" and "antisubordination" have long roots in discrimination and equal protection law, feminist legal theory, and CRT, as well as in some education law literature. Indeed, subordination "comes in many forms, and operates simultaneously across multiple axes of identity in complex, oftentimes mutually reinforcing, ways."[53]

Many scholars have documented the struggle courts have faced in understanding and applying principles of subordination and antisubordination.[54] Ruth Colker, for example, explains that under principles of antisubordination, a legal framework should seek to eliminate power disparities "through the development of laws and policies that directly redress those disparities," focusing directly on "society's role in creating subordination" and the "way in which this subordination affects, or has affected, groups of people."[55] In equal protection jurisprudence, antisubordination scholars argue that the more a perceived inequality would "stigmatize or dehumanize" a suppressed group or impair its ability to participate fully, the stronger a government's rationale must be for impeding that interest.[56] Courts' dominant approach, however, has increasingly been one of "anti-differentiation," in which treating individuals differently in any way on the basis of race, sex, or other identity markers, is "inappropriate," and any identity-based policies are invidious on their face—often described as a "color-blind[]" approach.[57] Indeed, though the Court has on rare occasion invoked antisubordination theory in its equal protection jurisprudence,[58] the concept of antisubordination exists "almost exclusively in scholarship, with little hope of influencing [a modern] Court."[59]

As Charles R. Lawrence III has explained, antisubordination principles are justified given the "additional problem" posed by "unconscious prejudice"—"it is

52. CHERIS KRAMARAE & PAULA A. TREICHLER, A FEMINIST DICTIONARY 315 (1985) (quoting MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 33 (1983)).

53. Jerome M. Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435, 2447 (2003).

54. Owen Fiss, Derrick Bell, Catharine MacKinnon, and Ruth Colker, among others, are widely seen as pioneers of the antisubordination movement. *See, e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

55. Colker, *supra* note 54, at 1007–09.

56. *See, e.g.*, Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 63 (1977).

57. Colker, *supra* note 54, at 1005–06.

58. Luke Boso, for example, has argued that two of the Court's "best examples of antisubordination theory" are in *Brown v. Board of Education* and *Obergefell v. Hodges*. Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 355–56 (2021).

59. Sergio J. Campos, *Subordination and the Fortuity of Our Circumstances*, 41 U. MICH. J.L. REFORM 585, 587 (2008) (footnotes omitted). As discussed further below, the Court over the past two decades has increasingly endorsed theories of colorblindness. *See infra* Part III; *see, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

not subject to self-correction within the political process," because the discriminator may not be "aware of his prejudice and is convinced that he already walks in the path of righteousness."[60] Cass Sunstein similarly has discussed the "anticaste principle," which would forbid law and cultural practices "from translating highly visible and morally irrelevant differences into systemic social disadvantage."[61] Feminist legal scholars, too, have offered variations on antisubordination: Catharine MacKinnon's "dominance approach" situates gender inequality not as an issue of societal differentiation between genders but instead through the lens that "one group has dominated the other," forming a conception of equality based on power distribution among gendered groups.[62] Indeed, patriarchy relies on men constituting the dominant power group, with women subordinate.

Subordination, then, is perpetrated by these social, cultural, and political systems: white supremacy and patriarchy, among others.[63] And feminist legal theory and CRT, as branches of scholarship, are reactions to inequalities resulting from these systems of subordination.[64] Scholars of intersectionality have also observed that subordinating systems "never travel alone"—as Angela Harris and Zeus Leonardo have explained, "race always operates through gender, and gender through sexuality."[65] In this way, CRT, feminist legal theory, and LatCrit[66] scholars also have elucidated the relationship between principles of antisubordination and democratic health: the view that "[d]emocracy is *the* anti-subordination

60. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 349 (1987).

61. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994).

62. *See* MACKINNON, *supra* note 54, at 40; Anne-Marie Leath Storey, *An Analysis of the Doctrines and Goals of Feminist Legal Theory and Their Constitutional Implications*, 19 VT. L. REV. 137, 172–73 (1994) (summarizing MacKinnon's dominance theory).

63. *See, e.g.*, Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989) (defining "white supremacy" in part as "a political, economic and cultural system in which whites overwhelmingly control power and material resources"); Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 9 n.27 (1998) ("Patriarchy is a system in which men create the definitions of power, the ways to maintain power, and the avenues for obtaining power in all of its forms." (quoting RUS ERVIN FUNK, STOPPING RAPE: A CHALLENGE FOR MEN 29 (1993))).

64. *See, e.g.*, Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 788 n.323 (2006) ("Feminist legal theory is a reaction to the gender inequality perpetuated by a patriarchal culture."); Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1, 4 (1994) ("Social and political systems of racial subordination, which in effect promote white supremacy, sustain [subordinating] hierarchies.").

65. Angela Harris & Zeus Leonardo, *Intersectionality, Race-Gender Subordination, and Education*, 42 REV. RSCH. EDUC. 1, 8 (2018); *see also id.* (describing various formulations of intersectionality theory).

66. *See About LatCrit*, LATCRIT.ORG, https://latcrit.org/about-latcrit/ [https://perma.cc/864Z-AYUS] (last visited Feb. 27, 2023) ("LatCrit theorists aim to center Latinas/os multiple internal diversities and to situate Latinas/os in larger inter-group frameworks, both domestically and globally, to promote social awareness and activism.")

perspective."[67] As they argue, structural inequality perpetrated by systems of subordination makes democratic deliberation impossible; indeed, as Natalie Gomez-Velez explains, the "false promise of deliberation" in a system of subordination reinforces structural inequality.[68] Accordingly, the ways in which subordination can compromise democratic efforts are well-documented in the literature.[69]

Many have also noted the relationship between education, oppression, democracy, and subordination, drawing on the "violent history of depriving education as a means of racial subordination."[70] Osamudia James, for example, has documented the ways in which deprivation of meaningful public education options and an emphasis on school choice undermines equality in the democratic project while increasing racial subordination.[71] Wendy Brown-Scott has observed that ending racial subordination, and accessing full citizenship for all, requires access to quality education and academic proficiency.[72] And LaToya Baldwin Clark has described the theory of "stealing education," recognizing education is often viewed as a form of property that may be both transferred and used to exclude in attempts to entrench structures of privilege, as well as "concentrate and reproduce inequality and stratification."[73] Put simply, "[t]he apparatus of schooling is an intersectional meeting point . . . of forces in the interpellation of the student as a subject on one hand and the nation creation project that is education on the other."[74]

In this way, the wave of anti-identity bills represents the antithesis of antisubordination principles. Indeed, proponents of various anti-identity bills have explicitly noted their dedication to antidifferentiation principles: "[w]e are fighting for a colorblind America," one author of a "divisive concepts" bill explained.[75] Anti-CRT bills, for example, explicitly require a complete turn away from the concept of racial subordination, or any structural, institutional, or implicit racial

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67. Max J. Castro, *Democracy in Anti-Subordination Perspective: Local/Global Intersections: An Introduction*, 53 U. MIA. L. REV. 863, 863 (1999).

68. Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?*, 53 VILL. L. REV. 297, 333 (2008).

69. *See, e.g.*, Jane S. Schacter, Lawrence v. Texas *and the Fourteenth Amendment's Democratic Aspirations*, 13 TEMP. POL. & C.R. L. REV. 733, 734 (2004).

70. Arijeet Sensharma, *A "Charter of Negative Liberties" No Longer: Equal Dignity and the Positive Right to Education*, 97 N.Y.U. L. REV. 835, 860 (2022).

71. *See* Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1102–28 (2014).

72. Brown-Scott, *supra* note 64, at 32–34.

73. LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397, 398 n.5 421, 424 (2019); *see also* LaToya Baldwin Clark, *Educational "Ownership" and the Backlash to CRT*, LAW & POL. ECON. PROJECT (Dec. 6, 2021), https://lpeproject.org/blog/educational-ownership-and-the-backlash-to-crt/ [https://perma.cc/S24C-GQL4] (noting that the way education is funded, through property taxes and local control, encourages the idea that education is a property interest that should be controlled).

74. Harris & Leonardo, *supra* note 65, at 19.

75. Rebecca Griesbach, *Alabama Educators Oppose Compromise CRT Bill that Would Ban 'Divisive' Concepts from Classrooms*, AL.COM (Feb. 24, 2022, 9:51 AM), https://www.al.com/news/2022/02/alabama-educators-oppose-compromise-crt-bill-banning-racist-divisive-concepts-from-classrooms.html [https://perma.cc/GR7P-EUNU].

bias at all.[76] Accordingly, the democratic problems with these bans are myriad. As Engy Abdelkader explains, "good citizenship" "require[s] an appropriate critical lens to understand the ways that racism and inequality" intersect in structural ways.[77] In this way, students need to understand the lived experiences of those other than themselves and the causes of modern economic, social, and political inequality to effectively participate in democratic systems.[78] And campaigns against antiracist teaching also serve as attempts to continue to disempower and disenfranchise marginalized communities, threatening to entrench poverty and economic inequality.[79] Jason Stanley has called this type of teaching, which attempts to flatten historical truth and avoid guilt in favor of national pride, "fascist," while a "democratic" education, to the contrary, enables students to grapple with historical truth en route to forming their own opinions about national identity.[80] Dog-whistle language about CRT bans risks serious ramifications for civic education: educators explain that they cannot possibly teach history accurately—from slavery to Jim Crow laws—under such regulations.[81] One professor noted that under these bans, he would not be able to discuss certain Supreme Court precedent in his classroom—at all.[82] These bans, of course, would also dramatically affect the curricular content students are exposed to. In Oklahoma, for example, school leaders were unsure about whether teaching about the Tulsa Massacre would be permitted under anti-CRT laws, while a Dallas school district discussed potentially discontinuing classes in Black and Latino studies under a

76. *See* Natalie Gomez-Velez, *What* U.S. v. Vaello-Madero *and the* Insular Cases *Can Teach About Anti-Critical Race Theory Campaigns*, N.Y. ST. BAR ASS'N (Feb. 14, 2022), https://nysba.org/what-u-s-v-vaello-madero-and-the-insular-cases-can-teach-about-anti-crt-campaigns/ [https://perma.cc/BWA5-MWSY].

77. Engy Abdelkader, *Are Government Bans on the Teaching of Critical Race Theory Unconstitutional?*, AM. BAR. ASS'N: ABA J. (Oct. 7, 2021, 10:22 AM), https://www.abajournal.com/columns/article/are-government-bans-on-the-teaching-of-critical-race-theory-unconstitutional [https://perma.cc/F3NE-QTZM].

78. Maggie Hicks, *Experts Fear Ban on Critical Race Theory Could Harm Civic Education*, FULCRUM (Aug. 12, 2021), https://thefulcrum.us/civic-ed/critical-race-theory-civic-ed [https://perma.cc/2RSZ-CDNM].

79. *See, e.g.*, Marokey Sawo & Asha Banerjee, *The Racist Campaign Against 'Critical Race Theory' Threatens Democracy and Economic Transformation*, ECON. POL'Y INST.: WORKING ECON. BLOG (Aug. 9, 2021, 9:35 AM), https://www.epi.org/blog/the-racist-campaign-against-critical-race-theory-threatens-democracy-and-economic-transformation/ [https://perma.cc/3JQ9-644S].

80. Lily Kwak, *The Fight Over Critical Race Theory is a Fight Over Democratic Education*, MICH. DAILY (Nov. 4, 2021), https://www.michigandaily.com/opinion/columns/the-fight-over-critical-race-theory-is-a-fight-over-democratic-education/ [https://perma.cc/C5SG-RLK9].

81. *See, e.g.*, Melinda D. Anderson, *'These Are the Facts': Black Educators Silenced from Teaching America's Racist Past*, GUARDIAN (Sept. 14, 2021, 6:00 PM), https://www.theguardian.com/education/2021/sep/14/black-us-teachers-critical-race-theory-silenced [https://perma.cc/93BN-PEV2].

82. Nicholas Barry Creel, *Professor: Banning Critical Race Theory Would Keep Me from Teaching Supreme Court Rulings*, ATLANTA J.-CONST. (July 8, 2021), https://www.ajc.com/education/get-schooled-blog/law-professor-banning-critical-race-theory-would-prevent-me-from-teaching-supreme-court-decisions/CJJZ73UXTVDXBBANSJCN53PZXM/ [https://perma.cc/WAT3-HL7S].

law that requires teachers to conduct social studies "without giving deference to any one perspective."[83]

Rhetoric surrounding these anti-identity bills also has focused significantly on the role of parents in a child's education and the corresponding need, advocates argue, for school choice and private options. The conservative Heritage Foundation has argued that teaching CRT in public schools runs "contrary to parental rights," and the solution is "school choice";[84] others contend that anti-identity legislation is necessary because curricular content "should be a partnership between parents, educators, and the general public," a partnership that "only works if parents truly have the ability to choose their child's school."[85] And the Manhattan Institute has published a guide to "woke schooling" that teaches parents ways to counter "critical pedagogy," including boycotting public schools, going to local and national media, and taking legal action.[86] Coupled with massive public school withdrawals in the wake of the COVID-19 pandemic, it is perhaps no wonder that the pro-privatization group American Federation for Children called 2021 the "Year of School Choice."[87]

Public education, then, is being attacked on multiple fronts. Educators are increasingly forbidden from discussing accurate historical truths, societal and cultural realities, and concepts of inclusivity and acceptance. Students, teachers, and administrators fear sharing their gender and sexual identities or helping others navigate their own identity formation. Institutions are subject to parental hostility, distrust, and at times, even violence. "I would be lying if I told you every day I

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83. Eesha Pendharkar, *Four Things Schools Won't Be Able to Do Under 'Critical Race Theory' Laws*, EDUC. WK. (June 30, 2021), https://www.edweek.org/policy-politics/four-things-schools-wont-be-able-to-do-under-critical-race-theory-laws/2021/06.

84. Melissa Moschella, *Critical Race Theory, Public Schools, and Parental Rights*, HERITAGE FOUND. (Mar. 24, 2022), https://www.heritage.org/education/commentary/critical-race-theory-public-schools-and-parental-rights [https://perma.cc/D87G-65B2]. For purposes of this Article, "school choice" refers to the theory that free-market principles of "choice," rather than government-sponsored public schools, produce better education outcomes and preserve parental autonomy. For a discussion of how principles of "school choice" are rooted in segregationist theory, see Diane Ravitch, *The Dark History of School Choice*, N.Y. REV. (Jan. 14, 2021), https://www.nybooks.com/articles/2021/01/14/the-dark-history-of-school-choice/ [https://perma.cc/GNB5-82YJ].

85. Gary W. Houchens & John Garen, Opinion, *Why We Should Advance School Choice, Not Critical Race Theory*, COURIER J. (Jan. 20, 2022, 8:02 AM), https://www.courier-journal.com/story/opinion/2022/01/20/opinion-advance-school-choice-not-crt-give-parents-more-say-education/6518624001/.

86. *Woke Schooling: A Toolkit for Concerned Parents*, MANHATTAN INST. (June 17, 2021), https://www.manhattan-institute.org/woke-schooling-toolkit-for-concerned-parents [https://perma.cc/LW75-SPYG]. Similarly, the Goldwater Institute has advocated for the "Sunlight in Learning Act," which would require public schools to publicize their curriculum online, as an attempt to "ensure[] parents aren't held hostage by the public education establishment's whims." Joe Setyon, *Gaslighting from the Left: CRT Advocate Belittles Concerned Parents*, GOLDWATER INST. (Jan. 27, 2022), https://www.goldwaterinstitute.org/gaslighting-from-the-left-crt-advocate-belittles-concerned-parents/ [https://perma.cc/F7A8-PYHY].

87. Nick Gillespie, *Corey DeAngelis: 2021 Was 'the Year of School Choice,' but 2022 Will Be Even Better*, REASON (Jan. 26, 2022, 4:15 PM), https://reason.com/podcast/2022/01/26/corey-deangelis-2021-was-the-year-of-school-choice-but-2022-will-be-even-better/ [https://perma.cc/Y4D4-N2ZK]. For a discussion of the pandemic's impact on public education, see Melissa Murray & Caitlin Millat, *Pandemics, Privatization and the Family*, 96 N.Y.U. L. REV. ONLINE 106 (2021).

leave school, I don't walk out to my car and wonder if someone's going to be out there," one teacher said.[88] And these challenges are heaped on top of others, complicated by decades of systemic underfunding, a chronic lack of resources, and a bureaucratic, bloated, and balkanized management structure. It is unsurprising, then, that given these circumstances, alongside the impact wrought by the pandemic, American teachers are leaving the profession in record numbers, a shortage that has threatened to upend education and significantly impact student achievement.[89] As Laura Meckler has written, "[t]est scores are down," "violence is up," "[p]arents are screaming at school boards, and children are crying on the couches of social workers. Anger is rising. Patience is falling."[90] Indeed, public education is "facing a crisis of epic proportions."[91]

The successful emergence of this multipronged attack on public education—from anti-identity bills that reinforce its subordinating ability, decrease its democratic function, and scare teachers and students alike into compliance, to outright attempts to privatize the enterprise entirely—bears examination. After all, the Founding Fathers were clear in the emphasis they placed on public education: John Adams cautioned that the education of "every rank and class of people, down to the lowest and the poorest," had to be "the care of the public," "maintained at the public expense,"[92] and George Washington believed that the "'prospect of [a] permanent union' depended on education in the science of government."[93] As education scholar Derek Black has observed, "American public education is one of the two foundational elements of our democracy. The other is the ballot itself."[94]

Indeed, as Anne Newman explains, "a right to education is a necessary precondition for a just deliberative democracy" for several reasons, including its

88. Olivia B. Waxman, *Anti-'Critical Race Theory' Laws Are Working. Teachers Are Thinking Twice About How They Talk About Race*, TIME (June 30, 2022, 12:37 PM), https://time.com/6192708/critical-race-theory-teachers-racism/.

89. *See, e.g.*, Christian Spencer, *Teachers Across America Are Fleeing in Record Numbers*, HILL (Oct. 4, 2021), https://thehill.com/changing-america/enrichment/education/575176-teachers-across-america-are-fleeing-in-record-numbers/ [https://perma.cc/35SH-RSGW]; Desiree Carver-Thomas, *Teacher Shortages Take Center Stage*, LEARNING POL'Y INST. (Feb. 9, 2022), https://learningpolicyinstitute.org/blog/teacher-shortages-take-center-stage [https://perma.cc/6K79-H2BN].

90. Laura Meckler, *Public Education Is Facing a Crisis of Epic Proportions*, WASH. POST (Jan. 30, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/01/30/public-education-crisis-enrollment-violence/.

91. *Id.*

92. *See* Derek W. Black, *America's Founders Recognized the Need for Public Education. Democracy Requires Maintaining That Commitment*, TIME (Sept. 22, 2020, 11:00 AM) https://time.com/5891261/early-american-education-history/ (describing the emphasis placed on public education at the Founding). For a comprehensive discussion of views on public education at the Founding, see generally DEREK W. BLACK, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY (2020).

93. Peter Grier & Chelsea Sheasley, *Public Education, Democracy, and the Future of America*, CHRISTIAN SCI. MONITOR (June 8, 2022), https://www.csmonitor.com/USA/Education/2022/0608/Public-education-democracy-and-the-future-of-America [https://perma.cc/LX3G-QAXK] (alteration in original).

94. *Id.*

antisubordinating impact—namely, that it protects individuals from subjugation to economically advantaged democratic majorities and enables all students to participate in collective decisionmaking as "civic equals."[95] Indeed, it is well established that subordinating opportunity disparities result in entrenched segregation and vast quality discrepancies hinder schools from fulfilling their essential democratic functions.[96] Most states, in fact, do not provide sufficient funding to educate low-income children in high-poverty districts.[97] "Low-income school districts are more than twice as likely to have a funding gap as higher-income districts," and districts with high concentrations of Black and Latinx students have significantly larger funding gaps, thousands of dollars per pupil.[98] In this way, the notion that education is critical for democracy at an individual and collective level is inherently in tension with the conclusion that access to it is not fundamental. Indeed, nearly every democratic country in the world—other than the United States—recognizes education as a fundamental human right.[99]

The increasing conscription of public education into a subordinating agenda—and its resulting antidemocratic outcomes—is made deeply ironic by what the Supreme Court has said about public education and its role in American society. Indeed, as the following Part describes, the Court has routinely deployed rhetoric that extolls public education as a critical democratizing, equalizing, and identity-affirming tool. But rather than reinforce the public education franchise, the Court's education jurisprudence has instead increasingly chipped away at the project. In doing so, it has set the stage for a public education system that fails at all levels to accomplish its purportedly democratic, equalizing, and antisubordinating aims.

II. EDUCATION, DEMOCRACY, AND SUBORDINATION IN THE COURT

A. THE EDUCATION–DEMOCRACY NEXUS

The Supreme Court has in its rhetoric routinely embraced the idea that public education is a critical democratic, citizenship-enhancing, and equalizing tool, and a franchise worthy of protection; litigants and academics alike have relied on

95. ANNE NEWMAN, REALIZING EDUCATIONAL RIGHTS: ADVANCING SCHOOL REFORM THROUGH COURTS AND COMMUNITIES 86 (2013).

96. *See* Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 290 (2013) (noting, for example, that "[t]he disparities in educational opportunity that relegate many poor and minority students to substandard schooling have hindered the ability of schools to serve these functions," and that "rather than solve these challenges, low graduation rates and substandard schools cost the United States billions of dollars each year in lost tax and income revenues," welfare, and housing assistance).

97. Charles J. Ogletree Jr. & Kimberly Jenkins Robinson, *Inequitable Schools Demand a Federal Remedy*, EDUC. NEXT, Spring 2017, at 71, 74.

98. *Closing America's Education Funding Gaps*, CENTURY FOUND. (July 22, 2020), https://tcf.org/content/report/closing-americas-education-funding/ [https://perma.cc/28RJ-E25P].

99. Katherine Smith Davis & Jeffrey Davis, *Restoring the Rights Multiplier: The Right to an Education in the United States*, 28 J.L. & POL'Y 395, 403–04 (2020).

these rhetorical proclamations to advance various doctrinal aims.[100] And though arguments relying on this proposition seek different doctrinal goals, they share structural characteristics. First, they generally advance some variation of a thesis that the Court has committed to, recognized, or underscored the symbiosis between public education and democracy. Second, these arguments pull from a common pool of precedent: in particular, a portfolio of Supreme Court education cases that cross seemingly disparate doctrinal and theoretical lines, from First to Fourteenth Amendment challenges.[101] And third, these arguments leverage the education–democracy canon in similar tactical ways: they primarily rest their conclusions on rhetoric.

As an illustration, take the Court's oft-cited statement in *Brown v. Board of Education*:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.[102]

Advocates have relied upon this statement to argue that a "core premise" of the Court's education jurisprudence "is that educational institutions do not merely provide tools for learning," but also to "forge paths toward fuller participation in our democratic system;"[103] and that the Court has recognized education's role in "preparing citizens to participate in a democracy."[104] Others claim that it illustrates that the Court "has long recognized the centrality of public education to the health of American democracy."[105]

Those claiming that the Supreme Court has endorsed education as a democratic tool also often use this framework to make a normative claim. For example, amici in a case concerning the constitutionality of a state provision banning affirmative

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100. *See, e.g.*, Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 123 (2004) (noting language from the Court that "reiterated the vital importance of public education"); Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 570 (2004) (noting the Court has "acknowledged . . . that education is central to democracy and the success of civic republicanism"); MICHAEL A. REBELL, FLUNKING DEMOCRACY: SCHOOLS, COURTS, AND CIVIC PARTICIPATION 46–47 (2018) (discussing how the Court has "repeatedly referred to the schools' critical role in educating for citizenship").

101. *See infra* Section II.E.

102. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

103. Brief of The Leadership Conference on Civil & Human Rights & the Leadership Conference Education Fund *et al*. as *Amici Curiae* in Support of Respondents Chase Cantrell *et al*. at 20, Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291 (2014) (No. 12-682).

104. Brief of *Amici Curiae* National School Boards Ass'n et al. in Support of Petitioners at 6, DeRolph v. Ohio, 540 U.S. 966 (2003) (No. 03-245).

105. John Rogers, Marisa Saunders, Veronica Terriquez & Veronica Velez, *Civic Lessons: Public Schools and the Civic Development of Undocumented Students and Parents*, 3 NW. J.L. & SOC. POL'Y 201, 203 (2008).

action leveraged *Brown* to argue for the application of heightened judicial scrutiny given that these policies could affect democratic participation.[106] Similarly, amici in the Supreme Court's 2020 decision *Espinoza v. Montana Department of Revenue* relied on *Brown* to argue that although the Court "has long recognized the crucial importance of public education in preparing students for participation as responsible members of society," this responsibility should fall on state and local actors.[107] And plaintiffs in *A.C. ex rel. Waithe v. McKee*, a recent right-to-education case, argued that *Brown* supports a conclusion that civics education should be recognized as a fundamental right under the Federal Constitution.[108]

The "education–democracy nexus," then, refers to the thesis that the Supreme Court has enumerated a positive relationship between public education and democracy.[109] As the following Section describes, from the early twentieth century to the decade post-*Brown*, the Court issued a series of opinions that, taken together, rhetorically advanced two primary theories as to education's democratizing functions: in particular, that public education is necessary to build a shared set of unifying, American values that prepares students for citizenship, and also to expose students to a diverse marketplace of ideas.

B. EDUCATION–DEMOCRACY FRAMEWORKS

Beginning in the early twentieth century, the Court observed that public education facilitates democracy by providing a shared set of cultural values.[110] In *Meyer v. Nebraska*, the Court considered the constitutionality of a state statute forbidding the teaching of non-English languages in public schools to ensure that English was the "mother tongue" of immigrants.[111] The Court struck down the statute because it interfered with private liberty interests, in particular the "natural duty of the parent to give his children education suitable to their station in

106. *See, e.g.*, Brief for the States of California et al. as Amici Curiae in Support of Respondents at 3–4, 12, *Schuette*, 572 U.S. 291 (No. 12-682).

107. Brief of National School Boards Ass'n et al. as *Amici Curiae* in Support of Respondents at 6–7, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (No. 18-1195).

108. Plaintiffs' Memorandum in Opposition to the Joint Motion to Dismiss at 9–10, 26–28, 44, A.C. v. Raimondo, 494 F. Supp. 3d 170 (D.R.I. 2020) (No. 1:18-cv-00645-WES-PAS), *aff'd sub nom.* A.C. *ex rel.* Waithe v. McKee, 23 F.4th 37 (1st Cir. 2022).

109. Defining "democracy" is a slippery enterprise. Indeed, "conceptual confusion over the meaning of democracy is so serious" that others have identified over 500 "subtypes" of democracy. Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577, 634 & n.291 (1997). Divergent views on American democracy have persisted since the Founding. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 172–73 (2002). There too is persistent debate about whether America can be called a "democracy" or instead is better labeled as a "constitutional republic." *Compare, e.g.*, Bernard Dobski, *America Is a Republic, Not a Democracy*, HERITAGE FOUND. (June 19, 2020), https://www.heritage.org/american-founders/report/america-republic-not-democracy [https://perma.cc/F7CG-9LEM], *with* Eugene Volokh, Opinion, *Is the United States a Republic or a Democracy?*, WASH. POST (May 13, 2015, 2:43 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/13/is-the-united-states-of-america-a-republic-or-a-democracy/ (concluding that the United States is "a representative democracy, which is a form of democracy").

110. *See* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 441–42 (2006).

111. 262 U.S. 390, 397–98 (1923).

life."[112] However, the Court at the same time expressed approval for the legislature's motives, observing that the "desire . . . to foster a homogenous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate."[113] In *Pierce v. Society of Sisters*, decided two years later, the Court elaborated on *Meyer* to articulate the principle that parents and guardians had a protected liberty interest to "direct the upbringing and education of children under their control."[114] The Court also doubled down on the principle that there was "no question . . . concerning the power of the State" to teach "good citizenship" and ensure teachers were of "patriotic disposition."[115]

More than a decade after *Pierce*, the Court further developed this values rhetoric in a pair of cases concerning the Pledge of Allegiance.[116] In *Gobitis*, a pair of Jehovah's Witnesses who believed scripture prohibited saluting the flag challenged a Pennsylvania school board's requirement that students do so daily.[117] The Court ruled for the school board, concluding that religious convictions did not "relieve the citizen from the discharge of public responsibilities," and that education in this way was meant to promote "national cohesion" and "[n]ational unity."[118] As the Court wrote, it was a "desirable end[]" to have children share an experience "designed to evoke in them appreciation of the nation's hopes and dreams."[119] Two years later, *Gobitis* was overruled by *Barnette*, which concerned a West Virginia statute that also mandated reciting the Pledge in schools.[120] Though the Court struck down the statute, observing that the First Amendment protected an intellectual and spiritual diversity of opinions, it nonetheless observed that the idea of "national unity" as "an end which officials may foster by persuasion and example" again was "not in question."[121]

The Court would also make a rhetorical commitment to a shared set of civic values in *Brown*, which overruled the "separate but equal" segregationist framework from *Plessy v. Ferguson*.[122] As the Court wrote, education served many purposes, including that by "awakening the child to cultural values," education was the "very foundation of good citizenship."[123] Relatedly, the Court also rhetorically endorsed the idea that education facilitates democracy by producing individuals capable of understanding and executing on their civic obligations, noting it is "required in the performance of our most basic public responsibilities,"[124]

112. *Id.* at 400.
113. *Id.* at 402.
114. 268 U.S. 510, 534–35 (1925).
115. *Id.* at 534.
116. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *Barnette*, 319 U.S. 624.
117. 310 U.S. at 591–92.
118. *Id.* at 594–95.
119. *Id.* at 597.
120. *Barnette*, 319 U.S. at 625–26, 629.
121. *Id.* at 640–42.
122. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
123. *Id.* at 493.
124. *Id.*

and that citizens should be "capable of fulfilling the social and political responsibilities of citizenship."[125] Of course, *Brown*'s emphasis on public responsibility took a different approach to the idea of "civic values" than that in *Barnette* emphasizing national homogeneity; the notion of "civic education" motivating these decisions facilitated different ends.

In *Wisconsin v. Yoder*, though the Court ruled in favor of a group of Amish parents who argued that a statute requiring their children to attend school until age sixteen was unconstitutional, it accepted as true the proposition that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system."[126] And in *Ambach v. Norwick*, which upheld a New York statute that prohibited noncitizens from serving as teachers,[127] the Court observed that public education was a tool for facilitating the "preservation of the values on which our society rests," and that teachers, in particular, had the opportunity to "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities," which was crucial to "the continued good health of a democracy."[128]

The Court also contemporaneously endorsed the idea that public schooling must provide an environment that facilitates a robust "marketplace of ideas."[129] In *Barnette*, for example, while the Court expressed sympathy for the concept of national unity, it also laid the foundation for marketplace of ideas principles, rejecting the idea that a goal of education was the "coerc[ion]" of uniform patriotic sentiment.[130] As the Court observed, "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard."[131]

Although it did not pick up "marketplace of ideas" threads for several years, in the 1960s, the Court issued two opinions that further expounded them. First, in *Keyishian v. Board of Regents of the University of the State of New York*, the Court struck down a New York statute that prohibited university teachers and

125. Wisconsin v. Yoder, 406 U.S. 205, 225 (1972).

126. *Id.* at 207, 221, 234.

127. 441 U.S. 68, 69, 81 (1979).

128. *Id.* at 76, 79.

129. *See, e.g.*, Brief Amicus Curiae of the Freedom to Read Foundation at 7–8, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (No. 84-1667) ("This Court has concluded in the past that our schools must not merely educate youth, but must educate them for life in a free, open, and democratic society."); Brief for the Independent Women's Law Center as *Amicus Curiae* Supporting Respondents at 4, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021) (No. 20-255) ("This Court has consistently recognized that the First Amendment's protection of free speech is essential for the preservation of a self-governing society."); Brief *Amicus Curiae* of Foundation for Individual Rights in Education in Support of Petitioner at 3, Lee-Walker v. N.Y.C. Dep't of Educ., 138 S. Ct. 1318 (2018) (No. 17-1065) ("This Court has also recognized the essential and necessary duty of an educator to prepare students for participation in the marketplace of ideas . . . ."); Amy H. Candido, Comment, *A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom*, 4 U. CHI. L. SCH. ROUNDTABLE 85, 92 (1997) ("Recognizing academic freedom as a concern of the First Amendment, the courts have also drawn upon the idea that education, much like free speech, plays an important role in preserving democracy.").

130. 319 U.S. 624, 640–41 (1943).

131. *Id.* at 641.

employees from membership in "seditious groups" such as the Communist Party.[132] As the Court observed, in the higher education context, the "classroom is peculiarly the 'marketplace of ideas,'" adding further that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'"[133]

In 1969's *Tinker v. Des Moines Independent Community School District*, the Court ruled that the wearing of a black armband at school to protest the Vietnam War was protected by the First Amendment—and that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[134] The *Tinker* Court extended the logic of the marketplace of ideas to primary and secondary schooling, favorably citing *Keyishian*'s discussion of a "robust exchange of ideas," and further observing that "personal intercommunication among . . . students" was not only inevitable, but also "an important part of the educational process."[135] As the Court observed, schools "may not be enclaves of totalitarianism," as "[s]chool officials do not possess absolute authority over their students."[136] And while the Court would largely be silent on "marketplace" rhetoric for several decades to follow, many have argued that *Barnette*, *Keyishian*, and *Tinker* show the Court's commitment to marketplace of ideas principles.[137]

In this way, from the early twentieth century through *Brown* and *Tinker*, the Court offered rhetorical support for several visions of how education could serve democracy: namely, through inculcating civic values, preparing students for civic responsibility, and providing access to a robust marketplace of ideas. A closer examination of these statements, considered against the backdrop of a series of cases that would follow these decisions, makes clear, however, that these endorsements are hollow alone.

C. THE ANTIDEMOCRATIC AND SUBORDINATION AGENDA

It is unsurprising, given the Court's language, that many claim that the Court has positioned public education as a tool with a variety of "democratic" benefits. As this Section demonstrates, however, that is an overly optimistic view that is belied by the Court's consistent and substantive decommitment to education as a public good.

This Section advances this argument on several fronts. First, it makes the claim that post-*Brown* and *Tinker*—high-water mark in educational equity and speech protection—the Court's endorsement of the education–democracy nexus, in both rhetoric and results, took a dramatic shift. Indeed, at this pivot point in the early

132. 385 U.S. 589, 591–93 (1967).

133. *Id.* at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

134. 393 U.S. 503, 504, 506, 513–14 (1969).

135. *Id.* at 512 (quoting *Keyishian*, 385 U.S. at 603).

136. *Id.* at 511.

137. *See, e.g.*, Brief Amicus Curiae of the Freedom to Read Foundation, *supra* note 129, at 10; Brief *Amicus Curiae* of Foundation for Individual Rights in Education in Support of Petitioner, *supra* note 129, at 2–3.

1970s[138] came the rise of the education–democracy anticanon, a series of cases that undercut the Court's purported commitment to public education. On this account, the rise of the anticanon saw not only an increasing rejection of education–democracy rhetoric but also a series of educational holdings that limited access to the public education franchise, its equity-enhancing benefits, and its democratizing functions. Second, it argues that, particularly taken alongside the anticanon, the Court's earlier articulations of the education–democracy nexus are best viewed as dicta, not doctrine. Finally, set against the backdrop of the Court's escalating rejection of education–democracy rhetoric, it argues that the Court has instead increasingly embraced another set of values in its education jurisprudence: a subordinating agenda of religious liberty, parental choice, and privatization.

Jamal Greene has conceptualized the constitutional "anticanon," or the group of Supreme Court cases that "all legitimate constitutional decisions must . . . refute."[139] This Section argues that there is a set of cases that make up a version of the public education anticanon for those who believe in public education's democratizing benefits—or, put differently, decisions that undermine public education's democracy-enhancing and antisubordinating reach. Taken together, these cases establish a pattern of rejection by the Court of the principle that public education is fundamental to democracy—or, perhaps, fundamental at all.

The marked turn away from education–democracy principles arguably began in 1973 with the Court's decision in *San Antonio Independent School District v. Rodriguez*.[140] There, a group of parents challenged a school finance system under which schools were mutually funded by local districts and the state, with local funding derived from property taxes in each area.[141] Predictably, this dual-approach system resulted in "substantial disparities" between communities.[142] The scheme, plaintiffs alleged, violated the Equal Protection Clause because it discriminated on the basis of wealth, depriving minority and low-income students of equal opportunity.[143]

The Court upheld the system. While it agreed "'the grave significance of education both to the individual and to our society' cannot be doubted," it nonetheless held that the "importance" of the service did "not determine whether it must be regarded as fundamental."[144] And while the Court rejected arguments that education should be distinguishable from other governmental services and benefits because of its close relationship to other rights, such as exercise of the First

138. For a discussion of how the Court under Chief Justice Warren Burger ushered in a period of transition to the right, see generally MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (2016).

139. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

140. 411 U.S. 1 (1973).

141. *Id.* at 4, 6–7.

142. *Id.* at 10–11.

143. *Id.* at 15–16.

144. *Id.* at 30 (quoting Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 283 (W.D. Tex. 1972)).

Amendment and the right to vote, the Court also did "not dispute" arguments that democracy "depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed."[145] Nonetheless, the Court observed that it had "never presumed to possess either the ability or the authority to guarantee . . . the most *effective* speech or the most *informed* electoral choice."[146] Since *Rodriguez*, the Court has repeatedly reiterated its conclusion that the right to education is not fundamental.[147]

As *Rodriguez* on one hand extolled and extended education–democracy and antisubordinating rhetoric, it on the other rejected the idea that the Constitution protected education as fundamental. This cognitive dissonance did not go unnoticed by the dissent. Justice Thurgood Marshall characterized the case as "a retreat from our historic commitment to equality of educational opportunity,"[148] noting that the decision was inconsistent with the Court's prior statements relating to the "particular[ly] importan[t] . . . relationship between education and the political process," and that "education is the dominant factor affecting political consciousness and participation."[149]

Rodriguez was immediately—and roundly—attacked. Commentators criticized the decision for trading in the same logic that had underlain the doctrine of separate but equal purportedly overturned by *Brown*.[150] They also questioned the majority's conclusion that Texas furnished sufficient education to provide each child with an opportunity to enjoy participation in the political process.[151] As Mark Yudof argued soon after *Rodriguez*'s passing, the Court had abdicated its role in doctrinal analysis, instead parrying the question to "focus on the appropriate judicial role, the limits on judicial manageability, and the dictates of public policy."[152] In the nearly fifty years since *Rodriguez*, scholars have continued to revile the decision. In 2015, Erwin Chemerinsky and Steven Shiffrin called *Rodriguez* the worst Supreme Court decision since 1960.[153] As Chemerinsky noted, *Rodriguez* "played a major role in creating the separate and unequal schools that exist today"—and, as Shiffrin observed, the case has since "permitted millions of children to be imprisoned in a system of educational inequality."[154]

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145. *Id.* at 35–36.

146. *Id.* at 36.

147. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) (citing *Rodriguez*, 411 U.S. at 35); Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988) (collecting cases).

148. *Rodriguez*, 411 U.S. at 71 (Marshall, J., dissenting).

149. *Id.* at 113.

150. *See, e.g.*, Carl F. Noll, Case Comment, San Antonio Independent School District v. Rodriguez*: A Retreat from Equal Protection*, 22 CLEV. ST. L. REV. 585, 593 (1973).

151. *See, e.g.*, *id.* at 597.

152. Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 503 (1973).

153. Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015, 11:36 AM), https://time.com/4056051/worst-supreme-court-decisions/.

154. *Id.*

To the extent one takes seriously the Court's rhetoric that an educated citizenry is a necessity "for the preservation of a democratic system of government," a "most vital civic institution,"[155] and "required in the performance of our most basic public responsibilities,"[156] *Rodriguez* is a radical departure. In this way, the gravity of education that had been noted in *Brown* was lost in translation through *Rodriguez*, where the Court rejected access to public education as a protected interest.[157] *Rodriguez* itself makes explicitly clear that rhetoric about the importance of education does not render it worthy of constitutional protection—that "importance," however elevated, does not guarantee constitutional significance.[158] The message was clear: even if public education may carry some perhaps essential democratic import, it is not enshrined as "fundamental" to American life.

The explicit rejection of education–democracy rhetoric continued in 1974's *Milliken v. Bradley*.[159] There, the National Association for the Advancement of Colored People (NAACP) sued Michigan public officials, alleging they had implemented policies, including racial gerrymandering, that perpetuated segregation in violation of *Brown*: in particular, that the policies contained Black families in specific school districts, while new suburban schools received funding increases as a result of white flight.[160] The lower court found for plaintiffs, ruling that the district lines needed to be redrawn and students needed to be bussed between Detroit and wealthier suburban districts, and the ruling was affirmed in part.[161]

The Supreme Court reversed. In its telling, there had been "no showing of significant violation" by the suburban districts, and the goal of desegregation in any event did not require "any particular racial balance" in schools.[162] The Court emphasized the importance of local control in schooling, particularly the drawing of district lines, observing that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."[163] Notably, the

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155. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). Justice Marshall also observed that

> In large measure, the explanation for the special importance attached to education must rest, as the Court recognized in *Yoder*, on the facts that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system . . . ," and that "education prepares individuals to be self-reliant and self-sufficient participants in society."

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 112 (1973) (Marshall, J., dissenting) (second alteration in original) (citation omitted).

156. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

157. Donald E. Lively, *The Desegregation Legacy: Uncertain Achievement and Doctrinal Distress*, 47 HOW. L.J. 679, 689–90 (2004).

158. *Rodriguez*, 411 U.S. at 30 (majority opinion) ("[T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.").

159. 418 U.S. 717 (1974).

160. *Id.* at 722–23, 735 n.16.

161. *Id.* at 732–36.

162. *Id.* at 740–41, 745.

163. *Id.* at 741.

majority did not invoke education–democracy nexus rhetoric—or mention education's democratizing or antisubordinating function at all.

In dissent, Justice Marshall took up the majority's local control point as "fl[ying] in the face of reality" given the statewide structure of Michigan's school system, which showed that it was the state itself, not simply Detroit, that bore the responsibility of curing segregation.[164] Justice Marshall argued that *Brown* and its progeny guaranteed to all students a school system in which all vestiges of enforced segregation had been eliminated, and the *Milliken* majority explicitly acted counter to this goal.[165] As Justice Marshall wrote, "[o]ur Nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together."[166]

Milliken, of course, further entrenched the urban–suburban divide and facilitated white flight, confining desegregation efforts to urban school districts while relieving suburban white schools of integration responsibility.[167] It has been called the "'single most damaging Supreme Court decision' on educational equity,"[168] and, as Justin Driver explains, a significant legacy of the decision is the "sorry state of racial integration in modern times."[169] Paired with *Rodriguez*, *Milliken* is often viewed as a de facto return to "separate but equal" principles purportedly overturned in *Brown*, an observation that is supported by data: one in five American students live on the "disadvantaged side" of a divisive school district boundary.[170] As of the early 2000s, public schools in the American South were less integrated than they were thirty years prior.[171] Indeed, as of 2020, nearly seventy years after *Brown*, 40% of Black and Latinx students attended schools where more than 90% of their classmates were non-white.[172]

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164. *Id.* at 797 (Marshall, J., dissenting).

165. *Id.* at 781–82.

166. *Id.* at 783.

167. *See, e.g.*, JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 6 (2010) (noting that *Milliken* "halted efforts to integrate public schools across district lines"); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1608 (2003) ("*Milliken* has the effect of encouraging white flight.").

168. Alexander Nazaryan, *School Segregation Is Getting Worse as Wealthier, Whiter Areas Form Splinter Districts*, NEWSWEEK (June 21, 2017, 3:30 AM), https://www.newsweek.com/reseg-627474.

169. Kalyn Belsha & Koby Levin, *45 Years Later, This Case Is Still Shaping School Segregation in Detroit – and America*, CHALKBEAT (July 25, 2019, 11:50 AM), https://www.chalkbeat.org/2019/7/25/21121021/45-years-later-this-case-is-still-shaping-school-segregation-in-detroit-and-america [https://perma.cc/EE2T-2228].

170. *Id.*

171. *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, UNIV. CAL. L.A., HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 23 tbl.8 (2007), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf [https://perma.cc/4SDG-T6LG].

172. Halley Potter & Michelle Burris, *Here Is What School Integration in America Looks Like Today*, CENTURY FOUND. (Dec. 2, 2020), https://tcf.org/content/report/school-integration-america-looks-like-today/ [https://perma.cc/9L52-5BBS].

There is much literature to support the conclusion that forced segregation and inequitable educational access—of course, subordinating phenomena—have significant individual and collective impacts. Racial isolation of schools localizes and exacerbates poverty, creating socioeconomic isolation in addition to racial isolation, which in turn decreases trust in the government and government institutions and prevents a sense of national unity, patriotic values, and collectivism.[173] Segregationist educational policies and unequal funding schemes also have significant impacts on individual predictors of low achievement: "concentrating students . . . in racially and economically homogeneous schools" is associated with greater rates of absenteeism, lower quality instruction, less extracurricular instruction, and ultimately lower average academic achievement than middle-class children.[174] Students in forced-segregated schools are deprived of cross-cultural navigational skills and exposure that, studies show, reduce bias and stereotype, increase empathy and acceptance of others, and broaden cultural worldviews.[175] As Areto Imoukhuede explains, "[t]he Court's holdings in *Rodriguez* and later in *Milliken v. Bradley* demonstrate a transparent avoidance if not outright abandonment of the principle of equality."[176] Indeed, persistent segregation, which perpetuates inequality in America, has been called an existential threat to democratic health.[177]

In the decade following *Rodriguez* and *Milliken*, the Court similarly would offer a new iteration of the "civic values" framework rooted in the state's own moral principles. *Tinker* was a high-water mark for First Amendment protection in the classroom: the Court would not rule against the state or district in a K–12 First Amendment case for another fifty years.[178] To the contrary, the Court's post-*Tinker* jurisprudence embraced a vision that a primary goal of schooling was

173. *See* Susan Ratner, *Integration, School Finance Reform, and* Milliken II *Remedies: The Time Has Come for Equal Educational Opportunity* (Hooks Inst. Working Paper #2005-01, 2005), https://www.memphis.edu/benhooks/creative-works/pdfs/ratner.pdf [https://perma.cc/CD87-969P].

174. *See* Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods – A Constitutional Insult*, ECON. POL'Y INST. (Nov. 12, 2014), https://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/ [https://perma.cc/6C4N-VGH8].

175. *See* NANCY MCARDLE & DOLORES ACEVEDO-GARCIA, CONSEQUENCES OF SEGREGATION FOR CHILDREN'S OPPORTUNITY AND WELLBEING AT THE HARVARD JOINT CENTER FOR HOUSING STUDIES SYMPOSIUM: A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY 12 (2017), https://www.jchs.harvard.edu/sites/default/files/a_shared_future_consequences_of_segregation_for_children.pdf [https://perma.cc/3DEF-PEXN].

176. Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467, 500 (2014).

177. *See generally* Lori Latrice Martin & Kenneth J. Varner, *Race, Residential Segregation, and the Death of Democracy*, 25 DEMOCRACY & EDUC. J., no. 1, 2017, at 1 (discussing how increasing segregation amid growing population diversity threatens democracy by minimizing equal access to resources like schooling).

178. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2043 (2021) (ruling against a school district).

to inculcate a set of values based in morality and civility as part of a shared social order.[179]

In *Bethel School District No. 403 v. Fraser*, the Court considered the constitutionality of the suspension of a student who had used an "elaborate . . . sexual metaphor" during a student assembly.[180] The Court upheld the suspension, finding that schools were charged with exemplifying "the shared values of a civilized social order" and that inculcating the "values necessary to the maintenance of a democratic political system" mitigated against using "highly threatening" or "offensive" terms.[181] Schools therefore could prohibit speech that was "lewd" or "indecent" because this would counteract "essential lessons of civil, mature conduct."[182]

In *Hazelwood School District v. Kuhlmeier*, the Court considered the constitutionality of a principal's decision to withhold from publication in the student newspaper two articles concerning pregnancy and divorce.[183] Applying *Fraser*, the Court held that a school was entitled to "disassociate itself" from certain speech it deemed "wholly inconsistent with the 'fundamental values' of public school education."[184] Indeed, the Court observed that holding the other way would have "unduly constrained" the school from fulfilling its role, under *Brown*, as a "principal instrument in awakening . . . cultural values."[185] The Court similarly endorsed the conception of shared "values" in *Board of Education, Island Trees Union Free School District No. 26 v. Pico ex rel. Pico*, where it considered whether a school board's policy to ban certain books in school libraries violated the First Amendment.[186] A plurality of the Court overturned the ban, finding the school library to be the "principal locus" of freedom to inquire and express choice.[187] In doing so, however, the Court observed that local school boards maintained the right to "establish and apply . . . curriculum in such a way as to transmit community values," and that, in fact, school boards may well maintain "absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values."[188]

Similarly, in *Morse v. Frederick*, decided twenty years after *Hazelwood*, students at an extracurricular event—a celebration for Olympic torchbearers passing

179. The "primary purpose of education" until the early twentieth century "was to inculcate children with the values necessary to become virtuous citizens who would pursue the common good." Stephen M. Feldman, *Free Expression and Education: Between Two Democracies*, 16 WM. & MARY BILL RTS. J. 999, 1000, 1019 (2008).

180. 478 U.S. 675, 677–79 (1986).

181. *Id.* at 683, 685.

182. *Id.* at 683.

183. 484 U.S. 260, 262–64 (1988).

184. *Id.* at 266–67 (quoting *Fraser*, 478 U.S. at 685–86).

185. *Id.* at 272 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)). For a cogent discussion of the roots of the civility framework endorsed in *Fraser* and *Hazelwood*, *inter alia*, see Feldman, *supra* note 179, at 1007–10.

186. 457 U.S. 853, 855–56 (1982) (plurality opinion).

187. *Id.* at 868–69, 872.

188. *Id.* at 864, 869.

down a street in front of a high school—flew a banner bearing the phrase "BONG HiTS 4 JESUS": the principal suspended a student who flew the banner.[189] The student argued that the suspension was unconstitutional under the First Amendment; the Court held for the school.[190] As the Court held, *Tinker* did not prohibit the school's course of action because the students' banner evinced a "far more serious and palpable" concern than mere "disturbance," because the banner could reasonably have been regarded as "promoting," indeed, "celebrating" illegal drug use.[191]

In the *Bethel–Hazelwood–Morse* trio, the Court subjugated the notion of the marketplace of ideas to instead defer to the state's interest in suppressing what it deemed "uncivil" speech. More particularly, in each case, the Court concluded that despite *Tinker*'s proclamations as to the broad protections of speech, even behind the "schoolhouse gate,"[192] school officials had sweeping authority to limit student speech and take disciplinary action in response. On this account, though these cases did not expressly overrule *Tinker*, they greatly narrowed its holding.[193] Indeed, the prevailing view is that the Court's public education speech cases, along with *Pico*, together stand for the principle that the government has "'broad discretion in the management of school affairs,' particularly in selecting curriculum," but, after *Morse*, that this deference may extend to all school activities.[194]

The Court's 2021 decision in *Mahanoy Area School District v. B.L. ex rel. Levy* adds a new dimension. There, a high school student who had failed to make the school's varsity cheerleading squad or softball team posted to her Snapchat story, from an off-campus location, profane messages about the school and the team, which were eventually passed along to the school and resulted in disciplinary action.[195] The Court held that the school's suspension violated the student's First Amendment rights, handing down its first favorable student speech decision since *Tinker*: in doing so, it echoed the "marketplace of ideas" rationale, and held that any state interest in prohibiting students from using vulgar language to criticize school personnel was "weakened considerably by the fact that B. L. spoke outside the school on her own time."[196] The Court, however, declined to apply a categorical forum analysis rule about how to treat off-campus speech.[197]

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189. 551 U.S. 393, 397–98 (2007).

190. *Id*. at 399–400.

191. *Id*. at 408–09 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

192. *Tinker*, 393 U.S. at 506.

193. *See* Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 831 (2009). Barry Friedman also has suggested that *Morse* could be viewed as an example of "stealth overruling." Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 7, 9 (2010).

194. Chemerinsky, *supra* note 193, at 830, 833.

195. Mahanoy Area Sch. Dist. v. B.L. *ex rel*. Levy, 141 S. Ct. 2038, 2043 (2021).

196. *Id*. at 2046–48.

197. *Id*. at 2045 ("[W]e do not now set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need[s] . . . .").

Although some have been optimistic about *Mahanoy*'s return to "marketplace of ideas" principles, the consensus in the as-yet limited scholarship on *Mahanoy* is that *Tinker* may theoretically apply to off-campus speech—and, indeed, that schools continue to enjoy significant power to regulate even off-campus speech.[198] Others believe that the decision represents a robust commitment to the primacy of parental rights, particularly given the concurrence authored by Justice Samuel Alito.[199] On this account, as Justice Alito emphasized, "parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children," and "do not implicitly relinquish all that authority when they send their children to a public school."[200]

But the turn from education–democracy rhetoric did not stop with *Morse*. That same year, the Court decided *Parents Involved in Community Schools v. Seattle School District No. 1*, a consolidation of two cases that would test the application of the Court's higher education diversity rationale in the K–12 setting.[201] Seattle's School District No. 1 used a selection system that allowed students to rank their preferred school; if too many students chose the same option, District No. 1 employed a series of tiebreakers, including the racial composition of the school and the race of the student.[202] If an oversubscribed school was not within ten percentage points of District No. 1's white–non-white ratio, students would be assigned in order to bring the school into racial balance.[203] Jefferson County, at issue in the companion case, adopted a voluntary student assignment plan that assigned students to groups of schools based on available space and racial guidelines that considered racial balance in the given school.[204]

In a plurality opinion written by Chief Justice John Roberts, the Court invalidated both plans, holding that while it had previously found two related interests to be compelling for purposes of applying strict scrutiny to state action—remedying the effects of past intentional discrimination and diversity in higher education—neither applied here.[205] As to the diversity rationale, the Court made clear that this

198. *See, e.g.*, Jenny Diamond Cheng, *Deciding Not to Decide:* Mahanoy Area School District v. B. L. *and the Supreme Court's Ambivalence Towards Student Speech Rights*, 74 VAND. L. REV. EN BANC 511, 518 (2021).

199. *See, e.g.*, David L. Hudson Jr., Mahanoy Area School District v. B.L.*: The Court Protects Student Social Media but Leaves Unanswered Questions*, 2020–2021 CATO SUP. CT. REV. 93, 104.

200. *Mahanoy*, 141 S. Ct. at 2053 (Alito, J., concurring).

201. 551 U.S. 701 (2007). The diversity rationale has its roots in the landmark *Regents of the University of California v. Bakke*, in which the Court concluded that diversity was a compelling state interest in the higher education context. 438 U.S. 265, 315 (1978) (plurality opinion). As the Court observed in *Grutter v. Bollinger*, "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints," and "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential." 539 U.S. 306, 330, 332 (2003).

202. *Parents Involved*, 551 U.S. at 711–12.

203. *Id.* at 712.

204. *Id.* at 715–16.

205. *Id.* at 720–22, 725 (holding that remedying the effects of past intentional discrimination was not a compelling interest here because Jefferson County had achieved unitary status, thereby "remed[ying] the constitutional wrong that allowed race-based assignments").

interest related in particular to higher education alone.[206] The plurality equated the desegregation plans to naked "racial imbalance, . . . without more," relying on 1977's *Milliken v. Bradley* to conclude that racial balancing was not constitutionally protected.[207] In the Court's view, permitting race-conscious decisionmaking would "assur[e] that race will always be relevant in American life"[208]: indeed, the Court invoked *Brown* to conclude that the use of race as a classification itself "denoted inferiority."[209] In its now-infamous line, the plurality wrote: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[210] Again, the Court declined to dedicate language to the education–democracy nexus, omitting entirely discussion of education's democratizing functions. Indeed, in concurrence, Justice Clarence Thomas explicitly rejected the idea that a "'democratic' interest qualifies as a compelling interest," writing this had "little basis in the Constitution or our precedent."[211]

The dissents highlighted this tortured interpretation of *Brown*: as Justice John Paul Stevens wrote, the Chief Justice had effectively "rewrit[ten] [its] history."[212] And while the plurality entirely ignored the education–democracy relationship, the dissents focused significantly on it. Justice Stephen Breyer described the "democratic element" inherent in integration—"an interest in helping our children learn to work and play together with children of different racial backgrounds," and "to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation."[213] As Justice Breyer wrote, "[p]rimary and secondary schools are where the education of this Nation's children begins."[214] The dissenters "fear[ed] the consequences" of the decision for the democratic process.[215]

Many labeled the decision as a misinterpretation of *Brown* that turned away from its core holding.[216] Indeed, *Parents Involved* has been called an "utter

206. *Id.* at 722 (defining the compelling interest as "diversity in higher education"); *id.* at 725 (noting the "unique context of higher education," and holding that *Parents Involved* would not be "governed by *Grutter*"). In a narrow concurrence, Justice Anthony Kennedy disagreed with the plurality's conclusions to this end and said that achieving racial diversity, avoiding racial isolation, and addressing segregation could be compelling interests. *Id.* at 783 (Kennedy, J., concurring) ("Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.").

207. *Id.* at 721 (majority opinion) (quoting Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977)).

208. *Id.* at 730 (plurality opinion) (alteration in original) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (plurality opinion)).

209. *Id.* at 746 (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

210. *Id.* at 748.

211. *Id.* at 766 n.15 (Thomas, J., concurring).

212. *Id.* at 798–99 (Stevens, J., dissenting).

213. *Id.* at 840 (Breyer, J., dissenting).

214. *Id.* at 842.

215. *Id.* at 863.

216. *See, e.g.*, Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts's Reinterpretation of* Brown, 69 OHIO ST. L.J. 791, 803 (2008); *see also* Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 766 (2008) (noting that *Brown*'s vision was "limited" by cases such as *Parents Involved*).

betrayal of *Brown*."[217] Some, however, did not see the decision as such an about-face, instead calling it consistent with years of unfavorable desegregation opinions.[218] For example, john a. powell and Stephen Menendian observe that though Justice Thomas had previously recognized in a case upholding the use of school vouchers that "one of the purposes of public schools was to promote democracy and a more egalitarian culture," his concurrence in *Parents Involved* contained no such observation—instead, when confronted with the "democratic element" at issue here, namely an environment that reflects pluralism, deploying race-conscious decisionmaking was, to Justice Thomas, pure discrimination.[219] In this way, Justice Thomas "completely reject[ed] the democratic claim."[220]

Parents Involved and its embrace of anti-differentiation ideals not only stands for a rejection of antisubordination and democratic principles, but also undermines each the Court's education–democracy nexus narratives. Its implicit rejection of diversity as a compelling interest in the primary and secondary school context and its failure to recognize the democratic importance of integrated school environments shows the limitations of the Court's view on the link between racial equity and democratic health: indeed, it has been labeled as ushering in the "end of the desegregation era."[221] It subverts the "civic values" rationale, because forced racially segregated schooling facilitates racial and socioeconomic isolation and deprives students in underperforming schools of access to high-quality instruction necessary to build national unity.[222] It cuts against rhetoric relating to civic responsibility, in spite of findings that racial and socioeconomic isolation are positively correlated to disenfranchisement and disengagement from the political process.[223] And it reduces participation in the marketplace of ideas, decreasing diversity of student thought, expression, and perspectives, while entrenching racial, social, and economic homogeneity.[224] Indeed, racial diversity in educational settings has various democratic aims,

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217. Robert L. Hayman Jr. & Leland Ware, *Introduction* to CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE 1, 14 (Robert L. Hayman Jr. & Leland Ware eds., 2009).

218. *See* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 142 (2007); *see also* Erica Frankenberg & Chinh Q. Le, *The Post*-Parents Involved *Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1020 (2008) ("[M]ost students of the Supreme Court's race jurisprudence probably could have predicted with a high degree of accuracy what the law coming out of the case would look like.").

219. john a. powell & Stephen Menendian, Parents Involved*: The Mantle of* Brown*, The Shadow of* Plessy, 46 U. LOUISVILLE L. REV. 631, 695, 698, 701 (2008) (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 681 (2002) (Thomas, J. concurring)).

220. *Id.* at 698.

221. Greenspahn, *supra* note 216, at 757.

222. *See* Rothstein, *supra* note 174.

223. *See* Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 305 (2014) (plurality opinion) (citing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470–74 (1982)).

224. The Court, for its part, has also rhetorically made this observation. *See, e.g.*, *Schuette*, 572 U.S. at 312–13 (noting that a "responsible, functioning democracy" requires the ability of its citizenry to "learn from its past mistakes; to discover and confront persisting biases; and by respectful, rational deliberation to rise above those flaws and injustices," and that this framework also requires "public discourse and political debate").

including that it increases interracial interactions and friendship, improves the likelihood students will live in integrated environments, and supports development of critical thinking skills.[225]

The Court again turned its back on ideals of diversity in public education in 2014, when a plurality of the Court upheld a Michigan amendment that prohibited race- and sex-based preferences in public education.[226] The plurality emphasized that Michigan voters had passed the amendment via "democratic process," refusing to take this "difficult question of public policy . . . from the reach of the voters."[227] It dodged the question of whether racial preferences could or should continue to be used in education, noting that the case was "not about how the debate about racial preferences should be resolved," but rather, "about who may resolve it."[228] Unsurprisingly, like *Rodriguez*, *Milliken*, and *Parents Involved*, the plurality opinion entirely omitted mention of the education–democracy nexus.

In dissent, Justice Sonia Sotomayor cautioned that all citizens had the right to participate "meaningfully and equally" in self-government—and here, the Michigan electorate had "changed the basic rules of the political process . . . in a manner that uniquely disadvantaged racial minorities."[229] In this way, Justice Sotomayor emphasized that democracy required protection of minority rights in the face of majority rule. In particular, Justice Sotomayor observed that "diversity in education is paramount"; that democracy demands the ability to "move[] beyond" stereotypes, assumptions, and perceptions of racial others; and that an individual leadership class must be open to racially diverse individuals.[230] And as she wrote, parroting Chief Justice Roberts's words in *Parents Involved*: "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."[231]

On its face, *Schuette* is perhaps a "democratic" decision: it upheld an amendment voted for by Michigan constituents and expressed fidelity to the democratic process. But the divided opinion notably prioritizes only one aspect of "democracy": majority rule. In this way, *Schuette* stands for the proposition that voters maintain absolute control over public universities and education systems—over, perhaps, scholarship, curriculum, pedagogical, and structural choices.[232] As Justice Sotomayor wrote in dissent, "without checks, democratically approved legislation can oppress minority groups"—and education should serve as an equalizing force to make real democracy's promise.[233] Indeed, this ignores the

225. Osamudia James, *Risky Education*, 89 GEO. WASH. L. REV. 667, 722 (2021).
226. *Schuette*, 572 U.S. at 299, 314–15.
227. *Id.* at 312–13.
228. *Id.* at 314.
229. *Id.* at 338 (Sotomayor, J., dissenting).
230. *Id.* at 390–91.
231. *Id.* at 381.
232. *See, e.g.*, Michael Kagan, *"Unelected Faculty":* Schuette v. Coalition *and the Limits of Academic Freedom*, 5 CALIF. L. REV. CIR. 286, 292–93 (2014).
233. 572 U.S. at 337–39.

Court's commitment to education's equalizing functions as expressed in *Brown*: as Cedric Merlin Powell explains, after *Schuette*, the "real danger is that . . . voters may choose to 'experiment' in a manner that harms discrete and insular minorities by targeting them for displacement from the process."[234] What, then, if voters expressed a preference for hiring teachers only of a certain race, or religion? Or teaching evolution alone? Or, perhaps, avoiding certain topics entirely in classroom settings? Indeed, as this Article has surfaced, these are not idle threats: legislation seeking to suppress certain views, historical education, and discussion of identity are percolating in states across the country.[235]

More broadly, *Schuette* demonstrates the Court's inconsistent commitment to "democratic processes" at all. As Michael Klarman explains, "Justices love referenda, except when they distrust them. Justices celebrate the Court's role in defending the rights of unpopular minorities, except when they celebrate the virtue of democratic decisionmaking, in which case the opposing Justices suddenly become 'black-robed rulers overriding citizens' choices.'"[236] *Schuette* also demonstrated a profound turn from *Barnette*, in which the Court observed that the "very purpose" of the Bill of Rights "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[237] And given the Court's endorsements in the higher education setting of the need for diversity for democratic health, the turn away from protection for these principles in primary and secondary schooling is stark and puzzling if one takes seriously an interest in diverse education. Unsurprisingly, many viewed *Schuette* as a retreat from the Court's commitment to affirmative action, an embrace of post-racial thinking, and a signal that entirely overruling *Grutter v. Bollinger*[238] and its progeny could be on the horizon.[239] This already has begun: states with affirmative action bans have seen significant declines in minority attendance and, in some cases, the lack of diversity has caused a chilling effect on the academic environment.[240] And *Schuette* and *Parents Involved* likely will lay the foundation of the Court's ruling in a pair of affirmative action cases heard last Term.[241]

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234. *See, e.g.*, Cedric Merlin Powell, *The Rhetorical Allure of Post-Racial Process Discourse and the Democratic Myth*, 2018 UTAH L. REV. 523, 549.

235. *See supra* Part I.

236. Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 226 (2020) (footnotes omitted) (quoting Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting)).

237. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

238. 539 U.S. 306 (2003).

239. *See, e.g.*, Powell, *supra* note 234, at 525.

240. *See, e.g.*, Morgan Mottley, *Taking a Step Back from Civil Rights: The Supreme Court's Approval of Affirmative Action Bans*, Winter 2015, J.L. & EDUC. at 155, 159–60.

241. To this end, Students for Fair Admissions, the group challenging admissions policies at the University of North Carolina and Harvard University, already has argued that *Grutter v. Bollinger* should be overruled under *Parents Involved*. Petition for a Writ of Certiorari Before Judgment at 28, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (Nov. 11, 2021) ("Now is the time to

Taken together, *Rodriguez*, *Milliken*, *Parents Involved*, *Schuette*, and the post-*Tinker* speech cases demonstrate not only that the Court has rejected education–democracy and antisubordination rhetoric over time, but also that any commitment to education's democratizing, equalizing, and antisubordinating functions has been undermined at a substantive level. The Court has (selectively) lauded education as the "very foundation"[242] of democracy—but declined to recognize it as a fundamental right.[243] It has called it the primary inculcator of "civic values"[244] and preparation for "civic responsibility"[245]—but has consistently resisted efforts to expand the franchise for all to access.[246] And it has endorsed education as a space for a diversity of ideas and people[247]—but has systematically undermined institutional freedom to permit creation of those spaces, and enabled stringent restrictions on speech rights where it has intervened at all.[248] Rather, any such protection the Court may once have offered to public education as a democratic tool has in the years since been undercut—leaving little doctrinal purchase for the Court's nexus rhetoric. Indeed, as the following Section describes, much of the Court's democracy-enhancing rhetoric itself suffers from various deficiencies that blunt or limit their doctrinal value—and, at times, even serves antidemocratic aims.[249]

D. UNPACKING THE RHETORIC

As an initial matter, the Court never has defined precisely which values public education is meant to inculcate, but has instead alluded generally to a broad set of "civic" values.[250] Rather, "the extent of the state's authority and obligation to educate students for civic participation" has "never been closely examined and

'stop discrimination on the basis of race' by 'stop[ping] discrimination on the basis of race.'" (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007))). And, as Jonathan Feingold explains, the Court's "hostility toward race-conscious remedies" as demonstrated in cases like *Parents Involved* has already seen the "piecemeal crippling of race-conscious remedies across sectors of American life." Jonathan P. Feingold, SFFA v. Harvard*: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 714 (2019).

242. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

243. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973).

244. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

245. *See, e.g.*, *Brown*, 347 U.S. at 493.

246. *See, e.g.*, *Rodriguez*, 411 U.S. at 58–59.

247. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

248. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion); Morse v. Frederick, 551 U.S. 393, 408–09 (2007).

249. As James E. Ryan writes, the Court's education jurisprudence "do[es] not reveal an elaborate and comprehensive theory . . . ; there is nothing close to a precise or complete vision of the permissible goals of public schools or the means by which those goals should be pursued." James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1340 (2000).

250. *See supra* Part II; *see also* Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. REV. 959, 977 (2003) ("[T]he Court [has] made no attempt to define these 'civic virtues,' leaving state and local authorities to fill the void."). As Welner explains, avoidance of defining these virtues is deliberate—and "reasonabl[e]," given federalist principles. *Id.*; *see id.* at 971 n.48. Indeed, "[t]he mission of schools as the transmitters of social, moral, and political values makes it inevitable that disputes will arise over which values are to be inculcated," and "[t]here is no consensus"

the constitutional basis for the state's authority in this area is still unclear."[251] Some argue, for example, that education should inculcate character values such as honesty, cooperation, tolerance, and truthfulness, or political values such as patriotism.[252] Others contend that schools should teach discipline values that prioritize respect for others and for authority figures, responsibility, and discipline.[253] Others, perhaps ironically, argue for the inculcation of values such as the importance of individualism and free speech to democracy.[254] And some suggest that education should focus on values essential to formation of morality, whether religious or character in nature.[255] This tension makes sense, given Americans' divergent views on the purpose of public education.[256] But where the Court has spoken on these values, however implicitly, it has, as discussed *supra*, offered only two primary visions: education that contributes to national unity by promoting love of government and loyalty to country, and education, in its post-*Tinker* speech cases, that teaches lessons in "civilized" or moral social conduct.[257]

Under the "patriotism" framework, education is tasked with molding "the attitudes of students toward government," and with promoting a sense of national unity, "patriotism," and "love of country."[258] The patriotism framework has long

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on these values. Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1649 (1986).

251. REBELL, *supra* note 100, at 40. Michael Rebell has articulated six categories of potential school-related values: character values, like honesty and self-reliance; discipline values, like respect for authority and orderliness; political values, like patriotism; equity values, like nondiscrimination and equal treatment; sexual values, like beliefs on questions of reproductive autonomy and abortion; and religious values. Michael A. Rebell, *Schools, Values, and the Courts*, 7 YALE L. & POL'Y REV. 275, 291 (1989). As Rebell notes, these values frameworks can often overlap—for example, some equity values are necessarily political. *Id.*

252. Welner, *supra* note 250; *see generally* Tracy M. Lorenz, Note, *Value Training: Education or Indoctrination? A Constitutional Analysis*, 34 ARIZ. L. REV. 593, 593 (1992) ("In a society where crime is prevalent, the formal structure of the schools is an appealing tool for teaching students basic societal values such as honesty and responsibility.").

253. *See, e.g.*, Jeffrey J. Pyle, *Socrates, the Schools, and Civility: The Continuing War Between Inculcation and Inquiry*, Jan. 1997, J.L. & EDUC., at 65, 66 (discussing theories of values inculcation).

254. Welner, *supra* note 250, at 978.

255. *See, e.g.*, Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 772, 840–42 (1995).

256. *See* Richard D. Kahlenberg & Clifford Janey, *Putting Democracy Back into Public Education*, CENTURY FOUND. (Nov. 10, 2016), https://tcf.org/content/report/putting-democracy-back-public-education/ [https://perma.cc/72M5-2F3X]. Pyle argues that these differences are rooted in different conceptions of "civility": the "standard conservative" version, which puts certain ways of speaking and topics beyond discussion, the "status based" version, concerned with equal treatment and respect, and the "libertarian" version, focusing on broad individual rights so long as they do not infringe upon others. Pyle, *supra* note 253, at 83.

257. *See* Justin R. Chapa, *Stripped of Meaning: The Supreme Court and the Government as Educator*, 2011 B.Y.U. EDUC. & L.J. 127, 145 (observing the Court turned post-*Tinker* to a conception of education that "seem[ed] focused on inculcating morals, rather than patriotism," with its tenets "derived from the moral sensibilities of school authorities").

258. *See supra* text accompanying notes 127–28; Brent T. White, *Ritual, Emotion, and Political Belief: The Search for the Constitutional Limit to Patriotic Education in Public Schools*, 43 GA. L. REV. 447, 517 (2009).

roots in history,[259] and the rationales for patriotic education are myriad in theory: some argue that it acts as a stabilizing force in society,[260] increases political participation,[261] and creates citizens willing to subjugate individual values for state welfare.[262]

"Patriotic" education, however, also has been deployed to propagandize, assimilate and Americanize immigrants, and drum up citizen support in times of war. In the early days of World War I, for example, the New York City Board of Education issued a statement signed by the city's public school teachers stating its "unqualified allegiance to the government of the United States," and "pledg[ing] . . . by word and example to teach and impress upon our pupils the duty of loyal obedience and patriotic service, as the highest ideal of American citizenship."[263] And just twenty years ago, after the September 11th attacks, the George W. Bush Administration launched a package of patriotic education that would call on schools to reinstate the Pledge of Allegiance, display patriotic signs, and engage in other rituals designed at patriotic expression,[264] a set of actions some said resembled America's approach during the Cold War.[265] And the "patriotic education" movement has reached its tentacles farther yet: in 2021, the Trump Administration's 1776 Commission published the 1776 Report, which aimed to "restor[e] patriotic education" by centering love of country—and casting civic and progressive rights movements as anti-American assaults on individual rights.[266] Indeed, American schools historically have promoted a vision of patriotism that is "closer to the blind, authoritarian, belligerent kind."[267] On this account, common

259. Diane Ravitch, *Celebrating America*, *in* PLEDGING ALLEGIANCE: THE POLITICS OF PATRIOTISM IN AMERICA'S SCHOOLS 91, 92 (Joel Westheimer ed., 2007); *see also* White, *supra* note 258, at 455 ("Schools have long been used to inculcate a sense of patriotism in young children.").

260. *See, e.g.*, White, *supra* note 258, at 512 & n.277.

261. *See id.* at 513–14.

262. *See id.* at 517.

263. Sohyun An, *Unpacking Patriotism in an Elementary Social Studies Methods Class* (quoting Stephan F. Brumberg, *New York City Schools March Off to War: The Nature and Extent of Participation of the City Schools in the Great War, April 1917-June 1918*, 24 URB. EDUC. 440, 446 (1990)), *in* (RE) IMAGINING ELEMENTARY SOCIAL STUDIES: A CONTROVERSIAL ISSUES READER 235, 240 (Sarah B. Shear et al. eds., 2018).

264. *See* Dana Milbank, *Bush Makes a Pitch for Teaching Patriotism*, WASH. POST (Nov. 2, 2001), https://www.washingtonpost.com/archive/politics/2001/11/02/bush-makes-a-pitch-for-teaching-patriotism/b8bb1daf-e3c6-4fbf-8eb9-8f4517892969/; Joel Westheimer, *Politics and Patriotism in Education*, PHI DELTA KAPPAN, Apr. 2006, at 608, 609.

265. *Cf.* Emily Stewart, *How 9/11 Convinced Americans to Buy, Buy, Buy*, VOX (Sept. 9, 2021, 8:00 AM), https://www.vox.com/the-goods/22662889/september-11-anniversary-bush-spend-economy [https://perma.cc/F5BQ-YN5N] (noting how "consumer patriotism" informed America's approach to both September 11th and the Cold War).

266. McClain & Fleming, *supra* note 6, at 1780 (quoting PRESIDENT'S ADVISORY 1776 COMM'N, THE 1776 REPORT 16 (2021), https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf [https://perma.cc/R7VE-UB8U]). For a critique of the 1776 Commission and Report's vision of "patriotic education," including its historical whitewashing, minimizing of the original sin of slavery, and focus on American exceptionalism, see McClain & Fleming, *supra* note 6, at 1779–85.

267. An, *supra* note 263.

schools sought to produce "patriotic" citizens who were informed and loyal—but also "homogenized, complaisant, and tractable."[268]

Unsurprisingly, many argue that patriotic values inculcation is subordinating and antidemocratic. The prevailing view among these critics is that it not only "undermines . . . individual rights of conscience" but also "the democratic process itself."[269] As Tyll van Geel contends, this type of values inculcation is counterproductive in that it does not reliably produce democratic attitudes, beliefs, and dispositions.[270] Rather, it is not the content of schooling but instead the quantity of schooling that correlates to the endorsement of democratic values;[271] the view that inculcative education facilitates patriotism "finds no support in the literature."[272] And even if these values were successfully inculcated, there is no evidence that holding these values contributes to democratic stability: rather, the research shows that thriving democratic governments can be characterized often by "sharp[] divi[sions] in [their] support for . . . democratic principles," demonstrating unity for some principles, such as freedom, but not for others.[273] In this way, this type of "patriotic" education centers American exceptionalism and casts criticism of country as anti-American, undercutting democracy's deliberative functions.[274]

Patriotic education also can subvert individual autonomy, which impedes democracy. As Brent White argues, conditioning affirmative patriotic predispositions in children that attempt to shape their political beliefs and motivate their political decisions infringes upon the democratic right to freedom of conscience, contributes to the manipulation of the public by those in power, and distorts political discourse.[275] Indeed, "love of country" can be "negatively correlated with democratic values" of critique and engagement with the state.[276] Others observe that "patriotic" education is inapposite in a nation that is not functionally democratic—or that notions of patriotism, or devotion to American ideals, for example, are racist, exclusive, and violent by origin, because they rely on America's history as a colonial state.[277]

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268. Aaron Saiger, *Deconstitutionalizing Dewey*, 13 FIU L. REV. 765, 785 (2019).

269. *See* White, *supra* note 258, at 449.

270. Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 274, 275 & nn.359–60 (1983).

271. *Id.* at 269–70 (noting the resulting increase in "belief in basic democratic values such as tolerance, freedom of speech, freedom of belief, privacy, and due process").

272. *Id.* at 270. In particular, van Geel argues that the literature relied on by the Court in *Ambach* does not support the Court's conclusion that schools can inculcate certain patriotic values that are in turn internalized by students. *Id.* at 263–71.

273. *Id.* at 280.

274. *See generally* McClain & Fleming, *supra* note 6 (arguing that "patriotism" should include an awareness of a nation's flaws, not merely unthinking fidelity to the state).

275. *See* White, *supra* note 258, at 452–53.

276. *See id.* at 515–16.

277. *See, e.g.*, Terrell Jermaine Starr, *Patriotism Is for White People*, ROOT (Sept. 25, 2017), https://www.theroot.com/patriotism-is-for-white-people-1818724099 [https://perma.cc/D6YW-JV4B].

Still others contend that "patriotic" education has totalitarian, autocratic, or fascist undertones. As Martin Redish and Kevin Finnerty write, much of public education is implicitly tainted because state officials dictate educational offerings: what curriculum is taught, how history is framed, and who teaches it—indeed, this picture is "disturbingly reminiscent of classic totalitarian societies, which have traditionally viewed the classroom as the primary means for imposing . . . thought control so essential to their continued success."[278] In this way, efforts to indoctrinate "official" values are necessarily in tension with democratic ideals, as controlling value transmission are a "hallmark of totalitarianism."[279] The "patriotism" framework, then, positions public education as a conveyor belt on which pro-American values are imparted into students—a top-down emphasis on loyalty to country, undermining First Amendment and liberty values.[280]

The alternative approach to values inculcation advanced by the Court post-*Tinker* is one that focuses on values of "civility," respect for authority, and decency. Under this framework, education is meant to inculcate "habits and manners of civility" that "include tolerance of divergent political and religious views" but also consider the "personal sensibilities" of others, and the "boundaries of socially appropriate behavior."[281] It is concerned in this way with values that contribute to civilized society[282] and "sustaining our political and cultural heritage" in accordance with a civilized social order.[283]

I am not the first to argue that an emphasis on "civility" may have subordinating and antidemocratic effects. Richard Roe, for example, has explained that the inculcation of values of civility, "together with deference to the schools' determination of the form and content of those values," necessarily undercuts any concomitant ability to express divergent views.[284] In this way, communication is unilateral: transmitted from teacher to student, with little value attached to student expression, challenge, or resistance. Because student knowledge and development, however, is tied not simply to "recall of information" but rather to active intellectual inquiry and the expression of ideas, this top-down ideological

278. Redish & Finnerty, *supra* note 16, at 65–66.

279. Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. 421, 443 (1995) (quoting PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 6 (1977)); *see* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 141 (1995); *see also* Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 865 (1979) (arguing that the power to inculcate may well be the power to "indoctrinate, distort judgment, and perpetuate the current regime").

280. *See* van Geel, *supra* note 270, at 251 ("[T]o permit the government to inculcate beliefs is to deny the very basis of the first amendment itself."); *see also* Redish & Finnerty, *supra* note 16, at 87 (arguing that indoctrination of patriotic values "distorts the marketplace of ideas").

281. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (internal quotations omitted).

282. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988).

283. Plyler v. Doe, 457 U.S. 202, 221 (1982).

284. Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1269, 1284–85 (1991).

indoctrination has little practical impact.[285] Rather, schools opt in to inculcative models to more easily maintain their authority: the inculcative model provides school officials with the ability to impose their own, often arbitrary opinions, on the rest of the school community, which allows officials "to claim that they are promoting democratic values, such as civility, when actually they are engaging in antidemocratic behavior, such as suppressing speech."[286] Amy Gutmann argues that even if one values "inculcating character," blind respect for these values does not serve the goal of conscious social reproduction for democratic citizens.[287] Instead, students "must learn not just to *behave* in accordance with authority but to *think* critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens."[288]

In this way, this is a fundamentally restrictive model that emphasizes the state's power to suppress speech that falls outside of designated "civil" boundaries. Put differently, it messages to educational institutions that suppressing what it deems to be inappropriate or uncivil speech is a democratic action. In *Hazelwood*, the Court invoked *Brown* to hold that schools "must be able to set high standards for . . . student speech," otherwise schools would not be able to uphold education's citizenship functions.[289] It is perhaps unsurprising, then, that the Court's invocation of the values framework has at times been used to support arguably antidemocratic ends. In *Ambach v. Norwick*, for example, the Court rejected an Equal Protection challenge to a state statute that forbid non-United States citizens from becoming certified as public school teachers unless they demonstrated intent to become citizens.[290] Favorably referencing schools as "assimilative force[s]" that worked to bring society together "on a broad but common ground," the Court concluded that New York had a legitimate interest in advancing students' "perceptions and values" toward government, and that noncitizen teachers could weaken those aims.[291] The citizenship restriction on teachers in the *Ambach* era was one of many statutes that required citizenship for both public and private employment, and the dissenters in *Ambach* observed that these laws had nationalist and nativist origins.[292] As they wrote, democratic health would, in fact, be disserved by such a provision, which sought to "disregard[] . . . the diverse elements that are available, competent, and contributory to the richness of our society and of the education it could provide."[293] Indeed, *Ambach*

285. *Id.* at 1293–94 (discussing cognitive processes of information processing and intellectual frameworks).

286. *Id.* at 1309.

287. AMY GUTMANN, DEMOCRATIC EDUCATION 51 (1987).

288. *Id.*

289. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–72 (1988) (plurality opinion).

290. 441 U.S. 68, 69, 70–71 (1979).

291. *Id.* at 77, 79–81 (quoting JOHN DEWEY, DEMOCRACY AND EDUCATION 26 (1929 ed. 1916)).

292. *See, e.g.*, *id.* at 82 (Blackmun, J., dissenting) ("These New York statutes, for the most part, have their origin in the frantic and overreactive days of the First World War when attitudes of parochialism and fear of the foreigner were the order of the day.").

293. *Id.* at 88.

may stand for the proposition that indoctrination, not merely inculcation, is a "central purpose of schooling."[294]

The substance of decisions in the education–democracy canon has also at times been motivated by an antidemocratic rationale. For example, a powerful counternarrative of *Brown* has emerged that contends that its result can be attributed to a convergence of interests among white and Black Americans—and the desire of white elites to subvert communism.[295] Indeed, during the Cold War Era, international press used the fact of American racism as anti-American propaganda.[296] As Derrick Bell argues, *Brown* "is the definitive example that the interest of blacks in achieving racial justice is accommodated only when and for so long as policymakers find that the interest of blacks converges with the political and economic interests of whites."[297] On this account, "it behooved America's establishment to arrange a spectacular victory for African Americans as a way to improve our competitive position *vis-à-vis* the Soviet bloc"; a demonstration that America had "blacks' best interests at heart would go far to quell any incipient uprising" from Black citizens returning from the armed service.[298] In this way, if *Brown* represents a muscular defense of the civic values framework, it arguably was motivated not by democratic function but instead by interest convergence rooted in protecting the elite white class—an argument some raise to explain, for example, why affirmative action regimes have consistently been upheld by the Court.[299]

The "civic values" model also focuses on a limited version of democracy that centers inculcation of specific knowledge rather than skill. There is agreement that teaching to a shared set of democratic understandings, capabilities, or ideals is not by nature an antidemocratic project, because democratic culture demands that its constituents share a willingness to compromise their own self-interest to support democratic processes.[300] But an inculcative approach focuses on

294. Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 514 (1987).

295. *See generally* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (advancing the "interest convergence" theory, namely that *Brown*'s landmark desegregation mandate must be understood in context of the decision's political and economic advantages to white people in the Cold War Era). *See also* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (elaborating historically on Bell's interest convergence theory).

296. Brief for the United States as Amicus Curiae at 6–7, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 8).

297. Derrick A. Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y. L. SCH. L. REV. 1053, 1056 (2005).

298. Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1507 (2009).

299. Many argue that affirmative action most significantly benefits white women and, accordingly, that the benefits of diversity espoused by the Court flow primarily to white students. *See, e.g.*, Victoria M. Massie, *White Women Benefit Most from Affirmative Action—and Are Among Its Fiercest Opponents*, VOX (June 23, 2016, 12:00 PM), https://www.vox.com/2016/5/25/11682950/fisher-supreme-court-white-women-affirmative-action [https://perma.cc/RWH8-JYE8]; Sally Kohn, *Affirmative Action Has Helped White Women More Than Anyone*, TIME (June 17, 2013, 9:00 AM), https://time.com/4884132/affirmative-action-civil-rights-white-women/.

300. Feldman, *supra* note 179, at 1011–12.

democratic values rather than skills: it aims to pass on a state-sanctioned vision of cultural heritage and normative values rather than the skills necessary to engage with and challenge those values, such as critical and independent thinking. Or, as K. Sabeel Rahman explains, if "civic capacity" can be defined as the ability not only to understand but also to act in democratic ways—to mobilize, advocate, and push for change[301]—the "civic values" model is anemic at best. If democracy requires both informed and informative debate—which, given increasing technological access and availability of social media as an individual platform, it does—the Court's vision of how education can facilitate democracy omits to consider the development of these skills. That is to say: a constituency that devoutly worships the American flag or adheres to community values of civility is woefully unprepared to engage in the kind of civic debate about the country's future that proliferates today.

As described above, the "civic values" framework can suffer various flaws—advancing visions of values that are antidemocratic and subordinating in nature, deployed at times to facilitate antidemocratic and subordinating ends, and focused on a vision of inculcation rather than deliberative democracy.

Unsurprisingly, the "marketplace of ideas" framework is plagued by similar deficiencies. The Court's articulation of the marketplace of ideas framework is simple: representative democracy "only works if we protect the 'marketplace of ideas,'" as free exchange "facilitates an informed public opinion."[302] The nation's future leaders, too, must have "wide exposure to"[303] a multitude of ideas—not to a "pall of orthodoxy."[304] But these promises too have been limited to rhetoric, not results.

First, as discussed *supra*, while the Court in *Tinker* embraced the "marketplace of ideas" as a tool of democracy, and twenty years earlier in *Barnette* spoke forcefully against such limitations on speech, the Court in its half-century of jurisprudence post-*Tinker* dramatically curtailed student and teacher speech rights. It has invoked the "marketplace of ideas" framework only selectively in the K–12 public education context, and it has differentiated explicitly from the "marketplace of ideas" in higher education—where it has been deemed central to the enterprise[305]—and in K–12 schooling. The Court's endorsement of the "marketplace of ideas" in the education context is made more limited still because none of *Barnette*, *Tinker*, or *Mahanoy*, nor the other post-*Tinker* student speech cases, concerned *curricular*, or classroom speech. Rather, *Tinker* concerned student attire[306] and *Mahanoy* off-campus social media speech[307] while none of *Fraser*

301. K. Sabeel Rahman, *(Re)Constructing Democracy in Crisis*, 65 UCLA L. REV. 1552, 1558–59 (2018).

302. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021).

303. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

304. *Keyishian*, 385 U.S. at 603.

305. *See, e.g.*, *Keyishian*, 385 U.S. 589.

306. *Tinker*, 393 U.S. 503.

307. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2043 (2021).

(student election assembly),[308] *Hazelwood* (newspaper articles),[309] nor *Morse* (extracurricular event)[310] addressed the importance of the marketplace of ideas in a curricular context.

Instead, the closest the Court has come to endorsing the marketplace of ideas in this way is *Pico*, in which the Court observed that because school libraries were "a matter of free choice," and afforded students "an opportunity at self-education and individual enrichment that is wholly optional," a school board could not remove certain text on content grounds.[311] But in doing so, the Court doubled down on its position that if the books were part of curricular instruction, the school board may well enjoy "absolute discretion" to regulate their contents "by reliance upon their duty to inculcate community values."[312] Justice Harry Blackmun noted in concurrence that the distinction between libraries and curriculum was artificial.[313] It is unsurprising, then, that while some hailed *Pico* as a First Amendment victory, others viewed the case as a recommitment to the idea that student speech rights after *Tinker* could be severely limited in the interest of values inculcation.[314] The Court, then, has never held that the "marketplace of ideas" rationale applies with equal force in the classroom or in curricular content—arguably the site most critical to developing democratic function.[315] To the contrary, it has held that officials may enjoy "absolute" curricular discretion in service of inculcating values.[316] These limitations undermine the marketplace of ideas' purportedly primary function—developing students and, in turn, facilitating democracy.

In this way, the "marketplace of ideas" rationale also plainly contradicts the Court's endorsement of the state as a values inculcator.[317] The civic values framework aims to "preserve existing norms," while the marketplace of ideas

308. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677–78 (1986).

309. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

310. Morse v. Frederick, 551 U.S. 393, 408–09 (2007).

311. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico *ex rel.* Pico, 457 U.S. 853, 869 (1982) (plurality opinion).

312. *Id.*

313. *Id.* at 878 (Blackmun, J., concurring in part and concurring in the judgment) ("[I]f schools may be used to inculcate ideas, surely libraries may play a role in that process.").

314. *See generally* Richard J. Peltz, *Pieces of* Pico*: Saving Intellectual Freedom in the Public School Library*, 2005 B.Y.U. EDUC. & L.J. 103, 103 (arguing that although *Pico* has stood as the Court's "leading pronouncement upon and against censorship in public libraries," it suffers from many deficiencies, including that it was a fractured plurality decision, did not effectively distinguish between a library's curricular and extracurricular functions, and was at odds with decisions such as *Hazelwood*).

315. *See* Welner, *supra* note 250, at 997 (noting that after *Hazelwood*, it remains an open question whether the classroom has been created as a "designated public forum").

316. *See Pico*, 457 U.S. at 869 (plurality opinion).

317. *See, e.g.*, Welner, *supra* note 250, at 974–75 (arguing that the Court's education jurisprudence has taken three different "line[s]": one that "supports the role of American public schools as indoctrinating institutions," another that "supports the role of schools as marketplaces of ideas," and a third that emphasizes "deference to the democratic political process" (footnotes omitted)); *see also* Lorenz, *supra* note 252 (discussing the "two idealistic, but conflicting lines of thought" animating public schooling, namely shaping beliefs and building individual belief systems). Indeed, "from one point of view, the public schools embody in all their aspects the denial of first amendment rights." David A.

framework nods toward change and development.[318] The view of schools on one hand as a vehicle for teaching "shared values and norms" and on the other as the site of a free exchange of ideas, free from inculcation of belief and ideas, necessarily oppose one another.[319] Or, as Tyll van Geel explains, the First Amendment "implies that people are to be won over to a particular viewpoint with means that demonstrate respect for them as rational, freely choosing individuals," with belief "to be formed, if at all, through dialogue"; in an inculcative framework, however, values are conveyed "directly through explicit instruction, indirectly through forced participation . . . or even more obliquely through 'protection' of children from 'dangerous' materials and viewpoints."[320]

There are two primary characteristics of "democracy": "citizen participation in governance" and, in return, "accountability of government" to citizens.[321] Democracy requires both "institutionalized state capacity," or the ability of the state to act on citizens' demands, and "civic capacity," or the ability of a citizenry to mobilize, levy demands of, and interact with the state.[322] In particular, scholars have increasingly noted the importance of education to "deliberative" democracy[323] in which decisions are made via collective discussion.[324] Unlike aggregative theories of democracy, in which a question is put to individuals and a decision is reached by vote, with political debate merely "advertising" for each side, or elite deliberation, in which debate is reserved for those in power, deliberative democratic theory relies on social engagement as a form of authentic deliberation, encouraging informed and informative debate from a variety of diverse voices.[325] And given the rise of technology and social media, which amplify citizen voices, the need for deliberative preparedness is all the more acute—indeed, the rise of technology has in some ways already forced society into pseudo-

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Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 497 (1981).

318. *See* Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 267–68 (2012) (arguing that "[b]oth models place education for citizenship on schools' instructional agenda, but their prescriptions for how to deliver that education diverge sharply").

319. *See* Welner, *supra* note 250, at 965–66; *see also* Diamond, *supra* note 317, at 498 (arguing that First Amendment rights are in tension with public schooling because "one of public education's principal functions always has been to indoctrinate a generation of children with the values, traditions, and rituals of society").

320. van Geel, *supra* note 270, at 253.

321. Reuben, *supra* note 109, at 634–35.

322. Rahman, *supra* note 301; *see* Peter Bachrach, *Interest, Participation, and Democratic Theory*, *in* PARTICIPATION IN POLITICS: NOMOS XVI 39, 41 (J. Roland Pennock & John W. Chapman eds., 1975).

323. *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 123, 133–34, 142–43 (1993) (arguing for a constitutional commitment to "deliberative democracy"); James, *supra* note 225, at 720 ("Scholars today still consider education to provide the content for deliberative democracy."); BRUCE ACKERMAN & JAMES FISHKIN, DELIBERATION DAY 3–5 (2004).

324. Seyla Benhabib, *Deliberative Rationality and Models of Democratic Legitimacy*, 1 CONSTELLATIONS 26, 30–31 (1994).

325. James Fishkin, for example, has proposed the use of a system of deliberative polling, under which a random citizen sampling would meet for structured debate, with the results reported in mainstream media. *See* JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM 81–104 (1991).

deliberative regimes.[326] Under a deliberative framework, debate should be both informed and informative, and conclusions reached based on sound argument rather than personality or politicization.[327] And as Amy Gutmann argues, consistent with deliberative democracy, the "primary aim" of democratic education is to impart the "ability to deliberate" by teaching problem solving skills "that are compatible with a commitment to democratic values."[328] And indeed, inclusive and meaningful deliberative democracy is only truly possible when society realizes equality among participants by eliminating structures and practices of subordination.

In this way, deliberative democracy frameworks suggest that citizens ought to be able to not only understand but also, as necessary, question and hold accountable authority, criticize, challenge, and mobilize—and have equal resources, access, and ability to do so. But the Court's marketplace of ideas jurisprudence, which has existed with respect to student speech solely outside the classroom and has been only haphazardly endorsed yet stringently circumscribed, does not in practice serve this goal. Students can speak out against authority—so long as the disruption is minimal, they are not on campus, and authority does not find their expression uncivil. Students can read and engage with ideas the state has not endorsed—in the library alone. Students can engage in political speech—so long as it is not disruptive to the state's curricular aims. But where speech is lewd, vulgar, or against the state's prescribed set of values and norms—particularly in curricular content—the state may intervene.

The preceding Sections illustrate that the Court's commitment to education's democratizing functions has mostly been rhetorical alone. As the final Section in this Part argues, examining the Court's educational jurisprudence at a broad level reveals other value narratives that the Court has increasingly endorsed: namely, protection for religious liberty, deference to local control, and supremacy of parental choice.

E. PUBLIC GOOD TO PRIVATE CHOICE: EMERGENT VALUE FRAMEWORKS

This Section offers a different set of unifying theories of the Court's education jurisprudence. Put differently, while the Court has rhetorically held out public education as a democratizing or antisubordination tool, its jurisprudence in practice has subjugated these functions to other values.

First, the Court has increasingly centered notions of religious liberty in its education jurisprudence. This rationale, too, has early roots: in *Pierce*, for example, the Court explicitly invoked the notion of religious liberty to hold that students were not required to attend public schools, finding that the state could not "standardize its children by forcing them to accept instruction from public teachers

326. *See, e.g.*, Sacha M. Coupet, *Valuing All Identities Beyond the Schoolhouse Gate: The Case for Inclusivity as a Civic Virtue in K-12*, 27 MICH. J. GENDER & L. 1, 19–21, 25 (2020) (discussing the importance of deliberative democracy in modern America).

327. Ed Cox, *Our Call for Action on Deliberative Democracy*, ROYAL SOC'Y ARTS (July 3, 2018), https://www.thersa.org/blog/2018/07/our-call-for-action-on-deliberative-democracy [https://perma.cc/84GF-PRNM].

328. GUTMANN, *supra* note 287, at 11, 36.

only."[329] And while the Court has acknowledged the importance of education in preparing students for societal "obligations," it has subjected that interest to a balancing process that requires consideration of "religious training" of children.[330] Indeed, intrusions by a state into "family decisions in the area of religious training," by, for example, mandating public schooling past a certain age, "give rise to grave questions of religious freedom."[331] And while the Court has found unconstitutional regimes that mandate prayer in schools[332] and struck down statutes banning the teaching of evolution,[333] it has in the years since retreated from that protection to blur the lines significantly between church and classroom.

Indeed, protection for religious liberty in education cases has ramped up in particular in the past two decades, during which the Court has handed down a series of decisions permitting the intrusion of religion into educational spaces. Over this time, the Court has held, *inter alia*, that the Constitution requires public funding of religious schools;[334] state scholarship programs funded by tax credits must subsidize religious schools;[335] public universities may not withhold funding from newspapers with religious editorial viewpoints;[336] states may allocate federal funds to Catholic and otherwise religiously affiliated schools;[337] and public schools must allow Christian clubs to use school facilities.[338] And a narrative has emerged that where public institutions abstain from funding religious activity, that amounts to suppression of that activity.[339] Accordingly, the Court has begun to shift its interpretation of discriminatory purpose doctrine to hold that failure to include religious entities in public funding programs can evince a "purpose to discriminate" in violation of the First Amendment.[340]

In this way, the Court has increasingly centralized religious autonomy in its education jurisprudence, a movement capped off by recent cases such as *Trinity Lutheran* and *Espinoza*, a case which has been described as an "inevitable" "step in the Court's long-running project to reform the constitutional law of financial aid to religious institutions."[341] Unsurprisingly, conservatives have lauded this

329. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

330. *Id.* at 519, 534–35.

331. Wisconsin v. Yoder, 406 U.S. 205, 231 (1972).

332. *See* Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

333. Epperson v. Arkansas, 393 U.S. 97, 103 (1968).

334. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017).

335. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020).

336. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 846 (1995).

337. Mitchell v. Helms, 530 U.S. 793, 801 (2000) (plurality opinion).

338. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102 (2001).

339. *See, e.g.*, Adam Sonfield, *In Bad Faith: How Conservatives Are Weaponizing "Religious Liberty" to Allow Institutions to Discriminate*, GUTTMACHER INST.: GUTTMACHER POL'Y REV. (May 16, 2018), https://www.guttmacher.org/gpr/2018/05/bad-faith-how-conservatives-are-weaponizing-religious-liberty-allow-institutions [https://perma.cc/X9CR-4FRK].

340. Leslie Gielow Jacobs, *Protecting Women's Rights by Keeping Religious Liberty in Its Lane*, 59 DUQ. L. REV. 54, 72 (2021).

341. Thomas C. Berg & Douglas Laycock, Essay, Espinoza*, Government Funding, and Religious Choice*, 35 J.L. & RELIGION 361, 361 (2020).

approach, celebrating cases such as *Espinoza*, for example, for preserving the minimization of governmental actors over religious choice and facilitating goals of "equal treatment."[342] As First Circuit Judge Kermit Lipez explains, these cases demonstrate that "the hand of those advocating in the courtrooms and in the legislative halls for government aid for religious schools has been greatly strengthened."[343] And, as unsurprisingly, advocates of "school choice"[344] also have celebrated cases such as *Espinoza* and *Trinity Lutheran* as victories.[345] In this way, revived calls for public funding of religious schools often have deployed choice rhetoric in a move to join forces with those seeking to use choice to afford educational opportunities to low-income students and students of color.[346]

As with increasing deference to and protection for religious preference in the educational context, choice advocates have applauded the advent of another narrative: primacy of parental control. As early as *Meyer*, the Court held that liberty interests under the Fourteenth Amendment included the right to "acquire useful knowledge, to marry, establish a home, and bring up children" and to "control the education of their own."[347] And as the Court has written, "parental direction of . . . upbringing and education of their children in their early and formative years have a high place in our society."[348] Indeed, in *Prince v. Massachusetts*, the Court returned to this principle to stress that it is "cardinal" that "custody, care and nurture of the child reside first in the parents."[349] The Court has explained that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children," and the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[350] And it has emphasized that parental choice is often exercised "by sending their children to religious schools, a choice protected by the Constitution."[351] In the years since *Meyer*, *Pierce*, and *Prince*, these principles have been oft-repeated in the Court.[352]

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342. *See, e.g.*, Carl H. Esbeck, *After* Espinoza*, What's Left of the Establishment Clause?*, 21 FEDERALIST SOC'Y REV. 186, 203 (2020).

343. Kermit V. Lipez, *Reflections on the Church/State Puzzle*, 72 ME. L. REV. 325, 376 (2020).

344. "School choice" advocates support using free-market principles rather than typically assigned public schooling. "Choice" reforms typically take one of several forms, such as private school vouchers, the formation of charter schools, tax credits, and homeschooling.

345. *See, e.g.*, Clint Bolick, *The Dimming of Blaine's Legacy*, 2019–2020 CATO SUP. CT. REV. 287, 299, 307; Libby Sobic, Espinoza *Is a Boon for School Choice Nationwide*, NAT'L REV. (July 1, 2020, 1:17 PM), https://www.nationalreview.com/2020/07/espinoza-is-a-boon-for-school-choice-nationwide/.

346. Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 821–24, 829–31 (2011) (arguing this is ironic given that "choice" rhetoric initially emerged as part of resistance to racial desegregation).

347. Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923).

348. Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972).

349. 321 U.S. 158, 166 (1944).

350. *Yoder*, 406 U.S. at 232.

351. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020).

352. *See, e.g.*, Winkelman *ex rel*. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 529 (2007) ("It is not a novel proposition to say that parents have a recognized legal interest in the education and

And beyond its choice narratives, the Court also has demonstrated a commitment to education as a province of local control. As the Court has repeatedly observed, "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."[353] Accordingly, the Court has expressed its desire to "refrain from imposing on the States" constitutional restraints for educational choices, particularly with respect to funding and curricular decisions, given the "ever-changing conditions" in the education landscape.[354] And it has explicitly noted that "[j]udicial interposition in the operation of the public school system" requires "care and restraint," and that, given the commitment to local control, courts "do not and cannot intervene in . . . daily operation[s] of school systems."[355] As many have observed, the Court has viewed the "local control" principle as an independent value that needs to be considered alongside antidiscrimination, equity, and access efforts, with local control not simply a means of governance but a federalist end in itself.[356] In this way, the Court has consistently protected efforts to keep education local. As Derrick Bell explains, the Court has "elevated the concept of 'local autonomy' to a 'vital national tradition,'"—even as "local control" can result in the "maintenance of a status quo that will preserve superior educational opportunities and facilities for whites at the expense of blacks."[357]

This suggests that while the Court's language in its education jurisprudence could be read on one hand to support the education–democracy nexus narrative, it could be read on the other to suggest dedication to countervailing narratives that in recent years the Court has favorably centered. Taken alongside the Court's turn away from education–democracy rhetoric, the emergence of these narratives gestures further toward the hollowness of the Court's education–democracy language. But beyond merely calling into question the Court's endorsement of the education–democracy nexus, the Court's creeping erosion of the line between religion and education, increasing deference to parental choice, and unwillingness to engage in what it deems matters of local control, also suggest a more existential threat to public education. The Court's increasing support for parental and

upbringing of their child."); Kerry v. Din, 576 U.S. 86, 94–95 (2015) (plurality opinion) (discussing the Court's jurisprudence relating to parental rights).

353. Milliken v. Bradley, 418 U.S. 717, 741–42 (1974).

354. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 43 (1973); Freeman v. Pitts, 503 U.S. 467, 489 (1992).

355. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

356. *See, e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2101–02 (2002); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1513 (2004) (discussing interpretations of *Brown*'s interaction with local control principles that would have "left Northern communities with discretion in the ways they would implement *Brown*."); Bell, Jr., *supra* note 295, at 526–27 ("Local control, however, may result in the maintenance of a status quo that will preserve superior educational opportunities and facilities for whites at the expense of blacks."). For a discussion of how the Court has invoked values of "federalism" as "warm images with little content," see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 319 (1997).

357. Bell, Jr., *supra* note 295, at 526–27.

religious choice, for example, nods toward an endorsement of privatization and a turn away from public systems. And while those who support "choice" narratives laud choice as a way to equalize educational opportunity and preserve parental autonomy, others contend that these narratives have more troubling goals: to maintain racial or religious segregation or to blur completely the line between religion and state.[358]

The surge in these narratives is unsurprising given current events. Debates about choice, religious autonomy, and parental involvement in schooling have of late dominated educational discourse. The COVID-19 pandemic placed an unprecedented level of strain on educational institutions, many of which were already hobbled by bureaucratic rot, teacher shortages, and inadequate funding.[359] Indeed, during the pandemic, many decamped from public schools entirely to private institutions or homeschooling.[360] School board meetings have become sites of intense, at times violent, debate over issues such as mask mandates and curricular content, because parents have increasingly demanded access to and a say in decisions.[361] And these conflicts have played out against a backdrop of broader societal concerns, including economic recession, political and social polarization, and mistrust in government and democratic processes.[362]

Alongside increasing calls for choice and parental involvement have come calls to strengthen public education's democratizing functions, particularly for those who believe American democracy is in decline. Education, proponents argue, can rebuild American democracy by preparing students for self-government, teaching students to engage with others, and building critical thinking skills to help students sort news from propaganda.[363] As Part III explains, however, education law has not risen to the occasion: indeed, the proliferation of anti-identity legislation, the Court's education jurisprudence, and the creeping embrace of narratives of privatization, antidemocratization, colorblindness and entrenchment

358. *Compare, e.g.*, SCHOOL CHOICE MYTHS: SETTING THE RECORD STRAIGHT ON EDUCATION FREEDOM (Corey A. DeAngelis & Neal P. McCluskey eds., 2020) (addressing a variety of "myths" about school choice, including that it has segregationist and racist origins and siphons money from public schools), *with* Ravitch, *supra* note 84 (discussing the ways in which choice advocacy stemmed from pro-segregationist arguments).

359. *See* Murray & Millat, *supra* note 87, at 128–33.

360. *See id.* at 132 & n.115.

361. Paul LeBlanc, *School Boards Are Under Siege. It's Going to Get Worse*, CNN (Nov. 1, 2021, 7:06 AM), https://www.cnn.com/2021/11/01/politics/school-board-meetings-harassment/index.html [https://perma.cc/HQ64-MNUN].

362. *See* JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 48–50 (2020) (discussing "constitutional rot" as what arises in a period of political polarization, economic inequality, mistrust, and policy "disaster"). Importantly, Linda C. McClain and James E. Fleming also argue that this framework should include "the nation's failure to reckon with systemic racism as [another] cause of rot." McClain & Fleming, *supra* note 6, at 1775.

363. *See, e.g.*, *Civic Education Is Vital to Saving Our Democracy*, AM. FED'N TCHRS. (July 8, 2021), https://www.aft.org/news/civic-education-vital-saving-our-democracy [https://perma.cc/F7T5-JJ79]; George Packer, *Can Civics Save America?*, ATLANTIC (May 15, 2021), https://www.theatlantic.com/ideas/archive/2021/05/civics-education-1619-crt/618894/.

have worked together to effectively destabilize public education's purported functions.

III. CONSCRIPTING PUBLIC EDUCATION INTO SUBORDINATION

Many argue that American democracy is on the verge of collapse, an argument spurred in part by a period of "constitutional rot": a time of extreme polarization, economic inequality, and mistrust in the government.[364] Indeed, American faith in government has declined precipitously in the past half-century.[365] This low level of trust has produced an electorate willing to accept alternative theories about institutions and individuals perceived to be part of the establishment, because the willingness to accept "conspiracy theories" increases as trust in government declines.[366]

This also has intersected with deficient democratic understanding. Only two in five Americans can name the three branches of government, while 40% inaccurately believe that individuals illegally present in the United States do not have any constitutional rights.[367] And nearly one in ten respondents believe the Constitution allows Congress to outlaw atheism.[368] Only 55% of Americans can correctly identify which party controls the House of Representatives.[369] Merely 28% of Americans can name the Chief Justice of the Supreme Court,[370] while fewer than half can name even one Justice.[371] So too is there a paucity of historical and geographic knowledge. While 40% of Americans are entirely unaware of what Auschwitz was—at all[372]—25% inaccurately believe that Adolf Hitler came

364. *See* BALKIN, *supra* note 362. Jack Balkin's work aims to, as Laura Weinrib explains, "stir people to action by dispelling the notion that we have embarked on a path of inevitable and irreversible decline." Laura Weinrib, *Breaking the Cycle: Rot and Recrudescence in American Constitutional History*, 101 B.U. L. REV. 1857, 1877–78 (2021).

365. *Public Trust in Government: 1958-2022*, PEW RSCH. CTR., (June 6, 2022) https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2022/ [https://perma.cc/83XX-NG9U].

366. David Roberts, *Why Conspiracy Theories Flourish on the Right*, VOX (Sept. 13, 2016, 9:45 AM), https://www.vox.com/2015/12/10/9886222/conspiracy-theories-right-wing [https://perma.cc/C9TC-3W5K].

367. *Americans' Civics Knowledge Increases but Still Has a Long Way to Go*, UNIV. PA.: ANNENBERG PUB. POL'Y CTR. (Sept. 12, 2019), https://www.annenbergpublicpolicycenter.org/americans-civics-knowledge-increases-2019-survey/ [https://perma.cc/M9DW-F222].

368. Valerie Strauss, *Many Americans Know Nothing About Their Government. Here's a Bold Way Schools Can Fix That.*, WASH. POST (Sept. 27, 2016, 11:35 AM), https://www.washingtonpost.com/news/answer-sheet/wp/2016/09/27/many-americans-know-nothing-about-their-government-heres-a-bold-way-schools-can-fix-that/.

369. *Americans' Civics Knowledge Increases but Still Has a Long Way to Go*, *supra* note 367.

370. *Well Known: Twitter; Little Known: John Roberts*, PEW RSCH. CTR. (July 15, 2010), https://www.pewresearch.org/politics/2010/07/15/well-known-twitter-little-known-john-roberts/ [https://perma.cc/W8W9-8LFL].

371. ROBERT GREEN & ADAM ROSENBLATT, C-SPAN / PSB, SUPREME COURT SURVEY 9 (2017), https://www.c-span.org/scotussurvey2017/ [https://perma.cc/NGS5-MTMP].

372. Julie Zauzmer, *Holocaust Study: Two-Thirds of Millennials Don't Know What Auschwitz Is*, WASH. POST (Apr. 12, 2018, 12:22 PM), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/04/12/two-thirds-of-millennials-dont-know-what-auschwitz-is-according-to-study-of-fading-holocaust-knowledge/.

to power in a coup, rather than through election.[373] Only half of Americans are able to find the State of New York on a map; 75% could not point to Iran or Israel.[374] The decline in civics knowledge also has correlated with a rise in the rejection of scientific fact and intellectual expertise, or an "anti-science bias."[375] While two-thirds of Democrats polled in 2021 said they had "'a great deal' of confidence in the scientific community," only a third of Republicans said the same—the largest gap in nearly fifty years.[376] As some argue, this is due to "clear convergence of fear, lack of critical thinking, confirmation bias and political tribalism."[377] And this democratic deficiency has in large part spurred recent calls for public educational reform: as many argue, accurate historical, political, and social understanding is necessary to preserve democratic legitimacy.[378]

The country also faces a textual literacy crisis. Fewer than a third of American elementary and middle school students read at a proficient level.[379] Roughly a third of high school seniors met or exceeded reading benchmarks that would qualify them for college-level courses.[380] And the pandemic has only exacerbated this issue: between 2019 and 2022, the country experienced the largest drop in reading achievement in thirty years.[381] More than 30 million American adults cannot read or write above a third-grade level.[382] And in addition to these knowledge gaps, there also exists what has been described as a "critical thinking" deficit. "Critical thinking," in lexical terms, is "the objective analysis and evaluation

373. *What Americans Know About the Holocaust*, PEW RSCH. CTR. (Jan. 22, 2020), https://www.pewforum.org/2020/01/22/what-americans-know-about-the-holocaust/ [https://perma.cc/2FYF-FA4P].

374. Kevin Quealy, *If Americans Can Find North Korea on a Map, They're More Likely to Prefer Diplomacy*, N.Y. TIMES (July 5, 2017), https://www.nytimes.com/interactive/2017/05/14/upshot/if-americans-can-find-north-korea-on-a-map-theyre-more-likely-to-prefer-diplomacy.html.

375. *See, e.g.*, Adrian Bardon, *Coronavirus Responses Highlight How Humans Have Evolved to Dismiss Facts That Don't Fit Their Worldview*, SCI. AM. (June 26, 2020), https://www.scientificamerican.com/article/coronavirus-responses-highlight-how-humans-have-evolved-to-dismiss-facts-that-dont-fit-their-worldview/.

376. Seth Borenstein & Hannah Fingerhut, *Americans' Trust in Science Now Deeply Polarized, Poll Shows*, ASSOCIATED PRESS (Jan. 26, 2022) https://apnews.com/article/coronavirus-pandemic-science-health-covid-19-pandemic-4e99139d995581319dffab4107627a5e [https://perma.cc/875J-CZ8T].

377. *Id.*

378. *See, e.g.*, McClain & Fleming, *supra* note 6, at 1776–78 (describing the specific ways in which civic education is necessary to democratic health).

379. *See* Natalie Wexler, *Why American Students Haven't Gotten Better at Reading in 20 Years*, ATLANTIC (Apr. 13, 2018), https://www.theatlantic.com/education/archive/2018/04/-american-students-reading/557915/; *NAEP Report Card: 2022 NAEP Reading Assessment*, NATION'S REP. CARD, https://www.nationsreportcard.gov/highlights/reading/2022/ [https://perma.cc/93MB-8N5Y] (last visited Jan. 31, 2023).

380. *See NAEP Report Card: 2019 NAEP Reading Assessment*, NATION'S REP. CARD, https://www.nationsreportcard.gov/highlights/reading/2019/g12/ [https://perma.cc/T6XY-FSF8] (last visited Jan. 31, 2023).

381. NATION'S REP. CARD, *supra* note 379.

382. Editorial, *Crisis Point: The State of Literacy in America*, RESILIENT EDUCATOR, https://resilienteducator.com/news/illiteracy-in-america/ [https://perma.cc/KSD9-NABS] (last visited Jan. 31, 2023).

of an issue in order to form a judgment."[383] The proliferation of unreliable and biased news outlets available online means it is more important than ever for schools to facilitate critical thinking skills: indeed, as one Stanford study on "civic online reasoning" in youth recently concluded, fewer than 10% of students were able to identify deliberately biased, propagandist reporting.[384] Education reformers of all stripes have united in their belief that critical thinking is a required twenty-first century skill.[385]

And this climate has been exacerbated by a series of events that have shaken the foundation of American democracy, from political unrest attending the Trump Administration and its transition from power to the transmission of the COVID-19 pandemic and the polarization it ensued.[386] An overwhelming majority of Americans surveyed in 2022 said they believed American democracy was at risk of decline,[387] a conclusion supported by the think tank International IDEA, which in early 2022 labeled America for the first time as being at risk of "democratic breakdown."[388] And amid the economic, physical, and structural devastation left in COVID-19's wake, coupled with growing levels of mistrust and apathy, governmental dissatisfaction, social unrest, and political polarization, many have sounded the death knell for American democracy—and called for immediate action to rectify it.

Notably, and perhaps unsurprisingly, many argue that public education is—and must be—a critical site of societal repair. Accordingly, they have called on courts to expand access to, make more robust, and protect the public education franchise. But in a series of blockbuster cases that have arisen in the federal courts, a different commitment instead has emerged. As this Part explains, a recent spate of federal litigation has made clear the Court's pro-public education rhetoric is toothless; indeed, the Court (and lower courts interpreting anticanon jurisprudence) has instead endorsed a vision of public education which is increasingly conscripted into a subordination, antidemocratic, and privatization-forward agenda.

383. Alexander Nazaryan, *You're 100 Percent Wrong About Critical Thinking*, NEWSWEEK (Aug. 14, 2015, 5:58 AM), https://www.newsweek.com/youre-100-percent-wrong-about-critical-thinking-362334; *see also* Natalie Wexler, *How Schools Can Turn Kids Into Critical Thinkers—And Voters*, FORBES (Nov. 5, 2018, 9:37 AM), https://www.forbes.com/sites/nataliewexler/2018/11/05/how-schools-can-turn-kids-into-critical-thinkers-and-voters/#7a1ada8a486b (criticizing current approaches to building critical thinking skills in students).

384. REBELL, *supra* note 100, at 3–4.

385. *See* Nazaryan, *supra* note 383.

386. *See* Borenstein & Fingerhut, *supra* note 376.

387. Nick Corasantini, Michael C. Bender, Ruth Igielnik & Kristen Bayrakdarian, *Voters See Democracy in Peril, but Saving It Isn't a Priority*, N.Y. TIMES (Oct. 18, 2022), https://www.nytimes.com/2022/10/18/us/politics/midterm-election-voters-democracy-poll.html.

388. *See* INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *supra* note 2, at 8; Berger, *supra* note 2.

The 2021 Supreme Court Term was, by all accounts, transformative. The Court overturned *Roe v. Wade*[389]; held that states could not undertake reasonable gun-control measures;[390] and limited the ability of the EPA to regulate climate change,[391] among other consequential decisions. These included, in particular, two landmark education cases—*Carson ex rel. O.C. v. Makin*[392] and *Kennedy v. Bremerton School District*[393]—in which the Court endorsed a vision of public education that threatened to collapse the already crumbling divide between church and state.

In *Carson*, heard in fall 2021, parents challenged the constitutionality of a Maine policy that permits school districts with insufficient student numbers to merit their own local school to meet state requirements by either contracting with another school or paying the tuition at an "approved" private school.[394] Schools are approved only if they are "nonsectarian in accordance with the First Amendment."[395] Maine parents who wished to send their students to private schools that are religiously affiliated brought suit, challenging the policy as unconstitutional; Maine won in both courts below.[396]

Both Maine's brief-in-chief and amici supporting Maine significantly relied on the Court's education–democracy language.[397] As a group of education and constitutional law scholars argued, the Court's language from *Yoder*, *Plyler*, *Rodriguez*, *Ambach*, *Brown*, and *Grutter*, *inter alia*, makes clear that "public school systems are central to reinforcing the citizenship and norms that [are] at the heart of the Nation's democracy," goals which can only be accomplished if education is delivered on "religiously neutral, nondiscriminatory grounds."[398] The National Education Association and American Federation of Teachers argued that states have a legitimate interest in limiting voucher programs because outsourcing education to private vendors "diminish[es] public schools' role as a foundation of our democracy, institutions in which children from all backgrounds and races come together and form common bonds."[399] Maine itself argued that

389. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

390. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022).

391. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

392. 142 S. Ct. 1987 (2022).

393. 142 S. Ct. 2407 (2022).

394. 401 F. Supp. 3d 207, 208 (D. Me. 2019), *aff'd*, 979 F.3d 21 (1st Cir. 2020), *rev'd*, 142 S. Ct. 1987 (2022).

395. 401 F. Supp. 3d at 208.

396. 979 F.3d at 21–22.

397. *See, e.g.*, Brief of Respondent at 23–25, *Carson*, 142 S. Ct. 1987 (No. 20-1088); Brief of Amici Curiae Education and Constitutional Law Scholars in Support of Respondent at 6–10, *Carson*, 142 S. Ct. 1987 (No. 20-1088).

398. Brief of Amici Curiae Education and Constitutional Law Scholars in Support of Respondent, *supra* note 397.

399. Brief of National Education Association et al. as Amici Curiae in Support of Respondent at 16, *Carson*, 142 S. Ct. 1987 (No. 20-1088).

the Court's "'abiding respect for the vital role of education in a free society' both predates and postdates *Brown*."[400]

Petitioners' arguments, unsurprisingly, instead centered counternarratives of parental choice and religious autonomy. The Cato Institute, for example, argued that "[t]he Court has long applied the bedrock principle of religious equality to protect the religious liberty of public-school students against coercive state action," and that Maine's policy therefore "is discriminating against religion" by "demanding secularism."[401] Another amicus brief leveraged language of parental control, contending that "Maine's unequal treatment of Petitioners interferes with their liberty to control the social, emotional, and academic development of their children."[402] And petitioners claimed that the policy "forces parents to choose between their free exercise rights and the tuition benefit," violating "their constitutional right to choose a religious school for their child."[403] In petitioners' view, the Court "has repeatedly held that government may not put citizens to such a choice."[404]

In June 2022, the Court held 6–3 that Maine's restrictions violated the Free Exercise Clause.[405] Applying *Trinity Lutheran* and *Espinoza*'s "unremarkable" principles, the Court concluded that Maine's program was not sufficiently "neutral," because its program's exclusion of religious schools constituted "discrimination against religion."[406] As the Court held, Maine's requirement "operate[d] to identify and exclude otherwise eligible schools on the basis of their religious exercise."[407] Indeed, the decision, which would require Maine to extend public education funds to religious schools, signaled another commitment: that public, secular education is not a compelling interest.[408]

In dissent, Justice Breyer observed *Carson*'s antidemocratic impact: "public schools [must be] religiously neutral," he wrote, to effectively provide a "primarily civic education," citing approvingly to *Plyler*'s discussion of education as a "vital civic institution for the preservation of a democratic system of government."[409] As Justice Breyer wrote, this was precisely why the Court had previously required public school education to be free from religious

400. Brief of Respondent, *supra* note 397, at 23–24 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973)).

401. Brief of the Cato Institute as *Amicus Curiae* Supporting Petitioners at 8, 20, *Carson*, 142 S. Ct. 1987 (No. 20-1088).

402. Brief for Georgia Goal Scholarship Program, Inc. as *Amicus Curiae* in Support of Petitioners at 34, *Carson*, 142 S. Ct. 1987 (No. 20-1088).

403. Reply Brief for Petitioners at 10–11, *Carson*, 142 S. Ct. 1987 (No. 20-1088).

404. Brief for Petitioners at 31, *Carson*, 142 S. Ct. 1987 (No. 20-1088).

405. *Carson*, 142 S. Ct. at 2002.

406. *Id.* at 1997–98.

407. *Id.* at 2002.

408. Mark Joseph Stern, *The Supreme Court Just Forced Maine to Fund Religious Education. It Won't Stop There.*, SLATE (June 21, 2022, 2:04 PM), https://slate.com/news-and-politics/2022/06/carson-makin-supreme-court-maine-religious-education.html.

409. *Carson*, 142 S. Ct. at 2008–09 (Breyer, J., dissenting) (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)).

affiliation; indeed, he argued, a "religiously neutral education [is] required in public school[s]."[410]

Similarly, in *Kennedy v. Bremerton School District*, petitioner Joseph Kennedy, a Washington high school football coach and "practicing Christian," routinely led students and coaching staff in "locker-room prayer" before and after football games; Kennedy claimed that his beliefs "require[d] him to give thanks through prayer at the end of each game."[411] Over time, "the majority of the team" joined the prayers.[412] After the Bremerton School District asked Kennedy to cease prayer on the football field, claiming the prayer violated its policies of religious neutrality, and Kennedy repeatedly refused, the District placed Kennedy on administrative leave, and ultimately recommended he not be rehired.[413] Kennedy sued the District under a First Amendment and Title VII religious discrimination theory.[414] The Ninth Circuit ultimately upheld the district court's denial of Kennedy's request for injunctive relief, holding that Kennedy's display of prayer constituted speech "as a public employee, not as a private citizen, and his speech therefore was constitutionally unprotected," further recognizing, as the Court held twenty-five years earlier in *Lee v. Weisman*, that "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere."[415] Two years later, Kennedy's case was heard and again rejected by the Ninth Circuit on the merits.[416]

Kennedy was granted certiorari.[417] Kennedy's brief-in-chief, which appealed both his Free Exercise and Establishment Clause claims, relied on a familiar narrative, one that invoked the idea of a "diverse Nation founded on principles of religious liberty," a freedom "[t]he founders fought for . . . and protected . . . as a fundamental right."[418] As Kennedy argued, prohibiting him from public prayer would amount to censorship of "literally everything that coaches and teachers say," a burden he argued would "predictably weigh most heavily on religious speech."[419] In a fascinating turn, however, Kennedy also argued that students are "mature enough . . . to understand that a school does not endorse or support . . . speech that it merely permits on a nondiscriminatory basis," in a nod to *Tinker*,

410. *Id.* at 2010.

411. Kennedy v. Bremerton Sch. Dist. (*Kennedy I*), 869 F.3d 813, 816 (9th Cir. 2017).

412. *Id.*

413. *Id.* at 817–20. At least one parent complained that his son "'felt compelled to participate' in Kennedy's religious activity, even though he was an atheist, because 'he felt he wouldn't get to play as much if he didn't participate.'" Kennedy v. Bremerton Sch. Dist. (*Kennedy II*), 991 F.3d 1004, 1011 (9th Cir. 2021).

414. *Kennedy I,* 869 F.3d at 820–21.

415. *Id.* at 830–31 (quoting Lee v. Weisman *ex rel.* Weisman, 505 U.S. 577, 589 (1992)).

416. *Kennedy II*, 991 F.3d at 1023.

417. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 857 (2022) (mem.).

418. Brief for Petitioner at 23, Kennedy v. Bremerton Sch. Dist. (*Kennedy III*), 142 S. Ct. 2407 (2022) (No. 21-418).

419. *Id.* at 35. Of course, the recent spate of anti-CRT, "Don't Say Gay," and related legislation makes clear that religious speech is not alone as a censorship target. *See infra* Part II.

contending that such a proposition "is central to understanding their *own* constitutional rights at school."[420]

Amici leveraged both democracy-enhancing and religious liberty rhetoric. As to the former, amici on behalf of the District repeatedly referenced the pluralistic, democracy-enhancing goals of public education. Members of the U.S. House of Representatives, for example, arguing on behalf of the District, emphasized the Court's earlier conclusion that it is "implicit in the history and character of American public education," given public education's status as a "symbol of our democracy," that Americans be educated in "an atmosphere free of parochial, divisive, or separatist influences of any sort."[421] Similarly, the ACLU also noted public schools' status as "symbol[s] of our democracy," arguing that to preserve this democratic function, public schools must "promot[e] inclusivity over religious favoritism."[422]

Those supporting Kennedy also co-opted democracy-enhancing rhetoric. For example, in support of Kennedy, the Foundation for Individual Rights in Education (FIRE) argued that democracy could only be served by "robust free-speech protections"; as FIRE contended, ruling for the District would provide a "free[] hand to punish faculty for the exercise of their academic freedom and expressive rights."[423] Of course, several amici for the District, such as a collection of states including New York, California, Delaware, and Hawai'i, as well as a group of religious and denominational organizations in the Bremerton area, argued that permitting Kennedy's prayer itself undermined religious freedom.[424] Several amici also pointedly introduced familial and parental choice into the

420. Brief for Petitioner, *supra* note 418, at 39 (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring)). Notably, and perhaps ironically, while the Liberty Justice Center (LJC) in its amicus brief in *Kennedy III* decried the prevalence of "cancel culture," bemoaning its purported ability to "actively shut[] down the speech of government employees who pray or say things that upset the self-appointed speech police in our midst," it has brought several lawsuits, including one in Virginia, challenging anti-racism and equity programs in the state's public schools. Brief of the Liberty Justice Center as *Amicus Curiae* in Support of Petitioner at 2, *Kennedy III*, 142 S. Ct. 2407 (No. 21-418); *see* Menders v. Loudon Cnty. Sch. Bd., 580 F. Supp. 3d. 316 (E.D. Va. 2022), *appeal docketed*, No. 22-1168 (4th Cir. 2022). Indeed, the LJC has decried this type of program, arguing that it amounts to the "impos[ition] [of] controversial political views on students and punishing those who don't agree." Menders v. Loudoun County School Board, LIBERTY JUST. CTR., https://libertyjusticecenter.org/cases/menders-v-loudoun-county-school-board/ [https://perma.cc/R2ER-SDRB] (last visited Jan. 31, 2023).

421. Brief of Members of the U.S. House of Representatives as *Amici Curiae* Supporting Respondent at 14–15, *Kennedy III*, 142 S. Ct. 2407 (No. 21-418) (first quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 241 (1963) (Brennan, J., concurring); then quoting McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring); and then quoting *Schempp*, 374 U.S. at 242).

422. Brief of the American Civil Liberties Union and ACLU of Washington as *Amici Curiae* in Support of Respondent at 16, *Kennedy III*, 142 S. Ct. 2407 (No. 21-418) (quoting *McCollum*, 333 U.S. at 231).

423. Brief of *Amicus Curiae* Foundation for Individual Rights in Education in Support of Petitioner at 1, 3, *Kennedy III*, 142 S. Ct. 2407 (No. 21-418).

424. *See* Brief for States of New York et al. as Amici Curiae in Support of Respondent at 19–21, *Kennedy III*, 142 S. Ct. 2407 (No. 21-418); Brief for Amici Curiae Religious and Denominational Organizations and Bremerton-Area Clergy Supporting Respondent at 4–8, *Kennedy III*, 142 S. Ct. 2407 (No. 21-418).

conversation. As the conservative Family Policy Alliance and others argued, Kennedy's public prayer paled in comparison to the "proselytizing" of other school teachers, who often "advocate[d] and pressure[d] students" by "directly advocating [for] their belief systems within the classroom itself," with the use of tools such as "books, flags, t-shirts, lesson plans, and more."[425]

Less than a week after its decision in *Carson*, and with the same 6–3 split, the Court found that the Free Exercise Clause protected Kennedy's religious observance.[426] In doing so, the Court jettisoned nearly a century of school prayer jurisprudence, including the landmark *Lemon v. Kurtzman*,[427] which it deemed "long ago abandoned."[428] As the Court held, applying a new "historical" test in place of *Lemon*, the Constitution did not "mandate[] nor tolerate[] that kind of discrimination" that resulted when the school district required Kennedy to stop the fifty-yard prayer.[429] And as Justice Breyer had done in the *Carson* dissent,[430] Justice Sotomayor too referenced in her *Kennedy* dissent the antidemocratic and subordinating implications of the *Kennedy* ruling. As she wrote, "government neutrality toward religion is particularly important in the public school context given the role public schools play in our society," as a "symbol of our democracy and the most pervasive means for promoting our common destiny."[431]

Taking *Carson* and *Kennedy* together, the tea leaves are clear. Embracing religious schooling as a state-funded enterprise has significant subordinating and antidemocratic implications. It operates to reinforce silos of belief that isolate groups rather than promote tolerance, acceptance, and understanding. Derek Black argues that these measures "cross the Rubicon for our democracy," "lock[ing] in the underfunding of public education" and "roll[ing] back the democratic gains Congress sought during Reconstruction and then recommitted to during the civil rights movement."[432] Indeed, the school at issue in *Carson* is openly discriminatory; it teaches students to "refute the teachings of the Islamic religion," and refuses to employ LGBTQIA+ teachers and enroll LGBTQIA+ students.[433] Both *Carson* and *Kennedy* also signal a creeping trend toward privatization of public schooling. Indeed, in over thirty states, legislatures have proposed bills to "enact or expand voucher programs or charter schools"; "eight states have enacted one or more bills."[434] One former privatization lobbyist has explained that there is "virtually no other initiative in the education space that's a

425. Brief of *Amici Curiae* Family Policy Alliance and State Family Policy Councils in Support of Petitioner at 3, 5, *Kennedy III*, 142 S. Ct. 2407 (No. 21-418).

426. *Kennedy III*, 142 S. Ct. at 2411.

427. 411 U.S. 192 (1973).

428. *Kennedy III*, 142 S. Ct. at 2427.

429. *Id.* at 2428, 2433.

430. Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 2008–09 (2022) (Breyer, J., dissenting).

431. *Kennedy III*, 142 S. Ct. at 2442 (Sotomayor, J., dissenting).

432. BLACK, *supra* note 92, at 238.

433. Stern, *supra* note 408.

434. Valerie Strauss, *The Movement to Privatize Public Schools Marches on During Coronavirus Pandemic*, WASH. POST (May 20, 2021, 11:50 AM), https://www.washingtonpost.com/education/2021/05/20/school-privatization-movement-marches-on-during-pandemic/.

bigger priority for the right today than creating and expanding unaccountable, unrestricted, universal voucher programs," an effort assisted mightily by cases like *Espinoza*, *Trinity Lutheran*, and *Carson*.[435] As Joshua Dunn has explained, *Carson* "energizes the choice movement," making it increasingly more difficult for states to "limit the range of choice options."[436]

But *Carson* and *Kennedy* are not the only watershed education cases that threaten to erode the public education franchise. In another bombshell grant, the Court announced in January 2022 that it would hear on appeal two affirmative action cases brought by the organization Students for Fair Admissions (SFFA).[437] These cases, consolidated for argument before the Court, challenge Harvard University and the University of North Carolina's undergraduate admissions criteria; petitioners have asked the Court to overrule *Grutter* to hold that institutions of higher education cannot use race as a factor in admissions.[438] Students for Fair Admissions, an organization that has long sought to eradicate affirmative action and race-conscious practices in public education, alleges that UNC and Harvard each use race-conscious decisionmaking practices to the detriment of Asian-American and white applicants.[439]

Of course, in its briefs opposing certiorari, respondents referenced education–democracy and antisubordination language. Harvard argued, for example, that it is a "basic ideal of our Nation . . . to create a society that is free of racial discrimination and harmful stereotypes," and that America retains a "historic commitment to creating an integrated society," as well as a "deep belief that education plays a critical role in preparing individuals to be good citizens in a pluralistic democracy."[440] In its certiorari petition, however, SFFA mentioned democracy precisely once: to argue that "[d]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."[441] Indeed, as SFFA argues, *Grutter* itself is antidemocratic, in that it "abandoned the principle of racial neutrality that *Brown* and Title VI vindicated."[442] SFFA's antidifferentiation narrative is clear: Harvard has a "[c]onstant [f]ocus on

435. Valerie Strauss, *Former Lobbyist Details How Privatizers Are Trying to End Public Education*, WASH. POST (Apr. 16, 2021, 6:00 AM), https://www.washingtonpost.com/education/2021/04/16/former-lobbyist-details-how-privatizers-are-trying-to-end-public-education/.

436. Naaz Modan, *What Does* Carson v. Makin *Mean for Ed Leaders?*, K-12 DIVE (June 22, 2022), https://www.k12dive.com/news/what-does-carson-v-makin-mean-for-ed-leaders/625886/ [https://perma.cc/XXE8-L4CR].

437. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 142 S. Ct. 895 (2022) (mem.); Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896 (2022) (mem.).

438. Petition for Writ of Certiorari at 20, *Harvard Coll.*, 142 S. Ct. 895 (No. 20-1199).

439. *See Id.* at 3, 8; Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fourth Circuit at 5, *Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707).

440. Brief in Opposition at 32–33, *Harvard Coll.*, 142 S. Ct. 895 (No. 20-1199) (second quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring)).

441. Petition for Writ of Certiorari, *supra* note 438, at 2 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment)).

442. *Id.* at 3.

[r]ace."[443] Indeed, SFFA has argued explicitly that *Grutter* should be overruled in light of *Parents Involved*: *Grutter* "cannot be applied to K-12 students"; "creates no right to race-based admissions"; and "does not weaken the narrow-tailoring standard that applies to other racial classifications."[444] In this way, SFFA's brief highlights the Court's fraying endorsement of the education–democracy nexus and antisubordination efforts—if it ever existed at all.

While SFFA has yet to be decided as of this writing, the Court is almost certain to at least view Harvard and UNC's programs skeptically.[445] Three of the Court's six conservative justices—Chief Justice Roberts, Justice Alito, and Justice Thomas—have previously voted to strike down race-conscious admissions policies, and most agree that President Trump's three appointees will likely follow suit.[446] The consensus view is that the Court's grant of certiorari itself sounded the death knell for affirmative action—and that the only question is precisely how, and to what degree, *Grutter* will be gutted.

Two lower court cases related to the right to education also reveal the extent to which the Court's consistent erosion of public education has undercut its antisubordination and democratic impact. In *Gary B. v. Whitmer*, a group of student plaintiffs sued Michigan state officials on the grounds that they had been deprived of their constitutional right to literacy.[447] In a landmark ruling, the Sixth Circuit overturned the district court to conclude that a fundamental right to literacy existed under the U.S. Constitution, stepping through the door left open by *Rodriguez* to conclude that literacy is necessary to "essentially *any* political participation."[448] As the *Gary B.* court held, "[e]ffectively every interaction between a citizen and her government depends on literacy," including "[v]oting, taxes, the legal system, jury duty—all of these are predicated on the ability to read and comprehend written thoughts."[449] The court concluded that it was required to perform "our most basic public responsibilities" in the twenty-first century, noting that "the practices of the 1700s cannot be the benchmark for what a democratic society requires."[450]

The case was hailed as a landmark acknowledgment of a door potentially left open by *Rodriguez*.[451] But after the panel decision was handed down, the Sixth

443. *Id.* at 8.

444. *Id.* at 26.

445. *See* Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html.

446. *See, e.g.*, *id.*; Nina Totenberg & Eric Singerman, *The Supreme Court Adds Affirmative Action to Its Potential Hit List*, NPR (Jan. 24, 2022, 5:39 PM), https://www.npr.org/2022/01/24/1003049852/supreme-court-adds-affirmative-action-to-its-potential-hit-list [https://perma.cc/9BSJ-7HBR].

447. 957 F.3d 616, 620–21 (6th Cir. 2020).

448. *Id.* at 652.

449. *Id.* at 652–53.

450. *Id.* at 653 (first quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

451. Rocco E. Testani, *A Short-Lived Constitutional Right to Education*, EDUC. NEXT (May 21, 2020), https://www.educationnext.org/short-lived-constitutional-right-to-education-sixth-circuit-rehear-gary-b-whitmer/ [https://perma.cc/A5S9-4QNE].

Circuit took the virtually unprecedented step of *sua sponte* calling for en banc review.[452] Anticipating the ruling would be overturned, the plaintiffs and Michigan Governor Gretchen Whitmer reached a $94.4 million settlement to improve the state of Detroit's schools, mooting the case.[453]

And in *A.C. v. Raimondo*, filed contemporaneously to *Gary B.*, a group of Rhode Island students sued the state for allegedly failing to provide what they claimed was a constitutional right to an "adequate civics education."[454] As the students argued, twenty-first century civic participation requires not only knowledge of democratic institutions and governmental structures, but development of "media literacy" skills, or the ability to "critical[ly] think" about media consumption, promotion of values of "tolerance" and "respect for . . . the rule of law," and "civic integration."[455] These values were "of heightened importance today as many of our democratic institutions are being challenged and compromised, in large part because of wide-spread ignorance of their importance."[456] Plaintiffs argued for the recognition of the fundamental right to "a meaningful opportunity to obtain the degree of education that is necessary to prepare them to be capable voters and jurors, to exercise effectively their right of free speech, to participate effectively and intelligently in our open political system and to function productively as civic participants."[457]

In 2020, the court granted Rhode Island's motion to dismiss on the basis that the *Rodriguez* line of cases precluded recognition of a right to education.[458] But it did so reluctantly, taking a marked rhetorical shift from prior right-to-education cases. In an impassioned analysis, the court observed that "American democracy is in peril," noting the "erosion and collapse of [democratic] norms across the American landscape"; the "fascistic" undertones of the 2020 presidential election; the "polariz[ation]" and "echo-chambers" attending media consumption; and the transformation of "basic public health protocols" into "political litmus tests leading to more infection spread and death."[459] As the court wrote, the "survival of our democracy . . . will not happen just because we want it to; we will have to work for it."[460] As the court on one hand acknowledged an apocalyptic vision of democracy, it nonetheless, constrained by *Rodriguez* and its progeny, could not declare civics education a fundamental right.[461]

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452. Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020) (mem.).

453. Valerie Strauss, *Michigan Settles Historic Lawsuit After Court Rules Students Have a Constitutional Right to a 'Basic' Education, Including Literacy*, WASH. POST (May 14, 2020, 12:50 PM), https://www.washingtonpost.com/education/2020/05/14/michigan-settles-historic-lawsuit-after-court-rules-students-have-constitutional-right-basic-education-including-literacy/.

454. 494 F. Supp. 3d 170, 174 (D.R.I. 2020), *aff'd sub nom.* A.C. *ex rel.* Waithe v. McKee, 23 F.4th 37 (1st Cir. 2022).

455. Complaint at 5, 12, 33, A.C. v. Raimondo, 494 F. Supp. 3d 170 (D.R.I. 2020) (No. 18-645).

456. *Id.* at 4.

457. *Id.* at 39.

458. *Raimondo*, 494 F.Supp. 3d. at 186.

459. *Id.* at 175–78.

460. *Id.* at 178.

461. *Id.* at 186.

The students appealed.[462] Importantly, both the appellate brief-in-chief and amici in support attempted at the appellate level to give doctrinal life to education–democracy rhetoric. The students, for their part, argued that the Court's jurisprudence paved a clear legal pathway for recognition of the right, invoking a variety of nexus language, including civic values (*Plyler*'s proclamation that "[w]e cannot ignore the significant social costs borne by our Nation when [students] *are denied the means to absorb the values and skills upon which our social order rests*"); preparation for civic responsibility (*Yoder*'s language that the Court accepted as true the proposition that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system"); the marketplace of ideas (*Rodriguez*'s language that "[t]he 'marketplace of ideas' is an empty forum for those lacking basic communicative tools"); and even pluralism rationales (*Pico*'s discussion of education's role in "prepar[ing] students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members").[463]

Amici followed suit. Martha Minow, for example, argued that *Brown*'s language about the unique importance of education should be viewed as the "cornerstone" of the Court's education jurisprudence, particularly given "recent events at the U.S. Capitol" that threatened erosion of "basic constitutional mandates and democratic norms."[464] Indeed, she argued that the Court itself had "acknowledged its precedent had long 'express[ed] an abiding respect for the vital role of education in a free society.'"[465] The National League of Women Voters too relied on *Rodriguez*'s language pertaining to education's role in "instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes," and language from *Yoder* that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[466] And the NAACP's brief deployed language from *Plyler* that education was critical in preparing students to participate "effectively and intelligently in our open political system," as well as *Brown*'s conclusions that education was an equalizing force for democratic participation.[467]

462. A.C. *ex rel.* Waithe v. McKee, 23 F.4th 37 (1st Cir. 2022).

463. Brief of Plaintiffs/Appellants A.C. *et al.* at 6, 13–14, 19, 24, *McKee*, 23 F.4th 37 (No. 20-2082) (first quoting Plyler v. Doe, 457 U.S. 202, 221 (1982) (alteration in original); then quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); then quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (alternation in original); and then quoting Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 868 (1982) (plurality opinion)).

464. *Amicus Curiae* Brief of Martha Minow, 300th Anniversary University Professor at Harvard University, in Support of Plaintiffs-Appellants Supporting Reversal at 2, 5, *McKee*, 23 F.4th 37 (No. 20-2082).

465. *Id.* at 12 (quoting *Rodriguez*, 411 U.S. at 30).

466. Brief of Amicus Curiae National League of Women Voters et al. in Support of Appellants and Reversal at 6, 18, *McKee*, 23 F.4th 37 (No. 20-2082) (first quoting *Rodriguez*, 411 U.S. at 113; and then quoting *Yoder*, 406 U.S. at 221).

467. Brief of Amici Curiae Advancement Project and NAACP in Support of Plaintiffs-Appellants at 5–6, *McKee*, 23 F.4th 37 (No. 20-2082) (quoting *Plyler*, 457 U.S. at 221).

All were in vain. Though the First Circuit noted favorably that the students had "called attention to critical issues of declining civic engagement and inadequate preparation for participation in civic life at a time when many are concerned about the future of American democracy," it nonetheless, like the district court, interpreted *Rodriguez* to foreclose the argument that an education that prepares students for meaningful civic engagement is constitutionally required.[468] Indeed, as the court found, though the Supreme Court had recognized education as a "vital civic institution for preservation of American democracy," it had explicitly rejected arguments that a nexus between education and democracy created a fundamental educational right.[469] The appellate opinion, in this way, captured inherent tensions in the Court's education jurisprudence, juxtaposing the Court's rhetorical endorsements of education's democratizing functions against anticanon holdings diluting educational protections. That is, hamstrung by *Rodriguez* and its progeny, the court could not transform rhetoric into results. Indeed, the students did not seek certiorari; they instead reached a settlement with the state in June 2022.[470]

Still other education litigation with significant antidemocratic and subordinating potential is likely coming down the pike, as advocates have begun to challenge various of the "anti-identity" wave in federal court. In fall 2021, the ACLU sued Oklahoma over a law prohibiting public universities from offering "any orientation or requirement" that presents "any form of race or sex stereotyping" or "bias on the basis of race or sex," and barring public elementary and secondary school teachers from discussing a host of concepts including that "an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously," and that "any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex."[471] Similarly, in December 2021, New Hampshire teachers and parents levied a federal challenge to the state's "Divisive Concepts Statute," which prohibits teaching that an individual, by virtue of his or her race, gender identity, or national origin, "is inherently racist, sexist, or oppressive, whether consciously or unconsciously."[472]

Importantly, advocates on the other side also have mobilized. In January 2021, after President Biden reversed Trump-Era executive orders on racial education in the federal government, conservative activist Christopher Rufo announced a "new coalition of law firms and legal foundations with the explicit goal of fighting critical race theory in the courts," aiming to "take one of these cases to the United States Supreme Court and establish that critical race theory-based

468. *McKee*, 23 F.4th at 48.

469. *Id.* at 42.

470. *Parties Settle Cook Case, Ending Federal Litigation*, CTR. EDUC. EQUITY, TCHRS. COLL. COLUM. UNIV., http://www.cookvmckee.info/ [https://perma.cc/E4GA-2C9Z] (last visited Jan. 31, 2023).

471. Amended Complaint at 1, 24–25, Black Emergency Response Team v. O'Connor, No. 21-cv-1022 (W.D. Okla. Nov. 9, 2021).

472. Complaint at 13, Local 8027, AFT N.H. v. Edelblut, No. 21-cv-01063 (D.N.H. Dec. 13, 2021).

programs" are unconstitutional.[473] These cases have proliferated in state courts and are beginning to be filed in federal fora. And in these cases, advocates have centered another set of values, namely an emphasis on private choice, relying not on education–democracy language but instead—and significantly—on anticanon cases.

In August 2021, for example, public school employees in Missouri challenged policies that allegedly required personnel to attend and participate in equity and antiracism training.[474] Unsurprisingly, the complaint relies explicitly on *Parents Involved* and an endorsement of "colorblindness."[475] Similarly, the same organization involved in the Missouri suit has brought suit in Illinois, challenging district antiracism training as unconstitutional, again leveraging *Parents Involved*'s proclamation that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[476] Another challenge brought by the Center for Renewing America equates antiracist teaching to Marxism.[477] Yet another, out of Minnesota, contends that a school violated the First Amendment and Title VI by permitting BLM posters to be posted on school property while not allowing All Lives Matter or Blue Lives Matter memorabilia to be shown.[478] These cases have been filed in state courts, as well—in Virginia, for example, a group of students challenged a local school board's "Anti-Racism Policy," which allegedly embraces the idea that "racism mainly exists in some institutions and some people groups, instructing students that 'racism' is 'the marginalization and/or oppression of people of color based on a socially constructed racial hierarchy that privileges *white people*.'"[479] Like the companion cases, plaintiffs contend that *Parents Involved*'s support for "colorblindness" mandates against antiracist teaching.[480]

Cases brought against antiracist regimes already have seen some measure of recent success in federal courts. As one example, in 2021, a Nevada student alleged that his school's "Sociology of Change" course, which allegedly required

473. Christopher F. Rufo (@realchrisrufo), TWITTER (Jan. 20, 2021, 6:22 PM), https://twitter.com/realchrisrufo/status/1352033792458776578 [https://perma.cc/J3RZ-R86J].

474. *See* Complaint for Declaratory and Injunctive Relief at 2, Henderson v. Sch. Dist. of Springfield R-12, No. 21-cv-03219 (W.D. Mo. Aug. 18, 2021).

475. *Id*. at 3–4.

476. Complaint for Declaratory and Injunctive Relief at 6, Deemar v. Bd. of Educ. of Evanston/Skokie, No. 21-cv-03466 (N.D. Ill. June 29, 2021) (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion)).

477. *See* Complaint at 2, Ctr. for Renewing Am. v. U.S. Dep't of Educ., No. 21-cv-2987 (D.D.C. Nov. 11, 2021).

478. *See* Complaint for Declaratory and Injunctive Relief at 15, Cajune v. Indep. Sch. Dist. 194, No. 21-cv-01812 (D. Minn. Aug. 6, 2021).

479. Complaint for Declaratory, Injunctive, and Additional Relief at 3, 5, C. v. Albemarle Cnty. Sch. Bd., No. CL21001737-00 (Va. Cir. Ct. Dec. 22, 2021) (citation omitted)*; see also* Justin Wm. Moyer & Nicole Asbury, *Va. Lawsuit Denounces Anti-Racism Curriculum as 'Pathological' Critical Race Theory*, WASH. POST (Jan. 14, 2022, 12:41 PM), https://www.washingtonpost.com/dc-md-va/2022/01/14/virginia-critical-race-theory-lawsuit/.

480. Complaint for Declaratory, Injunctive, and Additional Relief, *supra* note 479, at 40 & n.4 (citing *Parents Involved*, 551 U.S. at 772 (Thomas, J., concurring)).

students to "'label and identify' their gender, racial, and religious identities" and determine which marker, if any, had "oppression attached to it," violated the First Amendment's prohibition on compelled speech.[481] After the district court indicated at a preliminary hearing the speech "likely [would be] compelled," the school let the student opt out of the course.[482] Conservative critics lauded the student's resistance, decried the curriculum as plainly unconstitutional, and argued that the court's statements marked a positive development for anti-CRT advocacy.[483] Some judges also already have expressed disdain for curricula that emphasizes institutional and structural racism[484]; indeed, some in the academy also argue that cases challenging antiracist training have a "good chance" of success in the courts.[485] Some also contend that a teacher who is disciplined for teaching a forbidden subject in the classroom likely will not be able to raise a successful First Amendment challenge to a CRT ban.[486] Others are even more fearful, arguing that given the current conservative makeup of the Court, equal protection arguments that anti-CRT laws are racially discriminatory carry a low chance of success.[487]

Notably, these cases draw on counternarratives the Court has endorsed with increasing frequency: the supremacy of parental choice, as well as an embrace of "colorblind" approaches to racial justice. Indeed, the Heritage Foundation has emphasized the importance of parents being able to opt out of "CRT" education,[488] and conservative organization Moms for Liberty has explained that its objection to "CRT" instruction is rooted in its endorsement of the "natural right to direct the education, upbringing, and care of our children," rather than the

481. First Amended Complaint for Declaratory and Injunctive Relief at 9, 11, Clark v. Democracy Prep Pub. Schs., Inc., No. 20-cv-02324 (D. Nev. May 3, 2021).

482. Joshua Dunn, *Critical Race Theory Collides with the Law*, EDUC. NEXT (May 19, 2021), https://www.educationnext.org/critical-race-theory-collides-with-law/ [https://perma.cc/V7B3-FF57].

483. *See, e.g.*, Nicholas A. Christakis (@NAChristakis), TWITTER (Feb. 27, 2021, 1:10 PM), https://twitter.com/NAChristakis/status/1365726007160950792 [https://perma.cc/ZD98-F88E]; Colin Wright (@SwipeWright), TWITTER (Feb. 26, 2021, 12:00 PM), https://twitter.com/SwipeWright/status/1365345993873481728 [https://perma.cc/L7BR-LATS].

484. *See, e.g.*, Oliver v. Arnold, 19 F.4th 843, 843 (5th Cir. 2021) (Ho, J., concurring in denial of rehearing en banc) (noting with disfavor that "[s]ome teachers require students to view themselves and others differently because of their race—notwithstanding our Nation's commitment to racial equality and color-blindness," and in doing so citing Christopher Rufo and Joshua Dunn, *supra* note 482).

485. Christopher F. Rufo, John Yoo & Coleman Hughes, *The Parent-Led Challenge to Critical Race Theory*, MANHATTAN INST. (Feb. 18, 2021), https://www.manhattan-institute.org/parent-led-challenge-critical-race-theory [https://perma.cc/2DLY-3ZPU].

486. Frank LoMonte, Opinion, *Lawsuits on Banning Critical Race Theory Are Coming. Here's What Won't Work, and What Could.*, DES MOINES REG. (July 25, 2021, 6:00 AM), https://www.desmoinesregister.com/story/opinion/columnists/2021/07/25/critical-race-theory-bans-face-lawsuits/8061287002/.

487. Tiana Headley, *Laws Aimed at Critical Race Theory May Face Legal Challenges (1)*, BLOOMBERG L. (July 7, 2021, 10:24 AM), https://news.bloomberglaw.com/us-law-week/laws-curbing-critical-race-theory-may-face-legal-challenges.

488. *See* Angela Sailor & Adam Kissel, *Most Parents and Teachers Are Done with Critical Race Theory*, HERITAGE FOUND. (July 7, 2021), https://www.heritage.org/education/commentary/most-parents-and-teachers-are-done-critical-race-theory [https://perma.cc/HT2A-SWK2].

"powerful interests" of teachers' unions, school boards, and "big business[]."[489] Others have followed suit, helping to construct a zero-sum game, with parental choice on one side and "indoctrinat[ing]" education on the other.[490]

As this Part shows, though the Court has routinely deployed language lauding public education, it has rarely acted substantively in accordance with those principles. Instead, the Court has most robustly intervened in its education jurisprudence to safeguard religious autonomy, honor parental choice, and stifle student speech. Taken together, these cases suggest that the Court has rejected opportunities to double down on its education–democracy and antisubordination rhetoric and will continue to do so in the future, as intellectual freedom challenges and right-to-education cases come down the pike. That is, as litigants petition the Court to take seriously its rhetorical dedication to public education and its ability to prepare students for civic participation, inculcate civic values, foster pluralism and tolerance, and teach students how to participate in a marketplace of ideas, these calls will be drowned out by siren songs of religious liberty, "antidiscrimination" principles of racial neutrality, parental choice, and deference.

IV. POWER SOLUTIONS FOR POWER PROBLEMS: MOVEMENT LAWYERING IN EDUCATION

Education law scholars interested in safeguarding the public education franchise and amplifying its antisubordination and democratizing functions have offered a variety of what might be called traditionally "legal" solutions. These proposals generally take one of several forms.

First, many have offered creative approaches to a renewed push for a federal right to education aimed at leveraging analytical frameworks theoretically endorsed by both sides of the aisle. Derek Black, for example, offers an originalist theory that the right to education has a historical basis in the Constitution.[491] Barry Friedman and Sara Solow argue that under an application of "tools of traditional constitutional interpretation," such a right exists, though its contours may be imprecise.[492] Susan Bitensky contends that the right is rooted implicitly in several constitutional provisions, including the Privileges and Immunities Clause, the First Amendment, and the Due Process Clause, and in the implied right to vote.[493] California Supreme Court Justice Goodwin Liu has argued that the right

489. Tiffany Justice & Tina Descovich, Opinion, *What 'School Board Moms' Really Want – And Why Candidates Ignore Us at Their Peril*, WASH. POST (Nov. 8, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/11/08/moms-for-liberty-education-elections/.

490. *See, e.g.*, Houchens & Garen, *supra* note 85.

491. *See* Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1063 (2019).

492. *See* Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 96, 156 (2013).

493. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553 (1992).

to education can be derived from the Citizenship and Enforcement Clauses.[494] And Alexis M. Piazza has argued that *Obergefell v. Hodges*[495] can be applied to find a more flexible approach to defining fundamental rights, including the right to education.[496] All of these (doctrinally sound) theories have leveraged the Court's education–democracy language in support of these conclusions—yet few have found traction in federal courts. Indeed, *Gary B.*'s en banc grant and *A.C.*'s loss on appeal and failure to seek certiorari—taken together with the Roberts Court's increasing skepticism of substantive due process claims—likely all but sound the death knell for those seeking to enforce a federal right to education in any form.

Others have argued that federal legislative involvement in education—which would not necessarily require recognition of a fundamental right—is perhaps a proper avenue. Some, for example, have argued for a theory of "cooperative federalism," which would require cooperation between the Legislative Branch (Congress), the Executive Branch (the Department of Education), and the Judicial Branch to create a web of enforcement actions, funding conditions, and constitutional claims that would work in tandem.[497] Others have argued that public schools should be federally funded, at least in greater proportion to state funding, and supervised more significantly by the Federal Department of Education.[498] But this set of solutions too faces myriad problems. As a first cut, even a Democratic-controlled Congress has been unwilling to pass similar infrastructure measures, from Build Back Better's hope at universal pre-K education to paid maternity leave;[499] there is no indication that legislation for increased education funding would have congressional traction. Second, additional federal involvement is no panacea; debates about the proper use of such funding, the limits of the public fiscal and budget constraints, and organizational limitations have already and could severely limit the ability of any such involvement to be effective.

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494. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334–35 (2006).

495. 576 U.S. 644 (2015).

496. Alexis M. Piazza, *The Right to Education After* Obergefell, 43 HARBINGER 62, 75 (2019).

497. *See, e.g.*, Kristi L. Bowman, *The Failure of Education Federalism*, 51 U. MICH. J.L. REFORM 1, 40–46 (2017).

498. *See, e.g.*, Conor P. Williams & Shantel Meek, Opinion, *U.S. Public Schools Should Be Federally Funded*, HECHINGER REP. (Nov. 6, 2020), https://hechingerreport.org/opinion-u-s-public-schools-should-be-federally-funded/ [https://perma.cc/86N3-QTRP]; SYLVIA ALLEGRETTO, EMMA GARCÍA & ELAINE WEISS, ECON. POL'Y INST. PUBLIC EDUCATION FUNDING IN THE U.S. NEEDS AN OVERHAUL (July 12, 2022), https://www.epi.org/publication/public-education-funding-in-the-us-needs-an-overhaul/ [https://perma.cc/65UW-RV6D].

499. *See* H.R. 5376, 117th Cong. § 23002 (as introduced in the House of Representatives, Sept. 27, 2021). The compromise Inflation Reduction Act did not include the relevant Build Back Better proposal, some $390 billion proposed for childcare and preschool and $190 billion for a child tax credit. *See* Linda Jacobson, *'Like a Gut Punch': Advocates Reel as Manchin Compromise Abandons Pre-K*, 74 (Aug. 16, 2022), https://www.the74million.org/article/like-a-gut-punch-advocates-reel-as-manchin-compromise-abandons-pre-k/ [https://perma.cc/A3WL-MN62]. And the United States is one of only six countries in the world without national paid leave. Claire Cain Miller, *The World 'Has Found a Way to Do This': The U.S. Lags on Paid Leave*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html.

Still others have proposed either a partnership between federal and state law, or an explicit turn to state constitutions, in protecting public education and its democratizing and antisubordinating functions. Kimberly Jenkins Robinson, for example, has proposed "restructuring the partnership between the federal government and states" in a form of "disrupting" education federalism,[500] while Derek Black has proposed applying federal equal protection law to enforce state education rights.[501] Indeed, as Black argues, following *Rodriguez*, "state constitutions and supreme courts have recognized education as a constitutional and/or fundamental right with substantive dimensions," and have expanded their statutory and curricular protections to speak to educational quality.[502] Others have cautioned that state constitutions provide the only meaningful reform opportunities given federal resistance to education action.[503] But these approaches, too, are not without significant limitation. To the extent state constitutional reform or enforcement of state right-to-education, funding, and other public education litigation has not been rendered "meaningless" by justiciability concerns and legislative deference,[504] even the most successful suits take years to litigate, are won only rarely, and payouts and enforcement are often protracted and thorny.[505] Moreover, the spate of anti-identity legislation has revealed a sharp divide in state legislatures' approach to education; in the states in which education reform is perhaps the most needed, legislative efforts likely will be met with the most resistance.

That none of these well-reasoned approaches to educational reform has gained traction or proven effective at defending the public education project's utility as a tool of antisubordination is no coincidence. Rather, as several civil rights scholars have explained: "[t]he series of crises that we are currently living in has exposed this nation's commitment to white supremacy and racial capitalism. What seem like contradictions or double standards are simply demonstrations that law and law enforcement literally change depending on circumstance to ultimately serve and uphold systems of oppression."[506]

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500. Kimberly Jenkins Robinson, *Designing the Legal Architecture to Protect Education as a Civil Right*, 96 IND. L.J. 51, 55 n.14 (2020); *see also* Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 1002–15 (2015).

501. Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1391 (2010).

502. *Id.* at 1349.

503. *See, e.g.*, Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 1017 (2014). For additional commentary on how scholars have divided over right-to-education jurisprudence, see Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 917–20 (2016).

504. Weishart, *supra* note 503, at 920.

505. Rachel M. Cohen, *School Funding Lawsuits Are Long, Frustrating, and Crucial for Fighting Inequality*, VOX (July 11, 2022, 7:00 AM), https://www.vox.com/23178172/public-school-funding-inequality-lawsuit-pennsylvania [https://perma.cc/QV4A-V6B6]; *see also* Kimberly Jenkins Robinson, *Introduction: The Essential Questions Regarding a Federal Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 1, 12 (Kimberly Jenkins Robinson ed., 2019) (finding plaintiffs prevailed in school-funding lawsuits in twenty-three states and lost in twenty states).

506. Tifanei Ressl-Moyer, Pilar Gonzalez Morales & Jacqueline Aranda Osorno, *Movement Lawyering During a Crisis: How the Legal System Exploits the Labor of Activists and Undermines Movements*, 24 CUNY L. REV. 91, 94 (2021) (footnote omitted).

As Nikolas Bowie and Daphna Renan have argued, our system of judicial supremacy has often produced profoundly antidemocratic outcomes—and the twenty-first century Court has particularly chosen to exercise its supremacy power to "insulate the wealthy and powerful."[507] In this way, they argue, judicial supremacy "limits . . . our constitutional imagination" in a way that has "impoverished what we think is possible *through* democratic politics—and through organizing for political change at the national level."[508] Bowie and Renan argue that our failure to demand more from our elected representatives—and seek change through judicial review and supremacy—will continue the "eviscerat[ion]" of constitutional commitments and the continuation of antidemocratic principles.[509] As they cogently articulate: "[t]he promise of a genuinely multiracial democracy will fade if Americans are unwilling to embrace structural reforms that can make our policies and our politics more responsive to majority rule."[510]

This argument squarely applies to education law, where reformers have—with good intentions—long sited change efforts in judicial reform, particularly by and through the federal courts. As demonstrated above, however, these efforts have not only been largely unsuccessful in achieving meaningful "reform," but they also have facilitated an antidemocratic agenda of subordination—and have threatened to undermine the entire public education franchise. That is, as demonstrated by the earlier Parts, the systems of law purportedly meant to empower public education as a tool of antisubordination and democracy have not only actively suppressed its ability to do so but, critically, have also enabled the institution to be co-opted as an agent of subordination. Or, put more simply, legal reform of public education for those who believe in its antisubordinating and democratic ability is not possible where legal actors operate under a system of values aimed at deploying not only *law* but *education* to entrench social hierarchy. In this way, righting the ship to maximize public education's equalizing functions and protect the franchise may require looking outside of conventional legal theory and to more progressive models of advocacy.

One such model is that of "movement lawyering," drawing on the argument that court-centered reform and judicial activism often may be a "hollow hope" if they are unaccompanied by authentic social change through legislative reforms.[511] The theory of movement lawyering is based in significant part on the seminal

507. Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/.

508. *Id.*

509. *Id.*

510. *Id.*

511. Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1655–56, 1658–60 (2017). For a thorough recitation of critical works that center social movements in legal reform, see *id.* at 1647 n.8 and see also Alexi Freeman & Lindsey Webb, *Yes, You Can Learn Movement Lawyering in Law School: Highlights from the Movement Lawyering Lab at Denver Law*, 5 HOW. HUM. & C.R. L. REV. 55, 59 n.11 (2020).

work of Gerald P. López, who discussed the "rebellious idea of lawyering against subordination," practicing law in a way "compatible with a collective fight for social change."[512] Movement lawyering, then, seeks to empower marginalized groups to participate in social and cultural change, transforming this participation into a strategy of structural reform that deploys multiple legal strategies to advance various political and cultural goals.[513] Indeed, movement lawyering leans away from "law on the books" and into embedding change in social practice through grassroots advocacy, power restructuring, and cultural shifts.[514] Lawyers practicing forms of movement lawyering, then, do not strictly "formulat[e] legal arguments" or perform written advocacy; instead, they also "advise social movements, engage in policy advocacy, and provide community education."[515]

Jack Balkin and Reva Siegel have articulated that one goal of movement-style lawyering is to "take advantage of broad-based social, economic, or technological changes that unsettle conventional understandings about the jurisdiction of constitutional principles" in an attempt to "make new claims about the proper application" of those principles.[516] In this way, social movements "construct the semantic normative climate in which people talk about the great constitutional issues of the day."[517] In other words, movement lawyering deliberately incorporates into legal advocacy attempts to shift the Overton window and redistribute power through grassroots social, cultural, and political organizing. It centers power-building as a priority, realizing that the goal of increased power may be more important than law or policy reform if change is meant to be long-lasting.[518]

Movement lawyering, however, has historically rarely been taught as a mainstream method of practicing "law."[519] Iterations of movement lawyering have, however, successfully been deployed in, for example, the political campaign to achieve marriage equality, legal involvement in the BLM movement, and collective mobilization against police violence, as lawyers there deployed strategies

512. GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 11, 38 (1992) (alterations omitted).

513. Cummings, *supra* note 511, at 1657–58.

514. *Id.* at 1658; *see also* Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 653 (2022) ("Instead of regurgitating ivory tower concepts of the law, movement law acknowledges 'We the People.' It links arms with grassroots resistance and idealism.").

515. Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 627 (2020).

516. Jack M. Balkin & Reva B. Siegel, Essay, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 929 (2006).

517. *Id.* at 948.

518. Freeman & Webb, *supra* note 511, at 60.

519. *Id.* at 57; Alexi Freeman, *Teaching for Change: How the Legal Academy Can Prepare the Next Generation of Social Justice Movement Lawyers*, 59 HOW. L.J. 99, 104–05 (2015). Etienne C. Toussaint also, relatedly, has argued that legal education must go beyond black letter law and practical lawyering skills to engage the lawyer as a "public citizen." *See* Etienne C. Toussaint, *The Miseducation of Public Citizens*, 29 GEO. J. ON POVERTY L. & POL'Y 287, 293 (2022). Jamelia Morgan, similarly, has argued that legal education should incorporate "a space for a more radical imagining of possibilities within American law and legal institutions as well as deeper forms of critical engagement." Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1221 (2022).

both "inside and outside of formal lawmaking spaces . . . to build the power of those groups to produce or oppose social change goals that they define."[520] Brandon Hasbrouck also has described other liberationist movements that draw on movement law principles, from #MeToo and Time's Up to modern environmentalist and labor union activities.[521]

The correlation, then, becomes clear. Public education, if we are to believe in its ability to democratize, equalize, and combat subordination, is at its core an institution concerned with power—who has it, who does not, and what our students learn about their relationship to it. And it has been hobbled by a legal system unwilling and unable to defend its purportedly equalizing functions—and, in fact, actively acting against them. Movement lawyering, accordingly, is centered on *building* the power of non-elite constituencies, all the while recognizing limitations in traditional strategies and formal legal structures. What, then, would an embrace of movement lawyering for public education reformers look like? The answer, of course, is complex and multilayered, with many potential solutions the majority of which this Article could not purport to unearth. I offer here, though, borrowing from Alexi Freeman's four maxims of movement lawyering,[522] a few thoughts and guiding principles in this approach.

As to the recognition of the limited role of the law, a movement-based approach in modern education law likely would call for at least the two following frames of thought. First, progressive reformers must embrace a clear-eyed recognition of the limitations of traditional impact litigation, particularly at the federal level, from calls for the recognition of a federal fundamental right to education to progressive defense against encroachments on the separation of church and state and race-conscious decisionmaking. While advancing various legal theories undoubtedly contributes to the conversation and, indeed, may even advance another of the myriad plausible rationales for these conclusions, these efforts are tantamount to burying one's head in the sand given the political and structural realities of the modern Court. Second, education reformers must reframe their conceptions of "the law." Torrents of anti-identity legislation, book bans, and choice bills, coupled with the Court's recent blurring of the line between church and state, lifting of gun-control regulations, and rolling back of reproductive rights, all set against the backdrop of an already-crumbling public education system, have combined to form a firing squad of legal and political action unleashing round after round at public education. The "law" of education, then, is all of the above, operating on a shared set of subordinating, antidemocratizing, and oppressive values in tandem to act upon children, teachers, parents, and citizens. Siloing

520. Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 452–53 (2018).

521. Hasbrouck, *supra* note 514, at 657–60.

522. Freeman, *supra* note 519, at 109 (identifying recognition of the limited role of the law, relationships with clients, "long-term vision and power building," and "the use of multimodal advocacy strategies and skills" as the four key points underlying movement lawyering).

these legal regimes in discourse misses the forest for the trees—and risks omitting an opportunity to discuss their collective impact.

As to relationships with clients, as an instructive example, Amanda Alexander has described how lawyers worked with movement organizers in Detroit during the early days of the BLM movement and a water crisis in the city.[523] As she explains, lawyers provided "traditional" legal services, working to provide on-the-ground legal support to those being criminalized for reconnecting their water and also drafting a legal statement that prosecution of this action was unjust.[524] But lawyers also organized community teach-ins; trained others in legal observance for movement organizers; sat in on organizing meetings to answer legal questions and proposed new legal angles; and built productive relationships with organizers.[525] As she explains, the approach "came about through five years of listening, relationship building, and showing up for organizers in the city."[526]

These lessons can be applied to combat the "extensive, broad network" of individuals, organizations, media outlets, foundations, and committees behind the anti-CRT movement, demonstrating the ways in which massive, coordinated efforts can produce significant political and legal results.[527] Some such initiatives already have emerged: for example, H.E.A.L. Together—a coalition of student, parent, and teacher organizations including NYU Steinhardt, the Center for Popular Democracy, and the National Education Association—has mobilized, producing a "toolkit" aimed at safeguarding access to "an honest, accurate, and fully funded public education" under the belief that "public schools are the centers of democracy in neighborhoods across the country."[528] As part of its toolkit, it enables participants to build an organizing committee and campaign aimed at "chang[ing] the narrative," as well as winning "policy change and elections."[529] Other organizations, such as TeamChild, a Washington nonprofit aimed at youth rights, have developed movement lawyering-based approaches. TeamChild's framework centers on the creation of a Youth Advisory Board composed of young people impacted by education barriers, a partnership with legal aid programs, and a bimodal agenda of direct litigation and policy change.[530]

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523. Amanda Alexander, *Nurturing Freedom Dreams: An Approach to Movement Lawyering in the Black Lives Matter Era*, 5 HOW. HUM. & C.R. L. REV. 101, 122 (2021).

524. *Id.*

525. *Id.* at 122–24.

526. *Id.* at 123.

527. Anna Merod, *Grassroots Initiative Aims to Combat Anti-CRT Movement*, K-12 DIVE (Apr. 4, 2022), https://www.k12dive.com/news/grassroots-initiative-aims-to-combat-anti-crt-movement/621504/ [https://perma.cc/K4JL-U4EB].

528. H.E.A.L. TOGETHER, TOOLKIT FOR ORGANIZING YOUR COMMUNITY PART 1: INTRODUCTION AND BACKGROUND 1–2 (2022), https://drive.google.com/file/d/1ZkqSr5eGMysehiu1UADm055efmmXlYUn/view [https://perma.cc/H3ML-RG8N].

529. H.E.A.L. TOGETHER, TOOLKIT FOR ORGANIZING YOUR COMMUNITY PART 2: BUILDING A CAMPAIGN 7–8 (2022), https://docs.google.com/document/d/1_kx-LFfRAJBLcwRBpAQlNITc-9FsGn3ihW_gUVhOX-o/view [https://perma.cc/54NN-UTT6].

530. *See* Sara Zier, *A Movement Lawyering Approach to Education Inequities in the Wake of COVID*, TEAMCHILD (Apr. 26, 2022), https://teamchild.org/a-movement-lawyering-approach-to-education-inequities-in-the-wake-of-covid/ [https://perma.cc/9495-E57X].

Relatedly, another set of nonprofit organizations and political collectives has advanced a new wave of curricular reforms aimed squarely at restoring public education's democratizing functions and seeking to recapture the narrative around civics and historical education. In the 2018–2019 legislative session alone, for example, more than eighty pieces of civics-related legislation were introduced across two-thirds of states, many of which introduced civics requirements where there previously had been none at all, a wave of legislation that has continued until today.[531] Much of this legislation revolves around what some have called the "new civics," or a framework that moves from conceptions of public education's role in democratic health to codify a set of skills, understandings, attitudes, and behaviors that promote civic engagement rather than relying merely on a subset of knowledge: indeed, these plans focus often on a development of critical inquiry skills rather than facts alone.[532] CivXNow, for example, the nonprofit foundation behind several iterations of proposed legislation, argues for "equitable civic education," or education that is "inclusive, representative, and relevant," "promotes diverse voices," and focuses on "the power that young people have to bring change."[533] Indeed, in the CivXNow framework, civics education focuses not on "the structures and functions of government," but instead on knowledge about how society functions, awareness of how to have impact on society, and opportunities to put that into practice, as well as attention to social-emotional learning, equality of civic access and outcomes, and experiential civic experiences.[534] And, importantly, it requires not merely "celebrating the ideals of what could be," but also confronting "the struggles we have experienced" as a nation and discussing "controversial issues in the classroom."[535] The Center for American Progress also has advanced a vision of the new civics that focuses on

531. Matt Vasilogambros, *After Capitol Riot, Some States Turn to Civics Education*, PEW: STATELINE (May 19, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/05/19/after-capitol-riot-some-states-turn-to-civics-education [https://perma.cc/ZJ9Q-9TYS]. Such bills also advanced in the 2021–22 session. *See, e.g.*, H.B. 1384, 122d Gen. Assemb., 1st Reg. Sess. (Ind. 2021) (enacted) (requiring middle school students to complete one semester of civics education); Laura Wooten's Law, S.B. 854, 219th Leg. § 3 (N.J. 2021) (enacted) (requiring each board of education in New Jersey to provide a course to middle school students about the "values and principles underlying the American system of constitutional democracy," the "function and limitations of government," and the "role of a citizen in a democratic society"); The Civic Literacy Act, H.R. 5028, 2021 Gen. Assemb., Jan. Sess. (R.I. 2021) (enacted) (making civics education a requirement where it previously had left this decision to districts).

532. *See, e.g.*, Manisha Aggarwal-Schifellite, *Redrawing the Civics Education Roadmap*, HARV. GAZETTE (Mar. 1, 2021), https://news.harvard.edu/gazette/story/2021/03/report-lays-groundwork-for-recommitment-to-civics-education/ [https://perma.cc/4LF4-GJCE]. For a robust discussion of literature on improved models for modern civics education, see generally Linda C. McClain, *Bigotry, Civility, and Reinvigorating Civic Education: Government's Formative Task Amid Polarization*, *in* THE IMPACT OF THE LAW: ON CHARACTER FORMATION, ETHICAL EDUCATION, AND THE COMMUNICATION OF VALUES IN LATE MODERN PLURALISTIC SOCIETIES 109 (John Witte & Michael Welker eds., 2021).

533. GENERATION CITIZEN & ICIVICS, EQUITY IN CIVIC EDUCATION WHITE PAPER 5 (2020), https://civxnow.org/sites/default/files/resources/Equity%20in%20Civic%20Eduation%20White%20Paper_Public.pdf [https://perma.cc/BD7J-QJPC].

534. *Id.*

535. *Id.* at 5, 25.

active and engaged citizenship that emphasizes a combination of "knowledge, skills, values and motivation" to optimize a student's ability to contribute to "political activism, community and national service, [and] volunteering."[536] And Peter Levine and Kei Kawashima-Ginsberg argue in a landmark study that "proper[]" civic learning is the "best vehicle" to train young people to sustain our democracy and overcome hurdles of institutional mistrust, polarization, and democratic decline.[537] Effective civics education, they argue, requires six "proven practices" that have emerged from the literature: specifically, courses on civics and government; deliberation of current, controversial issues; service learning; student-led voluntary associations; student voices in schools; and simulations of adult civic roles, such as participation in elections and government.[538]

Many have offered support in particular for a framework set forth by the group Educating for American Democracy (EAD), a cross-partisan effort joining a group of over 300 academics, lawyers, educators, historians, administrators, students, and others.[539] The EAD initiative aims to provide "tools to make civics and history a priority" explicitly in recognition that "constitutional democracy is in peril," the country is "highly divided," and there is "widespread loss of confidence" in government.[540] EAD has proposed a curricular roadmap that focuses on seven themes: (1) civic participation, (2) America's changing political landscapes, (3) the development of American people and shared processes of decisionmaking, (4) the theoretical underpinnings of constitutional design, (5) institutional and social transformation and moments of change, (6) America's role in the world, and (7) contemporary political debates.[541] And in practice, the roadmap also centers on student engagement: it structures its curriculum around student discussion and guiding questions, meant to increase student participation.[542] EAD has set its goal that, by 2030, "60 million students will have access to high-quality civic learning opportunities," 100,000 schools will be "civic ready" with a civic learning plan and resources, and 1 million teachers will be prepared to teach to this civics framework.[543]

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536. Ashley Jeffrey & Scott Sargrad, *Strengthening Democracy with a Modern Civics Education*, CTR. FOR AM. PROGRESS (Dec. 14, 2019), https://www.americanprogress.org/article/strengthening-democracy-modern-civics-education/ [https://perma.cc/VP9G-NZQG].

537. PETER LEVINE & KEI KAWASHIMA-GINSBERG, THE REPUBLIC IS (STILL) AT RISK—AND CIVICS IS PART OF THE SOLUTION 1, 3 (Sept. 21, 2017), https://civxnow.org/sites/default/files/resources/SummitWhitePaper.pdf [https://perma.cc/3MAD-3B2X].

538. *Id*. at 4.

539. *Who We Are*, EDUCATING FOR AM. DEMOCRACY, https://www.educatingforamericandemocracy.org/about-us/who-we-are/ [https://perma.cc/AZY2-8ZZR] (last visited Feb. 1, 2023).

540. *Our Vision*, EDUCATING FOR AM. DEMOCRACY, https://www.educatingforamericandemocracy.org/our-vision/ [https://perma.cc/YS3W-2F8K] (last visited Feb. 1, 2023).

541. EDUCATING FOR AM. DEMOCRACY, ROADMAP TO EDUCATING FOR AMERICAN DEMOCRACY 2–3 (2021), https://www.educatingforamericandemocracy.org/wp-content/uploads/2021/02/Roadmap-to-Educating-for-American-Democracy.pdf [https://perma.cc/9HZU-FNEZ].

542. *See id*. at 5–38.

543. EDUCATING FOR AM. DEMOCRACY, *supra* note 540. Though the EAD Roadmap has largely been celebrated, it also has met its share of dissenters. Professor Mark Bauerlein, for example, argues that the Roadmap leads to the "politicization of learning" and prioritizes activism as a universal good without

In several states, the new civics frameworks have taken off, producing upticks in civic engagement among youth. Maryland, for example, has codified civics content and standards from pre-K to twelfth grade; it also requires public school students to complete seventy-five hours of community service and enables teens to preregister to vote at ages sixteen and seventeen.[544] California, for its part, has tackled media literacy: in 2018, the state passed robust legislation recognizing the need to prepare students to navigate "digital media platforms" given the "great deal of confusion" caused by "fabricated news stories," and committing to "ensur[ing] that young adults are prepared with the media literacy skills necessary to safely, responsibly, and critically consume and use social media and other forms of media."[545] The bill requires the state to provide teachers with access to professional development and other resources pertaining to media literacy.[546] And Illinois has adopted a complex system of student social studies standards aimed at helping "young people acquire and learn to use the skills, knowledge, and attitudes that will prepare them to be competent and responsible citizens throughout their lives."[547]

Legislation at the federal level has been proposed as well, though this has been more fraught. In 2021, a bipartisan group of senators proposed The Civics Secures Democracy Act, which would authorize $1 billion annually for six years across federal civics education grant programs, recognizing that "[i]n today's contentious civil environment, it is more important than ever that students are equipped with knowledge of our institutions and confronted with the enduring questions of civic life and political change."[548] The bill, drafted in partnership with CivXNow, among other organizations, would distribute the funding to state education agencies, nonprofit organizations, institutions of higher education, researchers, and a fellowship program meant to incentivize diversity in civics teaching.[549] The bill, however, was attacked from the right, as commentators such as Stanley Kurtz alleged that Republican cosponsors had been "hogtied into backing legislation that is about as far from conservative as a bill could be," commentary that started a tidal wave of lobbyists pressuring those on the right to avoid signing on to the bill.[550] It has not advanced as of this writing.

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discussing the ways in which activism may "drift[] toward illiberal ends." Mark Bauerlein, Paul O. Carrese, & James R. Stoner Jr., *Debating the Educating for American Democracy Roadmap*, REAL CLEAR EDUC. (July 23, 2021), https://www.realcleareducation.com/articles/2021/07/23/does_the_educating_for_american_democracy_roadmap_provide_an_adequate_pathway_for_civic_learning__110610.html [https://perma.cc/GZ9H-Q5HU].

544. Jeffrey & Sargrad, *supra* note 536.

545. S.B. 830, 2017–18 Leg., Reg. Sess. (Cal. 2018).

546. *Id.*

547. H.B. 4025, 99th Gen. Assemb., (Ill. 2015).

548. CHRIS COONS & JOHN CORNYN, THE CIVICS SECURES DEMOCRACY ACT (June 14, 2022), https://www.coons.senate.gov/news/press-releases/senators-coons-cornyn-introduce-bipartisan-bill-to-invest-1-billion-annually-in-civics-education [https://perma.cc/26MP-LCNQ]; *see also* S. 879, 117th Cong. (2021); H.R. 1814, 117th Cong. (2021).

549. COONS & CORNYN, *supra* note 548.

550. Stanley Kurtz, *The Greatest Education Battle of Our Lifetimes*, NAT'L REV. (Mar. 15, 2021, 8:13 AM), https://www.nationalreview.com/corner/the-greatest-education-battle-of-our-lifetimes/ [https://perma.cc/85JN-NTT5]. For example, the conservative National Association of Scholars drafted an open

As to long-term vision and power building, the public education protection movement can borrow several lessons from increasingly effective contemporary movement law-focused initiatives. For example, joint community- and lawyer-led movements after George Floyd's murder led to a flurry of cities restructuring police budgets, launching crisis response teams, and enacting legislative and policy reforms; indeed, half of American states have enacted new laws directly related to the use of force, the duty to intervene, and misconduct reporting.[551] Cities and towns in both red and blue states have become effective laboratories for reform experiments, such as Denver's "STAR" program, which gives 911 dispatchers authority to send nonemergency mental health and social work personnel to scenes rather than police officers and has resulted in some 3,000 calls being offloaded from the Denver police.[552] The NAACP Legal Defense Fund's (LDF) efforts in police reform are also instructive: it undertook multiple reform efforts based in movement law principles, including publishing "Community Oversight of Police Union Contracts," a toolkit to be used by the public to increase community voices; releasing reports outlining local disparate police practices and grand jury transcripts; lobbying the Department of Justice to suspend federal funding of local law enforcement agencies; and tracking state legislative reforms and information relating to officers' misconduct records.[553] Importantly, organizations like LDF also worked to keep police reform in the public discourse, with legal representatives repeatedly appearing in mainstream media outlets, on Twitter, and on other platforms to spread awareness and move the cultural needle.[554]

In this way, the BLM movement also is instructive. Black Lives Matter has had an indelible social impact; indeed, from 2014 to 2020, the hashtag #BlackLivesMatter was tweeted or retweeted 39.2 million times; it was shared more than 100 million times in the month after George Floyd was killed.[555] Sixty-two Fortune 500 companies posted about BLM on Facebook, BLM

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letter to Republicans John Cornyn and Tom Cole pressuring Cornyn and Cole to vote against the bill, arguing it was "an effort to smuggle progressive action civics into American K-12 classrooms under the guise of bipartisanship." *An Appeal to Senator John Cornyn and Congressman Tom Cole*, NAT'L ASS'N SCHOLARS (May 3, 2021), https://www.nas.org/blogs/article/an-appeal-to-senator-john-cornyn-and-congressman-tom-cole [https://perma.cc/YPH2-FZMF].

551. Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/83B9-KAMU].

552. Steve Friess, *'Defund the Police' Is Dead but Other Reform Efforts Thrive in U.S. Cities*, NEWSWEEK (May 24, 2022, 5:30 AM), https://www.newsweek.com/2022/06/24/defund-police-dead-other-reform-efforts-thrive-us-cities-1709393.html [https://perma.cc/LDK7-683C].

553. *The Changing Landscape of Policing*, NAACP LEGAL DEF. FUND, https://www.naacpldf.org/george-floyd-anniversary/ [https://perma.cc/GK6E-XWWL] (last visited Feb. 1, 2023).

554. For a discussion of the ways in which "movement lawyers" directly affiliated with BLM, as well as those affiliated with other organizations that operated alongside BLM on issues such as police reform, see Emanuel Powell III, *#BlackLivesMatter and the Families Left Behind*, 5 HOW. HUM. & C.R. L. REV. 1, 11–15 (2020).

555. Char Adams, *A Movement, a Slogan, a Rallying Cry: How Black Lives Matter Changed America's View on Race*, NBC NEWS (Dec. 29, 2020, 10:04 AM), https://www.nbcnews.com/news/nbcblk/movement-slogan-rallying-cry-how-black-lives-matter-changed-america-n1252434 [https://perma.cc/2UVR-27EL].

representatives appeared at significant cultural events such as the Academy Awards, and political leaders directly engaged with the movement.[556] So why was BLM so successful? Research on the movement has posited several theories. First, BLM's decentralization was "intentional," illustrating its intention to lead from the ground up.[557] Second, its allies operated in a set of "decentralized but tightly woven networks to reform government policies at state and local levels" in each of the fifty states, mirroring the approach same-sex marriage advocates took ten years prior.[558] Third, BLM effectively influenced public attitude toward race, in partnership with pop culture and corporate efforts.[559] Indeed, data show that BLM's waves of protest resulted in spikes in discussion of terms associated with its ideas, such as "systemic racism," disseminating its antiracist ideas into public discourse.[560] In these ways, BLM was highly effective at "[n]ormaliz[ing] [e]quality," inspiring solidarity and activism, and increasing political and social participation.[561] Like the same-sex marriage movement, which adopted the famous "10/10/10/20" strategy—a plan to move the nation toward acceptance of gay marriage by securing marriage equality in ten states, civil unions in ten others, legal recognition of same-sex couples in ten others, and pro-equality organizing in the remaining twenty[562]—BLM was effective in "think[ing] and work[ing] beyond litigation and law."[563]

Theoretically, these lessons can be imparted through movement lawyering to protect public education's antisubordinating and democratizing functions. As with BLM, approaching the public education problem will require coordination on multiple fronts, with multiple constituencies, at the local, state, and federal level; and like BLM, public education already has emerged as a topic *du jour* in the zeitgeist. What education reformers choose to do with these tools—and the extent to which advocates can adopt lessons of BLM, same-sex marriage, and

556. *Id.*

557. Leslie R. Crutchfield, *Black Lives Matter: From Protests to Lasting Change*, CHRON. PHILANTHROPY (June 18, 2020), https://www.philanthropy.com/article/Black-Lives-Matter-From/249017.

558. *Id.*

559. *Id.*

560. *See* Zackary Okun Dunivin, Harry Yaojun Yan, Jelani Ince & Fabio Rojas, *Black Lives Matter Protests Shift Public Discourse*, PROC. NAT'L ACAD. SCI., Mar. 2022, at 1, 7; *see also* Jamillah Bowman Williams, Naomi Mezey & Lisa Singh, *#BlackLivesMatter—Getting From Contemporary Social Movements to Structural Change*, CALIF. L. REV. ONLINE, June 2021, at 1, https://www.californialawreview.org/blacklivesmatter-getting-from-contemporary-social-movements-to-structural-change [https://perma.cc/W2TZ-S5SW].

561. Bowman Williams et al. *supra* note 560, at 17.

562. John F. Kowal, *The Improbable Victory of Marriage Equality*, BRENNAN CTR. FOR JUST. (Sept. 29, 2015), https://www.brennancenter.org/our-work/analysis-opinion/improbable-victory-marriage-equality [https://perma.cc/4KK6-YRKA].

563. Bowman Williams et al., *supra* note 560, at 16 (quoting Evan Wolfson, *The Freedom to Marry Win: Transformation and Triumph to Celebrate, Lessons to Adapt and Apply*, FREEDOM TO MARRY (Sept. 28, 2016), http://www.freedomtomarry.org/pages/georgetown-law-hart-lecture-2016 [https://perma.cc/5BCA-SAWP]); Crutchfield, *supra* note 557.

other civil rights movements to coordinate a movement-based approach to public education law—is the question.

As this Part illustrates, though courts may offer insufficient resources to combat public education's increasing antidemocratization and subordination, an embrace of movement lawyering principles represents one potentially fruitful path forward. For those who seek to maximize public education's impact on democratic health, working to organize around state and federal legislative efforts, engaging with nonprofit and community groups, and advancing various initiatives aimed at amplifying education's democratizing functions may be effective ways to target rehabilitating public education—and, indeed, an arguably failing American state.

CONCLUSION

Throughout its education jurisprudence, the Court has frequently offered rhetorical support for public education. But importantly, that rhetoric has not yielded meaningful democracy- or equality-enhancing results. Instead, and even as it has become increasingly clear that public education is essential to collective democratic health, the Court has substantively embraced another set of values—religious autonomy, parental choice, and privatization. It has done so in the face of mounting evidence that democracy is in peril, the country is deeply and dangerously polarized, and American citizens are ill-equipped to navigate the complex landscape they face. Indeed, this endorsement has set the stage for the emergence of the wave of anti-identity legislation that too operates on these thematic planes, emphasizing parental choice, privatization, and entrenchment of social hierarchy.

This Article suggests that a clear-eyed assessment of the Court's education jurisprudence reveals that its commitment to public education—both as a democratizing tool and as a public good itself—has, since the (purportedly) high-water mark of *Brown* and *Tinker*, been increasingly diluted, if not entirely disappeared. Rather, invocations of the education–democracy nexus have served a mollifying function, acting as pat observations of education's supposed importance while facilitating results that embrace other sets of values. To this end, disaggregating rhetoric from results shows the shallow depth of the Court's commitment to public education. For those who seek to reform public education, this conclusion is critical. It reveals that other avenues are necessary for those who wish to undertake the worthwhile project of bolstering public education and maximizing its antisubordinating functions, such as a turn to more radical forms of community lawyering.