Teenage Rebels and the Demand for Due Process

SARAH MEDINA CAMISCOLI*

ABSTRACT

In the 1975 case of Goss v. Lopez*, high school students who mobilized for Black Power and an end to the Vietnam War won the right to procedural protections that expanded the due process revolution in education. In a dramatic shift in constitutional law, the Supreme Court sided with marginalized students who mobilized together and recognized their property interests under statutory entitlements to compulsory public education. By resisting policies that deprived them of their education in a divisive political climate, these student plaintiffs reimagined a radical democratic system where students shape the laws that govern their civic life and education.*

Today, conservative parents and lawmakers of the Make America Great Again ("MAGA") movement have targeted the rights of marginalized youth by dismantling substantive due process, weaponizing bans on public school resources, and suppressing student resistance. This MAGA movement—one that aims to "Make America" as it was before the due process revolution—normalizes education without constitutional protections for students and a return to legal norms that once oppressed young people as wards of parents, enslavers, or the state. While legal scholars have studied these erosive threats to democracy and substantive due process, they have not yet considered the derailment of procedural *due process and how mobilized students might help forge a path forward.*

In response, this Article makes two contributions. First, it provides a descriptive account of the key historic contributions of student movements that prefigured and protected student entitlements to public education long before the Supreme Court decided Goss*. Second, the piece wields the legal concepts of property interests and procedural due process to create legally cognizable claims that support students' demands for more due process protections against bans in public education. In doing so, the Article demonstrates how student movements have been, and continue to be, important* accountability constituencies *in education law, and why formally trained legal professionals should write and work alongside them to realize the Constitution's unfulfilled promises.*

* Professor Medina Camiscoli works as an Assistant Professor of Constitutional Law, Education Law, Movement Law, and Critical Legal Studies at Rutgers Law School in Newark. She also practices law as the Founding Co-Executive Director of the Peer Defense Project—a youth movement lawyering shop that builds legal education, networks, and tools for mobilized and marginalized youth. Thank you to Professor Gerald Torres for his mentorship in my study of movement law and demosprudence. Thank you to Students Engaged in Advancing Texas (SEAT) whose insight and resistance for youth power under law inspired this article. Thank you to Professor Sarah Swann and the Rutgers Faculty Colloquium for their feedback and support. Thank you to Community Review Board Members and SEAT leaders, Da'Taeveyon Daniels and Cameron Samuels for their insight, trust, and collaborative review process. Thank you to Ash Barcus, Anna Griffith, Adaneka Witter Judge, Ayo Bowman, Elia Jefferson-Gonzalez, and Cynthia Mendoza for their wonderful work as my Research Assistants and thought partners.

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INTRODUCTION

> "The actions of one person alone, challenging a book in a school library, should not burden and restrict the education of 90,000 students in my district without due process."
>
> —Cameron Samuels, *Students Engaged in Advancing Texas (SEAT)*[1]
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> "That legislators can appropriate law to banish critiques of law should rattle every last one of us. . .[This] is not a healthy feature of a robust democracy."
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> —Kimberlé W. Crenshaw[2]

Historically, legal scholars, students, and educational justice practitioners have drawn on *Goss v. Lopez* to protect both students' public education property interests[3] and their right to procedural due process[4] in school suspensions.[5] Recently, scholars have debated the pitfalls of expanding property interests in education as students face unrelenting attacks on public education.[6] However, legal scholars and advocates have not yet drawn inspiration from *Goss*'s profound student activism story behind the "due

1. *Book Bans: Examining How Censorship Limits Liberty and Literature: Before the S. Comm. on the Judiciary,* 118th Cong. (2023) (statement of Cameron J. Samuels, Co-Founder, Students Engaged in Advancing Texas) [hereinafter Samuels Testimony]; *see also* Emily Bond, *Texas Book Ban Law is the Target of Youth Organizations like SEAT, Booksellers*, TEEN VOGUE (Apr. 23, 2024), https://www.teenvogue.com/story/texas-book-ban-law-seat#:~:text=Youth%20activists%20such%20as%20Cameron,or%20challenged%20by%20the%20state. (reporting on how SEAT organized against the Restricting Explicit and Adult-Designated Educational Resources (READER) Act in Texas and has successfully "got books back on shelves. . . [and] websites unblocked.").

2. Kimberlé W. Crenshaw, *This Is Not a Drill: The War Against Anti Racist Teaching in America*, 68 UCLA L. REV. 1702, 1717–18 (2022).

3. *See, e.g.*, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

4. *Id.* at 576 ("The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.").

5. *Goss v. Lopez*, 419 U.S. 565, 573–76 (1975) (holding that resident youth gain property entitlements when states pass laws that guarantee a free public education or compel students to attend school and that school officials must provide "some kind" of process before that property interest is interfered with); *see also* Matthew Patrick Shaw, *The Public Right to Education*, 89 UNIV. CHI. L. REV. 1179, 1207 (2022) ("A due process discussion of the educational property interest begins with *Goss v. Lopez*. In *Goss*, all nine Justices agreed that the State of Ohio created a property interest in public education—through the combination of laws that provide public education. . .and laws that compel all eligible children to attend school—that is protected by due process.").

6. *See* Shaw, *supra* note 5, at 1207; *see also* LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. REV. 566, 573–75 (2022) ("Parents purportedly 'steal' an education when they falsify a nonresident child's address to be able to benefit from a school district's schools that are designated only for resident children. . . school district officials justify stealing education laws by conceptualizing public education as private community property."); Rachel F. Moran, *Personhood, Property, and Public Education: The Case of Plyler v. Doe*, 123 COLUM. L. REV. 1271, 1275 (2023) ("Because neoliberalism mainly treats education as an individual entitlement, that is, a private rather than a public good, economic considerations overshadow other conceptions of a right to learn, deepening inequality in access to schooling.").

process revolution" to explore other ways to protect marginalized students' educational entitlements.[7] Scholars often separate *Goss* from the five-year history of student movements for Black Power,[8] culturally responsive education, and an end to the War in Vietnam leading up to it.[9] This decoupling of *Goss v. Lopez* from its teenage rebellion history makes sense as the named plaintiff, Dwight Lopez, did not participate in a student protest. Rather, he alleged that the school administration wrongly accused him of participating in a protest.[10] The fact that many of his peers and co-plaintiffs did protest specifically for the right to be heard on their school and policy demands—has gone unexamined. As an intervention, this Article turns to a lineage of teenage rebels[11] that catalyzed the "due process revolution" and advanced wider civil rights struggles.[12]

As progressive legal scholars, practitioners, and advocates scramble for legal tools to fight conservative attacks on education, the insight of student movements that are demanding due process and imploring adult law and policymakers "to listen,"[13] remains an untapped resource.[14] Further, without adequate procedural protections

7. *Goss*, 419 U.S. at 572–73 ("Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules. . .Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education.") (quoting *Bd. Of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *see also* Sherry Maria Tanious, *Schoolhouse Property,* 131 YALE L. J. 1641, 1644 (2022) ("By broadening the forms of property receiving constitutional protection, *Goldberg* initiated the 'due process revolution,' resulting in a series of Supreme Court decisions finding that public employment, immigration status, and. . .public primary-and secondary-school education are property under the Due Process Clause, requiring the government to afford property-holders some kind of process."). *See id.* at 1648 n.42–43 (citing David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 648–50 (2004)) (Tanious draws on Super's scholarship on entitlements to argue that school lunch and health services in public schools constitute "legally enforceable individual right[s]." Tanious emphasizes that "Super observes that federal provisions concerning school lunches and breakfasts meet the criteria for budgetary, responsive, and functional entitlements, and arguably meet the criteria for unconditional entitlements, in addition to the positive-entitlement[s].").

8. *See* Clark, *supra* note 6, at 568 n.1 (explaining that "[w]hile other authors may choose not to capitalize 'White' in their writing, I disagree with that convention. I believe capitalizing 'Black,' as I do throughout this Article, without also capitalizing 'White' normalizes Whiteness, while the proper noun usage of the word forces an understanding of 'White' as a social and political construct. . .in line with the social identity of 'Black.'"). This Article assumes this framework, capitalizing all racial constructions.

9. *See* KATHRYN SCHUMAKER, TROUBLEMAKERS: STUDENTS' RIGHTS AND RACIAL JUSTICE IN THE LONG 1960S 97, 105 (2019) (tracing the history of Black Power student organizers in Ohio high schools and a New York university prior to *Goss v. Lopez*).

10. *Goss*, 419 U.S. at 570.

11. *See generally* DAWSON BARRETT, TEENAGE REBELS: STORIES OF SUCCESSFUL HIGH SCHOOL ACTIVISTS FROM THE LITTLE ROCK 9 TO THE CLASS OF TOMORROW (2015) (using the term "teenage rebels" to describe mobilized students fighting to protect educational justice).

12. *Id.* at 93, 130.

13. *See* Deposition of Phillip Fulton at 95, *Goss v. Lopez*, 419 U.S. 565 (1975) (No. 71-67) (testifying that Plaintiff Tyrone Washington led a sit-in where he demanded that school administrators "listen to [students]" regarding their police demands for racial justice and a culturally responsive curriculum because the students were "tired of listening to [them].").

14. *See* Amanda Alexander, *Nurturing Freedom Dreams: An Approach to Movement Lawyering in the Black Lives Matter Era*, 5(2) HOW. HUM. &. C.R. L. REV. 101, 123 (2021) (explaining how working with organizers means "taking cues" and, "offer[ing]. . .skills," as well as acknowledging that legal skills are not the only or most important skill).

that extend beyond their schools, multiply marginalized youth[15] (e.g., immigrant learners) face life threatening risks. In fact, a federal court recently found that the U.S. government treated undocumented learners in detention facilities with less "efficiency and accuracy [than]. . .money, important documents, and automobiles."[16] University law professors have condemned "procedural irregularity" that resulted in university students' mass suspension, arrest, and potential deportation.[17] By not tending to the demands of student movements asking for due process, our democratic institutions risk backsliding into configurations where the law extends better protections to property than marginalized learners.[18]

In 2023, state actors passed a deluge of bans aimed at the school facilities, health care, and culturally responsive curricula designed to support marginalized learners.[19]

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15. This Article uses the term "multiply marginalized" people, youth and learners to refer to those young people excluded from access to education through multiple "intersections of myriad oppressions." *See* Mildred Boveda & Subini Ancy Annamma, *Beyond Making a Statement: An Intersectional Framing of the Power and Possibilities of Positioning*, 52 EDUC. RESEARCHER306 (2023); *see also* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87(8) MICH. L. REV. 2320, 2322 (1989) (arguing that "outsider jurisprudence—jurisprudence derived from considering stories from the bottom—will help resolve the seemingly irresolvable conflicts of value and doctrine that characterize liberal thought.").

16. Ndjuoh MehChu, *Help Me to Find My Children: A Thirteenth Amendment Challenge to Family Separation*, 17 STAN. J. OF C.R. & C.L. 133, 147 (2021) (citing Ms. L. v. U.S Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1144, 1148 (S.D. Cal. 2018) (order granting plaintiffs' motion for class-wide preliminary injunction) ("[A] Federal district judge. . .was particularly troubled by the reality that the 'practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children.'").

17. Letter from members of the Columbia Law School faculty to President Shafik, Provost Olinto, General Counsel Rosan, the Board of Trustees, and the Deans of Columbia University (Apr. 21, 2024), https://www.documentcloud.org/documents/24576351-columbia-law-school-faculty-letter [hereinafter Columbia Faculty Letter] (letter from fifty-four faculty members of Columbia Law School condemning the mass suspension of over 100 students and the failure of the University to adhere to "established procedures for enforcing campus rules, including content-neutral regulations of speech and assembly and prohibitions of harassment and discrimination.").

("Procedural irregularity, a lack of transparency about the University's decision-making, and the extraordinary involvement of the NYPD all threaten the University's legitimacy within its own community and beyond its gates. We urge the University to conform student discipline to clear and well-established procedures that respect the rule of law.").

18. *See* MehChu, *supra* note 16, at 16–17 (citing *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1144,1148 (S.D. Cal. 2018)) ("Federal district judge Dana Sabraw. . .lament[ed] that the government did not account for migrant children with the 'same efficiency and accuracy as property,' since the government routinely keeps track of "[m]oney, important documents, and automobiles," the court concluded the government had jeopardized the 'class members' constitutional rights to family association and integrity.").

19. *See* Sneha Dey & Karen Brooks Harper, *Transgender Texas kids are terrified after governor orders that parents be investigated for child abuse*, THE TEXAS TRIBUNE (Feb. 28, 2022), https://www.texastribune.org/2022/02/28/texas-transgender-child-abuse; Kelly Field, *Under new laws, some teachers worry supporting LGBTQ students will get them sued or fired*, USA TODAY (May 23, 2022), https://www.usatoday.com/story/news/nation/2022/05/23/lgbtq-civil-rights-laws-worry-some-teachers-who-fear-punishment/9859737002/?gnt-cfr=1; UCLA School of Law Critical Race Studies Program, CRT FORWARD, https://crtforward.law.ucla.edu/ (last visited Nov. 23, 2024); Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AMERICA (Sept. 19, 2022), https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/.

In an interview about his crusade against former Harvard President Claudine Gay, conservative MAGA bloc activist[20] Christopher Rufo proudly shared:

> I've run the same playbook on [C]ritical [R]ace [T]heory, on gender ideology, on DEI bureaucracy. For the time being, *given the structure of our institutions*, this is a universal strategy that can be applied by the right to most issues. I think that we've demonstrated that it can be successful.[21]

This playbook to "Make America Great Again"—a tripartite strategy to dismantle fundamental rights and public services through media, political pressure, and strategically sequenced campaigns—builds power for authoritarian state agents to erode democracy.[22] The success of this anti-DEAI[23] playbook is a byproduct of existing procedural protection failures and narrow judicial approaches to shield public education and democracy from nefarious actors. Marginalized learners, as the playbook's targets, represent what scholars have called the "miner's canary" because "their distress signals danger that threatens us all."[24] When marginalized learners are under threat, "we are all at risk"[25] because a movement to eradicate marginalized young peoples' rights signals a movement to eradicate democracy.[26]

Amidst a "quadruple crisis"[27] of a continuing pandemic, economic recession, institutional racism, and authoritarian threats, marginalized students face unique vulnerabilities,

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20. Staff, *Unprecedented Session 1 Recap*, MOVEMENT LAW LAB BLOG (Feb. 2024), https://www.movementlawlab.org/blog/session1recap (discussing the importance of building a multiracial pro-democracy bloc in solidarity with social movements to counter the MAGA bloc).

21. Ian Ward, *We Sat Down with the Conservative Mastermind Behind Claudine Gay's Ouster*, POLITICO (Jan. 3, 2024), https://www.politico.com/news/magazine/2024/01/03/christopher-rufo-claudine-gay-harvard-resignation-00133618.

22. *Id.*; *see also* Zoe Masters, *After Denial: Imagining with Education Justice Movements*, 25 U. PA. J. OF L. & SOC. CHANGE 219, 235 (2022).

23. I use diversity, equity, inclusion, and *accessibility* (DEAI) instead of DEI alone because accessibility is often left out of conversations about diversity, equity, and inclusion. The addition of accessibility has been modeled by advocates in the field. *See, e.g.,* Mari-Anne Kehler, *The Missing Piece to your DEI Strategy*, LOS ANGELES TIMES (Dec. 15, 2021), https://www.latimes.com/b2b/diversity/story/2021-12-15/the-missing-piece-to-your-dei-strategy (explaining why the world is recognizing that DEI is not complete without embracing disabilities and addressing accessibility); White House, *Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce* (Jun. 25, 2021) https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/). Thank you Ash Barcus for this insight.

24. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11 (2003) (describing the concept of the "miner's canary" as applied to "those who are racially marginalized") [hereinafter MINER'S CANARY].

25. Amanpour and Company, *Trans People Are the Canary in the Coal Mine This Midterm Cycle, Says Expert*, YOUTUBE (Oct. 13, 2022), https://youtu.be/WW_IY6P6gSU (Attorney Chase Strangio explaining that "Trans people are the canary in the coalmine.") (referencing MINER'S CANARY, *supra* note 24).

26. *See* Crenshaw, *supra* note 2, at 1717–18 ("That legislators can appropriate law[s] to banish critiques of law should rattle every last one of us. Changing the rules about what racial histories can be taught, and what experiences can be acknowledged is not a healthy feature of a robust democracy.").

27. Staff, *Future of Law*, MOVEMENT LAW LAB, https://www.movementlawlab.org/about/future-of-law (last visited Nov. 23, 2024) (discussing in their strategic initiative the "important role" that lawyers play not only in "protecting the most vulnerable" as we face a "quadruple crisis" of "a global pandemic; the ensuing economic recession; growing anti-black racism; and the rising threat of authoritarianism," but also in "building power and a future vision for law with them" and "working towards wholesale change to our political and economic systems.").

as they lack constitutional "safeguards that others enjoy or may seek without constraint."[28] While many youth, particularly ages fourteen through seventeen, are old enough for the government to tax their earnings or sentence them to life in prison without parole, they have no constitutional entitlements to the right to vote, run for office, or make campaign contributions.[29]

In the face of these "intersecting vectors of harm,"[30] marginalized learners have organized for more due process rights to defend public education[31] and their lives from proposed state sanctioned detention and general criminalization.[32] This Article makes the normative claim that progressive legal advocates, scholars, and practitioners have a responsibility to confront harmful White supremacist, sexist, and *adultist* uses of law, in solidarity with these brave teenage rebels, and to explore how to actualize their demands across legal institutions.[33]

To date, progressive legal scholars have disagreed on the value of expanding property interests in education.[34] While some argue that treating education as property necessitates greater constitutional due process protections,[35] others warn that recasting public resources as private property hardens White supremacy[36] and neoliberalism.[37] While these are important risks to consider, these debates have not yet explored how student movement demosprudence—that is, how they "shift ideas

28. *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint").

29. *Griffin v. Burns,* 570 F.2d 1065, 1077 (1st Cir. 1978) ("The right to vote remains, at bottom, a federally protected right. If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order."). Conservative lawmakers supporting the deprivation of statutory entitlements for marginalized youth who are taxed but also prohibited from voting directly counters their advocacy to uphold the rallying cry of "no taxation without representation." *See, e.g.,* No Taxation Without Representation Act, H.R. 4958, 116th Cong. (2019-2020) ("The phrase "no taxation without representation" was a rallying cry of many American colonists during the period of British rule in the 1760s and early 1770s.").

30. *See* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 44 (2011) (discussing how civil litigation alone often falls short of addressing multiply marginalized people's material needs because plaintiffs in successful cases tend to represent simply one rather than "intersecting vectors of harm.".

31. *See* Samuels Testimony, *supra* note 1.

32. *See* Evelyn Marcelina Rangel-Medina, *Citizenism: Racialized Discrimination by Design*, 104 B.U. L. REV. 831 (2024) (discussing how the "largest civil rights mobilization of Latinxs and Asian Pacific Islanders (APIs) and immigrant communities erupted [in] [2006] in response to the Congressional proposal of H.R. 4437" which sought to make undocumented immigration and status a crime.).

33. Sarah M. Camiscoli et al., *Youth Dignity Takings: How Book and Trans Bans Take Youth Property and Dignity*, 1(1) LOY. INTERDISC. J. OF PUB. INT. L. 1, 5 (2024) (outlining how "[e]ach week [marginalized] Young People lose individual freedoms, political accountability, and public resources while enduring dehumanizing White supremacist and adultist laws.") (citations omitted).

34. David Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1873–78 (2013); *see also* Moran, *supra* note 6, at 1275 ("Because neoliberalism mainly treats education as an individual entitlement, that is, a private rather than a public good, economic considerations overshadow other conceptions of a right to learn, deepening inequality in access to schooling.").

35. Shaw, *supra* note 5, at 1207; *see* Camiscoli et al., *supra* note 33 (explaining how relating to bans as a form of a "taking" allows for an acknowledgement of the harm of the deprivation and exclusion).

36. Clark, *supra* note 6, at 574–75.

37. Moran, *supra* note 6, at 1273; *see also supra* note 4 and accompanying text.

about constitutional and legal interpretation from the ground up"[38]—has illuminated the institutional failure to protect student interests. Instead, scholars adopt "a court-centric approach in their analysis" of education, due process, and property law.[39] But looking to the courts and academy alone yields insufficient outcomes for multiply marginalized people,[40] which in turn exacerbates dysfunction and distrust in democracy and excludes marginalized learners from making substantive life decisions.[41]

The Article proceeds as follows: Part I outlines movement law methodology within this paper's context.[42] Part II then examines several historic movements' demosprudence[43] to discern the relationship between education, marginalized learners, property, and procedural protections.[44] Using movement law, Part II demonstrates how,

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38. Amna A. Akbar, Sameer M. Ashar, & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 840 (2021); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J., 2740, 2749–51 (2014) ("[D]emosprudence is the study of the dynamic equilibrium of power between lawmaking and social movements. Demosprudence focuses on the legitimating effects of democratic action to produce social, legal, and cultural change. [W]e seek to understand, analyze, and document those social movements that increase the extant democratic potential in our polity, and which do so in a way that produces durable social and legal change.") [hereinafter referred to as Guinier & Torres].

39. Guinier & Torres, *supra* note 38, at 2748.

40. *See* JACK BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 7, 138 (2020) (discussing how political polarization impacts judicial review and the importance of tending to progressive social movements as a path out of constitutional rot and towards constitutional renewal); *see also*, Jamal Greene, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021) (explaining how "rights-ism" further polarizes an already polarized society by creating black and White assessments of conflicts and solutions); SPADE, *supra* note 30 (explaining how anti-discrimination rights-based interventions may actually tend to exacerbate harm for trans people facing intersecting vectors of harm as those interventions can further segregate facilities, increase police presence, and increase funding to military operations).

41. *See* Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 130 YALE L.J.F. 312, 333 (2020) (calling on scholars to bring "far greater" creativity to respond to this moment of interlocking crises of distrust and dysfunction in our democratic institutions)*; see also* Matsuda, *supra* note 15, at 2322 (1989) (arguing that "outsider jurisprudence—jurisprudence derived from considering stories from the bottom—will help resolve the seemingly irresolvable conflicts of value and doctrine that characterize liberal thought.").

42. *See* Amna A. Akbar et al., *supra* note 38, at 821 (defining movement law as "an approach to legal scholarship grounded in solidarity, accountability, and engagement with grassroots organizing and left social movements.").

43. When discussing student movements, this Article draws on scholarship focused on social movements. *See id.* at 824 n.1 ("[W]e define a social movement as 'a collective effort to change the social structure that uses extra-institutional methods at least some of the time." (citing Debra C. Minkoff, *The Sequencing of Social Movements*, 62 AM. SOCIO. REV. 779, 780 n.3 (1997)).

44. This Article uses the term "multiply marginalized" to refer to those communities "at the intersections of myriad oppressions." *See* Mildred Boveda & Subini Ancy Annamma, *Beyond Making a Statement: An Intersectional Framing of the Power and Possibilities of Positioning,* 52 EDUC. RESEARCHER 306 (2023). The Article uses the term "learners" instead of "students" in Part I to include young people legally or formally excluded from enrolling in school. This term has been used by scholars to engage in comparative analyses of young people who, regardless of the laws or infrastructure of the state, are of "school age." *See e.g.*, Lucie E. White, *Pro Bono or Partnership? Rethinking Lawyers' Public Service Obligations for A New Millennium*, 50(1) J. OF LEGAL EDUC. 134, 138 (2000) (discussing how "popular education methods" outside of traditional school settings "seek to move learners. . .to challenge unjust power hierarchies and gain greater voice in the political process."); *see also* Chiara Benetollo, *A Post-Secondary Writing Bridge Program for Incarcerated Learners, in* CASES ON ACADEMIC PROGRAM REDESIGN FOR GREATER RACIAL AND SOCIAL JUSTICE (2022) (discussing barriers that disrupt access to education and employment for incarcerated learners).

in education, as in other areas of law, "the contemporary doctrine of procedural due process did not spring, unheralded and fully formed, from the fevered brain of a liberal Justice."[45] Instead, Part II demonstrates how student movements prefigured procedural due process protections in education long before the courts even recognized many young people as fully human.[46] Building on the expansive vision of historic and present day student demosprudence, Part III explores how legal scholars and practitioners may reconfigure procedural due process to meet student demands for more due process. While "the substance of the educational property was not at issue" for the *Goss* plaintiffs,[47] the Court held that property entitlements stem from statutory entitlements under state law.[48]

Thus, Part III argues that, when the state entitles students to various public school resources under statutory law, then it also owes them due process before passing blanket bans on those resources. In doing so, Part III affirms student demands for more due process because, when "the states determine the predicate 'dimensions'" of the right to education,[49] and when those dimensions include bathrooms, health services, and school libraries, the state owes students certain procedural protections before they ban those entitlements. Part III, therefore, demonstrates how the demands of Students Engaged in Advancing Texas (SEAT) might translate into new due process protections that might better "promote participatory and dignitary values and advance fundamental fairness."[50]

As an intervention, this Article serves two purposes. First, it maps a history of marginalized learners prefiguring contemporary entitlements in education.[51] Second, it explores the possibilities of wielding those contributions to block public education bans and renew democratic systems.[52] This Article also serves as a companion to "Youth Dignity Takings,"[53] written in partnership with mobilized youth and frontline legal practitioners, which situates book bans and trans bans within socio-legal analysis of "dignity takings."[54] This Article expands on that scholarship in two ways.

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45. Cynthia R. Farina, *On Misusing "Revolution" and "Reform:" Procedural Due Process and the New Welfare Act,* 50 ADMIN. L. REV. 591, 601 (1998).

46. *See* Sameer M. Ashar, *Pedagogy of Prefiguration*, 132 YALE L. J. F. 869, 871 (2023) (describing "a movement-based definition of 'prefiguration'" as "the idea [that] we have to build our movement cultures and our leftist institutions in the model of the world we are seeking to create. . .[where] everything that I think and say comes not from me as one individual organizer or writer but as one person in a constellation of comrades and mentors.'") (quoting *Prefiguring Border Justice: Interview with Harsha Walia*, 6 CRITICAL ETHNIC STUD. (Spring 2020)).

47. *See* Shaw, *supra* note 5, at 1208.

48. *Id.* (quoting *Goss v. Lopez*, 419 U.S. 565, 586 (Powell, J., dissenting)).

49. *Id.*

50. Tanious, *supra* note 7, at 1643 (citations omitted).

51. *See generally* Camiscoli et al., *supra* note 33, at 17–20 (exploring the takings analysis to protect schoolhouse property).

52. *See* Guinier & Torres, *supra* note 38, at 2749–75 (arguing that social movements can "increase the extant democratic potential in our polity, and which do so in a way that produces durable social and legal change."); *see also* Benjamin Wallace-Wells, *How A Conservative Activist Invented the Conflict Over Critical Race Theory*, THE NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory (discussing how CRT bans emerged from a manufactured conflict to flame culture wars and win political favor).

53. Camiscoli et al., *supra* note 33, at 1.

54. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41(4) L. & SOC. INQUIRY 796, 800 (2016).

First, it highlights student demosprudence over the past 200 years to support the normative claim that scholars should attend to the strategies and successes of student demosprudence today. Second, it provides a legal analysis supporting the novel student claim that students deserve more procedural due process before state legislatures can make "material changes" to their statutory entitlements to school facilities, health services, and school libraries.[55]

Finally, this Article uses movement law—a methodology for legal scholars across various areas of law to draw on and "work alongside social movements"[56]—to explore the potential of procedural due process—"the least frozen concept of our law"[57]—to assume the powerful social standards of leftist student movements[58] and mitigate the harm of administrative violence against trans/gender expansive students and students of color.[59] In this way, this Article departs from traditional scholarship on children and the law, as it assumes a political theory more radical than the traditional ethos of democracy.[60] Instead, it assumes a theory of cultural democracy, respecting the demands and contributions of marginalized students who want to work together to "rule over all aspects of life that are shared."[61]

Importantly, this Article neither presents a complete history of student social movements nor offers a complete solution to the reduction of public education protections. Instead, it tends to marginalized students' demands for more procedural protections in one of the United States' most hostile districts and integrates student insights to protect student property interests in education as it materially and legally exists today.[62] In doing so, the Article encourages lawyers, judges, advocates, and scholars to engage, critique, and expand on student leaders' demosprudence *with*

55. Shaw, *supra* note 5, at 1209 ("Procedural due process, when it does attach, is insufficient as a safeguard against a state making material changes to the educational entitlement. Although education science has advanced considerably in documenting the importance of access to high-quality classroom instruction for teaching and learning, incorporating this context might only weight consideration of the *Mathews v. Eldridge* factors more favorably toward the conclusion that total exclusion from high-quality teaching-and-learning environments is a material deprivation of educational property.").

56. *See* Akbar et al., *supra* note 38, at 821.

57. Tanious, *supra* note 7, at 1647 n.39 (2022) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring) ("'Due process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.").

58. *Id.*

59. See generally SPADE, supra note 30, at 34 (explaining how low-income multiply marginalized trans people of color face administrative violence despite the rights that may have been passed through the legislature and interpreted by the courts). "Gender expansive" refers broadly to youth who identify and express gender identity and/or gender expression beyond the gender binary, which includes transgender and nonbinary youth. To include both transgender youth as well gender expansive youth more broadly, this Article uses the term "trans/gender expansive." *See* Angie Martell, *Legal Issues Facing Transgender and Gender-Expansive Youth*, MICH. BAR J., 30 (Dec. 2017); GIRLS FOR GENDER EQUITY, www.ggenyc.org (last visited Nov. 24, 2024) ("[W]orking. . .to center the leadership of Black girls and gender-expansive young people of color. . .to achieve gender and racial justice."); Marc Ramierez, *What does 'gender expansive' mean? Oklahoma teen's death puts identity in spotlight*, USA TODAY (Feb. 23, 2024) https://www.usatoday.com/story/news/nation/2024/02/22/gender-expansive-nex-benedict-oklahoma/72700938007/.

60. Jonathan Gingerich, *Democratic Vibes*, 32(4) WM. & MARY BILL OF RTS. J. 1151–52 (2024).

61. *Id.* at 1151–52.

62. *See generally* Alexander, *supra* note 14.

student leaders to build more robust, inclusive legal-political coalitions that democratize legal institutions and win pragmatic change for youth.[63] However, this Article neither assumes that building left-of-center coalitions will yield the most progressive or transformative change, nor does it deny that student procedural due process demands may have unintended economic and racial consequences.[64] The primary intention is to make the case for including mobilized students in live, scholarly debates on education and property and lend tools that can pragmatically defend those students in hostile districts.

I. MOVEMENT LAW AS METHODOLOGY

This Article employs movement law's four methodological steps to explore how the utopian visions of historic student movements prefigure and incubate legally cognizable claims in education.[65] In their seminal article, Akbar, Simonson, and Ashar articulated those four steps as: 1) "attend to modes of resistance by social movements and local organizing"; 2) "work to understand the strategies, tactics, and experiments of resistance and contestation"; 3) "shift epistemes away from courts and siloed legal expertise toward the strategies and histories of social movements"; and 4) "embody an ethos of solidarity, collectivity, and accountability with left social movements."[66]

Application of this organic methodology proceeds as follows: first, the Article attends to the resistance of present day student movements by accepting the demands of trans/gender expansive students and students of color from SEAT to ensure due process for statutorily granted public school resources such as books, bathrooms, and mental health services.[67] Second, it centers the prefigurative strategies of gender and racially minoritized students across history who struggled for educational entitlements and procedural protections of those entitlements long before and after *Goss*. This Article assumes the specific demosprudence method that explores the movement's impact on the U.S. political stratum and what legal changes succeeded those movements.[68] Third, the Article embodies an ethos of solidarity by considering how

63. *See* Rana, *supra* note 41, at 333 (discussing the need to rethink the *Insular Cases* and calling on scholars to shift their approach, stating "[b]ut in a sense, the present moment—marked by institutional dysfunction and popular discontent—speaks to the need for scholars to approach their work with far greater creativity than simply adding new cases at the margins.").

64. For a discussion of the potential racial and economic consequences of relating to education as a property interest, *see* Moran, *supra* note 6, at 1275 ("Because neoliberalism mainly treats education as an individual entitlement, that is, a private rather than a public good, economic considerations overshadow other conceptions of a right to learn, deepening inequality in access to schooling."); Clark, *supra* note 6, at 574–75.

65. Akbar et al., *supra* note 38, at 830.

66. *Id.* at 821–22.

67. This looks outside of traditional legal spaces, looking to student movement leaders advocating against unjust laws and procedures. *See id.* at 826 ("Movement law. . . often begins outside of the law as traditionally conceived. In this way, movement law builds on the work of jurisprudential schools of thought such as critical legal studies (CLS), critical race theory (CRT), Latina/o critical theory (LatCrit), feminist legal theory, critical lawyering, and democratic constitutionalism.").

68. Guinier & Torres, *supra* note 38, at 2749 ("Demosprudence focuses on the legitimating effects of democratic action to produce social, legal, and cultural change."); *see also* Akbar et al., *supra* note 38, at 840 (explaining how "Lani Guinier and Gerald Torres's work demonstrates how new legal and political understandings emerge from collective imagining. . .how social movements can generate and shift ideas about

SEAT's different strategies, campaigns, and utopian visions can inform powerful procedural uses to protect public education. The author worked closely with SEAT student leaders Da'Taeveyon Daniels and Cameron Samuels as community readers who read and assessed this piece for accuracy and alignment with their work.

II. THE POWER OF STUDENT DEMOSPRUDENCE AND PREFIGURATION FOR MULTIPLY MARGINALIZED LEARNERS

Since the earliest settlers colonized the land now known as the United States, state authorities have traditionally banned, excluded, and punished marginalized learners to restrict their participation in democracy.[69] The following Section provides a descriptive account of historic moments in which young, multiply marginalized learners resisted living in "virtual serfdom"[70] and demanded entitlements to education, civic life, and procedures, along with meaningful protection of those entitlements from antidemocratic bans and exclusions. Specifically, this Section provides a descriptive account of examples when the law protected White, property-owning adults to deploy enslavement, physical abuse, forced illiteracy, cultural genocide, and indoctrination to exclude marginalized young people from education.

This account serves as a cautionary tale of the horrors that marginalized learners might have to relive if the movement to "Make America Great Again" continues to backslide to historical periods of coverture, literacy bans, boarding schools, and concentration camps. Further, this Section supports the Article's normative claim that student movements serve as "*constituencies of accountability*" that can and should inform how progressive scholars and practitioners interpret property protections and liberty interests in education to prevent or remedy grievous loss and erroneous deprivation.[71] This Section illuminates the power and possibilities of reimagining law to match the utopian vision of student movements that

constitutional and legal interpretation from the ground up. . .[T]he implication is that scholars must be part of 'a commitment not only to struggle but also to struggle toward a larger vision.'").

69. *See* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062,1067, 1141 (2022) (Park highlights how present day book bans in schools are built upon "a narrative from which the histories of colonization and enslavement—and the ways they shaped the evolution of racial dynamics in this country—have been erased over time." Park argues that legal scholars must confront the tension between histories of law characterized by "epistemic norms of erasure" and the "the histories of law and knowledge production. . . in which people made decisive choices, shifted norms, and countenanced great risk."). S*ee also* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, YALE L.J. 1461, 1467 (2018) (discussing the limits of the use of state or parental "authority" as "the proper lens through which [we] conceptualize the field of children and law. . ."); Paige Duggins-Clay, *Bans on Black Literature and Learning are Nothing New – State Lawmakers Must Reject Calls to Reinstate Antebellum-era Policies*, INTERCULTURAL DEV. RSCH. ASS'N (Feb. 24, 2023), https://www.idra.org/resource-center/bans-on-black-literature-and-learning-are-nothing-new-state-lawmakers-must-reject-calls-to-reinstate-antebellum-era-policies/ ("Cognizant of the revolutionary potential of Black education, [19th century] southern lawmakers enacted strict laws that forbade the teaching of enslaved and often even free Blacks to read or write. . .Current efforts to limit the ability of all children to access ideas and information challenging normative attitudes, beliefs and perspectives on deep topics, such as racism, sexism and other forms of discrimination hearkens back to the policies of the Antebellum Era.").

70. Moran, *supra* note 6, at 1294 (citing Appellees' Brief on the Merits at 46, 49, *Plyler v. Doe*, 457 U.S. 202 (1982)).

71. Guinier & Torres, *supra* note 38, at 2750–51.

resisted dominant and oppressive laws through the creation of autonomous schools, self-managed literacy development, linguistic resistance, direct action, and more.

A. Prefiguring Educational Entitlements Under Sex-Based Coverture

Legal scholars have established how the current legal framework that enforces parental rights and control of young people emerged from early British property law's coverture doctrine.[72] During the seventeenth century, English courts reconstructed a child's legal identity as a person under the age of twenty-one who "society should see. . .only as part of a family, with a father at its head."[73] Within this parent custody structure, young people born within a marriage "became subject to their father's control" in all areas of life.[74] By the eighteenth century, the law categorized children as "chattels of the family and wards of the state" without legal personhood.[75] During the nineteenth century, fathers exclusively owned children and maintained absolute control over them through a "God-given right."[76] Consequentially, a White father in the nineteenth century could:

> [F]orce his children to work and collect the wages for himself; he could marry off his female children to persons of his choosing; and he [could] determine where and with whom his children would reside, whether with himself, the mother, or some third party. In addition, fathers had the right to physically control and punish their children, in some states up to the point of death.[77]

Until the creation of compulsory public education, a young person's—particularly young girls'—literacy, education, and access to public life remained under their

72. *Obergefell v. Hodges*, 576 U.S. 644, 660 (2015) (citations omitted) ("Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned."); Dailey & Rosenbury, *The New Law of the Child*, *supra* note 69, at 1457 ("The authorities framework is rooted in the early common-law property based theory of exclusive parental ownership of children. This theory located absolute control over children in parents—primarily fathers—based on actual or presumed biological ties."); *see also* Barbara Bennett Woodhouse, *"Who Owns the Child?" Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV 995, 1041–50 (1992) [hereinafter Woodhouse, *Who Owns the Child*].

73. Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 89 (2021) [hereinafter Dailey & Rosenbury, *The New Parental Rights*]. This marked a major shift from the legal conception during the sixteenth century. *Id.* at 88–89 (quoting Holly Brewer, *By Birth or Consent: Children*, LAW AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY, 230 (2005) ("In sixteenth-century England, children over age seven were of 'ripe age' to marry (under seven they could contract only 'espousals,' or betrothals). Four-year old people could make wills to give away their goods and chattels. Children of any age could bind themselves into apprenticeships. Eight-year-olds could be hanged for arson or any other felony. Teenagers were routinely elected to Parliament. Children who owned sufficient property could vote. And custody as we know it did not exist. These norms applied not only in England but in Virginia as it was founded during the seventeenth century. Children's legal capacity soon gave way to patriarchal control").

74. *Id.* at 89.

75. Hillary Rodham, *The Rights of Children*, HARV. ED. REV. 1, 3 (1974).

76. Dailey & Rosenbury, *The New Law of the Child*, *supra* note 69, at 1458.

77. Woodhouse, *Who Owns the Child*, *supra* note 72, at 1044–46.

father's or parents' exclusive control.[78] There was no process to pursue education outside of the discretion of their father's private rights.[79]

Young, White, women learners resisted this oppression, prefiguring property and liberty interests in education by building their own autonomous schools. In 1742, at only sixteen years old, Countess Benigna worked in partnership with a small movement of other young, wealthy, White women to design the first seminary school for White girls of property-owning families in Germantown, Pennsylvania.[80] While Horace Mann is often cited as the "father of public education," he began his work *after* Benigna and focused instead on the White *male* child's "natural right" to education.[81] While advocates critiqued his endorsement of racial segregation and gendered exclusion, the legal and political systems nevertheless legitimized child enslavement across the United States, offering little support for these demands.[82]

Despite Mann's influence, a grassroots movement of young, wealthy, White women again emerged, resisting their exclusion from education and demanding greater constitutional protections for White women in public life.[83] At seventeen years old, Emma Willard continued to prefigure a protected interest in education for young White women by founding a school to provide comparable education to women, asserting that women's rights "are equally sacred with those of men," and advocating for women to serve as consultants on Constitutional interpretation.[84] While Willard's advocacy efforts failed to include educational entitlements for enslaved learners, her efforts to create autonomous schools, led by and for marginalized learners, imagined a public school system that included marginalized youth in substantive decision making about access, curriculum, and exclusion.[85] Similar to

78. RESTATEMENT OF THE LAW, CHILDREN & LAW §1.20 (TENTATIVE DRAFT NO. 4 2022) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 273 U.S. 284 (1927)) (describing a series of cases that solidified parents' constitutional authority to make decisions regarding children's education).

79. Dailey & Rosenbury, *The New Law of the Child*, *supra* note 69, at 1457 (2018) (describing the current rights for parental controls over their children as rooted in an "authorities framework." The authors explain how this concept of full parental authority over children's lives "is rooted in the early common-law property-based theory of exclusive parental ownership of children [which] located absolute control over children in parents—primarily fathers—based on actual or presumed biological ties.").

80. Akbar et al., *supra* note 38, at 825–26 (defining a social movement as two or more people); *see also 1742–1745, First Girl's Boarding School in the Country*, BETHLEHEM AREA PUBLIC LIBRARY, https://www.bapl.org/local-history/local-history-timeline/bellhouseschool/ (last visited Mar. 18, 2024).

81. Barbara Winslow, *Education Reform in Antebellum America*, HISTORY NOW, https://mrtomecko.weebly.com/uploads/1/3/2/9/13292665/education.pdf (Jan. 4, 2014) (citing Massachusetts Board of Education, *Twelfth Annual Report of the Secretary* (Boston, 1848)).

82. *Id.*

83. *See* Winslow, *supra* note 81*; see also* Mark D. Hall, *Emma Willard on the Political Position of Women*, 6 HUNG. J. OF ENG. & AM. STUD. 11 (2000) (discussing Emma Willard, *An Address to the Public; Particularly to the Members of the Legislature for New York, Proposing a Plan for Improving Female Education*, NEW YORK STATE LEG. (1819)).

84. Hall, *supra* note 83, at 13.

85. *Id.* at 20 ("Willard was confident that if Americans could resolve their differences over [slavery], the war could be brought to a speedy end. [In her opinion] [t]he first step in resolving the problem [was] to recognize that [Black people are] made by God, that [they have] rights, and that these rights are often violated by bad [enslavers]. Yet, at the same time, she conceded that most [Black learners were] inferior to whites and are

Students Engaged in Advancing Texas' (SEAT) present day efforts to acquire, read, teach, and distribute banned books in their communities,[86] these young women rejected educational spaces that restricted access to them on the basis of their gender.[87] The autonomy of the young women founding, facilitating, and sustaining these schools seeded the "participatory and dignitary values" at the core of procedural due process and advanced "fundamental fairness" for their White, wealthy women peers.[88]

B. Learners Subverting Black Literacy Bans Under Enslavement

While young White women resisted their fathers' coverture by creating their own educational spaces, enslaved Black and Indigenous learners faced a more insidious form of coverture—enslavement.[89] Before enslavement's abolition, enslavers owned young people and their parents and could separate a family at will. Black children "belonged to the slave owners at the moment of their conception."[90] While White, property-owning, young women faced domestic abuse, discrimination, and educational exclusion, enslaved Black learners could face death for violating an anti-literacy statute.[91] Records show that, as a result of these literacy bans, only around five percent of enslaved people reported teaching themselves how to read after the Civil War.[92]

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generally incapable of taking care of themselves); *cf. id.* at 11–12 (discussing how Willard advocated and opened schools for females of wealthy families particularly those ages 14 through 17).

86. Greg Landgraf, *Newsmaker: Da'Taeveyon Daniels*, AM. LIBRARIES (Oct. 1, 2023), https://americanlibrariesmagazine.org/2023/10/01/newsmaker-dataeveyon-daniels/ (after being named Honorary Chair of Banned Book Week, Da'Taeveyon explains his activism with SEAT to create autonomous student spaces and identifies Dean Spade's book, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT), as a framework to understand the power of young people organizing); *see generally* Dean Spade, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) (2020).

87. *See* Hall, s*upra* note 83 (discussing Emma Willard advocating to the legislature on the importance of women to participate in political processes and to access education); *cf.* Samuels Testimony, *supra* note 1 ("The actions of one person alone, challenging a book in a school library, should not burden and restrict the education of 90,000 students in my district without due process.").

88. *See* Tanious, *supra* note 7, at 1643 (describing how procedural protections promote "participatory and dignitary values and advance fundamental fairness.") (footnotes omitted) (citing Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 902–03 (1981); David L. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting,* 28 STAN. L. REV. 841, 845–49 (1976); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957)).

89. Anita Sinha, *A Lineage of Family Separation*, 88 BROOKLYN L. REV. 445, 450 (2023) (citations omitted) (quoting Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014)), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/.

90. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 23 (1997) [hereinafter ROBERTS, KILLING THE BLACK BODY].

91. *Supra* note 69 https://www.idra.org/resource-center/bans-on-Black-literature-and-learning-are-nothing-new-state-lawmakers-must-reject-calls-to-reinstate-antebellum-era-policies/ ("The tension that the possibility of slave literacy provoked between slave owners and Black laborers sparked intense conflict, as the ability to read revealed to the world that America's most valuable property had a mind—while the potential to write foretold the ability to construct an alternate narrative about the bondage America kept them in.").

92. Janet Cornelius, *We Slipped and Learned to Read:' Slave Accounts of the Literacy Process, 1830–1865*, 44 PHYLON 171, 172 (1983) ("A reading and analysis of all the 3,428 responses by [formerly enslaved people] questioned by the Federal Writers Project interviewers as compiled in these volumes pinpointed just over 5 percent (179) who mentioned having learned to read and write [while enslaved].").

Despite threats of terrorism, torture, and death, enslaved learners prefigured spaces where they could learn culturally relevant texts and resist oppression by self-managing education in their community.[93] One of those learners was enslaved Black learner and blacksmith Gabriel Prosser, who taught himself to read and planned one of the largest insurrections of enslaved people in U.S. history, all before he turned twenty-four years old.[94] Inspired by the Haitian Revolution, Prosser planned a watershed insurrection, later known as Gabriel's Rebellion, with a coalition of enslaved and freed Black people, poor White people, occupied Indigenous people, and armed troops.[95] Through these efforts, Prosser prefigured an abolitionist utopia of an autonomous Black state where Black people learned, led, and thrived together. Although state actors thwarted the Rebellion and executed Prosser after a trial with no jury, the demosprudence of Gabriel's Rebellion inspired a legacy of resistance that seeded a freedom dream—one that included Black people as agents of democracy with entitlement and autonomy over their education, dignity, and political participation.[96] Within ten years of Gabriel's Rebellion, two more enslaved, self-educated, Black abolitionist learners, Denmark Vesey and Nat Turner, also revolted to reconstitute law and society.[97] Amidst this surge of rebellions, William Lloyd Garrison founded and published the abolitionist newspaper, *The Liberator,* and abolitionists formed the American anti-slavery lobby.[98] By 1865, these actions contributed to abolition of

93. DOUGLAS R. EGERTON, GABRIEL'S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1802 20, 45, 48, 165, 168 (1993) (discussing how Gabriel learned how to read in secrecy and used the skills to study abolitionist and political texts).

94. *Id.* at 24; *see also* MANISHA SINHA, THE SLAVE'S CAUSE: A HISTORY OF ABOLITION 58 (2016); WALTER RUCKER, THE RIVER FLOWS ON BLACK RESISTANCE, CULTURE, AND IDENTITY FORMATION IN EARLY AMERICA 5, 10 (2008); Lacy Ford, *Reconfiguring the Old South: 'Solving' the Problem of Slavery,1787-1838*, TEACHING THE J. OF AM. HIST. (June 2008), http://archive.oah.org/special-issues/teaching/2008_06/ex1.html; Susan DeFord, *Gabriel's Rebellion*, WASH. POST (Feb. 5, 2000), https://www.washingtonpost.com/archive/lifestyle/2000/02/06/gabriels-rebellion/33c9061a-e33d-4f18-bf02-fe3cd294f5df/.

95. Darrell A.H. Miller, *Estoppel by Nonviolence*, 85 L. & CONTEMP. PROBS. 69, 73 (2022) (citations omitted) ("In 1800, a blacksmith named Gabriel. . .planned a multiracial republican revolution against slavery and merchant oppression . . . [to] upend the social system in Virginia and, with luck, the nation. He was aided by two Frenchmen, 'political radicals and staunch anti-slavery men who were willing to forfeit their lives in the effort to achieve the kind of liberty and equality of which the Jeffersonian leadership only spoke'. . .The plan was used as a political tool by Federalists to show that liberal talk of freedom and equality by Jefferson's allies had poisoned the minds of African Americans.").

96. *See* GERALD MULLIN, FLIGHT AND REBELLION: SLAVE RESISTANCE IN EIGHTEENTH-CENTURY VIRGINIA 140–63 (1972); *see also* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 63–64 (2019) [hereinafter Roberts, *Abolition Constitutionalism*] ("The abolitionist Constitution was forged, as well, by ordinary black folks who abandoned plantations, served in the Union Army, and demanded recognition of their equal citizenship.").

97. Miller, *supra* note 95, at 69, 73–74 (citations omitted) ("'Twenty years later, a free Black polyglot and carpenter named Denmark Vesey became the face of an abortive uprising in Charleston County . . .[a]rmed with a copy of Rufus King's denunciation of slavery 'in the name of natural rights,' and surrounded by reports of the successful slave revolution in St. Domingue—now Haiti—Vesey drew up a plan of attack"); *see also id.* at 69, 74 (citations omitted) ("Within a decade, the mystic Nat Turner commenced an uprising in Southampton, Virginia that galvanized the nation. . .[on] the fortieth anniversary of the Haitian Revolution on August 21.").

98. Small & Small, *supra* note 101, at 517.

enslavement and the formulation of Civil War amendments.[99] In risking his life to learn to read and examine Black revolutions, Prosser seeded a utopian dream that fueled the abolitionist movement and ratification of Civil War amendments. In these ways, the demosprudence of Gabriel's Rebellion expanded the "horizon of the possible and sustainable" for Black learners and inspired a wave of new initiatives to resist enslavement and literacy bans and to build autonomous schools and communities for Black people.[100]

Just two years after Nat Turner's Rebellion, young Black students continued to fight for their dignity in education and democracy at Prudence Crandall's Canterbury Female Boarding School. Their efforts began after Crandall decided, after consulting Garrison of *The Liberator*, to exclude White pupils from her newly founded Canterbury Female Boarding School to establish a training school solely for Black women.[101]

While Crandall is often celebrated for her commitment to educate and train Black learners to become teachers, it was the young Black learners themselves who bore the risk to their lives and required protective procedures to safeguard their interests in her school.[102] Despite local resistance and threats to their lives, twenty young Black women traveled to Connecticut in 1833 for the opportunity to attend Crandall's school.[103] In response, residents leveraged "blue laws" requiring each learner to pay a weekly fine or "be whipped on the naked body not exceeding ten stripes."[104] When

99. *See* Roberts, *Abolition Constitutionalism*, *supra* note 96, at 122, n.312 ("Garrison helped to launch the abolitionist movement with the publication of his newspaper *The Liberator* in January 1831.") (citation omitted); *see also* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1472 (2019) (citing LIBERATOR, Feb. 10, 1865, at 2) ("William Lloyd Garrison, the veteran abolitionist who had once condemned the Constitution as a 'covenant with death'. . .acclaimed it as a 'covenant with life'" after the passage of the Thirteenth Amendment which signaled a "'regime shift in constitutional law.'").

100. Guinier & Torres, *supra* note 38, at 2752; *see also* Roberts, *Abolition Constitutionalism*, *supra* note 96, at 63–64 (citations omitted) ("The Radical Republicans responded to the crisis by passing the Civil Rights Act of 1866 over President Johnson's veto and enacting the Fourteenth Amendment in 1868 to extend to the formerly enslaved, as well as to any person born in the United States, the guarantee of citizenship. The language of the Fourteenth Amendment can be traced to specific speeches and writings of leading antislavery advocates who developed an abolition constitutionalism in the preceding decades. Most of these theorists were also intensely engaged in political activism and had been key players in the Liberty Party, which eventually became the Republican Party. Radical Republican leaders, like Charles Sumner and Henry Wilson in the Senate and James Ashley and Thaddeus Stevens in the House, urged incorporating their vision of slavery eradication and free labor in the rewritten Constitution's text.").

101. Miriam R. Small & Edwin W. Small, *Prudence Crandall Champion of Negro Education*, 17 NEW ENGLAND Q, 506, 507, 510 (explaining how Crandall recounted how a young Black woman named Marcia who worked as a servant for her parents introduced her to The Liberator. She recounted how Marcia's "intended husband," Charles Harris, was the "son of William Harris, a local agent for. . .The Liberator." Marcia brought home the paper, which Crandall eagerly read with Marcia who continued to work as her servant).

102. *See generally* Kabria Baumgartner, *Love and Justice: African American Women, Education, and Protest in Antebellum New England*, 52 J. OF SOC. HIST. 652, 652–676 (2019); SAMUEL J. MAY, SOME RECOLLECTIONS OF OUR ANTISLAVERY CONFLICT 51 (1869); *see also* ROBIN KELLEY, FREEDOM DREAMS 6 (2002) (discussing how White leftists and abolitionists have historically been focused on "training" Black leaders, rather than adopting Black people's vision of freedom).

103. Small & Small, *supra* note 101, at 517.

104. Act for the Admission of Inhabitants in Towns and for Preventing Charge on Account of Such as are Not Admitted Therein, THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT, Book 1, Title XCI, §6 (1789).

the blue laws failed to curb their educational pursuits, the town enacted the 'Black Law,' prohibiting youth of color from receiving instruction in private schools without White, male, adult state agent permission.[105] The Black Law was enacted to ban the "disgusting doctrines of amalgamation and their pernicious sentiments of subverting the Union,"[106] a justification that sounds oddly similar to today's legislators who call trans/gender expansive students, students of color, and their allies "terrorists,"[107] "confused,"[108] "brainwashe[d],"[109] "pedophiles,"[110] and "sex criminals."[111]

When sixteen-year-old and first out-of-state Black learner Ann Eliza Hammond assumed the "disgusting doctrine" of integrated education for Black learners and protested the laws, the Windham County Sheriff responded by issuing her a warrant with the threat of public whipping.[112] Local government officials intended to close the academy and terrorize Black learners. The state subpoenaed Ann and five other out-of-state Black students to testify against Crandall for violating the Black Law.[113] Hammond asserted the Fifth Amendment's procedural protections and refused to testify, remaining silent to protect her school.[114] While the Constitution did not yet recognize Hammond as fully human, she wielded due process, insisting that her right to participate in this radical education experiment was in fact a "necessary form . . . of truth."[115] The case was later quashed for lack of evidence, allowing the students to continue engaging in the educational process.[116] Over the next two hundred years, thousands of Black learners demanded procedural protections for these prefigured

105. Small & Small, *supra* note 101, at 517.

106. *Id.*

107. Staff, '*When They Call You a Terrorist': Patrisse Cullors' Advice For Young Activists,* TEEN VOGUE (Oct. 8, 2020), https://www.teenvogue.com/story/when-they-call-you-a-terrorist-patrisse-cullors-black-lives-matter.

108. Marc Siegel et al., *Detransitioning Becomes Growing Choice Among Young People After Gender-Affirming Surgery*, FOX NEWS (Dec. 19, 2022, 10:41 AM), https://www.foxnews.com/health/detransitioning-becomes-growing-choice-young-people-gender-affirming-surgery.

109. Danielle Wallace, *Mother of NYC Heiress Paid 'Deprogrammer' Big Bucks After Daughter 'Brainwashed' by College's Woke Agenda*, FOX NEWS (Nov. 27, 2022), https://www.foxnews.com/us/mother-nyc-heiress-paid-deprogrammer-big-bucks-daughter-brainwashed-college-woke-agenda.

110. Kiara Alfonseca, *Some Republicans use false 'pedophilia' claims to attack Democrats, LGBTQ people*, ABC NEWS (May 7, 2022), https://abcnews.go.com/US/republicans-false-pedophilia-claims-attack-democrats-lgbtq-people/story?id=84344687.

111. Jordan Weissmann, *So, Let's Talk About Republicans and Sex Crimes*, SLATE (April 9, 2022), https://slate.com/news-and-politics/2022/04/from-hastert-to-gaetz-lets-talk-about-republicans-and-sex-crimes.html.

112. Small & Small, *supra* note 101, at 517.

113. *See* Baumgartner, *supra* note 102, at 665.

114. *Id.*

115. RUTH LEVITAS, UTOPIA AS METHOD: THE IMAGINARY OF RECONSTITUTION OF SOCIETY 3 (2013) (explaining that "defending utopia entails insisting the identification and expression of the deepest desires of our hearts and minds, and those of others, is a necessary form of knowledge and of truth"); *see also* Ashar, *supra* note 46, at 877 ("utopian forms are relatively small in scale or narrow in application due to the power of capital and the disciplining force of the state. But they implement new institutional arrangements and help us imagine more just and equal social relations on a wider scale. Prefigurative projects fight the despair of ostensibly unchangeable institutional and social conditions and provide a means by which we may engage in collective utopian thinking, unfettered by the ongoing and depredating operations of capital facilitated by law").

116. *Crandall v. State*, 10 Conn. 339, 372 (1834).

education interests and procedural protections from discrimination, seeding some of the nation's most watershed cases such as *Brown v. Board of Education*.[117]

Presently, over 245 localities, states, and federal government entities have introduced "anti-Critical Race Theory bills, resolutions, executive orders, opinion letters, statements and other measures" to ban texts that teach histories like Gabriel's Rebellion and other stories of abolitionist resistance.[118] Scholars estimate that over 22,000,000 learners now suffer the effects of bans on texts that center the stories of Black activists fighting for education and abolition.[119] Ironically, Black workers aged fourteen through seventeen fund these legislative actions through taxes, despite not having the right to vote, receive notice, or be heard. While this article does not make the normative claim that a person's ability to pay taxes should be determinative of their right to participate in democracy, the fact that many youth are taxed—through income tax or through the purchase of goods—yet deprived of democratic participation, saliently demonstrates the imbalance of power and privilege that youth occupy in our democracy. As legislators "appropriate law to banish critiques" of enslavement,[120] scholars should recognize Black and Afro-diasporic individuals' bold vision to be as necessary and critical today as it was for their ancestors.[121]As Nikole Hannah

117. *See* Janel George, *Past is Prologue: African Americans' Pursuit of Equal Educational Opportunity in the United States*, 44 HUM. RTS. 11, 12 (2019) ("The catalyst for the most significant case related to k-12 school segregation, *Brown v. Board of Education*, came from an unexpected source. . . . Robert R. Moton High School sophomore Barbara Rose Johns staged a student walkout in protest of the deplorable conditions at the segregated African American high school"); *see also Brown v. Board of Education*, 347 U.S. 483 (1954).

118. Olivia B. Waxman, *Exclusive: New Data Shows the Anti-Critical Race Theory Movement Is 'Far From Over'*, TIME MAGAZINE (2023) https://time.com/6266865/critical-race-theory-data-exclusive/; CRT FORWARD, https://crtforward.law.ucla.edu/ (last visited Mar. 24, 2024). Ironically, many of these banned texts recount the abolitionist efforts that happened in the very state where Dwight Lopez and Tyrone Washington would test the bounds of due process in the Black Power movement over 100 years later: Ohio. *See* A. Leon Higginbotham, Jr., *My Metaphorical Journey on the Underground Railroad National Underground Railroad Freedom Center*, 67 U. CIN. L. REV. 761, 772 (1999) (citing WILBUR H. SIEBERT, THE UNDERGROUND RAILROAD FROM SLAVERY TO FREEDOM 81-90 (1898)) ("The geographical territory covered by the Underground Railroad was vast and many of the routes to freedom were located in the state of Ohio"); *see also* NIKOLE HANNAH JONES, THE 1619 PROJECT: A NEW ORIGIN STORY 210, 220, 236 (recounting how "[t]he last national colored convention on record was held in 1893. There, gathered in Cincinnati, Ohio, some five hundred Black activists upheld a tradition that had begun more than six decades earlier. Delegates stood firm in their belief that they were full and equal citizens before the Constitution"). The 1619's account of this history has been banned across the United States. *See* C.A. Bridges, *What is 'The 1619 Project' and why has Gov. DeSantis banned it from Florida schools?* TALLAHASSEE DEMOCRAT (Jan. 27, 2023) https://www.tallahassee.com/story/news/education/2023/01/27/1619-project-hulu-why-are-republican-states-banning-it-in-schools/69847374007/ (recounting how MAGA movement leaders Former House Speaker Newt Gingrich called the 1619 Project "a lie," former president Donald Trump called it "toxic propaganda" and "ideological poison that will destroy our country," and how MAGA supporters have filed bills to cut funding to K-12 schools and colleges that teach the content).

119. Olivia Waxman, *Exclusive: New Data Shows the Anti-Critical Race Theory Movement Is 'Far From Over,'* TIME (Apr. 6, 2023), https://time.com/6266865/critical-race-theory-data-exclusive/.

120. Crenshaw, *supra* note 2, at 1717–18.

121. Here, I use the term Black and Afro-diasporic youth to include diasporic youth of Latine and Asian descent to acknowledge the mixed race and diasporic identities of many youth leaders and challenge the racial binary. *See generally* Juan F. Perea, *The Black/White Binary Paradigm of Race: The 'Normal Science' of American Racial Thought*, 85 CAL. L. REV. 138 (1998) (describing the limits of the Black/White binary as a paradigm); *see also* Joshua Price & Maria Lugones, *Encuentros and Desencuentros: Reflections on A Latcrit Colloquium in Latin America*, 16 FLA. J. INT'L L. 743, 750 (2004) ("So, why would we not have reason to talk about

Jones, banned creator, slandered journalist, and terrorized author of *The 1619 Project*[122] has asserted, "[w]ithout the idealistic, strenuous and patriotic efforts of [B]lack Americans, our democracy today would most likely look very different—it might not be a democracy at all."[123] It is the responsibility of legal scholars committed to democracy and youth dignity to highlight the due process necessary to protect these histories and explore the relationship between education, enslavement, property, and coverture.[124]

C. Resisting Deprivation Under Cultural Genocide

While the legal concept of children as property faded for White children in the nineteenth and twentieth centuries,[125] state and private actors continued to treat Black, Indigenous, and migrant families of color as property through enslavement,[126] state-sanctioned kidnapping,[127] and "boarding school[s]"[128]

racism. . . within the encompassing sense of Latin America the variegated and large Latino/IndoLatino/AfroLatino/AsianLatino life in the United States?"); *see also* Sanda Mayzaw Lwin, *"A Race So Different from Our Own:" Segregation, Exclusion, and the Myth of Mobility*, AFROASIAN ENCOUNTERS: CULTURE, HISTORY, POLITICS 17, 20–21 (2006); Jin Niu, *Note: Who Is An American Soldier? Military Service and Membership In The Polity*, 95 N.Y.U. L. REV. 1475, 1481 (2020).

122. Alice Marwick & Daniel Kreiss, *The Conservative Disinformation Campaign Against Nikole Hannah-Jones*, SLATE (Jun. 2, 2021) https://slate.com/technology/2021/06/nikole-hannah-jones-unc-1619-project-disinformation-campaign.html ("The 1619 Project is perhaps the most frequently mentioned target of conservative attacks on critical race theory"); *see also* Ezekiel J. Walker, *Nikole Hannah-Jones exposes racist letter on Instagram*, THE BLACK WALL STREET TIMES (Dec. 7, 2022) https://theblackwallsttimes.com/2022/12/07/nikole-hanna-jones-exposes-racist-letter-on-instagram/ (reporting how Nikole Hannah-Jones has shared death threats online for her work with 1619 on social media).

123. Nikole Hannah-Jones, *Our democracy's founding ideals were false when they were written. Black Americans have fought to make them true*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html.

124. Roberts, *supra* note 96, at 52–53 (citing Hannah-Jones, *supra* note 123) ("The Constitution protected the 'property' of those who enslaved black people, prohibited the federal government from intervening to end the importation of enslaved Africans for a term of 20 years, allowed Congress to mobilize the militia to put down insurrections by the enslaved and forced states that had outlawed slavery to turn over enslaved people who had run away seeking refuge").

125. Dailey & Rosenbury, *supra* note 69, at 1459–60 ("The emerging view of children as dependent, along with increasing state involvement, ultimately dislodged traditional notions of children as property").

126. ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA 5 (2016) (discussing how "somewhere between 2.5 and 5 million Indigenous people were enslaved in the Americas between the arrival of Columbus and the year 1900").

127. *Dred Scott v. Sandford*, 60 U.S. 393, 404, 409, 416–17 (1856) (Supreme Court ruled that the Constitution did not recognize Scott as citizen, he did not have protected parental rights and the federal courts lacked jurisdiction to hear his complaint or provide him due process to even reach the substance of his claims for reunification).

128. Importantly, the US Government did not design Indian boarding schools to educate young people. Instead, the government created them as a tool of extortion, incarceration, and genocide. *See* Addie C. Rolnick, *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention*, 11 COLUM. J. RACE & L. 811, 814–815 (2021) (explaining "Pratt, the architect of the federal government's Indian boarding school program, had previously worked at Fort Marion, overseeing prisoners and creating and refining a program of assimilation that would later form the blueprint for the Carlisle School. Carlisle was styled as an alternative to the strategy of killing Native people in order to solve 'the Indian problem.' Pratt proposed instead to 'kill the Indian in him and save the man'"). Importantly, youth of color who did not attend Indian boarding schools also faced horrific kidnapping, detention, abuse, and murder under state law through

without the shield of law or procedural due process.[129] During the nineteenth century, the U.S. military invaded Indigenous lands and kidnapped school-aged children, sending them to "boarding schools" where they faced cultural genocide, abuse, and murder.[130] To maintain control over Indigenous lands and communities, state officials extorted leaders into ceding their land as a form of ransom after they had kidnapped, indoctrinated, and abused their children.[131] Edith Young, Indigenous survivor of boarding schools described her experience:

> We were yelled at and slapped. In the third grade, I asked the teacher why she was teaching that Columbus discovered America when Indians were here first. She came over and slapped me across my face. To be humiliated in front of the class, I'll never forget that.[132]

Adult-child survivors of boarding schools and other similar institutions "have described how abusive physical discipline (often severe violence in the form of 'beatings' and humiliation) was central to the schools' pedagogical approach and aimed at breaking children's spirits."[133] In response, Indigenous children resisted, prefiguring educational spaces that protected their minds, bodies, cultures, and resistance.[134] For example, Ernest Knocks, a kidnapped and brutally abused Indigenous learner, protested his forceful assimilation by running away, communicating with Indigenous plains sign language, and leading hunger

"reform schools." *See generally Unreformed: the Story of the Alabama Industrial School for Negro Children*, IHEART PODCASTS (2023) [hereinafter *Unreformed*] https://podcasts.apple.com/dk/podcast/unreformed-the-story-of-the-alabama-industrial/id1663696375.

129. Rolnick, *supra* note 128, at 835 (citations omitted) ("Narratives of kidnapping and loss are central to the history of Indian boarding schools: parents were sometimes forced or coerced into giving up their children, who were sent to far away schools and not permitted to return home for long periods of time").

130. *Id.* at 836–37.

131. *See* Brenda J. Child, *Perspective, U.S. Boarding Schools for Indians had a Hidden Agenda: Stealing Land*, WASH. POST (Aug. 27, 2021), https://www.washingtonpost.com/outlook/2021/08/27/indian-boarding-schools-united-states/ ("This is because the U.S. schools had a very specific purpose: They helped the government acquire Indian lands. . .Boarding schools, designed to reeducate Indian youth who would no longer have a tribal homeland, went hand in hand with this genocidal policy").

132. Rolnick, *supra* note 128, at 841–42 (citing INDIAN SCHOOL: STORIES OF SURVIVAL (Films Media Group 2011)); *see also* Ellen Eliason Kisker et al., *The Potential of a Culturally Based Supplemental Mathematics Curriculum to Improve the Mathematics Performance of Alaska Native and Other Students*, J. RSCH. MATH. EDUC. 75 (2012) (describing how "an elementary school in Alaska greatly increased math achievement for Native American students and all students by connecting math concepts with traditional cultural activities such as basket making, fire building, star navigating, fishing, collecting food, weaving, etc.").

133. Rolnick, *supra* note 128, at 842; *see also Unreformed, supra* note 128 (recounting stories from the Alabama Industrial School for Negro Children where Black learners "suffered physical and sexual violence, unlivable facilities, and grueling labor in the fields surrounding the school" as a form of punishment for alleged behavioral infractions without any procedural due process).

134. *See generally* SARAH KLOTZ, WRITING THEIR BODIES: RESTORING RHETORICAL RELATIONS AT THE CARLISLE INDIAN SCHOOL 70–73, 77 (2021) [hereinafter KLOTZ, WRITING THEIR BODIES] (tracing how Indigenous children such as Ernest Knocks resisted English-only education at Carlisle by running away to reject family separation, communicating in Plains Indian Sign Talk and Lakota to communicate with one another across tribes without teacher interference, and drawing pictographic to develop warrior identities).

strikes.[135] Knocks died in 1880 as a result of policies that encouraged malnutrition, abuse, and other health issues.[136]

The importance of Ernest's resistance to the Carlisle Boarding School continues today in jurisprudential debates over due process protections for Indigenous families, for protections against family separation,[137] and for Indigenous children's right to access a culturally responsive education.[138] Part of the conservative activist play book[139] includes encouraging courts and legislatures to ban texts, curricula,[140] and services[141] upon which Indigenous families rely to recover from the intergenerational trauma of Indian boarding schools like Carlisle.[142]

Interestingly, some of the same attorneys who represented the parents who challenged the Indian Children's Welfare Act, also represented the football coach who challenged student protections under the Establishment Clause and the gun owners who expanded the right to carry a gun just one month after one of the deadliest

135. *Id.* at 78–80; *see also* Sarah Klotz, *How Native Students Fought Back Against Abuse and Assimilation at US Boarding School*, THE CONVERSATION (AUG. 12, 2021), [hereinafter Klotz, *How Native Students Fought Back*], https://theconversation.com/how-native-students-fought-back-against-abuse-and-assimilation-at-us-boarding-schools-165222.

136. KLOTZ, *supra* note 134, at 78–80; Klotz, *supra* note 135. Youth in similar facilities also resisted through tactics such as running away. *See generally Unreformed, supra* note 128.

137. *Haaland v. Brackeen*, 599 U.S. 255, 292 (2023) (upholding specific procedural due process to protect Indigenous youth, families, and tribes from family separation).

138. Samuels Testimony, *supra* note 1("The actions of one person alone, challenging a book in a school library, should not burden and restrict the education of 90,000 students in my district without due process").

139. Ward, *supra* note 21; *see also* Zoe Masters, *After Denial: Imagining with Education Justice Movements,* 25 U. PA. J.L. & SOC. CHANGE 219, 235 (2022).

140. Katrina Schwartz, *Why It's Vital for Native Students to Learn with a Culturally Relevant Lens*, KQED. ORG (Oct. 5, 2016), https://www.kqed.org/mindshift/46138/why-its-vital-for-native-students-to-learn-with-a-culturally-relevant-lens (discussing the importance of culturally responsive curriculum); *see also* Kisker et al., *supra* note 132, at 75; Frank Vaisvilas, *This Wisconsin library remains a source of Native truth as libraries across the country ban books by Indigenous authors*, GREEN BAY PRESS GAZETTE (May 22, 2023), https://www.greenbaypressgazette.com/story/news/native-american-issues/2023/05/22/books-banned-on-native-americans-at-potawatomi-library-crandon-wisconsin/70232523007/ (discussing the role that libraries play in providing culturally relevant texts to learners).

141. Tyler Kingkade & Mike Hixenbaugh, *Parents protesting 'critical race theory' identify another target: Mental health programs*, NBC NEWS (Nov. 15, 2021), https://www.nbcnews.com/news/us-news/parents-protesting-critical-race-theory-identify-new-target-mental-hea-rcna4991; *see also* Anna Almendrala, *Native American Youth Suicide Rates Are At Crisis Levels*, HUFFINGTON POST (Oct. 2, 2015), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/PCFFA&IGFR/part2/pcffa_190.pdf (reporting elevated suicide rates of Indigenous youth); Victoria M. O'Keefe et al., *Increasing culturally responsive care and mental health equity with Indigenous community mental health workers*, PSYCHOL SERV. 84–92 (2021) (discussing the critical role than culturally responsive mental health services play in interrupting mental health crises). Despite this dire need for culturally responsive education and mental health services, conservative leaders have begun to target culturally responsive mental health treatments along with culturally responsive curriculum.

142. *See* Kasey Meehan & Jonathan Friedman, *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AMERICA (Apr. 20, 2023) https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/; *see also Banned Books Library,* BANNED BOOKS BOOK CLUB, https://www.bannedbooksbookclub.com/library/tag/Native (last visited Mar. 24, 2024) (listing the banned titles of FRY BREAD; THE ABSOLUTE TRUE DIARY OF A PART-TIME INDIAN; and AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES— all titles which reference or teach children themes relating to the trauma, resistance, and demosprudence of boarding schools and cultural genocide).

school shootings in U.S. history.[143] The conservative playbook is not just effective at winning in court—it is also effective at undermining protections for marginalized learners and quashing the vision and resistance of historic social movements through various institutions.

D. Marginalized Learners Resist Educational Deprivation and Detention

Throughout the twentieth century, state agents continued treating marginalized learners, particularly from immigrant and diasporic Latine and Asian families,[144] as wards of the state, seizing their parents' physical property[145] and custodial rights. As will be demonstrated, in these moments, learners continued to resist, advocating for a culturally responsive education and right to assemble.

During World War II, over 110,000 Japanese Americans were placed in concentration camps where they faced "mass, race-based, nonselective forced removal and incarceration. . ."[146] In these camps, the military forced Japanese learners to take courses where they were indoctrinated with Americanized values.[147] Under this state-mandated internment and assimilation, Japanese learners known as the Tule Lake Internment Dissidents refused to renounce allegiance to the Emperor of Japan and swear loyalty to the United States, as they believed it was unjust, arbitrary, and a

143. *See Kenny v. Bremerton School District*, THE FEDERALIST SOCIETY, https://fedsoc.org/case/kennedy-v-bremerton-school-district (citing Paul Clement as an advocate for the football coach demanding the right to pray before football games); Brittany Habbart, *Who's Really Behind Brackeen v. Haaland?: The Conspiracy that a law firm and Big Oil are duplicitously undermining tribal sovereignty through Native children*, L. J. FOR SOC. JUST. (2022) (citing Paul Clement as an attorney behind the effort to dismantle the procedural protections from family separation in the Indigenous Children Welfare act); *see also* Josh Gerstein, *Firm splits with lawyers who won gun rights case at Supreme Court,* POLITICO, (June 23, 2022), https://www.politico.com/news/2022/06/23/lawyers-gun-rights-supreme-court-00041909 ("Two of the lawyers responsible for a major victory for gun rights forces at the Supreme Court on Thursday are parting with their prominent law firm after it announced it would no longer handle Second Amendment litigation. Former Solicitor General Paul Clement and Erin Murphy, a regular Supreme Court litigator, said they were launching their own firm after Chicago-based Kirkland & Ellis decided to step back from gun-related litigation").

144. Perea, *supra* note 121, at 139 (discussing how "anti-immigrant initiatives targeted at Latinos/as and Asians. . . debunk[ing] any notion that the White majority tolerates easily the presence of Latino/a or Asian people").

145. *See* Randall Kennedy, *Justice Murphy's Concurrence in Oyama v. California: Cussing Out Racism,* 74 TEX. L. REV. 1245, 1246 (1996) ("*Oyama* involved an application of the California Alien Land Law in the mid-1940s. This law prohibited aliens ineligible for American citizenship from owning or transferring agricultural land. . .Barred from owning agricultural property himself, Oyama purchased land for his son, Fred Oyama, a United States citizen by birth. About a decade later—and after the Oyama family had spent much of World War II in an internment camp for persons of Japanese ancestry—California claimed that the previous purchases of property were a fraudulent evasion of the Alien Land Law and pursued an escheat of the lands").

146. Yoshinori H. T. Himel, *Americans' Misuse of "Internment"*, 14 SEATTLE J. SOC. JUST. 796, 797–798 (2016) ("But the word 'internment,' a term of art in the international law of war, does not describe that community-wide incarceration. Instead, it invokes an internationally agreed legal scheme under which a warring country may incarcerate enemy soldiers and selected civilian subjects of an enemy power").

147. *Id.* at 6; *see also* U.S. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 2 (1983) (emphasis added) (describing explaining how government agents divided incarcerated families into three groups: "[t]he first generation of ethnic Japanese born in the United States . . .the immigrant generation from Japan; and those who returned to Japan as children for education. . .").

violation of their constitutional rights.[148] Unsurprisingly, books and curricula acknowledging Japanese people's cultural genocide and mass incarceration are currently banned in public school districts across the country, including the district where many SEAT members attend school.[149]

Inspired by their Black, Indigenous, and Asian peers,[150] Latine students boycotted schools that failed to meet the minimum requirements of their statutory entitlements under state law.[151] Drawing on student-led wins in *Mendez v. Westminster*[152] and *Brown v. Board of Education*,[153] Latine learners in the Black Panthers, Young Lords,[154] and Brown Berets[155] demanded new statutory education entitlements such

148. *Two Newspaper Articles on Tule Lake Camp Protests*, UNIVERSITY OF CALIFORNIA, https://calisphere.org/item/9bab7be9b459ec98020f00cb7554387a; *Strike at Tule Lake Camp*, UNIVERSITY OF CALIFORNIA, https://calisphere.org/item/a750193f006a08eceda4797878bd3bdf.

149. Taiyler S. Mitchell, *Wisconsin school district dropped book on Japanese-American incarceration during WWII from curriculum, arguing that the story was 'unbalanced,'* BUS. INSIDER (Jun. 30, 2022), https://www.insider.com/wisconsin-school-district-book-japanese-american-incarceration-throughout-wwii-2022-6.

150. Inspired by the Black Panthers, Radical Latine youth organized alongside Asian youth for economic liberation and education access across the United States. *See* WILLIAM WEI, THE ASIAN AMERICAN MOVEMENT 207–9 (1994) (describing the advocacy of the Red Guard Party in New York and California); *see also* ERNESTO CHÁVEZ, MI RAZA PRIMERO, MY PEOPLE FIRST: NATIONALISM, IDENTITY, AND INSURGENCY IN THE CHICANO MOVEMENT IN LOS ANGELES, 1966-1978, 46–51 (2002) (tracing the advocacy and criminalization of youth leaders in the Brown Berets). *See also* Steven W. Bender & Keith Aoki, *Seekin' the Cause: Social Justice Movements and Latcrit Community*, 81 OR. L. REV. 595, 603 (2002) ("Of the many past and current movements for social change grounded in Latina/o communities, perhaps the two most substantial have been the Chicano movement of the 1960s and the farm worker/labor movement of the 1960s and 1970s. Others of note include the ongoing movement for Puerto Rican independence, as well as the 1960s Young Lords political party originating in New York's Puerto Rican community").

151. "District 4 Parents Demand 'Better Education!'" PALANTE Dec. 1972, https://dlib.nyu.edu/palante/books/tamwag_palante000058/#1 (reporting on and encouraging a "school boycott until Local School Board District 4 and the NY Board of Education promises to comply with the necessary demands" to restore teacher and supervisory positions, pre-kindergarten programs, adequate mental health facilities in each school, bilingual programs in each school, and mental health programs").

152. Frederick P. Aguirre et al., *Mendez v. Westminster: A Living History*, 2014 MICH. ST. L. REV. 401, 403 (2014) ("I think it was the first time my father realized the blatant discrimination in Orange County because we had gone to a Mexican school in Santa Ana before we moved to Westminster, and we were told we had to go to that school because of the district lines they had placed. So, we were enrolled in a Mexican school before we moved to Westminster"); *see also* Frederick P. Aguirre, *Mendez v. Westminster School District: How It Affected Brown v. Board of Education*, 4 J. OF HISPANIC HIGHER ED. 321, 330 ("Few people know, however, that the Orange County case of *Mendez v. Westminster School District, et al.*, 64 F.Supp. 544 (S.D.Cal. 1946) and its appellate case of *Westminster v. Mendez,* 161 F.2d. 774 (9th Cir. 1947) provided a key link in the evolutionary chain of school desegregation cases culminating in *Brown v. Board of Education*").

153. *See* Woodhouse, *supra* note 72, at 1052 n.274 ("Most scholars identify *Brown v. Board of Education*, 347 U.S. 483 (1954), as the first Supreme Court case directly recognizing children's substantive rights, and *In re Gault*, 387 U.S. 1 (1967), as the first directly recognizing children's procedural due process rights").

154. David McClintick, *Pupil Power: Disruptions Trouble Sime U.S. High Schools As Youth Ask 'Rights'*, WALL STREET JOURNAL (Nov. 6, 1970) (recounting how the Young Lords supported their peers in organizing across Bronx schools to demand freedom to distribute political literature and to invite parties of different political parties to speak at assemblies).

155. *See generally* Mary Romero, *Brown Is Beautiful*, 39 LAW & SOC'Y REV. 211, 234 (2005) (discussing the origins of the Brown Berets); Johanna Fernandez, THE YOUNG LORDS: A RADICAL HISTORY (2019) (tracing the history of the Young Lords).

as free lunch,[156] community health clinics,[157] ethnic studies,[158] and due process for university protestors.[159] These student movements laid much of the groundwork for the student organizers in *Goss v. Lopez*, who later cemented their predecessors' vision for due process and the opportunity to be heard into constitutional doctrine.

The Supreme Court decided *Goss v. Lopez* in the wake of student uprisings across the Columbus, Ohio school district.[160] In February and March of 1971, students were suspended en masse for any perceived association with student boycotts, sit-ins, and protests for racial justice across the Columbus school district.[161] While Dwight Lopez did not participate in a protest, many other suspended students had been punished for boycotts, sit-ins, and protests that demanded and prefigured an opportunity to be heard on school policies.[162] For example, Marion-Franklin High School suspended students Bill Taylor and Mike Sanborn for blocking hallway doors until school administrators would provide them with the opportunity to be heard about

156. *See* Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, & Mutual Aid,* 12 COLUM. J. RACE & L. 602, 613 (2022) (describing how the "Black Panthers' 'serve the people' programs were so successful and powerful that [FBI Director J. Edgar Hoover]. . .described the Breakfast for Children Program as 'the best and most influential activity [for the Black Panther Party] and, as such . . . potentially the greatest threat to efforts by authorities to neutralize the BPP and destroy what it stands for'" and how the "Young Lords organized free breakfast programs in the South Bronx in the late 1960s"); *See also* Tanious, *supra* note 7, at 1648, n. 42 (citing David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 648 (2004) (arguing that school meal services confer a "legally enforceable individual right" because federal statutes require the government to allocate federal dollars towards school meals).

157. *See* Garcia & Godsoe, *supra* note 156, *at* 613 (2022) (describing how the Young Lords organized free community tuberculosis and lead testing); *see also* Los Angeles Conservancy, *Historic Places in L.A.: El Barrio Free Clinic*, https://www.laconservancy.org/learn/historic-places/el-barrio-free-clinic/ (describing El Barrio Free Clinic as "a successful social welfare initiative implemented by the Brown Berets. . .[that] operated from May 1968 to December 1970 and is one of the Brown Berets' most important accomplishments").

158. Iris Morales, *¸Palante, Siempre Palante! Interview with Richie Perez*, 21 CENTRO J. 142, 156 (2009); *see generally* Fernandez, *supra* note 155, at 211, 218, 231.

159. DEMOCRACY NOW, *Interview with Juan Gonzalez*, at 39:40 (Apr. 23, 2024), https://democracynow.cachefly.net/democracynow/360/dn2024-0423.mp4 (Juan, a former Young Lord, describes how he feels that the procedural due process protections he fought for as a Columbia student demanding an end to the war in Vietnam have been eroded over the last 50 years, resulting in a threat to due process for university students today. Stating "[W]e were fighting at the time against the racism of the university toward Harlem and against the Vietnam War. . . [and] [t]hese students are protesting a genocide that is occurring before the eyes of the entire world and that is being funded by U.S. arms. . .[However] before we were suspended, we were allowed to appear before a tribunal to plead our cause. There was at least the rudiments of due process. Here, there is no due process. The university is already, within 24 hours, saying that the students are suspended, even though there is yet no legal proof that any of these students knowingly participated in illegal actions"); *see also* Emily Baum, *Jewish Students are Bringing their Faith to University Pro-Palestine Protests,* TEEN VOGUE, (Apr. 26, 2024) https://www.teenvogue.com/story/jewish-students-faith-palestine-university-protests ("For more than a week, students at Columbia and neighboring Barnard have occupied the main lawn in tents. They've been arrested, suspended, and evicted from university housing. . .Similar encampments have popped up at dozens of colleges across the US, and hundreds of students have been arrested, some in violent clashes with police").

160. *See Racial Strife Hits Schools*, COLUMBUS EVENING DISPATCH (Feb. 20, 1971) (discussing how "racial conflict" plagued three Columbus high schools alongside a fire, student fights, and protests).

161. Initial complaint, *Lopez v. Williams*, Civil 71-67 (Apr. 1 1971) (filing a complaint against the school district for failing to provide adequate process before suspending and removing students of color from school who alleged that they had not participated in any protests).

162. Gregory S. Jacob, GETTING AROUND BROWN: DESEGREGATION, DEVELOPMENT, AND THE COLUMBUS PUBLIC SCHOOLS, 24 (1998).

their school policy proposals.[163] Another Marion-Franklin student and *Goss* Plaintiff, Tyrone Washington, also led a sit-in, demanding that school administrators "must listen" to students' demands for racial justice and a culturally responsive curriculum because students were "tired of listening to them."[164] During this period, fifty Black students also organized a morning assembly and lunchtime forum to create an opportunity to be heard on issues their district refused to discuss.[165] Given that students could not vote or run for the school board, this process modeled an opportunity to be heard before government entities. In response to the surge of high school student protests across the nation, the United States Education Commissioner, James E. Allen, Jr., urged school officials to heed students' demands, declaring, "Our students. . . are telling us that change is needed in our schools. . .[and those] [c]oncerns and reforms presented by our students are important and warrant careful consideration."[166]

Over the last two decades, immigrant students have resisted threats to their education access and democracy at large. In 2017, for example, immigrant and marginalized students mobilized and won the right to study the "precious knowledge" of their cultures in public schools, free of statutory bans.[167] To resist the erosion of due process protections for undocumented learners, undocumented student leaders have protested the compounded harms of educational deprivation alongside state sanctioned kidnapping, indefinite detention, and militarization.[168] Social movement organization National Immigrant Youth Alliance (NIYA) demanded additional procedural protections for immigrant and undocumented learners and, through direct actions such as Dream Thirty and Trail of Tears, exposed the legislative failures that directly harmed immigrant learners.[169] Recent university student protests

163. Fulton Dep., *supra* note 13, 89:23–26, June 1973.

164. *See* Fulton Dep., *supra* note 13, 95:33–35, June 1973 (testifying that Plaintiff Tyrone Washington led a sit- in where he demanded that the school administrators "must listen to [students]" regarding their policy demands for racial justice and a culturally responsive curriculum, because the students were "tired of listening to [them]").

165. *Racial Strife Hits School*, COLUMBUS EVENING DISPATCH (Feb. 20, 1971) at 19.

166. Eric Wentworth, High Schools Act to Defuse Protest, WASH. POST (Sept. 2, 1969) at 1.

167. *See* Zoe Masters, *After Denial: Imagining with Education Justice Movements*, 25 U. PA. J.L. & SOC. CHANGE 219, 249–52 (2022) (citations omitted) (tracing how student and teacher organizers fought a statewide ban on ethnic studies in 2010, which culminated in "a federal district court [striking] down Arizona's ethnic studies ban as intentionally discriminatory in violation of the Equal Protection clause" a violation of "students' limited First Amendment right to receive information, as noted in *Board of Island Trees v. Pico*, because it was motivated by racial animus rather than being motivated by a legitimate pedagogical purpose"); *see also* M.S., Arce & T. Montaño, *No nos moveran: Chicana/o/x Studies in the movement for Ethnic Studies*, 47 AZTLÁN: A J. OF CHICANO STUD. 121, 121–132 (2022); González v. Douglas, 269 F. Supp. 3d 948, 972 (D. Ariz. 2017) (finding that restrictions on curriculum can violate Equal Protection if state actors implement those restrictions with discriminatory intent).

168. Evelyn Marcelina Rangel-Medina, *Citizenism: Racialized Discrimination by Design*, 104 B.U. L. REV. AT 110 (forthcoming 2024) (discussing how the "largest civil rights mobilization of Latinxs and Asian and Pacific Islanders (APIs) and immigrant communities erupted [in 2006] in response to the Congressional proposal H.R. 4437" which sought to make undocumented immigration a crime").

169. During these actions, undocumented learners have worn caps and gowns and donned signs demanding "education not deportation" as a means of demonstrating to expose the discriminatory absence of procedural protections for undocumented learners in the United States. Jonathan Blitzer, *Dreamers at the Border*,

and responses[170] further reveal how, for multiply marginalized immigrant learners, due process failures extend beyond the classroom. For many, due process dereliction can mean exile, abuse, and death.[171]

As these students continued to resist,[172] federal judges, legal practitioners, and legal scholars have supported their efforts.[173] In 2018, a federal court rebuked the U.S. government in failing to treat undocumented learners in detention facilities with the "same efficiency and accuracy as [their] . . . [m]oney, important documents, and automobiles."[174] By not heeding the warning of present day student movements

THE NEW YORKER (Oct. 3, 2013), https://www.newyorker.com/news/news-desk/dreamers-at-the-border ("In another action. . .N.I.Y.A. "infiltrated" a federal detention center—the group's term for when activists deliberately get themselves detained so that they can document conditions inside and inform other detainees of their rights. Some in the pro-immigrant fold see N.I.Y.A.'s actions, at a delicate time, as too bold"); *see also* Moran, *supra* note 6, at 1273–74 ("In *Plyler*, the Court declared that Texas violated the Equal Protection Clause when it allowed public schools to bar undocumented students or charge them tuition. The opinion did not declare a right to a basic education but instead offered a mélange of reasons for its holding. Some justifications were rooted in property-like entitlements, but others reflected a fraught discourse over immigration by invoking conceptions of the public good as well as norms of fundamental human decency") (citing *Plyler v. Doe*, 457 U.S. 202 (1982)).

170. University law professors have condemned the "procedural irregularity" that resulted in the mass suspension, arrest, and potential deportation of university students. Columbia Faculty Letter, *supra* note 17 (*"*Procedural irregularity, a lack of transparency about the University's decision-making, and the extraordinary involvement of the NYPD all threaten the University's legitimacy within its own community and beyond its gates. We urge the University to conform student discipline to clear and well-established procedures that respect the rule of law").

171. *Texas v. United States,* No.1:18-cv-00068 (S.D. Tex., Sept., 13 2023) https://storage.courtlistener.com/recap/gov.uscourts.txsd.1501682/gov.uscourts.txsd.1501682.728.0.pdf (holding that the Deferred Action for Childhood Arrivals (DACA) program was unlawful, which extended a block on first-time DACA applicants, leaving unclear if "DHS or the Department of Justice [would] take "any immigration, deportation, or criminal action against any DACA recipient, applicant, or any other individual that would otherwise not be taken."); Staff*, 'IMMEDIATELY DEPORT:' Foreign students face deportation threat amid anti-Israel protests,* FIRST POST (Apr. 25, 2024) https://www.firstpost.com/world/immediately-deport-foreign-students-face-deportation-threat-amid-anti-israel-protests-13763428.html; Khaled A. Beyduoin, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in "War on Terror" America*, 104 CAL. LAW REV. 1463, 1483 (2016) (discussing how universities have "endorse[d] the fear, hate, and violence executed by private actors in America" resulting in private violence such as the shooting of three Muslim American students in Chapel Hill in 2015).

172. *Dreams Protest on Capitol Hill on DACA deadline day,* ABC NEWS (Mar. 5, 2018) https://abcnews.go.com/Politics/dreamers-protest-capitol-hill-daca-deadline-day/story?id=53539262#:~:text=The%20protesters%20held%20sit%2Dins,and%2019%20inside%20the%20Capitol (describing how "the protesters held sit-ins at lawmakers' offices. . . [and] chained themselves to one another, closing a nearby street to traffic"); *see also* Blake Ellis et. al, *Handcuffs, assaults, and drugs called 'vitamins': Children allege grave abuse at migrant detention facilities*, CNN NEWS (June 21, 2018) https://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html (reporting a teenager learner from Honduras who reported that government agents assaulted him and pleaded "to be treated as human beings").

173. Columbia Faculty Letter, *supra* note 17 (letter from fifty-four faculty members of Columbia University condemning the mass suspension of over 100 students and the failure of the University to adhere to "established procedures for enforcing campus rules, including content- neutral regulations of speech and assembly and prohibitions of harassment and discrimination.").

174. Ndjuoh MehChu, *supra* note 16 at 147 (citing *Ms. L. v. U.S Immigr. & Customs Enf't* ("ICE"), 310 F. Supp. 3d 1133, 1142 (S.D. Cal. 2018) (order granting plaintiffs' motion for class-wide preliminary injunction) ("Federal district judge was "particularly troubled by the reality that the practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children").

mobilizing at the intersection of immigration status, race, and gender,[175] our democratic institutions risk a continual backslide where the law fails to recognize and extend protections to marginalized learners as full people (or even as property).[176]

III. STUDENTS DEMANDING DUE PROCESS

Although procedural due process should safeguard students from school officials arbitrarily depriving them of "life, liberty, or property,"[177] existing procedural due process frameworks have failed to protect trans/gender expansive students and students of color[178] from dysfunctional legislatures and demagogic elected officials.[179] These students have taken constitutional interpretation into their own hands as a means of resistance. They have asserted individual procedural due process rights to access bathroom facilities, health services, and public libraries, and prefigured more robust processes to secure their participation in substantive decision-making about public school bans. These processes include their own forms of notice and opportunities to be heard. For example, mobilized students have notified their peers of potential deprivations by disseminating regular alerts through Instagram.[180] Further, students have organized forums both in and out of school boards and state legislatures[181] and distributed contraband books when schools seize them without a fair hearing.[182] Like the historic student movements that came before them, marginalized learners have criticized how the law has failed to protect them from unjust

175. In these ways, undocumented learners, particularly those with marginalized identities, live as the miner's canary for today's marginalized learners, foreshadowing the horrors that young people will relive without procedural protections and recognition of their full personhood. *See generally* Miner's Canary, *supra* note 24 and accompanying text; *See* Sarah Kim, *Forgotten: Disabled and Detained at the Border,* FORBES J. (June 28, 2019), https://www.forbes.com/sites/sarahkim/2019/06/28/immigrants-with-disabilities/.

176. *See* MehChu, *supra* note 16, at 147 (discussing the comment of federal district judge Dana Sabraw who described the government's accounting for migrant children as worse than their accounting for vehicles).

177. *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 637–38 (1943) (asserting that public school officials are in fact government officials and thus must adhere to the constitutional limits on their actions); *see also* Tanious, *supra* note 7, at 1643.

178. *See* Students Engaged Texas, (@studentsengagedtexas), INSTAGRAM, https://www.instagram.com/p/C03BjyDMnyJ/ (last visited Oct. 10, 2024) (testifying about the harm that state legislatures have done to public school students through book bans).

179. *See* Balkin, *supra* note 40, at 56 (situating Trump as a demagogue within political science literature and discussing how legislatures today experience constitutional rot when they fail to meet the needs of the republic that they are charged to represent).

180. *See* Students Engaged Texas, (@studentsengagedtexas) INSTAGRAM, https://www.instagram.com/p/CyJpSoKuYHl/ (last visited Oct. 10, 2024) (SEAT Instagram alert about a "special session on education" called by Gov. Abbot without proper notice or information to students. SEAT wrote "Gov. Abbott has called a #txlege special session on education, specifically with a legislative agenda on "parental rights" vouchers. . .The "parental rights" movement for vouchers aligns with the discriminatory and bigoted rhetoric driving the students' rights crisis in Texas"). *See also* Students Engaged Texas, (@studentsengagedtexas) INSTAGRAM, https://www.instagram.com/p/C_gL6UYJXqZ/ (last visited Oct. 10, 2024) (informing followers that "The Texas State Board of Education is considering a new curriculum for K-5 English/Language Arts that infuses Bible teachings into public school lessons").

181. *Our Work,* SEAT https://www.studentsengaged.org/our-work (last visited Mar. 24, 2024) ("SEAT addressed the Katy ISD board and spoke on KPRC on book policy").

182. *Id.* ("SEAT protested library closures in Houston ISD with a read-in and testimony" as well as a mutual aid banned book distribution).

interference and arbitrary deprivation. Their arguments are particularly salient within discourse of educational deprivation, as courts and policy makers have historically recognized a broad public interest in decision-making around public education.[183] These criticisms exemplify the tension between constitutional promise and material due process limits for marginalized people in the face of right-wing authoritarianism. This Section demonstrates how student visions for due process—"the least frozen concept of our law"—should inspire constitutional law scholars to use "greater creativity"[184] to ensure that procedural protections match the "powerful social standards" of a "progressive society."[185]

A. Situating Schoolhouse Property within the Due Process Revolution

When courts find a statutory entitlement under the procedural due process doctrine, the Constitution promises some form of notice and opportunity to be heard before taking that entitlement.[186] The courts use a two-step process to assess procedural due process claims. First, the court must determine whether a protected property interest exists.[187] Second, if such an interest exists, the courts then circumscribe the required procedures to constitutionally deprive an individual of that interest.[188] This Section demonstrates how procedural due process jurisprudence aligns with the student argument that the state confers entitlements to learning facilities, health services, and libraries upon groups of marginalized students, and owes them due process before depriving them over those resources vis-à-vis anti-trans bathroom policies and book bans.

In the uncertain area of youth due process rights, educational "[p]roperty interests have considerable untapped and underexplored potential for sourcing procedural—and substantive—due process rights in education."[189] In addition to the protections

183. *See Kramer v. Union Free School District*, 395 U.S. 621 (1969) (holding that a provision of New York Education Law that permitted only property owners or lessees of taxable real property in a school district and/or parents of children enrolled in the public schools of that district to vote in school district elections violated the Equal Protection Clause because such classifications were not sufficiently narrowly tailored to define the interest of limited school election to those "primarily interested in school affairs," as the listed distinctions disenfranchised large groups of voters with a cognizable interest in school affairs and enfranchised others with no legitimate interest in such elections).

184. Rana, *supra* note 41, at 72 (arguing that "the present moment—marked by institutional dysfunction and popular discontent—speaks to the need for scholars to approach their work with far greater creativity than simply adding new cases at the margins" and suggesting a reframing of constitutional law as "a central repository for the country's broader cultural memory and consciousness about its legal-political processes and institutions").

185. Tanious, *supra* note 7, at 1647, n.39 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)).

186. *See id.* at 2022 (citations omitted) (characterizing *Board of Regents v. Roth*, writing that the Court "explicitly approved *Goldberg*'s implication that property interests warranting procedural protections are neither rooted in common-law property concepts nor set in 'rigid or formalistic' categories. Rather, courts must [determine] whether a government-conferred benefit constitutes a property interest more flexibly, in light of changing 'social and economic fact'").

187. *Id.* at 1644 (describing that to claim a property interest in a state welfare benefit, "a person must 'have a legitimate claim of entitlement to it'. . .[and those claims] arise from subconstitutional sources of positive law—such as federal, state, or local law or regulation, or express or implied government contracts— that create reasonable expectations of specific benefits").

188. *Id.*

189. Shaw, *supra* note 5, at 1206.

Goss promised, both *Goldberg v. Kelly* and *Board of Regents v. Roth* provide a jurisprudential schema to protect marginalized students' statutory entitlements to public education. In *Goldberg v. Kelly*, the Court classified welfare benefits as a constitutionally protected statutory entitlement and property interest requiring due process.[190] The Court held that the state owes welfare recipients an evidentiary hearing before terminating benefits from the Aid to Families with Dependent Children (AFDC) program.[191] *Goldberg* expanded the constitutional breadth of procedural due process to include government benefits as a bona fide property interest[192] "rather than as pure largesse or privilege that, because given out of generosity rather than obligation, created no vested rights."[193] As Michael Herz summarized, *Goldberg*'s "necessary premise" centered on the idea that government benefits are property and "a matter of 'statutory entitlement'" for those suffering a "brutal need," where termination of such would constitute a "grievous loss."[194] The Court clarified these parameters in *Kentucky Department of Corrections v. Thompson* by holding that a statute must have "'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion. . ." in order to confer a protected interest to an individual.[195] The jurisprudential framework in *Goss v. Lopez* situates educational entitlements within this procedural due process framework. In *Goss*, the Court reasoned that resident youth gain property entitlements when states pass laws that guarantee a free public education or compel students to attend school.[196] The Court also found that school officials deprive public school students of a property interest when they suspend students for ten days or more without procedural due process.[197] While the Court left the specific procedures unclear, it held that resident youth are entitled to a "rudimentary" process to challenge their exclusion from school.[198] This process must include "notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side. . ."[199] The Court suggested that a school official should "informally discuss the alleged misconduct with the student minutes after it has occurred. . .[in terms of] what [they are] accused of doing and. . .the basis of the accusation." To give the

190. *Id.* at 1657 (In *Goldberg v. Kelly*, [t]he Court. . .recogniz[ed] a property interest in welfare benefits for the first time, replaced the right/privilege distinction with the more expansive conception of property advocated by Reich—that government entitlements granted by statute are a form of property that, like the "old property," places limits on government action under the Due Process Clause").

191. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

192. *See* LaToya Baldwin Clark, *Whose Child is This? Education, Property and Belonging*, 123 COLUM. L. REV. 1201 (2023) (arguing that belonging within a school district requires being recognized as a bona fide owner of property in that district) [hereinafter Clark, Whose Child is This?].

193. Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1672 (1993).

194. *Id.* at 1672 n.10 (describing how the use of the phrase "grievous loss "began with Justice Frankfurter's concurrence in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951)).

195. *Id.* at 180, at 1674 (citing *Board of Regents v. Roth*) ("[T]o give rise to a protected liberty interest, the statute must act to limit meaningfully the discretion of the decisionmakers").

196. *Goss v. Lopez*, 419 U.S. 565, 572 (1975).

197. *Id.* at 576.

198. *Id.* at 581.

199. *Id.* at 582-583.

student "an opportunity to explain [their] version of the facts at this discussion, the student [must] first be told what [they are] accused of doing and. . .the basis of the accusation" before the school can deprive them of their property.[200]

One year later in *Mathews v. Eldridge*, the Supreme Court created a more nuanced three-step balancing test to assess the constitutionality of procedures provided to people deprived of property interests in government largess.[201] First, the Court "weighs heavily" the plaintiff's private property interest.[202] Second, the Court weighs the risk of whether the government will erroneously deprive the plaintiff of that property interest absent the procedures of notice and opportunity to be heard.[203] Courts have acknowledged that questions of whether an entitlement vests in a person and which process protects that entitlement "is sensitive to the facts and circumstances."[204] Lastly, the Court assesses the burden of requiring the government to add additional procedures.[205]

Recently, student movements fighting book and trans bans have shed new light on the potential for procedural due process protections to stop the onslaught of public education bans. While *Goss* did not address specific entitlements, states have passed thousands of laws over the last fifty years guaranteeing new public education entitlements such as free lunch, health services, and public school library funding.[206] While states generally do not have a statutory entitlement in a particular type of resource, total deprivation of a statutorily guaranteed benefit can materially impact a student's education and, without due process, can violate the Constitution.[207] Focusing on marginalized learners' educational property interests provides an innovative and responsive legal tool for practitioners to support student movements defending their statutorily guaranteed school property from bans. While courts have found that

200. *Id.*

201. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citations omitted) ("'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . .due process is flexible and calls for such procedural protections as the particular situation demands"). The holding in *Goss v. Lopez* did not include this more nuanced balancing test because the Court decided *Goss v. Lopez* one year before the *Mathews v. Eldridge* decision.

202. Tanious, *supra* note 7, at 1647 (citing Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 89 (1982)) ("The private interest weighs heavily in this analysis: the formality of the process required corresponds to the court's perception of the significance of the implicated property interest. The more consequential the property interest, the more likely courts are to mandate more formal, trial-like procedures"); *see also Mathews,* 424 U.S. at 334–35.

203. *Mathews*, 424 U.S. at 334–35.

204. Tanious, *supra* note 7, at 1646 (citing Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1119, 1127–28 (2019)).

205. *Id.* at 1647 ("Many commentators, addressing only the second step of the due-process inquiry, have called for additional procedures that might better protect students from unjust exclusion from school, such as mediation or representation at hearings") (should you not "Id." a previous cite with a parenthetical?); *see also* JP Nance*, Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 318 (2016) (discussing the "alarming" trends of "negative disciplinary and achievement" coupled with "access to fewer resources" for youth of color across the United States and across grade levels).

206. Tanious, *supra* note 7, at 1648–49.

207. *Goss v. Lopez*, 419 U.S. 565, 576 (describing that when states entitle students to education under state law, "total[ly] exclu[ding] [students] from the educational process for more than a trivial period," requires due process).

"closing a neighborhood school is not, by itself, an actionable harm," they found that total deprivation of an educational entitlement which "somehow harm[s] students' academic performance in the process could be actionable."[208] Since "state laws and regulations vest in students' property interests protected by the Due Process Clause," students reasonably expect that they will receive those benefits,[209] including school facilities, health services, and libraries.

B. Wielding the Due Process Revolution to Block Bans and Defend Democracy

Youth reasonably expect to use a bathroom that reflects their gender, receive required healthcare services for a condition, and find accurate information for school assignments in public libraries. Yet, such expectations are not met when a hostile legislature or school board has removed these services and resources without notice or students' opportunity to be heard.[210] This Section demonstrates how state bans often violate due process' constitutional promise. First, bans disregard existing statutory entitlements that protect school facilities, health services, and libraries. Second, bans materially deprive students of resources that meet a grievous need, and the exclusionary processes that are used risk erroneous deprivation. This Article does not assess the administrative burden, as the government's interests are beyond this project's scope.

1. Entitlements For Trans/Gender Expansive Youth in School Facilities

This Section outlines how states provide a "statutory entitlement" to some public school students to have bathroom or locker room access.[211] Further, this Section highlights the weight of trans/gender expansive students' private interest in bathrooms and facilities by exploring the "brutal need" to have bathroom and changing room access.[212] The analysis concludes with a discussion of the likelihood that state legislatures will erroneously deprive students of that entitlement, especially when they lack the right to vote, run for office, or serve on juries.

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208. Matthew Patrick Shaw, *Creating the Urban Educational Desert Through School Closures and Dignity Taking*, 92 CHI.-KENT L. REV. 1087, 1093 (2018); *see also* Tanious, *supra* note 7, at 1684 (finding "the majority of states have enacted laws or promulgated regulations that require schools to provide at least some students with particular benefits: government-subsidized meals and healthcare").

209. Tanious, *supra* note 7, at 1684 (citation omitted).

210. State and federal courts have largely agreed that key inputs for adequate public school education include adequate facilities, instrumentalities of learning, and up to date curricula. *See* Abigail Mahoney, *The Williams Complaint and the Role of the Learning Environment in Education Adequacy: "You Count; Do Well,"* 62 B.C. L. REV. 659, 675 n.90 (2021) (citing *First Amended Complaint from Williams v. State*, No. 312236 (Cal. Super. Ct. Aug. 21, 2002), which "identif[ied] ten basic 'educational necessities,'" including current textbooks, a fully certified permanent teacher, safe classrooms, "library and internet access," and accessible bathrooms"); *see also Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 332 (N.Y. 2003) ("To determine whether New York City schools in fact deliver the opportunity for a sound basic education, the trial court took evidence on the 'inputs' children receive—teaching, facilities and instrumentalities of learning—and their resulting 'outputs,' such as test results and graduation and dropout rates.").

211. *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970) (emphasizing that constitutional protections apply to statutory entitlements, such as welfare).

212. *Id.* at 261 (citing *Kelly v. Wyman*, 294 F.Supp. 893, 899, 900 (S.D.N.Y. 1968)); Herz, *supra* note 193, at 1672.

a. Statutory entitlement?

Like their cisgender, heteronormative peers, trans/gender expansive youth hold statutory entitlements to use public school restrooms. All states that grant "legitimate claims of entitlement to a public education. . .[for] *all* residents of [school] age"[213] extend that entitlement to "sanitary facilities. . .available to building occupants at all times of occupancy."[214] Like state laws that require schools to provide students with free lunch, these laws extend a property interest to resident public school students to access public school sanitation facilities.[215]

b. A brutal need?

Medical and psychological professionals have provided hard evidence that bathroom bans cause real physical harm and "grievous loss"[216] to trans/gender expansive youth.[217] Denying trans/gender expansive students access to a bathroom that aligns with their gender identity threatens their safety and well-being, exposing them to high stigmatization and discrimination risks,[218] and can cause dehydration, disordered eating,[219] genital infections,[220] and constipation.[221] Mobilized trans/gender expansive and youth of color have discussed how they "subconsciously started eating and drinking less so that [they] wouldn't have to go to the bathroom."[222] Further,

213. *Goss v. Lopez*, 419 U.S. 565, 573 (1975).

214. New York State Education Department, *SED Toilet Room Policy*, https://www.p12.nysed.gov/facplan/policy/Sanitarylaw.html (last visited Mar. 23, 2024) ("The occupied portion of any school building shall always comply with the minimum requirements necessary to maintain a certificate of occupancy. . .[such as] potable water. . .boys and girls toilet rooms with flush toilets.").

215. 8 N.Y. Comp. Codes R. & Regs. tit 8, § 125.2 (2024) (last accessed Mar. 1, 2024) ("(c) Sanitary facilities. (1) There shall be at least one flush toilet (open seat), stationary washbowl and a low mirror for each group of 15 children. If these facilities are not child-size, low platforms or steps shall be available. (2) Separate toilet facilities shall be provided for staff and employees in schools that provide a lunch program for children"); NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, 16–17, 225 (2016) [hereinafter NCTE 2015 SURVEY].

216. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'") (citing *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

217. NCTE 2015 SURVEY, *supra* note 215, at 225 (finding that "59% [of transgender people reported] avoid[ing] bathrooms in the last year because they feared confrontations in public restrooms. . .12% report that they have been harassed, attacked, or sexually assaulted in a bathroom in the last year; 32% have avoided drinking or eating so that they did not need to use the restroom in the last year; 24% report that someone told them they were using the wrong restroom or questioned their presence in the restroom in the last year; 9% report being denied access to the appropriate restroom in the last year; 8% report having a kidney or urinary tract infection, or another kidney-related medical issue, from avoiding restrooms in the last year.").

218. *Id.*

219. Julie Compton, *Trans Students Face 'Detrimental' Health Effects Without Fed Protection*, NBC NEWS (Feb. 25, 2017) https://www.nbcnews.com/feature/nbc-out/without-federal-protections-trans-students-face-potential-health-crisis-n725156 ("'I definitely subconsciously started eating and drinking less so that I wouldn't have to go to the bathroom,' said Dolan-Sandrino, who was in the 8th grade at the time. She said she was permitted to use the nurse's bathroom in a separate building across a [courtyard]. But walking there took a long time, which angered her teachers, she said.").

220. *Id.*

221. *Id.*

222. *Id.*

medical professionals have highlighted how depriving bathroom access to trans/gender expansive youth particularly harms youth who menstruate and decide to "sit in blood all day" instead of enduring gender dysphoria and harassment in the cisgender girls bathroom.[223] These pediatric illnesses should pass muster for the constitutional definition of "grievous loss," as using the bathroom is "essential in the pursuit of a livelihood."[224] Withholding students' access "adjudicates important rights" by regulating their nutrition and bowel movements, both of which have significant implications for educational performance and participation.[225]

Further, forcing trans/gender expansive youth who receive a gender dysphoria diagnosis to use a bathroom that does not align with their gender identity denies a "brutal need," as this exclusion only exacerbates medicalized distress from societal misgendering.[226] For those who experience gender dysphoria, the brutality of their need for bathroom access emerges from triggered responses to being forced to use the bathrooms of binary genders with which they do not align. Anxiety, depression, and suicidal ideation can occur as a result of a nonresponsive environment to gender dysphoria.[227] Further, the brutality of the need is particular to schools, where school aged children spend the most time on a daily basis. Unlike most conditions, gender dysphoria does not become more treatable with age because it is most severe during pubescent years.[228] While conservative lawmakers claim that access to the appropriate facilities encourages gender dysphoria and sexual deviance, medical practitioners have found the opposite.[229]

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223. *Id.* (citations omitted) ("Restricting access to bathrooms can be particularly harmful to transgender boys who are experiencing menstruation. . .'When you add on top of the gender dysphoria that can be associated with menstruation and then you think about a trans boy who is faced with having to go to either the girls' room or a teachers' bathroom that is far away, or has to walk past all the teachers who maybe are not supporting him every time he just wants to go to the bathroom, [he has to] decide is he going to take care of his menstrual needs, or sit in his blood all day because he doesn't want to go to the bathroom'").

224. *Bell v. Burson*, 402 U.S. 535, 539 (1971) (finding that a driver's license "'essential in the pursuit of a livelihood'" and that . . . "licenses are not to be taken away without [due process].").

225. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)); *see also Goss v. Lopez*, 419 U.S. 565, 585 (1975) (explaining how 10 days of exclusion from the "educational process" constitutes a enough of a deprivation requiring procedural due process); Compton, *supra* note 219 (describing how a transgender youth "got accustomed to holding her bladder for hours at a time and she began to perform 'terribly' in her schoolwork.").

226. STANDARDS OF CARE, WORLD PROFESSIONAL ASSOC. FOR TRANSGENDER HEALTH 5 (7th ed. 2011) [hereinafter STANDARDS OF CARE] ("Some people experience gender dysphoria at such a level that the distress meets criteria for a formal diagnosis that might be classified as a mental disorder. Such a diagnosis is not a license for stigmatization or for the deprivation of civil and human rights. A disorder is a description of something with which a person might struggle, not a description of the person or the person's identity."); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (citing *Kelly v. Wyman*, 294 F. Supp. 893, 899, 900 (1968))("Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable unless overwhelming considerations justify it.").

227. Tracy Becerra-Culqui et al., *Mental Health of Transgender and Gender Nonconforming Youth Compared with Their Peers*, 141 PEDIATRICS 141 (2018); Stephen M. Rosenthal, *Transgender Youth: Current Concepts*, 21 ANNALS PEDIATRIC ENDOCRINOLOGY & METABOLISM 186 (2016) (discussing how "the emergence or worsening of gender dysphoria with onset of puberty is thought to have significant diagnostic value in the determination of being transgender").

228. *See* Rosenthal *supra* note 227 .

229. *See* Becerra-Culqui et al., *supra* note 227 (concluding that trans/gender expansive youth require educational and social interventions that affirm their gender identity to support mental health).

Transness and gender expansiveness are not synonymous with gender dysphoria, and youth do not need a medical diagnosis to suffer a brutal need when they are banned from their bathrooms due to their gender non-conformity.[230] Trans youth activist Sage Dolan-Sandrino explains how restricting her bathroom use due to her gender identity "... makes [her] feel unimportant ... angry ... invisible."[231] Doctors explain how restricting bathroom use "reinforce[s] what we call internalized transphobia ... and that's going to lead to things like depression and anxiety, and that's where we get higher rates of suicide."[232] While lawmakers make pretextual arguments that trans/gender expansive bathrooms increase the likelihood of sexual assault, research shows the opposite. Gender inclusive bathrooms and changing rooms do not increase sexual assault rates.[233] On the contrary, bathroom restrictions and gender segregated bathrooms increase sexual assault rates for young people.[234]

c. Likelihood of erroneous deprivation?

There is a strong likelihood of erroneous deprivation as the trans/gender expansive youth impacted by these policies have no right to vote, run for office, or serve in other lawmaking roles where they could correct such due process errors. Further, school officials cannot accurately or appropriately identify students' gender, rendering their enforcement of restrictive bathroom policies inaccurate and harmful.[235]

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230. STANDARDS OF CARE, *supra* note 226, at 4 ("urging the de-psychopathologization of gender nonconformity worldwide" and a recognition that being "transsexual, transgender, or gender non-conforming" is a matter of diversity, not pathology).

231. Compton, *supra* note 219 (quoting trans student activist Grace Dolan-Sandrino at 16 years old stating "[o]bviously, my education and my life don't matter to [the Trump administration], because they don't believe that I should be able to just use the bathroom.").

232. *Id.* ("Medically, it's important for kids of all genders to be able to make their own decisions about bathrooms" because "[transgender youth] are going to take opinions that people have about transgender people and incorporate them into the thoughts that they have about themselves, and that's going to lead to things like depression and anxiety, and that's where we get higher rates of suicide."); *see also* Kim Chandler, *Transgender Kids Fear Alabama Laws Targeting Medicine, Bathrooms*, PBS NEWS HOUR (Apr. 8, 2022) https://www.pbs.org/newshour/nation/transgender-kids-fear-alabama-laws-targeting-medicine-bathrooms.

233. Amira Hasenbush, Andrew Flores, & Jody Herman, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEX RES SOC POLICY 70 (2019) ("This study finds that the passage of such laws is not related to the number or frequency of criminal incidents in these spaces. Additionally, the study finds that reports of privacy and safety violations in public restrooms, locker rooms, and changing rooms are exceedingly rare. This study provides evidence that fears of increased safety and privacy violations as a result of nondiscrimination laws are not empirically grounded.").

234. *Transgender teens with restricted bathroom access at higher risk of sexual assault,* HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH (2019) https://www.hsph.harvard.edu/news/hsph-in-the-news/transgender-teens-restricted-bathroom-access-sexual-assault/ ("Researchers looked at data from a survey of nearly 3,700 U.S. teens aged 13-17. The study found that 36% of transgender or gender-nonbinary students with restricted bathroom or locker room access reported being sexually assaulted in the last 12 months, according to a May 6, 2019, CNN article. Of all students surveyed, 1 out of every 4, or 25.9%, reported being a victim of sexual assault in the past year.").

235. Riittakerttu Kaltiala-Heino et al., *Gender dysphoria in adolescence: current perspectives*, PUBMED CENTRAL, (Mar. 2, 2018) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5841333/.

2. Entitlements to Gender Affirming School Based Health Services

The following Section outlines how states provide a "statutory entitlement"[236] to public school health-based services that are now forbidden under trans bans. Further, this Section highlights the "brutal need" for trans/gender expansive youth to have access to gender-affirming health services[237] and the likelihood that state legislatures will erroneously deprive students of that entitlement.

a. Statutory entitlement?

School health services include "the procedures carried out by physicians, nurses, dentists, teachers, and others to appraise, protect, and promote the health of students and school personnel."[238] These services emerge from statutory entitlements, and "[t]housands of public schools across the country now *require* comprehensive health appraisals" and psychological examinations under law.[239] When these laws and regulations appropriate funds to school health services, they entitle specific student groups to unique property interests that the *Goss* Court did not imagine or articulate in 1975 when considering the scope of student property interests.[240] In addition to state statutes, regional school policies give students the "reasonable expectation" that they will receive a particular resource in school.[241]

Low-income youth in public schools have an even stronger expectation that they will receive benefits under the federal Individuals with Disabilities Education Act (IDEA).[242] Under IDEA, "[a] school district has an affirmative obligation to 'identif [y], locate[,] and evaluate[,]' a student suspected of having a disability to determine if

236. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (Holding constitutional protections extend to statutory entitlements, including welfare.).

237. *See Goldberg*, 397 U.S. at 261; *see also* Herz, *supra* note 193, at 1672.

238. Tanious, *supra* note 7, at 1698–99 (citing Diane Allensworth, Elaine Lawson, Lois Nicholson, & James Wyche, *Schools & Health: Our Nation's Investment*, NAT. LIBRARY OF MEDICINE, (1997) https://pubmed.ncbi.nlm.nih.gov/25121262/ [hereinafter Allensworth et al.]

239. Tanious, *supra* note 7, at 1699; *see also* Allensworth at al., supra note 238, at 48 n.4; FLA. STAT. § 1006.04(1)(a-c) (2021) (effective 2018) (Schools constitute one part of the state's "'multiagency network' that supports students in each school district. . .'in joint planning with fiscal agents of children's mental health funds, including the expansion of school-based mental health services, transition services, and integrated education and treatment programs."); TEX. EDUC. CODE ANN. § 38.351-0591 (effective 2021) ("school districts must select programs to support students' mental health and emotional wellbeing" and "[t]he state education agency must also develop guidelines for school districts regarding "partnering with a local mental health authority and with community or other private mental health services providers . . . to increase student access to mental health services.").

240. *See* Tanious, *supra* note 7, at 1683.

241. *Id.* at 1683–84.

242. IDEA entitles students with disabilities to receive a Free Appropriate Public Education that is responsive to their individual needs. 20 U.S.C.A. § 1412(a)(1)(A) (West); U.S. DEP'T OF EDUC., OFF. FOR C.R., FREE APPROPRIATE PUBLIC EDUCATION FOR STUDENTS WITH DISABILITIES: REQUIREMENTS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 (1999) (revised 2010, 2023) (Title II of the Americans with Disabilities Act of 1990 prohibits state and local governments from discriminating on the basis of disability. ED enforces Title II in public elementary and secondary education systems and institutions, public institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and public libraries. The requirements regarding the provisions of a free appropriate public education (FAPE), specifically described in the Section 504 regulations, are incorporated in the general non-discrimination provisions of the Title II regulation. Because Title II does not change the

they qualify for mandated specialized services."[243] Gender expansiveness itself is *not* a medical disability,[244] and treating it as such is a form of harmful stigmatization of youth who challenge the gender binary.[245] However, gender dysphoria, which could arise for youth with or without support services, is a recognized disability and can be used strategically to defend trans/gender expansive people's access to basic resources.[246]

b. A brutal need?

Youth experiencing dysphoria have a "brutal need" for health services. Medical evidence "demonstrates that gender dysphoria derives from an uncommon interaction of the endocrine and neurological systems, which results in a person being born with sex characteristics that are inconsistent with the person's gender identity."[247] In 2015, the U.S. Department of Justice used this evidence to conclude that "gender dysphoria is a protected disability under federal disability rights laws."[248] In 2022, the Fourth Circuit Court of Appeals affirmed this distinction in *Williams v. Kincaid* and held that individuals with gender dysphoria may be protected under the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973.[249] Thus,

requirements of FAPE, this pamphlet refers only to Section 504.) (citing Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131–12134).

243. Fanna Gamal, *The Private Life of Education*, 75 STAN. L. REV. 1315, 1349 n.188 (2023) (quoting 20 U.S.C. § 1412(a)(3)(A)).

244. *See* 20 U.S.C. § 1401(3)(A) (defining "a child with a disability" as a young person who has one of the following disabilities: "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities."). *See also* Kevin Barry & Jennifer Levi, *Blatt v. Cabela's Retail, Inc. and a New Path for Transgender Rights*, 127 YALE L.J.F. 373, 386 (2017) ("Transgender identity is not a medical condition. Gender dysphoria, on the other hand, is a medical condition. . .").

245. Critical trans resistance scholar, Dean Spade, discusses the danger of using the law in ways that cement binaries and cause more harm to multiply marginalized trans people. Describing trans youth's needs only in terms of medical interventions can cement stereotypes that transgender identity is a medical condition. *See* SPADE, *supra* note 30, at xiv ("The most marginalized trans people experience more extreme vulnerability, in part because more aspects of their lives are directly controlled by legal and administrative systems of domination. . .that employ rigid gender binaries."). *See also* Jessica Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 906–08 (2019) (explaining that while some courts have recognized gender dysphoria as a disability because it "substantially limits [their] major life activities," trans/gender expansive youth and advocates may not be willing to make this argument because it further marginalizes trans people by "pathologiz [ing] transgender identity.").

246. *See Williams v. Kincaid*, 45 F.4th 759, 769 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2414 (2023) (holding that Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 can protect people diagnosed with gender dysphoria because it does not fall under the "gender identify disorder" exclusion); *see also* Kevin Barry & Jennifer L. Levi, *Embracing the ADA: Transgender People and Disability Rights*, HARV. L. REV. BLOG (Feb. 22, 2021).

247. Barry & Levi, *supra* note 246 ("For lawyers who represent transgender people, and doctors who treat transgender patients, the symptoms are familiar. "[A]s a young transgender boy described to his parents, a comment relayed to their counsel . . . 'I just don't feel like getting out of bed knowing wherever I go people don't see the me I am in my heart.'"); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (citing *Kelly v. Wyman*, 294 F. Supp. 893, 899, 900 (1968))("Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable unless overwhelming considerations justify it.").

248. *Id.*

249. *Id.*

while gender expansiveness itself is not a disability, a gender dysphoria diagnosis entitles trans/gender expansive youth to critical medical treatments.[250] In fact, research has found that failure to support trans/gender expansive youth to explore and express their identity can lead to increased anxiety and depression levels, compounding gender dysphoria, and heightening need.[251]

Depriving trans youth of access to these crucial health services can contribute to a higher likelihood of suicide, a deprivation that "arguably constitutes a far more grievous injury to students than the mere academic loss that the *Goss* Court anticipated."[252] Further, there is clear medical evidence that health disparities inhibit learning and academic performance, resulting in the "grievous injury" of academic loss identified in *Goss*.[253]

c. Likelihood of erroneous deprivation?

Given the complete denial that hostile state legislatures profess for transgender people's existence, coupled with the unique gender identity of trans/gender expansive youth, erroneous deprivation is all but guaranteed. In 2012, The Human Rights Campaign surveyed more than 10,000 lesbian, gay, bisexual, transgender, and queer youth across the United States. The term "gender expansive" emerged from their research to describe experiences of youth who "did not identify with the provided gender roles but were otherwise not identified with one gender narrative or experience."[254] Trans/gender expansive youth risk serious erroneous deprivation as legislators lack the political will and awareness to recognize the range of gender expansive identities and the severe health impacts their words and inactions could have on these young people.[255] As a result, trans/gender expansive youth lose access to life-saving mental health services without notice, due process, or voting rights.[256] Instead, they must endure these anti-democratic restrictions and try to survive as their elected officials' "favorite objects of political attack."[257]

250. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 511–14 (5th ed. 2022) ("The DSM-5-TR defines gender dysphoria in adolescents and adults as a marked incongruence between one's experienced/expressed gender and their assigned gender, lasting at least 6 months, as manifested by at least two" of a list of experiences.).

251. Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 173 PEDIATRICS e20153223 (2016) ("Transgender children who have socially transitioned, that is, who identify as the gender "opposite" their natal sex and are supported to live openly as that gender. . .have notably lower rates of internalizing psychopathology than previously reported among children with GID living as their natal sex").

252. Tanious, *supra* note 7, at 1683. *See* Rokia Hassanein, *New Study Reveals Shocking Rates of Attempted Suicide Among Trans Adolescents*, HUM. RTS CAMPAIGN (Sept. 12, 2018), https://www.hrc.org/news/new-study-reveals-shocking-rates-of-attempted-suicide-among-trans-adolescen (documenting the higher likelihood of suicide).

253. Olson, *supra* note 251; *see also Goss*, 419 U.S. at 575–576.

254. *Resources on Gender-Expansive Children and Youth*, HUM. RTS CAMPAIGN, https://www.hrc.org/resources/resources-on-gender-expansive-children-and-youth (last visited Aug. 11, 2024).

255. *Id.*

256. *See generally* Olson, *supra* note 251.

257. Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1505 (2023).

3. Entitlements for Multiply Marginalized Youth in School Libraries

In solidarity with (SEAT) organizers who inspired this Article, this final Section argues that procedural due process attaches to public school libraries by applying the three factor test in *Goss*. First, this Section argues that students have a statutory entitlement to school libraries in districts that have allocated Title I budgets to fund libraries.[258] This Section also argues that when a legislature passes a deluge of bans resulting in complete closure of a public school library, that closure causes a "grievous loss"[259] for multiply marginalized low-income youth who suffer a "brutal" need for public library access.[260]

a. Statutory entitlement?

While public school students do not enjoy due process protections "in the *individual* components of education," federal courts have found that "the claim that a public school closure might somehow harm students' academic performance in the process could be actionable."[261] Thus, SEAT's assertion that banned books constitute a procedural due process violation may be cognizable in districts where government funds are allocated, creating a reasonable expectation for marginalized youth who depend on a school library.[262]

b. A brutal need?

Title I of the federal "Every Student Succeeds Act" provides funds so that students may receive "significant opportunity to . . .a fair, equitable, and high-quality education, and to close educational achievement gaps."[263] Under Title I, state and local educational agencies must publish a plan describing how they will use those funds. While not required, local education agencies may allocate district funds "to assist schools in developing effective school library programs to provide students an opportunity to develop digital literacy skills and improve academic achievement."[264] Once

258. *See* Every Student Succeeds Act, Pub. L. No. 114-95, Title I, § 1001, 129 Stat. 1814 (2015) (codified as amended at 20 U.S.C. §6301) (providing the statement of purpose for Title I); *see also Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (noting that students are entitled to certain benefits).

259. *Goldberg,* 397 U.S. at 262–63; *see also* Herz, s*upra* note 193, at 1672.

260. Herz, s*upra* note 193 at 1672 (citing *Goldberg*, 397 U.S. at 261).

261. Shaw, *supra* note 208, at 1092–93.

262. *Texas county plans to close entire library system rather than un-ban books*, NBC NEWS (Apr. 12, 2023), https://www.nbcnews.com/now/video/texas-county-plans-to-close-entire-library-system-rather-than-un-ban-books-170083909796 (describing how "Llano County, Texas, is threatening to shut down its entire public library system rather than bring back banned books after a judge ordered them to do so."); Hannah Natanson, *School librarians face a new penalty in the banned-book wars: Prison*, WASH. POST. (May 18, 2023), https://www.washingtonpost.com/education/2023/05/18/school-librarians-jailed-banned-books/#:~:text=Librarians%20could%20face%20years%20of,of%20school%20and%20library%20personnel ("Librarians could face years of imprisonment and tens of thousands in fines for providing sexually explicit, obscene or "harmful" books to children under new state laws that permit criminal prosecution of school and library personnel."); Kelly Weill, *Book Banners Are Now Trying To Close Public Libraries*, THE DAILY BEAST (Apr. 15, 2023), https://www.thedailybeast.com/book-banners-are-now-trying-to-close-public-libraries; Tovia Smith, *Library funding becomes the 'nuclear option' as the battle over books escalates*, NPR (May 4, 2023), https://www.npr.org/2023/05/04/1173274834/book-bans-library-funding-missouri-texas-ashcroft.

263. 20 U.S.C. §6301.

264. 20 U.S.C. §6312.

a local school or education authority allocates Title I funds to school libraries, authorities "*must* ensure that the schoolwide [district] receives all the local or State funds to which it is entitled for the purpose of purchasing library books."[265] So, while districts *may* initially have discretionary power to allocate funds to school libraries, once libraries and "library programs" are assigned that allocation, all of those funds *must* be used for school library operations.[266] In other words, when a local education agency allocates library funds in their Title I spending plan, they vest a property interest in the low-income students for whom they received and allocated those funds.

In *Plyler v. Doe*, the Supreme Court recognized the "brutal need" of literacy for low-income youth to participate in democracy as full persons: "Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life."[267] Given the "positive correlations between high-quality library programs and student achievement [for]. . .the most vulnerable and at-risk learners, including students of color, low-income students, and students with disabilities,"[268] school libraries must adhere to the Supreme Court's constitutional requirement that the "property deprivation is not *de minimis*."[269] In this way, depriving low-income young people of libraries after their district has allocated Title I resources to fund those libraries infringes upon their property interest in public school libraries.

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265. U.S. DEPT. OF EDUC., GUIDANCE: THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (ARRA) 38 (2009), https://oese.ed.gov/files/2020/07/titlei-reform.pdf (Under TITLE I, local school and educational authorities have the discretion to use federal funds to purchase library books "*if* using the funds for that purpose is consistent with needs identified in the comprehensive needs assessment and articulated in the schoolwide plan."(citing American Recovery And Reinvestment Act Of 2009, 111 P.L. 5, 123 STAT. 115, 111 P.L. 5, 2009 Enacted H.R. 1, 111 Enacted H.R. 1)).

266. *Id.* at 38 ("In addition, prior to using Title I [] funds for this purpose, an [school district] must ensure that the [] school receives all the local or State funds to which it is entitled for the purpose of purchasing library books"); 20 U.S.C. §6312.

267. *Plyler v. Doe*, 457 U.S. 202, 222 (1982) ("The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause."); *see also Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937), *overruled* by *Benton v. Maryland*, 395 U.S. 784 (1969)); *Gary B. v. Whitmer*, 957 F.3d 616, 642 (2020); *Gary B. v. Snyder*, 329 F. Supp. 3d. 344 (E.D. Mich. 2018). *But see* Shaw, *supra* note 5, at 1194 ("But one month after the divided panel issued their opinions in Gary B., the full complement of Sixth Circuit active judges vacated that opinion in preparation for a hearing en banc. The parties settled the case soon after. The sum of these procedures leaves Gary B. a nonprecedent, a judicial event with reduced persuasive value, if any [awkward wording?]. Thus, any plaintiffs aspiring to secure a fundamental right to education might find it difficult to rely successfully on Gary B.").

268. Keith C. Lance & Debra E. Kachel, *Why school librarians matter: What years of research tell us*, KAPPAN ONLINE (Mar. 26, 2018), https://kappanonline.org/lance-kachel-school-librarians-matter-years-research/.

269. *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (citations omitted) ("[E]ducation is perhaps the most important function of state and local governments and the total exclusion from the educational process for more than a trivial period. . .is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.").

c. Likelihood of erroneous deprivation?

To date, state legislators and executive authorities have banned thousands of books, disproportionately targeting content about trans/gender expansive youth and youth of color[270] without a vote, notice, or hearing. As the Supreme Court held in *Island Trees v. Pico*, the U.S. Constitution "does not permit the official suppression of ideas" based upon "narrowly partisan or political" interests or a desire to deny access to ideas with which school officials merely disagree.[271] For over forty years, the Court has held that states cannot "impose upon the teachers in its schools any conditions that it chooses" and cannot prohibit teaching a "theory or doctrine where that prohibition is based upon reasons that violate the First Amendment."[272] Similarly, students "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate," and "school officials cannot suppress 'expressions of feeling with which they do not wish to contend'" through book bans.[273]

In *González v. Douglas,* a federal court ruled that school authorities could not deprive students from access to ethnic studies curricula without a legitimate pedagogical purpose, strengthening protections for their statutory public education right.[274] While *González* remains good law, the right-wing playbook weaponizes the case's limits to intimidate public schools and claim animus against White children.[275] As of January 2024, several books that should be protected under the *González* ruling have

270. Paige Duggins-Clay*, HB 500 Promotes Book Bans and Undermines Students' Constitutional Rights to Access Ideas*, IDRA (May 10, 2023), https://www.idra.org/wp-content/uploads/2023/05/5.11.23-IDRA-Testimony-Against-HB-900-PDC.pdf (explaining "The American Library Association recently released a report finding that book bans have increased dramatically across the country and the "most targeted books were by or about Black or LGBTQIA+ persons."); *see also* Louise Liu, *BANNED: An Asian American Reading List of Banned Books in 2023*, MEDIUM (May 31, 2023), https://medium.com/advancing-justice-aajc/banned-an-asian-american-reading-list-of-banned-books-in-2023-e718a7cfcaea; *Asian American Author's Book is Banned in New York School Districts*, NBC BAY AREA (Sep. 29, 2021), https://www.nbcbayarea.com/video/asian-american-authors-book-is-banned-in-new-york-school-districts/2669717/; *Hispanic Heritage Month: Banned Books by Hispanic Authors*, NYIT LIBRARIES, https://libguides.nyit.edu/c.php?g=61938&p=929883 (showing the list of books banned by Hispanic authors).

271. *Bd. of Educ. v. Pico*, 457 U.S. 853, 870–71 (1982) (although school officials "rightly possess significant discretion to determine the content of their school libraries. . .that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books").

272. *Epperson v. State of Arkansas*, 393 U.S. 97 (1968) (invalidating bans on teaching evolution).

273. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (citing *Burnside v. Byars,* 363 F.2d 744, 749 (1966)) ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. . .school officials cannot suppress 'expressions of feelings with which they do not wish to contend.'"); s*ee also* Paige Duggins-Clay*, HB 500 Promotes Book Bans and Undermines Students' Constitutional Rights to Access Ideas*, IDRA (May 10, 2023), https://www.idra.org/wp-content/uploads/2023/05/5.11.23-IDRA-Testimony-Against-HB-900-PDC.pdf. (should this be supra note 270?)

274. Masters*, supra* note 22, at 234.

275. *See* Ward, *supra* note 21 (quoting Christopher Rufo as describing his efforts targeting Claudine Gay as the "same playbook on critical race theory, on gender ideology, on DEI bureaucracy.").

been banned for over 20,000,000 children, demonstrating the need for additional procedural protections from such bans.[276]

Similar to school bathrooms, school libraries constitute a form of government largesse in which public school students hold property interests.[277] Although different state statutes and regulations entitle students to different benefits and procedures, state mandates that allocate funds to K–12 public school libraries confer a property entitlement to students required to attend school in their jurisdiction. In states where statutes and regulations mandate schools to allocate funds to public libraries, students have a clear statutory entitlement to government-subsidized libraries and, "accordingly, an additional property interest in avoiding unjust exclusion from the school setting and losing access."[278]

The likelihood of erroneous deprivation becomes most obvious when elected officials threaten to close an entire public library rather than fulfill a judge's order to strike unconstitutional legislation and return banned books.[279] Effectively, the recognition of the property entitlements in libraries would mean more than providing additional legal protections for library access; it also means creating more democratic protections for these learners.

CONCLUSION

This Article aims to make two contributions: 1) to provide a descriptive account of how student movements have historically been, and continue to be, instrumental in creating and protecting public education; and 2) to demonstrate how legal scholars and practitioners might elevate student epistemology of law by wielding legal concepts of property interests and procedural due process to realize student demands.

During the year spent writing this Article, legislatures around the country introduced dozens of new hostile statutory schemes, executives used anti-DEAI bills to justify pulling funding from libraries with any affiliation to progressive library associations,[280] and thousands of students faced suspension, expulsion, and harassment for

276. *See* Allyson Tintiangco-Cubales et al., *The Fight for Ethnic Studies Moves to K-12 Classrooms,* CONVERGENCE MAG. (Sept. 19. 2022), https://convergencemag.com/articles/fight-for-ethnic-studies-moves-to-k-12-classrooms; *see generally* Xicanx Inst. For Teaching & Organizing, https://www.xicanxinstitute.org/ (last visited Mar. 24, 2024) ("XITO is a grassroots, urban education consulting collective and non-profit organization committed to training teachers, school districts, and higher education institutions in decolonial and re-humanizing pedagogies and curriculum development.").

277. Daniel C. Kramer, *Perspective on American Library Association v. United States*, 66 ALB. L. REV. 815, 818 (2003) ("By now, however, most American courts accept. . .the idea that when the government hands out largesse, it cannot always condition the grant on the waiver by the recipient of his or her constitutional rights. . .[because] 'conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms.'").

278. Tanious, *supra* note 7, at 1696–97.

279. *Texas county plans to close entire library system rather than un-ban books*, NBC NEWS (Apr. 12, 2023), https://www.nbcnews.com/now/video/texas-county-plans-to-close-entire-library-system-rather-than-un-ban-books-170083909796 ("Librarians could face years of imprisonment and tens of thousands in fines for providing sexually explicit, obscene or 'harmful' books to children under new state laws that permit criminal prosecution of school and library personnel.").

280. Samantha Riedel, *8 States Are Pushing to Leave a National Library Group Because Its President Is a Marxist Lesbian*, THEM (Aug. 9, 2023), https://www.them.us/story/marxist-lesbian-librarian-american-

participating in anti-war protests.[281] SEAT members called emergency strategy sessions to stop the state of Texas from replacing trained mental health and academic counselors in public schools with unlicensed religious chaplains and organized hundreds of students to testify across the state to "give bans the boot."[282] Now, more than ever, legal scholars have a responsibility and opportunity to defend public education and advance democratic integrity in collaborative partnership with mobilized students.[283] In the spirit of solidarity, this Article ends with a series of questions that SEAT advocates offered to encourage new collaborations for improving legal scholarship and elevating student movements: [284]

I. Which spheres of influence within legal academia can bolster student demands for procedural due process?
II. How might legal scholars foster solidarity and collaboration with student movements at their own universities to improve procedural due process?
III. In what other areas of law have legal scholars overlooked youth demosprudence in social movements that might help our democracy?

In answering these questions, perhaps scholars and practitioners can elevate the legacy of student organizers who are "tired of listening to [us]" and discover how we can better protect public education when we finally "listen to them."[285]

library-association ("Republican officials in at least eight states are pushing to completely withdraw from the American Library Association (ALA), over a Twitter post the group's new president made last year in which she described herself as a 'Marxist lesbian'. . .last month, the Montana State Library Commission withdrew all state libraries from ALA membership, which the Montana Library Association said 'undermines the shared goals of Montana libraries. . .' [and] seven more states—Arizona, Idaho, Illinois, Georgia, Louisiana, South Carolina and Wyoming— are also pushing to withdraw from the ALA.).

281. *See* Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, *Students For Justice in Palestine, The University Of Florida v. Raymond Rodriguez*, Case No. 1:23-cv-275 (N.D. Fla. 2023) (University of Florida chapter of Students for Justice in Palestine (UF SJP) challenged a state ban on university students forming chapters of Students for Justice in Palestine) https://www.aclu.org/cases/students-for-justice-in-palestine-at-the-university-of-florida-v-raymond-rodrigues?document=Memorandum-in-Support-of-Plaintiffs-Motion-for-Preliminary-Injunction; *see also* DEMOCRACY NOW (Apr. 23, 2024) (interview with Joseph Slaughter), at 24:45 https://democracynow.cachefly.net/democracynow/360/dn2024-0423.mp4 (Joseph Slaughter, Columbia University Professor at the Institute for the Study of Human Rights explains "We have, actually, in the wake of 1968, a very strong set of university statutes that include things like protections for speech and protest on campus. They effectively are the constitution of Columbia University. . .We have an extremely robust rules for the protections of speech and protest on campus. We have an extremely robust system for protecting due process rights for students when they have violated or are accused of having violated those protections. If this administration had chosen to lean into the statutes of the university and the rules that have kept our community together for 50 years, we would be in a much better place, with faculty and students on board.").

282. SEAT at the Table (@studentsengagedtx), INSTAGRAM (Sep. 20, 2024), https://www.instagram.com/p/DAJe-rPJfmK/?img_index=1; *See also* Jarred Burton, *Don't replace counselors with religious chaplains*, SHIFT, https://shift.press/articles/dont-replace-counselors-with-religious-chaplains/.

283. Amanda Alexander, *Nurturing Freedom Dreams: An Approach to Movement Lawyering in the Black Lives Matter Era*, 5 HOW. HUM. & CIV. RTS. L. REV. 101, 137 (2021) ("[e]mergence is beyond what the sum of its parts could even imagine.").

284. Da'Taeveyon Daniels, Remarks at the Georgetown Journal of Law & Modern Critical Race Perspectives 2024 Symposium, "70 Years Later: Revisiting Brown v. Board of Education and the Struggle for Racial Equity in Education" (Mar. 7, 2024).

285. *See* Fulton Dep., *supra* note 13.