

2024

The Multitudinous Racial Harms Caused by Florida's Stop WOKE and Anti-DEI Legislation

Katheryn Russell-Brown

University of Florida Levin College of Law, russellbrown@law.ufl.edu

Follow this and additional works at: <https://scholarship.law.ufl.edu/facultypub>



Part of the [State and Local Government Law Commons](#)

Recommended Citation

Fordham Urban L. Rev. (Forthcoming)(2024)

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact jessicaejoseph@law.ufl.edu.

Forthcoming, *Fordham Urban Law Journal* (2024)

**THE MULTITUDINOUS RACIAL HARMS CAUSED BY
FLORIDA'S STOP WOKE AND ANTI-DEI LEGISLATION**

*Katheryn Russell-Brown**

ABSTRACT

Since 2021, Florida has passed legislation that radically redefines how educators address race-related topics in the university classroom. Two laws in particular, HB 7 (Stop WOKE Act) and HB 999, which outlaws DEI programs at Florida universities, have led the charge. The goals of this Article are three-fold. First, to demonstrate how HB 7 and HB 999 have created a devastating and powerful educational force in Florida, a force that diminishes certain forms of racial discussion and inquiry in the college classroom. Second, to show the direct link between these laws and antebellum anti-literacy laws. The historical moments that separate enslavement-era anti-literacy laws and the passage of HB 7 and HB 999 are centuries apart. However, the goals are the same: To remove critical race narratives from the public education curriculum. Third, to detail the broad range of people, including educators and students, who are harmed and silenced by these laws. Race-related scholarship, which has been an integral part of race-focused courses, is on the chopping block as well. The range of harms caused by these laws is also explored. Once the pieces are connected, it is evident that HB 7 and HB 999 pose a mammoth threat to historical and contemporary knowledge about race. Part I provides an overview of the texts of HB 7 and HB 999. Part II focuses on the ways in which these laws marginalize and denigrate race scholarship. Part III examines how the Florida legislation diminishes the efforts of race scholars. Part IV shows how ignorance about U.S. race relations and race history creates danger for African Americans. Part V employs the Fifth Amendment's Takings Clause and applies it to Florida's Bright Futures Scholarship Program. This framework amplifies and crystalizes the vast and unremedied harms caused by HB 7 and HB 999.

* [Author: Byline goes here].

INTRODUCTION	3
I. FLORIDA LEGISLATION IN FOCUS	6
A. <i>House Bill 7: Stop WOKE Legislation</i>	7
B. <i>House Bill 999: Anti-DEI Legislation</i>	9
1. General Education	9
2. A Focus on Academic Programs	10
3. Diversity, Equity, and Inclusion (DEI)	11
C. <i>House Bill 551: Teaching K-12</i>	
<i>African American History in Florida</i>	12
D. <i>A Tangled Web of Laws and Practices</i>	15
II. IMPACT ON RACE-RELATED SCHOLARSHIP	19
A. <i>Minimization and Marginalization of</i>	
<i>Race-Related Scholarship</i>	19
B. <i>Denigration and Suspicion of Race Scholarship</i>	20
C. <i>Children’s Feelings</i>	22
III. IMPACT ON RACE SCHOLARS	27
A. <i>Diminishment of Race Scholars</i>	27
B. <i>Syllabi & Classroom Instruction</i>	30
IV. THE BIGGER PICTURE OF HARM	34
A. <i>Leaving Florida</i>	34
B. <i>Allies for Teaching and Learning about Race</i>	36
C. <i>(Placing Black People) In Harms’ Way</i>	38
V. AN EDUCATIONAL “TAKING”?	42
A. <i>Bright Futures</i>	44
B. <i>The Fifth Amendment Takings Clause</i>	45
C. <i>The Takings Clause Applied to</i>	
<i>Bright Futures Scholarships</i>	46
CONCLUSION	50

INTRODUCTION

The state of Florida has one of the largest university education systems in the country. It proudly boasts a state university system that includes twelve colleges and universities.¹ In 2023, *U.S. News and World Report* ranked Florida as the number one state in the country for higher education.² In 2023, three of the state's public colleges were ranked among the top 100 "national universities" in the United States.³ Approximately 400,000 students are enrolled in Florida's public colleges and universities.⁴

Each year in Florida approximately 178,000 students graduate from the state's public high schools.⁵ These students are eligible for in-state tuition benefits for the state's colleges and universities. Some high school graduates are also eligible for the state's top scholarship, the Florida Bright Futures Scholarship program.⁶

There are more than 25,000 faculty members who teach in Florida's public college and university system.⁷ Across these institutions of higher learning, a small group of instructors teach and specialize in race-related topics or broader issues of social justice.⁸ These college instructors along with their students, who are learning about race and justice issues, are the

1. The twelve colleges and universities are Florida Agricultural and Mechanical University, Florida Atlantic University, Florida Gulf Coast University, Florida International University, Florida Polytechnic, Florida State University, New College of Florida, the University of Central Florida, the University of Florida, the University of North Florida, the University of South Florida, and the University of West Florida, and Universities - State University System of Florida (flbog.edu)

2. U.S. News and World Report, *Rankings: Higher Education - States With the Best Education*, <https://www.usnews.com/news/best-states/ranking/education/higher-education>.

3. *Id.* The universities are the University of Florida, Florida State University, and the University of South Florida.

4. OPPAGA, Education System, Program Summary, <https://oppaga.fl.gov/ProgramSummary/ProgramDetail?programNumber=2101>.

5. According to the National Center for Education Statistics, there were 178,000 students graduated from Florida public schools in the 2022-2023 academic year. National Center for Education Statistics, Digest of Education Statistics, Table 219.20 ("Public high school graduates, by region, state, and jurisdiction: Selected years, 1980-81 through 2030-31"), https://nces.ed.gov/programs/digest/d21/tables/dt21_219.20.asp (showing statistics for Public high school graduates, by region, state, and jurisdiction).

6. FLA. STAT. § 1009.53 (2022).

7. Press Release, United Faculty of Florida, United Faculty of Florida Stands Up for UF Professors & All Floridians' First Amendment Rights (Oct. 30, 2021), <https://myuff.org/wp-content/uploads/2021/11/2021-10-29-FINAL-UFF-Press-release-re-Voting-rights-Outside-Activity-denial-at-UF.pdf>. The Florida Board of Education states that there are 46,000 college professors and administrators who work in higher education in the state of Florida. Florida Department of Education, About Us, <https://www.fldoe.org/about-us/>.

8. Data on areas of specialization are not publicly available.

focus of this Article. Specifically, this Article examines how recent Florida laws restructure how race-related topics can be addressed in the college classroom. The analysis uncovers the myriad ways these laws impose legal, economic, and social harm.

Florida's "Stop WOKE" Act, also known as HB 7, took effect in 2022.⁹ The Stop WOKE law mandates new rules for how and when race and social justice issues can be included in the state's public school classrooms.¹⁰ In an earlier law review article, I investigate the reach of the Stop WOKE law and establish its connection to earlier laws that made it unlawful for enslaved Blacks to achieve basic literacy.¹¹ These anti-literacy laws not only punished enslaved Blacks, they also sanctioned the people who taught them to read and write (Whites and free Black people). The earlier piece examines Stop WOKE through the lens of two theories, racial threat and critical race theory (CRT). These theoretical approaches establish that HB 7 is part of a long legacy of anti-Black legislative responses. I evaluate the eight key components of HB 7 and conclude that it operates in much the same way as early anti-literacy laws. Hypothetical scenarios are used to analyze these effects as well. The discussion demonstrates the difficulty law school professors will have determining how to comply with the new law. The piece identifies other problematic aspects of the law, namely its ambiguity, and sketches out the likely long-term consequences and harms of HB 7.¹²

In 2023, Florida passed HB 999, a law that further curtails classroom teaching on race-related subjects, particularly when the framework applies a critical or racial analytic lens. Additionally, the law bans diversity, equity, and inclusion programs, training, and institutional frameworks in Florida public schools.¹³ The combined impact of HB 7 and HB 999 has been a wholesale restructuring of race and social justice education in Florida's public colleges and universities.

This Article, a companion piece to the earlier piece, is part of a larger writing project that identifies and analyzes both the impetus for and impact of the recent Florida laws that rewrite how race and social justice issues are taught in the state's public schools. In giving Florida residents HB 7 and HB 999, what does the Florida legislature take away? The central focal point of this piece is to identify the range of harms caused by these laws. This includes an evaluation of the social, legal, economic,

9. House Bill 7 (2022), <https://www.flsenate.gov/session/bill/2022/7>.

10. *Id.*

11. Katheryn Russell-Brown, 'The Stop WOKE Act'? HB 7, Race, and Florida's 21st Century Anti-Literacy Campaign, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2023).

12. *Id.*

13. House Bill 999 (2023).

and psychological harm imposed by HB 7 and HB 999. The Article analyzes the broad impact of these laws on race-related scholarship, race scholars, and students.

This Article offers an analytical update and an expansion of the issues raised in the first piece. The discussion also considers the broader harms and impacts of HB 7. Because HB 7 has been in effect for more than a year, it is possible to identify concrete harms caused by the law and to predict more accurately the future harms of HB 999. A deep dive into the reach of HB 7 and HB 999 evidences various harms, tangible and intangible. These laws may result in the devaluation of a Florida high school diploma or college degree. The central focus is on the two recent Florida laws that have essentially rewritten how K-20 public school instructors can teach certain subjects. This new educational paradigm has sweeping legal and social consequences.

There are two anchors for this discussion, one theoretical, the other structural. First, anti-literacy laws frame the base for HB 7 and HB 999. Both laws are directly tied to laws from the 1700s onward that outlawed literacy for Black people. These laws initiated harsh punishment for anyone of any race who taught enslaved Blacks (basic literacy) how to read or write. Anti-literacy laws later evolved to ban substantive literacy. These more selective laws make it unlawful for instructors to expose children (of any race) to certain topics and perspectives about race. This includes narratives and material that critique racial history and American racism. Second, HB 7 and HB 999 are supported by an extensive network of laws, policies, and practices. This network, or what I would call a tangled web of laws, buoys both the Stop WOKE law and the Anti-DEI law. In different ways, each part of this network reinforces the belief that Black people and members of other marginalized groups should have fewer civil rights, fewer constitutional protections, and less access to mainstream success. Examples include laws that reduce Black voting power, laws that reduce students' access to race-related history, books bans and voter disenfranchisement laws.¹⁴

This Article is divided into five parts. Part I provides an overview of the legislation under analysis, HB 7 and HB 999. These laws identify specific perspectives and approaches that are not permissible, including Critical Race Theory (CRT) and programs that promote diversity, equity and inclusion (DEI). This Part includes a review of HB 551 the legislation that addresses the mandated K-12 African American History in Florida. The discussion also indicates how the new laws intersect with other laws, such as voting rights and book bans. Part II examines how these laws

14. See *infra* notes 203-249 (discussing the detailed “tangle of laws”).

impact the generation of race-related scholarship. Part III considers how this legislation affects the research and teaching of race scholars, specifically curriculum development, classroom discussion, and belongingness within the university community. Part IV assesses the larger impact of these harms, beyond scholarship and beyond the university classroom. The analysis reveals that the individual weight of each identified harm is significant. Collectively, the weight of these harms is immense and cannot be dismissed. A devastating picture emerges: HB 7 and HB 999 have resulted in a significant devaluation of a Florida college degree. Part V uses this finding as a point of entry for analyzing the nature of the harm wrought by these laws. A novel theory of harm, the Fifth Amendment's Takings clause is used to explore this issue. This Part applies the Takings Clause to Florida's Bright Futures Scholarship Program. While the argument would not be successful in court, a takings analysis dramatically illustrates the intertwining economic and social costs triggered by HB 7 and HB 999.

It is important to make two preliminary notes. One, the primary focus of this Article is on how HB 7 and HB 999 regulate race-related curriculum and scholarship. These laws, however, apply to other academic subjects, including gender studies, social justice, ethnicity, and religion. Two, while these laws apply to K-20 public education, this Article focuses on the impact of these laws at the college level.

I. FLORIDA LEGISLATION IN FOCUS

Two pieces of legislation have led to a vast shift in Florida's educational policies. These two laws, HB 7 and HB 999, have mandated new curricular approaches to history, theory and race, in public school classrooms. These laws address which race-related subjects may be taught, how these subjects can be taught, and as important, which specific topic areas, theories and language are to be avoided in the K-20 classroom.¹⁵ This legislative duo is at the core of the analysis undertaken in this Article. This Part also includes a discussion of a third, law, HB 551, which addresses the K-12 teaching of subjects related to the African American life experience.¹⁶

15. The legislation applies to public education beginning with kindergarten and ending with graduate or professional school. These prohibitions extend to guest lecturers. See Russell-Brown, *supra* note 11 (discussing in detail HB 7).

16. House Bill 551 (2023).

A. House Bill 7: Stop WOKE Legislation

Florida's HB 7 regulates how race-related subject matter may be taught in the public school classroom. The law prescribes how race, racism, and the history of race relations—and their intersection with state structures—may be taught. It identifies eight topics for curriculum reform.¹⁷ Under HB 7, it is discrimination for an instructor to compel or encourage students to endorse certain perspectives regarding specific topics.¹⁸ For instance, an instructor is prohibited from advancing or promoting the concept of race-based reparations.¹⁹ The law also prohibits classroom instruction that talks about the concepts of merit, excellence, or colorblindness as racist.²⁰ The legislative language is both plain and opaque. It lists for example, the subject areas it identifies as problematic (*e.g.*, reparations, colorblindness, systemic racism). However, the wording is ambiguous,²¹ such as the meaning of “objective” or

17. House Bill 7 (2022).

18. *Id.*

19. Under HB 7 it constitutes discrimination for an instructor to teach in a way that encourages or compels students to believe: “An individual, by virtue of his or her race, color, sex, or national origin, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, sex, or national origin.” *Id.* § 760.10(8)(a)5.

20. *Id.* § 760.10(8)(a)5. Justice Ketanji Brown Jackson's dissenting opinion in *Students for Fair Admissions v. University of North Carolina*, provides an exquisite analysis that underscores the challenges to HB 7. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. ___ (2023) (Jackson, J., dissenting).

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces “colorblindness for all” by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems.

Id. at 25. Let us assume that a law professor assigns Justice Jackson's dissent in SFA to her Constitutional Law class. She focuses on Justice Jackson's dismissal of “colorblindness.” The professor, a Black woman, offers a few of her personal race-related experiences with classmates that echo Justice Jackson's argument that colorblindness does not exist.

21. For instance, the law does not define the terms, “espouses,” “promotes,” “advances,” and “inculcates.” See AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, PRELIMINARY REPORT OF THE SPECIAL COMMITTEE ON ACADEMIC FREEDOM AND FLORIDA 14 (May 24, 2023) [hereinafter AAUP ACADEMIC FREEDOM AND FLORIDA REPORT], https://www.aaup.org/file/Preliminary_Report_Florida.pdf (“Sowing confusion and fear among faculty members about what they can and cannot teach may be the underlying and main goal of the curricular legislation as a package”); Megan Zahneis & Beckie Supiano, *Fear and Confusion in the Classroom: Vaguely Worded Legislation in Florida and Texas is Already Affecting How Professors Teach*, CHRON. HIGHER EDUC., June 9, 2023 (University of North Florida Professor Nicholas Seabrook states, “A lot of bills have been phrased in a way that's purposely vague . . . [I]t places faculty in a tough position, where you have this kind of broad, sweeping language without a lot of specifics.” New and

“compel.”²² In other instances the text is incomprehensible.²³ The law also includes what might be called an “escape hatch.” It states that some controversial classroom topics may be discussed, but only if they are taught in an “objective” manner.²⁴ The interpretation of the term is presumably left up to individual instructors.

HB 7’s overarching objective is to disallow course discussions and assignments on systemic and structural analyses of how race and racism have impacted the social, political, and economic landscape. HB 7 also codified Florida’s 2021 ban on teaching CRT.²⁵

An instructor found to be in violation of the law may face a wide range of punishments, from large fines to job loss.²⁶ In the months following HB 7’s enactment, seven complaints were filed in Florida universities and colleges.²⁷ None of them resulted in a finding that the law had been violated.²⁸

Proposed Laws in Florida and Texas Are Already Reshaping the College Classroom).

22. See, e.g., Russell-Brown, *supra* note 11 (presenting seven hypothetical scenarios to illustrate and assess the ambiguities of HB 7).

23. See, e.g., House Bill 7, § 4 (2022) (stating it is discrimination for an instructor to compel students to believe that: “Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex.”). The use of “cannot” and “without” make it appear that the law *supports* treating people differently on the basis of race, color, national origin, or sex. See also Russell-Brown, *supra* note 11.

24. House Bill 7 (2022).

25. See Required Instruction Planning and Reporting, 6A-1.094124, 3(b), <https://www.flrules.org/gateway/ruleNo.asp?id=6A-1.094124/>. In 2021, the Florida State Board of Education passed a “Required Instruction Planning and Reporting” rule. It states:

Instruction . . . must be factual and objective, and may not suppress or distort significant historical events . . . Examples of theories that distort historical events and are inconsistent with State Board approved standards include the denial or minimization of the Holocaust, and the teaching of Critical Race Theory, meaning the theory that racism is not merely the product of prejudice, but that racism is embedded in American society and its legal systems in order to uphold the supremacy of white persons. Instruction may not utilize material from the 1619 Project and may not define American history as something other than the creation of a new nation based largely on universal principles stated in the Declaration of Independence.

Id. A 2023 letter signed by Florida’s twelve college and university presidents, states that CRT can only be referenced under certain conditions: “[I]f critical race theory or related concepts are taught as part of an appropriate postsecondary subject’s curriculum, our institutions will only deliver instruction that includes critical race theory as one of several theories and in an objective manner.” Florida College System Presidents Statement on Diversity, Equity, Inclusion and Critical Race Theory, Jan. 18, 2023, <https://www.fldoe.org/core/fileparse.php/5673/urlt/FCSDEIStatement.pdf>.

26. See Russell-Brown, *supra* note 11, pt. III.A.

27. See, e.g., Sarah Blaskey, *Few Complained of ‘Woke’ Classes at Florida*, MIA. HERALD, Apr. 25, 2023.

28. *Id.*

At the same time, HB 7 has not fared well in court. In 2022 a complaint was filed alleging that HB 7 violates free speech protected by the First Amendment and equal protection, guaranteed by the Fourteenth Amendment.²⁹ The plaintiffs include seven Florida professors and one undergraduate student. In November 2022, Federal District Court Judge Mark Walker granted the plaintiffs a preliminary injunction.³⁰ In his Order, Judge Walker stated that HB 7 is enforced state orthodoxy and, “[B]oth robust intellectual inquiry and democracy require light to thrive. Our professors are critical to a healthy democracy.”³¹ In June 2023, Judge Walker’s decision was appealed to the Eleventh Circuit.³² The impact of this law is noteworthy considering that HB 7, has not been upheld by any court.³³

B. House Bill 999: Anti-DEI Legislation

Signed into law in 2023,³⁴ Florida House Bill 999 (HB 999)³⁵ places race-related curriculum on a short leash. Three of the sections shed light on its breadth and scope. They are highlighted here.

1. General Education

The section on general education courses³⁶ states:

[General education courses] may not distort significant historical events or include a curriculum that teaches identity

29. *Pernell v. Fla. Bd. Governors St. Univ. Sys.*, U.S. Dist. Ct. for N. Dist. Fla., Case No. 4:22-cv-304, Nov. 18, 2022, https://www.documentcloud.org/documents/22140343-ecf_no_1ht_7_complaint.

30. *See, e.g., Pernell v. Fla. Bd. Governors St. Univ. Sys.*, Nov. 17, 2022, Order by Judge Mark Walker, <https://fingfx.thomsonreuters.com/gfx/legaldocs/gkplwgxrbbv/walker-order-florida-law-professors-2022.pdf> [hereinafter Order by Judge Walker]. *See* Zahneis & Supiano, *supra* note 21 (discussing self-policing by faculty members). University of Florida Historian Paul Ortiz describes faculty compliance with stringent new state laws as an example of the political theory concept of “anticipatory obedience.” He says, “The state doesn’t have to ban anything, frankly, because people are afraid and they’re not going to step out of line because they’re afraid of the consequences.” *Id.*

31. Order by Judge Walker, *supra* note 30.

32. Appellees-Brief-filed-by-Appellees-Russell-Almond-Sharon-Austin-Johana-Dauphin-Dana-Thompson, USCA11 Case: 22-13992, filed 06/16/2023.

33. *See* compliance discussion, *infra* notes x-x. [Need Cite].

34. The law took effect July 1, 2023.

35. House Bill 999 (2023).

36. Florida’s General Education Core Course Options lists the following subject areas for general education courses, mathematics, communication, social sciences, humanities and natural sciences. Students are required to take at least one of the identified courses in each subject area. General Education Core Course Options, Florida Department of Education, <https://www.fldoe.org/policy/articulation/general-edu-core-course-options.stml>.

politics . . . or is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities.³⁷

By stating what is not permissible under the law, this admonition by the Florida legislature appears to compel the teaching of mainstream viewpoints and exclude oppositional and critical viewpoints from the curriculum. In fact, HB 999 creates a huge extension of the state's educational authority. The prohibition of curriculum that “*teaches* identity politics” means instructors may not teach, discuss, or reference identity politics. This is a huge restraint on instruction as well as an nebulous demand since the meaning of “identity politics” is contested. It is one thing to say that an instructor cannot teach material in a way that compels students to reach a particular conclusion. In fact, that is one of HB 7's stated goals.³⁸ It is another thing entirely to say that the educational material may not be taught at all. Accordingly, HB 999 is observably more restrictive than HB 7. HB 7 includes the following language:

[It] may not be construed to prohibit discussion of the concepts listed herein as part of a larger course of a larger course of . . . instruction, provided such . . . instruction is given in an objective manner without endorsement of the concepts.³⁹

This proviso appears to allow an exception for teaching some subjects, so long as “both sides” or multiple sides are presented. However, this language is conspicuously absent from HB 999. Thus, under HB 999, instructors may not teach the prohibited topics at all, under any circumstances. Teaching certain material is prohibited, regardless of whether an instructor also teaches perspectives contrary to the controversial material.

2. A Focus on Academic Programs

HB 999 creates a larger apparatus for state regulation and oversight of classroom education. Under the law, the Florida Board of Governors is tasked with ensuring that the twelve public universities are in compliance. Specifically, the Board of Governors must determine

37. House Bill 999, lines 551-558 (2023).

38. HB 7 makes it discrimination when an instructor “espouses, promotes, advances, inculcates, or compels” students to believe specially enumerated concepts. House Bill 7 (2022).

39. FLA. STAT. § 760.10(8)(a)(8), 1000.5(4)(a)(8)(b) (2022).

whether any of the colleges or universities have academic programs that violate HB 7. This would include, for instance, an academic unit or program that is based on theories of privilege or systemic racism.⁴⁰ HB 999 requires that the Florida Board of Governors monitor and possibly eliminate college courses or curriculum that is being used in some college courses. Further, HB 999 highlights state oversight of not only individual college courses but also specific majors, minors, and departments. It places academic *programs* and fields of inquiry on the legislative tenterhooks.⁴¹

3. Diversity, Equity, and Inclusion (DEI)

The section of HB 999 that has drawn the most attention has been its DEI provision. DEI programs have been attacked as racially biased and denigrated as forced efforts to indoctrinate students.⁴² The push to eliminate these programs has been the subject of national discussion and debate. These debates have included basic questions about what constitutes DEI and which groups are subject to DEI-based restrictions.⁴³ HB 999 states:

[Colleges and universities] may not expend any state or federal funds to promote, support, or maintain any programs or campus activities that: promote, support, or maintain any programs or campus activities that . . . advocate for diversity, equity and inclusion or promote or engage in political or social activism.⁴⁴

In response, some Florida colleges and universities have removed, reassigned, or reclassified employees who were hired to work in DEI-related positions.⁴⁵ Prior to HB 999, each of the twelve Florida public colleges and universities had staff and faculty members who held DEI-related posts. That is, by a broad estimate, approximately one hundred

40. House Bill 999, at 5-6 (2023).

41. *Id.*

42. In his comments about DEI means, Florida Governor Ron DeSantis has said, “DEI is better viewed as standing for division, exclusion, and indoctrination.” Jaclyn Diaz, *Florida Gov. Ron DeSantis signs bill Banning DEI Initiatives in Public Colleges*, NPR, (May 15, 2023, 5:46 PM).

43. One of the more explosive questions raised was whether the law would mean an end to Black fraternities and sororities. DL Hughley Twitter: Gov. DeSantis Office Response [**Need Date**]; Erin Jones & Tristan Hardy, *Florida House Bill Won't Ban Historically Black Fraternities and Sororities from State Universities*, VERIFY (Mar. 24, 2023, 12:09 PM).

44. House Bill 999, at 13 (2023).

45. Prior to the passage of HB 999, at the University of Florida for instance, each of the sixteen colleges had a DEI representative. The DEI assistant deans worked directly with the university's Chief Diversity Officer.

state university employees. In anticipation of HB 7 and HB 999, several university departments removed their “DEI statements”⁴⁶ from their websites. The wording of the legislation leaves many questions unanswered. While HB 999 states that DEI programs are not permissible on Florida college campuses, it raises the question, “Which types of college programs and speakers are acceptable?”⁴⁷

C. House Bill 551: Teaching K-12 African American History in Florida

One of the common criticisms of HB 7 and HB 999 is that the legislative language is vague and confusing. The ambiguity surrounding these laws makes it difficult for instructors to determine which activities, programming, and course content comply with or violate the Florida laws. The source of the ambiguity is not only in how the laws are worded. While these laws clearly impose limits on teaching courses and sponsoring programs related to race and social justice, another law, HB 551, makes it mandatory to teach African American history in K-12 instruction.⁴⁸

HB 551, “An Act related to required African American instruction,” was signed into law by Florida Governor Ron DeSantis in 2023.⁴⁹ It is the latest version of a law that has been on the Florida books for decades.⁵⁰ The law sets forth detailed, multi-step criteria for reviewing mandated African American studies material in Florida’s K-12

46. See, e.g., Russell-Brown, *supra* note 11, at 33-34 (in draft); Jacob Reyes, *DeSantis Signs Bill Banning DEI Degrees at Florida Colleges*, AXIOS TAMPA BAY, May 15, 2023, <https://www.axios.com/2023/05/15/desantis-dei-bill-florida-colleges>; Andrew Atterbury, *Florida’s Ban on DEI Spending Becomes Official as DeSantis Enacts College Reforms*, POLITICO (May 15, 2023, 1:13 PM).

47. For instance, under the law would a Florida college’s student government association be allowed to invite Dr. Ibram Kendi to campus to give a talk on race and the college curriculum? It is noted that in Fall 2023, Ben Shapiro has been invited to speak at the University of Florida. See Vivienne Serret, *Ben Shapiro to come to UF in the Fall*, INDEP. FLA. ALLIGATOR (June 5, 2023). Would campus lectures by either or both of them constitute “political or social activism” under HB 999?

48. Add official legislative cite. Florida is one of approximately twelve states that requires teaching African American history.

49. It is noted that HB 551 uses the word “diversity.” House Bill 551, at 2 (2023). In discussing the history of African Americans, the text states that instruction may “examine what it means to be a responsible and respectful person, for the purpose of encouraging tolerance of diversity in a pluralistic society and for nurturing and protecting democratic values and institutions.” *Id.* The passage of HB 551 came in the wake of heated criticism Governor DeSantis received for rejecting an AP Black History course for Florida high school students. See generally Jesse Scheckner, *Lawmakers pass bill to strengthen reporting requirements on African American history lessons*, FLA. POL., May 4, 2023; Brian Burgess, *Undercutting Critics, DeSantis Signs Unanimous Bill Mandating African American History Curriculum*, CAPITOLIST, May 18, 2023.

50. House Bill 551 (2023).

curriculum.⁵¹ With HB 551, the legislature focuses on curriculum devoted to the African American experience. Under this law, any material taught that classifies as “African American instruction,” is closely catalogued and monitored.⁵² Each school district must submit an implementation plan to the Florida Department of Education. Once approved, the material must be posted on each school district’s website. The law references a wide range of permissible Black history topic areas. Subjects include the “passage to America,”⁵³ the enslavement experience, abolition, the history and contributions of “the Americans of the African Diaspora,” racial segregation, and racial oppression.⁵⁴ This laundry list of allowable teaching topics is followed by a warning that educational material and teaching may not be used indoctrinate or convince students to have a particular point of view.⁵⁵ HB 551 also makes explicit reference to diversity:

Students shall develop an understanding of the ramifications of prejudice, racism, and stereotyping on individual freedoms, and examine what it means to be a responsible and respectful person, for the purpose of encouraging tolerance of *diversity* in a pluralistic society and for nurturing and protecting democratic values and institutions.⁵⁶

51. In May 2023, Florida passed House Bill 1537. This law mandates that Asian American history is included within Florida’s K-12 public school curriculum:

The history of Asian Americans and Pacific Islanders, including the history of Japanese internment camps and the incarceration of Japanese-Americans during World War II; the immigration, citizenship, civil rights, identity, and culture of Asian Americans and Pacific Islanders; and the contributions of Asian Americans and Pacific Islanders to American society. Instructional materials shall include the contributions of Asian Americans and Pacific Islanders to American society.

House Bill 1537, lines 631-638 (2023).

52. In May 2023, Florida passed legislation mandating Asian American Studies instruction for students. See, e.g., Ileana Najarro, *Florida Is Latest State to Require Teaching Asian American and Pacific Islander History*, EDUC. WK., May 26, 2023.

53. Oddly, the text does not refer to the “Middle Passage.” House Bill 1551, at 2 (2023). This is noteworthy given that “Passage to America” denudes/downplays the brutality of the Middle Passage through which millions of Blacks were kidnapped and chained and forced onto ships and taken to countries in the Caribbean and the Americas.

54. Per HB 551, it is permissible for an educator to discuss racial oppression. However, under HB 999, it is not permissible for an instructor to teach students about systemic racism. As systemic racism could be described as oppression, it is not clear what definitions legislators are using for either term—or whether this points to a legislative contradiction.

55. House Bill 1551, at 3 (2023); House Bill 1537 (2023).

56. House Bill 1551, at 2 (2023) (emphasis added).

It also allows the state to override any curricula decisions by seeking external input.⁵⁷

While the primary focus of this Article is on university-level restrictions on race-related instruction in Florida, HB 551 provides important context. Based on an initial reading of HB 999, it may appear that Florida law is more supportive of students' engagement with Black history in middle school and high school than in college. However, a closer examination indicates that the African American history perspectives and topics that are permissible in K-12 align with the African American history and perspectives that are permissible in Florida college classrooms. Florida's K-12 Black history educational standards,⁵⁸ which were released in July 2023, have received withering scrutiny.⁵⁹ Particular attention has focused on language suggesting that enslaved persons received "benefits" from their enslavement. The standards have been criticized for over emphasizing the role of Whites in the fight for Black emancipation, deemphasizing the role of Whites in maintaining slavery, for downplaying the harms of slavery,⁶⁰ and for failing to acknowledge systemic racism.⁶¹

HB 551 and the legislature's approval of the African American history standards, specifies which information Florida students can be taught about Black history. Because the approved history standards have large gaps in knowledge and perspectives, students graduating from Florida public schools will have a limited understanding of the historical impact of race, race relations, and racism on African Americans. These gaps in knowledge mirror those that will exist at the college level as a result of HB 7 and HB 999.

57. *Id.* This includes input from "nationally recognized African American educational organizations." See Sarah Mervosh, *Florida's New Black History Standards Have Drawn Backlash. Who Wrote Them?*, N.Y. TIMES, July 28, 2023 (reporting on the role council members played in the development of the standards).

58. Florida's State Academic Standards—Social Studies, 2023, <https://www.flrules.org/gateway/ruleNo.asp?id=6A-1.09401>.

59. See, e.g., Lori Rozsa, *Florida Approves Black History Standards Decried as 'Step Backward'*, WASH. POST, July 19, 2023; Michael Harriot, *Florida's Black History Standards Are Even Worse than Reported*, GRIO, July 27, 2023.

60. The language that has generated the most attention and criticism references the "benefits" enslaved persons received by learning skills. One of the educational benchmark clarifications states, "Instruction includes how slaves developed skills which, in some instances, could be applied for their personal benefit." Florida's State Academic Standards, *supra* note 58, at 6.

61. There are many race-related terms that do not appear in the 216-page document. For instance, there is no reference terms such as, "systemic racism" or "White supremacy." Also notable, the document references "slaves" but not "enslavers." *Id.*

D. *A Tangled Web of Laws and Practices*

The above discussed laws operate within a larger legal sphere. This sphere includes an interrelated web of legislation, cases, rules, policy decisions, structures, and procedures related to race, civil rights, criminal justice and education.⁶² They reflect a perspective that Florida colleges and universities focus too much on race, racism, and history. Further, they assume that Florida students are being indoctrinated by instructors, librarians, and school boards. In order for the state to protect students, the state had to restructure the curriculum. While the intricacies of HB 7 and HB 999 must be examined, it is essential to establish that they are part of an expansive thicket of laws. This tangled web of laws represents a system in which anti-literacy and anti-Blackness⁶³ are its heaviest threads.⁶⁴

One part of this sprawling web is the state's ban on the Advanced Placement (AP) African American Studies course. In 2023, Governor DeSantis rejected the course for high school seniors.⁶⁵ The pilot course focuses on six topic areas, including Intersectionality and Activism; Black Queer Studies; Movements for Black Lives; Black Feminist Literary Theory; Reparations; and Black Study and Black Struggle in the 21st Century.⁶⁶ In response to the proposed class, the Florida Department of Education stated, "[T]he content of this course is inexplicably contrary to Florida law and significantly lacks educational value."⁶⁷ The Florida governor referred to the course as "woke," "contrary to Florida law," and as "an exercise in indoctrination."⁶⁸ In marked contrast, Florida high school students are permitted to enroll in an AP Japanese Language and

62. See Russell-Brown, *supra* 11 (giving an earlier discussion of laws and rules that aid what might be labeled a kind of curricular apartheid).

63. *Id.* at 34 (in draft).

64. *Id.* (discussing "companion legislation").

65. AP Course Letter from Office of Articulation, State Board of Education, to Brian Barnes, Senior Director, College Board Florida Partnership (Jan. 12, 2023) (confirming FDOE does not approve the inclusion of the AP African American Studies course). Florida's Governor, Ron DeSantis referred to the course as "indoctrination." Terry Spencer & Anthony Izaguirre, *DeSantis Calls Black History Course 'Indoctrination.'* *What Do the Authors Florida Criticized Say?*, L.A. TIMES (Jan. 24, 2023, 11:54 AM).

66. For a list of the course topics and the State Board of Education's response, see Manny Diaz Jr. on Twitter (Jan. 20, 2023): "Despite the lies from the Biden White House, Florida rejected an AP course filled with Critical Race Theory and other obvious violations of Florida law. We proudly require the teaching of African American history. We do not accept woke indoctrination masquerading as education." *Id.*

67. *Id.*

68. Joshua Zeitz, *What's Really in the AP African-American Studies Class DeSantis Rejected?*, POLITICO, Jan. 31, 2023.

Culture course.⁶⁹

Book bans are another component of this web of laws.⁷⁰ This legislation signals Blackness as problematic. The state's book bans have been disproportionately focused on reading that features Black characters and race-related themes.⁷¹ This includes the exclusion of books on Rosa Parks,⁷² Roberto Clemente,⁷³ and Martin Luther King, Jr.⁷⁴ Approximately one-half of all Florida counties compiled a list of books that students were not allowed to read.⁷⁵ The lists include fiction,⁷⁶ non-fiction,⁷⁷ and children's books⁷⁸ that address race, racism, and racial history. Some address themes of belonging, exclusion, cultural practices, and legal history. Laws that ban these books treat books with fictional characters of color and books that raise racial topics as the equivalent of indoctrination. This represents a conflation of Black history and Black storytelling with brainwashing. It ensures that Florida students will not be exposed to the range of literatures, narratives, and research studies that address race issues.⁷⁹

69. C Mandler, *AP African American Studies Course Does Not Belong in Florida Schools, Says DeSantis Administration*, CBS NEWS (Jan. 19, 2023, 5:18 PM). For specific information about the AP Japanese course, see AP Japanese Language and Culture Course—AP Central, <https://apcentral.collegeboard.org/courses/ap-japanese-language-and-culture>.

70. See, e.g., Sara Mervosh & Dana Goldstein, *Florida Rejects Dozens of Social Studies Textbooks, and Forces Revisions in Several Others*, N.Y. TIMES, May 5, 2023.

71. See, e.g., Eesha Pendharkar, *How Prevalent are Book Bans this Year: New Data Show Impact*, EDUC. WK., Apr. 7, 2022 (noting that one-third of the books banned between July 2021 and March 2022 involved stories with LGBTQ characters).

72. Justin Gamble, *Race Left Out of Rosa Parks Story in Revised Weekly Lesson Text for Florida Schools Highlights Confusion with Florida Law*, CNN, Mar. 23, 2023 (text book publisher asked to remove race as the reason Parks was told to move her seat on the bus).

73. See Lisa Tolin, *These 176 Books were Banned in Duval County, Florida*, PEN AM., Dec. 6, 2022.

74. See, e.g., Claire Heddles, *Duval Schools to Keep 73 'Diverse, Inclusive' Books Out of Classrooms*, JACKSONVILLE TODAY, Dec. 22, 2022.

75. See, e.g., Alex Deluca, *Report: 350+ Books Banned in Florida School Districts Since Last July*, MIA. NEW TIMES, Apr. 25, 2023. *List of Books Banned in Florida Schools Recommended for Reading*, SPLCTR.org, May 3, 2023.

76. *Id.* Harper Lee, *To Kill a Mockingbird* (1960); Toni Morrison, *the Bluest Eye* (1970) and *Beloved* (1987); Sandra Cisneros, *The House on Mango Street* (1984); Sherman Alexie, *The Absolutely True Diary of a Part-Time Indian* (2007); Arundhati Roy, *The God of Small Things: A Novel* (1997); Alice Walker, *The Color Purple* (1985); Zora Neale Hurston, *Their Eyes were Watching God* (1937).

77. *Supra* note 75; JAMES BALDWIN, *THE FIRE NEXT TIME* (1963); IBRAM KENDI, *STAMPED FROM THE BEGINNING* (2016).

78. IBRAM KENDI, *ANTI-RACIST BABY* (2020); NIKOLE HANNAH-JONES & RENEE WATSON, *THE 1619 PROJECT: BORN ON THE WATER* (2021).

79. Russell-Brown, *supra* note 11, at 1. See *id.* at 36-37 (discussing "Alternative Educational Spaces"); *supra* notes 70-78 and accompanying text (indicating that the majority of the book bans are on books that allude to or address the experiences of characters of color or gender and sexuality issues).

Legislation that redraws the state's electoral voting maps is another part of the Florida legal web that seeks to neutralize and downplay race and race history, particularly African American history. In 2022, the Florida legislature voted to pass an aggressive redistricting plan. The new redistricting map reduced the number of "predominantly Black voting districts."⁸⁰ While African Americans comprise approximately 20 percent of Florida's population, the voting districts have been gerrymandered to reduce the number of majority-Black districts.⁸¹ The new legislation also eliminated two of four districts where African American voters had been able to elect their preferred candidates.⁸² These laws reduce the possibility of Black civic engagement. Black people comprise 46 percent of the formerly incarcerated population in Florida.⁸³ Legal limitations on voting have also made it harder for ex-felons to vote or otherwise restore their rights.⁸⁴ At the same time, former felons whose voting rights have been restored have been targeted for voter fraud.⁸⁵ Redrawn electoral maps that minimize the power of Black votes and additional requirements for restoring voting rights to the formerly convicted, are two areas of legislation that also impact how public education addresses race, history, and law issues in the state of Florida.⁸⁶

As discussed, HB 7 and HB 999 are bolstered by a web of laws that minimize Black narratives and Black civic engagement. At the same time that the Florida legislature has disallowed the teaching of marginalized perspectives, it requires the teaching of mainstream racial narratives across the university system. HB 999 mandates the establishment of new

80. See, e.g., Nathaniel Rakich, *The Extreme Bias of Florida's New Congressional Map*, FIVE THIRTYEIGHT, Apr. 21, 2022.

81. These changes increased the voting power of Florida Republicans. See, e.g., Sam Levine, *Florida Republicans Pass Congressional Map Severely Limiting Black Voter Power*, GUARDIAN, Apr. 22, 2022.

82. *Id.*

83. *Id.*

84. In 2018, Florida voters, restored the voting rights of former felon. In the following legislative session, Florida governor DeSantis issued an executive order that required former felons to pay off court restitution, fines and fees before they could register to vote. See, e.g., Wayne Washington, *New Florida Law Drastically Undercuts Felon Voting Rights Restoration*, FLA. TIMES-UNION, Aug. 16, 2019; Kristen M. Budd, *Florida Bans Voting Rights of Over One Million Citizens*, THE SENTENCING PROJECT, Jan. 2023.

85. See e.g., Sam Levine, *The Fight for Democracy: He Voted in Florida for the First Time in 2020. Then Came the Criminal Charges*, GUARDIAN, May 19, 2023; Ashley Lopez, *20 Were Charged for Voter Fraud in Florida. Advocates Say a Broken System is to Blame*, NPR (Aug. 27, 2022, 5:00 AM).

86. Other laws, that might be deemed secondary laws, could be considered constituent parts of the Florida web of anti-Black laws. This includes state laws that allow the carrying of a concealed weapon without a permit and stand your ground laws. Stand your ground laws are more likely to be used against Black victims (e.g., Trayvon Martin) and less likely to be available to Black defendants (e.g., Marissa Alexander).

university centers that focus on civics education, underscores this point. HB 999 lists the goals of the Hamilton Center for Classical and Civic Education, at the University of Florida,⁸⁷ as “Educat[ing] university students in core texts and great debates of Western civilization and the great books.”⁸⁸ In 2023, the state legislature requested \$10 million in funding for the Hamilton Center.⁸⁹ The Florida Institute for Governance and Civics, at Florida State University offers another example.⁹⁰ Its goals include, “. . . [D]evelop[ing] academically rigorous scholarship and coursework on the origins of the American system of government, its foundational documents, its subsequent political traditions and evolution. . . .”⁹¹ HB 999 also states that these civic education centers have related missions and goals and are designed to work together.⁹²

In summary, HB 7 and HB 999 establish the instructional limits on race-related curriculum. By its language, HB 999, which followed in the wake of HB 7, imposes greater restraints. It prohibits instructors from presenting certain perspectives on race and social justice. As noted, HB 999 does not appear to allow these controversial topics to be discussed, even when opposing viewpoints are part of the discussion. HB 551 shows the steppingstones it creates between secondary and post-secondary teaching and learning about race. HB 551 and the mandated approaches to African American history, establishes its direct connection to HB 7 and HB 999. The power of these laws is strengthened by a range of other laws that support and broaden the ways issues of race, law, and social justice are handled in the public education system in Florida. These laws both support erasure (of critical perspectives) and mandate exposure (of mainstream perspectives). Altogether, what has been created is an educational fortress, one that blocks out curriculum that includes race, social justice, gender studies, or critical analysis. The next Part considers the range of harms associated with these laws.

87. House Bill 999, § 1004.6496, lines 385-443 (2023).

88. *Id.* line 406

89. A.G. Gancarski, *Budget Conference: \$10M for UF Hamilton Center*, FLA. POL., Apr. 24, 2023.

90. *See* House Bill 999, § 1004.6499, lines 446 (2023).

91. *See id.* lines 455-459.

92. This includes the establishment of other college institutes, including the Adam Smith Center for the Study of Economic Freedom at Florida International University. *Id.* § 1004.64991. The New College of Florida’s Freedom Institute is another, related curricula center. The Institute will focus on combatting “cancel culture” and promoting tolerance of opposing viewpoints. New College wants ‘Freedom Institute’ to battle ‘cancel culture.’ Ryan Dailey, *New College of Florida Wants \$2 Million for ‘Freedom Institute’ to Combat ‘Cancel Culture’: The Board of Trustees, Handpicked by Gov. DeSantis Aims to Promote ‘Tolerance of Opposing Views,’* ORLANDO WKLY (July 7, 2023, 12:27 PM).

II. IMPACT ON RACE-RELATED SCHOLARSHIP

This Part identifies the precise ways that HB 7 and HB 999 influence the future production of race scholarship.

A. *Minimization and Marginalization of Race-Related Scholarship*

In recent years, CRT has been publicly maligned and attacked as a racist theory designed to get students to hate America.⁹³ The public attacks on CRT helped to lay the groundwork for policies and laws that outlaw the teaching of this legal analytical approach (or set of approaches, as CRT is not a unitary body of scholarship). College instructors in Florida who teach and research on race—including CRT—must now question the viability of their scholarly contributions. This means that instructors who teach race-related subjects will have to decide whether they can continue their instruction as usual or whether they need to remove specific material. It also means that instructors whose research includes examinations of race will have to give serious thought to how that research will be evaluated by their university.⁹⁴

In calculating the impact of continuing to teach race-related subjects, instructors will likely consider how it will impact their availability to receive institutional perks. For instance, some universities have established initiatives that reward important faculty scholarship. As part of these initiatives, universities publicize the work of the selected scholars and may provide a monetary award.⁹⁵ Is it realistic to believe that faculty members, post HB 7 and HB 999, who conduct race scholarship that is critical of the status quo would be competitive applicants in the same way that the work of non-race scholars would be? When areas of academic scholarship have been nationally denounced as indoctrination, this impacts the scholars who teach these contested topics and the scholarship produced on the topics.

Untenured and non-tenure track faculty members are unlikely to choose research topics that will jeopardize a favorable tenure decision or

93. Anthony Zurcher, *Critical Race Theory: The Concept Dividing the U.S.*, BBC NEWS, July 22, 2021; Jon Greenberg & Amy Sherman, *What is Critical Race Theory, and Why Are Conservatives Blocking It*, POLITIFACT, May 24, 2021.

94. This is likely to have a disproportionate impact on Black faculty members, who are more likely to address race issues in their work than their White and other non-Black colleagues.

95. See, e.g., University of Florida News, Faculty Resources, Work with Us, Research Promotion Initiative, <https://news.ufl.edu/for-faculty/> [hereinafter UF Research Promotion Initiative]. University of Florida's Research Promotion Initiative, described as a competitive award designed to help us connect your research with a broad audience. They encourage submissions from all areas of campus.

contract renewal. Even if an untenured faculty member decided to conduct research on topics that involve race (*e.g.*, drug policies, cash bail, or solitary confinement), other questions remain. For instance, if the faculty member's published scholarship focuses on race, that instructor will have to determine whether she can assign her research to her students—particularly if the research draws conclusions.

The detailed thinking process that an instructor would have to go through to determine how to approach race and curriculum changes may make studying race less attractive to academics. It might cause Florida professors who began their teaching careers interested in race, to reconsider their scholarship focus. In fact, HB 7 and HB 999's impact extends across disciplines. Whether instructors teach in medicine, law, the social sciences, art, or education, or other academic disciplines, these laws encourage them to stay away from “race stuff.”⁹⁶ While it is difficult to predict how much scholarship will not be done because of these laws, there are indicators that fewer Florida professors will engage in non-mainstream race scholarship. This makes it likely that there are race-based social theories that will not be developed and paradigms that will not be explored. Simply put, the legislative attack on race scholarship imposes incalculable harm as it reshapes the future of race education in Florida. The negative impact of these laws on future race scholarship is more than a theoretical concern. These laws make Florida a hostile space for race-related scholarship—and thus a hostile space for race scholars.

B. Denigration and Suspicion of Race Scholarship

Florida's new laws, which create new educational parameters, have far-reaching consequences. HB 7 and HB 999 influence the curriculum decisions of individual instructors. These laws foster a climate that actively undermines the role race plays in society. By design, these laws craft a new blueprint for which bodies of knowledge constitute “the truth.” The laws delineate which information about race is acceptable for students to learn and which information is off-limits. In this way, these laws do double duty: They mandate both ignorance *and* knowledge.⁹⁷ In

96. In some instances, it is the mention of race that sparks controversy. An incident that took place in Oklahoma offers an example. Ryan Walters, the State superintendent of instruction, said that the 1921 Tulsa Race massacre was not “really about race.” He said that teachers should not say that “the skin color determined it.” The Race Riot involved mobs of Whites who killed approximately 300 Black people and burned down scores of Black homes and businesses. Adam Gabbatt, *Outrage as Republican Says 1921 Tulsa Massacre Was Not Motivated By Race*, GUARDIAN, July 8, 2023.

97. See, *e.g.*, House Bill 7 (2022). In the year following the passage of HB 7 many instructors have decided to err on the side of compliance, which means removing material from

effect these laws place a scarlet letter on the scholarship they ban. It is not just that these perspectives are marginalized,⁹⁸ it is also that they are dismissed as illegitimate, faux scholarship.⁹⁹ These laws operate in a way that denigrates race scholarship. This creates suspicion about race research. This creates a climate in which the denigration and suspicion of race scholarship reinforce and propel one another.

HB 7 and HB 999 act as preemptive strikes against instruction that includes critical analysis and marginalized narratives. They mandate the exclusion of some topics (*e.g.*, reparations) and theoretical perspectives that identify the systemic harms of racism (*e.g.*, CRT, Afro-pessimism¹⁰⁰). They demand that instructors teach some material but in doing so, teachers will obscure key aspects of history. In this scheme, students are taught a one-sided, non-critical, and ultimately superficial version of U.S. racial history.

What, for instance, can instructors teach students about Thomas Jefferson? While his political credentials are widely known and widely taught in K-20 education, do HB 7 and HB 999 rewrite how instructors can present Jefferson to their students? Jefferson was the third president of the United States, the author of the Declaration of Independence, a governor of Virginia, and a lawyer. He was also an enslaver. Over the course of his life, he held more than 600 Black people in bondage.¹⁰¹ One of them was Sallie Hemmings who bore six of his children.¹⁰² Under HB 7 and HB 999, as part of a larger discussion of Jefferson, can an instructor assign books and articles that give a fuller picture of Jefferson? This could be done by assigning reading material that addresses his treatment of

their courses. Neither the Florida State University System, nor another statewide entity, has provided instructors with detailed guidance as to what is permissible. This encourages instructors to take the safest route. This makes the legislative reach of the law even broader—far past what the law can constitutionally require. Given there are numerous newspaper articles that quote faculty members who say the law is confusing and they are afraid of being in violation, the state knowingly benefits from this default position. The state is aware that at least some of the material instructors have removed from their courses do *not* violate the law.

98. See, *e.g.*, Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994) (discussing CRT).

99. See, *e.g.*, Stephanie Saul, Patricia Mazzei & Trip Gabriel, *DeSantis Takes on the Education Establishment, and Builds His Brand*, N.Y. TIMES, Jan. 31, 2023 (referring to curriculum that should be taught in college Governor DeSantis stated, “The core curriculum must be grounded in actual history, the actual philosophy that has shaped Western civilization . . . We don’t want students to go through, at taxpayer expense, and graduate with a degree in *Zombie studies*” *id.* (emphasis added)).

100. See, *e.g.*, FRANK WILDERSON III, AFROPESSIMISM (2020).

101. See, *e.g.*, Slavery FAQs—Property, Monticello.org, <https://www.monticello.org/slavery/slavery-faqs/property/>.

102. ANNETTE GORDON-REID, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1998).

enslaved people as a group (compared with his treatment of enslaved people he owned), and material that analyzes his political position on U.S. chattel slavery.¹⁰³ This context, then allows for a comparison of Jefferson with other founding fathers.¹⁰⁴ What if students ask their instructor, “Is slavery wrong?” It is troubling that this question might give pause. It is perplexing not because everyone agrees on the answer, though most people believe slavery was wrong,¹⁰⁵ but because the instructor—the expert in the classroom—has to consider whether it is permissible to share his informed opinion with students.¹⁰⁶ The Florida legislation does not attach educational value to nuanced discussions of race and history. History is flattened to emphasize good news stories and everything else is indoctrination. The same questions would arise across a range of courses that highlight established mainstream historical figures—particularly ones who have engaged in racially problematic actions.¹⁰⁷

C. Children’s Feelings

One of the arguments offered to support these new laws is that they acknowledge and protect children’s feelings. Florida Governor DeSantis

103. Regarding slavery, Jefferson acknowledged the gross injustice of the institution. However, he also expressed a belief that slavery was a benefit for Black people because they were not capable of taking care of themselves and should be returned to Africa. THOMAS JEFFERSON: BRIEF BIOGRAPHY OF THOMAS JEFFERSON, <https://www.monticello.org/thomas-jefferson/brief-biography-of-Jefferson/>.

104. Similar issues regarding instruction could be raised about how HB 7 and HB 999 would impact instruction on Alexander Hamilton.

105. See, e.g., Jeffrey Jones, *Americans Say Government Should Address Slavery Effects*, SOC. & POL’Y ISSUES, June 16, 2022 (poll finds that 62 percent of Americans think the government should act to minimize the impact of slavery. Eighty-three percent of Blacks, 71 percent of Hispanics and 54 percent of Whites).

106. See, e.g., Hannah Natanson, ‘*Slavery Was Wrong*’ And 5 Other Things Some Educators Won’t Teach Anymore, WASH. POST, Mar. 6, 2023. Article highlights difficulty teachers are having implementing new, nebulous rules around race instruction. It includes an interview with an Iowa high school teacher who asked the school superintendent, “Is it acceptable for me to teach students that slavery was wrong?” In response, the superintendent stated that an answer would be a “stance” not a fact. This incident exemplifies the fear, lack of clarity, and overall problem the new education laws have created for instructors.

107. Alexander Hamilton offers another example. For centuries he has been hailed as a staunch abolitionist—one of the few founding fathers who did not own slaves. This is a narrative that is supported by “Hamilton,” Lin-Manuel Miranda’s Tony-award winning Broadway play. In fact, Hamilton did own slaves. See, e.g., Mary Esch, *Research Sheds Light on Alexander Hamilton as Slave Owner*, ASSOCIATED PRESS NEWS, Nov. 11, 2020, <https://apnews.com/article/research-alexander-hamilton-slavery-bbc774b5175f20e8f1543c9b9e14aed3>; Jessie Serfilippi, *As Odious and Immoral a Thing: Alexander Hamilton’s Hidden History as an Enslaver*, SCHUYLER MANSION STATE HISTORIC SITE (2020), <https://parks.ny.gov/documents/historic-sites/SchuylerMansionAlexanderHamiltonsHiddenHistoryasanEnslaver.pdf>. Again, does HB 7 and HB 999 provide space for investigating Hamilton’s efforts to implement the electoral college (as a way of preventing Black people from having direct power in the voting booth) and its racial implications?

has said that exposing children to certain racial topics makes them feel bad and that they should not be made to feel guilty for being White.¹⁰⁸ Here are five counterarguments for consideration. One, the “children’s feelings” perspective only takes into consideration one specific group of children—White children.¹⁰⁹ For decades, Black children and other children of color have expressed concern and torment related to the teaching of race-related topics, in assigned readings,¹¹⁰ class projects,¹¹¹ and class discussions.¹¹² In her article examining how anti-CRT laws privilege White children, Law Professor LaToya Baldwin-Clark states, “The anti-CRT measures that prohibit assigning ‘psychological guilt’ put White children’s emotional well-being before other values of public education, such as democratic pluralism and accurate portrayals of the past.”¹¹³ There is a racial hierarchy of children’s feelings. Accordingly, some children’s feelings are treated as more important than other children’s feelings.

108. One of the threads that runs deeply through the arguments for HB 7 and HB 999, primarily through public political statements, is that people who are interested in teaching children about race and social justice (e.g., reparations and global warning), have their facts wrong. So, these new laws are offered as an essential corrective. Here is an example. In a 2022 gubernatorial debate with Charlie Crist, DeSantis said: “You have people that are teaching . . . the United States was built on stolen lands . . . That is inappropriate for our schools. It’s not true.” C-SPAN, Oct. 20, 2022, <https://www.c-span.org/video/?522607-1/florida-gubernatorial-debate>.

109. See generally Benjamin Justice, *Schooling as a White Good*, 63 HIST. EDUC. Q. 154-78 (2023) (examining ways in which pronouncements of education as a “public good” mask the particular centering of White children in the development of educational curriculum. As a result, schooling is more accurately labeled as a “White good.” Article gives historical accounting of how Whiteness and schooling worked to bar children of other races (e.g., indigenous and Black), from basic learning opportunities.).

110. See, e.g., MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (1884). (using the “n-word” more than two hundred times in the book, it has faced numerous challenges by Black parents). See, e.g., Maureen Downey, *Students Can’t Utter The N-Word in School But Can Read It in English Class*, ATLANTA-J. CONST., Dec. 4, 2016; Fox 11 YouTube, *California Teacher Tells Middle School Student To Read Racial Slur Used In Huck Finn Aloud In Class* (April 2023), <https://video.search.yahoo.com/yhs/search?fr=yhs-mnet-001&ei=UTF-8&hsimp=yhs-001&hspart=mnet¶m1=796¶m2=84469&p=california+teacher+tells+middle+school+student+to+read+racial+slur+used+in+huck+finn+aloud+in+class&type=type9043493-spa-796-84469#id=1&vid=346515ecf112ddf1f326d6650e0fab10&action=click>. For examples involving indigenous children, see, e.g., Shane Croucher, *Native American Mom Blasts ‘Racist’ School Assignment About Slaughter of White Colonists*, NEWSWEEK MAG., Mar. 6, 2018; Kate Perez, *Indigenous Parents, Students Call Out Iowa City Schools, Iowa City for Racism*, DAILY IOWAN, Jan. 25, 2023.

111. See, e.g., Sonja Haller, *5th-Grade Class Holds Mock Slave Auction Selling Black Students; Authorities Investigating*, U.S.A. TODAY (Mar. 10, 2019, 9:07 PM) (probing by New York Attorney General is taking place over Slave auction of Black students).

112. See, e.g., Meagan Mangrum, *Federal Judge Dismisses Lawsuit Over ‘Let’s Make A Slave’ Assignment Taught at Nashville Elementary School*, NASHVILLE TENNESSEAN, May 18, 2021.

113. See, e.g., LaToya Baldwin Clark, *The Critical Racialization of Parents’ Rights*, 132 YALE L.J. 3000, 3056 (2023).

Two, if we value children's feelings, why would we only take them into account when they relate to a particular subject—*e.g.*, race? If it matters how children feel when they read and discuss racial topics in class, it should also matter how they feel about other educational subject matter. What if children become upset when they learn about the sinking of the Titanic? Or, when they learn about the number of casualties during World War II or the Vietnam War? Or, what if while reading Roald Dahl's children's book, *Charlie and the Chocolate Factory*, students feel sad and guilty about the poverty-stricken living conditions of the main character?¹¹⁴ Based on children's feelings, should state legislatures be permitted to excise this information or material from classroom lessons?¹¹⁵

Three, it appears that the feelings of White parents may be as much an impetus for the new laws as the feelings of their children. It is clear from the protests by White parents that they are upset about curriculum that they believe implies that White people are responsible for or benefit from anti-Black racism.¹¹⁶ Four, the emphasis on children's feelings points to another contradiction in the Florida laws. One of the stated rationales for HB 7 and HB 999 is concern for children's feelings. The facts, however, indicate otherwise. If Florida legislators were concerned with children's feelings, they would embrace social-emotional learning (SEL)¹¹⁷ and more broadly, social justice. SEL is an educational approach that is based on the role of emotion in the learning process. However, Florida has rejected SEL as a teaching approach.¹¹⁸ It appears that education administrators in Florida are not concerned with children's feelings.¹¹⁹ Their concern only extends to how some children feel about

114. ROALD DAHL, *CHARLIE AND THE CHOCOLATE FACTORY* (1964).

115. The consideration of children's feelings offers a classical slippery slope. We can imagine infinite other school lessons and material that might make some students feel bad, feel sad, or feel guilt. For example, school lessons on the growing unhoused population, people who are mentally ill, those who are drug-addicted, famines, and the impact of global warming, might cause students to have feelings of grief, despair, or personal responsibility.

116. See, *e.g.*, Chelsea Bailey & Brandon Drenon, *Florida's Battle Over How Race is Taught in Schools*, BBC, Mar. 11, 2023 (including interview with Florida mother who says that "teachers should teach history without making children feel guilty for being [W]hite or that they are 'inherently racist'").

117. See, *e.g.*, Tim Walker, *The Truth About SEL? It Works*, NEA TODAY, Jan. 19, 2023.

118. See, *e.g.*, Emma Kate Fittes, *Florida Targets Imagine Learning's SEL Curriculum in Message to Superintendents*, EDUC. WK. MKT. BRIEF, Mar. 7, 2023 (State's education commissioner, Manny Diaz says that SEL is "divisive and discriminatory" and "has no place in Florida's classrooms"); Sarah Mervosh & Dana Goldstein, *Florida Rejects Dozens of Social Studies Textbooks, Forces Changes in Others*, N.Y. TIMES, May 9, 2023.

119. In an early draft of HB 999, the legislation banned "any major or minor that is based on or otherwise utilizes pedagogical methodology associated with Critical Theory, including, but not limited to, Critical Race Theory, Critical Race Studies, Critical Ethnic Studies, Radical

some curriculum topics taught from specific perspectives.

Finally, there are no research findings indicating that students are harmed by learning about race, racism, or racial history.¹²⁰ If part of the core legislative rationale is centered on children's feelings, where is the scholarly support? There is none. In fact, a written complaint by a *single* parent can force a book from the shelves of a school library.¹²¹ This undercuts the argument that the focus of the law is on children as a group. In sum, the children's feelings argument is a disingenuous cover for Florida's anti-race, anti-education laws.

The below graphic illustrates the various objections leveled against race scholarship. It shows how these objections have been used to justify the new laws. It shows the harms that come from the denigration of race as a legitimate, rigorous subject of research. The below graphic draws the route from problem, to harm, to solution:

Feminist Theory, Radical Gender Theory, Queer Theory, Critical Social Justice, or Intersectionality.” House Bill 999, lines 78-84 (2023).

120. See, e.g., Julie M. Hughes et al., *Consequences of Learning About Historical Racism Among European American and African American Children*, 78 CHILD DEV. 1689-705.

121. Chris Panella, *A South Carolina Teacher Had Her AP Lesson Shut Down After Students Snitched that She Planned to have Them Read Ta-Nehisi Coates' Memoir*, BUS. INSIDER, June 14, 2023.

RACE SCHOLARSHIP

<u>Problem</u>	→	<u>Harm</u>	→	<u>Solution</u>
Based on Lies ¹²²	→	Racist ¹²³	→	
Grievance Scholarship ¹²⁴				
Harmful to White Children	→	Unpatriotic	→	Must Regulate
Marxist ¹²⁵	→	Indoctrination ¹²⁶	→	→ HB 7 & 999
Presents Negative Image of America ¹²⁷				
Not Reputable Scholarship ¹²⁸				

This chart illustrates how race scholarship has been framed as a problem. As shown, there are multiple indicators of this problem. These indicators include a mix of concerns about the curriculum students are

122. Referring to his bill banning CRT, Gov. DeSantis commented, “[W]hat we will not do is let people distort history to try to serve their current ideological goals. . . . [W]e will absolutely teach all aspects of history that are true.” Amber Phillips, *How Florida Gov. Ron DeSantis Wages His Culture Wars*, WASH. POST, Apr. 28, 2023.

123. Governor DeSantis has referred to CRT as “state-sanctioned racism.” See, e.g., Amy Simonson, *Florida Bill to Shield People from Feeling ‘Discomfort’ Over Historic Actions By Their Race, Nationality or Gender Approved by Senate Committee*, CNN, Jan. 20, 2022.

124. See, e.g., Steve Peoples, Brendan Farrington, & Kat Stafford, *DeSantis Is Defending New Slavery Teachings. Civil Rights Leaders See a Pattern of ‘Policy Violence,’* NEWS & OBSERVER, July 28, 2023, <https://www.newsobserver.com/news/national/world/national/article277709023.html#storylink=cpy>.

125. See, e.g., Press Release, Florida Governor’s Office, Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (Apr. 22, 2022) referring to “wokeness,” Florida State Lt. Governor, Jeanette Nuñez said, “We will always fight to protect our children and parents from this Marxist-inspired curriculum” when commenting on DeSantis signing HB 7 law).

126. See, e.g., Leah Asmelash, *Florida Bans Teaching Critical Race Theory in Schools*, CNN, June 10, 2021 (banning in Florida schools. DeSantis comments that students need protection “from being indoctrinated to think a certain way”).

127. See, e.g., Sarah Blaskey, *Few complained of ‘woke’ classes at Florida*, MIA. HERALD, April 25, 2023 (quoting Governor DeSantis, “We won’t allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other.”); Asmelash, *supra* note 126 (quoting DeSantis who stated that CRT teaches that “the country is rotten and that our institutions are illegitimate”).

128. Patricia Mazzei & Anemona Hartocollis, *Florida Rejects A.P. African American Studies Class*, N.Y. TIMES, Jan. 19, 2023 (quoting Governor DeSantis about AP African American Studies course, “As presented, the content of this course is inexplicably contrary to Florida law and significantly lacks educational value.”).

exposed to and the type of scholars and scholarship incorporated into classroom learning. Together, these problems develop into a perception of larger-scale harms. The next predictable step is adopting legislation that will quell the problems they have labeled as indoctrination.¹²⁹

III. IMPACT ON RACE SCHOLARS

This Part looks at how HB 7 and HB 999 impact academic researchers whose scholarship focuses on race. While there is some overlap between how the Florida laws affect scholarship on race (discussed in Part II) and academics engaged in race-related research, there are distinct harms that these laws pose to instructors who conduct research on race-related issues. Further the discussion explores how these laws discourage and dissuade Florida scholars from engaging in race research.

A. Diminishment of Race Scholars

“There goes my career.”¹³⁰ That was the response of a professor who retired from a Florida university in 2022. The professor’s reaction to the passage of HB 999 may sound like hyperbole but a close assessment of the law’s effect indicates that it could have widespread and potentially severe consequences on academics who do research on race. As a result of the aspersions the laws cast on instructors who study and teach about race and social justice, educators are much less likely to expose their students to broader understandings of how race matters across various disciplines and historical frameworks. These laws appear poised to greatly diminish the research of scholars whose central area of study involves race, race relations, and racism. Per HB 999, DEI-related programs are not allowed at public state colleges and universities in Florida.¹³¹ This effectively shuts down the work of scores of educators and administrators. This includes scholars who have studied, evaluated, and developed DEI programs. The new laws have silenced the vast body of research on DEI. While the DEI shutdown will likely cause harm to a relatively small number of academics, the reach of the law extends to many more people. Not only do these laws signal that race-related scholarship is not important, they also imply that it is not really scholarship.

Because the Florida legislation devalues some areas of scholarship, this arguably lessens the perceived benefit of certain degrees and

129. See 6A-1.094124 Required Instruction Planning and Reporting.

130. Correspondence on file with Author.

131. House Bill 999, at 13 (2023).

disciplines,¹³² such as African American Studies,¹³³ Gender Studies,¹³⁴ and Ethnic Studies.¹³⁵ Florida's curriculum shift may cause race scholars to be treated differently from their peers. For instance, instructors who engage in research focused on race or gender studies, may be less likely to receive university recognition and support.¹³⁶ When seasoned Florida educators—those with years-long educational training and credentialing—find themselves in an academic environment they perceive as hostile, they may reevaluate the viability of their scholarship and academic discipline. Further, many African American academics study, research, and teach on issues involving race, equity, and justice in their respective fields. Thus, the new laws may disproportionately impact Black scholars.¹³⁷

The diminution of some scholarly issues may cause professional as well as personal harm to the scholars doing this work. The breadth of the legislative changes combined with the speed with which they were made, adds to the degree of impact on faculty. The psychological effects of these changes remain to be seen. However, it is not a stretch to deduce that instructors who engage in race-related scholarship in Florida are likely to experience trauma-related consequences in the wake of HB 7 and HB 999.¹³⁸ The trauma might involve the stress associated with attempting to

132. *See id.* at 21-22.

133. *See, e.g.*, University of Florida (African American Studies Program), <https://afam.clas.ufl.edu>; Florida State University (African American Studies Program), <https://coss.fsu.edu/aas/>.

134. *See, e.g.*, University of Florida (Department of Gender, Sexuality, and Women's Studies), <https://wst.ufl.edu>.

135. *See, e.g.*, Florida International University (Ethnic Studies), <https://www.collegefactual.com/colleges/florida-international-university/academic-life/academic-majors/ethnic-cultural-gender-studies/ethnic-studies/>; Florida State University (Global, Area, & Ethnic Studies), <https://academic-guide.fsu.edu/global-area-ethnic-studies>, University of South Florida (Department of Humanities and Cultural Studies), <https://www.usf.edu/arts-sciences/departments/humanities-cultural-studies/>, and the University of Florida (Ethnic Studies), <https://www.collegefactual.com/colleges/university-of-florida/academic-life/academic-majors/ethnic-cultural-gender-studies/ethnic-studies/>; University of Miami (Native American & Global Indigenous Studies), <https://nagis.as.miami.edu/>.

136. *See, e.g.*, UF Research Promotion Initiative, *supra* note 95. The Initiative invites faculty members to submit a recently published article. Articles that are chosen are widely publicized and highlighted in UF online and print media. The recognition also comes with a \$1,000 stipend. The university's goal is to support and highlight faculty and select faculty scholarship. It is described as a "competitive award designed to help us connect your research with a broad audience . . . We encourage submissions from all areas of campus." *Id.*

137. There does not appear to be data available that calculates the percentage of African American scholars who produce race-related scholarship. However, a detailed review/look at who the academics are who teach and conduct research on race-related issues in the state of Florida (e.g., university or law school level), indicates that a disproportionate percentage are academics of color, primarily Black scholars.

138. *See, e.g.*, Mallory Pace & Carter Mudgett, *Anger, Anxiety, Uncertainty Mark Last Six*

understand the new laws; stress related to determining how to comply with these laws; and ultimately, stress associated with assessing the educational, psychological, and professional costs of both compliance and non-compliance.

Understandably, some instructors will wonder whether their long-nurtured areas of scholarship and expertise are valued by their institution.¹³⁹ Specifically they will be faced with considering the worth of their academic degrees in the new educational climate.¹⁴⁰ Based on this assessment, some faculty members will decide to leave Florida and seek employment at another college, university, or business that welcomes their areas of expertise. A decision to leave the state comes with tangible and intangible costs.¹⁴¹ HB 7 and HB 999 impose a steep toll on race

Months of Battle Waged Over Florida University Diversity Centers' Fight for Existence, SPINNAKER, June 30, 2023. UNF Spinnaker Matt Harley, director of the University of North Florida's Interfaith Center (part of the university's Office of Diversity and Inclusion office), describes experiences following passage (but prior to implementation) of HB 999, says,

Throughout these months, I've felt my career under attack . . . I think because we're welcoming new students to campus, and we don't know what things are going to look like . . . I just felt my body kind of collapse, metaphorically, what it felt like was chest tightness . . . It's like all of the stages of grieving at once. It's anger, it's despair, it's bargaining.

Id.

139. See KATHERYN RUSSELL-BROWN & RYAN MORINI, A WAY FORWARD: UF RACE SCHOLARS ON SUPPORT, OBSTACLES, AND THE NEED FOR INSTITUTIONAL ENGAGEMENT (Fall 2021). The Report is based on 2021 survey and interviews with 39 faculty members engaged in race-related scholarship at the University of Florida. One survey respondent commented, "Scholars conducting work on racism are being heavily surveilled and I do not get the sense that the school will protect them." *Id.* at 20. Another stated,

As a non-tenured faculty member, I am hesitant to share certain views and perspectives regarding race and structural racism due to prevailing political tendencies that are evident at UF. I do not feel open to share those perspectives . . . because of fear of retribution during evaluation periods. This dynamic ultimately impedes my work on race and anti-racism because I knowingly hold back out of concern for my job security. In other words, I often feel my freedom of expression and academic inquiry is suppressed.

Id. at 19.

140. See *id.* Governor DeSantis has made it clear that universities must now focus on whether particular college majors will result in employment. Under HB 999, the viability of a major is based on the rates of post-graduation student employment. House Bill 999, at 9, lines 203-220. Governor DeSantis, has stated that if students are interested in topics such as gender ideology, they should "go to Berkeley." C.A. Bridges, *DeSantis to Florida DEI Students*, USA TODAY NETWORK-FLORIDA, May 16, 2023.

141. This includes tangible and intangible costs, such as rebuilding academic networks; leasing, selling or purchasing a home; having to locate new health care providers, changing retirement plans, finding a new school for children, and re-establishing oneself in a new academic

scholars. Placing race scholarship in the cross hairs of educational reform puts race scholars at risk. HB 7 and HB 999 marginalize race scholarship *and* at the same time marginalize the race scholars who by degree and training are best positioned to critique and analyze these vast legislative changes. Researchers, who have already devoted their careers to studying race and who have produced a robust body of scholarship on race, will be forced to decide how to navigate under the new rules.¹⁴²

B. Syllabi & Classroom Instruction

The new laws impose additional burdens on instructors. It requires that they engage in a detailed analysis of how to proceed in view of the legislation. For instance, should their course lectures and reading material include issues, theories and direct references to race? To answer this, they would have to spend time familiarizing themselves with the basics of the laws. This could include speaking with colleagues, reviewing any information that is on the university's website and conducting online searches on the topic. They will also need to assess whether any of their course content is in the danger zone. If so, instructors will have to decide whether to remove the material or reduce the amount of the material.¹⁴³ Even when they do not think their course curriculum violates the law, many instructors will revise their material anyway.¹⁴⁴ They will do this even though the law they are attempting to adhere to has not been upheld as constitutional.¹⁴⁵

home.

142. In response to the passage of HB 999, Professor David Canton, the director of the African American Studies Program at the University of Florida, said, "As a professor you start doing double takes: Am I making sure that I'm showing students multiple perspectives?" Megan Zahneis & Supiano, *supra* note 21.

143. Daniel Golden, *Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching*, PROPUBLICA (Jan. 3, 2023, 7:00 AM) (detailing University of Central Florida sociology Professor Jonathan Cox details his academic dilemma).

For Fall 2022 semester, Cox was scheduled to teach two courses, both would include a discussion of colorblind racism. Professor Cox decided not to teach either, "Race and Social Media" or "Race and Ethnicity," saying, "It didn't seem like it was worth the risk," noting that he was "completely unprotected." He noted, "Somebody who's not even in the class could come after me. Somebody sees the course catalog, complains to a legislator — next thing I know, I'm out of a job." *Id.*

144. Zahneis & Supiano, *supra* note 21. Professor Andrea Marquez, who teaches business courses at the University of Texas, describes the process she undertook to determine whether she could require her students to read a case study that addressed issues of racial disparity in a business model. Since Texas passed a law similar to Florida's anti-CRT legislation, Marquez, an assistant professor, says she was concerned that some of her material "could potentially ruffle feathers." She went through what she described as an "internal debate." She evaluated the curriculum for the course and considered removing some material that might be considered CRT. Ultimately Professor Marquez decided to keep in the case study. AAUP ACADEMIC FREEDOM AND FLORIDA, *supra* note 21, at 16.

145. See *Pernell v. Fla. Bd. Governors*, Case No: 4:22-cv-304, Nov. 18, 2022. District Court

Another wrinkle in this analysis is how the new mandate for post-tenure review will impact specific pockets of the university faculty.¹⁴⁶ For college instructors who study race, this enhanced oversight will likely make them more wary of addressing race in their scholarship and in their classrooms. This will likely hold true for untenured faculty and adjunct faculty members who will be concerned about an unfavorable tenure decision or that their employment contract will not be renewed.¹⁴⁷ The same will also be true for tenured faculty members, who may be concerned with pay raises, teaching assignments, and committee placements. While parts of the law do not explicitly reference race, they may have race-related consequences. For instance, because Black scholars may be more likely to address race issues in their research, HB 7 and HB 999 will likely have a disproportionate impact on those scholars.

The graphic at the end of Part II¹⁴⁸ illustrates the stepping stones that the new laws were built upon. These steps include the deployment of a narrative that warns that certain types of race talk are harmful for our children and warns that there is a proliferation of radical teaching, this causes a social panic, and in response, punitive laws are offered as the solution. The following deduction summarizes how anti-race narratives frame race scholars as problematic:

- (i) Race scholars promote grievance narratives, they are Marxist, they present a skewed, negative image of America, they are anti-White, and their scholarship is not real science.
- (ii) Race scholars are unpatriotic, racist, and their goal is to indoctrinate students.
- (iii) Therefore, race scholars and race scholarship must be

Judge Mark Walker issues injunction against implementation of HB 7. *Id.*; *supra* text accompany note 30.

146. House Bill 999 (2023). Prior to HB 999 post-tenure evaluations were optional, “The Board of Governors may adopt a regulation requiring each tenured state university faculty member to undergo a comprehensive post-tenure review every five years.” *Id.* lines 221-225. With HB 999 the Florida legislature replaced “may” with “shall.” *Id.*

147. There are approximately 18,000 adjunct professors teaching in the Florida College System. Soon, more than half of Florida’s adjunct professors could belong to a union. Adjunct professors comprise 70 percent of the faculty in the Florida College System. Professors at Seven Florida Colleges File for their Union, SEIU Faculty Forward, <http://seiufacultyforward.org/professors-seven-florida-colleges-file-union/>.

148. See *supra* Part II.A.3.

regulated or banned.

This deductive schema positions Florida college instructors who study race, teach about race, and write about race issues as a social threat: They are perceived as such a serious threat to the status quo that legislative action is required. However, there are other, more viable frameworks available for interpreting the work of instructors who are engaged in race-related teaching and scholarship.

Examining these instructors and researchers as *whistleblowers* is a useful analytic prism.¹⁴⁹ It is only through the work done by those who chronicle history that we know what we know about race and racism and their integral role in the founding of the United States. These chroniclers are researchers who revisit longstanding approaches to social and legal facts, who identify new areas of research study, and who are students of history. They are educational whistle blowers who should be listened to and protected.¹⁵⁰ Part of this protection includes ensuring that educators can teach in an environment where they are safe to pursue and critique controversial and areas of scholarship outside of the mainstream. Instead, Florida laws discourage instructors from discussing and investigating race issues across a multi-disciplinary and theoretical landscape.

History is replete with educational whistle blowers. These advocates are introduced to students through various means. An instructor, for instance, may assign the work of journalist Ida B. Wells. Wells meticulously documented thousands of racial-terror lynchings that were committed throughout the United States in the late 1800s and early 1900s.¹⁵¹ In addition to the number of lynchings, she gathered information about the killings, including the reasons the vigilante mobs gave for the killing, the method of killing, and the size of the crowds that gathered to watch and cheer the lynching. Wells's research helped to radically reshape our socio-legal understanding of lynchings, including the racial motivations associated with vigilante killings.¹⁵² Ida B. Wells

149. The term whistleblower is typically used to describe someone who provides information to authorities that a company/corporate employee or state actor has engaged in unlawful behavior. Whistleblowers act despite the risk of professional and personal harm they may face.

150. See, e.g., John Ismay, *The Final Flight for Black Sailors Known as the 'Philadelphia 15'*, N.Y. TIMES, June 17, 2023 at A13 (stating "15 sailors assigned to the U.S.S. Philadelphia wrote a letter to a Black newspaper detailing the abuse and indignities they had faced on the warship solely because of the color of their skin." Because they spoke out all were "kicked out of the Navy.").

151. See, e.g., IDA B. WELLS-BARNETT, ON LYNCHINGS (2022).

152. See, e.g., IDA B. WELLS, CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS (2020).

was a whistleblower. Likewise, Law Professor Derrick Bell's scholarship is devoted to analyzing how laws affected the availability of civil rights protections and justice for Black people.¹⁵³ Specifically, his writings examine how and when the law provides Black people with legal access and redress.¹⁵⁴ Professor Bell was a whistleblower. Instructors who teach marginalized perspectives, investigate different paradigms, and who use varied pedagogical approaches for understanding racial history, they are whistleblowers as well.¹⁵⁵

Legislative attempts to silence instructors who incorporate non-mainstream race perspectives deny the long history of anti-literacy and a White-focused educational structure.¹⁵⁶ Whether they are instructors or researchers (or both), educational whistleblowers play a critical role in providing students with a more expansive and critical education. Their work undercuts anti-literacy movements, such as HB 7 and HB 999. Whistleblowers' work illuminates research and perspectives that have been missed or hidden. Whether they are researchers or instructors, the work of whistleblowers may disrupt the status quo: Educational whistleblowers are pro-literacy.¹⁵⁷

153. See, e.g., Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992); DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004).

154. See, e.g., Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 153, at 518.

155. See Dawn C. Nunziato, *First Amendment Protections for 'Good Trouble,'* 72 EMORY L.J. 45 (2023) (arguing the role of instructors as civil rights advocates, who are protected by the First Amendment). Nunziato states:

Many of the fundamental First Amendment doctrines that were forged in the classical civil rights era are implicated in the context of modern-day civil rights and social protest movements like the BLM movement and movements critical of police misconduct, as well as educators' efforts to teach students about the effects of systemic racism within our public institutions of learning.

Id.

156. See, e.g., JARVIS R. GIVENS, *FUGITIVE PEDAGOGY: CARTER G. WOODSON AND THE ART OF BLACK TEACHING* (2021) (discussing in detail ways in which mid-twentieth century Black teachers forged school lessons that embraced and celebrated Black humanity). See e.g., Russell-Brown, *supra* note 11, at 5-6 (in draft) (discussing Givens's thesis).

157. ERVING GOFFMAN, *PRESENTATION OF SELF IN EVERYDAY LIFE* (1973). Goffman's discussion of backstage and frontstage offers a useful analogy for whistleblowers. Goffman observed that there are actions that happen on front stage and those that happen on the backstage, behind the curtain. The activities in the front and the back are interconnected. *Id.* at 112. Goffman's framework supports the value, indeed necessity, of the backstage in understanding and analyzing the mainstream, or frontstage, views.

IV. THE BIGGER PICTURE OF HARM

As detailed earlier, HB 7 and HB 999 are part of a larger web of laws that signify racial retrenchment.¹⁵⁸ These laws identify what counts as acceptable scholarship. In doing so, they signal that some scholars are legitimate, and others are not. In fact, these laws create a vast field of harm. This Part explores some of the social problems caused by these laws.

A. *Leaving Florida*

“Brain drain”¹⁵⁹ is a predictable response to laws that substantially curtail how race is taught in Florida. The term is typically used to describe the process of intellectual talent that migrates from one location to another, such as from one state to another (or from one country to another). During the time period that HB 7 and HB 999 were enacted, there has been an overall decline in the number of employees at some state colleges.¹⁶⁰ Because these laws are new, there is not yet a reliable estimate of Florida faculty who have left the state, who have plans to leave, and who will eventually leave. However, evidence abounds of college instructors,¹⁶¹ administrators, and students “voting with their feet,”¹⁶² and choosing to exit Florida, rather than live under its new educational regime.¹⁶³

In addition to those faculty members who have moved or will leave

158. See *supra* text accompanying note 14.

159. See, e.g., merriamwebster.org Brain drain Definition & Meaning - Merriam-Webster, <https://www.merriam-webster.com/dictionary/brain%20drain>.

160. A 2023 study by the Tampa Bay Times found that in 2022, the University of Florida had 1,087 employee resignations, the first time in the last five years that the number has been higher than one thousand. Divya Kuman & Ian Hodgson, *Florida Laws Chasing University Faculty Away?*, TAMPA BAY TIMES, July 6, 2023, at 1.

161. See generally Francisco Alvarado, *Desantis War On ‘Woke’ Leads to Faculty Brain Drain At Florida Public Universities*, FLA. BULLDOG, Apr. 25, 2023.

162. Refers to an expression of one’s opinion by physical movement, such as “to show your opinion by leaving an organization or by no longer supporting, using, or buying something.” Cambridge Dictionary VOTE WITH YOUR FEET definition, <https://dictionary.cambridge.org/dictionary/english/vote-with-feet>.

163. Professor Carolyne Ali-Khan who taught at the University of North Florida for twelve years comments: “It’s not safe here anymore on so many levels. . . It’s not physically safe. It’s not economically safe. It’s not professionally safe. It’s not intellectually safe. That was not true when I got here.” Kuman & Hodgson, *supra* note 160. Further, the impact of these laws may extend to state residents who are not affiliated with a Florida college or university. See, e.g., “Goodbye, Florida” Twitter post by Karla Smith says, in part, “I want nothing to do with a place where LGBTQ+ people are deliberately put in danger, where books are banned, where science and the media are demonized and derided.” Panoramic Information Voices and Perspectives: The Impact and Controversy Surrounding Affirmative Action day 05/07/2023 - Bestideadiy (Point “10”).

the state,¹⁶⁴ there are professors outside of Florida who have declined academic positions in Florida for the same reason.¹⁶⁵ Further, there are faculty members in other states who are on the job market, who will no longer consider a move to Florida.¹⁶⁶ This tumult is not only the result of the new laws but also the state's larger socio-political climate, which includes the passage of other legislation, such as book banning.¹⁶⁷ For some people, these new laws broadcast that Florida is anti-literacy and anti-Black history.¹⁶⁸ The academic migration includes not only university instructors and administrators, but also students.¹⁶⁹ Students have expressed concern about legislation that excises race and social justice learning from the college curriculum.¹⁷⁰ They wonder what substantive course material and what class discussions they will miss because their professors are fearful of violating the law.¹⁷¹ These concerns have caused some students to make plans to transfer to universities outside of Florida.¹⁷² This academic migration also includes

164. Since 2021, a growing number of faculty members of color have accepted teaching positions at universities outside of Florida or retired. In 2020, there were six Black faculty members teaching at University of Florida's Levin College of Law. By the end of 2022, none of the six were teaching courses at the College of Law.

165. See, e.g., AAUP ACADEMIC FREEDOM AND FLORIDA REPORT, *supra* note 21. "We have heard reports that faculty members of color and those teaching in the humanities and social sciences in particular are seeking to leave and that filling positions with candidates of color has become difficult, if not impossible." *Id.* at 16; Joseph Contreras, 'I'm Not Wanted': Florida Universities Hit By Brain Drain As Academics Flee, *GUARDIAN*, July 30, 2023 (A faculty member who decided to leave Florida said, "All of the legislation surrounding higher education in Florida is chilling and terrifying"); Garrett Shanley, *New State Legislation Leads To Departures, Concerns Among UF Faculty*, *INDEP. ALLIGATOR*, July 31, 2023 (a former UF faculty member comments, "Nobody's really comfortable being put on a list in the governor's office . . . [a]t a certain point, you have to protect yourself"). For the 2022-2023 academic year, the University of Florida's African American Studies Program made offers to nine scholars (to fill three positions). None of the nine candidates accepted an offer. See Kuman & Hodgson, *supra* note 160.

166. See, e.g., Kuman & Hodgson, *supra* note 160.

167. See generally *supra* Part I.D.

168. In a few instances, educators outside of Florida have expressed support for Florida college students who plan to leave the state. For instance, Professor Imani Perry has called for progressive states to waive the out-of-state tuition fees for Florida college students who plan to leave the state, and instead charge them the less costly in-state tuition rate. Imani Perry, [Twitter@imaniperry](https://twitter.com/imaniperry), Eddie Glaude, May 15, 2023.

169. See, e.g., Fast Company, *Ron Desantis Wants to Reshape Florida's Universities. It Could Lead To Massive 'Brain Drain'*, June 21, 2023 [hereinafter Fast Company] ("Professors and students are considering leaving Florida in light of higher education changes.").

170. Christine Emba, *How Alarming Are Florida's Higher-Ed Reforms? Students Weigh In*, *WASH. POST*, Apr. 19, 2023 (noting that more than two-thirds of students who plan to attend college in Florida are concerned that the new policies will have a negative impact on their collegiate education). See also *The Role of Politics in Where Students Want to Go to College*, *INSIDE HIGHER ED*, Mar. 26, 2023.

171. See Fast Company, *supra* note 169 (including a discussion of perception college students have since HB 7 has passed. One notes that his professor sometimes skirted around topics and placed words on the board rather than saying them aloud.).

172. See *id.*

college students who decide not to apply to Florida colleges, though they had initially planned to do so.¹⁷³ Notably, the shift in how Florida is perceived is not limited to people who are directly affiliated with Florida's colleges and universities. The new laws have led to concerns about the hospitability (and habitability) of Florida for the general public.¹⁷⁴

B. *Allies for Teaching and Learning about Race*

The sting of these laws may also be felt by instructors who do not teach race-related courses in their fields (*e.g.*, anthropology, criminology, or economics). They may include race-related content in their courses. For instance, a criminology instructor who teaches a class on sentencing may discuss the racial disparities that exist in arrest, charging, and sentencing. How is it in the students' best interests for this professor to avoid teaching and talking about racial issues that are the subject of major criminological studies and national debate? Rather than attempt to navigate Florida's legislative thicket, many instructors will likely skip over any material that might be viewed as objectionable under the law.

Beyond the social sciences, there are professors in science, technology, engineering, and medicine (STEM), who incorporate race

173. See, *e.g.*, Tressie McMillian Cottom, *What It Is Like to Teach in the Cross Hairs of Ron DeSantis*, N.Y. TIMES, June 27, 2023 (noting that two of the three Florida professors she spoke with say they will leave the state as a result of the new laws). Fast Company, *supra* note 169.

174. See *infra* notes x-x [Need cite]. See Press Release, NAACP, NAACP issues Travel Advisory in Florida (May 20, 2023), <https://naacp.org/articles/naacp-issues-travel-advisory-florida> (giving an example of the shift in perception of Florida by potential visitors). The Advisory states in part:

Under the leadership of Governor Ron DeSantis, the State of Florida has criminalized protests, restricted the ability of educators to teach African-American history, and engaged in a blatant war against diversity and inclusion. On a seeming quest to silence African American voices, the Governor and the State of Florida have shown that African Americans are not welcome in the State of Florida. Due to this sustained, blatant, relentless and systemic attack on democracy and civil rights, the NAACP hereby issues a travel advisory to African American, and other people of color regarding the hostility towards African-Americans and other minorities.

Id. Nation's Oldest Black Fraternity Moves Convention from Florida Over 'Hostile' Policies, NBC6 (stating "[its] barrage of harmful and discriminatory policies on protests, voting rights, education, and diversity, equity, and inclusion." The fraternity estimates that its conventions generate \$4.6 million in economic impact.). Press Release, Alpha Phi Alpha, Alpha Phi Alpha Fraternity, Inc. Moves 2025 Convention from Orlando, FL due to Governor DeSantis' Harmful, Racist, and Insensitive Policies Against The Black Community (July 26, 2023), <https://apa1906.net/fl-convention-moved/>.

topics into their courses. The ambiguity and newness of HB 7 and HB 999, make it likely that instructors teaching classes where race is a small component of the course will delete this material. Though the Florida laws have not been upheld by the courts, they appear to have been met with preemptive compliance. HB 999 and HB 7 have pushed faculty members to engage in self-censorship.¹⁷⁵ The result is quiet compliance and it has far-reaching consequences. It impacts not only course subjects but approaches to teaching. Prior to HB 999, Sarah Eddy, a biology professor at Florida International University, had adopted an inclusive teaching approach.¹⁷⁶ This approach identifies teaching strategies designed to minimize, for example, “stereotype threat.”¹⁷⁷ The new laws will likely discourage instructors from implementing curricula strategies that will benefit all students.¹⁷⁸ This highlights a critical consequence of these laws. They ban certain subjects and they discourage educators from implementing new teaching methods that would benefit students.

An additional consequence of these laws is that they place Florida college students at a disadvantage, compared with other college students. Students who live in states where teachers are allowed to teach substantive topics and perspectives, even critical ones, will be better prepared to live, learn, and work in a diverse world. The current laws put Florida students at a disadvantage. For example, Florida students will be less likely to have engaged in critical analysis of contemporary race issues, such as reparations, affirmative action, and global warming. These laws will likely make Florida students less competitive than their peers from states that have not banned diversity and race education. These laws may also result in a decline in the national rankings of Florida universities.¹⁷⁹

175. See, e.g., Zahneis & Supiano, *supra* 21 (referencing STEM faculty member who declined to keep topic of redlining in his course—to ensure compliance with HB 999).

176. *Id.*

177. CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO (2011); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in THE BLACK–WHITE TEST SCORE GAP 401-27 (Christopher Jencks & Meredith Phillips eds., Brookings Institution Press 1998).

178. See, e.g., Erin Sanders O’Leary et al., *Creating Inclusive Classrooms by Engaging STEM Faculty in Culturally Responsive Teaching Workshops*, 7 INT’L J. STEM EDUC. 32 (2020).

179. See, e.g., Oliver Grundmann, *Is Florida Where Higher Education Goes To Die?*, FLA. ALLIGATOR, Apr. 10, 2023.

Opinion editorial by UF professor states:

By attempting to limit students’ options for their studies, any lawmaker who supports HB 999 is doing a tremendous disservice to academic freedom and the greater pursuit of education. This attack will recklessly move Florida’s secondary education system backwards, causing underrepresented identities to

C. (Placing Black People) In Harms' Way

As discussed above, there exists a laundry list of harms that comes with Florida's new education restrictions. The most discussed and "seeable" harms are ones that impact instructors and students, and their college classroom experiences. However, there is at least one other large-scale social harm. Racial ignorance, places Black people in harms' way. For instance, racial subordination and inequity are more prevalent when White people have mostly stereotypical information about Black people. These types of racial injury are much harder to observe and take longer to manifest themselves. They result in racial harms that are woven into the fabric of our social and political systems and institutions.

For instance, if media images of Blackness disproportionately portray uneducated, criminal, and buffoonish characters, then Black people will be viewed by White people and members of other racial groups as less deserving and less entitled to state protections and constitutional rights. This puts Black people at an increased risk for all manner of harms: psychological harms as well as physical assault. Examples include demeaning racially-charged exchanges in public,¹⁸⁰ harms that result in physical assault and violence against African Americans (such as anti-Black police violence),¹⁸¹ racially-disparate rates of arrest, charging, and sentencing of Black people,¹⁸² and vigilante assaults targeting Black

feel as if their sheer existence is a political debate, especially since they would be prevented from conducting their own independent research regarding these subjects should this bill be signed into law.

Id.; see also MSNBC with Alex Wagner, Aug. 4, 2023 (interviewing a Florida high school teacher who stated that parents have expressed concern about whether the curriculum changes will make their students less competitive). *But see* Divya Kumar, *US News Ranks Florida No. 1 For Education*, TAMPA BAY TIMES, May 4, 2023.

180. These are sometimes referred to as "microaggressions." The term was initiated by psychologist Charles Pierce, *Black Rage* (19XX) [Need Cite]. See DERALD WING, *MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER AND SEXUAL ORIENTATION* (2010). In recent years, the name "Karen" has been ascribed to/used to refer to a White woman who says that she has been harmed by a Black person in a public space and she seeks protection, often-times from law enforcement. The incidents often involve emotionally wrought claims of harm, involve yelling or tears and sometimes have the quality of a performance or spectacle. Evan Simko-Bednarski, *White Woman is Fired After Calling Police on Black Man in Central Park*, CNN, May 26, 2020 (videotaped calling people on Black birdwatcher in Central Park); see, e.g., Diane deGuzman, *Video Shows Woman Calling Police Over Barbeque at Lake Merritt*, S.F. GATE, May 10, 2018 (using a public grill at Lake Merritt in Oakland, CA).

181. For instance, the killing of George Floyd by four Minneapolis police officers in 2020.

182. For racial disparities in prison, see, e.g., Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/> The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf; ASHLEIGH ELDEMIRE ET AL., *THE BLACK TAX: EVIDENCE OF RACIAL*

people.¹⁸³

Education about the construction of “race” is essential to understanding that Blackness and Whiteness were devised as constructs. These constructs were used to create a racial and economic hierarchy. In this system, White people are at the top and Black people are at the bottom. In this system, members of other racial groups, such as Indigenous peoples, Latinos, and Asians, are placed between Blacks and Whites. During slavery, with this hierarchy firmly in place, the evolving social sciences were used to enshrine the manufactured racial hierarchy.¹⁸⁴ A multitude of harms result from these race-based perceptions. Examples include ways in which Blackness is viewed as a cost (rather than a benefit).¹⁸⁵ The role of race in real estate property valuations make this point. The empirical literature provides overwhelming evidence that Black-owned homes are appraised at much lower values than White-owned homes (as well as homes owned by other non-Blacks).¹⁸⁶ Some scholars refer to these varied racial inequalities as a “Black tax.”¹⁸⁷

The failure of a U.S. educational system to address the basic building blocks related to race, racial history, and race relations means that students in that system will not have a full picture of how race matters in history and in contemporary times. Florida’s legislative restructuring of areas of curricula involving race levies a stiff social cost. While this harm extends to all students, it is Black students who will bear the brunt of society’s racial ignorance. If educators and students are not required to wrestle with individual, group, and state-level analyses of race-related historical events, the inferences and conclusions they draw will be incomplete. Let us assume a student signs up for a course on the criminal justice system. If the course does not incorporate race issues throughout

DISCRIMINATION IN MUNICIPAL BORROWING COSTS (Brookings: The Brennan Project, Nov. 9, 2022).

183. For instance, the vigilante murder of Ahmaud Arbery in Georgia in 2020.

184. See, e.g., STEPHEN J. GOULD, *THE MISMEASURE OF MAN* 72-73; 153 (1980) (critiquing discussion of scientists, including anatomist Etienne Serres and Cesare Lombroso, who sought to prove that Whites are a superior race and less prone to deviance than members of other racial groups).

185. See, e.g., ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 42-43 (1992) (describing a class assignment used in his classes called “The Visit.” The exercise asks White students to consider the financial worth of Black life).

186. See, e.g., Debra Kamin, *Widespread Racial Bias Found in Home Appraisals*, N.Y. TIMES, Nov. 2, 2022; *Racial and Ethnic Valuation Gaps in Home Purchase Appraisals*, FREDDIE MAC, Sept. 20, 2021; Juania Howell & Elizabeth Korver-Glenn, *The Increasing Effect of Neighborhood Racial Composition on Housing Values, 1980–2015*, 68 SOC. PROBS. 1051-71 (2020).

187. See, e.g., SHAWN ROCHESTER, *THE BLACK TAX: THE COST OF BEING BLACK IN AMERICA* (2018).

or at least include a section on race, students might be left to conclude that the disparate rate of Black involvement in the criminal legal system simply reflects disproportionate offending and are therefore justifiable.¹⁸⁸ If students are not taught about the origins and evolution of policing, for instance, they will be much more likely to believe, genetic or biological arguments about the connection between race and deviance.¹⁸⁹ This may lead to perceptions, conscious or otherwise, that Black is “bad,” and White is “good.”¹⁹⁰

Beyond categorizing some academic topics as off limits, HB 7 and HB 999 place limits around the perspectives instructors can use to analyze how the world operates. The legislation prohibits teaching students that systemic racism exists.¹⁹¹ This promotes teaching what could be labeled “narrow history.” This is a perilous road. On the one hand, it allows students to be taught that there is individual-level race discrimination (one person who treats another person unlawfully because of their race). However, if instructors cannot also address institutional level or systemic racism, where does this lead?¹⁹² Banning instructors from addressing the historical and political “connective tissue” harms students. Instructional silence on the role race and racism played in the development and founding of the United States, only gives students an understanding of how individual White people have treated individual Black people—and no understanding of the state’s role in supporting and perpetrating race-based treatment of people. State supported racism has taken many forms. This includes race-based practices, such as sundown

188. For instance, it would be reasonable to expect some of a discussion of origins of American policing would include material on the slave patrols. *See, e.g.*, SALLY E. HADDON, *THE SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND IN THE CAROLINAS* (2001); KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME*, (3d ed. 2021).

189. *See, e.g.*, CHARLES MURRAY & RICHARD HERRNSTEIN, *THE BELL CURVE* (1994).

190. *See, e.g.*, John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, POL’Y COMMONS, May 21, 2019.

191. House Bill 7 (2022).

192. The critique of systemic racism as an improper, problematic approach is notable considering that Governor DeSantis’s changes to Florida’s public education curricula has been systemic as well. The systemic bias, however, has been in service of educational reform that favors particular topics and perspectives. And, an overarching system of changes have been implemented to ensure that these state-preferred educational approaches are adopted. For instance, throughout the state, there has been removal and replacement of some school board members, removal and replacement of some members of college boards of trustees (*e.g.*, New College of Florida), firing of instructors who have used controversial classroom material. It is within this larger context that HB 7 and HB 999 operate. It appears that Florida legislators are fine with systemic bias if it supports their educational aims.

towns,¹⁹³ lynchings,¹⁹⁴ educational segregation,¹⁹⁵ housing segregation,¹⁹⁶ employment segregation,¹⁹⁷ commercial segregation,¹⁹⁸ and racial disparities in the justice system.¹⁹⁹ HB 7 and HB 999 discourage educators from drawing conclusions regarding the impact and ethics of these practices. Instead, educators are expected to present students with some positive explanations for these practices.²⁰⁰ A citizenry educated about systemic racism could mean the difference

193. See, e.g., JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2005).

194. See, e.g., WELLS, ON LYNCHINGS, *supra* note 151; EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2017).

195. See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104737, K-12 EDUCATION: STUDENT POPULATION HAS SIGNIFICANTLY DIVERSIFIED, BUT MANY SCHOOLS REMAIN DIVIDED ALONG RACIAL, ETHNIC, AND ECONOMIC LINES," JULY 14, 2022. K-12 EDUCATION: STUDENT POPULATION HAS SIGNIFICANTLY DIVERSIFIED, BUT MANY SCHOOLS REMAIN DIVIDED ALONG RACIAL, ETHNIC, AND ECONOMIC LINES (2022).

196. See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017); Stephen Menendian et al., 21st Century Racial Residential Segregation in the United States, Othering and Belonging Institute, UC Berkeley, Apr. 21, 2022, <https://belonging.berkeley.edu/21st-century-racial-residential-segregation-us>.

197. See, e.g., MARINA ZHAVORONKOVA ET AL., *OCCUPATIONAL SEGREGATION IN AMERICA* (Center for American Progress, Mar. 29, 2022); VALERIE WILSON & WILLIAM DARITY, JR., *UNDERSTANDING BLACK-WHITE DISPARITIES IN LABOR MARKET OUTCOMES REQUIRES MODELS THAT ACCOUNT FOR PERSISTENT DISCRIMINATION AND UNEQUAL BARGAINING POWER* (Economic Policy Inst., March 25, 2022).

198. This includes the history of denial of loans to Black citizens (commercial and private) (e.g., Denial of loans to Black post -WWII veterans and modern era racial bias against Blacks in commercial and private lending). Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Wells Fargo Resulting in More Than \$175 Million in Relief for Homeowners to Resolve Fair Lending Claims (July 12, 2012).

199. See, e.g., For an example of explicit, systemic racial bias by the U.S. Supreme Court, see *Dred Scott v. Standford*, 60 U.S. 393 (1857) (holding that enslaved persons have no constitutionally recognized rights); for an example of explicit, systemic racial bias by Florida Supreme Court, see *Luke v. Florida*, 5 Fla. 185, 195 (1853). The Court held that enslaved person following orders to commit animal theft by enslaver is not criminally liable. In discussing the status of free Blacks versus enslaved Blacks, the court references the goal of preserving White domination:

[T]he superiority of the white or Caucasian race over the African negro, should be ever demonstrated and preserved so far as the dictates of humanity will allow—the degraded caste should be continually reminded of their inferior position, to keep them in a proper degree of subjection to the authority of the free white citizens.

Id. For current data on racial disparities, see National Conference of State Legislatures, "Racial and Ethnic Disparities in the Criminal Justice System," May 24, 2022.

200. The impossibility of teaching this is highlighted by a scenario: First, in the late 1800s, Black people fought for the freedom to choose where to sit on public transportation. This was the factual core of *Plessy v. Ferguson* [(163 U.S. 537 (1896)]. Do the new Florida laws allow children to be taught that the people who would not let Mr. Plessy sit in the White section of the train and arrested him—state employees—were just "individuals"?

between life and death for some Black citizens. Historian Carter G. Woodson's quote crystalizes this point: "There would be no lynching if it didn't start in the schoolhouse."²⁰¹

Parts II – IV identify the harms caused by excluding a broad range of race and social justice studies topics from the college classroom. The consequences include an exodus of students, faculty, and staff across Florida's twelve colleges and university campuses. HB 7 and HB 999 make it likely that more students and faculty who were considering a move to Florida will now reconsider and possibly decline. These laws minimize the education, scholarship, and expertise of scores of faculty members and administrators employed at Florida colleges and universities. These laws are likely to disproportionately impact Black scholars and instructors (who are more likely to teach or address race subjects). Their existence also means placing Black people and members of other marginalized communities, in harm's way by requiring that instructors present an ahistorical narrative that downplays racial discrimination, colonialism, genocide, and slavery.

V. AN EDUCATIONAL "TAKING"?

The multiple harms identified and discussed in Parts II-IV prove that the reach of HB 7 and HB 999 is expansive. These laws impact different constituencies, including people with direct ties to Florida universities (*e.g.*, instructors, students, and parents) and other people with indirect ties to the state (*e.g.*, potential students, potential instructors, and potential state residents). These laws will steer the educational experiences of most Florida college students. It is important to determine whether these laws have dramatically redefined—and possibly voided—two prominent state education benefits, the Bright Futures Scholarship Program and the in-

201. CARTER G. WOODSON, *THE MIS-EDUCATION OF THE NEGRO* 3 (1933). In a discussion of Professor Woodson's words, Professor Jarvis Givens notes Professor Woodson's concern that "anti-Black ideas in school knowledge were inextricably linked to the violence Black people experienced in the world." Jarvis Givens, *There Would Be No Lynching If It Did Not Start in the Schoolroom: Carter G. Woodson and the Occasion of Negro History Week, 1926-1950*, 56 AM. EDUC. RES. J. 1457-94 (2019).

state tuition benefit.²⁰² This Part will specifically address the former.²⁰³ As such, an important question arises: Whether the restructured educational paradigm in Florida mandated by HB 7 and HB 999, one in which race instruction is either limited or completely upended, has irreparably reconfigured the Bright Futures program in such a way that it constitutes a constructive taking of the scholarship, in violation of the Fifth Amendment's Takings Clause?

Most of the debate about the legality of HB 7 and HB 999 has centered on constitutional claims involving either the First Amendment's Free Speech clause or the Fourteenth Amendment's, Equal Protection Clause. However, the Fifth Amendment's Takings Clause presents an opportunity for a novel application and analysis of HB 7 and HB 999. A takings analysis allows for an investigation of whether these modern-day anti-literacy laws cause additional economic, social, and psychological harm. It allows for viewing these laws from a different angle to assess whether they are likely to diminish the attractiveness and ultimately the value of the state's long standing scholarship program—the Bright Futures Scholarship Program.²⁰⁴ What was designed as a game-changing financial benefit available to high-achieving high school graduates, is now perceived as less valuable by some eligible Florida students and their families. In doing so, they change what the Bright Futures program offers.

Next is an overview of the Bright Futures program, a discussion of the basics of a Takings Clause claim, and an application of these factors to the Bright Futures Scholarship Program.

202. The Fifth Amendment Takings argument could also be used to analyze the impact HB 7 and HB 999 have had on Florida's in-state tuition benefit. In the same way that some students, and their families, may conclude that the Bright Futures scholarship is no longer realistically available to them because of the state's dramatic change in curriculum, some families will reach the same conclusion about the benefit of in-state tuition. This is a larger group than those eligible for Bright Futures. All students who graduate from a Florida high school will be eligible for in-state tuition. Notably, approximately fifty percent of Florida high school students are eligible for one type of the Bright Futures 180-degree turn in what constitutes acceptable college curriculum may make attending college in Florida less attractive to some students and families. In turn, this may make in-state tuition less attractive. Some students and families who oppose the state's educational shift will be able to leave.

202. However, for most families, leaving the state is not an option. A range of considerations, including family, employment, and health care, may prevent an out-of-state move. Some state residents will believe they have lost a benefit and have not been compensated, nor made whole for their loss.

203. In state tuition and Bright Futures are related benefits and the concerns raised by both are addressed by analyzing Bright Futures.

204. See Bright Futures, *supra* text accompanying notes 6-14.

A. Bright Futures

At some point, any parent or guardian who has a school-aged child in the state of Florida will hear about the Bright Futures Scholarship Program.²⁰⁵ Bright Futures is an academic scholarship plan passed in 1997 by the Florida legislature.²⁰⁶ The Bright Futures program rewards high academic achievement by high school students.²⁰⁷ In 2021-2022 approximately 120,000 students received Bright Futures scholarships.²⁰⁸ Of those, 44 percent of the recipients were White students, 28 percent were Hispanic students, 9 percent were Pacific Islander/Asian students, and 6 percent were Black students.²⁰⁹ The state scholarship is available to Florida students who plan to attend a Florida college or university. At the top scholarship funding level, students must have achieved a minimum 3.5 GPA, a score of 19 on the ACT (or 1330 on the SAT) and completed at least one hundred volunteer or work hours.²¹⁰ The lottery-funded scholarship covers tuition and other fees.²¹¹ The popular program has been cited as one of the reasons some families move to Florida.²¹²

205. FLA. STAT. § 1009.53. The Bright Futures scholarship is one of several postsecondary scholarships available in the state of Florida. The state offers need-based scholarships, merit-based scholarships, and grant programs. *See e.g.*, Florida Department of Education, Office of Student Financial Assistance, Student Financial Assistance, Annual Report 2020-21 (2022), <http://www.floridastudentfinancialaidsg.org/PDF/Commissioner/annualreport20-21.pdf>), Lyle McKinney, *An Analysis of Policy Solutions to Improve the Efficiency and Equity of Florida's Bright Futures Scholarship Program*, 2 FLA. J. EDUC. ADMIN. & POL'Y 85-101 (2009). *Florida Journal of Educational Administration & Policy*, v2 n2 p85-101 Sum 2009

206. FLA. STAT. §1009.53 (2022).

207. *See supra* note 48. Bright Futures was “created to . . . reward any Florida high school graduate who merits recognition of high academic achievement and who enrolls in a degree program, certificate program, or applied technology program at an eligible Florida public or private postsecondary education institution.”

208. Florida Bright Futures Student Counts and Total Costs, BFRReportsA, <https://www.floridastudentfinancialaidsg.org/PDF/PSI/BFRReportsA.pdf>. This number includes new and continuing Bright Futures scholars.

209. *Id.* Some commentators have noted that access to Bright Futures is not racially-equitable. *See e.g.*, Naomi Harris, *How Popular Merit College Scholarships Have Perpetuated Racial Inequalities*, WASH. POST, May 7, 2002 (noting that Black people comprise approximately 17 percent of Florida population by only six percent of the recipients of Bright Futures. Further, Black people are disproportionately low income, and low income people disproportionately purchase lottery tickets which fund the Bright Futures scholarship program.).

210. Sue Zemstein, *Legislators Should Keep 'Bright Futures Scholarship' In Place*, NAPLES DAILY NEWS, Feb. 26, 2022 (building a case for not touching bright futures scholarship in Florida).

211. “The applicable fees . . . include the activity and service fee, health fee, athletic fee, financial aid fee, capital improvement fee, campus access/transportation fee, technology fee, and tuition differential fee.” BRIGHT FUTURES STUDENT HANDBOOK, 2022-23, ch. 2, at 4.

212. In a 2021 article that addresses the impact in changes to eligibility for Bright Futures, one parent commented, “We moved here specifically for Bright Futures—that was the whole purpose of us picking up our family and moving to Florida from New York.” Jeff Allen, *Senator*

For eligible students, Bright Futures pays for tuition and mandatory fees.²¹³ The scholarship funds are deposited directly to the university that the student-awardee will attend. Because tuition amounts vary across universities, the dollar amount of the scholarship for a specific student varies as well. It has been estimated that at the high end, Bright Futures students receive approximately \$6,800 per year.²¹⁴ Over a four-year period, the scholarship is worth more than \$27,000.²¹⁵ For many families the scholarship program means the difference between being able to send their children to school and not being able to send their children to college.²¹⁶

B. *The Fifth Amendment's Takings Clause*

The protection of private property rights from unreasonable government interference is a core right under the U.S. Constitution.²¹⁷ The Fifth Amendment states that “private property [shall not] be taken for public use, without just compensation.”²¹⁸ If the government seizes a person’s private property, it may be considered a “taking.” Both tangible and intangible property may be subject to the Takings Clause.²¹⁹ However, not all intangible property is constitutionally protected private property subject to remedy under the Takings Clause.²²⁰ To be classified as private legal property, the owner must establish exclusive use. The factors that determine the calculation for just compensation is not always clear. When takings claims involving real property, the value of the

Backs Off on Career Path Changes to Florida’s Bright Futures Scholarship, SPECTRUM NEWS (Mar. 25, 2021, 6:10 PM), <https://www.mynews13.com/fl/orlando/news/2021/03/25/senator-backs-off-on-career-path-changes-to-florida-s-bright-futures-scholarship>.

213. FLA. STAT. § 1009.53 (2022).

214. *Id.*

215. There are other calculations of the distribution of Bright Future funds, such as a per credit measurement. Using this, the scholarship award is approximately \$212 per credit hour.

216. *But see* Kathleen McGrory, *Feds Investigate Florida’s Bright Futures Scholarship Awards*, MIA. HERALD (Sept. 17, 2014, 11:25 PM (discussing racial impact of Bright Futures Scholarship Awards)). *See, e.g.*, Harriet Stranahan & Mary O. Borg, *Some Futures are Brighter than Others: the Net Benefits Received by Florida Bright Futures Scholarship Recipients*, 32 PUB. FIN. REV. 105-26 (2004).

217. Both the Fifth and Fourteenth Amendments of the U.S. Constitution reference property rights.

218. This is the “Takings Clause.”

219. *See West River Bridge Co. v. Dix*, 47 U.S. 507, 533-34 (1848) (the Takings Clause applies to intangible property).

220. For instance, patents are categorized as intangible property but do not classify as constitutional property under the Takings Clause. *See, e.g.*, *Zoltek Corp. v. United States*, 442 F.3d 1345 (Fed. Cir. 2006) (per curiam). Other types of intangible property include trusts, trade secrets and copyrights. *See generally* Dustin Marlan, *Trademark Takings: Trademarks as Constitutional Property Under the Fifth Amendment Takings Clause*, 15 J. CONST. L. 1581-1629 (2013) (arguing that trademarks should qualify as constitutional property).

property is typically determined by its fair market value. When this cannot be determined, courts will look to other factors. The valuation problem is avoided if injunctive relief is granted to address damages. The U.S. Supreme Court has heard takings cases since the late 1800s. The evolution of these cases shed light on the shifting values placed on private property and social needs.²²¹

C. *The Takings Clause Applied to the Bright Futures Scholarship*

This Part identifies the factors courts use to evaluate Takings claims and applies the required elements to the Bright Futures scholarship.²²²

Intangible private property Owners of some forms of intangible property may raise a takings claim.²²³ Not all private property is protected under the takings clause. However, in order for property to be protected under the takings clause it must be private. Protected private property is “constitutional property.” Exclusivity is the primary characteristic of private property. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the U.S. Supreme Court states that “The hallmark of a protected property interest is the right to exclude others.”²²⁴

It could be argued that the Bright Futures scholarship is intangible property that belongs to a select group of people—eligible students. These students, however, do not have the power to prevent other students from receiving the scholarship (or conversely the power to allow other students to receive the scholarship). Because Bright Futures’ students are not exclusive owners, they cannot establish a key component of constitutional private property.²²⁵

Constitutional property interest In *Felipe Rivadeneira v University of South Florida*,²²⁶ the plaintiffs claimed a taking occurred when the

221. See, e.g., TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY (2015)

222. The issue of which persons or entities could be held accountable is noted here but not discussed in detail. Notably there is judicial language noting that when takings cases involve actions against state entities, they are based in U.S. Section 1983. See, e.g., *Rivadeneira v. University of South Florida* (2022) (motion to dismiss).

223. *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009).

224. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, at 673 (1999).

225. *Lankheim v. Fla. Atl. Univ.*, 992 So.2d 828, 834 (Fla. Dist. Ct. App 2008). Court observes that there are various sources for protected property interests. The court notes that a property interest “encompasses a variety of valuable interests that go well beyond the traditional view of property. However, these interests do not make up some exclusive list; rather, they are defined in the light of existing rules or understanding” *id.* (quoting *Moser v. Barron Chas Secies, Inc.* 783 So.2d 231, 235 n. 5 (Fla.2001)).

226. *Rivadeneira v. Univ. S. Fla.* (2022), Case No: 8:21-cv-1925-CEH-AAS,

University of South Florida transitioned to remote instruction following the school's Covid-19 shutdown. The U.S. District court held that there was no taking because the plaintiffs did not establish a constitutional property interest. The court found that a determination that the university breached its contract is insufficient to establish a taking: The taking threshold is higher than a contract breach. Applying Rivadeneira's analysis to Bright Futures it could be argued that a Bright Futures' student's taking claim is stronger than the claim made by the plaintiff in Rivadeneira. While the delivery mode of education changed for Rivadeneira changed, this did not alter the substance of the education students received. During Covid, instructors would use the same course material, maintain the same course objectives, meet at the same times, and have course exams that test on the same material.

By comparison, HB 7 and HB 999 cause the removal of race-related historical perspectives, theories and contemporary understandings from the college classroom creates a substantive change in the educational experience. These laws will force some instructors to revise substantial portions of their courses. In addition to locating new material, they will have to develop new teaching strategies (*e.g.*, lecture and discussion questions). In some instances, an instructor will have to overhaul an entire course to comply with HB 7 and HB 999. Depending upon the success of this effort, the instructor may determine that the course can no longer be taught. Overall, the changes required to comply with the new Florida laws are different in scope and degree from the changes required to move from in-person to online learning. Based on this discussion, an argument can be made that Bright Futures meets the constitutional property interest requirement.

Public use or public benefit A takings analysis requires courts to examine whether the state's use of a person's private property was for public use or for public benefit is justified.²²⁷ U.S. courts have found the taking of property justified in a variety of circumstances.²²⁸ Some

https://ecf.flmd.uscourts.gov/cgi-bin/show_public_doc?2021-01925-34-8-cv.

227. See Micah Elazar, *'Public Use' and the Justification for Takings*, 7 J. CONST. L. 249-78 (2004) (reviewing U.S. Supreme Court's decisions in *Berman v. Parker*, (348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)). *Id.* at 250-54 (concluding that the Court does not set out a clear meaning of the justification required for taking another's property. Elazar discusses three models of political justification, weak rationality justification (some relationship between the policy change and a public end), cost-benefit (on balance the public policy outweighs any social costs), and deontological justification (acknowledging that some social costs are too high to allow government infringement via social policy)). *Id.* at 256-62 (using these frameworks to analyze how courts interpret public use).

228. See, generally *Kelo v. City of New London*, 545 U.S. 469 (2005).

commentators have argued that establishing a justification should require more than a *de minimis* showing. Since a taking typically burdens an identifiable group of people, the justification should explain why a particular group should bear the cost for the public benefit.²²⁹ Applied to Bright Futures, the restrictions on learning about race in college potentially harms many of the students who are eligible for the scholarship. The state has not established that the curricula changes provide a public benefit. HB 7 and HB 999 allow a good to be taken away—a comprehensive college education²³⁰—without proof that on balance there is a public value in doing so. Students are on the losing end. Students who stay in Florida and use Bright Futures are less likely to have a well-rounded education *and* the students who leave Florida because of the legislative changes lose the financial benefit of Bright Futures. While the state could argue that HB 7 and HB 999 provide an educational benefit to Florida students, there is no empirical evidence to support this. Based on the above discussion, the public use requirement has not been clearly established.

Taking The passage of HB 7 and HB 999 has arguably caused the diminution at best and the destruction at worst, of private, intangible property in the form of a guaranteed state benefit.²³¹ These laws amount to a constructive taking. Notably, the state has the power to modify or eliminate privileges it creates.²³² Over the years, the Florida legislature has instituted changes to the Bright Futures program. For example, the threshold eligibility requirements for the scholarship have been raised (*e.g.*, higher SAT scores required).²³³ Arguably these shifts in eligibility are not comparable to the changes in education resulting from the passage of HB 7 and HB 999. These laws have ushered in a complete overhaul of the educational experience Florida college students can have. These laws are not simple modifications. The taking—the result of the state’s new

229. Elazar, *supra* note 227, at 254-55. *See also id.* at 277-78 (arguing “The burden should rest on legislatures to show exceptional need, not ordinary legislative business, to justify a taking”).

230. *See, e.g.*, Sam Sachs, *Gov. DeSantis Signs Update to Bright Futures Scholarship Requirements*, NEWS CHANNEL 8, June 22, 2022 (noting that DeSantis says that Bright Futures allows Florida residents to have access to “high quality higher education,” and says that it allows for a “credible four-year education.”).

231. The reduction in property value as a result of a taking may be actionable for the taking of either physical or intangible property. *See, e.g.*, *Jacobson v. Southeast Pers. Leasing, Inc.*, 113 So. 3d 1042, 1051 (Fla. 1st DCA 2013).

232. *See, e.g.*, *Carry, Inc. v. Univ. Fla.*, 180 So.3d 137 (Fla. 1st DCA 2015) (noting that the state has the power to modify or eradicate privileges it has created).

233. Note that these changes have had a racially disproportionate impact—making fewer Black students eligible for the scholarship.

education paradigm—effectively remakes the college education offered in Florida. The laws change the academic environment, including classroom instruction, class discussion, assigned reading, guest lectures, trainings, and programming for campus events. This will impact the viability of some college majors and minors. It will also determine which majors and concentrations students choose to pursue. It may also influence the research topics professors and students choose for grants and research papers. Based on this discussion a moderate argument can be made that the new laws' impact on Bright Futures amounts to a taking.

Remedies Injunctive relief is one possible remedy for a taking clause violation. It would return the power to instructors to determine how to address race issues in the curriculum. Though an injunction would put a legal stop to the implementation of the new Florida laws, it is unlikely that it would address the past harms or end any future harms caused by these laws. As previously discussed, these two laws are part of a larger group of laws that are mutually reinforcing.²³⁴ Given this web of connected laws, it would likely take a stronger legal remedy—stronger than a temporary injunction—to prompt educators to disregard the dictates of HB 7 and HB 999.²³⁵

Compensatory damages are another possible remedy for finding that Florida's education laws unconstitutionally encroach upon Bright Futures.²³⁶ A per year calculation provides a baseline for a compensation amount.²³⁷ In terms of remedies available for takings, adequate redress exists if HB 7 and HB 999 were found to constitute a taking of Bright Futures.²³⁸

234. See *supra* notes 62-83.

235. Many educators have already engaged in anticipatory compliance. See *supra* text accompanying note 30.

236. If all students who are eligible for Bright Futures are eligible for compensation, that will include two groups of students. One group includes new high school graduates. The second group includes students currently attending college who were awarded a Bright Futures scholarship. The class of eligible students could also extend to students who have transferred to institutions outside of Florida as well as students who discontinued their studies at a Florida college as a direct result of HB 7 and HB 999 becoming law.

237. See *supra* notes 98-109.

238. It has been argued that when there is a state taking of intellectual property, the need for compensation is greater than when the taking involves real property. See Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After College Savings v. Florida Prepaid*, 37 SAN DIEGO L. REV. 637 (2000). Ghosh argues that unlike real property, intellectual property is used to develop cultural and civic life. This makes intangible property more valuable than real estate because its community impact is much greater. A second reason for treating the taking of intellectual property as a taking is because it safeguards the expression of ideas (e.g., literary works, scientific inventions). Intellectual property allows for “individual and society flourishing . . . and the means of dissent and expression against state

While the above discussion shows there is not a compelling case to be made that HB 7 and HB 999 amount to a taking of the Bright Futures program, the takings framework makes four valuable points. First, it provides a fresh constitutional framework for understanding the harms caused by HB 7 and HB 999. Second, it establishes that the harm caused by these laws is quantifiable. Third, it underscores the fact that the new laws harms many people in many different ways. Fourth, the analysis enables an understanding of the deep ripple effects that legislative changes can cause. These changes may cause harms that are comparable to the destruction of physical property.

While the takings argument is not a strong, it further demonstrates the broad scope of harm caused by laws, such as HB 7 and HB 999. It also shows that harm may exist whether or not it is legally recognized as harm.²³⁹ The takings analysis does important work: Along with Parts II, III, and IV, it reveals the undeniable harm caused by laws such as HB 7 and HB 999. These laws are not simply new ways of doing old things. It is not “new math.” Rather, they represent a transformation of Florida’s educational paradigm. The new model combines anti-literacy with anti-Blackness.

CONCLUSION

This Article shines a spotlight on two Florida laws, Stop WOKE and Anti-DEI. Together HB 7 and HB 999 have fundamentally changed how race can be taught in Florida’s college classrooms. They mandate substantive and pedagogical boundaries around race-related curriculum. These laws have historical roots in anti-literacy legislation.

For centuries, there have been various bans on literacy. During slavery, it was illegal for enslaved Blacks to learn to read and write. There was acute concern that enslaved Blacks not have access to material or narratives of freedom and independence. Following the Civil War, strategies were implemented to prevent Black people from achieving racial equality. For instance, schools for Black children were burned down. In the early to mid 1900s, states took broad measures to control

governments.” *Id.* at 640. These same characteristics describe the goals of a well-rounded, comprehensive college education. Applying this reasoning to argue that HB 7 and HB 999 make for a constitutional taking, strengthens the compensation argument. A quality college education enhances the populous at large. In fact, it likely aids in the creation of literary works and scientific breakthroughs. Thus, the inability to receive a well-rounded, historically-rooted education—as a direct result of new laws—is a compensable loss.

239. See Katheryn Russell-Brown, *While Visions of Deviance Danced in Their Heads*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* (D. Troutt ed., 2006) (Author uses term, “ajustice” to describe harm without legal remedy).

the curriculum Black school children would receive. In some instances, the local school board provided an educational template for Black teachers, which outlined the subjects and perspectives they could and could not teach. Educators who did not comply were punished. Anti-literacy and anti-Blackness have firm roots in the U.S. education system. Florida's HB 7 and HB 999 are legislative legacies of this history.

By design, both HB 7 and HB 999 ensure that Florida college students will know less about critical racial perspectives of U.S. history. With each subsequent piece of legislation, it seems, Florida builds a higher barrier wall, and thereby reduces the scope of knowledge about race and history more broadly.²⁴⁰ College educators who teach race-related subjects and college students who are interested in race and social justice issues, will feel the greatest sting from HB 7 and HB 999. However, the reach of these laws extends much further. It includes professors who teach subjects that may intersect with race issues. It includes their students. The laws may also impact which students apply to Florida universities for undergraduate and graduate programs. They may also affect the pool of candidates who apply for faculty positions at Florida universities. Based on the discussion, we are all only a few degrees of separation from the impact of these laws.

The harms caused by these laws should be taken seriously. In response to unclear legislative boundaries, educators are wary. Some educators are afraid to teach and are afraid to speak openly about the new rules. To avoid reprisals from state or university officials, some professors have excised race material completely from their courses. As a result, students are not being exposed to material that professors had previously determined were essential to meet core competencies. Students are rethinking majors that focus on race. There is growing evidence of an academic exodus out of Florida. HB 7 and HB 999 have been bolstered by other legislation, including book bans, re-drawn electoral voting districts, more stringent rules for the restoration of voting rights, new post-tenure review procedures, and allowing the permitless carrying of concealed weapons.

In case there was any doubt about the breadth of harm caused by HB 7 and HB 999, the Fifth Amendment takings analysis crystalizes their harms. The takings discussion evaluates how these laws impact the Bright

240. See House Bill 7 (2022). The HB 7 proviso reads: "It may not be construed to prohibit discussion of the concepts listed therein as part of a larger course of training or instruction, provided such training or instruction *is given in an objective manner* without endorsement of the concepts." *Id.* (emphasis added); FLA.STAT. §§ 760.10(8)(a)(8), 1000.5(4)(a)(8)(b) (2022). For instance, HB 7 includes language that protects instructors who address subjects such as reparations and implicit bias in an unbiased way. HB 999 does not include this safeguard.

Futures scholarship. Though it would be an unsuccessful legal claim, the takings issue provides a unique framework and highlights what is at stake. It provides a coherent framework for examining harm. Specifically, it shows how the HB 7 and HB 999 legislative shift take away a benefit without providing compensation. The takings assessment provides a structure for calculating how these new laws, ostensibly designed to benefit the public, actually cause injury and loss.

A complete transformation of Florida's public education system is well underway. The radical legislative changes that punish race education are occurring in plain sight. If past is prologue, we can expect to see more laws like HB 7 and HB 999. The harms of this educational earthquake are multitudinous. In the absence of rapid and broad interventions, education as we have known it will be a matter of history. Under the current regime, future educators may not be permitted to tell or teach the story of HB 7 and HB 999 in their college classrooms.
