THE MULTITUDINOUS RACIAL HARMS CAUSED BY FLORIDA’S ANTI-DEI AND “STOP WOKE” LAWS

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Since 2021, Florida has passed legislation that radically redefines how educators address race-related topics in the university classroom. Two laws in particular, House Bill 7 (HB 7 or the “Stop WOKE Act”) and Senate Bill 266 (SB 266), which outlaws diversity, equity, and inclusion (DEI) programs at Florida universities, have led the charge. The goals of this Article are three-fold. First, to demonstrate how HB 7 and SB 266 have created a devastating and powerful educational force in Florida, a force that diminishes and punishes 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 SB 266 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 SB 266 pose a mammoth threat to historical and contemporary knowledge about race. Part I provides an overview of the texts of HB 7 and SB 266. 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 social danger for African Americans. Part V employs the Fifth Amendment’s Takings Clause and applies it to Florida’s Bright Futures Scholarship

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Program. This framework amplifies and crystallizes the vast and unremedied harms caused by HB 7 and SB 266.

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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 12
colleges and universities. In 2023, *U.S. News and World Report* ranked Florida as the number one state in the country for higher education. In 2023, three of the state’s public colleges were ranked among the top 100 “national universities.” Approximately 400,000 students are enrolled in Florida’s public colleges and universities.

Each year in Florida, approximately 178,000 students graduate from the state’s public high schools. 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.

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

1. The 12 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. See [STATE UNIV. SYS. OF FLA.](https://flbog.edu) (last visited Jan. 20, 2024).


3. See [Rankings: Higher Education — National Universities](https://www.usnews.com/best-colleges/fl?schoolType=national-universities&_sort=rank&_sortDirection=asc) (last visited Jan. 26, 2024). The universities are the University of Florida, Florida State University, and the University of South Florida. See id.

4. See [Education System](https://oppga.fl.gov/ProgramSummary/ProgramDetailPrint?programNumber=2045) [https://perma.cc/L73H-MXCW] (last visited Jan. 31, 2024).


8. Data on areas of specialization are not publicly available.
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. The Stop WOKE Act mandates new rules for how and when race and social justice issues can be included in the state’s public school classrooms. In another law review article, I investigate the reach of the Stop WOKE Act and establish its connection to earlier laws that made it unlawful for enslaved Blacks to achieve basic literacy. 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 article 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 in 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.

In 2023, Florida passed SB 266, 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. The combined impact of HB 7 and SB 266 has been a wholesale restructuring of race and social justice education in Florida’s public colleges and universities.

This Article is part three of my analysis of Florida legislation that targets race scholarship. The discussion identifies and analyzes both the impetus for and impact of the recent Florida laws that rewrite how race and social

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10. See id.
12. See id. at 378–79.
13. See id. at 380–81.
15. See id.
justice issues are taught in the state’s public schools. In giving Florida residents HB 7 and SB 266, 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, and psychological harm imposed by HB 7 and SB 266. This 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 SB 266. A deep dive into the reach of HB 7 and SB 266 establishes 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.17 This new educational paradigm has sweeping legal and social consequences.

There are two anchors for this discussion, the historical roots of anti-DEI legislation and the larger sociopolitical structure in which it operates. First, anti-literacy laws frame the base for HB 7 and SB 266. As analyzed in Part I, both laws are directly tied to laws from the 1700s and onward that outlawed literacy for Black people. These laws initiated harsh punishment for anyone of any race who taught enslaved Blacks the basics of 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.18 This includes narratives and material that critique racial history and American racism. Second, HB 7 and SB 266 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 Act 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.19

18. See infra notes 26–94 and accompanying text.
19. See infra notes 72–102 and accompanying text (discussing the “tangled web of laws”).
This Article is divided into five parts. Part I provides an overview of the legislation under analysis, HB 7 and SB 266. These laws identify specific perspectives and approaches that are not permissible, including Critical Race Theory (CRT) and programs that promote DEI. Part I also includes a review of HB 551: the legislation that addresses the mandated K-12 African American History in Florida. The discussion indicates how the new laws intersect with other laws, such as voting rights and book bans. Part II examines how these 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 SB 266 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 through 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 SB 266.

It is important to make two preliminary notes. One, the primary focus of this Article is on how HB 7 and SB 266 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 SB 266, 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 which specific topic areas, theories, and language are to be avoided in the K-20 classroom.20 This legislative duo is at the core of the analysis undertaken in this Article. This Part also includes a discussion of a

20. The legislation applies to public education beginning with kindergarten and ending with graduate or professional school. These prohibitions extend to guest lecturers. See generally Russell-Brown, 'The Stop WOKE Act?', supra note 11 (discussing in detail HB 7).
third law, HB 551, which addresses the K-12 teaching of subjects related to
the African American life experience.21

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.22 Under HB 7, it
is discrimination for an instructor to compel or encourage students to endorse
certain perspectives regarding specific topics.23 For instance, an instructor
is prohibited from advancing or promoting the concept of race-based
reparations.24 The law also prohibits classroom instruction that talks about
the concepts of merit, excellence, or colorblindness as racist.25 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,26 such as the meaning of

23. See id.
24. 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.
25. See id. 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. See 600 U.S. 181, 407 (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. Let us assume that a law professor assigns Justice Jackson’s dissent in Students for Fair
Admissions 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.

26. For instance, the law does not define the terms, “espouses,” “promotes,” “advances,”
and “inculcates.” See Am. Ass’n of Univ. Prof., 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
[https://perma.cc/2VTC-UUZJ] (“[S]howing 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
“objective” or “compel.” In other instances the text is incomprehensible. 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. The interpretation of the term objective 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.

An instructor found to be in violation of the law may face a wide array of punishments, ranging from large fines to job loss. In the months following HB 7’s enactment, it was reported that at least seven complaints were filed...

EDUC. (June 9, 2023), https://www.chronicle.com/article/fear-and-confusion-in-the-classroom [https://perma.cc/9ANP-S2VP] (University of North Florida Professor Nicholas Seabrook states: “A lot of these bills have been phrased in a way that’s purposefully vague . . . . [I]t places faculty in a tough position, where you have this kind of broad, sweeping language without a lot of specifics.”).

28. See generally Russell-Brown, ‘The Stop WOKE Act’?, supra note 11 (presenting seven hypothetical scenarios to illustrate and assess the ambiguities of HB 7).
29. See, e.g., H.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022). (stating it is discrimination for an instructor to compel students to believe that “[m]embers 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 generally Russell-Brown, ‘The Stop WOKE Act’?, supra note 11.
31. In 2021, the Florida State Board of Education passed a “Required Instruction Planning and Reporting” rule. See FLA. ADMIN. CODE ANN. r. 6A-1.094124 § 3(b) (2021). 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, FLA. COLL. SYS. COUNCIL OF PRESIDENTS (Jan. 18, 2023), https://www.fldoe.org/core/fileparse.php/5673/urlt/FCSDEIstatement.pdf [https://perma.cc/U7JC-PKUG].
32. See Russell-Brown, ‘The Stop WOKE Act’?, supra note 11, at Section III.A.
in Florida universities and colleges. None of them resulted in a finding by the school that the law had been violated.

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. 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. In his Order, Judge Walker stated that HB 7 is enforced state orthodoxy and that “both robust intellectual inquiry and democracy require light to thrive. Our professors are critical to a healthy democracy.”

B. Senate Bill 266: Anti-DEI Legislation

Signed into law in 2023, Florida Senate Bill 266 places race-related curriculum on a short leash. Three sections of the legislation shed light on its breadth and scope. They are highlighted here.

1. General Education

The Florida Department of Education webpage on general education courses states:

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

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34. See id.


36. See, e.g., Order Granting in Part and Denying in Part Motions for Preliminary Injunction, Pernell (No. 4:22-cv-304) [hereinafter Order by Judge Walker]; Zahneis & Supiano, supra note 26 (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,” saying: “The state doesn’t even 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.” Zahneis & Supiano, supra note 26.

37. Order by Judge Walker, supra note 36, at 135.


39. See id.

40. Florida’s General Education Core Course Options page 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, FLA. DEP’T OF EDUC., https://www.fldoe.org/policy/articulation/general-edu-core-course-options.stml [https://perma.cc/LU8H-P5MM] (last visited Jan. 20, 2024).
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, or economic inequities.41

By stating what is not permissible under the law, this admonition by the Florida legislature appears to compel the teaching of mainstream viewpoints and excludes oppositional, critical, and credible viewpoints from the curriculum. For instance, SB 266 bans courses that “promote or engage in political or social activism.”42 Further, the law creates a huge extension of the state’s educational authority. The prohibition of curriculum that “teaches identity politics,” for example, appears to mean that instructors may not teach, discuss, or engage with the issue of identity politics. This places a huge restraint on instruction and is a nebulous demand, because the meaning of “identity politics” itself 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, which is one of HB 7’s stated goals.43 It is another thing entirely to say that the educational material may not be taught at all. Accordingly, SB 266 is observably more restrictive than HB 7. HB 7 includes the following language: “[HB 7] may not be construed to prohibit discussion of the concepts listed therein as part of a larger course of instruction, provided such instruction is given in an objective manner without endorsement of the concepts.”44

This proviso appears to exempt teaching certain subjects, so long as “both sides” or multiple sides are presented. However, this language is conspicuously absent from SB 266. Thus, under SB 266, 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 curriculum.

42. See S.B. 266, 2023 Leg., Reg. Sess. (Fla. 2023). In its definition of terms for SB 266, the Florida Board of Governors states that “political or social activism” is “any activity organized with a purpose of effecting or preventing change to a government policy, action, or function, or any activity intended to achieve a desired result related to social issues.” Notice of Proposed Amended Regulation, Fla. Bd. Governors (Nov. 9, 2023), https://www.flbog.edu/wp-content/uploads/2023/11/Proposed_AmendedRegulationForm-9-016-1.pdf [https://perma.cc/FFD7-CMQH].
43. HB 7 considers it discriminatory when an instructor “espouses, promotes, advances, inculcates, or compels” students to believe specially enumerated concepts. H.B. 7, 2022 Leg., Sess. 2022 ( Fla. 2022).
44. See id.; see also Fla. Stat. § 1000.05(4)(a)(8)(b) (2022).
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2. A Focus on Academic Programs

SB 266 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 state’s 12 public universities are in compliance. Specifically, the Board of Governors must determine whether any of the colleges or universities have academic programs that violate HB 7. This would include, for instance, an academic unit or program grounded in theories of privilege or systemic racism. SB 266 requires that the Florida Board of Governors monitor and possibly eliminate college courses or curriculum that is being used in some college courses. Further, SB 266 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. For example, in 2024 the Florida Board of Governors voted to exclude “Principles of Sociology” from the list of approved core courses.

3. Diversity, Equity, and Inclusion (DEI)

The section of SB 266 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. 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. SB 266 states:

46. See id.
47. See id.
48. See id.
49. See Praveena Somasundaram & Hannah Natanson, Florida Removes Sociology as a Core Course Option for Public Colleges, WASH. POST (Jan. 25, 2024), https://www.washingtonpost.com/education/2024/01/25/florida-sociology-core-course-removal/ [https://perma.cc/EPM5-V55L]. The course was replaced with, “Introductory Survey to 1877.” Manny Diaz, the state’s Education Commissioner, has stated that sociology has been “hijacked by left-wing activists.”
51. One of the more explosive questions raised was whether the law would mean an end to Black fraternities and sororities. 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), https://www.verifythis.com/article/news/verify/education-verify/florida-house-bill-999-black-greek-fraternities-sororities-universities-ban-fact-check/536-c5fb390a-06b2-4d9a-9622-f371fe4ced [https://perma.cc/77BA-Z8QY].


(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.52

In response, some Florida colleges and universities have removed, reassigned, or reclassified employees who were hired to work in DEI-related positions.53 Prior to SB 266, each of the twelve Florida public colleges and universities had staff and faculty members who held DEI-related positions. That is, by a broad estimate, approximately 100 state university employees. In anticipation of HB 7 and SB 266, several university departments removed their DEI statements54 from their websites. The wording of the legislation leaves many questions unanswered. While SB 266 states that DEI programs are not permissible on Florida college campuses, it raises the question: Which types of college programs and speakers are acceptable?55

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

One of the common criticisms of HB 7 and SB 266 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 due in part to the laws’ language and the fact that they appear to contradict other legislation. While these laws clearly impose limits on teaching courses and sponsoring programs related to race and social

52. See S.B. 266, 2023 Leg., Reg. Sess. (Fla. 2023).
53. See, e.g., Zoey Thomas, Florida Shut Down State Funding for Diversity, Equity, and Inclusion. These UF Programs Could be Affected, INDEP. FLA. ALLIGATOR (Jan. 29, 2024 9:00 AM), https://www.alligator.org/article/2024/01/dei [https://perma.cc/X7YH-QKYX] (“Nine UF colleges had deans responsible for DEI in January 2023. One year later, eight of those deans are still at UF — but none hold the same position.”).
55. 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 was invited to speak at the University of Florida. See Vivienne Serret, Ben Shapiro to Come to UF in October, INDEP. FLA. ALLIGATOR (June 5, 2023), https://www.alligator.org/article/2023/06/aigich8efjricon [https://perma.cc/V7RH-DB2X]. Would campus lectures by either or both of them constitute “political or social activism” under SB 266?
justice, another law, HB 551, makes it mandatory to teach African American history in K-12 instruction.56

HB 551, “An [A]ct relating to required African-American instruction,” was signed into law by Florida Governor Ron DeSantis in 2023.57 It is the latest version of a law that has been on the Florida books for decades.58 The law sets forth detailed, multi-step criteria for reviewing mandated African American studies material in Florida’s K-12 curriculum.59 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.60 Each school district must submit an implementation plan to the Florida Department of Education, and 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.61 Subjects include the “passage to America,”62 the

57. It is noted that HB 551 uses the word “diversity.” Id. 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), https://floridapolitics.com/archives/610005-lawmakers-pass-bill-to-strengthen-reporting-requirements-on-african-american-history-lessons/ [https://perma.cc/7F7B-4NQ7]; Brian Burgess, Undercutting Critics, DeSantis Signs Unanimous Bill Mandating African American History Curriculum, CAPITOLIST (May 18, 2023), https://thecapitolist.com/undercutting-critics-desantis-signs-unanimous-bill-mandating-african-american-history-curriculum/ [https://perma.cc/4EVE-Y2CF].
59. During the same time frame, Florida passed legislation mandating the teaching of Asian American history. 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.

61. See id.
62. Oddly, the text does not refer to the “Middle Passage.” Id. This is noteworthy given that “Passage to America” denudes/downplays the brutality of the Middle Passage through which millions of Blacks were kidnapped, chained, forced onto ships and taken to countries in the Caribbean and the Americas.
enslavement experience, abolition, the history and contributions of “the Americans of the African diaspora,” racial segregation, and racial oppression.63 The list of allowable teaching topics is followed by a warning that educational material and teaching may not be used to indoctrinate or convince students to have a particular point of view.64 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.65

It also allows the state to override any curricular decisions by seeking external input.66

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 a cursory reading of SB 266, it might appear that Florida law is more supportive of students’ engagement with Black history in middle school and high school than in college. A closer examination, however, indicates that Florida’s K-12 restrictions complement the restrictions placed on college curricula and instruction. Florida’s K-12 Black history educational standards,67 released in 2023, were roundly criticized.68 Media attention in particular has focused on language suggesting that enslaved persons received “benefits” from their enslavement.69 The standards have

63. Per HB 551, it is permissible for an educator to discuss racial oppression. However, HB 7 and SB 266 punish teaching that supports a systemic racism analysis. H.B. 551, 2023 Leg., Reg. Sess. (Fla. 2023); S.B. 266, 2023 Leg., Reg. Sess. (Fla. 2023); H.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022).
67. FLA. ADMIN. CODE ANN. r. 6A-1.09401 (2023).
been criticized for over-emphasizing the role of Whites in the fight for Black emancipation, while deemphasizing the role of Whites in maintaining slavery, downplaying the harms of slavery,\(^70\) and failing to acknowledge systemic racism.\(^71\)

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 SB 266.

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.\(^72\) 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 SB 266 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-Blackness are deeply embedded into this web.\(^73\)

One part of this sprawling web is the state’s ban on the Advanced Placement (AP) African American Studies course. In 2023, Governor

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\(^70\) 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.” FLA. ADMIN. CODE ANN. r. 6A-1.09401 (2023).

\(^71\) There are many race-related terms that do not appear in the 216-page document. For instance, there is no reference to terms such as, “systemic racism” or “White supremacy.” Also notable, the document references “slaves” but not “enslavers.” Id.

\(^72\) See Russell-Brown, ‘The Stop WOKE Act?’, supra note 11, at 355–56 (giving an earlier discussion of laws and rules that aid what might be labeled a kind of curricular apartheid).

\(^73\) See Russell-Brown, ‘The Stop WOKE Act?’, supra note 11, at 363 (discussing “companion legislation”).
DeSantis rejected the course for high school seniors. The pilot course focuses on six topic areas, including Intersectionality and Activism; Black Queer Studies; Movements for Black Lives; Black Feminist Literary Thought; Reparations; and Black Study and Black Struggle in the 21st Century. 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.” The Florida governor referred to the course as “woke,” “contrary to Florida law,” and an exercise in “indoctrination.” In marked contrast, Florida high school students are able to take an AP Japanese Language and Culture course.

Book bans are another component of this web of laws. This legislation signals Blackness as problematic. The state’s book bans have been disproportionately focused on reading that features Black characters and


75. See id. For a list of the course topics and the State Board of Education’s response, see Manny Diaz Jr. (@CommMannyDiazJr), TWITTER (Jan. 20, 2023), https://twitter.com/CommMannyDiazJr/status/1616565048767385601 [https://perma.cc/CPD9-VSGM] (“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.”).


race-related themes. This includes the exclusion of books on Rosa Parks, Roberto Clemente, and Martin Luther King, Jr. Approximately one-half of all Florida counties have compiled lists of books that students are not allowed to read. The lists include fiction, non-fiction, and children’s books that address race, racism, and racial history. Some address themes of belonging, exclusion, cultural practices, and legal history. Books with fictional characters of color and books that raise racial topics are treated as tools 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.


86. See generally supra note 84; JAMES BALDWIN, THE FIRE NEXT TIME (1963); IBRAM KENDI, STAMPED FROM THE BEGINNING (2016).


88. Russell-Brown, ‘The Stop WOKE Act’, supra note 11, at 338, 384–85 (discussing “Alternative & Supplemental Educational Spaces”); supra notes 74–81 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.90 While African Americans comprise approximately 17% of Florida’s population, the voting districts have been gerrymandered to reduce the number of majority-Black districts.90 The new legislation also eliminated two of four districts where African American voters had been able to elect their preferred candidates.91 These laws reduce the possibility of Black civic engagement. Black people, who comprise 46% of the incarcerated population in Florida, are disproportionately overrepresented.92 Legal limitations on voting have also made it harder for ex-felons to vote or otherwise restore their rights.93 At the same time, formerly convicted people whose voting rights have been restored have been targeted for voter fraud.94 Redrawn electoral maps that minimize the power of Black votes and add other requirements for restoring voting rights to the formerly convicted are


91. See Levine, supra note 90.


two areas of legislation that also impact how public education addresses race, history, and law issues in the state of Florida.\textsuperscript{95}

As discussed, HB 7 and SB 266 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 required the teaching of mainstream racial narratives across the university system. SB 266 mandates the establishment of new university centers that focus on civics education, which underscores this point. SB 266 lists the goals of the Hamilton Center for Classical and Civic Education, at the University of Florida,\textsuperscript{96} as “[e]ducat[ing] university students in core texts and great debates of Western civilization and the great books.”\textsuperscript{97} In 2023, the state legislature requested $10 million in funding for the Hamilton Center.\textsuperscript{98} The Florida Institute for Governance and Civics at Florida State University offers another example.\textsuperscript{99} Its goals include “develop[ing] academically rigorous scholarship and coursework on the origins of the American system of government, its foundational documents, [and] its subsequent political traditions and evolutions.”\textsuperscript{100} SB 266 also states that these civic education centers have related missions and goals and are designed to work together.\textsuperscript{101}

\textsuperscript{95} Other laws, which might be deemed secondary laws, could be considered constituent parts of the Florida web of anti-Black laws. These include 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 asserted in cases involving a Black victim of deadly force and less likely to be available to Black defendants who use deadly force. See, e.g., “Stand Your Ground Kills: How These NRA-Backed Laws Promote Racist Violence”, GIFFORDS L. CTR. & SPLC ACTION (2020), https://www.splcenter.org/sites/default/files/stand_your_ground_kills_-how_these_nra-backed_laws_promote_racist_violence_1.pdf [https://perma.cc/2N46-ZAVB].

\textsuperscript{96} See H.B. 999, 2023 Leg., Reg. Sess. (Fla. 2023), FLA. STAT. § 1004.6496 (2022).

\textsuperscript{97} Id.

\textsuperscript{98} See A.G. Gancarski, Budget Conference: $10M for UF Hamilton Center, FLA. POL. (Apr. 24, 2023), https://floridapolitics.com/archives/606276-hamilton/ [https://perma.cc/CK7A-YXFR] (The Hamilton Center’s mission is to combat the growth of cancel culture by “help[ing] students develop the knowledge, habits of thought, analytical skills, and character to be citizens and leaders in a free society.”).

\textsuperscript{99} See H.B. 999, 2023 Leg., Reg. Sess. (Fla. 2023), FLA. STAT. § 1004.6499.

\textsuperscript{100} See id.

\textsuperscript{101} This includes the establishment of other college institutes, including the Adam Smith Center for the Study of Economic Freedom at Florida International University. See id. 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. See Ryan Dailey, New College of Florida Wants $2 Million for ‘Freedom Institute’ to Combat ‘Cancel Culture’, ORLANDO WKLY. (July 7, 2023, 12:27 PM), https://www.orlandoweekly.com/news/new-college-of-florida-wants-2-million-for-freedom-institute-to-combat-cancel-culture-34578288 [https://perma.cc/L89Y-GK9R].
In summary, HB 7 and SB 266 establish the instructional limits on race-related curriculum. By its language, SB 266, 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, SB 266 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, with its mandated approaches to African American history, establishes a direct connection between HB 7 and SB 266. 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 curricula that include race, social justice, gender studies, or critical analysis. The next Part considers the range of harms associated with these laws.

II. IMPACT ON RACE-RELATED SCHOLARSHIP

This Part identifies the precise ways that HB 7 and SB 266 influence the future 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. 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 race-related courses and conduct race-related research — 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. Instructors whose research includes


examinations of race will also have to give serious thought to how that research will be evaluated by their university.\textsuperscript{104}

In calculating the impact of continuing to teach race-related subjects, instructors will likely consider how it will impact their likelihood to receive institutional perks. For instance, some universities have established initiatives that reward important faculty scholarship.\textsuperscript{105} As part of these initiatives, universities publicize the work of the selected scholars and may provide a monetary award.\textsuperscript{106} Is it realistic to believe that faculty members, post HB 7 and SB 266, 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 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. These factors might cause Florida professors who began their teaching careers interested in race, to reconsider their scholarship focus. In fact, HB 7 and SB 266’s impact extends across disciplines. Whether instructors teach in medicine, law, the social sciences, art, education, or other academic disciplines, these laws encourage them to stay away from race-related issues.\textsuperscript{107} While it is difficult to predict how

\textsuperscript{104} HB 7 and SB 266 will likely 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.

\textsuperscript{105} See, e.g., Faculty Resources: Work with Us, Research Promotion Initiative, UNIV. OF FLA. NEWS, https://news.ufl.edu/for-faculty/ [https://perma.cc/6D7U-RYXL] (last visited Jan. 20, 2024) [hereinafter UF Research Promotion Initiative].

\textsuperscript{106} See supra note 105 and accompanying text.

\textsuperscript{107} 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, shared his thoughts 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 Not Motivated by Race, GUARDIAN (July 8, 2023, 6:00 AM),
much scholarship will not be written because of these laws, there are some indications that fewer Florida professors will engage in non-mainstream race scholarship.\textsuperscript{108} There may be 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 harms 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 SB 266 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.\textsuperscript{109} In effect, these laws place a scarlet letter on the scholarship they ban. It is not just that these perspectives are marginalized.\textsuperscript{110} It is that these laws operate in ways that denigrate race scholarship and recast it as illegitimate.\textsuperscript{111} These laws amplify suspicions about the legitimacy of race scholarship.

\textsuperscript{108} See, e.g., KATHERYN RUSSELL-BROWN & RYAN MORINI, A WAY FORWARD: UF RACE SCHOLARS ON SUPPORT, OBSTACLES, AND THE NEED FOR INSTITUTIONAL ENGAGEMENT (2021) [hereinafter RUSSELL-BROWN & MORINI, A WAY FORWARD].

\textsuperscript{109} See, e.g., H.B. 7, 2022 Leg., Reg. Sess. (Fla. 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 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.

\textsuperscript{110} See generally Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 CALIF. L. REV. 741 (1994) (discussing CRT).

\textsuperscript{111} 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), https://www.nytimes.com/2023/01/31/us/governor-desantis-higher-education-chris-rufu.html [https://perma.cc/X7FL-RJ3A] (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
HB 7 and SB 266 act as preemptive strikes against instruction that allows for critical investigation and analysis. For instance, HB 7 states that instructors may engage with controversial subjects so long as it is done in an “objective manner without endorsement” of academic concepts. These laws discourage instructors from drawing conclusions, even empirically-based ones. Further, it is unclear whether instructors will face sanctions for addressing theoretical perspectives, such as CRT and Afro-pessimism, that identify the systemic harms of racism, even if done in what is believed to be an objective manner. 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 SB 266 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. One of them was Sally Hemings who bore six of his children. Under HB 7 and SB 266, as part of a larger discussion on Jefferson, can an instructor assign books and articles that give a fuller picture of Jefferson — such as assigning reading material that addresses his treatment of 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? This context then allows for a

through, at taxpayer expense, and graduate with a degree in Zombie studies” (emphasis added)).


113. See generally FRANK WILDERSON III, AFROPESSIMISM (2020). Wilderson describes Afro-pessimism as “a theoretical lens that clarifies the irreconcilable difference between, on the one hand, the violence of capitalism, gender oppression, and White supremacy . . . and, on the other hand, the violence of anti-Blackness.” Id. at 228.

114. SB 266 states: “General education core courses may not . . . include a curriculum that teaches identity politics . . . or is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States.” S.B. 266, 2023 Leg., Reg. Sess. (Fla. 2023). While HB 7 does not use “systemic bias,” it does preclude instruction that suggests that concepts such as merit, excellence, colorblindness, and objectivity are racist or designed to oppress members of certain groups. See H.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022).


117. 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
comparison of Jefferson with other founding fathers. 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, but because the instructor
— the expert in the classroom — must consider whether it is permissible to
share his informed opinion with students. 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.

were not capable of taking care of themselves and should be returned to Africa. See Thomas

118. Similar issues regarding instruction could be raised about how HB 7 and SB 266
would impact instruction on Alexander Hamilton. See infra note 121 and accompanying text.

119. See, e.g., Jeffrey Jones, Americans Say Government Should Address Slavery Effects,
[https://perma.cc/Q765-Q3FF] (poll finds that 62% of Americans think the government should act to minimize the impact of slavery — 83% of
Blacks, 71% of Hispanics, and 54% of Whites).

120. See, e.g., Hannah Natanson, ‘Slavery Was Wrong’ and 5 Other Things Some
Educators Won’t Teach Anymore, WASH. POST (Mar. 6, 2023), https://www.washingtonpost.com/education/2023/03/06/slavery-was-wrong-5-other-things-educators-wont-teach-anymore/ [https://perma.cc/2C74-NGUY]. Teachers are having
difficulty implementing new, nebulous rules around race instruction. It includes an interview
with an Iowa high school teacher who asked the school superintendent: “[I]s 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. See id.

121. 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 [https://perma.cc/3QHG-PSFE]; Jessie Serfilippi, As
Odious and Immoral a Thing: Alexander Hamilton’s Hidden History as an Enslaver,
[https://perma.cc/W4DK-T4D2]. Again, does HB 7 and SB 266 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?
C. Children’s Feelings

One of the arguments offered to support these new laws is that they acknowledge and protect children’s feelings.122 Florida Governor DeSantis 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.123 Below are five counterarguments for consideration.

One, the children’s feelings perspective only takes into consideration one specific group of children — White children.124 For decades, Black children and other children of color have expressed concern and torment related to

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123. One of the threads that runs deeply through the arguments for HB 7 and SB 266, primarily through public political statements, is that people who are interested in teaching children about race and social justice (e.g., reparations and global warming), 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.” Florida Gubernatorial Debate, C-SPAN (Oct. 20, 2022) https://www.c-span.org/video/?522607-1/florida-gubernatorial-debate [https://perma.cc/855Y-3DZZ].

124. See 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.” Historically, Whiteness and schooling worked to bar children of other races (e.g., indigenous and Black), from basic learning opportunities.); Charles Blow, The Other Children in the Cultural War, N.Y. Times (Mar. 8, 2023), https://www.nytimes.com/2023/03/08/opinion/education-ron-desantis-crt.html [https://perma.cc/8VSB-KX2A].
the teaching of race-related topics, in assigned readings, class projects, class discussions. 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.” There is a racial hierarchy of children’s feelings whereby some children’s feelings are treated as more important than other children’s feelings.

Two, if we value children’s feelings, why would we only take them into account when they relate to a particular subject — 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 matters. 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? Based on


children’s feelings, should state legislatures be permitted to excise this information or material from classroom lessons?\textsuperscript{130}

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.\textsuperscript{131}

Four, the emphasis on children’s feelings points to another contradiction in the Florida laws. As noted above, one of the proffered rationales for HB 7 and SB 266 is the 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),\textsuperscript{132} and more broadly, social justice. SEL is an educational approach that is based on the role of emotion in the learning process.\textsuperscript{133} However, Florida has rejected SEL as a teaching approach.\textsuperscript{134} It appears that education administrators in Florida are not concerned with children’s feelings.\textsuperscript{135} Their concern only

\textsuperscript{130} The consideration of children’s feelings offers a classic 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.


\textsuperscript{135} In an early draft of SB 266, 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 Feminist Theory, Radical Gender Theory, Queer Theory, Critical Social Justice, or Intersectionality.” H.B. 999, 2023 Leg., Reg. Sess., Comm. Substitute 1 (Fla. 2023); Ana Ceballos & Divya Kumar, \textit{Florida Bill Targeting College Diversity Programs No Longer Mentions Them}, TAMPA BAY TIMES (Apr. 12, 2023),
extends to how some children feel about 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. 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. 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.

Figure 1 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. Figure 1 draws the route from problem, to harm, to solution.


136. 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, 1701 (2007).

Figure 1 illustrates how race scholarship has been framed as a problem. As shown, there are multiple indicators of this problem, including a mix of

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138. Referring to his bill banning CRT, Governor 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), https://www.washingtonpost.com/politics/2022/04/28/desantis-culture-wars/ [https://perma.cc/RY36-C2A7].


140. See, e.g., Press Release, Florida Governor’s Office, supra note 122 (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).

141. See, e.g., Blaskey, supra note 33 (quoting Governor DeSantis: “We won’t allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other.”); Leah Asmelash, Florida Bans Teaching Critical Race Theory in Schools, CNN (June 10, 2021), https://edition.cnn.com/2021/06/10/us/critical-race-theory-florida-ban-trnd/index.html [https://perma.cc/GAQ5-K894] (quoting Governor DeSantis stating that CRT teaches that “the country is rotten and that our institutions are illegitimate”).

142. Patricia Mazzei & Anemona Hartocollis, Florida Rejects A.P. African American Studies Class, N.Y. TIMES (Jan. 19, 2023), https://www.nytimes.com/2023/01/19/us/desantis-florida-ap-african-american-studies.html [https://perma.cc/6JU2-CE99] (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.”).


144. See Asmelash, supra note 141 (discussing banning CRT in Florida schools; DeSantis commented that students need protection from being “indoctrinated to think a certain way”).
concerns about the curriculum students are 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 that have been labeled as indoctrination.145

III. IMPACT ON RACE SCHOLARS

This Part looks at how HB 7 and SB 266 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, this Part explores how these laws discourage and dissuade Florida scholars from engaging in race research.

A. Diminishment of Race Scholars

“There goes my career.”146 That was the response of a professor who retired from a Florida university in 2022. The professor’s reaction to the passage of SB 266 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 research on race. As a result of the aspersions the laws cast on instructors who study and teach 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 SB 266, DEI-related programs are not allowed at public state colleges and universities in Florida.147 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 unimportant — they imply that it is not really scholarship.

Because the Florida legislation devalues some areas of scholarship,148 this arguably lessens the perceived benefit of certain degrees and disciplines,

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146. Identifying information omitted for privacy concerns. Correspondence on file with Author.
148. See id.
such as African American Studies, Gender Studies, and Ethnic Studies. 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. 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 issues involving race, equity, and justice in their respective fields. Thus, the new laws may disproportionately impact Black scholars.

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 SB 266. Describing his experience following debates about SB 266, Matt Harley, the director of the University of North Florida’s Interfaith Center, said:


152. See, e.g., UF Research Promotion Initiative, supra note 105. 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.” UF Research Promotion Initiative, supra note 105.

153. It does not appear that there is data available that calculates the percentage of African American scholars who produce race-related scholarship.
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, but 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.154

The trauma experienced might involve: stress associated with attempting to 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.155 Specifically, they will be faced with considering the worth of their academic degrees in the new educational climate.156 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


155. See generally RUSSELL-BROWN & MORINI, A WAY FORWARD, supra note 108. 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.” RUSSELL-BROWN & MORINI, A WAY FORWARD, at 19. 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.

RUSSELL-BROWN & MORINI, A WAY FORWARD, at 19.

156. See RUSSELL-BROWN & MORINI, A WAY FORWARD, supra note 108. Governor DeSantis has made it clear that universities must now focus on whether particular college majors will result in employment. Under SB 266, the viability of a major is based on the rates of post-graduation student employment. See H.B. 999, 2023 Leg., Reg. Sess. (Fla. 2023). 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: ‘Go to Berkeley,’ USA TODAY NETWORK-FLA. (May 16, 2023, 3:31 PM), https://www.tallahassee.com/story/news/politics/2023/05/16/ron-desantis-diversity-equity-inclusion-floridacolleges-funding-cut/70222887007/ [https://perma.cc/SH8J-7VPJ].
HB 7 and SB 266 impose a steep toll on race scholars. Placing race scholarship in the cross hairs of educational reform puts race scholars at risk. HB 7 and SB 266 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.158

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 materials include issues, theories, and direct references to race? To answer this, faculty members 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 must decide whether to remove the material or reduce the amount of the material.159 Even when they do not think their course curriculum violates the law, many instructors will revise their material anyway.160 Even though the law they are

157. These costs may include: rebuilding academic networks; leasing, selling or purchasing a home; locating new health care providers; changing retirement plans; finding a new school for children; and re-establishing oneself in a new academic home.

158. In response to the passage of SB 266, 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?” Zahneis & Supiano, supra note 26.

159. Daniel Golden, Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching, PROPUBLICA (Jan. 3, 2023, 7:00 AM), https://www.propublica.org/article/desantis-critical-race-theory-florida-college-professors [https://perma.cc/9HRN-JGQG]. University of Central Florida sociology Professor Jonathan Cox detailed his academic dilemma. For the Fall 2022 semester Cox was scheduled to teach two courses, “Race and Social Media” or “Race and Ethnicity,” both of which would include a discussion of colorblind racism. Professor Cox decided not to teach either, stating: “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.

160. Zahneis & Supiano, supra note 26. Professor Andrea Marquez, who teaches business courses at the University of Texas at San Antonio, 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
attempting to adhere to has not been upheld as constitutional, instructors may adjust their curriculum.161

Another wrinkle in this analysis is how the new mandate for post-tenure review will impact specific pockets of the university faculty.162 For college instructors who study race, this enhanced oversight will likely make them warier of addressing race in their scholarship and in their classrooms. This will likely hold true for untenured and adjunct faculty who will be concerned about an unfavorable tenure decision or that their employment contract will not be renewed.163 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 SB 266 will likely have a disproportionate impact on those scholars.

Figure 1 illustrates the stepping stones that the new laws were built upon.164 These steps include the deployment of a narrative that warns that certain types of race talk are harmful to our children and that there is a proliferation of radical teaching. This narrative may prompt a social panic, and further, may spur punitive laws designed to solve the perceived problem. 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.

that might be considered CRT. Ultimately Professor Marquez decided to keep in the case study. AAUP ACADEMIC FREEDOM AND FLORIDA REPORT, supra note 26, at 16.

161. See Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1291 (N.D. Fla. 2022) (issuing injunction against implementation of HB 7); see also supra note 36 and accompanying text.

162. Postsecondary Educational Institutions, H.B. 999, 2023 Leg. Reg. Sess. (Fla. 2023). Prior to SB 266, post-tenure evaluations were optional. Id. at lines 221–25 (“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.”). With SB 266 the Florida legislature replaced “may” with “shall.” Id.

163. 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/ [https://perma.cc/C9Z2-9K56].

164. See supra Section II.C.
Therefore, race scholars and race scholarship must be regulated or banned.165

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

1. Educational Whistleblowers

Designating these instructors and researchers as whistleblowers is a useful analytic prism.166 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 whistleblowers who should be listened to and protected.167 Part of this protection includes ensuring that educators can teach in an environment where they are safe to pursue and critique controversial areas of scholarship outside of the mainstream. Instead, Florida laws discourage instructors from discussing and investigating race issues across a multidisciplinary and theoretical landscape.

History is replete with educational whistleblowers. 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.168 In addition to tracking the number of lynchings, she gathered information about the killings, including the reasons the vigilante mobs gave for the killing, the

165. See supra Part III.

166. 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. See, e.g., Whistleblower, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/whistleblower [https://perma.cc/5XBJ-TB5B] (last visited Jan. 20, 2024).

167. See, e.g., John Ismay, The Final Flight for Black Sailors Known as the ‘Philadelphia 15’, N.Y. TIMES (June 17, 2023), https://www.nytimes.com/2023/06/16/us/racism-navy-philadelphia-15.html [https://perma.cc/AMX7-95G4]. Ismay reported that “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.” Id. Because they spoke out all were “kicked out of the Navy.” Id.

168. See, e.g., IDA B. WELLS-BARNETT, ON LYNCHINGS 9 (2022).
method of killing, and the size of the crowds that gathered to watch and cheer the lynching.\textsuperscript{169} Wells’s research helped radically reshape our socio-legal understanding of lynchings, including the racial motivations associated with vigilante killings.\textsuperscript{170} Ida B. Wells 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.\textsuperscript{171} Specifically, his writings examine how and when the law provides Black people with legal access and redress.\textsuperscript{172} Professor Bell was a whistleblower. Instructors who teach marginalized perspectives, investigate different paradigms, and who use varied pedagogical approaches for understanding racial history are whistleblowers as well.\textsuperscript{173}

Legislative attempts to silence instructors who incorporate non-mainstream race perspectives deny the long history of anti-literacy and a White-focused educational structure.\textsuperscript{174} 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 SB 266. 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.

\textsuperscript{169} See id.


\textsuperscript{172} See, e.g., Derrick Bell, Interest Convergence Dilemma, supra note 171, at 518.

\textsuperscript{173} See Dawn C. Nunziato, First Amendment Protections for “Good Trouble,” 72 Emory L.J. 1187, 1190 (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 Black Lives Matter 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.

IV. THE BIGGER PICTURE OF HARM

As detailed earlier, HB 7 and SB 266 are part of a larger web of laws that signify racial retrenchment. 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 HB 7 and SB 266.

A. Leaving Florida

Brain drain 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, or one country, to another. During the time period that HB 7 and SB 266 were enacted, there has been an overall decline in the number of employees at some state colleges. 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, there is evidence that college instructors, administrators, and students are “voting with their feet,” and are choosing to exit Florida, rather than live under its new educational regime.

175. See supra Section I.D.
177. 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 Kumar & Ian Hodgson, Are Florida Laws Chasing University Faculty Away?, TAMPA BAY TIMES (July 6, 2023), https://www.tampabay.com/news/education/2023/07/06/are-florida-laws-chasing-university-faculty-away-some-see-brain-drain/ [https://perma.cc/HG5A-P5NU].
179. 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.” Vote With Your Feet, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/vote-with-feet [https://perma.cc/HPC3-BW6P] (last visited Jan. 16, 2024).
180. See, e.g., Stephanie Saul, In Florida’s Hot Political Climate, Some Faculty Have Had Enough, N.Y. TIMES (Dec. 3, 2023), https://www.nytimes.com/2023/12/03/us/florida-professors-education-desantis.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/YFB7-2QC7] (interview with several former Florida university professors who left the state to teach elsewhere, due to the political climate related to education reform). Professor Carolyne Ali-Khan who taught at the University of North Florida for 12 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
In addition to those faculty members who have moved or will leave the state,\(^{181}\) there are professors outside of Florida who have declined academic positions in Florida for the same reason.\(^{182}\) Further, there are faculty members in other states who are on the job market, who will no longer consider a move to Florida.\(^{183}\) 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.\(^{184}\) For some people, these new laws broadcast that Florida is anti-literacy and anti-Black history.\(^{185}\) The academic migration includes not only university instructors and administrators, but also students.\(^{186}\) Students have expressed concern about

when I got here.” Kumar & Hodgson, supra note 177. Further, the impact of these laws may extend to state residents who are not affiliated with a Florida college or university. For example, in a letter to the Tampa Bay Times titled “Goodbye, Florida,” resident Karla Smith wrote: “I want nothing to do with a state where LGBTQ+ people are deliberately put in danger, where books are banned, where science and the media are demonized and derided.” Karla Smith, Let’s Address Racial Inequality Long Before College, TAMPA BAY TIMES (July 5, 2023), https://www.tampabay.com/opinion/2023/07/05/lets-address-racial-inequality-long-before-college-letters/ [https://perma.cc/X2UD-3NUL].

181. Since 2021, a growing number of Florida faculty members of color have accepted teaching positions at universities outside of Florida or have retired. In 2020, University of Florida Levin College of Law had six Black full professors with tenure. By the end of 2022, none of them were teaching at the law school. See Garrett Shanley, New State Legislation Leads to Departures, Concerns Among UF Faculty, INDEP. FLA. ALLIGATOR (July 31, 2023, 8:00 AM) https://www.alligator.org/article/2023/07/new-state-legislation-leads-to-departures-concerns-among-uf-faculty [https://perma.cc/RF28-BMLA].

182. See, e.g., AAUP ACADEMIC FREEDOM AND FLORIDA REPORT, supra note 26, at 16 (“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.”); Joseph Contreras, ’I’m Not Wanted’: Florida Universities Hit By Brain Drain as Academics Flee, GUARDIAN (July 30, 2023), https://www.theguardian.com/us-news/2023/jul/30/florida-universities-colleges-faculty-leaving-desantis [https://perma.cc/NV8P-7HPJ] (quoting a faculty member who decided to leave Florida: “All of the legislation surrounding higher education in Florida is chilling and terrifying”); Shanley, supra note 181 (quoting a former UF faculty member: “Nobody’s really comfortable being put on a list in the governor’s office . . . . At 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 Kumar & Hodgson, supra note 177.

183. See Kumar & Hodgson, supra note 177.

184. See generally supra Section I.D.

185. 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. Eddie S. Glaude, Jr. (@esglaude), TWITTER (May 15, 2023, 12:08 PM), https://twitter.com/esglaude/status/1658142386399084545 [https://perma.cc/8CM-5H4A].

legislation that excises race and social justice learning from the college curriculum.\textsuperscript{187} They wonder what substantive course material and what class discussions they will miss because their professors are fearful of violating the law.\textsuperscript{188} These concerns have caused some students to make plans to transfer to universities outside of Florida.\textsuperscript{189} This academic migration also includes college students who decide not to apply to Florida colleges, though they had initially planned to do so.\textsuperscript{190} 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. The NAACP, for instance, issued a searing travel advisory, warning Black people of the dangers of traveling in the state of Florida.\textsuperscript{191}

\footnotesize{universities-could-lead-to-massive-brain-drain [https://perma.cc/2V7V-F7WV] ("Professors and students are considering leaving Florida in light of higher education changes.").}


\textsuperscript{188} See Visram, supra note 186 (discussing the perception college students have since HB 7 has passed). One student notes that his professor sometimes skirted around topics and placed words on the board rather than saying them aloud. See Visram, supra note 186.

\textsuperscript{189} See Visram, supra note 186.

\textsuperscript{190} 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), https://www.nytimes.com/2023/06/27/opinion/ron-desantis-florida-bills.html [https://perma.cc/MZS9-3K32] (noting that two of the three Florida professors she spoke with say they will leave the state as a result of the new laws); Visram, supra note 186.


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 Americans, and other people of color regarding the hostility towards African Americans and other minorities.

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, some instructors may 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 topics into their courses. The ambiguity and newness of HB 7 and SB 266 make it likely that instructors teaching classes where race is a small component of the course will delete this material altogether. Though the Florida laws have not been upheld by the courts, they appear to have been met with preemptive compliance. SB 266 and HB 7 have pushed faculty members to engage in self-censorship. The result is quiet compliance, and it has far-reaching consequences. It impacts not only course subjects but approaches to teaching. Prior to SB 266, Sarah Eddy, a biology professor at Florida International University, had adopted an inclusive teaching approach. This approach identifies teaching strategies designed to minimize, for example, “stereotype threat.” The new laws will likely discourage instructors from implementing curricula strategies that will benefit all students. This highlights a critical consequence of these laws. They ban

barrage of harmful and discriminatory policies on protests, voting rights, education, and diversity, equity, and inclusion”); 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/ [https://perma.cc/QD6R-YZHA] (estimating that the fraternity’s conventions generate $4.6 million in economic impact).

192. See, e.g., Zahneis & Supiano, supra note 26 (referencing STEM faculty member who declined to keep topic of redlining in his course to ensure compliance with SB 266).


195. 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).
certain subjects and discourage educators from implementing new teaching methods that would benefit students.

An additional consequence of these laws is that they may place Florida college students at a disadvantage compared to other college students outside of Florida. Students who live in states where teachers are allowed and even encouraged to teach substantive topics and perspectives, even critical ones, will be better prepared to live, learn, and work in a diverse world. 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. An editorial by a UF professor identifies the potential harms of SB 266:

[Florida legislators are] 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 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.196

Time will tell whether laws such as SB 266 and HB 7 will make Florida college graduates less competitive than their peers who graduate from colleges in states that have not banned diversity and race education. It may be that employers will prefer to hire people who have grappled with an unfettered range of academic and social issues in their collegiate studies. These laws might also spur a decline in the national rankings of Florida universities.

C. Placing Black People in Harms’ Way

As discussed above, a laundry list of harms can be expected to come after 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 harm’s way. For instance, racial subordination and inequity are more prevalent when White people have

mostly stereotypical information about Black people. These types of racial injuries 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, stereotypical and negative media images of Blackness (e.g., portrayals of Black people as uneducated, criminal, and buffoonish) ensure that 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 may put Black people at an increased risk of harm, including psychological injury and physical assault. Examples include demeaning, racially-charged exchanges in public, physical assaults and violence against African Americans (such as anti-Black police violence), racially-disparate rates of arrest, charging, and sentencing of Black people, and vigilante assaults targeting Black people.


198. These are sometimes referred to as “microaggressions.” The term was initiated by psychologist Chester Pierce. See Chester Pierce et al., An Experiment in Racism: TV Commercials, 10 Educ. & Urb. Soc’y 61, 65 (1977);erald Wing Sue, 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 seeks protection, often from law enforcement. The incidents often involve emotionally wrought claims of harm, involve yelling or tears, and sometimes have the quality of performance or spectacle. See Evan Simko-Bednarski, White Woman Is Fired after Calling Police on Black Man in Central Park, CNN (May 26, 2020), https://edition.cnn.com/2021/05/26/us/amy-cooper-lawsuit-fired/index.html [https://perma.cc/YTA7-H9ZX] (woman videotaped calling police on Black birdwatcher in Central Park); see, e.g., Diane de Guzman, Video Shows Woman Calling Police over Barbecue at Lake Merritt, S.F. Gate (May 10, 2018), https://www.sfgate.com/bayarea/article/Oakland-barbecue-Lake-Merritt-Sunday-confrontation-12902520.php [https://perma.cc/6AEW-EB4R] (woman calling police on Black people using a public grill at Lake Merritt in Oakland, CA).

199. For instance, the 2020 killing of George Floyd, a Black man, by four Minneapolis police officers.


201. For instance, the vigilante murder of Ahmaud Arbery in Georgia in 2020 while Arbery, a Black man, was jogging through a neighborhood. See Ahmaud Arbery Shooting: A Timeline of the Case, N.Y. Times (Aug. 8, 2022), https://www.nytimes.com/article/ahmaud-arbery-timeline.html [https://perma.cc/2U75-XVDP].
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. 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). 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 (this is also true for homes owned by other non-Blacks). Some scholars refer to these varied racial inequalities as a “Black tax.”

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 drawn will be incomplete. Let us assume a student signs up for a course on the criminal justice system. If the course

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203. See id. at 1.
204. See, e.g., STEPHEN J. GOULD, THE MISMEASURE OF MAN 72–73, 153 (W.W. Norton & Co. 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).
205. See ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 42–43 (1992) (describing a class assignment used in his classes called “The Visit,” which asks White students to consider the financial worth of Black life).
does not incorporate race issues throughout, 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 is therefore justifiable.\(^{208}\) 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.\(^{209}\) This may lead to perceptions, conscious or otherwise, that being a Black person is something negative or “bad” and being a White person is something positive or “good.”\(^{210}\)

Beyond categorizing some academic topics as off limits, HB 7 and SB 266 place limits around the perspectives instructors can use to analyze how the world operates. These limits force teachers to teach a narrow version of 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?\(^{211}\) 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 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

\(^{208}\) For instance, it would be reasonable to expect that discussions of the origins of American policing would include material on the slave patrols. See generally SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND IN THE CAROLINAS (Harvard Univ. Press 2001); RUSSELL-BROWN, THE COLOR OF CRIME, supra note 197.


\(^{211}\) 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, and removal and replacement of some members of college boards of trustees (e.g., New College of Florida), and firing of instructors who have used controversial classroom material. It is within this larger context that HB 7 and SB 266 operate. It appears that Florida legislators are fine with systemic bias if it supports their educational aims.
sundown towns, lynching, educational segregation, housing segregation, employment segregation, commercial segregation, and racial disparities in the justice system. HB 7 and SB 266 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. A citizenry educated about systemic racism could mean the difference between life and death for some.


217. This includes the history of denial of loans to Black citizens, from the denial of loans to Black post-WWII veterans to modern-era racial bias against Blacks in commercial and private lending. See Press Release, U.S. Dep’t of Just., 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), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief [https://perma.cc/5W8Q-Q8UX].

218. For an example of explicit, systemic racial bias by the U.S. Supreme Court, see generally Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding enslaved persons have no constitutionally recognized rights). For an example of explicit, systemic racial bias by the Florida Supreme Court, see Luke v. Florida, 5 Fla. 185, 195 (1853) (holding an enslaved person following enslaver’s orders to commit animal theft 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 Nat’l Conf. of State Legislatures, Racial and Ethnic Disparities in the Criminal Justice System (2022).

219. 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, 538–39 (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”?
Black citizens. Historian Carter G. Woodson crystalizes this point: “[T]here would be no lynching if it didn’t start in the schoolhouse.”

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 SB 266 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 SB 266 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-state

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220. 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).
tuition benefit. As such, an important question arises: Whether the restructured educational paradigm in Florida mandated by HB 7 and SB 266, 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 SB 266 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 SB 266. 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. 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.

221. The Fifth Amendment Takings argument could also be used to analyze the impact HB 7 and SB 266 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 50% of Florida high school students are eligible for one type of the Bright Futures scholarships. The 180-degree turn in what constitutes acceptable college curricula, caused by HB 7 and SB 266, 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. 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.

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

223. See supra text accompanying notes 5–12.
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.224 Bright Futures is an academic scholarship plan passed in 1997 by the Florida legislature.225 The Bright Futures program rewards high academic achievement by high school students.226 In 2021–22, approximately 120,000 students received Bright Futures scholarships.227 Of those, 44% of the recipients were White students, 28% were Hispanic students, nine percent were Pacific Islander/Asian students, and 6% were Black students.228 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.229 The lottery-funded scholarship covers tuition and other fees.230 The popular

224. FLA. STAT. § 1009.53 (2022).
225. Id. 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 FLA. DEP’T OF EDUC., OFF. OF STUDENT FIN. ASSISTANCE, STUDENT FINANCIAL ASSISTANCE, ANNUAL REPORT 2020-21 (2022).
226. 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.” See FLA. STAT. § 1009.53 (2022).
227. See FLA. BRIGHT FUTURES SCHOLARSHIP PROGRAM, FLORIDA BRIGHT FUTURES STUDENT COUNTS AND TOTAL COSTS (Sept. 20 23), https://www.floridastudentfinancialaidsg.org/PDF/PSI/BFReportsA.pdf [https://perma.cc/8Z58-9NFB]. This number includes new and continuing Bright Futures scholars.
228. 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), https://www.washingtonpost.com/education/2022/05/07/merit-scholarships-college-racial-inequities/ [https://perma.cc/Y37J-E2NE] (noting Black people comprise approximately 17% of Florida population but only 6% 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. Id.
230. “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.” What You Need to Know Now That You are Eligible, in 2023–24 BRIGHT FUTURES STUDENT HANDBOOK 4 (2023).
program has been cited as one of the reasons some families move to Florida. 231
For eligible students, Bright Futures pays for tuition and mandatory fees. 232 The scholarship funds are deposited directly to the university that the student-awardee will attend. 233 Because tuition amounts vary across the states’ 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. 234 Over a four-year period, the scholarship is worth more than $27,000. 235 For many families, the scholarship program means the difference between being able to send their children to college or not. 236

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. 237 The Fifth Amendment states that “private property [shall not] be taken for public use, without just compensation.” 238 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. 239 However, not all intangible property is constitutionally protected private property subject to

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231. 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 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 [https://perma.cc/39AY-B4V5].


233. See id.

234. See Zumstein, supra note 229.

235. See Zumstein, supra note 229. 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.


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

238. U.S. Const. amend. V.

239. See W. River Bridge Co. v. Dix, 47 U.S. 507, 533–34 (1848) (holding Takings Clause applies to intangible property).
remedy under the Takings Clause. To be classified as private legal property, the owner must establish exclusive use. The factors that determine the calculation for just compensation are not always clear. When takings claims involve real property, the value of the property is typically determined by its fair market value. When this cannot be determined, courts will look to other factors. The U.S. Supreme Court has heard takings cases since the late 1800s. The evolution of these cases sheds light on the shifting values placed on private property and social needs.

C. The Takings Clause Applied to the Bright Futures Scholarship

This Section identifies the factors courts use to evaluate takings claims and applies the required elements to the Bright Futures scholarship.

1. Intangible Private Property

Owners of some forms of intangible property may raise a takings claim. The claim must involve private property. Protected private property is “constitutional property.” Exclusivity is the primary characteristic of private property. In *College Savings Bank v. Florida Prepaid Postsecondary**

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240. For instance, patents are categorized as intangible property but do not classify as constitutional property under the Takings Clause. See *Zoltek Corp. v. United States*, 442 F.3d 1345, 1366 (Fed. Cir. 2006). Other types of intangible property include trusts, trade secrets and copyrights. See Dustin Marlan, *Trademark Takings: Trademarks as Constitutional Property under the Fifth Amendment Takings Clause*, 15 J. CONST. L. 1581, 1581–1629 (2013) (arguing that trademarks should qualify as constitutional property).


243. See *supra* note 242 and accompanying text; *United States v. Fuller*, 409 U.S. 488, 490 (1973) (holding fair market value “term is not an absolute standard nor an exclusive method of valuation” (citation omitted)).


245. See id.

246. 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., Motion to Dismiss, *Rivadeneira v. Univ. of S. Fla.*, No. 8:21-cv-01925 (M.D. Fla. 2022).


248. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

Education Expense Board, the U.S. Supreme Court states that “[t]he hallmark of a protected property interest is the right to exclude others.”250

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.251

2. Constitutional Property Interest

In *Felipe Rivadeneira v. University of South Florida*, the plaintiffs claimed a taking occurred when the University of South Florida transitioned to remote instruction following the school’s Covid-19 shutdown.252 The U.S. District Court held that there was no taking because the plaintiffs did not establish a constitutional property interest.253 The court found that a determination that the university breached its contract is insufficient to establish a taking: the takings threshold is higher than a contract breach.254 Applying *Rivadeneira*’s analysis to the Bright Futures scholarship, it could be argued that a Bright Futures’ student’s takings claim is stronger than the claim made by the plaintiff in *Rivadeneira*. While the delivery mode of education changed for Rivadeneira, this did not alter the substance of the education students received. For example, during Covid, it could have been possible for some instructors to 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.

In contrast, HB 7 and SB 266 cause the removal of race-related historical perspectives, theories, and contemporary understandings from the college classroom. This creates a substantive change in the educational experience.255 These laws will force some instructors to revise substantial

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251. See Lankheim v. Fla. Atl. Univ., 992 So.2d 828, 834 (Fla. Dist. Ct. App. 2008). 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 Chase Secs., Inc., 783 So.2d 231, 236 n.5 (Fla. 2001)).


253. See *id.* at *5.

254. See *id.*

255. See *supra* Parts II–IV.
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 SB 266. 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.

3. Public Use or Public Benefit

A takings analysis requires courts to examine whether the state’s use of a person’s private property for public use or public benefit was justified. U.S. courts have found the taking of property justified in a variety of circumstances. Some commentators have argued that establishing a justification should require more than a de minimis showing; because 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. 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 SB 266 allow a good to be taken away — a comprehensive college education — 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

256. See Micah Elazar, “Public Use” and the Justification for Takings, 7 J. CONST. L. 249, 249–78 (2004) (reviewing Supreme Court decisions in Berman v. Parker, 348 U.S. 26 (1954) and Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)). The Court does not set out a clear meaning of the justification required for taking another’s property. See id. at 250–54. 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). See id. at 256–62 (using these frameworks to analyze how courts interpret public use).


258. See Elazar, supra note 256, at 254–55, 277–78 (arguing “[t]he burden should rest on legislatures to show exceptional need, not ordinary legislative business, to justify a taking”).

education and the students who leave Florida because of the legislative changes lose the financial benefit of Bright Futures. The state could argue that the educational changes ushered in by HB 7 and SB 266 provide educational benefits to Florida students. Empirical proof of such benefits, however, have not yet been established. Further, any benefits that might be established come at a high cost — a cost that may obliterate any proposed benefits. Based on the above discussion, the public use requirement has not been clearly established.

4. Taking

The passages of HB 7 and SB 266 have arguably caused the diminution at best, and the destruction at worst, of private, intangible property in the form of a guaranteed state benefit. These laws amount to a constructive taking. Notably, the state has the power to modify or eliminate privileges it creates. 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). Arguably these shifts in eligibility are not comparable to the changes in education resulting from the passage of HB 7 and SB 266. 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 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.

260. See supra Section IV.B and accompanying footnotes.

261. The reduction in property value as a result of a taking may be actionable for the taking of either physical or intangible property. See Jacobson v. Southeast Pers. Leasing., Inc., 113 So. 3d 1042, 1051 (Fla. Dist. Ct. App. 2013).

262. See, e.g., Fla. Carry, Inc. v. Univ. Fla., 180 So.3d 137 (Fla. Dist. Ct. App. 2015) (noting the state has the power to modify or eradicate privileges it has created).

263. Note that these changes have had a racially disproportionate impact — fewer Black students are eligible for the scholarship. See, e.g., Harris, supra note 228.
5. Remedies

Injunctive relief is one possible remedy for a takings\textsuperscript{264} 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 past harms or prevent any future harms caused by these laws. As previously discussed, HB 7 and SB 266 are part of a larger group of laws that are mutually reinforcing.\textsuperscript{265} Given this web of connected laws, it would likely take a stronger legal remedy than a temporary injunction to prompt educators to disregard the dictates of HB 7 and SB 266.\textsuperscript{266}

Compensatory damages is another possible remedy for finding that Florida’s education laws unconstitutionally encroach upon Bright Futures.\textsuperscript{267} A per-year calculation provides a baseline for a compensation amount.\textsuperscript{268} In terms of remedies available for takings, adequate redress exists if HB 7 and SB 266 were found to constitute a taking of Bright Futures.\textsuperscript{269}

While the above discussion shows there is not a compelling case to be made that HB 7 and SB 266 amount to a taking of the Bright Futures program, the takings framework makes four valuable points. First, it


\textsuperscript{265} See \textit{supra} Section I.D.

\textsuperscript{266} Many educators have already engaged in anticipatory compliance. \textit{See supra} note 36 and accompanying text.

\textsuperscript{267} 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 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 SB 266 becoming law.

\textsuperscript{268} \textit{See supra} notes 232–36 and accompanying text.

\textsuperscript{269} 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. \textit{See generally} Shubha Ghosh, \textit{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 societal flourishing . . . and for the development of means of dissent and expression against state governments.” \textit{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 SB 266 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.
provides a fresh constitutional framework for understanding the harms caused by HB 7 and SB 266. Second, it establishes that the harms caused by these laws are quantifiable. Third, it underscores the fact that the new laws harm many people in many different ways. Fourth, this 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 SB 266. It also shows that harm may exist whether or not it is legally recognized as harm. 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 SB 266. These laws are not simply new ways of doing old things. They are not new math. Rather, they represent a transformation of Florida’s educational paradigm into a new model. 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 SB 266 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 Black people did 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 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

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in the U.S. education system. Florida’s HB 7 and SB 266 are legislative legacies of this history.\textsuperscript{275}

By design, both HB 7 and SB 266 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, and thereby reduces the scope of knowledge about race and history more broadly.\textsuperscript{276} 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 SB 266. 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 many 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.\textsuperscript{277} 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. The impacts of HB 7 and SB 266 have been bolstered by other anti-civil rights legislation, including book bans, re-drawn electoral voting districts, more stringent rules for the formerly incarcerated to have their voting rights restored, post-tenure review for university faculty, and relaxed gun laws.\textsuperscript{278}

In case there was any doubt about the breadth of harm caused by HB 7 and SB 266, the Fifth Amendment takings analysis crystalizes their harms. The takings discussion evaluates how these laws impact the Bright Futures scholarship. Though it would be an unsuccessful legal claim, the takings issue provides a unique framework and highlights what is at stake. It

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\textsuperscript{275} See Russell-Brown, ‘The Stop WOKE Act’?, supra note 11, at 343.
\textsuperscript{276} See H.B. 7, 2022 Leg., Reg. Sess. (2022). The HB 7 proviso reads: “[It] may not be construed to prohibit discussion of the concepts listed therein as part of a 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. SB 266 does not include this safeguard.
\textsuperscript{277} See Golden, supra note 159 (interview with UCF professor Jonathan Cox).
\textsuperscript{278} See supra notes 77–95 and accompanying text.
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provides a coherent framework for examining harm. Specifically, it shows how the HB 7 and SB 266 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 the past is prologue, we can expect to see more laws like HB 7 and SB 266. 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 be banned from teaching about HB 7 and SB 266 in their college classrooms.