



National Lawyers Guild *Review*



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EDITOR'S PREFACE

By Dalia Fuleihan

The Trump Administration's judicial appointments had a devastating effect on courts across the country. Across the board, we are seeing courts leaning to the right and failing to defend fundamental rights. While litigation should not be the main mechanism to achieve change, it has at times provided a useful avenue to challenge unjust laws. However, our currently conservative leaning judiciary necessitates a reevaluation of the utility of litigation to progressive movements. Some of the Supreme Court's recent decisions—most notably the decision in *Dobbs v. Jackson Women's Health* which overturned *Roe v. Wade*, provide a needed reminder of the importance of grassroots organizing and community directed action in progressive movements. In this issue of the Review, we are excited to present three articles that both analyze the problems with our ineffective judiciary, but also provide alternative paths towards protecting rights and pursuing the structural change that this country sorely needs.

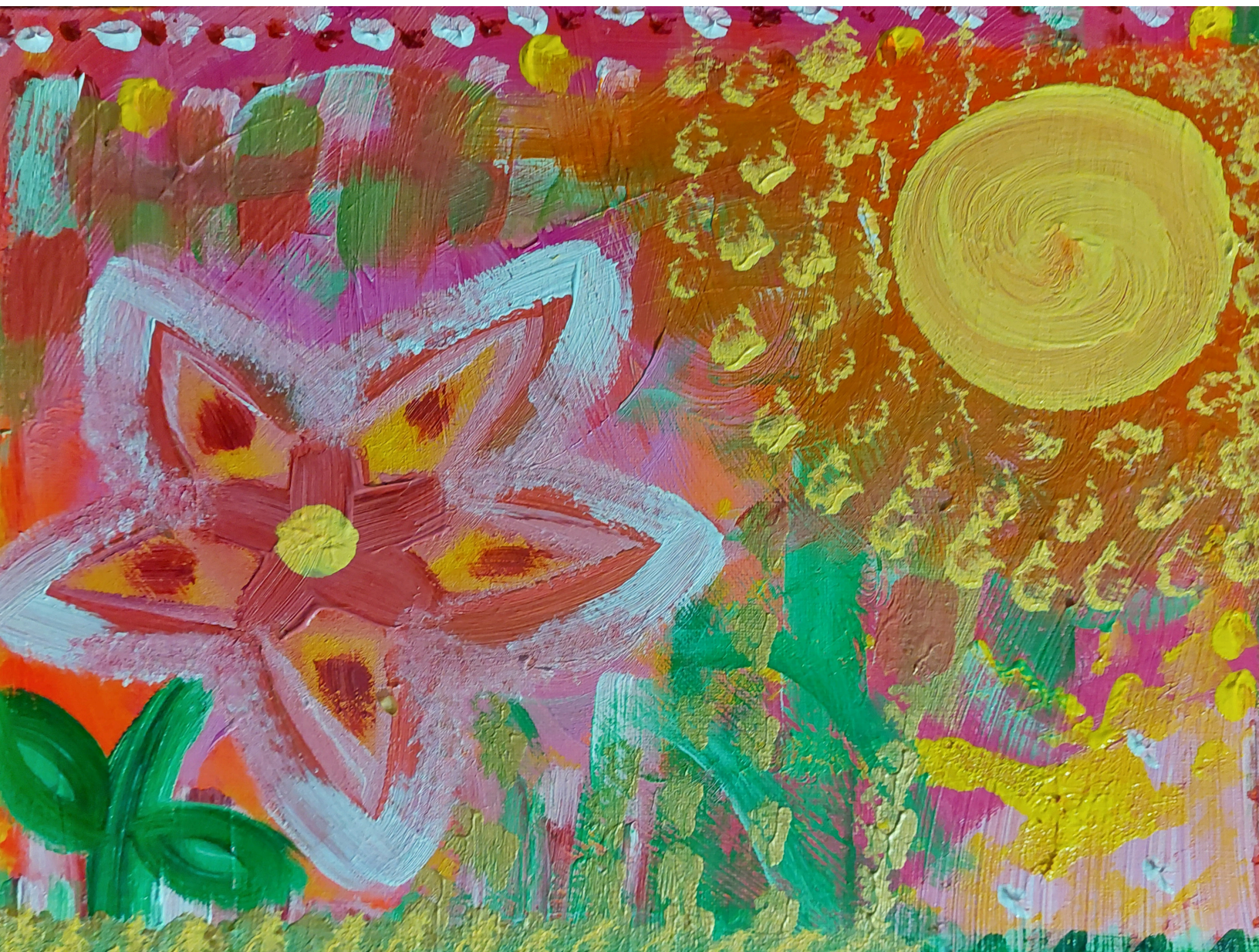
In "Frustrated Federalism: *Daimler v. Bauman* and the Entrenchment of Supranational Corporate Sovereignty," Jake Romm, takes a deeper look at the Supreme Court's decision in *Daimler*, which famously limited the state's general jurisdiction over corporations operating within their borders—holding that corporations may only be subject to general jurisdiction in their state of incorporation and the state of their principal place of business. While such a decision may seem obscure and academic, Romm masterfully discusses the devastating real-world consequences of such a decision—the declining ability of the general population to hold supranational corporations accountable for their actions. In a world where the power of supranational corporations increases daily, decisions like *Daimler* only further empower supranational corporations by giving them a degree of sovereignty and insulating them from suit in the majority of states.

In "Invitation Accepted: Challenging Anti-Education Laws at the Intersection of Critical Race Theory, Academic Freedom, and Labor Rights," Simon X. Cao takes a closer look at the many anti-critical race theory laws that have been introduced and passed in state legislatures. The right has been disturbingly successful in passing legislation that proscribes all historical interpretations of the United States' founding except those that describe the founding of the U.S. as "the creation of a new state based on the universal principles in the Declaration of Independence." Meanwhile the courts have been woefully ineffective when it comes to protecting the academic

freedom of K-12 educators. While Cao’s article analyzes the acquiescence of the courts in the right’s anti-critical race theory crusade, he also provides a model for future action. Cao discusses the potential for collective action, specifically through teachers’ unions to combat anti-critical race theory laws. Cao’s article masterfully highlights the importance of collective action to combat unjust laws, particularly when the court system does not fulfill its obligations.

In this issue’s final article, “Racial Reckoning in a ‘White Utopia’: Oregon’s 2021 Criminal Justice Reform Bills,” Sierra Paola analyzes the flurry of criminal justice reform bills passed in Oregon in the wake of the 2020 George Floyd protests. The onslaught of criminal reform bills in Oregon was remarkable, particularly considering the racist history of the state. Paola describes in detail the different categories of bills passed—police reform bills, downstream harm reduction bills, and upstream prevention bills—as well as the different organizing strategies that led to the bills’ success. As Paola points out different categories of bills have different effects. While police reform bills focus more on eliminating “bad apples” without addressing systematic overhaul, other types of bills such as the upstream prevention bills aim to prevent people from interacting with the criminal system in the first place through decriminalization efforts, among other tactics. All the bills passed were the direct result of organizing strategies including mass demonstrations, BIPOC representation in the state legislature, and lobbying for bipartisan support. Paola’s article is a masterful analysis of the importance of organizing, and of maintaining diverse organizing strategies to achieve progressive change.

While our current economic and political systems designed to maintain a white supremacist status quo and attempts at change are repeatedly thwarted by the ineffectiveness of our elected representatives and judiciary, it is more important than ever that we look to alternative mechanisms for challenging entrenched injustice. This issue of the Review provides us not only with a demonstration of the shortfalls of our current institutions, but also a demonstration of how mass demonstrations and organizing can be engines for progressive change.



**Flower Growing Through a
Crack in the Concrete**
by Ursula Curiosa
Acrylic
2022

Frustrated Federalism: *Daimler v. Bauman* And The Entrenchment Of Supranational Corporate Sovereignty

By: Jake Romm¹

Thank you to Sophia Gaulkin for her editing help on the initial draft of this article.

At first glance, the Supreme Court case *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) seems to be unrelated to federalism. The case arose out of a California Alien Torts Statute claim and the Supreme Court's decision was entirely concerned with delineating the contours of general jurisdiction.² Ultimately, the Court held that corporations can only be subjected to general jurisdiction in their state of incorporation and in the state of their principal place of business.³ While this may seem to be an area of the law conceptually and formally distinct from federalism, the decision is, on the contrary, intimately tied up with federalism and has a number of implications on its understanding and practice.

We have traditionally considered federalism issues in the context of state power versus national power.⁴ Behind this, there is a broad theoretical edifice constructed by scholars that attempts to ask the question: where is federalism best protected? But working in the interstices of these debates are those organizations and entities that resist traditional categorization, that have remained, in certain ways, beyond the law just as they have shaped it. I am referring to supranational corporations.⁵ In particular, I want to focus on the problems such corporations pose for traditional notions of jurisdiction,

1 Jake Romm is a writer and human rights lawyer working mainly on behalf of Guantanamo Bay detainees. His writing has appeared in *Opinio Juris*, *The International Criminal Law Review*, *Inkstick Media*, *The Brooklyn Rail*, and elsewhere.

2 See *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

3 *Id.* at 761-762.

4 See, e.g., Robert R.M. Verchick & Nina A. Mendelson, *Preemption and Theories of Federalism*, in *Preemption Choice: The Theory, Law and Reality of Federalism's Core Questions* 13-22 (Cambridge University Press ed. 2009) (defining Federalism as chiefly "concerned with the distribution of power between the federal government and state governments"); Heather K. Gerken, *Our Federalism(s)*, 53 *Wm. & Mary L. Rev.* 1549 (2012) (lamenting the inability to consider the numerous different ways states fulfill various roles under federalism vis-a-vis their relationship with the federal government).

5 This paper will use the phrase supranational corporations (or "supranationals" for short) as opposed to multinational corporations for two reasons. First, to underscore the fact that many large corporations do not just operate across national or state borders, but over those borders—they are unconstrained by territoriality on both an international and national scale. That is, they exist above the national system, as quasi-sovereign entities in their own right. Second, supranational corporations need not actually be multi-national in scope. It is possible for a supranational to operate only within a national context.

and therefore, for traditional notions of federalism and sovereignty.

The *Daimler* decision relied heavily on traditional notions of territorial sovereignty.⁶ The irony is, that in limiting general jurisdiction to a narrow understanding of “at home”, the Court did not reinforce states’ territorial sovereignty – rather, the decision eroded it and handed a degree of sovereignty over to supranational *corporations*. As Justice Sotomayor pointed out in her *Daimler* concurrence, supranational corporations have become too big for general jurisdiction.⁷ This troubles our conceptions of federalism in a number of ways: first, it allows supranationals to enjoy immunity from general jurisdiction in at least 48 states, thus limiting those states’ abilities to protect their citizens and regulate the behavior of foreign corporations – giving them less voice in national policy; second, in Heather Gerken’s terms, federalism promotes either voice or exit,⁸ but *Daimler* denies minorities both voice and exit. Finally, the *Daimler* decision undermines the benefits of jurisdictional redundancy – a key feature of federalism.⁹ Focusing on jurisdiction through the federalism lens allows us to restore to horizontal state-state interactions some of the salience that is sometimes lost in the federalism discourse’s focus on vertical state-federal relations. It also allows us to see that the fight for self-governance extends beyond formal government arrangements, beyond informal ones as well, and into the interaction between localities and capital, and between people and the supranational corporations that increasingly govern their lives.

A Short History of Jurisdiction Pre-*Daimler*

In order to understand just how sweeping the implications of *Daimler* are, it is important to understand the legal paradigms which existed beforehand. There are two types of personal jurisdiction in American law. First, there is specific jurisdiction in which a state can exercise jurisdiction over an out-of-state resident where the conduct in question arose out of the defendant’s contacts with the forum state.¹⁰ General jurisdiction, on the other hand, is a state’s ability to exercise jurisdiction over an out-of-state defendant for any and all claims against it, even those occurring outside or

6 *Daimler*, 134 S. Ct. at 757 (stating that, although, “[s]pecific jurisdiction has been cut loose from *Pennoyer*’s sway,” the Court has, “declined to stretch general jurisdiction beyond limits traditionally recognized.”).

7 *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring).

8 Heather Gerken, Foreword, *Federalism All the Way Down*, 124 Harv. L. Rev. 6, 9 (2010).

9 Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation*, 22 Wm. & Mary L. Rev. 639 (1981), available at https://digitalcommons.law.yale.edu/fss_papers/2702.

10 See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2848-2849 (2011) (explaining the core concepts of specific and general jurisdiction).

having little or nothing to do with the forum state.¹¹

But these are relatively modern understandings of jurisdiction. Until the middle of the 20th century, the predominant paradigm was one of territorial sovereignty, articulated by Justice Field in *Pennoyer v. Neff* (1878).¹² Field understood jurisdiction as stemming from the:

two well established principles of public law...that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory...The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others.¹³

Jurisdiction, on this understanding, was rooted in the territorial sovereignty exercised by each state and was, as a result, coterminous with a state's borders—one state could not reach the residents of another as long as those residents stayed within their state's borders. This ruling was predicated in part on the 14th Amendment's Due Process Clause—under the territorial understanding of jurisdiction, an exercise of jurisdiction over an out-of-state individual would be a violation of that individual's due process rights.¹⁴

Eventually, due to “changes in the technology of transportation and communication, and the tremendous growth of interstate business activity,”¹⁵ the Court moved away from this strict territorial picture of jurisdiction and developed the minimum contacts standard for both specific and general jurisdiction inquiries in the seminal case of *International Shoe Co. v. Washington* (1945).¹⁶ That is, both inquiries revolved around assessing the level of contact the defendant had with the forum state.¹⁷ Given the increased flow of capital and people across state borders, the strict territorial model no longer made practical or conceptual sense—borders, historically permeable, were finally recognized as such.

Though the Court's post-*International Shoe* decisions focused primarily on specific jurisdiction, there were a number of general jurisdiction decisions as well.¹⁸ The reigning precedents in the general jurisdiction space

11 *Id.*

12 Carol R. Andrews, *Another Look at General Personal Jurisdiction*, 47 Wake Forest L. Rev. 999, 1002 (2012), available at https://scholarship.law.ua.edu/fac_articles/33.

13 *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

14 *Id.* at 733.

15 *Burnham v. Superior Court of Cal., County of Marin*, 495 U. S. 604, 617 (1990).

16 *Id.*

17 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

18 Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For: Goodyear*,

prior to *Daimler* were *Helicopteros Nacionales de Colombia, S.A. v. Hall*, decided in 1984 and *Goodyear Dunlop Tires Operations, S.A. v. Brown*.¹⁹ The former, arising out of the Texas state courts, involved American plaintiffs suing a Colombian helicopter company over a fatal crash that happened in Peru.²⁰ The Supreme Court ultimately decided that Texas could not exercise general jurisdiction over the company because the company's contacts with the state were not sufficiently "continuous and systematic."²¹ Later, in *Goodyear*, which involved the American parents of children killed in a bus crash in Paris suing the North Carolina subsidiary of Goodyear (an Ohio corporation) along with various foreign subsidiaries, the Court confirmed again invoked the lack of "continuous and systematic general business contacts" in their finding that North Carolina could not exercise general jurisdiction over the defendant.²²

Thus, the standard was set— a state could only exercise general jurisdiction over an out-of-state resident when the out-of-state resident had continuous and systematic contacts with the forum state, a standard that, despite the Court's insistence in the discontinuity between the development of personal and general jurisdiction, is borrowed language from dicta in *International Shoe* and more or less recapitulates the personal jurisdiction standards albeit on stricter terms.²³ The Court did not entirely abandon *Pennoyer*, however, in that it still assessed the validity of states' exercises of jurisdiction with respect to the 14th Amendment—such exercises, the Court held in their contacts line of cases, must not be so grasping as to offend "traditional notions of fair play and justice."²⁴ At the same time, the Court sought to balance the so called *Asahi* fairness factors: "the burden on the defendant, the interests of the forum state, the interests of the plaintiff in choosing the forum, efficiency concerns, and policy interests"²⁵ which, under the old paradigm, were used in evaluating both general and specific jurisdiction.²⁶

Daimler; and the Evisceration of General Jurisdiction, 64 Emory L. J. Online 2001, 2002 (2014), available at <https://scholarlycommons.law.emory.edu/elj-online/23>.

19 466 U.S. 408, 416 (1984); 564 U.S. 915 (2011); see also *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 448 (1952) (articulating the same principles on the basis of on significantly more idiosyncratic facts); *Daimler*, 134 S. Ct. at 756-757 (tracing the development of general jurisdiction jurisprudence through *Helicopteros* and *Goodyear*).

20 *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

21 *Id.* at 415-16.

22 *Goodyear*, 564 U.S. at 915.

23 *Helicopteros*, 466 U.S. at 415-416.

24 *International Shoe Co. v. Washington*, 326 U. S. 310, 326 (1945)

25 *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 116 (1987)

26 Arthur & Freer, *supra* note 17, at 2012.

Daimler: Pennoyer Returns

Daimler represents a paradigmatic shift in the Court's understanding of general jurisdiction. But, for reasons that will become clear in our discussion of the case, one can easily see this shift not as an advance or horizontal change, but as a marked regression to the *Pennoyer* era. But first, the facts: The plaintiffs in *Daimler* were 22 residents of Argentina who alleged that Daimler (a German corporation) collaborated with Argentinian security forces to murder, arbitrarily detain, torture, and kidnap their family members during the period of 1976-1981 (Argentina's "Dirty War").²⁷ Though all of the alleged acts took place in Argentina, the plaintiffs sued Daimler through their subsidiary MBUSA (incorporated in Delaware with its principal place of business in New Jersey, and wholly owned by a Daimler subsidiary) in California under a theory of general jurisdiction.²⁸ At the time, MBUSA had "multiple California-based facilities" and was "the largest supplier of luxury vehicles to the California market."²⁹ In particular, over 10% of all sales of new vehicles in the United States take place in California, and MBUSA's California sales account for 2.4% of Daimler's worldwide sales.³⁰

The question before the Court was whether Daimler's contacts with California were so pervasive as to open it up to general jurisdiction in the state (California's long arm statute allows the exercise of jurisdiction to the full extent permitted by the U.S. Constitution; therefore the inquiry before the Court was conducted with respect to the contours of the 14th Amendment's Due Process Clause).³¹ The Court ruled that California's exercise of jurisdiction was illegitimate.³² "Even if we assume," the Court stated, "that MBUSA is at home in California, and...MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the state hardly render

27 *Daimler*, 134 S. Ct. at 748. Argentina's so-called "Dirty War" was a campaign of state repression against leftists, union organizers, and others deemed subversive by the military junta which held power from 1976-1983. For a primer on the kinds of violence perpetrated on union organizers at auto plants, see Ian Steinman, *When Ford Built a Torture Chamber*, Jacobin (Feb. 23, 2018), <https://jacobin.com/2018/02/ford-factory-argentina-vi-dela-mauricio-macri>. For a critical discussion of the term "Dirty War" and its applicability to the campaign of state violence in Argentina during the dictatorship years, see Constanza Dalla Porta & Pablo Pryluka, *Argentina's Dictatorship Was Not a "Dirty War." It Was State Terrorism.*, Jacobin (June 07, 2020), <https://jacobin.com/2020/06/argentina-dictatorship-dirty-war-military>.

28 *Daimler*, 134 S. Ct. at 748.

29 *Id.* at 752.

30 *Id.*

31 *Id.* at 751.

32 *Id.*

it at home there.”³³ At this point in the decision, it appears as if the Court was going to engage in a contacts analysis (albeit a strange one, considering MBUSA’s extensive contacts with the state), but, instead of engaging in the usual jurisdictional inquiries, the Court proceeded to throw the minimum contacts standard out the window. Relying on *Goodyear*, decided three years earlier, the Court stated that, “[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individuals domicile; for a corporation, it is...one in which the corporation is fairly regarded as at home.... With respect to a corporation, the place of incorporation and principal place of business are ‘paradigm...bases for general jurisdiction.’”³⁴

Although the Court only identifies these two locations as paradigm cases, it proceeds, without justification, to ossify them into rules: “Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation ‘engages in a substantial, continuous, and systematic course of business... That formulation, we hold, is unacceptably grasping.”³⁵ The Court here rejected the traditional general jurisdiction contacts inquiry wholesale—a corporation is only at home in its principal place of business and its place of incorporation.³⁶ Incredibly, the Court stated that while “[s]pecific jurisdiction has been cut loose from *Pennoyer*’s sway,” general jurisdiction has not.³⁷ Furthermore, up until *Daimler*, the *Asahi* fairness factors had been applied to both specific jurisdiction or to general jurisdiction.³⁸ In *Daimler*, the Court declared, again without much explanation (beyond a statement that it had only ever been intended to apply in the specific jurisdiction context), that there is no room for the fairness factors in general jurisdiction.³⁹ Thus, the Court has jettisoned both contacts and fairness from the general jurisdiction inquiry. We find ourselves, then, back at the beginning—general

33 *Id.* at 760.

34 *Id.*

35 *Id.* at 761.

36 *Id.* at 760. The Court also allowed for an exceptional case in a footnote, where “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home,” but the Court failed to define the contours of such a case and the unequivocal nature of the rest of the decision casts doubt upon the actual possibility of ever finding such a case. *Id.* at 761. Indeed, the practice of lower courts has suggested that such a case does not exist. See Douglas E. Wagner, *Hertz So Good: Amazon, General Jurisdiction’s Principal Place of Business, and Contacts Plus as the Future of the Exceptional Case*, 104 Cornell L. Rev. 1085 (2019) (outlining various failed attempts to assert general jurisdiction on the basis of the “exceptional case”).

37 *Daimler*, 134 S. Ct. at 749.

38 Arthur & Freer, *supra* note 17, at 2012.

39 *Daimler*, 134 S. Ct. at 762.

jurisdiction has returned to its roots in territorial sovereignty and is again effectively coterminous with at most two states' borders (place of incorporation and principal places of business).

Despite narrowing general jurisdiction to just two locations, the Court provided scant guidance on how to determine a corporation's principal place of business, merely stating that "General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide."⁴⁰ It may seem as if the Court had preserved a place for a traditional contacts analysis, but what it has actually did is flip the analysis on its head. Whereas the traditional analysis "focused solely on the magnitude of the defendant's in-state contacts," the Court's new test is only concerned with "the relative magnitude of those contacts in comparison to the defendant's contacts with other States."⁴¹ That is, in assessing the location of a corporation's principal place of business, the relevant inquiry is what percentage of the corporation's business is located in the state in question relative to the corporation's entire business worldwide (the Court does not identify the threshold above which the percentage would have to rise for a proper exercise of general jurisdiction).

In her concurrence, Justice Sotomayor identified a number of troubling implications of the decision (presented in a different order than they appear in the concurrence in the following discussion).⁴² First, the majority's decision "unduly curtails the State's sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries."⁴³ "When a corporation chooses to invoke the benefits and protections of a State in which it operates," Justice Sotomayor writes, "the State acquires the authority to subject the company to suit in its Courts."⁴⁴ This traditional notion of jurisdiction stems from "the concept of reciprocal fairness."⁴⁵ But, because the majority has flipped the contacts inquiry on its head, there is no reciprocal fairness to be found—corporations can avail themselves of the benefits and protections of a State without opening themselves up to general jurisdiction

40 *Id.*

41 *Id.* at 767.

42 Even though Justice Sotomayor's concurrence reads more like a dissent, she would have reached the same ruling as the majority, except she would have ruled against the plaintiffs on fairness and reasonableness grounds only. *See id.* at 764 (Sotomayor, J., concurring) (stating that, "[the] State's exercise of jurisdiction would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available").

43 *Id.* at 772.

44 *Id.* at 768.

45 *Id.*

so long as they avail themselves of the benefits and protections of a different state just a little more.

But even this is too rosy-eyed a reading—the problem extends further. The majority’s test for determining a corporation’s principal place of business essentially renders certain corporations too big for general jurisdiction. Justice Sotomayor writes, “a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum.”⁴⁶ Because the contacts inquiry is now relative to a corporation’s overall business, and because supranational corporations, by virtue of their size, will likely have extensive contacts with a multiplicity of venues, it is entirely possible, probable even, that no single forum will ever represent a majority or even plurality of the corporation’s contacts. This renders corporations at home in the state where they are incorporated and *only that state*, unless the corporation declares a single forum its headquarters or principal place of business. However, it is worth nothing that the holding in *Perkins* and the holding in *Hertz Corp. v. Friend* (2010) suggest that the “nerve center,” meaning the place from which a corporation directs its activities, may be one in the same as the corporation’s principal place of business for a general jurisdiction analysis.⁴⁷ But, as Justice Sotomayor states, it is “increasingly common [that] a corporation ‘divide[s] [its] command and coordinating functions among officers who work at several different locations.’”⁴⁸ As Douglas Wagner has pointed out, this problem allows supranational corporations to engage in *ex ante* forum shopping by tailoring their activities in such a way as to either preclude or complicate a “principal place of business finding” or to simply make their principal place of business the most defendant-friendly forum.⁴⁹

Finally, Justice Sotomayor identified two particularly troubling effects. First, *Daimler* has effectively granted supranational corporations more due process rights than individuals. Whereas an individual can still be subjected to general jurisdiction in a forum just by virtue of having been served with process in the forum, even if just passing through (so-called “tag jurisdiction”), a corporation will, in most cases, escape general jurisdiction despite possibly having hundreds of employees, multiple offices, and billions of dollars of revenue in the forum state.⁵⁰

Second, Justice Sotomayor writes that “it should be obvious that the ultimate effect of the majority’s approach will be to shift the risk of

46 *Id.* at 772.

47 *Perkins*, 342 U.S. at 494; *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010).

48 *Daimler*, 134 S. Ct. at 772.

49 Wagner, *supra* note 36, at 1089.

50 *Daimler*, 134 S. Ct. at 772-773.

loss from multinational corporations to the individuals harmed by their actions.”⁵¹ Not only does the *Daimler* decision make it significantly more difficult to hold U.S.-based supranational corporations accountable in at least 48 states, but it also makes it potentially impossible for a U.S. national harmed by a foreign corporation to ever find a proper forum. For example, “a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States,”⁵² if the conglomerate is incorporated outside the U.S. and does not conduct a sufficient magnitude of business in any one forum. This would remain the case “even if no other judicial system was available to provide relief.”⁵³

Whose Sovereignty?

The *Daimler* decision is a return to *Pennoyer*’s strict understanding of jurisdiction as coterminous with territorial sovereignty. The irony, however, is that the effect of the decision is to strip at least 48 states of a key aspect of their territorial sovereignty in the case of U.S. incorporated corporations and to potentially strip all 50 states of that key aspect in the case of internationally incorporated corporations.

In light of such a bizarre and fundamentally unjust state of affairs one must ask, whose sovereignty is the Court really concerned with? It cannot be the states—if the Court were interested in granting the states a robust territorial sovereignty, then it would have expanded general jurisdiction in the supranational corporate context rather than restricted it. That is, it would have expanded the notion of “at home” so that states could more robustly govern the corporations that operate within their borders. And so perhaps it is only to certain states that the Court has granted sovereignty. If a corporation is at home in, say Arizona, then it is Arizona’s exclusive prerogative to exercise jurisdiction over that corporation. But this is again an incomplete or inaccurate picture of what has actually occurred. Arizona may retain the sovereign prerogative of jurisdiction in certain instances, but it has lost them in the majority of instances (the only state that seems to benefit from this decision is Delaware, but more on that in the next section).

The entity that has really been granted sovereignty, then, must be the corporations themselves. Seyla Benhabib conceptualizes this problem as “the uncoupling of jurisdiction and territory.”⁵⁴ She writes, “along with the

51 *Id.* at 773.

52 *Id.*

53 *Id.*

54 Seyla Benhabib, *Borders, Boundaries, and Citizenship*, 38 PS: Pol. Sci. & Pol. 673, 676 (2005), available at <http://www.jstor.org/stable/30044348>.

spread of cosmopolitan norms, we are witnessing a shrinking of the effectiveness of popular sovereignty and the emergence of sovereignty beyond the boundaries set by the rule of law... Vis-a-vis the movement of capital and commodities, information, and technology across borders, by contrast, the state today is more hostage than sovereign.”⁵⁵ This uncoupling is perhaps better conceptualized as a transfer. As Benhabib points out, “states are players with considerable power in this process: they themselves often nurture and guide the very transformations which appear to curtail or limit their own powers.”⁵⁶ This is precisely what has happened with *Daimler*. The territorial boundaries of the 50 states remain the same, but they have lost an important aspect of their sovereignty. We can almost imagine sovereignty as a zero-sum game here because this sovereignty was not lost in the ether but rather transferred to corporations. The decision has unleashed capital and corporations as truly supranational entities—they now exist not only beyond borders, but above them, free from (at least one avenue of) interference in their own spheres.

Let’s take Google as an example. As Justice Sotomayor points out, the decision fails to keep pace with the nature of the modern economy.⁵⁷ Alphabet Inc., for example, is the multinational conglomerate parent company of Google. Alphabet is incorporated in Delaware and has its headquarters in California. Google, Alphabet’s largest and most important subsidiary, has offices in 16 states,⁵⁸ data centers in 11 states,⁵⁹ and generates massive amounts of revenue in all 50 states (ironically, a 2013 study determined that residents of Delaware were the least likely to use Google relative to residents of any other state).⁶⁰ Under *Daimler*’s jurisdictional analysis, Delaware and California are the only two states in which Alphabet would be subject to general jurisdiction. If a Florida resident is struck by one of Google’s self-driving cars while on vacation in Oregon, she will have to either remain in Oregon or travel to California or Delaware to successfully bring suit. This is so despite Google’s enormous resources and nationwide presence—Google does not, like states, stay within its boundaries, it exists everywhere. It exerts power, both economically and politically (notably in

55 *Id.* at 673.

56 *Id.* at 676.

57 *Daimler* 134 S. Ct. at 771 (Sotomayor, J., concurring).

58 Google, https://about.google/intl/en_us/locations/?region=north-america&office=mountain-view (last visited Sept. 22, 2022).

59 Google, <https://www.google.com/about/datacenters/locations/> (last visited Sept. 22, 2022).

60 Amy Gesenhues, *Study: Delaware Least Likely State To Use Google, While Yahoo Is More Popular In Southern & Midwest States*, Search Engine Land (May 16, 2013), <https://searchengineland.com/delaware-only-state-with-less-than-70-google-marketshare-in-study-of-search-engine-usage-across-us-159811>.

the form of advertising, pay for sponsored search results and price comparison elevation),⁶¹ across the country and in every state. The practical effect of the uncoupling of jurisdiction and sovereignty is that Google, jurisdictionally speaking, exerts the power of a sovereign—it cannot be challenged except in its restricted domain.

What makes *Daimler* so conceptually slippery, then, is that the uncoupling of territory and jurisdiction was accomplished via a renewed jurisprudential focus on that very coupling. In the last analysis, the circumscription of corporate homes, the imposition of a narrow territoriality on corporations, is the very thing that frees them from territoriality, the very thing that frees them from other sovereigns.

But we have yet to actually define sovereignty. Let us understand sovereignty as Heather Gerken explains it in *Federalism All the Way Down*—“a state’s power to rule without interference over a policymaking domain of its own,” that is, “freedom from interference and...an affirmative ability to serve as a source of law and policy.”⁶² With this understanding, we can begin to delve deeper into the ways that *Daimler* transferred aspects of sovereignty to corporations—the decision has granted supranational corporations both increased freedom from interference and, concomitantly, an increased ability to serve as their own sources of law and policy.

Supranational corporations have attained increased freedom from interference because they are no longer amenable to suit on a general jurisdiction theory in the majority of locations in which they operate (increased access to travel has made general jurisdiction more important than it has ever been just as it has effectively died as a legal tool in this context).⁶³ They

61 Megan Graham & Jennifer Elias, *How Google’s \$150 billion advertising business works*, CNBC (May 18, 2021), <https://www.cnbc.com/2021/05/18/how-does-google-make-money-advertising-business-breakdown-.html>; Laurie Swenson, *Do Companies Pay Google to Be the First Result?*, Chron, <https://smallbusiness.chron.com/companies-pay-google-first-result-48392.html> (last visited Sept. 22, 2022).

62 Gerken, *supra* note 7, at 12.

63 For a comprehensive look at the ways in which *Daimler* and *Goodyear* have insulated corporate actors from accountability for malfeasance ranging from human rights abuses to interest rate manipulation, see Gwynne L. Skinner, *Expanding General Personal Jurisdiction Over Transnational Corporations For Federal Causes of Action*, 121 Dick. L. Rev. 617 (2017), available at <https://ideas.dickinsonlaw.psu.edu/dlra/vol121/iss3/2>. Furthermore, as Leslie Brueckner of Public Justice pointed out in 2017, “In the wake of *Daimler*, corporations seized on lack of personal jurisdiction as a threshold defense to being sued” and that, due to the effective death of general jurisdiction, have been pushing increasingly stringent readings of specific jurisdiction with which a number of lower courts have agreed. Leslie Brueckner, *CORPORATIONS’ USE OF PERSONAL JURISDICTION DEFENSE ON TRIAL IN U.S. SUPREME COURT*, Pub. Just. (Apr. 18, 2017), <https://www.publicjustice.net/corporations-use-personal-jurisdiction-defense-trial-u-s-supreme-court/>.

have attained an increased ability to assert their own policy preferences because states can no longer utilize the legal system to protect their own citizens (when harmed outside the forum).⁶⁴

This deprivation means that states have also lost an effective legal tool for checking and reigning in corporate character. That is, if a corporation engages in, say, widespread damage of the environment or widespread wage-theft, a state's population may wish to provide its courts as a friendly forum to adjudicate such suits, regardless of whether the actual harm took place in the forum. Opening up a forum with plaintiff-friendly policies can be a state's way of signaling disapproval of general corporate behavior and a way of utilizing the power of the legal system to censure and regulate supranational corporations. But states have lost this power, which, in a common law system, also effectively limits a primary avenue of law making (which, in turn, is a means of exercising self-governance).

Frustrated Federalism

In order to understand how the *Daimler* decision interacts with federalism, we can look to two seminal pieces on the benefits of the federalist system—Heather Gerken's aforementioned *Federalism All the Way Down*, and Robert Cover's *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation*. While not explicitly coded as a piece on federalism, the latter's focus on jurisdictional redundancy, or the overlap of state courts with federal courts and one another, is itself an articulation of the structure of federalism in the judicial context.

Starting first with Professor Gerken, we can distill the key attributes of federalism identified in her piece down to two concepts: voice and exit. By "exit," Professor Gerken means giving minorities (states) "the chance to make policy in accord with their own preferences, separate and apart from the center."⁶⁵ The concept of "voice" is slightly more complex—essentially, in an integrated system, where exit is not an option (or is not desirable), minorities can effect change through "voice," to contribute to national policy setting by speaking out against it (or in favor) and by implementing national policies in particular ways (which amounts, in a way, to voice through action).⁶⁶ With these concepts in mind, it is not difficult to see how the *Daimler* decision undermines both. Exit can be understood as conceptually similar, if not identical, to the notion of sovereignty. If the federal government is conceived of as the "center" with respect to the concept of exit, with our understanding of supranational corporations as newly sovereign entities,

64 See, *infra* notes 90-95 and accompanying text.

65 Gerken, *supra* note 7, at 7.

66 *Id.* at 74.

we can also reconceptualize them as a new “center” against which states can struggle. When a supranational makes a decision regarding wages, the use of unethically sourced materials in its supply chain, or any other aspect of its operation, it has made, by virtue of its breadth and, in the case of near monopolies or monopsonies like Amazon,⁶⁷ its depth, something of a national policy decision. States retain numerous ways to struggle against these policies, particularly via legislation, but the power of the courts to exercise ‘exit’ has been greatly diminished.

Voice is equally undermined. The Supreme Court is a fundamentally undemocratic institution—justices are appointed for life, they are unaccountable to voters, and their decisions are beyond appeal and binding on all jurisdictions. The one way in which minorities were able to operate from within the system and to utilize their voice was to legislate or issue judicial decisions in contradiction with or in tension with Supreme Court precedent in order to attempt to force a circuit split and a renewed look at the issue. Insofar as state courts are no longer able to exercise general jurisdiction over supranationals, and thus no longer able to even entertain such cases, they have lost an important mechanism for voicing complaints and policy preferences to the Supreme Court. Furthermore, insofar as some supranationals, like Google or Amazon, have functional monopolies over information and commerce flows,⁶⁸ the possibility of mass voice-action is infeasible to either materialize or translate into policy changes. Under such circumstances, Gerken’s account of the power that exists in minorities’ voice without sovereignty loses currency.⁶⁹

Cover’s article demonstrates the slightly more granular, but perhaps more insidious effects of the *Daimler* decision. The article focuses on the benefits of what Cover calls “jurisdictional redundancy.” In the U.S., Cover writes, “[t]here are more than fifty separate systems of state courts, for most purposes largely independent of one another, but coordinated in important respects by the full faith and credit clause and by some dubious specialized applications of due process.”⁷⁰ With the addition of federal courts, two pos-

67 Cory Doctorow, Amazon’s monopsony power: the other antitrust white meat, BoingBoing (May 23, 2019), <https://boingboing.net/2019/05/13/consumer-harms-everywhere.html>.

68 See *id.*; Russel Brandom, *THE MONOPOLY-BUSTING CASE AGAINST GOOGLE, AMAZON, UBER, AND FACEBOOK*, Verge (Sept. 5, 2018), <https://www.theverge.com/2018/9/5/17805162/monopoly-antitrust-regulation-google-amazon-uber-facebook>.

69 Gerken, *supra* note 8, at 47.

70 Cover, *supra* note 9, at 639. “What is dubious,” Cover writes in a footnote, “about the application of due process is the use of the phrase to designate insufficient state authority to adjudicate quite apart from consideration of fairness to the parties.” The piece was written before the Supreme Court handed down the *Asahi* fairness factors, but in a cruel twist of fate, the *Daimler* decision has made it so Cover’s complaint remains accurate

sibilities of concurrency open up: “‘vertical’ (state-federal) and ‘horizontal’ (state-state).”⁷¹ These courts are tied together by “‘loose coordinating factors, enforced from time to time by the Supreme Court.’”⁷² While federalism conversations typically focus, with good reason, on vertical relationships, horizontal relationships as well as the new vertical relationship between states and supranational corporations, are sometimes left out. *Daimler* and its ramifications implicate state-state relations far more than state-federal relations. Indeed, the formal question is purely state-state—the Supreme Court has effectively limited jurisdiction to two states, which ones will have jurisdiction? Therefore, our discussion of Cover and jurisdictional redundancy will focus on horizontal concurrency.

Before proceeding to the benefits of horizontal concurrency that have been frustrated by *Daimler*, it is important to point out what Cover identifies as the two essential attributes of the “adjudicatory act”: “dispute resolution and norm articulation.”⁷³ Both elements are performed simultaneously—when a court resolves the dispute before it, the decision also has a normative value. Or, as Justice Cardozo put it, “as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent.”⁷⁴

It is these two attributes of adjudication that are served by jurisdictional redundancy. Specifically, Cover identifies three areas in which redundancy amplifies the attributes of the adjudicatory act: Interest, Ideology, and Innovation. “These terms,” he writes,

are a shorthand for three general problems: (a) the self-interest of incumbent elites in a regime; (b) the more or less unconsciously half values and ways of seeing the world, reflected in the governing elites, which tend to serve and justify in general and long run terms the social order which the elites dominate; and (c) the consciously determined policies of the authoritative elites, especially insofar as they depart from traditional, common cultural norms and expectations.⁷⁵

Essential to Cover’s analysis is the proposition that “different polities with differing constituencies, peopled by distinct governing elites, indeed will

today. *See id.*, n. 2.

71 *Id.* at 640.

72 *Id.* at 639.

73 *Id.* at 643.

74 *Id.* at 644.

75 *Id.* at 657.

differ from one another in some measure with respect to all three areas.”⁷⁶ While Cover’s analysis allows for the problem of an increasingly homogenized national polity, it still assumes, and this assumption holds up today, that despite increasing homogeneity, there remain salient political and ideological differences in the different polities that make up the country. Even among the governing (including judges and legislators), who Cover correctly identifies as sharing a certain ‘vocational’ solidarity, we can see ideological difference corresponding roughly to geopolitical markers (Cover asserts that these ideological differences are always a “toned down” reflection of the “social reality and right conduct held by at least locally significant groups in the society”).⁷⁷

One of the side-effects of ideological heterogeneity is that there is a built in possibility of mistrust between the different ideological camps—a mistrust, that is, between states insofar as states remain relevant geopolitical entities (even if Gerken’s assertion that states may just be “convenient sites”⁷⁸ of organizing is true, this does not vitiate the fact that geography still carries some political valence, even if it is only a manufactured one [think only of the mystifying concept of the “coastal elite” which has figured so prominently in our recent political discourse]). With respect to adjudication, Cover writes that

it is surely not the specific conflict, the facts of which are to be adjudicated, that is itself responsible for the chasms of mistrust that make it difficult...for normal adjudicatory institutions to be trusted to reach reliable findings. Rather, certain specific conflicts are understood to lie upon a perceptual or conceptual fault line determined by the different and conflicting ideologies of the relevant social groups.⁷⁹

One of the benefits of redundancy, then, vis-a-vis ideology, is that norm-articulation becomes increasingly trustworthy and the articulated norms increasingly concretized when they are articulated across ideological and geographical lines. To bring this back to general jurisdiction, allowing a multiplicity of forums to adjudicate conflicts regarding the same corporate actor for the same potential conduct can reinforce the legitimacy of any one particular ruling if the different forums reach the same or similar results. It can reinforce it from an error-minimization perspective, but, more importantly for federalism, it can reinforce it from an ideological perspective—as suaging fears of ideological taint and eroding distrust between the states and

76 *Id.*

77 *Id.* at 672.

78 Gerken, *supra* note 8, at 17.

79 Cover, *supra* note 9, at 662.

geographically and ideologically distinct political groups while simultaneously allowing those political groups to retain their specific identities and their own institutions.

After *Daimler*, however, this benefit has been greatly frustrated. Stripping all but two state courts of general jurisdiction in any given cases risks ossifying certain ideological concepts with respect to corporate, state, and judicial behavior. It is the multiplicity of ideologies expressed by different polities and courts that, in an idealized view at least, creates debate and democratic churn which in the common law system helps to create law reflective of the nation as a whole (both because courts will look to one another for guidance on issues of first impression and because circuit splits or coalescence are important data points for Supreme Court decisions and grants of certiorari).⁸⁰ Delaware, where over 67.6% of all Fortune 500 companies are incorporated,⁸¹ has, after *Daimler*, thus become an outsized player in the jurisdictional game. Delaware, of course, is known throughout the world as a tax haven and an immensely pro-corporate jurisdiction (it is no accident that so many corporations chose to incorporate in the state).⁸² Because Delaware can exercise jurisdiction over so many more corporations, and can therefore adjudicate significantly more claims, its specific ideological and political makeup has gained an inflated influence in the norm articulation space. This concentration of norm articulation in one forum not only risks spreading site-specific ideology on a national level. It also promotes general mistrust on an ideological level because so many forums have lost their voice in what ought to be a national conversation.⁸³

80 Indeed, *Daimler* would not be nearly as problematic a decision if there did not exist ideological differences between the forums. As Cover writes, “The political pressure for open avenues of redundancy comes about when effects are not random. Thus, to the extent that the redundant forum simply provides an avenue for forum shopping with no systematic differences arising from interest, ideology, or innovation, there will not be an identifiable and cohesive group prejudiced by the presence or absence of the alternative forum. When the forum becomes an issue to an identifiable group, it is because that group thinks that there is more than mere randomly distributed error at stake. This means that the very fact that significant groups have conflicting systematic preferences for a forum or type of forum as to some issue is a strong argument for relatively unrestrained redundancy.” Cover, *supra* note 9, at 681-682.

81 Annual Report Statistics, *Delaware Division of Corporations*, <https://corp.delaware.gov/stats/> (last visited Sept. 22, 2022).

82 See Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. Times (June 30, 2012), https://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html?pagewanted=all&_r=0.

83 Even the potential recourse to federal diversity jurisdiction is unlikely to alleviate this geospatial ideological problem in light of both the *Erie* doctrine as well as the *Klaxon* rule (articulated in *Klaxon Company v. Stentor Electric Manufacturing Company*, 313 U.S. 487 (1941)), which requires federal courts sitting in diversity to apply the choice-of-law

There is another, somewhat counterintuitive side effect of *Daimler*—it will lead to increased homogeneity in our political, cultural, and ideological makeup. Federalism served as a protector of heterogeneity insofar as it was able to designate, via the power of jurisdiction and other sovereign prerogatives, certain zones of exclusion, that is, zones in which local interests predominate at the expense of national or supranational interests (of course, this picture has often been a painful one with these zones of exclusion used to further racists, classist, sexist, and homophobic agendas). State judges, as Cover has asserted, are generally more responsive, sometimes too responsive, to local politics than their federal counterparts.⁸⁴ They are products, like anyone else, of these zones of exclusion. In this way they are another site of federalism. That is, they are both products and enforcers of local ideological and political interests. Understanding judges as ideological and political actors puts an enormous salience on granting communities the ability to define and actuate these interests. Supranational corporations, however, have created or are striving to create uniform desires, uniform ways of seeing, of listening, of engaging with politics, uniform ways of desiring even. The opening up of markets, the proliferation of chains, the imperative of growth—these are all made possible and presupposed by a leveling of culture and of place, by a de-topographization of the map. It is easier to create and market a product when all markets are the same.⁸⁵ *Daimler's* restrictions on general jurisdiction has made it increasingly difficult for state courts to act as agents of resistance against this de-topographization. And in so doing, *Daimler* has made it increasingly difficult for polities to define themselves away from the corporate center. The decision has unleashed, even more so than before, the homogenizing power of supranational corporations (look no further than, again, Google and Amazon. They operate in every state and their algorithms help shape our habits of consumption with respect to both information and material goods). Despite this homogeneity, the individual harms wrought by supranational corporations are always just that, individual.

To steal a phrase from the writer Teju Cole, “the death toll is always one, plus one, plus one. The death toll is always one.”⁸⁶ Harms too can be widespread and homogenous in type, but their effects are local. Therefore,

rules of the forum state. This privileging of a forum states would be unproblematic if there were many potential forum states, but *Daimler* has limited the pool.

84 Cover, *supra* note 9, at 665.

85 For an excellent and thorough articulation of this problem in the international and cultural space, see Frederic Jameson, *Notes on Globalization as a Philosophical Issue*, in *The Cultures of Globalization* 54-80 (Duke University Press ed.1998).

86 Teju Cole, *Blind Spot* 180 (2017).

despite the ever-increasing market concentration⁸⁷ and the attendant cultural compression resulting therefrom, the use of local courts could have been an important means for helping those whose voices have been silenced through absorption to regain individuality, to re-topographize the flattened map on which capital strives to operate. But of course, *Daimler* has worked to reduce the likelihood that this help will not materialize.

The spoiled benefits of jurisdictional redundancy extend beyond the ideological. Cover also identifies jurisdictional choice as a means of affording “a kind of fairness to people whose affairs are caught in the vice of change—whose private lives and expectations are shaken by innovation.”⁸⁸ This is especially important in the supranational corporate context. The quasi-sovereign nature of these corporations, particularly corporations in the information space, means that they are operating unmoored from many regulations, which have been slow to adapt to the rapid advance of technological and economic interconnectedness. Capital marches forwards even as the courts do not. Allowing some degree of forum shopping would allow those harmed by corporate action to avail themselves of the forum that has best kept pace with supnationals, or has at least built in robust mechanisms of resistance (like strong punitive damages precedents or pro-plaintiff discovery rules). These benefits of forum shopping are intimately linked not only to dispute resolution but also to norm articulation. Cover writes, “it is important to see the nature of the plight of the litigant. She appeals to ‘law’ against law. It may be an appeal to law which one of several alternative forums calls no law. But so long as such a forum is only one of several, there is room...for recognition of the truly open, tentative, and transitional status of norms which do not yet command common acquiescence among all relevant authoritative courts.”⁸⁹ As already stated however, *Daimler* all but ensures that norm articulation will take place in a mere handful of pro-corporate forums, thus leading to rapid concretization and rapid “acquiescence among all relevant authoritative courts.”⁹⁰ The help our litigant seeks, unfortunately, will not materialize post-*Daimler*.

Conclusion

It is curious that *Daimler*, a decision so dependent upon the language of sovereignty, that so undermines the power of states, should be silent on federalism—indeed, the word never appears in the entire decision.

87 Adil Abdela & Marshall Steinbaum, *The United States has a Market Concentration Problem: Reviewing Concentration Estimates in Antitrust Markets, 2000-Present*, FTC (Sept. 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/09/ftc-2018-0074-d-0042-155544.pdf

88 Cover, *supra* note 9, at 676.

89 *Id.* at 679.

90 *Id.* at 680.

But, as this paper has shown, far from being conceptually distinct, general jurisdiction ought to be at the core of our federalism discourse. Indeed, what is at stake in both federalism and jurisdiction is the question of which bodies are given the right to determine their political life. In particular, the interaction between supranational corporations and the states has, in light of *Daimler*, tipped even more in favor of the former. To illustrate one last example, consider the case of Amazon’s second headquarters, it’s “HQ2.” After much fanfare and obsequious courting by cities and states, Amazon finally decided to build its HQ2 in northern Virginia.⁹¹ In exchange for granting Virginia with its HQ2, Amazon received a slew of benefits. Under the deal with the county, Amazon is eligible

for up to \$23 million in tax incentives — part of a larger \$573 million incentive package... When journalists or citizens make public records requests for information on Amazon from Arlington County, the company will be given at least two days notice to “take such steps as it deems appropriate...” Amazon is eligible for a share of Arlington County’s hotel tax revenue, which is expected to go up after the e-commerce giant comes to town. Amazon will receive 15 percent of any increase in Arlington’s Transient Occupancy Tax if the company moves into a specified amount of office space each year.⁹²

The county did not demand “funding for affordable housing” or “wage requirements for construction labor” in return for its largesse.⁹³ Instead, its only demand was that Amazon occupy a certain amount of office space each year.⁹⁴ Before *Daimler*, the people of Virginia would have received at least one benefit from the whole arrangement—general jurisdiction over Amazon. That is, the ability to exercise a robust voice with respect to judicial oversight of Amazon’s nationwide affairs. But after *Daimler*, even the state containing Amazon’s second headquarters is unlikely to receive the right to exercise general jurisdiction. As Douglas Wagner writes, Amazon is currently subject to jurisdiction in Delaware, where it is incorporated, and either Washington or California, one of which is their principal place of business

91 Jesse Rifkin, Everything You Need To Know About Amazon Coming To Northern Virginia, N. Va. Mag. (Dec. 20, 2017), <https://northernvirginiamag.com/culture/culture-features/2018/12/20/everything-you-need-to-know-about-amazon-coming-to-northern-virginia/>.

92 Monica Nickelsburg, *Full details of Amazon’s HQ2 deal with Arlington County, Va., revealed for the first time*, Geek Wire (Mar. 5, 2019), <https://www.geekwire.com/2019/amazons-hq2-deal-with-arlington-county-gives-big-concessions-asks-little-of-the-company/>.

93 *Id.*

94 *Id.*

(or possibly neither).⁹⁵ Under *Daimler*, Amazon can only be subject to general jurisdiction in two states, therefore either Virginia will supersede California or Washington as Amazon's principal place of business, or, more likely, it will simply be yet another forum incapable of exercising general jurisdiction over Amazon despite its extensive contacts throughout the nation.⁹⁶

As Virginia's winning offer in the nationwide race to the bottom demonstrates, supranational corporations are receiving numerous benefits from state populations without concomitant responsibilities. *Daimler*'s restriction of general jurisdiction has removed one of the few mechanisms available to localities to push back against corporate power after their representatives have invited them in. Absent such power, we find ourselves in an inevitably escalating scenario: once ground is ceded, the supranational will always ask for more. *Daimler* thus represents, finally, one more stop on the road to what Benhabib has identified as the "escape of public power from the purview of the public autonomy of citizens."⁹⁷ "The losers in the process," she writes (in words that sound in uncanny echo with Justice Sotomayor's concurrence), "are the citizens from whom state protection is withdrawn...and who thus become dependent upon the power and mercy of transnational corporations and other forms of venture capitalists."⁹⁸ Here, Benhabib describes us all—we, alas, are the losers.

95 Wagner, *supra* note 36, at 1127.

96 As Wagner writes, "Amazon's presence is permanent, physical, and unique—a state should have the power to protect its citizens from harms the corporation commits. In 2017, the corporation accounted for 44% of all U.S. e-commerce and pulled in over 50 billion dollars of revenue." Wagner, *supra* note 36, at 1128.

97 Benhabib, *supra* note 54, at 676.

98 *Id.* at 675.

INVITATION ACCEPTED: CHALLENGING ANTI-EDUCATION LAWS AT THE INTERSECTION OF CRITICAL RACE THEORY, ACADEMIC FREEDOM, AND LABOR RIGHTS

By: Simon X. Cao¹

Introduction

In 1952, Justice Frankfurter opined that “[t]o regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole.”² According to some state legislators and governors, the “priests of our democracy” evoke hysteria as progenitors of indoctrination.³ Observers might think that statements like those made by Justice Frankfurter would provide educators insulation against laws restricting valid and necessary topics in history for kindergarten through twelfth grade (“K-12”) educators.⁴ Unfortunately, the Supreme Court’s affirmations for public school educators will not provide educators with the protections they need to educate their students about the reality of our society and the true history of the United States. Instead, educators can find refuge in their unions.

This article contends that solidarity made manifest through collec-

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2 *Wieman v. Updegraff*, 344 U.S. 183, 197 (1952) (Frankfurter, J. concurring).

3 See Executive Office of Governor Ron DeSantis, *Governor Desantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations* (press release) (Dec. 15, 2021) <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/> (last accessed Feb. 6, 2022) (stating that “[w]e won’t allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other. We also have a responsibility to ensure that parents have the means to vindicate their rights when it comes to enforcing state standards.”).

4 See *Epperson v. State of Arkansas*, 393 U.S. 97, 105 (1968) (drawing on *Meyer v. Nebraska*, Justice Fortas opined that the statute in *Meyer* “unconstitutionally interfered with the right of the individual, guaranteed by the Due Process Clause, to engage in any of the common occupations of life and to acquire useful knowledge.”); J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 Yale L.J. 251, 257 (1989) (stating that “[t]he Court has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning.”).

tive bargaining agreements and organizing provides K-12 educators their best chance to fulfill their calling.⁵ This article begins by describing some of the legal attacks against educators and instruction on the curricular topic of systemic racism and implicit bias. Next, it critiques the judiciary's failure to protect educators and students through academic freedom. Finally, this article discusses strategies that advocates may use to insulate educators from the worst effects of laws prohibiting instruction on systemic racism and implicit bias, nominally called Critical Race Theory ("CRT").

I. Laws and regulations prohibiting the topic of systemic racism in K-12 schools

Recently, organizations with ties to right-wing political groups have gained notoriety for their protests at school board meetings and for making death threats against school officials for implementing Critical Race Theory in public school curricula.⁶ Even though many of these groups have failed to identify CRT when questioned, state politicians have made CRT essential to their election campaigns.⁷ Other elected officials use CRT as a rallying cry to buttress support from their core constituency.⁸

Even though educators dispute the existence of CRT in K-12 curricula, the driving force of legislation prohibiting CRT targets curricular

5 See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (stating "education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare.").

6 Brandy Zadrozny, Ben Collins, *From the Capitol to the City Council: How Extremism in the U.S. has shifted since Jan. 6*, NBC News (Jan. 3, 2022) <https://www.nbc-news.com/tech/internet/extremism-us-jan-6-capitol-rcna10731> (last accessed Jan. 3, 2022); Anya Kamenetz, *A Look at the Groups Supporting School Board Protests Nationwide*, National Public Radio (Oct. 21, 2021) <https://www.npr.org/2021/10/26/1049078199/a-look-at-the-groups-supporting-school-board-protesters-nationwide> (last accessed Jan. 3, 2022).

7 See Sen. Rick Scott, *An 11 Point Plan to Rescue America: What Americans Must Do to Save this Country* (2022) <https://www.politico.com/f/?id=0000017f-1cf5-d281-a7ff-3ffd5f4a0000> (last accessed Apr. 26, 2022) (announcing that the number one issue under Senator Rick Scott's political platform is to "inspire patriotism and stop teaching the revisionist history of the radical left . . . [and] not indoctrinate children with critical race theory or any other political ideology."); Rep. Jim Banks, Re: Lean into the culture war, Republican Study Committee Memorandum (Jun. 24, 2021) <https://www.politico.com/f/?id=0000017a-3f65-d283-a3fb-bf6f99470000> (last accessed Feb. 6, 2022); Chris Cillizza, *This is exactly how dumb our politics have gotten*, CNN Politics (Nov. 4, 2021) <https://www.cnn.com/2021/11/02/politics/critical-race-theory-virginia-governor-youngkin-mcauliffe/index.html> (last accessed Jan. 3, 2022).

8 See Executive Office of Governor Ron DeSantis, *supra* note 2 (introducing legislation that would ban using the 1619 Project and CRT in public schools).

topics such as implicit bias and structural racism.⁹ Both implicit bias and structural racism are legitimate phenomena found in society.¹⁰ However, legislation and rules prohibiting CRT's use in public schools circumscribe the breadth and depth of educational opportunities for students on both topics.¹¹

In 1940, the American Association of University Professors ("AAUP") released the Statement of Principles on Academic Freedom and Tenure.¹² The statement ultimately published by the AAUP, was the culmination of work that began in 1915 but contained roots dating back to the first prototypical universities in Germany in 19th century.¹³ The AAUP and the multitude of institutional signatories to the statement entitled teachers to discuss relevant subjects accurately in their classroom without interference in the pursuit of truth and knowledge.¹⁴ The AAUP declared in 1940 that "[a]cademic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning."¹⁵ Moreover, the AAUP and commentators stated that without providing educators tenure after a probationary period, the promise of academic freedom was essentially hollow.¹⁶ Ultimately, the purpose of academic freedom was to preserve truth and knowledge no matter its popularity. Without the objective of pursuing knowledge and truth, one would be justified in wondering what purpose does education serve if not pursuing knowledge and truth.

9 Rashawn Ray & Alexandra Gibbons, *Why are states banning Critical Race Theory?*, Brookings Institution (November 2021) <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> (last accessed Feb. 6, 2022) (explaining that despite the reality that K-12 educators do not teach CRT, the efforts of some state legislatures are designed to roll-back social progress and chill educator efforts to discuss systemic racism in class).

10 See Eva Patterson, Kimberly Thomas-Rapp & Sara Jackson, *The Id, The Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 Conn. L. Rev. 1175, 1186-87 (2008).

11 See Ray & Gibbons, *supra* note 8 (relaying that as a professor in post-secondary education, many students are unprepared for class discussions regarding racial inequity).

12 See 1940 Statement of Principles on Academic Freedom and Tenure, with 1970 interpretive comments, AAUP (1970) <https://www.aaup.org/file/1940%20Statement.pdf> (last accessed Sept. 16, 2022).

13 Cary Nelson, *No University is an Island: Saving Academic Freedom* 1-2 (2010).

14 1940 Statement of Principles on Academic Freedom and Tenure, with 1970 interpretive comments, AAUP at 14 (1970).

15 *Id.*

16 See 1940 Statement of Principles on Academic Freedom and Tenure, with 1970 interpretive comments, AAUP at 14-16; Cary Nelson, *No University is an Island: Saving Academic Freedom* 31-32 (stating that "[y]ou cannot really have either professional authority or academic freedom if you can easily be fired or nonrenewed . . .").

An example of an education system that does not pursue knowledge and truth, the Florida state legislature and governor enacted a statute proscribing classroom instruction that touches on topics related to systemic racism on April 22, 2022.¹⁷ Under the enacted statute, the state of Florida declares that educators discriminate against students when the educator “espouses, promotes, advances, inculcates, or compels such student . . . to believe . . . [a] person, by virtue of his or her race, color, national origin, or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously.”¹⁸ Under the statute, Florida demands that “American history shall be viewed as factual, not as constructed, shall be viewed as knowable, teachable, and testable, and shall be defined as the creation of a new nation based largely on the universal principles stated in the Declaration of Independence.”¹⁹

Before enacting the law proscribing CRT, the state’s Board of Education promulgated rules that went further than merely prohibiting CRT in K-12 curricula.²⁰ Under the rules promulgated by Florida’s Board of Education, educators are prohibited from teaching that the United States was founded on principles other than those stated in the Declaration of Independence.²¹ Adding to the prohibition of instructing students on the attributes of systemic racism, the new law imposes penalties on educators when classroom discussions depart from the Board of Education’s singular historical perspective regarding race and American history.²²

To that end, failure to comply with the limitations on curricula in Florida public schools could result in the revocation of the educator’s license or discharge of employment.²³ Under Florida law, the Florida Education Practices Commission (“EPC”) adjudicates charges prosecuted by the EPC Commissioner for failing to comply with the Florida Code of Conduct.²⁴ The Commissioner of the EPC is empowered to investigate charges from anyone alleging educator misconduct under the Code.²⁵ Not only may

17 Fla. Stat. § 1003.42(2)(h) (West 2022); Fla. Stat. § 1000.05(4) (West 2022) (taking effect Jul. 1, 2022, approximately one month before K-12 classes typically begin).

18 Fla. Stat. § 1000.05(4)(a)(2) (West 2022).

19 Fla. Stat. § 1003.42(2)(f) (West 2022).

20 Fla. Admin. Code Ann. r. 6A-1.094124(3)(b) (2021).

21 *Id.*

22 Fla. Stat. § 1012.22(1)(f) (2016). (providing school boards with the power to promulgate rules and discipline educators within their jurisdiction); Fla. Stat. § 1012.795(1)(j) (2018) (providing penalties, including the revocation of a teaching license for violating the Principles of Professional Conduct for the Education Profession (“Florida Code of Conduct”) under Fla. Admin. Code Ann. r. 6A-10.081 (2016)).

23 Fla. Admin. Code Ann. r. 6A-10.08.

24 Fla. Admin. Code Ann. r. 6B-11.007(1).

25 Fla. Stat. § 1012.796(1)(a) (2002).

members of the public submit complaints against educators for allegedly violating the Code, but educators are also duty-bound to report violations.²⁶ The Code of Conduct states that an educator may receive a penalty ranging from a reprimand to permanent revocation of license for “unreasonably deny[ing] a student access to diverse points of view.”²⁷ Another provision forbids educators from “intentionally suppress[ing] or distort[ing] subject matter relevant to a student’s academic program.”²⁸ In addition to the rule proscribing curricula touching on systemic racism, the rule also commands educators in Florida to engage in the “[e]fficient and faithful teaching of the required topics”²⁹ At bottom, adverse actions against an educator’s license require the EPC Commissioner to prove the educator violated the Florida Code of Conduct by clear and convincing evidence.³⁰

In addition to sanctioning an educator’s license by the EPC, local school boards may impose discipline on educators using a lower quantum of proof through the preponderance of the evidence standard.³¹ Because each local school board in Florida must “incorporate the Next Generation Sunshine State Standards as appropriate for subject areas contained . . . “ in the school curriculum, educators must adhere to the amended rule proscribing topics concerning structural or systemic racism and implicit bias.³² Failing to comply with the promulgated rule in Florida could lead to an adverse employment action for inefficiency, as defined by the Florida Board of Education.³³ Because local school board officials in Florida have a lower quantum of proof for imposing discipline, educators in Florida are more likely to suffer adverse employment actions at the hands of their local school board

26 Fla. Stat. § 1012.795(1)(j) (2021); *See* Fla. Admin. Code Ann. r. 6A-10.081(c) (14).

27 Fla. Admin. Code Ann. r. 6A-10.081(2)(a)(3); Fla. Admin. Code Ann. r. 6B-11.007(2)(j)(2) (2016) (cross-referenced with the associated level of penalty).

28 Fla. Admin. Code Ann. r. 6A-10.081(2)(a)(4); Fla. Admin. Code Ann. r. 6B-11.007(2)(j)(4) (imposing a penalty of at least a reprimand against an educator’s license for violating this provision).

29 Fla. Admin. Code Ann. r. 6A-1.094124(3)(a) & (c) (2021) (The FLBOE rule defines “efficient and faithful” teaching to include “not shar[ing educator’s] personal views or attempt[ing] to indoctrinate or persuade students to a particular point of view that is inconsistent with the Next Generation Sunshine State Standards and the Benchmarks for Excellent Student Thinking (B.E.S.T.) Standards.”); Fla. Stat. § 1003.42(2) (enabling the FLBOE to promulgate required teaching standards for educators); Fla. Admin. Code Ann. r. 6A-1.094124(3)(c) (2021).

30 *See Ferris v. Turlington*, 510 So. 2d 292, 294-95 (Fla. 1987) (determining that “the revocation of a professional license is of sufficient gravity and magnitude to warrant a standard of proof greater than a mere preponderance of the evidence.”).

31 Fla. Stat. § 120.57(1)(j).

32 Fla. Admin. Code Ann. r. 6A-1.09401(3).

33 Fla. Admin. Code Ann. r. 6A-1.094124(3)(c) (2021).

rather than sanctions against their license.

Dispelling any doubt about the breadth and scope of the regulations, Florida recently rejected twenty-eight math textbooks.³⁴ While Florida's Board of Education officials have only revealed that twenty-eight of the proposed math textbooks "'contain[] prohibited topics,' from social-emotional learning or critical race theory."³⁵ One excerpt from a rejected math textbook included a graph that measured implicit biases from an implicit association test.³⁶ Another included a lesson about building student proficiency in empathy and social awareness.³⁷ The examples provided by the Florida Board of Education may provide indicia for the breadth of interpretation the agency is likely to use when regulating K-12 curricula and educator pedagogical practices.

In addition to Florida, other states also seek to tie the hands of educators who would otherwise instruct students on the topic of systemic racism and implicit bias. For context, the 1619 Project is a collection of works by preeminent scholars, published by the New York Times Magazine, marking the 400th anniversary of the first ship carrying enslaved Africans to the colonies.³⁸ On September 17, 2021, Texas prohibited schools and educators from "requir[ing] an understanding of the 1619 Project."³⁹ In addition to restricting a school's required curriculum, Texas's law precludes educators from "making part of a course the concept that: . . . an individual, by virtue of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously"⁴⁰

34 See Florida Dept. of Education, *Florida Rejects Publisher's Attempts to Indoc-trinate Students* (press release) (Apr. 18, 2022) <https://www.fldoe.org/newsroom/latest-news/florida-rejects-publishers-attempts-to-indoc-trinate-students.shtml> (last accessed Sept. 18, 2022); Dana Goldstein & Stephanie Saul, *A Look Inside the Textbooks that Florida Rejected*, New York Times (Apr. 25, 2022) <https://www.nytimes.com/2022/04/22/us/florida-rejected-textbooks.html> (last accessed Sept. 18, 2022) (reviewing twenty-one rejected textbooks to reach the conclusion that few rejected textbooks referenced race but used social-emotional learning objectives); Alia Shoaib, *Florida releases samples from math textbooks rejected over references to 'prohibited topics' such as critical race theory*, Business Insider (Apr. 23, 2022) <https://www.businessinsider.com/florida-releases-samples-from-rejected-math-textbooks-with-prohibited-topics-2022-4> (last accessed Sept. 18, 2022); See Dana Goldstein, *Florida Rejects Math Textbooks, Citing 'Prohibited Topics'*, New York Times (Apr. 18, 2022) <https://www.nytimes.com/2022/04/18/us/florida-math-textbooks-critical-race-theory.html> (last accessed Sept. 18, 2022).

35 Goldstein & Saul, *supra* note 33.

36 Shoaib, *supra* note 33.

37 *Id.*

38 The 1619 Project, New York Times Magazine (2019) <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> (last accessed Sept. 18, 2022).

39 Tex. Educ. Code Ann. § 28.0022(4)(C) (West 2021).

40 Tex. Educ. Code Ann. § 28.0022(4)(A)(ii) (West 2021).

Like the employment penalties imposed in Florida, local school boards in Texas may impose discipline for good cause against educators who teach implicit bias in violation of the statute.⁴¹ The Texas Supreme Court determined that when a school district presents evidence that an educator violated a local policy that implements state law, the school district has met its burden of proving that discipline for good cause.⁴²

As another example, in July of 2021, New Hampshire enacted legislation prohibiting educators from using curricula that includes implicit bias and systemic racism.⁴³ Unlike Texas and Florida, the New Hampshire legislature determined that explicating concepts touching on systemic racism in K-12 public schools is a *per se* violation of the New Hampshire educator's code of conduct and may result in adverse actions against an educator's license.⁴⁴ To initiate the process of adverse action against an educator in New Hampshire, any person may file a complaint against an educator with the state's Commission for Human Rights.⁴⁵ In addition, members of the public are free to pursue a private right of action to enforce the provision.⁴⁶ Public post-secondary educational institutions are exempt from the New Hampshire law proscribing attributes of CRT.⁴⁷

In a race to the bottom, many states enacting laws proscribing curricula on implicit bias and systemic racism use similar language in their regulations.⁴⁸ Each of these laws operates under the guise of curbing racism in public schools. The reality is that far right-wing ideologues are using anti-CRT legislation as a call to arms for their core constituency.⁴⁹

II. The judiciary's failure to protect academic freedom in K-12 schools

Even though anti-CRT legislation is a recent phenomenon, the motivation for proscribing curricular topics such as systemic racism and im-

41 Tex. Educ. Code Ann. § 28.0022(f) (West 2021); Tex. Educ. Code Ann. § 21.156(a) (West 2011) (enabling local education authorities to impose discipline for good cause meaning "the failure to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts in this state.").

42 *N. E. Indep. Sch. Dist. v. Riou*, 598 S.W.3d 243, 246 (Tex. 2020).

43 N.H. Rev. Stat. Ann. § 193:40 (2021) (titled the "Prohibition on Teaching Discrimination" statute).

44 N.H. Rev. Stat. Ann. § 193:40(IV).

45 N.H. Rev. Stat. Ann. § 193:40(III); *See* N.H. Rev. Stat. Ann. § 193:38 (2021).

46 N.H. Rev. Stat. Ann. § 193:40(III).

47 N.H. Rev. Stat. Ann. § 354-A:29(III) (2021).

48 *Compare* Tex. Educ. Code Ann. § 28.0022(4)(A)(i)-(viii) *with* Okla. Stat. tit. 70, § 24-157(B)(1)(a)-(f) (2021) *and* Tenn. Code Ann. § 49-6-1019(A)(1)-(14) (West 2021).

49 *See* Rep. Jim Banks, *RE: Lean into the culture war*, Republican Study Committee (memorandum) (Jun. 24, 2021) <https://www.politico.com/f/?id=0000017a-3f65-d283-a3fb-bf6f99470000> (last accessed Feb. 6, 2022).

plicit bias is rooted in a decades-long program to roll-back social progress.⁵⁰ Indeed, this program to reverse the gains made at the zenith of the Supreme Court's jurisprudence on academic freedom in K-12 public education was in response to social movements that were creating a more equitable society.⁵¹ In the context of social progress manifesting in Supreme Court decisions, examples of the gains made include the Supreme Court's disposition in *Epperson v. State of Arkansas*, where the Court decided that a law proscribing the existence of evolution violated the establishment clause of the First Amendment.⁵² Another example where the Court progressed was in *Keyishian v. Bd. of Regents of Univ. of N.Y.*, where the Court determined that K-12 educators may not be discharged from employment when vague laws prohibit subversive advocacy and teaching.⁵³ Perhaps most famously, the Court's disposition in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, where the Court stated that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁵⁴

However, since the Court's high-water mark in the 1970's, the judiciary has refused to support academic freedom, and in many instances has gone in the opposite direction. One example of the Supreme Court's double speak concerning academic freedom is Justice Frankfurter's concurrence in *Sweezy v. State of New Hampshire*, where only five years after declaring that teachers were "priests of our democracy," Justice Frankfurter implied that academic freedom belonged to the employer of professors.⁵⁵ Taking Justice Frankfurter's hints, lower court decisions such as *Urofsky v. Gilmore*, have stated "that to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in

50 Cf. Mark Kende, *Constitutional Law Symposium: The Role of Courts in Social Change*, 54 Drake L. Rev. 791, 791-93 (2006); Lewis F. Powell, Jr., *Powell Memorandum: Attack on the American Free Enterprise System*, Washington & Lee Univ. School of Law Scholarly Commons 1, at 26, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo> (Aug. 23, 1971) (decrying that with "an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic, and political change[]" to reverse the gains made by "leftists" through social movements) (last accessed Aug. 26, 2022).

51 See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R. Civ. Lib. L. Rev. 373, 373-74 (2007); Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L.J. 1515, 1534-37 (1991).

52 393 U.S. at 109.

53 385 U.S. 589, 604 (1967).

54 393 U.S. 503, 506 (1969) (emphasis added).

55 354 U.S. 234, 263 (1957) (Frankfurter J., concurring).

individual professors”⁵⁶ Similarly, the Supreme Court’s indifference to academic freedom led only to a plurality decision in *Island Trees Union Free Sch. Dist. v. Pico*, where the Court determined that school boards could not remove books from a school library because they were believed to be “anti-American.”⁵⁷

A. The judiciary’s failure to materially protect educators and the mission of public education

In the 1980s, the Supreme Court began rolling back speech protections for public employees.⁵⁸ Starting with *Pickering v. Bd. of Ed. of Township High School Dist.*, the Court determined that when a public employee speaks as a citizen, courts must balance the interests of the public employer’s need to promote efficiency with the public employee’s interest in speaking as a citizen.⁵⁹ Later, in *Connick v. Myers*, the Court held that before reaching a balancing analysis under *Pickering*, a court must determine whether the public employee’s speech touches on matters of public concern.⁶⁰ Finally, in *Garcetti v. Ceballos*, the Supreme Court held that irrespective of whether a public employee speaks on matters of public concern, when their speech is pursuant to their official duties, public employers may lawfully sanction them for its content.⁶¹ All told, in the absence of a law, regulation, or contractual provision to the contrary, public employees who speak pursuant to their duties will not enjoy protections under the First Amendment.⁶² Cases such as *Connick* and *Garcetti* continue to play a prominent role in diminishing the speech rights of public employees, including public school educators.⁶³

56 216 F.3d 401, 410 (4th Cir. 2000).

57 457 U.S. 853, 857, 69 (1982).

58 *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) *Connick v. Myers*, 461 U.S. 138, 146-47 (1983).

59 *Pickering v. Bd. of Ed. of Township High School Dist.* 205, 391 U.S. 563, 568 (1968).

60 *Connick*, 461 U.S. at 146 (drawing from *Pickering* that “[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”).

61 *Garcetti*, 547 U.S. at 424.

62 *Connick*, 461 U.S. at 146 (opining that “[p]erhaps the government employer’s dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.”).

63 *Evans-Marshall v. Bd. of Ed. of Tipp City Exempted Village Sch. Dist.*, 624 F.3d 332, 334 (6th Cir. 2010) (applying *Garcetti* to secondary school educators even when they make curricular decisions); *Mayer v. Monroe Cnty. Comm. School Corp.*, 474 F.3d 477 (7th Cir. 2007) (affirming summary judgment in favor of public-school employer when a

During the downward trend in protections for educators' speech, Justice Souter identified the potential peril the Court's disposition in *Garcetti* could have on academic freedom.⁶⁴ Despite Justice Souter's concern for academic freedom, the Court has failed to match their rhetoric in support of educators⁶⁵ with a limiting principle on a K-12 public school employer's ability to sanction educators for speech related to teaching.

B. Lower court failures to protect academic freedom in K-12 education

In contrast to the positive affirmations announced by individual justices,⁶⁶ the Supreme Court has granted significant deference to public school employers to determine a school's curriculum.⁶⁷ Following suit, some appellate courts have determined that K-12 educators who deviate from their local school board's curricular choices will not find refuge under the First Amendment.⁶⁸ For example, the Sixth Circuit Court of Appeals affirmed summary judgment against a high school English teacher who initially prepared a lesson for students to investigate the censorship of specific books and later used the book *Siddhartha* to discuss personal growth.⁶⁹ Objecting to the lesson, several parents attended a local school board meeting to voice their concerns over sexual themes and language expressed in the book.⁷⁰

In another instance, the same teacher asked a colleague to make copies of previous student writing samples that included a story of a rape, the desecration of a church, and the murder of a priest for use in a creative writing assignment.⁷¹ Before the English teacher could use these writing

teacher shared her support for demonstrators protesting the war in Iraq).

64 *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) (stating that "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to ... official duties.'").

65 *Wieman v. Updegraff*, 344 U.S. 183, 197 (1952) (Frankfurter, J., concurring).

66 *Id.*

67 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 273-73, n.7 (1988) (while the Court couched their decision in terms of an "educators" control over curricular speech, each case cited by the Court in *Hazelwood*'s footnote, including the question presented in *Hazelwood*, were restrictions originating from school officials imbued with the ability to discipline educators as opposed to classroom teachers); *Epperson*, 393 U.S. at 107.

68 *Evans-Marshall*, 624 F.3d at 334; *Mayer*, 474 F.3d at 478-480; but see *Meriwether v. Hartop*, 992 F.3d 492, 505, n.1 (6th Cir. 2021) (distinguishing *Evans-Marshall* from the facts here because *Evans-Marshall* concerned a secondary school teacher and this case involved a college professor refusing to use a student's preferred pronouns).

69 *Evans-Marshall*, 624 F.3d at 335.

70 *Id.*

71 *Id.* at 335-36.

samples, the principal discovered her plan.⁷² The principal shouted at the English teacher and brought up the previous controversy where she tried to use Siddhartha.⁷³ Still, the teacher complied with the principal's demand not to use the student writing samples.⁷⁴ Finally, the principal objected to the English teacher's final exam and the use of a student self-evaluation.⁷⁵ In response, the teacher requested a model final exam for students so she could meet her principal's expectations.⁷⁶ Later in the school year, the principal criticized the English teacher's curricular choices, demeanor, and attitude.⁷⁷ Subsequently, the English teacher's employment contract was terminated.⁷⁸ After appealing to the school board and filing a grievance, the school board upheld the determination to terminate the teacher's contract.⁷⁹

After pursuing her administrative remedies, the English teacher filed suit alleging her First Amendment rights were abridged when her employer retaliated against her for making curricular and pedagogical choices.⁸⁰ The Southern District Court of Ohio granted the employer's motion for summary judgment.⁸¹ On appeal, the Sixth Circuit Court of Appeals affirmed the lower court's grant of summary judgment against the employee.⁸² The Sixth Circuit reasoned that *Garcetti* applied to K-12 educators and exempted only professors at post-secondary educational institutions.⁸³ Because the English teacher's curricular choices were made pursuant to her duties, she was not insulated from sanctions under the First Amendment even though her curricular choices constituted speech for First Amendment purposes.⁸⁴

Like the Sixth Circuit, the Seventh Circuit applies *Garcetti* to K-12 public school educators.⁸⁵ In the Seventh Circuit, once an educator executes an employment contract, the school district employs their speech instead of

72 *Id.* at 336.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.* (in response to the English teacher's request, the principal called her a "smart—" and told her that he did not like her curricular choices).

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *See id.* (the District Court and Sixth Circuit Court of Appeals initially denied the employer's motion to dismiss before ultimately granting the employer's motion for summary judgment).

82 *Id.* at 343-44.

83 *Id.* at 343.

84 *Id.* at 338.

85 *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007).

regulating it.⁸⁶ For instance, in *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, an elementary school teacher, was asked by a student during a current events lesson whether she participated in demonstrations.⁸⁷ The teacher responded that she once honked her car horn in support of anti-war demonstrators protesting the war in Iraq.⁸⁸ Parents of some students learned about the teacher's response and complained to school officials leading to the termination of the teacher's contract.⁸⁹ Judge Easterbrook of the Seventh Circuit Court of Appeals affirmed the decision for summary judgment against the elementary school teacher.⁹⁰ The court reasoned that the rule in *Garcetti* applies to K-12 educators and that when a teacher speaks pursuant to their professional duties, they may not seek shelter under the First Amendment from adverse employment actions.⁹¹ The court opined that when a school district hires a teacher, the school district employs the teacher's speech.⁹² In addition, K-12 teachers must adhere to a state-approved curriculum, irrespective of their personal beliefs, because the employer pays the educator's salary to teach only state-approved curricula.⁹³ The Seventh Circuit also reasoned that, because school boards are elected and likely represent the majority view of their constituency, educators must comply with school board decisions on curricula.⁹⁴

The Sixth and Seventh Circuit Court of Appeals applied *Garcetti* to K-12 educators and limited the availability of protection educators may seek under academic freedom. Instead of providing students and educators the ability to explore educational topics, lower courts have determined that when a school board promulgates curricula for schools, they are engaged in government speech.⁹⁵ In turn, school boards may lawfully sanction educators who diverge from conveying government-approved speech.⁹⁶

86 *Id.* at 479.

87 *Id.* at 478.

88 *Id.*

89 *Id.*

90 *Id.* at 480.

91 *Id.* at 478-79.

92 *Id.* at 479.

93 *Id.* (citing *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir. 1990)).

94 *Id.* at 479-80.

95 See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (stating that "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."); *Hazelwood Sch. Dist.*, 484 U.S. at 273; *Evans-Marshall*, 624 F.3d at 340-41; *Mayer*, 474 F.3d at 479; *Boring v. Buncombe County Bd. of Ed.*, 136 F.3d 364, 371 (4th Cir. 1993) (determining that authority over curricular decisions belong to the school and not the teacher).

96 See *Evans-Marshall*, 624 F.3d at 340-41; *Mayer*, 474 F.3d at 479; *Ward v. Hickey*,

In contrast to the Sixth and Seventh Circuits, the Ninth Circuit extended the *Garcetti* exemption to K-12 public education teachers.⁹⁷ In *Demers v. Austin*, the Ninth Circuit reasoned that judges lacked the facility to determine whether disputes in the K-12 and post-secondary education context related to teaching and scholarship or whether they were employment-related.⁹⁸ Instead of encroaching into academic debates on school campuses and the special characteristics of educational institutions, the Ninth Circuit exempts public school teachers from analysis under *Garcetti* and applies a *Pickering* balancing.⁹⁹

Like the Ninth Circuit, the Fourth Circuit refrained from applying *Garcetti* to secondary school teachers but defined the curriculum broadly.¹⁰⁰ In *Lee v. York Cnty. Sch. Div.*, a Highschool Spanish teacher in Virginia, posted religious materials on his classroom bulletin board which the school principal subsequently removed, despite the absence of a written rule prohibiting such materials.¹⁰¹ Because removal of the items related to the school curriculum and resembled an employment dispute, the Fourth Circuit affirmed the grant for summary judgment against the teacher.¹⁰² Although the Fourth Circuit refused to apply *Garcetti*'s "pursuant to official duties" inquiry to the teacher's appeal,¹⁰³ the court found that the school lawfully regulated the teacher's curricular speech because the teacher's speech was not a matter of public concern under the *Connick* and *Pickering* standard.¹⁰⁴ The court reasoned that because the removed materials were placed on the bulletin board to impart knowledge and improve student morals, the materials constituted curricular speech.¹⁰⁵ The court further reasoned that because curricular speech bears the school's imprimatur, the school board's prerogative was to determine the appropriate topics for imparting knowledge and morals.¹⁰⁶

While the Fourth Circuit refrained from applying the *Garcetti* standard in *Lee v. York Cnty. Sch. Div.*, the Fourth Circuit primarily relied

996 F.2d 448, 452 (1st Cir. 1993) (determining that a public school employer may regulate the classroom speech of teachers if the regulation is reasonably related to pedagogical concerns and the teacher had adequate notice that the specific classroom speech was proscribed).

97 *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014).

98 *Id.* at 413.

99 *Id.*

100 *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694, n.11 (4th Cir. 2007).

101 *Id.* at 689-91.

102 *Id.* at 689, 700.

103 *Id.* at 694, n.11.

104 *Id.* at 694 n.11, 700.

105 *Id.* at 699-700.

106 *Id.* at 700 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

on the school board's prerogative to determine curriculum as a manifestation of government speech.¹⁰⁷ Anchored in the political consequences of democratic elections, the manifestation of government speech is rarely overturned by the judiciary.¹⁰⁸ In turn, the standard for determining whether speech belongs to the government is (1) "the history of the expression at issue," (2) the public's perception of whether the government or a private person is speaking, and (3) the degree of control the government exercises over the speech.¹⁰⁹ However, the first and second factors used in *Shurtleff v. City of Boston* flow from the degree of control government officials exercise over the putative government speech.¹¹⁰ As a countervailing force to a government official's control over speech, the Court in *Shurtleff v. City of Boston* opined that "[t]he Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks."¹¹¹ Thus, the judiciary invites objecting community members to vote against political actors responsible for decisions that distort the reality of systemic racism through a hegemonic school curriculum.¹¹² For this invitation, community members and educator unions should accept the challenge.

While organizing for political change, advocates should anticipate arguments that conflate proselytizing and teaching history like the arguments in *Lee v. York Cnty. Sch. Div.*¹¹³ To be sure, plaintiffs like the one in

107 *Id.* at 699-700.

108 See *Shurtleff v. City of Boston*, 142 S.Ct. 1583, 1589 (2022); *Boring v. Buncombe Cnty. Bd. of Ed.*, 136 F.3d 364, 371 (4th Cir. 1998) (stating that "it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.").

109 *Shurtleff*, 142 S.Ct. at 1589.

110 *Shurtleff*, 142 S.Ct. at 1592-93 (opining that after weighing the factors used to determine whether the government is speaking, the City of Boston's lack of control over the putative speech was the determining factor that raising a specific flag was not government speech); *Walker v. Texas Div. Sons of Confederate Veterans Inc.*, 576 U.S. 200, 207-08 (2015); *Johanns v. Livestock Marketing Ass'n.*, 544 U.S. 550, 563-64 (2005); *Bd. of Regents of Univ. Wisconsin Sys. v. Southworth*, 529 U.S. 217, 235 (2000); *O'Brien v. Village of Lincolnshire*, 955 F.3d 616, 627 (7th Cir. 2020).

111 *Shurtleff*, 142 S.Ct. at 1589.

112 See *Shurtleff*, 142 S.Ct. at 1589; *Southworth*, 529 U.S. at 235 (stating that "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

113 *Lee*, 484 F.3d at 692-93 (reciting with approval that curricular speech "is nothing more than an execution of a teacher's employment duties.") (citing *Urofsky v. Gilmore*, 216 F.3d 401, 409 (4th Cir. 2000)).

Lee v. York Cnty. Sch. Div. sometimes engage in dubious speech that invites employment penalties, but academic freedom relies on taking risks.¹¹⁴ Notwithstanding the objective differences between teaching history that includes historically marginalized voices and promoting a single religion in a K-12 classroom, advocates should prepare to confront arguments that conflate the two.

At any rate, teaching topics relating to systemic racism in K-12 settings are not issues confined to “red states.”¹¹⁵ Across the country, once sleepy school board elections have seen a deluge of money from right-wing organizations funding candidates under the banner of “parent’s rights.”¹¹⁶ While the Supreme Court has recognized that parents have a fundamental right to raise their children as they wish,¹¹⁷ these same “parent’s rights” groups seek to expand the fundamental right of raising their own children as they wish to include raising other people’s children too. Despite the right-wing shift in school board politics and the inherently conservative role played by the judiciary, there are still opportunities for challenging anti-CRT laws and regulations so children may learn the truth about their history.

C. *Viability of constitutional challenges to overturn anti-CRT legislation*

Even though the application of *Garcetti* to K-12 educators in some jurisdictions presents significant challenges, educators may challenge adverse employment actions under a void for vagueness theory. Undergirding a void for vagueness theory is the Fifth and Fourteenth Amendment’s guarantee that individuals have the right to due process when serious interests are deprived.¹¹⁸ Generally, when the government fails to clearly notify individuals of the potential penalties associated with specific conduct, that

114 *See Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957) (discussing the importance of academic freedom in a post-secondary educational setting).

115 *See* Hannah Natanson, *Parent-activists, seeking control over education, are taking over school boards*, Washington Post (Jan. 19, 2022) <https://www.washingtonpost.com/education/2022/01/19/parents-school-boards-recall-takeover/> (last accessed Aug. 31, 2022) (describing efforts across the country to move school boards to the political right).

116 *See id.*; James R. Copeland, John Ketcham, and Christopher F. Rufo, *Next Step for the Parents’ Movement: Curriculum Transparency*, Manhattan Institute: City Journal (Dec. 1, 2021) <https://www.city-journal.org/how-to-achieve-transparency-in-schools> (last accessed Aug. 31, 2022); Scott, *supra* note 6, at 11, 13, 18-19, 46-47.

117 *Meyer*, 262 U.S. at 402-03.

118 *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Cohen v. California*, 403 U.S. 15, 26 (1971) (finding that “offensive conduct” clause in law was unconstitutionally vague for enforcement under the First and Fourteenth Amendment).

penalty may be unconstitutionally vague.¹¹⁹ For example, in *Keyishian v. Bd. of Regents of Univ. of N.Y.*, a New York state statute prohibited teachers from membership in “subversive” organizations such as the Communist Party.¹²⁰ In addition to proscribed membership in the Communist Party, the statute prohibited all educators from uttering seditious words and advising, advocating, teaching, or embracing the duty that the government should be overthrown by unlawful means.¹²¹ The Court determined that the scope and uncertainty of the statutory language prohibiting educators from teaching abstract doctrines were unconstitutionally vague and invalidated the statute.¹²² Writing for the Court, Justice Brennan reasoned that the threatening enforcement mechanisms and the uncertain boundaries of prohibited speech constricted educators’ pedagogical practices and undermined the purpose of education in a free democracy.¹²³ Because the resulting constraints over pedagogical practices had a chilling effect on educators’ academic freedom and the First Amendment, the law was unconstitutional.¹²⁴

Similarly, when the government imposes undefined and contradictory rules that prohibit the use of CRT, those rules likely provide insufficient notice to impose lawful sanctions. Take, for example, Florida’s rule requiring that:

[i]nstruction on the required topics must be factual and objective, and may not suppress or distort significant historical events, such as . . . slavery, the Civil War and Reconstruction, the civil rights movement and the contributions of women, African American and Hispanic people to our country . . . Examples of theories that distort historical events and are inconsistent with State Board approved standards include . . . 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

119 *See City of Chicago v. Morales*, 527 U.S. 41, 60-61 (1999) (reasoning that a loitering ordinance’s scope swept in both lawful and unlawful conduct when effectuated and was, therefore, a violation of the Due Process Clause); *Keyishian*, 385 U.S. at 599.

120 *Keyishian*, 385 U.S. at 595-96.

121 *Id.* at 597-98, 600.

122 *Id.* at 600-02.

123 *Id.* at 601-02 (the law also applied to educators’ speech and conduct outside the classroom).

124 *Id.* at 604.

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. Instruction must include the U.S. Constitution, the Bill of Rights and subsequent amendments.¹²⁵

Nevertheless, one of the required topics in the seventh-grade civics and government standards requires students to analyze how the Reconstruction Amendments impacted minority groups.¹²⁶ The putative seventh-grade civics teacher in Florida will be in the unenviable position of maintaining two positions that will likely collide. Adding to the conflicting positions is the prohibition against “attempt[ing] to indoctrinate or persuad[ing] students to a particular point of view inconsistent with . . .” Florida state education standards.¹²⁷ Here, the putative seventh-grade civics teacher in Florida is required to teach students how to think critically about the abolition of slavery’s impact on minority groups without distorting the facts. However, educators are prohibited from persuading students that the over 200 years of chattel slavery and the institution of Jim Crow were systemic or had a persistent impact on minority groups. Educators have received conflicting commands containing undefined vague language in each enacted rule banning CRT. Because educators in Florida are unlikely to discern the boundaries of permissible topics of instruction without incurring penalties, the laws banning CRT may be challenged under a void for vagueness theory established by the First, Fifth, and Fourteenth Amendments.

D. Potential arguments states may employ to defeat a void vagueness theory should still fail.

On the other hand, states may try to distinguish the unconstitutional law in *Keyishian* from their laws based on the scope of regulation and permissive language held elsewhere in their respective statutes. Different from *Keyishian*, where the law applied to advocacy and teaching outside of the classroom,¹²⁸ the laws banning CRT and the 1619 Project do not venture to regulate the speech of educators outside of the classroom. Furthermore, many laws include language that encourages classroom discussion on controversial topics.¹²⁹ Finally, states may counter that because the K-12 cur-

125 Fla. Admin. Code Ann. r. 6A-1.094124(3)(b).

126 Florida K-12 Civics and Government Standards, SS.7.C.3.7.

127 Fla. Admin. Code Ann. r. 6A-1.094124(3)(c).

128 *Keyishian*, 385 U.S. at 601-02.

129 See e.g. N.H. Rev. Stat. Ann. § 193:40(II) (2021) (declaring “[n]othing in this section shall be construed to prohibit discussing, as part of a larger course of academic instruction, the historical existence of ideas and subjects identified in this section.”); Tex.

riculum is equivalent to government speech, educators are not being sanctioned for their speech as citizens but rather for disobeying work rules.

Although the law at issue in *Keyishian* also chilled protected speech outside of the classroom, the primary focus of *Keyishian* concerned the special characteristics of schools.¹³⁰ The fact that the law swept in speech occurring outside the confines of the educator's school in *Keyishian* only added to the unconstitutional characteristics of the law.¹³¹ Next, the disclaiming language that permits educators to discuss controversial topics in class only adds to the contradictory commands contained in the statutes. Even though the statutes disclaim restrictions on spontaneous discussion of current events,¹³² the disclaiming language does nothing to define the contours of proscribed topics in their required curriculum. Instead, educators are more likely to avoid spontaneous discussions altogether because they fear teaching proscribed topics.

Perhaps the most persuasive argument states may employ is that curriculum is equivalent to government speech. Because lower courts have applied *Garcetti* to K-12 educators and the Supreme Court has repeatedly affirmed that schools maintain the prerogative to determine school curriculum,¹³³ educators are likely at a disadvantage in challenging state laws banning CRT and curricular topics concerning systemic racism. Indeed, the distinguishing characteristic between post-secondary faculty and K-12 educators is the existence of a pre-determined curriculum imposed on K-12 educators.¹³⁴

Educ. Code Ann. § 28.0022(e) (West 2021) (stating that “Nothing in this section may be construed as limiting the teaching of or instruction in the essential knowledge and skills adopted under this subchapter.”).

130 *Keyishian*, 385 U.S. at 603 (reasoning that “freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”).

131 *Id.* at 603-04.

132 Tex. Educ. Code Ann. § 28.0022(a)(1) (prohibiting public school officials from compelling educators to “to discuss a widely debated and currently controversial issue of public policy or social affairs”); *but see* Tex. Educ. Code Ann. § 28.0022(d) (prohibiting educators from imposing “a chilling effect on reasonable student discussions involving those concepts in school or during a school-sponsored activity.”).

133 *See Tinker*, 393 U.S. at 507; *Hazelwood Sch. Dist.*, 484 U.S. at 273; *Evans-Marshall*, 624 F.3d at 340-41; *Mayer*, 474 F.3d at 479; *Boring v. Buncombe County Bd. of Ed.*, 136 F.3d 364, 370-71 (4th Cir. 1993).

134 *See Demers*, 746 F.3d at 413 (opining that when analyzing the interests involved, courts must evaluate “the degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a university professor.”).

Considering the varying analyses used in different jurisdictions, K-12 educators should not rely on academic freedom under the First Amendment to defend their employment from penalties. Despite the Court's performative affirmations for academic freedom and the noble profession of educators, K-12 educators are unlikely to find material protections under the First Amendment once accused of teaching topics associated with systemic or structural racism. Even still, a void for vagueness theory may present a viable claim because the laws banning CRT in K-12 classrooms include contradictory commands that encroach on the special status schools play in our society. In contrast to the dour outlook for K-12 educators seeking refuge under the First Amendment and the lack of due process, protections held in collective bargaining agreements ("CBAs") and organizing efforts may provide some refuge to educators accused of teaching about systemic racism and implicit bias in their classrooms.

III. Finding refuge in solidarity and labor rights

Notwithstanding the uncertain terrain advocates will need to traverse for challenging the laws banning CRT in K-12 classrooms, educators likely have the best opportunities for success through organizing. As a corollary for successful organizing campaigns, educators may be able to leverage campaign wins into stronger collective bargaining agreements ("CBA") that defend educators accused of teaching CRT. In addition to strengthening their collective bargaining agreements to defend educators from unjust discipline, educator unions may also include CBA provisions that prevent unjust discipline arising out of allegations of teaching CRT. Finally, the method of securing organizing campaign wins depend on building intersectional coalitions from the communities in which educator's work.

A. Collective bargaining agreements include academic freedom

Despite the absence of a judicial remedy for educators to preserve some autonomy over the school curriculum, collective bargaining agreements are a viable path to limit a school board's ability to impose employment sanctions on educators.¹³⁵ Generally, CBAs are contracts with democratic properties.¹³⁶ The parties to a CBA are employers and a union, and the union is typically designated an exclusive representative which undertakes

¹³⁵ See *Cary v. Bd. of Ed. Adams-Arapahoe Sch. Dist.* 28, 598 F.2d 535, 539 (10th Cir. 1979) (determining that teachers objecting to a school board's ban on books used for curriculum did not waive or provide additional rights to academic freedom when the teacher's CBA included an aspirational declaration that recited the school board's authority to determine curriculum).

¹³⁶ See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334-36, 338-39 (1944).

the responsibility of representing employees.¹³⁷ Once the parties agree on an issue, they usually reduce that agreement into writing in a CBA document.¹³⁸ Part of the unique character of a CBA is the bargaining relationship between the parties and the processes for resolving disputes.¹³⁹ Because the First Amendment and the Constitution resemble a floor bearing the minimum degree of protection an individual can receive under the law, CBAs may be a viable way to raise the floor of protection for educators.¹⁴⁰

For educator unions to raise the floor of protections for their members, they must negotiate CBA provisions that provide academic freedom to the same extent that post-secondary educational faculty enjoy.¹⁴¹ However, because educator unions are obligated to negotiate with their employers, which often represent school board interests, ratifying an agreement that provides academic freedom that is coextensive with those of post-secondary faculty may be difficult.¹⁴²

Despite the difficulty of attaining an academic freedom provision resulting in enforceable language within a CBA, educator unions may be able to increase opportunities for an enforceable provision through effective organizing and political activism. Alternatively, educator unions could advocate for a provision in their CBAs that obligates school officials to engage

137 *See id.*

138 *See id.* at 338-39; *NLRB v. Jones Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937).

139 *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960).

140 *But see Cary*, 598 F.2d at 539 (cautioning that a CBA provision which waives a school board's right to control each aspect of the curriculum must be a deliberate).

141 *See Demers*, 746 F.3d at 406 (finding that a pamphlet prepared by a university professor critical of their university's structuring of his department was not subject to analysis under *Garcetti* because the pamphlet was related to scholarship and teaching); *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011) (determining that the *Garcetti* Court refused to apply their analysis to post-secondary educational faculty).

142 *See e.g. Bd. of Educ. Woodstown-Pilsgrove School Dist. v. Woodstown-Pilsgrove Educ. Ass'n.*, 410 A.2d 1131, 1135 (N.J. 1980) (opining that "[w]hen the dominant issue is an educational goal, there is no obligation to negotiate and subject the matter, including its impact, to binding arbitration."); *but see NLRB v. Katz*, 369 U.S. 736, 742-43 (1962) (requiring good faith bargaining under the National Labor Relations Act's ("NLRA") section 8(a)(5) and finding that a refusal to bargain on mandatory subjects of bargaining is a violation of the NLRA). *School Committee of Boston v. Boston Teachers Union Local 66*, 389 N.E.2d 970, 973-74 (Mass. 1979) (establishing that because the school board as an employer may bind itself through contractual relationships, courts in Massachusetts must not overturn arbitration awards after they are deemed arbitrable); *Developments in the Law: Academic Freedom, E. Collective Bargaining*, 81 Harv. L. Rev. 1045, 1122-23 (1968) (discussing the legal hurdles that may prevent educators from including CBA language that provides academic freedom).

in processes for determining certain curricular choices, such as those touching on controversial topics.¹⁴³

For example, under the CBA between the Albuquerque Teachers Federation (“ATF”) and Albuquerque Public Schools (“APS”), if a school administrator has concerns over an educator’s curriculum, they must first notify the educator.¹⁴⁴ Next, the school administrator must provide alternative means to achieve similar objectives.¹⁴⁵ If the alternative means are insufficient,¹⁴⁶ then the teacher and the school administrator must resolve the dispute through mediation between the educator’s union and the superintendent’s designee.¹⁴⁷ Finally, if the school district declines to engage in the process, the teacher’s union is free to file a grievance culminating in final and binding arbitration.¹⁴⁸ In turn, the outcome of a final and binding arbitration proceeding may compel the employer to engage in the bargained-for process to mediate the dispute.¹⁴⁹

Nevertheless, the process enumerated in the ATF and APS CBA occurs before the educator engages in teaching a controversial topic.¹⁵⁰ Juxtaposed to *the ex-post* accusations against teachers for violating anti-CRT regulations, the *ex-ante* processes for determining the permissibility of specific controversial topics may provide shelter for educators. Notwithstanding preventative measures that mediate disputes revolving around curricular disputes, shelter may be sought after a charge against an individual educator is filed because many laws or regulations limiting the scope of topics touch-

143 See *LA Unified Sch. Dist. and United Teachers of Los Angeles, Academic Freedom & Responsibility*, Article XXV(1.2)-(1.3) (2019-2022) https://utla.net/app/uploads/2022/07/2019-2022_utla-laUSD_collective_bargaining_agreement.pdf (last accessed Sept. 18, 2022); Albuquerque Public Schools and Albuquerque Teachers Federation, *Negotiated Agreement*, Article 5(F)(1)-(5) (2022-2023) <https://atfunion.org/wp-content/uploads/ws-form/4/dropzonejs/117/2022-09-aps-atf-negotiated-agreement.pdf> (last accessed Sept. 18, 2022).

144 Albuquerque Public Sch.s and Albuquerque Teachers Fed’n, *Negotiated Agreement*, Article 5(F)(6) (2021-2022).

145 *Id.*

146 *Id.* (as determined by the teacher).

147 *Id.*

148 Albuquerque Public Sch.s and Albuquerque Teachers Fed’n, *Negotiated Agreement*, *Grievance Procedures*, Article 26(B) & (Q) (1) (defining a grievance as an allegation where there “has been a violation of any provision(s) of this Agreement[]” and may result in final and binding arbitration after a grievance was denied and a hearing officer provides an adverse opinion).

149 *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); F. Elkouri & E. Elkouri, *How Arbitration Works* at 7.4.G.iii (Elizabeth J. Fabrizio, 8th ed. 2021).

150 Albuquerque Public Sch.s and Albuquerque Teachers Fed’n, *Negotiated Agreement*, Article 5(F)(6).

ing on systemic racism and implicit bias do not provide educators adequate notice of proscribed pedagogical practices.

B. Collective bargaining agreements provide that educators may only be sanctioned for just cause.

Equally important, CBAs that include a just cause standard for imposing discipline may be used to defend educators from allegations of teaching a proscribed course of study. Unlike the at-will doctrine established as the default rule in most workplaces not governed by a CBA,¹⁵¹ the just cause standard limits the employer's prerogative to impose discipline for any reason.¹⁵² In contrast, when a CBA includes a provision requiring that an employee may only receive sanctions for just cause, the employer bears the burden of proving the employee engaged in misconduct.¹⁵³

Under the standard of just cause, employees are obliged to receive both procedural and substantive due process modified by the character of the workplace.¹⁵⁴ Indeed, the hallmark of fair notice under the just cause standard is whether the employer clearly forewarned the grievant employee of the proscribed conduct and the consequences for non-conformance.¹⁵⁵

When considering the confusing and contradictory language held in the laws proscribing curriculum on CRT and systemic racism,¹⁵⁶ educators accused of teaching topics related to systemic racism may be able to challenge any imposed discipline under an unfair notice theory before an arbitrator. A likely theory against the imposition of discipline from a putative K-12 school employer in Florida may focus on the obligation to teach history accurately while refraining from "defin[ing] American history as something other than the creation of a new nation based largely on universal

151 See Restatement of Employment Law § 2.01 (2015).

152 See Office of Attorney General v. AFSCME Council 13, 844 A.2d 1217, 1224-25 (Pa. 2004); F.Elkouri & E. Elkouri, *supra* note 140 at 15.2.A.ii; Discipline and Discharge in Arbitration, Theories of Just Cause at 2.I (Norman Brand & Melissa H. Biren, 3d ed. 2015).

153 See F. Elkouri & E. Elkouri, *supra* note 140 at 7.4.G.iii & 15.3.D.i (when the union alleges that the employer breached the CBA, the union is required to prove their case).

154 See *id.* at 15.3.F.ii (sometimes referred to as industrial due process).

155 See *id.* at 15.3.F.x; Adolph M. Koven & Susan L. Smith, Just Cause: The Seven Tests at 90 (Kenneth May, 3rd ed. 2006).

156 Compare Fla. Admin. Code Ann. r. 6A-1.094124(3)(b), with Florida K-12 Civics and Government Standards, SS.912.P.10.6 (requiring as a related benchmark for high school psychology classes that students and teachers should "[d]iscuss how privilege and social power structures relate to stereotypes, prejudice, and discrimination.") and Florida K-12 Civics and Government Standards, SS.912.A.7.6 (including as an annual benchmark that students should be able to "[a]ssess key figures and organizations in shaping the Civil Rights Movement and Black Power Movement.").

principles stated in the Declaration of Independence.”¹⁵⁷

Here, the regulations in Florida require educators to teach accurate portrayals of the Civil War while simultaneously commanding educators to refrain from explaining that chattel slavery was so embedded in American society that the deadliest war in American history was fought to end the institution of slavery.¹⁵⁸ In the unlikely event that the public school employer can clearly define the contours of the regulation’s command, the educator may be subject to employment penalties as a constitutional matter. Nevertheless, using the just cause standard in an arbitral forum may open up several defenses for the individual educator, placing the burden of proving the educator engaged in misconduct on the employer.

In addition to the just cause standard, educators may enjoy more protections where employers face even higher standards of proof, such as the clear and convincing standard under the EPC. Even though the EPC in Florida uses a clear and convincing standard to sanction an educator’s license,¹⁵⁹ each state may require different standards of evidence necessary to sanction educator licenses.¹⁶⁰ In contrast to the just cause standard used to impose adverse employment actions, the clear and convincing standard requires a greater quantum of evidence to impose penalties.¹⁶¹ In theory, the chilling effect of anti-CRT legislation foisted on educators could be muted by winning contractual language that implements the clear and convincing standard in CBAs.

However, union interests in increasing job security often diverge from the employer’s interest. Even in areas where union density is relatively high among educators, employers prefer using the threat of discipline to ensure obedience in the workforce. For example, in 2008, the District of Columbia implemented a merit pay program that increased some educators’ pay when their students achieved higher standardized test scores.¹⁶² To

157 Fla. Admin. Code Ann. r. 6A-1.094124(3)(b).

158 *Id.*

159 *Ferris*, 510 So. 2d at 294-95.

160 *Cf. Ferris*, 510 So. 2d 292, 294-95; V.A. Code Ann. § 22.1-307 (2020); *Grimes v. Pa. Dept. of Educ.*, A.3d 1152, 1162 (Pa. Cmwlth. 2019) (requiring the Professional Standards and Practices Commission to prove by substantial evidence that an educator engaged in immorality).

161 *See* F. Elkouri & E. Elkouri, *supra* note 140 at 15.3.D.ii.a (reporting that when a just cause provision is left undefined in a CBA, many arbitrators apply a preponderance of the evidence standard when ordinary discipline is contemplated and a clear and convincing standard when the alleged misconduct involves criminal conduct or other stigmatizing sanctions).

162 Sam Dillon, *In Washington, Large Rewards in Teacher pay*, *New York Times* (Dec. 31, 2011) <https://www.nytimes.com/2012/01/01/education/big-pay-days-in-wash->

be eligible for the merit pay program, educators had to waive their right to job security.¹⁶³ Putting aside the strategy of dividing rank-and-file educators against each other through the use of merit pay,¹⁶⁴ merit pay programs that relinquished educator job security were designed to contain both positive and negative incentives.¹⁶⁵ Reward some educators monetarily for following directions with fidelity, fire other educators school district managers dislike,¹⁶⁶ and scare the rest into conformity.

On the other hand, when educators are accused of teaching CRT, educator unions may be able to set a precedent through the reasons provided in arbitration awards after an arbitrator interprets the operative CBA.¹⁶⁷ Similarly, educators may be able to set a state-wide precedent through administrative decisions from agencies tasked with adjudicating controversies arising out of allegations against educator licenses.¹⁶⁸ Even with a greater quantum of evidence necessary to impose sanctions against educator licenses, many teacher licensing boards are composed of political appointees who have expressed hostility towards educators teaching on the topic of systemic racism and implicit bias.¹⁶⁹ Either way, educators are likely to steer

ington-dc-schools-merit-system.html (last accessed Sept. 18, 2022); Paul Abowd, *D.C. Teachers Divided on Merit Pay Plan*, Labor Notes (Aug. 28, 2008) <https://labornotes.org/2008/08/dc-teachers-divided-merit-pay-plan> (last accessed Sept. 7, 2022).

163 Sam Dillon, *In Washington, Large Rewards in Teacher pay*, New York Times (Dec. 31, 2011).

164 Abowd, *supra* note 161.

165 Erik A. Hanushek, *School Human Capital and Teacher Salary Policies*, 1 J. Pro. Cap. & Cmty. 23, 35 (2015) (stating with approval that the DC merit pay program rewarded approximately 1,000 teachers while firing 500 others).

166 Abowd, *supra* note 161 (stating that school administrators retained the final say in whether an educator was fired after student test scores dropped below a specified threshold).

167 See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960) (opining that the CBA “calls into being a new common law—the common law of a particular industry or of a particular plant.”) (footnote omitted).

168 See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969) (plurality opinion) (finding that when administrative agencies adjudicate cases, the agency’s disposition on an issue may guide how the agency decides a future controversy); e.g. *Fitchburg Gas & Elec. Light Co. v. Dept. of Public Utilities*, 956 N.E.2d 213, 222 (Mass. 2011) (ordinarily providing deference to administrative agencies adjudicating controversies they were empowered to decide); *McKay v. N.H. Compensation Appeals Bd.*, 732 A.2d 1025, 1030-31 (N.H. 1999) (stating that agency adjudications hold the same force as judicial opinions).

169 E.g. Fla. Const. Art. 9 § 2 (empowering the governor to appoint members of the State Board of Education); Fla. Stat. § 1012.79(1) (empowering the State Board of Education to appoint members to the EPC); N.H. Rev. Stat. Ann. § 21-N:3 (providing the Governor of New Hampshire power to appoint members of the State Board of Education); N.H. Rev. Stat. Ann. § 186:60(VI)(a) (conveying power to the Professional Standards Board to revoke educator licenses).

their speech and classroom discussions away from topics arguably associated with systemic racism and implicit bias to avoid potential penalties.¹⁷⁰ Because educators are incentivized to avoid topics touching on systemic racism in their classrooms, the strategic utility of the laws restricting CRT likely served the intended purpose of silencing educators.¹⁷¹ Conversely, community members affected by educational policy should consider co-alescing with educator unions and other progressive organizations to challenge anti-CRT legislation and regulations locally.

Admittedly, challenging reactionary laws through union solidarity and alternative dispute resolution systems typically contained in CBAs assumes the existence of a union and the legal authority to enter into a CBA. But, even in states where public sector unions are non-existent, the activism seen in states like Arizona and West Virginia can provide a glimmer of hope in some of the most repressed jurisdictions.¹⁷² Further research and insights into the challenges presented by organizing in traditionally anti-worker states could provide guidance to labor organizations for the best use of their limited resources. However, due to this article's self-imposed limitation on topic, further research into organizing in historically anti-worker states must be addressed in another article.

C. Organizing: what workers do best

Although educators and students face opposition from reactionary politicians, those elected leaders are still politically accountable. Accepting the invitation from the judiciary to hold elected officials democratically accountable, educator unions must strengthen their resolve to organize their communities around shared interests at the local level. Indeed, inroads between educator unions and other progressive movements have emerged recently.¹⁷³ Those inroads have established allies with Black Lives Matter,

170 *Cf. Keyishian*, 385 U.S. at 601 (opining that “It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery.”).

171 *Cf. supra* note 129.

172 Eric Blanc, *The Red for Ed Movement: Two Years In*, New Labor Forum, <https://newlaborforum.cuny.edu/2020/10/03/the-red-for-ed-movement-two-years-in/> (October 2020) (last accessed Sept. 18, 2022).

173 See American Fed’n. of Teachers Resolution, *Confronting Racism and in Support of Black Lives*, <https://www.aft.org/resolution/confronting-racism-and-support-black-lives> (2020) (last accessed Feb. 4, 2022); American Fed’n. of Teachers Resolution, *In Support of LGBTQ Youth and Educators* (2021) <https://www.aft.org/resolution/support-lgbtq-youth-and-educators> (last accessed Feb. 4, 2022); National Education Association, *NEA Demands Justice for Black Lives* (2022) <https://neaedjustice.org/black-lives-matter-at-school/nea-demands-justice-for-black-lives/> (2022) (last accessed Feb. 4, 2022).

the NAACP, Color of Change, and LGBTQ+ communities.¹⁷⁴ To be sure, winning electoral contests with progressive coalitions will provide the most effective method of protecting educators and their students from revisionist and politically partisan historical narratives. However, even if the progressive groups fail to succeed at the ballot box, building coalitions and recruiting progressive allies can have a profound impact that strengthens community support and resolve for educator’s labor and contractual rights.

1. *Bargaining for the common good*

While allyship with organizations holding intersecting values with educator unions are necessary steps when organizing for political action, the allied coalition must organize non-employee members in their local communities. Taken in isolation, the potential impact of building intersecting coalitions and recruiting progressive allies can be profound. For instance, educator unions have successfully used the strategic initiative called “bargaining for the common good” to organize local communities.¹⁷⁵ Bargaining for the common good is an intersectional strategy that attempts to include issues beyond traditional bargaining topics.¹⁷⁶ One element of bargaining for the common good is to relate traditional bargaining issues to address systemic racial injustice.¹⁷⁷

Moreover, legal authority supports a broad scope for mandatory subjects of collective bargaining. For its part, the Supreme Court provided broad deference to the National Labor Relations Board (“NLRB”) when determining mandatory subjects of bargaining related to working conditions and decisions that may directly impact employees.¹⁷⁸ The inquiry used by the NLRB is whether the change in the terms and conditions of employment was “material, substantial, and significant.”¹⁷⁹ To be sure, NLRB

174 See American Civil Liberties Union, *Banned Concepts Law Unconstitutionally Chills Discourse on Race, Gender, Sexual Orientation, Disability, and Gender Identity in Schools and Public Workplaces* (press release) (Dec. 20, 2021) <https://www.aclu.org/press-releases/aclu-largest-teachers-union-nea-nh-leading-disability-and-lgbtq-advocacy-groups-file> (last accessed Feb. 4, 2022) (reporting the intersectional alliance challenging New Hampshire’s anti-CRT legislation); Erica L. Green, *New Leader Pushes Teachers’ Union to Take on Social Justice Role*, New York Times (Dec. 12, 2021) <https://www.nytimes.com/2021/12/12/us/politics/teachers-union-becky-pringle.html> (last accessed Feb. 4, 2022).

175 See Bargaining for the Common Good Network, *Elements of Bargaining for the Common Good Campaigns*, <https://www.bargainingforthecommongood.org/about/> (last accessed Feb. 4, 2022).

176 *Id.*

177 *Id.*

178 *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-96 (1979); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-11 (1964).

179 *Salem Hospital Corp.*, 360 NLRB 768, 769 (2014).

adjudications are not binding on public sector labor boards. However, rules established through NLRB adjudications are often persuasive for state labor boards when adjudicating controversies containing similar facts and claims.¹⁸⁰

Turning the bargaining for the common good concept into action, the Chicago Teachers Union (“CTU”) adopted the concept when it went on strike in 2012.¹⁸¹ The strike commenced when Chicago Mayor Rahm Emanuel refused to expand art and music programs at some of Chicago’s most underfunded schools, proposed closing neighborhood schools, and would not address issues with teacher evaluations based on a corporate-driven curriculum.¹⁸² As a strategic and moral imperative, the CTU put racial justice at the heart of its demands for fair funding in predominately Black and Brown schools.¹⁸³ These issues were popular with the educators voting in favor of the strike and community members.¹⁸⁴ In response, the Chicago Board of Education petitioned to enjoin the strike.¹⁸⁵ Reticent to wade into the controversy, the chancery court refused to issue an injunction.¹⁸⁶ In the end, CTU won using an intersectional approach to organizing

180 *E.g. City of Miami v. Fraternal Order of Police Lodge 20*, 511 So.2d 549, 552, n.5 (Fla. 1987) (accepting the Florida Labor Boards reliance on NLRB decisions); *Pa. Labor Relations Bd. v. Williamsport Area Sch. Dist.*, 406 A.2d 329, 331 (Pa. 1979) (using NLRB and the National Labor Relations Act (“NLRA”) as authority for determining an unfair labor practice); *Wapella Educ. Ass’n v. Illinois Educ. Labor Relations Bd.*, 531 N.E.2d 1371, 1376 (Ill. App. Ct. 1988); *N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73*, slip op. at n.1 (1979) (adopting the NLRB’s analysis for section 8(a)(1) charges under the NLRA for New Jersey’s analogous provision).

181 Sarah Jaffe, *The Chicago Teachers Union Strike was a Lesson in 21st-Century Organizing*, *The Nation* (Nov. 26, 2019) <https://www.thenation.com/article/archive/chicago-ctu-strike-win/> (last accessed Feb. 6, 2022).

182 *Id.*; See Jason Meisner & Hal Dardick, *Court Hearing Set for Wednesday After Union Vote*, *Chicago Tribune* (Sept. 17, 2012) <https://www.chicagotribune.com/news/breaking/chi-chicago-teachers-union-meets-on-contract-today-20120916-story.html> (last accessed Feb. 5, 2022).

183 *Id.*

184 *Id.*

185 *Bd. of Educ. City of Chicago v. Chicago Teachers Union Local 1*, Verified Complaint for Temporary Restraining Order, 2012 WL 4054140, No. 12CH35003 (Sept. 17, 2012).

186 *Bd. of Educ. City of Chicago v. Chicago Teachers Union Local 1*, 2012 WL 12531760 *1 (Ill. Cir. Ct. Oct. 26, 2012) (trial order) (dismissing the complaint with prejudice); *Bd. of Educ. of the City of Chicago v. Chicago Teachers Union Local 1*, 2012 WL 12531759 *1 (Ill. Cir. Ct. Sept. 20, 2012) (trial order) (postponing the deadline for the answer to the complaint); Meisner & Dardick, *supra* note 181 (reporting that one commentator speculated that state judicial elections were on the horizon and the chancery court judge was incentivized to abstain from involvement).

when the Chicago Board of Education relented to many of their demands.¹⁸⁷

The CTU had a reasonable chance to defend its strike against the Chicago Board of Education when it related its demands to working conditions. Among the stated issues educators in CTU were on strike against were school closures and corporate curriculum.¹⁸⁸ The schools most in danger of closing resided in historically Black and Brown neighborhoods.¹⁸⁹ Even though Illinois law prohibited educator strikes for permissive subjects of bargaining,¹⁹⁰ the CTU likely had a strong case demonstrating that their strike resulted from failing to address educator working conditions in collective bargaining.

Aside from the likelihood of success in court, the CTU strike was years in the making.¹⁹¹ After years of dormancy, the organizing efforts of building solidarity among members and their communities took years to establish before the CTU voted to strike.¹⁹² However, the CTU strike may provide a framework for challenging systemic racism through member action. To summarize the success of CTU's strategy and other progressive educator unions' rallying cry: teacher working conditions are student learning conditions.

IV. Conclusion

All told, educators must challenge anti-CRT legislation. Educators and their unions may challenge laws that undermine academic freedom nominally labeled anti-CRT laws with the legal theory that the rules are vague and thus unconstitutional. They may also challenge these anti-education laws locally through grievances culminating in final and binding arbitration when accused of violating anti-education rules. However, a more effective strategy is to challenge laws that prohibit curricular topics that touch on systemic racism and implicit bias through organizing.

Although some remedies at law may be available to defend educa-

187 Sarah Jaffe, *The Chicago Teachers Union Strike was a Lesson in 21st-Century Organizing*, *The Nation* (Nov. 26, 2019).

188 Theresa Moran, *Behind the Chicago Teachers Strike*, *Labor Notes* (Sept. 10, 2012) <https://labornotes.org/2012/09/behind-chicago-teachers-strike> (last accessed Feb. 6, 2022).

189 *Id.*

190 5 ILCS 315/7 (West 2020).

191 See Anne Bouleanu, *US: History of Chicago Teacher Strikes*, *Aljazeera* (Oct. 31, 2019) <https://www.aljazeera.com/news/2019/10/31/us-a-history-of-chicago-teacher-strikes> (last accessed Feb. 6, 2022) (stating that the Caucus of RaRank-and-Fileducators ("CORE") replaced an entrenched union leadership and brought a focus of racial justice two years before the strike occurred in 2012).

192 See *id.*

RACIAL RECKONING IN A ‘WHITE UTOPIA’: OREGON’S 2021 CRIMINAL JUSTICE REFORM BILLS

By Sierra Paola¹

INTRODUCTION

In the national outcry that followed George Floyd’s murder during the summer of 2020, Portland, Oregon became a leader in demanding policing and criminal law reform.² Protests in Portland began in late May and reached a fever pitch by July when President Trump deployed federal officers to the city to suppress demonstrators. Officers detained protesters in unmarked cars and fired tear gas and non-lethal munitions into crowds—intensifying calls for change.³

Less than a year after the height of these protests, Oregon lawmakers passed 28 separate bills addressing criminal law and policing reform.⁴ While many of these reforms represented differing strategies to addressing racial inequity in the criminal system, all were groundbreaking within the context of Oregon’s exceptionally racist, anti-Black history.⁵ This paper analyzes the strategies that various Oregon stakeholders utilized in order to pass these reforms—despite the state’s anti-Black history—and how they may be implemented elsewhere.⁶

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2 Asitha Nagesh, *Portland protests: How a ‘hyper-liberal’ city’s racist past is resurfacing*, BBC (Sept. 3, 2020), <https://www.bbc.com/news/world-us-canada-53996159>.

3 *Portland protests: Federal agents ‘abuse power’ in arrests*, BBC (July 18, 2020), <https://www.bbc.com/news/world-us-canada-53453077>.

4 News Release, Danny Moran, Communications Director, Office of the House of the Speaker, Critical Policing and Criminal Justice Reforms Cross Finish Line (June 26, 2021), <https://www.oregonlegislature.gov/kotek/Documents/2021%20Session%20-%20Criminal%20Justice%20and%20Police%20Reform.pdf>.

5 See *id.*; see Nina Stolic, *Oregon once legally banned Black people. Has the state reconciled its racist past?*, NAT’L GEOGRAPHIC (Mar. 8, 2021), <https://www.nationalgeographic.com/history/article/oregon-once-legally-barred-black-people-has-the-state-reconciled-its-racist-past>.

6 This paper uses “Black” as a proper noun to refer to the socially-created race of people whose ancestors are from Africa. In this way, “Black” refers to a group of individuals with shared experiences in the United States. “White” is likewise used as a proper noun to identify how Whiteness functions in Oregon’s social and political institutions. See Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC (June 18,

Part I reviews Oregon's long history of Black criminalization, from its inception as an all-White utopia to present-day policies that have caused severe racial disparities in the state's prison population. Part II explores the reforms to state criminal law that were passed during the 2021 legislative session and analyzes their approach and potential impact. Specifically, Oregon's three distinct approaches to addressing racial inequality: police reform, downstream harm reduction measures, and upstream prevention methods. Finally, Part III reviews how activists and legislators were able to achieve success and what strategies can be effective in achieving similar reforms elsewhere.

PART I: OREGON'S ANTI-BLACK HISTORY

Despite its modern veneer of liberal politics and progressive social movements, Oregon's history is shrouded in anti-Black racism. According to the U.S. Census Bureau, only 2.2% of Oregon's population is Black or African American, while 86.7% is White.⁷ The fact that Oregon's population has remained overwhelmingly White over the past 160 years is a direct result of successful Black exclusion laws, as well as an ongoing political and cultural climate of anti-Black ideology.⁸

A. The Oregon Trail

During the 19th century, some 400,000 White settlers took to the Oregon Trail to claim "free" land in the West.⁹ Black criminalization in Oregon began in the 1840's and 1850's as White settlers passed a series of laws to both exclude Blacks from the state and prohibit slavery, the latter stemming not from

2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-White/613159/>.

7 *QuickFacts Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/OR/RHI125219#RHI125219> (last visited Jan. 16, 2022). Portland, Oregon's largest city, is 77.4% white and 5.8% Black or African American. *QuickFacts Portland city, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/portlandcityoregon> (last visited Jan. 16, 2022). Portland is the Whitest big city in the United States. Emily Badger, *How the Whitest city in America appears through the eyes of its Black residents*, WASH. POST (Mar. 24, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/24/how-the-Whitest-city-in-america-appears-through-the-eyes-of-its-black-residents/>.

8 Cheryl A. Brooks, *Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 OR. L. REV. 731, 733 (2004). Darrell Millner, former chair of the Black Studies Program at Portland State University, best summed up the state's continued overwhelming Whiteness as simply, "[i]t is not like Blacks didn't like the rain." ELINOR LANGER, *A HUNDRED LITTLE HITLERS* 210 (2003) (quoting Darrell Millner).

9 Carmen P. Thompson, *Expectation and Exclusion: An Introduction to Whiteness, White Supremacy, and Resistance in Oregon History*, 120 OR. HIST. Q. NO. 4, 358, 363 (2019) (detailing the core characteristics of Whiteness in Oregon's history as expectations for a right to claim "new" lands and exclusion as a means to retain that land).

altruism but a desire for a labor-friendly and homogenous White society.¹⁰ Meanwhile, overt Black-exclusion laws arose from White settlers' fears they would be consumed managing "hostile" Native Americans in the region and they did not want to deal with multiple "unfriendly races."¹¹ In fact, Oregon's last explicit Black-exclusion law was included in the state's constitution in 1857, where it remained until its repeal in 1926.¹²

Although historians cite only one known instance in which a Black person was expelled from Oregon under the exclusion laws, the laws were indirectly effective in discouraging Black Americans from settling in Oregon during westward expansion; they made clear the state did not welcome Blacks.¹³ Amidst this culture of exclusion, Oregon also utilized the law to criminalize Black people already residing in the state.

Apart from Black-exclusion laws, Oregon enacted legislation that explicitly discriminated against Blacks. For example, in 1862, Oregon forbade Blacks from serving on juries.¹⁴ In 1866, the legislature passed an anti-miscegenation law that criminalized interracial marriage and empowered county clerks to investigate the racial pedigree of marriage license applicants.¹⁵ The legislature also rescinded the state's ratification of the 14th Amendment and refused to adopt any law that permitted Blacks to enjoy equal rights.¹⁶ Oregon's long and glaring history of racism is perhaps most apparent by the fact that it did not ratify the 14th Amendment until 1973, over 100 years after it passed in Congress.¹⁷

B. Post-Reconstruction and "Klan State"

Black Oregonians faced new challenges in the 1920's when Oregon became a "Klan state"

10 ELIZABETH MCLAGEN, *A PECULIAR PARADISE A HISTORY OF BLACKS IN OREGON, 1788-1940*, 25-37, 60 (1980).

11 *Id.* at 24.

12 *Id.* at 28.

13 *Id.* at 23 (discussing the 1851 expulsion of Jacob Vanderpool from Oregon).

14 MCLAGEN *supra* note 9, at 64.

15 *Id.* at 23.

16 *Id.* at 74.

17 Brooks *supra* note 7, at 754. When finally ratified in 1973, many Oregonians were surprised to learn that the amendment had never been ratified. Oregon lawmakers acted quickly and inconspicuously to ratify the 14th Amendment as to not draw too much media and public attention. *Id.* (noting that *The Oregonian* buried the story on page 30 of its daily publication). A similar process occurred for the 15th Amendment which gave Blacks the right to vote. Oregon did not ratify the 15th until 1959. Alana Semuels, *The Racist History of Portland, the Whitest City in America*, THE ATL. (July 22, 2016), <https://www.theatlantic.com/business/archive/2016/07/racist-history-portland/492035/>.

. . . a southern state transplanted to the North” in which the Klu Klux Klan rose to immense political and social power.¹⁸ The Oregon Klan originated in Medford, Oregon but quickly spread throughout the state.¹⁹ At the time, Oregon’s population was over 95% White and mainly Protestant, making the state fertile ground for the Klan’s westward expansion.²⁰ However, given that Oregon’s exclusionary law were so successful in maintaining a virtually non-existent Black population—the census reported there were only 2,144 “Negros” living in Oregon in 1920, a mere 0.27% of the state’s population—the Klan mainly targeted Catholics and Jews as opposed to Black Oregonians.²¹

While the Klan’s reign in Oregon was astonishing, it was ultimately short-lived.²² Despite recruiting over 40,000 Oregonians in just three years (about 9.6% of Oregon’s White, male population in 1920), the KKK all but disappeared from Oregon by the 1930’s.²³ Rationales for its demise include the Klan’s loss of influence over local newspapers, public outrage over isolated incidents of violence, poor leadership, and intergroup fighting.²⁴ Yet no one posits that the Klan’s racism and extremism led to its decline in Oregon;²⁵ clearly, these core principals were valued by Oregon’s White majority

C. The Modern Era

Against this historical backdrop, it’s unsurprising that the evolution of White Supremacy in Oregon led to criminal laws that disproportionately criminalized Black Oregonians. “Black criminalization” refers to the theory that crime policy, rather than crime itself, leads to the incarceration of Black Americans at a much higher rate than White Americans.²⁶ The use of

18 MCLAGEN *supra* note 9, at 129; Thompson, *supra* note 8, at 365.

19 MCLAGEN *supra* note 9, at 9.

20 Ben Bruce, *The Rise and Fall of the Ku Klux Klan in Oregon During the 1920s*, 11 VOCES NOVAE 1, 1 (2019) (noting that the Klan’s desire to expand westward was motivated by the fact that Jim Crow segregation in the South had proven so successful in achieving the KKK’s goals). Catholics made up around 8% of Oregon’s population in 1920. Jeff LaLande, *Beneath the Hooded Robe: Newspapermen, Local Politics, and the Klu Klux Klan in Jackson County, Oregon 1921-1923*, PAC. NW. Q. VOL 83, NO. 2, 42, 46 (1992).

21 Darrell Millner, *Blacks in Oregon*, PDXSCHOLAR: BLACK STUD. FAC. PUBL’NS AND PRESENTATIONS, 1, 5 (2021); U.S. BUREAU OF THE CENSUS LIBR., OREGON COMPOSITION AND CHARACTERISTICS OF THE POPULATION (1920).

22 Bruce, *supra* note 19, at 8.

23 *Id.* There were 416,334 White males in Oregon in 1920. U.S. BUREAU OF THE CENSUS LIBR., OREGON COMPOSITION AND CHARACTERISTICS OF THE POPULATION (1920).

24 Bruce, *supra* note 19, at 8.

25 *Id.*

26 Khalil Gibran Muhammad, *Where Did All the White Criminals Go?: Reconfiguring Race and Crime on the Road to Mass Incarceration*, SOULS 72, 73 (2011) [hereinafter Muhammad, *Reconfiguring Race*].

Blackness as a proxy for crime serves to support views of Black inferiority.²⁷ By viewing crime as a “racial problem,” Whites have built a framework that allows them to ignore their own contribution to the criminalization of Blackness, and instead put the blame entirely on Black culture.²⁸ The modern US would not exist without Black criminalization, as it has provided a huge source of free or low-cost labor after the abolition of slavery.²⁹ Additionally, most of the efforts to enact criminal reforms in the past were extended only to Whites and not Black Americans.³⁰

For instance, in 1934, Oregon amended its constitution to allow for nonunanimous jury verdicts in felony criminal cases.³¹ The amendment was a direct reaction to increased xenophobia and racial tensions and, in particular, the public outrage when a Jewish man was freed after a single juror refused to find him guilty of murdering a Protestant man.³² Politicians touted the amendment as a way to prevent the epidemic of Southern lynching from spreading to Oregon, but the law’s inevitable consequence was to permit unjust criminal convictions for minority groups.³³

The constitutionality of this law was challenged in 1972 in *Apodaca v. Oregon* and the U.S. Supreme Court upheld it, ruling that the Sixth Amendment did not mandate unanimous jury trials.³⁴ As noted, nonunanimous crim-

27 KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS* 205 (Harvard University Press paperback ed. 4th prtg. 2011) [hereinafter MUHAMMED, *CONDEMNATION OF BLACKNESS*].

28 *Id.*

29 *Id.* at 272.

30 Muhammad, *Reconfiguring Race* *supra* note 25, at 78.

31 ALIZA B. KAPLAN & AMY SAACK, *OVERTURNING APODACA V. OREGON SHOULD BE EASY: NONUNANIMOUS JURY VERDICTS IN CRIMINAL CASES UNDERMINE THE CREDIBILITY OF OUR JUSTICE SYSTEM*, 95 OR. L. REV. 1, 2 (2016).

32 *Id.*

33 *See id.* at 5. In other words, the state chose to step in and commit de facto lynchings to prevent the Whites from taking actions into their own hands. *See id.*

34 *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972) (holding that the Sixth Amendment itself does not require proof beyond a reasonable doubt in criminal cases because the concept of “beyond a reasonable doubt” did not take shape until after the Constitution was adopted). Relevantly, the Supreme Court held that unanimity is not a precondition for assembling a jury that represents a cross-section of the community. *Id.* at 413. More specifically, defendants had no right to a jury that represented every distinct voice in their community nor a jury that had a member of their own race. *Id.* The Supreme Court explicitly stated that “[n]o group, in short, has the right to block convictions.” *Id.* This reasoning played into the precise racist assumptions that Oregon had for amending its constitution in the first place, namely that people of color would infect juries as “unreasonable jurors” who would intentionally cause mistrials in order to exonerate people of the same race and make the twelve person jury “unwieldy and unsatisfactory.” *See id.* In other words, Black jurors

inal jury trials exacerbated racial inequities by preventing “minority” jurors from challenging the implicit biases of criminal prosecution or giving voice to their dissent.³⁵ Indeed, in a state that has historically excluded Blacks, both legally and culturally, nonunanimous jury verdicts perpetuates racial stereotypes about the criminality of Black Americans and contributes to the disparate make-up of Oregon’s prison population.

Oregon’s nonunanimous jury rule still remains a part of Oregon’s constitution.³⁶ In April 2020, the U.S. Supreme Court overturned *Apodaca v. Ramos v. Louisiana*, holding that the 14th Amendment does, in fact, guarantee the Sixth Amendment’s right to a unanimous jury conviction in state criminal cases.³⁷ Even though Oregon will now review of thousands of nonunanimous convictions, little can be done to remedy the nearly 40% of state felony convictions that resulted from nonunanimous verdicts.³⁸

It is no surprise that the anti-Black racism within Oregon’s criminal system has led to outstanding racial disparities within the carceral state. Today, Black Oregonians comprise only 2% of the total state population but account for 9% of the prison population.³⁹ Specifically, the imprisonment rate for White Oregonians was 366 for every 100,000, while the rate for Black Oregonians was 2,061 for every 100,000.⁴⁰ Put another way, Blacks are incarcerated 5.5 times more than Whites.⁴¹ The historical context discussed above illustrates just a few state-specific policies that have led to this disparity in criminalization. The next part of this paper will explore the reform bills that passed in Oregon’s 2021 legislative session and the different approaches the bills use to address Black Criminalization.

posed a threat to the easy and liberal conviction of Black defendants.

35 KAPLAN, *SUPRA* NOTE 30, AT 33 (NOTING THAT RESEARCH SHOWS THAT “JURORS SYMPATHIZE WITH ‘SIMILAR’ DEFENDANTS WHILE UNCONSCIOUSLY REINFORCING SOCIAL STEREOTYPES AGAINST ‘DIFFERENT’ DEFENDANTS.”).

36 OR. CONST. ART. I, § 11.

37 *Ramos v. Louisiana*, 140 S.Ct. 1390, 1397 (2020).

38 Len Reed, *Responding to Ramos: Focus in Oregon Shifts to Reviewing Cases and Addressing Implicit Bias Among Jurors*, 81 NOV. OR. STATE BAR BULL. 18, at 2. Further, Oregon requires that misdemeanors require the unanimous verdict of a six person jury. Therefore, life sentences may be handed out on a nonunanimous verdict, but crimes where the maximum sentence is only one year have to be unanimous. OR. REV. STAT. § 136.210(2) (2015); Kaplan, *supra* note 30, at 19.

39 *Incarceration Trends in Oregon*, VERA INST. OF JUST., <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-oregon.pdf> (last visited Nov. 30, 2021).

40 *State-by-State Data*, SENT’G PROJECT, <https://www.sentencingproject.org/the-facts/#map> (last visited Nov. 30, 2021).

41 *See id.*

PART II: RACIAL RECKONING AND CRIMINAL LAW REFORM

Despite Oregon's history of White supremacy, Portland became a hub for mass protests demanding radical racial justice reform in 2020. In the wake of these demonstrations, the Oregon legislature undertook extensive reforms in three broad areas, each of which is addressed below.

A. The Impetus: Portland Protests Make International News

On May 28, 2020, protests began in downtown Portland following the murder of George Floyd by Minneapolis police.⁴² Months later, as protests calmed in other major cities, they persisted nightly in Portland.⁴³ In July 2020, protests became even more heated when demonstrators were injured by federal agents that had been dispatched by President Trump.⁴⁴ In the wake of this unrest, Oregon lawmakers vowed to enact racial and criminal law reforms during the 2021 legislative session and delivered 28 separate bills doing so.⁴⁵ As explained below, these reforms generally fall into three categories based on their approach for effecting change.⁴⁶

The first 18 bills introduced during Oregon's 2021 legislative session address police reform and police victimization of Black Oregonians. These laws target the recruitment, conduct, and punishment of law enforcement officers as a direct means to encourage equality and reduce the disparate representation of minorities within the carceral system.⁴⁷ This category draws from Professor Paul Butler's four articulations of inequities in criminal law

42 JAYARI RAMAKRISHNAN, *PROTESTERS TAKE TO PORTLAND STREETS FOLLOWING MINNEAPOLIS POLICE KILLING OF GEORGE FLOYD*, THE OREGONIAN, (MAY 28, 2020, 10:54 PM), [HTTPS://WWW.OREGONLIVE.COM/NEWS/2020/05/PROTESTERS-TAKE-TO-PORTLAND-STREETS-FOLLOWING-MINNEAPOLIS-POLICE-KILLING-OF-GEORGE-FLOYD.HTML](https://www.oregonlive.com/news/2020/05/protesters-take-to-portland-streets-following-minneapolis-police-killing-of-george-floyd.html).

43 *Id.*

44 Robert L. Taylor, *Confidential Settlement Communication Under FRE 408 Re: United States v. City of Portland*, 3:12-cv-02265-SI Risk Mgmt. No. G2012-0493-01 BC, PORTLAND.GOV (May 7, 2021), <https://www.portlandoregon.gov/pcccep/article/783538>.

45 Hillary Borrud, *Oregon Legislature concludes session marked by huge spending, racial justice reforms*, THE OREGONIAN, (June 27, 2021, 6:15 AM), <https://www.oregonlive.com/politics/2021/06/oregon-legislature-concludes-session-marked-by-huge-spending-racial-justice-reforms.html>; News Release, Danny Moran, Communications Director, Office of the House of the Speaker, Critical Policing and Criminal Justice Reforms Cross Finish Line (June 26, 2021), <https://www.oregonlegislature.gov/kotek/Documents/2021%20Session%20-%20Criminal%20Justice%20and%20Police%20Reform.pdf>.

46 All 28 bills are listed and categorized along with the names of the chief sponsors and the votes each received in Appendix A. See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1420 (2016); Muhammad, *Reconfiguring Race*, *supra* note 25, at 78.

47 Appendix A.

and Professor Khalil Gibran Muhammed's formulation of successful reforms in criminal law in the early 20th century.

The other two categories involve front- and back-end measures to prevent contact with the criminal system and reduce recidivism, respectively. For example, six bills introduced in Oregon's legislative session are what I classify as "downstream harm reduction" measures, which encourage the rehabilitation of those who've already come into contact with the criminal system.⁴⁸ Meanwhile, five bills are classified as "upstream prevention" measures, which seek to prevent interactions with the criminal system in the first place.⁴⁹

B. Police Reform Bills

Police reform bills represented the largest category passed by the Oregon legislature in 2021. These reforms generally fall under Professor Butler's Third Articulation of inequity in criminal law, "police-community relations."⁵⁰ This articulation posits that racial inequities in the criminal system occur when police treat people of color differently from Whites.⁵¹ Under this articulation, weeding out the "bad apples"—meaning the individual racist officers—will result in greater racial equity in policing.⁵² Professor Muhammed similarly explains that although White Americans have long benefited from being portrayed as the victims of unfair social stratification, Blacks have not been afforded similar sympathies.⁵³ In this way, police reform bills would provide legal recourse for Black victims of police violence and discrimination, implicitly recognizing that Blacks are victims of the criminal "justice" system.⁵⁴

The problem with police reform bills that aim to eliminate bad actors is that they ignore larger systems of oppression that allow and promote racial discrimination in the first place.⁵⁵ For example, critical race theory suggests that racial disparities in the criminal system are actually the result of legal police conduct, as opposed to illegal misconduct.⁵⁶ In other words, it is not the "bad apples" who cause oppression and violence as much as it is the legal rights to discriminate, which has been authorized by the U.S. Supreme Court

48 *Id.*

49 *Id.*

50 Butler, *supra* note 45, at 1432.

51 *Id.* at 1433–34.

52 *Id.* at 1434.

53 Muhammad, *Reconfiguring Race*, *supra* note 25, at 74.

54 *See id.*

55 *See* Butler, *supra* note 45, at 1445–46.

56 *Id.* at 1446.

of the United States over time.⁵⁷

Oregon's 18 police reform bills aimed to filter out "bad apples" as early as the hiring process through bills such as HB 2936, which requires background checks and the use of standardized checklists and questionnaires for prospective police officers.⁵⁸ Other bills seek to achieve procedural justice and eliminate discrimination that occurs when police interact with citizens.⁵⁹ For example, SB 418 prohibits police from using false information during interrogations with minors.⁶⁰

Other police reform bills use pattern and practice approaches to help ensure accountability and uncover repeated instances of police misconduct that, in turn, permit legal recourse.⁶¹ For example, HB 2932 requires departments to participate in National Use-of-Force Data Collection operated by the FBI and empowers the Oregon Criminal Justice Commission to analyze these statistics and report annually to the legislature.⁶²

Passage of the above police reforms was largely spearheaded by members of the Oregon legislature, especially the BIPOC Caucus.⁶³ Senator Lew

57 *Id.* at 1454–57 (discussing the various "superpowers" that Supreme Court criminal procedure jurisprudence has granted to police. Such as the "super power to kill" granted by the *Scott v. Harris* holding which allowed police to use deadly force to enforce a traffic law).

58 H.B. 2936, 81st Leg. Assemb., Reg. Sess. (Or. 2021). Senator Manning Jr. noted, "Unfortunately, we keep learning about some officers' ties to hate groups. We've seen examples of bigoted speech on the internet and social media by law enforcement officers as well. Hate groups and hate speech are never acceptable, and it blocks Oregonians of color from feeling as though they can count on our men and women in uniform to protect them equally. We need to get ahead of allowing these individuals to join law enforcement and have officers who are truly interesting in protecting and serving all people." Press Release, Oregon Senate Democrats, Oregon Senate Passes Suite of Bills to Improve Public Safety and Police Accountability (June 4, 2021), <https://www.oregonlegislature.gov/senatedemocrats/Documents/PRESS%20RELEASE%20Oregon%20Senate%20Passes%20Suite%20of%20Bills%20to%20Improve%20Public%20Safety%20and%20Police%20Accountability.pdf>

59 Butler, *supra* note 45, at 1433–34.

60 S.B. 418, 81st Leg. Assemb., Reg. Sess. (Or. 2021). Oregon and Illinois are the only two states with laws that prohibit police from using deceptive interrogation techniques on children. Innocence Staff, *Oregon Deception Bill Signed into Law, Banning Police from Lying to Youth During Interrogations*, INNOCENCE PROJECT (July 14, 2021), <https://innocenceproject.org/deception-bill-passes-oregon-legislature-banning-police-from-lying-to-youth-during-interrogations/>.

61 Butler, *supra* note 45, at 1458.

62 H.B. 2932, 81st Leg. Assemb., Reg. Sess. (Or. 2021).

63 See Press Release, Oregon Senate Democrats, Oregon Senate Passes Suite of Bills to Improve Public Safety and Police Accountability (June 4, 2021), <https://www.oregonlegislature.gov/senatedemocrats/Documents/PRESS%20RELEASE%20Oregon%20Senate%20Passes%20Suite%20of%20Bills%20to%20Improve%20Public%20Safety%20and%20Police%20Accountability.pdf>

Frederick (D-Portland) sponsored seven of the 18 bills⁶⁴ and Representative Janelle Bynum (D-Happy Valley), the only African American female legislator in Oregon at the time, sponsored ten and led a bipartisan effort to obtain their passage.⁶⁵

Despite these legislative successes, civil rights advocates have criticized the Oregon legislature for not going further in their police reform efforts, such as revoking qualified immunity.⁶⁶ For example, several major community organizations in Oregon did not actively support of the police reform bills.⁶⁷ One such reason may be that, in accordance with critical race theory, legislative reform is incapable of creating meaningful social change, since the law itself is not “a neutral force of change,” but a mechanism through which White supremacy is perpetuated.⁶⁸ Likewise, the civil rights community has a legitimate concern that slow and incremental reform leads to backlash, as occurred on a national level post-Reconstruction and post-Civil Rights era.⁶⁹ For these and other reasons, many racial justice advocates focused their efforts on downstream harm reduction and upstream prevention bills as opposed to police reform during the 2021 legislative session.

C. Downstream Harm Reduction Bills

The second category of criminal law reforms introduced in 2021 sought to alleviate the downstream burdens that result from an individual's past or current involvement with the criminal system. These measures include expungements, alternative release programs for persons in custody, sentencing reconsideration, and reliving individuals from the collateral consequences of a criminal conviction (such as restoring voting rights, social welfare, and ac-

Senate%20Passes%20Suite%20of%20Bills%20to%20Improve%20Public%20Safety%20and%20Police%20Accountability.pdf.

64 Appendix A.

65 *Id.* *SEE ALSO* MAXINE BERNSTEIN, *OREGON HOUSE PASSES PACKAGE OF POLICE ACCOUNTABILITY MEASURES*, THE OREGONIAN (APR. 26, 2021, 7:50PM), [HTTPS://WWW. OREGONLIVE.COM/POLITICS/2021/04/OREGON-HOUSE-PASSES-PACKAGE-OF-POLICE-ACCOUNT- ABILITY-MEASURES.HTML](https://www.oregonlive.com/politics/2021/04/oregon-house-passes-package-of-police-accountability-measures.html).

66 Jonathon Levinson, *Oregon Lawmakers OK police accountability measures, but face calls for bigger change*, OR. PUB. BROAD. (APR. 27, 2021, 6:00 AM), <https://www.opb.org/article/2021/04/27/oregon-lawmakers-ok-police-accountability-measures/>.

67 *See e.g.*, *Legislative Recap: A Historic Legislative Session for Racial Justice*, COAL. CMTYS. COLOR (JUNE 28, 2021), <https://www.coalitioncommunitiescolor.org/cc-news/2021-legislative-recap>.

68 Margaret Davies, *Legal Theory and Law Reform: Some Mainstream and Critical Approaches*, 28 ALT. L.J. 168, 170 (2003).

69 Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1335 (1988).

cess to housing).⁷⁰

As formulated by Professor Muhammad, downstream harm reduction laws strive to rehabilitate individuals and help them successfully reintegrate into their community.⁷¹ For example, SB 819 permits the district attorney and an incarcerated person to jointly petition for sentencing modification or reduction.⁷² Likewise, SB 620 aims to repeal mandatory supervision fees so that people on supervision, such as parole or probation, can achieve financial stability for themselves and their families as opposed to these onerous fees.⁷³

Unlike the police reform measures discussed above, downstream harm reduction bills were heavily backed by Oregon community organizations and social justice advocacy groups.⁷⁴ This was typically because such groups recognize that downstream efforts are vitally important for people who are already entangled in the criminal system.⁷⁵ For instance, The Partnership for Safety and Justice lobbied for SB 620, relating to abolishing supervision fees, argued that the bill would reduce recidivism through increased economic opportunities for formerly incarcerated individuals.⁷⁶ It also framed the bill as a way to increase public safety by freeing up community corrections officers to focus on higher priorities than collecting such fees.⁷⁷ Another group, Sponsors, Inc., which is a nonprofit assisting individuals with reentry after release from prison, posited that SB 620 would emphasize the rehabilitative nature of our criminal system, as opposed to its punitive nature.⁷⁸ Sponsors, Inc. also touted the bill as reducing crime, increasing productivity, and promoting

70 Bridget McCormack, *Let's Move Criminal Justice Reforms Upstream: A Perspective from the Bench*, 74 SMU L. REV. 575, 578 (2021).

71 Muhammad, *Reconfiguring Race*, *supra* note 25, at 79.

72 S.B. 819, 81st Leg. Assemb., Reg. Sess. (Or. 2021).

73 S.B. 620, 81st Leg. Assemb., Reg. Sess. (Or. 2021); *Legislative Recap: A Historic Legislative Session for Racial Justice*, COAL. CMTYS. COLOR (June 28, 2021), <https://www.coalitioncommunitiescolor.org/ccc-news/2021-legislative-recap>.

74 See Appendix A; *Promoting Success of Supervision*, P'SHIP FOR SAFETY & JUST., <https://safetyandjustice.org/wp-content/uploads/SB620A-Overview-v0621c.pdf> (last visited Nov. 18, 2021) (listing Latino Network, Sponsors Justice Reimagined, ACLU of Oregon, Central City Concern, Coalition of Communities of Color, Disability Rights Oregon, ImagineBlack, Bridges to Change, and more as advocates in support of SB 620).

75 McCormack, *supra* note 69, at 591.

76 *Promoting Success of Supervision*, P'SHIP FOR SAFETY & JUST., <https://safetyandjustice.org/wp-content/uploads/SB620A-Overview-v0621c.pdf> (last visited Nov. 18, 2021).

77 *Id.*

78 Letter from Paul Solomon, Executive Director of Sponsors, Inc. to the House Rules Comm., Support for SB 620 (June 18, 2021), <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/32070>; *About Sponsors*, SPONSORS JUST. REIMAGINED, <https://sponsorsinc.org/about-sponsors/>.

effective law enforcement.⁷⁹ In other words, the bill would help turn incarcerated people into “law-abiding, hardworking, and tax-paying citizens.”⁸⁰

Although downstream harm reduction bills undoubtedly benefit people already involved with the criminal system—who are disproportionately people of color—they do little to actually address the root problems of racial disparity in the criminal system.⁸¹ For example, expungement is beneficial for people who have already entered the criminal system because it helps alleviate the burdens that often follow from conviction; such as difficulties finding job, securing housing, and taking out student loans.⁸² However, expungements do not address the root causes of racial disparity in the criminal system that have resulted in Black Americans being arrested and incarcerated at significantly higher rates than White Americans.⁸³ This is where upstream prevention bills attempt to address the legacy of anti-Blackness.

D. Upstream Prevention Bills

The final category of reform bills introduced during Oregon's 2021 legislative session aimed to prevent interaction with the criminal system in the first instance, through decriminalization and structural reform. By addressing the root causes of inequity in the criminal system, such measures prevent the inevitable consequences stemming from arrest, conviction, and incarceration.⁸⁴ For example, SB 236 banned suspensions and expulsions from state-funded early learning programs, which was one measure to disrupt the school-to-prison pipeline.⁸⁵

79 See *id.*

80 See *About Sponsors*, SPONSORS JUST. REIMAGINED, <https://sponsorsinc.org/about-sponsors/> (last visited Nov. 19, 2021). Corrections Officer organizations and the Oregon Department of Corrections supported SB 620. Unlike advocacy groups, Corrections Officers focused on the fact that SB 620's waiver of supervisory fees was not mandatory, so that counties can still impose fees when they need to collect revenue. See Letter from Jeremiah Stromberg, Or. Dep't. of Corr. to the Senate Comm. on Judiciary and Ballot Measure 110 Implementation, Re: Senate Bill 620 (Feb. 18, 2021), <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/4688>; see also OACCD Executive Board Members, Or. Ass'n. of Cmty. Corr. Dirs. to Or. Senate, OACCD Supports Senate Bill 620, <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/4669> (last visited Nov. 19, 2021).

81 See McCormack, *supra* note 69, at 576.

82 *Id.* at 577.

83 John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 690–91 (2014).

84 McCormack, *supra* note 69, at 576.

85 S.B. 236, 81st Leg. Assemb. Reg. Sess. (Or. 2021); Press Release, Oregon House Democrats, House Votes to Ban Suspensions and Expulsions from Early Childhood Programs (June 22, 2021), <https://www.oregonlegislature.gov/housedemocrats/Documents/>

Another example is SJR 10, an anti-slavery constitutional amendment, which would eliminate slavery as a punishment in the Oregon Constitution.⁸⁶ A modern example of slavery can be seen in prison work programs, where inmates—who are primarily people of color—work for nominal to no wages at the behest of a private, corporate prison.⁸⁷ SJR 10 was sponsored by Senator James Manning Jr. (D-Eugene), Senator Frederick, and Representative Bynum and widely supported by racial justice advocacy groups.⁸⁸ Organizations including Oregonians Against Slavery and Involuntary Servitude (OASIS) and the non-profit law firm, Oregon Justice Resource Center, lobbied hard for the resolution as a way for Oregon to begin dismantling the racist and slavery-based roots of incarceration.⁸⁹

Bills like SJR 10 fall under Professor Butler’s fourth articulation of inequity in criminal law, known as “Anti-Black Racism” or “White Supremacy.”⁹⁰ This articulation posits that police practices and the disproportionate imprisonment of Black Americans are the result of structural racism and White supremacy, as opposed to individual racist actions.⁹¹ This articulation embraces critical race theory and a “historicized” view of social relationships between groups.⁹²

Oregon also passed a decriminalization bill, HB 3059, which abolished the requirement that law enforcement arrest people who are unlawfully assembled.⁹³ The ACLU of Oregon argued that the amendment would rid the Oregon criminal code of a “toothless vestige” of an era in which people of color were frequently arrested without probable cause for exercising their First Amendment rights.⁹⁴ The amendment was a direct response to the arrests that occurred in Portland during the 2020 protests, seeking to expand the privilege of decriminalization to non-Whites who organized and participated in those protests—an encouraging step towards equity in decriminalization, historically reserved only for Whites.⁹⁵

PRESS%20RELEASE%20House%20Votes%20to%20Ban%20Suspensions%20and%20Expulsions%20from%20Early%20Childhood%20Programs.pdf.

86 S.J.R. 10, 81st Leg. Assemb. Reg. Sess. (Or. 2021).

87 MUHAMMED, CONDEMNATION OF BLACKNESS, *supra* note 26, at 272.

88 *Id.*

89 *Oregon legislators vote to eliminate punishment exception to constitution*, OASIS PRISON COAL. (Aug. 18, 2021), <https://oasisprisoncoalition.org/ojrc-press-release/>.

90 Butler, *supra* note 45, at 1434–35.

91 *Id.*

92 *Id.* at 1443.

93 H.B. 3059, 81st Leg. Assemb. Reg. Sess. (Or. 2021).

94 ACLU of Oregon, *Proposal to Repeal ORS 131.675, Oregon’s Unlawful Assembly Statute*, 2 (July 23, 2020).

95 Muhammad, *Reconfiguring Race*, *supra* note 25, at 71, 88.

E. Summary

Although Oregon's 28 separate reforms sought justice through different approaches, each was a huge achievement in the battle towards racial equality. And while the Oregon legislature readily took credit for passing the bills, none of these measures would have passed without the long-term efforts of racial justice advocates in Oregon.⁹⁶ The next part of this paper analyzes the successes of these differing reform strategies and recommends how other states can implement these strategies to achieve similar legislative reforms.

PART III: ANALYSIS AND RECOMMENDATIONS

Reforming criminal law at the state level is important because most incarcerated people in the United States are policed and prosecuted by the State and reside in state and county facilities.⁹⁷ For this reason, the criminal reform bills passed in Oregon (despite the state's history of anti-Blackness) provide a blueprint for of successful strategies and legislation for other states may use in seeking to enact broad reform in criminal law.

A. Mass Demonstrations

The first strategy that contributed to Oregon's success was a willingness to take advantage of a critical moment of national reckoning. Oregon legislators seized the national momentum towards reform in the wake of George Floyd's murder—displayed through mass demonstrations—to pass many of the aforementioned police reform laws that they had proposed for many years.⁹⁸

For example, Senator Lew Frederick sponsored 59 bills related to police reform and accountability since he was elected in 2010.⁹⁹ Prior to the 2020 protests, most of Fredrick's bills were met with disinterest and allowed to die in committee; this was despite Frederick's repeated personal stories of police

96 See News Release, Danny Moran, Communications Director, Office of the House of the Speaker, Critical Policing and Criminal Justice Reforms Cross Finish Line (June 26, 2021), <https://www.oregonlegislature.gov/kotek/Documents/2021%20Session%20%20Criminal%20Justice%20and%20Police%20Reform.pdf>.

97 Lauren-Brook Eisen, *Criminal Justice Reform at the State Level*, BRENNAN CTR. FOR JUST. (Jan. 2, 2020), <https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level>.

98 See Molly Harbarger & Hillary Borrud, *Police accountability, long ignored by Oregon lawmakers, poised to become law as White leaders finally see black colleagues' urgency*, THE OREGONIAN (Jun. 23, 2020), <https://www.oregonlive.com/politics/2020/06/police-accountability-long-ignored-by-oregon-lawmakers-poised-to-become-law-as-white-leaders-finally-see-black-colleagues-urgency.html>.

99 *Id.*

bias that he encountered as a Black Oregonian.¹⁰⁰ In the summer of 2020, however, the Oregon legislature took interest in police reform, which Frederick recognized: “[sometimes] it takes a national incident for people to see this is not just something Lew’s making up.”¹⁰¹ Not only did White state legislators have access to a disturbing video of police violence against George Floyd, a Black man, but they were also faced with months of relentless protests and unrest in the state’s most populous city.¹⁰²

This is not the first time that the visible violence against Black Oregonians encouraged White legislators to spur to action.¹⁰³ In 2018, Representative Janelle Bynum “seized a moment of wide awareness of what present-day racism looked like” after a constituent called the police on the Representative while she was out canvassing.¹⁰⁴ The incident was reported nationally and Bynum was able to pass a bill that punishes people for making racist 911 calls,¹⁰⁵ which she recognized would likely not have garnered so much support but for national attention.¹⁰⁶

Activists also seized the critical moment in creating new projects pushing for decriminalization.¹⁰⁷ For instance, a collective of Black-led organizations launched “Reimagine Oregon” in the summer of 2020 with a two-year plan to begin dismantling systemic racism in the state.¹⁰⁸ Reimagine Oregon not only used the critical moment to spur a multifaceted political campaign, they also helped organize and participate in the protests themselves.¹⁰⁹ Specifically, Reimagine Oregon coordinated reoccurring meetings between legislators and Black community member, Black-led organizations, and protest organizers to address policies that would improve the lives of Black Oregonians.¹¹⁰ These policy proposals covered everything from education to healthcare and housing.¹¹¹ Leaders recognized that protests do, in fact, bring power and

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 Julie Sabatier, *How is Oregon doing with its efforts to dismantle systemic racism*, OR. PUB. BROAD. (May 27, 2021), <https://www.opb.org/article/2021/05/27/how-is-oregon-doing-with-its-efforts-to-dismantle-systemic-racism/>.

108 *The Reimagine Oregon Project, Born Out of 2020 Protests Against Racial Injustice, Releases Multi-Jurisdictional Plan to Begin Dismantling Systemic Racism in Oregon*, REIMAGINE OR. (July 28, 2020), <https://www.reimagineoregon.org/launch>.

109 *Id.*

110 *Id.*

111 *Id.*

a political willingness to enact change.¹¹² After the 2020 protests, political leaders in Oregon actively engaged with community demands for racial justice; politicians engaged with organizers and pushed bills through the finish line.¹¹³ Nkenge Harmon Johnson, President and CEO of the Urban League of Portland, noted that for the first time in over six years of work for the League, legislators started calling her for input on legislation, as opposed to the other way around.¹¹⁴

Because the state lacks a formal history of slavery and lynching, the continued struggles faced by Black Oregonians are often not at the forefront of White liberal thinking.¹¹⁵ Many Oregonians are unaware of the state's past anti-Black policies, such as the failure to ratify the 14th Amendment and the not-too-distance Black exclusion laws.¹¹⁶ Additionally, since Black Oregonians comprise such a small percentage of the state's population, White Oregonians can engage in "race-blindness" and ignore present realities of racial discrimination.¹¹⁷ In other words, White Oregonians can pretend that racism is not a prominent issue because there are simply less Blacks Oregonians to experience racism.¹¹⁸ The murder of George Floyd sparked outrage amongst Oregonians because, for many, it was the first time they had been saturated in such explicit racial violence.¹¹⁹

Oregon's willingness to take advantage of the national reckoning with racist police violence is a strategy that advocates can adopt in all states. Activists everywhere can and should organize and engage in community-based protests. Indeed, the most remarkable aspect of the 2020 Portland protests was how long they lasted despite the fact that the legislative session did not convene until 2021. Communities in other states should strive to create and build upon the strength of community-based social movements.

112

Id.

113

Sabatier, *supra* note 106.

114

Id.

115

See Brooks supra note 7, at 733–34.

116

Id. at 757–58 (noting that the eventual ratification of the 14th could have been a real moment of reckoning for Oregonians, but politicians and the media chose to bury the story rather than confront the significance of Oregon's belated ratification).

117

IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 176–79 (1996).

118

See id.

119

The fact that it required graphic video and images of a Black man's murder to fuel motivations for change is worthy of further examination, but is outside the scope of this paper.

B. Representation in the Legislature

A second strategy for success during Oregon's 2021 legislative session was to establish long-term representation in the state legislature. Oregon's 2021 BIPOC Caucus was the largest the state had ever seen with 12 members and it was able to advance bills in 10 different areas¹²⁰ and sponsor 20 of the 28 bills discussed above.¹²¹ The BIPOC Caucus is also a useful example for how a state legislature can create spaces for non-White members to meet and develop policies together. Oregon's BIPOC caucus was developed just before the start of the 2021 session and has proven to be an effective way for non-White legislators to garner support and traction for their bills.¹²² Building solidarity amongst non-White legislators and their communities helps leaders establish political capital that has been historically monopolized by their White political counterparts.

As part of this strategy, it is equally important to elect non-White political candidates. Specifically, advocates should seek non-White representatives with a background in community work that are willing to collaborate with advocacy organizations in developing progressive, racial justice policies. Several members of Oregon's BIPOC Caucus are former directors and executives from racial justice advocacy groups.¹²³ For example, Senator Kayse Jama was the former Executive Director of Unite Oregon; Representative Khanh Pham was the former Environmental Justice Manager for the Asian Pacific American Network of Oregon; Representative Andrea Valderrama was the former Advocacy Director of Coalition for Communities of Color; and Representative Tawna Sanchez was the Director of Family Services at the Native American Youth and Family Center.¹²⁴

Representation in the legislature is important because, throughout its history, Oregon continuously refused to recognize Black residents as full citizens.¹²⁵ Even though Black exclusion laws were largely unenforceable, the

120 Anthony Veliz, *BIPOC Caucus Legislative Agenda*, OR. LATINX LEADERSHIP NETWORK (May 26, 2021),

[HTTPS://WWW.OLLN.ORG/NEWS/BIPOC-CAUCUS-LEGISLATIVE-AGENDA](https://www.olln.org/news/bipoc-caucus-legislative-agenda).

121 Appendix A (illustrating that several of the bills that were not sponsored by BIPOC members were bills recommended from groups and organizations such as Lewis and Clark Law School and the Innocence Project).

122 *SEE BIPOC CAUCUS UPDATE*, OR. STATE LEG. (MAY 20, 2021), <https://www.oregonlegislature.gov/bynum/Documents/BIPOC%20Caucus%20Update%20May%202021.pdf>.

123 *Legislative Recap*, *supra* note 84.

124 *Id.*; Representative Tawna D. Sanchez, OR. STATE LEG., <https://www.oregonlegislature.gov/sanchez/Pages/biography.aspx> (last visited Nov. 23, 2021).

125 *See e.g.*, Brooks, *supra* note 7, at 744 (discussing the refusal to ratify the 14th

fact that they remained on books for decades indicates the legislature's complete indifference to its Black constituents. Similar to how a mostly White community can refuse to recognize racial realities because they effect such a small portion of the community, a White legislature can ignore the pleas of racial minorities and still claim it is representing the interests of the majority. But even though Oregon's non-White population remains relatively small, this fact should not preclude or discourage non-White legislators from running for office.

It is clear from Oregon's 2021 legislative session that the collective action of non-White legislators can have a major impact on passing reform bills with support that crosses racial and geographic lines. Other state legislatures can engage in similar practices to ensure that non-White legislators have the space and resources to develop policies that reflect the interests of their communities. Electing non-White legislators in every state is vital to provide representation for historically marginalized communities.

C. Moderate Police Reform is Possible with Bipartisan Support

A final strategy for reform is seeking bipartisan support. Here, too, Oregon's 2021 legislature proved that police reform is possible with support across the aisle. Overwhelmingly, the police reform bills were products of the Oregon legislature's BIPOC Caucus and other senate democrats,¹²⁶ but Representative Bynum, who led the BIPOC Caucus, intentionally spearheaded a bipartisan effort in order to get those bills passed.¹²⁷

For example, Bynum worked closely with Republican Representative Ron Noble, a former police chief, who co-sponsored 10 of the 18 police reform bills.¹²⁸ The goal of these reform bills was to improve professionalism and build trust between citizens and officers.¹²⁹ Noble even framed the bills as a means to increase a sense of safety for police officers when interacting with their community.¹³⁰

amendment as a way to keep anti-miscegenation laws in place and maintain the inferior status of Black Oregonians).

126 See Press Release, Or. Senate Democrats, Oregon Senate Passes Suite of Bills to Improve Public Safety and Police Accountability (June 4, 2021), <https://www.oregonlegislature.gov/senatedemocrats/Documents/PRESS%20RELEASE%20Oregon%20Senate%20Passes%20Suite%20of%20Bills%20to%20Improve%20Public%20Safety%20and%20Police%20Accountability.pdf>; Butler, *supra* note 55, at 1433–34.

127 Bernstein, *supra* note 64; Appendix A.

128 Bernstein, *supra* note 64; Appendix A.

129 Bernstein, *supra* note 64.

130 *Id.* (quoting Representative Noble, "Community policing -- when an officer feels safe to engage with the public, to walk a beat, to drive a car and to engage in communication -- in many areas in our state that doesn't happen anymore," Noble said.

Passing moderate reform is much more attainable when legislation is framed as a bipartisan issue.¹³¹ Bipartisan support overcomes the barrier of political polarization that causes conservatives to vehemently oppose any bill seen as part of the “liberal agenda.”¹³² One notable means to such support is to focus on directions for the future instead of assigning blame for the past.¹³³ Representatives Bynum and Noble employed this strategy by emphasizing the aspects of their reform bills that appealed to conservative values such as public safety, law enforcement safety, and professionalism of government actors.¹³⁴ Noble’s former career as a law enforcement officer also helped make the laws attractive to police organizations and lobbyists who saw him as a champion of their interests.¹³⁵

While such legislation admittedly does not address the root causes of racial disparities in the criminal system, they nonetheless serve an important function in putting in place necessary restrictions on police conduct. Bipartisan work can also increase constituents’ support across the political spectrum and use police and other law enforcement organizations as conduits for change. Key Democrats can partner with key Republicans to develop police reform bills that are more likely to pass both the House and Senate and not spark backlash.

Other state legislatures can harness bipartisan support to pass moderate police reform bills. Bipartisan support will be necessary to pass such legislation in states with Republican majorities. These efforts will not only make passing police reform more politically feasible, but it will also protect such bills from repeal upon election of new legislatures.

“I’m hoping this package of police reform bills will encourage that to happen.”).

131 It should be noted that both Democrats lead both Oregon’s House and Senate by a large majority. Even so, many of the 2021 police reform bills passed the House with near unanimity. Appendix A.

132 See e.g. Lee De-Wit, et. al., *What Are the Solutions to Political Polarization*, GREATER GOOD MAG. (July 2, 2019), https://greatergood.berkeley.edu/article/item/what_are_the_solutions_to_political_polarization (discussing how people often prefer policies proposed by members of their own in-group).

133 Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32, 37 (2018).

134 See Peter Wong, *Oregon legislative panel starts hearing policing bills*, PORTLAND TRIB. (Jan. 29, 2021), [HTTPS://PAMPLINMEDIA.COM/PT/9-NEWS/496274-397980-OREGON-LEGISLATIVE-PANEL-STARTS-HEARING-POLICING-BILLS](https://pamplinmedia.com/pt/9-news/496274-397980-oregon-legislative-panel-starts-hearing-policing-bills).

135 See *id.*

CONCLUSION

The Oregon 2021 legislative session proves how a variety of criminal reform bills including police reform, downstream relief, and upstream prevention can be replicated elsewhere through strategic advocacy. Oregon's willingness to embrace a critical moment of mass demonstrations, increasing representation in the legislature and creating a foundation of representation within the legislature committed to long-term representation on reform, and employing strategies to making criminal law reform a bipartisan issue were essential to the successful passage of criminal reform bills during its 2021 legislative session—despite the state's anti-Black history.

Other states can implement one or all of these strategies in seeking to reform their criminal codes. However, is no one-size-fits-all approach; strategies will naturally have to vary based on each state's historical context, existing laws, and current political climate. Rather, Oregon is an example of how a predominately White, historically anti-Black state can enact substantive change to redress deeply-ingrained racial disparities. In this way, Oregon is a laboratory for new and innovative reforms to criminal law with the potential for long-lasting effect.

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National Lawyers Guild Review is published three times a year by the NLG. Our readership includes lawyers, scholars, legal workers, jail-house lawyers and activists. With that audience in mind, we seek to publish lively, insightful articles that address and respond to the interests and needs of the progressive and activist communities. We encourage authors to write articles in language accessible to both legal professionals and intelligent non-experts. Submissions that minimize legal jargon are especially encouraged.

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