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OHIO: A CASE STUDY IN SUBNATIONAL AUTHORITARIANISM

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ABSTRACT

Since 2021, legislators and school board members in Ohio have continuously introduced, proposed, or adopted a barrage of measures aimed at restricting what can be taught in K-12 and higher education institutions. This article contextualizes the attacks in Ohio on higher education specifically in a national and global context; closely analyzes the provisions of proposed Senate Bill 83, Ohio's version of the educational gag order bills which have been enacted in some form already in over twenty-five states; and, by using Ohio as a case study of the state as a "laboratory of autocracy," demonstrates how such legislation signals a dangerous slide toward subnational authoritarianism in the United States.

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INTRODUCTION

For the past several years, far-right activists and politicians have waged a coordinated campaign in the United States to eliminate, in the words of political strategist Christopher Rufo, the “woke nihilism” that has purportedly “corrupted” public education.¹ The assaults on both public K-12 and higher education are being waged state by state, which comes as no surprise given that public education in the United States has always been locally controlled by state agencies and local school boards.² Nowhere has the campaign been more successful than in Florida, where measures have been passed to ban both the teaching of “critical race theory” and discussion of sexual orientation or gender identity in public K-12 classrooms.³ In the higher education context, Florida Governor Ron DeSantis has effected an ideological takeover of the highly regarded liberal arts alternative New College of Florida, in order, as recently

1. Christopher F. Rufo (@realchrisrufo), X (Jan. 6, 2023, 12:02 PM), <https://twitter.com/realchrisrufo/status/1611407924768956417?lang=en> [<https://perma.cc/9C5Z-9S8B>].

2. *The Federal Role in Education*, U.S. DEP’T OF EDUC. (June 15, 2021), <https://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/28NG-BUR4>].

3. ASSOCIATION OF AMERICAN LAW PROFESSORS, REPORT OF A SPECIAL COMMITTEE: POLITICAL INTERFERENCE AND ACADEMIC FREEDOM IN FLORIDA’S PUBLIC HIGHER EDUCATION SYSTEM 1 (2023) (hereinafter AAUP FLORIDA REPORT), https://www.aaup.org/file/AAUP_Florida_final.pdf [<https://perma.cc/PZ4N-BA4R>]; H.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022).

appointed New College trustee Rufo has tweeted, to “recapture[], reform[], and restructure[]” the institution.⁴

This takeover prompted the American Association of University Professors (“AAUP”), already closely monitoring Florida as a state where academic freedom and public education were under attack, to convene a Special Committee to report on “Political Interference and Academic Freedom in Florida’s Public Higher Education System.”⁵ After several months of interviews with various Florida higher education constituents (including faculty, students, and former institutional leaders), the Special Committee issued a comprehensive and detailed report, itself the subject of several Symposium participants’ remarks.⁶ The Special Report’s conclusion states, in part:

But placing Florida in a national context is insufficient; the attack on academic freedom is part of an extensive assault on democracy worldwide. Florida and other states following suit are part of a global rise in right-wing, nationalistic political agendas that know well the power of a diminished sense of citizenship, increased surveillance, and increased obedience to the state to control citizens for generations to come. [These right-wing activists and policymakers] know well that access to knowledge, free inquiry, and education that employs a critical lens to understanding our past and present injustices are among the biggest threats to their dreams of a nation built for uplifting only certain races or religions. They are also among the most powerful means for inculcating an expansive sense of citizenship, one that challenges authoritarian directives and narratives. . . .

4. Rufo, *supra* note 1; Jeremy C. Young, *Christopher Rufo’s Alarming and Deceptive Crusade Against Public Universities*, TIME (Aug. 30, 2023, 12:10 PM), <https://time.com/6309612/christopher-rufo-public-universities-deceptive-essay/> [<https://perma.cc/7KLG-HEEX>].

5. AAUP FLORIDA REPORT, *supra* note 3, at 1–2.

6. *Id.* at 2.

What is unfolding in Florida is horrifying. It should serve as a cautionary tale to all in higher education, but we are mindful that this tale has yet to reach its conclusion. The time for intervention has not passed—yet The survival of the institution of higher education free from political interference and the ideological agenda of autocrats—a cornerstone of democratic societies—hangs in the balance.⁷

In the interest of full disclosure, I was a member of the Special Committee that issued the Special Report on Florida.⁸ Additionally, during the past many years I have served on various AAUP investigating and/or special committees, and since 2018 on its Committee A on Academic Freedom and Tenure. I have also been an active member of the AAUP (collective bargaining) chapter at the University of Cincinnati (where I teach) for two decades now. As a result, I have some expertise on academic freedom issues and have closely followed related attacks on education since late 2020. But it was my service on the Florida committee that revealed to me just how at-risk public education and knowledge are in the United States. At the end of each Special Committee interview in which I participated, I marveled at the courage and dedication of the Floridians we spoke with. If similar assaults on education were to succeed in Ohio, where I have lived and taught for over twenty years, would I and my colleagues be up to the fight? Very unfortunately, my fellow Ohioans and I may soon find out.

Ohio, like many states throughout the nation, aspires to be Florida. Since 2021, legislators and school board members in the Buckeye state have continuously introduced, proposed, or adopted a barrage of measures aimed at restricting what can be taught in K-12 and higher education institutions with varying degrees of success. For example, over the past two years, bills

7. *Id.* at 31.

8. The committee was co-chaired by Professors Afshan Jafar and Henry Reichman. Other Special Committee members included Professors Davarian Baldwin, Anil Kalhan, Charles Toombs, and Brian Turner. *Id.* at 32.

have been introduced, passed, and stalled in the Ohio legislature.⁹ Around the state, anti-critical race theory (“CRT”) school board members have been elected, unseated, and rejected.¹⁰ Nonetheless, the assault in Ohio feels relentless on the ground, and we are in constant fear of becoming Florida. Moreover, the Supreme Court’s 2023 decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*¹¹ seems to have re-energized at least some state actors who are as committed to preventing students of color, especially Black and Brown students, from attending Ohio colleges and universities as they are mandating curriculums—at every level—that exclude entirely the histories of those same students.¹²

Still, Ohio is not Florida, *yet*. It *is*, however, a bellwether. Ohio shows how states that lack an aggressively demagogic governor, like Ron DeSantis—to whom the legislature is beholden—may yet achieve their Floridian goals. My colleagues participating in this Symposium Issue, as well as in the recently published and above-excerpted Special Report on Florida, described and discussed the dangers of these Floridian goals at length. In this Article, I present Ohio as a case study of similarly situated states in an effort to provide a more in-depth view of how we got to this point, and why.

9. Laura Hancock, *From Guns in Schools to Coronavirus Catchup, over 125 Education Bills Wait in Ohio Legislature to Pass*, CLEVELAND.COM (Apr. 14, 2022, 12:00 PM), <https://www.cleveland.com/news/2022/04/from-guns-in-schools-to-coronavirus-catchup-over-125-education-bills-wait-in-ohio-legislature-to-pass.html> [https://perma.cc/UB87-LHUS]; see *infra* Part II.

10. See Madeline Mitchell, *What Do School Board Results Say About the Future of Diversity Debates in Cincinnati?*, CIN. ENQUIRER, <https://www.cincinnati.com/story/news/education/2023/11/08/ohio-school-board-election-results-whats-next-in-the-culture-wars/71472766007/> [https://perma.cc/KSZ7-6V9V] (Nov. 8, 2023, 9:40 AM) [hereinafter Mitchell, *Diversity Debates in Cincinnati*].

11. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

12. See Lara A. Flath, David E. Schwartz & Amy Van Gelder, *The Supreme Court’s Affirmative Action Opinion Continues to Spawn Challenges to DEI Programs*, SKADDEN (Dec. 13, 2023), <https://www.skadden.com/insights/publications/2023/12/2024-insights/esg/the-supreme-courts-affirmative-action-opinion> [https://perma.cc/8FGT-U9P9]; Derek W. M. Barker, *Anti-DEI Laws and Democracy: What You Need to Know About Ohio SB 83*, KETTERING FOUND. (Jan. 4, 2024), <https://www.kettering.org/news/what-you-need-to-know-ohio-sb-83-anti-dei-laws-and-democracy/> [https://perma.cc/7SBN-JM7S].

In Part I of this Article, I situate Ohio's attack on higher education in the broader context of democratic decline around the world and, more specifically, as evidence of a move toward "subnational authoritarianism" in the United States. In Part II, I present the case study by, first, describing key provisions of Ohio's Senate Bill 83 ("SB 83"), one of the most comprehensive "educational gag-order"¹³ bills targeting higher education of its kind. I then closely analyze SB 83's key provisions, both as they relate to *what* Ohio's academic institutions may and may not advocate, promote, or teach and *how* Ohio's academic institutions should be governed. Additionally, throughout Part II, I discuss how these provisions violate long-held principles of academic freedom and shared governance developed in the early twentieth century by the AAUP in their efforts to protect and preserve the independence and autonomy of academic institutions. In Part III, I discuss how SB 83 deploys authoritarian tactics with the effect of advancing the subnational authoritarian project in the United States, in the hopes that exposing and understanding these tactics will assist us in defending and strengthening our multivalent democracy.

I. FRAMING AND THE BIG PICTURE

As someone who has worked with faculty, advocates, and activists on issues related to higher education, institutional autonomy, and academic freedom for almost two decades, I have often sensed, when talking with colleagues and students who have not been involved in this work, a lack of understanding of what is currently at stake in today's "culture wars," also known among some as the "war on woke."¹⁴ I try to avoid using both

13. See JOHNATHAN FRIEDMAN & JAMES TAGER, PEN AM., EDUCATIONAL GAG ORDERS: LEGISLATIVE RESTRICTIONS ON THE FREEDOM TO READ, LEARN, AND TEACH 4 (2021), https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf [<https://perma.cc/4WWQ-SGM7>] [hereinafter PEN AM., EDUCATIONAL GAG ORDERS]; S.B. 83, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

14. See Susan Page, *A GOP War on 'Woke'? Most Americans View the Term as a Positive*, USA TODAY/Ipsos Poll Finds, USA TODAY, <https://www.usatoday.com/story/news/politics/2023/03/08/gop-war-woke-most-americans-see-term-positive-ipsos-poll/11417394002/> [<https://perma.cc/KBJ2-XM29>] (Mar. 8, 2023, 2:11 PM).

these phrases because, while I understand them as terms of art and shorthand used by media and commentators in reference to the backlash against the mass global movements for racial justice following the 2020 police killing of George Floyd, I believe they trivialize what is now a decades-old project to undermine and prevent the development of a multivalent democracy in the United States. For those of us who believe that a democratic society should exist for and serve *all* who live in it, the stakes are about as high as they can get. As such, it is necessary to understand intimately what is happening on the ground and how it serves a broader and comprehensive authoritarian purpose and mission. To that end, I provide here some background on the discourse of democratic erosion or backsliding or, as some have called it, “autocratization.”¹⁵

As political scientist and legal scholar Thomas Keck has noted, there has been “[a]n explosion of recent literature by socio-legal scholars, comparative constitutional lawyers, and political scientists [grappling] with the marked decline in both the number and quality of liberal democracies worldwide.”¹⁶ Much of this work covers what has happened in countries like Hungary, Turkey, Poland, Brazil, Argentina, Venezuela, Russia, India, and China.¹⁷ Researchers who monitor democracies worldwide also have noted a “loss of democratic quality” in the United States in recent years.¹⁸ This, of course, has not escaped the attention of American legal scholars and political scientists,

15. See Anna Lührmann & Staffan I. Lindberg, *A Third Wave of Autocratization Is Here: What Is New About It?*, 26 DEMOCRATIZATION 1095, 1095 (2019); Vanessa A. Boese, Martin Lundstedt, Kelly Morrison, Yuko Sato & Staffan I. Lindberg, *State of the World 2021: Autocratization Changing Its Nature?*, 29 DEMOCRATIZATION 983, 983–84 (2022); Vansessa Boese & Sebastian Hellmeier, *Autocratization and Its Consequences*, 176 WZB-MITTEILUNGEN 1 (2022).

16. Thomas M. Keck, *Erosion, Backsliding, or Abuse: Three Metaphors for Democratic Decline*, 48 LAW & SOC. INQUIRY 314, 314 (2023); see also *Free to Think 2023: Report of the Scholars at Risk Academic Freedom Monitoring Project*, SCHOLARS AT RISK NETWORK, <https://www.scholarsatrisk.org/resources/free-to-think-2023/> [<https://perma.cc/9F8M-3A4W>] [hereinafter *Free to Think*].

17. *Free to Think*, *supra* note 16. In the higher education context in particular, Scholars at Risk reports “the suppression of dissent and spread of illiberalism” in, for example, China (government use of surveillance apparatus including student informants) and Hungary (laws being advanced to “constrain the autonomy of academic institutions”). *Id.*

18. Boese & Hellmeier, *supra* note 15, at 3; see generally Keck, *supra* note 16.

some of whom have written for many years about democratic erosion in the United States, in both the comparative and domestic contexts, and as both historical and current phenomena.

For example, in her 2018 essay *Autocratic Legalism*, Kim Lane Scheppele examines in the global context an aspect of democratic decline where “charismatic new leaders are elected by democratic publics [who] then use their electoral mandates to dismantle by law the constitutional systems they inherited.”¹⁹ She calls this phenomenon—“when electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda”—“autocratic legalism.”²⁰ Relatedly and in the specific context of the United States, James Gardner, in a pair of 2021 articles, challenges the notion that “federalism might serve as a useful defense for liberal democracy by impeding the ability of an authoritarian central government to stamp it out at the subnational level.”²¹ In so doing, he also questions the long-held presumption that subnational variation in the American federalist system reflects a universally shared commitment to liberal democracy in the United States.²² Gardner comes to the troubling conclusion that “several American states are well along the road to becoming—or, in the cases of North Carolina, Florida, Texas, Alabama, and Georgia, reverting to—illiberal, authoritarian enclaves.”²³

More recently, Jon D. Michaels and David L. Noll, concerned particularly with the spate of state measures aimed at rolling back the rights of LGBTQ+ persons and the elimination of anti-racist curricula and diversity, equity, and inclusion programs, argue that such measures set up “private subordination regimes.”²⁴ These regimes, Michaels and Noll contend, “bolster

19. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 545 (2018).

20. *Id.* at 548.

21. James A. Gardner, *Federalism and the Limits of Subnational Political Heterogeneity*, 2021 WIS. L. REV. 1097, 1097 (2021); see also James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829, 829 (2021) [hereinafter, Gardner, *Illiberalism*].

22. See Gardner, *Illiberalism*, *supra* note 21.

23. *Id.* at 910.

24. Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1187 (2023).

the right-wing anti-democratic project by legalizing vigilantism and encouraging (White, Christian) partisans to police the most intimate aspects of other people's lives and force Black Americans, women, and LGBTQ+ persons out of public spaces."²⁵ Further, their article

makes the case for viewing private subordination via legalized vigilantism as a noteworthy development in anti-democratic politics, explains the functions that private subordination regimes perform, and posits that they are emblematic of a new "vigilante federalism." In this permutation of American federalism, state power is first devolved then privatized by turning it over to private partisans newly authorized to surveil members of their communities and newly empowered (and urged) to enforce the MAGA agenda.²⁶

Michaels and Noll find "parallels" between their theory of vigilante federalism and Scheppele's "autocratic legalism," but they differentiate the autocrats' "fundamentally illiberal" agenda from the private subordination regimes' ostensibly liberal commitments to democratic constitutionalism.²⁷ That is, vigilante federalism focuses on how the private cause of action can be weaponized toward authoritarian ends, while autocratic legalism focuses on the elected leader's manipulation of democratic mechanisms to do the same—both are salient features of democracies in decline.²⁸

Though distinct, vigilante federalism and autocratic legalism are linked by the concept of subnational authoritarianism—a term most associated with political scientists Edward L. Gibson and Robert Mickey.²⁹ Gibson uses the term to describe a

25. *Id.*

26. *Id.* at 1188.

27. *Id.* at 1197 n.34.

28. *See id.*

29. Edward L. Gibson, *Boundary Control: Subnational Authoritarianism in Democratic Countries*, 58 *WORLD POL.* 101, 104 (2005) [hereinafter Gibson, *Boundary Control: Democratic Countries*]; Robert Mickey, *Challenges to Subnational Democracy in the United States, Past and Present*, 699

“situation of regime juxtaposition, in which a large and unambiguously authoritarian assemblage of state governments coexisted with a national democratic government.”³⁰ Gibson’s work examines power dynamics and relations of “authoritarian province[s] in [] nationally democratic countr[ies]” like Mexico and Argentina³¹ and of “authoritarian enclaves” in the post-Reconstruction American South.³² Within the narrower context of American constitutionalism, James Gardner describes how in a federalist regime like that of the United States, power is theoretically “divided between national and subnational governments” in order to enable a “combination of ‘self-rule and shared rule,’” which in turn provides opportunities for “public policies to vary within a federal system and in particular among the subnational units comprising the federation.”³³ From this widely understood notion of federalism, of course, flows Louis Brandeis’s idealized vision of states as “laboratories of democracy.”³⁴

But as Gardner, Gibson, Michaels and Noll, and Scheppele have all observed, in slightly different terms and from different angles, these laboratories of democracy can just as easily function as laboratories of autocracy or authoritarianism. That American states are indeed functioning in this way is readily and distressingly apparent, as state after state proposes and enacts legislation to strip American citizens of hard-won civil rights, ban the teaching and learning of American history’s hard truths in K-12 public schools, and repress the dissemination and

ANNALS AM. ACAD. OF POL. & SOC. SCI. 118, 120 (2022); ROBERT MICKEY, *PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA’S DEEP SOUTH, 1944-1972*, at 14 (2015).

30. EDWARD L. GIBSON, *BOUNDARY CONTROL: SUBNATIONAL AUTHORITARIANISM IN FEDERAL DEMOCRACIES* 37 (2012) [hereinafter, GIBSON, *BOUNDARY CONTROL – FEDERAL DEMOCRACIES*].

31. Gibson, *Boundary Control: Democratic Countries*, *supra* note 29, at 103–04.

32. GIBSON, *BOUNDARY CONTROL – FEDERAL DEMOCRACIES*, *supra* note 30, at 3–4.

33. Gardner, *Illiberalism*, *supra* note 21, at 834 (quoting DANIEL J. ELZAR, *EXPLORING FEDERALISM* 5 (1987)).

34. See *New State Ice Co. v. Liebmann*, 285 U.S. 202, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”) (emphasis omitted).

production of critical knowledge and expertise in American institutions of higher education institutions (“IHEs”).³⁵ In the laboratory of autocracy that is Florida (currently), politicians are going for a democratic society’s lifeblood—public education and the right to vote.³⁶ That much of this legislation has been developed and strategically deployed by a close cadre of extreme right-wing and libertarian think tanks and foundations further reveals the central role that private interests continue to play in shaping both state and national politics and “values.”³⁷

II. ON THE GROUND IN OHIO

In the remainder of this Article, I describe the ground game in Ohio, which can be useful and productive for two reasons. First, Ohio is a state that has no significant history—as the Southern states do—of being part of a subnational “authoritarian enclave.”³⁸ Ohio *is*, however, one of the non-Southern states leading the charge toward subnational authoritarianism vis-à-vis its “democratically” elected state and local bodies.³⁹ As such, an examination of how these bodies are manipulating the mechanisms of state government is imperative to any critique of the

35. See TAIFHA ALEXANDER, LA TOYA BALDWIN CLARK, KYLE REINHARD & NOAH ZATZ, *CRT FORWARD: TRACKING THE ATTACK ON CRITICAL RACE THEORY* 4–5 (2023), https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf [<https://perma.cc/7MVX-GBYJ>]. PEN. AM., EDUCATIONAL GAG ORDERS, *supra* note 13, at 4–5.

36. See Nora de la Cour, *Ron DeSantis’s Crusade Against “Wokeness” in Public Schools Isn’t Popular*, JACOBIN (Jan. 12, 2023), <https://jacobin.com/2023/01/ron-desantis-public-schools-education-woke-republican-party-culture-war> [<https://perma.cc/DAS9-EYLR>]; NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT’S STEALTH PLAN FOR AMERICA*, at xxxii (2017) (explaining synchronized proposals targeting public education and voting rights throughout forty-one states).

37. See generally JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016) (taking an investigative journalism approach to uncovering the players and goals of billionaire political donors and the institutions they fund); MACLEAN, *supra* note 36 (investigating the coordinated and extensive effort of the radical right to, among other things, suppress voting and privatize education); RALPH WILSON & ISAAC KAMOLA, *FREE SPEECH AND KOCH MONEY: MANUFACTURING A CAMPUS CULTURE WAR* (2021) (cataloguing the coordinated effort by the Koch-funded network to influence debates, litigation, and policy regarding free speech on college campuses).

38. See Gardner, *Illiberalism*, *supra* note 21, at 870–71.

39. See *id.* at 909–10.

anti-democratic project. Second, getting into the weeds of some of Ohio's proposed legislation—which draw largely from model legislation and resolutions developed by right-wing nonprofit organizations and foundations⁴⁰—can illuminate how language originating within the discourse of liberal democratic theory is being used to serve illiberal and authoritarian ends. What can and should be made of this?

The efforts to de-democratize and erode education in Ohio are occurring at the local and state levels through resolutions and statements adopted and issued by school boards and state agencies and, of course, through bills proposed and enacted by the Ohio legislature. According to UCLA's CRT Forward Tracking Project,⁴¹ to date four Ohio school districts have taken "anti-CRT" measures in various forms, for example through the adoption of resolutions and/or policies or issuance of statements.⁴² Two of these districts are located in Cincinnati's suburbs, another in a suburb between Cincinnati and Dayton, and the fourth in a city twenty-five miles north of Columbus.⁴³ All are overwhelmingly white.⁴⁴ Ahead of the November 2023 election and in blue Hamilton County alone, the county's Moms for

40. See, e.g., WILSON & KAMOLA, *supra* note 37, at 10–28 (describing the history, strategy, and infrastructure of radical libertarian donor networks whose mission is to roll back progressive gains of the modern civil rights movement).

41. See *Interactive Map*, CRT FORWARD, <https://crtforward.law.ucla.edu/map/> [<https://perma.cc/M6NN-X3LP>].

42. See *id.*; ALEXANDER ET AL., *supra* note 35, at 4. The 2023 Report includes a comprehensive definition of CRT. In part, it states:

Drawing on research in history, social sciences and humanities, CRT demonstrates how laws and policies can reproduce racial inequality even when those policies and practices are adopted without explicit racial bias. CRT is thus an important tool to evaluate and support the United States' ongoing efforts to achieve a robust multiracial democracy.

Id. It further explains how conservative politicians and policymakers have misrepresented CRT in their efforts to push back on "[t]he summer of 2020's mass mobilization against police violence and anti-Blackness." *Id.*

43. See *Interactive Map*, *supra* note 41.

44. *Education Demographic and Geographic Estimates*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/programs/edge/TableViewer/acsProfile/2021> [<https://perma.cc/6FQ7-3H5K>] (reporting Forest Hills School District as 85.7% White, Lakota Local School District (Butler County) as 72% White, Springboro Community City School District as 93.6% White, and Big Walnut Local School District as 92.1% White).

Liberty⁴⁵ chapter endorsed eight school board candidates, including one running for the majority-Black Cincinnati Public Schools (“CPS”) district.⁴⁶ That candidate did not win a seat on the CPS board, nor did most of the other anti-CRT candidates running for seats on other local school boards.⁴⁷ In fact, in the 2023 state elections, at least two suburban districts’ anti-CRT school board members lost their seats to candidates endorsed

45. “Moms for Liberty” (“MFL”) touts itself as a grassroots, parents-rights organization “dedicated to fighting for the survival of America by unifying, educating, and empowering parents to defend their parental rights at all levels of government.” Glenn C. Altschuler, *Opinion, Six Reasons Why Moms for Liberty Is an Extremist Organization*, HILL (Jul. 9, 2023, 8:00 AM), <https://thehill.com/opinion/education/4086179-six-reasons-why-moms-for-liberty-is-an-extremist-organization/> [https://perma.cc/P8QH-ZT8F]. However, the Southern Poverty Law Center describes MFL as an “anti-government extremist” and “anti-student inclusion group” that fights against “what they consider the ‘woke indoctrination’ of children by advocating for book bans in school libraries and endorsing candidates for public office that align with the group’s views.” *Moms for Liberty*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/moms-liberty> [https://perma.cc/4EZX-6AQC]. “They also use their multiple social media platforms to target teachers and school officials, advocate for the abolition of the Department of Education, advance a conspiracy propaganda, and spread hateful imagery and rhetoric against the LGBTQ community.” *Id.*; see also Michael Feola, *Opinion, Moms for Liberty Is Part of a Long History of Rightwing Mothers’ Activism in the US*, GUARDIAN (Jul. 6, 2023, 12:00 PM), <https://www.theguardian.com/commentisfree/2023/jul/06/moms-for-liberty-long-history-rightwing-activism> [https://perma.cc/9F4C-SADE] (explaining how MFL “weaponizes family rights” to shift schools away from more diverse views of race, gender, and sexuality).

46. Madeline Mitchell, *What Do School Board Results Say About the Future of Diversity Debates in Cincinnati?*, CIN. ENQUIRER (Nov. 8, 2023), <https://www.cincinnati.com/story/news/education/2023/11/08/ohio-school-board-election-results-whats-next-in-the-culture-wars/71472766007/> [https://perma.cc/KSZ7-6V9V] [hereinafter Mitchell, *Diversity Debates in Cincinnati*]; see Howard Wilkinson, *Analysis: Moms for Liberty Is Running Candidates for School Board Races in Ohio*, WOSU PUB. MEDIA (Nov. 1, 2023, 4:11 AM), <https://news.wosu.org/2023-11-01/analysis-moms-for-liberty-ohio-school-board-races> [https://perma.cc/6LHC-3JY2] (Moms for Liberty endorsed Paul Schiele for the CPS School Board in the 2023 election); see also *Cincinnati Public Schools*, U.S. NEWS & WORLD REP., <https://www.usnews.com/education/k12/ohio/districts/cincinnati-public-schools-100231> [https://perma.cc/EPC7-YVKE] (Cincinnati Public Schools are 61.4% Black based on November 2018 data).

47. Madeline Mitchell, *Ohio School Board Results: New Board Member Elected to Cincinnati Public Schools Board*, CIN. ENQUIRER (Nov. 7, 2023, 10:55 PM), <https://www.cincinnati.com/story/news/education/2023/11/07/2023-ohio-election-cincinnati-public-schools/71468420007/> [https://perma.cc/636R-YU26] [hereinafter Mitchell, *Ohio New Board Member Elected*] (Paul Schiele, who was endorsed by Moms for Liberty, did not win his seat on the CPS school district board); Judi Kettler, *Opinion: We Defeated ‘Moms for Liberty’ in Our Small Ohio Community. Here’s How*, CNN, <https://www.cnn.com/2023/11/16/opinions/moms-for-liberty-ohio-school-board-election-kettler/index.html> [https://perma.cc/U43K-CUDS] (Nov. 16, 2023, 3:58 PM); Tori Otten, *Moms for Liberty Falls Flat on Its Face in School Board Races*, THE NEW REPUBLIC (Nov. 8, 2023, 11:02 AM), <https://newrepublic.com/post/176746/moms-liberty-falls-flat-face-school-board-races-iowa> [https://perma.cc/43C2-533Q].

by Democrats.⁴⁸ (Perhaps not coincidentally, in this same election, Ohio voters statewide voted to protect abortion rights in the state constitution.)⁴⁹

At the state level, the non-partisan coalition Honesty for Ohio Education (“H4OE”), which “champions honest education,” and the Ohio Conference of the AAUP have tracked the Statehouse’s and State Board of Education’s “attempts to restrict and censor education around the history of racism, sexism, homophobia, xenophobia, classism and other forms of discrimination.”⁵⁰ While the bulk of my discussion *infra* relates to legislation, it is important to acknowledge and understand the role of the state’s executive branch in the anti-democratic project—namely, for purposes of this Article, the Ohio State Board of Education and the Ohio Attorney General.

A. The Executive Branch: State Board of Education and Attorney General

In July 2021, the Ohio State Board of Education (“Board”) solicited a formal Attorney General (“AG”) opinion on the “resolution to condemn racism and advance equity and opportunity for Black students, Indigenous students, and students of color,” which the Board adopted a year earlier in the wake of global

48. Cole Behrens & Sheridan Hendrix, *Central Ohio Voters Mostly Rejected School Board Candidates Endorsed by Conservative Groups*, THE COLUMBUS DISPATCH, <https://www.dispatch.com/story/news/politics/elections/local/2023/11/08/heres-how-central-ohio-voters-decided-on-local-school-board-elections/71391959007/> [<https://perma.cc/WX9J-NNUT>] (Nov. 8, 2023, 1:00 PM); See Zack Carreon, *Forest Hills Voters Shake up School Board with Election of 2 New Members*, WVXU (Nov. 8, 2023, 12:24 AM), <https://www.wvxu.org/education/2023-11-08/forest-hills-school-board-wendy-strickler-biederman-jason-simmons> [<https://perma.cc/7DBZ-TZ6H>].

49. Jo Ingles, *Ohio Votes in Favor of Amending the State Constitution to Enshrine Abortion Rights*, NPR, <https://www.npr.org/2023/11/07/1209092670/2023-results-key-ohio-elections> [<https://perma.cc/R7W4-MLWZ>] (Nov. 7, 2023, 9:41 PM).

50. *About Us*, HONESTY FOR OHIO EDUC., <https://www.honestyforohioeducation.org/we-are.html> [<https://perma.cc/XS8G-DLZU>] (“Honesty for Ohio Education is a nonpartisan, statewide coalition that champions honest education, the affirmation of all identities, cultures, and lived experiences, and the rights and safety of all students, families, and educators.”); See *Anti-Academic Freedom Bill Threatens Faculty, Accreditation, Public Higher Education*, ACTION NETWORK, <https://actionnetwork.org/letters/anti-academic-freedom-bills-threaten-faculty-higher-education> [<https://perma.cc/5QU2-G9NK>] (showing a petition campaign sponsored by the Ohio Conference of AAUP against HB 327, which would restrict the teaching of concepts related to race, sex, nationality, and ethnicity).

protests against police violence and systemic racism.⁵¹ The AG's opinion, issued in September 2021, states in relevant part:

[C]urricula and standards will be contrary to law if they treat students differently on the basis of race. For example, standards that differentiate on the basis of race, or that promote the idea that one's race inherently affects one's abilities will violate the legal prohibition on racial discrimination

This prohibition on racial discrimination is a commandment to be followed, not an inconvenience to be evaded. "In the eyes of government, we are just one race here. It is American. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgement). Our laws—not to mention basic morality—entitle each of us to be judged by the content of our character rather than the color of our skin. [citing Martin Luther King, Jr.'s "I have a Dream" speech]. The Department must therefore ensure that its curricula and standards draw no race-based distinctions. Every decent person agrees on the importance of eradicating racial discrimination. And the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race. *Parents Involved in Community School v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 127 S. Ct. 2738, 168 L.Ed.2d 508 (2007) (op. of Roberts C.J.).⁵²

On the basis of this opinion, the Board repealed the resolution to condemn racism a month later and in its place adopted a "resolution to promote academic excellence in K-12 education for

51. See STATE BD. OF EDUC. OF OHIO, MINUTES OF THE JULY 2021 MEETING, 66–70.

52. Ohio Att'y Gen., Opinion Letter No. 2021-022, at 1, 5–6 (Sept. 14, 2021) (discussing whether the State Board had authority to adopt the aforementioned resolution).

each Ohio student without prejudice or respect to race, ethnicity, or creed.”⁵³ More recently, in December 2022, the Board adopted another resolution that, among other things, defines gender identity as biological sex and refuses to recognize established anti-discrimination protections for LGBTQ+ students.⁵⁴

The AG Opinion and the Board’s resolutions exemplify how the rhetoric of colorblind ideology coopts the language of liberal or progressive civil rights discourse. This strategic appropriation of language originating in Black Americans’ struggles for civil rights—in which the author or speaker always quotes Dr. King’s “I Have a Dream” speech and insists that we are “just one race” in the eyes of the law—is one of the oldest and most effective plays in the book.⁵⁵ Moreover, it is an easy play because over the past forty to fifty years, it has been honed, perfected, and employed in the Supreme Court’s antidiscrimination jurisprudence, coming to full fruition in its recent *Students for Fair Admissions* decision which struck down affirmative action programs in IHEs.⁵⁶

As many scholars and commentators have already pointed out, however, the problem with this colorblind approach is that it presumes conditions of equality that do not exist but are required in order for the approach to work. That is, it elides the historical and continuing material realities of racial, gender, and sex hierarchies and inequalities that are not only individual but structural, systemic, and institutional in nature. To use a hackneyed analogy, it uses rules of an already fixed game—and if the game is already rigged, then no amount of playing by the

53. See STATE BD. OF EDUC. OF OHIO, MINUTES OF THE JULY 2021 MEETING, 38–39.

54. Anna Staver, *Ohio State Board of Education Votes Against Biden-Supported LGBTQ Protections in Title IX*, COLUMBUS DISPATCH, <https://www.dispatch.com/story/news/politics/2022/12/13/ohio-school-board-votes-against-backing-lgbtq-protections-in-title-ix/69722205007/> [https://perma.cc/64JY-P4UJ] (Dec. 14, 2022); See STATE BD. OF EDUC. OF OHIO, MINUTES OF THE JULY 2021 MEETING, 47–50.

55. See, e.g., Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King Jr.’s Legacy to Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101, 124–25 (1996) (explaining how Dr. King’s messages have been used by many, such as former President Ronald Reagan, to defend actions that could be seen as weakening the civil rights that Dr. King fought for during his lifetime).

56. See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2175–76 (2023).

purportedly neutral rules will result in a fair or just outcome. Indeed, the Ohio AG is so committed to the colorblind playbook that, not long after the Supreme Court issued its decision in *Students for Fair Admissions*, his office issued a memo to Ohio “University and College Colleagues” warning them (1) not to “evade [*Students for Fair Admissions*] with subterfuge” via “disguised race-conscious admissions policies” based on “application essays or other means,” and (2) that any employee’s consideration of race in the admissions process would result in their exposure to personal liability in the event of a lawsuit.⁵⁷

B. State Legislature

SB 83 particularly targets Ohio’s public higher education institutions.⁵⁸ It passed the Senate in May 2023.⁵⁹ In early

57. Memorandum from Dave Yost, Ohio Att’y Gen., on Supreme Court’s Recent Opinion in *Students for Fair Admissions v. Harvard* to University and College Colleagues 1–2 (June 30, 2023) (available at <https://woub.org/wp-content/uploads/2024/02/AG-memo-on-Supreme-Court-ruling.pdf>); but see *Students for Fair Admissions*, 143 S. Ct. at 2176 (“[N]othing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”); Jeffrey S. Lehman, *Don’t Misread SFFA v. Harvard*, INSIDE HIGHER ED (July 17, 2023), <https://www.insidehighered.com/opinion/views/2023/07/17/dont-misread-sffa-v-harvard-opinion> [<https://perma.cc/5N5U-FSF3>] (“It will not be easy to design affirmative action policies that comply with SFFA, but it should not be impossible. Indeed, I expect that many universities are already in compliance.”).

58. S.B. 83, 135th Gen. Assemb., Reg. Sess. (Ohio 2023). At the Ohio Statehouse, several restrict-and-censor bills aimed at K-12 public schools and public universities are currently pending, have been passed in the House, or have been passed by the full legislature to become law; while these bills are of tremendous importance, a discussion of them is simply beyond the scope of this Article. See H.B. 8, 135th Gen. Assemb., Reg. Sess. (Ohio 2023) (enacting the “Parents’ Bill of Rights,” which requires Ohio public school district policies to control “sexuality content” and disclose such content to parents prior to instruction); H.B. 6, 135th Gen. Assemb., Reg. Sess. (Ohio 2023) (banning transgender student athletes in K-12 and higher education institutions); H.B. 68, 135th Gen. Assemb., Reg. Sess. (Ohio 2023) (banning gender affirming mental health and health care for minors; vetoed by Ohio’s Governor on December 28, 2023; passed House and Senate notwithstanding Governor’s veto); H.B. 103, 135th Gen. Assemb. Reg. Sess. (Ohio 2023) (creating the “Ohio Social Studies Standards Task Force” to overhaul K-12 social studies standards using “American Birthright” standards); H.B. 183, 135th Gen. Assemb., Reg. Sess. (Ohio 2023) (restricting usage of K-12 school restrooms and locker rooms to gender identities aligning with “biological sex”). All updates and links to bills can be found at *Ohio Statehouse Legislation Tracker*, HONESTY FOR OHIO EDUC., <https://www.honestyforohioeducation.org/legislation-tracker.html> [<https://perma.cc/DB6U-UTXB>].

59. *Senate Bill 83 Status*, THE OHIO LEGISLATURE 135TH GEN. ASSEMBLY, <https://www.legislature.ohio.gov/legislation/135/sb83/status>.

December 2023, the House Higher Education Committee (in an eight-to-seven vote) passed SB 83 (at this point in its eleventh iteration) in a three-minute-long meeting that was called at the last minute in violation of 24-hour notice rules, and where testimony that had been submitted by no less than 144 interested parties (130 opposing the bill) was not read.⁶⁰ This cleared the way for the bill to come to the floor for a full House vote, but SB 83 stalled again when the House Speaker declined to bring it to the floor during the final legislative session of 2023.⁶¹ That said, SB 83 (likely in yet another version) may very well come before the full House for a vote when legislative session resumes in mid-January of 2024.⁶²

To be sure, SB 83 has not had an easy journey through the Ohio Statehouse. In May 2023, the Senate passed a version of SB 83 which was later removed from the final version of the state operating budget bill that passed two months later in July.⁶³ That (tentative) victory resulted from intense and collective organizing among and between faculty, students, civil rights organizations, faculty and teacher unions, and other public *and*

60. See *SB 83 Passes Committee, No Floor Vote Scheduled*, OHIO CONF. AAUP: NEWS & BLOG (Dec. 6, 2023), <https://ocaaup.org/news/sb-83-passes-committee-no-floor-vote-scheduled/> [<https://perma.cc/7WAG-LKHP>]; Megan Henry, *Testimony on Ohio's Proposed Higher Ed Overhaul Shows More than 130 Opposed and 14 in Support*, OHIO CAP. J. (Nov. 30, 2023, 4:45 AM), <https://ohiocapitaljournal.com/2023/11/30/testimony-on-ohios-proposed-higher-ed-overhaul-shows-more-than-130-opposed-and-14-in-support/> [<https://perma.cc/H28J-5ZFX>]; Alice Momany, *Ohio House Committee Approves Bill Overhauling Higher Education, DEI Programs, Clearing Way for Vote*, MIA. STUDENT, (Dec. 6, 2023, 10:35 AM), <https://www.miamistudent.net/article/2023/12/ohio-house-committee-approves-sb83-overhauling-higher-education-dei-house-vote-next> [<https://perma.cc/9ZDY-CYHM>].

61. *SB 83 Stalls Again*, OHIO CONF. AAUP: NEWS & BLOG (Dec. 13, 2023), <https://ocaaup.org/news/sb-83-stalls-again/> [<https://perma.cc/546G-QW8U>].

62. As of this writing, it appears that, according to the Ohio Conference of the AAUP, SB 83 “in its current form does not have sufficient support among all representatives. As such, SB 83 sits in the House Rules and Reference Committee, which decides what bills will make it to the House floor.” This means, however, that the bill “could be moved to the floor for a vote at any time. 5 *Updates for Members*, OHIO CONF. AAUP: NEWS & BLOG (Jan. 31, 2024), <https://ocaaup.org/news/5-updates-for-members/> [<https://H3TQ-KQU5>].

63. *SB 83 Removed from State Budget Bill*, OHIO CONF. AAUP: NEWS & BLOG (July 3, 2023), <https://ocaaup.org/news/sb-83-removed-from-state-budget-bill/> [<https://perma.cc/NJ3K-FHRY>].

private sector unions.⁶⁴ Moreover, it came with a tradeoff, in the passage and enactment of Senate Bill 117, which creates centers dedicated to “intellectual diversity” at five Ohio universities including state flagship The Ohio State University and my own institution, the University of Cincinnati.⁶⁵ Each center is to be led by an “academic council” whose members are “appointed” not by faculty at the various institutions—as would be the case under well-established institutional shared governance norms—but by each university’s board of trustees.⁶⁶ Moreover, each “academic council” may include only *one* faculty member from its respective institution.⁶⁷

III. ANALYSIS OF SB 83

Turning to the substance of the bill, SB 83 in its current form appears to be one of the most restrictive measures of its kind, despite the fact that it is significantly less extreme than earlier versions.⁶⁸ Those who are familiar with gag order bills generally will recognize much of SB 83’s language, which is drawn from plug-and-play model legislation developed by organizations like the American Legislative Exchange Council (“ALEC”) and

64. See Sara Kilpatrick, *A Provisional Victory in Ohio*, AM. ASS’N OF UNIV. PROFESSORS, <https://www.aaup.org/article/provisional-victory-ohio> [https://perma.cc/MU7A-39PH]; Morgan Trau, *Ohio Labor Unions Fight Back Against Higher Education Bill Banning Strikes*, OHIO CAP. J. (May 31, 2023, 4:50 AM), <https://ohiocapitaljournal.com/2023/05/31/ohio-labor-unions-fight-back-against-higher-education-bill-banning-strikes/> [https://perma.cc/7KXU-JVV2] (explaining how growing unions in Ohio are fighting against Senate Bill 83). For a list of organizations engaged in these collective efforts, see *Honesty Partners*, HONESTY FOR OHIO EDUC., <https://www.honestyforohioeducation.org/our-partners.html> [https://perma.cc/HUH8-Q7DS].

65. See S.B. 117, 135th Gen. Assemb. Reg. Sess. §§ 3335.39, 3339.06, 3344.07, 3361.06, 3364.07 (Ohio 2023).

66. See, e.g., *id.* § 3361.06(D)(1).

67. See, e.g., *id.* § 3361.06(D)(2).

68. According to the Ohio Conference of the AAUP, the eighth version of SB 83 “[r]emoves ‘gender identity’ from the list of ‘specified concepts,’” and “[r]emoves references to ‘sexual orientation,’ ‘gender identity,’ or ‘gender expression’ in the sections that require institutions to provide equality of opportunity and prohibit any type of ‘segregation,’ leaving only ‘race,’ ‘ethnicity,’ and ‘sex’ in those sections.” *Another New Version of SB 83*, OHIO CONF. AAUP: NEWS & BLOG (Sept. 15, 2023), <https://oaaup.org/news/another-of-new-version-of-sb-83/> [https://perma.cc/6BYK-3G2E]; see *Government Relations*, OHIO CONF. AAUP, <https://oaaup.org/government-relations/> [https://perma.cc/PFT3-9BTU] (The Ohio Conference of the AAUP “engages in government advocacy on behalf of” its members and tracks related activity at the Statehouse).

the Heritage Foundation.⁶⁹ The following describes key provisions of SB 83 in its most current form.

Its first directive describes an idealized learning environment in which students are to be educated by institutions that will “equip students with the opportunity to develop the intellectual skills necessary to reach their own, informed conclusions” by means of “free, open, and rigorous intellectual inquiry to seek the truth.”⁷⁰ On this, I think most of us can agree. Indeed, these ideals are not inconsistent with, for example, how the AAUP 1915 Declaration of Principles on Academic Freedom and Academic Tenure describes one of the purposes for which academic institutions exist, that is, “to promote inquiry and advance the sum of human knowledge.”⁷¹ But this section of the bill *requires* public IHEs to include this precise language in their respective “statements of commitment,” along with language that prohibits IHEs from “requiring, favoring, disfavoring, or prohibiting speech or lawful assembly,” and that compels IHEs to “tolerate[] the differences in opinion that naturally occur in a public higher education community.”⁷²

At the outset, the “statement of commitment” requirement raises some red flags. First, the bill’s language implicates First Amendment free speech rights by essentially mandating that all opinions be treated equally in the “higher education community,” as they would under basic free speech principles in a public forum.⁷³ But academic institutions are *not* public fora and, in the academy, not all opinions and ideas receive—nor should they receive—equal treatment. Academic institutions exist not only to “promote inquiry and *advance the sum of human knowledge*” but also to “provide general instruction to the

69. See Wilson & Kamola, *supra* note 40, at 10, 21.

70. S.B. 83, 135th Gen. Assemb., Reg. Sess. § 3345.0216(A)–(B) (Ohio 2023).

71. AM. ASS’N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 295 (11th ed. 2015) (hereinafter AAUP 1915 DECLARATION).

72. S.B. 83, 135th Gen. Assemb., Reg. Sess. § 3345.0216(C)–(D).

73. S.B. 83, 135th Gen. Assemb., Reg. Session § 3345.0216; see Kristi Nickodem & Kristina Wilson, *Responding to First Amendment Audits: What Is a “Forum” and Why Does It Matter?*, UNC SCH. OF GOV’T (Nov. 15, 2022), <https://canons.sog.unc.edu/2022/11/responding-to-first-amendment-audits-what-is-a-forum-and-why-does-it-matter/> [<https://perma.cc/H87Z-M7BF>] (clarifying what is and is not a traditional public forum).

students; and . . . develop experts for various branches of the public service.”⁷⁴ In other words, academic institutions exist to promote and engage in the production and dissemination of knowledge for the public of “common good.”⁷⁵ To achieve these ends, opinion, speculation, and even existing knowledge must be continually reviewed, questioned, challenged, tested, and developed within academic institutions by experts who have been trained and vetted in their respective disciplines. From this precept, the concept of academic freedom emerged and developed in the United States to enable academic institutions to engage in such activity, following several incidents in the early twentieth century in which powerful politicians, donors, and private interests attempted—successfully—to quash research and teaching that they believed was inimical to their values and interests.⁷⁶

To be clear, I am not asserting that academic freedom and free speech are not related—only that they are not the same thing. Indeed, in the landmark 1967 decision *Keyishian v. Board of Regents of the University of the State of New York*, which struck down as unconstitutional the State University of New York at Buffalo’s imposition on faculty members of a loyalty oath that also prohibited Communist Party membership, the Supreme Court characterized academic freedom as a “special concern” of the First Amendment.⁷⁷ Writing for the majority Justice Brennan stated,

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not

74. AAUP 1915 DECLARATION, *supra* note 71, at 295 (emphasis added).

75. See MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 37 (2009).

76. See *id.* at 25.

77. 385 U.S. 589, 591–93, 603 (1967).

tolerate laws that cast a pall of orthodoxy over the classroom.⁷⁸

Second, American colleges and universities have long embraced the values and principles set forth by the AAUP, as stated on its website:

Since our founding in 1915, the AAUP has helped to shape American higher education by developing the standards and procedures that maintain quality in education and academic freedom in this country's colleges and universities. We define fundamental professional values and standards for higher education, advance the rights of academics, particularly as those rights pertain to academic freedom and shared governance, and promote the interests of higher education teaching and research.

....

The mission of the [AAUP] is to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, postdoctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good.⁷⁹

What is absolutely fundamental, though not explicitly stated above, is that academic freedom and shared governance together are what enable academic institutions, as centers of the production and dissemination of knowledge for the public

78. *Id.* at 603.

79. *About the AAUP*, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/about-aaup> [<https://perma.cc/2PJG-796F>].

good, to maintain their independence and autonomy by protecting them from becoming beholden to the desires and preferences of politicians and private interests.⁸⁰ It is in fact our well-established and longstanding commitments to institutional independence and autonomy that have made the United States' system of higher education one of the best and most competitive in the world, both in terms of teaching and research.⁸¹ Understood against this background, SB 83's attempts to dictate the commitments, values, and/or mission of Ohio's state academic institutions belie its real goal—to undermine the independence of those very institutions.

SB 83 goes on to create policies relating to “intellectual diversity” and “controversial beliefs or policies.”⁸² One section of the bill prohibits Ohio IHEs from taking public positions on “controversial beliefs or policies,” which are in turn defined as

any belief or policy that is the subject of political controversy, including issues such as climate policies, electoral politics, foreign policy, diversity, equity, and inclusion programs, immigration policy, marriage, or abortion . . . except on matters that directly impact the institution's funding or mission of discovery, improvement, and dissemination of knowledge.⁸³

80. See AAUP 1915 DECLARATION, *supra* note 71, at 294–96 (discussing “The Nature of the Academic Calling” and “The Function of the Academic Institution”); HENRY REICHMAN, THE FUTURE OF ACADEMIC FREEDOM 1–27 (2019) (describing “The Power of Money” and “Legislative and Board Interference” as “Threats to Academic Freedom”).

81. HOLDEN THORP & BUCK GOLDSTEIN, OUR HIGHER CALLING: REBUILDING THE PARTNERSHIP BETWEEN AMERICA AND ITS COLLEGES AND UNIVERSITIES 12, 15–16 (2018) (arguing that American higher education institutions are “the best in the world” in part because institutional “Governance is Grounded in Faculty Autonomy and Academic Freedom”).

82. An earlier version also included reference to “specified concept[s]” and “specified ideologies.” S.B. 83, 135th Gen. Assemb., Reg. Sess. § 3345.0217(3)–(4) (Ohio 2023) (as introduced). “Specified concept[s]” referred to “concept[s] such as allyship, diversity, social justice, sustainability, systemic racism... equity, or inclusion.” *Id.* “Specified ideolog[ies]” referred to those that classify “individuals within identity groups, divide[] identity groups into oppressed and oppressors, and prescribe[] advantages, disadvantages, or segregation based upon identity group membership.” *Id.* Both were removed from the latest version of SB 83. S.B. 83, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

83. S.B. 83, 135th Gen. Assemb., Reg. Sess. § 3345.0217(A)(1), (B)(6) (Ohio 2023).

Which is to say, Ohio academic institutions may not take public positions on almost anything that matters in the world today—unless the institution is receiving funding for taking any such position or unless doing so impacts “discovery, improvement, and dissemination of knowledge” in any applicable or useful way. It is difficult to find a way to read this language in a way that has any real meaning. Individual faculty members are always—by vocation—engaged in research that falls into the bill’s definition of “controversial beliefs and policies.” How else are they supposed to “discover[], improve[], and disseminate[] knowledge?” Moreover, state academic institutions themselves are already restricted from endorsing political candidates and issues.⁸⁴

“Intellectual diversity” is defined in SB 83 as “multiple, divergent, and varied perspectives on an extensive range of public policy issues.”⁸⁵ It then goes on to require the “[d]emonstrat[ion] [of] intellectual diversity for course approval, approval of courses to satisfy general education requirements, student course evaluations, common reading programs, annual reviews, strategic goals for each department, and student learning outcomes.”⁸⁶ It similarly requires Ohio IHEs to “seek out invited speakers who have diverse ideological or political views.”⁸⁷ Once again, it is difficult to square this definition with any academic institution’s mission to advance human knowledge, which in turn requires disciplinary training and expertise. That is, does “intellectual diversity” encompass ideas and theories that have been discredited through rigorous study and/or experimentation in any given field? If so, then what would be the point of getting a college education and majoring

84. See, e.g., *Political Activity Guidelines*, OHIO STATE UNIV. OFF. OF LEGAL AFFS., <https://legal.osu.edu/topics/political-activity-guidelines> [<https://perma.cc/RA4W-PBDD>] (Political activity guidelines state that university employees are restricted from exercising “their constitutional right to vote, as well as express their personal opinions regarding political candidates, issues, local, state, and national programs, initiatives and referendums . . . in a manner that suggests university endorsement of a cause or candidates” (emphasis added)).

85. S.B. 83, 135th Gen. Assemb., Reg. Sess. § 3345.0217(A)(2) (Ohio 2023).

86. *Id.* § 3345.0217(B)(5).

87. *Id.* § 3345.0217(B)(12).

in any particular discipline? How would you teach students what disciplinary standards are, why they are important, and how they have been developed in any given field? How much “diversity” is enough—how many “views” of an issue must be taught or expressed? How does an academic institution distinguish itself from a public square where anyone can say anything (as long as what they say does not fall into a category of unprotected speech under First Amendment law)? Moreover, to the extent “intellectual diversity” requires faculty, for example, to include more “conservative” materials on course syllabi, on the presumption that faculties are “too liberal,” it is a clear infringement on academic freedom—and officious micromanagement in the extreme—for a political body to dictate what kinds of material should be required in a college course, particularly when the legislators lack the background, expertise, or experience that would make them competent to make these types of pedagogical and intellectual judgments.

The hypocrisy of SB 83’s provisions defining “controversial beliefs and policies” and requiring “intellectual diversity” is fully exposed in its provision that prohibits the advocacy or promotion of certain concepts, which is worth quoting in full:

Sec. 3345.87(C). No state institution of higher education shall provide or require training for any administrator, teacher, staff member, or employee that advocates or promotes any of the following concepts:

- (1) One race or sex is inherently superior to another race or sex.
- (2) An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
- (3) An individual should be discriminated against or receive adverse treatment solely or partly because of the individual’s race.

- (4) Members of one race cannot nor should not attempt to treat others without respect to race.
- (5) An individual's moral standing or worth is necessarily determined by the individual's race or sex.
- (6) An individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex.
- (7) An individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex.
- (8) Meritocracy or traits such as hard work ethic are racist or sexist, or were created by members of a particular race to oppress members of another race.
- (9) Fault, blame, or bias should be assigned to a race or sex, or to members of a race or sex because of their race or sex.⁸⁸

Again, at first blush, the list of prohibited concepts appears to be unobjectionable—not even the hardest line race crit or fem crit would disagree, for example, that we should promote or advocate for the (non-existent and unproven) *fact* of racial or gender supremacy on our campuses. But sprinkled throughout the list are references to both contested and well-settled concepts and ideas that sociologists, political scientists, literary scholars, legal scholars, historians, philosophers, education scholars, natural and applied scientists, and researchers in just about every academic field one can think of have studied rigorously and in myriad contexts for decades. These include: unconscious or implicit bias in item 2 in the above list; affirmative action in item 3; reparations in item 6; structural discrimination

88. *Id.* § 3345.87(C)(1)–(9).

in item 8; and arguably throughout, any study of race, gender, or sex discrimination, whether past or present. Thus, while being directed to ensure the “fullest degree of intellectual diversity,” academic personnel are simultaneously prohibited from “promoting” or “advocating” concepts that the bill’s proponents apparently find taboo—belying the fact that “intellectual diversity” is simply a euphemism for their ideological preferences.⁸⁹

Finally, SB 83’s prohibitions on mandatory DEI programs and trainings include orientation programs designed for new students and employees, as well as “diversity statement” requirements for candidates in hiring, promotion, and admissions processes.⁹⁰ SB 83 includes mechanisms to track, monitor, and report the use of mandatory DEI programs and trainings, and requires institutions to respond to any complaints of their use.⁹¹ All of this must be summarized and reported to the state chancellor of higher education.⁹² SB 83 does not stop there; it further prohibits policies “designed explicitly to segregate faculty, staff, or students based on those individuals’ race, ethnicity, religion, or sex in credit-earning classroom settings, formal orientation ceremonies, and formal graduation ceremonies.”⁹³ Put

89. *Id.* §§ 3345.0217(B)(3), 3345.87(C). (~~Ohio 2023~~). I made this point in the context of legal education in testimony that I submitted on April 19, 2023 to the Senate Committee that sponsored SB 83:

I want to address an assumption of SB 83: that there is a lack of intellectual diversity in our institutions of higher education. The foundational concepts of American education rest on Western classical liberal ideas, such as individual free will, free markets, and political equality. These concepts continue to permeate our institutions, from K12 through higher ed. They did so without much competition until a few decades ago, when public education became more accessible to a growing and increasingly diverse citizenry. This in turn opened the door to intellectual ideas and theories critical of or different from Western liberal ideology, which then began to gain legitimacy. This openness and appreciation for different ideas is what created space for *real* intellectual diversity in American universities and colleges. SB 83 would actually *reverse* this progress and impose a regressive intellectual orthodoxy, taking us backward to the early 19th century, not forward into the 21st.

Hearing on S.83 Before the S. Workforce & Higher Educ. Comm., 135th Gen. Assemb., 3d. Sess. 1 (Ohio 2023) (statement of Emily Houh, Citizen of Ohio, Opponent).

90. S.B. 83, 135th Gen. Assemb., Reg. Sess. § 3345.0217(B)(1), (8), (10) (Ohio 2023).

91. *Id.* § 3345.0217(C), (D).

92. *Id.* § 3345.0217(C).

93. *Id.* § 3345.87(F).

simply, it prohibits students, faculty, and/or staff from forming affinity groups, which exist historically to build community in spaces from which they have been historically excluded or marginalized.⁹⁴

The prohibition on mandatory DEI programs and trainings is particularly strange given how much diversity matters in the bill when it comes to “intellectual diversity.” While the bill defines almost every other term, it does not define the term “diversity” *itself*—thereby allowing it to play fast and loose with the word’s meaning. So, in SB 83, diversity as it is used in the context of DEI programs and training—which are meant to address social, structural, and institutional forms of past (and present) discrimination—is bad. But diversity as it relates to ideological viewpoints that align with the conservative politics of SB 83’s proponents, is good.

Section after section of SB 83 reads largely in the same way—it is full of internal contradictions and meaningless statements. It becomes clear, however, after spending some time with the language, that internal coherence and clarity are really not the priority of SB 83’s various mandates and prohibitions. Rather, the point is two-fold.

First, regardless of whether it passes, SB 83’s inclusion of and explicit references to specific topics and issues creates an *in terrorem* effect designed to chill discussion, teaching, and research on those topics. This is a point that has been made by many

94. See generally Diana Ali, *Safe Spaces and Brave Spaces: Historical Context and Recommendations for Student Affairs Professionals*, 2 NASPA POL’Y & PRACTICE SERIES, Oct. 2017, at 4 https://www.naspa.org/images/uploads/main/Policy_and_Practice_No_2_Safe_Brave_Spaces_DOWNLOAD.pdf [<https://perma.cc/SGQ7-JGJT>] (briefly outlining the history of “safe spaces” based on identity/affinity in American higher education institutions); Beverly Daniel Tatum, *Together and Alone: The Challenge of Talking About Racism on Campus*, 148 DAEDALUS 79, 87–88 (2019) (“Though it may seem counterintuitive that affinity group opportunities would promote higher rates of overall interracial contact, if we understand that people are more willing to take risks when they are operating from an internal sense of strength, it makes sense that the experience of affirmation and belonging found in affinity groups could serve as a launching pad for greater cross-campus engagement”); JULIE J. PARK, RACE ON CAMPUS: DEBUNKING MYTHS WITH DATA 25 (2018) (“Ethnic student organizations play a vital role in not just helping retain students of color; they also contribute to the broader campus racial climate by promoting interracial interaction, giving students of color space to recharge their batteries and navigate a diverse and at times racially charged environment.”).

others, including in lawsuits filed around the country challenging similar bills and statutes.⁹⁵ That it is already working has been made clear to me based on many private conversations I have around my university about SB 83, in which colleagues have expressed trepidation and unease about what material they can or should continue to teach, or concern about how to recruit quality candidates for various faculty positions, with the bill's passage a constant worry.

Second, and perhaps more importantly, SB 83's rhetoric—and it matters little whether the language makes sense or not—instantiates a false “war on woke” narrative about American higher education. In this narrative, students go to college or university not to learn how to sift through new ideas and challenge themselves, but to be brainwashed en masse, by faculty who can magically force students to *believe* specific ideas on the presumption that students can or will not think for themselves—thereby misrepresenting the dissemination of knowledge and teaching of critical thinking as “indoctrination.”⁹⁶ Moreover, this narrative recasts academic institutions and their continuing efforts to advance human knowledge for the public good as “DEI bureaucracies” that use taxpayer dollars to promote “woke nihilism” and “corrupt” American society.⁹⁷

95. For example, in a lawsuit filed in federal court challenging Florida's “Stop W.O.K.E.” Act, the plaintiffs assert that “[n]ot only does the law prohibit instructors from teaching legislature's disfavored viewpoints in the manner dictated by their disciplines; its vague terms also generate uncertainty about when and how the Act will apply, thus creating an even greater chilling effect on academic expression.” Amended Complaint at 6, *Pernell v. Cerio*, No. 4:22-cv-304-MW-1 MAF (N.D. Fla., Dec. 9, 2022).

96. In early December 2023, Senate Bill 83 sponsor Sen. Jerry Cirino posted “on the record” that the bill would “help ensure students receive an education not an indoctrination.” Jerry C. Cirino, *My Bill to Reform Higher Education Is One Big Step Closer to Becoming Law*, OHIO S. (Dec. 7, 2023), <https://ohiosenate.gov/news/on-the-record/my-bill-to-reform-higher-education-is-one-big-step-closer-to-becoming-law> [https://perma.cc/JW7L-TEWX].

97. See, e.g., Tom Mockaitis, *Attacks on Academic Freedom Undermine the Quality of the U.S. Education*, THE HILL (Apr. 21, 2023, 11:30 AM), <https://thehill.com/opinion/education/3962012-attacks-on-academic-freedom-undermine-the-quality-of-us-education/> [https://perma.cc/6LTW-SG55]; Christopher F. Rufo (@realchrisrufo), X (Jan. 17, 2023, 6:31 PM), <https://twitter.com/realchrisrufo/status/1615491918812844032> [https://perma.cc/98CJ-EVXB]; Christopher F. Rufo (@realchrisrufo), X (Jan. 6, 2023, 12:02 PM), <https://twitter.com/realchrisrufo/status/1611407924768956417?lang=en> [https://perma.cc/9C5Z-9S8B].

But whose taxpayer dollars are being counted here? Who are the intended beneficiaries of these “DEI bureaucracies”? And whose “American society” is being “corrupted”? What could be more “corrupt” than the capture of research and knowledge production by corporations and politicians (and, not unrelatedly, of elections through extreme gerrymandering)? And what is more “nihilistic” than the refusal by private interests and elected officials to accept or respond to scientifically proven evidence of climate change that may result in the destruction of the planet? As the United States becomes an increasingly more diverse nation—in terms of race, ethnicity, gender, sex, and religion⁹⁸—the “moral of the story” being told through the rhetoric of SB 83 and similar bills becomes clearer: to fear and prevent progress and advancements that aim to dismantle entrenched socio-economic hierarchies and concentrations of power long-held and secured by them.

A. *Autonomy*

In addition to its provisions on what can and cannot be taught, promoted, advocated, or spoken of on the campuses of Ohio’s state institutions, SB 83 seeks to transfer institutional governance functions that have long been held by faculties, to the legislators themselves. Here, as with academic freedom and tenure, American academic institutions have long embraced and implemented the AAUP’s principles of institutional governance.⁹⁹ These were first set forth in its 1966 Statement on

98. William H. Frey, *The Nation Is Diversifying Even Faster than Predicted, According to New Census Data*, BROOKINGS INST. (Jul. 1, 2020), <https://www.brookings.edu/articles/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/> [https://perma.cc/5Z5N-9NQH]. See generally ROBERT P. JONES & DANIEL COX, PRRI, AMERICA’S CHANGING RELIGIOUS IDENTITY: FINDINGS FROM THE 2016 AMERICAN VALUES ATLAS (2017), <https://www.prii.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf> [https://perma.cc/6T95-DJJV]; Caroline Medina & Lindsay Mahowald, *Collecting Data About LGBTQI+ and Other Sexual and Gender-Diverse Communities: Best Practices and Key Considerations*, CTR. FOR AM. PROGRESS (May 24, 2022), <https://www.americanprogress.org/article/collecting-data-about-lgbtqi-and-other-sexual-and-gender-diverse-communities/> [https://perma.cc/VQ52-7TK8].

99. See Larry G. Gerber, *College and University Governance*, AM. ASS’N OF UNIV. PROFESSORS <https://www.aaup.org/article/college-and-university-governance> [https://perma.cc/Q74D-FQW8].

Government of Colleges and Universities.¹⁰⁰ According to AAUP policy:

The role of the governing board is to ensure that the institution stays true to its mission, to play a major role in ensuring that the institution has the financial resources it needs to operate successfully, to possess final decision-making authority, and to entrust the conduct of administration to the administrative officers.

The role of the president is to be the chief executive officer of the institution, to ensure that the operation of the institution conforms to the policies set forth by the governing board and to sound academic practice, to provide institutional leadership, to make sure there is effective communication between components of the institution, and to represent the institution to its many publics.

The role of the faculty is to have primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. The responsibility for faculty status includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal.¹⁰¹

Moreover, in answer to the question of *why* faculty serve as the “authoritative voice” in the academic area, the AAUP states: “[1] Faculty are distinctly qualified to exercise decision-making

100. *Statement on Government of Colleges and Universities*, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/report/statement-government-colleges-and-universities> [<https://perma.cc/GMK8-SZL4>].

101. *Shared Governance*, AM. ASS'N OF UNIV. PROFESSORS, https://www.aaup.org/sites/default/files/AAUP_shared_governance.pdf [<https://perma.cc/M8Q6-SZRZ>]; see also *Statement on Government of Colleges and Universities*, *supra* note 100 (providing an in-depth review of the roles of the governing board, the president, and the faculty).

authority in their areas of expertise. [2] The faculty's 'judgment is central to general educational policy.' [3] Scholars in a particular field or activity 'have the chief competence for judging the work of their colleagues.'"¹⁰² It bears pointing out explicitly, again, that the implementation of these shared governance principles is essential to preserving the autonomy of the academic institution.

The bill aims to coopt completely the faculty's "primary responsibilities." As discussed at length above, it attempts to restrict and dictate what faculty can and cannot advocate, promote, oppose, teach in and out of the classroom. It also requires each state institution's *board of trustees* to: adopt board-approved university-wide post-tenure review policies; require and approve revision of faculty workload policies every five years,¹⁰³ and adopt and approve annual faculty performance evaluation policies that must include specified criteria in the bill, including "standardized, objective, and measurable performance metrics."¹⁰⁴ Similarly, SB 83 requires that state institutions adopt and implement *student* evaluation criteria developed not by faculty or even trustees but by the state chancellor of higher education, which criteria must include, specifically, the question "Does the faculty member create a classroom atmosphere free of political, racial, gender, and religious bias?"¹⁰⁵ With regard to issues relating to academic programming and personnel, the bill requires the board of trustees of each state institution to develop policies on tenure and retrenchment, to be updated every five years.¹⁰⁶ This last mandate takes aim at the role that faculty currently play—and are entitled to play under well-established shared governance norms (and various collective bargaining agreements)—in institutional retrenchment provisions that would impact existing academic programs

102. *Shared Governance*, *supra* note 101.

103. S.B. 83, 135th Gen. Assemb., Reg. Sess. § 3345.453(B), (D) (Ohio 2023).

104. *Id.* § 3345.452(D)(1).

105. *Id.* § 3345.451(B).

106. *Id.* § 3345.454(B).

and the status of academic personnel.¹⁰⁷ It must be noted here that retrenchment policies have been employed by state institutions across the nation, especially since the COVID pandemic of 2020, to eliminate academic programs and departments and terminate tenured and untenured faculty—without meaningful (or any) faculty (or student or staff) consultation.¹⁰⁸

And finally, SB 83 delivers the death knell to faculty governance in its collective bargaining provisions, which prohibit employees from bargaining over workload policies, faculty evaluation systems and policies, post-tenure review policies, policies on tenure and retrenchment—and specify that where collective bargaining terms and the bill's systems and policies, conflict, the latter prevail.¹⁰⁹ It goes almost without saying that these specified areas represent basic working conditions of academic employees because they directly impact how they teach, research, and write. Moreover, attempts to prohibit bargaining over these subjects reflects the Republican legislature's hostility to collective bargaining and unionism more generally.¹¹⁰ In fact, prior versions of SB 83 also included a no-strike provision for

107. See AM. ASS'N OF UNIV. PROFESSORS, *The Role of the Faculty in Conditions of Financial Exigency*, in AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 292 (11th ed. 2015).

108. See AM. ASS'N OF UNIV. PROFESSORS, SPECIAL REPORT: COVID-19 AND ACADEMIC GOVERNANCE 2, 29, 35 (2021), https://www.aaup.org/file/Special-Report_COVID-19-and-Academic-Governance.pdf [<https://perma.cc/583S-P6HE>]. For example, in September 2023, the West Virginia University ("WVU") Board of Governors voted to "slash 143 faculty positions and 28 academic programs [including all its foreign language degree programs and its math graduate degree programs] from its flagship Morgantown campus." Ryan Quinn, *Despite National Pushback, West Virginia Will Cut Faculty, Programs*, INSIDE HIGHER ED. (Sept. 15, 2023), https://www.insidehighered.com/news/faculty-issues/shared-governance/2023/09/15/despite-national-pushback-wvu-will-cut-faculty_ [<https://perma.cc/9L3R-SWSV>]. The WVU President and Board cited a \$45 million structural budget deficit as the reason for the cuts but failed to consult meaningfully with faculty in making their decisions, in violation of AAUP standards and regulations on the role of faculty in conditions of financial exigency. See *AAUP Calls Out Lack of Faculty Involvement as WVU Board Votes on Massive Program Cuts*, AM. ASS'N OF UNIV. PROFESSORS (Sept. 14, 2023), <https://www.aaup.org/news/aaup-calls-out-lack-faculty-involvement-wvu-board-votes-massive-program-cuts> [<https://perma.cc/4YKX-A5RX>].

109. See S.B. 83, 135th Gen. Assemb., Reg. Sess. § 3345.455(B) (Ohio 2023).

110. See, e.g., Michael Lind, *Republican Party Platforms on Collective Bargaining, 1920-2020*, AM. COMPASS (Jan. 6, 2021) <https://americancompass.org/republican-party-platforms-on-collective-bargaining-1920-2020/> [<https://perma.cc/SAB8-STU7>] (indicating that "most contemporary Republican elected officials express an unremitting hostility to the very existence of labor unions").

faculty unions¹¹¹—which was removed because of opposition not just from faculty unions but also from other public sector unions and trade unions across the state of Ohio.¹¹²

IV. AS OHIO GOES, SO GOES . . .

So, what does all this have to do with subnational authoritarianism? Looking to *The Authoritarian Playbook*¹¹³ (“*Playbook*”) published in 2022 by Protect Democracy—a “cross-ideological nonprofit group dedicated to defeating the authoritarian threat, building more resilient democratic institutions, and protecting our freedom and liberal democracy”¹¹⁴—is instructive. Drawing from the work of several democratization and autocratization scholars, Protect Democracy identifies how “aspiring modern authoritarians tend to employ the same seven basic tactics in the pursuit of power.”¹¹⁵ Specifically:

- (1) They attempt to politicize independent institutions.
- (2) They spread disinformation.
- (3) They aggrandize executive power at the expense of checks and balances.

111. *Another New Version of SB 83*, *supra* note 68.

112. *SB 83 Receives 2d Hearing in House Committee*, OHIO CONF. AAUP NEWS & BLOG (Nov. 2, 2023), <https://ocaaup.org/news/sb-83-receives-2nd-hearing-in-house-committee/> [<https://perma.cc/59EQ-B8SG>]; see Jo Ingles, *Dozens of Unions in Ohio Coming Together to Oppose Controversial Higher Education Bill*, STATEHOUSE NEWS BUREAU (Sept. 11, 2023, 4:16 PM), <https://www.statenews.org/government-politics/2023-09-11/dozens-of-unions-in-ohio-coming-together-to-oppose-controversial-higher-education-bill> [<https://perma.cc/AS4P-4JDK>].

113. JENNIFER DRESDEN, AARON BAIRD & BEN RADERSTORF, PROTECT DEMOCRACY, *THE AUTHORITARIAN PLAYBOOK* (2022), <https://protectdemocracy.org/wp-content/uploads/2022/06/the-authoritarian-playbook-how-reporters-can-contextualize-and-cover-authoritarian-threats-as-distinct-from-politics-as-usual-1.pdf> [<https://perma.cc/L95G-FQUY>].

114. *About Us*, PROTECT DEMOCRACY, <https://protectdemocracy.org/about/> [<https://perma.cc/MLY2-CVPW>]. Based on various surveys and studies, the *Playbook* reports that “64% of Americans agree that democracy is in crisis and at risk of failing,” and “[o]nly 7% of young Americans view the United States as a ‘healthy’ democracy.” DRESDEN ET AL., *supra* note 113, at 5.

115. DRESDEN ET AL., *supra* note 113, at 8.

- (4) They quash criticism and dissent.
- (5) They specifically target vulnerable or marginalized communities.
- (6) They work to corrupt elections.
- (7) They stoke violence.¹¹⁶

The *Playbook* offers case studies of how each tactic is being used, usually by particular politicians and/or by national regimes in countries like Russia,¹¹⁷ Hungary,¹¹⁸ India,¹¹⁹ Venezuela,¹²⁰ and the United States.¹²¹ However, with regard to each of these tactics, the *Playbook* does not include any mention of educational gag orders or related state efforts, focusing mostly on national and federal efforts and measures. Yet, as discussed in Part I of this Article, the authoritarian project in the United States has been most effective, historically, at the subnational level. My analysis of SB 83 within sheds light on how these tactics described in the *Playbook* are being used to target autonomous *state* institutions in ways that contravene our presumed national commitments to democracy and may lead once again to the establishment of authoritarian enclaves.

SB 83 politicizes state academic institutions—whose legitimacy depends on their autonomy and independence—by inserting the state into the internal management of its IHEs and defining and dictating what concepts and ideas are off limits based the legislative majority’s own ideological preferences. It spreads disinformation by reinforcing a narrative by directing state institutions to overlook the “uncomfortable” parts of American history and promoting the idea that majority Americans are under attack by a “woke mob.”¹²² It quashes criticism

116. *Id.* at 8–9.

117. *Id.* at 10.

118. *Id.* at 11.

119. *Id.* at 15.

120. *Id.* at 16.

121. *Id.* passim.

122. Philip Bump, *The Rhetorical Power of The Word ‘Woke’ Is Far More Obvious than Its Definition*, WASH. POST (Nov. 8, 2021, 11:16 AM EST)

and dissent by identifying “controversial beliefs and policies” — comprised of pretty much everything that matters in our society — on which state institutions may not take a public position, and by replacing one purported “ideological litmus test” with its own, in the name of “intellectual diversity.” It specifically targets vulnerable or marginalized communities by prohibiting programs designed to create inclusive learning and teaching environments for historically excluded and marginalized students, staff, and faculty. And, though not specific to higher education institutions, the Ohio legislature has succeeded in creating political districts so gerrymandered to favor Republican candidates that even a conservative Ohio Supreme Court declared them unconstitutional in 2022 — though their order to re-draw districting lines had been ignored openly and flagrantly by Statehouse Republicans.¹²³ In November 2023, an even more conservative Supreme Court, in a “drastic change from previous rulings . . . chose to leave Statehouse redistricting maps in place for 2024 and beyond, denying a challenge to the constitutionality of the newest maps.”¹²⁴

As to calls for violence, this is one thing that SB 83 does not do — and perhaps that is the only “good” thing that can be said of it. The state’s targeting of public colleges and universities — the centers of knowledge production and dissemination in the United States — is crucial to the subnational authoritarian

<https://www.washingtonpost.com/politics/2021/11/08/rhetorical-power-word-woke-is-far-more-obvious-than-its-definition/> [<https://perma.cc/2XYJ-V3X5>] (commenting on Aaron Rodgers’ use of the term “woke mob” after Rodgers tried to explain his decision not to get a COVID-19 vaccine).

123. Susan Tebben, *Ohio Supreme Court Dismisses Redistricting Challenge, Leaving Statehouse Maps in Place*, OHIO CAP. J. (Nov. 28, 2023, 5:00 AM), <https://ohiocapitaljournal.com/2023/11/28/ohio-supreme-court-dismisses-redistricting-challenge-leaving-statehouse-maps-in-place/> [<https://perma.cc/VZ6B-ARVG>] (discussing the state Supreme Court’s rejection of Statehouse maps as unconstitutional and the Ohio Redistricting Commission’s “unprecedented position of refusing our orders, delaying these cases and disobeying our deadlines”); Rachel Selzer, *Ohio Supreme Court Allows Gerrymandered Legislative Maps to Remain for 2024*, DEMOCRACY DOCKET (Nov. 28, 2023), <https://www.democracydocket.com/news-alerts/ohio-supreme-court-allows-gerrymandered-legislative-maps-to-remain-for-2024/> [<https://perma.cc/GW92-AUM2>].

124. Tebben, *supra* note 123.

project because it recognizes just how important autonomous academic institutions are to democratic societies.

CONCLUSION

The Ohio legislature's targeting of public colleges and universities—the centers of knowledge production and dissemination in the United States—is crucial to the authoritarian project because it recognizes just how important autonomous academic institutions are to democratic societies. As of this writing, SB 83 has stalled in the House—but by the time of publication, it may very well have been passed and forwarded to Ohio Governor Mike DeWine for signature. If so, then we in Ohio will have joined the ranks of former “authoritarian enclaves” like Florida. But even if SB 83 is (finally) defeated, much of the writing is on the wall. A new play in the *subnational* authoritarian handbook is being tested and practiced in states like Florida and Ohio, and it is a play that could take democracy out at the knees. Knowledge, education, and democracy are all at risk.