

DREXEL LAW REVIEW

THOMAS R. KLINE SCHOOL OF LAW

VOLUME 16

2024

ISSUE 4

ARTICLE

ANTI-TRUTH MOVEMENTS IN POST WORLD WAR II GERMANY AND CONTEMPORARY TEXAS: THE REPETITION OF HISTORY AND LESSONS IN TRUTHFUL RECONSTRUCTION

*Antonio L. Ingram II**

ABSTRACT

*Legislators in Texas mounted an assault on multiracial democracy when they attacked public higher education throughout the Lone Star State in the 87th legislative session with the introduction of Senate Bills 16, 17 and 18.** Together, these bills arguably constituted a tripartite attack on the foundation of public higher education in Texas, seeking to curtail certain discussions of race, gender, and sexuality in university classrooms, ban diversity, equity, and inclusion offices and policies, and possibly punish professors who taught accurate racial history or engaged in diversity, equity, and inclusion-based policies. These types of legislative efforts against truth and attempts to foster belonging for minoritized groups are not without historical precedent. After the allied victory in World War II, similar assault on democracy arose in post-World War II*

* Assistant Counsel at the Legal Defense Fund. Special thanks to Alexandria Richards, Sarah Stone, and the editors at the *Drexel Law Review*. Gratitude is also due to the participants of the 2023 *Drexel Law Review* Symposium: Knowledge at Risk: Democratic Erosion and the Contemporary Assault on Education and Expertise. All views and mistakes are my own and do not represent the Legal Defense Fund.

** This article analyzes Senate Bill 16, which failed and an earlier version of Senate Bill 18 which did not become law. This article also discusses Senate Bill 17, but only in the context of its initial iteration and does not analyze or discuss the final version of Senate Bill 17 which became effective on January 1, 2024.

Germany. In the aftermath of the war, various reactionary groups in Germany attempted to curtail the truth of the Holocaust and transparent discussions of antisemitic human rights violations seen throughout the Third Reich in a way that arguably mirrors the attacks currently taking place in Texas on accurate and inclusive teaching. In keeping with democratic norms, post World-War II Germany responded with legislation to curtail the attempts to promulgate revisionist histories. Decades after the end of World War II and the Holocaust, Germany passed a series of laws prohibiting the denial of the Holocaust and restricting the promulgation of antisemitic revisionist histories. By analyzing the German response to the assaults on truth, and their free speech jurisprudence and First Amendment jurisprudence in the United States, lessons emerge for pursuing potential litigation to combat anti-democracy bills in legislative bodies across the United States.

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INTRODUCTION

The lynching of George Floyd ushered in a racial awakening that gripped many communities in the United States and

caused them to join in protest, often led by students, to confront the indignities Black Americans have faced for generations and address systemic racism and legacies of inequality with fresh eyes.¹ Despite its reputation for having predominately conservative political leadership, buttressed by a conservative electorate, the Lone Star State was also home to a movement for racial justice.² Protesters gathered in large cities such as Austin, Dallas, Houston, and San Antonio as well as smaller cities such as Waco, Odessa, Beaumont, and Amarillo to advocate for racial justice in their state and their country.³ As Texans protested racial injustice, they also began to demand change in their local communities, giving fresh wind to previous movements for racial justice. For example, in Carroll High School in Southlake, Texas⁴, an affluent suburb of Dallas, “racist incidents led previous trustees to embrace racial diversity teachings. The killing of George Floyd in Minneapolis in 2020 gave birth to a more insistent movement of young alumni who demanded students address white privilege and have every teacher and school trustee examined for implicit bias.”⁵ Specifically, students and parents advocated for a Cultural Competence Action Plan, which would implement diversity, equity, and inclusion practices and provide culturally appropriate and inclusive curriculum.⁶

1. See *What George Floyd Changed*, POLITICO (May 23, 2021, 7:00 AM), <https://www.politico.com/news/magazine/2021/05/23/what-george-floyd-changed-490199>

[<https://perma.cc/XHQ2-XHA5>]; Britny Eubank & Bryce Newberry, *Austin High School Students Lead Black Lives Matter Protest*, KVUE, <https://www.kvue.com/article/news/local/protests/austin-protest-black-lives-matter-austin-liberation-youth-movement/269-4988c30e-d011-473e-b671-701f87d7776a> [<https://perma.cc/ZQN7-3TMG>] (July 11, 2020, 10:23 PM).

2. See *Protests over George Floyd Death Erupt Across Texas*, KBMT 12NEWSNOW, <https://www.12newsnow.com/article/news/local/protests-across-texas-george-floyd/502-9843e775-071d-49be-a606-2ef2e65bc76c> [<https://perma.cc/5EB2-C52Z>] (May 29, 2020, 9:49 PM).

3. Sunny Sone, *The Protest Against Police Brutality in Texas, in Photos*, TEX. OBSERVER (June 1, 2020, 7:05 PM), <https://www.texasobserver.org/texas-protests-police-brutality-george-floyd/> [<https://perma.cc/W6KU-FGPX>].

⁴ I am a member of the legal team currently representing Southlake students and parents in an administrative complaint before the Department of Education, Office of Civil Rights.

5. Michael Powell, *In Texas, A Battle Over What Can Be Taught, and What Books Can Be Read*, N.Y. TIMES, <https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html> [<https://perma.cc/Q22K-HSAV>] (June 23, 2023).

6. See *The Cultural Competency Action Plan*, DIGNITY FOR ALL TEX. STUDENTS, <https://www.dignityforalltexasstudents.org/what-is-ccap> [<https://perma.cc/FY6V-JCX2>]; Leah Asmelash, *A School District Tried to Address Racism, a Group of Parents Fought Back*, CNN,

Similarly, in a suburb of Houston, a group of high school students organized a racial justice protest that attracted more than one thousand people.⁷

The conservative political leadership across Texas responded to this student lead racial justice movement, predicated in many ways on calling for more accurate histories and promoting more inclusive classrooms, by proposing what seemed to be reactionary laws to stifle progress and curtail what it viewed to be the source of these movements: “Critical Race Theory.”⁸ Conservative legislators initiated the Texas attack on Critical Race Theory in publicly funded primary and secondary schools through the passage of Senate Bill 3 in 2021.⁹ Then in 2023, Governor Greg Abbott, Lieutenant Governor Dan Patrick, and conservative legislators championed three bills to fundamentally reimagine public higher education through the lens of reactionary revisionism grounded in censorship and misinformation, leading the Texas Senate to introduce Senate Bill 16,¹⁰ Senate Bill 17,¹¹

<https://www.cnn.com/2021/05/05/us/critical-race-theory-southlake-carroll-isd-trnd/index.html> [https://perma.cc/SQ5U-MTTJ] (May 10, 2021, 7:58 PM).

7. Christopher Rim, *How Student Activism Shaped the Black Lives Matter Movement*, FORBES (June 4, 2020, 9:23 AM), <https://www.forbes.com/sites/christopherrim/2020/06/04/how-student-activism-shaped-the-black-lives-matter-movement/?sh=2cdf88574414> [https://perma.cc/2QH6-R83T].

8. See Asmelash, *supra* note 6.

The term “critical race theory” has been co-opted by opponents as a catch-all and rallying cry to silence any discussions about systemic racism, ban the truthful teaching of American history, and reverse progress toward racial justice. The term has been unjustifiably used to include all diversity and inclusion efforts, race-conscious policies, and education about racism, whether or not they draw from CRT. Attempts to ban CRT are really attacks on free speech, on discussions about the truthful history of race and racism in the U.S., and the lived experiences of Black people and other people of color.

Critical Race Theory: Frequently Asked Questions, LEGAL DEF. FUND, <https://www.naacpldf.org/critical-race-theory-faq/> [https://perma.cc/FH4X-LJN7].

9. Brian Lopez, *Republican Bill that Limits How Race, Slavery, and History Are Taught in Schools Becomes Law*, TEX. TRIB. (Dec. 2, 2021, 6:00 PM), <https://www.texastribune.org/2021/12/02/texas-critical-race-theory-law/> [https://perma.cc/3TLJ-MA3H]; S.B. 3, 87th Leg., 2d Sess. (Tex. 2021).

10. S.B. 16, 88th Leg., Reg. Sess. (Tex. 2023); Kate McGee, *How Republicans’ Threats to Tenure and Diversity Might Undercut Their Own Efforts to Advance Texas’ Universities*, TEX. TRIB. (Apr. 11, 2023, 5:00 AM), <https://www.texastribune.org/2023/04/11/texas-legislature-republicans-universities-tenure-diversity/> [https://perma.cc/2WYE-W296] [hereinafter McGee, *Republicans’ Threats Undercut Efforts*].

11. S.B. 17, 88th Leg., Reg. Sess. (Tex. 2023).

and Senate Bill 18¹² during the 88th Legislative Session.¹³ Senate Bill 16 sought to ban the teaching of so-called “Critical Race Theory” in public higher education throughout Texas.¹⁴ Senate Bill 17 sought to ban diversity, inclusion, and equity offices and policies in Texas higher education.¹⁵ Senate Bill 18 sought to ban tenure that raised a fear among professors about the possibility of Texas officials punishing academic speech viewed as dissident by the state.¹⁶

These proposed bills, when read together, created an environment that risked denying the historical and contemporary experiences of racial minorities and the LGBTQIA+ community and potentially creating legislative gag orders prohibiting discussions on undisputed histories of oppression. Moreover, they risked prohibiting interventions designed to create a sense of belonging for those communities that have been historically discriminated against, both inside and outside of the public university setting. These proposed attacks on truth are reminiscent of post-World War II Germany—when groups such as the Negationist and Revisionists rose up to deny the undisputed history of violence and oppression experienced by the European Jewish community under the Third Reich and promoted revisionist recollections of state-sanctioned discrimination and violence.¹⁷ Germany responded to the attacks on truth with legislation and jurisprudence, legally sanctioning voices of falsehood and uplifting the collective values of the post-World War II nation state.¹⁸ By looking at the German legal system’s

12. S.B. 18, 88th Leg., Reg. Sess. (Tex. 2023).

13. Senate Bill 16 failed to become law. Iterations of Senate Bill 17 and Senate Bill 18, not discussed in this article were successfully converted into laws. See Kate McGee, *For Higher Education in Texas, This Year’s Session Was a Mixed Bag of Interference and Investment*, TEX. TRIB. (June 5, 2023, 5:00 AM) [hereinafter McGee, *Higher Education in Texas*], <https://www.texastribune.org/2023/06/05/texas-legislature-universities-higher-education/> [https://perma.cc/U43B-DJ7F].

14. *Id.*

15. See S.B. 17 § 51.9317; McGee, *Higher Education in Texas*, *supra* note 13.

16. See S.B. 18 § 51.9415; McGee, *Higher Education in Texas*, *supra* note 13.

17. John C. Knechtle, *Holocaust Denial and the Concept of Dignity in the European Union*, 36 FLA. STATE U. L. REV. 41, 44–45 (2008).

18. *Id.* at 50.

response to assaults on truth and its free speech jurisprudence and the United States Supreme Court case, *Virginia v. Black*,¹⁹ advocates may glean comparative frameworks and insight for strategies to advance affirmative litigation in states like Texas to protect and promulgate accurate and inclusive educational policies. The actions undertaken by Germany to protect its nascent post-war democracy may hold lessons for how states, post-2020 racial awakening, can resist falling into the reactionary impulses of censorship and misinformation.

Part I of this Article provides an overview of Texas, beginning with the impact of the 2020 racial justice protests across Texas and the demands made by students and parents across the state that resulted in the backlash from conservative political officials. Additionally, this Part provides an overview of public comments made by Texas Governor Gregg Abbott and Texas Lieutenant Governor Dan Patrick expressing their disapproval for Critical Race Theory, diversity, equity, and inclusion, and professorial tenure. This Part will also discuss the executive actions taken to effectuate this vision and provide a foundation for the trifecta of proposed anti-truth legislation that is the subject of this Article.

Part II provides an overview of Senate Bills 16, 17, and 18 as introduced and discusses some of the most harsh and draconic measures that could have become law, though ultimately defeated. Specifically, this Part will focus on the prescription in Senate Bill 16 that a professor not “compel” a student to adopt beliefs that various forms of identity, race, sex, ethnicity are “inherently superior” to any other form of identity and how this could potentially get weaponized to curtail discussions of race, gender, sexual orientation, and historical events.²⁰ Further, this Part will examine Senate Bill 16’s penalty of tenure revocation for violating its speech-stifling provision. Part II will also

19. *Virginia v. Black*, 538 U.S. 343, 347 (2003).

20. See S.B. 16 § 51.982(b); Kate McGee, *Texas Senate Approves Bill Barring Professors From “Compelling” Students to Adopt Certain Political Beliefs*, TEX. TRIB. (Apr. 12, 2023), <https://www.texastribune.org/2023/04/11/texas-legislature-higher-education-political-bill/> [<https://perma.cc/QX4F-6VGX>] [hereinafter McGee, Bill Barring Professors].

summarize the original version of Senate Bill 17, with a focus on the prohibition against institutions requiring students or faculty to endorse ideologies that promote differential treatment for certain groups based on race, sexual orientation, gender identity and any mandatory trainings regarding those identities.²¹ Finally, this Part will summarize the original version of Senate Bill 18 and its mandate to abolish the institution of tenure and erode any protection that tenured faculty would have to resist the enforcement of Senate Bills 16 and 17.

Part III will turn to look at the history of post-World War II Germany and the specific approaches taken by anti-truth groups who sought to deny the Holocaust. Specifically, this Part will focus on the approach of the Negationists, who claimed the Holocaust never occurred, and that of the Revisionists, who agreed the Holocaust occurred as a historical event, but diminished its scope and violence.²² Moreover, this Part will examine Section 130 of the German Criminal Code, revised in 1994, and the history of antisemitism and aristocratic German culture that gave rise to it.²³ This includes an examination of Subsection 3, which “makes Holocaust denial a crime as an offense against the public peace,” and Subsection 4, which “considers Holocaust denial a form of libel against the victims.”²⁴

Part IV will examine how attempts to pass Senate Bills 16 and 18 arguably find analogs in the approach of the Negationists by attempting to silence discussions related to race, gender identity, and sexuality believed to be false. Additionally, this Part will examine how the attempt to enact Senate Bill 17 compares to the approach of the Revisionists by selectively banning diversity, equity, and inclusive programming. This Part argues that this selectivity is an admission that some histories of state-

21. See S.B. 17, 88th Reg. Sess. § 51.603(a)(1)(A-B) (Tex. 2023).

22. Knechtle, *supra* note 17, at 44–45.

23. See generally Robert A. Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163, 181–91 (2006) [hereinafter, Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*].

24. Thomas Just, *Germany’s Approach to Countering Antisemitism Since Reunification*, 39 GER. POL. & SOC’Y 1, 3 (2021).

sanctioned discrimination exist, as embedded in federal law, and therefore need to be addressed through at least piecemeal diversity, equity, and inclusion practices.

Part V will conclude by examining how United States jurisprudence may be able to learn from the power of history to create a new jurisprudence borrowing from the German system while maintaining fealty to the First Amendment by considering the German conception of dignity and how it might be applied to other protected groups in the United States.²⁵ Specifically, this Part will examine how the consideration of history in German free speech jurisprudence, may have an analogue in the United States case of *Virginia v. Black*, where the court referred to the Ku Klux Klan and the history of apartheid in the United States when upholding a criminal statute prohibiting cross burning with the intent to intimidate.²⁶ This Part will explore how the emphasis on how history created space for advocacy in Germany's free speech jurisprudence and how through using history, *Virginia v. Black* may also create space to challenge anti-truth laws that harm protected classes—even under America's robust First Amendment jurisprudence—as advocates grapple with anti-truth legislation in states like Texas.

I. AN OVERVIEW OF TEXAS

The murder of George Floyd in 2022 spurred protests for racial justice and against police violence across the nation but had a particular salience in Texas. Even though Minneapolis police officers committed the extrajudicial killing of Mr. Floyd in Minnesota, Mr. Floyd did not hail from the Midwest.²⁷ Rather, he “spent most of his life in Houston’s historically black Third Ward neighborhood after moving to the city as a child,” moving

25. See generally Neville Cox, *Blasphemy, Holocaust Denial, and the Control of Profoundly Unacceptable Speech*, 62 AM. J. COMPAR. L. 739, 753 (2014).

26. *Virginia v. Black*, 538 U.S. 343, 352 (2003).

27. Aliyya Swaby, Jolie McCullough, & Cassandra Pollock, *Texas Police Using Tear Gas and Rubber Bullets on Protesters Incites More Violence, Experts Say*, TEX. TRIB. (June 3, 2020, 3:00 PM), <https://www.texastribune.org/2020/06/03/texas-police-force-protests-george-floyd/> [https://perma.cc/6U9W-XBRC].

to Minneapolis in search of work a few years earlier.²⁸ Mr. Floyd's connections to Texas were significant enough that he was buried in Houston.²⁹ The protests against racial injustice and police brutality covered his home state and spread to both traditionally conservative and progressive communities, such as Lubbock, Fort Worth, El Paso, San Antonio, Austin, Houston, Dallas, Marfa, and Odessa.³⁰ Public high school students, public college students and young college alumni constituted integral parts of many of these protests.³¹ This level of student activism prompted Governor Greg Abbott to speak with mayors across Texas about these racial justice protests, saying, "I'll be candid with you—everybody's talking about the same thing: They need more resources because of the large numbers of people who are involved in these protests" ³² Consequently, Governor Abbott declared a state of disaster for Texas "to designate federal law enforcement officers to perform the duties of 'peace officers'" in Texas to help curtail the student lead social movement taking place across the state.³³ Governor Abbott's

28. *Id.*

29. *Id.*; Brakkton Booker, *Family of George Floyd, Whose Death Sparked Protests, Says Final Goodbye*, NPR, <https://www.npr.org/2020/06/09/870808615/george-floyd-whose-death-ignited-a-social-justice-movement-to-be-buried-in-houst> [<https://perma.cc/GXK6-4DEJ>] (June 9, 2020, 7:28 PM).

30. *Photo Gallery: Black Lives Matter Protests in Texas*, TEX. MONTHLY (June 10, 2020), <https://www.texasmonthly.com/news-politics/photos-george-floyd-protests-texas/> [<https://perma.cc/6RVH-F8DK>].

31. See Britny Eubank & Bryce Newberry, *Austin High School Students Lead Black Lives Matter Protest*, KVUE, <https://www.kvue.com/article/news/local/protests/austin-protest-black-lives-matter-austin-liberation-youth-movement/269-4988c30e-d011-473e-b671-701f87d7776a> [<https://perma.cc/ZQN7-3TMG>] (July 11, 2020, 10:23 PM); *City of Prairie View Teams Up with PVAMU Faculty, Staff, Students to Paint "Black Lives Matter" on University Drive*, PRAIRIE VIEW A&M UNIV. (June 19, 2020), <https://www.pvamu.edu/blog/city-of-prairie-view-teams-up-with-pvamu-faculty-staff-students-to-paint-black-lives-matter-on-university-drive/> [<https://perma.cc/5X44-C3VPI>]; *Alumna Organizes Socially Distant Black Lives Matter Protest*, UNIV. OF TEX. AT DALL. (July 8, 2020), <https://development.utdallas.edu/alumna-organizes-socially-distant-black-lives-matter-protest/> [<https://perma.cc/W5HZ-XVHQ>].

32. *As Donald Trump Threatens to Deploy the Military, Texas Officials Urge Calm After a Weekend of Protests*, TEX. TRIB. (June 1, 2020, 7:00 PM), <https://www.texastribune.org/2020/06/01/floyd-protests-trump-abbott/> [<https://perma.cc/9HBV-X363>].

33. Eddie Gaspar, Shelby Tauber, Pu Ying Huang & Miguel Gutierrez Jr., *A Weekend of Protest and Mourning: George Floyd's Death Spurs Demonstrations in Texas Cities*, TEX. TRIB., <https://www.texastribune.org/2020/05/29/george-floyd-texas-protest-photos-houston-dallas-austin/> [<https://perma.cc/D4UY-N97X>]. (May 31, 2020).

designation of a state of disaster underscores the significance of these protests and their perceived threat by Texas politicians. Cities like San Antonio and Dallas also instituted curfews during the protests.³⁴ It is within this social and political upheaval that attacks on “Critical Race Theory”, tenure, and diversity, equity, and inclusion arose as part of the Texas political system.

A. *Anti-truth Activities In The Texas Legislative and Executive Branches*

In the months after the 2020 racial reckoning in Texas, and as the 88th legislative session approached, the political leadership in Texas made a series of public comments attacking “Critical Race Theory” and diversity, equity, and inclusion in higher education in direct opposition to the demands of statewide protests for racial justice. Lieutenant Governor Dan Patrick spearheaded the attack on “Critical Race Theory” by attacking the academic freedom that tenure afforded professors in Texas’ public higher education.³⁵ The modern institution of tenure dates back to 1940 and it serves to “safeguard academic freedom” of professors and allows for them to teach, research and engage in speech without the fear of being terminated for their ideas or research.³⁶ This is especially true for minority faculty in Texas as over 700 professors, many of whom were faculty of color, signed a petition about the importance of tenure in spring of 2023.³⁷ In the petition the faculty of color described how faculty of color experience disproportionate amounts of discrimination and that tenure offers protection and security for these

34. *See id.*

35. Kate McGee, *Lt. Gov. Dan Patrick Proposes Ending University Tenure to Combat Critical Race Theory Teachings*, TEX. TRIBUNE (Feb. 18, 2022, 12:00 PM), <https://www.texastribune.org/2022/02/18/dan-patrick-texas-tenure-critical-race-theory/> [https://perma.cc/J6RT-49VQ] [hereinafter McGee, *Ending University Tenure*], (quoting governor Patrick saying “I will not stand by and let looney Marxist UT professors poison the minds of young students with Critical Race Theory”).

36. *Tenure*, AM. ASS’N OF UNIV. PROFESSORS, <https://www.aaup.org/issues/tenure> [https://perma.cc/67QH-FY5N] (Feb. 8, 2024).

37. Cora Neas, *Texas Professors Petition for Keeping Tenure System as Senate Ban Bill Advances to House*, <https://www.kxan.com/news/texas-politics/texas-professors-petition-for-keeping-tenure-system-as-senate-ban-bill-advances-to-house/> [https://perma.cc/AR59-AEHF].

professors.³⁸ The petition also described how tenured allowed faculty of color to research and teach controversial subjects related to histories of race and racism, structural inequalities and systemic abuses of power without fear of losing their jobs.³⁹

In its previous session, the Texas legislature passed Senate Bill 3, which banned “critical race theory” in Texas public schools from kindergarten to twelfth grade.⁴⁰ Public high schools generally do not have the protections of tenure to protect academic freedom, and many professors of color, protected by tenure, stood in solidarity with their primary and secondary school counterparts in the wake of Senate Bill 3. For example, in response to Senate Bill 3, faculty at the University of Texas at Austin condemned the bill and invoked academic freedom in passing a resolution decrying the Texas Legislature’s endeavor to curtail accurate discussions of history and race in America in public primary and secondary schools across Texas.⁴¹ Lieutenant Governor Patrick responded to the resolution with public statements like this one:

Tenured professors must not be able to hide behind the phrase “academic freedom” and then proceed to poison the minds of our next generation. I am outraged by the University of Texas at Austin’s Faculty Council’s 41-5 vote on a resolution in support of teaching critical race theory, and I am further outraged that the Faculty Council told the legislature and the UT Board of Regents that it is none of their business what they taught. Universities across Texas are being taken

38. *Id.*

39. *Id.*; Petition to Texas State Legislature on Senate Bill 18 (Apr. 14, 2023) (available at <https://www.kxan.com/wp-content/uploads/sites/40/2023/05/Stop-the-Elimination-of-Tenure-Final-Petition-FINAL.pdf> [<https://perma.cc/FKZ8-27PD>]).

40. See S.B. 3, 87th Leg. 2d Sess. (Tex. 2021); Lopez, *supra* note 9.

41. See Colleen Flaherty, *UT Austin Council Approves Academic Freedom Statement on CRT*, INSIDE HIGHER ED (Feb. 15, 2022), <https://www.insidehighered.com/quicktakes/2022/02/16/ut-austin-council-approves-academic-freedom-statement-crt> [<https://perma.cc/C459-8NWU>].

over by tenured, leftist professors, and it is high time that more oversight is provided.⁴²

Lieutenant Governor Patrick further commented on X, “I will not stand by and let looney Marxist UT professors poison the minds of young students with Critical Race Theory. We banned it in publicly funded K-12 and we will ban it in publicly funded higher ed.”⁴³ He explained that legislative “language will be amended to include that: ‘teaching critical race theory is prima facia evidence of good cause for tenure revocation’” and stated that Texans “are not going to allow a handful of professors who do not represent the entire group to teach and indoctrinate students with critical race theory, that we are inherently racist as a nation.”⁴⁴ Instead, he said, tenure, which typically is an offer of permanent employment, would be abolished and decisions about the future employment of a faculty member would be reviewed on an annual basis.⁴⁵

A few weeks into the legislative session, Lieutenant Governor Patrick reiterated his commitment to attacking Critical Race Theory *vis a vis* tenure in his inauguration comments. Reflecting his deep desire to curtail ideas about race and gender that he found unsavory, he explained that the political leadership had already banned critical race theory in K-12 and that because of the defiance exhibited by the U.T. Austin professors through their resolution, he was going to spearhead the charge to end

42. Lt. Gov. Dan Patrick Says Teaching of Critical Race Theory Should be Grounds for Firing at Texas Universities, Wants to End Tenure for Professors, KVUE, <https://www.kvue.com/article/news/politics/dan-patrick-critical-race-theory-university-of-texas/269-d2ceabc8-1151-45ef-851d-af16db51fdb2> [<https://perma.cc/563G-ZP3T>] (Feb. 18, 2022, 6:58 PM).

43. Dan Patrick (@DanPatrick), X (Feb. 18, 2022, 4:09 PM), <https://twitter.com/DanPatrick/status/1493694009600053250> [<https://perma.cc/VN4G-AVJC>]; McGee, *Ending University Tenure*, *supra* note 35.

44. Julián Aguilar, Lt. Gov. Dan Patrick Wants to Revoke Tenure for Professors Who Teach Critical Race Theory, HOUS. PUB. MEDIA (Feb. 21, 2022, 7:59 AM), <https://www.houstonpublicmedia.org/articles/news/politics/2022/02/21/419441/lt-gov-dan-patrick-wants-to-revoke-tenure-for-professors-who-teach-critical-race-theory/> [<https://perma.cc/V4HC-C6G9>].

45. See Megan Menchaca, Lt. Gov. Dan Patrick Pledges to End Tenure for New Hires at Texas Public Universities, AUSTIN AM.-STATESMAN, <https://www.statesman.com/story/news/2022/02/18/lt-gov-dan-patrick-pledges-end-tenure-new-hires-texas-critical-race-theory-crt/6843755001/> [<https://perma.cc/UC38-QQJX>] (Feb. 18, 2022, 4:22 PM).

tenure and the protections it offered professors.⁴⁶ Lieutenant Governor Patrick grounded his opposition to tenure in his ideological disdain for what he felt was occurring in university classrooms and explained:

I don't want teachers in our colleges saying America is evil, and capitalism is bad, and socialism is better, and if that means some of those professors who want to teach that don't come to Texas, I'm okay with that. I want professors who love this country, who love this state, and raise up the next generation – be proud of being in business.⁴⁷

Conversely, Governor Abbott led the charge on attacking diversity, equity, and inclusion policies and practices. In February 2023, Governor Abbott's office issued a memorandum to state agencies explaining that the "innocuous-sounding notion of Diversity, Equity, and Inclusion (DEI) has been manipulated to push policies that expressly favor some demographic groups to the detriment of others" and that using diversity, equity, and inclusion in the workplace or as a condition of employment violated the law.⁴⁸

This gubernatorial memorandum caused many universities to preemptively pause their diversity, equity, and inclusion programs and offices before elected officials introduced anti-diversity, equity, and inclusion legislation.⁴⁹ These preemptive

46. Lt. Gov. Dan Patrick Delivers Inauguration Speech, NBC 5 DFW, (Jan. 17, 2023, 1:15 PM) <https://www.nbcdfw.com/news/local/lt-gov-dan-patrick-delivers-inauguration-speech/3172160/> [<https://perma.cc/YCQ3-83QM>] [hereinafter *Patrick Delivers Inauguration Speech*].

47. *Hearing Inaugurating the Governor-Elect and the Lieutenant Governor-Elect*, 88th Leg. Sess., at 34–38 (Tex. 2023) (statement of Lt. Gov. Dan Patrick); see *Patrick Delivers Inauguration Speech*, *supra* note 46, at 13:31.

48. Sophia Beausoleil, *Gov. Abbott's Office Says Using Diversity Initiatives When Hiring is Illegal*, NBC 5 DFW, <https://www.nbcdfw.com/news/local/texas-news/abbott-warns-against-diversity-initiatives-in-hiring/3193028/> [<https://perma.cc/PW3C-HFWQ>] (Feb. 14, 2023, 4:33 PM); Letter from Gardner Pate, Chief of Staff to Tex. Gov. Greg Abbott, to Porter Wilson, Exec. Dir. of Emp. Ret. Sys. of Tex. (Feb. 4, 2023) (available at https://www.documentcloud.org/documents/23601962-file_4253 [<https://perma.cc/6SXB-QJFM>]).

49. See Kate McGee, *University of Texas System Pauses New Diversity, Equity and Inclusion Policies*, TEX. TRIB. (Feb. 22, 2023, 4:00 PM), <https://www.texastribune.org/2023/02/22/university-texas-system-dei-pause/> [<https://perma.cc/7W6C-R439>] [hereinafter McGee, *Texas Pauses New*

changes reflected the powerful public discourse surrounding the legislative attacks to come on attempts to foster a sense of belonging among minoritized students and professors.

II. AN OVERVIEW OF POTENTIAL ANTI-TRUTH HIGHER EDUCATION LEGISLATION IN TEXAS

On March 10, 2023, the Texas Senate introduced the bill text for Senate Bills 16, 17, and 18 giving legislative flesh to the anti-critical race theory, anti-tenure, and anti-DEI public comments made by the Texas political leadership.⁵⁰ While these bills underwent various iterations, this Article will focus on the earlier versions of the bills and their provisions that reflect the impulses characteristic of a Texas legislature with a one-party supermajority that does not typically need bipartisan support to pass prominent pieces of legislation.

A. Senate Bill 16

The opening language in Senate Bill 16⁵¹ describes its purpose as “a prohibition on compelling students enrolled at those institutions to adopt certain beliefs.”⁵² The bill specifies that a “faculty member of an institution of higher education may not compel or attempt to compel a student enrolled at the institution to adopt a belief that any race, sex, or ethnicity or social, political, or religious belief is inherently superior to any other race, sex, ethnicity, or belief.”⁵³ Senate Bill 16 also provides that a violation of Senate Bill 16 would lead to a faculty member facing disciplinary action, including the revocation of tenure.⁵⁴

DEI] (discussing Texas A&M University, Texas Tech. University, and University of Texas System).

50. S.B. 16, 88th Leg., Reg. Sess. (Tex. 2023); S.B. 17, 88th Leg., Reg. Sess. (Tex. 2023); S.B. 18, 88th Leg., Reg. Sess. (Tex. 2023).

⁵¹ Senate Bill 16 failed to pass in the Texas State House and did not become law. William Melhado, *Texas House's Weekend off Means Key Senate Bills Die After Missing a Legislative Deadline*, TEX. TRIB. (May 20, 2023, 6:00 PM), <https://www.texastribune.org/2023/05/20/texas-lgbtq-guns-education-bills-die/> [https://perma.cc/SQ9Q-K4MP].

52. S.B. 16.

53. *Id.* § 51.982(b).

54. *Id.* § 51.942(c-1).

During the legislative hearing, many professors testified against the bill; one in particular, Dr. Karma Chávez, explained, “[m]y worry here is that SB 16 is a solution looking for a problem that doesn’t exist[.]”⁵⁵ Senator Mayes Middleton explained that it is important for legislators to help ensure that students do not “feel they have to censor their sincerely held belief or their ideology, what they truly believe about a particular issue.”⁵⁶ However, professors like Dr. Chávez retorted:

But you cannot just make arguments based on an unfounded opinion I do think that one of the challenges is when you’re talking about studies of race, and sex, and gender, sexuality . . . the scholarship that exists across the humanities and social sciences, by and large, does not support a conservative viewpoint. Not because it’s based on a liberal or politicized opinion, but that’s what the principal archival or social scientific research has shown about a given topic. But it’s not political, it’s research.⁵⁷

When Senate Bill 16 passed in the Senate, the Lieutenant Governor commented:

Last session, we banned CRT in kindergarten through 12th grade because no child should be taught that they are inferior to others due to their race, sex, or ethnicity. In 2023 this should be common sense but the radical left’s drive to divide our society is relentless. This session, there was no question that we would ban the teaching of CRT in Texas universities. Liberal professors, determined to indoctrinate our students with their

55. Kate McGee, *Texas Senate Approves Bill Barring Professors from “Compelling” Students to Adopt Certain Political Beliefs*, TEX. TRIB., <https://www.texastribune.org/2023/04/11/texas-legislature-higher-education-political-bill/> [<https://perma.cc/QX4F-6VGX>] (Apr. 12, 2023) [hereinafter McGee, *Bill Barring Professors*].

56. *Id.*

57. *Id.*

woke brand of revisionist history, have gone too far.⁵⁸

The K-12 version of the ban on Critical Race Theory and the books that school district attempt to ban demonstrate the attack on accurate depictions of America's racial history that undergirded the introduction of Senate Bill 16. For example, in Round Rock, Texas, a suburb of Austin, complaints about *Stamped: Racism, Antiracism, and You* by Jason Reynolds and Ibram X. Kendi faced removal as it address the history of racist ideas in the United States.⁵⁹ Similarly, in Klein Independent School District, located in a suburb of Houston, officials removed, *The New Jim Crow*, by Michelle Alexander; *They Called Themselves the K.K.K.: The Birth of an American Terrorist Group*, by Susan Bartoletti; and *Everything You Love Will Burn: Inside the Rebirth of White Nationalism in America*, by Vegas Tenold, all books about the racial history and racial reality of the United States.⁶⁰ In Katy Independent School district, also a suburb of Houston, officials removed *This Is Your Time*, by Ruby Bridges; *Etched in Clay*, by Andrea Chang; and *Beloved*, by Toni Morrison, all books that deal with the history of race in the United States.⁶¹ Though these book bans were never justified using Senate Bill 3, these demonstrate how legislation can empower individuals to engage in anti-

58. Dan Patrick, *Lt. Gov. Dan Patrick: Statement on the Passage of Senate Bill 16 – Banning Critical Race Theory (CRT) in Texas Universities*, OFF. OF THE LIEUTENANT GOVERNOR (Apr. 12, 2023), <https://www.ltgov.texas.gov/2023/04/12/lit-gov-dan-patrick-statement-on-the-passage-of-senate-bill-16-banning-critical-race-theory-crt-in-texas-universities/> [https://perma.cc/EZ9Y-AQHA].

59. Tat Bellamy-Walker, *Meet the Moms of Color from Texas Fighting Book Bans at Their Kids' Schools*, NBC NEWS (Feb. 2, 2022, 7:26 AM), <https://www.nbcnews.com/news/nbcblk/meet-moms-color-texas-fighting-book-bans-kids-schools-rcna13701> [https://perma.cc/V2ZH-SZV8].

60. E-mail from Am. C.L. Union of Tex., Am. C.L. Union, Big Thought, Child.'s Def. Fund – Tex., Equal. Tex., Intercultural Dev. Rsch. Ass'n, Tex. C.R. Proj., Tex. Freedom Network & Young Leaders, Strong City to Klein Indep. Sch. Dist. & Superintendent McGown (Apr. 20, 2022), https://www.aclutx.org/sites/default/files/4.20.22_klein_isd_book_removals_1.pdf [https://perma.cc/SU73-AJKM] (listing banned books and their topic such, as books about racism and the history of racism, LGBTQ+ issues, and reproductive rights).

61. E-mail from Am. C.L. Union of Tex., Big Thought, Intercultural Dev. Rsch. Ass'n, Tex. C.R. Proj., Young Leaders, Strong City, Am. C.L. Union, Child.'s Def. Fund – Tex., Equal. Tex. & Tex. Freedom Network to Katy ISD. Bd. Members & Superintendent Gregorski (Apr. 20, 2022), https://www.aclutx.org/sites/default/files/4.20.2022_katy_isd_book_removals_1.pdf [https://perma.cc/A7QZ-Q2VT].

democratic behaviors. The same legislators under Senate Bill 16 sought to rewrite the story of our country and blot out the parts of our American story that are incongruent with their American mythologies through silencing accurate and inclusive discussions of race and history.

B. Senate Bill 17

As for Senate Bill 17, it similarly borrows the compelled language from Senate Bill 16 but is directed at both faculty and institutions. Specifically, Senate Bill 17 states:

- (a) an institution of higher education may not:
 - (1) compel, require, induce, or solicit a student enrolled at the institution, an employee or contractor of the institution, or an applicant for admission to or employment or contracting at the institution to:
 - (A) endorse an ideology that promotes the differential treatment of an individual or group of individuals based on race, color, or ethnicity; or
 - (B) provide a statement of the person's:
 - (i) race, color, ethnicity, or national origin, except to record any necessary demographic information;
 - (ii) views on, experience with, or past or planned contributions to efforts involving diversity, equity, and inclusion, marginalized groups,

antiracism, social justice, intersectionality, or related concepts; or

(iii) views on or experience with race, color, ethnicity, national origin, or other immutable characteristics. . . .⁶²

The initial prohibitions listed in Senate Bill 17 demonstrate the ideological attacks on the lexicon of discussions involving the history of race in the United States and methods to remediate historical discrimination. The bill language initially banned trainings around antiracism, intersectional and social justice⁶³ in a clear attempt to send a message that paradigms and concepts meant to give language to historical discrimination are not welcome on public college and universities in Texas nor are attempts to remediate those history. The censorship of the language of these issues functions as a tool to silence discussions and proposed solutions by stripping university staff from naming and giving meaning to the lived reality that so many of their students exist in and learn in. Senate Bill 17 also initially prohibited the provision of “preferential consideration to a student enrolled at the institution, an employee or contractor of the institution, or an applicant for admission to or employment or contracting at the institution on the basis of the person’s unsolicited statement” regarding the previously prohibited topics.⁶⁴ The initial iteration of Senate Bill 17 arguably sought to prevent disparities in the hiring of diverse faculty, which was a product of historical state sanctioned discrimination, from being remediated under state law. For example, Chair of the Texas Legislative Black Caucus, Representative Ron Reynolds explained, “[d]iversity, equity and inclusion programs are designed so that they could address those inequities that existed for centuries. It

62. S.B. 17 § 51.603(a)(1). These provisions of Senate Bill 17 failed to become law.

63. See S.B. 17. § 51.9319(b). This provision of Senate Bill 17 failed to become law.

64. S.B. 17 § 51.603(a)(2). This provision of Senate Bill 17 failed to become law.

is just recently that we started to make some marginal progress because of these very initiatives.”⁶⁵ Specifically in Texas, only 5% of tenured faculty are Black.⁶⁶ Yet, under Senate Bill 17’s initial prohibition, hiring committees were likely unable to take into account this stark underrepresentation and potentially lose tools designed to help engage in remedial hiring practices to create more a more diverse academy.⁶⁷

A prior version of Senate Bill 17 also included harsh penalties for individual faculty members and institutions found in violation including being placed on unpaid academic leave for the first violation for one academic year.⁶⁸ The second violation resulted in termination and placement on a black list and barred from employment at any public institution of higher education in Texas for 5 years.⁶⁹ In addition to the penalties against individual faculty members, institutions would have faced a penalty of \$1 million dollars for violating this prior version of Senate Bill 17.⁷⁰

Despite the harsh penalties in the initial iterations of the bill, they failed to become a part of the final law along with all of the explicit subject matter prohibitions. Nonetheless, Black legislators still expressed concerns about the motivations behind the proposed legislation. For example, Representative Reynolds challenged Senate Bill 17 on the House Floor and asked: “What kind of message are we sending to African Americans, to Hispanics, to Asians, to the disabled, to veterans that will be

65. Kirk McDaniel, *Texas Governor Signs Ban on College Diversity Programs into Law*, COURTHOUSE NEWS SERV. (June 14, 2023), <https://www.courthousenews.com/texas-governor-signs-ban-on-college-diversity-programs-into-law/> [<https://perma.cc/7UUG-44MZ>].

66. Kalley Huang & Valeria Olivares, *Why Are so Few Black Professors Tenured? Texas Has Made Little Progress Despite Promises of Change*, DALL. MORNING NEWS (July 15, 2021, 6:00 AM), <https://www.dallasnews.com/news/education/2021/07/15/why-are-so-few-black-professors-tenured-texas-has-made-little-progress-despite-promises-of-change/> [<https://perma.cc/9CN2-3WXJ>] (stating that in 2019, 4.64% of tenured professors in Texas were Black).

67. See S.B. 17 §§ 51.9317(a)(2)(A), 51.603(a)(2).

68. *Id.* § 51.9317(i)(1)(A). This provision of Senate Bill 17 failed to become law.

69. *Id.* § 51.9317(i)(1)(B). This provision of Senate Bill 17 failed to become law.

70. *Id.* § 51.9317(1). This provision of Senate Bill 17 failed to become law.

adversely impacted by this piece of legislation?”⁷¹ Another Black legislator, Representative Barbara Gervin-Hawkins said that Senate Bill 17 would be a detrimental regression for the state of Texas and that “[w]e must recognize that diversity is not a threat but a strength.”⁷²

Conversely, Senator Brandon Creighton, the bill’s sponsor, commented after bill passed:

The days of political oaths, compelled speech, and racial profiling in university hiring are behind us. Moving forward, Texas will prioritize the advancement of the most qualified individuals and endorse policies that promote diversity and equality for our great state.⁷³

Senate Bill 17 seemingly sought to prohibit positive interventions on minoritized populations across higher education in Texas and its opponents appeared to view it as a way to return Texas back to a place where meritocracy reigned, drawing upon anti-race conscious admissions sentiment, despite that Senate Bill 17’s original language focused on prohibiting topics that impacted the discussions around race based and sex-based disparities. In the original iterations of Senate Bill 17, there were prohibitions about discussing topics such as intersectionality and social justice in statements referred to as “loyalty oaths,” also known as diversity statements.⁷⁴ Conservative legislators argued these statements constitute a partisan ideological litmus test that infringes upon the ideological neutrality of public institutions in Texas.⁷⁵ These diversity statements are often mere

71. Nicole Chavez, *Black Lawmakers in Texas Criticize Bill That Seeks to Ban DEI Offices in Higher Education*, CNN (May 23, 2023, 2:20 PM), <https://www.cnn.com/2023/05/23/politics/texas-house-dei-college-legislation-reaj/index.html> [<https://perma.cc/W8XL-THPQ>].

72. *Id.*

73. *Senator Brandon Creighton on the Passage of SB 17, Ending DEI at Texas Public Colleges and Universities*, TEX. S. (May 28, 2023), <https://senate.texas.gov/press.php?id=4-20230528a> [<https://perma.cc/59LK-8CYW>].

74. See Kate McGee, *Texas Senate Approves Bill that Would Ban Diversity Programs in Public Universities*, TEX. TRIB., <https://www.texastribune.org/2023/04/19/texas-senate-dei-universities/> [<https://perma.cc/46A4-JG4V>] (Apr. 20, 2023) [hereinafter McGee, *Bill Barring University Diversity Programs*].

75. See *id.*

expressions of commitment to a broad array of diverse communities, including but not limited to communities of color, but also first-generation professionals, immigrants, individuals with disabilities, and veterans without requiring any particular ideological orientation. Rather, diversity statements used across public colleges and universities in the United States often help recruit staff and faculty who can effectively teach, advise, and mentor students from a wide array of communities.⁷⁶ In particular, diversity statements can be predicated on the notion that historical disparities exist and that in order to fully effectuate the pedagogical goals of institutions of higher education, staff need to demonstrate the ability to effectively communicate and serve students of a variety of backgrounds.⁷⁷ These types of statements do not necessarily define diversity in any particular way, and potential job candidates of all background often have the ability to effectively talk about how through their work or identity to demonstrate that they will be effective administrators and professors.⁷⁸ Despite what should be common sense goals for public colleges and universities, legislation like the initial versions Senate Bill 17 can lead to the possible removal of tools that helped minoritized students feel safe and a sense of belonging once they matriculated into a public higher education system, thus potentially hamstringing the ability for universities to recruit culturally competent staff to serve those same students.

76. See, e.g., *Drafting a Diversity, Equity, and Inclusion (DEI) Statement*, UNIV. OF TEXAS AT AUSTIN CTR. FOR TEACHING AND LEARNING, <https://ctl.utexas.edu/drafting-diversity-equity-and-inclusion-dei-statement> [<https://perma.cc/BYZ4-UPMF>] (explaining that “everyone has something to contribute” in a DEI statement); Misbah Hyder, *Writing a DEI Statement*, UNIV. NOTRE DAME, <https://learning.nd.edu/resources/writing-a-dei-statement/> [<https://perma.cc/98T9-38Q4>] (explaining that DEI statements are a symbol of inclusivity).

77. See, e.g., *Drafting a Diversity, Equity, and Inclusion (DEI) Statement*, *supra* note 76 (explaining that DEI statements allow universities to combat the “culture taxation” historically imposed on members of the community from marginalized backgrounds).

78. See Sara L. Beck, *Developing and Writing a Diversity Statement*, VAND. UNIV., <https://cft.vanderbilt.edu/guides-sub-pages/developing-and-writing-a-diversity-statement/#write> [<https://perma.cc/L5ZZ-SQ7J>] (providing examples of diversity statement prompts and topics that are generally covered for faculty positions).

C. Senate Bill 18

Finally, a prior version of Senate Bill 18 proposed that “[a]n institution of higher education may not grant an employee of the institution tenure or any type of permanent employment status.”⁷⁹ Compared to the language of Senate Bills 16 and 17 discussed above, the language of Senate Bill 18 appears more innocuous; however, context illustrates how these three bills had the potential of becoming a multiprong attack on public higher education.

The attack on tenure represents a method of constraining professors who are seen as instruments of implementation behind critical race theory and diversity, equity, and inclusion. The protection that tenure affords is especially important in a state like Texas where professors may have ideas that run contrary to conservative political leadership. For example, in 2022, the dean at the University of Houston, Dr. Alan Dettaff, lost his position as head of their school of social work due to his ideas regarding social justice and abolition.⁸⁰ Fortunately, the former dean was a tenured professor and able to return to his academic work despite his ideas costing him his deanship.⁸¹ In the absence of tenure, this type of faculty member would have likely faced unemployment. By abolishing the institution of tenure, the political leadership, under the failed version of Senate Bill 18, seemingly sought to strip professionals of the academic shield, like the one Dr. Dettlaff successfully raised, to resist edicts demanding ideological conformity, revisionist histories and less inclusive educational environments. In the wake of Senate Bill 18 which went into effect September 1, 2023, a Black associate professor of history on Africa and the African Diaspora at a Texas public university, Dr. Mickie Mwanzia Koster, was notified by email that she would be fired without receiving any due process despite

79. S.B. 18, 88th Leg., Reg. Sess. (Tex. 2023). This version of Senate Bill 18 failed to become law.

80. Colleen Flaherty, *Too Far Afield?*, INSIDE HIGHER ED (Jan. 5, 2023), <https://www.insidehighered.com/news/2023/01/06/u-houston-removes-social-justice%E2%80%93focused-dean-social-work> [<https://perma.cc/527Z-RJDS>].

81. *Id.*

having tenure.⁸² Given the political context of Senate Bill 18, it is not a surprise the faculty of color who teach Black history in Texas public schools are amongst the first facing termination for teaching inclusive and accurate histories.

III. ANTI-TRUTH MOVEMENTS IN POST-WORLD WAR II GERMANY: NEGATIONISTS AND REVISIONISTS

The attack on accurate discussions surrounding history and state-sanctioned violence after significant times of social and political upheaval is not without precedent. Unlike in Texas where attacks on truth seemed to stem from governmental leaders, such attacks in post-World War II Germany came from non-governmental Holocaust denial groups.⁸³ During World War II, six million Jewish people lost their lives at the hands of Adolf Hitler and the Nazi regime.⁸⁴ Despite eyewitness accounts and irrefutable historical evidence,⁸⁵ the seeds of this anti-truth movement began while the horrors of the Holocaust were still taking place.⁸⁶ For example:

[t]he Nazis themselves recognized that the incredibility of what they had done would cast shadows of doubt upon any eyewitness reports. Inmates at concentration camps testified that they were frequently taunted by their captors: “And even if some proof should remain and some of you

82. *In Wake of SB 18 Passage, Tenure Debacle Emerges at UT-Tyler*, TEX. AFT (Nov. 9, 2023, 5:07 PM), <https://www.texasaft.org/membership/higher-ed/in-wake-of-sb-18-passage-tenure-debacle-emerges-at-ut-tyler/> [<https://perma.cc/F6VQ-FZQL>].

83. Anthony Long, *Forgetting the Führer: The Recent History of the Holocaust Denial Movement in Germany*, 48 AUSTRALIAN J. POLS. & HIST. 72–82 (2002) (discussing popular figure heads in the Holocaust denial movement in Germany); *Holocaust Denial*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/holocaust-denial> [<https://perma.cc/R67U-XBEU>] (discussing significant Holocaust denial groups).

84. *See How Many People Did the Nazis Murder?*, U.S. HOLOCAUST MEM’L MUSEUM (Sept. 26, 2023), <https://encyclopedia.ushmm.org/content/en/article/documenting-numbers-of-victims-of-the-holocaust-and-nazi-persecution> [<https://perma.cc/543Y-7AE9>].

85. *Id.*; Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 37–38 (1997).

86. *A Short History of Holocaust Denial in the United States*, ANTI-DEFAMATION LEAGUE (Apr. 17, 2023), <https://www.adl.org/resources/backgrounder/short-history-holocaust-denial-united-states> [<https://perma.cc/9H86-NLDS>]; Lasson, *supra* note 85, at 37–39.

survive, people will say that the events you describe are too monstrous to be believed; they will say that they are the exaggerations of Allied propaganda and will believe us, who will deny everything, and not you.”⁸⁷

The words of the Nazis to their captives demonstrate the reality that some acts of dehumanization and violence are so confounding that it would strain credulity for some people to believe they occurred. This level of incredulity functions as a dangerous tool because through the denial of the history of violence and trauma, incredulity seeks to dissuade individuals from intervening through the act of disbelief. Moreover, it also dampens any movements to prevent that type of violence from reoccurring through making it unprecedented and stifling the ability for history and comparison to create a galvanizing force. The phrase “never again” that is commonly used when referred to the Holocaust has been used to help galvanize activism about other genocides that have taken place in places like Sudan and Rwanda.⁸⁸ However, if the Holocaust never occurred in the first place, those subsequent movements could not draw on the moral imperatives to prevent these violent events from reoccurring.⁸⁹ It is through the legacy of the taunts of Nazi prison guards that the modern Holocaust denial movement emerged, consisting of two schools of thought which, while different, both sought to advance anti-truth claims and effectuating those

87. Lasson, *supra* note 85, at 37.

88. David Rieff, *The Persistence of Genocide*, HOOVER INST. (Feb. 1, 2011), <https://www.hoover.org/research/persistence-genocide> [<https://perma.cc/ZH5Y-XW9L>]; Douglas Todd, *Giving New Meaning to ‘Never Again’: Canadian Jews on Sudan*, VANCOUVER SUN (Jan. 10, 2011), <https://vancouversun.com/news/staff-blogs/giving-new-meaning-to-never-again-canadian-jews-on-sudan> [<https://perma.cc/JZC2-K7P6>].

89. See Emily Burack, *How ‘Never Again’ Evolved from Holocaust Commemoration Slogan to Universal Call*, TIMES OF ISR. (Mar. 9, 2018, 10:30 AM), <https://www.timesofisrael.com/how-never-again-evolved-from-holocaust-commemoration-slogan-to-universal-call/> [<https://perma.cc/V4PT-RHKF>]; Mutasim Ali & Yonah Diamond, *The Imminent Risk of Genocide in Darfur: Never Again Cannot Become a Relic of the Past*, JUST SEC. (Dec. 7, 2023), <https://www.justsecurity.org/90517/the-imminent-risk-of-genocide-in-darfur-never-again-cannot-become-a-relic-of-the-past/> [<https://perma.cc/N2EB-TF3V>]; Jonas Claes, *‘Never Again’ Isn’t Enough*, U.S. INST. OF PEACE (Apr. 7, 2014), <https://www.usip.org/publications/2014/04/never-again-isnt-enough> [<https://perma.cc/3J6Z-9FH3>].

taunts.⁹⁰ The Negationists claimed the Holocaust never occurred.⁹¹ This group argued that the Holocaust constituted a “Auschwitz lie” and “that the extermination of Jews by the National Socialist regime never took place, and that reports of such actions were deliberate lies formulated to defame Germans and exploit them financially.”⁹² Their counterparts, the Revisionists, conceded that the Holocaust occurred, but sought to minimize the scope of the violence and genocide.⁹³ The Revisionists advanced various anti-truth ideas, seeking to downplay the severity of the violence and the dehumanization that the European Jewish community experienced at the hands of the Nazis.⁹⁴

Scholars explain the key difference between Negationists and Revisionists as such:

the former persist in trying to challenge “the main features” of the Holocaust even though those features are “clearly visible to all but the willfully blind,” while legitimate revisionists focus their investigative efforts instead on those areas “for which the evidence is incomplete or ambiguous,” such as “Hitler’s role in the event, Jewish responses to persecution, and reactions by onlookers both inside and outside Nazi-controlled Europe.”⁹⁵

At bottom, the Negationists and the Revisionists both sought to distort the history of racial and religious violence that the European Jewish community experienced. One key difference between the Negationists and Revisionists that emerged in the

90. See Knechtle, *supra* note 17; Pascale Bloch, *Response to Professor Fronza’s The Punishment of Negationism*, 30 VT. L. REV. 627, 630–31 (2006).

91. Jamie Rauch, *The Good, the Bad, and the Historically Anti-Semitic: An Analytical Comparison of Anti-Hate Laws in Germany and the United States*, 47 BROOK. J. INT’L L. 260, 271 (2021); see also Knechtle, *supra* note 17.

92. Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 319–20 (1999).

93. Rauch, *supra* note 91.

94. Peter R. Teachout, *Making “Holocaust Denial” a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 662, 664 (2006); see also Knechtle, *supra* note 17, at 45.

95. Teachout, *supra* note 94, at 664.

wake of the Holocaust and the current legislative forces behind Senate Bills 16, 17, and 18 comes down to adjacency to power. The Negationist and the Revisionists failed to capture institutional power in the Post-War World II world and did not wield any institutional political power.⁹⁶ Conversely, the legislative architects of the anti-truth movement are mostly elected officials who have majoritarian power in conservative states in America. It is in the halls of state capitols that the spirit of the German anti-truth movement finds an analogous paradigm nearly eight decades later in the post-2020 American anti-truth movements.

A. Anti-truth Frameworks Applied: Negationists and Revisionists

The legislative process surrounding the failed versions of Texas Senate Bills 16, 17, and 18 are comparable to the anti-truth principles of the Holocaust denial movement by similarly attempting to distort the history of identity-based violence and discrimination in the United States. The versions of Senate Bills 16 and 18 that were defeated in the Texas legislature can be said to reflect the Negationist perspective, choosing to completely deny historical events; the original iteration of Senate Bill 17 reflects the adoption of a piecemeal reality that mingles truth and lies. The Negationist impulse is reflected in the prohibition on teaching critical race theory and removal of the protection that tenure provides for professors who teach subjects the state feels are implicated in critical race theory and other disfavored topics. In the same way that Negationists denied the reality of the Holocaust, the Texas legislative enactments, should they have passed, would seemingly have denied the salience of race, gender identity, and sexual orientation in modern-day Texas and, more broadly, America. Under the failed Senate Bill 16 discussions of racial histories, such as the biography of Ruby Bridges, possibly would be rendered suspect and therefore prohibited

96. See David E. Weiss, *Striking a Difficult Balance: Combatting the Threat of Neo-Nazism Germany While Preserving Individual Liberties*, 27 VAND. J. TRANSNAT'L L. 899, 900-01, 904 (1994) (highlighting the extensive steps Germany took in the aftermath of World War II to distance itself from its Nazi past).

from forming part of the cannon of state funded higher education. Consequently, the Texas legislature seemingly sought to stifle discussions of ideologies and viewpoints it viewed as false.

On the other hand, Revisionist ideologies are reflected in the piecemeal view of the truth adopted by the political leadership in Texas. In terms of background, Senate Bill 17, in its original form, constitutes a different side of the same coin that motivated the curriculum bans in Senate Bill 16. The original language of Senate Bill 17 worked to attack aspects of the university setting where policies exist that the political leadership in Texas felt implemented the principles banned in Senate Bill 16. Yet, there is a profound hypocrisy in the nascent form of Senate Bill 17. For example, a plain reading of earlier versions of Senate Bill 17, would have still permitted some programs arguably help remediate the history of state sanctioned discrimination. The justification for these programs would have been illustrated by the learning about the life of Ruby Bridges, literature that could potentially face complete prohibition under Senate Bill 16. Indeed, it is these same histories that would have been prohibited under Senate Bill 16 that arguably undergird the remedial rationale that some advocates argue would be permitted under the original iteration of Senate Bill 17. Diversity, equity, and inclusion programming is fundamentally about increasing the sense of belonging for populations who faced historical—and often state-sanctioned—exclusion. Senate Bill 16 had no exceptions and were content based exclusions based on a more Negationist view of the history of race relations. Conversely, while the original iteration of Senate Bill 17 likely curtails certain voices from expressing opinions about race in some forms, it still arguably allowed for professors and students to use classrooms and college campuses to disseminate information that the state may disfavor.⁹⁷

97. See S.B. 17 § 51.603(b). See generally Am. Assoc. of Univ. Professors at UT Austin, *Guidance on Anti-DEI SB 17 and Its Exceptions for Academic Course Instruction, Scholarly Research, and Creative Works*, AAUP@UT (Jan. 4, 2024), <https://aaup-utaustin.org/2024/01/04/guidance-on-anti-dei-sb17-and-its-exceptions-for-academic-course-instruction-scholarly-research-and->

In addition, it is important to note the role of the Civil Rights Act of 1964 in this daylight between Negationist impulses in Senate Bill 16 and Revisionist realities in Senate Bill 17. The United States Department of Education, Office of Civil Rights (OCR) provides guidance explaining that Title VI and other civil rights laws are not categorically violated by

diversity, equity, and inclusion training; instruction in or training on the impact of racism or systemic racism, cultural competency training or other nondiscrimination trainings; efforts to assess or improve school climate, including through creation of student, staff, and/or parent teams, use of community focus groups, or use of climate surveys, student assemblies or programs focused on antiharassment or antibullying; investigations of, and issuance of reports concerning the causes of, racial disparities within a school, use of specific words in school policies, programs; or activities, such as equity, discrimination, inclusion, diversity, systemic racism, or similar terms.⁹⁸

OCR's guidance further explains that the diversity, equity, and inclusion measures mentioned constitute remedial measures used by the Department of Education to remedy discrimination based on race and to cultivate more inclusive school climates.⁹⁹

The failure of earlier iterations of Senate Bill 17 indeed may reflect this background and is in conversation with the way that federal civil right law stands as a bulwark against the reimaging of the history of our country's interactions between various minority groups. For its part, Germany created a legal framework to address similar anti-truth impulses about false speech

creative-works/ [https://perma.cc/24D2-ECT9]. It is possible Senate Bill 17 presumed the passing of Senate Bill 16 and excluded certain topics from its text.

98. U.S. DEPT. OF EDUC. OFF. FOR C.R., FACT SHEET: DIVERSITY AND INCLUSION ACTIVITIES UNDER TITLE VI 2 (2023), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tvi-dia-202301.pdf> [https://perma.cc/LC8N-F9RM].

99. *Id.*

regarding groups who were marginalized, and used the power of the state to confront and deny the ability of these anti-truth ideologies to flourish.¹⁰⁰

B. *The German Approach to Anti-truth Threats*

Post-World War II Germany created legal frameworks to address the anti-truth movements of the Negationists and the Revisionists. The foundation of Germany's approach to addressing anti-truth speech by Holocaust denial groups stems from the "Grundgesetz für die Bundesrepublik Deutschland (The Basic Law)," or the constitution of the Federal Republic of Germany that came into effect shortly after the end of World War II and the collapse of Nazi Germany.¹⁰¹ Referred to as Germany's "dignity jurisprudence," the Basic Law was "in part a reaction to the War and in part a continuation of older German traditions pertaining to personal honor."¹⁰²

Article 1 of the Basic Law "firmly establishes the protection of human dignity as Germany's first and most important enumerated principle."¹⁰³ As a reaction to post-Nazi Germany, "[p]ursuant to Germany's self-assigned moral responsibility to protect vulnerable individuals and prevent mass atrocities like the Holocaust from reoccurring, Germany grounded its Basic Law in human dignity."¹⁰⁴

Consequently, the German Basic Law asserts the value of human dignity takes preeminence over every other value and that any free speech claims in Germany must be weighed against and in the context of human dignity and personal honor. Furthermore, jurisprudence finds its source in Germany's commitment to eradicating any racial and religious prejudice attributed to Nazi ideology and to ensure that freedom of speech yields to

100. Douglas-Scott, *supra*, note 92.

101. Knechtle, *supra* note 17, at 49–50, 50 n.55.

102. Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT'L L.J. 277, 327 (2008).

103. Rauch, *supra* note 91, at 265.

104. Peyton Edelson, *Lanzerath v. Germany: The Use of Censorship to Combat Holocaust Denial and Holocaust Severe Trivialization*, 31 TUL. J. INT'L & COMP. L. 317, 319 (2023).

protecting, under the penalty of criminal law, ideologies that would foster the revival of that type of violent dehumanization.

It is in this context that the Holocaust denial ban arose in Germany in the decades following World War II. Passed in 1944 as part of Section 130 of the German Penal Code, the “denial ban . . . covers hate speech.”¹⁰⁵ Specifically, “Section 130, Subsection 3 makes Holocaust denial a crime as an offense against the public peace, while Subsection 4 considers Holocaust denial a form of libel against the victims.”¹⁰⁶ Notably, these issues are treated under German criminal law, as opposed to German civil law, demonstrating the gravity of the offense these lies hold in German society.¹⁰⁷

“In 1995, the new [criminal denial] law was enforced against a neo-Nazi group that used the phrase ‘Auschwitz Myth’ as an organizing tool.”¹⁰⁸ Examined holistically, Germany’s approach to these issues reflects a “militant democracy-style restriction of hate speech aimed at protecting the state against a Nazi revival.”¹⁰⁹ The newfound German democracy demonstrated it was willing to use the power of the state to curtail expression it deemed at odds with the democratic, multiethnic republic that it strove to exemplify after the holocaust.¹¹⁰ For example, the German constitutional court, in one of its most famous Holocaust denial cases, prohibited a revisionist historian from promoting the “Auschwitz Hoax” at a National Democratic Party meeting.¹¹¹ As Neville Cox described, the court noted:

[T]he protection of free speech in Article 5(1) of the Basic Law is constrained by the terms of Article 5(2), which expressly allows speech to be restricted in order to protect the right to *personal*

105. Robert A. Kahn, *Does It Matter How One Opposes Memory Bans? A Commentary on Liberte Pour L’Histoire*, 15 WASH. UNIV. GLOB. STUD. L. REV. 55, 59 (2016).

106. Just, *supra* note 24, at 3; *see also* Strafgesetzbuch [StGB] [Penal Code], § 130(3)–(4), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1333 (Ger.).

107. *See* Just, *supra* note 24, at 3.

108. Khan, *supra* note 145, at 59–60.

109. *Id.* at 60.

110. *See* Just, *supra* note 24, at 3.

111. Cox, *supra* note 25, at 751.

honour, and that previous case law had found that, in the case of speech which constituted a formal insult or vilification, the right to personal honour would take precedence generally over the right to freedom of expression, the court concluded that the insult to Jews as a group meant that there was a grave violation of the right of personality.¹¹²

More strikingly, the court found that the revisionist work did not merely constitute an insult to the personal dignity and honor of the Jewish individuals who had died in the Holocaust, but also to the current Jewish community in Germany.¹¹³ As one scholar explains, the holistic way to view Holocaust denial laws “is to see them as laws which exist for the sake of the community rather than disparate individuals living within the community.”¹¹⁴ This collectivist impulse to use the law and the state to foster belonging and acceptance for minoritized communities becomes inherently remedial for a nation state whose past entailed using the law and the state to foster division and violence for minoritized communities.¹¹⁵ As such, the history of the Holocaust is a key part of this aspect of German jurisprudence, and the

historical fact alone that human beings were singled out according to the criteria of the “Nuremberg Acts” and robbed of their individuality with the goal of exterminating them puts the Jews who live in the Federal Republic of Germany into a special relationship vis-à-vis their fellow citizens; the past is still present in this relationship today.¹¹⁶

German jurisprudence has an eye to the past as it seeks to create a constitutional framework that prevents some of the worst

112. *Id.*

113. *Id.* at 751–52.

114. *Id.* at 752.

115. See Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law (Part II)*, 4 GER. L.J. 23, 39–40 (2003).

116. *Id.* at 35 (citation omitted).

acts of human depravity from ever gaining a foothold again in their country.

IV. VIRGINIA. V. BLACK: A TOOL AGAINST ANTI-DEMOCRATIC IMPULSES

Both German jurisprudence and the Supreme Court's *Virginia v. Black* opinion provide insights on how to legally redress the restrictions on discussions of race, gender, and sexuality. In *Virginia v. Black*, the Supreme Court held state statutes criminalizing cross burning, meant to intimidate, did not violate the First Amendment.¹¹⁷ The Justices review the history of cross-burnings in the United States and conclude that "cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence" and that the prohibition on cross-burning with an intent to intimidate is valid because it is "most likely to inspire fear of bodily harm."¹¹⁸ Under the holding in *Virginia v. Black*, the First Amendment permits prohibitions of "true threats," which are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."¹¹⁹ Typical First Amendment protections yield when speech constitutes a true threat because "the fear of violence they foster is itself a harm, one the state can seek to prevent."¹²⁰ In *Virginia v. Black*, the court situated the "true threat" speech within a racialized historical context.

Specifically, the Supreme Court held that lawmakers "must examine whether there are historical reasons to believe that offensive expression against an identifiable group is likely to intimidate reasonable audiences."¹²¹ The Supreme Court's First

117. *Virginia v. Black*, 538 U.S. 343, 347 (2003).

118. *Id.* at 360, 363; see also Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 GEO. L.J. 575, 580 (2005) (offering a summary of the majority opinion's reasoning in *Black*).

119. *Black*, 538 U.S. at 359.

120. Renee Griffin, *Searching for Truth in the First Amendment's True Threat Doctrine*, 120 MICH. L. REV. 721, 728 (2022); see *Black*, 538 U.S. at 360.

121. Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 511 (2009).

Amendment analysis relied on “the historical use of cross burning by the Klan” in finding state regulation appropriate.¹²²

This approach pairs quite logically with the German jurisprudence around Holocaust denial, which implicates free speech within a historical context. As in the German context, the Supreme Court in *Virginia v. Black*,

weighed historical evidence of the burning cross’s connection with domestic terrorism against the social interest in leaving speakers unimpeded to use the symbol for ascertaining truth. The burning cross, the justices found, is historically linked to violence and intimidation rather than any truth-seeking activity. States are free to pursue a policy against dangerous messages in an effort to prevent the likely instigation of violence.¹²³

German jurisprudence reflects an understanding that denials of history do not just insult ancestors, but also lead to harm and violence against the descendants of the individuals whose history is being denied. In that sense, Holocaust denial becomes a “true threat” of sorts to the current Jewish community in Germany.¹²⁴ Analogously, attempts in the United States to erase historically accurate depictions of enslavement, race relations, and discussions related to gender, sexuality, and gender identity may portend violence.¹²⁵ In that sense, an argument may exist

122. Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 963, 975 (2009); see also *Black*, 538 U.S. at 357, 363 (upholding Virginia’s ban on cross-banning as constitutional because of its “long and pernicious history as a signal of impending violence” in the state).

123. Tsesis, *supra* note 121, at 503.

124. See Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, *supra* note 23, at 163–64.

125. See The Associated Press, *Protesters March Through Miami to Object to Florida’s Black History Teaching Standards*, NBC NEWS (Aug. 16, 2023, 2:25 PM), <https://www.nbcnews.com/news/nbcblk/protesters-march-miami-object-floridas-black-history-teaching-standard-rcna100243> [<https://perma.cc/5A9L-R9LD>] (describing how protesters marched to the School Board of Miami-Dade County to protest Florida curriculum standards that describe slavery as an opportunity for enslaved people to learn skills); see also Lopez, *supra* note 9 (describing Texas legislators’ attempts to restrict school curricula).

that the denial of the history of race relations in educational contexts may constitute a “true threat” in particular contexts.

In the same way the historical context of cross burning with the intent to intimidate led the Court to uphold the statue in *Virginia v. Black*, advocates may use the same logic to similarly challenge the legality of legislation designed to deny and erase histories and current realities as capable of fostering violence. Revisionist and Negationist histories distort the history of race relations and have led to violence.¹²⁶ The Holocaust denial movement is predicated on obfuscating the violence and dehumanization that the European Jewish community experienced during World War II.¹²⁷ However, the denial movement is not ideologically dangerous just because of how it chooses to rewrite history. The newfound German Republic understood the Negationist and Revisionist to represent values that would ferment modern day antisemitism, a hate-filled ideology fundamentally at odds with the newly reconstituted German nation state and its underpinnings as a multiracial democracy.¹²⁸ The danger and the potential impact of the attack on higher education through legislation like Senate Bills 16, 17, and 18 is not merely an academic one or one merely concerned with the accurate recitation of the history of race relations and social movements. To potentially curtail discussions of race, to potentially hamstring efforts to remediate historical discrimination and to usher in tools to potentially facilitate the termination of professors for teaching accurate and inclusive histories creates an existential threat to an American republic which is only half a century removed from state sanctioned racial apartheid. In the same manner that Holocaust denial threatens the existence of the German republic, denial of the history of racial oppression in the United States threatens the existence of the future of the United States as a multiracial democracy. Anti-truth legislation,

126. See Cory Collins, *The Miseducation of Dylann Roof*, 57 LEARNING FOR JUST. (2017), <https://www.learningforjustice.org/magazine/fall-2017/the-miseducation-of-dylann-roof> [<https://perma.cc/HB95-6J2B>].

127. See Knechtle, *supra* note 17, at 44–45.

128. See Cox, *supra* note 25, at 753.

similar to attempts to deny the Holocaust, fundamentally undermine the teaching of true history that is needed to sustain and progress the American democratic experiment, and the Negationist approach to history may “extort[] others to commit discriminatory acts” that threaten “the orderliness of a multi-ethnic, representative democracy.”¹²⁹ Anti-truth legislation may eventually prove to create a potentially dangerous schism in values, between impulses seeking to pursue the remediation of past harm and impulses to deny that existence and relevance of that harm and lays the groundwork for a potential fissure of values that are fundamental to our democratic republic. The danger of cross burning with the intent to intimidate, especially given its historical association with the Klan, is reminiscent of

how Germans view the relationship between Holocaust denial, neo-Nazi activity, and fears about the future of the Federal Republic. In both cases, a set of highly provocative racist acts, through their symbolic power, carry the risk of undermining the legitimacy of the current, post-racist society. Just as Holocaust denial (and to a lesser extent other forms of anti-Semitism) threatens to tarnish the image of Germany as a country that has learned from its mistakes, Klan activity, with its masked demonstrations and cross-burnings, threatens the image of the South as a region that has finally put segregation behind it.¹³⁰

The existence of Holocaust deniers and activities by domestic anti-Black hate groups such as the Klan share a similar goal of working to undermine the collective values that both Germany and the United States have sought to cultivate.¹³¹ As such, both

129. Tsesis, *supra* note 121, at 514, 516.

130. Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, *supra* note 23, at 176.

131. Compare Steven Levitsky, *The Third Founding: The Rise of Multiracial Democracy and The Authoritarian Reaction Against It*, 110 CAL. L. R. 991, 991–92 (2022), <https://www.californialawreview.org/print/the-third-founding-the-rise-of-multiracial-democracy-and-the-authoritarian-reaction-against-it> (stating that the United States is and has been attempting to become a better multiracial democracy as a core goal for itself) with ILL. LEGIS, INVESTIGATING COMM’N,

have faced legal impediments, whether under German jurisprudence, or at times, United States Supreme Court precedent. As anti-truth laws continue to proliferate across the United States,¹³² advocates may be wise to look to the lesson of history, often times facing censorship and suppression, when advocating to protect some forms of speech, whose erasure may one day even constitute a true threat, in the spirit of *Virginia v. Black*.

CONCLUSION

The United States cannot survive as a multiracial democracy if we deny the history of race relations in this country and the current challenges we face across race, gender identity, and sexual orientation. Germany knew that it could not survive as a democracy if it allowed the impulses of the Negationists and Revisionists to take hold after the reckoning of World War II.¹³³ Similarly, the United States will not continue to move toward becoming a truly multiracial democracy if the potential anti-democratic weeds represented in Senate Bills 16, 17, and 18 are planted in fertile ground. Fortunately, the Supreme Court's approach in *Virginia v. Black* may provide a roadmap for challenging laws like these as they continue to be introduced and sometimes pass in legislative bodies throughout the United States.

KU KLUX KLAN at 105 (1976) (stating that the goals of the Ku Klux Klan include "defeat[ing] all politicians" that try to represent black voters instead of white men).

132. *In Defense of Truth*, NAACP Legal Def. Fund, <https://www.naacpldf.org/truth/> [<https://perma.cc/F3VJ-FYUA>].

133. *See Cox, supra* note 25, at 752 (describing the "more complete" understanding of German Holocaust denial laws as a matter of importance to the foundation of the multiracial public "as a whole"); *see also* discussion *supra* Part VI (explaining how post World War II Germany's restrictions on hate speech were aimed at preventing a Nazi resurgence in the country).