

The Political Machinery Behind the Right's Attack on Academic Freedom

By Steven Brint

How should we understand the sources of the Republican Party's mobilization to restrict curricular content in higher education and to ban diversity, equity, and inclusion (DEI) policies? Is it driven by substantive concerns, presidential ambitions, racial politics, illiberalism on the Left, some combination, or something else entirely?

I have spent many dozens of hours listening to the committee and floor hearings in two states at the forefront of these restrictive efforts: Florida and Texas. I have also interviewed legislators and higher education officials in these states and conducted quantitative studies to identify the characteristics of states that have been most eager to pass these restrictive laws.

The answers I have come up with focus on a national-level political machine. Business influence, the pandemic, and the anti-racism movement were also factors, but not in the ways most people imagine. To understand what drove this restriction fever it is necessary to look at the political machinery that generated the bills and signings, the rhetoric that sustains this political machinery and gives it emotional force, and the economic and social conditions of the states swept up in it.

By understanding what happened, those who are appalled by state intrusions into free inquiry can gain clues about what can be done to protect academic freedom, not only against this continuing assault but against future attacks along similar lines.

In 2021, Republican legislators began to draft bills to ban what they referred to as "divisive concepts" and to eliminate administrative offices and practices concerned with racial-ethnic diversity. The term "divisive concepts" refers to ideas popular in anti-racist texts that the supremacy of Whites and men are inherent in the institutions of the United States and that these institutions were created to maintain racial and gender inequalities. Most of the bills to regulate curriculum content have been directed toward public K-12 education where the states have been accorded great regulatory authority by the courts. But even in these early days, this restriction fever seeped into the higher education arena where state prescription has historically run aground of academic freedom protections.

By the summer of 2023, governors of nine states had signed into law curriculum content restrictions aimed at higher education. Similar legislation was still pending in 10 states. Governors in five states had signed into law restrictions on DEI and legislatures in 12 states were still considering similar bills. In 11 states, bills restricting course content or banning DEI had died in committee or had been vetoed by Democratic governors. Legislators and governors in 15 states – most of them with large Democratic Party

majorities – had shown no interest in pursuing either course content or DEI restrictions.¹

At least since the time of Socrates, political authorities have wanted to restrict intellectual inquiry when it has seemed to threaten their beliefs or interests. Academic freedom is intended to ensure that professors are able to pursue their teaching and research within the sphere of their professional expertise free from the restrictions of outside authorities. In the United States, the principle of academic freedom was developed by the founders of the American Association of University Professors (AAUP) following the firing of Darwinists by religiously dogmatic college presidents in the 1880s and 1890s and the removal of social reformers by boards dominated by business people in the early 1900s. Arguably, the current wave of curricular content restrictions do not match the damage to academic freedom associated with the anti-Communist McCarthy era when some 100 professors in the 1940s and 1950s were removed from their positions and hundreds more were harassed and silenced.² But the sweep of the current wave of legislation is broader than the relatively few incidents that gave rise to the principle of academic freedom, as first articulated by the AAUP in 1915.³

The most notorious of the recent bills, Florida SB 266, authorized a blanket ban on general education core courses that, in the words of the bill, “distort significant historical events or include a curriculum that teaches identity politics...or (are) based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities.” The bill stated further that courses with a curriculum based on “unproven, speculative, or exploratory content” are not suitable for general education credit.⁴ The bill, which was signed into law by Governor Ron DeSantis in May, also defunded DEI offices and programs, and put more power for hiring professors in the hands of university presidents. Following the logic of the law, it does not matter now in Florida public universities if the evidence shows that some policies of American institutions were in fact enacted to maintain social inequalities or that most scientific theories are speculative in so far as they lack definitive proof.

The Political Machinery

The merciless killing of George Floyd by Minneapolis police precipitated racial protests that began in May 2020 and lasted throughout the rest of the year and into 2021. The protests were the culmination of years of discontent over states’ failures to prevent police killings of unarmed Black people. The frustrations of isolation during Covid-19,

¹ These figures are calculated by the author from two sources: (1) the PEN America, PEN America, *PEN America Index of Educational Gag Orders* (as of July 2023). https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=1505554870/; and (2) The Chronicle of Higher Education, *DEI Legislation Tracker* (as of July 2023). <https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts?/>

² Ellen H. Schrecker, *No Ivory Tower: McCarthyism and the Universities*. (New York: Oxford University Press, 1986).

³ Walter P. Metzger, *Academic Freedom in the Age of the University*. (New York: Columbia University Press, 1955).

⁴ Florida SB 266 (as enrolled). <https://flsenate.gov/Session/Bill/2023/266/BillText/er/PDF/>

job loss, death of loved ones, and the botched federal response, undoubtedly contributed to the breadth and anger of the George Floyd protests, which spread to some 2000 U.S. cities and towns, were mostly peaceful, but also caused well over \$1 billion in property damages and several deaths.⁵

It was at this time, during the period of protest, that Americans outside of academic circles became aware of such terms as “systemic racism,” “White supremacy,” “White privilege,” and “White fragility.” And they became familiar also with the term “critical race theory” (also known by its initials CRT), which drew attention to the pervasiveness and systemic nature of racial inequalities, and the “1619 Project” a *New York Times* sponsored history that placed slavery at the heart of the American story.

National-Level Organization

A common view of state politics is that legislators learn about a problem from advocacy groups or constituents, write legislation to address the problem, and then try to convince their colleagues to support their bill. This imagery is increasingly at odds with how state politics actually works⁶ – and it is definitely not how the recent restrictions on academic freedom have occurred. Instead, well established webs of organizations geared up to exploit the opportunities provided by racial protest by disseminating model legislation to receptive legislators and governors.

The Right began capitalizing on the protests and the new ideas about systemic racism almost immediately. Already by September 2020 – just four months after the protests began - the Trump Administration had issued an Executive Order decrying “divisive content” in public education.⁷ By divisive content, it meant content that argued that members of any racial or gender group were superior to any other – as anti-racists were arguing about Whites - and ideas that made members of any group feel uncomfortable about historical injustices in which they had themselves played no part. Here too Whites were implicitly identified as the group requiring protection.

Three months later, in December 2020, the American Legislative Exchange Council (ALEC) held a workshop attended by some 30 state legislators as well as representatives from corporations and non-profits on “Stopping the Onslaught of Critical Race Theory.” The policy entrepreneur Chris Rufo was one of the conveners of this workshop, together with staffers from the Heritage Foundation, the American Enterprise Institute, and the Woodson Institute⁸. Rufo had gained a following by publicizing and critiquing the new

⁵ Jennifer A. Kingson, “\$1 Billion Plus Property Damage is Most Expensive in History.” *Axios* (September 16, 2020). <https://www.axios.com/2020/09/16/riots-cost-property-damage/>

⁶ Jacob Grumbach, *Laboratories Against Democracy: How National Parties Transformed State Politics*. (Princeton: Princeton University Press, 2022).

⁷ The White House, Executive Order Combatting Race and Sex Stereotyping (Washington DC: The White House, 2020). <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/>

⁸ Don Weiner and Alex Kotch, “ALEC Inspires Lawmakers to File Anti-Critical Race Theory Bills.” *Exposed by CMD* (July 27, 2021). <https://www.exposedbycmd.org/2021/07/27/alec-inspires-lawmakers-to-file-anti-critical-race-theory-bills/>

anti-racist programs in K-12 schools, and it was an interview with him on Fox News that had inspired the Trump Executive Order.⁹ His workshop associates at the Heritage Foundation were at this time already focusing on ways to ban Critical Race Theory in K-12 classrooms through state legislation.

During its heyday in the early 2010s, ALEC's model legislation gave birth to some 1000 bills a year in state legislatures.¹⁰ However, apart from convening the anti-CRT workshop, it remained largely on the sidelines as the new wave of restrictive legislation rolled out. Instead, other organizations in the conservative organizational ecosystem took up the reins. The main actors have been staffers in three GOP-aligned think tanks: The Heritage Foundation, whose staffers were responsible for model legislation on "divisive concepts," and the Manhattan and Goldwater Institutes, whose staffers were responsible for the model to restrict DEI offices and activities. Other institutions, such as Hillsdale College, the Claremont Institute, the James G. Martin Center in North Carolina, and the National Association of Scholars, have played supporting roles in areas where they have had an interest and access to policy makers.

State-Level Organization

Gubernatorial staff members are connected to the think tanks and these staffers are often the source of proposed legislation. The staffs tweak the model legislation, discuss it with important constituencies, and prepare talking points, including responses to anticipated questions, for allies of the governor who are persuaded to carry the legislation. For governors or their staffs, it is usually a straightforward matter to find willing partisans to carry the legislation, because the rewards can be significant. Those who have carried legislation for Governor Ron DeSantis in Florida have, for example, been rewarded with college presidencies and top executive positions in the state's educational bureaucracies.¹¹ In some cases, legislators themselves are the policy entrepreneurs, but most state legislators have limited discretionary time and little staff support and are dependent on those who do have time and staff support.¹²

It is much easier to pass controversial legislation in states with substantial partisan majorities. Where governors come from the opposite party, veto-proof majorities are

⁹ Benjamin Wallace-Wells, "How a Conservative Activist Invented the Conflict over Critical Race Theory." *The New Yorker* (June 18, 2021). <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory/>

¹⁰ Molly Jackman, "ALEC's Influence over Lawmakers in State Legislatures." *The Brookings Institution* (December 6, 2013). <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/>

¹¹ One of those who carried legislation, Richard Corcoran, is now interim president of New College in Sarasota, Florida. Another, Manny Diaz, Jr., is Education Commissioner of Florida. A third, Ray Rodrigues, is Chancellor of the State University System of Florida.

¹² The latest data suggest that 33,000 staffers work with some 7,400 state legislators, yielding a staffing ratio of 4.5 per legislator. This average is misleading. Legislative staff are divided between committee staff and members' personal staff. Moreover, the top 23 legislatures employ nearly three-quarters of the staff. See National Conference of State Legislatures, *Size of Legislative Staff*. <https://www.ncsl.org/about-state-legislatures/size-of-state-legislative-staff/> In the Florida legislature, I observed that very junior representatives often shared a single staffer and even senior members had no more than one or two staff assistants.

essential. Large majorities matter, because they ensure that the votes are there to defeat unfriendly amendments and to pass legislation. It was not surprising to hear a leading Democrat in Texas admit with resignation: “You have the votes. It is what it is. You can do what you want.”¹³

“Divisive Concepts” Restrictions

In early 2021, the Heritage Foundation introduced model legislation to ban “divisive content” in public education. Although written for K-12 schools, this model was picked up, often word for word, by state legislatures for application to public higher education institutions.¹⁴

The central provision of the model legislation read: “No public education employee shall compel a teacher or student to adopt, affirm, adhere to, or profess ideas...(including) the following: 1. That individuals of any race, ethnicity, color, or national origin are inherently superior or inferior; 2. That individuals should be adversely or advantageously treated on the basis of their race, ethnicity, color, or national origin; 3. That individuals, by virtue of race, ethnicity, color, or national origin, bear collective guilt and are inherently responsible for actions committed in the past by other members of the same race, ethnicity, color, or national origin.”¹⁵

The proposed legislation was justified by a novel treatment of the equal protection clause of the 14th amendment, applied to Whites rather than minorities, as well as a similarly novel interpretation of Title V and VI of the Civil Rights Act of 1964. Where Blacks were once protected by these provisions, Heritage proposed to use them to protect the sensibilities of White children who were allegedly identified by Critical Race Theory as inherently superior. The model put teeth into this extension of state authority by proposing that noncompliant schools become ineligible for state funds and subject to civil suits.

What remained was to find politicians ready to fight for these policies. Recall that school board meetings had been heating over throughout the country during 2020 and 2021. Most of the heat came from parents who were angry about school closures, vaccine requirements, and mask mandates. In some cases, Critical Race Theory, the 1619 Project, and anti-racism programs also became bones of contention.¹⁶

Two governors helped to supercharge the movement. In the fall of 2021, Virginia GOP gubernatorial candidate Glen Youngkin was able to mobilize suburban Virginians around “parental rights” in the schools. This included not only keeping the schools open

¹³ Royce D. West statement during a Texas Senate Higher Education Subcommittee hearing on Texas SB 17 (April 6, 2023).

¹⁴ The Heritage Foundation, *Protecting K-12 Students from Discrimination*. <https://www.heritage.org/protecting-k-12-students-discrimination/>

¹⁵ Ibid.

¹⁶ Nicole Carr and Lucas Waldron, “How School Board Meetings Became Flash Points for Anger and Chaos Across the Country.” *Pro Publica* (July 19, 2023). <https://www.heritage.org/protecting-k-12-students-discrimination/>

but transparency about what was being taught in the curriculum and opposition to “divisive” content. Youngkin capitalized on his opponent, former Virginia Governor Terry McAuliffe’s statement in a debate, that he didn’t “think parents should have a say in what was taught in schools.”¹⁷ The Youngkin campaign’s victory impressed national Republicans because Virginia has been trending blue for many years and because Youngkin had bested a well-known and well-funded challenger. The head of the Republican Study Group in Congress urged others in his caucus to recognize “parental rights” as a top-tier issue.¹⁸

Like Youngkin, Florida governor Ron DeSantis saw that anger over what was happening in schools could be harnessed to a right-wing agenda. Proposed one month after Youngkin’s election in Virginia, the so-called “Stop WOKE” Act, Florida HB 7, represented DeSantis’s first major strike at the educational establishment, including the higher education establishment. It drew on the Heritage language to proscribe trainings and instruction that purported to argue that members of any group was inherently superior or morally better than members of any other group. The bill added that no students should feel “guilt, anguish or other forms of psychological distress” for actions taken in the past by other members of the same race or sex. The provisions of the Act that applied to higher education institutions were enjoined by Federal District Court Judge Mark Walker in November 2022. “Defendants argue that, under this Act, professors enjoy ‘academic freedom’ so long as they express only those viewpoints of which the State approves,” Walker wrote. “This is positively dystopian.”¹⁹

The first bills to restrict higher education content were proposed in 2021 but they were few in number—just 13 – and only three were signed into law. The movement hit its crescendo in 2022 when some 57 pieces of legislation to restrict higher education content were proposed. A great majority of these bills died in committee, but seven made it to a governor’s desk and were signed into law. Several more are still pending. Nor did Judge Walker’s words prevent states from moving forward in 2023 with efforts to impose content restrictions in higher education. Another 26 content-restricting laws were introduced in 2023. Many are still pending, as of this writing, and two have been signed into law.²⁰

Four out of five of the 96 “divisive concepts” bills bearing on higher education included language drawn directly from the Heritage Foundation’s model legislation, showing the

¹⁷ Matthew Impelli. “McAuliffe Saying Parents Shouldn’t Tell Schools What to Teach Big Factor in Election: Poll.” *Newsweek*. <https://www.newsweek.com/mcauliffe-saying-parents-shouldnt-tell-schools-what-teach-big-factor-election-poll/>

¹⁸ The Republican Study Group. *Lessons from Virginia*. https://banks.house.gov/uploadedfiles/final_virginia.pdf/

¹⁹ Andrew Atterberry, ‘Positively Dystopian’: Florida Judge Blocks DeSantis’ Anti-Woke Law for Colleges “ *Politico* (Nov. 17, 2022). <https://www.politico.com/news/2022/11/17/florida-anti-woke-law-block-colleges-education-00069252/>

²⁰ Calculated by the author from PEN America, *PEN America Index of Educational Gag Orders* (as of July 2023). https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=1505554870/

extent to which this was a think tank led national movement rather than a spontaneous outburst of concern by legislators in conservative-leaning states.

DEI Bans

Diversity trainings were a popular target of conservative bills as early as 2021 but model legislation to restrict DEI-related activities came only later. In January 2023, the Manhattan Institute and the Goldwater Institute joined in writing model legislation banning DEI offices, diversity trainings, and diversity statements. Chris Rufo, who seemed to be everywhere in this policy arena, was one of the three authors.

One key provision read: “Public...institutions of higher education in the state...may not...expend any funds...to establish, sustain, support, or staff a diversity, equity, and inclusion office or to...hire an individual to serve as a diversity, equity, and inclusion officer.” Diversity trainings and diversity statements came in for similar treatment: “A public... institution of higher education may not make diversity training mandatory.” Another read: “No diversity statement shall ever be required or solicited as part of an admissions process, employment application process, hiring process, contract renewal process, or promotion process...”²¹

The model legislation produced by Rufo and his colleagues is so prolix that no states adopted it verbatim. But the underlying justifications were influential. These justifications relied primarily on assertions about the stifling of thought due to DEI and its alleged failure to improve conditions for under-represented students.

All 40 DEI bans currently tracked by *The Chronicle of Higher Education* followed on the heels of this model legislation. The bills clearly reflected the imprint both of the organizational force provided by conservative think tanks and the tailoring of bills to fit local conditions. Bans on diversity statements and mandatory DEI trainings were targeted most often, in 20 and 18 of the bills, respectively, followed by identity-based preferences in 14 of the bills and the closing of DEI offices in 13. Seven of the bills were signed into law in 2023 and 23 are still pending as of this writing.

Rhetoric and Emotion

State political machinery can operate tolerably well without the emotional energy that comes from conviction, provided the votes are there. At the same time, emotional energy gives a sense of life and purpose to the workings of the political machinery. As I listened to committee hearings, it seemed to me that some of the Republicans who carried legislation in Florida and Texas were repeating lines written by others and were delivering them with a seeming lack of conviction. In other cases, those carrying the bills gave every appearance of being emotionally invested in them. Democratic opponents of the bills sometimes presented dry pragmatic arguments but more often

²¹ Christopher F. Rufo, Ilya Shapiro, and Matt Beienburg, *Abolish DEI Bureaucracies and Restore Colorblind Equality in Public Universities*. The Manhattan Institute (January 2023). https://media4.manhattan-institute.org/sites/default/files/model_dei_legislation013023.pdf/

they expressed not only conviction but indignation. This was true also of the hundreds who showed up to protest the bills during periods of public testimony. Indignation is no substitute for insufficient votes, of course, but it also indicates what opponents think is at stake for themselves and their constituents. The rhetoric of those who supported and those who opposed the legislation is, in this sense, not simply epiphenomenal to the cranking of the political machinery.²²

Many of the thematic contrasts in the speeches of Republicans and Democrats in Florida and Texas would not be surprising to anyone who has maintained even a passing interest in American party politics over the last several decades. For Republicans the best people will tend to rise regardless of the circumstances of their birth. For Democrats, structural inequalities prevent talented people from gaining the resources and support they need to succeed. Republicans gravitate to the idea of equality under the law for all races, while Democrats emphasize the legacy of racism.

The Republican position was encapsulated by one of the expert witnesses, Adam Kissel from the Heritage Foundation, who spoke in support of the DEI ban in Texas: “DEI is expensive, counter-productive and probably illegal. It categorizes people by characteristics at birth and marginalizes some identities such as political conservatives.... It (advocates) equality of outcomes by identity group. Any allegation of discrimination is taken as real. It leads people to walk on eggshells. DEI leaders cause division rather than healing.”²³

The opposite position was represented by Rep. José Menendez, a Texas Democrat: “Not everyone is equal to begin with. Some students have three or four computers in their homes and their parents are professionals. Others have no computers and have two less educated parents.... We forget what it is like to feel like you don’t belong, the loneliness and doubt.”²⁴

Nor is it unexpected that members of the two parties differed on how they calculated the benefits and costs of the laws to the state. Republicans expressed confidence that students and their parents would like the idea of high and unified standards grounded in a western-oriented curriculum and that the new laws would boost public universities in the state. Democrats said the new laws would drive students and faculty away from the state while also jeopardizing federal grants and professional accreditations that require statements about DEI contributions.

In the midst of these well-worn themes, I heard three surprising points of contention. The first is that the Right has adopted the same psychology of harm that has figured in

²² It is a testimony to how much opponents cared about these bills that many hundreds of students, professors, and others stayed through long committee meetings for a chance to deliver statements to committee members, some of which were limited to no longer than 90 seconds.

²³ Adam Kissel, Testimony at Texas Senate Subcommittee on Higher Education (April 6, 2023).

²⁴ Jose Menendez recorded during a Texas Senate Higher Education Subcommittee hearing (April 6, 2023).

progressives' campus rhetoric over the last decade.²⁵ For Republicans these psychological harms come from the damage to White children created by being seen as oppressors, not from progressives' emphasis on micro-aggressions and other wounding behavior aimed at members of marginalized groups. The claim is explicit in Florida's Stop WOKE Act: No student should be made to feel "guilt, anguish, or discomfort" over events that happened in the nation's history for which they are not directly responsible²⁶ – for example, when discussing slavery or Jim Crow. One wonders how conservatives became so tender in their sensibilities – and, given that both sides are now so easily hurt, how much more political mileage can be gained from expressions of psychological damage.

Conservatives' contradictory views of freedom of expression were a second surprising feature of the debates. Incongruously, Republicans seemed to want to create greater freedom of expression by prohibiting forms of speech with which they disagreed. They were convinced that a "monoculture" existed on campus – without providing more than anecdotal evidence to support the contention – and they wanted to expand intellectual diversity as an antidote.²⁷ They desired to do so by prohibiting ideas they identified as divisive, such as Critical Race Theory. As Anna Eskamani, a Democratic legislator in Florida, said, "How can you be for more intellectual diversity when you are limiting intellectual diversity?"²⁸ And a professor who spoke during public testimony prophesied, "You'll be able to say anything you want on Florida campuses as long as it agrees with what the State finds acceptable."²⁹ The Republicans' arguments seemed to show the truth of this remark. They argued that Critical Race Theory and the language of DEI stifled debate and discussion, whereas speech based on Republicans' favored ideological positions created unique conditions for enlarging it.

A third surprising feature had to do with the partisan differences over the nature of knowledge. In the discussion over Stop WOKE and SB 266, Florida Republicans argued that some knowledge is objective, non-exploratory, and non-speculative, while "true knowledge" has the opposite characteristics. Professors were encouraged by Rep. Bryan Avila, who carried the Stop WOKE bill in the Florida House, to teach only "the most objective" knowledge.³⁰ Democrats were quick to point out that all knowledge starts out as speculative and exploratory. They noted that knowledge that seems objective to us today may be shown to be incomplete or biased in the future. Republicans expressed little in the way of persuasive counters. When pressed about the kinds of works that should be taught in general education courses, Erin Grall, who carried SB 266 in the

²⁵ See, e.g., Greg Lukianoff and Jonathan Haidt. *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure*. (New York: Penguin Books, 2018).

²⁶ Florida HB 7 (as Enrolled). <https://www.flsenate.gov/Session/Bill/2022/7/BillText/er/PDF/>

²⁷ Spencer Roach, Statement on Florida HB 931 in House Subcommittee on Postsecondary Education (February 17, 2023).

²⁸ Anna Eskamani, Statement on Florida HB 999 in House Postsecondary Education and Workforce Subcommittee (February 15, 2023).

²⁹ Public Testimony on Florida HB 999 in House Education and Employment Committee Meeting (April 19, 2023).

³⁰ Bryan Avila, Statement on Florida HB 7 in House Judiciary Committee Meeting (January 26, 2022).

Florida Senate, said, “Tradition has established (some texts) as important in western culture.” They are, she said, “the fundamental books that allow us to have civil discourse about the most important issues of western civilization.”³¹ A Democratic legislator, Bobby Powell, asked her, “Would that include Maya Angelou’s *I Know Why the Caged Bird Sings*?”³² Grall said that would be up to the University System’s Board of Governors to decide. The “most objective” knowledge in Florida higher education will soon be whatever the State’s Board of Governors approves. At this time, only one professor sits on that Board; most of the other members are business people appointed by the governor.³³

Beyond these sometimes mystifying positions, it is possible to observe a deep structure of cultural opposition at work.³⁴ The ostensible Republican commitment is to civic ideals based on equal treatment under the law, equality of opportunity, merit based advancement, and standards of discourse and achievement that apply in the same way to everyone. They do not ask whether these principles in practice advantage people like themselves. The Democratic commitment is to civic ideals that take into account differences in social origins, justice for those who have suffered from legacies of discrimination, and standards of discourse and achievement that are tempered by an embrace of pluralism and cultural differences. They do not ask whether these principles can under some circumstances reinforce rather than disrupt the disadvantages of those they represent.

Emotions give force to these cultural oppositions. Strong emotions of pride, longing, and anger were evident on both sides of the aisle. On the Republican side, I heard pride in putting forward what Republicans see as inclusive, color-blind policies in the place of the overt racism that so many white Southerners embraced in the past. On the Democratic side the pride came from celebrating the distinctive cultures that make up an American mosaic where everyone is respected and has a place. Republican longing is for a unified ethos and common standards where all students and faculty, regardless of gender, race or socioeconomic status, can be evaluated fairly; Democratic longing is for a sense of belonging in a world that often seems unwelcoming. Republican anger stems from the curricular and administrative decisions on campus that stand as a threat to the ideals they long for. Democratic anger comes from the subordinate status some marginalized students and faculty experience as inherent in American institutional structures and day to day interactions.

The anger sometimes boiled out in the hearings. In Florida, in particular, several Black Democrats accused Republicans of trying to erase Black history and Republicans

³¹ Erin Grall, Statement on Florida SB 266 on Senate Floor (April 27 2023).

³² Bobby Powell, Statement on Florida SB 266 on Senate Floor (April 27, 2023).

³³ State University System of Florida, Board of Governors Members. <https://www.flbog.edu/board/members/>

³⁴ See Jeffrey C. Alexander and Philip Smith, “The Discourse of American Civil Society: A New Proposal for Cultural Studies.” *Theory and Society* 22 (1993): 151-207; and Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*. New Haven: Yale University Press, 1999.

admitted to getting angry when Democrats said they were erasing Black history. At one point Alex Andrade, the Republican who carried SB 266 in the Florida House, read out a long list of topics mandated in Florida K-12 schools on the history of African Americans and asked how these lessons could constitute erasure.³⁵ In another flash of anger, a Florida Republican Senator, Randy Fine, bitterly commented, “Professors don’t think they are indoctrinating students (with divisive concepts). They just think they are right.”³⁶

How much of the discord is rooted in the familiar antagonisms of racial and gender politics? The partisan distribution by race and gender was obvious in both states and these differences were joined by differences in legislators’ employment locations. Republicans were composed of White men (and some White women) whose work lives have been connected to business or law. Democrats were composed of White women (and a very few White men) and minorities of both genders whose work lives had more often been located in education, non-profits, and social services (though many had also practiced law). Cultural positions are the proximate bases for disagreement and emotions are the power that make these positions forceful politically. But the consistency of the identity characteristics of partisans suggests that Republicans’ representations of themselves as color blind and inclusive are more than likely disingenuous and Democrats’ representations of themselves as embracing the entire American mosaic (including conservatives of various stripes) are more than likely also misleading.

Receptive and Resistant States

Why are some states more receptive to restrictive legislation than others? To find out, graduate student Benjamin Fields and I conducted statistical analyses to investigate the relationship between state characteristics and the fate of laws restricting course content and DEI. We examined a wide range of possible relationships including Republican Party dominance, measures of business influence, demographic changes over the last decade, and the dependence of public universities on state appropriations relative to tuition. Altogether we examined some 20 state characteristics that we thought could plausibly help to account for receptivity or resistance to the new restrictions.

The most distinctive features of the states that have passed content-restrictive legislation were GOP dominance and a strongly pro-business economic climate. We also found weak evidence that high levels of state investment in public research universities is associated with less interest in banning DEI. We think that racial politics also mattered, though not in ways that our measures of demographic change could convey.

The average of the proportion of Republicans in state senates and houses of representatives was by far the strongest influence on restrictive legislation. States like

³⁵ Alex Andrade, Statement on Florida HB 999 in House Education and Employment Committee (April 19, 2023).

³⁶ Randy Fine, Statement on Florida HB 999 in House Education and Employment Committee (April 19, 2023).

North Dakota, Oklahoma, and Tennessee where three-quarters or more of legislators are Republicans were very likely to push restrictive legislation forward, usually including both “divisive concepts” restriction and DEI bans. By contrast, states like California, Maryland, and Vermont where one-third or fewer of legislators are Republicans saw, with rare exceptions, no efforts to introduce legislation in either area.

We drew our measure of business climate from the index created by *Chief Executive Magazine*.³⁷ It is important to note that business climate is an environmental factor and it can influence legislation only in so far as politicians carry forward the sensibilities of business leaders into their legislative work. Business climate showed up as a statistically significant factor in both content restrictions and DEI bans, but in opposite ways. The top ranking states for business climate were more likely to be supportive of legislation restricting “divisive content” but more likely to be opposed to DEI bans. Many business leaders have embraced DEI as good for the cultural competency of employees – and for the bottom line.³⁸ On the other hand, one can imagine that “divisive concepts” in higher education might alarm business leaders in so far as they create a more critical frame of mind about American institutions, including their own.

The findings on state funding of universities may be an artifact of the kinds of states that provide comparatively high levels of funding for their public universities. For the most part, state funding of universities (as compared to tuition funding) is high in a few mineral-rich states like Alaska, New Mexico and Wyoming where receipts from leasing are used to support higher education *and* in a few liberal states that have embraced the idea that prosperity is closely linked to well-funded universities. Neither of these two very different types of states has shown much interest in higher education restrictions.

Consistent with this interpretation, we find that restrictive legislation has been most successful in the South and the farm Midwest, the locations of two-thirds of the still-pending or signed legislation. It has been almost non-existent on the Eastern seaboard, on the West Coast, and in the Mountain states, the locations of just 17 percent of the pending or signed legislation.

Rapid change in a state’s racial-ethnic composition generally reinforces Democratic Party dominance. California, Illinois, and New Jersey are among the states with the fastest percentage decline in their White population over the last decade – and they are all solidly Democratic states. Most GOP-dominated states remain predominantly white.

Florida and Texas are exceptions to this rule; minority populations in those states have been growing rapidly, and it is clear from the committee hearings that racial politics are sizzling in those states.

³⁷ Chief Executive, *Best and Worst States for Business 2023*. <https://chiefexecutive.net/best-worst-states-business/>

³⁸ See, e.g., Sundaitu Dixon-Fyle, Kevin Dolan, Dame Vivian Hunt and Sara Prince. 2020. “Diversity Wins: How Inclusion Matters.” *McKinsey and Co.* <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters/>; cf. Thomas Kochan et al. “The Effects of Diversity on Business Performance.” *Human Resources Management* 42 (1) (2003): 3-21.

In other GOP-dominated states, racial politics also mattered, albeit indirectly. A CBS poll in February 2022 found that only 13 percent of Republicans (and less than half of Independents) who had heard of Critical Race Theory had a favorable view of it.³⁹ It seems likely under the circumstances that White parents in GOP-dominated states were more alarmed by anti-racist school programs than White parents in Democratic Party-dominated states. Given this well of support, Republican governors and legislatures were prepared to be receptive to the signals coming from the White House and the think tanks about putting the brakes on “divisive content” and this was true whether or not racial minorities were a sizeable or fast-growing segment of the state’s population. What mattered was that these politicians had a base they could mobilize and partisans in the legislature on whom they could depend to pass legislation.

Remedies

The appeal of higher education restrictions has thus fallen within tight geo-political boundaries. The bills propagated in GOP strongholds in the Southern and farm Midwestern states. States under Democratic Party control, by and large, showed no interest in them. Moreover, the success rate of this legislation has not been notably impressive -- 19 of the 136 total higher education bills have been signed into law.

Yet we should not underestimate their impact. Public research universities in Florida, Iowa, North Carolina, and Texas are among the top-ranked in the country and state legislatures have now curtailed academic freedom and DEI efforts in those states. Outstanding professors also teach in other states that have been impacted by the restrictions and, of course, those states also enroll students who are interested in ideas the State wants to suppress. Nor is the modest success rate of the bills necessarily a good indicator of impact. As PEN America’s Jeremy Young observes, some failed bills are near-duplicates of bills that have passed or are still pending. Several of the bills that passed this year are more extreme than the bills that passed earlier – and more of these extreme bills are on the way.⁴⁰ Thus far, neither academic freedom watchdogs nor members of the public have been able to persuade Republican Party legislators in red states to allow university professors to adjudicate on the value of academic ideas.

It is likely, though not a foregone conclusion, that the courts will strike down the laws that restrict what can be taught in college classrooms. The courts have historically provided robust protections from what Supreme Court Justice William Brennan called “the pall of orthodoxy over college classrooms.”⁴¹ Civil liberties organizations, such as the Foundation for Individual Rights and Expression and the American Civil Liberties Union, are contesting the constitutionality of the content-restriction laws as they apply to higher education. Because the courts are not immune to partisanship, no guarantees exist about the final outcomes of these cases.

³⁹ Fred Backus and Anthony Salvanto, “Big Majorities Reject Book Bans – CBS Poll.” CBS (February 22, 2022). <https://www.cbsnews.com/news/book-bans-opinion-poll-2022-02-22/>

⁴⁰ Jeremy C. Young, private correspondence, July 28, 2023.

⁴¹ See William O. Brennan majority opinion in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)

The fate of the DEI bans is still less certain. The staffing of DEI offices would typically be considered a matter of administrative discretion and therefore outside of the purview of the courts. Diversity statements, on the other hand, do raise First Amendment issues but law professors have pointedly disagreed about whether or not they are constitutional.⁴²

Regardless of how the court challenges turn out, those who are concerned about the future of academic freedom in the United States have good reasons for concern. Apart from hoping that the recent wave of restrictive legislation is a spent force, they have a number of avenues to pursue.

One potential avenue is through an alliance with leading American corporations. The research literature suggests that opposition to DEI is not widespread in U.S. corporations, indicating that the business community could be mobilized in support of campus DEI efforts. Such an alliance might be aided by the new generation of DEI advocates, such as Karith Foster, Carlos Hoyt, and Irshad Manji, who are replacing the politics of suspicion that has sometimes marred campus DEI efforts⁴³ with programs that emphasize human connections.

Another avenue would be through monitoring the consequences of enacted restrictions. Many speakers in Florida and Texas argued that students and faculty will not apply to their public universities because of the restrictions and that some faculty will leave when they go into effect. They also argued that the state would run into problems with federal grants and accreditation and licensing boards that require statements about DEI contributions. It would be important to determine whether and the extent to which these fears prove to be warranted.

A third avenue is to show that universities are more than capable of creating open learning and inquiry environments where they do not currently exist. I reject the idea that illiberalism on campus is the direct source of restrictive legislation. Instead, conservative activists have seized on opportunities to promote policies that have been brewing for decades.⁴⁴ But universities do not help their cause if they look the other way when threats to academic freedom come from left-leaning groups on campus. A vigorous defense of academic freedom against all forms of illiberalism is now occurring on private university campuses such as Cornell and Stanford.⁴⁵ The leaders of public

⁴² See, e.g., Brian Leiter, "The Legal Problem with Diversity Statements." *Chronicle of Higher Education*. (March 30, 2020). <https://www.chronicle.com/article/the-legal-problem-with-diversitystatements/>; and Brian Soucek, "Diversity Statements." *UC Davis Law Review* 55 (2022):1989-2062. <https://ssrn.com/abstract=4087555/>

⁴³ Carlos E. Cortes, "Speech vs. Diversity, Diversity vs. Speech." *The American Diversity Report*. <https://americandiversityreport.com/speech-vs-diversity-diversity-vs-speech-by-carlos-e-cortes/>

⁴⁴ See, e.g., National Coalition Against Censorship, *Academic Bill of Rights – A Wolf in Sheep's Clothing*. <https://ncac.org/resource/academic-bill-of-rights-a-wolf-in-sheeps-clothing/>. This article critiques the Academic Bill of Rights, a forerunner of today's restrictive legislation, developed in 2003 by a conservative think tank, the David Horowitz Freedom Center.

⁴⁵ Martha Pollack, "The Indispensable Condition: Freedom of Expression at Cornell." (April 17, 2023). <https://statements.cornell.edu/2023/20230417-free-expression.cfm/> Jenny S. Martinez, "SLS Memorandum"

universities should consider joining this nascent movement. The long-term benefits in public support might easily outweigh the costs.

(March 23, 2023). <https://law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf/>