

ESSAY ROUNDTABLE

## Continuous Action toward Justice

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(Received 19 January 2022; accepted 19 January 2022)

### Abstract

Conservative activists and politicians have condemned critical race theory and have supported measures to prohibit teaching the subject in public schools. The anti-critical race theory movement is part of broader social movement activity inspired by the 2020 presidential election. Many conservatives view Donald Trump's defeat as a victory for antiracism. In response, they have portrayed the election as a product of fraud, enacted laws that will make it more difficult for people of color to vote, endorsed measures that would chill antiracist political activism, and banned instruction related to contemporary antiracist theory. These practices have been employed historically in response to antiracism. This history should guide social justice advocates as they analyze the meaning of counter-movement activity and build strategies of resistance.

**Keywords:** John Lewis; antiracism; critical race theory; backlash

### Introduction

Several commentators describe Donald Trump's 2016 election victory as a "whitelash."<sup>1</sup> By this, they mean to convey the idea that because many whites were so angered by the election of Barack Obama as president they supported an openly racist, sexist, and generally polarizing candidate.<sup>2</sup> The 2020 presidential election has led to a similar conservative<sup>3</sup> backlash that, much as the 2016 election did, threatens political participation and freedom of expression by subordinate groups and antiracist activists. The elements of this backlash

<sup>1</sup> TERRY SMITH, *WHITELASH: UNMASKING WHITE GRIEVANCE AT THE BALLOT BOX* (2016); Josiah Ryan, "This Was a Whitelash": Van Jones' Take on the Election Results, CNN, Nov. 9, 2016, <https://www.cnn.com/2016/11/09/politics/van-jones-results-disappointment-cnntv/index.html>.

<sup>2</sup> See, e.g., Ryan, *supra* note 1 ("This was a whitelash against a changing country . . . It was whitelash against a black president in part.").

<sup>3</sup> Conservatism occupies a spectrum, like other ideologies. This article arguably addresses a more reactionary version of conservative politics. Nonetheless, many mainstream conservative organizations and politicians have participated in or endorsed extremist activities this article analyzes. The Republican National Committee, for example, recently voted to censure Representatives Liz Cheney of Wyoming and Adam Kinzinger of Illinois. See Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack "Legitimate Political Discourse"*, N.Y. TIMES, Feb. 4, 2022, <https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html>. Cheney and Kinzinger have been highly critical of the January 6, 2021, riot at the U.S. Capitol led by supporters of President Trump. See *id.* The censure resolution accuses Cheney and Kinzinger of involvement in the "persecution of ordinary citizens engaged in legitimate political discourse." See *id.* Although the Republican National Committee subsequently stated that it was not endorsing violent protesters, the idea that contesting the presidential election results due to fraud represents "legitimate" discourse has no basis in fact. Indeed, this political rhetoric represents just one basket of activity designed to counter antiracism as a social movement. See *infra* text accompanying notes 29–42.



include discrediting of the presidential election results, voter suppression, efforts to chill antiracist political expression, and attacks on antiracist intellectuals. In order to understand and develop effective strategies to combat this racist countermovement, social justice advocates must place current backlash politics within an historical context. Examining history can help to demonstrate the resilience of racism and the ongoing need for activism. John Lewis spoke of the need for continuous resistance to oppression in his speeches and writings.<sup>4</sup> Similarly, scholars of critical race theory argue that the Civil Rights Movement achieved only a partial victory over racism and that much work remains to be done.<sup>5</sup> In this essay, I analyze the 2020 countermovement to antiracism and offers suggestions for future social justice advocacy. I further examine the specific dimensions of the countermovement by analyzing participants' strategy to discredit the election, suppress voting by persons of color, chill antiracist activism, and stigmatize antiracist intellectuals. Placing these events in an historical context, I make recommendations for social change.

### Resurgent White Supremacy and White Nationalism

The 2020 presidential election has generated a surge of conservative countermovement activity. In order to understand why Trump's loss has sparked such a reaction, it is important to understand the racial meaning of his presidency. Starting with his 2016 presidential campaign and continuing through his presidency, Trump became a highly visible symbol of white supremacy and white racial resentment. Commentators have detailed Trump's history of racism that began long before his political career.<sup>6</sup> One of his most pernicious acts involved purchasing full-page ads in New York City's three major newspapers, demanding the death penalty for defendants in the Central Park rape case.<sup>7</sup> The public furor sparked by the Central Park rape case was wrought with racial animus, as it involved allegations of interracial rape and criminality, stereotypes of sexually threatening men of color, and tropes of white womanhood as pure and vulnerable.<sup>8</sup> Scholars have documented the racist historical context of capital punishment for rape.<sup>9</sup> Execution was reserved for cases involving white women victims and, primarily, Black male defendants. When the death penalty was imposed for rape, the vast majority of defendants were Black, and the victims were all white women.<sup>10</sup> This striking statistic becomes even more pronounced when one considers the reality that most rapes are intraracial. Yet, the small subset of alleged rapes with Black male defendants and white victims were most likely to result in capital punishment.<sup>11</sup> When Trump demanded the death penalty for the now-exonerated Central Park defendants, he situated himself within the racist legacy of capital punishment and rape. But in the lead-up to his presidential candidacy he would go even further.

During the Obama presidency, Trump cultivated his Twitter stardom, which the social media company has now seen fit to silence by expelling Trump from the platform. With

<sup>4</sup> For my discussion of Lewis's speeches and writings, see *infra* "Looking to the Past and Future."

<sup>5</sup> Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARVARD LAW REVIEW 1331, 1376–79 (1988) (discussing limits of Civil Rights Movement).

<sup>6</sup> German Lopez, *Donald Trump's Long History of Racism, from the 1970s to 2020*, VOX, Aug. 13, 2020, <https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history>.

<sup>7</sup> Michael Wilson, *Trump Draws Criticism for Ad He Ran after Jogger Attack*, N.Y. TIMES, Oct. 23, 2002, <https://www.nytimes.com/2002/10/23/nyregion/trump-draws-criticism-for-ad-he-ran-after-jogger-attack.html>.

<sup>8</sup> N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO LAW REVIEW 1315, 1348–50 (2004) (discussing racist portrayal of black men in rape trials); Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARVARD WOMEN'S LAW JOURNAL 103, 111 (1983) (discussing racial stereotypes in rape cases).

<sup>9</sup> See Wriggins, *supra* note 8, at 111–12.

<sup>10</sup> Sheri Lynn Johnson, *Coker v. Georgia: Of Rape, Race, and Burying the Past*, in DEATH PENALTY STORIES 171, 192–93 (John H. Blume & Jordan M. Steiker eds., 2009).

<sup>11</sup> Wriggins, *supra* note 8, at 112–13 (discussing executions of Black men accused of raping white women). In the 1977 case *Coker v. Georgia*, the Supreme Court held that the death penalty for rape—in the absence of murder—deprives defendants of due process. *Coker v. Georgia*, 433 U.S. 584, 598–99 (1977).

respect to race, Trump endorsed and promoted the false “birther” claim—or the idea that Obama was not a “natural-born” US citizen and, thus, did not meet the qualifications for office detailed in the Constitution.<sup>12</sup> Trump only abandoned this claim when the media repeatedly pressed him to do so during the 2016 presidential campaign.<sup>13</sup> Even so, racially tinged xenophobia would continue to be a feature of Trump’s campaign. Trump opened his campaign by criminalizing Mexicans.<sup>14</sup> Also, during a presidential debate, he endorsed New York City’s “stop and frisk” policy, which a federal judge had invalidated due to its racist application.<sup>15</sup> Despite this ruling, Trump actually recommended stop and frisk as a policy to “help” Black communities.

Many of the Trump administration policies emanated from racial hostility and worsened conditions for people of color. Punitive immigration policies harmed people of color migrating to the United States.<sup>16</sup> Housing policies designed to ensure that people of color have access to affordable housing in suburbs were revoked following Trump’s claims that the programs destroyed suburban communities.<sup>17</sup> Trump responded with great hostility to the anti-racism protests that erupted after police murdered George Floyd, calling for governors to act with brute force and “dominate” protestors<sup>18</sup> and deploying the National Guard against peaceful protesters in Washington, DC.<sup>19</sup> Trump made opposition to the protests a central platform in his reelection campaign—homing in with particular vehemence against the police abolitionist movement.<sup>20</sup> The Trump administration also utilized the Department of Homeland Security as a quasi-police force to silence antiracist protesters in many cities.<sup>21</sup> An executive order required that the Department of Justice prosecute persons who vandalize federal monuments “to the fullest extent permitted under Federal law.”<sup>22</sup>

The racist dimensions of the Trump administration help to demonstrate how Trump himself became a symbol—or even mascot—of white supremacy. Social scientists who have studied the attitudes of Trump’s supporters have found that they have higher levels of racism, sexism, and other forms of bigotry.<sup>23</sup> Research findings indicate that dominant groups perceive

<sup>12</sup> Alana Abramson, *How Donald Trump Perpetuated the “Birther” Movement for Years*, ABC NEWS, Sept. 16, 2016, <https://abcnews.go.com/Politics/donald-trump-perpetuated-birther-movement-years/story?id=42138176>.

<sup>13</sup> See Abramson, *supra* note 12.

<sup>14</sup> *Donald Trump Announces a Presidential Bid*, WASHINGTON POST, June 16, 2015, <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid>.

<sup>15</sup> Michelle Ye Hee Lee, *Trump’s False Claim That Stop and Frisk in NYC Wasn’t Ruled Unconstitutional*, WASHINGTON POST, Sept. 28, 2016, <https://www.washingtonpost.com/news/fact-checker/wp/2016/09/28/trumps-false-claim-that-stop-and-frisk-was-not-ruled-unconstitutional>.

<sup>16</sup> Kevin R. Johnson, *Trump’s Latinx Repatriation*, 66 UCLA LAW REVIEW 1442, 1480–83 n.181–92 (2019).

<sup>17</sup> Libby Cathey, *Trump Stokes Racist Fears after Revoking Obama-Era Housing Rule Intended to Fight Segregation*, ABC NEWS, July 30, 2020, <https://abcnews.go.com/Politics/trump-stokes-racist-fears-revoking-obama-era-housing/story?id=72074862>.

<sup>18</sup> Alana Wise, *Trump Calls Governors Weak, Urging Them to “Dominate” to Quell Violence*, NPR, June 1, 2020, <https://www.npr.org/2020/06/01/867063007/trump-calls-governors-weak-and-urges-them-to-dominate-violent-protesters>.

<sup>19</sup> Karoun Demirjian & Alex Horton, *National Guard’s Capitol Security Mission Ends as Lawmakers Feud over Protection Needs, Costs*, WASHINGTON POST, May 24, 2021, [https://www.washingtonpost.com/national-security/national-guard-us-capitol/2021/05/24/136754a6-bc9a-11eb-9c90-731aff7d9a0d\\_story.html](https://www.washingtonpost.com/national-security/national-guard-us-capitol/2021/05/24/136754a6-bc9a-11eb-9c90-731aff7d9a0d_story.html).

<sup>20</sup> Michael Scherer, *Trump Employs Images of Violence as Political Fuel for Reelection Fight*, WASHINGTON POST, Sept. 8, 2020, [https://www.washingtonpost.com/politics/trump-violence-election/2020/09/08/0a7fa096-edf6-11ea-99a1-71343d03bc29\\_story.html](https://www.washingtonpost.com/politics/trump-violence-election/2020/09/08/0a7fa096-edf6-11ea-99a1-71343d03bc29_story.html). Police and prison abolition movements seek to redirect resources away from criminal justice and to invest in the structural causes of criminality—poverty, mental illness, and other factors. See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIFORNIA LAW REVIEW 1781, 1814–37 (2020) (discussing police abolition).

<sup>21</sup> Ben Fox & Gillian Flaccus, *Homeland Security Gets New Role under Trump Monument Order*, ASSOCIATED PRESS, July 10, 2020, <https://apnews.com/article/law-enforcement-agencies-immigration-donald-trump-ap-top-news-wa-state-wire-4435a1f27cf85e087e112ba1224a2f1f>.

<sup>22</sup> Riley Beggin, *Trump Signs an Executive Order on Prosecuting Those Who Destroy Monuments*, VOX, June 27, 2020, <https://www.vox.com/policy-and-politics/2020/6/27/21305396/trump-confederate-monuments-executive-order>.

<sup>23</sup> Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-immigrant Sentiments*, 51 PS: POLITICAL SCIENCE & POLITICS 528, 532 (2018); Jarrod Bock, Jennifer Byrd-Craven & Melissa Burkley, *The Role of Sexism in Voting in the 2016 Presidential Election*, 119 PERSONALITY AND INDIVIDUAL DIFFERENCES 189, 192–93 (2017).

advancement in the condition of subordinates as a status loss. Many whites, for example, view antiracism as a zero-sum competition for social status.<sup>24</sup> In this sense, Trump's racist stances were consistent with the attitudes of many of his supporters. Trump's supporters were attracted to him because he embraced white supremacy as ideology and policy. This mentality fuels the conservative backlash to the 2020 election, which Trump supporters view as a loss for white supremacy. In this vein, his defeat represents a triumph of antiracism.

The ongoing resistance by Trump supporters to the results of the 2020 election reflects a mindset steeped in paranoia. Biden is largely a political moderate, with a lengthy career of reaching bipartisan deals across racial and political lines.<sup>25</sup> Yet, in order to build and retain power, reactionaries in conservative politics have mobilized to counter relatively moderate social justice gains. The Senate remains bitterly divided, which limits the passage of progressive legislation.<sup>26</sup> The Supreme Court has a 6–3 conservative majority, with the appointment of three justices during Trump's presidency.<sup>27</sup> Despite the demographic diversity and more liberal attitudes of younger generations, economic inequities remain racialized and substantial for the foreseeable future.<sup>28</sup>

### Elements of Backlash

The conservative backlash to the 2020 election has at least four central components. First, conservatives seek to discredit the election. Second, they are passing laws making it tougher for people of color to vote. Third, they are attempting to chill antiracist political activism. Fourth, they are attacking antiracist intellectuals. All of these reflect the perduring power of white supremacy and white nationalism in the American body politic.

Trump and his supporters filed numerous lawsuits and used state legislative and executive power in order to discredit the election. While the litigation and political mobilization failed to reverse the results of the election, the filings and resulting media coverage helped to spread the false claim that election fraud cost Trump an election victory.<sup>29</sup> Some states ordered numerous recounts of election results under the guise of uncovering fraud.<sup>30</sup> Furthermore, ninety-one Republican state legislators unsuccessfully tried to persuade Vice President Pence to delay certification of the election. They hoped that the delay would give battleground-state legislatures time to reverse their states' results.<sup>31</sup> Also, 147 Republicans in Congress voted to disapprove of the election results.<sup>32</sup> The most aggressive

<sup>24</sup> Rebecca Aviel, *Rights as a Zero-Sum Game*, 61 ARIZONA LAW REVIEW 351 (2019); Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 215, 216–17 (2011).

<sup>25</sup> Some commentators, however, claim that Biden has governed as a progressive. Jonathan Martin & Jonathan Weisman, *Biden Throws in with Left, Leaving His Agenda in Doubt*, N.Y. TIMES, Oct. 2, 2021, <https://www.nytimes.com/2021/10/02/us/politics/biden-progressives-moderates-agenda.html>.

<sup>26</sup> The Senate is divided 50–50, with Vice President Kamala Harris casting the deciding vote in the event of a tie. Deirdre Walsh & Kelsey Snell, *Democrats Take Control of Senate with Twin Georgia Victories*, NPR, Jan. 6, 2021, <https://www.npr.org/2021/01/06/953712195/democrats-move-closer-to-senate-control-as-counting-continues-in-georgia>.

<sup>27</sup> Susan Davis & Nina Totenberg, *The Docket: The First Term with a New Conservative 6–3 Majority on the Supreme Court*, NPR, July 3, 2021, <https://www.npr.org/2021/07/02/1012670108/the-docket-the-first-term-with-a-new-conservative-6-3-majority-on-the-supreme-co>.

<sup>28</sup> Greg Rosalsky, *There Is Growing Segregation in Millennial Wealth*, NPR, April 27, 2021, <https://www.npr.org/sections/money/2021/04/27/990770599/there-is-growing-segregation-in-millennial-wealth>.

<sup>29</sup> Colleen Long & Ed White, *Trump Thought Courts Were Key to Winning. Judges Disagreed*, ASSOCIATED PRESS, Dec. 8, 2020, <https://apnews.com/article/donald-trump-courts-election-results-e1297d874f45d2b14bc99c403abd0457>.

<sup>30</sup> Michael Wines, *Half a Year after Trump's Defeat, Arizona Republicans Are Recounting the Vote*, N.Y. TIMES, Sept. 23, 2021, <https://www.nytimes.com/2021/04/25/us/Election-audit-Arizona-Republicans.html>.

<sup>31</sup> See, e.g., Patrick Marley, *15 Wisconsin Republicans Asked Pence to Block Biden's Victory the Day before the Attack on the Capitol*, MILWAUKEE JOURNAL SENTINEL, Jan. 14, 2021, <https://www.jsonline.com/story/news/politics/elections/2021/01/14/15-wisconsin-republicans-trying-block-biden-win-before-capitol-riot/4161574001/>.

<sup>32</sup> Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES, Jan. 7, 2021, <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html>.

action to discredit the election involved the January 6, 2021, insurrection conducted by a violent group of individuals who stormed the Capitol building in Washington, DC, hoping to disrupt the Senate confirmation of the election results.<sup>33</sup> Many participants were armed with guns or other weapons,<sup>34</sup> and five people died from injuries they suffered during the riot.<sup>35</sup> Four Capitol Police officers committed suicide after the attack.<sup>36</sup> Many individuals were injured.<sup>37</sup> Federal prosecutors have brought charges against more than six hundred participants in the violence.<sup>38</sup>

Many media have reported that Republican officeholders coordinated with and provided support for the insurgents and that Trump incited the violence.<sup>39</sup> Although he was silent publicly about the validity of the election, several media report that Vice President Pence considered whether he could legally subvert the election.<sup>40</sup> After finding no legal path, he exercised his ministerial constitutional role of certifying the Electoral College vote.<sup>41</sup> Although one could applaud Pence for adhering to the law, his alleged effort to appease Trump by considering ways to negate the election outcome is consistent with a counter-movement strategy to discredit President Biden's victory, which many conservatives perceive as an advancement for civil rights and a loss for white supremacy. Evidence of Pence's desire, intent, and effort to be efficacious in reversing the results of the election should inform analysis of Pence by historians.

<sup>33</sup> U.S. media have conducted extensive reporting on the insurrection. See, e.g., *The Attack: The Jan. 6 Siege of the U.S. Capitol Was Neither a Spontaneous Act nor an Isolated Event*, WASHINGTON POST, Oct. 31, 2021, <https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/>; *Inside the Capitol Riot: An Exclusive Video Investigation*, N.Y. TIMES, Jan. 6, 2022, <https://www.nytimes.com/2021/06/30/us/jan-6-capitol-attack-takeaways.html>. An investigation by the House of Representatives remains ongoing. Barbara Sprunt, *Here Are the 9 Lawmakers Investigating the Jan. 6 Capitol Attack*, NPR, July 27, 2021, <https://www.npr.org/2021/07/27/1020713409/here-are-the-9-lawmakers-investigating-the-jan-6-capitol-attack>.

<sup>34</sup> Michael S. Schmidt & Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES, July 12, 2021, <https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html>.

<sup>35</sup> Rachel Weiner, Spencer S. Hsu, Tom Jackman & Sahana Jayaraman, *Desperate, Angry, Destructive: How Americans Morphed into a Mob*, WASHINGTON POST, Nov. 9, 2021, <https://www.washingtonpost.com/dc-md-va/2021/11/09/rioters-charges-arrests-jan-6-insurrection/>.

<sup>36</sup> Tim Fitzsimons, Geoff Bennett & Phil Helsel, *Four Officers Who Responded to Capitol Riot Have Died by Suicide*, NBC NEWS, Aug. 3, 2021, <https://www.nbcnews.com/news/us-news/third-d-c-officer-who-responded-capitol-riot-dies-suicide-n1275740>.

<sup>37</sup> Tom Jackman, *Police Union Says 140 Officers Injured in Capitol Riot*, WASHINGTON POST, Jan. 27, 2021, [https://www.washingtonpost.com/local/public-safety/police-union-says-140-officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297\\_story.html](https://www.washingtonpost.com/local/public-safety/police-union-says-140-officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297_story.html).

<sup>38</sup> Weiner, Hsu, Jackman & Jayaraman, *supra* note 35.

<sup>39</sup> David Siders, *Capitol Riot Fueled by Deep Network of GOP Statehouse Support*, POLITICO, Jan. 13, 2021, <https://www.politico.com/news/2021/01/13/republican-legislatures-trump-conspiracy-458507>; Michael Kranish, Karoun Demirjian & Devlin Barrett, *Democrats Demand Investigation of Whether Republicans in Congress Aided Capitol Rioters*, WASHINGTON POST, Jan. 13, 2021, [https://www.washingtonpost.com/national-security/republicans-capitol-rioters/2021/01/13/9737a336-55e2-11eb-a931-5b162d0d033d\\_story.html](https://www.washingtonpost.com/national-security/republicans-capitol-rioters/2021/01/13/9737a336-55e2-11eb-a931-5b162d0d033d_story.html); Dan Barry, Mike McIntire & Matthew Rosenberg, *"Our President Wants Us Here": The Mob That Stormed the Capitol*, N.Y. TIMES, Nov. 10, 2021, <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html>.

<sup>40</sup> The reports center on claims made in *Peril*, a book by journalists Bob Woodward and Robert Costa. See, e.g., Aaron Blake, *New Details Undermine Pence's Supposed "Hero" Turn on Jan. 6*, WASHINGTON POST, Sept. 14, 2021, <https://www.washingtonpost.com/politics/2021/09/14/new-details-undermine-pences-supposed-hero-turn-jan-6/>; Chris Cillizza, *How Dan Quayle Saved Democracy. Yes, Really*, CNN, Sept. 14, 2021, <https://www.cnn.com/2021/09/14/politics/dan-quayle-pence-trump-january-6-woodward-costa-book/index.html>; Ed Kilgore, *The Vice-President Who Saved Democracy on January 6 Was . . . Dan Quayle?*, NEW YORK MAGAZINE, Sept. 14, 2021, <https://nymag.com/intelligencer/2021/09/dan-quayle-convicted-mike-pence-to-reject-trumps-coup.html>; Charles Davis, *"You Have No Power": Former VP Dan Quayle Told Mike Pence He Had to Certify the 2020 Election after Getting Pressure to Overturn It by Trump*, NEW BOOK CLAIMS, BUSINESS INSIDER, Sept. 14, 2021, <https://www.businessinsider.com/bidens-election-dan-quayle-urged-mike-pence-to-certify-2021-9>.

<sup>41</sup> Maggie Haberman & Annie Karni, *Pence Said to Have Told Trump He Lacks Power to Change Election Result*, N.Y. TIMES, Jan. 5, 2021, <https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election-results.html>.

States with Republican-dominated legislatures have also enacted numerous measures to suppress the vote since the 2020 elections. Due to the migration of northern voters and people of color to Georgia, the state elected two Democratic senators and gave Biden a narrow victory over Trump. Republicans realize that demographics in many states do not favor them. Generation Z is majority people of color. Half of the millennial generation is persons of color. Most voters of color support Democratic candidates. Accordingly, restrictive voting laws give Republicans hope for future election victories. The surge in absentee or mail-in ballots during the pandemic provided a rhetorical basis for election restrictions. In the lead-up to the election, Trump continuously argued that mail-in voting was laden with fraud, even though he used this method himself to vote in Florida in 2016 and 2020. Tellingly, many of the changes to election laws that were enacted following the election involve restrictions on mail-in ballots.

The post-election countermovement has also focused on suppressing antiracist political activism. This began even before the election. Trump, for example, supported and executed very punitive responses to the protests that followed the murder of George Floyd.<sup>42</sup> Also, in St. Louis, a white couple, Patricia and Mark McCloskey, brandished guns as Black Lives Matter protesters marched in their neighborhood. St. Louis county District Attorney Kimberly Garner, a Black woman, charged them with various crimes, but Mike Carson, the white male Republican governor of Missouri, pardoned them.<sup>43</sup> Furthermore, prior to and following the election, state legislatures considered or passed laws that immunize motorists who run into protesters from liability.<sup>44</sup> States have also passed laws designed to label protests as riots, which could trigger greater police authority to suppress the mobilization.<sup>45</sup>

The conservative countermovement has also mobilized to attack antiracist intellectuals—by conducting a war against critical race theory in public schools.<sup>46</sup> Critical race theory originated formally in legal education during the 1980s. It is steeped in Black intellectual and political thought.<sup>47</sup> Although it is difficult to condense a complex field of legal theory into a compact formulation, the synopsis by Kimberlé Williams Crenshaw in her introduction to one of the earliest anthologies of critical race theory captures the broad goals of most theorists. According to Crenshaw, critical race theory represents a progressive intervention in traditional antiracism movements and a racial insurgency in progressive movements that already existed within legal education, particularly the critical legal studies movement.<sup>48</sup> Critical race theory analyzes racism as systemic and rejects efforts to reduce racism to individual bias.<sup>49</sup> Critical race theory embraces race-conscious remedies, such as affirmative action, and seeks to uncover how neutral laws and policies can strengthen racial inequality.<sup>50</sup> Critical race theory also posits that oppression exists in bundles due to the intersection of race, gender, sexual orientation, class, and other important statuses.<sup>51</sup>

<sup>42</sup> See Wise, *supra* note 18.

<sup>43</sup> Meryl Kornfield, *Missouri Governor Pardons Mark and Patricia McCloskey, Who Pointed Guns at Protesters*, WASHINGTON POST, Aug. 3, 2021, <https://www.washingtonpost.com/nation/2021/08/03/mccloskey-pardon/>.

<sup>44</sup> Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, N.Y. TIMES, June 16, 2021, <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html>.

<sup>45</sup> *Id.*

<sup>46</sup> Trip Gabriel & Dana Goldstein, *Disputing Racism's Reach, Republicans Rattle American Schools*, N.Y. TIMES, Nov. 8, 2021, <https://www.nytimes.com/2021/06/01/us/politics/critical-race-theory.html>.

<sup>47</sup> *INTRODUCTION TO CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xiii–xxxii (Kimberlé Williams Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

<sup>48</sup> *Id.*, at xix (stating that critical race theory makes a “left intervention into race discourse and a race intervention into left discourse”). I have analyzed the general themes of critical race theory in previous works. See generally Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AMERICAN UNIVERSITY LAW REVIEW 1187 (2004).

<sup>49</sup> See Hutchinson, *supra* note 48, at 1195–96 n.62–71 (discussing critical race theory’s critique of formal equality).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*, at 1197–1200 n.77–94.

Opponents of antiracism have attacked critical race theory through legislation or executive action in at least twenty-four states.<sup>52</sup> But they actually seek to attack antiracism—not critical race theory specifically. Although the backlash has sought to eliminate critical race theory from public schools, the subject is taught in colleges and in graduate and professional schools, not in primary and secondary education. Because elementary and secondary schools do not offer critical race theory courses, finding the purpose of the concerted attacks on the subject matter requires a look behind the rhetoric of the countermovement. The timing and content of the attacks strongly support the proposition that the anti-critical race theory movement is really an organized action against antiracism. The conservative anti-critical race theory movement originated after Trump’s election loss and the symbolic harm to white supremacy that it caused. Furthermore, the content of some of the critical race theory regulations reveal the anti-antiracist goal. Florida’s anti-critical race theory regulation prohibits teachers from instructing students in subjects that “are inconsistent with State Board approved standards,” including critical race theory.<sup>53</sup> The regulation defines critical race theory as “the theory that racism is not merely the product of prejudice, but that racism is embedded in American society and its legal systems in order to uphold the supremacy of white persons.”<sup>54</sup> The regulation could be construed as requiring teachers to prohibit discussions of systemic racial inequality that are common in antiracist activism and academic disciplines.<sup>55</sup>

Although critical race theory rejects efforts to define racism as individual prejudice, the concept of institutional or systemic racism is grounded in sociological research and is not unique to critical race theory.<sup>56</sup> Challenging systemic inequality has also been a central theme of antiracist mobilization from Reconstruction to the present. Dr. Martin Luther King Jr. addressed the history of antiracist mobilization in these terms. In a 1967 speech, he argued that equality cannot simply mean ending discrimination but that it must include eradication of poverty, including racialized economic inequality that disempowered Black Americans and other people of color.<sup>57</sup> He also attributed the lack of substantive racial progress to the historical denial of economic justice, including the failure to remediate the harmful impact of slavery through reparations.<sup>58</sup> Contemporary antiracist movements like Black Lives Matter also make systemic racism a central focus of advocacy.<sup>59</sup> The conservative erasure of historical racism and limited definition of contemporary racism represent an assault on the intellectual framework for antiracism, which conceptualizes present-day conditions as the product of past and ongoing practices that have become institutionalized and facially neutral. While these claims have an empirical and scholarly basis, opponents of antiracist education seek to eradicate them from educational institutions by stigmatizing the

<sup>52</sup> Jennifer Schuessler, *Bans on Critical Race Theory Threaten Free Speech, Advocacy Group Says*, N.Y. TIMES, NOV. 8, 2021, <https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html> (“Since January, according to PEN [America], legislatures in 24 states have introduced 54 separate bills aimed at restricting teaching and training in K–12 school, higher education and state agencies and institutions, by banning various ‘prohibited’ or ‘divisive’ concepts, mostly relating to race, racism, gender and American history.”).

<sup>53</sup> Florida Administrative Code Rule 6A–1.094124 (July 26, 2021).

<sup>54</sup> *Id.*

<sup>55</sup> See Hutchinson, *supra* note 48, at 1195–96 n.62–71 (discussing systemic racism critiques in critical race theory).

<sup>56</sup> Tanya Golash-Boza, *A Critical and Comprehensive Sociological Theory of Race and Racism*, 2 SOCIOLOGY OF RACE & ETHNICITY 129, 131–33 (2016) (discussing individual, institutional, and structural theories of racism used in sociology).

<sup>57</sup> Martin Luther King, Jr., *Speech at the Hungry Club Forum in Atlanta, Georgia* (May 10, 1967), in THE ATLANTIC, March 7, 2018, <https://www.theatlantic.com/magazine/archive/2018/02/martin-luther-king-hungry-club-forum/552533/>.

<sup>58</sup> *Id.* (“In 1863 the Negro was granted freedom from physical slavery through the Emancipation Proclamation. But he was not given land to make that freedom meaningful.”).

<sup>59</sup> See *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> (“Black Lives Matter is an ideological and political intervention in a world where Black lives are *systematically* and intentionally targeted for demise. It is an affirmation of Black folks’ humanity, our contributions to this society, and our resilience in the face of deadly oppression.” (emphasis added)).

intellectual movement responsible for their existence. These political tactics mobilize white nationalism just like Trump's more explicitly racist appeals.<sup>60</sup>

### Looking to the Past and Future

In considering the future of civil rights and human rights, both in the United States and around the world, it is helpful to conceive of social justice as a project without a conclusion—and this was surely the conception of John Lewis. Lewis recognized that resistance to oppression is a continuous process, rather than an event with a fixed ending. In his book *Across That Bridge*, a collection of thoughtful reflections about social justice, Lewis explains: “Freedom is not a state; it is an act. It is not some enchanted garden perched high on a distant plateau where we can finally sit down and rest. Freedom is the continuous action we all must take, and each generation must do its part to create an even more fair, more just society. The work of love, peace, and justice will always be necessary, until their realism and their imperative takes hold of our imagination, crowds out any dream of hatred or revenge, and fills up our existence with their power.”<sup>61</sup>

These words can serve as an inspiration for contemporary antiracist activism. Reconstruction, the Civil Rights Movement, the Second Reconstruction, and the antiracist protests of 2020 did not end racism. But as Lewis argued, freedom is not an event. This echoes the ideas seen in Derrick Bell's work *Racial Realism*, where Bell argued that racism was permanent, but that antiracists needed to continue fighting it<sup>62</sup>—a tall order, because people usually engage in activism to achieve results.

Examining the resiliency of racism in history can help contemporary activists appreciate the indefinite nature of antiracist activism. Some of the greatest antiracist movements in U.S. history received similar backlash. Both Reconstruction and the Civil Rights Movement generated countermovement hostility designed to discredit the movements, impede voting and political expression, and silence intellectuals. The Confederate States portrayed abolition and Reconstruction as efforts to oppress the South and as violations of states' rights.<sup>63</sup> Southern states also banned speech related to abolition. Mississippi law, for instance, authorized sentences of hard labor, up to a twenty-one-year prison term, and execution for anyone “using language having a tendency to promote discontent among free colored people, or insubordination among slaves.”<sup>64</sup> Abolitionists in southern states faced legal restrictions on speech and hostility from the public, government officials, and mob violence.<sup>65</sup> President Andrew Jackson and some members of Congress proposed federal regulations banning the postal service from distributing abolitionist literature to slave states.<sup>66</sup> Furthermore, during Reconstruction and the Civil Rights Movement, states excluded people of color from political participation using grandfather clauses, literacy tests, poll taxes, and violent intimidation by

<sup>60</sup> Tyler Kingkade, Brandy Zadrozny & Ben Collins, *Critical Race Theory Battle Invades School Boards—With Help from Conservative Groups*, NBC NEWS, June 15, 2021, <https://www.nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794>.

<sup>61</sup> JOHN LEWIS, *ACROSS THAT BRIDGE: A VISION FOR CHANGE AND THE FUTURE OF AMERICA* 8–9 (2017).

<sup>62</sup> Derrick Bell, *Racial Realism*, 24 CONNECTICUT LAW REVIEW 363, 378 (1992). (“While implementing Racial Realism we must simultaneously acknowledge that our actions are not likely to lead to transcendent change. . . . Continued struggle [however] can bring about unexpected benefits and gains that in themselves justify continued endeavor. The fight in itself has meaning and should give us hope for the future.”).

<sup>63</sup> Joseph Fishkin, *The Dignity of the South*, 123 YALE LAW JOURNAL ONLINE 175, 181–86 (2013) (discussing usage of states' rights to justify slavery and segregation).

<sup>64</sup> William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEXAS LAW REVIEW 1065, 1084 (2021) (citation omitted).

<sup>65</sup> Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA LAW REVIEW 1109, 1120–24 (1997) (“Southern states had laws making it a crime to engage in speech or publication tending to cause discontent by slaves or free Negroes. Most southerners understood these laws to make Abolitionist and ultimately all antislavery literature criminal.”).

<sup>66</sup> *Id.*, at 1121.



actors such as the Ku Klux Klan.<sup>67</sup> After the Civil War, states banned Blacks from assembling, and the U.S. government subjugated Black artists and intellectuals during the mid-twentieth century.<sup>68</sup>

Social change is cyclical. Trump's defeat has sparked concerted efforts to counter antiracism and social justice. These responses, however, have occurred historically. They demonstrate the resiliency of racism and the difficulty of sustained progress. Antiracists must combat the current countermovement by attending to issues that make people of color vulnerable. These include discrimination in a variety of governmental and private sectors, including criminal law, employment, and housing. Antiracists must also recognize the breadth of racism and think creatively about the institutions that contribute to racial inequality. Environmental law, health care delivery, and immigration are sites of racial inequality, just as much as education and criminal law.

All of these concerns will inform the activity of Emory Law School's Center on Civil Rights and Social Justice. The center will provide a space for students, faculty, alumni, and corporate and nonprofit partners to contribute to the attainment of the Beloved Community that John Lewis imagined. Viewing justice from the long-term perspective of John Lewis can provide a firm basis for continued activism and confrontation.

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<sup>67</sup> Gabriel J. Chin, *The "Voting Rights Act of 1867": The Constitutionality of Federal Regulation of Suffrage during Reconstruction*, 82 NORTH CAROLINA LAW REVIEW 1581, 1582–83 (2004) ("The suffrage provisions of the constitutions created under the Reconstruction Acts—indeed, in most of the South, the entire constitutions—were superseded by now notorious tests and devices designed to disenfranchise African-Americans: poll taxes, literacy tests, and grandfather clauses."); Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 MINNESOTA JOURNAL OF LAW & INEQUALITY 263, 274 (2003) ("New laws were created to disenfranchise black voters and to reverse gains made during Reconstruction. White mob violence was yet another means by which blacks were disenfranchised.")

<sup>68</sup> Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL LAW REVIEW 899, 935–41 (2019) (discussing Black Codes); Mary L. Dudziak, *Josephine Baker, Racial Protest, and the Cold War*, 81 JOURNAL OF AMERICAN HISTORY 543 (1994).

**Cite this article:** Hutchinson, Darren Lenard. "Continuous Action toward Justice." *Journal of Law and Religion* 37, no. 1 (2022): 63–71. <https://doi.org/10.1017/jlr.2022.2>.