



## THE LOST CAUSE OF FREE SPEECH

*Mary Anne Franks\**

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### INTRODUCTION

Contemporary free speech law and policy in the United States teems with contradictions that cannot be explained by any principled doctrine. The key to understanding the current legal and cultural landscape of free speech is not some enduring constitutional value or method of interpretation, but rather the ascendance of a very specific political ideology that is best described as neo-Confederate. Neo-Confederate ideology is a constellation of values that includes investment in racial hierarchy, attachment to traditional gender roles and gender conformity, idealization of the pre-Civil War South, belief that the U.S. is a Christian nation, and hostility to democracy.<sup>1</sup> The neo-Confederate agenda renders coherent what otherwise appear to be chaotic free speech positions: the condemnation of “cancel culture” by promoters of censorship; the conflation of speech *reactions* with speech *restrictions*;

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\* Professor of Law and Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law (mafranks@law.miami.edu).

<sup>1</sup> *Neo-Confederate*, S. POVERTY L. CTR., <https://perma.cc/67UR-TKEZ>.

the equation of the right to speak with the right to an audience; alternating invocations and dismissals of the state action doctrine. While these positions are malleable enough to occasionally serve progressive interests, they are most consistently and powerfully deployed to protect the interests of white male supremacy.

The neo-Confederate agenda is, as its name suggests, a partisan project. Though not all Republicans are neo-Confederates, virtually all neo-Confederates are Republican. While the attachment to Lost Cause mythology<sup>2</sup> may be strongest in the South, its core tendencies—whitewashing the role of slavery in American history; selectively championing states' rights; and promoting racial, gender, and religious supremacy—have spilled over geographic borders.

The conservative reactionaries waging war against racial, gender, and religious equality have increasingly zeroed in on educational institutions as targets, often in the guise of fighting “critical race theory.” In the first six weeks of 2022 alone, 103 bills were introduced in state legislatures across the nation that were aimed at restricting speech in schools and universities.<sup>3</sup> These bills range from censoring what can be said about the role of racism and misogyny in shaping American institutions to forbidding “inappropriate” discussions of sexual orientation or gender identity. These provisions are vaguely and broadly worded in order to create maximum confusion and uncertainty about what speech is permitted. Many of these bills allow parents or other parties not only to demand removal of but also to sue over educational material they find personally objectionable, creating financial and social incentives for censorship. Republican officials and organizations have also issued executive orders, statements, book bans, and administrative guidelines attacking discussions of social justice and diversity. This anti-education movement vilifies teachers, administrators, librarians, and school-board members as “indoctrinators,” “groomers,” and “pedophiles,” leading to harassment, doxing, threats, physical assaults, and firings.<sup>4</sup>

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<sup>2</sup> See Gary W. Gallagher, *Introduction* to *THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY* 1, 11–31 (Gary W. Gallagher & Alan T. Nolan eds., 2000).

<sup>3</sup> Jeffrey Sachs & Jonathan Friedman, *Educational Gag Orders Target Speech About LGBTQ+ Identities with New Prohibitions and Punishments*, PEN AM. (Feb. 15, 2022), <https://perma.cc/G3M6-8WLW>.

<sup>4</sup> Brennan Suen & Ari Drennen, *The Real Victims in the “Libs of TikTok” Discourse Are the Teachers and LGBTQ People Harassed Because of the Account*, MEDIA MATTERS FOR AM. (Apr. 19, 2022), <https://perma.cc/4TJY-RP72>.

In the midst of this highly coordinated, well-funded, Republican-led, governmental assault on freedom of expression generally and in education in particular, the American public continues to be subjected to an endless stream of op-eds, think pieces, media coverage, social-media commentary, speeches, academic conferences, academic articles, and expert panels devoted to the topic of what is often popularly referred to as “cancel culture.” Like “safe spaces,” “trigger warnings,” and “political correctness,” “cancel culture” is an amorphous concept, often used loosely and interchangeably with “censorship” and “silencing” to describe a wide range of negative reactions to particular speech. As is the case with those concepts, cancellation discourse tends to rely heavily on anecdotal, self-reported experiences of victimization; to focus on private, as opposed to governmental, perpetration; and to identify “liberal intolerance” as the primary culprit.<sup>5</sup>

These characteristics make clear why cancel-culture discourse is such a powerful tool of Republican propaganda: It serves as both a distraction from and a justification for Republicans’ sustained campaign to censor, punish, delegitimize, and drown out every idea that conflicts with their neo-Confederate political and cultural agenda. It explains why cancel culture is a favorite topic among conservatives, from Fox News talking heads<sup>6</sup> to *Wall Street Journal* op-ed writers<sup>7</sup> to former President Trump,<sup>8</sup> all of whom never tire of invoking the shadowy, all-powerful, intolerant liberal forces that supposedly pose the true threat to free speech.

It is a testament to the power of the neo-Confederate agenda that those who disclaim reactionary conservative sensibilities have not only failed to effectively denounce the cancel-culture narrative for the Republican agitprop that it is, but have instead frequently fallen under its spell. If cancel culture is the neo-Confederate shell game, civil libertarians are its dupes, shills, and sometimes accomplices. Some of the most naïve and elitist proclamations on free speech and censorship, especially in the context of educational institutions, have been churned out by influential entities identifying as or perceived to be liberal or civil libertarian, including

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<sup>5</sup> Ligaya Mishan, *The Long and Tortured History of Cancel Culture*, N.Y. TIMES (Dec. 3, 2020).

<sup>6</sup> Jake Lahut, *Fox News Is Betting Big on the ‘Cancel Culture’ Wars Post-Trump*, BUS. INSIDER (Apr. 6, 2021), <https://perma.cc/9YJ7-Q2PT>.

<sup>7</sup> Joshua Katz, *Princeton Fed Me to the Cancel Culture Mob*, WALL ST. J. (May 24, 2022).

<sup>8</sup> Daniel Politi, *Trump Decries “Cancel Culture,” Calls On Republicans to Boycott More Companies*, SLATE (Apr. 4, 2021), <https://perma.cc/732D-PUV2>.

organizations such as the ACLU and FIRE and major media outlets such as *The New York Times* and *The Atlantic*. It has become commonplace for liberals and civil libertarians to follow any acknowledgement of Republicans' brutal use of government power to suppress progressive speech and ideas with some version of the claim that "private liberal intolerance can be as powerful, or even more powerful, than government censorship."<sup>9</sup> And the bottom-line message from self-described civil libertarians continues to be that, however regrettable it may be, the speech in need of the very highest protection by both law and policy just happens to be racist, sexist, bigoted speech—a point with which Republicans, especially neo-Confederates, gleefully agree.<sup>10</sup>

This is how free speech becomes a Lost Cause—not by the self-interested, bad-faith machinations of conservative extremists alone, but by the willing or naïve collaboration of civil libertarians who have allowed the myth of liberal aggression to distract from and justify the imposition of a neo-Confederate agenda.

#### I. THE NEO-CONFEDERATE ATTACK ON EDUCATION

In prior work, I have described the phenomenon of selective, self-interested interpretations of constitutional rights as "constitutional fundamentalism."<sup>11</sup> I have explored how constitutional fundamentalism closely resembles religious fundamentalism, most obviously when conservatives claim certain rights as being "God-given" and more subtly in the cross-partisan veneration of the Constitution and the "Founding Fathers."<sup>12</sup> I have noted that conservative and liberal constitutional fundamentalists, while frequently diverging on issues such as guns and abortion, have largely converged on free speech issues in recent decades, and I have attributed this to their shared commitment to white male supremacist values<sup>13</sup> and free-market capitalist ideology.<sup>14</sup> I have sometimes referred to this as the triumph of the *civil*

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<sup>9</sup> See, e.g., Pamela Paul, *There's More Than One Way to Ban a Book*, N.Y. TIMES (July 24, 2022).

<sup>10</sup> See Mary Anne Franks, *Beyond 'Free Speech for the White Man': Feminism and the First Amendment*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 366 (Robin Weszt & Cynthia Grant Bowman eds., 2019).

<sup>11</sup> See generally MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION (2019).

<sup>12</sup> *Id.* at 35–50.

<sup>13</sup> As I have explained in previous work, "white male supremacists" include not only violent extremists and radical conservatives, but anyone who "demands, in essence, that the interests of white men *take priority* over those of all others." *Id.* at 6.

<sup>14</sup> *Id.* at 45.

*liberties* approach over the *civil rights* approach to free speech: an ahistorical focus on individual rights in isolation over a historically-informed view of group rights in a constitutional ecosystem.<sup>15</sup> What this convergence has looked like in practice is a free speech orthodoxy that over-protects the speech rights of the powerful and under-protects those of the vulnerable.

Broadly speaking, self-proclaimed civil libertarians view harassment, intimidation, invasions of privacy, and threats directed at women, racial minorities, sexual minorities, or other minority groups as free speech that must be protected by both law and policy, and any attempts to safeguard the expressive rights of these groups against these attacks as censorship. This conception of free speech is replete with contradictions and myths, including the claim that safeguarding the “unpopular” speech of white male supremacists is necessary to protect the speech of the groups they seek to silence and exploit; the embrace of the pseudo-competitive, corporatist logic of the “marketplace of ideas” as long as that market reinforces existing power structures; and the selective hostility to that same marketplace when private actors decline to serve as all-access platforms for bigots and abusers.<sup>16</sup>

Beginning with the Trump Administration and continuing to the present day, Republicans have openly pursued an agenda of aggressive, state-sponsored suppression of speech, seeking to curtail press freedoms, limit the rights of protesters,<sup>17</sup> and punish dissenters. These efforts have many targets, but have increasingly taken aim at educational institutions. The current anti-education movement began in earnest in September 2020, after an obscure journalist named Christopher Rufo appeared on Tucker Carlson’s show to demand an executive order from then-President Trump to abolish what Rufo called “critical race theory,” which he characterized as an “existential threat to the United States.”<sup>18</sup> Rufo chose the term not because it accurately described the curriculum of the corporate anti-bias trainings he had been examining, but because he considered it to be “a promising political

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 181–82.

<sup>17</sup> See Tabatha Abu El-Haj, *Breathing Room for the Right of Assembly*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 29, 31 (2021) (observing that while “[t]he First Amendment’s role in our constitutional system is to defend its democratic foundations. . . . it consistently under-protects those seeking political change and racial reckoning by demonstrating in the streets”).

<sup>18</sup> Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, NEW YORKER (June 18, 2021).

weapon”:

Its connotations are all negative to most middle-class Americans, including racial minorities, who see the world as “creative” rather than “critical,” “individual” rather than “racial,” “practical” rather than “theoretical.” Strung together, the phrase “critical race theory” connotes hostile, academic, divisive, race-obsessed, poisonous, elitist, anti-American. . . . “Critical race theory” is the perfect villain.<sup>19</sup>

Three weeks after Rufo’s appearance, Trump delivered exactly what Rufo demanded. His Executive Order on Combating Race and Sex Stereotyping is shamelessly Orwellian, denouncing those who acknowledge the centrality of slavery in America’s founding and the lasting legacy of racism as slavery apologists whose views “were soundly defeated on the blood-stained battlefields of the Civil War.”<sup>20</sup> Tucked among the spluttering denunciation of various straw man claims, including “that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans,” and innocuous-sounding platitudes about racial and gender equality are the order’s real targets: the discussion of “divisive concepts” or “scapegoating” relating to race or sex.<sup>21</sup>

According to the Order, such divisive concepts include suggestions that “an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex” or that “any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex.”<sup>22</sup> Race or sex scapegoating means “assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex,” or claims that “consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.”<sup>23</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> Donald J. Trump, *Executive Order on Combating Race and Sex Stereotyping*, WHITE HOUSE ARCHIVES (Sept. 22, 2020), <https://perma.cc/FN3Z-E6D6>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Trump's executive order marked the beginning of a nationwide legislative assault against educational institutions. "Schools and universities are being threatened today to a degree that has no recent parallel," wrote Jeffrey Sachs and Jonathan Friedman of PEN America in February 2022. "There is a willingness, and even *eagerness*, to bring the weight and power of government to bear on controlling classroom speech."<sup>24</sup> PEN America maintains a comprehensive database of what it has termed "educational gag orders," laws that restrict what can be taught, read, or discussed in the classroom.<sup>25</sup> According to PEN's database, as of August 2022, nearly 200 such laws have been introduced in 40 different states since 2021, 19 of which have become law in 15 states, affecting 122 million Americans.<sup>26</sup> Additionally, governors, attorneys general, and administrative agencies in several states have issued numerous orders, statements, and guidelines seeking to censor school speech relating to social justice and diversity.<sup>27</sup> These laws and policies, often vaguely and broadly worded to ensure maximum chilling effect, are primarily aimed at repressing speech that acknowledges or condemns the influence of racism, sexism, homophobia, and transphobia in American society.<sup>28</sup>

#### A. *The Lost Cause and the War of Liberal Aggression*

Kimberlé Crenshaw, who coined the term critical race theory decades ago, has observed that the attack on critical race theory is only the most recent attempt by conservatives to avoid acknowledging the centrality of slavery to America's founding and its continuing impact on American institutions.<sup>29</sup> One prominent form of this denial, dating back to 1866, is the Lost Cause of the Confederacy. The Lost Cause is a pseudohistorical account of the Civil War that insists that the Confederacy was motivated by noble economic and chivalric purposes, not by slavery, and that Northern forces were the true aggressors. Proponents of the Lost Cause spread

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<sup>24</sup> Sachs & Friedman, *supra* note 3.

<sup>25</sup> *PEN America Index of Educational Gag Orders*, PEN AM., <https://perma.cc/8EQ4-A2FW>.

<sup>26</sup> *Id.*

<sup>27</sup> Jordan Williams, *20 State AGs Tell Education Dept They Oppose Teaching Critical Race Theory*, HILL (May 20, 2021), <https://perma.cc/24A3-RT5J>.

<sup>28</sup> Jeffrey Sachs, Jeremy C. Young & Jonathan Friedman, *For Educational Gag Orders, the Vagueness Is the Point*, PEN AM. (Apr. 28, 2022), <https://perma.cc/4PU8-BXDK>.

<sup>29</sup> Wallace-Wells, *supra* note 18.

this myth through the construction and defense of Confederate monuments, displays of the Confederate flag, revision of history textbooks, and cultural organizations such as the United Daughters of the Confederacy.<sup>30</sup>

Lost Cause mythology is a central aspect of neo-Confederate ideology, which has an agenda of racial patriarchy that “incorporates advocacy of traditional gender roles, is hostile toward democracy, strongly opposes homosexuality and exhibits an understanding of race that favors segregation and promotes white supremacy.”<sup>31</sup> Neo-Confederates hold “a sociological vision derived from the fundamentally unequal society of their forebears, a conception that is organic, static, and natural, and structures society on the basis of gender, race, and class hierarchies.”<sup>32</sup> This is the vision that now dominates in the Republican Party not only in the South, but across the United States. As the Republican Party has moved increasingly to the far right, especially during the Trump years, it has increasingly embraced neo-Confederate values: hostility to reproductive rights, voting rights, LGBTQ rights, and efforts to recognize and redress systemic racism and sexism in the United States.

The idealized pre-Civil War South has become a symbol for right-wing conservatism across the country, as made clear in this description by Michael Hill, president of the neo-Confederate organization League of the South: “The South stands for—orthodox Christianity, honor, hierarchy, loyalty to place and kin, patriarchy, respect for the rule of law.” The Confederate flag, Hill explains, “says ‘NO’ to gun control, abortion, Third World immigration, moral deviancy, feminism, paganism, radical environmentalism, exorbitant taxation, globalism, crass consumerism, and big government”<sup>33</sup>—a description that summarizes the current GOP platform.

All but one of the educational gag orders introduced since January 2021 were sponsored by Republicans.<sup>34</sup> Republican officials have also banned affirmative action at public universities in Idaho, weakened tenure protections in Georgia, and

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<sup>30</sup> See Lloyd A. Hunter, *The Immortal Confederacy*, in *THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY*, *supra* note 2, at 193.

<sup>31</sup> *Neo-Confederate*, *supra* note 1.

<sup>32</sup> Heidi Beirich & Kevin Hicks, *Gender, Sexuality, and Neo-Confederacy*, in *NEO-CONFEDERACY: A CRITICAL INTRODUCTION* 78 (Euan Hague, Heidi Beirich & Edward H. Sebesta eds., 2008).

<sup>33</sup> *Id.* at 83.

<sup>34</sup> *PEN America Index of Educational Gag Orders*, *supra* note 25.

have sought control of campus operations in North Carolina.<sup>35</sup> Florida, led by Republican Governor Ron DeSantis, provides a particularly illuminating example of the neo-Confederate agenda. The state's efforts to control and intimidate teachers, alongside its attacks on freedom of expression more broadly, have led one commentator to describe Governor DeSantis as "creating a paradise of authoritarianism."<sup>36</sup> In April 2021, DeSantis signed a bill that would impose stiff criminal penalties on nonviolent protesters and those who damage Confederate monuments, while at the same time providing criminal and civil immunity to people who kill or injure protesters with their vehicles.<sup>37</sup> The federal judge who blocked the law from being enforced described it as "effectively criminaliz[ing] the protected speech of hundreds, if not thousands, of law-abiding Floridians."<sup>38</sup>

In a May 2021 speech, Florida education commissioner Richard Corcoran stated that it was necessary to "police" teachers to ensure they are not indoctrinating students with a liberal agenda.<sup>39</sup> Corcoran boasted that he had "censored or fired or terminated numerous teachers." "There was an entire classroom memorialized to Black Lives Matter," he offered as one example, "and we made sure [the teacher] was terminated."<sup>40</sup> In June 2021, the Florida Board of Education banned public schools from teaching about "critical race theory."<sup>41</sup> Also in 2021, Florida enacted a "free speech" law that forbids educators from limiting "students', faculty members', or staff members' access to, or observation of, ideas and opinions that they may find uncomfortable, unwelcome, disagreeable, or offensive," including those propounded by the "KKK" and "Nazis,"<sup>42</sup> but made clear in a 2022 law that

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<sup>35</sup> Daniel Golden & Kirsten Berg, *The Other Cancel Culture: How a Public University Is Bowing to a Conservative Crusade*, SALON (June 29, 2022), <https://perma.cc/SCE3-BEA5>.

<sup>36</sup> Paul Waldman, *In Florida, Ron DeSantis Is Creating a Paradise of Authoritarianism*, WASH. POST (Jan. 19, 2022).

<sup>37</sup> Daniel Conrad, *Florida Anti-Riot Law Struck Down as Unconstitutional to Protesters*, COURT-HOUSE NEWS (Sept. 9, 2021), <https://perma.cc/7TF9-AGCP>.

<sup>38</sup> *Id.*

<sup>39</sup> Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring*, WASH. POST (Feb. 14, 2022).

<sup>40</sup> *Id.*

<sup>41</sup> Bobby Caina Calvan, *Florida Bans 'Critical Race Theory' from Its Classrooms*, AP NEWS (June 10, 2021), <https://perma.cc/DK6S-BJ8J>.

<sup>42</sup> Jason Delgado, *State Lawmaker, Lobbyist Skirmish over KKK Remarks, Free Speech Issues*

free speech did not include speech that caused individuals to believe that they must feel “discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race, color, sex, or national origin.”<sup>43</sup> In 2022, Governor DeSantis signed the euphemistically titled ““Parental Rights in Education” (“Don’t say Gay”) bill, which prohibits school districts from “encourag[ing] classroom discussion about sexual orientation or gender identity in primary grade levels or in a manner that is not age-appropriate or developmentally appropriate for students.” In defending the bill, DeSantis’s press secretary, Christina Pushaw, characterized critics of the bill as “groomers,” sparking a nationwide trend of right-wingers accusing Democrats and liberals of being pedophiles and groomers.<sup>44</sup>

These Neo-Confederate attacks on education have had a predictably chilling effect on teachers and students alike, who are no longer sure what topics they are allowed to discuss or what questions they are allowed to answer in the classroom. Many of the censorship bills give parents and other parties the right to sue over alleged violations,<sup>45</sup> and tip lines<sup>46</sup> and watchlists<sup>47</sup> have been established to encourage reporting and to facilitate tracking of incidents. The politicized hysteria over critical race theory has converged with hysteria over transgender bathroom access and COVID measures, creating a climate of animosity against teachers, administrators, and school-board members. Teachers have been defamed, threatened, and physically attacked; many educators have left the profession in the wake of the anti-CRT movement.<sup>48</sup> Librarians have been harassed for the inclusion of books with LGBTQ+ themes in their collections and confronted by armed extremist groups for

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*During Hearing*, FLA. POL. (Feb. 19, 2021), <https://perma.cc/VG9Z-FMWC>.

<sup>43</sup> Paul Blest, *Florida Just Passed Its ‘Stop WOKE’ Anti-CRT Bill*, VICE (Mar. 11, 2022), <https://perma.cc/4VPU-7UGC>.

<sup>44</sup> Ben Mathis-Lilley, *How One Florida Woman with Twitter Problems Plunged Us into a Nightmarish National Conversation About “Grooming”*, SLATE (Apr. 21, 2022), <https://perma.cc/2P64-T4JK>.

<sup>45</sup> Peter Greene, *Teacher Anti-CRT Bills Coast to Coast: A State by State Guide*, FORBES (Feb. 16, 2022).

<sup>46</sup> Theresa Vargas, *Youngkin’s Tell-on-a-Teacher Tip Line Drew Jokes, but Behind the Laughter Is a Serious Concern*, WASH. POST, (Jan. 26, 2022).

<sup>47</sup> Greg Childress, *National Watchlist for ‘Radical Left’ Policies includes 5 North Carolina School Boards*, NC POL’Y WATCH (Sept. 7, 2021), <https://perma.cc/9KPN-K22A>.

<sup>48</sup> Daniel Villarreal, *Death Threats and Fights Over Critical Race Theory Have Driven at Least Six Educators to Resign*, NEWSWEEK (July 14, 2021).

hosting Pride-themed events.<sup>49</sup>

In October 2021, one newly-elected Brevard County School Board member, Jennifer Jenkins, published a written account of her firsthand experience with the hostility of the anti-education movement.<sup>50</sup> When Brevard schools instituted mask mandates in defiance of Gov. DeSantis’s executive order banning them, Florida state representative Randy Fine posted Jenkins’ cellphone number on his Facebook page and urged residents to call her, leading to a deluge of hostile messages. Angry protesters confronted Jenkins at board meetings and also at her home, calling her a pedophile and threatening to “make you beg for mercy. If you thought January 6 was bad, wait until you see what we have for you!” One protestor outside Jenkins’ home coughed in her face while another shouted “Give her covid!” and a third swung a “Don’t Tread on Me” flag near her face. At one point, Jenkins was visited by the Florida Department of Children and Families due to a false report that she had abused her 5-year-old child.<sup>51</sup>

## II. THE CANCEL-CULTURE CON AND ITS MARKS

On March 28, 2022, as Republican-led efforts to suppress speech in schools, vilify educators, harass librarians, criminalize protest, and commandeer social media companies swept the country, an op-ed in a major media outlet solemnly proclaimed, “Americans are losing hold of a fundamental right as citizens of a free country: the right to speak their minds and voice their opinions in public without fear of being shamed or shunned.”<sup>52</sup> It was the journalistic equivalent of pointing out the broken window of a house on fire, and it was the kind of statement by then commonplace in countless right-wing propaganda outlets, from Fox News to the Daily Caller. This particular claim, however, was notable because it appeared not in a conservative tabloid but in what many consider to be the nation’s most influential, reputable, “left-leaning” newspaper, *The New York Times*, authored not by some rabble-rousing guest contributor but by the *Times*’ own Editorial Board. As such, it

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<sup>49</sup> Claire Woodstock, *Oklahoma Threatens Librarians: ‘Don’t Use the Word Abortion,’* VICE (July 21, 2022), <https://perma.cc/5DDD-QCP5>.

<sup>50</sup> Jennifer D. Jenkins, *I’m a Florida School Board Member. This Is How Protesters Come After Me*, WASH. POST (Oct. 20, 2021).

<sup>51</sup> *Id.*

<sup>52</sup> New York Times Editorial Board, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022).

was perhaps the clearest illustration of how successfully “cancel culture” has functioned as a shell game to distract the American public’s attention from the conservative attack on free speech, with liberals and libertarians serving as its dupes and, sometimes, its shills.

The shell game is one of the oldest confidence tricks in history, dating back as far as Ancient Greece.<sup>53</sup> Also known as “cup and balls” or “thimblorig,” the shell game invites spectators to keep their eye on a ball as it is covered by a shell or other container and then shuffled around with other identical containers. The seductive premise of the game is that you only have to pay attention to win; the con, of course, is that paying attention to the game is exactly how you lose. The con artist is in control of the ball at all times, and is skilled at distracting players’ attention so that they do not notice when the ball is slipped beneath another identical shell or off the table altogether. The con artist will sometimes occasionally let a player win, or have a shill posing as a player win, to convince the crowd that the game is not rigged. Inevitably, though, those sucked into the game will find themselves on the losing end, because a shell game by definition cannot be won.

Those who have studied shell games and other cons note that there are two types of people who are most susceptible to becoming dupes: the naïve and the arrogant. The naïve are easily swayed by the appearance of legitimacy (professional attire, official-sounding vocabulary) or sympathetic stories (tales of woe),<sup>54</sup> while the arrogant are done in by their conviction that they possess unique powers of perception or skills that allow them to see what others cannot.<sup>55</sup> But the players are not the only marks; so too are the spectators so absorbed by the con artist’s game that they fail to notice his confederates in the crowd robbing them blind. Some people fall for the cancel-culture con because they are entranced by sensationalist stories about liberal censorship; some because they believe so fully in the accuracy of their own intuitions that free speech is under attack. Still others may see through the propaganda but collaborate with it for personal, financial, or reputational gain. Regardless of the explanation for focusing on the spectacle of cancel culture, neo-

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<sup>53</sup> The Editors of Encyclopedia Britannica, *Cup and Balls Trick*, BRITANNICA, <https://perma.cc/9EUS-9SN7>.

<sup>54</sup> Doug Shadel, *Confessions of a Con Artist*, AARP, <https://perma.cc/H6NS-NRNU>.

<sup>55</sup> Richard Feloni, *Psychologist: Being Smart Could Make You More Prone to Fall for a Con Artist’s Lies*, BUS. INSIDER (Mar. 24, 2016), <https://perma.cc/G386-2VE4>.

Confederates will exploit that focus to strip Americans of their rights.

### A. *The Con*

One of the persistent features of cancel-culture discourse, like previous discourse around political correctness,<sup>56</sup> “safe spaces,” and “the campus free speech crisis,” is its fundamental ambiguity. The term is used to describe everything from students “feeling uneasy”<sup>57</sup> in class to professors being fired for innocuous remarks.<sup>58</sup> As Osita Nwanevu writes, “[C]ancel culture, as best as one can tell, seems to describe the phenomenon of being criticized by multiple people . . . Neither the number of critics, the severity of the criticism, nor the extent of the actual fallout from it seem particularly important.”<sup>59</sup> That kind of imprecision makes substantive analysis impossible, which is exactly the point of the con. Those sucked into cancel-culture discourse are certain that they are following a real object—“Cancel culture is here, in this tense classroom! No wait, it’s over there, in those vicious social-media posts!”—oblivious to the reality that the only real object all along is what the con(servative) artist wants them to see, or rather, *not* to see: the Republican theft of democracy.

To state it plainly: The neo-Confederate defense of free speech is based exclusively on politics, not principle. In the manner of all authoritarians, neo-Confederates seek to use the power of the state to censor speech that threatens their values and to compel speech that serves them. Both of these practices blatantly violate the First Amendment, and that creates an image problem for a party desperate to present itself as the true defender of the Constitution. Overt admission of an anti-democratic agenda also creates the danger of unifying opposition across the political

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<sup>56</sup> Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 1992–93 (2017).

<sup>57</sup> Emma Camp, Opinion, *I Came to College Eager to Debate. I Found Self-Censorship Instead*, N.Y. TIMES (Mar. 7, 2022).

<sup>58</sup> Zack Beauchamp, *The “Free Speech Debate” Isn’t Really About Free Speech*, VOX (July 22, 2020), <https://perma.cc/G3SA-Y56P> (“‘Cancel culture’ . . . is a notoriously fuzzy concept. It is often taken to refer to all of the following things at once: allegedly widespread self-censorship in elite intellectual institutions, a rise in vicious social media mobbing, and the firing of non-public figures for allegedly racist or bigoted behavior.”).

<sup>59</sup> Osita Nwanevu, *The “Cancel Culture” Con*, NEW REPUBLIC (Sept. 23, 2019), <https://perma.cc/U3PE-6XVQ>.

spectrum, including non-extremist Republicans, centrists, and liberals. Being (accurately) perceived as authoritarian censors depriving the American people of their constitutional rights threatens the political domination and cultural legitimacy that neo-Confederates crave.

To avert this, neo-Confederates need a way to both distract from their assault on the First Amendment and to justify it. Hence the cancel-culture con, though the technique predates the term. The cancel-culture narrative, like the “campus free speech crisis” and “political correctness” narratives that preceded it, relies heavily on self-reported anecdotes about individuals being silenced, criticized, or punished by some private, non-governmental, force. Focusing on non-governmental “censorship” turns the spotlight away from Republicans’ rampant use of state power to control speech, and the reliance on subjective reports gives pride of place to those with the thinnest skin and greatest sense of grievance—a group that happens to include a great number of conservatives who feel persecuted by non-conservative individuals and ideas.<sup>60</sup> That feeling of persecution drives the hyperbolic rhetoric of the cancel-culture narrative, reinforcing the message that the “left” is an insidious enemy that can only be countered with force. This is in some ways the most pernicious aspect of the thought-terminating cliché<sup>61</sup> of cancel culture: the vilification that helps justify not only censorship of but violence towards the alleged perpetrators of evil.

While president, Donald Trump referred to cancel culture as a “political weapon” of the left. In 2020, Trump claimed that cancel culture was “driving people from their jobs, shaming dissenters, and demanding total submission from anyone who disagrees,” and declared that this was “the very definition of totalitarianism, and it is completely alien to our culture and our values, and it has absolutely no place in the United States of America.”<sup>62</sup> Trump invoked cancel culture again in his

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<sup>60</sup> Sophia A. McClennen, *The Conservative Urge to Be a Victim: Why Right-Wing Victimhood Is Spreading so Fast*, SALON (Dec. 27, 2021), <https://perma.cc/4D44-UTSB>.

<sup>61</sup> ROBERT JAY LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF ‘BRAINWASHING’ IN CHINA* 429 (1963) (using the term to describe how “[t]he most far-reaching and complex of human problems are compressed into brief, highly reductive, definitive-sounding phrases, easily memorized and easily expressed.”).

<sup>62</sup> Tommy Beer, *Trump Attacks “Cancel Culture” -- But Tried Recently to Cancel These People*, FORBES (Sept. 6, 2020).

speech accepting the 2020 Republican presidential nomination, asserting that because “[t]he goal of cancel culture is to make decent Americans live in fear of being fired, expelled, shamed, humiliated and driven from society as we know it,” it must be countered with “patriotic education.”<sup>63</sup>

“To say ‘cancel culture,’” writes Ligaya Mishan, “is already to express a point of view, implicitly negative. Although cancel culture is not a movement—it has neither leaders nor membership, and those who take part in it do so erratically, maybe only once, and share no coherent ideology—it’s persistently attributed to the extremes of a political left and a fear-mongering specter of wokeness, itself a freighted term, originally derived and then distorted from the Black vernacular ‘woke,’ which invokes a spirit of vigilance to see the world as it really is.”<sup>64</sup> The use of “wokeness” as a pejorative, along with “critical race theory,” “cultural Marxism,” and “socialism,” reinforces the message that the *real* censors and traitors are not the Republican leaders repressing dissent and compelling conformity, but shadowy leftists laying siege to our schools. As Trump declared in March 2022, “If we allow the Marxists and Communists and Socialists to teach our children to hate America, there will be no one left to defend our flag or to protect our great country or its freedom.”<sup>65</sup> Accordingly, Trump issued a call to arms: “Getting critical race theory out of our schools is not just a matter of values, *it’s also a matter of national survival. We have no choice, the fate of any nation ultimately depends upon the willingness of its citizens to lay down and they must do this, lay down their very lives to defend their country.*”<sup>66</sup>

### ***B. The Enablers: Confederates, Shills, and Dupes***

Distraction, justification, vilification: “Cancel culture” is, for good reason, a powerful tool in the conservative propaganda playbook. But its effectiveness would be limited if it were only promoted or internalized by the conservative faithful. To achieve cultural and political domination, partisan propaganda requires legitimation by external sources. To succeed, the cancel-culture con game requires confed-

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<sup>63</sup> READ: *Trump’s Acceptance Speech for the GOP Nomination*, U.S. NEWS (Aug. 27, 2020).

<sup>64</sup> Ligaya Mishan, *The Long and Tortured History of Cancel Culture*, N.Y. TIMES (Dec. 3, 2020).

<sup>65</sup> Bess Levin, *Trump Tells Supporters They Must Fight to the Death to Stop Schools from Teaching Kids about Systemic Racism*, VANITY FAIR (Mar. 14, 2022).

<sup>66</sup> *Id.* (emphasis added).

erates, shills, and dupes, and a seemingly endless supply of liberals and civil libertarians have lined up to volunteer.

As noted above, dupes are drawn into the con either through naivete, arrogance, or both. Cancel culture dupes are the people who fall for stories like the one that led to the weeklong suspension of, and investigation into, an entire multi-section diversity course at Boise State University.<sup>67</sup> The triggering allegation was that an instructor for the course had called a female student stupid and forced her to apologize for being white, leading to taunts from other students that drove her out of the class in tears.<sup>68</sup> There was no evidence offered for the claim except the report of an unidentified source.<sup>69</sup> As it turned out, nothing about the report was true.<sup>70</sup> The report was apparently based on a mischaracterization of an incident in which a student called an instructor's logic stupid, not the reverse.<sup>71</sup> Those who uncritically swallowed the story did so because it *felt* so true, making them oblivious to the possibility of deception.

Sometimes the cancel-culture story is not necessarily false, but unworthy of the outsized attention lavished upon it. One prominent example is the op-ed published by *The New York Times* in March 2022 titled "I Came to College Eager to Debate. I Found Self-Censorship Instead."<sup>72</sup> In it, a University of Virginia student describes losing her former confidence to speak her mind because of the "steep consequences" for doing so. According to the student's entirely self-reported account, those consequences were observing her fellow students "shift in their seats" and seeming "to get angry" after she expressed an opinion in class.<sup>73</sup> At a time when

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<sup>67</sup> Golden & Berg, *supra* note 35.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Camp, *supra* note 57.

<sup>73</sup> *Id.*

campuses across the nation are grappling with the chilling effects of sexual harassment and abuse,<sup>74</sup> white supremacist recruitment efforts,<sup>75</sup> gun violence,<sup>76</sup> professor “watchlists,”<sup>77</sup> and unauthorized surveillance,<sup>78</sup> the decision of the national paper of record to amplify an allegation of censorship anchored in little more than the subjective feelings and anecdotal observations of an individual student was a master stroke of misdirection.

If its publication of the UVA student’s op-ed had left any doubt about whether *The New York Times* had become a mouthpiece for cancel-culture propaganda, that doubt was removed by the Editorial Board’s own op-ed a few days later, “America Has a Free Speech Problem.”<sup>79</sup> As described above, its opening claim is that Americans are losing the “fundamental right” to express their views “without fear of being shamed or shunned.”<sup>80</sup> Such a constitutionally illiterate and politically disingenuous claim is straight out of the neo-Confederate playbook. The United States has never recognized an absolute right, fundamental or otherwise, to speech without negative consequences. To the contrary, among the most important aspects of the right to free speech protected by the First Amendment is the right to criticize the speech of others, even in harsh ways. This is a point that liberals and civil libertarians have traditionally understood and defended: When private actors object to or avoid speech they do not like, including through protests and boycotts, they are engaging in quintessential exercises of free speech and individual liberty.

But recently, and particularly in the context of education and social media, lib-

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<sup>74</sup> See Moira Donegan, *Another Reckoning over Sexual Assault in US Colleges Is Starting. Officials Must Listen*, GUARDIAN (Oct. 31, 2021); Lexi McMenamin, *Harvard’s Sexual Harassment Lawsuit Is About Free Speech for Students*, TEEN VOGUE (Feb. 11, 2022).

<sup>75</sup> Kristin Lam, *Recruiting Hate: White Supremacist Propaganda Rises for Third Straight Year on College Campuses, ADL Says*, USA TODAY (June 28, 2019).

<sup>76</sup> Donna St. George, *School Shootings Rose to Highest Number in 20 Years, Federal Data Says*, WASH. POST (June 28, 2022).

<sup>77</sup> Adam Gabbatt, *US Rightwing Group Targets Academics with Professor Watchlist*, GUARDIAN (Sept. 17, 2021).

<sup>78</sup> Pia Ceres, *Kids Are Back in Classrooms and Laptops Are Still Spying on Them*, WIRED (Aug. 3, 2022).

<sup>79</sup> *America Has a Free Speech Problem*, *supra* note 52.

<sup>80</sup> *Id.*

erals and libertarians have increasingly joined conservatives in vilifying counter-speech and conflating (private) reactions to speech with (governmental) restrictions of speech. As I have detailed in prior work,<sup>81</sup> powerful liberal and libertarian organizations such as the American Civil Liberties Union (ACLU) and the Foundation for Individual Rights in Education (FIRE), along with mainstream and liberal-leaning publications such as *The New York Times* and *The Atlantic*, have played a significant role in deflecting attention away from conservative attacks on democracy and free expression by focusing their opprobrium on the supposed liberal excesses of political correctness, campus “safe spaces,” and now cancel culture.

It is certainly both noteworthy and noble that organizations like the ACLU and FIRE have stood up in meaningful ways against the most recent wave of blatant conservative censorship in schools, challenging the constitutionality of educational gag orders<sup>82</sup> and representing faculty who have been fired for First Amendment-protected speech.<sup>83</sup> But these same organizations also directly contributed to the current conservative assault on educational institutions through their internalization and amplification of propaganda about campus intolerance and cancel culture.<sup>84</sup> These organizations have disproportionately highlighted breathless anecdotes of liberal intolerance over widespread, systematic evidence of harassment and censorship by conservatives.<sup>85</sup> Even worse, they have actually supported the imposition of laws and policies that purport to counter the supposed excesses of liberal intolerance by restricting students’ right to protest.<sup>86</sup> While never failing to admonish women and minority students that “the best answer to bad speech is more

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<sup>81</sup> Mary Anne Franks, *The Miseducation of Free Speech*, 105 VA. L. REV. ONLINE 218 (2019).

<sup>82</sup> Julia Carrie Wong, *The ACLU on Fighting Critical Race Theory Bans: ‘It’s About Our Country Reckoning with Racism’*, GUARDIAN (July 1, 2021).

<sup>83</sup> *Active Cases*, FIRE, <https://www.thefire.org/legal/fire-in-the-courts/active-cases/>.

<sup>84</sup> See FRANKS, *supra* note 11. For examples of FIRE’s promotion of cancel culture propaganda, see Robert Shibley & Talia Barnes, *Cancel Culture Empowers the Powerful—at Everyone Else’s Expense*, FIRE (July 27, 2022), <https://perma.cc/RVX3-L6N5>; FIRE, *National FIRE Survey: Cancel Culture Widely Viewed as Threat to Democracy, Freedom*, FIRE, (Jan. 31, 2022), <https://perma.cc/YX7G-XDDL>; Greg Lukianoff, Ryne Weiss & Adam Goldstein, *Greg’s Nowhere Near Definitive Outrage/Call-Out/Cancel Culture Study List*, FIRE (July 8, 2020), <https://perma.cc/S8X3-7Q32>; Komi T. German & Greg Lukianoff, *Don’t Stop Using the Term ‘Cancel Culture’*, DAILY BEAST (June 12, 2022), <https://perma.cc/GJ7Z-N5HU>.

<sup>85</sup> See FRANKS, *supra* note 11, at 135–52.

<sup>86</sup> See Franks, *supra* note 81.

speech,” liberals and libertarians have helped delegitimize counterspeech and vilify student protesters.<sup>87</sup>

Fighting the most extreme and obvious excesses of the right’s coordinated attack on schools and educators while reprimanding the left for isolated incidents of private recrimination is a version of the “both sides-ism” exhibited by media outlets like *The New York Times*. In its “Free Speech Problem” op-ed, the *Times* editorial board writes that “[m]any on the right, for all their braying about cancel culture, have embraced . . . laws that would ban books, stifle teachers and discourage open discussion in classrooms,” while “many on the left refuse to acknowledge that cancel culture exists at all.”<sup>88</sup> This is the evidence offered to demonstrate that “the political left and the right are caught in a destructive loop of condemnation and recrimination around cancel culture.”<sup>89</sup> This kind of false equivalence is what historian Thomas Zimmer refers to as journalism’s “neutrality dogma”: “the privileging of ‘nonpartisanship’ over accuracy, the tendency to present both sides as essentially the same when they are evidently not, the distortion-by-‘balance.’”<sup>90</sup> That distortion, Zimmer argues, consistently both favors and obscures “the radicalizing rightwing forces in American life.”<sup>91</sup>

Have powerful organizations and institutions like the ACLU, FIRE, and *The New York Times* been duped, or is their participation in the cancel-culture con motivated by cynical self-interest? The anti-cancel-culture movement has become a veritable cottage industry, inspiring books, op-eds, feature articles, podcasts, policy papers, seminars, legislative proposals, and academic conferences. Taking up the mantle of a free speech defender against the ominous and amorphous threat of “cancellation” can be tremendously lucrative not only financially, but also in terms of social, intellectual, or moral capital. Far from being ostracized or silenced, the provocateur, the heterodox thinker, and the balanced journalist are often rewarded with cultural accolades and impassioned fan bases. As Osita Nwanevu observes, “[B]eing outrageous has never cost so little or earned professional contrarians and

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<sup>87</sup> *Id.*

<sup>88</sup> *America Has a Free Speech Problem*, *supra* note 52.

<sup>89</sup> *Id.*

<sup>90</sup> Thomas Zimmer, TWITTER (April 27, 2022), <https://perma.cc/3654-NTUS>.

<sup>91</sup> Thomas Zimmer, TWITTER (May 31, 2022), <https://perma.cc/CD4M-RUDA>.

provocateurs so much.”<sup>92</sup>

This reality—that “for all the fear that cancel culture elicits, it has not succeeded in toppling any major figures—high-level politicians, corporate titans—let alone institutions”<sup>93</sup>—points toward yet another motivation for ostensibly non-conservative entities to participate in the cancel-culture con: ideological alignment with at least some neo-Confederate goals. As I have explored in previous work, white male supremacy often transcends political affiliation.<sup>94</sup> Much of what passes for liberalism in the United States is simply a less extreme, and less crudely expressed, version of conservatism. Power in America, whether political, cultural, or economic, has always primarily been the province of white men, and plenty of people across the political spectrum think that it should stay that way. Sometimes the only meaningful difference between conservatives and liberals on this point is whether they are willing to admit this openly.

There are plenty of liberals as well as conservatives who are, to use philosopher Regina Rini’s evocative term, “status quo warriors.”<sup>95</sup> What unites status quo warriors is sometimes not so much their objection to *what* is being “cancelled” but to *who* is doing the “cancelling.”<sup>96</sup> Part of the power, or threat, of the #MeToo and #BlackLivesMatter movements is the centering of women and minorities’ voices and experiences. As Nwanevu writes,

The critics of cancel culture are plainly threatened not by a new and uniquely powerful kind of public criticism but by a new set of critics: young progressives, including many minorities and women who, largely through social media, have obtained a seat at the table where matters of justice and etiquette are debated and are banging it loudly to make up for lost time. The fact that jabs against cancel culture are typically jabs leftward, even as conservatives work diligently to cancel academics, activists, and companies they disfavor in both tweets and legislation, underscores this.<sup>97</sup>

It can sometimes be difficult to determine whether participation in the cancel-culture con is driven by naivete, opportunism, ideological alignment, or some combination. What is clear, however, is the cumulative impact of this collaboration: the

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<sup>92</sup> Nwanevu, *supra* note 59.

<sup>93</sup> *Id.*

<sup>94</sup> See FRANKS, *supra* note 11, at 45.

<sup>95</sup> Beauchamp, *supra* note 58.

<sup>96</sup> *Id.*

<sup>97</sup> Nwanevu, *supra* note 59.

hijacking of free speech for neo-Confederate ends. As the Lost Cause myth recast the Civil War as the War of Northern Aggression, the cancel-culture myth recasts censorship as liberal repression. Over and over again, speech favoring white male supremacy—racist, sexist, homophobic, transphobic—is characterized as “free speech” that must be defended and speech challenging it as indoctrination that must be rooted out.<sup>98</sup> “The power to cancel is nothing compared to the power to establish what is and is not a cultural crisis,” writes Nwanevu. “And that power remains with opinion leaders who are, at this point, skilled hands at distending their own cultural anxieties into panics that—time and time and time again—smother history, fact, and common sense into irrelevance.”<sup>99</sup> Stripped of its rhetorical flourishes, the upshot of cancel-culture discourse is that power, and speech, belongs where it always has been: in the hands of white men.

#### CONCLUSION

Like all fascist movements, the neo-Confederate movement targets educational institutions in order to destroy the capacity for critical reflection that makes resistance to fascism possible. “For those who perceive the truth that critical thinking is intrinsic to freedom, the banning of books, lists of which grow by the day, along with the outlawing of specific words and ideas, and the repression of teachers’ autonomy, is obviously distressing,” writes scholar Graham Slater.<sup>100</sup> “These acts threaten an already threadbare social fabric, auguring a future of fascist miseducation, in which the act of teaching itself—but not ideological enforcement, the very fear projected by the right—becomes an increasingly dangerous endeavor.”<sup>101</sup>

The hijacking of the free speech debate is crucial to the right’s war on schools, drawing attention away from Republicans’ coordinated campaign of state-sponsored censorship and painting “leftist indoctrination” as the real enemy. The persistent invocation of liberal intolerance, whether in the form of “political correctness,” “snowflake students,” or “cancel culture,” not only distracts from, but is used to justify, repressive measures against students and teachers. The right’s de-

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<sup>98</sup> See Mary Anne Franks, *Speaking of Women: Feminism and Free Speech*, SIGNS (2022), <https://perma.cc/MQN6-M5JN>.

<sup>99</sup> Nwanevu, *supra* note 59.

<sup>100</sup> Graham B. Slater, *Neoliberalism Paved the Way for Book Banning to Take Hold in US Schools*, TRUTHOUT (Apr. 10, 2022), <https://perma.cc/3VYK-L6RY>.

<sup>101</sup> *Id.*

education campaign depends on the support and amplification of liberal collaborators. Unintentionally or not, every participant in the cancel-culture shell game contributes to the delegitimization of protest, the rewriting of history, and the vilification of educators. Until neo-Confederate propaganda is named and shamed for what it is, free speech, education, and democracy in America will be a lost cause.