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**HOW TO GET AWAY WITH RACISM: INSIDIOUS  
CONSERVATIVE BIAS IN TEXTBOOKS AND THE  
WHITEWASHING OF CRITICAL EVENTS IN MINORITY  
HISTORIES**

**Karly Houchin\***

*“Education is the most powerful weapon which you can use to change the world.” -Nelson Mandela<sup>1</sup>*

**INTRODUCTION**

Consider the situation facing minority students in public education: significant historical and cultural events relevant to your family and ancestors are minimized in the history lessons taught at your school. Conversely, the same history book that diminishes the importance of the Civil Rights Movement lauds political implications of the Ku Klux Klan. Unfortunately, this blatant slanting of history textbooks encourages students to value historical contributions of white people and devalue historical contributions of minority groups. This comment will demonstrate the harmful implications of this scenario, which is playing out in public schools across Texas. While there have been constitutional challenges to religion-

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\* St. Mary's University School of Law, J.D., expected May 2017; The University of Texas at Austin, B.A. Psychology, May 2014. I would like to thank my family for their support over the last three years, particularly in writing this Note. I would also like to thank the tireless, ever-important public educators who take time to impact their students' lives and those who continue advocating for equality and justice in education.

<sup>1</sup> Jessica Durando, *15 of Nelson Mandela's Best Quotes*, USATODAY.COM (Dec. 6, 2013),

<http://www.usatoday.com/story/news/nation-now/2013/12/05/nelson-mandela-quotes/3775255>.

centered curriculum content,<sup>2</sup> there is a growing need for lawsuits challenging the detrimental effects of removing critical figures and events from minority histories.<sup>3</sup> Successful First Amendment challenges to textbook content are rare,<sup>4</sup> yet it is even rarer for a suit to be brought that represents the disparate education minority students receive in public education systems across the United States.<sup>5</sup>

When minority students, specifically African American students, are taught in school that their culture's history is irrelevant or becomes greatly distorted, it sends a message that those students are less important than their white counterparts.<sup>6</sup> Minority students should have legal recourse against the State for the discrimination they suffer from whitewashed social studies textbooks. The possibility of legal recourse for these students could be found via statutory violations made by SBOE under the Texas Education Code and Texas Constitution, discrimination under the Equal Protection Clause of the United States Constitution, education malpractice claims, or even violation of due process rights.

There is a substantial body of law granting school boards a great deal of deference in censoring library books as well as textbooks.<sup>7</sup> The

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<sup>2</sup> *E.g.*, Press Release, American Civil Liberties Union, Agreement With Ector County School Board Will Prevent Unconstitutional Curriculum From Being Taught (Mar. 5, 2008), <https://www.aclu.org/news/texas-school-board-agrees-stop-teaching-unconstitutional-bible-class-public-schools> (announcing that a Texas public school will no longer teach an unconstitutional Bible course, which promoted a particular religious viewpoint).

<sup>3</sup> See Crystal Gayle Simmons, *A Critical Race Theory Content Analysis of a High School African American Social Studies Curriculum 72–75* (March 24, 2015) (unpublished Ph.D. dissertation, North Carolina State University) (using the Critical Race Theory to examine the harmful results from inadequate history curriculum that downplays slavery and racism).

<sup>4</sup> See, *e.g.*, *Cal. Parents for the Equalization of Educ. Materials v. Noonan*, 600 F. Supp. 2d 1088, 1112 (E.D. Cal. 2009) (granting summary judgment on a claim brought by parents claiming school textbooks discriminated against Hindu students); Marielle E. Dirkx, *Big Brother is Reading: An Examination of the Texas Textbook Controversy and the Legacy of PICO*, 17 U.C. DAVIS J. JUV. L. & POL'Y 29, 53 (2013) (discussing the dismal chances of success for First Amendment claims against curricula changes).

<sup>5</sup> A search on a number of legal research platforms, such as Westlaw and LexisNexis, yields few case results mentioning disparate impact of textbook or curriculum content. Further, the disparate impact theory has low success rates for plaintiffs. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006).

<sup>6</sup> Nicholas Ferroni, *We Teach Racism, Sexism and Discrimination in Schools*, THE HUFFINGTON POST (Aug. 24, 2010), [http://www.huffingtonpost.com/nicholas-ferroni/teaching-education-discrimination\\_b\\_1826113.html](http://www.huffingtonpost.com/nicholas-ferroni/teaching-education-discrimination_b_1826113.html).

<sup>7</sup> See generally Dirkx, *supra* note 4 (tracing the wide-ranging authority school boards can assert over pedagogical matters related to education).

discriminatory impact that biased textbooks inflict on minority students is anything but new;<sup>8</sup> however, in today's current political climate, there will likely be more educational justice advocates calling for change and reform in the processes of determining the content of instructional materials for public education classrooms.<sup>9</sup> In 2010, the Texas State Board of Education decided to revamp the content of textbooks distributed to public schools, making over 100 amendments to the then-current textbooks and curriculum standards for social studies classes.<sup>10</sup> The State Board of Education (SBOE) adopted a new social studies textbook curriculum that featured a blatant conservative viewpoint in discussing the histories of minorities.<sup>11</sup> The members of the 2010 SBOE openly acted along party lines in their capacity of creating textbook content.<sup>12</sup> The new amendments were an attempt to correct the purported "liberal bias" alleged in previous textbooks.<sup>13</sup> Many critics of the newly adopted social studies curriculum accuse the SBOE of whitewashing history to reflect a biased version of events that perpetuates racist ideologies.<sup>14</sup> Whitewashing can be defined as covering up or glossing

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<sup>8</sup> See Nicholas Ferroni, *We Teach Racism, Sexism, and Discrimination in Schools*, HUFFINGTON POST: THE BLOG (Aug. 24, 2012), [http://www.huffingtonpost.com/nicholas-ferroni/teaching-education-discrimination\\_b\\_1826113.html](http://www.huffingtonpost.com/nicholas-ferroni/teaching-education-discrimination_b_1826113.html) ("Our text books do not blatantly encourage students to be racist, sexist or discriminatory, but it's the lack of figures and truths which give students the impression that certain groups didn't nearly have as large of role as others and, in some cases, groups are completely nonexistent.")

<sup>9</sup> Groups such as the Texas Freedom Network already devote entire committees to combatting the partisan textbook adoption process. See generally *Textbook Censorship*, TEX. FREEDOM NETWORK, <http://tfn.org/issue/textbook-censorship> (last visited April 24, 2017).

<sup>10</sup> See Stephen D. Lott, *Culture War in the Classroom: A Legal Analysis of the 2010 Texas Curriculum Controversy*, 13 TEXAS TECH ADMIN. L.J. 101 (2011) (explaining the amendments approved by the State Board of Education in 2010); See also Emma Brown, *Texas Officials: Schools should teach that slavery was 'side issue' to Civil War*, THE WASH. POST (July 5, 2015), [https://www.washingtonpost.com/local/education/150-years-later-schools-are-still-a-battlefield-for-interpreting-civil-war/2015/07/05/e8fbd57e-2001-11e5-bf41-c23f5d3face1\\_story.html](https://www.washingtonpost.com/local/education/150-years-later-schools-are-still-a-battlefield-for-interpreting-civil-war/2015/07/05/e8fbd57e-2001-11e5-bf41-c23f5d3face1_story.html) (discussing the 2010 amendments to the Texas social studies curriculum).

<sup>11</sup> *Id.*

<sup>12</sup> Brown, *supra* note 10.

<sup>13</sup> Mariah Blake, *Revisionaries: How a group of Texas conservatives is rewriting your kids' textbooks*, WASH. MONTHLY (Jan. 2010), <http://www.washingtonmonthly.com/features/2010/1001.blake.html>; See also Michael Birnbaum, *Texas board approves social studies standards that perceived liberal bias*, THE WASH. POST (May 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/21/AR2010052104365.html> (discussing SBOE attempts to correct liberal bias in previous textbooks).

<sup>14</sup> John Archibald, *Don't remember Alabama's racist textbooks? You're probably white*, AL.COM (May 19, 2015),

over faults and errors “or [to] absolve from blame.”<sup>15</sup> In the context of whitewashing textbooks, the nature of the content absolves white people from previous wrongdoings and blame, such as the role white Americans in the slave trade.<sup>16</sup> In addition to whitewashing the social studies curriculum, the SBOE further advanced their conservative political agenda by imposing an excessive Christian-centric religious bias in the social studies and science textbooks.<sup>17</sup> While it’s arguable that conservative and Evangelical Christian ideologies overlap, SBOE was able to specifically inflict each ideological camp separately into almost every subject matter taught in public education.<sup>18</sup> The science curriculum updated in 2009, the social studies curriculum in 2010, and the language arts curriculum in 2012 were each victim to SBOE’s biased governance.<sup>19</sup>

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[http://www.al.com/opinion/index.ssf/2015/05/dont\\_remember\\_alabamas\\_racist.html](http://www.al.com/opinion/index.ssf/2015/05/dont_remember_alabamas_racist.html);  
Jonathan Burack, *How Textbooks Obscure and Distort the History of Slavery*, THE  
TEXTBOOK LEAGUE (Nov. 1992), <http://www.textbookleague.org/35slave.htm>.

<sup>15</sup> Whitewash, DICTIONARY.COM (2016),  
<http://dictionary.reference.com/browse/whitewash>; See Leonard Pitts, Jr., *Black history  
whitewashed in textbooks*, MIAMI HERALD (Oct. 10, 2015),  
<http://www.miamiherald.com/opinion/op-ed/article38697888.html>  
(defining  
whitewashing as “the vandalism of African-American memory, to acts of radical revision  
and wholesale theft that strike at the core of black identity”).

<sup>16</sup> See Editorial Board, *How Texas is Whitewashing Civil War History*, THE WASH.  
POST (July 6, 2015), [https://www.washingtonpost.com/opinions/whitewashing-civil-war-history-for-young-minds/2015/07/06/1168226c-2415-11e5-b77f-eb13a215f593\\_story.html](https://www.washingtonpost.com/opinions/whitewashing-civil-war-history-for-young-minds/2015/07/06/1168226c-2415-11e5-b77f-eb13a215f593_story.html) (noting that Texas textbooks whitewash the history of the civil war and distort the role white Americans played in the slave trade); Thelma Reese, *Whitewashing History*, WASH. TIMES (July 27, 2015), <http://www.washingtontimes.com/news/2015/jul/27/whitewashing-history> (commenting on the effects whitewashing history can have on students in public education); See generally, *Publisher apologizes for textbook calling slaves “workers”*, AL JAZEERA, (Oct. 6, 2015), <http://america.aljazeera.com/articles/2015/10/6/publisher-apologizes-for-textbook-calling-slaves-workers.html>.

<sup>17</sup> Lott, *supra* note 10 (providing an analysis of the Christian biases in the updated social studies curriculum); TEX. FREEDOM NETWORK, [http://www.tfn.org/site/PageServer?pagename=issues\\_sboe\\_index](http://www.tfn.org/site/PageServer?pagename=issues_sboe_index) (2004) (criticizing the conservative SBOE for inflicting religious bias on Texas students). See also The Associated Press, *Texas Ed Board Adopts Resolution Limiting Islam in Textbooks*, USATODAY.COM, Sept. 25, 2010, [http://www.usatoday.com/news/religion/2010-09-26-textbooks25\\_ST\\_N.htm](http://www.usatoday.com/news/religion/2010-09-26-textbooks25_ST_N.htm) (examining the SBOE’s attempt to correct Islamic influence in textbooks by imposing a Christian bias).

<sup>18</sup> Dirx, *supra* note 4.

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

The 2010 curriculum debate garnered national attention.<sup>20</sup> Texas is the largest purchaser of school textbooks and often influences the content of other states' textbooks.<sup>21</sup> SBOE functions as the governing body of public education matters in the state of Texas.<sup>22</sup> Every few years, SBOE is tasked with updating the curriculum and adopting new textbooks and instructional materials.<sup>23</sup> In 2010, the SBOE selected the new textbooks, set to be distributed in classrooms across the state in the fall of 2015.<sup>24</sup> A few controversial amendments to the curriculum in social studies textbooks include leaving out Jim Crow laws and the harmful impact of the Ku Klux Klan, minimizing the role of slavery as a unifying cause for secession and combat in the American Civil War, and equating Jefferson Davis's inauguration speech with Abraham Lincoln's inaugural address.<sup>25</sup>

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<sup>20</sup> See, e.g., April Castro, *Texas Board of Education Approves More Conservative Curriculum*, HUFFINGTON POST (May 21, 2010), [http://www.huffingtonpost.com/2010/05/21/texas-board-of-education-\\_n\\_584697.html](http://www.huffingtonpost.com/2010/05/21/texas-board-of-education-_n_584697.html) (analyzing the adopted amendments to the social studies curriculum); Terrence Stutz, *Texas State Board of Education Approves New Curriculum Standards*, THE DALLAS MORNING NEWS (May 22, 2010), <http://www.dallasnews.com/news/education/headlines/20100521-Texas-State-Board-of-Education-approves-9206.ece> (criticizing the overtly conservative changes implemented in history textbooks); *Texas Schoolbook Fight Heats Up*, BBC NEWS, May 19, 2010, <http://news.bbc.co.uk/2/hi/americas/8693397.stm> (discussing the heated debate between political parties in Texas over the updated social studies curriculum).

<sup>21</sup> Blake, *supra* note 13 ("Texas is the nation's second-largest textbook market... which means publishers that get their books approved can count on millions of dollars in sales."); Gail Collins, *How Texas Inflicts Bad Textbooks on Us*, THE N.Y. REVIEW OF BOOKS (June 21, 2012), <http://www.nybooks.com/articles/archives/2012/jun/21/how-texas-inflicts-bad-textbooks-on-us> (detailing the monopoly Texas has over the textbook market); Lott, *supra* note 10 (affirming the stronghold influence Texas has as the largest textbook industry).

<sup>22</sup> TEX. EDUC. AGENCY, <http://tea.texas.gov/sboe> (2007); See also Lott, *supra* note 10. (detailing the functions and responsibilities of the SBOE).

<sup>23</sup> See, e.g. TEX. EDUC. AGENCY, *supra* note 22. (defining the tasks of the SBOE); Lott, *supra* note 10. (outlining the role of the SBOE regarding textbook curriculum); TEX. CONST. art. VII, § 1 (stating the power delegated to the SBOE); TEX. CONST. art. II, § 1 (acknowledging that the state legislature governs the SBOE and defines its functions); Dirx, *supra* note 4 (noting that the curriculum for each subject area is updated every 10 years and the textbooks are updated every 6 years).

<sup>24</sup> TEX. EDUC. AGENCY, *supra* note 22; see also Lott, *supra* note 10.; Philippa H. Stewart, *The great Texas textbook debate*, AL JAZEERA (Mar. 11, 2014) <http://www.aljazeera.com/indepth/features/2014/02/great-texas-textbook-debate201421613551126796.html>.

<sup>25</sup> Brown, *supra* note 10; see also James W. Loewen, *Five myths about why the South seceded*, THE WASH. POST (Feb. 26, 2011) [https://www.washingtonpost.com/outlook/five-myths-about-why-the-south-seceded/2011/01/03/ABHr6jD\\_story.html](https://www.washingtonpost.com/outlook/five-myths-about-why-the-south-seceded/2011/01/03/ABHr6jD_story.html) (detailing the reasoning southern states gave for secession as wanting to preserve the institution of slavery); Pitts, *supra* note 15 (defining whitewashing as "the vandalism of African-

To aid in development of the analysis of the textbook publishing market, and in understanding the provenance of Texas's unprecedented influence on other states' textbooks, this comment first examines the legal history of the SBOE and its decisions regarding textbook content. Next, there will be a discussion of the social studies curriculum updated in 2010, which effectively whitewashes history. A discussion on possible causes of action and routes for legal recourse available to minority students will follow, exploring options ranging from tort suits to due process claims. Finally, there will be a brief discussion of policy implications that could affect a student's ability to seek legal recourse for the claims previously discussed. In conclusion, this comment addresses the probable future of whitewashed history textbooks and legal actions available to minority students and their advocates.

## I. THE TEXTBOOK ADOPTION PROCESS IN TEXAS AND THE STATE BOARD OF EDUCATION

The SBOE is comprised of fifteen members who are elected from their respective districts.<sup>26</sup> The Texas Governor can appoint the Chairman of the board as well as one "regular" member.<sup>27</sup> SBOE members are elected by their local Texas communities.<sup>28</sup> Many of these members are regular people—not career politicians.<sup>29</sup> This can be a double-edged sword—while

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American memory, to acts of radical revision and wholesale theft that strike at the core of black identity"); Michael Schaub, *Do new Texas textbooks whitewash slavery and segregation?* L.A. TIMES (July 7, 2015), <http://www.latimes.com/books/jacketcopy/la-et-jc-do-new-texas-textbooks-whitewash-slavery-segregation-20150707-story.html>; Scott Bomboy, *Jefferson Davis and Abraham Lincoln: Dueling Inaugural Address*, CONSTITUTION CENTER (Feb. 18, 2015), <http://blog.constitutioncenter.org/2015/02/jefferson-davis-and-abraham-lincoln-dueling-inaugural-addresses> (contrasting Davis' inaugural speech with Lincoln's inaugural address); Adam Goodheart, *Hastily Composed*, THE N.Y. TIMES (Feb. 17, 2011), [http://opinionator.blogs.nytimes.com/2011/02/17/hastily-composed/?\\_r=0](http://opinionator.blogs.nytimes.com/2011/02/17/hastily-composed/?_r=0) (pointing out the absurdity of comparing Davis' speech with Lincoln's due to the difference in content and political affiliation).

<sup>26</sup> See TEX. EDUC. AGENCY, *supra* note 22 (offering biographies of each elected member of the State Board of Education).

<sup>27</sup> *Id.* (explaining the process of how the State Board of Education chairman is appointed).

<sup>28</sup> The Texas Education Agency outlines the functions and duties of the SBOE and the districts each member represents. See *SBOE-State Board of Education*, TEX. EDUC. AGENCY, <http://tea.texas.gov/sboe> (last visited April 24, 2017) (explaining that SBOE members are elected from their districts to serve for four year terms).

<sup>29</sup> See *SBOE Members*, TEX. EDUC. AGENCY, [http://tea.texas.gov/About\\_TEA/Leadership/State\\_Board\\_of\\_Education/Board\\_Members/](http://tea.texas.gov/About_TEA/Leadership/State_Board_of_Education/Board_Members/)

it is refreshing, and often times effective, to have normal citizens holding official titles within the state government, when it comes to an area as sensitive and imperative as public education, more expertise would be beneficial. The SBOE has power to “develop and update a long-range plan for public education” by establishing the scope and content of curriculum taught in public schools.<sup>30</sup> Its authority to select textbooks and develop standardized curriculum is specifically outlined in the Texas Constitution and Texas Education Code (TEC).<sup>31</sup> The SBOE works together with the Texas Education Agency (TEA) to ensure the public education system is designed in accordance with the Texas Constitution, which states: “[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”<sup>32</sup> The Texas Legislature solidified their intent for the SBOE to decide public school curricula in Section 28.001 of the TEC, which created a guideline for the “Essential Knowledge and Skills” subchapter of the Education Code.<sup>33</sup> The Texas Legislature may overrule any amendment or change to the public education system made by the SBOE.<sup>34</sup> Ultimately, it is the legislature that holds the power to govern schools in Texas, as delegated from the United States Constitution.<sup>35</sup> The Tenth Amendment of the United States Constitution provides: “[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>36</sup>

While the SBOE has always been the entity for creating educational standards and deciding instructional materials, there was previously unprecedented influence by one couple in the late 1960’s: the Gablers.<sup>37</sup> When the Gablers discovered that the public could recommend changes to

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SBOE\_Members (last visited April 24, 2017) (clicking on each member lists their education history and occupations; for example, Georgina Perez from District 1 was an 8<sup>th</sup> grade English Language Arts and Reading teacher before being elected to the SBOE).

<sup>30</sup> TEX. EDUC. CODE ANN. § 7.102(c)(4) (West 2006); *See also* TEX. CONST. art. VII, § 1 (demarcating the delegation of powers from the state legislature to the SBOE).

<sup>31</sup> *See* TEX. CONST. art. II, § 1 (noting that the State Board of Education is delegated power via the State Legislature); TEX. EDUC. CODE ANN. § 7.102(c)(4) (explaining the duties of the SBOE to develop curricula and testing materials).

<sup>32</sup> TEX. CONST., *supra* note 23.

<sup>33</sup> TEX. EDUC. CODE ANN. §§ 28.001-28.002 (West 2006) (defining the Teaching Essential Knowledge and Skills, or TEKS); *see also* TEX. CONST. art. VII, § 1 (allocating the powers of the SBOE regarding curriculum requirements).

<sup>34</sup> TEX. CONST. art. VII, § 1 (noting the Texas Legislature has the ultimate governing power over the education system in Texas); Lott, *supra* note 10.

<sup>35</sup> U.S. CONST. amend. X.

<sup>36</sup> *Id.*

<sup>37</sup> Dirks, *supra* note 4.

Texas's curriculum standards, they embarked on their over twenty-year journey of lobbying for ultra-conservative curriculum in Texas schools.<sup>38</sup> The Gablers notoriously called for Christian and conservative ideologies to pervade textbooks used by the Texas public education system.<sup>39</sup> At one point, the Gablers were described as, "two ignorant, fear-mongering, right-wing fruitloops who have spent the last twenty years doing untold damage to the public education in [Texas]."<sup>40</sup> In the mid-1980's, the Texas legislature finally intervened and prevented regular citizens, such as the Gablers, from having such autonomous influence on the SBOE and textbook content.<sup>41</sup> The legislature stripped away the old review process and implemented a new one.<sup>42</sup> However, it was at this turning point that SBOE positions became contentious political positions.<sup>43</sup> If the public had diminishing effect on the textbook content, then people like the Gablers were intent on electing ultra-conservative members to the SBOE.<sup>44</sup> In 2006, eight of the fifteen board members identified as extremely far right, with a total of ten board members identifying as republican; effectively transitioning this state entity to be representative of the Tea Party.<sup>45</sup> The conservative stronghold on the SBOE has since continued.<sup>46</sup> While there are legitimate criticisms to be made of the SBOE's obvious political indorsements, the converse side of the argument is also legitimate—SBOE members are elected, voted in, and should be representing what constituents want. If the constituents are actively electing extremely conservative members to SBOE, then there is a valid argument that the democratic process should speak for itself. Further, SBOE members are completely forward and up front about their political and ideological affiliations when they campaign, and are still voted into their respective positions.<sup>47</sup> This creates strong support for the argument that SBOE members should be able to change curriculum accordingly because it's what "the people" want.

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

<sup>39</sup> *Id.*

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

<sup>41</sup> *Id.*

<sup>42</sup> The Gablers utilized a "citizen review" rule, which allowed citizens to comment on, and review, proposed textbook content. After the Gablers' drastic impact on the SBOE, the Texas legislature implemented the current policy where the SBOE can only reject a proposed textbook for failing to adhere to the TEKS. Dirks, *supra* note 4, at 70.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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

<sup>46</sup> *Id.*

<sup>47</sup> *See id.* at 70 (explaining the campaign contributions by conservative groups for Republican, conservative SBOE members).

Also, along the lines of representing their constituents, there is justification for the SBOE to adopt conservative texts if they purport to correct over-liberal teachings of the past. It isn't illogical for SBOE members to claim that the adoptions are minor and don't have an effect on students because, at the end of the day, teachers are able to supplement instructional materials with their own biases. However, there seems to be more support and findings<sup>48</sup> that SBOE is acting unilaterally as a political entity and infiltrating history textbooks with their own personal, religious biases.<sup>49</sup>

Although residents in other states might not be concerned with the current textbook controversy plaguing Texas, they should. Texas largely influences the curriculum taught in most other states and determines textbook content adopted in most states.<sup>50</sup> The State of Texas purchases approximately 48 million textbooks each year.<sup>51</sup> California is the only state that even comes close to the amount of textbooks Texas buys.<sup>52</sup> Thus, Texas essentially has a monopoly over the textbook market. Due to a publishing market that succumbs to the demands of their largest client, Texas, many other states merely receive a state-specific customized version of Texas textbooks.<sup>53</sup> Textbook publishers create a standard book, which is then customized to each state.<sup>54</sup> For example, South Dakota might receive the same social studies textbooks that Texas uses with the state's name changed and history specific to the state added. Most of the states receiving the "standard" form of the Texas textbook receive content that contains general conservative and Evangelical Christian bias.<sup>55</sup> The bias is not a problem unique to Texas; it clearly affects many states.<sup>56</sup> Furthermore, textbook

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<sup>48</sup> See e.g., Castro, *supra* note 20 ("We have been about conservatism versus liberalism," said Democrat Mavis Knight of Dallas, explaining her vote against the standards. "We have manipulated strands to insert what we want it to be in the document, regardless as to whether or not it's appropriate.").

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., Blake, *supra* note 13 (explaining the market monopoly Texas has over the textbook industry); Lott, *supra* note 10 (discussing the way Texas textbooks influence the textbook market); Right Wing Watch Staff, *Texas Textbooks: What happened, what it means, and what we can do about it*, PEOPLE FOR THE AM. WAY (June 2010) <http://www.pfaw.org/rww-in-focus/texas-textbooks-what-happened-what-it-means-and-what-we-can-do-about-it> (analyzing how states adopt textbook content based off of Texas textbooks).

<sup>51</sup> Tim Walker, *Guess Who's Coming to Your Classroom*, NEA TODAY (May 23, 2010) <http://neatoday.org/2010/05/23/guess-whos-coming-to-your-classroom>.

<sup>52</sup> Dirx, *supra* note 4, at 75.

<sup>53</sup> Lott, *supra* note 10, at 113.

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

<sup>55</sup> Dirx, *supra* note 4, at 72.

<sup>56</sup> *Id.* at 75.

publishers cater specifically to Texas because the SBOE approves a narrow list of textbooks each district can choose to use, which means the “approved” textbooks are guaranteed a few million dollars in sales.<sup>57</sup>

The process of the SBOE approving a list of textbooks for Texas schools is elaborated by Marielle Elisabet Dirx in “*Big Brother is Reading: An Examination of the Texas Textbook Controversy and the Legacy of Pico.*”<sup>58</sup> For each subject and grade level, the SBOE is required to create three lists of textbooks: one list of “conforming” textbooks, another list of “nonconforming” textbooks, and lastly, a list of books that cannot be used.<sup>59</sup> “Conforming” textbooks contain material covering each element of essential knowledge and skills of that subject as determined by SBOE.<sup>60</sup> “Nonconforming” textbooks contain material covering at least half, but not all, of SBOE's adopted curriculum.<sup>61</sup> Thus, all books that do not cover at least half of the State's curriculum, or contain errors, are rejected for use in schools.<sup>62</sup>

The publishers create sample instructional materials that conform to SBOE's curriculum standards to be eligible for a coveted spot on the “conforming” textbook list.<sup>63</sup> If deemed “conforming,” the conforming textbook list is then dispersed amongst all the school districts in Texas, which means the textbooks have potential to reach almost five million public school students.<sup>64</sup> In contrast to Texas, California is the largest textbook purchaser in the nation.<sup>65</sup> Typically, the textbook market depends on the liberal-centric textbooks used in California, which counteract the conservative influence found in Texas textbooks.<sup>66</sup> However, California has faced budget cuts in recent years and will not be updating their instructional materials for quite some time.<sup>67</sup> Thus, by the time California purchases new textbooks, and that template is sent around to other states,

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 74.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (Texas is the second largest textbook purchaser.)

<sup>66</sup> Richard Fausset, *Outside Texas, alarm over textbook changes*, L.A. TIMES (March 22, 2010), <http://articles.latimes.com/2010/mar/22/nation/la-na-texas-textbooks23-2010mar23> (“California has traditionally served as the liberal and multicultural yin to the Texas yang in the industry.”)

<sup>67</sup> Dirx, *supra* note 4 at 75.

most other states will already be influenced by the Texas textbook template, created by the current ultra-conservative Texas SBOE.<sup>68</sup>

## II. HISTORICAL BACKGROUND OF DISCRIMINATORY CONTENT IN TEXTBOOKS

The debate over textbook content in Texas is anything but new. History shows us the SBOE has caused political battles in Texas for quite some time now.<sup>69</sup> In 1995, Texas made national headlines for a heated debate over the content of health textbooks, when the SBOE demanded a publisher replace a picture of a mother holding a briefcase with a picture of a mother baking a cake.<sup>70</sup> As predicted, political activists on either side of the ideological spectrum became involved and embattled over the content of the health books, including whether teaching abstinence or sex education was appropriate.<sup>71</sup> Similarly, in 2007, there was a debacle with the English and Language Arts curriculum wherein the SBOE determined the curriculum focused too much on critical-thinking.<sup>72</sup> In 2009, political groups argued over whether SBOE should integrate content regarding climate change into

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<sup>68</sup> *Id.* See also Richard Fausset, *Outside Texas, alarm over textbook changes*, L.A. TIMES (March 22, 2010), <http://articles.latimes.com/2010/mar/22/nation/la-na-texas-textbooks23-2010mar23>.

<sup>69</sup> See generally Education Archives, TEX. FREEDOM NETWORK, [http://www.tfn.org/site/PageServer?pagename=issues\\_sboe\\_index](http://www.tfn.org/site/PageServer?pagename=issues_sboe_index) (website highlighting all previous textbook debates in Texas); *Texas Ed Board Adopts Resolution Limiting Islam in Textbooks*, USA TODAY (Sept. 25, 2010), [http://www.usatoday.com/news/religion/2010-09-26-textbooks25\\_ST\\_N.htm](http://www.usatoday.com/news/religion/2010-09-26-textbooks25_ST_N.htm) (examining Islamophobia in Texas textbooks); Russell Shorto, *How Christian Were the Founders?*, N.Y. TIMES (Feb. 11, 2010), <http://www.nytimes.com/2010/02/14/magazine/14texbooks-t.html> (criticizing the SBOE for interjecting Christian bias in previous textbook updates); Ferroni, *supra* note 6.

<sup>70</sup> See Brantley Hargrove, *Creationists' Last Stand at the State Board of Education*, DALLAS OBSERVER (Nov. 14, 2013), <http://www.dallasobserver.com/news/creationists-last-stand-at-the-state-board-of-education-6431134>; Amruthaj Mani, *Gender Bias in School Textbooks*, ACADEMIA [http://www.academia.edu/2972634/Gender\\_Bias\\_in\\_School\\_Textbooks](http://www.academia.edu/2972634/Gender_Bias_in_School_Textbooks), (last visited Dec. 28, 2015) (explaining the negative stereotypes textbooks reinforce about women such as their capability of being only mothers or housewives).

<sup>71</sup> Dirx, *supra* note 4, at 75.

<sup>72</sup> Dan Quinn, *Texas GOP Platform: Don't Teach Kids Critical Thinking Skills!*, TEX. FREEDOM NETWORK (June 28, 2012), <http://tfn.org/texas-gop-platform-dont-teach-kids-critical-thinking-skills/> (quoting David Bradley saying "this critical thinking stuff is gobbledygook").

the science textbooks.<sup>73</sup> Ultimately, the board adopted an amendment to the science curriculum holding that students should “analyze and evaluate different views on the *existence* of global warming.”<sup>74</sup> The proposed amendments to the 2010 social studies curriculum have created the most recent stir.<sup>75</sup> Don McElroy, the SBOE Chairman at the time, was appointed to his position by former Governor Rick Perry.<sup>76</sup> With regards to the social studies textbook, McElroy stated:

the way I evaluate history textbooks is first I see how they cover Christianity and Israel . . . Then I see how they treat Ronald Reagan—he needs to get credit for saving the world from communism and for the good economy for the last twenty years because he lowered taxes.<sup>77</sup>

McElroy infamously denounced purported liberal, or even moderate, influence on classroom curriculum. He is open about his conservative viewpoint.<sup>78</sup> McElroy received an inordinate amount of attention from both sides of the political spectrum for his comments regarding the 2010 amendments.<sup>79</sup> The 2010 curriculum amendments have also been widely criticized for the adopted Christian biases, which were published in textbooks for use in the public schools in fall of 2015.<sup>80</sup>

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<sup>73</sup> Joe Romm, *How ultraconservative Texans are rewriting your kids' textbooks and bringing global-warming denial into science class*, THINK PROGRESS (Jan. 4, 2010), <https://thinkprogress.org/how-ultraconservative-texans-are-rewriting-your-kids-textbooks-and-bringing-global-warming-denial-4a55055b196a#.gw4gi5vnr> (quoting Maria Blake's article “Revisionaries” in the *Washington Monthly* January/February 2010 issue) (emphasis added).

<sup>74</sup> *Id.*

<sup>75</sup> However, in early 2017 the textbook debate was reinstated by the SBOE's decision to keep “evolution doubting” language in Biology textbooks. Alex Zielinski, *Texas Board of Education Votes to Keep Evolution-Doubting Language in High School Biology Textbooks*, SACURRENT (Feb. 1, 2017), <http://www.sacurrent.com/the-daily/archives/2017/02/01/texas-board-of-education-votes-to-keep-evolution-doubting-language-in-high-school-biology-textbooks>.

<sup>76</sup> Collins, *supra* note 21.

<sup>77</sup> *Id.*

<sup>78</sup> See Abby Rapoport, *The SBOE, Revised*, TEX. TRIBUNE (Mar. 3, 2010), <https://www.texastribune.org/2010/03/03/christian-conservatives-lose-former-sboe-chair> (recounting McElroy's pride in categorizing himself as a conservative Christian).

<sup>79</sup> Castro, *supra* note 20.

<sup>80</sup> See Lott, *supra* note 10; *Texas Ed Board Adopts Resolution Limiting Islam in Textbooks*, USA TODAY, (Sept. 25, 2010), [http://www.usatoday.com/news/religion/2010-09-26-textbooks25\\_ST\\_N.htm](http://www.usatoday.com/news/religion/2010-09-26-textbooks25_ST_N.htm) (blaming the SBOE for adopting curricula that reflect their personal political and religious beliefs); Laura Isenne, *Texas Hits the Books*, NAT'L PUB.

While Texas appears to be constantly embattled over curriculum content for public school textbooks, the issues plaguing SBOE are not unique to Texas.<sup>81</sup> In fact, a study by Fordham University assigns letter grades to each state's history curriculum.<sup>82</sup> According to the Fordham University, Texas receives a "D" for their history curriculum along with Arkansas, Illinois, Kentucky, Nevada, New Mexico, Ohio, South Dakota, Washington, and West Virginia.<sup>83</sup> Arizona has a lengthy history of tumultuous debates surrounding minority studies programs, which are typically greeted with extreme resistance from the State's legislature.<sup>84</sup> In the late 1950s, Alabama experienced criticism for racist content in history textbooks, including a claim that slaves were "content in their captivity."<sup>85</sup> In 2010, Virginia history textbooks made national headlines when the books claimed that there were thousands of African Americans who freely enlisted to serve as confederate soldiers.<sup>86</sup> Many attacked this claim and criticized the State for attempting to re-write history.<sup>87</sup> In 2014, students at a high school in Denver, Colorado staged a walkout to protest the school board implementing a "whitewashed" history curriculum.<sup>88</sup> The students were

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RADIO (Nov. 21, 2014), <http://www.npr.org/sections/ed/2014/11/21/365686593/texas-hits-the-books>.

<sup>81</sup> See, e.g., Archibald, *supra* note 14; Carol Sheriff, *Textbook clash in Virginia over Civil War*, WASH. POST (Oct. 20, 2010), <http://www.washingtonpost.com/wp-dyn/content/discussion/2010/10/20/DI2010102002560.html> (detailing the conflicts over textbook content in Virginia).

<sup>82</sup> Sheldon M. Stern & Jeremy A. Stern, *The State of State U.S. History Standards 2011*, THOMAS B. FORDHAM INST. (2011), <http://edexcellence.net/publications/the-state-of-state-us.html>; See also Matthew Ladner, *Report Card on American Education*; AM. LEGIS. EXCHANGE COUNCIL. (Dec. 28, 2015), <http://www.alec.org/publications/report-card-on-american-education> (ranking public education programs within all fifty states).

<sup>83</sup> Stern, *supra* note 82; Ladner, *supra* note 82.

<sup>84</sup> See, e.g., Lupe S. Salinas, *Arizona's desire to eliminate ethnic studies programs: A time to take the "pill" and to engage Latino students in critical education about their history*, 14 HARV. LATINO L. REV. 301 (2011); Roque Planas, *Arizona's Law Banning Mexican-American Studies Curriculum is Constitutional, Judge Rules*, HUFFINGTON POST (Mar. 11, 2013), [http://www.huffingtonpost.com/2013/03/11/arizona-mexican-american-studies-curriculum-constitutional\\_n\\_2851034.html](http://www.huffingtonpost.com/2013/03/11/arizona-mexican-american-studies-curriculum-constitutional_n_2851034.html).

<sup>85</sup> Archibald, *supra* note 14. (Alabama textbooks distorting the atrocity of slavery and captivity created a generation of children who were subconsciously racist)

<sup>86</sup> Sheriff, *supra* note 81 (pointing out how ludicrous it is for Virginia textbooks to claim that slaves voluntarily enlisted as confederate soldiers in the Civil War); Kevin Sieff, *Virginia 4<sup>th</sup>-grade textbook criticized over claims on black Confederate soldiers*, WASH. POST (Oct. 20, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/19/AR2010101907974.html>.

<sup>87</sup> Sieff, *supra* note 86.

<sup>88</sup> See *Denver students stage walkout over whitewashing history*, AL JAZEERA (Sept. 24, 2014), <http://america.aljazeera.com/articles/2014/9/24/colorado>

displeased with the proposed curriculum's goal to "[F]ocus U.S. history lessons on topics that promote citizenship, patriotism and respect for authority."<sup>89</sup> The students believed the curriculum encouraged students to be submissive and not actively participate in democratic processes like protesting.<sup>90</sup> The students argued the curriculum was flawed and should be removed from schools in Colorado.<sup>91</sup> Similarly, there is a growing national debate criticizing the Advanced Placement for U.S. History curriculum for portraying America in a negative light.<sup>92</sup> Advocates for educational justice have tirelessly defended neutral teaching of the advanced course.<sup>93</sup> While these examples of discrimination in other states are atrocious, the degree of whitewashing in the Texas public school system has profound implications on a local and national level—most other states do not have the platform or buying power to influence education outside of their own state, while Texas continues to have the power to influence textbooks across the nation and riddle the history textbooks with obvious conservative, historical biases.<sup>94</sup> Other states have a vested interest in how Texas creates curriculum.

### III. DISCRIMINATION AGAINST STUDENTS IN TEXAS AND HOW TEXTBOOKS CONTRIBUTE

Texas has a deep-rooted history of discrimination against minority groups; Texas has gone so far as to specifically target the academic success

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walkoutconservative.html (recognizing the form of protest utilized by Colorado students against biased curriculum); Leonard Pitts, *Effort to whitewash American history is a cowardly attack on the truth*, PORTLAND PRESS HERALD (Oct. 1, 2014), <http://www.pressherald.com/2014/10/01/leonard-pitts-effort-to-whitewash-american-history-is-a-cowardly-attack-on-the-truth> (examining the protest organized by students against the textbook content in Colorado public schools).

<sup>89</sup> *Denver students stage walkout over whitewashing history*, *supra* note 88 (describing the walkout Colorado students organized to protest inaccurate history textbook content); Pitts, *supra* note 88 (providing details of why Colorado disagreed with the contents of the history textbooks).

<sup>90</sup> *Denver students stage walkout over whitewashing history*, *supra* note 88.

<sup>91</sup> *Id.*

<sup>92</sup> See Renee Lewis, *Okla. debate over U.S. history overshadows education cuts, critics say*, AL JAZEERA (Feb. 21, 2015), <http://america.aljazeera.com/articles/2015/2/21/Oklahoma-AP-education.html> (scolding the attention given to the AP U.S. History curriculum over other important issues such as budget cuts); Steve Nelson, *Whitewashed History is Unpatriotic*, HUFFINGTON POST (Aug. 13, 2015), [http://www.huffingtonpost.com/steve-nelson/whitewashed-history-is-un\\_b\\_7983830.html](http://www.huffingtonpost.com/steve-nelson/whitewashed-history-is-un_b_7983830.html). (attacking those critical of the AP U.S. History curriculum).

<sup>93</sup> Lewis, *supra* note 92; Nelson, *supra* note 92.

<sup>94</sup> Dirks, *supra* note 4, at 74.

of minority students.<sup>95</sup> For example, the majority of the legal challenges to affirmative action programs arise from claims in Texas.<sup>96</sup> Furthermore, Texas students were once subjected to extreme Jim Crow laws, which perpetuated discriminatory stereotypes and imposed devastating hardships against African-Americans.<sup>97</sup> Many Latino and African-American Texans experienced voter intimidation tactics, including the newly implemented voter-ID laws enacted as a ploy to discourage minorities from voting.<sup>98</sup> The social injustices and discrimination that minority students experience within the Texas public education system are atrocious. While correcting textbook content to adequately depict critical events in minority histories won't solve all of the problems plaguing these groups, it is a terrific start to counteract institutionalized racism and systems of oppression.<sup>99</sup>

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<sup>95</sup> *But cf.* Mikaela Rodriguez, *Tyrant's Foe: DeJuana Lozada is Helping Minority Students Succeed*, OBSERVER (May 21, 2014), <https://www.texasobserver.org/tyrants-foe-helping-minority-students-teachers-succeed> (in recent years, activists are attempting to combat harmful, racist myths about minority students in Texas).

<sup>96</sup> *See, e.g.*, Fisher v. Univ. Tex. Austin, 133 S. Ct. 2411, 2416 (2013) (challenging the undergraduate admission process for considering race when accepting applicants); Hopwood v. Univ. Tex. L. Sch., 236 F.3d 256, 261 (2000) (challenging the law school's admission process for considering race when accepting applicants).

<sup>97</sup> *See* David Pilgrim, *Jim Crow Museum of Racist Memorabilia*, FERRIS ST. UNIV. (Sept. 2000), <http://www.ferris.edu/jimcrow/what.htm> (explaining how Jim Crow laws helped reinforce racial stereotypes of African-Americans); Sheldon Rampton, *Jim Crow Propaganda*, CTR. MED. DEMOCRACY PR WATCH (Sept. 21, 2005), <http://www.prwatch.org/news/2005/09/4005/jim-crow-propaganda> (commenting on the Jim Crow museum at Ferris State University and how it sheds light on the discriminatory effects of Jim Crow laws); *The Truth About Jim Crow*, AM. C.R. UNION (2014), <http://www.theacru.org/wordpress/wp-content/uploads/2014/07/ACRU-the-truth-about-jim-crow.pdf> (giving examples of Jim Crow laws reinforcing racial stereotypes such as that black men were sexually uncontrollable and predatory).

<sup>98</sup> Andrew Cohen, *How Voter ID Laws Are Being Used to Disenfranchise Minorities and the Poor*, ATLANTIC (Mar. 6, 2012), <http://www.theatlantic.com/politics/archive/2012/03/how-voter-id-laws-are-being-used-to-disenfranchise-minorities-and-the-poor/254572>; Laurel Brubaker Calkins & Lauren Etter, *Texas Voter ID Law Found to Discriminate Against Minorities*, BLOOMBERG (Dec. 28, 2015), <http://www.bloomberg.com/news/articles/2015-08-05/texas-voter-id-law-found-to-discriminate-against-minorities>; Nicole Hemmer, *An Immoral Texas Law Gets Nixed*, U.S. NEWS (Oct. 14, 2014), <http://www.usnews.com/opinion/blogs/nicole-hemmer/2014/10/14/texas-voter-id-law-is-unconstitutional-and-discriminates-against-minorities>.

<sup>99</sup> *See* Livia Gershon, *The Racism of History Textbooks*, JSTOR (Oct. 20, 2015), <http://daily.jstor.org/racism-history-textbooks> (recounting the detrimental effects racist history textbooks have on minority students); Ferroni, *supra* note 6 (explaining that textbooks can contribute to students holding racist or sexist ideologies).

The role textbooks, specifically history textbooks, play in shaping social schemas and forming ideologies makes the content imperative to minority groups.<sup>100</sup> Dr. David Crabtree, an expert in the philosophy of education, states in his article about the importance of historical accuracy, “[H]istory is a story about the past that is significant and true.”<sup>101</sup> When students are taught history lacking one of the two elements—significance or truth—it can impact the way their peers treat them as well as how students view themselves.<sup>102</sup> Crabtree further explains:

History is important because it helps us to understand the present. If we will listen to what history has to say, we can come to a sound understanding of the past that will tell us much about the problems we now face. If we refuse to listen to history, we will find ourselves fabricating a past that reinforces our understanding of current problems.<sup>103</sup>

Thus, when the history textbooks reinforce racist ideologies or misrepresent the past of minority groups, it can reinforce misunderstanding of these groups and also perpetuate white supremacy.<sup>104</sup> The issues of racial inequality and social injustice via discrimination within public schools should be analyzed through the lens of critical race theory (“CRT”). CRT provides a crucial analysis of race from a legal viewpoint.<sup>105</sup> The University of California, Los Angeles School of Public Affairs describes the function of CRT as:

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<sup>100</sup> See generally Susan D. Witt, *The Influence of School and Reading Materials on Children’s Gender Role Socialization*, U. AKRON (2001), <http://gozips.uakron.edu/~susan8/school.htm>; Abby Phillip, ‘Painfully offensive’ racial stereotypes lead district to recall books, WASH. POST (Sept. 11, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/11/lazy-lucy-and-other-painfully-offensive-racial-stereotypes-lead-a-school-district-to-recall-books>.

<sup>101</sup> *Introduction to David Crabtree*, GUTENBERG COLL., <http://msc.gutenberg.edu/authors/david-crabtree/>; David Crabtree, *The Importance of History*, GUTENBERG COLL. (Nov. 1993), <http://msc.gutenberg.edu/2001/02/the-importance-of-history>.

<sup>102</sup> *Id.*; Witt, *supra* note 100.

<sup>103</sup> Crabtree, *supra* note 101.

<sup>104</sup> *Cf.*, ABS Staff, *8 Disturbingly Racist Children’s Books Designed to Devalue Black People*, ATLANTA BLACK STAR (Feb. 21, 2014), <http://atlantablackstar.com/2014/02/21/8-disturbingly-racist-childrens-books-designed-to-devalue-black-people>.

<sup>105</sup> *What is Critical Race Theory?*, UCLA SCH. OF PUB. AFF. (June 2009), <https://spacrs.wordpress.com/what-is-critical-race-theory/>; see also Nicola Rollock, *Critical Race Theory (CRT)*, ACADEMIA.EDU (Sept. 2011), [http://www.academia.edu/1201277/Critical\\_Race\\_Theory\\_CRT](http://www.academia.edu/1201277/Critical_Race_Theory_CRT).

CRT recognizes that racism is engrained in the fabric and system of the American society. The individual racist need not exist to note that institutional racism is pervasive in the dominant culture. This is the analytical lens that CRT uses in examining existing power structures. CRT identifies that these power structures are based on white privilege and white supremacy, which perpetuates the marginalization of people of color.<sup>106</sup>

The SBOE can be categorized as a powerful institution historically governed predominantly by white males.<sup>107</sup> The SBOE's forcing conservative bias into textbook content and classroom curriculum perpetuates the marginalization of people of color, similar to other conservative social policies.<sup>108</sup> By using CRT to help discern the discriminatory impact textbooks can have on minority students and express the possible repercussions of such discrimination, the legal remedies available to these students are further supported.

Critics of CRT argue the effects of the textbook content on students is minimal,<sup>109</sup> a major point of contention between Critical Race Theorists and their critics.<sup>110</sup> Many SBOE members believe teachers implement their own liberal bias while teaching the courses, so the textbook content is merely an over-correction of that perceived liberal bias.<sup>111</sup> Along that theory, detrimental effects of the textbook content or teacher's bias would basically cancel each other out.<sup>112</sup> There are also arguments that emphasizing minority groups' influence on history will threaten the

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<sup>106</sup> UCLA SCH. OF PUB. AFF., *supra* note 105; Rollock, *supra* note 105

<sup>107</sup> See generally *Texas State Board of Education*, TEX. STATE LIBRARY AND ARCHIVES COMM'N, <http://www.lib.utexas.edu/taro/tslac/30140/tsl-30140.html> (providing archived documents from the SBOE in 1990-2005).

<sup>108</sup> See Crabtree, *supra* note 101 ("If in the course of this sorting procedure we have held tightly to our preconceived notions, the final picture will be a reaffirmation of those prejudices."); Sean McElwee, *Republican policies don't help people of color*, AL JAZEERA (Feb. 24, 2015), <http://america.aljazeera.com/opinions/2015/2/republican-policies-dont-help-people-of-color.html> (detailing harmful impacts of conservative ideologies on minorities).

<sup>109</sup> *Contra* UCLA SCH. OF PUB. AFF., *supra* note 105.

<sup>110</sup> See Bill Barlow, *Racism, Justified: A Critical Look at Critical Race Theory*, HARVARD L. RECORD (Feb. 29, 2016), <http://hlrecord.org/2016/02/racism-justified-a-critical-look-at-critical-race-theory> ("To teach Critical Race Theory is to teach the latest in a sad line of theoretical justifications for legally-codified racism.")

<sup>111</sup> See Birnbaum, *supra* note 13; *Contra* UCLA SCH. OF PUB. AFF., *supra* note 105.

<sup>112</sup> *Contra* UCLA SCH. OF PUB. AFF., *supra* note 105.

knowledge and history of white Americans.<sup>113</sup> Such an argument is ludicrous because recognizing the contributions one group made to society does not inherently negate what other groups did (unless they are miscrediting one group with the other's accomplishments).

#### IV. Possible Legal Recourse for Minority Students in Texas Public Education Systems

##### A. Recent Amendments to the Social Studies Curriculum TEKS

Minority students across the state of Texas were given social studies textbooks in the fall of 2015 that discriminate against them by over-emphasizing white Americans' contribution to history and completely eradicating reference to critical events in specific minority histories.<sup>114</sup> Minority students within the public education system are being taught distorted views of their culture's history, while the detrimental role colonialism and white Americans participating in forcing Africans into the oppressive institution of slavery is drastically downplayed.<sup>115</sup>

There are quite a few disturbing amendments made to the elementary school TEKS; however, the SBOE also amended middle school social studies TEKS and high school level social studies and history TEKS.<sup>116</sup> When the SBOE changes the TEKS or curriculum requirements, it directly impacts textbook content.<sup>117</sup> Textbook publishers are aware of amendments to TEKS and adjust their proposed textbooks accordingly.<sup>118</sup> Therefore, when the TEKS require a distorted teaching of history, the textbooks will fulfill that requirement by portraying such a distorted view. In the 2010

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<sup>113</sup> The 2016 presidential election encouraged a conservative, white resurgence of false claims of "reverse racism" against white people and complaints that white people were "under attack." *But cf.* Jenée Desmond-Harris, *Why we don't have white history month*, VOX (Feb. 7, 2017), <http://www.vox.com/identities/2017/2/7/14503144/white-history-month-black-history-month-white-pride-nationalism-racism> (explaining how ludicrous a white history month would be).

<sup>114</sup> Schaub, *supra* note 25.

<sup>115</sup> 19 TEX. ADMIN. CODE § 113 (2010) (Proposed Revisions) [hereinafter Proposed Revisions] (amending the TAC chapter 113 requirements of content objectives to be taught within elementary level education in Texas public schools).

<sup>116</sup> *Id.*

<sup>117</sup> There is a circuitous process involved with the SBOE and textbook publishers. The publishers initially propose instructional materials, then the SBOE updates curriculum and TEKS. The textbook publishers then amend the content of the materials to match the TEKS and re-propose the materials to the SBOE. This process continues on and on. Dirx, *supra* note 4, at 30.

<sup>118</sup> *Id.* at 74

proposed amendments, titled “Proposed Revisions to 19 TAC Chapter 113, Texas Essential Knowledge and Skills for Social Studies,” which alters chapter 113 of the Texas Administrative Code, all changes made from 2010 are detailed and color-coded.<sup>119</sup> This document is convenient for analysis because it allows the reader to follow any proposed changes, new rules, and also compare the previous rule to the newly implemented changes.<sup>120</sup> For example, Section 113.32 41(c)(30)(B) is completely redacted,<sup>121</sup> which previously required students to “use standard grammar, spelling, sentence structure, and punctuation . . .”<sup>122</sup> Also, Section 113.32 41(c)(25)(B) removes Hip Hop as a “significant example of cultural movements in art, music, and literature,” but adds country and western music.<sup>123</sup> Amending political teachings, Section 113.32 41(c)(19)(C) requires the student to study political scandals such as the Bill Clinton impeachment, but makes no mention of the Iran-Contra affair, possible vote-rigging in the 2000 election, potentially deliberate misinformation regarding weapons of mass destruction allegedly in Iraq, or any other republican president’s shortcomings.<sup>124</sup> Continuing with amending political teachings, Section 113.32 41(c)(11)(D) places understandable historical emphasis on the election of 2008, but does not place emphasis on the failure of the electoral college or even mention the historical context of the 2000 election.<sup>125</sup> Furthermore, Section 113.32 41(c)(11)(C) diminishes the role of third party politics in the United States and removes mention of Ralph Nader.<sup>126</sup> One amendment to the TEKS, Section 113.32 41(c)(10)(E), places emphasis on the role and importance of “key organizations, and individuals of the conservative resurgence of the 1980s and 1990s, including Phyllis Schlafly, the Contract with America, the Heritage Foundation, the Moral Majority, and the National Rifle Association . . .”<sup>127</sup> Section 113.32 41(c)(5)(B)&(C) of the amendments removes mention of Robert LaFollette and Eugene V. Debs, two key historical figures.<sup>128</sup> One article even notes the absurdity of a particular amendment by stating:

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<sup>119</sup> 19 TEX. ADMIN. CODE § 113.

<sup>120</sup> *Id.*

<sup>121</sup> *Compare* Proposed Revisions, with 19 TEX. ADMIN. CODE §§ 113.41-113.5 (2010).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Birnbaum, *supra* note 13.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

In 2010, the State Board of Education eliminated Thomas Jefferson from historical discussions because the Board disliked the fact that he coined the phrase “the separation between church and state.” The State Board of Education also required schools to teach about the violence of the black power movement and mandated that children be tested on the conservative resurgence of the 1980's and the political influence of the National Rifle Association.<sup>129</sup>

A particularly absurd amendment to the social studies TEKS requires students to “evaluate efforts by global organizations to undermine U.S. sovereignty;” namely, the United Nations.<sup>130</sup> Pandering to such far-right conspiracy theories threatens everything education stands for and tears down progress made in areas like critical thinking. There are also new amendments requiring students to evaluate long-term “entitlements” such as Social Security and Medicare, while considering alternatives to long-term use of such programs.<sup>131</sup> The evaluation required of students for these topics features a negative slant—which is representative generally of Republican ideologies on Social Security, Medicare, and other governmental assistance.<sup>132</sup> There are also recent attacks to the concept of separation of church and state, by encouraging students to “contrast the Founders' intent relative to the wording of the First Amendment's Establishment Clause and Free Exercise Clause, with the popular term, ‘Separation of Church and State.’”<sup>133</sup>

While the aforementioned amendments are ghastly, there were amendments that specifically erased or altered African American history.<sup>134</sup> For example, Section 113.3(b)(1) strikes through observing Martin Luther King, Jr. day in the first grade curriculum.<sup>135</sup> Similarly,

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<sup>129</sup> Dirx, *supra* note 4, at 30.

<sup>130</sup> Barrett Sheridan, *Texas Cooks the Textbooks*, NEWSWEEK (May 20, 2010, 8:00 PM), <http://www.newsweek.com/texas-cooks-textbooks-72627>.

<sup>131</sup> This proposed revision was made in the 2010 amendments, and is problematic because it perpetuates the conservative idea that programs like Medicare and Medicaid are “welfare” and “free handouts” given to the poor. Dirx, *supra* note 4, at 30.

<sup>132</sup> See e.g., Wade Goodwyn, *Texas Politicians And Businesses Feud Over Medicaid Expansion*, NPR.ORG (May 29, 2015), <http://www.npr.org/sections/health-shots/2015/05/29/410520561/texas-politicians-and-businesses-feud-over-medicaid-expansion> (detailing Republican lawmakers' viewpoint against Medicaid expansion in Texas).

<sup>133</sup> *Id.*

<sup>134</sup> Compare Proposed Revisions, with 19 TEX. ADMIN. CODE § 113.3(b)(1).

<sup>135</sup> *Id.*

Section 113.5(b)(10) excludes Harriet Tubman, Dolares Huerta, and Jane Addams from the curriculum of important historical figures to study.<sup>136</sup> Also, the proposed amendments erase studying the cultural and historical ramifications of the Hip Hop movement in the United States and across the world, while requiring students to learn the cultural implications of Rock and Roll and Country music.<sup>137</sup> The TEKS requirements also drastically downplay Jim Crow laws and their influence on society and institutionalized racism.<sup>138</sup> In some instances, the amendments altogether erase teaching Jim Crow laws in specific grades.<sup>139</sup> There were changes that also touch on the Civil Rights Movement, such as “when learning about the non-violent teachings of Martin Luther King Jr., students are required to study the violent teachings of the Black Panthers.<sup>140</sup> Additionally, teachers are required to emphasize the Republican votes in Congress on Civil Rights Legislation which wrongfully attributes crucial civil rights improvements to Republican legislators.<sup>141</sup> The most egregious amendment to curriculum that affects African-American students is the SBOE’s decision to dilute the role slavery played in the civil war as well as remove studying the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments to the U.S. Constitution.<sup>142</sup> This single amendment was the most harmful because these historical events are lauded as some of the most pivotal events in American history.<sup>143</sup> The Civil War is the only one of its kind our country has experienced and the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> amendments to the U.S. Constitution were a monumental step towards recognizing African-Americans as having basic human rights.<sup>144</sup> Belittling the importance of these amendments is

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<sup>136</sup> *Id.*

<sup>137</sup> Krysten Hughes, *Texas Board of Education Declare Hip Hop is Not a Cultural Movement*, HIPHOPDX (Mar. 13, 2010), <http://hiphopdx.com/news/id.10826/title.texas-board-of-education-declare-hip-hop-is-not-a-cultural-movement>; Proposed Revisions, *supra* note 115.

<sup>138</sup> Compare Proposed Revisions with 19 TEX. ADMIN. CODE §§ 113.41-113.5 (2010).

<sup>139</sup> *Id.*

<sup>140</sup> Dirkx, *supra* note 4, at 73.

<sup>141</sup> *Id.*

<sup>142</sup> Proposed revisions, *supra* note 115; See also TEX. ADMIN. CODE §§ 113.41-113.5 (2010).

<sup>143</sup> E.g., Michael Zuckert, *Natural Rights and the Post-Civil War Amendments*, NLNAC (2011), file:///C:/Users/scholar/Downloads/16%20(1).pdf.

<sup>144</sup> Editorial Board, *supra* note 16 (The 13th Amendment abolished slavery and the 14<sup>th</sup> amendment granted citizenship to all natural citizens, including former slaves and ultimately led to Congress passing the Civil Rights Act of 1964); see *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> (last visited Apr. 11, 2017) (providing summaries of the importance of the civil war

devastating to all African-Americans in the United States. Demeaning the impact of slavery on the Civil War is just as egregious. It is well established the Civil War involved the southern states' right to slavery—it was the central issue to the Civil War.<sup>145</sup>

African-American students are not the only minority group whose history became distorted or made irrelevant by the 2010 curriculum changes. Mexican-American students will also recognize the lack of key Mexican and Mexican-American historical figures within the curriculum. For example, Section 113.5(b)(12) removes the requirement to “explain the significance of selected ethnic and/or cultural celebrations . . . such as Cinco de Mayo. . .” in the third grade.<sup>146</sup> Chapter 113.6(b) also glosses over Texas's problematic role in Mexican Independence and the Spanish-American war.<sup>147</sup> Most notably though is the strikethrough of teaching about César Chávez in fourth grade curriculum.<sup>148</sup> This particular strikethrough of deleting an important civil rights and political leader like César Chávez can detrimentally impact the way white students and Mexican-American students interpret and view Mexican-American histories.<sup>149</sup>

While it is clear minority students, such as African-American and Mexican-American, are disproportionately affected by the 2010 curriculum amendments, there are also other groups implicated.<sup>150</sup> The new textbooks also discriminate against women as a class by perpetuating gender stereotypes and gender roles.<sup>151</sup> Further, the curriculum amendments also removed key women involved in political processes and the women's suffrage movement.<sup>152</sup> Thus, for purposes of discussing minority discrimination experienced by the textbooks, women are also included as a minority group.

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amendments).

<sup>145</sup> Editorial Board, *supra* note 16 (By downplaying the fact that the institution of slavery contributed to the Civil War, the SBOE is attempting to minimize the devastating impact of slavery and perpetuate conservative ideologies that the south was faultless); *contra* Jon Greenberg, *In defense of Confederate flag, frequent Fox News guest claims Civil War wasn't about slavery*, POLITIFACT (June 25, 2015), <http://www.politifact.com/punditfact/statements/2015/jun/25/gavin-mcinnis/tweet-civil-war-was-about-secession-not-slavery>.

<sup>146</sup> Editorial Board, *supra* note 16.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Cf.* Crabtree *supra* note 101 (Applying CRT to this particular amendment underscores its negative impact).

<sup>150</sup> Lott, *supra* note 10; *see also* Mani, *supra* note 70.

<sup>151</sup> Mani, *supra* note 70.

<sup>152</sup> Proposed revisions, *supra* note 115.

This discussion is remiss without recognizing the interrelationship of class and socioeconomic status (SES) and the harmful textbook revisions. The lack of school choice means low SES students are essentially forced to be subjected to public school textbooks.<sup>153</sup> While there are strong correlations between the discrimination in textbooks and the low SES students, unfortunately class and wealth are not suspect classes under the Equal Protection Clause.<sup>154</sup> Thus, the fact that the SBOE is discriminating against poorer, low income families is not a sufficient basis alone to bring an Equal Protection Clause claim.<sup>155</sup> It is important to note the curriculum changes implemented do not on their own cause whitewashed, discriminatory textbooks. Rather, the fact that publishers pander directly to the TEKS set forth by the SBOE is what leads to the problematic instructional material. There is a direct causal relationship between the two: if not for the biased curriculum changes, the textbooks would not be whitewashed to reflect the issues; on the converse, if not for the publishers relying on Texas as a large textbook market and adhering to the majority of TEKS then the curriculum amendments from 2010 would not have as damaging of an effect on minority students.

Applying a CRT lens to the aforementioned changes to social studies curriculum makes the negative and discriminatory impact of the curriculum obvious. The crucial figures and events from African-American, Latino, Mexican-American, and Women's Rights histories are removed.<sup>156</sup> The significance of being taught history that emphasizes one's cultural role in developing current society is imperative.<sup>157</sup> One can only imagine that Dr. Crabtree would be dismayed to learn of each of the amendments from 2010 that directly and disproportionately affect minority students.

### **B. Education Malpractice Cause of Action**

Education malpractice is a cause of action that has not been widely accepted across the United States.<sup>158</sup> It is considered a tort negligence claim

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<sup>153</sup> Janie Boschma and Ronald Brownstein, *The Concentration of Poverty in American Schools*, THE ATLANTIC (Feb. 29, 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414>.

<sup>154</sup> See generally Sharon E. Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1 (1997).

<sup>155</sup> *Id.*

<sup>156</sup> See discussion *supra* in Part IV for a discussion on CRT as applied to textbooks.

<sup>157</sup> *Id.*

<sup>158</sup> See generally *Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc.*, 277 S.W.3d 696, 699 (Mo. App. W.D. 2008); *Christensen v. S. Normal Sch.*, 790 So.2d 252, 255 (Ala. 2001);

raised by a student against a teacher or school for providing an inadequate education to the point of it being considered professional malpractice.<sup>159</sup> While many education malpractice suits are defeated for policy reasons, such as not wanting to encourage a floodgate of litigation against teachers and educators, it could be possible to extend the suit to higher agencies within the state. For example, instead of a student suing their teacher for an inadequate education, they could try to sue the SBOE, the Education Commissioner, or their respective school district, although this brings up its own hurdles to overcome. A proper malpractice claim is held to the negligence standard which requires four elements: duty, breach, causation, and damages.<sup>160</sup> Duty and breach are easy to prove with the textbooks—the state owes a duty to not discriminate against students in the public schools and the textbooks that do so breach such a duty. It becomes tricky when proving up causation and damages because the harm suffered by minority students is atypical of many negligence claim damages. However, there is guidance on clarifying this issue.

In Texas, government entities and employees typically cannot be held liable for negligent behavior unless there is an express waiver of governmental immunity.<sup>161</sup> In *Texas Dept. of Pub. Safety v. Petta*,<sup>162</sup> the Supreme Court of Texas held that plaintiff's claim the police department negligently failed to provide the proper instruction and training to a defendant police officer fails because they have “long held that information is not tangible personal property, since it is an abstract concept . . .”<sup>163</sup> Clearly, there is difficulty with holding the SBOE, a government entity, liable for education malpractice, which would be considered a tort suit in negligence.<sup>164</sup> However, the Texas Civil Remedies and Practices Code includes a specific exception that could result in the State of Texas, and as an extension the SBOE, being liable for a negligence suit.<sup>165</sup> Section

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Moss Rehab. v. White, 692 A.2d 902, 905 (Del. 1997).

<sup>159</sup> *Id.*

<sup>160</sup> See e.g., *Harris Methodist Fort Worth v. Ollie*, 342 S.W.3d 525 (Tex. 2011); *Weiner v. Wasson*, 900 S.W.2d 316 (Tex. 1995); Lydia M. V. Brandt, *The Maccratte Report and the Teaching of Legal Research: A Justified Scenario for Educational Malpractice*, 2 TEX. WESLEYAN L. REV. 123 (1995).

<sup>161</sup> *Texas Dept. of Pub. Safety v. Petta*, 44 S.W.3d 575 (Tex. 2001); See also TEX. CIV. PRAC. & REM. CODE ANN. § 101 (West 2016).

<sup>162</sup> *Texas Dept. of Pub. Safety supra* note 161.

<sup>163</sup> *Id.* Not having tangible property affected in this case cut against the plaintiff's claims and ultimately caused them to fail. Typically, the injury must be caused by real property or motor vehicles in order to overcome the immunity privilege.

<sup>164</sup> *Id.*

<sup>165</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 104.002 (a)(2) (West 2016).

104.002 of the code posits that the State will indemnify liability if the claim is against a public official while acting within the scope of their official duties and:

[T]he damages arise out of a cause of action for deprivation of a right, privilege, or immunity secured by the constitution or laws of this state or the United States, except when the court in its judgment or the jury in its verdict finds that the person acted in bad faith, with conscious indifference or reckless disregard.<sup>166</sup>

While a suit brought under this exception could be possible, it would be an uphill battle against the state entity. This particular cause of action would be the last ditch effort for a student to seek relief against the state. Not only would the negligence action be difficult to prove up, it would not elicit institutional change from the public education system. Education malpractice claims are difficult to implement because of the aforementioned policy reasons and aren't widely recognized.<sup>167</sup> Also, it would entail suing the teachers or the school district specifically and, while this could offer some type of relief, it wouldn't help to solve the ultimate problem of the SBOE's conservative influence on public education.

### C. Statutory Violations as a Basis for Suit

While the U.S. Constitution does not provide a fundamental right to education, the Texas Constitution does.<sup>168</sup> This fact alone should underscore the great importance Texas legislators gave to an equal and efficient education system. A claim brought under the Texas Constitution's guaranteeing the fundamental right to education would, however, be different than a federal claim asserting infringement of a fundamental right.<sup>169</sup>

The duties and liabilities of the SBOE and the Education Commissioner are detailed in the Texas Education Code (TEC).<sup>170</sup> The TEKS outline the requirements for each class subject; thus, it is easy to identify which criteria students aren't learning due to the problematic textbooks.<sup>171</sup> Notably, if

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> TEX. CONST. art. VII, § 1.

<sup>169</sup> *Id.*

<sup>170</sup> See TEX. EDUC. CODE ANN. § 7.021 (West 2017) (explaining the duties and responsibilities of education-related governing bodies).

<sup>171</sup> See generally *Texas Essential Knowledge and Skills*, TEX. EDUC. AGENCY,

there are violations to the education code, there is a section outlining how to proceed.<sup>172</sup> Rule 157.1071 of the Texas Administrative Code states:

(b) In hearings in which the agency is not the petitioner, petitions for review or requests for hearing shall be filed with the commissioner within 30 calendar days after the decision, order, or ruling complained of is first communicated to the petitioner, except as otherwise provided by law or agency rule. (c) The agency's division responsible for hearings and appeals shall transmit the petition for review or request for hearing and a request to docket the hearing to SOAH. (d) The agency administrative law judge may issue subpoenas if the requirements of Texas Government Code, §2001.089, are met. To obtain a subpoena, the moving party shall meet the following requirements.<sup>173</sup>

This provision also continues on to delineate requirements for discovery and judicial processes by administrative judges.

Proceeding with a cause of action claiming the SBOE violated the TEC could be difficult.<sup>174</sup> However, if a student proceeded with a claim stating the school district or teacher failed to satisfy the social studies TEKS, there is a greater chance for success.<sup>175</sup> This is both a positive and a negative—positive because it offers some type of recourse for minority students; negative because it attacks too low down the food chain to actually incite change from the SBOE. Further, the SBOE could simply amend the TEKS to more stringently reflect the biases in the textbooks and this entire cause of action would dissipate. This course of action is only slightly better than the education malpractice claims.

#### **D. Due Process Claims**

Notice and Comment procedures originated in the federal government as an exercise of power by the executive branch.<sup>176</sup> Administrative agencies were delegated power by the president, who implemented laws via the

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<http://tea.texas.gov/index2.aspx?id=6148>.

<sup>172</sup> TEX. ADMIN. CODE ANN. § 157.1071 (West 2010).

<sup>173</sup> *Id.*

<sup>174</sup> TEX. EDUC. CODE ANN. § 7.057 (West 2010).

<sup>175</sup> TEX. ADMIN. CODE § 157.1071 *supra* note 172.

<sup>176</sup> See Ari Cohn, *Did the Office for Civil Rights' April 4 'Dear Colleague' Letter Violate the Law?*, THE FIRE (Sept. 12, 2011), <https://www.thefire.org/did-the-office-for-civil-rights-april-4-dear-colleague-letter-violate-the-law> (detailing administrative procedure generally).

executive branch of government.<sup>177</sup> One major attack on the creation of administrative agencies was their apparent unilateral ability to create laws.<sup>178</sup> In response, the Administrative Procedure Act (APA) was promulgated and all administrative agencies were subject to a “notice-and-comment” requirement.<sup>179</sup> This rule essentially means the agency has to notify the public and allow them to comment on proposed rules and amendments, and address each comment with reasoning, before it can be adopted.<sup>180</sup>

Under the Texas Administrative Code, there is a notice and comment requirement,<sup>181</sup> which states:

Sec. 2001.023. NOTICE OF PROPOSED RULE. (a) A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. (b) A state agency shall file notice of the proposed rule with the secretary of state for publication in the Texas Register in the manner prescribed by Chapter 2002.<sup>182</sup>

Specifically as applied to the SBOE’s duties, any proposed amendment or rule to the TEKS must satisfy notice and comment requirements.<sup>183</sup> The comments are made public and are individually addressed by the SBOE.<sup>184</sup> After the notice and comment period, there is a second meeting regarding the rule before it will be adopted and published.<sup>185</sup> The 2010 curriculum changes for social studies programs fell within the scope of required notice and comment procedures via the TAC. Although the comments were individually addressed, there are questions that remain about adequate notice being given. Further, the comments submitted by and large did not effect any changes within the rules.<sup>186</sup> This raises a procedural issue: if the SBOE, governed by the TAC which delineates notice and comment

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<sup>177</sup> *Id.*

<sup>178</sup> See Adrian Vermeule, *Review of Philip Hamburger, Is Administrative Law Unlawful?*, 93 TEX. L. REV. 1547 (2015) (criticizing administrative agencies for their unyielding law-making power).

<sup>179</sup> 5 U.S.C. §§ 500–596 (1946).

<sup>180</sup> *Id.*

<sup>181</sup> TEX. GOV’T CODE ANN. § 2001.023 (West 2016).

<sup>182</sup> *Id.*

<sup>183</sup> Given that the SBOE is an entity subject to the Texas Administrative Procedure, it must follow the procedures proscribed in the Texas Government Code. *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *SBOE Operating Rules Amended 1-31-17*, TEX. EDUC. AGENCY (2017), [http://tea.texas.gov/About\\_TEA/Leadership/State\\_Board\\_of\\_Education/SBOE\\_Meetings/SBOE\\_Operating\\_Rules\\_Amended\\_1-31-17](http://tea.texas.gov/About_TEA/Leadership/State_Board_of_Education/SBOE_Meetings/SBOE_Operating_Rules_Amended_1-31-17).

<sup>186</sup> 35 Tex. Reg. 7318 (2010)

requirements, fails to do adhere to the requirements, what happens? The adopted rule might be voidable and it could also give rise to a due process claim.<sup>187</sup> Further, if the SBOE is allowing comments but failing to meet the notice requirements, then minority students and their allies cannot properly advocate to rectify any harm or bias.<sup>188</sup>

A due process violation can occur if there are substantive laws proposed by an agency that do not adhere to the notice and comment standards, as people are being stripped of their right to protect their interests and comment on the new rules.<sup>189</sup> There are two components: notice and comment.<sup>190</sup> If one of these elements is missing then its likely due process rights are being violated.<sup>191</sup> There were notice and comments for TEC amendments (2010) to social studies TEKS.<sup>192</sup> The comments submitted ranged from objecting to how the Ku Klux Klan was addressed to stating that Aesop's Fables are more appropriate for language arts instead of social studies curriculum.<sup>193</sup> Generally, the responses to the comments were "The SBOE disagreed and determined the TEKS were adequate."<sup>194</sup> It is important to look at the submitted comments and proposals and compare that document to the finally implemented TEKS to see what was actually adopted from the notice and comment procedure. For the social studies curriculum updates in 2010, there was an outpouring of comments for one particular area:

Comment. Two hundred and seventy-two community members expressed concern that the history of the civil rights movement is being rewritten and that atrocities committed in the United States by groups such as the Ku Klux Klan are being ignored. Response. The

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<sup>187</sup> *Id.*

<sup>188</sup> The SBOE allows for public comment to allow "citizens" to have their voices heard on pertinent education issues. *The Review and Adoption Process*, TEX. EDUC. AGENCY, [http://tea.texas.gov/Academics/Instructional\\_Materials/Review\\_and\\_Adoption\\_Process/The\\_Review\\_and\\_Adoption\\_Process](http://tea.texas.gov/Academics/Instructional_Materials/Review_and_Adoption_Process/The_Review_and_Adoption_Process) (last visited April 24, 2017).

<sup>189</sup> See *El Paso Hosp. Dist. v. Tex. Health and Human Services Comm'n*, 247 S.W.3d 709 (Tex. 2008) ("When an agency promulgates a rule without complying with the proper rule-making procedures, the rule is invalid. See TEX. GOV'T CODE ANN. § 2001.035(a).").

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> 19 TEX. ADMIN. CODE §§112.41-112.49 (2010) (repealed 35 Tex. Reg. 5147); 35 TEX. Reg. 7155 (Aug. 20, 2010).

<sup>193</sup> 35 Tex. Reg. 7155 (Aug. 20, 2010).

<sup>194</sup> *Id.*

SBOE disagreed and determined that the history of the civil rights movement was appropriately addressed.<sup>195</sup>

There are two questions to keep in mind when checking to see if any comments or suggestions were implemented: Is one political side having more bargaining power than the other? If comments aren't taken seriously, then is the notice and comment requirement a shell of the law? Looking at the comments that specifically addressed curriculum changes relating to African-American and Latino histories, the SBOE declined to implement any of the changes.<sup>196</sup> The SBOE responded to almost every comment in this subject area as being already adequately addressed.<sup>197</sup> The issue of the SBOE disregarding most of the comments and refusing to implement change, particularly on topics that disproportionately affect minority students, also raises questions about whether an Equal Protection claim is viable.

Due process claims brought against an agency for violating the notice and comment standards would be the most effective cause of action against the SBOE and would bring about actual, wide-spread change.<sup>198</sup> It has the potential to elicit real change to the curriculum updating process and could remedy some of the damage already done to minority students who began using the biased textbooks in the fall of 2015.<sup>199</sup> This would cast the farthest net over the SBOE and textbook implementation; it is the best chance at achieving educational justice for minority students. Due Process claims typically render immediate action, especially when the violation is committed by a state agency against public education students or a protected class of students. As mentioned previously, due process rights being infringed upon by failure to adhere to notice and comment standards dawdles over the line into equal protection claims.

#### ***D. Equal Protection Clause Cause of Action***

The 14th Amendment of the United States Constitution states:

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<sup>195</sup> *Id.*

<sup>196</sup> 19 TEX. ADMIN. CODE §§112.41-112.49 (2010) (repealed 35 Tex. Reg. 5147); 35 TEX. Reg. 7155 (Aug. 20, 2010).

<sup>197</sup> 35 Tex. Reg. 7155 (Aug. 20, 2010).

<sup>198</sup> *See* 2 Tex. Jur. 3d Admin. Law § 243 (discussing process for parties to challenge administrative rulings and procedures, after exhausting all administrative remedies).

<sup>199</sup> The SBOE's adoptions could be found invalid by a final judgment from the court, essentially mandating the state remove the textbooks which implemented such invalidated adopted rules. The SBOE would also be forced to actually listen to the public comments submitted for TEKS changes.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>200</sup>

The last sentence of the 14th Amendment is the Equal Protection Clause. This particular clause has been used numerous times as standing for lawsuits suing educational entities on the basis of discrimination.<sup>201</sup> There are some educational rights extended to citizens within the United States, depending on each respective state's constitution<sup>202</sup> which may be violated by discriminating against a group of individuals based on their race, ethnicity, religion or sexual orientation.<sup>203</sup> The function of the Equal Protection Clause is to ensure that citizens are treated equally and fairly under the administration of laws.<sup>204</sup> Thus, any time a specific piece of legislation regarding educational policy discriminates directly or in effect against a protected class, there could be standing for an Equal Protection cause of action.<sup>205</sup>

### E. Issues Concerning Standing and Damages

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<sup>200</sup> U.S. CONST. amend. XIV § 1.

<sup>201</sup> See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003) (upholding a race-based admission process into the Michigan University School of Law); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (striking down a Michigan University admission process that integrated race as a factor for acceptance into the university); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 270 (1985) (holding unconstitutional a school's plan to maintain a racially integrated faculty); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that a racially diverse university is a substantial interest of the school).

<sup>202</sup> Compare *San Antonio Indep. Sch. Dist. v. Rodriguez*, 406 U.S. 966 (1972) (holding that there is no fundamental right to education); Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 51 (April 2011) (The Supreme Court has repeatedly held that states have a substantial interest in the administration of education as well as a right of parents to choose which schooling is appropriate for their children); TEX. CONST. art. VII § 1 (education is a fundamental right extended to Texas citizens).

<sup>203</sup> See *Rush*, *supra* note 154 (citing *Brown v. Board of Education* as a trailblazing case for equal protection claims based on discrimination within public education).

<sup>204</sup> See e.g., Nathaniel Persily, *The Meaning of Equal Protection: Then, Now, and Tomorrow*, AM. BAR. ASS'N: GP SOLO (2014), [http://www.americanbar.org/publications/gp\\_solo/2014/november\\_december/the\\_meaning\\_equal\\_protection\\_then\\_now\\_and\\_tomorrow.html](http://www.americanbar.org/publications/gp_solo/2014/november_december/the_meaning_equal_protection_then_now_and_tomorrow.html).

<sup>205</sup> *Id.*

It is harder to prove injury in a case of racial discrimination. The standard most likely to be applied to race discrimination via textbooks is the *Brown v. Board of Education* standard. The standard used in the *Brown* decision is disparate impact, which means a law or regulation discriminates in effect and can make a minority group feel inferior to other groups of people.<sup>206</sup> There are also issues of damages that arise from the previously proposed causes of action against the SBOE. First, it is hard to propose a remedy that could rectify the damage done to minority students in Texas and beyond. Luckily, we can again turn to the *Brown* decision to see that changing current law can offer one source of remedy as well as eliminating obstacles that were preventing African-American students from receiving an adequate, equal education.<sup>207</sup> As applied to the current context, the obstacles facing minority students in Texas regarding discriminatory textbooks are the processes of amending curriculum and publishers pandering to the SBOE's TEKS. Arguably, each of those two processes could be directed to be changed by the legislature as a remedy for the aforementioned suits. Further, with the educational malpractice claim being a tort suit, it is likely the plaintiffs bringing suit could be awarded punitive damages as long as they have proper standing to bring the suit, and can get around the obstacle of governmental immunity.<sup>208</sup>

## V. Policy Considerations for Causes of Action Against The State Board of Education

Education malpractice cases have outlined strong policy considerations against allowing students to sue on these claims.<sup>209</sup> For example, courts fear that this would hinder educational processes by allowing each and every student to have standing for a claim that the educator or school district inadequately educated that particular student.<sup>210</sup> Not only would that threshold be a high burden to overcome for the student, but there are rarely appropriate remedies available for such a claim, which also makes the courts hesitant to uphold education malpractice suits.<sup>211</sup>

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<sup>206</sup> Rush, *supra* note 154.

<sup>207</sup> *Id.*

<sup>208</sup> See Section V(b) *supra* for discussion of education malpractice.

<sup>209</sup> See, e.g., Dallas Airmotive, Inc., 277 S.W.3d at 699; Christensen, 790 So. 2d at 255; Moss Rehab., 692 A.2d at 905.

<sup>210</sup> See Dallas Airmotive Inc., 277 S.W.3d at 699.

<sup>211</sup> *Id.*

Equal protection cases have a better chance at success because, while there is policy against opening the floodgates of lawsuits against Texas education agencies, the negative considerations are outweighed by the necessity to uphold the Equal Protection Clause of the U.S. Constitution.<sup>212</sup> The constitutional protections afforded to students being infringed upon by state agencies will almost always allow the student to challenge the state's policies for discrimination.<sup>213</sup> The fact that the Texas constitution features a guaranteed right to education shows the state's interest in providing efficient, equal educational opportunities are of utmost importance.<sup>214</sup> Courts have proceeded with caution when a school district or educator is sued or charged with sanctions for their actions towards students;<sup>215</sup> this is observably from the judicial system's reluctance to implement an education malpractice cause of action.<sup>216</sup> Judicially, the possibility of detrimental floodgates of litigation ensuing against school districts and educators are a great fear.<sup>217</sup> However, that does not have to be the case. By allowing minority students to have standing and seek legal recourse against the higher institutions like the TEA and the SBOE, the court system would avoid many of the negative policy impacts of education-related lawsuits.

### CONCLUSION

The State Board of Education and Texas Education Agency are discriminating against minority students by implementing excessively biased content in public education textbooks. The social studies textbooks are discriminatory because they contain a white-centric and conservative bias that sends a message to minority students that their culture's history is less important than the cultural histories of white students, or even that their culture's history is nonexistent. These biased textbooks perpetuate racial stereotypes in public schools and subject minority students to severe discrimination.<sup>218</sup> Not only are minority students facing discrimination,

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<sup>212</sup> See Persily, *supra* note 205 (underscoring the importance of the Equal Protection Clause).

<sup>213</sup> See, e.g., Gratz, 539 U.S. 244; Grutter, 539 U.S. 306; Wygant, 476 U.S. 270; Bakke, 438 U.S. 265.

<sup>214</sup> TEX. CONST. art. VII, § 1.

<sup>215</sup> See, e.g., Dallas Airmotive Inc., 277 S.W.3d at 699; Christensen, So. 2d at 255; Moss Rehab., 692 A.2d at 905.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Michael King, *NAACP and LULAC: Texas Education System Violates Federal Law*, AUSTIN CHRONICLE (Dec. 31, 2010), <http://www.austinchronicle.com/news/2010-12-31/naacp-and-lulac-texas-education-system-violates-federal-law>.

biased textbooks can have detrimental, long lasting effects.<sup>219</sup> For example, devaluing an entire minority population's contributions to society can help facilitate the school-to-prison pipeline, produce lower self-esteem for minority students, and falsely inflate perceptions of white American's history.<sup>220</sup> Minority students should be able to seek legal recourse against the SBOE for the way public education textbooks have whitewashed their race's history. While there are challenges facing plaintiffs bringing a cause of action against the SBOE, it is not impossible for minority students to seek legal recourse for these whitewashed books. The routes to bring a cause of action against SBOE include bringing a cause of action for statutory violations,<sup>221</sup> education malpractice,<sup>222</sup> due process, or even equal protection claims.<sup>223</sup> As for most lawsuits, their success will hinge on being able to prove standing and damages.

The current political climate is changing and we may be on the brink of a new civil rights era.<sup>224</sup> The culmination of advocacy for minority groups and widespread recognition of institutionalized racism and oppression will likely contribute to Texas' textbook content being scrutinized under close watch.<sup>225</sup> Given the national attention the 2010 amendments garnered, it is probable the SBOE will be pressured to adopt a different system that is less biased along political ideologies. For example, the Texas Legislature could convene a panel of experts, professors, and other educators to help guide the SBOE in amending TEKS in a way that does not inject Evangelical Christian biases into publicly disseminated educational materials.

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<sup>219</sup> *Id.*

<sup>220</sup> Chauncey D. Smith, *Note: Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009 (2009) ("inter-institutional policies and practices interact in a manner which results in minority students being deprived of an equal education, and set on a path to prison").

<sup>221</sup> TEX. CONST. art. VII, § 1; TEX. EDUC. CODE ANN. § 7.102(c)(4) (LexisNexis, Lexis Advance through the 2015 regular session, 84th Legislature).

<sup>222</sup> See, e.g., *Dallas Airmotive Inc*, 277 S.W.3d at 699; *Christensen, So.* 2d at 255; *Moss Rehab.*, 692 A.2d at 905

<sup>223</sup> Smith, *supra* note 221, at 1020. ("[P]olicies often results in students of color being disparately pushed out of school, such policies may give rise to claims under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, § 1983 of Title 42 of the U.S. Code, and state equal protection and right to education clauses").

<sup>224</sup> Rebecca Onion, *Are We in the Midst of a New Civil Rights Era?*, SLATE (Aug. 6, 2015 3:26 PM), [http://www.slate.com/articles/news\\_and\\_politics/history/2015/08/ferguson\\_and\\_black\\_lives\\_matter\\_are\\_we\\_in\\_the\\_midst\\_of\\_a\\_new\\_civil\\_rights.html](http://www.slate.com/articles/news_and_politics/history/2015/08/ferguson_and_black_lives_matter_are_we_in_the_midst_of_a_new_civil_rights.html)

<sup>225</sup> King, *supra* note 219.

There are a few scenarios that could result from the crossroads the SBOE is currently facing with backlash over social studies curriculum. First, the SBOE could continue on the route they are going—which is permeating public textbooks with conservative and religious biases. This option would likely result in an overwhelming ousting of the current members in favor of a more moderate Board. Secondly, the SBOE could require the publishers to provide supplements to the current instructional materials that adequately cover minority histories and rectify the discrimination against minority students. The third possible, and most likely, outcome is that minority students begin bringing lawsuits against the SBOE and TEA for the discrimination they are experiencing as a result of biased history (and other) textbooks. This option, while unprecedented for now, would not be a far reach to expect in the near future. There are more advocates for minority students and organizations like National Association for the Advancement of Colored People (“NAACP”) and League of United Latin American Citizens (“LULAC”) have already attempted to intervene in Texas’ curriculum updates.<sup>226</sup> It is easy to predict this is a storm of litigation brewing and eventually the biases will have to be rectified. With the current political climate and new civil rights era, it is not impractical to expect whitewashed history books to elicit vitriol from social justice advocates.

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<sup>226</sup> *Id.*