From "Race to the Top"* to No Race at All: A First Amendment Challenge to Anti-Critical Race Theory Bills

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* Race to the Top is an Obama-era education policy that pitted states against one another to develop innovative proposals for federal grant money. *See* William G. Howell, *Results of President Obama's Race to the Top*, EDUC. NEXT, https://www.educationnext.org/results-president-obama-race-to-the-top-reform/ (last visited Dec. 25, 2021). While Race to the Top is a former trending topic in the education world, this Note explores a recent iteration of education policy.

† Staff Member, Volume 52, and Senior Notes Editor, Volume 53, *The University of Memphis Law Review*; Juris Doctor Candidate, University of Memphis Cecil C. Humphreys School of Law, 2023. First, a thank-you to Professor Daniel Kiel for being a patient faculty advisor with extraordinary feedback and an unwavering belief that I could teach myself First Amendment jurisprudence. Thank you to Ericka Webster, Tommy Davis, and Paden Hemphill for challenging me throughout the editing process in order to craft the best Note possible. Thank you to my Mom and Dad for convincing me to attend law school. And last, but certainly not least, to the teachers in Mandeville, Louisiana, who encouraged me to never stop questioning, to the Educational Studies faculty at Rhodes College, who gave me the space to answer those questions, and to the students and teachers of Memphis-Shelby County Schools, who made me a lifelong learner and Memphian by choice—this one is for you.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.[1]

I. INTRODUCTION

In Williamson County, Tennessee, parents claim that books on Martin Luther King, Jr. and segregation "reveal both explicit and implicit Anti-American [and] Anti-White teaching" and demand their removal from school curricula.[2] To aid their cause, these parents, part of

1. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

2. Letter from Robin E. Steenman, Chair, Moms for Liberty Williamson Cnty., to Dr. Penny Schwinn, Comm'r, Tenn. Dep't of Educ. 2 (June 30, 2021),

a local Moms for Liberty Chapter,[3] hosted a conference on Martin Luther King Jr. Day weekend, where attendees paid $100 per seat, and invited Ben Carson, former Housing and Urban Development Secretary, to "examine[] the American Dream of Dr. Martin Luther King and

https://bloximages.newyork1.vip.townnews.com/williamsonherald.com/content/tncms/assets/v3/editorial/0/04/0046809a-e120-11eb-8132-43a3f70463e5/60e8fb22e0215.pdf.pdf ("The relentless nature of how these divisive stories are taught, the lack of historical context and difference in perspective, and the manipulative pedagogy all work together to amplify and sow feelings of resentment, shame of one's skin color, and/or fear."). After Williamson County Public Schools implemented coronavirus mask mandates, Steenman withdrew her child and has no children currently attending public school. Evan McMorris-Santoro & Meridith Edwards, *Tennessee Parents Say Some Books Make Students 'Feel Discomfort' Because They're White. They Say a New Law Backs Them Up*, CNN (Sept. 29, 2021), https://www.cnn.com/2021/09/29/us/tennessee-law-hb-580-book-debate/index.html. While this particular request from the Williamson County parents has been rejected on procedural grounds, there is nothing stopping them from refiling the same complaint next school year, filing a different complaint that adheres to the proper procedures outlined by the Tennessee Department of Education, or, alternatively, a completely different group from filing a different complaint. Meghan Mangrum, *Tennessee Department of Education Rejects Complaint Filed Under Anti-Critical Race Theory Law*, TENNESSEAN (Nov. 29, 2021), https://www.tennessean.com/story/news/education/2021/11/29/tennessee-department-education-declines-investigate-curriculum-complaint-filed-under-new-anti-critical-race-theory-la/8744479002 (explaining that the Moms for Liberty chapter filed outside the timeframe permitted by the Tennessee Department of Education's guidelines).

3. According to their website, Moms for Liberty "is dedicated to fighting for the survival of America by unifying, educating and empowering parents to defend their parental rights at all levels of government." *Who We Are*, MOMS FOR LIBERTY, https://www.momsforliberty.org/about (last visited Dec. 14, 2021). The group has attracted sharp criticism nationally for their opinion on the "country's violent and racist history against Black people and other people of color." Kevin L. Clark, *Right-Wing "Moms for Liberty" Group Wants 'Anti-American' MLK Jr. Books Banned from Schools*, ESSENCE (Dec. 3, 2021), https://www.essence.com/news/mlk-book-ban. Their activism has included vocal opposition of Critical Race Theory in schools and mobilization in enforcement of the state bills. *See, e.g.*, Morgan Keith, *New Hampshire Moms for Liberty Chapter Offers $500 to Anyone Who Can Catch Teachers Breaking New 'Discrimination' Law*, INSIDER (Nov. 14, 2021), https://www.businessinsider.com/anti-crt-moms-for-liberty-teachers-breaking-new-discrimination-law-2021-11 (explaining how a New Hampshire chapter offers bounties for reports of teachers violating the state's Critical Race Theory law); *see also* McMorris-Santoro & Edwards, *supra* note 2 (discussing Moms for Liberty Williamson County).

. . . warn about the dangers of [C]ritical [R]ace [T]heory."[4] Moms for Liberty Williamson County is not alone in their curricular concerns.[5] State lawmakers in more than half of states around the country, including in Tennessee, have introduced largely identical legislation to prohibit the instruction of certain concepts in schools that, they claim, indoctrinate students with Critical Race Theory.[6] This Note argues that these anti-Critical Race Theory bills violate the First Amendment as partisan content-based regulations of speech, and the impermissibly vague and substantially overbroad prohibitions on the teaching of certain concepts within the bills chill the teaching of American history and

4. Cole Villena, *Ben Carson, Moms for Liberty Headline Anti-Critical Race Theory Conference in Franklin*, TENNESSEAN (Jan. 14, 2022), https://www.tennessean.com/story/news/local/williamson/2022/01/14/ben-carson-headlines-anti-critical-race-theory-conference-franklin/6531665001; Alexander Willis, *Daughter of Martin Luther King Jr. to Williamson County Moms for Liberty: 'They're Using [My Father] to Make Money'*, WILLIAMSON HOME PAGE (Jan. 6, 2022), https://www.williamsonhomepage.com/news/daughter-of-martin-luther-king-jr-to-williamson-county-moms-for-liberty-theyre-using-my/article_95e1c1d4-6eb3-11ec-ae79-0b4d587a352a.html. Another speaker at the conference read King's "I Have a Dream" speech but omitted 30% of the original speech. Villena, *supra* note 4. King's daughter condemned the event. *Id.*

5. Martin Luther King, Jr. and the Civil Rights Movement are both included in the Tennessee social studies standards, which also provides the following guidance: "[T]he standards are what students should know, understand, and be able to do by the end of a grade level or course; however, the standards do not dictate how a teacher should teach them. In other words, the standards do not dictate curriculum." Tenn. Dep't of Educ., Tennessee Social Studies Standards 1, 7, 40 (2017) [hereinafter Tennessee Standards], https://www.tn.gov/content/dam/tn/education/standards/ss/Social_Studies_Standards.pdf. The standards also encourage teachers to "center instruction on inquiry-based models, which require[s] . . . critical thinking" and should be used to help students "understand the complexity of the world." *Id.* at 2. *See generally* Tenn. Dep't of Educ., Rules of the Department of Education, Chapter 0520: Prohibited Concepts in Instruction (July 29, 2021) [hereinafter Tennessee Guidance], https://www.tn.gov/content/dam/tn/education/legal/Prohibited%20Concepts%20in%20Instruction%20Rule%207.29.21%20FINAL.pdf (explaining enforcement and punishment mechanisms for Tennessee's bill).

6. Stephen Kearse, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, PEW: STATELINE (June 14, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/14/gop-lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools; Cathryn Stout & Thomas Wilburn, *CRT Map: Efforts to Restrict Teaching About Racism and Bias Have Multiplied Across the U.S.*, CHALKBEAT (Feb. 1, 2022), https://www.chalkbeat.org/22525983/map-critical-race-theory-legislation-teaching-racism.

justify the courts' declaration of these bills as unconstitutional and unenforceable.

Part II will introduce the anti-Critical Race Theory bills by providing a brief background of Critical Race Theory itself, the purported target of these bills, before exploring the specific prohibited concepts in each bill. Part II will also discuss relevant First Amendment jurisprudence, including the scrutiny applied to content-based regulations of speech; the vagueness, overbreadth, and chilling effect doctrines; and cases on the free speech protections available to schools and students. Part III will then apply that First Amendment jurisprudence to identify multiple ways courts may declare these statutes unconstitutional. Part IV will advocate for complete voidance of these state statues as the proper judicial remedy, and Part V will conclude the Note with a summary that contextualizes the popular misconceptions of Critical Race Theory to further establish the need for judicial intervention.

II. BACKGROUND AND HISTORY

This Note's background section will explore the history of the anti-Critical Race Theory bill as a political movement, including the origin of the specific language within the bills and the enforcement and punishment methods authorized by state legislatures. Next, relevant Supreme Court jurisprudence will introduce the level of scrutiny and doctrines necessary for a First Amendment analysis of these bills. This jurisprudence will also include relevant cases on the free speech protections available to protect schools as institutions of progressive thought and vital to democracy.

A. The Anti-Critical Race Theory Bills

Critical Race Theory has not, and never has been, taught in schools.[7] Despite this fact, Manhattan Fellow Christopher Rufo is credited with turning Critical Race Theory into a household concern.[8] In September of 2020, Rufo appeared on Fox News's Tucker Carlson Show to warn viewers that Critical Race Theory had invaded federal

7. *See infra* notes 19–23.

8. Adam Harris, *The GOP's "Critical Race Theory" Obsession*, ATLANTIC (May 7, 2021), https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828.

government institutions and to urge then-President Trump to ban diversity trainings for federal employees.[9] The following morning, President Trump's Chief of Staff, Mark Meadows, called Rufo to discuss his prime time appearance.[10] In less than three weeks, the President had signed his "divisive concepts" executive order.[11] Although a judge recognized the impermissible and unenforceable ambiguity of the language used in the executive order, the same sweeping "divisive concepts" have been adopted in statewide anti-Critical Race Theory bills.[12]

1. Critical Race Theory

The intricacies involved in the study of Critical Race Theory hardly allow for its implementation into K-12 curricula. Originating in the late 1970s, Critical Race Theory is a systems-level analysis of the relationship between race and law.[13] This means that, rather than defining "racism . . . as solely the consequence of discrete irrational bad acts as perpetuated by individuals[,]"[14] Critical Race Theory explores the way that racial bias is embedded in the rules and regulations of societal institutions, such as the criminal justice system, the education system, and the healthcare system, and the negative outcomes produced by those systems on non-white individuals.[15] Critical Race Theorists pay particular attention to the "ways that racism is often cloaked in terminology regarding . . . 'traditional' values or 'neutral' policies,

9. *Id.*

10. *Id.*

11. *Id.*; *see infra* notes 24–25 and accompanying text (discussing the executive order). Now, almost two years later, Rufo has pledged to continue politicizing Critical Race Theory. *See infra* note 253 and accompanying text.

12. *See infra* notes 24–38 and accompanying text.

13. Stout & Wilburn, *supra* note 6.

14. Janel George, *A Lesson on Critical Race Theory*, 46 A.B.A. HUM. RTS., NO. 2 (2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory.

15. Kiara Alfonseca, *Florida Doubles Down on Anti-Critical Race Theory Legislation*, ABC NEWS (Jan. 19, 2022), https://abcnews.go.com/US/florida-doubles-anti-critical-race-theory-legislation/story?id=82348795; Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS: FIXGOV (Nov. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory.

principles, or practices."[16] Although former Harvard Law Professor Derrick Bell is credited with the theory's creation,[17] the contributions of other scholars in fields like sociology and education have expanded the theory into a robust field of inquiry.[18]

While Critical Race Theory is offered as an elective course in some graduate programs and law schools,[19] it is not included in K-12 curriculums; there is no evidence that it has been,[20] and leading Critical Race Theorists assert that it is not.[21] Indeed, the complex nature of social systems themselves, much less as a thorough analysis of those systems, makes Critical Race Theory nearly impossible to introduce in grade school, and teachers are unlikely to elect to teach this complicated concept when they are already required to teach state curricular standards in preparation for standardized tests.[22] Despite the multilevel analysis and complexity involved in Critical Race Theory, the

16. George, *supra* note 14.

17. *Id.*

18. *Id.*; Kearse, *supra* note 6.

19. Evan Watson, *Critical Race Theory: What's the Truth and Why Are We Talking About This Now?*, 13NEWS NOW (Aug. 4, 2021), https://www.13newsnow.com/article/news/local/13news-now-investigates/critical-race-theory-the-truth-why-are-we-talking-about-this-now/291-af3014dd-f7fa-4565-85c3-90f8b36b867b. When advocating for Tennessee's bill, State Senator Brian Kelsey admitted that he was subjected to Critical Race Theory instruction—in law school. Natalie Allison, *Tennessee Bans Public Schools from Teaching Critical Race Theory Amid National Debate*, TENNESSEAN (May 6, 2021), https://www.tennessean.com/story/news/politics/2021/05/05/tennessee-bans-critical-race-theory-schools-withhold-funding/4948306001.

20. Kearse, *supra* note 6.

21. Kiara Alfonseca, *Critical Race Theory in the Classroom: Understanding the Debate*, ABC NEWS (May 19, 2021), https://abcnews.go.com/US/critical-race-theory-classroom-understanding-debate/story?id=77627465; Ray & Gibbons, *supra* note 15.

22. *See, e.g.*, Tennessee Standards, *supra* note 5; *see also* Tenn. Dep't of Educ., *Student Assessment in Tennessee*, https://www.tn.gov/education/assessment.html ("In every Tennessee classroom, teaching and learning look different based on the textbooks, curricula, and lessons that school and teacher have chosen. The state has a responsibility to make sure these varied learning opportunities are preparing all students for college, career, and life."); Lisa C (@heymscampbell), TWITTER (Mar. 15, 2022), https://twitter.com/heymscampbell/status/1503870504100569090 ("Seriously. All these comments of teachers indoctrinating students is so laughable. Our hot topics in class are main idea and supporting details, prepositional phrases, and figurative language. They are all so ridiculous.").

current national rhetoric falsely insists that K-12 students are subject to Critical Race Theory indoctrination in school.[23]

2. President Trump introduces "divisive concepts" in "patriotic education" Executive Order 13950

At the first White House American History Conference, President Trump slammed Critical Race Theory, claiming that it "is being forced into our children's schools . . . to rip apart friends, neighbors, and families" as a "crusade against American history . . . [and a] toxic propaganda, ideological poison that, if not removed, will dissolve the civic bonds that tie us together. It will destroy our country."[24] Less

23. *See* Kearse, *supra* note 6 and accompanying text (discussing the bills as a trend); Ray & Gibbons, *supra* note 15 and accompanying text (discussing the trend).

24. Donald Trump, President, U.S., Remarks at the White House Conference on American History (Sept. 17, 2020). In addition to his voicing his concern about Critical Race Theory at the conference, the President also claimed that "the left has warped, distorted, and defiled the American story with deceptions, falsehoods, and lies. There is no better example than the New York Times' totally discredited 1619 Project." *Id.* The *1619 Project* "aims to reframe the country's history by placing the consequences of slavery and the contributions of [B]lack Americans at the very center of our national narrative." *The 1619 Project*, N.Y. TIMES, https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html (last visited Mar. 20, 2023). Despite overwhelmingly positive reception to the *1619 Project*, especially from Black students and teachers, more anti-Critical Race Theory bills signed into law explicitly mention the *1619 Project* than Critical Race Theory itself. Sarah Ellison, *How The 1619 Project Took Over 2020*, WASH. POST (Oct. 13, 2020), https://www.washingtonpost.com/lifestyle/style/1619-project-took-over-2020-inside-story/2020/10/13/af537092-00df-11eb-897d-3a6201d6643f_story.html; *see infra* note 36 for the codified bills. Further exhibiting his disdain for the *1619 Project*, President Trump announced at the conference that he was establishing an advisory "1776 Commission." Ellison, *supra* note 24; Press Release, The White House, 1776 Commission Takes Historic and Scholarly Step to Restore Understanding of the Greatness of the American Founding (Jan. 18, 2021), https://trumpwhitehouse.archives.gov/briefings-statements/1776-commission-takes-historic-scholarly-step-restore-understanding-greatness-american-founding. The Commission's findings were later used by South Carolina state legislators in an attempt to rewrite the state's history curriculum. Rob Way & Jared Kofsky, *SC Lawmakers May Use Trump's 1776 Report to Shape US History Curriculum*, LIVE5NEWS (Mar. 31, 2021), https://www.live5news.com/2021/03/31/sc-lawmakers-may-use-trumps-report-shape-us-history-curriculum. Leaders of private universities in Missouri asked their legislature to modify their state curriculum following the Commission's report, including Hillsdale College, which released its own "1776 Curriculum." Galen

than a week after the conference, President Trump signed Executive Order 13950—a "patriotic education" order that banned "divisive concepts" in workplace trainings for the United States Uniformed Services, federal agencies, and federal contractors.[25]

After a challenge to that executive order by a group of California LGBTQ+ nonprofits, a federal judge held that the order violated the First Amendment on multiple grounds and issued a nationwide

Bacharier, *Missouri Lawmakers Question History Curriculum, Role of School Boards in K-12 Education*, SPRINGFIELD NEWS-LEADER (Nov. 30, 2021), https://www.news-leader.com/story/news/politics/2021/11/30/missouri-lawmakers-question-history-curriculum-school-boards-crt-1619-project/8793271002. Interestingly, Tennessee Governor Bill Lee invited Hillsdale College in Missouri to establish up to 100 charter schools across the state of Tennessee. Phil Williams, *Revealed: Governor Dodges Questions About Charter School Curriculum on Civil Rights History*, NEWSCHANNEL 5 NASHVILLE (Mar. 9, 2022), https://www.newschannel5.com/news/newschannel-5-investigates/revealed/revealed-governor-dodges-questions-about-charter-school-curriculum-on-civil-rights-history. Several Tennessee charter schools later disaffiliated from Hillsdale College after a series of comments made by President Larry Arnn, in which he compared education to "the plague," complained that "teachers are trained in the dumbest parts of the dumbest colleges in the country," and promised to demonstrate that "basically anybody" can teach. WBIR Staff, *East TN Charter School, Hillsdale College Cut Ties after College President's Comments Toward Teachers*, WBIR (July 11, 2022), https://www.wbir.com/article/news/education/hillsdale-college-tennessee-teacher-insults-response/51-ecbe9b6f-0760-47f1-b6be-baed62054656; Phil Williams, *Clarksville-Montgomery County Becomes Third District to Reject Charter School Pushed by Governor*, NEWSCHANNEL5 (July 19, 2022), https://www.newschannel5.com/news/newschannel-5-investigates/revealed/clarksville-montgomery-county-becomes-third-district-to-reject-charter-school-pushed-by-governor. President Biden revoked the 1776 Commission's report after taking office. Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021). Republican Senators have also been vocal in their critique of the *1619 Project*, including Senator Ted Cruz of Texas, where an anti-Critical Race Theory bill has been signed into law. Nicole Gaudiano, *Ted Cruz's New E-book on Critical Race Theory Argues That Seeking Equity in the US Is Really Calling for 'Discrimination' Against White People*, INSIDER (Dec. 16, 2021), https://www.businessinsider.com/ted-cruz-critical-race-theory-ebook-education-conservative-school-boards-2021-12; TEX. EDUC. CODE ANN. § 28.0022 (West 2021).

25. Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020); Kathryn Watson & Grace Segers, *Trump Blasts 1619 Project on Role of Black Americans and Proposes His Own "1776 Commission"*, CBS NEWS (Sept. 18, 2020), https://www.cbsnews.com/news/trump-1619-project-1776-commission. After the order, it is estimated that over 300 diversity and inclusion trainings were cancelled. George, *supra* note 14.

preliminary injunction to halt the order's implementation.[26] The judge found that the order had a chilling effect on speech, "exacerbated by its vagueness."[27] To reach this conclusion, she noted that the executive order threatened federal funding for workplace trainings, but the prohibition of "divisive concepts" extended beyond the trainings and into other parts of the organization, including in community work.[28] This broad restriction of speech violated the free speech rights of the organization,[29] and the "murky" line between teaching, which was prohibited, and informing, which was permitted, effectively inhibited otherwise constitutionally protected speech because individuals will avoid that permitted speech out of fear of punishment.[30] Since the only remedy was a preliminary injunction, and President Biden revoked the executive order before the case was heard on the merits,[31] this judge's ruling was not conclusive on the issue of constitutionality of the divisive concepts executive order.

3. Various states adopt or seek to adopt "divisive concepts" into legislation

Despite President Biden's revocation of Executive Order 13950,[32] Republican legislators in at least thirty-two states have introduced anti-Critical Race Theory bills that copied the order's "divisive concepts" and prohibit those same concepts from being taught in K-12 schools.[33] Although lawmakers claim these bills are necessary to

26. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 543, 550 (N.D. Cal. 2020).

27. *Id.* at 534.

28. *Id.* at 546.

29. *Id.* at 543.

30. *Id.* at 544.

31. Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

32. *Id.*

33. *See* Stout & Wilburn, *supra* note 6 (tracking the anti-Critical Race Theory activity nationwide); Harris, *supra* note 8 (explaining the anti-Critical Race Theory legislation); Alfonseca, *supra* note 15 (providing an updated bill-track count); *see also* Kearse, *supra* note 6 (exploring anti-Critical Race Theory legislation). *Compare* Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020), *with* IDAHO CODE § 33-138 (2021); TENN. CODE ANN. § 49-6-1019 (2021); (2021); IOWA CODE § 279.74 (2021); ARIZ. REV. STAT. ANN. § 15-717.02 (2021); OKLA. STAT. tit. 70, § 24-157 (2021); N.H. REV. STAT. ANN. § 193:40 (2021); TEX. EDUC. CODE ANN. § 28.0022

protect students from Critical Race Theory,[34] Idaho is the only state with a fully implemented bill explicitly naming the theory.[35] In addition to Idaho, Tennessee, Iowa, Arizona, Oklahoma, New Hampshire, Texas, Mississippi, Georgia, and Florida have had nearly identical anti-Critical Race Theory bills introduced into state legislatures by Republicans, passed almost exclusively on partisan lines, and signed into law by Republican governors.[36] While the bills vary on which "divisive

(West 2021); MISS. CODE ANN. § 37-13-2 (2022); *and* GA. CODE ANN. § 20-1-1 (2022). The term "divisive concepts" was originally used in Executive Order 13950 by President Trump. Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020); *see supra* notes 25–32 and accompanying text for more information on the order. The term itself has also been codified in several bills, including in Iowa and Texas. IOWA CODE § 279.74 (2021); TEX. EDUC. CODE ANN. § 28.0022 (West 2021). While each state's anti-Critical Race Theory bill is largely identical, some include additional prohibited concepts that are not included in others or the original "divisive concepts" executive order. For example, Tennessee is the only state with a passed anti-Critical Race Theory bill that includes a prohibition on "promoting or advocating the violent overthrow of the United States government." TENN. CODE ANN. § 49-6-1019(a)(9) (2021).

34. Kearse, *supra* note 6; Stout & Wilburn, *supra* note 6. North Dakota has also passed legislation banning Critical Race Theory, but rather than adopting the language from Executive Order 13950, legislators issued a short statute to prohibit instruction in schools that supports "the theory that racism is not merely the product of learned individual bias or prejudice, but that racism is systemically embedded in American society and the American legal system to facilitate racial inequality." N.D. CENT. CODE § 15.1-21-05.1 (2021). The statute also permits the state superintendent to "adopt rules" to enforce the statute. *Id.* Arguably, North Dakota is the only state that has banned Critical Race Theory, as the theory exists to examine the way "racism is systemically embedded in American society and the American legal system." *Id.*; *see also supra* notes 13–19 and accompanying text (discussing Critical Race Theory).

35. Ray & Gibbons, *supra* note 15.

36. Note that this list of states is current as of the time this Note is written, but with pending legislation in so many states, it is likely that more states will adopt the same legislation. IDAHO CODE § 33-138 (2021); TENN. CODE ANN. § 49-6-1019 (2021); IOWA CODE § 279.74 (2021) (applying the same concepts banned for higher education in IOWA CODE § 261H.7 (2021) to K-12 schools); ARIZ. REV. STAT. § 15-717.02 (2021); OKLA. STAT. tit. 70, § 24-157 (2021); N.H. REV. STAT. ANN. § 193:40 (2021); TEX. EDUC. CODE ANN. § 28.0022 (West 2021); MISS. CODE ANN. § 37-13-2 (2022); GA. CODE ANN. § 20-1-11 (2022); FLA. STAT. ANN. § 760.10 (West 2022). Arizona's bill passed both the bicameral and full legislative process, but it has since been overturned by the Arizona Supreme Court as a violation of the state constitution's "single-subject rule," which requires that legislation embrace "one general subject." Jeremy Duda, *Supreme Court Unanimously Strikes Down Mask Mandate, 'Critical*

concepts" are selected from the original executive order, all bills signed into law prohibit instruction that suggests that one race or sex is "inherently superior" to another, and many also expressly prohibit

Race Theory' Bans, ARIZONA MIRROR (Nov. 2, 20201), https://www.azmirror.com/2021/11/02/supreme-court-unanimously-strikes-down-mask-mandate-critical-race-theory-bans. While this Note is limited to Critical Race Theory legislation, many states have enacted regulations around the subject mirroring the prohibited concepts via nonlegislative methods, such as school board orders. Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUCATIONWEEK (Sept. 28, 2022), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06. For example, shortly upon his entrance into office, Virginia Governor Glenn Youngkin signed an executive order banning Critical Race Theory that also mirrored the language in the Trump executive order. Melissa Quinn, *Youngkin Begins Term as Virginia Governor with Executive Actions on Critical Race Theory, Masks in Schools*, CBS NEWS (Jan. 18, 2022), https://www.cbsnews.com/news/glenn-youngkin-virginia-executive-actions-critical-race-theory-school-mask-mandates. South Dakota Governor Kristi Noem later did the same. Amy Simonson & Nicole Chavez, *South Dakota Restricts Teaching of Critical Race Theory in Schools*, CNN (Apr. 5, 2022), https://www.cnn.com/2022/04/05/us/south-dakota-governor-critical-race-theory-order/index.html. Utah and Alabama have prohibited Critical Race Theory through resolutions passed by their State Boards of Education, and those resolutions include language that mirrors the "divisive concepts" executive order. *See* Courtney Tanner, *Utah OKs Rules for Teaching About Racism—and Just in Time Before School Year Starts*, SALT LAKE TRIBUNE (Aug. 5, 2021), https://www.sltrib.com/news/education/2021/08/05/utah-board-education (discussing the Utah resolution); Erin Davis, *Alabama Bans Teaching Concepts Like Critical Race Theory*, WSFA 12 NEWS (Aug. 12, 2021), https://www.wsfa.com/2021/08/12/alabama-bans-teaching-concepts-like-critical-race-theory (discussing the Alabama resolution). These actions outside of the bicameral process still interest and attract involvement from concerned parents. For example, in Alabama, parents have complained that Black History Month constitutes Critical Race Theory, and a separate investigation into impermissible Critical Race Theory instruction occurred in Huntsville. Timothy Bella, *Black History Month Is Not Critical Race Theory, Alabama Educator Says in Response to Complaints*, WASH. POST (Feb. 4, 2022), https://www.washingtonpost.com/education/2022/02/04/alabama-black-history-month-crt-schools. Alabama is not the only state taking issue with Black History Month; although the Indiana state senate rejected the state's anti-Critical Race Theory bill, parents in one school were still given the choice to opt their children out of Black History Month lessons. Biba Adams, *Parents Given Choice for Elementary School Kids to Opt out of Black History Month Lessons*, GRIO (Feb. 17, 2022), https://thegrio.com/2022/02/17/parents-elementary-school-opt-out-black-history-lessons; Arika Herron, *Indiana Senate Kills CRT-Inspired Legislation That Created Outrage Among Educators, Black Hoosiers*, INDYSTAR (Mar. 1, 2022), https://www.indystar.com/story/news/education/2022/02/28/hb-1134-indiana-senate-kills-crt-critical-race-theory-inspired-legislation/9323738002.

instruction on conscious and unconscious bias, privilege, discrimination, and oppression.[37] Most bills also prohibit teachers from any instruction that causes students to feel "psychological distress" or "discomfort" on account of their race or sex or feel "responsibility for actions committed in the past by other members of the same race or sex."[38]

In addition to this extensive list of prohibited concepts, many bills include a provision emphasizing that neutral teaching of these otherwise prohibited concepts is permitted. For example, the Tennessee bill allows for "impartial discussion of controversial aspects of history" and "impartial instruction on the historical oppression of a particular of people group based on race, ethnicity, class, nationality, religion, or geographic region."[39] However, teachers are unlikely to test the boundaries of permitted and prohibited speech as these bills threaten to withdraw school funding or discipline individual teachers.[40] The Tennessee

37. IDAHO CODE § 33-138 (2021); TENN. CODE ANN. § 49-6-1019 (2021); IOWA CODE § 279.74 (2021); ARIZ. REV. STAT. ANN. § 15-717.02 (2021); OKLA. STAT. tit. 70, § 24-157 (2021); TEX. EDUC. CODE ANN. § 28.0022 (West 2021); N.H. REV. STAT. ANN. § 193:40 (2021); MISS. CODE ANN. § 37-13-2 (2022); GA. CODE ANN. § 20-1-11 (2022); FLA. STAT. ANN. § 760.10 (West 2022); *see also* Ray & Gibbons, *supra* note 15 (discussing the bills); Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020) (listing the original "divisive concepts"). The bills range in the number of concepts explicitly prohibited. *Compare* IDAHO CODE § 33-138 (2021) (identifying three prohibited concepts), *with* TENN. CODE ANN. § 49-6-1019 (2021) (identifying fourteen prohibited concepts). The bills also range in the scope of those concepts. *Compare* N.H. REV. STAT. ANN. § 193:40 (2021) (prohibiting instruction of "inherent superiority" based on "age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin"), *with* TEX. EDUC. CODE § 28.0022 (West 2021) (limiting the scope of prohibition to "race or sex").

38. TENN. CODE ANN. § 49-6-1019 (2021); IOWA CODE § 279.74 (2021); ARIZ. REV. STAT. ANN. § 15-717.02 (2021); OKLA. STAT. tit. 70, § 24-157 (2021); TEX. EDUC. CODE ANN. § 28.0022 (West 2021); GA. CODE ANN. § 20-1-11 (2022); FLA. STAT. ANN. § 760.10 (West 2022). *Contra* IDAHO CODE § 33-138 (2021); N.H. REV. STAT. ANN. § 193:40 (2021); MISS. CODE ANN. § 37-13-2 (2022).

39. TENN. CODE ANN. § 49-6-1019(b)(2)–(3) (2021). Iowa even emphasizes that their statute "shall not be construed to . . . inhibit or violate the [F]irst [A]mendment rights of students or faculty, or . . . prevent a school district from promoting . . . diversity or inclusiveness." IOWA CODE § 279.74(4)(a)–(b) (2021).

40. Tennessee Guidance, *supra* note 5; *see also* Honeyfund.com, Inc. v. DeSantis, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at *37 (N.D. Fla. Aug. 18, 2022) ("With no guidance on the line between 'objective discussion' and

Department of Education's guidance on enforcement of the anti-Critical Race Theory statute delineates penalties for teachers and schools deemed noncompliant, establishes a timeframe for filing complaints, and details an appellate procedure for violations.[41] If an investigation reveals that the school district "knowingly violated" the statute, the Department of Education will withhold between $1 million and $5 million in funding until a district establishes and meets the requirements of a "corrective action plan."[42]

Noncompliance with the statute not only threatens school funding, but it also inhibits teaching, as the Department of Education also threatens appropriate "[d]isciplinary or licensure action against a teacher for violation" of the statute.[43] Schools are unlikely to defend teachers as their own funding is jeopardized, and teachers will refrain from any instruction that may potentially lead to discipline. For example, shortly after the state's anti-Critical Race Theory bill was passed, a Tennessee teacher was fired after showing students in his contemporary-issues class a poetry performance titled "White Privilege" and assigning a Ta-Nehisi Coates essay.[44] Describing him as "arrogan[t],"

'endorsement' or what those poles mean, Plaintiffs will self-censor their speech."). Note that Critical Race Theory exists, in part, to critique "the ways that racism is often cloaked in terminology regarding . . . 'neutral' policies." George, *supra* note 14. In addition to these provisions in the state anti-Critical Race Theory bills, the original Trump executive order also attempted to carve out permitted conduct in relation to the prohibited conduct. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 544 (N.D. Cal. 2020) (declaring that the line between teaching, which was prohibited, and informing, which was permitted, was "murky" and "may operate to inhibit the exercise of freedom of expression because individuals will not know whether the ordinance allows their conduct").

41. Tennessee Guidance, *supra* note 5.

42. *Id.* The guidance states that the first determination of a knowing violation allows the state to withhold either 2% of annual state funds or $1 million, whichever is less. *Id.* For each additional knowing violation, the percentage withheld increases by 2% and another $1 million, whichever is less. *Id.*

43. *Id.*; *see also* Eesha Pendharkar, *A $5 Million Fine for Classroom Discussions on Race? In Tennessee, This Is the New Reality*, EDUC. WEEK (Aug. 3, 2021), https://www.edweek.org/leadership/a-5-million-fine-for-classroom-discussions-on-race-in-tennessee-this-is-the-new-reality/2021/08 (elaborating on both the Tennessee and Oklahoma penalties for noncompliance).

44. Emma Green, *He Taught a Ta-Nehisi Coates Essay. Then He Was Fired.*, ATLANTIC (Aug. 17, 2021), https://www.theatlantic.com/politics/archive/2021/08/matt-hawn-tennessee-teacher-fired-white-privilege/619770

employees of the county school system did not defend the teacher.[45] As teachers lose the support of their school boards, and school boards worry how to navigate these concepts with teachers, less resources are actually devoted to supporting teachers as they teach students—with many more resources at risk.

B. First Amendment Jurisprudence

The Free Speech Clause of the First Amendment prohibits the government from "abridging the freedom of speech."[46] The rights guaranteed by the First Amendment are generally considered to be "preferred" rights, meaning that they have greater immunity from government interference than other protected actions.[47] This preferential treatment is related to the goals of the First Amendment itself, which include protection of the democratic decision-making processes, an individual's self-realization, and the marketplace of ideas.[48] The correlation between freedom of speech and a representative democracy is strong; in order for constituents to elect leaders whose beliefs and ideals mirror their own, constituents must actually have free flowing and fully cognizable beliefs and ideals that translate into actionable

(explaining that Tennessee's anti-Critical Race Theory "bill was approved by the legislature shortly before [the teacher] received notification of his dismissal); Hannah Natanson, *A White Teacher Taught White Students About White Privilege. It Cost Him His Job.*, WASH. POST (Dec. 6, 2021), https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory.

45. Green, *supra* note 44. It is important to note that Tennessee is not the only state in which teachers and school districts are experiencing threats of discipline. In Oklahoma, Governor Kevin Stitt called for "a special audit of Tulsa Public Schools" due to concern that schools were teaching Critical Race Theory. Joshua Q. Nelson, *Oklahoma Governor Calls for Audit of Tulsa Public Schools for Potentially Mishandling Funds, Teaching CRT*, FOX NEWS (July 8, 2022), https://www-foxnews-com.cdn.ampproject.org/c/s/www.foxnews.com/media/oklahoma-governor-calls-audit-tulsa-public-schools-potentially-mishandling-funds-teaching-crt.amp.

46. U.S. CONST. amend. I.

47. DAVID CRUMP ET. AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 919 (6th ed. 2014) (citing Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943)); Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1105–09 (1979).

48. CRUMP, *supra* note 47, at 918 (citing THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970)).

political opinions.[49] Several doctrines have resulted from the Court's protection of the freedom of speech and its necessity in independent thought and communication, including the void-for-vagueness, overbreadth, and chilling effect doctrines.

1. Content-Based Speech Regulations

To protect one's freedom of speech, the Supreme Court is extremely skeptical of any government speech regulations based on subject matter.[50] While the government may have a legitimate interest in limiting speech in some circumstances, courts are fearful of enabling a government body to "regulate [speech] based on hostility—or favoritism—to the underlying message expressed."[51] As a result, when the government restricts expression based on the content of the message, that statute is subject to "the most exacting scrutiny" by a court.[52] Laws prohibiting speech based on content "are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests."[53] This protects individuals against "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[54] Essentially, any government interest in the

49. *See id.* at 918–19 (citing J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW ch. 18 § II (3d. ed. 1986)) (elaborating on the relationship between freedom of speech and democracy).

50. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). Regulations on speech are often classified as either content-based or content-neutral. CRUMP, *supra* note 47, at 921. This is sometimes called a "Two Track" system: one for content-neutral regulations, and the other for content-based regulations. *Id.*

51. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992); *see also* Texas v. Johnson, 491 U.S. 397, 414 (1989) (recognizing that the government may not prohibit expression of an idea simply based on its disagreement with the concept).

52. *Johnson*, 491 U.S. at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)); s*ee also* CRUMP, *supra* note 47, at 921 (explaining strict scrutiny for content-based speech regulations). On the other hand, content-neutral regulations on speech are analyzed by applying "an intermediate level of scrutiny." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

53. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

54. *Turner Broad. Sys*., 512 U.S. at 641.

regulation of a certain type of speech must be necessary and narrowly tailored to protect an individual's constitutional right to free speech, and no government interest in the suppression of speech alone will survive a court's strict scrutiny analysis.[55]

The most extreme version of a content-based regulation is known as a viewpoint-based regulation.[56] A viewpoint-based regulation occurs when the government prohibits one side of a debate in favor of the other side. This type of regulation damages democracy by inhibiting a citizen's ability to form beliefs and participate in debates.[57] The Court has recognized that "allow[ing] a government the choice of permissible subjects for public debate would . . . allow the government control over the search for political truth."[58] For example, in *Matal v. Tam*, an Asian-American rock group named themselves "The Slants" to reclaim a term used to discriminate against Asian-Americans.[59] The band attempted to register their name with the Patent and Trademark Office, but the office denied the request because the Lanham Act bars registration of trademarks that "may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."[60] Although the Supreme Court ruled in two concurrences, all Justices agreed that this provision of the Lanham Act was an unconstitutional viewpoint-based regulation of speech.[61] As Justice

55. United States v. O'Brien, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

56. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 1014 (6th ed. 2019). *See generally Boos*, 485 U.S. 312 (exemplifying the distinction between content-neutral and viewpoint-based restrictions by declaring one prohibition an unconstitutional viewpoint-based restriction yet upholding another part of the ordinance as content-neutral and important for public safety).

57. *See supra* notes 46-49 and accompanying text on the relationship between the freedom of speech and democracy.

58. Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980).

59. Matal v. Tam, 582 U.S. 218, 228–29 (2017).

60. *Id.* (quoting 15 U.S.C. § 1052); *see also* CHEMERINSKY, *supra* note 56, at 1016–17.

61. *Matal*, 137 S. Ct. at 233–39; *see also* CHEMERINSKY, *supra* note 56, at 1017.

Alito explained, "The name 'The Slants' not only identifies the band but expresses a view about social issues,"[62] and there was no sufficient government interest to overcome strict scrutiny.[63] The government's regulations would have permitted the band to register with a name favorable to Asian-Americans, and a government attempt to restrict one "view" of speech constitutes an impermissible viewpoint-based restriction on free speech.[64] Strict scrutiny of content-based and viewpoint-based restrictions on free expression provides an important mechanism for courts to protect citizens against government infringement upon protected speech.

2. Vagueness and Chilling Effect Doctrines

In order to protect an individual's due process rights, a law must be sufficiently unambiguous as to allow an individual to understand the illegality of their conduct.[65] The vagueness doctrine requires that a law define an offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[66] The Supreme Court has held that a law is unconstitutionally vague "when [people] of common intelligence must necessarily guess at its meaning."[67] The most important aspect of the vagueness doctrine is "the requirement that a legislature establish minimal guidelines" to prevent "a standardless sweep that allows [enforcers] to pursue their personal predilections."[68] If an individual government official can selectively enforce the law, then the law is likely unconstitutionally vague.

62. *Matal*, 137 S. Ct. at 245–46.

63. *Id.* at 245–47 (analyzing the two asserted interests in protecting underrepresented minorities and "protecting the orderly flow of commerce").

64. CHEMERINSKY, *supra* note 56, at 1017.

65. *See generally* City of Chicago v. Morales, 527 U.S. 41, 42 (1999) (invalidating an ordinance requiring gang members to disperse if ordered to do so by police on vagueness grounds). The requirement that the statute be unambiguous reflects the notice requirement of due process. Kolender v. Lawson, 461 U.S. 352, 357–58 (1983).

66. *Id.* at 357.

67. *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (describing one situation where the vagueness doctrine applies for this specific reason).

68. *Kolender*, 461 U.S. at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

The Supreme Court is particularly concerned about overly vague laws that chill constitutionally protected speech. A layperson, attempting to be lawful, cannot ascertain the meaning behind vague statutes and, instead, censors his or her own speech out of a fear of prosecution.[69] To protect an attempt at compliance, the Court recognizes that "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions."[70] If "the practical consequences of state action [chill] the conduct of the individual,"[71] then a court may void the entire statute for inappropriate vagueness.[72]

3. Overbreadth Doctrine

When a state law is challenged as overbroad, a court will decide whether the law "reaches a substantial amount of constitutionally protected conduct."[73] The Supreme Court recognizes "that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[74] It has called the overbreadth doctrine "strong medicine" because a Court may invalidate the statute on its face,[75] but the Court has justified this intervention

69. Frank Askin, *Chilling Effect*, FREE SPEECH CTR.: FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/897/chilling-effect (last visited Dec. 14, 2021). Interestingly, the Supreme Court first used the term "chill" to describe a First Amendment violation when recognizing that an "'unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirt which all teachers ought to especially cultivate and practice.'" *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 808 (1969) (quoting Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

70. NAACP v. Button, 371 U.S. 415, 433 (1963).

71. *The Chilling Effect in Constitutional Law*, *supra* note 69.

72. CHEMERINSKY, *supra* note 56, at 1027.

73. Boos v. Berry, 485 U.S. 312, 329 (1988).

74. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

75. *Id.* at 613. Adding to the strength of the overbreadth doctrine is the Court's relaxed standing rules for third parties; the Court is so critical of overbroad statutes that it will permit a challenger to sue to protect free speech rights even if the statute at issue does not directly impact the particular challenger. *See, e.g.*, *id.* at 610–12 (discussing this relaxed standing rule); Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392–93 (1998) (implementing the rule); New York v. Ferber, 458 U.S. 747, 767 (1982) (implementing the rule); United States v. Raines, 362 U.S. 17, 21–22 (1912) (implementing the rule).

when recognizing that the "First Amendment needs breathing space."[76] Courts may avoid outright invalidating a law by affirming a state courts' narrow construction or severing the overbroad portion from the rest of the statute.[77] Allowing a flexible response to overbroad statutes respects the separation of powers while protecting the public against unconstitutional legislation.

While the Supreme Court has not explicitly defined the amount of overbreadth considered substantial enough to warrant judicial intervention, it appears that it may find sufficiently inappropriate overbreadth if a challenger can demonstrate multiple situations in which the statute at issue improperly applies to constitutionally protected speech.[78] For example, in *Houston v. Hill*, the defendant was arrested after shouting at police officers to distract them from his friend.[79] He was charged with violating an ordinance that prohibited an individual from "interrupt[ing] any policeman in the execution of his duty."[80] The Court found that the "ordinance criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement."[81] It emphasized how the ordinance was violated daily, but only some individuals, at the discretion of police officers, were arrested.[82] This protection against discretion of

76. *Broadrick*, 413 U.S. at 611.

77. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 113 (1990) (accepting the Ohio Supreme Court's narrow construction of a child pornography law after an overbreadth challenge); Gooding v. Wilson, 405 U.S. 518, 520 (1972) (striking down a law as unconstitutionally overbroad in the absence of any limiting construction); Brockett v. Spokane Arcades, Inc, 472 U.S. 491, 498 (1985) (severing the unconstitutionally overbroad part of the law that defined "lust" as substantially overbroad and upholding the rest of an obscenity law).

78. CHEMERINSKY, *supra* note 56, at 1029; *see also* City Council v. Taxpayers for Vincent, 466 U.S. 789, 800–01 (1984) ("The concept of 'substantial overbreadth' is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. . . . In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.").

79. 482 U.S. 451, 453–54 (1987).

80. *Id.* at 455.

81. *Id.* at 466.

82. *Id.* at 466–67.

enforcement against otherwise constitutionally protected speech provides another mechanism for courts to protect speech and guarantee the free flowing exchange of thoughts, vital to the continuation and health of a democracy.[83]

4. Free Speech Protections for Students

The Supreme Court has identified and underscored the connection between education, teachers, and democracy.[84] It has acknowledged that education is the "most important" purpose of government and is essential to democracy as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[85] Teachers, in "'the heart of representative government,'" require "wide discretion over the way course material is communicated to students" so that material can properly "develop[] students' attitude toward government and understanding of the role of citizens in our society."[86] Effectively, teachers socialize future democratic participants by exposing them to cultural norms and values. The Court has referred to schools as "the nurseries of democracy"[87] and established the "classroom [as] peculiarly the 'marketplace of ideas'" because "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"[88]

83. *See supra* notes 46–49 and accompanying text.

84. Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions[.]"); *id.* at 79 ("[A] teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good heath of a democracy.").

85. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

86. *Ambach*, 441 U.S. at 76, 78 (1979) (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

87. Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021).

88. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) (alteration in original).

However, there is an inherent tension between a school's mission to produce civic-minded students and the legally permissible authoritarian control that schools exert in preparation for democratic participation.[89] Although the Court has consistently held that students do not "'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"[90] the Court has been clear that these rights are not "coextensive with the rights of adults in other settings."[91]

89. *See* CHEMERINSKY, *supra* note 56, at 1229 ("The Supreme Court has treated speech in some government places differently based on the need for greater government control. These are authoritarian environments such as . . . schools."); *see also id.* at 1261; *supra* notes 48–49 and accompanying text (expounding on the relationship between the First Amendment and democracy).

90. *Tinker*, 393 U.S. at 506; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506 and affirming this stance); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 680 (1986) (quoting *Tinker*, 393 U.S. at 506 and affirming this stance).

91. *Fraser*, 478 U.S. at 682. School is a particularly interesting setting for First Amendment jurisprudence. The public forum doctrine requires government-owned properties to be made available for speech, and content-based regulations on speech within them are subject to strict scrutiny. CHEMERINSKY, *supra* note 56, at 1233. Some places, known as "limited purpose public forums," are places that the government limits to particular speakers or messages, and a court's analysis depends on the purpose of the public forum and whether the speech at issue conforms to the purpose. *Id.* at 1245–46. Nonpublic forums are government properties that the government may close to all speech activities, and speech prohibitions within them only must be reasonable and viewpoint neutral. *Id.* at 1249. The Supreme Court's ultimate categorization of a forum is important to its analysis as it determines the scrutiny of speech that is applied. *Id.* at 1233–35, 1245–46, 1249. Interestingly, the Supreme Court first crafted these forum categories in a case about teachers' unions. David Hudson, Jr., *Public Forum Doctrine*, FREE SPEECH CTR.: FIRST AMENDMENT ENCYC., https://www.mtsu.edu/first-amendment/article/824/public-forum-doctrine (Jan. 8, 2020). *See generally* Perry Educ. Ass'n v. Perry Local Educators' Assn'n, 460 U.S. 37 (1983) (designating these categories). In *International Society for Krishna Consciousness, Inc. v. Lee*, the Court listed factors used to determine whether a forum is public: (1) The space must have always been considered open to the public; (2) The space's primary purpose must be to exchange ideas; (3) The space must have been intentionally created by the government; and (4) The space must not be a "special enclave" remote from where people gather. 505 U.S. 672, 679–680 (1992). While these factors may suggest that schools are a public forum, the Court expressly rejected this notion in *Hazelwood School District v. Kuhlmeier*. 484 U.S. at 287. There, the Court recognized that streets and parks are the quintessential public forum, and, since schools are generally not open to the public and do not mirror the features of streets and parks, they are not to be considered public forums. *Id.* The Court has generally

The Supreme Court has decided that school boards should determine the appropriateness of speech in the classroom.[92] As such, in *West Virginia Board of Education v. Barnette*, the Court intervened when the state legislature required students to recite the pledge of allegiance or risk expulsion.[93] It recognized the improper infringement upon students' individual liberties by compelled speech,[94] and it rejected a state interest in national unity when asserted as a justification for this First Amendment violation.[95] The Court acknowledged the divisive nature of selecting which viewpoints require unison and emphasized that this effort has been futile throughout history.[96] It reasoned that these West Virginia state legislators "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[97]

classified schools as limited purpose public forums. *See e.g.*, *Perry Educ. Ass'n*, 460 U.S. at 72 n.7 (establishing the possibility for student group discussions to be categorized as a limited purpose public forum). However, the Court has recognized certain aspects of schools to be nonpublic forums. *Id.* at 49 (holding that access to a union mailbox was a nonpublic forum issue). Although a public forum doctrine analysis is outside the scope of this Note, revisiting the doctrine may provide another route for the Court to explain what regulations on speech are or are not permissible in the public-school context.

92. *Fraser*, 478 U.S. at 683. Note that the Court does *not* give this authority to state legislatures. *Id.*

93. 319 U.S. 624, 628–29 (1943).

94. *Id.* at 633–36.

95. *Id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

96. *Id.* at 641 ("Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.").

97. *Id.* at 641–42. The *Barnette* Court affirmed that the Bill of Rights also limits the powers of school districts. *Id.*; *see also* Bd. of Educ. v. Pico, 457 U.S. 853, 877 (1982) (Blackmun, J., concurring) (quoting *Barnette*, 319 U.S. at 637) ("[T]he

At the same time, the Supreme Court has placed limits against a school board's collective authority by affirming a student's "right to receive ideas" as central to the "meaningful exercise of his own rights of speech, press, and political freedom."[98] In *Board of Education v. Pico*, the Court considered the constitutionality of a school board's removal of "objectionable" books from school libraries—books by Kurt Vonnegut, Desmond Morris, Langston Hughes, and Eldridge Cleaver.[99] While a plurality acknowledged a student's right to the reception of ideas as integral to the student's ability to exercise his or her First Amendment rights, the majority of the Court held that the constitutionality of the removal turned on the intent of the government's action when removing the books.[100] Quoting *Barnette*, the Court

school board must perform all its functions 'within the limits of the Bill of Rights' . . . .").

98. *Pico*, 457 U.S. at 867.

99. *Id.* at 856 n.3. The removal of these books came after school board members attended a conservative conference for parents concerned about education legislation. *Id.* The conference published a list of books deemed inappropriate, and the school board ordered books on the list to be removed from schools within the district so the board could review them. *Id.* at 856–57. When this act became public, the school board characterized the books as unamerican and claimed their removal was necessary "'to protect the children in our schools from this moral danger.'" *Id.* at 857 (quoting Pico v. Bd. of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)). The board appointed a committee to review the books but rejected their recommendations. *Id.* at 858. The plaintiffs sued, alleging that the board had removed the books for political reasons, rather than educational, which violated the First Amendment rights of students. *Id.* at 858–59.

100. *Id.* at 871. As constitutional law scholar Erwin Chemerinsky indicates, "[i]t is difficult to imagine any permissible justification for a school library to remove from its shelves books by authors such as Kurt Vonnegut, Desmond Morris, Langston Hughes, or Eldridge Cleaver." CHEMERINSKY, *supra* note 56, at 1265. In his concurring opinion, Justice Blackmun asserted a "narrower and more basic" construction of the First Amendment implications, rather than the right recognized by the plurality. *Pico*, 457 U.S. at 878 (Blackmun, J., concurring). Justice Blackmun believed that "the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons." *Id.* at 877 (emphasis in original). He went on to write that he believed a better opinion would be one which prohibited the removal of books based on the "political ideas or social perspectives discussed in them." *Id.* at 879. Essentially, Justice Blackmun advocated for a test that would prohibit a government interest in the suppression of speech. *See supra* notes 50–55 and accompanying text (discussing strict scrutiny). Justice White concurred in

concluded "that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[101] The Court presented two examples of viewpoint-based regulations in education—a Democratic school board removing books written by Republicans, and a white school board removing books by Black authors—to acknowledge that books removed for partisan or racial animus were clearly intended to deny students access to certain ideas.[102] These actions by school boards would violate the First Amendment by attempting to limit protected speech in the classroom.[103]

Pico's rationale has been extended from library books to curricular materials,[104] and at least one federal district court has interpreted *Pico* to conclude that "[a] plaintiff may establish a First Amendment violation by proving that the reasons offered by the state, though pedagogically legitimate on their face, in fact serve to mask other illicit motivations."[105] In *Gonzalez v. Douglas*, a federal judge recognized that the asserted policy rationale behind a statute banning an ethnic studies program—reducing racism in schools—was pedagogically sound, but when the facts were considered, "defendants had no legitimate basis for believing that the [ethnic studies] program was promoting racism such that eliminating it would reduce racism."[106] Evidence including political speeches, radio advertisements, and even personal blog posts led the judge to determine that "both enactment and

the holding but believed the Supreme Court should not be the factfinder of the intent to suppress speech. *Pico*, 457 U.S. at 883 (White, J., concurring).

101. *Id.* at 872 (quoting *Barnette*, 319 U.S. at 642).

102. *Id*. at 870–71; *see supra* notes 56–64 and accompanying text (discussing viewpoint-based regulations).

103. *See supra* notes 46–49 and accompanying text.

104. Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027 n.5 (9th Cir. 1998) (citing Pico, 457 U.S. at 870–71). Additionally, the Second, Sixth, Eighth, and Tenth Circuits have all recognized a pretext-based First Amendment claim in the school curriculum context. *See* Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 631 (2d Cir. 2005); Settle v. Dickson Cty. Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995); Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn., 670 F.2d 771, 773 (8th Cir. 1982); Axson-Flynn v. Johnson, 356 F.3d 1277, 1292–93 (10th Cir. 2004).

105. Gonzalez v. Douglas, 269 F. Supp. 3d 948, 972, 974 (D. Ariz. 2017).

106. *Id.*

enforcement [of the statute] were motivated by racial animus."[107] Applying *Pico*, the judge found the statute to violate the First Amendment because "no legitimate pedagogical objective motivated the enactment and enforcement of [the statute]."[108] In a later opinion, the court issued a permanent junction preventing enforcement of the statute at issue, including preventing the superintendent and state board of education from withholding state funding for failure to comply with the statute and conducting any audits to determine compliance.[109] By ensuring that the actions of the school board were motivated by pedagogy rather than politics, the court ensured that students were properly able to exercise their free speech rights in the classroom.

Nationwide, litigation is commencing against the enforcement of anti-Critical Race Theory bills in a variety of contexts.[110] For example, Chief Judge Mark E. Waller has issued two different preliminary injunctions against enforcement of Florida's anti-Critical Race Theory bill—one in favor of plaintiffs who wanted to provide diversity training for their employees, and another in favor of state university professors and students.[111] In *Honeyfund.com, Inc. v. DeSantis*, Chief Judge Waller compared Florida to the *Stranger Things* Netflix Series by referring to the state's anti-Critical Race Theory bill as "a First Amendment upside down," a "naked viewpoint-based regulation on speech that does

107. *Id.* at 957, 973–74.

108. *Id.* at 974.

109. Gonzalez v. Douglas, No. CV 10-623 TUC AWT, 2017 U.S. Dist. LEXIS 213874 (D. Ariz. Dec. 26, 2017). Interestingly, the anti-ethnic studies statute at issue in *Gonzalez* was the subject of litigation for almost five years, even reaching the Ninth Circuit. *See* Arce v. Douglas, 793 F.3d 968 (9th Cir. 2015).

110. *See, e.g.*, Black Emergency Response Team v. O'Connor, No. 90-345 (W.D. Okla. filed Oct. 19, 2021); Local 8027 v. Edelblut, No. 21-CV-1077-PB, 2023 WL 171392, at *16 (D.N.H. Jan. 12, 2023); Honeyfund.com, Inc. v. DeSantis, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at *1 (N.D. Fla. Aug. 18, 2022); Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22CV304-MW/MAF, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022).

111. Honeyfund.com, Inc. v. DeSantis, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at *1, *47 (N.D. Fla. Aug. 18, 2022) (granting a preliminary injunction in favor of the businesses); Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *1, *52–54 (N.D. Fla. Nov. 17, 2022) (granting a preliminary injunction in favor of the university professors and students).

not pass strict scrutiny," and "impermissibly vague."[112] He also railed the bill's allowance of "objective" permissible concepts as largely nonsensible since the bill fails to give an individual understanding of what discussion is permitted, and the judge explicitly recognized that the legislation attacks ideas rather than conduct.[113] Challenging the state's argument, Chief Waller declared, "If Florida truly believes we live in a post-racial society, then let it make its case. But it cannot win the argument by muzzling its opponents."[114] Chief Judge Waller maintained his critique in *Pernell v. Florida Board of Governors*, criticizing the state for "lay[ing] the cornerstone of its own Ministry of Truth under the guise of the [anti-Critical Race Theory bill], declaring which viewpoints shall be orthodox and which shall be verboten in university classrooms."[115] While university professors and students brought this First Amendment challenge, the same anti-Critical Race Theory statute is also "muzzling" American history lessons in K-12 classrooms.[116]

III. ANALYSIS

These anti-Critical Race Theory bills violate basic First Amendment protections as content-based restrictions on speech that cannot survive strict-scrutiny.[117] The bills lack any compelling governmental interest that would justify the infringement on protected speech. In fact, the asserted state interests in the suppression of Critical Race Theory speech and patriotism have been explicitly rejected by the Supreme Court in the free speech context, and the racial animus driving the adoption of these statutes is impermissible.[118] Not only will these anti-

112. *DeSantis*, 2022 U.S. Dist. LEXIS 147755, at *1, *3, *5, *30.

113. *Id.* at *30, *40–41; *see also supra* notes 39–40 and accompanying text (discussing similar provisions in other state bills); *infra* notes 135–40 and accompanying text (discussing the effects of similar provisions on teaching). Chief Judge Waller also refused to apply the overbreadth doctrine to avoid granting the legislation any legitimacy. *Id.* at *41–42.

114. *Id.* at *30.

115. *Pernell*, 2022 WL 16985720, at *52.

116. *DeSantis*, 2022 U.S. Dist. LEXIS 147755, at *30; *see infra* notes 129–32, 135–40 and accompanying text.

117. *See supra* notes 107–16; discussion *infra* Section IV.A. (arguing for strict scrutiny based on the restriction of content).

118. *See infra* notes 144–70 and accompanying text (analyzing the asserted state interests).

Critical Race Theory bills fail a traditional strict scrutiny analysis, but these bills also threaten students' access to information in schools and inherently harm the democratic process.[119]

A. The anti-Critical Race Theory bills are content-based speech restrictions and are therefore subject to strict scrutiny.

A federal judge categorized President Trump's "divisive concepts" executive order as "clearly" a content-based restriction of speech because it conditioned federal grant money for workplace trainings on a recipient's adherence to the order.[120] The anti-Critical Race Theory bills guarantee enforcement in the same way as the executive order—on adherence to the same "divisive concepts."[121] As school districts and teachers must avoid the same prohibited concepts in order to avoid sanctions, it logically follows that these bills should also be classified as content-based speech restrictions that operate with the same conditioned funding scheme.[122] Likewise, when a Florida federal judge was presented with almost identical "divisive concepts" in the state's anti-Critical Race Theory bill, he twice recognized the legislation as a viewpoint regulation of speech and issued two different preliminary injunctions against their enforcement—one in favor of employers wishing to conduct diversity training and one in favor of university professors and

119. *See infra* notes 174–200 and accompanying text (discussing the applicable First Amendment doctrines).

120. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 542–43, 550 (N.D. Cal. 2020).

121. *See*, *e.g.*, Tennessee Guidance, *supra* note 5 (discussing enforcement for the anti-Critical Race Theory bill); *see supra* notes 26–30 and accompanying text (summarizing a federal judge's classification of this scheme as a content-based speech restriction); *see also* Natalie Colarossi, *School Board Passes Code to Punish Teachers Over Critical Race Theory After Funding Threat*, NEWSWEEK (Oct. 2, 2021), https://www.newsweek.com/school-board-passes-code-punish-teachers-over-critical-race-theory-after-funding-threat-1635021 (introducing a North Carolina bill that threatens sanctions).

122. *See supra* notes 40–45 and accompanying text (explaining enforcement of the anti-Critical Race Theory bill in Tennessee). Note that the judge in this case declined to name the appropriate level of scrutiny, but any content-based regulation of speech receives strict scrutiny. *Trump*, 508 F. Supp. 3d at 540 ("The parties disagree on the legal standards applicable to this claim. . . . The Government disputes application of strict scrutiny, asserting that it has broad discretion to regulate the conduct of federal contractors and federal grantees.").

students wishing to safely discuss these concepts in the classroom.[123] This judge noted the way Florida's anti-Critical Race Theory statute operates to "muzzle" speech, "impose . . . viewpoints" and "cast us all into the dark."[124]

It is important to note, however, in these examples, the plaintiffs were not K-12 schools and students objecting to curricular parameters.[125] Understandably, a court may hesitate to declare a content-based speech restriction when a state exercises its police powers—here, regulating its K-12 schools and curricula.[126] Alternatively, a court may recognize that the anti-Critical Race Theory bills and accompanying rhetoric of state legislators implicates the Supreme Court's explicit description of impermissible viewpoint-based speech restrictions in K-12 schools.[127] In *Pico*, the Court gave two examples of unconstitutional attempts to suppress speech: a Democratic school board removing books written by Republicans, and a white school board removing books by Black authors.[128] Arguably, the Supreme Court's theoretical examples have now become reality as these anti-Critical Race Theory bills, introduced by Republican legislators, have caused concern among teachers about their ability to adequately teach history—specifically the country's history of enslavement and segregation of Black

123. Honeyfund.com, Inc. v. DeSantis, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755 (N.D. Fla. Aug. 18, 2022) (issuing a preliminary injunction in favor of the businesses); Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22CV304-MW/MAF, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022) (issuing a preliminary injunction in favor of university students and professors).

124. *Pernell,* 2022 WL 16985720, at *52; *see also DeSantis*, 2022 U.S. Dist. LEXIS 147755, at *29–30 (quoting Whitney v. California, 274 U.S. 357, 377 (1927)).

125. *See Pernell,* 2022 WL 16985720, at *52 ("One thing is crystal clear—both robust intellectual inquiry and democracy require light to thrive. Our professors are critical to a healthy democracy, and the State of Florida's decision to choose which viewpoints are worthy of illumination and which must remain in the shadows has implications for us all."); Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 527–28, 550 (N.D. Cal. 2020) (issuing a preliminary injunction based on the executive order).

126. *See supra* notes 92–116.

127. *See supra* notes 98–103 and accompanying text (discussing *Pico*).

128. Bd. of Educ. v. Pico, 457 U.S. 853, 870–71 (1982) (plurality opinion).

people.[129] For example, Oklahoma teachers have identified books by Black authors that have been banned to comply with the sweeping nature of the statute, such as *Their Eyes Were Watching God* and *A Raisin in the Sun*.[130] Teachers in New Hampshire sent home permission slips for their students to watch Martin Luther King, Jr.'s "I Have a Dream" speech, stopped showing films like *Hidden Figures*,[131] and at least one high school history teacher in the state stopped incorporating analysis of Jim Crow laws, redlining, and other historical instances of racial and economic disparities in her class.[132] This prohibition of content mirrors both examples of impermissible viewpoint-based content regulations theorized by the *Pico* Court of impermissible racial and political animus,[133] especially when one considers the typical racial profile of a Republican and a Democrat.[134]

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

130. Tyler Kingkade & Antonia Hylton, *Oklahoma's Anti-Critical Race Theory Law Violates Free Speech Rights, ACLU Suit Says*, NBC NEWS (Oct. 20, 2021), https://www.nbcnews.com/news/us-news/oklahoma-critical-race-theory-lawsuit-aclu-rcna3276. For more information about the ACLU's suit in Oklahoma, see *infra* note 204 and accompanying text.

131. Atiya Irvin-Mitchell, *Critical Race Theory Panic Is Stopping Teachers from Teaching About Juneteenth*, VICE (June 17, 2022), https://www.vice.com/en/article/5d3z9z/teachers-crt-bans-juneteenth.

132. Theodore R. Johnson, Emelia Gold, & Ashley Zhao, *How Anti-Critical Race Theory Bills Are Taking Aim at Teachers*, FIVETHIRTYEIGHT (May 9, 2022), https://fivethirtyeight.com/features/how-anti-critical-race-theory-bills-are-taking-aim-at-teachers.

133. *See supra* notes 99–103 and accompanying text (discussing the *Pico* example).

134. John Gramlich, *What the 2020 Electorate Looks Like by Party, Race and Ethnicity, Age, Education and Religion*, PEW RSCH. CTR. (Oct. 26, 2020), https://www.pewresearch.org/fact-tank/2020/10/26/what-the-2020-electorate-looks-like-by-party-race-and-ethnicity-age-education-and-religion (listing statistics that show that 81% of Republicans are white and 59% of Democrats are white). When considering typical racial dynamics, either *Pico* example could apply: Republican state legislators are prohibiting teachings about Blackness, and teachings on Blackness are stereotypically considered to be Democratic ideology. This prohibition is impermissible as political animus. Additionally, these state legislators are disproportionately white and prohibiting concepts from being taught to Black students. This prohibition is impermissible as racial animus. *See supra* note 102–03, 172 and

Perhaps anticipating another First Amendment challenge to the same prohibited concepts already deemed unenforceable,[135] many anti-Critical Race Theory bills include provisions that attempt to protect constitutionally protected speech in the classroom.[136] For example, Tennessee included an exclusion for "impartial" discussions of history in its anti-Critical Race Theory bill.[137] Oklahoma even requires that the bill "not prohibit the teaching of concepts that align to the Oklahoma Academic Standards."[138]

Unfortunately for students in these states, these provisions are not counteracting teachers' understanding of these bills and their broad scope. Despite their state's respective "impartiality" provision, Tennessee teachers doubt their ability to "adequately teach about the Trail of Tears, the Civil War, and the Civil Rights Movement" and the practicality of the requirement "to avoid teaching almost any text by an African American author because many of them mention racism to various extents."[139] Even Oklahoma's state superintendent of public instruction has identified the 1921 Tulsa Race Massacre as an example of a concept potentially prohibited by the law, despite its inclusion in state standards.[140] The overly ambiguous language used in these bills,

accompanying text (discussing *Pico* and the Supreme Court's willingness to identify and reject animus).

135. *See supra* notes 24–31 and accompanying text (summarizing the First Amendment challenge to the Trump executive order). Note that the original Trump executive order also included a permitted-language carve-out. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 544 (N.D. Cal. 2020) (declaring that the line between teaching, which was prohibited, and informing, which was permitted, was "murky" and "may operate to inhibit the exercise of freedom of expression because individuals will not know whether the ordinance allows their conduct").

136. *See, e.g.*, IOWA CODE § 279.74(4)(a)–(b) (2021) (emphasizing that the anti-Critical Race Theory statute "shall not be construed to . . . [i]nhibit or violate the [F]irst [A]mendment rights of students or faculty, or . . . [p]revent a school district from promoting . . . diversity or inclusiveness").

137. TENN. CODE ANN. § 49-6-1019(b)(2)–(3) (2021).

138. OKLA. STAT. tit. 70, § 24-157 (B) (2021).

139. Cathryn Stout, *'Teaching the Truth': Tennessee Educators Respond to Proposed Limits on Teaching About Racism*, CHALKBEAT (May 10, 2021), https://tn.chalkbeat.org/2021/5/10/22429654/teaching-the-truth-tennessee-educators-respond-to-proposed-limits-on-teaching-about-racism.

140. Alfonseca, *supra* note 15; Randy Krehbiel, *Once Taboo Discussion, Tulsa Race Riots Now Included in State Academic Standards*, TULSAWORLD (May 31, 2016), https://tulsaworld.com/news/local/education/once-taboo-discussion-tulsa-

the same language used in the original "divisive concepts" executive order, is sweeping enough to prohibit instruction in the same way as that order.[141] The prohibited concepts are again chilling otherwise constitutionally protected speech, even in classrooms, despite any provision intending otherwise, and this chilling of speech to avoid state-sponsored sanctions must be recognized as a content-based restriction.[142] Further, educators understand these bills as effectively banning certain books, strengthening the comparison between the anti-Critical Race Theory bills and the *Pico* Court's examples of viewpoint-based regulations of speech: racial and political animus underlying the intent to prohibit constitutionally protected speech by removing books from student access.[143]

B. Government interests in the suppression of speech, patriotism, and racial animus cannot survive strict scrutiny.

In *Pico*, a majority of the Court held that the constitutionality of the prohibition of content in schools turned on the intent behind the restriction.[144] Essentially, the Court affirmed what has remained consistent in First Amendment jurisprudence: no government interest in the suppression of speech alone will survive a strict scrutiny analysis, even in schools.[145] Here, state legislators have demonstrated their

race-riot-now-included-in-state-academic-standards/article_9f6dfdd5-1fd7-58b4-9c06-b047c7ebe31e.html; *see also* Lenthang, *infra* note 251 for an additional Oklahoma bill attempting to limit the instruction of the history of slavery itself.

141. *See supra* notes 24–31 and accompanying text (summarizing the First Amendment challenge to the Trump executive order).

142. *See supra* notes 120–124 (drawing a comparison between schemes using the prohibited concepts).

143. *See supra* notes 98–102 and accompanying text (discussing *Pico* and its examples of content-based speech regulation); Stout, *supra* note 139 and accompanying text (discussing book banning); *see also infra* note 205 (discussing book banning in the context of the ALCU suit).

144. Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982); *see also supra* notes 100–103 and accompanying text (discussing the *Pico* holding). Note that while *Pico* was a plurality opinion, Justices Brennan, White, Marshall, Blackmun, and Stevens, a majority, agreed on this point. *Id.*

145. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression;

animosity and intent to suppress speech by their media interviews and intentional selection of language from the repealed "divisive concepts" executive order that was already deemed inappropriately ambiguous and violative of First Amendment protections.[146]

Recent media coverage and textual commitments suggest that many Republican legislatures intend to suppress speech on Critical Race Theory in schools.[147] For example, State Representative Steve Toth, the House sponsor of Texas's anti-Critical Race Theory bill, did not name Critical Race Theory in the text of his bill but interviewed with local news channels to discuss his disdain for the theory.[148] In one interview, he proclaimed that "Critical [R]ace [T]heory says I'm a white supremacist. Anyone that is not a person of color is a white supremacist. . . . That's ridiculous."[149] In Tennessee, State Senator Jack Johnson went on a local radio show to explain that the language in the bill is "very thorough" and an effort to produce "the strongest language

and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) (rejecting a state interest in national unity as justification for a limitation on speech in schools, recognizing that a belief that "patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."); *see also supra* notes 120–143 and accompanying text (analyzing the anti-Critical Race Theory bills as content- and viewpoint-based regulations of speech). Further, it is possible that state legislators will also assert the mental health of students as a state interest, but this interest also would not survive strict scrutiny; banning these concepts is not necessary to the promotion of student's mental health, and these bills have been used by some parents to advocate against programs addressing the mental health and wellbeing of students in school. *See infra* note 157 (discussing the mental health assertions).

146. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 534, 543 (N.D. Cal. 2020) (finding that the same language in the original Trump executive order chilled speech, "exacerbated by its vagueness").

147. Kearse, *supra* note 6; *see supra* notes 33–38 and accompanying text (introducing the anti-Critical Race Theory bills and prohibited concepts). For example, although the Missouri anti-Critical Race Theory bill died in committee, Republican State Representative Brian Seitz says he plans to reintroduce the bill next session to ban Critical Race Theory because it "identifies people or groups of people, entities, or institutions in the United States as inherently, immutably, or systemically sexist, racist, anti-LGBT, bigoted, biased, privileged or oppressed." Kearse, *supra* note 6.

148. Alfonseca, *supra* note 15.

149. *Id.*

possible" to ban Critical Race Theory.[150] "The strongest language possible" is the same language used in President Trump's "divisive concepts" executive order,[151] an order originally halted by a federal judge on First Amendment grounds,[152] and an order that appears to have been passed to suppress the teaching of general American history curricula.[153] When state legislators proclaim their intent to suppress Critical Race Theory to local news media, and those statements are combined with the intentional selection of the same language already halted because it chills speech, there is a government interest in the suppression of speech that is not a sufficient justification to survive a strict scrutiny analysis.[154]

150. Julie Carr, *Tennessee House Majority Leader Senator Jack Johnson Confident Anti-Critical Race Theory Bill Will Pass*, TENNESSEE STAR (May 6, 2021), https://tennesseestar.com/2021/05/06/tennessee-house-majority-leader-senator-jack-johnson-confident-anti-critical-race-theory-bill-will-pass.

151. Exec. Order No. 13950, 85 Fed. Reg. 60683. The language has also been adopted in model legislation by advocacy groups. Sarah Schwartz, *Who's Really Driving Critical Race Theory Legislation? An Investigation*, EDUCATIONWEEK (July 19, 2021), https://www.edweek.org/policy-politics/whos-really-driving-critical-race-theory-legislation-an-investigation/2021/07.

152. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 543–44 (N.D. Cal. 2020).

153. *See supra* notes 24–25 and accompanying text (discussing the relationship between the anti-Critical Race Theory bills and the *1619 Project*); *see also* Alfonseca, *supra* note 15 (including perspectives of teachers and other leaders about the purpose of the legislation).

154. *See supra* notes 50–64 and accompanying text (discussing content-based speech restrictions). Republican lawmakers have also introduced legislation against Critical Race Theory at the federal level. Republicans on the House Education and Labor Committee introduced the "Curriculum Review of Teachings (CRT) Transparency Act" to require school districts to publish their curricula. Press Release, Committee on Education and Labor Republicans, Foxx, Fitzgerald Introduce CRT Transparency Act (Sept. 3, 2021), https://republicans-edlabor.house.gov/news/documentsingle.aspx?DocumentID=407698. The acronym is intentional; the press release specifically mentions Critical Race Theory as the only example of the "dangerous ideologies" targeted by the bill. *Id.* Upon the bill's introduction in the House, Representative Mary Miller of Illinois expressed concern about children "being taught to hate our country, the land of freedom and opportunity" and commended parents for "reject[ing] racist [C]ritical [R]ace [T]heory" which attempts to "teach[] children that they are victims." 167 Cong. Rec. 6167. Several other House Republicans spoke, including many who contextualized the battle against Critical Race Theory as a larger battle against Democrats, big government, and socialism. *Id.*

Nor is an asserted interest in national unity sufficient justification for suppressing the constitutional right to the freedom of speech. The "divisive concepts" were written to ban Critical Race Theory as an act of patriotism; President Trump referred to the original source of the anti-Critical Race Theory bills' prohibited concepts, Executive Order 13950, as a "patriotic education" order.[155] Mirroring this rhetoric, State Senator Brian Kelsey, a member of the Tennessee legislature's drafting committee for the state's anti-Critical Race Theory bill, tweeted that "Critical Race Theory teaches that American democracy is a lie. . . . It is harmful to our students & is antithetical to everything we stand for as Americans & as Tennesseans."[156] In *West Virginia Board of Education v. Barnette*, the Supreme Court expressly rejected a state interest in patriotism as justification for a limitation on speech in schools, recognizing that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," and any belief that "patriotism will not flourish if patriotic ceremonies are

Shortly after, the "Defending Students' Civil Rights Act of 2021" was introduced to make instruction on Critical Race Theory a violation of the Civil Rights Act of 1964. H.R. 3598, 117th Cong. (2021). The Act prohibits the same concepts seen in the "divisive concepts" executive order. *Id.*; Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020). Other federal legislation has been introduced, including an attempt to codify the Trump executive order in the Senate, the "Ending Critical Race Theory in D.C. Public Schools Act," and the "No CRT for our Military Kids Act." S. 2221, 117th Cong. (2021); H.R. 3937, 117th Cong. (2021); H.R. 4764, 117th Cong. (2021). The Senate's attempt to codify President Trump's "divisive concepts" executive order was introduced by Senator Ted Cruz, who has since released an e-book connecting Critical Race Theory to Marxism, the *1619 Project*, and the National Education Association. Gaudiano, *supra* note 24. Senator Cruz also commended Texas parents in their "fight" against a school district reportedly teaching opposing views of the Holocaust. *Id.*; *see also infra* notes 179–182 for more on the Texas school district; *infra* text accompanying note 258 for more on the Critical Race Theory debate as Republican strategy.

155. Donald Trump, President, U.S., Remarks at the White House Conference on American History (Sept. 17, 2020). In the order itself, President Trump explains that it was designed to prohibit "anti-American race and sex stereotyping" from "infect[ing] core institutions of our country." Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

156. Brian Kelsey (@BrianKelsey), TWITTER (May 5, 2021, 7:34 PM), https://twitter.com/briankelsey/status/1390102620484866054.

voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."[157] The Court recognized that forced national unity is inherently unpatriotic, and without any compelling justification for suppressing the constitutional right to free speech, these bills will not survive a court's strict scrutiny analysis.[158]

A less-discussed governmental interest in the anti-Critical Race Theory bill conversation, and ironically perhaps the most otherwise constitutional interest, is the state legislature's interest in curricula. State legislators have the authority to pass statutes setting academic standards for their states.[159] At the same time, local schoolboards work

157. 319 U.S. 624, 641–42 (1943). *See also supra* notes 92–97 and accompanying text (discussing *Barnette*). Further, it is possible that state legislators will also assert the mental health of students as a state interest, but this interest also would not survive strict scrutiny; banning these concepts is not necessary to the promotion of student's mental health, and these bills have been used by some parents to advocate against programs addressing the mental health and wellbeing of students in school. *See* Kingkade & Hixenbaugh, *infra* note 191 (discussing mental health assertions).

158. *Barnette*, 319 U.S. at 641–42; *see also* Texas v. Johnson, 491 U.S. 397, 418 (1989) ("The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas."). The Court even explicitly rejects retaining symbols of national unity as an interest sufficient to withstand strict scrutiny. *See id.* at 417 ("We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents.").

159. U.S. Department of Education, *The Federal Role in Education*, https://www2.ed.gov/about/overview/fed/role.html (June 15, 2021) ("Education is primarily a State and local responsibility in the United States. It is States and communities, as well as public and private organizations of all kinds, that establish schools and colleges, develop curricula, and determine requirements for enrollment and graduation. The structure of education finance in America reflects this predominant State and local role."); *see, e.g.*, Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 156 (Tenn. 1993) ("The [Tennessee] constitution contemplates that the power granted to the General Assembly will be exercised to accomplish the mandated result, a public school system that provides substantially equal educational opportunities to the school children of Tennessee. The means whereby the result is accomplished is, within constitutional limits, a legislative prerogative."); *see also* Tenn. Const. Art. XI, § 12 ("The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools."). In many instances, state courts have labeled education a "fundamental right" and required a heightened involvement of state

with principals and teachers to meet those standards through the adoption of curriculum frameworks, textbook approval, and appropriate assessments of student achievement.[160] By passing such broad statutes, Republican legislators are undermining what many consider to be a long-held conservative value—local control.[161] These legislators have opted to use sweeping statues to take decision-making authority away from local school boards who, traditionally, have been able to choose and devise curricula that fits within state-prescribed standards.[162] It is hard to reconcile conservative notions of "local control" with anti-Critical Race Theory bills that give additional pedagogical power to the state—including in enforcement of these statutes.[163]

Additionally, the requirement that the prohibited concepts be taught in a neutral manner mirrors the permissibility of teaching about religion (rather than teaching religion itself) in a secular, neutral manner in public schools.[164] Instructional parameters for religious classroom instruction have been well-established throughout case law attempting to reconcile constitutional mandates between the Free Exercise Clause and Establishment Clause; for example, many courts have established that the Bible may be studied as literature, but not as religious doctrine, and the accompanying lesson must be secular, religiously neutral, and objective.[165] Unfortunately, the concepts

legislators. *See, e.g.*, Washakie Cnty. Sch. Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980); Horton v. Meskill, 376 A.2d 359 (Conn. 1977).

160. Washington State School Directors' Association, *The Role of School Boards in Improving Student Achievement*, https://files.eric.ed.gov/fulltext/ED521566.pdf.

161. Emmett McGroarty & Jane Robbins, *Republicans and Lost Promise of Local Control in Education*, THE HILL (June 19, 2017), https://thehill.com/blogs/pundits-blog/education/338469-republicans-and-the-lost-promise-of-local-control-in-education.

162. *See* Michael D. Usdan, *States and Education: State Boards of Education*, https://education.stateuniversity.com/pages/2450/States-Education-STATE-BOARDS-EDUCATION.html (last visited Mar. 26, 2023).

163. *See supra* notes 40–45.

164. *See supra* notes 39–40, 135–38; *infra* notes 166, 192–95; Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

165. U.S. CONST. amend. I; *see First Amendment and Religion,* U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion (last visited Feb. 11, 2023) (explaining the tension between the Free Exercise Clause and Establishment Clause); *see e.g.*, Sch. Dist. v. Schempp, 374 U.S. 203 (1963).; Hall v. Bd. of Sch. Comm'r, 656 F.2d 999 (5th Cir. 1981); Gibson v. Lee

addressed in the Critical Race Theory bills do not have the benefit of decades of judicial opinions assisting in defining the parameters of what is and is not acceptable classroom speech in relation to constitutional commands. While a court may feel inclined to respect these provisions and the legislative processes, what is clearly "secular" does not have a readily ascertainable equivalence in the context of these anti-Critical Race Theory statues.

Further, while reducing racism is a legitimate state interest, when the entire historical context is considered, from President Trump's executive order to the rhetoric of state legislators as they write and pass the anti-Critical Race Theory bills, these bills "were motivated by a desire to advance a political agenda by capitalizing on race-based fears" and have no true pedagogical motivation.[166] In *Gonzalez v. Douglas*, the district court judge slammed politicians and school leaders for banning an ethnic studies program "to reduce racism" where there was no evidence that the program increased racism.[167] Instead, this judge analyzed ample evidence of individuals involved in the passing of the bills proclaiming conservative ideology conflicted with the program, ignoring audits to conduct their own investigations, and posting racist anti-Spanish and anti-Mexican comments on online blogs.[168] This evidence allowed the judge to recognize that the passage and enforcement of this Arizona statute banning an ethnic studies program was motivated by racial animus and violated the First Amendment.[169]

The *Gonzalez* logic and analysis easily applies to the anti-Critical Race Theory bills. If a federal judge analyzed the rhetoric of state legislators who passed anti-Critical Race Theory bills with prohibited concepts already deemed unconstitutional and justified this codification as necessary to ban Critical Race Theory and, in turn, reduce racism,[170] she would clearly determine that the passage and enforcement of these anti-Critical Race Theory bills is motivated by the same type of impermissible racial animus the *Gonzalez* court deemed

Cnty. Sch. Bd., 1 F. Supp. 2d 1426 (M.D. Fla. 1998); Herdahl v. Pontotoc Cnty. Sch. Dist., 933 F. Supp 582, 588 (N.D. Miss. 1996).

166. Gonzalez v. Douglas, 269 F. Supp. 3d 948, 974 (D. Ariz. 2017).

167. *Id.* at 973–74.

168. *Id.* at 957, 962–63, 973.

169. *Id.* at 974.

170. *See supra* notes 24–31, 148–55 and accompanying text (discussing the source of the prohibited concepts and legislative rhetoric).

pretextual.[171] Asserted interests in racial animus, despite attempts to cloak the animus in valid governmental interests, cannot survive even a rational basis review.[172] The Supreme Court has warned against clear examples of partisan and racial animus driving classroom instruction and has effectively enabled federal courts to protect students by identifying and preventing this behavior.[173]

C. The anti-Critical Race Theory bills violate several First Amendment doctrines.

The anti-Critical Race Theory bills offer no avenue for enforcement under a First Amendment analysis. In addition to operating as unconstitutional content-based and viewpoint-based restrictions of speech with asserted state interests that cannot survive a court's strict

171. *Gonzalez*, 269 F. Supp. 3d at 970; *see also* Honeyfund.com, Inc. v. DeSantis, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at *47 (N.D. Fla. Aug. 18, 2022) (analyzing the Florida's Anti-Critical Race Theory bill and determining that "[t]elling your employees that concepts such as "normal" or "professional" are imbued with historically based racial biases is not—and it pains this Court to have to say this—the same as trapping Black employees in a room while a woman in a gorilla suit puts on a retaliatory, racially inflammatory performance the day before a holiday celebrating the end of slavery. Rather, it is speech protected by the First Amendment."); Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *40 (N.D. Fla. Nov. 17, 2022) (analyzing the Florida's Anti-Critical Race Theory bill and determining that "simply because the State of Florida says it wants to reduce racism or sexism in public universities does not give the State of Florida a safe harbor in which to enact rank viewpoint-based restrictions on protected speech. Further, it should go without saying that enacting a prophylactic ban on protected expression of certain viewpoints—in the interest of suppressing those viewpoints because the State of Florida finds them "repugnant"—is neither sufficiently weighty nor reasonable. If that were the case, the State of Florida could declare *any* idea repugnant and prohibit its professors from expressing approval of that idea while in the classroom.").

172. To the point of not-so-subtle animus, the Supreme Court has rejected asserted state interests to find the only true state interest is in animus against "a politically unpopular group." Romer v. Evans, 517 U.S. 620, 632, 634 (1996) (striking down a Colorado state constitutional amendment that prohibited any protection from discrimination for LGBTQ+ individuals by finding that it failed a rational basis review).

173. Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982).

scrutiny analysis,[174] they are also subject to additional challenges under multiple First Amendment doctrines. Each of these doctrines—the overbreadth, void for vagueness, and chilling effect doctrines—provide grounds for judicial intervention individually. Their applicability together, however, only further supports the appropriateness and need for that judicial intervention.

The district court judge who issued the preliminary injunction against the enforcement of President Trump's executive order noted that the order's "sweep" extended outside of the workplace trainings and into other aspects of the organization's "community advocacy and training," such as institutions of higher education, where dissenting opinions are required in order for society to ultimately advance.[175] Arguably, this judge recognized the applicability of the overbreadth doctrine to the prohibited concepts, especially to advance a productive classroom environment, but she declined to expressly analyze the doctrine as it was not mentioned in briefs.[176] The overbreadth doctrine is relevant to the same prohibited concepts as listed within the anti-Critical Race Theory bills.[177]

The concepts are so substantially overbroad that their application has reached beyond even the drafters' purported intent.[178] In Texas, a school district is reportedly requiring teachers to instruct "opposing views" of the Holocaust under Texas's anti-Critical Race Theory bill, despite the legislation's author denying that this was the bill's intent.[179] Per state standards, Texas teachers are required to facilitate

174. *See supra* notes 145, 154–55, 158, 171 (rejecting the asserted state interests).

175. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 542–43 (N.D. Cal. 2020).

176. *Id.* at 545 n.3. Note that the Florida district court judge refused to apply the overbreadth doctrine in order to prevent legitimizing the anti-Critical Race Theory statutes. Honeyfund.com, Inc. v. DeSantis, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at *41–42 (N.D. Fla. Aug. 18, 2022).

177. *See supra* notes 73–83 and accompanying text (introducing the overbreadth doctrine).

178. Mike Hixenbaugh & Antonia Hylton, *Southlake School Leader Tells Teachers to Balance Holocaust Books with 'Opposing' Views*, NBC NEWS (Oct. 15, 2021), https://www.nbcnews.com/news/us-news/southlake-texas-holocaust-books-schools-rcna2965.

179. *Id.* NBC News obtained a recording of teachers asking administrators how "you oppose the Holocaust," to which the executive director of the school district

instruction on the Holocaust.[180] An objective instruction of history is not Critical Race Theory; this is acknowledged by many of the anti-Critical Race Theory bills themselves,[181] but many teachers still fear exposing themselves to liability under this overbroad law.[182] In another Texas school district, a Black principal of a majority white high school resigned over allegations that he was teaching Critical Race Theory, despite his administrative status.[183] Texas administrators must be able to function without fear that they, too, will be reprimanded by a law designed to limit classroom instruction.[184] In Florida, the Department of Education rejected 41% of proposed math textbooks for including Critical Race Theory and social-emotional learning. When the Department finally released examples of the problems that violated their content standards, the math problems at issue included a graph of a test measuring racial prejudice against political identification, an implicit association test, and a social-emotional learning objective of "build[ing] proficiency with social awareness as [students] practice

replied, "Believe me, that's come up." *Id.*; *see also* Jessica Montoya Coggins, *An Attempt to "Both Sides" the Holocaust in a Texas School District Draws Condemnation*, TEXAS SIGNAL (Oct. 15, 2021), https://texassignal.com/an-attempt-to-both-sides-the-holocaust-in-a-texas-school-district-draws-condemnation (explaining the recording and contextualizing it with Texas's anti-Critical Race Theory bill).

180. *Holocaust and Genocide-Related TEKS*, TEX. HOLOCAUST, GENOCIDE, & ANTISEMITISM ADVISORY COMM'N (2020), https://thgaac.texas.gov/learning/best-practices/standards.

181. *See supra* notes 39–40 and accompanying text (discussing the bills' attempt to permit "neutral" teaching).

182. *See* Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused, and Self-Censoring*, WASH. POST (Feb. 14, 2022), https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws (introducing a New Hampshire teacher that "worries . . . about an upcoming unit teaching the Holocaust"). The teacher went on to wonder whether someone might "conclude that teaching this history sends a message that people of German descent are guilty by association." *Id.*

183. Antonia Hylton et al., *Texas Principal Forced to Resign Over Critical Race Theory*, NBC NEWS (Nov. 10, 2021), https://www.nbcnews.com/news/us-news/texas-principal-forced-resign-critical-race-theory-rcna5036.

184. *See supra* notes 36–39 and accompanying text (discussing the anti-Critical Race Theory bills and prohibited concepts).

with empathizing with classmates."[185] If anti-Critical Race Theory bills are designed to prohibit discussion of Critical Race Theory in the classroom, then their applicability to the Holocaust, school administrators, and math textbooks should render these bills inappropriately overbroad as they infringe not only upon otherwise legitimate classroom speech required by state curricular standards but also protected speech that legislators did not even intend to curtail.[186] The overinclusive nature of the statute may be remedied by a court's application of the overbreadth doctrine.

Additionally, the ambiguous language in these anti-Critical Race Theory bills, the same language identified as vague by multiple district court judges,[187] triggers the constitutional protections provided by the vagueness doctrine.[188] Not only does the doctrine protect an individual's right to due process under the law by requiring the law be comprehendible by "ordinary" people,[189] but it also prevents

185. Valerie Strauss, *Florida Releases 4 Prohibited Math Textbook Examples. Here They Are.*, WASH. POST (Apr. 21, 2022), https://www.washingtonpost.com/education/2022/04/21/4-math-textbook-problems-florida-prohibited.

186. CHEMERINSKY, *supra* note 56, at 1029; *see supra* note 180 and accompanying text.

187. A federal judge found that the "divisive concepts" executive order was "so vague that it is impossible for Plaintiffs to determine what conduct is prohibited" and that "[t]he line between teaching or implying (prohibited) and informing (not prohibited) 'is so murky, enforcement of the ordinance poses a danger of arbitrary and discriminatory application.'" Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 543–44 (N.D. Cal. 2020). When analyzing Florida's Critical Race Theory bill, another district court judge also found the prohibited concepts to violate the First Amendment—twice. *See supra* notes 111–16, 120–24 and accompanying text.

188. *See supra* notes 65–72 and accompanying text (introducing the vagueness doctrine).

189. Kolender v. Lawson, 461 U.S. 352, 357 (1983); *see also supra* notes 66–67 and accompanying text. Literature often suggests that teachers are the embodiment of middle-class norms and values. *See, e.g.*, Kobe De Keere & Bram Spruyt, *'Prophets in the Pay of State': The Institutionalization of Middle-Class Habitus in Schooling Between 1880 and 2010*, 67(5) THE SOCIO. REV. 1066, 1068–70 (2019) (exploring the role of teachers in defining the evolution of the middle class). It follows that teachers fall under the definition of some of the most "ordinary" people in society, and as "ordinary" people unable to understand what content is prohibited, the statute should be rendered void for vagueness.

enforcement based on nothing more than arbitrary "personal predilections."[190] A provision prohibiting instruction that causes students to feel "psychological distress" or "inherently racist or sexist" is subject to multiple interpretations,[191] and parents are "pursuing their personal predilections" as they attempt to utilize this ambiguous language to

190. *Kolender*, 461 U.S. at 358; *see also supra* text accompanying note 68 (emphasizing this specific aspect of the vagueness doctrine).

191. *See* Meckler & Natanson, *supra* note 182 (introducing teachers "not clear on the definition of 'inherently,' 'superior,' or 'inferior'" who could not get a definition from the state, the union, or school attorneys); *see supra* notes 33, 37 and accompanying text (comparing the codified bills on their inclusion of this language). It is often a purported concern for mental health that drives the anti-Critical Race Theory concerns for most parents, such as the ones in Williamson County, making this particular provision of the state bills particularly relevant to the analysis. *See, e.g.*, Letter from Nebiat Hagos, Parent, to Dr. Penny Schwinn, Comm'r, Tenn. Dep't of Educ. (June 30, 2021), https://bloximages.newyork1.vip.townnews.com/williamsonherald.com/content/tncms/assets/v3/editorial/0/04/0046809a-e120-11eb-8132-43a3f70463e5/60e8fb22e0215.pdf.pdf ("I had never connected the dots on how this curriculum is damaging my child . . . . [T]his curriculum is destroying our children and my son is one of many."). Now, other parents are using the bill to attack initiatives focused on student mental health and emotional well-being. Tyler Kingkade & Mike Hixenbaugh, *Parents Protesting 'Critical Race Theory' Identify Another Target: Mental Health Programs*, NBC NEWS (Nov. 16, 2021), https://www.nbcnews.com/news/us-news/parents-protesting-critical-race-theory-identify-new-target-mental-hea-rcna4991 ("[Y]ou are actually advertising suicide."). Many Black parents, on the other hand, remain concerned about the education their children are receiving as school districts accommodate the demands of predominately white parents. Nicquel Terry Ellis & Eva McKend, *Black Parents Say Movement to Ban Critical Race Theory Is Ruining Their Children's Education*, CNN (Dec. 2, 2021), https://www.cnn.com/2021/12/02/us/black-parents-and-critical-race-theory/index.html ("'I hear a lot of White mothers say they think their child is too young to learn about racism. You know what, my child's not too young to experience it.'"). Some mental health professionals even advocate for directly teaching students Critical Race Theory as a way to begin dismantling racism in the classroom. Amanda Fialk, *Why Teaching Critical Race Theory Matters for Mental Health*, PSYCH. TODAY (Nov. 1, 2021), https://www.psychologytoday.com/us/blog/our-youth-today/202111/why-teaching-critical-race-theory-matters-mental-health. The mental health implications of the bill's language have triggered emotional responses from parents, including those who wish to "pursue their personal predilections" as the Court warned was impermissible. *Kolender*, 461 U.S. at 358. As the debate on this bill continues, emotional reactions from parents concerned for the mental health of their children will likely remain grounds for objections or support.

revise school curricula.[192] For example, a New Hampshire Moms for Liberty Chapter is offering a bounty for tips on teachers breaking the anti-Critical Race Theory law.[193] Virginia Governor Glenn Youngkin also opened a tip line for parents to report violations of his executive order banning Critical Race Theory, an order that prohibited the same concepts as the state anti-Critical Race Theory bills.[194] Further, even permission to teach "impartial" versions of dark eras in American history is cause for concern and vague; it is not clear how a teacher determines whether their teaching is sufficiently impartial under the law.[195]

Deputizing parents as bounty hunters under an overly ambiguous law only exacerbates the "chilling effect on education" feared by both teachers and legal scholars.[196] The Supreme Court has long recognized that teacher autonomy "is critical to the continued good health of a democracy."[197] As long as teachers are unable to discern which topics are permitted and which are prohibited based on the plain text of the anti-Critical Race Theory bills, the rhetoric from state legislators makes that distinction no less apparent, and parents are encouraged to interfere with day-to-day classroom instruction, teachers will refrain from teaching American history, jeopardizing the health and future of democracy.[198] Whether speech is silenced as intended by the bills'

192. *Id.*; Santoro & Edwards, *supra* note 2; Kingkade & Hixenbaugh, *supra* note 191.

193. Keith, *supra* note 3; *see also* Stout & Wilburn, *supra* note 6 (exploring anti-Critical Race Theory efforts nationwide).

194. Sophia Ankel, *Virginia's New Republican Governor, Who Banned Critical Race Theory in Schools, Is Launching a Tip Line for Parents to Report Their Kids' Teachers*, INSIDER (Jan. 25, 2022), https://www.businessinsider.com/glenn-youngkin-launches-tipline-report-teachers-2022-1; Quinn, *supra* note 36.

195. *See supra* notes 39–40, 135–143 and accompanying text (discussing the impartiality provisions in the anti-Critical Race Theory bills).

196. Ashley Coleman, *Teachers Say the Conservative Backlash to Critical Race Theory Is Overblown, but Fear It Will Have a 'Chilling' Effect on Education*, INSIDER (Sept. 2, 2021), https://www.insider.com/critical-race-theory-debate-teachers-fear-chilling-effect-on-education-2021-8; Allison, *supra* note 19; *see also supra* notes 2–4, 130–31 and accompanying text (discussing the attacks on teachers and some of the effects).

197. Ambach v. Norwick, 441 U.S. 68, 78–79 (1979); *see also supra* notes 84–88 and accompanying text (discussing the relationship between schools, teaching, and democracy).

198. Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons*, NPR (May 28, 2021),

prohibition, parents scare teachers into silencing themselves, or teachers opt to censor themselves for failure to understand which speech is permitted and which is prohibited,[199] the remedy for speech that a state legislature deems "repugnant" should be "more speech, not enforced silence."[200]

IV. PROPOSED SOLUTION

There are multiple grounds in First Amendment jurisprudence that render the anti-Critical Race Theory bills vulnerable to a court's judicial intervention. First and foremost, the statutes are content-based speech restrictions and subject to strict scrutiny, and there is no asserted government interest that will allow the statutes to survive a court's analysis.[201] Additionally, several First Amendment doctrines provide grounds for voidance of the statutes.[202] As plaintiffs raise First Amendment challenges against the enforcement of these anti-Critical Race Theory bills, courts must consider the importance of school in the continuance of democracy. Educating future citizens in a representative democracy requires an unflinching respect for history and its lessons,

https://www.npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship (explaining that "though the state's new law bans teachers from discussing concepts they weren't discussing anyway, and though its penalties are not yet clear, the danger is the fear it instills"); Meckler & Natanson, *supra* note 182 ("But many teachers nonetheless describe a chilling effect. They say they now err on the side of caution for fear that a student or parent might complain, resulting in a public battle—or even, in extreme cases, that they might lose their jobs."); *see supra* note 3 and accompanying text (introducing Moms for Liberty).

199. *See, e.g.*, Honeyfund.com, Inc. v. DeSantis, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at *37 (N.D. Fla. Aug. 18, 2022) ("With no guidance on the line between 'objective discussion' and 'endorsement' or what those poles mean, Plaintiffs will self-censor their speech."); *see also supra* notes 130–32 and accompanying text (discussing teachers self-censoring due to the legislative intent to suppress speech).

200. *See* Whitney v. California, 274 U.S. 357, 361, 377 (1927) (Brandeis, J., concurring).

201. *See supra* notes 145–46, 154, 158 and accompanying text (rejecting state interests in suppression of speech and patriotism under strict scrutiny).

202. *See supra* notes 175–95 and accompanying text (applying the applicable First Amendment doctrines).

and there is no place more vital to teaching and learning those lessons than schools.[203]

A. A court should void these statutes entirely.

The ACLU has begun a state-by-state attempt to block these anti-Critical Race Theory bills against enforcement in K-12 classrooms, charging, in large part, that they violate the First Amendment.[204]

203. *See supra* notes 84–88 and accompanying text (exploring the connection between teaching and democracy).

204. The ACLU has filed suit against the enforcement of anti-Critical Race Theory bills in K-12 classrooms in New Hampshire and Oklahoma. *See* Local 8027 v. Edelblut, No. 1:21-cv-01063 (D.N.H. filed Dec. 13, 2021) ("The [anti-Critical Race Theory bill] invites partisanship into our schools and deputizes private, politically-motivated individuals to enforce its vague proscriptions."); Black Emergency Response Team et al. v. O'Connor, No. 90-345 (W.D. Okla. filed Oct. 19, 2021) ("The [anti-Critical Race Theory bill's] confounding language is not only facially unconstitutional but its application has also chilled and censored speech that strikes at the heart of public education and the nation's democratic institutions. Educators at all levels are blacklisting books by diverse authors and adapting their instructional approaches to avoid raising complex questions about race and gender."); *supra* notes 110–16, 122–24 and accompanying text (discussing the Florida litigation). In Oklahoma, a federal judge has recently held, on defendants' motions to dismiss, that "the [bill's] vague terminology . . . and the possibility that teachers can be found liable for teaching a banned concept by implication, leave both teachers and enforcers to guess at what speech the amendments prohibit. Given the severe consequences that teachers face if they are found to have taught or advocated a banned concept, plaintiffs have pleaded a plausible claim that the amendments are unconstitutionally vague." Local 8027 v. Edelblut, No. 21-CV-1077-PB, 2023 WL 171392, at *16 (D.N.H. Jan. 12, 2023). Interestingly, in Oklahoma, the ACLU's specifically identified books by women authors and authors of color that have been banned to comply with the sweeping nature of the statute, such as *To Kill a Mockingbird* and *Raisin in the Sun*. Black Emergency Response Team v. O'Connor, No. 90-345 (W.D. Okla. filed Oct. 19, 2021). The Supreme Court has already held that the banning of books in schools written by Black authors may constitute impermissible racial animus when banned by white school boards motivated by racial animus. *See supra* notes 143–45 and accompanying text (discussing *Pico* and impermissible racial animus). Additionally, the ACLU has sued a Missouri school district over book removals, charging that they were removed for discussing race, gender, and sexual identity. Amanda Musa, *Two Students and ACLU Sue Missouri School District Over Removing 8 Books from Libraries*, CNN, https://www.cnn.com/2022/02/18/us/missouri-aclu-banned-books-lawsuit/index.html (Feb. 18, 2022). While the Missouri suit is largely outside the scope of this note, the

Now that these bills have been challenged, federal courts have a variety of options when recognizing the constitutionality, or lack thereof, of these bills.[205] First, a federal judge should classify these laws as either content- or viewpoint-based restrictions on speech because they are designed to limit speech on Critical Race Theory, especially any favorable presentation of Critical Race Theory.[206] Once a judge makes this classification, the subsequent strict scrutiny analysis requires the judge to consider whether the statute is narrowly tailored to advance a compelling state interest,[207] and interests in speech suppression, patriotism, and racial animus have been explicitly rejected by the Supreme Court as insufficiently compelling state interests.[208] Based on a traditional strict scrutiny analysis alone, a judge should void these bills as unconstitutional restrictions on speech.[209]

recent book banning trend further implicates *Pico*. *See supra notes* 99–103, 128–32, 139, 143 and accompanying text (discussing book banning).

205. Nikole Hannah-Jones, author of the *1619 Project*, introduced an interesting idea that exceeds the scope of this note: "To test how race-neutral the [anti-Critical Race Theory] bill[s] . . . are, Black, Latino, and Indigenous parents should flood these states with lawsuits about lessons that make their children feel discomfort, or that one race is superior to another and see how it goes." Nicole Hannah Jones (@nhannahjones), TWITTER (Jan. 19, 2022, 4:30 PM), https://twitter.com/nhannahjones/status/1483929906732011524; *see also supra* notes 24–25 for more information on the *1619 Project*.

206. *See supra* notes 120–134 and accompanying text (analyzing the proper classification).

207. *See supra* note 52–55 and accompanying text (explaining this part of the analysis); *Pernell,* 2022 WL 16985720, at *38 ("But even if this Court agrees [that reducing racism] is a legitimate concern motivating the [anti-Critical Race Theory bill's] enactment, the restriction the State of Florida imposes upon its public university employees—a viewpoint-discriminatory ban targeting protected in-class speech—is certainly not reasonable. Defendants try to dress up the State of Florida's interest as a public employer and educator as prohibiting discrimination in university classrooms, but this does not give Defendants a safe harbor in which to enforce viewpoint-based restrictions targeting protected speech. In short, it is no answer that the challenged provisions are situated within an antidiscrimination law. To the extent Defendants suggest a viewpoint-discriminatory restriction on protected speech is immunized from a First Amendment challenge because it is situated within an antidiscrimination law, they are mistaken.").

208. *See supra* notes 144–72 and accompanying text (rejecting the asserted state interests).

209. *See, e.g.*, Honeyfund.com, Inc. v. DeSantis, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at *3 (N.D. Fla. Aug. 18, 2022).

In addition to failing strict scrutiny, the vague and substantially overbroad prohibited concepts within these anti-Critical Race Theory bills implicate multiple First Amendment doctrines: overbreadth, void-for-vagueness, and chilling effect.[210] Challenges to statutes based on vagueness and overbreadth are often brought together, and courts are able to strike down a statute on either of these grounds.[211] While the overbreadth doctrine allows a court to apply a state court's narrow construction or sever overbroad portions rather than strike down the entire statute,[212] a narrow construction or severance would further legitimize the unconstitutional goal of state legislators to restrict speech in schools.[213] Upholding certain concepts as constitutional while striking down others as substantially overbroad—and the rhetoric, media attention, and specific prohibited concepts remains largely consistent across state bills—would only cause further confusion and concern for teachers attempting to balance state curricular standards with a prohibition of speech.[214] For example, a court may decide that a teacher should not be held responsible for the emotions of a student and strike down the provision that ensures a student does not feel "discomfort, guilt, anguish, or another form of psychological distress solely because of the

210. *See supra* notes 174–200 and accompanying text (applying these doctrines to the anti-Critical Race Theory bills).

211. CHEMERINSKY, *supra* note 56, at 1032; *see also supra* notes 174–95 (analyzing the anti-Critical Race Theory bills under both doctrines).

212. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 768–69 (1982) (advocating the limited and cautious use of the overbreadth doctrine); *see also supra* notes 73–77 and accompanying text (discussing the overbreadth doctrine).

213. *See supra* notes 147–154 and accompanying text (discussing the legislative intent to suppress speech).

214. *See, e.g.*, Tennessee Standards, *supra* note 5 (listing required concepts that must be taught); *see supra* notes 22, 128–143 and accompanying text (discussing teachers' inability to teach due to anti-Critical Race Theory bills despite the requirement of preparing students for standardized tests). While some states add additional prohibited concepts or omit some from the original "divisive concepts" executive order, most of the prohibited concepts are shared among the bills, including the prohibition of teaching that an individual may be "inherently racist or sexist." *See supra* note 36–37 and accompanying text (comparing the bills). A federal judge in Florida declined to apply the overbreadth doctrine altogether, finding that the anti-Critical Race Theory bill had no *legitimate* sweep—as is required in order for the doctrine to apply. Honeyfund.com, Inc. v. DeSantis, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at *41–42 (N.D. Fla. Aug. 18, 2022).

[student]'s race or sex."[215] If the court upholds other provisions in the statute, such as a prohibition on instruction that "[a]n individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex,"[216] multiple iterations of language that Republican legislators have equated with Critical Race Theory would remain.[217]

In addition to balancing curricula, lawmakers should not be asking teachers to determine which provisions of the law apply to which aspect of American history. It is an unreasonable ask for educators to analyze court rationale behind striking certain provisions of these bills—in which each provision is broad, sweeping, and all-encompassing—to then determine whether their history lesson comports with the parameters and provisions a court has recognized as permissible. Rather than make this determination, teachers are likely to self-censor and avoid basic American history lessons. Further, by establishing such parameters, not only has a court inappropriately exercised legislative authority,[218] but it has also inserted itself into a task best left to educators and local school boards. Therefore, it is most beneficial for schools, students, and the continuity of democracy for a court to find the statutes sufficiently ambiguous and substantially overbroad as to render all of the prohibited concepts completely void when applying either, or both, of these doctrines.

Relatedly, the applicability of the chilling effects doctrine further supports the entire voidance of these statutes. Concerned teachers, threatened with job loss, will avoid teaching anything that could be reasonably interpreted as falling within the purview of the prohibited concepts, and school districts will not be eager to assist these teachers as they, too, are threatened with millions of dollars funding cuts.[219]

215. TENN. CODE ANN. § 49-6-1019(a)(6) (2021).

216. TENN. CODE ANN. § 49-6-1019(a)(5) (2021).

217. *See, e.g.*, Ray & Gibbons, *supra* note 15 (discussing the prohibited concepts and their purported relation to Critical Race Theory).

218. *See supra* notes 161–63 and accompanying text (discussing local control of school curricula). State legislative bodies and local school boards are the ones that adopt and modify curricula, not the courts. Judges, devoid of educational expertise and often appointed for life, should not be tasked with establishing the parameters of curriculum.

219. *See* Local 8027 v. Edelblut, No. 1:21-cv-01063 (D.N.H. filed Dec. 13, 2021) ("The resulting enactment . . . chills teacher speech in violation of the First

Indeed, the nationwide rhetoric surrounding anti-Critical Race Theory bills has chilled constitutionally protected speech as teachers and school leaders attempt to avoid punishment that does not exist. For example, while Florida's anti-Critical Race Theory bill was advancing through the legislature, a public school district cancelled a professor's civil rights lecture for teachers over concerns about Critical Race Theory instruction, even though the lecture was on a different topic.[220] This cancelled history lecture in a state without a fully enacted anti-Critical Race Theory bill demonstrates the powerful rhetoric and fear among public schools nationwide as they avoid any potential violation, and, in turn, experience a chilling of their constitutionally protected speech that will inevitably effect the quality of the education that students receive in the classroom.

B. Without complete voidance of these statutes, democracy is in danger.

These anti-Critical Race Theory bills force teachers, historically overworked and underpaid,[221] to be liable for the mental health and wellbeing of students exploring a troublesome United States history.[222] In a healthy democracy, students must have knowledge of history to understand modern society.[223] Some of that history is bleak and

Amendment and conflicts with and compels abridgment of New Hampshire's Constitution and laws, thereby creating further vagueness, fear and uncertainty as to what New Hampshire teachers may teach and as a result hurts New Hampshire's students."); Meckler & Natanson, *supra* note 182 (introducing teachers "not clear on the definition of 'inherently,' 'superior,' or 'inferior'" who could not get a definition from the state, the union, nor school attorneys); Tennessee Guidance, *supra* note 5; *see also supra* notes 22–23, 33–45 129–32, 136–42, 193, 198–200 and accompanying text (discussing the effect on teachers and their ability to teach).

220. Marc Caputo & Teaganne Finn, *Florida School District Cancels Professor's Civil Rights Lecture over Critical Race Theory Concerns*, NBC NEWS (Jan. 24, 2022), https://www.nbcnews.com/politics/politics-news/florida-school-district-cancels-professors-civil-rights-lecture-critic-rcna13183.

221. Katie Reilly, *'I Work 3 Jobs and Donate Blood Plasma to Pay the Bills.' This Is What It's Like to Be a Teacher in America*, TIME (Sept. 13, 2018), https://time.com/longform/teaching-in-america.

222. *See supra* note 2, 29–30, 37–45 and accompanying text (discussing the attacks and the effect of noncompliance on teachers).

223. *See, e.g.*, Tennessee Standards, *supra* note 5 (detailing the requirements of the state curricular standards, which support this notion); Ray & Gibbons, *supra* note

troublesome, but meaningful learning often involves inherent discomfort as students step outside of their comfort zone to explore new ideas and form their unique opinions on complex issues.[224] As long as these statutes are active and teachers are threatened with discipline,[225] many students will not be exposed to foundational American history instruction as teachers avoid any topic that could lead students to even inquire about a prohibited concept.[226] Teachers should not be terminated due to the emotion a student may experience when confronted with the oftentimes harsh realities of United States history.

In fact, state legislators should think more deeply about ways to incentive teachers to remain in the profession rather than forcing their departure. Nationwide, the country is short 100,000 teachers.[227] Since

15 ("Policies attempting to suffocate this much-needed national conversation [regarding the enduring effects of racism] are an obstacle to the pursuit of an equitable democracy.").

224. *See generally* MEGAN BOLER, FEELING POWER: EMOTIONS AND EDUCATION (1999) (discussing a "pedagogy of discomfort"). *See also* Mimi Eisen, *Analysis: Learning About Reconstruction Is Critical to Understanding This Country's History. But No Era Is More Neglected in Schools, New Report Finds*, 74 MILLION (Feb. 15, 2022), https://www.the74million.org/article/analysis-learning-about-reconstruction-is-critical-to-understanding-this-countrys-history-but-no-era-is-more-neglected-in-schools-new-report-finds ("Learning about Reconstruction and its legacies disrupts both the myth that U.S. history is one long victory march from slavery to a post-racial present and the complacency that myth is designed to produce.").

225. *See* Local 8027 v. Edelblut, No. 1:21-cv-01063 ¶ 35 (D.N.H. filed Dec. 13, 2021) ("The overbreadth and ambiguity of the statute makes it impossible for teachers to follow and highly susceptible to arbitrary and discriminatory enforcement, particularly by State enabled private citizen 'bounty hunters' and informers."); Tennessee Guidance, *supra* note 5, at 4–11 (detailing punishment and enforcement measures for the anti-Critical Race Theory bill).

226. *See supra* notes 129–32, 139–40 and accompanying text (discussing the effect of the prohibited concepts on teachers). School districts are likely to encourage compliance with the law as their own funding is significantly threatened. *See supra* notes 40–45 and accompanying text (describing the authorized sanctions for noncompliance).

227. Demetrios Sanders, *National Education Association Weighs-in on Nationwide Teacher Shortage*, CENT. ILL. PROUD (Jan. 20, 2022), https://www.centralillinoisproud.com/news/local-news/national-education-association-weighs-in-on-nationwide-teacher-shortage; *see also* Jocelyn Gecker, *COVID-19 Creates Dire US Shortage of Teachers, School Staff*, AP NEWS (Sept. 22, 2021), https://apnews.com/article/business-science-health-education-california-b6c495eab9a2a8f1a3ca068582c9d3c7 (listing Tennessee, home of the Williamson

the beginning of 2020, there has been a net loss of 600,000 educators, and 55% more are making plans to leave the profession.[228] In March 2022, nearly half of public schools across the country reported teaching vacancies.[229] In July 2022, in the state of Tennessee alone, there were over 2,000 teacher vacancies—200 of which were in Nashville[230]—and

County Moms for Liberty, as one of the states experiencing teacher shortages). *See generally* Tennessee Guidance, *supra* note 5. *See also supra* notes 40–45 and accompanying text. To combat their teacher shortages, Tennessee proposed a bill that would allow individuals with no formal teacher training to teach most classes, not just certified teachers. Adrian Mojica & Jackie DelPilar, *Tennessee Bill Would Allow Temporary Permits for Not Just Teachers to Teach Most Courses*, NEWS CHANNEL 9 (Feb. 22, 2022), https://fox17.com/news/local/tennessee-bill-would-allow-temporary-permits-for-not-just-teachers-to-teach-most-courses-education-usa-news-bill-lee-employment-labor-shortages. Oklahoma is not only experiencing a shortage of teachers; a shortage of individuals who want to pursue the profession has forced suspension of education programs, making laws exerting control over teaching and discipline of teachers even more problematic for the success and future of the profession. Kilee Thomas, *Oklahoma Colleges Suspend Education Programs for Upcoming Semester*, KOCONEWS, https://www.koco.com/article/oklahoma-colleges-suspend-education-programs-upcoming-semester/38702156 (Jan. 10, 2022). Teachers in Texas, another state that with an anti-Critical Race Theory bill as law, are leaving the job "after their first year at an alarming rate." Brittany Ford, *New Texas Teachers Leaving the Job Most After Their First Year, Study Says*, FOX W. TEX. (Jan. 25, 2022), https://www.myfoxzone.com/article/news/education/new-texas-teachers-quitting-after-first-year/285-29426428-e31b-40f9-833f-ad4253eefeaa. Some school districts in Texas have sanctioned teachers for resigning and reported them to the Texas Education Agency for job abandonment, which could result in the loss of their teaching certificate. Kelly Wiley, *Data Shows Surge in Central Texas Teacher, School Staff Resignations*, KXAN (Mar. 3, 2022), https://www.kxan.com/investigations/some-school-districts-are-sanctioning-teachers-because-too-many-are-quitting-mid-school-year.

228. Liz Mineo, *Reasons So Many Teachers Joining Great Resignation*, HARVARD GAZETTE (Mar. 15, 2022), https://news.harvard.edu/gazette/story/2022/03/ed-school-panel-examines-u-s-teacher-exodus; Bianca Quilantan, *The 'Great Resignation' Leaves Schools Reeling*, POLITICO (Feb. 7, 2022), https://www.politico.com/newsletters/weekly-education/2022/02/07/the-great-resignation-leaves-schools-reeling-00006061.

229. NCES, *U.S. Schools Report Increased Teacher Vacancies Due to COVID-19 Pandemic, New NCES Data Show*, (Mar. 3, 2022) https://nces.ed.gov/whatsnew/press_releases/3_3_2022.asp.

230. Damon Mitchell, *As Tennessee School Districts Make Backup Plans to Tackle Teacher Shortage, the Underlying Issues Remain*, 90.3 WPLN NEWS (July 14, 2022), https://wpln.org/post/as-tennessee-school-districts-make-backup-plans-to-tackle-teacher-shortage-the-underlying-issues-remain.

the number of teachers in new educator programs statewide has been both declining and unable to keep up with the departure of current teachers.[231] Even if these vacancies were filled in time for the next schoolyear, there would still be a large cohort of novice teachers who require additional training and support. These dire statistics do not even include the shortage of school support staff.[232]

While factors behind this mass resignation of teachers plagued the profession before the coronavirus pandemic,[233] since the pandemic, not only have schools been forced to adapt to virtual teaching and masking guidelines, but there has also been a heightened climate of threats and hostility toward both teachers and school board members.[234]

231. Marta W. Aldrich, *Report: Too Few New Educators Are Graduating to Reverse Tennessee Teacher Shortage*, CHALKBEAT: TENN. (Feb. 15, 2022), https://tn.chalkbeat.org/2022/2/15/22936124/tennessee-teacher-shortage-educator-training-teacher-vacancies.

232. Donna St. George & Valerie Strauss, *The Principal Is Cleaning the Bathroom: Schools Reel with Staff Shortages*, WASH. POST (Dec. 5, 2021), https://www.washingtonpost.com/education/school-staff-shortages-bus/2021/12/03/05b88a0e-4cab-11ec-a1b9-9f12bd39487a_story.html.

233. *See* Christina Maxouris & Christina Zdanowicz, *Teachers Are Leaving and Few People Want to Join the Field. Experts Are Sounding the Alarm*, CNN (Feb. 5, 2022), https://www.cnn.com/2022/02/05/us/teacher-prep-student-shortages-covid-crisis/index.html (listing factors for departure such as low salaries and low respect for teachers in addition to the recent additional complications resulting from the coronavirus pandemic).

234. *See* Alan Feuer, *'I Don't Want to Die for It': School Board Members Face Rising Threats*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/2021/11/05/us/politics/school-board-threats.html. Effectively, these threats interfere with classroom instruction. Not only do they make learning more difficult; they jeopardize the safety of schools and students, and cause teachers, especially teachers of color, to worry for their students and themselves. Umme Hoque, *Anti-Critical Race Theory Efforts Put Unique Pressures on BIPOC teachers*, PRISM (Aug. 25, 2021), https://prismreports.org/2021/08/25/anti-critical-race-theory-efforts-put-unique-pressures-on-bipoc-teachers. In addition to the politization of Critical Race Theory, many parents are angry about mask mandates and school closures resulting from the coronavirus pandemic. This includes Moms for Liberty Williamson County Chairwoman Steenman, who withdrew her child from public school after a mask mandate. McMorris-Santoro & Edwards, *supra* note 2. See also *supra* note 3 for more information on the Williams County Moms for Liberty. However, parents are doing much more than switching their child's school; for example, a Virginia mother was arrested for threatening to bring loaded guns to school if the school board did not revoke its mask mandate. Tori B. Powell, *Virginia Parent Charged After She*

In the 2020–21 school year alone, despite increased virtual learning due to the coronavirus pandemic, an American Psychological Association report found that more than one third of teachers experienced at least one violent incident.[235] Even Fox News's Tucker Carlson, the most popular cable news host in United States history,[236] asked why "the men" and "the dads" who watch his prime time show aren't "thrashing the teacher" because "agent[s] of the government [are] pushing someone else's values on [their] kid."[237] This type of rhetoric is clearly meant to stoke resentment and serve as a call-to-action for parents.

After this substantial interference from parents and threats of violence nationwide, the National School Board Association asked President Biden for federal assistance in combatting what "could be the equivalent to a form of domestic terrorism and hate crimes" against school boards and other school-based employees.[238] In response, Attorney General Merrick Garland directed the FBI to "facilitate the discussion of strategies from addressing threats against school administrators, board members, teachers, and staff" and open "dedicated lines of communication for threat reporting, assessment, and response."[239] The

Threatens to "Bring Every Single Gun Loaded" Over School's Mask Mandate, CBS NEWS (Jan. 21, 2021), https://www.cbsnews.com/news/virginia-school-board-gun-threat-face-mask-dispute.

235. Daniella Silva, *New Report Highlights Violence Against Educators, School Staff During Pandemic*, NBC NEWS (Mar. 17), https://www.nbcnews.com/news/us-news/new-report-highlights-violence-educators-school-staff-pandemic-rcna20276.

236. Jake Lahut, *Tucker Carlson, the Most Popular Cable News Host in US History, Claims He Has No Idea What His Ratings Are: 'I Don't Know How to Read a Ratings Chart*,*'* YAHOO!NEWS (July 7, 2022), https://news.yahoo.com/tucker-carlson-most-popular-cable-195601472.html.

237. Media Matters Staff, *Tucker Carlson Calls on Men to Storm into Schools "And Thrash the Teacher*,*"* MEDIA MATTERS (April 8, 2022), https://www.mediamatters.org/fox-news/tucker-carlson-calls-men-storm-schools-and-thrash-teacher.

238. Stef W. Kight, *First Look: Thousands of School Board Members Urge Biden to Protect Them*, AXIOS (Sept. 30, 2021), https://www.axios.com/school-board-threats-critical-race-theory-d99a7959-829c-48dd-b1b3-93b89760c3d2.html; *see also* Local 8027 v. Edelblut, No. 1:21-cv-01063 (D.N.H. filed Dec. 13, 2021) ("Indeed, teachers, including a Plaintiff in this action, have been made the subject of online harassment, obscenities and vicious attacks as a direct result of the climate of political intimidation created by and with the facilitation of various Defendants.").

239. Letter from Merrick Garland, U.S. Att'y Gen., to FBI Dir. and U.S. Att'ys (Oct. 4, 2021), https://www.justice.gov/ag/page/file/1438986/download. After criticism from Republicans, the NSBA later apologized for the domestic terrorist

mobilization of the FBI exemplifies the delicate state of education systems nationwide, and the judiciary must recognize this threat to democracy as the ability to educate citizens is jeopardized.[240]

The invalidation of these laws protects the public school system, an institution vital to a healthy democracy, and teachers, critical to the effectiveness and longevity of the institution.[241] These laws have come at a time when the very foundation and credibility of American democracy is at stake,[242] and the role of the judiciary remains vital against antidemocratic pressures.[243] Unfortunately, state legislators have contributed to antidemocratic movements by crafting bills that target the very spirit of the First Amendment.[244] A state's police power to regulate schools does not include a partisan curricular restriction with no justifiable interest; indeed, the Supreme Court explicitly warned against this type of prohibition of content as unconstitutional racial animus and has consistently emphasized the importance of education to

characterization and removed the letter to President Biden from their website, but Garland refused to withdraw his memorandum mobilizing the FBI. Lauren Camera, *Garland Refuses to Rescind Memo Asking FBI to Probe School Board Threats*, US NEWS (Oct. 27, 2021), https://www.usnews.com/news/education-news/articles/2021-10-27/garland-refuses-to-rescind-memo-asking-fbi-to-probe-school-board-threats. Thirteen state attorneys general have filed a Freedom of Information Act lawsuit to obtain records from FBI surveillance of parents protesting at school board meetings. Rebecca Downs, *As DOJ Targets Parents, Fmr. Agent Running for Congress Warns FBI Is 'Enforcement Arm of Biden's Agenda*,*'* TOWNHALL (Mar. 6, 2022), https://townhall.com/tipsheet/rebeccadowns/2022/03/06/over-a-dozen-states-sue-biden-administration-n2604199.

240. *See supra* notes 84–88 and accompanying text (discussing the relationship between schools and democracy).

241. *Id.*

242. Celine Castronuovo, *US Score Falls in Economist's Annual Democracy Index*, THE HILL (Feb. 3, 2021), https://thehill.com/homenews/news/537204-us-score-falls-in-economists-2020-democracy-index.

243. Tierney Sneed, *US Capital Riot Judges Step up as the Conscience of Democracy While Lawmakers Squabble*, CNN (Aug. 13, 2021), https://www.cnn.com/2021/08/13/politics/judges-riot-court-describe-january-6-chilling-disgrace-tyranny/index.html. *See also supra* notes 135, 154 (exemplifying rhetoric used by House Republican that provokes antidemocratic sentiment).

244. *See supra* notes 114–16, 155–58, 195–200, 203 and accompanying text (giving examples of the threat to democracy by infringing upon the First Amendment).

the continuance of a functioning democracy.[245] Lower courts must prevent schools from becoming political stomping grounds by intervening against partisan efforts to suppress basic history.[246]

V. CONCLUSION

Ironically, anti-Critical Race Theory bills exemplify the very phenomenon that Critical Race Theorists study.[247] By legislating the parameters for discussing racism in the classroom, the laws themselves operate to maintain the status quo, and as a result, perpetuate inequity.[248] Contextualizing the popularization of this academic theory into a household term is important; it has accompanied the coronavirus pandemic and subsequent remote learning, learning loss, teacher and other staff shortages, declining public-school enrollment, chronic absenteeism, and increased violence in schools.[249] Experts are comparing the

245. *See supra* notes 84–88, 101–103 and accompanying text (discussing the relationship between schools and democracy and the *Pico* examples of viewpoint-based speech restrictions). Further, in *Pico*, the concerns prompting school board leaders to ban books came after a conservative conference. *See supra* note 99 (discussing the authors banned by the school board in *Pico*). Similarly, here, Republican legislators are crafting bills that are also causing conservative parents to question the curriculum, including books, in their children's schools. *See supra* note 2 and accompanying text (discussing Moms for Liberty's book banning request).

246. *See supra* notes 144–73 and accompanying text (rejecting the asserted state interests by Republicans); *see also* Honeyfund.com, Inc. v. DeSantis, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at *30 (N.D. Fla. Aug. 18, 2022) ("If Florida truly believes we live in a post-racial society, then let it make its case. But it cannot win the argument by muzzling its opponents.").

247. *See supra* text accompanying notes 13–23; *see also supra* note 16 (discussing Critical Race Theory's emphasis on "neutrality").

248. *See generally* Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61 (2021); Kelley R. Taylor, *Legislating Classroom Conversation: What Do the "Anti-Critical Race Theory" Laws Mean for Teachers?*, SLJ (Aug. 13, 2021), https://www.slj.com/story/legislating-classroom-conversation-what-do-the-anti-critical-race-theory-mean-for-teachers.

249. Laura Meckler, *Public Education Is Facing a Climate of Epic Proportions*, WASH. POST (Jan. 30, 2022), https://www.washingtonpost.com/education/2022/01/30/public-education-crisis-enrollment-violence; *see also supra* notes 227–40 and accompanying text (discussing the current nationwide teacher shortage and threat of violence nationwide).

current tumultuous school climate to the aftermath of *Brown v. Board of Education*.[250]

Across the country, state lawmakers are introducing additional legislation to supplement anti-Critical Race Theory bills,[251] and over 1,100 unique book titles have fallen victim to book bans.[252]

250. Meckler, *supra* note 249.

251. In Oklahoma, State Representative Jim Olsen has introduced a bill that includes language similar to the prohibited concepts in the state's anti-Critical Race Theory bill to explicitly place limitations on the "instruction of slavery" and prohibit instruction on the *1619 Project*. Marlene Lenthang, *Oklahoma Republican Introduces Bill to Limit How Slavery Is Taught in Schools*, NBC NEWS (Dec. 17, 2021), https://www.nbcnews.com/news/us-news/republican-oklahoma-lawmaker-introduces-bill-limit-slavery-taught-scho-rcna9132; *see also supra* note 24 for more information on the *1619 Project*. The Wisconsin legislator that introduced Wisconsin's anti-Critical Race Theory bill has added an addendum to the bill to elaborate on the prohibited concepts. Testimony from Chuck Wichgers, State Representative, to Wisconsin Committee on Education (Aug. 11, 2021), https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2021/ab411/ab0411_2021_08_11.pdf. The list begins with Critical Race Theory and includes other unalphabetized concepts like "Social Emotional Learning" and "culturally responsive teaching" before the alphabetized portion. *Id.* There are almost ninety prohibited concepts, ranging from "cultural awareness" to "land acknowledgment" and "woke." *Id.* Social-Emotional Learning focuses on skill-building necessary for formulating healthy identities, including self-control, by helping children articulate and process their feelings. *See, e.g.*, Melanie Asmar, *'I Have Feelings:' How Denver Schools Prioritize Social-Emotional Learning*, CHALKBEAT COLORADO (Dec. 20, 2021), https://co.chalkbeat.org/2021/12/20/22846698/social-emotional-learning-pandemic-denver-public-schools-trevista-elementary (explaining social-emotional learning further). Social-Emotional Learning, unfortunately, is another target of those concerned about Critical Race Theory that is not normally politicized. Laura Meckler, *In 'Social-emotional Learning,' Right Sees More Critical Race Theory*, WASH. POST (Mar. 28, 2022), https://www.washingtonpost.com/education/2022/03/28/social-emotional-learning-critical-race-theory. As the list of prohibited concepts grows and includes concepts clearly otherwise pedagogically sound, like Social-Emotional Learning, it will be harder for teachers to simply teach as they work to discern what is and is not permitted classroom conversation. Further, these additional prohibited concepts beg further questions. What if a student says "woke"? What if a student asks what happened to the land of the Native Americans? What if there is a student of Native American descent in the class? Does the teacher discipline the student? Does the teacher change the topic, regardless of the curricular goals or state standards?

252. Eesha Pendharkar, *How Prevalent Are Book Bans This Year? New Data Show Impact*, EDWEEK (April 7, 2022), https://www.edweek.org/teaching-learning/how-prevalent-are-book-bans-this-year-new-data-show-impact/2022/04; Ronald

Christopher Rufo, the Manhattan Fellow often credited with Critical Race Theory's politicization, pledged to "use [the] non-threatening liberal value" of "transparency" to support the adoption of at least ten anti-Critical Race Theory bills.[253] At a confirmation hearing for Supreme Court Justice Ketanji Brown Jackson, Republican Senator Marsha Blackburn accused Justice Jackson of advocating for the "progressive indoctrination" of children "being pushed in some of our public schools" and questioned whether Justice Jackson's "personal hidden agenda" is to promote Critical Race Theory "at a time when these parental rights appear to be under assault."[254] Conservative

Brownstein, *Book Bans Move to Center Stage in the Red-State Education Wars*, CNN (April 5, 2022), https://www.cnn.com/2022/04/05/politics/republican-states-book-ban-race-lgbtq/index.html; Anika Exum & Meghan Mangrum, *Williamson County Schools Committee Removes Book from Elementary Curriculum*, TENNESSEAN (Jan. 28, 2022), https://www.tennessean.com/story/news/local/williamson/2022/01/25/williamson-county-schools-committee-removes-book-elementary-curriculum/9217318002; Scottie Andrew, *'Maus' Is Back on Best Seller Lists After Its Ban from a Tennessee School District*, CNN (Jan. 31, 2022), https://www.cnn.com/2022/01/31/media/maus-best-seller-banned-book-cec/index.html; Kimberlee Kruesi, *Tennessee Gov, GOP Push More Scrutiny of School Libraries*, AP NEWS (Feb. 4, 2022), https://apnews.com/article/entertainment-education-race-and-ethnicity-racial-injustice-legislature-9c5434dfe55f31ac45b3b0b0d890bf49; *see also supra* note 2. Republican Governor Brian Kemp made the connection even more explicit by signing his state's anti-Critical Race Theory Bill and a bill that bans "offensive" literature on the same day. Tina Burnside & Devan Cole, *Georgia Gov. Kemp Signs Bill into Law That Limits Discussions About Race in Classrooms*, CNN (April 28, 2022), https://www.cnn.com/2022/04/28/politics/georgia-bill-limits-race-discussions-classrooms/index.html. While largely outside the scope of this note, the recent book banning trend further implicates *Pico*. *See supra* notes 99–103, 128–32, 139, 143 and accompanying text (discussing book banning).

253. Christopher F. Rufo (@realchrisrufo), TWITTER (Jan 7, 2022, 12:13 PM), https://twitter.com/realchrisrufo/status/1479516522896781312; Nicole Gaudiano, *A Key Conservative Instigator of the Critical Race Theory Controversies Says He Now Wants to 'Bait' the Left into Fights over Republican-Led 'Transparency' Efforts in Schools*, INSIDER (Mar. 8, 2022), https://www.businessinsider.com/critical-race-theory-curriculum-transparency-christopher-rufo-conservative-school-education-2022-3.

254. Nicole Gaudiano, *Sen. Marsha Blackburn Accused Ketanji Brown Jackson of Supporting 'Progressive Indoctrination' of Children and Having Ties to a School That Teachers Kindergarteners About 'White Privilege' and Choosing Their Gender*, INSIDER (Mar. 22, 2022), https://www.businessinsider.in/politics/world/news/sen-marsha-blackburn-accused-ketanji-brown-jackson-of-supporting-progressive-

organizations, such as the Leadership Institute, are devoting resources to "train brave men and women" on "how to lobby and influence school boards from the outside through coalition building, how to assist on a local campaign, and how to run for office."[255] These organizations have dedicated their mission to combating "leftist indoctrination and abuse" such as "hateful Critical Race Theory" and "radical leftist teachers more concerned about 'gender identity' and 'anti-racism' than giving children an actual education in things like math and social studies."[256] Fox News has hosted parents to voice concern about the instruction of Critical Race Theory in their children's schools—without informing viewers that these parents also double as prominent conservative activists.[257] It is clear that Critical Race Theory is politically prevalent, but the popularity of a trend does not guarantee its constitutionality; indeed, segregation, at one point, was a popular methodology.[258]

indoctrination-of-children-and-having-ties-to-a-school-that-teaches-kindergarteners-about-white-privilege-and-choosing-their-gender/articleshow/90364021.cms; Peter Hasson & Cameron Cawthorne, *Judge Jackson Serves on Board of Georgetown Day School, Which Promotes Books by Originators of Critical Race Theory*, FOX NEWS (Mar. 22, 2022), https://www.foxnews.com/politics/ketanji-brown-jackson-board-school-critical-race-theory.

255. E-mail from Morton Blackwell, Pres., Leadership Institute (Feb. 5, 2022) (on file with the author).

256. *Id.*; *see also supra* notes 20–23 and accompanying text (explaining that Critical Race Theory is not taught in schools).

257. Matt Gertz, *Fox's Anti-"Critical Race Theory" Parents Are Also GOP Activists*, MEDIA MATTERS, https://www.mediamatters.org/fox-news/foxs-anti-critical-race-theory-parents-are-also-gop-activists (June 17, 2021); *see also* Matthew Gertz (@MattGertz), TWITTER (Oct. 14, 2022, 8:53 AM), https://twitter.com/mattgertz/status/1580919700262830080.

258. Fox News exit polls at the Virginia gubernatorial election found that 25% of voters viewed Critical Race Theory as the "single most important factor they considered when deciding who to support for governor." Andrew Mark Miller, *Critical Race Theory Top Factor for 25% of Virginia Voters, While 72% Called It Important: Fox Analysis*, FOX NEWS (Nov. 3, 2021), https://www.foxnews.com/politics/critical-race-theory-virginia-top-factor-important-fox-analysis. Opposition of Critical Race Theory, along with anger over face mask mandates and school closures, has been adopted into the national Republican party platform. Republicans "suggest they're sharpening lines of attack on education" since they see "parental involvement as an issue that can help them win majorities in 2022." Nicole Gaudiano, *Rep. Steve Scalise and 15 Other Republicans Lay out Their Plan to Use Controversies over the Teaching of Race and Gender in Schools to Beat Democrats in 2022*, INSIDER (Dec. 17, 2020),

These partisan anti-Critical Race Theory bills are vulnerable to a First Amendment challenge as content-based restrictions of speech,[259] viewpoint-based regulations of speech,[260] unconstitutionally vague,[261] and substantially overbroad.[262] In order to protect schools as fundamental institutions in the continuation of our nation's democracy,[263] a court's identification of these statutes as violative of "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control"[264] justifies, and indeed necessitates, rendering these statutes entirely unconstitutional.

https://www.businessinsider.com/republicans-2022-elections-critical-race-theory-education-culture-wars-scalise-2021-12; *see also* Quinn, *supra* note 36. Included in the Republican agenda is a "Parents Bill of Rights Act" which includes a requirement for school districts to post curricula and library books. Gaudiano, *supra* note 258. Republican Representative Glenn Thompson of the House Education and Labor Committee called the legislation "defensive" after the "weaponiz[ation of] the FBI against parents." *Id.* See also *supra* note 238–39 and accompanying text for more information on the FBI's mobilization. When signing Georgia's Critical Race Theory bill into law, Republican Governor Brian Kemp also signed his state's "Parents' Bill of Rights" into law, which also aims to make curricula more accessible to parents. Burnside & Cole, *supra* note 252.

259. *See supra* text accompanying notes 120–24, 142.

260. *See supra* text accompanying notes 127–33, 143.

261. *See supra* text accompanying notes 187–195.

262. *See supra* text accompanying notes 175–186.

263. *See supra* notes 46–49, 84–88, 203 and accompanying text (emphasizing the relationship between the First Amendment, democracy, and schools).

264. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).