CENSORSHIP OF THE MARKETPLACE OF IDEAS: WHY CRITICAL RACE THEORY BANS IN PUBLIC SCHOOLS VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

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I. INTRODUCTION

Critical race theory has reemerged under the national spotlight in the last two years.[1] This theory that originated as a response to the civil rights movement, now stands at the center of political debate.[2] The topic was once an obscure academic framework circulating strictly in higher education, and now it has evolved into a catchall term for any discussion regarding systemic racism or

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1. Jacey Fortin, *Critical Race Theory: A Brief History*, S.F. EXAM'R, July 29, 2021, at 10.

2. *See id.* at 11; Ricardo Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1510 (2009).

racial bias.[3] Efforts to thwart discussions about critical race theory have resulted in bans at the national level, and more recently, bans at the state level.[4] Parents and legislators in support of legislation banning critical race theory in public schools allege that educators are "'indoctrinating' students with [] lessons on race" that cause students discomfort and shame.[5] Meanwhile, critical race theorists, educators, and some parents say that opponents are misconstruing the theory's principles to reverse progress made in racial equality and add that the theory is not taught in K-12 classrooms.[6] This Comment seeks to clarify what the academic framework of critical race theory means at its core and the history of how it came to be in order to illustrate how far it has strayed from its true meaning.[7] This Comment also seeks to explain why such bans are unconstitutional.[8] Part II of this Comment provides background on the history of critical race theory and how it was established, as well as the tenets of critical race theory and the concepts that critical race theorists promote.[9] Part III of this Comment explores how critical race theory has spilled over from scholarly commentary into the political arena.[10] Part IV of this Comment reviews legislation that has been introduced and passed nationwide and briefly analyzes the general language contained in the legislation.[11] Part V explores the theme in American history to keep certain materials out of public schools.[12] Part VI explores issues of constitutionality with regard to the First Amendment, while Part VII explores issues of constitutionality with regard to the Fourteenth Amendment and includes an analysis focused on the "void for vagueness" doctrine and the Equal Protection Clause.[13] Part VIII applies the analysis to Florida law.[14]

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3. *See* Olivia B. Waxman, *'Critical Race Theory Is Simply the Latest Bogeyman.' Inside the Fight Over What Kids Learn About America's History*, TIME, http://time.com/6075193/critical-race-theory-debate (July 16, 2021, 7:42 PM); Fortin, *supra* note 1.

4. *See* Fortin, *supra* note 1; Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK, http://perma.cc/LPF6-V65D (Apr. 1, 2022).

5. Kiara Alfonseca, *Critical Race Theory Thrust into Spotlight by Misinformation*, ABC NEWS (Feb. 6, 2022, 10:02 AM), http://abcnews.go.com/US/critical-race-theory-thrust-spotlight-misinformation/story?id=82443791.

6. *Id.*

7. *See* discussion *infra* Part II.

8. *See* discussion *infra* Parts VI–VII.

9. *See* discussion *infra* Part II.

10. *See* discussion *infra* Part III.

11. *See* discussion *infra* Part IV.

12. *See* discussion *infra* Part V.

13. *See* discussion *infra* Parts VI, VII.

14. *See* discussion *infra* Part VIII.

II. OVERVIEW OF CRITICAL RACE THEORY

A. *Origins*

The birth of critical race theory can be attributed to the plateau that the civil rights movement hit following the landmark decisions and legislation passed in the 1950s, 60s, and early 70s.[15] 1954 was the beginning of seeing monumental institutional changes meant to combat racism.[16] The *separate but equal* doctrine was overturned, and then liberal momentum carried the civil rights movement to victories aimed at dismantling the badges of segregation.[17] The Civil Rights Act of 1964 and the Voting Rights Act of 1965 evidenced the progress that the movement had achieved.[18] Following these successes, there was a slowdown in momentum of the civil rights movement.[19] The inauguration of Richard Nixon in 1969 opened the door for four United States Supreme Court justice nominations, which did not help streamline the path towards racial justice.[20] Rather, the United States Supreme Court decisions during Nixon's presidency indicated a drastic change in the direction that the civil rights movement was heading in.[21] For example, in 1976, the United States Supreme Court established that only governmental actions motivated by discriminatory intent violated the United States Constitution and "rejected [using] discriminatory effects as the basis for determining unconstitutional discrimination."[22] Another attack on the opportunities put forth in the civil rights movement happened in 1978 when the United States Supreme Court struck down a medical school's admission plan because it reserved sixteen of its one hundred admission seats for Black, Native American, Hispanic, and Asian students.[23] The United States Supreme Court became a vehicle by which civil rights policies

15. *See* Bernie D Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACK LETTER L.J. 1, 1, 13 (2002).

16. *See id.* at 1.

17. *See id.*; Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Kevin Brown & Darrell D. Jackson, *The History and Conceptual Elements of Critical Race Theory*, *in* HANDBOOK OF CRITICAL RACE THEORY IN EDUCATION 9, 9 (Marvin Lynn & Adrienne D. Dixson eds., 2013).

18. Jones, *supra* note 15, at 1, 6; Brown & Jackson, *supra* note 17, at 9–10.

19. Jones, *supra* note 15, at 1.

20. Brown & Jackson, *supra* note 17, at 10.

21. *See id.*

22. *See* Washington v. Davis, 426 U.S. 229, 242 (1976); Brown & Jackson, *supra* note 17, at 11.

23. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271, 276 n.6 (1978); Brown & Jackson, *supra* note 17, at 11.

could be rejected, and activists viewed this as a threat to civil liberties.[24] This led scholars and activists in legal education to turn to examining race through a different lens.[25]

Critical race theorists challenged traditional civil rights discourse and instead, looked towards understanding the roots of racism and how it has persisted in the United States.[26] Derrick Bell, a pioneer of critical race theory ideas, was an attorney advocating for the civil rights movement through the National Association for the Advancement of Colored People ("NAACP").[27] Bell asserted that the United States Supreme Court's decision to declare racial segregation unconstitutional was not aimed at furthering the interests of Black Americans, but rather was decided as a product of "interest convergence."[28]

It is from the interest convergence principle that concepts about critical race theory arose, such as the idea that racism is a permanent part of American society.[29] Bell's interest convergence principle held that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[30] The development of this principle came to be because of the idea that the United States Supreme Court's actions to further racial equality did not serve to address the struggles of Black individuals.[31] Rather, they were a means to assert America's stance on racial equality to the country and to the world and to establish the nation's credibility.[32] The United States court-sanctioned racial inequality posed a massive problem in its competition with the Soviet Union for the support of developing countries.[33] As the Cold War emerged, it became difficult for the United States to justify the persistence of racial inequality in the country.[34] The Soviet Union had an advantage over the United States with international recognition of the treatment of Black individuals in the Jim Crow South, which could be overcome through the United States Supreme Court's action.[35]

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24. Jones, *supra* note 15, at 3.
25. Brown & Jackson, *supra* note 17, at 12–13.
26. *Id.* at 14; Jones, *supra* note 15, at 26.
27. Jones, *supra* note 15, at 3, 33.
28. Brown & Jackson, *supra* note 17, at 14, 17; *see also* Jelani Cobb, *The Limits of Liberalism*, NEW YORKER, Sept. 20, 2021, at 20, 24.
29. Brown & Jackson, *supra* note 17, at 14.
30. *Id.* at 17.
31. *See id.* at 16–17; Jones, *supra* note 15, at 3; Cobb, *supra* note 28, at 22.
32. *See* Brown & Jackson, *supra* note 17, at 16–17; Jones, *supra* note 15, at 3; Cobb, *supra* note 28, at 22.
33. Delgado, *supra* note 2, at 1507.
34. *See id.*
35. *See id.*

B. *Basic Principles of Critical Race Theory*

Kimberlé Crenshaw coined the term "Critical Race Theory" in the late 1980s.[36] Critical race theorists often offer different insights, but the general principles are commonly accepted.[37] Along with other Bell students, Crenshaw endorsed techniques involving storytelling to reveal one of the main foundations of critical race theory, which is the premise that racism is not an occasional part of the lives of Black individuals, but rather it surrounds every part of their lives.[38] Critical race theory views racism in a broader context and does not limit discrimination to overt acts thereof; rather, it focuses on routine activities that are often left unnoticed.[39] Critical race theorists recognize the importance of embracing the stories of Black individuals and embedding these stories into scholarship.[40]

Proponents of critical race theory assert that racial bias is a manifestation of institutions and agencies such as the economy, the criminal justice system, and the education system.[41] They assert that racism is a normal feature of American systems that are woven into the structures and embedded in public policy.[42] An example is racial inequality in education, including the dominance of culturally exclusive narratives in history courses, school funding inequalities, and racially segregated education.[43] Further, the overrepresentation of Black Americans in the criminal justice system and the way the legal system perpetuates racial inequality can also be observed through a critical race theory lens.[44] Another well-known illustration is America's War on Drugs, which invoked higher penalties for possession of crack cocaine than those for powder cocaine and resulted in Black Americans being convicted at a higher rate than White Americans.[45] Critical race theory can also be used to understand how the average

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36. Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333 (2006).

37. *Id.* at 354–55.

38. Brown & Jackson, *supra* note 17, at 19; Jones, *supra* note 15, at 4.

39. *See* Janel George, *A Lesson on Critical Race Theory*, 46 HUM. RTS., no. 2, 2021, at 2, 2–3.

40. *See id.* at 3.

41. *See id.*

42. *Id.*

43. *Id.* at 4.

44. *See* Gabriella Borter, *Explainer: What 'Critical Race Theory' Means and Why It's Igniting Debate*, REUTERS, http://www.reuters.com/legal/government/what-critical-race-theory-means-why-its-igniting-debate-2021-09-21/ (last visited Nov. 6, 2022).

45. *Id.*

White household in the United States is seven times wealthier than the average Black one.[46] This can be traced back to the United States government's practice in the 1930s of redlining.[47] These effects are still felt today among Black homeowners.[48]

Critical race theorists generally reject the idea of "colorblindness" in the law, which implies that race should not be determinative of an individual's ability to succeed in society.[49] One of the most notable implications of colorblindness in the law was written by Justice Harlan, who wrote, "in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens."[50] Critical race theorists reject viewing race from this standpoint.[51] Instead, critical race theorists advocate for understanding the ways legal colorblindness has disadvantaged Black Americans by ignoring the social and institutional structures that maintain the systemic lack of opportunities.[52] Proponents assert that a colorblind approach to racism does not cure inequalities because it fails to acknowledge race, which is crucial to build towards progress.[53] Critical race theorists understand race to be pervasive and a creation of society rather than a biological reality.[54] "[R]ather, races are categories that society invents, manipulates, or retires when convenient."[55]

III. SPILLOVER FROM ACADEMIA INTO THE MEDIA

Critical race theory has gained attention in recent years, initially following the murder of George Floyd at the hands of police, which drew nationwide conversations about race.[56] Following the tragedy, schools

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46. Claire Suddath, *How Critical Race Theory Became a Political Target*, BLOOMBERG, http://www.bloomberg.com/news/articles/2021-10-02/how-critical-race-theory-became-a-political-target-quicktake (Nov. 30, 2021, 1:35 PM).

47. *Id.*

48. *Id.*

49. Mutua, *supra* note 36, at 334.

50. *Id.* at 335; Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

51. *See* Mutua, *supra* note 36, at 337.

52. *See id.* at 336.

53. *See id.* at 334, 336.

54. Fortin, *supra* note 1.

55. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 9 (Richard Delgado & Jean Stefancic eds., 3d ed. 2017).

56. Fortin, *supra* note 1; Marisa Iati, *What Is Critical Race Theory, and Why Do Republicans Want to Ban It in Schools?*, WASH. POST (May 29, 2021, 8:00 AM), http://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/.

nationwide began promoting diversity and inclusion efforts in their curriculum.[57] Districts have also encouraged anti-bias training for teachers and required lessons to include the experiences of marginalized groups.[58] The spillover of critical race theory into the contemporary political arena can be analyzed from the catalyst that waged the culture wars, which was conservative activist Christopher Rufo's appearance on Tucker Carlson's Fox News show in September 2020.[59] Rufo appeared on the show and denounced the federal government's alleged trainings aimed at teaching critical race theory.[60] Rufo stated that, "[c]ritical race theory has become, in essence, the default ideology of the federal bureaucracy and is now being weaponized against the American people."[61] In response to the call-to-action by Rufo to abolish critical race theory in the federal government, former President Donald Trump issued an executive order banning federal contractors from conducting racial sensitivity training, which President Biden has since revoked.[62] On September 4, 2020, Russell Vought, former Director of the Office of Management and Budget, under the instruction of former President Donald Trump, issued a Memorandum regarding training in the federal government.[63] It instructed agencies to:

> [I]dentify all contracts or other agency spending related to any training on 'critical race theory,' 'white privilege,' or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil.[64]

57. Iati, *supra* note 56; *see also* Khiara M. Bridges, *Evaluating Pressures on Academic Freedom*, 59 HOUS. L. REV. 803, 804 (2022).

58. Iati, *supra* note 56.

59. *See* Bridges, *supra* note 57, at 812.

60. *See id.*

61. *See* Laura Meckler & Josh Dawsey, *Republicans, Spurred by an Unlikely Figure, See Political Promise in Targeting Critical Race Theory*, WASH. POST (June 21, 2021, 6:22 PM), http://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/.

62. *See id.*; Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 28, 2020); Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

63. *See* Memorandum from Russell Vought, Dir., Off. of Mgmt. & Budget, on Training in the Fed. Gov't to the Heads of the Exec. Dep'ts & Agencies (Sept. 4, 2020) (on file with the Executive Office of the President).

64. *Id.*; Bridges, *supra* note 57, at 813.

Discourse surrounding critical race theory garnered support among conservative activists, commentators, and politicians who turned to the discussion of critical race theory in K-12 schools.[65]

Despite the true meaning of critical race theory, the term's core principles have strayed in the conservative narrative.[66] Conversative activists and politicians now use the phrase broadly and generalize the theory to include any discussion of systemic racism and racial bias.[67] Rufo has taken credit for achieving the goal of spreading critical race theory into the public conversation and driving up negative perceptions; he explained that his coalition will turn it toxic and put various "cultural insanities" under the same label.[68] The descriptions that have been disseminated suggest that efforts to ban critical race theory do not involve legal scholarship.[69] For example, Rufo's website alleges that the key concepts and quotations of critical race theory include the fact that "all whites are racist."[70] These conceptions of critical race theory that differ from the term coined decades ago have had the effect of disseminating misinformation; for example, it has resulted in the portrayal of critical race theory as the basis of policies related to race, diversity trainings, and education about racism, regardless of how much of the true theory is involved in these initiatives.[71] Critical race theory has largely existed in scholarly journals for decades and has hardly been accepted into mainstream American society.[72] Critics of what has been called "critical race theory" in the mainstream media assert that bans are intended to protect children from anti-white indoctrination; however, school officials nationwide have denied teaching critical race theory in schools, and teachers are not trained in critical race theory to be able to incorporate it into K-12 curriculum.[73] It is a school of thought that law students and theorists find challenging and difficult to transform into understandable terms, even more so for students K-12.[74]

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65. Bridges, *supra* note 57, at 813–14.

66. *See* Iati, *supra* note 56.

67. *Id.*

68. *See* Christopher F. Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021, 3:14 PM), http://twitter.com/realchrisrufo/status/1371540368714428416.

69. Bridges, *supra* note 57, at 814.

70. *Critical Race Theory Briefing Book*, CHRISTOPHER RUFO, http://christopherrufo.com/crt-briefing-book/ (last visited Nov. 6, 2022).

71. *See* Iati, *supra* note 56.

72. *See* Gary Peller, Opinion, *I've Been a Critical Race Theorist for 30 Years. Our Opponents Are Just Proving Our Point for Us*, POLITICO (June 30, 2021, 4:31 AM), http://www.politico.com/news/magazine/2021/06/30/critical-race-theory-lightning-rod-opinion-497046.

73. *See id.*; Alfonseca, *supra* note 5.

74. Peller, *supra* note 72.

IV. LEGISLATION

In conjunction with the nationwide culture-wars in the media and other spaces regarding critical race theory, many states have introduced or passed legislation to regulate the discussion of race in public schools.[75] The 2020-2021 school year introduced schoolboard meetings as battlegrounds for discourse addressing loosely defined sets of ideas regarding race and racial bias.[76] As of April 1, 2022, forty-two states introduced bills or took other measures to either restrict teaching critical race theory or limit how teachers can discuss racism and sexism.[77] Fifteen states have implemented these bans through legislation or through other measures.[78] According to a study conducted by UCLA, at least 894 school districts, enrolling 17,743,850 students, or thirty-five percent of all K-12 students in the United States, have been impacted by local anti-critical race theory efforts.[79] Idaho became the first state to pass legislation aimed to enact prohibitions against critical race theory in public education on April 28, 2021.[80] Idaho House Bill 377 ("HB 377") explicitly mentions critical race theory in the language of the Bill, explaining that the basic tenets that are banned in public schools are often found in "critical race theory" and "inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria in ways contrary to the unity of the nation and the well-being of the state of Idaho and its citizens."[81] The Bill prohibits public institutions of higher education, school districts, and other public schools from directing students to adhere to specified teachings, such as the idea that "any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior."[82] The Bill also bans funding for any curriculum related to the tenets described in section 33-138 of the Bill.[83]

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75. Alfonseca, *supra* note 5; *see also, e.g.*, H.B. 1508, 67th Leg., Spec. Sess. (N.D. 2021); H.R. 550, 130th Leg., 1st Reg. Sess. (Me. 2021).

76. *See* MICA POLLOCK ET AL., THE CONFLICT CAMPAIGN: EXPLORING LOCAL EXPERIENCES OF THE CAMPAIGN TO BAN "CRITICAL RACE THEORY" IN PUBLIC K–12 EDUCATION IN THE U.S., 2020–2021, at 24 (2022).

77. Schwartz, *supra* note 4; Ryan Teague Beckwith, *The Issues Dividing America Ahead of the Midterms, Explained*, BLOOMBERG, http://www.bloomberg.com/news/articles/2022-04-07/mandates-don-t-say-gay-and-other-u-s-culture-wars-quicktake (Apr. 11, 2022, 12:27 PM); *see also, e.g.*, N.D. H.B. 1508.

78. Schwartz, *supra* note 4.

79. POLLOCK ET AL., *supra* note 76, at 11.

80. *See id.* at 30.

81. H.B. 377, 66th Leg., Reg. Sess. (Idaho 2021).

82. *Id.*

83. *Id.*

Much of the language in HB 377 is replicated among other bills introduced across the board.[84] For example, Florida Governor Ron DeSantis signed into law House Bill 7 ("HB 7"), the "Stop W.O.K.E. Act," in February 2022, which replicated the language of racial inferiority in the Idaho Bill and added that individuals should not be made to "feel guilt, anguish, or other forms of psychological distress because of actions, in which the [individual] played no part, committed in the past by other members of the same race, color, national origin, or sex."[85] In a handout issued by the State of Florida, the government asserts that the "Stop W.O.K.E. Act" "codifies the Florida Department of Education's prohibition on teaching critical race theory in K-12 schools," and that it "[p]rohibits school districts, colleges, and universities from hiring woke CRT consultants."[86] Legislation introduced and passed across the nation has also included a ban on teaching "divisive concepts."[87] Arkansas, Louisiana, Rhode Island, and West Virginia have introduced legislation bearing this language.[88] However, only Arkansas has gone as far as enacting the legislation into law.[89]

Critics of such bans hold that the language-banning instruction on "divisive concepts" has the effect of silencing speech that can encompass many different topics.[90] Educators, in particular, have noted the chilling effects of teaching in states where laws have either been introduced or passed.[91] Testimonials from teachers show that widespread confusion exists over what teachers can and cannot teach and that there is fear over losing school funding for participating in classroom instruction that may or may not be included in the legislation of their respective state ban.[92] Teachers have also revealed that they have begun to censor discussions in advance of new policies in order to avoid

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84. *See* POLLOCK ET AL., *supra* note 76, at 17; H.B. 377; *e.g.*, Fla. CS for HB 7, § 2 (2022) (proposed Fla. Stat. § 1000.05(4)(a)(7)).

85. *See* Fla. CS for HB 7.

86. *Stop W.O.K.E. Act*, OFFICE OF FLA. GOV. RON DESANTIS (Dec. 15, 2021), http://www.flgov.com/wp-content/uploads/2021/12/Stop-Woke-Handout.pdf.

87. *See* Anuli Ononye & Jackson Walker, *The States Taking Steps to Ban Critical Race Theory*, HILL (June 9, 2021, 1:13 PM), http://thehill.com/homenews/state-watch/557571-the-states-taking-steps-to-ban-critical-race-theory/.

88. *Id.*; ARK. CODE. ANN. § 25-1-902(a) (2022); H.B. 564, 2021 Leg., Reg. Sess. (La. 2021); H. 6070, 2021 Gen. Assemb., Jan. Sess. (R.I. 2021); H.B. 2595, 2021 Leg., Reg. Sess. (W. Va. 2021); S.B. 618, 2021 Leg., Reg. Sess. (W. Va. 2021).

89. *See* ARK. CODE ANN. § 25-1-902(a); Ononye & Walker, *supra* note 87.

90. *See* POLLOCK ET AL., *supra* note 76, at 31; *Joint Statement on Efforts to Restrict Education About Racism*, AM. ASS'N UNIV. PROFESSORS (June 16, 2021), http://www.aaup.org/news/joint-statement-efforts-restrict-education-about-racism#.Y83ruOzML0o.

91. *See* POLLOCK ET AL., *supra* note 76, at 69.

92. *See id.*

conflict with the state legislature as well as with local parents.[93] Although these laws have already impacted the American education system at large, the constitutionality of such bans has remained unanswered in the courts.[94]

V. THE COMMON TREND OF AMERICAN SCHOOLS AS VENUES FOR CULTURE WARS

Censoring race-based discussions in the classroom also censors fact-based classroom instruction, which has been a common trend in the history of education in America.[95] For example, topics such as evolution and sexual education have long been contested subjects in public school classrooms.[96] In 1925, high school science teacher John Scopes was arrested for teaching evolution in violation of a Tennessee law that banned the teaching of evolution in all educational institutions in the state.[97] He was found guilty,[98] and it was not until 1968 that the Supreme Court was able to test the constitutionality of anti-evolution laws once again.[99] In 1968, the Supreme Court unanimously found that an Arkansas law that banned teaching that mankind ascended or descended from a lower order of animals was unconstitutional and violated the Establishment Clause of the First Amendment.[100] Similar to the movement against critical race theory, the fight over evolution was an effort to plant a particular ideology in America's public schools.[101] The anti-evolution bills passed in the 1920s were similarly vague and did not capture the scientific aspect of evolution, banning things like "nefarious matter" from being taught in public schools.[102]

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93. *Id.* at 71.

94. *Id.* at 2; Engy Abdelkader, *Are Government Bans on the Teaching of Critical Race Theory Unconstitutional?*, ABA J. (Oct. 7, 2021, 10:22 AM), http://www.abajournal.com/columns/article/are-government-bans-on-the-teaching-of-critical-race-theory-unconstitutional.

95. *Teaching About Racism Is Essential for Education*, SCI. AM. (Feb. 1, 2022), http://www.scientificamerican.com/article/teaching-about-racism-is-essential-for-education/.

96. *Id.*

97. Tennessee v. Scopes, 289 S.W. 363, 363 (1925); State of Tennessee v. Scopes, ACLU, http://www.aclu.org/other/state-tennessee-v-scopes (last visited Nov. 6, 2022).

98. *Scopes*, 289 S.W. at 363.

99. Epperson v. Arkansas, 393 U.S. 97, 98 (1968).

100. *Id.* at 107–09.

101. *See* Adam Laats, *The Conservative War on Education That Failed*, ATL. (Nov. 23, 2021), http://www.theatlantic.com/ideas/archive/2021/11/failed-school-ban-evolution-conservatives/620779/.

102. *See id.*

The culture war surrounding sex education has also persisted between the right and the left.[103] More recently, Florida Governor Ron DeSantis signed House Bill 1557 (hereinafter referred to as "HB 1557") into law in March of 2022, which prohibits instruction regarding sexual orientation or gender identity in K-3 classrooms.[104] Opponents of the Bill have referred to HB 1557 as the "Don't Say Gay" bill.[105] Opponents of the Bill have argued that the constitutional right to have open classroom discussions regarding gender and sexuality in public is rooted in the First Amendment, which is analogous to the right to receive an education that promotes racial equality.[106] Critics of HB 1557 have argued that public school students may not be deprived of access to information just because the state disagrees with the material, just as critics of critical race theory bans have argued.[107]

VI. FIRST AMENDMENT VIOLATION

The First Amendment provides that no law shall be made "abridging the freedom of speech."[108] The scope of the First Amendment's protection in school settings remains a subject for debate.[109] The courts have recognized that "[s]chool authorities, not the courts, are charged with the responsibility of deciding what speech is appropriate in the classroom."[110] It is well established in American jurisprudence that neither teachers nor students shed their First Amendment right to free speech at the schoolhouse gate.[111] In *Tinker v. Des Moines Independent Community School District*,[112] the Court held that a student's decision to wear an armband in protest of the Vietnam War was constitutionally protected, reasoning that "state-operated schools may not be

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103. *See id.*

104. Fla. CS for HB 1557, § 1 (2022) (proposed Fla. Stat. § 1001.42); Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay,'* NPR, http://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis (Mar. 28, 2022, 2:33 PM).

105. Diaz, *supra* note 104.

106. *See* Complaint & Demand for Jury Trial at 73, Equal. Fla. v. DeSantis, No. 4:22-cv-00134-AW-MJF (N.D. Fla. Mar. 31, 2022), ECF No. 1.

107. *See id.*

108. U.S. CONST. amend. I.

109. *See* Garcetti v. Ceballos, 547 U.S. 410, 413 (2006); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

110. Wood v. Arnold, 915 F.3d 308, 315 (4th Cir. 2019).

111. *Tinker*, 393 U.S. at 506; David L. Hudson Jr., *Rights of Teachers*, FIRST AMEND. ENCYC., http://www.mtsu.edu/first-amendment/article/973/rights-of-teachers (last visited Nov. 6, 2022).

112. 393 U.S. 503 (1969).

enclaves of totalitarianism."[113] Different standards have been applied by the courts when ruling on matters of First Amendment issues in relation to public employees, although none specifically address the question of a teacher's speech related to school curricula.[114] In 1968, the Supreme Court held in *Pickering v. Board of Education*[115] that a teacher does not, as a public employee, relinquish his or her First Amendment protections.[116] In *Pickering*, the Court established a balancing test to determine First Amendment protection, weighing the teacher's interest as a citizen in making a public comment against the State's interest in promoting the efficiency of its employees' public services.[117] Teachers' speech on matters of public concern, therefore, became constitutionally protected under *Pickering*.[118]

Garcetti v. Ceballos[119] established a different framework for evaluating public employees' speech.[120] *Garcetti* established that the First Amendment does not protect the expressions that public employees make pursuant to their professional duties.[121] As a result, the reinvented framework for analyzing cases where public employees' First Amendment protections are at issue became a multi-part test.[122] First, the inquiry is whether the employee speaks regarding his official duties.[123] If the employee does speak pursuant to his official duties, he is not afforded First Amendment protections.[124] If the employee speaks as a matter of public concern, then the state must balance the competing interests defined in *Pickering*.[125] However, *Garcetti* raised the question of whether this test should apply in teaching-related cases.[126] The majority acknowledged this inquiry, stating that "[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[127]

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113. *Id.* at 509, 511.
114. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); *Garcetti*, 547 U.S. at 421.
115. 391 U.S. 563 (1968).
116. *See id.* at 568.
117. *Id.*
118. *See id.* at 574.
119. 547 U.S. 410 (2006).
120. *See id.* at 421.
121. *See id.* at 421, 423.
122. *See id.* at 423.
123. *See id.*
124. *See Garcetti*, 547 U.S. at 424.
125. *See id.* at 417.
126. *See id.* at 425.
127. *Id.*

Nonetheless, this framework has been used in the lower courts to deny First Amendment protections to teachers regarding academic freedom in the classroom.[128] In *Evans-Marshall v. Board of Education*,[129] a public school teacher, Shelley Evans-Marshall, assigned Ray Bradbury's *Fahrenheit 451* to her students.[130] To explore the book's theme of government censorship, the teacher distributed a list issued by the American Library Association of the "100 Most Frequently Challenged Books."[131] She instructed her students to pick a book from the list and search why the book was contested in order to lead in-class discussion regarding the book.[132] Two of the groups in Evans-Marshall's class chose *Heather Has Two Mommies* by Lesléa Newman.[133] After the conclusion of that assignment, Evans-Marshall taught *Siddhartha* by Hermann Hesse.[134] During the school year, approximately twenty-five parents "complained about the curricular choices . . . including the teaching of *Siddhartha* and the book-censorship assignment."[135] The Sixth Circuit found that the content of Evans-Marshall's speech did "relate[] to . . . matters of political, social, or other concern to the community."[136] Evans-Marshall also passed the test in which "her 'interests . . . as a citizen, in commenting upon matters of public concern' through her in-class speech, outweighed the school board's interest[s] . . . ."[137] Nonetheless, the Sixth Circuit concluded that Evans-Marshall could not overcome *Garcetti*.[138]

In the *Garcetti* dissent, Justice Souter warned against the dangers of applying *Garcetti* to academic freedom.[139] The *Pickering-Garcetti* test applied to teachers regarding conversations surrounding race directly conflicts with the overwhelming case law that supports preserving academic freedom regarding classroom instruction that promotes ideas and open dialogue.[140] The test is contradictory to the right to academic freedom and the right to receive

128. *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 343 (6th Cir. 2010).
129. 624 F.3d 332 (6th Cir. 2010).
130. *Id.* at 334.
131. *Id.* at 334–35.
132. *Id.* at 335.
133. *Id.*
134. *Evans-Marshall*, 624 F.3d at 335.
135. *Id.*
136. *Id.* at 338 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).
137. *Id.* at 339 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).
138. *Id.* at 340; *see also* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
139. *See Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).
140. *See id.* at 438–39; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

information, both of which are well established doctrines.[141] For example, in *Keyishian v. Board of Regents*,[142] appellants were faculty members of a state university who were required by state law to sign a certificate asserting that they were not members of the Communist Party.[143] Appellants were instructed that failure to do so would result in their dismissal.[144] The Court held in favor of the faculty, reasoning that the country is "deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[145] The Court further noted "[t]hat freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[146]

Thus, it cannot be the case that public school teachers are restricted in their speech while acting within their professional duties if, at the same time, they have the duty of fostering an environment to stimulate authentic discussions in the classroom.[147] America's public schools have been recognized by the Supreme Court to be "the nurseries of democracy."[148] In *Mahoney Area School District v. B.L.*,[149] the Supreme Court held that a student's off-campus speech regarding cheerleading was protected by the First Amendment, reasoning that America's public schools foster an environment where democracy is born.[150]

> [T]he school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. [The United States'] representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known

141. *See Garcetti*, 547 U.S. at 438–39 (Souter, J., dissenting); Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982).
142. 385 U.S. 589 (1967).
143. *Id.* at 592.
144. *Id.*
145. *Id.* at 603.
146. *Id.*
147. *See Keyishian*, 385 U.S. at 603; Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
148. Mahoney Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).
149. 141 S. Ct. 2038 (2021).
150. *Id.* at 2042, 2046, 2048.

> aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'[151]

Adequate instruction includes teaching about history and race relations unapologetically; thus, it is inconsistent for an educator to be limited in their instruction on race discussions in the classroom if they are acting in their capacity as a teacher while being held responsible for properly educating America's youth.* For the First Amendment to adequately protect the freedom of expression, it should extend to ideas that promote academic freedom and the right to receive information in the classroom.[152] In *Board of Education v. Pico*,[153] school board members attended a conference sponsored by a politically conservative organization where they obtained lists of books described as "objectionable."[154] Some of these books were held in two school libraries within the school district, and the board responded by directing that the books be removed from the schools pending board review, reasoning that such books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[155] Students brought suit, alleging that the board violated their First Amendment rights.[156] The Court explained that their precedents have held that the role of the First Amendment is to "foster[] individual self-expression" and that it affords "public access to discussion, debate, and the dissemination of information and ideas."[157] In asserting that the school board had violated the students' First Amendment rights, the Court reasoned that access to diverse ideas prepares students for active participation in society and that the Constitution ensures that no state officials shall direct the orthodoxy "in politics, nationalism, religion, or other matters of opinion."[158] Although the school board retains discretion to regulate the content contained in school libraries, that discretion may not be exercised in a narrow manner in order to conform to a partisan or political interest.[159] *Pico* established that school boards may not deprive students of access to information merely because they dislike certain ideas, and that if it is the school board's intention to

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151. *Id.* at 2046.
152. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982).
153. 457 U.S. 853 (1982).
154. *Id.* at 856.
155. *Id.* at 857 (quoting Pico v. Bd. of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).
156. *Id.* at 859.
157. *Id.* at 866 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)).
158. *Pico*, 457 U.S. at 868, 872 (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
159. *See id.* at 870.

do so, they will be in violation of the Constitution.[160] The Court established that "access to ideas makes it possible for citizens . . . to exercise their rights of free speech and press in a meaningful manner, [which] prepares students [to be] active [members of] pluralistic, often contentious society in which they will soon be adult members."[161] For students to be adequately equipped to be members of society with proper knowledge and skills on how inequality and race operate in society, it must be the case that open dialogues about race in society are constitutionally protected.[162] When teachers are not limited in their discussions regarding systemic racism and justice, students are better equipped to understand the foundations of American society and the origins of inequality.[163] Students are in the best position to begin to tackle the systems that build barriers to opportunities when race-based discussions and accurate instruction about history take place in the classroom.[164] Silencing discussions that are rooted in racial equity is inconsistent with the doctrines that are well established in case law.[165] For example, the court's reasoning in *Brown v. Board of Education*[166] established that education "is the very foundation of good citizenship" and that it is critical to "awakening the child to cultural values . . . ."[167]

The test outlined in *Garcetti* ignores the fact that public employees, more specifically public school teachers, possess information worth disseminating, which warrants constitutional protection.[168] If public school teachers are prohibited from speaking on matters of concern to the public, even if they are speaking in their capacity as public school teachers, the community would be deprived of informed opinions on important societal issues.[169] It is well understood that in American public schools, students build the knowledge and skills necessary to improve public life and to enter society as dynamic and well-versed individuals.[170] In order to do so, students must accurately understand the United States' history, society, and rich diversity.[171] In order to sustain

160. *Id.* at 871, 872.
161. *Id.* at 868.
162. *See Teaching About Racism Is Essential for Education*, *supra* note 95.
163. *See id.*
164. *See id.*
165. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
166. 347 U.S. 483 (1954).
167. *Id.* at 493.
168. *See* Garcetti v. Ceballos, 547 U.S. 410, 419–20 (2006) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 572, 573 (1968)).
169. *See id.* at 420; United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 470 (1995).
170. *E.g.*, POLLOCK ET AL., *supra* note 76, at vi.
171. *Id.*

classrooms that have fact-driven curricula that accurately recite the history and culture of America, teachers must be able to freely hold classroom discussions related to race and racism.*

VII. FOURTEENTH AMENDMENT VIOLATION

A. *Void for Vagueness*

Laws across the United States that aim to ban the teaching of critical race theory in public schools are largely, if not completely, unclear in the behavior they seek to prohibit.[172] These laws invoke the "void-for-vagueness" legal doctrine, which rests on the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.[173] The doctrine holds that a law is invalid if it does not specify what is required or what conduct is punishable.[174] More specifically, in reference to the First Amendment, a facial challenge to a state law asserting vagueness holds that the law lacks specificity such that individuals are unable to decipher whether or not their behavior is in violation of the law.[175] For example, in *Reno v. ACLU*,[176] the Court examined whether the anti-indecency provisions enacted to protect minors from "indecent" and "patently offensive" communications on the internet violated the First Amendment.[177] In finding that the Communications Decency Act ("CDA") violated the First Amendment, the Court reasoned that the language of the Act provoked uncertainty and was far too vague for readers to understand the standard being applied.[178] The Court established that, under the First Amendment, there is a level of precision required when a statute regulates the content of speech and, if not narrowly tailored, such statutes violate the First Amendment.[179] In *Keyishian*, the Supreme Court also explored whether a state law was overbroad.[180] The Court held that the state law was unconstitutional for being overbroad and reasoned that laws restricting speech may be crafted with narrow specificity.[181] The Supreme Court explained that "[w]hen one must guess

172. *See* Schwartz, *supra* note 4.
173. Philip A. Dynia, *Vagueness*, FIRST AMEND. ENCYC., http://www.mtsu.edu/first-amendment/article/1027/vagueness (last visited Nov. 6, 2022).
174. *Id.*
175. *Id.*
176. 521 U.S. 844 (1997).
177. *Id.* at 849.
178. *Id.* at 870–71.
179. *See id.* at 874.
180. Keyishian v. Bd. of Regents, 385 U.S. 589, 595 (1967).
181. *Id.* at 604, 609.

what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone.'"[182]

Legislation introduced and passed relating to critical race theory generally describes the same sweeping language.[183] Toolkits and memorandums alike can be the reason for such shared language across the board.[184] The language contained in the bills "fails to provide [reasonable] notice of what [teachers] can and cannot include in their courses . . . ."[185] Further, much of the language mirrors the language in former President Trump's Executive Order ("Order") issued in 2020.[186] The California Northern District Court partially struck down the Order, reasoning that the Order was void for vagueness because it infringed on the plaintiff's constitutionally protected right to free speech and did not raise proper notice of the conduct it sought to prohibit.[187] Opponents argue that vague language, which does not explicitly define prohibited speech with specificity, puts the livelihood of teachers at risk.[188] They further argue that, without proper notice, teachers risk losing their jobs or facing disciplinary action for teaching about historical events and notable figures who may subscribe to the viewpoints outlined in the laws, regardless of whether they are denouncing certain positions or simply holding discussions objectively.[189] Additionally, they argue that much of the language contained in anti-critical race theory bills across the United States prohibits discussion regarding unconscious bias and systemic racism.[190] Notably, studies have shown that such concepts are "innate to the human experience" and that these discussions create more inclusive spaces for historically marginalized students.[191]

182. *Id.* at 604 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

183. POLLOCK ET AL., *supra* note 76, at 17; *see also, e.g.*, GA. CODE ANN. § 20-1-11(a) (2022); H.B. 564, 2021 Leg., Reg. Sess. (La. 2021).

184. POLLOCK ET AL., *supra* note 76, at 34.

185. Amended Complaint at 67, Black Emergency Response Team v. O'Connor, No. 5:21-cv-1022-G (W.D. Okla. Nov. 9, 2021), ECF No. 50.

186. *See* Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 28, 2020); Memorandum from Russell Vought to Heads of the Exec. Dep'ts & Agencies, *supra* note 63; *e.g.*, GA. CODE ANN. § 20-1-11(a); La. H.B. 564.

187. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 545 & n.3 (N.D. Cal. 2020).

188. Amended Complaint, *supra* note 185, at 24.

189. *See id.* at 24, 67.

190. *See id.* at 22; POLLOCK ET AL., *supra* note 76, at 6.

191. Amended Complaint, *supra* note 185, at 5.

B. *Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[192] If a state law is not discriminatory on its face, it may still be unconstitutional if its enactment was motivated by a discriminatory purpose.[193] A plaintiff does not have to prove that the discriminatory purpose was the sole purpose, but rather only that it was a motivating factor.[194] In *Village of Arlington Heights v. Metropolitan Housing*,[195] the Supreme Court provided factors that a court should consider when analyzing whether a defendant acted with a discriminatory purpose, which includes: "(1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision; (3) the specific sequence of events leading to the challenged action; (4) the defendant's departures from normal procedures or substantive conclusions; and (5) the relevant legislative or administrative history."[196]

The Ninth Circuit employed this analysis in 2015 in *Arce v. Douglas*.[197] In *Arce*, the school board of Tucson initiated a Mexican American Studies ("MAS") program in public schools in an effort to promote education about Mexican cultural heritage for the students of the district—the majority of whom are of Mexican or other Hispanic descent.[198] The Arizona legislature passed House Bill 2281 ("HB 2281"), which eliminated the MAS program and prohibited a school district or charter school from including in the school curriculum any classes that: (1) "promote the overthrow of the United States government," (2) "promote resentment toward a race or class of people," (3) "are designed primarily for pupils of a particular ethnic group," or (4) "advocate ethnic solidarity instead of the treatment of pupils as individuals."[199] Applying the standard in *Arlington*, the Ninth Circuit found that the enactment of HB 2281 had a disproportionate impact on Mexican American students.[200]

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192. U.S. CONST. amend. XIV, § 1.

193. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

194. *Id.* at 265.

195. 429 U.S. 252 (1977).

196. Acre v. Douglas, 793 F.3d 968, 977 (9th Cir. 2015) (citing *Vill. of Arlington Heights*, 429. U.S. at 266–68).

197. 793 F.3d 968, 977 (9th Cir. 2015).

198. *Id.* at 973.

199. H.B. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010); *Arce*, 793 F.3d at 973.

200. *See Arce*, 793 F.3d at 978; *Vill. of Arlington Heights*, 429 U.S. at 266, 267, 268.

In a study conducted by UCLA, it was found that 35.46% of the school districts impacted by the campaign to ban instruction of critical race theory in public schools fell into the "Majority Students of Color" category, while 46.87% of the school districts fell into the "Racially Mixed Majority White" category.[201] This means that students in "Majority Students of Color" districts could largely be limited in their education about issues of race and diversity in history and present-day America.[202] Although students from all different backgrounds alike benefit from learning about such topics, opponents of critical race theory bans assert that Black students are disproportionately disadvantaged by such bans.[203] Opponents further address that curriculum that is under attack largely closes the existing achievement gaps among minorities.[204] Research has shown that curriculum focused on culturally responsive teaching, or teaching that engages learners whose experiences and cultures are typically ignored in mainstream education, is critical to fostering engagement and deep, meaningful learning.[205] States are required to meet academic content standards for math and reading, but not for social studies and United States history.[206] This means that teaching about subjects such as the institution of slavery or chilling parts of America's history goes unguided.[207] There exists widespread illiteracy among students regarding their understanding of slavery; for example, in a 2017 survey of over 1,700 social-studies teachers and 1,000 high-school seniors, more than a third of survey respondents thought that the Emancipation Proclamation formally ended slavery.[208] Opponents of critical race theory bans assert that censoring inclusive discussions causes disproportionate injury to students of color, who already do not receive adequate representation in educational curricula, because they do not see their communities reflected in the curricula, resulting in less engagement and interactivity at school.[209]

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201. POLLOCK ET AL., *supra* note 76, at 93.

202. *See id.* at 92.

203. Amended Complaint, *supra* note 185, at 62.

204. *See id.*

205. *See id.*; *Understanding Culturally Responsive Teaching*, NEW AM., http://www.newamerica.org/education-policy/reports/culturally-responsive-teaching/understanding-culturally-responsive-teaching/ (last visited Nov. 6, 2022).

206. Nikita Stewart, *'We Are Committing Educational Malpractice': Why Slavery Is Mistaught – and Worse – in American Schools*, N.Y. TIMES, http://www.nytimes.com/interactive/2019/08/19/magazine/slavery-american-schools.html (Nov. 9, 2021).

207. *See id.*

208. *Id.*; KATE SHUSTER, SW. POVERTY L. CTR., TEACHING HARD HISTORY: AMERICAN SLAVERY 22 (Maureen Costello ed., 2018).

209. Amended Complaint, *supra* note 185, at 63.

VII. APPLICATION TO FLORIDA LAW

Florida's "Stop W.O.K.E. Act" took effect on July 1, 2022, and its effects have since been felt throughout the state.[210] The same month, the University of Central Florida removed anti-racist statements from some of the university's academic departments' websites in an effort to maintain compliance with the new state law.[211] The website stated, "we acknowledge the key place of the university as a site of struggle for social justice and are committed to addressing the problem of anti-Blackness, white supremacy, and all forms of implicit and explicit racism in our professions, wherever we find it, even if in our own department."[212]

Although the Florida law does not mention critical race theory by name, the legislation was a part of Governor Ron DeSantis' efforts to keep critical race theory out of schools.[213] In a meeting with the State Board of Education, DeSantis named several examples of what he deemed to be critical race theory, including an occurrence where "Seattle Public Schools told teachers that the education system is guilty of 'spirit murder' against black children and that white teachers must 'bankrupt [their] privilege in acknowledgement of [their] thieved inheritance.'"[214] This illustrates the misconceptions of what the academic framework of critical race theory actually encompasses.[215] Florida law ensures that "all K-12 public school students are entitled to a uniform, safe, secure, efficient, and high quality system of education, one that allows students the opportunity to obtain a high quality education."[216] Florida law also guarantees that "[a]ll education programs . . . must be made available without discrimination on the basis of race, ethnicity, national origin, gender, disability, religion, or marital status . . . ."[217] The State of Florida thus recognizes the importance of guaranteeing a meaningful education for its students free from discrimination,

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210. Susan Svrluga, *Florida University Removes Some Anti-Racism Statements, Worrying Faculty*, WASH. POST, http://www.washingtonpost.com/education/2022/07/14/ucf-anti-racism-statements-removed/ (July 14, 2022, 3:04 PM); *see also* FLA. STAT. § 1000.05(4)(a) (2022).

211. *See* Svrluga, *supra* note 210.

212. *Id.*

213. *See* Press Release, Ron DeSantis, Governor of Fla., Governor DeSantis Emphasizes Importance of Keeping Critical Race Theory Out of Schools at State Board of Education Meeting (June 10, 2021), http://www.flgov.com/2021/06/10/governor-desantis-emphasizes-importance-of-keeping-critical-race-theory-out-of-schools-at-state-board-of-education-meeting/.

214. *Id.*

215. *See id.*; Iati, *supra* note 56; Tiana Headley, *Laws Aimed at Critical Race Theory May Face Legal Challenges*, BLOOMBERG L., http://news.bloomberglaw.com/us-law-week/laws-curbing-critical-race-theory-may-face-legal-challenges (July 7, 2021, 10:24 AM).

216. FLA. STAT. § 1002.20(1) (2022).

217. *Id.* § 1002.20(7).

and HB 7 goes against the well-established principles carved out in Florida law due to its sweeping effects.[218]

According to the Florida Department of Education's reports, approximately twenty-one percent of students enrolled in Florida public schools are Black or African American.[219] Thus, the Florida law has wide-reaching effects.[220] Applying the *Arlington Heights* standard, the impact of the Florida law "bears more heavily on one race than another;" thus, it violates the Equal Protection Clause of the Fourteenth Amendment.[221] Individuals who identify as "'Black[]' are more likely than [others] to say that their race is central to their identity" and how they see themselves in the world.[222] Thus, restricting instruction on race-related subjects, such as Black history, more heavily impacts this group than others.[223] According to a study by the Pew Research Center, the majority of Black Americans say that they have experienced discrimination because of their race or ethnicity, and a majority of Black Americans find that race relations in the United States are generally bad.[224] Thus, opponents argue that legislation that interferes with the ability of public school teachers to promote race consciousness and teach Black history to improve students' understanding of how America stands where it is today has a disparate effect on Black students.[225] Opponents assert that the purpose and effect of the Florida law banning critical race theory in public schools is to treat classroom discussions related to race different than any other fundamental concept taught in schools.[226] This effectively violates the constitutional guarantee of Equal Protection under the law because, due to the law's lack of clarity, teachers are restricted from covering certain topics involving race out of fear of disciplinary action or termination.[227]

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218. *See id.*; Fla. CS for HB 7.

219. *See* FLA. DEP'T EDUC., FLORIDA ENROLLMENT/MEMBERSHIP BY GRADE BY RACE/ETHNICITY 2021-22, SURVEY 2 (AS OF DECEMBER 23, 2021) (2021), http://www.fldoe.org/core/fileparse.php/7584/urlt/2122MembBySchoolByGradeByRace.xlsx.

220. *See id.*

221. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265, 266 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

222. JULIANA MENASCE HOROWITZ ET AL., PEW RSCH. CTR., RACE IN AMERICA 2019, at 13 (2019), http://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2019/04/Race-report_updated-4.29.19.pdf.

223. *See id.*; *Understanding Culturally Responsive Teaching*, *supra* note 205.

224. HOROWITZ ET AL., *supra* note 222, at 13, 17.

225. *See* Amended Complaint, *supra* note 185, at 72–73.

226. *See id.*

227. *See* Headley, *supra* note 215.

The Florida law's ambiguity furthers its discriminatory effect, such that teachers are unable to decipher what their curriculum may or may not include.[228] It prohibits:

> [I]nstruction that espouses, promotes, advances, inculcates, or compels [a] student . . . to believe [that] [a] person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.[229]

It also prohibits teaching that compels a student to think that "[a] person, by virtue of his or her race, color, national origin, or sex, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex."[230] The vagueness of the law has the potential to ban any discussion that may cause an individual to believe that any of the preceding concepts are true.[231]

Topics regarding slavery, racial oppression, racial discrimination, and segregation all have the potential to cause an emotional reaction from students, and opponents argue that such reactions will now have the potential to give rise to lawsuits under Florida law.[232] The classroom is an open space for discourse and conversations, which sometimes may be difficult spaces for students.[233] This law has the potential to open a floodgate of litigation and allow many litigants, most of whom would be parents, to bring claims against schools and teachers when teachers are only going as far as teaching United States history, which could overwhelm the courts.[234] Further, according to the State Board of Education Rules in Florida, instruction on topics "such as the Holocaust, slavery, the Civil War and Reconstruction, the civil rights movement and the contributions of women, African American and Hispanic people to our country . . . " "must be factual and objective, and may not suppress or distort significant historical events."[235] Thus, this rule promulgated by the Florida Department of Education is evidently in conflict with section 1000.05 of the Florida Statutes because significant historical events told accurately bear the potential to have a

228. *See id.*
229. FLA. STAT. § 1000.05(4)(a)(7) (2022).
230. *Id.* § 1000.05(4)(a)(5).
231. *See id.* § 1000.05(4)(a)(5), (7).
232. *See* Amended Complaint, *supra* note 185, at 25–26.
233. *See id.*
234. *See id.* at 30, 31.
235. FLA. ADMIN. CODE ANN. r. 6A-1.094124 (2022).

strong, emotional impact on students.[236] Under the Florida law, these discussions cannot be held if they cause a student to believe that a person, due to their race, color, or national origin, must feel some form of psychological distress because of actions committed in the past by members of that person's same race, color, or national origin.[237] The law also fails to define the terms: "espouses," "promotes," "advances," "inculcates," and "compels," which is especially troublesome in an academic environment where any classroom instruction by a teacher can be received differently depending on the interpretation of the student.[238] Because of this language, the law has a broad scope and reaches protected expression; thus, it is void for vagueness.[239]

Moreover, the law chills free speech in the classroom.[240] The law's ban on instruction that causes an individual "psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex" is in direct violation of *Tinker*, where the Court explained the value of openness in education and how it is the "basis of our national strength."[241] The Court provided that any departure from uniformity in our society may cause discomfort but that the Constitution says it is a risk to be taken.[242]

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But [the] Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[243]

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236. *See id.*; FLA. STAT. § 1000.05(4)(a); Amended Complaint, *supra* note 185, at 25–26.

237. FLA. STAT. § 1000.05(4)(a)(7); *see also* Amended Complaint, *supra* note 185, at 25–26.

238. *See* FLA. STAT. § 1000.05(4)(a).

239. *See* Headley, *supra* note 215.

240. *See id.*

241. *See* FLA. STAT. § 1000.05(4)(a)(7); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969).

242. *See Tinker*, 393 U.S. at 508.

243. *Id.* at 508–09 (citation omitted).

Opinions that spur controversy may arise in classroom discussions, which is what deems the classroom the "marketplace of ideas."[244] By limiting instruction related to race and racism, the American values that promote academic freedom, which are recognized by the courts, will be defeated.[245] The courts overwhelmingly denounce prohibiting the expression of opinions, and such opinions that may cause a specific reaction may be within the scope of instruction that the law bans.[246] Additionally, large parts of Florida's uncomfortable history with issues of race go largely ignored in the classroom as is.[247] On November 2, 1920, the same day that women were able to vote for the first time in the United States, Florida experienced the worst instance of Election day violence.[248] A Black man named Mose Norman was turned away at the polls.[249] When he returned to the polls to take note of the individuals who had denied him his right to vote, as instructed by an attorney, he incited a mob of white men, many of whom were involved with the Ku Klux Klan.[250] During the violence, the mob targeted Julius "July" Perry, beat him, shot him, and lynched him.[251] The mob murdered between thirty to sixty Black residents, and "[w]ithin one year of the massacre, all Black residents [had been] driven out of Ocoee."[252] Much of America's dark history may cause discomfort or shame, and it is a natural response.[253] Until the Supreme Court reviews the constitutionality of anti-critical race theory legislation, widespread uncertainties will exist among America's educators and much of America's dark history will remain ignored.[254]

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244. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

245. *See id.*

246. *See id.*; W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Bd. of Educ. v. Pico, 457 U.S. 853, 870 (1982).

247. Kirk Bailey & Zuri Davis, *Historical Erasure Is Dangerous for Democracy. A New Florida Law Would Erode Students' Fundamental Right to Learn History Accurately*, ACLU OF FLA. (May 3, 2022, 12:30 PM), http://www.aclufl.org/en/news/historical-erasure-dangerous-democracy-new-florida-law-would-erode-students-fundamental-right.

248. Gillian Brockell, *A White Mob Unleashed the Worst Election Day Violence in U.S. History in Florida a Century Ago*, WASH. POST (Nov. 2, 2020, 7:00 AM), http://www.washingtonpost.com/history/2020/11/02/ocoee-florida-election-day-massacre/.

249. Bailey & Davis, *supra* note 247.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *See* Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring*, WASH. POST (Feb. 14, 2022, 6:00 AM), http://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/.