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## Essay

# Fighting Orthodoxy: Challenging Critical Race Theory Bans and Supporting Critical Thinking in Schools

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National unity as an end which officials may foster by persuasion and example is not in question . . . . Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men . . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. . . . 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. —Justice Robert H. Jackson<sup>1</sup>

Orthodoxy means not thinking—not needing to think. Orthodoxy is unconsciousness. —George Orwell<sup>2</sup>

## INTRODUCTION

Fox News mentioned critical race theory (CRT) more than 1,900 times from April to mid-July of 2021,<sup>3</sup> marking CRT as a new focus of

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1. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–42 (1943).
2. GEORGE ORWELL, 1984, at 68 (Planet E-books ed.), <https://www.planetebook.com/free-ebooks/1984.pdf> [<https://perma.cc/7CJ8-NHC4>].
3. Lis Power & Rob Savillo, *Fox News' Obsession with Critical Race Theory, by the Numbers*, MEDIA MATTERS FOR AM. (July 14, 2021), <https://www.mediamatters.org/fox-news/fox-news-obsession-critical-race-theory-numbers> [<https://perma.cc/T8Y3-N7H4>].

Republicans and conservative donors<sup>4</sup> and sparking a movement to ban teaching of the theory in schools.<sup>5</sup> Nine states have already passed legislation intended to ban the teaching of CRT, and nineteen states are considering similar legislation.<sup>6</sup> The state school boards in four additional states have introduced new guidelines prohibiting race-related discussions;<sup>7</sup> and, by some counts, as many as twenty-four other states have seen some kind of effort to restrict education on racism, bias, or the history of some ethnic or racial groups.<sup>8</sup> Several local school boards have adopted their own bans,<sup>9</sup> and federal bills have

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4. See, e.g., The Daily, *The School Board Wars, Part 2*, N.Y. TIMES, at 21:05–42:31 (Nov. 17, 2021), <https://www.nytimes.com/2021/11/17/podcasts/the-daily/school-board-bucks-county.html> [<https://perma.cc/X7KE-FDU3>] (interviewing one wealthy conservative donor who describes a new focus on school board elections to build a base of “apolitical people” who can be used for political advantage in future elections and linking this focus on schools to elections to higher office such as the Virginia governor’s race in 2021).

5. See Power & Savillo, *supra* note 3.

6. See Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory> [<https://perma.cc/9UDG-J3A2>]. Legislation passed in Arizona is no longer in effect because it was overturned by the Arizona Supreme Court for violating the “single subject rule.” See *Ariz. Sch. Boards Ass’n, Inc. v. State*, 501 P.3d 731 (Ariz. 2022).

Not all states explicitly state that their goal is to ban CRT or name CRT in their legislation, but the intent of each state to ban what legislators view as CRT is clear in each state’s legislation—whether explicitly named or not. For this reason, whenever I use phrases such as “statutes that ban CRT” or “CRT bans,” I am referring both to statutes that explicitly name CRT as the intended target and to statutes that do not explicitly refer to CRT but have similar or identical legislative intent.

7. Ray & Gibbons, *supra* note 6.

8. See Cathryn Stout & Thomas Wilburn, *CRT Map: Efforts to Restrict Teaching 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> [<https://perma.cc/QYR9-HJP5>].

9. See Kristal Dixon, *Cobb County School Board Bans Teaching Critical Race Theory*, ATLANTA J.-CONST. (June 10, 2021), <https://www.ajc.com/news/atlanta-news/cobb-county-school-board-bans-teaching-critical-race-theory/WSPF6NAVZJC2PNPBAPD7SCXOXE> [<https://perma.cc/ESN2-VJN1>] (Cobb County, GA); WSBTV.com News Staff, *‘Their Own Language Is Confusing:’ District Votes Against Allowing Critical Race Theory*, WSB ATLANTA (May 21, 2021), <https://www.msn.com/en-us/news/us/their-own-language-is-confusing-chokeee-co-school-board-votes-against-adopting-critical-race-theory/ar-AAKdwYe> [<https://perma.cc/7EYG-6F7K>] (Cherokee County, GA); Port City Daily Staff, *Brunswick School Board Passes Policy to Prevent ‘Bias in Teaching,’ Ban Critical Race Theory*, PORT CITY DAILY (June 10, 2021), <https://portcitydaily.com/local-news/2021/06/10/brunswick-school-board-passes-policy-to-prevent-bias-in-teaching-ban-critical-race-theory> [<https://perma.cc/H54G-XWRH>] (Brunswick County, NC); Madeline Mitchell, *Why Did Gallatin County Schools Ban Critical Race Theory? No One ‘Is Inherently Racist’*, CINCINNATI ENQUIRER (June 17,

been introduced as well.<sup>10</sup> Most of the legislation passed and proposed mirrors language contained in an executive order by former-President Trump that attempted to ban specific concepts that many conservatives believe are being taught by radical leftist teachers.<sup>11</sup> Though this order has been partially struck down by a federal court as unconstitutionally vague,<sup>12</sup> the state legislation remains.

Some principals and teachers pursuing educational best-practices for their students have already been fired or forced to resign.<sup>13</sup> And after less than two years, examples of widespread confusion and fear among teachers are numerous—leading teachers to begin self-censoring.<sup>14</sup> Students are now genuinely at risk of being left with a

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2021), <https://www.cincinnati.com/story/news/2021/06/17/gallatin-county-schools-superintendent-banning-critical-race-theory/7734193002> [<https://perma.cc/S36U-93SF>] (Gallatin County, KY).

10. See Saving American History Act of 2021, H.R. 3810, 117th Cong. (2021); Ending Critical Race Theory in D.C. Public Schools Act, H.R. 3937, 117th Cong. (2021); Stop CRT Act, S. 2346, 117th Cong. (2021); S. Con. Res. 14, 117th Cong. § 3024 (2021) (as agreed to in the Senate, August 10, 2021, and in the House, August 24, 2021) (“prohibiting or limiting Federal funding from being used to promote critical race theory or compel teachers or students to affirm critical race theory in prekindergarten programs, elementary schools, and secondary schools”); Protect Equality and Civics Education (PEACE) Act, S. 2682, 117th Cong. (2021); Protecting Students from Racial Hostility Act, S. 2574, 117th Cong. (2021).

11. See Exec. Order No. 13,950, 85 Fed. Reg. 60,683, 60,685 (Sept. 28, 2020), <https://www.federalregister.gov/documents/2020/09/28/2020-21534/combating-race-and-sex-stereotyping> [<https://perma.cc/S47D-V7MZ>].

12. See *Santa Cruz Lesbian Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 543, 549 (2020). “Partially struck down” here is used as shorthand for the court having enjoined enforcement of sections four and five of Executive Order 13,950, which apply the ban to federal contractors and grantees.

13. See, e.g., Bianca Marais, *Sullivan County School Board Approves Teacher Termination Charges, Supporters Outraged*, WJHL (June 9, 2021), <https://www.wjhl.com/news/local/sullivan-county-teacher-facing-termination-at-school-board-meeting-tuesday-supporters-to-gather> [<https://perma.cc/W7BF-U4EP>] (teacher fired for assigning Ta-Nehisi Coates article “The First White President” and showing a video of a spoken-word poem by Kyla Lacey entitled “White Privilege” in his Contemporary Issues class); Antonia Hylton, Emily Berk, & Alicia Victoria Lozano, *Texas Principal Forced to Resign over Critical Race Theory*, YAHOO! NEWS (Nov. 10, 2021), <https://news.yahoo.com/texas-principal-forced-resign-over-005339525.html> [<https://perma.cc/ZD9N-BG6F>]; 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/?utm\\_source=instagram&utm\\_medium=social&utm\\_campaign=wp\\_main&cr18\\_id=da873819-1040-46d9-8244-946c5a2de8da](https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory/?utm_source=instagram&utm_medium=social&utm_campaign=wp_main&cr18_id=da873819-1040-46d9-8244-946c5a2de8da) [<https://perma.cc/F4RC-KGDN>].

14. See, e.g., 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> [<https://perma.cc/W2U3-DGC4>].

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school environment devoid of cultural affirmation that inadequately supports development of critical reasoning skills. This movement is more than a mere symbolic move in the ongoing culture wars as America struggles with its evolving identity and is forced to reckon with the enduring legacy of racist policymaking. It will have significant consequences for the next generation.

This Essay begins by surveying the new legislation and describing the common features among each state's CRT ban. It then provides a broad overview of some potential constitutional challenges to the legislation, including First Amendment and Fourteenth Amendment challenges, and addresses the possibility of a justiciability defense. Focusing on the need to show harm to students—not just teachers—this Essay next outlines two specific harms to students that have arisen or are likely to arise from the legislation and from its chilling effect: harm to culturally sustaining pedagogy and critical reasoning skills. Finally, this Essay examines these harms by reviewing a portion of the literature on culturally sustaining pedagogy and examining how new social studies standards in Minnesota—as a prototypical example of educational best-practices—might conflict with anti-CRT legislation. This discussion may serve as a starting point for litigators challenging CRT legislation who need to articulate the harms caused by the legislation and identify viable challenges.

### I. THE LEGISLATION

Though much of the statutory text in anti-CRT legislation is uncontroversial—banning ideas that have been rejected by a supermajority of Americans—some prohibitions could present real issues for educators if interpreted broadly. If courts interpret prohibitions using the plain meaning of the statutory text, most of what the average educator teaches and discusses is not banned; but, if courts interpret the prohibitions broadly, many state statutes may be read to ban even objective accounts of historical events involving conflict along lines of identity. Thus, at least until courts and administrative agencies have defined the banned concepts with more specificity, the chilling effect of the legislation alone presents strong disincentives to instruction on important academic topics.<sup>15</sup>

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15. This Essay does not suggest that CRT is an academic topic that should be taught to K-12 students. Rather, this Essay is concerned primarily with students' opportunity to learn about non-CRT topics that are clearly important for students to learn, non-exhaustively: the history of communities of color and gender and sexual minorities; literature written by or about people of color and gender and sexual minorities; and social science research related to race, gender, and sexuality.

## A. BANNED IDEAS

Most of the actual statutory text describing the concepts that legislatures intend to ban should probably be uncontroversial even to CRT supporters, so long as they are read literally. The Arizona statute provides an appropriate example, as it includes a list of banned ideas similar to most other states' bans,<sup>16</sup> and it mirrors the Trump administration's executive order closely.<sup>17</sup> It begins with a blanket ban on "blame or judgment on the basis of race, ethnicity, or sex," and defines that phrase as:

1. One race, ethnic group or sex is inherently morally or intellectually superior to another race, ethnic group or sex.
2. An individual, by virtue of the individual's race, ethnicity or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously.
3. An individual should be invidiously discriminated against or receive adverse treatment solely or partly because of the individual's race, ethnicity or sex.
4. An individual's moral character is determined by the individual's race, ethnicity or sex.
5. An individual, by virtue of the individual's race, ethnicity or sex, bears responsibility for actions committed by other members of the same race, ethnic group or sex.
6. An individual should feel discomfort, guilt, anguish or any other form of psychological distress because of the individual's race, ethnicity or sex.
7. Meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race, ethnic group or sex to oppress members of another race, ethnic group or sex.<sup>18</sup>

Even the most ardent CRT supporters are unlikely to take issue with banning the teaching that many of these ideas are *true*. For example, CRT supporters certainly do not want students to think one class of people is morally or intellectually superior or should be discriminated against because of their identity. Though ideas five, six, and seven may come closer to actual beliefs of CRT proponents, Richard Delgado and Jean Stefancic—two of the foremost CRT proponents—list none of these ideas when describing the most critical tenets of CRT.<sup>19</sup>

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16. See ARIZ. REV. STAT. § 41-1494 (2021); see also IOWA CODE §§ 261H.8, 279.74 (2021) (containing a near-identical list); OKLA. STAT. tit. 70, § 24-157(B)(1) (2021) (same); H. 4100, 2021 Gen. Assemb., 124th Sess. § 1.105 (S.C. 2021) (same); N.H. REV. STAT. ANN. § 193:40 (2021) (containing similar language).

17. See Exec. Order No. 13,950, *supra* note 11.

18. ARIZ. REV. STAT. § 41-1494(D) (2021).

19. See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 7–10 (3d ed. 2013).

The legislation, limited to banning the teaching of these ideas, therefore does not actually ban the core tenets of CRT, namely that: racism is ordinary and every day, White people benefit from racism and thus have little incentive to eliminate it, race is a social construction, the ways different groups are racialized change over time, no person has a single unitary identity, and White people are unlikely to understand or communicate racism in the same way that it is experienced by people of color.<sup>20</sup> The only provision that, on its face, comes close to a core CRT theory is a Tennessee provision banning the concept that “[t]he rule of law does not exist, but instead is a series of power relationships and struggles among racial or other groups . . . .”<sup>21</sup>

However, CRT supporters and educators who support educational best practices such as culturally sustaining pedagogy (who I call “culturally sustaining educators”)<sup>22</sup> may still take issue with a few specific banned concepts. For example, CRT supporters may disagree with banning the idea that a group member might bear some “responsibility” for the actions of members of their group because, interpreted broadly, banning the idea suggests that group members bear *no* responsibility for the sins of the past—i.e., that White people have no duty to eliminate the vestiges of racism. But this phrase on its face does not ban teaching that there were *in fact* actions committed in the past by members of a group. Likewise, banning the idea that “[a]n individual . . . is inherently racist, sexist or oppressive” does not facially ban teaching examples of racist or sexist behavior or the history of racist or sexist policymaking.

Thus, these concepts—so long as they are narrowly construed—are probably unobjectionable even to CRT supporters. Yet, many statutes will not be interpreted narrowly.

#### B. AMBIGUOUS PROVISIONS & PROVISIONS OPEN TO BROAD INTERPRETATION

Some states appear to ban only intentionally instructing that a concept is *true*, not that the concept exists and has motivated historical and contemporary policies and practices. For example, Idaho bans

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20. *See id.*

21. TENN. CODE ANN. § 49-6-1019(a)(12) (2021).

22. Culturally sustaining educators may or may not support CRT specifically but do support educational best practices that involve affirming, exploring, and celebrating each student’s unique personality and background. Culturally sustaining education and CRT should not be conflated, which is why I refer to CRT supporters and culturally sustaining educators separately. See Part III.A for more discussion of culturally sustaining pedagogy.

“direct[ing] or otherwise compel[ing] students to personally affirm, adopt, or adhere to” the listed ideas.<sup>23</sup> This seems to only ban advocating for those ideas or asking students to believe in the truth of them—not to ban teaching that those beliefs have been held by others. New Hampshire’s law bans teaching, “instruct[ing], inculcat[ing] or compel[ing] to express a belief in” each of the ideas and lists each concept starting with the word “[t]hat.”<sup>24</sup> In other words, New Hampshire’s law only appears to ban teaching that the concept is *true*, not teaching that concept exists in some people’s belief systems and in history.<sup>25</sup>

Other statutes are far more susceptible to broad interpretations that do not require any intent and could punish teachers for merely teaching that a concept exists without advocating for the truth of the concept. South Carolina’s statute bans materials and practices “that serve to inculcate any of the . . . concepts.”<sup>26</sup> Though, initially, this phrase appears narrow like New Hampshire and Idaho’s bans, common definitions of “inculcate” do not require any intent to cause a belief.<sup>27</sup> Under a broad reading, the statute can be violated inadvertently. If a child has developed a belief as a consequence of a teacher repeating that belief—even when not for the truth of the belief, but only to demonstrate its existence—a teacher could plausibly be found guilty for having inculcated the belief. But South Carolina’s law is only the tip of the iceberg of ambiguity in CRT bans.

Some statutes are blatantly overbroad and confusing. The Oklahoma statute bans “requir[ing]” the banned concepts “or mak[ing]

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23. IDAHO CODE § 33-138(3)(a) (2021).

24. N.H. REV. STAT. ANN. § 193:40 (2021).

25. As the next paragraph discusses, “inculcation” can likely happen inadvertently, lending the statute to broad interpretations that may punish teachers for merely teaching that the idea exists. But New Hampshire’s statute remains narrow because it includes language that clarifies this ambiguity and constrains overbroad interpretations. *See id.* § 193:40(II) (“Nothing in this [statute] shall be construed to prohibit discussing, as part of a larger course of academic instruction, the historical existence of ideas and subjects identified in this section.”). Further, because “inculcate” appears in a list, the canon of construction *noscitur a sociis* likely applies to constrain interpretations of “inculcate” to be read similarly to “instruct” and “compel” which appear to require intent. *See, e.g., Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) (applying *noscitur a sociis* when interpreting a statute).

26. H. 4100, 2021 Gen. Assemb., 124th Sess. § 1.105 (S.C. 2021).

27. *See, e.g., Inculcate*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/inculcate> [<https://perma.cc/V5YV-XLUS>] (“to fix beliefs or ideas in someone’s mind, especially by repeating them often”; “to cause someone to have particular beliefs or values by repeating them frequently”); *Inculcate*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/inculcate> [<https://perma.cc/ACM5-B4R2>] (“to teach and impress by frequent repetitions or admonitions”).

them] part of a course.”<sup>28</sup> Texas uses the language “require or make part of a course.”<sup>29</sup> The Arizona statute is also broad, banning “allow[ing] instruction in [the listed ideas] or mak[ing them] part of a course.”<sup>30</sup> Similarly, the Tennessee statute bans “includ[ing] or promot[ing] the . . . concepts.”<sup>31</sup> Statutes that ban either “including” any of the concepts or “making [any of the concepts] part of a course” are overbroad and could result in the banning of just about any historical event.

For example, one concept—that an individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual’s race or sex—appears in at least five state statutes<sup>32</sup> and is particularly open to a broad interpretation. A court may reasonably hold that the statute covers any teaching of historical events that might cause a student to feel uncomfortable or guilty. Though, facially, it only bans teaching that an individual “should” feel discomfort or anguish, a court could reasonably construe teaching a historical event—especially using primary sources with higher emotional valence—as teaching that an individual should feel discomfort. Though the teacher may not wish for students to feel discomfort or guilt, a court or administrative adjudicator may find that a lesson with the actual effect of engendering these feelings nevertheless taught that students “should” feel that way.<sup>33</sup> Of course, there also may be important texts that more directly state that White students *should* feel guilt for past and current wrongs, and these are even more likely to be banned. This broad interpretation could have dire consequences for educators wishing to teach even the most basic historic events that shed the nation’s history in anything but a falsely rosy light.

28. OKLA. STAT. tit. 70, § 24-157(B)(1) (2021).

29. TEX. EDUC. CODE ANN. § 28.0022(a)(4)(A) (West 2021).

30. ARIZ. REV. STAT. § 15-717.02(B) (2021).

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

32. See TENN. CODE ANN. § 49-6-1019(a)(6) (2021); H. 4100, 2021 Gen. Assemb., 124th Sess. § 1.105(6) (S.C. 2021); OKLA. STAT. tit. 70, § 24-157(B)(1)(g) (2021); IOWA CODE § 261H.8(1)(c)(8) (2021); ARIZ. REV. STAT. § 41-1494(D)(6) (2021).

33. *But see* Response of Defs. to Motion for Preliminary Injunction at 21, Black Emergency Response Team v. O’Connor, No. 5:21-cv-01022 (W.D. Okla. Dec. 16, 2021), ECF No. 61 [hereinafter BERT Response] (“The [Oklahoma] provision doesn’t prohibit teaching lessons that might *cause* discomfort or psychological distress—it prohibits teaching that a student ‘should’ feel discomfort or psychological distress ‘on account of his or her race or sex.’ That is it. In other words, it condemns telling students they *should* feel guilty for being of a certain race. There is an enormous gap between teaching, say, that slavery was an evil perpetrated mostly by white people (permissible) and saying that a young child who is white ‘should’ feel distressed about slavery solely because she is white. Such basic distinctions are not difficult or confusing.”).

A similar analysis applies to a unique additional prohibition found in Tennessee's statute: "[p]romoting division between, or resentment of, a race, sex, religion, creed, nonviolent political affiliation, social class, or class of people."<sup>34</sup> The word "promoting" could reasonably be construed as presenting any historical event or account that might elicit feelings of resentment or division. Thus, teaching about the Civil War—which likely stokes at least some division and resentment among some students, particularly in the southern states—could be banned under a broad interpretation of the provision.

Even many of the narrower statutes are subject to significant danger of overbroad interpretations. Though the Idaho Code only bans "direct[ing] or otherwise compel[ing] students to personally affirm, adopt, or adhere to" the ideas,<sup>35</sup> it ventures into objectionably vague territory by naming CRT explicitly as the source of the ideas it seeks to ban<sup>36</sup> and banning all distinctions among students on account of race.<sup>37</sup> The Idaho Code's explicit naming of CRT may reasonably be interpreted by a court to encompass all CRT ideas, including sharing stories of how people of color have experienced racism. The ban on distinguishing among students on account of race may hamper schools' ability to get underprivileged students the resources and support that they need. Overall, the Idaho legislation could pose a threat depending on how courts interpret it. If courts take a broad reading of the statute, it is far more susceptible to banning ideas that are important for educators to teach.

The Oklahoma statute is probably the broadest, especially in its provision pertaining to higher education institutions. The Oklahoma provision regarding higher education includes a blanket ban on "mandatory gender or sexual diversity training or counseling" and "[a]ny orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex."<sup>38</sup> Even taken literally, this ban completely prohibits any conversation in a mandatory setting that acknowledges the lived experiences of people of color or that even "presents" information about historical events involving "a racial

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34. TENN. CODE ANN. § 49-6-1019(a)(10) (2021).

35. IDAHO CODE § 33-138(3)(a) (2021).

36. *See id.* § 33-138(2).

37. *Id.* § 33-138(3)(b).

38. OKLA. STAT. tit. 70, § 24-157(A)(1) (2021).

bias.”<sup>39</sup> This creates obvious conflicts with many universities’ standard practices in response to federal regulations such as those under Title IX<sup>40</sup> and Title VI.<sup>41</sup>

Thus, the bulk of the banned concepts may not immediately appear to be a threat to CRT theories or to the teaching of basic historical events and culturally sustaining pedagogical practices. But many provisions are open to interpretations that could threaten culturally sustaining educators’ ability to do their job well.

### C. ADMINISTRATIVE INTERPRETATIONS AND ACTIONS

Regardless of the danger of the statutes’ language alone, many of the statutes provide opportunities for administrators to adopt the broadest possible interpretations with the most oppressive consequences. For example, the Oklahoma statute grants authority to the State Board of Education to promulgate rules,<sup>42</sup> and the Oklahoma State Board of Education implemented emergency rules implementing the bill quickly after it passed. The rules require districts to “adopt policies and procedures, including incorporating into employee and student handbooks, the requirements . . . [to] notify individuals of the right to file complaints . . . [and to] ensure that the parent . . . of all students . . . are annually notified of the non-discrimination requirements.”<sup>43</sup> The rules further give parents “the right to inspect curriculum, instructional materials, classroom assignments, and lesson plans to ensure compliance” and require the district “to report for each complaint filed . . . to the State Department of Education within thirty (30) days of resolution of the complaint.”<sup>44</sup>

These rules come with significant consequences for teachers and schools deemed out of compliance. The new Oklahoma rules threaten to suspend or revoke licenses of school officials and to disaccredit

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39. *See id.*

40. 20 U.S.C. §§ 1681–1688; 34 C.F.R. § 106.45(b)(1)(iii).

41. 42 U.S.C. §§ 2000d–2000d-7. Though there does not appear to be a formal requirement for training university employees about Title VI of the Civil Rights Act of 1964, such trainings may be necessary to comply with the statute’s prohibition against discrimination in education. *See id.*

42. *See, e.g.*, OKLA. STAT. tit. 70, § 24-157(B)(2) (2021) (“The State Board of Education shall promulgate rules, subject to approval by the Legislature, to implement the provisions of this subsection.”).

43. OKLA. ADMIN. CODE § 210:10-1-23(g) (2021).

44. *Id.* §§ 210:10-1-23(e), (i).

schools deemed out of compliance.<sup>45</sup> Arizona also provides for “disciplinary action” and “suspension or revocation of [a] teacher’s certificate” based on the board of education’s judgment—which may not be as precise as a court’s.<sup>46</sup> South Carolina legislation was part of an appropriations bill and provides that no state funds can be used to “carry out standards, curricula, lesson plans, textbooks, instructional materials, or instructional materials that serve to inculcate” the common list of ideas.<sup>47</sup> Interpreting this legislation broadly, the South Carolina Department of Education could completely cut off funding to many schools.<sup>48</sup> A proposed bill in Wisconsin even provides for a private cause of action and attorney’s fees if a school is found to be in violation and mandates a ten percent reduction in state aid to that school.<sup>49</sup>

This legislation could have an adverse impact on schools with more students of color, which are naturally more likely to have conversations that could be deemed to violate the law.<sup>50</sup> Regardless of any disparate impact, *all* students are worse off when they are not exposed to other cultures and ideas. All students will be far less prepared to participate in a globalized society and navigate the rapidly increasing diversity of the United States.<sup>51</sup>

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45. *Id.* §§ 210:10-1-23(h), (j).

46. ARIZ. REV. STAT. § 15-717.02(D) (2021).

47. H. 4100, 2021 Gen. Assemb., 124th Sess. § 1.105(6) (S.C. 2021).

48. *See id.*

49. S.B. 411, 2021–22 Leg., Reg. Sess. (Wis. 2021).

50. This follows logically from the tendency of students and teachers to discuss the students’ lived experiences and connect curriculum with students’ everyday lives. The higher number of racial and ethnic minorities in the classroom, the more statistically likely it is that a student will share an experience that could engender guilt or other uncomfortable feelings among White students. Further, teachers are logically more likely to discuss concepts through the lens of differing identities when their classrooms are not majority White and homogeneous.

51. *See* William H. Frey, *The Nation Is Diversifying Even Faster Than Predicted, According to New Census Data*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted> [<https://perma.cc/K3W2-XMTL>] (highlighting the increasing diversity of the United States); *see also* Ernest T. Pascarella, Georgianna L. Martin, Jana M. Hanson, Teniell L. Trolan, Benjamin Gillig, & Charles Blaich, *Effects of Diversity Experiences on Critical Thinking Skill over 4 Years of College*, 55 J. COLL. STUDENT DEV. 86, 86–92 (2014) (studying benefits of diverse classrooms and conversations for critical thinking skills); GARY ORFIELD & JONGYEON EE, OUR SEGREGATED CAPITAL: AN INCREASINGLY DIVERSE CITY WITH RACIALLY POLARIZED SCHOOLS 18 (2017), [https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/our-segregated-capital-an-increasingly-diverse-city-with-racially-polarized-schools/POSTVERSION\\_DC\\_](https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/our-segregated-capital-an-increasingly-diverse-city-with-racially-polarized-schools/POSTVERSION_DC_)

## D. CHILLING EFFECT

More than anything, the chilling effect of the legislation is the primary concern. Particularly when paired with media rhetoric depicting the statutes in their broadest form, the legislation has sparked fear in educators that they will face legal repercussions by teaching something that may fall under their state's prohibitions.<sup>52</sup> In states with CRT bans, teachers are likely to shy away from teaching concepts through a lens that acknowledges race, sex, class, and other identifiers and the way these identifiers shape everyday interactions.<sup>53</sup> Some educators are even avoiding teaching objectively true historical events that depict any sort of animosity or conflict along lines of identity.<sup>54</sup> Thus, educators, reasonably fearing a broad interpretation of these bans, may not feel comfortable teaching critical aspects of U.S. history, including ethnic cleansing of indigenous people, slavery, the Civil War, reconstruction, Jim Crow, internment of Japanese Americans during World War II, the Holocaust, the civil rights movement, the women's suffrage movement, and Stonewall—let alone current events and social science relating to current and persisting structures of inequity.

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020117.pdf [<https://perma.cc/VS9K-3KNH>] (describing the importance of critical thinking skills in an increasingly multiracial society).

52. See Meckler & Natanson, *supra* note 14.

53. See, e.g., Complaint at 2 ¶ 3, *Black Emergency Response Team v. O'Connor*, No. 5:21-cv-01022 (W.D. Okla. Oct. 19, 2021) (“The Act’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. District administrators have struck texts by Black and women authors from their reading lists, including *To Kill a Mockingbird*, *Their Eyes Were Watching God*, *I Know Why the Caged Bird Sings*, *Narrative of the Life of Frederick Douglass*, and *A Raisin in the Sun*, while leaving in place texts by White and male authors. Teachers have received guidance to comply with H.B. 1775 by avoiding terms such as ‘diversity’ and ‘white privilege,’ while administrators have simultaneously acknowledged that ‘no one truly knows what [the Act] means or can come to agreement on its meaning.’ Professors have stopped testing on certain theories related to the implications of race on society, and university librarians are afraid to purchase materials related to race and gender. In response to serious complaints of racism and discrimination on its campus and to provide a safer climate for all, the University of Oklahoma (“OU”) had required all students to participate in sexual harassment training and diversity, equity, and inclusion coursework; but now, OU is prohibited under the Act from mandating the training and coursework. Across the state, educators are censoring their speech to avoid deeper student inquiry around race, gender, and inequality because they do not know where the line between lawful and unlawful conduct lies.”).

54. See, e.g., Meckler & Natanson, *supra* note 14 (“Florida school officials canceled a lecture for teachers on the history of the civil rights movement while they considered whether it would violate state rules.”).

This legislation has a strong potential to deter and a fair potential to punish instruction about historical events and social science that acknowledges discrimination and conflict along lines of identity.<sup>55</sup>

## II. CHALLENGING CRT BANS IN THE COURTS

Anti-CRT legislation likely violates fundamental constitutional principles, especially those in the First and Fourteenth Amendments.<sup>56</sup> CRT bans are directly at odds with foundational Supreme Court cases such as *Pico*<sup>57</sup> and *Meyer*.<sup>58</sup> Courts may find that legislatures' motivations for the restriction on speech were impermissibly nationalistic and political. Thus, there is a significant chance that the legislation could be struck down as long as litigators can adequately articulate the legislation's harm.

### A. FIRST AMENDMENT CHALLENGES

Courts may find that the legislation violates teachers' First Amendment rights to teach material they find to be academically important, and—perhaps more importantly—that it violates parents' First Amendment rights to decide what is appropriate for their child to learn.

In *Pico*, the Supreme Court held that a school board could not restrict the availability of library books simply because its members disagreed with their content.<sup>59</sup> The board justified its actions saying that the books were “anti-America, anti-Christian, anti-Semitic, and just plain filthy” and claiming that it was their “moral obligation[] to protect the children in [their] schools from this moral danger.”<sup>60</sup> The Court found that the board's actions violated the First Amendment, quoting *Tinker v. Des Moines*<sup>61</sup> and stating that students do not “shed their constitutional rights to freedom of speech or expression at the

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55. *But see* BERT Response, *supra* note 33, at 22 (“[T]he [Oklahoma] State Department of Education has stated that revocation of a license shall only proceed if the employee is found in ‘willful violation.’ . . . Therefore, Plaintiffs’ false specter of professional ruin is quashed through this scienter requirement. Teachers cannot be chilled from instructing students on concepts unless they know those concepts are prohibited . . . [O]ffenders would have to willfully violate what they already understand as a prohibition.”).

56. U.S. CONST. amends. I, XIV.

57. Bd. of Educ., *Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853 (1982).

58. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

59. *Island Trees Union Free Sch. Dist.*, 457 U.S. at 872.

60. *Id.* at 857 (quoting *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

61. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

schoolhouse gate.”<sup>62</sup> The Court broadly opined that schools should prepare students for democratic life, noting that “just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”<sup>63</sup>

Further, the Court noted that, while the board had significant discretion to determine the content of its libraries, the board could not remove books from the library simply because it disliked the ideas contained in the books; and it could not seek “by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’”<sup>64</sup> Though the Court noted that its holding was specific to libraries and suggested that school boards might rightfully claim more discretion over matters of curriculum, the principle remains that legislators and school boards may not restrict speech in schools for political or nationalistic reasons.<sup>65</sup>

Courts may reasonably analogize anti-CRT legislation to removal of books from schools. The legislation bans specific ideas and is meant to combat a particular ideology that conservatives have identified as unorthodox and undesirable. In that sense, challengers of the legislation may successfully convince a court that the legislation attempts to “prescribe what shall be orthodox.”<sup>66</sup> Proponents of the legislation may argue that *Pico* applies only to school libraries and not classrooms or curriculum,<sup>67</sup> but challengers may note that several circuits have already extended *Pico* to the context of curriculums.<sup>68</sup> Thus, a

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62. *Island Trees Union Free Sch. Dist.*, 457 U.S. at 865 (quoting *Tinker*, 393 U.S. at 506).

63. *Id.* at 868.

64. *Id.* at 854 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

65. *Id.* at 864, 872.

66. *Id.* at 854 (quoting *Barnette*, 319 U.S. at 642).

67. See, e.g., BERT Response, *supra* note 33, at 14 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968)) (“[A] State has the ‘undoubted right to prescribe the curriculum for its public schools.’”). This quote is taken out of context by the defendants in *Black Emergency Response Team*, as it reads in whole: “The State’s undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine [i.e., the theory of evolution,] where that prohibition is based upon reasons that violate the First Amendment [i.e., political or religious motivations]. It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees.” *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968).

68. See, e.g., *Peck ex rel. Peck v. Baldwinville 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.*

court may find that *Pico* is forceful authority against the anti-CRT legislation.

Challengers may also analogize anti-CRT legislation to *Epperson v. Arkansas*, where the Supreme Court held that a law that banned teaching the theory of evolution was unconstitutional.<sup>69</sup> The Court noted that there was “[n]o suggestion [that the] law may be justified by considerations of state policy other than the religious views of some of its citizens.”<sup>70</sup> Though political motivations may not carry the same weight of impermissibility as religious motivations, the two can be analogized easily. Pluralism of political viewpoints is arguably as important to American democracy as religious pluralism. Consequently, political motivations may also cause the prohibition to violate the First Amendment.

Challengers of the legislation may also make a broader appeal to the purpose of schools as “nurseries of democracy”<sup>71</sup> and “marketplace[s] of ideas”<sup>72</sup> and may illustrate the need for preparing students to understand others’ “cultural values”<sup>73</sup> and to deal “effectively and intelligently”<sup>74</sup> with dissent in “our open political system . . . to preserve freedom and independence.”<sup>75</sup>

Aside from broad appeals to pluralism and supporting democratic values, challengers may also argue that the legislation impinges on teachers’ and students’ academic freedom by regulating what they

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Indep. Sch. Dist. No. 831, 670 F.2d 771, 773 (8th Cir. 1982); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292, 1292 (10th Cir. 2004).

69. *Epperson*, 393 U.S. 97.

70. *Id.* at 107.

71. See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (“[T]he school itself has an interest in protecting a student’s unpopular expression . . . because America’s public schools are the nurseries of democracy.”).

72. *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)) (“The classroom is peculiarly the ‘marketplace of ideas.’ The 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.’”) (alteration in original).

73. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[Schools are 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.”).

74. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[Schools are vital for] prepar[ing] citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”).

75. *Id.*

can think about and evaluate.<sup>76</sup> The Court has opined that the First Amendment protects “the right to receive information and ideas.”<sup>77</sup> The Court has also noted that teachers and students have the right “to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>78</sup> Challengers may effectively convince the court that no state should be allowed to totally prevent teachers and students from examining and analyzing an idea, even if the state is allowed to encourage teachers and students to reject the idea. In other words, challengers may allege First Amendment violations for impingement on the right to receive information<sup>79</sup> and for viewpoint-based restrictions on academic freedom.<sup>80</sup>

First Amendment challenges are most likely to be successful if challengers illustrate the political and partisan purposes behind the legislation. Proponents are unlikely to articulate any legitimate pedagogical objectives behind the legislation aside from shielding students from discomfort or divisiveness,<sup>81</sup> and evidence is likely abundant

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76. See, e.g., *Keyishian*, 385 U.S. at 603 (espousing academic freedom as a “transcendent value” in the United States and noting that the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom”).

77. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); see also *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 866–68 (1982) (plurality opinion).

78. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

79. See, e.g., Complaint, *supra* note 53, at 68–69 (alleging violation of First Amendment right to receive information in challenge to Oklahoma anti-CRT statute).

80. See, e.g., *id.* at 34–36, 69–71 (alleging (1) violation of First Amendment for “Overbroad and Viewpoint-Based Restriction on Academic Freedom” and (2) facts to support restrictions on academic freedom).

81. See, e.g., Stephen Kearse, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, STATELINE, PEW CHARITABLE TRUSTS (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> [https://perma.cc/NX8V-FLEE] (“Missouri state Rep. Brian Seitz, a Republican, said in a phone interview that teaching critical race theory in schools would create ‘another great divide in America.’ He introduced a bill that would ban critical race theory from all publicly funded schools, including universities . . . . Tennessee state Sen. Brian Kelsey also argued that critical race theory will split Americans. ‘Critical Race Theory creates divisions within classrooms and will cause irreversible damage to our children who hold the future of our great country,’ . . . . [T]he critical race theory controversy has little connection to existing curriculums or school district policies. There is no evidence that critical race theory, as defined by its originators, has been taught in any public school. Nor has a school board in any state cited critical race theory as an element of its curriculum . . . . West Virginia state Sen. Mike Azinger, a Republican, demurred when asked for specific evidence of critical race theory’s footprint in his state . . . . The critical race theory cited by Republican lawmakers and conservative pundits is often nebulous, comprising equity and diversity initiatives, workplace trainings, school curricula, reading lists and selectively edited quotations of critical race theorists. ‘They don’t

that politics and/or racial animus motivated legislators in any given state.<sup>82</sup> The more evidence of legislators' political intent—or even racial animus, if possible—that challengers can collect, the more likely a First Amendment challenge is to succeed.<sup>83</sup>

#### B. FOURTEENTH AMENDMENT—PROCEDURAL DUE PROCESS CHALLENGES

Challengers may also successfully argue that the legislation violates procedural due

process because it is unconstitutionally vague. In *Keyishian v. Board of Regents*, the Court struck down a New York law aimed at combating communist ideologies in universities, holding it invalid in part because it was unconstitutionally vague, in violation of the Fourteenth Amendment.<sup>84</sup> The Court noted that teachers were unlikely to know what constitutes the boundary between permissible utterances and acts and “seditious” utterances and acts, which were banned by the legislation.<sup>85</sup> This lack of clarity about what was and was not illegal under the statute prevented teachers from having the requisite notice of what was prohibited, violating teachers' right to due process.<sup>86</sup>

Challengers may argue that anti-CRT statutes are too vague for teachers to be on notice of what is banned. Because many provisions are unclear,<sup>87</sup> teachers are unlikely to know where the line is between teaching one of the banned ideas and not. Teachers who care about

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name specific texts,’ said Adrienne Dixon, a University of Illinois at Urbana-Champaign professor of education, in a phone interview.”).

82. See, e.g., Complaint, *supra* note 53, at 51–61 (documenting racial and political rhetoric of legislators as part of First Amendment challenge to Oklahoma’s anti-CRT statute); Reid Wilson, *GOP Legislatures Target Critical Race Theory*, HILL (May 5, 2021), <https://thehill.com/homenews/state-watch/551977-gop-legislatures-target-critical-race-theory> [<https://perma.cc/MRQ4-GVVK>] (“In Tennessee, the bill’s chief sponsor, state Rep. John Ragan (R), castigated those who promote critical race theory as ‘seditious charlatans [who] would if they could destroy our heritage of ordered, individual liberty under the rule of law, before our very eyes.’”).

83. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (“The State’s undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine [i.e., the theory of evolution] where that prohibition is based upon reasons that violate the First Amendment [e.g., political or religious reasons].”); *Gonzalez v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017) (holding political motivations, including racial animus, made legislation impermissible); Complaint, *supra* note 53, at 51–61 (documenting racial and political rhetoric of legislators as part of First Amendment challenge to Oklahoma’s anti-CRT statute).

84. 385 U.S. 589, 603 (1967).

85. *Id.* at 597–604.

86. *Id.*

87. See *supra* Part I.B.

their students' learning are likely to be forced to test an invisible line between the permissible and impermissible, and they may suffer harsh penalties as a result. In this circumstance, a court may find that teachers do not have adequate notice of what is banned and therefore have not been provided due process.<sup>88</sup>

C. FOURTEENTH AMENDMENT—SUBSTANTIVE DUE PROCESS, AS-APPLIED CHALLENGES

Challengers may also fight the legislation on substantive due process grounds as an impingement on parents' right to control the upbringing of their children as they see fit. By the state deciding for parents whether their children can be exposed to contentious theories, parents are deprived of this right.

In *Meyer*, the Supreme Court declared a Nebraska law that banned teaching in German unconstitutional for violation of the Due Process Clause of the Fourteenth Amendment.<sup>89</sup> The Court emphasized the rights of both the parent and the teacher to determine what students will be taught and opined that “[n]o emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.”<sup>90</sup> It ultimately held that “the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.”<sup>91</sup>

The legislatures have not clearly identified a harm that they are trying to prevent. Commentators have primarily made vague nationalistic arguments painting CRT as unpatriotic or describing CRT as an ideology that they disagree with and that must be stopped.<sup>92</sup> Other justifications have focused on the fear that students will experience negative mental effects from guilt or that the concepts create divisiveness.<sup>93</sup> Some have made the conclusory argument that anti-CRT legis-

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88. See Complaint, *supra* note 53, at 1, 6, 20–27, 66–68 (illustrating ambiguities in Oklahoma statute and laying out an extensive due process argument based on vagueness).

89. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

90. *Id.* at 403.

91. *Id.*

92. See, e.g., Complaint, *supra* note 53, at 51–56 (documenting Oklahoma legislators' arguments for banning CRT).

93. See, e.g., IDAHO CODE § 33-138(2) (2021) (“The Idaho legislature finds that tenets . . . often found in ‘critical race theory[.]’ undermine the objectives of [respecting the dignity of others, acknowledging the right of others to express differing opinions, and

lation has the “legitimate pedagogical justification” of “protecting children from race and sex discrimination in school curriculum.”<sup>94</sup> Overall, there are only tenuous justifications for the censorship.

Like in *Meyer*, courts may find that legislatures have not demonstrated that the banned ideas are harmful enough to justify an infringement on the freedom of students, parents, and teachers. Savvy challengers can frame the issue for courts to require that the state show it has a legitimate interest that it is trying to protect or is trying to prevent a genuine harm. Because most legislators focused on their political disagreement with the ideas or fear that children might feel uncomfortable or guilty from them, courts may find that states’ justifications do not outweigh a parent’s right to control their child’s upbringing. Thus, courts could hold that the statutes are “arbitrary and without reasonable relation to any end within the competency to the state.”<sup>95</sup>

#### D. FOURTEENTH AMENDMENT—SUBSTANTIVE DUE PROCESS, DISCRIMINATORY INTENT CHALLENGES

Substantive due process challenges on discriminatory intent grounds are far less

likely to prevail, despite that many litigators will be drawn to such arguments because of the racial nature of the legislation.<sup>96</sup> Such challenges will require a significant showing of discriminatory purpose that may be difficult to produce.

To successfully overturn legislation on discriminatory intent grounds, courts generally consider (1) whether the impact of the action 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.<sup>97</sup>

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fostering and defending intellectual honesty and freedom of speech] and *exacerbate 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 . . . .”) (emphasis added); BERT Response, *supra* note 33, at 9 (“HB 1775 attempts to make education in Oklahoma more inclusive, [sic] by prohibiting the inculcation of concepts that exclude and demonize persons purely based on race and sex.”).

94. See BERT Response, *supra* note 33, at 2.

95. *Meyer*, 262 U.S. at 403.

96. See, e.g., Complaint, *supra* note 53, at 71–74 (alleging racially discriminatory purpose in derogation of Fourteenth Amendment).

97. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

Challengers may be able to show that the action bears more heavily on some races than others but will likely need to rely on theoretical and anecdotal examples<sup>98</sup>—as it will be difficult to show that not teaching the specific banned ideas will harm specific groups. To satisfy the first factor, challengers must essentially be able to convince a court through concrete research and analysis that harm to specific groups has occurred or is likely to occur. Part III of this Essay discusses two avenues to do this. For the second factor, challengers may provide a brief overview of historic segregation in their state and frame the legislation in the context of historical attempts to resegregate.

Challengers may be able to demonstrate factors three, four, and five if they compile evidence of the motivations for the decision, including suspect comments by legislators and unusual procedures by legislatures. The complaint in *Black Emergency Response Team (BERT)* provides a useful example in which challengers of the Oklahoma statute documented racial and political rhetoric in an attempt to illustrate racial animus.<sup>99</sup> The plaintiffs also emphasized that the Oklahoma statute was passed on an emergency basis—illustrating the Oklahoma legislature’s departure from normal proceedings to pass the statute—and the Oklahoma Department of Education’s expedited measures implementing the legislation.<sup>100</sup> Challengers may also emphasize departure from normal procedures by illustrating how similar decisions are typically made by local school districts rather than at the state level.<sup>101</sup>

Plaintiffs have been successful with this argument when they were able to compile overwhelming evidence of racial animus. In *Gonzalez v. Douglas*, plaintiffs successfully challenged a discriminatory law designed to ban culturally relevant programming by collecting extensive records demonstrating discriminatory intent.<sup>102</sup> Plaintiffs

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98. See *infra* Part III.

99. Complaint, *supra* note 53, at 51–61 (documenting racial and political rhetoric of legislators).

100. *Id.* at 49–51 (“The Oklahoma Legislature deviated from its own procedure to pass H.B. 1775, in furtherance of its racial and partisan interests . . . . The law was passed . . . on an emergency basis because representatives wanted to ensure it went into effect for the upcoming school year. The legislature did not reference a particular change in Oklahoma educational practices, either in the recent past or pending, that the legislature needed to address on an emergency basis. All Republican members of the legislature present and voting voted in favor of H.B. 1775; all Democratic members present and voting voted against it.”).

101. See, e.g., *id.* at 56–58.

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

convinced the court that legislative proceedings were full of dog whistles<sup>103</sup>--including "Raza," "un-American," "radical," "communist," "Aztlán," and "M.E.Ch.A.," which operated as derogatory code words for Mexican Americans.<sup>104</sup> Plaintiffs also documented racial commentary from the blog posts of the main proponent of the bill to show that it was motivated by racial animus.<sup>105</sup> Perhaps most importantly, plaintiffs were able to demonstrate that the act was specifically targeted at one racial group and one particular course by showing that the administrative enforcers of the statute—who were also the bill's main proponents—"refused to believe" independent evidence that the course was "academically excellent" and attempted to shut it down despite that it had allowed other similar programs to continue.<sup>106</sup>

Making as strong of a showing as the *Gonzalez* plaintiffs is unlikely but possible. Challengers who track legislators' Twitter posts and delve into the specific enforcement decisions of departments of education may find convincing evidence of racial animus and the targeting of specific groups. Challengers should place special emphasis on legislators' tendency to identify Black Lives Matter—a movement obviously associated with one racial group—as the movement/ideology that legislators intend to target. The fact that the legislation was passed as a reaction to a particular racial group's social movement could constitute circumstantial evidence of racial animus.

Ultimately, the success of a discriminatory intent claim is likely to fall on the shock-value of the evidence of racial animus and whether the court takes the states' explanations about legislative purpose—e.g., wanting to promote unity and combat divisiveness—at face value. Challengers may experience some success if they can make a significant evidentiary showing that motivations behind the legislation were political and racialized.

#### E. JUSTICIABILITY DEFENSE

Finally, some challengers may need to overcome a justiciability defense by their state.

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103. See Ian Olosov, *Offensive Political Dog Whistles: You Know Them When You Hear Them. Or Do You?*, VOX (Nov. 7, 2016), <https://www.vox.com/the-big-idea/2016/11/7/13549154/dog-whistles-campaign-racism> [<https://perma.cc/HG2S-CUKN>].

104. *Gonzalez*, 269 F. Supp. 3d at 967–68.

105. *Id.* at 968–72 ("Huppenthal's blog comments provide the strongest evidence that racial animus motivated . . . [the statute] . . .").

106. *Id.* at 972.

Where a teacher or administrator has been fired,<sup>107</sup> of course, states will have a difficult time arguing that there is no harm giving rise to the claim; but some challengers may have difficulty finding a plaintiff in states where the legislation has not yet been implemented or where educators have been unwilling to risk their livelihood.

Plaintiffs may find some success overcoming a justiciability defense if they are able to demonstrate the policy changes that the legislation has caused and show with particularity how this impacts the classroom experience for students and teachers. The following section attempts to articulate harms to overcome this barrier, but specific anecdotes from schools in the challengers' states will be the most convincing.<sup>108</sup>

### III. HARM TO STUDENTS

Because of Fourteenth Amendment and justiciability requirements, harm will be an important issue in litigation and will require attorneys to sufficiently articulate the harm that anti-CRT statutes cause. This is a difficult task.

Some may argue that courts are highly unlikely to interpret the statutes so broadly as to ban teaching the objective history of real events without any analysis, and they are probably right. But teaching history, art, literature, science, and more without analysis and acknowledgment of racial, gender, ethnic, and socioeconomic conflict has an undeniable disparate impact on students from marginalized groups. Further, it robs *all* students—regardless of their identity—of adequate skill development by encouraging watered-down, surface-level instruction that deemphasizes critical reasoning. This Part discusses these two broad harms—harm to culturally sustaining curriculum and harm to critical reasoning—in turn. The latter is illustrated within the context of social studies standards representing the skills students need to develop.

#### A. HARM TO CULTURALLY SUSTAINING CURRICULUM

As a way to combat the abysmal racial disparities in educational outcomes,<sup>109</sup> culturally sustaining pedagogy (previously called “culturally *relevant* pedagogy”) has become a commonly accepted best

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107. See, e.g., sources cited *supra* note 13.

108. See, e.g., Complaint, *supra* note 53, at 2 (providing anecdotes of striking local policy changes resulting from the anti-CRT legislation).

109. See Tyrone C. Howard & Andrea C. Rodriguez-Minkoff, *Culturally Relevant Pedagogy 20 Years Later: Progress or Pontificating? What Have We Learned, and Where*

practice among educators.<sup>110</sup> Gloria Ladson-Billings coined the term after studying a small number of talented educators who experienced outstanding success in classrooms of primarily Black students.<sup>111</sup> Since then, educators have come to widely understand the need to “focus[] on student learning and academic achievement versus classroom and behavior management, cultural competence versus cultural assimilation or eradication, and sociopolitical consciousness rather than school-based tasks that have no beyond-school application” in order to allow students to “take both responsibility for and deep interest in their education.”<sup>112</sup>

This need for culturally sustaining pedagogy necessarily involves acknowledging, studying, and analyzing cultural differences. For culturally sustaining pedagogy to be successful, teachers must go beyond just focusing on “achievement and cultural competence.” Instead, “students must develop a broader sociopolitical consciousness that allows them to critique the cultural norms, values, mores, and institutions that produce and maintain social inequities.”<sup>113</sup> Considering a student’s culture and identity when choosing the content and form of

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*Do We Go?*, TCHRS. COLL. REC., Jan. 1, 2017, at 2–4 (collecting disparities).

110. Culturally relevant pedagogy was a term coined by Gloria Ladson-Billings, a professor of education at the University of Wisconsin-Madison, who had set out to identify the techniques that worked for successful teachers of Black students. *See generally* Gloria Ladson-Billings, *Like Lightning in a Bottle: Attempting to Capture the Pedagogical Excellence of Successful Teachers of Black Students*, 3 INT’ J. QUALITATIVE STUD. EDUC. 335 (1990); Gloria Ladson-Billings, *Toward a Theory of Culturally Relevant Pedagogy*, 32 AM. EDUC. RSCH. J. 465 (1995). Ladson-Billings’ theory quickly became a foundational theory for educational best-practice, particularly for educating students of color. This theory has been referenced thousands of times by education scholars. *See, e.g.,* Gloria Ladson-Billings, *Culturally Relevant Pedagogy 2.0: A.k.a The Remix*, 84 HARV. EDUC. REV. 74 (2014) (reflecting on the wide use and influence of the author’s original theory of culturally relevant pedagogy, identifying misconceptions about the theory, and proposing a change in terminology to “culturally sustaining pedagogy”); Search for “Culturally Relevant Pedagogy” or “Culturally Sustaining Pedagogy,” GOOGLE SCHOLAR, [https://scholar.google.com/scholar?hl=en&as\\_sdt=0%2C24&q=%22culturally+relevant+pedagogy%22+or+%22culturally+sustaining+pedagogy%22&btnG=](https://scholar.google.com/scholar?hl=en&as_sdt=0%2C24&q=%22culturally+relevant+pedagogy%22+or+%22culturally+sustaining+pedagogy%22&btnG=) (last visited Apr. 4, 2022) (returning 2,630 results in a Google Scholar search narrowed to the specific phrases “culturally relevant pedagogy” and “culturally sustaining pedagogy”).

111. *See* Ladson-Billings, *supra* note 110, at 335–44; GLORIA LADSON-BILLINGS, *DREAMKEEPERS: SUCCESSFUL TEACHERS OF AFRICAN AMERICAN CHILDREN* (1994); Ladson-Billings, *supra* note 110, at 465–91.

112. Ladson-Billings, *supra* note 110, at 76–77.

113. Gloria Ladson-Billings, *But That’s Just Good Teaching! The Case for Culturally Relevant Pedagogy*, 34 THEORY INTO PRAC. 159, 162 (1995).

pedagogy is vital for motivating students, and it impacts student outcomes tremendously.<sup>114</sup> Though it is difficult to empirically capture the impacts of culturally sustaining pedagogy, numerous studies have found tremendous benefits for educational equity.<sup>115</sup> Culturally sustaining pedagogy is thus vital for the reduction of severe educational disparities.

Pedagogy that acknowledges and analyzes systemic racism and sociopolitical conflicts across lines of identity is also crucial for developing citizens who will become positive democratic participants. Put another way: “[i]f school is about preparing students for active citizenship, what better citizenship tool than the ability to critically analyze the society?”<sup>116</sup> Thus, the benefits of culturally sustaining pedagogy span beyond just reducing disparities in education; it ultimately creates a more equitable and vibrant society for all citizens.

The anti-CRT legislation threatens significant harm to aspects of culturally sustaining pedagogy. Far from just limiting harmful ideology, the effect of the legislation is to discourage practices that both reduce educational disparities and create a more vibrant, democratic society.

#### B. HARM TO CRITICAL REASONING & NEW SOCIAL STUDIES STANDARDS

Anti-CRT legislation also threatens significant harm to students’ opportunity to learn the critical reasoning skills necessary to thrive in a diverse society. In some anti-CRT states, students may receive instruction about important historical events; but, in several anti-CRT states, teachers who attempt to meet nationally respected standards are in danger of violating anti-CRT statutes.

Some statutes attempt to preclude the argument that the legislation harms academic standards by providing that their legislation will not prohibit the teaching of concepts that align to the state’s academic standards. Tennessee allows “impartial discussion of controversial aspects of history” and “impartial instruction on the historical oppression of a particular group of people”—though it does not address current events.<sup>117</sup> New Hampshire specifies that “[n]othing . . . shall be construed to prohibit discussing . . . the historical existence of ideas

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114. See generally Tyrone C. Howard, *Powerful Pedagogy for African American Students: A Case of Four Teachers*, 36 J. URB. EDUC. 179 (2001).

115. See Howard & Rodriguez-Minkoff, *supra* note 109, at 11–15.

116. Ladson-Billings, *supra* note 113.

117. TENN. CODE ANN. § 49-6-1019(b)(2), (3) (2021).

and subjects identified in this section.”<sup>118</sup> Oklahoma has provided that “[t]he provisions of this subsection shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards.”<sup>119</sup> This may provide some room for teachers to address important historical events and to “analyze” and “evaluate” those events.<sup>120</sup>

The Oklahoma standards provide room for sixth graders, whose studies focus on geography, to “[i]dentify and describe cultural traits of language, ethnic heritage, religion, and traditions practiced among peoples”<sup>121</sup> and to “[a]nalyze reasons for conflict and cooperation among and between groups, societies, nations, and regions.”<sup>122</sup> Seventh graders, who focus on world studies, are allowed to “[d]escribe how cultural diffusion, both voluntary and forced, impact society” and “[d]escribe how political, economic, and cultural forces challenge contemporary political arrangements.”<sup>123</sup> The eighth-grade standards, which are meant to teach U.S. history, ask teachers to address slavery, the Civil War, and Jim Crow.<sup>124</sup> And high school U.S. history discusses post-Reconstruction civil rights struggles,<sup>125</sup> the Civil Rights movement (including comparing its ideologies),<sup>126</sup> and even “the ongoing issues to be addressed by the Donald Trump and subsequent administrations, including taxation, *immigration*, employment, climate change, *race relations*, religious discrimination and *bigotry*, civic engagement, and perceived biases in the media.”<sup>127</sup>

If courts construe these standards broadly, teachers can probably teach any historical event so long as they refrain from assigning blame or guilt on students for any of these events,<sup>128</sup> but teachers are also in danger of being caught in a catch-22 where they have a duty to teach in adherence with the standards but do not have enough clarity about

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118. N.H. REV. STAT. ANN. § 193:40(II) (2021) (2021); *see also* IOWA CODE § 261H.8(4)(f) (2021) (“This statute shall not be construed to . . . : (f) Prohibit the use of curriculum that teaches the topics of sexism, slavery, [and] racial oppression . . .”).

119. *See, e.g.*, OKLA. STAT. tit. 70, § 24-157(B) (2021).

120. *See generally* OKLAHOMA ACADEMIC STANDARDS FOR SOCIAL STUDIES, OKLA. STATE DEP’T OF EDUC. (2019), <https://sde.ok.gov/sites/default/files/documents/files/Oklahoma%20Academic%20Standards%20for%20Social%20Studies%205.21.19.pdf> [<https://perma.cc/3AAM-C9D5>].

121. *Id.* at 27, objective 6.3.2.

122. *Id.* at 28, objective 6.5.5.

123. *Id.* at 31, objectives 7.5.2, 7.5.7.

124. *See id.* at 32–40.

125. *See id.* at 58–59, USH.1.2, USH.2.1.

126. *See id.* at 64, USH.7.1.

127. *Id.* at 66, USH.9.3 (emphasis added).

128. *See* OKLA. STAT. tit. 70, § 24-157(B)(1)(f)–(h) (2021).

what is prohibited to comfortably do so without fear of violating the law.<sup>129</sup>

Further, most states do not have this exception. South Carolina explicitly bans discussion of the concepts even to “carry out standards,”<sup>130</sup> and Idaho and Arizona do not provide any exceptions when the bans conflict with curriculum or standards.<sup>131</sup> In these states, the legislation is likely to conflict with the state’s own standards and is almost certain to conflict with any standards reflecting national best practices.

The National Curriculum Standards for Social Studies, promulgated by the National Council for the Social Studies (NCSS), have ten themes—many of which conflict with broad interpretations of the CRT bans.<sup>132</sup> Themes one, four, and five—respectively titled “Culture”; “Individual Development and Identity”; and “Individuals, Groups, and Institutions”—all have the potential to conflict with CRT bans.<sup>133</sup>

A comparison between anti-CRT legislation and Minnesota’s proposed social studies standards—which are designed to reflect the updated NCSS standards—is instructive.<sup>134</sup> The proposed standards consist of five strands: Citizenship and Government (Standards 1–6), Economics (Standards 7–12), Geography (Standards 13–17), History (Standards 18–21), and Ethnic Studies (Standards 22–24).<sup>135</sup> There is certainly potential conflict between the anti-CRT legislation and several of the citizenship and government standards, economics standards, and—of course—ethnic studies standards. But the geography and history standards are arguably most instructive, as they are the most foundational and generalizable to any state.

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129. *See supra* Part II.B.

130. H. 4100, 2021 Gen. Assemb., 124th Sess., § 1.105 (S.C. 2021).

131. *See* IDAHO CODE § 33-138 (2021); ARIZ. REV. STAT. § 41-1494 (2021).

132. *See National Curriculum Standards for Social Studies*, NAT’L COUNCIL FOR THE SOC. STUD., <https://www.socialstudies.org/standards/national-curriculum-standards-social-studies-introduction> [<https://perma.cc/GSJ5-3QMY>]. These standards have been carefully crafted by the NCSS to guide states in adopting social studies standards for “the promotion of civic competence—the knowledge, intellectual processes, and democratic dispositions required of students to be active and engaged participants in public life.” *Id.* The NCSS is “the largest professional association in the country devoted solely to social studies education.” *About*, NAT’L CONF. FOR THE SOC. STUD., <https://www.socialstudies.org/about> [<https://perma.cc/W2F7-JUZE>].

133. *See id.*

134. 2021 Minnesota K-12 Academic Standards in Social Studies Draft Three, Minn. Dep’t of Educ. (proposed Nov. 15, 2021).

135. *Id.*

### 1. Geography Standards

Standard Fifteen asks students to “[a]nalyze patterns of movement and interconnectedness among different peoples within and between cultural, economic, and political systems from a local to a global scale.”<sup>136</sup> While this may not appear to necessarily conflict with any banned ideas, a closer look at the ninth-grade benchmarks under this standard reveal a requirement to teach concepts that might breed resentment and/or guilt among students. One benchmark requires students to “[e]xplain migration patterns, including forced migration and displacement . . . at a range of scales, local to global.”<sup>137</sup> To understand modern forced migration and displacement, students must know undocumented immigration and deportation, ethnic cleansing, refugees, and more—and this knowledge is likely to make most empathetic students feel uncomfortable. Another benchmark requires analysis of how “global capital and technologies were used to shape the global wealth distribution and the legacies of subordinate and dominant powers that have existed in the world . . . .”<sup>138</sup> A teacher will likely struggle to address this standard without students noticing the high correlation of race and sex with wealth both locally and globally; and students, upon noticing this fact, are likely to feel some amount of guilt, anguish, or responsibility.<sup>139</sup> Further, students may organically arrive at a conclusion that meritocracy was created by one group to oppress other groups—an idea banned by several of the anti-CRT statutes.<sup>140</sup>

Standard Seventeen asks students to “[i]nvestigate how sense of place is impacted by different cultural perspectives.”<sup>141</sup> As applied to high school students, this standard requires “[e]xplain[ing] the social construction of race and how it was used to oppress people of color and assess[ing] how social policies and economic forces offer privilege or systemic oppressions for racial/ethnic groups related to accessing social, political, economic and special opportunities.”<sup>142</sup> Meeting this benchmark almost undoubtedly requires violating an anti-CRT stat-

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136. *Id. passim*.

137. *Id.* at 74, Benchmark 9.3.15.3.

138. *Id.* at Benchmark 9.3.15.5.

139. This has the potential to violate at least five statutes that ban concepts that engender feelings of guilt. *See supra* notes 32–33 and accompanying text.

140. *See, e.g.*, ARIZ. REV. STAT. § 41-1494(D)(7).

141. 2021 Minnesota K-12 Academic Standards in Social Studies Draft Three, Minn. Dep’t of Educ. *passim* (proposed Nov. 15, 2021).

142. *Id.* at 76, Benchmark 9.3.17.3.

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ute. It is near impossible for students to understand power and privilege and its relationship to race without creating, at minimum, discomfort in White students. Exploring the difference in access to social, political, economic, and special opportunities requires teachers to at least acknowledge the existence of discrimination in a way that would subject them to punishment under some states' statutes.

## 2. History Standards

Standard Eighteen seems to almost directly address anti-CRT statutes and their historical analogs by setting a goal that students are able to “[a]sk historical questions about context, change and continuity in order to identify and analyze dominant and non-dominant narratives about the past.”<sup>143</sup> Teachers could conceivably address this standard by discussing the rise of anti-CRT statutes, asking students to recognize their historical context—an increasingly diverse society breeding racial resentment and a political movement giving voice to these repressed feelings—and evaluate how some states are attempting to create a dominant narrative and suppress a non-dominant narrative by banning certain concepts. Of course, meeting this standard is likely to make some individuals feel discomfort or guilt, so it is likely banned under the institutionalized narrative created by anti-CRT statutes.

Similarly, Standard Nineteen asks students to “[i]dentify diverse points of view and describe how one’s frame of reference influences historical perspective.”<sup>144</sup> Legislators who have supported anti-CRT statutes cannot plausibly support this standard, as they are explicitly attempting to suppress points of view that diverge from their own.

Thus, students are likely doomed to receive lower-quality instruction if their teachers are fearful of the conflict between many social studies academic standards and anti-CRT statutes in their states. This harm to students may not be immediately obvious, but the long-term impact will be a generation of students with underdeveloped critical reasoning and discernment skills—even more necessary in the globalized and information-saturated world of today—and little respect for pluralism and dissent.

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143. *Id. passim.*

144. *Id. passim.*

## CONCLUSION

Though the plain language of anti-CRT statutes may not appear threatening, the statutes pose significant danger because of their ambiguous language allowing for broad interpretations—especially broad interpretations by state administrative agencies—and their chilling effect on teachers. These statutes can and should be challenged on First Amendment and Fourteenth Amendment grounds, but such challenges will require sufficient articulation of the statutes' harms. Litigators should gather evidence of harms to students and teachers from the legislation—particularly if such evidence tends to show any disparities between groups of students. Evidence of the legislation's chilling effect will be especially persuasive; and, where feasible, empirical studies should be commissioned to examine the impact on student outcomes. It may be easy to show harm to teachers who are fired or have their licenses revoked; but, in the probable absence of clear empirical evidence of harm to *students*, litigators should be prepared to produce circumstantial evidence of these harms. Evidence of teachers who have been deterred or outright barred from teaching specific books, units, historical events, or courses will be helpful.<sup>145</sup> This will demonstrate the significant harms to the ability to teach culturally sustaining curriculums and to students' opportunity to develop the critical reasoning skills necessary to thrive in a diversifying and globalizing society.

Ultimately, litigators will have to read their state's anti-CRT statute closely and should work with clients to create compelling narratives about the change in their classroom as a result of the statute's passage.

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145. See, e.g., Meckler & Natanson, *supra* note 14.