Note

School Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans

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> 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[.][1]

INTRODUCTION

In 2021, conservative politicians and media personalities launched a culture war[2] over teaching critical race theory (CRT)—the idea that U.S. laws and institutions are products of

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1. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (finding that school officials forcing schoolchildren to salute the American flag and recite the Pledge of Allegiance violate the First Amendment).

2. *See* Laura Ansley, *"The Culture Wars—They're Back!": Divisive Concepts, Critical Race Theory, and More in 2021*, AM. HIST. ASS'N: PERSPS. ON HIST. (Aug. 11, 2021), https://www.historians.org/publications-and-directories/perspectives-on-history/september-2021/the-culture-wars%E2%80%94theyre-back-divisive-concepts-critical-race-theory-and-more-in-2021 [https://perma.cc/ZVC6-EA82]; Jennifer C. Berkshire, Jack Schneider & Valerie Strauss, *The Culture War over Critical Race Theory Looks Like the One Waged 50 Years Ago Over Sex Education*, WASH. POST (July 25, 2021), https://www.washingtonpost.com/education/2021/07/25/critical-race-theory-sex-education-culture-wars [https://perma.cc/54LE-K3GY]; Melanie Zanona, *"Lean Into the Culture War": House Conservatives Push Fight Against Critical Race Theory*, POLITICO (June 24, 2021), https://www.politico.com/news/2021/06/24/culture-war-critical-race-theory-496087 [https://perma.cc/YPY6-C57Q].

and perpetuate white[3] supremacy—in K–12 public schools.[4] In the midst of this "manufactured panic,"[5] nine state legislatures enacted statutes that either explicitly[6] or implicitly[7] banned the

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3. This Note capitalizes the term "Black," but not "white," when referring to racial identities. However, other scholars elect to use different terms or different capitalization conventions, and this Note has preserved original capitalization in quotations. *See, e.g.*, Ann Thúy Nguyên & Maya Pendleton, *Recognizing Race in Language: Why We Capitalize "Black" and "White*,*"* CTR. FOR THE STUDY OF SOC. POL'Y (Mar. 23, 2020), https://cssp.org/2020/03/recognizing-race-in-language-why-we-capitalize-black-and-white/?gclid=Cj0KCQiA8vSOBhCkARIsAGdp6RQI4MMRmwhxYEufYcvWbScJ0NbnGQ7QfWZhSlZZfyXMrzEGRtZVvYUaAoe7EALw_wcB [https://perma.cc/Q894-DAPP].

4. For a discussion of CRT, see *infra* Part I. As defined by Professor Kimberlé Crenshaw, a founding member of the CRT movement, CRT is "an approach to grappling with a history of White supremacy that rejects the belief that what's in the past is in the past, and that the laws and systems that grow from that past are detached from it." Faith Karimi, *What Critical Race Theory Is—and Isn't*, CNN (May 10, 2021), https://www.cnn.com/2020/10/01/us/critical-race-theory-explainer-trnd/index.html [https://perma.cc/N6AA-GJ66]. A core tenet of CRT teaches that white supremacy is so intertwined with American institutions that racism is practiced "unconcious[ly] . . . in ways that pervade everyday life." Jerome M. Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435, 2448 (2003). This "illness of racism infects almost everyone," but few Americans are willing to acknowledge it. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987). The legal system's failure to recognize this unconscious racism, for example, harms Black Americans in many ways, such as by requiring civil rights plaintiffs to prove racially discriminatory purpose without recognizing that racial bias is often subconscious and therefore unprovable. *See id.* at 318–19 (discussing the Supreme Court's requirement that equal protection plaintiffs demonstrate discriminatory intent in Washington v. Davis, 426 U.S. 229 (1976)); *id.* at 329–30 (analyzing lawyers' reluctance to accept the reality of unconscious racial discrimination in law). For a history of the CRT movement, see Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1262–1300 (2011).

5. LastWeekTonight, *Critical Race Theory: Last Week Tonight with John Oliver*, YOUTUBE (Feb. 21, 2022), https://www.youtube.com/watch?v=EICp1vGlh_U.

6. *See, e.g.*, IDAHO CODE § 33-138 (2021) (finding that "critical race theory . . . inflame[s] divisions on the basis of sex, race, ethnicity, religion, color [or] national origin" and requiring that "[n]o public institution of higher education, school district, or public school . . . shall . . . adhere to [CRT's] tenets.").

7. *See, e.g.*, TEX. EDUC. CODE ANN. § 28.0022(a)(4) (West 2021) (providing that a public school district may not teach perceived CRT concepts such as "an individual, by virtue of the individual's race or sex, is inherently racist, sexist, or oppressive"; "an individual, by virtue of the individual's race or sex, bears responsibility, blame, or guilt for actions committed by other members of the

teaching of real or perceived CRT concepts in public schools. Many more are debating similar bills.[8] In reality, few secondary schools actually teach CRT, given that CRT is an intellectual and often abstract legal theory.[9] Yet anti-CRT legislation is often drafted broadly to ban the teaching of concepts such as "the United States of America or [a given state] are fundamentally or systematically racist,"[10] thus creating a "chilling effect" that prohibits an array of classroom discussions about race.[11] For many

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same race or sex"; or "the advent of slavery in the territory that is now the United States constituted the true founding of the United States").

8. 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/L4JE-8ZS7] (tracking states that have banned or considered banning CRT); 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/PD9H-HL8G] (same).

9. *See* Liz Crampton, *GOP Sees "Huge Red Wave" Potential by Targeting Critical Race Theory*, POLITICO (Jan. 5, 2022), https://www.politico.com/news/2022/01/05/gop-red-wave-critical-race-theory-526523 [https://perma.cc/Q894-DAPP] ("Yet most public school officials across the country say they do not teach any curriculum based on [critical race] theory . . . ."); *see also* Chris Kahn, *Many Americans Embrace Falsehoods About Critical Race Theory*, REUTERS (July 15, 2021), https://www.reuters.com/world/us/many-americans-embrace-falsehoods-about-critical-race-theory-2021-07-15 [https://perma.cc/GDY5-8NP2] (noting that most high schools do not teach CRT).

10. *See, e.g.*, IOWA CODE ANN. § 261H.8 (West 2021). Quite apart from causing students of color to disengage with their history classes, assertions like those made in the Iowa CRT ban are also factually incorrect. *See* JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 135–71 (1995) (documenting textbooks' failures to educate students on systemic racism throughout American history).

11. *See* Crampton, *supra* note 9 (expressing concern that CRT bans will produce a "chilling effect" on lessons about systemic racism); Ray & Gibbons, *supra* note 8 (same); LastWeekTonight, *supra* note 5 (same); *see also* Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUCATIONWEEK (June 11, 2022), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 [https://perma.cc/K8K7-LL9L] ("[T]eachers and school leaders in states where these laws have passed reported widespread confusion about what kind of instruction is and is not allowed."). "Chilling effect" is a legal term of art meaning "[t]he result of a law or practice that seriously discourages the exercise of a constitutional right, such as . . . the right of free speech." *Chilling Effect*, BLACK'S LAW DICTIONARY (11th ed. 2019). Scholars have traditionally defined the chilling effect as "occur[ing] when individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from so doing by governmental regulation not specifically directed at

students, however, systemic racism is a reality that must be confronted every day, including in school.[12] CRT bans thus threaten to marginalize or devalue both students' lived experiences and informal cultural-historical training.[13]

CRT bans' impact on American schoolchildren ought to concern parents and citizens. Data show that "ethnic studies" classes and "culturally relevant pedagogy" correlate with positive feelings of self-empowerment and improved school performance among K–12 students of color.[14] Crucially, psychological studies have long indicated[15]—and courts have only recently recog-

that protected activity." Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 693 (1978).

12. *See* Claire McCarthy, *How Racism Harms Children*, HARV. HEALTH PUBL'G (Jan. 8, 2020), https://www.health.harvard.edu/blog/how-racism-harms-children-2019091417788 [https://perma.cc/2PL7-8JHR] (describing racism as a "socially transmitted disease" that "can lead to chronic stress for children," particularly in the education context, where minority students "are more likely to be harshly punished for minor infractions, less likely to be identified as needing special education, and teachers may underestimate their abilities").

13. *See* Sonia R. Jarvis, Brown *and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1287 (1992) ("Black children will no longer feel a need to reject their Blackness as a 'badge of inferiority' if given the opportunity to study from an Afrocentric perspective."); *see also* Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 819 (1993) (arguing that to combat racism, "African-Americans have developed an alternative culture that provides them with a different understanding of their racial group," but that this leads to "cultural conflict between dominant [white] American culture, which is enshrined in the traditional public education program, and African-American culture").

14. *See* Christine E. Sleeter & Miguel Zavala, *What the Research Says About Ethnic Studies*, *in* TRANSFORMATIVE ETHNIC STUDIES IN SCHOOLS: CURRICULUM, PEDAGOGY, AND RESEARCH 3 (2020), https://www.nea.org/sites/default/files/2020-10/What%20the%20Research%20Says%20About%20Ethnic%20Studies.pdf [https://perma.cc/8HD4-RN9E] ("If students have been taught implicitly that people like themselves are incapable and unimportant, doing well in school has little meaning. Conversely . . . having a strong sense of ethnic identity and high racial awareness is linked with young people's mental health and achievement.").

15. In the (in)famous footnote eleven of *Brown v. Board of Education,* "Chief Justice Warren cited a number of authorities to support his conclusion that segregation had a negative psychological effect on African-Americans." Kevin Brown, *The Road Not Taken in* Brown*: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579, 1580 (2004) (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954)). However, the Chief Justice neglected to include psychological evidence from the appellant's brief that white children "often develop patterns of guilt feelings, rationalizations and other mechanisms which they must use in an attempt to protect themselves from recognizing the essential

nized[16]—that white students benefit just as much from interactions with diverse peer groups and critical examination of white supremacy as students of color do.[17] "Critical Race pedagogical practices," proponents argue, "have the potential to empower students of color while dismantling notions of colorblindness, meritocracy, deficit thinking, linguicism, and other forms of subordination."[18] Simply put, even if CRT itself is not taught in K–12 schools, "it is important for young people to learn about the past—and to discover both the good and the bad in our history."[19] But CRT bans' explicit purpose is to prevent these conversations from happening in the classroom: they prohibit discussions of "inherent privilege[]," deny that white people "bear[] responsibility" for "actions committed in the past," seek to prevent white people from feeling "discomfort," and outlaw teaching that the United States is "fundamentally . . . racist."[20] To the extent that CRT bans prohibit students from engaging with this difficult material, they present a very real threat to all students' learning outcomes that merits a legal remedy. However, because challenges to CRT bans have yet to work their way through the

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injustice of their unrealistic fears and hatreds of minority groups." *Id.* at 1582–83 (citing Brief for Appellants at 6, *Brown*, 347 U.S. 483 (1954) (No. 1) (1952 WL 47265).

16. *See* Kevin Brown, *Reflections on Justice Kennedy's Opinion in* Parents Involved*: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735, 740–43 (2008) (arguing that Justice Kennedy's concurring opinion in Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 782 (2007), implicitly acknowledges that all students, including white students, benefit from teachings that "our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all").

17. *See* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 5–6 (1992) (arguing that segregated schools inculcate a belief about Black inferiority, meaning that race-conscious remedies to encourage diversity trigger a "socializing process" that benefits "*all* public school students, not only African-American school children") (emphasis original).

18. María C. Ledesma & Dolores Calderón, *Critical Race Theory in Education: A Review of Past Literature and a Look to the Future*, 21 QUALITATIVE INQUIRY 206, 208 (2015). The authors point out that critical race pedagogy "is also useful for White students," in that it enables "Whites to understand themselves through the history of the other, in much the same way many communities of color understand themselves in relationship to Whites." *Id.* at 209.

19. Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1031 (9th Cir. 1998).

20. *See* TENN. CODE ANN. § 49-6-1019 (2021); TEX. EDUC. CODE ANN. § 28.0022(a)(4) (West 2021); OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021).

courts, students, teachers, and activists seeking to challenge CRT bans have a dearth of precedent to rely on.[21]

This Note seeks to help plaintiffs in future CRT curriculum cases overcome that hurdle by identifying possible constitutional challenges to CRT bans. Part I delves into the history of CRT and the contemporary backlash to it. Part II compares the CRT debate with analogous legal battles over ethnic studies curricula, which reveal that students have grounds to challenge CRT bans as an infringement of their First Amendment freedoms, notwithstanding states' undoubted ability to set public school curricula.[22] Part III advances a novel three-part First Amendment argument for challenging the constitutionality of CRT bans. First, the bans infringe students' "right to receive information."[23] Second, courts should resolve a longstanding circuit split by requiring viewpoint neutrality in school curricula.[24] Third, given CRT bans' predominant political purpose, state and local governments fail the viewpoint neutrality test and lack the requisite "legitimate pedagogical concerns" necessary to infringe students' rights.[25] This Note concludes that while students have standing to challenge CRT bans under the First Amendment, courts will likely hesitate to wade into the culture war by overturning dem-

21. *See infra* Part II.A.

22. *See infra* Parts II.B and II.C.

23. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866–67 (1982) (plurality opinion) ("[T]he Constitution protects the right to receive information and ideas."); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."); Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 779 (8th Cir. 1982) ("What is at stake is the right to receive information and to be exposed to controversial ideas—a fundamental First Amendment right."); *Monteiro*, 158 F.3d at 1027 n.5 (noting "the well-established rule that the right to receive information is an inherent corollary of the rights of free speech and press").

24. A government regulation is viewpoint neutral when it is "not based on a point of view or an ideology." *Viewpoint-Neutral*, BLACK'S LAW DICTIONARY (11th ed. 2019). Viewpoint discrimination, by contrast, occurs when "the government targets not a particular subject, but instead certain views that speakers might express on the subject." *Viewpoint Discrimination*, BLACK'S LAW DICTIONARY (11th ed. 2019). For a discussion of courts' approaches to viewpoint neutrality versus viewpoint discrimination in K–12 public schools, see *infra* Parts III.B and III.C.

25. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); *see also infra* Parts III.C and III.D.

ocratically-enacted curricular bans thought to be within the purview of states' traditional police power. Nevertheless, this Note's roadmap for mounting legal challenges to CRT bans can also help students and activists rachet up social pressure to repeal CRT bans through the court of public opinion.

I. OVERVIEW OF AND BACKLASH TO CRITICAL RACE THEORY

In order to mount a legal challenge to CRT bans, it is first necessary to examine both the CRT movement and the pushback against it. This Part provides a cursory overview of basic CRT tenets and places contemporary CRT backlash in a broader political context. Ultimately, this Part argues that conservative politicians stoked white anxieties about CRT to manufacture a moral panic for political gain, masked by unfounded accusations that CRT drives division and racial resentment.

A. CRITICAL RACE THEORY ASSERTS THAT LEGAL INSTITUTIONS ARE INTERTWINED WITH WHITE SUPREMACY

As described by its principal founder, Professor Derrick Bell, CRT is a body of academic legal scholarship "a majority of whose members are both existentially people of color and ideologically committed to the struggle against racism, particularly as institutionalized in and by law."[26] It has also been characterized as a "site of resistance and debate" to white supremacy.[27] Because "racial subordination in the United States is practiced in 'unconscious' ways," CRT argues that "social patterns constituting white supremacy in the United States have been institutionalized and normalized in ways that pervade everyday life," including in law.[28] Indeed, whiteness and non-whiteness have been codified into law since the beginning of the American republic.[29]

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26. Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 898 (1995).

27. Gregory Scott Parks, *Toward a Critical Race Realism*, 17 CORNELL J.L. & PUB. POL'Y 683, 707 (2008).

28. Culp, Jr. et al., *supra* note 4, at 2448.

29. Historians argue that, in the American colonies, the notion of whiteness itself was created to form a wedge between European and African bonded laborers. Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 360 (2014) (referencing THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE, VOLUME II: THE ORIGIN OF RACIAL OPPRESSION IN ANGLO-AMERICA 249 (2d ed. 2012)). This white/non-white distinction was later codified into law "for the purpose of imposing hierarchical subordination on nonwhites." *Id.*

CRT therefore disputes "the notion that laws are . . . written from a neutral perspective."[30] Rather, CRT posits that Black American perspectives, and the perspectives of other U.S. racial minorities, are intentionally "oppressed," "appropriated," and "marginalized," whereas "the law simultaneously and systematically privileges subjects who are white."[31] In essence, CRT asks whether "the legal landscape" that contributes to ongoing inequality "would look different today if outsiders, rather than 'insiders' (mainly elite, straight, white males) were the decision makers."[32] By critiquing (often called "deconstructing") the law, CRT scholars hope to emancipate (or "reconstruct") the law from its white supremacist roots.[33] CRT scholars such as Professors Derrick Bell,[34] Kimberlé Crenshaw,[35] Richard Delgado,[36] Charles Lawrence,[37] Mari Matsuda,[38] Patricia Williams,[39] and others have committed themselves to this work.

However, CRT's efforts to reconstruct the law as a tool of racial liberation have been hampered by racism's ability to morph from blatant, Jim Crow-era discrimination to more subtle, but just as invidious, forms of discrimination.[40] This means

at 362 (referencing Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465, 471–72 (1997)).

30. Bell, *supra* note 26, at 901.

31. *Id.*

32. Roy L. Brooks, Conley *and* Twombly*: A Critical Race Theory Perspective*, 52 HOW. L.J. 31, 34 (2008) (citation omitted).

33. Bell, *supra* note 26, at 899 (citing Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994)).

34. *See, e.g.*, DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW (6th ed. 2008).

35. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1998).

36. *See, e.g.*, Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407 (1988).

37. *See, e.g.*, Lawrence, *supra* note 4.

38. *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

39. *See, e.g.*, Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIA. L. REV. 127 (1987).

40. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 374 (1992) ("[C]ontemporary color barriers are less visible but neither less real nor less oppressive. Today, one can travel for thousands of miles across this country and never come across a public facility designated for 'Colored' or 'White.' Indeed, the very ab-

that "white people rarely see acts of blatant or subtle racism, while minority people experience them all the time."[41] White Americans, therefore, can unknowingly repeat and perpetuate racism, including through the white-dominated legal system.

There is no dispute that the legal system comprises primarily white actors, which leads to disparate results for white and non-white individuals. The overwhelming majority of each president's federal judicial nominees, for example, are white.[42] This is significant because empirical evidence suggests that the racial makeup of the federal judiciary affects decisions reached in civil rights cases and other disputes where race may be a factor.[43] Furthermore, while only four percent of U.S. lawyers are Black, forty percent of U.S. prisoners are Black.[44] Similarly, data from the U.S. Sentencing Project show that 7.44% of Black Americans are disenfranchised as a result of criminal convictions, whereas only 1.8% of non-Black Americans are disenfranchised, meaning that even a century and a half after the enactment of the Fifteenth Amendment, Black Americans are more than four times

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sence of visible signs of discrimination creates an atmosphere of racial neutrality that encourages whites to believe that racism is a thing of the past.").

41. Delgado, *supra* note 36, at 407. For a list of "white privileges" that enable white Americans to avoid confronting race and racism in a variety of day-to-day circumstances, see Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM (July/Aug. 1989), https://psychology.umbc.edu/files/2016/10/White-Privilege_McIntosh-1989.pdf [https://perma.cc/V6J2-BCX7].

42. Elena Mejía & Amelia Thomson-DeVeaux, *It Will Be Tough for Biden to Reverse Trump's Legacy of a Whiter, More Conservative Judiciary*, FIVETHIRTYEIGHT (Jan. 21, 2021), https://fivethirtyeight.com/features/trump-made-the-federal-courts-whiter-and-more-conservative-and-that-will-be-tough-for-biden-to-reverse [https://perma.cc/8LMR-KG8P] (containing statistics on the racial diversity of federal judicial nominees).

43. *See* Maya Sen, *Diversity, Qualification, and Ideology: How Female and Minority Judges Have Changed, or Not Changed, over Time*, 2017 WIS. L. REV. 367, 397–98. Sen documents studies demonstrating that minority judges are more sympathetic towards civil rights plaintiffs than white judges, and that minority judges' presence influences the thinking of their white colleagues. *Id.* at 375–77. Sen further demonstrates that minority judges are, overall, more liberal than white judges appointed by the same president. *Id.* at 394 tbl.4. *See also* Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 207–08 (2017), https://doi.org/10.1146/annurev-lawsocsci-110615-085032 (affirming that minority judges are more likely to rule in favor of civil rights plaintiffs).

44. Adrien K. Wing, *Is There a Future for Critical Race Theory?*, 66 J. LEGAL EDUC. 44, 46 (2016).

as likely as non-Black Americans to be denied the right to vote.[45] Perhaps most tellingly, courts have warped civil rights law—once intended to guarantee equal rights to Black Americans—into "reasoning that race-conscious policies derogate the meaning of racial equality"[46] to the point where Justice Harlan's famous *Plessy v. Ferguson* dissent, claiming that the Constitution is "colorblind," is often weaponized against proponents of affirmative action.[47] These examples prove CRT's point that white supremacy pervades legal institutions[48] and demonstrate how much work remains for the CRT movement in ending racial disparities in the legal system.

The racial disparities observed in law are no less pronounced in education. Over a half century after *Brown v. Board of Education*, "students of color are increasingly less likely to attend integrated schools, which is a threat to a healthy multiracial democracy as well as a thriving economy."[49] Black students, troublingly, are more than twice as likely to be suspended or disciplined in school than students of any other race.[50] And it comes as no surprise that, perhaps as a result of racist treatment in education, students of color are less likely to graduate high school than their white peers.[51]

45. Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U. L. REV. 335, 368 tbl.2 (2019).

46. Bell, *supra* note 40, at 376.

47. Richard Delgado, *Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1265 (2011) ("A famous judge might write that the Constitution is color-blind as a way of condemning Jim Crow laws in the South. Years later, the conservative movement picks up on the same slogan to oppose affirmative action."); *see also* J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870 (1993) (noting that "theories of constitutional interpretation do not have a fixed normative or political valence").

48. Ironically, "making laws outlawing critical race theory confirms the point that racism is embedded in the law." Victor Ray (@victorerikray), TWITTER (June 11, 2021), https://twitter.com/victorerikray/status/1403437961367240711?s=12 [https://perma.cc/K7NE-QE2N].

49. Erica Frankenberg & Kendra Taylor, *De Facto Segregation: Tracing a Legal Basis for Contemporary Inequality*, 47 J.L. & EDUC. 189, 229 (2018).

50. Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 651 (2011).

51. *See* McCarthy, *supra* note 12 (noting that 88% of white students graduated from high school in the 2015–16 school year, compared to 76% of Black students, 72% of Native American students, and 79% of Hispanic students).

Professor Bell and other CRT scholars conclude that because legal advances in racial inequality are made only when the interests of Blacks and whites converge,[52] "Black people will never gain full equality in this country."[53] If Bell's "convergence theory" is correct, then CRT bans—to the extent they prohibit white students from examining white supremacy's role in American history—place another obstacle on the path to racial equality. On the other hand, effectively incorporating race-based discussions into the classroom might benefit students of color, in addition to freeing white people from racist beliefs that must be unlearned to advance racial equality.[54] According to James Baldwin, "The price of the liberation of the white people is the liberation of the blacks," and "we, the black and the white, deeply need each other here if we are really to become a nation."[55] CRT-

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52. *See* L. Darnell Weeden, *Essay: Can* Brown v. Board of Education *Meet the Challenge of Race-Neutral Discrimination in the 21st Century?*, 28 T. MARSHALL. L. REV. 271, 283 n.80 (2003) (citing Derrick A. Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980)) ("Translated from judicial activity in racial cases both before and after *Brown,* this principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the [F]ourteenth [A]mendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.").

53. Bell, *supra* note 40, at 373. White Americans have not demonstrated an interest in true racial equality. White support for the Black Lives Matter movement, for example, peaked at 60% in June 2020, amid nationwide protests over the murder of George Floyd. *See* Deja Thomas & Juliana Menasce Horowitz, *Support for Black Lives Matter Has Decreased Since June But Remains Strong Among Black Americans*, PEW RSCH. CTR. (Sept. 16, 2020), https://www.pewresearch.org/fact-tank/2020/09/16/support-for-black-lives-matter-has-decreased-since-june-but-remains-strong-among-black-americans [https://perma.cc/PM9X-MWHQ]. But by September of 2020, white support for Black Lives Matter reverted to 45%. *Id.* The most recent data from September 2021 shows white support for Black Lives Matter at 47%. *See* Juliana Menasce Horowitz, *Support for Black Lives Matter Declined After George Floyd Protests but has Remained Unchanged Since*, PEW RSCH. CTR. (Sept. 27, 2021), https://www.pewresearch.org/fact-tank/2021/09/27/support-for-black-lives-matter-declined-after-george-floyd-protests-but-has-remained-unchanged-since [https://perma.cc/YQP9-NUCH].

54. *See* Brown, *supra* note 17, at 5–6 (arguing that integrated public schools serve a socialization function that benefits "*all* public school students"); Ledesma & Calderón, *supra* note 18, at 209 (asserting that classroom conversations about race are "also useful for White students").

55. JAMES BALDWIN, DOWN AT THE CROSS: LETTER FROM A REGION IN MY MIND (1962), *reprinted in* THE FIRE NEXT TIME 104 (1963).

adjacent discussions about white supremacy's role in American history, then, ought not to be banned, but welcomed as one tool for advancing national unity and equality.

B. MODERN CRT CRITICS ADVOCATE FOR CRT BANS TO REAP POLITICAL BENEFIT

CRT has weathered more than its fair share of criticism.[56] Only recently, however, has CRT become a buzzword outside of academic and antiracism circles. In the wake of George Floyd's murder, antiracism trainings sprung up around the country—as did backlash to those trainings.[57] Conservative activist Christopher Rufo seized on white people's discomfort with antiracism trainings, and realized he could mobilize people to political action by casting CRT as "the perfect villain."[58] Conservative media outlets seized on Rufo's strategy,[59] and the anti-CRT movement gained so much steam that, on September 2, 2020, Rufo was invited to speak on Fox News's *Tucker Carlson Tonight*.[60]

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56. Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door"*, 49 UCLA L. REV. 1343, 1365–69 (2002) (listing critiques of CRT scholarship).

57. Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory [https://perma.cc/Y3W2-9YUB] (listing white people's complaints about antiracism trainings, such as: "If you spend millions to call people in our community racist, you better be able to prove it"; "[T]hese institutions that I believe in . . . are being devoured by an ideology I don't understand"; and "[I have this] nagging sense of guilt that I'm the problem."); *see also* Jonathan Friedman & James Tager, *Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach*, PEN AMERICA 4 (Nov. 8, 2021) [hereinafter *Educational Gag Orders*], https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf [https://perma.cc/Z8YL-2GF9] ("It is not a coincidence that [the anti-CRT] legislative onslaught followed the mass protests that swept the United States in 2020 in the wake of the murder of George Floyd. . . . Republican legislators and conservative activists have capitalized on this backlash . . . .").

58. Wallace-Wells, *supra* note 57. In Rufo's own words: "Strung together, the phrase 'critical race theory' connotes hostile, academic, divisive, race-obsessed, poisonous, elitist, anti-American." *Id.* Most importantly, he stated critical race theory is not "an externally applied pejorative"; instead, "it's the label the critical race theorists chose themselves." *Id.*

59. Fox News mentioned "critical race theory" 4,707 times in 2021. LastWeekTonight, *supra* note 5.

60. *Tucker Carlson Tonight* "is one of the most polarizing and influential shows on television." A.J. Katz, *Top Cable News Shows of 2021: Tucker Carlson Tonight Is No. 1 in All Measurements for First Time Ever*, TVNEWSER (Jan. 3,

Rufo used the opportunity to sound the alarm that CRT "is an existential threat to the United States," that it "is being weaponized against core American values," and that then-President Trump must "stamp out this destructive, divisive, pseudoscientific ideology."[61] President Trump obliged, proclaiming that CRT "is a Marxist doctrine holding that America is a wicked and racist nation, that even young children are complicit in oppression, and that our entire society must be radically transformed."[62]

The former President's statement prompted a tsunami of anti-CRT legislation.[63] Such legislation is often drafted by conservative think tanks.[64] Oklahoma's anti-CRT legislation, which serves as a "template" for many other states' bills,[65] bans teaching of perceived CRT concepts such as: (1) "an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously"; (2) "an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex"; and (3) "[an] individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex."[66] Tennessee's CRT ban parrots Oklahoma's language, and further bans teaching that "the United States is fundamentally or irredeemably racist or sexist," or that "[t]he rule of law does not exist, but instead is a series of power relationships and struggles among racial or other groups."[67] The Texas

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2022), https://www.adweek.com/tvnewser/top-cable-news-shows-of-2021-tucker-carlson-tonight-is-no-1-in-all-categories-for-first-time-ever/496940 [https://perma.cc/TN2R-4VLQ]. Carlson's show "averaged the largest total audience on cable news" in 2021, "having averaged 3.21 million total viewers," and—at the time—was "the most popular show on cable news among adults [aged] 25–54." *Id.* Rufo's anti-CRT message, in short, reached millions of American households overnight.

61. Wallace-Wells, *supra* note 57.

62. Karimi, *supra* note 4.

63. Nine states have enacted CRT bans and twenty-seven more are considering similar legislation. *See generally* Ray & Gibbons, *supra* note 8 (summarizing CRT state legislation as of November 2021); Stout & Wilburn, *supra* note 8 (detailing that as of February 2022, thirty-six states had made efforts "to restrict education on racism, bias, the contributions of specific racial or ethnic groups to U.S. history, or related topics").

64. *See* Crampton, *supra* note 9 ("[T]he legislative movement spun out from conservative think tanks like the Heritage Foundation, American Enterprise Institute and Goldwater Institute.").

65. *Id.*

66. OKLA. STAT. ANN. tit. 70, § 24-157.B.1 (West 2021).

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

ban also mirrors Oklahoma's, but prohibits teaching that "the advent of slavery in the territory that is now the United States constituted the true founding of the United States" as well.[68] These laws seem designed, therefore, not so much to prohibit teaching actual CRT concepts, but rather to discourage a broad array of classroom discussions about white supremacy's role in shaping American history.

Moreover, the second wave of proposed anti-CRT legislation is increasingly troubling because it creates a cause of action for disgruntled parents to sue school boards that violate the CRT ban.[69] By deputizing parents to sue non-compliant school boards, these bills are designed to have a "chilling effect" on race-based classroom conversations.[70] The chilling effect is working: teachers report "widespread confusion" about what can and cannot be taught,[71] and in some cases have lost their jobs[72] or are adapting their lessons for fear of being caught in non-compliance.[73] These

68. TEX. EDUC. CODE ANN. § 28.0022(a)(4) (2021).

69. *E.g.*, S.B. 411, 105th Leg., Reg. Sess. (Wis. 2021) (permitting parents to sue school boards for teaching banned CRT principles); Andrew Atterbury, *DeSantis Pushes Bill That Allows Parents to Sue Schools over Critical Race Theory*, POLITICO (Dec. 16, 2021), https://www.politico.com/news/2021/12/16/desantis-bill-critical-race-theory-525118 [https://perma.cc/3KAA-6VT7] (examining a law granting parents the same cause of action in Florida); H.R. 1532, 2021 Leg., Reg. Sess. (Pa. 2021) (creating the same cause of action in Pennsylvania).

70. *See* sources cited *supra* note 11 (discussing the "chilling effect" concept generally and within the CRT context); *Educational Gag Orders*, *supra* note 57, at 6 ("[W]e have already seen the chilling effects of [anti-CRT] legislation, which has been used to justify . . . instructing teachers that they should balance having books on the Holocaust with those with 'opposing views' in Texas, and challenging the teaching of civil rights activist Ruby Bridges's autobiographical picture book about school desegregation in Tennessee.").

71. Schwartz, *supra* note 11; *see also* Stephanie Wang, *These Indiana Schools Made Racial Equity Their Mission. Now They Face Hostile Legislation.*, CHALKBEAT (June 13, 2022), https://in.chalkbeat.org/2022/6/13/23159604/indiana-schools-racial-equity-critical-race-theory-ips-bethel-park [https://perma.cc/H9SQ-YAPW] ("[T]eachers also worry about being silenced on current racial injustices—especially when their students are hungry for those conversations.").

72. *See* 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 [https://perma.cc/TYR7-L8DQ] (telling the story of a teacher who was fired under Tennessee's CRT ban after assigning a Ta-Nehisi Coates essay and a poem about white privilege).

73. *See* Amended Complaint at 10, Black Emergency Response Team v. O'Connor, No. 5:21-cv-01022-G (W.D. Okla. Nov. 9, 2021) (concerning a teacher

bills employ a similar statutory scheme to Senate Bill 8 of Texas's 87th Legislature (S.B. 8), which creates a private cause of action for ordinary citizens to sue abortion clinics that provide abortions after detecting fetal cardiac activity, and to recover $10,000 if successful.[74] The Supreme Court allowed S.B. 8 to take effect,[75] notwithstanding the statute's "novelty"[76] in allowing "private bounty hunters" to "chill[] the exercise of [what was, at the time,] a constitutional right."[77] Troublingly, then, the Supreme Court would likely find that these anti-CRT bills are not unconstitutional simply because of their enforcement scheme.

While few of these bills mention CRT by name,[78] and many of the banned concepts listed above are "gross exaggerations" or fundamental misunderstandings of actual CRT tenets,[79] there is little doubt that conservative politicians are introducing these bills because stoking white Americans' fears about CRT generates headlines and political gain.[80] For example, Florida Governor Ron DeSantis, a potential GOP 2024 Presidential candidate, unveiled high-profile anti-CRT legislation—tellingly titled the "STOP W.O.K.E. Act," which received the support of Christopher

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who abandoned lesson plans concerning detention centers at the U.S.–Mexico border); *id.* at 12–13 (concerning a teacher who questioned whether he could teach students about racial injustice under Oklahoma's CRT ban); *id.* at 13 (concerning a teacher who was instructed to avoid phrases like "diversity" and "white privilege").

74. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021) (codifying S.B. 8).

75. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

76. *Id.* at 545 (Roberts, J., concurring in part and dissenting in part).

77. *Id.* (Sotomayor, J., concurring in part and dissenting in part).

78. Ray & Gibbons, *supra* note 8 ("None of the state bills that have passed even actually mention the words 'critical race theory' explicitly, with the exception of Idaho and North Dakota.").

79. *Id.*; *see also* Kahn, *supra* note 9 (finding that thirty-three percent of survey respondents supposedly familiar with CRT mistakenly believe that CRT "says that white people are inherently bad or evil").

80. *See* Michael Tesler, *How the Rise of White Identity Politics Explains the Fight over Critical Race Theory*, FIVETHIRTYEIGHT (Aug. 10, 2021), https://fivethirtyeight.com/features/how-the-rise-of-white-identity-politics-explains-the-fight-over-critical-race-theory [https://perma.cc/ER2F-URH9] (explaining empirical data showing that "when you combine the rise of white identity politics in the GOP with its mischaracterization of critical race theory as tantamount to anti-white indoctrination, it's even easier to see how a relatively obscure framework emerged as a leading issue in Republican Party politics.").

Rufo[81]—at "a de facto campaign rally."[82] Newly-elected Virginia Governor Glenn Youngkin fulfilled a promise to his Republican voters by signing an executive order, on his first day in office, that banned the teaching of "inherently divisive concepts, including critical race theory" in public schools.[83] Firebrand Republican Senator Ted Cruz characterized CRT as "every bit as racist as the Klansmen in white sheets."[84] Former President Trump advisor Steve Bannon forecasted that the anti-CRT strategy would net Republicans fifty House seats in the 2022 midterms.[85] And President Trump often draws large applause by lambasting critical race theory at his campaign rallies.[86] Conservative politicians recognize the political upside in banning CRT, and other "woke" or "divisive" concepts, regardless of its potential to redress racism in law and education.

CRT ban proponents are sure to argue that the bans merely prohibit divisive race-based discussions in school.[87] CRT bans, after all, prohibit teaching evils like "one race or sex is inherently superior to another race or sex," and proclaim that no child "should feel discomfort, guilt, anguish, or any other form of psychological distress on account of th[eir] race or sex."[88] But CRT

81. *Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations*, FLA. GOVERNOR RON DESANTIS (Dec. 15, 2021) [hereinafter *Stop W.O.K.E.*], https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations [https://perma.cc/NAH9-B9XR] (detailing commentary provided in support of the Act—including comments from Rufo—at the announcement press conference).

82. *See* Atterbury, *supra* note 69 (describing the scene at the press conference).

83. Alex Samuels & Amelia Thomson-DeVeaux, *Why Democrats Keep Losing Culture Wars*, FIVETHIRTYEIGHT (Feb. 3, 2022), https://fivethirtyeight.com/features/why-democrats-keep-losing-culture-wars [https://perma.cc/8YMQ-LYJ8] (outlining how Governor Youngkin ran his campaign with CRT as a central issue to garner political favor even though Virginia schools do not teach CRT).

84. LastWeekTonight, *supra* note 5.

85. *Educational Gag Orders*, *supra* note 57, at 35 (quoting Bannon from a June 2021 interview).

86. *Id.* at 34–35 (detailing reaction to President Trump's critique of CRT during a June 2021 speech in North Carolina).

87. *See, e.g.*, *Stop W.O.K.E.*, *supra* note 81 ("We won't allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other.").

88. OKLA. STAT. ANN. tit. 70, § 24-157.B.1 (West 2021); TENN. CODE ANN. § 49-6-1019(a) (2021); TEX. EDUC. CODE ANN. § 28.0022(a)(4) (West 2021).

does not, in fact, "say that white people are inherently evil or bad."[89] And classroom discussions about race, when handled effectively, can reduce racism rather than increase it.[90] This suggests that conservative activists are intentionally twisting CRT's meaning,[91] which Christopher Rufo himself confirmed by proudly tweeting, "The goal is to have the public read something crazy in the newspaper and immediately think 'critical race theory.' We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans."[92] The inescapable conclusion is that CRT bans' primary purpose is not to protect schoolchildren, but to reap political benefit.

II. POTENTIAL CONSTITUTIONAL CHALLENGES TO CRT BANS

Due to the relatively recent enactment of CRT bans, plaintiffs seeking to overturn the bans have little direct precedent to draw from. This Part draws on comparisons to the most recent factually analogous cases—disputes over ethnic studies curricular bans—to build the foundation for First Amendment and Fourteenth Amendment arguments against CRT bans' constitutionality. This analysis suggests that, while the Fourteenth Amendment argument is likely to fail, an argument based on students' First Amendment right to receive information is likely the most effective option to challenge CRT bans.

A. Curricular Bans on Ethnic Studies Programs Provide Helpful Arguments for CRT Ban Plaintiffs

Students, teachers, and parents wishing to challenge the constitutionality of their states' CRT-curriculum bans in K–12

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89. Samuels & Thomson-DeVeaux, *supra* note 83 (summarizing a Reuters/Ipsos poll in which twenty-two percent of Americans reported believing this falsity); Kahn, *supra* note 9 (stating "[CRT] does not" make this claim).

90. Ledesma & Calderón, *supra* note 18, at 208–09 (arguing that critical race pedagogy can liberate both white students and students of color from entrenched racial misconceptions); *see also* LastWeekTonight, *supra* note 5 (arguing that a measure of white "discomfort" should not prohibit race-based conversations that enable whites to learn and grow).

91. *See supra* notes 57–63 and accompanying text (detailing how Christopher Rufo used a mischaracterization of CRT to promote political action).

92. Christopher F. Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021), https://twitter.com/realchrisrufo/status/1371541044592996352?lang=en [https://perma.cc/L264-J7P2].

schools have a dearth of precedent to rely on.[93] This may be in part because the bans are relatively recent, because students and families in CRT-banned states largely support CRT bans, or because CRT ban dissenters pursue solutions outside of the courtroom—like joining grassroots advocacy campaigns or forming student groups.[94] What little precedent exists largely focuses on university-level CRT disputes,[95] teacher-employment cases,[96] or procedural challenges to CRT bans.[97] Two cases—both quickly dismissed—were even brought by white plaintiffs, alleging that schools infringed on white students' First and Fourteenth Amendment rights by allegedly teaching CRT[98] or implementing racial bias reporting programs.[99]

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93. As of November 2022, a search in Westlaw for cases containing the terms "critical race theory" and "school" yields only twenty-one results across all state and federal jurisdictions; a search for "critical race theory" and "curriculum" yields only seventeen. Searching for the same terms in Lexis produces similar results. Many of the cases listed concern employment issues or university-level, not K–12 level, disputes over CRT in the classroom. Those that do focus on CRT classroom disputes are still in their nascent stages.

94. *See generally* Kelly Percival & Emily Sharpe, *Sex Education in Schools*, 13 GEO. J. GENDER & L. 425, 445 (2012) (advancing similar explanations for why there is a lack of precedent concerning students challenging curricular bans on sex education).

95. *See, e.g.*, McLaughlin v. Bd. of Regents of Univ. of Okla., 566 F.Supp.3d 1204, 1210–11, 1219 (W.D. Okla. 2021) (allowing a Section 1983 First Amendment claim against university volleyball coaches who allegedly discriminated against a politically conservative player for her refusal to embrace CRT).

96. *See, e.g.*, Ziel v. Romeo Cmty. Schs., No. 21-11929, 2021 WL 4125326 (E.D. Mich Sept. 9, 2021) (concerning a teacher terminated after posting inflammatory Facebook comments in response to a "Moms for Liberty" protest at a school board hearing, where moms accused the board of being "evil" for adopting COVID-19 mask mandates and critical race theory).

97. *See, e.g.*, Ariz. Sch. Bds. Ass'n v. State, 501 P.3d. 731 (Ariz. 2022). The Supreme Court of Arizona upheld a trial court decision striking down a budget reconciliation bill—HB 2898—that failed to meet the Arizona State Constitution's requirement that the subject of every act be expressed in the act's title. *Id.* at 741–42. HB 2898 concerned COVID-19 protocols and CRT bans in public schools, not budgetary measures, and thus the bill's title did not provide adequate notice of its contents. *Id.* at 735, 738–39. However, as the court's opinion did not address the merits of the CRT ban, plaintiffs seeking substantive challenges to CRT bans must look elsewhere for guidance.

98. Canning v. Bd. of Educ. Calvert Cnty., No. 8:21-cv-02381-PX, 2022 WL 2304671, at *6–7 (D. Md. June 27, 2022) (holding that white parents failed to demonstrate an injury-in-fact sufficient to confer standing to bring a Fourteenth Amendment claim against a school district that allegedly taught critical race theory).

99. Menders v. Loudoun Cnty. Sch. Bd., 580 F.Supp.3d 316, 328–30 (E.D.

In one apposite case, *Falls v. DeSantis*, high school teachers and a kindergarten student directly challenged the constitutionality of Florida Governor Ron DeSantis's CRT bill, on First and Fourteenth Amendment grounds.[100] The *Falls* court primarily concerned itself with the plaintiffs' standing. To have standing in federal court, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[101] *Falls* held that the teachers did not have standing because the possibility of their being disciplined for teaching CRT required "too many inferential leaps": any punishment would have to work its way through the Florida Board of Education, through the school districts, to the teacher's school, and finally to the teacher.[102] Therefore, there was no "fairly traceable" injury that could be judicially redressed by preliminary injunction.[103]

Falls, however, specified that students *could* have standing by producing evidence that the CRT ban denied students the right to access information.[104] For example, student plaintiffs could introduce an affidavit from a teacher explaining which materials had to be removed from an AP U.S. History curriculum to comply with a state CRT ban.[105] This suggests that students, not teachers, make the ideal CRT ban plaintiff; CRT bans deprive students of the right to access certain perspectives on American history, whereas teachers sacrifice no First Amendment right by agreeing to be bound by the state's curriculum while teaching.[106] But given that *Falls* and many other pro- and anti-CRT ban cases are still in their nascent stages,[107] challengers to CRT bans

Va. 2022) (finding that white plaintiffs lacked standing to bring a First Amendment claim against a school district that enacted a racial bias reporting program).

100. No. 4:22cv166-MW/MJF, 2022 WL 2303949, at *1–4 (N.D. Fla. June 27, 2022).

101. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

102. *Falls*, 2022 WL 2303949, at *7.

103. *Id.*

104. *Id.* at *8.

105. *Id.*

106. *See infra* Part III.C.2 (explaining that public school teachers' First Amendment rights are not infringed when they contract with a district to teach a curriculum set by the state).

107. *See* Amended Complaint, *supra* note 73 (arguing that the Oklahoma

will need to look for analogous precedent to support their assertions.

The clear precursor and most readily analogous example is the debate over "ethnic studies" programs, which seek to engage students of color by teaching cultural and historical perspectives that are all-too-frequently left out of standard history curricula.[108] One prominent—and relatively recent—challenge to ethnic studies programs concerned a Mexican-American Studies program (MAS Program) enacted pursuant to a desegregation order in a Tucson, Arizona public school district to meet the needs of the rapidly growing Mexican student population.[109] After several MAS Program students walked out of a speech given by a Republican Deputy Superintendent, the Superintendent and his successor resolved to terminate the MAS Program.[110] Accordingly, the Arizona state legislature passed A.R.S. § 15-112, which prohibited classes that: (1) "[p]romote resentment toward a race or class of people," (2) "[a]re designed primarily for pupils of a particular ethnic group," or (3) "[a]dvocate ethnic solidarity instead of the treatment of pupils as individuals."[111] MAS Program students successfully challenged the constitutionality of A.R.S. § 15-112 under both Fourteenth and First Amendment

CRT ban violates teachers and students' First Amendment rights under a similar argument to the one advanced in this Note); Complaint at 18, Clark v. Democracy Prep Pub. Sch. Inc., No. 2:20-CV-02324 (D. Nev. May 3, 2021) (concerning a high school student who was compelled to "proclaim in class and in assignments his race, color, sex, gender, and religious identities," and the privilege that accompanies them); Complaint at 9–11, Cajune v. Indep. Sch. Dist. 194, No. 0:21-CV-01812-ADM-BRT (D. Minn. Aug. 6, 2021) (alleging that fifth graders were impermissibly shown a video on structural racism).

108. *See* M. Isabel Medina, *Silencing Talk About Race: Why Arizona's Prohibition of Ethnic Studies Violates Equality*, 45 HASTINGS CONST. L.Q. 47, 52–55 (2017) (arguing that ethnic studies programs were developed to desegregate schools and combat Euro-American curricular biases); *see also* Ledesma & Calderón, *supra* note 18, at 206, 208 (bridging the gap between CRT's legal roots and "ethnic studies," as well as other forms of "culturally relevant pedagogy"). For an overview of ethnic studies programs' effectiveness, see Sleeter & Zavala, *supra* note 14.

109. Medina, *supra* note 108, at 70–71.

110. *See* González v. Douglas, 269 F. Supp. 3d 948, 957, 963 (D. Ariz. 2017) (finding that the Superintendent campaigned on a "'crusade' to 'destroy[] the entire' MAS program," and that his successor engaged in a self-declared "war with MAS"). The Deputy Superintendent's speech that triggered the protest was meant to rebut a civil rights activist's assertion that "Republicans hate Latinos." *Id.* at 952.

111. ARIZ. REV. STAT. ANN. § 15-112 (2011) (held unconstitutional by *González*).

theories.[112] While student challenges to CRT bans will likely fail under a Fourteenth Amendment theory, students have a colorable argument that CRT bans violate their First Amendment right to receive information without a legitimate pedagogical purpose.

B. A FOURTEENTH AMENDMENT CHALLENGE TO FACIALLY NEUTRAL CRT BANS IS UNLIKELY TO SUCCEED

The MAS Program students convinced the court that A.R.S. § 15-112 violated the Fourteenth Amendment because the school superintendent only targeted the MAS Program, thus evidencing discriminatory intent.[113] By contrast, any student-led Fourteenth Amendment challenge to CRT bans would certainly fail, because CRT bans are facially neutral[114] and do not discriminate against any identifiable group of students.

While it may well be true that students of color are harmed disproportionately to white students when discussions of systemic racism are banned in the classroom,[115] merely demonstrating that CRT bans may adversely impact students of color more than white students is insufficient to bring a successful Equal Protection claim. Per the controlling *Washington v. Davis* standard, a law is not "unconstitutional *solely* because it has a racially disproportionate impact."[116] Rather, "the invidious quality of a

112. Arce v. Douglas, 793 F.3d 968, 986 (9th Cir. 2015) (holding that A.R.S. § 15-112 violates the First Amendment by "chill[ing] the teaching of ethnic studies courses . . . without furthering the legitimate pedagogical purpose of reducing racism"); *González*, 269 F. Supp. 3d at 972 (holding, on remand, that "A.R.S. § 15-112 was enacted and enforced with a discriminatory purpose" in violation of the Fourteenth Amendment).

113. *González*, 269 F. Supp. 3d at 972 ("The passage and enforcement of the law against the MAS program were motivated by anti-Mexican-American attitudes.").

114. Laws that do not explicitly discriminate on the basis of race typically survive Fourteenth Amendment challenges. The Supreme Court has "not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another." Washington v. Davis, 426 U.S. 229, 242 (1976).

115. *See, e.g.*, Medina, *supra* note 108 at 75 ("[T]reating individuals as individuals, without acknowledging that their individual identity reflects their membership in a particular racial or ethnic group is significant because society has historically and traditionally rendered that aspect of their identity as the defining and material trait, perpetuates inferiority and subordination of that racial or ethnic group.").

116. *Id.* at 239 (emphasis original).

law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[117] As Professor Charles Lawrence argues, the *Davis* standard "places a very heavy, and often impossible, burden of persuasion" on the plaintiff alleging racial discrimination, and perhaps more importantly, "the injury of racial inequality exists irrespective of the decisionmakers' motives."[118] Nevertheless, federal courts will not recognize an Equal Protection violation absent evidence of discriminatory intent.

Although CRT bans' history demonstrates that they are the product of white malaise,[119] the facially neutral statutory language only shows an implicit, not explicit, preference in favor of a whitewashed history. For example, CRT bans prohibit teaching that "one race or sex is inherently superior to another race or sex" or that "an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex."[120] In light of this facially neutral language, it will be difficult for plaintiffs to make out a prima facie Fourteenth Amendment case that survives dismissal under *Washington v. Davis*. Professor Clifford Rosky rightly points out that if "Arizona had adopted a law that expressly prohibited schools from teaching 'Mexican-American Studies,' while permitting them to teach 'Anglo-American studies,'" it would be "absurd" for the Supreme Court not to find an Equal Protection violation.[121] CRT bans lead to the same practical result as Rosky's hypothetical statute: they prohibit discussion of American history from the viewpoint of marginalized racial identities while privileging a whitewashed narrative that normalizes whiteness.[122] Yet the reality is that an overwhelmingly white judiciary[123] is unlikely to

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117. *Id.* at 240.

118. Lawrence, *supra* note 4, at 319.

119. *See* Tesler, *supra* note 80 (tracing a correlation between perceived anti-white discrimination and support for CRT bans).

120. OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021); TENN. CODE ANN. § 49-6-1019 (2021); TEX. EDUC. CODE ANN. § 28.0022(a)(4) (West 2021).

121. Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1533 (2017).

122. *See* Culp et al., *supra* note 4, at 2448 ("[M]uch of racial subordination in the United States is practiced in 'unconscious' ways; the corollary that social patterns constituting white supremacy in the United States have been institutionalized and normalized in ways that pervade everyday life . . . .").

123. *See* Mejía & Thomson-DeVeaux, *supra* note 42 (noting that federal judges are "unrepresentative of the population they serve," and that racially

find that these wrongs derive from discriminatory intent sufficient to constitute a cognizable Fourteenth Amendment injury, especially because CRT bans do not name any particular student or racial group.[124]

In short, because CRT bans do not discriminate against a specific racial group, plaintiffs bringing a Fourteenth Amendment challenge would struggle to satisfy the discriminatory intent standard under *Washington v. Davis*. A state could easily meet this standard by pointing to facially neutral statutory language and asserting that CRT bans' rational purpose is to prevent "adverse treatment solely or partly because of [] race or sex."[125] Conversely, a First Amendment challenge would only require showing that CRT bans implicate all students' rights, a condition readily satisfied for CRT bans. The following Subpart outlines the First Amendment challenge.

C. Plaintiffs' First Amendment Challenges to CRT Bans Are More Likely to Succeed

1. Under *Hazelwood*, the State Requires a Legitimate Pedagogical Purpose to Restrict Students' First Amendment Right to Receive Information

In addition to their Fourteenth Amendment challenge, the MAS Program students challenged A.R.S. § 15-112 under a First Amendment theory. Specifically, the plaintiffs alleged that the ethnic studies ban impermissibly limited "students' rights to receive information and ideas."[126] After wading through an array

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diverse judges both boost perceptions of court legitimacy and influence courts' decisions on racial issues).

124. For this exact reason, Professor Roy Brooks advocates for lowering the pleadings standards bar for civil rights plaintiffs alleging racial discrimination. "Society and its institutions, including its legal system, express a white worldview, a perspective that necessarily operates to the benefit of whites at the expense of people of color. To right this wrong, society needs rules of law that are more explicitly oriented toward African Americans, that are more affirming of the black experience and that are more empowering of these outsiders." Brooks, *supra* note 32, at 59–60. For empirical evidence showing that white judges are less likely than Black judges to rule in favor of civil rights plaintiffs, see Sen, *supra* note 43 and Rachlinski & Wistrich, *supra* note 43.

125. OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021); TENN. CODE ANN. § 49-6-1019 (2021); TEX. EDUC. CODE ANN. § 28.0022(a)(4) (West 2021).

126. Arce v. Douglas, 793 F.3d 968, 981 (9th Cir. 2015) (citing Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866–67 (1982) (plurality opinion)). As the Supreme Court articulated, "the right to *receive* ideas is a necessary predicate to the recipient's meaningful exercise of his own

of Circuit splits and Supreme Court precedent, the Ninth Circuit in *Arce v. Douglas* determined that the "appropriate level of scrutiny that applies to a state's decision to restrict classroom materials presented as part of a curriculum approved by a local school board in light of a student's right to receive information and ideas"[127] was articulated by the Supreme Court in *Hazelwood School District. v. Kuhlmeier*.[128] In *Hazelwood*, the Court held that a public school principal could exercise editorial control over the school newspaper—deemed to be part of the school's curriculum—because such "school-sponsored" speech "bear[s] the imprimatur of the school."[129] Therefore, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[130]

The corollary of the *Hazelwood* principle is that "state limitations on school curricula that restrict a student's access to materials otherwise available may be upheld only where they are reasonably related to legitimate pedagogical concerns."[131] Accordingly, the Ninth Circuit's decision in *Arce v. Douglas* hinged on whether A.R.S. § 15-112's ethnic studies ban violated the First Amendment insofar as it prohibited "ethnic studies courses that may offer great value to students . . . without furthering the legitimate pedagogical purpose of reducing racism."[132] The court found A.R.S. § 15-112 did just that: as the defendants' counsel admitted, A.R.S. § 15-112 would prohibit a public school course on Chinese history designed for the substantial Chinese American student population in San Francisco.[133] The Ninth Circuit therefore remanded to the District Court to determine whether the statute impermissibly engaged in "viewpoint discrimination."[134]

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rights of speech, press, and political freedom." *Pico*, 457 U.S. at 867; *see also* cases cited *supra* note 23 (recognizing the First Amendment right to receive information in public school).

127. *Arce*, 793 F.3d at 982.

128. 484 U.S. 260 (1988).

129. *Id.* at 270–71.

130. *Id.* at 273. For further discussion of school-sponsored speech, see *infra* Part III.D.3.

131. *Arce*, 793 F.3d at 983.

132. *Id.* at 986.

133. *Id.*

134. *Id.* Viewpoint discrimination occurs when "the government targets not a particular subject, but instead certain views that speakers might express on

2. Under *Pico*, the Government Violates Students' First Amendment Rights by Banning Materials Based on Viewpoint

On remand, the district court in *González v. Douglas*—the *Arce* case's district-level name—applied the Supreme Court's *Board of Education v. Pico*[135] test to decide whether the superintendent who enacted and enforced A.R.S. § 15-112 engaged in viewpoint discrimination.[136] *Pico* concerned a dispute between a school board and students who claimed a First Amendment violation after the politically conservative board removed controversial books from the school library.[137] A plurality of Justices acknowledged that local school boards could shape curricula as they saw fit to "transmit community values,"[138] but ruled that if the Board "*intended* . . . to deny [students] access to ideas with which [the Board] disagreed," then the Board violated the First Amendment.[139] For example, "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans," or "if an all-white school board, motivated by racial animus, decided to remove all books au-

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the subject." *Viewpoint-Discrimination*, BLACK'S LAW DICTIONARY (11th ed. 2019). For a discussion of courts' approaches to viewpoint neutrality versus viewpoint discrimination in K–12 public schools, see *infra* Parts III.B and III.C.

135. 457 U.S. 853 (1982) (plurality opinion).

136. 269 F. Supp. 3d 948, 972–73 (D. Ariz. 2017) (applying *Pico* after concluding that "five members of the Supreme Court subscribed to the view that the First Amendment forbids school officials from removing materials from school libraries to further narrowly partisan, political, or racist ends"). The *González* court acknowledged that "*Pico* concerned library materials rather than curricular materials," but noted that the Second, Sixth, Eighth, and Ninth Circuits all either applied *Pico* or else "recognized a pretext-based First Amendment claim in the school curriculum context." *Id.* at 973; *see* Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 631 (2d Cir. 2005); Settle v. Dickson Cnty. Sch. Bd., 54 F.3d 152, 155 (6th Cir. 1995); Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 773 (8th Cir. 1982); Monteiro v. Temp Union High Sch. Dist., 158 F.3d 1022, 1027 n.5 (9th Cir. 1998).

137. *Pico*, 457 U.S. at 856–58. The books at issue included SOUL ON ICE by Eldridge Cleaver (recounting the life story of a Black liberationist and admitted rapist), OUR SEXUAL EVOLUTION by Helen Colton (discussing group sex, abortion, and sexual education), and A READER FOR WRITERS–A CRITICAL ANTHOLOGY OF PROSE READINGS by Jerome W. Archer (containing an essay comparing Malcolm X to the Founding Fathers, and a satirical piece proposing that impoverished parents sell their children as food). *See* Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26, 638 F.2d 404, 407–12 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).

138. *Pico*, 457 U.S. at 864.

139. *Id.* at 871 (emphasis original).

thored by blacks or advocating racial equality," they would trigger a First Amendment infringement, a point which the dissent "cheerfully concede[d]."[140]

Following *Pico*'s lead, the *González* court had little difficulty concluding that A.R.S. § 15-112 "was in fact enacted and enforced for narrowly political, partisan, and racist reasons" in violation of the First Amendment.[141] The court particularly noted that the superintendents primarily responsible for its enactment and enforcement campaigned heavily on the "war" with the MAS Program, with "no legitimate basis for believing that the MAS program was promoting racism."[142] Since the ethnic studies ban was enacted for viewpoint-discriminatory political reasons, not for the legitimate purpose of reducing racism, the state officials were precluded from claiming that a "legitimate pedagogical concern" motivated the ban on school-sponsored speech.[143]

In sum, the ethnic studies curricular ban shows that federal courts can engage in a two-step process to overturn state curricular bans motivated by racial or political animus. First, courts can determine whether a ban infringes on students' right to receive information. Then, courts can apply *Hazelwood* to determine whether the state had a legitimate pedagogical reason for interfering with school-sponsored speech or instead merely engaged in viewpoint discrimination prohibited by *Pico*. The First Amendment challenges to ethnic studies curricular bans thus present an alternative path for future plaintiffs in CRT ban cases.[144]

3. Students Can Make a Prima Facie First Amendment Case More Easily than a Fourteenth Amendment Case

There are numerous advantages of a First Amendment approach over a Fourteenth Amendment approach. First, since CRT bans undeniably seek to constrain the expression of particular political views (such as "the United States is fundamentally

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140. *Id*. at 907 (Rehnquist, J., dissenting).

141. *González*, 269 F. Supp. 3d at 973.

142. *Id.* at 974.

143. *Id.* at 973; *accord* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

144. *See, e.g.*, Amended Complaint, *supra* note 73 (arguing that the Oklahoma CRT ban violates teachers and students' First Amendment rights under a similar argument to the one advanced in this Note); Falls v. DeSantis, 2022 WL 2303949 (N.D. Fla. June 27, 2022) (same).

or irredeemably racist or sexist"[145]) and prohibit teaching a certain viewpoint of American history (such as "the advent of slavery in the territory that is now the United States constituted the true founding of the United States"[146]), there is at least a justiciable question as to whether CRT bans violate students' First Amendment rights by limiting their exposure to certain ideas[147] without any "legitimate pedagogical concern."[148] Infringing such a recognized, fundamental constitutional right would constitute an "injury in fact . . . that is fairly traceable to the challenged conduct of the defendant . . . that is likely to be redressed by a favorable judicial decision."[149] Indeed, federal courts have recognized that former President Trump's Executive Order banning "divisive concepts"—which used the exact same language as CRT bans[150]—constituted an "injury in fact" sufficient to confer standing on federally-funded nonprofits by creating a "chilling effect" that deterred the non-profits from continuing diversity training for fear of losing their funding.[151] Even cases that ultimately uphold curricular bans recognize that students have

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

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

147. *See* cases cited *supra* note 23 (recognizing the First Amendment right to receive information in public school).

148. *Hazelwood*, 484 U.S. at 273.

149. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)). A state violates the First Amendment by denying speakers access, based on their viewpoints, to nonpublic fora. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."). This includes when students are denied access to information in public schools due to viewpoint discrimination. *See, e.g.*, Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888, 896–97 (W.D. Mo. 2012) (recognizing standing when "the state violates the First Amendment right of speakers [by] den[ying] them access to even a non-public forum if the state does so based on the speakers' viewpoint," such as by denying students access to pro-LGBT websites).

150. *Compare* Exec. Order No. 13,950, 85 Fed. Reg. 60,683, 60,685 (Sept. 22, 2020), *with* OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021), TENN. CODE ANN. § 49-6-1019 (2021), *and* TEX. EDUC. CODE ANN. § 28.0022(a)(4) (West 2021).

151. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 534 (N.D. Cal. 2020) (acknowledging the Executive Order's chilling effect on diversity trainings at federally-funded organizations); *id.* at 536–40 (finding an injury-in-fact that was fairly traceable to the Executive Order and redressable by judicial order).

standing to challenge chilling effect policies.[152] Given that CRT bans create a similar chilling effect in public schools,[153] CRT ban plaintiffs would likely meet the injury-in-fact standing requirement.

Second, rather than demonstrating that CRT bans are the product of animus against a specific racial group—as would be required under the Fourteenth Amendment—CRT ban plaintiffs would only need to show that the state enacted or enforced CRT bans without a legitimate pedagogical reason under the First Amendment.[154] Ample evidence exists demonstrating that conservative politicians galvanized the CRT culture war for political gain instead of a legitimate pedagogical purpose.[155] The fact that CRT bans are designed to cause a "chilling effect,"[156] which urges teachers to "steer far wider of the unlawful zone"[157] of systemic racism conversations, lends further credence to the argument that CRT ban challengers have standing under the First Amendment.[158]

152. *See, e.g.*, Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1304 (7th Cir. 1980) (finding standing because a school board's decisions to ban controversial books and fire teachers "are said to have had a chilling effect on academic freedom and to have caused harm to one [student] and to be causing harm to another").

153. *See* sources cited *supra* notes 70–73 and accompanying text.

154. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that control over the content and style of student speech does not violate the First Amendment if it is rooted in "pedagogical concerns").

155. *See* Jaclyn Diaz, *Teachers and Civil Rights Groups Sue over Oklahoma's Ban on Critical Race Theory*, NPR (Oct. 20, 2021, 3:40AM), https://www.npr.org/2021/10/20/1047519861/aclu-sues-over-oklahoma-law-on-critical-race-theory [https://perma.cc/H7YT-T282] ("The [Oklahoma CRT ban] was intended to inflame a political reaction, not further a legitimate educational interest."); *see also* Zanona, *supra* note 2; Karimi, *supra* note 4; Crampton, *supra* note 9; Wallace-Wells, *supra* note 57; Atterbury, *supra* note 69; Tesler, *supra* note 80.

156. *See* sources cited *supra* notes 70–73 and accompanying text.

157. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

158. Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 604 (1967) ("The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed."). Indeed, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027 n.5 (9th Cir. 1998) (quoting *Keyishian*, 385 U.S. at 603); *see also* Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 779 (8th Cir. 1982) (arguing that when a school board removes a film from a curriculum, the "chilling effect is obvious," which implicates "a fundamental First Amendment right"); Zykan v. Warsaw Cmty.

Third, and relatedly, while no specific racial group or student organization is singled out for unfavorable treatment by CRT bans, the bans do implicate all students' rights, thus sidestepping the need to demonstrate discriminatory intent against particular plaintiffs under the *Washington v. Davis* standard.[159] Accordingly, CRT ban challengers are more likely to make out a prima facie First Amendment case than a Fourteenth Amendment one.[160]

This free speech approach is far from ironclad. One early hurdle that CRT ban challengers will have to clear is facially neutral statutory language claiming that CRT bans merely prohibit teaching concepts such as "one race or sex is inherently superior" or "an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex."[161] Provisions such as these may be enough to satisfy textualist judges to take CRT bans at face value. Yet when interpreted in light of the entire anti-CRT Act and the Act's legislative history, it becomes clear that the purpose of CRT bans is not to further the legitimate purpose of preventing discrimination, but to fulfill impermissible partisan goals.[162]

Sch. Corp., 631 F.2d 1300, 1304 (7th Cir. 1980) (affirming that a "chilling effect" in the classroom creates standing under the First Amendment); Maldonado v. Morales, 556 F.3d 1037, 1044 (9th Cir. 2009) ("[A] plaintiff alleging that a statute . . . resulting in a chilling effect on speech has standing even if the law is constitutional as applied to him.").

159. For further discussion of *Washington v. Davis* as applied to race-based education cases, see Kevin R. Johnson & George A. Martinez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000). Johnson and Martinez argue that "[t]he conventional wisdom considers [the *Washington v. Davis* 'discriminatory intent' requirement] to be unduly stringent because it fails to fully appreciate the nature of modern racial discrimination in the United States," and that "[t]he discriminatory intent standard has proven to be a formidable barrier to an Equal Protection claim." *Id.* at 1229, 1266.

160. *See, e.g.*, Canning v. Bd. of Educ. Calvert Cnty., 2022 WL 2304671, at *6–7 (D. Md. June 27, 2022) (holding that white parents failed to demonstrate an injury-in-fact sufficient to confer standing to bring a Fourteenth Amendment claim against a school district that allegedly taught critical race theory).

161. OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021); TEX. EDUC. CODE ANN. § 28.0022(a)(4)(A)(iii) (West 2021); *see also* TENN. CODE ANN. § 49-6-1019 (2021).

162. See sources cited *supra* note 155, detailing the political benefits of galvanizing the CRT debate. While students do not have control over public school curricula, state actors cannot remove items from the curriculum for political or partisan reasons. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982) (plurality opinion) (holding that removing library

Another significant obstacle is the fact that the Supreme Court has long acknowledged that states have the authority to prescribe public school curricula[163] and to set boundaries for appropriate classroom speech.[164] Although states undeniably have the right to control curricula, they must have a legitimate pedagogical reason for doing so when the curricular bans also limit school-sponsored student speech.[165]

CRT ban defenders might also argue that "public education in our Nation is committed to the control of state and local authorities," and "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of the school systems and which do not directly and sharply implicate basic constitutional values."[166] But "[t]he State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit . . . the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment."[167] And, as discussed above, federal courts generally do recognize a First Amendment right to receive information in school, thus sharply implicating basic constitutional values.[168] Finally, if state legislatures were truly concerned about local control, they would have allowed school boards to set their own CRT policies. If anything, state legislatures' rush to enact CRT bans strengthens the argument that CRT bans serve a predominantly political purpose and belies any assertion that their enactment was meant to protect students or promote local school board control.

III. FIRST AMENDMENT CHALLENGES TO CRT BANS

Weighing students' free speech rights in public schools against the state's control of the curriculum "requires recourse

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books for partisan reasons would violate the First Amendment); Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983) (holding that public officials may not discriminate against speakers based solely on the speaker's opinion or perspective); Chiras v. Miller, 432 F.3d 606, 619–20 (5th Cir. 2005) (holding that state discretion in curricular decision-making is limited, albeit only if motivated by "narrowly partisan or political" considerations).

163. Epperson v. Arkansas, 393 U.S. 97, 107 (1968).

164. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

165. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

166. *Epperson*, 393 U.S. 97 at 104.

167. *Id.* at 107.

168. *See* sources cited *supra* note 136 and accompanying text. In the school context, free speech rights are particularly at risk in the presence of a chilling effect. *See* sources cited *supra* note 158 and accompanying text.

to a complicated body of law that seeks, often clumsily, to balance a number of competing First Amendment imperatives."[169] Part III attempts to guide the reader through this case law while advancing a First Amendment-based argument for challenging CRT bans. This Part concludes that while students' best hope for overturning CRT bans lies in the court of public opinion, students do have a colorable argument that CRT bans violate the First Amendment by causing a chilling effect and restricting their right to receive information without a legitimate pedagogical purpose; all of which constitutes impermissible viewpoint discrimination.

A. Courts Consider Type of Forum, Type of Expression, and Reasons for Prohibiting Speech in Public Schools When Analyzing Students' First Amendment Claims

Judges asked to rule on students' free speech rights in public schools liken their task to "sail[ing] into [] unsettled waters . . . rife with rocky shoals and uncertain currents,"[170] and "cut[ting] a path through the thorniest of constitutional thickets—among the tangled vines of public school curricula and student freedom of expression."[171] Indeed, federal jurisprudence on students' free speech rights has been anything but clear: "As it turns out, deciding how the First Amendment should apply to high school students is hard," even for the Supreme Court.[172] On one hand, the Court famously declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[173] On the other, the Court emphasizes that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,"[174] and that the rights of students "must be 'applied in light of the special characteristics of the school environment.'"[175]

169. Morgan v. Swanson, 659 F.3d 359, 364 (5th Cir. 2011), *cert. denied*, 567 U.S. 905 (2012).

170. Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 321 (2d Cir. 2006).

171. Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 620 (2d Cir. 2005).

172. Ian Millhiser, *The Supreme Court's "Cursing Cheerleader" Case Is Its Biggest Student Free Speech Case in Years*, VOX (June 23, 2021), https://www.vox.com/2021/6/23/22547040/supreme-court-cursing-cheerleader-stephen-breyer-free-speech-mahanoy-bl-brandi-levy [https://perma.cc/9LR3-VA4D].

173. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

174. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

175. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506).

In short, while students have First Amendment rights, these rights are restricted by the school board's legitimate interests in maintaining order, setting curricula, and educating pupils.

The Supreme Court's most recent student speech case, *Mahoney Area School District v. B.L. ex rel. Levy*,[176] exemplifies this unresolved balance between free speech and school control. The *Mahoney* Court held that a high school violated a student's free speech rights by suspending her from the cheerleading squad after she uploaded a photo to Snapchat with the caption "fuck school fuck softball fuck cheer fuck everything."[177] In reaching their decision, the Justices relied heavily on the fact that the student was off-campus when she expressed these feelings and that her speech did not cause a "substantial disruption" of school activities.[178] Free speech rights in school, by contrast, are much more limited because student conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech."[179] Accordingly, students' free speech rights are at their lowest ebb—and the state's authority reaches its peak—when students are in class, and courts can only intervene in classroom and curricular decisions when "basic constitutional values" are "sharply implicated."[180] The preliminary question for CRT ban plaintiffs, then, is whether a First Amendment violation occurs when the curriculum prevents students from learning about and discussing CRT in class.

A broad review of federal student speech cases reveals that judges review the following factors when determining the extent of students' First Amendment rights. First, judges consider the forum where the speech is made, which is a necessary predicate to determining which speech public officials can exclude.[181] As

176. 141 S. Ct. 2038 (2021).

177. *Id.* at 2042–43.

178. *Id.* at 2047 (citing *Tinker*, 393 U.S. at 514).

179. *Id.* at 2044 (citing *Tinker*, 393 U.S. at 513).

180. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

181. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) ("We deal first with the question of whether [the school newspaper] may appropriately be characterized as a forum for public expression."); Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 625 (2d Cir. 2005) ("Because the level of judicial scrutiny varies with the nature of the forum in which the speech occurs we must first consider what sort of forum had been created . . . ."); Planned Parenthood of S. Nev., Inc. v. Clark Cnty. Sch. Dist., 941 F.2d 817, 821 (9th Cir. 1991) ("[W]e must first resolve whether the school newspapers, yearbooks and athletic programs are forums for public expression.").

the Supreme Court has long recognized, "the type of restrictions which may be placed on First Amendment activities depends in large part on 'the nature of the relevant forum.'"[182] Second, judges evaluate who is speaking and the type of speech being made, because different categories of expression receive different levels of First Amendment protection.[183] In the Supreme Court's words, speech restrictions may "be based on subject matter and speaker identity so long as the distinctions are reasonable in light of the purpose served by the forum and are viewpoint neutral."[184] Finally, judges examine the school's reasons for prohibiting the speech in order to decide whether free speech restrictions are justified. Specifically, "exercising editorial control over the style and content of student speech in school-sponsored expressive activities" must be "reasonably related to legitimate pedagogical concerns."[185] This Part will analyze how courts might consider CRT bans in each of these three steps.

B. PUBLIC SCHOOL CLASSROOMS ARE NONPUBLIC FORA WHERE CONTENT DISCRIMINATION IS PERMITTED BUT VIEWPOINT DISCRIMINATION IS OFTEN NOT

"For First Amendment purposes, there are three kinds of government property: (1) traditional public fora, (2) designated public fora, and (3) nonpublic fora."[186] Public schools are public fora "only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.'"[187] "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[188] Absent "clear intent to create a public forum," therefore, the school can regulate student speech in the context of a nonpublic forum.[189]

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182. Searcey v. Harris, 888 F.2d 1314, 1318 (11th Cir. 1989) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

183. *See, e.g.*, Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 923–24 (10th Cir. 2002) (listing "three main categories of speech that occur within the school setting," those being student speech, government speech, and school-sponsored speech).

184. *Cornelius*, 473 U.S. at 806.

185. *Hazelwood*, 484 U.S. at 273.

186. *See* Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1212 (11th Cir. 2004) (quoting Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983)).

187. *Hazelwood*, 484 U.S. at 267 (quoting *Perry Educ. Ass'n*, 460 U.S. at 47).

188. *Cornelius*, 473 U.S. 788 at 802.

189. *Hazelwood*, 484 U.S. at 270 (quoting *Cornelius*, 473 U.S. at 802).

In a nonpublic forum, speakers have fewer free speech rights than they would in a public forum, especially when their speech is controversial.[190] The courts' proclamations that schools are the "marketplace of ideas"[191] notwithstanding, judges routinely uphold school boards' authority to prohibit a wide range of speech on controversial topics. For example, the Supreme Court affirmed a principal's decision to prevent publication of a student newspaper discussing high school students' experiences with pregnancy.[192] The Eleventh Circuit ruled that a school could force a student to paint over religious symbols she added to a mural on the school's wall.[193] And the Tenth Circuit determined that a school art project, meant to heal the school community in the wake of a school shooting, was a nonpublic forum over which the school could exercise control.[194] In short, schools can exercise wide control over potentially controversial topics in a nonpublic forum.[195] However, CRT bans do not seek to ban all discussions of race outright; rather, they prohibit teaching the view that an individual might be "unconsciously" racist or oppressive because of their race's treatment throughout American history.[196] CRT ban challengers, therefore, have room to argue that CRT bans discriminate against their viewpoint in the nonpublic fora.

While the school board can undoubtedly regulate the *content* of speech in nonpublic fora, the question of whether the government can regulate the *viewpoints* expressed in school nonpublic

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190. *Cornelius*, 473 U.S. at 811 ("Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas.").

191. Mahoney Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969); Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1304 (7th Cir. 1980).

192. *Hazelwood*, 484 U.S. at 273.

193. Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1217 (11th Cir. 2004).

194. Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 934 (10th Cir. 2002).

195. Importantly, school board control over speech in nonpublic forums extends to teachers as well as students. In *Downs v. Los Angeles Unified School District*, the Ninth Circuit permitted the school to take down a teacher's inflammatory anti-gay posts on a school bulletin board, reasoning that since "bulletin boards that are not 'free speech zones,' but instead are vehicles for conveying a message from the school district," the school board could regulate the boards as nonpublic fora. 228 F.3d 1003, 1008, 1016–17 (9th Cir. 2000).

196. OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021); TENN. CODE ANN. § 49-6-1019 (2021); TEX. EDUC. CODE ANN. § 28.0022(a)(4)(A)(iii) (West 2021).

fora is unresolved. "[T]he distinction" between content discrimination and viewpoint discrimination "is not a precise one."[197] In general, content discrimination occurs when the government "regulate[s] speech based on its substantive content or the message it conveys," whereas viewpoint discrimination occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject."[198] For instance, "offering a course in economics at the expense of a course of medieval history" constitutes content discrimination, but "selecting a science book highlighting genetics at the expense of one that emphasizes global warming" constitutes viewpoint discrimination.[199]

Content discrimination "may be permissible if it preserves the purposes of th[e] limited forum" in which it takes place, but viewpoint discrimination "is presumed impermissible when directed against speech otherwise within the forum's limitations."[200] In *Rosenberger v. University of Virginia*, for example, the Supreme Court concluded that the University of Virginia violated the First Amendment by engaging in viewpoint discrimination when it denied funding to a Christian student group.[201] Because "the University d[id] not exclude religion as a subject matter," which would be permissible content discrimination, but rather targeted religious publications for "disfavored treatment," the University impermissibly discriminated between students based on their views.[202] Although the University was operating in a "limited public forum,"[203] corroborating Supreme Court precedent makes clear that, even in a nonpublic forum, "the government violates the First Amendment when it denies

197. Rosenberger v. Univ. of Va., 515 U.S. 819, 831 (1995); *see also* Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 630 (2d Cir. 2005) ("We recognize at the outset that drawing a precise line of demarcation between content discrimination, which is permissible in a non-public forum, and viewpoint discrimination, which traditionally has been prohibited *even* in non-public fora, is, to say the least, a problematic endeavor.") (emphasis original).

198. *Rosenberger*, 515 U.S. at 828–29.

199. Esquivel v. S.F. Unified Sch. Dist., 630 F. Supp. 2d 1055, 1060 (N.D. Cal. 2008).

200. *Rosenberger*, 515 U.S. at 829–30.

201. *Id.* at 837.

202. *Id.* at 831.

203. *Id.* at 829.

access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject."[204]

C. The Circuit Split over Whether to Permit Viewpoint Discrimination in K–12 Schools Should Be Resolved in Favor of Requiring Viewpoint Neutrality

Federal appellate courts are split as to whether this prohibition on viewpoint discrimination applies in K–12 school settings. The First,[205] Fifth,[206] and Tenth[207] Circuits hold that educators can discriminate based on viewpoint. Meanwhile, the Second,[208] Ninth,[209] and Eleventh[210] Circuits explicitly require schools to remain viewpoint neutral.

1. The Argument for Allowing Viewpoint Discrimination in Nonpublic Fora

Consider, first, the argument that the government can discriminate based on viewpoint in K–12 public schools. In *Ward v. Hickey*, the First Circuit affirmed that a school board did not violate a high school biology teacher's First Amendment rights in terminating her after she led a discussion on aborting "Down's

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204. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

205. Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993) (arguing that the Supreme Court "did not require that school regulation of school-sponsored speech be viewpoint neutral.").

206. Morgan v. Swanson, 659 F.3d 359, 379 (5th Cir. 2011), *cert. denied*, 567 U.S. 905 (2012) ("No matter how 'axiomatic' the generalized rule against viewpoint discrimination may be, we cannot neglect that this case arises in the public schools, a special First Amendment context, which admits of no categorical prohibition on viewpoint discrimination.").

207. Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 926 (10th Cir. 2002) ("[W]e conclude that *Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech.").

208. Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 633 (2d Cir. 2005) (declining to depart from Supreme Court precedent requiring viewpoint neutrality in school).

209. Planned Parenthood of S. Nev., Inc. v. Clark Cnty. Sch. Dist., 941 F.2d 817, 828 (9th Cir. 1991) (noting that schools retain the authority to refuse to sponsor speech that might "associate the school with any position other than neutrality on matters of political controversy").

210. Searcey v. Harris, 888 F.2d 1314, 1319 n.7, 1325 (11th Cir. 1989) (finding that the Supreme Court, in *Hazelwood*, did not "inten[d] to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views," and that school officials must "make decisions relating to speech which are viewpoint neutral").

Syndrome fetuses" during class.[211] The *Ward* court adopted the Supreme Court's "legitimate pedagogical concern" test from *Hazelwood*, correctly noting that *Hazelwood* does not expressly require viewpoint neutrality.[212] Because the school board had a legitimate pedagogical interest in preventing inappropriate lessons and its restriction of Ward's speech was "reasonable," the school board did not violate the First Amendment despite the fact that it discriminated based on viewpoint.[213] Yet the court failed to explain why the school board's concern was legitimate and its actions reasonable.

In *Morgan v. Swanson*, the Fifth Circuit also applied the *Hazelwood* test to determine whether a principal infringed on an elementary schooler's free speech rights by preventing the student from giving a religious message as a gift at a school holiday party.[214] After acknowledging "the generalized rule against viewpoint discrimination," and recognizing a Circuit split in the matter, the *Morgan* court stated that "there [is] no categorical ban on viewpoint discrimination in public schools."[215] However, the *Morgan* court failed to explain its reasoning in disregarding the "axiomatic" viewpoint-neutrality rule,[216] and did little more than decide that the principal at issue was entitled to qualified immunity based on persuasive Establishment Clause precedent from the Fourth Circuit.[217]

Finally, in *Fleming v. Jefferson County School District*, the Tenth Circuit "conclude[d] that *Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech."[218] *Fleming* concerned a school mural meant to heal the community after a school shooting; plaintiffs were prevented from painting religious symbols and the shooting date on the mural.[219] The Tenth Circuit reasoned that "[i]f *Hazelwood* required viewpoint neutrality, then it would essentially provide the same

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211. Ward v. Hickey, 996 F.2d 448, 450, 456 (1st Cir. 1993).

212. *Id.* at 453–54. Viewpoint neutrality refers to when government regulation is "not based on a point of view or an ideology." *Viewpoint-Neutral*, BLACK'S LAW DICTIONARY (11th ed. 2019).

213. *Ward*, 996 F.2d at 454.

214. Morgan v. Swanson, 659 F.3d 359, 365, 389 (5th Cir. 2011) (en banc), *cert. denied*, 567 U.S. 905 (2012).

215. *Id.* at 379.

216. *Id.*

217. *Id.* at 383.

218. Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 926 (10th Cir. 2002).

219. *Id.* at 922.

analysis as under a traditional nonpublic forum case."[220] Therefore, "[i]n light of the Court's emphasis on the special characteristics of the school environment . . . it would make no sense to assume that *Hazelwood* did nothing more than simply repeat the traditional nonpublic forum analysis in school cases."[221]

Fleming's reasoning is much more satisfactory than *Ward*'s or *Morgan*'s because it provides a justification for departing from the Supreme Court's longstanding preference for viewpoint neutrality, articulated in *Perry Education Ass'n v. Perry Local Educators' Ass'n*[222] and *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*[223] In *Perry*, the litigants asked the Court to decide whether a school board violated the First Amendment by denying one teachers' union access to an interschool mail system.[224] The Court found no violation, as there was "no indication that the school board intended to discourage one viewpoint and advance another."[225] Similarly, in *Cornelius*, the Court held that the federal government does not violate the First Amendment by excluding political organizations from a federal government charity drive.[226] The Court specifically ruled that "[t]he First Amendment does not forbid a viewpoint-neutral exclusion of [disruptive] speakers," but that excluding speakers cannot be excluded on grounds that are really "a façade for viewpoint-based discrimination."[227] *Fleming* posits that *Hazelwood* justifiably breaks from these viewpoint-neutral precedents by allowing for viewpoint discrimination that restricts schoolchildren's access to potentially inappropriate information.

2. The Argument for Requiring Viewpoint Neutrality in Nonpublic Fora

Consider, however, the alternative theory that the government cannot discriminate between different viewpoints in a public school setting. The Second Circuit, in *Peck ex rel. Peck v. Baldwinsville Central School District*, considered whether a principal infringed on a kindergartener's free speech rights by censoring a religiously-themed poster the kindergartener submitted for a

220. *Id.* at 926.
221. *Id.* (internal quotation marks and citation omitted).
222. 460 U.S. 37 (1983).
223. 473 U.S. 788 (1985).
224. *Perry Educ. Ass'n*, 460 U.S. at 39.
225. *Id.* at 48–49.
226. *Cornelius*, 473 U.S. at 813.
227. *Id.* at 811.

school assignment.[228] Finding that the assignment constituted school-sponsored curricular speech, and that the school was a nonpublic forum, the court applied *Hazelwood*.[229] The *Peck* court recognized the Circuit split on whether *Hazelwood* allows schools to discriminate based on viewpoint,[230] but concluded that, in light of longstanding Supreme Court precedent favoring viewpoint neutrality, "a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests."[231]

Another analogous case is *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, wherein the Ninth Circuit applied *Hazelwood* to determine that the school district had a legitimate pedagogical reason for not publishing controversial advertisements in school-sponsored publications.[232] The court relied on *Hazelwood* for the principle that school officials retain the authority to refuse to "associate the school with any position other than neutrality on matters of political controversy,"[233] and *Cornelius* for the platitude that "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum."[234] In contrast to *Fleming*, then, the *Planned Parenthood* court "decided that *Hazelwood* did not alter the general requirement of viewpoint neutrality in nonpublic fora."[235]

Planned Parenthood's logic is persuasive. As the Eleventh Circuit pointed out in *Searcey v. Harris*, it is doubtful that the *Hazelwood* Court intended to "drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views."[236] *Searcey* addressed the question of whether a school board could prevent an anti-military organization from

228. 426 F.3d 617, 620 (2d Cir. 2005).

229. *Id.* at 627–29.

230. *Id.* at 632.

231. *Id.* at 633 (emphasis in original).

232. Planned Parenthood of S. Nev., Inc. v. Clark Cnty. Sch. Dist., 941 F.2d 817, 819, 829–30 (9th Cir. 1991).

233. *Id.* at 829 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988)).

234. *Id.* at 829 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 809 (1985)).

235. Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 632 n.9 (2d Cir. 2005).

236. Searcey v. Harris, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989).

attending a school Career Day—a nonpublic forum—due to concerns of the organization denigrating military recruiters.[237] The Eleventh Circuit reasoned that, while *Hazelwood* directs judges' attention to "the special characteristics of the school environment,"[238] the longstanding *Cornelius* test already instructs judges, when balancing free speech rights, to consider "the purpose served by the forum," which must remain "viewpoint neutral."[239] Therefore:

> We fail to see how th[e *Hazelwood*] standard differs from the *Cornelius* standard for nonpublic forums; instead it is merely an application of that standard to a curricular program. Since the purpose of a curricular program is by definition "pedagogical," the *Cornelius* standard requires that the regulations be reasonable in light of the pedagogical purposes of the particular activity. *Hazelwood* therefore does not alter the test for reasonableness in a nonpublic forum such as a school but rather provides the context in which the reasonableness of regulations should be considered.[240]

"Without more explicit direction," *Searcey* concludes, "we will continue to require school officials to make decisions relating to speech which are viewpoint neutral."[241] The court found, accordingly, that inviting military recruiters but banning propeace organizations from a school Career Day amounted to viewpoint discrimination: having "determined that the students should learn about career and educational opportunities . . . the Board cannot exclude [a given organization] solely because it disagreed with the [organization's] views."[242] Significantly, the *Searcey* court reached this result despite the fact that the Career Day ban was facially neutral.[243] This precedent suggests that courts ruling on the constitutionality of CRT bans must both apply a viewpoint neutrality approach and discern whether the facially neutral language actually amounts to viewpoint discrimination.

237. *Id.* at 1315–17.

238. *Hazelwood*, 484 U.S. at 266 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

239. *Cornelius*, 473 U.S. at 806.

240. *Searcey*, 888 F.2d at 1319.

241. *Id.* at 1325.

242. *Id.*

243. *Id.* ("[A]lthough facially reasonable," a free speech restriction designed to "avoid[] debate about controversial matters" is "capable of concealing bias."); *see also Cornelius*, 473 U.S. at 812 ("[T]he purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers.").

3. Courts Will More Likely Require Viewpoint Neutrality in Nonpublic Fora

The viewpoint-neutrality camp has the stronger legal argument. Given that *Hazelwood* never even mentions the viewpoint neutrality/discrimination question, it is hard to imagine "that the Supreme Court would, without discussion and indeed totally *sub silentio*, overrule *Cornelius* and *Perry*—even in the limited context of school-sponsored student speech."[244] In addition to being more in keeping with *Cornelius* and *Perry*, viewpoint neutrality is also more in line with *Rosenberger v. University of Virginia*. The Supreme Court in *Rosenberger* affirmed that "[v]iewpoint discrimination is . . . an egregious form of content discrimination," and that even schools "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[245] Notably, *Rosenberger* did not concern school-sponsored speech[246]—rather, "the University [took] pains to disassociate itself from the private speech"[247]—but the principle still holds that viewpoint neutrality is foundational to First Amendment analysis.[248] Absent any indication that the Supreme Court intended to dispose with longstanding precedent establishing that the government cannot discriminate based on viewpoint in nonpublic fora solely on the basis that the nonpublic forum is a school building, the Circuits should resolve the split in favor of viewpoint neutrality.[249] In other words, "the existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a façade for viewpoint-based discrimination."[250]

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244. Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 633 (2d Cir. 2005).

245. 515 U.S. 819, 829 (1995).

246. Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1216 (11th Cir. 2004) ("*Rosenberger* [did not] involve[] school-sponsored speech that could be attributed to the school.").

247. *Rosenberger*, 515 U.S. at 841.

248. *Cornelius*, 473 U.S. at 812 (stating that facially neutral justifications for excluding a speaker from a nonpublic forum "cannot save an exclusion that is in fact based on the desire to suppress a particular point of view").

249. *See Peck ex rel. Peck*, 426 F.3d at 633 ("[A] manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests.") (emphasis in original).

250. *Cornelius*, 473 U.S. at 811.

The most compelling argument against viewpoint neutrality is that it would deprive schools of the ability to prohibit harmful or disruptive messages.[251] If viewpoint neutrality were required, some courts worry, the school "would be required to [publish speech] with inflammatory and divisive statements."[252] For example, some may argue that a school which allows students to wear Malcolm X T-shirts must also permit Confederate flag T-shirts,[253] or that a school with a pro-LGBT message board must also allow a teacher to create an anti-LGBT counterpart,[254] or that a school mural reading "God is Love" must be balanced with the message "God is Hate."[255] The fallacy of this argument is twofold.

First, courts universally agree that "when the State is the speaker, it may make content-based choices."[256] Given that schools may restrict content "on the basis of subject matter and speaker identity,"[257] and "refuse to sponsor student speech that might . . . associate the school with any position other than neutrality,"[258] viewpoint neutrality does not require public schools to play devil's advocate.[259] For example, the school plagued by disruptions caused by Confederate flag T-shirts could legitimately enforce a content ban on "all symbols which 'cause[] disruption to the educational process,' regardless of whether the disruption arises because of a student's racial animus, or for another reason entirely."[260] The school with the teacher-sponsored anti-LGBT message board could legitimately adopt a policy of

251. Pompeo v. Bd. of Regents, 852 F.3d 973, 982–83 (10th Cir. 2017).

252. *Id.*

253. Castorina *ex rel.* Rewt v. Madison Cnty. Sch. Bd., 246 F.3d 536, 544 (6th Cir. 2001) (arguing that the court would be forced to "strike down" a school ban on Confederate flag clothing if the ban also did not apply to "Malcolm X-inspired clothing").

254. Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1005 (9th Cir. 2000) (deciding "whether the First Amendment compels a public high school to share the podium with a teacher with antagonistic and contrary views").

255. Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 934 (10th Cir. 2002).

256. Rosenberger v. Univ. of Va., 515 U.S. 819, 833 (1995); *see also Fleming*, 298 F.3d at 923 ("When the government speaks, it may choose what to say and what not to say.").

257. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 49 (1983).

258. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988).

259. *Downs*, 228 F.3d at 1013 ("Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.").

260. Barr v. Lafon, 538 F.3d 554, 572 (6th Cir. 2008).

promoting tolerance, and take down the teacher's offensive message board that undermines the school's speech.[261] And the school with the religious mural could, on the theory that a visitor would reasonably perceive the mural to "bear the imprimatur of the school," require students to paint over the religious messages.[262] Simply put, in their haste to grant schools the right to discriminate based on viewpoint, courts forget that schools retain the ability to regulate content in a nonpublic forum.[263]

Second, schools have a crucial role to play in students' social and civic development.[264] As such, K–12 public schools have a legitimate pedagogical interest in helping students understand and appreciate differences in personal identity, navigate conflict and disagreement, and learn to work with others.[265] This mission necessarily involves teaching students that classroom debates about important social issues—whether sexuality, religion, or, certainly, CRT—are not "bipolar."[266] The reality is that people are not divided into straight/gay, devout/atheist, or white/Black. Rather, people are multi-faceted, as are school discussions about these issues. True viewpoint neutrality, then, ought not to entail balancing "liberal" and "conservative" perspectives on CRT so much as it ought to encourage students to critically examine the complicated range of perspectives on race in America. Plaintiffs challenging state CRT bans should, accordingly, argue that CRT bans are viewpoint-discriminatory in-

261. *Downs*, 228 F.3d at 1012 ("Because the bulletin boards were a manifestation of the school board's policy to promote tolerance . . . all speech that occurred on the bulletin boards was the school board's and [the school's] speech.").

262. Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1213–14 (11th Cir. 2004) (citing *Hazelwood*, 484 U.S. at 271–73).

263. *See, e.g.*, Busch v. Marple Newtown Sch. Dist., 567 F.3d 89, 97–99 (3d Cir. 2009) (upholding a principal's refusal to allow a parent to read the Bible to a kindergarten class as a form of content, not viewpoint, discrimination).

264. Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1304 (7th Cir. 1980) (emphasizing that schools play a key role in inculcating "fundamental social, political, and moral values," and thus "the community has a legitimate, even a vital and compelling interest in the choice [of] and adherence to a suitable curriculum for the benefit of our young citizens") (internal citations omitted).

265. *See* Brown, *supra* note 17, at 5 (arguing that courts "have embraced the notion that public schools are cultural institutions engaged in socializing America's children"); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring) ("The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.").

266. Rosenberger v. Univ. of Va., 515 U.S. 819, 831–32 (1995).

sofar as they prohibit teaching one perspective of American history: the perspective that U.S. institutions are systemically racist and operate to sustain white supremacy.[267]

D. CLASSROOM DISCUSSIONS ABOUT CRT ARE SCHOOL-SPONSORED SPEECH, WHICH CAN BE REGULATED ONLY PURSUANT TO A LEGITIMATE PEDAGOGICAL CONCERN

Free speech rights in school hinge on not only the type of forum created, but on the type of speech made. Courts generally recognize three broad categories of speech in public schools: pure student speech, government speech, and school-sponsored speech.[268] Depending on the identity of the speaker and the form of their expression, CRT bans could be analyzed under any of these three standards.

First, *Tinker* demands that purely student speech which occurs on school premises must be tolerated if it will not "substantially interfere with the work of the school or impinge upon the rights of other students."[269] For example, students wearing armbands to "silent[ly], passive[ly]" protest the Vietnam War constitutes pure student speech that does not interfere "with the school's work" or "colli[de] with the rights of other students to be secure and to be let alone," and is thus entitled to First Amendment protection.[270]

Second, speech that flows from the school itself is "government speech," which, per *Rosenberger*, "permit[s] the government to regulate the content of what is or is not expressed."[271] Schools reserve the right, therefore, to remove inflammatory materials from a teacher-operated bulletin board, because "when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis."[272]

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267. *See, e.g.*, TENN. CODE ANN. § 49-6-1019 (2021) (prohibiting teaching that "the United States is fundamentally or irredeemably racist"); TEX. EDUC. CODE ANN. § 28.0022(a)(4) (West 2021) (prohibiting teaching that an individual's race can make that person "unconsciously" racist); *see also supra* Part I for a discussion of CRT tenets and modern conservative efforts to re-frame those tenets.

268. Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 923–24 (10th Cir. 2002).

269. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

270. *Id*. at 508.

271. *Rosenberger*, 515 U.S. at 833.

272. Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1013 (9th Cir. 2000).

Finally, "[s]chool-sponsored speech is student speech that a school 'affirmatively . . . promote[s],' as opposed to speech that it 'tolerates.'"[273] School-sponsored speech is regulated by *Hazelwood*, which holds that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[274] Under *Hazelwood*, a school official could censor articles about teen pregnancy from a school newspaper, since the newspaper "[b]ears the imprimatur" of the school.[275]

1. Pure Student Speech–The *Tinker* Standard

Free speech rights are strongest when the speech is pure student speech under the *Tinker* framework. In *Tinker*, the Supreme Court upheld students' First Amendment right to wear a black armband in silent protest of the Vietnam War, because their "speech" did not "materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school."[276] Students, when speaking for themselves and not disrupting the school day, "may not be confined to the expression of those sentiments that are officially approved."[277] Therefore, while student speech occurring in the context of a class assignment would be judged under *Hazelwood*,[278] students peacefully protesting a CRT ban at school—by, say, wearing a shirt or an armband expressing their views—would have greater free speech rights under the *Tinker* standard.

Courts tend to uphold students' First Amendment right to extreme and provocatory political views outside of the classroom. Applying *Tinker*, the Second Circuit found that a school violated a student's First Amendment rights by forcing him to censor a shirt depicting then-President George W. Bush surrounded by

273. Hansen v. Ann Arbor Pub. Schs., 293 F. Supp. 2d 780, 793 (E.D. Mich. 2003) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988).

274. *Hazelwood*, 484 U.S. at 273.

275. *Id.* at 270–71.

276. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

277. *Id.* at 511.

278. *See* Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 628–29 (2d Cir. 2005) (finding that a kindergartener's religiously-themed poster for a class project should be judged under *Hazelwood*, not *Tinker*, because the poster was "part of the kindergarten curriculum" and bore the "imprimatur of the school.").

martinis and cocaine.[279] In an analogous case, the Sixth Circuit has held that students wearing Confederate flag T-shirts are entitled to *Tinker* protection if they can prove that the school engaged in viewpoint discrimination by banning Confederate flag shirts but not other racially divisive symbols.[280] By contrast, the Fourth Circuit determined that a ban on Confederate flag shirts did not violate the First Amendment in *Hardwick ex rel. Hardwick v. Heyward*, but reached this result only after determining that the school was plagued by incidents of racial animosity,[281] and that the dress code was also enforced against other race-sensitive shirts.[282] Since CRT bans are targeted and discriminate against the particular viewpoint that the United States is a systemically racist country, students wishing to organize against the ban would enjoy *Tinker* protection if they attended school wearing attire with pro-CRT messaging. This could be an under-explored strategy to push the envelope in the CRT debate outside of a court system that has defaulted too often on its obligations to students of color.[283] However, this is a limited finding unlikely to satisfy students who are already engaging in protests against racism in both red and blue states across the country.[284]

279. Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 330 (2d Cir. 2006).

280. Castorina *ex rel.* Rewt v. Madison Cnty. Sch. Bd., 246 F.3d 536, 539, 544 (6th Cir. 2001). The court's lamentable and false equivalency between the Confederacy and Malcolm X is beyond the scope of this Note.

281. 711 F.3d 426, 432–33 (4th Cir. 2013).

282. *Id.* at 444.

283. The Supreme Court surrendered the fight for racial integration of public schools, for example, in *Milliken v. Bradley I*, 418 U.S. 717 (1974) and *Milliken v. Bradley II*, 433 U.S. 267 (1977).

284. *See, e.g.*, Tyler Kingkade, *As Parents Protest Critical Race Theory, Students Fight Racist Behavior at School*, NBC NEWS (Dec. 16, 2021), https://www.nbcnews.com/news/us-news/critical-race-theory-student-protests-rcna8926 [https://perma.cc/C9BV-X54G] ("Students have walked out of class over racist remarks by classmates in Connecticut and Massachusetts, racist social media posts by teens in Minnesota and Washington, graffiti with racial slurs found in bathrooms at schools in Michigan and Missouri, and threats against students of color in New York and Ohio."); Samantha West, *Tennessee Students: CRT Laws Promote Bias in School, Hurt Mental Health*, CHALKBEAT (Apr. 1, 2022), https://tn.chalkbeat.org/2022/4/1/23004966/tennessee-schools-critical-race-theory-culture-wars-mental-health-memphis-nashville-knoxville [https://perma.cc/WKK6-URNU] (documenting students' efforts to combat Tennessee's CRT ban).

2. Government Speech–The *Rosenberger* Standard

"When the government speaks," such as the principal speaking at a school assembly, "it may choose what to say and what not to say."[285] In *Rosenberger*, the Supreme Court made clear that this rule applies in the education context: "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker."[286] Put differently, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[287] Government speakers—such as public school teachers, principals, and school board members—are therefore obligated to toe the line when it comes to CRT. A school could, for example, prevent one of its teachers from contravening school policy by posting anti-LGBT rhetoric on a bulletin board.[288] A school could similarly shut down the speech of a teacher who violated a CRT curricular ban.[289]

Teachers likely cannot successfully challenge CRT bans because it is well-settled that though "teachers have presumptive expertise to exercise broad discretion in doing what they are hired to do . . . their discretion is expressly circumscribed" by the curriculum and their school board superiors.[290] For example:

> A teacher hired with directions to teach *Uncle Tom's Cabin* (and not *Huckleberry Finn*) has waived no constitutional right, because the

285. Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 923 (10th Cir. 2002).

286. Rosenberger v. Univ. of Va., 515 U.S. 819, 833 (1995).

287. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

288. Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1011–13 (9th Cir. 2000).

289. *See* Scallet v. Rosenblum, 911 F. Supp. 999, 1009 (W.D. Va. 1996), *aff'd per curiam*, 106 F.3d 391 (4th Cir. 1997) (determining that a university had sufficient justification in preventing teacher's speech, advocating for diversity, that undermined its curricular plan); *see also* Eesha Pendharkar, *Teacher Fired for Lesson on White Privilege Loses Appeal*, EDUCATIONWEEK (Oct. 26, 2021), https://www.edweek.org/teaching-learning/teacher-fired-for-lesson-on-white-privilege-loses-appeal/2021/10 [https://perma.cc/KTG5-9TCU] (reporting that a self-described "anti-racist" teacher was fired for failure to provide "varying viewpoints" after assigning materials such as Ta-Nehisi Coates's "The First White President" or Peggy McIntosh's "White Privilege: Unpacking an Invisible Knapsack").

290. William G. Buss*, Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER, RACE & JUST. 213, 218–19 (1999).

> teacher remains free to exercise the right to communicate ideas about *Huckleberry Finn* to a willing listener not supplied by the employer at the place of employment. What the teacher has given up is not a constitutional right because the teacher had no prior right to teach *Huckleberry Finn* to the group of students provided by the employer.[291]

Therefore, public school teachers would be unable to allege a constitutional injury sufficient to challenge an express CRT ban on a First Amendment theory. A teacher could, however, challenge a state's pretextual interference in classrooms without a legitimate pedagogical purpose:

> One can imagine cases in which the suppression of teacher speech communicating the curriculum is not a result of the school board's affirmative effort to promulgate and preserve its own curriculum, but only an attempt to suppress a particular disapproved word or book or idea. Such a pretextual action by a school board would presumably not satisfy the *Hazelwood* test.[292]

Indeed, Oklahoman schoolteachers are mounting such a challenge to Oklahoma's CRT ban, alleging that the state legislature enacted the ban for racial and political reasons, at the expense of student achievement.[293] But this merely confirms that *Hazelwood*, not *Rosenberger*, is the proper path for CRT ban challengers to take.[294] "[T]eachers [themselves] have no First Amendment right to influence curriculum as they so choose,"[295] and while "development of curriculum [i]s government speech and d[oes] not create a public forum," a student's First Amendment claim is not per se excludable.[296] Any CRT ban challenges brought by teachers that do not also allege a harm to students are likely to fail.

3. School-Sponsored Speech–The *Hazelwood* Standard

It is crucial, therefore, that CRT ban plaintiffs convince the courts that CRT bans restrict school-sponsored student speech (judged under *Hazelwood*), in addition to government speech

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291. *Id.* at 235–36.

292. *Id.* at 237.

293. *See* Amended Complaint, *supra* note 73, at 47 ("The Oklahoma Legislature Passed H.B. 1775 With The Racial And Partisan Intent To Chill Speech That Increases The Educational Achievement, Success, And Safety Of Historically Marginalized Students.").

294. *See infra* Part III.C.3.

295. Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1015–16 (9th Cir. 2000).

296. Arce v. Douglas, 793 F.3d 968, 982 (9th Cir. 2015) (citing Chiras v. Miller, 432 F.3d 606, 619–20 (5th Cir. 2005)).

(judged under *Rosenberger*). This is a tall order: "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,"[297] and courts can only intervene "in the daily operation of school systems" which "directly and sharply implicate basic constitutional values."[298] Furthermore, CRT bans prohibit teachers from "requir[ing]," "promot[ing]," or "mak[ing] part of a course" any CRT concepts discussed above, but are silent on student conduct.[299] Students challenging CRT bans, accordingly, must demonstrate that the bans' restrictions on teachers impermissibly interfere with students' own constitutional rights. However, this stumbling block is not fatal to plaintiffs' argument, for two reasons.

First, the Supreme Court has recognized that "the Constitution protects the right to receive information and ideas,"[300] thus creating an avenue for students to argue that their First Amendment rights are infringed when the state discriminates against certain viewpoints in a nonpublic forum[301] by excluding those views from the curriculum. When states prohibit teachers from discussing CRT in class, they necessarily also "contract the spectrum of available knowledge" that students are exposed to.[302] Therefore, curricular bans ought to be understood as both a limit on teachers' rights to *convey* information and students' rights to *receive* information. State actors may limit both rights under *Hazelwood*, but only "so long as their actions are reasonably related to legitimate pedagogical concerns."[303]

Second, and relatedly, the *Hazelwood* opinion itself explicitly states that *Hazelwood* is the correct standard to apply to "school-sponsored" speech that "may fairly be characterized as part of the school curriculum."[304] This includes "school-sponsored publications, theatrical productions, and other expressive

297. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

298. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

299. OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021); TENN. CODE ANN. § 49-6-1019 (2021); TEX. EDUC. CODE ANN. § 28.0022(a)(4) (West 2021).

300. *See* cases cited *supra* note 23.

301. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); *see also supra* Part III.B (reviewing the different legal ramifications of content and viewpoint discrimination in nonpublic fora, and arguing CRT ban challengers could leverage viewpoint discrimination jurisprudence).

302. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

303. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–73 (1988).

304. *Id.* at 271.

activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[305] It also includes substantive classroom discussions,[306] instructive materials shown to students,[307] and bans on specific curricular programs.[308] In sum, Circuit courts consistently apply *Hazelwood* to curricular decisions,[309] and there is no reason why courts would not similarly apply *Hazelwood* to a CRT ban challenge.

Under *Hazelwood*, "school-sponsored" speech that "may fairly be characterized as part of the school curriculum" is subject to restrictions that "are reasonably related to legitimate pedagogical concerns."[310] Speech is "school-sponsored" if it "bear[s] the imprimatur of the school,"[311] which necessitates considering:

> (1) where and when the speech occurred; (2) to whom the speech was directed and whether recipients were a "captive audience"; (3) whether the speech occurred during an event or activity organized by the school, conducted pursuant to official guidelines, or supervised by school officials; and (4) whether the activities where the speech occurred were designed to impart some knowledge or skills to the students.[312]

As speech affected by CRT bans would occur (or not occur) in classrooms, be communicated by teachers to a "captive audience" of supervised students, and be designed to impart knowledge about American history, CRT-related classroom speech is "school-sponsored." CRT bans are, moreover, "part of

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305. *Id.*

306. Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993) ("[A] school committee may regulate a teacher's classroom speech if . . . the regulation is reasonably related to a legitimate pedagogical concern . . . .").

307. *See* Virgil v. Sch. Bd. of Columbia Cnty., 862 F.2d 1517, 1521–23 (11th Cir. 1989) (applying *Hazelwood* to sexually explicit textbooks).

308. Arce v. Douglas, 793 F.3d 968, 982 (9th Cir. 2015) (finding that *Hazelwood* applies to curricular bans involving "*student's* First Amendment rights," as opposed to "government speech" that a "teacher ha[s] no First Amendment right to challenge").

309. *See* Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 628–29 (2d Cir. 2005) (explaining that a class assignment is governed by *Hazelwood* because the assignment is incorporated into the curriculum); Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1214 (11th Cir. 2004) (stating that *Hazelwood* "controls school-sponsored expression that occurs in the context of a curricular activity"); Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 924 (10th Cir. 2002) (discussing how the district court applied *Hazelwood* "to activities conducted as part of the school curriculum.").

310. *Hazelwood*, 484 U.S. at 270–73.

311. *Id.* at 270–71.

312. Morgan v. Swanson, 659 F.3d 359, 376 (5th Cir. 2011), *cert. denied*, 567 U.S. 905 (2012).

the school curriculum," as they prescribe what cannot be taught in public schools.[313] Finally, while the Supreme Court has not defined "legitimate pedagogical concern," the term is broad enough to encompass such far-flung objectives as watching age-appropriate films in class,[314] "reducing racism,"[315] "amplify[ing] the voices of students of color,"[316] "making students aware of minority points of view,"[317] teaching "discipline, courtesy, and respect for authority,"[318] and even "participating in community healing."[319] The final challenge facing potential CRT ban plaintiffs, therefore, is demonstrating that no such legitimate pedagogical reason exists for prohibiting CRT discussions in class.

E. SCHOOLS LACK THE REQUISITE "LEGITIMATE PEDAGOGICAL CONCERN" FOR UPHOLDING CRT BANS

No legitimate pedagogical reason exists for denying students the opportunity to learn about CRT. Some CRT ban proponents might argue that the concepts prohibited by CRT bans are not "age-appropriate"[320] or "educational[ly] suitab[le]"[321] for secondary school students. In one sense, they are correct: CRT is a complex legal academic theory, which is partly why CRT is not, in fact, being taught in most American high school classrooms.[322]

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313. *See* OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021); TENN. CODE ANN. § 49-6-1019 (2021); TEX. EDUC. CODE ANN. § 28.0022(a)(4) (West 2021).

314. Virgil v. Sch. Bd. of Columbia Cnty., 862 F.2d 1517, 1523 (11th Cir. 1989).

315. Arce v. Douglas, 793 F.3d 968, 985–86 (9th Cir. 2015).

316. Menders v. Loudoun Cnty. Sch. Bd., 580 F. Supp. 3d 316, 326–27 (E.D. Va. Jan. 19, 2022) ("[A]ddressing the effects of invidious discrimination within the educational environment is clearly a legitimate pedagogical concern . . . ."); *id.* at 328–30 (finding that white plaintiffs lacked standing to bring a First Amendment claim against a school district that enacted a racial bias reporting program).

317. Hansen v. Ann Arbor Pub. Schs., 293 F. Supp. 2d 780, 797 (E.D. Mich. 2003).

318. Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002) (citing Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990)).

319. *Id.* at 931.

320. Virgil v. Sch. Bd. of Columbia Cnty., 862 F.2d 1517, 1523 (11th Cir. 1989).

321. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982).

322. *See* Crampton, *supra* note 9 (explaining that secondary schools do not teach CRT); *see also* Kahn, *supra* note 9 (finding that twenty-two percent of

But the moniker "CRT," when used by the drafters of anti-CRT legislation, is less an actual reference to critical race theory and more a "shorthand"[323] for ill-defined concepts that make white Americans uneasy and about which they know very little.[324] CRT bans are therefore designed, not to prohibit esoteric CRT conversations that are not actually happening, but to create a "chilling effect"[325] on classroom conversations about systemic racism that *are* happening. Claims that classroom conversations about systemic racism are neither age-appropriate nor educationally suitable ignore the growing body of research that culturally relevant pedagogy benefits white students and students of color.[326] More fundamentally, such claims ignore the reality that many students of color learn at a very young age that systemic racism is alive and well in the United States.[327] Using age-appropriateness or educational suitability as a justification for failing to teach students about racism, then, serves only to perpetuate white ignorance about racism's impact on people of color.[328]

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survey respondents supposedly familiar with CRT mistakenly believe that CRT is taught in most public high schools).

323. *Cf.* González v. Douglas, 269 F. Supp. 3d 948, 967 (D. Ariz. 2017) (noting that the Superintendents primarily responsible for enacting and enforcing A.R.S. § 15-112, the ethnic studies prohibition, used "Raza" as a "dog whistle" and "shorthand for . . . communicating with Republican primary voters," and training voters to equate the Mexican American Studies Program with words like "un-American," "radical," and "communist"). Conservative politicians employ CRT bans in much the same way as the Tucson Unified School District Superintendents used A.R.S. § 15-112: to convert white Americans' racial fears into votes. *See* Tesler, *supra* note 80 (detailing the connection between white identity politics and CRT bans).

324. *See* Kahn, *supra* note 9 (reporting that thirty-three percent of survey respondents supposedly familiar with CRT mistakenly believe that CRT "says that white people are inherently bad or evil"); Samuels & Thomson-DeVeaux, *supra* note 83 (finding that twenty-two percent of Americans mistakenly believe the same).

325. *See* sources cited *supra* notes 70–73 and accompanying text.

326. *See, e.g.*, Ledesma & Calderón, *supra* note 18, at 208–09 (arguing that critical race pedagogy can help liberate students of all races from systemically racist beliefs).

327. *See* Lawrence, *supra* note 4, at 317 (detailing the Black author's first memory of racism at age five); IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 44–55 (2019) (recounting the Black author's experience with racism in third grade); Mari J. Matsuda, *This is (Not) Who We Are: Korematsu, Constitutional Interpretation, and National Identity*, 128 YALE L.J.F. 657, 666–69 (2019) (documenting how the author's father, then a Japanese American teenager, was confined to internment camps during World War II).

328. *See* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1031 (9th

Another potential objection to teaching secondary students about racism is that many teachers may be unqualified to lead the discussion.[329] This argument is not to be dismissed out-of-hand: a mismanaged conversation about race can certainly cause more harm than good, and could well prompt "substantial disruption of or material interference with school activities."[330] When "school officials reasonably forecast a substantial disruption,"[331] they have a legitimate pedagogical interest in preventing it; but they also have a legitimate pedagogical interest in "reducing racism"[332] and "making students aware of minority points of view,"[333] objectives which would be furthered by examining racism's role in American history. Effective conversations about race can even spur "community healing," which would accomplish another legitimate pedagogical goal.[334] As challenging as race-based conversations can be, schools must show "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" in order to suppress expression.[335] Failing to train or hire staff who are equipped to lead challenging conversations about racism, then, is not so

Cir. 1998) ("[I]t is important for young people to learn about the past—and to discover both the good and the bad in our history."); Delgado, *supra* note 36, at 408 ("[M]ost white people see relatively little racism, while minorities are on the receiving end of a great deal of it.").

329. Ledesma & Calderón, *supra* note 18, at 211 (cautioning that white teachers often mimic and perpetuate racism, highlighting a need for ongoing racial-equity-focused teacher training).

330. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

331. Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 440 (4th Cir. 2013); *see also* Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1213 (11th Cir. 2004) (ruling that schools must tolerate student expression "unless they can reasonably forecast that the expression will lead to substantial disruption") (internal quotations omitted).

332. Arce v. Douglas, 793 F.3d 968, 985–86 (9th Cir. 2015).

333. Hansen v. Ann Arbor Pub. Schs., 293 F. Supp. 2d 780, 797 (E.D. Mich. 2003).

334. Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 931 (10th Cir. 2002); *see also* NEA Ctr. for Soc. Just., *10 Principles for Talking About Race in School*, NAT'L EDUC. ASS'N (Nov. 2020), https://www.nea.org/professional-excellence/student-engagement/tools-tips/10-principles-talking-about-race-school [https://perma.cc/REW8-AKNT] (listing potential benefits of and suggestions for discussing race in the classroom).

335. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2048 (2021) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

much a valid reason to ban CRT as it is evidence of schools' complicity in the prevailing white-dominated education system.[336]

The argument most often advanced by today's conservative CRT critics is that teaching CRT in school serves to divide students based on race, undermine respect for authority, and diminish patriotism.[337] This argument gives the game away. First, Americans "fighting to be included in the ideal of equality are not being divisive; those fighting to keep those people out, are."[338] Second, while teaching "discipline, courtesy, and respect for authority" may be a valid pedagogical concern,[339] there is no basis for asserting that CRT undermines these goals.[340] Finally, although critically examining the history of racism in America might well dampen students' patriotism, students' First Amendment rights cannot be infringed in the name of "national unity" or "patriotism."[341] Learning about a broader range of perspectives on American history and institutions might, moreover, awaken a deeper kind of patriotism in students; one that involves an appreciation for the sacrifices made to achieve what racial progress had been made to date,[342] a commitment to help shape a more racially just future for this country, and an ability

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336. As of the 2017–18 school year, seventy-nine percent of elementary and secondary public school teachers are white. *Table 209.10*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d20/tables/dt20_209.10.asp [https://perma.cc/8RCH-AG4D]. In the same years, white students accounted for approximately forty-seven percent of elementary and secondary public school students. *Table 203.50*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d20/tables/dt20_203.50.asp [https://perma.cc/KPV8-DH3A].

337. *See supra* Part I.B and accompanying text.

338. The Late Show with Stephen Colbert, *Jon Stewart Takes over Colbert's Late Show Desk*, YOUTUBE (July 22, 2016), https://www.youtube.com/watch?v=mNiqpBNE9ik.

339. *Fleming*, 298 F.3d at 924 (citing Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990)).

340. Recall that the conservative politicians who enacted the Arizona ethnic studies ban, discussed *supra* Part II, justified their actions on non-white students' perceived rudeness and radicalism. But there was no basis for assuming that the ethnic studies program taught disrespect. Arce v. Douglas, 793 F.3d 968, 974–75 (9th Cir. 2015); González v. Douglas, 269 F. Supp. 3d 948, 969–70 (D. Ariz. 2017).

341. W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640–41 (1943); *see also* Texas v. Johnson, 491 U.S. 397, 399 (1989) (affirming a First Amendment right to burn an American flag).

342. LastWeekTonight, *supra* note 5 (featuring a video clip of Professor Kimberlé Crenshaw arguing that "critical race theory is not anti-patriotic; in fact, it is more patriotic than those who are opposed to it, because we believe in the Thirteenth, and the Fourteenth, and the Fifteenth Amendment[s]").

to more effectively navigate an increasingly diverse democratic society.[343]

In sum, no legitimate pedagogical concern justifies CRT bans. This becomes all the more clear when one considers the history behind CRT bans' enactment.[344] Reporting shows that CRT bans were enacted as part of a political strategy to engender moral panic in the wake of Black Lives Matter protests, and were championed by politicians because of the bans' ability to galvanize support among grassroots conservatives.[345] CRT bans' chief architects have admitted as much.[346] Although it is well-established that "public education in our Nation is committed to the control of state and local authorities," local government's authority over the curriculum "may not be exercised in a narrowly partisan or political manner."[347] "At the very least, the First Amendment precludes local authorities from imposing a 'pall of orthodoxy' on classroom instruction which implicates the state in the propagation of a particular . . . ideological viewpoint."[348]

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343. "In 2019, for the first time, more than half of the nation's population under age 16 identified as a racial or ethnic minority." 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/QN43-RVGY].

344. *See supra* Part I.B (arguing that politicians' statements, corroborated by reporting, indicate that CRT bans were motivated by political upsides, not concern for students).

345. *See* Zanona, *supra* note 2 (reporting on a memo circulated by a Republican Congressman which suggests the party's attempt to capitalize on grassroots anger over CRT); Karimi, *supra* note 4; Crampton, *supra* note 9; Wallace-Wells, *supra* note 57; Atterbury, *supra* note 69; Tesler, *supra* note 80; Diaz, *supra* note 155.

346. *See supra* notes 85, 92 and accompanying text.

347. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864, 870–71 (1982) (plurality opinion). The *Pico* dissent "cheerfully concede[d]" this point. *Id.* at 907 (Rehnquist, J., dissenting); *see also* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983) (noting that public officials may not discriminate against speakers based solely on the speaker's opinion or perspective); Chiras v. Miller, 432 F.3d 606, 619–20 (5th Cir. 2005) (holding that state discretion in curricular decision-making is limited, albeit only if motivated by narrowly partisan or political considerations); Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027 n.5 (9th Cir. 1998) ("The Supreme Court has long recognized that the freedom to receive ideas, and its relation to the freedom of expression, is particularly relevant in the classroom setting.").

348. Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 776 (8th Cir. 1982) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

Undoubtedly, courts would prefer to stay out of the culture war politics and defer to local government determinations of what a teacher can and cannot teach.[349] For example, in *Zykan v. Warsaw Community School Corp.*, the Seventh Circuit upheld a school board's curricular book ban for two reasons.[350] First, high schoolers lack "the intellectual skills necessary for taking full advantage of the marketplace of ideas," thus necessitating "direction and guidance from those better equipped by experience and reflection to make critical educational choices."[351] When it comes to CRT, however, the *Zykan* court underestimates high schoolers: as demonstrated above, high schoolers of color will be all too familiar with racism by that point in their academic career[352]—in fact, many high schoolers may be better equipped to discuss race than their teachers.[353] Second, *Zykan* correctly argues that school boards have every right to "nurture[e] . . . those fundamental social, political, and moral values that will permit a student to take his place in the community."[354] But evidence suggests that banning conversations of systemic racism inhibit students' ability to navigate America's increasingly diverse communities and workplaces.[355] Finally, CRT bans restrict local school board control rather than restore it: if courts truly do intend to let communities make their own curricular decisions, they would allow local school boards to create their own CRT policies.

Thus, CRT bans' predominant purpose is not pedagogical whatsoever: they exist to serve politicians' goals, not students' or educators', and therefore cannot meet *Hazelwood*'s "legitimate

349. *See, e.g.*, Esquivel v. S.F. Unified Sch. Dist., 630 F. Supp. 2d 1055, 1061 (2008) (arguing that courts lack expertise to serve as "de facto school boards," and should not be "saddl[ed] with difficult pedagogical and political decisions that are best left to elected officials").

350. 631 F.2d 1300, 1301–03 (7th Cir. 1980).

351. *Id.* at 1304.

352. *See* sources cited *supra* note 327 and accompanying text.

353. *See* sources cited *supra* note 336 and accompanying text (finding that most public school teachers are white, but that most public school students are not).

354. *Zykan*, 631 F.2d at 1304.

355. *See* Ledesma & Calderón, *supra* note 18 (suggesting that critical race pedagogy can socially benefit students of all races); *see also* sources cited *supra* note 265 (recognizing that racially integrated public schools serve a key socialization function); Frey, *supra* note 343 (noting that white Americans will soon constitute less than half of the American population).

pedagogical concern" requirement.[356] As one mother of a Black high schooler put it, the CRT panic is "all about politics, and our children are having to pay for it."[357] The Constitution does not "disparage[] the application of social, political and moral tastes to secondary school educational decisions," but when "decisions of [school] administrators flow . . . from some systematic effort to exclude a particular type of thought, or even from some identifiable ideological preference," students have—at the very least—a fighting chance under the First Amendment.[358]

CONCLUSION

This Note demonstrates that curricular bans on teaching CRT-related concepts in K–12 public schools are susceptible to First Amendment challenges predicated on students' "right to receive information."[359] Specifically, this Note argues that when placed in the context of conservative backlash to Black Lives Matter protests, CRT bans serve two purposes: (1) drumming up moral panic for political profit;[360] and (2) creating a "chilling effect" on classroom discussions about systemic racism.[361] Although school boards and state legislators retain broad rights to

356. *See* González v. Douglas, 269 F. Supp. 3d 948, 973 (D. Ariz. 2017); *accord* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

357. Kingkade, *supra* note 284.

358. *Zykan*, 631 F.2d at 1306.

359. *See* cases cited *supra* note 23.

360. *See* Zanona, *supra* note 2; Karimi, *supra* note 4; Crampton, *supra* note 9; Wallace-Wells, *supra* note 57; Atterbury, *supra* note 69; Tesler, *supra* note 80; Diaz, *supra* note 155.

361. *See* Diaz, *supra* note 155 ("[The Oklahoma CRT ban] is so poorly drafted—in places it is literally indecipherable—that districts and teachers have no way of knowing what concepts and ideas are prohibited."); *see also Educational Gag Orders*, *supra* note 57, at 10 ("The potential chilling effect of these bills is obvious . . . [I]f discussion of, say, the Black Lives Matter and MeToo movements become too risky . . . class instruction will skirt difficult truths . . . ."); Crampton, *supra* note 9 (noting critics of the anti-CRT movement argue it "is motivated by . . . an unwillingness to grapple with how the legacy of slavery manifests today."); Ray & Gibbons, *supra* note 8 (arguing CRT bans "would put a chilling effect on what educators are willing to discuss in the classroom and provide cover for those who are not comfortable hearing or telling the truth about the history and state of race relations in the United States"); LastWeekTonight, *supra* note 5 (arguing that discussing race in the classroom is not easy, but if done right, "you tell the story all the way to the present day which kids want and need . . . [but] the panic over CRT threatens to shut those conversations down").

set curriculum and restrict "school-sponsored" expression, neither of these objectives is "reasonably related to legitimate pedagogical concerns," as is required by *Hazelwood*.[362] If anything, evidence suggests that banning CRT from the classroom does a disservice to students of all races: "CRT in education, specifically in curriculum," allows educators to "provide students a real understanding of U.S. history and thus maybe have a more concrete grasp of race and racism today."[363] And to the extent that CRT bans prohibit only certain views in race-based classroom discussions, they fly in the face of compelling precedent holding that public schools cannot engage in viewpoint discrimination when setting the curriculum.[364] No matter how vehemently conservative politicians disagree with CRT, the government may not exercise its discretion "in a narrowly partisan or political manner" nor deny access to ideas merely because it disagrees with the speaker's view.[365]

CRT adherents reading this Note have every reason to be pessimistic about the chances of successfully overturning CRT bans, given courts' complicity in upholding a legal tradition rooted in white supremacy.[366] Indeed, the most important avenue to push back against CRT bans may well be in the court of public opinion, such as by encouraging students to peacefully protest CRT bans in the same vein as *Tinker*.[367] Yet comparisons to analogous case law concerning ethnic studies bans[368] provide a spark of hope. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[369] Given the fervor of white society's disagreement with CRT, in the words of Professor Kimberlé Crenshaw, CRT proponents "have every reason to be wildly optimistic."[370]

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362. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

363. Ledesma & Calderón, *supra* note 18, at 210.

364. *See supra* Part III.C.

365. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870, 871 (1982).

366. *See supra* Part I.A (discussing how CRT argues white supremacy is intertwined with legal institutions).

367. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

368. Arce v. Douglas, 793 F.3d 968, 986 (9th Cir. 2015); González v. Douglas, 269 F. Supp. 3d 948, 974 (D. Ariz. 2017).

369. Texas v. Johnson, 491 U.S. 397, 414 (1989).

370. Crenshaw, *supra* note 4, at 1352.