



EDUCATIONAL GAG ORDERS



Legislative Restrictions on the Freedom to Read, Learn, and Teach

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INTRODUCTION

Between January and September 2021, 24 legislatures across the United States introduced 54 separate bills intended to restrict teaching and training in K-12 schools, higher education, and state agencies and institutions. The majority of these bills target discussions of race, racism, gender, and American history, banning a series of “prohibited” or “divisive” concepts for teachers and trainers operating in K-12 schools, public universities, and workplace settings. These bills appear designed to chill academic and educational discussions and impose government dictates on teaching and learning. In short: They are educational gag orders.

Collectively, these bills are illiberal in their attempt to legislate that certain ideas and concepts be out of bounds, even, in many cases, in college classrooms among adults. Their adoption demonstrates a disregard for academic freedom, liberal education, and the values of free speech and open inquiry that are enshrined in the First Amendment and that anchor a democratic society. Legislators who support these bills appear determined to use state power to exert ideological control over public educational institutions. Further, in seeking to silence race- or gender-based critiques of U.S. society and history that those behind them deem to be “divisive,” these bills are likely to disproportionately affect the free speech rights of students, educators, and trainers who are women, people of color, and LGBTQ+. The bills’ vague and sweeping language means that they will be applied broadly and arbitrarily, threatening to effectively ban a wide swath of literature, curriculum, historical materials, and other media, and casting a chilling effect over how educators and educational institutions discharge their primary obligations. It must also be recognized that the movement behind these bills has brought a single-minded focus to bear

on suppressing content and narratives by and about people of color specifically--something which cannot be separated from the role that race and racism still plays in our society and politics. As such, these bills not only pose a risk to the U.S. education system but also threaten to silence vital societal discourse on racism and sexism.

In this report, we have focused our examination on state-level legislation, as state governments have primary authority over public education. However, the language in many of these bills has also appeared elsewhere: in bills and proposals introduced at the federal level, within other state organs, and in local school boards. Arriving alongside similar waves of legislation to restrict voting and protest rights, these censorious bills reflect a larger and worrying anti-democratic trend in U.S. politics, in which lawmakers use the machinery of government in attempts to limit Americans’ ability to express themselves—and particularly in order to block the expression of ideas or sentiments the lawmakers oppose.

It is not a coincidence that this legislative onslaught followed the mass protests that swept the United States in 2020 in the wake of the murder of George Floyd. As many Americans and U.S. institutions have attempted a true reckoning with the role that race and racism play in American history and society, those opposed to these cultural changes surrounding race, gender, and diversity have pushed back ferociously, feeding into a culture war. Certain Republican legislators and conservative activists have capitalized on this backlash, borrowing the name of an academic framework -- critical race theory (CRT) -- and inaccurately applying it to a range of ideas, practices, and materials related to advancing diversity, equity, or inclusion. The individual behind the Trump

Administration executive order (EO) that inspired many of these bills—Manhattan Institute senior fellow Christopher Rufo—acknowledges that he intentionally uses the label to rally political support, saying that CRT is “the perfect villain” and a useful “brand category” to build opposition to progressives’ perceived dominance of American educational institutions.¹ This “Critical Race Theory” framing device has been applied with a broad brush, with targets as varied as *The New York Times*’ 1619 Project, efforts to address bullying and cultural awareness in schools,² and even the mere use of words like “equity, diversity, and inclusion,” “identity,” “multiculturalism,” and “prejudice.”³

To justify their censorious proposals, the bills’ proponents have also seized on a series of episodes related to diversity and teaching about racism in schools to stoke fears over “critical race theory” run amok, and adopted spurious and inflammatory characterizations of theories and programs as “Marxist,” “un-American,” and existentially threatening to American values and institutions. As author and literary critic Jeet Heer has written, these attacks follow “an old script, one where the name of the bogeyman changes but the basic storyline is always the same: sinister, alien forces are trying to corrupt children. We’ve seen this before in the battles over teaching evolution, over prayer in the schoolroom, over LGBTQ teachers, over sex ed,

over trans students, over bathrooms, among others.”⁴

Yet while these tactics may be old, they are also powerfully tied to the current political and social moment. As historian and writer Jelani Cobb starkly described on Twitter, “The attacks on critical race theory are clearly an attempt to discredit the literature millions of people sought out last year to understand how George Floyd wound up dead on a street corner. The goal is to leave the next dead black person inexplicable by history.”⁵

Eleven of these bills have already become law in nine states, while similar legislation is pending across the country. Beyond statehouses, national and local organizations are actively pressuring school boards, principals, university regents, and state educational agencies to ban the teaching of certain ideas and content. Political action committees (PACs) have formed to campaign against elected school board officials who do not support these bans. Parents who have been recruited to join the campaign have reportedly harassed local elected leaders and school administrators and disrupted public meetings.⁶ The tensions are so feverish that local officials have turned to the federal government for help, asking for heightened security at local school board meetings.⁷

1 Benjamin Wallace-Wells, “How a Conservative Activist Invented the Conflict Over Critical Race Theory,” *New Yorker*, June 18, 2021, [newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory](https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory); @realchrisrufo, March 15, 2021, twitter.com/realchrisrufo/status/1371541044592996352

2 Leah Asmelah, “A School District Tried to Address Racism, a Group of Parents Fought Back,” *CNN*, May 10, 2021, [cnn.com/2021/05/05/us/critical-race-theory-southlake-carroll-isd-trnd/index.html](https://www.cnn.com/2021/05/05/us/critical-race-theory-southlake-carroll-isd-trnd/index.html)

3 Brigid Kennedy, “Texas Nonprofit Shares Bizarre Cheat Sheet for Identifying CRT Buzzwords in the Classroom,” *The Week*, June 30, 2021, [theweek.com/us/1002125/texas-nonprofit-shares-bizarre-cheat-sheet-for-identifying-crt-buzzwords-in-the](https://www.theweek.com/us/1002125/texas-nonprofit-shares-bizarre-cheat-sheet-for-identifying-crt-buzzwords-in-the); Reid Wilson, “‘Woke,’ ‘Multiculturalism,’ ‘Equity’: Wisconsin GOP Proposes Banning Words from Schools,” *The Hill*, September 29, 2021, thehill.com/homenews/state-watch/574567-woke-multiculturalism-equity-wisconsin-gop-proposes-banning-words-from

4 Jeet Heer, “Critical Race Theory and ‘the children,’” *Substack*, June 12, 2021, jeetheer.substack.com/p/critical-race-theory-and-the-children

5 Jelani Cobb, Twitter, June 11, 2021, twitter.com/jelani9/status/1403401984254758914

6 Tyler Kingkade, Brandy Zadrozny, and Ben Collins, “Critical race theory battle invades school boards—with help from conservative groups,” *NBC News*, June 15, 2021, [nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794](https://www.nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794)

7 National School Boards Association Asks for Federal Assistance to Stop Threats and Acts of Violence Against Public Education Leaders, National School Boards Association, Sept. 30, 2021, nsba.org/News/2021/federal-assistance-letter; Jennifer Calfas, “School Boards Ask for Federal Help as Tensions Rise Over Covid-19 Policies,” *The Wall Street Journal*, Sept. 30, 2021,



"Teach the Truth" Rally in Milwaukee on June 12, 2021, as part of the National Day of Action organized by the Zinn Education Project and Black Lives Matter at School. Photo by the Milwaukee Teachers' Education Association (MTEA)/Flickr

These bills will have—and are already having—tangible consequences for both American education and democracy, both distorting the lens through which the next generation will study American history and society and undermining the hallmarks of liberal education that have set the U.S. system apart from those of authoritarian countries. In a very short time, we have already seen the chilling effects of this kind of legislation, which has been used to justify suspending a sociology course on race and ethnicity in Oklahoma,⁸ providing professors at Iowa State University written guidance for how to avoid 'drawing scrutiny' for their teaching under their state's Act,⁹ instructing

teachers that they should balance having books on the Holocaust with those with "opposing views" in Texas,¹⁰ and challenging the teaching of civil rights activist Ruby Bridges's autobiographical picture book about school desegregation in Tennessee.¹¹

PEN America intends this report to sound the alarm and recognize these bills for what they are: attempts to legislate constraints on certain depictions or discussions of United States history and society in educational settings; to stigmatize and suppress specific intellectual frameworks, academic arguments, and opinions; and to impose a particular political

8 Hannah Knowles, "Critical race theory ban leads Oklahoma college to cancel class that taught 'white privilege,'" *The Washington Post*, May 29, 2021, [washingtonpost.com/education/2021/05/29/oklahoma-critical-race-theory-ban/](https://www.washingtonpost.com/education/2021/05/29/oklahoma-critical-race-theory-ban/)

9 Iowa State University - Frequently Asked Questions - Iowa House File 802 - Requirements Related to Racism and Sexism Trainings at Public Postsecondary Institutions, August 5, 2021, <https://www.provost.iastate.edu/policies/iowa-house-file-802---requirements-related-to-racism-and-sexism-trainings>; Daniel C. Vock, "GOP furor over 'critical race theory' hits college campuses," *Iowa Capital Dispatch*, July 3, 2021, [iowacapitaldispatch.com/2021/07/03/gop-furor-over-critical-race-theory-hits-college-campuses/](https://www.iowacapitaldispatch.com/2021/07/03/gop-furor-over-critical-race-theory-hits-college-campuses/)

10 Mike Hixenbaugh and Antonia Hylton, "Southlake school leader tells teachers to balance Holocaust books with 'opposing' views," October 14, 2021, [nbcnews.com/news/us-news/southlake-texas-holocaust-books-schools-rcna2965](https://www.nbcnews.com/news/us-news/southlake-texas-holocaust-books-schools-rcna2965)

11 Brendan Morrow, "Anti-critical race theory parents reportedly object to teaching Ruby Bridges book," *The Week*, July 8, 2021, [theweek.com/news/1002407/anti-critical-race-theory-parents-reportedly-object-to-teaching-ruby-bridges-book](https://www.theweek.com/news/1002407/anti-critical-race-theory-parents-reportedly-object-to-teaching-ruby-bridges-book)

diktat on numerous forms of public education. Taken together, these efforts amount to a sweeping crusade for content- and viewpoint-based state censorship.

For this reason, we refer to these bills not by incomplete or misleading terms like “anti-critical race theory,” or “divisive concepts”—as their proponents prefer—but rather by a more accurate description: educational gag orders. We use this term because we believe that it best captures the actual and intended effect of these bills: to stop educators from introducing specific subjects, ideas, or arguments in classroom or training sessions.

This report does not evaluate the pedagogical benefits or drawbacks of specific curricular materials, educational approaches, intellectual frameworks, or professional trainings. Our efforts stem from PEN America’s mission as a literary and human rights organization to stand for the free flow of ideas, an abiding commitment to the freedom to write and the freedom to read—and, when it comes to educational institutions, the freedom to learn. As such, we seek to demonstrate these bills’ censorious nature, and to call attention to their specific attempts to silence teaching and discussion regarding race and racism in U.S. history. The teaching of history, civics, and American identity has never been neutral or uncontested, and reasonable people can disagree over how and when educators should teach children about racism, sexism, and other facets of American history and society.¹² But in a democracy, the response to these disagreements can never be to ban discussion of ideas or facts simply

because they are contested or cause discomfort.¹³ As American society reckons with the persistence of racial discrimination and inequity, and the complexities of historical memory, attempts to use the power of the state to constrain discussion of these issues must be rejected.

REPORT CONTENT AND STRUCTURE

This report offers an in-depth analysis of these state legislative efforts from January to September, 2021. We document the origins and extensive spread of various proposals and describe the many legal, constitutional, and civic concerns they raise.

In Section I, we discuss the origins of this year’s educational gag orders, tracing the transition from rhetoric used by former President Donald Trump into a widespread Republican policy push. In Section II, we summarize the 54 state-level bills introduced this year, tracing common patterns. In Section III, we discuss the worrying political context in which these bills have arisen and elaborate on the way many legislators have held out a false conception of critical race theory as a bogeyman and political wedge for the next election cycle. While there has been some opposition from Republican politicians and conservative commentators, to date their voices are too few and too quiet, as educational gag orders have become increasingly normalized as a Republican legislative priority across multiple levels of government in the past year.

¹² For a contemporary look at how Americans respond differently over questions of historical consideration in education, see “History, The Past, and Public Culture: Results from a National Survey,” American History Association & Farleigh Dickinson University, August 2021, historians.org/history-culture-survey

¹³ PEN America has produced three substantial reports on the tensions that can arise between advancing equity and inclusion and defending free speech in college settings, and has proposed guidance—our Campus Free Speech Guide—on how to ensure that campuses in particular remain arenas for thoughtful, even contentious debate that cuts across the ideological spectrum, while also being spaces of equal opportunity for all.

In Section IV, we lay out PEN America’s grave concerns with the ways these bills threaten free speech, academic freedom, and open inquiry. We examine specific provisions and language in many of the bills and explain what makes them so problematic for education in a democracy. Within this analysis, we offer four main observations about these educational gag orders:

1. Each of these bills represents an effort to impose content- and viewpoint-based censorship.
2. Individually and collectively, these bills will have a foreseeable chilling effect on the speech of educators and trainers: Even when crafted in ways that nominally permit free expression, they send an unmistakable signal that specific ideas, arguments, theories, and opinions may not be tolerated by the government.
3. These bills are based on a misrepresentation of how intellectual frameworks are taught, and threaten to constrain educators’ ability to teach a wide range of subjects.
4. Many of these bills include language that purports to uphold free speech and academic inquiry. This language, intended to help safeguard these bills from legal and constitutional scrutiny, does little or nothing to change the essential nature of these bills as instruments of censorship.

In Section V, we examine the legal and constitutional concerns with the state-level bills as a whole, detailing the existing judicial precedents that are likely to shape any legal challenges. We explain why, even if all of the laws resulting from these bills are struck down, they are still likely to have a chilling effect on education in schools, colleges, universities, and state agencies and institutions. In our Conclusion we sum

up our concerns and offer some recommendations for legislators and other actors.

OVERVIEW OF BILLS

In writing this report, PEN America identified 54 bills, introduced or pre-filed in 24 states between January and September 2021, that we characterize as educational gag orders. [As described in detail below and in the report’s index](#), each of these bills seeks to prohibit the teaching of specific ideas, concepts, or curricular materials in public schools, higher education, state agencies and institutions, or some combination thereof. There is, however, great variation among them. Some bills are explicit in their targets—prohibiting the teaching of specific curricula or squarely banning certain concepts from the classroom. Others do not explicitly target the classroom but impose broad prohibitions on public institutions and employees, including public school teachers and college professors. Still others prohibit the introduction of specific concepts within trainings, rather than in-classroom education or curricula.

Although as of this writing few of these bills have become law, together they illustrate a disturbing willingness among Republican legislators to use the power of government to censor and restrict viewpoints, intellectual frameworks, and historical truths or narratives that they dislike:

- With only one exception, the bills appear to have been influenced by U.S. Senator Tom Cotton’s Saving American History Act, former President Trump’s 2020 Executive Order on Combating Race and Sex Stereotyping, or conservative lawyer Stanley Kurtz’s Partisanship Out of Civics Act. Forty-two bills have a clear antecedent in Trump’s executive order (EO), with most of them

including a list of prohibited “divisive concepts” related to “race and sex stereotyping” that mirror the EO’s language, though there is some variation among the bills’ listed concepts.

- Forty-eight bills explicitly apply to teaching in some form in public schools, while 21 explicitly apply to public colleges and universities. Of the latter, 19 include restrictions on college-level teaching.
- Eleven bills explicitly prohibit schools from using materials from *The New York Times’ 1619 Project*, a journalistic and historical examination of the modern impact of slavery in the United States. Six bills prohibit private funding for curricula in public schools, which—given the context in which they were developed and introduced —appears similarly aimed at blocking specific educational materials that deal with racial justice and sexism.
- Nine of the bills explicitly target critical race theory, (CRT) a term that has been invoked by conservative activists not on the basis of its actual meaning - namely, a specific intellectual framework developed by legal scholars - but as a catchall for any teaching on race or diversity of which they disapprove. Some bills mention CRT only in their introductory language, while others incorporate it in the actionable legislative text.
- Ten bills use the formulation of prohibiting schools, teachers, or instructors from “compelling” a person to affirm a belief in a “divisive concept.” As this report explains, by identifying a specific set of beliefs that officials must guard against, such formulations function as viewpoint-based

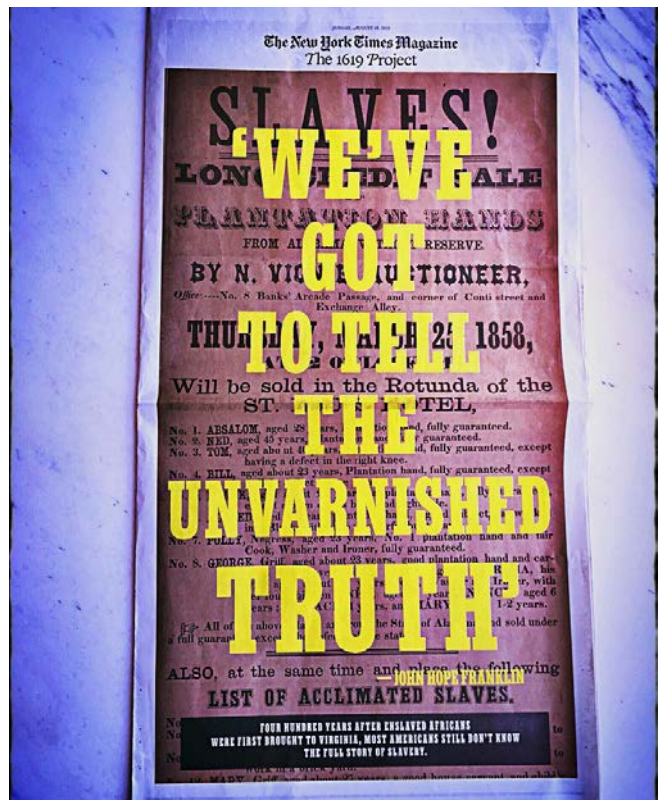


Photo of *The 1619 Project* report in *The New York Times Magazine*. Photo by Waltar/Flickr

prohibitions while masquerading as a defense of intellectual freedom.

- One bill introduced in Tennessee seeks to ban curricular materials that “promote, normalize, support, or address lesbian, gay, bisexual, or transgender (LGBT) issues or lifestyles.”¹⁴
- Eight bills mandate the “balanced” teaching of “controversial” political or social topics or the equal presentation of “diverse and contending views”—requirements that appear to promote evenhandedness while actually inviting partisan politics into public educational institutions.

As of this writing, eleven educational gag order bills have become law. Some completed their legislative

14 Tennessee HB 800, capitol.tn.gov/Bills/112/Bill/HBo800.pdf

TABLE: STATUS OF EDUCATIONAL GAG ORDERS AS OF OCTOBER 1, 2021

Targets	Introduced	Passed	Failed	Pendiner/Pre-filed
Public Schools	48	9	17	22
Colleges and Universities	21	3	6	12
State Agencies, Institutions and/or Contractors	19	6	5	8
Total	54	11	19	24

Note: Because many bills apply to more than one setting, the columns do not add up to the totals shown. This count represents a facial reading of these bills and does not account for interpretations that may widen the scope of certain provisions.

journey in days, and all eleven passed despite strong opposition from education and civil liberties advocates.¹⁵ Nine of these laws explicitly apply to public schools (one each in Arizona, Idaho, Iowa, New Hampshire, Oklahoma, South Carolina, and Tennessee, and two in Texas), three of them explicitly apply to colleges and universities (in Idaho, Iowa, and Oklahoma), and six of them explicitly apply to state agencies and institutions (one each in Arizona, Arkansas, Iowa, and New Hampshire, and two in Texas).¹⁶

Nineteen bills were introduced but did not pass, though only four of those were withdrawn. Twenty-four bills have already been introduced and could still move forward; of these, 18 remain pending from the 2021 legislative session, and six have been pre-filed for 2022.

The potential chilling effect of these bills is obvious: Teachers, professors, and trainers who are afraid they might venture too close to prohibited topics will instead draw back, wary of being party to any discussion that could attract government censors or result in budgetary penalties, as some of the laws and bills provide. If educators who raise complex issues related to race, gender, or history face serious legal, financial, or reputational consequences—if discussions of, say, the Black Lives Matter and Me Too movements become too risky—class instruction will skirt difficult truths and fear will squelch free expression. Even when political leaders merely threaten to introduce these educational gag orders, or when they are introduced but do not become law, they can still send a potent message that educators are being watched and that ideological redlines exist.

15 Emerson Sykes and Sarah Hinger, “State Lawmakers Are Trying to Ban Talk About Race in Schools,” ACLU, May 14, 2021, [aclu.org/news/free-speech/state-lawmakers-are-trying-to-ban-talk-about-race-in-schools/](https://www.aclu.org/news/free-speech/state-lawmakers-are-trying-to-ban-talk-about-race-in-schools/); Adrian Florido, “Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons,” NPR, May 28, 2021, [npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship](https://www.npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship); Madeline Will, “Teachers’ Unions Vow to Defend Members in Critical Race Theory Fight,” Education Week, July 6, 2021, [edweek.org/teaching-learning/teachers-unions-vow-to-defend-members-in-critical-race-theory-fight/2021/07](https://www.edweek.org/teaching-learning/teachers-unions-vow-to-defend-members-in-critical-race-theory-fight/2021/07); Talia Richman, Texas Senate committee advances bill aimed at tackling ‘critical race theory’, Dallas Morning News, August 10, 2021, <https://www.dallasnews.com/news/education/2021/08/10/texas-senate-committee-advances-bill-aimed-at-tackling-critical-race-theory/>

16 New Hampshire’s HB 2 does not explicitly include public universities and colleges in its definition of public employers, but neither does it definitively exclude them. The ambiguity has led to concern and confusion as to whether it would implicate institutions of higher education.

The bills that become law will undoubtedly face court challenges. These bills are attempts at ideological exclusion based on hostility to certain content and viewpoints, and their prohibitions are both vague and overbroad, raising obvious First Amendment concerns. They are also likely to violate the Equal Protection Clause of the Fourteenth Amendment, in that these bills will foreseeably be enforced disproportionately against educators and trainers of color. Previous litigation surrounding a state law in Arizona—HB 2281, which made the teaching of ethnic studies courses illegal for public and charter schools—offers a preview of how at least some of these bills are likely to be struck down for violating constitutional guarantees of equal protection, free speech, or the right of students to receive information. Still, it is possible that certain laws will survive judicial review, or be narrowed but not invalidated upon review. The Supreme Court, for example, has given governments leeway to impose restrictions on which ideas they will

fund when training public employees. Many of the bills include language that purports to keep them within the technical limits of constitutionality, giving friendly courts potential cover to uphold them.

Even if such laws are struck down, the process may take years, by which point substantial damage to our educational system will already have been done. Schools, educators, and even students will have received and internalized the legislators' message that they could face disfavor and punishment from the government for espousing certain ideas in the classroom. As Emerson Sykes, senior staff attorney at the ACLU, warns: “The courts alone will not save us. This is really a social and political issue.”¹⁷

¹⁷ Interview with Emerson Sykes, Staff Attorney - ACLU Speech, Privacy, and Technology Project, June 22, 2021

SECTION I

FROM PRESIDENTIAL RHETORIC TO REPUBLICAN POLICY

Battles over education in the U.S. are often a proxy for broader societal debates and anxieties, and in recent years, a wide-ranging public debate has unfolded surrounding free speech in schools and universities, and perceived tensions with efforts to advance diversity, equity, and inclusion. PEN America has produced three reports on these issues on college campuses, detailing the tensions that have sometimes emerged between calls for greater racial, sexual, and gender equity and traditional notions of free speech and academic freedom, and articulating how schools and universities can and must reconcile these tensions in order to remain open and equitable spaces of learning and debate.¹⁸ There is a direct connection between these dynamics on campuses and those which have now spilled over into schools, workplaces, and school board meetings. But it is also an extension of a longstanding debate focused particularly on the area of social studies, which shapes students' un-

derstanding of the country's history and culture. Battles over social studies curricula are so long-standing that some experts call them the "social studies wars."¹⁹ In the past several years, these debates over education, and social studies in particular have been subsumed by broader political trends, largely related to the illiberal inclinations of former President Trump--and the significant segments of the Republican party that follow his lead--seeking to exert new power or execute threats against schools, colleges and universities, in an effort to stifle and suppress their perceived progressive leanings.

A major flashpoint for these battles occurred in August 2019, with the release of *The New York Times'* 1619 Project and the ensuing backlash. It took less than a year for Republican legislators to go from criticizing the project to trying to censor it legislatively: In June 2020, Senator Tom Cotton of Arkansas introduced the Saving American History Act in the U.S. Senate, with the goal of

¹⁸ For PEN America's previous work on how academic institutions can responsibly address the intersections between freedom of speech and diversity, equity, and inclusion, see "Chasm in the Classroom; Campus Free Speech in a Divided America," PEN America, April 2, 2019, pen.org/wp-content/uploads/2019/04/2019-PEN-Chasm-in-the-Classroom-04.25.pdf; "And Campus for All; Diversity, Inclusion, and Freedom of Speech at U.S. Universities," PEN America, October 17, 2016, pen.org/wp-content/uploads/2017/06/PEN_campus_report_06.15.2017.pdf; "Wrong Answer: How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire," PEN America, November 7, 2017, pen.org/wp-content/uploads/2017/11/2017-wrong-answer_11.9.pdf; PEN America Campus Free Speech Guide, campusfreespeechguide.pen.org/about/

blocking federal funds to any school using the project.²⁰

The summer of 2020 also saw mass Black Lives Matter protests following the murder of George Floyd by Minneapolis police. This public reckoning with racism led many American institutions in various fields to adopt new curricula, training, and commitments to confront and dismantle racism. These have, in turn, become the focus of pointed ideological disagreement. Kimberlé Crenshaw, the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School and an original architect of critical race theory, noted in an interview with *The New Yorker* that the large number of “corporations and opinion-shaping institutions” that made “statements about structural racism” in the summer of 2020 meant

that “the line of scrimmage has moved.” She characterized the conservative outcry against this shift as “a post-George Floyd backlash.”²¹ Similarly, Jin Hee Lee, a senior deputy director of the NAACP Legal Defense and Educational Fund, argued in a July 2021 interview that “it is no coincidence” that this backlash has come “on the heels of what is maybe the greatest civil rights moment in our history, when there was such a focus on systemic racism and anti-Black racism.”²²

19 Kelly Field, The Hechinger Report, “Can critical race theory and patriotism coexist in classrooms?” NBC News, May 28, 2021, [nbcnews.com/news/us-news/can-critical-race-theory-patriotism-coexist-classrooms-n1268824](https://www.nbcnews.com/news/us-news/can-critical-race-theory-patriotism-coexist-classrooms-n1268824); see also Ronald W. Evans, “The Social Studies Wars, Now and Then,” National Council for the Social Studies, Theory & Research in Social Education, Research and Practice, September 2006, socialstudies.org/system/files/publications/articles/se_700506317.pdf; Seeking a Truce in the Civics and History Wars: Is ‘Educating for American Democracy the Answer?, Thomas B. Fordham Institute, June 28, 2021, fordhaminstitute.org/national/events/seeking-truce-civics-history-wars-educating-american-democracy-answer (“Like the cicadas now infesting the mid-Atlantic, debates over how to present American history and civics to our children come around with striking regularity.”)

20 S.4292, “Saving American History Act of 2020,” [congress.gov/imo/media/doc/200723%20Saving%20American%20History%20Act.pdf](https://www.congress.gov/imo/media/doc/200723%20Saving%20American%20History%20Act.pdf)

21 Benjamin Wallace-Wells, “How a Conservative Activist Invented the Conflict Over Critical Race Theory,” *New Yorker*, June 18, 2021, [newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory](https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory)



Nikole Hannah-Jones being interviewed in 2021. Hannah-Jones has led *The New York Times*'s "The 1619 Project," which has aimed to "reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative." Photo by AP/John Minchillo

WHAT IS THE 1619 PROJECT?

The 1619 Project is an initiative, led by *New York Times* journalist Nikole Hannah-Jones, to explore the impact of slavery on U.S. history and modern life. In August 2019 *The New York Times Magazine* published a special issue "containing essays on different aspects of contemporary American life, from mass incarceration to rush-hour traffic, that have their roots in slavery and

its aftermath." *The Times* partnered with the Smithsonian's National Museum of African-American History and Culture to create a visual history of slavery in the United States.²³ In addition, more than a dozen original literary works were commissioned from contemporary

Black writers to "bring to life key moments in American history."²⁴ The project asked readers to imagine that 1619, the year enslaved people were first brought to North America, was "our nation's birth year. Doing

22 Maggie Severns, "'People are scared': Democrats lose ground on school equity plans," *Politico*, July 26, 2021, [politico.com/news/2021/07/26/democrats-school-critical-race-theory-500729](https://www.politico.com/news/2021/07/26/democrats-school-critical-race-theory-500729)

23 Jake Silverstein, "Why We Published The 1619 Project," *The New York Times*, December 20, 2019, [nytimes.com/interactive/2019/12/20/magazine/1619-intro.html](https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html); Mary Elliott and Jazmine Hughes, "Four hundred years after enslaved Africans were first brought to Virginia, most Americans still don't know the full story of slavery," *The New York Times Magazine*, August 18, 2019, www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html

so," it posited, "requires us to place the consequences of slavery and the contributions of black Americans at the very center of the story we tell ourselves about who we are as a country."²⁵ *The Times* selected the Pulitzer Center, which runs fellowships and grants for journalists and develops curricula based on journalism, to produce a companion curriculum.²⁶

The Project received significant praise from a range of historians, professors, and teachers, who highlighted how it filled an important gap in high school and college history curricula. "Taken together, it attempts to guide readers not just toward a richer understanding of today's racial dilemmas, but to tell them the truth," wrote Alexandria Neason for *Columbia Journalism Review*, "For many, it may be the first time they've heard it."²⁷ Christopher Span, a history of education professor at the University of Illinois, Urbana-Champaign, told *Forbes* that "'The 1619 Project' should be added to every undergraduate course surveying American history," and that, in centralizing "the longstanding role

race, racism, and slavery played in the making of this nation... [it] affords opportunities for healing and reconciliation."²⁸ In May 2020, Hannah-Jones was awarded the Pulitzer Prize for Commentary for the Project.²⁹

The 1619 Project has also not been free from criticism, and critics have not just come from the right. The most significant critique came on December 4, 2019, when five prominent liberal American history professors including Princeton University's Sean Wilentz argued in a letter to *the Times* that the project misrepresented several matters of fact—including the assertion that the founders were motivated to declare independence from Britain in order to maintain the institution of slavery—and that these errors "suggest a displacement of historical understanding by ideology."³⁰ *The Times* responded that all of their claims were grounded in the historical record.³¹ *The Times* did, however, later qualify one of the Project's claims in response to criticism, changing one passage to clarify that protecting slavery was "a primary motivation for some of the colonists," as

24 Jake Silverstein, "Why We Published The 1619 Project," *The New York Times*, December 20, 2019, [nytimes.com/interactive/2019/12/20/magazine/1619-intro.html](https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html)

25 "The 1619 Project," *The New York Times Magazine*, [nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html](https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html); Jake Silverstein, "Why We Published The 1619 Project," *The New York Times*, December 20, 2019, [nytimes.com/interactive/2019/12/20/magazine/1619-intro.html](https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html)

26 Jeff Barrus, "Pulitzer Center Named Education Partner for The New York Times Magazine's 'The 1619 Project,'" The Pulitzer Center, August 14, 2019, [pulitzercenter.org/blog/pulitzer-center-named-education-partner-new-york-times-magazines-1619-project](https://www.pulitzercenter.org/blog/pulitzer-center-named-education-partner-new-york-times-magazines-1619-project). The Pulitzer Center is not affiliated with Columbia University's Pulitzer Prizes, it was endowed by the wife of Joseph Pulitzer, Jr. the grandson of Joseph Pulitzer who founded Columbia's journalism school and endowed the prizes which bear his name. See "About the Pulitzer Center," [pulitzercenter.org/about/our-mission-and-model](https://www.pulitzercenter.org/about/our-mission-and-model), "Emily Rauh Pulitzer, President of the Board," [pulitzercenter.org/people/emily-rauh-pulitzer](https://www.pulitzercenter.org/people/emily-rauh-pulitzer), "Emily Rauh Is Married To Joseph Pulitzer Jr.," *The New York Times*, July 1, 1973, [nytimes.com/1973/07/01/archives/emily-rauh-is-married-to-joseph-pulitzer-jr.html](https://www.nytimes.com/1973/07/01/archives/emily-rauh-is-married-to-joseph-pulitzer-jr.html).

27 Alexandria Neason, "The 1619 Project and the stories we tell about slavery," *Columbia Journalism Review*, August 15, 2019, [cjr.org/analysis/the-1619-project-nytimes.php](https://www.cjr.org/analysis/the-1619-project-nytimes.php)

28 Marybeth Gasman, "What History Professors Really Think About 'The 1619 Project,'" *Forbes*, June 3, 2021, [forbes.com/sites/marybethgasman/2021/06/03/what-history-professors-really-think-about-the-1619-project/?sh=344084ee7a15](https://www.forbes.com/sites/marybethgasman/2021/06/03/what-history-professors-really-think-about-the-1619-project/?sh=344084ee7a15)

29 "Nikole Hannah-Jones Wins Pulitzer Prize for 1619 Project," The Pulitzer Center, May 4, 2020, [pulitzercenter.org/blog/nikole-hannah-jones-wins-pulitzer-prize-1619-project](https://www.pulitzercenter.org/blog/nikole-hannah-jones-wins-pulitzer-prize-1619-project)

30 "We Respond to the Historians Who Critiqued The 1619 Project," *The New York Times Magazine*, December 20, 2019, [nytimes.com/2019/12/20/magazine/we-respond-to-the-historians-who-critiqued-the-1619-project.html](https://www.nytimes.com/2019/12/20/magazine/we-respond-to-the-historians-who-critiqued-the-1619-project.html) ("Raising profound, unsettling questions about slavery and the nation's past and present, as The 1619 Project does, is a praiseworthy and urgent public service."); "Twelve Scholars Critique The 1619 Project and the *New York Times Magazine* Editor Responds," History News Network, January 26, 2020, [historynewsnetwork.org/article/174140](https://www.historynewsnetwork.org/article/174140) ("None of us have any disagreement with the need for Americans, as they consider their history, to understand that the past is populated by sinners as well as saints, by horrors as well as honors, and that is particularly true of the scarred legacy of slavery."); Bret Stephens, "The 1619 Chronicles," *The New York Times*, October 9, 2020, [nytimes.com/2020/10/09/opinion/nyt-1619-project-criticisms.html](https://www.nytimes.com/2020/10/09/opinion/nyt-1619-project-criticisms.html) ("in a point missed by many of The 1619 Project's critics, it does not reject American values."); Steven Mintz, "The 1619 Project and Uses and Abuses of History," *Inside Higher Ed*, October 28, 2020, [insidehighered.com/blogs/higher-ed-gamma/1619-project-and-uses-and-abuses-history](https://www.insidehighered.com/blogs/higher-ed-gamma/1619-project-and-uses-and-abuses-history).

opposed to all, in declaring independence.³²

Journalist Adam Serwer argued in *The Atlantic* that the disagreement between The 1619 Project writers and critical historians was rooted in a broader dispute over America's realization of—and commitment to—its founding ideals, writing,

"The clash between the Times authors and their historian critics represents a fundamental disagreement over the trajectory of American society. Was America founded as a slavocracy, and are current racial inequities the natural outgrowth of that? Or was America conceived in liberty, a nation haltingly redeeming itself through its founding principles? These are not simple questions to answer, because the nation's pro-slavery and anti-slavery tendencies are so closely intertwined. The [December 4] letter is rooted in a vision of American history as a slow, uncertain march toward a more perfect union. The 1619 Project, and Hannah-Jones's introductory essay in particular, offer a darker vision of the nation, in which Americans have made less

*progress than they think, and in which black people continue to struggle indefinitely for rights they may never fully realize."*³³

Jonathan Zimmerman, an educational historian at the University of Pennsylvania, has said that teaching "The 1619 Project" alongside other interpretations of history "represents a huge opportunity to teach students what history actually *is*: an act of interpretation."³⁴ Similarly, Alan J. Singer, professor of teaching, learning and technology and the director of social studies education at Hofstra University, explains that though he disagrees with some points of emphasis in the Project, it is still "vitally important" considering that the U.S. has no national history curriculum. As he states, "Unless Americans understand the role slavery and racism played in the past and in the present, this country will never be able to create a more just and equitable future."³⁵

31 *Id.*

32 Jake Silverstein, "An Update to The 1619 Project," *The New York Times*, March 11, 2020, [nytimes.com/2020/03/11/magazine/an-update-to-the-1619-project.html](https://www.nytimes.com/2020/03/11/magazine/an-update-to-the-1619-project.html)

33 Adam Serwer, "The Fight Over The 1619 Project Is Not About the Facts," *The Atlantic*, December 23, 2019, theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093/

34 Marybeth Gasman, "What History Professors Really Think About 'The 1619 Project'," *Forbes*, June 3, 2021, forbes.com/sites/marybethgasman/2021/06/03/what-history-professors-really-think-about-the-1619-project/?sh=344084ee7a15

35 Alan J. Singer, "Defending the 1619 Project in the Context of History Education Today," History News Network, December 20, 2020, historynewsnetwork.org/article/178586

As American institutions—including educational institutions—have increasingly committed to anti-racism and diversity training programs, some commentators have expressed concern that these programs may enforce singular narratives and interpretations of history and culture that cannot be contested without the challenger being labeled as out of touch, insensitive, or worse. This includes programming that purportedly draws on critical race theory. “Critical race theory as it developed in the academy is intellectually rich, but some of the ways it’s been adapted by workplace diversity trainers and education consultants seem risible,” Michelle Goldberg wrote in *The New York Times* in March. (She nonetheless went on to note that the right-wing effort to ban CRT was “a far more direct threat to free speech than what’s often called cancel culture.”)³⁶ Others have questioned whether American schools’ commitment to eradicating racism, as put into practice, may chill the speech of students and teachers who feel that they cannot express thoughtful disagreement with their school’s instruction without repercussions.³⁷

PEN America takes such concerns – and their manifest chilling effect – very seriously: Our Campus Free Speech Guide, for example, includes advice to administrators, educators, and students alike on how to ensure that colleges’ and universities’ embrace of diversity is underpinned by a commitment to freedom of speech and strong protections for academic freedom. It is essential that American institutions take steps to combat racism without steamrolling dissent or smothering robust debate.

But such nuanced deliberation is often at odds with political imperatives. Here, the question of how to most thoughtfully promote anti-racism in public schools and in workplace trainings has been overtaken and supplanted by a political narrative against “Critical Race Theory” that has been embraced by Republican legislators as a partisan rallying cry. We can clearly trace the origins of this narrative. Beginning in 2020, President Trump seized upon “diversity trainings” and anti-racism teachings as a convenient bogey to rally supporters against. In turn, the Trump Administration’s efforts directly spurred and shaped today’s state-level legislative efforts to impose ideological blacklists on educators and trainers. These efforts, in the name of saving Americans from anti-racist “indoctrination,” represent a substantial and unwarranted government intrusion into Americans’ free speech and academic freedom.

TRUMP EXECUTIVE ORDER

The majority of the state bills reviewed in this report draw extensively on an executive order issued by former President Donald Trump shortly before he left office. In September 2020, the Trump administration’s Office of Management and Budget released a prelude of sorts—a memo from OMB director Russell Vought that condemned critical race theory and directed federal agencies to “desist from using taxpayer dollars to fund . . . divisive, un-American propaganda training sessions.”³⁸ A couple of weeks later, in a speech at the National Archives, Trump claimed that “the left

36 Michelle Goldberg, “The Social Justice Purge at Idaho Colleges,” *The New York Times*, March 26, 2021, [nytimes.com/2021/03/26/opinion/free-speech-idaho.html](https://www.nytimes.com/2021/03/26/opinion/free-speech-idaho.html)

37 See e.g. Michael Powell, “New York’s Private Schools Tackle White Privilege. It Has Not Been Easy,” *The New York Times*, August 27, 2021, [nytimes.com/2021/08/27/us/new-york-private-schools-racism.html](https://www.nytimes.com/2021/08/27/us/new-york-private-schools-racism.html)

38 Agencies were directed to “identify all contracts or other agency spending related to any training on “critical race theory,” “white privilege,” or “any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil.” Memo from Russell Vought, Director, OMB (Sept. 4, 2020), M-20-34, [whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf).



President Donald Trump signs an executive order. On September 22, 2020 he signed EO 13950, “Combating Race and Sex Stereotyping” which included a list of prohibited “divisive concepts” which has been copied by legislatures across the country.

has warped, distorted, and defiled the American story with deceptions, falsehoods, and lies,” identifying certain efforts by name as especially pernicious: “Critical race theory, The 1619 Project, and the crusade against American history is toxic propaganda, ideological poison that, if not removed, will dissolve the civic bonds that tie us together. It will destroy our country.”³⁹ To fight back, he announced the formation of a “1776 Commission” to promote “patriotic education.”⁴⁰

On September 22, 2020, Trump issued his Executive Order on Combating Race and Sex Stereotypes. It

claimed that “many people are pushing a . . . vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual.” The EO decried this vision as a “destructive,” “malign” ideology that “threatens to infect core institutions of our country.”⁴¹ The executive order adopted sweeping rules that defined particular “divisive concepts” dealing with race and sex in America, such as the argument that “the United States is fundamentally a racist country”.

39 President Trump Remarks at White House History Conference, Sept. 17, 2020, [c-span.org/video/?475934-1/president-trump-announces-1776-commission-restore-patriotic-education-nations-schools](https://www.c-span.org/video/?475934-1/president-trump-announces-1776-commission-restore-patriotic-education-nations-schools); Kathryn Watson and Grace Segers, “Trump blasts 1619 Project on role of Black Americans and proposes his own ‘1776 commission,’” CBS News, September 18, 2020, [cbsnews.com/news/trump-1619-project-1776-commission/](https://www.cbsnews.com/news/trump-1619-project-1776-commission/)

40 Cecelia Smith-Schoenwalder, “Trump Says He Will Create Commission to Promote ‘Patriotic Education,’” US News, September 17, 2020, [usnews.com/news/national-news/articles/2020-09-17/trump-says-he-will-create-commission-to-promote-patriotic-education](https://www.usnews.com/news/national-news/articles/2020-09-17/trump-says-he-will-create-commission-to-promote-patriotic-education)

41 Executive Order on Combating Race and Sex Stereotyping, September 22, 2020, trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/

TRUMP'S "DIVISIVE CONCEPTS"

Sec. 2. Definitions. For the purposes of this order, the phrase:

(a) "Divisive concepts" means the concepts that

(1) one race or sex is inherently superior to another race or sex;

(2) the United States is fundamentally racist or sexist;

(3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

(4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;

(5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;

(6) an individual's moral character is necessarily determined by his or her race or sex;

(7) 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;

(8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or

(9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

The term "divisive concepts" also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

(b) "Race or sex stereotyping" means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

(c) "Race or sex scapegoating" means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.

The EO went on to prohibit the expression of these concepts from any federal employee training, as well as from any training that any institution that contracted with the federal government could offer its own employees. The EO also prohibited the US military from offering training or courses in any such concepts.⁴²

The EO further directed all federal agencies to compile a list of grants that could be conditioned on prohibiting the concepts, set up a hotline for reporting violations, and instructed the Office of Personnel Management to adopt rules that would require supervisors to “pursue a performance-based adverse proceeding” against any employee who approved training that contained these blacklisted ideas.⁴³ The order also threatened to strip federal funding from institutions that required training that included these concepts.

Since almost all state universities have contracts with the federal government, university officials across the country scrambled to understand how the EO would apply to them, especially for Title IX training on sex discrimination or other training on gender and racial inequality in academia. At least two educational insti-

tutions, the University of Iowa and John A. Logan College in Illinois, quickly moved to suspend diversity-related training and events in the wake of the order.⁴⁴

Where did the ideas behind this EO come from? In a general sense, this EO, issued late in the Trump presidency and just before the 2020 election, reflected the broader political strategy that, in 2019, *The Washington Post* called “Trump’s combustible formula of white identity politics.”⁴⁵ More proximately, according to *The New York Times*, “Mr. Trump’s focus on diversity training seems to have originated with an interview he saw on Fox News, in which Christopher F. Rufo, a conservative scholar at the Discovery Institute, told Tucker Carlson of the ‘cult indoctrination’ of ‘critical race theory’ programs in the government.”⁴⁶ Rufo himself has been clear that his goal is not to attack critical race theory as a concept in academia, but rather to appropriate the phrase as an umbrella term to demonize a range of vaguely related activities that he believes conservatives should find objectionable and can be motivated to mobilize against. As described in a profile of Rufo by *The New Yorker’s* Benjamin Wallace-Wells, “As Rufo eventually came to see it, conservatives engaged in the culture war had been fighting

42 At Section 3. In January 2021, in response to questions from Republican federal legislators, the Chairman of the Joint Chiefs of Staff, General Mark Milley, would give remarks stating that the military does not teach Critical Race Theory, but defending the military’s ability to offer classes on subjects such as “white rage,” saying that it was crucial for military members “to be open-minded and widely read.” See “Gen. Milley defends military studies of critical race theory: ‘I want to understand white rage,’” NBC News, June 23, 2021, [nbcnews.com/video/gen-milley-defends-studying-critical-race-theory-in-the-military-at-house-hearing-115349061782](https://www.nbcnews.com/video/gen-milley-defends-studying-critical-race-theory-in-the-military-at-house-hearing-115349061782); see also Jeff McCausland, “General Milley, critical race theory and why GOP’s ‘woke’ military concerns miss the mark,” NBC News, June 28, 2021, [nbcnews.com/think/opinion/general-milley-critical-race-theory-why-gop-s-woke-military-ncna1272558](https://www.nbcnews.com/think/opinion/general-milley-critical-race-theory-why-gop-s-woke-military-ncna1272558)

43 *Id.* Although not as extensive or as extreme in consequence, the Trump EO brings to mind Truman’s Executive Order 9835, which set up loyalty boards throughout the federal government and required people who failed to be fired. Executive Order 9835, www.trumanlibrary.gov/library/executive-orders/9835/executive-order-9835; see also Dan Kaufman, “The Real Legacy of a Demagogue,” *The New Republic*, October 2, 2020, newrepublic.com/article/159568/real-legacy-demagogue-joseph-mccarthy-donald-trump-book-review.

44 Colleen Flaherty, “Colleges cancel diversity programs in response to Trump order,” *Inside Higher Ed*, October 7, 2020, insidehighered.com/news/2020/10/07/colleges-cancel-diversity-programs-response-trump-order

45 Michael Sherer, “White identity politics drives Trump, and the Republican Party under him,” *The Washington Post*, July 16, 2019, [washingtonpost.com/politics/white-identity-politics-drives-trump-and-the-republican-party-under-him/2019/07/16/a5ff5710-a733-11e9-a3a6-ab670962db05_story.html](https://www.washingtonpost.com/politics/white-identity-politics-drives-trump-and-the-republican-party-under-him/2019/07/16/a5ff5710-a733-11e9-a3a6-ab670962db05_story.html)

46 Hailey Fuchs, “Trump Attack on Diversity Training Has a Quick and Chilling Effect,” *The New York Times*, Oct. 13, 2020, www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html.

against the same progressive racial ideology since late in the Obama years, without ever being able to describe it effectively.” Rufo told the magazine, “We’ve needed new language for these issues,” and “‘critical race theory’ is the perfect villain.”⁴⁷ Rufo had previously explained on Twitter, “We will eventually turn [critical race theory] toxic, as we put all of the various cultural insanities under that brand category.... 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.”⁴⁸

Patricia Williams, the Director of Law, Technology, and Ethics at Northeastern University and a leading scholar of Critical Race Theory, has labeled this deliberate mischaracterization of Critical Race Theory as “definitional theft.”⁴⁹ Kimberlé Crenshaw has argued that this misrepresentation allows opponents of CRT to “take the name, fill it with meaning, and create this hysteria” which is politically useful.⁵⁰

Rufo’s efforts have been largely successful in positioning the term “critical race theory” into a political label to be appended onto any instruction that certain

conservatives find objectionable. Rufo does not mince words in his attacks: “CRT-based programs are often hateful, divisive, and filled with falsehoods; they traffic in racial stereotypes, collective guilt, racial segregation, and race-based harassment.”⁵¹ He depicts CRT as an existential threat to the country. As he wrote in a paper for the Heritage Foundation, “Critical race theory seeks to undermine the foundations of American society and replace the constitutional system with a near-totalitarian ‘antiracist’ bureaucracy.”⁵²

The Wall Street Journal reported that the day after Rufo’s September 1 segment with Carlson, Trump’s White House Chief of Staff Mark Meadows called him, and two days after that, Trump’s Office of Management and Budget issued its memo.⁵³ Trump’s speech at the National Archives came 13 days later, and his executive order came five days after that—exactly three weeks after Rufo’s Fox appearance. Since Trump’s executive order was released, Rufo told a reporter, he has provided his analysis to a half-dozen state legislatures, the United States House of Representatives, and the United States Senate.⁵⁴ In December 2020, Rufo participated in webinars with the Heritage Foundation⁵⁵ and with the American Legislative Exchange Council (ALEC), the organization known for producing

47 Benjamin Wallace-Wells, “How a Conservative Activist Invented the Conflict Over Critical Race Theory,” *New Yorker*, June 18, 2021, [newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory](https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory).

48 @realchrisrufo, March 15, 2021, twitter.com/realchrisrufo/status/1371541044592996352; see also Christopher Rufo, “Critical Race Theory Briefing Book,” christopherrufo.com/crt-briefing-book/ (purporting to offer tools to “win the language war” around critical race theory).

49 Jelani Cobb, “The man behind critical race theory,” *New Yorker*, September 13, 2021, [newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory](https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory)

50 Jon Wiener, “The predictable backlash to Critical Race Theory: A Q&A with Kimberle Crenshaw,” *The Nation*, July 5, 2021, thenation.com/article/politics/critical-race-kimberle-crenshaw/

51 Christopher Rufo, “Critical Race Fragility,” *City Journal*, March 2, 2021, [city-journal.org/the-left-wont-debate-critical-race-theory](https://www.city-journal.org/the-left-wont-debate-critical-race-theory).

52 Christopher Rufo, “Critical Race Theory Would Not Solve Racial Inequality: It Would Deepen It,” The Heritage Foundation, March 23, 2021, [heritage.org/progressivism/report/critical-race-theory-would-not-solve-racial-inequality-it-would-deepen-it](https://www.heritage.org/progressivism/report/critical-race-theory-would-not-solve-racial-inequality-it-would-deepen-it).

53 Paul Kiernan, “Conservative Activist Grabbed Trump’s Eye on Diversity Training,” *The Wall Street Journal*, October 9, 2020, [wsj.com/articles/conservative-activist-grabbed-trumps-eye-on-diversity-training-11602242287](https://www.wsj.com/articles/conservative-activist-grabbed-trumps-eye-on-diversity-training-11602242287)

54 Adam Harris, “The GOP’s ‘Critical Race Theory’ Obsession,” *The Atlantic*, May 7, 2021, [theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828/](https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828/);

55 “Against Critical Theory’s Onslaught: Reclaiming Education and the American Dream,” American Legislative Exchange Council, December 8, 2020 alec.org/article/reclaiming-education-and-the-american-dream-against-critical-theorys-onslaught/

and pushing conservative model bills for state legislatures.⁵⁶

Trump's executive order met with widespread condemnation, including from the higher-education and business sectors. One hundred sixty trade associations and nonprofits, including the U.S. Chamber of Commerce, sent a letter to President Trump a few weeks after the EO's adoption, asking him to withdraw it because it would "create confusion and uncertainty, lead to non-meritorious investigations, and hinder the ability of employers to implement critical programs to promote diversity and combat discrimination in the workplace."⁵⁷ More than a hundred civil rights groups denounced the order. The Lawyers Committee for Civil Rights Under Law declared it "a blatant effort to perpetuate and codify a deeply flawed and skewed version of American history. It promotes a particular vision of history that glorifies a past rooted in white

supremacy while silencing the viewpoints and experiences of all who have been victimized by individual and structural inequalities—a kind of dangerous propaganda or thought-policing comparable only to authoritarian regimes."⁵⁸

A federal judge partially blocked the order on constitutional grounds in December 2020, and President Biden repealed it on his first day in office.⁵⁹ Even so, Trump's executive order was instrumental in galvanizing the broad effort that gained momentum in 2021 to circumscribe discussions of race, racism, and gender by prohibiting the teaching of certain ideas.

56 Ed Pilkington, "Rightwing 'bill mill' accused of sowing racist and white supremacist policies," *The Guardian*, December 3, 2019, [theguardian.com/us-news/2019/dec/02/alec-white-supremacy-conservatives-racism](https://www.theguardian.com/us-news/2019/dec/02/alec-white-supremacy-conservatives-racism); Tyler Kingkade, Brandy Zadrozny and Ben Collins, "Critical race theory battle invades school boards—with help from conservative groups," NBC News, June 15, 2021, [nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794](https://www.nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794)

57 Letter to President Trump from 160 trade associations and non-profits, October 15, 2020, [image.uschamber.com/lib/fe3911727164047d731673/m/5/b5c62775-5376-4f8d-9384-35b76ce39682.pdf](https://www.uschamber.com/lib/fe3911727164047d731673/m/5/b5c62775-5376-4f8d-9384-35b76ce39682.pdf)

58 Don Owens, "Civil Rights Groups Condemn White House Move to Censor Race and Gender Equity," Lawyers' Committee for Civil Rights Under Law, October 7, 2020, [lawyerscommittee.org/civil-rights-groups-condemn-white-house-move-to-censor-race-and-gender-equity/](https://www.lawyerscommittee.org/civil-rights-groups-condemn-white-house-move-to-censor-race-and-gender-equity/)

59 The details of the injunction are addressed below. Jessica Guynn, "Trump diversity executive order: Civil rights group sues federal government for access to documents" *USA Today*, May 2, 2021, [usatoday.com/story/money/2021/04/30/trump-diversity-executive-order-naacp-lawsuit-biden-racism/4893931001/](https://www.usatoday.com/story/money/2021/04/30/trump-diversity-executive-order-naacp-lawsuit-biden-racism/4893931001/)



Kimberlé Crenshaw, an original architect of critical race theory, speaks at an event. Photo by Mohamed Badarne/Heinrich-Böll-Stiftung/Flickr

WHAT IS CRITICAL RACE THEORY?

Critical Race Theory (CRT) is an intellectual framework used to analyze, explain, and critique racial disparities. It originated in the 1970s in the aftermath of the civil rights movement as an interpretation of why progress toward racial equality had seemingly stalled.⁶⁰ Its earliest proponents included prominent scholars such as Derrick Bell, a civil rights activist and

Harvard Law School's first tenured Black professor, and Mari Matsuda, the first tenured Asian-American law professor in the United States.

Kimberlé Crenshaw, one of the leaders and founders of CRT, has said that the theory starts with the contention that "the triumph of formal equality did not signify the end of racism," then attempts to explain why and identify remedies.⁶¹ Over time this foundational observation has grown beyond its legal origins

⁶⁰ Critical Race Theory's origins lie with Prof. Derrick Bell's article "Brown v. Board of Education and the Interest-Convergence Dilemma," *Harvard Law Review*, Volume 93, No. 3, 1980, pages 518–533, [jstor.org/stable/1340546](https://www.jstor.org/stable/1340546); see Richard Delgado and Jean Stefancic, "Critical Race Theory: Past, Present, and Future," *Current Legal Problems*, Volume 51, Issue 1, 1998, pages 467–491, doi.org/10.1093/clp/51.1.467, academic.oup.com/clp/article-abstract/51/1/467/366105?redirectedFrom=PDF

⁶¹ Kimberlé Williams Crenshaw, "Race to the Bottom," *The Baffler*, June 2017, thebaffler.com/salvos/race-to-bottom-crenshaw. See also: "Critical Legal Studies Movement" Harvard University Law School, Berkman Klein Center, The Bridge, cyber.harvard.edu/bridge/CriticalTheory/critical2.html; "Critical Race Theory," Harvard University Law School, Berkman Klein Center, The Bridge, cyber.harvard.edu/bridge/CriticalTheory/critical4.html.

to influence other social science, humanities, and professional fields, such as sociologist Eduardo Bonilla-Silva's theory of "color-blind racism" as a model to

explain the existence of "racism without racists."⁶² Scholars working in this tradition generally contend that U.S. legal and societal structures operate in ways that solidify racial inequality, even if these laws and institutions, and the individuals who populate them, do not consciously embrace racist ideas.

In state after state, primary and secondary teachers and pre-service teacher educators have strongly attested that, as an intellectual framework, CRT is not taught in elementary, middle or high schools, insisting that critics have conflated the academic theory taught in colleges (and law schools in particular) with other diversity initiatives.⁶³ Yet discussion of what does or doesn't constitute CRT is in many ways a distraction from the pressing issues at stake in statehouses across

the country. As Rufo's comments demonstrate, and as PEN America's review of the 54 educational gag order bills reveals, this "anti-CRT" legislation is not principally intended to prohibit the academic study of CRT itself, and it would ban and punish a far broader set of inquiries and ideas from examination and discussion in American schools and universities.

62 Eduardo Bonilla-Silva, *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America*, (Lanham, MD: Rowman and Littlefield Publishers, 2018); Samuel Hoadley-Brill, "Critical Race Theory's Opponents Are Sure It's Bad. Whatever It Is," *The Washington Post*, July 2, 2021, [washingtonpost.com/outlook/critical-race-theory-law-systemic-racism/2021/07/02/6abe7590-d9f5-11eb-8fb8-aea56b785b00_story.html](https://www.washingtonpost.com/outlook/critical-race-theory-law-systemic-racism/2021/07/02/6abe7590-d9f5-11eb-8fb8-aea56b785b00_story.html)

63 David Childs, "Is Anyone Actually Teaching Critical Race Theory in their Classroom? Why are States Banning It?" *Democracy & Me*, June 23, 2021, democracyandme.org/is-anyone-actually-teaching-critical-race-theory-in-their-classroom-why-are-states-banning-it/; Rashawn Ray and Alexandra Gibbons, "Why are states banning critical race theory?" *Brookings Institution*, July 2021, [brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/](https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/); Caitlin O'Kane, "Head of teachers union says critical race theory isn't taught in schools, vows to defend 'honest history'," *CBS News*, July 8, 2021, [cbsnews.com/news/critical-race-theory-teachers-union-honest-history/](https://www.cbsnews.com/news/critical-race-theory-teachers-union-honest-history/); Phil McCausland, "Teaching critical race theory isn't happening in classrooms, teachers say in survey," *NBC News*, July 1, 2021, [nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945](https://www.nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945); "EXPLAINED: The Truth About Critical Race Theory and How It Shows Up in Your Child's Classroom," *EducationPost*, May 5, 2021, [educationpost.org/explained-the-truth-about-critical-race-theory-and-how-it-shows-up-in-your-childs-classroom/](https://www.educationpost.org/explained-the-truth-about-critical-race-theory-and-how-it-shows-up-in-your-childs-classroom/)

SECTION II

STATE-LEVEL LEGISLATIVE EFFORTS TO IMPOSE EDUCATIONAL GAG ORDERS

Beginning in January 2021, various state legislators took up the charge initiated by the Trump Administration, continuing the campaign against curricula and ideas labeled “CRT,” The 1619 Project, and diversity training in the workplace. While many of these bills were clearly inspired by the Trump executive order, together this raft of bills attempts to impose a far more sweeping and society-wide change. Specifically, while the Trump EO primarily applied to government trainers and contractors as well as military personnel, the great majority of the state-level bills would extend these prohibitions to all state schools and/or colleges and universities.

Over time, the depiction of critical race theory by Republican officials and some politically conservative media has evolved into exactly the scapegoat envisioned by Rufo. Just as he'd hoped, parents are now pressuring school boards to ban books and remove elements of curriculum they object to under the inaccurate guise

that it is ‘Critical Race Theory.’⁶⁴ Lawmakers, meanwhile, have weaponized these beliefs with actions. The term “Critical Race Theory” appeared by name in only one of 15 educational gag order bills introduced in January and February but was named in five of 21 bills introduced from March to May.

In January, legislators in Mississippi, Arkansas, and Iowa introduced bills that would have explicitly barred the expenditure of public funds on curricula derived from *The New York Times*' 1619 Project,⁶⁵ based in part or whole on Senator Tom Cotton's Saving American History Act, introduced in July 2020.⁶⁶ A separate Arkansas bill (HB 1218) proposed a prohibition on any public school or college allowing a “course, class, event, or activity” that “promotes division between, resentment of, or social justice for” a race, gender, political affiliation, social class, or particular class of people.”⁶⁷ A South Dakota bill (HB 1157) with very similar provisions quickly followed.⁶⁸

64 Tyler Kingkade, Brady Zadrozny, and Ben Collins, “Critical race theory battle invades school boards— with help from conservative groups”, NBC News, June 15, 2021, [nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794](https://www.nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794)

65 Arkansas HB 1231, legiscan.com/AR/text/1231/2021; Mississippi SB 2538, billstatus.ls.state.ms.us/documents/2021/html/SB/2500-2599/SB2538IN.htm; Iowa, HF 222, legiscan.com/IA/text/HF222/id/2260602

66 Saving American History Act of 2020, S.4292, congress.gov/bill/116th-congress/senate-bill/4292/text

67 Arkansas HB 1218, arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2021R%2FPublic%2FHB1218.pdf

68 South Dakota HB 1157, mylrc.sdlegislature.gov/api/Documents/214785.pdf

That same month, South Dakota's HB 1158 proposed to ban The 1619 Project as well but listed it as an example of a broader prohibition on schools using materials "associated with efforts to reframe this country's history in a way that promotes racial divisiveness and displaces historical understanding with ideology."⁶⁹ In Missouri, HB 952 sought to ban "any curriculum implementing critical race theory" and provided an explicit list of examples, including The 1619 Project as well as the Learning for Justice Curriculum, We Stories, programs of Educational Equity Consultants, BLM at School, Teaching for Change, and the Zinn Education Project.⁷⁰

All seven of these bills died or were withdrawn in the ensuing months. But the crusade to pass educational gag orders continued. In February and March, bills were introduced that focused on barring "divisiveness," "race and sex stereotyping," and discussions of "divisive concepts" in schools, colleges, state agencies, and institutions as well as from contractors. State after state mimicked the Trump EO's list of "divisive concepts," proposing a range of ways that these concepts could be barred from education and training. Over those two months, bills in this vein were introduced in nine states: Arizona, Arkansas, Oklahoma, Tennessee, West Virginia, Rhode Island, Iowa, Texas, and North Carolina. The trend continued in April, with bills introduced in Arkansas, Louisiana, New Hampshire, North Carolina, and Idaho—

and then in May, in Missouri, South Carolina, Michigan, and Ohio. In June, similar bills appeared in Pennsylvania, Arizona, Michigan, Missouri, and Wisconsin, along with the pre-filing of bills for 2022 legislative sessions in Alabama and Kentucky. In July and August, Texas legislators filed two sets of sequential, nearly identical bills during two separate special legislative sessions.

During the same period, several states took executive actions—including attorney general's opinions,⁷¹ governor's pledges,⁷² and state education rules—all borrowing similar language prohibiting "divisive concepts," "race and sex stereotyping," "critical race theory," or The 1619 Project.⁷³ Some local school boards adopted the same rhetoric and aims.⁷⁴ In May, Montana Attorney General Austin Knudsen joined the national debate, issuing a binding resolution that carries the weight of law in the state, holding that teaching CRT and anti-racism programs is discriminatory and violates federal law.⁷⁵

In addition to the Trump EO and the Saving American History Act, another influential template for state-level legislation has been the Partisanship Out of Civics Act, a model bill published in February 2021. This model bill was written by Stanley Kurtz, a conservative commentator and senior fellow at the Ethics and Public Policy Center, a D.C. think tank whose purpose is to "apply the riches of the Judeo-Christian tradition" to American

69 South Dakota HB 1158, mylrc.sdlegislature.gov/api/Documents/214787.pdf

70 Missouri HB 952, house.mo.gov/billtracking/bills211/hlrbillspdf/2087H.02C.pdf

71 Montana Attorney General Opinion Letter, Vol. No. 58, Op. No. 1, at 18, May 27, 2021 dojmt.gov/attorney-general-knudsen-issues-binding-opinion-on-critical-race-theory/ (concluding that "key elements of Critical Race Theory and so-called "antiracism" education and training, when used to classify students or other Montanans by race, violate the Equal Protection Clause, Title VI, Montana's Individual Dignity Clause, and the MHRA.").

72 South Dakota Governor Noem signed a "The 1776 Pledge to Save Our Schools," which seeks to restore "patriotic education" while also attacking critical race theory. Aris Folley, "Noem takes pledge to restore 'patriotic education' in schools," *The Hill*, May 4, 2021, thehill.com/homenews/state-watch/551799-noem-takes-pledge-to-restore-patriotic-education-in-schools.

73 Department of Education, State Board of Education, Notice of Change, Rule No. 6A-1.094124, Required Instruction Planning and Reporting, flrules.org/gateway/ruleno.asp?id=6A-1.094124&PDate=6/14/2021&Section=3.

74 "Combating Racist Training in the Military Act of 2021," S. 968; "Stop CRT Act," HR 3179.

75 "Attorney General Knudsen Issues Binding Opinion On Critical Race Theory," Montana Department of Justice, May 27, 2021, dojmt.gov/attorney-general-knudsen-issues-binding-opinion-on-critical-race-theory/



North Carolina Republican Senate leader Phil Berger speaks at a Senate Education Committee Hearing on July 14, 2021, discussing his intention to advance a measure to ban the promotion of critical race theory in K-12 public school classrooms. Photo by AP/Bryan Anderson

policy.⁷⁶ The Partisanship Out of Civics Act bans the supposedly divisive concepts in the Trump EO from the classroom, prohibits civics teachers from being required to teach “controversial issues of public policy or social affairs,” and, if the topics are taught, requires teachers to “strive to explore such issues from diverse and contending perspectives.”⁷⁷ It also prohibits schools from giving

“service-learning” credit to students engaging in social or public policy advocacy and from using private funding to obtain curricular materials or teacher training.⁷⁸ Eight bills—proposed in Arizona, Ohio, Texas, and South Carolina—bear a partial or direct likeness to this model bill. In North Carolina, SB 700, introduced in April, focuses on mandating that students encounter “balanced political

76 Notably, Kurtz is also the author of the Goldwater model bill, a model piece of legislation that claims to restore free expression on U.S. college campuses. PEN America examined the Goldwater bill at length in our previous report *Wrong Answer*, concluding that though the Goldwater model bill possesses strengths, it also outlines an overly punitive system of discipline that may in fact serve to deter peaceful protests. See “Wrong Answer: How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire,” PEN America, November 7, 2017, pen.org/wp-content/uploads/2017/11/2017-wrong-answer_11.9.pdf

77 Stanley Kurtz, “The Partisanship Out of Civics Act,” February 15, 2021, National Association of Scholars, nas.org/blogs/article/the-partisanship-out-of-civics-act.

78 *Id.*, Section B, (3)-(5).

viewpoints” on all subject matter in schools. It bears little resemblance to the Trump-inspired “divisive concepts” or 1619 Project bills; instead, it appears exclusively influenced by Kurtz’s model bill.⁷⁹

A bill in Tennessee, HB 800, similarly tries to impose ideological controls on education but sticks to gender and sexuality issues. The bill, currently the only one of its kind insofar as our research revealed, proposes to ban any curricular materials that “promote, normalize, support, or address lesbian, gay, bisexual, or transgender (LGBT) issues or lifestyles.”⁸⁰ What proponents of HB 800 are “really worried about,” wrote University of Tennessee Knoxville psychology professor Patrick Grzanska, is “that curricula that include the experiences, contributions, and struggles of sexual and gender minorities might actually do exactly what all good education is intended to do. A strong education should expose students to unfamiliar ideas, challenge them to take another’s perspective, reconsider taken-for-granted assumptions, and, ideally, become less inclined to prejudice, dehumanize, or discriminate against those who are different from them.”⁸¹

In all, 54 educational gag order bills were introduced in 24 states over a nine-month period: 18 remain pending,⁸² 14 died, four were withdrawn, one was vetoed, and

six were pre-filed for 2022. Eleven of these bills were passed into law.

The 54 state-level bills are not carbon copies. They mix and match concepts and wording—taking a phrase from one source, a mechanism from another, and enforcement provisions from another, while often creating one or two new provisions. A minority of the bills style themselves as defending teachers or students from being “compelled” to affirm critical race theory or specific “prohibited” or “divisive” ideas. Even those bills that explicitly claim to defend academic freedom or the First Amendment accomplish the exact opposite, sending the message to instructors and educators that the state intends to police their speech and block consideration of a specific viewpoint.

79 North Carolina S.B. 700, nclg.gov/Sessions/2021/Bills/Senate/PDF/S700v1.pdf

80 Tennessee H.B. 800, capitol.tn.gov/Bills/112/Bill/HBo800.pdf

81 Patrick R. Grzanska, “Tennessee lawmakers seek to cancel LGBTQ history and censor education | Opinion,” *Tennessean*, March 29, 2021, tennessean.com/story/opinion/2021/03/29/tennessee-lawmakers-seek-cancel-lgbtq-history-and-censor-education/7045649002/ Note that Grzanska included another Tennessee bill in this critique—HB 529, which would require parents to be notified before their child is taught a “sexual orientation” or “gender identity” curriculum. While this bill raises many of the same concerns as the 54 bills we evaluate in this report, we did not include curriculum “opt out” bills in this analysis. This lack of inclusion in no way implies that PEN America supports such a bill or considers it to be consistent with the commitments to freedom of expression or to supporting the expression of diverse voices that underlie PEN America’s mission.

82 As of October 1, 2021.

CAN STATE AGENCIES BE PARALLEL WITH K-12 SCHOOLS?

K-12 SCHOOLS

Forty-eight bills have applied to K-12 schools, of which nine became law, in Arizona, Idaho, Iowa, New Hampshire, Oklahoma, South Carolina, Tennessee, and Texas. Twenty-two are either pending or have been pre-filed for 2022. The nine passed laws include language similar to the Trump executive order on so-called divisive concepts, laying out topics that are forbidden for teaching or training purposes.

COLLEGES AND UNIVERSITIES

Twenty-one bills explicitly apply to colleges and universities. Of these, 16 explicitly impose restrictions on academic courses or curricula, and 10 explicitly address training for college students or employees. Three bills became law, in Oklahoma, Idaho, and Iowa. All three impose prohibitions on training or orientations, while Idaho's law additionally applies these ideological bans to academic instruction. Twelve such bills, all but two of them explicitly targeting academic teaching, are pending or have been pre-filed for 2022.

STATE AGENCIES, INSTITUTIONS, AND/OR CONTRACTORS

Nineteen bills call for prohibitions on training for or by state agencies, institutions, political subdivisions, and/or contractors. Six of them became law, in Arizona, Arkansas, Iowa, New Hampshire, and Texas. Eight bills are pending or have been pre-filed for 2022. The scope of many of these bills is ambiguous, and it is unclear whether their provisions extend to public colleges and universities and to public schools.

SECTION III

CRITICAL RACE THEORY AS A POLITICAL BOGEYMAN

Over the past year, what started as an election-season gambit by President Trump to prohibit “race and sex stereotyping” metamorphosed into a nationwide movement among Republican legislators, governors, pundits, and activists to crush a broad set of ideas and teachings dubbed “critical race theory” and specific curricula they associate with it.

This campaign has been zealously promoted by right-wing media. Media Matters for America, a progressive watchdog group, documented an explosive rise from relative obscurity in use of the term “critical race theory” on Fox News from March to June of this year.⁸³ This media barrage has led some Americans to conclude that CRT poses an urgent threat. Reporting on a spate of viral videos of parents condemning CRT at school

board hearings, *The Guardian* noted: “In one such video, a mother declares critical race theory (CRT) to be ‘a tactic used by Hitler and the Ku Klux Klan on slavery many years ago to dumb down my ancestors so we could not think for ourselves.’ In another, a woman calls CRT ‘the American version of the Chinese cultural revolution.’ A third mother says she has proof that her local school board is ‘teaching our children to go out and murder police officers.’”⁸⁴

This media onslaught has been supported and reinforced by conservative national leaders and think tanks, which are churning out reports.⁸⁵ Shortly after President Trump adopted his EO, the Southern Baptist Convention asserted that “Critical Race Theory, Intersectionality and any version of Critical Theory is incompatible

83 Lis Power, “Fox News’ obsession with critical race theory, by the numbers,” *Media Matters*, June 15, 2021, mediamatters.org/fox-news/fox-has-mentioned-critical-race-theory-nearly-1300-times-past-35-months

84 Julia Carrie Wong, “From viral videos to Fox News: how rightwing media fueled the critical race theory panic,” *The Guardian*, June 30, 2021, theguardian.com/education/2021/jun/30/critical-race-theory-rightwing-social-media-viral-video

85 E.g., Christopher Rufo, “Critical Race Theory Would Not Solve Racial Inequality: It Would Deepen It,” The Heritage Foundation, March 23, 2021, heritage.org/progressivism/report/critical-race-theory-would-not-solve-racial-inequality-it-would-deepen-it; Mike Gonzalez and Jonathan Butcher, “State Education Officials Must Restore a Sense of National Character in Public Schools,” The Heritage Foundation, April 22, 2021, heritage.org/sites/default/files/2021-04/BG3571.pdf; Timothy Sandefur, “Cynical Theories: How Activist Scholarship Made Everything about Race, Gender, and Identity—and Why This Harms Everybody by Helen Pluckrose and James Lindsay,” *The Objective Standard*, October 2, 2020, theobjectivestandard.com/2020/10/cynical-theories-how-activist-scholarship-made-everything-about-race-gender-and-identity-and-why-this-harms-everybody-by-helen-pluckrose-and-james-lindsay/; “The New Social Justice Makes Everyone Guilty: A Primer on Critical Race Theory,” The Goldwater Institute, goldwaterinstitute.org/criticalracetheory/

with the Baptist Faith & Message.”⁸⁶ The Heritage Foundation has developed a substantial body of commentary on the subject, producing over a hundred articles on it within the past year.⁸⁷ Christopher Rufo, the activist who kick-started the CRT frenzy, has created a briefing book that recommends a wide range of pejorative phrases and slogans to deploy against it, such as “Race-based Marxism,” “Racial engineering,” “Neo-racist theories have no place in public education,” and “Free speech was designed to protect the individual against the government, not to empower the government to force individuals to believe in fringe racial theories.”⁸⁸ Organizations like Turning Point USA and Prager University are crafting their own curricula, offering them as “antidotes to leftist teaching.”⁸⁹ William A. Jacobson, founder of the conservative Legal Insurrection Foundation, has

created CriticalRace.org, which attempts to document colleges and universities that teach CRT in trainings and programming.⁹⁰ A national PAC called the 1776 Project is funding proponents of educational gag orders who are current school board candidates around the country.⁹¹

Proponents of educational gag orders say that lawsuits challenging the teaching of critical race theory are heading to the courts.⁹² A handful of suits have already been filed, arguing that schools are engaging in discrimination as part of their efforts to educate students on racial justice.⁹³ Myriad web pages and local grassroots efforts are taking up the cause.⁹⁴ In June, NBC News documented 165 local and national groups that “aim to disrupt lessons on race and gender.”⁹⁵ Pitched battles over CRT have erupted in local school districts from Southlake, Texas-

86 George Schroeder, “Seminary presidents reaffirm BFM, declare CRT incompatible,” *Baptist Press*, November 30, 2020, baptistpress.com/resource-library/news/seminary-presidents-reaffirm-bfm-declare-crt-incompatible/. The action prompted a number of Black Baptist pastors to resign positions or to leave the denomination entirely.

87 See heritage.org/search?contains=%22Critical+Race+Theory%22 (producing 107 results over the past year). heritage.org/search?contains=%22Critical+Race+Theory%22 See also: “Combatting Critical Race Theory,” The Heritage Foundation, May 21, 2021, heritage.org/civil-society/commentary/combating-critical-race-theory

88 Christopher Rufo, “Critical Race Theory Briefing Book,” christopherrufo.com/crt-briefing-book/

89 Kelly Field, The Hechinger Report, “Can critical race theory and patriotism coexist in classrooms?” May 28, 2021, nbcnews.com/news/us-news/can-critical-race-theory-patriotism-coexist-classrooms-n1268824

90 “Critical Race Training in Education,” criticalrace.org; see also: William A. Jacobson, “Introducing the Legal Insurrection Foundation,” Legal Insurrection, March 4, 2019, legalinsurrection.com/2019/03/introducing-the-legal-insurrection-foundation/

91 Stef W. Kight, “Scoop: New conservative PAC targets school board elections,” *Axios*, May 25, 2021, axios.com/pac-critical-race-theory-school-board-election-2f41f62f-7161-47fo-9a70-5472a69c7ab6.html; “1776 Project PAC,” 1776 projectpac.com/; Stef W. Kight, “The next political battleground: school boards,” *Axios*, May 9, 2021, axios.com/the-next-political-battleground-school-boards-b5f5be3e-0937-42d6-b71d-5bd5fbcc22d7.html

92 John Murawski, “Op-Ed: Critical race theory is about to face its day(s) in court,” *The Center Square*, April 27, 2021, thecentersquare.com/national/op-ed-critical-race-theory-is-about-to-face-its-day-s-in-court/article_9dcef10a-a76c-11eb-bf9f-27e0e238e56d.html

93 “CFER submits first ever civil rights complaint against San Diego Unified School District for unlawful Critical Race Theory training,” *Californians for Equal Rights Foundation (CFER)*, April 9, 2021, cferfoundation.org/cfer-submits-first-ever-civil-rights-complaint-against-san-diego-unified-school-district-for-unlawful-critical-race-theory-training/; Sam Dorman, “Illinois teacher sues school district, claims ‘equity’ push violates US Constitution,” *Fox News*, June 29, 2021, foxnews.com/us/evanston-illinois-teacher-lawsuit-equity-trainings; “OCR Complaint: Wellesley Public Schools,” *Parents Defending Education*, May 12, 2021, defendinged.org/complaints/ocr-complaint-wellesley-public-schools/?fbclid=IwAR1zMKtHj98ub49Dbqx1k2JC_3zLiaojw7meKdsfmS8uFpN3-gbQ4YLfS_E; Sam Dorman, “Missouri school district employees sue over allegedly unconstitutional ‘equity’ training,” *Fox News*, August 18, 2021, foxnews.com/us/missouri-school-district-critical-race-theory-lawsuit

94 Laura Meckler and Hannah Natanson, “As schools expand racial equity work, conservatives see a new threat in critical race theory,” *The Washington Post*, May 3, 2021, washingtonpost.com/education/2021/05/03/critical-race-theory-backlash/; see, e.g., “Parent’s Guide and Resources to Fight Critical Race Theory,” *United States Parents Involved in Education*, May 24, 2021, uspie.blog/2021/05/24/parents-guide-and-resources-to-fight-critical-race-theory

95 Tyler Kingkade, Brady Zadrozny, and Ben Collins, “Critical race theory battle invades school boards— with help from conservative groups”, *NBC News*, June 15, 2021, nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794

,⁹⁶ and Forsyth County, Georgia,⁹⁷ to Manhattan⁹⁸ and the suburbs of Baltimore⁹⁹. In some places, like Loudon, Virginia, parents, teachers, and school board members have received threats, and school board meetings have devolved into screaming matches.¹⁰⁰ State boards of education have passed resolutions banning CRT, “divisive concepts,” or The 1619 Project in Florida, Alabama, Georgia, and South Carolina.¹⁰¹ Some local boards have followed suit, including in Cobb County, Virginia, and in Gallatin County, Kentucky.¹⁰² In April, the Germantown School District in greater Milwaukee banned critical race theory but then reversed the ban weeks later.¹⁰³ NBC reported: “While the efforts vary, they share strategies of disruption, publicity and mobilization. The groups swarm school board meetings, inundate districts with time-consuming public records requests and file lawsuits and federal complaints alleging discrimination against white students. They have become media darlings in conservative circles and made the debate over critical race theory a national issue.”¹⁰⁴

96 The Editorial Board, “Southlake Says No to Woke Education,” *The Wall Street Journal*, May 7, 2020, [wsj.com/articles/southlake-says-no-to-woke-education-11620426330](https://www.wsj.com/articles/southlake-says-no-to-woke-education-11620426330)

97 Jon Shirek, “Critics claim schools using ‘Critical Race Theory’ to indoctrinate students, disguising it as diversity policy; Others disagree,” 11 Alive News, May 19, 2021, 11alive.com/article/news/education/parents-accuse-school-board-of-trying-to-teach-students-with-critical-race-theory/85-fce39e59-a639-491b-b60f-1170206ae49e

98 Ginia Bellafante, “Private Schools Brought In Diversity Consultants. Outrage Ensued,” *The New York Times*, April 23, 2021, [nytimes.com/2021/04/23/nyregion/private-schools-diversity-brearley-dalton-grace.html](https://www.nytimes.com/2021/04/23/nyregion/private-schools-diversity-brearley-dalton-grace.html) (describing, among other things, a secretly taped meeting between a teacher and headmaster).

99. David Anderson, “Harford parents say schools are teaching ‘critical race theory,’ but officials stress ‘culturally responsive teaching,’” *The Baltimore Sun*, April 15, 2021, [baltimoresun.com/maryland/harford/aegis/cng-ag-crt-schools-20210415-wcj7dkdgefgi5n3rgynwoswg7y-story.html](https://www.baltimoresun.com/maryland/harford/aegis/cng-ag-crt-schools-20210415-wcj7dkdgefgi5n3rgynwoswg7y-story.html)

100 Tyler Kingkade, “In wealthy Loudoun County, Virginia, parents face threats in battle over equity in schools,” NBC News, June 1, 2021, [nbcnews.com/news/us-news/wealthy-loudoun-county-virginia-parents-face-threats-battle-over-equity-n1269162](https://www.nbcnews.com/news/us-news/wealthy-loudoun-county-virginia-parents-face-threats-battle-over-equity-n1269162); Nicquel Terry Ellis and Boris Sanchez, “Turmoil erupts in school district after claims that critical race theory and transgender policy are being pushed,” CNN, June 24, 2021, [cnn.com/2021/06/24/us/loudoun-county-school-board-meeting/index.html](https://www.cnn.com/2021/06/24/us/loudoun-county-school-board-meeting/index.html)

101 Map: Where Critical Race Theory is under attack,” Education Week, Jun 11, 2021 - Updated, September 13, 2021, [edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06?s=O3](https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06?s=O3)

102 Kristal Dixon, “Cobb County school board bans teaching critical race theory,” *The Atlanta Journal-Constitution*, June 10, 2021, [ajc.com/news/atlanta-news/cobb-county-school-board-bans-teaching-critical-race-theory/WSPF6NAVZJC2PNPBAPD7SCXOXE/](https://www.ajc.com/news/atlanta-news/cobb-county-school-board-bans-teaching-critical-race-theory/WSPF6NAVZJC2PNPBAPD7SCXOXE/) Kentucky: Madeline Mitchell, “Gallatin County School Board bans critical race theory in unanimous vote,” *The Enquirer*, June 16, 2021, [cincinnati.com/story/news/2021/06/16/gallatin-county-school-board-bans-critical-race-theory-unanimous-vote/5294534001/](https://www.cincinnati.com/story/news/2021/06/16/gallatin-county-school-board-bans-critical-race-theory-unanimous-vote/5294534001/)

103 Alec Johnson, “Germantown School Board reverses its ban on critical race theory,” *Milwaukee Journal Sentinel*, April 27, 2021, [jsonline.com/story/communities/northwest/news/germantown/2021/04/27/germantown-school-board-reverses-ban-critical-race-theory/7391558002/](https://www.jsonline.com/story/communities/northwest/news/germantown/2021/04/27/germantown-school-board-reverses-ban-critical-race-theory/7391558002/)

104 Tyler Kingkade, Brandy Zadrozny, and Ben Collins, “Critical race theory battle invades school boards—with help from conservative groups,” NBC News, June 15, 2021, [nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794](https://www.nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794)

FEDERAL LEGISLATION

While this report focuses on state-level bills, legislators have similarly proposed educational gag orders at the federal level. Since January, at least 10 bills have been introduced in Congress. None has advanced.

S.968 - Combating Racist Training in the Military Act of 2021

Introduced by Sen. Tom Cotton (R-AR)

Prohibits the U.S. Armed Forces or any academic institutions operated or controlled by the Department of Defense from promoting certain “anti-American and racist theories.”

H.R.3046 - To prohibit Federal service academies from providing training and education based on critical race theory

Introduced by Rep. Mark Green (R-TN)

Prohibits federal funds from being used for training or education in CRT at the five federal service academies.

H.R.3163 - CRT Act

Introduced by Rep. Chip Roy (R-TX)

Bars federal funds for K-12 schools or institutions of higher education that promote specified “race-based theories” or compel “teachers or students to affirm, adhere to, adopt, or process” certain beliefs.

H.R.3179 - Stop CRT Act

Introduced by Rep. Dan Bishop (R-NC)

Codifies Trump’s Executive Order 13950. Bars federal funds for any entity that teaches or advances divisive concepts.

S.2346 - Stop CRT Act

Introduced by Sen. Tom Cotton (R-AR)

Codifies Trump’s EO 13950, but exempts elementary schools, secondary schools, or institutions of higher education. Bars federal funds for any elementary or secondary school that “promotes race-based theories

or compels teachers or students to affirm, adhere to, adopt, or profess” certain beliefs. Bars federal funds for any institution of higher education that “compels teachers or students to affirm, adhere to, adopt, or profess” certain “race-based theories or beliefs.”

H.R.3754 - Military Education and Values Act

Introduced by Rep. Buddy Carter (R-GA)

Prohibits the Department of Defense and the Armed Forces from using “any education or training methodology that promotes or causes a racial divide or lack of equality.”

S.2035 - Saving American History Act of 2021

Introduced by Sen. Tom Cotton (R-AR)

Bars the use of federal funds for teaching The 1619 Project in elementary and secondary schools.

H.R.3937 - Ending Critical Race Theory in D.C. Public Schools Act

Introduced by Rep. Glenn Grothman (R-WI)

Prohibits DC public schools from compelling teachers or students “to personally adopt, affirm, adhere to, or profess ideas that promote race or sex stereotyping or scapegoating.”

S.2221 - END CRT Act

Introduced by Sen. Ted Cruz (R-TX)

Codifies Trump’s EO 13950, save for the provisions on contractors and grant recipients. Bars federal grants or subgrants to entities or individuals that teach or advance divisive concepts.

H.R.4764 - No CRT for our Military Kids Act

Introduced by Rep. Vicky Hartzler (R-MO)

Bars funding for teaching critical race theory in K-12 schools operated by the Department of Defense.



North Carolina Republican Senate leader Phil Berger speaks at a Senate Education Committee Hearing on July 14, 2021, discussing his intention to advance a measure to ban the promotion of critical race theory in K-12 public school classrooms. Photo by AP/Bryan Anderson

Jennifer Victor, a political scientist at George Mason University, told *The Hill*: “Republicans’ focus on critical race theory is a part of [a] cycle of backlash. Regardless of whether its critics can accurately define or describe CRT’s contributions to legal studies or any other field, the rhetoric surrounding it helps to define political in-groups and out-groups for competitive partisans.”¹⁰⁵ Some commentators have characterized the rash of gag order - bills as part of a broader “culture war,” aimed at

firing up right-leaning voters.¹⁰⁶ *The Economist* called critical race theory “the Republican Party’s new bogey,” noting that as with calls to “defund the police” after George Floyd’s murder, “the party believes it has found an unpopular notion that can be used for electoral gain.”¹⁰⁷ *The Washington Post* observed that “among the GOP base, the issue has caught fire. During a June 2021 speech in North Carolina, Trump’s comments opposing critical race theory were the largest applause line of the

105 Reid Wilson, “GOP sees critical race theory battle as potent midterm weapon,” *The Hill*, June 22, 2021, thehill.com/homenews/campaign/559732-republicans-see-critical-race-theory-as-new-front-in-ongoing-culture-wars.

106 Melanie Zanona, “‘Lean into the culture war’: House conservatives push fight against critical race theory,” *Politico*, June 24, 2021, politico.com/news/2021/06/24/culture-war-critical-race-theory-496087

107 “Americans who have heard of critical race theory don’t like it,” *The Economist*, June 17, 2021, economist.com/graphic-detail/2021/06/17/americans-who-have-heard-of-critical-race-theory-dont-like-it

evening.”¹⁰⁸

In a May 2021 interview on Fox News, Representative Nancy Mace, a South Carolina Republican, linked her concerns about critical race theory with GOP goals to “get on the record, lay the groundwork for November 2022.”¹⁰⁹ NBC News reported: “Prominent Republican political figures are rushing in to support the parent activists, hoping that these local battles will mobilize conservative voters in next year’s midterms and beyond. As former Trump adviser Steve Bannon put it on his podcast in May: ‘The path to save the nation is very simple—it’s going to go through the school boards.’”¹¹⁰ Bannon was even more explicit in a June interview about the political benefits of the campaign against critical race theory, saying “I look at this and say, ‘Hey, this is how we are going to win.’ I see 50 [House] seats in 2022. Keep this up.”¹¹¹

Not all conservatives have been comfortable with the Republican Party’s efforts to pass these educational gag orders. Some conservative thinkers have recognized the paradox of self-identified conservative legislators—who often hold a commitment to limited government and to freedom of thought as central to their stated beliefs—

attempting to impose these sweeping ideological bans. Charlie Ruger of the Charles Koch Foundation warned that the gag order bills threaten free expression, as “they effectively argue that free speech and open inquiry are good only to the extent that those principles are applied in support of the ideas and questions lawmakers approve.”¹¹² Neal McCluskey of the Cato Institute’s Center for Educational Freedom wrote an op-ed criticizing two conservatives’ campaign against critical race theory, concluding that their approach “is no less ‘indoctrination’ than what many accuse critical race theorists of when they push for public schools to teach what they think is right.”¹¹³

Three Republican governors also disputed the need for these bills and questioned whether they protected individual freedoms. Arkansas Governor Asa Hutchinson declined to sign his state’s legislation, saying, “The bill does not address any problem that exists, and the paperwork and manpower requirements are unnecessary.”¹¹⁴ Utah Governor Spencer Cox chose not to address the censorious laws in a special legislative session because they “would benefit from more time, thought, dialogue and input.” He further explained that while he

108 Laura Meckler and Josh Dawsey, “Republicans, spurred by an unlikely figure, see political promise in critical race theory,” *The San Diego Union-Tribune*, June 20, 2021, [sandiegouniontribune.com/news/politics/story/2021-06-20/republicans-spurred-by-an-unlikely-figure-see-politicalpromise-in-critical-race-theory](https://www.sandiegouniontribune.com/news/politics/story/2021-06-20/republicans-spurred-by-an-unlikely-figure-see-politicalpromise-in-critical-race-theory).

109 Eric Kleefeld, “Fox News’ fearmongering about critical race theory is all about the midterm campaigns—and now the network is admitting it,” *Media Matters*, May 26, 2021, [mediamatters.org/diversity-discrimination/fox-news-fearmongering-about-critical-race-theory-all-about-midterm](https://www.mediamatters.org/diversity-discrimination/fox-news-fearmongering-about-critical-race-theory-all-about-midterm)

110 Tyler Kingkade, Brandy Zadrozny and Ben Collins, “Critical race theory battle invades school boards—with help from conservative groups,” *NBC News*, June 15, 2021, [nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794](https://www.nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794)

111 Theodor Mayer, Maggie Severns, and Meredith McGraw, “The Tea Party to the 10th power: Trumpworld bets big on critical race theory,” *Politico*, June 23, 2021, [politico.com/news/2021/06/23/trumpworld-critical-race-theory-495712](https://www.politico.com/news/2021/06/23/trumpworld-critical-race-theory-495712)

112 Charlie Ruger, “State Legislators Who Think They’re Defending Free Speech Are Actually Hurting It,” *Real Clear Education*, May 14, 2021, [realcleareducation.com/articles/2021/05/14/state_legislators_who_think_theyre_defending_free_speech_are_actually_hurting_it_110578.html](https://www.realcleareducation.com/articles/2021/05/14/state_legislators_who_think_theyre_defending_free_speech_are_actually_hurting_it_110578.html)

113 Neal McCluskey, “Government indoctrination, whether ‘critical’ or ‘patriotic,’ is wrong,” *The Hill*, May 11, 2021, thehill.com/blogs/congress-blog/education/552779-government-indoctrination-whether-critical-or-patriotic-is. McCluskey favors school choice to avoid conflicting views about what should be taught in schools.

114 The Associated Press, “Bill limiting state agencies’ race, sex training becomes law,” *Arkansas Democrat Gazette*, May 4, 2021, [arkansasonline.com/news/2021/may/04/bill-limiting-state-agencies-race-sex-training-bec/](https://www.arkansasonline.com/news/2021/may/04/bill-limiting-state-agencies-race-sex-training-bec/). The legislation is now Act 1100, which adopted a new provisions §25-1-601-606, legiscan.com/AR/bill/SB627/2021



People hold candles during a vigil for the centennial commemorations of the Tulsa Race Massacre in the historic Greenwood neighborhood, May 31, 2021, in Tulsa, OK. Photo by AP/John Locher

was sure that critical race theory had no place in Utah's curriculum, "the difficulty . . . comes in defining terms and making sure that we are never stifling thought or expression—and that we make sure our children learn both the best of our past as well as our mistakes so we don't repeat them." He added: "We must also make it abundantly clear that Utah is a place that welcomes everyone regardless of race, ethnicity, religion or any other background. It is who we are, and it may be easy to lose sight of that during a knee-jerk debate."¹¹⁵

New Hampshire Governor Chris Sununu said, "When you start turning down the path of government banning things, I think that's a very slippery slope." He also pointed to existing civil rights safeguards: "We already have protections in place for discrimination in classrooms. You cannot discriminate against a student regardless of their race, whether it's a person of color, whether it's a White or Caucasian student, teachers cannot be up there dictating who is better than another."¹¹⁶

115 Katie McKellar, "Why Gov. Cox left critical race theory and 2nd Amendment sanctuary off special session agenda," *Deseret News*, May 17, 2021, [deseret.com/utah/2021/5/17/22440500/critical-race-theory-cox-utah-2nd-amendment-sanctuary-legislature-gunscontrol-discrimination](https://www.deseret.com/utah/2021/5/17/22440500/critical-race-theory-cox-utah-2nd-amendment-sanctuary-legislature-gunscontrol-discrimination)

116 Michael Graham, "Sununu: I Don't Like Critical Race Theory, But I Won't Ban It, Either," *NH Journal*, April 8, 2021, [nhjournal.com/sununu-i-dont-like-critical-race-theory-but-i-wont-ban-it-either/](https://www.nhjournal.com/sununu-i-dont-like-critical-race-theory-but-i-wont-ban-it-either/). Sununu would go on to sign the state's educational gag order into law, but only after Republican legislators folded their bill into a state budget. In response, more than half the members of Sununu's Advisory Council on Diversity and Inclusion resigned their posts, telling the governor "Given your willingness to sign this damaging provision and make it law, we are no longer able to serve as your advisors. Holly Ramer, "Systemic racism does exist in NH': Diversity council members quit over 'damaging' budget," Associated Press, June 29, 2021, [seacoastonline.com/story/news/2021/06/29/nh-diversity-council-members-quit-says-new-hampshire-budget-prevents-ending-systemic-racism/7800113002/](https://www.seacoastonline.com/story/news/2021/06/29/nh-diversity-council-members-quit-says-new-hampshire-budget-prevents-ending-systemic-racism/7800113002/)

Yet amid the rash of censorious bills and laws, most prominent Republicans who have spoken out publicly have weighed in support of new restrictions on curriculum and teaching.

Some of the most prominent voices against this tide of censorious activism and subsequent legislative efforts have been Black state senators and other Black community leaders. In Tennessee, State Senator Raumesh Akbari implored Governor Bill Lee to veto the state's divisive concepts bill: "By enacting these new classroom restrictions on racial discussions," he said, "the state legislature is actively denying the lived experiences of people who have been mistreated and underserved."¹¹⁷ But Lee went on to sign the bill. Governor Kevin Stitt of Oklahoma signed educational gag order HB 1775 at the same time that Tulsa was commemorating the 100th anniversary of one of the worst race massacres in U.S. history—a convulsive event that for many decades lay buried, barely showing up in the media or in classrooms. In May, *The Black Wall Street Times* of Tulsa released a statement: "With just weeks until the centennial of the 1921 Tulsa Race Massacre, this bill has re-opened deep wounds in Tulsa's Black community. Many believe the law will make it nearly impossible for the full scope of the massacre to be accurately taught."¹¹⁸

117 Sen. Raumesh Akbari, D-Memphis, "Gov. Lee, veto bill banning Tennessee students from racial injustice lessons," *Tennessean*, May 17, 2021, tennessean.com/story/opinion/2021/05/17/tennessee-governor-bill-lee-critical-race-theory-raumesh-akbari/5135956001/.

118 *The Black Wall Street Times*, statement via Facebook, May 7, 2021, facebook.com/TheBWSTimes/posts/1393721944345839. See also Hicham Raache, "Black Wall Street Times calls for Gov. Stitt's removal from Tulsa Race Massacre Commission for restricting critical race theory in schools," KFOR, May 8, 2021, kfor.com/news/oklahoma-legislature/black-wall-street-times-calls-for-gov-stitts-removal-from-tulsa-race-massacrecommission-for-restricting-critical-race-theory-in-schools/.

SECTION IV

WHY THESE BILLS ARE SO CONCERNING

To varying degrees, all 54 educational gag order bills introduced this year attempt to impose greater state control over what information or ideas educators and instructors can teach, and to prohibit or limit the presentation of specific approaches to race, gender, and our nation’s history. [An index to this report provides a listing and summary of all the bills.](#) Here we offer four overarching observations about them:

1. THESE BILLS REPRESENT AN EFFORT TO IMPOSE CONTENT- AND VIEWPOINT-BASED CENSORSHIP

The most common provision of these bills prohibits the teaching of so-called “divisive concepts” in public schools or in training and orientation programs for college students and public employees.¹¹⁹ In most cases,

the bills’ provisions tightly constrict the educational freedom of both students and faculty. While many bills are explicit in their aim to impose an ideological blacklist on classroom curricula or other educational instruction, even those bills that apply broadly to public employees could still implicate the conduct of teachers, trainers, or professors at public schools and colleges.

All of these bills attempt to impose viewpoint censorship on educators and trainers. First Amendment jurisprudence is especially hostile to viewpoint and content-based regulation: The Supreme Court has previously ruled that government attempts to regulate “particular views taken by speakers on a subject” is a “blatant” violation of the Constitution, ruling, “Viewpoint discrimination is . . . an egregious form of content discrimination.”¹²⁰ In the gag order bills, each of the prohibited concepts is literally a point of view, making the bills flagrant attempts at censorship.

¹¹⁹ All the bills that passed apply in the public school setting, except for Arkansas SB 627 and Arizona HB 2906/SB1840.

¹²⁰ *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995), supreme.justia.com/cases/federal/us/515/819/.

ARKANSAS HB 1761

Arkansas's HB 1761, which died in committee in October 2021 (after PEN America's period of analysis), is reproduced here as an illustrative example of an educational gag order. See our Index for descriptions and links to the text of the 54 educational gag orders examined in this report.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS: 20 21 SECTION 1. Arkansas Code Title 6, Chapter 16, Subchapter 1 is amended to add an additional section to read as follows:

6-16-156. Instructional materials – Race and ethnicity.

(a) Curricula, reading materials, teachers' guides, computer programs, computer applications, programs, counseling, and activities in public schools and open-enrollment public charter schools shall not express, depict, or teach any of the following:

(1) That any race or ethnicity is superior to any other race or ethnicity;

(2) That any individual from a particular race or ethnicity is inherently racist;

(3) That any race or ethnicity should feel guilt or shame because of their race or ethnicity;

(4) That the United States, as a nation, is systemically racist; or

(5) The promotion of prejudice or discrimination toward any race or ethnicity.

(b) A public school or an open-enrollment charter school shall not express, depict, or teach about race or ethnicity in a manner that prevents or inhibits fair and open discourse that employs reason as a guide for deliberation in the exchange of ideas and opposing points of view.

(c) Each public school and open-enrollment public charter school may:

(1) Promulgate policies for the implementation of this section; and

(2) Ensure that all parents and legal guardians of public school students are advised of the policies implemented under this section.

As this report explores in the subsequent section, it is possible that at least some of these bills may withstand constitutional scrutiny—either because they involve areas where the government is permitted to ‘speak’ in its own voice, or because the government has some leeway over setting educational curriculum. Sympathetic courts may uphold or merely narrow the applicability of such laws. Yet we must be absolutely clear: The foreseeable effect of each and every one of these bills will be to silence speech based on the speaker's viewpoint. As such, these bills are fundamentally incompatible with the First

Amendment, the norms and guarantees of academic and intellectual freedom, and the foundational democratic notion of civic debate on a neutral playing field.

These bills would be problematic enough if they only silenced the presentation of specific viewpoints. But they will also foreseeably silence trainers and educators from sharing specific facts. There is no way to draw a clear distinction between the facts that teachers offer in the classroom, and the implied conclusions that students may draw from these facts—meaning that a prohibition

on specific “divisive” concepts must also be understood as inhibiting the presentation of facts that may underlie these concepts.

It is useful to illustrate the concrete ways in which teachers and trainers may be affected by these gag orders. Take, for example, the writings of the country’s most venerated civil rights icon, Dr. Martin Luther King Jr. Supporters of these educational gag orders have argued that Critical Race Theory is so dangerous, in part, because CRT is itself racist; that by focusing on race so intensely it contravenes Dr. King’s famous dream that people be judged “not by the color of their skin but by the content of their character.”¹²¹ Yet these educational gag orders could easily be used to block educators or trainers from including King’s words in their lessons. Take these lines from King’s 1967 book *Where Do We Go From Here*: “White Americans must recognize that justice for black people cannot be achieved without radical changes in the structure of our society . . . It is an aspect of their sense of superiority that the white people of America believe they have so little to learn . . . with each modest advance the white population promptly raises the argument that the Negro has come far enough. Each step forward accents an ever-present tendency to backlash.”¹²²

Will a teacher or trainer who includes these words in their lesson be accused of promoting resentment between races, or of arguing that the United States is fundamentally racist, or of implying that white students should feel

uncomfortable about their race? Any of these would be prohibited under many of the laws reviewed in this report. Even if simply citing to King’s words were not seen as violating the “prohibited concepts” blacklist, how can teachers or trainers be expected to conduct a guided discussion about these words without stepping on the ideological landmines that these educational gag orders create? This is particularly the case if the teacher makes any attempt to connect them to the present day, such as through a discussion of the Black Lives Matter movement, or affirmative action, or workplace discrimination.

It seems inevitable that teachers and administrators will be less likely to assign such passages from King and other writers to their students—or to foster any serious discussion of what King meant when he wrote these words—for fear of running afoul of these ideological prohibitions.

Critical race theory scholar Kimberlé Crenshaw describes this phenomenon precisely, writing in an op-ed earlier this year that “In closing off room to explore the impact of America’s racist history by citing ‘division’ – a subjective condition that turns on any student’s (or parent’s) claim to feel resentment or guilt – the laws directly threaten any teacher who pursues a sustained, critical understanding of the deeper causes, legacies or contemporary implications of racism in fomenting uncivil discord.” These efforts to bar such examinations, she argues, are “possible in part because Americans are not often taught about the policies and practices through

121 For example, Indiana Attorney General Todd Rokita told Fox News that critical race theory was “exact opposite of what Martin Luther King [Jr.] taught us, when he said that he hoped that his children would one day be judged by the content of their character – not the color of their skin.” Sam Dorman, “Indiana AG says critical race theory is ‘exact opposite’ of MLK’s vision,” Fox News, May 26, 2021, [foxnews.com/politics/todd-rokita-critical-race-theory](https://www.foxnews.com/politics/todd-rokita-critical-race-theory). See also Arnie Alpert, “Op-Ed: King’s Dream was Rooted in Analysis of Systemic Racism,” *In Depth New Hampshire*, May 24, 2021, [indepthnh.org/2021/05/24/kings-dream-was-rooted-in-analysis-of-systemic-racism/](https://www.indepthnh.org/2021/05/24/kings-dream-was-rooted-in-analysis-of-systemic-racism/). See also Opinion No. 2021-042, Office of the State of Arkansas Attorney General, August 16, 2021 [concluding that a ban on critical race theory-derived concepts “does not preclude teaching the history of racial injustice or our Nation’s longstanding and continuing efforts to realize what Dr. Martin Luther King, Jr. recognized as the dream expressed in our founding creed: We hold these truths to be self-evident, that all men are created equal.” content.govdelivery.com/attachments/ARAG/2021/08/16/file_attachments/1907584/2021-042%20%20%2808.16.21%29.pdf]

122 Martin Luther King Jr., *Where Do We Go From Here? From Chaos to Community* (1967).

FROM THE TRUMP EO:

The term “divisive concepts” also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

(b) “Race or sex stereotyping” means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

(c) “Race or sex scapegoating” means assigning fault,

blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.

Seventeen bills incorporate these definitions of “race or sex stereotyping” and/or “race or sex scapegoating.”

which racism has shaped our nation. Nor do we typically teach that racist aggression against reform has been repeatedly legitimized as self-defense – an embodiment of an enduring claim that anti-racism is racism against White people.”¹²³

Educational gag orders that apply to high schools and colleges could tangibly impact large portions of students’ curricula: Every social studies course—including history, civics, and English literature—would be overlaid with these ideological prohibitions. It is unclear how a teacher could offer instruction or even guide conversation on some of the most important and contentious moments or themes in American history or society—such as slavery, the emancipation of women, the treatment of Native Americans—without triggering such a prohibition. This applies to both historical fact and literary narrative—from examinations of race and gender in *Huckleberry Finn* or *The Scarlet Letter*, to the unvarnished facts of the Wounded Knee or Tulsa Race Massacres.

It also applies to the presentation of academic ideas: for example, any description of social privilege, a concept that draws upon a wide-ranging body of social scientific scholarship, would seemingly violate at least half of the prohibited concepts under Trump’s EO and the bills that mirror it. In fact, twenty of the bills follow the Trump EO’s lead in prohibiting “race or sex stereotyping” or “race or sex scapegoating”¹²⁴ (see sidebar) in ways that are transparently aimed at shutting down discussions of societal privilege or racial disparities. The Trump-proposed definition of “scapegoating,” in particular, even prohibits any claim that people may be unconsciously primed to act in racist or sexist ways—which would essentially make it illegal to discuss bias in the classroom or training hall altogether.

While support for these educational gag orders comes exclusively from Republican legislators, these prohibitions will foreseeably silence educators from citing American figures across the political spectrum. For ex-

123 123 Kimberlé Crenshaw, “The panic over critical race theory is an attempt to whitewash U.S. history,” *Washington Post*, July 2, 2021, [washingtonpost.com/outlook/critical-race-theory-history/2021/07/02/e90bc94a-da75-11eb-9bbb-37c30dcf9363_st](https://www.washingtonpost.com/outlook/critical-race-theory-history/2021/07/02/e90bc94a-da75-11eb-9bbb-37c30dcf9363_st)

124 AL HB 8, AL HB 9, AR SB 627, FL SB 242/HB 57, IA HF 802, KY BR 60, LA HB 564, MO SB 586, MO SB 5, OH HB327, OK HB 1775, OK SB 803, OK SB 830, RI H 6070, TX HB 3979, WV HB 2595, WV SB 618, WI SB 409, WI SB410, WI SB 411. A twenty-first bill, IA SF 478, similarly defines “race or sex stereotyping” in line with these other bills, but neglects to follow up with language prohibiting it.

ample, it is difficult to understand how a Civics professor could instruct students on Justice Antonin Scalia's declaration that the Founders did not intend the Constitution to protect women from gender-based discrimination¹²⁵ without opening themselves up to accusations that they are claiming the United States is fundamentally sexist. Indeed, one of the areas where these bills could have the most devastating impact is in public law schools, where the original intent of the Founders is—and must continue to be—constantly and vigorously debated.

There is also a probable Fourteenth Amendment claim that can be levied against each of these bills—that, either as written or as implemented, their prohibitions will be wielded in racially discriminatory ways. The wording of the bills, combined with the telegraphed intent of the legislators introducing these bills, essentially guarantee that the brunt of their impact will fall disproportionately on teachers, trainers, and even students who are people of color or women, who are less likely to be given the benefit of the doubt that their critical utterances regarding race or sex in the classroom or training hall were not intended as prohibited or “divisive” critiques.¹²⁶

Proponents of these bills have argued that they are not blocking the expression of these allegedly contentious ideas, but rather that they are merely blocking the teaching of such ideas by people in positions of authority (i.e., teachers and trainers). Six bills even include specific language to this effect, declaring that they will not prohibit the discussion of divisive concepts “in an objective manner and without endorsement as part of a larger course of academic instruction.”¹²⁷ In practice, such a distinction is impossible to enforce. For exam-

ple, if a student shares the view that racism has a long and institutionalized history in the United States, and a teacher responds by elaborating on the student's argument, or even by simply saying, “Good point,” does that constitute the endorsement of a divisive concept? The bills are unclear on this matter—and yet, to many teachers it will be obvious that the only safe course of action is to refuse to even acknowledge such an argument. This makes these bills an egregious threat to the teaching of history.

Proponents of these bills also claim that they are acting to protect both children and adults from a malign ideology, from propaganda. Yet these bills seek to impose an ideological blacklist on American classrooms and training halls, placing a government-imposed test over teacher and trainers' speech, curricula, and training materials. In short, they are efforts at viewpoint-based state censorship. Anyone committed to freedom of speech and open debate should be fundamentally opposed to these educational gag orders.

PROHIBITING SPECIFIC INITIATIVES

Sixteen bills directly name “critical race theory” or specific educational initiatives—most commonly The New York Times' 1619 Project—as intellectual frameworks or educational materials they seek to ban from schools. In their specificity, these bills are particularly obvious in their animus against the viewpoint of these initiatives, making them textbook examples of government conduct that violates the First Amendment.

125 See e.g. Max Fisher, “Scalia says Constitution doesn't protect women from gender discrimination,” *The Atlantic*, January 4, 2011, [theatlantic.com/politics/archive/2011/01/scalia-says-constitution-doesn-t-protect-women-from-gender-discrimination/342789/](https://www.theatlantic.com/politics/archive/2011/01/scalia-says-constitution-doesn-t-protect-women-from-gender-discrimination/342789/)

126 Melinda D. Anderson, “These are the Facts’: Black Educators Silenced from Teaching America's Racist Past,” *The Guardian*, September 14, 2021, [theguardian.com/education/2021/sep/14/black-us-teachers-critical-race-theory-silenced](https://www.theguardian.com/education/2021/sep/14/black-us-teachers-critical-race-theory-silenced)

127 AL HB 8, AL HB 9, AR SB 627, OH HB 327, OK SB 803, WV SB 618.



Supporters and opponents of Utah's educational gag order bill speak to each other outside the state Capitol in Salt Lake City, May 19, 2021. Photo by Kristin Murphy/Deseret News

Of the bills that explicitly ban specific educational initiatives, only two—Texas's HB 3979 and SB 3, which include a specific prohibition for The 1619 Project—have become law. As of this writing, three pending bills target The 1619 Project—Michigan's SB 460, New York's A8253, and South Carolina's HB 4343. Yet even without singling out curricula by name, 53 of the 54 educational gag order bills PEN America examined (all except the Tennessee anti-LGBTQ+ bill) could be used to block The 1619 Project or any other educational approach that could be seen as teaching “prohibited” ideas on racism or sexism. This includes the eleven bills that have already become law.

PROHIBITING SPECIFIC VIEWS OF AMERICAN SOCIETY AND HISTORY

The list of “divisive concepts” from the Trump executive order is a litany of vague terms that can be interpreted so broadly that they foreseeably muzzle entire areas of discussion of racism, sexism, and other societal concerns. In several cases, however, legislators have gone further, creating additional prohibited concepts or expanding the concepts' definitions. For example, Louisiana's bill includes a prohibition on criticizing capitalism through a race- or gender-based perspective, banishing the argument that “capitalism, free markets, or working

for a private party in exchange for wages are racist and sexist or oppress a given race or sex.”¹²⁸

The model Partisanship Out of Civics Act adds two purportedly divisive concepts to its list of prohibitions:

(i) that the advent of slavery in the territory that is now the United States constituted the true founding of the United States; and

(j) that, with respect to their relationship to American values, slavery and racism are anything other than deviations from, betrayals of, or failures to live up to, the authentic founding principles of the United States, which include liberty and equality.¹²⁹

Five bills that PEN America examined contain at least one of these additional prohibited concepts.

These provisions represent a transparent effort to ban The 1619 Project without saying so explicitly. But even if we read these proposals without that contextual knowledge, they are obvious attempts at viewpoint-based censorship, impeding the teaching of historical perspectives or the sharing of specific interpretations of American history. Under this formulation, any educator who points out that slavery was part of America’s founding legal structure—by, for example, citing the provisions in the U.S. Constitution that treated slaves as three-fifths of a person, or by quoting Supreme Court Justice Thurgood Marshall’s statement that the Constitution was “defective from the start” for its failure to prohibit slavery¹³⁰—could be found in violation of the law. On its

face, this provision could make it illegal to teach children about slavery at all, since it is impossible to note that the Founding Fathers ratified the legality of slavery without at least the implication that they saw it as reconcilable with America’s founding principles.

To better understand these provisions as censorship, one only has to look at the self-examination that Americans conducted after both the Charlottesville white nationalist rally in 2017 and the insurrection at the Capitol on January 6, 2021. After both events, on the front pages of leading newspapers and at many kitchen tables around the country, there was a society-wide debate of a phrase that many Americans used to express their dismay, anger, and frustration: This isn’t America. “They say this isn’t America. For most of us, it is,” wrote author Kaitlyn Greenidge.¹³¹ Journalist Sam Sanders wrote that the phrase “This isn’t who we are” represents one of “the lies we tell ourselves about race.”¹³²

Americans are unlikely to ever share a single view regarding whether or not violent outbursts such as Charlottesville reflect “who we are as a country.” But the Partisanship Out of Civics Act, as well as the bills adopting its additional prohibited concepts, are attempting to exclude that mere question and any examination of it from the classroom and the lecture hall. Any civics teacher covered by such a law could foreseeably be prohibited from assigning any readings, films, or assignments that might reflect Greenidge and Sanders’ arguments.

In all, these provisions—like all other prohibitions on specific divisive concepts—represent attempts to exclude

128 Louisiana HB 564, new §2119(A)(i)(j), (A)(i)(c)

129 Ohio HB 322, new § 3313.6028(A)(11), [search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb322/IN/00/hb322_00_IN?format=pdf](https://prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb322/IN/00/hb322_00_IN?format=pdf)

130 David G. Savage, “Marshall on Constitution: ‘Defective From Start’,” *Los Angeles Times*, May 7, 1987, latimes.com/archives/la-xpm-1987-05-07-mn-4540-story.html

131 Kaitlyn Greenidge, “They Say This Isn’t America. For Most Of Us, It is,” *Harper’s Bazaar*, January 7, 2021, harpersbazaar.com/culture/politics/a35153881/they-say-this-isnt-america-trump-insurrection/

132 Sam Sanders, “The Lies We Tell Ourselves About Race,” NPR, January 10, 2021, npr.org/2021/01/10/955392813/the-lies-we-tell-ourselves-about-race

certain viewpoints from consideration in the study of American history and society, and even to exclude the presentation of facts which may lead people to adopt or at least entertain “prohibited” ideas about.

“TEACHING THE CONTROVERSY”

Nine bills analyzed for this report use language that parallels the model Partisanship Out of Civics Act’s attempt at enforced nonpartisanship, in which teachers of social studies, politics, history, or civics cannot be compelled to discuss either “current events” or “widely debated and currently controversial issues” in public policy or social affairs. Teachers who do teach such “controversial issues” would be obliged to explore them from “diverse and contending perspectives.”

The requirement to explore controversial issues from diverse perspectives may sound laudable. Debate, in any academic or scientific field, is key to discovery, the production of knowledge, and the emergence of consensus. The problem arises when determining just what constitutes “controversial” content and “diverse perspectives.” As the American Association of University Professors has taken pains to explain, such requirements can impose absurd obligations to balance multiple ideas even if some political philosophies (such as Nazism) have no redeeming value among scholarly opinion within political theory.¹³³

The idea that teachers would be compelled to teach Nazism in school as a result of these bills may seem farcical. But there’s disquieting evidence that something similar

is already happening. In Texas, HB 3979—one of the eleven educational gag order bills that has become law—contains the Partisanship Out of Civics Act’s language to teach “widely debated and currently controversial issues” without giving “deference to any one perspective.” The law went into effect in September, immediately triggering schools across the state to change their curricula and course offerings.¹³⁴ Most shockingly, a school administrator in Southlake, Texas, advised teachers in October that, as they went through their curricula, to “just try and remember the concepts of [House Bill] 3979, and make sure that if you have a book on the Holocaust, that you have one that has opposing – that has other perspectives.”¹³⁵

Supporters of these bills may respond by saying they do not intend to distort factual teachings of the Holocaust. That intent is irrelevant. The Southlake administrator’s statement is a powerful illustration of how the demand to teach “diverse perspectives” on “controversial issues” will in fact play out, with teachers and administrators scrambling to water down the teaching of history to remove all trace of “controversy.”

The model bill itself makes no effort to define what content is “controversial,” other than using the phrase “widely debated.” Is the efficacy of the COVID-19 vaccine, for example, controversial? It certainly has been widely debated on Facebook pages and in Twitter threads across the country—does this mean that teachers will be obliged to teach disinformation about the vaccine alongside verifiable fact, or decline to discuss COVID-19 at all?

133 American Association of University Professors, “Academic Bill of Rights,” 2003, aaup.org/report/academic-bill-rights

134 Nicole Chavez, “Confusion reigns in Texas as new law aims to restrict how race and history are taught in schools,” Sept. 1, 2021, [cnn.com/2021/09/01/us/texas-critical-race-theory-social-studies-law/index.html](https://www.cnn.com/2021/09/01/us/texas-critical-race-theory-social-studies-law/index.html)

135 Dani Anguiano, “Texas school official says classrooms with books on Holocaust must offer ‘opposing’ views,” *The Guardian*, Oct. 14, 2021, [theguardian.com/us-news/2021/oct/14/texas-school-holocaust-books-race-southlake](https://www.theguardian.com/us-news/2021/oct/14/texas-school-holocaust-books-race-southlake); Mike Hixenbaugh and Antonia Hylton, “Southlake school leader tells teachers to balance Holocaust books with ‘opposing’ views,” NBC News, Oct. 14, 2021, [nbcnews.com/news/us-news/southlake-texas-holocaust-books-schools-rcna2965](https://www.nbcnews.com/news/us-news/southlake-texas-holocaust-books-schools-rcna2965)

136 See e.g. Eugenie C. Scott and Glenn Branch, “Evolution: what’s wrong with ‘teaching the controversy,’” *Trends in Ecology and Evolution*, Vol. 18, Issue 10, 499-502, October 1, 2003, [cell.com/trends/ecology-evolution/fulltext/S0169-5347\(03\)00218-0](https://www.cell.com/trends/ecology-evolution/fulltext/S0169-5347(03)00218-0)

Many Americans falsely believe that Donald Trump won the 2020 election. Does this mean that U.S. government teachers should explore the “contending perspectives” of both fact and falsehood, or avoid discussing the election? The difference between a legitimate controversy and a spurious or politically-constructed one is often in the eye of the beholder—a subjective assessment that no law can clearly parse. Certainly, the state legislators who have pushed their iterations of the Partisanship Out of Civics Act are likely to have their own specific notions of what constitutes “controversial” material.

Just as the argument to “teach the controversy” once served as a Trojan horse to mandate the teaching of scientifically ungrounded theories of creationism in schools,¹³⁶ any legislatively imposed obligation to include diverse political perspectives on matters of civic education similarly opens the door to the politicization of school curricula. Further, the requirement that teachers cannot be “compelled” to teach current events strips power from principals or department heads that may introduce curricula or programs that call upon their teachers to connect, say, historical lessons to the current day. Such provisions demonstrate why the Partisanship Out of Civics Act, and the bills modeled on it, should be recognized as attempts to inject partisanship into civics education rather than attempts to excise it.

ENFORCEMENT AND PENALTIES

The most damaging bills pair their ideological prohibitions with severe penalties for violations—bills that, for example, impose automatic budget cuts or the firing of teachers, or that expose school districts to expensive litigation. Such bills would enable government officials to punish teachers, schools, and districts for introducing blackballed ideas, forcing them to choose between acceding to censorship and forfeiting essential educational funds.

Of the bills PEN America analyzed that have become law, only Tennessee's imposes a financial penalty for violations. In that case, the state education commissioner must withhold a portion of state funds until the school proves it is no longer in violation.¹³⁷ Seven pending bills would also slash state funding.¹³⁸ If Pennsylvania's HB 1532 is passed, any Pennsylvania public agency or educational institution found to be in violation by the state attorney general would lose all state funds for the remainder of the fiscal year¹³⁹ and the following fiscal year. Wisconsin would require the withholding of fully 10 percent of state funds until a school or university resumes compliance.¹⁴⁰ Michigan would reduce funding annually for any school in violation, with no provision for restoration of the funds.¹⁴¹

Another significant threat lies in the six bills—including two that have become law—that create a civil cause

137 Tennessee SB 623 §51(c), wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SBO623

138 Michigan SB 460, Ohio HB 327, Pennsylvania HB 1532, South Carolina H 4343, Wisconsin SB 409, Wisconsin SB 410, Wisconsin SB 411

139 Pennsylvania HB 1532, §6, legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2021&slnd=O&body=H&type=B&bn=1532

140 Wisconsin AB 413/SB409, new §36.42(3), docs.legis.wisconsin.gov/2021/related/proposals/sb409

141 Michigan SB 460, new § 380.1167(2), legislature.mi.gov/documents/2021-2022/billintroduced/Senate/pdf/2021-SIB-0460.pdf

of action for schools to be sued.¹⁴² Some bills have provisions for the recovery of attorney fees and costs for successful lawsuits, which incentivizes litigation.¹⁴³ Arizona and New Hampshire's bills, both of which have become law, authorize private suits or suits by the attorney general or county attorney to challenge violators.¹⁴⁴ Arizona's law authorizes civil penalties of \$5,000 per violation, while New Hampshire's creates a right of action under its human rights law, enabling the state's Human Rights Commission—normally tasked with preventing discrimination—to investigate and penalize offenders.¹⁴⁵

The Arizona and New Hampshire laws also permit penalties to be imposed directly on individual teachers who dare contravene these ideologically motivated bans. In Arizona, teachers who violate the law would be subject to disciplinary action, including suspension or revocation of their teaching certificates.¹⁴⁶ New Hampshire authorizes disciplinary sanctions under the state's "educator code of conduct."¹⁴⁷ None of the currently pending bills

penalize individual teachers.

Arkansas' law, Act 1100, takes a different tack, requiring state agencies to conduct annual reviews to root out the prohibited concepts, with agency staff to be appointed to enforce it; contractors found to be in violation can be dropped.¹⁴⁸ One of Ohio's pending bills would prohibit a student from getting high school graduation credit for any class that uses the prohibited concepts.¹⁴⁹ South Dakota's legislation, since withdrawn, would have mandated a school board hearing if a violation was reported.¹⁵⁰ Michigan's pending bill, SB 460, would require the state department of education to compile a list of schools that do not comply.¹⁵¹

142 Arizona SB1840, §22, new § 15-717.02(C), www.azleg.gov/legtext/55leg/1r/bills/sb1840p.html; New Hampshire HR 2, §298, new §193:40(III), gencourt.state.nh.us/bill_status/billText.aspx?id=1080&txtFormat=html&sy=2021;

Pennsylvania HR 1532, §7,

legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2021&sInd=0&body=H&type=B&bn=1532; Wisconsin AB 413,

§2, new §38.21(3)(f), docs.legis.wisconsin.gov/2021/related/proposals/ab413; Wisconsin AB 411, §1, new

§18.018(4), docs.legis.wisconsin.gov/2021/related/proposals/ab411;

Idaho HB 352, §1, new §33-138(6),

legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/legislation/HO352.pdf

143 Pennsylvania HR 1532, §7(2),

legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2021&sInd=0&body=H&type=B&bn=1532; Wisconsin AB 413,

§2, new §38.21(3)(f), docs.legis.wisconsin.gov/2021/related/proposals/ab413; Wisconsin AB 414, §2, new

§230.49(3)(f), docs.legis.wisconsin.gov/2021/related/proposals/ab414

144 Arizona SB1840, §22, new § 15-717.02(C), azleg.gov/legtext/55leg/1r/bills/sb1840p.html; New Hampshire HR 2,

§298, new §193:40(III), gencourt.state.nh.us/bill_status/billText.aspx?id=1080&txtFormat=html&sy=2021

145 *Id.*

146 Arizona SB1840, §22, new § 15-717.02(D), azleg.gov/legtext/55leg/1r/bills/sb1840p.html. Arizona's original legislation, which did not pass, would have

made teachers or administrators individually responsible for \$5,000 penalties imposed as a result of litigation. Arizona SB 1532, new § 15-717.02(H),

azleg.gov/legtext/55leg/1r/bills/SB1532H.pdf

147 New Hampshire HR 2, §298, new §193:40(IV), gencourt.state.nh.us/bill_status/billText.aspx?id=1080&txtFormat=html&sy=2021

148 Arkansas Act 1100, §25-1-605(b), arkleg.state.ar.us/Acts/FTPDocument?path=%2FACTS%2F2021R%2FPublic%2F&file=1100.pdf&ddBienniumSession=2021%2F2021R

149 Ohio HB 322, new § 3313.6028(C), search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb322/IN/oo/hb322_oo_IN?format=pdf

150 South Dakota HB 1158, mylrc.sdlegislature.gov/api/Documents/214787.pdf

151 Michigan Senate Bill No. 460, legislature.mi.gov/documents/2021-2022/billintroduced/Senate/pdf/2021-SIB-0460.pdf



A scene from a college classroom in Massachusetts. Educational gag orders send a message to teachers that the government may target them for allowing “prohibited ideas” in their classroom. Photo by AP/Charles Krupa

2. THESE BILLS WILL HAVE A CHILLING EFFECT ON THE SPEECH OF EDUCATORS AND TRAINERS

These bills are striking fear into the hearts of educators and teachers—even, in some cases, before they become law.¹⁵² Professor Jeffrey Sachs, an expert on academic

freedom at Canada’s Acadia University, explains: “We need not ask ourselves how a rational person would interpret these bills. We need only ask how the most paranoid attorney or the most distracted and cash-strapped high school administrator is going to interpret these bills. They are going to immediately shut down any course content that would upset a sensitive student or an outraged parent.”¹⁵³

The full scope of a law or policy’s censorship should be understood to include not just what expression is prohibited but the extent to which people will self-censor

¹⁵² Adrian Florido, “Teachers Say Laws Banning Critical Race Theory Are Putting A Chill On Their Lessons,” Delaware Public Media, May 28, 2021, delawarepublic.org/post/teachers-say-laws-banning-critical-race-theory-are-putting-chill-their-lessons; Colleen Flaherty, “Diversity Work, Interrupted,” *Inside Higher Ed*, October 7, 2020, insidehighered.com/news/2020/10/07/colleges-cancel-diversity-programs-response-trump-order

¹⁵³ Interview with Jeffrey Sachs, Instructor, Department of Politics, Acadia University, June 22, 2021.

out of fear of punishment. This so-called "chilling effect" is a well-recognized concept in both American jurisprudence¹⁵⁴ and in anti-censorship research and advocacy.¹⁵⁵

The Supreme Court's jurisprudence on the chilling effect largely derives from the McCarthy era, when legislators similarly tried to prohibit what they saw as "un-American" and "Marxist" ideas.¹⁵⁶ In 1964, for example, the Supreme Court struck down a law mandating that state employees swear not to be part of "subversive organizations."¹⁵⁷ In part, the court determined that "the threat of sanctions" alone, "almost as potently as the actual application of sanctions," would deter state employees from exercising their First Amendment rights.¹⁵⁸ The next year, the Supreme Court invalidated a law that would have required people wanting to receive communist literature to register at the post office, finding that the law was "almost certain to have a deterrent effect" on people wanting to exercise their First Amendment right to receive such literature, even though the law had no penalties attached to it—to the court, it was obvious that Americans would understand the implicit message of the law, which was that accessing communist literature could bring punishment from the state.¹⁵⁹ The Supreme Court has been inconsistent over the years in

recognizing whether a chilling effect alone is sufficient for finding a First Amendment violation.¹⁶⁰ Yet their jurisprudence on the issue helps to illustrate the likelihood that self-censorship will occur as a foreseeable result of these bills, deeply implicating educators' and students' rights to freely express themselves in academic settings.

The concept of the chilling effect is also linked to the legal doctrines of overbreadth and vagueness. A law regulating speech can be unconstitutionally overbroad if its scope appears to encompass a substantial amount of constitutionally protected expression.¹⁶¹ Similarly, a law regulating speech is unconstitutionally vague if a reasonable person cannot determine what speech is permissible, as "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."¹⁶² Here, there is a strong argument that each of these bills, if implemented, are unconstitutionally vague and overbroad.

Much of the chilling effect of these educational gag orders also derives from the fact that the Trump-defined "divisive concepts" are nebulous and broad, meaning that all kinds of subjects, opinions, and even verifiable matters of historical fact might be construed as falling

154 Frank Askin, "Chilling Effect," The First Amendment Encyclopedia, 2009, mtsu.edu/first-amendment/article/897/chilling-effect

155 Previous PEN America reports discussing the chilling effect include: "Cracking Down on Creative Voices: Turkey's Silencing of Writers, Intellectuals, and Artists Five Years After the Failed Coup," PEN America, June, 2021, pen.org/wp-content/uploads/2021/06/cracking-down-creative-voices-turkey-FINAL.pdf; "Arresting Dissent: Legislative Restrictions on the Right to Protest," PEN America, May, 2020, pen.org/wp-content/uploads/2020/05/Arresting-Dissent-FINAL.pdf; and "Chasm in the Classroom; Campus Free Speech in a Divided America," PEN America, April 2, 2019, pen.org/wp-content/uploads/2019/04/2019-PEN-Chasm-in-the-Classroom-04.25.pdf

156 Frank Askin, "Chilling Effect," The First Amendment Encyclopedia, 2009, mtsu.edu/first-amendment/article/897/chilling-effect

157 *Baggett v. Bullitt*, 377 U.S. 360, (1964), supreme.justia.com/cases/federal/us/377/360/

158 Frank Askin, "Chilling Effect," The First Amendment Encyclopedia, 2009, mtsu.edu/first-amendment/article/897/chilling-effect

159 *Lamont v. Postmaster General*, 381 U.S. 301 (1965), supreme.justia.com/cases/federal/us/381/301/

160 See *Younger v. Harris*, 401 U.S. 37 (1971) (holding that "a chilling effect even in the area of First Amendment rights has never been considered a sufficient basis, in and of itself, for prohibiting state action"); *Laird v. Tatum*, 408 U.S. 1 (1972); *Clapper v. Amnesty International USA*, 568 US 398 (2013). But see *Baggett v. Bullitt*, 377 U.S. 360, (1964); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Americans for Prosperity Foundation v. Bonta*, 594 U.S. __ (2021).

161 See e.g. *United States v. Stevens* (2010), *United States v. Alvarez* (2012)

162 *Grayned v. City of Rockford*, 408 U.S. at 109, 92 S. Ct. at 2299 (internal ellipses and quotation marks omitted). See also *Kramer v. Price*, 712 F.2d (1983) at 177



Alabama Governor Kay Ivey voices her support for banning critical race theory on Twitter. Over the past year, some Republican officials have become increasingly vocal about their efforts to legislate bans on critical race theory in educational institutions.

within their wide sweep. Faced with these impossible demands to parse out which concepts are illegal to introduce into the classroom or how to educate students on a concept without appearing to “endorse” it, it is far more likely that teachers will ground their interpretation not only in the letter of the law, but also in the perceived intent of the legislators who promoted the law—an intent that these legislators have loudly telegraphed.

Many of the bills that prohibit “divisive” concepts in training sessions are also so vague as to leave unclear to university administrators whether and how these prohibitions apply to them. For example, SB 410 in Wisconsin prohibits “training regarding race and sex stereotyping” for all “employees of state government and local government.”¹⁶³ As public institutions, colleges and universities would likely be implicated. But how would this apply to training for residential advisers—who are effectively government employees—on topics like Title-IX compliance and sexual assault? How would it apply to training on discrimination in academic hiring? In the absence of clear guidance, college administrators, instructors, or trainers will be more likely to self-censor and avoid

these topics entirely, even at the expense of being able to do their jobs properly and ensure compliance with non-discrimination law.

Bills and laws that include enforcement measures or penalties dramatically intensify the chilling effect. If a teacher could lose their job, or if their employer is likely to lose a significant portion of its budget or face expensive litigation under such a law, all concerned are more likely to give the prohibitions a wide berth and avoid any potentially controversial topics altogether. Yet even bills that do not impose penalties still send the message that the government may target teachers or other officials who allow these “prohibited ideas” in their classroom.

We have already seen this effect in action, with administrators preemptively self-censoring to avoid potential punishment. For example, even before Idaho’s divisive concepts bill became law, Boise State University suspended teaching 52 sections of a required ethics and diversity course to 1,300 students because it received a complaint from a person outside the university—who, the public later learned, was in fact a state legislator¹⁶⁴—

¹⁶³ WI SB 410.

¹⁶⁴ Ian Max Stevenson, “That Course Boise State Suspended? An Idaho Legislator Made the Complaint, Email Shows,” *Idaho Statesman*, June 11, 2021, idahostatesman.com/news/local/education/article251989888.html

alleging that a student was taunted and told she must “apologize in front of a class for being white or for having white privilege.”¹⁶⁵ An independent investigation could not substantiate that such an event ever occurred.¹⁶⁶ The university’s reaction was likely influenced by administrators’ awareness that earlier that month legislators had proposed to strip \$409,000 from Boise State’s budget, after a group of Republican legislators alleged that the university was indoctrinating its students with a “social justice agenda,” including by supporting the “Marxist cause” of Black Lives Matter.¹⁶⁷

Idaho legislators sent an even stronger signal the next month, when they ended up stripping \$1.5 million from Boise State’s budget, as well as half a million each from the University of Idaho and Idaho State University budgets.¹⁶⁸ Senator Carl Crabtree, a supporter of the budget cuts, said that they would “send a message” to university officials about their social justice programming.¹⁶⁹ And if that message was unclear, Idaho’s Lieutenant Governor, Janice McGeachin, surely reinforced it when, in May, she formed an executive 14-member “Task Force to Examine Indoctrination in Idaho Education”

aimed at rooting out “teachings on social justice, critical race theory, socialism, communism, [and] Marxism” from public schools.¹⁷⁰ The political signaling in such a situation is obvious, as will be the incentives for Idaho’s public educators to interpret the state’s new law through this political lens.

One Idaho legislator, Rep. Ron Nate, even explained how legislators could use the state’s new educational gag order to punish schools found to be in violation, even though the law does not enumerate a specific punishment for violators, saying, “The main plan for enforcing it--you’ll notice the bill doesn’t have a penalty worked into it--but the plan for enforcement is through the budgeting process--that we are not supposed to be spending public funds for promoting or advocating for critical race theory or social justice promotion. And so if that happens, then we have to respond by cutting budgets.”¹⁷¹

In Kansas, a legislator’s inquiry about whether critical race theory was being taught at state universities resulted in the state’s Board of Regents informally surveying six state schools, putting them on notice that legislators

165 *Id.*

166 Colleen Flaherty, “Ethics and Diversity Course on Hold,” *Inside Higher Ed*, March 18, 2021, insidehighered.com/news/2021/03/18/boise-state-suspends-diversity-course-1300-students; Kevin Richert, “Investigators find no wrongdoing in Boise State diversity course,” *Idaho Ed News*, May 24, 2021, idahoednews.org/top-news/investigators-find-no-wrongdoing-in-boise-state-diversity-course/

167 Colleen Flaherty, “Ethics and Diversity Course on Hold,” *Inside Higher Ed*, March 18, 2021, insidehighered.com/news/2021/03/18/boise-state-suspends-diversity-course-1300-students; Kevin Richert, “Boise state budget gets cut by Legislature in ongoing dispute over social justice,” *Idaho Statesman*, March 3, 2021, idahostatesman.com/news/local/education/boise-state-university/article249667283.html; Kevin Richert and Clark Corbin, “Legislative roundup, 1.29.21 : Boise State budget pitch turns testy,” *Idaho Ed News*, January 29, 2021, idahoednews.org/legislature/legislative-roundup-1-29-21-boise-state-budget-pitch-turns-testy/

168 Hayat Norimine, “Idaho lawmakers OK education budget, ‘send a message’ about teaching social justice,” *The Spokesman-Review*, May 4, 2021, spokesman.com/stories/2021/may/04/idaho-lawmakers-ok-education-budget-send-a-message/

169 Kevin Richert and Blake Jones, “Legislative roundup, 5.4.21: Senate passes key education budgets, including higher ed,” *Idaho Education News*, May 4, 2021, idahoednews.org/top-news/legislative-roundup-5-4-21-senate-passes-key-education-budgets-including-higher-ed/; Hayat Norimine, “Idaho lawmakers OK education budget, ‘send a message’ about teaching social justice,” *The Spokesman-Review*, May 4, 2021, spokesman.com/stories/2021/may/04/idaho-lawmakers-ok-education-budget-send-a-message/

170 Blake Jones, “Education indoctrination task force members: updated list and bios,” *Idaho Education News*, May 20, 2021, idahoednews.org/school-policy/mcgeachin-announces-indoctrination-task-force-members/

171 Kaylee DeWitt, “What you need to know about Idaho’s new critical race theory law,” *ABC 4*, May 4, 2021, abc4.com/news/local-news/what-you-need-to-know-about-idahos-critical-race-theory-law/

may be evaluating their curricula.¹⁷² In Florida, a new law requires annual surveys to assess "intellectual freedom and viewpoint diversity" in the state system so that it can determine "the extent to which competing ideas and perspectives are presented" and whether students, professors, and staffers "feel free to express their beliefs and viewpoints on campus and in the classroom."¹⁷³ While on its face such a provision may seem innocuous—or even protective of open debate—the context makes plain that the measure is intended to lay the groundwork to threaten and punish educators. Florida Governor Ron DeSantis made clear that he would be paying attention to the survey results, saying that colleges that were “hotbeds for stale ideology” were “not worth tax dollars, and that's not something that we're going to be supporting going forward.”¹⁷⁴

Today, all of these educational gag order laws and proposals offer the same implicit message, regardless of what the text actually says: that educators and trainers may face consequences for instruction or training that discusses systemic racism and sexism, or that otherwise contravenes Republican legislators’ preference for a particular vision of American history, norms, and institutions when it comes to the fault lines of race and sex.

3. THESE BILLS ARE BASED ON A MISREPRESENTATION OF HOW INTELLECTUAL FRAMEWORKS ARE TAUGHT, AND THREATEN TO CONSTRAIN EDUCATORS’ ABILITY TO TEACH A WIDE RANGE OF SUBJECTS.

In making a straw man out of CRT, legislators are seeking to dictate and constrict how educators address a wide range of subjects relating to race, diversity, and American history. In state after state, primary and secondary teachers and teacher educators have strongly attested that critical race theory is not taught in elementary, middle, or high schools, insisting that critics have conflated the academic theory taught in colleges (and law schools in particular) with other diversity initiatives.¹⁷⁵ “Let’s be clear—critical race theory is not taught in elementary

172 Andrew Bahl, “The debate over critical race theory has cropped up in Kansas. Here's what you need to know.” *Topeka Capital-Journal*, June 8, 2021, cjonline.com/story/news/education/2021/06/08/what-is-critical-race-theory-meaning-crt-debate-kansas/7544853002/

173 Eliza Relman, “Florida Gov. Ron DeSantis signs a law punishing student 'indoctrination' at public universities and threatens budget cuts,” *Business Insider*, June 23, 2021, businessinsider.com/desantis-signs-law-to-punish-student-indoctrination-at-florida-universities-2021-6 Note: PEN America did not include this law in our count of education gag orders because it does not incorporate “divisive concepts” or specific prohibitions.

174 *Id.*

175 See David Childs, “Is Anyone Actually Teaching Critical Race Theory in their Classroom? Why are States Banning It?” *Democracy & Me*, June 23, 2021, democracyandme.org/is-anyone-actually-teaching-critical-race-theory-in-their-classroom-why-are-states-banning-it/; Rashawn Ray and Alexandra Gibbons, “Why are states banning critical race theory?” *Brookings Institution*, July 2021, brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/; Caitlin O’Kane, “Head of teachers union says critical race theory isn’t taught in schools, vows to defend ‘honest history,’” *CBS News*, July 8, 2021, cbsnews.com/news/critical-race-theory-teachers-union-honest-history/; Phil McCausland, “Teaching critical race theory isn’t happening in classrooms, teachers say in survey,” *NBC News*, July 1, 2021, nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945; “EXPLAINED: The Truth About Critical Race Theory and How It Shows Up in Your Child’s Classroom,” *Education Post*, May 5, 2021, educationpost.org/explained-the-truth-about-critical-race-theory-and-how-it-shows-up-in-your-childs-classroom/



A pre-K teacher reads with students in her classroom in Palisades Park, NJ. Routine storytelling stands to be chilled by educational gag orders around the country. Photo by AP/Mary Altaffer

schools or high schools," said Randi Weingarten, president of the American Federation of Teachers, the country's second-largest teacher's union. "It's a method of examination taught in law school and college that helps analyze whether systemic racism exists."¹⁷⁶

Supporters of these bills have argued that, because contemporary curricula addressing racism or sexism may draw upon research and arguments made by critical race theorists, educators are lying when they say that CRT is not being taught in schools. For example, in July the editorial board of the conservative Washing-

ton Examiner called the statement from the American Federation of Teachers "a lie," writing that "CRT left the universities long ago and has been infiltrating the culture ever since, manifesting itself in corporate diversity and equity seminars, political activist groups such as Black Lives Matter, and now in school curricula."¹⁷⁷

Beyond the fact that accusations of dangerous ideologies "infiltrating the culture" evoke the McCarthy era, there is a big difference between introducing ideas or perspectives influenced by an intellectual framework with promulgating that framework as dogma. Arguing

¹⁷⁶ Caitlin O'Kane, "Head of teachers union says critical race theory isn't taught in schools, vows to defend 'honest history,'" CBS News, July 8, 2021, [cbsnews.com/news/critical-race-theory-teachers-union-honest-history/](https://www.cbsnews.com/news/critical-race-theory-teachers-union-honest-history/)

¹⁷⁷ Yes, critical race theory is being taught in schools", Washington Examiner, July 12, 2021, [washingtonexaminer.com/opinion/yes-critical-race-theory-is-being-taught-in-public-schools](https://www.washingtonexaminer.com/opinion/yes-critical-race-theory-is-being-taught-in-public-schools)

that a grade school lesson on diversity that may be influenced by CRT amounts to teaching CRT in grade school—or even further, that it amounts to encouraging students to adopt CRT as a system of belief—is tantamount to arguing that an economics course that teaches Marxist ideas about class structures is indoctrinating students in Marxism.

In fact, the argument over whether CRT is being taught in K-12 classrooms demonstrates just how difficult it is to identify and isolate a specific academic idea. Does citing a CRT theorist mean that an educator is “teaching critical race theory,” or that they are simply referencing a specific idea that the theorist raises? What about one step further—can educators cite fiction writers or journalists who may themselves have been influenced by Critical Race Theory, or will that run afoul of these bills’ ideological prohibitions? Critical race theory has informed our public discourse on issues of race and racism—must all these arguments be treated as intellectually polluted under these new educational gag orders?

Proponents of educational gag order legislation are acting to characterize virtually any conversation about systemic or pervasive racism as impermissible indoctrination grounded in dangerous fringe ideas.

Many teachers and administrators across the country are seeking to take fuller account of the role that race and racism has played and continues to play in our country’s history, politics, and culture. It is imperative that such examinations make room for differing perspectives and arguments. Yet, by caricaturing such efforts as the indoctrination of children into critical race theory, proponents of educational gag orders threaten to shut down the very space for honest inquiry and discussion that they claim to prize.

The push to ban critical race theory also cannot be divorced from a broader societal debate, one that legislators do not always make explicit but which is ever-present—the debate over how far America has come in realizing racial equality and in moving past the historical institutions of slavery and segregation. In attempting to legislate away systemic critiques of race and racism in America, particularly the critiques that connect historical injustices to present-day inequities, legislators are attempting to resolve this debate by decree.

Historian Hasan Kwame Jeffries, Associate Professor of History at the Ohio State University, gave remarks earlier this year explaining how this enforced resolution could end up inhibiting childrens’ understanding of contemporary issues:

“Well, certainly, we have always had this version of kind of a pseudo-patriotic history, mythmaking to instill in young people, to instill in Americans this sort of a sense of pride. But it’s a false pride if it’s not rooted in truth, if it’s more nostalgia than actual fact. And the truth is that no child, no one living today, is responsible for enslavement . . . But they are responsible for the problems of tomorrow and of the future. And there is no way that they will be able to address those problems forthrightly if they don’t understand how we got them in the first place. And that’s the project of history - not to create patriotism, but to create understanding. And if you teach it right, even the hard stuff will not cause you to dislike the country, to hate the country. It will cause you to take pride in the fact that there were always people who were willing to fight to make it better.”¹⁷⁸

During our research, PEN America even found cas-

178 “Historian discusses the politics that shape U.S. history in schools,” NPR, January 24, 2021, [npr.org transcripts/960171962?fbclid=IwAR3lNdLWeDsMQpmZ_GTmzaoLpx39-c-u8iUle_fbO6m78YC5lohdgmPZVok](https://www.npr.org/transcripts/960171962?fbclid=IwAR3lNdLWeDsMQpmZ_GTmzaoLpx39-c-u8iUle_fbO6m78YC5lohdgmPZVok)



A wall of protest over police brutality. As many Americans and U.S. institutions have attempted a true reckoning with the role that race and racism play in American history and society, certain Republican legislators and conservative activists have capitalized on this backlash. Photo by Ted Eytan/Creative Commons

es where bills themselves either contained obvious mistakes of historical fact, or were identifiably based on blinkered or ill-formed perspectives on American history. Mississippi Senate Bill 2538, which seeks to cut off state funding from any school that teaches The 1619 Project, includes the false declaration that “the true date of America’s founding is July 4, 1775.”¹⁷⁹ This is, almost certainly, a typo. Yet it is an instructive typo, as it illustrates the dangers of attempting to legislate the teaching of history.

Tennessee’s HB 580, which is now law, is even more troubling in this regard. During the debate of HB 580

on the Tennessee House floor, several Black lawmakers pointed to the Three-Fifths Compromise, the 1787 agreement that counted slaves as three-fifths of a person for the purpose of allotting congressional representatives to states, as an example of a historical event that they worried would be censored in American classrooms as a result of the bill. In response, Justin Lafferty, a state representative who supported the bill, spoke at length about how the compromise was adopted “for the purpose of ending slavery,” an argument that contradicts the historical record: The Three-Fifths Compromise is widely acknowledged to have dramatically increased the political power of slaveholding states, enabling the

¹⁷⁹ Mississippi Senate Bill 2538, billstatus.ls.state.ms.us/documents/2021/html/SB/2500-2599/SB2538IN.html

survival of slavery as a legal institution.¹⁸⁰ Other legislators applauded Lafferty after he spoke, appearing to endorse his statements.¹⁸¹ The Tennessee House went on to approve the bill later that day, and it has since become law.¹⁸²

Lafferty's inaccurate statement about a foundational moment in American history, which he offered both as fact and as part of his argument for HB 580's passage, demonstrates how easily this legislation can be deployed by partisans to enforce a specific political narrative on our schools, regardless of its historical veracity. It also raises the question: When Lafferty voted to pass this law, did he understand it as prohibiting teachers from teaching students that the Three-Fifths Compromise extended the institution of slavery in the United States? Did other legislators? And will those who enforce the law take a similar view, forcing educators to teach a false understanding of American history in order to comply?

4. MANY OF THESE BILLS ARE MISLEADINGLY FRAMED AS PROTECTING FREE SPEECH AND ACADEMIC INQUIRY WHEN THEIR PURPOSE AND EFFECT IS TO DO THE OPPOSITE.

Many of these bills are marked by serious conceptual flaws that their own drafters implicitly acknowledge, tying themselves in knots to disguise their ideological censorship. Several of them attempt to depict themselves as protecting, not infringing on, academic inquiry in the classroom, mandating that teachers not “compel” students to believe in any divisive concept. While these laws may at first glance seem protective of speech, the fact that the legislature is singling out specific beliefs or viewpoints and purporting to “protect” students from them sends the obvious message that the state disfavors the expression of these perspectives. Many bills also contain so-called “savings clauses” that purportedly limit the scope of the bill to better comport with the Constitution. Such provisions state, for example, that nothing in the law should be construed to conflict with the protections of the First Amendment. These savings clauses should be best understood as attempts to conceal or get around the fact that these proposals

180 See e.g. Mark Sherman and Kimberlee Kruesi, “EXPLAINER: No evidence ‘3/5 Compromise’ aimed to end slavery,” *Associated Press*, May 6, 2021, apnews.com/article/electoral-college-slavery-election-2020-race-and-ethnicity-government-and-politics-Oef97970a86255bf89c897838fcd335

181 Kimberlee Kruesi, “GOP lawmaker in Tennessee: Three-Fifths Compromise was to end slavery,” *Tennessean*, May 4, 2021, tennessean.com/story/news/politics/2021/05/04/gop-lawmaker-tennessee-three-fifths-compromise-end-slavery/4948942001/; see also: Rick Rojas, “Tennessee Lawmaker Is Criticized for Remarks on Three-Fifths Compromise,” *The New York Times*, May 4, 2021, nytimes.com/2021/05/04/us/politics/justin-lafferty-tennessee-three-fifths-compromise.html

182 *Id.*

will foreseeably silence speech. They are the legislative equivalent of painting a happy face on a sad clown: They do not change the underlying nature of the thing but only help cover it up.

“PROTECTIVE” LANGUAGE

Some legislation purports not to mandate the exclusion of specific beliefs but rather to protect people from being forced to accept these beliefs. Seventeen bills prohibit schools or state agencies from requiring teachers or staff to have students affirm certain principles or to require training on such topics. For example, Idaho’s law forbids public schools and institutions of higher learning to “direct or otherwise compel students to personally affirm, adopt, or adhere to” any of the divisive concepts.¹⁸³ Arkansas’s SB 627, which became law in May—despite the state’s governor arguing that it “does not address any problem that exists”¹⁸⁴—is similarly phrased as protecting employees from penalty or discrimination if they refuse to “believe, endorse, embrace, confess, act upon, or otherwise assent to the divisive concepts.”¹⁸⁵

Two other states passed laws that attempt to have it both ways: both prohibiting “divisive concepts” and “protecting” employees or students from being exposed to them. New Hampshire’s law not only prohibits the divisive concepts from being taught in schools but also protects employees—both private and public—if they refuse to participate in training that includes those concepts.¹⁸⁶

Texas similarly bars divisive concepts while also prohibiting the implementation, interpretation, or enforcement of any student code of conduct that “would result in the punishment of a student for discussing, or have a chilling effect on student discussion of,” the concepts.¹⁸⁷

On its face, legal provisions that prevent teachers from force-feeding particular ideologies to students may seem legitimate. Schools should not be places where students are pressed into particular belief systems or compelled to subscribe to a specific worldview, and where such policies do exist, they should be rejected. Yet, such legislatively imposed “protections” are unnecessary—the First Amendment already protects people’s right not to be compelled to hold certain beliefs.¹⁸⁸ These bills’ provisions will instead put educators on notice that any teachings that could be interpreted as instilling specific prohibited beliefs may violate the law. It is a short journey from You can’t force this belief on students to Don’t discuss this belief with students. Particularly for educators whose classroom lessons help shape student views—civics teachers, for instance—there is no clear line to distinguish between educating students on specific ideas or viewpoints and leading them to adopt such viewpoints. The very nature of education is that at least some of the concepts taught will be ones that students embrace and believe in.

For example, if a history teacher structures his or her curriculum to include a substantial focus on the racist policies of America’s leaders—from the Founding Fathers

183 Idaho HB 377, §1, new § 33-138(3)(a), legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/legislation/HO377.pdf

184 The Associated Press, “Bill limiting state agencies’ race, sex training becomes law,” *Arkansas Democrat Gazette*, May 4, 2021, arkansasonline.com/news/2021/may/04/bill-limiting-state-agencies-race-sex-training-bec/; The legislation is now Act 1100, which adopted a new provisions §25-1-601-606, legiscan.com/AR/bill/SB627/2021

185 Arkansas Act 1100, §25-1-602, arkleg.state.ar.us/Acts/FTPDocument?path=%2FACTS%2F2021R%2FPublic%2Ffile=1100.pdf&ddBienniumSession=2021%2F2021R

186 New Hampshire HR 2, §298, new § 354-A:33, gencourt.state.nh.us/bill_status/billText.aspx?id=1080&txtFormat=html&sy=2021

187 Texas HB 3979, new subsection § 28.002(h-5), legiscan.com/TX/text/HB3979/id/2339637

188 See *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

owning slaves to the Jim Crow era or the segregation of the armed forces—does this curricula “compel” students to conclude that America is systemically racist? What if the teacher summarizes these historical facts as “part of a long history of racist policies from America’s leaders”? Or if this teacher requires students to cite these facts on a test, or examine them in an essay? Does this requirement mean that the teacher is compelling students to adopt certain conclusions?

As another example: if a student claims that the lynching of Black men was a historical artifact from which the country has moved on, and a teacher responds by noting that United Nations experts have concluded that “African Americans continue to experience racial terror in state-sponsored and privately organized violence,”¹⁸⁹ does that mean that the teacher is compelling his or her students to adopt a specific view on systemic racism? What if the teacher further cites the UN experts’ statement that “The origin story of policing in the United States of America starts with slave patrols and social control . . . this legacy of racial terror remains evident in modern-day policing”?¹⁹⁰ Does the introduction of this argument into the classroom, in the context of the teacher’s rebutting of the student’s point, mean that the teacher is “compelling” the student to adopt a certain viewpoint?

In a situation where teachers hold authority over their students, there is no absolute line between educating students on facts which may support a certain viewpoint, and fostering their adoption of that viewpoint.

That is not to say that teachers should be unmindful of the power they wield, and conscientious to avoid compelling students to ascribe to particular beliefs. It is to say that laws that claim to protect students from adopting specific ideologies, will foreseeably and inevitably silence teachers who seek to present information on racism and sexism in American culture, for fear that they will violate the law. In other words, bills that adopt this “protective” formulation claim to safeguard ideological freedom only in order to attack it.

"FAUX-ENLIGHTENED TALK" AND MISLEADING LANGUAGE

One of the most paradoxical elements of the legislation under review is the use of pro-free speech and anti-discrimination language interspersed with language that assumes that anti-discrimination protections are no longer needed. Kimberlé Crenshaw, one of the founders of CRT, describes such language as “faux-enlightened talk of racist barriers definitively overcome.”¹⁹¹

Iowa’s law provides a good illustration. It bans supposedly divisive ideas (called “specific defined concepts”) from the public K-12 school curriculum¹⁹² and holds that state or local government agencies must not “teach, advocate, act upon, or promote” those ideas.¹⁹³ Among the forbidden concepts is the contention that “the United States of America and the state of Iowa are fundamentally or systemically racist or sexist.” Also forbidden is “race or sex stereotyping,” which includes ascribing “privileges” or “status” to a given race or sex. These prohibitions apply to mandatory training for educators—meaning that

189 UN Human Rights Office of the High Commissioner, UN experts condemn modern-day racial terror lynchings in US and call for systemic reform and justice, June 5, 2020, [ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25933](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25933)

190 UN Human Rights Office of the High Commissioner, UN experts condemn modern-day racial terror lynchings in US and call for systemic reform and justice, June 5, 2020, [ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25933](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25933)

191 Kimberlé Williams Crenshaw, “Race to the Bottom,” *The Baffler*, June 2017, [thebaffler.com/salvos/race-to-bottom-crenshaw](https://www.thebaffler.com/salvos/race-to-bottom-crenshaw)

192 Iowa HF 802, §3, new §279.74(2), legis.iowa.gov/legislation/BillBook?ba=HF%20802&ga=89

193 Iowa HF 802, §§1-3, legis.iowa.gov/legislation/BillBook?ba=HF%20802&ga=89

teachers cannot be compelled by their bosses to attend trainings on racial or gender discrimination that includes these ideas.

At the same time, the law is fulsome in affirming the state's commitment to academic freedom, free expression, and antidiscrimination. For example, it bans discrimination based on "political ideology" and states that its provisions should not be construed to "inhibit or violate the First Amendment rights of students or faculty, or undermine a public institution of higher education's duty to protect to the fullest degree intellectual freedom and free expression."¹⁹⁴

In short, the law requires educators to uphold two irreconcilable commitments: They must respect one another's political ideology in the classroom, but not if that ideology includes a belief in systemic racism or sexism. They must protect intellectual freedom and free expression, but not if an educator uses that intellectual freedom to argue that certain races or sexes enjoy societal advantages. In the face of these conflicting obligations, teachers and trainers are essentially put on notice that the portions of their curricula that deal with race or sex have been placed in a gray zone of ambiguous legality. In light of this uncertainty, and the potential political or legal backlash against those who step over this poorly drawn line, it is virtually inevitable that cautious educators or administrators will forgo course offerings, discussion topics, and ideas that seem risky.

In the case of Iowa, it is not necessary to imagine how this chilling effect will play out. Even though its law does not explicitly cover college courses, administrators at Iowa State University chose earlier this year to enforce

a maximal interpretation of the law, applying its prohibitions not only to mandatory training but also to any academic courses that are required for graduation.¹⁹⁵

This means that all compulsory introductory, general, or survey courses are now subject to these prohibitions on curricular content.

In explaining its decision, the university's counsel, Michael Norton, wrote that the law's prohibitions on "mandatory staff or student training" was "open to interpretation," concluding that "there exists some risk that a program described as an academic course could nonetheless be reasonably classified as a mandatory student training" under the new law.¹⁹⁶ The Iowa State provost also cited the new law as justification for blocking updates to a course on diversity in the United States. Brian Behnken, a professor of history and Latino/a studies at Iowa State, countered that some of his colleagues had already begun self-censoring their curricula to avoid running afoul of the new law, noting, "Some faculty are revising their courses to sanitize them, while others have said they will purposefully try to violate the law. Neither of those responses is good." Behnken added another fear of his: that university officials, attempting to ensure conformity with the law and its vague provisions, will be transformed into censors. "It's the university that would punish us, or perhaps not defend us, or not defend us strongly if we were to be challenged or attacked under this law. That fear of what the punishment may or may not be is also motivating people to restrict their speech or to simply feel lost or unsure about what is acceptable or not acceptable."¹⁹⁷

Twenty-five of these bills include savings clauses stating that the bill must not be interpreted in ways that im-

194 Iowa HF 802, §1, new §261H.7(4)(a), (c), new § 279.74(4)(a),(c), legis.iowa.gov/legislation/BillBook?ba=HF%20802&ga=89

195 Daniel C. Vock, "GOP furor over 'critical race theory' hits college campuses," *Iowa Capital Dispatch*, July 3, 2021, iowacapitaldispatch.com/2021/07/03/gop-furor-over-critical-race-theory-hits-college-campuses/

196 Iowa State University letter to Foundation for Individual Rights in Education (FIRE), August 6, 2021, published by FIRE at thefire.org/iowa-state-university-letter-to-fire-august-6-2021/

197 Interview with Brian Behnken, Associate Professor, History and Latino/a Studies and Affiliate Faculty, African and African American Studies, Iowa State University, September 2021.

pede on the First Amendment or on other freedoms. Such clauses provide the state with the defense that the bill was explicitly written to be in conformity with the constitution, providing cover for sympathetic judges to interpret a law narrowly and potentially find it constitutional. As this report describes in further detail below, Arizona’s 2010 law making ethnic studies courses illegal was permitted to stand for years, in part because the first courts to examine it relied on its savings clause.

Yet savings clauses are not magic wands. They cannot transform an unconstitutional law into a constitutional one.¹⁹⁸ PEN America has previously noted that such savings clauses attempt to shift the burden of proof: instead of the state proving that its regulation of speech does not violate the First Amendment, an individual teacher or school district would have to prove in court that their speech is protected by the First Amendment.¹⁹⁹ In essence, the state is daring teachers and schools to litigate their First Amendment rights, rather than guaranteeing these rights.

The Supreme Court has repeatedly affirmed that citizens do not have to simply accept governmental claims that it will enforce overbroad rules in accordance with the Constitution.²⁰⁰ Additionally, as the Texas Court of Criminal Appeals has described it, such savings clauses “require people of ordinary intelligence and law enforcement officials to be First Amendment scholars. . . . Moreover, an attempt to charge people with notice of First Amendment caselaw would undoubtedly serve to chill free expression.”²⁰¹

In sum, these saving clauses do not save these bills from operating as censorship strictures, nor redeem these bills as anything other than sweeping ideological bans.

198 See e.g. *Abbott v. Pastides*, Brief amicus curiae of the First Amendment Clinics at Duke Law and Sandra Day O’Connor College of Law at Arizona State University, December 26, 2018, pp. 14-15, supremecourt.gov/DocketPDF/18/18-704/77711/20181227134210953_18-704.amicus.FINAL.pdf (“Paying cursory tribute to the constitutional guarantee of free expression by invoking the words “First Amendment” and “constitutionally protected,” is no talismanic guarantee of a regulation’s constitutionality.”)

199 PEN America, *Wrong Answer: How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire*, November 2017, pen.org/wp-content/uploads/2017/11/2017-wrong-answer_11.9.pdf, at 19

200 See, e.g., *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750 (1988); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002); *United States v. Stevens*, 559 U.S. 460, 480 (2010)

201 *Long v. State*, 931 S.W.2d 285, 295 (Tex. Ct. Crim. App. 1996), law.justia.com/cases/texas/court-of-criminal-appeals/1996/803-95-4.html

SECTION V

CONSTITUTIONAL CONCERNS AND JUDICIAL REVIEW

All of these educational gag orders raise obvious constitutional questions, given their obvious intent to prohibit ideas, their vague and overbroad requirements, their foreseeable consequences of chilling speech, and their apparent inconsistency with the Fourteenth Amendment. In October, a coalition of civil rights groups sued to find Oklahoma’s educational gag order unconstitutional,²⁰² and other gag orders will inevitably be challenged in court.

Yet the legal case against all these bills is not that cut-and-dried. The Supreme Court has granted governments considerable latitude under some circumstances—particularly in K-12 education and particularly when the government is spending its own funds to support speech—to impose limitations on speech in the classroom or in government trainings, meaning that some gag orders may withstand constitutional scrutiny. It is useful to break down this analysis according to the three areas where legislators seek to impose their ideological prohibitions: in training sessions, in university classrooms, and in K-12 classrooms. As noted above, however, the bills’ technical variations, which might lead to a more or less favorable opinion from a court, will probably not change the reactions of teachers and administrators under in-

tense political scrutiny. Whether found constitutional or not, these bills remain, fundamentally, attempts at content and viewpoint-based censorship that will chill speech in the classroom and training hall.

PROHIBITIONS ON TRAININGS

One major legal distinction that could prove important for evaluating the constitutionality of these bills is the substantial difference between regulating school curricula and regulating workplace training. The government has a stronger basis to argue that it can place limits on workplace training materials for government employees, in the same way that a private entity could choose to put limits on training materials: that is to say, that the government is ‘speaking in its own voice’, rather than compelling private speech, when it places limits on its trainers.

If the government is speaking in its own voice, it is permitted to express a viewpoint. For example, the Supreme Court has previously permitted the government to limit a doctor’s ability to advise on abortion at publicly funded medical clinics, reasoning that such limits were “necessary” to avoid creating “the appearance of gov-

202 Tyler Kingkade and Antonia Hylton, “Oklahoma’s anti-critical race theory law violates free speech rights, ACLU suit says,” NBC News, Oct. 19, 2021, [nbcnews.com/news/us-news/oklahoma-critical-race-theory-lawsuit-aclu-rcna3276](https://www.nbcnews.com/news/us-news/oklahoma-critical-race-theory-lawsuit-aclu-rcna3276)

ernmental support for abortion-related activities.”²⁰³ The government may not, however, compel private speech as part of a government-funded program.²⁰⁴ This distinction—between the government’s own speech and the speech of those contracting with or funded by the government—is hazy, particularly given the close Supreme Court votes on most of these cases, making it difficult to predict where they would draw the line for these bills.

Importantly, the “speaking in its own voice” defense is not available to the government if a law imposes these same ideological restrictions on workplace training for persons other than government employees. It cannot, for instance, meddle in private universities’ training of their professors. This difference was one reason that Trump’s executive order—which prohibited its “divisive concepts” for government training as well as for any institution that had a contract with the federal government—was initially suspended in federal court before being rescinded by President Biden.

The Trump executive order underwent judicial review soon after the administration implemented it, when the Santa Cruz Lesbian and Gay Community Center sued in federal district court to find it unconstitutional, arguing that it restricted the training the center could offer. The trial court quickly sided with the plaintiff, finding that the EO was likely unconstitutional on 1st and 14th Amendment grounds and ordering its suspension. In its holding, the court relied on the Supreme Court’s decision in *Pick-*

ering v. Board of Ed, a 1968 case that set forth the scope of a teacher’s First Amendment right to speak freely on issues of public importance. Considering Trump’s EO, federal Judge Beth Labson Freeman concluded that “the restricted speech, addressing issues of racism and discrimination, goes to matters of public concern” and that the EO’s attempt to condition federal grants on the “recipient’s certification that federal funds will not be used to promote concepts that the Executive Order characterizes as ‘divisive’ . . . clearly would constitute a content-based restriction on protected speech.”²⁰⁵

Moreover, the court was persuaded by the arguments of eight institutions of higher learning that protested the executive order, citing their amicus brief’s assertion that “[s]cholars need to be able to give voice to, and indeed ‘endorse,’ opposing views in order for intellectual progress to occur. The Order inhibits this advancement.”²⁰⁶ The court further cited a 2020 California decision that found, “There can be little question that vocational training is speech protected by the First Amendment.”²⁰⁷

The Trump EO was particularly vulnerable because it extended prohibitions on training beyond the government’s own speech or employees, to the employees of contractors that worked for the government. In its decision, the court emphasized how the order’s “restriction on the contractor’s training of its own employees applies regardless of whether the federal contract has anything to do with diversity training or the identified ‘divisive concepts,’ and is untethered to the use of the federal

203 *Rust v. Sullivan*, 500 U.S. 173 (1991), supreme.justia.com/cases/federal/us/500/173/#tab-opinion-1958749

204 In 1947 the Supreme Court struck down a West Virginia law requiring students to stand, salute the flag, and recite the Pledge of Allegiance, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). And in contrast to *Rust v. Sullivan*, the Supreme Court struck down two mandatory notice provisions in the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act, *National Institute of Family and Life Advocates v. Becerra*, 585 US __ (2018), oyez.org/cases/2017/16-1140.

205 Injunction at 23.

206 Injunction at 23 (quoting amicus brief of 8 Institutions of Higher Learning).

207 Injunction at 23 (quoting *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020)).

funds.”²⁰⁸ The court held that the federal government did not have a right to infringe on the “Plaintiffs’ freedom to deliver the diversity training and advocacy that they deem necessary to train their own employees and the service providers in the communities in which they work, using funds unrelated to the federal contract” and that “the Government cannot condition grant funding on a speech restriction that is outside the confines of the grant program.”²⁰⁹ In other words, the fact that the EO applied a blanket prohibition against organizations that receive federal funding, stopping them teaching diversity trainings to anyone, was crucial for the Court’s decision.

In addition to finding a likely 1st Amendment violation, the district court ruled that the EO’s provisions likely violated Americans’ due process rights under the 14th Amendment, because they were too vague for the affected people and organizations to know specifically what conduct was prohibited. As the decision states, the line between the prohibited conduct of teaching a divisive concept and the permitted conduct of informing trainees about a divisive concept was “so murky, enforcement of the ordinance poses a danger of arbitrary and discriminatory application.”²¹⁰ The Trump order was enjoined because its lack of clarity would inhibit the “exercise of freedom of expression because individuals will not know whether the ordinance allows their conduct, and may choose not to exercise their rights for fear of being . . . punished.”²¹¹ This portion of the holding demonstrates, in this instance at least, the court’s clear-eyed acknowledgment of the chilling effects of such an order.

State bills that are most similar to the original Trump executive order are likely to be found unconstitutional under both the 1st and 14th Amendments. Pennsylvania’s HB 1532, for example, not only prohibits government entities from communicating or teaching divisive concepts but also bars any government contractors (and even their subcontractors) from engaging in workplace training that teaches or encourages such ideas.

What is less clear, however, is whether an educational gag order that prohibits specific concepts in training government employees alone could survive such a review. The court’s decision on the Trump EO seems to indicate that such bills could be found unconstitutional on 14th Amendment grounds, at least. But, because the Biden administration rescinded the EO, the courts never made a final ruling on the case. In sum, it is an open question whether the courts will grant state governments the leeway to impose such ideological restrictions on the training of their own employees.

PROHIBITIONS ON CURRICULA AND CONTENT IN K-12 SCHOOLS

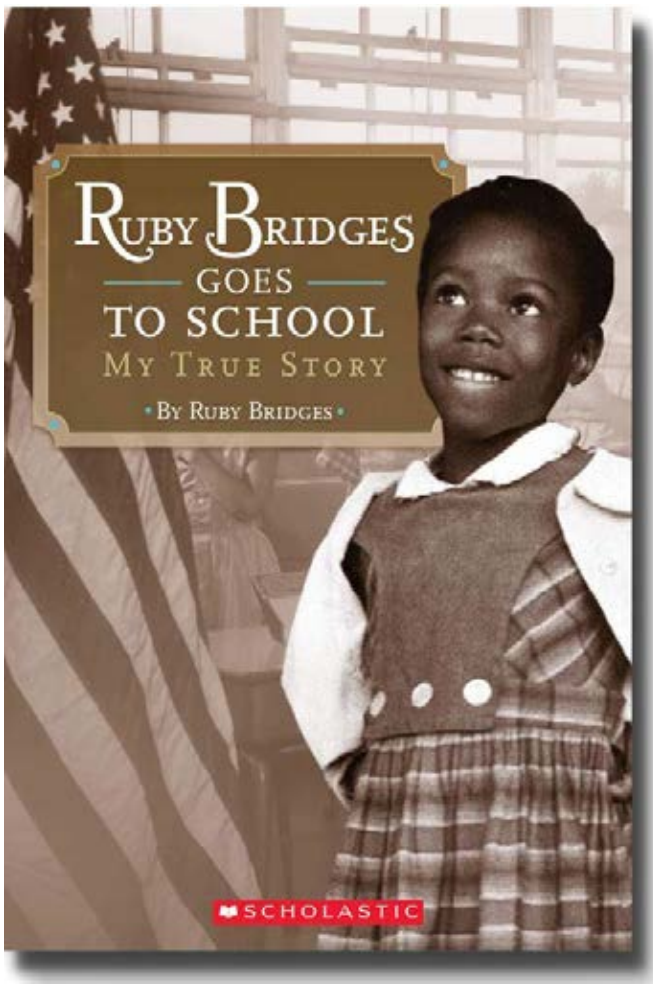
Under the First Amendment, laws that would be unconstitutional if applied to the citizenry at large may pass muster when applied to children’s education. This is particularly the case when it comes to course curricula. There, government actors can defend themselves against claims of viewpoint discrimination by noting that curricula decisions for public schools inevitably require choices about which material to present within the

208 *Santa Cruz Lesbian and Gay Community Center, et al. v. Donald J. Trump, et al.*, Case No. 20-cv-07741-BLF, Order Granting in Part Plaintiff’s Motion for a Nationwide Preliminary Injunction, Dec. 22, 2020, [dol.gov/sites/dolgov/files/OFCCP/EO-13950/SantaCruz80-Opinion.pdf](https://www.dol.gov/sites/dolgov/files/OFCCP/EO-13950/SantaCruz80-Opinion.pdf) (citing *Pickering v. Board of Ed.*, 391 US 563, 568 (1968), [oyez.org/cases/1967/510](https://www.oyez.org/cases/1967/510)).

209 Injunction at 22

210 Injunction at 25-26 (quoting *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011), caselaw.findlaw.com/us-9th-circuit/1560209.html).

211 *Id.* (citing *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011), caselaw.findlaw.com/us-9th-circuit/1560209.html).



In Williams County, TN, a local group, Moms for Liberty, called for the removal of the autobiography Ruby Bridges Goes to School, stating that the book is divisive and presents an unrelentingly dark portrait of a United States in which all white people are evil.

As explained by the National Coalition Against Censorship: "A school is not comparable to a public park where

anyone can stand on a soapbox, or a bulletin board on which anyone can post a notice. While students and teachers do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate', speech is not quite as free inside educational institutions as outside."²¹³ Nonetheless, censorship of curricular decisions has been overturned. The leading Supreme Court case on the subject is *Epperson v. Arkansas*, which unanimously struck down an Arkansas law that criminalized the teaching of evolution in public schools because it violated the First Amendment prohibition on establishing religion.²¹⁴

There are few judicial decisions that squarely deal with a state law prohibiting the teaching of particular concepts in grade school classrooms. School boards have substantial discretion to make curriculum decisions as long as these decisions are "reasonably related" to a "legitimate pedagogical concern."²¹⁵ Yet even this substantial discretion is bounded by the Constitution, most relevantly, the First and Fourteenth Amendments. A number of judicial opinions have indicated discomfort with the idea that a particular viewpoint might be suppressed for a non-pedagogical purpose,²¹⁶ and the courts have been vigilant against viewpoint discrimination when it comes to book banning in school libraries—a body of law upon which the courts may draw in deciding the constitutionality of these proposed educational gag orders.

The major Supreme Court case on the issue of book

²¹² See *Griswold v. Driscoll*, 616 F. 3d 53 - 2010 ("there is no denying that the State Board of Education may properly exercise curricular discretion"); *Griswold v. Driscoll*, 562 U.S. 1179 (2011) (denying certiorari); see also *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) ("States and local school boards are generally afforded considerable discretion in operating public schools").

²¹³ "The First Amendment in Schools," National Coalition Against Censorship, August 9, 2021, ncac.org/resource/first-amendment-in-schools (internal citation omitted)

²¹⁴ "*Epperson v. Arkansas*, 393 U.S. 97 (1968)," First Amendment Encyclopedia, mtsu.edu/first-amendment/article/265/epperson-v-arkansas. The Supreme Court case replicated the questions raised in the infamous Scopes Monkey Trial, which had been conducted in Tennessee state courts in the 1920s. "Scopes Monkey Trial," First Amendment Encyclopedia, mtsu.edu/first-amendment/article/1100/scopes-monkey-trial

²¹⁵ E.g. *Virgil v. School Board of Columbia County*, 862 F.2d 1517 (11th Cir. 1989)

²¹⁶ E.g., *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980), law.justia.com/cases/federal/appellate-courts/F2/631/1300/86496/ ("This is not to say that an administrator may remove a book from the library as part of a purge of all material offensive to a single, exclusive perception of the way of the world...")

banning in school libraries is *Island Trees Union Free School District v. Pico* (1982) where a plurality held that “school boards do not have unrestricted authority to select library books and that the First Amendment is implicated when books are removed arbitrarily.”²¹⁷ Justice Brennan, writing for the plurality, declared: “Local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”²¹⁸ It is this language that may prove most damning for these bills, which—in PEN America’s analysis—uniformly attempt to impose such an orthodoxy on school classrooms by banning the presentation of certain opinions or even facts within these classrooms.

Federal courts have applied *Pico* in multiple scenarios, overruling, for example, the removal of the Harry Potter book series in Cedarville, Arkansas, by reasoning that “regardless of the personal distaste with which these individuals regard ‘witchcraft,’ it is not properly within their power and authority as members of defendant’s school board to prevent the students at Cedarville from reading about it.”²¹⁹ Similarly, removal of a lesbian romance was reversed in Kansas.²²⁰ But the removal of a book in Florida about travel to Cuba was upheld because the court found that the removal concerned the

book’s factual accuracy.²²¹

These educational gag orders would affect not only curricula, but also how teachers would speak and conduct themselves—that is to say, what teachers could say without illegally introducing a banned concept into the classroom or “compelling” their students to believe in such a concept. The courts have found that grade school teachers can be disciplined for departing from pre-approved curricula,²²² but some courts have also ruled that schools may not discipline teachers for sharing certain controversial words or concepts in class that are relevant to the curriculum, as long as the school has no legitimate interest in restricting that speech.²²³ This makes it unclear as to how the courts may rule regarding the speech of a teacher who, for example, introduces the concept of systemic racism or racial privilege in the classroom in a state where one of these gag orders is law.

PROHIBITIONS ON ACADEMIC FREEDOM IN HIGHER EDUCATION

There is a larger body of law concerning the in-class free speech rights of university professors, though this law is still evolving. According to the American Associa-

217 American Library Association, Notable First Amendment Court Cases, Freedom of Expression in Schools, ala.org/advocacy/intfreedom/censorship/courtcases#fes (describing *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982)), oyez.org/cases/1981/80-2043 218 *Id.*

219 *Counts v. Cedarville School District*, 295 F. Supp. 2d 996 (W.D. Ark. 2003), law.justia.com/cases/federal/district-courts/FSupp2/295/996/2307891/

220 *Case v. Unified School Dist. No. 233*, 908 F. Supp. 864 (D. Kan. 1995), law.justia.com/cases/federal/district-courts/FSupp/908/864/1457522/

221 *ACLU v. Miami-Dade City*, 557 F.3d 1177 (11th Cir. 2009), aclu.org/press-releases/aclu-florida-sues-stop-book-censorship-miami-dade-county-school-board; these cases are helpfully summarized in Claire Mullally and Andrew Gargano, “Banned Books,” *Freedom Forum*, Nov. 2017, freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/libraries-first-amendment-overview/banned-books/

222 *E.g. Webster v. New Lenox School District No. 122*, 917 F.2d 1004 (7th Cir.1990); *Palmer v. Board of Education*, 603 F.2d 1271 (7th Cir.1979); *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir.1998). See also *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991); *Piggee v. Carl Sandburg College*, 464 F.3d 667 (7th Cir. 2006) (ruling that colleges can obligate their instructors not to go “off message” in using their classrooms to expound specific religious views).

223 See generally *Free Speech Rights of Public School Teachers in Washington State*, ACLU-Washington, September 1, 2016, aclu-wa.org/docs/free-speech-rights-public-school-teachers-washington-state

tion of University Professors, in some cases professors hold First Amendment rights over the specific content they teach in their classrooms.²²⁴ The origins of this protection date to cases from the McCarthy era, when university professors were threatened for failing to affirm that they were not communists or members of the Communist Party. The Supreme Court found that “by imposing a loyalty oath and prohibiting membership in ‘subversive groups,’ the law unconstitutionally infringed on academic freedom and freedom of association.”²²⁵ Federal courts have found that these protections extend to some classroom topics but not others. For example, federal courts in New York permitted a professor to bring a claim that he was denied tenure for teaching a class that posited that Zionism could be considered a form of racism.²²⁶

In the 2006 case *Garcetti v. Ceballos*, the Court found that public officials do not have First Amendment protections for speech that they express as part of their official duties, but refused to determine whether “expression related to academic scholarship or classroom instruction” enjoyed additional First Amendment protections, though they did hint that the concept of academic freedom could constitute “another level of constitutional concern” regarding the rights of academics.²²⁷ The Ninth Circuit has held that professors do, in fact, enjoy additional protections,²²⁸ while the Third Cir-

cuit has held the opposite.²²⁹ In the absence of a more definitive holding from the Supreme Court, the precise constitutional bounds of professors’ First Amendment rights over their in-class speech remain blurry.

The most significant recent precedent relating to a state’s ability to impose ideological censorship on schools derives from the twinned Arizona cases of *Arce v. Douglas* and *González v. Douglas*, better known as the litigation over Arizona House Bill 2281.

THE LEGAL BATTLE OVER ARIZONA HB 2281

In 2010, Arizona legislators enacted HB 2281, which banned schools from teaching classes that “promote resentment toward a race or class of people; are designed primarily for pupils of a particular ethnic group; advocate ethnic solidarity instead of the treatment of pupils as individuals”; or advocate “the overthrow of the United States government.”²³⁰ Schools violating the law faced fines of up to 10 percent of their state funds until the school resumed compliance.²³¹ The law’s primary sponsor, state Representative Jonathan Paton of Tucson, was reportedly motivated to propose the law after learning that Dolores Huerta, a nationally recognized civil rights advocate, had criticized Republicans during a speech at a Tucson high school, saying at one point,

224 Rachel Levinson, “Academic Freedom and the First Amendment,” American Association of University Professors, July 2007, aaup.org/our-work/protecting-academic-freedom/academic-freedom-and-first-amendment-2007

225 *Id.*, citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), supreme.justia.com/cases/federal/us/385/589/

226 *Dube v. State University of New York*, 900 F.2d 587, 598 (2d Cir. 1990), casetext.com/case/dube-v-state-university-of-new-york

227 *Garcetti v. Ceballos*, 547 U.S. 410 (2006), at 425.

228 *Demers v. Austin*, 729 F.3d 1011 (9th Cir. 2013)

229 *Gorum v. Sessoms*, 561 F.3d 179 (3rd Cir. 2009). See also *Adams v. Trustees of Univ. of N. Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008); *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012) for other Circuit courts’ treatment of the issue.

230 Arizona HB 2281 (2010), azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf, codified at Ariz. Rev. Stat. § 15-111-12; Nicole Santa Cruz, “Arizona bill targeting ethnic studies signed into law,” Los Angeles Times, May 12, 2010, latimes.com/archives/la-xpm-2010-may-12-la-na-ethnic-studies-20100512-story.html

231 *Id.*



In 2011, protesters gathered to support the Tucson Unified School District after the announcement that its Mexican American Studies Department's ethnic studies program violated state law. Photo by AP/Ross D. Franklin

"Republicans hate Latinos."²³²

In the first legal battle over the constitutionality of HB 2281, the court considered the law in the abstract (or, in legal parlance, "on its face"), while in the second the court evaluated the law as it applied to an actual school curriculum. During the first round of litigation, in *Arce v. Douglas*,²³³ the court's evaluation of the law in the abstract granted a huge advantage to the state, with the court determining that the law could be upheld if there was deemed to be any circumstance under which it could be found consistent with the Constitution. Applying this test, the trial court overturned only one pro-

vision of the law. On appeal, the federal appeals court invalidated much of the law but upheld two provisions, adopting a narrow view of the law which allowed it to find these provisions constitutional.

Specifically, the appeals court upheld the prohibition on promoting "resentment toward a race or class of people," finding that a classroom discussion that inadvertently (rather than purposely) engendered resentment would not violate the law, particularly given its savings clause, which stated that "nothing in this section shall be construed to restrict or prohibit the instruction of the holocaust [sic], any other instance of genocide, or

232 Stephenson, "What Arizona's 2010 Ban on Ethnic Studies Could Mean for the Fight Over Critical Race Theory," *Politico*, July 11, 2021, [politico.com/news/magazine/2021/07/11/tucson-unified-school-districts-mexican-american-studies-program-498926](https://www.politico.com/news/magazine/2021/07/11/tucson-unified-school-districts-mexican-american-studies-program-498926)

233 *Arce v. Douglas*, 793 F.3d 968, cdn.ca9.uscourts.gov/datastore/opinions/2015/07/07/13-15657.pdf

the historical oppression of a particular group of people based on ethnicity, race, or class.”²³⁴ The court similarly concluded that the prohibition on advocating “ethnic solidarity instead of the treatment of pupils as individuals” was not overbroad because it prohibited only “ethnic solidarity instead of treating students as individuals.”²³⁵ The court further found the provision to be “reasonably related to the state’s legitimate pedagogical interest in reducing racism.”²³⁶ It also upheld the provisions against claims of being unconstitutionally vague, concluding that a reasonable person could understand what was prohibited. The Arizona court did overturn the provision prohibiting classes that were “designed primarily for pupils of a particular ethnic group,” holding that it “threatens to chill the teaching of ethnic studies courses that may offer great value to students—yet it does so without furthering the legitimate pedagogical purpose of reducing racism.”²³⁷

Essentially, the court did much of the bill drafters’ work for them, reinterpreting the law to be less severe in order to find it constitutional. This example offers a practical demonstration of how courts could similarly offer a deferential interpretation to today’s educational gag orders, particularly those that contain the fig leaf of savings clauses.

For the second round of litigation, in *González v. Douglas*, rather than considering the law in the abstract, the

appeals court sent back the case to a trial court to determine whether the law was unconstitutional as applied to a particular school curriculum, a Mexican-American Studies class at the Tucson Unified School District. A law that might seem neutral in the abstract could still be unconstitutional, the Supreme Court has held, “if its enactment or the manner in which it was enforced were motivated by a discriminatory purpose.”²³⁸ This time incorporating real-world facts into its analysis, the trial court refused to enforce the law against the Tucson school district.

The court made this decision, in large part, because the case record was filled with overwhelming evidence of racial discrimination. The Mexican-American Studies curriculum in Tucson had been adopted partly to meet court-ordered desegregation requirements and had a proven track record of improving the high school performance and graduation rates of students enrolled in it.²³⁹ Meanwhile, the record of how HB 2281 had been both drafted and applied was replete with racist language and procedural irregularities. For example, the superintendent who enforced the law wrote blog posts that said things like: “MAS [Mexican-American Studies] = KKK in a different color” and “The Mexican-American Studies classes use the exact same technique that Hitler used in his rise to power. In Hitler’s case it was the Sudetenland. In the Mexican-American Studies case, it’s Aztlán,” a ref-

234 *Arce v. Douglas*, 793 F.3d at 985 (quoting A.R.S. § 15-112(F)), casetext.com/case/arce-v-douglas-1

235 *Id.* (emphasis original).

236 *Arce v. Douglas*, 793 F.3d at 986, casetext.com/case/arce-v-douglas-1

237 *Id.*

238 *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). As the court noted: A plaintiff does not have to prove that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a “motivating factor.” ... The Supreme Court articulated the following, non-exhaustive factors that a court should consider in assessing whether a defendant acted with discriminatory purpose: (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision; (3) the specific sequence of events leading to the challenged action; (4) the defendant’s departures from normal procedures or substantive conclusions; and (5) the relevant legislative or administrative history. *Id.* (citing *Arlington Heights*, 429 U.S. at 266-68)

239 *González v. Douglas*, 269 F. Supp. 3d 948, 951 (D. Ariz. 2017), casetext.com/case/gonzalez-v-douglas

erence to the Aztec ancestral homeland.²⁴⁰ On the witness stand, one state official who had supported the law shared his belief that Spanish-language media should be banned from the United States—with a limited exception for Mexican food menus.²⁴¹ The court also found that the state enforced the law against a predominantly Hispanic school but not against a predominantly white charter school that used a similar curriculum or against ethnic studies programs for African Americans or Asian Americans.²⁴² The court also found that the legislature, as well as those who had enforced the law, had—in the words of Circuit Judge Wallace Tashima—“assumed, without evidence, that MAS teachers were promoting politically radical positions, rather than teaching their students about history and literature in a factually accurate and balanced manner.”²⁴³

Given all these findings, the court struck down the law on both 1st and 14th Amendment grounds, concluding: “Both enactment and enforcement were motivated by racial animus. . . . [T]he Court is convinced that decisions regarding the MAS program were motivated by a desire to advance a political agenda by capitalizing on race-based fears.”²⁴⁴

This decision offers a clear precedent for how today’s ideological gag orders may be found unconstitutional: either because they explicitly disfavor one point of view on racism or sexism or because they will not be enforced evenhandedly in actual K-12 settings. Yet such a decision is far from guaranteed, particularly if the state is able to convince the court that such laws are neither

motivated by animus against a particular viewpoint or unfairly enforced—as was the case in the first round of litigation against HB 2881.

Although the Tucson school district was ultimately victorious, these legal battles took seven years. By the time the law was found unconstitutional, the district had long stopped offering the Mexican-American Studies course, unable to withstand the loss of funding that accompanied the state’s initial finding that it violated the law.²⁴⁵ The seven-year delay illustrates perhaps the greatest danger of these educational gag orders: that even when justice ultimately prevails, the time and resources required to get there can block students from being educated on a wide range of topics in American history, society, and literature and deprive them of information and ideas that could strengthen their understanding of race, sex, ethnicity, and other fault lines.

All this is to say: Those who find these educational gag orders to be morally objectionable exercises in ideological censorship—as PEN America does—cannot rest easy on the grounds that the courts will simply invalidate these bills as they come into law. Instead, the appropriate time to contest these ideological gag orders is right now, as legislators are considering them.

²⁴⁰ *Id.*

²⁴¹ Kelly McEvers, “Arizona’s Ethnic Studies Ban in Schools Goes to Trial”, NPR, July 14, 2017, npr.org/2017/07/14/537291234/arizonas-ethnic-studies-ban-in-public-schools-goes-to-trial

²⁴² *González v. Douglas*, 269 F. Supp. 3d 948, 968-969 (D. Ariz. 2017), casetext.com/case/gonzalez-v-douglas

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Hank Stephenson, “TUSD board majority sidesteps effort to resurrect aspects of Mexican American Studies,” *Arizona Daily Star*, January 31, 2018, tucson.com/news/local/tusd-board-majority-sidesteps-effort-to-resurrect-aspects-of-mexican-american-studies/article_620f0e1b-6b09-57c3-ae4c-342130d3b612.html

CONCLUSION

Educational gag orders are, in many ways, the exact opposite of what they claim to be. Proponents say that these orders protect academic freedom and open inquiry when they actually undermine it, imposing political and ideological censorship on schools and workplaces. Proponents say that these orders safeguard American history and values, when they actually tarnish the country's long tradition of freedom of thought and expression. Proponents suggest that racism and sexism are things of the past, when these bills risk disproportionately curtailing the speech of teachers, trainers, and students of color, while simultaneously cramping honest conversations about contemporary manifestations of discrimination. Ultimately, these bills are a painful demonstration of the yawning chasm between many legislators' professed commitment to the principle of free speech, and their willingness to use the machinery of government to silence the speech of those with whom they disagree.

As organizations and institutions across the country—including schools, colleges, and state agencies—introduce diversity initiatives and other curricular efforts to bring new perspectives to our understanding of American history, society, and identity, it is imperative to ensure space for open debate and a diversity of viewpoints. The passage of censorious laws does just the opposite, setting an alarming precedent for government intrusions on the freedom to read and to learn, academic freedom, and historical inquiry.

These bills have already caused damage. They have fostered a climate of censoriousness among institutional leaders, educators, and the general public. They have led to troubling developments in our schools and universities, as administrators try to implement them and decode their ambiguities while confronting the distrust of citizens who have become convinced that certain conversations about diversity, racism, or inequality pose

a proximate threat to national identity and social cohesion. They have legitimized a response to contested ideas that emphasizes not more speech and debate—the approach privileged by our Constitution and Bill of Rights—but, instead, government-mandated silencing.

If the troubling legislative trend these bills represent is not stopped and reversed, the underpinnings of the constitutional right to freedom of speech, and our concomitant freedom of thought, will be weakened. It is impossible to reconcile support for the First Amendment with support for these bills, which are uniformly exercises in censorship. If the widespread campaign against “Critical Race Theory” does indeed prove a winning political issue in the 2022 election, we can expect similar campaigns in the next election cycles, an emboldening of censorship to constrict even broader areas of public debate. For these reasons, it is imperative that all Americans concerned about our constitutional rights and civil liberties immediately and resolutely oppose these educational gag orders, and push to repeal the wrong-headed laws that have already been passed.

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