Let's Get Critical: The Rights and Obligations of School District Stakeholders under State Laws Limiting or Banning Discussion of Critical Race Theory in K-12 Classrooms

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LET’S GET CRITICAL: THE RIGHTS AND OBLIGATIONS OF SCHOOL DISTRICT STAKEHOLDERS UNDER STATE LAWS LIMITING OR BANNING DISCUSSION OF CRITICAL RACE THEORY IN K-12 CLASSROOMS

By John E. Rumel/*

INTRODUCTION

Critical Race Theory has moved from the halls of academia to the center of a national debate about the role of teachers in instructing students about race, race relations and the United States’ troubled history concerning those subjects. Addressing growing concerns over Critical Race Theory from the political right, state legislatures have responded quickly by enacting a host of Anti-Critical Race Theory (anti-CRT) bills that seek to expel Critical Race Theory from the classroom.

This Article will explore several aspects of anti-CRT laws which are or should be of interest to K-12 education law scholars, attorneys and judges, but also to primary and secondary public school stakeholders --
teachers, administrators, school boards and their members, and parents of school age children and other school district patrons -- and their respective legal representatives, as well as to state law policymakers during these tumultuous political times. First, the Article will explain what Critical Race Theory is (and is not) and will discuss concerns – real, imagined, or falsely claimed -- which underlie the enactment of anti-CRT laws.¹

Second, the Article will describe the variety of anti-CRT bills enacted in the past few years, ranging from limitations on teachers endorsing or indoctrinating students in Critical Race Theory during instructional time to complete bans on teaching or advocating purported Critical Race Theory concepts.² Third, the Article will explore legal challenges against anti-CRT bills under several constitutional provisions, including Due Process, First Amendment, Equal Protection and local school board control grounds, by evaluating the contours of those challenges and their likelihood of success in the courts.³ Fourth, the Article will make several recommendations to the above-mentioned K-12 public school stakeholders and will conclude with observations about two, related

¹ See discussion infra at notes 5 through 19 and accompanying text.
² See discussion infra at notes 20 through 37 and accompanying text.
³ See discussion infra at notes 38 through 149 and accompanying text.
matters – the current political environment which has led to the passage of anti-CRT laws, which can most accurately be described as legislative assaults on racial equity and constitutional principles, and the importance of bringing well placed legal challenges to this form of state law policymaking which – either naively or intentionally – has caused the very divisiveness that anti-CRT laws have promised to remedy.4

DISCUSSION

I. Definition of Critical Race Theory

Critical Race Theory exploded into the national discourse shortly after the summer protests in 2020 sparked by the police killing of George Floyd.5 Critical Race Theory had long been a somewhat obscure academic theory that originated in the 1980s,6 the term being first coined by legal scholar Kimberlé Crenshaw.7 Critical Race Theory describes a loosely

4 See discussion infra at notes 150 through 156 and accompanying text.
7 While the term Critical Race Theory is new to the culture wars, Professor Crenshaw has been at least adjacent to political controversy for some time since her concept of intersectionality entered mainstream use around 2017 and has been subject to criticism about its application by political activists, including criticism from herself. See Jane Coaston, The Intersectionality Wars, VOX (May 28, 2019, 9:09 AM), https://www.vox.com/the-
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connected set of ideas that critique the role and function of race in society and its relationship to power in the United States. While no single definition of Critical Race Theory exists, certain concepts are generally embraced by theorists, including that racism is “ordinary” and not an aberration in society, race is socially constructed and historically contingent, and historically marginalized races and ethnicities bring a unique ability to speak about the impact of racism. The concepts are broad, and even though much political hay has been made about Critical Race Theory, there is still a mass misunderstanding concerning its meaning and how much it is actually taught in K-12 schools.

Much of the confusion concerning Critical Race Theory has been due to attempts to conflate it with various other ideas. Concepts like “Social Emotional Learning” have somehow been identified as stealth efforts to sneak Critical Race Theory into ordinary classroom teachings. Social Emotional Learning is a rather straightforward idea which teaches

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9 Id. at 6.
children how to respond emotionally to their environment and has no intrinsic connection with upper-division graduate legal theories. Another common effort has been the attempt to conflate Critical Race Theory with Marxism so as to associate the idea with un-American values. A fear of Marxist professors is, of course, not uncommon in American history, and attempts to root out “communists” have often been the basis for political vendettas.

Although almost all the evidence indicates that Critical Race Theory is not taught in K-12 schools, critics of Critical Race Theory are

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12 Id.
15 See 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, 12:07 PM) (quoting AFT president Randi Weingarten), https://perma.cc/8M5G-3EXZ; Nation’s 2nd-Largest Teachers Union Says It’s Time for In-Person Learning, NPR (May 17, 2021, 5:07 AM ET), https://perma.cc/2V5D-AULK; see also Phil McCausland, *Teaching Critical Race Theory Isn’t Happening in Classrooms, Teachers Say in Survey*, NBC NEWS (July 1, 2021, 3:23 PM PDT), https://perma.cc/R76C-Z6S4 (reporting that more than 96% of teachers who responded to a survey conducted by the Association of American Educators said that their schools did not mandate instruction about CRT); Craig Jones, Newswise, *Critical Race Theory (CRT) is not being taught in K-12 schools, but that didn’t stop Virginia Governor-Elect from vowing to ban it*, (Nov. 4, 2021, 8:50 AM EDT), https://www.newswise.com/factcheck/critical-race-theory-crt-is-not-being-taught-in-k-12-schools-but-that-didn-t-stop-virginia-governor-elect-glenn-youngkin-from-vowing-to-ban-it/?article_id=760245; but cf. Zach Goldberg & Eric Kaufmann, *Yes, Critical Race Theory is Being Taught in Schools*, City-
correct in identifying a genuine sea change in discourse about race and equity in the United States. Interest in Diversity, Equity, and Inclusion training and consultation has exploded among corporate America and, by some estimates, is an $8 billion industry.16 Schools have also taken steps to incorporate concepts of Diversity, Equity, and Inclusion into their teacher training and their curriculum.17 A good example of the shift in racial discourse comes from the New York Times 1619 Project, which re-examines the centrality of racism in American history by “redefining” the founding of America as the year 1619 when enslaved people first arrived in the new world.18 Ultimately, the definition and substance of Critical
Race Theory is not all that important to the debate because, unfortunately, the term has often been hollowed out and deployed as a catch-all against a perceived progressive bias in educational institutions.  

II. Legal Landscape of Anti-CRT Bills

In response to the rise in awareness of Critical Race Theory, a host of anti-CRT bills have popped up in states across the nation. Laws targeting new modes of racial discourse track back to at least the *Saving America* bill, which started with efforts to ban the use of the 1619 Project in school curricula. As backlash to the new discourse about race grew and theories encouraging that discussion became relabeled as Critical Race Theory, former President Donald Trump added fuel to the fire by enacting an executive order which prohibited contractors who receive funding from the federal government from advancing with or training their employees regarding certain divisive concepts. Those divisive concepts were listed as follows:

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

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

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20 *Id.* at 25.

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(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 hard work ethic are racist or sexist, or were created by a particular race to oppress another race.”

While several states have employed ingenuity in their efforts to fight Critical Race Theory (the UCLA School of Law CRT Forward

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22 Id. President Joseph Biden revoked Executive Order No. 13,950 on January 20, 2021, i.e., his first day in office.
Tracking Project has identified over 500 anti-CRT efforts introduced at the local, state, and federal levels,\(^\text{23}\) a significant amount of the concern comes from anti-CRT bills at the state legislative level. Most of these anti-CRT bills have adopted the divisive concepts language directly from the Trump Executive Order and have applied the prohibitions listed in the executive order, not just to government contractors, but also to public schools.\(^\text{24}\) In 2021, twelve States passed anti-CRT bills, and another seven were passed during the first eight months of 2022.\(^\text{25}\)

As alluded to above, most of these bills employ the “divisive concepts” terminology while also attacking “Critical Race Theory” generally.\(^\text{26}\) Despite sharing a common origin and target, the bills have taken on a variety of forms. This Article will focus primarily on the type of ban deployed. Those bans include (1) prohibitions on compulsion, (2) prohibitions on promotion; and (3) prohibitions on inclusion.\(^\text{27}\) The above-mentioned prohibitions can be viewed as a sliding scale in terms of degrees

\(^{23}\) CRT Forward Tracking Project, [https://crtforward.law.ucla.edu](https://crtforward.law.ucla.edu) (last accessed October 3, 2022).


\(^{26}\) *Id.* at 9; *see supra* note 24 and accompanying text.

\(^{27}\) Jeremy Young & Jonathan Friedman *supra* note 25.
of censorship. The bans on compulsion mostly prevent teachers from “direct[ing] or otherwise compel[ling] students to personally affirm, adopt or adhere to” the divisive concepts. Students generally already have protection against the forced endorsement of certain beliefs under the First Amendment so, in effect, these bills do little to change the legal landscape and are on the lower end of censorship. On the opposite end are the bills that ban any introduction of the divisive concepts. These bills ban the introduction of any racially charged topic no matter how objective the conversation and, as a result, ban the presentation of a vast swath of content, much of which has a clearly legitimate educational purpose.

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29 Id.
30 See West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943) (famously stating in the K-12 public school context, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or matters of opinion or force citizens to confess by word or act their faith therein”); see also Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (“the First Amendment … does not tolerate laws that cast a pall of orthodoxy over the classroom”). Thus, although anti-CRT legislation does not add any new rights proscribing compulsion or indoctrination of students in the K-12 setting, if the only purpose of anti-CRT laws is to clarify student rights, then the issue becomes why specific Critical Race Theory ideas are targeted and other “offensive” social and political ideas that might be taught in K-12 schools are left unfettered.
31 Jeremy Young & Jonathan Friedman supra note 25.
just one example, a history teacher would likely be prohibited from introducing material that depicted Confederate defenses of slavery.\textsuperscript{33}

Two other important issues arise from these bills – namely, to whom they apply and how they are enforced. As to the first issue, some of the bills are strictly limited to regulating employees at the public institutions they serve. As to the second issue, although many of the bills directly copy the language of the Trump executive order, most of the early anti-CRT bills did not include specific enforcement mechanisms;\textsuperscript{34} however, bills passed in 2022 have largely amended this policy oversight. They have included a variety of enforcement mechanisms, ranging from creating causes of action for parents to bring suit against teachers to allowing for cuts in school district funding to, in some extremely troubling cases, imposing criminal penalties for their violation.\textsuperscript{35} The nature of the enforcement mechanism may be important to how legal challenges to anti-CRT bills will play out. For example, in states like Idaho, where there is no explicit enforcement mechanism, challenges to the bill may fail because

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excludes the history and lived experiences of Americans of color and imposes a dominant white narrative of history”).

\textsuperscript{33} Jeremy Young & Jonathan Friedman \textit{supra} note 25.
\textsuperscript{34} PEN AMERICA, \textit{supra} note 19 at 46.

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no one may have standing to raise constitutional issues about a law that, by its terms, cannot be enforced.\(^{36}\)

Another substantial variation in the laws is whether they exclusively target K-12 schools or also regulate institutions of higher education.\(^{37}\) This Article will primarily focus on anti-CRT laws’ impact of K-12 schools and legal challenges in that context, but additional academic freedom concerns come into play when targeting higher education.

III. Legal Challenges to Anti-CRT Laws

The educational system, who has access to it, and who may shape it have often been at the heart of this country’s struggle.\(^{38}\) Federal courts must balance a state’s legitimate pedagogical interest in controlling curriculum against several constitutional rights, including the rights of students and teachers.\(^{39}\) Moreover, the importance of education in

\(^{36}\) See Falls v. DeSantis, 609 F.Supp.3d 1273, 1283 (N.D. Fla. 2022) (holding that a teacher, among other plaintiffs, was unable to show injury caused by the passage of Florida’s STOP WOKE Act and, therefore, was unable to establish standing at preliminary injunction stage, in part because state educational agency could only withhold funding to school districts and could not take direct action against teachers). In Idaho, this may be somewhat off the point, since the Idaho Legislature made clear that the purpose of enacting anti-CRT law was more about signaling affiliation with a political side in the culture war and setting the groundwork for further efforts to cut higher education funding. PEN AMERICA, supra note 19 at 46 (“the main plan for enforcing it – you’ll note the bill doesn’t have a penalty worked into it – but the plan for enforcement is through the budgeting process”).

\(^{37}\) Jeremy Young & Jonathan Friedman supra note 25.


\(^{39}\) See Virgil v. School Bd. of Columbia County, Fla., 862 F.2d 1517, 1520-1525 (11th Cir. 1989).
preparing citizens to meaningfully participate in our democracy and
inculcating community values is interconnected with the advancement of
knowledge through academic freedom. Specific legal challenges to anti-
CRT bills include claims based on Substantive Due Process, First
Amendment, and Equal Protection (and, possibly, local school board
control) grounds.

A. Substantive Due Process and Who Decides on Curriculum

In the early part of the Twentieth century, the United States
Supreme Court twice invalidated – under the substantive due process
provisions of the Fourteenth Amendment – state statutory provisions
prohibiting instruction regarding a particular subject and requiring school
children attendance at public, as opposed to private religious, schools. In
Meyer v. Nebraska, the Supreme Court held that a state law banning the
teaching of German to children under a certain age violated parents’ liberty
interests in raising their children in the manner of their own choosing, as
well as “the right of the individual . . . to engage in any of the common
occupations of life, to acquire useful skills” – both of which are protected
under substantive due process principles. In Pierce v. Society of Sisters,

40 Keyishian, 385 U.S. at 603.
41 Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters,
268 U.S. 510 (1925).
42 Meyer, 262 U.S. at 399.
the Court extended its decision in *Meyer* to the right to send children to private religious schools.\(^{43}\)

In *Meyer*, the Supreme Court made clear, however, that its holding, while striking down Nebraska’s prohibition on German language instruction at certain grade levels, did not generally limit “the state's power to prescribe a curriculum for institutions which it supports.”\(^{44}\) Thus, post-*Meyer*, numerous lower courts have rejected parental substantive due process challenges to curricular decisions affecting instruction in school districts and schools by either expressly or implicitly relying on *Meyer*'s language limiting the breadth of its holding.\(^{45}\)

\(^{43}\) *Pierce*, 268 U.S. at 534.

\(^{44}\) *Meyer*, 262 U.S. at 402. Similarly, in *Pierce*, the Court stated that “[n]o question is raised concerning the power of the state reasonably to regulate all schools …; to require that … certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.” 262 U.S. at 534.

\(^{45}\) *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005), amended by 447 F.3d 1187 (9th Cir. 2006) (rejecting parents' substantive due process challenge to having elementary school children complete a questionnaire containing sex-related questions); *see also Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 396 (6th Cir. 2005) (rejecting due process challenge to a public school dress code, stating “[w]hile parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child” and emphasizing that issues of public education are “generally committed to the control of state and local authorities”); *Brown v. Hot, Sexy & Safer Prods.*, Inc., 68 F.3d 525, 532–34 (1st Cir. 1995) (upholding compulsory high school sex education assembly program over a “right to rear children” due process challenge stating, “[i]f all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems …”); *Leebaert v. Harrington*, 332 F.3d 134, 46
The First Circuit’s decision in *Parker v. Hurley* is particularly instructive. In *Parker*, the parents of public-school children brought substantive due process, free exercise, and state law claims against various school officials and administrators and one teacher challenging their implementation of Massachusetts statutory and regulatory law requiring public schools to “inculcate respect for the cultural, ethnic and racial diversity of the commonwealth,” as well as respect for diverse families, same-sex couples and gay marriage in their curricula. After the district court granted the defendants’ motions to dismiss the parents’ federal constitutional claims, the parents appealed.

The First Circuit affirmed. Specifically, regarding the parents’ substantive due process claims, the Court of Appeals reiterated the Supreme Court’s admonitions in *Meyer* and *Pierce* that substantive due process principles do not generally limit the state’s ability to regulate

142 (2d Cir. 2002) (explaining that the fundamental right to control the upbringing and education of one's child does not include “the right to tell public schools what to teach or what not to teach him or her”), all cited in Jones v. Boulder Valley Sch. Dist. RE-2, No. 20-CV-03399-RM-NRN, 2021 WL 5264188, at *16 (D. Colo. Oct. 4, 2021)

46 514 F.3d 87 (1st Cir. 2008).
47  Id. at 90-92, 94.
49  *Parker*, 514 F.3d at 90.
50  Id. at 95, 107.
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1] curriculum in public schools\textsuperscript{51} and further stated that the “proposition is well recognized” that “parents … do not have a constitutional right to ‘direct how a public school teaches their child.’”\textsuperscript{52} The Court of Appeals concluded its analysis by stating “the substantive due process clause … , either in its parental control or its [familial] privacy focus, does not give plaintiffs the degree of control over their children’s education that their requested relief seeks.”\textsuperscript{53} And, after analyzing and rejecting the parents’ free exercise claim, the Court of Appeals concluded regarding both the due process and religion claims that “[p]ublic schools often walk a tightrope between the many competing constitutional demands made by parents, students, teachers, and the schools’ other constituents. … The balance the school struck here does not offend the Free Exercise or Due Process Clauses of the U.S. Constitution.”\textsuperscript{54}

Certainly, there are aspects of state legislative enactments of anti-CRT bills that parallel the social climate existing in Nebraska and Oregon in the 1920s when the Supreme Court struck down on substantive due process grounds the laws at issue in those two states. As recounted in \textit{Meyer}, Nebraska banned the teaching of German to students in certain

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\textsuperscript{51} \textit{Id.} at 102, citing \textit{Meyer}, 262 U.S. at 402 and \textit{Pierce}, 268 U.S. at 534; \textit{see supra} note 44 and accompanying text.
\textsuperscript{52} \textit{Parker}, 514 F.3d at 102 (quoting \textit{Blau}, 401 F.3d at 395); \textit{see supra} note 45.
\textsuperscript{53} \textit{Id.} at 102-103.
\textsuperscript{54} \textit{Id.} at 107.
grade levels due to the influx of German immigrants to the United States and heated anti-German sentiments after World War I.\textsuperscript{55} Specifically, the State argued it needed to prevent foreigners from raising their children in a way that “inculcate[d] in them the ideas and sentiments foreign to the best interests of this country.”\textsuperscript{56} Similarly, underlying the \textit{Pierce} decision, the Oregon legislature enacted its requirement that all school children living within its borders attend public schools largely based on anti-Catholic and nativist sentiment.\textsuperscript{57} Anti-CRT bills likewise rely heavily on the idea that teachers are inculcating anti-American values through Critical Race Theory and unfairly painting America as fundamentally racist.\textsuperscript{58} In addition, as pointed out by the Supreme Court in \textit{Meyer}, the Nebraska law at issue had a deleterious effect on students’ ability to acquire useful skills.\textsuperscript{59} So too the anti-CRT bills. In today’s economy, corporations are

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\textsuperscript{55} See \textit{Meyer}, 262 U.S. at 398.
\textsuperscript{56} Id.
\textsuperscript{57} See Justin R. Chapa, Comment, \textit{Stripped of Meaning: The Supreme Court and the Government as Educator}, 2011 B.Y.U. Educ. & L. J. 127, 132 n. 31 (2011) (“[I]n \textit{Pierce}, … the Court struck down an Oregon initiative that effectively abolished private schools. Although one would not learn of it from reading the Court’s opinion, the law had been passed during a time of rising anti-Catholic and nativist sentiment and was promoted by a then-influential Ku Klux Klan.”) (citing Paula Abrams, Cross Purposes: \textit{Pierce} v. Society of Sisters and the Struggle over Compulsory Public Education 7-14 (2009)).
\textsuperscript{58} Mike Lee, \textit{Critical race theory attacks what it means to be an American}, \textsc{Mike Lee US Senator for Utah} (July 14, 2021) \url{https://www.lee.senate.gov/2021/7/critical-race-theory-attacks-what-it-means-to-be-an-american}.
\textsuperscript{59} \textit{Meyer}, 262 U.S at 399.
increasingly interested in hiring and retaining employees who understand diversity and know how to navigate an increasingly diverse society in a culturally sensitive way.\textsuperscript{60} Anti-CRT bills -- which restrict the ability of schools and teachers to teach about issues of race and diversity-- may leave students unprepared to enter the evolving workforce of the Twenty-first century.

These parallels notwithstanding, courts evaluating anti-CRT bills as against substantive due process challenges will likely rely upon and apply the Supreme Court’s strongly worded dicta in \textit{Meyer} (and \textit{Pierce}) limiting challenges to state curricular policy decisions (some of which emanate from the opposite end of the ideological spectrum than anti-CRT legislation), just as the lower courts did in rejecting those challenges in \textit{Parker}\textsuperscript{61} and the other above-cited cases.\textsuperscript{62} Thus, although \textit{Meyer} and \textit{Pierce} continue to be cited as essential sources of parents’ rights concerning their children’s education and, more broadly, concerning substantive due process rights, courts have more often relied on cases and principles outside the two seminal Supreme Court decisions when

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\textsuperscript{60} See University of Idaho, \textit{The Micron Foundation Commits Over $1 Million to Promote Greater Diversity in Engineering in Idaho}, UNIVERSITY OF IDAHO (February 03, 2022) \url{https://www.uidaho.edu/news/news-articles/news-releases/2022/020322-microngift}.
\textsuperscript{62} See \textit{supra} note 45.
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evaluating states’ regulation of education.\textsuperscript{63} Indeed, in more recent case law, when a court strikes down a state law pertaining to education, it is much more likely to do so on freedom of speech or equal protection grounds.\textsuperscript{64} Especially with a current Supreme Court that has been critical of an expansive interpretation of substantive due process rights, it is not likely that a purely substantive due process challenge to anti-CRT bills would succeed.\textsuperscript{65}

\textbf{B. First Amendment Challenges and Concerns}

\textbf{1. Vagueness – Due Process and First Amendment Issues}

The strongest argument against Critical Race Theory bills -- and the one that has been most successful thus far -- comes from vagueness challenges. The Due Process clause of the Fourteenth Amendment requires that statutes or executive orders not be so vague that they violate

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\textsuperscript{64} \textit{Id.} For a brief discussion concerning challenging anti-CRT bills on substantive due process grounds under \textit{Meyer}, and, more generally, for an informative discussion of other legal theories under which anti-CRT bills might be challenged, see Essay, Joshua Grutzmann, \textit{Fighting Orthodoxy: Challenging Critical Race Theory Bans and Supporting Critical Thinking in Schools}, 106 Minn. L. Rev. Headnotes 333, 345 and 345-353 (2022).
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\textsuperscript{65} See Dobbs v. Jackson Women’s Health Org., 142 S.Ct. 2228, 2301 (2022) (Thomas, J., concurring) (“As I have previously explained, ‘substantive due process’ is an oxymoron that ‘lacks any basis in the Constitution.’”) (quoting \textit{Johnson v. United States}, 576 U.S. 591, 607 (2015)).
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the free speech provisions of the First Amendment. Specifically, the principle of vagueness overlap with First Amendment principles because vagueness is considered extra worrisome when laws impose a chilling effect on free speech.

The courts in Santa Crux Lesbian and Gay Comm. Center v. Trump, Honeyfund.com v DeSantis, Pernell v. Florida Board of Governors of State University System, and Loc. 8027, AFT-N.H., AFL-CIO v. Edelblut relied primarily on the vagueness of the term “divisive concepts” or the like and their component parts in granting preliminary injunctions or denying a motion to dismiss in favor of plaintiffs. Santa Crux Lesbian and Gay Comm. Center and Honeyfund.com dealt with private employers’ ability to conduct trainings that promote the “forbidden concepts” emanating from the above-discussed Trump Executive Order

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66 Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (holding a statute whose prohibitions were not clearly defined and, as a result, did not give persons of ordinary intelligence a reasonable opportunity to know what was allowed or proscribed, and encouraged arbitrary and discriminatory enforcement violated due process).

67 F.C.C. v. Fox Television Stations, 567 U.S. 239, 253-254 (2012) (“When speech is involved, rigorous adherence to those [vagueness] requirements is necessary to ensure that ambiguity does not chill protected speech.”).

and Florida statutory law, while Pernell and Local 8027 addressed the right and ability of university professors and K-12 teachers and other educators, respectively, to engage in teaching relating to those same forbidden concepts. These cases are illuminating because, although the speech rights of private actors and teachers and, indeed, university professors and K-12 teachers, differ in important respects, the laws are no less vague in these several contexts.

In Santa Cruz Lesbian and Gay Comm. Center, the district court held that the above-quoted “divisive concepts” in the original Trump executive order which had inspired anti-CRT bills and related interpretive information issued by the Department of Labor were not understandable by persons of ordinary intelligence sufficient to allow them to conform their conduct with the requirements of the law and, as such, were void for vagueness. Specifically, the court, after extensive analysis, found and concluded as follows:

… The Court agrees … that Sections 4 and 5 of the Executive Order are so vague that it is impossible for Plaintiffs to determine what conduct is prohibited. For

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71 Santa Cruz Lesbian and Gay Comm. Center, 508 F.Supp.3d at 544.
example, Section 4 requires a contractor to agree not to “inculcate in its employees” certain concepts, including the concept that “an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.” … Section 5 directs agency heads to identify programs for which grants may be conditioned on the recipient's certification that it will not use federal funds to “promote” certain concepts, among them the same concept identified above that “an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.” …

As set forth in Plaintiffs’ declarations and discussed above, training on unconscious bias is critical to Plaintiffs’ missions and their work. … Plaintiffs do not know whether they can continue with this critical training, or if it runs afoul of Sections 4 and 5. …

The district court further found and concluded that the FAQs propounded by the Department of Labor (“DOL”) did not clarify the

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72 *Id.* at 543-544.
ambiguity in the provisions of the Executive Order and, indeed, only made it worse, stating that

The ambiguity regarding the conduct prohibited by Sections 4 and 5 is only exacerbated by the DOL FAQs. With respect to training on unconscious bias, the FAQs state that “[u]nconscious or implicit bias training is prohibited to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously.” … However, such training is not prohibited “if it is designed to inform workers, or foster discussion, about preconceptions, opinions, or stereotypes that people – regardless of their race or sex – may have regarding people who are different, which could influence a worker’s conduct or speech and be perceived by others as offensive.” … The line between teaching or implying (prohibited) and informing (not prohibited) “is so murky, enforcement of the ordinance poses a danger of arbitrary and discriminatory application.” … “[T]his lack of clarity may operate to 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.”

In *Honeyfund.com*, the statute in question was Florida’s Individual Freedom Act (IFA) – also casually referred to as the STOP WOKE Act – promoted and signed into law by Florida Governor Ron DeSantis. Although one provision of the bill prevented the teaching of the eight forbidden concepts in schools, another provision defined “unlawful employment practice” as any mandatory training that promotes the eight forbidden concepts. The court primarily took issue with the vagueness of two of the IFA’s concepts. Concept one, which prohibited endorsing the belief that “members of one race, color, sex, or national origin are morally superior to members of another race,” did not clearly define what constituted endorsing “moral superiority” beyond the most obvious examples of racism. Many of the court’s concerns with “moral superiority” apply equally to the education context. Thus, the court wondered if an employer, during a mandatory seminar on dispute resolution, cites the civil disobedience exemplified by Martin Luther King Jr. and Mahatma Gandhi as a

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73 Id. at 544.
75 Id. at 1168.
76 Id. at 1181-82.
peaceful, preferred approach. Has that employer ‘inculcated’ the belief that Black and Asian people are morally superior to White People? ... Or, by training its employees on Holocaust awareness, does the beloved softshell jacket company Summit Ice ‘espouse’ the view that Jewish people are morally superior to Gentiles?77

Without more clarity, the IFA was susceptible to “arbitrary and discriminatory” enforcement, a malady against which due process was meant to protect -- especially in important areas like freedom of speech.78

Concept four of the IFA offended vagueness principles even more.79 Specifically, Concept four employs “the rarely seen triple negative, resulting in a cacophony of confusion.”80 because the law stated, “employers cannot endorse the view that ‘[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.’”81 The triple negative left the IFA so vague that a person of ordinary intelligence would not be able to determine what was prohibited.82

77 Id. at 1182.  
78 Id.  
79 Id. at *13.  
80 Id. (quoting Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys. 938 F.3d 424, 437 n.2 (3d Cir. 2019)).  
81 622 F.Supp.3d at 1182 (emphasis in original).  
82 Id.
In concluding its analysis, the court held that the entire bundle of concepts were vague because the statute granted permission to discuss the concepts objectively as long as the discussion did not cross over into endorsement or promotion.\textsuperscript{83} The court further opined that drawing the line between objective discussion and endorsement would be so difficult that plaintiffs would need to self-censor to avoid running afoul of the law, especially where contentious terms like “objective” come into play.\textsuperscript{84}

More recently, in \textit{Pernell}, the same district court that struck down the IFA’s “unlawful employment practices” and training provisions prohibiting private sector employers from engaging in instruction on the eight forbidden concepts on vagueness grounds in the \textit{Honeyfund.com} matter reached the same conclusion concerning the provisions affecting instruction and teaching by plaintiffs state university professors.\textsuperscript{85} The court commenced its Order Granting in Part and Denying in Part Motions for Preliminary Injunction with a broadside, stating as follows:

\begin{quote}
It was a bright cold day in April, and the clocks were striking thirteen,” and the powers in charge of Florida’s public university system have declared the State has unfettered authority to muzzle its professors in the name
\end{quote}

\textsuperscript{83} \textit{Id.} at 1183-84.
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} 2022 WL 16985720 at **42-48.
of “freedom.” To confront certain viewpoints that offend the powers that be, the State of Florida passed the so-called “Stop W.O.K.E.” Act in 2022—redubbed (in line with the State’s doublespeak) the “Individual Freedom Act.” The law officially bans professors from expressing disfavored viewpoints in university classrooms while permitting unfettered expression of the opposite viewpoints. Defendants argue that, under this Act, professors enjoy “academic freedom” so long as they express only those viewpoints of which the State approves. This is positively dystopian. It should go without saying that “[i]f liberty means anything at all it means the right to tell people what they do not want to hear.”\(^\text{86}\)

In Part IV.D. of its Order in Pernell, the district court largely adhered to its reasoning concerning the arguments made by the new parties in the higher education context.\(^\text{87}\) Specifically, the court, after emphasizing the additional importance of academic freedom in the public university setting (an issue not present in Honeyfund.com (or Santa Cruz Lesbian and

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\(^{86}\) Id. at *1 (citations omitted).

\(^{87}\) Id. at **42-48.
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Gay Comm. Center),\textsuperscript{88} again determined that several of the IFA’s eight forbidden concepts were ambiguous and vague – particularly, concept four’s multiple negative phraseology and the savings clause “objectivity” provision – such that the professors could not determine what speech was prohibited and what speech was protected.\textsuperscript{89}

Similarly, within the past few months in Local 8027, a New Hampshire federal district court had before it several amendments to New Hampshire state law provisions that prohibit the teaching or advocacy of four concepts in the K-12 setting, which concepts largely track the divisive or forbidden concepts in the Trump Executive Order and Florida’s STOP WOKE Act.\textsuperscript{90} The district court denied the defendant state officials’ motion to dismiss, concluding that plaintiffs teachers and other educators and their unions (among other plaintiffs) had stated claims for relief sufficient to support their challenge on due process and related First Amendment vagueness grounds.\textsuperscript{91} In so holding, the district court stated that

[T]he principal problem with the amendments … [is that]

they do not give teachers fair notice of what they can and

\textsuperscript{88} Id. at *41 (“Plaintiffs’ free speech claims present an interest in academic freedom of the highest degree”).
\textsuperscript{89} Id. at **44-48.
\textsuperscript{90} 2023 WL 171392 at *2 & n.2.
\textsuperscript{91} Id. at **7-16.
cannot teach. Teachers can be sanctioned for speech … [when] they do not intend to advocate a banned concept. They can be sanctioned even for speech that is later deemed to violate the amendments only by implication. Because teachers can lose their jobs and teaching credentials if they cross the line into prohibited speech, they should not be left to guess about where that line will be drawn.

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[T]he amendments’ vague terminology, their lack of a scienter requirement, and the possibility that teachers could be found liable for teaching a banned concept by implication, leave both teachers and enforcers to guess at what speech the amendments prohibit. Given the severe consequences that teachers face if they are found to have taught or advocated a banned concept, plaintiffs have pleaded a plausible claim that the amendments are unconstitutionally vague.92

92 Id. at **14 and 16. In addition to concluding that the Local 8027 plaintiffs had stated claims for relief under void-for-vagueness principles against the New Hampshire amendments and defendant state officials, the district court held that, because the amendments arguably proscribe teacher extracurricular and off-duty speech with students concerning banned concepts and because the state officials had not addressed that aspect of plaintiffs’ claims, the court refused to
Regarding vagueness challenges in the K-12 context, the same Florida court that struck down the employment provisions of the STOP WOKE Act did not grant a preliminary injunction as to its educational provisions regulating elementary and secondary school teachers because the court found and concluded that plaintiffs were unlikely to prove standing. That said, the educational provisions of the Florida bill target many of the same forbidden concepts -- including vague terms like “morally superior,” as well as confusing triple negatives, while also providing the same vague carve-out for objective discussion – as the employment provisions in the Florida law (which, as discussed above, are similar to the New Hampshire K-12 provisions). The court in the Florida K-12 case, although holding that the case was not justiciable, emphasized it was not endorsing the educational components of the bill and strongly suggested that serious concerns remain when the government takes steps to dismiss plaintiffs’ First Amendment claims under the Pickering-Connick balancing test. Id. at **6-7. For a discussion of legal limits on the regulation of K-12 teacher off-duty speech (and conduct), see John E. Rumel, Beyond Nexus: A Framework for Evaluating K-12 Teacher Off-Duty Conduct and Speech in Adverse Employment and Licensure Proceedings, 83 U. Cin. L. Rev. 685 (2015). Falls, 609 F.Supp.3d at 1283; see supra note 36 and accompanying text. In contrast, the district court in Pernell, in an exceedingly comprehensive analysis, held the university professor plaintiffs had standing to bring their constitutional challenges against the IFA’s education provisions. 2022 WL 16985720, **13-14 and 17-30. Falls, 609 F.Supp.3d at 1278-1280.
to ban teaching and instruction of displeasing ideas in public elementary and secondary schools.\textsuperscript{95}

Although the above-discussed Florida and New Hampshire state law cases are far from final resolution, they represent what will likely be the most successful legal challenge -- especially regarding anti-CRT laws that prohibit compulsion or promotion. When a K-12 teacher takes the time to teach about a concept, he, she, or they inherently endorse(s) that concept (at least in a general sense), and the line between when an educator teaches about an idea that exists “objectively” is too undefined to give teachers sufficient notice to allow them to conform their conduct to comply with requirements of anti-CRT laws. In a perverse sense, however, the bills that completely ban teaching divisive concepts may be less vague and, therefore, may not violate due process. For these latter types of bills, litigants will need to advance -- and courts will need to evaluate and apply -- other legal principles, such as other free speech and equal justice protections.\textsuperscript{96}

\textsuperscript{95} \textit{Id.} at 1288. The district court judge, notwithstanding his concerns about the substance of the Florida state law as it applied to K-12 schools, eventually dismissed the case without prejudice on the grounds that plaintiffs lacked standing. Falls v. DeSantis, Case No. 4:22cv166 MF/MWF, 2023 WL3568526 (N.D. Fla. May 19, 2023).

\textsuperscript{96}Enactment of anti-CRT laws concerning K-12 schools as well as legal challenges to them has not been limited to state legislatures. During Summer 2022, one Ohio school board approved a resolution banning “Critical Race Theory, intersectionality, identity, or anti-racism curriculum” from school district educational programs. Updike v. Jonas, Case No. 1:22-CV-374, 2023 WL 63
2. **Overbreadth**

In *Honeyfund.com* and *Pernell*, the plaintiffs argued that the IFA’s provisions were constitutionally infirm on overbreadth grounds. In both cases, the district court rejected the plaintiffs’ argument, stating that “[w]hile laws that fail to clearly define their prohibitions are void for vagueness, ‘[a] clear and precise enactment may nevertheless be “overbroad” if in its reach it prohibits constitutionally protected conduct’” and further that “[o]verbroad laws violate the First Amendment because they punish ‘a “substantial” amount of protected free speech, “judged in relation to the statute's plainly legitimate sweep.”’ The court concluded in both cases that the overbreadth doctrine did not apply to the IFEA, stating in *Honeyfund.com* that

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7036295, *1 (S.D. Ohio Oct. 26, 2023). Shortly thereafter, several parents and teachers brought suit in federal court against the school district and its school board under vagueness, overbreadth, content and viewpoint discrimination, academic freedom, and equal protection theories. *Id.* As of this writing, the district court had not yet ruled on the merits of the plaintiffs’ claims, but recently decided that the plaintiffs had standing to sue. *Id.* at **2-4.

97 *Honeyfund.com*, 622 F.Supp.3d at 1185; *Pernell*, 2022 WL 16985720 at *49. In *Santa Cruz Lesbian and Gay Comm. Center*, plaintiffs attempted to assert an overbreadth argument at oral argument on their motion for preliminary injunction. 508 F.Supp.3d at 645 n.3. However, because plaintiffs failed to argue overbreadth grounds in their briefing on the motion, the district court refused to consider the merits of the overbreadth argument in ruling on the motion. *Id.*


… Plaintiffs argue that the IFA improperly chills a substantial amount of protected free speech in relation to its “plainly legitimate sweep.” … Indeed, Plaintiffs contend that the IFA has “zero ‘plainly legitimate sweep,’” … and this Court agrees. … [T]he IFA unconstitutionally discriminates on the basis of viewpoint in violation of the First Amendment and is impermissibly vague in violation of the Fourteenth Amendment. Thus, under either ground, the IFA has no legitimate sweep. And the very concept of overbreadth presupposes that there is some legitimate sweep. So, because the IFA has no legitimate sweep, the overbreadth doctrine does not apply.\(^\text{100}\)

Thus, the IFA was not subject to overbreadth challenge only because the anti-CRT statutes woefully failed to satisfy other constitutional requirements.

\(^{100}\) *Honeyfund.com*, 622 F.Supp.3d at 1185. The *Pernell* court used essentially identical language in reaching the same conclusion. 2022 WL 16985720 at *49.
3. Academic Freedom, Government Speech and Viewpoint Discrimination

Academic freedom and freedom from viewpoint discrimination have long been core First Amendment principles in the college and university setting. However, in K-12 schools, the legal landscape is different. In primary and secondary schools, based largely on the government speech doctrine and the Supreme Court’s decision in *Garcetti v. Ceballos*, teachers have essentially no academic freedom concerning speech and pedagogy related to curriculum. Thus, in *Garcetti*, the Court

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101 See *Keyishian*, 385 U.S. at 603 (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”) and *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant … Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).


103 Both pre- and post-*Garcetti*, federal Courts of Appeals and district courts have almost universally held that teachers do not enjoy academic freedom in K-12 schools. See *Brown v. Chicago Board of Education*, 824 F.3d 713, 716 (7th Cir. 2016) (teacher “speech in a … primary or secondary school” governed by *Garcetti*’s “official duties” standard, with no carve-out for academic freedom); *Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 066 (9th Cir. 2011) (“*Ceballos*’s ‘academic freedom’ carve-out… applied to teachers at “public colleges and universities,” … not primary and secondary school teachers”); *Evan-Marshall v. Board of Educ. of Tipp City Exempted Village School Dist.*, 624 F.3d 332, 344 (6th Cir. 2010) (“Even to the extent academic freedom, as a constitutional rule, could somehow apply to primary and secondary schools, that does not insulate a teacher's curricular and pedagogical choices from the school board's oversight … It is the educational institution that has a right to academic freedom, not the individual teacher”); *Mayer v. Monroe County Comm. School Corp.*, 474 F.3d 477, 480 (7th Cir. 2007) (“The Constitution does not entitle teachers to
held that when public employees speak as part of their official duties, they are not entitled to protection from retaliation by their employer under the First Amendment. In addition, under the government speech doctrine, present personal views to captive audiences against the instructions of elected officials’); Loc. 8027, AFT-N.H., AFL-CIO, 2023 WL 171392 at *6 (“the First Amendment does not protect the curricular speech of primary and secondary school teachers”); Boring v. Buncombe County Board of Educ., 136 F.3d 364, 370 (4th Cir. 1998) (holding that “the school, not the teacher, has the right to fix the curriculum”); but cf. Lee v. York County School Div., 484 F.3d 687, 694 n. 11 (4th Cir. 2007) (Court of Appeals, without analysis, declined to apply Garcetti’s “official duties” limitation in K-12 school teacher speech setting).

547 U.S. at 421. Discussing Garcetti, one scholar has pointed out that because the government effectively hires “official duty” speech, it is the government speech to control …. The Court offered one potential caveat to the broad rule of Garcetti, noting that it was not deciding whether “expression related to academic scholarship or classroom instruction” was included in official-duty speech because of academic freedom concerns. … This caveat echoes the Court’s respect for teachers’ academic freedom and personal political freedom expressed during the 1960s in Shelton v. Tucker… and Keyishan [sic] v. Board of Regents… Although the Court did not specify, it seems much more likely the Garcetti caveat applies, if at all, in the higher education context rather than in the elementary/secondary education context because courts historically have been extremely reluctant to recognize academic freedom rights for elementary and secondary teachers, while the concept of academic freedom has become fairly robust in the college and university setting. …

Kristi L. Bowman, The Government Speech Doctrine and Speech in Schools, 48 Wake Forest L. Rev. 211, 254 (2013). Thus, as discussed immediately above, Courts of Appeals have invariably refused to apply the Garcetti academic freedom carve-out or caveat to speech by K-12 teachers, see supra note 103 and accompanying text; however, Courts of Appeals and district courts have either recognized and applied Garcetti’s academic freedom carve-out (or prior academic freedom decisions of the Supreme Court) to protect public university professor speech either generally or when it relates to teaching and scholarship, Meriwether v. Hartop, 924 F.3d 492, 505 (7th Cir. 2021); Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014); Adams v. Trustees of Univ. No. Carolina, Wilmington, 640 F.3d 550, 562-564 (4th Cir. 2011); Pernell, 2022 WL
the Supreme Court has made clear that when the government is the speaker, it may engage in viewpoint discrimination without violating the First Amendment:

As we have said, “it is not easy to imagine how government could function” if it were subject to the restrictions that the First Amendment imposes on private speech. … “[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,’ ” …, but imposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to

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16985720 at **9-12, or have acknowledged that Garcetti’s academic freedom carve-out applies or likely applies to some professor speech in the public university setting, but did not apply to the case before it because the professors’ speech was too attenuated from their teaching and scholarship official duties. Gorum v. Sessoms, 561 F.3d 179, 186 (3rd Cir. 2009); Sadid v. Vailas, 936 F.Supp.2d 1207,1224-1226 (D. Idaho 2013); Rushing v. Board of Supervisors of Univ. of Louisiana System, Civil Action No. 06-623, 2011 WL 6047097, **3-4 (M.D. La. 2011).
maintain viewpoint neutrality when its officers and employees speak about that venture. 105

Thus, a district court, applying this doctrine and upholding a K-12 school board’s curricular choice concerning teaching about possible American involvement in genocide, stated as follows:

Public officials have the right to recommend, or even require, the curriculum that will be taught in public school classrooms. Doing so is a form of government speech, which is not generally subject to First Amendment scrutiny. There is no requirement that such government speech be balanced or viewpoint neutral. Rather, public officials generally have the right to decide what should be taught in the effort to prepare students for citizenship.

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[T]he Supreme Court has repeatedly emphasized that decisions concerning the content of public education are, except in limited circumstances not applicable here, to be left to the exercise of discretion by state and local officials

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rather than made by federal judges. … As also described earlier, decisions concerning curriculum are a form of government speech which is generally immune from First Amendment scrutiny by the courts.\textsuperscript{106}

Anti-CRT bills constitute government speech since state legislatures step into the shoes of local school boards to enact statewide laws specifying and proscribing the content of curriculum concerning issues of race.\textsuperscript{107} Although anti-CRT legislation clearly limits the ability of teachers to exercise academic freedom concerning curricular choices and clearly discriminates against certain Critical Race Theory-supportive speech on the basis of viewpoint, the above-discussed case law concerning government speech allows such limitations and proscription in K-12

\textsuperscript{106} Griswold v. Driscoll, 625 F.Supp.2d 49, 54 and 64-65 (D. Mass. 2009), \textit{aff'd on other grounds}, 616 F.3d 53 (1st Cir. 2010).

\textsuperscript{107} To be sure, curricular content and viewpoint choices at the K-12 school district level are typically made by local school boards. \textit{See} Cary v. Board of Education, 598 F.2d 535, 543 (10th Cir. 1979). However, federal or state legislative choices about content and viewpoint in government-sponsored programs constitute government speech with that doctrine’s concomitant laxity concerning scrutiny of viewpoint discrimination. \textit{See, e.g.}, \textit{Rust v. Sullivan}, 500 U.S. 173, 178–83 (1991) (where a federal law allocated Title X funds to doctors for family-planning purposes, the First Amendment did not bar the government from controlling its own speech and thus allowed it to forbid doctors from discussing abortion as a medical option with patients in the federally funded program); \textit{ACLU v. Bredesen}, 441 F.3d 370, 375 (6th Cir.2006) (Tennessee statute that permitted residents to pick “Choose Life” license plates, but not license plates with pro-choice messages upheld because “when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes”).
For these reasons, challenges to anti-CRT statutes laws based on academic freedom and anti-viewpoint discrimination principles in the K-12 context will not likely succeed in the courts.109

108 For an informative article discussing anti-CRT laws and suggesting that the government speech doctrine should be modified by continuing to apply the doctrine regarding what curriculum is taught in K-12 public schools, but not applying the doctrine to how the curriculum is delivered by K-12 teachers and instructors, see Tess Bissell, Note, Teaching in the Upside Down: What Anti-Critical Race Theory Laws Tell Us About the First Amendment, 75 Stan. L. Rev. 205, 247-56 (2023); see also Mary Lindsay Krebs, Note, Can’t Really Teach: CRT Bans Impose on Teachers’ First Amendment Pedagogical Rights, 75 Vand. L. Rev. 1925, 1952-55 (2022) (likewise focusing on teacher instructional speech).

109 At least one commentator has suggested that anti-CRT bills might be subject to First Amendment challenge under the Supreme Court’s decision in Board of Educ., Island Trees Union School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) where a plurality of the Justices held that students have a constitutional “right to receive information and ideas.” Id. at 867. See Dylan Salzman, Comment, The Constitutionality of Orthodoxy: First Amendment Implications of Laws Restricting Critical Race Theory in Public Schools, 89 U. Chi. L. Rev. 1069, 1079-1082 (2022). However, in Pico itself, the plurality distinguished the facts of the case, i.e., school board removal of books from the school library where significant First Amendment issues are implicated, with more general curricular decisions vested in the board, stating that “however much discretion may be limited in the instance of the library, where “the regime of voluntary inquiry ... holds sway,” a school board “might well defend [a] claim of absolute discretion in matters of curriculum by reliance on their duty to inculcate community values.” 457 U.S. at 869 (emphasis in original); see also Griswold v. Driscoll, 616 F.3d at 54 and 56-60 (distinguishing Pico, and affirming district court decision holding that school board had near absolute discretion under the government speech doctrine to modify curriculum re teaching genocide and human rights); but cf. Pernell, 2022 WL 16985720 at *13 (relying on Pico and stating, at the university level, “[i]t logically follows that a university student’s First Amendment right to receive a professor’s viewpoints should flow from that professor’s First Amendment right to express those viewpoints, for the former cannot be said to exist without the latter.”) and González v. Douglas, 269 F.Supp.3d 948, 972 (D. Ariz. 2017) (citing to Pico, but misinterpreting the plurality’s holding by stating with regard to K-12 schools, “[s]tudents have a First Amendment right to receive information and ideas, ... a right that applies in the context of school curriculum design ...”). Thus, unless and until the Supreme Court removes curricular decisions of public officials from the government speech category and, instead, treats them akin to school library book removal, a Pico-based challenge will not be successful at the K-12 public school level.
C. Racial Discrimination and Equal Protection

Although Critical Race Theory is a new concern to most people, conflicts about the practice of discussing race in school are not new at all. In 2010, the Arizona legislature passed a law that directly led to the elimination of Mexican American Studies courses in Tucson public schools. The courts’ struggle to apply the equal protection clause to the law could be illuminating for how an equal protection claim might play out against anti-CRT bills.

The Arizona law at issue, A.R.S. §15-112(A), initially withstood a challenge that it facially violated the equal protection clause. The ideas targeted by the law were identifiably precursors to the ideas targeting in anti-CRT bills, such as the prohibition on classes that “promote resentment toward a race or class of people,” or “advocate ethnic solidarity instead of the treatment of pupils as individuals.” The Ninth Circuit found the statute not to be discriminatory on its face and therefore not immediately subject to equal protection challenge. The Court, however, did not foreclose the possibility of subsequent equal protection challenges and a later decision in Gonzalez v. Douglas held the law was discriminatory in

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100 González, 269 F.Supp.3d at 963.
101 Arce v. Douglas, 793 F.3d 968, 977 (9th Cir. 2015).
102 Id. at 973.
103 Id. at 977.
104 Id.
both intent and implementation.\textsuperscript{115} In the second challenge to the Arizona statute, the court pointed out that a law that is not racially discriminatory on its face may still face equal protection challenge if racially discriminatory motives underlie its enactment or enforcement.\textsuperscript{116} The court next reiterated the factors set forth by the Supreme Court in \textit{Arlington Heights v. Metro Housing Dev. Corp.} regarding determining if there was an improper racial purpose underlying the bill.\textsuperscript{117} The \textit{Arlington Heights} factors are as follows:

(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 sequences leading to the challenged action; (4) the defendant’s departures from normal procedures or substantive conclusions; and (5) the relevant legislative or administrative history.\textsuperscript{118}

Applying the \textit{Arlington Heights} factors, the \textit{Gonzalez} district court held that the Arizona statute was “enacted and enforced with a discriminatory purpose” – namely, “anti-Mexican–American attitudes.”\textsuperscript{119}

\begin{thebibliography}{99}
\bibitem{115} 269 F.Supp.3d 948 (D. Ariz. 2017).
\bibitem{116} \textit{Id.} at 964.
\bibitem{118} \textit{Id.}
\bibitem{119} \textit{Id.} at 965-972 and 972.
\end{thebibliography}
Specifically, the evidentiary record in Gonzalez that led to the successful equal protection challenge included, among other facts, that (1) the senator who sponsored the bill -- and who became interested in shutting down the classes after confrontations with students from those classes -- had made comments in an anonymous blog post which revealed racial or ethnic animus towards Mexicans\(^\text{120}\) and (2) in enforcing the law, state officials only shut down Mexican American Studies classes, while similar courses relating to other ethnic groups were never investigated or suspend.\(^\text{121}\)

Similarly, in the above-discussed Pernell matter,\(^\text{122}\) the Florida district court noted in a separate opinion that plaintiffs, in addition to asserting First Amendment challenges to Florida’s STOP Woke Act, had brought an equal protection claim which alleged that the Florida legislature enacted the statute with the intent to discriminate on the basis of race.\(^\text{123}\) Although not ruling on the merits of plaintiffs’ equal protection claim, the district court granted in part and denied in part defendants Florida legislators’ motion to quash subpoenas seeking discovery of information concerning their intent in enacting the statutory provision.\(^\text{124}\)

Specifically, the district court prohibited discovery concerning the

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\(^{120}\) Id. at 959.

\(^{121}\) Id. at 955.

\(^{122}\) See supra at notes 85-89 and accompanying text.


\(^{124}\) Id. at **1 and 7.
legislators’ motivation and mental impression under long-established principles of legislative privilege.\textsuperscript{125} However, the court, pointing to the \textit{Arlington Heights} factors relating to proof of discriminatory intent, allowed discovery into documents containing factually based information used in the legislative decision-making process or disseminated to legislators or committees, including committee reports and other studies and analyses.\textsuperscript{126}

On appeal, the Eleventh Circuit reversed that portion of the district court’s order requiring production of the factual documents in the Florida legislators’ possession.\textsuperscript{127} In so holding, the Court of Appeal stated as follows:

[The plaintiffs served the subpoenas on the legislators to “determin[e] whether there was a discriminatory motive behind the [Act].” By the plaintiffs’ own admission, the subpoenas’ purpose was to uncover the legislators’ motives in passing the law. “The privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments.”]

\textsuperscript{125} \textit{Id.} at *2.
\textsuperscript{127} \textit{Pernell v. Fla. Bd. of Governors of State Univ.}, 84 F.4th 1339, 1343–45 (11th Cir. 2023).
… So, the privilege applies with its usual force against the discovery of even the factual documents in the Florida legislators’ possession. The district court abused its discretion when it determined otherwise.128

Specifically, the Court of Appeal rejected the district court’s conclusion that the legislative privilege was qualified and might have to give way where important federal interests were involved, concluding that To be sure, the legislative privilege may yield “where important federal interests are at stake, as in the enforcement of federal criminal statutes.” United States v. Gillock, 445 U.S. 360, 373, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980). But the district court decided that “the exception to [the] legislative privilege extends beyond the circumstances identified in Gillock” to include the facts of this case because the vindication of a “public right that impact[s] thousands of faculty and students” is “at least as important as—if not more important” than—prosecuting criminals.

This extension was erroneous. The Supreme Court has never expanded the Gillock exception beyond criminal

128 Id. at 1343-44 (citations omitted).
cases. … Not only is a private action under section 1983 “not a federal criminal investigation,” …, but the Supreme Court declared in Gillock that “a state legislator's common-law absolute immunity from civil suit survived the passage of the Civil Rights Act of 1871.” In … light of Gillock …, we cannot except civil-rights actions from the application of the legislative privilege.129

The Eleventh Circuit concluded by rejecting “the plaintiffs’ argument that the privilege must give way when the claim depends on proof of legislative intent,” stating as follows.

The Supreme Court has described legislative immunity as “indispensably necessary” as it “support[s] the rights of the people, by enabling their representatives to execute the functions of their office.” … “A court proceeding that probes legislators’ subjective intent in the legislative process is a ‘deterrent[ ] to the uninhibited discharge of their legislative duty.’ ” … [W]e cannot create an “exception whenever a constitutional claim directly implicates the government's intent” because “that exception would render the privilege ‘of little value.’ ” …

129 Id. at 1344 (citations omitted).
“The claim of an unworthy purpose does not destroy the privilege.”… “This holds true even when constitutional rights are at stake.\textsuperscript{130}

Thus, the Eleventh Circuit, although not opining on the merits of the plaintiffs’ equal protection challenge to Florida’s anti-CRT law, made it more difficult for plaintiffs to prove their claim by requiring them to prove the state legislators’ intent to discriminate on the basis of race based on evidence outside the information protected by the legislative privilege.

Lastly, in plaintiffs’ challenge to Oklahoma’s anti-CRT bill in \textit{Black Emergency Response Team v. O’Connor}, they also rely heavily on the equal protection clause.\textsuperscript{131} The plaintiffs emphasized the legislature’s unconventional use of “emergency” legislative processes to enact the bill and further highlighted the legislature’s expressed racial sentiment that the Black Lives Matter organization was akin to the Ku Klux Klan.\textsuperscript{132} The plaintiffs ultimately claimed the legislature was targeting diverse groups “with the purpose to discriminate against students of color by chilling and suppressing Inclusive Speech aimed at enhancing the educational, social, civic experiences of students of color.”\textsuperscript{133} While these circumstances

\textsuperscript{130} \textit{Id.} at 1345 (citations omitted).
\textsuperscript{131} \textit{Black Emergency Response Team v. O’Connor}, No. 5:21CV01022 (W.D. Okla. 2021), Complaint at 71.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.} at 72.
certainly show an aberration from the normal enactment process and the legislature’s mind set concerning issues of race, they lack some of the specificity present in Gonzalez. Although the parties in Black Emergency Response Team have filed and briefed motions for preliminary injunction and to dismiss, respectively, no decisions by the district court on the motions have been reported.

In sum, although challenges to anti-CRT bills are in their early stages, they may benefit from the equal protection jurisprudence developed against similar legislation enacted and implemented in Arizona in the pre-Trump era.

D. Local Control

This Article has primarily focused on constitutional challenges under Federal law to anti-CRT bills. There may also be unique challenges solely available under state Constitutions. Every State creates its

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educational system through a constitutional provision requiring the legislature to establish a system of public education.\textsuperscript{136} A number of these provisions include defined distributions of power between the legislature and local school boards. Generally, school boards, even while constitutionally created act under delegated authority from the State legislature.\textsuperscript{137} Some case law, however, has established a doctrine of local control. The theory of local control follows the same logic as federalism in our constitutional system: the unit of government closest to the people is best suited to serve their interests and adopt responses concerning issues facing the locality while acting as “laboratories” of democracy.\textsuperscript{138} Local control theories challenge the amount of power state legislatures should have over school districts and generally seek to maximize the power and control of school boards, the unit of government closest to the people being served. Much of the litigation in the area of local control has focused on


\textsuperscript{138} Kimberly Jenkins Robinson, \textit{Disrupting Education Federalism}, 92 Wash. L. Rev. 959, 970 (2015) (referencing Justice Brandeis’ famous words that “[d]enial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. ” \textit{New State Ice Co. v. Liebmann}, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
school financing; however, the local control doctrine can illustrate important principles that may inform how a state Supreme Court might address anti-CRT bills.

The most expansive version of local control has been seen in Colorado. The Colorado Supreme Court has interpreted the local control provision of the Colorado Constitution as a limitation on the legislature’s authority. Most recently, in Owens v. Colorado Congress of Parents, Teachers, and Students, the Colorado Supreme Court held that a law requiring locally generated school district funding to go to charter schools violated the local control provision of the state constitution. An essential element of the local control provision was the district’s control over the curriculum it funds. According to the state high court, requiring local funds to fund charter school curricula over which the district has no control violated the constitutional provision.

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140 Board of Educ. of School Dist. No. 1 v. Booth, 984 P.2d 639, 648 (1999) (en banc) (quoting School Dist. No. 16 v. Union High Sch. No. 1, 60 Colo. 292, 294 (Colo. 1915)) (“legislature’s action ‘clearly interfered’ with the district’s control of instruction [which] . . . requires substantial discretion regarding the character of instruction that students will receive at the district’s expense.”).
142 Id. at 940.
143 Id.
Because most of the case law has arisen in the context of funding disputes and charter schools, the Colorado Supreme Court has not weighed in specifically on curricula bans. However, local control principles easily apply to curricula bans. If the state legislature bans school boards from including specific topics or points of view in its curricula, then the legislature has divested school boards of control over the curricula that it funds. The legislature’s stepping in to ban what and how teachers may teach – and thereby wresting that decision from school boards – violates principles of local control, which place curriculum choices in the hands of the unit of government closest to the people it represents. If school districts and their teachers categorically cannot teach certain topics, then they will have been denied substantial discretion in instructional decisions protected or mandated by the local control doctrine.\textsuperscript{144}

Ultimately, local control principles may not prove fundamental in challenging many anti-CRT bills. Colorado does not have an anti-CRT bill so, although Colorado is the state that has most developed the theory of local control, there may not be an opportunity to test the theory as against a state-enacted anti-CRT law in that forum. Most states do not have local

\textsuperscript{144} For a self-described “toolkit” decrying state legislative intervention into what traditionally has been a local school district matter relating to curriculum, see Preemption of Critical Race Theory and Other Curricular Decisions, Local Solutions Support Center (lasted updated April 2022), https://www.supportdemocracy.org/issuespecific-preemption-guides/preemption-of-critical-race-theory-amp-other-curriculum-decisions.
control provisions and, of the few that do, the courts have been less interested in reading the provisions as expansively as the Colorado Supreme Court. For example, Florida, where challenges to anti-CRT provisions have been heavily litigated, has a local control provision in its constitution. But Florida courts, unlike courts in Colorado, have not read their local control clause broadly; instead, they have recognized that “[t]he State’s ‘broader supervisory power may at times infringe on a school board’s local powers, but such infringement is expressly contemplated – and in fact encouraged by the very nature of supervision – by the Florida Constitution.”

States that do not have local control provisions have been even more hostile to the general concept of local control as a limitation on state legislative authority to regulate education. Thus, the Supreme Court of Wyoming has recognized that the intent of the framers of the Wyoming Constitution “mandate[d] that the state, not local boards, through the legislature, control the system of education.” In other words, although local control principles play a substantial role in the development of

146 School Board of Collier County v. Florida Department of Education, 279 So.3d 281, 286-87 (Fla. Dist. Ct. App. 2019); see also Board of Public Instruct. of Brevard County, 231 So.2d 1, 4 (Fla. S. Ct. 1970) (holding that the State legislature could require locally raised funds to go to schools outside the school board’s control).
148 Id. at 1272.
education policy, the state legislature must determine the extent of that control.\textsuperscript{149}

Given that one of the major purposes of public education is to inculcate community values, it makes sense that courts generally give the legislature wide latitude in regulating education, which may include curriculum bans. While the principles underlying local control mitigate against the legislature interfering with curriculum minutia, school boards generally will be subject to the supervision of the state legislature, which includes the ability to ban the teaching of certain curriculum provided the ban is not subject to other constitutional challenges.

\textbf{IV. Recommendations for K-12 School Stakeholders and their Legal Representatives}

Coupled with the meritorious legal challenges discussed above, K-12 school stakeholders would do well to adopt a multi-faceted approach to avoid or respond to anti-CRT legislation.

First, K-12 education stakeholders – school districts and their administrators and school board members, teachers and their unions, and parents of school age children -- should communicate with state policymakers about the importance of inculcating a full understanding of

\textsuperscript{149} Id.
the United States’ troubled racial history, the benefits of and need for Diversity, Equity and Inclusion training for teachers and students, and the low incidence of Critical Race Theory pedagogy occurring in K-12 schools. For these reasons, those same stakeholders should urge those state policymakers that anti-CRT bills are a solution in search of a problem. Second, school stakeholders should familiarize themselves with the type of anti-CRT bill proposed or enacted in their jurisdiction. While the anti-CRT bills have a common theme, their variety of specific provisions and enforcement mechanisms make each one a different animal. These variations also make it difficult to predict how the several types of bills will fare against legal challenges. As such, familiarity will only take stakeholders so far. Third, since most of the bills vest enforcement in the school district, students, or parents of students, teachers and school district leaders can avoid being on the receiving end of a legal challenge concerning these bills by forging and maintaining positive relationships with school district parents and patrons. This may not be as difficult as it seems in the currently heated political climate because, even as tension rises around these issues and attacks on teachers

150 See supra note 32 and accompanying text.
151 See supra notes 17 and 60 and accompanying text.
152 See supra note 15 and accompanying text.
153 Jeremy Young & Jonathan Friedman supra note 25.
and school officials appear all too often in the press, a large majority of parents still report being happy with their school district and the teachers in it. Fourth, and related, given the likely variable success of legal challenges to anti-CRT laws, K-12 school stakeholders seeking to avoid or challenge anti-CRT bills should focus on both the political process -- by electing like-minded student- and teacher-centered candidates for state political office and by speaking out against anti-CRT bills -- and by bringing well-placed legal challenges against such legislation. Ultimately, though, the vast majority of anti-CRT laws adopted in states across the nation -- with their focus on banning training, teaching and advocacy regarding so-called “divisive concepts” or “woke” ideas concerning race and racial relations in the United States -- have themselves been the manifestation of an unprecedented racially divisive and constitutionally wanting political agenda where factual analysis and data-driven policymaking have been at a low ebb. On this score, Northern District of Florida chief judge Mark Walker cogently stated in one of his several opinions concerning Florida’s STOP WOKE Act as follows:

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155 Anya Kamenetz, The education culture war is raging. But for most parents, it’s background noise. NPR (April 29, 2022 5:00 AM).
It is not lost on this Court that … [George] Orwell, in the original preface to his iconic political satire of the rise of Joseph Stalin, *Animal Farm*, was responding to the liberal elites of his time. According to Mr. Orwell, the censoring of *Animal Farm* was merely a symptom of the fashionable orthodoxy of that era—namely, an “uncritical admiration of Soviet Russia.” … So too, here, the State has responded to fears of “woke indoctrination” in university classrooms [and other educational settings]. But rather than combat “woke” ideas with countervailing views in the “marketplace of ideas,” the State has chosen to eliminate one side of the debate. … [I]n the name of combatting “indoctrination” of one perceived orthodoxy, the State allows for “indoctrination” in its preferred orthodoxy.\textsuperscript{156}

As such, at this juncture, and given the breakdown in the political process, the most effective antidote to anti-CRT bills and laws may well be found in the courts.

\textsuperscript{156}Pernell, 2022 WL 16985720 at *1 n. 5.
CONCLUSION

Anti-CRT bills have made an already fraught political and legal landscape for K-12 school stakeholders even more fraught. Coming during and after Covid-19 and the difficulties caused by on-line learning, the controversy over teaching Critical Race Theory and the enactment of anti-CRT bills have placed schools and their employees in a difficult, if not precarious, position. Although much of the concern over Critical Race Theory does not match what is actually happening in schools, school officials and teachers can expect conflicts between legislatures and educators to continue to arise as objections and challenges to anti-CRT laws – which laws constitute misguided, imbalanced and divisive forms of state-enacted policymaking – play out in the political arena and work their way through courts.