William & Mary Bill of Rights Journal

Volume 31 (2022-2023)
Issue 2 The Problem of Mass Incarceration: Diagnosis and Reform

Article 9

12-2022

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INDOCTRINATION BY ELIMINATION: WHY BANNING CRITICAL RACE THEORY IN PUBLIC SCHOOLS IS UNCONSTITUTIONAL

Emma Postel*

INTRODUCTION

This Note argues that Texas public school students' First Amendment Rights have been violated by the passage of Senate Bill 3 (SB 3), which bans the teaching of Critical Race Theory (CRT) in K–12 public schools. The First Amendment is violated here because (1) students have a First Amendment right to speech, and this law bans protected speech; (2) students have a right to receive information, and this ban prevents them from receiving information; and (3) schools are meant to be the marketplace of ideas for students and banning CRT amounts to unconstitutional viewpoint discrimination. This Note does not suggest that CRT must be added to all public school curricula, given that CRT was not taught in K–12 public school students prior to this ban. Instead, this Note argues that an outright ban violates students' constitutional rights under the First Amendment.

While it is true that schools are special environments within the context of the First Amendment where students have more limited First Amendment rights, the Supreme Court has made clear that students' fundamental First Amendment rights remain, and that while courts will not generally intervene in schools' issues, they will intervene when fundamental constitutional rights are infringed.[1] This Note argues that CRT bans, like those of Texas and other states, are an example of such an infringement.

First, this Note will discuss what Critical Race Theory is, and why Texas and other states have tried to ban it. Second, this Note will discuss what First Amendment rights students have, and argue that this ban violates those rights. This Note specifically examines a student's right to speak and a student's right to receive information under the First Amendment. Finally, this Note will argue that rather than protecting the educational system and its students, as the proponents of this law argue, this ban actually counteracts the values and mission of the country's public education system and constricts the ability of students to grow into members of society capable of participating in an increasingly diverse and complex world.

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[1] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

I. WHAT IS CRITICAL RACE THEORY?

Very broadly, Critical Race Theory (CRT) is an analytical framework which argues that race is a social construct, and that racism is "embedded in legal systems and policies."[2] CRT emerged in the 1970s, 1980s, and 1990s in response to frustrations surrounding academic analysis of race in modern society.[3] In the legal field, for example, critics often felt that "the law was divorced from social context."[4] Instead of a "color-blind" analysis of societal issues (an approach meant to specifically ignore race), CRT theorists sought to bring race into conversations about society.[5] CRT was used as an analytical approach "that 'encourage[s] us to move past the superficial explanations that are given about equality and suffering, and to ask for new kinds of explanations.'"[6] Essentially, CRT was a new way to approach the study of racism in American society.

CRT's genesis may be attributed to Harvard Law School (HLS) and the departure of Professor Derrick Bell.[7] Bell was the first Black professor at HLS to receive tenure, and was one of the "first legal scholars to be critical of the court victories that civil rights lawyers had secured in the 1950s and 1960s—victories that had brought formal racial equality to the country[,]"[8] pushing back against the assumptions that these cases "actually reflected the desires and needs of the marginalized people . . . ."[9] Bell further pushed back against the prevailing attitudes that the United States "was well on its way to expunging itself of racial injustice."[10]

Bell later left HLS, frustrated that no Black female professors had been hired or given tenure.[11] As a result, the classes he taught—classes that directly confronted race in the legal system—disappeared.[12] HLS refused to hire a Black professor to replace Bell and revive these courses, claiming that "there was no [B]lack professor

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[2] Stephen Sawchuck, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WEEK (May 18, 2021), https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05 [https://perma.cc/ZC93-A532]. Critical Race Theory is complex. My introduction to it here is only a brief overview for the purposes of this Note. For a more in-depth discussion about CRT, see generally RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (3d ed. 2017).

[3] Sawchuck, *supra* note 2.

[4] KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 25 (2019).

[5] *Id.* at 21.

[6] Isabella Zou, *What Is Critical Race Theory? Explaining the Discipline that Texas' Governor Wants to "Abolish"*, TEX. TRIB. (June 22, 2021, 5:00 AM), https://www.texastribune.org/2021/06/22/texas-critical-race-theory-explained/ [https://perma.cc/2UVT-VKB6].

[7] *See* BRIDGES, *supra* note 4, at 22.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *See id.* at 22–23.

[12] *See id.* at 23.

alive that could meet HLS's standards of excellence in hiring."[13] The school did offer a minicourse that would touch on civil rights issues, but students protested, arguing that the minicourse was not an adequate replacement for Bell's courses.[14] As a result, students "boycotted the school's minicourse . . . [and] organized an 'Alternative Course' that they could take instead . . . [which] featured law professors of color from other institutions who were invited to give lectures that offered critical analyses of the relationship between law and race."[15] Kimberlé Crenshaw, one of the students at the protests, stated "it was one of the earliest attempts to bring scholars of color together to address the law's treatment of race from a self-consciously critical perspective."[16] From here, CRT grew into the theory it is today.

CRT consists of a few central ideas. First, CRT theorists argue that race is a social construction rather than a biological one.[17] Ian Haney Lopez, a prominent scholar of this concept, states the idea as "historically contingent systems of meaning that attach to elements of morphology and ancestry."[18] Or, in other words, "physical traits of race always have been imagined to correlate with nonphysical traits."[19] López further elaborates on the idea that race has never been "*solely* about bodies. Rather, it always has been about what those bodies mean in terms of mental, emotional, and political capacities."[20]

Second, CRT scholars frequently focus on "institutional racism" rather than "individual racism."[21] For instance, an example of individual racism would be if a white store owner refused to allow Black people into their store. A result of institutional racism would be if in a single town significantly more Black children dropped out of school than white children, or if in that same town "five hundred black babies die[d] each year because of the lack of proper food, shelter, and medical facilities."[22] Critically, institutional racism lacks intent.[23] CRT recognizes that the policies and laws that result in these instances of institutional racism were not put into place specifically to create these inequities, or in other words they "do not have racial subordination as their purpose or design."[24] The racism instead can come from "white privilege" or "implicit biases," both of which are discussed briefly below.[25]

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[13] *Id.* at 23.
[14] *See id.*
[15] *Id.*
[16] *Id.*
[17] *See id.* at 123.
[18] *Id.* at 127–28.
[19] *Id.* at 129.
[20] *Id.*
[21] *Id.* at 147.
[22] *Id.*
[23] *See id.* at 148.
[24] *Id.*
[25] *See infra* notes 26–28, 32–34 and accompanying text.

Third, CRT theorists are interested in exploring implicit racial biases, or those biases that a person might not be aware that they have.[26] These can be tricky to study, as someone's implicit bias will often contradict what they report when asked.[27] However, CRT seeks to study these biases to understand, for instance, how institutional racism emerges.[28]

Fourth, CRT theorists examine racial microaggressions.[29] A racial microaggression is a "brief and commonplace daily verbal, behavioral and environmental indignit[y], whether intentional or unintentional, that communicate[s] hostile, derogatory, or negative racial slights and insults to the target person or group[.]"[30] These microaggressions are studied in the context of a subject being constantly barraged with them, and how these microaggressions feed into societal structure.[31]

Fifth, CRT examines white privilege, or the idea that being white is an advantage in modern society.[32] Peggy McIntosh, who popularized the term in an essay, offered some examples of white privilege:

> When I am told about our national heritage or about "civilization," I am shown that people of my color made it what it is. I do not have to educate my children to be aware of systemic racism for their own daily physical protection. I can worry about racism without being seen as self-interested or self-seeking. I can take a job with an affirmative action employer without having my coworkers on the job suspect that I got it because of my race. I can choose blemish cover or bandages in "flesh" color and have them more or less match my skin. I can be late to a meeting without having the lateness reflect on my race.[33]

CRT theorists use white privilege as another means of explaining the existence of institutional racism.[34]

Sixth, CRT theorists focus on the intersection between race and class, as "[p]eople of color disproportionately bear the burdens of poverty in the U.S. today."[35] CRT examines how each of the topics mentioned above contribute to this fact.

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[26] *See* BRIDGES, *supra* note 4, at 157.
[27] *See id.* at 159.
[28] *See id.*
[29] *See id.* at 181.
[30] *Id.* (quoting Derald Wing Sue et al., *Racial Microaggressions Against Black Americans: Implications for Counseling*, 86 J. COUNSELING & DEV. 330, 330 (2008)).
[31] *See* BRIDGES, *supra* note 4, at 183.
[32] *Id.* at 195.
[33] *Id.* at 195–96.
[34] *Id.* at 198–99.
[35] *Id.* at 215.

Furthermore, as an underpinning to the themes discussed above, CRT scholars emphasize intersectionality, or the concept that various interactions between race, gender, socioeconomic status, cultural identity, etc., can affect how a person is treated in modern society.[36] For instance, CRT theorists would challenge the idea that all Black people face the same challenges.[37] As an example, Black women might face different challenges than Black men or white women.[38] Recognition and analysis of these various factors is key to understanding how society operates in relation to each of its citizens.

CRT generally rejects the "color-blind" approach to addressing issues of institutional racism.[39] The "color-blind" approach suggests that race should be ignored all together, in an effort to contrast with past blatantly racist discriminatory policies.[40] CRT argues that this approach does nothing to address the institutional racism that is embedded in this country, aiming instead to ignore it, in the hope that racism will cease to exist.[41]

Finally, CRT recognizes that addressing these systemic issues is very difficult because racism is ingrained in American society and institutions, but at the same time is not often discussed, whether it be through "color-blind" efforts to increase equality or discomfort with the topic.[42]

However, even within CRT there are distinctions in thought. One subset emphasizes, as noted previously, that race is a social construction, or in other words a "matter[] of thinking, mental categorization, attitude, and discourse," and confronting these thoughts is a means of combatting systemic racism.[43] On the other hand, another area of CRT thought believes that race is a "means by which society allocates privilege and status" and relies on evidence from the history of racial oppression around the world.[44]

In sum, CRT is an analytical method through which history and current society can be studied, typically in the context of legal instruction, with the ultimate aim of understanding the prevalence of racial discrimination today, so that we may more effectively work to eliminate it.

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[36] *Id.* at 233.

[37] *Id.*

[38] *Id.*

[39] *See id.* at 7 ("Critical Race Theory ['CRT'] proceeds from the opposite assumption. It takes the vignettes that open this chapter as incontrovertible evidence that race remains highly significant in the present-day U.S.").

[40] *See* Adia Harvey Wingfield, *Color Blindness Is Counterproductive*, ATLANTIC (Sept. 15, 2015), https://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037/ [https://perma.cc/QD7W-4PFQ].

[41] *See* Monnica T. Williams, *Colorblind Ideology Is a Form of Racism*, PSYCH. TODAY (Dec. 27, 2011), https://www.psychologytoday.com/us/blog/culturally-speaking/201112/colorblind-ideology-is-form-racism [https://perma.cc/49G5-JQB7].

[42] DELGADO & STEFANCIC, *supra* note 2, at 8–9.

[43] *Id.* at 21.

[44] *Id.*

II. WHY HAS CRT BEEN BANNED?

Before the passage of anti-CRT laws, the theory had not generally been taught in American public schools (K–12).[45] CRT is commonly taught in college and graduate level classes, but this Note focuses on the bans that target K–12 public schools, specifically Texas' SB 3.[46] However, it is important to note that the anti-CRT laws currently being passed across the country largely contain the same or very similar language, and thus result in comparable laws.[47] Additionally, even though these laws are advertised as "anti-CRT" bans, these laws rarely mention CRT by name in the actual text of the law.[48] Instead, they try and target what they incorrectly believe to be the tenants of CRT, for instance banning a teacher from introducing a lesson or topic that suggests that one race is "inherently superior" to another.[49] This Note focuses on Texas as just one example of an unconstitutional law banning CRT.

The animus against CRT has been building for some time.[50] It hit a critical point when the *New York Times* published the 1619 Project.[51] The 1619 Project "aims 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."[52]

This report was interpreted by many, mostly (but not entirely) conservatives, to be an "un-American" effort to divide Americans based on race.[53] Not long after the publication of the report, President Trump signed Executive Order No. 13,950

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[45] Zou, *supra* note 6.

[46] TEX. EDUC. CODE ANN. § 28.0022 (West 2021).

[47] *Compare* EDUC. § 28.0022, *and* ARIZ. REV. STAT. ANN. § 15-171.02 (West 2021), *with* H.B. 377, 66th Leg., 1st Reg. Sess. (Idaho 2021), *and* N.D. CENT. CODE ANN. § 15.1-21-11.1 (West 2021), *and* OKLA. STAT. ANN. Tit. 70, § 24-157 (West 2021), *and* H. 4100, 124th Sess. (S.C. 2021–2022), *and* TENN. CODE ANN. § 49-6-1019 (West 2021). As an example, each of these laws bans the teaching of any material that suggests that one race is "inherently" "superior" to another race. In addition to the above, Alabama, Alaska, Arkansas, Florida, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, West Virginia, Wisconsin, and Wyoming are all considering legislation banning CRT.

[48] Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS, https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/ [https://perma.cc/T5MW-WJDM] (last visited Dec. 8, 2022).

[49] *See, e.g.*, *supra* note 47 and accompanying text.

[50] *See, e.g.*, Bryan Anderson, *Critical Race Theory Is a Flashpoint for Conservatives, but What Does It Mean?*, PBS NEWSHOUR (Nov. 4, 2021), https://www.pbs.org/newshour/education/so-much-buzz-but-what-is-critical-race-theory [https://perma.cc/M68L-F3HA].

[51] Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html [https://perma.cc/T32F-RAWR]; *see Educational Gag Orders*, PEN AM., https://pen.org/report/educational-gag-orders/ [https://perma.cc/RHS2-2T9Y]; *see also* Anderson, *supra* note 50.

[52] Silverstein, *supra* note 51.

[53] *Educational Gag Orders*, *supra* note 51, at 5.

which forbid "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 Executive Order (EO) also prohibited the US military from offering training or courses in any such concepts."[54] In the lead up to this Executive Order, President Trump claimed "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."[55] From here, efforts to prevent anything conservatives deemed to be promoting these "divisive concepts" continued, including the passage of laws banning CRT in public school classrooms.[56] Put simply, the term "Critical Race Theory" has been coopted to label any anti-discrimination effort.

In the wake of the 1619 project, the Executive Order, and the laws banning CRT, what CRT actually represents was lost. The dominant narrative espoused by those opposed to the theory is that CRT teaches that white people are inherently racist as a byproduct of their race, and that teaching this analytical framework will lead to a more divisive country.[57] CRT does not teach this.[58] These anti-CRT laws therefore are based on a false premise and arguments in support of them rely on misinformation. In addition, the vague language of these bans results in confusion over what teachers may and may not discuss in their classrooms.[59] While CRT may not be explicitly mentioned in many of these statutes, this uncertainty, as well as the legislative intent publicized around these bans, effectively leads to a ban not only on CRT, but on any discussion that hints at discussions of race. As a result of misinformation and

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[54] *Id.* at 20.

[55] *Id.* at 18.

[56] Anderson, *supra* note 50.

[57] *See* Ian Richardson, *Iowa Gov. Kim Reynolds Signs Law Targeting Critical Race Theory, Saying She's Against 'Discriminatory Indoctrination'*, DES MOINES REG. (June 8, 2021, 7:41 AM), https://www.desmoinesregister.com/story/news/politics/2021/06/08/governor-kim-reynolds-signs-law-targeting-critical-race-theory-iowa-schools-diversity-training/7489896002/ [https://perma.cc/B23Y-NECR] ("Critical Race Theory is about labels and stereotypes, not education. It teaches kids that we should judge others based on race, gender or sexual identity, rather than the content of someone's character . . . ."); *see also* Lauren Camera, *Federal Lawsuit Poses First Challenge to Ban on Teaching Critical Race Theory*, U.S. NEWS & WORLD REP. (Oct. 20, 2021, 3:57 PM), https://www.usnews.com/news/education-news/articles/2021-10-20/federal-lawsuit-poses-first-challenge-to-ban-on-teaching-critical-race-theory [https://perma.cc/A3DJ-TDFF]; *see also* Karen Sloan, *Law School Association: Banning Critical Race Theory is Censorship*, REUTERS (Aug. 5, 2021, 11:37 AM), https://www.reuters.com/legal/government/law-school-association-banning-critical-race-theory-is-censorship-2021-08-04/ [https://perma.cc/B5UD-H9LE]; *see also* Fabiola Cineas, *Critical Race Theory Bans Are Making Teaching Much Harder*, VOX (Sept. 3, 2021, 11:30 AM), https://www.vox.com/22644220/critical-race-theory-bans-antiracism-curriculum-in-schools [https://perma.cc/JG2L-TC8K].

[58] BRIDGES, *supra* note 4, at 21–22.

[59] Zou, *supra* note 6.

overbroad language, the anti-CRT laws that ban the teaching of CRT from K–12 public schools violate students' First Amendment rights, specifically the students' right to receive information and their right to a freedom of expression.

In Texas, banning CRT is a politically charged issue.[60] Nationally, CRT is also up for debate, with some claiming the theory itself is racist[61] and others saying that trying to ban CRT is "targeting any teachings that challenge and complicate dominant narratives about the country's history and identity."[62] Texas Lt. Governor Dan Patrick believes that CRT "maintain[s] that one race or sex is inherently superior to another race or sex or that any individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive."[63] Conservative news media fueled the drafting and passage of similar laws across multiple states banning CRT from being taught in public schools.[64] In banning the teaching of the theory, these states believe they are protecting their students from a theory that might cause disruptions or emotional distress to certain students.[65]

The Texas law[66] at issue never specifically names Critical Race Theory, but instead tries to ban it and similar conversations regarding racial issues, through common misconceptions of CRT. Some examples of this include:

1. "one race or sex is inherently superior to another race or sex."[67] CRT does not suggest that one race is inherently superior to another, as if there was a biological advantage of one race over another.[68] CRT teaches that over the course of American history the white race has established itself as the dominant, most privileged race in this country, and that the societal, legal, and governmental systems in place keep it that way.[69] By 'dominant race' CRT theorists mean, for example, that the poverty rate amongst white people is lower than that of people of color, or that people of color are less likely to own a home than their white counterparts.[70]
2. "an individual, by virtue of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously."[71] This is a common misconception about CRT. CRT does not focus on

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Ray & Gibbons, *supra* note 48.
[65] *See* TEX. EDUC. CODE ANN. § 28.0022 (West 2021); *supra* note 47 and accompanying text.
[66] EDUC. § 28.0022.
[67] *Id.*
[68] *But see* DELGADO & STEFANCIC, *supra* note 2, at 20–21.
[69] *See* BRIDGES, *supra* note 4, at 215–18.
[70] *Id.*
[71] EDUC. § 28.0022.

the individual, but rather on the systems and the society as a whole.[72] In fact, when discussing institutional racism, CRT theorists often specifically note that these institutions are not set up with racial subordination as a goal.[73] Therefore, CRT would not teach that an individual—or in this case, what the critics are concerned about, a student learning about CRT—that they are inherently racist based on their race.

3. "an individual should be discriminated against or receive adverse treatment solely or partly because of the individual's race."[74] CRT does not teach that someone "should" be discriminated against based on their race.[75] It *does* teach, however, that people of color are more likely to be on the receiving end of racism in this country.[76] The theories about where exactly this systemic racism comes from and how it manifests itself today differ among CRT theorists depending on their viewpoints, but none of them suggest that a person's race results in a determination that they "should" be discriminated against.[77]

As written, this ban reaches farther than just CRT and can prevent teachers from discussing any race issues in their classrooms.[78] This leads to confusion, as well as dismay later in life when students realize just how much they missed in their K–12 educations.[79] In essence, then, the Texas ban, and others like it, are attempting to censor any discussion of American history or current events that involves race in public schools.

III. THE TEXAS LAW SB3, AND THE OTHERS LIKE IT, VIOLATE STUDENTS' FIRST AMENDMENT RIGHTS

Putting aside the misconceptions regarding CRT, banning the theory from being taught in schools violates students' First Amendment rights. As of the drafting of this Note, the author is aware of no federal cases directly dealing with the banning of Critical Race Theory in public schools and a student's right to free expression and to receive information. Therefore, this Note aims to analogize banning CRT to other situations involving students' First Amendment rights within public schools in order

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[72] BRIDGES, *supra* note 4, at 123, 147, 215, 233.

[73] *Id.* at 148.

[74] EDUC. § 28.0022.

[75] *See supra* notes 17–33 and accompanying text.

[76] *Id.*

[77] *Id.*

[78] Brittany Wong, *'Critical Race Theory'? Here's What Teachers Say They're Actually Teaching*, HUFFPOST (July 7, 2021, 1:45 PM), https://www.huffpost.com/entry/teachers-talk-critical-race-theory_l_60ec85cae4b01f1189519da6 [https://perma.cc/ECC7-ZWRD].

[79] *See* Cineas, *supra* note 57; *see also* Ray & Gibbons, *supra* note 48.

to show how these CRT bans are similar—and therefore unconstitutional—or can be distinguished from those bans found to be constitutional.

A. Students' First Amendment Right to Speech and Expression in School

Public schools have traditionally had significant control over the speech and expression of their students and teachers.[80] In *Hazelwood School District v. Kulmeier*, for instance, the Supreme Court held that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[81] However, in the same breath, they continued, "[i]t is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights."[82] This Note argues that the banning of CRT has no "educational purpose," and therefore would justify "judicial intervention."

A school's control over students' expression is not absolute. In *Tinker v. Des Moines Independent Community School District*, students chose to protest the Vietnam War through wearing black armbands.[83] The school heard about this plan and tried to ban the students from wearing the armbands on campus.[84] The Supreme Court found this ban unconstitutional, holding that it violated the students' expression rights under the First Amendment.[85] The Court specifically addressed the school's fear of disruption, holding that it was not a strong enough interest to deny the students freedom to express themselves peacefully: "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom

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[80] *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."). *See generally* Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1009 (9th Cir. 2000) ("Cases have identified this lesser-protected type of speech as 'school-sponsored speech' or speech that will likely bear the 'imprimatur' of the school."); State v. Webber, 8 N.E. 708, 711 (1886) ("The power to establish graded schools carries with it, of course, the power to establish and enforce such reasonable rules as may seem necessary to the trustees, in their discretion, for the government and discipline of such schools, and prescribing the course of instruction therein."); Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338, 350 (5th Cir. 2017) ("In sum, it is clearly established that a school may compel some speech."); Ronald D. Wenkart, *Public School Curriculum and the Free Speech Rights of Teachers*, 214 EDUC. L. REP. 1 (2006) (discussing how public-school teachers have limited free speech rights as public employees).

[81] 484 U.S. 260, 273 (1988).

[82] *Id.* (quoting Epperson v. Ark., 393 U.S. 97, 104 (1968)).

[83] *See Tinker*, 393 U.S. at 504.

[84] *Id.*

[85] *See id.* at 514.

of expression."[86] In order for a school to ban a student's expression, the school "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[87] The Court was also wary of the ban given that other forms of expression had been permitted, for instance, buttons from political campaigns and even the wearing of the Iron Cross.[88]

In affirming the student's expressive rights, the Court emphasized that allowing different opinions to be expressed in schools is a constitutional mandate: "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk."[89] The *Tinker* Court further held that maintaining the freedom of speech and expression for students in public schools is critical to the development of our nation and the maintenance of the "marketplace of ideas," in allowing "robust exchange of ideas."[90]

By banning CRT, state legislatures are violating this very mandate issued by the Supreme Court. Those who wish to ban CRT specifically cite their fears of "discomfort" or "guilt" they think some students might feel.[91] In *Tinker*, the Supreme Court specifically refused to allow a concern like that to be a reasonable justification for banning certain speech in a school.[92]

Furthermore, the *Tinker* Court held that a fear of a disturbance must be concrete, and not a hypothetical, unsubstantiated concern.[93] There is no clear evidence that shows that teaching CRT, or, for example, discussing issues of race in the context of American history may cause a disturbance that would trigger this threshold. To the contrary,

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[86] *Id.* at 508.

[87] *Id.* at 509.

[88] *Id.* at 510.

[89] *See id.* at 508.

[90] *See id.* at 512 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)) ("'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" (citation omitted)).

[91] *See* Zou, *supra* note 6.

[92] *Tinker*, 393 U.S. at 509 (emphasis added) ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the *discomfort and unpleasantness* that always accompany an unpopular viewpoint.").

[93] *See id.* at 508 ("But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.").

students who have discussed race in their classrooms have reported appreciating the discussions, and those who did not discuss race reported feeling distressed.[94]

As noted above, however, students do not have unlimited rights of expression and speech while in school. In *Morse v. Frederick*, the Supreme Court denied First Amendment protection to students who displayed a pro-drug banner at a school event.[95] The Court found both that the sign had an "undeniable reference to illegal drugs" and could be "[reasonably] interpreted . . . as promoting illegal drug use,"[96] and that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest."[97] Furthermore, in *Hazelwood School District v. Kulmeier*, the Court found that schools have increased authority over school-sponsored publications and activities that other parents and students "might reasonably perceive to bear the imprimatur of the school."[98] The Court held that schools may be permitted to "disassociate" themselves "from speech that would 'substantially interfere with [their] work . . . or impinge upon the rights of other students"[99] or that would "be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order,' . . . or to associate the school with any position other than neutrality on matters of political controversy."[100]

The anti-CRT laws also violate these directives from the Supreme Court. First, under *Morse*, a school must have a "compelling interest" to ban certain speech.[101] In the *Morse* case, the speech they were banning was the promotion of illegal drug activity.[102] This is not comparable to discussion of CRT or related topics. CRT does not promote illegal activity, nor does it cause scientifically proven physical harm to young people like drug use does.[103] CRT is an analytical tool meant to offer an alternative lens through which students may study history and culture, in order to examine and address the pervasive racial inequalities that exist in this country.[104]

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[94] Char Adams, *Here's What Black Students Have to Say About 'Critical Race Theory' Bans*, NBC NEWS (Sept. 1, 2021), https://www.nbcnews.com/now/video/critical-race-theory-what-do-the-kids-think-119961157731 [https://perma.cc/WY2V-U6GH]; Ray & Gibbons, s*upra* note 48.

[95] *See* Morse v. Frederick, 551 U.S. 393, 397 (2007).

[96] *Id.* at 399, 402.

[97] *Id.* at 407 ("School years are the time when the physical, psychological, and addictive effects of drugs are most severe.").

[98] 484 U.S. 260, 271 (1988).

[99] *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) and Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

[100] *Id.* at 272 (quoting *Fraser*, 478 U.S. at 683).

[101] Morse v. Frederick, 551 U.S. 393, 407 (2007) ("Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest.").

[102] *Id.* at 396.

[103] *Id.* at 407.

[104] Zou, *supra* note 6.

The promotion of academic topics already discussed in history and social studies curriculum by way of American slavery and the Civil Rights movement, among other academic topics, cannot be reasonably compared to the promotion of illegal drug use.

Furthermore, in *Hazelwood*, the Court allowed schools to ban speech if it bore the "imprimatur of the school," or, in other words, if the speech could be reasonably interpreted to be coming from the school itself.[105] In this case, should public schools teach CRT (which, again, they are not), it is reasonable to assume that the speech would be perceived to be coming from the school. Schools have previously been allowed to ban articles in student newspapers that discussed divorce and abortion,[106] the rationale being that the speech would be "inconsistent with its basic educational mission."[107]

But CRT speech does not fall under any of the categories that would reasonably allow the school to ban it. CRT is an academic theory, which surely has a place in academic settings, and therefore would not interfere with a school's academic purpose. Schools are preparing young Americans to both enter and become productive, positive contributors to society. Allowing complete discussions of this country's past and present racial problems is a key part of this preparation, and therefore, CRT—and discussions of race in general—are directly serving the mission of public schools. As noted above, CRT does not promote any sort of illegal behavior. CRT seeks to analyze history and culture in a manner that directly addresses racial discrimination, with the ultimate goal of eliminating it.[108] Surely this is a value that our civilized society holds.

Finally, banning CRT is not a neutral act. The Supreme Court allowed schools to have more control over speech that bore their imprimatur if it associated the school with a "position other than neutrality on matters of political controversy."[109] As noted above in Part II, CRT is a politically charged issue. Banning CRT is specifically choosing to not remain neutral. Because CRT is not taught in public schools in the first place,[110] the neutral action would have been to not ban anything. By banning a theory that isn't even being taught, the legislatures in Texas and the other states have specifically taken a side on a contentious political issue, banning speech not because it moves them back into a neutral zone, but banning speech because they don't like it. This goes against the core values of the First Amendment.

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[105] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) ("A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order' . . . or to associate the school with any position other than neutrality on matters of political controversy."); *id.* at 272 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

[106] *See id.* at 260.

[107] *Id.* at 266 (quoting *Fraser*, 478 U.S. at 685).

[108] Zou, *supra* note 6.

[109] *Hazelwood*, 484 U.S. at 272.

[110] Zou, *supra* note 6.

The First Amendment protects the speech that makes us uncomfortable;[111] banning CRT then violates that principle, and the First Amendment that protects it.

B. Students' Right to Receive Information

While public schools may restrict some student speech (for instance, speech that advocates illegal activity[112]), public schools do not have the right to restrict fundamental First Amendment rights of public-school students.[113]

Students have also been held to have a "right to receive" information under the First Amendment.[114] However, just like the student's right to speak, this right must be considered in the more limited and restrictive context of a school.[115] In *Arce v. Douglas*, the Ninth Circuit analyzed the student's right to receive information in the context of school curriculum.[116] While the test generally "implicates the delicate balance between a student's First Amendment rights and a state's authority in educational matters,"[117] there is no set standard for this analysis.[118]

For instance, the Eighth and Eleventh Circuits held that schools must show "legitimate reasons for limiting students' access to information."[119] The Eleventh Circuit Court of Appeals found the removal of books that contained sexually explicit materials comported with the school's "pedagogical concerns."[120] In allowing this

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[111] *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (holding that flag burning is protected by the First Amendment); Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that speech advocating for the use of violence may be banned only if it is likely to produce harm and if the speaker intended to cause harm).

[112] Morse v. Frederick, 551 U.S. 393, 393–94 (2007).

[113] *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[114] *See* Arce v. Douglas, 793 F.3d 968, 983 (9th Cir. 2015) ("Though the facts in *Kuhlmeier are somewhat distinct fro*m this case in that it involved students' right to speak as opposed to right to receive, we agree with the district court that *Kuhlmeier*'s reasoning can be read to establish that state limitations on school curricula that restrict a student's access to materials otherwise available may be upheld only where they are reasonably related to legitimate pedagogical concerns."); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) ("First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them: 'The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it.' . . . 'The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.'") (quoting Martin v. Struthers, 319 U.S. 141, 143 (1943) and Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring)).

[115] *Tinker*, 393 U.S. at 506.

[116] 793 F.3d at 983.

[117] *Id.* at 982.

[118] *See id.* at 982–83.

[119] *Id.* at 982.

[120] Virgil v. Sch. Bd. of Columbia Cnty., 862 F.2d 1517, 1521, 1525 (11th Cir. 1989).

removal, the Court considered one recognized legitimate concern: "'[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics . . . [e.g.,] the particulars of teenage sexual activity.'"[121] Additionally, the court found that the curriculum choices would bear the "imprimatur" of the school, and therefore could be limited by the school.[122]

The Eighth Circuit Court of Appeals found that "the board must establish that a substantial and reasonable governmental interest exists for interfering with the students' right to receive information."[123] In that case, the film, "The Lottery" was "purported[ly]" banned for "graphically plac[ing] an exaggerated and undue emphasis on violence and bloodshed which is not appropriate or suitable for showing in a high school classroom and which has the effect of distorting the short story and overshadowing its many otherwise valuable and educationally important themes."[124] However, while the court noted that it was under the board's authority to determine what content might be too violent or inappropriate for their students, here their actual reason for banning the film was that they found certain themes to be "offensive,"[125] which in turn was found to violate the student's First Amendment rights.[126] The Court here specifically warned that allowing ideological concerns to justify the banning of information from schools would set "a precedent . . . for the removal of any such work."[127]

In the Fifth and Seventh Circuits, the tests laid out gave much more discretion to the schools and school boards. In the Fifth Circuit in *Chiras v. Miller*, the Fifth Circuit Court of Appeals found that a school could limit curricular choices unless the limitation was "motivated by 'narrowly partisan or political' considerations."[128] The Seventh Circuit Court of Appeals similarly practices discretion, except when the school starts venturing towards "indoctrination."[129]

C. Application of Each Test

The First Amendment, through its guarantee of a freedom of speech, also comports a freedom to receive information.[130] This is the right of the students that is being infringed here. By banning the teaching of CRT, the legislature is denying

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[121] *Id.* (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988)).
[122] *Id.* at 1522.
[123] Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn., 670 F.2d 771, 777 (8th Cir. 1982).
[124] *Id.* at 777–78.
[125] *Id.* at 778.
[126] *Id.* at 778–79.
[127] *Id.* at 779.
[128] 432 F.3d 606, 619–20 (5th Cir. 2005).
[129] Arce v. Douglas, 793 F.3d 968, 983 (9th Cir. 2015).
[130] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982).

the students the opportunity to receive instruction in this theory, and in related topics, therefore violating their First Amendment rights.

In *Arce v. Douglas*, the Ninth Circuit Court of Appeals laid out the various standards set by the Courts of Appeals across the country for analyzing whether or not a school may ban certain information from a school.[131] If a court were to apply these standards, they would find that the CRT ban is not constitutional under any test set out by the Courts of Appeals.

1. The CRT Ban Fails the Eighth Circuit's Test

If a court were to use the Eighth Circuit's test that there must be a legitimate reason for limiting the student's access to the information, the argument for banning CRT falls apart. The arguments for banning CRT are based on serious misrepresentations of the theory, and in some cases are flat out false.[132] For instance, a common conception is that CRT teaches that white people are inherently racist.[133] This is not true. CRT suggests that the systems that this country is founded upon were built to favor white people, and therefore seemingly neutral actions can actually turn out to be disadvantageous to people of color.[134] In fact, when discussing institutional racism, for example, it is specifically noted that the systems that result in racial discrimination are *not* knowingly or intentionally built with racial subordination as a goal.[135] Therefore, CRT is not looking to place blame, or suggest that the color of one's skin makes the person automatically racist.[136] Instead, the theory operates as a means of re-examining the everyday structures of modern life in order to find ways of improving them to benefit all people.[137] Therefore, the reasons for banning CRT often promoted by its critics are not legitimate reasons because they are not based in fact. Illegitimate and fundamentally false concerns would not pass the Eighth Circuit's test for limiting students' access to information and therefore would be found unconstitutional.

There is also another parallel here with the Eighth Circuit's case. In that case, the Court found that while the purported reasons for banning the film were violence, the actual reasons were based on displeasure with certain themes in the film.[138] A similar fake-out is going on here. The critics of CRT profess to be protecting their children from propaganda and "un-American" ideas.[139] But in fact, the real reason this theory is being banned is that it challenges the very systems of power that keep

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[131] 793 F.3d at 982–83.
[132] *Compare* Richardson, *supra* note 57, *with* BRIDGES, *supra* note 4.
[133] *See, e.g.*, Richardson, *supra* note 57.
[134] *See supra* notes 2–38 and accompanying text.
[135] *See id.*
[136] *See id.*
[137] *See id.*
[138] Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn., 670 F.2d 771, 777 (8th Cir. 1982).
[139] *Educational Gag Orders*, *supra* note 51.

white people as the "dominant race." Critical Race Theory challenges the status quo and thus is capable of making some people uncomfortable. Discomfort is not a strong enough incentive to censor educational materials from schools.[140] In other words, this theory directly challenges the entrenched systems of power in this country, and those who are challenged do not want to give up their power.

2. The CRT Ban Fails the Eleventh Circuit's Test

The CRT ban in public schools fails the Eleventh Circuit's balancing test because the school's interests here do not outweigh the student's First Amendment interests. The Eleventh Circuit established a balancing of the school's and the student's interests as a test of whether certain curricula could be banned.[141] Schools have established interests in providing students an education that will allow them to function in society.[142] Additionally, schools have an interest in maintaining student and staff safety, as well as protecting underage students from topics they are not mature enough to handle.[143] Students, on the other hand, also have an interest in expression, derived from the First Amendment.[144] Students have First Amendment rights and interests in protecting those rights.

Proponents of anti-CRT laws claim that teaching CRT will distort history, and make white students feel that they are inherently racist.[145] This Note established above that these concerns are based in misinformation and a misunderstanding of CRT.

Proponents of anti-CRT laws also voice concerns that these issues are not appropriate for children and will only distress them.[146] They, therefore, claim these laws are a form of protection. The Supreme Court has previously allowed for schools to censor certain speech on campuses because it was deemed inappropriate or too mature, for instance sexual material or material dealing with illegal drugs.[147] These materials however have specific and tangible concerns that the court could rely on. For instance, preventing materials that promote the use of illegal drugs can help reduce exposure to these drugs, helping to reduce the known harmful effects, as well as addiction.[148]

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[140] *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

[141] *Virgil*, 862 F.2d at 1522.

[142] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (citing Ambach v. Norwick, 441 U.S. 68, 76–77 (1997)).

[143] *See id.* (citing *Tinker*, 393 U.S. at 507).

[144] *Id.* at 864–65 (citing West Virginia Bd. of Ed. V. Barnette, 319 U.S. 624, 637 (1943)).

[145] *See* Sawchuck, *supra* note 2.

[146] *Id.*

[147] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (referring to the Supreme Court's decision in Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. (1986), which permitted schools to limit speech referencing drug use or sexual conduct).

[148] *See id.*

There are no similar, tangible concerns here. Most of the concerns regarding discomfort or distress regarding CRT are being voiced by parents.[149] However, when the children themselves are asked about discussions of race, many see it as a welcome addition to their classroom curriculum.[150] Here are some examples of young Black students' responses in particular to learning about race issues in school:

- "[Race] should be taught in school because we come to school to learn and learning about yourself is a part of the school experience . . . . It's important for kids, especially Black kids, to learn about race so they can understand who they are . . . . Education is good." (Age 16)[151]
- "To cut out half, almost all, of America's history will put Black kids at a disadvantage . . . . If we don't know our history, how can we come up with our own point of view? How can we grow?" (Age 17)[152]
- "I think introducing ethnic studies and critical race theory topics in high school, and even sooner than that, is the prime age for students to think critically about the history of this country and apply it to everyday life . . . . College is too late."[153] (Recent high school graduate)

White students have also reacted positively to learning CRT.[154] College students who were taught CRT did not react with guilt or distress, but rather appreciated the education and the humanity shown by their instructors.[155] In fact, older students who were not taught about inequality at a younger age can feel distressed about what was kept from them.[156]

Banning CRT and any related discussions of racial issues in public school classrooms has also started to cause educational problems for teachers.[157] For instance, in Iowa City, a fifth-grade teacher was unsure of how, when teaching about Native American history, to answer her students when they asked "[w]here are the

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[149] *See* Sawchuck, *supra* note 2.

[150] Adams, *supra* note 94.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] Ebony Omotola McGee, Devin T. White & Lynette Parker, *We Taught Critical Race Theory*, INSIDE HIGHER ED (Sept. 28, 2021), https://www.insidehighered.com/views/2021/09/28/what-white-students-say-about-critical-race-theory-course-opinion [https://perma.cc/G8JR-WRNW].

[155] *Id.*

[156] *See* Ray & Gibbons, *supra* note 48.

[157] Kalyn Belsha, Matt Barnum & Marta W. Aldrich, *Not Getting Into It: How Critical Race Theory Laws Are Cutting Short Classroom Conversations*, CHALKBEAT (Dec. 17, 2021, 7:00 AM), https://www.chalkbeat.org/2021/12/17/22840317/crt-laws-classroom-discussion-racism [https://perma.cc/R66S-HFQL].

Native Americans now?"[158] Normally, the teacher "would tell her class more about why Indian reservations were established, discuss the term genocide, and talk about what Native culture looks like today."[159] Now, however, the teacher feels she cannot address these topics and must move on from the subjects, leaving her students confused.[160] The anti-CRT laws thus have not only affected CRT but *any* instruction that handles racial issues.[161] These laws then, by censoring discussions about racial issues in this country's past and present, will leave students with confused, incomplete educations surrounding our nation's history, as well as its current state. Surely this does not meet the educational interests of a public school in this country. Furthermore, the resulting confusion infringes upon a student's right to receive an education.

3. The Fifth Circuit's Tests

In the Fifth and Seventh Circuits, the tests laid out gave much more discretion to the schools and school boards. The Fifth Circuit Court of Appeals, in *Chiras v. Miller*,[162] found that a school could limit curricular choices unless the limitation was "motivated 'by narrowly partisan or political' considerations."[163]

The CRT ban here clearly fails this test. Proponents of the CRT bans have specifically promoted them as being "anti-woke."[164] President Trump himself referred to CRT as "toxic propaganda" and pushed for its ban from public schools.[165] CRT was not taught in public schools, so there was no legitimate reason to ban it, other than the political motivations voiced by the former President. While the surface level concerns surrounding teaching CRT in public schools are for the emotional health of the students, the deeper motivations behind these bans are to prevent the excising of the systems that secure white privilege.

4. The Seventh Circuit's Test

The Seventh Circuit similarly gives more discretion to the schools, but again, the CRT ban at issue here would fail the test. In *Zykan v. Warsaw Community School*

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[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *See id.*

[162] Chiras v. Miller, 432 F.3d 606, 619–20 (5th Cir. 2005).

[163] Arce v. Douglas, 793 F.3d 968, 983 (9th Cir. 2015) (referencing the Fifth Circuit's decision in *Chiras* to allow a school to censor library materials).

[164] *See* Richardson, *supra* note 57; Zou, *supra* note 6.

[165] Cady Lang, *President Trump Has Attacked Critical Race Theory. Here's What to Know About the Intellectual Movement*, TIME (Sept. 29, 2020, 10:53 PM), https://time.com/5891138/critical-race-theory-explained/ [https://perma.cc/549W-N26N].

Corporation, the Court held "nothing in the Constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute."[166]

The CRT bans show the schools starting down the path of "exclusive indoctrination."[167] Prior to these bans, the schools did not require the teaching of CRT. Perhaps this was their way of managing situations or matters where there is a "legitimate dispute." However, by banning CRT, they are no longer simply making a legitimate pedagogic choice, but seeking to exclude an entire viewpoint, and, in some cases, entire parts of history that are in contention with the view they wish to hold. The Texas CRT ban and the others like it are not a reasonable limitation on a student curriculum but an attempt to force the elimination of a viewpoint. These bans are a thinly veiled attempt at indoctrination.

D. Banning CRT Is Not Reasonably Related to Any "Pedagogical Concerns"

At the heart of each of these tests is a balancing act between the interests of the students and the interests of the schools. Courts will typically defer to the school's decisions if they reasonably relate to a "pedagogical concern," or in other words, whether the information at stake will interfere with the educational mission of the school.[168]

1. What Is a Pedagogical Concern?

Prior examples of information that has been successfully banned include sexually explicit, violent, or religious information.[169]

In *Miles v. Denver Public Schools*, the Court recognized three pedagogical interests as legitimate.[170] In that case, a teacher made comments about a rumor regarding certain students that was circulating in the school.[171] The students referenced in the rumor complained and the teacher was put on paid administrative leave.[172] The teacher sued, claiming that this leave chilled his First Amendment speech rights.[173] The Tenth Circuit disagreed, applying the standard from *Hazelwood*: first, look to see whether the school was advancing any legitimate pedagogical concerns, and then

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[166] 631 F.2d 1300, 1306 (7th Cir. 1980).

[167] *Id.*

[168] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[169] Fleming v. Jefferson Cty. Sch. Dist. R-1, 298 F.3d 918 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003); *Hazelwood*, 484 U.S. at 266–67, 272.

[170] 944 F.2d 773, 778 (10th Cir. 1991).

[171] *Id.* at 774.

[172] *Id.*

[173] *Id.* at 775.

second, determine whether the actions taken by the school are legitimately related to those concerns.[174] Here the legitimate interests were (1) to prevent the teacher from using his position of power to "confirm an unsubstantiated rumor," (2) "ensuring that teacher employees exhibit professionalism and sound judgment," and (3) "providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers."[175] Additionally, in *Hazelwood*, the Court recognized that the protection of student's privacy interests and the consideration of a student's maturity level were both "reasonably related" to pedagogical interests.[176] Furthermore, there is a generally recognized legitimate pedagogical concern related to preventing activities outside the classroom that might cause a disruption to academic activities.[177]

The second part of the "pedagogical concern" test is whether the restrictions in place are reasonably related to the pedagogical concern of interest.[178] There is some debate over whether these restrictions must be viewpoint neutral. For instance, the Third Circuit held that the restrictions do not have to be viewpoint neutral, given that a school was a specialized environment where "educators are entitled to exercise greater control over student expression when it is elicited as part of a teacher-supervised, school-sponsored activity."[179] However, the Ninth Circuit has required viewpoint neutrality.[180]

2. Causing Disruption Is Not a Pedagogical Concern When Teaching CRT in Public Schools

With regard to the bans on CRT and other race-related discussions in the classroom, the main concerns voiced by the proponents of these laws have been essentially that these discussions would cause a disruption in the classroom.[181] In the cases mentioned above and others, preventing disturbances has been recognized as a legitimate pedagogical concern that justifies a restriction on student's first

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[174] *Id.* at 778.

[175] *Id.*

[176] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[177] *See* Fleming v. Jefferson Cty. Sch. Dist. R-1, 298 F.3d 918, 925–26 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003) ("Many cases have applied a *Hazelwood* analysis to activities outside the traditional classroom where, so long as the imprimatur test is satisfied, the pedagogical test is satisfied simply by the school district's desire to avoid controversy within a school environment.").

[178] *Hazelwood*, 484 U.S. at 273.

[179] *Fleming*, 298 F.3d at 927.

[180] Planned Parenthood of S. Nevada, Inc. v. Clark Cnty. Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991).

[181] *See* Sawchuck, *supra* note 2; *see also* Ray & Gibbons, *supra* note 48; Anderson, *supra* note 50.

amendment rights.[182] However, these concerns are not justified here because there is no proven disturbance.

States banning CRT frequently cited concerns regarding the effect teaching CRT would have on school life, specifically that it would cause disruptions and would emotionally harm students.[183] In previous cases, in order to establish this concern as legitimate, the Court has required some kind of proof or evidence that this disturbance is either imminent or occurring at all.[184] For instance, speech that promoted the use of drugs was found to cause disturbances, given evidence presented regarding the effects of drugs on minors, and the fact that the speech was promoting illegal activity.[185]

Here, there are no incidents of disruption to point to because CRT is not being taught.[186] The fears that state officials have propagated are based on false interpretations of CRT.[187] Many believe that CRT specifically places blame on certain segments of the population and teaches that based on your race, a person automatically is or isn't racist.[188] This simply is not true. As discussed above, CRT is an analytical tool used to discuss and explore current and past historical events, with the aim of understanding why racial discrimination still prevails today, despite the formal equality laws on the books.[189] It is not a body of information or content meant to indoctrinate a student body with a certain view of the world or meant to place blame on some students and not others.[190] It is a means through which students and their teachers, in a safe and collaborative environment, can learn about this country's history and current social structures and institutions all to support the goal of preparing our youngest generations to make positive contributions to the country. Unlike the instances where the Court did find evidence of disruptions that could occur,[191] here there is none. In contrast, students who have had discussions about racial issues have reported back that they appreciated the discussions.[192] As an additional point, banning CRT or discussions of related issues could actually *cause* disruptions in the classroom.[193] As mentioned above with the Iowa teacher unsure of how to address the current state of Native Americans to her class of fifth graders, the teacher's inability to teach a topic completely caused significant confusion.[194]

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[182] Morse v. Frederick, 551 U.S. 393, 409–10 (9th Cir. 2007).

[183] *See* Zou, *supra* note 6.

[184] *Morse*, 551 U.S. at 399–400 (recognizing that the prohibited speech in question definitively occurred during school hours).

[185] *Id.* at 407–08, 410.

[186] *Id.*; *see* Zou, *supra* note 6.

[187] *See supra* notes 2–35 and accompanying text.

[188] *See* Zou, *supra* note 6.

[189] *See supra* notes 2–35 and accompanying text.

[190] *Id.*

[191] Morse v. Frederick, 551 U.S. 393, 409–10 (9th Cir. 2007).

[192] *See* McGee et al., *supra* note 154.

[193] *See* Belsha et al., *supra* note 157.

[194] *Id.*

As for the second part of the pedagogical concerns test, CRT has no relation to the activities that the schools in precedent cases have been banning. Illegal drug use, for example, has clear, medically proven adverse effects, especially on minors.[195] Preventing students from having access to materials that promote the use of these illegal drugs is a legitimate interest in protecting the health of the students with evidence to back up the interest.[196] Preventing teachers from abusing their positions of power is necessary in a space where students are required to be and are naturally in a subordinate position. Teaching CRT does not cause physical damage to people in a similar way that drug use might. Teaching CRT does not abuse a teacher's position of power in the same way that a teacher spreading a rumor might. Spreading rumors has nothing to do with the academic purpose of a teacher, whereas teachers should be encouraged to have discussions with their students about all aspects of our country's history. CRT does not promote itself as the absolute truth, or something that should be taught in exclusion of all other methods of analysis but rather as another way to view the world, through a lens that is different than that historically used.[197]

IV. BANNING CRT IS NOT VIEWPOINT NEUTRAL

Very clearly, banning CRT is not viewpoint neutral. The bans are specifically denying the teaching and discussion of a certain viewpoint, i.e., that racism is a systemic issue that still persists in this country.[198] Viewpoint discrimination is "a subset—and a particularly 'egregious form'—of content discrimination . . . . It occurs '[w]hen the government targets not subject matter, but particular views taken by speakers on a subject.'"[199] The legislators and critics of CRT claim that they are protecting a non-biased educational scheme that CRT would disrupt.[200] However, by banning CRT, the Texas legislation has disrupted the supposedly neutral educational scheme. CRT is not being taught in public schools.[201] The Texas law, and others like it, ban not just CRT but other related discussions of race issues.[202] The bans are written in a vague manner which makes it difficult to understand what is and is not allowed.[203] This results in a chilling effect on the teachers' ability to discuss historical events they could freely discuss before the ban.[204] Therefore, rather than protecting

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[195] *Morse*, 551 U.S. at 394–95 (referencing Congress's efforts to combat drug addiction in schools).

[196] *Id.* at 407–08.

[197] *See* Wong, *supra* note 78.

[198] Anderson, *supra* note 50.

[199] Pahls v. Thomas, 718 F.3d 1210, 1229 (10th Cir. 2013).

[200] Belsha et al., *supra* note 157; Zou, *supra* note 6.

[201] Zou, *supra* note 6.

[202] *Id.*

[203] *Id.*

[204] Belsha et al., *supra* note 157.

an educational system, the Texas law, and others like it, is stripping away pieces as it sees fit. Banning CRT specifically and deliberately chooses to prevent public school children from ever learning about large swaths of American history, clearly disrupting the educational scheme the proponents of these laws claim to protect.

V. BANNING CRT AND RELATED RACE DISCUSSIONS WILL HARM THE PUBLIC EDUCATION SYSTEM'S GOAL: PREPARE AMERICA'S CHILDREN FOR PARTICIPATION IN MODERN SOCIETY

Public schools are essential to building a student's ability and confidence to function in society as an adult. In *Ambach v. Norwick*, the Court emphasized the role of the educator in our society: "Public education, like the police function, 'fulfills a most fundamental obligation of government to its constituency . . . in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests.'"[205] In other words, "it is a principal instrument in awakening the child to cultural values."[206] Public schools are *exactly* the forum in which to promote challenging discussions, as they can be "an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground."[207] By banning CRT and the associated discussions of systemic racism in public school classrooms, the Texas legislature (and the other states following suit) are restricting the breadth of knowledge and awareness that is so valuable to the development of a mature member of society. In other words, they are hindering the preparation of our nation's students to positively contribute to this country.

Similarly, as noted above in *Tinker*, schools are meant to foster an exchange of ideas, and allow for students to be exposed to society so that they may learn to adjust and grow to be a part of it.[208] The Supreme Court in *Tinker* emphasized that "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[209] Exposure to concepts that are contrary to a student's

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[205] Ambach v. Norwick, 441 U.S. 68, 76 (1979).

[206] *Id.* at 77.

[207] *Id.*

[208] Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 512 (1969).

[209] *Id.* (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)). *See generally* Roberts v. Madigan, 702 F. Supp. 1505 (D. Colo. 1989), aff'd 941 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1990) (regarding removal of religious texts to maintain children's education and freedom from coercive beliefs); Bd of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.") (quoting Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring)).

lived experiences are valuable in developing perspective and respect for differences in others. Banning CRT and the associated discussions about systemic racism are attempting to invalidate the lived experience of people of color in this country through the education of their children. This indoctrination of a viewpoint that finds these discussions distasteful does not lead to a tolerant society, but one that continues the systems of oppression that have persisted throughout this country's history.

Learning in a diverse environment, and in turn learning a diverse set of information, leads to a more well-rounded and informed citizen.[210] One of the values supported by the Court consistently is that schools are meant to prepare students to be citizens in this society.[211] Allowing students then to be exposed to and learn from multiple different viewpoints, especially viewpoints that challenge the current norms and that offer alternative ways of looking at the world offer a unique opportunity to prepare the young generations for the future. The U.S. is getting more and more racially and culturally diverse, and school curriculum needs to be allowed to keep up. Deep social rifts are rife in this country among adults, why not allow students to learn about these issues early, and confront any biases and entrenched systems earlier rather than later? Do we not want our children to learn from our mistakes?

CONCLUSION

Ultimately, the crux of this issue is misinformation. The Texas legislature passed SB3 banning Critical Race Theory, a theoretical framework that was not even being taught in K–12 public schools in the first place.[212] The fears and concerns voiced are similarly fueled by false information.[213] Because of this, the consequences claimed to be prevented by this law are in fact non-existent phantoms that do nothing to support any constitutional argument that might justify banning CRT. Instead, the aim of these bans is closer to that of indoctrination, narrowing the scope of discussion within which teachers may discuss historical and current events with their students. Public schools have the power to protect their students from information that may be inappropriate or advocate illegal activity. They do not have the power to censor discussion of Critical Race Theory, or related race issues, because these issues are not inappropriate, illegal, nor is there any evidence to suggest that they will cause a disruption in the classroom. In fact, the evidence that exists from students who have had these discussions suggests the contrary.[214]

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[210] *See Tinker*, 393 U.S. at 512 (arguing schools play a role in facilitating diverse discussions between students).

[211] *Id.*; *Pico*, 457 U.S. at 876.

[212] Zou, *supra* note 6.

[213] *Id.*; Ray & Gibbons, *supra* note 48.

[214] McGee et al., *supra* note 154.

Schools are meant to be a safe place of learning, a place where students can explore a multitude of ideas and learn about the world alongside their peers. They are built to be a forum for complex discussions and exploration of topics, cultures, and history that students would otherwise be unfamiliar with. Banning CRT is not protecting or advancing these goals. Allowing CRT to be taught, if desired, and allowing discussions of race to be held in classrooms would best serve our future generations by giving them the tools to be able to positively participate in a diverse and complex country reckoning with its past.