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## The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Education

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# The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Education

Vanessa Miller, Frank Fernandez, & Neal H. Hutchens\*

## ABSTRACT

*Anti-critical race theory bills have garnered national attention in the K-12 context. However, many critical race theory (“CRT”) bans also impact institutions of higher education. The bills seek to prohibit the teaching of ideas that include the premise that racism and sexism are pervasive in our society. Those opposing CRT believe its tenets promote anti-white racism, cultural division, and threaten the public institution of education. Scholars and educators have criticized anti-CRT bills for their mischaracterization of the use and tenets of CRT and related theories of scholarship. This Article argues that state anti-CRT laws and policies in higher education run afoul of legal and normative principles. First, the bans conflict with basic First Amendment legal standards. Second, the bans are poor policy choices because they run contrary to the pursuit of equity and inclusion in educational environments as well as the traditional norms of higher education. Part I of the Article provides an overview of recent efforts to ban CRT and their relation to higher education. Part II presents a First Amendment legal analysis of why the bans are legally impermissible as written. Part III contends that anti-CRT legislation, in serving to perpetuate existing racial inequities in education and elsewhere, demonstrates the ongoing importance of CRT and other critical lines of scholarship in higher education.*

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## I. INTRODUCTION

Conservative government officials across the country are supporting state education laws and policies that could alter the nature of higher education in some states. The laws and policies attempt to ban institutions from teaching critical race theory (“CRT”), an academic framework that scholars use to examine the relationship between law and race, and more broadly seek to prohibit the teaching of ideas that include the premise that racism and sexism are pervasive in our society.<sup>1</sup> Individuals opposing CRT believe its tenets promote anti-white racism, cultural division, and threaten the public institution of education.<sup>2</sup> In some states, lawmakers have outright banned the teachings of what they believe to be CRT in the classroom.<sup>3</sup> In other states, lawmakers have restricted institutions and companies from providing workplace anti-racism trainings that discuss race or sex.<sup>4</sup> However, scholars have criticized these state officials for their misunderstanding and mischaracterization of the tenets of CRT and related theories or strands of scholarship.<sup>5</sup>

The current anti-CRT legislative movement closely resembles former President Donald Trump’s public attacks on CRT, anti-bias workplace trainings, the *New York Times* 1619 Project, and the Black Lives Matter movement following months of global racial justice protests in response to the murder of George Floyd and other racialized incidents.<sup>6</sup> The

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<sup>1</sup> See KIMBERLÉ CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 13 (3d ed. 1995); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3 (3d ed. 2017); DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS* (3d ed. 2014).

<sup>2</sup> Stephen Kears, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, PEW (June 14, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/14/gop-lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools> [https://perma.cc/XW37-GQZF].

<sup>3</sup> IDAHO CODE § 33-138 (2021) (prohibiting institutions of higher education from discussing specific tenets believed to be associated with critical race theory).

<sup>4</sup> H.B. 7, Reg. Sess. (Fla. 2022) (prohibiting workplace trainings that include or discuss specific tenets believed to be associated with critical race theory).

<sup>5</sup> Marisa Iati, *What is critical race theory, and why do Republicans want to ban it in schools?*, WASH. POST (May 29, 2021), <https://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/> [https://perma.cc/BWA2-DXD2].

<sup>6</sup> See generally *The George Floyd Protests Go Global*, ROLLING STONES (June 02, 2020), <https://www.rollingstone.com/culture/culture-pictures/photos-the-george-floyd-protests-go-global-1008934/topshot-spain-us-race-unrest/> [https://perma.cc/7BMV-ELGC]; Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/ZN2F-CYGL] (George Floyd was a 46-year-old Black man who was murdered in broad daylight on May 25, 2020, when Derek Chauvin, a white Minneapolis Police Department police officer, pressed his knee on

national shock of a widely publicized incident of police violence and the increasing popularity of the Black Lives Matter movement led companies to adopt anti-racism workplace strategies and schools to include a racially inclusive curriculum. Influenced by an emerging conservative push against CRT and related concepts or ideas, President Trump signed Executive Order 13950, “Combating Race and Sex Stereotyping” (“EO 13950”) on September 22, 2020.<sup>7</sup> EO 13950 asserted anti-racism trainings in the workplace promoted “offensive and anti-American” race and sex stereotypes that falsely misrepresented “our country’s history” and “role in the world.”<sup>8</sup> Although President Joseph Biden rescinded EO 13950 on his first day in office, the purpose of the order fueled a nationwide conservative effort to ban CRT and eradicate discourse of race and racism in educational settings.<sup>9</sup>

Most of the current legislative bans on CRT primarily focus on curriculum in elementary and secondary education, such as limiting course content and course materials.<sup>10</sup> However, lawmakers in nearly thirty states have also introduced bills targeting CRT or other “divisive concepts” in higher education.<sup>11</sup> As of December 2022, eight states have passed legislation banning CRT in postsecondary institutions or in some way targeting CRT even if the actual requirements of a law are unclear: Idaho, Oklahoma, Iowa, New Hampshire, South Dakota, Mississippi, Tennessee, and Florida.<sup>12</sup> Additionally, Montana and Arkansas took other legal means to target CRT in higher education.<sup>13</sup>

In Montana, the Superintendent of Public Instruction requested the state’s Attorney General to weigh in on the issue of CRT. The Montana Attorney General issued an opinion, holding that CRT was analogous to racial discrimination and “[c]ommitting racial discrimination in the name

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Floyd’s neck for 9 minutes and 29 seconds. Four other police officers and multiple citizens watched the incident unfold. The videotape of the incident shows Floyd laying on the ground dying calling for his “Momma” and saying, “I can’t breathe.”)

<sup>7</sup> Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

<sup>8</sup> *Id.*; see *infra* Part I.B.1 (President Trump also issued another Executive Order in response to the *New York Times*’ 1619 Project that would have established a “1776 Commission” to promote “patriotic education.”).

<sup>9</sup> See Jonathan Friedman & James Tager, *Educational Gag Orders*, PEN AMERICA, 30–37 (Jan. 18, 2022), [https://pen.org/wp-content/uploads/2022/02/PEN\\_EducationalGagOrders\\_01-18-22-compressed.pdf](https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf) [https://perma.cc/Z5FK-ESWZ].

<sup>10</sup> See Dana Goldstein & Stephanie Saul, *A Look Inside the Textbooks That Florida Rejected*, N.Y. TIMES (Apr. 22, 2022), <https://www.nytimes.com/2022/04/22/us/florida-rejected-textbooks.html> [https://perma.cc/VU9K-2LAW].

<sup>11</sup> Friedman & Tager, *supra* note 9, at 4.

<sup>12</sup> See, e.g., H.B. 1775, 58th Leg., (Okla. 2021) (prohibiting public school teachings on race and gender issues).

<sup>13</sup> See, e.g., 58-1 Mont. Op. Att’ys Gen. 1 (2021).

of ending racial discrimination is both illogical and illegal.”<sup>14</sup> State Attorney General opinions in Montana carry the weight of law.<sup>15</sup> Similarly in Arkansas, a state representative requested an analysis on the issue of CRT in schools from the state’s Attorney General. The Arkansas Attorney General held that the First Amendment does not “immunize a person or educational institution from violating others’ rights under [law] by engaging in race-based practices,” such as “practices based on critical race theory, professed ‘antiracism,’ or associated ideas.”<sup>16</sup> Though Arkansas Attorney General opinions are not binding on the courts, the Arkansas Supreme Court has held they can be persuasive.<sup>17</sup>

The inclusion of postsecondary education in the wave of anti-CRT legislation has already impacted faculty teaching and scholarship. An Iowa State University undergraduate diversity requirement stalled for months because it violated the state’s recently passed legislation against teaching “divisive concepts.”<sup>18</sup> Oklahoma City Community College canceled a fully-enrolled summer course on race and ethnicity because it conflicted with the state’s new law on how to discuss race and racism.<sup>19</sup> As discussed in Part III, professors at the University of Florida who teach or engage in race scholarship have become political targets and face job insecurity because of the nature of their work.<sup>20</sup> The anti-CRT laws have threatened academic freedom and challenged the very purpose of higher education as a social institution for teaching and scholarship.

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<sup>14</sup> *Id.*

<sup>15</sup> Attorney General’s Opinions, Montana Judicial Brand, <https://courts.mt.gov/library/mr/agopinions/> [<https://perma.cc/8XK8-66D9>] (last visited Mar. 9, 2023).

<sup>16</sup> 042 Ark. Op. Att’y Gen. 9–10 (2021).

<sup>17</sup> *Jefferson Cnty. Election Comm’n v. Wilkins ex rel. Jefferson Cnty.*, 547 S.W.3d 58, 62 (Ark. 2018).

<sup>18</sup> See Jack McClellan, *Updated Iowa State diversity requirements turned down due to recent legislation banning ‘divisive’ concepts*, IOWA STATE DAILY (May 28, 2021), [https://www.iowastatedaily.com/news/iowa-state-daily-news-diversity-requirements-remain-the-same-after-faculty-works-to-change-them/article\\_6f89ae34-c026-11eb-abe0-2b81564c2609.html](https://www.iowastatedaily.com/news/iowa-state-daily-news-diversity-requirements-remain-the-same-after-faculty-works-to-change-them/article_6f89ae34-c026-11eb-abe0-2b81564c2609.html) [<https://perma.cc/N4CV-V5GV>]; Colleen Flaherty, *Compromising on Diversity?*, INSIDE HIGHER ED. (Nov. 12, 2021), <https://www.insidehighered.com/news/2021/11/12/iowa-state-faculty-approve-diversity-requirement-compromise> [<https://perma.cc/7WGF-6TCB>].

<sup>19</sup> See Hannah Knowles, *Critical race theory ban leads Oklahoma college to cancel class that taught ‘white privilege,’* WASH. POST (May 29, 2021), <https://www.washingtonpost.com/education/2021/05/29/oklahoma-critical-race-theory-ban/> [<https://perma.cc/C8VE-L7K3>].

<sup>20</sup> See Katheryn Russell-Brown & Ryan Morini, *A Way Forward: UF Race Scholars on Support, Obstacles, and the Need for Institutional Engagement*, RACE AND CRIME CTR. FOR JUST. AT UNIV. OF FLA. LEVIN COLL. OF LAW 19 (Fall 2021), <https://www.law.ufl.edu/law/wp-content/uploads/UFRaceScholarshipReport-2021.pdf> [<https://perma.cc/TNC4-BCYD>].

The bans on CRT are also causing university general counsel offices and law firms that represent educational organizations to grapple with the legal and educational implications. How do public institutions of higher education comply with the anti-CRT state laws *and* refrain from impinging on faculty First Amendment freedoms? What legal avenues do faculty have when they are dissuaded or prohibited from teaching concepts that are foundational to an academic discipline that helps understand and address pervasive social problems? Can faculty or administrators demonstrate their support for opposing racism and sexism on campus or in society generally in other lawful ways? These legal questions are important because they point to the legal, educational, social, and economic costs of anti-CRT bans.

This Article argues that state anti-CRT laws and policies in higher education run afoul of legal and normative principles. First, the bans conflict with basic First Amendment legal standards. Second, the bans are poor policy choices because they run contrary to the pursuit of equity and inclusion in educational environments, as well as the traditional norms of higher education. Part I of the Article provides an overview of recent efforts to ban CRT and their relation to higher education. Part II presents a First Amendment legal analysis of why the bans are legally impermissible as written. And finally, Part III contends that anti-CRT legislation, in serving to perpetuate existing racial inequities in education and elsewhere, demonstrates the ongoing importance of CRT and other critical lines of scholarship in higher education.

## II. OVERVIEW OF CRITICAL RACE THEORY BANS IN HIGHER EDUCATION

### A. *What Is Critical Race Theory? What Is It Not?*

As of December 2022, ten states have adopted legal measures to ban critical race theory and “divisive concepts” grounded in CRT at institutions of higher education: Idaho, Oklahoma, Montana, Iowa, New Hampshire, Arkansas, South Dakota, Mississippi, Tennessee, and Florida.<sup>21</sup> Eight of those states passed laws prohibiting institutions of higher education from teaching or introducing CRT,<sup>22</sup> and two of those states requested Attorney Generals’ opinions on the legality of institutional practices based in CRT and whether they violate federal or

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<sup>21</sup> See Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WK. (Sept. 28, 2022), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [https://perma.cc/6WFS-AMDE].

<sup>22</sup> See *supra* note 12.

state anti-discrimination law.<sup>23</sup> Based on the language of the anti-CRT laws, it is evident that lawmakers advocating these provisions fundamentally misunderstand or intentionally misrepresent CRT. Because the laws fail to describe CRT in line with the academic use of the framework, we provide a brief overview here.

Critical race theory is an academic legal framework based on the premise that race and racism are central in the formation of American law and society.<sup>24</sup> It rose to prominence in the 1970s and 1980s based on the work of legal scholars who became disillusioned with the unfulfilled social, political, and economic promises of the Civil Rights Movement. CRT scholars hold that stark racial disparities persist in the United States despite decades of civil rights legislation because racism is embedded into the systems and traditions of American society, which maintain and enforce racial hierarchies that produce disparities.<sup>25</sup> CRT scholarship does not hold a canonical set of principles or methodologies but does generally seek to examine the relationship between law and race and challenges the ways in which race is constructed and represented in American legal culture.<sup>26</sup>

CRT can be traced back to the works of figures that include Derrick Bell, Richard Delgado, and Mari Matsuda. Bell challenged dominant conceptions of civil rights remedies available under the law and examined race within social, political, and economic dimensions. For example, in his foundational piece in 1976, “*Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*,” Bell critiqued the civil rights impact litigation efforts on desegregation as being detached from the wants and needs of the victims of school segregation.<sup>27</sup> For Bell, the national imperative to force integration at white schools because Black schools were considered inherently unconstitutional resulted in racial hostility and detrimental social repercussions for Black schoolchildren.<sup>28</sup> The focus on Black schools as inherently unconstitutional allowed for the government to ignore any obligation to invest in Black schools by improving their quality and educational effectiveness.<sup>29</sup> Over time, Bell’s CRT developed several premises, including interest-convergence; counternarratives; critique of race-neutrality; and structural determinism.<sup>30</sup>

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<sup>23</sup> See Mont. Op. Att’y Gen., *supra* note 13; see also Ark. Op. Att’y Gen., *supra* note 16.

<sup>24</sup> See CRENSHAW ET AL., *supra* note 1.

<sup>25</sup> Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1485–87 (2004).

<sup>26</sup> See CRENSHAW ET AL., *supra* note 1.

<sup>27</sup> Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 488 (1976).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See DELGADO & STEFANCIC, *supra* note 1.



On July 8, 1989, several scholars interested in “defining and elaborating on the lived reality of race, and who were open to the aspiration of developing theory,”<sup>31</sup> gathered at a workshop in Madison, Wisconsin.<sup>32</sup> The workshop was spearheaded by Kimberlé Crenshaw and organized by several notable scholars, such as Neil Gotanda, Stephanie Phillips, Richard Delgado, David Trubek, and Terri Miller.<sup>33</sup> Participants in the workshop included Anita Allen, Taunya Banks, Derrick Bell, Kevin Brown, Paulette Caldwell, John Calmore, Harlon Dalton, Linda Greene, Trina Grillo, Isabelle Gunning, Angela Harris, Mari Matsuda, Teresa Miller, Philip T. Nash, Elizabeth Patterson, Benita Ramsey, Robert Suggs, Kendall Thomas, and Patricia Williams.<sup>34</sup> It was at the workshop that legal scholars conceptualized what is now known as “Critical Race Theory.” Common themes of discussion at the workshop included critiques of neutrality, objectivity, colorblindness, and “formal” equality in the law, which stemmed from other intellectual movements such as feminist legal theory and critical legal studies.<sup>35</sup>

Methodologically, CRT took inspiration from feminist legal theory, which went beyond analyzing the rules governing sex discrimination and instead unpacked law’s relationship to gender.<sup>36</sup> Substantively, CRT grew from the Critical Legal Studies (“CLS”) movement, rooted in principles of legal liberation and transformation that seek to usher a more just American society.<sup>37</sup> Embedded in the CLS movement are tenets of critical theory: unraveling “the ideology of legal institutions” and questioning conventional methods of the law.<sup>38</sup>

Conventional methods of law purport to push “objective” and “apolitical” legal language to justify the legal rules necessary for a doctrinal method of adjudication.<sup>39</sup> In particular, the CLS movement turns a critical eye toward the language of the law and rejects the existence of an objective or apolitical legal system.<sup>40</sup> CLS suggests the law is

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<sup>31</sup> Kimberlé W. Crenshaw, *The First Decade: Critical Reflections, or A Foot in the Closing Door*, 49 UCLA L. REV. 1343, 1360–61 (2001).

<sup>32</sup> Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 IOWA L. REV. 1497, 1497 (2009).

<sup>33</sup> Crenshaw, *supra* note 31, at 1360.

<sup>34</sup> *Id.* at 1361 n.19.

<sup>35</sup> *Id.* at 1362–63.

<sup>36</sup> *Id.* at 1360.

<sup>37</sup> See A.W. Haines, *The Critical Legal Studies Movement and Racism: Useful analytics and guides for Social Action or an Irrelevant Modern legal Skepticism and Solipsism?*, 13 WILLIAM MITCHELL L. REV. 685, 692–93 (1987).

<sup>38</sup> Frank W. Munger & Carroll Seron, *Critical Legal Studies versus Critical Legal Theory: A Comment on Method*, 6 LAW & POLICY 257, 257–58 (1984).

<sup>39</sup> See ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 79–80 (1986).

<sup>40</sup> See Haines, *supra* note 37, at 699–700.

inherently subjective and reflects the vested power of those who operate within the judicial system while maintaining the guise of objectivity.<sup>41</sup> CRT uses many of the same ideological frameworks in identifying how race and power operate within, and because of, the language of the law.

CRT scholars point to the racial disparities and outcomes in the American education, healthcare, housing, and criminal legal system as examples of the configurations of historical and continual racism and racial subordination. Under CRT, it is not an accident, nor is it unrelated that Black people carry more student loan debt, are denied affordable housing, and face police violence and incarceration at rates disproportionately higher than their White counterparts. CRT is meant to be an academic tool used to dismantle the structures that give rise to, and maintain, racial inequality while highlighting more equitable policies and solutions.<sup>42</sup> Specifically, CRT is an analysis of “structures, policies, practices, and laws in the United States [and] provides a lens across intersectional identities, for which our society can determine how the impacts of racism, classism, sexism, and other forms of oppression and discrimination have shaped traditional outcomes for the most vulnerable.”<sup>43</sup>

### *B. Development of Critical Race Theory Bans*

The murder of George Floyd and the global racial justice protests that followed pushed conversations about race to the forefront of national attention, especially within schools and workplaces.<sup>44</sup> Christopher Rufo, a White conservative activist, found political opportunity to enter the national conversation after receiving information from a Seattle city

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<sup>41</sup> Richard Michael Fischl, *Some Realism about Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 525 (1987).

<sup>42</sup> DELGADO & STEFANCIC, *supra* note 1, at 3.

<sup>43</sup> AARON J. GRIFFEN ET AL., *CRT Receipts and the Trust Inequity*, SAMUEL DEWITT PROCTOR INST. FOR LEADERSHIP, EQUITY, AND LEADERSHIP AT RUTGERS UNIV. (Jan. 2022), <https://proctor.gse.rutgers.edu/sites/default/files/CRT%20Essay.pdf> [<https://perma.cc/USP4-WSQ4>].

<sup>44</sup> See generally Thu T. Nguyen et al., *Progress and push-back: How the killings of Ahmaud Arbery, Breonna Taylor, and George Floyd impacted public discourse on race and racism on Twitter*, 15 POPULATION HEALTH 100922 (2021); Stephen Sawchuk, *4 Ways George Floyd’s Murder Has Changed How We Talk About Race and Education*, ED WK. (Apr. 21, 2021), <https://www.edweek.org/leadership/4-ways-george-floyds-murder-has-changed-how-we-talk-about-race-and-education/2021/04> [<https://perma.cc/XZ8K-Y4Q9>]; Audra D.S. Burch et al., *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html> [<https://perma.cc/86EM-VG5Q>].

employee about government anti-bias and anti-racism trainings.<sup>45</sup> He submitted a public records request for all related documents and wrote about his findings in *City Journal*, a magazine published by the conservative think tank Manhattan Institute.<sup>46</sup> In his findings, he condemned workplace anti-racism efforts and critical race theory as cult-like identity politics that are infiltrating the public discourse.<sup>47</sup> He called on President Trump to ban federal agencies from teaching critical race theory and warned the public about a “long war against the diversity-industrial complex.”<sup>48</sup> Persuaded by his call to action against “critical race theory indoctrination,” government officials, including President Trump, and parent advocacy organizations took swift action to prohibit American schools and workplaces from discussing certain concepts of race and racism.<sup>49</sup>

Christopher Rufo published two pieces about government workplace anti-racism trainings for *City Journal* before appearing on Fox News. His first piece, “*Cult Programming in Seattle*,” was published on July 8, 2020.<sup>50</sup> His second piece, which discussed the rapidly spreading “critical race theory” through the federal government, “*‘White Fragility’ Comes to Washington*,” was published on July 18, 2020.<sup>51</sup> Of importance, Rufo concluded the article with an urgent message to President Trump to “issue an executive order banning federal agencies from teaching the toxic principles of critical race theory.”<sup>52</sup> On September 2, 2020, Rufo landed a time slot on *Tucker Carlson Tonight* on Fox News.

President Trump watched the interview between Christopher Rufo and Tucker Carlson.<sup>53</sup> Rufo said “critical race theory has pervaded every

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<sup>45</sup> See Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, THE NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [https://perma.cc/RSE7-ARR6].

<sup>46</sup> See Christopher Rufo, *Cult Programming in Seattle*, CITY JOURNAL (July 8, 2020), <https://www.city-journal.org/seattle-interrupting-whiteness-training> [https://perma.cc/8RTH-GBHE]; Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, THE NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [https://perma.cc/KGJ6-6KP2].

<sup>47</sup> Rufo, *supra* note 46; Christopher Rufo, “*White Fragility*” Comes to Washington, CITY JOURNAL (July 18, 2020), <https://www.city-journal.org/white-fragility-comes-to-washington> [https://perma.cc/KC6T-4QWU].

<sup>48</sup> Rufo, *supra* note 47.

<sup>49</sup> See Christopher Rufo, *America’s Parents Join Fight Against CRT*, MANHATTAN INST. (Nov. 4, 2021), <https://www.manhattan-institute.org/join-fight-america-future-critical-race-theory> [https://perma.cc/95GD-2UY7].

<sup>50</sup> Rufo, *supra* note 47.

<sup>51</sup> Rufo, *supra* note 49.

<sup>52</sup> *Id.*

<sup>53</sup> Wallace-Wells, *supra* note 45.

aspect of the federal government” and “has become, in essence, the default ideology of the federal bureaucracy.”<sup>54</sup> He referred to the “cult indoctrination” of critical race theory as dangerous and destructive, and specifically called on Trump to “immediately issue [an] executive order and stamp out this destructive, divisive, pseudo-scientific ideology at its root.”<sup>55</sup> A few days later, diversity trainings in the federal government related to critical race theory were suspended via memo from the Director of the Office of Management and Budget.<sup>56</sup> The memo denounced the “divisive, false, and demeaning propaganda of the critical race theory movement” as contrary to American ideals.<sup>57</sup>

In addition, Trump announced plans to establish a federal commission that would promote “patriotic education” developed from a “pro-American curriculum” to combat “indoctrination in our schools.”<sup>58</sup> Trump referred to CRT as “toxic propaganda” that will “dissolve the civil bonds that tie us together.”<sup>59</sup> His fixation on critical race theory and related cultural issues in American schools and workplaces became central to his re-election campaign.

On September 22, 2020, less than three weeks after Rufo appeared on Fox News, President Trump signed Executive Order 13950, “Combating Race and Sex Stereotyping.”<sup>60</sup> Conservative politicians and activists publicly celebrated the executive order. It prohibited federal agencies, contractors, and grant recipients from providing workplace trainings that instruct employees in any form of race or sex stereotyping or any form of race or sex scapegoating, including concepts that one race

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<sup>54</sup> Laura Meckler & Josh Dawsey, *Republicans, spurred by unlikely figure, see political promise in targeting critical race theory*, WASH. POST (June 21, 2021), <https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/> [<https://perma.cc/HQ9H-9UMF>]; see also Paul Kiernan, *Conservative Activist Grabbed Trump’s Eye on Diversity Training*, WALL STREET J. (Oct. 9, 2020), [https://www.wsj.com/articles/conservative-activist-grabbed-trumps-eye-on-diversity-training-11602242287?mod=article\\_inline](https://www.wsj.com/articles/conservative-activist-grabbed-trumps-eye-on-diversity-training-11602242287?mod=article_inline) [<https://perma.cc/4YMB-3WDS>].

<sup>55</sup> Sam Dorman, *Chris Rufo calls on Trump to end critical race theory ‘cult indoctrination’ in federal government*, FOX NEWS (Sept. 2, 2020), <https://www.foxnews.com/politics/chris-rufo-race-theory-cult-federal-government> [<https://perma.cc/JBC5-PL6B>].

<sup>56</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-20-34, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (Sept. 24, 2020).

<sup>57</sup> *Id.*

<sup>58</sup> Alana Wise, *Trump Announced ‘Patriotic Education’ Commission, A Largely Political Move*, NPR (Sept. 17, 2020), <https://www.npr.org/2020/09/17/914127266/trump-announces-patriotic-education-commission-a-largely-political-move> [<https://perma.cc/9GHZ-SEPU>].

<sup>59</sup> *Id.*

<sup>60</sup> Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

or sex is inherently superior to another race or sex or that an individual should feel discomfort or guilt on account of his or her race or sex.<sup>61</sup> Although EO 13950 did not specifically mention CRT, the call to action behind EO 13950 to ban CRT in workplaces and schools began to circulate in conservative circles.

Rufo subsequently played a key role in shaping a public perception of critical race theory as “radical” “dogma” that directly causes violence and destruction in American cities.<sup>62</sup> After his appearance on Fox News, he wrote almost exclusively on the topic of CRT in classrooms and workplaces. He created a narrative that positioned CRT as emblematic of *anything* shocking or extreme.<sup>63</sup> Rufo stated his goal was to take breaking news and manipulate it into “a salient political issue with a clear villain”—namely, race.<sup>64</sup> Between March 2021 and June 2021, Fox News mentioned the words “critical race theory” almost 2,000 times.<sup>65</sup>

On January 18th, 2021, Martin Luther King, Jr. Day, the Trump Administration released the “1776 Report.”<sup>66</sup> The Report was created by the President’s Advisory 1776 Commission, established to promote patriotic education.<sup>67</sup> Specifically, the Report sought to “build up a healthy, united citizenry” that will “reject false and fashionable ideologies that obscure facts, ignore historical context, and tell America’s story solely as one of oppression and victimhood rather than one of imperfection but also unprecedented achievement toward freedom, happiness, and fairness for all.”<sup>68</sup> The Commission was comprised of mostly conservative activists and Republican politicians. On his first day in office, President Biden issued an executive order on racial equity titled, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” which, among the issues addressed in the EO, revoked the 1776 Commission.<sup>69</sup>

Rufo is credited with manufacturing the right-wing panic over critical race theory and discussions of racism in American workplaces and

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<sup>61</sup> *Id.*

<sup>62</sup> Christopher Rufo, *Against Wokeness*, CITY JOURNAL (Sept. 16, 2020), <https://www.city-journal.org/threat-of-critical-race-theory> [<https://perma.cc/3NN7-T68C>].

<sup>63</sup> Meckler & Dawsey, *supra* note 54.

<sup>64</sup> *Id.*

<sup>65</sup> Lis Power, *Fox News’ obsession with critical race theory, by the numbers*, MEDIA MATTERS (June 15, 2021), <https://www.mediamatters.org/fox-news/fox-news-obsession-critical-race-theory-numbers> [<https://perma.cc/9FK8-F8NM>].

<sup>66</sup> The President’s Advisory 1776 Commission, *The 1776 Report* (Jan. 2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf> [<https://perma.cc/3YWH-4L5L>].

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1, 18.

<sup>69</sup> Exec. Order No. 13985, 85 Fed. Reg. 01753 (Jan. 20, 2021).

schools. Opponents of CRT have looked to Rufo's characterization of the theory, namely that educational institutions should not discuss certain concepts of race and racism, including that America is fundamentally racist or that racial oppression continues to impact racially minoritized communities in the United States, because those ideas are divisive and inflame racial discord.

### *C. State Legislative Efforts to Ban Critical Race Theory in Higher Education*

Although President Biden revoked President Trump's Executive Order 13950 and 1776 Commission on his first day in office with Executive Order 13985,<sup>70</sup> conservative politicians continued their efforts to ban critical race theory.<sup>71</sup> On June 24, 2021, Republican Senator Ted Cruz introduced the "END CRT Act" into Congress.<sup>72</sup> The bill sought to codify Trump's EO 13950 into law and prohibit agencies from acting in violation of its provisions.<sup>73</sup> On July 14, 2021, Republican Senator Tom Cotton introduced the "Stop CRT Act" into Congress.<sup>74</sup> The bill also sought to codify Trump's EO 13950 into law and prohibit institutions of higher education from promoting race-based theories or materials.<sup>75</sup> None of the bills introduced to the United States Congress passed; however, state-specific CRT bans began to garner interest.

#### 1. Examples of State Legislative Bans

Ten states have taken legal measures to ban CRT in institutions of higher education: Arkansas, Idaho, Iowa, Florida, Mississippi, Montana, New Hampshire, Oklahoma, South Dakota, and Tennessee.<sup>76</sup> Eight states passed anti-CRT laws and two states requested Attorney General Opinions

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<sup>70</sup> *Id.*

<sup>71</sup> See Friedman & Tager, *supra* note 9.

<sup>72</sup> S. 2221, 117th Cong. (2021–2022).

<sup>73</sup> *Id.*

<sup>74</sup> S. 2346, 117th Cong. (2021–2022).

<sup>75</sup> *Id.*

<sup>76</sup> See Kiara Alfonseca, *Map: Where anti-critical race theory efforts have reached*, ABC NEWS (Mar. 24, 2022), <https://abcnews.go.com/Politics/map-anti-critical-race-theory-efforts-reached/story?id=83619715> [https://perma.cc/3QN2-NZX5]; Peter Greene, *Teacher Anti-CRT Bills Coast to Coast: A State By State Guide*, FORBES (Feb. 16, 2022), <https://www.forbes.com/sites/petergreene/2022/02/16/teacher-anti-crt-bills-coast-to-coast-a-state-by-state-guide/?sh=3089d60e4ff6> [https://perma.cc/K5F9-KGWX].

on the legality of CRT trainings and curricula.<sup>77</sup> Nearly twenty additional states have introduced bills targeting CRT in higher education.<sup>78</sup>

Idaho became the first state to prohibit all public schools, including institutions of higher education, from teaching tenets of CRT when Republican Governor Brad Little signed House Bill 377, entitled “Dignity And Nondiscrimination In Public Education,” into law on April 28, 2021.<sup>79</sup> House Bill 377 amended the Idaho Code by adding sections 33-138 and 33-139, which outline the limitations placed on the teaching of materials related to race and gender and the expenditure of public money for teaching race and gender.<sup>80</sup> Section 33-138 of the Idaho Code states that public institutions of higher education are prohibited from directing or otherwise compelling students to personally affirm, adopt, or adhere to any of the following tenets:

- (i) That any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior; (ii) That individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin; or (iii) That individuals, by virtue of sex, race, ethnicity, religion, color, or national origin, are inherently responsible for actions committed in the past by other members of the same sex, race, ethnicity, religion, color, or national origin.<sup>81</sup>

Moreover, section 33-138 of the Idaho Code states that distinctions or classifications of students on account of race or color is prohibited, and public institutions of higher education are prohibited from introducing any mandatory “course of instruction or unit of study” relating to the tenets above.<sup>82</sup> Section 33-139 of the Idaho Code states that money cannot be expended by any public institution of higher education for any purposes prohibited by section 33-138.<sup>83</sup>

In a letter to the Idaho Speaker of the House, Governor Little wrote that he had concerns over allegations of “widespread, systemic indoctrination” in Idaho’s public schools, which “undermines popular

<sup>77</sup> See Alfonseca, *supra* note 76; see also Greene, *supra* note 76.

<sup>78</sup> See Peter Greene, *Teacher Anti-CRT Bills Coast to Coast: A State by State Guide*, FORBES (Feb. 16, 2022), <https://www.forbes.com/sites/petergreene/2022/02/16/teacher-anti-crt-bills-coast-to-coast-a-state-by-state-guide/?sh=3daf4dac4ff6> [https://perma.cc/UY4K-Q8N3].

<sup>79</sup> Brad Little, *Letter from Governor of the State of Idaho to Scott Bedke, Speaker of the House of Representatives in the State of Idaho* (Apr. 28, 2021), [https://gov.idaho.gov/wp-content/uploads/2021/04/transmittal-h377\\_2021.pdf](https://gov.idaho.gov/wp-content/uploads/2021/04/transmittal-h377_2021.pdf) [https://perma.cc/KL7P-XGKS].

<sup>80</sup> H.B. 377, 66th Leg., Reg. Sess. (Idaho 2021).

<sup>81</sup> IDAHO CODE § 33-138(3)(a)(i-iii) (2021).

<sup>82</sup> *Id.* § 33-138(3)(c).

<sup>83</sup> *Id.* § 33-139.

support for public education in Idaho.”<sup>84</sup> He advocated for a need to focus on “facts and data, not anecdotes and innuendo,”<sup>85</sup> suggesting that tenets of critical race theory are not factual or data-based. The Idaho law is notable for specifically mentioning critical race theory by name. Many, if not most, other legislative bans on critical race theory make no mention of the theory and only allude to its existence.<sup>86</sup>

Two months after Idaho, on June 8, 2021, Iowa became the second state to prohibit public schools, including institutions of higher education, from including tenets of critical race theory in trainings or curriculum when Republican Governor Kim Reynolds signed House File 802 into law.<sup>87</sup> House File 802 amended the Iowa Code by adding sections 25A.1, 261H.8, and 279.74, which outline the limitations placed on the content and materials prohibited from government trainings and university curricula.<sup>88</sup> While the Iowa law does not prohibit the use of curriculum that includes topics of sexism, slavery, racial oppression, racial segregation, or racial discrimination, it does prohibit teaching:

- (1) That one race or sex is inherently superior to another race or sex.
- (2) That the United States of America and the state of Iowa are fundamentally or systemically racist or sexist.
- (3) That an individual, solely because of the individual’s race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
- (4) That an individual should be discriminated against or receive adverse treatment solely or partly because of the individual’s race or sex.
- (5) That members of one race or sex cannot and should not attempt to treat others without respect to race or sex.
- (6) That an individual’s moral character is necessarily determined by the individual’s race or

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<sup>84</sup> Little, *supra* note 79.

<sup>85</sup> *Id.*

<sup>86</sup> For example, Florida Governor Ron DeSantis claims Florida’s HB 7, known as the “Stop W.O.K.E. Act,” takes on critical race theory in schools and corporations despite any mention of the words “critical race theory” in the law itself. *See Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination*, GOVERNOR RON DESANTIS NEWS (Apr. 20, 2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/> [<https://perma.cc/RV47-AWNG>]; Mississippi Governor Tate Reeves blames critical race theory for indoctrinating and forcing students to feel guilty because of the color of their skin. Nevertheless, the language of SB 2113 makes no mention of critical race theory. *See Molly Minta, Bill that seeks to ban CRT signed into law*, MISSISSIPPI TODAY (Mar. 15, 2022), <https://mississippitoday.org/2022/03/15/anti-crt-bill-signed-into-law/> [<https://perma.cc/8EH6-6Z52>].

<sup>87</sup> Kim Reynolds, *Letter from Governor of the State of Iowa to Paul Pate, Secretary of State of Iowa*, IOWA OFFICE OF THE GOVERNOR (June 8, 2021), <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=HF802> [<https://perma.cc/5EKC-F2V4>].

<sup>88</sup> H.F. 802, 89th Gen. Assemb., Reg. Sess. (Iowa 2021).



sex. (7) That an individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex. (8) That any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of that individual's race or sex. (9) That meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. (10) Any other form of race or sex scapegoating or any other form of race or sex stereotyping.<sup>89</sup>

Furthermore, the Iowa law prohibits employees of an institution of higher education from discriminating against students based on political ideology or any characteristic protected under the Federal Civil Rights Act of 1964.<sup>90</sup>

On April 22, 2022, Republican Florida Governor Ron DeSantis signed House Bill 7 (“HB 7”) into law, a controversial bill which limits discussions based on race in K-20 public education.<sup>91</sup> DeSantis said CRT is “state-sanctioned racism” that trains and indoctrinates students and employees.<sup>92</sup> The Florida law, titled the “Individual Freedom” Act, prohibits public K-20 institutions from subjecting students or employees from training or instruction that “espouses, promotes, advances, inculcates, or compels such individual to believe specific concepts.”<sup>93</sup>

## 2. Review of State Legislative Bans

The legislative attack on critical race theory in postsecondary education is unusual for several reasons. First, state legislatures do not usually seek to control so directly the curriculum of public colleges and universities. While state legislatures govern certain functions at postsecondary institutions, like state of emergency protocols or authority to regulate intellectual property, the scope and content of the curriculum are not ordinarily under their control.<sup>94</sup> Faculty scholarship, course

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<sup>89</sup> IOWA CODE § 261H.8(1)(c)(1-10) (2022).

<sup>90</sup> *Id.* § 261H.8(3).

<sup>91</sup> *Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination*, GOVERNOR RON DESANTIS NEWS (Apr. 22, 2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/> [<https://perma.cc/RA9P-5ZMH>].

<sup>92</sup> *Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations*, GOVERNOR RON DESANTIS NEWS (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/> [<https://perma.cc/5WSK-L6TF>].

<sup>93</sup> H.B. 7, Reg. Sess. (Fla. 2022).

<sup>94</sup> LA. STAT. ANN. § 17:3109 (1969) (state emergency protocols); FLA. STAT. § 1004.23 (2020) (regulate intellectual property).

offerings, and teaching content are traditionally matters of academic freedom and institutional autonomy.<sup>95</sup>

Second, many government representatives pushing efforts to ban CRT generally oppose restrictions to freedom of speech on campus, such as campus speech codes. Campus speech codes, or anti-discrimination codes, developed in the 1990s at over 350 institutions of higher education to restrict and combat hate speech.<sup>96</sup> The anti-discrimination codes targeted offensive, hateful, racist, or demeaning speech that was either aimed at an individual or created a hostile educational environment.<sup>97</sup> Opponents argue speech codes are unconstitutional for restricting otherwise constitutional speech. Further, opponents suggest that speech codes undermine the very mission of public institutions of higher education as a “marketplace of ideas.”<sup>98</sup> Conservative lawmakers tout an ostensible commitment to free speech by repealing anti-discrimination speech codes, even as they support new policies that limit students’ rights to counter-protest or challenge white supremacist speakers on campus.<sup>99</sup> Ironically enough, despite their apparently steadfast commitment to free speech, conservative lawmakers seem to forget their “commitment” when it comes time to ban CRT-related speech.

On April 22, 2022, Republican Governor Ron DeSantis of Florida signed HB 7 into law.<sup>100</sup> Governor DeSantis stated HB 7, also known as the “Stop Wrongs Against Our Kids and Employees” (Stop WOKE Act), stands against the “woke indoctrination” of CRT in schools and

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<sup>95</sup> See generally *Legal Cases Affecting Academic Speech*, AM. ASS’N OF UNIV. PROFESSORS (Oct. 2013), <https://www.aaup.org/get-involved/issue-campaigns/speak-speak-out-protect-faculty-voice/legal-cases-affecting-academic> [<https://perma.cc/P3EW-MUS3>].

<sup>96</sup> ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 82 (2017).

<sup>97</sup> James R. Bussian, *Anatomy of the Campus Speech Code: An Examination of Prevailing Regulations*, 36 S. TEX. L. REV. 153, 154–55, 163 (1995).

<sup>98</sup> See generally Neal H. Hutchens & Frank Fernandez, *Searching for Balance with Student Free Speech: Campus Speech Zones, Institutional Authority, and Legislative Prerogatives*, 5 BELMONT L. REV. 103 (2018).

<sup>99</sup> *Id.*

<sup>100</sup> See, e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, *Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination* (Apr. 22, 2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/> [<https://perma.cc/4357-PL3P>]. For critical scholarship on H.B. 7 in Florida, see Katheryn Russell Brown, *“The STOP Woke Act:” HB 7, Race, and Florida’s 21st Century Anti-Literacy Campaign*, NYU REV. L. & SOC. CHANGE (forthcoming 2023) (discussing the ambiguity of Florida’s H.B. 7 as applied in legal education).

corporations.<sup>101</sup> Four months after HB 7 was signed into law, the NAACP Legal Defense and Educational Fund, Inc. (“LDF”) filed a lawsuit on behalf of a group of college and university faculty and students challenging the Florida legislation for unconstitutionally violating the First Amendment and Equal Protection Clause.<sup>102</sup> The lawsuit argues HB 7 places First Amendment protections of academic freedom under judicial scrutiny.<sup>103</sup> In response, the state of Florida argued public institutions of higher education maintain constitutional academic freedom which, consequently, permits the institution to that public university curriculum and public faculty speech in the classroom is “government speech.”<sup>104</sup> In December 2022, Governor DeSantis issued a memorandum ordering Florida state universities to report expenditures and resources on campus initiative related to diversity, equity, and inclusion (“DEI”) and CRT.<sup>105</sup> Despite his continued attacks on speech in public colleges and universities, Governor DeSantis has passed legislation and rooted his political campaign on the prohibition of censorship. On May 24, 2021, Governor DeSantis signed Senate Bill 7072, which allows private citizens and political figures to sue social media companies if they are censored or removed from a platform for more than fourteen days.<sup>106</sup> The bill is aimed to protect Floridians from censorship and “other tyrannical behavior”

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<sup>101</sup> See, e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, *Governor Ron DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations* (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/> [<https://perma.cc/6Y9F-EMYS>].

<sup>102</sup> See *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 2022 WL 16985720 (N.D. Fla. Aug. 18, 2022).

<sup>103</sup> For an explanation of the First Amendment academic freedom rights at stake following Florida’s H.B. 7, see Neal Hutchens and Vanessa Miller, *Florida’s Stop WOKE Act: A Wake-Up Call For Academic Freedom*, 48 J.C.U.L. (forthcoming 2023).

<sup>104</sup> *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 2022 WL 16985720, \*19 (N.D. Fla. Sept. 22, 2022) (defendants’ response in opposition to plaintiffs’ motion for preliminary injunction).

<sup>105</sup> For the memo, see Chris Spencer, *Memorandum re: Higher Education Program and Activity Survey*, (Dec. 28, 2022), <https://www.theflstandard.com/content/files/2023/01/Executive-Memorandum-23-021.pdf> (last visited Mar. 10, 2023); also see Emma Pettit, “A Florida University is Quickly Assembling a List of Courses on Diversity. Why? DeSantis Asked.”, *CHRON. OF HIGHER EDUC.* (Jan. 3, 2023), <https://www.chronicle.com/article/a-florida-university-is-quickly-assembling-a-list-of-courses-on-diversity-why-desantis-asked> [<https://perma.cc/GBX6-EFX7>].

<sup>106</sup> See, e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, (May 24, 2021), <https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/> [<https://perma.cc/2YH9-ZMMG>].

faced in Cuba and Venezuela.<sup>107</sup> Further, during his reelection speech on January 3, 2023, Governor DeSantis not only said he embraced freedom, but that Florida “held the line” for the “concept of freedom” and that “freedom is here to stay.”<sup>108</sup>

On February 25, 2022, Republican Governor Kirsti Noem of South Dakota said at the Conservative Political Action Conference (“CPAC”), “The Left crushes free speech. Conservatives celebrate free expression.”<sup>109</sup> Her remarks at CPAC were made just one month prior to signing her state’s ban on CRT at postsecondary institutions. Republican Representative Phil Jensen of South Dakota also supported the anti-CRT bill, despite his track record of introducing bills aimed at “protecting the constitutional right of speech and association.”<sup>110</sup> In 2014, he introduced SB 128, which sought to provide private businesses with the free speech right to discriminate on the basis of sexual orientation.<sup>111</sup> In 2021, he introduced House Bill 1223, which sought to prohibit political or religious censorship on social media platforms.<sup>112</sup>

On March 27, 2019, Republican Governor Kim Reynolds of Iowa signed Senate File 274 into law.<sup>113</sup> The law requires the state’s public institutions of higher education to adopt free speech policies, prohibit First Amendment restrictions relating to visiting speakers, and allow student organizations to select leaders on alignment of values.<sup>114</sup> The law specifically prohibits institutions from “shield[ing] individuals from speech protected by the First Amendment to the Constitution of the United States, which may include ideas and opinions the individual finds unwelcome, disagreeable, or even offensive.”<sup>115</sup> However, just two years later, Governor Reynolds signed Iowa’s anti-CRT law, which bans

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<sup>107</sup> *Id.*

<sup>108</sup> See Florida Governor Ron DeSantis Victory Speech, CSPAN (Nov. 8, 2022), <https://www.c-span.org/video/?524142-1/florida-governor-ron-desantis-victory-speech> [<https://perma.cc/DSJ2-FEAK>].

<sup>109</sup> Joe Sneve, *Read South Dakota Gov. Kristi Noem’s full CPAC 2022 Speech*, ARGUS LEADER (Feb. 25, 2022), <https://www.argusleader.com/story/news/2022/02/25/south-dakota-governor-kristi-noem-speech-cpac-2022-conservative-political-action-conference/6942392001/> [<https://perma.cc/D2C9-QUA3>].

<sup>110</sup> Clare Kim, *GOP lawmaker: Businesses should be able to refuse services to blacks*, MSNBC (Mar. 17, 2014), <https://www.msnbc.com/the-last-word/goper-businesses-have-right-discriminate-msna288211> [<https://perma.cc/6GE4-XUKD>].

<sup>111</sup> S.B. 128, 89th Sess. (S.D. 2014).

<sup>112</sup> H.B. 1223, 96th Sess. (S.D. 2021).

<sup>113</sup> Kim Reynolds, *Letter from Governor of the State of Iowa to Paul Pate, Secretary of State of Iowa*, IOWA OFFICE OF THE GOVERNOR (Mar. 27, 2019), [https://www.legis.iowa.gov/legislation/BillBook?ba=SF274&ga=88&utm\\_medium=email&utm\\_source=govdelivery](https://www.legis.iowa.gov/legislation/BillBook?ba=SF274&ga=88&utm_medium=email&utm_source=govdelivery) [<https://perma.cc/2KUU-LDF9>].

<sup>114</sup> *Id.*

<sup>115</sup> IOWA CODE § 261H.(1)(b)(1) (2021).

multiple “divisive concepts” from being taught or discussed at institutional trainings.<sup>116</sup>

Third, lawmakers supportive of anti-CRT legislation are (mis)construing the scope of CRT as an all-encompassing bracket for a cadre of issues related to race, gender, gender identity, and sexual orientation. In other words, lawmakers are ignorantly or erroneously grouping together several concepts as emblematic of “CRT,” including anti-racism, diversity and inclusion trainings, anti-bias trainings, whiteness studies, the 1619 Project, meritocracy, critical theory, gender identity and sexual orientation, and sexism. While CRT may engage with gender or gender identity, for example, in analyzing the high murder rates of Black trans women,<sup>117</sup> it is inaccurate to include *all* gender-related concepts or feminist studies under the larger framework of CRT. Likewise, while CRT engages with race, for example, in analyzing disproportionately high sentencing rates for Black men, it is inaccurate to label *everything* involving race as grounded in CRT. To do so is an attempt to shut down *all* conversation about race and racism by alleging connection to CRT.

Although critical race theory scholarship differs in object, argument, and method, two central tenets of critical race scholarship are: (1) the understanding that white supremacy and subordination of persons of color, specifically Black persons, has been created and maintained under the false guise of professed legal ideals such as “the rule of law” and “equal protection” and (2) the desire to examine and transform the relationship between law and power.<sup>118</sup> Critical race scholars do not seek to exacerbate or inflame divisions on the basis of sex, race, ethnicity, religion, color, or national origin, but rather seek to identify and examine those divisions that were created and maintained because of a person’s sex, race, ethnicity, religion, color, or national origin.

Fourth, lawmakers have misrepresented CRT as an academic framework that dictates an *individual’s* behavior regarding racism. In fact, CRT analyzes the *systems* and *structures* of American institutions, such as the criminal legal system and education, and not the *individuals* within those institutions. CRT centers racism as systemic and not simply demonstrated by individual actions.<sup>119</sup> However, anti-CRT laws describe the practice or tenets of CRT as individualistic and prohibits institutions of higher education from teaching or providing trainings about how to use

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<sup>116</sup> Reynolds, *supra* note 87.

<sup>117</sup> See INCITE! Women of Color Against Violence, *Law Enforcement Violence Against Women of Color & Trans People of Color: A Critical Intersection of Gender Violence & State Violence* (Aug. 2018), <https://incite-national.org/wp-content/uploads/2018/08/TOOLKIT-FINAL.pdf> [<https://perma.cc/TZ6N-NRTP>].

<sup>118</sup> See CRENSHAW ET AL., *supra* note 1.

<sup>119</sup> See DELGADO & STEFANCIC, *supra* note 1.

the framework to consider how systems, structures, and processes may be improved. For example, the anti-CRT law in Iowa prohibits institutions from introducing the idea “[t]hat an individual should be discriminated against or receive adverse treatment solely or partly because of the individual’s race,” or “[t]hat an individual’s moral character is necessarily determined by the individual’s race or sex.”<sup>120</sup> CRT does not wholly concern itself with the actions of individual persons but with the overall culture of American law and society.<sup>121</sup>

Lastly, the panic surrounding the infiltration of CRT in the federal government and schools is baseless. Neither the federal government nor public school districts use CRT in their programming or curriculum, let alone to a degree that should raise concerns of indoctrination. Even now, the history and tenets of CRT are largely limited to upper-level elective law school and graduate school courses. As an academic framework, CRT has been in existence for over forty years. However, conservative lawmakers and news outlets suddenly became interested in CRT after Derek Chauvin knelt on George Floyd’s neck for more than nine minutes and a racial reckoning followed. Unlike their response to last century’s Civil Rights movement, White elected officials cannot easily use law enforcement, police dogs, and fire hoses to silence citizens advocating for racial equality; instead, they propped up CRT as a straw man and sought to target and censor faculty as divisive instigators of racial tension.

### III. ACADEMIC FREEDOM, THE FIRST AMENDMENT, AND CRITICAL RACE THEORY LEGISLATION

State legislative proposals to ban or limit the teaching of CRT or related concepts—such as the nebulous divisive concepts language found in multiple proposals<sup>122</sup>—impinge directly on academic freedom considerations in higher education. This section considers potential implications for anti-CRT legislation and other related directives aimed at public colleges and universities in relation to the First Amendment academic freedom rights of faculty members. In relation to academic freedom as a professionally grounded concept in higher education,<sup>123</sup> anti-

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<sup>120</sup> Reynolds, *supra* note 113.

<sup>121</sup> See CRENSHAW ET AL., *supra* note 1.

<sup>122</sup> As covered in Part I, one of the challenges with understanding the extent of state legislative proposals is that they are often vague and poorly drafted and, despite language aimed at CRT, reflect either a misunderstanding or mischaracterization of CRT and related critical strands of scholarship.

<sup>123</sup> See, e.g., AM. ASS’N OF UNIV. PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AAUP: POLICY DOCUMENTS AND REPORTS 13, 15 (11th ed. 2015). The AAUP statement on academic freedom has been widely adopted by colleges and universities. Among the protections that are supposed to encompass faculty academic freedom are those related to research

CRT proposals undercut academic freedom principles because they seek to ban certain ideas or topics from the classroom. As for First Amendment underpinnings of academic freedom, anti-CRT legislative initiatives highlight continuing debates and questions over the extent of First Amendment protections for the academic freedom of individual professors and for institutions generally, including whether constitutional academic freedom protections co-exist at the individual or institutional levels or accrue only to the institution or to the individual scholar.<sup>124</sup>

There are longstanding debates over the existence and scope of constitutional protections for academic freedom. Some scholars and courts conclude that individual faculty members possess constitutionally protected academic freedom rights.<sup>125</sup> Others contend that if the First Amendment serves as an independent source of legal protection for academic freedom, then any such rights are possessed by the institution and not individual faculty members.<sup>126</sup>

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and to teaching. The AAUP has denounced anti-CRT bans as an infringement on academic freedom. AAUP, *Statement on Legislation Teaching about Race*, (Aug. 4, 2021), <https://www.aaup.org/news/statement-legislation-restricting-teaching-about-race#.YncEiy1h2Cc> [<https://perma.cc/84PC-RCEL>].

<sup>124</sup> For a sampling of several works that wade into the various debates over constitutional academic freedom, see generally Nathan A. Adams, IV, *Resolving Enmity Between Academic Freedom and Institutional Autonomy*, 46 J.C. & U.L. 1 (2022); Inara Scott et al., *First Do No Harm: Revisiting Meriwether v. Hartop and Academic Freedom in Higher Education*, 71 AM. U. L. REV. 977 (2022); Lawrence Rosenthal, *Does the First Amendment Protect Academic Freedom?*, 46 J.C. & U.L. 223 (2022); Michael K. Park, *A Matter of Public Concern: The Case for Academic Freedom Rights of Public University Faculty*, 26 COMM. L. & POL'Y 32 (2021); William E. Thro, *Follow the Truth Wherever It May Lead: The Supreme Court's Truths and Myths of Academic Freedom*, 45 U. DAYTON L. REV. 261 (2020); Michael H. LeRoy, *How Courts View Academic Freedom*, 42 J.C. & U.L. 1 (2016); Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 678 (2014); Judith Areen, *Government As Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 946 (2009).

<sup>125</sup> For a court concluding that such protections exist, this section considers *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), a case in which a federal appeals court determined that public college and university faculty members possess constitutionally protected rights relative to their classroom speech.

<sup>126</sup> See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (holding that public university faculty members did not possess an individual First Amendment academic freedom right to be exempt from a state law that regulated searches on state owned or leased computers). In relation to institutional academic freedom, this article focuses on the issue of constitutional academic freedom rights for public colleges and universities that could be exercised against other state governmental entities, such as a legislature. A private college or university may well possess an institutional right under the First Amendment that can be asserted against state or federal governmental actors. For faculty members in private higher education, academic freedom protections in relation to their institution are based on employment arrangements, such

Current legal disagreement over First Amendment academic freedom reveals that the U.S. Supreme Court has failed to establish a clear legal doctrine following its initial articulation of constitutional protection for academic freedom. In *Keyishian v. Board of Regents*,<sup>127</sup> writing for the majority, Justice Brennan offered lofty aspirations for academic freedom and the constitution in a well-known passage:

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. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “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.”<sup>128</sup>

In arriving at a declaration of the importance of academic freedom in a majority opinion in *Keyishian*, the Supreme Court built on a series of decisions it had rendered during the McCarthy era. In *Adler v. Board of Education of the City of New York*,<sup>129</sup> academic freedom first appeared in a Supreme Court decision in a dissenting opinion authored by Justice Douglas.<sup>130</sup> The legal clashes of the Red Scare period have strong parallels—that should serve as a cautionary tale—to current legislative efforts to enact CRT bans in education. Both of these threats to academic freedom come from governmental actors seeking to intrude into the internal affairs of public colleges and universities and other education actors and to impose potential sanctions on specific individuals for supporting particular views or ideas.<sup>131</sup>

In *Adler*, the Supreme Court upheld the legality of a New York Law, called the Feinberg Law, which prohibited employment in educational institutions by individuals who belonged to groups determined to be

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as tenure, and the policies and procedures contained in sources that include faculty and employee handbooks. A faculty member at a private college of university would not possess a First Amendment claim as to their employer, which, outside of special circumstances, would not qualify as a state actor for purposes of a constitutional claim.

<sup>127</sup> 385 U.S. 589 (1967).

<sup>128</sup> *Id.* at 603 (citations omitted).

<sup>129</sup> 342 U.S. 485 (1952).

<sup>130</sup> *Id.* at 508.

<sup>131</sup> In contrast to anti-CRT legislation, many later academic freedom cases involving faculty members involve a First Amendment dispute between a professor and their institutional employer.



subversive, such as communist organizations.<sup>132</sup> In an often-cited dissenting opinion in *Adler*, Justice Douglas characterized the “havoc” to academic freedom that the Feinberg Law would create:

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of inquiry. A “party line”—as dangerous as the “party line” of the Communists—lays hold. It is the “party line” of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.<sup>133</sup>

In the same year that *Adler* was decided, the Supreme Court struck down an Oklahoma loyalty law on the basis that the statute could apply to individuals who had unknowingly belonged to a prohibited group.<sup>134</sup> In a concurring opinion in that case, Justice Frankfurter offered the following thoughts about the role of teachers and the educational system:

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of

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<sup>132</sup> *Adler*, 343 U.S. at 496.

<sup>133</sup> *Id.* at 510.

<sup>134</sup> *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government.<sup>135</sup>

In another well-known case decided five years after *Adler and Wieman*, the Supreme Court considered the case of Paul Sweezy, a Marxian economist.<sup>136</sup> He was held in contempt by a state court for refusing to answer questions from the New Hampshire attorney general, including ones about a lecture that Sweezy gave at the University of New Hampshire.<sup>137</sup> A majority of the Supreme Court, concluding that Sweezy's rights were violated, offered strong support for the need for unencumbered inquiry in higher education:

[W]e believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>138</sup>

However, the Court stated that it did not have to reach the issue of constitutional protections for academic freedom to decide the case and, instead, relied on due process grounds to invalidate the contempt finding against Sweezy.<sup>139</sup> Justice Frankfurter, in a concurring opinion, contended that the attorney general's actions were impermissible on academic freedom grounds.<sup>140</sup> As to the need for free inquiry in higher education, he wrote:

Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit

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<sup>135</sup> *Id.* at 196–97.

<sup>136</sup> *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

<sup>137</sup> *Id.* at 238–44.

<sup>138</sup> *Id.* at 250.

<sup>139</sup> *Id.* at 254–55.

<sup>140</sup> *Id.* at 261–62 (Frankfurter, J., concurring).

of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.<sup>141</sup>

Frankfurter also looked to a statement by South African scholars regarding the need for a university “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>142</sup>

In *Keyishian v. Board of Regents*,<sup>143</sup> the U.S. Supreme Court perhaps reached what is the legal highwater mark for constitutional academic freedom. Again considering New York's Feinberg Law at issue in *Adler*, the Court this time struck down the law as impermissible.<sup>144</sup> In its decision, the Supreme Court concluded that the New York law was unconstitutional both on vagueness and overbreadth grounds.<sup>145</sup> In the section of the opinion invalidating the Feinberg Law, along with looking approvingly to *Sweezy*, the Court offered a strong endorsement of academic freedom:

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. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “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.”<sup>146</sup>

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<sup>141</sup> *Id.* (Frankfurter, J., concurring).

<sup>142</sup> *Id.* at 263 (Frankfurter, J., concurring).

<sup>143</sup> *Keyishian v. Board of Regents of State of New York*, 385 U.S. 589 (1967).

<sup>144</sup> *Id.* at 609–10.

<sup>145</sup> *Id.* at 604, 608–09.

<sup>146</sup> *Id.* at 603 (citations omitted).

Despite touting academic freedom as a “special concern” of the First Amendment in *Keyishian* and periodically acknowledging academic freedom as a constitutional concern in other decisions, Supreme Court cases have not delineated clear standards for lower courts to apply in adjudicating academic freedom claims. Notably, and as further developed in Part III, the Supreme Court has historically looked to academic freedom principles when it examined the legal permissibility of colleges and universities to consider race as one factor in admissions to achieve the educational benefits of diversity. The Court, without offering clarification, has also acknowledged potential tensions between an individual faculty member’s academic freedom and institutional prerogatives.<sup>147</sup>

Despite periodic references in Supreme Court decisions,<sup>148</sup> academic freedom as a constitutional doctrine is characterized by ambiguity and debate. Some commentators, such as law professor Scott Bauries, have concluded that the McCarthy era decisions, including *Keyishian*, do not establish any kind of special constitutional protection for individual academic freedom beyond those available to other citizens employed by governmental actors.<sup>149</sup> One line of argument contends that if any academic freedom protections exist under the First Amendment, then these accrue at the institutional level and do not apply to individual faculty members. The *Urofsky v. Gilmore* decision provides an example of a federal appeals court taking this position in denying a challenge to a Virginia state law by a group of faculty members at public universities in the state.<sup>150</sup>

During the McCarthy period, academic freedom cases centered on state governmental intrusions into educational contexts, but later decisions often tended to center on legal disagreement between faculty members and their institutions.<sup>151</sup> Faced with a dispute between a college or university

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<sup>147</sup> See *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (stating “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students. . . but also, and somewhat inconsistently, on autonomous decision making by the academy itself. . .”) (citations omitted).

<sup>148</sup> Academic freedom considerations, for example, have served as a rationale to uphold the constitutionality of using race as a factor in higher education admissions. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”). See Part III for more on of the role of academic freedom in the Supreme Court’s review of the use of race as a factor in admissions.

<sup>149</sup> Bauries, *supra* note 124. See also, e.g., Thro, *supra* note 124.

<sup>150</sup> *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000).

<sup>151</sup> See WILLIAM A. KAPLIN, BARBARA A. LEE, NEAL H. HUTCHENS, & JACOB ROOKSBY, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL*

and a faculty member, courts have often turned to the line of cases dealing with the speech rights of public employees in general and the legal progeny of *Pickering v. Board of Education*.<sup>152</sup> This approach permitted courts to largely sidestep directly sorting out tensions between constitutional guarantees of individual or institutional academic freedom while recognizing, in some instances, First Amendment protection for faculty speech under the public employee speech framework.<sup>153</sup>

This arrangement, however, was thrown into doubt with the Supreme Court's 2006 decision in *Garcetti v. Ceballos*.<sup>154</sup> Prior to *Garcetti*, courts in a public employee speech case would evaluate whether the employee speech at issue dealt with a matter of public concern or only raised an issue of private concern.<sup>155</sup> If categorized as dealing with a matter of public concern, then the speech potentially qualified for First Amendment protection; the court would then apply a balancing test to determine whether the public concern outweighed countervailing justifications from the employer, such as the need to regulate or restrict speech to ensure efficient business operations.<sup>156</sup>

In *Garcetti*, the Supreme Court considered whether a Los Angeles deputy district attorney's First Amendment rights were violated based on his communications that raised doubts over whether law enforcement officials lied in an affidavit to obtain a search warrant.<sup>157</sup> In the case, the Supreme Court created a new, threshold inquiry in public employee speech analysis. If a public employee engages in speech as part of carrying out their official employment duties, then the speech is ineligible for First Amendment protection.<sup>158</sup> In a dissenting opinion, Justice Souter questioned whether the *Garcetti* standard impinged on academic freedom protections under the First Amendment.<sup>159</sup> Writing for the majority, Justice Kennedy stated that Souter raised a potentially salient issue but one not presented in the current case.<sup>160</sup> Since then, courts and commentators

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IMPLICATION OF ADMINISTRATIVE DECISION MAKING 770–75 (2019) (providing an overview of cases dealing with academic freedom and faculty speech claims).

<sup>152</sup> *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968). See KAPLIN ET AL., *supra* note 151, at 760–66.

<sup>153</sup> See KAPLIN ET AL., *supra* note 151, at 760–66.

<sup>154</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>155</sup> See *id.* at 418–19.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 414.

<sup>158</sup> *Id.* at 421 (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).

<sup>159</sup> *Id.* at 438–39.

<sup>160</sup> *Id.* at 425 (“Justice Souter suggests today’s decision may have important ramifications for academic freedom, at least as a constitutional value. . . There is some

have taken divergent stances on whether some type of academic freedom exception exists in relation to the public employee speech standards announced in *Garcetti*. Some courts have applied the standard from *Garcetti* to multiple types of faculty speech,<sup>161</sup> while other courts, including several federal appeals courts, have ruled that faculty speech made in the course of carrying out employment duties, such as teaching, is eligible for First Amendment protection.<sup>162</sup>

*Meriwether v. Hartop* is one of the more recent—and potentially far-reaching—decisions from a federal appeals court dealing with faculty speech and the *Garcetti* standard.<sup>163</sup> In *Meriwether*, the Sixth Circuit reversed the lower court’s decision to grant a university’s motion to dismiss a professor’s free speech claim.<sup>164</sup> The faculty member sued the university after being reprimanded for refusing to use a student’s preferred pronouns.<sup>165</sup> The court relied on *Sweezy* and *Keyisian* for the proposition that “the First Amendment protects the free-speech rights of professors when they are teaching.”<sup>166</sup> According to the court in *Meriwether*:

[O]ur court has rejected as “totally unpersuasive” “the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction.” And we have recognized that “a professor’s rights to academic freedom and

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argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”).

<sup>161</sup> See KAPLIN ET AL., *supra* note 151, at 760–66.

<sup>162</sup> See *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014); *Adams v. Trs. of Univ. of North Carolina-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011); *Buchanan v Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019).

<sup>163</sup> See generally 992 F.3d 492 (6th Cir. 2021).

<sup>164</sup> *Id.* at 518.

<sup>165</sup> *Id.* at 499. Even if agreeing with the general legal standards announced in *Meriwether*, other courts might well conclude that the interests of the university and the student should have prevailed in this case. The authors of this article, in fact, contend that the court gave insufficient consideration to the harm caused when professors refuse to use a student’s preferred gender pronouns. However, disagreement over whether the court weighed the competing interests correctly as applied to the facts present in the case is a distinct issue from whether, as a general legal standard, that faculty members are potentially entitled to First Amendment protection for classroom speech research-related speech based on an academic freedom exception to the *Garcetti* standard.

<sup>166</sup> *Id.* at 504–05. The court also looked to cases typically associated with student free speech, specifically *Healy v. James*, 408 U.S. 169 (1972), and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), as Supreme Court cases supportive of free speech rights in the domain of academic freedom connected to professors.

freedom of expression are paramount in the academic setting.” Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.<sup>167</sup>

The court also pointed out that three other circuits—the Fourth, Fifth, and Ninth—had rendered rulings that recognized an academic freedom exception to the *Garcetti* standard.<sup>168</sup>

*Meriwether* likely causes consternation for some higher education professionals in that the faculty member refused to use a student’s preferred pronouns. Additionally, other courts could view the balancing undertaken by the *Meriwether* court as flawed because the court gave scant attention to the issue of how refusing to use preferred gender pronouns impacted the student. At the same time, academic freedom, if recognized by courts, cannot simply be a one-way street in terms of the content of protected ideas, speech, or other forms of expression. Courts cannot and should not create a framework solely to protect speech on either end of the sociopolitical spectrum. Upholding academic freedom will invariably mean that some speech that is disagreeable to particular individuals or groups will be protected (i.e., refusing to use preferred pronouns riles the political left while critical race theory upsets the political right). While, from our perspective, the CRT attacks from the political right present a far more serious challenge to higher education, academic freedom must also shield professors who engage in research and speech that is objectionable to individuals on the political left. Those who are invested in academic freedom, including as a constitutional concern, must be ready to tolerate, if not defend, some types of speech that they find objectionable.

As covered in Part III, current efforts based on anti-CRT legislation represent severe threats to academic freedom and professors’ speech rights in their capacity as private citizens because recently adopted and proposed legislation would prohibit a wide swath of speech and research activities. Events that have unfolded in Florida illustrate the dangers to academic freedom, faculty autonomy, and speech rights that have arisen in recent movements to silence faculty voices, including through anti-CRT initiatives. The University of Florida, under the auspices of a conflict-of-interest policy, attempted to block faculty members from testifying as expert witnesses in litigation that challenged the legality of a voting law in Florida.<sup>169</sup> In a lawsuit filed by six faculty members over the University

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<sup>167</sup> *Meriwether*, 993 F.3d at 505 (citations omitted).

<sup>168</sup> *Id.*

<sup>169</sup> Andrew Atterbury, *University of Florida Reverses on Professors Testifying Against DeSantis-backed Voting Bill*, POLITICO (Nov. 11, 2021), <https://www.politico.com/states/florida/story/2021/11/05/university-of-florida-faculty-decry-1392327> [<https://perma.cc/F6JM-W9J4>]. The university later reversed

of Florida's efforts to stop professors from providing testimony or signing amicus briefs,<sup>170</sup> a federal district judge issued a preliminary injunction.<sup>171</sup> In issuing the injunction, the court compared efforts to stifle faculty speech at the institution as comparable to the squashing of faculty academic freedom in Hong Kong in 2021.<sup>172</sup> During litigation, the university reversed course to permit the faculty members to provide expert testimony, but the court decided that the faculty members' claims against the university could still proceed.<sup>173</sup> The court agreed with the plaintiffs that the university's actions had "chilled" their speech and "drawn a line in the sand" by contending that the institution possessed authority to deny approval of faculty to testify as expert witnesses in litigation based on the viewpoints of their testimony.<sup>174</sup>

The court unambiguously declared that professors have a First Amendment right to serve as expert witnesses:

Plaintiffs have a First Amendment right to testify about topics related to their expertise in litigation against the State of Florida, and just because such testimony relates to their expertise—which is itself related to their work as public university professors—does not mean that it falls outside the First Amendment's reach.<sup>175</sup>

The court turned to the public employee speech standards and determined that the professors spoke as private citizens on a matter of public concern—something the university conceded.<sup>176</sup> The court soundly rejected the argument that the university possessed any legitimate reasons to restrict the speech.<sup>177</sup> It described as "shocking" the institution's efforts to claim the authority to restrict private speech through the exercise of an "unlimited discretion" to determine whether a faculty member's views expressed in testimony would be in opposition to the interests of the university.<sup>178</sup> The court described the university's side of the *Pickering* balancing scale as "empty" and pointed to the important academic freedom

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course to give approval to the professors serving as expert witnesses, but the litigation over the matter continued.

<sup>170</sup> *Austin v. Univ. of Florida Bd. of Trustees*, 580 F. Supp. 3d 1137, 1146–53 (N.D. Fla. 2022). Describing the amicus brief issue as "a bit of an afterthought" for the parties, the court declined to enjoin the university from enforcing this policy. *Id.* at 1154.

<sup>171</sup> *Id.* at 1176.

<sup>172</sup> *Id.* at 1145–46.

<sup>173</sup> *Id.* at 1159–60.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1161.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1171.

<sup>178</sup> *Id.*



concerns present in allowing faculty members to offer testimony as expert witnesses in their areas of academic specialization.<sup>179</sup>

An exhaustive examination of all the strands comprising legal debates over the First Amendment and faculty academic freedom and speech rights falls beyond the scope of this Article.<sup>180</sup> Still, even the general overview provided in this section shows that anti-CRT legislation and related efforts to squelch faculty speech face significant constitutional hurdles. Multiple federal appeals courts have decided that public college and university faculty members possess First Amendment rights that attach to speech made in carrying out their professional duties. State anti-CRT bills that limit the right of faculty members to speak in the classroom or that seek to suppress their research face substantial First Amendment obstacles. Likewise, as shown in litigation involving University of Florida faculty members, public college and university faculty members possess substantial First Amendment rights when speaking in their capacity as private citizens, ones that are supported by academic freedom considerations.

Issues related to anti-CRT bills undoubtedly deal with matters of public concern, which makes these provisions highly susceptible to First Amendment legal challenges. As highlighted in the Florida expert witness testimony litigation, faculty members will be able to draw from academic freedom protections that are recognized by multiple courts despite the *Garcetti* decisions and the compelling public interest of fostering open inquiry and debate when courts engage in a *Pickering*-style balancing test. In contrast, the state governmental interest boils down to engaging in viewpoint discrimination, chilling faculty speech, and dismantling the “marketplace of ideas,” which harkens back to legislative provisions in the McCarthy era. The vague and poorly crafted anti-CRT laws are highly susceptible to successful legal challenges by faculty, either on constitutional academic freedom grounds or on the basis of rights protecting faculty when speaking as private citizens. Moving beyond the purely legal arguments, the next section evaluates anti-CRT efforts from a critical perspective.

#### IV. USING A CRITICAL LENS TO PUT ANTI-CRITICAL RACE THEORY LEGISLATIVE EFFORTS INTO FOCUS: RACIAL EQUITY AND CIVIL RIGHTS IN EDUCATION

Beyond legal arguments about academic freedom and speech rights, CRT bans undercut longstanding jurisprudence that defers to colleges and universities about the best ways to achieve the educational benefits of

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<sup>179</sup> *Id.* at 1127.

<sup>180</sup> For more on these debates, see generally KAPLIN ET AL., *supra* note 151, at Chapter 7.

diversity. Supreme Court justices have cited amici briefs from higher education administrators, military leaders, and industry executives to affirm that the educational benefits of diversity are of critical importance in the twenty-first century, which is characterized by increasing pluralism and globalization.<sup>181</sup> Not only has the Supreme Court repeatedly concluded that the educational benefits of diversity are a public good worth pursuing, but the Court has also continued to hold for more than half a century that it is a *compelling state interest*—one so important that it has even warranted the consideration of race in selective admissions decisions.<sup>182</sup> As Justice Kennedy wrote in *Fisher v. University of Texas at Austin* (“*Fisher I*”), the Supreme Court has never questioned higher education’s pursuit of the educational benefits of diversity.<sup>183</sup> The Court has only questioned whether universities can help students achieve those benefits in an ostensibly, race-neutral way.<sup>184</sup>

By seeking to ban CRT, conservative legislators are being anything but conservative in terms of adhering to long-held legal precedent from the Supreme Court. At the same time as states consider anti-CRT legislation, direct legal challenges to race-conscious admission continue, with the Supreme Court set to issue its decision on race-conscious admissions litigation involving Harvard University and the University of North Carolina.<sup>185</sup> Thus, even as state legislative bodies seek to block diversity and equity related initiatives, the Supreme Court may roll back longstanding precedent for institutions to consider race as one factor in higher education admissions.

When considered together, anti-CRT initiatives and legal challenges to race-conscious admission are seeking to divest colleges and universities of the autonomy to pursue and promote the educational benefits of diversity. Both efforts represent exactly the types of actions that CRT and other critical theories help to show are grounded in promoting a political, economic, and legal status quo in which whiteness is privileged.

In multiple cases, the Supreme Court has refused to equate the educational benefits of diversity with the mere presence or numerical representation of diverse students.<sup>186</sup> Instead, the Court has recognized that students need to be exposed to new ideas and perspectives, including

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<sup>181</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003).

<sup>182</sup> *Id.* at 324–25.

<sup>183</sup> *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013).

<sup>184</sup> *Id.* at 311–12.

<sup>185</sup> Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html> [https://perma.cc/B6V4-6GQM].

<sup>186</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314–15 (1978); see also *Grutter*, 539 U.S. at 324–25.

through cross-racial interactions.<sup>187</sup> In other words, achieving the educational benefits of diversity is not simply about pursuing equal access to higher education—that students of color can access college at similar rates as White students. From the Court’s perspective, White students are not meant to go to college to be ensconced in so-called safe spaces where their views of the world are reinforced and alternate perspectives are excluded. Instead, the perspectives of communities of color are meant to directly influence and improve the quality of higher education and the educational experiences of *all students*. In *Regents of University of California v. Bakke*, *Grutter v. Bollinger*, and *Gratz v. Bollinger*,<sup>188</sup> the Supreme Court approved of the use of race-conscious admissions if the consideration of race was narrowly tailored and carried out in a holistic manner such that race was considered alongside multiple other factors.<sup>189</sup> The Court repeatedly allowed the consideration of race because it recognized that learning is limited if students are only exposed to homogenous peers and viewpoints.

Some commentators may argue that the effects of CRT-related legislation, even when enacted, on higher education will be limited—that any laws enacted will ultimately be circumscribed by future court rulings or are only symbolic in nature and do not actually prohibit topics that may be covered in college classrooms. However, as with the business sector and other non-profit organizations, colleges and universities are responsive to signals from voters and legislatures.<sup>190</sup> Higher education institutions are risk averse and will often self-censor to avoid potential conflicts with state elected officials.<sup>191</sup> Thus, even the introduction of legislation or a nebulously worded law may push college and university leaders to limit topics that deal with CRT or, more broadly, that implicate other strands of critical scholarship.

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<sup>187</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978).

<sup>188</sup> *Regents*, 438 U.S. at 315; *Grutter*, 539 U.S. at 308; *Gratz v. Bollinger*, 539 U.S. 244, 270–71 (2003).

<sup>189</sup> *Regents*, 438 U.S. at 315; *Grutter*, 539 U.S. at 308; *Gratz*, 539 U.S. at 270–71.

<sup>190</sup> Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. OF SOC. 479, 507 (1997).

<sup>191</sup> Liliana M. Garces, et al., *Repressive Legalism: How Postsecondary Administrators’ Responses to On-Campus Hate Speech Undermine a Focus on Inclusion*, 58 AM. EDUC. RES. J. 1032, 1049–52 (2021) [hereinafter *Repressive Legalism*]; Liliana M. Garces & Darkhan Bilyalov, *Navigating the Quicksand: How Postsecondary Administrators Understand the Influence of Affirmative Action Developments on Racial Diversity Work*, 121 TCHRS. C. REC. 1, 2–3 (2019); Liliana M. Garces & Courtney D. Cogburn, *Beyond Declines in Student Body Diversity: How Campus-Level Administrators Understand a Prohibition on Race-Conscious Postsecondary Admissions Policies*, 52 AM. EDUC. RES. J. 828, 844–45 (2015).

*A. Banning CRT as an Attempt to Limit the Educational Benefits of Diversity*

In testimony before Congress, General Mark Milley, Chair of the Joint Chiefs of Staff, responded to questions about and criticisms of CRT by some members:

The United States Military Academy is [a] university, and it is important that we train and we understand. . . . It's important that we understand that because our soldiers, sailors, airmen, Marines, and guardians, they come from the American people. So it is important that the leaders now and in the future do understand it. I've read Karl Marx. I've read Lenin. That doesn't make me a communist. So what is wrong with understanding, having some situational understanding about the country for which we are here to defend?<sup>192</sup>

General Milley's comments echoed a long history of Supreme Court rulings about the purpose of higher education and its role in society as generator and purveyor of the educational benefits of diversity.

As early as 1950, in *Sweatt v. Painter*, the Supreme Court indicated that academia, our legal system, and our society cannot function without the exchange of ideas in higher education.<sup>193</sup> When the Court considered Heman Sweatt's case against the University of Texas Law School, it concluded that law schools should be integrated to help students understand interactions among the legal system, social institutions, and individuals.<sup>194</sup> The Court stated:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.<sup>195</sup>

Emerging from critical legal studies, CRT is a lens for examining how often overlooked individuals are affected by institutions that are created in ways that benefit the dominant group.<sup>196</sup> As one of any number of theories students encounter in higher education, it exactly fits the Court's

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<sup>192</sup> Danielle Kurtzleben, *Top General Defends Studying Critical Race Theory in the Military*, NPR (June 23, 2021), <https://www.npr.org/2021/06/23/1009592838/top-general-defends-studying-critical-race-theory-in-the-military> [<https://perma.cc/KX87-EAXJ>].

<sup>193</sup> *Sweatt v. Painter*, 339 U.S. 629, 630 (1950).

<sup>194</sup> *Id.* at 634.

<sup>195</sup> *Id.*

<sup>196</sup> *See supra* Part I.

endorsement that universities facilitate the “interplay of ideas and exchange of views.”<sup>197</sup>

In the latter half of the twentieth century, the Supreme Court transitioned from desegregation cases to cases involving affirmative action or race-conscious admissions.<sup>198</sup> Though the Court has historically vacillated between deferring to the professional autonomy of colleges and universities and seeking to regulate their practices, the race-conscious admissions cases that began with *Bakke* established two ideas: first, that educational benefits exist in the exchange of ideas between racial majority and minority communities, and second, that colleges and universities know best how to achieve the educational benefits of diversity.<sup>199</sup>

Despite the fractured nature of the *Bakke* decision, Justice Powell’s plurality opinion in the case, which garnered support from other justices, developed a logic for promoting the educational benefits of diversity that could evolve with the country.<sup>200</sup> When discussing race-conscious admissions at Harvard College, Justice Powell’s opinion included an Appendix that described the Harvard admissions program, which explained that prior to the Civil Rights movement, “diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians” attended a single campus and learned from each other.<sup>201</sup> As the nation began to move beyond *de jure* segregation, diversity at Harvard College came to “include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans, but also blacks and Chicanos and other minority students.”<sup>202</sup>

Yet the end goal of diversifying higher education was not merely to achieve representation of previously excluded students.<sup>203</sup> Rather, the purpose of diversity was to improve the educational experience of all students.<sup>204</sup> Citing an amicus brief submitted by multiple universities, Justice Powell recognized that:

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<sup>197</sup> *Sweatt*, 339 U.S. at 634.

<sup>198</sup> Pamela Barta Moreno, *The History of Affirmative Action Law and its Relation to College Admission*, 179 J. OF C. ADMISSION 14, 16–18 (2003).

<sup>199</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–14 (1978); see generally SCOTT GELBER *COURTROOMS AND CLASSROOMS: A LEGAL HISTORY OF COLLEGE ACCESS, 1860–1960* 153 (2016).

<sup>200</sup> *Bakke*, 438 U.S. at 322–23.

<sup>201</sup> *Id.* (quoting from Appendix of amicus brief of Columbia University, Harvard University, Stanford University, and the University of Pennsylvania).

<sup>202</sup> *Id.* (quoting from Appendix of amicus brief of Columbia University, Harvard University, Stanford University, and the University of Pennsylvania).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.<sup>205</sup>

In emphasizing the importance of the “differences in the background and outlook that students bring,” the Appendix to Justice Powell’s opinion described Harvard’s admission program as follows:

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower, but who had demonstrated energy and leadership, as well as an apparently abiding interest in black power. If a good number of black students much like A, but few like B, had already been admitted, the Committee might prefer B.<sup>206</sup>

The quotes from the amicus brief contained in Justice Powell’s opinion and in the Appendix to the opinion underpin the Supreme Court’s adherence to notions of the educational benefits of diversity in *Bakke*. The Court rejected arguments that affirmative action should be used to address a general legacy of segregation.<sup>207</sup> The only rationale for deferring to higher education was to expose all students to the “differences in background and outlook” that come with minority students.<sup>208</sup>

As higher education becomes increasingly diverse, what CRT bans seek to do is to accept numerical representation of students of color while silencing the important perspectives for understanding their racialized experiences. Going back to *Bakke*, the Supreme Court broadly discussed that all students benefit from an diverse student body, including that White students should learn from the perspectives of students of color “directly

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<sup>205</sup> *Id.* at 323.

<sup>206</sup> *Id.* at 323–24 (quoting from quoting from Appendix of amicus brief of Columbia University, Harvard University, Stanford University, and the University of Pennsylvania).

<sup>207</sup> *Id.* at 310 (stating “. . . the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”).

<sup>208</sup> *Id.* at 323 (quoting from Appendix of amicus brief of Columbia University, Harvard University, Stanford University, and the University of Pennsylvania).

or indirectly” and that they may “learn from their differences” and “stimulate one another to reexamine *even their most deeply held assumptions about themselves and their world.*”<sup>209</sup> Yet, those who seek to ban CRT apparently want the halls of academia to be populated with diversity of complexion without diversity of ideas. And, in fact, legal efforts continue to take away the ability of colleges and universities to use race as one factor among many in working to assemble more diverse classes.<sup>210</sup>

When the Supreme Court revisited the issue of race-conscious admissions in 2003 in *Grutter* and *Gratz*, it continued to abide by Justice Powell’s explanation of the compelling interest possessed by colleges and universities to pursue the educational benefits of diversity.<sup>211</sup> As previously mentioned, the Court has not specifically grounded support for racial diversity in higher education admissions on equity or social justice grounds, but instead as comprising a compelling interest to foster educational environments and experiences that may challenge White students to learn by considering other worldviews. Adhering to this directive, Justice O’Connor wrote in *Grutter* that seeking to achieve some specific percentage of a particular group would “amount to outright racial balancing, which is patently unconstitutional,”<sup>212</sup> but the law school, instead, “defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce.”<sup>213</sup>

Whereas Justice Powell largely quoted from an amicus brief submitted by several leading private universities, the Supreme Court in *Grutter* and *Gratz* looked to amici briefs submitted by military and business leaders.<sup>214</sup> Justice O’Connor’s majority opinion in *Grutter* stated:

The Law School’s claim is further bolstered by numerous expert studies and reports showing that such diversity promotes learning outcomes and better prepares students for an increasingly diverse work force, for society, and for the legal profession. Major American

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<sup>209</sup> *Id.* at 313 n.48 (quoting from a statement by the President of Princeton University) (emphasis added).

<sup>210</sup> For an understanding of the impending case before the United States Supreme Court regarding the use of race in admissions, see Supreme Court Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 20-1199 (U.S. argued Oct. 31, 2022); Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. argued Oct. 31, 2022).

<sup>211</sup> See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>212</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

<sup>213</sup> *Id.* at 308.

<sup>214</sup> *Id.* at 331 (citing Consolidated Brief of Lt. Gen. Julius Becton, Jr. et al., as Amicus Curiae in Support of Respondents, *Grutter v. Bollinger*); *Id.* (citing Brief of General Motors Corporation as Amicus Curiae in Support of Respondents).

businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.<sup>215</sup>

Foreshadowing General Milley's testimony to Congress almost two decades later, the Dean of the United States Army Military Academy explained that the educational benefits of diversity occur when students achieve "personal growth in areas where people may not have gotten it otherwise. We want people to understand the society they will defend."<sup>216</sup>

In the last set of race-conscious admissions cases, *Fisher I* and *Fisher v. University of Texas at Austin* ("*Fisher II*"),<sup>217</sup> the Supreme Court acknowledged that three prior cases (*Bakke*, *Grutter*, and *Gratz*) had established that universities should be given deference to pursue the educational benefits of diversity.<sup>218</sup> As Justice Kennedy stated in the opinion for the majority in *Fisher II*, the *Fisher I* Court "confirmed" that deference should be given to universities in their pursuit of the educational benefits of diversity as an "academic judgment."<sup>219</sup> Even as the Supreme Court has issued increasingly rigorous examinations of race-conscious admissions practices, whether they survive strict scrutiny and are narrowly tailored, it has never sought to undermine the normative question about whether the educational benefits of diversity are a public good. Neither have modern courts seriously questioned whether colleges and universities should be allowed to pursue, or whether universities know best how to pursue, the educational benefits of diversity. Instead, over multiple decades, the Supreme Court has only questioned whether colleges and universities may consider race in admissions to pursue the educational benefits of diversity or whether that pursuit must be limited to, ostensibly, race-neutral alternatives.

Efforts to ban CRT from college campuses counter the Supreme Court's judgment in multiple cases involving race-conscious admissions. The *Sweatt*, *Bakke*, and *Grutter* opinions reflect that our nation's legal, educational, military, and business enterprises depend on students learning perspectives that lead them to "reexamine even their most deeply held assumptions about themselves and their world."<sup>220</sup>

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<sup>215</sup> *Id.* at 308.

<sup>216</sup> Adam Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. TIMES (Jan. 28, 2003), <https://www.nytimes.com/2003/01/28/us/service-academies-defend-use-of-race-in-their-admissions-policies.html?searchResultPosition=1> [<https://perma.cc/5MNX-U8YG>].

<sup>217</sup> *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016).

<sup>218</sup> *Id.* at 372.

<sup>219</sup> *Id.* at 376.

<sup>220</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 n.48 (quoting from president of Princeton University).



The fact that many students are attending *de facto* racially segregated primary and secondary schools is itself evidence for the need to use CRT to consider educational inequities.<sup>221</sup> Yet it also demonstrates the need for colleges and universities to teach graduates of *de facto* segregated high schools. When research indicates that in rural parts of the country, “[t]he typical white student went to a rural school in which 80% of students were white,”<sup>222</sup> those students may never have a chance to learn about how communities of color differently experience the legal system and social institutions if they do not have an opportunity to achieve the educational benefits of diversity in college.

### *B. The Chilling Effects of Efforts to Ban Critical Race Theory*

We need not draw on CRT specifically to understand how attempts to ban CRT will have a chilling effect on instruction. Social scientists have provided useful frameworks for thinking about the ways that organizations—such as schools, colleges, and universities—respond to their environments. DiMaggio and Powell, for example, described three processes by which organizations become more similar as networks encourage imitation and diffusion of ideas or practices.<sup>223</sup> In their framing, one of the mechanisms that drives organizations to become more alike “stems from political influence and the problem of legitimacy.”<sup>224</sup> DiMaggio and Powell define the concept of *coercive isomorphism* as the challenge that exists when “pressures [are] exerted on organizations by other organizations upon which they are dependent and by cultural expectations in the society within which organizations function.”<sup>225</sup>

In discussing several ways that coercive isomorphism exists in society, DiMaggio and Powell note that “in some circumstances, organizational change is a direct response to government mandate” and “the existence of a common legal environment affects many aspects of an

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<sup>221</sup> See generally ERICA FRANKENBERG ET AL., HARMING OUR COMMON FUTURE: AMERICA’S SEGREGATED SCHOOLS 65 YEARS AFTER BROWN (2019). Also, consider how Florida Governor Ron DeSantis’s appointee to direct the Florida Department of Juvenile Justice wrote a dissertation that used CRT to “uncover and expose racism and its related impact on those who are often without power . . . minority students.” Matt Dixon & Andrew Atterbury, *Top DeSantis Official Embraced Critical Race Theory in Dissertation*, POLITICO (Dec. 20, 2021), <https://www.politico.com/states/florida/story/2021/12/20/top-desantis-official-embraced-critical-race-theory-in-dissertation-1400688> [<https://perma.cc/V5KQ-B9C2>].

<sup>222</sup> FRANKENBERG ET AL., *supra* note 221, at 5; see also DANIELLE COHEN, NYC SCHOOL SEGREGATION REPORT CARD STILL LAST, ACTION NEEDED NOW (2021).

<sup>223</sup> See generally Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AMERICAN SOCIOLOGICAL REV. 147 (1983).

<sup>224</sup> *Id.* at 150.

<sup>225</sup> *Id.*

organization's behavior and structure."<sup>226</sup> When elected officials make decisions that shape the legal environment they tend to make sweeping policies that encompass broad categories of organizations as if they are more similar than different.<sup>227</sup> For instance, coercive isomorphism is facilitated when states make policies that affect all public agencies, as if the department of motor vehicles, local primary schools, and a state flagship university have similar purposes, employees, and activities.<sup>228</sup> Although the three types of organizations are more dissimilar than similar, a state policy—such as a ban on affirmative action or CRT—tends to drive similar organizational changes because the three types of organizations are dependent on state policymakers and cannot lose legitimacy with those who provide their funding.

In the sociology of law, scholars have extended DiMaggio and Powell's work to consider the importance of the legal environment on organizational behavior. Edelman and Suchman argue, for instance, that organizations do not merely follow rational, utility-maximizing behaviors.<sup>229</sup> Instead, they advocate for viewing "organizations as cultural rule-followers" navigating "the law as a system of moral principles, scripted roles, and sacred symbols" such that "organizations look to the law for normative and cognitive guidance, as they seek their place in a socially constructed cultural reality."<sup>230</sup> From such a cultural perspective, organizations do not merely adhere to laws in fear of sanction, they see the law as providing cues or guidance on the right ways to act.<sup>231</sup> Following DiMaggio and Powell's earlier writing, Edelman and Suchman argued that networks of professionals try to make sense of legal developments and adapt their actions to maximize legitimacy under the law.<sup>232</sup>

Empirical evidence supports cultural perspectives on the sociology of law. For instance, Lauren Edelman's work examines how professionals working in Equal Employment Opportunity offices implement organizational change in response to the law.<sup>233</sup> Additionally, Edelman and colleagues show how networks matter in the ways that organizations

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<sup>226</sup> *Id.*

<sup>227</sup> See generally JEFFREY PFEFFER & GERALD SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE* (1978).

<sup>228</sup> *Id.*

<sup>229</sup> Edelman & Suchman, *supra* note 190.

<sup>230</sup> *Id.* at 482.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> See, e.g., Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 *AMERICAN JOURNAL OF SOCIOLOGY* 1531 (1992); see also Lauren B. Edelman, et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 *LAW AND POLICY* 73 (1991).

seek legitimacy and respond to the legal environment.<sup>234</sup> When managers within organizations look to norms set by their superiors, rather than consider the needs of subordinates, they focus on diffusing conflict rather than upholding employees' legal rights.

Recent work suggests that organizations respond to cultural pressures even when the law does not require them to change. In other words, empirical evidence suggests that organizations scan the environment and begin to change in anticipation of legal developments or from a risk-averse attempt to avoid litigation or legislation. For example, Garces and colleagues use the term *repressive legalism* to describe how university administrators respond to hate speech incidents.<sup>235</sup> Administrators scan the legal environment and interpret the law and its accompanying cultural signals in ways that limit institutional efforts to address hate speech, as well as support campus diversity and inclusion.<sup>236</sup> Fernandez and Garces reviewed news accounts and prior literature to argue that repressive legalism plays out in college admissions, financial aid, and student services decisions.<sup>237</sup> Even when universities were not required to do so by law, some campuses voluntarily curtailed race-conscious admissions, changed scholarship eligibility requirements to downplay race as a consideration, and altered student recruitment and outreach efforts.<sup>238</sup>

Informed by these social science perspectives, we argue that even when states do not successfully ban CRT, legislative efforts and the national landscape for banning CRT will lead universities to self-censor institutional and individual faculty speech and activities. Whether academic freedom is construed as an institutional right or as an individual right held by faculty, empirical findings in the sociology of law suggest that universities will increasingly silence critical perspectives.

### C. *Cloudy Times in the Sunshine State*

The threat of repressive legalism is not hypothetical. We have already seen it at work in Florida. The University of Florida espouses commitments to academic freedom and insists that academic freedom is protected by the faculty collective bargaining agreement. Yet, in the fall 2021 semester, a faculty member alleged that University of Florida administrators refused to approve a new course with the proposed title:

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<sup>234</sup> Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Rights in the Workplace*, 27 LAW & SOCIETY REVIEW 497 (1993).

<sup>235</sup> *Repressive Legalism*, *supra* note 191.

<sup>236</sup> *Id.*

<sup>237</sup> Frank Fernandez & Liliana M. Garces, *The Influence of Repressive Legalism on Admissions*, in GATEKEEPING IN HIGHER EDUCATION: RESEARCH-BASED PRACTICE AND POLICY IN COLLEGE ADMISSIONS (OiYan A. Poon & Michael N. Bastedo eds., in press).

<sup>238</sup> *Id.*

“Critical Studies in Race, Ethnicity, and Culture.”<sup>239</sup> The course was intended to be part of a curriculum plan for a new concentration in “Critical Study of Race, Ethnicity, and Culture in Education.”<sup>240</sup> Administrators also threatened not to approve the concentration unless its name was changed to avoid the use of words, such as “critical” and “race.”<sup>241</sup> Moreover, the faculty member proposing the new course and concentration contended that he was threatened with disciplinary action for using “critical race” in his teaching.<sup>242</sup>

As with the examples above, repressive legalism created an environment where school leaders began to self-censor their own words and actions to avoid public scrutiny—even when their words and actions were still permitted by law. By early 2022, there was more evidence of repressive legalism in Florida. In January 2022, a professor at the private Flagler College had his public lecture canceled even though the lecture did not promote critical race theory.<sup>243</sup> The public lecture addressed the history of the civil rights movement, and the faculty member submitted his presentation materials for review by the Osceola County School District.<sup>244</sup>

In Florida, political sophistry by some elected officials has created a legal-political context where the idea of critical race theory is being equated with anti-white discrimination. Conservative legislators continue to advance policies that will ban CRT-related education, not only by public schools, colleges, and universities, but also in the private sector. As one Republican elected official said, trainings “on how to be less oppressive . . . should not be occurring” and legislation is needed to “make sure everyone feels comfortable in a positive learning environment and

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<sup>239</sup> WCJB Staff, *University of Florida Professor Files Academic Freedom Grievance after Critical Race Curriculum was Barred*, WCBJ (Dec. 2, 2021), <https://www.wcjb.com/2021/12/02/university-florida-professor-files-academic-freedom-grievance-after-critical-race-curriculum-was-barred/> [https://perma.cc/D4R6-PSKY]; see also Divya Kumar, *At UF, Someone Used ‘Critical’ and ‘Race’ in a Sentence: Trouble Ensued*, TAMPA BAY TIMES (Dec. 1, 2021), <https://www.tampabay.com/news/education/2021/11/30/at-uf-someone-used-critical-and-race-in-a-sentence-trouble-ensued/> [https://perma.cc/PE59-2E4R]; Gainesville Sun Editorial Board, *The University of Florida Needs to Do More to Protect Academic Freedom*, THE GAINESVILLE SUN (Dec. 2, 2021), <https://www.gainesville.com/story/opinion/2021/12/02/editorial-uf-needs-do-more-protect-academic-freedom/8822900002/> [https://perma.cc/7L43-CG5P].

<sup>240</sup> See WCJB Staff, *supra* note 239.

<sup>241</sup> *Id.*

<sup>242</sup> See Kumar, *supra* note 239.

<sup>243</sup> Marc Caputo & Teaganne Finn, *Florida School District Cancels Professor’s Civil Rights Lecture over Critical Race Theory Concerns*, NBC NEWS (Jan. 24, 2022), <https://www.nbcnews.com/politics/politics-news/florida-school-district-cancels-professors-civil-rights-lecture-critic-rca13183> [https://perma.cc/883U-2SEL].

<sup>244</sup> *Id.*

positive working environment.”<sup>245</sup> The irony is, of course, that Republicans have long defended hate speech by variously arguing that regulating speech that is harmful to People of Color is a waste of time, that regulating speech is political theater, that speech is an important indicator of cultural currents, that exposure to unwanted hate speech is actually good for People of Color (a form of tough love), and that—while hate speech is deplorable—silencing speech is an even worse evil.<sup>246</sup> All the arguments that conservatives have clung to in their defense of racist and problematic speech are shown to be hypocritical by their efforts to ban the teaching of a legal and social science framework.

Then, amid the cultural tides of repressive legalism, Florida has approved legislation to further weaken academic freedom by undermining the protections offered by tenure.<sup>247</sup> Mimicking a policy adopted in Georgia,<sup>248</sup> Florida policymakers are weakening employment security even as they work to limit academic freedom on critical topics. Although administrators and policymakers may argue that faculty may still use CRT and related critical perspectives in their research, prior literature suggests that faculty are responsive to signals about which types of scholarship are—or are not—valued and that they can be coerced into aligning their work with prevailing research expectations, even when institutional or government research expectations do not reflect individual researchers’ values.<sup>249</sup>

This is problematic for many reasons, but one pragmatic reason has to do with Florida’s ambitions to have several prominent, nationally ranked research universities and to secure additional external funding, including federally funded research expenditures.<sup>250</sup> However, several

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<sup>245</sup> Ana Ceballos, *Bill Targeting Discomfort or Guilt in School, Work Discussions Ready for House Floor*, THE MIAMI HERALD (Feb. 8, 2022), <https://www.miamiherald.com/news/politics-government/state-politics/article258170173.html>.

<sup>246</sup> Richard Delgado & David Yun, *Neoconservative Case Against Hate-Speech Regulation—Lively, D’Souza, Gates, Carter, and the Toughlove Crowd*, 47 VANDERBILT L. REV. 1807, 1809 (1994).

<sup>247</sup> Divya Kumar, *DeSantis Signs Bill Limiting Tenure at Florida Public Universities*, TAMPA BAY TIMES (Apr. 19, 2022), <https://www.tampabay.com/news/education/2022/04/19/desantis-signs-bill-limiting-tenure-at-florida-public-universities/> [https://perma.cc/3RGV-WYUP].

<sup>248</sup> *University System of Georgia Eviscerates Tenure*, AAUP (Dec. 8, 2021), [https://www.aaup.org/news/university-system-georgia-evisceratetenure#](https://www.aaup.org/news/university-system-georgia-evisceratetenure#.YiWF1JZOk2w). YiWF1JZOk2w [https://perma.cc/W8EH-LPNG].

<sup>249</sup> Richard Watermeyer & Jennifer Chubb, *Evaluating ‘Impact’ in the UK’s Research Excellence Framework (REF): Liminality, Looseness and New Modalities of Scholarly Distinction*, 44 STUDIES IN HIGHER EDUCATION 1554 (2019).

<sup>250</sup> STATE UNIVERSITY SYSTEM OF FLORIDA, 2025 SYSTEM STRATEGIC PLAN (amended Oct. 2019), [https://www.flbog.edu/wp-content/uploads/2025\\_System\\_Strategic\\_Plan\\_2019.pdf](https://www.flbog.edu/wp-content/uploads/2025_System_Strategic_Plan_2019.pdf) [https://perma.cc/GT8A-X9NH].

federal funding streams call for projects that use critical perspectives. For example, the National Science Foundation's ("NSF") ADVANCE program seeks to fund researchers who will "support equity and inclusion and to mitigate the systemic factors that create inequities."<sup>251</sup> Further, the program call notes that "proposals are expected to use intersectional approaches in the design of systemic change strategies in recognition that gender, race and ethnicity do not exist in isolation from each other."<sup>252</sup> Although the program call does not explicitly refer to CRT, it is calling for proposals that address CRT tenets. Another example may be found in the NSF's Hispanic-Serving Institution ("HSI") Program.<sup>253</sup> The NSF's program for serving HSIs also contains language encouraging proposals that "use an intersectional perspective" which "takes into consideration the interconnectedness of overlapping social identities" such as providing "[f]aculty development [which] should include DEI [diversity, equity, and inclusion] as a foundation for any instructional training and development for example, but not limited to, culturally relevant and sensitive pedagogy training, implicit bias awareness and mitigation, stereotype threat, microaggressions, and fixed vs. growth mindset."<sup>254</sup> Florida law has sought to ban such mandatory training for faculty, but the state has twenty-nine HSIs and another thirty-two "emerging" HSIs that may be eligible for such federal funding if their Hispanic enrollment increases.<sup>255</sup>

Florida's attempts to ban teaching and training that incorporate CRT tenets is like cutting off its nose to spite its face. Yet, Florida's short-sightedness fits a broader pattern of evidence of "white racial resentment" in higher education policy. Barrett Taylor and colleagues showed that Republican legislatures tend to spend more on higher education when enrollments at flagship institutions are disproportionately white and reduce spending as flagship campuses become more racially diverse.<sup>256</sup> In this case, efforts to ban CRT education and training contradict federal

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<sup>251</sup> *ADVANCE: Organizational Change for Gender Equity in STEM Academic Professions (ADVANCE)*, NATIONAL SCIENCE FOUNDATION, <https://beta.nsf.gov/funding/opportunities/advance-organizational-change-gender-equity-stem-academic-professions-advance> [<https://perma.cc/SX84-G6BK>] (last visited May 8, 2022).

<sup>252</sup> *Id.*

<sup>253</sup> *Improving Undergraduate STEM Education: Hispanic Serving Institutions (HSI Program)*, NAT'L SCI. FOUND., <https://beta.nsf.gov/funding/opportunities/improving-undergraduate-stem-education-hispanic-serving-institutions-hsi> [<https://perma.cc/RC8F-TB6Z>] (last visited May 8, 2022).

<sup>254</sup> *Improving Undergraduate STEM Education: Hispanic Serving Institutions (HSI Program: Program Solicitation NSF 22-545)*, NAT'L SCI. FOUND., <https://www.nsf.gov/pubs/2022/nsf22545/nsf22545.pdf> [<https://perma.cc/W2E3-8ZED>] (last visited May 8, 2022).

<sup>255</sup> *A Florida Briefing on 25 Years of HSIs*, EXCELENCIA IN EDUCATION (2021), <https://www.edexcelencia.org/25yrs-HSIs-Florida> [<https://perma.cc/9FNP-MXRK>].

<sup>256</sup> Barret Taylor et al., *Partisanship, White Racial Resentment, and State Support for Higher Education*, 91 THE JOURNAL OF HIGHER EDUCATION 858 (2020).

funding streams that would benefit colleges, universities, and students in the state of Florida. This is not unlike religious colleges that refuse to allow their students to receive federal aid so that the colleges can reject federal nondiscrimination regulations.<sup>257</sup>

## V. CONCLUSION

There has been a weaponization of free speech by groups from the political right attempting to cast restrictions on free speech and, at times, academic freedom as only emanating from the political left.<sup>258</sup> As covered in Part I, states have adopted campus speech laws and various organizations have touted a campus free speech crisis. While challenges to academic freedom can and do arise from liberal or progressive circles, in reality, anti-CRT legislation and related efforts, such as the attempts to halt expert testimony by faculty members in Florida, highlight that weaponization efforts from the political right could be particularly devastating for academic freedom and faculty free speech. Infringements from academic freedom can come from the “right” or the “left” of the political and social continuum, and recognition of this state of affairs is one way to help courts craft First Amendment standards that are broadly protective of academic freedom rights.

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<sup>257</sup> Iby Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forego Federal Funding*, THE ATLANTIC (July 7, 2016), <https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/> [https://perma.cc/TL9S-KD3R].

<sup>258</sup> For more on the issue of such conservative critiques of higher education, see, for example, Sean M. Kammer, *The ‘Intellectual Diversity’ Crisis That Isn’t: Liberal Faculties, Conservative Victims, and the Cynical Effort to Undermine Higher Education for Political Gain*, 39 QUINNIPIAC L. REV. 149, 154 (2021); Jason M. Shepard & Kathleen B. Culver, *Culture Wars on Campus: Academic Freedom, the First Amendment, and Partisan Outrage in Polarized Times*, 55 SAN DIEGO L. REV. 87, 88 (2018).