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# A Critical Race Theory Analysis of Critical Race Theory Bans

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*A majority of state legislatures have introduced bills prohibiting public schools from teaching certain “divisive concepts” attributed to critical race theory (CRT), with at least fifteen states successfully enacting them. This Article applies a critical race theory analysis to these critical race theory bans, finding that the bans embody white privilege and especially its companion, white fragility.*

*After providing a primer on critical race theory, Part I explains how the state bans profoundly misunderstand critical race theory, which focuses on how systems and institutions reproduce racial inequality. These bans, however, assume that racism is individual, intentional, and rare, and that racial harm is caused by discussions of race rather than systemic racism. At the same time, to the extent the laws forbid suggesting that systemic racism is widespread or that the United States is not a meritocracy, these bans may prevent students from learning core CRT concepts.*

*Part II then examines these bans through a critical race theory lens. It first demonstrates how the laws’ ignorance of critical race theory and of the role race plays in the United States reflects white privilege. It next explains how the bans embody white fragility—those defensive behaviors white people may exhibit when their racial advantages are pointed out—in the way they overreact to imagined threats, focus on white people’s wellbeing, frame white people as the true victims of race relations in the United States, and finally assert false equivalencies.*

*Ultimately, critical race theory bans reinscribe racial inequalities. By chilling classroom discussions about the creation and maintenance of racial hierarchies, these bans leave unaddressed all the structural issues that critical race theory aims to uncover. It is a perfect vicious circle.*

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## INTRODUCTION

According to many state legislatures, U.S. public schools are in thrall to “woke” extremists who are bent on indoctrinating the youth of America with critical race theory and who are determined to make innocent white schoolchildren feel guilty for simply being white. Florida Governor Ron DeSantis, for example, has warned that “critical race theory is basically teaching people to hate our country, hate each other. It’s divisive, and it’s basically an identity politics version of Marxism.”<sup>1</sup>

In response, a majority of states have proposed laws barring their vision of critical race theory (CRT) in the public-school classroom.<sup>2</sup> These bills forbid

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1. A.G. Gancarski, *Ron DeSantis Denounces Critical Race Theory as ‘Marxism,’* FLA. POL. (Mar. 24, 2021), <https://floridapolitics.com/archives/414375-ron-desantis-critical-marx/> [https://perma.cc/L29R-PYJJ].

2. See generally *PEN America Index of Educational Gag Orders*, PEN AM. (Apr. 25, 2022) [hereinafter *CRT Bill List*], <https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg->

“divisive concepts” that lawmakers believe constitute the core tenets of critical race theory.<sup>3</sup> At least fifteen states have enacted these bans, with many more lined up to follow suit.<sup>4</sup> Most do not use the exact term “critical race theory.”<sup>5</sup> Indeed, most legislators have no clear idea of what the legal theory actually entails, such as its focus on structural racism.<sup>6</sup> Nevertheless, in a quest to protect the white children of America from indoctrination and discomfort, public school teachers’ ability to teach students about race in America is being severely restricted.<sup>7</sup>

Although the “divisive concepts” run the gamut, most banned ideas are not espoused by critical race theory.<sup>8</sup> Whereas anti-CRT legislatures imagine teachers browbeating white students, critical race theory actually agrees that no race is

zP\_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=267763711 [https://perma.cc/Q5L2-ZYF7] (listing all the proposed and passed bills regulating critical race theory in schools); *CRT Forward Tracking Project*, UCLA CRITICAL RACE STUDIES [hereinafter CRT Map], https://crtforward.law.ucla.edu/ [https://perma.cc/98DV-6PAG] (last visited Jan. 22, 2023) (listing government action on critical race theory in each state).

3. These “divisive concepts” first appeared in a Trump executive order banning critical race theory in federal government trainings. *See generally infra* notes 97–101 and accompanying text.

4. “Critical Race Theory” Is Being Weaponized. *What’s the Fuss About?*, *ECONOMIST* (July 14, 2022) https://www.economist.com/interactive/united-states/2022/07/14/critical-race-theory-is-being-weaponised-whats-the-fuss-about [https://perma.cc/2GJ4-7HK6] (“Forty-two states have introduced bills or taken other actions to limit CRT in classrooms; 17 have restricted it.”).

5. *See infra* Section I.B.1.

6. *See infra* Section I.B.2.

7. Although their constitutionality is not the focus of this Article, these laws likely violate the Free Speech Clause. States may argue that these bans present no free speech problems because teachers’ speech in the classroom is speech “pursuant to official duties,” *Garvetti v. Ceballos*, 547 U.S. 410, 421 (2006), and therefore is essentially government speech outside free speech protection, *Matal v. Tam*, 528 U.S. 218, 233–34 (2017). However, the Supreme Court has alluded to a potential exception from the *Garvetti* rule for academic freedom. *Garvetti*, 547 U.S. at 425.

Furthermore, while the government enjoys wide latitude in setting the school curriculum, that power is not unlimited. *Bd. of Educ. v. Pico*, 457 U.S. 853, 863 (1982); *id.* at 861 (“Our precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom.”). Censorship in public schools might be constitutional if motivated by legitimate pedagogical reasons but not if motivated by hostility to ideas. And there is good reason to conclude that it is hostility to certain ideas—that widespread discrimination against black Americans persists due to structural inequalities, that white people enjoy certain unearned privileges—that drives these educational decisions. *Id.* at 870–71 (“Our Constitution does not permit the official suppression of ideas.”). Moreover, students too have free speech rights, and their right to receive knowledge about their history, their status, and their own experience is also at stake. *Id.* at 867 (noting that “the Constitution protects the right to receive information and ideas” and that “the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library”). In sum, “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.” *Id.* at 866.

Finally, these ambiguously worded laws are probably unconstitutionally vague. *Cf. Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1281 (N.D. Fla. 2022) (finding that under Florida’s anti-CRT ban “[i]t is unclear what is prohibited and even less clear what is permitted”).

8. For example, critical race theory is not synonymous with communism nor does it advocate the violent overthrow of the United States. *See generally infra* notes 133–136 and accompanying text.

inherently superior<sup>9</sup> or racist<sup>10</sup> or deserves to suffer from discrimination.<sup>11</sup> And given that critical race theory emphasizes *systemic* rather than *individual* racism,<sup>12</sup> its goals do not include imposing blame,<sup>13</sup> guilt,<sup>14</sup> or other forms of psychological distress on individuals—never mind young children. At the same time, a few banned “divisive concepts” come closer to important CRT tenets, including the views that racism is widespread<sup>15</sup> and that the United States is not a meritocracy.<sup>16</sup>

Examining the bans through a CRT lens reveals that they reflect white privilege and especially its companion, white fragility, both concepts from critical race theory. White privilege describes the unearned advantages white people enjoy, often without even realizing it, such as the benefit of having the white experience as the default.<sup>17</sup> This privilege produces further ones, such as the privilege of disregarding nonwhite culture—including its legal scholarship<sup>18</sup>—and the privilege of ignoring how raced the world actually is.<sup>19</sup> The CRT bans illustrate both of these privileges.

The bans also embody white fragility, the term used to describe a constellation of defensive behaviors many white people exhibit when their racial advantages are pointed out. These behaviors include overreacting; prioritizing white people’s well-being; casting white people as the true victims; and ultimately asserting false equivalencies, such as arguing that critical race theory—a theory meant to analyze systemic discrimination against racial minorities in the United States—is as racist and bigoted against white people as any racism in our history.<sup>20</sup> The CRT bans exemplify all these to provide a textbook example of white fragility.

9. See *infra* note 101 and accompanying text (listing as common divisive concepts “(1) one race or sex is inherently superior to another race or sex” and “(6) an individual’s moral character is necessarily determined by his or her race or sex”).

10. See *infra* note 101 and accompanying text (listing as a common divisive concept “(3) an individual, by virtue of his or her race or sex, is inherently racist”).

11. See *infra* note 101 and accompanying text (listing as a common divisive concept “(4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex”).

12. As discussed in Section I.A., critical race theory involves much more, from noting the constructed nature of race to centering racial minorities to analyzing how white people are raced, as well as the concepts of white privilege and white fragility.

13. See *infra* note 101 and accompanying text (listing as a common divisive concept “(7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex”).

14. See *infra* note 101 and accompanying text (listing as a common divisive concept “(8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex”).

15. See *infra* note 101 and accompanying text (listing as a common divisive concept “(2) the United States is fundamentally racist or sexist”).

16. See *infra* note 101 and accompanying text (listing as a common divisive concept “(9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race”).

17. See *infra* notes 51–55, 173–184 and accompanying text.

18. See *infra* Section II.A.1.

19. See *infra* Section II.A.2.

20. See *infra* Section II.B.

Ultimately, these bans reinscribe the racial status quo. Rather than ban actual racism, states ban information and discussion about racism, as though ignorance will make racial problems disappear. By failing to teach those who will hold power about how racial hierarchies manifest and are maintained, they leave unaddressed all the structural issues that critical race theory aims to uncover. It is a perfect vicious circle.

Part I explains the basic tenets of critical race theory and how the classroom bans regularly misapprehend the legal theory. Part II undertakes a critical race theory analysis of the critical race theory bans and finds that they provide a paradigmatic example of white privilege and especially white fragility in action.

## I. CRITICAL RACE THEORY AND CRITICAL RACE THEORY BANS

Bans on critical race theory are having a moment. But what exactly does the theory encompass? This Part starts with a primer on critical race theory and then explores the bans in primary and secondary public schools on teaching the legal theory and lawmakers' distortions thereof. In a nutshell, critical race theory focuses on the ways in which the law has constructed racial categories and perpetuated racial inequality.<sup>21</sup> While the CRT bans often target boogeymen borne of white fragility, they also seek to outlaw discussion of some key concepts associated with critical race theory, including the views that structural racism is widespread and that the United States is not a meritocracy.

### A. Critical Race Theory Basics

Critical race theory—a term invented by Kimberlé Crenshaw, one of the founders of the field<sup>22</sup>—arose as a method of analyzing why racial inequalities persist despite the gains of the Civil Rights Movement.<sup>23</sup> Even after it became illegal to discriminate on the basis of race in education, housing, employment, places of public accommodation, banking, and a host of other areas, black Americans still found themselves worse off than white Americans on most metrics of well-being.<sup>24</sup>

21. KHIARA BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 7 (2019) (Critical race theory “proposes that law plays a crucial role in maintaining the significance of race.”); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 868 (1997) (“In short, critical race theory analyzes ways in which law ignores cultural domination within law’s own processes and the ways in which those processes contribute to racial oppression.”).

22. BRIDGES, *supra* note 21, at 8. Not only one of the founders of critical race theory, but Professor Crenshaw is also responsible for key insights including that race’s impact intersects with other crucial identities like sex. *Id.*

23. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 4 (3d ed. 2017) (“Critical race theory sprang up . . . as lawyers, activists, and legal scholars across the country realized, more or less simultaneously, that the heady advances of the civil rights era of the 1960s had stalled and, in many respects, were being rolled back.”).

24. BRIDGES, *supra* note 21, at 174 (“People of color are more indigent than white people; have a poorer quality of life than white people; are sicker than white people, and die earlier than white

As Richard Delgado and Jean Stefancic observed, “by every social indicator, racism continues to blight the lives of people of color.”<sup>25</sup> Critical race theory focuses on how the law itself perpetuates these inequalities.

Most scholars who employ critical race theory agree with several key concepts.<sup>26</sup> One is that race is not grounded in biology or genetics, but is socially constructed.<sup>27</sup> That is, who counts as “black” or “white” or “Asian” is determined not by science, but by law and society.<sup>28</sup> Nonetheless, despite its artifice, race plays an outsized influence in the United States and therefore cannot simply be ignored.<sup>29</sup> “[A]lthough race may not be biologically or genetically real, it is socially real,”<sup>30</sup> and pretending it is not only perpetuates racial inequality.<sup>31</sup>

Another important tenet of critical race theory is to center the black experience rather than the white one.<sup>32</sup> Thus, issues should be considered from the point of view of black Americans.<sup>33</sup> Personal narratives, for example, often help convey the lived experience of African Americans in a way that traditional scholarship does

people.”); DELGADO & STEFANCIC, *supra* note 23, at 13 (“People of color lead shorter lives, receive worse medical care, complete fewer years of school, and occupy more menial jobs than do whites.”).

25. DELGADO & STEFANCIC, *supra* note 23, at 12. Although critical race theory originally examined black-white race dynamics in the United States, its offshoots like LatCrit have expanded its focus. See generally Francisco Valdes, *Under Construction: Latcrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087 (1997) (applying critical race theory to Latina/o issues).

26. KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARY PELLER & KENDALL THOMAS, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii (1995) (“[T]here is no canonical set of doctrines, or methodologies to which we all subscribe.”).

27. BRIDGES, *supra* note 21, at 123 (“One of the cardinal tenets of Critical Race Theory is that race is a social construction.”); DELGADO & STEFANCIC, *supra* note 23, at 9 (“[R]ace and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather races are categories that society invents, manipulates, or retires when convenient.”).

28. BRIDGES, *supra* note 21, at 137 n.41 (citing ARIELA J. GROSS, WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 294 (2008)) (noting that Louisiana courts held a woman to be black in 1883 under a Louisiana statute that defined as black anyone with “1/32 degree of African blood”).

29. CRENSHAW ET AL. *supra* note 26, at xxvi (“It was obvious to many of us that although race was, to use the term, socially constructed (the idea of biological race is ‘false’), race was nonetheless ‘real’ in the sense that there is a material dimension and weight to the experience of being ‘raced’ in American society, a materiality that in significant ways has been produced and sustained by law.”).

30. BRIDGES, *supra* note 21, at 10; see also *id.* at 173 (“Americans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness.”).

31. BRIDGES, *supra* note 21, at 10.

32. Valdes, *supra* note 25, at 1095 n.19 (“Critical Race Theory has been described as an intellectual and discursive movement that seeks to center a marginalized subject or viewpoint.”).

33. MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, *Introduction, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 6 (Westview Press, 1993) (“Critical race theory insists on recognition of the experiential knowledge of people of color . . . in analyzing law and society.”); Maria C. Malagon, Lindsay Perez Huber & Veronica N. Velez, *Our Experiences, Our Methods: Using Grounded Theory to Inform a Critical Race Theory Methodology*, 8 SEATTLE J. FOR SOC. JUST. 253, 257 (2009) (“CRT strongly believes that the lived experiences of People of Color are instrumental in helping us understand how, and to what extent, race and racism mediate everyday life.”).

not.<sup>34</sup> Furthermore, the purpose of critical race theory is to find solutions to combat continuing racial inequality.<sup>35</sup> Critical race theory is therefore an intellectual endeavor with a racial justice goal.<sup>36</sup>

Crucially, the focus of critical race theory is structural racism. It does not deny the existence of intentional racist acts by individuals, but its concern lies in the ways that institutions or societal structures perpetuate racial inequalities.<sup>37</sup> “Systemic racism is so embedded in systems that it often is assumed to reflect the natural, inevitable order of things.”<sup>38</sup> The subpar public schools which many black Americans must endure provide an example. During the civil rights era, the blame lay with overtly racist legislators or governors—individual white men who were consciously racist—who barred black schoolchildren from attending the superior all-white schools.<sup>39</sup> Instead of hunting for individual bad actors, critical race theory examines how school funding today is tied to property taxes and how that policy results in widely disparate funding for majority-minority schools, given segregated housing patterns and black Americans’ lower socioeconomic status.<sup>40</sup> These factors,

34. DELGADO & STEFANCIC, *supra* note 23, at 49 (“The hope is that well-told stories can help readers bridge the gap between their worlds and those of others. Engaging stories can help us understand what life is like for others and invite the reader into a new and unfamiliar world.”); cf. Jerome M. Culp, Jr., Angela P. Harris, & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435, 2444 (2003) (“Rather than asking, ‘Is Jerome the subject of discrimination, or is he crazy,’ critical race theory tells stories of various sorts about what it is like to be the (perpetually possible) subject of discrimination, and to constantly wonder whether one is crazy or appears so to others. Critical race theory takes seriously, in other words, the subject in crisis.”).

35. CRENSHAW ET AL. *supra* note 26, at xiii (noting that core to CRT “is a desire not merely to understand the vexed bond between law and racial power but to change it”).

36. DELGADO & STEFANCIC, *supra* note 23, at 8 (“Unlike some academic disciplines, critical race theory contains an activist dimension.”); MATSUDA ET AL., *supra* note 33, at 6 (“Critical race theory works towards the end of eliminating racial oppression.”).

37. See, e.g., Paula A. Braveman, Elaine Arkin, Dwayne Proctor & Nicole Holm, *Systemic and Structural Racism: Definitions, Examples, Health Damages, and Approaches to Dismantling*, 41 HEALTH EQUITY 171, 171 (2022) (“Systemic and structural racism are forms of racism that are pervasively and deeply embedded in systems, laws, written or unwritten policies, and entrenched practices and beliefs that produce, condone, and perpetuate widespread unfair treatment of people of color[.]”); Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 785 (2020) (“Institutional discrimination as we define it here refers to norms and practices, intentionally adopted or not, that perpetuate unjust disparities within a particular organization or throughout social institutions such as education, employment, and the legal system.”).

38. Braveman et al., *supra* note 37, at 172.

39. See, e.g., *Orval Faubus; Governor Blocked School Desegregation*, L.A. TIMES (Dec. 15, 1994), <https://www.latimes.com/archives/la-xpm-1994-12-15-mn-9162-story.html> [<https://perma.cc/RF23-CERF>] (describing how former Arkansas Governor Orval E. Faubus “became a national figure on Sept. 2, 1957 when he called out the Arkansas National Guard to keep nine black students from entering Little Rock’s all-white Central High School”).

40. See, e.g., Emma Garcia, SCHOOLS ARE STILL SEGREGATED, AND BLACK CHILDREN ARE PAYING THE PRICE (2020), <https://files.epi.org/pdf/185814.pdf> [<https://perma.cc/4RUH-ZGNZ>] (finding that 69.2% of black children versus 12.9% of white children attend schools with high concentration of students of color and 72.4% of black children versus 31.2% of white children attend high-poverty schools); Clare Lombardo, *Why White School Districts Have So Much More Money*, NPR (Feb. 26, 2019), <https://www.npr.org/2019/02/26/696794821/why-white-school-districts-have-so>



in turn, flow from earlier institutional decisions regarding highway construction<sup>41</sup> and housing subsidies,<sup>42</sup> among other things.<sup>43</sup> In short, critical race theory does not seek to blame individuals; on the contrary, one of its main goals is to shift focus from individuals to systems, like housing patterns and school funding.

Another key CRT concept is that structural racism is not an aberration but is in fact widespread.<sup>44</sup> The claim is not that the United States is populated by people with racial animus who act on that animus, thereby making racism widespread. Rather, the claim is that systems that replicate racism and racial inequalities, from highway construction,<sup>45</sup> to residential housing,<sup>46</sup> to local school funding,<sup>47</sup> to mass

much-more-money [<https://perma.cc/39YY-RAKF>] (explaining that school resources depend on the tax base of the district and reporting a study that found that “[f]or every student enrolled, the average nonwhite school district receives \$2,226 less than a white school district”).

41. See generally Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1268 (2020) (“[R]esidential isolation and segregation are all a part of the legacy of highway politics that focus on growth and expansion at the expense of Black communities: by building roads to whites-only suburbs through the heart of Black neighborhoods.”).

42. Terry Gross, *A ‘Forgotten History’ of How the United States Government Segregated American*, NPR (May 3, 2007), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america> [<https://perma.cc/KX7K-KJHL>] (explaining how the Federal Housing Authority subsidized builders who were “mass producing” affordable housing that could be sold only to whites but refused to insure mortgages in redlined black neighborhoods); see also Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/7HPN-FT5E>].

43. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (describing the federal, state, and local laws, programs, and policies that helped create and help maintain segregated neighborhoods).

44. DELGADO & STEFANCIC, *supra* note 23, at 8 (“[R]acism is ordinary, not aberrational.”); BRIDGES, *supra* note 21, at 11 (explaining that “racism is a normal feature of American society . . . and that institutions, like the law, work to perpetuate racial inequality”); Culp, Jr. et al., *supra* note 34, at 2436 (“Critical race theory . . . is founded on the proposition that white supremacy pervades society, that it is intertwined with the very institutions of family, market, and state that shape social life.”).

45. Federally funded highway construction not only destroyed black middle-class urban neighborhoods but also helped enable white flight to the suburbs. See generally *supra* note 41 and accompanying text.

46. Segregated housing patterns mean black families disproportionately suffer from issues ranging from food deserts to environmental racism. See, e.g., Kelly M. Bower, Roland J. Thorpe Jr., Charles Rohde & Darrell J. Gaskin, *The Intersection of Neighborhood Racial Segregation, Poverty, and Urbanicity and its Impact on Food Store Availability*, 58 PREV. MED. 33 (2014) (finding that food deserts were associated with both poverty and racial composition and that “poor predominantly black neighborhoods face a double jeopardy with the most limited access to quality food”); Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394-95 (1991) (noting, for example, that “three out of the four commercial hazardous waste landfills in the Southeast United States were located in majority black communities” and that “race is the predominant factor related to the presence of hazardous wastes in residential communities throughout the United States—a more significant factor than even socioeconomic status”). These disparities beget further adverse impacts. See generally Casey Berkovitz, *Environmental Racism Had Left Black Communities Especially Vulnerable to COVID-19*, CENTURY FOUND. (May 20, 2020), <https://tcf.org/content/commentary/environmental-racism-left-black-communities-especially-vulnerable-covid-19/?session=1> [<https://perma.cc/6JCD-LU6F>].

47. See generally *supra* notes 38–43 and accompanying text.

media's depictions of people of color,<sup>48</sup> are everywhere.<sup>49</sup> They may seem to be racially neutral, but they are not. Or more specifically, they may be neutral on their face and not necessarily motivated by racial hostility, but they have a racially disparate impact that goes unaddressed.<sup>50</sup>

Another systemic issue is that “white” is the unstated default and that American society is structured around the interests, needs, and behavior of white people. Whiteness “is normative. It sets the standard in dozens of situations.”<sup>51</sup> This manifests in small ways: white manufacturers make “nude” stockings and “invisible” Band-Aids that match white skin,<sup>52</sup> or white authors who describe the hair and eye color but not skin color of white characters but mention all for characters of color (assuming the story has any).<sup>53</sup> It also appears in larger ways, such as the fact that history in American schools tends to focus on the viewpoint and accomplishments of white people,<sup>54</sup> or that standardized test questions may be subtly biased in favor of (wealthy) white test-takers.<sup>55</sup>

48. See generally *infra* notes 56–66 and accompanying text.

49. BRIDGES, *supra* note 21, at 12 (“CRT proposes that, in the post civil-rights era, rational structures, institutions, and discourses do the bulk of the work creating and maintaining racial hierarchies.”). These examples only scratch the surface; others might focus on health, employment, the school-to-prison pipeline, criminal justice, or voting. See generally Braveman et al., *supra* note 37.

50. Khiara Bridges cites another example from STOKEY CARMICHAEL AND CHARLES HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (1967): “[w]hen white terrorists bomb a black church and kill five black children, that is an act of individual racism . . . when five hundred black babies die each year [in the same city] because of the lack of proper food, shelter and medical facilities . . . that is a function of institutional racism.” BRIDGES, *supra* note 21, at 147.

51. DELGADO & STEFANCIC, *supra* note 23, at 86.

52. Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 *FIRST AMEND. L. REV.* 185, 194 (2017) (“[F]lesh’ colored crayons, ‘nude’ stockings, and ‘invisible’ Band-Aids have, until very recently, only met their vaunted criteria for white people.”).

53. Cf. Robin DiAngelo, *White Fragility*, 3 *INT’L J. CRITICAL PEDAGOGY* 54, 60 (2011) (“[P]eople of color are almost always seen as ‘having a race’ and described in racial terms (‘the black man’) but whites rarely are (‘the man’)”).

54. How many U.S. public schools teach the history of Asia or South America or Africa compared to the history of Europe? How many describe U.S. history from the perspective of an enslaved or free black American? Cf. Nadia B. Ahmad, *Blood, Sweat, Tears: A Muslim Woman Law Professor’s View on Degenerative Racism, Misogyny, and (Internal) Islamophobia from Preeclampsia and Presumed Incompetent to Pandemic Tenure*, 16 *FIU L. REV.* 13, 44 (2021) (“I thought history was all messed up because World History was given from a Eurocentric viewpoint as if the rest of the world never existed, so people like me were made to feel invisible as if our people had not contributed to civilization.”).

55. To start, test questions are more likely to draw on the experience of moneyed white people, hence SAT questions on subjects like tobogganing, lacrosse, polo, and sailing. When tests are timed, and every second counts, familiarity with the subject matter gives the test-taker a competitive edge. Scott Jaschik, *New Evidence of Racial Bias on SAT*, *INSIDE HIGHER ED* (June 21, 2010), <https://www.insidehighered.com/news/2010/06/21/new-evidence-racial-bias-sat> [https://perma.cc/9MTW-9UTC] (describing an earlier study that found easier questions favored white students over black students and theorized “that easier questions are likely reflected in the cultural expressions that are used commonly in the dominant (white) society, so white students have an edge based not on education or study skills or aptitude, but because they are most likely growing up around white people”); Richard Delgado, *Rodrigo’s Tenth Chronicle: Merit and Affirmative Action*, 83 *GEO. L.J.* 1711, 1721 (1995) (“The SAT, for example, has test items about toboggans, lacrosse, polo, and other activities prominent in white, middle- and upper-class culture.”).

Yet another systemic issue is the depiction of people of color in mass media.<sup>56</sup> As Leonard M. Baynes has observed, given how racially segregated the United States is, “many whites often have more electronic, rather than personal, encounters with people of color.”<sup>57</sup> Studies show that black Americans are, among other stereotypes, regularly shown as poor,<sup>58</sup> lazy/on welfare,<sup>59</sup> and criminal<sup>60</sup> in popular culture and on the news.<sup>61</sup> One interviewed white girl noted that “you always see black people

In addition, when choosing which screened questions to include on official tests, the College Board is more likely to use those that benefit white students than those that benefit black students. *See, e.g.,* Maria Veronica Santelices & Mark Wilson, *Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 HARV. EDUC. REV. 106, 124, 128 (2010).

56. This is assuming they appear at all. One study of the 100 highest-grossing films from 2015 found that only fourteen had a nonwhite lead or co-lead, and only three of these were women. In fact, 17% of movies did not have a single black character with lines. The study also found that only four out of 107 directors of those movies were black. STACY L. SMITH, MARC CHOUËFFI & KATHERINE PIEPER, *INEQUALITY IN 800 POPULAR FILMS: EXAMINING PORTRAYALS OF GENDER, RACE/ETHNICITY, LGBT, AND DISABILITY FROM 2007-2015* (2016), [https://annenberglaw.usc.edu/sites/default/files/2017/04/10/MDSCI\\_Inequality\\_in\\_800\\_Films\\_FINAL.pdf](https://annenberglaw.usc.edu/sites/default/files/2017/04/10/MDSCI_Inequality_in_800_Films_FINAL.pdf) [<https://perma.cc/WTP2-J5EQ>].

57. Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 299 (2003).

58. *See, e.g.,* TRAVIS L. DIXON, *A DANGEROUS DISTORTION OF OUR FAMILIES, REPRESENTATION OF FAMILIES, BY RACE, IN NEWS AND OPINION MEDIA* 22 (Dec. 2017), [https://colorofchange.org/wp-content/uploads/2019/05/COC-FS-Families-Representation-Report\\_Full\\_121217.pdf](https://colorofchange.org/wp-content/uploads/2019/05/COC-FS-Families-Representation-Report_Full_121217.pdf) [<https://perma.cc/V3S2-JKVQ>] (“Black families represent 59% of the poor in news and opinion media but make up just 27% of the poor” versus “white families represent 17% of the poor in news and opinion but make up 66% of the poor, according to official reports.”).

59. *See, e.g., id.* at 23 (“Black families represent 60% of welfare recipients in news and opinion media but make up just 42% of welfare recipients.”).

60. *See, e.g., id.* at 24 (finding that 37% of criminals in media were black when in fact only 26% of those arrested are, compared to 28% of criminals in media are white when they constitute 77% of those arrested); Elliott Ash, Ruben Durante, Maria Grebenshchikova & Carlo Schwartz, *Visual Representation and Stereotypes in News Media 2* (Dec. 16, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3934858](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3934858) [<https://perma.cc/23HR-FT83>] (analyzing two million articles from the NYT and Fox News and finding that “articles about crime and poverty are disproportionately associated with images of Blacks”); Sherri Burr, *Television and Societal Effects: An Analysis of Media Images of African-Americans in Historical Context*, 4 J. GENDER RACE & JUST. 159, 178 (2001) (“Watching television could lead viewers to believe that all African-Americans may be . . . crooks and drug dealers as depicted in Hill Street Blues and Law and Order.”); Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 852 n. 14 (2010) (“[N]ine of twelve studies conducted predominantly during the 1990s found that the media overrepresented minorities as perpetrators of crime.”); *cf.* Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 283 (2007) (finding black criminals are more likely to be depicted as threatening and more often shown in mug shots compared to white criminals).

61. Tracy Jan, *News Media Consistently Warped Portrayal of Black Families, Study Finds*, WASH. POST (Dec. 13, 2017, 6:00 AM) <https://www.washingtonpost.com/news/wonk/wp/2017/12/13/news-media-offers-consistently-warped-portrayals-of-black-families-study-finds/> [<https://perma.cc/KBD4-B3DV>] (“If all you knew about black families was what national news outlets reported, you are likely to think African Americans are overwhelmingly poor, reliant on welfare, absentee fathers and criminals.”); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1553–54 (2005) (“[L]ocal news programs, dense with images of racial minorities committing violent crimes in one’s own community, can be analogized to Trojan Horse viruses.”).

doing drugs and carrying around drugs, shooting people and stealing things.”<sup>62</sup> As a result, movies, television shows, video games, and newspaper articles tend to reinforce age-old and harmful stereotypes.<sup>63</sup> According to one study, eighty-three percent of black Americans believe that the media perpetuates negative stereotypes about them.<sup>64</sup> Americans are inevitably exposed to these stereotypes and internalize them without even realizing they are doing so.<sup>65</sup> Once the stereotypes take hold, they can be very hard to dislodge. The result is widespread unconscious discrimination.<sup>66</sup>

These unconscious biases distort people’s evaluations in a way that reinforces their preexisting stereotypes. Studies have repeatedly shown that people notice and interpret identical information differently depending on the race of the person evaluated.<sup>67</sup> People rate the exact same resume more highly when they think the candidate is white versus black.<sup>68</sup> Law firm partners evaluated an identical legal memorandum more favorably when told it was drafted by a white associate (rated

62. Burr, *supra* note 60, at 180.

63. As recently as 1990, the General Social Survey found that, of whites polled, 52% considered violence as a characteristic of African Americans and 57.1% believed that African Americans prefer welfare to work. In a 1996 survey, 27.8% of white people agreed African Americans were lazy. See Baynes, *supra* note 57, at 303; see also Teresa M. Bruce, *Terrorism Du Jour How the Trayvon Martin Case Exposes an Endemic Regime of Fear That Keeps Black Males and Females of All Colors in A State of Subjugation*, 21 UCLA WOMEN’S L.J. 1, 25–26 (2014) (“African Americans, male and female, are often depicted in movies and on television, and even in the news, in a discriminatory manner. . . . African Americans are presented as ugly, dirty, lazy, immoral, and stupid.”).

64. Bryan Alexander, *Two in Three Black Americans Don’t See Themselves Represented in Movies and TV*, *Study Says*, USA TODAY (Sept. 17, 2020, 12:00 PM), <https://www.usatoday.com/story/entertainment/movies/2020/09/17/study-black-americans-no-representation-movies-tv/3476650001/> [<https://perma.cc/2EZA-MTAD>].

65. Kang, *supra* note 61, at 1514 (“[E]ven if our sincere self-reports of bias score zero, we would still engage in disparate treatment of individuals on the basis of race, consistent with our racial schemas. . . . That we are not even aware of, much less intending, such race-contingent behavior does not magically erase the harm.”); Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 282 (2007) (“Researchers readily acknowledge that the impact of media image can be extremely powerful.”).

66. Kang, *supra* note 61, at 1495 (“Racial minorities are repeatedly featured as violent criminals. Consumption of these images, the social cognition research suggests, exacerbates our implicit biases against racial minorities.”); Baynes, *supra* note 57, at 304 (“[T]he absence and stereotyping of people of color by the broadcast media has an effect on the attitudes that white people have towards people of color and the attitudes that each group has about itself.”); see also Kang, *supra* note 61, at 1540 (“[A]s the computer scientists say, ‘garbage in, garbage out.’”).

67. There are countless studies like these. See, e.g., Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 309–10 nn.64–66, 68 (2015) (collecting studies).

68. See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. R. 991 (2004) (finding that resumes with white-sounding names received 50% more callbacks for interviews); cf. Katherine L. Milkman, Modupe Akinola & Dolly Chugh, *What Happens Before? A Field Experiment Exploring How Pay and Representation Differently Shape Bias on the Pathway into Organizations*, 100 J. APPLIED PSYCHOL. 1678, 1690 n. 10 (2015), <http://dx.doi.org/10.1037/apl0000022> [<https://perma.cc/CAT8-JYMQ>] (finding professors are most likely to respond to otherwise identical e-mail requests for mentorship when signed with a white male name).

4.1 out of five) versus a black one (3.2 out of five).<sup>69</sup> Because of their preexisting stereotypes, the law partners found around six spelling and grammar errors in black Thomas Meyer's writing but only around three in white Thomas Meyer's.<sup>70</sup> Not only will employers evaluate the exact same performance differently, but they are more likely to remember the black employee's mistakes and the white employee's accomplishments.<sup>71</sup> Furthermore, people are unaware of their disparate assessments. Consequently, people make race-based decisions without even realizing it. Indeed, if asked, they might sincerely believe that illegitimate factors played no role.<sup>72</sup> But they did, and the upshot is that people are regularly denied equal opportunity due to their race.

Because structural racism is so widespread, critical race theory rejects the notion that the United States is a land of equal opportunity, with success due solely to effort and ability.<sup>73</sup> In other words, the U.S. is not actually a meritocracy, as much as we might wish it were.<sup>74</sup>

As critical race theorists point out, constitutional law has failed to come to grips with systemic racism.<sup>75</sup> Currently, Equal Protection Clause doctrine covers only discrimination that can be traced back to individual racist decisions—a “bad apples” test.<sup>76</sup> If a law that harms black people overtly discriminates on its face, then

69. Debra Cassens Weiss, *Partners in Study Gave Legal Memo a Lower Rating When Told Author Wasn't White*, A.B.A. J. (Apr. 21, 2014, 12:19 PM), [http://www.abajournal.com/news/article/hypothetical\\_legal\\_memo\\_demonstrates\\_unconscious\\_biases](http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases) [<https://perma.cc/2HC2-JJUF>]. In both cases, the partners were told that Thomas Meyer wrote the writing sample. *Id.* But half of the partners were told the associate was white while the other half were told he was black. *Id.* In addition to the different scores, black law associate “Thomas Meyer” was criticized as “average at best and needing a lot of work” while white law associate “Thomas Meyer” was praised for his “potential and good analytical skills.” *Id.*

70. *Id.*

71. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1208 (1995) (“[O]nce a target individual has been perceived as a member of a particular category, people are more likely to remember the target as exhibiting attributes and behaviors commonly associated with that category.”); see also Gillian B. White, *Black Workers Really Do Need to Be Twice as Good*, ATLANTIC (Oct. 7, 2015).

72. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136–37 (1997) (“In sum, the sociological and psychological literature demonstrates that (1) racial bias remains the norm among white Americans; but that (2) they are strongly inhibited in expressing the racial attitudes they consciously hold, and often are wholly unaware of the extent to which their conscious judgments are unconsciously race based.”).

73. CRENSHAW ET AL. *supra* note 26, at xxix (describing a “meritocracy ideology” with “unacknowledged resistance to reaching any deep understanding of the myriad ways racism continues to limit the realization of goals such as equal opportunity”).

74. MATSUDA ET AL., *supra* note 33 at 6 (“Critical race theory expresses skepticism towards dominant legal claims of neutrality, objectivity, colorblindness and meritocracy.”).

75. DELGADO & STEFANCIC, *supra* note 23, at 3–8.

76. CRENSHAW ET AL. *supra* note 26, at xv (“[T]he dominant legal conception of racism as a discrete and identifiable act of ‘prejudice based on skin color’ placed virtually the entire range of everyday social practices in America . . . beyond the scope of critical examination or legal remediation.”).

it will be subject to strict scrutiny.<sup>77</sup> But if a law that disparately harms black people and entrenches racism is neutral on its face, then it is not subject to any kind of heightened scrutiny unless the state actor also consciously intended to discriminate.<sup>78</sup> In other words, a law will not be considered racially problematic and subject to strict scrutiny unless it has both a racially discriminatory impact and is motivated by a racially discriminatory intent.<sup>79</sup> Moreover, equal protection law rejects the common sense assumption that the legislators intended the foreseeable consequences of their law.<sup>80</sup> Only if the law was enacted *in order to* harm a racial minority does it merit closer review.<sup>81</sup> To illustrate, even when the government continued to rely on a potentially biased employment test that black applicants failed at four times the rate as white ones—a test that had not been validated and so had no proven ability to measure job performance—no heightened scrutiny was deemed warranted without the requisite showing of a conscious intent to harm black applicants.<sup>82</sup> In sum, “Colorblind, or ‘formal’ equality . . . can thus remedy only the most blatant forms of discrimination.”<sup>83</sup>

To add insult to injury, current equal protection doctrine demands the most exacting scrutiny for race-based laws designed to help black Americans, such as affirmative action programs.<sup>84</sup> According to the Supreme Court, these programs represent invidious discrimination against innocent white people and should be presumed unconstitutional.<sup>85</sup> Indeed, the Supreme Court recently held that affirmative action programs in higher education violate the Equal Protection Clause.<sup>86</sup> Thus, a CRT examination of how law perpetuates racial inequality

77. *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) (“[A]ll governmental uses of race are subject to strict scrutiny.”).

78. *Washington v. Davis*, 426 U.S. 229, 238–40 (1976) (a facially neutral law with disparate impact does not trigger strict scrutiny without discriminatory intent); *see also id.* at 240 (arguing that a “law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”).

79. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 260 (1979) (“The *Davis* case held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race.”).

80. *Feeney*, 442 U.S. at 279 (rejecting assumption on grounds that “[d]iscriminatory purpose,’ however, implies more than . . . intent as awareness of consequences”).

81. *Feeney*, 442 U.S. at 279 (holding that no discriminatory intent unless “particular course of action [was] at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

82. *Davis*, 426 U.S. at 245–48.

83. DELGADO & STEFANCIC, *supra* note 23, at 8.

84. *See, e.g., Fisher v. Univ. of Tex.*, 579 U.S. 365, 376 (2016) (“Race may not be considered [by a university] unless the admissions process can withstand strict scrutiny.”).

85. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (“[T]here are serious problems of justice . . . there is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.”); *see also id.* at 295 n.34 (“The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious.”).

86. The Supreme Court struck down University of North Carolina’s affirmative action program in *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*. No. 21-707 (U.S. June 29, 2023) and

demonstrates that existing equal protection law both ignores racial discrimination and hinders attempts to remediate racial discrimination.

Finally, scholars aligned with critical race theory have diagnosed not only the ways that black people are disadvantaged by societal systems and structures, but also the ways that white people are advantaged by them.<sup>87</sup> This is not a shocking insight. Every hierarchy has those who benefit as well as those who are disadvantaged.<sup>88</sup> But with the concepts of “white privilege” and “white fragility,” the focus is on whiteness rather than blackness.<sup>89</sup>

Among the first to investigate white privilege was Peggy McIntosh, who describes the concept as “an invisible package of unearned assets that I can count on cashing in each day, but about which I was ‘meant’ to remain oblivious.”<sup>90</sup> McIntosh lists dozens of concrete examples of white privilege. I described one above: the ability to walk into a drug store and find products designed for your needs (e.g., suitable stockings and bandages). But the privileges of white people run the gamut, ranging from “If a traffic cop pulls me over . . . I can be sure I haven’t been singled out because of my race;”<sup>91</sup> to “Whether I use checks, credit cards or cash, I can count on my skin color not to work against the appearance of my financial reliability;”<sup>92</sup> to “I can turn on the television or open to the front page of the paper and see people of my race widely represented.”<sup>93</sup> All of these are

Harvard’s affirmative action program in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199 (U.S. June 29, 2023).

87. See generally CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997); Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 971 (1993); see also, e.g., Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 427–28 (2014) (“[White Abigail Fisher who challenged the affirmative action program] seemed never to have considered that her skin color likely ensured a childhood filled with positive representations of people of her own race, a benefit that has been shown to aid children’s psychological and emotional development; that subjective assessments made of her intellectual or emotional capacities in school were likely interpreted in ways that enhanced, rather than undermined, her intellectual development; or that skin color likely aided her family’s financial stability.”).

88. BRIDGES, *supra* note 21, at 195.

89. DELGADO & STEFANCIC, *supra* note 23, at 85 (“[A] new generation of scholars has put whiteness under the lens and examined the construction of the white race.”).

90. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, in BEYOND HEROES AND HOLIDAYS 79 (Enid Lee, Deborah Menkart & Margo Okazawa-Rey, 1998); see also *id.* (“White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks.”); cf. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1713 (1993) (“In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites [seek] to protect.”).

91. McIntosh, *supra* note 90, at 79.

92. *Id.*

93. *Id.*; see also *id.* (“When I am told about our national heritage or about ‘civilization,’ I am shown that people of my color made it what it is.”).

advantages that white people enjoy for no other reason than their whiteness.<sup>94</sup> They are unearned.

Examining white Americans and their privileges shifts the discussion in two ways. First, it changes the norm. Rather than start with white people as the default and examine how black people suffer particular disadvantages, white privilege starts with black people as the default and examines how white people benefit from particular advantages. Second, it gives white people a race. Focusing on white people's different experiences due to their race highlights that white people are also raced. Race is not simply what other nonwhite people have. All people have it. There is no vantage point that is completely neutral because everyone is raced in one way or another.

In sum, although constitutional law still clings to an outdated view of discrimination as limited to individual bad actors, critical race theory does not. It trains its sights on institutions and systems, from education to mass media. In exposing widespread systemic discrimination, it dismantles the idea that the United States is a land of equal opportunity with the results reflecting a true meritocracy. It also draws attention to the two sides of racism: the discrimination of some and the privilege of others. With these basic concepts of critical race theory in mind, it becomes apparent that although the proliferating CRT bans often miss the mark, they land some—or at least approach the target—as well.

### B. Critical Race Theory Bans

North Dakota's ban is unusual in that it names “critical race theory” as the object of its ban, which it defines as “the theory that racism is not merely the product of learned individual bias or prejudice, but that racism is systemically embedded in American society and the American legal system to facilitate racial inequality.”<sup>95</sup> Most other state bans are neither as direct nor as accurate as North Dakota's.<sup>96</sup> Instead, they draw from the same set of “divisive concepts” that first appeared in a Trump Executive Order banning the use of critical race theory in federal government trainings.<sup>97</sup> Some of these forbidden concepts represent a gross misunderstanding of critical race theory, and ironically, their prohibition might actually help a CRT examination of history. Others come closer to important tenets of critical race theory.

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94. Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 246 (2005) (“Peggy McIntosh's widely acknowledged definition of white privilege emphasizes the benefit that privilege bestows upon the individual holder.”).

95. N.D. CENT. CODE § 15.1-21-05.1 (2021), <https://ndlegis.gov/cencode/t15-1c21.pdf> [<https://perma.cc/44ZV-3YR5>].

96. See *CRT Bill List*, *supra* note 2.

97. Exec. Order No. 13,950, 3 C.F.R. § 433, 436 (2021).



### 1. Content

The inspiration for many state critical race theory bans is a 2020 executive order issued by then-President Trump targeting the allegedly “destructive” and “malign ideology.”<sup>98</sup> Complaining about “offensive and anti-American race and sex stereotyping and scapegoating,” the order bars funds to any civil service education or training that promotes a list of nine “divisive concepts.”<sup>99</sup> These same concepts—the Trump administration’s understanding of critical theory—appear, often word for word, in most of the state-level bans on critical race theory in schools.<sup>100</sup> The “divisive concepts” are:

- (1) one race or sex is inherently superior to another race or sex;
- (2) the United States is fundamentally racist or sexist;
- (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- (6) an individual’s moral character is necessarily determined by his or her race or sex;
- (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
- (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.<sup>101</sup>

#### a. All Races Are Equal

One cluster of prohibitions seeks to safeguard the fundamental principle that all races are of equal worth and deserve equal treatment. Thus, these laws bar

98. *Id.* at 434. Trump issued the executive order days after watching conservative activist Christopher Rufo on Fox News lambasting critical race theory. Laura Meckler & Josh Dawsey, *Republicans, Spurred by an Unlikely Figure, See Political Promise in Targeting Critical Race Theory*, WASH. POST (June 21, 2021, 6:22 PM), <https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/> [https://perma.cc/Z2CG-XSYM].

99. *Id.* at 433, 436.

100. *See CRT Map*, *supra* note 2.

101. Exec. Order No. 13,950, 3 C.F.R. at 436.

teaching that any race is inherently superior to another,<sup>102</sup> or that any individual's moral character is determined by their race.<sup>103</sup> The laws also ban teaching that anyone should be treated poorly or discriminated against on account of their race or other protected characteristics.<sup>104</sup>

An aside on the characteristics protected from discrimination: while virtually all state laws include race and sex,<sup>105</sup> others vary on how widely they cast their net. Some stop with race and sex.<sup>106</sup> Others extend their prohibitions to include ethnicity,<sup>107</sup> color,<sup>108</sup> national origin,<sup>109</sup> and/or religion.<sup>110</sup> New Hampshire provides the most comprehensive list, and its ban covers “age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin.”<sup>111</sup>

### *b. No Race is Responsible*

Two popular prohibitions try to ensure that no race is ever blamed for racial inequality or is made to feel bad about it. The first, incorporated into almost all anti-critical race theory laws, makes it illegal to teach that anyone, on account of their race, bears responsibility for racism in the past.<sup>112</sup> The second one bars teachers

102. This is the first “divisive concept” in the Trump Executive Order: “(1) one race or sex is inherently superior to another race or sex.” *Id.*

103. This is divisive concept number six from the Executive Order: “(6) an individual’s moral character is necessarily determined by his or her race or sex.” *Id.*

104. The Executive Order’s fourth “divisive concept” is “(4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex.” *Id.*

105. See *CRT Bill List*, *supra* note 2. With the exception of North Dakota, which outlaws “critical race theory.” See N.D. CENT. CODE § 15.1-21-05.1 (2021).

106. See *CRT Bill List*, *supra* note 2 (including IOWA CODE § 261H.7(1)(b) (2021), <https://www.legis.iowa.gov/perma/030920216557> [<https://perma.cc/4LVG-JXPW>]; OKLA. STAT. tit. 70, § 24-157(B)(1)(a) (2021), [http://webserver1.lsb.state.ok.us/cf\\_pdf/2021-22%20ENR/hB/HB1775%20ENR.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/hB/HB1775%20ENR.PDF) [<https://perma.cc/NDR6-YT2Q>]; 2021 S.C. Acts § 1.105, [https://www.scstatehouse.gov/sess124\\_2021-2022/appropriations2021/tap1b.htm](https://www.scstatehouse.gov/sess124_2021-2022/appropriations2021/tap1b.htm) [<https://perma.cc/3G7P-TT65>]; TENN. CODE § 49-6-109 (2021), <https://legiscan.com/TN/text/HB0580/id/2408921/Tennessee-2021-HB0580-Chaptered.pdf> [<https://perma.cc/9KJE-6G6N>]; TEX. EDUC. CODE ANN. § 28.002(4)(B)(i) (2021), <https://capitol.texas.gov/tlodocs/871/billtext/pdf/SB00003L.pdf> [<https://perma.cc/NHZ7-2HBK>]).

107. See *CRT Bill List*, *supra* note 2; ARIZ. REV. STAT. § 15-717.02(B) (2021), <https://www.azed.gov/sites/default/files/2021/07/Teacher%20Guidance%20for%20ARS%2015-717.02%20-%207.22.21%20.pdf> [<https://perma.cc/ZR4G-G9VL>]; IDAHO CODE § 33-138 (2022), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/legislation/H0377.pdf> [<https://perma.cc/57ZZ-2SSS>].

108. IDAHO CODE § 33-138 (2022).

109. *Id.*

110. *Id.*

111. N.H. REV. STAT. ANN. § 193:40 (2021), <https://www.gencourt.state.nh.us/rsa/html/XV/193/193-40.htm> [<https://perma.cc/Y6XB-2B7A>]. Some also contemplate additional unspecified protected categories. Idaho’s list finishes with “or other criteria.” IDAHO CODE § 33-138 (2022).

112. Exec. Order No. 13,950, 3 C.F.R. § 433, 436 (2021) (“(7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex”).

from making students feel guilt due to their race.<sup>113</sup> Arizona's and South Carolina's laws state that no one can be "blamed or judged because of their race."<sup>114</sup> Other states copy the executive order's language verbatim and make it illegal to teach "that any individual should feel discomfort, guilt, anguish or any form of psychological distress because of the individual's race."<sup>115</sup>

*c. No Race is Racist, and Certainly Not the United States*

The bans forbid any suggestion that people's race might lead them to be racist. Teachers cannot propose that people might be consciously or unconsciously "racist" or "oppressive" due to their race.<sup>116</sup> If no one is racist, then clearly it is false to claim that the United States is racist—another taboo "divisive concept."<sup>117</sup> States frame this latter prohibition as a bar on teaching that the United States or their state is "fundamentally"<sup>118</sup> or "irredeemably"<sup>119</sup> or "systemically"<sup>120</sup> racist.

*d. Colorblind is Best and Meritocracy Rules*

The last cluster of "divisive concepts" props up the belief that American society is a meritocracy and, therefore, Americans should be colorblind. After all, if racism is not a widespread problem, then there is no basis to challenge the idea that the existing distribution of achievements, wealth, power, and well-being is due to merit and hard work as opposed to race. Hence the prohibition on challenging the view that the United States is a meritocracy.<sup>121</sup>

And if the nation operates as a true meritocracy, no one should be saddled with penalties or bestowed advantages on account of their race. Instead of highlighting race, then, the goal is to ignore it, making race-conscious decision-making another "divisive concept." Rather than directly mandate colorblindness, many states opted for the more opaque phrasing used in the Trump executive order.<sup>122</sup> Nevertheless, compulsory colorblindness is one outcome of the double

113. *Id.* ("(8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex").

114. ARIZ. REV. STAT. § 15-717.02 (2021) (forbidding "blame or judgment on the basis of race or ethnicity"); 2021 S.C. Acts § 1.105 (budget bill mandating that funds cannot be used to teach "fault, blame, or bias should be assigned to a race or sex, or to members of a race or sex because of their race or sex"); 2021 S.C. Acts § 59-29-630, [https://www.scstatehouse.gov/sess124\\_2021-2022/bills/4343.htm%20\[https://perma.cc/CD38-GBF5\]](https://www.scstatehouse.gov/sess124_2021-2022/bills/4343.htm%20[https://perma.cc/CD38-GBF5]).

115. Exec. Order No. 13,950, 3 C.F.R. at 436 (eighth "divisive concept").

116. *Id.* ("(3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously").

117. *Id.* ("(2) the United States is fundamentally racist or sexist").

118. *See, e.g.*, TENN. CODE § 49-6-1019 (2021); IOWA CODE § 261H.8(1)(b) (2021).

119. *See, e.g.*, TENN. CODE § 49-6-1019 (2021); IOWA CODE § 261H.8(1)(b) (2021).

120. *See, e.g.*, N.D. CENT. CODE § 15.1-21-05.1 (2021).

121. Note that the idea is written as prohibition on teaching that "(9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race." Exec. Order No. 13,950, 3 C.F.R. at 436.

122. *Id.* ("(5) That members of one race or sex cannot and should not attempt to treat others without respect to race or sex.").

negative in “an individual of one race . . . should not attempt to treat others without respect to race.”<sup>123</sup>

*e. Additional Limits Tinged with Red Scare*

Some states exceed the Trump Administration’s template by placing additional restrictions. Tennessee, for example, wants to rid the classroom of any discussion of white privilege and so bars “[a]scrib[ing] character traits, values, moral or ethical codes, *privileges* or beliefs to a race or sex, or to an individual because of the individual’s race or sex.”<sup>124</sup>

Several states target *The 1619 Project: A New Origin Story*,<sup>125</sup> a collection of essays and poems organized by Nikole Hannah-Jones and published by the New York Times.<sup>126</sup> The date marks the arrival of the first enslaved Africans to the American colonies, and the *Project’s* stated aim is “to reframe the country’s history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative.”<sup>127</sup> In Texas, no teacher can “require an understanding of the 1619 Project” or teach “that the advent of slavery in the territory that is now the United States constituted the true founding of the United States.”<sup>128</sup> Texas also bans teachers from depicting slavery and racism as “anything

123. *Id.* Florida even specifically targeted affirmative action. *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22CV304-MW/MAF, 2022 WL 16985720, at \*4 (N.D. Fla. Nov. 17, 2022) (“When asked directly whether concept six [‘a person by virtue of his race... should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion’] is ‘affirmative action by any other name,’ defense counsel answered, unequivocally, ‘Your Honor, yes.’”).

124. Additionally, Tennessee forbids the idea that “the rule of law does not exist, but instead is a series of power relationships and struggles among racial or other groups.” TENN. CODE § 49-6-1019 (2021). Also barred is “promoting division between or resentment of a race [or] nonviolent political affiliation.” *Id.*

125. Texas and Florida have successfully banned requiring understanding of or using *The 1619 Project* in K-12 classrooms. *See* TEX. EDUC. CODE ANN. § 28.0022 (a)(4)(B) (2021); FLA. ADMIN. CODE ANN. r. 6A-1.094124 (“Instruction may not utilize material from the 1619 Project . . .”). An additional thirteen states have attempted to pass laws to ban *The 1619 Project* from classrooms, and although many bills have died, legislation is still pending in Michigan and Ohio. *See CRT Bill List, supra* note 2. “Yet even without singling out curricula by name, 53 of the 54 educational gag order bills . . . could be used to block The 1619 Project . . .” JONATHAN FRIEDMAN, JAMES TAGER, ANDY GOTTLIEB, EDUCATIONAL GAG ORDERS: LEGISLATIVE RESTRICTIONS ON THE FREEDOM TO READ, LEARN, AND TEACH 43 (Summer Lopez & Nadine Faird eds., 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/5UTP-45V2>].

126. Claretta Bellamy, *Nikole Hannah-Jones on the 1619 Project Book, Harsh Truths of the Black Experience*, NBC NEWS (Nov. 18, 2021), <https://www.nbcnews.com/news/nbcblk/nikole-hannah-jones-1619-project-book-harsh-truths-black-experience-rcna5876> [<https://perma.cc/UCJ7-AYNW>] (“The 1619 Project: A New Origin Story,” is comprised of 18 essays and 36 poems and works of fiction, highlighting the legacy of slavery in the United States, and how it continues to shape contemporary American life.); Adam Serwer, *The Fight Over the 1619 Project Is Not About the Facts*, ATLANTIC (Dec. 23, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093/> [<https://perma.cc/4DG2-CD57>] (describing *The 1619 Project* as “a historical analysis of how slavery shaped American political, social, and economic institutions”).

127. *The 1619 Project*, N.Y. TIMES MAG., Aug. 2019, <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/PHE4-RGSE>].

128. TEX. EDUC. CODE ANN. § 28.0022(a)(2021).

other than deviations from, betrayals of, or failures to live up to the authentic founding principles of the United States.”<sup>129</sup>

A few states link critical race theory to communism.<sup>130</sup> Among its CRT prohibitions, Tennessee bans “promoting or advocating the violent overthrow of the United States government.”<sup>131</sup> According to the Governor of Nebraska, “[C]ommunism isn’t something that’s just studied in history books. There’s growing awareness across our state and country that it’s reinventing itself right here at home under the label of Critical Race Theory.”<sup>132</sup>

## 2. *The Failure to Bar Critical Race Theory*

These prohibitions, aimed at eradicating critical race theory in the classroom, often miss the mark and instead reflect profound befuddlement regarding CRT. In fact, the mandated point of view on some “divisive concepts” helps advance a CRT perspective. At the same time, to the extent these prohibitions deny the existence of widespread racism and insist that the United States is a meritocracy, they do come closer to some of CRT’s core teachings. Yet, even here, the actual phrasing reveals confusion about the theory’s basic premises.

### *a. Missing the Mark*

Notwithstanding North Dakota’s fairly accurate description of critical race theory, many prohibitions are grounded in some foundational misunderstandings. Several “divisive concepts” have nothing to do with CRT, and critical race theorists would be just as opposed to them.

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129. *Id.*

130. See S.B. 588, 58th Leg., 1st Reg. Sess. (2021 Okla. Sess. Laws), <https://legiscan.com/OK/text/SB588/id/2442064/Oklahoma-2022-SB588-Introduced.pdf> [<https://perma.cc/XS33-VPRY>] (“A student enrolled in and attending a public school district or public charter school in this state shall be afforded . . . The right to an unbiased education that does not endorse, favor or promote socialism, communism or Marxism and that is free from anti-American bias[.]”); H.B. 4016, 85th Leg., 1st Reg. Sess. § 18-2L-3(a) (W. Va. 2022), [https://www.wvlegislature.gov/Bill\\_Text\\_HTML/2022\\_SESSIONS/RS/bills/hb4016%20intr.pdf](https://www.wvlegislature.gov/Bill_Text_HTML/2022_SESSIONS/RS/bills/hb4016%20intr.pdf) [<https://perma.cc/CVE8-GVVV>] (prohibiting “[t]he presentation or promotion of any political, economic, or political-economic system that is based on ideological concepts rooted in or inspired by . . . communism”).

131. TENN. CODE § 49-6-1019 (2021).

132. Office of Governor Pete Ricketts, *Marxism Reinvented* (Aug. 9, 2021), <https://governor.nebraska.gov/press/marxism-reinvented> [<https://web.archive.org/web/20210809223839/https://governor.nebraska.gov/press/marxism-reinvented>]; see also Tom Latek, *Education Committee Hears Passionate Talk about CRT*, KY. TODAY (Oct. 6, 2021), [https://www.kentuckytoday.com/state/education-committee-hears-passionate-talk-about-crt/article\\_5bf2521f-785b-5670-b9af-3070d55e7d77.html](https://www.kentuckytoday.com/state/education-committee-hears-passionate-talk-about-crt/article_5bf2521f-785b-5670-b9af-3070d55e7d77.html) [<https://perma.cc/EP4W-UDJW>] (reporting that CRT ban sponsor Rep. Matt Lockett argued that “CRT is simply identity-based Marxism, based solely on the color of one’s skin. At the end of the day, all Marxist theories fail and come unraveled”).

As an initial matter, the need to violently overthrow the government is not a tenet of critical race theory the way it is a tenet of Marxism.<sup>133</sup> The two may have become conflated in people’s minds either because critical race theory broke off from critical legal studies,<sup>134</sup> which did draw on Marxist thought,<sup>135</sup> or because Marxism was one of many theories, “including poststructuralism, postmodernism, . . . feminism, literary criticism, liberalism, neopragmatism and discourses of self-determination such as Black nationalism and radical pluralism” that influenced it.<sup>136</sup> Although critical race theory calls for a “massive social transformation,”<sup>137</sup> seeking reform of existing power structures is not equivalent to advocating the violent overthrow of those structures. Accusers may simply be redbaiting—trying to discredit the theory by linking it to communism, something deemed quintessentially un-American, atheist, and immoral.

Moreover, no critical race theorist argues that any race is inherently superior to another, nor that any individual person’s moral character is determined by their race. White politicians’ logic failed them when they made the leap from “black people are not inferior,” which CRT does espouse, to “white people are inferior,” which CRT does not. The same is true of attributing moral value to individuals based on race—it is simply not a CRT tenet. On the contrary, critical race theory wholeheartedly agrees there should be no racial hierarchies.<sup>138</sup>

In any event, the obsessive focus on individuals misses the main thrust of critical race theory, which aims to excavate how institutions and systems—not individuals—reproduce racial inequity.<sup>139</sup> Thus, the goal of critical race theory is not to blame individual white people today for the racism of the past, nor to make

133. See *infra* Section II.A; see generally Shiv Narayan Persaud, *Towards an Understanding of Critical Race Theory: Dispelling False Claims and Misrepresentations*, 18 U. MASS. L. REV. 79, 84 (2023) (explaining why “CRT is not Marxism”).

134. See generally Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or ‘A Foot in the Closing Door,’* 49 UCLA L. REV. 1343 (2002) (describing how critical race theory broke off from Critical Legal Studies); see also *id.* at 1363 (“Critiques of neutrality, objectivity, colorblindness, meritocracy, and formal equality constituted the most common themes that linked our work.”).

135. Rob Hunter, *Critical Legal Studies and Marx’s Critique: A Reappraisal*, 31 YALE J.L. & HUMAN. 389, 391 (2021) (“CLS included figures who were sympathetic to or considered themselves Marxists . . . .”); Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1525 (1991) (“[A] great deal of the early work associated with critical legal studies involved efforts to make sense of a Marxist-Weberian notion of the relative autonomy of law.”).

136. Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW* 195, 214 n.7 (David Kairys ed., 2d ed. 1990).

137. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and A Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1392–93 n.226 (1991); Crenshaw, *supra* note 136, at 214 n.7 (“The normative stance of critical race theory is that massive social transformation is a necessary precondition of racial justice.”).

138. Of course, proponents of CRT bans meant that white people should not be disparaged or deemed less worthy because of their race. However, because the bans are written in neutral terms, this neutral language also ensures that nonwhite people are not disparaged or deemed less worthy because of *their* race. Ironically, this broader meaning was made possible by the anti-CRT insistence of a colorblind approach to the law.

139. See *supra* notes 37–50 and accompanying text.

individual white people feel guilt or anguish or other forms of psychological distress for the continuing inequalities. As stated, the primary goal is to expose and remedy systemic racism, not individual racism.<sup>140</sup> That critical race theory teaches that all white people are immoral racists who ought to be ashamed of themselves simply perpetuates a widespread misapprehension that CRT is trying to correct, namely that racism stems from individual bad people acting maliciously rather than from systems and structures.

Ironically, some of the prohibitions, though written with the aim of protecting white students, might actually promote a CRT analysis of existing inequalities.<sup>141</sup> If all races are inherently equal, no one is a racist, and intentional discrimination is illegal anyway, then what explains the fact that whites are overrepresented in positions of power from academia to business to politics? Enter CRT's systemic explanations.<sup>142</sup>

These prohibitions may also be used to eliminate any lingering white supremacy in the classroom. For example, the requirement to teach that no race or religion is morally superior might necessitate rethinking how Manifest Destiny is presented in school.<sup>143</sup> At the very least, Manifest Destiny cannot be taught uncritically. After all, an underlying assumption of Manifest Destiny—the doctrine that American settlers were destined to expand throughout North America—was that God favored the white Christian settlers over the non-Christian Native Americans who occupied that land.<sup>144</sup>

But the main point is that the critical race theory conjured up in the fevered minds of anti-CRT politicians does not match its actual tenets. The goal is not to attack or denigrate individual white people. It is to expose systems and structures that reinscribe racial hierarchies and to fix them—and not by violent revolution. In

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140. Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and A New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000) (describing institutional racism as “a theory of racism that explains organizational activity that systematically harms minority groups even though the decision-making individuals lack any conscious discriminatory intent”).

141. One scholar goes so far as to argue that “[m]any bills—if we take seriously their actual text—call for more CRT in the classroom, not less.” Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723, 726 (2022).

142. See *id.* at 749; see also *id.* at 754 (arguing that ambiguous divisive concept number four, barring discriminatory treatment based on protected characteristics, could be interpreted to bar teachers from approving the Trump travel ban targeting Muslims or sports teams targeting trans athletes).

143. Cf. Daniel Koen, *Advocacy Should Be Personal: An Interview with Emma Lozano*, 13 PUB. INT. L. REP. 245, 246 (2008) (“We need to understand that racism in this country, the racism that justified slavery and Jim Crow, it is part and parcel of the supremacist attitudes of manifest destiny—the notion that white Europeans were chosen by God to establish their culture, religion and economic system on this continent.”).

144. Bill Ong Hing, *Immigration Policy: Thinking Outside the (Big) Box*, 39 CONN. L. REV. 1401, 1411 (2007) (“In part, racism drove the belief in manifest destiny. Native Americans were perceived as savages best confined to small areas of the west. . . . Thus the same racism that justified slavery in the south and discrimination in the north supported expansion in the west.”). Similarly, Tennessee’s ban on advocating the violent overthrow of the U.S. government—aimed at CRT’s imagined communist call to violence—might inadvertently inform lessons on the January 6 insurrection.

fact, some “divisive concepts” targeted by the bans are consistent with critical race theory and even further it.

*b. Hitting the Target—or at Least Coming Closer*

Other forbidden “divisive concepts” come closer to major critical race theory tenets. The prohibitions related to the pervasiveness of discrimination, unconscious discrimination, and colorblindness and meritocracy approach core critical race theory concepts. Still, most of the “divisive concepts” are sufficiently far afield such that critical race theory could still be taught without violating the letter of the law.

*i) Widespread Racism*

One of the key principles of critical race theory is that racism in the United States is ubiquitous because it is built into so many different institutions and structures.<sup>145</sup> While critical race theorists would not necessarily summarize this idea as “the United States is fundamentally racist,”<sup>146</sup> the inability to teach about the pervasiveness of racism in the United States would render it difficult to properly explain critical race theory.

The scope of this forbidden “divisive concept” may turn on how “racism” is understood.<sup>147</sup> Given CRT critics’ focus on individual bad actors, they may well translate “the United States is fundamentally racist” as “the United States is peopled by those overtly hostile to racial minorities.” (That this overlooks the millions of Americans who are racial minorities themselves may not register with the white legislators who unconsciously view racial minorities as “other.”) If so, there is little clash with critical race theory. But because “racist” encompasses so many kinds of racism, this banned concept may sweep in the basic CRT tenet that racism is, in fact, widespread in the United States and has permeated its history from the start.<sup>148</sup>

145. See *supra* note 44 and accompanying text; see also MATSUDA ET AL., *supra* note 33, at 6 (“Critical race theory recognizes that racism is endemic to American life.”).

146. See Exec. Order No. 13,950, 3 C.F.R. § 433, 436 (2021) (second divisive concept)

147. It would also turn on what is meant by “fundamentally.” Defining “fundamentally” so that the divisive concept means that racism has been a defining characteristic of the United States since its inception would impinge on a CRT approach to history. “Fundamentally” defined as inevitable and unalterable would not.

148. The U.S. Constitution itself had three clauses protecting slavery, despite never using the word. First, the Constitution barred Congress from ending the international slave trade until 1808. U.S. CONST. art. 1, § 9 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.”). Second, the Constitution gave slave states outsized influence by allowing them to count each slave as three-fifths of a person for purposes of determining representation in Congress. U.S. CONST. art. 1, § 2 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”). Third, the “fugitive slave clause” required that free states return escaped slaves to their slave owners. U.S. CONST. art. 4, § 2 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into



One type of commonplace racism that scientific studies have exhaustively documented is unconscious racism—another banned “divisive concept.”<sup>149</sup> As described above, this includes the phenomenon of people noting, evaluating, and remembering the exact same conduct or performance differently depending on the actor’s race.<sup>150</sup> The existence of unconscious discrimination helps explain how even well-meaning people discriminate without any awareness that they treat people differently because of their race.

The actual language of the bans does not necessarily preclude discussing unconscious discrimination. Notably, most states do not bar the entire concept of “unconscious racism.” Rather, teachers may not instruct that an individual “by virtue of his or her race” is guilty of unconscious racism.<sup>151</sup> As it happens, the science indicates that everyone, regardless of race, has unconscious biases. That is, even people of color may unconsciously discriminate against other people of color,<sup>152</sup> and women may discriminate against women.<sup>153</sup> After all, as Charles Lawrence III has emphasized, we have all grown up in and been influenced by the same racist (and sexist) culture.<sup>154</sup> Thus, strictly speaking, the view that unconscious discrimination distorts everyone’s decision-making can still be taught.

another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

149. Although unconscious discrimination is not necessarily a focus of critical race theory, it is one of the reasons why racism is so widespread.

150. See *supra* notes 67–72 and accompanying text. That is, due to unconscious discrimination, Americans of all races judge people—and subsequently award or punish them—based on their race.

151. See Exec. Order No. 13,950, 3 C.F.R. at 436.

152. For example, in a study documenting shooter bias, researchers found that “participants were more likely to mistake a Black target as armed when he in fact was unarmed . . . [and] more likely to mistake a White target as unarmed when he in fact was armed [and] Black participants showed similar amounts of ‘shooter bias’ as Whites.” Kang, *supra* note 61, at 1493 (summarizing Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–17 (2002)).

153. See, e.g., Daniel Storage, Tessa E.S. Charlesworth, Mahzarin R. Banaji & Andrei Cimpian, *Adults and Children Implicitly Associate Brilliance with Men More Than Women*, 90 J. EXPERIMENTAL SOC. PSYCHOL. 104020 (2020), <https://doi.org/10.1016/j.jesp.2020.104020> [<https://perma.cc/SUB4-3DF8>] (finding that both men and women more likely to link “brilliant” to men compared to women); Corinne A. Moss-Racusin, John F. Dovidio, Victoria L. Brescoll, Mark J. Graham & Jo Handelsman, *Science Faculty’s Subtle Gender Biases Favor Male Students*, 109 PROCEEDINGS NAT’L ACAD. SCI., 16474 (2012), <https://doi.org/10.1073/pnas.1211286109> [<https://perma.cc/E6U4-ATYB>] (finding that male and female science faculty rated application with male name more highly than exact same application with female name); Sigal Samuel, *Women in Science Are Up Against a Lot of Unconscious Bias. Here’s How to Fight It*, VOX (Feb. 11, 2020, 2:00 PM), <https://www.vox.com/future-perfect/2019/8/28/20833505/women-science-unconscious-gender-implicit-bias-study> [<https://perma.cc/C68H-DH4L>] (describing study finding that “most scientists on the committees—whether they were men or women, and whether they worked in particle physics or political science—unconsciously associated science with men”).

154. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. . . . To the extent that this cultural belief

Unconscious microaggressions, however, may fare differently.<sup>155</sup> Microaggressions are those constant mini-acts of racism that white people inflict on people of color, often out of ignorance rather than ill intent.<sup>156</sup> Research scientist Derald Wing Sue defines them as “the everyday slights, insults, putdowns, invalidations and offensive behaviors that people of marginalized groups experience in daily interactions with generally well-intentioned people who may be unaware of their impact” and states they “are reflections of implicit bias or prejudicial beliefs and attitudes beyond the level of conscious awareness.”<sup>157</sup> A white man complimenting an Asian-American lecturer (presumed foreign and other) on their impeccable English is one classic example.<sup>158</sup> A white woman reacting to the proximity of a young black man (presumed criminal and dangerous) by crossing to the other side of the road or holding her bag more tightly is another.<sup>159</sup> Microaggressions have been called “death by a thousand cuts”<sup>160</sup>—while individually they may seem manageable, their relentlessness and cumulative impact is less so.<sup>161</sup> Thus, critical race theory bans might reach microaggressions, as they are more likely to be individual, unconscious, acts of racism that one race inflicts on another.

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system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism.”).

155. Nantiya Ruan, *Papercuts: Hierarchical Microaggressions in Law Schools*, 31 HASTINGS WOMEN’S L.J. 3, 16 (2020) (“The term is attributed to Dr. Chester Pierce, an early African-American psychiatrist and medical school faculty member, from his 1970 work, *Offensive Mechanisms*.”).

156. Daniel G. Solórzano, Lindsay Pérez Huber & Layla Huber-Verjan, *Theorizing Racial Microaffirmations as a Response to Racial Microaggressions: Counterstories Across Three Generations of Critical Race Scholars*, 18 SEATTLE J. SOC. JUST. 185, 191 (2020) (“I came to define racial microaggressions as one form of systemic everyday racism used to keep those at the racial margins in their place.”); Lauren Munro, *Everyday Indignities: Using the Microaggressions Framework to Understand Weight Stigma*, 45 J.L. MED. & ETHICS 502, 502–03 (2017) (“A distinct feature of microaggressions is that the individuals who perpetrate them are often, though not always, unaware of the fact that they are engaging in the denigration of a marginalized group or do so unintentionally.”).

157. Derald Wing Sue, Opinion, *Microaggressions: Death by a Thousand Cuts*, SCI. AM. (Mar. 30, 2021), <https://buff.ly/3Qtr9tp> [<https://perma.cc/95B7-XXFD>].

158. *Id.*

159. Jenee Desmond-Harris, *What Exactly Is a Microaggression*, VOX (Feb. 16, 2015, 9:20 AM), <https://www.vox.com/2015/2/16/8031073/what-are-microaggressions> [<https://perma.cc/A8QX-NXE9>]; see also Renee Nicole Allen & Deshun Harris, *#socialjustice: Combatting Implicit Bias in an Age of Millennials, Colorblindness & Microaggressions*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 12–13 (2018) (“While microaggressions are too numerous to include in an exhaustive list, a statement like ‘[y]ou are so articulate’ is a microinsult which falls within the ascription of intelligence theme. The hidden message received by a person of color is, ‘[i]t is unusual for someone of your race to be intelligent.’”); Catharine Wells, *Microaggressions: What They Are and Why They Matter*, 24 TEX. HISP. J.L. & POL’Y 61, 62 (2017) (“Examples [of microaggressions] include such common statements as ‘I don’t think of you as Black’ ‘You don’t look Jewish’ and ‘Where are you from? No, where are you really from?’”).

160. Sue, *supra* note 157; Ruan, *supra* note 155.

161. Sue, *supra* note 157 (“Microaggressions often convey to targets the message that they are foreigners, criminals, dangerous, a threat or subhuman. . . . Far from being harmless and benign, microaggressions have a macro impact on targets. A whole body of research supports this conclusion.”).

*ii) Colorblindness and Meritocracy*

One of the core tenets of critical race theory that these bans target is the view that the United States is not a meritocracy.<sup>162</sup> According to CRT, the existing distribution of goodies—a distribution where white Americans control most of those goodies—does not simply reflect ability and effort, but also widespread racism at every level.<sup>163</sup> Just as a bar on the idea of widespread racism would repudiate a central element of critical race theory, so would a bar on challenging the American ideal that everyone competes on a level playing field and success goes to those with the most talent and best work ethic.

Yet, once again, the phrasing of the ban reflects a funhouse version of critical race theory, starting with the mistaken belief that CRT argues that a “hard work ethic” on its own is a racist idea and that the “meritocracy” ideal was created by racists in order to hide their racism.<sup>164</sup> Because critical race theory critics do not understand that racism can exist without consciously racist individuals, they misconstrue the CRT challenge to meritocracy as a claim that the idea (or ideal) of a meritocracy was concocted by mustachio-twirling white villains plotting the subordination of black victims. Accordingly, the laws do not ban teaching that the U.S. is not a meritocracy; they ban teaching that a meritocracy is racist or “created by a particular race to oppress another race.”<sup>165</sup> Consequently, bans that echo the wording of the Trump executive order do not strictly speaking cover the CRT concept.

The same hitting-yet-simultaneously-missing the mark also applies to the attempts to outlaw color-consciousness or anything other than absolute colorblindness.<sup>166</sup> For critical race theory, mandating colorblindness is equivalent to willfully ignoring almost all the ways that racism—unconscious racism, microaggressions, but primarily structural racism—operates to perpetuate

162. See *supra* notes 73–74 and accompanying text; Robert L. Hayman, Jr., *Race and Reason: The Assault on Critical Race Theory and the Truth About Inequality*, 16 NAT'L BLACK L.J. 1, 19 (1999) (“Little is objectionable about [the meritocratic idea as ‘positions in society should be based on the abilities and achievements of the individual, rather than on characteristics such as family background, race, religion, or wealth’]. The difficulty, articulated clearly by critical race theorists, is that we are far from realizing this meritocratic ideal.”).

163. Hayman, Jr., *supra* note 162, at 19; see also *id.* at 24 (“Critical race theorists share that aspiration [of a meritocracy], but they refuse to be complacent about the gap between the aspirational and the actual; it is in that gap that the experience of ‘race’ is lived.”).

164. Exec. Order No. 13,950, 3 C.F.R. § 433, 436 (2021) (listing as the ninth divisive concept “meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race”).

165. *Id.*

166. See *supra* Section I.B.1.d.

inequality.<sup>167</sup> In the United States, race matters.<sup>168</sup> With racism permeating our brains and our institutions, we cannot hope to achieve equal opportunity, never mind true equality, without taking race into account.<sup>169</sup> Consequently, to mandate colorblindness is to negate a core element of any CRT course.

Yet, once again, the language of the ban reflects something other than actual critical race theory. Color-consciousness gets translated as deliberately discriminating against white people, or as stated in the banned divisive concept, teaching that “an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race.”<sup>170</sup> This, of course, is not equivalent to taking race into account.

Not all states have wildly misconceived critical race theory. As mentioned, North Dakota’s definition is a much better summary, although it too clings to a view of racism as intentional by characterizing it as systemically embedded *in order to* facilitate inequality.<sup>171</sup> Tennessee prohibits ascribing any privileges to one particular race, which seems to squarely cover the concept of white privilege, even if the ban did not expressly call out this concept.<sup>172</sup> But more often than not, they miss the mark. Still, the very attempt in itself embodies white privilege and white fragility.

## II. THE PRIVILEGE AND FRAGILITY OF CRITICAL RACE THEORY BANS

Critical race theory bans exemplify white privilege and especially white fragility. One of the most noted privileges of white Americans is the ability to pass through life with little awareness of race’s impact, and the bans reflect this obliviousness.<sup>173</sup> The bans also reflect white fragility, which is a series of defensive reactions and moves that white people regularly make when their privileges are

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167. Hayman, Jr., *supra* note 162, at 20–21 (“[E]ven in the absence of a verifiable, malicious intent, neutral laws may perpetuate inequity simply by deferring to forces (i.e. the marketplace, majoritarian politics, ‘private’ decision-making) that still harbor their own sets of biases forged through centuries of official (and unofficial) discrimination.”).

168. BRIDGES, *supra* note 21, at 7 (“[R]ace remains highly significant in present-day U.S.”); Hayman, Jr., *supra* note 162, at 19 (“Race is a facet of identity . . . . It is not, race theorists insist, the only facet of identity; it may be, however, the only facet of identity that we pretend does not exist.”); Flagg, *supra* note 87, at 959 (“Beyond the individual forms of racism that stereotyping, bias, and hostility represent lie the vast terrains of institutional racism—the maintenance of institutions that systematically advantage whites—and cultural racism—the usually unstated assumption that white culture is superior to all others.”).

169. *Cf.* Hayman, Jr., *supra* note 162, at 22 (“Is it ‘merit’ that compels disparities in educational funding? Is it ‘merit’ that disproportionately locates minority students in under-funded schools?”).

170. Exec. Order No. 13,950, 3 C.F.R. at 436.

171. N.D. CENT. CODE § 15.1-21-05.1 (2021) (defining critical race theory as “the theory that racism is not merely the product of learned individual bias or prejudice, but that racism is systemically embedded in American society and the American legal system to facilitate racial inequality”).

172. TENN. CODE § 49-6-1019 (2021).

173. Of course, “[t]his description obviously does not apply to every single white person in the United States, but it does apply to many.” Corbin, *supra* note 52, at 220 n.56.

pointed out.<sup>174</sup> The consequence is the perpetuation of both racial ignorance and racial inequality.

### A. *White Privilege*

“White privilege” refers to the benefits that white people enjoy because of their race. While Peggy McIntosh envisions it as an “invisible package of unearned assets,”<sup>175</sup> scholars Ashleigh Shelby Rosette and Tracy L. Dumas have observed that white privilege “is best described as myriad advantages that White people enjoy on a daily basis that racial minorities do not.”<sup>176</sup>

Recall that one of the privileges that white people enjoy is that whiteness is the unstated norm.<sup>177</sup> In ways small and large, the presumed standard for needs, knowledge, and acceptable behavior is usually a white person. When white people want to buy a picture book with children looking like their own at the neighborhood bookstore, they can easily do so.<sup>178</sup> A white person can readily find hair products at the corner drugstore and can even choose from dry, regular, or oily shampoo and conditioner.<sup>179</sup> A black person may discover that same store does not carry any of the hair products they need, not even in the “ethnic” section.<sup>180</sup> Indeed, that black people use “ethnic” hair care products while white people simply use “normal” hair care products perfectly encapsulates how society is normed to whiteness. Not only are consumer goods designed with white people in mind but mass entertainment

174. *Id.*

175. See McIntosh, *supra* note 90, at 79.

176. Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL'Y 407, 418 (2007).

177. See *supra* notes 51–55 and accompanying text (discussing whiteness as unstated default).

178. Clothilde Ewing, *I Never Thought I'd Become a Children's Book Author. Then I Became a Mom* (Mar. 7, 2022, 5:12 PM), NBC THINK, <https://www.nbcnews.com/think/opinion/black-characters-children-books-don-t-only-need-talk-about-ncna1291107> [<https://perma.cc/6XP2-2QPA>] (“I didn’t realize how challenging and time-consuming it would be to find a collection of books that portrayed a child that would look like mine.”); Dan Moser, *Trends in Children's Lit Track America's Racial History, Research Shows*, NEB. TODAY (Mar. 26, 2021), <https://news.unl.edu/newsrooms/today/article/trends-in-children-s-lit-track-america-s-racial-history-research-shows/> [<https://perma.cc/QN3Q-YJFS>] (noting that in 2000, less than 3% of children’s books even had a Black character).

179. Stylists versed in white hair are also much easier to find. See, e.g., Lauren Valenti, *The Hairstyling Industry Has a Racism Problem, and It Starts with Beauty School*, VOGUE (July 8, 2020), <https://www.vogue.com/article/hairstyling-industry-racism-bias-beauty-cosmetology-school-salons-red-carpet> [<https://perma.cc/G8D4-7ZXK>] (“I went to [beauty] school for 1,600 hours, and we probably spent about five of those hours working on hair that wasn’t naturally straight.”).

180. Natasha Marsh, *Dear Drugstores—Please Stop Segregating Your Haircare Products*, BRYDIE (Nov. 20, 2020), <https://www.byrdie.com/natural-hair-products-segregation-5088393> [<https://perma.cc/79WZ-DRXT>] (“Sectioning off Black hair care products into a couple shelves—with never enough products or variety—perpetuates a racial stereotype that Black hair doesn’t fit in.”). Nevermind that the products may be locked up. Andrew Wheeler, *Walgreens and CVS to Stop Locking Up Beauty Products for Women of Color*, GUARDIAN (June 11, 2020), <https://www.theguardian.com/business/2020/jun/11/walgreens-cvs-beauty-hair-products-women-of-color%20> [<https://perma.cc/T8ST-LBP7>].

and history classes star white people,<sup>181</sup> standardized test questions are keyed to white experiences,<sup>182</sup> and the list goes on.<sup>183</sup>

Moreover, the privileges associated with whiteness are usually invisible to their beneficiaries. That is, white people often do not realize that their whiteness confers benefits.<sup>184</sup> Because the world is so tailored to their (white) needs and (white) experiences, white people often do not realize that whiteness is the default.<sup>185</sup>

This privilege begets more privileges, including (a) the privilege of not having to learn about nonwhite culture—including its legal scholarship—and (b) the privilege of not having to understand how raced the world actually is.<sup>186</sup> The CRT bans illustrate both. That is, CRT bans bespeak not only ignorance about critical race theory itself, but also ignorance about the role race plays in the United States.

### 1. Ignorance of Critical Race Theory

White people may freely ignore the culture of people of color.<sup>187</sup> When the world is designed around your needs and experiences, it is not necessary to learn about others' needs and experiences. Black people inevitably study white culture in order to navigate dominant white spaces, which is most of mainstream society.<sup>188</sup> For example, because natural and commonplace black hair styles like afros or braids are deemed less professional than natural and commonplace white hair styles, black women must study up on white hair.<sup>189</sup> White people need make no equivalent effort. As one black columnist wrote regarding hair, “[I]t is now clear to me that I

181. See *supra* notes 57–66 and accompanying text (describing dearth of black leads in American movies).

182. See *supra* note 55 and accompanying text (describing how creators of standardized tests choose questions).

183. See *supra* note 55 and accompanying text.

184. Flagg, *supra* note 87, at 957 (1993) (“The most striking characteristic of whites’ consciousness of whiteness is that most of the time we don’t have any.”).

185. Cf. Flagg, *supra* note 87, at 971 (“Whiteness is the racial norm.”); *id.* at 969 (“[T]he white person has an everyday option not to think of herself in racial terms at all. In fact, whites appear to pursue that option so habitually that it may be a defining characteristic of whiteness: to be white is not to think about it.”).

186. Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604–05 (1999) (“White people rarely contemplate the fact of our whiteness—it is the norm, the given. It is a privilege to not have to think about race.”).

187. McIntosh, *supra* note 90, at 79 (describing as a white privilege “I can remain oblivious of the language and customs of persons of color . . . without . . . any penalty for such oblivion.”).

188. Cf. Renee Nicole Allen, *From Academic Freedom to Cancel Culture: Silencing Black Women in the Legal Academy*, 68 UCLA L. REV. 364, 373 (2021) (arguing that American law schools are white spaces) “In white spaces, whiteness is the norm and everything else is an other. . . . For white people, white spaces are normal; for Black people, white spaces are informally ‘off limits.’ Yet, navigation of these spaces is a condition of the Black existence.” *Id.*

189. See generally D. Wendy Greene, *Black Women Can’t Have Blonde Hair . . . in the Workplace*, 14 J. GENDER, RACE & JUST. 405, 407–08 (2011); see also Rosette & Dumas, *supra* note 176, at 409 (“‘[E]thnic’ hair styles are sometimes not welcome in the corporate world.”).

have been in AP White Hair, while my white peers had been left back twice in remedial Black Hair 101.”<sup>190</sup>

This white privilege also extends to ignoring the scholarship of black Americans, given the way the bans fundamentally misunderstand critical race theory. That is, CRT bans embody the white privilege of not needing to know nonwhite culture in that almost none of the presumably white legislators passing these laws seems to have researched what the theory actually teaches.

As detailed in Part I, nowhere does critical race theory posit that race determines your superiority or moral character.<sup>191</sup> Its primary focus is not individuals at all, which makes fears about guiltning white school children off base. And of course, as many have pointed out, critical race theory is a complicated, sophisticated theory that arose in law schools and is generally taught in law schools rather than elementary and high schools.<sup>192</sup>

## 2. Ignorance of Race Itself

In addition to ignorance about the theory, the critical race theory bans reflect great ignorance about race. A world catering to them allows white people to not only ignore nonwhite culture but also to ignore the raced nature of their own culture, often leaving them unaware how race impacts their day-to-day lives. Even with something as mundane as hair, the ease of finding products, stylists, or a hair style accepted as professional vary depending on race.<sup>193</sup> Black women in the United States well know that race matters even with hair; white women may have no clue. As a result, white people do not think of themselves or the world as raced.

Because they are unaware of the role race plays in their life, white people may well assume that race also plays no role in other people’s life. Or, perhaps, they assume that race only becomes salient when faced with bigotry that can be traced to a “bad apple”—surely, they may think, a rare phenomenon these days. Their obliviousness as to how their race makes their life easier may make them equally oblivious as to how race makes others’ lives harder. This conviction that race is

190. Marquia Walton, *As a Black Women I Know Too Much About White Hair*, ELLE (July 1, 2020), <https://www.elle.com/beauty/a32998826/black-hair-white-hair-knowledge-and-norms/> [<https://perma.cc/SL33-GLP6>]; *see also id.* (“In high school I learned the greatest hits of white hair styles while my white counterparts learned close to zero about Black hair.”).

191. *See supra* Section I.B.1 (explaining how bans misunderstand critical race theory).

192. Phil McCausland, *Teaching Critical Race Theory Isn’t Happening in Classrooms, Teachers Say in Survey*, NBC NEWS (July 1, 2021, 6:23 PM), <https://www.nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945> [<https://perma.cc/EU3A-G82U>] (“[T]he responses from more than 1,100 teachers across the country . . . suggest that the panicked dialogue on critical race theory made by lawmakers and the media does not reflect the reality of American classrooms.”); *cf.* Jeff Sanders, *Alabama State Board of Education Permanently Bans Critical Race Theory in Public Schools*, CBS42 (Oct 14, 2021, 7:04 PM), <https://www.cbs42.com/alabama-news/alabama-school-board-makes-ban-on-critical-race-theory-permanent/> [<https://perma.cc/F9EB-BRZ2>] (“State Superintendent Dr. Eric Mackey . . . did acknowledge that despite the rule change, the state never received a single complaint about a critical race theory being taught by a teacher.”).

193. *See supra* notes 179–180, 189–190, and accompanying text.

irrelevant is then coupled with the conviction that racism should remain beside the point and that *discussing* race is pointless.

The belief that racism is not a problem in the United States helps explain the hostility to teaching that the United States is fundamentally racist or that anyone should be viewed as guilty of being racist, consciously or unconsciously. This race-is-irrelevant worldview also makes more plausible the belief that the United States is a true meritocracy and that those who have succeeded—like themselves—earned their achievements due to their hard work ethic rather than unearned advantages and unconscious favoritism. Plus, if race is irrelevant, it makes more sense to insist on colorblindness and to refuse any teaching that race should ever be taken into account.<sup>194</sup>

Likewise, blindness to the widespread and systemic racism still plaguing the country leads privileged white politicians to blame the discussion of racism rather than racism itself as the cause of all racial problems.<sup>195</sup> A sponsor of Arizona's CRT ban proclaimed, "We should be focused on bringing people together, not pushing people apart. Critical race theory will do nothing but increase divisiveness in our communities,"<sup>196</sup> while one of Texas's asserted, "I think critical race theory and the belief in critical race theory is creating racial disharmony in the United States."<sup>197</sup> These proponents have convinced themselves that not only is there no need to talk about race, but that talking about race actually creates racial divides that would otherwise not exist.

In sum, undergirding the CRT bans are a series of erroneous assumptions made possible by white privilege. Specifically, white privilege makes possible ignorance about critical race theory and the critical role of race in the United States. Consequently, to certain white people whose life experiences minimize the

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194. This explanation generously gives white people the benefit of the doubt. In fact, white blindness is often willful blindness. It may not even be that, given the popularity of white supremacy and white supremacist groups. See, e.g., Simon Clark, *How White Supremacy Returned to Mainstream Politics*, CTR. AM. PROGRESS (July 1, 2020), <https://www.americanprogress.org/article/white-supremacy-returned-mainstream-politics/> [https://perma.cc/ZNB8-4S7V].

195. The pronouncement of Governor of Oklahoma Kevin Stitt as he signed a CRT ban into law is typical: "As governor, I firmly believe that not one cent of taxpayer money should be used to define and divide young Oklahomans about their race or sex." Sean Murphy, *Oklahoma Governor Signs Ban on Teaching Critical Race Theory*, US NEWS & WORLD REP. (May 7, 2021, 6:24 PM), <https://www.usnews.com/news/us/articles/2021-05-07/oklahoma-governor-signs-ban-on-teaching-critical-race-theory> [https://perma.cc/9A4J-K3QD] (quoting Oklahoma Governor Kevin Stitt).

196. News Release, Office of Governor Doug Ducey, Legislature Takes Strong Action to Stop Critical Race Theory (July 9, 2021), <https://azgovernor.gov/governor/news/2021/07/governor-ducey-legislature-take-strong-action-stop-critical-race-theory> [https://web.archive.org/web/20221116122648/https://azgovernor.gov/governor/news/2021/07/governor-ducey-legislature-take-strong-action-stop-critical-race-theory] (quoting Arizona Representative Michelle Udall).

197. Valeria Olivares, *Gov. Greg Abbott Signs Tougher Anti-Critical Race Theory Law*, DALLAS MORNING NEWS (Sept. 17, 2021, 5:08 PM), <https://www.dallasnews.com/news/education/2021/09/17/gov-greg-abbott-signs-tougher-anti-critical-race-theory-law/> [https://perma.cc/AKE5-EE3Y] (quoting Representative Steve Toth).



importance of race, the main racial problems in the country today are those caused by talking about race.

### B. *White Fragility*

White privilege is what lets white people remain ignorant of the widespread racism that black Americans face day in and day out, in ways large and small. But perhaps even more than white privilege, critical race theory bans illustrate white fragility. White privilege tends to breed “white fragility”—the term used to describe a constellation of defensive behaviors that white people exhibit when their unearned racial advantages are pointed out.<sup>198</sup> They include overreacting; making white people’s wellbeing the priority; casting white people as the true victims; and ultimately asserting false equivalencies, often by coopting the language of civil rights icons. The CRT bans encapsulate all these behaviors to provide a textbook example of the fragility white people display when confronted with the claim that widespread racism exists in the United States. The ultimate result is to further entrench the existing racial status quo.

#### 1. *Overreacting*

One of the most well-known fragile white reactions is to overreact. Robin DiAngelo, the academic who coined the term, defines “white fragility” as “a state in which even a minimum amount of racial stress becomes intolerable, triggering a range of defensive moves.”<sup>199</sup>

There are different causes of the distress. One may be that these issues are novel and uncomfortable. Black Americans have experience addressing racial issues (they have no choice) in a way white people have not.<sup>200</sup> As a result of this unfamiliarity, white Americans find conversing about race difficult.<sup>201</sup>

Exacerbating this unease are preexisting assumptions about what racism entails.<sup>202</sup> Although racism can cover a range of behaviors and effects,<sup>203</sup> white people are often only versed in one variant: “[R]acism is what happens when racist individuals think racist thoughts and then do racist things.”<sup>204</sup> As discussed above,

198. DiAngelo, *supra* note 53, at 54 (coining the term “White Fragility” in an academic article); *see also id.* at 55 (“This insulated environment of racial privilege builds white expectations for racial comfort while at the same time lowering the ability to tolerate racial stress.”).

199. DiAngelo, *supra* note 53, at 57.

200. Corbin, *supra* note 52, at 197–98 (“Although people of color are used to engaging with racial issues, white people are not.”).

201. DiAngelo, *supra* note 53, at 57 (“Whites have not had to build the cognitive or affective skills or develop the stamina that would allow for constructive engagement across racial divides.”).

202. Corbin, *supra* note 52, at 198 (“Exacerbating this discomfort is the simplistic view of racism often held by whites.”).

203. DELGADO & STEFANCIC, *supra* note 23, at 31 (noting that the single word *racism* has to cover a range of different behaviors ranging from intentional racism, unconscious racism, microaggressions, institutional racism, “racism tinged with homophobia or sexism, racism that takes the form of indifference . . . , and white privilege . . .”).

204. BRIDGES, *supra* note 21, at 173.

white people regularly overlook the other types of discrimination at play.<sup>205</sup> Consequently, white people tend to equate racism with individual animus.<sup>206</sup> Recall that under this view—a view shared by Equal Protection Clause jurisprudence—race discrimination requires a bad actor. When this worldview holds, any attempt to point out widespread systemic discrimination is translated in the fragile white mind as an accusation of invidious individual discrimination:<sup>207</sup> white people hear it as “you, personally, are a racist and you, personally, are to blame.”<sup>208</sup>

Finally, for white people to acknowledge their privileged place in society can feel like a blow to the ego. It means that they cannot take full credit for their wealth, position, and accomplishments.<sup>209</sup> White people have had an extra edge, an unfair advantage, and no one likes to think of themselves as a cheater.

Regardless of the reasons why, to overdramatize when confronted with any analysis of race, never mind one that highlights white privilege, is a hallmark of white fragility. The very existence of CRT bans in primary or secondary schools is an overreaction given most elementary, middle, and high schools do not teach the tenets of critical race theory.<sup>210</sup> Critical race theory is a legal theory that grew out of law schools and few (or no) public school sixth-graders or eleventh-graders are studying the ways that the Supreme Court’s equal protection jurisprudence overlooks discrimination that does not arise from animus.

Furthermore, the CRT bans often pass in places that seem least likely to incorporate cutting-edge, race-based legal theory in their curriculum. Idaho, the first state to successfully pass a ban, is one of the whitest states in the nation, with black people making up less than 1% of its population.<sup>211</sup> Yet Idaho’s CRT ban included an emergency provision so that it would go into effect immediately, as if a legal theory were an actual threat to the state and its inhabitants.<sup>212</sup> Even the Governor,

205. Corbin, *supra* note 52, at 198 (“Whites often simply do not see the other kinds of discrimination that operate. They are unaware of the unconscious racism that gives whites a boost in supposedly objective evaluations. They are unaware of the structural racism that results in ‘nude’ stockings and Columbus Day.”).

206. Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 897 (1995) (“Generally whites think of racism as voluntary, intentional conduct, done by horrible others.”).

207. Corbin, *supra* note 52, at 198 (“Accordingly, when someone tries to explain to a white person how they benefit from their race, they feel accused of racial malice.”).

208. Samuel R. Bagenstos, *Implicit Bias’s Failure*, 39 BERKELEY J. EMP. & LAB. L. 37, 50 (2018) (“While terms like . . . ‘implicit bias’ intend to point out systemic biases in America, for white Americans they’re often seen as coded slurs.”); *see also id.* at 50 (“For many people who are told that they are racially biased, what they are likely to hear is an accusation of racism.”).

209. DiAngelo, *supra* note 53, at 61 (“[M]any whites believe their financial and professional successes are the result of their own efforts while ignoring the fact of white privilege.”).

210. *See supra* note 192 and accompanying text.

211. *Population Distribution by Race/Ethnicity (2021)*, KAISER FAM. FOUND., <https://buff.ly/3QbdiYd> [<https://perma.cc/HS5E-3T2K>] (last visited Jan. 22, 2023). Other states with very low black populations are disproportionately represented in states that have already passed a critical race theory ban, including Montana (0.4%), New Hampshire (1.2%), and North Dakota (2.9%). *Id.*

212. James Dawson, *Idaho Governor Signs Bill to Ban Critical Race Theory in Schools*, NPR: ALL THINGS CONSIDERED (May 1, 2021, 5:13 PM), <https://www.npr.org/2021/05/01/992761507/>

who signed his state's ban, suggested that the Idaho law was a solution in search of a problem.<sup>213</sup>

Sometimes the reaction recalls the paranoid red scares of the 1920s and 1950s.<sup>214</sup> Just as politicians then exaggerated the threat of American communism and communists, politicians today exaggerate the threat of anti-racism and anti-racism teachings. Tennessee Governor Bill Lee's declaration that "[c]ritical race theory is un-American"<sup>215</sup> is surpassed only by U.S. Senator Ted Cruz's avowal that "[i]t is evil."<sup>216</sup>

And lest this comparison to red scares seem like a stretch, many CRT opponents have explicitly linked critical race theory to communism and Marxism. Tennessee's ban, after all, proscribes promoting or advocating the violent overthrow of the United States government<sup>217</sup>—as though that were part and parcel of an examination of systemic racism. Nebraska Governor Pete Ricketts explicitly connected the two when he claimed that communism was “reinventing itself right here at home under the label of Critical Race Theory.”<sup>218</sup> And he is hardly alone in casting critical race theory as the modern-day incarnation of a long-reviled nemesis.<sup>219</sup>

idaho-governor-signs-bill-to-ban-critical-race-theory-in-schools [https://perma.cc/293F-USAK] (“Lawmakers considered the need for the legislation so dire that they added a clause to make it effective immediately.”).

213. Blake Jones, *Little Signs Nondiscrimination Bill, but Questions ‘Anecdotes and Innuendo’ that Birthed It*, IDAHO EDUC. NEWS (Apr. 29, 2021) (quoting Idaho Governor Brad Little, Letter to House Speaker Scott Bedke (Apr. 28, 2021)), <https://www.idahoednews.org/top-news/legislative-roundup-4-29-21-little-signs-nondiscrimination-bill-but-questions-anecdotes-and-innuendo-that-birtherd-it/> [https://perma.cc/7GN5-TWJF] (“Little questioned the Legislature’s narrative of ‘widespread, systemic indoctrination in Idaho classrooms’ that fueled the bill . . . . ‘We must be focused on facts and data, not anecdotes and innuendo.’”). Other Republicans have made similar concessions, including Idaho Republican Representative Julie Yamamoto, a former school superintendent, who is on record stating, “In my 32 years in two different school districts, a public charter school, I never saw any of this happening, and I still don’t see that happening.” Dawson, *supra* note 212.

214. *The Red Scare*, HISTORY.COM (Feb. 28, 2020), <https://www.history.com/topics/cold-war/red-scare> [https://perma.cc/5RLM-4FKP] (“The Red Scare was hysteria over the perceived threat posed by Communists in the U.S. during the Cold War between the Soviet Union and the United States, which intensified in the late 1940s and early 1950s.”).

215. Brandon Richard, *Tennessee Releases Guidelines on Critical Race Theory*, ACTION NEWS 5 (Aug. 2, 2021, 7:09 PM), <https://www.actionnews5.com/2021/08/02/tennessee-releases-guidelines-critical-race-theory-law> [https://perma.cc/SV9T-PWMW].

216. Lawrence Richard, *Ted Cruz Slams Critical Race Theory as ‘Every Bit as Racist as the Klansman in White Sheets,’* WASHINGTON EXAMINER (June 18, 2021), [https://www.washingtonexaminer.com/news/ted-cruz-critical-race-theory-racist-klansmen?utm\\_source=yahoo&utm\\_medium=referral&utm\\_campaign=yahoo\\_feed](https://www.washingtonexaminer.com/news/ted-cruz-critical-race-theory-racist-klansmen?utm_source=yahoo&utm_medium=referral&utm_campaign=yahoo_feed) [https://perma.cc/482J-8YJJ]

217. TENN. CODE § 49-6-1019 (2021).

218. See *supra* note 132 and accompanying text.

219. Ted Cruz is among them, describing critical race theory as “a theory that derives from Marxism. Karl Marx viewed the entire world as a conflict between classes, between the owners of capital and the working men and women, the proletariat—a fundamental battle in society. Critical race theory takes that same Marxist concept, except it replaces class with race.” Richard, *supra* note 216; see also Adam Mintzer, *Governor, State Superintendent, Lawmakers, Strongly Oppose Critical Race Theory in SC*, WBTV (June 9, 2021, 10:59 AM), <https://www.wbvtv.com/2021/06/09/governor-state->

In sum, the first characteristic of white fragility is the exaggerated response to discussions of race and especially discussions of white privilege. It leads predominately white states to see critical race theory where there is none, and to imagine teachings that do not exist. Of course, critical race theory is no more anti-American than any other theory pointing out widespread injustices, and it is certainly not the second coming of communism or advocating the violent overthrow of the United States government. Its goal is simply to help people of color by pointing out and addressing the institutional biases against them.

## 2. *Stealing the Spotlight*

A second characteristic of the fragile white response is the tendency for white people to turn the spotlight onto themselves.<sup>220</sup> When the topic turns to race, their foremost concern is the discussion's impact on them. Specifically, it should not portray or affect them negatively. This is reflected in critical race theory bans that shut down any hint that white people may be racist, even unconsciously;<sup>221</sup> bear any responsibility for racism;<sup>222</sup> or should suffer the slightest upset because of their race.<sup>223</sup>

Mississippi Governor Tate Reeves epitomized the fragile white response when, after protesting that “[i]n too many schools around the country, critical race theory is running amok,” he declared that critical race theory “threatens the integrity of our kids’ education and aims only to humiliate and indoctrinate . . . . Our kids are our greatest assets and Mississippi will do whatever we can to protect them.”<sup>224</sup>

The first thing to note is that the focus is entirely on how critical race theory will affect white school children. Despite the nation’s incontrovertibly racist past, the primary concern for white people in power is not trying to understand how enslaved people were dehumanized based on their skin color or how that original sin of white supremacy became entrenched in our culture and institutions, but

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superintendent-lawmakers-strongly-oppose-critical-race-theory-sc/ [https://perma.cc/9FXA-F7V8] (reporting that U.S. Congresswoman from South Carolina Nancy Mace stated that “[n]ot a single taxpayer dime should support Critical Race Theory” because “[i]ndoctrinating our kids with a curriculum based in Marxist ideology has no place in American institutions”).

220. CHERYL E. MATIAS, *FEELING WHITE* 70 (2016) (noting that even among white allies, after an anti-racist presentation, “[i]nstead of questions that engage deconstruction and decentering whiteness, the mainly White audience members shift the focus back onto enacting hegemonic whiteness”); cf. Corbin, *supra* note 52, at 211 (“Another tactic of the privileged that Justice Scalia employed is to center the privileged group and their concerns.”).

221. Exec. Order No. 13,950, 3 C.F.R. § 433, 436 (2021) (“(4) An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.”).

222. *Id.* (“(7) An individual, by virtue of his race or sex, bears responsibility for actions committed in the past by other members of the same race or sex.”).

223. *Id.* (“(8) Any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his race or sex.”).

224. Angela Williams, *Governor Signs Bill Banning Critical Race Theory in Schools*, WAPT16 ABC (Mar. 14, 2022, 9:47 PM), <https://www.wapt.com/article/mississippi-governor-signs-critical-race-theory-prohibit-bill-into-law/39431076#> [https://perma.cc/835A-YFZF].

instead to ensure that no white child today should take any blame for their ancestors' acts, or even feel bad about it.<sup>225</sup>

Granted, the language is facially neutral, but the prohibitions are obviously written with the well-being of white students in mind. For example, when six members of Congress complained that critical race theory “foster[s] an atmosphere of self-loathing based on physical characteristics outside of our control,”<sup>226</sup> they were clearly worried about self-loathing among white children given their stated assumption that “CRT proclaims all white people are oppressors.”<sup>227</sup>

Thus, when politicians talk about preventing the degradation of “our kids” or protecting the sensibilities of “our kids,” they are not thinking about black school children.<sup>228</sup> After all, critical race theory does not humiliate black children. If anything, its examination of racism from a black perspective dignifies black children by putting them at the center rather than on the margins. In short, when addressing a legal theory about racism in the United States, these white critics are focusing solely on the potential harm to white children.<sup>229</sup>

While one might expect Idaho to prioritize white school children given its demographics, Mississippi has the largest proportion of black people in any state: close to 40% of its citizens are black.<sup>230</sup> Yet, not only is the black American perspective overlooked by CRT critics, but black children themselves are absent. They do not enter into the critics' calculations. They are invisible.

Note too that *The 1619 Project*, which intentionally centers black people and the black experience, is specifically barred in several states, perhaps because it dared to put white people at the margins.<sup>231</sup> Once again, an attempt to move the spotlight

225. Indeed, just about all the prohibitions in the CRT ban can be regarded as a legal effort to protect the easily bruised feelings of white people.

226. The six members of Congress include Ralph Norman, Joe Wilson, William R. Timmons IV, Tom Rice, Nancy Mace, and Jeff Duncan. Letter to Dr. Harris Pastides, President, Univ. S.C., and Dr. James P. Clements, President, Clemson Univ. (June 21, 2021), [https://norman.house.gov/uploadedfiles/crt\\_letter.pdf](https://norman.house.gov/uploadedfiles/crt_letter.pdf) [<https://perma.cc/KU9L-TK7F>].

227. *Id.*

228. Of course, it bears repeating one more time that humiliating young children is not the point of critical race theory, at all. Again, its goal is not to blame individual people but institutions and systems that make pervasive racism possible. This wild distortion of the theory indicates both the ignorance made possible by white privilege and the histrionics that characterize white privilege.

229. As Kimberlé Crenshaw notes, these laws reflect that “[w]hite kids’ feelings are more important than black kids’ reality.” Gloria Oladipo, *Just the Tip of the Iceberg: Kimberlé Crenshaw Warns Against Rightwing Battle over Critical Race Theory*, *GUARDIAN* (Mar. 4, 2023, 2:00 AM), <https://www.theguardian.com/us-news/2023/mar/04/critical-race-theory-kimberle-crenshaw-segregation-us-democracy> [<https://perma.cc/3N3W-PVLS>].

230. *Black Population by State 2023*, *WORLD POP. REV.*, <https://worldpopulationreview.com/state-rankings/black-population-by-state> [<https://perma.cc/8DPY-VHES>] (last visited Jan. 22, 2023) (reporting that the African American population in Mississippi was 38.83%).

231. *The 1619 Project*, *supra* note 127 (“The 1619 Project is an ongoing initiative from The New York Times Magazine that began in August 2019, the 400th anniversary of the beginning of American slavery. It aims to reframe the country’s history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative.”).

onto black people and their concerns results in a response that shifts the spotlight back onto white people and their needs. This is white fragility.

The fragility of the white response is also evident from the degree to which CRT bans explicitly protect the emotions of white people. Laws do not usually single out feelings for protection. Contrast this extreme solicitousness for white people's sense of peace with the extreme callousness for black people's sense of peace when it comes to Confederate monuments celebrating Southern leaders of the Civil War.<sup>232</sup> Not only did the South fight (and lose) the Civil War to preserve slavery,<sup>233</sup> but most Confederate monuments were erected in order to cement white supremacy.<sup>234</sup> Indeed, their popularity spiked not immediately after the Civil War but during Jim Crow and again during resistance to the modern Civil Rights Movement.<sup>235</sup> White lawmakers have fiercely resisted calls to take down these monuments to racial subordination,<sup>236</sup> even passing laws to prohibit their

232. See Karen L. Cox, *Black Protesters Have Been Rallying Against Confederate Statues for Generations*, SMITHSONIAN MAG. (Apr. 12, 2021), <https://www.smithsonianmag.com/history/black-protesters-have-been-rallying-against-confederate-statues-generations-180977484/> [<https://perma.cc/34JB-HN5Z>].

233. *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019) [hereinafter *Whose Heritage?*], <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy#executive-summary> [<https://perma.cc/P6ZB-8RVK>] (quoting the Confederate vice president's "Cornerstone speech" proclaiming that "[o]ur new government is founded upon . . . the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition").

234. Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes"*, 91 TEMP. L. REV. 1, 13 (2018) ("[T]he history of most Confederate monuments is intimately and inextricably bound up with campaigns of racial intimidation and violence designed to overturn Reconstruction, to establish Jim Crow, and to resist integration after *Brown v. Board of Education*"); Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 11 (2013) (according to author Mamie Field, "Blacks took that statue [of slaver John C. Calhoun] personally. . . . Calhoun [seemed to] look[] you in the face and tell[] you, 'Nigger, you may not be a slave, but I am back to see you stay in your place'"); Kyshia Henderson, *Samuel Powers, Michele Claibourn, & Sophie Trawalter, Confederate Monuments and the History of Lynching in the American South: An Empirical Examination*, 118 PROCEEDINGS NAT'L ACAD. SCI. e2103519118 (Oct. 11, 2021), <https://www.pnas.org/doi/full/10.1073/pnas.2103519118> [<https://perma.cc/YU6M-4FEZ>] ("This finding [that counties with more confederate monuments also had more lynchings] provides concrete, quantitative, historically and geographically situated evidence consistent with the position that Confederate memorializations reflect a racist history, marred by intentions to terrorize and intimidate Black Americans.").

235. *Whose Heritage?*, *supra* note 233 (documenting two spikes in dedications); Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 ARIZ. L. REV. 45, 83–84 (2021) ("It is no accident that the bulk of Confederate statues were built during two periods: during the 1920s, when states were adopting Jim Crow laws meant to restrain and send a message to Blacks of whites' dominant status, and during the 1950s and 1960s, when the Black civil rights movement was again threatening white supremacy.").

236. *Whose Heritage?*, *supra* note 233 (noting that while over 100 monuments and symbols of the Confederacy have recently been removed, 1,747 Confederate monuments, place names, and other symbols remain, including 100 schools named after famous Confederates).

removal.<sup>237</sup> In the face of attempts to intimidate and subjugate them,<sup>238</sup> black Americans are effectively told to toughen up and develop a thick skin.<sup>239</sup> Yet, white lawmakers have made certain that there are now statutes on the books ensuring that no white person ever feel a touch of “guilt,” “anguish,” or even “discomfort” on account of their race.<sup>240</sup> Indeed, white fragility is what leads white people to conclude that the real problem with racism lies in its discussion—which may damage the white psyche or make white people feel bad about themselves.

### 3. *Creating False Equivalencies*

A byproduct of exaggerating or imagining harms to white people while simultaneously downplaying the actual harms experienced by African Americans are false equivalencies.<sup>241</sup> Proponents of critical race theory bans already claim that it is conversations about race, rather than pervasive racism, that create divisions along racial lines. Another hallmark of white fragility is to take this one step further and argue that talking about racism is as harmful as racism. In other words, not only do white people put themselves at the center of the narrative on race, but they also maintain they are the real victims in this story, as critical race theory represents overt

237. Kasi E. Wahlers, *North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape*, 94 N.C. L. REV. 2176, 2182 (2016) (noting that North Carolina, South Carolina, Georgia, Mississippi, and Tennessee have such “Heritage Protection” laws, with Alabama and Arkansas soon to follow).

238. *AHA Statement on Confederate Monuments*, AM. HIST. ASS'N (Oct 1, 2017), <https://www.historians.org/publications-and-directories/perspectives-on-history/october-2017/aha-statement-on-confederate-monuments> [<https://perma.cc/QH96-PMY2>] (“Memorials to the Confederacy were intended . . . to intimidate African Americans politically and isolate them from the mainstream of public life.”); Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 BUFF. L. REV. 1393, 1406 (2020) (“The political will that enabled these monuments to be placed in front of courthouses, state capitals, schools, town squares, and other public civic places shows that communities in the Jim Crow-era wanted clear visual images in important public spheres emphasizing white supremacy and the subjugation of Black communities as part of the post-Civil War order.”).

239. See, e.g., Samantha Galvez, *National and Local Leaders Work to Protect Monuments from Vandalism*, FOX43 (July 16, 2020, 5:45 PM), <https://www.fox43.com/article/news/local/national-and-local-leaders-work-to-protect-monuments-from-vandalism/521-dbf63aa4-0440-4d02-820c-258b89ae40c4> [<https://perma.cc/QPX2-RXZQ>] (quoting Penn. State Senator Mastriano complaining as he introduced legislature to protect confederate monuments) (“I don’t know why we’re so offended so easily these days. It’s time to toughen up a little bit. Not everything in life is roses and peaches.”).

240. Some CRT ban proponents take this to the extreme. “Mr. Krause, the state representative . . . suggest[ed] that a teacher might overstep simply by assigning a book that troubles a student.” Michael Powell, *In Texas, a Battle Over What Can Be Taught, and What Books Can Be Read*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html> [<https://perma.cc/JF4K-RE7L>].

241. Corbin, *supra* note 52, at 199 (“[T]he combination of elevating white pain and minimizing non-white pain, until conversations about race are equated with actual racism, results in a textbook example of a false equivalency.”).

racism against white people.<sup>242</sup> To add insult to injury, some coopt the language of civil rights icons in making this claim.<sup>243</sup>

To be clear, those supporting CRT bans argue that the theory, which is meant to analyze systemic racism against black people in the United States, a country that had chattel slavery, a country that denied black adults the right to vote, a country that still discriminates against black Americans in everything from its schools to its monuments, this theory that tries to uncover racist systems and institutions, is itself racist and bigoted. Former Vice President Mike Pence, for example, stated that critical race theory “teaches kids as young as kindergarten to be ashamed of their skin color. It is nothing short of state-sponsored and state-sanctioned racism.”<sup>244</sup> Even more pointedly, a U.S. Senator said that “[c]ritical race theory is bigoted, it is a lie, and it is every bit as racist as the klansmen in white sheets.”<sup>245</sup>

The notion that critical race theory is racist stems from either unwitting or willful ignorance of CRT’s actual tenets. As this Article has explained, critical race theory seeks, in part, to address why advances in civil rights laws have not eliminated racism or its effects. It does so by uncovering structures that continue to disadvantage black people. Nothing about this requires discriminating against white people.<sup>246</sup> However disorienting it may feel to move even theoretically from a position of privilege to one of equal status, the move cannot be characterized as racism.<sup>247</sup>

Certainly, the hyperbolic comparisons to the Ku Klux Klan can be rejected out of hand. The KKK, as Justice Thomas has explained, functionally served as white supremacist terrorists who deployed “the most brutal of methods.”<sup>248</sup> First

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242. Cf. DiAngelo, *supra* note 53, at 64 (noting that when finally confronted with discussion of race, “whites position themselves as victimized, slammed, blamed, attacked”).

243. See *infra* notes 256–257 and accompanying text.

244. Adam Mintzer, *Bills, the Budget, and Letters to University Presidents: The Critical Race Theory Debate in SC*, LIVE 5 WCSC (June 26, 2021, 12:12 PM), <https://www.live5news.com/2021/06/25/sc-lawmakers-hoping-ban-teaching-critical-race-theory/> [<https://perma.cc/947D-LHV9>].

245. Richard, *supra* note 216 (quoting Ted Cruz).

246. Removing a barrier to equality against one group is not equivalent to imposing a barrier against another. In other words, CRT does not propose to erect interstate highways through historically white neighborhoods or to deny federal support for white home mortgages; it seeks to bring to light obstacles like these that were imposed on black neighborhoods and families. In any event, at the end of the day, CRT in schools is about teaching a theory, not putting it into practice.

247. Cf. Corbin, *supra* note 52, at 200 (“[Attempts to remedy discrimination] can be experienced as undeserved and hostile attacks. And, to be fair, these are attempts to take something from them, namely their unearned (and unfair) advantages. But because whites do not understand them as such, they feel unjustly targeted.”).

248. *Virginia v. Black*, 538 U.S. 343, 389 (2003) (Thomas, J., dissenting) (noting the “common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods”); see also *id.* at 353 (majority) (quoting STETSON KENNEDY, *SOUTHERN EXPOSURE*, 31 (1991)) (“[T]he Klan imposed ‘a veritable reign of terror’ throughout the South.”); Jared A. Goldstein, *The Klan’s Constitution*, 9 Ala. C.R. & C.L. L. REV. 285, 287 (2018) (“The Ku Klux Klan is America’s oldest and most prominent terrorist organization.”).



active during Reconstruction and again during the 1920s,<sup>249</sup> the Klan used extra-legal means to enforce white supremacy in the South.<sup>250</sup> The Klan, which often worked hand in glove with the local authorities,<sup>251</sup> was notorious for lynching anyone, but especially black Americans, who dared challenge the racist status quo.<sup>252</sup> If someone failed to heed a warning, they could be dragged out of bed in the middle of the night by a white robed posse<sup>253</sup> and tortured to death,<sup>254</sup> with their body left as a warning.<sup>255</sup> The KKK's reign of terror has nothing in common with critical race theory, even if every single imagined tenet were actually taught to every single white child. Presumably, the comparison was meant rhetorically and not literally, but to

249. Cf. Goldstein, *supra* note 248, at 292–95, 320–22 (noting that the Klan first emerged in reaction to Reconstruction and again in the 1920s in reaction to huge influx of Catholic, Jewish and other immigrants); see also *id.* at 290 (“The Klan has gained prominence whenever white Americans have feared that their dominant status and power are threatened.”).

250. Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1971 (2000) (“These organizations, such as the Ku Klux Klan, held as their agenda to protect white social identity, white women, and white political and economic dominance through terror.”); Lisa Cardyn, *Sexualized Racism/gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 690 (2002) (describing the Klan’s “enduring mission” as “the advancement of white supremacy in every sector of southern society”).

251. *Ku Klux Klan*, HISTORY.COM (Feb. 4, 2022), <https://www.history.com/topics/reconstruction/ku-klux-klan> [<https://perma.cc/6EYV-S4NP>] (“In the regions where most Klan activity took place, local law enforcement officials either belonged to the Klan or declined to take action against it.”); *The Rise and Fall of Jim Crow*, PBSTHIRTEEN, [https://www.thirteen.org/wnet/jimcrow/stories\\_events\\_kkk.html](https://www.thirteen.org/wnet/jimcrow/stories_events_kkk.html) [<https://perma.cc/6DUT-6Z88>] (last visited Jan. 22, 2023) (noting that the KKK was in every state in the South and included “mayors, judges, and sheriffs”).

252. Goldstein, *supra* note 248, at 297 (“Klan chapters organized lynch parties to carry out vigilante justice.”); see, e.g., Cardyn, *supra* note 250, at 772–74 (noting that the Klan targeted blacks who were not sufficiently deferential to whites; those “whose words or deeds bespoke support for the notion of social equality” such as teachers in the new black schools; and those who were successful, “an unwelcome signal that blacks were perhaps not so inferior as their assailants preferred to believe”); Darin E.W. Johnson, *Homegrown and Global: The Rising Terror Movement*, 58 HOUS. L. REV. 1059, 1068 (2021) (“[T]he Equal Justice Initiative produced a report that found that between 1877 and 1950, over 4,384 Black men, women, and children were the victims of terror lynchings by groups such as the KKK and individuals who shared their ideology of white supremacy.”).

253. *New York v. Zimmerman*, 278 U.S. 63, 75 (1928) (“It is a matter of common knowledge that this organization functions largely at night, its members disguised by hoods and gowns and doing things calculated to strike terror into the minds of the people.”); Goldstein, *supra* note 248, at 297 (“Klan groups typically employed violence during night-riding, in which small bands of hooded and robed members came unannounced to the houses of black residents in the middle of the night . . .”).

254. Cardyn, *supra* note 250, at 678 (noting the KKK used “whippings, rape, lynching, genital mutilation, and other nameless tortures . . . to reinvigorate a system of uncontested white male supremacy.”).

255. Cardyn, *supra* note 250, at 756 (noting the “deliberately public character” of much Klan violence); Account of Former Slave Ben Johnson, *The Ku Klux Klan, 1868*, EYEWITNESS TO HISTORY (2006), <http://www.eyewitnesstohistory.com/kkk.htm> [<https://perma.cc/Z9BE-H3NL>] (“The most that I can tell you ‘bout is the Klu Klux. I never will forget when they hung Cy Guy. They hung him for a scandalous insult to a white woman an’ they comed after him a hundred strong. They tries him there in the woods, an’ they scratches Cy’s arm to get some blood, an’ with that blood they writes that he shall hang ‘tween the heavens and the earth till he is dead, dead, dead, and that any nigger what takes down the body shall be hanged too. Well sir, the next morning there he hung, right over the road an’ the sentence hanging over his head. Nobody would bother with that body for four days an’ there it hung, swinging in the wind . . .”).

even suppose that white people suffer from racism— from a legal theory—in the same way that black people have—in real life—is extravagant.

Moreover, not only does the fragile white reaction take on the mantle of victimhood, it appropriates the words of civil rights heroes who were fighting for black equality.<sup>256</sup> Thus, you end up with CRT foes declaring that their state “stands with Martin Luther King Jr.’s proclamation that people should be judged by the content of their character, not the color of their skin.”<sup>257</sup> Using Dr. King’s words exhorting the end of racism to attack a theory that seeks to do just that is nothing short of ironic.

Exaggerating the harm to the already privileged while trivializing the harm to the non-privileged creates false equivalences. In turn, these false equivalencies help justify the status quo and maintain whites’ privileged status within it.

#### 4. *Perpetuating Racial Inequality*

There is more to the fragile white response than just hyperbole. There are practical consequences to banning critical race theory in the classroom. Teachers who risk losing their jobs or even their licenses for violating these laws will not only eschew examinations of the central tenets of critical race theory, but in an abundance of caution they will avoid teaching anything remotely related to it, enabling the racial status quo to remain undisturbed.<sup>258</sup> In short, critical race theory bans work to shut down anti-racism education in public schools.<sup>259</sup>

256. Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621, 654 (2020) (noting that those on the top of hierarchies “cannot usually (legitimately) claim the moral high ground of being from a group subject to widespread oppression, so they borrow from the moral force of those who can”).

257. Alexa Lardieri, *Arizona Gov. Doug Ducey Signs Bill Banning Critical Race Theory*, U.S. NEWS & WORLD REP. (July 9, 2021), <https://www.usnews.com/news/education-news/articles/2021-07-09/arizona-gov-doug-ducey-signs-bill-banning-critical-race-theory> [https://perma.cc/9A4J-K3QD]. Never mind that MLK was called a communist agitator when he was actually alive. Doug Donovan, *Federal Agents Blamed Martin Luther King’s Nonviolent Movement for Violence in Baltimore, Other Cities*, BALT. SUN (Jan. 18, 2019, 12:00 PM), <https://www.baltimoresun.com/news/investigations/bs-md-sun-investigates-mlk-20190117-story.html> [https://perma.cc/E8CB-BMUU] (“Incessant agitation and propaganda by communists and extremists have contributed toward Negro unrest. In particular, individuals like Martin Luther King and Stokely Carmichael have fanned the flames of racial discord.”).

258. Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring*, WASH. POST (Feb. 14, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/> [https://perma.cc/2W3S-GE5Z] (describing chilling effect).

259. Indeed, some argue that CRT bans are best understood as targeting anti-racism efforts in general rather than critical race theory itself. *See, e.g., Critical Race Theory FAQ*, LEGAL DEFENSE FUND, <https://www.naacpldf.org/critical-race-theory-faq/> [https://perma.cc/SP9W-Z3YV] (last visited Oct. 16, 2023) (“The term ‘critical race theory’ has by co-opted by opponents as a catch-all and rallying cry to silence any discussions about systemic racism, ban the truthful teaching of American history, and reverse progress towards racial justice.”); *see also* CRT FORWARD, UCLA SCH. L. CRITICAL RACE STUD., TRACKING THE ATTACK ON CRITICAL RACE THEORY 10 (2023), [https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law\\_CRT-Report\\_Final.pdf](https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf).

*a. Chilled Classrooms*

Perhaps aware of the maxim that those who do not learn about their racist past are doomed to perpetuate it,<sup>260</sup> public schools in some states have begun to incorporate anti-racism concepts into their curriculum.<sup>261</sup> While full-fledged classes on critical race theory are unlikely at most educational levels to begin with (with or without CRT bans), the vague language and ambiguous scope of anti-CRT laws will discourage teachers from discussing topics relating to racism in a variety of contexts, be it a discussion of the causes of the Civil War to a discussion of the characters' motivations in *To Kill a Mockingbird*.<sup>262</sup> In free speech jurisprudence, this is known as chilling speech.

Vague laws generally raise several problems: they do not provide adequate notice; they confer too much discretion to those who enforce them; and, if they regulate speech, they risk chilling speech.<sup>263</sup> When people do not know what speech crosses the line into illegality, they will err on the side of caution and steer far clear of the line, thereby self-censoring more than what is actually required by the law.<sup>264</sup> “The absence of certainty in the law is always unfortunate, but it is particularly pernicious where speech is concerned because it tends to deter all but the most courageous . . . from entering the marketplace of ideas.”<sup>265</sup>

Here, the various CRT laws are not a model of clarity. One Florida district court cited the barred divisive concept “[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin” as an example,<sup>266</sup> describing it as “mired in

[<https://perma.cc/6FWZ-VZ4K>] (noting that Christopher Rufo intentionally distorted the meaning of critical race theory for his *anti-anti-racism* project).

260. Obviously, this is not the maxim. Some know it as “[T]hose who do not learn history are doomed to repeat it,” which may be based on George Santayana’s “Those who cannot remember the past are condemned to repeat it.” Nicholas Clairmont, “*Those Who Do Not Learn History Are Doomed to Repeat It. Really?*,” BIG THINK: CULTURE & RELIG. (July 31, 2013), <https://bigthink.com/culture-religion/those-who-do-not-learn-history-doomed-to-repeat-it-really/> [<https://perma.cc/FN3L-7H9X>].

261. Meckler & Natanson, *supra* note 258 (“In recent years, many school districts have worked to examine structural racism in their systems . . . . Many have added curriculums, books and lessons about racism and White privilege.”).

262. *Cf.* Complaint at \*2, Black Emergency Response Team v. O’Connor, No. 5:21-ev-1022-G (W.D. Okla. filed Nov. 9, 2021) (noting that books that have been struck from Oklahoma school reading lists include *To Kill a Mockingbird*, *Their Eyes Were Watching God*, *I Know Why the Caged Bird Sings*, *Narrative of the Life of Frederick Douglass*, and *A Raisin in the Sun*).

263. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

264. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 807 (2011) (Alito, J., concurring) (“Vague laws force potential speakers to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal quotation marks omitted) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))).

265. 1 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA & NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2:59 (3d ed. 1996 & Supp. 2022).

266. *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22CV304-MW/MAF, 2022 WL 16985720, at \*44 (N.D. Fla. Nov. 17, 2022) (“Under that provision, educators cannot endorse the view

obscurity,” given that it “features a rarely seen triple negative, resulting in a cacophony of confusion.”<sup>267</sup> Confused teachers do not understand what they can and cannot teach.<sup>268</sup> Typical is a history teacher from New Hampshire, who observed the state’s CRT law was “really, really vague”<sup>269</sup> and complained that “[w]e asked for clarification from the state, from the union, from school lawyers. The universal response is no one’s really sure.”<sup>270</sup>

As a result, chill has already set in. Schools, uncertain of the reach of their state’s critical race theory ban, have cancelled classes and lectures on topics that even raise the question of race.<sup>271</sup> In Florida, a school district cancelled a history professor’s presentation to teachers on “The Long Civil Rights Movement,” “even though his lecture had nothing to do with [critical race theory].”<sup>272</sup> A Tennessee school cancelled its annual visit to the National Civil Rights Museum in Memphis.<sup>273</sup> A middle school principal in Utah cancelled a popular class on American institutions with a unit that covered the Black Lives Matter movement because teachers were too afraid to teach it.<sup>274</sup>

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that ‘[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.’”) (citing FLA. STAT. § 760.10(8)(a)(4) (2022)).

267. *Id.*

268. One U.S. history teacher from Texas said he was not sure that if, when discussing the GI Bill, he can continue to make the factual observation that its benefits did not extend to black Americans who had served. Madeline Will, Catherine Gewertz, Ileana Najarro & Sarah Schwartz, *Teachers Share What They Will—and Won’t—Do Differently Under Critical Race Theory Law*, EDUC.WK. (July 15, 2021), <https://www.edweek.org/teaching-learning/teachers-share-what-they-will-and-wont-do-differently-under-critical-race-theory-law/2021/07> [<https://perma.cc/VXY9-VQ3D>].

269. Meckler & Natanson, *supra* note 258.

270. Meckler & Natanson, *supra* note 258.

271. *Pernell*, 2022 WL 16985720, at \*41 (noting that “to step out of line during class and utter a single expression of approval of one of the State of Florida’s disfavored ideas is to risk discipline or even termination”).

272. Marc Caputo & Teaganne Finn, *Florida School District Cancels Professor’s Civil Rights Lecture Over Critical Race Theory Concerns*, NBC NEWS (Jan. 24, 2022, 1:26 PM), <https://www.nbcnews.com/politics/politics-news/florida-school-district-cancels-professors-civil-rights-lecture-critic-rcna13183> [<https://perma.cc/T8JT-3PX4>].

273. Marta W. Aldrich, *Teachers Sue Over Tennessee Law Restricting What They Can Teach About Race, Gender, and Bias*, CHALKBEAT TENNESSEE (July 26, 2023 9:22 AM), [https://perma.cc/29GE-N8PA](https://tn.chalkbeat.org/2023/7/26/23808118/tennessee-teachers-lawsuit-tea-prohibited-concepts-crt-bill-lee-race-gender-bias#:~:text=Tennessee's%20largest%20teacher%20organization%20has,and%20bias%20in%20their%20classrooms)]; see also Brian Lopez, *The Law that Prompted a School Administrator to Call for an ‘Opposing’ Perspective on the Holocaust is Causing Confusion Across Texas*, TEX. TRIB. (Oct. 15, 2021, 7:00 PM), <https://www.texastribune.org/2021/10/15/Texas-critical-race-theory-law-confuses-educators/> [<https://perma.cc/XXD8-QZJD>] (describing a Texas school cancelling its Youth and Government elective).

274. Meckler & Natanson, *supra* note 258; cf. Hannah Knowles, *Critical Race Theory Ban Leads Oklahoma College to Cancel Class that Taught ‘White Privilege,’* WASH. POST (May 29, 2021, 8:00 AM), <https://www.washingtonpost.com/education/2021/05/29/oklahoma-critical-race-theory-ban/> [<https://perma.cc/3U2H-Z5TF>] (noting that, in an abundance of caution, a community college in Oklahoma cancelled a longstanding class on race and ethnicity); Daniel Golden, *Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching*, PROPUBLICA (Jan. 3, 2023), <https://www.propublica.org/article/desantis-critical-race-theory-florida-college-professors> [<https://perma.cc/9AF2-Y962>] (describing cancellation of college classes addressing race in Florida).

Meanwhile, many teachers in these states are second-guessing themselves over the books they may require and the classroom discussion they may have, even on topics they have covered for years.<sup>275</sup> “It led us to be exceptionally cautious because we don’t want to risk our livelihoods when we’re not sure what the rules are.”<sup>276</sup> High school English teachers at one school decided to stop assigning *The Flowers*, a short story by Alice Walker, whose young black protagonist in the Deep South discovers the dead body of a lynched black man while picking flowers in the woods near her home.<sup>277</sup> Meanwhile American history teachers made optional Ibram X. Kendi’s book, *Stamped: Racism, Antiracism, and You*.<sup>278</sup> With discussions, an economics teacher stopped linking the lack of black wealth to Jim Crow laws and redlining lest “we were somehow suggesting one group is better than the other,”<sup>279</sup> while a high school English teacher dropped from her unit on race any discussion of privilege.<sup>280</sup> In short, “teachers seem to view any lessons that explicitly discussed racial oppression as vulnerable to challenge.”<sup>281</sup>

Some of these retrenchments are entirely unnecessary under their state’s CRT ban.<sup>282</sup> For example, there are many lessons to learn from the America’s Jim Crow

275. See Will et al., *supra* note 268 (“It’s like, I’ve got to be careful what I say.”). Book publishers, too, seem to be censoring themselves. One publisher revised their history lesson on Rosa Parks to eliminate any mention of her race. Justin Gamble, *Race Left Out of Rosa Parks Story in Revised Weekly Lesson Text for Florida Schools Highlights Confusion with Florida Law*, CNN (Mar. 22, 2023, 9:03 PM), <https://www.cnn.com/2023/03/22/us/florida-textbook-race-rosa-parks-reaj/index.html> [<https://perma.cc/U7UX-JFXR>].

276. Meckler & Natanson, *supra* note 258; see also Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons*, NPR (May 28, 2021, 9:04 AM), <https://www.npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship> [<https://perma.cc/2UQW-YPEG>] (reporting that a Texas educator “said she knows teachers who are already self-censoring. They’re ‘afraid to speak out on issues because they feel there are going to be repercussions from their districts[.]’”).

277. Fabiola Cineas, *Critical Race Theory Bans Are Making Teaching Much Harder*, VOX (Sept. 3, 2021, 11:30 AM), <https://www.vox.com/22644220/critical-race-theory-bans-antiracism-curriculum-in-schools> [<https://perma.cc/S354-HTY2>].

278. *Id.*; see also Olivia B. Waxman, *Anti-‘Critical Race Theory’ Laws Are Working. Teachers Are Thinking Twice About How They Talk About Race*, TIME (June 30, 2022, 12:37 PM), <https://time.com/6192708/critical-race-theory-teachers-racism/> [<https://perma.cc/9SVJ-MMWJ>] (quoting Florida AP teacher unsure whether he could still teach Martin Luther King Jr.’s “Letter from a Birmingham Jail”).

279. Meckler & Natanson, *supra* note 258.

280. Meckler & Natanson, *supra* note 258.

281. Laura Beth Kelly, Laura Taylor, Cara Djonko-Moore & Aixa D. Marchand, *The Chilling Effects of So-Called Critical Race Theory Bans*, RETHINKING SCHOOLS, <https://rethinkingschools.org/articles/the-chilling-effects-of-so-called-critical-race-theory-bans/> [<https://perma.cc/WL69-V4JN>] (last visited Oct. 16, 2023) (summarizing focus group with Tennessee teachers); see also Paul Blest, *This Teacher Gave Students Access to ‘Banned’ Books. She was Put on Leave and Resigned*, VICE NEWS (Aug. 24, 2022, 7:04 AM), <https://www.vice.com/en/article/g5v55j/oklahoma-teacher-resigned-brooklyn-library-banned-books> [<https://perma.cc/LQ3A-4RE4>] (quoting an Oklahoma teacher who described Oklahoma’s anti-CRT law as targeting “any discussion of systemic racism” in the schools).

282. Then again, some are dictated from the top. For example, Florida blocked AP African American History from its public high schools on the grounds it violated state law. Patricia Mazzei & Anemona Hartocollis, *Florida Rejects A.P. African American Studies Class*, N.Y. TIMES (Jan. 19, 2023, 1:11 PM), <https://www.nytimes.com/2023/01/19/us/desantis-florida-ap-african-american-studies.html> [<https://perma.cc/XB6V-VYXW>].

era of de jure segregation, but that the black race is superior to the white one is not one of them. But teachers understandably do not want to jeopardize their positions, and so censor themselves and their classroom discussions.<sup>283</sup> In short, these explorations of race in America are chilled.

*b. Vicious Circle*

By causing schools and teachers to purge their curricula of discussions on race (perhaps an intended outcome of the critical race theory laws),<sup>284</sup> students will fail to learn crucial aspects of American culture and history.<sup>285</sup> Even teaching that “slavery is wrong” might be off the table.<sup>286</sup> As one professor of social justice lamented, “[L]earning will be incomplete since [children are] only being taught half-truths.”<sup>287</sup> The concrete result of CRT bans will be a public education system that helps maintain existing racial inequalities.

In the end, “[t]hese bans make it harder for our country to change.”<sup>288</sup> Instead of embarking on long overdue investigations of the role of race in our nation’s past and present, even the most basic discussions of race and racial inequality will become taboo. If students fail to learn the truth about the intentional discrimination of black Americans in the past,<sup>289</sup> they certainly will not recognize the systemic discrimination of the present. They won’t learn to question today’s unequal distribution of wealth and power, never mind the tools to help dismantle it. By pressuring schools and teachers to turn a blind eye to race, these bans will help perpetuate the American myth of a colorblind meritocracy and, ultimately, white supremacy.<sup>290</sup>

283. For example, a Tennessee teacher was fired after telling students white privilege was a fact, assigning a Ta-Nehisi Coates essay, and showing YouTube video “White Privilege,” a poetry-performance with lines such as “Oh, am I making you uncomfortable? Try a cramped slave ship.” Hannah Natanson, *A White Teacher Taught White Students About White Privilege, It Cost Him His Job*, WASH. POST (Dec. 6, 2021, 8:00 AM), <https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory/> [https://perma.cc/5ESK-VTZ5].

284. Cf. Feingold, *supra* note 141, at 753 (“In all likelihood, the indeterminate text is by design . . . to dissuade teachers from even basic conversations about race and racism.”).

285. Implementing guidance in Oklahoma tells teachers they cannot use the terms “diversity” or “white privilege.” Complaint at \*2, Black Emergency Response Team v. O’Connor, No. 5:21-ev-1022-G (W.D. Okla. filed Nov. 9, 2021).

286. Hannah Natanson, *‘Slavery Was Wrong’ and 5 Other Things Some Educators Won’t Teach Anymore*, WASH. POST (Mar. 6, 2023 7:33 AM), <https://www.washingtonpost.com/education/2023/03/06/slavery-was-wrong-5-other-things-educators-wont-teach-anymore/> [https://perma.cc/K7NF-JPD9] (recounting how in response to a teacher’s query whether it was still acceptable to teach that slavery was wrong, a superintendent responded, “I really need to delve into it to see if that is part of what we can or cannot say. And I don’t know that”).

287. Cineas, *supra* note 277.

288. Cineas, *supra* note 277.

289. Cf. Caputo & Finn, *supra* note 272 (“The victims of this censorship are history and the truth.”).

290. As the President of the National Urban League noted in an op-ed, “[i]n the 20th century, white Americans threatened by the encroachment of racial equality erected Confederate monuments in their town squares. In the 21st century, they restrict what students can read and learn about American

## CONCLUSION

The critical race theory bans illustrate and embody many of the characteristics of white privilege, and especially white fragility. Indeed, both the legislative history and the laws themselves provide a textbook example of white people's obliviousness to issues of racial inequality, and their fragility when confronted with teaching that exposes it. The result is a mandate that perpetuates both racial ignorance and racial inequality.

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history.” Marc H. Morial, *Today's Attacks on 'Critical Race Theory' Aim to Perpetuate Myth of White Supremacy*, CHI. SUN-TIMES (Feb. 28, 2023, 1:00 PM), <https://chicago.suntimes.com/columnists/2023/2/28/23618536/critical-race-theory-white-supremacy-lost-cause-illinois-marc-morial-column> [<https://perma.cc/Y7XU-874Y>].