NOTES

The Erosion of Academic Freedom and Democratic Principles: Anti-Critical Race Theory Assaults on Higher Education

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TABLE OF CONTENTS

INTRODUCTION

Lani Guinier, a legal scholar who devoted her life to envisioning and fighting for a more just society, was the first Black woman tenured Harvard Law professor.[1] Despite her significant contributions to the legal profession and the preservation of our democratic ideals, Guinier found herself at the center of a major controversy when former president Clinton announced her nomination as Assistant Attorney General for the

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1. Matt Schudel, *Lani Guinier, law professor and embattled Justice Department nominee, dies at 71*, WASH. POST (Jan. 9, 2022), https://www.washingtonpost.com/obituaries/2022/01/09/harvard-law-prof-lani-guinier-dies.

Civil Rights Division on April 29, 1993.[2] Following President Clinton's announcement of Guinier's nomination, conservative leaders and activists hijacked the nomination by accusing Guinier, then a University of Pennsylvania Law school professor, of "championing a radical school of thought called '[C]ritical [R]ace [T]heory.'"[3]

Guinier's "radical" scholarship examined America's electoral processes, focusing on how race permeates electoral outcomes.[4] She called for reforms to make the political system more inclusive and advocated for creating an electoral system that allowed Black voters to elect candidates who represented their interests.[5] Guinier's academic writings soon became fodder for news and media outlets as they began to besmirch Guinier's nomination. At the Wall Street Journal, Clint Bolick, a former employee of the Justice Department during the Reagan administration, labeled Guinier a "quota queen"—a racially charged term meant to evoke the welfare queen stereotype.[6] Bolick alleged that Guinier supported "racial quotas in judicial appointments,"[7] despite Guinier's previous writings where she explicitly opposed the use of quotas.[8] Guinier's detractors succeeded in distorting the narrative around her, diverting attention away from her actual views and instead steering the nation to their interpretations of them. Soon, both the political left and the right began to distance themselves from Guinier and her "anti-democratic" views.[9] On June 4, 1993, President Clinton withdrew Guinier's nomination, denouncing her writings as unrepresentative of his views on civil rights.[10]

Guinier's scholarship engendered controversy because of her extensive writings on the insidious nature of racism after the Civil Rights era and its continued threat to America's democratic institutions.[11] She challenged the dominant discourse on race by revealing how racism was ingrained in America's political, institutional, and social structures—an analysis rooted in the theoretical framework of Critical Race Theory (CRT).[12] Instead of allowing Guinier to explain her positions or debate the merits of her claims, the anti-CRT movement tethered Guinier to CRT and labeled the theory

2. *Id.*

3. Adam Harris, *The GOP's 'Critical Race Theory' Obsession*, ATLANTIC, May 7, 2021, https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828/

4. *See* Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393 (1989); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991).

5. WILLIAM F. TATE IV, AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, CRITICAL RACE THEORY AND EDUCATION: HISTORY, THEORY, AND IMPLICATIONS, REVIEW OF RESEARCH IN EDUCATION, 195 (Vol. 22, 1997).

6. Richard Harris, *How a Celebrated Legal Scholar Got Swept Up in the Political* Machine, POLITICO (Jan. 1, 2022), https://www.politico.com/news/magazine/2022/01/29/lani-guinier-ground-national-tv-doj-nominaton-legal-ideas-00003375.

7. *Id.*

8. *Id.*

9. David G. Savage, *Guinier's Ideas Viewed as Largely Theoretical: Nominee: In her 'academic' article on voting rights, the conclusions she reaches appear to be tentative*, L.A. TIMES (June 5, 1993), https://www.latimes.com/archives/la-xpm-1993-06-05-mn-43571-story.html.

10. *Id.*

11. *See* Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 398–99 (1989).

12. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S 156 (1991).

as "a profoundly left-wing school of thought that has redefined the outer boundaries of radicalism in legal academia."[13]

After the withdrawal of her nomination, Guinier held a press conference where she warned of the dangers of political attacks that "distort [and] caricature" academic expression.[14] She stated, "I hope that we are not witnessing that dawning of a new intellectual orthodoxy in which thoughtful people can no longer debate provocative ideas without denying the country their talents as public servants."[15] Although Guinier has since departed, more than thirty years later, her words still resonate. Since January 2021, forty states have introduced bills or taken other measures to restrict teaching CRT or limit discussions on race and racism in the classroom.[16] While many of these bills target K-12 education, there has been an increased attack on academic autonomy and intellectual freedom in higher education.

This Note argues that anti-CRT laws are unconstitutional as applied to higher education institutions, as these laws violate the principles of academic freedom. Part I will provide a definition of CRT, discussing its origins in academia, the modern anti-CRT movement, and the proliferation of anti-CRT policies impacting higher education institutions. Part II follows the development of academic freedom principles and its formation as a constitutional right under the First Amendment. Part III will evaluate the anti-CRT policies using the principles of academic freedom.

I. DEFINING CRITICAL RACE THEORY

This Section attempts to define CRT by tracing its history and foundational roots in Critical Legal Studies to its formal establishment in the late 1980s by a group of young academics who sought to forge their own path within legal academia. Next, this Section will discuss the evolution of CRT, highlighting the diversity of the framework while identifying unifying tenets that lay at its core. After a discussion of CRT rooted in historical authorities and the writings of the leaders of the CRT movement, this Section will discuss the bastardization of CRT by conservative pundits and politicians, examining their motives for doing so. Lastly, this section will end with an exposition of how CRT appears in educational contexts.

A. Emergence of Critical Race Theory

CRT was the progeny of Critical Legal Studies (CLS), a movement propelled by a group of progressive—mainly white[17]—law students and academics in the 1970s.[18]

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13. Clint Bolick, *The Legal Philosophy That Produced Lani Guinier*, WALL STREET J. (June 2, 1993).

14. *Excerpts from Lani Guinier's News Conference*, WASH. POST (June 4, 1993), https://www.washingtonpost.com/archive/politics/1993/06/05/excerpts-from-lani-guiniers-news-conference/292e46d8-91f2-487d-9458-3bd2fa57315c.

15. *Id.*

16. *Index of Educational Gag Orders*, PEN AM., https://airtable.com/appg59iDuPhlLPPFp/shrtwubfBUo2tuHyO/tbl49yod7l01o0TCk/viw6VOxb6SUYd5nXM?blocks=hide (last visited Nov. 23, 2023).

17. *See* Richard Delgado, *The Etheral Scholar: Does Critical Legal Studies Have What Minorities Want Minority Critiques of the Critical Legal Studies Movement*, 22 Harv. C.R.C.L. L. Rev. 301 (1987).

18. KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARY PELLER & KENDALL THOMAS, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxii (1996).

"Crits," as believers of CLS were known, advanced the idea that the indeterminacy of the law contributed to an "illogic[al] and corrupted jurisprudence" that reinforced cultural norms.[19] Crits rejected the notion of a rights-based legal order, contending that pursuing individual rights had undesirable outcomes and shifted the focus from more urgent forms of change.[20] While crits of color gravitated to the crit's "radical" examination of how the law legitimized an oppressive regime, many felt ostracized by the crits' unwillingness to examine the mechanisms in which the exploitation and subjugation of the outgroup were compounded by not only class but also by race.[21] Those seeking an analysis of "law and racial power" expressed dissatisfaction with CLS's "failure to come to terms with the particularity of race."[22] Additionally, for crits of color, the crits' rights discourse was a matter of contention.[23] While the crits of color, to varying degrees, conceded the CLS premise that the concept of rights was "indeterminate, vague, and disutile," historically, the act of exercising one's rights was paramount in the struggle for Black liberation, and the Black American struggle was characterized by equality-centered-rights discourse.[24] Crits of color maintained a commitment and willingness to a "vision of liberation" that held space for laws and rights as tools in the struggle.[25] Disenchanted by their relegation to the "margins of liberal institutional policies and critical legal studies," many crits of color gradually began to form a collective identity.[26] They set out to articulate a distinct intellectual theory responsive to the racial hegemony pervasive in American society.[27]

The crits of color found inspiration in the work of Derrick Bell, a professor at Harvard Law School at the time.[28] In 1970, Bell published his seminal casebook, *Race, Racism and American Law*, where he "almost exclusively focuse[d] on racism as a specific past and present pathology in the American legal process."[29] Frustrated with the stagnation and retrenchment of civil rights advancements after the *Brown v. Board of Education* decision, Bell, along with Alan Freeman,[30] began to examine the development and preservation of racial inequities in American society.[31] According to CRT theorists, this cycle—which Kimberlé Crenshaw, a disciple of Bell, would later term "race, reform, and retrenchment"—signified the permanence of racism.[32]

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19. Derrick A. Bell, *Who's Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893, 900 (1995).
20. *See* Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 26, 33 (1984).
21. Peter Monaghan, *"Critical Race Theory" Questions Role of Legal Doctrine in Racial Inequity*, CHRON. HIGHER EDUC., at A9 (June 23, 1993).
22. CRENSHAW ET AL., *supra* note 17, at xxvi.
23. *Id.* at xxiii.
24. Bell, *supra* note 18 at 900.
25. Angela P. Harris, *The Jurisprudence of Reconstruction,* 82 CALIF. L. REV. 741, 743, 750-51 (1994).
26. CRENSHAW ET AL., *supra* note 17, at xxvii.
27. *Id.*
28. *Id.* at xx.
29. A. Leon Higginbotham, Jr., *Book Review: Race, Racism and American Law by Derrick A. Bell*, 122 U. PA. L. REV. 1044, 1046 (1974).
30. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 5, 6 (3rd ed. 2017).
31. *Id.* at 4.
32. *See generally* Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

In 1989, Crenshaw joined Neil Gotanda and Stephanie Phillips in founding the CRT workshop—a defining moment in CRT's development. Crenshaw, in framing the purpose and goals of the retreat, originated the term "Critical Race Theory," communicating the theory's position at the "intersection of critical theory and race, racism, and the law."[33] This formative event engendered scholarship from a racially diverse group of legal scholars who, along with Bell, Crenshaw, Freeman, and Gotanda, would go on to be known as the founding members of CRT, including Richard Delgado, Patricia Williams, Mari Matsuda, and Charles Lawrence.[34]

Since its inception, CRT has evolved into an academic framework that examines the intersectionality of race and other identity markers, with a focus on the experiences of Black, Latinx, Asian, and Indigenous peoples.[35] CRT is characterized by a diversity of thought connected by the uniting commitment to combat the institutionalized racism indelibly rooted in American society.[36] Although CRT is not a "monolithic doctrine," CRT theorists and academics have identified core tenets of CRT, including the belief that racism is "endemic in American life."[37] CRT rejects the idea that acts of racism are "aberrations,"[38] instead emphasizing the notion that racism is deeply entrenched "legally, culturally, and even psychologically."[39] CRT also challenges the "traditional claims of the legal system to neutrality, objectivity, color blindness, and meritocracy,"[40] exposing how white normativity dominates "'mainstream,' 'normal,' or 'traditional' values or 'neutral' policies, principles, or practices."[41] It calls for a reformation of society that is reflective of the "perspectives and experiences of the 'outsider groups' that experience racism first hand."[42] Finally, CRT emphasizes the value of story-telling or first-person accounts based on the idea that people of color are uniquely positioned to speak about the patterns and impacts of racism.[43]

B. Modern Anti-Critical Race Movement

The use of CRT as a framework for analyzing race and the endemic nature of racism in American society was predominantly debated in academia.[44] The public controversy surrounding CRT did not emerge until the nomination of Lani Guinier in

33. CRENSHAW ET AL., *supra* note 17, at xxvii.

34. Bell, *supra* note 18, at 898; Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021), https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory.

35. *See* Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/article/what-is-critical-race-theory.html.

36. CRENSHAW ET AL., *supra* note 17, at xiii.

37. Monaghan, *supra* note 20, at A7.

38. Janel George, *A Lesson on Critical Race Theory*, HUMAN RIGHTS MAGAZINE (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory.

39. Monaghan, *supra* note 20, at A7.

40. *Id.*

41. George, *supra* note 37.

42. Monaghan, *supra* Jacey note 20, at A7.

43. DELGADO & STEFANCIC, *supra* note 29, at 11.

44. *See* Fortin, *supra* note 35.

1993.[45] This was the first time CRT entered political discourse, as conservative activists began to weaponize CRT, distorting the theory as a representation of hate, bigotry, and undemocratic values.[46] Similar to the anti-CRT campaign being waged today, Guinier's detractors labeled CRT as "divisive" in order to skirt substantial conversations about race.[47] After the failed nomination of Guinier, CRT dissipated from mainstream discourse, only resurfacing after Bell's death in 2011.[48]

In 2020, the issue of racial inequality was brought to the forefront, and CRT was once again in the national spotlight.[49] The murder of George Floyd at the hands of the Minneapolis Police Department in 2020 was the catalyst for a new social justice movement, catapulting the issues of structural and institutionalized racism into the mainstream.[50] Across America, there was a proliferation of calls to action, driven by communities of color, for the country to reckon with its sordid racial history; there were cries for a collective acknowledgment of the residue of these sins and their haunting impact.[51]

In response to the growing discussion of this country's rotten roots, it was no longer acceptable for white people to cloak themselves with the simple declaration, "I am not racist."[52] There appeared to be a societal shift where white people were challenged to see that "[t]he opposite of 'racist' isn't 'not racist.' It is 'anti-racist.'"[53] Being anti-racist involves taking a proactive stance and identifying, opposing, and dismantling racist systems, structures, institutions, policies, and practices that perpetuate a racial hierarchy centering on whiteness.[54] For a moment, it appeared that society had finally succumbed to the murmurs of its moral conscience; throughout the public and private spheres, leaders enacted measures and policies to remedy centuries of societal ills.[55] Yet, as Crenshaw astutely argued in 1988, the "cyclical dimensions of race, reform,

45. *See* Mary Harris, *This Isn't the First "Critical Race Theory" Backlash*, SLATE (July 6, 2021), https://slate.com/news-and-politics/2021/07/critical-race-theory-republicans-clinton-obama-derrick-bell-guinier.html; Peter Monaghan, *'Critical Race Theory': Some Startling Analyses*, CHRON. HIGHER EDUC. (June 23, 1993), https://www.chronicle.com/article/critical-race-theory-some-startling-analyses/.

46. *Id.*

47. *See* Neil A. Lewis, *Clinton Abandons His Nominee For Rights Post Amid Opposition*, N.Y. TIMES (June 4, 1993), https://www.nytimes.com/1993/06/04/us/clinton-abandons-his-nominee-for-rights-post-amid-opposition.html.

48. *See* Tom Cohen, *Obama's Harvard law professor challenged U.S. racism*, CNN (Mar. 9, 2012), https://www.cnn.com/2012/03/09/election/2012/derrick-bell-profile/index.html.

49. Fortin, *supra* note 35.

50. *See How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), https://www.nytimes.com/article/george-floyd.html.

51. *See id.*

52. *See* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 10 (2019).

53. *Id.*

54. *Id.* at 10–11.

55. *See, e.g.,* Edward Segal, *One Year Later: How Companies Have Responded to George Floyd's Murder*, FORBES (May 25, 2021), https://www.forbes.com/sites/edwardsegal/2021/05/25/one-year-later-how-companies-have-responded-to-george-floyds-murder; Ram Subramanian & Leily Arzy, STATE POLICING REFORMS SINCE GEORGE FLOYD'S MURDER, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder.

and retrenchment" remained undefeated.[56] Threatened by the perceived efforts to "subvert society,"[57] conservatives commandeered the movement, revolting against the antiracist ideas promulgated during the 2020 uprisings.[58]

Targeting CRT as "the perfect villain,"[59] the right transformed the academic framework into a rallying cry for Republicans.[60] For individuals who sought to reject the impending cultural shifts triggered in 2020, the words "Critical Race Theory" illustrated what they were opposing.[61] They argued that they wished to see the world and themselves as individuals, not defined by race.[62] CRT "connote[d] hostile, academic, divisive, race-obsessed, poisonous, elitist, [and] anti-American."[63] Critics of CRT have labeled the framework as a "moral eugenics program,"[64] and a "destructive, divisive, pseudoscientific ideology."[65] The anti-CRT movement has co-opted and distorted CRT and its principles, warping the theory to represent everything they fear.[66]

Christopher Rufo, a conservative activist and one of the people most responsible for the misinformation surrounding CRT,[67] readily revealed the conservative movement's mission on X formerly known as Twitter: "The goal is to have the public read something crazy in the newspaper and immediately think '[C]ritical [R]ace [T]heory.' We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans."[68] In a later tweet, Rufo expounded on which "cultural constructions" he found to be "unpopular with Americans:" "Whiteness, White privilege, White fragility, Oppressor/oppressed, Intersectionality, Systemic racism, Spirit murder, Equity, Antiracism, Collective guilt [and] Affinity spaces."[69] This campaign proved effective in redefining CRT to

56. Kimberlé Williams Crenshaw, *This Is Not A Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. REV. 1702, 1707 (2022).

57. Jonathan Butcher & Mike Gonzalez, *Critical Race Theory, the New Intolerance, and Its Grip on America*, THE HERITAGE FOUND. (Dec. 7, 2020), https://www.heritage.org/civil-rights/report/critical-race-theory-the-new-intolerance-and-its-grip-america.

58. *See* Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Jason Hill, *Critical Race Theory Aims To Murder The Souls Of White Children*, FEDERALIST (Aug. 13, 2021), https://thefederalist.com/2021/08/13/critical-race-theory-aims-to-murder-the-souls-of-white-children.

65. Sam Dorman, *Chris Rufo Calls on Trump to End Critical Race Theory 'Cult Indoctrination' in Federal Government,* FOX NEWS (Sept. 2, 2020), https://www.foxnews.com/politics/chris-rufo-race-theory-cult-federal-government.

66. Wallace-Wells, *supra* note 57.

67. *See* Laura Meckler & Josh Dawsey, *Republicans, spurred by an unlikely figure, see political promise in targeting critical race theory*, WASH. POST (June 21, 2021), https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/.

68. Stephen Kearse, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, STATELINE (June 14, 2021), https://stateline.org/2021/06/14/gop-lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools.

69. Samuel Hoadley-Brill, *Critical race theory's opponents are sure it's bad. Whatever it is.*, WASH. POST (July 2, 2021), https://www.washingtonpost.com/outlook/critical-race-theory-law-systemic-racism/2021/07/02/6abe7590-d9f5-11eb-8fb8-aea56b785b00_story.html.

encompass "a whole swath of progressive trends in sociocultural life, ranging from diversity trainings to history curricula emphasizing the role of racism in American history."[70]

During a guest appearance on Fox News on September 1, 2020, Rufo asserted that CRT was "now being weaponized against the American people."[71] He further urged former President Donald Trump to "stamp out" CRT from federal government programs.[72] Three days later, in a memo released by Russell T. Vought, former Director of the Office of Management and Budget, directed agencies to "identify all contracts or other agency spending related to any training on '[C]ritical [R]ace [T]heory,' 'white privilege,' or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) any race or ethnicity is inherently racist or evil."[73] Later, on September 17, 2020, Trump announced that he would create a commission to promote "patriotic education" and develop a grant to fund a "pro-American curriculum."[74] Trump decried efforts to make history curricula more reflective of the history and experiences of historically marginalized groups, and labeled them a "form of child abuse."[75] He lamented what he called "toxic propaganda," and stated that "[c]ritical race theory, the 1619 Project,[76] and the crusade against American history" would "dissolve the civic bonds that tie us together."[77]

On September 22, 2020, Trump issued Executive Order 13950, which purported to "combat offensive and Anti-American race and sex stereotyping and scapegoating" in diversity and inclusion trainings by federal agencies, federal contractors, and federal grant recipients.[78] The order prohibited federal agencies, federal contractors, and

70. Zack Beauchamp, *Did Critical Race Theory Really Swing the Virginia Election?*, VOX (Nov. 4, 2021), https://www.vox.com/policy-and-politics/2021/11/4/22761168/virginia-governor-glenn-youngkin-critical-race-theory.

71. Sam Dorman, *Chris Rufo Calls on Trump to End Critical Race Theory 'Cult Indoctrination' in Federal Government,* FOX NEWS (Sept. 2, 2020), https://www.foxnews.com/politics/chris-rufo-race-theory-cult-federal-government.

72. *Id.*

73. RUSSELL VOUGHT, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: TRAINING IN THE FEDERAL GOVERNMENT, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT (Sept. 4, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf.

74. Alana Wise, *Trump Announces 'Patriotic Education' Commission, A Largely Political Move*, NPR (Sept. 17, 2020), https://www.npr.org/2020/09/17/914127266/trump-announces-patriotic- education-commission-a-largely-political-move.

75. *Id.*

76. The 1619 Project was a retelling of American History created by Nikole Hannah-Jones. It sought to "reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of [the] national narrative." The project spurred controversy when critics objected, arguing that it reflected "a displacement of historical understanding by ideology." *See The 1619 Project*, N.Y. TIMES MAG. (Nov. 9, 2021 https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html; *see, e.g.*, Jake Silverstein, *We Respond to the Historians Who Critiqued the 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/magazine/we-respond-to-the-historians-who-critiqued-the-1619-project.html.

77. Jake Silverstein, *The 1619 Project and the Long Battle Over U.S. History*, N.Y. TIMES MAG. (Nov. 12, 2021), https://www.nytimes.com/2021/11/09/magazine/1619-project-us-history.html.

78. Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

federal grant recipients from discussing "divisive concepts."[79] For example, prohibited concepts included ideas that the United States was "fundamentally racist," and an individual should "[bear] responsibility" or be made to feel "discomfort, guilt, [or] anguish" because of the actions of "other members of the same race."[80] Although President Joe Biden later revoked Trump's Executive Order 13950,[81] the vestiges of Trump's assaults settled in legislative and executive chambers across the country.[82]

C. Development of "anti-CRT" Policies in Higher Education

Students of all ages felt the intensity of the events in the Summer of 2020, prompting some schools and educators to respond by adopting anti-racist lesson plans and diversity, equity, and inclusion initiatives.[83] These efforts sparked a gust of legislative assaults to restrict discussions of "divisive concepts," both on the K-12 level and in higher education, mirroring Trump's Executive Order 13950.[84] Given that courts take different approaches to K-12 and higher education issues, this Section focuses solely on policies pertaining to higher education institutions.

Legislative efforts restricting "divisive concepts" in higher education are commonly referred to as "anti-CRT laws"[85] even though, as discussed in Part I Section A of this Note, CRT is an academic framework mainly used in the legal context. Still, CRT has permeated other disciplines since its inception, including education.[86] In the 1990s, Gloria Ladson-Billings adapted CRT to education, pioneering the use of the theory in analyzing the racial inequities within education.[87] Since then, CRT has served as a theoretical tool to address how institutionalized racism creates inequities in the accessibility of higher education and students' experiences on campuses.[88] Higher education institutions can use CRT-based analyses to create diverse and inclusive campuses by examining how institutional processes and procedures reinforce

79. *Id.*

80. Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

81. Exec. Order No. 13985, 85 Fed. Reg. 01753 (Jan. 20, 2021) (Executive Order rescinding Executive Order 13950 entitled Advancing Racial Equity and Support for Underserved Communities Through the Federal Government").

82. *See* Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (June 11, 2021), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06.

83. *See id.*

84. *Id.*; *see Index of Educational Gag Orders*, PEN AM., https://airtable.com/appg59iDuPhlLPPFp/shrtwubfBUo2tuHyO/tbl49yod7l01o0TCk/viw6VOxb6SUYd5nXM?blocks=hide (last visited Nov. 23, 2023).

85. *See, e.g.*, Aziz Huq, *The Conservative Case Against Banning Critical Race Theory*, TIME (July 13, 2021), https://time.com/6079716/conservative-case-against-banning-critical-race-theory.

86. *See, e.g.*, CRITICAL RACE THEORY IN EDUCATION (Laurence Parker & David Gilborn eds., 2020); Phil Salter & Glenn Adams, *Toward a Critical Race Psychology*, 7/11 Social and Personality Psychology Compass 781 (2013); Camara Dia Holloway, *Critical Race Art History*, 75 Art Journal 89 (2016).

87. Jill Anderson, *The Harvard EdCast: The State of Critical Race Theory in Education,* HARV. GRADUATE SCH. OF EDUC. (Feb. 23, 2022), https://www.gse.harvard.edu/ideas/edcast/22/02/state-critical-race-theory-education.

88. *See* Payne Hiraldo, *The Role of Critical Race Theory in Higher Education*, 31 VT. CONNECTION 53, 54 (2010).

and perpetuate racialized hegemony.[89] However, the extent to which CRT is taught in higher education courses is limited and varies across educational contexts.[90]

When discussing whether CRT is taught in schools, Ladson-Billings stated that she did not teach the theory to her undergraduate students; she only taught it in her graduate courses.[91] However, the facts are irrelevant for those pushing this narrative that CRT is pervasive throughout higher education institutions. Proponents of these bills barring discussion of "divisive concepts" want society to believe these concepts discriminate against white people while forcibly "indoctrinating" the masses.[92] However, what they are really telling us is that any nuanced recounting of America's history and the lived experiences of marginalized groups is a threat to whiteness. Therefore, upholding the dominance of whiteness necessitates restricting conversations about race and the inherent existence of racism throughout American society.

As of November 1, 2023, thirty-three states have introduced legislation to limit discussions of race and racism in higher education (hereinafter anti-CRT bills).[93] Seven of these states have successfully passed anti-CRT bills.[94] The discussion below will focus on three states that have successfully passed anti-CRT legislation: Idaho, Iowa, and Florida.

Idaho became the first state to limit discussions of race and racism in higher education.[95] After eliminating funding for teaching salaries in K-12 and higher education due to concerns that teachers proselytized anti-racist ideas and CRT, on April 28, 2021, Republican Governor Brad Little "signed into law the controversial House Bill 377, dealing with school nondiscrimination and targeting [C]ritical [R]ace [T]heory."[96] This amendment prohibits schools from compelling students to "adopt" or "adhere" to the ideas that any one race is "inherently superior or inferior," that a person should be "adversely treated" on account of their race, and that an individual is "inherently responsible for actions committed in the past" by those of the same race.[97] Given the "ambiguous" language of the bill, it is unclear what discussions are clearly prohibited, leaving even the sponsors of the bill splintered in their understanding

89. *Id.*

90. Anderson, *supra* note 86.

91. *Id.*

92. Aziz Huq, *The Conservative Case Against Banning Critical Race Theory*, TIME (July 13, 2021), https://time.com/6079716/conservative-case-against-banning-critical-race-theory.

93. *Index of Educational Gag Orders*, PEN AM., https://airtable.com/appg59iDuPhlLPPFp/shrtwubfBUo2tuHyO/tbl49yod7l01o0TCk/viw6VOxb6SUYd5nXM?blocks=hide (last visited Nov. 23, 2023).

94. Jon Edelman, *The Critical Race Debate*, DIVERSE ISSUES IN HIGHER EDUC. (Jan. 30, 2023), https://www.diverseeducation.com/from-the-magazine/article/15306014/the-critical-race-theory-debate. These states are Iowa, Oklahoma, Idaho, Tennessee, South Dakota, Mississippi, and Florida. *Id.*

95. *See* Idaho Code § 33-138 (2021).

96. Blake Jones, *Legislative roundup, 4.29.21: Little signs nondiscrimination bill, but questions 'anecdotes and innuendo' that birthed it*, IDAHO EDUC. NEWS (Apr. 29, 2021), https://www.idahoednews.org/top-news/legislative-roundup-4-29-21-little-signs-nondiscrimination-bill-but-questions-anecdotes-and-innuendo-that-birthed-it.

97. IDAHO CODE § 33-138 (2021).

of the law's scope.[98] Those in opposition to the law are fearful that the law's ambiguity enables government actors to interpret and apply the law in a variety of ways to exert control over the classrooms.[99] While the law does not specifically define nor ban CRT, it does denounce the theory, finding that its "tenets . . . exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria in ways contrary to the unity of the nation and the well-being of the state of Idaho and its citizens."[100]

Two months after Idaho passed HB 377, on June 8, 2021, Iowa Governor Kim Reynolds signed into law House File 802—the second state bill prohibiting tenets attributed to CRT by its critics.[101] House File 802 outlines requirements for content and materials relating to the diversity and inclusion initiatives created by government agencies, school districts, and higher education institutions. The bill prohibits the same ideas as Idaho House Bill 377, with the addition of new "divisive concepts," including the idea that the United States is "fundamentally or systemically racist," that a person is "inherently racist . . . or oppressive, whether consciously or unconsciously," and that "meritocracy or traits such as hard work ethic" are racist or a product used by a particular race to oppress another.[102]

Although Governor Reynolds and advocates of House File 802 asserted that the prohibitions sought to eliminate "rac[ial] stereotyping," their targeting of CRT illuminates that their true objective was to restrict speech that deviates from their preferred version of America and its unsettling racial history.[103] Just two years prior to the passage of House File 802, Governor Reynolds signed Senate File 274 into law, requiring public higher education institutions to adopt free speech policies.[104] The law proclaimed "[t]hat it is not the proper role of an institution of higher education to shield individuals from speech protected by the [F]irst [A]mendment to the Constitution of the United States, which may include ideas and opinions the individual finds unwelcome, disagreeable, or even offensive."[105] Despite Iowa House Republicans hailing House File 802 as a rebuke against "racist ideology"[106] and an attempt to foster inclusivity, the timing of these assaults and the selectiveness in upholding certain types of speech evinces an effort to protect the race-based power structures through the demonization of those advocating for racial equality.

98. *What You Need to Know About Idaho's New Critical Race Theory Law*, IDAHO ABC4 (May 4, 2021), https://www.abc4.com/news/local-news/what-you-need-to-know-about-idahos-critical-race-theory-law/.

99. *Id.*

100. IDAHO CODE § 33-138 (2021).

101. *See* IOWA CODE § 25A.1 (2021).

102. IOWA CODE § 261H.8 (2021).

103. Ian Richardson, *Iowa Gov. Kim Reynolds Signs Law Targeting Critical Race Theory, Saying She's Against 'Discriminatory Indoctrination*,' DES MOINES REG. (June 9, 2021), https://www.desmoinesregister.com/story/news/politics/2021/06/08/governor-kim-reynolds-signs-law-targeting-critical-race-theory-iowa-schools-diversity-training/7489896002/.

104. *See generally* IOWA CODE § 261H.2 (2021).

105. *Id.*

106. Ian Richardson*, Iowa House passes bill seeking to ban 'divisive' school, university, government diversity trainings*, DES MOINES REG. (Mar. 17, 2021), https://www.desmoinesregister.com/story/news/politics/2021/03/17/critical-race-theory-iowa-house-votes-end-divisive-diversity-training-legislature-2021/4717023001.

Florida also enacted legislation targeting CRT under the guise of anti-discrimination efforts. On April 22, 2022, Florida Governor Ron DeSantis signed into law Florida House Bill 7, the "Individual Freedom Act," better known as the "Stop Wrongs to Our Kids and Employees (WOKE) Act."[107] Proponents of the bill touted it as a measure to "prevent discrimination in the workplace and public schools."[108] The law prohibits public institutions—including higher education institutions—from subjecting students or employees to training or instruction that "espouses, promotes, advances, inculcates, or compels" the same "divisive concepts" outlined in Iowa's House File 802.[109] These concepts include the idea that a person's status as "privileged or oppressed" is determined by their race.[110] When DeSantis first announced this legislative proposal in December 2021, he situated this bill as a "[tool] to fight back against woke indoctrination."[111] He proclaimed, "[i]n Florida, we are taking a stand against the state-sanctioned racism that is [C]ritical [R]ace [T]heory. We won't allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other."[112]

In January 2023, DeSantis continued to wield his political power against CRT when he unveiled his higher educational proposal, "pushing back against the tactics of liberal elites who suppress free thought in the name of identity politics and indoctrination."[113] DeSantis's announcement came after requests from his administration the month prior that higher education institutions "submit spending data and other information on programs related to diversity, equity and inclusion, and Critical Race Theory."[114] In his higher education proposal, DeSantis proposed legislation that furthered his attempts to censor discussions related to race and racism at higher education institutions.[115] To "elevate civil discourse and intellectual freedom in higher education," DeSantis's legislative proposal included prohibitions on higher education institutions using any funding to "support DEI, CRT, and other discriminatory initiatives" and required state agencies to "review and realign" curriculum to ensure that courses "provide historically accurate, foundational and career-relevant education" and

107. FLA. STAT. §760.10 (2022); Andrew Atterbury, *Appeals court slams Florida's 'Stop-Woke' law for committing 'greatest First Amendment sin,'* POLITICO (Mar. 4, 2024), https://www.politico.com/news/2024/03/04/desantis-woke-law-court-00144801.

108. Fabiola Cineas, *Ron DeSantis's war on "woke" in Florida schools, explained*, VOX (Apr. 29, 2023), https://www.vox.com/policy-and-politics/23593369/ron-desantis-florida-schools-higher-education-woke.

109. FLA. STAT. §760.10 (2022).

110. FLA. STAT. §760.10 (2022).

111. Staff Press Release, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/.

112. *Id.*

113. Staff Press Release, Governor DeSantis Elevates Civil Discourse and Intellectual Freedom in Higher Education (Jan. 31, 2023), https://www.flgov.com/2023/01/31/governor-desantis-elevates-civil-discourse-and-intellectual-freedom-in-higher-education.

114. Anthony Izaguirre, *DeSantis pushes ban on diversity programs in state colleges*, AP NEWS (Feb. 1, 2023), https://apnews.com/article/ron-desantis-florida-state-government-race-and-ethnicity-b1d847ddc5e1f136b17f254f71fd15dc.

115. *See* Staff Press Release, *supra* note 112.

does not "suppress or distort significant historical events or include a curriculum that teaches identity politics."[116]

In February 2023, the Florida Legislature packaged DeSantis's proposals into Florida House Bill 999 and Senate Bill 266.[117] The initial language of these bills mirrored DeSantis's legislative proposals, barring public colleges and universities from spending funds—including federal and state funding—on programs and activities that "advocate for diversity, equity, and inclusion, or promote or engage in political or social activism."[118]

An earlier version of the bill would have also required higher education institutions to eliminate specific majors and minors that were "based on or otherwise utilizes pedagogical methodology associated with Critical Theory, including, but not limited to, Critical Race Theory, Critical Race Studies, Critical Ethnic Studies . . . Critical Social Justice or Intersectionality."[119] The language of the bill implied that any content attributed to those concepts is based on "unproven, theoretical, or exploratory" thinking.[120] Instead, the bill required curricula that "articulate[d] the values and knowledge necessary to preserve the constitutional republic" using "proven, historically accurate, and high-quality coursework."[121] A later version of the bill removed the language banning certain majors and minors and any specific references to CRT and diversity, equity, and inclusion.[122] Instead, those phrases were replaced with language such as "theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States."[123]

However, even with these changes, the bill still sought to regulate and control curricula, stating that core general education classes "may not distort significant historical events or include a curriculum that teaches identity politics . . . or is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequalities."[124] Additionally, the bill vested authority to the Board of Governors and the State Board of Education to approve the list of general education courses that can be taught at public colleges and universities, shifting this responsibility away from individual faculty committees.[125] Both bodies would also recommend courses for the state's general education core curriculum, and every four years, faculty committees would have to submit recommendations for changes to these courses to the Articulation Coordinating Committee—an advisory body appointed by

116. *Id.*
117. SB 266, 2023 Leg., 125th Reg. Session (Fla. 2023); HB 999, 2023 Leg., 125th Reg. Session (Fla. 2023).
118. *See* SB 266; HB 999.
119. *See* HB 999.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

the Commissioner of Education.[126] DeSantis signed SB 266 into law on May 15, 2023.[127]

These legislative attempts to restrict discussions of race and prohibit concepts related to CRT conflict with legal principles and impermissibly erode the state's traditional relationship with higher education institutions. While state legislatures and officials have authority over certain matters at public colleges and universities, they typically do not have control over the curriculum and programmatic activities.[128] Attempts by external sources to rigidly regulate and restrict "divisive concepts" on campuses infringe on higher education institutions' academic freedom and institutional autonomy. The following Sections explain the development of academic freedom as a constitutional doctrine and how anti-CRT initiatives threaten this freedom.

II. ACADEMIC FREEDOM AS A CONSTITUTIONAL DOCTRINE

American higher education institutions have historically been heralded as fundamental to preserving and advancing democratic values because they are venues committed to academic excellence, intellectual inquiry, and open exchange of ideas through robust civil discourse.[129] Paramount to these principles is the fundamental right to academic freedom—the "absolute freedom of thought, of inquiry, of discussion and teaching, of the academic profession."[130] Part II explores the progression of academic freedom and its principles within the United States. More specifically, I discuss the evolution of Supreme Court academic freedom jurisprudence.

The establishment of academic freedom as a fundamental right for colleges and universities in the United States began in the first decade of the 19th century.[131] During this period, numerous ideological clashes between faculty and university administrators within institutions across the country led six hundred professors to form the American Association of University Professors (AAUP) in 1913.[132] In 1940, the AAUP published the *1940 Statement of Principles on Academic Freedom and Tenure*—widely accepted as setting the theoretical foundation for academic freedom. In defining the purpose of academic freedom, the *1940 Statement of Principles* declared that "[i]nstitutions of higher education are conducted for the common good and . . . [t]he common good depends upon the free search for truth and its free

126. *Id.*

127. Staff Press Release, Governor Ron DeSantis Signs Legislation to Strengthen Florida's Position as National Leader in Higher Education (May 15, 2023), https://www.flgov.com/2023/05/15/governor-ron-desantis-signs-legislation-to-strengthen-floridas-position-as-national-leader-in-higher-education/.

128. Adrienne Lu, *How State Lawmakers Control State Universities*, GOVERNING (Apr. 24, 2014), https://www.governing.com/news/headlines/how-state-lawmakers-control-state-universities.html.

129. *See* Darrel M. West, *Why Academic Freedom Challenges Are Dangerous for Democracy*, BROOKINGS (Sept. 8, 2022), https://www.brookings.edu/articles/why-academic-freedom-challenges-are-dangerous-for-democracy/.

130. *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AM. ASS'N OF UNIV. PROFESSORS (1915), https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf.

131. Lawrence White, *Fifty Years of Academic Jurisprudence*, 36 J.C. & U.L. 791, 800 (2010).

132. *Id.*

exposition."[133] It recognized that academic freedom was "essential" for these institutions to adhere to these purposes.[134] Twelve years later, the term would appear in its first Supreme Court decision, *Adler v. Board of Education of the City of New York*.[135]

In *Adler*, the Supreme Court upheld the constitutionality of the Feinberg Law, a New York statute that prohibited public educational institutions from employing members of "subversive groups"—such as the Communist Party.[136] Under the Feinberg Law, the governing board for New York State's public schools, the Board of Regents, had the authority to create a list of "subversive groups" and foundthat membership in such group was "prima facie evidence for disqualification for appointment to or retention in" any teaching position.[137] In a 6–3 decision, the Court held that the law did not violate the plaintiff's First Amendment right to freedom of speech and assembly, reasoning that although his "freedom of choice between membership in the organization and employment in the school system might be limited" his freedom of speech or assembly remained intact.[138] Ascending the supremacy of the state's interest in shaping the "attitude of young minds towards society," the Court vested a right and duty to the state to maintain the "integrity" of schools.[139] The Court found that while teachers have a right to "assemble, speak, think, and believe as they will," being employed by the state was a privilege.[140] Thus, it was within the state's purview to delineate employment conditions.[141]

Justice Douglas espoused the significance of public education in his dissenting opinion, proclaiming it as "the cradle of our democracy."[142] He warned that this decision would "raise havoc with academic freedom."[143] Although Justice Douglas did not expound on the meaning of academic freedom, he lamented the decision declaring that "[w]hat happens under this law is typical of what happens in a police state."[144] He characterized this interference as a "pall . . . cast over the classrooms," creating an environment that stifles academic freedom and "exercise of the free intellect."[145]

That same year, the Supreme Court unanimously struck down a similar statute in Oklahoma in *Wieman v. Updegraff*.[146] The Oklahoma statute under consideration required all public employees—including college and university employees—to take an oath disavowing any affiliation with "subversive organization[s]."[147] If a person

133. *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AM. ASS'N OF UNIV. PROFESSORS (1970), https://www.aaup.org/file/1940%20Statement.pdf.
134. *Id.* at 14.
135. Adler v. Bd. of Educ. of City of New York, 342 U.S. 485 (1952).
136. *Id.* at 489.
137. *Id. at* 490–91.
138. *Id.* at 493.
139. *Id.*
140. *Id.* at 492.
141. *Id.*
142. *Id.* at 508.
143. *Id.* at 509.
144. *Id.* at 510.
145. *Id.*
146. Wieman v. Updegraff, 344 U.S. 183, 186 (1952).
147. *Id.*

was found to be a member of the Communist Party or another "subversive organization," they were barred from employment at a state college or university.[148] In reaching its conclusion, the Court reasoned that the Oklahoma law violated the Fourteenth Amendment right to due process because it penalized individuals who may have unknowingly belonged to an organization implicated by the law.[149]

Justice Frankfurter wrote a concurring opinion and, although he did not expressly use the term, evoked the spirit of academic freedom by declaring the importance of "freedom of responsible inquiry" and the need for protection against "infraction[s] by national or State government."[150] He upheld teachers as "the priests of our democracy," echoing the sentiments of the *1940 Statement of Principles* and Douglas's dissent in *Adler* by connecting the institutional autonomy of educational institutions to the preservation of America's democracy.[151] Justice Frankfurter continued his evocation of the concepts and principles outlined in the *1940 Statement of Principles* when he included an excerpt from testimony given before a House of Representatives committee by former President of the University of Chicago Robert M. Hutchins:

> Now, a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. It is a center of independent thought and criticism that is created in the interest of the progress of society . . . It is important . . . to attract into the institution men of the greatest capacity, and to encourage them to exercise their independent judgment . . . [and] guarantee those men the freedom to think and to express themselves.[152]

During his testimony, Hutchins emphasized the importance of resisting societal pressures to restrict these freedoms:

> Now, the limits on this freedom . . . cannot be merely prejudice, because although our prejudices might be perfectly satisfactory, the prejudices of our successors, or of those who are in a position to bring pressure to bear on the institution, might be subversive in the real sense, subverting the American doctrine of free thought and free speech.[153]

Five years after *Wieman*, the Supreme Court officially recognized the importance of academic freedom in *Sweezy v. New Hampshire*.[154] In *Sweezy*, the Court questioned whether a New Hampshire statute regulating "subversive activities," "subversive organizations," and "subversive persons" was constitutional.[155] Per the statute, all public employees were required to make sworn statements disavowing allegiance to all "subversive organizations" and declaring that they were not "subversive persons."[156] The plaintiff, a guest lecturer at the University of New Hampshire, was

148. *Id.* at 187.
149. *Id.* at 190.
150. *Id.* at 196–97.
151. *Id.* at 196.
152. *Id.* at 197–98.
153. *Id.* at 198.
154. Sweezy v. New Hampshire, 354 U.S. 234 (1957).
155. *Id.* at 236.
156. *Id.*

summoned to appear before the state attorney general.[157] There, he was held in contempt of court for refusing to answer detailed questions about the content of his lectures, his ideological beliefs, and his political relations.[158] The plaintiff appealed his conviction arguing that the questioning infringed upon his First Amendment rights.[159] In a plurality decision, Chief Justice Warren found for the plaintiff.[160] Although the case was decided on due process grounds, Warren acknowledged that there was a violation of the plaintiff's "liberties in the areas of academic freedom" and cautioned that the state should be "extremely reticent to tread."[161] Writing for the Court, Warren deemed the "essentiality of freedom" of higher education institutions to be "self-evident."[162] He explained, "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[163]

Despite the Court's full endorsement of academic freedom, the Court skirted finding constitutional protections on those grounds because the issue was easily resolved under a due process analysis.[164] The Court held that the sanction violated the plaintiff's Fourteenth Amendment right to due process, finding no connection between the questions concerning his lectures and a compelling state interest.[165]

However, in Justice Frankfurter's concurrence, he analyzed the impermissibility of the State's action and the threat of "governmental intrusion" on the "intellectual life of a university" using principles of academic freedom.[166] Frankfurter wrote of the necessity of academic freedom to ensure the integrity and effectiveness of colleges and universities.[167] Quoting *The Open Universities in South Africa*—a conference report published on behalf of the Conference of Representatives of the University of Cape Town and the University of the Witwatersrand, Johannesburg—Frankfurter delineated the "four essential freedoms" of a university: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[168] Frankfurter's four freedoms have become "a touchstone for understanding constitutional academic freedom."[169] These freedoms became canonized in Supreme Court jurisprudence and would serve as precedents in

157. *Id.* at 238, 243.
158. *Id.* at 243–44.
159. *Id.* at 239–240.
160. *Id.* at 235, 267.
161. *Id.* at 250.
162. *Id.*
163. *Id.*
164. *See id.* at 254–55.
165. *Id.*
166. *Id.* at 262.
167. *Id.*
168. *Id.* at 263.
169. Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 971 (2009).

later Supreme Court decisions evaluating the institutional right to academic freedom.[170]

A decade after *Sweezy*, the Supreme Court established a constitutional foundation for academic freedom grounded in First Amendment principles. In *Keyishian v. Board of Regents*,[171] the Court revisited the Feinberg Law, the same law at issue in *Adler*.[172] This time it found that the law was unconstitutional because its terms were unconstitutionally vague and overbroad.[173] Justice Brennan, writing for the majority, declared:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'[174]

When *Keyishian* was decided in 1967, the Supreme Court established academic freedom as a fundamental constitutional doctrine.[175] By 1967, academic freedom seemed to protect "faculty members from censure or termination based on ideologically motivated resistance to their teaching, scholarship, political associations, or civic utterances."[176]

Post-*Keyishian*, a distinction emerged within academic freedom jurisprudence between disputes related to encroachments on individuals' rights versus higher education institutions' rights.[177] Alternatively stated, courts and legal scholars have grappled with the question of whether academic freedom is a right attached to the individual or the institution.[178] In the formative years of academic freedom jurisprudence, most threats to academic freedom came from external sources, such as state legislatures.[179] In more recent years, almost all academic freedom cases arise from "internal university disputes rather than threats from outside the university."[180] Thus, in cases where the "individual and institutional prerogatives collide[]," the outcome depends upon where the court assigns ownership of the right to academic freedom.[181] In cases where the threat is external, this distinction seems to be irrelevant,

170. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003).
171. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).
172. *Id.* at 593.
173. *Id.* at 604, 608.
174. *Id.* at 603.
175. White, *supra* note 130, at 810–11.
176. *Id.*
177. *Id.* at 813.
178. *Id.*
179. *Id.* at 822.
180. Areen, *supra* note 168, at 976.
181. White, *supra* note 130, at 822.

as the Supreme Court has found that in these cases, academic freedom protects both the individual and the institution.[182] For example, in *Sweezy*, Chief Justice Warren recognized that the government's infringement on the plaintiff's right to lecture "unquestionably was an invasion of petitioner's liberties in the area[] of academic freedom."[183] While academic freedom jurisprudence does contain ambiguity—exacerbated by the Court's unwillingness to set forth clear standards when analyzing claims of academic freedom violations[184]—the Supreme Court has protected the institutional autonomy of higher education institutions from external forces, such as state legislatures.[185]

When the threat to academic freedom materializes from an external source—the White House, state legislatures, offices of the governor—the Court explicitly expands the scope of academic freedom to protect an institution's autonomy in self-governance as it relates to the "four essential freedoms" outlined in *Sweezy*: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[186] These four essential freedoms have become a "touchstone for understanding constitutional academic freedom."[187] In 1978, the Court adopted the four essential freedoms as precedent in *Regents of the University of California v. Bakke*.[188] Writing for the majority, Justice Powell struck down the use of race by the Medical School of the University of California at Davis in its admission criteria, holding that it violated the Equal Protection Clause.[189] In his holding, Justice Powell explained that a state university was permitted to consider race as one of many factors in its admissions process if doing so advanced its diversity initiatives.[190] For Justice Powell, the "attainment of a diverse student body" warranted constitutional protection because academic freedom, "though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[191] Citing Justice Frankfurter's *Sweezy* concurrence, Powell relied on the fourth essential freedom, arguing that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."[192]

182. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 248–50 (1957).

183. *Id.* at 250.

184. *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that when a public employee speaks "pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.") The decision in Garcetti opened the question of whether a faculty member's speech, specifically at a public higher education institution, would be protected under the First Amendment, although the Court directly questioned if Garcetti would apply to "speech related to scholarship and teaching." [SOURCE NEEDED] The Garcetti decision led to various circuits applying differing set of rules to determine when First Amendment protections apply in an academic setting. [SOURCE NEEDED]

185. *See, e.g.,* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

186. *Sweezy*, 354 U.S at 263.

187. Areen, *supra* note 168, at 971.

188. *See generally* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

189. *Id.* at 270–71, 287, 320.

190. *Id.* at 317.

191. *Id.* at 311–12.

192. *Id.* at 312.

In 1981, Justice Powell once again referred to the four essential freedoms in writing for the majority in *Widmar v. Vincent*.[193] In holding that a university's policies prohibiting the use of university buildings for religious worship or teaching violated students' First Amendment rights, Justice Powell made a point to articulate that the Court does not "question the right of the University . . . 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"[194]

Powell's adherence to the idea that academic freedom protects these four essential freedoms was most recently cited by the Court in 2003 when a majority held in *Grutter v. Bollinger* that Michigan Law School's goal of establishing diversity was a compelling state interest.[195] Writing for the majority, Justice O'Connor acknowledged the Court's tradition of recognizing that "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[196] Justice O'Connor, citing Justice Powell's opinion in *Bakke*, conceded that there exists a "constitutional dimension, grounded in the First Amendment, of educational autonomy."[197]

While all the cases addressed here specifically focus on the fourth essential freedom, "who may be admitted to study," the Court has incorporated all the essential freedoms into its academic freedom jurisprudence. As illustrated in this Section, Justice Frankfurter's articulation of these freedoms was adopted by the Court in *Bakke* and upheld in subsequent decisions. The right to academic freedom, which protects the university's ability "to determine for itself on academic grounds 1) who may teach, 2) what may be taught, 3) how it shall be taught, and 4) who may be admitted to study,"[198] is ingrained in our modern conception of democratic order. Anti-CRT legislation and the encroachment of external forces into the "cradle of our democracy" reinforces the importance of protecting these freedoms and provides the Court an opportunity to reaffirm its long-established commitment to academic freedom. In Part III, I will evaluate Florida Senate Bill 266 and House Bill 999 using three of the essential freedoms to determine whether they violate the constitutionally protected right to academic freedom.

III. ANALYSIS OF FLORIDA HOUSE BILL 999 AND SENATE BILL 266 USING ACADEMIC FREEDOM PRINCIPLES

In Part I, this Note discussed efforts by the Florida State Legislature and Governor DeSantis to censor discussions related to race and racism at higher education institutions. As part of these efforts, in February 2023 the Florida State Senate introduced Senate Bill 266 (SB 266). As discussed earlier in this Note, both bills targeted

193. Widmar v. Vincent, 454 U.S. 263, 276 (1981).
194. *Id.*
195. Grutter v. Bollinger, 539 U.S. 306, 325 (2003).
196. *Id.* at 329.
197. *Id.*
198. *Id.* at 363.

curricula and faculty decisions at higher education institutions to suppress the free expression of ideas and concepts, such as systemic racism, oppression, and racial privilege.[199] While SB 266 was officially signed into law on May 15, 2023, and went into effect on July 1, 2023, the full language of its companion bill HB 999, was not incorporated into SB 266.[200] Although Florida failed to enact HB 999, examining its proposed policies using academic freedom principles is necessary. The restrictions embedded within the bill and the ideology undergirding its popularity remain a looming threat to the sanctity of higher education and its place as a "marketplace of ideas."[201]

In this Section, I will analyze SB 266 and HB 999 using three of the essential freedoms discussed in Part II to determine whether its policies violate academic freedom principles. As discussed in Part II of this paper, the Supreme Court has adopted Justice Frankfurter's position that the Constitution protects the right to academic freedom, which encompasses the right for a higher education institution to determine for itself on academic grounds 1) what may be taught, 2) how it shall be taught, 3) who may teach, and 4) who may be admitted to study.[202] Because SB 266 and HB 999 primarily regulate activities related to three of the four essential freedoms, "what may be taught," "how it shall be taught," and "who may teach," this Section will focus on these three essential freedoms.

A. What May Be Taught and How It Shall Be Taught

Considering that the freedom to determine "what may be taught" and "how it shall be taught" are inextricably linked, this subsection will combine a discussion of these two essential freedoms as applied to SB 266 and HB 999.A higher education institution has the authority to determine for itself its curriculum and how that curriculum shall be taught, or in other words, the instructional speech and tactics used to deliver concepts and ideas.[203] SB 266 provides that the State Board of Education and the Board of Governors—both composed of political appointees—must approve general education core courses taught at all public colleges and universities.[204] The law empowers political bodies to determine whether any public higher education institution courses or course materials "distort" historical events, teach "identity politics," or are "based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities."[205] Such a determination could result in the "removal, alignment, realignment, or addition of general education courses."[206]

199. *See* SB 266; HB 999.

200. Eva Surovell, *'Diversity, Equity, and Inclusion' Is Stripped Out of Florida's Higher-Ed Reform Bill*, CHRON. HIGHER EDUC. (April 13, 2023), https://www.chronicle.com/article/diversity-equity-and-inclusion-is-stripped-out-of-floridas-higher-ed-reform-bill.

201. *Supra* note 171 at 603.

202. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).

203. *See supra* note 154 at 263.

204. SB 266.

205. *Id.*

206. *Id.*

SB 266 ostensibly enables an external political body to dictate what is taught in public higher education institutions, yet Florida State Senator Erin Grail, author of the law, believes SB 266 is representative of academic freedom. She argues that it "encourages all voices to be heard, robust debate to happen, and merit . . . at all of [Florida's] colleges and universities."[207] It is difficult to reconcile Grail's understanding of the law's purpose with its actual language. Statements issued by the DeSantis administration also cast severe doubt about SB 266's purported purpose. According to DeSantis, "the legislation [would] ensure Florida's public universities and colleges are grounded in the history and philosophy of Western Civilization; prohibit DEI, CRT, and other discriminatory programs . . . ."[208] In his view, these bills were drafted to "further push[] back against the tactics of liberal elites who suppress free thought in the name of identity politics and indoctrination."[209] For DeSantis, the solution to combating what he perceives to be the suppression of free thought is to codify the actual suppression of ideas and concepts proven unfavorable by some. Despite assertions that higher education institutions are inhospitable to conservatives, one must acknowledge that efforts by the conservative movement to eliminate unfavorable concepts or ideas from the classroom are counterproductive and erode the legitimacy of our academic institutions. Such efforts have already harmed students and faculty across the state.[210]

On January 24, 2024, the Board of Governors for Florida's State University System voted to replace sociology as a course requirement with "a factual history course," titled "Introductory Survey to 1877." According to the board, the "factual history course" will focus on the "forces that shaped America," teaching students a "historically accurate account of America's founding, the horrors of slavery, the resulting Civil War, and the Reconstruction Era."[211] The replacement of sociology as a required course follows remarks by Florida Education Commissioner Manny Díaz who asserted that "[s]ociology has been hijacked by left-wing activists and no longer serves its intended purpose as a general knowledge course for students."[212]

Under the shadow of SB 266, universities can no longer conduct the "robust exchange of ideas."[213] Instead, faculty members and students must navigate the classroom with trepidation, fearful of circumventing the state's "authoritative selection"

207. Kate Marijolovic, *Florida's Controversial Anti-DEI Bill Heads to DeSantis's Desk*, CHRON. HIGHER EDUC. (May 3, 2023), https://www.chronicle.com/article/floridas-controversial-anti-dei-bill-heads-to-desantiss-desk.

208. Staff Press Release, Governor DeSantis Elevates Civil Discourse and Intellectual Freedom in Higher Education (Jan. 31, 2023), https://www.flgov.com/2023/01/31/governor-desantis-elevates-civil-discourse-and-intellectual-freedom-in-higher-education.

209. *Id.*

210. Katheryn Russell-Brown, *The Multitudinous Racial Harms Caused by Florida's Anti-DEI and "Stop Work" Laws*, LI FORDHAM URB L.J. 785, 971 (2024).

211. *Board of Governors Adds Factual History Course as Option for Requirements for Social Sciences Core*, STATE UNIV. SYS. OF FLA. (Jan. 24, 2024), https://www.flbog.edu/2024/01/24/board-of-governors-adds-factual-history-course-as-option-for-requirements-for-social-sciences-core/.

212. Manny Diaz Jr. (@CommMannyDiazJr), X (Dec. 8, 2023, 1:32 PM), https://twitter.com/CommMannyDiazJr/status/1733192839100568018.

213. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

of acceptable content.[214] Robert Cassanello, an associate professor at the University of Central Florida, contends that these types of laws restrict his "ability to accurately and fully teach" subjects like the civil rights movements, the Jim Crow era, and Reconstruction.[215] Some, finding the academic climate in Florida to be "dystopian," have relinquished their coveted and secure professorship roles rather than operate under the "pall of orthodoxy" ushered in by DeSantis and his conservative allies.[216] The challenges facing faculty members underscore the complex interplay between the "what" and the "how" of teaching and highlight the importance of safeguarding institutional autonomy to determine these key aspects of the educational process, especially at the risk of losing talented and qualified professors.

B. Who May Teach

SB 266 burdens public higher education institutions' ability to maintain and determine who may teach its students. It burdens this liberty, as illustrated in the previous subsection, by usurping decisions that have traditionally been made by faculty—such as the "what" and "how" of teaching—leaving many feeling compelled to flee the state.[217] In 2023, the United Faculty of Florida published results from a multi-state faculty survey, which revealed that of the 642 Florida faculty members who participated in the survey, "almost 300 said they planned to seek employment in another state within the next year."[218] Christopher Rufo, whom DeSantis appointed a trustee of New College of Florida in 2023, finds the exodus of professors to be a "net gain."[219] He wrote, "Professors who want to practice D.E.I.-style racial discrimination . . . and replace scholarship with partisan activism are free to do so elsewhere. Good riddance."[220]

Through SB 266, Florida has empowered political actors, like DeSantis and his political appointees, to seize control of higher education institutions by encroaching upon three of the four essential freedoms: 1) what to teach, 2) how to teach, and 3) who may teach. As a result, external forces are now authorized to dictate the curriculum and instruction provided to students and shape faculty membership to align with their political ideology. This development has the potential to significantly impact its state university system and compromise the integrity of every institution for years to come.

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214. *Id.*

215. Abigail Goldberg-Zelizer, *Educators sound the alarm on DeSantis' classroom censorship*, SALON (July 7, 2022), https://www.salon.com/2022/07/07/florida-educators-sound-the-alarm-on-desantis-classroom-censorship/.

216. Stephanie Saul, *In Florida's Hot Political Climate, Some Faculty Have Had Enough*, N.Y. TIMES (Dec. 2023), https://www.nytimes.com/2023/12/03/us/florida-professors-education-desantis.html.

217. Tarah Jean, *As Florida Board of Governors Restrict Tenure, Survey Says Faculty are Looking Elsewhere*, TALLAHASSEE DEMOCRAT (Sept. 9, 2023), https://www.tallahassee.com/story/news/2023/09/09/florida-board-of-governors-ok-tenure-overhaul-faculty-sound-alarm-survey/70799499007/.

218. *Id.*

219. Saul, *supra* note 215.

220. *Id.*

CONCLUSION

The conservative movement has crusaded against Critical Race Theory, co-opting the academic and legal framework as part of a political agenda sustained by racist rhetoric. Proponents of anti-CRT legislation are inciting the fears of parents across America, arguing that CRT encourages the idea that white people are inherently racist and seeks to stir feelings of guilt and anguish in white children due to their race. However, the truth is that CRT shifts the focus from indicting individuals for racist acts to critiquing race-based power structures in hopes that the systems and institutions that govern our society may be reimagined to equitably serve all.

Legislative attempts to impose ideological control over institutions of higher learning by banning concepts related to CRT, race, or racism are designed to stifle academic discussions while stigmatizing accurate accounts of this country's racial history and its haunting impact on the present day. Anti-CRT legislation threatens academic freedom while insidiously eroding our entire democracy. Higher education institutions should be committed to fostering freedom of thought, promoting intellectual inquiry, and advancing truth rather than being another tool in our system to silence and subjugate the oppressed.