

How to Regulate Critical Race Theory in Schools: A Primer and Model Legislation

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In December 2020, Gabrielle Clark sued a Las Vegas, Nevada, school in federal court.¹ She alleged that the public charter school—a part of the New York-based Democracy Prep network—had violated her son William’s constitutional right to free speech. According to Clark’s lawsuit, the school’s mandatory “Sociology of Change” course required students to categorize themselves as either “oppressor” or “oppressed,” based on their race, sex, sexual orientation, gender identity, and religious faith, and otherwise compelled students to parrot school-approved speech.

Democracy Prep had added the Sociology of Change course to the school’s required curriculum without notifying parents or making course materials available for prior review. Students were not allowed to opt out of the course, or opt out of any required course activities, including the requirement that students self-identify as being part of various oppressor or oppressed groups.

William, a Christian heterosexual male whose mother is black and whose late father was white, refused to participate. The school threatened to withhold his diploma if he would not complete the course. The teacher gave him a failing grade.

The federal judge handling the case allowed the lawsuit to proceed, stating in a hearing that Clark was “likely to succeed on the merits” of his claim since the school had “likely compelled” speech. In April 2021, on the eve of trial, the school finally relented, agreeing to let Clark opt out of the class and expunge his failing grade.²

Clark’s litigation strategy was trailblazing, but his story is hardly unique. Across America, public schools have adopted curricula, training programs, and other required activities that impart racially charged messages—not only for high school seniors but in classes for very young elementary school students as well. In some cases, schools have even compelled students, faculty, and staff to affirmatively endorse school-approved racial messages.

- A Cupertino, California, public school directed eight- and nine-year-olds to “deconstruct” their racial identities and rank themselves according to their “power and privilege,” as a required exercise in a third-grade math class.³

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- A Philadelphia public elementary school ordered fifth-graders to march across an auditorium stage bearing signs that read “Jail Trump” and “Black Power Matters” in a rally celebrating “black communism.”⁴
- The Buffalo school district adopted an “emancipatory curriculum”; its “pedagogy of liberation” instructed students that “all white people play a part in perpetuating systemic racism.”⁵

Students are not alone. Public school teachers and staff, as well as other government employees, have also faced mandatory training sessions as conditions of their employment.

- A Springfield, Missouri, middle school compelled teachers to locate themselves on an “oppression matrix”; teachers were required to “consent” to the dictates of “social justice work.”⁶
- Portland public schools have required teachers to attend weekly “antiracism” training sessions that divided faculty along “lines of oppression”; faculty were advised that they had to profess the beliefs taught in the sessions and could lose their jobs if they did not reorient their classroom instruction along the prescribed lines.⁷
- The San Diego Unified School District, in addition to forbidding teachers from requiring that homework be turned in on time as part of an antiracism initiative, required faculty to attend mandatory training sessions that accused public schools of the “spirit murder” of black babies and required teachers to admit their “white fragility.”⁸

Chances to opt out of these curricula and training sessions are either not presented at all, or dissenters are severely shunned.⁹

Tellingly, many of the schools pushing these radical curricula are failing their students, at least in terms of teaching traditional competencies. In the Buffalo schools following the emancipatory curriculum, 80% or more of fifth-graders fail to meet state reading and writing requirements. The Philadelphia school requiring students to participate in racially charged rallies has an even greater record of failure, with more than 90% of sixth-graders missing state reading and writing targets.

Unsurprisingly, many parents and teachers across the country have been troubled by these developments. Critical Race Theory (CRT) is unpopular with the public, especially when details of specific practices are made clear. For the abstract question of whether people support CRT, a *YouGov/Economist* survey conducted June 13–15, 2021, found that many Americans didn’t know what it was; but of those who did, 56% opposed it while 38% supported it.¹⁰ A Morning Consult/Politico poll showed 29% opposed, 19% in support, and the rest unsure.¹¹ But when specifics of CRT are put in front of respondents, opinions become even more negative. An April 2021 Competitive Edge Research survey asked whether schools should “assign White students the status of ‘privileged’ and assign nonwhite students the status of ‘oppressed.’” On this question, 96% of people were opposed. Another question read: “Teach that White people are inherently privileged, while Black and other people of color are inherently oppressed and victimized. Should schools in your area teach that or not?” Fully 82% opposed this idea, with just 18% in favor.¹² Republicans and independents were strongly against these questions, but few Democrats were strongly in favor, either.

As a result, some have begun to push back. In recent months, teachers and parents, like Gabrielle Clark, have filed lawsuits challenging aspects of public school systems’ race and equity initiatives.

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- A group of parents in Loudoun County, Virginia, sued the public school system for infringing on First Amendment free-speech rights and unconstitutionally discriminating on the basis of race.¹³
- Parents in eastern Pennsylvania sued their local school district after the superintendent refused to allow them to opt out of required class exercises on “white fragility.”¹⁴
- Stacy Deemar, a white teacher in a K–8 school district in Evanston, Illinois, sued the school for violating Title VI of the 1964 Civil Rights Act, as well as the federal constitution.¹⁵

Parental discontent has also spurred political reaction. In May, the school board, city council, and mayoral races in Southlake, Texas, a Dallas suburb, centered on the school’s “cultural competence action plan”; candidates opposing the racially charged program won every election, with each successful candidate winning more than two-thirds of the vote.¹⁶

Elected officials have taken notice. Legislators in at least 25 states have introduced bills aimed at curtailing various forms of racial instruction and indoctrination of the sort seen in public schools in Buffalo, Cupertino, Las Vegas, Philadelphia, Portland, San Diego, and Springfield.¹⁷ Several of these have become law, including, as of this writing, enactments in Arizona,¹⁸ Arkansas,¹⁹ Idaho,²⁰ Iowa,²¹ New Hampshire,²² Oklahoma,²³ Tennessee,²⁴ and Texas.²⁵ In addition, the Florida Board of Education adopted a new rule clarifying its education standards and limiting the teaching of certain racially charged theories and materials.²⁶ More legislation and rulemaking is almost certain to follow.²⁷

These legislative efforts have varied in scope and approach. Some commentators have cast the past several months’ virtual tug-of-war over K–12 curricula as “the latest battleground in the culture war”;²⁸ public debate has often been heated.²⁹ This issue brief is designed to add some light by elucidating basic principles that policymakers should consider in crafting legislative and other responses and by presenting model legislation, drawn from existing templates in many states, that should conform to these principles and pass constitutional muster.

“Critical Race Theory” is the term commonly applied in public debates to controversial racially charged curricula and initiatives in the public schools, as well as various parallel trainings and programs commonly being adopted in school and other settings. Manhattan Institute senior fellow Christopher Rufo, in particular, has pointed to the links between what parents are reacting to in their children’s public schools and the conceptual framework developed decades ago by a previously obscure group of law professors and social scientists.³⁰

The term “Critical Race Theory” was coined by a small group of legal academics who gathered in 1989 for a workshop at the University of Wisconsin, titled “New Developments in Critical Race Theory.”³¹ The Critical Race Theory movement was an offshoot of, and a reaction to, an earlier legal-academic movement, Critical Legal Studies, which was, in the words of its founders, a “peripheral corner of legal academia.” Its adherents, known as “crits,” were engaged in a “struggle to create a more humane, egalitarian, and democratic society.”³² Critical Legal Studies drew inspiration from the “legal realist” movement, which emerged at Yale and Columbia Law Schools in the 1920s and 1930s and disdained the “formalisms” of the law in lieu of an outcome-driven jurisprudence consistent with Progressive principles.³³ The crits also drew from the eponymous “critical theory,” another interwar school of thought centered at the Marxist Institute for Social Research at the University of Frankfurt, which rejected “detachment” and “neutral” scholarly principles and sought instead “to hasten developments which will lead to a society without injustice.”³⁴

The Critical Race Theory scholars departed from their progenitors in centering their discussion on race.³⁵ (Some of them even accused the other critics of behaving in “imperial” fashion and “silencing” minority scholars’ views.)³⁶

Although scholars who have embraced the Critical Race Theory moniker are not monolithic, they are broadly committed to reinterpreting civil rights law “in light of its ineffectuality.” Certain tenets are common among scholars in the field:

- Racism is ordinary, ubiquitous, and “endemic” to American life;
- Racism explains all observed disparities among contemporary racial groups;
- Cultural norms such as “legal neutrality, objectivity, color-blindness, and meritocracy” perpetuate inequality and group dominance; and thus “race liberalism” must be rejected in favor of “race consciousness”;
- An “insistence on subjectivity” because true insight into the real operation of American life is gained through the “lived experience” of racism by “people of color”; and
- White people are necessarily complicit in racism by way of their adherence to, and benefit from, dominant cultural norms that invest them with sociopolitical capital (“whiteness”).³⁷

Initially, Critical Race Theory was confined to the niche circles of legal academia from which it originated.³⁸ More recently, its core ideas have been applied and expanded to an array of disciplines, including education. Professors Gloria Ladson-Billings and William F. Tate IV at the University of Wisconsin–Madison wrote a seminal article in the field in 1995, titled “Toward a Critical Race Theory in Education.”³⁹ Ladson-Billings applied the precepts developed by legal Critical Race Theory scholars to attack “colorblindness, meritocracy, deficit thinking, linguisticism, and other forms of subordination” in the education context.⁴⁰ Those who have applied Critical Race Theory to education also draw heavily on “critical pedagogy,” a distinct school of academia that itself borrowed heavily from Critical Race Theory scholars.⁴¹ Critical pedagogy views “curriculum as a form of cultural politics” and argues that “knowledge should be analyzed on the basis of whether it is oppressive or exploitative, and not on the basis of whether it is ‘true.’”⁴²

Some have claimed that Critical Race Theory has nothing to do with the racially charged curricula and trainings that are becoming commonplace in public schools. For example, Randi Weingarten, president of the American Federation of Teachers union, insists that “critical race theory is not taught in elementary schools or high schools.”⁴³ To be sure, that statement is broadly true in a literal sense: it would be the rare secondary school, indeed, that would assign to its students the writings of Critical Race Theory scholars such as Derrick Bell, Richard Delgado, Charles Lawrence, Kimberlé Crenshaw, or Mari Matsuda—or their education-field heirs like Ladson-Billings and Tate. But the ideas developed and espoused in Critical Race Theory scholarship certainly do inform modern educational pedagogy. And belying Weingarten’s claim, the national meeting of the other large teachers’ union, the National Education Association, recently passed a resolution affirming its commitment to a “curriculum . . . informed by academic frameworks for understanding and interpreting the impact of the past on current society, including critical race theory”; and allocating significant new union resources to providing “an already-created, in-depth, study that critiques empire, white supremacy, anti-Blackness, anti-Indigeneity, racism, patriarchy, cisheteropatriarchy, capitalism, ableism, anthropocentrism, and other forms of power and oppression at the intersections of our society.”⁴⁴

To be sure, the teachers and administrators implementing racialized curricula, initiatives, and training programs are more likely to have read popular modern books by Boston University history professor Ibram X. Kendi⁴⁵ or diversity trainer Robin DiAngelo⁴⁶ than

they are the writings of law professors associated with Critical Race Theory. But “pop anti-racism” authors themselves derive many of their premises from congruent Critical Race Theory scholarship.⁴⁷ Unambiguously, the principles developed by Critical Race Theory and critical pedagogy scholars have infused many public schools. A 2019 study⁴⁸ by the James G. Martin Center for Academic Renewal found that the most assigned author at the education schools at three leading public universities—the University of Michigan–Ann Arbor, the University of North Carolina–Chapel Hill, and the University of Wisconsin–Madison—was the aforementioned Gloria Ladson-Billings, who is “known for her groundbreaking work in the fields of Culturally Relevant Pedagogy and Critical Race Theory.”⁴⁹ Other Critical Race and critical pedagogy scholars dominated the most assigned reading lists at these schools.

As noted in a Manhattan Institute issue brief, “Woke Schooling: A Toolkit for Concerned Parents,” using the term “Critical Race Theory” to describe what’s happening in the public-education context is perhaps both underinclusive (not everything parents are objecting to in the school context derives directly or indirectly from Critical Race Theory scholarship) and over-inclusive (as a body of scholarship originating in law schools, Critical Race Theory certainly includes concepts not used in public school settings).⁵⁰

In any event, the debate over whether Critical Race Theory is the appropriate moniker for what has been happening in many public schools is something of a sideshow. Almost 20 years ago, Kimberlé Crenshaw, a founder of the movement, suggested that Critical Race Theory was “now used as interchangeably for race scholarship as Kleenex is used for tissue.”⁵¹ The exact academic pedigree vehicle of various curricula, initiatives, and training programs observed at public schools and other public institutions matters less than their substance. The fundamental question involves not what we *call* these ideas and programs, or their origins, but their appropriateness—and the appropriateness of the legislative responses being promulgated in response.

Legislative efforts reacting to parental concerns about Critical Race Theory–laden school curricula and programs have prompted fierce pushback from some quarters, across the political spectrum. The quality of such pushback has varied. Some of the criticisms of Critical Race legislation have been disingenuous—arguing about nomenclature or claiming that legislators or activists have not read enough legal scholarship to have a legitimate opinion on K–12 children being forced to recite self-deprecating pledges, publicly to admit their “privilege,” and to apologize for their “complicity” in current racial inequities. Others have engaged in various motte-and-bailey arguments: suggesting that objections to Critical Race programs in schools are principally about downplaying genuine historical atrocities like chattel slavery, Jim Crow laws, and the like; while insisting, as does Randi Weingarten, that Critical Race Theory is not actually “taught” in secondary schools.

That said, various scholars and thought leaders have raised genuine concerns that certain of the legislative proposals responding to racially charged pedagogy have overreached, and thus raise constitutional concerns, or that they might be counterproductive.⁵² Although a complete assessment of every piece of legislation already introduced in a majority of American states is beyond the scope of this issue brief, it is worth spelling out what responsive legislation in this context should *not* do. Bills responding to concerns about Critical Race Theory should *not*:

- *Stifle the marketplace of ideas.* Such concerns are particularly significant in the context of higher-education institutions, which have historically embraced principles of academic freedom and whose curricula have been granted significantly greater constitutional protection than K–12 schools. When it comes to secondary and elementary education, however, public school curricula have long been set by state and local elected officials.

- *Proscribe or discourage classroom discussion of race and racism, past and present.* In particular, legislation should not encourage schools to “whitewash” history by failing to teach adequately historical atrocities committed in the name of race. Although limiting such discussions does not appear to be the intent of the overwhelming majority of Critical Race Theory–inspired legislation introduced around the country, poorly drafted statutes could unintentionally deter appropriate instruction.
- *Condition curriculum on individual student “discomfort” or “distress.”* Schools necessarily teach an array of texts—and convey historical lessons—that may make some students uncomfortable. While pedagogy should be age-appropriate, the contours of the K–12 curriculum should be affirmatively developed by elected officials, state and local, without giving implicit “veto power” to subjective student or parent concerns.
- *Strain school budgeting.* State legislatures should weigh the cost and benefits of all requirements placed on the schools they oversee. The model legislation proposed here exempts smaller schools from proposed transparency and other reporting mechanisms. Legislation should also be sensitive to enforcement mechanisms, particularly those that would empower private damages lawsuits, which might have the unintended effect of directly or indirectly straining school budgeting.
- *Undermine educational pluralism in non-district schools.* Schools that students and their families attend voluntarily should have a greater degree of freedom in approach. The model legislation proposed here would apply to public charter schools attended voluntarily only by requiring transparency (so that choice to attend such a school is informed) and prohibiting compelled speech (which is constitutionally proscribed). The model legislation would not apply to private schools attended voluntarily, even if such schools receive some direct or indirect state support.

Good legislation responsive to concerns about racially charged pedagogy in the schools *should*:

- *Facilitate greater transparency.* One reason that parental concern about Critical Race Theory–inspired pedagogy in the public schools erupted in the last year is that widespread online schooling afforded parents a window into their children’s classrooms. As a general matter, such transparency should be the norm, not the exception. Legislators should endorse solutions that empower elected officials—including local school boards or other elected governmental actors charged with educational curriculum—rather than delegating such decisions to unelected bureaucrats, lawyers, and judges.⁵³ Ensuring that parents are fully informed about schools’ curricula, initiatives, and trainings in this context will offer built-in feedback—informing the electorate and elected officials alike.
- *Prohibit government-compelled speech.* Under the U.S. Constitution, the government cannot compel speech: “The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”⁵⁴ This principle has been clearly established as a matter of First Amendment law in the context of public education since 1943, when the Supreme Court struck down a West Virginia requirement compelling students to salute the American flag or recite the pledge of allegiance in public school in *West Virginia Board of Education v. Barnette*.⁵⁵ To be sure, schools necessarily have significant control over student speech in a certain sense; there are right and wrong answers on tests. But the *Barnette* decision makes clear that it is a “fixed star in our constitutional constellation . . . that no [government] official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁵⁶

- *Clarify public school curricular choices.* Teachers, like students, do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵⁷ But in the public school context, in performing their official duties, teachers are acting as agents of the state—essentially giving voice to government-approved speech. State legislatures and other elected government officials have significant constitutional authority to direct such speech⁵⁸—including by *preventing* public school teachers from engaging in offensive classroom speech such as using racial epithets or presenting age-inappropriate material.⁵⁹ And state legislatures and state and local boards of education, of course, regularly do make curricular decisions—including recent controversial decisions in some states to embrace Critical Race Theory—adjacent curricular choices.⁶⁰ Many such choices have been unwise, in our view—but, in most cases, not outside state governments’ constitutional authority.

The proposed model legislation that appears below is offered as a tool for elected officials to consider in crafting legislation responsive to Critical Race Theory–infused pedagogy, consistent with the aforementioned principles. The model legislation includes two substantive sections, (2) and (3), the former oriented around transparency and the latter around compelled speech and curricular content. Although the proposed model bill is crafted with constitutional limits in mind, it does not push the outer bound of what is constitutionally permitted for state legislatures, and some state legislatures could go further without running afoul of federal law.

Scope. As drafted, this model legislation applies only to public elementary and secondary schools and their governing apparatus, not to public colleges and universities, other government entities, or private schools or contractors with government linkages.

In not applying to private schools that receive state aid—which might include direct appropriations or voucher-type programs that offer scholarship support to students—the model bill supports broad principles of educational pluralism. Private schools regularly adopt curricula and requirements that would not be permissible for a public school. Religious schools, for instance, often have “statement of faith” requirements for participating students.

The bill does not apply identically to public charter schools, under the rationale that state legislatures should also broadly embrace educational pluralism when school attendance decisions involve a high degree of parental choice. Two of its core features, however, do apply to charters. The bill applies transparency requirements to public charter schools, in order to facilitate informed choice, though legislatures may wish to exempt smaller charter schools—like smaller school districts—from such requirements, given the cost of compliance. The model legislation, as well as clear constitutional law, would also prohibit government-compelled speech—like that involved in William Clark’s litigation in Nevada—in public charter schools.

The model bill does not apply to public institutions of higher education. Unlike for public K–12 schools, no state government requires compulsory attendance at a college or university. The legal parameters governing how state elected officials interact with public university curricular decisions are very different from the K–12 context; long-standing Supreme Court precedent protects “academic freedom” in public institutions of higher education, including not only “the independent and uninhibited exchange of ideas among teachers and students” but also “autonomous decision making by the academy itself.”⁶¹ This autonomy is not unfettered. State universities cannot compel student, staff, or faculty speech,⁶² and a state legislature could affirmatively clarify these constitutional protections with separate legislation. But such a law would have to be significantly more narrowly tailored and carefully worded than would be required in the K–12 context.⁶³ Similar, though less exacting, requirements would apply to other state-employment scenarios outside the education context.

Substance. In terms of substance, the model legislation focuses on the principles previously articulated: transparency, compelled speech, and curricular content. The proposed transparency requirements are relatively narrow and precise, in order to avoid undue compliance burdens on already-pressed school administrators and staff.

The content prescriptions in the proposed legislation are also narrow. The bill focuses on four core concepts or beliefs, distilled from various state bills on the subject:

1. That the United States or the state is “fundamentally and irredeemably racist or sexist”;
2. That individuals are “inherently racist, sexist, or oppressive” by virtue of “race” or other intrinsic characteristics;
3. That individuals are personally “responsible for actions committed in the past by other members of the same” race or other intrinsic characteristics; and
4. That individuals’ “moral character is necessarily determined” by race or other intrinsic characteristics.

Our model bill purposely focuses on value-laden judgments, particularly those involving individual identity. Moreover, in keeping with the “light touch” of the proposed model legislation, the bill would not directly proscribe the teaching of even these concepts. Rather, the model bill would prevent public schools from compelling students, faculty, and staff to affirm these ideas; and would allow students, faculty, and staff the right to opt out of any “training, seminar, continuing education, orientation, or therapy” requirements imparting these ideas—whether or not such activities involve compelled speech. The model bill does offer some suggested language for state legislatures that wish to embrace a more proscriptive approach.

The model legislation also prohibits schools from requiring or rewarding specific political, policy, or social activism as a substitute for or adjunct to teaching and learning. While there certainly may be value in “hands-on” applications of various social-studies instruction, we question whether K–12 education is the appropriate nexus for the same, particularly in light of the fact that student attendance is compulsory, student minds are yet unformed, and there is the potential for teachers and administrators to co-opt scarce student time for their own political, policy, or social-reform objectives.

Finally, the model legislation prohibits end runs around its requirements through outside contracts, by preventing schools from using public funds to “contract with, hire, or otherwise engage” outside consultants and trainers for purposes of political and social advocacy or to compel students, faculty, or staff to affirm the four core concepts or beliefs outlined in the legislation. Schools could hire consultants and trainers to impart such concepts if they expressly clarified that the ideas were not school-sponsored or supported and if students, faculty, and staff had the right to opt out of such programs.

The model bill purposely avoids proscribing the teaching of concepts based on the subjective perceptions of students, faculty, or staff. The elevation of so-called lived experience over objective deductive and inductive analysis is a hallmark of Critical Race Theory; it should not be embraced by its critics.⁶⁴ That said, much of the public commentary suggesting that enacted CRT legislation has, in fact, hinged on individuals’ subjective perceptions has simply misrepresented the statutory text in question. For example, an opinion piece in the *New York Times* authored by Kmele Foster, David French, Jason Stanley, and Thomas Chatterton Williams claims that Tennessee’s law bans “any teaching that could lead an individual to ‘feel discomfort, guilt, anguish or another form of psychological distress solely because of the individual’s race or sex.’”⁶⁵ But that is not what the Tennessee legislation does; rather, the law prohibits public schools from

promoting the idea that an “individual *should* feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual’s race or sex”⁶⁶—something quite different indeed.⁶⁷ Similarly, although certain states’ CRT legislation has prohibited public schools or other state institutions from promoting “divisive concepts,” the actually enacted bills have expressly defined that term to include only normative-laden judgments premised on identity—similar to those articulated in the model legislation presented here⁶⁸—rather than relying on listeners’ subjective perspectives.

The model bill does not prohibit any particular textbook, document, or course of study, beyond the prohibitions previously described. This omission should not be read to imply that such a provision would be legally problematic in the K–12 context; states have broad leeway to select and reject materials and curricula, and most such prohibitions would pass constitutional muster.⁶⁹ Although a comprehensive review of alternative school curricula is beyond the scope of this issue brief, it is hardly surprising that some state bills have specifically singled out for exclusion the Pulitzer Center’s 1619 Project study materials,⁷⁰ based on the *New York Times*’ controversial series of essays,⁷¹ which have already been adopted by a reported 4,500 schools less than a year after its introduction.⁷²

Enforcement. The proposed model legislation relies on state attorneys general and local district and county attorneys to enforce its provisions.⁷³ Some state legislatures may prefer also to create discrete mechanisms for private enforcement through civil litigation brought by parents, students, or employees, beyond those available as existing remedies under state or federal law—particularly when legislators lack confidence that executive-branch officials will actually enforce the law. Legislatures that decide to create an express private right of enforcement action should be exceedingly careful not to create the potential for “shakedown” lawsuits that could overly tax local school districts or, if filed against individual public employees, unduly interfere with government-employee contracting. Legislatures should be aware that in the absence of express language clarifying otherwise, some courts will infer an implied private right of enforcement action, regardless of legislative intent.

Some CRT bills have called for particularized penalties against teachers and school districts for noncompliance. Arizona’s enacted statute, for instance, specifies that teachers violating the new law “shall be subject to disciplinary action, including the suspension or revocation of the teacher’s certificate,” leaving the particulars to the discretion of the State Board of Education. The law also allows executive-branch officials to seek civil penalties in court against schools and state agencies involved in K–12 education, up to \$5,000 “per violation.”⁷⁴ In addition to the political realities of such approaches, legislatures considering such penalty structures should consider the implications for public-employee contracting and on local school budgets.

In sum: children in primary and secondary public schools are being forced to admit their “privilege” based on race and other intractable characteristics of identity; to apologize for “complicity” in injustices that they could not possibly have created or influenced; and to recite self-deprecating pledges to “do better.” Informed by the lens of Critical Race Theory and related analytical structures being taught widely in leading university schools of education, many public schools are eschewing “race liberalism” for “race consciousness,” as they work to disrupt “white comfort” on the path to “liberation.”⁷⁵ Far too often, students and public employees alike have been required to express identity-based opinions and worldviews, in clear contravention of constitutional prohibitions against state-compelled speech.

Many parents are understandably outraged by these developments, and many elected officials are rightly taking notice and responding. The flurry of public attention and legislative activity has predictably spurred significant public debate, of varying quality. This issue brief is designed

to guide that debate as public officials consider how to react to this public concern. The model legislation offered in this issue brief is intended to provide best-in-class ideas to assist state legislatures as they tackle this complex issue.

This issue brief has sketched out the basic case for reform legislation in this space and articulated the main principles that reformers should consider in adopting varying legislative approaches—considering the substance of reform legislation, its scope, and possible enforcement remedies. State lawmakers are welcome to adapt the appended model legislation in whole or part as they consider reforms in this area; Manhattan Institute scholars are available to comment on any proposed variations.

MODEL LEGISLATION

SECTION 1. PURPOSES

The purposes of the [Act Name Here] are:

- A. To ensure that schools provide transparency in the training and instructional materials used to promote diversity, equity, and inclusion and to give parents and students reasonable access to review such materials.
- B. To ensure that students, teachers, administrators, and other school employees recognize the equality, dignity, and rights of all persons and to discourage public schools from teaching ideas and concepts that are contrary to this aim.
- C. To ensure that public schools do not compel students to engage in political or social activism or advocacy.
- D. To prevent government entities and actors from compelling students, teachers, administrators, and other public school employees to affirm prescribed speech or beliefs.

SECTION 2: TRANSPARENCY IN TRAINING AND CURRICULUM

- A. The governing body of a public school, including public charter schools, shall ensure that the following information is displayed on the school website in an easily accessible location:
 - (1). All training materials used for staff and faculty training on all matters of nondiscrimination, diversity, equity, inclusion, race, ethnicity, sex, or bias, or any combination of these concepts with other concepts.
 - (2). All instructional or curricular materials principally concerning nondiscrimination, diversity, equity, inclusion, race, ethnicity, sex, or bias, or any combination of these concepts with other concepts. Such instructional materials shall identify, at a minimum:
 - i. The title, author, organization, and any website associated with each material and activity;
 - ii. A brief description of the instructional material;
 - iii. A link to the instructional material, if publicly available on the Internet, or information on how to request review of a copy of the instructional material; and
 - iv. The identity of the teacher, if the instructional material was created by the teacher.
 - (3). Any procedures for the documentation, review, or approval of the training, instructional, or curricular materials used for staff and faculty training or student instruction at the school, including by the principal, curriculum administrators, or other teachers.

- (4) Nothing in this subsection shall be construed to require the digital reproduction or posting of copies of the instructional materials themselves, where such reproduction would infringe upon copyrighted material; but in such cases, original materials should still be linked, if possible, or provided upon request, as required under subsection (2)(iii) of this section.
- B. The information required by subsection (A) of this section shall be displayed online prior to the first instance of training or instruction, or, at latest, seven days after the training or instruction. Such information shall remain displayed on the school website for at least two years.
- C. [A school whose governing board is responsible for the operation of schools with fewer than (X) students cumulatively is not required to post a list of learning materials and activities pursuant to this section.]
- D. The attorney general or the district or county attorney for the district or county in which an alleged violation of this section occurs may initiate a suit in the district or county court in the jurisdiction in which the school district, public school, public charter school, or other governmental entity responsible for the oversight of public secondary or elementary schools is located for the purpose of complying with this section. [The legislature can, in addition to injunctive relief, specify a fine or penalty according to state law.]
- E. An attorney acting on behalf of a school district, public school, public charter school, or governmental entity responsible for the oversight of public secondary or elementary schools may request a legal opinion of the county or district attorney or the attorney general as to whether a particular piece of training, instructional, or curricular material fits under this subsection.

SECTION 3: CONTROLLING STATE SCHOOL CURRICULUM, PROTECTING AGAINST COMPELLED SPEECH, AND PERMITTING INDIVIDUAL OPT-OUTS

- A. No school district, public school, or governmental entity responsible for the oversight of public secondary or elementary schools, including public charter schools only with respect to subsection (A)(2) of this section, shall:
 - (1) Permit teachers or administrators to require or make part of a course or award a grade or course credit, including extra credit, for:
 - i. A student's political activism, lobbying, or efforts to persuade members of the legislative or executive branch at the federal, state, or local level to take specific actions by direct communication; or
 - ii. Participation in any internship, practicum, or similar activity involving social or public-policy advocacy.
 - (2) Direct or otherwise compel a teacher, administrator, or student personally to affirm, adopt, or adhere to any belief or concept that:
 - i. The United States or the state of [STATE NAME] is fundamentally or irredeemably racist or sexist;
 - ii. An individual, by virtue of sex, race, ethnicity, religion, color, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

- iii. An individual, by virtue of sex, race, ethnicity, religion, color, or national origin, should be blamed for actions committed in the past by other members of the same sex, race, ethnicity, religion, color, or national origin; or
- iv. An individual's moral character is necessarily determined, in whole or in part, by his or her sex, race, ethnicity, religion, color, or national origin.

[NOTE: States that wish to implement a more expansive law may include more prescriptive language to guide curriculum, beyond that merely protecting against compelled speech. One approach would be to include serial, severable listing of prohibited action items—e.g., “(a) promote, (b) advance, (c) inculcate” the aforementioned concepts. Legislatures may wish to exempt public charter schools from this requirement, in order to promote educational pluralism, given that charter school enrollment is not mandatory; but in such cases, ensuring adequate transparency is paramount to inform parental choice.]

- (3) Use public funds to contract with, hire, or otherwise engage speakers, consultants, diversity trainers, and other persons:
 - i. To engage students, teachers, administrators, and other employees in activism or advocacy as described in subsection (A)(1) of this section;
 - ii. To direct or otherwise compel a teacher, administrator, or student personally to affirm, adopt, or adhere to any belief or concept described in subsection (A)(2) of this section; or
 - iii. To advocate concepts described in subsection (A)(2) of this section, unless:
 - a. The school expressly makes clear that it does not sponsor, approve, or endorse such concepts or materials; and
 - b. The school affords students, teachers, administrators, and other employees the opportunity to opt out of any speeches by or sessions with such outside contractors, as specified under subsection (B) of this section.

B. No school district, public school, or governmental entity responsible for the oversight of public secondary or elementary schools may require a student, teacher, administrator, or other employee of a school district, or public school to attend or participate in a training, seminar, continuing education, orientation, or therapy that promotes any concept described in subsection (A)(2) of this section or any combination of these concepts. Public charter schools are excluded from this subsection, except as otherwise constrained by subsection (A)(2).

C. Nothing in this section shall be construed as prohibiting:

- (1) Speech protected by the First Amendment of the U.S. Constitution or [Art. # of the State Constitution];
- (2) Voluntary attendance in a training session, seminar, continuing education, orientation, or therapy, provided that no inducement or coercion for such attendance exists;
- (3) Access to sources on an individual basis that advocate concepts described in subsection (A)(2) of this section for the purpose of research or independent study; or

- (4) Discussion of concepts described in subsection (A)(2) of this section or the assignment of materials that incorporate such concepts for educational purposes, provided that the public school expressly makes clear that it does not sponsor, approve, or endorse such concepts or materials.
- D. The attorney general or the district or county attorney for the district or county in which an alleged violation of this section occurs may initiate a suit in the district or county court in the jurisdiction in which the school district, public school, public charter school, or governmental entity responsible for the oversight of public secondary or elementary schools is located for the purpose of complying with this section. [NOTE: some state legislatures may also wish to delegate enforcement authority to the state superintendent of public education or other enforcement authorities, depending on executive-branch structure; or to create private rights of action to enforce.]
- E. An attorney acting on behalf of a school district, public school, public charter school, or governmental entity responsible for the oversight of public secondary or elementary schools may request a legal opinion of the county or district attorney or the attorney general as to whether a proposed use of school resources would violate this section.

SECTION 4: SEVERABILITY

- A. The provisions of this act are hereby declared to be severable. If any provision of this act or the application of such provision to any person or circumstance is declared or held to be invalid for any reason, such declaration or holding shall not affect the validity of the remaining portions of this act and the application of its provisions to any other persons or circumstances.

Endnotes

- ¹ Greg Piper, “Family Sues School That Won’t Let Student Out of Class Promoting Anti-White Racism,” *The College Fix*, Dec. 24, 2020; Sam Dorman, “Nevada Charter School’s Students Were Instructed to Link Aspects of Their Identity with Oppression: Lawsuit,” *Fox News*, Dec. 23, 2020.
- ² Joshua Dunn, “Critical Race Theory Collides with the Law,” *Education Next*, May 19, 2021.
- ³ Christopher F. Rufo, “Woke Elementary,” *City Journal*, Jan. 13, 2021.
- ⁴ Christopher F. Rufo, “Bad Education,” *City Journal*, Feb. 11, 2021.
- ⁵ Christopher F. Rufo, “Failure Factory,” *City Journal*, Feb. 23, 2021.
- ⁶ Christopher F. Rufo, “‘Antiracism’ Comes to the Heartland,” *City Journal*, Jan. 19, 2021.
- ⁷ Christopher F. Rufo, “The Child Soldiers of Portland,” *City Journal* (Spring 2021).
- ⁸ Christopher F. Rufo, “Radicals in the Classroom,” *City Journal*, Jan. 5, 2021.
- ⁹ Parents, too, have not been immune from the woke educational onslaught. A New York school recently sent letters to parents encouraging them to embark on the journey of “white confession” to achieve the subversion of “white authority” and eventual “white abolitionism.” See Christopher F. Rufo, “Gone Crazy,” *City Journal*, Feb. 18, 2021.
- ¹⁰ “Americans Who Have Heard of Critical Race Theory Don’t Like It,” *The Economist*, June 17, 2021.
- ¹¹ Eli Yokley, “Many GOP Voters Hold Strong Views on Critical Race Theory. Democrats? Not So Much,” *Morning Consult*, June 23, 2021.
- ¹² Parents Defending Education, “Poll: Americans Overwhelmingly Reject ‘Woke’ Race and Gender Policies in K–12 Education,” May 10, 2021.
- ¹³ Sam Dorman, “Virginia Parents Sue School District over Alleged Racial Discrimination, Free Speech Violations,” *Fox News*, June 2, 2021.
- ¹⁴ Rudy Miller, “Parents Sue over Black Lives Matter Lessons in Lehigh Valley School District,” *Lehighvalleylive.com*, June 16, 2021.
- ¹⁵ Douglas Belkin and Jacob Gershman, “Federal Lawsuits Say Antiracism and Critical Race Theory in Schools Violate Constitution,” *Wall Street Journal*, July 1, 2021.
- ¹⁶ Lee Brown, “Opponents of ‘Critical Race Theory’ Win Texas School Board Election,” *New York Post*, May 3, 2021.
- ¹⁷ See Christopher F. Rufo, CRT Legislation Tracker, <https://christopherrufo.com/crt-tracker> (updated regularly).
- ¹⁸ H.B. 2898 (signed June 30, 2021); H.B. 2906 (signed July 9, 2021).

- ¹⁹ S.B. 627 (became Act 1100 without governor's signature, May 3, 2021).
- ²⁰ H.B. 377 (signed Apr. 28, 2021).
- ²¹ H.J. 1211 (signed June 8, 2021).
- ²² H.B. 2 (signed June 25, 2021).
- ²³ H.B. 1775 (signed May 7, 2021).
- ²⁴ S.B. 623 (signed May 25, 2021).
- ²⁵ H.B. 3979 (signed June 15, 2021).
- ²⁶ See, e.g., Matt Papaycik, "Florida Education Leaders Ban 'Critical Race Theory' from Being Taught in K-12 Schools," 5WPTV, June 9, 2021.
- ²⁷ For a running list of proposed and enacted legislation in this space, see Rufo, CRT Legislation Tracker.
- ²⁸ Christopher F. Rufo, "Battle over Critical Race Theory," *Wall Street Journal*, June 27, 2021.
- ²⁹ Colleen Flaherty, "Legislating Against Critical Race Theory," *Inside Higher Ed*, June 9, 2021; "Should PA Schools Adopt Critical Race Theory Curriculum? Pro/Con," *Philadelphia Inquirer*, June 10, 2021; Kmele Foster et al., "We Disagree on a Lot of Things. Except the Danger of Anti-Critical Race Theory Laws," *New York Times*, July 5, 2021.
- ³⁰ Rufo, "Battle over Critical Race Theory."
- ³¹ See Kimberlé Williams Crenshaw, "The First Decade: Critical Reflections, or 'A Foot in the Closing Door,'" 49 *UCLA Law Review* 1343, 1361 (2002) ("Sometime toward the end of the interminable winter of 1989, we settled on what seemed to be the most telling marker for this peculiar subject. We would signify the specific political and intellectual location of the project through 'critical,' the substantive focus through 'race,' and the desire to develop a coherent account of race and law through the term 'theory'... We decided to go for broke. If we were going to give this inchoate thing a name, let it be a proper sign on the intellectual landscape: Critical Race Theory. (I had this preoccupation at the time about the politics of proper nouns, having just won a battle with the *Harvard Law Review* about capitalizing 'Black' when used as a racial identifier.) So the name Critical Race Theory, now used as interchangeably for race scholarship as Kleenex is used for tissue, was basically made up, fused together to mark a possibility").
- ³² Duncan Kennedy and Karl E. Klare, "A Bibliography of Critical Legal Studies," 94 *Yale Law Journal* 461 (1984); Duncan Kennedy, *Lizard* (1984).
- ³³ See, e.g., Karl Llewellyn, "Some Realism About Realism: Responding to Dean Pound," 44 *Harvard Law Review* 1222 (1931).
- ³⁴ Max Horkheimer, "Traditional and Critical Theory" (1937), in idem, *Critical Theory: Selected Essays* (New York: Continuum, 1972), pp. 221–22.

- 35 Kimberlé Crenshaw et al., eds., *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995), pp. xiii–xxxii; Jean Stefancic and Richard Delgado, *Critical Race Theory: An Introduction* (New York: New York University Press, 2011), pp. 4–5.
- 36 Richard Delgado, “The Imperial Scholar: Reflections on a Review of Civil Rights Literature,” 132 *University of Pennsylvania Law Review* 561, 566 (1984); Harlon Dalton, “The Clouded Prism,” 22 *Harvard Civil Rights–Civil Liberties Law Review* 435, 441 (1987).
- 37 Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview, 1993), p. 6; Cheryl Harris, “Whiteness as Property,” 106 *Harvard Law Review* 1707 (1993); Kimberlé Crenshaw, “Race Liberalism and the Deradicalization of Racial Reform,” 130 *Harvard Law Review* 2298 (2017).
- 38 Crenshaw et al., *Critical Race Theory*, pp. xiii–xxxii.
- 39 97 *Teachers College Record* 47 (1995).
- 40 Gloria Ladson-Billings, “Just What Is Critical Race Theory and What’s It Doing in a Nice Field Like Education?” *International Journal of Qualitative Studies in Education* 11, no. 1 (1998): 7–24.
- 41 Though it should be noted that “critical pedagogy” developed independently and partly in advance of Critical Race Theory, it has since experienced significant cross-pollination with critical race scholarship. See, generally, Paulo Freire, *Pedagogy of the Oppressed* (New York: Continuum, 1970); bell hooks, *Teaching to Transgress: Education as the Practice of Freedom* (New York: Routledge, 1994), pp. 45–57 (discussing Freire); Edward Taylor, David Gillborn, and Gloria Ladson-Billings, eds., *Foundations of Critical Race Theory in Education* (New York: Routledge, 2015); Adrienne D. Dixon, Celia K. Rousseau Anderson, and Jamel K. Donnor, eds., *Critical Race Theory in Education: All God’s Children Got a Song* (New York: Routledge, 2017).
- 42 Peter McLaren, *Life in Schools* (Boston: Pearson Education, 1998), pp. 211, 214.
- 43 Caitlin O’Kane, “Teachers Union Defends ‘Honest History’ amid Critical Race Theory Bans,” CBS News, July 9, 2021.
- 44 National Education Association, New Business Item 39, June 30, 2021 (adopted as modified). See also Christopher F. Rufo, “Going All In,” *City Journal*, July 15, 2021.
- 45 E.g., Ibram X. Kendi, *How to Be an Antiracist* (New York: One World, 2019).
- 46 E.g., Robin DiAngelo, *White Fragility: Why It’s So Hard for White People to Talk About Racism* (Boston: Beacon, 2018).
- 47 See, e.g., Aaron Silbarium, “How Critical Race Theory Led to Kendi,” *Washington Free Beacon*, July 14, 2021 (pointing to linkage between Kendi’s and DiAngelo’s arguments with Critical Race Theory antecedents).
- 48 Jay Schalin, “The Politicization of University Schools of Education: The Long March Through the Education Schools,” James G. Martin Center, February 2019.

- ⁴⁹ Ibid.
- ⁵⁰ “Woke Schooling: A Toolkit for Concerned Parents,” issue brief, Manhattan Institute, June 17, 2021.
- ⁵¹ Crenshaw, “The First Decade,” 1361.
- ⁵² See, e.g., Keith E. Whittington, “Banning ‘Critical Race Theory’ Would Be Bad for Conservatives, Too,” *Washington Post*, June 30, 2021; Ronald J. Krotoszynski Jr., “Laws Against Teaching Critical Race Theory in College Are Unconstitutional,” *Washington Post*, May 26, 2021.
- ⁵³ Cf. James R. Copland, *The Unelected: How an Unaccountable Elite Is Governing America* (New York: Encounter, 2020).
- ⁵⁴ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding unconstitutional New Hampshire’s attempt to require citizens to show—and not obscure—the “Live Free or Die” motto on state license plates).
- ⁵⁵ *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).
- ⁵⁶ 319 U.S. at 642.
- ⁵⁷ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).
- ⁵⁸ See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (“Government employers, like private employers, need a significant degree of control over their employees’ words and actions”); *Mayer v. Monroe County Community School*, 474 F.3d 477 (7th Cir. 2007) (upholding dismissal of public school teacher fired for refusing to follow prescribed public school curriculum); *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005) (denying First Amendment challenge to state legislature’s decision not to fund a certain textbook). But cf. *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down state statute mandating teaching of “creationism” in public schools as violation of First Amendment’s Establishment Clause); *Board of Education v. Pico*, 457 U.S. 853 (1982) (divided Court allowed lawsuit to proceed involving challenge to local school board decision to remove books from middle and public high school library).
- ⁵⁹ See *Brown v. Chicago Board of Education*, 824 F.3d 713 (7th Cir. 2016) (upholding discipline of public school teacher for using racial slur in the classroom); *Board of Education v. Wilder*, 960 P.2d 695 (Colo. 1998) (upholding dismissal of public school teacher for showing unapproved R-rated movie containing violence, drug use, profanity, and nudity).
- ⁶⁰ See, e.g., Andrew Dunn, “State Board of Education Rewrites Social Studies Standards to Focus on Racism, Discrimination,” *Carolina Journal*, Feb. 4, 2021; editorial, “California’s Proposed New Ethnic Studies Curriculum Is Jargon-Filled and All-Too-PC,” *Los Angeles Times*, Aug. 4, 2019.
- ⁶¹ *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985).

- ⁶² Indeed, the seminal Supreme Court case affirming public universities’ special academic freedom, *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), originated as a challenge to a New York Red Scare–era government-mandated “loyalty oath” requiring faculty to forswear allegiance to the Communist Party and other “subversive” organizations.
- ⁶³ See *Keyishian*, 385 U.S. at 604 (invalidating speech-adjacent university regulation based on “extraordinary ambiguity” and “vagueness”).
- ⁶⁴ Cf., generally, Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure* (New York: Penguin, 2018).
- ⁶⁵ Foster et al., “We Disagree on a Lot of Things.”
- ⁶⁶ S.B. 623 (signed May 25, 2021) (emphasis added).
- ⁶⁷ For a fuller discussion, see Max Eden, “The Misguided Argument Against Bans on Teaching Critical Race Theory,” *Newsweek*, July 9, 2021.
- ⁶⁸ See, e.g., Arkansas S.B. 627 (became Act 1100 without governor’s signature, May 3, 2021) (defining “divisive concepts” in state law prohibiting various employee trainings by state government entities).
- ⁶⁹ See, e.g., *Chiras v. Miller*, 432 F.3d 606 (denying First Amendment challenge to state legislature’s decision not to fund a certain textbook).
- ⁷⁰ See Pulitzer Center, The 1619 Project Curriculum.
- ⁷¹ See, e.g., Nikole Hannah-Jones, “Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True,” *New York Times Magazine*, Aug. 14, 2019.
- ⁷² See Mike Gonzales, “‘1619’ Pulitzer Will Boost Socialist Teaching in Schools,” Heritage Foundation, May 11, 2020. Some recent Critical Race Theory legislation, such as that signed into law in Texas, has also sought to ensure that schools do not evade state curricular and other school oversight by receiving donated materials from private entities like the Pulitzer Center. Texas’s recently enacted H.B. 3979 specifies: “No private funding shall be accepted by state agencies, school district, campuses, open-enrollment charter schools, or school administrations for the purposes of curriculum development, purchase or choice of curricular materials, teacher training, or professional development pertaining to courses on Texas, United States, and world history, government, civics, social studies, or similar subject areas.”
- ⁷³ This is the approach taken, for example, by Arizona’s enacted H.B. 2898.
- ⁷⁴ See *ibid.* (codified at Arizona Revised Statutes 15-717.02 (D), (F)).
- ⁷⁵ Barbara Applebaum, “Comforting Discomfort as Complicity: White Fragility and the Pursuit of Invulnerability,” *Hypatia* 32, no. 4 (2020): 862–75; Gail B. Griffin, “Speaking of Whiteness: Disrupting White Innocence,” *Journal of the Midwest Modern Language Association* 31, no. 3 (Spring 1998): 3–14.