Critical Erase Theory: The Assault on Public School Curriculum

I. Introduction

On July 26, 2021, a failed school board candidate took to the podium at a public school board meeting for the Grapevine-Colleyville Independent School District (GCISD), located in northern Texas.[1] His comments took aim at Dr. James Whitfield, a recently appointed principal at Colleyville Heritage High School and a black man.[2] The speaker's comments were personal and accusatory; against meeting rules, he referred to Whitfield by name four times.[3] He claimed Whitfield was promoting Critical Race Theory (CRT), "encouraging the disruption and destruction of our district," and called for the principal's job.[4] Audience members cheered; about a month later, Dr. Whitfield was placed on administrative leave.[5] Since then, the school board has reached a separation agreement to terminate Whitfield's contract.[6]

In reality, Whitfield never taught Critical Race Theory in the high school.[7] He had written an open letter, as principals sometimes do, following the killing of George Floyd.[8] In the letter, Whitfield denounced systemic racism in society; he never advocated for the "disruption or

1. Brian Lopez, *How a Black High School Principal Was Swept into a 'Critical Race Theory' Maelstrom in a Mostly White Texas Suburb*, TEX. TRIB. (Sept. 20, 2021), https://www.texastribune.org/2021/09/18/colleyville-principal-critical-race-theory/; Kevin Reece, *Students Held Walkout in Support of Colleyville Heritage HS Principal Sidelined Amid Critical Race Theory Complaints*, WFAA+ (Sept. 10, 2021, 6:50 PM CDT), https://www.wfaa.com/article/news/local/students-held-walkout-in-support-of-colleyville-heritage-hs-principal-amid-critical-race-theory-complaints/287-55584e9d-932f-426c-b1dc-0ec4f3cf0497.

2. Lopez, *supra* note 1.

3. *See id.*

4. *Id.*

5. *Id.*

6. Emily Donaldson, *Former Colleyville Principal James Whitfield Drops Out of State Board of Education Race*, DALL. MORNING NEWS (Dec. 29, 2021, 10:42 AM), https://www.dallasnews.com/news/education/2021/12/29/former-colleyville-principal-james-whitfield-drops-out-of-state-board-of-education-race/.

7. *See* Lopez, *supra* note 1.

8. *See id.*

destruction of the school district" as accused.[9] Notably, years earlier, Whitfield had been reprimanded for having a picture on his private Facebook page of him and his wife kissing; he claims the parent complaint was racially motivated because his wife is white.[10] In any case, Whitfield found himself removed and effectively fired from the school he once led because of a newfound frenzy over CRT.[11]

While the Colleyville School Board is tilting at the windmill of Critical Race Theory at Whitfield's expense, other school boards have found themselves the target of citizens on their own quixotic quests. Brenda Stephens has been a school board member in Orange County, North Carolina for two decades.[12] Stephens has been alarmed by the intimidation and angry disruptions that characterize the community meetings in Orange County now,[13] including protests led by the Proud Boys at the district's public forums.[14] "There's so much bullying and threats," Stephens said.[15] The atmosphere is such that Stephens decided to buy a gun and take concealed-carry firearms training.[16]

Stephens is not alone in fearing for her safety as a public education official. Similarly tense meetings have occurred across the country,[17] such as a Loudoun County, Virginia, meeting where local law enforcement declared an unlawful assembly[18] and the aforementioned GCISD meeting.[19]

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9. *See id.*

10. *See id.*

11. *Id.*

12. Andrew Ujifusa, *School Boards, 'Domestic Terrorism,' and Free Speech: Inside the Debate*, EDUCATIONWEEK (Oct. 20, 2021), https://www.edweek.org/policy-politics/school-boards-domestic-terrorism-and-free-speech-inside-the-debate/2021/10 [hereinafter Ujifusa, *Inside the Debate*].

13. *Id.*

14. Alexandria Sands, *'It's Time to Ramp up Pressure.' Why the Proud Boys Say They Showed up to a New Hanover School Board Meeting*, PORT CITY DAILY (Wilmington, N.C.) (Nov. 10, 2021), https://portcitydaily.com/local-news/education/2021/11/10/its-time-to-ramp-up-pressure/.

15. Ujifusa, *Inside the Debate*, *supra* note 12.

16. *Id.*

17. Andrew Ujifusa, *School Boards Ask Biden to Review Threats and Violence as Possible 'Domestic Terrorism'*, EDUCATIONWEEK (Sept. 30, 2021), https://www.edweek.org/policy-politics/school-boards-ask-biden-to-review-threats-and-violence-as-possible-domestic-terrorism/2021/09 [hereinafter Ujifusa, *School Boards Ask Biden*].

18. Zachary Evans, *School Board Meeting Cut Short, Parent Arrested After Fiery Speech on CRT, Transgender Policy*, YAHOO! (June 22, 2021), https://www.yahoo.com/entertainment/school-board-meeting-cut-short-011222151.html.

The environment has become so dire that the National School Boards Association sent a letter to President Joe Biden in September 2021 characterizing these acts as "equivalent to a form of domestic terrorism and hate crimes" and encouraging the enforcement of the PATRIOT Act[20] against individuals who terrorize school board members.[21] In response, the Department of Justice commissioned a task force, including the FBI, to address how best the "federal enforcement tools can be used."[22] This federal action demonstrated its recognition of the predicaments plaguing school boards.[23]

Furor is especially heightened, as anger concerning critical race theory collides with outcry over school COVID-19 policies.[24] Regardless, school boards, once the "most local of all forms of American governance . . . have turned into . . . ground zero of the nation's political and cultural debates."[25] With increased attention comes increased aggravation, intimidation, and fear for elected officials' safety.[26]

The effects of the ire directed at CRT, however, are not unique to public grade-schools. Many states have taken steps to limit the teaching of its tenets in both grade schools and higher-education.[27] While discussing Alabama's proposed legislation targeting higher education, professors at the University of Alabama referred to the state's effort as "an existential threat to everyone in the room."[28] An education professor urged the body to make

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19. *See* Reece, *supra* note 1.

20. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act Of 2001, Pub. L. No. 107-56, 115 Stat. 272.

21. Ujifusa, *School Boards Ask Biden*, *supra* note 17.

22. *FBI and Justice Department Will Help Protect School Employees Amid Uptick in Violence over COVID-19 Policies and Critical Race Theory*, CBS NEWS (Oct. 5, 2021, 10:43 AM), https://www.cbsnews.com/news/garland-fbi-school-employees-violence-threats/.

23. *Id.*

24. *Id.*

25. Stephen Sawchuk, *Why School Boards Are Now Hot Spots for Nasty Politics*, EDUCATIONWEEK (July 29, 2021), https://www.edweek.org/leadership/why-school-boards-are-now-hot-spots-for-nasty-politics/2021/07.

26. *See*, *e.g.*, Ujifusa, *School Boards Ask Biden*, *supra* note 17.

27. *See* sources cited *infra* note 69.

28. Ruth Serven Smith, *University of Alabama Faculty Say Laws Targeting Critical Race Theory Are 'Existential Threat'*, AL.COM (Oct. 20, 2021, 6:25 AM), https://www.al.com/news/2021/10/university-of-alabama-faculty-say-laws-targeting-critical-race-theory-are-existential-threat.html.

a preemptive stand against the law.[29] Not to do so would be "cowardice bullshit" given the proposed legislation would "fundamentally attack[] what we are supposed to be about" and affect each professor "in terms of academic freedom."[30] Alabama's professors are not alone; the American Association of University Professors condemned efforts across the nation to "ban, limit, or distort the teaching of history and related academic subjects."[31]

As will be discussed throughout the rest of this Comment, courts have treated public grade schools and universities as unique contexts which guides how efforts to conscribe curriculum can be enacted—or defeated. However, it is plain to see that the furor over this topic impacts countless individuals and institutions. The debate stretches from kindergarten classrooms to university lecture halls and impacts students, parents, teachers, administrators, professors, and elected officials.[32]

A. What Is Critical Race Theory and Why Is It the Target of Such a Targeted Campaign?

Critical race theory (CRT) can best be thought of as a lens to *critically* examine any social structure or institution by analyzing how race and racism shaped the structure or institution.[33] Legal scholars Derrick Bell, Kimberlé Crenshaw, and Richard Delgado initially developed the theory of CRT as a tool for legal analysis in the late 1970s and early 1980s.[34] Importantly, as its proponents note, critical race theory is not a curriculum

29. *Id.*

30. *Id.*

31. *Statement on Legislation Restricting Teaching About Race*, AM. ASS'N OF UNIV. PROFESSORS (Aug. 4, 2021), https://www.aaup.org/news/statement-legislation-restricting-teaching-about-race.

32. *See supra* Part I.

33. *See, e.g.*, Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333, 334 n.26 (2006); Soo Kim, *What Is Critical Race Theory and Why Do Some People Want to Ban It?*, NEWSWEEK (Apr. 30, 2021 12:20 PM EDT), https://www.newsweek.com/what-critical-race-theory-why-do-some-want-ban-1587389; Jack Dutton, *Critical Race Theory Is Banned in These States*, NEWSWEEK (June 11, 2021 6:57 AM EDT), https://www.newsweek.com/critical-race-theory-banned-these-states-1599712.

34. Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUCATIONWEEK (May 18, 2021), https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05; *see also* Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door"*, 49 UCLA L. REV. 1343, 1345–65 (2002) (tracing the origins and emergence of CRT).

in and of itself; it is a method of analyzing other institutions.[35] Just as a literary critic may employ feminist criticism as a tool to highlight the treatment of women in *Wuthering Heights*,[36] a critical race theorist may employ CRT to highlight how current-day, de facto segregation in cities was propelled by legal and political decisions made by an overwhelmingly white power structure.[37] Thus, CRT proponents argue that certain rhetoric condemning CRT—like government officials claiming it teaches that one race is inherently superior to another—[38]entirely mischaracterizes CRT.[39]

Instead, "critical race theory" is used by its critics as a convenient political catch-all term to encompass topics they find divisive, like anti-racism and social justice.[40] The opposition to CRT largely, but not exclusively, comes from Republicans.[41] This, in part, stems from former-President Donald Trump's denouncement of the 1619 Project and his administration's subsequent creation of the 1776 Commission.[42] Some state statutes include sections derived nearly verbatim from the Trump

35. Crenshaw, *supra* note 34, at 1356.

36. *See generally* EMILY BRONTË, WUTHERING HEIGHTS (1847) (chronicling a nonfiction story in which the depiction and treatment of women is a driving force).

37. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA, at viii (2017); Andre M. Perry & David Harshbarger, *America's Formerly Redlined Neighborhoods Have Changed, and So Must Solutions to Rectify Them*, BROOKINGS (Oct. 14, 2019), https://www.brookings.edu/research/americas-formerly-redlines-areas-changed-so-must-solutions/.

38. *See, e.g.*, 70 OKLA. STAT. § 24-157(B)(1)(a) (2022) (prohibiting teachers from teaching that one race is inherently superior to another).

39. *See* Sawchuk, *supra* note 34.

40. *See id.*

41. Bryan Anderson, *Explainer: So Much Buzz, but What Is Critical Race Theory?*, AP NEWS (June 24, 2021), https://apnews.com/article/what-is-critical-race-theory-08f5d0a0489c7d6eab7d9a238365d2c1.

42. *See id.*; Combatting Race and Sex Stereotyping, Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 28, 2020); Nicole Gaudiano, *Trump Creates 1776 Commission to Promote 'Patriotic Education'*, POLITICO (Nov. 2, 2020, 5:36 PM EST), https://www.politico.com/news/2020/11/02/trump-1776-commission-education-433885. In her recent Note, author Jennie Hill characterized Christopher Rufo as "the architect of the anti-CRT movement" and explained how his appearance on *Tucker Carlson Tonight* served as an impetus for Trump's Executive Order. Jennie A. Hill, Note, *Legitimate State Interest or Educational Censorship: The Chilling Effect of Oklahoma House Bill 1775*, 75 OKLA. L. REV. 385, 389 (2023). Rufo subsequently helped the White House draft this Executive Order. *Id.*

Administration's prohibited "concepts" language.[43] Additionally, numerous conservative think tanks, such as Citizens for Renewing America, have expanded on Trump's example and drafted model legislation, subsequently used by states including Idaho.[44] While protecting students from "critical race theory" is their stated purpose, state legislators are really using CRT as pretext to eliminate educational topics in schools that they disagree with.

Statistics reveal conservative media especially highlights the issue.[45] In June 2021, Fox News mentioned the term "critical race theory" 993 times,[46] compared to only 297 and 278 times on CNN and MSNBC, respectively.[47] Fox News went on to mention the term 921 times in July 2021, but it largely reduced its coverage of the topic to only 150 instances in September.[48] That number, however, stands in stark contrast to 2020 when Fox News mentioned critical race theory on-air only 132 times in twelve months.[49] Likewise, One America News and Newsmax, both conservative alternatives to Fox News, each covered critical race theory vociferously in June 2021.[50]

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43. *See* Sarah Schwartz, *Who's Really Driving Critical Race Theory Legislation? An Investigation*, EDUCATIONWEEK (July 19, 2021), https://www.edweek.org/policy-politics/whos-really-driving-critical-race-theory-legislation-an-investigation/2021/07. *Compare* Combatting Race and Sex Stereotyping, 85 Fed. Reg. at 60685, *with* 70 OKLA. STAT. § 24-157.

44. Schwartz, *supra* note 43; Sawchuk, *supra* note 34.

45. Lis Power, *Fox News' Obsession with Critical Race Theory, by the Numbers*, MEDIA MATTERS FOR AM., https://www.mediamatters.org/fox-news/fox-news-obsession-critical-race-theory-numbers (last updated July 14, 2021); Jake Lahut, *Fox News Has Mentioned 'Critical Race Theory' Nearly 1300 Times Since March, According to Watchdog Study*, BUS. INSIDER (June 15, 2021, 10:33 AM), https://www.businessinsider.com/fox-news-critical-race-theory-mentions-thousand-study-2021-6.

46. Jeremy Barr, *Critical Race Theory Was the Hot Topic on Fox News This Summer. Not So Much Anymore*, WASH. POST (Oct. 6, 2021, 3:56 PM), https://www.washingtonpost.com/media/2021/10/06/fox-news-critical-race-theory/.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See id.*

Television News Network	Mentions of CRT in June	Mentions of CRT in September
Fox News[51]	993	150
One America News[52]	1,000+	208
Newsmax[53]	930	242
CNN[54]	297	54
MSNBC[55]	278	76

B. Summary of the Argument

The concurrent timing of the attack on Dr. James Whitfield[56] and the conservative media's emphasis on CRT is no coincidence.[57] The broad network of conservative media introduced their followers to a distorted version of CRT, which frightened them into believing it was being taught in all public schools, and so repeated the claim over thirty times a day throughout 2021's summer months.[58] Real-world consequences inevitably ensued. Whitfield's termination, and other heated school board meetings in North Carolina and Virginia, are just some instances of countless conflicts spawned by CRT throughout the country.[59] Perhaps more troubling, this effort highlights the weaknesses of curricular protections in current case law and the need for rethinking school board elections.

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51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *See* Lopez, *supra* note 1.
57. Dr. Whitfield came under fire for "teaching" critical race theory at a school board meeting in July after leading conservative television stations had mentioned the term nearly 1,000 times each during the month of June. *See* Barr, *supra* note 46.
58. *See* Power, *supra* note 45; Barr, *supra* note 46.
59. *See, e.g.*, Ujifusa, *Inside the Debate*, *supra* note 12; Ujifusa, *School Boards Ask Biden*, *supra* note 17; Evans, *supra* note 18; Smith, *supra* note 28; Andrea Zelinski, *Lone Star Parent Power: How One of the Nation's Toughest Anti-Critical Race Theory Laws Emboldened Angry Texas Parents Demanding Book Banning, Educator Firings*, THE 74 (Nov. 4, 2021), https://www.the74million.org/article/lone-star-parent-power-how-one-of-the-nations-toughest-anti-critical-race-theory-laws-emboldened-angry-texas-parents-demanding-book-banning-educator-firings/.

The recent legislative decisions concerning school curricula show how easily and quickly they can be manipulated by a small, coordinated, and hyperactive faction.[60] Politicians recognize that they can score political points with these likely voters by fighting the CRT boogeyman and pushing curriculum-based legislation.[61] In turn, school board elections will become loaded with divisive, partisan rhetoric. Administrators, teachers, and professors will be tasked with policing one another for teachings verging on prohibited concepts, creating a culture of mistrust. In the end, the children will end up the losers, failed by a system that is too-easily wielded as a political cudgel rather than remaining a non-partisan academic institution.

The underlying issue is not partisan in nature; it is rooted in judicial doctrine and in the design of our institutions.[62] While this Comment has, to this point, focused on conservative opposition to critical race theory, the overarching concern is not limited to any one political party. The crux of the issue is the ease with which the educational system was manipulated to the political ends of a select faction. Regardless of the existence of, or the value added to, our academic discourses by CRT, the rapidity and impetuousness with which the curriculum of millions of students in our country is being restricted should alarm all persons.

While CRT proved to be the animus this time, it will be a new political boogeyman next time. Perhaps public-school education on climate change is next, or the alteration of personal finance curriculum to accord with the economic views of a faction after that. The banning of books containing certain content and phrases has already been in effect.[63] Any education

60. *See* Sawchuk, *supra* note 34.

61. *See, e.g.*, Alex Seitz-Wald, *In Virginia, Republicans See Education, Curriculum Fears as a Path to Victory*, NBC NEWS (Oct. 17, 2021, 3:33 AM CDT), https://www.nbcnews.com/politics/elections/virginia-republicans-see-education-curriculum-fears-path-victory-n1281676.

62. *See infra* Part IV.

63. *See, e.g.*, Nora McGreevy, *Banned by Tennessee School Board, 'Maus' Soars to the Top of Bestseller Charts*, SMITHSONIAN MAG. (Feb. 2, 2022), https://www.smithsonianmag.com/smart-news/maus-becomes-bestseller-after-tennessee-school-ban-180979499/; Mike Hixenbaugh, *Banned: Books on Race and Sexuality Are Disappearing from Texas Schools in Record Numbers*, NBC NEWS (Feb. 2, 2022, 10:56 AM CST), https://www.nbcnews.com/news/us-news/texas-books-race-sexuality-schools-rcna13886; Kaylee Olivas, *'What Did I Do?': OSDE Claims Former Norman High Teacher Taught Unlawful Racist Instruction, Exposed Students to Sexual Content*, KFOR (Mar. 21, 2023, 6:14 PM CDT), https://kfor.com/news/local/osde-claims-former-norman-high-teacher-taught-unlawful-racist-instruction-exposed-students-to-sexual-content/.

provided on a topic that verges on political controversy—biology, physics, economics, civics, literature, and nearly any other educational subject—has the potential to inflame, and thus, incite to action a sizable group of individuals in our nation.[64] Add in a concerted media effort to stoke the flames of division, and the result is exactly what was witnessed in 2021:a knee-jerk political reaction to appease a hyper-interested faction that makes the jobs of educators more difficult and the education of students less robust.

This Comment began with an examination of this issue through the lens of a recent trend of banning CRT in education. In Part II, this Comment analyzes specific legislative and executive actions targeting school curricula and universities. Part III surveys the current state of the law that enables political action to affect curricular decisions in both public schools and higher education. The Part argues that court decisions have produced sufficiently strong safeguards of academic freedom for institutions of higher learning, but have not provided those same safeguards for public grade schools. As a result, public school curricula are vulnerable to the exact action discussed in Part I. Part IV offers solutions; while these are neither definitive nor foolproof, this author hopes they provide a blueprint for improving the current state of curricular protection in the United States. Part V concludes.

II. The Legislative and Executive Action Taken in Response to Critical Race Theory

As of November 2021, nine states had passed legislation restricting, in some form, the teaching of racially charged subjects.[65] Twenty-five more states had legislation in progress.[66] Numerous other states and localities have imposed similar restrictions through executive action.[67] The situation

64. *See, e.g.*, Hixenbaugh, *supra* note 63; Olivia B. Waxman, *'Critical Race Theory Is Simply the Latest Bogeyman.' Inside the Fight over What Kids Learn About America's History*, TIME (July 16, 2021, 7:42 PM EDT), https://time.com/6075193/critical-race-theory-debate/ (identifying past examples of public school curriculum being limited in an attempt to combat divisive subjects in the classroom).

65. *See* Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS: FIXGOV (Nov. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/.

66. *Statement on Legislation Restricting Teaching About Race*, *supra* note 31.

67. *See* Ray & Gibbons, *supra* note 65 (providing an extensive appendix with "[l]egislative and administrative actions regarding CRT").

is rapidly developing, however, and this Comment does not profess to be the definitive collection of all the enacted, proposed, and discussed governmental responses. The intricacies of each state's actions vary, but much of the language is similar.[68] The following is a brief review of some of the most emblematic approaches employed by states.[69]

A. State-Specific Legal Bars

Oklahoma's House Bill 1775[70] is a prime example of state legislation that attempts to restrict both public school and higher education instructional content in a way that avoids a constitutional challenge on vagueness grounds. The bill, enacted into law in May 2021, delineates certain "concepts" which are prohibited from being made "part of a course" within public grade schools.[71] Banned concepts include teaching that "one race or sex is inherently superior to another race or sex,"[72] that "an individual's moral character is necessarily determined by his or her race or sex,"[73] and that "any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex."[74] The law also takes aim at higher education by prohibiting students from being "required to engage in any form of mandatory gender or sexual diversity training"[75] and prohibiting any orientation that includes "race or sex stereotyping or a bias on the basis of race or sex."[76] Presumably, legislators carefully chose each word in the bill, but the application of those words remains practically vague .[77]

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68. For a more thorough examination of actions taken to ban critical race theory from schools, see Ray & Gibbons, *supra* note 65 and Schwartz, *supra* note 43.

69. *See, e.g.*, 70 OKLA. STAT. § 24-157 (2022); IDAHO CODE § 33-138 (2022); TEX. EDUC. CODE ANN. § 28.022(a)(4) (West 2021); FLA. STAT. ANN. § 1003.42 (West 2022); S.D. CODIFIED LAWS § 13-1-67 (2023); ARK. CODE ANN. § 25-1-901(1)(A) (West 2022).

70. H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021), https://www.sos.ok.gov/documents/legislation/58th/2021/1R/HB/1775.pdf (as approved by Gov. Stitt, May 7, 2021) (codified at 70 OKLA. STAT. § 24-157).

71. 70 OKLA. STAT. § 24-157(B)(1).

72. *Id.* § 24-157(B)(1)(a).

73. *Id.* § 24-157(B)(1)(e).

74. *Id.* § 24-157(B)(1)(g).

75. *Id.* § 24-157(A)(1).

76. *Id.*

77. *See* Janelle Stecklein, *Oklahoma Education Groups Say They Are Fielding Few Questions About State Law Banning Critical Race Theory*, NORMAN TRANSCRIPT (Oct. 25, 2021), https://www.normantranscript.com/oklahoma/oklahoma-education-groups-say-they-

Idaho's law[78] takes a slightly different tack. As an initial matter, the law states explicitly that "tenets . . . often found in 'critical race theory' . . . exacerbate and inflame divisions . . . in ways contrary to the unity of the nation and the well-being of the state of Idaho and its citizens."[79] Instead of making separate rules for grade schools and higher education like Oklahoma, Idaho groups them together.[80] Idaho prohibits either entity from "direct[ing] or otherwise compel[ling] students to personally affirm, adopt, or adhere to any of the following tenets,"[81] listing three substantially similar "tenets" to some of the "concepts" outlined in Oklahoma's law.[82]

Texas's law, true to its unofficial state motto,[83] is bigger in scope. Like Oklahoma, Texas prohibits the inclusion of certain concepts within a course[84] and prohibits certain diversity trainings in public schools related to race and sex.[85] Texas' law also prohibits so-called "action civics" that require or reward student participation in political activism.[86] The law also states that "a teacher may not be compelled to discuss a widely debated and currently controversial issue,"[87] and if a teacher chooses to do so, they must "explore the topic objectively and in a manner free from political bias."[88] Texas's law also forbids any curricular requirement for students to study the 1619 Project, a long-form journalistic project focusing on slavery's long history and enduring effects in America.[89]

Wisconsin has not enacted a law; in March 2022, Governor Tony Evers vetoed a CRT related bill passed by Wisconsin's Republican-controlled Assembly.[90] The failed legislation, however, reveals yet another approach

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are-fielding-few-questions-about-state-law-banning-critical-race/article_2e226798-0942-5d93-8026-8054130f8cc5.html.

78. IDAHO CODE § 33-138 (2022).

79. *Id.* § 33-138(2).

80. *See id.* § 33–138(3)(a).

81. *Id.*

82. *Compare id.* § 33-138(3)(a)(i)-(iii) *with* 70 OKLA. STAT. § 24-157(B)(1) (2022).

83. *See Why People Say "Everything's Bigger in Texas"*, TRIP TRIVIA (July 30, 2020), https://www.triptrivia.com/everythings-bigger-in-texas/XyB8z69wOwAGejBC.

84. TEX. EDUC. CODE ANN. § 28.0022(a)(4) (West 2021).

85. *Id.* § 28.0022(c).

86. *See id.* § 28.0022(a)(3)(C).

87. *Id.* § 28.0022(a)(1).

88. *Id.* § 28.0022(a)(2).

89. *Id.* § 28.0022(a)(4)(C).

90. *Evers Vetoes Republican Bill Banning Critical Race Theory*, AP NEWS (Feb. 4, 2022), https://apnews.com/article/business-wisconsin-race-and-ethnicity-racial-injustice-legislature-8db54c00be82e0183ac6badc2d4c0804.

in the wave of anti-CRT proposed legislative action. Along with the now-familiar prohibition on including certain concepts in curriculum,[91] Wisconsin's bill requires schools to publicly post all curricula on the school's and school board's website, and all schools must provide a physical copy of the curriculum upon request.[92] The bill passed the state's lower legislative body in this form.[93] One of the bill's lead authors initially included another section that prohibited certain terms, not just concepts.[94] Among the off-limits terms proposed were: "equity," "multiculturalism," "woke," "systemic racism," "social justice," and "abolitionist teaching."[95]

Florida initially bypassed the legislative process entirely, confronting the topic with its executive branch instead.[96] After failing to persuade the legislature to take action on the issue, Governor Ron DeSantis personally spoke to the State Board of Education and requested it enact a curricular restriction.[97] The Board listened, adopting a rule that emphasized the need to present "historical facts over 'fiction, projects, or theory masquerading as fact.'"[98] The rule requires factual and objective teaching on topics such as slavery and the Holocaust, but it expressly disallows the teaching of critical race theory or the 1619 Project.[99] Critics took issue with the rule's use of

91. S.B. 411, 2021-2022 Leg., § 1 (Wis. 2021), https://docs.legis.wisconsin.gov/2021/related/proposals/sb411.pdf.

92. *Id.* § 7.

93. *See* Scott Bauer, *Wisconsin Assembly Passes Critical Race Theory Ban*, AP NEWS (Sept. 28, 2021), https://apnews.com/article/business-wisconsin-education-race-and-ethnicity-racial-injustice-dc73ee7fd8962ea52f56eae2319055d5.

94. *See* Reid Wilson, *'Woke,' 'Multiculturalism,' 'Equity': Wisconsin GOP Proposes Banning Words from Schools*, THE HILL (Sept. 29, 2021, 5:13 PM ET), https://thehill.com/homenews/state-watch/574567-woke-multiculturalism-equity-wisconsin-gop-proposes-banning-words-from?rl=1.

95. *Id.*

96. Bobby Caina Calvan, *Florida Bans 'Critical Race Theory' from Its Classrooms*, AP NEWS (June 10, 2021), https://apnews.com/article/florida-race-and-ethnicity-government-and-politics-education-74d0af6c52c0009ec3fa3ee9955b0a8d.

97. Jeffrey S. Solochek, *Florida State Board of Education Bans the Use of Critical Race Theory in Schools*, EDUCATIONWEEK (June 10, 2021), https://www.edweek.org/policy-politics/florida-state-board-of-education-bans-the-use-of-critical-race-theory-in-schools/2021/06.

98. *Id.* (quoting Tom Grady, State Board of Education member).

99. *See id.*

the term "indoctrinate" when referring to teaching[100] and decried the move as politically-motivated.[101]

B. The Aftermath of Curricular Restrictions

These state actions have sown confusion and reaped resistance; school officials find it difficult to parse the language of the laws,[102] and the ACLU has already filed legal challenges in some states.[103] However, pursuing the issue has energized the Republican base and has proven to be a successful political tactic.[104] The weaponization of education policy seems likely to continue as long as CRT remains a cultural flashpoint and anger with school administrations' COVID-19 policies continues to simmer.

Given the cacophony of ire that led to these actions,[105] the ensuing confusion over the implementation of these legislative demands comes as little surprise. For example, just miles away from Whitfield's Colleyville Heritage High School, a neighboring Southlake-Carroll School District administrator came under criticism for her attempt to comply with a provision of Texas's law.[106] While leading a meeting on new guidelines for classroom libraries, Gina Peddy, the district's Executive Director of Curriculum and Instruction, spoke privately to a group of teachers about the implementation of Texas's recent law.[107] Unwittingly being recorded, Peddy made her newsworthy mistake, saying "make sure that if you have a book on the Holocaust, that you have one that has opposing, that has other perspectives."[108] She subsequently apologized, and the district clarified its

100. Calvan, *supra* note 96.

101. *See* Solochek, *supra* note 97.

102. *See, e.g.*, Mike Hixenbaugh & Antonia Hylton, *Southlake School Leader Tells Teachers to Balance Holocaust Books with 'Opposing' Views*, NBC NEWS (Oct. 15, 2021, 9:00 AM CDT), https://www.nbcnews.com/news/us-news/southlake-texas-holocaust-books-schools-rcna2965.

103. *See* Press Release, ACLU, ACLU of Oklahoma, Lawyers Committee File Lawsuit Challenging Oklahoma Classroom Censorship Bill Banning Race and Gender Discourse (Oct. 19, 2021) [hereinafter ACLU Lawsuit Press Release], https://www.aclu.org/press-releases/aclu-aclu-oklahoma-lawyers-committee-file-lawsuit-challenging-oklahoma-classroom.

104. Seitz-Wald, *supra* note 61.

105. *See* Ujifusa, *School Boards Ask Biden*, *supra* note 17.

106. *See* Hixenbaugh & Hylton, *supra* note 102.

107. *Id.*

108. *Id.*

official position by assuring the public this was not a proper application of the law.[109]

Yet, it is the curriculum administrator's other comments, along with her extreme example, that reveal the crux of the issue. Lamenting about the widespread confusion resulting from the law, Peddy alludes that "[n]o one knows how to navigate these waters" and told the teachers they are all "in the middle of a political mess."[110] Anticipating future battles over classroom libraries, Peddy promised to defend the teachers: "[I]f you think the book is OK, then . . . . whatever happens, we will fight it together."[111] Peddy's comments represent just one experience reacting to a state's curricular restriction. By no means is it the definitive account, but it is indicative of the atmosphere facing educators in states where these restrictions are being considered or are already in place. Prohibited concepts are relatively easy for lawmakers to define in legislation, but it is much harder for teachers to determine the boundaries of those concepts in the classroom.

In addition to the difficulties in applying the law in Texas, Oklahoma's law has already drawn a legal challenge from the American Civil Liberties Union.[112] The suit challenges the law as facially unconstitutional and argues the law as applied has a chilling effect within the classroom.[113] An ACLU staff attorney asserted the bill's ambiguous concepts and application to public universities were clear infirmities of the law.[114] While the legal challenge to Oklahoma's statute may be the first, it is far from likely to be the last litigation opposing these actions.[115]

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109. *Id.* The school obviously denounced Peddy's comments and reiterated that Holocaust denial was not presented as a viable, alternative view. *Id.*

110. Sarah Ruiz-Grossman, *Texas School Official Suggests Teaching Both Holocaust Books and 'Opposing' Views: Report*, YAHOO FIN. (Oct 14, 2021), https://finance.yahoo.com/news/texas-school-official-suggests-teaching-225600084.html.

111. *Listen: Southlake Teachers Shocked by Advice to Balance Holocaust Books with 'Opposing' Views* at 1:02, NBC NEWS (Oct. 14, 2021) (embedded video) (verbal statement by Gina Peddy), *in* Hixenbaugh & Hylton, *supra* note 102.

112. ACLU Lawsuit Press Release, *supra* note 103; Lauren Camera, *Federal Lawsuit Poses First Challenge to Ban on Teaching Critical Race Theory*, U.S. NEWS & WORLD REP. (Oct. 20, 2021), https://www.usnews.com/news/education-news/articles/2021-10-20/federal-lawsuit-poses-first-challenge-to-ban-on-teaching-critical-race-theory.

113. ACLU Lawsuit Press Release, *supra* note 103.

114. *Id.*

115. Camera, *supra* note 112.

Despite the early difficulties encountered by these laws, they appear to be part of a successful political strategy. In Virginia, the issue became central to the 2021 gubernatorial campaign.[116] Republican Glenn Youngkin won after making his promise to ban CRT in public schools one of the central messages in his campaign.[117] The move resonated with voters; exit polls showed education as the second-most important issue to voters,[118] and a quarter of voters cited it as the most important factor to them.[119] The issue is potent beyond Virginia, too, as anti-CRT policy points featured prominently in recent, successful school board and state elections.[120] As highlighted by a April 2023 Time article, anti-CRT messaging is "far from over" and will continue to play a significant role in future elections and policy decisions at the local, state, and national level.[121]

III. The Current State of "Academic Freedom" in Universities and Public Schools

At the outset, it must be noted that there is little consistency or clarity concerning court decisions related to "academic freedom" in either the higher education or public-school environments. As noted by one scholar, "Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles."[122] This makes some sense. Disputes in this area exist at the intersection of

116. Seitz-Wald, *supra* note 61.

117. *Id.*

118. Zack Beauchamp, *Did Critical Race Theory Really Swing the Virginia Election?*, VOX (Nov 4, 2021, 1:00 PM EDT), https://www.vox.com/policy-and-politics/2021/11/4/22761168/virginia-governor-glenn-youngkin-critical-race-theory; Ariel Edwards-Levy, *Independent Voters Favor Youngkin as He Clinches Victory in Virginia, CNN Exit Poll Shows*, CNN (Nov. 3, 2021, 5:01 PM EDT), https://www.cnn.com/2021/11/02/politics/virginia-exit-polls/index.html.

119. Beauchamp, *supra* note 118.

120. *See* Stephanie Saul, *Energizing Conservative Voters, One School Board Election at a Time*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/2021/10/21/us/republicans-schools-critical-race-theory.html; Joshua Zeitz, *Why the Virginia School Fight Might Just Be the Beginning*, POLITICO (Nov. 4, 2021, 1:30 PM EDT), https://www.politico.com/news/magazine/2021/11/04/why-the-virginia-school-fight-might-just-be-the-beginning-519507.

121. Olivia B. Waxman, *Exclusive: New Data Shows the Anti-Critical Race Theory Movement Is 'Far From Over'*, TIME (Apr. 6, 2023, 5:00 AM EDT), https://time.com/6266865/critical-race-theory-data-exclusive/.

122. J. Peter Byrne, *Academic Freedom: A 'Special Concern of the First Amendment'*, 99 YALE L.J. 251, 253 (1989).

numerous areas of law. Cases deal with the confluence of the First Amendment rights of students and educators,[123] institutional rights of universities and schools,[124] implications of teachers as public employees,[125] property rights in employment,[126] and the proper contours of state authority.[127] Given the convoluted jumble that such cases pose to courts, it is not shocking that courts have spoken broadly of academic freedom while remaining "remarkably consistent in their unwillingness to give analytical shape to [their] rhetoric."[128] Doing so presumably allows courts to keep the notion of academic freedom in their back pocket when encountering complicated issues in the educational arena. Nonetheless, there are some consistent concepts that arise, especially when observing the differences between universities and public schools.

Universities and professors have a much more robust set of protections for their curriculum and teaching methods in place than public grade schools.[129] This idea is logical, as public schools are fundamentally different than public universities.[130] Consequently, the protections afforded to each diverge.

A brief recitation of the differences between public schools and universities will illuminate and justify the differences in their curricula protections. While public schools (or any private alternative) are compulsory to attend for school-age children,[131] higher education is optional. Accordingly, though higher education is subsidized by taxpayer funding, students are responsible for a significant cost of attendance.[132]

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

124. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); Wieman v. Updegraff, 344 U.S. 183 (1952).

125. *See, e.g.*, Cary v. Bd. of Educ., 598 F.2d 535 (10th Cir. 1979).

126. *See, e.g.*, Bernheim v. Litt, 79 F.3d 318 (2d Cir. 1996).

127. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

128. W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 302 (1998).

129. *Compare* discussion *infra* Section III.A *with* discussion *infra* Section III.B.

130. Universities are defined for the purpose of this Comment as any institution of higher learning supported by taxpayer money, including two and four-year colleges and vocational schools. This definition excludes private universities which may receive some federal funds but remain independent from state control.

131. *See, e.g.*, 70 OKLA. STAT. § 10-105 (2022) (providing example of a state truancy law holding a parent criminally responsible if a child does not attend public school for the requisite time).

132. See *Section 1: Current Revenue Sources for Public Research Universities*, *in* AM. ACAD. ARTS & SCIS., PUBLIC RESEARCH UNIVERSITIES: UNDERSTANDING THE FINANCIAL

Conversely, public schools are free to attend for all students because they are funded by taxpayers at the local, state, and federal levels.[133] Universities are places where students can specialize and focus on complicated topics with more depth; public schools, while allowing students some choice in their education, try to deliver a complete education covering a breadth of subjects thought necessary to produce adults who are productive members of society.[134] And, obviously, the ages of the students in each environment differ.

These differences can be broadly summed up as representing the factors of choice, cost, and consensus-building. Compelled to attend, grade-school students are a captive audience,[135] compared to university students who have opted to enroll in a class. As such, courts are reticent to allow sensitive topics into grade-school classrooms.[136] In other words, the choice of the student to enroll in a university setting means the student is free to choose, for better or worse, not to encounter certain curricula. Public school students, on the other hand, have no choice in their school attendance and are compelled to receive the school's curricula.[137]

The cost of universities is borne by several stakeholders, but tuition-paying students bear more than any other.[138] While state funding comprises a large revenue stream as well, the students are more essential.[139] Given the choice, university students may enroll in different classes, attend different schools, or not attend college at all. University administrators are, in a

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MODEL 3, 3 fig.2 (2016), https://www.amacad.org/sites/default/files/publication/downloads/PublicResearchUniv_FinancialModel.pdf (highlighting the increase in student/family responsibility for public university tuition from 33% in 1970 to over 50% as of 2012).

133. Grace Chen, *An Overview of the Funding of Public Schools*, PUB. SCH. REV., https://www.publicschoolreview.com/blog/an-overview-of-the-funding-of-public-schools (last updated June 22, 2022); *Glossary: Public School or Institution*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/coe/glossary#publicschool (last visited Mar. 6, 2023) (defining public school or institution).

134. *See* Tim Walker, *What's the Purpose of Education? Public Doesn't Agree on the Answer*, NAT'L EDUC. ASS'N (Aug. 29, 2016), https://www.nea.org/advocating-for-change/new-from-nea/whats-purpose-education-public-doesnt-agree-answer (describing how the public's favored purposes of academic, civic, and labor market preparedness do not have to be mutually exclusive).

135. Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987).

136. *See id.*

137. *Id.*

138. *See Section 1: Current Revenue Sources for Public Research Universities*, *supra* note 132, at 3, 3 fig.2.

139. *See id.*

sense, providing a consumer product to students, and they should consider their curricular decisions with an eye towards student interest.[140] After all, while universities can and do exist without state funding, a university would be unrecognizable without students and their tuition checks.

Public schools, however, are effectively owned by the taxpaying public and so are almost entirely funded by tax dollars.[141] As the primary funders of public schools, taxpayers have a sense of ownership and, thus, an actual say in the educational objectives of the school.[142] Because school board members are directly responsible to members of the public, taxpayers can voice their opinions through democratic governance, like school board member elections.[143] School board members can then directly govern school administrators and educational objectives.[144] Thus, the cost of schooling is borne by different stakeholders, and the judiciary generally recognizes that affects the overall balancing of stakeholder interests.[145]

Finally, the age of the students and the depth in which subjects are studied create necessary differences in curriculum. Universities host students that have generally reached adulthood and consequently can cover more mature and sensitive information. Public schools tailor curriculum to various ages and provide a general level of education to all students. In all, these differences present a convincing case for treating these two educational institutions distinctly when analyzing academic freedom and curricular restrictions. This Comment does not argue that they should be treated identically. Rather, this Comment argues that though the protections for institutions of higher education are, in fact, wholly adequate, public-school protections should be strengthened. Moreover, the different approaches taken by courts to preserve academic freedoms in either setting

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140. *See, e.g.*, Miguel Martinez-Saenz & Steven Schoonover Jr., *Resisting the "Student-as-Consumer" Metaphor*, AM. ASS'N OF UNIV. PROFESSORS: ACADEME MAG. (Nov.-Dec. 2014), https://www.aaup.org/article/resisting-student-consumer-metaphor.

141. *See Public School Revenue Sources*, NAT'L CTR. FOR EDUC. STAT. 1 (2022), https://nces.ed.gov/programs/coe/pdf/2022/cma_508.pdf.

142. *About School Board and Local Governance*, NAT'L SCH. BDS. ASS'N, https://www.nsba.org/About/About-School-Board-and-Local-Governance (last visited Mar. 7, 2023).

143. *Id.*

144. *Id.*

145. *See* Mercer v. Mich. State Bd. of Ed., 379 F. Supp. 580, 585 (E.D. Mich.), *aff'd mem.*, 419 U.S. 1081 (1974) (noting that delegation of educational authority to school boards is motivated by a recognition of country's "diverse and varied communities" that each have a unique sense of the "social importance of a variety of values").

are illuminating. Analyzing each setting in turn will help to illuminate the strengths and shortcomings of each, and it will aid in crafting solutions to the burgeoning threat posed to school curriculum.

A. Universities Receive Higher Levels of Curricular Protection Because the Courts Have Found Academic Freedom Implied in the First Amendment

For decades, courts have recognized that the nature of higher learning requires some independence from governmental intrusion.[146] While not absolute, this independence has created a significant measure of discretion within a university's academic domain.[147] The First Amendment does not specifically create a right to academic freedom, but "[t]he Supreme Court [has] recognized . . . an institutional right of self-governance in academic affairs" implied in the Amendment.[148] A university has "four essential freedoms . . . 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."[149] Likewise, "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[150] Using this stark language, courts have demonstrated that educating students in postsecondary settings without needless obstruction is within society's interest, not just a student's interest.

The First Amendment's implication of academic freedom most commonly arose in the "Red Scare" era when teachers and professors were forced to pledge loyalty to the country or disclose membership in "subversive" organizations.[151] Nearly all of these restrictions placed on professors or teachers were struck down for infringing on the free association of these individuals.[152] While these cases are relevant and

146. *See infra* Section III.A.

147. Byrne, *supra* note 122, at 317.

148. Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000).

149. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 11–12 (Albert van de Sandt Centlivres et al. eds., 1957)).

150. *Id.* at 250 (majority opinion).

151. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 593 (1967); Wieman v. Updegraff, 344 U.S. 183, 184–85 (1952); Shelton v. Tucker, 364 U.S. 479, 480–82 (1960); *Sweezy*, 354 U.S. at 236.

152. *See, e.g.*, *Keyishian*, 385 U.S. at 609; *Wieman*, 344 U.S. at 191–92; *Shelton*, 364 U.S. at 489–90.

provide flowery quotes about the general concept of academic freedom,[153] their legally binding holdings are limited to professors' First Amendment rights.[154]

The First Amendment rights of university professors are not the focus of this Comment, but the doctrine can be helpful to contrast with that of First Amendment rights of public schoolteachers. Professors have received full-throated protection from courts when they were punished for choosing not to reveal their associations,[155] but it's unclear if a schoolteacher would receive any such protection beyond the typical public employee.[156] The public employee speech doctrine achieved near-unanimous approval over a series of Court decisions,[157] but the experience of Whitfield and other educators may require courts to reexamine whether public-school teachers should receive First Amendment protection more akin to a professor than an employee of the Department of Motor Vehicles.

In more recent jurisprudence, courts have brought the freedom of the academic institution itself to the forefront.[158] This institutional academic freedom includes "liberty from restraints on thought, expression, and

153. *See, e.g.*, *Keyishian*, 385 U.S. at 603 (referring to academic freedom as a "transcendent value").

154. *See, e.g.*, *id.* at 609–10.

155. *See, e.g.,* Meriwether v. Hartop, 992 F.3d 492, 506–07 (6th Cir. 2021) (citing *Keyshian* and *Pickering* as standing for an expansive reading of First Amendment protections unique to professors) (*"*The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings. And a professor's in-class speech to his students is anything but speech by an ordinary government employee.").

156. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574–75 (1968) (defining the high school teacher's First Amendment rights with respect to "public employment" and not referencing broader academic freedom); *see also* Stone T. Hendrickson, Note, *Salvaging* Garcetti*: How A Procedural Change Could Save Public-Employee Speech*, 71 ALA. L. REV. 291, 296 (2019) (explaining that *Pickering* is a case relating to public employee doctrine).

157. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006) (applying the *Pickering* standard to a public employee); *see also* Hendrickson, *supra* note 156, at 296 ("Running faithfully through *Pickering*, *Connick*, and *Garcetti* is the formulation that a public employee speaking (1) as a citizen and (2) on a matter of public concern potentially merits First Amendment protection based on a balancing of interests.").

158. *See, e.g.*, Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) (noting that academic freedom thrives on autonomous decision-making by the academy); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978) (referencing "constitutionally permissible goal[s] for an institution of higher education"); Grutter v. Bollinger, 539 U.S. 306, 308 (2003) (referencing the law school's "institutional mission").

association . . . but also the idea that schools should have the freedom to make decisions about what and how to teach."[159]

Courts have made clear that academic freedom rests with the institution, not the individual. In a Fourth Circuit case, *Urofsky v. Gilmore*, professors in Virginia challenged a state law restricting access to sexually explicit images on their state-owned computers.[160] The professors argued that academic freedom gave them a unique individual right, inapplicable to other state employees, to access these images within the scope of their studies and teaching.[161] The court disagreed.[162] Journeying through the history of the Supreme Court's academic freedom cases, the Fourth Circuit found that the Court had never, given the opportunity, recognized an individual right of professors to "determine for themselves the content of their courses and scholarship."[163]

Notably, an institution of higher learning's educational mission and its associated freedoms can extend outside the lecture hall, too. In *Board of Regents of the University of Wisconsin System v. Southworth*, a student challenged the University of Wisconsin's mandatory student fee which subsidized student organizations.[164] The student claimed his forced subsidization of groups he personally objected to on religious grounds infringed his First Amendment rights.[165] Countering, Wisconsin maintained that the student activity fee furthered the school's educational mission.[166] The Supreme Court sided with the university, saying, "The University may determine that its mission is well served if students have the means to engage in dynamic discussions of . . . social[] and political subjects . . . outside the lecture hall."[167] Universities should be "entitled to impose a mandatory fee to sustain an open dialogue to these ends."[168] The Court

159. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 237 (2000).

160. 216 F.3d 401, 404 (4th Cir. 2000).

161. *See id.* at 411 & n.13.

162. *Id.* at 412.

163. *Id.* at 414. Note that while courts have not inured academic freedom in individual professors, tenure does provide some professors academic freedom on a personal level. *See generally Tenure*, AM. ASS'N OF UNIV. PROFESSORS, https://www.aaup.org/issues/tenure (last visited Feb. 12, 2022). But this protection is only available for a minority of professors. *Id.* (noting only 21% of academic faculty in the United States have tenure).

164. 529 U.S. at 221.

165. *Id.*

166. *Id.*

167. *Id.* at 233.

168. *Id.*

stipulated that when administering student programs, however, the University must be viewpoint neutral.[169]

Viewpoint discrimination is a well-known concept within First Amendment jurisprudence, but applying it in an educational context can be tricky.[170] In *Rosenberger v. Rector & Visitors of the University of Virginia*,[171] the Supreme Court found viewpoint discrimination had occurred when the school denied certain funds earmarked for printing costs to a Christianity-themed student newspaper.[172] Viewpoint discrimination has been deemed so "egregious" that "[t]he government must abstain from regulating speech when the . . . ideology or the opinion or perspective of the speaker is the rationale for the restriction."[173] Texas's law[174] seems to use viewpoint neutrality as a benchmark, but its efficacy as a curricular tenet is questionable given the confusion caused by the statute.[175] Holocaust denial is not a legitimate belief or educational objective,[176] but if viewpoint neutrality were the main objective of education, Gina Peddy's comments are an attempt at compliance.

Apart from the decision's mention of viewpoint neutrality, the impact of the *Southworth* decision cannot be overstated in relation to states' recent restrictions on institutions of higher education. While a court could use any number of cases to invalidate a law restricting subject matter within a professor's syllabus, it has fewer precedents to choose from regarding extracurricular education.[177] Presumably aware of the strong protections afforded universities within the lecture hall, states have taken aim at other parts of a university's educational mission. For example, Oklahoma's law bars certain mandatory trainings and orientations for students.[178] While this restriction cleverly avoids a blatant restriction on a narrow conception of

169. *Id.* at 233–34.

170. *See* Stuller, *supra* note 128, at 341.

171. 515 U.S. 819 (1995).

172. *Id.* at 822, 844–46.

173. *Id.* at 829.

174. TEX. EDUC. CODE ANN. § 28.0022 (West 2021).

175. *See* Hixenbaugh & Hylton, *supra* note 106.

176. *See Explaining Holocaust Denial*, U.S. HOLOCAUST MEM'L MUSEUM, https://www.ushmm.org/antisemitism/holocaust-denial-and-distortion/explaining-holocaust-denial (last visited Mar. 7, 2023).

177. A court could use any case from the *Keyishian* line of cases to invalidate lecture hall material, but *Southworth* gives the most direct corollary to non-curricular teachings.

178. 70 OKLA. STAT. § 24-157(A)(1) (2022).

"institutional . . . self-governance in academic affairs,"[179] it runs afoul of the broader conception of academic student life in *Southworth*. Just as the University of Wisconsin in Southworth could classify its student organizations as part of its educational mission, the University of Oklahoma would likely also consider its student orientation materials and trainings in the same way. Much like Wisconsin's permissive imposition of a mandatory fee on students to support its educational mission, Oklahoma likely would be able to mandate its student trainings, as well. Thus, *Southworth* is the leading case courts should use to evaluate laws like Oklahoma's.

Overall, courts across the country have provided universities with a significant measure of "academic freedom." More specifically referred to as an "institutional right of self-governance in academic affairs"[180] in some decisions, this power allows universities to exercise their "four essential freedoms."[181] Better yet, the Court has couched this notion in a reading of the First Amendment, thereby constitutionalizing these protections.[182] Given the strong protections and lengthy history of court opinions to that effect, it is much more challenging to envision a political subversion of universities' curricula.

B. Courts Have Affirmed That States, Not Teachers, Have Broad Authority to Shape the Curricula Within Public School Classrooms

Conversely, public schools and teachers are afforded much less "academic freedom" or institutional self-governance. While some of that is a necessary byproduct of the differences between the two contexts, it makes the educational mission of public schools more vulnerable to political manipulation. Note, that at universities, the curriculum is set by forces within the organization such as deans, administrators, and professors.[183] At public schools, the state determines the boundaries of curriculum and

179. Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000).

180. *Id.*

181. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA, *supra* note 149, at 11).

182. *See id.* at 265.

183. *Statement on Government of Colleges and Universities*, AM. ASS'N OF UNIV. PROFESSORS, https://www.aaup.org/report/statement-government-colleges-and-universities (last visited Mar. 8, 2023) ("When an educational goal has been established, it becomes the responsibility primarily of the faculty to determine the appropriate curriculum and procedures of student instruction.").

educational standards.[184] Despite that difference, curriculum-makers have received similar protections of "academic freedom" in both instances. The Supreme Court has consistently recognized the broad discretion that state and local school boards have in operating public schools, including the ability to prescribe the curriculum.[185] Thus, while methods differ, the authority to determine curriculum framework rests with the state and is often delegated to local school boards.[186] Like an "institutional right of self-governance in academic affairs,"[187] the Court, in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,[188] also recognized a substantial community interest in transmitting and promoting a community's social, moral, or political values through curricula.[189]

Pico, however, also warned that a community's discretion "must be exercised in a manner that comports with the transcendent [values] of the First Amendment."[190] After all, neither "students [n]or teachers shed their . . . rights . . . at the schoolhouse gate."[191] These rights include freedom of speech and expression, but they also include a "right to receive information and ideas," so a state may not "contract the spectrum of available knowledge."[192] The Court noted that the motivation behind curricular decisions must not be intended to deny students access to

184. 70 OKLA. STAT. § 11-103.6(A)(2) (2022) ("The State Board of Education shall adopt subject matter standards for instruction of students in the public schools of this state that are necessary to ensure there is attainment of desired levels of competencies in a variety of areas to include language, mathematics, science, social studies, communication, and health and physical education.").

185. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104–05 (1968); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969); Edwards v. Aguillard, 382 U.S. 578, 583 (1987).

186. 70 OKLA. STAT. § 11–103.6 ("School districts shall develop and implement curriculum, courses and instruction in order to ensure that students meet the skills and competencies as set forth in this section and in the subject matter standards adopted by the State Board of Education."); *see also* Julie Underwood, *The Legal Balancing Act over Public School Curriculum*, KAPPAN (Feb. 25, 2019), https://kappanonline.org/legal-balancing-act-public-school-curriculum-underwood/.

187. Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000).

188. 457 U.S. 853 (1982).

189. *Id.* at 864.

190. *Id.*

191. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

192. *Pico*, 457 U.S. at 866–67 (first quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969); and then quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)).

knowledge.[193] Allowing such discretionary denial of access, particularly in a narrowly partisan manner, would be improperly prescribed orthodoxy.[194]

Seemingly at odds with a state's command not to limit the spectrum of possible knowledge, some courts have also recognized the inescapable need to exclude certain topics from the classroom.[195] In an opinion affirmed by the Supreme Court, a district court in Michigan recognized that local authorities must necessarily make choices as to what available knowledge will be included in curriculum and which portions must be excised.[196] Simply put, "[t]he whole range of knowledge and ideas cannot be taught in the limited time available in public school."[197] The Court has also approved of excluding topics that may violate the Establishment Clause or be particularly divisive.[198] Thus, there seems to be an inherent disconnect. A community can craft its curriculum (which naturally must exclude some topics) to transmit community values, but it must not contract the limitless spectrum of knowledge that students have a right to access.

The jurisprudence reflects the tension between these two directives in numerous cases. In *Edwards v. Aguillard*,[199] a Louisiana state law forbade the teaching of evolution unless creationism was taught as a viable alternative.[200] The Court noted the unique attributes of public schooling—such as mandatory attendance and a young and impressionable captive audience—called for added vigilance if a curricular topic possibly violated the Establishment Clause.[201] Ultimately, the Court struck down Louisiana's statute as impermissibly advancing religious doctrine and thus violating the Establishment Clause.[202] Writing in a separate concurrence, Justice Lewis Powell explained that the Court's Establishment Clause holding did not affect "traditionally broad discretion accorded state and local school officials in the selection of the public school curriculum."[203]

193. *Id.* at 871.
194. *Id.*
195. *See, e.g.*, Cary v. Bd. of Educ., 598 F.2d 535, 543–44 (10th Cir. 1979); Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1302 (7th Cir. 1980).
196. Mercer v. Mich. State Bd. of Educ., 379 F. Supp. 580, 585 (E.D. Mich.), *aff'd mem.*, 419 U.S. 1081 (1974).
197. *Id.*
198. Edwards v. Aguillard, 382 U.S. 578, 596–97 (1987).
199. 382 U.S. 578.
200. *Id.* at 581.
201. *Id.* at 583–84.
202. *Id.*
203. *Id.* at 597 (Powell, J., concurring).

While the outcome of *Edwards* shows that a state's broad discretion is not plenary, other cases demonstrate the broad deference that courts have afforded to school officials. A Tenth Circuit case reviewed the constitutionality of a school board in Colorado that banned books from teachers' reading lists.[204] A committee the Board established to review books recommended only one book for removal, but the Board opted to ban ten books instead and gave no written explanation of why it was doing so.[205] The court upheld the action, noting that courts could not intervene in daily conflicts within school districts and that the Board's decision was not arbitrary in nature.[206]

The banning of books from public schools is not always a simple proposition, however. *Zykan v. Warsaw Community School Corp.*,[207] discussed the constitutionality of removing books from a school.[208] The case's procedural posture prevented a holding on the merits, but the court gave students leave to amend their complaint, recognizing that a constitutional violation could possibly be alleged on the facts.[209] The court took special notice of the removal of books from the school library.[210] While it stressed that local educational discretion should not be interfered with for anything short of "rigid and exclusive indoctrination," it also noted that the removal of books from the school library could be such indoctrination, even though it is not part of a teacher's curriculum.[211]

Another related line of cases has thoroughly dismissed the argument that public school teachers have a First Amendment right to teach information not included in the curriculum.[212] The broad discretion allowed to states and local authorities does not flow down to individual teachers. Importantly, these teachers are carrying out their employment duties, and First

204. Cary v. Bd. of Educ., 598 F.2d 535, 536–38 (10th Cir. 1979).
205. *Id.* at 537.
206. *Id.* at 540, 544.
207. 631 F.2d 1300 (7th Cir. 1980).
208. *Id.* at 1302.
209. *See id.* at 1308–09.
210. *Id.*
211. *Id.* at 1306.
212. *See, e.g.*, Palmer v. Bd. of Educ., 603 F.2d 1271, 1274 (7th Cir. 1979); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 795 (5th Cir. 1989); Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 371 (4th Cir. 1998) (en banc); Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987).

Amendment protections are conscribed when a government employee is speaking in the course of employment and not as a private citizen.[213]

Circuit courts across the country have concluded a teacher has no individual constitutional right to determine curriculum.[214] "It cannot be left to individual teachers to teach what they please. . . . [They have] no constitutional right to require others to submit to [their] views . . . ."[215] As the Fifth Circuit noted, "The first amendment has never required school districts to abdicate control over public school curricula to the unfettered discretion of individual teachers."[216] It is "far better public policy" that local authorities craft a curriculum than individual teachers, given local authorities are responsible to the public.[217] Like in universities, the academic freedom that courts have recognized resides at an organizational level. Furthermore, teachers are subject to even more institutional oversight than professors because of the age and required attendance of their students.

At the same time, courts have been careful to note that a teacher's speech cannot be entirely proscribed, both as a practical matter and as a benefit to learning. Synthesizing many holdings on the topic, the Seventh Circuit stated that "academic freedom at the secondary school level precludes a local board from imposing a 'pall of orthodoxy' on the offerings of the classroom which might . . . impair permanently the student's ability to investigate matters that arise in the natural course of intellectual inquiry."[218] Commonly, this claim arises when a plaintiff challenges a law or rule restricting curriculum as overly broad or vague.[219] When that occurs, the Court has warned against the "pall of orthodoxy" that can "stifle that free play of spirit which all teachers ought . . . to cultivate and practice."[220] This point means that while the prohibition of express topics could be entirely legal, an unintended prohibition on a topic—as teachers could interpret from unclear requirements—could invalidate an otherwise valid restriction.

The numerous recent legislative actions banning the teaching of certain concepts[221] fall firmly in this legally tenuous gray area. Given the broad

213. *See* Garcetti v. Ceballos, 547 U.S. 410, 422 (2006).

214. *See, e.g.*, *Boring*, 136 F.3d at 370–71.

215. *Palmer*, 603 F.2d at 1274.

216. *Kirkland*, 890 F.2d at 795.

217. *Boring*, 136 F.3d at 371.

218. Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1306 (7th Cir. 1980) (quoting Keyishian v. Bd. of Regents, 385 U.S. 675, 681 (1967)).

219. *See* Cary v. Bd. of Educ., 598 F.2d 535, 535–37 (10th Cir. 1979).

220. *Keyishian*, 385 U.S. at 601, 603.

221. *See supra* Part II.

discretion allowed to local and state authorities, these curricular restrictions are likely constitutionally valid on their face. Apart from an unlikely showing of arbitrary decision-making or viewpoint discrimination,[222] the biggest overruling risk to state statutes passed on the topic are based in concerns of a chilling effect on educational opportunities.

To present a concrete example, consider Idaho's statute barring from classrooms the tenet that "individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin."[223] Enacted by an authority with broad discretion to shape curriculum, the prohibition is likely valid on its face. An Idaho teacher could conceivably, like Gina Peddy in Texas, read the law to bar discussion of the history of Jim Crow laws in America. While the law's proponents would undoubtedly refute that as the intention of the statutory text, the law's intention is not being adjudged. Rather, if a teacher feels that a "pall of orthodoxy" has been cast over the classroom, and so consequently avoids topics with legitimate educational value, a court will evaluate whether that teacher's *subjective* interpretation of the law is reasonable. If so, the court may invalidate the law, even though the statute's text and purpose had no direct connection to the history of Jim Crow in the United States.

The protections afforded public school curricula under the guise of "academic freedom" are much narrower than those in the higher education setting. While the disparate judicial doctrines make sense conceptually, given the inherent differences between the two environments, they will likely produce different outcomes for these recently enacted state laws[224] in courts. Restrictions in the higher education space are unlikely to succeed, but curricular prohibitions in public schools will likely be upheld as valid unless the "chilling effect" argument prevails. Regardless of your perspective on CRT and its judicial challenges, the ease and speed with which school curriculum has changed and should change in the future is a distinct issue.

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222. While many may argue that the banning of content is baseless, the governmental units taking action to bar these subjects from curriculum have done so with consideration. Given the broad discretion given school boards, it is near impossible these laws could be struck down as arbitrary. Viewpoint discrimination is a closer call, but, as *Cary* and *Zykan* demonstrate, the removal of certain books and topics from schools will also be afforded significant deference. *See Zykan*, 631 F.2d 1300; *Cary*, 598 F.2d 535.

223. IDAHO CODE § 33-138 (2022).

224. *See supra* Part II.

The curriculum of public-school students should not be subject to rash changes with only a slight chance at strenuous judicial oversight. *Pico*'s recognition of a community's interest in transmitting its values through public school curriculum[225] should be limited to only a community's universally shared civic values, not a community's political ideology. The differences may be subtle, but courts are the only institution capable of parsing legitimate educational objectives from political opportunism. The ongoing fervor and legislative backlash to the convenient catch-all term of CRT is a predictable byproduct of right-wing media airwaves in the summer of 2021.[226] The immediate effects of this concerted media effort and subsequent legislation will continue to be seen, but it portends an unpromising path forward. If these curriculum-altering actions are successful, a new battlefront will open for political maneuvering and manipulation. School board elections will be hyper-politicized, and new proverbial-boogeyman subjects will arise. A slippery slope argument, yes, but all the more valid because the slipping has already started. Curricula must be insulated from hasty changes for the sake of our educators if nothing else. Public school curriculum should be afforded more protection judicially, or, in the alternative, at least managed by an institution more insulated from political appropriation.

IV. How to Strengthen Curricular Protections

School administrators are losing jobs,[227] school boards are under fire,[228] and curricula are shifting as quickly as the political winds will carry. The current state of law in public grade schools enables these outcomes. While critical race theory is the impetus for the latest trend, these events have shown a public education system that is vulnerable to political manipulation.

Despite the current commandeering of curriculum, public education has always been and should remain just that, *public*. School board elections have long been the source of this public management; elected school board members are often parents, and any interested citizen can affect public

225. Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982).

226. *See supra* notes 46–56 and accompanying text.

227. *See, e.g.*, Lopez, *supra* note 1.

228. *See*, *e.g.*, Ujifusa, *Inside the Debate*, *supra* note 12; Ujifusa, *School Boards Ask Biden*, *supra* note 17.

policy through the school board.[229] Thus, the issue crystallizes. Public schools must balance between insularity and accountability. They must ensure a curriculum free from partisanship and political hijacking, while retaining the parents' ability to influence the education of their children and taxpayers' ability to hold the public education system accountable.

Solutions must bridge the divide. They must protect student education from being used as a political pawn while still enabling public involvement in public education. The following solutions are mere proposals by this author and will examine the benefits and downsides inherent in each. The proposals are broadly grouped into two categories: judicial and institutional.

A. Judicial Proposals to Strengthen Public School Curriculum Protections

One option is simple. Courts can strengthen the academic freedom doctrine within public grade schools to match the protections afforded to curriculum and professors in higher education settings. This Comment refers to this as the "Matching option." In other words, local school districts could be considered commensurate with universities and both receive the First Amendment-based "institutional right of self-governance in academic affairs."[230] Instead of public school teachers being vulnerable to possessive administrative oversight for fear of running afoul of state law, teachers would have the academic freedom and "free play of the spirit"[231] to educate students within certain parameters set by the district. The Matching option may be the strongest option to protect public school curriculum from political interference, but it suffers several fatal flaws.

The central issue with strengthening curriculum protections in this way is the potential legal conflation of public schools with universities. The two environments have fundamental differences which necessitate different judicial approaches.[232] The application of higher education standards in public schools would open Pandora's box, causing numerous complications. Chief among them would be treating public school teachers

229. *See* Joe Hong, *Frustration Spurs California Parents to Run for School Boards*, CAL MATTERS (Aug. 18, 2022), https://calmatters.org/education/2022/08/school-board-elections/; *see also* CHUCK DERVARICS & EILEEN O'BRIEN, CTR. FOR PUB. EDUC., NAT'L SCH. BD. ASS'N, EIGHT CHARACTERISTICS OF EFFECTIVE SCHOOL BOARDS 3 (2019), https://www.nsba.org/-/media/NSBA/File/cpe-eight-characteristics-of-effective-school-boards-report-december-2019.pdf?la=en&hash=1E19C481DAAEE25406008581AE75EB2ABA785930.

230. Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000).

231. Keyishian v. Bd. of Regents, 385 U.S. 589, 601 (1967).

232. *See supra* Part III.

as having tenure.[233] Consider the holdings of *Palmer v. Board of Education*,[234] *Kirkland v. Northside Independent School District*,[235] and others. To bestow personal academic freedom in teachers, would be counter to these holdings. Such a drastic change would raise more questions rather than providing answers to the immediate situation.[236] Finally, a wholesale change in doctrine such as this would have to come from the Supreme Court, as no circuit court would make such a monumental change.[237]

Another judicial option could approach the issue from a balancing standpoint. Fittingly, this Comment calls this the "Balancing option." Instead of wholesale replacement of the public-school educational doctrine, this solution calls for a reassessment of priorities through judicial decisions. To strengthen curriculum protections, decisions would need to lend greater credence to certain considerations, such as the First Amendment rights of students to receive information[238] and the fear of the "chilling effect" instilled by curricular restrictions.[239] Likewise, the credence given to local "community interest"[240] in shaping curricula must be reduced. Specifically, courts could opt to allow legitimate community interests to guide policy but lend no credence to politically motivated movements. Given the current situation, courts could hold that the absence of CRT-based content in public schools revealed the illusory impetus for many of these laws. As a result, they would be less worthy of judicial deference. Along with examining the motivating force behind changes, courts could also analyze the practical effects of the policy and the feasibility of enforcement by teachers and

233. *See, e.g.*, Adams v. Campbell Cnty. Sch. Dist., 511 F.2d 1242, 1247 (10th Cir. 1975) (discussing how teacher employment can be contingent on compliance with an established curriculum).

234. 603 F.2d 1271 (7th Cir. 1979).

235. 890 F.2d 794 (5th Cir. 1989).

236. Such a change would raise questions about teacher employment, educational objectives, and curricular objectives. For instance, when, if ever, could teachers be removed from their job and would standardized tests have any efficacy if curriculum varied from classroom to classroom?

237. *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 788 (2012) (noting that change in precedent overall must come from the highest court).

238. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 866–67 (1982); *see also* Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1304 (7th Cir. 1980) (discussing the constitutional dimension of a student's "right to hear").

239. *See* Cal. Teachers Ass'n v. Bd. of Educ., 271 F.3d 1141, 1152 (9th Cir. 2001) (discussing the potential "chilling effect" of a curriculum restriction).

240. *Pico*, 457 U.S. at 864.

administrators. Curricular changes for legitimate civic purposes should have an identifiably apolitical purpose, explicable effects, and be capable of consistent application across schools and classrooms.

The Balancing approach also suffers from flaws. First, various judges across circuits may apply a scattershot reassessment of current law. Even if an uncoordinated effort took place to change doctrine, the gains would be uncemented; future court decisions could simply readjust the balancing of interests.

Further, this shift would not necessarily solve the present problem. Recognizing a student's First Amendment right to receive information[241] does not, per se, imply that a student has a right to learn about CRT. Just modifying the doctrine to reduce the weight given to local "community interest" in curriculum[242] still presents a gap for bad actors to exploit. In total, the problem with current doctrine remains. The Balancing approach may make it more difficult than it is now to hijack curriculum for political purposes, but the potential would still exist. Given the political boon the current strategy has shown to be,[243] it seems likely that political actors could still find a way to thread a then-narrower needle.

In sum, there are ways to strengthen the protections of public-school curriculum through judicial action. They are, however, limited in viability and sustainability. Barring a reevaluation of *Pico* and associated precedent at the Supreme Court level, judicial efforts to strengthen curricular safeguards will be too piecemeal and variable to effect major change. Rather, the most effective and (relatively) practical method for insulating curriculum from political actors is through the political process itself.

B. Non-Judicial Proposals to Strengthen Public School Curriculum Protections

As discussed above, judicial efforts to strengthen curriculum protections suffer from a common problem: they are difficult to accomplish uniformly and incapable of effecting permanent change. Non-judicial efforts differ. While any solution will be difficult—such is the nature of important change—these proposals present an opportunity for long-term systemic

241. *Zykan*, 631 F.2d at 1304.

242. *Pico*, 457 U.S. at 864.

243. *See, e.g.*, David Smith, *How Did Republicans Turn Critical Race Theory into a Winning Electoral Issue?*, THE GUARDIAN (Nov. 3, 2021, 2:28 PM EDT), https://www.theguardian.com/us-news/2021/nov/03/republicans-critical-race-theory-winning-electoral-issue..

protections for public school curricula. At the same time, the political nature of these proposals buttress these changes from one of the most withering criticisms: the dreaded label of "judicial activism."[244] These proposals may be harder to enact than change found in a judicial opinion, but they would more effectively resolve the problem in the long term.

One non-judicial approach would be legislation protecting the rights of students. Federal legislation would likely be unwelcome in this area as it is likely too politically thorny.[245] One needs only consider the controversy and opposition to Common Core standards proposed by the Obama Administration[246] to envision the negative reaction to a federal law mandating public school curriculum standards. Instead, any legislative action would need to take the form of state legislation, preempting the ability of school boards to unilaterally deviate from state standards.[247] Since states are already endowed with the power to manage public education, they could reclaim power delegated to local authorities, such as school boards, and ensure any curricular changes came only from state legislative action.

Alternatively, state legislation could be narrower. Instead of preempting local school boards entirely, state legislatures could institute a form of legislative review of school board decisions involving curriculum. Alternately, state legislators could prescribe certain topics to be covered or not be covered, much like the legislative changes enacted recently.[248] Therein lies the issue. State legislatures are far from immune from politics; they have been the source of multiple threats to public school curriculum.[249] Though legislatures have the tools to solve this problem, it is foolhardy to expect they will act in direct opposition to the current trend. Rather, the more likely trend suggests state legislatures will continue to alter public school curriculum for as long as it continues to help legislators gain votes.

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244. *See* Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002).

245. *See* Libby Nelson, *The Common Core, Explained*, VOX (July 23, 2015, 11:52 AM EDT), https://www.vox.com/2015/7/22/18105410/the-common-core-explained (discussing how Common Core became a proxy for a larger debate about the proper role of the federal government in education).

246. *Id.*

247. Just as state legislatures have constrained local school boards and districts with recent legislation, a state legislature could limit its delegation of power to local leaders to ensure curricular changes were not made rashly.

248. *See supra* Part II.

249. *See supra* Part II (discussing state actors limiting school curriculum through legislative and executive action).

Realizing the futility of relying on politically reactive elected officials prompts another realization. The problem may be the design of the system itself. The main priority should be insulating curriculum from politics, not simply relocating the political battle from local school boards to state capitols. The ideal non-judicial solution must copy a solution from the judiciary. As the crux of the issue lies in overly politicized school board decisions and elections, the answer should be de-politicizing the school board as an institution. What better way to do this than copying the playbook from another governmental institution that needed protection from political manipulation? Just as judicial insulation from political forces furthers the fair and impartial administration of justice, the educational and pedagogical priorities of public school curricula are furthered by a degree of political separation for school boards.

This Comment's ultimate proposal is simple: appoint and retain local school board members in the same manner states appoint and retain judges. Likewise, provide school board members with longer terms in office, similar to many state judges' terms.[250] While states differ in how they appoint or elect judges,[251] the consistent general principle is to free judges from being blown by the winds of political change.[252] The state places the right judge based on their qualifications, including educational background, past rulings or advocacy experience, and professional conduct.[253] Likewise, the emphasis for school board members should be on their qualifications, educational experience, pedagogical knowledge,[254] and professional

250. *See Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Oct. 11, 2022), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures (describing the length of terms judges serve as a feature of the judiciary and identifying three states where no fixed term is set).

251. *Id.* (surveying the various methods states place judges on the bench, including appointment, partisan, and nonpartisan elections).

252. *Judicial Independence*, JUD. LEARNING CTR., https://judiciallearningcenter.org/judicial-independence/ (last visited Mar. 14, 2023) (discussing the merits of judicial independence at the federal level).

253. *See* Steven Platt, *The Qualities of a Good Judge*, A PURSUIT OF JUST. (Oct. 31, 2007), https://www.apursuitofjustice.com/the-qualities-of-a-good-judge/ (describing "the qualities that should be identified and then sought after in an applicant for judicial office").

254. ILL. ASS'N SCH. BDS., QUALIFICATIONS & CHARACTERISTICS OF A SCHOOL BOARD MEMBER 3 (2022), https://www.iasb.com/IASB/media/Documents/Qualifications-Characteristics-of-a-School-Board-Member.pdf ("The single most important reason voters elected them was for their knowledge and experience.").

conduct.[255] Running and winning a general election has no bearing on the qualifications of a school board member; it has only a bearing on the political skills of the school board candidate.

Much like filling judicial roles, this appointment process would likely vary by state and even city. So, this Comment does not propose one uniform method. The keystone of this Comment's proposal lies in providing school board members an institutional bulwark from politics much like judges. To illustrate, this Comment offers a hypothetical school board member process: current members run on a retention ballot,[256] and if any member loses, the vacant seat is filled by appointment via the city's legislative body. Appointment could be an interim measure before an upcoming election, and it would ensure the interim member was well-vetted. Member terms would be five years; then, the member could face a retention election. These measures focus the board member on the student stakeholder and ensure a board's collective institutional knowledge, political insulation, and likely continuity.

The benefits of such an approach are innumerable. School board member-candidates would be evaluated on their merits for the job, not on a letter appearing on the ballot next to their name or the quality of their campaign literature. Like a judge, once a Board member were in office, her competition to remain in office would be her own job performance. Elections could be held on a retention basis instead of a head-to-head basis. In this way, school board members could still be responsive to the public, but they would be insulated from facing an instant political judgment at the ballot box. Instead of making politically expedient decisions, school board members could make more difficult decisions with more job security. While the public and concerned parents would still be able to voice their opinions in open meetings to school board members, the board could feel more assured in focusing on its most important stakeholder: the student.

255. Just as a potential judge's suitability is evaluated by looking at relevant indicators for future performance in the role, a school board member's suitability should be too.

256. Sixteen states use some form of a retention election to allow the public to vote on judges. *Judicial Selection: Significant Figures*, *supra* note 250. For example, the voter's ballot might say "Do you vote to retain Jane Doe as the school board member for District 2? Yes or No" instead of facing a choice between Jane Doe and John Doe.

Critics of this solution may point to the fact that the judicial selection system is already highly partisan[257] and that school boards would see little change. While judicial selection at the federal level has become a partisan exercise,[258] the variation in state methods of judicial selection means that some state judiciaries are more insulated from partisanship than others.[259] Fundamentally, this criticism misses a dose of reality and lets perfect be the enemy of good. Critics would avoid providing an electoral bulwark for school boards because political actors have maximized their ability to affect seemingly apolitical judicial elections. While critics correctly note school board races would retain some partisan electioneering under this alternative proposal, the status quo ensures a steady march towards school board partisanship.[260]

Currently, school board candidates are incentivized to react to the prospective voter or risk losing their position.[261] States are even changing laws to make school board elections *more* partisan. In 2021, Tennessee passed a measure allowing school board candidates to list their party affiliation on the ballot, and the American Enterprise Institute urges all Republican-led states to do so.[262] This political pandering reflects a broader

257. *See Rethinking Judicial Selection*, AM. BAR ASS'N (Mar. 1, 2016), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/rethinking_judicial_selection/?login.

258. *See* Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POL'Y 521, 522 (2018).

259. *See Judicial Selection: Significant Figures*, *supra* note 250.

260. *See* Evie Blad, *More States Consider Partisan School Board Races as Education Debates Intensify*, EDUCATIONWEEK (Apr. 27, 2023), https://www.edweek.org/policy-politics/more-states-consider-partisan-school-board-races-as-education-debates-intensify/2023/04 (noting rising trend of push for partisanship in school board elections).

261. *See* Lauren Camera, *School Board Recalls at All-Time High as GOP Puts K-12 Issues in Spotlight*, U.S. NEWS & WORLD REP. (Nov. 1, 2021), https://www.usnews.com/news/education-news/articles/2021-11-01/school-board-recalls-at-all-time-high-as-gop-puts-k-12-issues-in-spotlight (examining the proliferation of school board recall elections in the United States and finding recalls in 2021 were four times the yearly average). It may sound odd to say putting the voter first is wrong, but in this case, the student should be the school board's focus.

262. Andrew Atterbury & Juan Perez Jr., *Republicans Eye New Front in Education Wars: Making School Board Races Partisan*, POLITICO (Dec. 29, 2021, 4:30 AM EST), https://www.politico.com/news/2021/12/29/republicans-education-wars-school-board-races-526053.

trend toward politicizing school board elections as a campaign strategy.[263] Given the traditionally low turnout in municipal elections,[264] a good electoral strategy captures the attention of a politically active faction, such as a Three Percenter militia member who won school board office running on an anti-CRT and anti-mask mandate platform.[265] Proponents of measures that increase competitiveness and partisanship for school board seats emphasize the need for local parental educational control that only frequent, open elections provide.[266] These actions, however, which further recruit school board elections into partisan culture wars,[267] will only inflame school boards nationwide[268] and disservice students. When school board candidates must provoke a party's base to be a winner, the children they seek to serve ultimately lose.

V. Conclusion

School boards and public-school curriculum are under attack. Parents and other citizens have engaged in a concerted effort to restrict the curriculum available to teachers, remove school administrators, and intimidate school board members.[269] The movement has been successful. School board elections are becoming focal points for partisan culture wars,[270] and legislation prohibiting the teaching of certain concepts has

263. *Id.*; Saul, *supra* note 120; Amelia Nierenberg, *The Conservative School Board Strategy*, N.Y. TIMES (Feb. 15, 2023), https://www.nytimes.com/2021/10/27/us/the-conservative-school-board-strategy.html.

264. *See* Jay Brennan, *Increasing Voter Turnout in Local Elections*, NAT'L CIVIC LEAGUE: NAT'L CIVIC REV. (Spring 2020), https://www.nationalcivicleague.org/ncr-article/increasing-voter-turnout-in-local-elections/ (noting that only 15-27% of eligible voters turnout for local elections as a national average, which contributes to white, older, and more affluent voters exerting a disproportionate impact on local policy).

265. Hannah Allam, *A Rural Washington School Board Race Shows How Far-Right Extremists Are Shifting to Local Power*, WASH. POST (Jan. 8, 2022, 6:00 PM EST), https://www.washingtonpost.com/national-security/2022/01/08/far-right-school-boards/.

266. Hannah Natanson, *Parent-Activists, Seeking Control over Education, Are Taking over School Boards*, WASH. POST (Jan. 19, 2022, 8:50 AM EST), https://www.washingtonpost.com/education/2022/01/19/parents-school-boards-recall-takeover/.

267. *See id.*

268. *See, e.g.*, Camera, *supra* note 261 (discussing the exponential increase in school board member recall efforts).

269. *See supra* Part I.

270. *E.g.*, Saul, *supra* note 120; Camera, *supra* note 261; Atterbury & Perez Jr., *supra* note 262; Natanson, *supra* note 266.

been passed in numerous states.[271] While Critical Race Theory is the impetus for curricular restrictions now, the effort has illuminated a successful playbook for imposing the ideology of some into the educational experience of many.

The issue is not novel, but courts have not effectively protected public school curricula from political interference in the past. Universities and professors are imbued with a significant amount of academic freedom from the courts to manage their own educational missions.[272] Public schools and teachers, however, are subject to the increasingly political machinations of school boards and state legislatures.[273] The difference in judicial doctrine is appropriate considering their distinguishing features, but the status quo leaves public school curriculum too vulnerable to political interference. While shifts in judicial doctrine could strengthen the barrier between politics and the classroom, change must come at an institutional level.

School boards *should* be more insulated from politics to ensure the educational mission of public education remains the priority. The selection of judges provides a useful analogue for school board reform. Generally, judges are nominated or appointed based upon their merit, receive longer terms, and may face only nonpartisan or retention-based elections. This helps to secure judicial independence, competence, and objective focus on the case at hand. Extending similar protections to school board members would produce similar benefits. Insulating school board members from political retribution while preserving their duty to listen to concerned citizens in open meetings strikes a proper balance. Protecting these educational decisionmakers ensures curricular decisions are made with the student, not the ballot box, in mind.

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271. *See supra* Part II.
272. *See supra* Section III.A.
273. *See supra* Section III.B.