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The Best Way to "Ban" Critical Race Theory: Prohibiting Promotion Rather Than Inclusion or Compulsion

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Key Points

- In the first half of 2021, 26 states introduced—and 12 passed—bills colloquially labeled "critical race theory (CRT) bans."
- While many attacks against these bills were disingenuous or spurious, some of these bills were crafted more prudently than others.
- The bills introduced to date can be grouped into three categories: prohibitions against compulsion, against inclusion, and against promotion.
- The prohibition against promoting CRT, first introduced in the North Carolina legislature, addresses parent concerns about indoctrination without resorting to the blunt tool of statutory censorship and should be considered by all states that have yet to pass a "CRT ban."

In the first half of 2021, 26 states introduced and 12 passed laws or regulations that have been colloquially labeled "critical race theory (CRT) bans."[1] Few of these bills directly address CRT.[2] Instead, they take aim at pedagogical techniques and teachings that are obviously and overtly racist (e.g., "one race or sex is inherently superior to another race or sex," and "moral character is necessarily determined by his or her race or sex").[3]

Although most Americans would agree that schools should not promulgate obviously racist doctrines, these proposals have become highly polarizing. Some of the polarization can be attributed to journalistic coverage that at times appears willfully dishonest. For example, a *New York Times* article titled "Disputing Racism's Reach, Republicans Rattle Schools" explained: "In Ohio, Republicans in the General Assembly introduced a bill last week to ban teaching that any individual is 'inherently racist.'"[4] *Times* readers would have every right to be worried that such a prohibition would cripple history instruction; preventing teachers from applying the word "racist" to John C. Calhoun and his theory of slavery as a "positive good" would be egregious educational malpractice.

But the clause actually stipulates that schools shall not teach that "an individual, by virtue of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously."[5] America's "newspaper of record" fundamentally changed the meaning of a law from something that most Americans would support (i.e., schools shouldn't teach that race determines character) to something most would oppose (i.e., teachers should not proffer obvious moral judgment).

Example of a Critical Race Theory "Ban": Concepts Prohibited by North Carolina's House Bill 324

1. One race or sex is inherently superior to another race or sex.
2. An individual, solely by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
3. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex.
4. An individual's moral character is necessarily determined by his or her race or sex.
5. An individual, solely by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex.
6. Any individual, solely by virtue of his or her race or sex, should feel discomfort, guilt, anguish, or any other form of psychological distress.
7. That the belief that the United States is a meritocracy is an inherently racist or sexist belief, or that the United States was created by members of a particular race or sex for the purpose of oppressing members of another race or sex.[6]

Lost amid the spurious attacks and reflexive defenses of these bills is the reality that some are better crafted than others are. Several proposed bills actually do resemble detractors' caricature of "CRT bans" writ large. Others contain clauses that provide CRT opponents with an uncontestable moral high ground and a strong likelihood of thoughtful and effective implementation.

This report is an exercise in constructive criticism for lawmakers who intend to thoughtfully draft or revisit legislation addressing the state-sponsored racism of CRT pedagogy. I begin by outlining three principles that animate this analysis. I then provide some criticism of bills introduced to date, offer a typology for understanding the varieties of bills proposed, and argue for the most constructive path legislators could take.

Animating Principles

This report is a work of informed judgment, so it is necessary to discuss the convictions and principles that animate it.

"CRT Bans" Are Primarily an Effort to Enforce Antidiscrimination Law. While both detractors and proponents have labeled these legislative efforts "CRT bans," that term is not quite accurate. Most of these bills do not take aim at CRT as an academic concept, but rather as a set of practices or teachings that—if presented to students as true—would obviously create a racially hostile environment prohibited by Title VI of the Civil Rights Act of 1964, which declared simply that

> no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[7]

A few examples: A school district in North Carolina launched a campaign against "whiteness in educational spaces,"[8] popular teacher professional development materials insist that "White identity is inherently racist,"[9] and schools are segregating students and staff by race[10] and subjecting students to racially shaming "privilege walks."[11]

If an American school publicly committed itself to fighting against "Blackness," no reasonable observer would deny that this would create a racially hostile learning environment. Unfortunately, the ideology of "antiracism"[12] propounded by Ibram X. Kendi, whose work is based on CRT[13] and has become popular in K–12 education, all but argues that racial discrimination against White students is a moral imperative: "The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination."[14]

Federal Antidiscrimination Law Is Inadequate to Address the Racism of CRT Pedagogy. Some self-identified conservative critics of "CRT bans" such as David French have argued that it would be better to "enforce existing civil rights laws," reasoning that

> Title VI and Title VII of the Civil Rights Act prohibit discrimination on the basis of race, and they are rooted in a considerable body of case law that provides administrators with far more concrete guidance on how to proceed.[15]

This would be a persuasive argument if the federal government's civil rights enforcement apparatus had not already signaled that it does not intend to enforce the provisions of the Civil Rights Act when White students or teachers are the victims of discrimination.[16] While Title VI of the Civil Rights Act does have a private right of enforcement, which allows individuals to bring civil lawsuits, it is unconstitutional for the government to protect students of one race and leave parents of students of another to fend for themselves in the courts. This is a clear-cut case of de facto unequal protection. Until the federal government signals that it will faithfully enforce the Civil Rights Act to protect all students, regardless of race, states have a constitutional duty to act.

The State Has a Compelling Interest in What Students Are Taught. Another downside of the moniker "CRT ban" was pointed out by Ethics & Public Policy Foundation Fellow Pascal-Emmanuel Gobry, who wrote that "*nobody* is trying to 'ban' CRT. They're trying to have it *not taught in schools*, which is not remotely the same thing as banning." Gobry points out that the list of what is not taught in schools is long, and he proposes the thought experiment of replacing "CRT" with "Juche," a North Korean state ideology. Few would argue that a state policy to curb the teaching that Kim Jong Un is divine would be illiberal. "By definition," Gobry notes, "public schools can't teach everything; by definition, public schools are run by the government; by definition, citizens & their representatives can decide what public schools do and don't teach."[17]

The analogy to Juche is hardly outré. According to one of its key architects, Richard Delgado, CRT "questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law."[18] Insofar as all the above listed are foundational to American society, it is not a matter of political rhetoric, but rather of technical accuracy, to label it "anti-American."

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The state surely has an interest in assuring that the next generation is not educated in state-run schools to oppose the foundational principles of the state. The state has an even higher obligation to act on behalf of the parents whose children it educates. CRT-inspired pedagogy at times aims to subvert the family itself, teaching ideas such as "it [is] important to disrupt the Western nuclear family dynamics as the best/proper way to have a family."[19] Faced with the prospect of having their authority undermined by public institutions, parents have a right—if not a duty—to act through their representatives in government to safeguard their moral authority over their children.

Perils, Pitfalls, and Bad Clauses

The key criticism leveled against these bills is that they would stifle the teaching of honest history. These claims are, mostly, either willful or earnest misreadings of legislative language. But lawmakers should still take care to ensure they do not draft or pass laws that could reasonably be interpreted to impinge on accurate teaching of, and prudent moral judgments about, American history.

Perhaps the most striking example of legislative language that would have substantively harmed history instruction if passed was Missouri's House Bill No. 952. It reads:

> As used in this section, "curriculum implementing critical race theory" shall include any curriculum that does any of the following: (1) Identifies people or groups of people, entities, or institutions in the United States as inherently, immutably, or systemically sexist, racist, anti-LBGT, bigoted, biased, privileged, or oppressed.[20]

The goal of these lawmakers is intelligible, but the language they use is so sweeping and broad that it could support morally unsupportable interpretations. A proponent of CRT would not be wrong to point out that slavery was an institution in the United States, and if the Missouri legislation forbids the identification of institutions as inherently racist, then the law might prohibit teachers from characterizing slavery as inherently racist. Fortunately, this bill died in committee.

State legislatures should steer clear of overly broad and vague prohibitions targeting curricular characteristics. For example, Michigan's Senate Bill 460 would require schools to "ensure that the curriculum provided to all pupils enrolled in the school district or public school academy does not include coverage of the critical race theory."[21] It further explains that

> "critical race theory" means anti-American and racist theories, reading guides, lesson plans, activities, guided discussions, and other resources that promote that the United States is a fundamentally racist nation, that the United States Constitution is a fundamentally racist document, and that certain races are fundamentally oppressive or oppressed.[22]

Such language is misguided, not because any of its goals are wrong, but because it begs the question of what constitutes CRT ("'critical race theory' means anti-American and racist theories") and in such a broad way that it would be certain to cast either too wide or too narrow of a net when implemented at the local level.

Legislators should think carefully about every prohibitory clause to assure that it actually reflects the values and principles they aim to defend and promote. For example, Tennessee's bill (signed into law in May 2021) says that schools may not promote "division between, or resentment of, a race, sex, religion, creed, nonviolent political affiliation, social class, or class of people."[23] Contrast this clause with a recent bill signed by Florida Gov. Ron DeSantis, which requires schools to teach about "the evils of communism and totalitarian regimes."[24] Students in Florida must be taught that Communism is evil; teachers in Tennessee are likely legally prohibited from teaching such an explicit lesson, as they would surely promote resentment against that totalitarian creed.

Opponents of "CRT bans" have accused bills that could not possibly be read to censor history as doing so.[25] Still, supporters have a duty to carefully review every clause to assure these measures don't unintentionally conform to their opponents' caricature.

Three Categories of Prohibition

The bills introduced and passed to date tend to fall into one of three categories: (1) prohibiting compulsion, (2) prohibiting inclusion, or (3) prohibiting promotion. While each approach has its strengths and weaknesses, the least commonly introduced option of prohibiting promotion is the most effective and defensible.

Prohibiting Compulsion. The first "CRT ban," passed in Idaho, declared that "no public institution of higher education, school district, or public school, including a public charter school, shall direct or otherwise compel students to personally affirm, adopt, or adhere to any of the following tenets."[26] The prohibition against compelling students to personally affirm the standard list of racialist doctrines is also the preferred approach of the conservative Manhattan Institute, which introduced model legislation stipulating that no school may "direct or otherwise compel a teacher, administrator, or student personally to affirm, adopt, or adhere to any belief or concept" related to a four-clause definition of CRT.[27] The prohibition against compulsion is also the preferred approach of the Heritage Foundation, which has promoted model legislation stipulating that "no public education employee shall compel a teacher or student to

adopt, affirm, adhere to, or profess ideas in violation of Title IV and Title VI of the Civil Rights Act of 1964."[28]

This approach has the distinctive virtue of claiming the highest possible moral and constitutional ground. There is a strong body of First Amendment constitutional jurisprudence against compelled speech, which would almost assuredly effectively insulate a law framed in this way from legal challenge.[29] The prohibition against compulsion takes aim at some CRT-inspired pedagogical practices that strike most Americans as inherently degrading. A privilege walk, for example, would be illegal under this type of law because asking students to take a step forward if they fall into certain categories of race, sex, or gender identity would amount to compelled speech. So, too, would classroom assignments that require students to reflect on their "privilege" or decry their "oppression."

These bills would not, however, necessarily preempt teacher professional development that intends to instill into school staff the teachings of, say, Robin DiAngelo's *White Fragility*: *Why It's So Hard for White People to Talk About Racism*.[30] Teachers could still be told by taxpayer-funded professional development trainers that "White identity is inherently racist."[31] They just could not be required to confess their alleged racism within that seminar. Students could still be instructed that certain moral characteristics are part of "Whiteness." They just could not be required to write essays decrying "Whiteness" or confessing to complicity in racialized "oppression."

Given that the prohibition against compelled speech is already well established, a state law that prohibits compulsion will not present a fundamentally new legal reality with which schools must comply. Such laws may send a useful cultural signal that could dissuade school districts from adopting or further embracing CRT-inspired pedagogy, but concerned parents may eventually be upset to realize that the letter of the law itself would permit teachings and trainings that they believed the state legislature had banned.

Prohibiting Inclusion. Most bills introduced to date fall into the category of prohibiting inclusion, with an operative clause such as this one (taken from Tennessee's law):

> [A school district] or public charter school shall not include or promote the following concepts as part of a course of instruction or in a curriculum or instructional program, or allow teachers or other employees of the [school] . . . to use supplemental instructional materials that include or promote the following concepts.[32]

Whereas bills that prohibit compulsion would not necessarily affect the substance of curriculum provided to students, bills such as Tennessee's that prohibit inclusion certainly could. The broadness of the word "include" provides sufficient ground for concern that it could impinge on an accurate and thorough discussion of historical figures, events, and trends. For example, Calhoun developed and promoted the thesis that slavery was a positive good, given that—in his opinion—Blacks were a fundamentally inferior race. But Tennessee law prohibits "including" the concept that "one race or sex is inherently superior to another race or sex."[33]

Tennessee's law does carve out an exception that would address this concern, stipulating that teachers may provide lessons and materials that engender an "impartial discussion of controversial aspects of history" and "the impartial instruction on the historical oppression of . . . people based on race, ethnicity, class, nationality, religion, or geographic region."[34] Such provisions, however, are not universally found within bills that prohibit inclusion. To the extent that any curricular dispute arising from the implementation of such bills occurs in the political realm, it can likely be handled responsibly between educators and community members. But in the court of law, bills that prohibit inclusion run a risk of yielding a court decision that their proponents may regret.

Prohibiting Promotion. The North Carolina legislature has taken a unique approach, one which is worthy of emulation in other states. Its proposed legislation prefaces the typical list of prohibited concepts with the words "public schools shall not promote" and provides a three-part definition of the word "promote":

> (1) Compelling students, teachers, administrators, or other school employees to affirm or profess belief in the concepts . . . (2) including concepts . . . in curricula, reading lists, seminars, workshops, trainings, or other educational or professional settings in a manner that could reasonably give rise to the appearance of official sponsorship, approval, or endorsement. (3) Contracting with, hiring, or otherwise engaging speakers, consultants, diversity trainers, and other persons for the purpose of advocating [these] concepts.[35]

This approach encompasses the prohibition against compulsion. It also prohibits school districts from contracting with professional development providers that peddle CRT-inspired lessons for teachers—something that not every bill prohibiting inclusion does. But most importantly, it threads the needle of preventing the politicization of the classroom without presenting any barrier to honest and accurate classroom instruction by prohibiting only the presentation of materials "in a manner that could reasonably give rise to the appearance of official sponsorship."[36]

Materials from Calhoun or Kendi could still be provided as reading assignments, but teachers would not be free to present either of their teachings as true. Nor would schools be permitted to provide summer reading lists that draw uniformly from CRT-inspired authors advancing CRT arguments, as students could easily interpret such a list to imply that the school district endorses those authors and their arguments.

Prohibiting promotion achieves CRT opponents' core aims. It precludes schools from teaching racist doctrines as though they were true. It prevents schools from actively working to subvert parental authority. It is not actually a "ban" on any idea, which should provide for a greater degree of comfort and political acceptance.

The thrust of any dispute that would arise from this law would be over not whether children have been presented with certain materials but whether the school or teacher presented them in such a way as to suggest that it is true and students should believe it. Other legislative proposals have attempted to thread a similar needle with wording such as "shall not teach, instruct, or train . . . to adopt or believe" the enumerated concepts.[37] But the reasonable person standard inherent in the prohibition against promotion would likely provide easier grounds for concerned parents to threaten or take legal action. What's more, legislation against promotion should also be a clear political winner; anyone who opposed it would essentially be forced to take the position that schools should be allowed to officially endorse the position that some races are inherently superior to others.

Prohibiting promotion is not actually a "ban" on any idea, which should provide for a greater degree of comfort and political acceptance.

Conclusion

The COVID-19 pandemic opened parents' eyes to what was truly being taught to their children at the same time that much of the public education establishment openly endorsed a profoundly divisive ideology. Parental discontent with the politicization of education was channeled into legislative proposals or action in more than half the country's states. Although pundits and journalists have broadly mischaracterized these bills, some proposals were less advisable than others were.

Of all the proposals introduced to date, the approach the North Carolina legislature took—to prohibit the promotion of CRT in schools—strikes the best balance between addressing parents' concerns about ideological indoctrination without running any risk of substantively hampering history or civics instruction. As more state legislatures consider similar measures, and perhaps as some states that have passed laws decide to revisit them, North Carolina's bill presents an excellent starting point for deliberation.

About the Author

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Notes

1. Sarah Schwartz, Emma Patti Harris, and Eesha Pendharkar, "Map: Where Critical Race Theory Is Under Attack," *Education Week*, September 13, 2021, https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06.
2. See Adrian Florido, "Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons," National Public Radio, May 28, 2021, https://www.npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship.
3. Ensuring Dignity & Nondiscrimination/Schools, H. B. 324, North Carolina State Legislature, 2021 Sess., https://legiscan.com/NC/text/H324/id/2394784/North_Carolina-2021-H324-Amended.pdf.
4. Trip Gabriel and Dana Goldstein, "Disputing Racism's Reach, Republicans Rattle American Schools," *New York Times*, June 1, 2021, https://www.nytimes.com/2021/06/01/us/politics/critical-race-theory.html.
5. H. B. No. 322, Ohio State Legislature, 134th General Assembly (2021), https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb322/IN/00/hb322_00_IN?format=pdf.
6. Ensuring Dignity & Nondiscrimination/Schools, H. B. 324, North Carolina State Legislature, 2021 Sess.
7. US Department of Labor, Office of the Assistant Secretary for Administration and Management, "Title VI, Civil Rights Act of 1964," https://www.dol.gov/agencies/oasam/regulatory/statutes/title-vi-civil-rights-act-of-1964.
8. Christopher F. Rufo, "Subversive Education," *City Journal*, March 17, 2021, https://www.city-journal.org/critical-race-theory-in-wake-county-nc-schools.
9. Frederick M. Hess and J. Grant Addison, "'Anti-Racist' Education Is Neither," American Mind, December 18, 2020, https://americanmind.org/memo/anti-racist-education-is-neither/.
10. Parents Defending Education, "Office for Civil Rights Administrative Complaint," May 12, 2021, https://defendinged.org/wp-content/uploads/2021/05/Wellesley-OCR_2.pdf.
11. Kimberly Hermann, "The People v. Critical Race Theory," *City Journal*, July 16, 2021, https://www.city-journal.org/evanston-illinois-teacher-lawsuit-over-critical-race-theory.
12. Ibram X. Kendi, *How to Be an Antiracist* (New York: One World, 2019), https://www.oneworldlit.com/books/how-to-be-an-antiracist-hc.
13. Jason Johnson, "Critical Race Theory Is a Convenient Target for Conservatives," Slate, June 12, 2021, https://slate.com/news-and-politics/2021/06/critical-race-theory-ibram-kendi-racism-racists.html.
14. Kendi, *How to Be an Antiracist*.
15. Kmele Foster et al., "We Disagree on a Lot of Things. Except the Danger of Anti–Critical Race Theory Laws," *New York Times*, July 5, 2021, https://www.nytimes.com/2021/07/05/opinion/we-disagree-on-a-lot-of-things-except-the-danger-of-anti-critical-race-theory-laws.html.
16. Max Eden, "A Landmark Civil Rights Lawsuit," *City Journal*, July 8, 2021, https://www.city-journal.org/evanston-critical-race-theory-lawsuit-and-the-non-enforcement-of-civil-rights.
17. Pascal-Emmanuel Gobry (@pegobry), "What's particularly dumb here is that *nobody* is trying to 'ban' CRT. They're trying to *not have it taught in schools*, which is not remotely the same thing as 'banning.' The list of things that aren't taught in school is very very long.," Twitter, June 19, 2021, 2:41 a.m., https://twitter.com/pegobry/status/1406140138321743877.
18. Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction*, 3rd ed. (New York: NYU Press, 2017), https://nyupress.org/9781479802760/critical-race-theory-third-edition/.
19. Complaint, Stacy Deemar v. District 65, No. 1:21-cv-03466 (Dist. Ct. N.D. Ill.), https://345h6j74bj93ldnop2phvizr-wpengine.netdna-ssl.com/wp-content/uploads/sites/12/2021/06/202106029-Deemar-v.-D65-Complaint.pdf.
20. H. B. No. 952, Missouri State Legislature, 101st General Assembly (2021), https://legiscan.com/MO/text/HB952/id/2384095/Missouri-2021-HB952-Comm_Sub.pdf.
21. S. B. No. 460, Michigan State Legislature, 101st General Assembly (2021), http://www.legislature.mi.gov/documents/2021-2022/billintroduced/Senate/pdf/2021-SIB-0460.pdf
22. S. B. No. 460, Michigan State Legislature, 101st General Assembly (2021).
23. Tennessee General Assembly, "S. B. 0623: Bill Summary," 2021, https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0623.

24. Richard Tribou, "DeSantis Signs Education Bills That Target Communism, Socialists," *Orlando Sentinel*, June 22, 2021, https://www.orlandosentinel.com/politics/os-ne-desantis-press-conference-tuesday-20210622-rwsguttymnal7p2jieqngq6p4i-story.html.
25. Aziz Huq, "The Conservative Case Against Banning Critical Race Theory," *Time*, July 13, 2021, https://time.com/6079716/conservative-case-against-banning-critical-race-theory/.
26. H. B. No. 377, Idaho State Legislature, 66th General Assembly (2021), https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/legislation/H0377.pdf.
27. James R. Copland, "How to Regulate Critical Race Theory in Schools: A Primer and Model Legislation," Manhattan Institute, August 26, 2021, https://www.manhattan-institute.org/copland-critical-race-theory-model-legislation.
28. Heritage Foundation, "Protecting K–12 Students from Discrimination," June 18, 2021, https://www.heritage.org/article/protecting-k-12-students-discrimination.
29. Joshua Dunn, "Critical Race Theory Collides with the Law," *Education Next* 21, no. 4 (Fall 2021), https://www.educationnext.org/critical-race-theory-collides-with-law/.
30. Robin DiAngelo, *White Fragility: Why It's So Hard for White People to Talk About Racism* (Boston, MA: Beacon Press, 2018), http://www.beacon.org/White-Fragility-P1631.aspx.
31. Hess and Addison, "'Anti-Racist' Education Is Neither."
32. Tenn. Code Ann. § 49-6-1019, https://www.tn.gov/content/dam/tn/education/safety/bully_harass_cyber-bullying_laws.pdf.
33. Tenn. Code Ann. § 49-6-1019.
34. Tenn. Code Ann. § 49-6-1019.
35. Ensuring Dignity & Nondiscrimination/Schools, H. B. 324, North Carolina State Legislature, 2021 Sess.
36. Ensuring Dignity & Nondiscrimination/Schools, H. B. 324, North Carolina State Legislature, 2021 Sess.
37. H. B. No. 9 (prefilled legislation), Alabama State Legislature, 2022, https://legiscan.com/AL/text/HB9/2022.