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## Critical Race Theory and Florida Schools: An Attempt to Suppress Racism Embedded Within American History

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# CRITICAL RACE THEORY AND FLORIDA SCHOOLS: AN ATTEMPT TO SUPPRESS RACISM EMBEDDED WITHIN AMERICAN HISTORY

*Angelica Knight*<sup>1</sup>

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## OPENING THOUGHTS

*“Our Constitution is colorblind, and neither knows nor tolerates classes among its citizens.”<sup>2</sup> Imagine that a public school student learns that the curriculum taught at their school about their culture and its history has just been banned.<sup>3</sup> Further, they discover that the reasoning*

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2. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); see also Eric J. Segall, Op-Ed: *A Conservative Quandary in Affirmative Action Case Fisher vs. Texas*, LOS ANGELES TIMES (Dec. 6, 2015, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-1206-segall-affirmative-action-fisher-texas-20151206-story.html> (noting the argument that the Equal Protection Clause requires that all governmental decisions be made on a color-blind basis and the way to stop racial discrimination is to “stop discriminating on the basis of race.” (quoting Chief Justice Roberts)).

3. See *Arce v. Douglas*, 793 F.3d 968, 973 (9th Cir. 2015) (describing how the school board in Tucson, Arizona, developed a Mexican American Studies (MAS) program in the public schools in order to provide a curriculum relevant to the Mexican American culture by

for the removal is the belief that the curriculum promotes reverse racism.<sup>4</sup> Imagine this happening only to classes related to their culture and background, but similar courses teaching the history and experiences of other cultures remain untouched, unbanned, and unaddressed.<sup>5</sup> History is the story of the past and tells us where we are, where we come from, and can give us insight into the future.<sup>6</sup>

#### INTRODUCTION

In May of 1896, the United States Supreme Court ruling in *Plessy v. Ferguson* upheld a state law in Louisiana allowing racial segregation if each race had equal quality facilities.<sup>7</sup> This issue arose from a transportation law requiring separate train cars for Black Americans and White Americans and came to embody the “separate but equal” doctrine.<sup>8</sup> Over half a century later, on May 17, 1954, the United States Supreme Court issued a unanimous ruling in the landmark case—*Brown v. Board of Education*—deciding that racial segregation was unconstitutional.<sup>9</sup> The Court held that the “separate but equal” doctrine violated the equal protection clause of the Fourteenth Amend-

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including history and contemporary contributions of individuals into the coursework and classroom studies, but the Arizona state superintendents of education “successfully sponsored and implemented legislation that did away with the program).

4. See *id.* at 973 (“The statute prohibits a school district or charter school from including in its program of instruction any courses or classes that: (1) ‘Promote the overthrow of the United States government,’ (2) ‘Promote resentment toward a race or class of people,’ (3) ‘Are designed primarily for pupils of a particular ethnic group,’ or (4) ‘Advocate ethnic solidarity instead of the treatment of pupils as individuals.’”).

5. See *id.* (noting that there was no dispute by either party that the legislation was created specifically with the intent to target the Mexican American Studies Program).

6. See *Why Is History Important and How Can it Benefit Your Future?*, UNIV. PEOPLE: TIPS FOR ONLINE STUDENTS BLOG, <https://www.uopeople.edu/blog/why-is-history-important/> (last visited Nov. 22, 2021) (explaining how studying history is important because it is essential in providing us with an understanding of ourselves and the world around us); see also Nord Anglia, *Why Is it Important To Study History?*, NORD ANGLIA EDUC. (Apr. 29, 2020) <https://www.nordangliaeducation.com/news/2020/04/29/why-is-it-important-to-study-history> (noting that societies and individuals benefit from having a deeper understanding of history).

7. See *Plessy*, 163 U.S. at 543-44, 547-48 (holding that public accommodations segregated based on race are not unconstitutional and introducing the separate but equal doctrine).

8. See *id.* at 540-42 (explaining that the issue which sparked this case derived from Louisiana enacting the Separate Car Act requiring separate railway cars for Black and White people, and Homer Plessy, who was seven-eighths Caucasian, but black under the Louisiana Law, sat in a whites-only car of a Louisiana train, refusing to move when asked to vacate and subsequently arrested).

9. See *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty. Kan.*, 347 U.S. 483, 495 (1954) (ruling that separate but equal was unconstitutional).

ment of the United States Constitution.<sup>10</sup> This decision ultimately overturned *Plessy v. Ferguson*.<sup>11</sup> *Brown* intended to create equal access to education for all individuals, regardless of race.<sup>12</sup> For many people, *Brown* represented a huge turning point in the fight for equality because of the belief that the decision signified the beginning of the end of segregation and that they were winning the battle.<sup>13</sup> However, *Brown* was not the end of the story, and racism did not stop. Poverty and racial separation are still prevalent in schools today.<sup>14</sup> Schools today may not look like they once did before *Brown*, but discrimination issues have become present through other avenues.<sup>15</sup> Most recently, in the opposition to Critical Race Theory; opposers argue that it is a divisive concept, with supporters explaining that racism is embedded in American history through a historical context.<sup>16</sup>

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10. See *id.* at 490 (explaining that the Fourteenth Amendment of the Constitution prohibits states from denying equal protection to any person within their jurisdictional boundaries).

11. See *id.* at 494-95 (overturning the ruling in *Plessy*).

12. See Sonya Ramsey, *The Troubled History of American Education After the Brown Decision*, PROCESS: A BLOG FOR AM. HIST. (Feb. 9, 2017), <http://www.processhistory.org/american-education-after-brown/> (noting that some Americans celebrated the ruling in *Brown* believing the ruling would eliminate racial inequalities in the public schools); see also *Brown*, 347 U.S. at 495 (holding that racial segregation in public schools was a violation of the Fourteenth Amendment of the Constitution).

13. See Karen Wolff, *From Plessy v. Ferguson to Brown v. Board of Education: The Supreme Court Rules on School Desegregation*, YALE-NEW HAVEN TCHRS. INST., <https://teachersinstitute.yale.edu/pubs/A5/wolff.html> (last visited Nov. 22, 2021) (noting that the decision in the *Brown* signaled the start of the civil rights movement and propelled Black people to fight for equality); see also Ramsey, *supra* note 11 (discussing how *Brown* had a major impact on the nation's education system that stretched far beyond what was originally intended).

14. See Ramsey, *supra* note 12 (explaining how issues of poverty and racial segregation are still apparent in public schools today); see also Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods – a Constitutional Insult*, ECON. POL'Y INST. (Nov. 12, 2014), <https://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/> (discussing the social and economic disadvantages faced by students in public schools).

15. See Ramsey, *supra* note 12 (noting that as a result of *Brown*, black students are not legally barred from attending schools with white students but face other issues relating to the class status of their families and the location of their neighborhoods); see also Rothstein, *supra* note 14 (explaining how segregation still exists in the form of racial and economic disadvantages).

16. See Stephen Sawchuk, *What Is Critical Race Theory, and Why Is it Under Attack?*, EDU. WEEK, (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05> (explaining the background and make-up of Critical Race Theory and why there are opposing views on the topic between liberals and conservatives); see also Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 21, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> (noting the difference in opinion between supporters of and opponents of Critical Race Theory).

Across the country, groups have begun to stand up for the civil rights to which they are entitled. In May 2020, the United States saw the largest racial protests since the Civil Rights Movement; Black Lives Matter activists stood against racism after George Floyd, a black man, was murdered at the hands—or knee—of a white officer.<sup>17</sup> After the murder of George Floyd, racism became more apparent, undeniable, and visible, making Critical Race Theory an important part of the political agenda.<sup>18</sup> Bills and legislation removing Critical Race Theory from the educational curriculum are also hot topics in secondary and higher education institutions.<sup>19</sup> In September 2020, President Trump signed an executive order that excluded Critical Race Theory from federal contracts.<sup>20</sup> In May 2021, United States Senators Marco Rubio, Kevin Cramer, and Mike Braun introduced the Protect Equality And

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17. See Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS, (June 4, 2021, 7:39 PM), <https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/> (noting that the Black Lives Matter Movement sparked a global movement, including the largest racial justice protests since the civil rights movement); see also Larry Buchanan ET AL., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (noting that, in a single day, half a million people turned out in over 500 places across the United States in response to the Black Lives Matter Movement).

18. See Anthony Zurcher, *Critical Race Theory: The Concept Dividing the U.S.*, BBC (July 22, 2021), <https://www.bbc.com/news/world-us-canada-57908808> (explaining that the George Floyd case and the Black Lives Matter Movement propelled the “nation to take a look at race and racism” (quoting Marvin Lynn)); see also Jeremy Barr, *Critical Race Theory Is the Hottest Topic on Fox News. And It’s Only Getting Hotter.*, WASH. POST (June 24, 2021, 6:06 PM), <https://www.washingtonpost.com/media/2021/06/24/critical-race-theory-fox-news/> (noting that the conversation surrounding Critical Race Theory has become a major theme for networks and media).

19. See Sawchuk, *supra* note 16 (discussing how numerous state legislatures are considering bills which intend to ban Critical Race Theory); see also Bobby Caina Calvan, *Florida Bans ‘Critical Race Theory’ from its Classrooms*, ASSOC. PRESS (June 10, 2021), <https://apnews.com/article/florida-race-and-ethnicity-government-and-politics-education-74d0aff6c52c0009ec3fa3ee9955b0a8d> (discussing that there is currently a national debate over how American history should be taught, with governors and legislatures considering bills that would eliminate Critical Race Theory and control how teachers can frame their teaching of history).

20. See Janel George, *A Lesson on Critical Race Theory*, AM. BAR ASS’N (Jan. 11, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/) (explaining that the executive order issued by President Trump excluded “from federal contracts any diversity and inclusion training interpreted as containing ‘Divisive Concepts,’ ‘Race or Sex Stereotyping,’ and ‘Race or Sex Scapegoating,’” including Critical Race Theory); see also Lindsay Burke et al., *President Trump Issues Executive Order Prohibiting “Divisive Concepts” in Federal Contractor Trainings*, COVINGTON: INSIDE GOV’T CONTRS. (Sept. 29, 2020), <https://www.insidegovernmentcontracts.com/2020/09/president-trump-issues-executive-order-prohibiting-divisive-concepts-in-federal-contractor-trainings/> (noting that President Trump issued an executive order prohibiting workplace training on divisive concepts).

Civics Education (“PEACE”) Act to prohibit federal funding from being utilized to support or promote divisive concepts, such as Critical Race Theory, in schools.<sup>21</sup> Following the introduction of the PEACE Act in May, Florida’s State Board of Education, in June 2021, adopted a rule banning public schools from teaching Critical Race Theory.<sup>22</sup> Based on the Ninth Circuit’s decision in *Arce*, what does the Eleventh Circuit intend to do, or what should it do?<sup>23</sup> The legislation banning the Mexican American Studies program in *Arce v. Douglas* is similar to the PEACE Act.<sup>24</sup> The Court in *Arce* found that the bill violated the equal protection clause of the Fourteenth Amendment, the right to association of the First Amendment, and interpretations around education.<sup>25</sup> Removing Critical Race Theory is not the solution; the solution is to make changes to the country’s systems and institutions and acknowledge that the racial injustices embedded within them are no longer acceptable, and it is imperative to treat all individuals equally.<sup>26</sup>

This comment will analyze *Arce v. Douglas* to inform how the Eleventh Circuit should analyze this decision to allow educators to teach Critical Race Theory in Florida schools.<sup>27</sup> The underlying goal is to assess why it is essential for educators to teach Critical Race Theory in schools. This comment argues attempts to remove Critical Race Theory from curriculum obscure and ignore the instances of racism that

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21. S.2682 117th Cong. § 2 (2022) (stating the history of the PEACE Act); see also John Haughey, *Rubio Co-Sponsoring Federal Bills Targeting Critical Race Theory*, THE CTR. SQUARE (Aug. 12, 2021), [https://www.thecentersquare.com/florida/rubio-co-sponsoring-federal-bills-targeting-critical-race-theory/article\\_92a41de0-fb87-11eb-be5d-fb3dc423a124.html](https://www.thecentersquare.com/florida/rubio-co-sponsoring-federal-bills-targeting-critical-race-theory/article_92a41de0-fb87-11eb-be5d-fb3dc423a124.html) (discussing the PEACE Act and legislative efforts by Senator Rubio and others aimed at prohibiting Critical Race Theory).

22. See Calvan, *supra* note 19 (noting that Florida adopted new rules banning Critical Race Theory from being taught in the classrooms); see also Haughey, *supra* note 21 (explaining how, initiated by Florida Governor Ron Desantis, the Florida Board of Education adopted a rule banning Critical Race Theory from its classrooms).

23. See *Arce*, 79 F.3d at 981, 986 (concluding that the statute raised First Amendment discriminatory issues and Equal Protection clause issues); see also Haughey, *supra* note 21 (stating that Critical Race Theory has not been taught in Florida’s K-12 schools).

24. Compare S.2682, 117th Cong. § 2 (2022) with *Arce*, 79 F.3d at 973 (describing the legislation banning the Mexican American Studies program in Arizona).

25. See *Arce*, 79 F.3d at 990 (noting that the legislation raised both equal protection and First Amendment issues).

26. See Sawchuk, *supra* note 16 (stating that Critical Race Theory focuses more on outcomes and these outcomes need to be considered and adjusted in order to combat the causes of social inequality); see also Ray and Gibbons., *supra* note 16 (explaining that systemic racism can affect a multitude of areas of our daily lives and in order to combat it, we must address the issues directly rather than run from them).

27. See *infra*, Parts I-III. (providing a detailed analysis of *Arce v. Douglas*, comparing the events and decisions of that case to Florida, and discussing the decision that Florida should ultimately make.)

marginalized populations in America have repeatedly been subjected to throughout history.<sup>28</sup> Part I of this paper will provide background on Critical Race Theory, provide its definition, and explain how it came into existence.<sup>29</sup> Part II, sections A and B will discuss the Constitutionality of bans on Critical Race Theory.<sup>30</sup> Part II, section C, will provide an in-depth analysis of the Ninth Circuit's decision in the *Arce v. Douglas* case and compare the legislation in that case to the Florida Protect Equality And Civic Education (PEACE) Act, highlighting the blatant similarities between the two legislations and any apparent differences.<sup>31</sup> Part II section D will discuss the importance of using a historical analysis when reviewing cases centered around racial discrimination and equal protection.<sup>32</sup> Finally, Part III will discuss a solution as to how the courts should analyze Critical Race theory, and finishing off with discussing how it is impossible to achieve justice while attempting to utilize a non-racial means to get there.<sup>33</sup>

## I. BACKGROUND

Critical Race Theory is an academic concept, over forty years old, that states racism is not limited to prejudices or biases stemming from individuals but is also embedded into the construct of our justice systems and legislative policies.<sup>34</sup> Critical Race Theory “exposes how racism is often [hidden] in terminology regarding ‘mainstream,’ ‘normal,’ or ‘traditional’ values or ‘neutral’ policies, principles, or

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28. See George, *supra* note 20 (explaining the principles of Critical Race Theory, the applicability of the concept in education, and the importance that it be acknowledge and understood); see also Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 08, 2021), [https://www.nytimes.com/article/what-is-critical-race-theory.html?.mc=Aud\\_dev&ad-keywords=Auddevgate&gclid=CJwKCAjw2bmLBhBREiwAZ6ugo2VGWolahf3YeNulnKttzVfallhsPuvZG\\_iTd1rKiWlC3E3CJzofURoCkWsQAvD\\_BwE&gclid=Aw.ds](https://www.nytimes.com/article/what-is-critical-race-theory.html?.mc=Aud_dev&ad-keywords=Auddevgate&gclid=CJwKCAjw2bmLBhBREiwAZ6ugo2VGWolahf3YeNulnKttzVfallhsPuvZG_iTd1rKiWlC3E3CJzofURoCkWsQAvD_BwE&gclid=Aw.ds) (explaining that Critical Race Theory provides an understanding of the underlying reasoning for racial disparities and provides a basis for combating system racial inequalities).

29. See *infra*, Part I. (discussing the origins of Critical Race Theory and why it is important to both history and present day).

30. See *infra*, Part II. (discussing the Constitutional freedoms to which we are entitled and how banning Critical Race Theory imposes on these freedoms).

31. See *infra*, Part II. (analyzing the Ninth Circuit's decision and comparing and contrasting the *decision* with Florida Legislation).

32. See *infra*, Part II. (highlighting the importance of history when analyzing cases that target racial discrimination).

33. See *infra*, Part III. (explaining the way courts should utilize Critical Race Theory to come to a fair and just decision).

34. See Sawchuk, *supra* note 16 (explaining the definition of Critical Race Theory); see also George, *supra* note 20 (explaining the principles of Critical Race Theory, the applicability of the concept in education, and its significance).

practices.”<sup>35</sup> The basic framework of Critical Race Theory emerged in the late 1970s and early 1980s from the writings of Derrick Bell, Kimberlé Crenshaw, and Richard Delgado, among others.<sup>36</sup> With origins stemming back to the 1980s, the groundwork of Critical Race Theory resulted from miscommunications and disagreements “between a range of individuals and groups” over the “scope of race and racism” and how best to achieve racial equality.<sup>37</sup> In its earliest form, Critical Race Theory began as an intellectual concept comprised of efforts to create “sharp reliefs” from racial tensions and colorblindness, the result being the identification and articulation of racial power, not limited to philosophical critiques but including actual engagement by activists.<sup>38</sup> Critical Race Theory challenges conventional legal strategies to promote social and economic justice in the form of legal approaches that take race into account when analyzing the lives of Americans.<sup>39</sup>

The 1619 Project is a central reason why Critical Race Theory has been pushed to the forefront of the political arena today.<sup>40</sup> This

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35. See George, *supra* note 20 (discussing Critical Race Theory); see also Sawchuk, *supra* note 16 (explaining the definition of Critical Race Theory and elaborating on what the concept entails).

36. See Sawchuk, *supra* note 16 (explaining the origins of Critical Race Theory and identifying the creators of the concept); see George, *supra* note 20 (discussing the origins of Critical Race Theory).

37. See Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253, 1259 (2011) (explaining the background and founding principles of Critical Race Theory, stating “[o]ne might say that what nourished CRT and facilitated its growth from a collection of institutional and discursive interventions into a sustained intellectual project was a certain dialectical misalignment. Within the context of particular institutional and discursive struggles over the scope of race and racism in the 1980s, significant divergences between allies concerning their descriptive, normative, and political accounts of racial power began to crystallize. This misalignment became evident in a series of encounters-institutional and political-that brought into play a set of ‘misunderstandings’ between a range of individual actors and groups.”); see also Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 363 (1992) (explaining the struggles faced by black people as they encountered injustices and sought racial equality).

38. See Crenshaw, *supra* note 37, at 1260 (discussing the issues and events that led to the development of Critical Race Theory); see also KIMBERLÉ WILLIAMS CRENSHAW ET AL., *SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES* 76 (Univ. Cal. 5th ed. 2019) (discussing the development of critical Race Theory).

39. See Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1596 (2011) (discussing the beginnings of Critical Race Theory more than twenty years later); see also Chris Demaske, *Critical Race Theory*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1254/critical-race-theory> (discussing the history of critical Race Theory in relation to the First Amendment).

40. See Lauren Camera, *What Is Critical Race Theory and Why Are People So Upset About It?*, U.S. NEWS (June 1, 2021), <https://www.usnews.com/news/national-news/articles/what-is-critical-race-theory-and-why-are-people-so-upset-about-it> (explaining the connection between Critical Race Theory and the 1619 Project); see also Olivia B. Waxman,



project, spearheaded by Nikole Hannah-Jones, consists of more than 30 individual pieces of work, including poems, audio, essays, graphics, and visual art pieces, highlighting how slavery and Black Americans are the foundation of democracy in the United States.<sup>41</sup> Marking “the 400th anniversary of the arrival of the first known enslaved Africans to the British colony,” which later became known as the United States, the 1619 Project was published in the *New York Times*.<sup>42</sup> While widely hailed by many, the project displeased political conservatives who believed that the project undermined patriotism and promoted divisiveness, which is comparable to the feelings and response to Critical Race Theory by the same group.<sup>43</sup>

The formation of Critical Race Theory provides an avenue for evaluating how racial inequalities address imbalances in society.<sup>44</sup> Still, it is essential first to acknowledge that these inequalities do exist.<sup>45</sup> Conservative thinking related to race-based discrimination reinforces the thought that the solution is increasing constitutional rights and allowing individuals who face discrimination to pursue legal

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*‘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), <https://time.com/6075193/critical-race-theory-debate/> (noting how the 1619 Project pushed the topic of racism and its impact on American history into the mainstream).

41. See Melody Mercado, *What you need to know about the 1619 Project and its creator, native Iowan Nikole Hannah-Jones*, *DES MOINES REG.* (Feb. 11, 2021, 2:42 PM), <https://www.desmoinesregister.com/story/news/2021/02/11/what-does-1619-project-teach-pulitzer-winning-project-native-iowa-nikole-hannah-jones/6719245002/> (explaining the 1619 Project and its purpose); see also Camera, *supra* note 40 (explaining the connection between Critical Race Theory and the 1619 Project).

42. See Mercado, *supra* note 41 (discussing the 1619 Project); see also Camera, *supra* note 40 (discussing the connection between Critical Race Theory and the 1619 Project).

43. See Camera, *supra* note 40 (discussing the 1619 Project); see also Jeremy Engle, *Lesson of the Day: ‘Critical Race Theory: A Brief History’*, *NEW YORK TIMES* (September 20, 2021), [https://www.nytimes.com/2021/09/20/learning/lesson-of-the-day-critical-race-theory.html?\\_mc=Aud\\_dev&ad-keywords=Auddevgate&gclid=CjwKCAjw2bmLBhBREiwAZ6ugo0DPG7ENejLoD\\_gzWDKOrQtCg7CJEjHDILTli5kedgZ6LDsbtjsjyexoC5U0QAvD\\_BwE&glsrc=Aw.ds](https://www.nytimes.com/2021/09/20/learning/lesson-of-the-day-critical-race-theory.html?_mc=Aud_dev&ad-keywords=Auddevgate&gclid=CjwKCAjw2bmLBhBREiwAZ6ugo0DPG7ENejLoD_gzWDKOrQtCg7CJEjHDILTli5kedgZ6LDsbtjsjyexoC5U0QAvD_BwE&glsrc=Aw.ds) (noting that Critical Race Theory includes divisive content such as the 1619 Project).

44. See Engle, *supra* note 43 (discussing how Critical Race Theory, at its origins, sought to challenge the conventional view of race-based discrimination, which supported the idea that expanding constitutional rights would allow individuals who were discriminated against on the basis of race to seek legal remedies but failed to consider that racism is woven into the foundations of the legal system as a whole); see also Fortin, *supra* note 27 (explaining that Critical Race Theory provides an understanding of the underlying reasoning for racial disparities and provides a basis for combating system racial inequalities).

45. See Fortin, *supra* note 28 (noting the intentions of Critical Race Theory); see also Camera, *supra* note 40 (discussing the how Critical Race Theory is embedded in all aspects of American life and that racism is systemic no matter how far-removed society is from the origins of racism).

remedies.<sup>46</sup> However, as realized by legal scholars, lawyers, and activists in the 1980s, progress made during the civil rights era has come to a halt and, in some cases, has even been reversed.<sup>47</sup> Today, inequalities remain between majority-white and majority-black educational districts, so much so that there exists a \$23 billion gap between the two groups.<sup>48</sup> If an entire group of people deny the existence of a problem, then what are the solutions to combat such inequalities permanently?<sup>49</sup>

## II. BANNING CRITICAL RACE THEORY IS A VIOLATION OF CONSTITUTIONAL PRINCIPLES

Critical Race Theory is not required by the Constitution, but it is still protected, and banning it violates core constitutional principles.

### A. *Critical Race Theory and the First Amendment*

The First Amendment guarantees freedom related to religion, expression, assembly, and the right to petition.<sup>50</sup> This amendment

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46. See Camera, *supra* note 40 (discussing the origins of Critical Race Theory leading back to a framework challenging the conventional way of thinking about race-based discrimination); see also Waxman, *supra* note 40 (noting how Conservative groups are making efforts to weaponize the teaching of Critical Race Theory).

47. See Demaske, *supra* note 39 (noting the reversal of civil rights advances and how this contributed to the scholarship and development of Critical Race theory); see also Carbado, *supra* note 39, at 1608 (stating “[n]or do racial progress narratives make clear that the episodes we celebrate today as significant moments of racial reform (e.g., Brown ) were moments of national crisis, moments that contested what Lani Guinier has called the ‘tyranny of the majority,’ counter-majoritarian moments, moments preceded by mass political mobilization. Far from reflecting national harmony in which the country as a whole agreed that racial change was in order, racial reform typically has occurred when the equality interest of people of color converges with the interest of powerful elites; and ‘even when the interest convergence results in an effective racial remedy, that remedy will be abrogated at the point that policy makers fear that the remedial policy is threatening’ to the dominant social order.”).

48. See Camera, *supra* note 40 (noting the racial inequalities which are still present between majority-black and majority-white educational districts); see also Lauren Camera, *White Students Get More k-12 Funding Than Students of Color: Report*, U.S. NEWS (Feb. 26, 2019), <https://www.usnews.com/news/education-news/articles/2019-02-26/white-students-get-more-k-12-funding-than-students-of-color-report> (noting the educational funding inequities that exist between institutions serving white students and institutions serving students of color).

49. See Camera, *supra* note 40 (discussing the origins of Critical Race Theory leading back to a framework challenging the conventional way of thinking about race-based discrimination); see also Waxman, *supra* note 40 (noting how Conservative groups are making efforts to weaponize the teaching of Critical Race Theory).

50. See Legal Info. Inst., *First Amendment*, CORNELL L. SCHOOL, [https://www.law.cornell.edu/constitution/first\\_amendment](https://www.law.cornell.edu/constitution/first_amendment) (last visited Nov. 22, 2021) (discussing

also protects hate speech.<sup>51</sup> There is not one legal definition of hate speech; however, the term generally describes abusive language targeting a person or group “based on their race, color, religion, ethnic group, gender, or sexual orientation.”<sup>52</sup> In 1992, in *R.A.V. v. St. Paul*, the Supreme Court ruled against a city ordinance that made it a crime to place a burning cross or swastika anywhere “in an attempt to arouse anger or alarm on the basis of race, color, creed, or religion.”<sup>53</sup> The Court found the ordinance violated the First Amendment.<sup>54</sup> In the unanimous Court opinion for *R.A.V. v. St. Paul*, Justice Scalia noted how the St. Paul Statute targeted and prohibited expressions that served to cause outrage, alarm, or anger only with respect to racial, gender, or religious intolerances, yet other expressions designed equally to arouse anger or outrage on other bases were not prohibited and therefore this ordinance was unconstitutional on the basis of singling out particular viewpoints.<sup>55</sup> Compare this with the PEACE Act which places emphasis on combatting race, racial stereotyping, and racial superiority, yet the only avenue toward achieving this means has been to target and prohibit Critical Race Theory, singling out a partic-

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the rights afforded under the First Amendment of the Constitution); see also *First Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendment/amendment-i> (last visited Oct. 23, 2022) (explaining the First Amendment of the Constitution).

51. See Demaske, *supra* note 39 (discussing how the First Amendment preserves inequities by protecting hate speech); see also Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484, 527 (1990), reprinted in Henry Louis Gates, Jr. ET AL., *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 183 (1984), [https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2110&context=Fac\\_articles\\_chapters](https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2110&context=Fac_articles_chapters) (explaining how in the only three legal challenges to campus hate speech codes, all three courts ruled that the codes intended to combat hate speech were a violation of the First Amendment).

52. See Demaske, *supra* note 39 (stating “[n]o one legal definition exists for hate speech, but it generally refers to abusive language specifically attacking a person or persons based on their race, color, religion, ethnic group, gender, or sexual orientation.”); see *R.A.V. v. St. Paul* 505 U.S. 377 (1992); see also Strossen, *supra* note 50 (stating “‘hate speech’ -that is, speech that expresses hatred or bias toward members of racial, religious, or other groups.”).

53. See Demaske, *supra* note 39 (noting the ruling in Supreme Court case *R.A.V. v. St. Paul*, which seemed to “close the door” on hate speech regulation); see also David A. May, *R.A.V. v. St. Paul* (1992), *FIRST AMEND. ENCYCLOPEDIA*, <https://mtsu.edu/first-amendment/article/270/r-a-v-st-paul> (last visited Nov. 22, 2021) (discussing the procedural history and final ruling by the Supreme Court in *R.A.V. v. St. Paul*).

54. See May, *supra* note 53 (discussing the Court’s reasoning for striking down the city ordinance); see also Demaske, *supra* note 39 (noting how this Supreme Court decision impacted future hate speech regulation).

55. See Demaske, *supra* note 39 (discussing the ruling in Supreme Court case *R.A.V. v. St. Paul*); see also David A. May, *R.A.V. v. St. Paul* (1992), *FIRST AMEND. ENCYCLOPEDIA*, <https://mtsu.edu/first-amendment/article/270/r-a-v-st-paul> (last visited May 24, 2023) (discussing the unanimous opinion by the Supreme Court in *R.A.V. v. St. Paul*).

ular viewpoint of history.<sup>56</sup> Despite the freedoms and protections granted by the First Amendment, Idaho, Iowa, Oklahoma, Tennessee, and Florida passed legislation banning Critical Race Theory, and many other states have proposed similar legislation.<sup>57</sup> Educators are facing uncertainty as to what they can discuss in classrooms as it relates to race and other “divisive” topics; they are in fear of the consequences of their actions if they overstep.<sup>58</sup> Educators fear discipline if their choice of curriculum violates the laws and legislations banning Critical Race Theory; this seems to be in direct contrast with the primary purpose of education as identified in *Brown*, which states:

Today, education is the most important function of state and local governments. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>59</sup>

### *B. Critical Race Theory and the Fourteenth Amendment*

The Fourteenth Amendment of the United States Constitution guarantees all persons born or naturalized in the United States the

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56. See S.2682, 117th Cong. § 2 (2022) (discussing the language of the PEACE Act); see also Haughey, *supra* note 20 (noting the PEACE Act legislative was aimed at banning Critical Race Theory).

57. See Sawchuk, *supra* note 16 (noting the passing of legislation banning Critical Race theory in four states and proposals in various other statehouses); see also Ray and Gibbons, *supra* note 15 (discussing an assessment of anti- Critical Race Theory state legislation and the findings of the assessment).

58. See Mark Walsh, *If Critical Race Theory is Banned, Are Teachers Protected by the First Amendment?*, EDU. WEEK, (June 10, 2021), <https://www.edweek.org/policy-politics/does-academic-freedom-shield-teachers-as-states-take-aim-at-critical-race-theory/2021/06> (discussing the amount of “academic freedom” teachers actually have with new state laws arising which take aim at Critical Race Theory); see also Robert Kim, *What Critical Race Theory Is and What it Means for Teachers*, LEARNING FOR JUST. (Aug. 23, 2021), <https://www.learningforjustice.org/magazine/what-critical-race-theory-is-and-what-it-means-for-teachers> (discussing “anti-critical race theory” laws and what these laws mean for educators).

59. See Engy Abdelkader, *Are government bans on the teaching of critical race theory unconstitutional?*, ABA JOURNAL (Oct. 7, 2021, 10:22AM), <https://www.abajournal.com/columns/article/are-government-bans-on-the-teaching-of-critical-race-theory-unconstitutional> (discussing the primary purpose of education as identified in *Brown*); see also *Brown*, 347 U.S. at 493 (discussing the importance of education).

right to life, liberty, property, and equal protection of the laws.<sup>60</sup> Legislation banning Critical Race Theory can violate the rights afforded under the Fourteenth Amendment if these laws assert racially discriminatory intentions in how they are enacted or enforced.<sup>61</sup> Laws seeking to prohibit Critical Race Theory are designed in a way that eliminates an individual or a student's ability to understand the full role of race and racism in the history of the United States<sup>62</sup>—where opportunity, freedom, and wealth benefits have primarily been associated with, and reserved for, white individuals as displayed by the intentional exclusion and oppression of minority populations and specifically people of color.<sup>63</sup> As a result, removing or banning Critical Race Theory is equivalent to erasing an individual's history because students of color, or minority populations, will no longer have the privilege of being taught their past.<sup>64</sup> In contrast, their white counterparts will have

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60. See Legal Information Institute, *14th Amendment*, CORNELL L. SCHOOL, <https://www.law.cornell.edu/constitution/amendmentxiv> (last visited Nov. 22, 2021) (stating “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); see also Interactive Constitution, *14th Amendment*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendment/amendment-xiv> (quoting the Fourteenth Amendment of the Constitution).

61. See Tiana Headley, *Laws Aimed at Critical Race Theory May Face Legal Challenges*, BLOOMBERG LAW (July 7, 2021, 10:24 AM), <https://news.bloomberglaw.com/us-law-week/laws-curbing-critical-race-theory-may-face-legal-challenges> (discussing the various legal challenges that may be faced by states enacting legislation restricting curriculum related to Critical Race Theory); see also *Arce*, 793 F.3d at 977 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977)) (stating “the statute and/or its subsequent enforcement against the MAS program would still be unconstitutional if its enactment or the manner in which it was enforced were motivated by a discriminatory purpose.”).

62. See Karen Sloan, *Law School Association: Banning critical race theory is censorship*, REUTERS (Aug. 5, 2021, 11: 37 AM), <https://www.reuters.com/legal/government/law-school-association-banning-critical-race-theory-is-censorship-2021-08-04/> (discussing how banning Critical Race Theory stifles the “full exploration of the role of race and racism in United States history.”); see also Fabiola Cineas, *Critical race theory bans are making teaching much harder*, VOX (Sep. 3, 2021, 11:30 AM), <https://www.vox.com/22644220/critical-race-theory-bans-antiracism-curriculum-in-schools> (noting how “learning will be incomplete since students will only be taught half-truths” as a result of the ban).

63. See Rashawn Ray, *Is the United States a racist country?*, BROOKINGS, (May 4, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/05/04/is-the-united-states-a-racist-country/>. (explaining the history of systemic racism in the United States)

64. See Sloan, *supra* note 62 (explaining that banning Critical Race Theory will “. . . erase some people from the very classrooms in which they have a right to be full participants as students and as educators.”); see also Cineas, *supra* note 62 (noting “how classrooms will become unsafe spaces with marginalized students unable to discuss their experiences and making it harder for the country to change.”).

their history centered as the history that everyone is supposed to share, rather than embracing that multiple stories can be valid.<sup>65</sup> A student's ability to learn about culturally relevant and diverse topics, which paints a more accurate picture of history, allows all students to feel seen, and bridges the educational gaps between minority students and their non-minority counterparts, can be considered a right and a privilege.<sup>66</sup> Banning Critical Race Theory is a violation of such rights and privileges afforded under the Fourteenth Amendment.<sup>67</sup>

### C. The Ninth Circuit Decision in *Arce v. Douglas* and Florida's P.E.A.C.E. Act

In Arizona, the Tucson Unified School District is composed of students of Mexican or other Hispanic descent.<sup>68</sup> Naturally, these students are interested in knowing more about their cultural background and their community, so the school board of Tucson decided to create and implement a Mexican American Studies program, one of multiple ethnic studies programs held in the district.<sup>69</sup> In response, the Arizona state superintendent sponsored and implemented legislation to remove

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65. See Kali Halloway, "Critical Race Theory" Is White History, *NATION* (Nov. 16, 2021), <https://www.thenation.com/article/society/crt-race-history/> (discussing how Conservatives have been waging war against Critical Race Theory and are attempting to rebrand American history); see also Cineas, *supra* note 59 (discussing how marginalized student populations will no longer have the ability to feel safe and discuss their experiences in their classrooms).

66. See M. Isabel Medina, *Silencing Talk About Race: Why Arizona's Prohibition of Ethnic Studies Violates Equality*, 45 *HASTINGS CONST. L.Q.* 47, 49 (2017) (discussing the importance of ethnic studies programs, stating "[e]thnic studies, or 'culturally relevant pedagogy,' have proved successful at bridging educational gaps between minority students and their white cohorts. Black and Hispanic eighth-grade students are significantly behind their white peers in mathematics; are substantially overrepresented among students with learning disabilities; and have double the dropout rates than white students. However, a recent Stanford study concluded that the ethnic studies program in use in some San Francisco high schools increased student attendance significantly, student grade point average by 1.4 grade points, and the number of credits earned."); see also Hoa P. Nguyen, *Through Ethnic Studies, Schools Push to Include Marginalized Perspectives*, *EDUTOPIA* (May 21, 2021), <https://www.edutopia.org/article/through-ethnic-studies-schools-push-include-marginalized-perspectives> (discussing how supporters of curriculums inclusive of ethnic studies programs feel that these programs tell a more accurate story, "boosts academic performance and attendance," and helps students "develop a better understanding of race, identity, and equity.").

67. See Legal Information Institute, *supra* note 60 (discussing the rights and privileges guaranteed by the Fourteenth Amendment).

68. See *Arce*, 793 F.3d at 973 (discussing the student demographic in Tucson, Arizona).

69. *Id.* (discussing how the school board in Tucson, Arizona developed the Mexican American Studies (MAS) program in the public schools there in order to provide curriculum relevant to the Mexican American culture).

the program because they believed the program “was being perverted into a program for promoting ethnocentrism and reverse racism.”<sup>70</sup> Four provisions were listed in H.B. 2281 as being prohibited by the passing of the legislation.<sup>71</sup> These provisions prohibited any courses or classes that: (1) “Promote the overthrow of the United States government,” (2) “Promote resentment toward a race or class of people,” (3) “Are designed primarily for pupils of a particular ethnic group,” or (4) “Advocate ethnic solidarity instead of the treatment of pupils as individuals.”<sup>72</sup> Plaintiffs in the *Arce* case asserted that H.B. 2281, later codified at as Arizona Revised Statutes (“A.R.S. ”) §§ 15–111 and 15–112, violated their rights under the First and Fourteenth Amendments.<sup>73</sup> The Ninth Circuit Court of Appeals reversed the summary judgment granted to the defendants and remanded the equal protection claim back to the district court for trial, finding that there were genuine issues of fact regarding whether the enactment and/or enforcement of § 15-112 was motivated at least in part by a discriminatory intent. <sup>74</sup> Furthermore, the Court in *Arce* considered “the impact of the official action and whether that bears more heavily on one race than another — it is undisputed that the statute’s enactment and enforcement has had a disparate impact on Mexican American students”<sup>75</sup>

Now compare this with Florida, where the PEACE Act was introduced and intended to ban any curriculum that encompasses Critical Race Theory directly.<sup>76</sup> This act prohibits the funding of any

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70. *Id.* (discussing how the school superintendents of the Tucson Unifies School District successfully proposed legislation eliminating the Mexican American Studies (MAS) program curriculum in the public schools there);

71. *Id.* (discussing the provisions of Arizona’s H.B. 2281).

72. *Id.* (discussing the provisions of Arizona’s H.B. 2281).

73. *See Arce*, 793F.3d at 973-74 (discussing the students arguments as plaintiffs that the statute were violative of their constitutional rights due to the statute being overbroad and vague); *see also* Barbara Jones, *Ninth Circuit Court of Appeals issues decision in lawsuit challenging Arizona’s Ethnic Studies ban*, ALA NEWS (July 13, 2015), <https://www.ala.org/news/press-releases/2015/07/ninth-circuit-court-appeals-issues-decision-law-suit-challenging-arizona-s> (discussing *Arce* and the decision made by the Ninth Circuit).

74. *See Arce*, 793 F.3d at 977 (discussing the decision made by the Ninth Circuit Court of Appeals in *Arce*, the Court stating “. . . in light of the evidence presented in the record and on appeal, we see no reason to remand the equal protection claim for additional briefing on summary judgment, because, even on the record before us, we find that there are genuine issues of fact regarding whether the enactment and/or enforcement of § 15–112 was motivated at least in part by a discriminatory intent.”); *see also* Jones, *supra* note 70 (noting the opinion of the Ninth Circuit Court of Appeals in *Arce*).

75. *Id.* (discussing the Court’s opinion in *Arce*).

76. *See* S.2682, 117th Cong. § 2 (2022) (discussing the intent of the PEACE Act); *see also* Haughey, *supra* note 21 (noting the PEACE Act legislative was aimed at banning Critical Race Theory).

“curriculum, or teaching or counseling, that promotes or compels a divisive concept.”<sup>77</sup> The bill then goes on to define terms and concepts, stating:

(1) The term ‘promotes or compels a divisive concept’, means race stereotyping or race scapegoating, or promotion of one or more of the following concepts: (A) One race is inherently superior to another race. (B) The United States is fundamentally racist. (C) An individual, by virtue of his or her race, is inherently racist or oppressive, whether consciously or unconsciously. (D) An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race. (E) Members of one race cannot and should not attempt to treat others without respect to race. (F) An individual’s moral character is necessarily determined by his or her race. (G) An individual, by virtue of his or her race, bears responsibility for actions committed in the past by other members of the same race. (H) Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race. (I) Meritocracy or traits such as a hard work ethic are racist or were created by a particular race to oppress another race. (2) The term ‘race scapegoating’ means assigning fault, blame, or bias to a race or to members of a race because of their race. (3) The term ‘race stereotyping’ means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or to an individual because of the individual’s race.<sup>78</sup>

When comparing the text of the H.B. 2281 in Arizona with the PEACE Act bill proposed in Florida, the two bills read nearly identical.<sup>79</sup> There is resentment in Arizona and divisiveness and discomfort in Florida.<sup>80</sup> In Arizona, the Mexican American Studies program was specifically targeted; even though the Black, Native American, and Asian-American programs were similarly vulnerable under 2281, the latter programs were not subjected to the same political rhetoric.<sup>81</sup> In

77. See S.2682, 117th Cong. § 2 (2022) (explaining the PEACE Act bill proposed in Florida); see also Protect Equality and Civics Education (PEACE) Act, *supra* note 23 (discussing elements of the PEACE Act bill).

78. See S.2682, 117th Cong. § 2 (2022) (explaining the PEACE Act bill proposed in Florida); see also Haughey, *supra* note 21 (noting the PEACE Act legislative was aimed at banning Critical Race Theory).

79. See S.2682, 117th Cong. § 2 (2022) (explaining the PEACE Act bill introduced to Congress in Florida); see also *Arce*, 793 F.3d at 973 (discussing the provisions of Arizona’s H.B. 2281).

80. See *Arce*, 793F.3d at 973 (discussing the terms and provisions of H.B. 2281); see also Protect Equality and Civics Education (PEACE) Act, *supra* note 24 (explaining the provisions of the PEACE Act bill).

81. See Roque Planas, *Arizona Republican Still Wants 2010 Law To Ban All Ethnic Studies*, HUFFPOST, (July 19, 2017, 9:45 AM), [https://www.huffpost.com/entry/arizona-republican-still-wants-2010-law-to-ban-all-ethnic-studies\\_n\\_596ed536e4b00db3d0f3f44c](https://www.huffpost.com/entry/arizona-republican-still-wants-2010-law-to-ban-all-ethnic-studies_n_596ed536e4b00db3d0f3f44c) (explaining how only the Mexican American Studies program was the only ethnic program



Florida, this bill aimed at banning Critical Race Theory was introduced despite it never having been taught in Florida's K-12 schools.<sup>82</sup> Knowing that specific groups are targeted raises the question of who these acts are trying to protect.<sup>83</sup> The Court in *Arce* found that the statute and its enforcement would be unconstitutional when either the enactment or enforcement were motivated by discriminatory practices.<sup>84</sup> With the Ninth Circuit Court of Appeals decision in *Arce* ruling H.B. 2281 unconstitutional and given the similarities of the PEACE Act in Florida, intending to target and do away with Critical Race Theory directly, why would this legislation not be subject to the same fate?<sup>85</sup>

#### D. A Historical Approach to Racial Discrimination

The origins of Critical Race Theory provided an avenue to promote racial equality and empowerment for groups and individuals as they struggled to find ways to reduce racism.<sup>86</sup> Supporters of Critical Race Theory believe implementing this curriculum teaches students about their history and paints a complete picture of history, which fa-

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shut down even though other programs could have been shut down by the government after the passing of the law.); *see also* *What you Need to Know About The Arizona Mexican American Studies Trial; Update: Judge Rules Ban Unconstitutional*, NAT'L COALITION AGAINST CENSORSHIP, (Aug. 23, 2017) <https://ncac.org/news/blog/what-you-need-to-know-about-the-arizona-mexican-american-studies-trial> (discussing how the Mexican American Studies Program was not the only curriculum subject to the ethnic studies ban but it was the only one that was shut down).

82. *See* Haughey, *supra* note 21 (noting that Critical Race Theory has not been taught in K-12 schools in the Sunshine State); *see also* Valerie Strauss, *Student challenges Florida Gov. DeSantis over critical race theory ban*, WASHINGTON POST (June 21, 2021, 2:51), <https://www.washingtonpost.com/education/2021/06/21/critical-race-theory-ban-florida/> (stating "Critical race theory (CRT) is an academic framework for looking at systemic racism. Though states are banning it from being taught in schools, most teachers don't use the term when discussing racism and don't require students read the work scholars who use that framework.").

83. *See* Planas, *supra* note 81 (discussing how other ethnic studies program were never found to be out of compliance even once the law was passed and only the Mexican American Studies program was targeted); *see also* Waxman, *supra* note 39 (noting how Conservative groups are making efforts to weaponize the teaching of Critical Race Theory).

84. *See Arce*, 793 F.3d at 977 (discussing the decision made by the Ninth Circuit Court of Appeals); *see also* Jones, *supra* note 73 (noting the opinion of the Ninth Circuit Court of Appeals in *Arce*).

85. *See* Calvan, *supra* note 19 (noting that Florida's state Board of Education adopted rules banning Critical Race Theory from the classrooms).

86. *See* Crenshaw, *supra* note 37 at 1260 (discussing the origins of Critical Race Theory); *see also* Carbado, *supra* note 39 at 1596 (discussing the history of Critical Race Theory).

ilitates an understanding of why things are the way they are today.<sup>87</sup> Race is a cultural invention, and laws are not simply reflective of ideas about race; instead, the law has constructed race and preserved treating individuals unjustly based on race.<sup>88</sup> Historically, the law has instituted the separation of groups based on race and has assigned social meaning to these groups.<sup>89</sup> Throughout America's history of the United States, black people have been viewed as inferior, creating social hierarchies and avenues for slavery to exist.<sup>90</sup> Compared to their white counterparts, Black people are less likely to identify as middle class, and are less likely to get deference; systemic racism throughout history has shown that living life is different when a person are is Black.<sup>91</sup> To combat the inefficiencies and lack of equality in a system where racism is embedded in its foundation, we must look to our history and acknowledge that these inequalities are real and do exist.<sup>92</sup>

### III. SOLUTION

This paper proposes that the Eleventh Circuit adopts the approach taken by the Ninth Circuit in *Arce* against H.B. 2281, where the Court ruled the legislation unconstitutional.<sup>93</sup> The Ninth Circuit iden-

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87. See *Why Is History Important and how can it Benefit Your Future?*, *supra* note 6 (explaining how studying history is important because it provides us with an understanding of ourselves and the world around us and how individuals benefit from having a deeper understanding of history).

88. See 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> (explaining how proponents of Critical Race Theory believe that race is not biological, but invented and that federal laws have preserved unequal treatment); see also Carbado, *supra* note 39 at 1610 (discussing how the law plays a part in the construct of racial group differentiation).

89. See Carbado, *supra* note 39 at 1610 (explaining how the law constructs race categories); see also David R. Roediger, *Historical Foundations of Race*, NAT'L MUSEUM OF AFR. AM. HIST. AND CULTURE, <https://nmaahc.si.edu/learn/talking-about-race/topics/historical-foundations-race> (last visited Nov. 22, 2021) (discussing the history of the invention of race).

90. *Id.* (discussing how law has set forth rules or criteria assigning social meaning to categories of race and creating structural hierarchies as a result); see also Ray, *supra* note 60 (discussing how research has shown that Black people are less likely to receive the same privileges as their white counterparts and how system racism inhibits people's ability to accomplish the American Dream).

91. See Ray, *supra* note 63. (discussing the difference in privileges and lifestyle faced by white and black individuals)

92. See Camera, *supra* note 40 (discussing how racism is embedded into all aspects of American life and those systems have been constructed in a way to disadvantage people of color); see also Crenshaw, *supra* note 37 at 1260 (discussing the origins of Critical Race Theory and how history has helped with its development over time).

93. See *Arce*, 793 F.3d at 988 (noting the decision of the Ninth Circuit that the legislation raised both equal protection and First Amendment issues).

tified that the legislation was created with the intent to target specific groups, and this is blatantly discriminatory.<sup>94</sup> The Florida P.E.A.C.E Act directly targets Critical Race Theory and attempts to rewrite history in a way that does not tell the true story of history.<sup>95</sup> In support of the bill Florida's Governor stated:

[w]e are not gonna tell some kindergartener that they're an oppressor based on their race and what may have happened 100 or 200 years ago. And we're not gonna tell other kids that they're oppressed based on their race.<sup>96</sup>

Critical Race Theory is just as much a part of white history as it is Black history, and the goal is to educate in order to prevent history from repeating itself. Manipulating this history in a way that benefits one group over the other is the exact reason why Critical Race Theory exists in the first place.<sup>97</sup> Suggesting that banning Critical Race Theory will lead to a more equal and just society is a load of hope.<sup>98</sup>

Banning Critical Race Theory in the hopes that it will lead to a more equal and just society is renaming history. Renaming something to call it anything other than what it is can be detrimental to society because a name is influential and can have some effect on interpretation and point of view.<sup>99</sup> An example of this was the Tulsa Race

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94. See *id.* at 977 (discussing the decision made by the Ninth Circuit and discussing how H.B. 2281 was discriminatory if it was created with the intent to target a specific group).

95. See Peter Greene, *Florida's New Critical Race Theory Gag Rule Will Have A Chilling Effect in Classrooms.*, FORBES (June 11, 2021, 5:04 PM), <https://www.forbes.com/sites/petergreene/2021/06/11/floridas-new-gag-rule-will-have-a-chilling-effect-in-classrooms/?sh=3674bbf1a3d8> (discussing how simply teaching history as facts and figures and dates is not true to historical studies); see also Camera, *supra* note 40 (discussing how people of color have been historically disadvantaged).

96. See Matt Papaycik & Forrest Saunders, *Florida's Governor Signs Controversial Bill Banning Critical Race Theory in Schools*, WPTV (APR. 22, 2022), <https://www.wptv.com/news/education/floridas-governor-to-sign-critical-race-theory-education-bill-into-law> (discussing Florida Governors' statements as it relates to banning Critical Race Theory in schools).

97. See Crenshaw, *supra* note 37 at 1260 (discussing the issues and events that led to the development of Critical Race Theory); see also KIMBERLÉ WILLIAMS CRENSHAW ET AL., *SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES* 72 (Univ. Cal. 5th ed. 2019) (discussing the development of critical Race Theory).

98. See Jeremiah Chin, *What a Load of Hope: The Post-Racial Mixtape*, 48 CAL. W. L. REV. 368, 392 (2011) (discussing the phrase "load of hope"); see also Tide, *Tide Loads of Hope*, YouTube (Mar. 9, 2009), <https://www.youtube.com/watch?v=1K-yjsRFW9Y> (noting the load of hope phrase as used in the laundry marketing campaign symbolizing the hope for clean clothes for victims of Hurricane Katrina).

99. See Greene, *supra* note 95 (noting how a name makes a difference); see also Halloway, *supra* note 65 (discussing how rebranding Critical Race theory does not erase its impact on history).

Massacre, which was for years known as the Tulsa Race Riot; these two names can offer two very different perspectives to an individual who hears them.<sup>100</sup> Although time has passed, the struggles of people of color have remained the same, and this paper proposes that the Eleventh Circuit considers the history of people of color.<sup>101</sup> Systemic racism is embedded within all aspects of American history.<sup>102</sup> *Brown* was decided in 1954, yet students of color still have not realized complete educational equality.<sup>103</sup> Removing ethnic studies from schools, and more specifically Critical Race Theory, is an attempt to detach people of color from the real events of history and promote a false sense of cohesiveness.<sup>104</sup> A statement made in 2002 by Lani Guinier and Gerald Torres still holds true today:

[C]onsciousness of race has, for many people of color, functioned as a form of political literacy, both affirmatively connecting individuals to a group and critically assessing the conditions of the group in light of larger structures within the society. It may encourage them not only to see but also to act.<sup>105</sup>

History is important. It teaches everyone who they are, where they came from, and where they are headed.<sup>106</sup> Without history, society cannot know how they got to where they are, and there is no way to

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100. *Id.* (explaining the original name of the Tulsa Race Massacre); see also Randi Richardson, *Tulsa Race Massacre, 100 years later: Why it happened and why it's still relevant today*, NBC NEWS (May 29, 2021, 11:36 AM), <https://www.nbcnews.com/news/nbcblk/tulsa-race-massacre-100-years-later-why-it-happened-why-n1268877> (discussing the history of the Tulsa Race Massacre).

101. See also Ray, *supra* note 61 (discussing Vice President Kamala Harris stating “[b]ut we also do have to speak truth about the history of racism in our country and its existence today.”).

102. See Evan Gerstmann, *Should The States Ban Critical Race Theory In Schools?*, FORBES (July 6, 2021, 6:46 PM), <https://www.forbes.com/sites/evangerstmann/2021/07/06/should-the-states-ban-critical-theory-in-schools/?sh=50a4cabb111a> (discussing structural racism and how minorities, especially black people, have been victims of racial prejudice throughout history); see also Ray, *supra* note 60 (explaining the history of systemic racism in the United States).

103. See Ramsey, *supra* note 12 (noting that as a result of *Brown*, black students are not legally barred attending schools with white students, but face other issues relating to the class status of their families and the location of their neighborhoods); see also Rothstein, *supra* note 13 (explaining how segregation still exists in the form of racial and economic disadvantages).

104. See Chin, *supra* note 98 at 391 (stating how disconnecting students from historical knowledge that can generate critical consciousness); see also Halloway, *supra* note 65 (discussing the importance of learning real history and not a censored version of it).

105. *Id.* (quoting Lani Guinier & Gerald Torres, *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy* (2002)).

106. See *Why Is History Important and how can it Benefit Your Future?*, *supra* note 6 (explaining how studying history is important because it is essential in providing us with an understanding of ourselves and the world around us).

take preventative measures to ensure not to repeat the same behaviors time and time again.<sup>107</sup> It is important to realize that all individuals must be treated equally and justly, and it is not as simple as influencing the facts of history to create the story everyone wants to tell rather than speaking to the truth of the matter.

#### CONCLUSION

Critical Race Theory is an important component of American history; therefore, this ban should not be allowed to take place, and the Eleventh Circuit should find it to be unconstitutional.<sup>108</sup> From Ethnic Studies, to Critical Race Theory, and most recently the attack on Diversity, Equity, and Inclusion (DEI), which is aimed at diversifying staff, and promoting inclusivity for faculty and students.<sup>109</sup> Florida's Governor, Ron DeSantis, has stated "DEI, critical race theory, and gender ideology are not "what a liberal arts education should be."<sup>110</sup> He has made it clear that he will not accept nor tolerate these practices further going on to state "the whole experiment with DEI is coming to an end in the state of Florida. We are eliminating the DEI programs."<sup>111</sup> Critical Race Theory ensures that we are aware of where and what we've come from. Choosing to target specific groups through ethnic bans and prohibitions does not display solidarity or advancement toward equality and justice. Injustice anywhere is a threat to justice everywhere.<sup>112</sup> It is impossible to disregard race as we attempt to advance to a society where all things and people are treated equally and afforded the same opportunities. We must consider how history has shaped our present-day society. In the words of the late and great Justice Ruth Bader Ginsburg: "It's very hard for me to see how you can have a racial objective but a nonracial means to get there."<sup>113</sup>

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107. *Id.*

108. *See* Halloway, *supra* note 65 (discussing how limiting the teaching of Critical Race Theory is not just).

109. *See* Jaelyn Diaz, *Florida Gov. Ron Desantis Signs A Bill Benning DEI Initiatives in Public Colleges*, WLRN (MAY 15, 2023) <https://www.npr.org/2023/05/15/1176210007/florida-ron-desantis-dei-ban-diversity> (discussing Florida Governor's views and opinions on Diversity, Equity, and Inclusion Programs in Florida)

110. *Id.* (discussing statements made by Florida's Governor)

111. *Id.* (discussing the views expressed by Florida's Governor as it relates to DEI programs)

112. *See* "Letter from a Birmingham Jail [King, Jr.]", AFRICAN STUDIES CTR. – UNIVERSITY PENNSYLVANIA (APR 16, 1963) [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) (discussing the thoughts of Dr. Martin Luther King Jr. as indicated in a letter written by him during his confinement in a Birmingham city jail).

113. *See* Sawchuk, *supra* note 16.