

## BANNING BOOKS OR BANNING BIPOC?

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**ABSTRACT**—Following the murder of George Floyd in May 2020, social justice movements renewed calls for the country to confront the pervasive reality of systemic racism in the United States. In response to these publicized social justice movements, however, calls for book bans relating to critical race theory began rising at an unprecedented rate. Although book ban censorship is not novel, the recent shift in focus to remove critical race theory from public school libraries marks a new era of content-based censorship.

This Essay examines why current book bans targeting critical race theory are content-based restrictions that necessarily violate the First Amendment. It explores the social and legal history of book bans in the United States and discusses recent trends in book ban censorship. This Essay then identifies First Amendment “areas of nonprotection” through which book ban proponents seek to exclude race-related content and analyzes why all are pretextual fallacies that undermine freedom of speech principles and mandate diversity in the judiciary.

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INTRODUCTION

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>1</sup>

A bill in Iowa seeks to criminalize the dissemination of “material [a] person knows or reasonably should know, is obscene or harmful to minors” in K–12 public schools or libraries with two years of jail time.<sup>2</sup> A Texas Representative has distributed a list of 850 books statewide that he believes could “make students feel discomfort, guilt, anguish, or any other form of psychological distress because of their race or sex.”<sup>3</sup> And parents nationwide are submitting formal paperwork to school administrators challenging the appropriateness of books dealing with race, social justice, and discrimination, arguing that these books promote terrorism.<sup>4</sup> These examples form a cross section of the contemporary book banning movement rampant in the United States.

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<sup>1</sup> Texas v. Johnson, 491 U.S. 397, 414 (1989).

<sup>2</sup> Valerie Strauss, *This Wave of Book Bans is Different from Earlier Ones*, WASH. POST (Feb. 10, 2022, 8:30 AM), <https://www.washingtonpost.com/education/2022/02/10/book-bans-maus-bluest-eye/> [<https://perma.cc/TJM3-U2DB>].

<sup>3</sup> Bill Chappell, *A Texas Lawmaker is Targeting 850 Books that He Says Could Make Students Feel Uneasy*, NPR (Oct. 28, 2021, 1:00 PM), <https://www.npr.org/2021/10/28/1050013664/texas-lawmaker-matt-krause-launches-inquiry-into-850-books> [<https://perma.cc/6JAN-JPPV>].

<sup>4</sup> See, e.g., Mike Hixenbaugh, *Here Are 50 Books Texas Parents Want Banned from School Libraries*, NBC NEWS (Feb. 2, 2022, 9:23 AM), <https://www.nbcnews.com/news/us-news/texas-library-books-banned-schools-rcna12986> [<https://perma.cc/QYK6-DC7B>] (describing Texas parents as part of the national trend).

Although book bans are not historically novel, current book ban efforts led by conservative groups primarily target works that deal with race, racial justice, and the critical race movement and that are often written by minority authors. These attempts to silence minority voices, however, use pretextual arguments and an incorrect application of the First Amendment. This Essay discusses the increasing prevalence of book bans aimed at critical race theory, analyzes these bans under the current First Amendment framework, and identifies an essential response to this issue.

This Essay proceeds in four parts. Part I introduces book bans and their social and legal history in the United States. It then discusses general First Amendment principles that limit restrictions on the freedom of speech and summarizes the current efforts to ban books related to critical race theory from public school libraries. Next, Part II introduces the fallacious arguments that critical race theory is unprotected speech under the First Amendment. Part II then identifies the pretext underlying each argument and, consequently, identifies why each argument fails to justify the book bans within the bounds of the First Amendment. Finally, Part III asserts that the recent push for book bans demonstrates the overinclusive and underinclusive nature of First Amendment jurisprudence when applied to majority and minority groups respectively. Part III concludes by emphasizing the need for a judiciary diverse in thought, experience, and color to guarantee First Amendment protection for critical race theory and racial minorities in the United States.

## I. BACKGROUND: BOOK BANNING AND THE FIRST AMENDMENT

Book banning in American culture predates the formation of the United States itself—Thomas Morton’s *New English Canaan*, published in 1637, is the first known book to be “explicitly banned in what is now the United States.”<sup>5</sup> Historically, book banning, or the removal of books based on objections from individuals or groups,<sup>6</sup> has been used to suppress materials, ideas, and contents that conflict with a person or group’s beliefs.<sup>7</sup> Although proponents of book bans may, in theory, target public libraries, they generally focus their attention on schools.

Calls for book bans in U.S. schools, universities, and libraries have grown at an unprecedented rate in recent years. According to the American

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<sup>5</sup> Matthew Taub, *America’s First Banned Book Really Ticked Off the Plymouth Puritans*, ATLAS OBSCURA (Nov. 1, 2019), <https://www.atlasobscura.com/articles/americas-first-banned-book> [https://perma.cc/SY35-8SD3] (describing why the Puritans banned Morton’s book in Plymouth colony).

<sup>6</sup> See *Banned Book FAQ*, AM. LIBR. ASS’N, <https://www.ala.org/advocacy/bbooks/banned-books-qa> [https://perma.cc/NJH3-4KET].

<sup>7</sup> *Id.*

Library Association (ALA), 330 book challenges were reported to its Office for Intellectual Freedom between September and December of 2021.<sup>8</sup> Book bans and challenges during this three-month period are nearly two-times the 156 challenges reported during 2020 and are close to the 377 yearly total in 2019.<sup>9</sup> Members of the ALA in 2021 reported that the organization was receiving book bans and challenges daily—a frequency they had never seen before.<sup>10</sup> This sudden increase raises an obvious but essential question: what is driving this recent rise in book ban demands?

This Part introduces book banning, explains the First Amendment principles that apply to content-based speech restrictions, and examines the seminal book banning case that guides book banning jurisprudence.

#### A. *Book Banning and Contemporary Attempts to Ban Books in the United States*

School-based book bans seek to protect children from inappropriate, offensive, or unsuitable content and are typically premised on the idea that children are a particularly vulnerable group.<sup>11</sup> However, these broad terms often encompass a myriad of vague book ban rationales, leading to pushes for bans against books like *Where the Wild Things Are* for being too dark,<sup>12</sup> or the *Harry Potter* series for encouraging witchcraft and heresy.<sup>13</sup>

<sup>8</sup> See *Surge in Book Challenges Press Kit*, AM. LIBR. ASS'N, <https://www.ala.org/news/mediapress-center/presskits/surge-book-challenges-press-kit> [<https://perma.cc/D9MR-RYL3>]; Zack Beauchamp, *Why Book Banning Is Back*, VOX (Feb. 10, 2022, 7:00 AM), <https://www.vox.com/policy-and-politics/22914767/book-banning-crt-school-boards-republicans> [<https://perma.cc/4GEY-AT9G>]. The ALA contextualizes its report of total book challenges by noting that between 82% and 97% of book challenges remain unreported. See Betsy Gomez, *ALA Unveils Top 10 Most Challenged Books of 2020*, BANNED BOOKS WK. (Apr. 5, 2021), <https://bannedbooksweek.org/ala-unveils-top-10-most-challenged-books-of-2020/> [<https://perma.cc/B5K8-DT4Y>].

<sup>9</sup> *2020 Banned & Challenged Books List*, AM. LIBR. ASS'N: INTELL. FREEDOM BLOG (Aug. 2, 2021), <https://www.oif.ala.org/oif/2020-banned-challenged-books-list/> [<https://perma.cc/AR2U-9YRS>]; AM. LIBR. ASS'N, FIELD REPORT 2019: BANNED & CHALLENGED BOOKS 20 (2019).

<sup>10</sup> Olivia B. Waxman, *'We're Preparing for a Long Battle.'* *Librarians Grapple with Conservatives' Latest Efforts to Ban Books*, TIME (Nov. 16, 2021, 12:13 PM), <https://time.com/6117685/book-bans-school-libraries/> [<https://perma.cc/BUJ4-BZWZ>].

<sup>11</sup> See Hixenbaugh, *supra* note 4 (describing some parents' wish to ban certain books in order to "protect my kids' hearts and minds" and to prevent children from "question[ing] their sexual orientation when they don't even comprehend what that means," among other reasons).

<sup>12</sup> See Alissa Wilkinson, *Many Banned Books Were Made into Movies. Where the Wild Things Are May Be the Greatest*, VOX (Sept. 24, 2018, 3:48 PM), <https://www.vox.com/culture/2017/9/30/16363296/banned-books-week-where-wild-things-are-sendak> [<https://perma.cc/C7RV-W4VT>].

<sup>13</sup> See Antonia Noori Farzan, *A Catholic School Removed Harry Potter Books from its Library, Warning that Readers 'Risk Conjuring Evil Spirits'*, WASH. POST (Sept. 3, 2019), <https://www.washingtonpost.com/nation/2019/09/03/harry-potter-books-catholic-school-ban-conjuring-evil-spirits/> [<https://perma.cc/HC29-T595>].

Consequently, what is considered inappropriate, offensive, or unsuitable reflects the social anxieties that exist when bans are proposed.<sup>14</sup> For example, in the midst of the “Red Scare” of the 1950s and 60s, an Indiana Textbook Commission member sought to remove *Robin Hood* from the state’s school textbooks, arguing that Robin Hood’s robbing the rich and giving to the poor enforced communist ideologies.<sup>15</sup> Similarly, in 1989, members of a California logging town fought to ban Dr. Seuss’s *The Lorax* from schools because they perceived the book as environmental activism that taught antilogging propaganda.<sup>16</sup>

The contemporary focus of book bans on race-related content, critical race theory, and beyond departs from traditional bases for book ban censorship. Prior to 1999, most book bans submitted to the ALA sought to censor “sexual content” and “obscene language.”<sup>17</sup> However, 2020 marked a precipitous increase in requests for book bans relating to race, racial justice, and more generally, stories of “Black, Indigenous, or people of color,”<sup>18</sup> or “BIPOC.”<sup>19</sup> This revival of book bans corresponds with the increased public awareness of social justice movements and critical race theory following the murder of George Floyd in May 2020.<sup>20</sup>

The critical race theory movement “is a collection of activists and scholars engaged in studying and transforming the relationship among race, racism, and power.”<sup>21</sup> Considered as “an approach to grappling with [the] history of [w]hite supremacy” in the United States, it rejects detachment from the past and recognizes that current laws and systems are products of that history.<sup>22</sup> Unlike the incremental approach taken by traditional civil rights activists, “critical race theory questions the very foundations of the

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<sup>14</sup> Waxman, *supra* note 10.

<sup>15</sup> *Indiana Textbook Commission Member Charges that Robin Hood Is Communist*, HISTORY (Nov. 15, 2021), <https://www.history.com/this-day-in-history/indiana-textbook-commission-member-charges-that-robin-hood-is-communistic> [https://perma.cc/98KZ-WH7Y].

<sup>16</sup> Jill Lepore, *The Lessons of “The Lorax”*, NEW YORKER (Nov. 28, 2021), <https://www.newyorker.com/magazine/2021/12/06/the-lessons-of-the-lorax> [https://perma.cc/UBK6-Q83W].

<sup>17</sup> Beauchamp, *supra* note 8.

<sup>18</sup> Gomez, *supra* note 8.

<sup>19</sup> Standing for “[B]lack, Indigenous, and people of color,” the term BIPOC expands upon the term “people of color,” or “POC,” “to account for the erasure of [B]lack people with darker skin and Native American people.” Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/article/what-is-bipoc.html> [https://perma.cc/8AGE-QE3T].

<sup>20</sup> See Strauss, *supra* note 2.

<sup>21</sup> RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3 (3d ed. 2017).

<sup>22</sup> Faith Karimi, *What Critical Race Theory Is -- and Isn't*, CNN (May 10, 2021, 3:45 PM), <https://www.cnn.com/2020/10/01/us/critical-race-theory-explainer-trnd/index.html> [https://perma.cc/BWR9-D9MU].

liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.”<sup>23</sup>

As Americans continued to confront the pervasive reality of systemic racism in the United States in the months following George Floyd’s murder, the Trump Administration unveiled the “1776 Commission” and prohibited the use of critical race theory in federal offices in September 2020.<sup>24</sup> Through the 1776 Commission, the Trump Administration sought to “promote patriotic education” by eliminating critical race theory from governmental, workplace, and classroom settings.<sup>25</sup> The Commission released its report on January 18, 2021—both the penultimate day of the Trump administration and Martin Luther King Jr. Day.<sup>26</sup> In its report, the 1776 Commission advocated for U.S. history classroom discussions that focused on the Constitution and the Declaration of Independence rather than “‘fashionable ideologies’ like ‘claims of systemic racism’ that threaten national unity.”<sup>27</sup> Although terminated by President Joe Biden in an executive order two days after its release,<sup>28</sup> the 1776 Commission nonetheless precipitated the movement to ban race-related material from schools and erase critical race theory from public discourse altogether.<sup>29</sup>

Since January 2021, state legislatures have introduced over 120 bills that seek to ban critical race theory from K–12 schools, with twelve bills passing in ten states and over eighty remaining active across the country.<sup>30</sup> For example, legislators in Arizona introduced a bill under which teachers could be fined up to \$5,000 for making students feel race-related guilt.<sup>31</sup> In Florida, a lawmaker has “introduced legislation that would allow parents to scrutinize video recordings of their children’s classrooms for signs of ‘critical race theory,’” what the bill seems to categorize as “abuse or neglect.”<sup>32</sup> And under a bill introduced in Iowa, “anyone connected to a K–12 public school or library” who disseminates “material the person knows or

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<sup>23</sup> DELGADO & STEFANCIC, *supra* note 21, at 3.

<sup>24</sup> Olivia B. Waxman, ‘Critical Race Theory Is Simply the Latest Bogeyman.’ *Inside the Fight over What Kids Learn About America’s History*, TIME (July 16, 2021, 7:42 PM), <https://time.com/6075193/critical-race-theory-debate/> [<https://perma.cc/92AR-VDF4>].

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* (noting the termination of the 1776 Commission only “spurred conservatives on”).

<sup>30</sup> Beauchamp, *supra* note 8.

<sup>31</sup> Waxman, *supra* note 24; S. 1532, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

<sup>32</sup> Beauchamp, *supra* note 8; H.R. 1055, 2022 Leg. (Fla. 2022).

reasonably should know, is obscene or harmful to minors” may face fines and two years of jail time.<sup>33</sup>

These attempts to remove critical race theory and race-related education from schools are not limited to legislative enactments. As of February 2022, forty-two states have taken some form of action to prohibit critical race theory or restrict how educators may discuss racism and sexism in classrooms.<sup>34</sup> In Texas, Representative Matt Krause compiled a list of 850 books that he believed “might make students feel discomfort, guilt, anguish, or any other form of psychological distress because of their race or sex.”<sup>35</sup> As the chair of the Texas House’s General Investigating Committee, Representative Krause requested that schools statewide report which books they possessed, the money spent on each, and the physical location of the books within the schools.<sup>36</sup> Notably, upon reviewing the first 100 books on Krause’s list, a local news source determined that ninety-seven “were written by ethnic minorities, women[,] or LGBTQ authors.”<sup>37</sup> As evidenced by this list and the current slew of legislatures seeking to remove race-related content from schools, these recent book bans flout the principles of the First Amendment by seeking to silence the underprivileged and the oppressed.<sup>38</sup>

### *B. The First Amendment and the Freedom of Speech*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>39</sup> Although simple on its face, this text has led to decades of scholarly debate. Nowhere in its text does the First Amendment define “speech,” “the freedom of speech,” or any relationship that may exist between the two premises.<sup>40</sup> Consequently, much of First

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<sup>33</sup> Strauss, *supra* note 2; S. 2198, 89th Gen. Assemb. (Iowa 2022). Although the Iowa bill primarily targets “books written about LGBTQ characters and characters of color,” the overbreadth of the bill’s language “could greatly expand the list of targeted materials for civil lawsuits” and thereby encompass critical race theory. Nikoel Hytrek, *GOP Legislators Target Librarians for Prosecution, Fines Under New Bill*, IOWA STARTING LINE (Feb. 4, 2022, 11:12 AM), <https://iowastartingline.com/2022/02/04/gop-legislators-target-librarians-for-prosecution-fines-under-new-bill/> [<https://perma.cc/GKV2-DFCL>].

<sup>34</sup> Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WK. (Apr. 14, 2022), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/LB76-JGGU>].

<sup>35</sup> Chappell, *supra* note 3.

<sup>36</sup> *Id.*

<sup>37</sup> Anthony Zurcher, *Why Are Certain School Books Being Banned in US?*, BBC (Feb. 7, 2022), <https://www.bbc.com/news/world-us-canada-60261660> [<https://perma.cc/HP4U-SKUR>].

<sup>38</sup> *Id.*

<sup>39</sup> U.S. CONST. amend. I.

<sup>40</sup> Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 324–25 (2018).

Amendment scholarship wrestles with the definition of each concept and with the scope of the speech-related right granted by the Constitution.<sup>41</sup>

Due to the vagueness and potential breadth of the freedom of speech, courts and scholars also grapple with when speech may be limited and to what degree. Traditionally, scholarship and jurisprudence have focused on the rationales underlying the freedom of speech and the degree to which the Constitution protects that right—namely, the level of scrutiny mandated for different speech-related issues—in an effort to determine the scope of the freedom of speech and the protections afforded by the First Amendment.<sup>42</sup>

One vein of First Amendment jurisprudence addresses the *content* of speech and whether the restrictions or prohibitions at issue target speech on the basis of its substance.<sup>43</sup> Restrictions that do not target speech on such a basis are deemed content-neutral.<sup>44</sup> When considering the constitutionality of content-neutral restrictions, the Supreme Court has held that courts must apply the intermediate scrutiny test, which requires judges to consider the degree of the restriction, “the substantiality of the government interests” that the restriction serves, and “whether [the government’s] interests could be served by means that would be less intrusive on activity protected by the First Amendment.”<sup>45</sup> Thus, with content-neutral restrictions, the government bears the burden of “demonstrat[ing] the substantiality of its interests and the absence of less restrictive alternatives,” meaning that the greater the restriction’s interference with the freedom of speech, the greater the government’s burden of justifying that restriction.<sup>46</sup>

In contrast, content-based restrictions, or those that expressly limit communication based on the message conveyed, are presumptively invalid under the Constitution.<sup>47</sup> Rather than consider varying degrees of scrutiny under which content-based restrictions fall, the Supreme Court has held that courts are to presume that the First Amendment protects all speech on the basis of content.<sup>48</sup> However, for content deemed particularly worthy and reflective of societal concern, the Court has carved out “areas of

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<sup>41</sup> See *id.* at 319 (arguing that much of First Amendment scholarship has focused on “justification for a free speech principle and the level of . . . strength of scrutiny . . . that should apply in various contexts within the First Amendment’s borders”).

<sup>42</sup> *Id.*

<sup>43</sup> See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189–90 (1983).

<sup>44</sup> *Id.* at 189.

<sup>45</sup> *Id.* at 190 (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 70 (1981) (upholding the modified intermediate scrutiny test)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 190, 194.

<sup>48</sup> *Id.* at 194.



nonprotection” that capture specific classes of speech that it finds do not sufficiently advance the First Amendment or its underlying purposes.<sup>49</sup> Under current jurisprudence,<sup>50</sup> these areas of nonprotection include “express incitement, false statements of fact, obscenity, commercial speech, fighting words, and child pornography.”<sup>51</sup>

Of these areas of nonprotection, three warrant special attention in the context of book bans: express incitement, false statements of fact, and obscenity. First, under the express incitement carve-out, states may prohibit advocating for force or the violation of laws but only “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>52</sup> Next, laws targeting “defamatory speech”—false statements of fact that damage a person’s reputation—are permissible where private plaintiffs can demonstrate negligent falsity,<sup>53</sup> and where public figures and officials can show proof of actual malice.<sup>54</sup> Last, speech may be prohibited if deemed obscene, which encompasses content that (a) “the average person, applying contemporary community standards” would find appealing to the “prurient interest,” (b) “depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,” and (c) “taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>55</sup> To apply these three areas of nonprotection to book bans, it is crucial to first understand the Supreme Court’s jurisprudence on book banning.

### *C. Book Banning and the First Amendment Applied—Board of Education v. Pico*

Notably, Supreme Court precedent contains no bright-line rule on the constitutionality of book bans. In 1982—nearly forty years before the contemporary book ban movement—the Court, in a plurality opinion, confronted the scope of book bans under the First Amendment in the seminal

<sup>49</sup> *Id.*

<sup>50</sup> Notably, the categorization of these areas of nonprotection in First Amendment jurisprudence “extends back to the ratification of the First Amendment” in 1791. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168 (2015).

<sup>51</sup> Stone, *supra* note 43, at 194–95 (citations omitted).

<sup>52</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>53</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

<sup>54</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967). The distinction between public and private petitioners reflects the government’s greater interest in protecting more vulnerable, private individuals. *Gertz*, 418 U.S. at 344.

<sup>55</sup> *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

case *Board of Education v. Pico*.<sup>56</sup> In *Pico*, the Court addressed whether the First Amendment limited local school boards in exercising their discretion to remove high school and middle school library books.<sup>57</sup>

After obtaining a list of “objectionable” books from a politically conservative educational conference, a New York school board of education “unofficial[ly]” directed its principals and superintendents to remove the listed books from their libraries for the board to review.<sup>58</sup> Calling on its duty and moral obligation to protect its children from “moral danger as surely as from physical and medical dangers,” the board created a book review committee composed of parents and school staff to review the books.<sup>59</sup>

In determining whether the books warranted prohibition, the committee considered “‘educational suitability,’ ‘good taste,’ ‘relevance,’ and ‘appropriateness to age and grade level.’”<sup>60</sup> The committee recommended that five books be retained and two be removed, took no position on one, “could not agree on two,” and suggested that one be available to students who receive parental approval.<sup>61</sup> Although the committee submitted its recommendations to the board, the board nonetheless determined that only one book be retained without restriction and that nine should be banned,<sup>62</sup> giving no reason for its departure from the committee’s advice.<sup>63</sup> Consequently, high school and middle school students within the board’s district filed suit under 42 U.S.C. § 1983, asserting that the board’s actions deprived them of their First Amendment rights.<sup>64</sup>

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<sup>56</sup> Notably, the Court in *Pico* did not address the constitutionality of book “challenges” under the First Amendment. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 855–56 (1982) (asserting that the question presented regards First Amendment limitations upon the ability “to remove library books” from schools). A book “challenge is an attempt to remove or restrict materials, based upon the objections of a person or group,” while a ban is the successful removal of materials. *Banned Book FAQ*, AM. LIBR. ASS’N, <https://www.ala.org/advocacy/bbooks/banned-books-qa> [<https://perma.cc/NJH3-4KET>]. Although a detailed analysis of book challenges exceeds the scope of this Essay, I hope to explore this issue in a future work.

<sup>57</sup> *Pico*, 457 U.S. at 855–56.

<sup>58</sup> *Id.* at 856–57.

<sup>59</sup> *Id.* at 857 (quoting *Pico v. Bd. of Educ.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 857–58.

<sup>62</sup> The eleven books considered by the Board were “Slaughter House Five, by Kurt Vonnegut, Jr.; The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Best Short Stories of Negro Writers, edited by Langston Hughes; Go Ask Alice, of anonymous authorship; Laughing Boy, by Oliver LaFarge; Black Boy, by Richard Wright; A Hero Ain’t Nothin’ But A Sandwich, by Alice Childress; . . . Soul On Ice, by Eldridge Cleaver[;]” A Reader for Writers, edited by Jerome Archer; and The Fixer, by Bernard Malamud. *Id.* at 856–57 n.3. Of those, the Board decided that only two should not be removed: Laughing Boy and Black Boy. *Id.* at 858 nn.10–11.

<sup>63</sup> *Pico*, 457 U.S. at 858.

<sup>64</sup> *Id.* at 858–59.

Before the Court addressed the specific facts before it in *Pico*, it first discussed whether the First Amendment imposed any limitations on a school board's discretion to remove library books and, if so, how broadly those limitations extended over that discretion.<sup>65</sup> Although the Court recognized local school boards' broad discretion in managing school affairs, it nonetheless reasoned that "the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."<sup>66</sup> In a plurality opinion, the Court held that under this limited authority, the rights and protections granted by the First Amendment extend to students, including the right to send and receive ideas in the school setting.<sup>67</sup>

The Court next addressed "the extent to which the First Amendment places limitations" on the discretion of school boards to remove books from school libraries.<sup>68</sup> While school boards may possess substantial discretion in managing school affairs, the Court found that the First Amendment's prohibition against the suppression of ideas bars local school boards from intentionally exercising their discretion "in a narrowly partisan or political manner."<sup>69</sup> The Court provided an example of a "narrowly partisan or political," and therefore unconstitutional, exercise of a school board's discretion: "an all-white school board, motivated by racial animus, decid[ing] to remove all books authored by [B]lack or advocating racial equality and integration."<sup>70</sup> Consequently, the Court held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"<sup>71</sup>

Upon determining that the First Amendment prohibits local school boards from limiting the content of school library books on the basis of disagreeable content, the Court addressed whether the factual record raised a genuine issue of fact of whether the Board exceeded those limitations.<sup>72</sup> Finding that the evidence did "not foreclose the possibility that [the Board's] decision to remove the books rested decisively upon disagreement with

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<sup>65</sup> See *id.* at 864–69 (explaining generally how the powers of a school board are limited by the students' First Amendment rights and why First Amendment rights as they pertain to school libraries merit additional consideration).

<sup>66</sup> *Id.* at 863–64.

<sup>67</sup> *Id.* at 866–67.

<sup>68</sup> *Id.* at 869.

<sup>69</sup> *Id.* at 870–71.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 871–72 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>72</sup> *Id.* at 872.

constitutionally protected ideas in those books,” the Court held that a genuine issue on the record existed that made the district court’s grant of summary judgment to the Board improper.<sup>73</sup>

In sum, it is clear that book bans in the school setting must yield to the commands of the First Amendment and require comprehensive review to determine their constitutionality. Bans may not suppress ideas or authors based on political, partisan, or opinion-based reasoning. Yet current book bans aim to do just that.

## II. BOOK BANS TARGETING CRITICAL RACE THEORY VIOLATE THE FIRST AMENDMENT

Determining the constitutionality of current book bans against critical race theory and BIPOC-related content requires answering the two distinct questions posed by the Court in *Board of Education v. Pico*: (1) “does the First Amendment impose *any* limitations” on the school boards’ or school administrations’ discretion to remove library books from public schools?; and, if so, (2) did those boards or administrations exceed the limits imposed by the First Amendment?<sup>74</sup>

*Pico* answered the first question in the affirmative. The Court determined that although school boards and administrations have substantial discretion in managing school affairs, they must do so in a way “that comports with the transcendent imperatives of the First Amendment.”<sup>75</sup> The Court further outlined examples of these First Amendment limitations, including that school boards cannot remove books from libraries due to disagreeable material or based on racial animus.<sup>76</sup>

Here, the second question under the *Pico* analysis is also answered affirmatively because the bans are clearly motivated by racial animus and disagreement with content.<sup>77</sup> Some of the baseless arguments that support

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<sup>73</sup> *Id.* at 875.

<sup>74</sup> *See id.* at 863. Although the Court’s decision in *Pico* specifically applied to school boards and school administrations, its decision may be extended to the current anti-critical race theory book bans implemented by bills and legislative proposals, as the affected groups in both instances are schools and students.

<sup>75</sup> *Id.* at 864; *see also Barnette*, 319 U.S. at 637 (“Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”).

<sup>76</sup> *Pico*, 457 U.S. at 870–72.

<sup>77</sup> *See id.* at 871–72 (“If [the school board] *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners’ decision, then petitioners have exercised their discretion in violation of the Constitution.” (footnote omitted)).

critical race theory-related book bans and exceed the limits imposed by the First Amendment include that the books promote “radical and racist ideologies to students,”<sup>78</sup> “opine[] [on] prejudice based on race,”<sup>79</sup> and “unfairly depict[] former President Donald Trump as a bully.”<sup>80</sup> As noted by the Court in *Pico*, “[t]his would be a very different case if the record demonstrated that [the school boards] had employed established, regular, and facially unbiased procedures for the review of controversial materials.”<sup>81</sup>

However, in the recent attacks against critical race theory, some proponents of such book bans are employing rhetoric that, if accepted, would render an analysis under *Pico* irrelevant. Namely, these proponents assert that the First Amendment prohibition against content-based restrictions does not extend to critical race theory because the subject falls outside First Amendment protections and into three areas of nonprotection: incitement to violence, defamatory speech, and obscenity. This Part explores these alleged areas of nonprotection and establishes why each is a fallacy clouding an unconstitutional pretext for banning critical race theory books that cannot survive First Amendment scrutiny.

#### A. *The “Critical Race Theory Incites Violence” Fallacy*

The first fallacious argument fueling current book bans is that critical race theory incites violence. Opponents of critical race theory allege that the movement’s emphasis on activism promotes violence, sedition, and lawlessness. Such an argument is exemplified by one Texas parent describing *Woke: A Young Poet’s Call to Justice*, an anthology of social justice-focused poetry by women of color, as a promotion of “terrorism.”<sup>82</sup>

For speech to fall under the incitement area of nonprotection under the First Amendment, it must qualify as advocacy to incite or produce *imminent* lawlessness that is “likely to incite or produce such action.”<sup>83</sup> First, imminence requires an immediate call for lawless action—“the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”<sup>84</sup> Second, inciting speech must be directed at

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<sup>78</sup> Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (Feb. 8, 2022), <https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html> [<https://perma.cc/5BL5-WSH4>].

<sup>79</sup> Hixenbaugh, *supra* note 4.

<sup>80</sup> *Id.*

<sup>81</sup> *Pico*, 457 U.S. at 874.

<sup>82</sup> Hixenbaugh, *supra* note 4.

<sup>83</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>84</sup> *Id.* at 447–48 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

a specific person or group.<sup>85</sup> And lastly, speech must actually call for lawless action.

Critical race theory books do not meet any of these prongs. First, although critical race theorists urge people to engage in social and racial activism, a general urge for activism is insufficient to qualify as immediacy. Many critical race theory books fail this first prong because they do not advocate for lawless action. However, books that arguably do promote such action nonetheless fail this prong, as “advocacy of illegal action at some indefinite future time” is insufficient for that speech to lose its shelter under the First Amendment.<sup>86</sup>

Second, an author of a children’s critical race theory book found in a school library may anticipate that schoolchildren will read their literary work, but they are not directing their books at specific students or schools.<sup>87</sup> Consequently, it also fails the second prong.

Last, critical race theory is not a call for lawless action; instead, its activist dimension attempts to understand current social situations, how to change them, and the paths to transforming society for the better.<sup>88</sup> The attempts by critical race theory opponents to market it as unlawful incitement despite an obvious incongruence with existing Supreme Court precedent reveals the pretextual motives underlying their efforts. Namely, it reveals the fallacious common trope that calls for racial activism and equity are synonymous with violence. More deeply embedded in this trope is the notion that people of color are inherently violent,<sup>89</sup> allowing those who resist racial

<sup>85</sup> *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (“Since the uncontroverted evidence showed that Hess’ statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action.”).

<sup>86</sup> *Id.* at 108.

<sup>87</sup> In *Hess*, the Court found that although an antiwar demonstrator remarked, “[w]e’ll take the fucking street again,” in the middle of a crowd, his statement was not inciting because it “did not appear to be addressed to any particular person or group, and that his tone, although loud, was no louder than that of the other people in the area.” *Id.* at 106–08. Relatedly, in the case of critical race theory works, although authors are, at times, writing to a student demographic, they are not directing their works to specific students or student groups.

<sup>88</sup> DELGADO & STEFANCIC, *supra* note 21, at 8.

<sup>89</sup> See, e.g., D. Marvin Jones, *The “Big Black Man” and Other Stories: George Floyd, Stereotypes, and the Shape of Fear*, 75 U. MIA. L. REV. CAVEAT 97, 102 (2020) (discussing the historical and social constructions of the “big black man” and “urban thug” stereotypes); Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 46 (2017) (discussing the role that persistent stereotypes against Black women, such as the trope that “Black women are overly aggressive and accustomed to violence within their environment[s],” plays in police killings, sexual assaults, and domestic violence perpetrated against Black women); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 495–96 (1996) (noting that “[t]he average American might fear a Black man simply because of the Black man’s race when it is not normatively justified to assume that another person is violent or dangerous based on race”).

equity to reframe the oppressed as the aggressors and justify violent action against them. This systemic issue is exemplified by protests in the summer of 2020 that followed the murder of George Floyd, in which peaceful protesters nationwide were met with the same police brutality against which they were protesting.<sup>90</sup>

Critical race theory is not a philosophy of militant rebellion; instead, it pursues mindfulness, unity, and solidarity among communities nationwide. Critical race theory “necessarily[] [is] to think community building and intimacy and to move individuals to intervene in oppressive systems . . . [I]t is to think about creating spaces for coping with inequality, and it is to think about the connection required to sustainably resist violence against people of color.”<sup>91</sup> Consequently, because book ban proponents cannot establish that critical race theory is incitement, this pretextual and fallacious justification for banning books relating to critical race theory fails under the First Amendment.

### B. *The “Critical Race Theory is Defamatory” Fallacy*

The second pretextual fallacy used by current proponents of critical race theory book bans is that critical race theory is defamatory to white people in the United States. Those who wield this argument assert, among other things, that critical race theory and other avenues towards racial justice disparage white Americans and force feelings of racial guilt and distress upon young white students. An infamous example of this rhetoric is Representative Matt Krause’s justification for the 850 books he implicitly proposed to be banned—the books were those that Krause believed “might make students feel discomfort, guilt, anguish, or any other form of psychological distress because of their race or sex.”<sup>92</sup>

To establish that speech is defamatory such that it falls outside the protections provided by the First Amendment, a private petitioner must demonstrate that the speech negligently communicates a false statement of

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<sup>90</sup> Zack Beauchamp, *What the Police Really Believe*, VOX (July 7, 2020, 8:10 AM), <https://www.vox.com/policy-and-politics/2020/7/7/21293259/police-racism-violence-ideology-george-floyd> [https://perma.cc/ML6X-XHNU].

<sup>91</sup> Anjali Vats & Deidré A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 784 (2018).

<sup>92</sup> Chappell, *supra* note 3. Among these 850 books are *2020 Black Lives Matter Marches* by Joyce L. Markovics, *What is White Privilege* by Leigh Ann Erickson, *#BlackLivesMatter: Protesting Racism* by Rachel L. Thomas, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* by Michelle Alexander, *This Book Is Anti-Racist: 20 Lessons on How to Wake up, Take Action, and Do the Work* by Tiffany Jewell, *Multicultural Education: Issues and Perspectives* by James A. Banks, and *How to Be An Antiracist* by Ibram X. Kendi. Letter from Matt Krause, Tex. State Rep., to Lily Laux, Deputy Comm’r Sch. Programs, Tex. Educ. Agency add. (Oct. 25, 2021), <https://static.texastribune.org/media/files/94fee7ff93eff9609f141433e41f8ae1/krausebooklist.pdf> [https://perma.cc/Y6VY-XMEN].

fact damaging to their reputation.<sup>93</sup> However, such a task is insurmountable for proponents of this book ban fallacy, as there is no negligent falsity underlying critical race theory for them to reveal. Instead, critical race theory confronts the realities of racism, both past and present, in the United States. These realities are reflected by the basic tenants of critical race theory as defined by Jean Stefancic and critical race theory pioneer Richard Delgado: (1) racism is an ordinary social science that can be studied, analyzed, and learned from; (2) race is a social construct; and (3) current and historical racial hierarchies serve the white majority and discredit, neglect, and oppress racial minorities.<sup>94</sup>

Critical race theory is not an indictment on whiteness; instead, it is a methodology that inspects how social structures benefit the white majority over people of color and seeks to establish racial equity.<sup>95</sup> In other words, it aims to validate and articulate the experiences of people of color in the United States. To do so, however, requires “aggressive, color-conscious efforts”<sup>96</sup> that necessitate race-centric discourse.

The misclassification of critical race theory as defamatory speech by book ban proponents reveals the pretextual motives behind their actions. Through assertions that critical race theory is an attack on whiteness that necessitates the removal of race-related discourse in schools, opponents of critical race theory effectively advocate for a “colorblind” engagement with race-related issues. Although proponents of a colorblind discourse assert that it furthers racial equality, the colorblind approach neglects racial equity, thereby erasing the experiences, perspectives, and voices of people of

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<sup>93</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (finding that a “private defamation plaintiff who establishes liability under a less demanding standard than” the standard for public figure “may recover only such damages as are sufficient to compensate him for actual injury”). Because the failure to meet reputational damage on any one person would automatically bar a public figure from establishing actual malice, this discussion only addresses defamation as applied to private practitioners.

<sup>94</sup> See DELGADO & STEFANCIC, *supra* note 21, at 8–9. The concept of “biological race,” or the idea that biological distinctions divide humans into distinct groups, originates from the colonialist endeavors of the seventeenth century and “[t]he desire to enslave people, take their land, [and] dominate them.” Susan Kelly, *Myth of Race Still Embedded in Scientific Research, Scholar Says*, CORNELL CHRON. (Nov. 20, 2017), <https://news.cornell.edu/stories/2017/11/myth-race-still-embedded-scientific-research-scholar-says> [<https://perma.cc/E2CU-BHJA>]. Scientists at that time used “race” as a means to justify “why it was moral” and “naturally imperative[] for Europeans to inflict these harms” on members of colonized populations. *Id.* In modern days, scientists and white nationalists point to biological racial differences as the cause of racial inequality—despite the fact that the notion of biological race “has been definitively proven false.” *Id.* This erroneous assertion relies on outdated and disproven research, rather than the social science demonstrating that racial inequality is due to social differences, such as “higher rates of incarceration, lower educational attainment, lower income, [and] lower wealth.” *Id.*

<sup>95</sup> See Kelly, *supra* note 94.

<sup>96</sup> DELGADO & STEFANCIC, *supra* note 21, at 27.



color—particularly those of Black people in the United States.<sup>97</sup> The colorblind consequence of classifying critical race theory as defamatory speech would “stand[] in the way of taking account of difference in order to help people in need.”<sup>98</sup> Thus, the “critical race theory is defamatory speech” fallacy is pretextual and meritless, and it cannot withstand scrutiny under the First Amendment.

### C. *The “Critical Race Theory is Obscene” Fallacy*

The last pretextual fallacy used to support current book bans against critical race theory is that critical race theory is or closely connects to obscene content. As mentioned in Part II, obscenity—or, more specifically, sexual content and obscene language—has historically been the most common justification for book bans.<sup>99</sup> Current book ban efforts are no exception; they cite obscenity as one of several justifications to ban critical race theory books from school libraries.<sup>100</sup> This depiction of critical race theory as obscene ranges from parental allegations that books that advocate for the abolition of racism in schools are patently offensive because they “promote[] discrimination”<sup>101</sup> to state legislators seeking to criminalize the distribution of obscene or harmful materials, i.e., critical race theory books, to minors in schools.<sup>102</sup>

Removal of critical race theory-related books from school libraries under the basis of obscenity requires that book ban proponents establish that critical race theory either (1) appeals to society’s prurient interests, (2) relates to patently offensive sexual conduct under state law, or (3) lacks serious national value, including literary, artistic, political, and scientific value.<sup>103</sup> The first and second prongs are wholly unrelated to critical race theory, as critical race theory neither appeals to prurient interests nor relates to patently sexual conduct. Although the movement may intersect with other social

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<sup>97</sup> See, e.g., Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 STAN. L. REV. 1, 2 (1991) (discussing how “the United States Supreme Court’s use of color-blind constitutionalism—a collection of legal themes functioning as a racial ideology—fosters white racial domination”).

<sup>98</sup> DELGADO & STEFANCIC, *supra* note 21, at 27.

<sup>99</sup> See Beauchamp, *supra* note 8.

<sup>100</sup> Strauss, *supra* note 2; see generally Hixenbaugh, *supra* note 4 (listing examples of book challenges on the basis of obscenity).

<sup>101</sup> See Hixenbaugh, *supra* note 4 (listing parents’ complaints of various books dealing with topics such as race, gender, racism, and sexuality).

<sup>102</sup> See Strauss, *supra* note 2.

<sup>103</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

justice movements addressing sexuality and sex positivity, critical race theory at its core addresses racial justice.<sup>104</sup>

Although opponents of critical race theory argue that critical race theory falls under the third prong of obscenity so long as an entire community determines that the movement lacks serious social value, this argument fails under the First Amendment. Despite attempts to make “obscenity” a broad, catchall phrase that encompasses many subjects,<sup>105</sup> the increased access to content and information during the Information Age has rendered the scope of obscenity “quite specific and limited.”<sup>106</sup> Specifically, three notions remain under the modern interpretation and application of the “lacks any redeeming social value” prong of obscenity: (1) there is a “strong presumption in favor of protecting unconsenting adults and children when they are in public”; (2) “the government can constitutionally prohibit the sale or exhibition to children of material that is obscene for minors, but only if it can do so without significantly interfering with the rights of adults”; and (3) “the government can constitutionally prohibit the production, distribution, and possession of child pornography,” defined as “sexual images and videos made with real children.”<sup>107</sup> Critical race theory books fall outside each of these notions.

As the Court held in *Pico*, the First Amendment does not tolerate the removal of books from school libraries simply because people “dislike the ideas contained in those books” or due to motivations of racial animus.<sup>108</sup> The First Amendment cannot tolerate the use of obscenity as a blunt instrument to force any disagreeable topic outside of the confines of the Constitution, nor should it be used as a back door argument that facilitates a racist application of the First Amendment. Therefore, the obscenity-related fallacy used against critical race theory cannot survive scrutiny under the First Amendment.

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<sup>104</sup> See *supra* notes 94, 96, 100–101 and accompanying text. Although the constitutionality of book bans against gender-, gender identity-, and sexuality-related books are an important subsection of the general book ban discussion, this topic is beyond the scope of this Essay. This Essay instead addresses the erroneous argument that critical race theory itself appeals to the prurient interests.

<sup>105</sup> See *supra* note 101 and accompanying text.

<sup>106</sup> Geoffrey R. Stone, *Sexual Expression and Free Speech: How Our Values Have (D)evolved*, A.B.A., [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-ongoing-challenge-to-define-free-speech/sexual-expression-and-free-speech/\[https://perma.cc/9ZNF-J65F\]](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/sexual-expression-and-free-speech/[https://perma.cc/9ZNF-J65F]).

<sup>107</sup> *Id.* (discussing how the government’s power to restrict material is now far more limited).

<sup>108</sup> *Bd. of Educ. v. Pico*, 457 U.S. 853, 854, 872 (1982).

### III. THE FIRST AMENDMENT AND A MORE DIVERSE JUDICIARY

Although the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech,”<sup>109</sup> the First Amendment is often interpreted such that its constitutional protections neither serve nor protect racial minorities. The Constitution has historically been interpreted to serve the majority population.<sup>110</sup> This approach, in theory, is logical and unfeeling—because it is impossible to serve the needs of all simultaneously, it relies on notions of fairness and general applicability. This majority-centric approach further purports to be colorblind—it serves the population based on general need rather than specific qualities, traits, or attributes.<sup>111</sup>

However, when applied, this approach demonstrates racial bias and underinclusivity. Because the majority population has historically been a white majority, majority-centric interpretations of the Constitution are both overinclusive and underinclusive: they widen the gap of racial equity by continuing to serve white majority interests while neglecting the needs of racial minorities.<sup>112</sup>

An apt example of a Supreme Court decision that demonstrates the racial underinclusivity of the First Amendment is *Virginia v. Black*, 538 U.S. 343 (2003). In *Black*, the Court addressed the constitutionality of a Virginia cross-burning statute, VA. CODE ANN. § 18.2-423 (1996), that criminalized a person or persons’ cross burning “with the intent of intimidating any person or group of persons” and allowed the action of cross burning itself to be “prima facie evidence of an intent to intimidate a person or group of persons.”<sup>113</sup> The Court discussed the history of cross burning at length, the Ku Klux Klan (KKK), and racism in the United States, noting that “when a cross burning is used to intimidate, few if any messages are more powerful,” as many of the recipients of such a message “fear for their lives.”<sup>114</sup>

Nonetheless, in a 6–2 majority decision—and from a majority composed entirely of white justices—the Court struck down the prima facie provision of the statute, holding that “[a]s the history of cross burning indicates, a burning cross is not always intended to intimidate.”<sup>115</sup> In support

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<sup>109</sup> U.S. CONST. amend. I.

<sup>110</sup> Gotanda, *supra* note 97 (discussing how “the United States Supreme Court’s use of color-blind constitutionalism—a collection of legal themes functioning as a racial ideology—fosters white racial domination”).

<sup>111</sup> *See id.* at 7 (“Color-blind constitutional analysis ignores this ordinary lived experience of race as a highly charged concept with complex historical and social implications.”).

<sup>112</sup> *See id.* at 2–3 (“A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.”).

<sup>113</sup> *Virginia v. Black*, 538 U.S. 343, 348 (2003).

<sup>114</sup> *Id.* at 357.

<sup>115</sup> *Id.* at 365.

of its decision, the Court reasoned that because cross burning at times “is a statement of ideology, a symbol of group solidarity,” and “a ritual used at Klan gatherings” that represents the Klan itself, “[b]urning a cross at a political rally would almost certainly be protected expression.”<sup>116</sup>

Founding his remarks on the notion that “certain things acquire meaning well beyond what outsiders can comprehend” in every culture, Justice Clarence Thomas—the sole Black justice on the Court—dissented from the majority opinion.<sup>117</sup> Noting that cross burning in the United States “has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence,” Justice Thomas rejected the majority’s assertion that cross burning could be performed without the intent to intimidate.<sup>118</sup>

He opined that the majority’s idealistic distinction between cross burning with and without the intent to intimidate overlooked “not only the words of the statute but also reality.”<sup>119</sup> He detailed the pervasive presence of the KKK in Virginia, the reality that most victims of cross burnings in the state were Black families, and the legality of racial segregation at the time the cross-burning statute was enacted.<sup>120</sup> He cited the well-documented “association between acts of intimidating cross burning and violence,” adding that “[f]or those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder.”<sup>121</sup> And he identified the pretextual rationale underlying the arguments against the statute, emphasizing that “those who hate cannot terrorize and intimidate to make their point.”<sup>122</sup>

The significance of Justice Thomas’s remarks as the sole Black Supreme Court Justice is substantial. As Justice Thomas remarked to begin his dissent, there are “certain things [that] acquire meaning well beyond what outsiders can comprehend.”<sup>123</sup> In the case of *Virginia v. Black*, six white Supreme Court justices could not comprehend the inherent racism of and threat behind cross burning. Their experiences both informed and limited their understanding of cross burning. Because they had not directly been targets of systemic racism, they overlooked the reality of the statute and of the experience of Black, Brown, and other racial minorities in the United

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<sup>116</sup> *Id.* at 365–66 (White, J., concurring) (quoting *R. A. V. v. St. Paul*, 505 U.S. 377, 402 n.4 (1992)).

<sup>117</sup> *Id.* at 388 (Thomas, J., dissenting).

<sup>118</sup> *Id.* at 391.

<sup>119</sup> *Id.* at 388.

<sup>120</sup> *See id.* at 391–94.

<sup>121</sup> *Id.* at 389 (citing JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954–1965* 39 (1987)).

<sup>122</sup> *Id.* at 394.

<sup>123</sup> *Id.* at 388.

States. And, as the sole Black justice on the Court, Justice Thomas was forced to articulate and educate his white colleagues of these realities on his own.

Relatedly, the humanity of and, therefore, the fallibility of the judiciary further contributes to the over and underinclusivity of the application of the First Amendment. Although the Constitution theoretically can be applied in a racially equitable manner, the judiciary interpreting and applying its principles are human. As a part of that humanity, they carry with them implicit biases that are informed by their individual life experiences.<sup>124</sup> Where there is a broad cross section of backgrounds and life experiences in the judiciary, implicit biases are diversified, making it more likely that those serving as judges hold one another accountable for recognizing and confronting their biases. However, when the judiciary is limited to a narrow cross section of the population, the probability of overlapping biases increases, creating the risk of a judicial echo chamber in which biases are unrecognized, unacknowledged, and reinforced. The result of this phenomenon is an inequitable application of the Constitution that either erroneously applies First Amendment protection as in *Black* or restricts the First Amendment and the freedom of speech it affords as currently at risk in the wake of state book bans targeting critical race theory.

To prevent this echo chamber of judicial bias, the Constitution—and more specifically, the First Amendment—will continue to provide unequal protection without a judiciary diverse in thought, experience, and color. Because every culture has “certain things [that] acquire meaning well beyond what outsiders can comprehend,”<sup>125</sup> the judiciary must come from a broad cross section of society to ensure the equitable enforcement of inclusivity. A diverse judiciary would thereby mitigate over and underinclusive interpretations of the freedom of speech.

This notion is exemplified when applied to the pretextual fallacies currently targeting critical race theory. In the context of determining whether critical race theory incites violence, a diverse judiciary would more likely recognize that critical race theory is a community-centric movement and not a lawless approach to social reform. It would more likely understand that critical race theory’s activist dimension focuses on not violent sedition but proactive reform. In analyzing whether critical race theory is defamatory to white U.S. citizens, diversity in the judiciary would avoid the temptation to

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<sup>124</sup> In the legal context, “systemic implicit bias” is “the way automatic racial bias may have become unwittingly infused with, and even cognitively inseparable from, supposedly race-neutral legal theories . . . and jurisprudential approaches to well-considered constitutional doctrines.” Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J. F. 406, 408 (2017).

<sup>125</sup> *Black*, 538 U.S. at 388 (Thomas, J., dissenting).

promote a colorblind Constitution and the consequent erasure of color that follows. The judiciary would recognize the danger in silencing race-related discourse and the benefits of allowing schoolchildren to learn from the experiences of those different from their own, both past and present. And for arguments asserting that critical race theory is obscene, a diverse judiciary would recognize the national value of critical race theory while simultaneously rejecting any pretextual attempts to disguise disagreement and racial animus with the fallacious cloak of obscenity.

#### CONCLUSION

As unprecedented demands for book bans have spread across the United States, so too has the effort to remove critical race theory from public school libraries. In response to the increased societal awareness of the continued existence of systemic racism in the United States, the attack against critical race theory in current book ban proposals seeks to calm public discomfort by erasing race-related discourse and the experiences of BIPOC altogether. Although the attacks against critical race theory cannot survive under First Amendment scrutiny, this recent phenomenon highlights the necessity of diversifying the judiciary. A judiciary diverse in thought, perspective, and color may more readily apply the First Amendment with racial equity in mind, extending First Amendment protections to often-neglected minority groups.