

How Recent Laws Infringe on Teacher’s First Amendment Rights

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The Constitution’s First Amendment guarantees freedom of speech, but recent laws across numerous states seek to erode this essential protection. Over time, the Supreme Court has clarified what precisely the amendment covers. For example, the Court has found that the amendment protects the right to burn the flag but not the right to use “fighting words.”¹ It allows school students to protest peacefully but not to use language deemed to promote drug use at a school event.² Two lawsuits, in New Hampshire and in Oklahoma, raise a new issue of what type of speech is protected.³ That issue: a teacher’s right to discuss race in the classroom.

Since 2021, forty-two states have proposed laws limiting teachers’ speech and academic freedom, and these proposals became law in seventeen of those states.⁴ At the center of many of these statutes is fervent opposition to what lawmakers and parents of school-age children deem to be Critical Race Theory (CRT).⁵ CRT was conceptualized in the 1970s to analyze how racism is systematic and embedded in legal systems and policies.⁶ In recent years, CRT has become a catch-

¹ *Texas v. Johnson*, 491 U.S. 397 (1989).

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1968); *Morse v. Frederick*, 551 U.S. 393 (2007).

³ See Naaz Modan, *New Hampshire Lawsuit Challenges Law on ‘Divisive Concepts’ in Classrooms*, K-12 DIVE (Dec. 16, 2021), <https://www.k12dive.com/news/new-hampshire-lawsuit-challenges-law-on-divisive-concepts-in-classrooms/611640/>; Jaclyn Diaz, *Teachers and Civil Rights Groups Sue Over Oklahoma’s Ban on Critical Race Theory*, NAT’L PUB. RADIO (Oct. 20, 2021), <https://www.npr.org/2021/10/20/1047519861/aclu-sues-over-oklahoma-law-on-critical-race-theory>.

⁴ Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (July 15, 2022), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06>.

⁵ *Id.*; Laura Meckler, *Teachers Union Sues New Hampshire Over Law Barring Certain Race Lessons*, WASH. POST (Dec 13, 2021), <https://www.washingtonpost.com/education/2021/12/13/new-hampshire-critical-race-theory-lawsuit/>.

⁶ Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack*, EDUC. WEEK (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05>.



all term for any discussion of race, such as diversity and inclusion policies, regardless of their relation to the theory.⁷

The fight against CRT began in the summer of 2020.⁸ Events like the murder of George Floyd incited weeks of large-scale protests focused on racism in the United States and forced the country to examine itself and its troubled history.⁹ During this time, government institutions, workplaces, and schools sought to incorporate education aimed at discussing race, the ongoing struggles faced by people of color in the country, and how white individuals' experiences may differ.¹⁰ As a result, many conservative pundits pushed back, and most notably was Christopher Rufo.¹¹

Rufo's ire over the then-recent trend in anti-bias training culminated in his September appearance on "Tucker Carlson Tonight."¹² He broadly denounced these programs as "critical race theory," despite that being a mischaracterization.¹³ Rufo claimed "[CRT] had pervaded every aspect of the federal government" and made a direct appeal to former President Trump to "issue an executive order to abolish critical-race-theory training from the federal government."¹⁴ It worked. By the end of the week, Rufo was in Washington D.C. helping to draft an executive order limiting how race could be discussed in federal diversity seminars which would become law later

⁷ *Id.*

⁸ See Sarah Schwartz, *Who's Really Driving Critical Race Theory Legislation? An Investigation*, EDUC. WEEK (July 19, 2021), <https://www.edweek.org/policy-politics/whos-really-driving-critical-race-theory-legislation-an-investigation/2021/07>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, THE NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>.

¹³ *Id.*

¹⁴ *Id.*

that month.¹⁵ President Biden subsequently overturned the order.¹⁶ Since Rufo’s 2020 appearance on Fox News, he has advised on the language of ten state bills that sought to ban discussing “critical race theory.”¹⁷ Prominent politicians have used Rufo’s language when discussing CRT, and many of the bills aimed at banning CRT have used language from President Trump’s executive order that Rufo helped write.¹⁸ In short, Rufo is a prominent voice in the fight against what has been labeled CRT.

Educators’ feelings about the anti-CRT laws are mixed.¹⁹ Teachers who support the laws view them as tools to combat liberal bias in academia, while those opposing the laws see them as stifling debate and classroom instruction.²⁰ Aside from their content, another central concern about the laws is how they were written.²¹ For example, a 2021 Tennessee law prohibits teaching the “... United States is fundamentally... racist or sexist,” and goes on to say it does not prohibit *impartial* instruction of “controversial aspects of history.”²² This leaves many teachers unsure of what topics are now off-limits or how lessons must now be approached in states with such laws.²³

¹⁵ *Id.*

¹⁶ Schwartz, *supra* note 8.

¹⁷ Wallace-Wells, *supra* note 12.

¹⁸ Wallace-Wells, *supra* note 12; Schwartz, *supra* note 8.

¹⁹ See Madeline Will, Catherine Gewertz, Ileana Najjarro & Sarah Schwartz, *What Does the Critical Race Theory Law Mean for Texas Classrooms? Teachers Speak Out*, EDUC. WEEK (July 15, 2021), <https://www.edweek.org/teaching-learning/what-does-the-critical-race-theory-law-mean-for-texas-classrooms-teachers-speak-out/2021/07>.

²⁰ *Id.*

²¹ Schwartz, *supra* note 8.

²² Conference Committee Report on House Bill No. 580 / Senate Bill No. 623, 2021 Sess. (Tenn. 2021), <https://www.capitol.tn.gov/Bills/112/CCRReports/CC0003.pdf>.

²³ See Brian Lopez, *Texas ‘Critical Race Theory’ Law Confuses Educators*, THE TEX. TRIB. (Oct. 15, 2021), <https://www.texastribune.org/2021/10/15/Texas-critical-race-theory-law-confuses-educators/>; Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused, and Self-Censoring*, WASH. POST (Feb. 14, 2022), <https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/>; Olivia B. Waxman, *Anti-‘Critical Race Theory’ Laws Are Working. Teachers Are Thinking Twice About How They Talk About Race*, TIME (June 30, 2022), <https://time.com/6192708/critical-race-theory-teachers-racism/>.

In Texas, which has a law similar to Tennessee, teachers were informed in at least one school district that an “opposing” perspective to the Holocaust must be taught.²⁴ A Texas state senator later tweeted that the district in question “got it wrong,” but the law’s ambiguity abounds.²⁵ Biology teachers in Texas are unsure if they now must devote equal amounts of class time to evolution and creationism.²⁶ These laws have already caused some teachers to become more guarded about what they say and, in some cases, to lose their jobs.²⁷ At least two teachers in Tennessee and Missouri have been fired for teaching what their districts deemed CRT.²⁸

The answer to the lawsuits mentioned above is unclear.²⁹ Academic freedom has long been recognized to apply to professors at universities but not to K-12 teachers.³⁰ Through the 1960s and 1970s, public school teachers won a handful of cases which expanded their freedom to classroom speech, but this was brought into question with the 2006 Supreme Court case *Garcetti v. Ceballos*.³¹ In *Garcetti*, the Court ruled that public employees generally do not have First Amendment protection for on-the-job speech.³² Several courts since this decision have interpreted *Garcetti* to limit a teacher’s First Amendment rights in the classroom.³³ Some have argued these laws, if not challenged by teachers, could be challenged by students as a violation of their First

²⁴ Lopez, *supra* note 23.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Hannah Natanson, *A White Teacher Taught White Students About White Privilege. It Cost Him His Job*, WASH. POST (Dec. 6, 2021), <https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory/>; Claudette Riley, *Southwest Missouri High School Teacher Accused of Using Critical Race Theory Loses Job*, SPRINGFIELD NEWS LEADER (Apr. 7, 2022), <https://www.newsleader.com/story/news/education/2022/04/07/greenfield-missouri-teacher-kim-morrison-accused-teaching-critical-race-theory-crt-loses-job/7264924001/>.

²⁸ *Id.*

²⁹ Mark Walsh, *If Critical Race Theory Is Banned, Are Teachers Protected by the First Amendment?* EDUC. 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>.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*



Amendment right to receive information.³⁴ If that failed, suits could be brought via the Fourteenth Amendment’s Equal Protection Clause given the laws’ “racial animus,” as the passage of these laws has left many to doubt that they were passed in “good faith.”³⁵

These laws have made it much more difficult for a teacher to have an honest conversation about race in the United States. Teachers are forced to self-censor, and a student’s education suffers as a result.³⁶ Take, for example, Matthew Hawn, a Tennessee teacher who was fired in 2021 for teaching “CRT.” His perspective, however, is that in his 94% white classroom, teaching the viewpoint of African American writers and history *is* the opposing viewpoint. As lawsuits move through the court system, it is essential to not only see them as challenging a law, but as standing up for a teacher’s First Amendment rights.

³⁴ *Id.*

³⁵ Walsh, *supra* note 29; Schwartz, *supra* note 8.

³⁶ Eesha Pendharkar, *Efforts to Ban Critical Race Theory Could Restrict Teaching for a Third of America’s Kids*, EDUC. WEEK (Jan 27, 2022), <https://www.edweek.org/leadership/efforts-to-ban-critical-race-theory-now-restrict-teaching-for-a-third-of-americas-kids/2022/01>.

