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## THE “DIVISIVE CONCEPTS” LAWS AND AMERICANS OF ASIAN DESCENT

*Ilhyung Lee\**

*Sticks and stones  
May break my bones  
Oh but your words  
They really kill me.<sup>1</sup>*

### I. INTRODUCTION

In the past year, a number of states have enacted laws that prohibit public schools from teaching certain lessons about race.<sup>2</sup> The main target of these laws appears to be “critical race theory,” once a theory advanced in legal academia that has now become a “catchall term” for discussions of race and racism.<sup>3</sup> The states mean business and seek to enforce their new or proposed laws by prohibiting state funding for teaching the banned content,<sup>4</sup> withholding funding to local educational agencies or schools in violation,<sup>5</sup> subjecting offending teachers to disciplinary action,<sup>6</sup> and allowing those aggrieved to bring an action at law or equity.<sup>7</sup> More of these anti-critical race theory laws appear to be

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1. BABYSHAMBLES, *Sticks and Stones, on DOWN IN ALBION* (Rough Trade Records 2005).

2. *E.g.*, IDAHO CODE § 33-138 (2022); N.H. REV. STAT. ANN. § 193:40 (2021); N.D. CENT. CODE § 15.1-21-05.1 (2021).

3. Jennifer Schuessler, *Bans on Critical Race Theory Threaten Free Speech, Advocacy Group Says*, N.Y. TIMES, <https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html> [<https://perma.cc/UFM7-YHEN>] (Nov. 9, 2021).

4. *E.g.*, IDAHO CODE § 33-139 (2022); H.R. 4100, 124th Gen. Assemb., Reg. Sess. § 1, ¶ 1.105 (S.C. 2021) (General Appropriations Bill for FY 2021-2022).

5. *E.g.*, TENN. CODE ANN. § 49-6-1019(c) (2021).

6. *E.g.*, N.H. REV. STAT. ANN. § 193:40(IV) (2021). Under Virginia’s bill, any individual who knowingly and intentionally violates the law would be “guilty of a Class 4 misdemeanor.” H.D. 781, 2022 Gen. Assemb., Reg. Sess. (Va. 2022). West Virginia’s bill states that “[a] teacher may be dismissed or not reemployed.” S. 618, 85th Leg., Reg. Sess. (W. Va. 2021).

7. *E.g.*, N.H. REV. STAT. ANN. § 193:40(III) (2021). Pennsylvania’s bill would grant standing and a private cause of action to “[a] resident of [the] Commonwealth.” H.R. 1532, 2021

coming, as there are bills pending in more than a dozen states with provisions virtually identical to those in already-enacted statutes.<sup>8</sup> Commentators have expressed alarm,<sup>9</sup> describing the laws as “content- and viewpoint-based state censorship,”<sup>10</sup> an infringement “on the right of faculty to teach and of students to learn,”<sup>11</sup> and “an attack on democracy.”<sup>12</sup>

A closer examination of these laws is in order. My own view is that some of the provisions in these laws are actually commendable, reflecting societal acknowledgment of the problem of racism and a commitment toward racial equality and justice. But about other provisions and their practical application, I raise several questions, concerns, and doubts. Examining the anti-critical race theory laws as a whole, I ask whether they might ultimately advance the much-maligned theory’s standing and legitimacy. With this background in place, I devote the rest of the discussion to the impact of these laws on Americans neither White nor Black, but of Asian descent. Questions arise in this setting too, making the new laws even more dubious. I also seize the opportunity to ask whether legislatures, while at work on education legislation, might consider including the Asian American experience in the school curriculum, especially given these divisive and polarizing times.

## II. THE LAWS AND THEIR PROVISIONS

As a preliminary note, although most of the subject statutes address not only race but also sex,<sup>13</sup> race will be the focus of the discussion herein. I begin with what I see as the most virtuous of the laws’ provisions and take passages from the recently enacted laws of Oklahoma, South Carolina, Tennessee, and Texas. These laws prohibit the teaching of the concepts, among several others, that “one

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Gen. Assemb., Reg. Sess. § 7(1) (Pa. 2021).

8. E.g., H.R. 8, 2022 Leg., Reg. Sess. (Ala. 2022); H.R. 564, 2021 Leg., Reg. Sess. (La. 2021); S. 460, 101st Leg., Reg. Sess. (Mich. 2021); H.R. 327, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); H.R. 1532, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021).

9. See JONATHAN FRIEDMAN & JAMES TAGER, PEN AM., EDUCATIONAL GAG ORDERS: LEGISLATIVE RESTRICTIONS ON THE FREEDOM TO READ, LEARN, AND TEACH (2022), [https://pen.org/wp-content/uploads/2022/02/PEN\\_EducationalGagOrders\\_01-18-22-compressed.pdf](https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf) [<https://perma.cc/33CV-U2AQ>]; Am. Ass’n of Univ. Professors, Am. Hist. Ass’n, Ass’n of Am. Colls. & Univs. & PEN Am., *Joint Statement on Legislative Efforts to Restrict Education About Racism in American History*, AM. HIST. ASS’N (June 16, 2021), <https://www.historians.org/divisive-concepts-statement> [<https://perma.cc/M79C-KK58>]; Kmele Foster, David French, Jason Stanley & Thomas Chatterton Williams, *We Disagree on a Lot of Things. Except the Danger of Anti-Critical-Race-Theory Laws.*, N.Y. TIMES (July 5, 2021), <https://www.nytimes.com/2021/07/05/opinion/we-disagree-on-a-lot-of-things-except-the-danger-of-anti-critical-race-theory-laws.html> [<https://perma.cc/L3EQ-PYJY>].

10. FRIEDMAN & TAGER, *supra* note 9, at 7.

11. Am. Ass’n of Univ. Professors et al., *supra* note 9.

12. Jennifer Schuessler, *Scholarly Groups Condemn Laws Limiting Teaching on Race*, N.Y. TIMES (quoting Jonathan Friedman, Director of Free Expression and Education at PEN America), <https://www.nytimes.com/2021/06/16/arts/critical-race-theory-scholars.html> [<https://perma.cc/BS6X-PRHK>] (Nov. 8, 2021).

13. For example, New Hampshire’s law adds more classifications: “[A]ge, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion or national origin.” N.H. REV. STAT. ANN. § 193:40(I)(a) (2021).

race . . . is inherently superior to another race”<sup>14</sup> and that “an individual should be discriminated against or receive adverse treatment solely or partly because of the individual’s race.”<sup>15</sup> Oklahoma’s law adds to the list of the forbidden the concept that “members of one race . . . cannot and should not attempt to treat others without respect to race.”<sup>16</sup> Initially, I note that *race* is not defined in these statutes; presumably, the term is clear to the drafters.<sup>17</sup> Regarding the substance of these provisions, no law will please everyone, and there are sure to be those who will oppose the above bans, rather endorsing racial superiority as well as discriminatory and disparate treatment based on race.<sup>18</sup> Other detractors may also condemn the above prohibitions as legislative cowering to political correctness. Nevertheless, these laws reflect the standards of the people and the will of the electorate. These formal mandates are long overdue in a multiracial society’s continuing quest for racial harmony and tolerance.

Some of these provisions could go further and serve as a springboard for the next step. That is, if it is the province of the legislature to prohibit the teaching of such “divisive concepts” (as they have come to be known in pending legislation),<sup>19</sup> perhaps the legislature is also empowered to require affirmatively the teaching of nondivisive or “uniting” concepts, such as (with my proposed amendments to the current laws indicated by ~~deletion~~ and addition):

- “~~one no~~ no race . . . is inherently superior to another race; ~~rather, one all~~ rather, all races . . . ~~is~~ are inherently equal to each other ~~superior to another~~.”

14. OKLA. STAT. tit. 70, § 24-157(B)(1)(a) (2021); see TENN. CODE § 49-6-1019 (2021); TEX. EDUC. CODE ANN. § 28.0022(a)(2021); H.R. 4100, 124th Gen. Assemb., Reg. Sess. § 1, ¶ 1.105(1) (S.C. 2021).

15. TEX. EDUC. CODE ANN. § 28.0022(a)(4)(A)(iii) (2021); see OKLA. STAT. tit. 70, § 24-157(B)(1)(c) (2021); TENN. CODE ANN. § 49-6-1019(a)(3); H.R. 4100, 124th Gen. Assemb., Reg. Sess. § 1, ¶ 1.105 (S.C. 2021).

16. OKLA. STAT. tit. 70, § 24-157(B)(1)(d) (2021).

17. *Webster’s* offers as one definition of race “a division of [hu]mankind possessing traits that are transmissible by descent and sufficient to characterize it as a distinct human type.” *Race*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1993). The U.S. Census Bureau notes that racial categories in its decennial questionnaire “generally reflect a social definition of race recognized in this country and not an attempt to define race biologically, anthropologically, or genetically.” *About the Topic of Race*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> [https://perma.cc/W46X-E7CW] (Mar. 1, 2022).

18. See, e.g., Trip Gabriel, *Before Trump, Steve King Set the Agenda for the Wall and Anti-Immigrant Politics*, N.Y. TIMES (Jan. 10, 2019), <https://www.nytimes.com/2019/01/10/us/politics/steve-king-trump-immigration-wall.html> [https://perma.cc/5NVA-8T4B]; Isaac Chotiner, *A Penn Law Professor Wants to Make America White Again*, NEW YORKER (Aug. 23, 2019), <https://www.newyorker.com/news/q-and-a/a-penn-law-professor-wants-to-make-america-white-again> [https://perma.cc/R9H4-7VY6].

19. E.g., H.R. 8, 2022 Leg., Reg. Sess. § 1(1) (Ala. 2022); H.R. 564, 2021 Leg., Reg. Sess. § 1 (La. 2021); H.R. 327, 134th Gen. Assemb., Reg. Sess. § 1 (Ohio 2021); H.R. 6070, 2021 Gen. Assemb., Jan. Sess. § 1 (R.I. 2021); H.D. 781, 2022 Gen. Assemb., Reg. Sess. (Va. 2022). The impetus for these laws, and much of the text, including the “divisive concepts” term, is seen in President Trump’s executive order, which prohibited trainings in these concepts for federal contractors, federal agencies, and the military. Exec. Order No. 13,950, 85 Fed. Reg. 60,683, 60,685 (Sept. 22, 2020). President Biden revoked the order when he took office. Exec. Order No. 13,985, 86 Fed. Reg. 7,009, 7,012 (Jan. 20, 2021).

race”,<sup>20</sup>

- “an individual should not be discriminated against or receive adverse treatment solely or partly because of the individual’s race”;<sup>21</sup> or
- “members of one race . . . cannot and should not attempt to treat others without respect to race.”<sup>22</sup>

The prospect of such legislation must be tempered, however, with the declaration by some legislatures that “[p]roviding an education in a democracy is best done by teaching students *how* to think, rather than telling them *what* they should think.”<sup>23</sup> It was this fear that prompted the anti-critical race theory laws in the first place.

Next, I turn to the more controversial provisions in the laws. The list of prohibited items continues and includes the concept that “an individual, by virtue of the individual’s race . . . is inherently racist . . . or oppressive, whether consciously or unconsciously.”<sup>24</sup> Just as *race* is undefined in these statutes, neither is there any elaboration of the *racist* phrasing, and perhaps none is needed, in that racism is a bad thing, and no one wishes to be called racist, not even white supremacists.<sup>25</sup> I will pause to ask whether by *racist*, the states would include the view that the Founding Fathers intended America to be a nation of Whites and that non-Whites should go back to where they came from, even those who were born stateside and have lived in America all their lives or those who lawfully received naturalized citizenship under U.S. law. One hopes. Is it also racist to express the view that educational units at all levels devote too much of already limited resources to diversity, equity, and inclusion efforts? Is it racist for a student to sit at a lunch table in the cafeteria only with other students of the same race (or only with students of a different race)?

Another prohibited concept is that “[a]n individual, by virtue of the individual’s race . . . bears responsibility for actions committed in the past by other members of the same race.”<sup>26</sup> Similarly, bills introduced in other states prohibit “race scapegoating,” typically defined as “assigning fault, blame, or bias to a race . . . or to members of a race . . . because of their race.”<sup>27</sup> Like the provision banning the teaching of the concept that one race is inherently racist,

20. OKLA. STAT. tit. 70, § 24-157(B)(1)(a) (2021).

21. TEX. EDUC. CODE ANN. § 28.0022(a)(4)(iii) (2021).

22. OKLA. STAT. tit. 70, § 24-157(B)(1)(d) (2021).

23. S. 4166, 219th Leg., Reg. Sess. ¶ 1.b. (N.J. 2021) (emphasis added); Assemb. 6136, 219th Leg., Reg. Sess. ¶ 1.b. (N.J. 2021) (emphasis added).

24. E.g., TEX. EDUC. CODE ANN. § 28.0022(a)(4)(ii) (2021).

25. Eric Deggans, ‘Not Racist’ Is Not Enough: Putting in the Work To Be Anti-Racist, NPR (Aug. 25, 2020, 12:03 AM), <https://www.npr.org/2020/08/24/905515398/not-racist-is-not-enough-putting-in-the-work-to-be-anti-racist> [https://perma.cc/4GKS-XXDW]. But see ROBERT LOPEZ & JEFF MARX, *Everyone’s a Little Bit Racist, on AVENUE Q* (RCA Records 2003) (“If we all could just admit That we are racist a little bit Even though we all know that it’s wrong Maybe it would help us Get along!”).

26. TENN. CODE ANN. § 49-6-1019(a)(5) (2021); see TEX. EDUC. CODE ANN. § 28.0022(a)(4)(v) (2021).

27. IOWA CODE § 261H.8(1)(a) (2021). The term is defined identically in pending legislation. E.g., H.R. 8, 2022 Leg., Reg. Sess. § 1(2) (Ala. 2022); H.R. 564, 2021 Leg., Reg. Sess. (La. 2021).

one wonders if there is a school district in the country whose curriculum includes the teaching of race responsibility, fault, blame, or scapegoating,<sup>28</sup> leaving such mandates in the new laws ineffectual. In urging Oklahoma's governor to veto the bill approved by the legislature, one public school superintendent noted that the law appears to be a "solution looking for a problem which does not exist."<sup>29</sup>

Yet another prohibited concept might be more worrisome to teachers and beyond their control. The new laws also prohibit teaching concepts that "any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race."<sup>30</sup> As one eighth-grade history teacher in Tulsa, Oklahoma, cautioned, "If a kid comes home and says they're uncomfortable, now you're breaking the law[.]"<sup>31</sup> One question is whether this clause contemplates a subjective or an objective standard. Is the discomfort in the eye of the racial beholder? Or should the feeling be reasonable? If the latter, does the statute contemplate a universal standard of reasonableness, or one that varies from race to race?

In addition to bans on teaching race responsibility, fault, blame, and scapegoating, the laws also address "race stereotyping." Iowa's law defines "race . . . stereotyping" as "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>32</sup> One wonders how this race stereotyping provision might apply to the works of Geert Hofstede and of Charles Hampden-Turner and Fons Trompenaars, which explore cultural differences between and among countries.<sup>33</sup> Even though their research and analysis focus on national societies rather than racial groups, some countries in their studies are predominantly of a single race.<sup>34</sup> Would discussion of their findings be prohibited by the race stereotyping provisions of the new laws? The question is especially applicable in Ohio, where a bill in committee adds more classifications in its definition of race stereotyping: "ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a *nationality*, color, ethnicity, race, . . . to an individual because of the individual's *nationality*, color, ethnicity, race."<sup>35</sup>

28. See Sarah Schwartz, *Four States Have Placed Legal Limits on How Teachers Can Discuss Race. More May Follow*, EDUC. WK. (May 17, 2021), <https://www.edweek.org/policy-politics/four-states-have-placed-legal-limits-on-how-teachers-can-discuss-race-more-may-follow/2021/05> [https://perma.cc/U2DY-LE6C].

29. Nuria Martinez-Keel, *OKC School Board Denounces Critical Race Theory Law*, OKLAHOMAN (May 11, 2021, 8:51 AM), <https://www.oklahoman.com/story/news/education/2021/05/11/okc-school-board-denounces-house-bill-1775-nothing-short-racism-critical-race-theory/5032007001/> [https://perma.cc/L8S2-KPBV].

30. E.g., OKLA. STAT. tit. 70, § 24-157(B)(1)(g) (2021).

31. Schwartz, *supra* note 28.

32. IOWA CODE § 261H.8(1)(b) (2021). Pending bills in other states offer the same definition, with variations in conjunctions and possessive pronouns. E.g., H.R. 8, 2022 Leg., Reg. Sess. § 1(3) (Ala. 2022).

33. GEERT HOFSTEDE, GERT JAN HOFSTEDE & MICHAEL MINKOV, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* 4 (3d ed. 2010); FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, *RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS* 1 (4th ed. 2021).

34. See, e.g., HOFSTEDE ET AL., *supra* note 33, at 36.

35. H.R. 327, 134th Gen. Assemb., Reg. Sess. § 1 (Ohio 2021) (emphasis added).

Would the works of Hofstede and of Hampden-Turner and Trompenaars be added to the list of offending (banned) books?

Law is inexorably tied to politics.<sup>36</sup> Republican legislators pushed through the anti-critical race theory laws,<sup>37</sup> which became “a conservative rallying cry,”<sup>38</sup> an “obsession.”<sup>39</sup> These laws appear to reflect the growing fear of, and opposition to, what proponents fear is “indoctrination”<sup>40</sup> of our youth, that: their “state or the United States is fundamentally . . . racist”;<sup>41</sup> Whites, by virtue of their race, are racist and should take responsibility for events ranging from slavery to police killings of unarmed Black persons; and Whites are generally guilty of white privilege.<sup>42</sup> Such indoctrinating instruction would bring them, again by virtue of their race, unwarranted bad feelings—discomfort or distress. Some states cautiously add that their laws do not prohibit the “*impartial* discussion of controversial aspects of history,” the “*impartial* instruction on the historical oppression of a particular group of people based on race,”<sup>43</sup> or the teaching of the “divisive concepts in an *objective* manner.”<sup>44</sup> But are these qualifiers and the

36. “The furor over the subject . . . is credited with contributing to last week’s election victory by the Republican Glenn Youngkin, who promised at nearly every campaign stop to ban critical race theory on his first day in office as Virginia’s governor.” Schuessler, *supra* note 3. North Carolina’s bill, H.R. 324, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021), was approved in both houses along strict party lines. See *House Roll Call Vote Transcript for Roll Call #510*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2021/H/510> [https://perma.cc/98CK-GTGC]; *Senate Roll Call Vote Transcript for Roll Call #423*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2021/S/423> [https://perma.cc/BN7L-N72D]. The governor vetoed it, stating, “[T]his bill pushes calculated, conspiracy-laden politics into public education.” Governor Roy Cooper, *Governor Roy Cooper Objections and Veto Message*, STATE OF N.C. (Sept. 10, 2021), <https://webservices.ncleg.gov/ViewBillDocument/2021/53068/0/H324-BD-NBC-9175> [https://perma.cc/ZN77-NPZ3].

37. Trip Gabriel & Dana Goldstein, *Disputing Racism’s Reach, Republicans Rattle American Schools*, N.Y. TIMES, <https://www.nytimes.com/2021/06/01/us/politics/critical-race-theory.html> [https://perma.cc/V73T-HDKD] (Nov. 8, 2021); Schwartz, *supra* note 28.

38. Stephanie Saul, *How a School District Got Caught in Virginia’s Political Maelstrom*, N.Y. TIMES (Nov. 14, 2021), <https://www.nytimes.com/2021/11/14/us/loudoun-county-school-board-va.html> [https://perma.cc/ZSC8-LFDK].

39. John Haltiwanger & Jake Lahut, *Critical Race Theory Is a Lucrative Obsession for Republicans Because the Party Is ‘Offended by the Political Focus on Racism and Racial Justice’*, INSIDER (June 12, 2021, 8:14 AM), <https://www.businessinsider.com/what-is-critical-race-theory-why-is-gop-so-obsessed-2021-6> [https://perma.cc/YF4N-52UN]; Adam Harris, *The GOP’s ‘Critical Race Theory’ Obsession*, ATLANTIC (May 7, 2021), <https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828/> [https://perma.cc/4YGK-ES7U].

40. Catie Edmondson, *McConnell Attacks Biden Rule’s Antiracism Focus, Calling It ‘Divisive’*, N.Y. TIMES (quoting a letter from thirty-nine Republican Senators to Dr. Miguel Cardona, Secretary of Education), <https://www.nytimes.com/2021/04/30/us/politics/mitch-mcconnell-1619-project.html> [https://perma.cc/L8YE-65X6] (Nov. 9, 2021); see Schuessler, *supra* note 3 (quoting Florida Governor Ron DeSantis). Bills in some states refer to this indoctrination explicitly. H.R. 395, 130th Leg., 1st Reg. Sess. (Me. 2021); S. 4166, 219th Leg., Reg. Sess. ¶ 1.c. (N.J. 2021); Assemb. 6136, 219th Leg., Reg. Sess. ¶ 1.c. (N.J. 2021).

41. TENN. CODE ANN. § 49-6-1019(a)(8) (2021); see H.R. 8, 2022 Leg., Reg. Sess. § 1(1)a.2. (Ala. 2022).

42. See TENN. CODE ANN. § 49-6-1019(a)(2) (2021) (including as a prohibited concept that “[a]n individual, by virtue of the individual’s race . . . is inherently privileged”).

43. *Id.* § 49-6-1019(b)(2), (3).

44. H.R. 327, 134th Gen. Assemb., Reg. Sess. § 1 (Ohio 2021); see H.R. 8, 2022 Leg., Reg.

boilerplate references to the First Amendment<sup>45</sup> enough, or might they clash with the laws' main prohibitions? For example, would inquisitive students in North Dakota be able to inquire what critical race theory is, and why they are prohibited from learning about it, given the state's law that "[a] school district or public school may not include instruction relating to critical race theory in any portion of the district's required curriculum . . . or any other curriculum offered by the district or school"?<sup>46</sup> Would students be permitted to challenge the definition of critical race theory as enacted by their legislatures,<sup>47</sup> in comparison and contrast to the definition provided by *Black's Law Dictionary*?<sup>48</sup> Would students be permitted to write an essay arguing that American law includes examples of legal racism, some in the original text of the U.S. Constitution,<sup>49</sup> as well as in decisions by the U.S. Supreme Court?<sup>50</sup> These questions regarding the provisions' application, which have also been noted in the media and commentary,<sup>51</sup> highlight concerns about the laws' vagueness. An action challenging the Oklahoma law on this ground, among others, is pending.<sup>52</sup> In interpreting the legality of these anti-critical race theory laws, which affect the public education of youth, courts must decide whether these measures are "arbitrary or without reasonable relation to some purpose within the competency of the state to effect."<sup>53</sup>

One wonders if attacking and banning critical race theory merely gives more attention to this once "arcane legal concept,"<sup>54</sup> and why laws are necessary to proscribe discussion of an academic *theory*. What actually is critical race theory, anyway? *Black's* defines it as:

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Sess. § 3(b) (Ala. 2022); S. 618, 85th Leg., 1st Reg. Sess. (W. Va. 2021).

45. H.R. 564, 2021 Leg., Reg. Sess. § 1 (La. 2021); see IDAHO CODE § 33-138(1).

46. N.D. CENT. CODE § 15.1-21-05.1 (2021).

47. *Id.* ("[C]ritical race theory' means the theory that racism is not merely the product of learned individual bias or prejudice, but that racism is systemically embedded in American society and the American legal system to facilitate racial inequality."); S. 460, 101st Leg., Reg. Sess. (Mich. 2021) ("'Critical race theory' means anti-American and racist theories, reading guides, lesson plans, activities, guided discussions, and other resources that promote that the United States is a fundamentally racist nation, that the United States Constitution is a fundamentally racist document, and that certain races are fundamentally oppressive or oppressed."); S. 4166, 219th Leg., Reg. Sess. ¶ 2.a. (N.J. 2021) ("For purposes of this act, 'critical race theory' includes, but shall not be limited to, any of the following concepts: . . . (9) promoting or advocating the violent overthrow of the United States government."); Assemb. 6136, 219th Leg., Reg. Sess. ¶ 2.a. (N.J. 2021) (same).

48. See *infra* note 55 and accompanying text.

49. U.S. CONST. art. I, § 2, cl. 3 (amended 1868); U.S. CONST. art. IV, § 2, cl. 3 (amended 1865).

50. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944); *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896).

51. See Foster et al., *supra* note 9; Michael Powell, *In Texas, a Battle over What Can Be Taught, and What Books Can Be Read*, N.Y. TIMES, <https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html> [<https://perma.cc/C2EM-MP5X>] (Dec. 14, 2021); Schuessler, *supra* note 3 (quoting Dean Erwin Chemerinsky, University of California, Berkeley School of Law).

52. Amended Complaint, *Black Emergency Response Team v. O'Connor*, No. 5:21-cv-1022-G (W.D. Okla. filed Nov. 9, 2021).

53. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). In *Meyer*, the Court reversed the conviction of a teacher who taught German to an underage student in violation of a Nebraska statute. *Id.* at 403.

54. Schuessler, *supra* note 3.

A reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities. • Critical race theorists observe that even if the law is couched in neutral language, it cannot be neutral because those who fashioned it had their own subjective perspectives that, once enshrined in law, have disadvantaged minorities and even perpetuated racism.<sup>55</sup>

I ask whether proponents of the legislation banning the lessons of this theory, by title or effect, unwittingly played into the hands of critical race theorists. The recently enacted laws are indeed couched in race-neutral language, and some add assurances to allow impartial and objective teaching, sometimes set to egalitarian mood music.<sup>56</sup> Presumably, those who fashioned these laws were motivated by their own subjective perspectives and political ideologies. Critics of the anti-critical race theory laws have already denounced them as racist.<sup>57</sup> Thus, ironically, these enactments may be to the critical race theory movement the latest examples of law, presented under the guise of neutrality, that disadvantage minorities and perpetuate racism.<sup>58</sup>

With the anti-critical race theory laws on the books and the dust settled after divisive discourse on the subject, the laws’ advocates may be left to deal with “the most unkindest cut of all,”<sup>59</sup> the charge that the laws were enacted to protect “white fragility.”<sup>60</sup> “[T]he times they are a-changin’.”<sup>61</sup> Perhaps teaching our youth that “[s]ticks and stones may break my bones, [b]ut names [e.g., *Racist? Responsible? Privileged?*] will never hurt me”<sup>62</sup> is a relic of a bygone era.

### III. THE LAWS AND THEIR APPLICATION TO AMERICANS OF ASIAN DESCENT

As alluded to above, while the political motivation behind the anti-critical race theory laws might have been to shape instruction and discussion in schools relating to White–Black race relations, the text is composed in general antidiscrimination prose, referring to *race* generally and not identifying specific races. It is the neutral manner in which the statutes are presented that invites

55. *Critical race theory*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added).

56. See H.R. 377, 66th Leg., 1st Reg. Sess. (Idaho 2021) (“An Act Relating to Dignity and Nondiscrimination”); H.R. 1532, 2021 Gen. Assemb., Reg. Sess. § 1 (Pa. 2021) (“This act shall be known and may be cited as the Teaching Racial and Universal Equality Act.”).

57. See Austin Breasette, *Oklahoma City Public School Board of Education Sounds off on New Law Dictating How Race Is Taught in School*, KFOR (quoting school board members), <https://kfor.com/news/local/oklahoma-city-public-school-board-of-education-sounds-off-on-new-law-dictating-how-race-is-taught-in-school/> [<https://perma.cc/8DCF-WB4X>] (May 11, 2021, 6:46 AM).

58. See Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [<https://perma.cc/3YX5-8C5M>].

59. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 2, l. 183.

60. Breasette, *supra* note 57.

61. BOB DYLAN, *The Times They Are A-Changin’*, on *THE TIMES THEY ARE A-CHANGIN’* (Columbia 1964).

62. MRS. GEORGE CUPPLES, *TAPPY’S CHICKS: AND OTHER LINKS BETWEEN NATURE AND HUMAN NATURE* 78 (London, Strahan & Co. 1872).

discussion of their possible application to those Americans neither White nor Black, but of Asian descent. Per the laws' text, just as Whites of today should not be deemed responsible or blamed for slavery and segregation of yesteryear, nor should they be burdened with the same for the Chinese Exclusion Act (a law that specifically named a race of persons prohibited from immigrating to America),<sup>63</sup> the internment of American citizens of Japanese descent during World War II,<sup>64</sup> and the murder of Vincent Chin,<sup>65</sup> among others.<sup>66</sup>

*Asian* is one of the five races that the U.S. Census Bureau recognizes for its decennial census.<sup>67</sup> "Native Hawaiian[] or Other Pacific Islander[]," which was previously coupled with Asian, is now a separate group.<sup>68</sup> The term *Asian American* has its origins "in the 1960s when members of the various Asian immigrant groups began to act politically together."<sup>69</sup> I resort to the Asian American designation as a convenient and common shorthand phrase to describe those in America of Asian descent, mindful that "Asian Americans as well as Native Hawaiians and other Pacific Islanders . . . are an extremely diverse group, with ethnicities from over 30 different countries."<sup>70</sup>

Asian Americans then, more as a coalition than a monolith,<sup>71</sup> may welcome those provisions of the laws that prohibit teachings that they be blamed, assessed fault, held responsible, or be scapegoats—by virtue of their race—for the Japanese attack on Pearl Harbor;<sup>72</sup> the tens of thousands of American casualties and the turbulent societal turmoil stateside as a result of the Vietnam War;<sup>73</sup> and

63. See *The Chinese Exclusion Act* (PBS television broadcast May 29, 2018). A preview and excerpts of this documentary are available at *The Chinese Exclusion Act*, PBS, <https://www.pbs.org/wgbh/americanexperience/films/chinese-exclusion-act/#part01> (last visited Mar. 31, 2022). Note Justice Harlan's observation in his dissent in *Plessy v. Ferguson*: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

64. See, e.g., ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II (2007); *Children of the Camps: The Documentary*, PBS, <https://www.pbs.org/childdofcamp/index.html> [<https://perma.cc/K5LH-394E>].

65. Vincent Chin was the ultimate Asian scapegoat and paid the ultimate price. A Chinese American, Chin was beaten to death with a baseball bat by two Detroit autoworkers, one of whom apparently believed that he was Japanese: "[I]t's because of you little mother fuckers that we're out of work." *United States v. Ebens*, 800 F.2d 1422, 1427 (6th Cir. 1986). Both defendants pled guilty to manslaughter, and the trial judge sentenced each to three years' probation, a \$3,000 fine, and court costs. See Denny Chin & Kathy Hirata Chin, *Asian Americans and the Law*, 11 JUD. NOTICE 6, 21–22 (2016).

66. For an informative video discussion of various aspects of the "Asian American" experience, with irreverent comedic delivery and occasional profanities, see Last Week Tonight, *Asian Americans: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (June 7, 2021), <https://www.youtube.com/watch?v=29IXsOYBaow>.

67. *About the Topic of Race*, *supra* note 17.

68. See 2021 N.Y. Sess. Laws ch. 745, § 1(a).

69. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 369 n.4 (1996) (citation omitted).

70. 2021 N.Y. Sess. Laws ch. 745, § 1(b) (requiring reporting of persons of Asian descent by their specific subgroups).

71. See Last Week Tonight, *supra* note 66, at 5:18.

72. See Frank L. Kluckhohn, *Japan Wars on U.S. and Britain; Makes Sudden Attack on Hawaii; Heavy Fighting at Sea Reported*, N.Y. TIMES, Dec. 8, 1941, at 1.

73. See *The Vietnam War: A Film by Ken Burns & Lynn Novick* (PBS television broadcast

most recently, the SARS-CoV-2 (Covid-19) virus.<sup>74</sup> Asian Americans may also welcome those provisions banning the teaching of Asian stereotyping, i.e., again, “ascribing character traits . . . to a race . . . or to an individual because of the individual’s race.”<sup>75</sup> Commonly ascribed traits of Asian Americans are that they are good at math,<sup>76</sup> “passive, compliant, and reserved,”<sup>77</sup> and “socially inept.”<sup>78</sup>

Should Asian American activists then applaud the anti-critical race theory laws and urge their ready and equal application of the responsibility, scapegoating, and stereotyping provisions, as applied to Americans of Asian descent? Should they, for example, press state education departments to implement guidelines to restrict the teaching of Victory over Japan Day, the Vietnam War, or the Covid-19 pandemic, or to present these topics in the most “impartial,” “objective,” or narrow way, so that Asian American students do not feel discomfort or distress? Should they also urge guidelines, or FAQ entries, discouraging teachers during instruction hours from asking certain students: “Where are you from?,” “Where are you *really* from?,” or “Where are you from *originally*?,” as these questions only reinforce the widely held perception of Asian Americans as “perpetual foreigner[s],”<sup>79</sup> which again would bring students discomfort or distress, due to their race?<sup>80</sup>

2017).

74. As reported by the World Health Organization: “The first human cases of COVID-19, the coronavirus disease caused by SARS-CoV-2, were first reported from Wuhan City, China, in December 2019.” *Origin of SARS-CoV-2*, WHO (Mar. 26, 2020), [https://apps.who.int/iris/bitstream/handle/10665/332197/WHO-2019-nCoV-FAQ-Virus\\_origin-2020.1-eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/332197/WHO-2019-nCoV-FAQ-Virus_origin-2020.1-eng.pdf) [<https://perma.cc/UK5Q-GKBW>].

75. IOWA CODE § 261H.8(1)(b) (2021).

76. See Niral Shah, “*Asians Are Good at Math*” Is Not a Compliment: STEM Success as a Threat to Personhood, 89 HARV. EDUC. REV. 661, 661 (2019) (“Through this false narrative, Asian people are erroneously perceived to be inherently gifted in mathematics.”). Then there is the NBC newscast in 1986 in which Tom Brokaw reported, “The academic achievement of Asian American students are so notable that in some colleges, students warn each other that if they end up in a class with a lot of Oriental faces, get out. The grading curve, they say, will go out of sight.” Last Week Tonight, *supra* note 66, at 2:20.

77. Rebecca K. Lee, *Implementing Grutter’s Diversity Rationale: Diversity and Empathy in Leadership*, 19 DUKE J. GENDER L. & POL’Y 133, 151 (2011).

78. Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice: A Social Psychological Equation for Racial Oppression*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 33, 52 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998). Note how Asian American students as a group were characterized in their applications to Harvard, according to a study commissioned by the plaintiffs in an action challenging the university’s admissions policies. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022). Although they “scored higher than applicants of any other racial or ethnic group on admissions measures like test scores, grades and extracurricular activities,” they were rated lower than others “on traits like ‘positive personality,’ likability, courage, kindness and being ‘widely respected[.]’” Anemona Hartocollis, *Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says*, N.Y. TIMES (June 15, 2018), <https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html> [<https://perma.cc/C8ZC-TG5E>].

79. *E.g.*, FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 79 (2002).

80. After all, students’ addresses (including their birthplace) should already be available in school records. Idaho’s law states: “Nothing in this section should be construed to prohibit the required collection or reporting of demographic data by public schools or public institutions of higher education.” IDAHO CODE § 33-138(4) (2021).

I think such efforts would be unwise and pointless. It appears that many in America finish their K–12 school years with certain perceptions of Asian Americans, as discussed above, even without any formal education or reinforcement at school, and long before any statutory bans. Their perceptions may have been shaped by popular entertainment, social media, family, and a basic lack of facts. Ultimately, when it comes to educating America’s youth about race, racism, and law, I think more, not less, discussion in schools is needed. Given the concerns of assessing race responsibility, blame, fault, or ascribing race traits or privilege, is it a better policy to prohibit affirmatively the teaching of such scapegoating and stereotyping—thereby allowing them to circulate as truth—or to address them openly and critically?<sup>81</sup>

Public schools are where students receive an education to become “well-informed and discerning citizens.”<sup>82</sup> Working toward a more informed American society then, if discussion of race and racism in schools will allow an introduction of those in the country of Asian ancestry, perhaps the instruction could include the following basic lessons:

- Some persons of Asian descent in America are relatively recent arrivals stateside; some of them may be in the country temporarily. Others were born in America and have lived their entire lives here, as did their parents and possibly their parents before them; they are United States citizens.
- Some Asian Americans earn far above the average income; others are at the poverty line. “Today, income inequality in the U.S. is greatest among Asians.”<sup>83</sup>
- Asian Americans as a demographic include persons from a diverse number of countries of origin, with “[e]ach group ha[ving] its own national identity with accompanying differences in language, culture, ethnicity, religious beliefs, and socioeconomic conditions. In addition to the vast diversity among Asian groups, there are numerous subgroups within each national group.”<sup>84</sup> Asian Americans “are often misrepresented as a homogeneous group.”<sup>85</sup>
- Some Asian Americans’ countries of origin are in tension with each

81. Would the anti-critical race theory laws permit the *discussion* of common racial stereotypes, for the purpose of asking whether they have merit or rejecting them? One tenth-grade teacher was terminated for this effort. Jane Harper, *Ex-Virginia Beach Teacher Fired for Racial Stereotypes Lesson Settles Lawsuit with School Board*, VIRGINIAN-PILOT (Dec. 13, 2021), <https://www.pilotonline.com/news/education/vp-nw-teacher-settles-lawsuit-20211213-eupvt3lk7bhafbcjrtklwhoq5u-story.html>. Special training would be required for this sensitive matter.

82. Foster et al., *supra* note 9.

83. Rakesh Kochhar & Anthony Cilluffo, *Income Inequality in the U.S. Is Rising Most Rapidly Among Asians*, PEW RSCH. CTR. (July 12, 2018), <https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/> [<https://perma.cc/NFN3-JTP3>].

84. K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & C.R.L. REV. 1, 31 (1992).

85. 2021 N.Y. Sess. Laws ch. 745, § 1(b). Thus, use of the Asian American label can be “far too reductive and superficial.” Last Week Tonight, *supra* note 66, at 5:42.

other,<sup>86</sup> and these tensions may continue stateside.

Further discussion may lead to the origins of the “model minority” characterization for Asian Americans and whether this is more myth and fallacy than complimentary,<sup>87</sup> and whether it is really true that Asian Americans—as indicated by the success of some, or merely by *virtue* of their *race*—do not suffer from discrimination.<sup>88</sup> A discussion in the earlier years of schooling could include whether the “slanted eyes” gesture is merely an accompaniment to a song<sup>89</sup> or a way of saying hello, and in more advanced instruction, whether the gesture should be legally protected expression under the First Amendment.<sup>90</sup> At all levels, students may consider whether it matters that this gesture causes discomfort, anguish, or distress to some.<sup>91</sup> Of all America’s institutions, the education setting is best equipped to address these issues.

Given the general language of the subject laws, the applicable provisions would prohibit the teaching of the concept that students of Japanese descent bear responsibility or should be assessed fault or blame for the events of December 7, 1941, “a date which will live in infamy,”<sup>92</sup> presumably even if they are direct descendants of those who participated in the military attacks. Thus, I suppose the statutes will dissuade the wayward school district or the teacher gone rogue from teaching such a concept of Asian responsibility, blame, scapegoating, or stereotyping. In my view, the classroom is a proper setting for a discussion that students of Korean descent should not bear this burden either. Teachers may choose to lead a discussion on the predicament, or torment, of a student of *Korean* descent who is guiltily associated with the atrocities of the *Japanese* military—solely because of their common race—the same student whose grandparents recall painfully the years of brutal Japanese colonial rule of Korea,

86. See Choe Sang-Hun, *South Koreans Now Dislike China More Than They Dislike Japan*, N.Y. TIMES, <https://www.nytimes.com/2021/08/20/world/asia/korea-china-election-young-voters.html> [https://perma.cc/Z8NV-K6AU] (Mar. 8, 2022).

87. E.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1260–65, 1275 (1993); Miranda Oshige McGowan & James Lindgren, *Testing the “Model Minority Myth”*, 100 NW. U.L. REV. 331, 335, 343, 373 (2006).

88. See Chang, *supra* note 87, at 1247 n.11; McGowan & Lindgren, *supra* note 87, at 359–60.

89. Some children use this gesture while singing the “‘Chinese, Japanese, dirty knees’ . . . playground chant in the United States used to mock children of Asian origin.” *Chinese, Japanese, Dirty Knees*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Chinese,\\_Japanese,\\_dirty\\_knees](https://en.wikipedia.org/wiki/Chinese,_Japanese,_dirty_knees) [https://perma.cc/5PGG-43AY] (Feb. 2, 2022).

90. For a discussion of whether this is protected speech for purposes of trademark registration under U.S. law, see Ilhyung Lee, Tam *Through the Lens of Brunetti: THE SLANTS, FUCTION*, 69 EMORY L.J. ONLINE 2001 (2019), <https://scholarlycommons.law.emory.edu/elj-online/1> [https://perma.cc/PZ7K-L2NF].

91. See, e.g., Brahmjot Kaur, *Wisc. Fan Removed from Northwestern Game for Anti-Asian Gestures*, NBC NEWS (Jan. 21, 2022), <https://www.nbcnews.com/news/asian-america/wisconsin-fan-removed-northwestern-basketball-game-making-racist-gestu-rcna13083> [https://perma.cc/9SUG-LEZR].

92. Franklin D. Roosevelt, “December 7, 1941—A Date Which Will Live in Infamy”—*Address to the Congress Asking That a State of War Be Declared Between the United States and Japan* (Dec. 8, 1941), in 1941 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 514 (Samuel I. Rosenman ed. 1950).

which ended with Japan's surrender to the Allied powers at the close of the Second World War.<sup>93</sup> I would think that one purpose of education is to inform students of such distinctions and differences and their significance.<sup>94</sup> Even allowing the convenient label of *Asian Americans*, attributing the same foreign *Asian-ness* to both Koreans and Japanese by conflating the two (or for that matter, Chinese and Japanese, or South and North Koreans) seems to me an example of the very uninformed race hysteria that proponents of the anti-critical race theory laws so passionately condemn.

In all events, it is a most bitter irony to see the swift enactment of laws designed to satisfy the popular preoccupation with prohibiting the teaching of race blame, fault, or responsibility in schools at the very time when Asian Americans are being blamed for the Covid-19 pandemic.<sup>95</sup> Thus, while state legislatures are approving new laws to protect some Americans from *discomfort* due to their race, other Americans are reportedly being stabbed, lit on fire, shoved, spat on, and verbally attacked, because of *theirs*.<sup>96</sup>

Alas there is hope. In July 2021, as the first wave of the anti-critical race theory laws were being enacted, Illinois became the first state in the Union to require in its public school curriculum a unit of instruction on Asian American history and contributions of Asian Americans in civil rights, beginning with the 2022–2023 academic year.<sup>97</sup> New Jersey became the second in January 2022.<sup>98</sup> As of this writing, Ohio is deliberating in committee both an anti-critical race theory bill (which includes the prohibited “divisive concepts”)<sup>99</sup> as well as a bill mandating instruction in Asian American history,<sup>100</sup> a remarkable demonstration of the democratic process at work during politically divisive times.

93. See CARTER J. ECKERT, KI-BAIK LEE, YOUNG ICK LEW, MICHAEL ROBINSON & EDWARD W. WAGNER, *KOREA OLD AND NEW: A HISTORY* 317 (1990); ANDREW C. NAHM, *INTRODUCTION TO KOREAN HISTORY AND CULTURE* 177–78 (1993).

94. Likewise, there is a difference of significance between Ukraine and Russia.

95. See, e.g., Alex Ellerbeck, *Over 30 Percent of Americans Have Witnessed COVID-19 Bias Against Asians, Poll Says*, NBC NEWS (Apr. 28, 2020), <https://www.nbcnews.com/news/asian-america/over-30-americans-have-witnessed-covid-19-bias-against-asians-n1193901> [<https://perma.cc/PRB6-TJVQ>].

96. Alexandra E. Petri & Daniel E. Slotnik, *Attacks on Asian-Americans in New York Stoke Fear, Anxiety and Anger*, N.Y. TIMES, <https://www.nytimes.com/2021/02/26/nyregion/asian-hate-crimes-attacks-ny.html> [<https://perma.cc/7RPZ-C6Z4>] (Oct. 15, 2021); see Anh Do, *Nearly a Third of Asians in San Gabriel Valley Report Experiencing Racism During the Pandemic*, L.A. TIMES (Jan. 13, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-01-13/san-gabriel-valley-anti-asian-hate> [<https://perma.cc/XB45-2MK7>].

97. 105 ILL. COMP. STAT. 5/27-20.8(a) (2022). In March 2021, the California State Board of Education approved a statewide “Ethnic Studies Model Curriculum” for its high schools, which includes coverage of four groups, including Asian Americans. *Ethnic Studies Model Curriculum*, CAL. DEP’T OF EDUC., <https://www.cde.ca.gov/ci/cr/cf/esmc.asp> [<https://perma.cc/V5E5-CC8H>] (“The Model Curriculum (preface)”).

98. See N.J. STAT. § 18A:35-4.44(a) (2022). When the governor signed the bill into law, another bill that would prohibit instruction in “concepts related to critical race theory” was in committee. S. 4166, 219th Leg., Reg. Sess. ¶ 2.a. (N.J. 2021); Assemb. 6136, 219th Leg., Reg. Sess. ¶ 2.a. (N.J. 2021).

99. H.R. 327, 134th Gen. Assemb., Reg. Sess. § 1 (Ohio 2021).

100. S. 214, 134th Gen. Assemb., Reg. Sess. § 1 (Ohio 2021).

## IV. CONCLUSION

The Supreme Court has noted that “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials.”<sup>101</sup> Perhaps the first in this triad has been the most vocal, and its outcry is leading to new state laws. “[P]arents matter,” indeed.<sup>102</sup> Ultimately then, parents and policymakers will have to decide what type of instruction they wish their students to have in schools relating to race, racism, and the rule and the role of law in American history and the country today. They must also decide whether it is in their community’s interest to allow or require some study of the experience of those who comprise approximately 6% of the country’s population.<sup>103</sup> “Public schools are where a society transmits values and beliefs . . . .”<sup>104</sup>

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101. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (citations omitted).

102. Saul, *supra* note 38.

103. *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/9E7H-7DWK>].

104. Powell, *supra* note 51.