

DATE: Wednesday, September 22, 2021

TO: Members of the House State and Local Government Committee

FROM: James R. Copland, Senior Fellow & Director, Legal Policy, Manhattan Institute

RE: H.B. 327: Prohibit Teaching, Advocating, or Promoting Divisive Concepts

Chair Wiggam, Vice Chair John, Ranking Member Kelly, and members of the Ohio House State and Local Government Committee, I appreciate the members of this committee considering my written testimony on House Bill 327, The Promoting Education, Not Indoctrination Act.

My name is James R. Copland. I am a senior fellow with and director of legal policy for the Manhattan Institute for Policy Research,¹ a public-policy think tank in New York City. Although my comments draw upon my research conducted for the Manhattan Institute, my statement before the Committee is solely my own, not my employer's, nor any of my colleagues'.

The proposed legislation under consideration by the committee intersects significantly with my research, specifically a recently published issue brief, "How to Regulate Critical Race Theory in Schools: A Primer and Model Legislation,"² from which this statement is derived and which I incorporate here by reference. In this statement to the committee, I will summarize the manner in which "Critical Race Theory" has taken root in many of America's K-12 public schools; and the rationale for state legislatures, including Ohio's, to address this issue. I will then offer my thoughts on how legislators should respond on this issue, based on my research, and apply that briefly to the proposed legislation.

Background: Critical Race Theory and the Public Schools

As my Manhattan Institute colleague Christopher Rufo³ has documented in a series of investigative reports, public schools in the United States have adopted curricula, training programs, and other required activities that impart racially charged messages—not only for high school seniors but in classes for very young elementary school students as well. In some cases, schools have even compelled students, faculty, and staff to affirmatively endorse school-approved racial messages.

- Eight- and nine-year-olds in a third-grade math class were ordered to "deconstruct" their racial identities and rank themselves according to their "power and privilege."⁴
- Fifth graders were compelled to march across an auditorium stage bearing signs that read "Jail Trump" and "Black Power Matters" in a rally celebrating "black communism."⁵
- One school district adopted an "emancipatory curriculum" instructing students through its "pedagogy of liberation" that "all white people play a part in perpetuating systemic racism."⁶

The ascendant racially charged curricula and initiatives in the public schools, as well as various parallel trainings and programs commonly being adopted in school and other settings, broadly

¹ See [James R. Copland](#). The Manhattan Institute for Policy Research is a non-profit, non-partisan think tank developing ideas that foster economic choice and individual responsibility. See [About MI](#). The Institute does not take institutional positions on legislation, rules, or regulations; my statement before the committee is solely my own, not my employer's.

² James R. Copland, "[How to Regulate Critical Race Theory in Schools: A Primer and Model Legislation](#)," August 26, 2021.

³ See [Christopher F. Rufo](#).

⁴ Christopher F. Rufo, "[Woke Elementary](#)," *City Journal*, Jan. 13, 2021.

⁵ Christopher F. Rufo, "Bad Education," *City Journal*, Feb. 11, 2021.

⁶ Christopher F. Rufo, "[Failure Factory](#)," *City Journal*, Feb. 23, 2021.

trace to “Critical Race Theory,” a conceptual framework developed decades ago by a previously obscure group of law professors and social scientists.⁷ The term “Critical Race Theory” was coined by a small group of legal academics who gathered in 1989 for a workshop at the University of Wisconsin.⁸ Rooted in the eponymous “critical theory”—an interwar school of thought centered at the Marxist Institute for Social Research at the University of Frankfurt, which rejected “detachment” and “neutral” scholarly principles and sought instead “to hasten developments which will lead to a society without injustice”⁹—Critical Race Theory scholars departed from their progenitors in centering their discussion on race.¹⁰

Although scholars who have embraced the Critical Race Theory moniker are not monolithic, certain tenets are common among scholars in the field:

- Racism is ordinary, ubiquitous, and “endemic” to American life;
- Racism explains all observed disparities among contemporary racial groups;
- Cultural norms such as “legal neutrality, objectivity, color-blindness, and meritocracy” perpetuate inequality and group dominance; and thus “race liberalism” must be rejected in favor of “race consciousness”;
- An “insistence on subjectivity” because true insight into the real operation of American life is gained through the “lived experience” of racism by “people of color”; and
- White people are necessarily complicit in racism by way of their adherence to, and benefit from, dominant cultural norms that invest them with sociopolitical capital (“whiteness”).¹¹

Initially, Critical Race Theory was confined to the niche circles of legal academia from which it originated.¹² More recently, its core ideas have been applied and expanded to an array of disciplines, including education.

In the education space, professors Gloria Ladson-Billings and William F. Tate IV at the University of Wisconsin–Madison wrote a seminal article in the field in 1995, titled “Toward a Critical Race Theory in Education.”¹³ Ladson-Billings applied the precepts developed by legal Critical Race Theory scholars to attack “colorblindness, meritocracy, deficit thinking, linguisticism, and other forms of subordination” in the education context.¹⁴ Those who have applied Critical Race Theory to education also draw heavily on “critical pedagogy,” a distinct school of

⁷ Christopher F. Rufo, “[Battle over Critical Race Theory](#),” *Wall Street Journal*, June 27, 2021.

⁸ See Kimberlé Williams Crenshaw, “The First Decade: Critical Reflections, or ‘A Foot in the Closing Door,’ ” 49 *UCLA Law Review* 1343, 1361 (2002).

⁹ Max Horkheimer, “Traditional and Critical Theory” (1937), in idem, *Critical Theory: Selected Essays* (New York: Continuum, 1972), pp. 221–22.

¹⁰ Kimberlé Crenshaw et al., eds., *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995), pp. xiii–xxxii; Jean Stefancic and Richard Delgado, *Critical Race Theory: An Introduction* (New York: New York University Press, 2011), pp. 4–5.

¹¹ Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview, 1993), p. 6; Cheryl Harris, “Whiteness as Property,” 106 *Harvard Law Review* 1707 (1993); Kimberlé Crenshaw, “Race Liberalism and the Deradicalization of Racial Reform,” 130 *Harvard Law Review* 2298 (2017).

¹² Crenshaw et al., *Critical Race Theory*, pp. xiii–xxxii.

¹³ 97 *Teachers College Record* 47 (1995).

¹⁴ Gloria Ladson-Billings, “Just What Is Critical Race Theory and What’s It Doing in a Nice Field Like Education?” *International Journal of Qualitative Studies in Education* 11, no. 1 (1998): 7–24.

academia that itself borrowed heavily from Critical Race Theory scholars.¹⁵ Critical pedagogy views “curriculum as a form of cultural politics” and argues that “knowledge should be analyzed on the basis of whether it is oppressive or exploitative, and not on the basis of whether it is ‘true.’ ”¹⁶

The pathways through which Critical Race Theory and critical pedagogy scholarship has infused many public schools is clear enough. A 2019 study¹⁷ by the James G. Martin Center for Academic Renewal found that the most assigned author at the education schools at three leading public universities—the University of Michigan–Ann Arbor, the University of North Carolina–Chapel Hill, and the University of Wisconsin–Madison—was the aforementioned Gloria Ladson-Billings, who is “known for her groundbreaking work in the fields of Culturally Relevant Pedagogy and Critical Race Theory.”¹⁸ Other Critical Race and critical pedagogy scholars dominated the assigned reading lists at these schools.

Pushback: Public and Legislative Responses to Critical Race Theory in Schools

Unsurprisingly, many parents and teachers across the country have been troubled by these developments. At least when details of specific practices are made clear, overwhelming majorities of Americans oppose the infusion of various Critical Race Theory–laden concepts in public-school pedagogy.¹⁹ In an April 2021 Competitive Edge Research survey, 96% of Americans surveyed opposed the concept of a school “assign[ing] White students the status of ‘privileged’ and assign[ing] nonwhite students the status of ‘oppressed.’ ” When asked whether schools should “Teach that White people are inherently privileged, while Black and other people of color are inherently oppressed and victimized,” 82% opposed this idea.²⁰ Republicans and independents were strongly against these questions, but few Democrats were strongly in favor, either.

Elected officials have taken notice. Legislators in at least 25 states have introduced bills aimed at curtailing various forms of racial instruction and indoctrination in public schools and state and

¹⁵ Though it should be noted that “critical pedagogy” developed independently and partly in advance of Critical Race Theory, it has since experienced significant cross-pollination with critical race scholarship. See, generally, Paulo Freire, *Pedagogy of the Oppressed* (New York: Continuum Publishing, 1970); bell hooks, *Teaching to Transgress: Education as the Practice of Freedom* (New York: Routledge, 1994), pp. 45–57 (discussing Freire); Edward Taylor, David Gillborn, and Gloria Ladson-Billings, eds., *Foundations of Critical Race Theory in Education* (New York: Routledge, 2015); Adrienne D. Dixon, Celia K. Rousseau Anderson, and Jamel K. Donnor, eds., *Critical Race Theory in Education: All God’s Children Got a Song* (New York: Routledge, 2017).

¹⁶ Peter McLaren, *Life in Schools* (Boston: Pearson Education, 1998), pp. 211, 214.

¹⁷ Jay Schalin, “[The Politicization of University Schools of Education: The Long March Through the Education Schools](#),” James G. Martin Center, February 2019.

¹⁸ Ibid.

¹⁹ A *YouGov/Economist* survey conducted June 13–15, 2021, found that many Americans didn’t know the term “critical race theory”—commonly applied in public debates to controversial racially charged curricula and initiatives in the public schools, as well as various parallel trainings and programs commonly being adopted in school and other settings; but of those who did know the term, 56% opposed it while 38% supported it.

“[Americans Who Have Heard of Critical Race Theory Don’t Like It](#),” *The Economist*, June 17, 2021. A Morning Consult/Politico poll showed 29% opposed, 19% in support, and the rest unsure. Eli Yokley, “[Many GOP Voters Hold Strong Views on Critical Race Theory. Democrats? Not So Much](#),” Morning Consult, June 23, 2021.

²⁰ Parents Defending Education, “[POLL: Americans Overwhelmingly Reject ‘Woke’ Race and Gender Policies in K–12 Education](#),” May 10, 2021.

local government agencies.²¹ Several of these have become law, including enactments in Arizona,²² Arkansas,²³ Idaho,²⁴ Iowa,²⁵ New Hampshire,²⁶ Oklahoma,²⁷ Tennessee,²⁸ and Texas.²⁹ In addition, the Florida Board of Education adopted a new rule clarifying its education standards and limiting the teaching of certain racially charged theories and materials.³⁰ More legislation and rulemaking is almost certain to follow.³¹

Principles: How to Tackle Critical Race Theory in the Public Schools

Legislative efforts reacting to parental concerns about Critical Race Theory–laden school curricula and programs have prompted fierce pushback from some quarters. The quality of such pushback has varied.

- Some opponents of reform have resorted to *ad hominem* attacks on activists—claiming that legislators or advocates have not read enough Critical Race Theory legal scholarship to have a legitimate opinion.
- Others have engaged in various motte-and-bailey arguments—suggesting that objections to Critical Race programs in schools are principally about downplaying genuine historical atrocities like chattel slavery, Jim Crow laws, and the like. These critics avoid discussing whether K–12 children should be forced to recite self-deprecating pledges, publicly to admit their “privilege,” or to apologize for their “complicity” in current racial inequities.
- Still others have denied the existence of any problem with a disingenuous appeal to nomenclature. For example, Randi Weingarten, president of the American Federation of Teachers (AFT) union, insists that “critical race theory is not taught in elementary schools or high schools.”³² To be sure, that statement is broadly true in a literal sense: it would be the rare secondary school, indeed, that would assign to its students the writings of Critical Race Theory scholars such as Derrick Bell, Richard Delgado, Charles Lawrence, Kimberlé Crenshaw, or Mari Matsuda—or their education-field heirs like Ladson-Billings and Tate. But the ideas developed and espoused in Critical Race Theory scholarship certainly do inform modern educational pedagogy, as previously discussed. Almost 20 years ago, Kimberlé Crenshaw, a founder of the movement, suggested that Critical Race Theory was “now used as interchangeably for race scholarship as Kleenex is used for tissue.”³³ The exact academic pedigree vehicle of various curricula, initiatives, and training programs observed at public schools and other public institutions matters less than their substance. The fundamental question involves not what we

²¹ See Christopher F. Rufo, CRT Legislation Tracker, <https://christopherrufo.com/crt-tracker> (updated regularly).

²² [H.B. 2898](#) (signed June 30, 2021); [H.B. 2906](#) (signed July 9, 2021).

²³ [S.B. 627](#) (became Act 1100 without governor’s signature, May 3, 2021).

²⁴ [H.B. 377](#) (signed Apr. 28, 2021).

²⁵ [H.J. 1211](#) (signed June 8, 2021).

²⁶ [H.B. 2](#) (signed June 25, 2021).

²⁷ [H.B. 1775](#) (signed May 7, 2021).

²⁸ [S.B. 623](#) (signed May 25, 2021).

²⁹ [H.B. 3979](#) (signed June 15, 2021).

³⁰ See, e.g., Matt Papaycik, “[Florida Education Leaders Ban ‘Critical Race Theory’ from Being Taught in K–12 Schools](#),” 5WPTV, June 9, 2021.

³¹ For a running list of proposed and enacted legislation in this space, see Rufo, CRT Legislation Tracker.

³² Caitlin O’Kane, “[Teachers Union Defends ‘Honest History’ amid Critical Race Theory Bans](#),” CBS News, July 9, 2021.

³³ Crenshaw, “The First Decade,” 1361.

call these ideas and programs, or their origins, but their appropriateness—and the appropriateness of the legislative responses being promulgated in response.

Even as some opponents of legislative action to curtail Critical Race pedagogy in public schools have insisted that advocates' concerns are illusory, others have doubled down and insisted that such pedagogy is an affirmative good. *Contra* AFT president Weingarten's claim, the national meeting of the other large teachers' union, the National Education Association, recently passed a resolution affirming its commitment to a "curriculum . . . informed by academic frameworks for understanding and interpreting the impact of the past on current society, including critical race theory"; and allocating significant new union resources to providing "an already-created, in-depth, study that critiques empire, white supremacy, anti-Blackness, anti-Indigeneity, racism, patriarchy, cisheteropatriarchy, capitalism, ableism, anthropocentrism, and other forms of power and oppression at the intersections of our society."³⁴

That said, various scholars and thought leaders have raised genuine concerns that certain of the legislative proposals responding to racially charged pedagogy have overreached, raise constitutional concerns, or are otherwise counterproductive.³⁵ Thus, my recent issue brief lays out broad principles that state reformers should consider in tackling this issue:

- **Facilitate greater transparency.** One reason that parental concern about Critical Race Theory–inspired pedagogy in the public schools erupted in the last year is that widespread online schooling afforded parents a window into their children's classrooms. As a general matter, such transparency should be the norm, not the exception. Legislators should endorse solutions that empower elected officials—including local school boards or other elected governmental actors charged with educational curriculum—rather than delegating such decisions to unelected bureaucrats, lawyers, and judges.³⁶ Ensuring that parents are fully informed about schools' curricula, initiatives, and trainings in this context will offer built-in feedback—informing the electorate and elected officials alike.
- **Prohibit government-compelled speech.** Under the U.S. Constitution, the government cannot compel speech: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"³⁷ This principle has been clearly established as a matter of First Amendment law in the context of public education since 1943, when the Supreme Court struck down a West Virginia requirement compelling students to salute the American flag or recite the pledge of allegiance in public school in *West Virginia Board of Education v. Barnette*.³⁸ To be sure, schools necessarily have significant control over student speech in a certain sense; there are right and wrong answers on tests. But precisely for that reason, it is fully appropriate for state legislatures ultimately charged with setting secondary school curricula to articulate guardrails to inform school administrators and educators the appropriate boundary between instruction and indoctrination. The *Barnette* decision makes

³⁴ National Education Association, [New Business Item 39](#), June 30, 2021 (adopted as modified). See also Christopher F. Rufo, "[Going All In](#)," *City Journal*, July 15, 2021.

³⁵ See, e.g., Keith E. Whittington, "[Banning 'Critical Race Theory' Would Be Bad for Conservatives, Too](#)," *Washington Post*, June 30, 2021; Ronald J. Krotoszynski Jr., "[Laws Against Teaching Critical Race Theory in College Are Unconstitutional](#)," *Washington Post*, May 26, 2021.

³⁶ Cf. James R. Copland, *The Unelected: How an Unaccountable Elite Is Governing America* (New York: Encounter, 2020).

³⁷ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding unconstitutional New Hampshire's attempt to require citizens to show—and not obscure—the "Live Free or Die" motto on state license plates).

³⁸ *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

clear that it is a “fixed star in our constitutional constellation . . . that no [government] official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”³⁹

- **Clarify public school curricular choices.** Teachers, like students, do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴⁰ But in the public-school context, in performing their official duties, teachers are acting as agents of the state—essentially giving voice to government-approved speech. State legislatures and other elected government officials have significant constitutional authority to direct such speech⁴¹—including by *preventing* public school teachers from engaging in offensive classroom speech such as using racial epithets or presenting age-inappropriate material.⁴² And state legislatures and state and local boards of education, of course, regularly do make curricular decisions—including recent controversial decisions in some states to embrace Critical Race Theory—adjacent curricular choices.⁴³ Many such choices have been unwise, in my view—but, in most cases, not outside state governments’ constitutional authority.

My issue brief also spells out the “don’ts” for state legislatures acting in this space. In my opinion, bills responding to concerns about Critical Race Theory should *not*:

- **Stifle the marketplace of ideas.** Such concerns are particularly significant in the context of higher-education institutions, which have historically embraced principles of academic freedom and whose curricula have been granted significantly greater constitutional protection than K–12 schools. (When it comes to secondary and elementary education, as discussed, public school curricula have long been set by state and local elected officials.)
- **Proscribe or discourage classroom discussion of race and racism, past and present.** In particular, legislation should not encourage schools to “whitewash” history by failing to teach adequately historical atrocities committed in the name of race. Although limiting such discussions does not appear to be the intent of the overwhelming majority of Critical Race Theory–inspired legislation introduced around the country, poorly drafted statutes could unintentionally deter appropriate instruction.
- **Condition curriculum on individual student “discomfort” or “distress.”** Schools necessarily teach an array of texts—and convey historical lessons—that may make some students

³⁹ 319 U.S. at 642.

⁴⁰ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

⁴¹ See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (“Government employers, like private employers, need a significant degree of control over their employees’ words and actions”); *Mayer v. Monroe County Community School*, 474 F.3d 477 (7th Cir. 2007) (upholding dismissal of public school teacher fired for refusing to follow prescribed public school curriculum); *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005) (denying First Amendment challenge to state legislature’s decision not to fund a certain textbook). *But cf. Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down state statute mandating teaching of “creationism” in public schools as violation of First Amendment’s Establishment Clause); *Board of Education v. Pico*, 457 U.S. 853 (1982) (divided Court allowed lawsuit to proceed involving challenge to local school board decision to remove books from middle and public high school library).

⁴² See *Brown v. Chicago Board of Education*, 824 F.3d 713 (7th Cir. 2016) (upholding discipline of public school teacher for using racial slur in the classroom); *Board of Education v. Wilder*, 960 P.2d 695 (Colo. 1998) (upholding dismissal of public school teacher for showing unapproved R-rated movie containing violence, drug use, profanity, and nudity).

⁴³ See, e.g., Andrew Dunn, “State Board of Education Rewrites Social Studies Standards to Focus on Racism, Discrimination,” *Carolina Journal*, Feb. 4, 2021; editorial, “California’s Proposed New Ethnic Studies Curriculum Is Jargon-Filled and All-Too-PC,” *Los Angeles Times*, Aug. 4, 2019.

uncomfortable. While pedagogy should be age-appropriate, the contours of the K–12 curriculum should be affirmatively developed by elected officials, state and local, without giving implicit “veto power” to subjective student or parent concerns.

- **Strain school budgeting.** State legislatures should weigh the cost and benefits of all requirements placed on the schools they oversee. Sensitive to this concern, my proposed model legislation would exempt smaller schools from proposed transparency and other reporting mechanisms. Legislation should be sensitive to enforcement mechanisms, particularly those that would empower private damages lawsuits, which might have the unintended effect of directly or indirectly straining school budgeting.
- **Undermine educational pluralism in non-district schools.** Schools that students and their families attend voluntarily should have a greater degree of freedom in approach. My proposed model legislation would apply to public charter schools attended voluntarily only by requiring transparency (so that choice to attend such a school is informed) and prohibiting compelled speech (which is constitutionally proscribed). The model legislation would not apply to private schools attended voluntarily, even if such schools receive some direct or indirect state support.

The Legislation: H.B. 327

As a general matter, H.B. 327 sweeps more broadly than my proposed model legislation, in terms of scope, substance, and enforcement. I will discuss the differences in turn.

Scope. Unlike my proposed model legislation, H.B. 327 applies to public institutions of higher education as well as public elementary and secondary schools. I will limit my comments to the latter; as previously mentioned, the constitutional and legal doctrines cabining legislative direction over higher education can be significantly broader than in the K-12 context, but the exact limits and parameters of doctrine in the higher-education context are beyond the focus of my research.

In addition, in the K-12 context, H.B. 327 would apply not merely to state-run public schools but to any private school “that enrolls students who are participating in a state scholarship program.” As suggested above, my preference would be to avoid tying private schools’ pedagogical hands purely on the basis of accepting students who receive scholarship dollars. While attaching such “strings” to private-school vouchers or other scholarships could be *permissible* for state legislatures, I would tend to lean toward a deeper commitment to educational pluralism—including allowing vouchers to attend religious schools, which, for instance, often have “statement of faith” requirements for participating students.

Substance. On substance, while my model legislation would focus principally on *transparency* and *compelled speech*, H.B. 327 goes further and directly proscribes teaching “divisive concepts.” To be clear, the legislation *defines* “divisive concepts” in fairly narrow fashion—applying to statements of racial inferiority/superiority, “fundamental” national or individual character, and other concepts centered on racial stereotyping, scapegoating, or culpability. These definitions intersect significantly with those articulated in my model legislation and various enactments in other states. Moreover, the bill clarifies that various racially charged concepts can be taught “without endorsement” and allows assignment of various topics in viewpoint-neutral debating contexts.

Although my proposed model legislation, unlike H.B. 327, does not prohibit the *promotion* of concepts as long as students are not compelled to affirm a belief in same, I want to emphasize

that such provisions, including those here, are broadly within the scope of a state legislature’s authority in the K–12 context. States have broad leeway to select and reject materials and curricula;⁴⁴ and as I note in my issue brief, “it is hardly surprising that some state bills have specifically singled out for exclusion” certain controversial courses of study.⁴⁵

In some other respects, H.B. 327 is *narrower* than my proposed model legislation, in that it lacks the specific transparency requirements and opt-out provisions proposed in my issue brief. The opt-out provisions in my model legislation would be somewhat superfluous given the broader reach of H.B. 327, to include not only compelled speech but promotion of the divisive concepts in question. (H.B. 327 does protect faculty and administrators from “penalty” or “discrimination” based on a refusal to teach the “divisive concepts” defined in the bill.) But the legislature may wish to consider adopting more specific transparency requirements, better to inform parents. (In addition to my model legislation, North Carolina’s General Assembly recently voted out a bill—subsequently vetoed by the governor—that lays out various transparency requirements and, similar to my proposed legislation, limits “promotion” to compelled-speech contexts.⁴⁶)

Enforcement. My model legislation eschews formal enforcement mechanisms, leaving those up to the states’ idiosyncratic structures. H.B. 327 includes significant enforcement powers delegated to state officials—including powers to withhold funding and affect teacher, principal, and superintendent licensure. The bill also permits private rights of action—*i.e.*, civil lawsuits filed by parents or students, including liability for damages.

As a general matter, I tend to be skeptical of private-enforcement provisions, which in practice have far too often tended to permit attorneys to file extortionate “shakedown” lawsuits.⁴⁷ It is important to note that such litigation can be profitable for plaintiffs’ attorneys even if meritless. The high costs of discovery and legal representation in U.S. litigation give even meritless litigation a settlement value well above expected recoveries.⁴⁸ Such lawsuits can be onerous for government defendants,⁴⁹ particularly if filed as class litigation. If the legislature wishes to include a private right of action as an enforcement mechanism—due to budget constraints on public enforcement or concerns about executive branch officials’ willingness to pursue this issue—it would be well advised to cabin the scope of such lawsuits. I am willing to discuss various ways to accomplish this objective with any interested legislators or staffers.

⁴⁴ See, e.g., *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005) (denying First Amendment challenge to state legislature’s decision not to fund a certain textbook).

⁴⁵ For example, some states have specifically directed schools not to use the Pulitzer Center’s 1619 Project study materials, based on the *New York Times*’ controversial series of essays. Such sponsored curricula have already been adopted by a reported 4,500 schools less than a year after its introduction. See Pulitzer Center, [The 1619 Project Curriculum](#); Nikole Hannah-Jones, “Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True,” *New York Times Magazine*, Aug. 14, 2019; Mike Gonzales, “‘1619’ Pulitzer Will Boost Socialist Teaching in Schools,” Heritage Foundation, May 11, 2020.

⁴⁶ See [H.B. 324](#).

⁴⁷ See [Testimony by James Copland on Proposed Int. No. 97-A, the Earned Sick Time Act](#), New York City Council, March 22, 2013. For a fuller discussion of issues with civil litigation in the United States, see James R. Copland, *The Unelected*, chapters 8–12.

⁴⁸ See Marie Gryphon, “[Greater Justice, Lower Cost: How a ‘Loser Pays’ Rule Would Improve the American Legal System](#),” December 1, 2008.

⁴⁹ See Walter Olson, “[Sue City](#),” *City Journal*, Winter 1993.

In conclusion, I applaud the Ohio legislature for taking up the issue of Critical Race Theory–infused pedagogy in the state’s public schools. The need is real; and I hope my comments help to guide you in your efforts. I am happy to discuss further, and I can be reached at jcopland@manhattan-institute.org.

Sincerely,

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