Legitimate State Interest or Educational Censorship: The Chilling Effect of Oklahoma House Bill 1775

I. Introduction

The Oklahoma Legislature "crawls into classrooms way too much and tells classroom teachers, which we are short on by the way, what they can and can't do . . . . [This bill] reeks of something that is not local . . . and that we do not need to be addressing in this building."[1] The bill—Oklahoma House Bill 1775—originally created emergency medical preparedness measures for local schools,[2] but in a last-minute substitution, banned the teaching of "divisive concepts" focused on "race" and "sex."[3] Controversy and uncertainty surrounded the statutory substitution and its sudden emergence and necessity.[4] Despite these concerns, Governor Kevin Stitt adopted the legislation on May 7, 2021.[5] The bill authors, Senator David Bullard and Representative Kevin West, justified the emergent substitution as necessary to thwart the teaching of divisive critical race theory concepts that indoctrinated school children in Oklahoma classrooms.[6]

This Note examines the emergent promulgation of Oklahoma House Bill 1775 ("H.B. 1775") and its likely detrimental effects on Oklahoma students

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1. Streaming Video: Oklahoma Senate, Third Revised Senate Education Committee Meeting, Hearing on H.B. 1775, at 10:40:07 AM (Apr. 6, 2021) [hereinafter H.B. 1775 Education Committee Hearing], https://oksenate.gov/live-chamber (statement of Sen. J.J. Dossett, member S. Educ. Comm.) (accessible by selecting Calendar-Year in the left panel, navigating to April 6, 2021 in the resulting menu, then selecting the video titled "Education [Room 535]").

2. H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20INT/hB/HB1775%20INT.PDF (as introduced, Jan. 15, 2021).

3. H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20AMENDMENTS/Amendment%20&%20Engr/HB1775%20SAHB%20&%20ENGR.PDF (as passed by Senate, Apr. 21, 2021); Storme Jones, *Gov. Stitt Signs Bill Limiting Race Curriculum from Kindergarten to College into Law*, NEWS ON 6 (May 7, 2021, 9:11 PM), https://www.newson6.com/story/6095b2398bc26a0bb7202d6b/gov-stitt-signs-bill-limiting-race-curriculum-from-kindergarten-to-college-into-law. *See generally Bill Information for HB 1775*, OKLA. STATE LEG., http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1775&Session=2100 (last visited Sept. 28, 2022).

4. *See* Nuria Martinez-Keel & Carmen Forman, *Bill Forbidding Schools from Teaching Critical Race Theory Divides Oklahoma Educators, Politicians*, OKLAHOMAN (May 6, 2021, 6:00 AM CT), https://www.oklahoman.com/story/news/education/2021/05/06/oklahoma-bill-banning-critical-race-theory-in-schools-divides-educators/4944150001/.

5. H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021), https://www.sos.ok.gov/documents/legislation/58th/2021/1R/HB/1775.pdf (as approved by Gov. Stitt, May 7, 2021).

6. *See* Ray Carter, *Lawmakers Say Anti-CRT Work Not Done*, OCPA (June 17, 2021), https://www.ocpathink.org/post/lawmakers-say-anti-crt-work-not-done.

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and educators. Part II explores the circumstances surrounding the enactment of H.B. 1775 and its alignment with the national movement against the teaching of critical race theory. Part III discusses the legislative role states possess in constructing public education curriculum while balancing the interests of an informed citizenry and the states' police power. Part IV analyzes the statutory text, which points to its—likely unconstitutional—vague language and discriminatory intent. Part V concludes that H.B. 1775's vague statutory terms and invidious rise cast "a pall of orthodoxy"[7] over Oklahoma classrooms. The statute therefore likely violates constitutional protections afforded to Oklahoma students and teachers necessitating its repeal.

II. The Rise of H.B. 1775

A. Total Legislative Substitution

The initial statutory language of H.B. 1775 proposed concrete emergency medical preparedness measures for adoption by Oklahoma public schools.[8] Yet, on March 4, 2021, after a third reading of the bill and its engrossment in the House of Representatives, the Oklahoma Senate suddenly shifted course with a substantive change in the bill's language and purpose.[9] Bill author, Senator David Bullard, offered the substitution to "prohibit the indoctrination requirements from schools to teach or to engage in training or orientation or theory that promotes stereotyping . . . or guilt for race or sex which are having enormous effects in our schools."[10] Senate colleagues requested explicit identification of the schools conducting this teaching or training to validate the bill's necessity.[11] Despite these requests, Senator Bullard continuously refused to specify school names, courses, or curriculum necessitating the bill.[12]

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7. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

8. H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20INT/hB/HB1775%20INT.PDF (as introduced, Jan. 20, 2021).

9. *See* Comm. Substitute for Engrossed H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20COMMITTEE%20SUBS/SCSH/HB1775%20SCSH.PDF (S. Comm. Substitute, Apr. 6, 2021); *Bill Information for HB 1775*, *supra* note 3.

10. H.B. 1775 Education Committee Hearing, *supra* note 1, at 10:25:02 AM (statements of Sen. Bullard, member, S. Educ. Comm.).

11. *Id.* at 10:25:33–10:32:13 AM (statements of Sens. Hicks & J.J. Dossett).

12. *Id.*

Despite the vague necessity, the substituted bill received a Do Pass As Amended[13] from the Senate Education Committee, and voracious discussion ensued at the Senate floor hearing prior to the bill's engrossment.[14] In the discussion, Senators questioned the bill's origin to determine if it came as a request bill from parents.[15] Senator Bullard stipulated that it did not.[16] But, a direct question on the origin of the bill's language prompted Senator Bullard to state that Texas, Iowa, and Florida were "run[ning]" similar bills.[17] Additionally, when the Senate floor discussion turned to a review of the benefits of diversity education and training, Senator Bullard stated that this type of diversity training "is best left to parents."[18] Questions as to the research and curricular examples reviewed in preparation of the bill led to Senator Bullard holding up file folders to indicate his voluminous review.[19] But, when asked what amount of the research was specifically focused on Oklahoma schools, the Senator responded that "about half" was from Oklahoma and the remainder was nationwide.[20]

In the House of Representatives, H.B. 1775, introduced by Representative Kevin West, resulted in similar questions around the legislative "problem" the bill intended to solve.[21] Representative West stipulated that the bill "tr[ies] to set boundaries that we as a state say will not be crossed"[22] because "we are not going to teach people they are inherently evil because of

13. *See generally How an Idea Becomes a Law*, OKLA. STATE LEGIS., https://okhouse.gov/Information/CourseOfBills.aspx (last visited Sept. 28, 2022) (discussing how a bill becomes law in Oklahoma and stating that "do pass" refers to an assigned committee's consideration of the bill and its recommendation that the bill pass as written or amended).

14. *See* Streaming Video: Oklahoma Senate, First Regular Session of the 58th Legislature, at 9:31:38 PM (Apr. 21, 2021) [hereinafter Oklahoma Senate Debate over H.B. 1775], https://oksenate.gov/live-chamber (statements of Sen. Bullard) (accessible by selecting Calendar-Year in the left panel, navigating to April 21, 2021 in the resulting menu, then selecting the video titled "Chamber Session [Senate]" with the time range of "1:30 PM - 3:30 PM").

15. *See id.* at 9:32:16 PM (statements of Sen. Hicks).

16. *Id*. at 9:32:17 PM (statement of Sen. Bullard).

17. *Id.* at 9:32:35 PM (statement of Sen. Bullard).

18. *Id.* at 9:32:19 PM (statements of Sens. Hicks & Bullard).

19. *See id.* at 9:46:03 PM (statements of Sens. Kirt & Bullard).

20. *Id.* at 9:55:40 PM (statements of Sens. Floyd & Bullard).

21. *See* Streaming Video: Oklahoma House of Representatives First Regular Session of the 58th Legislature, Day 50, Afternoon Session, at 10:09:22 AM (Apr. 29, 2021) [hereinafter Oklahoma House Debate over H.B. 1775], https://sg001-harmony.sliq.net/00283/Harmony/en/PowerBrowser/PowerBrowserV2/20210429/242/30671 (statements of Rep. Rosecrants).

22. *Id.* at 10:09:24 AM (statements of Rep. West).

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something they did not do."[23] In light of the textual substitution of H.B. 1775, Representative Andy Fugate requested a ruling on the germaneness of the amended bill prior to the House's review.[24] Ultimately, the House ruled H.B. 1775 to be not germane, or ineligible to be heard.[25] Despite this ruling, House Republicans voted to suspend the House Rules in order for the review of H.B. 1775 to proceed.[26] Absent direct Oklahoma examples and concrete evidence of the bill's necessity, both the House of Representatives and Senate enrolled and signed the substituted bill language.[27]

In response, Oklahoma City Public Schools Superintendent Sean McDaniel declared that H.B. 1775 "appears to be a solution looking for a problem which does not exist."[28] Superintendent McDaniel further requested that the Governor veto the bill, stating that "we can continue to trust our educators to guide these difficult yet necessary conversations with our students inside of their classrooms."[29] On the other side of the ideological coin, the Oklahoma Republican Party similarly called on the Governor to "ensure that children are not indoctrinated by dangerous leftist ideologies."[30] Three days after receipt of the enrolled bill, Governor Kevin Stitt signed H.B. 1775 into law on May 7, 2021.[31]

B. The Anti-CRT Movement

Critical Race Theory ("CRT") emerged from a framework of legal analysis in the late 1970s and early 1980s created by legal scholars.[32] CRT recognizes that racial difference is a social construct with racism endemic to

23. *Id.* at 10:07:18 AM (statements of Rep. West).

24. Matt Trotter, *GOP Lawmakers Send Stitt Bill to Ban Critical Race Theory in Oklahoma Schools*, PUB. RADIO TULSA (Apr. 29, 2021, 6:29 PM CDT), https://www.publicradiotulsa.org/local-regional/2021-04-29/gop-lawmakers-send-stitt-bill-to-ban-critical-race-theory-in-oklahoma-schools#stream/0.

25. *Id.*

26. *Id.*

27. *See Bill Information for HB 1775*, *supra* note 3 (highlighting the legislative history of H.B. 1775).

28. Martinez-Keel & Forman, *supra* note 4.

29. *Id.*

30. *Id.*

31. H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021), https://www.sos.ok.gov/documents/legislation/58th/2021/1R/HB/1775.pdf (as signed by Gov. Stitt, May 7, 2021).

32. *See* Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or a Foot in the Closing Door*, 49 UCLA L. REV. 1343, 1345–65 (2002) (tracing the origins and emergence of CRT).

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institutional and community life in the United States.[33] CRT scholars espouse that law constructs and produces racial policies in a manner to uphold White supremacy.[34]

Those critical of CRT advocate that its tenets encourage discrimination against White people to achieve equity.[35] The architect of the anti-CRT movement, Christopher Rufo, found that "'[c]ritical race theory' is the perfect villain" to politicize in the fight against progressive racial ideology.[36] This politicized interpretation fueled national attention and statewide bans of CRT in public education classrooms across the United States in 2021.[37]

On September 2, 2020, Rufo appeared on "Tucker Carlson Tonight" espousing that Critical Race Theory "has pervaded every aspect of the federal government."[38] He called on conservatives to "wake up" to this "existential threat to the United States."[39] He concluded by challenging then President Trump to issue an Executive Order "stamp[ing] out this destructive, divisive, pseudoscientific ideology."[40] Within days of his television appearance, Rufo aided the White House in drafting an Executive Order to purge the federal government of racial sensitivity training.[41] President Trump assailed CRT as "a sickness that cannot be allowed to continue" demanding that Americans "report any sightings so we can quickly extinguish [it]."[42] From his media platform and relationship with President Trump, Rufo essentially launched a national movement based on his own opinions.[43]

The correlative rise of H.B. 1775, in tandem with the anti-CRT movement, suggests the statute is likely a product of Rufo's platform. Evidence alleged

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33. Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333, 334 n.26 (2006).

34. *Id.* at 333–34.

35. *See* Crenshaw, *supra* note 32, at 1366–69.

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

37. *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/.

38. Wallace-Wells, *supra* note 36.

39. *Id.*

40. *Id.*

41. *Id.*; *see also* Exec. Order No. 13,950, 85 Fed. Reg. 188 (Sept. 28, 2020).

42. Peter Baker, *More Than Ever, Trump Casts Himself as the Defender of White America*, N.Y. TIMES (Sept. 10, 2020), https://www.nytimes.com/2020/09/06/us/politics/trump-race-2020-election.html.

43. Wallace-Wells, *supra* note 36.

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in *Black Emergency Response Team v. O'Connor*, which involves Oklahoma teachers and students challenging the validity of this statute, asserts the legislative intent of H.B. 1775 was to restrict discussions on race and gender in Oklahoma classrooms and remain lockstep with national anti-CRT legislation.[44] The Complaint identifies the statutory text as a verbatim copy of Executive Order 13950 issued by President Trump in September 2020, drafted with the aid of Rufo.[45] Even the defendants' response asserts that "[t]hese prohibited concepts largely mirror the 'divisive concepts' found in President Trump's Executive Order."[46] Yet, in presenting examples of divisive curricular concepts to necessitate passage of H.B. 1775, defendants did not highlight any local Oklahoma examples, and instead they pointed to seven examples from other states.[47] Hence, Senator J.J. Dossett was likely correct that H.B. 1775 "reeks" of something national—the anti-CRT movement.[48]

III. Legislative Authority over Public Education Curriculum

The Oklahoma Constitution authorizes legislative involvement in the establishment and maintenance of a system of free public schools in the state.[49] It further vests the supervision of public school instruction in a Board of Education and an appointed committee of active educators to determine official textbook lists for school use.[50] Statutory authority empowers the Board of Education to formulate and adopt curricula and courses of study in Oklahoma.[51] This authority may be limited by other laws that allow for legislative involvement in public education.[52]

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44. Amended Complaint at 45–46, Black Emergency Response Team v. O'Connor, No. 5:21-cv-01022 (W.D. Okla. Nov. 9, 2021).

45. *Id.* at 46–48; *see also* Exec. Order No. 13,950, 85 Fed. Reg. 188 (Sept. 28, 2020); Wallace-Wells, *supra* note 36.

46. Response of Defendants [1-18] to Motion for Preliminary Injunction at 7, Black Emergency Response Team v. O'Connor, No. 5:21-cv-01022 (W.D. Okla. Dec. 16, 2021).

47. *Id.* at 3–5.

48. H.B. 1775 Education Committee Hearing, *supra* note 1, at 10:40:07 AM (statement of Sen. J.J. Dossett).

49. OKLA. CONST. art. XIII, § 1.

50. *Id.* §§ 5–6.

51. 70 OKLA. STAT. § 3-104(A)(5) (2021).

52. *Id.* § 3-104(A).

The scant evidence about the origin and "necessity" of H.B. 1775 calls into question the legislative authority to pass this bill.[53] Legislative history is a valuable tool in determining the legislature's intent and justifying its authority to pass a statute.[54] Generally, committee reports are one of the most important pieces in determining legislative intent.[55] However, in Oklahoma, committee reports are only procedural in nature and lack sufficient substantive information to determine the purpose of enacting the statute.[56] In fact, as the Oklahoma Supreme Court noted, "[T]he Oklahoma system of recording legislative history does not include debates, explanatory committee reports, or other documentation which might shed light upon the reasons or considerations motivating the action or inaction on the part of the legislature."[57] Additionally, the Oklahoma Legislature, in passing the Oklahoma Open Records Act, exempted itself from the Act's application.[58] Thus, records from committee meetings, hearings, or other communications among legislators are not subject to disclosure.[59] As a result, when construing legislative intent, interpreters are limited to public comments to the media, recorded committee hearings, or televised floor debates.[60]

Legislative floor debates concerning H.B. 1775 also highlight a lack of consultation with the state agency statutorily empowered to regulate public education in Oklahoma.[61] In response to these concerns about the absence of consultation with public schools, Senator Pugh—the Chair of the Senate Education Committee—expressed that it struggles with the balance of local

53. *See* Darla Jackson, *Legislative History: A Guide for the State of Oklahoma*, 30 LEGAL REFERENCES SERVS. Q. 119, 119–20 (2011), https://www.tandfonline.com/doi/pdf/10.1080/0270319X.2011.585327?needAccess=true (discussing how legislative history for the Oklahoma Legislature is difficult to obtain and what resources are available for interpretation).

54. *See id.* at 119–21.

55. *See* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 860–61 (noting the judiciary's tendency to consult committee reports as trustworthy sources of legislative intent).

56. Jackson, *supra* note 53, at 119–20; Brandon Davis Kemp, Comment, *Spoiled Broth? Section 895 of the Oklahoma Economic Development Pooled Finances Act Bounces Between Committees and Co-Opts Terms to Defend Your New Back Yard*, 66 OKLA. L. REV. 155, 186 (2013).

57. Kemp, *supra* note 56, at 186 (quoting State *ex rel.* Cartwright v. Ga. Pac. Corp., 1982 OK 148, ¶ 32, 663 P.2d 718, 723).

58. *Id.* at 187 (citing 51 OKLA. STAT. § 24A.3(2) (2011)).

59. *Id.*

60. *See id.*

61. Oklahoma Senate Debate over H.B. 1775, *supra* note 14, at 9:38:15 PM (statement of Sen. Bullard) (stipulating that no consultation was made with the Board of Education prior to drafting of H.B. 1775).

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and state control.[62] Senator Pugh then articulated the special role of the legislature: it may define school curriculum because of its "power of the purse," a referral to the state legislature's explicit funding of public education.[63] Inherent in this view is the idea that public funding for education legitimizes the legislature's heavy-handed involvement in curriculum administration. *National Gay Task Force v. Board of Education* stipulates to the contrary: the "power of the purse" is restricted by constitutional guardrails.[64]

In April 1978, the Oklahoma Legislature enacted the "Helm Statute" to dismiss public school teachers who advocated or encouraged public or private homosexual conduct.[65] The statute defined public homosexual conduct broadly and described conduct to include "public or private homosexual activity in a manner that creates . . . substantial risk that [it] will come to the attention of school children or school employees."[66] Violation of the statute included various disciplinary measures including termination.[67] On behalf of Oklahoma teachers, the National Gay Task Force challenged the statutory scope and definition of "public homosexual conduct" as unconstitutionally vague.[68] The Tenth Circuit Court of Appeals agreed, finding the provisions that defined homosexual conduct as facially overbroad, thus severing those provisions.[69]

In its decision, the court focused on the state's authority to regulate the speech of teachers as opposed to the general citizenry.[70] Where a teacher's expression "results in a material or substantial interference or disruption in the normal activities of the school," the state's interests in restricting this expression outweigh the rights of the teacher.[71] The case offers a measuring rod for material disruption in the classroom with considerable weight given

62. H.B. 1775 Education Committee Hearing, *supra* note 1, at 10:40:13 AM (statement of Sen. Pugh, Chair, S. Educ. Comm.).

63. *See id.*

64. 729 F.2d 1270, 1275 (10th Cir. 1984).

65. Thomas J. Burrows, *Constitutional Law—First Amendment—Public Teacher's Right to Speak in Favor of Homosexuality—*(National Gay Task Force v. Board of Education of the City of Oklahoma City), 3 N.Y.L. SCH. HUM. RTS. ANN. 171, 173 (1985).

66. *Nat'l Gay Task Force*, 729 F.2d at 1272 (quoting 70 OKLA. STAT. § 6-103.15(A) (repealed 1990)).

67. *Id.* (quoting 70 OKLA. STAT. § 6-103.15 (repealed 1990)).

68. *Id.*

69. *Id.* at 1275.

70. *Id.* at 1274 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

71. *Id.* (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

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to the veracity of adverse effects on students or employees from such disruption.[72]

In his dissent, Judge James E. Barrett highlighted state legislatures' right to exercise police power when enacting regulations that protect the public health, safety, morals, and welfare.[73] The Helm Statute, in his opinion, should be upheld, because Oklahoma—by its enactment—protected students from an "abominable and detestable crime against nature."[74] A teacher espousing homosexual conduct creates a substantial risk to school children "in fact and in truth inciting school children to participate."[75] Judge Barrett opined the statute furthered a substantial governmental interest in "deter[ring] speech or conduct . . . 'encouraging' school children to commit the crime of sodomy."[76] Similarly, the legislature promulgated H.B. 1775 under the guise of protecting the state's children from purported indoctrination through the teaching of CRT in Oklahoma classrooms; hence, protecting the public welfare of Oklahoma's children.[77]

Current educators however contest their ability to indoctrinate—or even strongly influence—school children, arguing that "children aren't listening to me: they are listening to and seeing the humanity in each other."[78] Educators believe children are not being indoctrinated, but are "more curious about the lives of people who are not like themselves."[79] A student's natural curiosity does not raise sufficient concern to vest legislative authority in utilizing the "power of the purse" to promulgate H.B. 1775.

IV. The Constitutionality of H.B. 1775

A. The Judiciary's Toolbox for Statutory Interpretation

To understand the textual terms of H.B. 1775 and how each section relates within the overall statutory scheme, a framework of statutory interpretation is employed to guide the interpreter. Various frameworks exist; each with its

72. *See id.* at 1275.

73. *Id.* (Barrett, J., dissenting).

74. *Id.* at 1276.

75. *Id.*

76. *See id.* at 1277–78.

77. *See* H.B. 1775 Education Committee Hearing, *supra* note 1; Oklahoma House Debate over H.B. 1775, *supra* note 21, at 9:56:18 AM.

78. Brian Broome, Opinion, *Professors Indoctrinating Students? In Reality, It's the Other Way Around.*, WASH. POST (Aug. 26, 2021, 2:31 PM EDT), https://www.washingtonpost.com/opinions/2021/08/26/professors-indoctrinating-students-reality-its-other-way-around/.

79. *See id.*

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separate consideration, tools, and goal in the interpretative process to determine the meaning of a statute's words.[80]

Statutes are "active instruments of policy"[81] written by governmental entities to address categories of conduct.[82] The generality of the words utilized is an intentional choice to ensure the statute applies to unforeseen circumstances within the proscribed categories of conduct.[83] Words are "inexact symbols," which vary in meaning over time.[84] Thus, in construing the intent of a statute and the exact behavior or conduct to be prohibited by its language, courts use tools of statutory interpretation to determine the language's function.[85] Courts "emphatically [have] the province and duty . . . to say what the law is."[86] Where the language appears ambiguous, courts may invalidate the law as unconstitutional, sever the vague provision to retain the rest, or narrow vague provisions in their application.

To understand judicial interpretation of H.B. 1775's statutory text, inclusive of the text's breadth and linguistic meaning, identification of the interpretative framework a court may employ is necessary. Each court, and each judge, holds a specific theoretical preference when approaching statutory interpretation.[87] Historically, statutory interpretation by the United States Supreme Court focused on the "letter" of a statute and, where conflicts

80. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1121–27 (2017) (discussing the usage of interpretative canons as to discerning linguistic meaning and content of statutory text).

81. John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 71 (2006).

82. CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 1 (2018) (quoting ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 111 (2d ed. 2002)).

83. *See id.* at 1–2.

84. *Id.* at 1 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947)).

85. *Id.* at 2–3.

86. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

87. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 252–59 (1994) (discussing judicial considerations of stare decisis weighing on statutory construction).

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emerged, yielded to its underlying "spirit."[88] Contemporary theoretical frameworks generally include either textualism[89] or purposivism.[90]

In analyzing state statutes, however, federal appellate courts have employed the state's own rules of statutory construction to interpret constitutionality claims.[91] Thus, to analyze H.B. 1775, a review of Oklahoma's caselaw on statutory interpretation illuminates the likely interpretative tools utilized in its judicial examination. Historically, Oklahoma followed a textualist approach but subsequently broadened its interpretative framework to allow for the examination of extrinsic evidence.[92] Extrinsic evidence to the bill contextualizes the statute's purpose and mischief to be remedied.[93] *State ex rel. Rucker v. Tapp* highlights the Oklahoma Supreme Court's use of extrinsic evidence to resolve uncertainty or inconsistency in the text.[94] The court's inquiry focused on how the statutory words "were . . . intended to be used in the act," not their "abstract force."[95]

Additional interpretative tools are codified in Oklahoma law requiring "[w]ords used in any statute . . . to be understood in their ordinary sense, except when a contrary intention plainly appears."[96] This authority also restricts the usage of "common law" in favor of liberal construction of

88. Manning, *supra* note 81, at 90. Subsequent interpretative practices have since diverged rooted on judicial preferences. *Id.*

89. *See* Manning, *supra* note 81, at 73 (describing that textualists believe the Constitution "requires judges to treat the clear import of an enacted text as conclusive, even when the text fits poorly with its apparent background").

90. *See* CONG. RSCH. SERV., *supra* note 82, at 2. *See also* Manning, *supra* note 81, at 76 (identifying that purposivists find statutes are enacted for some broad purpose and where the text is incongruous with this purpose, then the Court may look to contextual cues to identify its meaning).

91. *See, e.g.*, Arce v. Douglas, 793 F.3d 968, 984 (9th Cir. 2015).

92. Jackson, *supra* note 53, at 121–22 (discussing the shift in the Oklahoma Supreme Court's historical textualist framework to broad interpretative practice in statutory interpretation); *see*, *e.g.,* McIntosh v. Watkins*,* 2019 OK 6, ¶ 10–16, 441 P.3d 1094, 1099–101 (analyzing legislative background and the arc of amendments to resolve statutory ambiguity); YDF, Inc. v. Schlumar, Inc., 2006 OK 32, ¶ 6, 136 P.3d 656, 658 (interpreting the Surface Damages Act in light of the Act's purpose and need to balance interest of both surface owners and mineral owners).

93. *See* Atl. Refin. Co. v. Okla. Tax Comm'n, 1959 OK 168, ¶ 14, 360 P.2d 826, 830 (explaining that the "history of the times when the act was passed" should be utilized as a tool of statutory interpretation).

94. 1963 OK 37, ¶ 7, 380 P.2d 260.

95. *Id.* (quoting 2 J. G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4706, at 339 (1904)).

96. 25 OKLA. STAT. § 1 (2021).

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statutes "to effect their objects and to promote justice."[97] Thus, both statutory authority and judicial opinions on statutory interpretation point to interpretative methods inclusive of ordinary meaning and a purposivist approach in Oklahoma.

B. Judicial Guideposts in Constitutionality Claims

Challenges to a statute's constitutionality—either on its face or through its application—are examined through precedent. Challenges to a statute's validity primarily consist of facial challenges where "the challenger must establish that no set of circumstances exists under which [a challenged statute] would be valid."[98] Facial challenges may include overbreadth and non-overbreadth claims.[99] First Amendment claims of overbreadth, in particular, focus on a statute as facially invalid when it "prohibits a substantial amount of protected speech."[100] Non-overbreadth facial challenges include causes of action that argue the statute has a discriminatory purpose or "attempt[s] to commandeer state and local governmental officials to perform federally prescribed functions."[101] These claims may similarly result in the constitutional invalidity of a statute.[102]

To decide constitutionality claims, courts use judicially established tests.[103] These tests first involve an identification of the appropriate level of judicial review utilized in the statutory analysis.[104] Then, courts determine if

97. *Id.* § 29.

98. Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 TEX. L. REV. 215, 217 (2020) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

99. *Id.* at 217–18.

100. *Id.* at 218 n.13 (citing United States v. Williams, 553 U.S. 285, 292 (2008)).

101. *Id.* at 218 n.12.

102. *See id.* at 228.

103. *Id.*

104. *See Equal Protection*, 14 GEO. J. GENDER & L. 397, 400 (Cain Norris & Whitney Turk eds., 2013) ("Courts have developed three basic levels of review for analyzing Constitutional challenges, including equal protection claims: strict scrutiny, intermediate scrutiny, and rational basis review." (citing Adam J. Rosen, *Slaughtering Sovereignty: How Congress Can Abrogate State Sovereign Immunity to Enforce the Privileges or Immunities Clause of the Fourteenth Amendment*, 11 TEMP. POL. & CIV. RTS. L. REV. 111, 117 (2001)). Strict scrutiny is the most rigorous form of judicial review focused on governmental activities that may impede fundamental rights or appear aimed at suspect classes. *Id.* (citing St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 637 (7th Cir. 2007)) (explaining that strict scrutiny will apply if the act "targets a suspect class or addresses a fundamental right"). Suspect classes focus on an immutable characteristic of a group or historic discrimination

the legislature met the test's requirements in enacting the statute.[105] For instance, a test of strict scrutiny requires that a statute is narrowly tailored and is necessary to achieve a compelling governmental interest to be constitutional.[106] The legislature is then required to demonstrate what compelling interest, within its governmental function, the statute precludes.[107] If it is unable to meet this burden, the statute is unconstitutional.[108] Then, the court may totally invalidate the statute, severe the offending statutory sections, or narrowly construe the statute's application.[109]

C. The Doctrine of Overbreadth

The statutory language of H.B. 1775 generally frames terms broadly; hence, an examination of the statute's possible reach or overbreadth is critical to assess its constitutionality. H.B. 1775 stipulates requirements as to "training," "counseling," or "course" that are restricted by the Act, but the statute did not define these words nor make clear their intended application.[110] A law may be invalidated under First Amendment overbreadth if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[111] The overbreadth doctrine exists to examine statutory enforcement of an expansive law that

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against that group, and, in general, the Court recognizes race, national origin, and alienage as suspect classes. *Id.* at 400–01. To overcome strict scrutiny, "the government must prove that the challenged action furthers a 'compelling governmental interest' and is 'narrowly tailored.'" *Id.* at 400 (quoting Adarand Constructors, Inc. v. Pena,. 515 U.S. 200, 215–17, 227 (1995)). Intermediate scrutiny is generally applied where "legislation categorizes people based on irrelevant stereotypes instead of individual capacity or culpability." *Id.* at 404. Intermediate scrutiny generally applies to classifications based on gender or legitimacy, and to survive this level of scrutiny, the government must show the classification serves important governmental objectives and is substantially related to achieving those objectives. *Id*. at 404–05. Finally, judicial scrutiny at the level of rational basis review requires only that the statute is "rationally related to a legitimate governmental purpose." *Id.* at 405. Most statutory classifications reviewed within this deferential rational basis standard are upheld. *Id.* at 406.

105. *See* Fallon, supra note 98, at 228–29.

106. *Id.* at 218.

107. *See, e.g*., *id.* at 262 (analyzing the compelling interest of a state in eliminating fire hazards) (citing Ladue v. Gilleo, 512 U.S. 43, 52 (1994)).

108. *Id.* at 228.

109. *See id.* at 230.

110. 70 OKLA. STAT. § 24-157 (2021).

111. United States v. Stevens, 559 U.S. 460, 473 (2010) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)).

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"may deter or 'chill' constitutionally protected speech."[112] Analysis for overbreadth starts with an examination of the statute's reach and "what the statute covers."[113] If the statutory language is clear and unambiguous, the court generally will not extend its examination beyond the statutory text.[114]

Recent cases concerning overbreadth provide guidance on judicial determinations of state statutes, which limit or proscribe conduct within the school environment, similar to H.B. 1775. For instance, in *Arce v. Douglas*, the Ninth Circuit Court of Appeals held that an Arizona statute, which prohibited schools from including courses designed for specific ethnic groups within its instruction, was not facially overbroad in violation of the First Amendment.[115] Rather, in an analysis of the statutory text "prohibit[ing] any courses or classes that '[p]romote resentment toward a race or class of people,'" the provision on its face was not overbroad.[116] The court opined the statute targeted implementation of courses and did "not restrict individual student speech or class discussions."[117] Thus, "promote," within the context of the text, took on a clear meaning which reflected congressional intent.[118] The court disputed that a class designed to teach about the oppression of Mexican-Americans, which may incidentally promote resentment, would automatically do so.[119] The claim of constitutional overbreadth failed because a substantial number of the statute's applications were "reasonably related to the state's legitimate pedagogical interest in reducing racism."[120]

Similarly, in *Santa Cruz Lesbian & Gay Community Center v. Trump*, the U.S. District Court for the Northern District of California held that plaintiffs were entitled to a nationwide preliminary injunction of Executive Order 13950.[121] The Order prohibited federal agencies and contractors from promoting a list of "divisive concepts" in workplace trainings.[122] The plaintiffs, agencies that received federal funds to conduct diversity training,

112. Comite de Jornaleros v. City of Redondo Beach, 657 F.3d 936, 944 (9th Cir. 2011) (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)).

113. *Id.* at 945 (quoting United States v. Williams, 553 U.S. 285, 293 (2008)).

114. Arce v. Douglas, 793 F.3d 968, 984 (9th Cir. 2015) (citing Ariz. Dep't of Revenue v. Action Marine, Inc., 181 P.3d 188, 190 (Ariz. 2008)).

115. *Id.* at 985 (citing ARIZ. REV. STAT. ANN. § 15–112(F) (2011)).

116. *Id.* (quoting ARIZ. REV. STAT. ANN. § 15–112(A)(2)).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. 508 F. Supp. 3d 521, 550 (N.D. Cal. 2020).

122. *Id.* at 528 (quoting Exec. Order No. 13,950, 85 Fed. Reg. 60683, 60685–87 (Sept. 22, 2020)).

https://digitalcommons.law.ou.edu/olr/vol75/iss2/6

argued that the Executive Order censored or terminated trainings fundamental to their mission in violation of the Free Speech Clause of the First Amendment.[123] To analyze this claim, the court applied a balancing test.[124] The test resulted in the court's finding that the Executive Order restricted speech as to issues of racism and discrimination that were of public concern.[125] The court further found that the Order impermissibly reached into the plaintiffs' freedom to deliver diversity training beyond the scope of the federal contract.[126] Therefore, according to the court, Executive Order 13950 likely violated First Amendment speech protections and unlawfully restricted plaintiffs' constitutional rights.[127]

In *Garcetti v. Ceballos*, the Court clarified the balancing test used to define constitutional protections accorded to public employee speech.[128] It ascribed a two-step analysis focused on: (1) if the employee spoke as a "citizen on a matter of public concern."[129] If the answer in this step is no, then the employee has "no First Amendment cause of action based on . . . her employer's reaction to the speech."[130] But, if the answer is yes, then (2) that governmental entity must identify "an adequate justification for treating the employee differently [than] any other member of the general public."[131] The Court highlighted that a governmental entity possesses broad discretion as an employer.[132] Yet, it stipulated that speech restrictions may only apply to employee speech that has some potential to affect the entity's operations.[133] First Amendment protection of employee speech hinges on the breadth of the public employee's official duties.[134] Thus, where the employee is speaking "pursuant to their official duties," the employee is not "speaking as [a] citizen[] for First Amendment purposes."[135]

Garcetti continues to define the scope of First Amendment claims for public school employees. In *Brown v. Chicago Board of Education*, the Seventh Circuit Court of Appeals denied Brown protection because he spoke

123. *Id.*
124. *Id.* at 540.
125. *Id.* at 541.
126. *Id.* at 541–42.
127. *See id.* at 542.
128. 547 U.S. 410, 418 (2006).
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *See id.* at 421.
135. *Id.*

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as a teacher and therefore "*Garcetti* doom[ed] his [First Amendment] position."[136] The Third, Sixth, and Ninth Circuits have similarly constrained the First Amendment protections afforded to public employees.[137] The Supreme Court opined in *Garcetti* that it would not extend its analysis to "a case involving speech related to scholarship or teaching."[138] Yet, circuit courts continue to uphold their interpretations absent a Supreme Court directive to the contrary.

In light of *Arce* and *Brown*, a constitutional challenge as to the overbreadth of H.B. 1775 will likely be unsuccessful. The text of H.B. 1775 applies to students of "higher education within The Oklahoma State System of Higher Education" in order to restrict compelled attendance at mandatory gender or diversity based training and any "teacher, administrator, or other employee of a school district, charter school or virtual school" within the state.[139] The identified public school personnel shall not "require or make part of a course" eight enumerated concepts.[140] While the statutory text does not explicitly define "course," subsection (B)(2) requires that the State Board of Education promulgate rules sufficient to further define such terms.[141] Subsection (B) also expressly states that the bill "shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards."[142] In construing the statute's breadth, this narrowing provision at (B) will likely overcome a finding of overbreadth.

As compared to *Arce*, the statute on its face is not likely overbroad as it "targets the design and implementation of courses,"[143] and does not expressly restrict individual or student speech. H.B. 1775 lists distinct concepts that cannot be required or included in a course.[144] The State Board of Education subsequently defined "[c]ourse" as "any program or activity where instruction or activities tied to the instruction are provided . . . including courses, programs, instructional activities, lessons, . . . coaching, tutoring, or

136. 824 F.3d 713, 718 (7th Cir. 2016).

137. *Id.* at 716 (discussing Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 962–63 (9th Cir. 2011); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 338 (6th Cir. 2010); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998)).

138. 547 U.S. 410, 425 (2006).

139. 70 OKLA. STAT. § 24-157 (2021).

140. *Id.* § 24-157(B)(1).

141. *Id.* § 24-157(B)(2).

142. *Id.* § 24-157(B).

143. Arce v. Douglas, 793 F.3d 968, 985 (9th Cir. 2015).

144. *See* 70 OKLA. STAT. § 24-157(B)(1)(a)–(h).

any classes."[145] The expansive scope of "course" may justify finding statutory overbreadth because its definitional scope likely includes protected First Amendment speech of students and educators.[146] But, as the Court stated in *Brown*, a teacher's First Amendment claim would likely be "doom[ed]" by *Garcetti* absent further clarification by the Supreme Court.[147]

The State insists its pedagogical justification for H.B. 1775 is the protection of Oklahoma children from race and sex discrimination in school curriculum.[148] In applying *Garcetti*, both the speech of education personnel and the scope of the employee's job responsibilities are critical to determinate the scope of First Amendment protection.[149] Here, the State likely can substantiate that any restriction as to speech of education personnel, as required by H.B. 1775,[150] is reasonably related to the legitimate end of protecting Oklahoma children from discrimination in school curriculum. The speech restricted pertains to the administration of curriculum and bars concepts deemed discriminatory. The restriction, therefore, is likely valid considering the government's ability to restrict speech as a private employer and precedent limiting facial overbreadth challenges in the primary and secondary school context.[151]

D. Void for Vagueness

Interpretation of H.B. 1775 lends itself to a constitutional claim of vagueness due to subjective prohibitions on individual feelings of "discomfort, guilt, anguish, or other psychological distress."[152] "A statute . . .

145. OKLA. ADMIN. CODE § 210:10-1-23(b)(1)(B) (2022), https://sde.ok.gov/sites/default/files/Final%20%28Clean%29%20-%20Adopted%20HB%201775%20Final%20Rules%20Language%20w%20Revisions%20from%20Public%20Comment.pdf.

146. *See id.; see also* Kemp, *supra* note 56, at 186 (discussing Oklahoma's procedural committee reports and scant legislative evidence available); H.B. 1775 Education Committee Hearing, *supra* note 1, at 10:25:33–10:32:13 AM (statements of Sens. Hicks & J.J. Dossett) (identifying no explicit examples as to Oklahoma school incidents necessitating passage of H.B. 1775). Here, with detailed committee reports and legislative records, the State likely could overcome an assertion of overbreadth by distinctly showcasing state specific examples that necessitated the passage of H.B. 1775.

147. Brown v. Chicago Bd. of Educ., 824 F.3d 713, 718 (7th Cir. 2016).

148. Response of Defendants [1-18] to Motion for Preliminary Injunction at 2, Black Emergency Response Team v. O'Connor, No. 21-cv-01022 (W.D. Okla. Dec. 16, 2021).

149. 547 U.S. 410, 418 (2006).

150. *See* 70 OKLA. STAT. § 24-158(B)(1)(a)–(h) (2021).

151. *See* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007) (discussing legal precedent limiting teacher's free speech rights in the primary and secondary classroom context due to consideration of pupils as a captive audience).

152. *See* 70 OKLA. STAT. § 24-158(B)(1)(g).

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is impermissibly vague if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited.'"[153] Vague laws must give fair warning of prohibited conduct.[154] If "arbitrary and discriminatory enforcement is to be prevented," laws should provide clear standards of application.[155] Vague laws delegate policy decisions to judges and risk subjective discriminatory application.[156] The lack of precise language can also lead educators, in fear of any possible legal violation, to inappropriately adopt an expansive and incorrect understanding, thereby chilling all speech that the educator perceives may make a student feel uncomfortable.[157] Educators may thus inadvertently fail to follow the law because they cannot understand it.

H.B. 1775 stipulates that "[n]o teacher, administrator or other employee of a school district, charter school or virtual charter school shall require or make part of a course" eight delineated concepts.[158] The law also provides that "[n]o enrolled student of an institution of higher education within The Oklahoma State System of Higher Education shall be required to engage in any form of mandatory gender or sexual diversity training or counseling."[159] Both the State Board of Education and Oklahoma State Regents for Higher Education must promulgate additional rules, which could further outline the limits of prohibited conduct.[160] Upon examination of the rules enacted by the State Board of Education, "Course," "Teacher," and "Public School" are the only defined terms.[161] The terms "discomfort" or "guilt" are not defined nor is notice provided as to how a teacher might ensure adherence to these terms.[162] Even when teaching curriculum pursuant to the Oklahoma Academic Standards, a teacher likely is unaware how to avoid impermissible psychological distress of students. Teaching the concepts of slavery, the

153. Brown v. Chicago Bd. of Educ., 824 F.3d 713, 716–17 (7th Cir. 2016) (quoting FCC v. Fox Television Studios, Inc., 537 U.S., 239, 253 (2012)).

154. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

155. *Id.*

156. *Id.* at 108–09.

157. *Id.* at 109; *see also* Robert L. Kerr, *What Does H.B. 1775 Mean for Educators' Free Speech? Lawyers Offer Perspectives*, OKLAHOMAN (Oct. 17, 2022, 9:01 AM CT), https://www.oklahoman.com/story/opinion/2022/10/17/guest-column-what-does-oklahoma-hb-1775-mean-for-free-speech/69553248007/.

158. 70 OKLA. STAT. § 24-157(B)(1) (2021).

159. *Id.* § 24-157(A)(1).

160. *Id.* §§ 24-157(A)(2), (B)(2).

161. OKLA. ADMIN. CODE § 210:10-1-23(b)(1) (2022), https://sde.ok.gov/sites/default/files/Final%20%28Clean%29%20-%20Adopted%20HB%201775%20Final%20Rules%20Language%20w%20Revisions%20from%20Public%20Comment.pdf.

162. *See id.* § 210:10-1-23(c)(7).

Tulsa Race Massacre, or Japanese Internment may unintentionally result in students feeling discomfort or psychological stress. Here, the challenge becomes construing what "require or make part of a course" includes.[163]

Fair notice to teachers, administrators, or other employees requires concrete definitions to understand the boundaries of prohibited conduct. An incidental occurrence of a student feeling discomfort over certain curricular concepts could subjectively be construed as a teacher violating the provision of "mak[ing] part of a course."[164] The definition of course is expansive and includes "coaching, tutoring, or any classes."[165] This definition deviates from Merriam-Webster's definition that a course is "a number of lectures or other matter dealing with a subject."[166] Again, the definition of course, as set forth in H.B. 1775, arguably delineates unclear boundaries as to when, and under what circumstances, education personnel may construe an activity is in fact included under "course." Statutory construction in Oklahoma stipulates words are "understood in their ordinary sense."[167] Here, an ordinary person would not likely find the word "course" to be inclusive of coaching or tutoring. The absence of awareness by the ordinary person similarly extends to public school personnel who may incorrectly be aware of H.B. 1775's application to tutoring or coaching. The interpretative framework of ordinary sense thus does not articulate a well-defined construction of course. This vague and imprecise conception of Critical Race Theory likely leads educators to censor and chill their speech in nearly all educational settings.

Additionally, discomfort or guilt are internal feelings with no clear indices provided to educators. A student may feel discomfort or guilt, but internal emotions give no outward notice to the educator as a warning or sign of the student's feelings.[168] Similarly, discomfort operates on an expansive continuum, where a particular phrase that results in discomfort to one student

163. 70 OKLA. STAT. § 24-157(B)(1).

164. *Id.*

165. OKLA. ADMIN. CODE § 210:10-1-23(b)(1)(B).

166. *Course (4)*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/course (last visited Oct. 4, 2022). The Oklahoma Supreme Court has relied on Merriam-Webster as a reliable indication of ordinary meaning. *See* Am. Airlines, Inc. v. State, *ex rel.* Okla. Tax Comm'n, 2014 OK 95, ¶ 46, 341 P.3d 56, 68 n. 22 (using Merriam-Webster online to interpret the ordinary meaning of the term "employed" consistent with title 25, section 1 of the Oklahoma Statutes).

167. 25 OKLA. STAT. § 1 (2021).

168. *See* Robert C. Coghill, *Individual Differences in the Subjective Experience of Pain: New Insights into Mechanisms and Models*, 50 HEADACHE: J. HEAD & FACE PAIN 1531, 1531 (2010) (discussing the subjective nature of discomfort and pain and the broad individual differences).

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does not in another student, despite being in the same classroom.[169] The subjective nature of this continuum encourages arbitrary and discriminatory enforcement of H.B. 1775. Even when an educator teaches the curriculum directly from the Oklahoma Academic Standards, a student could register a violation of H.B. 1775 by feeling discomfort or guilt. Under the administrative rules for H.B. 1775 promulgated by the Oklahoma State Department of Education, all legally sufficient complaints will be investigated, and educators face a variety of disciplinary actions, including suspension or revocation.[170] To avoid consequences, educators likely will restrict their speech beyond the requirements of H.B. 1775 due to the statute's vague terms.

Complainants allege in *Black Emergency Response Team v. O'Connor* that arbitrary enforcement of H.B. 1775 began with the restriction of textbooks, courses, and specific words in Oklahoma classrooms immediately after its adoption.[171] School districts have struck specific books—*To Kill a Mockingbird*, *Their Eyes Were Watching God*, and *A Raisin in the Sun*[172]—from the curriculum. To comply with H.B. 1775, teachers also received guidance to refrain from saying the words "diversity" and "White privilege" in classrooms.[173] Both of these examples likely restrain First Amendment speech rights of education personnel, while simultaneously violating the constitutional rights of students to access information.[174] Schools have discretion in determining available library books, "[b]ut that discretion may not be exercised in a narrowly partisan or political manner."[175] Removal of books on a discriminatory or partisan basis, due to H.B. 1775, violates the

169. *See id.* ("One texture may be pleasant to one individual, and uncomfortable to another.").

170. OKLA. ADMIN. CODE § 210:10-1-23(g)(3) ("Public Schools shall be required to investigate all complaints that meet the requirements of subsection (g)(1) and make a determination as to whether a violation occurred."); *see also id.* § 210:10-1-23(j) (providing for suspension or revocation of licensure for an educator who violates the provisions of the rule).

171. Amended Complaint at 2, Black Emergency Response Team v. O'Connor, No. 21-cv-01022 (W.D. Okla. Nov. 9, 2021).

172. *Id.*

173. *Id.*

174. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982) (plurality opinion) ("[W]e think that the First Amendment rights of students may be directly and sharply implicated by the removal of school books by a school library.").

175. *Id*. at 870.

constitutional rights of students to receive information.[176] H.B. 1775, therefore, is likely void for vagueness because of the lack of fair warning and arbitrary enforcement of its terms.

E. Unconstitutional Motivation of a Discriminatory Purpose

Even if H.B. 1775 survived claims of overbreadth or vagueness, it could still be unconstitutional because a discriminatory purpose motivated its enactment or enforcement.[177] The discriminatory purpose need not be the sole purpose of the challenged action, it only needs to be a motivating factor.[178] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court articulated factors considered in construing a discriminatory purpose.[179] Those include: (1) the impact of the official action and its effect on one particular race; (2) the historical background leading to the decision; (3) the specific sequence of events prior to the legislative action; (4) any departures from normal legislative procedures; and (5) the legislative or administrative history of the statute.[180] To demonstrate a discriminatory purpose, a party must also show a genuine issue of fact, no matter how small, for judicial review.[181]

In *Arce*, the Ninth Circuit found sufficient evidence that "an intent to discriminate against [Mexican-American] students on the basis of their race or national origin" motivated the enactment and enforcement of an Arizona statute to terminate Mexican-American studies.[182] In analyzing the *Arlington Heights* factors promulgated by the Supreme Court, the court highlighted that the statute disproportionately and disparately impacted Mexican-American students.[183] The legislative history however revealed only a few incidences of discriminatory expression.[184] The court opined that officials seldom

176. *See id*. at 870–71. (noting that if a school board ordered book removal for partisan motivations, "few would doubt that the order violated the constitutional rights of the students denied access to those books").

177. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

178. *Id.* at 266.

179. *Id.* at 266–68. These factors continue to be cited in more recent circuit court decisions. *See* Arce v. Douglas, 793 F.3d 968, 977 (9th Cir. 2015) (citing *Vill. of Arlington Heights*, 429 U.S. at 266–68).

180. *Arce*, 793 F.3d at 977 (citing *Vill. of Arlington Heights*, 429 U.S. at 266–68).

181. *Id.* at 977–78 (quoting Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1159 (9th Cir. 2013)).

182. *Id.* at 981.

183. *Id.* at 978.

184. *Id.*

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announce on the record a discriminatory course of conduct; thus, the court must "look to whether [officials] have 'camouflaged' their intent."[185]

A review of the enactment and legislative history in *Arce* reasonably suggested an intent to discriminate.[186] The determination of intent relied on statements by legislators characterizing the Mexican-American studies program as racial warfare.[187] The court also noted the legislative departure from normal procedures, and the bill author's simultaneous campaign for state superintendent where he pledged to eliminate Mexican-American studies.[188] The totality of these events led the court to find sufficient evidence as to an underlying discriminatory motivation, which necessitated a new trial.[189]

In applying the *Arlington Heights* factors, the second, third, and fourth factors likely substantiate a genuine issue of fact as to a discriminatory intention in Oklahoma's enactment of H.B. 1775. The first factor—the statute's adverse impact on one race more than another—is unlikely satisfied because of the statute's language.[190] The bill's text stipulates requirements as to "one race or sex" or "individual" rather than targeting a specific racial group as in *Arce*.[191] But, examples of subsequent enforcement highlight Oklahoma school districts who have disproportionately restricted books written by authors of color.[192] Further inquiry into the substantive changes resulting from enforcement, however, would be necessary to determine the voracity of this evidence.

As to the second factor, the historical background of the decision, the sudden rise of H.B. 1775 correlates to lockstep emergence with the anti-CRT movement.[193] The statute's verbatim language from Executive Order 13950, and the inability of bill sponsors to expressly point to Oklahoma examples, both raise suspicions as to H.B. 1775's true necessity.[194] As to the third and fourth factors, H.B. 1775 diverted from normal procedures when the legislature totally substituted the statutory language and allowed

185. *Id.* (quoting Smith v. Town of Clarkton, 682 F.2d 1055, 1064 (4th Cir. 1982)).

186. *Id.* at 978.

187. *Id.* (internal citation omitted).

188. *Id.* at 979–80.

189. *Id.* at 981.

190. *See* 70 OKLA. STAT. § 24-157(B)(1) (2021).

191. *Id.* § 24-157(B)(1)(a)-(b). *Contra Arce*, 793 F.3d at 968.

192. Amended Complaint at 2, Black Emergency Response Team v. O'Connor, No. 21-cv-01022 (W.D. Okla. Nov. 9, 2021).

193. *See supra* Part II (describing the pre-enactment activities leading to the promulgation of H.B. 1775).

194. *See supra* Part II.

consideration of the bill despite its germaneness.[195] Nevertheless, House Republicans voted to hear and enact the statute.[196]

Current litigation from Oklahoma educators and students provides further examples of H.B. 1775's purported discriminatory motivation. In *Black Emergency Response Team*, the defendants pointed to seven nationwide examples that necessitated H.B. 1775, without mentioning Oklahoma.[197] The defendants also stated that "[p]olicymakers in Oklahoma are fully entitled to take notice about what is occurring in other states to prophylactically craft their own policies."[198] As of May 23, 2021, the Oklahoma State Department of Education had not received any complaints from the public that schools taught CRT.[199] Without any Oklahoma-specific justifications for H.B. 1775, the legislative motive appears lockstep with national conservative politics rather than any practical, local, need for reform.

Finally, as to the fifth factor, the legislative history lacks any substantive information to demonstrate a statewide problem or statutory necessity.[200] Both House and Senate floor hearings recorded legislators who questioned the statutory language and repeatedly objected to its lack of clarity.[201] During consideration of the bill, legislators stated that Black Lives Matter is a terrorist organization and compared its tenets to the Ku Klux Klan.[202] They

195. *See* Trotter, *supra* note 24.

196. *Id.*

197. Response of Defendants [1-18] to Motion for Preliminary Injunction at 3–5, Black Emergency Response Team v. O'Connor, No. 21-cv-01022 (W.D. Okla. Dec. 16, 2021).

198. *Id.* at 5.

199. Carmen Forman & Nuria Martinez-Keel, *No Complaints of Oklahoma Schools Teaching Critical Race Theory, Department of Education Says*, OKLAHOMAN (May 23, 2021, 6:00 AM CT), https://www.oklahoman.com/story/news/2021/05/23/no-school-records-critical-race-theory-oklahoma-education-official-says/5162998001/.

200. *See supra* Part II (providing a full discussion of the legislative history regarding enactment of H.B. 1775 and the absence of substantive committee reports available for interpretation of legislative intent or examples provided in committee hearings or floor debates).

201. *See* Oklahoma Senate Debate over H.B. 1775, *supra* note 14, at 9:31:18 AM (highlighting questions on lack of specific examples in Oklahoma schools); Oklahoma House Debate over H.B. 1775, *supra* note 21, at 9:56:18 AM (highlighting questions on the true intent for the substituted bill language).

202. Carmen Forman, *Oklahoma Gov. Kevin Stitt to Decide on Bill to Ban Teaching of Critical Race Theory*, OKLAHOMAN (Apr. 30, 2021, 2:08 PM CT), https://www.oklahoman.com/story/news/2021/04/29/oklahoma-governor-kevin-stitt-decides-critical-race-theory-ban/7398125002/.

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framed CRT as rooted in Marxism.[203] In light of the foregoing evidence, the second, third, and fourth factors likely establish a genuine issue of fact as to a "camouflaged"[204] discriminatory intent motivating H.B. 1775.

V. Conclusion

A legitimate state interest was likely not the motivation behind H.B. 1775. Instead, Oklahoma likely enacted H.B. 1775 to remain lockstep with anti-CRT partisan politics. The absence of specific Oklahoma examples and abnormal promulgation of H.B. 1775 "reeks"[205] of a discriminatory purpose. The vague statutory language and likely arbitrary enforcement substantiate the unconstitutional nature of H.B. 1775. Repealing H.B. 1775 will ensure it evades addition to Oklahoma's growing list of unconstitutional legislation.[206]

Jennie A. Hill

203. *Id.*; Amended Complaint at 52–53, Black Emergency Response Team v. O'Connor, No. 21-cv-01022 (W.D. Okla. Nov. 9, 2021) (highlighting examples of Oklahoma legislators describing tenets of CRT as "racist, Marxist concepts").

204. Smith v. Town of Clarkton, 682 F.2d 1055, 1066 (4th Cir. 1982).

205. H.B. 1775 Education Committee Hearing, *supra* note 1, at 10:41:13 AM (statement of Sen J.J. Dossett).

206. Carmen Forman, *Oklahoma's Legislature Has a History of Passing Unconstitutional Laws*, OKLAHOMAN (May 2, 2021, 6:00 AM CT), https://www.oklahoman.com/story/news/2021/05/02/oklahoma-legislature-passes-unconstiutional-laws/72527890021/ (discussing the Oklahoma Legislature's propensity to enact unconstitutional legislation).

https://digitalcommons.law.ou.edu/olr/vol75/iss2/6