

COMPULSORY COLOR-BLINDNESS VERSUS THE FIRST AMENDMENT: PROTECTING CULTURALLY RESPONSIVE INSTRUCTION IN THE AGE OF ANTI-CRITICAL RACE THEORY HYSTERIA*

I. INTRODUCTION

“Who knows who might be the target of the well-read man?”¹ It appears conservative legislators fear it will be them. In May 2021, the first of a wave of politicians passed laws restricting discussions of race and racism in classrooms across the country.² These laws and policies began as a political response to the 2020 racial reckoning in the United States.³ Conservative activists turned their attention to critical race theory (CRT), “a practice of interrogating the role of race and racism in society,”⁴ and attempted to

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1. RAY BRADBURY, *FAHRENHEIT* 451, at 56 (Simon & Schuster Paperbacks, 60th Anniversary ed. 2018) (1951).

2. Eesha Pendharkar, *The Evolution of the Anti-CRT Movement: A Timeline*, EDUCATIONWEEK (Dec. 13, 2022), <https://www.edweek.org/leadership/the-evolution-of-the-anti-crt-movement-a-timeline/2022/12> [<https://perma.cc/84HD-57QY>] (“The first three divisive concepts laws were passed in Oklahoma, Tennessee, and Texas in May 2021.”).

3. Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021), <https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory> [<https://perma.cc/F8D8-U63H>] (explaining the history of racism, CRT—founded upon ideas of Derrick Bell, NAACP Legal Defense and Educational Fund attorney—and conservative lawmakers’ fixation on CRT as a response to Americans “reckoning” with systemic racism after George Floyd’s murder).

4. Janel George, *A Lesson on Critical Race Theory*, ABA (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/ [<https://perma.cc/42XE-MR3D>]; see also Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/article/what-is-critical-race-theory.html> [<https://perma.cc/KX7P-QMWH>] (“[CRT] is a way of seeing, attending to, accounting for, tracing and analyzing the ways that race is produced, . . . the ways that racial inequality is facilitated, and the ways that our history has created these inequalities that now can be almost effortlessly reproduced unless we attend to the existence of these inequalities.” (quoting Professor of Law Kimberlé Williams Crenshaw, UCLA Sch. of L. & Columb. L. Sch.)); Derrick A. Bell, *Who’s Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893, 898 (“[C]ritical race theory is a body of legal scholarship, . . . a majority of whose members are both existentially people of color and ideologically committed to the struggle against racism, particularly as institutionalized in and by law.” (footnote omitted)). But see, e.g., James Lindsay, *What Is Critical Race Theory?*, PRAGERU (Apr. 26, 2021), https://www.prageru.com/video/what-is-critical-race-theory?gclid=Cj0KCQiAtOmsBhCnARIsAGPa5yZN7YbsjUKXC9Ljew-18iFz6y3zRgKfnM3pqxRHWHFIEwqyJcuibmAaAr9mEALw_wcB [<https://perma.cc/M62W-RPBG>] (“Critical Race Theory holds that the most important thing about you is your race. The color of your skin. That’s who you are. Not your behavior. Not your values. Not your environment. Your race. In Critical Race Theory, if you are a member of a ‘minoritized’ racial group, . . . you are a victim of a system that is rigged against you, a system that doesn’t want you to succeed. On the other hand, if your race is ‘privileged,’ you’re an exploiter—whether you intend to be or not.”).

“turn it toxic” by ascribing to it definitions of “Black-supremacist racism” and “wokeness.”⁵ Public schools, from kindergarten to universities, became the center of this culture war, and restrictions on “wokeness” spread like wildfire through 138 school districts by September of 2022, requiring schools to remove books and curb diversity of thought in classrooms.⁶

These prohibitions focus on books and curricula representing diverse experiences—for example, of the 1,648 books that were banned between July 2021 and June 2022, 674 have either prominent LGBTQ+ characters or LGBTQ+ themes, 659 have prominent characters of color, and 338 explicitly address race and racism.⁷ Discussions of race and racism, gender identity, and diversity have been chilled from elementary schools to universities.⁸

At the same time, school populations are becoming more diverse.⁹ As of May 2021, white students made up forty-five percent of the student population in public kindergarten to twelfth grade (“K to 12”) schools, while Black and Hispanic students made up forty-three percent.¹⁰ Despite this increase in diversity, conservative legislators would mandate the teaching of a whitewashed curriculum that limits discussions of “racism, sexism, and issues of systemic inequality”¹¹ and that is not designed to facilitate the success of diverse members of the student body.¹² Despite the increasing diversity of student populations in public schools, one study found that one in four teachers have been told by district or school leaders to limit classroom discussions on political and

5. Cobb, *supra* note 3 (“As Christopher F. Rufo, an activist who launched the recent crusade, said on Twitter, the goal from the start was to distort the idea into an absurdist touchstone. . . . Accordingly, C.R.T. has been defined as Black-supremacist racism, false history, and the terrible apotheosis of wokeness. Patricia Williams, one of the key scholars of the C.R.T. canon, refers to the ongoing mischaracterization as ‘definitional theft.’” (first citing Christopher F. Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021, 3:14 PM), <https://twitter.com/realchrisrufo/status/1371540368714428416> [https://perma.cc/KPE3-N45G]; and then quoting Patricia Williams, Professor of L., Ne. U. Sch. of L.)); see also Matt Gonzales, *The Meaning of ‘Woke’*, SHRM (July 29, 2023), <https://www.shrm.org/topics-tools/news/all-things-work/the-meaning-of-woke-> [https://perma.cc/4Y69-DJHA] (defining “wokeness” as being “alert to racism” and explaining how the term “woke” became divisive through mocking use of the term by those opposed to social movements).

6. Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement To Censor Books in Schools*, PEN AM. (Sept. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/> [https://perma.cc/SWZ4-268S].

7. *Id.*

8. See UCLA SCH. OF L., *CRT Forward Tracking Project*, CRT FORWARD, <https://crtforward.law.ucla.edu/map/> [https://perma.cc/WC8G-X8VR] (select “View data in the table”) (last visited Apr. 17, 2024) (tracking anti-CRT legislative efforts at the state, local, and federal levels and showing 777 policies and laws introduced as of November 17, 2023).

9. INST. OF EDUC. SCIS., U.S. DEP’T OF EDUC., *REPORT ON THE CONDITION OF EDUCATION 2023*, at 14 (2023), <https://nces.ed.gov/pubs2023/2023144rev.pdf> [https://perma.cc/5FWQ-47T2].

10. *Id.*

11. Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUCATIONWEEK (June 13, 2023) [hereinafter Schwartz, *Map*], <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [https://perma.cc/7WWK-G82L]. See *infra* Part IIA for a discussion of anti-CRT laws and their effect on teacher ability to discuss race in classrooms.

12. GENEVA GAY, *AT THE ESSENCE OF LEARNING: MULTICULTURAL EDUCATION* 84 (1994) [hereinafter GAY, *AT THE ESSENCE OF LEARNING*].

social issues—specifically race, racism, and bias.¹³ Many teachers have been effectively silenced when it comes to these “controversial” topics, unable to teach for fear of retaliation, firing, and even civil or criminal liability.¹⁴

When enjoining enforcement of Florida’s Stop W.O.K.E. Act in the university setting, one federal judge described this politicization of speech in schools as something out of a dystopian novel: “‘It was a bright cold day in April, and the clocks were striking thirteen,’ and the powers in charge of Florida’s public university system have declared the State has unfettered authority to muzzle its professors in the name of ‘freedom.’”¹⁵ The chilling effect of these laws¹⁶ is antithetical to First Amendment principles of academic freedom and free speech.¹⁷

Specifically, the chilling effect on culturally responsive instruction—a pedagogy that focuses on embracing students’ diverse cultural experiences¹⁸—harms minority student academic outcomes¹⁹ and minority students’ development, particularly because the removal of their experiences “has the sanction of the law.”²⁰ In contrast, teaching a rich multicultural curriculum benefits all students intellectually and psychologically.²¹

This Comment begins by explaining the development and effects of anti-CRT laws in Part II.A. Part II.B discusses the importance of culturally responsive teaching for minority students—students of different ethnic and racial backgrounds than the majority European American student and teacher population in the United States.²² Part II.C

13. ASHLEY WOO, REBECCA L. WOLFE, ELIZABETH D. STEINER, SY DOAN, REBECCA ANN LAWRENCE, LISA BERTIE, LUCAS GREER, ALLYSON D. GITTENS & HEATHER L. SCHWARTZ, RAND CORP., WALKING A FINE LINE—EDUCATORS’ VIEWS ON POLITICIZED TOPICS IN SCHOOLING 19 (2022).

14. See *infra* notes 36–45 and accompanying text.

15. *Pernell v. Fla. Bd. of Governors*, 641 F. Supp. 3d 1218, 1229–30 (N.D. Fla. 2022) (footnote omitted) (quoting GEORGE ORWELL, 1984, at 1 (1961)).

16. See *infra* notes 36–44 and accompanying text for a discussion of the effects of anti-CRT laws on teachers.

17. See *infra* Part II.D for a discussion of how courts have applied the First Amendment to teachers’ speech in public schools, including the doctrines of academic freedom, government employee speech, student speech standards, and students’ “right to know.”

18. Madeline Will & Ileana Najarro, *What Is Culturally Responsive Teaching?*, EDUCATIONWEEK (Apr. 18, 2022), <https://www.edweek.org/teaching-learning/culturally-responsive-teaching-culturally-responsive-pedagogy/2022/04> [<https://perma.cc/2RZB-GW22>].

19. George, *supra* note 4.

20. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). This phrase originated in the *Plessy v. Ferguson* dissent: “The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.” 163 U.S. 537, 560 (1896) (Harlan, J., dissenting). In *Brown*, the Kansas district court made findings of fact that segregation damaged Black child development: “A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of [Black] children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.” *Brown*, 347 U.S. at 494 (first and third alterations in original). Nevertheless, the Kansas court ruled against the Black plaintiffs. *Id.*

21. GENEVA GAY, CULTURALLY RESPONSIVE TEACHING: THEORY, RESEARCH, AND PRACTICE 33 (3d ed. 2018) [hereinafter GAY, CULTURALLY RESPONSIVE TEACHING].

22. See Geneva Gay, *Acting on Beliefs in Teacher Education for Cultural Diversity*, 61 J. TCHR. EDUC. 143, 143 (2021) [hereinafter Gay, *Acting on Beliefs*]. In the 2019–2020 school year, fifty-five percent of traditional public schools had a majority white student population. INST. OF EDUC. SCIS., U.S. DEP’T OF EDUC.,

discusses the legal significance of sociological studies, as relied upon in *Brown v. Board of Education*.²³ Part II.D outlines the existing First Amendment doctrines that govern speech in public schools, including academic freedom, government employee speech, student speech standards, and students' right to know, in Parts II.D.1, II.D.2, II.D.3, and II.D.4, respectively. The Overview concludes in Part II.E with one example of the early challenges to anti-CRT laws in the Northern District of Florida.

Section III critiques current First Amendment protections for teachers' in-classroom speech and proposes a new framework to protect teacher speech. It begins in Part III.A with an argument that *Brown v. Board of Education* provides support for the incorporation of sociological studies, like those showing the necessity of culturally responsive instruction, in legal analysis. Part III.B.1 addresses the shortcomings of the public employee speech doctrine as applied to teachers. Part III.B.2 argues that student speech standards are inappropriately applied to teachers. Finally, Part III.B.3 proposes that teacher speech should be constitutionally protected when it is tied to legitimate pedagogical concerns, specifically the need for culturally responsive instruction. Ultimately, this Comment argues that protections for teacher speech aimed at fostering the success of *all* students must outweigh states' attempts to impose their own "orthodoxy of viewpoints" to the detriment of the nation's youth.²⁴

II. OVERVIEW

A. *Regulating Curricular Speech in the Age of Anti-CRT Hysteria*

Critical race theory began dominating newscasts in 2020, after protests erupted following the murder of George Floyd at the hands of Minneapolis police.²⁵ Corporations and public and private organizations responded to pressure to speak out against systemic racism, both within their own organizations and in American society as a whole, by promising antibias trainings and diversity initiatives.²⁶ This public acknowledgement of the systemic racism pervasive in the United States was met with an "emphatic backlash."²⁷

CRT became a flashpoint of conversation for conservatives when journalist Christopher F. Rufo published an article about the city of Seattle's antibias training.²⁸ He

REPORT ON THE CONDITION OF EDUCATION 2023, at 14 (2023), <https://nces.ed.gov/pubs2023/2023144rev.pdf> [<https://perma.cc/WDZ6-TZD4>].

23. 347 U.S. at 494 & n.11.

24. *Pernell v. Fla. Bd. of Governors*, 641 F. Supp. 3d 1218, 1291 (N.D. Fla. 2022).

25. See Daniel Bergner, *Daring To Speak Up About Race in a Divided School District*, N.Y. TIMES MAG. (Jun. 15, 2023), <https://www.nytimes.com/2022/09/06/magazine/leland-michigan-race-school.html> [<https://perma.cc/2UPU-NDZY>].

26. *Id.*

27. *Id.*

28. 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> [<https://perma.cc/X77W-Q2YM>]. In the summer of 2020, Rufo wrote, "Under the banner of 'antiracism,' Seattle's Office of Civil Rights is now explicitly endorsing principles of segregationism, group-based guilt, and race essentialism—ugly concepts that should have been left behind a century ago." *Separate But Equal*, CHRISTOPHER F. RUFO (July 29, 2020), <https://christopherrufo.com/p/separate-but-equal> [<https://perma.cc/GT46-FJ9V>].

described government diversity and inclusion trainings as “teaching that America is ‘a fundamentally white supremacist nation’ and asserting an oppressive ‘essence of whiteness.’”²⁹ He labeled this “critical race theory cult indoctrination” and called on then-President Trump to take action.³⁰

CRT has been defined as, among other things, the practice of critiquing “the social construction of race and institutionalized racism[, which] perpetuate[s] a racial caste system that relegates people of color to the bottom tiers.”³¹ This framework recognizes the intersectionality of race with other identities, including gender identity, sexuality, and religion.³² It additionally rejects the idea that racism is limited to “a few ‘bad apples.’”³³ Instead, it recognizes that racism, though it may not always be overt, is embedded in our systems, from our laws and public policies to the very structure of our education system.³⁴

Despite the value of open discussions on race and diversity,³⁵ anti-CRT laws throughout the country are stifling those discussions in public school classrooms.³⁶ In September of 2020, then-President Trump issued an executive order³⁷ prohibiting the use of federal funds for “any training on ‘critical race theory,’ ‘white privilege,’ or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil.”³⁸ Though President Biden revoked that executive order the day he took office,³⁹

29. Sam Dorman, *Chris Rufo Calls on Trump To End Critical Race Theory ‘Cult Indoctrination’ in Federal Government*, FOX NEWS (Sep. 2, 2020 12:02 AM EDT), <https://www.foxnews.com/politics/chris-rufo-race-theory-cult-federal-government> [<https://perma.cc/YNU9-P34A>]; see also Bergner, *supra* note 25.

30. Dorman, *supra* note 29.

31. George, *supra* note 4; see also Bell, *supra* note 4, at 898; Richard Delgado & Jean Stefancic, *Critical Race Theory: Past, Present, and Future*, 51 CURRENT L. PROB. 467, 467–68, 480–88 (1998) (crediting Critical scholars Derrick Bell, Richard Delgado, Mari Matsuda, and Kimberlé Crenshaw with early development of CRT and then describing the evolution of CRT to its modern iteration).

32. George, *supra* note 4; see also Bell, *supra* note 4, at 902.

33. George, *supra* note 4.

34. *Id.* (“[C]urrent manifestations of racial inequality in education” include “[t]he predominance of curriculum that excludes the history and lived experiences of Americans of color and imposes a dominant white narrative of history; . . . [s]chool discipline policies that disproportionately impact students of color and compromise their educational outcomes . . . ; [s]chool funding inequities, including the persistent underfunding of property-poor districts, many of which are composed primarily of children of color; and [t]he persistence of racially segregated education.”).

35. See *infra* Part II.B for a discussion of the importance of culturally responsive instruction in classrooms as a means to engage, and foster success in, diverse student populations.

36. See Schwartz, *Map*, *supra* note 11 (collecting statutes); see, e.g., N.D. CENT. CODE ANN. § 15.1-21-05.1 (West 2024) (prohibiting any “instruction relating to critical race theory” in K to 12 school curricula); OKLA. STAT. ANN. tit. 70, § 24-157 (West 2024); GA. CODE ANN. § 20-1-11 (West 2024); see also Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUCATIONWEEK (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05> [<https://perma.cc/9HPD-CE4C>].

37. Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020).

38. Memorandum from Russell Vought, Dir. of Mgmt. & Budget, to the Heads of Exec. Dep’ts & Agencies (Sept. 4, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf> [<https://perma.cc/YBB3-HQNG>].

39. Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 20, 2021).

conservative lawmakers in state and local governments have continued to follow former President Trump's lead.⁴⁰ The hysteria surrounding anti-bias training and education has spread like wildfire. Between January 2021 and December 2022, forty-nine states saw the introduction of bills that would restrict the ways public school teachers can discuss issues surrounding race and gender.⁴¹ Of the 528 anti-CRT measures introduced by state or local authorities, 241 were adopted in twenty-eight states.⁴² According to a 2023 report by the University of California Los Angeles Law School's Critical Race Studies Program, twenty-two million children are affected by anti-CRT measures that have been adopted by state or local governments.⁴³ Restrictions on education continue to be a hot topic for Republican candidates leading up to the 2024 presidential election.⁴⁴

These anti-CRT laws⁴⁵ require school boards, districts, and schools to design guidelines to ensure compliance.⁴⁶ They have led to books being removed from school

40. Olivia B. Waxman, *Exclusive: New Data Shows the Anti-Critical Race Theory Movement is 'Far from Over'*, TIME (Apr. 6, 2023, 5:00 AM EDT), <https://time.com/6266865/critical-race-theory-data-exclusive/> [<https://perma.cc/8AAX-RRUD>].

41. See TAIJHA ALEXANDER, LA TOYA BALDWIN CLARK, KYLE REINHARD & NOAH ZATZ, UCLA SCH. OF L., CRT FORWARD: TRACKING THE ATTACK ON CRITICAL RACE THEORY 4 (2023), https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf [<https://perma.cc/Y98X-4M4V>]; see also Sarah Schwartz, *Map, supra* note 11; see, e.g., GA. CODE ANN. § 20-1-11 (West 2024) (prohibiting employees from advocating for divisive concepts); IDAHO CODE ANN. § 33-138 (West 2024) (prohibiting public schools from compelling students to "personally affirm, adopt, or adhere to" tenets of critical race theory); TEX. EDUC. CODE ANN. § 28.0022 (West 2024) (requiring teachers who choose to discuss certain topics to do so "objectively and in a manner free from political bias" and prohibiting districts from awarding credit to students for work with organizations engaging in policy advocacy or political activism).

42. ALEXANDER ET AL., *supra* note 41, at 20.

43. *Id.* at 21–22.

44. See Libby Stanford, *WATCH: 5 Key Takeaways on Education from the 1st GOP Presidential Debate*, EDUCATIONWEEK (Aug. 24, 2023), <https://www.edweek.org/policy-politics/watch-5-key-takeaways-on-education-from-the-1st-gop-presidential-debate/2023/08> [<https://perma.cc/C3PL-PKCB>]. At the first Republican presidential debate in 2023, Florida Governor Ron DeSantis attributed the decline in the nation's education system to "indoctrination," and touted his achievements of eliminating CRT and gender ideology from K to 12 schools. *Id.* Donald Trump has proposed an education plan that would cut federal funding for schools that teach "Critical Race Theory, gender ideology, or other inappropriate racial, sexual, or political content onto our children." *President Trump's Plan To Save American Education and Give Power Back to Parents*, TRUMP: MAKE AM. GREAT AGAIN! 2024 (Jan. 26, 2023), <https://www.donaldjtrump.com/agenda47/president-trumps-plan-to-save-american-education-and-give-power-back-to-parents> [<https://perma.cc/GU9P-Y5FV>]; see also Meridith McGraw, *Trump Unveils New Education Policy Loaded with Culture War Proposals*, POLITICO (Jan. 26, 2023, 5:37 PM EST), <https://www.politico.com/news/2023/01/26/trump-unveils-education-policy-culture-war-00079784> [<https://perma.cc/4MK3-P974>].

45. See, e.g., OKLA. STAT. ANN. tit. 70, § 24-157 (West 2024); GA. CODE ANN. § 20-1-11(c), (e) (West 2024) (requiring "local board[s] of education, local school superintendent[s], and the governing bod[ies] of each charter school" to ensure compliance with its anti-CRT law and "adopt a complaint resolution policy"); FLA. STAT. ANN. § 1000.05(6)(a)–(b) (West 2024) (requiring the Florida State Board of Education and the Florida Board of Governors to "adopt rules to implement" the anti-CRT law in school districts and universities, respectively).

46. See, e.g., OKLA. STATE SCH. BDS. ASS'N, GUIDANCE: HOUSE BILL 1775 (2022), <https://www.ossba.org/wp-content/uploads/2021/06/HB-1775-Guidance.pdf> [<https://perma.cc/7U24-873X>] (explaining H.B. 1775, in force as OKLA. STAT. ANN. tit. 70, § 24-157, giving examples of what is and is not allowed under each prohibition, and explaining what kinds of policies districts must pass to comply with the law); PENNCREST SCH. DIST., POLICY 119, CURRENT EVENTS/CONTROVERSIAL ISSUES (2022), <https://go.boarddocs.com/pa/pncr/Board.nsf/goto?open&id=C7PFB63E4754> [<https://perma.cc/3KUZ-CXZL>]

and classroom libraries,⁴⁷ teachers being fired for discussing current events,⁴⁸ parents filing lawsuits challenging lessons regarding race,⁴⁹ and teachers fearfully self-censoring to avoid harsh penalties.⁵⁰ For example, some teachers are afraid to celebrate Black History Month or teach core history lessons like Dr. Martin Luther King, Jr.'s "Letter from a Birmingham Jail," because they might run afoul of their states' anti-CRT laws.⁵¹

Oklahoma enacted its anti-CRT law on July 1, 2021,⁵² and later that school year, an Oklahoma teacher resigned after a parent filed a complaint and called for the teacher's criminal prosecution after she posted a QR code on a covered classroom bookshelf.⁵³ The QR code directed students to the Brooklyn Public Library's Books Unbanned

(assigning the district's assistant superintendent responsibility for establishing procedures to enforce district's anti-CRT policy); *see also* Schwartz, *Map*, *supra* note 11 (explaining that "divisive concepts" prohibitions originated with President Trump's 2020 executive order, which was revoked by President Biden, and that "Republican state lawmakers have continued their crusade against 'critical race theory' . . . [by] introducing more bills that attempt to regulate how teachers can discuss racism, sexism, and issues of systemic inequality in the classroom").

47. *See, e.g.*, Joe Hernandez, *An Oklahoma Teacher Gave Her Students Access to Banned Books. Now She's Under Scrutiny*, NPR (Sept. 1, 2022, 8:41 PM), <https://www.npr.org/2022/09/01/1120576731/an-oklahoma-teacher-gave-her-students-access-to-banned-books-now-shes-under-scrutiny> [https://perma.cc/4U5B-7Z32]. In an interview, an Oklahoma teacher explained she covered her classroom bookshelves with red paper with the hand-written label, "Books the state doesn't want you to read," in response to the passing of House Bill 1775. Max Brian, *Walters Asks State Board To Revoke Former NPS Teacher's Certificate*, NORMAN TRANSCRIPT (Aug. 31, 2022), https://www.normantranscript.com/news/walters-asks-state-board-to-revoke-former-nps-teachers-certificate/article_546ab96e-293d-11ed-a184-d3d4f8cae8f.html [https://perma.cc/6Q7B-33YX]; *see also* OKLA. STAT. ANN. tit. 70, § 24-157.

48. *See, e.g.*, Eesha Pendharkar, *He Taught About White Privilege and Got Fired. Now He's Fighting To Get His Job Back*, EDUCATIONWEEK (Oct. 16, 2023), <https://www.edweek.org/teaching-learning/he-taught-about-white-privilege-and-got-fired-now-hes-fighting-to-get-his-job-back/2021/09> [https://perma.cc/K9CH-K9BU].

49. *See, e.g.*, Complaint, *Parents' Choice Tenn. v. Golden*, No. 22CV-51642 (Tenn. Ch. Jul. 8, 2022) (suing the superintendent, assistant superintendent, Commissioner of Education, and board of education for violations of Tennessee's anti-CRT legislation); *see also* Sarah Schwartz, *Conservative Parent Group Sues School District Over Curriculum that Discusses Race and Gender*, EDUCATIONWEEK (July 26, 2022), <https://www.edweek.org/policy-politics/conservative-parent-group-sues-school-district-over-curriculum-that-discusses-race-and-gender/2022/07> [https://perma.cc/H7RB-47TB] (discussing state court lawsuit where parent group is suing education officials over curriculum under Tennessee's law that "prohibits schools from using materials that portray the United States as 'fundamentally or irredeemably racist or sexist,' or materials that aim to make students feel 'discomfort, guilt, anguish, or another form of psychological distress' because of their race or sex"). The case was dismissed for lack of standing and is on appeal as of the writing of this Comment. *See* Brief of Appellants, *Parents' Choice Tenn. v. Golden*, No. M-2022-01719-COA-R3-CV, 2023 WL 4744799 (Tenn. Ct. App. July 5, 2023).

50. *See* Eesha Pendharkar, *Legal Challenges to 'Divisive Concepts' Laws: An Update*, EDUCATIONWEEK (Oct. 17, 2022), <https://www.edweek.org/policy-politics/legal-challenges-to-divisive-concepts-laws-an-update/2022/10> [https://perma.cc/JQD3-F973] ("But most teachers haven't been teaching those ideas in classrooms, anyway. It's the fear caused by the vague wording of the laws and the threat of consequences that's causing teachers to self-censor."); *see also* Olivia B. Waxman, *Anti-'Critical Race Theory' Laws Are Working. Teachers Are Thinking Twice About How They Talk About Race*, TIME (June 30, 2022, 12:37 PM), <https://time.com/6192708/critical-race-theory-teachers-racism/> [https://perma.cc/MXK2-XGBK].

51. Waxman, *supra* note 50.

52. OKLA. STAT. ANN. tit. 70, § 24-157 (West 2024).

53. Hernandez, *supra* note 47; Lisa Tolin, *Oklahoma Teacher Is Still Fighting Book Bans, Now from Brooklyn*, PEN AM., <https://pen.org/oklahoma-teacher-summer-boismier/> [https://perma.cc/8NGZ-W67Z] (last visited Apr. 17, 2024).

Project, a website that provides free access to books that are banned in public schools.⁵⁴ After her resignation, Oklahoma's then-Secretary of Education called on the state Board of Education to revoke her teaching certificate, claiming that "[t]here is no place for a teacher with a liberal political agenda in the classroom."⁵⁵

Some of these laws, like Florida's Educational Equity Act (also known as the "Stop W.O.K.E. Act"),⁵⁶ limit discussion of race and gender not only in K to 12 schools, but even at the university level.⁵⁷ The Stop W.O.K.E. Act does this under the guise of prohibiting discrimination⁵⁸— it defines discrimination in education as "espous[ing], promot[ing], advanc[ing], inculcat[ing], or compel[ling]" students to believe

1. Members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex.
2. A person, by virtue of his or her race, color, national origin, or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
3. A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex.
4. Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex.
5. A person, by virtue of his or her race, color, national origin, or sex, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex.
6. A person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.
7. A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.
8. Such virtues, such as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by

54. Hernandez, *supra* note 47.

55. Superintendent Ryan Walters (@RyanWaltersSupt), Twitter (Aug. 31, 2022, 10:52 AM), https://twitter.com/sec_walters/status/1564989584450150401/photo/1 [<https://perma.cc/KY3K-AFHH>]; see also Nuria Martinez-Keel, *Ryan Walters Calls To Revoke Certification of Norman Teacher Who Resigned Over HB 1775*, OKLAHOMAN (Aug. 31, 2022, 5:24 PM CT), <https://www.oklahoman.com/story/news/education/2022/08/31/ryan-walters-calls-to-revoke-former-norman-teacher-summer-boismier-certification/65466233007/> [<https://perma.cc/Y7H3-HJZQ>].

56. See Brooke Migdon, *What is DeSantis's 'Stop WOKE Act'?* THE HILL (Aug. 19, 2022), <https://thehill.com/changing-america/respect/diversity-inclusion/3608241-what-is-desantiss-stop-woke-act/>

57. See FLA. STAT. ANN. § 1000.05 (West 2024) (defining discrimination as "subject[ing] any student or employee to training or instruction that espouses, promotes, advances, inculcates, or compels such student or employee to believe any" concept relating to critical race theory).

58. See Jeannie Suk Gersen, *Address, Academic Freedom and Discrimination in a Polarizing Time*, 59 HOUS. L. REV. 781, 797 (2022) ("Anti-'CRT' advocates appear to think that they are fighting against discrimination.").

members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.⁵⁹

The Stop W.O.K.E. Act allows for criticism or objective discussions of the existence of the enumerated concepts but prohibits endorsement of them.⁶⁰

When the law was challenged in court, Florida's own legal counsel conceded during oral argument that the sixth concept refers to affirmative action.⁶¹ Thus, the law prohibits endorsement of affirmative action,⁶² but teachers must somehow still teach students to analyze the Supreme Court's affirmative action decisions and their effects "on law, liberty and the interpretation of the U.S. Constitution."⁶³ For example, a high school teacher who is required to assign the reading of a Supreme Court opinion in support of affirmative action may discuss the mere fact that the concept exists or criticize the case as being wrongly decided.⁶⁴ But a teacher would violate Florida's law if she expresses agreement with the Burger Court's,⁶⁵ Rehnquist Court's,⁶⁶ or the early Roberts Court's⁶⁷ assessments of the compelling interest a university has in diversity.⁶⁸

In a separate section of the state's education code that prescribes required instruction, Florida also prohibits any K to 12 instruction inconsistent with six "principles of individual freedom."⁶⁹ These include

59. § 1000.05(4)(a).

60. *Id.* § 1000.05(4)(b).

61. *Pernell v. Fla. Bd. of Governors*, 641 F. Supp. 3d 1218, 1234 (N.D. Fla. 2022). In explaining that concept six prohibits any discussion endorsing affirmative action, the court noted that if a law school class hosted Justice Sotomayor as a guest speaker and she expressed an opinion "praising the affirmative action that opened a 'special door' for her, Justice Sotomayor [will have] expressed a viewpoint that the State of Florida deems repugnant and has prohibited. Under the [Individual Freedom Act], her words would be *per se* discrimination." *Id.*

62. § 1000.05(4)(a).

63. FLORIDA'S STATE ACADEMIC STANDARDS—SOCIAL STUDIES, GRADE: 9–12, Benchmark SS.912.A.7.8, at 122 (2023), <https://www.fldoe.org/core/fileparse.php/20653/urlt/6-4.pdf> [<https://perma.cc/5Z7G-L57H>]; see also *id.* Benchmark SS.912.CG.3.11, at 152.

64. See § 1000.05(4)(a), (b).

65. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314–15 (1978) ("As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest" (citing *In re Griffiths*, 413 U.S. 717, 721–22 (1973))).

66. See *Gutter v. Bollinger*, 539 U.S. 306, 331–33 (2003) ("This Court has long recognized that 'education . . . is the very foundation of good citizenship.' . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." (first omission in original) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954))).

67. See *Fisher v. Univ. of Tex.*, 579 U.S. 365, 376–77 (2016) ("Once . . . a university gives 'a reasoned, principled explanation' for its decision, deference must be given 'to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.'" (quoting *Fisher v. Univ. of Tex.*, 570 U.S. 297, 310–11 (2013))).

68. See § 1000.05(4)(a), (b). In 2023, the Supreme Court found that a race-based admissions policy designed to increase diversity, though a "commendable goal[,] . . . was not "sufficiently coherent" or measurable to satisfy strict scrutiny's compelling interest standard. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2160 (2023). The Court did not go so far as to say its affirmative action precedent was wrongly decided. *Id.* at 2163–65. Rather, it emphasized the need for "meaningful end points," and the universities' failures to establish a sufficiently specific compelling interest and "a meaningful connection between the means they employ and the goals they pursue." *Id.* at 2167, 2175.

69. § 1003.42.

- (a) No person is inherently racist, sexist, or oppressive, whether consciously or unconsciously, solely by virtue of his or her race or sex.
- (b) No race is inherently superior to another race.
- (c) No person should be discriminated against or receive adverse treatment solely or partly on the basis of race, color, national origin, religion, disability, or sex.
- (d) Meritocracy or traits such as a hard work ethic are not racist but fundamental to the right to pursue happiness and be rewarded for industry.
- (e) A person, by virtue of his or her race or sex, does not bear responsibility for actions committed in the past by other members of the same race or sex.
- (f) A person should not be instructed that he or she must feel guilt, anguish, or other forms of psychological distress for actions, in which he or she played no part, committed in the past by other members of the same race or sex.⁷⁰

The section allows teachers to discuss, “in an age-appropriate manner, how the freedoms of persons have been infringed by sexism, slavery, racial oppression, racial segregation, and racial discrimination.”⁷¹ Such instruction, however, “may not be used to indoctrinate or persuade students to a particular point of view inconsistent with the principles of this subsection or state academic standards.”⁷²

Florida’s Stop W.O.K.E. Act and similar laws around the country are being challenged on the grounds that they are viewpoint-based restrictions that are unconstitutionally vague and have the effect of chilling speech in the classroom.⁷³ The challenges rest on students’ First Amendment rights to receive information, teachers’ First Amendment rights of free speech and academic freedom, First Amendment doctrines of overbreadth and vagueness, and the Equal Protection Clause.⁷⁴ This Comment focuses only on the free speech and academic freedom doctrines as a means to protect culturally responsive instruction.

70. *Id.*

71. *Id.*

72. *Id.*

73. See, e.g., *Falls v. DeSantis*, 609 F. Supp. 3d 1273, 1287 (N.D. Fla. 2022) (denying motion for preliminary injunction for lack of standing but noting that the court “is not determining whether the challenged regulations are constitutional, morally correct, or good policy”); Amended Complaint at 20–27, *Black Emergency Response Team v. O’Connor*, No. 21-cv-1022 (W.D. Okla. Nov. 9, 2021) [hereinafter Complaint, *Black Emergency Response Team*] (challenging Oklahoma’s H.B. 1775 as unconstitutionally vague and overbroad and as an impermissible viewpoint-based restriction on speech); Complaint at 33–41, *Mejia v. Edelbut*, No. 21-cv-01077 (D.N.H. Dec. 20, 2021) [hereinafter Complaint, *Mejia*] (challenging New Hampshire’s Banned Concepts Act as being unconstitutionally vague); Complaint at 25–28, *Udike v. Jonas*, No. 22-cv-00374 (S.D. Ohio June 29, 2022) [hereinafter Complaint, *Udike*] (challenging Forest Hills School District’s “Resolution to Create a Culture of Kindness and Equal Opportunity for All Students and Staff” as an impermissible content-based restriction that is unconstitutionally overbroad and vague, and violative of students’ First Amendment rights to receive information).

74. See, e.g., *Falls*, 609 F. Supp. 3d at 1281; Complaint, *Black Emergency Response Team*, *supra* note 73, at 6; Complaint, *Mejia*, *supra* note 73, at 1–2.

B. *Culturally Responsive and Culturally Relevant Teaching*

Though CRT dominated headlines and political campaigns beginning in 2020, elementary and secondary public schools were not teaching the theory itself.⁷⁵ Instead, culturally responsive or culturally relevant teaching⁷⁶ has been practiced since the 1990s.⁷⁷ These instructional methods allow educators to “incorporate students’ cultural identities and lived experiences into the classroom as tools for effective instruction.”⁷⁸ Culturally relevant teaching “helps students of color see themselves and their communities as belonging in schools and other academic spaces, leading to more engagement and success.”⁷⁹ The pedagogy was introduced in response to a pattern in public schools of undervaluing minority students’ potential to achieve academic success.⁸⁰

These pedagogical approaches address the reality that students will not achieve academically where their diverse backgrounds are ignored or where they “do not see themselves reflected in the curriculum.”⁸¹ Most curricula are taught from Eurocentric, culturally blind, frameworks,⁸² even though evidence demonstrates that multicultural curricula contribute to greater academic success.⁸³ These culturally blind frameworks rest, in part, on the idea “that education has nothing to do with cultures and heritages,” but “is about teaching intellectual, vocational, and civic skills.”⁸⁴ They ignore the lived experiences of minority students, expecting all students to conform to one teaching

75. Bryan Anderson, *Critical Race Theory Is a Flashpoint for Conservatives, but What Does It Mean?*, PBS (Nov. 4, 2021, 9:18 AM EST), <https://www.pbs.org/newshour/education/so-much-buzz-but-what-is-critical-race-theory> [<https://perma.cc/2TQ2-6ZHY>].

76. The differences between culturally relevant and culturally responsive teaching—two independent methodologies—are outside the scope of this Comment, which will use the term “culturally responsive instruction” to refer to the pedagogy that reaches diverse students by incorporating and understanding their diverse experiences, backgrounds, and identities. See Felicia Moore Mensah, Guest Editorial, *Culturally Relevant and Culturally Responsive: Two Theories of Practice for Science Teaching*, 58 SCI. & CHILD., Mar.–Apr. 2021, at 10, 10–12 for a discussion on the importance of both approaches.

77. Will & Najarro, *supra* note 18.

78. *Id.*

79. *Id.*

80. *Id.*

81. Mensah, *supra* note 76, at 12 (discussing the importance of culturally relevant and culturally responsive teaching in science classrooms and the effect on students of making science more accessible, meaningful, and engaging).

82. GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 28; see also Greg Wiggan & Marcia J. Watson, *Teaching the Whole Child: The Importance of Culturally Responsiveness, Community Engagement, and Character Development in High Achieving African American Students*, 48 URBAN REV. 766, 768 (2016) (“In public schools, students are not provided many opportunities to learn about multicultural perspectives in literature, art, history, civics, social studies, and science classes; all the while, European history and perspectives are taken as the norm.”).

83. See Wiggan & Watson, *supra* note 82, at 769, 773 (explaining that “incorporating multicultural perspectives in state curriculum standards” will “better include non-White students in today’s schools” and “that students show academic gains when they receive high quality instruction from a culturally responsive teacher”); Thomas S. Dee & Emily Penner, *The Causal Effects of Cultural Relevance: Evidence from an Ethnic Studies Curriculum*, 54 AM. EDUC. RSCH. ASS’N 127, 129 (2017) (studying the effects of a ninth-grade ethnic studies course in a California school district and finding increases in academic outcomes of diverse, academically at-risk students, including increased attendance, grade point averages, and credits earned).

84. GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 28.

methodology, rather than reaching them through lessons that incorporate and include students' individual lived experiences.⁸⁵

Professor Geneva Gay, a leading researcher and proponent of culturally responsive instruction, has explained that "teaching is most effective when ecological factors, such as prior experiences, community settings, cultural backgrounds, and ethnic identities of teachers and students, are included in its implementation."⁸⁶ As Professor Gay explains, teaching is not a "one size, fits all" practice, and teachers must get to know and learn from their students, so they can "connect[] all the dreams, hopes, skills, experiences, and knowledge students bring to class with deeper and wider ways of knowing."⁸⁷ Moreover, she asserts that "the individuality and humanity of students cannot be genuinely addressed without accepting their diverse ethnic identities and cultural experiences. Race, class, ethnicity, culture, and gender are important components of humanity, and they should not be ignored or neglected in the educational development of individuals in our society."⁸⁸ Professor Gay further notes, "[T]eaching cultural diversity in schools offers intellectual and psychological benefits for both mainstream society" and minorities.⁸⁹

Failing to recognize cultural and experiential differences of students decreases the likelihood of their academic success.⁹⁰ Compounding this problem, minority teachers are severely underrepresented in the profession, and most minority students do not have teachers who understand their lived experiences.⁹¹ In order to reach and connect with all

85. *Id.* ("One of [the notions from which the attitude of 'cultural blindness' stems is] that education has nothing to do with culture and heritages. It is about teaching intellectual, vocational, and civic skills. Students, especially underachieving ones, need to learn knowledge and skills that they can apply in life, and how to meet high standards of academic excellence, rather than wasting time on fanciful notions about cultural diversity. Second, too few teachers have adequate knowledge about how conventional teaching practices reflect European American cultural values. Nor are they sufficiently informed about the cultures of different ethnic groups. Third, most teachers want to do the best for all their students, and they mistakenly believe that to treat students differently because of their cultural orientations is racial discrimination. Fourth, there is a belief that good teaching is transcendent; it is identical for all students, settings, and circumstances. Fifth, there is the claim that education is an effective doorway of assimilation into mainstream society for people from diverse cultural heritages, ethnic groups, social classes, and points of origin. These students need to forget about being different and learn to adapt to U.S. society. The best way to facilitate this process is for all students to have the same experiences in schools.").

86. *Id.*; see also GAY, AT THE ESSENCE OF LEARNING, *supra* note 12, at 84 ("Schools do not present caring and supportive climates conducive to maximum learning for all students when their programs and personnel ignore, distort, or demean culturally pluralistic identities, cultures, or experiences.").

87. GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 28 (quoting WILLIAM AYERS, TO TEACH: THE JOURNEY OF A TEACHER 122 (2d ed. 2001)).

88. GAY, AT THE ESSENCE OF LEARNING, *supra* note 12, at 75-76.

89. GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 33 (citing Lowell K.Y. Chun-Hoon, *Teaching the Asian-American Experience*, in TEACHING ETHNIC STUDIES: CONCEPTS AND STRATEGIES 118, 118-46 (James A. Banks ed., 1973)); see also Complaint, *Mejia*, *supra* note 73, at 57.

90. GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 30.

91. Gay, *Acting on Beliefs*, *supra* note 22, at 144; see also GAY, AT THE ESSENCE OF LEARNING, *supra* note 12, at 87 ("Teachers in the United States are predominantly European-American, middle class, female, in their mid-40s, highly educated (having master's degrees or the equivalent), and living in suburbs or small communities bordering large cities. By comparison, the student population is increasingly composed of children of color, poor children, immigrants, speakers of languages other than English, and children who live in large

students within a diverse population, teachers must take deliberate steps to recognize, understand, and confront challenges related to cultural differences and create strategies to address them.⁹²

C. Legal Significance of Sociological Studies on Culturally Responsive Teaching

While culturally responsive teaching is not tied to a legal doctrine, its import to student learning may be relevant to the legal challenges to anti-CRT laws.⁹³ In *Brown v. Board of Education*, the Supreme Court relied on psychological and sociological studies to support its conclusion that “separate but equal” has no place in our public schools.⁹⁴ It considered the importance of students’ feelings of belonging in their school communities and the detrimental effect a “feeling of inferiority” may have on children’s “hearts and minds.”⁹⁵ Further, the Court explained that “[a] sense of inferiority affects the motivation of a child to learn,” which will inevitably damage the academic progress of Black children and “deprive them of some of the benefits they would receive” in an environment where they were not made to feel inferior.⁹⁶

D. First Amendment Protections for Teachers in Public Schools

Challengers of anti-CRT laws have focused on First Amendment protections for on-campus speech.⁹⁷ Historically, teacher speech has been classified in two categories: classroom or curricular speech and extracurricular (or off-campus) speech.⁹⁸ Where teachers are speaking in the classroom and the speech is arguably curricular in nature, courts have been reluctant to find protection for that speech in the First Amendment.⁹⁹ Rather, the fundamental tradition of deferring to local control to determine what should be taught in the K to 12 classroom has largely outweighed concerns for teachers’ freedom of expression.¹⁰⁰ But courts have blurred the lines between curricular and noncurricular speech as well as in-class and out-of-class expression, “creat[ing] an area of murkiness for teachers and . . . limit[ing] their ability to be innovative in the classroom and responsive to the needs of the school environment.”¹⁰¹

urban areas. The absence of shared living experiences and points of reference is a serious obstacle to successful teaching and learning.” (citation omitted)).

92. Gay, *Acting on Beliefs*, *supra* note 22, at 145–46 (“[T]eachers must believe, and act accordingly, that problems related to teaching for, to, and through cultural diversity cannot be solved until they are recognized and confronted, their causes and characteristics are understood, and deliberate strategies for their resolution are developed.”).

93. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954).

94. *Id.* at 494–95, 494 n.11.

95. *Id.* at 494.

96. *Id.*

97. See *infra* Part I.E for a discussion of early court challenges to anti-CRT laws.

98. Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers’ First Amendment Rights, Time for a New Beginning*, 58 AM. U. L. REV. 1285, 1288 (2009).

99. *Id.*

100. *Id.* at 1289; see also *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.” (citing *Wright v. Council of Emporia*, 407 U.S. 451, 469 (1972))).

101. Wohl, *supra* note 98, at 1290–91.

The Supreme Court laid the foundation for First Amendment protections in classrooms in 1943, when it upheld the right of a student to refuse to say the Pledge of Allegiance, in *West Virginia State Board of Education v. Barnette*.¹⁰² The Court noted that the states, including boards of education, must operate within the confines of the Bill of Rights: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source"¹⁰³ In contrast with the idea that curricular decisions should be left to the control of locally elected political leaders, the Court explained:

Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. . . . One's right to life, liberty, and property, to free speech . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁰⁴

Nine years later, Justice Frankfurter emphasized the important role of teachers and education in our democracy in *Wieman v. Updegraff*.¹⁰⁵ He wrote:

The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.¹⁰⁶

These foundational cases laid the groundwork for future decisions, including those that developed principles of academic freedom and those that grappled with balancing the importance of individual expression with the state's interest in promoting its chosen message.¹⁰⁷

1. Development of the Academic Freedom Doctrine

Principles of academic freedom originated in nineteenth-century Germany, where universities were viewed as places where scholars must pursue and teach truth.¹⁰⁸ In 1902, University of Berlin Professor Friedrich Paulsen explained:

102. 319 U.S. 624 (1943); see also Wohl, *supra* note 98, at 1291.

103. *Barnette*, 319 U.S. at 637.

104. *Id.* at 637–38.

105. 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) (joining with the majority to strike down a state loyalty oath condition upon public employment because it offended due process by inhibiting democratic expression and freedom of movement).

106. *Id.*

107. See Wohl, *supra* note 98, at 1294.

108. Ralph F. Fuchs, *Academic Freedom Its Basic Philosophy, Function, and History*, 28 L. & CONTEMP. PROBS. 431, 435 (1963).

It is no longer, as formerly, the function of the university teacher to hand down a body of truth established by authorities, but to search after scientific knowledge by investigation, and to teach his hearers to do the same. . . . For the academic teacher and his hearers there can be no prescribed and no proscribed thoughts. There is only one rule for instruction: to justify the truth of one's teaching by reason and the facts.¹⁰⁹

In German universities, two forms of academic freedom were recognized—*lehrfreiheit* and *lernfreiheit*.¹¹⁰ *Lehrfreiheit* is the freedom to teach, research, and publish without interference or reproach by the church or state, as well as the freedom for professors to determine the content of their own curriculum.¹¹¹ Similarly, *lernfreiheit* protects students' rights to study and learn what they choose.¹¹²

In the United States, the American Association of University Professors and the Association of American Colleges defined academic freedom principles for the university setting in their 1940 *Statement of Principles on Academic Freedom and Tenure*.¹¹³ The statement provides that teachers must be free to engage in discussions about their subject but should tread carefully when introducing controversial issues that have no relation to that subject.¹¹⁴ The statement does not, however, discourage discussion of "controversial" topics, asserting that "[c]ontroversy is at the heart of the free academic inquiry which the entire statement is designed to foster."¹¹⁵ Rather, it establishes that teachers should avoid "persistently intruding material which has no relation to their subject."¹¹⁶

In post-World War II America, states limited free speech and inquiry in an attempt to protect conservative values against the backdrop of international conflicts and domestic struggles, including struggles related to race and rapid modernization.¹¹⁷ States enacted statutes requiring public employees to make sworn statements that they were not "subversive persons,"¹¹⁸ some even going so far as to require teachers to disclose

109. FRIEDRICH PAULSEN, *THE GERMAN UNIVERSITIES AND UNIVERSITY STUDY* 228 (Frank Thilly & William W. Elwang trans., 1906).

110. *Id.* at 283.

111. Todd A. DeMitchell & Vincent J. Connelly, *Academic Freedom and the Public School Teacher: An Exploratory Study of Perceptions, Policy, and the Law*, 2007 BYU EDUC. & L.J. 83, 87.

112. *Id.*

113. See AM. ASS'N OF UNIV. PROFESSORS (AAUP), *STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS* (1970) [hereinafter AAUP 1940 STATEMENT OF PRINCIPLES], <https://www.aaup.org/file/1940%20Statement.pdf> [<https://perma.cc/K4G4-APFU>].

114. *Id.* at 14.

115. *Id.* at 14 n.4. AAUP reevaluated the statement in 1970 and decided to add interpretive comments as footnotes rather than revise the original. 1940 *Statement of Principles on Academic Freedom and Tenure*, AAUP, <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> [<https://perma.cc/RQA5-586A>] (last visited Apr. 17, 2024).

116. AAUP 1940 STATEMENT OF PRINCIPLES, *supra* note 113, at 14 n.4.

117. See Stuart J. Foster & O.L. Davis, Jr., *Conservative Battles for Public Education Within America's Culture Wars: Poignant Lessons for Today from the Red Scare of the 1950s*, 2 LONDON REV. EDUC. 123, 125 (2004).

118. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 236 (1957) (plurality opinion). *Sweezy* involved a challenge to the New Hampshire Subversive Activities Act of 1951, designed to eliminate "subversive persons" (i.e., communists) from government employment. *Id.* at 236 n.1 (citing N.H. REV. STAT. ANN. § 588:1–16 (West 1951) (repealed 1973)).

membership or involvement with *any* organization as a prerequisite for employment.¹¹⁹ Unsurprisingly, challenges to these laws made their way into courts across the country.¹²⁰

In that context, the U.S. Supreme Court first recognized principles of academic freedom, in the 1957 case *Sweezy v. New Hampshire*.¹²¹ The Court recognized that freedom in universities is essential and that the role of professors in guiding the nation's youth is "vital" to democracy.¹²² It explained, "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."¹²³ Additionally, it stressed that it is imperative that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."¹²⁴

Justice Frankfurter's concurrence emphasized that a free society depends on universities being free from government intervention in intellectual life.¹²⁵ He argued that universities have a right to academic freedom that encompasses deciding for themselves which students to accept, what professors to hire, and what subjects to teach.¹²⁶

Just three years later, the Court expanded on First Amendment protections for teachers, proclaiming, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."¹²⁷ Even as applied to a high school teacher, a law that "has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice" cannot withstand constitutional scrutiny.¹²⁸

119. See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 480 (1960). The *Shelton* plaintiffs challenged Act 10 of the Second Extraordinary Session of the Arkansas Legislature of 1958, which required teachers to disclose all organizations with which they were associated. *Id.* at 480–81. The Court held the statute unconstitutionally interfered with freedom of association and went "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." *Id.* at 490.

120. See, e.g., *Sweezy*, 354 U.S. at 235; *Shelton v. McKinley*, 174 F. Supp. 351, 353 (E.D. Ark. 1959) (challenging a statute forcing teachers to sign affidavits listing all organizations to which they belonged or contributed, and including membership in NAACP as prohibitive of employment), *rev'd sub nom. Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Bd. of Regents*, 255 F. Supp. 981, 983–84 (W.D.N.Y. 1966) (challenging New York education law providing grounds for dismissal of teachers based on seditious words or acts), *rev'd*, 345 F.2d 236 (2d Cir. 1965), *rev'd*, 385 U.S. 589 (1967).

121. 354 U.S. at 255 (reversing university professor's conviction for contempt where he refused to answer questions regarding content of his lectures and knowledge of political party because it violated his constitutional rights of academic freedom and political expression).

122. *Id.* at 250.

123. *Id.*

124. *Id.*

125. *Id.* at 262 (Frankfurter, J., concurring).

126. *Id.* at 263 ("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." (quoting CONF. OF REPRESENTATIVES OF UNIV. OF CAPE TOWN & UNIV. OF THE WITWATERSAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA (1957))).

127. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (striking down as overbroad Act 10 of the Second Extraordinary Session of the Arkansas Legislature of 1958, which compelled, as condition of employment, teachers in state-supported schools or colleges to disclose every organization with which they were involved).

128. *Id.* (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Black, J., concurring)).

In the seminal academic 1967 freedom case, *Keyishian v. Board of Regents*, Justice Brennan explained:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools. The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.¹²⁹

Now, over fifty years later, academic freedom is under attack, and a framework for its protection is increasingly necessary.¹³⁰ While the Court has deemed academic freedom a “special concern of the First Amendment,” scholars have criticized the Court’s failure to provide a framework to protect that right¹³¹ or to identify academic freedom as an individual right for educational institutions or teachers.¹³²

As a result, courts are deeply divided when asked to extend academic freedom protections to elementary and secondary teachers.¹³³ But, in 2022, the Supreme Court demonstrated an openness to considering academic freedom for high school teachers in *Kennedy v. Bremerton School District*.¹³⁴ In assessing a high school coach’s right to kneel in prayer on the football field after games, it noted that neither party raised the issue of whether his conduct could have been protected by academic freedom, which could have implicated “‘additional’ First Amendment ‘interests.’”¹³⁵

Though the Supreme Court has not yet found an individual right to academic freedom for K to 12 teachers,¹³⁶ some circuits have found classroom discussions to be

129. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal quotation marks omitted) (first quoting *Shelton*, 364 U.S. at 487; and then quoting *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

130. See Gersen, *supra* note 58, at 790, 795 (discussing the conflict between academic freedom principles and antidiscrimination policies or commitments and noting “the chill that has descended on the classroom since 2007” as a result of “dramatic cultural shifts”).

131. See DeMitchell & Connelly, *supra* note 111, at 84 (quoting *Keyishian*, 385 U.S. at 603); W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish out of Water*, 77 NEB. L. REV. 301, 302–03 (1998) (“Despite the tributes, courts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom.”).

132. Stuller, *supra* note 131, at 314.

133. See *id.* at 303 (“To borrow a wonderful phrase: ‘Lacking definition or guiding principal, the doctrine floats in the law, picking up decisions as a hull does barnacles.’ This analogy would be entirely accurate except that barnacles tend to look somewhat alike while academic freedom cases do not.” (quoting J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L.J. 251, 253 (1989))).

134. 142 S. Ct. 2407, 2424 (2022).

135. *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)).

136. See Stuller, *supra* note 131, at 314; Nathan A. Adams, IV, *Resolving Enmity Between Academic Freedom and Institutional Autonomy*, 46 J. COLL. & UNIV. L. 1, 3 (2021) (“The [academic freedom] liberty is associated with the First and Fourteenth Amendments, but whether it has independent constitutional significance is a source of considerable disagreement due in part to the sorry state of its doctrinal development. A majority of courts now insist that, if an independent liberty, academic freedom is institutional, not withstanding that it

protected speech, beginning as early as the late 1960s.¹³⁷ For instance, in the Fifth Circuit a teacher may not be dismissed for using role-playing to teach American history, even where it “evoke[s] strong student feelings on racial issues.”¹³⁸ Because classroom discussions are protected speech, a teacher may not be discharged in the Fifth Circuit unless the discussions “clearly . . . over-balance (her) usefulness as an instructor.”¹³⁹

Similarly, the First Circuit recognizes that classroom discussions are protected speech.¹⁴⁰ It has found that while “some measure of public regulation of classroom speech is inherent in every provision of public education[,] . . . [t]he general chilling effect of permitting . . . rigorous censorship is even more serious.”¹⁴¹ Based on principles of academic freedom, the court determined that a teacher is protected from discharge for assigning an article that uses a potentially offensive word for the sake of inspiring thought-provoking discussion.¹⁴² Further, the court explained that parents’ sensitivities to particular language or content do not represent the full measure of what is appropriate for education.¹⁴³ A district court in the First Circuit later found, however, that a school district may be free to prohibit the use of certain words or teaching methods, and if a teacher has notice of what is prohibited, his speech may be regulated.¹⁴⁴ Regardless, it found the teacher was denied due process when he was fired because he did not know or have reason to know that his conduct was prohibited.¹⁴⁵ In affirming the district court, the First Circuit explained that it did not intend to depart from its precedent recognizing teachers had some academic freedom protection.¹⁴⁶ But it noted that

free speech does not grant teachers a license to say or write in class whatever they may feel like, and that the propriety of regulations or sanctions must depend on such circumstances as the age and sophistication of the students, the closeness of the relation between the specific technique used and some

was conceptualized originally as protecting faculty from interference by university trustees.” (footnotes omitted)).

137. See, e.g., *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577 (6th Cir. 1976); *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980).

138. *Kingsville Indep. Sch. Dist.*, 611 F.2d at 1113 (finding that, because classroom discussion is protected by the First Amendment, a high school teacher’s constitutional rights were violated when her contract was not renewed as a result of her use of role-playing to teach about the post-Civil War Reconstruction period).

139. *Id.* (omission and alteration in original) (quoting *Kaprelian v. Texas Woman’s Univ.*, 509 F.2d 133, 139 (5th Cir. 1975)).

140. See *Keefe*, 418 F.2d at 361–62.

141. *Id.* at 362 (internal quotation mark omitted).

142. *Id.* at 361.

143. *Id.* at 361–62.

144. *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass. 1971) (“[W]hen a secondary school teacher uses a teaching method which he does not prove has the support of the preponderant opinion of the teaching profession . . . but which he merely proves is relevant to his subject and students, is regarded by experts of significant standing as serving a serious educational purpose, and was used by him in good faith the state may suspend or discharge [him] . . . but it may not resort to such drastic sanctions unless the state proves he was put on notice . . . that he should not use that method. This exclusively procedural protection is afforded to a teacher . . . because in his teaching capacity he is engaged in the exercise of what may plausibly be considered ‘vital First Amendment rights.’” (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967))), *aff’d* 448 F.2d 1242 (1st Cir. 1971) (per curiam).

145. *Id.* at 1393.

146. *Mailloux*, 448 F.2d at 1243.

concededly valid educational objective, and the context and manner of presentation.¹⁴⁷

The Sixth Circuit has also accepted principles of academic freedom for teachers in public education.¹⁴⁸ In *Minarcini v. Strongsville City School District*, the court found it beyond dispute that academic freedom would both protect a teacher's choice to present a book as an important modern American novel and her students' right to hear that opinion and read the book.¹⁴⁹ The Sixth Circuit recognized that public school resources, like a school library, are "important privilege[s] created by the state for the benefit of the students in the school."¹⁵⁰ Once a public privilege has been created, governing bodies may not "place conditions on [its] use . . . which [are] related solely to the social or political tastes of school board members."¹⁵¹ Further, the court explained that a teacher's right to speak is inextricable from her students' "right to know."¹⁵²

In contrast, the Tenth Circuit has found that high school teachers have no right to academic freedom, though it did so without much discussion when considering the case of a teacher who repeated a rumor about his students "making out on the tennis court."¹⁵³ One lower court in the circuit followed suit, finding that a high school teacher who had been fired after making inappropriate sexual remarks to his students and introducing a controversial poem to his theater class was not protected by academic freedom.¹⁵⁴ Notably, both of these cases involved teacher misconduct that was objectively inappropriate and unrelated to curricular goals.¹⁵⁵

The Third Circuit has asserted that high school teachers have no right to academic freedom that would allow them to implement a classroom management technique that has been banned by the school.¹⁵⁶ In the 1990 case *Bradley v. Pittsburgh Board of Education*, the court noted that "no court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates."¹⁵⁷ This was expanded into the university setting when the Third Circuit concluded that "the First Amendment does not place restrictions on a public university's ability to control its curriculum."¹⁵⁸ The court reasoned that protecting the institution's rather than the individual teacher's rights was "consistent with the Supreme Court's jurisprudence concerning the state's ability to say

147. *Id.*

148. *See, e.g., Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577 (6th Cir. 1976).

149. *Id.* at 582.

150. *Id.* at 581.

151. *Id.* at 582.

152. *Id.* at 583 ("Freedom of speech presupposes a willing speaker. But where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both."). *See also infra* Part II.D.4 for a discussion of students' "right to know."

153. *See Miles v. Denver Pub. Schs.*, 944 F.2d 773, 774, 779 (10th Cir. 1991) (explaining case law does not support application of academic freedom principles to secondary schools but still noting that the district's restriction of appellant's speech with regard to students' "making out" on campus did not threaten to "cast a pall of orthodoxy over the classroom" (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))).

154. *Glaeser v. Acad. Sch. Dist. 20*, No. 01-cv-00384, 2006 WL 8451993, at *1 (D. Colo. Jan. 24, 2006).

155. *Id.*; *Miles*, 944 F.2d at 774.

156. *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990).

157. *Id.*

158. *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998).

what it wishes when it is the speaker.”¹⁵⁹ This approach affords academic freedom protection to the educational institution rather than to the individual educator, based on the premise that the teacher acts as the institution’s proxy when engaging in speech inside the classroom.¹⁶⁰

2. Limitations on the Speech of Teachers as Government Employees

More commonly, courts rely on the government employee speech doctrine to limit teachers’ in-classroom speech.¹⁶¹ It is well established that neither “students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁶² Nonetheless, courts have grappled with balancing the freedom of speech of individual teachers with the authority of schools to direct and control school environments.¹⁶³ Additionally, courts are frequently deferential to state and local authorities with respect to controlling conduct within schools.¹⁶⁴

Public employee speech is governed by the *Pickering-Connick* standard.¹⁶⁵ In 1968, *Pickering v. Board of Education* established a balancing test, weighing “the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁶⁶ Importantly, *Pickering*’s balancing test was established in response to a teacher speaking publicly, as a citizen, against school board decisions, and not in response to a teacher speaking in the classroom, pursuant to her professional duties.¹⁶⁷ *Connick v. Myers* later fine-tuned the test in 1983, explaining that expression involves a matter of public concern when it can fairly be considered to relate to “any matter of political, social, or other concern to the community.”¹⁶⁸

In 2006, the Court further narrowed the application of the *Pickering-Connick* balancing test, limiting First Amendment free speech protections for public employees,

159. *Id.*

160. *See Borden v. Sch. Dist.*, 523 F.3d 153, 172 (3d Cir. 2008) (finding no academic freedom protection for football coach’s pedagogic method of using prayer to teach respect and good moral character because school district has the right to choose how and what is taught).

161. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97 (1968); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007); *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332 (6th Cir. 2010); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

162. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

163. *See, e.g., Epperson*, 393 U.S. at 104 (“Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’” (footnote omitted) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))).

164. *See, e.g., id.* (“Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities.”).

165. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 146 (1983).

166. 391 U.S. at 568.

167. *See id.* at 565.

168. 461 U.S. at 146.

in *Garcetti v. Ceballos*.¹⁶⁹ *Garcetti* held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹⁷⁰ The Court included a caveat, in response to a dissent by Justice Souter, explaining that its analysis in *Garcetti* may not apply to public employees whose official duties involve teaching or scholarship.¹⁷¹

Justice Souter’s concern was that the majority’s decision might “imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’”¹⁷² Because “expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by [the] Court’s customary employee-speech jurisprudence,” the majority suggested that there may be room to exempt classroom instruction from the public employee speech doctrine.¹⁷³

As with academic freedom cases, lower courts have used different approaches to applying public employee speech standards to teachers in public schools.¹⁷⁴ For example, the Seventh Circuit applied *Garcetti* to allow an Indiana elementary school to decline to renew a teacher’s contract after she told students she honked her car’s horn to show support for anti-Iraq war demonstrators carrying signs reading “Honk for Peace.”¹⁷⁵ The court first reasoned that teachers sell their speech to the school “and must provide the service for which employers are willing to pay.”¹⁷⁶ In this case, the elementary school was “willing to pay” its teacher to discuss the different perspectives about the policy of the Iraq War, on the condition that she keep her opinions to herself.¹⁷⁷ Next, the court determined that public school teachers at the elementary and secondary levels must teach the prescribed curriculum, including subject matter and perspective on that subject matter.¹⁷⁸ Finally, the court stressed that students are a captive audience in compulsory education, so viewpoints expressed in the classroom should be determined by elected officials who can be voted out of office, not by tenured teachers.¹⁷⁹

169. 547 U.S. at 421.

170. *Id.* (upholding public employee speech restriction where deputy district attorney alleged retaliation after writing a memo recommending dismissal of a case because the First Amendment did not prohibit “managerial discipline”).

171. *Id.* at 425.

172. *Id.* at 438 (Souter, J., dissenting) (omission in original) (quoting *id.* at 413 (majority opinion)).

173. *Id.* at 425 (majority opinion).

174. See, e.g., *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007); *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332 (6th Cir. 2010); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

175. *Mayer*, 474 F.3d at 479–80.

176. *Id.* at 479.

177. *Id.* at 479–80.

178. *Id.* at 479; see also *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 714 (7th Cir. 2016) (holding that elementary and secondary teachers have no First Amendment protection of instructional speech where teacher deviated from curriculum even with “a well-intentioned but poorly executed discussion of why [racial epithets] are hurtful and must not be used,” which violated written policy prohibiting use of racial epithets in front of students).

179. *Mayer*, 474 F.3d at 479–80.

The Sixth Circuit followed the Seventh, explaining that the First Amendment does not protect the in-class curricular speech of elementary and secondary teachers.¹⁸⁰ Though an assignment to read Ray Bradbury's *Fahrenheit 451* and engage in follow-up assignments about book censorship may constitute discussion on a matter of public concern that outweighs the state's interest in regulating such speech, a teacher's curricular speech is speech pursuant to her official duties.¹⁸¹ Although teachers have constitutional rights to freedom of speech, "that does not transform them into the employee *and* employer when it comes to deciding what, when and how English is taught to fifteen-year-old students."¹⁸² The Sixth Circuit views curricular choices as belonging to the elected school boards or to the school districts, for "the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them."¹⁸³ Moreover, the court opined that the concept of academic freedom does not make teachers "sovereigns unto themselves."¹⁸⁴

In contrast, in 2014, the Ninth Circuit held "that *Garcetti* does not apply to 'speech related to scholarship or teaching,'" at least for college professors.¹⁸⁵ It applied *Pickering* instead, because it determined that applying *Garcetti* to teaching and scholarship would conflict with important First Amendment values recognized by the Supreme Court.¹⁸⁶ In dicta, the Ninth Circuit alluded to the idea that *Pickering* would also apply to public high schools.¹⁸⁷ Of course, *Pickering* requires a weighing of the interest of the school, which could present unique challenges, and the outcome would be heavily dependent upon the age and maturity of the students.¹⁸⁸ The court noted, "Possible variations are almost infinite. . . . [T]he degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a university professor."¹⁸⁹

The Supreme Court might have resolved these conflicts in 2022, however, when it applied *Garcetti* to a high school coach's speech, without hesitation.¹⁹⁰ The speech was not curricular and occurred outside of the classroom—a "quiet" prayer on the football field after a game.¹⁹¹ In applying *Garcetti*'s official duties test, the Court noted that

180. *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 334 (6th Cir. 2010).

181. *Id.* at 338–40 (asserting that, though a teacher's role is to prepare students to be responsible citizens, "and the teacher that can do that *without* covering topics of public concern is rare indeed, perhaps non-existent," teachers are inevitably speaking pursuant to their duties as public employees).

182. *Id.* at 340.

183. *Id.* at 341 (quoting *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 371–72 (4th Cir. 1998) (en banc) (Wilkinson, C.J., concurring)).

184. *Id.* (alterations omitted) (quoting *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989)).

185. *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)).

186. *Id.* at 406, 411 ("[T]eaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are 'a special concern of the First Amendment.'" (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))).

187. *Id.* at 413.

188. *Id.*

189. *Id.*

190. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022) ("Both sides ask us to employ at least certain aspects of this *Pickering-Garcetti* framework to resolve Mr. Kennedy's free speech claim.").

191. *Id.* at 2415–16.

neither party claimed any academic freedom concerns that may trigger additional interests, as discussed in *Keyishian* and *Garcetti*.¹⁹² The Court engaged in a two-step inquiry.¹⁹³ First, it applied *Garcetti*, asking whether the coach was acting “pursuant to [his or her] official duties,” in which case the speech would not be protected.¹⁹⁴ Next, if the coach was not speaking pursuant to official duties and was instead “speak[ing] as a citizen addressing a matter of public concern,” the Court would need to engage in *Pickering*’s “delicate balancing of the competing interests surrounding the speech and its consequences.”¹⁹⁵

3. Using Student Speech Standards To Regulate Teachers’ Classroom Speech

The Supreme Court has more clearly established standards for regulating student speech, and lower courts have frequently applied this standard to teachers.¹⁹⁶ Schools have the authority to regulate on-campus student speech where they have a reasonable belief that the speech would materially and substantially disrupt the operation of the school.¹⁹⁷ *Tinker v. Des Moines Independent Community School District* adopted this rule in 1969, with Justice Fortas’s pronouncement that neither “students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁹⁸ But this “perhaps utopian statement[] about free expression” has been slowly chipped away over time.¹⁹⁹ In fact, just a few sentences later, Justice Fortas provided the ammunition that allowed for the later diminution of free speech rights in schools.²⁰⁰ He explained that “the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”²⁰¹ Over the next twenty years, the Court granted schools greater regulatory

192. *Id.* at 2424 (first citing *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006); and then citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

193. *Id.* at 2423.

194. *Id.* (alteration in original) (quoting *Garcetti*, 547 U.S. at 421).

195. *Id.* at 2423–25 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). The Court ultimately found Coach Kennedy’s midfield prayer was private speech, not speech “‘ordinarily within the scope’ of his duties as a coach.” *Id.* at 2424 (quoting *Lane v. Franks*, 573 U.S. 228, 240 (2014)). It then found the school district did not meet its burden to prove why its interests in prohibiting the coach’s “private” speech outweighed the coach’s interest in free speech and free exercise of his religion. *Id.* at 2432.

196. *See, e.g.*, *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 775 (10th Cir. 1991); *Kirby v. Yonkers Sch. Dist.*, 767 F. Supp. 2d 452, 460 (S.D.N.Y. 2011); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1016–17 (9th Cir. 2000); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 696 (4th Cir. 2007).

197. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969) (holding that schools may not prohibit the silent, passive wearing of armbands in protest of Vietnam War, where there was no reasonable belief that it would result in any substantial or material interference with school activities).

198. *Id.* at 506.

199. Wohl, *supra* note 98, at 1287 (“[T]he disheartening truth is that the *Tinker* decision represented a high point of student and teacher rights. Since *Tinker*, these rights have been steadily whittled away, shortchanged in the name of enforcing academic discipline and pedagogical interests, a purported need to balance school-related issues against the ‘public concern’ and even against the measure of a teacher’s official duties itself.” (footnotes omitted) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968))).

200. *Id.* at 1296 (citing *Tinker*, 393 U.S. at 507).

201. *Tinker*, 393 U.S. at 507.

rights over student speech that is lewd or obscene,²⁰² or school sponsored and could be reasonably regarded as bearing the imprimatur of the school.²⁰³

These student speech cases demonstrate the Court's deference to school authorities to instill in students certain fundamental values.²⁰⁴ "The inculcation of these values is truly the 'work of the schools.'"²⁰⁵ But in striking a balance between exposing students to diverse ideas and instilling those fundamental values, the Court stated:

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.²⁰⁶

The Court maintained that in order for schools to inculcate those values to prepare students for citizenship, they must have sufficient authority to determine what those values should be.²⁰⁷ It asserted that "[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."²⁰⁸ The Court determined that schools as state actors, then, may decide what lessons of civility may be taught.²⁰⁹

Lower courts have applied some combination of the student speech standards to teacher speech as well.²¹⁰ One critic of this approach, Professor of Law Amanda Harmon Cooley, explained that in applying this standard to teachers, "courts are equating the speech rights of adult professionals with children. This equation does not afford proper First Amendment protection for teachers, and it infantilizes teachers both in law and policy."²¹¹ Moreover, she argued that the application of student speech standards to

202. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683, 685 (1986) (holding that schools may prohibit vulgar and offensive speech on campus because the inculcation of "fundamental values necessary to the maintenance of a democratic political system" is necessary and highly appropriate in schools).

203. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (holding that students' First Amendment rights were not violated by school refusing to publish articles about teen pregnancy and impact of divorce on students in school newspaper where speech could be reasonably regarded as "bear[ing] the imprimatur of the school").

204. *Fraser*, 478 U.S. at 685–86.

205. *Id.* at 683 (quoting *Tinker*, 393 U.S. at 508).

206. *Id.* at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

207. *See id.* at 683.

208. *Id.*

209. *Id.*

210. *See* Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235, 268 (2014).

211. *Id.* (footnote omitted).

teachers' speech "will result in fewer speech rights for teachers than for their students."²¹²

Even where courts purport to apply the public employee speech tests from *Garcetti*, *Pickering*, and *Connick*, they sometimes rely on the student speech cases for their underlying rationale.²¹³ One district court even used *Tinker*'s substantial disruption test to find that a teacher's firing for assigning Kurt Vonnegut, Jr.'s short story *Welcome to the Monkey House*²¹⁴ was a violation of her First Amendment right to academic freedom, because there was neither a threat of substantial disruption to the class, nor an actual disruption.²¹⁵ More commonly, to regulate teachers' in-classroom speech, courts rely on the test set out in the 1988 case *Hazelwood School District v. Kuhlmeier*.²¹⁶ In *Hazelwood*, the Court explained that the state has a unique responsibility "to assure that [students] learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."²¹⁷ With regard to teacher speech, this unique responsibility may inform the second prong of the analysis in *Pickering*—whether the speech relates to a matter of public concern.²¹⁸

Affording deference to elected officials' broad discretion to regulate school-sponsored speech in furtherance of educational goals, some courts have applied this standard to allow schools to limit classroom speech where the restrictions are "reasonably related to legitimate pedagogical concerns."²¹⁹ In one such jurisdiction, the school district's broad discretion to regulate classroom speech "includes not only the right to design curricula and select textbooks but also the right to impose regulations to ensure 'that readers or listeners are not exposed to material that may be inappropriate for their level of maturity.'"²²⁰

Because classroom speech implicates the school as the speaker, the Ninth Circuit allows teachers' speech to be limited by *Hazelwood*'s legitimate pedagogical concern

212. *Id.*

213. *Id.* at 270; see *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694–95 (4th Cir. 2007).

214. Kurt Vonnegut, Jr., *Welcome to the Monkey House*, in *WELCOME TO THE MONKEY HOUSE*, at 30 (Dial Press 1998). *Welcome to the Monkey House* was first published in *Playboy Magazine*. *PLAYBOY*, Jan.-1968, at 99. However, there is no indication that the publication in *Playboy* was a reason for the firing or was raised to the court. See *Parducci v. Rutland*, 316 F. Supp. 352, 356 (M.D. Ala. 1970) (noting that the story was published in an anthology "reviewed by several of the popular national weekly magazines").

215. *Parducci*, 316 F. Supp. at 356.

216. 484 U.S. 260, 271–73 (1988); *Cooley*, *supra* note 210, at 267.

217. *Hazelwood Sch. Dist.*, 484 U.S. at 271.

218. *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 777 (10th Cir. 1991) ("The concern addressed in *Pickering*—the right of an employee to participate as other citizens in debate on public matters—is simply less forceful when considered in light of the special characteristics of the school environment. . . . [W]e find no reason to distinguish between the classroom discussion of students and teachers in applying *Hazelwood* here. A school's interests in regulating classroom speech . . . are implicated regardless of whether that speech comes from a teacher or student." (internal quotation marks omitted) (quoting *Hazelwood Sch. Dist.*, 484 U.S. at 266)).

219. *Kirby v. Yonkers Sch. Dist.*, 767 F. Supp. 2d 452, 460–61 (S.D.N.Y. 2011) (quoting *Hazelwood Sch. Dist.*, 484 U.S. at 273) (finding no First Amendment violation where a middle school health teacher was discharged after conducting an icebreaker about the male reproductive anatomy); see also, e.g., *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 (4th Cir. 2007); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1016–17 (9th Cir. 2000).

220. *Kirby*, 767 F. Supp. at 460–61 (quoting *Hazelwood Sch. Dist.*, 484 U.S. at 271).

test.²²¹ “[W]hen a public high school is the speaker, its control of its own speech is . . . measured by practical considerations applicable to any individual’s choice of how to convey oneself: among other things, content, timing, and purpose.”²²²

Similarly, in the Fourth Circuit, where a teacher’s speech is curricular in nature, it is not protected by the First Amendment.²²³ The Fourth Circuit uses this curricular speech reasoning as part of its *Pickering* analysis, determining that where a teacher’s in-class speech is curricular in nature, it is not speech on a matter of public concern.²²⁴ To determine whether the speech is curricular in nature, Fourth Circuit courts first ask whether the speech “constitute[s] school-sponsored expression bearing the imprimatur of the school,” then whether it is “supervised by faculty members and designed to impart particular knowledge to the students.”²²⁵ Ultimately, under this application of *Hazelwood*, the school has the right to determine the curriculum, not the teachers.²²⁶

The Fourth Circuit affords greater regulatory rights to school boards than to other government employers, reasoning that “[c]ourts have generally recognized that the public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and that a school board’s ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums.”²²⁷ The court pointed to the Supreme Court’s explicit recognition “that First Amendment free speech rights in a school environment are not ‘automatically coextensive with the rights of adults in other settings.’”²²⁸

4. Students’ First Amendment “Right to Know”

Inherent in the First Amendment’s protection of speech is the freedom to hear or receive information.²²⁹ “Freedom of speech presupposes a willing speaker. But where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both.”²³⁰ This right is inextricably linked to teachers’ in-classroom speech.²³¹ The First Amendment protects the listener’s right to receive information in two ways.²³² First, it “follows ineluctably from the *sender’s* First Amendment right to

221. *Downs*, 228 F.3d at 1016–17 (citing *Hazelwood Sch. Dist.*, 484 U.S. at 270–73) (“[W]hen the school district speaks through bulletin boards that are not ‘free speech zones,’ but instead are vehicles for conveying a message from the school district, the school district may formulate that message without the constraint of viewpoint neutrality.”).

222. *Id.* at 1013.

223. *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368–70 (4th Cir. 1998) (en banc) (citing *Hazelwood Sch. Dist.*, 484 U.S. at 271).

224. *Lee*, 484 F.3d at 694.

225. *Id.* at 697 (citing *Hazelwood Sch. Dist.*, 484 U.S. at 271).

226. *Boring*, 136 F.3d at 370.

227. *Lee*, 484 F.3d at 695 (citing *Hazelwood Sch. Dist.*, 484 U.S. at 267).

228. *Id.* (quoting *Hazelwood Sch. Dist.*, 484 U.S. at 266).

229. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

230. *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 583 (6th Cir. 1976) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumers Couns., Inc.*, 425 U.S. 748, 756 (1976)).

231. *See id.*

232. *Pico*, 457 U.S. at 867.

send [ideas].”²³³ This is because communicating ideas is meaningless if willing listeners are not allowed to receive them.²³⁴ Next, and “[m]ore importantly, the right to receive ideas is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom,” for that is the only way people may arm themselves with knowledge.²³⁵

This principle applies to students in schools, of course taking into account the “special characteristics of the school environment.”²³⁶ One of those special characteristics is the necessity of the free exchange of ideas in order to “prepare[] students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”²³⁷ In fact, as recently as 2021, the Supreme Court stated, “America’s public schools are the nurseries of democracy. Our representative democracy only works if we protect the ‘marketplace of ideas.’”²³⁸

Teachers and schools must be able to present information in order to allow students to “remain free to inquire, to study and to evaluate, to gain new maturity and understanding.”²³⁹ Schools are tasked with exposing students to a variety of ideas—ideas that state legislatures and school officials agree with and those they disagree with.²⁴⁰ “In a variety of academic settings the Court . . . has acknowledged the force of the principle that schools, like other enterprises operated by the State, may not be run in such a manner as to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’”²⁴¹

Because public schools “may not be enclaves of totalitarianism” and students may not “be regarded as closed-circuit recipients of only that which the State chooses to communicate,”²⁴² Justice Blackmun explained that “the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons.”²⁴³ Thus, a state’s motivation is relevant to determining whether eliminating a book or material from the curriculum violates students’ rights to receive information.²⁴⁴ Impermissible motivations may include racial animus or the

233. *Id.*

234. *Id.* (quoting *Martin v. Struthers*, 319 U.S. 141, 143 (1943)).

235. *Id.* at 867.

236. *Id.* at 868 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

237. *Id.*

238. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

239. *Pico*, 457 U.S. at 868 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). But there may be a difference between allowing voluntary access to information, such as in a school library, and compulsory presentation of information, like with curricular speech. *Id.* at 869 (recognizing Board of Education’s argument that “the inculcative function of secondary education” may allow “absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values,” but finding the argument misplaced with respect to voluntary use of school libraries).

240. *See id.* at 868.

241. *Id.* at 876 (Blackmun, J., concurring) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

242. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

243. *Pico*, 457 U.S. at 877 (Blackmun, J., concurring).

244. *Arce v. Douglas*, 793 F.3d 968, 983 (9th Cir. 2015) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)) (“[T]he state may not remove materials otherwise available in a local classroom unless its actions are reasonably related to legitimate pedagogical concerns.”).

intent to prevent students from exposure to ideas with which the policymakers disagree.²⁴⁵ While schools have a responsibility to inculcate community values,²⁴⁶ they may not “strangle the free mind at its source” by eliminating all diversity of thought.²⁴⁷

E. One Early Challenge to Anti-CRT Laws: Falls v. DeSantis

Opponents of the restrictive anti-CRT laws have brought challenges in courts around the country.²⁴⁸ In November 2022, the Northern District of Florida was the first court to enjoin enforcement of Florida’s Stop W.O.K.E. Act against public colleges and universities.²⁴⁹ The court reasoned that the right of university students to receive information was coextensive with the professors’ free speech rights.²⁵⁰

The district court applied a three-part balancing test, where it considered doctrines governing viewpoint-based restrictions, public employee speech, and academic freedom.²⁵¹ It first examined the context of the state’s “sweeping prohibition on expressing certain viewpoints,” describing it as a “prophylactic ban on university employees’ speech [that] affects potentially thousands of professors and serves as an *ante hoc* deterrent that ‘chills potential speech before it happens.’”²⁵² The court found that the Stop W.O.K.E. Act is “rank viewpoint discrimination,” because it allows professors to discuss the enumerated concepts only “‘in an objective manner’—whatever that means—or [to] criticize or condemn the concepts” but prohibits their endorsement.²⁵³

Next, the court weighed the state’s interest in regulating its employees’ speech as a public employer and its interest in controlling its school curriculum.²⁵⁴ But the court found that even if the state’s purported interest in reducing racism was a legitimate concern motivating the law’s enactment, “a viewpoint-discriminatory ban targeting protected in-class speech” was “certainly *not* reasonable” or justified.²⁵⁵ The claims at issue “present[ed] an interest in academic freedom of the highest degree”²⁵⁶; rather than attempting to alter the state’s prescribed curriculum, the professors were fighting against

245. *González v. Douglas*, 269 F. Supp. 3d 948, 972–73 (D. Ariz. 2017) (citing *Pico*, 457 U.S. at 870–72 (plurality opinion)).

246. *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

247. *Pico*, 457 U.S. at 879 (Blackmun, J., concurring) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

248. *See, e.g., Falls v. DeSantis*, 609 F. Supp. 3d 1273, 1277–78 (N.D. Fla. 2022); Complaint, *Black Emergency Response Team*, *supra* note 73, at 6; Complaint, *Mejia*, *supra* note 73, at 1–2.

249. *Pernell v. Fla. Bd. of Governors*, 641 F. Supp. 3d 1218, 1291 (N.D. Fla. 2022).

250. *Id.* at 1243.

251. *Id.* at 1268–77.

252. *Id.* at 1271–72 (quoting *United States v. Nat’l Treas. Emps. Union*, 513 U.S. 454, 468 (1995)).

253. *Id.* at 1272–73 (quoting FLA. STAT. ANN. § 1000.05(4)(b) (West 2024)) (“[T]his Court has found no authority . . . that requires this Court to defer to the State of Florida’s blatant viewpoint-based restrictions on protected speech once the subject at issue is included in the curriculum. In other words, simply because the State of Florida has great flexibility in setting curriculum, it cannot impose its own orthodoxy of viewpoint about the content it allowed within university classrooms.”).

254. *Id.* at 1273.

255. *Id.* “In short, the State of Florida cannot do an end-run around the First Amendment by declaring which viewpoints are so repugnant to lawmakers that their mere utterance, on a single occasion, is *per se* severe or pervasive and prohibiting their expression under an antidiscrimination law.” *Id.* at 1276.

256. *Id.* at 1277.

the state's attempt to impose its "orthodoxy of viewpoint about that curriculum in university classrooms across the state."²⁵⁷ The court found that principles of academic freedom weighed heavily in favor of the professors and students.²⁵⁸ As a result, the court granted the professors' and students' preliminary injunction, declaring that the State of Florida cannot "prophylactically muzzle professors from expressing certain viewpoints about topics that the State of Florida has deemed fair game for classroom discussion."²⁵⁹

III. DISCUSSION

The cases limiting teacher speech, from the *Pickering-Connick-Garcetti* line to the *Tinker-Hazelwood* line, fail to prioritize the innovation and human connection necessary to foster success for a diverse student population.²⁶⁰ Critics have lamented that the current tests for permissible restrictions on teacher speech are "haphazard, arbitrary, [and] full of inconsistencies, exceptions, and a heavy bias toward limiting teacher speech."²⁶¹ It is amidst this landscape of inconsistent speech protections for teachers and unbalanced deference for local control of education²⁶² that conservative politicians have been able to introduce and pass laws that limit the way teachers can discuss issues surrounding race and gender in the classroom.²⁶³ Instead of protecting teachers' academic freedom, the teacher speech cases give state and local political leaders the power to prescribe the ideas teachers may convey to their students—only those ideas consistent with the politicians' own ideologies.²⁶⁴

The danger of that power is that it allows politicians to remove minority experiences from the classroom, making minority students feel separate from their white peers and separate from the lessons they are taught.²⁶⁵ This compulsory color-blindness in curricula, which requires teachers to disregard students' cultural differences instead of

257. *Id.* ("According to the State of Florida, so long as professors avoid promotion of one side of a particular idea—or do the State of Florida's bidding and condemn those ideas that the State has deemed unworthy—professors need fear no consequences from the State. But to step out of line during class and utter a single expression of approval of one of the State of Florida's disfavored ideas is to risk discipline or even termination. In other words, the State of Florida says that to avoid indoctrination, the State of Florida can impose its own orthodoxy and can indoctrinate university students to its preferred viewpoint. This extravagant doublespeak flies in the face of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level" (omission in original) (footnote and internal quotation marks omitted) (quoting *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991))).

258. *Id.*

259. *Id.* at 1278. Though outside the scope of this Comment, the court also found the Stop W.O.K.E. Act violated the both Fourteenth Amendment's Due Process Clause, because the Act was impermissibly vague, and the First Amendment, because the Act was overbroad. *Id.* at 1278, 1286–87.

260. See Wohl, *supra* note 98, at 1309.

261. *Id.*; e.g., Cooley, *supra* note 210, at 238–39 ("Given the disparity in treatment of these issues by courts and rationales, substantial confusion has been generated as to what teachers can and cannot say in schools and as to what types of tests might be imposed on them. Despite this generalized confusion, what is clear is that teachers, like students, are now in a vise of governmental control." (footnote omitted)).

262. Wohl, *supra* note 98, at 1311.

263. See Schwartz, *Map*, *supra* note 11; see also, e.g., OKLA. STAT. ANN. tit. 70, § 24-157 (West 2024); GA. CODE ANN. § 20-1-11(c), (e) (West 2024); FLA. STAT. ANN. § 1003.42(3) (West 2024).

264. See Wohl, *supra* note 98, at 1311.

265. See Mensah, *supra* note 76, at 12; see also GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 32.

embracing them, “has the sanction of law,” therefore tending to harm students’ development and deprive them of the full benefit of public education.²⁶⁶

Further, a color-blind curriculum does not foster success in any, let alone all, students,²⁶⁷ nor does it prepare them to be future leaders in our democracy.²⁶⁸ Though the anti-CRT laws and policies purport to prevent indoctrination,²⁶⁹ they are, in reality, viewpoint-based restrictions on instructional speech.²⁷⁰ In practice, they serve to silence the viewpoints that value diversity of experience²⁷¹ while maintaining the Eurocentric orientation of traditional education.²⁷² Rather than allow teachers to present different perspectives, the laws chill speech and stagnate curricular development, in a system where “European history and perspectives are taken as the norm” but students have little exposure to multicultural perspectives.²⁷³

Though contrary to *Tinker*’s warning, these restrictions on speech in schools are based on “a mere desire to avoid the discomfort and unpleasantness”²⁷⁴ that anti-CRT advocates associate with discussions of systemic racism or the lived experiences of minorities in America.²⁷⁵ Instead of allowing for a “robust exchange of ideas,” anti-CRT laws “cast a pall of orthodoxy over the classroom.”²⁷⁶ Instead of preventing indoctrination, anti-CRT laws prevent students from being exposed to diverse ideas and from connecting to the state’s compulsory curriculum. Instead of recognizing the needs of students to see their own diverse backgrounds represented in their curricula,²⁷⁷ anti-CRT laws impermissibly limit students’ access to information by tailoring curriculum “solely to the social or political tastes of school board members” and politicians.²⁷⁸

266. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492, 494 (1954).

267. See GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 31; see also Complaint, *Mejia*, *supra* note 73, at 56 (arguing that New Hampshire’s Banned Concept Act “chills permissible instruction by teachers who are uncertain whether their instruction could lead students to inquire about a prohibited concept”).

268. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

269. See, e.g., PENNCREST SCH. DIST., *supra* note 46 (allowing discussion of current events and controversial issues only where it “[d]oes not tend to indoctrinate or persuade students to a particular point of view or include presentation of divisive concepts” and is conducted in a balanced manner).

270. See Complaint, *Udike*, *supra* note 73, at 6 (arguing that Ohio’s H.B. 1775 “silences speech through its overbroad and viewpoint discriminatory terms, and intentionally targets and denies access to ideas aimed at advancing the educational and civic equality of historically marginalized students because of the legislators’ own discomfort and disagreement with certain viewpoints”). Though outside the scope of this Comment, viewpoint-based restrictions—or “the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—[are] a more blatant and egregious form of content discrimination” and are another type of impermissible infringement of free speech rights. *Pernell v. Fla. Bd. of Governors*, 641 F. Supp. 3d 1218, 1236 (N.D. Fla. 2022) (internal quotation marks omitted) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015)).

271. See Complaint, *Udike*, *supra* note 73, at 6.

272. See Gay, *Acting on Beliefs*, *supra* note 22, at 145–46.

273. *Wiggin & Watson*, *supra* note 82, at 768.

274. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

275. See Sawchuk, *supra* note 36 (explaining that “culture wars are always, at some level, battled out within schools” because politicians are nervous about broad social shifts in society).

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

277. See Mensah, *supra* note 76, at 12.

278. *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976).

This Comment argues that the First Amendment should protect teachers' curricular speech where it is necessary to meet the diverse needs of a diverse student body and to prepare students to be open-minded and critical participants in our democracy. Part III.A argues that under *Brown v. Board of Education*, courts may rely on the sociological studies supporting the effectiveness and necessity of culturally responsive teaching to extend constitutional protection to teachers' in-classroom speech.²⁷⁹ Part III.B argues that the First Amendment should protect elementary and secondary teachers' in-classroom speech. Part III.B.1 discusses the shortcomings of the public employee speech doctrine when applied to teacher speech. Part III.B.2 identifies some of the problems with applying student speech standards to teachers. Finally, Part III.B.3 proposes an academic freedom analysis for elementary and secondary classrooms that would adapt existing school speech doctrines in a way that better appreciates the role of teachers in our society and the importance of exposing students to diverse ideas.

A. *Protecting Culturally Responsive Teaching Under Brown v. Board of Education*

If, as *Brown v. Board of Education* asserted, the purpose of public education is to provide *all* children with the “ability to study, to engage in discussions and exchange views with other students, and in general, to learn [their] profession,”²⁸⁰ *all* students must be given the opportunity to “see themselves reflected in the curriculum.”²⁸¹ Students who are not able to see themselves in the curriculum may be less engaged and less academically successful than their nonminority peers.²⁸² Culturally blind, “one-size-fits-all” teaching, which assumes children will connect with the same curriculum regardless of their foundational experiences, is not effective, and teachers need to understand, appreciate, and adjust to students' cultural, behavioral, and experiential differences.²⁸³

Despite this, schools have historically attributed the failures of students of color to “deficit syndrome,” the education community's version of victim blaming.²⁸⁴ Where students are expected to do what they cannot do with foundational experiences they do not have, they are set up for failure.²⁸⁵ Professor Geneva Gay explains, “Success does not emerge out of failure, weakness does not generate strength, and courage does not stem from cowardice. Instead, success begets success.”²⁸⁶ Students of diverse backgrounds must be taught “through their cultural frames of reference to make the

279. 347 U.S. 483 (1954).

280. *Id.* at 493.

281. See Mensah, *supra* note 76, at 12.

282. See *id.*

283. See GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 30–31.

284. *Id.* at 31 (“Far too many educators attribute school failure to what students of color don’t have and can’t do. Some of the specific reasons given for why Navajo students do poorly in school are representative of this kind of thinking. . . . Among them were lack of self-esteem; inadequate homes and prior preparation; poor parenting skills and low parental participation in the schooling process; lack of language development; poor academic interests, aspirations, and motivation; few opportunities for cultural enrichment; high truancy and absentee rates; and health problems, such as fetal alcohol syndrome. . . . Trying to teach from this ‘blaming the victim’ and deficit mindset sounds more like a basis for ‘correcting or curing’ than educating.”).

285. See *id.*

286. *Id.*

content more personally meaningful and easier to master.”²⁸⁷ In other words, students will connect with and engage in instructional approaches that meet their needs: instruction that is relevant and meaningful to *them*, that “affirms [*their*] identities, draws from *their* funds of knowledge, and builds [*their*] critical intellectualism.”²⁸⁸ This connection leads to mastery and builds personal confidence by meeting students where they are and fostering success.²⁸⁹

Where a school’s Eurocentric curriculum denies students of color the opportunity to succeed or refuses to recognize that those students may have different needs, those students will inevitably achieve less academic success or at least face greater hurdles.²⁹⁰ When children face “consistent failure in performing a particular task, they will have little confidence in their ability to succeed . . . in the future, and each new failure confirms what they already ‘know’ about the task—they can’t do it.”²⁹¹

Because anti-CRT laws limit culturally responsive teaching, they are essentially removing minority experiences and perspectives from the classroom.²⁹² Teaching a whitewashed, Eurocentric curriculum creates a separation between students of color and the content they are supposed to absorb—a separation that is not experienced by their white classmates.²⁹³ Just as *Brown v. Board of Education* looked to “the effect of segregation itself on public education” and on the “hearts and minds” of Black students,²⁹⁴ courts today must look to the effect of compulsory color-blindness on public education and on the hearts and minds of minority students.

As these anti-CRT laws sweep the nation, it is important to note that their impact on minority children will be greater because the removal of their voices and experiences from the public-school curriculum “has the sanction of the law.”²⁹⁵ Where the law prohibits affirmation of children’s different needs or cultural experiences, and instead mandates that all students be treated the same,²⁹⁶ students with unrecognized needs will be left feeling inferior—a feeling that is abhorrent to the Constitution.²⁹⁷ Laws like the

287. *Id.* at 32.

288. Dee & Penner, *supra* note 83, at 131 (emphasis added).

289. *Id.* at 132.

290. See Mensah, *supra* note 76, at 12.

291. GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 32 (omission in original) (internal quotation marks omitted) (quoting JEANNE ELLIS ORMROD, HUMAN LEARNING 152 (Prentice Hall 2d ed. 1995)).

292. See *supra* notes 45–68 and accompanying text for examples of the practical effects of anti-CRT laws.

293. See Mensah, *supra* note 76, at 12; see also GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 32.

294. 347 U.S. 483, 492, 494 (1954).

295. *Id.* at 494.

296. See, e.g., OKLA. STAT. ANN. tit. 70, § 24-157(B)(1)(d) (West 2024) (prohibiting teaching students to consider the race or sex of another person in how that person should be treated).

297. See *Brown*, 347 U.S. at 494–95 (“A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of [Black] children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. . . . We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. . . . [T]he plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.” (first and third alterations in original)).

Stop W.O.K.E. Act that mandate, for example, the teaching that individuals must be treated without any consideration of their race²⁹⁸ disregard the fact that individuality stems from one's ethnicity and culture.²⁹⁹

These laws not only disenfranchise minority children but dilute the curriculum for all students. "[T]eaching cultural diversity in schools offers intellectual and psychological benefits for both mainstream society" and minorities.³⁰⁰ Because these laws restrict instruction of perspectives that differ from those preferred by elected representatives,³⁰¹ all of society suffers, and the "pall of orthodoxy"³⁰² cast over the classroom is felt by all of the nation's future leaders.³⁰³ The psychological and sociological implications of these laws provide ample support for altering the existing doctrines to protect teacher speech. As the Court did in *Brown*, courts today should rely on sociological studies of the needs of diverse students³⁰⁴ to overturn restrictive and harmful education laws.

B. Using First Amendment Principles To Protect Elementary and Secondary Education

In analyzing protections of teachers' speech in classrooms, courts have taken three approaches. First, few courts recognize that academic freedom is a "special concern" of the First Amendment³⁰⁵ and may implicate "'additional' First Amendment 'interests' beyond those captured by" other doctrines.³⁰⁶ Second, many courts instead apply *Garcetti* to strip teachers of free speech protections when making "statements pursuant to their official duties" as employees of the state.³⁰⁷ Other courts take a third approach, applying the *Pickering-Connick* test, which requires a balancing of the teacher's interest in speaking as a citizen on a matter of public concern with the state's interest in providing

298. See, e.g., FLA. STAT. ANN. § 1000.05(4)(a) (West 2024).

299. See GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 31.

300. *Id.* at 33 (citing Chun-Hoon, *supra* note 89, at 139); see also Complaint, *Mejia*, *supra* note 73, at 57 ("Student body diversity—and the resultant diversity in views and perspectives that flows from such diverse students' participation—improves critical thinking and problem solving, increases cross-racial understanding, reduces stereotypes and prejudices, and develops leadership skills and many other skills necessary to thrive in an increasingly diverse society. . . . These benefits manifest for all students.").

301. See Sawchuk, *supra* note 36; see also, e.g., TEX. EDUC. CODE ANN. § 28.0022 (West 2024); IDAHO CODE ANN. § 33-138 (West 2024); FLA. STAT. ANN. § 1003.42(3) (West 2024).

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

303. See GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 33; see also GAY, AT THE ESSENCE OF LEARNING, *supra* note 12, at 69 (recognizing that success is not reached "until all dimensions of human growth and development—the intellectual, emotional, social, aesthetic, ethical, moral, and physical—have reached equally high levels of accomplishment," which requires focus on cultural diversity along with academic excellence).

304. See, e.g., GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 28–56.

305. *Keyishian*, 385 U.S. at 603.

306. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2424 (2022) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)).

307. See e.g., *Garcetti*, 547 U.S. at 421; *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007); *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 334 (6th Cir. 2010).

efficient services to the community.³⁰⁸ Some of these courts, when applying *Pickering*, use *Hazelwood*'s "legitimate pedagogical interest" test to determine whether the classroom speech is curricular in nature or related to a matter of public concern, such that it warrants First Amendment protection.³⁰⁹

1. The Shortcomings of the Public Employee Speech Doctrine for Teacher Speech

The public employee speech doctrines are ineffective vehicles for protecting and regulating teacher speech.³¹⁰ A Fourth Circuit judge noted:

When a teacher steps into the classroom she assumes a position of extraordinary public trust and confidence: she is charged with educating our youth. Her speech is neither ordinary employee workplace speech nor common public debate. Any attempt to force it into either of these categories ignores the essence of teaching—to educate, to enlighten, to inspire—and the importance of free speech to this most critical endeavor.³¹¹

Applying *Garcetti* to teachers' instructional speech is especially problematic.³¹² Under *Garcetti*, teachers, who are inevitably speaking pursuant to their official duties when giving instruction, have no right to speak a message with which the State disagrees.³¹³ If the State is the only speaker in every classroom, students will be subject to the "pall of orthodoxy" that is incompatible with the need for exposure to diverse viewpoints³¹⁴ in preparation for life in our nation's "relatively permissive, often disputatious, society."³¹⁵ When a state requires students to learn historical events that center around race, like slavery, migration, or affirmative action,³¹⁶ while simultaneously prescribing that those topics must only be taught through a lens of color- or cultural-blindness, the *Garcetti* framework would prohibit the robust classroom discussion that allows for the contribution of diverse viewpoints.³¹⁷

For instance, Florida's state standards require students to read and analyze the Supreme Court's affirmative action cases and their effects "on law, liberty and the interpretation of the U.S. Constitution."³¹⁸ But under the Stop W.O.K.E. Act, Florida's teachers may either criticize affirmative action or objectively explain that it exists, but they are prohibited from offering any endorsement of the Supreme Court's own

308. See, e.g., *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014); *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 777 (10th Cir. 1991); *Kirby v. Yonkers Sch. Dist.*, 767 F. Supp. 2d 452, 460 (S.D.N.Y. 2011).

309. See, e.g., *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 697 (4th Cir. 2007); *Miles*, 944 F.2d at 777; *Kirby*, 767 F. Supp. 2d at 460. See *supra* Part II.D.3 for a discussion of courts applying *Hazelwood* to determine when teachers are speaking on matters of public concern.

310. See *supra* Part II.D.2 for a discussion of public employee speech doctrines.

311. *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 378 (4th Cir. 1998) (Motz, J., dissenting).

312. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

313. *Id.* at 421 (majority opinion).

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

315. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

316. See, e.g., FLORIDA'S STATE ACADEMIC STANDARDS, *supra* note 63, Benchmark SS.912.A.7.8, at 49.

317. See *Pernell v. Fla. Bd. of Governors*, 641 F. Supp. 3d 1218, 1239–40 (N.D. Fla. 2022).

318. FLORIDA'S STATE ACADEMIC STANDARDS, *supra* note 63, Benchmark SS.912.A.7.8, at 49; see also *id.* Benchmark SS.912.CG.3.11, at 57.

recognition that diversity in schools is a compelling interest.³¹⁹ *Garcetti* would give the state or school district unfettered authority to prescribe what viewpoint may be taught because teachers' instructional speech is inherently speech "pursuant to their official duties."³²⁰ This impossible standard could only "cast a pall of orthodoxy" over classrooms.³²¹

Applying the *Pickering-Connick* test is similarly inadequate—when a teacher, as a public employee, engages in instructional speech, it is difficult to argue that they are speaking as a citizen, even if that speech is on a matter of public concern.³²² A court could overcome the difficulty of that argument by determining that a teacher is speaking as a citizen when speaking on matters of public concern—matters related to race and gender, for example—even when in the classroom. The balancing test would weigh on one hand, the interest of the state (or school district) in controlling what viewpoints its students are exposed to, and on the other hand, the interest of the teacher in speaking on a matter of public concern.³²³ The test might then weigh in favor of the teacher.

But it is unlikely that even a court that favors expansive speech protections would find in favor of a teacher when the speech in question was conducted in the classroom in front of a captive audience of public-school students—with that likelihood growing more remote as the age of those students decreases.³²⁴

2. The Misapplication of Student Speech Standards to Teachers

Student speech standards are also inadequate with respect to teachers' instructional speech rights. Applying these standards to teachers inevitably results in fewer rights for the teachers than for the minors in their care.³²⁵ Though *Tinker*'s lofty pronouncement that neither "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" sounds noble, its strength has been diminished by subsequent decisions.³²⁶ Rather than regulating only speech that would materially and substantially interfere with the school's objectives, courts have allowed schools to regulate speech that may appear to be school sponsored, as long as the regulations are "reasonably related to legitimate pedagogical concerns."³²⁷ In adopting *Hazelwood*'s legitimate pedagogical interests test, the Court "erect[ed] a taxonomy of school censorship, concluding that *Tinker* applies to one category and not another."³²⁸ This means that students' personal expression "that happens to occur on the school premises" is protected as long as it does not materially disrupt the school's objectives.³²⁹ But speech

319. FLA. STAT. ANN. § 1000.05(4)(b) (West 2024); *Pernell*, 641 F. Supp. 3d at 1233–34.

320. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

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

322. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 146 (1983).

323. *See Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 146.

324. *See Demers v. Austin*, 746 F.3d 402, 413 (9th Cir. 2014).

325. *Cooley*, *supra* note 210, at 268.

326. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *see also Wohl*, *supra* note 98, at 1287; *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Pickering*, 391 U.S. at 568.

327. *Hazelwood*, 484 U.S. at 273.

328. *Id.* at 281 (Brennan, J., dissenting).

329. *Id.* at 271 (majority opinion).

that could reasonably be viewed as school sponsored may be censored by school officials.³³⁰

For students, this distinction provides some protection for on-campus expression. But for teachers, any speech that happens to occur on campus, at a school-related event, or that occurs off campus but involves a teacher interacting with a student or parent could reasonably be viewed as being school sponsored.³³¹ Additionally, the *Hazelwood* standard is too expansive when considering the deference given to local authorities to determine which moral and political values students should learn. It may be the state's "undeniable, and undeniably vital, mandate to inculcate moral and political values[, but this] is not a general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position."³³²

Unfortunately, in the circuits where this standard is applied to teachers,³³³ the role of teachers as intellectual leaders in the classroom is undermined, because their control is wrested from them and placed in the hands of school administrators and local officials.³³⁴ Instead of recognizing a teacher's role in shaping students to be thoughtful and productive contributors to our democracy, this application "confirms that teacher innovation in support of developing intellectual curiosity and promoting educational rigor is less at the center of the mission of schools than intellectual control, conformity, and political expedience. A legitimate pedagogical concern is merely what a school board . . . says it is."³³⁵ Thus, if a school board says that its anti-CRT law is addressing the legitimate pedagogical concern of reducing racism,³³⁶ in a *Hazelwood* jurisdiction, teachers may be nearly powerless to conform their curriculum to their students' diverse needs and experiences.

In classrooms with students from a diverse mix of cultures, innovation, creativity, and connection are vital to student success. Teachers must be able to learn from their students in order to adapt the curriculum to their needs rather than asking their students to "assimilate into the culture of [a curriculum] that often neglects and alienates their full participation."³³⁷ There is no "one-size-fits-all" way of teaching,³³⁸ and the state or school board is not in the position to connect with students or to accommodate their experiential differences. That unique responsibility belongs to teachers. Thus, teachers must be free to innovate and adapt to the needs of their diverse student body. The student speech standards, as applied, do not appropriately account for this need.

330. *Id.*

331. Cooley, *supra* note 210, at 269.

332. *Hazelwood Sch. Dist.*, 484 U.S. at 285–86 (Brennan, J., dissenting) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

333. See *supra* notes 215–228 and accompanying text for an overview of courts applying the *Hazelwood* standard to teacher speech.

334. Wohl, *supra* note 98, at 1299.

335. *Id.*

336. See *Pernell v. Fla. Bd. of Governors*, 641 F. Supp. 3d 1218, 1273 (N.D. Fla. 2022) (explaining Florida's argument that the Stop W.O.K.E Act "address[es] the pedagogical concern of reducing racism or prohibiting racial discrimination" but finding the viewpoint-based restriction on university professors' speech unreasonable).

337. Mensah, *supra* note 76, at 12.

338. *Id.* at 13.

3. Extending Academic Freedom to Elementary and Secondary Schools to Protect Culturally Responsive Teaching

Though academic freedom is a principle that has been traditionally defined for³³⁹ and applied to higher education,³⁴⁰ the Supreme Court has recognized that elementary and secondary classrooms also require “vigilant protection of constitutional freedoms.”³⁴¹ Young students are the nation’s future leaders, and their development depends upon “wide exposure” to diverse viewpoints.³⁴² Though schools must instill community values, that should not come at the cost of “strangl[ing] the free mind at its source” or preventing its development.³⁴³ This is especially true because “America’s public schools are the nurseries of democracy.”³⁴⁴

Academic freedom derives from the need for students to learn from “reason and the facts.”³⁴⁵ It gives teachers the freedom to discuss essential but sometimes controversial topics that are “at the heart of the free academic inquiry.”³⁴⁶ This freedom to discuss controversial topics is necessary to prepare students to be “active and effective” participants in a polarized democratic society—a notion that has been recognized by the Supreme Court.³⁴⁷ In fact, the Court has declared that our “Nation’s future depends upon” it.³⁴⁸

The Supreme Court’s grand pronouncements of the importance of academic freedom and “vigilant protection of constitutional freedoms” in schools³⁴⁹ have unfortunately remained largely symbolic.³⁵⁰ Courts have been reluctant to afford First Amendment protections to elementary and secondary teachers in the name of academic freedom or otherwise, perhaps for fear of allowing teachers the freedom to determine

339. See AAUP 1940 STATEMENT OF PRINCIPLES, *supra* note 113, at 14; PAULSEN, *supra* note 109, at 228.

340. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (plurality opinion).

341. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

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

343. *Bd. of Educ. v. Pico*, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)) (“The school is designed to, and inevitably will, inculcate ways of thought and outlooks; if educators intentionally may eliminate all diversity of thought, the school will ‘strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.’”).

344. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

345. Fuchs, *supra* note 108, at 435.

346. AAUP 1940 STATEMENT OF PRINCIPLES, *supra* note 113, at 14 n.4.

347. *Pico*, 457 U.S. at 868; see also *Keyishian*, 385 U.S. at 603.

348. *Keyishian*, 385 U.S. at 603.

349. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

350. *DeMitchell & Connelly*, *supra* note 111, at 84 (“While the Supreme Court has stated that academic freedom is a ‘special concern of the First Amendment,’ it has yet to ‘articulate a coherent analytical framework for protecting that concern.’ The Court’s pronouncements on academic freedom are majestic but not very helpful in establishing a definition.” (footnotes omitted) (first quoting *Keyishian*, 385 U.S. at 603; and then quoting *Recent Case*, 114 HARV. L. REV. 1414, 1414 (2001))).

what is best for their students.³⁵¹ That fear is misguided, though, for who better than teachers to advance the values of our society, “[a]nd what better way to demonstrate these shared values of a civilized social order than through a robust classroom dialogue?”³⁵² Contrary to what some believe,³⁵³

teachers do not want their classrooms to “become mere instruments for the advancement of the[ir] individual and collective social agendas.” Indeed, on most days, the vast majority of teachers are simply struggling to find the time to prepare lessons that will provide guidance and training for young minds seeking to succeed in a rapidly changing world.³⁵⁴

If clearly defined, academic freedom could protect teachers’ ability to teach those lessons that would prepare students to contribute and succeed in a diverse world. Though teachers may not have the authority to determine the content of their curriculum,³⁵⁵ principles of academic freedom could be used to allow teachers to determine how such curriculum is implemented. Of course, “[t]he right to academic freedom, . . . like all other constitutional rights, is not absolute and must be balanced against the competing interests of society.”³⁵⁶ The State has a vital interest in shaping young people into adults who will eventually participate in society, but shielding students from a variety of viewpoints does not serve that interest.³⁵⁷

The interest of the State and the intertwined interests of teachers and their students can be balanced, but it must be done not only “in light of the special characteristics of the school environment”³⁵⁸ but also in light of the sociological need for culturally responsive teaching.³⁵⁹ Of course, expanding First Amendment protections in classrooms must be done cautiously, because “[i]f we incorporate the First Amendment into the classroom in its full vigor at the invitation of a single person, hateful voices would gain entry to a room where listeners are not permitted to leave.”³⁶⁰

351. See Stuller, *supra* note 131, at 316–17 (citing *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987)); see also *Epperson v. Arkansas*, 393 U.S. 97, 113–14 (1968) (Black, J., concurring) (“I am . . . not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school’s managers do not want discussed.”).

352. Wohl, *supra* note 98, at 1318 (internal quotation marks omitted) (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986)).

353. See *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 373 (4th Cir. 1998) (Luttig, J., concurring) (“[W]ere every public school teacher in America to have the constitutional right to design (even in part) the content of his or her individual classes, as the dissent would have it—the Nation’s school boards would be without even the most basic authority to implement a uniform curriculum and schools would become mere instruments for the advancement of the individual and collective social agendas of their teachers.”).

354. Wohl, *supra* note 98, at 1319 (alteration in original) (quoting *Boring*, 136 F.3d at 373).

355. *Boring*, 136 F.3d at 370 (explaining a high school drama teacher has no First Amendment right to determine the contents of curriculum, particularly where the curriculum taught is a legitimate pedagogical concern of the school administration); see also *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (“[N]o court has found that teachers’ First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates.”).

356. *Parducci v. Rutland*, 316 F. Supp. 352, 355 (M.D. Ala. 1970).

357. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

358. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

359. See GAY, AT THE ESSENCE OF LEARNING, *supra* note 12, at 84.

360. Stuller, *supra* note 131, at 338.

One step in the right direction could be a reworking of existing school speech doctrines to protect academic freedom. As a starting point, classroom discussion must be recognized as protected speech, and teachers must be trusted to implement state-prescribed curriculum with the best interests of all of their students in mind. In an on-campus teacher speech case, the academic freedom analysis would begin with whether the *teacher* had a legitimate pedagogical reason for the expression.³⁶¹ This would result in teachers' free speech rights being presumptively protected and allow the state or school to restrict teacher speech only where it is unrelated to a legitimate pedagogical concern.³⁶² Because culturally responsive instruction is tied to increased student engagement and success, especially for minority students who have historically been marginalized,³⁶³ it *is* a legitimate pedagogical concern. Shifting the right from schools to teachers will protect culturally responsive instruction, increasing opportunities for student engagement and success.

If the teacher's expression was related to a legitimate pedagogical concern, the test would ask whether the expression was likely to or did substantially and materially interfere with the objectives of the school.³⁶⁴ This would address whether it was morally appropriate for the students' maturity level, whether it was offensive or harmful to any students, or whether it invaded the rights of others.³⁶⁵

These tests would operate where there is legal silence in the area of the teacher's expression. But if the teacher's speech violated a school policy or education law, a balancing test would be needed to weigh the government's interest in enforcing the policy against the teacher's right to academic freedom, coupled with the students' right to know. Under this analysis, the government's interest in enforcing the viewpoint-based restrictions of the anti-CRT laws would be far outweighed by the teacher's rights to discuss race and gender in light of the legitimate pedagogical concern of providing culturally responsive instruction. Acknowledging students' racial and cultural differences would not and does not substantially and materially interfere with schools' objectives—it helps each student connect with the curriculum and fosters their success,³⁶⁶ an objective schools are unlikely to repudiate.

Finally, students must be exposed to a diversity of ideas. Where a law restricts those ideas to one viewpoint and curbs students' access to legitimate, appropriate, and necessary information, the State has attempted to “strangle the free mind at its source”—an act that cannot withstand constitutional scrutiny.³⁶⁷ The State's interest in

361. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

362. This would also be consistent with the AAUP's 1940 *Statement of Principles*, which encourages discussion of controversial issues only when they are related to the subject being taught. AAUP 1940 STATEMENT OF PRINCIPLES, *supra* note 113, at 14 & n.4.

363. Dee & Penner, *supra* note 83, at 129–30; GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 31. See also *supra* Part II.B for a discussion of the impact of culturally responsive teaching.

364. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

365. See *id.* (“[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”).

366. See GAY, CULTURALLY RESPONSIVE TEACHING, *supra* note 21, at 31.

367. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943); see also *Bd. of Educ. v. Pico*, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring).

inculcating what it deems politically acceptable cannot outweigh a teacher's legitimate interest in connecting with students through a rich, age-appropriate curriculum, nor can it outweigh their students' interest in being exposed to diverse ideas or in engaging with a curriculum in which they see themselves and their cultural identities reflected.

IV. CONCLUSION

Centering education in the twenty-first century's culture wars is detrimental to the increasingly diverse population of students in public schools.³⁶⁸ Instead of encouraging the development of "well-read [citizens],"³⁶⁹ these laws cast a "pall of orthodoxy" ³⁷⁰ over classrooms. "Orthodoxy means not thinking—not needing to think. Orthodoxy is unconsciousness."³⁷¹ Orthodoxy is antithetical to the Supreme Court's acknowledgment of the importance of student exposure to diverse viewpoints. Rather than fostering thinking and academic inquiry or preparing students to participate in a democratic society, states have abused their authority by narrowing the scope of acceptable viewpoints in schools.

In light of the attacks on classroom discussion, particularly discussions that inspire inclusivity, teachers' speech must be protected. Existing First Amendment principles for teachers are lacking in structure and strength and have been misapplied to instructional speech. Courts should not defer to politicians and school boards who are not on the front lines every day. That deference should belong, at least in part, to the teachers who know their students and have to adapt each year to their students' diverse academic, social, and cultural needs.

As the challenges to the anti-CRT laws reach courts around the country, the academic freedom doctrine is ripe for reconsideration. By extending academic freedom to elementary and secondary teachers when speech concerns culturally responsive instruction, teachers will be afforded the autonomy to do their jobs, and students will be afforded the immeasurable benefits of growing up in inclusive classrooms—classrooms where they can succeed.

368. See *supra* Part II.B for an explanation of the importance of culturally responsive and culturally relevant instruction.

369. BRADBURY, *supra* note 1, at 56.

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

371. ORWELL, *supra* note 15, at 53.