The Constitutionality of Orthodoxy: First Amendment Implications of Laws Restricting Critical Race Theory in Public Schools

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> What else can the School Board now decide it does not like? How else will its sensibilities be offended? Are we sending children to school to be educated by the norms of the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems?[1]
>
> —Justice William O. Douglas

The past two years have seen a proliferation of state laws that restrict how race may be discussed in public schools. Among other topics, these laws commonly ban presentation of the viewpoint that the U.S. government—or legal system—is racist. But such policies raise important First Amendment questions: while it is well accepted that school boards and state legislatures retain great discretion to promulgate curricula, the exact scope of that authority is unclear. The Supreme Court case most closely related to this question, Hazelwood School District v. Kuhlmeier*, addresses only when school districts may permissibly regulate student speech in curricular contexts.* Hazelwood *does not resolve the antecedent question of whether local educational authorities may constitutionally constrict the range of permissible political viewpoints in curricula.*

This Comment argues that existing doctrine supports recognizing a student right to be free from political orthodoxy in public education. It proposes a burden-shifting test for vindicating that right. First, courts should evaluate whether curricular decisions restrict discussion of political viewpoints. Second, the government should have the opportunity to show that the restriction serves a legitimate interest, in part pursuant to the test laid out in Tinker v. Des Moines Independent Community School District. *Finally, plaintiffs should be able to prove that the government's restriction was based on impermissible animus. This Comment concludes by arguing that certain provisions in recently passed critical-race-theory laws should be*

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[1] Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25, 409 U.S. 998, 999–1000 (1972) (Douglas, J., dissenting from denial of certiorari).

considered unconstitutional because they restrict political discussion without legitimate justification.

INTRODUCTION

In the summer of 2020, Manhattan Institute fellow Christopher Rufo received a tip that the City of Seattle was conducting "internalized racial superiority" trainings for city employees. These trainings allegedly taught that "black Americans are reducible to the essential quality of 'blackness' and white Americans are reducible to the essential quality of 'whiteness.'"[2] Rufo later appeared on Fox News and called on President Donald Trump to "ban such training in all federal departments."[3] His advocacy bore fruit: President Trump reportedly watched the

[2] Adam Harris, *The GOP's 'Critical Race Theory' Obsession*, THE ATLANTIC (May 7, 2021), https://perma.cc/2CZD-6FJZ (quoting Christopher F. Rufo, *Cult Programming in Seattle*, CITY J. (July 8, 2020), https://perma.cc/Z7AW-CK2Y).

[3] *Id.*

program, contacted Rufo, and subsequently issued an executive order prohibiting trainings advocating certain "divisive concepts" from all federal programs.[4] The executive order defined "divisive concepts" to include views that "the United States is fundamentally racist or sexist" and that meritocracies are racist or sexist.[5] The accompanying implementation memorandum suggested that agencies might identify programs violating the executive order by searching for phrases such as "critical race theory," "systemic racism," and "unconscious bias."[6]

Several advocacy groups that provided trainings on issues of race and gender sued the Trump administration, requesting a preliminary injunction on the grounds that the executive order impermissibly discriminated between viewpoints and thus violated the First Amendment.[7] A federal judge granted the injunction, agreeing that the plaintiffs were "likely to prevail" on their viewpoint-discrimination claim.[8] But Rufo's influence did not abate. As of April 1, 2022, forty-two states had introduced bills or taken other steps to regulate the discussion of race in public schools.[9]

Many of these regulations parrot the language from President Trump's executive order: Tennessee, for instance, prohibits any public school from teaching that a "meritocracy is inherently racist or sexist . . . [or that] [t]his state or the United States is fundamentally or irredeemably racist or sexist."[10] It also prohibits teachers from using supplemental materials that reference such subjects.[11] Two recently enacted Texas statutes stipulate that no teacher or school authority may "make part of a course" the concept that meritocracies "are racist or sexist"[12] or that, "with respect to their relationship to American values, slavery and racism

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4 *See id.*; Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 528 (N.D. Cal. 2020) (quoting Exec. Order No. 13,950, 85 Fed. Reg. 60,683, 60,683 (Sept. 22, 2020)).

5 *See Santa Cruz*, 508 F. Supp. 3d at 529 (quoting Exec. Order No. 13,950, 85 Fed. Reg. at 60,685).

6 *Id.* at 531.

7 *See id.* at 531–34.

8 *Id.* at 541–42.

9 Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (Apr. 1, 2022), https://perma.cc/LPF6-V65D.

10 S.B. 623, 112th Gen. Assemb., Reg. Sess. § 51(a) (Tenn. 2021) (codified at TENN. CODE ANN. § 49-6-1019(a) (2021)).

11 S.B. 623, 112th Gen. Assemb., Reg. Sess. § 51(a) (Tenn. 2021) (codified at TENN. CODE ANN. § 49-6-1019(a)).

12 H.B. 3979, 87th Gen. Assemb., Reg. Sess. § 1 (Tex. 2021).

are anything other than deviations from . . . the authentic founding principles of the United States."[13] An Arizona law provides that school authorities "may not allow instruction in or make part of a course" the idea that "an individual . . . is inherently racist, sexist or oppressive, whether consciously or unconsciously" or that "academic achievement[ ] [or] meritocracy . . . are racist or sexist."[14] North Dakota recently passed a *second* critical-race-theory law prohibiting schools from including curricular instruction that "racism is systemically embedded in American society and the American legal system."[15]

These laws have already impacted U.S. education.[16] Teachers and administrators struggle to discern what exactly the laws restrict, forcing them to alter teaching strategies.[17] School authorities have banned books such as *A Raisin in the Sun*, *Their Eyes Were Watching God*, and *Narrative of the Life of Frederick Douglass* from core curricula.[18] Protests and lawsuits have proliferated on both sides of the issue.[19]

This is not the first time that U.S. school districts have served as culture-war battlegrounds. In 1925, Tennessee science teacher John Scopes was infamously prosecuted for teaching evolution in violation of a state statute prohibiting instruction of "any theory that denies the story of the divine creation of man as taught in the Bible."[20] In 1974, the Board of Education of Kanawha County,

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13 H.B. 40, 87th Gen. Assemb., 2d Called Sess. § 620.002(a)(10) (Tex. 2021).

14 H.B. 2898, 55th Leg., 1st Reg. Sess. § 15-717.02 (Ariz. 2021).

15 H.B. 1508, 67th Gen. Assemb., Reg. Sess. § 1 (N.D. 2021).

16 *See, e.g.*, Christine Hauser, *Texas Principal in Spotlight over Race Issues Agrees to Resign with Paid Leave*, N.Y. TIMES (Nov. 10, 2021), https://perma.cc/6V2L-5J9Q; Zack Beauchamp, *Did Critical Race Theory Really Swing the Virginia Election?*, VOX (Nov. 4, 2021), https://www.vox.com/policy-and-politics/2021/11/4/22761168/virginia-governor-glenn-youngkin-critical-race-theory.

17 *See* Fabiola Cineas, *Critical Race Theory Bans Are Making Teaching Much Harder*, VOX (Sept. 3, 2021), perma.cc/7LKT-F8LY.

18 Plaintiffs' Motion for Preliminary Injunction at 22, Black Emergency Response Team v. O'Connor, No. 21-cv-1022 (W.D. Okla. Oct. 29, 2021).

19 *See id.* at 12–22 (arguing that Oklahoma's critical-race-theory law violates the First Amendment). *Compare* Douglas Belkin & Jacob Gershman, *Federal Lawsuits Say Antiracism and Critical Race Theory in Schools Violate Constitution*, WALL ST. J. (July 1, 2021), https://www.wsj.com/articles/federal-lawsuits-say-antiracism-and-critical-race-theory-in-schools-violate-constitution-11625151879 (discussing a federal lawsuit alleging violations of the Fourteenth Amendment stemming from a school's diversity initiatives), *with* Gabriella Borter, *'Critical Race Theory' Roils a Tennessee School District*, REUTERS (Sept. 21, 2021), https://www.reuters.com/world/us/critical-race-theory-roils-tennessee-school-district-2021-09-21 (outlining local community resistance to the Tennessee law).

20 Scopes v. State, 289 S.W. 363, 363–64, 363 n.1 (Tenn. 1927) (finding "little merit" in Scopes's argument that he had a First Amendment right to teach evolution in schools

West Virginia, voted to purchase textbooks preaching multiculturalism and atheism despite petitions to the contrary. As a result, "homes were firebombed, schools were dynamited, [and] gunfire was exchanged."[21] And if the events of the past are any guide for what to expect in the future, the current dispute over critical race theory is unlikely to be the last time that conflict emerges over curricular decisions. Schools continue to serve as sites for discussion of many of today's "socially controversial"[22] topics, such as climate change[23] and abortion.[24]

Despite the significant role that schools play in preparing students for political conversation—and the controversy that comes with it—the precise scope of local officials' authority to regulate curricula is unclear. As the two of the most recent federal appellate opinions on this question have noted, courts have granted widely differing degrees of discretion to state officials when regulating the content of curricula.[25] The lack of doctrinal clarity on the appropriate standard of judicial review to be applied to curricular guidelines—along with heightened political polarization and ideological bent in classrooms[26]—makes the time right for a clarification.

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but overturning the conviction on a procedural issue); *see also* Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (rejecting the *Scopes* holding nearly forty years later).

21 Norman B. Smith, *Constitutional Rights of Students, Their Families, and Teachers in the Public Schools*, 10 CAMPBELL L. REV. 353, 389–90 (1988) (quoting Daniel M. Schember, *Textbook Censorship—The Validity of School Board Rules*, 28 ADMIN. L. REV. 259, 259 (1976)).

22 *See* JOHN ROGERS, MEGAN FRANKE, JUNG-EUN ELLIE YUN, MICHAEL ISHIMOTO, CLAUDIA DIERA, REBECCA COOPER GELLER, ANTHONY BERRYMAN & TIZOC BRENES, UCLA'S INST. FOR DEMOCRACY, EDUC. & ACCESS, TEACHING AND LEARNING IN THE AGE OF TRUMP: INCREASING STRESS AND HOSTILITY IN AMERICA'S HIGH SCHOOLS 12–16 (2017), https://perma.cc/B5SZ-6YL8 (noting that teachers have reported increased polarization in classrooms).

23 *See generally* Jennifer Bleazby, Simone Thornton, Gilbert Burgh & Mary Graham, *Is Climate Change Education Ever a Form of Political Indoctrination? Pedagogical and Epistemological Tools for Managing Climate Change 'Controversy' in the Classroom*, AUSTL. ASS'N OF RSCH. IN EDUC. CONF. (2021).

24 *See* David C. Wiley, Marina Plesons, Venkataram Chandra-Mouli & Margarita Ortega, *Managing Sex Education Controversy Deep in the Heart of Texas: A Case Study of the North East Independent School District*, 15 AM. J. SEXUALITY EDUC. 53, 55–58 (2020).

25 *See* Arce v. Douglas, 793 F.3d 968, 982–83 (9th Cir. 2015) (explaining that four other circuits have taken different approaches to this question); Oliver v. Arnold, 19 F.4th 843, 859 (5th Cir. 2021) (Duncan, J., dissenting) ("Our law in this area is . . . a dumpster fire.").

26 *See* Andrew Atterbury & Juan Perez Jr., *Republicans Eye New Front in Education Wars: Making School Board Races Partisan*, POLITICO (Dec. 29, 2021) https://perma.cc/R3ZE-3FLA; *see also* ROGERS ET AL., *supra* note 22, at 12–16 (noting that teachers have reported increased polarization in classrooms).

This Comment argues that existing First Amendment jurisprudence and important normative arguments provide support for the recognition of a robust student right to receive a public education that does not suppress viewpoints on matters of "politics, nationalism, . . . or other matters of opinion."[27] Part I explains why courts have historically granted broad deference to state authorities to set curricula. Part II then outlines how existing First Amendment jurisprudence warrants heightened protection against government-mandated indoctrination of political orthodoxy through public school curricula. Part III attempts to balance the competing interests of local educational authorities and students by proposing a burden-shifting framework under which plaintiffs can allege violations of the right to be free from orthodoxy. Finally, Part IV uses the Tennessee critical-race-theory statute as a blueprint for how the proposed burden-shifting framework should work in practice.

I. DISCRETION OF LOCAL STATE ACTORS TO SET CURRICULA

While the critical-race-theory laws discussed in this Comment have been promulgated by state legislatures,[28] it is worth noting up front that—because this Comment focuses on students' First Amendment rights—it makes no analytical difference whether curricular decisions which cement education of politically orthodox viewpoints are made by state legislatures, school boards, or school officials. School boards regulate public school curricula via delegated state power,[29] and teachers—as agents employed by the state—are subject to the same First Amendment limitations as state legislatures and school boards when restricting student speech rights.[30] As a result, I use the term "local

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27 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

28 *See* Schwartz, *supra* note 9.

29 *See, e.g.*, Dye v. McKeithen, 856 F. Supp. 303, 307–08 (W.D. La. 1994) ("It is a prerogative of the legislature to delegate to administrative boards and agencies of the state. . . . [But] [t]he Board is authorized to do only those acts expressly or implicitly granted to them by the legislature."); W.M. Schlosser Co. v. Sch. Bd., 980 F.2d 253, 255 (4th Cir. 1992) ("[S]chool boards 'possess and can exercise only those powers expressly granted by the General Assembly.'" (quoting City of Richmond v. Confrere Club, 387 S.E.2d 471, 473 (Va. 1990))).

30 *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267–70 (1988) (extending the principle that curricular determinations rest with the school board to cover actions by a school principal); Collins v. Putt, 979 F.3d 128, 134–35 (2d Cir. 2020) (applying the *Hazelwood* "school officials" framework to an action by a teacher); C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 202 (3d Cir. 2000) (explaining that school boards can be held liable for

authorities" to refer to all local government actors interchangeably. This Part explains why those local authorities have historically received nearly unlimited discretion to regulate curricula, and then it outlines the standard that is commonly applied in constitutional review of curricular decisions.

A. Support for Absolute Local Control over Curricula

The Free Speech Clause of the First Amendment—incorporated against the states by the Fourteenth Amendment—provides that "Congress shall make no law . . . abridging the freedom of speech."[31] While courts have consistently recognized that students[32] do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[33] the prerogative to determine curricular content is typically reserved to local authorities almost without limitation.[34]

The Supreme Court has recognized that "inculcation of [community] values is truly the 'work of the schools.' The determination of what manner of speech is . . . inappropriate properly rests with the school board."[35] Courts have repeatedly emphasized that school boards execute "important, delicate, and highly discretionary functions,"[36] which come with substantial community benefits. Aside from allowing localities to teach values of their choosing, "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages

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constitutional violations committed by their teachers if the teachers act in accordance with a "policy, custom or practice established or approved by the board").

31 U.S. CONST. amend. I.

32 Curricular restrictions also raise First Amendment concerns regarding teachers' free speech rights in schools. These are important issues but are not the subject of this Comment. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (balancing "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 [its] public services").

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

34 *See* Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) ("[School boards] might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values." (emphasis in original)).

35 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (quoting *Tinker*, 393 U.S. at 508); *see also* Morse v. Frederick, 551 U.S. 393, 411 (2007) (Thomas, J., concurring) ("[I]n the early 1800's, no one doubted the government's ability to educate and discipline children as private schools did.").

36 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). *But see id.* (admonishing that the board's responsibilities must still be performed "within the limits of the Bill of Rights").

'experimentation, innovation, and a healthy competition for educational excellence.'"[37]

Limited judicial interference with local school control also ensures that students will receive a well-structured and comprehensive education. Giving school authorities the power to set and enforce curricular limits—rather than allowing "teachers to teach what they please"[38]—cements educational oversight in executive bodies with the power to promulgate corrective policies. Further, placing curricular control in the hands of elected, democratically accountable school boards ensures that students will be taught the values of the community rather than those of the unelected judiciary.[39]

Local control over curricula is also consistent with the First Amendment principle that "when the State is the speaker, it may make content-based choices."[40] The Supreme Court, in a highly criticized line of cases,[41] has explained that "the Government can, without violating the Constitution, selectively fund a program" that expresses a viewpoint "without at the same time funding an alternative program which" expresses an alternate viewpoint.[42] Lower courts have extended this logic to the educational sphere, explaining that schools—as state entities—are entitled to regulate the content of what is expressed when they speak.[43]

For the foregoing reasons, school authorities act with largely unfettered discretion when making curricular decisions. The Supreme Court has not directly addressed what limitations—if any—are imposed on local curricular authorities by the

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[37] Milliken v. Bradley, 418 U.S. 717, 742 (1974) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)).

[38] Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004, 1007 (7th Cir. 1990) (quoting Palmer v. Bd. of Educ., 603 F.2d 1271, 1274 (7th Cir. 1979)).

[39] *See* Jason Persinger, Note, *The Harm to Student First Amendment Rights When School Boards Make Curricular Decisions in Response to Political Pressure: A Critique of* Griswold v. Driscoll, 80 U. CIN. L. REV. 249, 269–70 (2011).

[40] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

[41] *See, e.g.*, Jason A. Kempf, *Viewpoint Discrimination in Law School Clinics: Teaching Students When and How to "Just Say No"*, 70 MO. L. REV. 247, 252 (2007) (highlighting that these cases "introduced a significant amount of confusion into this area of First Amendment law").

[42] Rust v. Sullivan, 500 U.S. 173, 193 (1991); *see also* Maher v. Roe, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.").

[43] *But see* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 702 (2011) (outlining a tension between prohibiting viewpoint discrimination when the government restricts speech but allowing viewpoint discrimination when the government is the speaker).

First Amendment. As a result, courts have struggled to demarcate how much partisan or ideological bent may be baked into public curricula.[44]

B. The (Assumed) Current Standard: *Hazelwood*

Lower courts frequently apply the standard outlined in *Hazelwood School District v. Kuhlmeier*[45] when evaluating state curricular decisions.[46] *Hazelwood* dealt with a school principal's decision to delete two articles—describing teen pregnancy and parental divorce—from a school newspaper produced by a high school journalism class.[47] The Court upheld the principal's action, explaining that the student newspaper was part of the school's curriculum[48] and that, under certain circumstances, school authorities may constitutionally restrict student speech in school-sponsored expressive activities.[49]

The Court explained that allowing school authorities to restrict students' expression in curricular settings serves three important functions: (1) ensuring that students learn the intended lessons, (2) protecting other students from "material that may be inappropriate for their level of maturity," and (3) preventing the speaker's views from being erroneously attributed to the school.[50] The *Hazelwood* Court held that these factors may outweigh student speech rights, allowing school authorities to censor student expression in the classroom when the restriction is based upon "legitimate pedagogical concerns."[51]

Hazelwood addressed only "whether the First Amendment requires a school *affirmatively to promote* particular student speech" in curricula,[52] concluding that school officials may limit student speech pursuant to the pedagogical purpose of a

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44 *See, e.g.*, Oliver v. Arnold, 19 F.4th 843, 859 (5th Cir. 2021); Arce v. Douglas, 793 F.3d 968, 982–83 (9th Cir. 2015) (explaining that circuits have reached different conclusions on this question).

45 484 U.S. 260 (1988).

46 *See, e.g.*, ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1200 (11th Cir. 2009) (addressing "curricular decision[s] entitled to deference under the *Hazelwood* decision").

47 *Hazelwood*, 484 U.S at 263.

48 *Id.* at 269.

49 *See id.* at 273.

50 *Id.* at 271.

51 *Id.* at 273.

52 *Hazelwood*, 484 U.S. at 270–71 (emphasis added).

legitimate curriculum.[53] Essentially, this means that schools may discriminate along content-based lines when evaluating student speech in curricular contexts such as in essays, test responses, and school newspaper articles. *Hazelwood* indicates that when students receive poor grades for nonresponsive answers to essay prompts, they may not allege violations of their First Amendment rights so long as the bad grade was reasonably related to a legitimate pedagogical concern.[54]

Hazelwood thus answered a narrow question: Under what circumstances may school authorities regulate student speech in curricular contexts such as school newspapers, exams, and essays? Contrary to its subsequent use by several appellate courts,[55] *Hazelwood* did not answer the question posed by this Comment: What limits does the First Amendment place upon state actors when making curricular determinations? First, *Hazelwood* promulgates conditions under which state actors may restrict student speech, not outer limits on state speech in the closed school environment.[56] Second, *Hazelwood* does not resolve whether state actors may regulate curricular speech along viewpoint-discriminatory lines.[57]

Because applying the *Hazelwood* standard of review to all curricular decisions stretches the holding substantially beyond its

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53 *See* Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 100 (2008) (arguing that "the notion that *Hazelwood*'s standard applies to all school-sponsored speech," as opposed to only student speech, "reflects a misreading").

54 *Cf. Hazelwood*, 484 U.S. at 271 (reasoning that a school may distance itself "from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences"). *Hazelwood* still leaves some close calls on this point. *See, e.g.*, Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 620–23 (2d Cir. 2005) (describing a school that rejected a poster depicting Jesus as the only way to save the environment); Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 153–54 (6th Cir. 1995) (describing a teacher who rejected a student's paper on Jesus in response to an assignment requiring students to research an "interesting, researchable and decent" topic).

55 *See, e.g.*, *ACLU of Fla.*, 557 F.3d at 1200.

56 *See* Waldman, *supra* note 53, at 94 ("[O]nce *Hazelwood* is interpreted as applying to the speech of students, teachers, *and* outside entities, it is not possible to reach a uniform, workable answer to the viewpoint-discrimination question." (emphasis in original)); *see also Hazelwood*, 484 U.S. at 288 (Brennan, J., dissenting) (articulating a fear that the majority's broad standard would allow school officials to "camouflage viewpoint discrimination as the 'mere' protection of students from sensitive topics").

57 *See* Susannah Barton Tobin, Note, *Divining* Hazelwood*: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 219 (2004); *Peck*, 426 F.3d at 631–32 (explaining that the content-discrimination issue "has been the subject of much debate among Circuit Courts, which have reached conflicting conclusions").

intended scope, it has largely served as a rubberstamp for curricula. Part II will explain why existing free speech jurisprudence supports applying a far more stringent standard of review for curricular determinations.

II. EXISTING FOUNDATIONS OF A RIGHT TO RECEIVE INFORMATION FREE FROM ORTHODOXY

While local authorities typically have broad discretion to regulate school environments, students retain substantial free speech rights even in school contexts.[58] These include important rights that are ancillary to speech, such as a limited right to receive information[59] and a right to remain silent when schools mandate speech expressing a political viewpoint.[60] The Court has also explained that free speech rights take on unique contours in educational settings. Schools, unlike other government actors, must be able to mandate certain types of speech—and restrict others—to achieve the legitimate curricular goals[61] outlined by local authorities. However, in *Board of Education v. Pico*,[62] a plurality of the Supreme Court articulated a limit on the discretion of school authorities to regulate content in schools. The *Pico* Court held that school authorities may not constitutionally censor selected books from public school libraries "in a narrowly partisan or political manner."[63]

While *Pico* was expressly limited to a school board's authority to remove certain books from school libraries, the Court's precedents—and underlying First Amendment principles—justify articulating a broader restriction on the state's prerogative to select viewpoints when promulgating curricula.

A. *Pico* and the Right to Receive Information

The right to receive communicated speech is now an established piece of free speech jurisprudence.[64] In

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

59 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976).

60 *See Barnette*, 319 U.S. at 642; Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 789 (2012) ("*Barnette* [ ] self-consciously created a new 'right not to speak,' rather than simply applying existing First Amendment doctrine.").

61 *See Hazelwood*, 484 U.S. at 273.

62 457 U.S. 853 (1982).

63 *Id.* at 870.

64 *Va. State Bd. of Pharmacy*, 425 U.S. at 756 (1976) ("[W]here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients.").

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,[65] the Court explained that the Free Speech Clause implies a right to receive information in certain circumstances, including receipt of advertising and of mail.[66] The right to receive information rests on the notion that "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."[67]

In *Pico*, the Supreme Court recognized that students have a right to receive information in school libraries.[68] A plurality of the Court ruled that a school board could not remove books from a school library simply because it considered the books "anti-American, anti-Christian, anti-Semitic, and just plain filthy."[69] While the *Pico* ruling was replete with caveats[70] and ostensibly limited to its facts,[71] the Court held that the state may not constitutionally "contract the spectrum of available knowledge" in school libraries.[72] Such restrictions can—even in schools, typically subject to unencumbered state regulation—violate "the right to receive information and ideas."[73]

The *Pico* Court built upon the right to receive information recognized in other contexts. It explained that the right to receive information is, in two ways, "an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution."[74] First, the right to receive information "follows ineluctably from the *sender's* First Amendment right to send [ideas]."[75] Second, the *Pico* Court recognized the right to receive ideas as a "necessary predicate to the *recipient's* meaningful exercise of his

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65 425 U.S. 748 (1976).

66 *Id.* at 757.

67 Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

68 *Pico*, 457 U.S. at 867 ("[W]e have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.'" (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969))).

69 *Id.* at 857.

70 *See id.* at 869 ("[School boards] might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values." (emphasis in original)).

71 *See id.* at 862 (explaining that the holding "does not intrude into the classroom, or into the compulsory courses taught there. Furthermore, even as to library books, the action before us does not involve the *acquisition* of books. . . . Rather, the only action challenged in this case is the *removal* from school libraries of books" (emphasis in original)).

72 *Id.* at 866 (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)).

73 *Pico*, 457 U.S. at 867 (quoting *Stanley*, 394 U.S. at 564).

74 *Id.*

75 *Id.* (emphasis in original).

own rights of speech, press, and political freedom."[76] The *Pico* plurality explained that students must be exposed to disparate viewpoints because "access [to diverse ideas] prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[77] The Court ultimately ruled that there was an unresolved question of whether the library books had been removed for legitimate educational reasons or pursuant to partisan whim, and the Court sent the case back to the district court for further fact-finding.

Thus, although the *Pico* plurality opinion nominally limits the right to receive information to the school library context, it hints at a more expansive right to receive information free from orthodoxy in public schools.[78] Indeed, the *Pico* Court split over whether its limitation on school authorities' discretion to restrict available information along partisan lines ought to extend beyond library books to classroom information. While the plurality cabined its holding to investigation of whether library books had been removed for partisan gain, Justice Harry Blackmun's concurrence argued that courts ought to apply a broader principle:

> [T]he State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to ideas. . . . [C]ertain forms of state discrimination *between* ideas are improper. In particular, our precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.[79]

Justice Blackmun criticized the plurality for limiting its holding to school libraries.[80] He argued that receipt of ideas—free from partisan taint—is crucial for students' future exercise of political freedom[81] and that "students may not be regarded as closed-circuit recipients of only that which the State chooses to

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[76] *Id.* (emphasis in original) (citing 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed., 1910)).

[77] *Id.* at 868; *see also* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1031 (9th Cir. 1998) ("It cannot be disputed that a necessary component of any education is learning to think critically about offensive ideas—without that ability one can do little to respond to them.").

[78] *See Pico*, 457 U.S. at 868.

[79] *Id.* at 878–80 (Blackmun, J., concurring) (emphasis in original).

[80] *See id.* at 879 ("[The unique] environment [of the school] makes it particularly important that *some* limits be imposed [on educational discretion]." (emphasis in original)).

[81] *Id.* at 879–80.

communicate."[82] To allow otherwise would risk turning "state-operated schools" into "enclaves of totalitarianism."[83]

Justice Blackmun argued that suppression of dissidence is the precise evil that the First Amendment prohibits.[84] He also explained that if one of the justifications for local curricular discretion is value inculcation, "allowing a school board to" eliminate certain books from curricula based solely on a distaste for the "political ideas or social perspectives discussed in them" is counterproductive.[85] It "hardly teaches children to respect the diversity of ideas that is fundamental to the American system."[86] Justice Blackmun's opinion represents the view—rejected by the majority of the Justices—that suppression of political discussion in classrooms, not just libraries, raises special First Amendment concerns.

B. Compelled Speech and Viewpoint Discrimination

Strands of First Amendment jurisprudence other than the right to receive information support extending into classrooms the *Pico* right to access information free from partisan filter. This approach finds support in Cold War–era precedent limiting viewpoint discrimination in schools. A useful example of this principle is *Keyishian v. Board of Regents of the University of the State of New York*,[87] in which the Court evaluated a New York statute that required removal of civil service and public school employees from membership in groups that advocated overthrow of the government by unlawful means or for "treasonable or seditious" utterances.[88] The Court held that the New York law violated the First Amendment because it was unconstitutionally vague, chilling the discussion of dissenting viewpoints.[89] It also noted that these vagueness concerns were especially significant in university

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[82] *Id.* at 877 (quoting *Tinker*, 393 U.S. at 511). This logic also underlies Establishment Clause cases. *See* Epperson v. Arkansas, 393 U.S. 97, 103 (1968) (holding that states may not prohibit teaching evolution); Edwards v. Aguillard, 482 U.S. 578, 584, 597 (1987) (explaining that the state cannot require teachers to discuss creationism because students are impressionable and school attendance is involuntary).

[83] *Pico*, 457 U.S. at 877 (Blackmun, J., concurring) (quoting *Tinker*, 393 U.S. at 511).

[84] *See id.* at 882 ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." (quoting *Barnette*, 319 U.S. at 638)).

[85] *Id.* at 879–80.

[86] *Id.* at 880.

[87] 385 U.S. 589 (1967).

[88] *Id.* at 596–97.

[89] *Id.* at 604.

classrooms, which served as important sites for discussion of politically relevant ideas.[90] In the Court's view, the law did not make it clear whether teachers could, under the statute, "carr[y] a copy of the Communist Manifesto on a public street."[91] The Court explained that because the New York law restricted the breadth of available knowledge in society—and universities in particular—it replaced the ability "to inquire, to study and to evaluate, to gain new maturity and understanding" with "authoritative selection."[92] *Keyishian* thus set down the oft-cited principle that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."[93]

If, per *Keyishian*, schools may not take political ideology into account when making employment decisions, may they require that those teachers instruct politically orthodox content? Subsequent decisions have not clearly established when schools can make viewpoint-based distinctions in curricular determinations.[94]

One situation in which schools clearly cannot prescribe orthodoxy is when compelling student speech expressing political viewpoints. In *West Virginia State Board of Education v. Barnette*,[95] the Court ruled that a school policy mandating that students salute the flag during the Pledge of Allegiance "transcends constitutional limitations on [local authorities'] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[96] The *Barnette* Court held that the compelled salute functioned to "coerce acceptance of [a] patriotic creed"[97] and explained that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . . If there are any circumstances which permit an exception, they do not now occur to us."[98]

Subsequent opinions on compelled school speech have explained that while a student may sometimes be "forced to speak

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90 *Id.* at 603.

91 *Id.* at 599.

92 *Keyishian*, 385 U.S. at 603 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

93 *Id.*; *see also Epperson*, 393 U.S. at 105 (affirming the language from *Keyishian*).

94 *See Arce*, 793 F.3d at 982–83 (explaining that courts have reached differing conclusions as to whether *Hazelwood* allows viewpoint discrimination when schools restrict student curricular speech).

95 319 U.S. 624 (1943).

96 *Id.* at 642.

97 *Id.* at 634.

98 *Id.* at 642.

or write on a particular topic even though the student might prefer a different topic," public schools "may not demand that a student profess beliefs or views with which the student does not agree."[99] Local school authorities may not require the utterance of a particular message, because such action "pose[s] the inherent risk that the Government seeks . . . to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[100] This shows that concern over compelled speech is based on the deeper concern that the government may create an echo chamber devoid of dissent. This logic supports expanding the anti-indoctrination underpinning of the Court's prohibition on viewpoint discrimination in compelled speech to curricular development. If the goal of the *Barnette* compelled-speech doctrine is to prevent the state from "strangl[ing] the free mind at its source,"[101] a similar doctrine ought to apply to the state's monopoly on authority to disseminate viewpoints in schools. As Professors Stephen Arons and Charles Lawrence have explained, "The requirement that the school's attitudes be accepted with silent consent [is] no less a coercive ritualistic confession than a flag salute. It [is] no less a denial of [ ] students' first amendment rights. [Such students are] being trained to be passive, docile, self-denying individuals."[102]

C. Justifying Heightened Protection for Political Viewpoints

This Comment seeks to extend *Barnette*'s protection against orthodoxy in politics, nationalism, and analogous "matters of opinion" to state curricular speech. Cabining judicial review to curricular decisions that impact these categories of speech—which I hereinafter call "political speech"—serves an important function: it protects the prerogatives of school officials to regulate obscene, indecent, or unambiguously harmful speech.[103]

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[99] C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 187 (3d Cir. 2005). This is also the logic underlying the robust application of the Establishment Clause in school settings. *See generally Epperson*, 393 U.S. 97 (striking down a statute that prohibited teaching evolution in schools).

[100] *C.N.*, 430 F.3d at 187 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

[101] *Barnette*, 319 U.S. at 637.

[102] Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 331 (1980).

[103] *See* S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 149–50 (1995).

Although evaluating whether curricular determinations fall within the ambit of the *Barnette* categories may seem like a difficult task, political speech already receives special protection under the First Amendment.[104] Distinguishing between political and nonpolitical speech[105] is necessary—and good—because, as the Supreme Court has explained,[106] the democratic system is best served by "free political discussion, to the end that government may be responsive to the will of the people."[107] Heightened protection for speech designated as political comes with greater skepticism for government action that risks "excising a particular point of view."[108] Landmark free speech decisions have explained that laws that restrain criticism of the state are antithetical to the First Amendment,[109] while "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values.'"[110]

Three jurisprudential theories are offered as justifications for the First Amendment: the "search for truth," self-governance, and self-fulfillment rationales.[111] The first two provide special support for heightened protection of political speech in schools. The "search for truth" approach conceptualizes the First Amendment as a guarantee that the marketplace of ideas will remain free from restriction, facilitating an uncensored pursuit of "living truth."[112] This theory gains force when considered in tandem with the second philosophical justification for First Amendment protections, which is the promotion of self-government.[113] As Professor Alexander Meiklejohn famously argued, political speech ought to be specially protected because a self-governing system relies on

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[104] *See id.* at 147.

[105] *See* Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 604–06 (explaining that "[t]he distinction between political and nonpolitical speech" is difficult but "serves a central function of the first amendment").

[106] Morse v. Frederick, 551 U.S. 393, 403 (2007) (explaining that political speech is protected in schools); Virginia v. Black, 538 U.S. 343, 365 (2003) (calling political speech "the core of what the First Amendment is designed to protect").

[107] De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

[108] Sunstein, *supra* note 105, at 610.

[109] *See, e.g.*, Bridges v. California, 314 U.S. 252, 270 ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.").

[110] Connick v. Myers, 461 U.S. 138, 145 (1983) (first quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); and then quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

[111] GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 1014–18 (8th ed. 2018).

[112] *See* JOHN STUART MILL, ON LIBERTY 33–84 (1859).

[113] *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

the ability of an informed citizenry to "pass judgment upon unwisdom and unfairness."[114] In Professor Cass Sunstein's words, "[t]he right to free speech . . . is a precondition for [democracy]," which means that regulation of political speech should be "subject to the strongest presumption of unconstitutionality."[115]

The U.S. education system should be responsive to the democratic function of the First Amendment.[116] The Supreme Court has explained that "[t]he classroom is peculiarly the 'marketplace of ideas'" because "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth."[117] While some might argue that education of children requires orthodoxy "imposed by conscious selection on the part of government officials,"[118] three counterarguments point to the contrary. First, as Judge Richard Posner explained, if "eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views . . . *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise."[119] Second, youth are capable of critical political thought—showcased today through youth activists like Greta Thunberg and Malala Yousafzai—and it is a crucial function of schools to facilitate the development of that skill.[120] Finally, the position that the First Amendment tolerates suppression of political speech in schools is simply antithetical to the First Amendment's protection of free thought: "In the absence of different perspectives and a wide range of information, the system cannot function. It will fail to expose errors of fact. It will fail

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114 *Id.* at 26.

115 CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121–22 (1993).

116 *See* Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. REV. 959, 973 (2003) (explaining the deeper critique that if schools "expose children only to values and ideas that buttress the status quo and legitimize the position of those in power, it is unlikely that those who are presently oppressed will learn the cause of their oppression or the means of overcoming it" (quoting Arons & Lawrence, *supra* note 102, at 322–23)).

117 *Id.* (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

118 *See* Malcolm Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J.L. & EDUC. 23, 65 (1989).

119 Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001) (emphasis in original).

120 *See* Welner, *supra* note 116, at 982 n.106 (arguing that youth are capable of political thought and that schools should promote critical thinking).

to shed the kind of light that comes only from diverse perspectives about public issues."[121]

D. Discerning Political Viewpoints

The premise that speech on political issues deserves heightened protection in schools raises an obvious question: What qualifies as a political viewpoint that is deserving of protection in classrooms?[122] The *Barnette* Court answered this question categorically, holding that schools may not compel speech on "politics, nationalism, religion, or other matters of opinion."[123] Other areas of First Amendment doctrine rely on similarly categorical approaches, assigning heightened protection to speech on matters of public concern.[124] This Comment adopts the *Barnette* approach: curricular decisions that restrict viewpoints on matters of politics, nationalism, or other matters of public opinion should be looked upon with judicial skepticism. Two similar cases—with opposite results—help illustrate the Court's approach to such content.

First, in *Pickering v. Board of Education*,[125] the Court considered a school board's dismissal of a teacher for writing a letter that criticized local educational tax policy to a local newspaper. While the Court recognized that the state, as an employer, has an interest in promoting the efficiency of its employees, it also noted that the public has a great interest in "free and unhindered debate on matters of public importance."[126] The Court explained that Pickering's speech did not jeopardize "either discipline by immediate superiors or harmony among coworkers" and that even if his allegations could be shown to be false, they were not "per se detrimental to the district's schools."[127] Conversely, Pickering, as a teacher, had an interest in speaking on the allocation of funding to schools. Because Pickering's speech did not inhibit the everyday operation of schools and contributed to discussion of a matter

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121 SUNSTEIN, *supra* note 115, at 22.

122 *See id.* at 148 ("How, for example, are we to treat the work of the controversial gay artist Robert Mapplethorpe, or rap music, or nude dancing?").

123 *Barnette*, 319 U.S. at 642.

124 *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759–61 (1985) (disapproving of punitive damages for libel when the speech is on a matter of "public concern"); *Claiborne Hardware Co.*, 458 U.S. at 913, 928 (expressing reluctance to criminalize a boycott related to "public issues").

125 391 U.S. 563 (1968).

126 *Id.* at 573.

127 *Id.* at 570–71.

of public concern, the Court held that he could not constitutionally be discharged from his post.[128]

In *Connick v. Myers*,[129] the Court evaluated an assistant district attorney's claim that she had been unconstitutionally discharged after circulating a questionnaire concerning internal office affairs such as "office transfer policy, office morale, the need for a grievance committee, [and] the level of confidence in supervisors."[130] The Court explained that *Pickering* intended to minimize the risk that speech on public issues might be "chilled" by fear of discharge for expressing unpopular viewpoints.[131] Surveying the post-*Pickering* progeny, the Court explained that if the speech causing firing "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for [the Court] to scrutinize the reasons for [the public employee's] discharge."[132] The Court went on to note that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."[133] Because it found that the attorney's questionnaire was intended to stir up controversy—rather than legitimately evaluate the performance of workplace duties[134]—and that the questionnaire would "disrupt the office, undermine [ ] authority, and destroy close working relationships," the Court held that the attorney could be fired consistent with the First Amendment.[135]

Pickering and *Connick* reveal that while determining what constitutes political speech—or speech on a public issue—may be difficult, it is required by the First Amendment.[136] They also show that context matters. For instance, a schoolteacher like Pickering might receive heightened protection for speech on school funding, while a disgruntled employee like Connick may not foment discontent under the guise of public concern. *Connick* also shows that while some speech (like the office questionnaire) might plausibly be construed to address matters of public concern, such

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128 *See id.* at 574–75.

129 461 U.S. 138 (1983).

130 *Id.* at 141.

131 *Id.* at 145.

132 *Id.* at 146.

133 *Id.* at 147–48.

134 *Connick*, 461 U.S. at 149–50 (noting, however, that one of the questions was related to a matter of public concern).

135 *Id.* at 154.

136 *See id.* ("Our holding today is grounded in our long-standing recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern.").

speech can be restricted if its primary purpose or effect is to undermine the orderly function of the workplace. Phrased differently, the degree of protection assigned to nominally political speech—or speech on a matter of public concern—can vary based on the interest that the government, as an employer, has in ensuring the smooth functioning of its services. Because the central function of public education is to create young adults capable of participation in politics,[137] the First Amendment should protect any speech that can be presented without substantially disrupting the educational process.[138]

Some may counter that providing heightened protection for political speech fails to provide clear delineation of what *exactly* ought to be subject to increased judicial protection. This argument counters that what may be considered a political viewpoint by some—for instance, whether climate change is real or whether Donald Trump legitimately won the 2020 election—might be considered a factually closed question by others. In Sunstein's words, "[T]hese questions are unhelpful. There is no way to operate a system of free expression without drawing lines."[139] The *Barnette* and *Pickering* Courts—as well as countless others—eschewed this line-drawing question in favor of provided heightened protection to political viewpoints.[140] Courts evaluating regulation of curricular content should do the same. As Professor Kevin Welmer has noted, the rise of *Hazelwood*'s broad deference to democratic authority over curricular content "has blinded courts to . . . *Barnette* and *Keyishian*. Gone are Meiklejohn and Mill. The new rubric, as applied, leaves no room for such considerations as academic freedom and the marketplace of ideas."[141]

E. Support from First Amendment Values

The *Pico* plurality explained that local authorities have a "duty to inculcate community values" in the "compulsory environment of the classroom" but not in the secondary environment of the school library.[142] This claim raises the question: Why does a state's monopoly on the ability to speak in the classroom grant it

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137 *See supra* Part II.C.

138 *See infra* Part III.B.

139 SUNSTEIN, *supra* note 115, at 149.

140 *See* Welner, *supra* note 116, at 982 n.106 ("[T]he First Amendment simply does not sanction the position that no freedom is better than limited freedom.").

141 *See id.* at 1008.

142 *Pico*, 457 U.S. at 869.

unfettered discretion to promote any viewpoint that it chooses at the expense of others?

Normative arguments support a broad interpretation of the student's right to be free from orthodoxy in schools. First, an influential article by Professor Tyll van Geel has called into question whether value inculcation actually plays the stabilizing and civic-culture-supporting function that courts seem to assume it does.[143] Expression and discussion are crucial to wise and efficient decision-making because they allow for consideration of alternative lines of thought and action—perhaps better fulfilling the objective of promoting civic virtue than narrow propagation of certain values.[144]

And contrary to the position taken by the *Pico* plurality, these arguments gain force in the curricular context as compared to in society at large. While the government may typically discriminate between viewpoints when it is the speaker,[145] it occupies a unique position as the facilitator of classrooms because it is the *only* speaker with access to those spheres.[146] "Public schools are, in many ways, an indoctrinator's dream. [ ] [A]ttendance is compulsory, and students lack the independent knowledge or psychological sophistication necessary to evaluate critically what their teachers tell them."[147] Cries to protect students from "influences or perspectives which may injure or disquiet them" inevitably have the secondary effect of making students unprepared to deal with those issues beyond the school context.[148] Indeed, in *Mahanoy Area School District v. B.L.*,[149] the Supreme Court recently reaffirmed that schools are important institutions for the free exchange of ideas because they teach the value of free speech.[150] Because schools facilitate this marketplace of ideas, they "have a

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143 *See* Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 247, 262–80 (1983) (noting that the formation of a belief "is the first stage in the process of expression." (quoting THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 21–22 (1970))).

144 *See generally* Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 COMM. L. & POL'Y 437 (2019).

145 *See Rosenberger*, 515 U.S. at 833.

146 *See* Walter A. Kamiat, Note, *State Indoctrination and the Protection of Non-state Voices in the Schools: Justifying a Prohibition of School Library Censorship*, 35 STAN. L. REV. 497, 514–15 (1983).

147 Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 21.

148 *See id.* at 23.

149 141 S. Ct. 2038 (2021).

150 *See id.* at 2046.

strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'"[151] The Court's language from *Mahanoy* implies that the normative logic underpinning the First Amendment justifies a heightened standard of review for curricular decisions that risk enforcing political orthodoxy.

III. A BURDEN-SHIFTING TEST FOR EVALUATING THE RIGHT TO BE FREE FROM ORTHODOXY

To ensure that students develop into free-thinking, politically capable adults, courts should apply a heightened standard of review[152] to curricular determinations that restrict dissenting viewpoints in matters of "politics, nationalism, [ ] or other matters of opinion."[153]

Prior commentators have proposed various doctrine-clarifying alternatives. Some are highly suspicious of local government and seek to restrict transmission of community values absent a compelling governmental interest.[154] And many deal narrowly with *compulsion* of student speech.[155] However, prior scholarship has not provided a framework for how courts should limit state curricular discretion based on students' implied right to receive information free from orthodoxy.

No framework for evaluating First Amendment implications of curricular determinations will provide bright lines and easily

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[151] *Id.*

[152] Some scholars have analogized the *Hazelwood* standard to rational basis review in the equal protection context. *See, e.g.*, Marielle Elisabet Dirkx, *Big Brother Is Reading: An Examination of the Texas Textbook Controversy and the Legacy of* Pico, 17 U.C. DAVIS J. JUV. L. & POL'Y 29, 60–61 (2013) (criticizing *Pico*'s progeny for being overly deferent to local content censorship).

[153] *Barnette*, 319 U.S. at 642. *Barnette* also lists religion as deserving of special protection, but religious content in public schools is subject to an independent category of Establishment Clause jurisprudence, *see Epperson*, 393 U.S. at 103 (holding that states may not prohibit teaching evolution), so it has been omitted from this list.

[154] *See* Nancy Tenney, Note, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1633–35 (1995) (proposing a new, six-factor balancing test based on First Amendment principles); *see also* Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 95 (2002).

[155] *See, e.g.*, Joseph J. Martins, *The One Fixed Star in Higher Education: What Standard of Judicial Scrutiny Should Courts Apply to Compelled Curricular Speech in the Public University Classroom?*, 20 U. PA. J. CONST. L. 85, 99–101 (2017) (outlining a framework to determine when compelled speech violates the First Amendment).

administrable rules. The tension underlying the conflict between the necessary role played by school authorities in regulating curricula and the importance of the right to be free from orthodoxy in education "demonstrates only that the problem here is a difficult one, not that the problem should be resolved by choosing one principle over another."[156] The following framework will attempt to balance the necessary role that school authorities fill in regulating education with the fundamental importance of an education that contains multiple viewpoints on topics essential to healthy civic discourse. Courts should first evaluate whether the challenged curricular policy restricts a viewpoint on a matter of politics, nationalism, or a similar issue of public opinion. If it does, the state entity should have an opportunity to defend its policy by showing that the suppressed speech either lacks pedagogical value or would substantially disrupt orderly school function. Finally, plaintiffs should be able to allege that the legitimate step-two justification was actually pretext for animus or partisan gain.

A. Step One: Petitioners Must Show That State Action Restricted Discussion of Politics, Nationalism, or Another Matter of Opinion

To establish a prima facie case that school authorities have violated a student's right to receive information free from ideological orthodoxy, the first step of the burden-shifting test should be for the plaintiff to show that a state curricular decision restricted discussion of politics, nationalism, or an analogous matter of opinion. As Part II explained, judicial review of policies that impede speech on such topics is consistent with Supreme Court precedent on the right to receive information and on viewpoint discrimination in the context of school-compelled speech as well as the heightened protection for speech on matters of public concern. This Section outlines the functional rationale behind this prong of the test before addressing some powerful counterarguments.

1. Functional justifications.

Because political viewpoints deserve heightened protection in curricula, courts should evaluate whether curricular decisions restrict speech on such topics. The foundational inquiry ought to be whether the curriculum allows for fair discussion of disparate

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[156] *Pico*, 457 U.S. at 881–82 (Blackmun, J., concurring).

political viewpoints—not whether it affirmatively provides space for every political viewpoint to be taught.[157]

While it is tempting, at this phase of the analysis, to distinguish between censorship and prescription of curricular content, this distinction falls apart upon closer examination. Restrictions of political viewpoints might come in the form of obvious bans—e.g., school policies that teachers may not instruct that gun control is good—or curricular mandates that chill dissenting viewpoints. To use an extreme example, a school policy requiring that teachers instruct using the Democratic Party platform would likely chill curricular discussion of alternate viewpoints: A rigid curriculum that allocates "the school's finite [educational] resources"[158] to one set of political views expresses a clear sentiment that the opposing views are disfavored.[159] It would indicate hostility toward nonorthodox views and would discourage Republican teachers or students from expressing their ideas.[160] While "[t]he school's finite resources—as well as the limited number of hours in the day—require that education officials make sensitive choices between subjects to be offered and competing areas of academic emphasis,"[161] such constraints should not be understood as a justification for school officials to instruct only politically orthodox viewpoints. A requirement that schools refrain from teaching just one side of politically controversial subjects hardly imposes an unmanageable burden on local educational authorities; to allow otherwise would impede the abilities of students to grow into critical-thinking participants in U.S. democracy.

Some might argue that judicial review of curricular policies that restrict viewpoints on politics, nationalism, or other matters of public opinion would lead to lawsuits against any social studies curriculum that touches on a controversial issue, such as a discussion of the invasion of Iraq or the history of affirmative action. There are three responses to this. First, not every curricular decision on a social studies topic will restrict dissident viewpoints. Fact-based descriptions of events or opinions can be distinguished from policies that actively promote one viewpoint on an issue of

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157 Teach every view is a practical impossibility.

158 *Pico*, 457 U.S. at 878 n.1 (Blackmun, J., concurring).

159 *Cf.* Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 779 (8th Cir. 1982) ("The board has used its official power to perform an act clearly indicating that the ideas . . . are unacceptable and should not be discussed or considered. This message is not lost on students and teachers, and its chilling effect is obvious.").

160 In practice, this should be a fact-specific inquiry.

161 *Pico*, 457 U.S. at 878 n.1 (Blackmun, J., concurring).

political concern at the expense of another. Second, even if applying this standard were to result in increased litigation, the benefits would outweigh the costs. School actions already serve as common subjects for First Amendment litigation,[162] and impeding judicial economy is a price well worth paying to provide an unconstrained education on matters of politics. Finally, overbreadth at this phase of analysis is acceptable. While not every curricular decision that deliberately chills speech should be considered to violate the First Amendment, a broad standard at the initial phase of the test serves a "smoking out" function, allowing courts to further examine policies that risk violating students' First Amendment rights.

Further, focus on the chilling effects created by curricular decisions would prove workable in practice. Courts are accustomed to evaluating chilling effects; suits alleging them are said to overcome many common "discretionary rules of judicial abstention,"[163] showing that the procedural issues with the standard—including standing—have been litigated and resolved. Because restrictions that chill protected First Amendment speech must cause "immediate and real injury,"[164] courts have clear standards with which to evaluate pleadings. This also provides plaintiffs with a clear standard for alleging violations of the right to be free from political orthodoxy.

Two brief examples show how this standard could work in practice. First, in *Keyishian*, the Supreme Court found that a New York law prohibiting teachers from expressing dissidence unconstitutionally chilled speech that would have "trained [students] through wide exposure to that robust exchange of ideas which discovers truth."[165] Similarly, *Pratt v. Independent School District No. 831*[166] evaluated a school board's removal of print and cinematic presentations of "The Lottery" from the curriculum. "The Lottery" is a short story in which "the citizens of a small town randomly select one person to be stoned to death each year."[167] Three students protested the removal of the film version of the story, alleging a right to "be free from official conduct that was

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[162] A Westlaw search for "school" and "First Amendment" revealed several hundred cases between January 1, 2021, and January 1, 2022, alone. WESTLAW, http://www.westlaw.com (search "school" and "First Amendment").

[163] Nat'l Student Ass'n v. Hershey, 412 F.2d 1103, 1112 (D.C. Cir. 1969).

[164] *Id.* at 1111.

[165] *Keyishian*, 385 U.S. at 603.

[166] 670 F.2d 771 (8th Cir. 1982).

[167] *Id.* at 773.

intended to suppress the ideas expressed in these films."[168] The Eighth Circuit found that "[t]he board ha[d] used its official power to perform an act clearly indicating that the ideas contained in the films are unacceptable and should not be discussed or considered. This message is not lost on students and teachers, and its chilling effect is obvious."[169] While *Pratt* was decided prior to *Pico*, the Eighth Circuit's opinion centered on the idea that an official action that expresses disapproval of political ideas serves to inhibit discussion of those ideas, which cannot be done absent a "substantial governmental interest."[170] As such, the court ruled that the restriction unconstitutionally interfered with "the right to receive information and to be exposed to controversial ideas—a fundamental First Amendment right."[171]

The policies at issue in both *Keyishian* and *Pratt* had the effect—regardless of aim—of suppressing valuable ideas, and the courts recognized this as raising serious constitutional concerns. These examples show that a narrow focus on a law's effect at the initial phase of analysis would allow courts to identify policies that raise indoctrination concerns. While *Keyishian* and *Pratt* both ultimately concluded that the restrictions were unconstitutional, such determinations should not be inevitable, as I explain in Part III.B.

This standard will inevitably lead to difficult cases in which the chilling effect of the law is unclear. For example, in *Griswold v. Driscoll*,[172] Justice David Souter—sitting on the First Circuit—ruled that a decision by a Massachusetts school commissioner to "revise an advisory 'curriculum guide' . . . in response to political pressure" did not violate the First Amendment.[173] The commissioner initially approved a textbook referring to "the Armenian genocide" before acceding to a request made by a local Turkish group for a revision of the curriculum excluding references to genocide.[174] A collection of students, parents, and teachers claimed that removal of the "contra-genocide references" violated their First Amendment rights to be free of viewpoint discrimination.[175] Justice Souter explained that the board's revision of the

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168 *Id.* at 776.
169 *Id.* at 779.
170 *See id.*
171 *Pratt*, 670 F.2d at 779.
172 616 F.3d 53 (1st Cir. 2010).
173 *Id.* at 54.
174 *Id.* at 54–55.
175 *Id.* at 55–56.

curricular guide did not violate the First Amendment in part because the revised guide was merely advisory.[176] In Justice Souter's words, "[T]he terms of the Guide allow teachers to look beyond it, and its directions to sources with a particular point of view are not meant to declare other positions out of bounds in study or discussion."[177] This language shows Justice Souter's awareness that if the advisory revision were to chill dissident speech, it might violate the First Amendment—but it survived constitutional scrutiny by refraining from declaring certain viewpoints out-of-bounds.[178]

2. Reverse-chilling-effect counterarguments.

Focusing on the effect of the state's action on political viewpoints comes with compelling normative benefits. As Professor Leslie Kendrick has explained, policies that chill speech raise constitutional questions because First Amendment rights are "preferred value[s], such that, when [they] conflict[ ] with other state values . . . [they] must receive more weight."[179] This is especially true in schools, where—in the words of the Second Circuit—"[u]nder the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail."[180] The same Second Circuit opinion also explained that a board's regulation of speech in classrooms "may be no more than the fulcrum to censor only that expression with which it disagrees."[181] Because of the fundamental importance of primary education in preparing students to be "active participants in a democracy,"[182] the First Amendment standard for evaluating regulations that restrict the ability of students to discuss particular ideas should be more stringent than rubberstamping any curriculum "reasonably related to legitimate pedagogical concerns."[183]

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176 *Id.* at 59.

177 *Driscoll*, 616 F.3d at 59.

178 Some have criticized *Griswold* for allowing partisan influence to permeate curricular determinations. *See, e.g.*, Persinger, *supra* note 39, at 262–70. But, assuming an elected school board, this perspective fails to acknowledge that any curricular determination will inevitably be the result of politics. Thus, the appropriate focal point should not be on the origin of the policy but on the effect that the policy has on dissenting viewpoints.

179 Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1650 (2013).

180 James v. Bd. of Educ., 461 F.2d 566, 575 (2d Cir. 1972).

181 *Id.*

182 *See* Tobin, *supra* note 57, at 241.

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

One counterargument is that increased judicial review of curricular decisions will itself chill the discussion of important ideas in schools. This concern was articulated by *Monteiro v. Tempe Union High School District*,[184] in which the Ninth Circuit rejected a plaintiff's suit against a school board alleging that certain books (including *The Adventures of Huckleberry Finn*) caused psychological harm because they used racially derogatory language.[185] In evaluating the complaint, the Ninth Circuit noted that the plaintiff's request for the court to enjoin the use of certain books squarely conflicted with both the school board's discretion to set curricula and other students' rights to receive information.[186] While the court avoided the question of whether a school board may constitutionally ban books from curricula,[187] it correctly noted that judicial censorship of assigned books could "have a significant chilling effect on a school district's willingness to assign books . . . that might offend the sensibilities of any number of persons or groups."[188]

To avoid this concern, judicial focus on chilling effects from state curricular determinations should not allow lawsuits against school authorities for content that makes plaintiffs uncomfortable or with which they do not agree. Plaintiffs should not be able to allege an infringement on their right to receive information from the assignment of books expressing unpopular views *unless* assignment of those books can be shown to actively chill the expression of alternate ideas. As Justice Brennan explained in his *Hazelwood* dissent, "[T]he state educator's undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as 'thought police' stifling . . . advocacy of all but the official position."[189] Policies that promote particular viewpoints but have neutral effects on dissenting viewpoints should be considered constitutional—but statutes that suppresses alternate viewpoints should not.

Proponents of the recent race-discussion laws argue that critical race theory—which they argue is being taught in schools now—marginalizes certain dissenting viewpoints by branding

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184 158 F.3d 1022 (9th Cir. 1998).

185 *Id.* at 1024–32.

186 *See id.* at 1027–29.

187 *Id.* at 1029 ("Because ours is not a case in which a school board has decided on the basis of its own evaluations to remove literary materials, we need not now decide the question.").

188 *Id.* at 1030.

189 *Hazelwood*, 484 U.S. at 285–86 (Brennan, J., dissenting).

them as racist.[190] If a court determines that a curricular decision to teach critical race theory sidelines dissenting political views, that decision should be considered a prima facie violation of students' rights.

B. Step Two: State Responses

While the exchange of ideas in the classroom plays an important role in facilitating the development of critical-thinking skills in soon-to-be participants in the democratic process, it is undisputed that inculcating community values is the purview of local school authorities.[191] As a result, if a plaintiff is able to make a prima facie showing that a state authority has chilled presentation of particular viewpoints in schools, the state should then have the opportunity to show that its policies were legitimate. It should be able to do this in two ways.

1. Application of *Tinker*.

School authorities should be able to justify their curricular determinations under another flagship case in the school speech sphere, *Tinker v. Des Moines Independent Community School District*.[192] The Court in *Tinker* held that school authorities could not suspend students for wearing black armbands in protest of the Vietnam War absent a special showing of harm to the educational process.[193] Specifically, *Tinker* established that schools may restrict student speech only when it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[194] This framework intends to simultaneously protect student speech rights and preserve the discretion of school authorities to "maintain order and discipline in [ ] schools."[195]

While the *Tinker* holding specifically addressed when school authorities may restrict student expressive conduct in

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[190] *See, e.g.*, Steve Piet, Opinion, *Critical Race Theory Is Itself Racist*, POST REGISTER (Aug. 22, 2021), https://www.postregister.com/opinion/guest_column/opinion-critical-race-theory-is-itself-racist/article_f1f91e4c-328b-5153-97b6-94f70d625091.html.

[191] *See supra* Part II.

[192] 393 U.S. 503 (1969). Justice Blackmun's *Pico* concurrence also proposes using *Tinker* as the operative standard. *See Pico*, 457 U.S. at 880 (Blackmun, J., concurring).

[193] *Tinker*, 393 U.S. at 514.

[194] *Id.* at 513. Some commentators have interpreted this language to mean that student speech should not be confined to speech approved by school authorities. *See, e.g.*, Julie Goyer, *Student First Amendment Rights in the Public School Setting: A Topic of Increased Litigation*, 6 AM. J. TRIAL ADVOC. 163, 177 (1982).

[195] *James*, 461 F.2d at 571.

noncurricular contexts, its standard has been applied to other areas of school speech as well. For example, the Second Circuit applied the *Tinker* standard to analogous teacher speech,[196] and the Third Circuit used it to resolve a teacher's complaint that internal school communications could not be permissibly regulated.[197] *Tinker* should be further extended to the context of curricular development. School board curricular policies that chill political speech[198] should be upheld upon a state showing that the speech that is allegedly chilled would cause substantial disruption to school function if it were permitted in the classroom. School authorities should receive deference on whether curricular instruction would cause substantial disruption in different age groups. For instance, robust discussion of torture or slavery might be inappropriate for elementary students.

Tinker does not allow school authorities to restrict speech solely to "avoid the controversy which might result from the expression."[199] This logic is consistent with the rationale underlying the Free Speech Clause more broadly: "Any variation from the majority's opinion . . . may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom . . . that is the basis of our national strength."[200] It is worth noting that while *Tinker* seeks to embrace the discomfort that comes with ideological heterogeneity, it does not require proof of imminent disorder to justify restricting speech in schools.[201]

Recent cases evaluating school racial-harassment policies illustrate how the *Tinker* standard works in practice. Courts have generally held that anti-harassment policies are constitutional

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196 *See id.* (applying *Tinker* to a teacher's political expression).

197 Policastro v. Kontogiannis, No. 4-2883, 2005 WL 1005131, at *2–3 (3d Cir. Jan. 12, 2005).

198 Other commentators have proposed similar approaches to regulation of speech in curricular contexts. *See* Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 732 (1990) (proposing that school boards may restrict teachers' speech only when it would "substantially disrupt the educational process"); *see also Pico*, 457 U.S. at 880 (Blackmun, J., concurring) ("[T]he school board must 'be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.'" (quoting *Tinker*, 393 U.S. at 509)).

199 *Tinker*, 393 U.S. at 510.

200 *Id.* at 508–09 (citation omitted) (citing Terminiello v. City of Chicago, 337 U.S. 1 (1949)).

201 *See, e.g.*, *James*, 461 F.2d at 572 (explaining that *Tinker* does not require school authorities to "wait until disruption is on the doorstep before they may take protective action").

when school authorities can point to facts indicating that the restricted speech would cause conflict and can show that the restrictions are narrowly targeted at restricting that speech. For instance, in *Sypniewski v. Warren Hills Regional Board of Education*,[202] the Third Circuit held that a history of racial tension in a school—including a white student attending school in blackface with a noose around his neck and other students observing "White Power Wednesdays"[203]—justified a policy restricting "racially divisive" materials. However, the court explained that the policy could not be used to censor a shirt that celebrated "redneck" humor.[204] The Third Circuit explained that in order to restrict student speech, school authorities "must point to a particular and concrete basis for concluding that the association [between the restricted material and violent disruption] is strong enough to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others."[205]

Pursuant to *Tinker*'s progeny, school authorities should have to point to specific facts particular to the effect of the restricted speech to justify chilling the content. If the speech-chilling policy is based a "well-founded expectation of disruption,"[206] it is justified. For instance, students using hate speech directed at particular individuals would likely disrupt the learning environment in a way that justifies prophylactic restriction under *Tinker*.[207] In this way, the *Tinker* standard protects the discretion of local authorities to create educational environments free from threats and epithets but does not provide discretion to create educational environments free from political controversy. This understanding of *Tinker* is also consistent with the useful theoretical distinction between speech that has political consequences and speech that is political for constitutional purposes.[208] While face-to-face racial harassment, for instance, might have political consequences, it does not meaningfully contribute to discourse on a matter of

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202 307 F.3d 243 (3d Cir. 2002).

203 *Id.* at 247.

204 *Id.* at 249–50 (noting that the policy permitted display and discussion of such materials "when selected and used to enhance knowledge" in classrooms).

205 *Id.* at 257.

206 Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001).

207 The Court has recognized that speech directed at certain individuals or groups, which may incite violence, may receive less protection than public speech. *See* Cohen v. California, 403 U.S. 15, 20 (1971).

208 *See* SUNSTEIN, *supra* note 115, at 153.

public concern and thus should be subject to reduced constitutional protection.[209]

The *Tinker* prong of the test can be used to resolve concerns that a heightened First Amendment standard for curricular restrictions will allow teachers to exceed the bounds of their teaching mandate. Teachers that fail to adequately teach the legitimate curriculum clearly "materially disrupt classwork" and cause "substantial disorder" to the smooth operation of the school. As Justice Brennan noted in his *Hazelwood* dissent, "the essence of the *Tinker* test" is to assure educators that "participants learn whatever lessons the activity is designed to teach."[210] Incorporation of the *Tinker* test ensures that curricular restrictions intended to induce compliance with educational standards will be upheld, and that students may not assert First Amendment violations for low marks on nonresponsive assignments.[211]

It is worth noting that a "heckler's veto"—in which a hostile audience responds negatively to speech, creating a substantial disruption—should not justify censoring curricular viewpoints on issues of politics, nationalism, or other matters of public opinion.[212] The benefits resulting from discussion of unpopular ideas substantially outweigh the abstract risk of retaliation. As the *Tinker* Court noted, "discomfort and unpleasantness [ ] always accompany [ ] unpopular viewpoint[s]."[213] Popular ideas tend not to raise the threat of a heckler's veto for the simple fact of their popularity. As a result, it is primarily unpopular ideas that "strike at prejudices and preconceptions and have profound unsettling effects as [they] press[ ] for acceptance of an idea."[214] Allowing heckler's vetoes to justify censorship of particular viewpoints would result in disproportionate promotion of majority-accepted ideas, creating substantial risk of indoctrination.

This raises the question of how school authorities should deal with potential displeasure from audiences resulting from curricular determinations. As the Eleventh Circuit explained in

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209 *See id.*

210 *Hazelwood*, 484 U.S. at 283 (Brennan, J., dissenting).

211 *See id.*

212 *See generally* Katherine M. Porter, Comment, Tinker*'s Timeless Teaching: Why the Heckler's Veto Should Not Be Allowed in Public High Schools*, 86 MISS. L.J. 409 (2017); *see also Terminiello*, 337 U.S. at 5 (disapproving of censorship of a speaker solely on the grounds that the speech might incite violence).

213 *Tinker*, 344 U.S. at 509.

214 *Terminiello*, 337 U.S. at 4.

Holloman ex rel. Holloman v. Harland,[215] the proper solution to a hostile audience is not "to sacrifice freedom upon the alter [sic] of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob."[216] Instead, school authorities should seek to regulate the mob. If parents are likely to riot because they believe that schools are teaching critical race theory, the state's solution should not be to outlaw the curricular material; instead, it should be to prevent the parents from rioting—or, at least, prevent the rioting from impeding the educational process.

Again, this standard does not mandate that every unpopular viewpoint be taught. Parents ought to have democratic recourses to control curricula: they should be able to lobby for policies that promote certain viewpoints, so long as promotion of those viewpoints does not come at the expense of dissenting viewpoints.

2. Inverted *Hazelwood* framework.

State educational authorities should also be able to justify challenged curricular determinations by showing that the restricted speech lacks pedagogical value. This is an inversion of the relatively permissive *Hazelwood* framework, which ordinarily places the burden of proof on plaintiffs to prove that the school authorities' restriction of curricular speech bore no relationship to a legitimate pedagogical concern.[217] The framework ought to be reversed—placing the burden of proof on states to prove that the restricted political speech lacks pedagogical value—because of the foundational First Amendment assumption that "unwise ideas must have a hearing as well as wise ones."[218]

In practice, courts have already outlined certain enclaves of speech that do not deserve First Amendment protection in schools. For instance, school authorities can act to prohibit teachers from making sexual remarks about students.[219] Similarly, speech that is obscene,[220] racially harassing,[221] or advocates drug

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215 370 F.3d 1252 (11th Cir. 2004).

216 *Id.* at 1275.

217 *See Hazelwood*, 484 U.S. at 271.

218 MEIKLEJOHN, *supra* note 113, at 26.

219 *See, e.g.*, Miles v. Denver Pub. Schs., 944 F.2d 773, 779 (10th Cir. 1991) (explaining that a teacher who made in-class comments about rumors that two students had engaged in sexual activities on the school tennis court could be disciplined by the school without violating the First Amendment).

220 *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680–86 (1986).

221 *See Sypniewski*, 307 F.3d at 243.

use[222] may be permissibly regulated by schools.[223] The unique school context makes these categories of speech deserving of reduced protection.

This standard raises difficult questions when applied to disputed facts. In an era of intense political polarization, facts themselves are commonly disputed by political groups.[224] Consider an example: Would a state legislature violate the First Amendment if it were to pass a law stipulating that no teacher may teach that Joe Biden won the 2020 presidential election? Presumably so—as the Court explained in *Pico*, "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books."[225] What if a state legislature passed a law prohibiting biology teachers from instructing that life begins at conception, citing concern over factual inaccuracy? Both policies intend to prevent the teaching of material that state authorities have deemed to be factually inaccurate, and courts have generally held that restrictive actions are legitimate when taken for "concerns about [factual] accuracy."[226] But both also restrict viewpoints discussing political issues in classrooms.

Disputed facts can hold significant pedagogical value. In fact, a recent empirical study found that open classroom discussion of "charged" topics, relating to hotly contested issues, correlates with "increased political efficacy, interest, tolerance, and knowledge."[227] As such, courts should not uphold viewpoint restrictions based on factual concerns unless the restricted material is clearly and demonstrably false, a stringent burden on the state actor. This is because "[i]t is the special task of [the educational

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[222] *See* Morse v. Frederick, 551 U.S. 393, 408–10 (2007).

[223] It is worth noting that application of this standard should vary depending on the age of the children involved. *See, e.g.*, Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993) ("[W]hether a regulation is reasonably related to legitimate pedagogical concerns will depend on, among other things, the age and sophistication of the students.").

[224] *See* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 899 (2010) (noting the apparent "increasing and unfortunate acceptance of factual falsity in public communication"); Kei Kawashima-Ginsberg & Rey Junco, *Teaching Controversial Issues in a Time of Polarization*, 82 SOC. EDUC. 323, 323 (2018) (explaining that U.S. political polarization has made students "less likely to hear diverse opinions in their networks").

[225] *Pico*, 457 U.S. at 870–71.

[226] ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1202 (11th Cir. 2009); *see also Driscoll*, 616 F.3d at 55–56.

[227] Judith L. Pace, *How Can Educators Prepare for Teaching Controversial Issues?*, 85 SOC. EDUC. 228, 229 (2021).

system] 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."[228]

If a school authority believes that curricular materials regarding issues of political concern present factual inaccuracies, its primary remedy should be to encourage teaching the alternative and discussion of the merits of the ideas—not to impose curricular policies that chill discussion of dissenting viewpoints. As Justice Blackmun's *Pico* concurrence notes, "positive educational action," which seeks to "instill certain values 'by persuasion and example,'" is the "converse of an intentional attempt to shield students from certain ideas that officials find politically distasteful."[229]

C. Step Three: Proof of Pretext

1. *Arce* and the importance of the third step.

If the state is able to prove that the challenged curricular provision served a constitutionally permissible purpose, the third step of the burden-shifting test should be for plaintiffs to argue that the curricular restriction was actually motivated by animus or partisan gain. Allowing plaintiffs to allege that the defendant's second-step justification is pretext is common in similar burden-shifting tests.[230] Courts are accustomed to dealing with allegations of pretext because they are frequently made under the *McDonnell Douglas Corp. v. Green*[231] burden-shifting framework in Title VII cases.[232] Additionally, courts are accustomed to evaluating claims of impermissible animus in the Fourteenth

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[228] Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

[229] *Pico*, 457 U.S. at 882 (Blackmun, J., concurring) (quoting *Barnette*, 319 U.S. at 640).

[230] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (articulating a three-step burden-shifting test in Title VII cases in which the final step is for a plaintiff to show that the employer's stated reason for alleged discrimination was pretextual).

[231] 411 U.S. 792 (1973).

[232] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2516–17 (2019) (Kagan, J., dissenting) ("If you are a lawyer, you know that [the burden-shifting] test looks utterly ordinary. It is the sort of thing courts work with every day."). *But see* Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 505 (2008) (arguing that subsequent cases using the *McDonnell-Douglas* framework have returned analysis to a traditional "sufficiency of the evidence standard" and articulating four major issues with the current approach).

Amendment context.[233] Even if the underlying justification for the restriction does not rise to the level of impermissible *racial* animus prohibited by the Fourteenth Amendment, courts still (infrequently) strike down statutes when based on a bare desire to harm.[234]

As an example of why the pretext analysis is important, consider the recent Ninth Circuit case *Arce v. Douglas*.[235] The Tucson school board added Mexican American Studies (MAS) classes to its curricula in 1998 and later expanded the program under a federally enforced desegregation decree in an effort to create a "culturally relevant curriculum."[236] "Arizona state superintendents of education, in the belief that MAS was being perverted into a program for promoting ethnocentrism and reverse racism," sponsored and subsequently implemented legislation that eliminated the MAS program.[237] The legislation prohibited public schools from including courses that were "designed primarily for pupils of a particular ethnic group"—and neither party disputed that the statue was enacted with the intention of eliminating the MAS program.[238]

At trial, the district court first noted that the statute did not infringe on the students' classroom speech rights and was directed narrowly at restricting curricula.[239] It then explained that the law implicated the students' right to receive information pursuant to *Pico*.[240] Citing *Pico* and *Monteiro*, the court agreed that the students' right to hear imposed "limits upon the power of the State to control even the curriculum and classroom," and that "curricular restrictions are at least subject to some degree of

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[233] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (finding that a zoning ordinance was based on "irrational prejudice" against those with intellectual disabilities); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (striking down a statute because "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

[234] *See, e.g.*, *Moreno*, 413 U.S. at 534–38.

[235] 793 F.3d 968 (9th Cir. 2015).

[236] *Id.* at 974.

[237] *Id.* at 973–75.

[238] *Id.* at 977. Notably, the statute exempted "courses that include discussion of 'controversial aspects of history' or that teach historical oppression of a particular ethnic group." Acosta v. Huppenthal, No. CV 10-623, 2013 WL 871892, at *1 (D. Ariz. Mar. 8, 2013) (quoting ARIZ. REV. STAT. ANN. § 15-112(E), (F) (2013)), *aff'd in part, rev'd in part, and remanded sub nom. Arce*, 793 F.3d 968.

[239] *Acosta*, 2013 WL 871892, at *4.

[240] *Id.* at *4–5 ("[S]tudents share the same 'right to receive information and ideas' as other citizens generally do." (quoting *Pico*, 457 U.S. at 861, 867–68)).

scrutiny."[241] Applying *Hazelwood*, the district court granted summary judgment to the state on the statute's provisions against teaching "overthrow of the United States government," promoting "resentment toward a race or class of people," and "advocat[ing] ethnic solidarity."[242] However, it found no independent legitimate pedagogical objective served by the statute's section prohibiting classes "designed primarily for pupils of a particular ethnic group" and explained that because it threatened to chill the teaching of ethnic studies, it violated the students' rights to receive information.[243] Accordingly, the district court granted summary judgment to the students on that provision.

The Ninth Circuit affirmed on appeal. It also ruled that the district court had dismissed the plaintiffs' viewpoint-discrimination claim prematurely due to a procedural error and remanded for further fact-finding on both the viewpoint discrimination issue and a separate equal protection claim.[244] On remand, the district court explained that otherwise legitimate curricular restrictions are unconstitutional if they "in fact serve to mask other illicit motivations."[245] It found, based on a litany of evidence (including anonymous racist blog posts by State Senator John Huppenthal, then chairman of the Senate Education Accountability and Reform Committee),[246] that the pedagogical values proffered by the state were pretext for racial animus.[247] It also concluded that the restriction was made only for political gain without consideration of the pedagogical merits of the program, independently constituting impermissible viewpoint

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[241] *Id.* at *5–7 (distinguishing this case from cases in which teachers alleged First Amendment infringement because teachers have "no First Amendment right to influence curriculum" whereas, "[i]n this case, the students do not actively seek to speak for the government, but instead seek to vindicate their passive right to be exposed to information and ideas" (quoting Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1016–17 (9th Cir. 2000))).

[242] *Id.* at *7–10.

[243] *Id.* at *8.

[244] *Arce*, 793 F.3d at 986–90.

[245] Gonzalez v. Douglas, 269 F. Supp. 3d 948, 972 (D. Ariz. 2017).

[246] *Id.* at 962–63 (explaining that Huppenthal had written that "[t]he Mexican-American Studies classes use the exact same technique that Hitler used in his rise to power" and "[t]he infected [MAS] teachers are the problem" (quoting Transcript of Proceedings, Bench Trial Day 2, at 98, *Gonzalez*, 269 F. Supp. 3d 948 (No. 10-cv-623))).

[247] *Id.* at 972 (summarizing evidence of animus in enacting the statute).

discrimination.[248] As a result of its finding that pretext undergirded the statute, the court declared it unconstitutional.[249]

The arc of *Arce* provides an example for how my proposed burden-shifting framework ought to function, with some modifications. If the policy chills discussion from certain viewpoints—as the district court found that the Arizona statute did[250]—plaintiffs have established a prima facie case that state authorities are imposing orthodoxy on classrooms. The school board should then bear the burden of articulating reasons why the burdened information either serves no pedagogical value or would cause substantial disorder in the school environment. This phase of the test is the biggest departure from the analysis in *Arce*: while the Arizona district court only required the government to articulate a legitimate pedagogical purpose to justify its restriction, a heightened burden on the government would appropriately protect the student's right to be free from politically orthodox education, which is inadequately protected by current doctrine. Finally, plaintiffs should be able to prove that the otherwise legitimate restriction was made pursuant to impermissible animus. If a case makes it to this phase of the test, extensive fact-finding may be required—as the district court's lengthy opinion after remand from *Arce* reflects[251]—but such analysis is necessary to preserve the "right to be free from official conduct that [is] intended to suppress [ ] ideas."[252]

2. Pretext analysis functions well in this framework.

The *McDonnell-Douglas* burden-shifting framework has not been immune from criticism. One particularly pointed critique has come from Chief Judge Timothy Tymkovich of the U.S. Court of Appeals for the Tenth Circuit. Chief Judge Tymkovich has criticized the *McDonnell-Douglas* pretext framework under the logic that, "[b]y dividing the presentation of the evidence into three stages, the ultimate fact of discrimination can easily become lost."[253] Fortunately, this concern can be easily resolved under this

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[248] *See id.* at 974 (noting that the record revealed "a fixation on winning a political battle against a school district" and "a desire to advance a political agenda by capitalizing on race-based fears").

[249] *See id.*

[250] *See Acosta*, 2013 WL 871892, at *10.

[251] *See generally Gonzalez*, 269 F. Supp. 3d 948.

[252] *Pratt*, 670 F.2d at 776.

[253] Tymkovich, *supra* note 232, at 521.

Comment's approach. Chief Judge Tymkovich's concern is that courts may lose track of evidence introduced in the first part of the test—in which plaintiffs must allege a prima facie case of discrimination—when evaluating the ultimate claim of pretext because the two steps are so closely related.[254] Here, the two parts are clearly discrete: the former is a simple inquiry into whether the law has a chilling effect, while the latter deals with the motives behind the suppression. Because the test avoids introduction of overlapping evidence in two different phases, it avoids the criticism levied by Chief Judge Tymkovich.

Another important criticism is that it may not always be easy for courts to distinguish between restrictions of content and restrictions of viewpoint. This issue is highlighted by *Peck ex rel. Peck v. Baldwinsville Central School District*,[255] in which a kindergarten student was assigned a poster project depicting "simple ways to save the environment."[256] Antonio Peck created a poster showing a robed figure, representing Jesus, bent in prayer, surrounded by phrases such as "the only way to save our world" and "God's love is higher than the heavens."[257] After the school decided not to display the poster and requested that Antonio create another, the Pecks filed a lawsuit. The district court granted summary judgment to the school board, and the Second Circuit reversed. It explained that "drawing a precise line of demarcation between *content* discrimination . . . and *viewpoint* discrimination . . . is, to say the least, a problematic endeavor"[258] and remanded to the district court for inquiry into whether the government had restricted Antonio's viewpoint without a compelling governmental interest.[259] In other words, the constitutional question was the motivation behind the school district's action.

This is a serious issue. Determinations of motive are inherently difficult[260] but are fundamental to many areas of First Amendment law.[261] While an ultimate inquiry into the intent

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254 *Id.*

255 426 F.3d 617 (2d Cir. 2005).

256 *Id.* at 620.

257 *Id.* at 622.

258 *Id.* at 630 (emphasis added).

259 *Id.* at 629–33.

260 *See* Kendrick, *supra* note 179, at 1681 (explaining the "difficulty of isolating the role of intent" in seeking to prevent a chilling effect).

261 *See id.* at 1635–36 (explaining that First Amendment protection of speech—such as incitement, defamation, and distribution of child pornography—requires evaluating the speaker's mindset).

behind a curricular determination may raise pragmatic difficulties, none exceed the issues that courts already face when evaluating criminal mens rea or discriminatory intent.[262] If the cost that must be paid for free discussion of political issues in schools is expenditure of judicial resources evaluating intent, it is a price worth paying.

IV. APPLICATION TO TENNESSEE'S LAW

Because effective participation in the political process is one of the fundamental values underlying the students' right to receive ideas in schools—and the First Amendment more generally[263]—courts should serve as a backstop against imposition of orthodoxy. This Comment has articulated a burden-shifting framework that attempts to give greater weight to the student's right to receive an education free from orthodox political indoctrination than is provided by existing doctrine. While state and local authorities must wield broad discretion to prescribe curricula, the existing *Tinker* standard paired with an inversion of the *Hazelwood* framework provides adequate protection for local prerogatives.

Application of the proposed framework to Tennessee's curricular race-discussion law clarifies how the test would work in practice. The initial inquiry ought to be whether the statute restricts expression of dissident viewpoints on a subject of politics, nationalism, or another matter of public opinion. Facially, it appears that the law would restrict such viewpoints. The statute stipulates that local educational agencies (school boards) may not "include or promote . . . as part of a course of instruction or in a curriculum or instructional program, or allow teachers or other employees . . . to use supplemental instructional materials that include or promote" concepts such as "[t]his state or the United States is fundamentally or irredeemably racist or sexist."[264]

This should, in practice, be a fact-specific inquiry: if the state punishes teachers for discussing political viewpoints with students or if curricular offerings are restricted because they discuss those ideas, the law has a chilling effect on discussion of political

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[262] *See id.* at 1644 n.40 (surveying cases evaluating mental states in other areas of law).

[263] *See, e.g.*, Alexander Meiklejohn, *The First Amendment Is Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) ("Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.").

[264] S.B. 623, 112th Gen. Assemb., Reg. Sess. § 51(a) (Tenn. 2021).

concepts. Because the statute says that the enumerated concepts may not be discussed in a curriculum or via supplemental materials, I assume that the law will have such an effect. Like the curricular policy at issue in *Arce*, this law impedes the abilities of students in Tennessee public schools to discuss concepts of race that are relevant to national political dialogue. To borrow the language from *Connick*, the "content, form, and context of a given statement"[265] impacts whether speech should be protected as political. Current public discourse on this question indicates that it should be.

Tennessee should then be able to counter that the chilled speech either lacks pedagogical value or substantially disrupts the orderly function of schools per *Tinker*. One provision of the law stipulates that no teacher may teach that "[Tennessee] or the United States is fundamentally or irredeemably racist or sexist."[266] It does not seem likely that discussion of this material would disrupt the ordinary function of schools. To be sure, post-*Tinker* cases have made it clear that schools can restrict materials that cause racial tensions. But the Supreme Court also clearly explained that *Tinker* does not authorize prophylactic action based on a vague concern of school disruption.[267] In order to restrict speech, school authorities must articulate a "particular and concrete basis"[268] for anticipating harm, pointing to facts that "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[269] It seems unlikely that Tennessee could do this with regards to speech on racially biased elements of U.S. political society.

Next, the inverted *Hazelwood* standard places an onerous burden on the state to show that there is no redeeming pedagogical value to the censored content. This should be an uphill battle. The ability to criticize the state is one of the fundamental underpinnings of the Free Speech Clause.[270] While teaching that the

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[265] *Connick*, 461 U.S. at 147–48.

[266] S.B. 623, 112th Gen. Assemb., Reg. Sess. § 51(a)(8) (Tenn. 2021).

[267] *Tinker*, 393 U.S. at 508.

[268] *See Sypniewski,* 307 F.3d at 257.

[269] *Tinker*, 393 U.S. at 514 (Stewart, J., concurring); *see also James*, 461 F.2d at 572 (explaining that the school board had not shown that a teacher wearing a black armband would cause disruption).

[270] *Cf.* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that the First Amendment limits libel actions by public officials); Cohen v. California, 403 U.S. 15,

U.S. political system is racist beyond repair might lack meaningful teaching value, articulating the argument that certain elements of the system are imbued with racial bias does not. Serious scholars,[271] public figures,[272] and even Supreme Court Justices[273] have argued that elements of U.S. society are fundamentally racist. This Comment does not evaluate whether they are right or wrong, and neither should judges. Rather it asks—just as a judge should—whether materials articulating such a viewpoint lack all pedagogical value. They do not.

Other elements of the Tennessee law might survive First Amendment scrutiny pursuant to the *Tinker* standard. For instance, the statute's provision that teachers may not instruct that "one race or sex is inherently superior to another" seems as though it might have the prophylactic effect of combatting race-based violence, which would certainly cause substantial disorder in schools.[274] Another of the statute's provisions, prohibiting assignment of "character traits, values, moral or ethical codes . . . to a specific sex or race,"[275] could be upheld under *Tinker* if the state authorities could show that such ideas substantially interfere with the abilities of students to learn.

Because it seems unlikely that the state can carry its burden under the second part of the test with regards to its prohibition on criticism of the state, we likely do not need to evaluate whether the legitimate step-two justification was pretext for animus or partisan gain. However, it is worth reiterating that an otherwise content-neutral curricular restriction can be made unconstitutional by underlying animus or by motivation for political gain

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18–20 (1971) (holding that the First Amendment protected the defendant from conviction for wearing a jacket stating "Fuck the Draft").

271 *See generally, e.g.*, Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839 (2019).

272 *See, e.g.*, Bill Chappell, *'We Are Not Cured': Obama Discusses Racism in American with Marc Maron*, NPR (June 22, 2015), https://perma.cc/76Q2-NQBH ("[T]he legacy of slavery, Jim Crow, discrimination in almost every institution of our lives. . . . [T]hat's passed on. We're not cured of it." (quoting *Episode 613 – President Barack Obama*, WTF WITH MARC MARON (June 22, 2015), https://perma.cc/X8XT-XBHY).

273 McCleskey v. Kemp, 481 U.S. 279, 329 (1987) (Brennan, J., dissenting) ("McCleskey's claim [that race impacted his death sentence] is not a fanciful product of mere statistical artifice.").

274 *See* West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366–67 (10th Cir. 2000) (upholding, under *Tinker*, a school board provision prohibiting racial harassment due to ongoing racial tensions).

275 S.B. 623, 112th Gen. Assemb., Reg. Sess. § 51(a)(11) (Tenn. 2021).

instead of focus on actual pedagogical concerns.[276] The statute in *Arce* was passed only after its sponsor made some remarkably racist remarks, and the law was eventually invalidated on those grounds. While I doubt that similar evidence is available for the Tennessee law, investigation into pretextual purpose should be the final step of a First Amendment analysis. Even existing doctrine makes it clear that curricula may not be established for narrow partisan gain,[277] and elimination of explicit partisan orthodoxy should be the fundamental goal of any renewed focus on the application of the First Amendment to curricular development.

As the Supreme Court explained in 1943, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy."[278] Today's courts should play a proactive role in the enforcement of the Bill of Rights, to ensure that tomorrow's leaders are prepared to engage in such political controversy. In the famous words of Justice Louis Brandeis, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[279]

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[276] *See, e.g.*, *Arce*, 793 F.3d at 982.

[277] *Pico*, 457 U.S. at 870–71 (explaining that a Democratic school board may not constitutionally ban all books by Republicans).

[278] *Barnette*, 319 U.S. at 638.

[279] Whitney v. California, 274 U.S. 357, 377 (1927).