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The Government Speech Doctrine Ate My Class: First Amendment Capture and Curriculum Bans

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Abstract. Because of the government speech doctrine, public school curriculum restrictions like "Don't Say Gay" mandates and bans on teaching critical race theory may escape free speech review. This exemplifies "First Amendment capture." The term "capture" comes from "agency capture," which occurs when regulated entities effectively gain control over the agency meant to oversee them. First Amendment capture occurs when speech becomes controlled by the government when the Free Speech Clause should be regulating the government.

Generally, laws that censor content trigger strict scrutiny under the Free Speech Clause. Curriculum bans, however, may trigger no scrutiny at all. Under the government speech doctrine, government speech is not subject to any free speech scrutiny. Teachers will struggle to challenge restrictions about what they may teach in the classroom because their speech "pursuant to official duties" is considered government speech. Likewise, students may not be able to challenge these restrictions on what they are allowed to learn if curricular decisions are deemed government speech—a possibility given unclear rules for evaluating censorship of public school curriculum. Although some lower courts have interpreted Supreme Court precedent to find that curriculum decisions violate the Free Speech Clause if motivated by political or partisan reasons rather than legitimate pedagogical ones, others have concluded that the Free Speech Clause does not apply because curriculum decisions represent government speech.

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The Government Speech Doctrine Ate My Class
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This Essay argues that the government speech doctrine overreaches in at least two ways. First, it classifies as "government speech" speech that might actually be mixed speech—that is, speech with both government and private speakers. Second, it classifies as "government speech" streams of speech that the audience has as much a stake in, if not more, than the speaker. The Free Speech Clause, after all, protects the free flow of speech, not just speakers. In both cases, the Essay concludes, the speech should undergo some level of Free Speech Clause review.

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Introduction

The Supreme Court has long recognized that states enjoy wide latitude in shaping public school curricula.[1] Recently, states have used that power to pass laws censoring entire topics and viewpoints. "Don't Say Gay" laws, first passed in Florida with similar laws proposed in multiple states,[2] ban teachers from discussing sexual orientation or gender identity.[3] Anti-critical race theory laws, introduced in most states and enacted in at least eighteen,[4] forbid teaching "divisive concepts" that lawmakers associate with critical race theory (CRT).[5]

Unlike curricular decisions about whether to teach cursive writing or to require geometry in ninth or tenth grade, these laws appear to be motivated more by politics than pedagogy. Florida's "Don't Say Gay" law was among a slate of anti-LGBTQ laws championed by an administration campaigning against all things "woke."[6] The CRT bans, which misconstrue many of the

1. *Cf.* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 861 (1982) (noting the existence of certain limits upon the State's power to control "even the [public school] curriculum").
2. Samantha LaFrance, *It's Not Just Florida: 4 New 'Don't Say Gay Laws' Passed in 2023*, PEN AM. (archived Aug. 31, 2023), https://perma.cc/DX3M-37RR (reporting that "Don't Say Gay" bills have been introduced in at least 23 states); Movement Advancement Project, Equality Maps: LGBTQ Curricular Laws 4 tbl.1 (2024), https://perma.cc/LDT8-U6YS (indicating that Alabama, Arkansas, Indiana, Iowa, Kentucky, and North Carolina "censor discussions of LGBTQ people or issues throughout school curricula").
3. Parental Rights in Education, ch. 2022-022, § 1(8)(c)(3), 2022 Fla. Laws 1, 3 (codified at FLA. STAT. § 1001.42 (2023)) ("Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.").
4. *CRT Forward Tracking Project Map*, UCLA CRITICAL RACE STUD., https://perma.cc/L9RY-9U62 (archived Apr. 20, 2024) (mapping states that have passed legislation barring critical race theory in public school curriculum or classrooms) (to locate, select "View the Live Page," then select "Filters," and then select "State," "Legislation," "Adopted," "K-12," "Classroom teaching," and "Curricular content").
5. These "divisive concepts" first appeared in a Trump executive order banning critical race theory in federal government trainings. Exec. Order No. 13950, 3 C.F.R. 433, 436 (2020), *revoked by* Exec. Order. No. 13985, 3 C.F.R. 409 (2021).
6. *See, e.g.*, Lori Rozsa, *Florida Anti-LGBTQ Laws Prompt Families Who Feel Unsafe to Flee*, WASH. POST (June 10, 2023, 6:00 AM EDT), https://perma.cc/5D7G-G4TZ (reporting that Florida had recently banned gender-affirming health care for minors, gender-affirming pronouns in schools, and children's attendance at drag performances); Jo Yurcaba, *DeSantis Signs 'Don't Say Gay' Expansion and Gender-Affirming Care Ban*, NBC NEWS (May 17, 2023, 9:30 AM PDT), https://perma.cc/FEB9-5YE4 (noting that Florida also barred transgender people from using bathrooms that match their gender identity).

actual tenets of critical race theory,[7] are perhaps best understood as a backlash to anti-racism campaigns, especially the Black Lives Matter movement.[8]

Both sets of laws undermine the education of millions of public school students. By effectively chilling examination of African American history and eliminating discussion of widespread, systemic racism in the United States, CRT bans deprive students of a deep understanding of America's history of racism as well as its continuing presence and impact.[9] Because of "Don't Say Gay" laws, students will not learn about the civil rights movement for the LGBTQ community and will lose a forum to discuss their own identities and experiences.[10] The censorship also hinders students from acquiring the critical analysis skills that can only be developed by fully analyzing complex topics.[11]

These content-based bans invite Free Speech Clause challenges. Normally, laws that censor specific subjects trigger strict scrutiny and fail.[12] These laws, however, may trigger no scrutiny at all. Under the evolving and expanding government speech doctrine, government speech is not subject to any free speech scrutiny,[13] enabling state defendants to assert that curricular speech is essentially the government's own speech and therefore outside the protection of the Free Speech Clause.[14]

Teachers charged with implementing the curriculum might counter that these mandates abridge their speech rights. However, a teacher's speech pursuant to official duties—the speech uttered while carrying out their paid job responsibilities—is considered government speech.[15] Although an academic

7. Caroline Mala Corbin, *A Critical Race Theory Analysis of Critical Race Theory Bans*, 14 U.C. IRVINE L. REV. 57, 76-79 (2024).

8. Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 GEO. L.J. 529, 535 (2023).

9. *See infra* Part III.B.1.

10. *See infra* Part I.A.

11. Finally, students may miss out on developing the tolerance that marks a successful diverse democracy.

12. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

13. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("The Free Speech Clause . . . does not regulate government speech.").

14. Florida did precisely that when defending a challenge to its CRT ban in universities: "They argue that because university professors are public employees, they are simply the State's mouthpieces in university classrooms." Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1233 (N.D. Fla. 2022).

15. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (explaining that government employee speech pursuant to official duties is not private citizen speech but government speech and is not protected by the Free Speech Clause).

freedom exception may protect professors at the postsecondary level,[16] it is unlikely to cover K-12 public school teachers.[17] Students might assert that the curriculum bans affect their free speech right to receive information, but that right has not yet defeated a government speech claim and may face an uphill battle in the public school curriculum context.

Granting the government complete control over any speech that may be classified as the government's—regardless of the free speech interests in that speech of other speakers or its audience—results in what I have termed "First Amendment capture."[18] The unreviewability of the curriculum bans' censorship presents a prime example. First Amendment capture occurs when contested speech is categorized as government speech, thereby allowing the government to suppress certain viewpoints.[19] The term "capture" comes from "agency capture," which occurs when regulated entities gain control of the agency meant to oversee them.[20] For example, the Food and Drug Administration, charged with regulating the food industry, becomes "captured" if it falls under the influence of the food industry and its lobbyists. First Amendment capture occurs when speech becomes controlled by the government when the Free Speech Clause should be regulating the government.[21]

This Essay argues that the government speech doctrine overreaches in at least two ways. First, it classifies as "government speech" speech that should be thought of as mixed speech—that is, speech with both government and private speakers.[22] Second, it classifies as government speech streams of speech that the audience has as much a stake in, if not more, than the speaker. In both cases, the

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16. *See infra* note 73 and accompanying text.

17. Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615, 652-53 (2022) ("Moreover, any academic freedom exception probably applies only to the university level if meant to protect the intellectual endeavors of researchers and scholars, 'work not generally expected of elementary and secondary school teachers.'" (quoting Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 3444 (6th Cir. 2010))).

18. Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 226 (2021) ("I call this move—classifying contested speech as government speech and then clamping down on certain viewpoints—'First Amendment capture.'").

19. *Id.*; *see also* Helen Norton, *A Framework for Thinking About the Government's Speech and the Constitution*, 2022 U. ILL. L. REV. 1669, 1672 (noting that "designating contested speech as the government's is essentially a constitutional get-out-of-jail-free card").

20. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21 n.23 (2010) ("Capture, for the purposes of agency design, may be defined as responsiveness to the desires of the industry or groups being regulated.").

21. Corbin, *supra* note 18, at 232.

22. *See* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607 (2008) (proposing mixed speech as a new category of speech in addition to private speech and government speech). Because I have already explored mixed speech in depth, I concentrate on audience free speech rights in this Essay.

Essay concludes, the speech should be subject to some level of Free Speech Clause review.

Part I describes the curriculum gag rules and their effects. Part II explains that free speech challenges brought by teachers will likely fail and challenges brought by students face an uncertain path, in large part due to the government speech doctrine. The result is a paradigmatic example of First Amendment capture. Part III advocates for two changes to the government speech doctrine. First, speech with both private and governmental speakers should not be deemed government speech immune to review. Second, even when the government alone speaks, the audience's free speech interest should, when weighty enough, trigger free speech review. The Free Speech Clause, after all, protects the free flow of speech, not just speakers.

One final note: This symposium Essay focuses on potential free speech challenges to these content- (and viewpoint-) based curriculum laws. It does not address other constitutional challenges, such as due process challenges arising from the vagueness of the laws[23] or equal protection challenges based on discrimination against a protected group.[24]

I. The Curriculum Bans

In contrast to curriculum regulations that detail topics and skills public school students should master, these state-level curriculum bans excise certain subjects and viewpoints from the public school curriculum. The "Don't Say Gay" laws target sexual orientation and gender identity while the CRT bans target race and race discrimination.

23. One of the core requirements of due process is to provide notice of when conduct is illegal so that people may adjust their conduct accordingly. FCC v. Fox Televisions Stations, Inc., 567 U.S. 239, 253-54 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). Vague laws with unclear or confusing language "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *Id.* Indeed, professors have successfully challenged Florida's anti-CRT law on vagueness grounds and that might be their strongest claim given these laws' pervasive ambiguity. Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1278 (N.D. Fla. 2022).

24. To the extent laws similar to Florida's "Don't Say Gay" legislation target groups based on protected characteristics like sex, they would probably violate equal protection. Even facially neutral laws trigger heightened scrutiny if they have both a discriminatory impact and a discriminatory motive. Washington v. Davis, 426 U.S. 229, 239-41 (1976). There is no question of disparate impact: Books with gay parents have been removed from classrooms while books with straight parents have not. And since that disparate impact was the avowed purpose of the law, discriminatory intent is present as well.

A. "Don't Say Gay" Laws

Nicknamed the "Don't Say Gay" law, Florida's Parental Rights in Education Act states that "[c]lassroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur."[25] The prohibition, which originally covered kindergarten to third grade public school classes, was subsequently extended to the twelfth grade.[26] Teachers who violate the law put their employment and their teaching licenses at risk.[27] Many states have proposed similar laws,[28] with six additional states succeeding by the end of 2023.[29]

School districts have interpreted the regulations to require cleansing classrooms of any books with LGBTQ characters, even if they are penguins or bunnies,[30] as well as any indications of support for LGBTQ students like "safe space" stickers.[31] Miami-Dade County's school district ceased

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25. FLA. STAT. § 1001.42 (2023).

26. Ashley Woo & Melissa Kay Diliberti, *How Florida's Expansion of 'Don't Say Gay' Law Will Hurt Students and Teachers Across the United States*, RAND (May 13, 2023), https://perma.cc/39YW-U3B6 (noting that the Florida Board of Education expanded scope of law to cover all grades).

27. Jo Yurcaba, *Florida Teacher Fired for Using Gender-Neutral Honorific Mx.*, NBC NEWS (Nov. 10, 2023, 5:53 PM PST), https://perma.cc/93SN-48JP ("[Florida teacher] Vary said they knew using 'Mx.' could potentially lead to legal issues because of the new law, but that they wanted to show their students they were an ally."); Joe Hernandez, *Florida Is Investigating a Teacher Who Showed a Disney Movie with a Gay Character*, NPR (May 16, 2023, 5:01 AM EDT), https://perma.cc/HA5C-MURQ ("A Florida teacher is under investigation by the state's Department of Education after she showed her students a Disney movie that features a gay character.").

28. LaFrance, *supra* note 2 (noting that at least twenty-three states have introduced a similar ban).

29. *See* Movement Advancement Project, *supra* note 2 (showing that six states passed bans through the end of 2023).

30. Judd Legum, *Florida School District Orders Librarians to Purge All Books with LGBTQ Characters*, POPULAR INFO. (Sept. 26, 2023) (noting removal of *And Tango Makes Three* about penguins and *A Day in the Life of Marlon Bundo* about bunnies); *see also id.* (quoting Charlotte County Superintendent as saying that books with "[t]hese characters and themes cannot exist."); *cf.* Judd Legum & Tesnim Zekeria, *The Chaos in Florida School Libraries*, POPULAR INFO., https://perma.cc/B9ZE-2DEE (Aug. 29, 2023) (listing LGBTQ-friendly books removed from school libraries in sixteen Florida school districts even though the law may not apply to school libraries).

31. Emily Bloch, *Equality Florida Slams Duval Schools for Removing 'Safe Space' Rainbow Stickers Amid 'Rebrand,'* FLA. TIMES-UNION (Aug. 15, 2022, 10:48 AM ET), https://perma.cc/3JFP-MB9S; *cf.* Thomas Kika, *Florida Teacher's 'Protect Trans Kids' Shirt Prompts Parent Complaints*, NEWSWEEK (Apr. 2, 2022, 7:07 PM EDT), https://perma.cc/69F2-DX2J (reporting that two days before Trans Day of Visibility, a St. Johns school principal ordered school teacher wearing a "Protect Trans Kids" T-shirt to remove it).

recognizing October as "LGBTQ history month" on the grounds that it conflicted with the law.[32]

The bans, with their vague language, also chill speech that is not directly forbidden. When people are unsure when their speech crosses the line into illegality, they will err on the side of caution and steer far clear of the line, thereby self-censoring more than what is actually required by the law.[33] Florida teachers are hesitant to discuss same-sex families or display LGBTQ symbols like pride flags or rainbows.[34] One school district took down a video about LGBTQ bullying.[35] Uncertainty also led schools to cancel AP Psychology because its developmental psychology section covers sexual orientation and gender identity.[36] As one Florida teacher observed, "We're all nervous."[37]

B. Critical Race Theory Bans

Even more states have enacted or proposed CRT bans.[38] Critical race theory arose in law schools to address why racial inequalities persist despite civil rights laws banning race discrimination in areas ranging from education to housing to employment.[39] The answer, CRT posits, is structural racism. CRT does not deny the existence of intentional racist acts by individuals, but it focuses on the ways that institutions or societal structures, including the law,

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32. Andrew Atterbury, *Miami School Board Again Shuts Down LGBTQ Month Recognition,* POLITICO (Sept. 7, 2023, 1:31 PM EDT), https://perma.cc/9B4Q-2X76.
33. "The absence of certainty in the law is always unfortunate, but it is particularly pernicious where speech is concerned because it tends to deter all but the most courageous . . . from entering the marketplace of ideas." 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:59 (West 2024).
34. Woo & Diliberti, *supra* note 26.
35. Claire Heddles, *Another LGBTQ Resource Disappears in Duval Schools,* JACKSONVILLE TODAY (July 10, 2022, 8:39 PM), https://perma.cc/FWB7-4GTL ("Duval County Public Schools has taken down a 12-minute anti-bullying video that taught middle and high school students how to support their gay and transgender peers . . . .").
36. Laura Meckler, *Florida Says AP Psychology Doesn't Violate the Law, After All,* WASH. POST (Aug. 9, 2023, 6:00 AM EDT), https://perma.cc/DS68-65VE (describing how Manny Diaz, the State Commissioner of Education, informed school superintendents that the course could not include the topics, leading the College Board to clarify that courses without them would not qualify as AP classes). Although the Florida Department of Education reversed its stance right before school started, many districts had dropped the AP class. *Id.*
37. Sarah Mervosh, *Back to School in DeSantis's Florida, as Teachers Look Over Their Shoulders,* N.Y. TIMES (Aug. 27, 2022), https://perma.cc/7H5X-FEPQ.
38. *CRT Forward Tracking Project Map, supra* note 4 (listing government action on critical race theory in each state).
39. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 4 (4th ed. 2023).

perpetuate racial disparities.[40] Indeed, CRT maintains, structural racism is so widespread that the United States cannot be fairly described as a land where opportunity is equal and where effort and ability alone determine success.[41] Consequently, insisting on colorblindness only ignores deeply embedded structural racism.[42]

The CRT bans themselves draw inspiration from a 2020 Trump executive order which prohibited funding any federal civil service training that promotes a list of nine "divisive concepts."[43] These same concepts—the Trump Administration's understanding of critical race theory—appear, often word for word, in most of the state-level bans on critical race theory in public schools.[44]

Some concepts ban making assumptions about individuals based on their race,[45] such as that one race is inherently superior to another[46] or that an

40. KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 11 (2019) (explaining that "racism is a normal feature of American society . . . and that institutions, like the law, have worked to perpetuate racial inequality").

41. *See* DELGADO & STEFANCIC, *supra* note 39, at 8 ("[R]acism is ordinary, not aberrational . . . .").

42. MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 6 (1993) ("Critical race theory expresses skepticism toward dominant legal claims of neutrality, objectivity, colorblindness and meritocracy.").

43. Exec. Order No. 13950, 3 C.F.R. 433, 436 (2020), *revoked by* Exec. Order. No. 13985, 3 C.F.R. 409 (2021). The "divisive concepts" are:

> (1) one race or sex is inherently superior to another race or sex;
> (2) the United States is fundamentally racist or sexist;
> (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
> (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
> (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
> (6) an individual's moral character is necessarily determined by his or her race or sex;
> (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
> (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
> (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

Id.

44. *See CRT Forward Tracking Project Map*, *supra* note 4; *see also, e.g.*, FLA. STAT. § 1000.05 (2023); OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021); TENN. CODE ANN. § 49-6-1019 (2021); TEX. EDUC. CODE ANN. § 28.0022 (West 2021); IOWA CODE ANN. § 261H.8 (West 2021).

45. *See* Exec. Order No. 13950, 3 C.F.R. at 436 ("(3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously").

46. *See id.* ("(1) one race or sex is inherently superior to another race or sex").

individual's moral character is determined by their race.[47] Ironically, these represent important civic values that CRT theorists would also support.

Others prohibit blaming individuals for the acts of their racial forebears.[48] Also forbidden is teaching that "any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race"[49] or that "meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race."[50] These too have little in common with CRT, which, as mentioned, concentrates on institutional rather than individual racism.[51]

However, despite relying on a skewed understanding, a few prohibitions approach core CRT concepts such as the pervasiveness of structural racism.[52] In addition to banning subjects and viewpoints outright, these laws have also chilled discussion on the broader topics of race, racism, and America's racial history.[53] Examples abound. A social studies teacher in Iowa was advised by his superintendent that their state's anti-CRT law may preclude him from asserting that "slavery was wrong."[54] An economics teacher stopped linking the lack of black wealth to Jim Crow laws and redlining lest "we were somehow suggesting one group is better than the other," while a high school English teacher dropped from her unit on race any discussion of privilege.[55] Meanwhile, Florida rejected an AP African American Studies course on the grounds that it violated parts of its CRT ban.[56]

47. *Id.* ("(6) an individual's moral character is necessarily determined by his or her race or sex").

48. *See id.* ("(7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex").

49. *Id.*

50. *Id.*

51. BRIDGES, *supra* note 40, at 12-13.

52. *See, e.g.*, Exec. Order No. 13950, 3 C.F.R. 433, 436 (2020), *revoked by* Exec. Order. No. 13985, 3 C.F.R. 409 (2021) ("(2) the United States is fundamentally racist or sexist"); Corbin, *supra* note 7, at 71-76.

53. *See* Corbin, *supra* note 7, at 99-100 (describing how schools have cancelled classes, trips, and lectures related to civil rights, and teachers have cut out discussions on racial privilege and stopped assigning literature by black authors among other chilling effects); *see also supra* note 33 and accompanying text (describing the chilling effect on speech of vaguely-worded laws).

54. Hannah Natanson, *'Slavery Was Wrong' and 5 Other Things Some Educators Won't Teach Anymore*, WASH. POST (last updated Mar. 6, 2023, 7:33 EST), https://perma.cc/YG73-GWF6.

55. Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring*, WASH. POST (Feb. 14, 2022, 6:00 AM EST), https://perma.cc/2W3S-GE5Z (describing chilling effect).

56. Patricia Mazzei & Anemona Hartocollis, *Florida Rejects A.P. African American Studies Class*, N.Y. TIMES (Jan. 19, 2023), https://perma.cc/G8WY-C4LW ("The state's
footnote continued on next page

II. Existing Free Speech Doctrine

The government speech doctrine makes it difficult for teachers and for students to challenge curriculum bans as unconstitutional government censorship. But for the government speech doctrine, teachers might claim that the educational gag laws violate their free speech rights by censoring their classroom lessons. However, the recent government speech gloss on public employee speech doctrine will likely defeat this claim. Students might argue that denying them sound educational knowledge violates their free speech rights. Unfortunately, the current doctrine on the free speech rights of audiences is not as well established as the free speech rights of speakers and may have limited applicability to public school curricula, especially if curricular decisions are deemed government speech.

A. Teacher Claims

The principal obstacle for public school teachers seeking to challenge curriculum bans as censorship is that their speech in the classroom will probably be deemed government speech. Government speech, as opposed to private speech, is not protected by the Free Speech Clause.[57] Consequently, teachers' claims that the government has censored their speech and distorted their teaching may be summarily rejected.[58]

1. The pre-government speech *Pickering-Connick* test

Even before the government speech doctrine, public school teachers' speech rights were limited at work: The government as employer could discipline its employees for their speech in a way the government as sovereign could not punish ordinary citizens.[59] Specifically, under the *Pickering-Connick* test, public employees' speech at work was protected only if it concerned a matter of public interest and did not unduly disturb the workplace and its efficient delivery of government services.[60] Thus, courts would perform a

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Department of Education said in a letter that the course content was 'inexplicably contrary to Florida law and significantly lacks educational value.'").

57. *See infra* notes 63-66.

58. This does not mean teachers are without legal recourse. *See supra* note 23.

59. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

60. Connick v. Myers, 461 U.S. 138, 146 (1983) (holding that government employee speech was not protected unless it was on a matter of public concern); *see also id.* at 150-52 (holding that speech cannot disrupt the efficient functioning of the workplace);
footnote continued on next page

balancing test, weighing the importance of the employee's speech against the disruption it caused in the government workplace.[61]

Under the *Pickering-Connick* test, teachers might well prevail against curriculum bans. Subjects related to American history and American culture would be considered speech on a matter of public interest, and teaching historically accurate lessons would not disrupt education; on the contrary, such instruction would further it.

2. The post-government speech *Garcetti* test

This approach changed once the government speech doctrine developed. The government speech doctrine is fairly new,[62] and its primary rule is straightforward: The Free Speech Clause does not constrain the government's own speech.[63] The rule presumes that the government must be able to control its messages in order to function, especially when executing the policies it was elected to promote.[64] For that reason, while the government may not suppress private viewpoints it disapproves, it may (and indeed, must) advocate for its own viewpoints. For example, a government elected to promote vaccines should not be required to provide a platform for anti-vaxxers as well.[65]

In 2006, *Garcetti v. Ceballos* added a government speech doctrine gloss to government employee law, granting even more control to government employers: So long as the government employee's speech is "pursuant to official duties," then it is government speech, full stop.[66] The idea is that if a

Pickering, 391 U.S. at 572-73 (protecting Pickering's op-ed because it did not interfere with Pickering's teaching nor the school's functioning).

61. Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1013 (1985) (Brennan, J., dissenting from denial of certiorari) ("The recognized goal of the *Pickering-Connick* rationale is to seek a 'balance' between the interest of public employees in speaking freely and that of public employers in operating their workplaces without disruption.").
62. Rust v. Sullivan, 500 U.S. 173 (1991)—among the first government speech doctrine cases—was only described as such after the fact. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring) (referring to the "recently minted government speech doctrine").
63. Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.").
64. *Cf.* Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022) ("But when the government speaks for itself, the First Amendment does not demand airtime for all views. After all, the government must be able to 'promote a program' or 'espouse a policy' in order to function." (quoting *Walker*, 576 U.S. at 208)).
65. *Walker*, 576 U.S. at 207-08.
66. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

government employee speaks in the course of fulfilling their job responsibilities—if the speech owes its existence to their government employment—then the government has essentially commissioned and paid for it and it is the government's own.[67]

Although the line demarcating what is and is not pursuant to official duties may sometimes lack clarity, teachers instructing their students in class clearly lies at the heart of teachers' official responsibilities.[68] As statements "pursuant to official duties," it is government speech that triggers no free speech scrutiny.[69] Consequently, a teacher's suit challenging the state's excision of certain subjects and viewpoints from their lessons will likely fail. Of course, not every workplace communication is pursuant to official duties, so there may be room to maneuver.[70] Yet teachers speak at their own peril: If interactions with students are characterized as pursuant to official duties, then even conversations outside class that contradict the ideology behind the "Don't Say Gay" and anti-CRT laws may be unprotected.[71] Consequently, unless a teacher can prove that their speech about sexual orientation or systemic racism is beyond their official responsibilities, they cannot shine a Free Speech Clause spotlight on curriculum bans.

In sum, *Garcetti* rejected the *Pickering-Connick* balancing test for public employees' speech claims in favor of a bright-line rule that speech pursuant to official duties is unprotected government speech.[72] Because teaching is pursuant to their official duties, the *Garcetti* rule precludes K-12 teachers from successfully challenging these curriculum bans. Although *Garcetti* contemplates an academic freedom exception to its new

67. *Id.* at 421-22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

68. *See* Corbin, *supra* note 17, at 636-38.

69. *Garcetti*, 547 U.S. at 421.

70. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424-25 (2022) (holding that a coach's prayer while he was still on duty was not government speech subject to establishment clause limits).

71. *See, e.g.*, Hannah Natanson, *This Florida Teacher Married a Woman. Now She's Not a Teacher Anymore*, WASH. POST (May 19, 2022, 6:00 AM EDT), https://perma.cc/C6KL-ZBDW ("[Gay schoolteacher] Solomon thought about how, under the new law, a parent lawsuit could stem from just one awkward exchange about her personal life.").

72. *Garcetti*, 547 at 421-22; *cf. id.* at 436 (Souter, J., dissenting) ("The majority accepts the fallacy . . . that any statement made within the scope of public employment is (or should be treated as) the government's own speech . . . .").

rule,[73] academic freedom is overwhelmingly reserved for professors at the college level.[74]

B. Student Claims

Teachers are not the only parties whose free speech rights are undercut by these bans. Students' free speech rights are also at stake.[75] The curriculum is taught to them, and free speech protects the audience's right to receive a free flow of knowledge, viewpoints, and information as well as the speaker's right to disseminate this speech.[76] Doctrinally, however, audience rights are not as well-established as speakers' rights, certainly not students' free speech rights vis-à-vis their public school curriculum. Specifically, although earlier Supreme Court cases suggest that censorship of content particularly in public school libraries must be justified by a legitimate pedagogical reason, it is not altogether clear whether this holding applies to today's curriculum bans. Some lower courts read the Supreme Court precedents as permitting review of certain public school curriculum decisions. Others, especially since the development of the government speech doctrine, have suggested that curricular decisions are government speech and therefore immune to review.

73. *Id.* at 425 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

74. Even college professors may not be protected given the uncertainties surrounding academic freedom doctrine, including whether it exists at all and whether it protects the university rather than its professors. *See* Corbin, *supra* note 17, at 642-54.

75. Arguably, the free speech rights of authors of barred material might also have a claim. *See, e.g.*, Parnell v. Sch. Bd. of Lake Cnty., No. 23-CV-381, 2023 WL 6309983, at *1 (M.D. Fla. Aug. 3, 2023) (describing how the author of *And Tango Makes Three* argues that the ban on their book amounted to viewpoint discrimination "because it censors [the book's] viewpoint that same-sex relationships and families with same-sex parents exist; that [those families and relationships] can be happy, healthy, and loving; and that same-sex parents can adopt and raise healthy children"). This Essay, however, focuses on those most directly affected at school: teachers and students.

76. Students' right to speak may also be implicated if teachers feel compelled to shut down questions or comments that touch on forbidden subjects or viewpoints. *Cf.* ABBIE E. GOLDBERG, UCLA SCHOOL OF LAW WILLIAMS INSTITUTE, IMPACT OF HB 1557 (FLORIDA'S DON'T SAY GAY BILL) ON LGBTQ+ PARENTS IN FLORIDA, 1 (2023), https://perma.cc/9NCH-S9QN (noting that LGBTQ parents worried their children would be afraid to talk about their families).

1. Audience rights generally

Audiences have always been central to free speech.[77] As noted in most First Amendment law school casebooks, the U.S. Constitution protects free speech in order to foster a marketplace of ideas; facilitate democratic self-governance; and promote autonomy.[78] Two of these three major free speech theories focus as much—if not more—on the importance of speech to audiences as opposed to speakers. Marketplaces are for buyers, and so the marketplace of ideas is for the benefit of the consumers of ideas—audiences.[79] Likewise, free speech is necessary for a democratic form of government because citizens need to possess certain information in order to vote wisely,[80] whether it be news on whether their elected officials are implementing their preferred policy or the knowledge to develop their policy preferences in the first place.[81]

The Supreme Court has repeatedly recognized that the Free Speech Clause protects listeners as well as speakers.[82] Audiences, rather than speakers, have

77. Thomas I. Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 2 (noting that the right to communicate and the right to receive communications are two sides of the same coin, namely "the system of freedom of expression"); Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 227 (1999) ("The Constitution protects the right to receive information and ideas. The right to receive information is the logical corollary of the right to speak.").

78. *See, e.g.*, RONALD J. KROTOSZYNSKI, LYRISSA BARNETT LIDSKY, CAROLINE MALA CORBIN & TIMOTHY ZICK, THE FIRST AMENDMENT: CASES AND THEORY 14-20 (4th ed. 2022).

79. Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("It would be a barren marketplace of ideas that had only sellers and no buyers.").

80. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-25 (1948); *see also id.* at 25 (arguing that free speech ensures that "everything worth saying shall be said").

81. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (noting "the paramount public interest in a free flow of information to the people concerning public officials, their servants"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

82. *See, e.g.*, Martin v. Struthers, 319 U.S. 141, 143 (1943) ("This freedom [of speech] embraces the right to distribute literature and necessarily protects the right to receive it."); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . ."); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas' . . . . This Court has recognized that this right is 'nowhere more vital' than in our schools and universities.").

been successful plaintiffs in several free speech lawsuits.[83] Moreover, audience interests drove the expansion of Free Speech Clause coverage to commercial speech[84] and then to corporate speech.[85] With regard to the former, the Supreme Court posited that consumers should have access to a free flow of commercial information since it might inform their economic decisions and their views on economic policy.[86] With regard to the latter, the Court held that listeners had the right to hear all opinions on matters of public import, regardless of their source.[87]

2. Audience rights of public school students: *Pico* and *Hazelwood*

Although listener rights to an unimpeded flow of speech are firmly embedded in free speech jurisprudence,[88] many doctrinal questions surround their scope. In the public school context, the Supreme Court vindicated the free speech rights of students as audiences in *Board of Education v. Pico* by holding that removing books from public school libraries may violate those rights,[89] though questions remain about *Pico*'s application to curricular decisions.[90] In *Pico*, high school and junior high school students sued a school board that, armed with a list of "objectionable" books from a conservative parent organization, removed books ranging from *Best Short Stories by Negro Writers*,

83. *Lamont*, 381 U.S. at 302-05 (recipients challenging federal statute requiring the Post Office to hold foreign communist propaganda unless requested); *Stanley*, 394 U.S. at 564-65 (reader challenging law barring possession of obscene materials); Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) (potential audience challenging commercial regulation barring pharmacists from advertising the price of prescription drugs).

84. Commercial speech is intended to encourage a sale and encompasses advertisements for goods and services as well as product labels. *Cf. Va. State Bd. Of Pharm.*, 425 U.S. at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n Hum. Rels., 413 U.S. 376, 385 (1973)) (defining commercial speech as speech is that which "does no more than propose a commercial transaction").

85. Corporate speech is speech by a corporation.

86. *Va. State Bd. of Pharm.*, 425 U.S. at 762-65.

87. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 782-83 (1978) (arguing that "the press does not have a monopoly on either the First Amendment or the ability to enlighten" and noting corporations' "role in affording the public access to discussion, debate, and the dissemination of information and ideas").

88. *See, e.g.*, Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.").

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

90. *Id.* at 870-72.

edited by Langston Hughes,[91] to *The Fixer*, by Bernard Malamud.[92] The board's press release described the targeted books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[93]

Pico unequivocally recognizes students' First Amendment right as audiences at school. The Court starts by emphasizing that the Free Speech Clause protects audiences as well as speakers: "[W]e have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.'"[94] The *Pico* Court continues with a quotation from James Madison about how "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[95] As future participants in our democracy, students likewise must have a right to receive information and ideas.[96] Accordingly, while the *Pico* Court concedes that states and local school boards have long had "broad discretion" in managing public schools,[97] it nonetheless insists that this discretion must be exercised in "a manner that comports with the transcendent imperatives of the First Amendment."[98] Indeed, the Court makes this point twice.[99]

Pico then addresses which curricular decisions violate those "transcendent imperatives" and students' free speech rights as recipients of speech. According to *Pico*, the government acts constitutionally when its decisions are based on legitimate criteria, including "educational suitability," "good taste," "relevance,"

91. *Id.* at 856-57 n.3. Langston Hughes is a famous African American writer and poet. *Langston Hughes*, ENCYCLOPEDIA BRITANNICA, https://perma.cc/NW3P-3TCW (archived Apr. 20, 2024).

92. *Pico*, 457 U.S. at 856-67 n.3. Bernard Malamud is a famous Jewish author whose *The Fixer* won a Pulitzer Prize. *Bernard Malamud*, ENCYCLOPEDIA BRITANNICA, https://perma.cc/M5W2-X3RL (archived Apr. 20, 2024).

93. *Pico*, 457 U.S. at 857 (quoting Pico *ex rel.* Pico v. Bd. of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)). Other removed books include *A Hero Ain't Nothin' but a Sandwich*, by African American Alice Childress; *Soul on Ice*, by African American Eldridge Cleaver; and *Down These Mean Streets*, by Latino Piri Thomas. *Pico*, 474 F. Supp. at 389 nn.2-4.

94. *Pico*, 457 U.S. at 867 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

95. *Id.* (quoting 9 WRITINGS OF JAMES MADISON 71 (Gaillard Hunt ed. 1910), https://perma.cc/S8RV-DUC6 (to locate, select "View the Live Page," and then select "Downloads")).

96. *Pico*, 457 U.S. at 868 ("[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.").

97. *Id.* at 863.

98. *Id.* at 864.

99. *Id.* at 865 ("[L]ocal school boards must discharge their 'important, delicate, and highly discretionary functions' within the limits and constraints of the First Amendment." (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943))).

and "appropriateness to age and grade level."[100] A later case addressing curricular decisions obliquely, *Hazelwood School District v. Kuhlmeier*, articulates a succinct standard. In *Hazelwood*, a public high school principal censored two articles from the school newspaper.[101] Because the newspaper was written for the school's Journalism II class, the Supreme Court categorized it "as part of the school's journalism curriculum."[102] The Court moreover held that a decision to quash an article did not violate students' free speech rights "so long as their actions are reasonably related to legitimate pedagogical concerns."[103] The legitimate pedagogical interests in that case included ensuring that topics were age-appropriate (echoing *Pico*) and that students adhered to journalistic standards of fairness.[104] In short, as articulated by *Hazelwood* and deployed in *Pico*, censorship of curriculum in public school represents an acceptable exercise of discretion provided it is "reasonably related to legitimate pedagogical concerns."[105]

In contrast, *Pico* held discretion "exercised in a narrowly partisan or political manner" does not conform with the First Amendment.[106] If the goal is to stifle ideas and thereby "cast a pall of orthodoxy over the classroom,"[107] then a state or school board has violated the free speech rights of students.[108] "If petitioners *intended* by their removal decision to deny respondents access to

100. *Id.* at 873.

101. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263 (1988) ("One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.").

102. *Id.* at 262.

103. *Id.* at 273.

104. The principal had cut an article about divorce because it cited a student criticizing their father without giving the parent a chance to respond. The principal had cut an article about students' pregnancy because he thought their identities might be uncovered and that their frank discussion of their sexual history and birth control use was not age-appropriate. *Id.* at 274-75.

105. *Id.* at 273; *see also id.* ("It is only when the decision to censor . . . has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d]' as to require judicial intervention to protect students' constitutional rights." (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968))).

106. Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 870 (1982).

107. *Id.* (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)) ("[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom.") (second alteration in original).

108. *Id.* at 871 ("[W]hether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions."). The *Pico* Court also notes that at issue is *removing* rather than *adding* books to the library, *id.* at 871-72, but the same holds true with the Don't Say Gay and anti-CRT laws: They aim to remove topics and viewpoints from the classroom.

ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution."[109] Emphasizing both the illicit motives and the resulting censorship of ideas, *Pico* observed that it would violate students' free speech rights if a Democratic school board, "motivated by party affiliation," removed all the pro-Republican books from the school library or if a white school board, "motivated by racial animus," removed books by black writers or books advocating racial equality.[110]

While it might seem like the Court has announced a rule of decision—censorship is constitutional if reasonably related to a legitimate pedagogical interest and unconstitutional if exercised in a narrowly partisan or political manner—the *Pico* Court limits its rule to its particular context. That is, the Court distinguishes censoring instruction from censoring library books on the grounds that school curriculum and school libraries serve different functions.[111] The duty to teach community values, an important component of classroom instruction,[112] does not extend to library materials, which are designed to allow students to explore the world of ideas on their own.[113] Thus, the Court writes "[p]etitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values."[114]

At the same time, the *Pico* Court did not foreclose challenges to curriculum decisions, and its underlying reasoning is not necessarily confined to libraries.[115] *Pico* also observed that "[o]ur precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom."[116] Granted, schools may have more latitude to

109. *Id.* at 871; *see also id.* ("Our Constitution does not permit the official suppression of *ideas.*").

110. *Id.* at 870-71.

111. *Id.* at 862 ("Respondents do not seek in this Court to impose limitations upon their school Board's discretion to prescribe the curricula of the Island Trees schools.").

112. *Id.* at 864; *see also id.* at 869 ("Petitioners emphasize the inculcative function of secondary education, and argue that they must be allowed *unfettered* discretion to 'transmit community values' through the Island Trees schools. But that sweeping claim overlooks the unique role of the school library.").

113. *Id.* at 869.

114. *Id.*; *cf.* Chiras v. Miller, 432 F.3d 606, 619 (5th Cir. 2005) ("Because *Pico* addressed the removal of an optional book from the school library, not the selection of a textbook for use in the classroom, we decline to apply *Pico* to the facts before us.").

115. Norman B. Lichtenstein, *Children, the Schools, and the Right to Know: Some Thoughts at the Schoolhouse Gate*, 19 U.S.F. L. REV. 91, 129 (1985) ("[E]ducational decisions based upon ideological considerations will burden the learning experience . . . whether made for a library book or textbook.").

116. Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 861 (1982).

dictate the curriculum given their mission to inculcate certain values, but the Court's instinct to require that decisions rest upon legitimate pedagogical reasons ought not end at the library's doors. That is, the values to be impressed upon America's youth should have an educational justification. Not all shared values of the community are appropriate to promote in the public schools, especially if those community values flow from, for example, a religious tenet or white supremacy. Thus, perhaps Justice Blackmun's concurring view of the school's responsibility to teach "*civic* virtues," specifically the "fundamental values necessary to the maintenance of a democratic political system,"[117] rather than "*community* values," whatever they may be, better captures the schools' responsibility—and the constitutional limits of its discretion. Certainly, it better aligns with other statements the Supreme Court has made about the importance of public schools in the United States,[118] such as its recent declaration that "America's public schools are the nurseries of democracy."[119]

Adding to the uncertainty of whether *Pico* applies to school curriculum is that it was a plurality decision. Justice White supplied the fifth vote, and the controlling rule going forward is the narrowest holding that comports with his view.[120] Justice White voted to affirm the Second Circuit's remand order but wanted to wait until after a trial on the school board's justifications before issuing constitutional guidelines.[121] Nevertheless, his affirmation implies that the Free Speech Clause may limit the school board's authority.[122] After all, if a school board could censor books for any reason whatsoever, a trial to

117. *Id.* at 876 (Blackmun, J., concurring) (quoting Ambach v. Norwich, 441 U.S. 68, 77, 80 (1979)).

118. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship."); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) ("[P]ublic education must prepare pupils for citizenship in the Republic." (quoting CHARLES BEARD & MARY BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968))).

119. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2041 (2021).

120. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'") (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

121. *Pico*, 457 U.S. at 883-84 (White, J., concurring); *see also id.* at 884 ("We should not decide constitutional questions until it is necessary to do so . . . .").

122. The Second Circuit panel, whose remand Justice White affirmed, thought so. It wrote that it would violate the Free Speech Clause if, as the evidence suggests, "political views and personal taste are being asserted not in the interests of the children's well-being, but rather for the purpose of establishing those views as the correct and orthodox ones for all purposes in the particular community." Pico *ex rel.* Pico v. Bd. of Educ., 638 F.2d 404, 417 (2d Cir. 1980).

determine its motivations would be pointless. Even the dissent admits that the school board should not exercise its discretion in a narrowly partisan or political manner as illustrated by the majority's two examples.[123] The dissent simply did not discern any such risk in this fact pattern.[124] Despite this, lower courts have not always found the *Pico* plurality to be binding.[125]

3. Lower courts divided

In the absence of a definitive Supreme Court ruling,[126] circuits have devised their own tests for addressing curriculum decisions.[127] Especially before the advent of the government speech doctrine, several circuits agreed with *Pico* that the Constitution affords school boards great discretion so long as they do not impose partisan or political orthodoxy, and/or with *Hazelwood* that school boards must articulate something akin to a legitimate pedagogical justification. The Seventh Circuit, for example, opined even before *Pico* that "nothing in the Constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute."[128] The Eleventh Circuit imported *Hazelwood*'s test wholesale[129] but held that removing Aristophanes' *Lysistrata* and Chaucer's

123. *Pico*, 457 U.S. at 907 (Rehnquist, J., dissenting) ("I can cheerfully concede all of this . . . . In *this case* the facts taken most favorably to respondents suggest that nothing of this sort happened.").

124. *Id.*

125. *See, e.g.*, ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1200 (11th Cir. 2009) ("*Pico* is of no precedential value as to the application of the First Amendment to these issues." (quoting Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1045 n.30 (en banc) (plurality opinion) (5th Cir. 1982))).

126. Justice Souter, sitting on the First Circuit, wrote "*Pico*'s rule of decision, however, remains unclear." Griswold v. Driscoll, 616 F.3d 53, 57 (1st Cir. 2010); Virgil v. Sch. Bd. of Columbia Cnty., 862 F.2d 1517, 1520-21 (11th Cir. 1989) ("[C]ourts that have addressed the issue have failed to achieve a consensus on the degree of discretion to be accorded school boards to restrict access to curricular materials.").

127. Chiras v. Miller, 432 F.3d 606, 616 (5th Cir. 2005) ("We note that there is no strong consensus among the circuit courts regarding the application of First Amendment principles to the selection of curricular materials by school boards.").

128. Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1306 (7th Cir. 1980); *see also id.* (rejecting student complaint because it "nowhere suggests that in taking these actions defendants have been guided by an interest in imposing some religious or scientific orthodoxy or a desire to eliminate a particular kind of inquiry generally"). Courts in the Seventh Circuit continue to apply this approach. *See, e.g.*, Borger v. Bisciglia, 888 F. Supp. 97, 99-100 (E.D. Wis. 1995) (relying on *Zykan*, *Pico*, and *Hazelwood* in evaluating school's decision to prohibit R-rated movies in classes).

129. Virgil v. Sch. Bd. of Columbia Cnty., 862 F.2d 1517, 1521 (11th Cir. 1989) ("*Hazelwood* established a relatively lenient test for regulation of expression which 'may fairly be characterized as part of the school curriculum.' Such regulation is permissible so long

footnote continued on next page

The Miller's Tale from the curriculum was "reasonably related to its legitimate concerns regarding the appropriateness (for this high school audience) of the sexuality and vulgarity in these works."[130] Finding in favor of students, the Eighth Circuit held in 1982 that a school board, offended by a film's ideological and religious themes,[131] violated students' free speech rights when it censored a film adaptation of Shirley Jackson's *The Lottery* without providing a plausible justification for its decision.[132]

Other courts, especially recently, have dismissed curriculum challenges altogether under the government speech doctrine.[133] For example, a 2010 First Circuit opinion written by retired Justice Souter rejected a challenge to a revised curriculum guide on the Armenian genocide in part because it assumed that curricular decisions constituted government speech.[134] The Fifth Circuit in 2005 rebuffed a challenge to the Texas Board of Education's rejection of an environmental science textbook on the grounds that the curriculum was government speech outside free speech protection.[135] The Fifth Circuit also noted that earlier cases (like the Eleventh Circuit's above) were decided without the benefit of a more fully developed government speech doctrine.[136]

as it is 'reasonably related to legitimate pedagogical concerns.'") (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271, 273 (1988)))

130. *Virgil*, 862 F.2d at 1523.

131. Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 778 (8th Cir. 1982).

132. *Id.* ("The board gave no reasons for its decision.").

133. *See, e.g.*, Nampa Classical Acad. v. Goesling, 447 F. App'x 776, 778 (9th Cir. 2011) ("Because Idaho charter schools are governmental entities, the curriculum presented in such a school is not the speech of teachers, parents, or students, but that of the Idaho government. The government's own speech is exempt from scrutiny under the First Amendment's speech clause.").

134. Griswold v. Driscoll, 616 F.3d 53, 58-59 (1st Cir. 2010) ("[T]he seriousness of the plurality's reservation of curricular autonomy free of review by a court for viewpoint discrimination is underscored by three strands of Supreme Court case law. . . . And the third is the developing body of law recognizing the government's authority to choose viewpoints when the government itself is speaking."). Justice Souter also noted that he did not think the curricular decision was suspect like *Pico*, which "was based more on patriotism and religion than educational suitability." *Id.* at 56-57.

135. Chiras v. Miller, 432 F.3d 606, 618 (5th Cir. 2005) ("[W]e conclude that the selection of curricular materials by the Board is clearly government speech."); *see also id.* at 616 ("[O]ur conclusion [is] that the selection and use of textbooks in the public school classrooms constitutes government speech, and therefore that *Hazelwood* does not apply . . . .").

136. *Chiras*, 432 F.3d at 617 ("Moreover, [the Eleventh Circuit case] Virgil was decided before *Rust*, *Rosenberger*, *Forbes*, *Finley*, and *ALA*, and therefore did not have the benefit of the Supreme Court's clarification of the government's authority over its own message, whether it speaks through its own employees or through private parties."). In any event, "[t]o the extent *Virgil* suggests that the selection of instructional materials by a school board is not generally government speech, we disagree." *Id.* At the same time, that portion of the opinion was addressing the author's challenge. For the students'

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In sum, just as teachers may not prevail in curricular challenges because their "speech pursuant to official duties" is government speech,[137] students may not succeed in their challenges to curricular decisions because the curriculum itself is deemed government speech.

The failure of students' claims, however, is not a forgone conclusion. Despite the trend to reject students' curriculum claims on government speech grounds, not all circuits agree. Even in our current government speech era, the Ninth Circuit struck down an Arizona law banning, among other things, courses that "[a]re designed primarily for pupils of a particular ethnic group," or that "[p]romote resentment toward a race or class of people."[138] In doing so, the Ninth Circuit read *Hazelwood* as holding that "the state may not remove materials otherwise available in a local classroom unless its actions are reasonably related to legitimate pedagogical concerns."[139] Thus, a *Pico* and/or *Hazelwood* test may still win the day, as the Supreme Court has not yet definitively ruled on student challenges to state laws banning certain subjects and viewpoints from public school classrooms.

4. Student claims under *Pico-Hazelwood* standard

In fact, students challenging the curriculum bans have a strong claim under a *Pico-Hazelwood* test. Although every challenge turns on a fact-intensive inquiry, the bans often seem more aimed at imposing certain conservative Christian or white Christian nationalist values than inculcating civic values, ensuring age-appropriateness, or other legitimate pedagogical goals.

The "Don't Say Gay" regulations, for example, do not merely require that teachers address questions of sexual orientation and gender identity in an age-appropriate manner; they ban discussion of these topics altogether for students of all ages, whether they are seven or seventeen.[140] A teacher cannot explain to her students that there are many kinds of families and that some classmates have a mother and a father who live together, some have two parents who are divorced, some have a mother and a mother, some have only one mother, and some live with their grandparents, etc. The law essentially requires teachers to pretend that gay and trans people—including gay and trans students—do not

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challenge, the Court declined to apply *Pico*, and also argued that even were *Pico* to apply, the students would lose. *Id.* at 619.

137. *See supra* Part II.A (discussing teachers' claims).

138. Arce v. Douglas, 793 F.3d 968, 973 (9th Cir. 2015). The law also prohibited courses that "[p]romote the overthrow of the United States government," or "[a]dvocate ethnic solidarity instead of the treatment of pupils as individuals." *Id.*

139. *Arce*, 793 F.3d at 983.

140. *See supra* Part I.A. and accompanying text.

exist.[141] Erasing any acknowledgement of people long reviled by conservative Christians is not a legitimate pedagogical goal but one motivated by an attempt to foist conservative Christian orthodoxy onto public school students of many religions, sexual orientations, and gender identities.[142]

The CRT bans are equally problematic. Although critical race theorists themselves would agree that some "divisive concepts" should not be taught,[143] the prohibition on others comes closer to imposing orthodoxy. These opaquely-worded concepts appear calculated to forbid teachers from suggesting that pervasive discrimination exists in the United States,[144] that Americans may be unconsciously biased,[145] or that white privilege exists.[146] Others mandate that teachers endorse colorblindness and oppose affirmative action.[147] Proposing that the United States may not be a true meritocracy because of widespread systemic discrimination is basically off the table.[148] It is not just that teachers are bidden to advocate a particular state-approved point of view; they are legally forbidden to encourage students to explore alternatives. This is not education but indoctrination. Under *Pico* or *Hazelwood*,

141. *See, e.g.*, Hallie Lieberman, *How the "Don't Say Gay" Law is Affecting Florida LGBTQ Students and Teachers*, BUZZFEED NEWS (Nov. 18, 2022, 6:53 AM), https://perma.cc/5JTC-AEJT (noting that a student reported a teacher for mentioning her wife); *cf.* Adam Gabbatt, *Revealed: Christian Legal Non-Profit Funds US Anti-LGBTQ+ and Anti-Abortion Organizations*, GUARDIAN (June 30, 2023, 5:00 AM EDT), https://perma.cc/T92E-RX48 (noting the impact of a Christian non-profit on anti-LGBTQ initiatives including Florida's curriculum ban).

142. Note too that "scientific research has linked the gag order's implicit message of exclusion, shame and unworthiness to tangible health harms for L.G.B.T.Q. youth." *See* Nathaniel Frank, Opinion, *What the Science Says About 'Don't Say Gay' and Young People*, N.Y. TIMES (Apr. 20, 2023), https://perma.cc/B5QX-TRBH.

143. *See supra* notes 45-47 and accompanying text.

144. Exec. Order No. 13950, 3 C.F.R. 433, 436 (2020), *revoked by* Exec. Order. No. 13985, 3 C.F.R. 409 (2021) ("(2) the United States is fundamentally racist or sexist").

145. *Id.* ("(3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously").

146. *See, e.g.*, TENN. CODE ANN. § 49-6-1019 (2021) ("[a]scribing character traits, values, moral or ethical codes, privileges, or beliefs to a race or sex, or to an individual because of the individual's race or sex").

147. *Cf.* Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1233 (N.D. Fla. Nov. 17, 2022) ("When asked directly whether concept six is 'affirmative action by any other name,' defense counsel answered, unequivocally, 'Your Honor, yes.' Thus, Defendants assert the idea of affirmative action is so 'repugnant' that instructors can no longer express approval of affirmative action as an idea worthy of merit during class instruction." (citation omitted)).

148. In truth, the language does not always accurately capture critical race theory concepts. *See* Corbin, *supra* note 7, at 76-78.

this government-mandated orthodoxy violates students' free speech rights to a vibrant marketplace of ideas.[149]

* * *

In sum, teachers might have prevailed under the *Pickering-Connick* test, and students might yet prevail under the *Pico-Hazelwood* test. But the expansion of the government speech doctrine into government employee speech makes it virtually impossible for teachers-as-employees to challenge curriculum bans. And the same may be true for student challenges: Courts may well reject *Pico* or *Hazelwood* as precedent and treat curriculum decisions as government speech.[150] In this way, the government speech doctrine prevents both teachers and students from challenging these bans as content-based laws designed to silence ideas the government does not like. The unreviewability of viewpoint restrictions on curricular speech thus presents a prime example of First Amendment capture.

III. Theory

Once speech is categorized as governmental, the government speech doctrine effectively protects government's attempt to censor views contrary to its own—the bête noire of free speech. The government speech doctrine is relatively new,[151] which perhaps explains why it is such a blunt instrument that places too much speech outside the ambit of the Free Speech Clause. Its current incarnation overreaches in at least two ways. First, it fails to recognize that speech may have more than one speaker. Second, it fails to appreciate that protection of speech is really about protection of the free flow of speech, a stream in which both the speaker and audience have a stake. Focusing solely on the government as speaker of contested speech—whether by ignoring private speakers or private audiences—allows for First Amendment capture.

The consequences can be severe, with the difficulty of challenging curriculum bans providing a textbook example of the harms wrought by an overly expansive government speech doctrine. If unreviewable, the

149. *Cf.* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 872 (1982) ("In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943))).

150. Courts, of course, might apply *Pico* and *Hazelwood* yet evaluate the facts differently, as the *Pico* dissent did. However, courts disposed towards upholding these laws might find it easier to rely on the government speech reasoning instead, forgoing any review at all.

151. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise.").

government could purge from the classroom topics children should be learning and viewpoints they should be engaging, let alone a golden opportunity to develop critical analysis skills.[152] While this Essay does not propose eliminating the government speech doctrine entirely, it does argue for narrowing its scope to take into account private co-speakers and certain private audiences. Here, that means claims by teachers and students against curriculum bans should receive some degree of free speech review. At the very least, the reinstatement of the *Pickering-Connick* test for public school teachers[153] and establishment of a *Pico-Hazelwood* test for public school students[154] would better advance the goals of the Free Speech Clause.

A. Government Speech Overlooking Private Speakers

1. Harm

One of the earliest casualties of the government speech doctrine has been the free speech rights of public employees. If a public employee's speech represents performance of an official job responsibility, then it is considered the government's, and the employee cannot challenge that censorship under the Free Speech Clause regardless of the consequence. Whether it be a government employee trying to blow the whistle on government wrongdoing or a teacher trying to thwart government-imposed orthodoxy, if the speech is pursuant to official duties, it is unprotected and the government employee cannot win.[155]

However, categorizing public employee speech pursuant to official duties as purely governmental overlooks that there may be both private and governmental components.[156] Take public school teachers' classroom speech. Although the state may decide the basic curriculum and even select the textbooks, teachers must plan the lesson, explain the concepts, ask and answer questions, and engage one-on-one with students. Moreover, teachers often

152. The government's censorship may also impede students from developing a tolerance for people with differing races and sexualities in a diverse country, a crucial civic virtue. *See infra* note 185 and accompanying text.

153. *See supra* Part II.A.

154. *See supra* Part II.B.

155. Pauline T. Kim, *Market Norms and Constitutional Values in the Government Workplace*, 94 N.C. L. REV. 601, 644 (2016) ("[I]n the years following *Garcetti*, the lower federal courts denied protection to numerous government employees who objected to their employers' illegal practices, health and safety violations, and financial improprieties."); Caroline Mala Corbin, *Government Employee Religion*, 49 ARIZ. ST. L.J. 1193, 1244 (2017) (noting that the attorney in the *Garcetti* case was demoted for trying to point out potential police misconduct).

156. Corbin, *supra* note 22, at 625-26.

supplement classes with their own materials and activities. The same course may differ wildly depending on who is teaching it because so much of the individual teacher becomes infused in the (state-dictated) curriculum. As a result of these features, public school teaching involves a combination of private and government speakers, a mix that the government speech doctrine ignores.[157]

2. Solution

One solution to the fact that both the government and the individual teacher contribute to the classroom instruction is to acknowledge that some speech has both government and private components and therefore ought to be treated differently than speech that is either purely private or purely governmental.[158] In an earlier paper, I proposed that a third category of speech—mixed speech—be recognized alongside the existing binary of private speech or government speech.[159] Unlike content-based regulations of private speech, which generally trigger strict scrutiny, or content-based regulations of government speech, which trigger no scrutiny at all, content-based regulations of mixed speech would trigger a robust intermediate scrutiny.[160]

An easier solution is to return to earlier doctrine, which implicitly recognized the mixed nature of public employee speech. Recall that before it incorporated the government speech doctrine, public employee speech doctrine—via the *Pickering-Connick* test—evaluated the value of the employee's speech against its disruptive effects in the workplace.[161] In this way, prior doctrine accounted for the interests of both the private employee and the government employer.[162]

157. *Cf.* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2313 (2023) ("Of course, Ms. Smith's speech may combine with the couple's in the final product. But for purposes of the First Amendment that changes nothing. An individual 'does not forfeit constitutional protection simply by combining multifarious voices' in a single communication." (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995))).

158. Corbin, *supra* note 22, at 618-26 (providing examples of speech with both private and government speakers).

159. *See generally id.* (arguing that existing free speech doctrine fails to recognize that much speech is neither purely private nor purely governmental but really a mix of both private and government speech).

160. *Id.* at 675-80.

161. *See supra* notes 60-61 and accompanying text.

162. Arguably, the *Pickering-Connick* test recognized the private audiences' free speech right to the free flow of information and views rather than the private speaker's free speech right to speak. Or perhaps, as is often the case, it is both.

B. Government Speech Overlooking Private Audiences

The government speech doctrine not only ignores that speech may have more than one speaker; it also overlooks that the Free Speech Clause has never been solely about speakers. While the paradigmatic free speech case is one where the government censors a speaker, this censorship harms more than the silenced speaker. Government censorship also denies the speaker's audience a comprehensive and dynamic marketplace of ideas, especially of opinions and information necessary to become an informed citizen.

That audiences form a core part of free speech jurisprudence has not always been well articulated, but it has always been present.[163] As described earlier, recipients of speech have successfully mounted free speech claims, establishing beyond doubt that the Free Speech Clause protects audiences as well as speakers.[164] Similarly, the Supreme Court has regularly justified expanding free speech coverage—to commercial speech, to corporations—on the grounds that the free flow of speech is important for audiences.[165] The Free Speech Clause was originally implicated not because the Constitution protected a business's right to express itself but because it protected audiences' right to receive important information, whether as consumers of commercial goods and services (for commercial speech) or as citizens weighing diverse points of view (for corporate speech).[166]

One reason for the underdevelopment of audiences' right to a free flow of speech is the primacy of speaker rights. Because protecting speakers usually also protects audiences, at least when their interests align,[167] there has been less need to elaborate on audience rights.[168] In addition, when speaker and audience interests clash—for example, if the audience seeks accurate information from a speaker not disposed to provide it[169]—the Supreme Court today consistently

163. *See supra* notes 82-86 and accompanying text.

164. *See supra* note 83 and accompanying text.

165. *See supra* notes 86-87 and accompanying text.

166. *Id.*

167. In other words, the speakers wanted to speak and the audiences wanted to hear their speech.

168. Ross, *supra* note 77, at 231 ("[T]he subtextual status of the right to receive information may be attributable in part to the fact that it is frequently taken for granted and subsumed within the speaker's right to express his or her views.").

169. This may occur when the government compels disclosures to protect consumers from speakers who would rather remain silent. *See, e.g.*, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2367 (2018) (striking California law that required pregnancy crisis centers to "provid[e] low-income women with information about state-sponsored service[s]"). It might also occur when an audience seeks the truth but the speaker prefers to lie. United States v. Alvarez, 567 U.S. 709, 727 (2012) (striking law that outlawed lies about receiving military medals because "[t]he remedy for speech that is false is speech that is true"). Finally, sometimes an audience does not want to hear the speaker's offensive

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favors speakers.[170] The Court's unwillingness to improve the quality of speech for audiences by silencing or compelling speakers has also hampered development of robust audience rights.[171]

As it happens, there is no tension between audience rights and speaker rights in the context of government speech because the government does not have free speech rights. The government possesses powers, which include the power to control its speech.[172] But its powers are not protected by the Free Speech Clause.[173] On the contrary, the Free Speech Clause may limit them, much like other provisions of the Constitution limit the government's powers. Thus, the thorny question of how to balance speaker rights and audience rights is absent with government speech because only the audience's free speech rights are at issue. "In other words, with government speech, there are no protected speakers, only protected audiences."[174]

The overly simplistic government speech doctrine entirely fails to acknowledge the audience's interest in the speech at hand. All that it considers when deciding whether free speech review is warranted is who is speaking, not who is listening. But that blinkered approach shortchanges a key goal of the Free Speech Clause, which is ensuring a free flow of speech *for audiences*. Audience rights may have to yield to speaker rights, but there are no speaker rights with government speech.

Does this mean that the government speech doctrine should be scrapped altogether? After all, the government is rarely speaking only to itself.[175] The answer is beyond the scope of this Essay. Here, I argue that assuming good reasons to keep the government speech doctrine, audience interests are sometimes

speech. Synder v. Phelps, 562 U.S. 443, 461 (2011) (noting that the First Amendment protects "even hurtful speech on public issues to ensure that we do not stifle public debate"). The speaker won in all these cases.

170. The Supreme Court has mostly retreated from earlier cases that privileged audiences over speakers such as Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (upholding right of reply rule for broadcasters and declaring "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount"). The one exception may be captive audience doctrine. *See infra* note 210 and accompanying text.

171. Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 878 (2020).

172. Thanks to Howard Wasserman for bringing this point into focus. *See also supra* notes 67-68 and accompanying text (explaining the government speech doctrine).

173. *Cf.* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government.").

174. Corbin, *supra* note 171, at 878.

175. In that case, the government would be both speaker and audience.

sufficiently strong to justify some degree of free speech review. Moreover, government censorship of public school curricula is one of those times.[176]

1. Harm

The government's curricular restrictions harm public school students by limiting schools' ability to teach students the knowledge, skills, and values necessary for effective citizenship.[177] As the Supreme Court wrote, "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system . . . ."[178] Public education does this both by inculcating civic values such as integrity and tolerance as well as by teaching the knowledge and analytic skills necessary to be an independent and informed voter.[179]

These educational gag rules undermine those goals. First, they deprive students of basic knowledge of America's history, such as the role race has played.[180] While this may seem an overstatement—after all, the CRT bans do not expressly ban teaching about slavery, the Civil War, or the civil rights movement—as discussed earlier, complying with these laws distorts basic and essential history. As for the "Don't Say Gay" law, if teachers are not allowed to discuss sexual orientation or gender identity, Florida students will learn nothing of the history of discrimination against the LGBTQ community or its fight for equal rights.[181] The chilling effect of the curriculum bans adds another layer of silencing as teachers avoid subjects entirely in an abundance of caution.[182] That is, even for subjects that do not land on a do-not-teach list, teachers may be afraid to teach them in a manner that does them justice, or at

176. Notably, this review applies to both censorship from the right and censorship from the left.

177. *See supra* notes 118-19 and accompanying text.

178. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

179. Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions . . . .").

180. Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 GEO. L.J. 529, 543 (2023) ("Educators are increasingly forbidden from discussing accurate historical truths [and] societal and cultural realities . . . .").

181. *See, e.g.*, Andrew Atterbury, *Miami-Dade School Board Rejects LGBTQ History Month Over Fears It Violates "Don't Say Gay,"* POLITICO (updated Sept. 8, 2022, 12:28 PM EST), https://perma.cc/3ZPR-TB6D.

182. *See supra* notes 33-37 (describing chill). Nor does it take into account how the anti-LGBTQ environment might negatively affect LGBTQ students. *See supra* note 142.

all. Without knowledge of the past, how can students properly evaluate the present, let alone choose the best policy for the future?[183]

In addition to providing students with a misleading and incomplete version of American history, laws mandating a one-sided presentation also deny students the opportunity to develop critical thinking skills. For example, in order to evaluate the costs and benefits of affirmative action, students need to learn the arguments against and for it and then endeavor to articulate their own viewpoint. But the CRT laws bar teachers from putting forth one side of the debate.[184] This is the case with issue after issue. Rather than removing topics for legitimate pedagogical reasons like age-inappropriateness, these laws eliminate one side of a controversy due to hostility to that point of view. Imposing orthodoxy is not the best way for students to learn to think for themselves—a necessary precursor for citizenship.[185]

The government speech doctrine's response to these criticisms is that voters rather than courts provide accountability: "[I]t is the democratic electoral process that first and foremost provides a check on government speech."[186] This may be especially true with public school curricula, given that local school boards, who often determine the school curriculum, are particularly close to the electorate.[187] If a community disapproves of the school

183. Antonio Planas, *New Florida Standards Teach Students that Some Black People Benefited from Slavery Because It Taught Useful Skills*, NBC NEWS (July 20, 2023, 3:14 PM PST), https://perma.cc/2E5C-7MCD (quoting the president of Florida's teachers' union as saying, "How can our students ever be equipped for the future if they don't have a full, honest picture of where we've come from?").

184. *See supra* note 147 (listing divisive concept that bars supporting affirmative action).

185. Finally, these laws will eliminate LGBTQ and anti-racism education. Indeed, many see that as the underlying if not always explicit goal of these curriculum bans. This, too, harms democracy. In a country with such varied people, it is incumbent to develop tolerance towards those of different races, nationalities, religions, sexual orientations, etc. These laws will hinder that. *See, e.g.*, Gary Abernathy, *Why Are Republicans So Afraid of Confronting America's Racial Past?*, WASH. POST (July 25, 2023, 6:45 AM EST), https://perma.cc/GQ55-AE6L ("Maybe if kids like me in largely White rural schools had learned more about the day-to-day horrors of human enslavement and its generational impact, there might be more widespread empathy.").

186. Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015); Shurtleff v. City of Boston, 142 S. Ct. 1583, 1589 (2022) ("The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.").

187. Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 894 (1982) (Powell, J., dissenting) ("It is fair to say that no single agency of government at any level is closer to the people whom it serves than the typical school board.").

curriculum, then voters can presumably vote for different officials to implement a curriculum they approve.[188] It is "democracy in a microcosm."[189]

Citizens, however, need to be properly informed in order to successfully hold the government accountable. Indeed, ensuring the free flow of vital political information to the electorate is one of the main reasons the Constitution protects free speech.[190] As the Supreme Court emphasizes, "the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate."[191]

Here, the government's absolute control over the curriculum prevents students from gaining the knowledge and analytic skills necessary to fulfill this responsibility. As described above, today's public school students, who are tomorrow's electorate, cannot fully develop their opinions and preferred policies on issues like civil rights without a proper understanding of our history and current situation.[192] They might end up agreeing with the government's opinions and policies even with the suppressed knowledge, but they might not. Rather than developing their own insights, these future voters learn only the government's viewpoint—and learn it as fact rather than opinion. The government controls speech in a way that helps it maintain power and entrench itself—precisely the abuse of government authority the Free Speech Clause was meant to prevent.[193] In short, the government speech doctrine applied to curriculum bans not only undermines the mission of public schools, but it is contrary to the mission of the Free Speech Clause itself. It is

188. *Id.* at 891 (Burger, C.J., dissenting) ("A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly 'of the people and by the people.' . . . If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office.").

189. *Id.* ("[L]ocal control of education involves democracy in a microcosm."). One rejoinder is that curriculum bans are frequently not implemented at the school board level but are state-wide mandates, so local school board elections cannot alter them.

190. *See supra* notes 78-81 and accompanying text (describing three main theories of the Free Speech Clause).

191. *Walker*, 576 U.S. at 207.

192. *See supra* notes 78-81.

193. *Cf.* Tabatha Abu El-Haj, *How the Liberal First Amendment Under-Protects Democracy*, 107 MINN. L. REV. 529, 533-34 (2022) ("The essence of self-governance is the absence of entrenched power . . . . The First Amendment precludes uses of state power to make it difficult or impossible for citizens to resist social, cultural, and political power."); Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 632 (2004) ("A fear embedded in much of our free speech jurisprudence is that what will drive government speech regulation . . . is a desire of incumbents to entrench themselves and the policies they favor.").

not "democracy in a microcosm"[194] but a failure of democracy.[195] It is also First Amendment capture.

In any event, that the government may be held accountable at the ballot box for its curricular speech is not a satisfactory check because the electorate may be all too willing to violate the Constitution. Constitutional rights, including free speech rights, are not meant to be put to a vote. They are guaranteed. As the Supreme Court famously noted, the whole point of the Bill of Rights was to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts. One's right . . . to free speech . . . may not be submitted to vote; [it] depend[s] on the outcome of no elections."[196]

This last point assumes private speech rights are implicated in the curriculum bans. The question then becomes: When should a private audience's free speech rights be weighty enough to overcome the government speech doctrine and defeat a claim that the government's speech does not trigger the Free Speech Clause? The case of curriculum bans can serve as a springboard for determining some potential factors.

2. Solution

To discover when significant free speech interests of audiences should prevail over the categorical application of the government speech doctrine, I have sought to avoid distinctions based on topics or institutions, which have long been disfavored in free speech jurisprudence.[197] Instead, I propose, as a starting point, evaluating audience interests using several non-exclusive and potentially overlapping factors[198]: (1) Does the government speaker monopolize the speech? (2) Does the government speaker owe special duties towards its audience? (3) Is the audience a captive one? (4) And is the audience especially vulnerable? When answered affirmatively, each factor represents a deviation from the ideal free speech exchange where speaker and listener are equals and the listener has the ability to both ignore the speaker and access

194. *See supra* note 189.

195. This is separate and apart from the problem that many if not most of the curriculum bans are not enacted at the local level. Many school boards actually oppose these laws, which are imposed by the state legislature and state governor.

196. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

197. *See supra* note 12 and accompanying text (explaining that content-based laws are presumptively unconstitutional); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 84 (1998) ("American free speech doctrine has never been comfortable distinguishing among institutions.").

198. For example, if the government speaker has fiduciary obligations to the listener, then the listener is vulnerable because she is dependent on the government for its greater expertise.

alternative viewpoints. In these suboptimal situations, it is especially problematic if the government speech is immune to review.

Applying these factors to curriculum bans in the public school classroom indicates that the student audience interests are at their highest ebb. Consequently, curriculum bans should undergo some level of free speech clause review.

a. Government's monopoly

The first factor asks whether the government enjoys a monopoly over the speech, as the harms of First Amendment capture are magnified if there is no other speech to counteract the government's.[199] This may occur if the government alone has access to certain information or if the government completely controls information available to a particular audience.[200] The government's control over its own speech matters less when it is merely one speaker among many.[201]

The curriculum bans aim to monopolize public school education and ensure that only the government's approved messages reach public school students in their classroom. As far as classroom instruction goes, then, the government and only the government determines the curriculum.[202]

b. Government's duty

If the government speaker has a particular duty towards its audience, that factor would point towards free speech review of its speech to that audience.[203]

199. *See* Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 101 (2015) (suggesting that problematic government speech like lies is especially harmful when the government has a monopoly or near monopoly as its "deliberate falsehoods are unlikely to be addressed by counterspeech").

200. In fact, before the government speech doctrine developed, scholars were most concerned about government speech dominating a market by drowning out other viewpoints. *See, e.g.*, Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 601 (1980) ("[O]ne of the problems to be faced in assessing government speech [is] the concern that government speech could result in unacceptable domination of the marketplace and the need for measures to confine the danger.").

201. Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 27 (2000) ("Government speech is most justifiable when it is clearly one voice among many. At the other extreme, government speech is highly problematic when it is the only voice in a relevant speech market.").

202. *Cf.* Emerson, *supra* note 77, at 8 ("For example, in the field of education, where the government has a virtual monopoly, certain kinds of curriculum restrictions seem to run afoul of the right to know.").

203. As Robert Post points out, the speech of those with power over others may be regulated in a way that political speech is not. *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 483 (2017) (observing that the state may, for

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Obligations may stem from various sources, including fiduciary duties or professional responsibilities, such as those an attorney owes their clients or a doctor their patients.[204] When a government-employed doctor advises a patient, for example, the doctor's speech—government speech because it is pursuant to official duties—represents the fulfillment of both the government's policy and the doctor's heightened responsibility towards their patient.

Whatever the parameters of such obligations, they clearly exist in the case of public school curriculum. Properly educating its young, which encompasses preparing them for citizenship, is one of the most important duties of a state—a duty that the Supreme Court has repeatedly underscored.[205] "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source."[206]

c. Audience's captivity

The captivity of the audience to the government speech also points towards a greater audience stake in the stream of information originating from the government and likewise calls for some free speech review. In fact, under existing captive audience doctrine, audiences' interests may prevail over speakers' when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."[207] Thus, the captive audience doctrine already recognizes that audiences as well as speakers have rights vis-à-vis a stream of speech.[208]

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example, regulate manufacturers and lawyers due to the imbalance of power vis-à-vis consumers and clients).

204. Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1207 (2016) ("Generally speaking, a fiduciary is one who has special obligations of loyalty and trustworthiness toward another person. The fiduciary must take care to act in the interests of the other person . . . .").

205. *See supra* notes 118-19 and accompanying text.

206. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

207. Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); *see also* Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

208. Of course, the captive audience doctrine protects an audience's right not to hear based on their right to privacy as opposed to an audience's right to hear based on their right to free speech.

Students at public school are a paradigmatic captive audience as they are legally required to attend school and often lack choices as to their classes.[209] Indeed, the Supreme Court applied exactly that term to students at a school assembly.[210] Moreover, public school students are an audience the government itself has captured and therefore even more captive than previously recognized examples such as people at home, patients at a medical facility, and riders of public transportation.[211] When people imagine compulsory government indoctrination, they might picture government agents strapping people into chairs and forcing them to watch and then parrot back government propaganda.[212] School is different in degree, but not necessarily in kind.[213]

d. Audience's vulnerability

A fourth factor that might overcome the government speech doctrine is when the government's audience, especially a captive one, is vulnerable in some way. This arises, for example, when there is a significant asymmetry in power or expertise. Such asymmetries are a hallmark of fiduciary relationships.[214]

Public school students are doubly vulnerable. First, they are vulnerable because of their youth, which makes them especially suggestible and susceptible to the government's speech.[215] Part of the school's responsibility, after all, is to mold these impressionable youngsters into contributing members of society. Second, at school students are under the power of school authorities. If a student's essay fails to match the lessons prescribed by the state curriculum, including its distorted views of history, they risk a poor grade and all the consequences that may follow.

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These factors are not exhaustive, and none are determinative. But they may help identify those instances when audience interests in the free flow of speech are strong enough to overcome the government speech doctrine. Even

209. *See* Corbin, *supra* note 17, at 656, 671-72; *see also* Edwards v. Aguillard, 482 U.S. 578, 584 (1987) ("The State exerts great authority and coercive power through mandatory attendance requirements . . . .").

210. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684 (1986).

211. Corbin, *supra* note 17, at 671-72.

212. I imagine a cross between *A Clockwork Orange* and *1984*.

213. Students are required to sit in class, attend their teacher, and repeat back their lessons in tests and essays.

214. Dana Howard, *The Medical Surrogate as Fiduciary Agent*, 45 J.L. MED. & ETHICS 402, 414 (2017) ("[A]symmetries of power and expertise may give rise to fiduciary relationships . . . .").

215. Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (describing students at school as impressionable).

if the government alone were speaking, if all the factors point towards strong audience interests, such as in the case of curriculum bans in public schools, the government's censorship ought to be subject to some kind of free speech scrutiny. Under existing law, that might be the *Pico-Hazelwood* test. But some other standard that would apply more broadly, like intermediate scrutiny, may also suffice.[216] Either way, the speech should not be categorized as government speech completely immune from Free Speech Clause strictures against content and viewpoint discrimination.

Conclusion

For curriculum bans to escape all free speech scrutiny represents a classic example of First Amendment capture. Categorizing classroom instruction as purely governmental ignores that both the government and a teacher are speaking. It also ignores that audiences (here, students) have as much—if not more—at stake in the free flow of speech as speakers do. Certainly, the bans on topics ranging from systemic racism, white privilege, sexual orientation, and gender identity deny public school students the kind of accurate, comprehensive education future citizens should have. While the free speech rights of private speakers may trump the free speech rights of audiences when speaker and audience interests clash, the government is not a free speech rights-holder. Although this Essay does not advocate a wholesale elimination of the government speech doctrine, it does argue that, in certain circumstances, the audience's interests are weighty enough to overcome the presumption that the government should be given free rein over the flow of information. Our democracy depends on it.

216. *See supra* note 160 and accompanying text.