

Preserving Viewpoint Pluralism and Democratic Principles: Florida's "Divisive Concepts" Law and Strategies for Challenging the Law's Enforcement in K-12 and Higher Education

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ABSTRACT

Florida passed The Individual Freedom Act in April 2022, its version of "divisive concepts" legislation modeled after former-President Trump's Executive Order outlawing diversity trainings, critical race theory, and references to systemic racism. This legislation is an assault on pluralism, silencing engagement with diverse voices and constituents in state decision-making, and silencing voices and engagement in public school classrooms. Examining Florida House and Senate public comment and debate on the bill and the successful legal challenge brought by professors and students in *Pernell v. Florida Board of Governors of the State University System*, this article traces the undemocratic processes and implications of the legislation and the methods used to challenge this bill. Focusing on both K-12 and higher education, Part I of the analysis considers the role of district-level school boards and shared governance in higher education to argue that the Florida legislature failed to engage with local decision-making partners. Part II of the analysis examines First Amendment freedom of expression precedent in K-12 and higher education to consider the legislation's restrictions on content and viewpoint in violation of institutional academic freedom and the First Amendment. Part III looks closely at the successful legal challenge to enforcement of Florida's law in higher education, and outlines the strategies used in the case as well as other strategies to challenge similar legislation. A central tenant of critical race theory is to value personal stories and lived experience in analyses

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of past and current systemic racism. The legislation in Florida and similar statutes across the nation silence the diverse voices of teachers, faculty, and students under the mantle of “American values.”

INTRODUCTION

Law Professor Kimberlé Williams Crenshaw, in a 2021 acceptance speech for a lifetime achievement award, reflected on the backlash against Black Lives Matter and the national protests in the wake of the murders of George Floyd, Breonna Taylor, and Arnaud Arbery. Crenshaw noted that theories and practices she helped develop, critical race theory and intersectionality, were leveraged in opposition to the national movement:

Politicians have sought to censor any study of the way that the American legal system sometimes facilitates and reinforces racial inequality. That legislators can appropriate law to banish critiques of law should rattle every last one of us. Changing the rules about what racial histories can be taught, and what experiences can be acknowledged is not a healthy feature of a robust democracy. It is a symptom of a dying one.¹

The use of the legal system to outlaw critiques of law and silence lived experiences is manifested in the various “divisive concepts” legislation which draws on components of critical race theory (CRT) to distort its meaning and silence its practice.

Florida’s divisive concepts legislation, titled the Individual Freedom Act and also known as “Stop the Wrongs to our Kids” or “Stop W.O.K.E. Act,” is an assault on pluralism in public school classrooms.² A basic component of CRT is to examine the persistence of systemic racism and to value and prioritize lived experiences in the analysis of

1. Kimberlé Williams Crenshaw, *This is Not a Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. REV. 1702, 1716–19 (2022).

2. Staff, *Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations*, FLA. GOV. (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/>; see Definition of Pluralism, BRITANNICA, [Britannica.com/topic/pluralism-politics](https://www.britannica.com/topic/pluralism-politics) (last visited Feb. 28, 2024) (“Pluralism assumes that diversity is beneficial to society and that autonomy should be enjoyed by disparate functional or cultural groups within a society, including religious groups, trade unions, professional organizations, and ethnic minorities.”).

racism.³ Divisive concepts laws that prohibit teaching concepts such as white privilege effectively silence students and teachers from sharing personal experiences and drawing connections between history and structural racism today.⁴ When students and teachers cannot share their full perspectives and experiential knowledge, the classroom no longer serves to promote a robust exchange of ideas. Similarly, when students study historical facts such as slavery or Japanese internment but are unable to engage in inquiry about how these events occurred and what legacies endure today, students are unprepared to engage in democratic debate and problem-solving regarding current, profound social issues.⁵

This article begins with an overview of the Florida divisive concepts legislation and background on CRT to highlight how the law does and does not engage CRT concepts. Part I of the analysis examines the undemocratic process of the bills enactment, as the state government disregarded district level leadership at the K-12 level and shared governance structures in higher education. Part II of the analysis reviews the federal courts' interpretation of First Amendment protections in education, particularly for the consistent emphasis on viewpoint pluralism and institutional academic freedom. Part III specifically examines Florida's divisive concepts legislation to outline the ways that the law violates the First Amendment and reviews the successful legal challenge brought by Florida professors and students in *Pernell v. Florida Board of Governors of State University*.⁶

FLORIDA'S INDIVIDUAL FREEDOM ACT AND CRITICAL RACE THEORY

3. See Jacey Fortin, *Critical Race Theory: A Brief History*. N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/article/what-is-critical-race-theory.html>.

4. Barret Smith and Sarah M. Stitzlein, *Classroom Conflict, 'Divisive Concepts' and Educating for Democracy*, in WHO'S AFRAID OF POLITICAL EDUCATION? 35, 37-38 (Henry Tam ed., 2023) ("At best, these sorts of laws are a mandate to teach issues of racism as strictly historical, rather than ongoing. At worst, it places teachers between a rock and a hard place, having to simultaneously teach about race and racism without making any sort of connection to students' contemporary experience.").

5. See e.g., Amended Complaint, *Pernell v. Cerio*, Case No. 4:22-cv-304-MW-1 MAF (2022) (No. 76) (analyzing legislation regarding the First Amendment and its protections of democratic pluralism and demonstrating Florida law and other similar laws can also be challenged on Equal Protection grounds).

6. *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022).

The Florida Legislature passed the Individual Freedom Act (IFA) in April 2022, Governor Ron DeSantis immediately signed the legislation, and the IFA became effective in July 2022.⁷ The legislation prohibits K-20 public schools and state-based employers from teaching or providing training in any topic that falls under a list of concepts deemed to be discriminatory.⁸ The prohibited concepts are :

(1) Members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex;

(2) A person, by virtue of his or her race, color, national origin, or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

(3) A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex;

(4) Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex;

(5) A person, by virtue of his or her race, color, national origin, or sex, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex;

(6) A person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion;

(7) A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and

7. Staff, News Release, April 22, 2022; “Governor DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination.” <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/>; Ian Hodgson and Divya Kumar, “DeSantis reshaped Florida Higher Education Over the Last Year. Here’s How.” Tampa Bay Times, July 5, 2023, (noting that the IFA took effect in July 2022).

8. FLA. STAT. ANN. § 1000.05(4)(a) (West 2022).

must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex;

(8) Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.⁹

The bill specifies that teachers and trainers are prohibited from engaging in any activity that “espouses, promotes, advances, inculcates, or compels such student or employee to believe” any of the listed concepts; however, training or instruction may include a discussion of such concepts if they are presented in an objective manner without endorsement.¹⁰ The IFA legislation is embedded into the state’s civil rights statutory provisions for K-20 education, provisions which already codify anti-discrimination provisions into Florida law.¹¹

Florida’s legislation is like other divisive concepts restrictive actions across the nation. Since January 2021, forty-four states have either passed a ban, introduced legislation, or established other methods to regulate “how the nation’s teachers can discuss racism, sexism, and issues of systemic inequality in the classroom.”¹² Although these laws have some differences,¹³ all are loosely modeled after President Trump’s Executive Order 13950 Combatting Race and Sex

9. *Id.*

10. FLA. STAT. ANN. § 1000.05(4)(a-b) (West 2022).

11. FLA. STAT. ANN. § 1000.05(2)(a) (West 2022) (“Discrimination on the basis of race, color, national origin, sex, disability, religion, or marital status against a student or an employee in the state system of public K-20 education is prohibited. No person in this state shall, on the basis of race, color, national origin, sex, disability, religion, or marital status, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any public K-20 education program or activity, or in any employment conditions or practices, conducted by a public educational institution that receives or benefits from federal or state financial assistance.”).

12. Sarah Schwartz, *Map: Where Critical Race Theory is Under Attack*, EDUCATION WEEK (June 13, 2023), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06>.

13. See Tess Bissell, *Teaching in the Upside Down: What Anti-Critical Race Theory Laws Tell Us About the First Amendment*, 75 STAN. L. REV. 205, 214-15 (2023) (presenting a comparison of various laws across the United States).

Stereotyping (hereinafter referred to as Executive Order 13950).¹⁴ Executive Order 13950 prohibited trainings in federal agencies that relied on a “dangerous ideology” that “America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.”¹⁵ The “dangerous ideology” refers to CRT but distorts its meaning.

Christopher Rufo, a conservative activist and fellow at the Manhattan Institute, zeroed in on CRT as “the perfect villain” to coalesce the conservative movement against racial progress ideology.¹⁶ Rufo took his campaign against CRT to Tucker Carlson on *Fox News*. Rufo described CRT as an “existential threat” to the nation and ordered then-President Trump to issue an executive order to “stamp out this destructive, divisive, pseudoscientific ideology.”¹⁷ Rufo’s demand was heeded; he was invited to the White House to help draft Trump’s Executive Order. Although Trump’s Executive Order was enjoined due to vagueness,¹⁸ then overruled by the Biden Administration,¹⁹ Florida modeled the IFA on Trump’s Executive Order, and Rufo praised Governor DeSantis on the Florida legislation.²⁰

Rufo’s use of the term CRT hit a conservative nerve and established a way to discredit the national movements towards racial justice in the wake of George Floyd’s murder in 2020. In June 2020,

14. Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 28, 2020), <https://www.federalregister.gov/documents/2020/09/28/2020-21534/combating-race-and-sex-stereotyping> (extensively using the term “divisive concepts”).

15. *Id.*

16. Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, *NEW YORKER* (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> (quoting Christopher Rufo, “[CRT]’s connotations are all negative to most middle-class Americans, including racial minorities, who see the world as ‘creative’ rather than ‘critical,’ ‘individual’ rather than ‘racial,’ ‘practice’ rather than ‘theoretical.’ Strung-together, the phrase ‘critical race theory’ connotes hostile, academic, divisive, race-obsessed, poisonous, elitist, anti-American.”).

17. *Id.*

18. *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521 (N.D. Cal. 2020).

19. Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government>.

20. Yael Halon, *DeSantis’s ‘Stop W.O.K.E.’ Legislation Would Make Teaching CRT in Florida Classrooms ‘Illegal’*: Rufo, *FOX NEWS* (Dec. 16, 2021, 9:58 PM), <https://www.foxnews.com/media/desantis-stop-woke-legislation-crt-florida-illegal-rufo>.

the *New York Times* reported a significant rise in support for Black Lives Matter and issues of race and criminal justice.²¹ In 2021, The Brennan Center for Justice argued that George Floyd's murder and the national protest movement that followed signaled that "the country may be on the precipice of positive change."²² However, as Professor Vivian Hamilton outlines, "[r]eform and racial progress...have rarely been linear over the course of U.S. history. Instead, they typically engender resistance and retrenchment. The response to the current justice movement is no exception."²³ CRT might have been embraced as a tool at this moment to "uncover the systemic dimensions of racial and intersectional injustice."²⁴ Instead, "the very opposite impulse gained traction. Critical Race Theory and intersectionality have not only been labeled as 'divisive,' 'dangerous,' and 'un-American,' they have also been appropriated to denounce the wider project of antiracism and social justice writ large."²⁵

CRT can be defined as a practice that "critiques how the social construction of race and institutionalized racism perpetuate a racial caste system that relegates people of color to the bottom tiers."²⁶ "CRT explores how racial disparities are produced and maintained, having been inherited from a time when racism was explicit."²⁷ The theory and practice acknowledges that despite formal equality, the legacies of slavery and segregation are still present in today's society, and institutions in society, including the legal system, perpetuate inequality;

21. See Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html>

("Public opinion on race and criminal justice issues has been steadily moving left since the first protests ignited over the fatal shootings of Trayvon Martin and Michael Brown. And since the death of George Floyd in police custody on May 25, public opinion on race, criminal justice and the Black Lives Matter movement has leaped leftward.")

22. Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder>.

23. Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61, 61 (2021).

24. Crenshaw, *supra* note 1, at 1713.

25. *Id.*

26. Janel George, *A Lesson on Critical Race Theory*, ABA (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.

27. Hamilton, *supra* note 23, at 87.

in other words, racism is not confined to the past nor confined to individual behavior.²⁸ Because CRT understands racism as ongoing and embedded into social structures, the theory rejects colorblindness and meritocracy, as people of color do not experience society as neutral regarding race.²⁹ And racism is this lived experience that is central to the analysis; as Professor Mari Matsuda, one founder of CRT, explains, “critical race theory is a method that takes the lived experience of racism seriously, using history and social reality to explain how racism operates in American law and culture, toward the end of eliminating the harmful effects of racism and bringing about a just and healthy world for all.”³⁰

In opposition, proponents of “divisive concepts” laws argue that because formal racism is outlawed, society is now free from racism.³¹ This logic implies that it is not relevant nor useful to promote awareness of the ways people experience society differently based on race (and gender); to focus on the experiences of racial groups today “threatens to take society backwards.”³² Those advocating against CRT “equate race consciousness in the service of advancing racial equity with race consciousness used to oppress. In other words, they claim that any race consciousness is in itself racist.”³³ As opponents of CRT view society as neutral regarding race, anti-CRT legislation

28. *Id.* at 69; see also George, *supra* note 26 (stating that CRT rejects “popular understandings about racism, such as arguments that confine racism to a few ‘bad apples.’ CRT recognizes that racism is codified in law, embedded in structures, and woven into public policy.”).

29. See Fortin, *supra* note 3 (“Critical race theorists reject the philosophy of ‘colorblindness.’ They acknowledge the stark racial disparities that have persisted in the United States despite decades of civil rights reforms, and they raise structural questions about how racist hierarchies are enforced, even among people with good intentions”); see also George, *supra* note 26 (“CRT rejects claims of meritocracy or ‘colorblindness.’ CRT recognizes that it is the systemic nature of racism that bears primary responsibility for reproducing racial inequality.”).

30. Fortin, *supra* note 3.

31. Hamilton, *supra* note 23, at 97 (“[F]ormal equality has enabled those who oppose efforts to achieve the goal of substantive equality to argue that the goal has already been reached.”).

32. Videotape: 2/1/22 House State Affairs Committee (Fla. Channel), <https://thefloridachannel.org/videos/2-1-22-house-state-affairs-committee/> (statement of Bryan Avila, Speaker pro tempore at 27:54) (statement by Representative Avila) (“[S]ome movements threaten to take us backwards, asking us to treat people not as individuals but as groups.”).

33. Hamilton, *supra* note 23, at 64.

prohibits critiques of meritocracy and colorblindness.³⁴ Other divisive concepts, such as references to moral superiority based on race, have nothing to do with CRT and are designed to incite opposition and anger.³⁵ Similarly, the focus on individual guilt is not promoted by CRT as CRT is attentive to systems, not individuals.³⁶

Florida's IFA has faced three legal challenges as of this writing. In the first challenge, private employers and workforce training organizations challenged the regulations in *Honeyfund v. DeSantis*.³⁷ Chief Judge Walker of the Florida District Court found the prohibitions on training by private companies to be vague, viewpoint-based restrictions and enjoined enforcement against private employers.³⁸ In the second challenge, *Falls v. DeSantis*, a coalition of K-12 educators and students filed a case arguing that the IFA violated freedom of expression and association; this case was dismissed for lack of standing.³⁹ In the third challenge, a coalition of Florida higher education professors and students challenged the IFA for viewpoint discrimination in violation of the First Amendment, challenged the law for vagueness under the Due Process Clause, and challenged the law for violating Equal Protection.⁴⁰ In this third case, *Pernell v. Florida Board of Governors*, Chief Judge Walker enjoined the Florida Board of Governors of the State University System (in their official capacities) against enforcement of the IFA.⁴¹ The Defendants in *Pernell* are currently filing an appeal.⁴²

34. FLA. STAT. ANN. § 1000.05(4)(a)(7) (West 2022).

35. Hamilton, *supra* note 23, at 64 (“Some of the claims--like the existence of systemic racism--were ones with which critical scholars of race would agree. Others--like the claim that “[a]n individual's moral character is determined by the individual's race or sex”--were manufactured in order to fan embers of racial resentment into flames of outrage and opposition.”).

36. Fortin, *supra* note 3 (quoting Mari Matsuda, “[t]he problem is not bad people...[t]he problem is a system that reproduces bad outcomes. It is both humane and inclusive to say, “[w]e have done bad things that have hurt all of us, and we need to find a way out.””).

37. *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159 (N.D. Fla. 2022).

38. *Id.* at 1168.

39. *Falls v. DeSantis*, 609 F. Supp. 3d 1273, 1287 (N.D. Fla. 2022).

40. Amended Complaint, *supra* note 5, at 212-43. (including four counts: two counts under the First Amendment, a third count under the Fourteenth Amendment Due Process Clause, and fourth count under the Fourteenth Amendment Equal Protection Clause). This article focuses on the First Amendment components.

41. *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022).

42. *Pernell v. Fla. Bd. of Governors of State Univ.*, No. 22-13992-J, 2023 WL 2543659 (11th Cir. 2023) (ruling the injunction stands during appeal).

This article draws on the recordings of Florida House and Senate debates on the bill as well as the Amended Complaint and Defendants' Memorandum to understand the intent and impact of the legislation. These conversations provide examples of what the legislation would prohibit. The divisive concepts language itself is inflammatory and disconnected from both CRT and the specific concepts the bill prohibits, so these other sources are useful to the analysis of the legislation.⁴³

ANALYSIS

I. The Individual Freedom Act and Disregard for Democratic Processes

A. *Pluralism and Local Control at the K-12 Level*

The United States has a long history of delegating decision-making authority to locally elected school boards who oversee K-12 districts.⁴⁴ School boards are established by state law, comprised of locally elected officials, and accountable to their constituents.⁴⁵ Florida's Article IX of the state constitution establishes that "The school board shall operate, control and supervise all free public schools within the school district."⁴⁶ The school board members are elected to four-year terms.⁴⁷ Their authority is not without limits, as each state also holds authority over public education, such as the authority enshrined in Florida's Constitution.⁴⁸ Local school boards must follow state law, federal law,

43. See Jon Edelman, *The Critical Race Theory Debate*, DIVERSE: ISSUES IN HIGHER ED. (Jan. 30, 2023), <https://www.diverseeducation.com/from-the-magazine/article/15306014/the-critical-race-theory-debate> (quoting Jeremy Young, senior manager of free expression and education at PEN America, who describes ideas such as moral superiority or that an individual must feel guilt a "paranoid fever dream of what opponents think [critical race theory] is . . . [i]t's nonsense . . . [b]ut it's nonsense that can be misused by whoever is enforcing the policies.").

44. See generally BRYAN SHELLY, MONEY, MANDATES, AND LOCAL CONTROL IN AMERICAN PUBLIC EDUCATION (2011) (presenting an overview of historical fights regarding control, mainly regarding funding but also over such reform efforts as desegregation).

45. FLA. CONST. art. IX, § 4.

46. *Id.* art. IX, § 4(b).

47. *Id.* art. IX, § 4(a).

48. See *id.* art. IX, § 1(a).

and the Constitution, but otherwise are granted authority to operate independently.⁴⁹

The importance of local district control in education is emphasized in the Supreme Court's decision in *San Antonio v. Rodriguez*, a case that challenged differential, property tax-based funding for districts across the state of Texas.⁵⁰ In *Rodriguez*, leaders in a poorly funded district brought a case against the state, arguing that local control was hindered by unequal funding in poor districts.⁵¹ The Court agreed that local control is critical, but argued that state control of funding would diminish local authority.⁵² In the decision, the Court emphasized the benefit of local control for pluralism and experimentation: "No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education."⁵³ This case unfairly impacted lower income communities and incorrectly associated local supervision with local sources of funding.⁵⁴ However,

49. *W.E.R. v. Sch. Bd. of Polk Cnty.*, 749 So. 2d 540, 542 (Fla. App. Ct. 2000) ("While the school board has significant authority in matters not addressed specifically by the Legislature, it is prohibited from promulgating rules at variance with legislation.").

50. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973) ("The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.' No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.").

51. *Id.* at 50 ("Appellees do not question the propriety of Texas' dedication to local control of education. To the contrary, they attack the school-financing system precisely because, in their view, it does not provide the same level of local control and fiscal flexibility in all districts.").

52. *Id.* at 51–53 ("The people of Texas may be justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies.").

53. *Id.* at 50.

54. See Eric P. Christofferson, *Rodriguez Reexamined: The Misnomer of "Local Control" and a Constitutional Case for Equitable Public School Funding*, 90 GEO. L.J. 2553, 2575 (2002) ("[P]roponents of local control make the mistake of conflating local control of education, which would include control of the purse strings, with local supervision of education. Arguably, because local school districts are in the best position to measure the educational needs of their

the case is relevant here for the way both parties focused on the importance of local authority in a controversy with the state.

Challenges to school board authority can also come from individual parents. Parents who assert their rights in opposition to majority elected officials present a minority position within local control.⁵⁵ Parents' rights advocates center their authority on the Supreme Court's articulation of the fundamental right to control the upbringing of their children.⁵⁶ However, the Supreme Court and other federal courts have protected the authority of elected state and district decision-making.⁵⁷ In a 2005 federal case challenging a school's right to survey students about sexual activity, the 9th Circuit curtailed parental rights in the context of public schooling.⁵⁸ In this case, *Fields v. Palmdale School District*, the court asserted that the fundamental right to raise a child "does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in

populations and to devise strategies and develop curricula to meet those needs, local control is an important state interest in education."); *See generally* Martha Minow, *Education: Constitutional Democracy's Predicate and Product*, 73 S.C. L. REV. 537 (analyzing *Rodriguez* and the need for a federal right to education).

55. The majority perspective is, or should be, reflected in school board decisions. However, even beyond the ideal of representative democracy, parents' rights language is invoked in specific instances. *See* Jamelle Bouie, *What the Republican Push for 'Parent's Rights' is Really About*, N.Y. TIMES (March 28, 2023), <https://www.nytimes.com/2023/03/28/opinion/parents-rights-republicans-florida.html> ("The reality of the 'parent's rights' movement is that it is meant to empower a conservative and reactionary minority of parents to dictate education and curriculums for the rest of the community.").

56. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (finding a liberty interest in allowing parents to choose to teach their children a foreign language); *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (upholding a parent's right to choose the educational institution for their children).

57. *Meyer*, 262 U.S. at 402 ("Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports.").

58. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005), *cert. denied*, 549 U.S. 1089 (2006).

connection with the performance of their educational functions.”⁵⁹ The 11th Circuit has upheld a similar standard.⁶⁰

Conservative activist Phyllis Schlafly decried the *Palmdale* decision as “liberal dogma that the government should raise and control children,”⁶¹ an idea echoed by the current nationally recognized parent-rights organization, Moms for Liberty, who rally behind the slogan “We do NOT co-parent with the government.”⁶² Conservative lawmakers similarly champion individual parental rights over classroom content; recently the federal legislature introduced a proposal to create a Parent Bill of Rights,⁶³ and Florida passed state legislation to protect parent’s rights, specifically tailored to block information related to the LGBTQI community or identity in K-3 classes.⁶⁴ The emphasis on the right of individual parents to ban the teaching of certain topics, as legalized in Florida’s, challenges ideals of pluralism and neglects the rights of other

59. *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1191 (9th Cir. 2006) (“In sum, we affirm that the *Meyer–Pierce* due process right of parents to make decisions regarding their children’s education does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions, or to collect monetary damages based on the information the schools provide.”).

60. *Arnold v. Bd. of Educ.*, 880 F.2d 305, 313–14 (11th Cir. 1989) (“We recognize that parental autonomy to direct the education of one’s children is not beyond limitation. When parents enroll their children in public schools they cannot demand that the educational program be tailored to their individual preferences.” (citation omitted)).

61. Phyllis Schlafly, *Judicial Supremacists Back School District Over Parental Control*, HUMAN EVENTS ONLINE (Nov. 14, 2005), [<https://web.archive.org/web/20051115013444/http://www.humaneventsonline.com/article.php?id=10280>].

62. *The Latest*, MOMS FOR LIBERTY, <https://portal.momsforliberty.org/news-press/> (showcasing photos of members wearing shirts and holding signs with the slogan) (last visited Feb. 29, 2024).

63. Parents’ Bill of Rights Act of 2021, S.3218, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/3218/text?r=4&s=1>.

64. HB 241, 123rd Leg., Reg. Sess. (Fla. 2021), <https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=70313>; see Staff, *Governor Ron DeSantis Signs Historic Bill To Protect Parental Rights in Education*, FLA. GOV. (Mar. 28, 2022), <https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/> (quoting Governor DeSantis, “Parents’ rights have been increasingly under assault around the nation, but in Florida we stand up for the rights of parents and the fundamental role they play in the education of their children. . . . Parents have every right to be informed about services offered to their child at school, and should be protected from schools using classroom instruction to sexualize their kids as young as 5 years old.”); see also Jaelyn Diaz, *Florida’s Governor Signs Controversial Law Opponents Dubbed ‘Don’t Say Gay,’* NPR (Mar. 28, 2022, 2:33 PM), <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis>.

parents and children. School leaders and elected school boards need to consider the full diversity of needs within their district;⁶⁵ parents, understandably, are focused on their own families. This tension is dangerous for the operation of public schools. As Professor Davis notes: “Were parental rights to dominate school interests, public education would become untenable, as each parent would effectively hold veto power over the school’s curriculum.”⁶⁶ Furthermore, if individual parents are able to veto school policies and curriculum, the strength of the school to promote democratic values and pluralism diminish.⁶⁷ The mantle of “parent’s rights” is rarely, if ever, invoked to promote gender or racial inclusivity.⁶⁸

The IFA is framed as a bill to protect parent’s rights. Rufo stated that the legislation “‘gives power to parents to enforce it at the very local level ... it’s about taking power away from unaccountable bureaucrats and giving power back to parents.’”⁶⁹ It is unclear who the “unaccountable bureaucrats” are, as local school boards are elected and hence are accountable. However, the emphasis on individual parental

65. School boards do not always make decisions that demonstrate awareness of the diverse constituencies in their districts. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 865 (1982) (ruling that the school board unconstitutionally removed books from a school library and that the boards must “discharge their ‘important, delicate, and highly discretionary functions’ within the limits and constraints of the First Amendment.”). And school boards are vulnerable to politically powerful groups. See, e.g., Tessa Stuart, *Right-Wing Activists Are Trying to Take Over Virginia’s Schools*, ROLLING STONE (Sept. 23, 2023), <https://www.rollingstone.com/politics/politics-features/virginia-school-board-extremist-candidates-1234829927/>. Still, school boards are the democratic structure in place for public debate.

66. Elliott M. Davis, *Unjustly Usurping the Parental Right: Fields v. Palmdale School District*, 29 HARV. J. L. & PUB. POL’Y 1133, 1133 (2006).

67. Todd A. DeMitchell & Joseph J. Onosko, *A Parent’s Child and the State’s Future Citizen: Judicial and Legislative Responses to the Tension over the Right to Direct an Education*, 22 S. CAL. INTERDISC. L. J. 591, 592 (2013) (“Maintaining an appropriate balance between the parental right to control their child’s education and the community’s obligation to create future citizens has been a persistent conundrum. Parents seek to mold their children in ways consistent with their ideals, social understandings, and aspirations, while communities and the state seek to form the ideal citizen through discourse and the democratic process. It is not surprising that these visions often collide.”).

68. Bouie, *supra* note 55 (“Parents’ rights,’ you will have noticed, never seems to involve parents who want schools to be more open and accommodating toward gender-nonconforming students. It’s never invoked for parents who want their students to learn more about race, identity and the darker parts of American history. And we never hear about the rights of parents who want schools to offer a wide library of books and materials to their children.”).

69. Halon, *supra* note 20.

control is written into the legislation as the law allows parents and students to initiate a private cause of action.⁷⁰

The *Pernell* Amended Complaint challenging the law argued that, in contrast to the rhetoric of local control, the legislation silences local voices and activism, as “[t]he Act comes after years of robust advocacy for the very speech the Act seeks to suppress.”⁷¹ The government as Defendants in the case responded that the prohibited speech includes “concepts and policies that the People of Florida, in their sovereign judgment, believe to be abhorrent and have determined to be *themselves racially discriminatory*.”⁷² However, as the Complaint makes clear, this statement ignores the reality that in 2020 people across Florida marched for racial justice and educational leaders responded by advocating for more inclusive academic policies and curriculum.⁷³ The Amended Complaint further noted that although the bill alleges to take on discrimination, and although the Senate sponsor claimed to have relied on parent concerns, when asked directly if any Black parents were consulted as part of the legislative process the Senator stated he had not.⁷⁴ Overall, the Amended Complaint outlined that proponents of the bill did not provide any evidence of “indoctrination” in Florida public school classrooms; the Complaint alleges the lawmakers did not focus on any specific issues in Florida classrooms.⁷⁵

The process of drafting and enacting the IFA undermined the authority of local school districts to respond to their constituents and make decisions based on local needs. This is evident in the disregard the Governor and state-level officials showed to district level authorities, teachers, and a diverse set of parental voices. The Amended Complaint pointed out that Governor DeSantis pledged to use the political power

70. Infographic for Stop W.O.K.E. Act, FLA. GOV., <https://www.flgov.com/wp-content/uploads/2021/12/Stop-Woke-Handout.pdf> (last visited Feb. 29, 2024) (“Provides employees, parents and students a private right of action.”).

71. Amended Complaint, *supra* note 5, at 70.

72. Defendants’ Memorandum of Law in Support of Motion to Dismiss at 29, *Pernell v. Cerio*, No. 4:22-cv-304-MW-1 MAF (2022) (No. 51-1).

73. Amended Complaint, *supra* note 5, at 35.

74. *Id.* at 55.

75. *Id.* at 57 (relying on university classrooms, but the Defendant’s response also cites K-12 case law); see Defendants’ Memorandum of Law in Support of Motion to Dismiss, *supra* note 72 at 26 (arguing that they do provide some examples in the discussion on the House floor, and furthermore arguing that “[p]laintiffs do not explain why Florida’s determination to address a problem occurring in other States before it spreads to Florida is a “[d]eparture from the normal procedural sequence.””).

of the Governor's office to support school board candidates in elections across the state who will advocate against CRT.⁷⁶ This information is further evidence that the Governor and majority of legislators acted in a manner contrary to principles of pluralism and democracy.

B. Shared Governance and Pluralism in Higher Education

Oversight in higher education is typically decentralized with authority shared among a state-wide board of governors and local boards at each university or college. Florida's Constitution establishes a board of governors to oversee the state-wide university system, and separate boards of trustees to govern each university.⁷⁷ Some of the trustees are appointed by the Governor and some are appointed by the board of governors, with the head of the faculty senate and president of the student body also serving alongside the trustees.⁷⁸ The Florida Constitution also includes a system of governance the state's colleges, and this governance system provides a way to support "access," "superior commitment to teaching and learning," and "to respond quickly and efficiently to meet the demand of communities by aligning certificate and degree programs with local and regional workforce needs."⁷⁹ The members of the state boards of education must reside in the region of the school, and are appointed by the governor.⁸⁰ The local governing boards at state universities and colleges typically grant each entity some level of autonomy from state control.⁸¹

76. Amended Complaint, *supra* note 5, at 45; see also A.G. Gancarski, *Ron DeSantis Get 'Political Apparatus Involved' in Florida School Board Races*, FLA. POLS. (June 6, 2021), <https://floridapolitics.com/archives/434128-political-apparatus/> ("We are going to get the Florida political apparatus involved so we can make sure there's not a single school board member who supports Critical Race Theory," DeSantis added.).

77. FLA. CONST. art. IX, § 7(b).

78. *Id.* art. IX, § 7(d).

79. *Id.* art. IX, § 8(a).

80. *Id.* art. IX, § 8(c).

81. The Boards of Trustees, as entities, are arms of the state but are given separate decision-making authority. See *Univ. of S. Fla. Bd. of Trustees v. CoMentis, Inc.*, 861 F.3d 1234, 1237 (11th Cir. 2017) ("Unsurprisingly given how tightly Florida's government controls its public education system, we have concluded, for Eleventh Amendment purposes, that boards of trustees of Florida's community colleges are "arms" of the state...and also in unpublished opinions that the boards of trustees of Florida's state universities are "arms" of the state."); *But*

At the individual university and college level, the authority of the trustees is often shared among various constituents using a model defined as shared governance. “By definition, shared governance in higher education refers to the processes and structures that governing boards, faculty, professional staff, and administration use to develop policies and make decisions that affect the institution. It’s also common for colleges and universities to invite input from their students.”⁸² The governing board has ultimate authority, but board leadership benefits by drawing on the expertise of various constituents within the system (faculty, students).⁸³ This model was established by the American Association of University Professors, and provides, under the tenet of academic freedom, some protection from state overreach.⁸⁴

Considering the complex levels of governance over universities and colleges, as well as the practice of delegating or at least sharing academic authority with faculties, the IFA is an overreach of state authority into the areas of teaching and research. The Amended Complaint in *Pernell* delineates actions taken at Florida colleges and

see Regents of the Univ. of Michigan v. State, 166 Mich.App. 314, 323 (1988) (holding that in Michigan, the state Supreme Court “has repeatedly affirmed the constitutional independence and exclusive authority of art. 8, § 5 boards in the face of attempted legislative encroachment.”). This ruling is under Michigan’s constitution but is significant for its emphasis on the independent decision-making authority of higher education governing boards.

82. Lena Eisenstein, *Shared Governance Model for Higher Education Boards*, BOARDEFFECT (June 16, 2021), <https://www.boardeffect.com/blog/shared-governance-model-higher-education-boards>.

83. Gary A. Olsen, *Exactly What is ‘Shared Governance’?* CHRON. OF HIGHER ED. (July 23, 2009), <https://www.chronicle.com/article/exactly-what-is-shared-governance> (“[A] concept of shared governance is that certain constituencies are given primary responsibility over decision making in certain areas. A student senate, for example, might be given primary (but not total) responsibility for devising policies relevant to student governance. The most obvious example is that faculty members traditionally exercise primary responsibility over the curriculum. Because professors are the experts in their disciplines, they are the best equipped to determine degree requirements and all the intricacies of a complex university curriculum. That is fitting and proper.”).

84. *See* Judith Areen, *Governing Board Accountability: Competition, Regulation, and Accreditation*, 36 J. C. & U. L. 691, 699–700 (2010) (“To protect American faculties from overreaching by governing boards, the *Declaration* adopted a broader form of academic freedom, one that rested on a new allocation of governance responsibilities within colleges and universities. This allocation has come to be known as ‘shared governance.’”); *see also id.* at 704 (“The American use of lay governing boards protects the independence of the nation’s colleges and universities from state control and, refined by the adoption of shared governance, has been a major force in producing the best higher education sector in the world.”).

universities in response to racial and gender justice movements.⁸⁵ For example, thirty-three Black faculty members at Florida State University wrote a public letter in support of students and called for a commitment to address systemic racism in the academy.⁸⁶ The president of the University of Florida (UF) wrote a letter to the UF community, outlining an anti-racism initiative for the 2020-2021 school year.⁸⁷ Student groups, such as the Black Student Union at UF, petitioned their administration to “better protect the safety and well-being of Black students at UF.”⁸⁸ These constituents — faculty, college leadership, and students, have a voice in shared governance. However, the state legislature ignored the diverse voices in these various constituencies.

Faculty are also governed by standards within their international academic communities, and the IFA separates Florida academics from their academic fields.⁸⁹ Faculty note that many concepts banned under the law are foundational in their academic fields, and the legislation prevents sharing current research in their fields.⁹⁰ The Amended Complaint documented that lawmakers “declined to formally consult with any instructors throughout the bill drafting process.”⁹¹ The Defendants do not refute this allegation nor the additional allegation that they consulted with Rufo; the Defendants merely responded that they consulted with people who agreed with the need for this bill.⁹² The Defendants’ argument is counterintuitive to a democracy representing the full membership of the state and is an affront to shared decision-making and engagement with those most impacted and

85. Amended Complaint, *supra* note 5, at 35-42.

86. *Id.* at 37-38.

87. *Id.* at 40.

88. *Id.* at 38.

89. *Id.* at 29 (“To uphold the standard of their disciplines, instructors must identify and teach foundational, widely accepted principles, even when those viewpoints are disfavored by the legislature.”).

90. *Id.* at 63-65 (“The Act also may prohibit teaching about scientific studies that reach conclusions the Florida legislature finds disagreeable.”).

91. *Id.* at 57.

92. Defendants’ Memorandum of Law in Support of Motion to Dismiss, *supra* note 72, at 26-28 (“[A]ll these allegations show is that the Acts proponents focused their efforts on consulting with individuals who *supported* the Act and believed it necessary rather than groups who *opposed* the Act and, in fact, represented the very teachers who the State feared would likely endorse and inculcate one or more of the Acts eight concepts.”).

knowledgeable of the issues facing college campuses. In the development and implementation of the IFA, the Florida Legislature departed from a respect for the state's own decentralized governance system in public higher education, as well as each university and college's shared governance structures.⁹³ Although the Defendants in the *Pernell* case include members of different university and college boards, these boards are now thrust into the role of enforcement; the Amended Complaint makes it clear that many university and college leaders supported a response to the national and state-level calls for change.⁹⁴

C. Public Comment, Open Debate, and Representative Government

Florida House Representative Àvila brought the bill (H.B.7) for comment and debate to the House State Affairs Committee and the House Education and Employment Committee. Many state citizens traveled to Tallahassee to engage in the public comment period, the vast majority of whom opposed the bill.⁹⁵ One citizen in the House Education and Employment committee session noted that “what we see here today is a massive people’s movement against this bill.”⁹⁶ Similarly, a citizen speaker in the House State Affairs comment session stated, “I am joining the overwhelming majority of people today in

93. It is clear from other recent actions by Governor DeSantis that he has no respect for the decentralized structures governing higher education, and no intent to work collaboratively with leadership. See, *Florida Higher Ed Faces an Ideologically Driven Assault Unparalleled in US History*, AM. ASS'N OF UNIV. PROFESSORS (May 24, 2023), <https://www.aaup.org/news/florida-higher-ed-faces-ideologically-driven-assault-unparalleled-us-history> (“Earlier this year, the AAUP established a special committee to review the apparent pattern of politically, racially, and ideologically motivated attacks on public higher education in Florida. . . .The Florida governor and state legislature are using their swift, aggressive, and ongoing “hostile takeover” of New College of Florida as a test case for future encroachments on public colleges and universities across the country.”).

94. Amended Complaint, *supra* note 71, at 35-42.

95. See Videotape: 2/8/22 House Education & Employment Committee (Fla. Channel), <https://thefloridachannel.org/videos/2-8-22-house-education-employment-committee/> (statement at 1:31:40-2:34:52); see also Videotape: 2/1/22 House State Affairs Committee, *supra* note 31, at 1:36:41-2:14:04.

96. Videotape: 2/8/22 House Education & Employment Committee, *supra* note 95, at 2:30:38.

opposition.”⁹⁷ Representative McCurdy asked his colleagues, “Where is the public support for this bill?”⁹⁸

The public comments in opposition mainly focused on the erasure and silencing of the daily experiences of systemic racism and gender discrimination.⁹⁹ One citizen argued that the bill “impedes intellectual freedom” and that classrooms should “be able to provide input from multiple perspectives.”¹⁰⁰ Another asked, “We may all be created equally but we are not treated equally ... What is wrong with learning about the struggles of fellow Americans?”¹⁰¹

Many Representatives similarly shared that the language of the bill ignores the way that racism impacts their everyday lives. Representative Woodson noted that as a person of color, “I get treated differently so many times.”¹⁰² Representative Campbell shared that as a black man with locks, he can feel “quite uncomfortable” in the House chambers.¹⁰³ These criticisms zeroed in on the way the bill prioritizes the comfort of some, but not all.¹⁰⁴ Other Representatives questioned how it would be possible to discuss topics such as slavery without acknowledging systemic racism; as Representative Chambliss exclaimed, “slavery was literally systemic racism.”¹⁰⁵

Only a few Representatives spoke in support of the bill, mainly around the idea that students should not be made to feel guilty.¹⁰⁶ For example, Representative Fine argued that he believed all topics should be discussed and he himself teaches his own children such historical events as Japanese internment, noting that American history shows “we’ve done bad things. But there are people who should be blamed for

97. *Id.* at 2:12:38.

98. *Id.* at 3:03:34.

99. Videotape: 2/1/22 House State Affairs Committee, *supra* note 32, at 1:41 (speaker arguing that “discomfort creates the true foundation for learning. Erasing history to comfort ignorance is not something we should be proud of.”); *Id.* at 1:41:38 (speaker continued by sharing times he felt “real uncomfortable,” such as when white supremacists published the address of his parents on Facebook).

100. Videotape: 2/8/22 House Education & Employment Committee, *supra* note 95, at 1:35:54.

101. Videotape: 2/1/22 House State Affairs Committee, *supra* note 32, at 1:52:25.

102. *Id.* at 2:46:46.

103. *Id.* at 2:33:49.

104. *Id.* at 1:41.

105. *Id.* at 2:38:17.

106. FLA. STAT. ANN. § 1000.05(4)(a)(7) (West 2022).

them and they're the people who did them."¹⁰⁷ Not only does this response focus on actions in the past without acknowledging the ongoing societal impact of racism, but also feelings (guilt, anguish) cannot be codified or tracked, a point Representative Chambliss emphasized,¹⁰⁸ so it is unclear how a parent could bring a private right of action if a child feels anguish. When the bill's House sponsor was directly asked if he had any evidence to warrant the legislation's language regarding guilt and anguish, he responded by discussing what he considered offensive materials on school websites, such as a video about white supremacy, and asked, how do you think it made students and their parents feel? That is the anguish I am speaking to.¹⁰⁹ The guilt and anguish arguments are clearly protective of white students.¹¹⁰ In a Senate floor debate, several Senators remarked that this is "a bill in search of a problem" and that the Senate was wasting valuable time without addressing a need faced by people in the state.¹¹¹ One Senator noted that the only evidence of any problem was "one example of a nasty comment that a teacher made that is easily resolvable under normal disciplinary standards."¹¹² The bill sponsor only discussed general concerns for individual freedom and equality.¹¹³ These recorded sessions do not paint a picture of representative government that is responsive to the needs of their constituents.

107. Videotape: 2/8/22 House Education & Employment Committee, *supra* note 95, at 3:15:09.

108. Videotape: 2/1/22 House State Affairs Committee, *supra* note 32, at 45:00 (presenting a question to ask how guilt is measured).

109. *Id.* at 43:45; *id.* at 40:08 (beginning of comments regarding "egregious" content).

110. See Alice Marwick et al., *The Anti-Critical Race Theory Movement Will Profoundly Affect Public Education*, SCI. AM. (Nov. 10, 2021), <https://www.scientificamerican.com/article/the-anti-critical-race-theory-movement-will-profoundly-affect-public-education/> ("Anti-CRT efforts offer a sweeping, bad-faith indictment of any attempt to...[honestly consider country's history] on the grounds that it is "reverse racism," [and] will make white kids feel bad for being white and will further divide the nation.").

111. Videotape: 3/10/22 Senate Session Part 1 (Fla. Channel), <https://thefloridachannel.org/videos/3-10-22-senate-session-part-1/> (statement at 28:10).

112. *Id.* at 21:59.

113. *Id.* at 1:38:40 (statement by Senate bill sponsor) ("We are human beings, and we need to get to treating each other as human beings."); see also *id.* at 1:26:50 (Senate bill sponsor repeatedly expressing he wants to share his story and his perspective and yet the bill itself silences the sharing of perspectives).

II. Freedom of Expression, the Classroom, and Pluralism

A. *First Amendment and the Marketplace of Ideas*

The freedom of expression clause in the First Amendment is considered a bedrock of democracy.¹¹⁴ The importance of this right is captured in the metaphor of a marketplace of ideas, a metaphor first developed by philosophers¹¹⁵ and later developed as a First Amendment argument in Supreme Court decisions. Justice Oliver Wendell Holmes, dissenting in a case involving the Espionage Act, argued that “the best test of truth is the power of the thought to get itself accepted in the competition of the market;” as such, “[the Court] should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death” unless the expression poses an imminent danger to the country.¹¹⁶ The marketplace metaphor was central in the landmark case protecting the journalists who challenge public officials, *New York Times Co. v. Sullivan*, in which the Court’s decision rested on “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]”¹¹⁷ In other decisions, the Court has held that the First Amendment and its marketplace of competing ideas must be preserved in the face of a potential threat of “monopolization of that market, whether it be by the Government itself or a private licensee”¹¹⁸ and that the Founding Fathers, in protecting free speech, “eschewed silence coerced by law” in order to defend against “the occasional tyrannies of governing majorities.”¹¹⁹

114. *See Palko v. Conn.*, 302 U.S. 319, 326–27 (1937) (“This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.”), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

115. Some attribute the idea to John Milton. *See* Christina Bohannon, *On the 50th Anniversary of Tinker v. Des Moines: Toward a Positive View of Free Speech on College Campuses*, 105 IOWA L. REV. 2233, 2238 n. 12 (2020). Some point to John Stuart Mill. *See generally* Jill Gordon, *John Stuart Mill and the “Marketplace of Ideas,”* 23 SOC. THEORY & PRAC. 235 (1997).

116. *Abrams v. United States*, 250 U.S. 616, 630, (1919).

117. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

118. *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

119. *Whitney v. Cal.*, 274 U.S. 357, 375-76 (1927).

The marketplace metaphor moved into judicial decisions protecting free speech in K-12 public classrooms. In *Tinker v. Des Moines*, in which students were forbidden by school officials to wear black arm bands in protest of the Vietnam War, the Court protected the students' right to protest because "[t]he classroom is peculiarly the 'marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"¹²⁰ Earlier in the *Tinker* decision, the Court ruled that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."¹²¹ More recently, the Court upheld the First Amendment rights of a high school student who posted criticism of her school and Cheer team on social media.¹²² The Court ruled that these protections are essential for democracy.

America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection.¹²³

The Court has also used the marketplace metaphor to protect higher education, linking marketplace to the protection of academic freedom. In 1957, the Court determined that the New Hampshire attorney general could not question the content of a classroom lecture in

120. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (citations omitted).

121. *Id.* at 511.

122. *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2043 (2021).

123. *Id.* at 2046.

an attempt to determine whether the professor was a “subversive.”¹²⁴ The Court ruled that to “impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”¹²⁵ Although the Court did not directly refer to the marketplace, the majority determined that to protect the discovery of information, faculty and students must “remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.”¹²⁶ A decade later, the Court protected a professor in New York who refused to sign a loyalty oath,¹²⁷ holding that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹²⁸ Marketplace does not mean that any content is permissible, as schools are not a public forum but instead a nonpublic forum created by the government; however, viewpoint discrimination is not constitutionally permitted even in government created forum.¹²⁹

The marketplace metaphor is only one conception of free expression. Scholars trace two other judicial theories of free speech

124. *Sweezy v. N.H.*, 354 U.S. 234, 249 (1957) (“The state courts upheld the attempt to investigate the academic subject on the ground that it might indicate whether petitioner was a ‘subversive person.’ What he taught the class at a state university was found relevant to the character of the teacher.”).

125. *Id.* at 250.

126. *Id.*

127. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 592 (1967).

128. *Id.* at 603.

129. *See Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 49 (1983) (“Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.”); *see also*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”) (citations omitted).

protection: individual autonomy and democratic self-governance.¹³⁰ It is also important to note that the marketplace metaphor is critiqued for its reliance on broad ideas of “truth” and “falsity” that do not serve to discern complex ideas or questions and critiqued for its focus on a competition of ideas rather than coalition building and mutual understanding.¹³¹ This article relies on the marketplace metaphor as it is an especially relevant metaphor for classroom inquiry and discussion, but the analysis here proceeds with the recognition that the “market” is functional only when all voices are protected and recognized. Professor Jared Schroeder updates the marketplace metaphor to a focus on “safeguarding the flow of information.”¹³² This would protect “each person’s ability to encounter information and engage with others so that truth, in the form of understandings and agreements, can emerge.”¹³³ The agreements allow people to form coalitions and these “coalitions can work together to create change in democratic society.”¹³⁴ Professor Schroeder’s revision is helpful to the argument here regarding the value of pluralism in democratic societies. Pluralism values multiple perspectives and viewpoints, based on differences in experience and exposure. In this way, a pluralistic marketplace values the lived experiences and stories of all.

“Divisive Concepts” legislation, including the Individual Freedom Act, restricts classroom speech. Educators and students across the nation and in Florida have challenged “divisive concepts” laws on First Amendment grounds, arguing that the laws are an unconstitutional restriction on the freedom of expression.¹³⁵ “Divisive concepts” laws restrict content through prohibitions on teaching theories such as white

130. See Bohannon, *supra* note 115; see also Dylan Salzman, *The Constitutionality of Orthodoxy: First Amendment Implications of Laws Restricting Critical Race Theory in Public Schools*, 89 U. CHI. L. REV. 1069, 1085–86 (2022) (outlining the three competing ideas of free expression with particular attention to the school context).

131. W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM’N Q. 40, 44 (1996) (“The most common of the false assumptions, according to critics, are (1) that everyone has access to the market, (2) that truth is objective and discoverable rather than subjective and chosen or created, (3) that truth is always among the ideas in the marketplace and always survives, and (4) that people are basically rational and, therefore, are able to perceive the truth.”).

132. Jared Schroeder, *‘Marketplace of Ideas’ Turns 100 — It’s Not What it Used to Be*, HILL (Nov. 9, 2019, 2:00 PM), <https://thehill.com/opinion/judiciary/469715-as-marketplace-of-ideas-turns-100-truth-is-not-what-it-used-to-be/>.

133. *Id.*

134. *Id.*

135. See Salzman, *supra* note 130.

privilege, for example.¹³⁶ Public school classrooms are government created forums, and as such the government can restrict the content of classroom speech.¹³⁷ The legal question regarding content restrictions, however, is what government entity can determine the content of K-12 and higher education classrooms. As the discussion below highlights, federal courts have consistently argued that decisions regarding content are best made by school boards and higher education administration.

Another type of free expression restriction is viewpoint. Once a topic or specific content is permitted in a government-created forum, viewpoint restrictions regarding the content is a violation of the First Amendment.¹³⁸ Viewpoint restrictions in “divisive concepts” legislation include, as one example, the inability to challenge the concept of meritocracy or colorblindness. Viewpoint restrictions are a more serious violation of the freedom of expression as students and teachers are silenced from engaging in debate or inquiry regarding content.¹³⁹

Overall, the freedom of expression restrictions established by “divisive concepts” laws are particularly harmful as the topics, such as systemic racism, are matters of public concern that impact the day-to-day lives of students and teachers. To restrict engagement, inquiry, and research on topics such as racism forces students and teachers to silence themselves regarding their shared history and everyday experiences.

B. Freedom of Expression in K-12 Education

In K-12 education, free speech protections upheld by the Supreme Court are mainly focused on students: students’ rights to speak and students’ right to receive information. The *Tinker* and *Mahanoy*

136. See Khiara M. Bridges, *Evaluating Pressures on Academic Freedom*, 59 Hous. L. Rev. 803, 815-16 (2022) (“[T]hese bans endeavor to prohibit ideas-like ‘structural racism,’ for example—that challenge the notion that the country’s dreadful racial past is, indeed, a thing of the past. These bans target any concept—like ‘White privilege,’ for example—that proposes that race helps to explain why some people’s live lives that are longer and more comfortable than others.”).

137. *Searcy v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989) (“[A]s with any other non-public forum, once the School Board determines that certain speech is appropriate for its students, it may not discriminate between speakers who will speak on the topic merely because it disagrees with their views.”).

138. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

139. *Id.*

cases, discussed above, are protections of student speech. These protections are limited if the student speech bears the “imprimatur of the school,”¹⁴⁰ disrupts the educational process,¹⁴¹ is vulgar and used during a school event,¹⁴² or is speech that promotes drug use.¹⁴³ These school-specific limitations are in addition to broader limitations on speech, such as speech that promotes violence and speech that is obscene.¹⁴⁴ Students also have a right to receive information. In *Board of Education v. Pico*, the Court considered the removal of library books by the school board. In ruling against the removal of the library materials, the Court determined that the right to receive information is a corollary to free speech¹⁴⁵ and, in a narrow ruling that considered only the “special characteristics of the school library,” the Court ruled that “access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, [and] such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”¹⁴⁶

Teacher speech protections in the K-12 context are typically analyzed by balancing the rights of a teacher as a citizen against the rights of the government (through its local authority) as an employer. Public school teachers are government employees speaking in their official capacity, and as such are not generally speaking as private citizens.¹⁴⁷ If the teacher argues they are speaking as a citizen and not an employee then the law applies an analytic tool that weighs the

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

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

142. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

143. *Morse v. Frederick*, 551 U.S. 393, 410 (2007).

144. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Miller v. California*, 413 U.S. 15, 23 (1973).

145. *Bd. of Educ. v. Pico*, 457 U.S. 853, 866–68 (1982) (“More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom. Madison admonished us: ‘A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.’”) (citation omitted).

146. *Id.* at 868.

147. *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.”).

citizen's interest against the government's interests.¹⁴⁸ The Court developed this balancing test in a decision regarding a teacher who wrote a letter to the editor of a local newspaper, criticizing the funding scheme of the school district.¹⁴⁹ In this case, *Pickering v. Board of Education*, the Court established a case-specific analytic tool that balances "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" and found that the teacher who wrote the letter was acting as a citizen.¹⁵⁰

The Court expanded the right of the government to restrict speech in *Garcetti v. Ceballos* by allowing employers to control employee speech "pursuant to their professional duties."¹⁵¹ This restriction, the Court determined, "reflects the exercise of employer control over what the employer itself has commissioned or created,"¹⁵² and therefore employee First Amendment protections are limited.¹⁵³ Although the Court held that this ruling did not concern classroom speech,¹⁵⁴ some federal courts have applied *Garcetti* to teachers.¹⁵⁵

Another consideration in the K-12 context is institutional academic freedom. Various federal courts have argued that school

148. *Id.* at 423 ("When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny.").

149. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

150. *Id.* at 568.

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

152. *Id.* at 422 (citation omitted).

153. See Neal H. Hutchens et al., *Essay: Faculty, the Courts, and the First Amendment*, 120 PENN ST. L. REV. 1027, 1028 (2016) ("If a public employee's speech occurred as part of carrying out such official duties, then it does not qualify for First Amendment protections under *Garcetti*." (citation omitted)).

154. *Garcetti*, 547 U.S. 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.").

155. See JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the School House Gate? The Eleventh Circuit's Post-Garcetti Jurisprudence*, 63 U. MIA. L. REV. 761, 761-62 (2009) (arguing that prior to *Garcetti*, the court weighed academic freedom (of educator and institution) against the "public-employee-speech doctrine," but noting that *Garcetti* may have changed the balance here in favor of the employer).

boards are elected officials who have the academic freedom to choose curriculum, and this is important for reasons of public accountability.¹⁵⁶ Locating authority in the school board and school officials pushes these entities to be accountable to the local community rather than to the judiciary.¹⁵⁷ As the Fourth Circuit argued in 1998, “The curricular choices of the schools should be presumptively their own—the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them.”¹⁵⁸ States establish curricular guidelines or standards, but determining how to reach these standards and meet the needs of the local community are decisions typically made at the local level. Individual teachers have successfully challenged School Board decisions on First Amendment grounds, and so have parents, but these battles are visible to the community impacted.

Relevant to the Eleventh Circuit is a 1970 case in which a high school dismissed a teacher after they taught a Kurt Vonnegut story that the School Board considered disruptive.¹⁵⁹ The District Court acknowledged that academic freedom is not a First Amendment right but noted, relying on Supreme Court precedent, that classroom academic freedom is valued in a democratic society.¹⁶⁰ The court used *Tinker’s* framework and first considered whether the teaching was disruptive; then, the court considered the appropriateness of the text for a high school class.¹⁶¹ On both counts the court found for the teacher.¹⁶² A decade later, a high school removed a history teacher after the district

156. *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 341 (6th Cir. 2010) (“State law gives elected officials—the school board—not teachers, not the chair of a department, not the principal, not even the superintendent, responsibility over the curriculum. This is an accountability measure, pure and simple, one that ensures the citizens of a community have a say over a matter of considerable importance to many of them—their children’s education—by giving them control over membership on the board.”).

157. *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 371 (4th Cir. 1998) (“Someone must fix the curriculum of any school, public or private. In the case of a public school, in our opinion, it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.”).

158. *Id.* at 371–72.

159. *Parducci v. Rutland*, 316 F. Supp. 352, 353–54 (M.D. Ala. 1970).

160. *Id.* at 355.

161. *Id.* at 356 (“Since the defendants have failed to show either that the assignment was inappropriate reading for high school juniors, or that it created a significant disruption to the educational processes of this school, this Court concludes that plaintiff’s dismissal constituted an unwarranted invasion of her First Amendment right to academic freedom.”).

162. *Id.*

received complaints from parents regarding a classroom activity.¹⁶³ The Circuit court determined that classroom discussion is protected speech unless the discussions “‘overbalance (her) usefulness as an instructor.’”¹⁶⁴ Here, the court agreed with school and district leadership that this overbalance was not present, and determined the classroom discussion was protected.¹⁶⁵ A 2017 Eleventh Circuit Court case affirmed this ruling regarding classroom discussion.¹⁶⁶

This section traced the general contours of freedom of expression and content restrictions at the K-12 level. The conclusion regarding local control is the same as the one reached in Part IA, but here the authority is established by First Amendment case law as opposed to the state constitution. In arguments regarding viewpoint, the Eleventh Circuit has affirmed the principle that public schools are nonpublic forums created by the government, and as such the government may limit the subject matter (content) but not viewpoint.¹⁶⁷

C. Freedom of Expression and Pluralism in Higher Education

Free speech protections for educators in higher education were emphasized in response to government loyalty tests under McCarthyism.¹⁶⁸ The *Sweezy* and *Keyishian* Supreme Court cases, cited earlier, are both cases protecting professor speech. These cases upheld the importance of academic freedom and pursuit of knowledge as critical to democracy in the face of accusations of disloyalty. The

163. *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1111 (5th Cir. 1980) (decided before this case was split).

164. *Id.* at 1113 (“It follows that Cooper’s discharge for discussions conducted in the classroom cannot be upheld unless the discussions ‘clearly . . . over-balance (her) usefulness as an instructor . . .’ We thus join the First and Sixth Circuits in holding that classroom discussion is protected activity.”) (citation omitted).

165. *Id.* (“We thus join the First and Sixth Circuits in holding that classroom discussion is protected activity.”) (citation omitted).

166. *Wollschlaeger v. Gov.*, 848 F.3d 1293, 1311 (11th Cir. 2017) (cited along with *Kingsville* in *Pernell v. Fla. Bd. of Govs. of State Univ. Sys.*, 2022 U.S. Dist. LEXIS 243016 (N.D. Fla. 2022)).

167. *Searcey v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989).

168. See Michael H. LeRoy, *How Cts View Acad. Freedom*, 42 J.C. & U.L. 1, 20 (2016) (“The McCarthy era. . . adversely affected professors; and as a result, the Supreme Court established First Amendment precedents that shielded faculty from ideological coercion.”).

Sweezy Court argued that “[m]ere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.”¹⁶⁹ The Court also argued that education must be open to changing or developing knowledge; “[n]o field of education is so thoroughly comprehended . . . that new discoveries cannot yet be made.”¹⁷⁰ As these cases directly involve faculty speech rights as a component of academic freedom, some scholars note that First Amendment protections are more robust in higher education.¹⁷¹

Federal case law also emphasizes institutional academic freedom, similar to the discussion above regarding school boards at the K-12 level. This authority of higher education administration was affirmed in a case involving whether a religious group could use the school facilities.¹⁷² The Court ruled the university’s action involved unconstitutional content restriction of student speech, as the university had opened their facilities to outside groups.¹⁷³ However, the Court limited its holding by noting that the decision does not impinge on the administration’s authority “to make academic judgments as to how best to allocate scarce resources or ‘to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.’”¹⁷⁴ This authority of the university

169. *Sweezy v. N.H.*, 354 U.S. 234, 251 (1957).

170. *Id.* at 250; *see also id.* (Court noting this is particularly “true in the social sciences, where few, if any, principles are accepted as absolutes.”).

171. *See* Hannah Daigle, *Critical Race Theory Through the Lens of Garcetti v. Ceballos*, 20 FIRST AMEND. L. REV. 230, 237–38 (2022) (“In contrast, educators in college or university settings are more likely to succeed in exercising their freedom of speech in the classroom. Several circuits have noted their concern that ‘if *Garcetti* applied to college professors, universities could compel uniformity of thought.’ The Supreme Court has granted considerable leeway to institutions of higher education when compared to other schools.”); *see also* Mary L. Krebs, *Can’t Really Teach: CRT Bans Impose Upon Teachers’ First Amendment Pedagogical Rights*, 75 VAND. L. REV. 1925, 1948 (2022) (“Unlike in the higher education context, where the value of academic freedom is a key purpose that could tip the scales in favor of permitting speech, the current legal tests have not made space for the purpose behind K-12 education beyond the state’s interest in efficiency or the teacher’s interest in self-expression.”).

172. *Widmar v. Vincent*, 454 U.S. 263 (1981).

173. *Id.* at 277 (“Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech.”).

174. *Id.* at 276.

leadership is sometimes established by the state constitution, such as the Florida articles addressed here in I.B.¹⁷⁵

Locating academic freedom in the institution rather than the individual may limit individual faculty rights.¹⁷⁶ However, as colleges and universities engage in shared governance, faculty have a voice in this institutional authority. Faculty asserted this shared authority through a statement on academic freedom, established and promoted by the American Association of University Professors (AAUP) beginning in 1915 and subsequently reaffirmed.¹⁷⁷ This statement emphasizes that faculty are hired to pursue knowledge, and as Professors Hutchens, Fernandez, Hulbert argue, “[o]nce an institution elects to empower faculty to engage in independent speech for purposes of carrying out their professional roles, it should not, under the First Amendment, then be able to renege on that grant of professional independence based on the public employee speech cases.”¹⁷⁸ Still, many First Amendment cases are brought by faculty against their administrations so the AAUP statements and its argument for broader protections do not always hold.

The *Garcetti* decision also looms over First Amendment protections on college and university campuses. As noted above, the Court stated that the applicability of the ruling to education was not a component of the decision, but Justice Souter, in dissent, expressed his concern that this could imperil teaching and learning.¹⁷⁹ Lower courts split on whether or not to apply *Garcetti*'s limited protections to educators. A Ninth Circuit Court of Appeals in 2016 declined to extend

175. One example of a case between a state and a university system is *Regents of Univ. of Mich. v. Mich. Emp. Rels. Comm'n*, 204 N.W.2d 218, 224 (Mich. 1973). The University of Michigan is an independent branch of the government of the State of Michigan, but it is not an island. Within the confines of the operation and the allocation of funds of the University, it is supreme. Without these confines, however, there is no reason to allow the Regents to use their independence to thwart the clearly established public policy of the people of Michigan.” (internal citation omitted).

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

177. *1940 Statement of Principles on Academic Freedom and Tenure*, AM. ASS'N UNIV. PROFESSORS, <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> (last visited Mar. 9, 2024).

178. Hutchens et al., *supra* note 153, at 1042.

179. *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006) (Souter, J., dissenting) (“This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write “pursuant to. . . official duties.”).

Garcetti to a dispute between a faculty member and the university because *Garcetti* and other precedent protect academic freedom.¹⁸⁰ In contrast, a Court of Appeals in the Fourth Circuit reached an opposite conclusion.¹⁸¹ According to Professor Michael H. LeRoy, while the AAUP statement was successful in protecting faculty academic freedom within the early part of the twentieth century, the *Pickering* and *Garcetti* decisions have “narrowed the speech rights of public employees while broadening the right of government employers to sanction employees for grievances or disruptive speech that affects efficiency.”¹⁸²

The Eleventh Circuit cases on First Amendment rights in higher education offer a more nuanced approach to faculty speech. Some cases regarding disputes between faculty and university or college administration have applied a balancing test modeled after *Pickering*, outlined above.¹⁸³ One such case, cited in *Pernell*, is *Bishop v. Aronov*.¹⁸⁴ In *Bishop*, a university professor injected religious instruction into his classes, and held optional classes—just prior to examinations—to discuss his religious perspective on university

180. *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) (“*Demers* presents the kind of case that worried Justice Souter. Under *Garcetti*, statements made by public employees “pursuant to their official duties” are not protected by the First Amendment. But teaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are ‘a special concern of the First Amendment.’ We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.”) (internal citations omitted); *See Hutchens et al.*, *supra* note 153, at 1039 (further discussing this case and its significance in post-*Garcetti* case law).

181. *Urofsky v. Gilmore*, 216 F.3d 401, 411–12 (4th Cir. 2000) (“Appellees’ insistence that the Act violates their rights of academic freedom amounts to a claim that the academic freedom of professors is not only a professional norm, but also a constitutional right. We disagree. It is true, of course, that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment. Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom. Moreover, a close examination of the cases indicates that the right praised by the Court is not the right Appellees seek to establish here. Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.”) (internal citations omitted).

182. *See LeRoy*, *supra* note 168, at 20; *see also Hutchens et al.*, *supra* note 153, at 1027–28 (arguing that professor speech rights on college and university campuses “represents something of a constitutional morass.”).

183. *See, e.g., Maples v. Martin*, 858 F.2d 1546, 1552 (11th Cir. 1988); *Williams v. Ala. State Univ.*, 979 F. Supp. 1406, 1410 (M.D. Ala. 1997); *Austin v. Univ. of Fla. Bd. of Trustees*, 580 F. Supp. 3d 1137, 1168 (N.D. Fla. 2022).

184. *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).

topics.¹⁸⁵ The court combined *Tinker* and *Hazelwood* to analyze the professor’s speech rights, arguing that “where the in-class speech of a teacher is concerned, the school has an interest not only in preventing interference with the day-to-day operation of its classrooms as in *Tinker*, but also in scrutinizing expressions that ‘the public might reasonably perceive to bear [its] imprimatur.’”¹⁸⁶ The court then created and applied a three-part analysis. First, the court considered the context of the university classroom as “the visage of the classroom as part of a university course” as well as the potential coercion of this context.¹⁸⁷ Second, the court considered the public employer-employee relationship and “the University’s authority to reasonably control the content of its curriculum [].”¹⁸⁸ Finally, the court considered “the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment.”¹⁸⁹ The *Bishop* court ruled that the professor was not permitted to supplant the course curriculum with lectures on his religious beliefs.¹⁹⁰ The decision is important for the court’s balancing test and emphasis on academic freedom within the institution.

The conclusion that institutions control curriculum in higher education is the same as the one reached in Part IB, but here the determination is made on First Amendment’s grounds, as opposed to the state constitution and shared governance. In regard to viewpoint free speech challenges, the Eleventh Circuit, consistent with the Supreme Court, does not allow restrictions based on viewpoint.¹⁹¹

III. Freedom of Expression and the Individual Freedom Act

A. IFA and Institutional Academic Freedom Regarding Content

The *Pernell* decision outlined the differences between content restrictions and viewpoint restrictions, explaining that “a speech

185. *Id.* at 1068-69.

186. *Id.* at 1073.

187. *Id.* at 1074.

188. *Id.*

189. *Id.* at 1075 (The court does not establish this third consideration to be a component of the First Amendment, but nevertheless argues for its importance in university administrative decisions involving classroom speech.).

190. *Id.* at 1076.

191. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

regulation targeted at specific subject matter is *content* based even if it does not discriminate among viewpoints within that subject matter.”¹⁹² The *Pernell* court determined, based on Supreme Court precedent, that “the State is, of course, permitted to determine the content of its public school curriculum.”¹⁹³ However, the argument here regarding institutional academic freedom challenges the determination that the Governor and state legislature has sole authority over content.¹⁹⁴ In the First Amendment case law cited above (II, B and C), the authority over curriculum is decentralized to the elected school boards in K-12 and to the administration of the specific college and university administration in higher education. At the K-12 level, the Supreme Court has directly compared the curricular and administrative control by local school districts to federalism and the experimentation that decentralized control promotes.¹⁹⁵ At the higher education level, shared governance promotes academic freedom—a right highly valued by the Supreme Court for the development of new knowledge.¹⁹⁶ Indeed, case decisions often note that academic freedom may not be a separate First Amendment right but is a significant consideration in regard to institutional authority.¹⁹⁷

Pernell Defendants cited *Bishop v. Aronov* as indicative of the government authority to regulate content in public classroom instruction.¹⁹⁸ Again, this argument regarding control over content defines “government” too broadly. In *Bishop*, the college administration sought to uphold the established curriculum in the face of a professor

192. *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1236 (N.D. Fla. 2022) (internal citations omitted).

193. *Id.* at 1241.

194. *Id.* at 1237 (“At the hearing on Plaintiffs’ motions, both sides recognized this authority of the State to prescribe the content of its universities’ curriculum.”); *id.* at 1277 (determining that the right of the government to control curriculum must be reasonable).

195. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973) (“The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters... Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State’s freedom to ‘serve as a laboratory; and try novel social and economic experiments.’ No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.”).

196. *Sweezy v. N.H.*, 354 U.S. 234, 251 (1957).

197. *Urofsky v. Gilmore*, 216 F.3d 401, 411–12 (4th Cir. 2000).

198.

who was inserting religious instruction into courses on physical education.¹⁹⁹ The state legislature was not directly involved in regulating classroom curriculum. This controversy was between the institutional authority of the local administration and the professor.²⁰⁰ The Defendants also cited a 2010 6th Circuit case regarding the application of *Garcetti* in a K-12 conflict.²⁰¹ In this citation, the Defendants disregarded the significant emphasis on the school district authority: the case applied *Garcetti* as relevant to a high school classroom but this control by the government was manifested through the elected school board.²⁰²

Representative Àvila stated that the IFA does not restrict content and under the IFA the curriculum is unchanged.²⁰³ The legislation itself includes a provision that the prohibited concepts can be discussed, but not endorsed.²⁰⁴ Furthermore, in Representative Àvila’s testimony before the House State Affairs Committee, he repeatedly stated that “Nothing in this bill bans the teaching of historical fact.”²⁰⁵ Instead, according to Representative Àvila, the bill outlaws “concepts contrary or contradictory to American shared values of individual freedom.”²⁰⁶

To illustrate concepts prohibited under the legislation, Representative Àvila shared training topics that have been implemented at various private businesses (in the state and across the nation) such as a training by American Express that considered the connections

199. *Bishop v. Aronov*, 926 F.2d 1066, 1068 (11th Cir. 1991).

200. *Id.* at 1067–69 (involving The University of Alabama, the Board of Trustees, and the Dean of the College of Education, and including students’ complaints).

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

202. *Id.* at 344 (“Even to the extent academic freedom, as a constitutional rule, could somehow apply to primary and secondary schools, that does not insulate a teacher’s curricular and pedagogical choices from the school board’s oversight, as opposed to the teacher’s right to speak and write publicly about academic issues outside of the classroom. “[I]t is the educational institution that has a right to academic freedom, not the individual teacher.”) (internal citations omitted).

203. Videotape: 2/1/22 House State Affairs Committee, *supra* note 32, at 33:34 (statement of Representative Àvila) (“[N]othing in this bill talks about removing any historical fact from the curriculum. Actually, the school districts are the ones that choose the curriculum.”).

204. FLA. STAT. ANN. § 1000.05(4) (West 2023).

205. Videotape: 2/8/22 House Education & Employment Committee, *supra* note 95, at 29:23.

206. Videotape: 2/1/22 House State Affairs Committee, *supra* note 32, at 31:34.

between capitalism and racism.²⁰⁷ This is content restriction. He also shared a story of a student pursuing a math licensure for elementary education who discovered that a course on identifying white privilege was a component of the licensure training; the Representative stated, “to me that is not whatsoever something that should be allowed.”²⁰⁸ This too is a restriction on content. Recently, a parent complained that “The Hill We Climb” by Amanda Gorman (the poem recited at the 2021 presidential inauguration) included references to critical race theory and indoctrination, and therefore must be removed from the elementary library.²⁰⁹ Again, this is content. Furthermore, the bill requires that any content that may cause a student to feel anguish must be prohibited, a broad, ambiguous content restriction.²¹⁰

During debate at the Florida Senate, Senator Cruz criticized the bill for “leveraging our power of this state to enforce strict guidelines on curriculum” which she noted is something done by “authoritarian regimes—not democratic republics.”²¹¹ The comments in the Florida House committees and Senate floor demonstrate that the Individual Freedom Acts restricts content and therefore is an overreach of the state government into the affairs of local authorities. The Florida legislature, by enacting specific content restrictions on all public classrooms in the state, violated the First Amendment authority of the local institutions charged with making curricular decisions.

207. *Id.* at 35:40.

208. *Id.* at 54:21.

209. Sommer Brugal, *Miami-Dade K-8 Bars Elementary Students From 4 Library Titles Following Parent Complaint*, MIAMI HERALD (May 24, 2023, 1:59 PM), <https://amp.miamiherald.com/news/local/education/article275671496.html> (A parent criticized several books “for what she said included references of critical race theory, ‘indirect hate messages,’ gender ideology and indoctrination, according to records obtained by the Florida Freedom to Read Project and shared with the Miami Herald.”).

210. FLA. STAT. ANN. § 1000.05(4)(a) (West 2023); see Aziz Huq, *The Conservative Case Against Banning Critical Race Theory*, TIME (July 13, 2021, 7:00 AM), <https://time.com/6079716/conservative-case-against-banning-critical-race-theory/> (“The idea that audience discomfort provides a justification for censorship...is at profound odds with our free speech tradition. The case against CRT shows why: Because it turns on how an audience feels, this argument for speech bans has an indefinite, elastic quality, one that accommodates an endlessly voracious appetite for censoriousness.”).

211. Videotape: 3/10/22 Senate Session Part 1, *supra* note 111, at 25:06.

B. IFA and Viewpoint Discrimination

Once content is allowed in a government created forum, the state may not regulate viewpoint in response to that content.²¹² The *Pernell* decision defined viewpoint as “the specific motivating ideology or the opinion or perspective of the speaker” and notes that viewpoint restrictions are “a ‘more blatant’ and ‘egregious form of content discrimination.’”²¹³ The *Pernell* Defendants relied on *Garcetti* to argue that all speech by teachers and professors is government speech and can be regulated.²¹⁴ However, the court determined that the Defendants conflate content and viewpoint, and IFA is viewpoint discrimination in violation of the First Amendment.

The IFA lists eight “divisive concepts” that teachers may discuss but not endorse.²¹⁵ Chief Judge Mark E. Walker considered this limitation by analyzing the concept #6: “A person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.”²¹⁶ The Judge reasoned that this language refers to affirmative action, and determined that under the IFA:

you can discuss affirmative action as a historical fact, and you can certainly condemn it as a failed policy, but because the idea of affirmative action is so odious, so repugnant, so vile, and so dangerous that it offends the basic principles of common decency, you cannot have a guest speaker submit their views in favor of affirmative action, even to a class of law students.²¹⁷

212. *Searcey v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989).

213. *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1236 (N.D. Fla. 2022) (internal citations omitted).

214. *See id.* at 1233 (“[Defendants] argue that because university professors are public employees, they are simply the State’s mouthpieces in the university classrooms.”).

215. FLA. STAT. ANN. § 1000.05(4)(a) (West 2023).

216. *Id.*

217. *Pernell*, 641 F. Supp. 3d. at 1234.

The Judge then analyzed the phrase “objective manner” and ruled that Defendants define “objective manner” as allowing “for only one side of the debate in Florida’s public universities—or for no debate at all.”²¹⁸

In *Pernell*, the court illustrated the unlawful outcome of IFA: “[T]he State of Florida says that to avoid indoctrination, the State of Florida can impose its own orthodoxy and can indoctrinate university students to its preferred viewpoint.”²¹⁹ Relying on the strong precedent supporting a marketplace of ideas and academic freedom within the boundaries established by the Constitution,²²⁰ the Judge ruled that the IFA dramatically departs from precedent, acting as a “prophylactic ban on university employee’s speech.”²²¹ The Court further determined that while the Florida legislature may believe “the State has unfettered authority to muzzle its professors in the name of ‘freedom,’” it does not.²²²

The viewpoint discrimination in the IFA is an orthodoxy framed as “American values.”²²³ This is viewpoint discrimination, but of a particular variety considered in *Sweezy* and *Keynishian* in which the Court condemned the imposition of orthodoxy in public classrooms.²²⁴ Orthodoxy is derived from the root words *orthos*, translated to right, and *doxa*, and can be defined as “the one true opinion.”²²⁵ Representative Àvila repeatedly argued that the law simply requires teachers present “the American way of life, the shared principles and values that formed

218. *Id.* at 1283.

219. *Id.* at 1277.

220. *See id.* at 1236.

221. *Id.* at 1271-72.

222. *Id.* at 1230.

223. Videotape: 2/8/22 House Education & Employment Committee, *supra* note 95, at 38:54 (for example, the phrases “American values,” “American principles,” and “American way of life” are repeated throughout the Representative’s comments).

224. *See Sweezy v. N.H.*, 354 U.S. 234, 251 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation.”); *see also Keynishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely the teachers concerned.”).

225. Definition of Orthodoxy, VOCABULARY, <https://www.vocabulary.com/dictionary/orthodoxy> (last visited Mar. 12, 2024).

our great nation,”²²⁶ values “everyone can agree on.”²²⁷ Furthermore, the Representative argued that teachers will know when they are violating the law by “injecting yourself and your specific point of view” into teaching.²²⁸

However, Representative Àvila and others who voted in favor of the bill clearly did not listen to the voices of the many Floridians, mainly young people of color, who came to the public hearings to express fear and anger about the way the bill would silence their everyday experiences of systemic racism and prohibit opportunities to explore these experiences. One speaker noted that the law will have a “chilling effect on our open and honest dialogue about who we are and where we come from.”²²⁹ The language of “objective” and “American values” implies that if an individual’s own, subjective experience or family history challenges the prohibition of a concept, such as systemic racism in society today, then the individual is expressing an un-American idea and in fact their lived experience is an affront to American values. This silencing of experience and perspective does not promote pluralism and democratic engagement.²³⁰

C. IFA and Restrictions on Access to Information

The Individual Freedom Act and majority in the Florida House and Senate also violate the principles outlined in *Pico* concerning the right to receive information. IFA focuses on classroom instruction, but Representative Àvila shared that the State had already removed content from various district websites. According to Representative Àvila, Broward County had links, movies and articles such as “White Privilege: Unpacking the Invisible Knapsack” that have been removed;

226. Videotape: 2/8/22 House Education & Employment Committee, *supra* note 95, at 28:50.

226. *Id.* at 28:58.

228. Videotape: 2/8/22 House Education & Employment Committee, *supra* note 95, at 1:17:15.

229. Videotape: 2/8/22 House Education & Employment Committee, *supra* note 95, at 1:55.

230. The Pernell decision did not engage the Equal Protection count of the Amended Complaint; however, plaintiffs are pursuing this count and a recent decision denying access to legislators’ documents regarding the bill. *Pernell v. Fla. Bd. of Governors of State Univ.*, No. 23-10616, 2023 WL 7125049, at ¶ 1 (11th Cir. Oct. 30, 2023).

Palm Beach County had “white advantage” in the district’s equity statement but after “public comment” this has been removed; Pine Ridge High School in Volusia County Schools was told to remove a book titled “systemic racism.”²³¹ Representative Àvila shared these examples because he was glad this material was removed (he used the word “egregious” twice) and because he was explaining how the law would enable a private right of action if a child felt anguish.²³² These removals should be challenged because they directly contradict the ruling in *Pico*: these are not classroom materials but are optional materials available to students and families that are being removed because of the viewpoint they express.²³³

CONCLUSION

The central concept from critical race theory that the IFA bans is the knowledge and value of individual life experiences. These lived realities are the basis of history and current society, and in a pluralistic society the lived experiences are diverse. Prohibitions that limit what questions can be asked about historical events, what stories can be shared, and how the past continues to influence the present can be viewed as “punitive memory laws,” according to Professor Danielle Conway.²³⁴ “Memory laws have the potential to create a body of legally defined and legally enforced knowledge that a government—in this case, state governments through proposed bans on the teaching of CRT—protects from public scrutiny and removes that knowledge from

231. Videotape: 2/8/22 House Education & Employment Committee, *supra* note 95, at 40:08-43:45.

232. *Id.*

233. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 879-80 (1982) (Blackmun, J., concurring) (“In my view, we strike a proper balance here by holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials’ disapproval of the ideas involved. It does not seem radical to suggest that state action calculated to suppress novel ideas or concepts is fundamentally antithetical to the values of the First Amendment. At a minimum, allowing a school board to engage in such conduct hardly teaches children to respect the diversity of ideas that is fundamental to the American system. In this context, then, the school board must ‘be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,’ *Tinker v. Des Moines School Dist.*, and that the board had something in mind in addition to the suppression of partisan or political views it did not share.”).

234. Danielle M. Conway, *The Assault on Critical Race Theory as Pretext for Populist Backlash on Higher Education*, 66 ST. LOUIS U. L.J. 707, 715 (2022).

the realm of historical dispute.”²³⁵ Memory laws can serve to “limit and narrow the national public debate on the collective past, in contrast to the principles of free speech and deliberative democracy that advocate the opening up of public debate to a variety of voices, experiences, and interpretations of the past and present.”²³⁶ Professor Conway argues that these types of laws create tension between First Amendment free expression principles and the ideas the government wants to promote.²³⁷ The tension, particularly if enforcement includes punishment, “creates a chilling effect on individuals and institutions who would otherwise seek to engage in open debate in furtherance of a pluralistic society.”²³⁸

Classrooms are dynamic environments to share perspectives and raise questions and inquiry. Ideally, students and teachers bring their subjective, individual experiences and share these with others in order to test understanding and broaden perspectives—their own and others. This is not to argue that learning does not also involve facts that are objective and corroborated by many perspectives, such as geographic locations, temporal locations, government documents. But learning comes through stories and active inquiry, and history in particular is an “argumentative discipline”²³⁹ that includes discerning meaning from multiple personal accounts and making connections between the past and the present. Acknowledging personal stories also promotes inclusion as students are able to see themselves and their histories in the classroom.²⁴⁰ Minority perspectives may offer counter or alternative

235. *Id.* at 715-16.

236. Yifat Gutman, *Memory Laws: An Escalation in Minority Exclusion or a Testimony to the Limits of State Power*, 50 L. & SOC’Y REV. 575, 577 (2016).

237. Conway, *supra* note 234, at 716.

238. *Id.*

239. Videotape: 2/8/22 House Education & Employment Committee, *supra* note 95, at 1:34:49, (a historian sharing the perspective of his discipline).

240. See Osamudia James, *White Injury and Innocence: On the Legal Future of Antiracism Education*, 108 VA. L. REV. 1689, 1699 (2022) (arguing that antiracism and CRT support gaps created by multicultural education programs, as these other theories go beyond merely “acceptance” to instead “affirmatively teach students about the historical roots of racial oppression, how institutions reproduce racism and racial hierarchy, and how these injustices can be disrupted and dismantled.”); see also, Bridges, *supra* note 136 at 806 (“Scholars have long observed how ‘diversity’ does not require us to engage with, or even recall, the country’s terrible racial history—a history that, in some school districts, is not being denounced as critical race theory and considered an object to expunge from K-12 curricula.”).

narratives about a community, an historical event, a current event--stories that are in danger of being silenced as “un-American.”

Chief Judge Walker’s *Pernell* decision emphatically argues for viewpoint diversity, and his decision will hopefully slow the movement of these bills in other states and give guidance to future courts. The *Pernell* case addresses the specifics of a university and college setting, but as Professor Christopher Thomas notes, the “anti-orthodoxy rationale [in the *Pernell* decision] would apply even more strongly in the K-12 context” because students are a captive audience in these settings.²⁴¹ And as the American Historical Society posted in response to “divisive concepts” legislation in Florida and across the nation:

Americans of all ages deserve nothing less than a free and open exchange about history and the forces that shape our world today, an exchange that should take place inside the classroom as well as in the public realm generally. To ban the tools that enable those discussions is to deprive us all of the tools necessary for citizenship in the twenty-first century.²⁴²

241. Christopher D. Thomas, “Positively Dystopian”: *Pernell v. Florida Board of Governors and Its Implications for Curricular Backlash Bills*, 406 ED. L. REP. 12, 19–20 (2023).

242. *Joint Statement on Legislative Efforts to Restrict Education about Racism in American History (June 2021)*, AM. HIST. ASS’N, <https://www.historians.org/divisive-concepts-statement> (indicating 155 organizations signed onto the statement).