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(E)racing Speech in School

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ABSTRACT

Speech on race and racism in our nation's public schools is under attack for partisan gain. The Free Speech Clause of the First Amendment teaches a lot about the wisdom and legality of laws that chill such speech in the classroom. But more importantly, a First Amendment analysis of these laws reveals profound insights about the health and meaning of our free speech doctrine.

Through a First Amendment analysis of "anti-critical race theory" laws, this essay illuminates the first principles of free speech law. Specifically, it shows that the First Amendment offers little refuge to teachers or parents looking to overturn anti-critical race theory laws, but often will protect students' right to receive the information these laws chill. The deeper insight of these conclusions is that they rest on the same, sound constitutional reasoning: that the First Amendment works to protect equal political participation in democratic self-governance, as part of the Constitution's larger foundational goal of securing equal popular sovereignty.

The First Amendment implications of these speech-chilling laws thus illustrate that, in service of democratic governance, the free speech right (1) leaves substantial room for government regulation of speech to protect safe and effective public services, including public school education; (2) rejects paternalism in favor of fostering individual enlightenment and growth in service of effective democratic self-governance; and (3) is primarily designed to protect the free flow of information so that citizens make good choices in their social, political, and economic lives. This analysis emphasizes that the First Amendment protects citizens' right to receive information critical to fulfilling and benefitting from their role as citizens. Anti-CRT laws do not run afoul of this principle—and in some ways they actually advance it—when it comes to regulating teachers' and parents' speech. The laws do, however, hinder democratic governance as applied to students' rights to receive information critical to their ability to engage as full citizens. Finally, this conclusion illustrates how seemingly disparate areas of free speech law all rest on a common anti-orthodoxy principle that serves to tie First Amendment law together and advance full and equal democratic participation.

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INTRODUCTION

Speech on race and racism in our nation's public schools is under attack for partisan gain. The Free Speech Clause of the First Amendment teaches a lot about the wisdom and legality of laws that chill such speech in the classroom. But more importantly, a First Amendment analysis of these laws reveals profound insights about the health and meaning of our free speech doctrine.

Increasingly throughout the country, Republican-led state legislatures are proposing and passing laws intended to restrict discussion of racism and bias in public schools.[1] The laws are colloquially referred to as "anti-critical race theory laws," or "anti-CRT" laws for short. They largely prohibit instructing that, for example, racism is systemically embedded in American society; that racism facilitates racial inequality; that the United States is fundamentally racist; or that it is right to treat others differently with respect to race. Simultaneously, conservative groups and parents are vigorously pushing to ban school library books and lessons presenting diverse racial experiences.[2] It is a clash of social conservatism and the freedom of speech, offering a pressing opportunity to explore and assess the constitutional bounds of the First Amendment right to free speech.

This essay takes up that opportunity. Through a First Amendment analysis of anti-CRT laws, it illuminates first principles and key insights about the free speech right. The top line conclusion of the case study is that anti-CRT laws typically do not violate the free speech rights of teachers or parents, but do violate students' free speech rights—specifically their First Amendment right to receive information that is integral to participating as

[1] *See* PEN AM., EDUCATIONAL GAG ORDERS 4 (2022); *Index of Educational Gag Orders*, PEN AM. (2023), https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=1505554870 [https://perma.cc/M6ZU-65UK].

[2] Elizabeth Harris & Alexandra Alter, *A Fast-Growing Network of Conservative Groups is Fueling a Surge in Book Bans*, N.Y. TIMES (Dec. 12, 2022), https://www.nytimes.com/2022/12/12/books/book-bans-libraries.html [perma.cc/AF6B-Z2N4].

engaged and informed citizens in a democracy.[3] This analysis, in turn, lucidly illustrates the core purpose of the First Amendment and the foundational theory of free speech law that stems from it. In short: it elucidates that the First Amendment is designed to protect equal political participation in democratic self-governance. It is a cornerstone right of the Constitution's larger foundational goal of securing equal popular sovereignty—the notion that sovereignty resides in the people and that political power is equally distributed among them.[4] Free speech law is designed to enforce and advance this principle. The animating theory that guides free speech doctrine is accordingly best described as a 'social democratic theory' of speech protection.[5] This theory shapes the free speech right in a way that protects equal democratic governance.[6]

To be sure, these are not uncontested readings of the purposes and theoretical contours of either the free speech right or our constitutional system of governance more generally. This is why a First Amendment case study of anti-CRT laws is particularly valuable. The case study bolsters this interpretation of the free speech right and constitutional democracy from a positivist and doctrinal perspective. It shows how a 'social democratic' First Amendment, focused on securing equal political participation in democratic self-governance, best explains and unifies the often-paradoxical contours of the free speech right and offers a clear guide for evaluating new restrictions on speech—including these new laws that chill speech on race in the classroom—in an ever more polarized world.

Democratic governance, as a constitutional end, has two interrelated parts: public participation in self-government (the "democratic" part) and well-functioning government services (the "governance" part). The First Amendment protects speech to advance both causes. First, it protects democratic participation by protecting the free flow of information that citizens need to make enlightened political, economic, and cultural choices. To this end, it permits regulations on speech that are necessary for citizens to meaningfully participate in democratic decision-making, broadly understood.[7]

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[3] I use the word citizenry and citizen throughout this essay to refer to members of our nation's social and political community, and not to the legal definition of citizenship.

[4] Francesca Procaccini, *Reconstructing State Republics*, 89 Fordham L. Rev. 2157, 2161 (2021).

[5] Francesca Procaccini, *Equal Speech Protection*, 108 Va. L. Rev. 353, 439–41 (2022).

[6] Contrast this theory to other traditional theories of free speech positing that the primary purpose of the right is to advance self-expression (in the spirit of John Locke), self-governance (championed by Alexander Meiklejohn), the pursuit of truth and knowledge (espoused famously by Justice Holmes dissenting in *Abrams v. United States*, himself influenced by contemporary Zechariah Chafee and forebear John Milton), a counterweight to government power (articulated eloquently by Vincent Blasi) or tolerance in a multicultural society (well described by Thomas Emerson).

[7] For example, the First Amendment broadly and equally protects the free flow of political, cultural, and commercial information and also permits governments to enact time, place, and manner restrictions on speech in order to foster the effective and safe exchange of ideas and information. Procaccini, *supra* note 5, at 357-58, 392-93.

Second, the First Amendment protects the functioning of government by protecting speech in ways that allow the government to execute its democratic mandates. To this end, it permits regulations on speech that are necessary for government to implement the public's will and effectively provide public services.[8]

The recent spate of laws banning various race-related lessons presents a uniquely clear and revealing case study for understanding the scope and focus of the free speech right and its social democratic underpinnings. These laws were politically dubbed 'anti-critical race theory' laws for purporting to prohibit the central tenets and instructional framework supplied by critical race theory. Critical race theory is a nuanced, complex, and insightful legal framework for understanding the interconnectedness of race with law, society, history, and justice.[9] The theory posits that the law and embedded power structures in the United States create and entrench systemic racial inequalities, and provides an analytical framework for evaluating how law and institutions can produce greater racial equality. Critical race theory examines how racial privilege, inequality, and bias pollute our legal and social systems and, in so doing, offers specific legal and policy paths forward for correcting past and present racial injustices. At bottom, critical race theory contributes a sound and significant diagnostic lens through which to assess our democracy.

The recent rise of so-called anti-CRT bills is the product of political opportunism.[10] In search of fodder to spur culture wars that translate into votes, conservative politicians advanced a narrative that progressive public school teachers are provoking racial divisions and teaching children that they are racist.[11] The language of these bills and of the 15 that have become

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[8] For example, the First Amendment permits government substantial discretion to regulate speech within government institutions (such as schools, courts, and prisons), on public property, among government employees, in the administration of government services (such as elections and taxation), and within private institutions that significantly impact the economy and public safety (such as the stock exchange and health insurance markets). *Id.* at 381-97.

[9] *See generally*, Kimberlé Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1996); DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE (2014).

[10] *See, e.g.*, Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory [https://perma.cc/453R-SAMQ].

[11] Liz Crampton, *GOP Sees 'Huge Red Wave' Potential by Targeting Critical Race Theory*, POLITICO (Jan. 5, 2022), https://www.politico.com/news/2022/01/05/gop-red-wave-critical-race-theory-526523 [https://perma.cc/URD6-YLSG]. The political salience of this caricature also has the added conservative benefit of maligning public and elite education and shielding existing power structures from critique. *See* Kathryn Joyce, *Republicans Don't Want to Reform Education. They Want to End It*, THE NEW REPUBLIC (Sept. 30, 2021), https://newrepublic.com/article/163817/desantis-republicans-end-public-education [https://perma.cc/H494-46ZL].

law, mostly do not mention critical race theory by name.[12] Nor do most actually ban the teaching of critical race theory lessons, as properly defined and understood. Instead, the typical bill consists of vague pronouncements, riddled with exceptions, that focus on banning the teaching of race stereotyping and the notion that individuals of different races should be treated differently or should bear responsibility (emotional or otherwise) for past racial discrimination.[13] As a result, the bills tend to chill conversation about race in the classroom by imposing vague and politically-charged prohibitions on speech and, more broadly, by explicitly characterizing discussion of racism, race relations, and structural racism as divisive, inflammatory, and unamerican.[14] One example of such a bill reads as follows:

> A school . . . may not include instruction relating to critical race theory in any . . . curriculum offered by the district or school. For purposes of this section, "critical race theory" means the theory that racism is not merely the product of learned individual bias or prejudice, but that racism is systemically embedded in American society and the American legal system to facilitate racial inequality.[15]

Additional examples of such bills ban the teaching of "divisive" concepts, including the concepts that:

1. One race or sex is inherently superior to another race or sex;
2. The United States is fundamentally racist or sexist;
3. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
4. Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
5. An individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
6. Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex;

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[12] *See* PEN AM., *supra* note 1.

[13] *See* Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723, 726–28 (2022) (arguing that these bills are so vague and spurious in their effort to address actual critical race theory lessons that many not only do not ban the teaching of true critical race theory but may even be read to mandate more CRT or defend the presence of CRT education).

[14] Most bills are structured as prohibiting educators from promoting a series of "divisive concepts," which then include an enumerated list of race-related concepts. Some legislatures, like in Idaho's H.B. 377, have gone further and explained in the bills that they find these topics to "exacerbate and inflame divisions" and are "contrary to the unity of the nation."

[15] N.D. CENT. CODE § 15.1-21-05.1 (2022).

7. Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.[16]

These bills tend to include the admonition that the listed prohibited lessons, "often found in critical race theory . . . exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria in ways contrary to the unity of the nation."[17]

For the purposes of this essay, I credit the extensive concerns of educators that these bills do prohibit or chill speech in the classroom about race, racism, and marginalization and their relationships to law, history, and society.[18] Such concerns have inspired national alarm over the educational, civic, and speech repercussions of these bills.[19] But the constitutional contours of these laws, and especially the First Amendment implications of their chilling effect on discussing race in the classroom, have yet to be deeply explored.[20] This essay provides that deep dive in service of a broader effort to offer a reckoning over the purpose and meaning of the free speech right.

The top line conclusion of the analysis is straightforward: the First Amendment offers little refuge to teachers or parents looking to overturn anti-critical race theory laws, but often will protect students' right to receive the information these laws chill. The deeper and more provocative insight of

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[16] *See, e.g.*, S.B. 377, 156th Gen. Assemb., Reg. Sess. (Ga. 2021–2022). Anti-CRT bills that include this, or near identical, language are borrowing from an Executive Order issued by President Trump. Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020), https://www.govinfo.gov/content/pkg/FR-2020-09-28/pdf/2020-21534.pdf [https://perma.cc/U43Q-W4GK].

[17] IDAHO CODE § 33–138 (2021).

[18] *See* Olivia B. Waxman, *Anti-'Critical Race Theory' Laws Are Working. Teachers Are Thinking Twice About How They Talk About Race*, TIME MAGAZINE (June 30, 2022), https://time.com/6192708/critical-race-theory-teachers-racism [https://perma.cc/LR9V-RHUT]; Laura Meckler and Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring*, WASH. POST (Feb. 14, 2022), https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws [https://perma.cc/356K-CH7S]; Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons*, NPR (May 28, 2022), https://www.npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship [https://perma.cc/2XWP-M8AR].

[19] *See generally* Eesha Pendharkar, *Efforts to Ban Critical Race Theory Could Restrict Teaching for a Third of America's Kids*, EDUCATION WEEK (Feb. 4, 2022), https://www.edweek.org/leadership/efforts-to-ban-critical-race-theory-now-restrict-teaching-for-a-third-of-americas-kids/2022/01 [perma.cc/3BCJ-NYSV].

[20] Meera Deo, Jeannie Suk Gersen, and Jonathan Feingold are a few that have written on their legal dimensions. The ACLU has brought two lawsuits, one in Oklahoma and one in New Hampshire, challenging these as void for vagueness in violation of the Fourteenth Amendment and, in the case of the Oklahoma law only, as violating the First Amendment rights of students and teachers. *ACLU, Largest Teachers' Union NEA-NH, Leading Disability And LGBTQ+ Advocacy Groups, File Federal Lawsuit Challenging New Hampshire Classroom Censorship Law*, ACLU (Dec. 20, 2021), https://www.aclu.org/press-releases/aclu-largest-teachers-union-nea-nh-leading-disability-and-lgbtq-advocacy-groups-file [https://perma.cc/Z427-CBLK]; *ACLU, ACLU of Oklahoma, Lawyers Committee File Lawsuit Challenging Oklahoma Classroom Censorship Bill Banning Race and Gender Discourse*, ACLU (Oct. 19, 2021), https://www.aclu.org/press-releases/aclu-aclu-oklahoma-lawyers-committee-file-lawsuit-challenging-oklahoma-classroom [https://perma.cc/56BK-77ZM].

these conclusions is that they rest on the same sound constitutional reasoning: that the First Amendment works to protect democratic governance and good citizenship. Analyzing the First Amendment implications of these speech-chilling laws illustrates that, in service of democratic governance, the free speech right (1) leaves substantial room for government regulation of speech to protect safe and effective public services, including public school education; (2) rejects paternalism in favor of fostering individual enlightenment and growth in service of effective democratic self-governance; and (3) is primarily designed to protect the free flow of information so that citizens make good choices in their social, political, and economic lives. In short, the analysis emphasizes that the First Amendment protects citizens' right to receive information critical to fulfilling and benefitting from their role as citizens. Anti-CRT laws do not run afoul of this principle—and in some ways they actually advance it—when it comes to regulating teachers' and parents' speech. The laws do, however, hinder democratic governance as applied to students' rights to receive information critical to their ability to engage as full citizens.

This essay expounds upon these features of the social democratic First Amendment by using anti-CRT laws as a case study. Part I.A explains that the First Amendment tolerates such restrictions on public school teachers' speech to facilitate democratic governance. These restrictions on curricula, however personally objectionable to one's own political persuasions, are necessary to ensure public education, as a public service, incorporates democratic input and is implemented effectively.

Part I.B explains that parents have no cognizable First Amendment rights on behalf of their children to strike down anti-CRT laws. The analysis here sheds light on the dignitary interests undergirding the free speech right and how those personal interests serve the First Amendment's constitutional interest in protecting democratic self-government.

Part II explains why students *do* have a First Amendment right to receive CRT-related education. The critical insight of this analysis is that students—and indeed, all citizens—have a First Amendment right to receive information that is necessary to meaningfully participate as citizens in a democracy. The right to receive information under the First Amendment is under-recognized. But it is an established and central tenet of free speech law deserving of excavation and embrace. Analyzing the contours of students' First Amendment right to receive certain information *in their public school education* elucidates an anti-orthodoxy principle that animates free speech law more broadly. The strength and ubiquity of this principle, in turn, exposes the social democratic theory of speech protection as undergirding the entire scaffolding of free speech law, helping to unify a disparate jurisprudence and expound a more resilient First Amendment.

I. Social Democratic Limits on Free Speech in Schools

The First Amendment permits reasonable regulations on speech to promote social democratic governance. This includes limiting public employees', including public school teachers', speech rights in the classroom. It also limits parents' rights to control the speech their children receive. It does not matter whether the speech at issue is pure political speech, which is purportedly afforded stringent protection under the First Amendment. In many ways, the fact that the speech is politically instructive actually cautions against granting increased constitutional protection for teachers and parents to impart their individualistic beliefs onto an impressionable and captured audience. The First Amendment is concerned with protecting the rights of citizens to shape and contest the performance of public services and to grow into mature and enlightened participants in democratic self-governance.

A. Democratic Limits on Teachers' Speech

Though neither students nor teachers shed their First Amendment rights at the schoolhouse gates, public school teachers, as government employees, enjoy significantly fewer speech rights when speaking *as teachers*. And this makes good sense. No government could function well or ensure democratic responsiveness if unable to control how its employees carry out its policies and services—and much of, if not most, government activity occurs through speech. Teaching is but one example. Without the authority to dictate what teachers teach, the task of public education would be inconsistent, arbitrary, and idiosyncratic, not to mention void of meaningful democratic oversight and accountability.

First Amendment law reflects this compromise. Teachers' free speech rights are governed by a two-pronged test that asks (1) is the teacher speaking as a citizen on a matter of public concern,[21] and if so (2) is there no reasonable justification for treating that teacher's speech rights differently from that of any other citizen.[22] Both prongs must be answered in the affirmative for the First Amendment to protect a teacher's speech from government regulation. In the case of teaching critical race theory (or not) as part of a school's designated curriculum, it is clear teachers don't satisfy either prong.[23]

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[21] Connick v. Meyers, 461 U.S. 138, 146–48 (1983)

[22] Pickering v. Bd. of Educ., 391 U.S. 563, 568, 572–73 (1968).

[23] This analysis is limited to primary and secondary public education. A harder question emerges when considering the First Amendment speech rights of public university professors. The question boils down to whether the First Amendment separately protects a sphere of academic freedom in a university setting. The Supreme Court has explicitly left the question open, and the lower federal courts are split. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022); Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) (leaving open whether its rule applies to teaching and academic scholarship); *see also* Meriwether v. Hartop, 992 F.3d 492, 518 (6th Cir. 2021) (finding public university professor stated a plausible First Amendment

First, when teachers are *teaching* they are not speaking as citizens on a matter of public concern. They are instead fulfilling the core official duty for which they are hired. The Supreme Court has explained 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."[24] True, the *content* of a teacher's statements in a CRT-related lesson would surely involve matters of public concern, defined by the Court as "any matter of political, social, or other concern to the community."[25] But a teacher would be discussing those matters as part of her official curricular responsibilities, not as a participant in public discourse. Lower courts roundly agree that curricular speech is official speech, and thus subject to state regulation.[26] Indeed, even the methods by which teachers deliver the curriculum, and how they communicate with their students, is core to their academic duties and thus official speech subject to state control.[27]

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claim challenging a university policy of not misgendering students); Adams v. Trs. of the Univ. of N.C. Wilmington, 640 F.3d 550, 562–63 (4th Cir. 2011); Buchanan v. Alexander, 919 F.3d 847, 852–53 (5th Cir. 2019); Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014); *but see* Wozniak v. Adesida, 932 F.3d 1008, 1010 (7th Cir. 2019) (applying *Garcetti* to public university professor's speech). From a doctrinal perspective, the answer is murky. The Supreme Court has recognized *some* indeterminant zone of increased constitutional protection for academic speech and scholarship. *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (The Supreme Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, *universities occupy a special niche in our constitutional tradition*." (emphasis added)); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (The First Amendment "does not tolerate laws that cast a pall of orthodoxy over the [university] classroom."); Sweezy v. New Hampshire, 354 U.S. 234, 235, 244–45, 250 (1957) (holding a legislative inquiry into the contents of a professor's lectures "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression."). From a theoretical perspective, the answer is more apparent. Though public university curricular speech is undoubtably official speech, there is little reasonable justification in a pluralistic democracy to confine or direct academic speech. Quite the opposite, as doing so would impede the function of the public university service, which is to generate knowledge, search for truth, and inculcate mature adults with the intellectual and interpersonal skills needed to handle diverse problems and the robust exchange of viewpoints and ideas.

[24] *Garcetti*, 547 U.S. at 421.

[25] *Connick*, 461 U.S. at 146–47.

[26] *See, e.g.*, Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 970 (9th Cir. 2011); *but* see Evans-Marshall v. Bd. of Educ. of Tipp City, 624 F.3d 332, 334 (6th Cir. 2010) ("[T]he First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools.").

[27] *See* Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 839 (S.D. Ind. 2020) (method of addressing students in high school classroom is official speech by teacher, not speech by a private citizen); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000) (material that a teacher posted on a school bulletin board is government speech, and therefore may be regulated by the government under the First Amendment). In addressing the issue of pronoun policies in the classroom, the Court in *Kluge* explained: "While addressing students by name may not be part of the music or orchestra curriculum, it is difficult to imagine how a teacher could perform his teaching duties on any subject without a method by which to address individual students. Indeed, addressing students is necessary to communicate with them and teach them the material—as the Seventh Circuit has stated, how teachers relate to students is part of their jobs, and running a classroom is a 'core academic dut[y].' Thus, the speech at

Second, even if a public school teacher was able to satisfy prong one,[28] they could not overcome prong two, which grants First Amendment protection to a teacher's speech only where the government does not have good reason to treat the teacher's speech differently from that of an ordinary citizen. In effect, the teacher's free speech interests are balanced against the state's interests "in promoting the efficiency of the public services it performs through its employees."[29] In the case of public school education, this means a teachers' speech—even if spoken as a citizen on a matter of public concern—is not protected if it impedes the performance of her classroom duties or the regular operations of the school.[30] Refusing to abide by curricular dictates such as those contained in anti-CRT laws would, by definition, impede a teacher's performance of her classroom duties.

This two-pronged test is often criticized for being insufficiently protective of government employees' speech rights, and consequently depriving the public of valuable information.[31] When viewed from the perspective of individual liberty and informational freedom, these criticisms have merit. In particular, the fallacy of a strict divide between speech made pursuant to a government employee's "official duties" and their "speech as a citizen on a matter of public concern" is problematic. Statements involving whistleblowing, public engagement or, as it happens, teaching can all be made as a part of one's job in government and nonetheless be voiced from the position of a concerned citizen. And once an employee is determined to be speaking as a citizen, it does not automatically follow that their speech should be subordinated to competing interests of government efficiency.

It is only when viewed through the understanding that the First Amendment's central aim is to protect democratic governance—for which individual speech rights and the free flow of information are *means* to this end—that the soundness of both prongs comes into clearer focus. First, where an employee is performing a government function—even where they are also acting as a citizen or saying something of public worth—the government must be able to discipline that speech to ensure it conforms with its (democratically enacted and accountable) policies. For example, if a community

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issue was part of Mr. Kluge's official duties, and this alone is sufficient to preclude any free speech claim under the First Amendment." *Kluge*, 432 F. Supp. 3d at 839.

[28] *Cf.* Santa Cruz Lesbian and Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 541-42 (N.D. Cal. 2020) (holding that federal contractors, when engaged in internal training, satisfy both prongs of *Pickering* and thus have a First Amendment claim against the enforcement of a Trump Administration order banning certain training related to race).

[29] *Pickering*, 391 U.S. at 568.

[30] *Id.* at 572.

[31] *See generally* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301; Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L. J. 1 (2009); Paul Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117 (2008); Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529 (1998).

votes in a district attorney who campaigns on the promise of reducing incarceration for minor offenses, an assistant district attorney may not express disapproval of that policy while negotiating a plea deal. Similarly, a country clerk may not go "off script" without consequence by denigrating same-sex marriage in the course of performing one.

The reason is not just that government should function in a way that reflects democratically enacted policy preferences. It is also for the basic reason that government employees have power; and when they act in their official capacity, the authority of their office attaches to their words. Their speech, in these circumstances, takes on greater power to persuade, to intimidate, to change the course of public conversation than that of the average citizen. Even where a government employee intends to speak as a citizen, their official words have outsized public influence.[32] This situation violates the bedrock constitutional principle of equal popular sovereignty—that all citizens have equal weight to influence their government—which the First Amendment exists to protect. Prong one is thus defensible as a proxy for protecting political equality among citizens.[33]

Prong two of the test is defensible under the same logic. Democratic *governance* requires subordinating an individual's speech right when it threatens the efficacy of governmental services. This is customary throughout First Amendment law. Your right to protest may not threaten public safety; your freedom of speech does not shield you from paying taxes; your right to campaign does not include a right to disrupt elections, etc. The second prong incorporates this 'effective governance' principle. The health of our government is indispensable to the survival of democracy. Balancing that existential goal against an individual right is constitutionally salient.

This is particularly true in the context of public education, where tailoring teachers' speech is essential to promoting and legitimating democratic governance. As two educators recently wrote in an article on handling the uproar over critical race theory in public schools:

> Controversies over 'official knowledge' are often proxies for larger issues of power relations. What textbooks to include or exclude touch on values that people hold most dear and obscure those who control the decisions about what—and whose—knowledge school children get to learn.[34]

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[32] *Cf. Bremerton*, 142 S. Ct. at 2429 (acknowledging public employee's religious speech raises the risk of impermissible religious coercion under the Establishment Clause due to the nature and power of a public employee's position in government).

[33] It is by this logic that it should be constitutional to treat the political speech rights of corporations or the wealthy different from the average citizen. *Cf.* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Davis v. Federal Election Commission, 554 U.S. 724 (2008). It does not violate the free speech clause, understood as a safeguard of democratic self-governance, to treat unequal citizens unequally (or, in the Court's words, to discriminate on "the basis of the speaker's . . . identity"). *Citizens United*, 558 U.S. at 365.

[34] Leslie S. Kaplan & William A. Owings, *Countering the Furor Around Critical Race Theory*, 105 NAASP Bulletin 200, 207 (2021).

This country is deeply divided over its history, and thus over its present, as well. These divisions reflect and incite larger political divisions, which in turn seriously impact citizens' trust in government. The deterioration of trust in government then diminishes public faith and confidence in constitutional democracy itself.[35] The place to air, vet, and mend these divisions is through public discourse and democratic participation.

Public school teachers enjoy one of the most enduring and powerful positions in this process of communicating and molding political values. A public school classroom, under teachers' stewardship, serves three integral, and interrelated, public services for children: socialization (instilling communal social and civic values), qualification (imparting knowledge and skills), and individuation (enhancing individual growth).[36] All three educational goals are ultimately defined and measured against the community's social and political standards. It is for this reason that community input into how teachers exercise their role in the classroom is so democratically vital. When our schools depart too far from the community's sense of values, the community loses faith not only in the government institution at issue (here, the public school system) but also in the process of democratic self-government itself.[37]

B. Democratic Limits on Parents' Speech Rights

The desire of many parents to determine what their children hear and learn in public school is understandable, even laudable; but it is not a protected right under the free speech clause of the First Amendment.[38] Parents, generally, do not have a First Amendment right to protect their children's voices from government regulation, or their ears from government messaging. Once again, this feature of the free speech right—that it protects only one's *own* participation in democratic discourse—tells us a lot about the democracy-serving function of the First Amendment.

The lack of First Amendment protection for parents over their minor children's speech rights serves two important democratic functions. First, it ensures that no individual parent has a constitutional veto over community

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[35] *See id.* at 201 (citing polls and studies).

[36] *Id.* at 207–08 (citing Gert Biesta, *Risking Ourselves in Education: Qualification, Socialization, and Subjectification Revisited*, 70 EDUCATIONAL THEORY 89 (2020)).

[37] This analysis also shows that while litigation is one avenue of resistance for teachers—and the Fourteenth Amendment void for vagueness argument has real merits—it is a limited avenue. A more successful approach is likely to be harnessing the power of teacher organization and advocacy. To start, the African American Policy Forum is spearheading an effort to explain to the public the purpose and importance of instruction around race, racism, bias, and marginalization. *See Welcome to the #TruthBeTold Campaign*, AAPF, https://www.aapf.org/truthbetold [https://perma.cc/EVJ3-YW8A] (last visited Jun. 20, 2023).

[38] As discussed *infra*, parents have a First Amendment free exercise right and Fourteenth Amendment due process right to choose not to enroll their children in public school. But once enrolled, they must rely on the democratic process (and their First Amendment protected rights to participate in that process) to influence the content of their children's education.

assessments and democratic decisions about school curricula, or any other speech regulation directed at child development. Granting parents First Amendment protection against government regulations of their child's speech would, in essence, force individual parental choices about knowledge, speech, and learning onto the community. This is not to say parents are powerless to influence what their children learn in public school or that the First Amendment is entirely irrelevant to exercising that power; parents may utilize their own First Amendment rights of speech, petition, assembly, and press to influence the democratic processes that control public school curricula. Indeed, most public schooling decisions are made at the local government and school board level, two hyper-popular bodies that are structured for maximum parental input.

Second, the lack of a parental right to control what one's children learn in public school enhances children's constitutional protection to develop beyond the confines of their parents' views and teachings, which is integral to the First Amendment's protection of individual enlightenment. Put succinctly, a paternalistic speech right is no free speech right at all.[39] To illustrate the point, it is helpful to borrow from the framework of standing. According to the doctrine, a litigant must suffer a concrete injury to bring a claim for relief. Inversely, a litigant has no right that was infringed if they weren't directly injured. Applied to parents' rights under the First Amendment, a parent's speech right is not infringed unless they suffer a personal injury. But for a parent to suffer a personal injury when their child's speech rights are infringed must mean that the injury suffered is a loss of control. Inversely, the right infringed upon is *control* over the child's speech. Control over another's speech is exactly what the First Amendment protects against, because controlling speech threatens to stifle or skew the acquisition of knowledge and awareness necessary to foster an informed citizenry.[40]

The Supreme Court has not articulated the absence of parental hegemony over their children's speech rights in quite this way, but it has consistently relied on children's position as future citizens to reject a parental speech right. Justice Thomas has resolutely disagreed, advocating the symbiotic argument that parents have absolute authority over their minor children's speech—an argument that serves to deprive children of any First Amend-

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[39] For a thoughtful discussion of the relationship and tensions between parental rights, children's speech rights, and citizenship, *see* Anne C. Dailey, *In Loco Respublicae* (Jul. 2022) (unpublished manuscript) (on file with author).

[40] *See* Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. (forthcoming 2023) (criticizing civil vigilante laws, including provisions authorizing citizens to sue teachers for violating an anti-CRT law as "empower[ing] culture warriors, who often have suffered no material harm, to wield the power of the state to suppress the rights of disfavored or marginalized individuals and groups (or their allies). . . . Private subordination regimes flip conventional understandings of rights and dignity on their head to empower individuals motivated by moral outrage to surveil, sue, and punish their neighbors, teachers, colleagues, healthcare providers, and other (politically disfavored) members of their communities.").

ment rights beyond those they residually inherit from their parents.[41] The Court has roundly rejected this view, finding it intolerable under the First Amendment to grant parents a veto over their children's speech rights because parental gatekeeping of information does not serve children in their development as future leaders, voters, and members of an informed, pluralistic society.[42] Similarly, the Court has resisted the theory that parents may *consent* to a state's constitutional violation of their child's speech rights at school, implicitly rejecting the suggestion that students' speech rights are controlled by their parents.[43]

To sharpen the point, contrast parents' lack of First Amendment rights over their children's *speech* with parents' Fourteenth Amendment rights to direct their children's *education*. The difference inheres in the nature of the right at issue. *Meyer v. Nebraska*[44] and *Pierce v. Society of Sisters*[45] together recognized a Fourteenth Amendment "liberty" right of parents to meaningfully guide their children's educational upbringing. This includes the right to choose a private education for their children or to privately teach their children certain subjects, such as foreign languages or religion.[46] Similarly, parents have a Fourteenth Amendment right against racial discrimination in their children's education.[47] The Fourteenth Amendment, unlike the First Amendment, is a reparative amendment that seeks to enshrine the fundamental rights of *political citizenry and personal autonomy* that were denied to slaves. The Amendment addresses *both* the political and personal liberties that the odious institution of slavery deprived enslaved individuals. As such, the many rights protected by the Fourteenth Amendment include the per-

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[41] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 822–23 (2011) (Thomas, J., dissenting).

[42] *Id.* at 795 n.3. It also is not in line with the robust history, which even Justice Thomas touts, of public concern with training malleable youth into adults capable of self-government. *See id.* at 825–28 (Thomas, J., dissenting).

[43] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2048 (2021) (Alito, J., concurring) (writing for himself and only one other Justice that schools may discipline student speech because parents consent to this diminution of their speech rights under the legal doctrine of *in loco parentis*—the school stands in the place of the parents).

[44] 262 U.S. 390 (1923).

[45] 268 U.S. 510 (1925).

[46] Neither *Meyers* nor *Pierce* were decided on First Amendment grounds, or even mentioned the First Amendment or the freedom of speech. Yet forty years later, in *Griswold v. Connecticut*, the Court grafted on a First Amendment rationale for their holdings. 381 U.S. 479, 482–83 (1965). The revisionist explanation was that the statutes at issue were unconstitutional because "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge," and that this First Amendment principle was applicable against the state via the Fourteenth Amendment. *Id.* at 482. The revision was likely spurred by then-hotly contested arguments over substantive due process and the incorporation doctrine (by which the Bill of Rights is made applicable to the states through the due process clause of the Fourteenth Amendment). As Justice Douglas wrote the majority in *Griswold* and favored the incorporation doctrine he was likely reinterpreting *Meyers* and *Pierce* to fit his preferred constitutional framework. *See* Gideon v. Wainwright, 372 U.S. 335, 345–346 (1963) (Douglas, J., concurring).

[47] Gonzales v. Douglas, 269 F. Supp. 3d 948, 972–74 (D. Ariz. 2017).

sonal liberty to compose and direct familial life that was denied to slaves.[48] The First Amendment, by contrast, protects the political liberties of speech, press, petition, and assembly. These political liberties promote the personal liberty of self-actualization, but they do so in function of protecting an informed and progressive citizenry. The relationship between political and personal liberty in the First Amendment is therefore functional; the latter serves the former, whereas the Fourteenth Amendment's dual concerns for political and personal liberty stand independent of one another. Parents do not have a First Amendment right to direct their children's speech because that amendment protects their political, not familial, autonomy.

It is ultimately important to limit parents' First Amendment rights in this way to better ensure children have a freer opportunity, beyond the paternalistic environment of the home, to receive the information and ideas necessary to develop into enlightened citizens. This is especially true given that school is compulsory, and over ninety percent of children attend public schools in which they have little or no say over the content of their learning. Parents already have vast authority to shape and gatekeep the information that reaches their children. Constitutionalizing this power dynamic in the school environment risks antidemocratic indoctrination, knowledge constriction, and a failure to socialize our youth in the pluralistic values that shape our communities.

II. Social Democratic Protections for Speech in School

Students have a First Amendment right to receive accurate and pertinent educational information that is necessary for making—or preparing to make—informed democratic decisions. Democratic decision-making, in a pluralistic free-market society such as ours, includes the combined social, political, and economic choices we make every day as community-members, citizens, and consumers.[49] In a diverse society that is founded on, grounded in, and awash with racial inequalities, learning about race, racism, and ine-

[48] One might ask then whether there is a *Fourteenth* Amendment right to control one's children's speech, above and beyond controlling their educational upbringing. The Fourteenth Amendment's protection against government interference in private and familial life may well go this far, though understanding parents' due process rights so expansively would, firstly, be redundant of children's own First Amendment rights and, secondly, might interfere with children's own Thirteenth and Fourteenth Amendment rights against state-sanctioned deprivations of natural liberty.

[49] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764–65 (1976); Amanda Shanor & Sarah E. Light, *Greenwashing The First Amendment*, 122 Columbia L. Rev. (forthcoming 2022) (adopting the understanding of the First Amendment this essay, and the Court in *Virginia State Pharmacy*, advances: that free speech serves democracy not just by protecting citizens' voice in the democratic process but also by understanding democratic participation more capaciously as including the myriad political, social, and commercial decisions citizens made each day and understanding the free speech clause as ensuring the free flow of information necessary to making such decisions in an enlightened and informed manner).

quality is vital to developing the knowledge and awareness needed for becoming an informed and capable participant in democratic self-governance.

A. Students' Right to Receive Educational Information in Public School

The right to receive information is inherent in the First Amendment's protection of political participation and democratic self-government. It is at its most salient when the government attempts to withhold or manipulate the free flow of information between citizens and where there is informational dependence between the speaker and listener. It is particularly vital where there is also a power asymmetry, and especially an element of coercion, inherent in the relationship between speaker and listener. In these situations, the listener requires robust protection of their right to receive information they depend on for democratic decision-making but are not in a position to know about, ask for, or understand. Naturally the teacher-student relationship fits these criteria. School is compulsory and school employees wield enormous power over students, who rely on the school for information they otherwise are not in a position to receive, know about, or understand. Further, the information at issue here—an education that is sensitive to issues of structural racism in our society—is integral for making informed social, political, and economic choices. The Supreme Court has acknowledged as much, and explicitly made the connection between a teacher's power, the student's reliance, and the health of democracy:

> Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. . . . Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.[50]

The right of students to receive information in their public school education, which necessarily involves myriad government selection and omission choices, means the state may not *prohibit* the teaching and classroom discussion of information that is integral to learning to participate as an informed citizen in a pluralistic democracy.[51] It also means, due to the "special

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[50] Ambach v. Norwick, 441 U.S. 68, 78–79 (1979).

[51] *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 879–82 (1982) (Blackmun, J., concurring).

characteristics of the school environment,"[52] in which "rights of students in the public schools are not automatically coextensive with the rights of adults in other settings,"[53] an exception to this rule exists for educational content that is not "reasonably related to legitimate pedagogical concerns."[54] In sum: students have a right to receive and discuss educational content needed for informed democratic decision-making unless there is a reasonable pedagogical purpose for excluding that content. As discussed further below, "reasonable" in the context of the First Amendment means pedagogical choices accounting for age, demographic, resource, and scholastic considerations, not those made for partisan or ideological purposes.

This rule comports with both the Supreme Court's most germane precedent and how Courts of Appeals have interpreted students' First Amendment rights in the context of school curricular choices. In *Kuhlmeier*, the Court held that the First Amendment permits schools to censor student speech that is reasonably attributed to the school "so long as their actions are reasonably related to legitimate pedagogical concerns."[55] In describing the type of speech at issue, the Court understood the case to concern speech activities that "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[56] Naturally, the actual design and implementation of a school's curriculum fits this definition, suggesting the rule it espoused does as well. This is indeed how lower courts have interpreted *Kuhlmeier* and the scope of public school's authority under the First Amendment to shape the curriculum.[57]

The rule is even clearer when viewed through the prism of the relevant threshold question here: why are students' First Amendment rights more limited in a public school to begin with?[58] If the state attempted to prohibit the teaching of critical race theory in private schools, or in the home, or even at

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

[53] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

[54] *Id.* at 273 (establishing the standard for protecting student speech that may reasonably be attributed to the school).

[55] *Id.*

[56] *Id.* at 271.

[57] *See* Arce v. Douglas, 793 F.3d 968, 982–83 (9th Cir. 2015) (applying *Kuhlmeier);* Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 629 (2nd Cir. 2005) (same); Virgil v. School Board of Columbia County, 862 F.2d 1517, 1522 (11th Cir.1989) (same); Pratt v. Independent School District No. 831, 670 F.2d 771, 779 (8th Cir.1982), (same, holding that removing material for purely ideological purposes is not legitimate); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289–93 (10th Cir. 2004) (same, and noting that the reason given may not be a pretext for an impermissible discriminatory motive); Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995 (same); Chiras v. Miller, 432 F.3d 606, 619–20 (5th Cir.2005) (applying *Pico*, limiting state's discretion if motivated by "narrowly partisan or political" considerations).

[58] *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2049–50 (2021) (Alito, J., concurring).

public libraries, there is little question the act would be unconstitutional. To understand why it is a harder question in the public school environment, one must understand the baseline reason for why the First Amendment operates differently in the public school setting. The answer is that the school must have sufficient, but not greater, authority than necessary for the institution to function. It must, in other words, have sufficient control of speech in that environment—from both teachers and students—to fulfill its educational mission. Laws that go further do not advance the purpose of the First Amendment to protect democratic governance and are unconstitutional. Students and teachers subordinate what speech rights they must—and no more—to protect the functioning of the institution as part of a "social contract" in a constitutional democracy to ensure the health of the governing system.[59]

B. Students' Right to Receive Critical Race Education in Public School

Under the rule just established—which could properly be shorthanded as the "anti-orthodoxy rule" of public school education—laws that prohibit all classroom instruction of age-appropriate critical race theory topics in public schools violate students' First Amendment right to receive information. These "anti-CRT" laws seek to instill a conservative ideological viewpoint about history and race in public school curricula. In our constitutional order, such an intent is not a "legitimate pedological purpose" and is therefore an unconstitutional restriction on speech in public schools under the First Amendment.

Laws that prohibit the teaching and discussion of critical race theory topics are designed to encourage, subsidize, and empower a conservative ideological movement. The aim of this curricular choice is to put a heavy thumb on the scale for one partisan group over highly contested matters in our democratic discourse. The laws are fundamentally anti-democratic because they are a transparent political effort "to reframe power in America, restructure intergovernmental, intergroup, and interpersonal relations, and advance an illiberal, partisan political agenda."[60] Such nakedly partisan and anti-democratic curricular choices are not "legitimate pedagogical purposes" under the First Amendment.

The permissible range of legitimate pedagogical reasons for excluding or prohibiting material from a school curriculum naturally depends on the

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[59] *Cf. id.* at 2051 (Alito, J., concurring) (answering this question with parental consent as opposed to social contract, or "public consent"). By Alito's reasoning, students enjoy limited constitutional rights at school because their parents consent to the diminution of their rights. But parents cannot consent to the diminution of their children's constitutional rights, as discussed above. Instead, students have limited rights in this context for the same reason *any* citizen has limited rights in certain contexts: because that limit on the speech right is necessary to advance democratic discourse or a functioning democratic system—in this case, the public education system.

[60] Michaels & Noll, *supra* note 40 at 25.

purpose of a public education system itself. In a constitutional democracy, a primary mission of a public school system is "inculcating fundamental values necessary to the maintenance of a democratic political system."[61] As the Court seminally recognized in *Brown v. Board of Education*, education may be the most important function of government because it is the most important fulcrum of democracy.[62] Education is required to perform all basic public responsibilities; it is, therefore, "the very foundation of good citizenship."[63] Education is also the principal instrument of socializing children to a democratic community and preparing them to adjust and participate in that community normally. As American philosopher and educator John Dewey recognized, democracy requires a "constant reweaving of the social fabric" through lessons and discussions of our nation's history, values, and standards.[64]

For public education to accomplish this essential purpose, it must be free of partisan ideology over democratically contested issues. Curricular choices that are premised on the ideological fixings of one "class, creed, party, or faction" create partisan education, not public education. The result is "to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes," thus failing to educate the young for citizenship.[65] Educational studies confirm that addressing contested social issues in the classroom through analysis, synthesis, evaluation, and creativity increases students' political knowledge and sense of citizenship.[66] Accordingly, the National Council for Social Studies is clear that "our democracy would disappear" if schools deprive students of the opportunity to engage with contested political ideas.[67] Accurately and holistically exploring this nation's past and present relationship to race and justice is indispensable to truly understanding our social fabric, and thus to gaining the knowledge necessary to make effective choices about how to govern and improve our democracy.

Put succinctly, students have a First Amendment right to receive pedagogically appropriate instruction about race, racism, and racial inequality in their public school education; and the desire to impose a political orthodoxy is not, in a pluralist democracy, a legitimate pedagogical reason to exclude such education. In its nature to protect full and equal political engagement, therefore, the First Amendment establishes an "anti-orthodoxy" rule for

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[61] Ambach v. Norwick, 441 U.S. 68, 77 (1979). *Cf.* Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 GEO. L.J. (forthcoming 2023) (arguing that the Supreme Court's education caselaw has, over time, prioritized consumer and private interests over the public-facing values of fostering democracy, citizenship, and equal opportunity).

[62] 347 U.S. 483, 493 (1954).

[63] *Id.*

[64] JOHN DEWEY, DEMOCRACY AND EDUCATION 4 (1916).

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

[66] Kaplan & Owings, *supra* note 34 at 10 (citing studies).

[67] National Council for Social Studies, *NCSS Position Statement*, 74 SOCIAL EDUCATION 334, 334 (2010).

public school education. As the next Section shows, this anti-orthodoxy rule—and the right to receive politically salient information more generally—undergirds, unifies, and helps elucidate the contours of the free speech right.

C. This Right Compliments, and Helps Stabilize, the Jenga Tower of Free Speech Law

The case study discussed in this essay, and its conclusion that students have a First Amendment right to learn and discuss critical race theory topics in public school, offers a unique vantage into the maze of First Amendment law that illuminates some of its most salient binding principles. In particular, it uncovers how foundational the anti-orthodoxy principle is and that its dominance persists because of how effectively it advances full and equal participation in democratic self-government. Starting narrow and expanding outward, this case study highlights how the anti-orthodoxy principle and, through it, equal political participation undergird: first, the Court's school speech doctrine; second, the Court's content and viewpoint neutrality rules; and third, the Court's broader precedents on the right to receive information and ideas in a democracy.

As this section shows, each of these areas of law rest on the first principle that the First Amendment protects speech to advance full democratic participation, in service of the larger constitutional goal of advancing equal popular sovereignty. Too often this insight is obscured, lost within the First Amendment's rabbit warren of intermingled doctrines. The task of unweaving them appears Sisyphean at best; but the endeavor to unearth the common threads that bind this law together—that make it a complimentary, rather than contradictory jurisprudence—is essential to understanding its meaning and maintaining its protections.

1. The Anti-Orthodoxy Rule Unifies School Speech Doctrine

The above analysis defining the scope of students' right to receive information in their public school curriculum, and the conclusion that this right precludes states from prohibiting discussion of critical race theory topics for partisan reasons, is consistent with the Supreme Court's broader precedents on student's free speech rights in school. Though these precedents articulate the right differently or address different speech suppression contexts, their reasoning and rules comport with the view that school speech doctrine is grounded in, and unified by, a robust anti-orthodoxy principle.

The Court's oldest seminal case on free speech in school is *West Virginia v. Barnette*, in which the Court held that the state may not force public school students to recite the pledge of allegiance.[68] The basis of the Court's

[68] 319 U.S. 624, 642 (1943).

reasoning was that such a requirement exceeded the states' power to define the public school curriculum to impose an "ideological discipline," or prescribe what is "orthodox in politics, nationalism, religion, or other matters of opinion."[69] Such an effort would, in other words, be an illegitimate pedological purpose. The Court acknowledged that schools may require instruction and study of history and government in a way that "tend[s] to inspire patriotism and love of country," but held the compulsion to declare a belief or the acceptance of a political idea is beyond the power of the state.[70] In threading this needle, the Court focused heavily on the Constitution's interest in preserving democracy. The unmistakable implication is that the state's power to encourage democracy may not be accomplished through anti-democratic means. The First Amendment stands as a safeguard against self-defeating regulations on speech.

In the modern era of free speech law, the foundational case defining students' speech rights at school is *Tinker v. Des Moines Independent Community School District*, which held a school may not punish a student's nondisruptive political expression.[71] *Tinker* teaches that it is not reasonable for the state to prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[72] The underlying rationale, again, here is that the First Amendment does not permit ideological disagreements, without more, to dictate the flow of information in a public school.

All of *Tinker*'s main progeny confirm this overarching principle, even while introducing varieties and subtleties to the standard of protection for student speech. First, in *Bethel School Dist. v. Fraser* and *Kuhlmeier*, discussed above, the Court broadly sanctioned schools' regulation of inappropriate and offensive student speech. These cases narrowed the scope of protected student speech, but their reasoning strongly reinforced the anti-orthodoxy principle of *Tinker* and *Barnette* by explicitly pinning the scope of the state's power over student speech to its "basic educational mission."[73] This framework limits the state to prohibiting only such speech that is "wholly inconsistent with the fundamental values of public school education,"[74] which, as discussed, do not include political indoctrination. This principle withstood the test of time. The Roberts Court upheld a principal's decision to censor a student for a message that could reasonably be interpreted as promoting drug use only because it understood drug abuse to pose a real threat to the state's legitimate pedagogical interest in protecting student health and safety. More recently, the Court held that a school could not

[69] *Id.*
[70] *Id.* at 631–32.
[71] 393 U.S. 503 (1969).
[72] *Id.* at 508–09.
[73] Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
[74] *Id.* at 685–86 (internal quotation omitted).

discipline a student for vulgar off-campus speech about the school cheerleading team because her speech could not pose any real danger of disrupting school morale or school operations.[75]

Finally, in a case with perhaps the most comparable facts to the case study of this essay—involving a First Amendment challenge to a school board's removal of racially-progressive books from the public school libraries based on a conservative educational ideology—seven Justices agreed that the government may not remove a book based on the author's political affiliation or the book's message "advocating racial equality and integration."[76] The plurality was more explicit: a school's "discretion may not be exercised in a narrowly partisan or political manner." [77] This would be to proscribe what is orthodox, and thus to deny access to ideas with which the state disagrees. The First Amendment makes this an illegitimate state goal, whether the state is using its discretion to censor, compel, exclude, or select speech in the school environment. Though the Court in this case was divided and the issue presented was quite narrow, the underlying reasoning again rests on, and carries forward, a robust anti-orthodoxy principle in school speech doctrine.

2. The Anti-Orthodoxy Rule Undergirds the Content- and Viewpoint-Neutrality Rules

The anti-orthodoxy rule in public school education also compliments, and helps elucidate, the Court's dogged insistence in other areas of First Amendment law on strict content- and viewpoint-neutrality. The general precept that laws which discriminate between content or amongst viewpoints are constitutionally suspect has long animated First Amendment law.[78] More recently, though, the Court has adapted this guiding principle into a reflexive, and rather inflexible, rule in an ever-increasing number of speech regu-

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[75] *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2047–48 (2021). Compare *Mahanoy* with Dariano v. Morgan Hill Unified Sch. Dist., 745 F.3d 354, 359 (9th Cir. 2014), which upheld a school's decision to require Caucasian students to remove their American flag t-shirts on Cinco de Mayo where there was evidence of impending racial violence, which would have caused a substantial disruption to school activities.

[76] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982). The four-Justice dissent "cheerfully concedes" this point made by the three-Justice plurality. *Id.* at 907 (Rehnquist, J., dissenting). There were also five votes in *Pico* (the dissenters plus Justice Blackmun, concurring in the plurality's opinion) that the school library is not special or apart from the school itself and that the same principles of free expression apply to each. *Id.* at 878, 892, 916.

[77] *Id.* at 870.

[78] *See* Stromberg v. California, 283 U.S. 359, 369 (1931); Chaplinsky v. New Hampshire, 315 U.S. 568, 569, 574 (1942); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Roth v. United States, 354 U.S. 476, 487–89 (1957); Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972).

lation contexts.[79] The explanations for its ascendence in jurisprudence are many.[80] A most convincing argument is that the rule acts as a very effective, if overinclusive, proxy for blocking laws that prescribe or encourage a state orthodoxy.[81] Where the Court has extended this rule to situations that pose little risk of the state regulating speech to impose a state-sponsored orthodoxy—such as, for example, state regulation of traffic signage or robocalls—the Court divorces the rule's purpose and effect.[82] Analyzing the case study of this essay through the lens of the court's content- and viewpoint-discrimination precedents helps elucidate that rules' proper function. It also shows how the anti-orthodoxy rule, derived from the silo of school speech cases, accords with the more widely applicable content- and viewpoint-neutrality precedents, helping to tie these disparate pockets of law into a more cohesive First Amendment doctrine.

The rule against content- and viewpoint-discrimination crystalized in the context of government regulation of speech in public places. Essentially all public property (and many public services) constitute some type of "public forum" for First Amendment purposes. The public nature and sheer ubiquity of such fora mean they are predominant places of public discourse. Even with the rise of the private internet, the case study of this essay shows how public spaces—like public schools—continue to have enormous discursive impact. Public forum doctrine divides public fora into different types based on use, and permits different levels of speech regulation accordingly. Relevant to the case study of this essay, public school is a quintessential (if paradoxically termed) "nonpublic" forum, defined as a place not designated as open for public expression.[83] In nonpublic fora, the government may reasonably regulate the content of speech to ensure speech comports with the intended purpose of the forum, but it may not regulate speech on the basis of viewpoint—a standard that squarely matches the school-specific test discussed above.

Applying forum doctrine, and its attendant content- and viewpoint-discrimination rules, to the case study of this essay, the same anti-orthodoxy

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[79] *See* Sorrell v. IMS Health, Inc., 564 U.S. 552, 564 (2011); Reed v. Town of Gilbert, 576 U.S. 155 (2015); *Becerra*, 138 S. Ct. at 2371; Barr v. Am. Ass'n of Political Consultants, Inc., 141 S. Ct. 84 (2020).

[80] *See generally* Susan Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991); Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 232 (2012) (noting that for forty years it has served as the "touchstone of First Amendment law").

[81] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996); *see also* City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) ("[The content discrimination doctrine] reflects important insights into the meaning of the free speech principle—for instance, that content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate. . . . And, perhaps most importantly, no better alternative has yet come to light.").

[82] *See* cases cited *supra* note 79.

[83] *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 48 (1983).

rule takes shape. Under a public forum analysis, the state would be permitted to reasonably control the content of its curriculum and students' speech in the classroom in keeping with the designated purpose of the forum. It may, for example, select relevant lessons and ensure students discuss the subject at hand, answer questions correctly, or speak in turn. This rule simply mirrors the one developed above: that schools may exercise their discretion over speech in ways "reasonably related to legitimate pedagogical concerns"[84] and in keeping with "the fundamental values of public school education."[85] Public forum doctrine would not permit the state, however, to censor or punish speech in the classroom based on viewpoint. Again, this outcome accords with the anti-orthodoxy rule that schools may not regulate the flow of information to and in classrooms in a nakedly partisan or ideological manner.

The analysis is complicated by the reality that the *speaker* in the nonpublic forum of the public school is often the government. For purposes of curriculum design and implementation, the relevant speaker is almost certainly the government. This introduces another doctrinal step-sister to the mix: the government speech doctrine. One of the only places in First Amendment law left untouched by the content- and viewpoint-neutrality principles is the government speech doctrine. When the government speaks, it may discriminate all it wants in terms of what it says and what views it espouses. The conundrum becomes, then, when a public school speaks, is it bound by the viewpoint-neutrality rules of the nonpublic forum doctrine or the more permissive rules of the government speech doctrine?

The Courts of Appeals are split on the question, disagreeing as to whether schools must be viewpoint neutral in designing and implementing school lessons and activities.[86] The answer to this conflict is to reason from first principles and ask why the viewpoint neutrality principle applies differently in these two areas of law. When the government opens a public forum—even one with a very specific public purpose—it cannot control speech in that forum to enforce, encourage, or subsidize one viewpoint over another because the result would be to taint public discourse with a state-sponsored view. Where the government is speaking, however, it does not surreptitiously taint public discourse as much as it transparently adds its (obviously partial) voice to the choir. The baseline principle that emerges here is that government may not *corrupt* public discourse with state-sponsored orthodoxy. Applied to the public school setting, this principle suggests that schools *may* instruct teachers to teach, and students to learn, a certain view

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[84] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[85] Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) (internal quotation omitted).

[86] *See* Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 631–33, 632 n.9 (describing the Circuit split between the First and Tenth Circuits' holding that educators may make viewpoint-based decisions about school sponsored speech; the Ninth and Eleventh Circuits' holding requiring viewpoint neutrality in non-public fora, which the Second Circuit joined; and the Third Circuit's equally divided opinion as to whether a viewpoint restriction is permissible if reasonably related to legitimate pedagogical concerns).

on a certain subject, but schools may not prohibit classroom discussion of other viewpoints on the designated topic of instruction.[87] In other words, where the school opens up discussions of history, race, civics, and politics—as it should—it cannot suppress or discriminate between moral and ideological viewpoints even as it officially espouses its own viewpoint preference. Once more, the analysis accords with the anti-orthodoxy rule.

Putting these doctrines together—public forum analysis, government speech doctrine, and the content- and viewpoint-neutrality rules—in the context of public school curricular choices reveals a coherent and binding thread in First Amendment law: the First Amendment establishes a floor for permissible speech regulations that permits context-dependent restrictions on speech that threatens to corrupt democratic governance or democratic discourse. But the perceived threat may not be amorphous, remote, or morally or ideologically constructed. In the case of anti-CRT laws, there is no plausible non-partisan threat that such teaching poses. The purported injury to students is entirely morally and ideologically constructed. This makes the prohibition viewpoint discriminatory and thus also an illegitimate pedagogical choice.

3. Students' Right to Receive Information in Public School Elucidates a Broader Right to Political Information in a Democracy

Tilling the soil of First Amendment law to address the constitutional implications of anti-CRT laws unearths the deeply rooted imperative that citizens have access to accurate and pertinent information for making informed democratic decisions. This imperative holds even when a speaker is averse to divulging information, and even when that speaker is the government. Such a situation arises when, as in the case of anti-CRT laws, the government controls the flow of information on a certain topic or in a certain setting and prohibits the disclosure or discussion of that information. In such a situation, three foundational doctrines converge: the right of citizens to receive information; the right of speakers to control their own speech, including to remain silent; and the public's right of access to government places and information. The rationales and rules underlying each again lead to the conclusion that, in this situation, the government may not prohibit citizens from receiving and discussing information pertinent to their political participation in a pluralistic democracy. This conclusion is relevant beyond the public school classroom. It helps elucidate how the First Amendment applies in other government controlled settings and ultimately helps refine how these doctrines apply more generally.

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[87] This conclusion mirrors that reached by the Supreme Court in Rust v. Sullivan, 500 U.S. 173, 176 (1991), which held that the First Amendment does not require the government to subsidize all viewpoints equally when distributing public funds so long as the funding scheme does not force any recipient to give up speech or significantly impinge a recipient's speech.

First, the right of citizens to receive information counsels that when the government holds information integral to making accurate and informed democratic decisions, it may not prohibit the release of that information. The right to receive was originally conceived as a corollary right to the sender's freedom of speech and as a predicate right to the recipient's exercise of their own First Amendment rights of speech, assembly, petition, and press.[88] The right was refined and brought into greater harmony with other foundational principles of free speech law in the 1970s when the Court recognized that receiving information and ideas is inherent in the right to participate in public discourse and democratic self-government. It is from this perch that the Court has recognized the right of consumers to receive commercial information;[89] of voters to receive corporate political messaging;[90] and of adults to receive all manner of dissident or distasteful speech of their choosing.[91] As the right applies to minors, all the Justices in *Pico* acknowledged that a comprehensive denial or suppression of access to an idea, beyond just the removal of a few library books, would offend the First Amendment.[92] These cases establish two critical lessons about the right to receive doctrine. First, the source of information is irrelevant. All members of the citizenry stand to contribute valuable information to the process of democratic self-government.[93] Presumably, this insight applies to the government as speaker as well. Second, the relative worth of the speech is irrelevant. All speech—whether purely political, commercial, cultural, or even nonsensical—contributes to public discourse and thus to democratic self-governance. All speech is, for constitutional purposes, equally valuable and therefore equally protected under the right to receive, even speech the government deems unsuitable or undesirable.[94]

Second, granting that all speech and all speakers contribute valuable information to public discourse raises a dilemma when the speaker does not wish to divulge that information to the interested listener. The freedom of speech includes the freedom not to speak; but like every constitutional right,

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[88] *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion).

[89] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756–57, 762–65 (1976).

[90] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 766 (1978).

[91] *See e.g.*, Procunier v. Martinez, 416 U.S. 396, 397 (1974) (applying heightened scrutiny to outgoing prison mail because it implicated non-prisoners' right to receive information); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (right to possess obscene information in the home); Kleindienst v. Mandel, 408 U.S. 753, 753 (1972) (acknowledging rights of U.S. citizens to engage with foreign speakers); Lamont v. Postmaster General, 381 U.S. 301, 310 (1965) (protecting recipients' right to receive literature from abroad); Butler v. Michigan, 352 U.S. 380, 384 (1957) (striking down a law that would constrict adults' access to literature to only that which is suitable for kids); Martin v. Struthers, 319 U.S. 141, 157 (1943) (protecting door-to-door distribution of literature).

[92] Pico, 457 U.S. at 868-72; *id.* at 913 (Rehnquist, J., dissenting).

[93] *See Virginia State Bd. of Pharmacy*, 425 U.S. at 765; Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354-56 (2010).

[94] Procaccini, *supra* note 5 at 416-18.

that freedom is neither categorical nor unconditional. Under the First Amendment, the government may regulate speech—including by compelling speech—where the regulation is narrowly tailored to advance democratic governance. Where government seeks to compel speech, the Court has developed several doctrinal rules that help guarantee such regulations go only as far as necessary to enhance democratic decision-making and ensure well-functioning governmental services. For example, the government may only compel private citizens to disclose purely factual and non-ideological information.[95] Anything more would deplete, rather than enhance, public discourse because it would effectively diminish the scope and quality of varying, diverse, and contested viewpoints.[96] The government may also only compel speech from an unwilling speaker where the relationship between speaker and listener involves informational asymmetry and reliance; the justification for regulation grows even stronger where informational asymmetries are compounded by power differentials.[97] This rule helps ensure that the compelled speech regulation is truly necessary by ensuring the listener cannot easily access the information otherwise. Such rules evince a free speech interest in government augmenting access to "raw" information, *i.e.* information needed to form the bases of our views. When the government is the speaker at issue, the compelled speech doctrine therefore teaches that it enhances democratic decision-making for the government to disclose facts where there is informational asymmetry and reliance by citizens. This epistemic and power dynamic occurs most readily in government-controlled places like schools or jails, but it also crops up in the metaphysical sphere of public discourse as it relates to information about government operations, which citizens have an interest in but cannot easily access from other sources.

Finally, the First Amendment interest in receiving government information touches on a third doctrinal building block known as the right of access. The right of access grants the public an affirmative, albeit qualified, constitutional right to access certain government proceedings and papers where there is a history of public access and where public access logically improves the functioning of the government process at issue.[98] Courts have accordingly found the right creates a presumption of public access to criminal trials[99] and their preliminary proceedings,[100] civil trials,[101] and certain ad-

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[95] *See* Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985).

[96] *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2374–75 (2018); Wooley v. Maynard, 430 U.S. 705, 715–16 (1977); *Zauderer*, 417 U.S. at 650–52 (finding that the compulsion of anything more than purely factual and uncontroversial information hinders public discourse).

[97] *See* Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 58–59 (2016).

[98] Press-Enter. Co. v. Superior Ct. of Calif. *(Press-Enterprise II)*, 478 U.S. 1, 10 (1986).

[99] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980)

ministrative adjudications.[102] The right of access is not to be confused with the right to receive. Though both contribute to one side of the free speech right's scaffolding by protecting the rights of listeners, they differ in two key respects. First, the right to receive is broader than the right of access, the latter of which only applies when the government is speaker. Second, the right to receive delineates what information the government may *block* from listeners, whereas the right of access dictates affirmatively what information the government must *disclose* to listeners. The rationale for locating a right of access in the First Amendment is that access to certain government proceedings and information accords with the fundamental purpose of the free speech clause—to protect equal participation in democratic self-governance—by promoting civic participation, government accountability, public discourse, and faith in the fairness and functioning of democratic government.

This reasoning underlying the right of access equally supports its sister doctrines just discussed, the right to receive and the compelled speech doctrine. Mining the common first principles of these three doctrines forges a more uniform theoretical basis for the free speech right grounded in ensuring citizens are equally free and informed to participate in our democracy. Put together, therefore, these three doctrines establish a baseline principle that the First Amendment protects the right of the public to receive information, including by permitting compelled disclosures of factual information, that is necessary for democratic participation and decision-making.

This shared theoretical grounding also helps clarify how these rights should apply. In particular, it sheds considerable light on the scope of the right of access and how its "history and logic" test ought to operate. On its face, the test risks both under- and over-inclusive interpretations of the right of access if applied without regard to the right's purpose in serving the First Amendment's protection of democratic governance. In particular, the history prong risks cutting off access to important government information if it is read as a necessary element of the test, rather than a supporting factor in the analysis of whether the right applies. Binding the scope of the right to history calcifies the right in time, preserving access to archaic processes but denying access to modern information and proceedings of widespread import for contemporary democratic decision-making. The history prong should thus be understood in tandem with, not as a precursor to, the logic prong whereby a history of access serves as evidence for whether access improves the functioning of the government process at issue. In this way, the absence of a tradition of access does not defeat the conclusion that a pre-

[100] Press-Enter. Co. v. Superior Ct. of Calif. *(Press-Enterprise I)*, 464 U.S. 501, 508–10 (1984); *Press-Enterprise II*, 478 U.S. at 13.

[101] ACLU v. Holder, 673 F.3d 245, 252 (4th Cir. 2011).

[102] N.Y.C.L. Union v. N.Y.C. Transit Auth., 684 F.3d 286, 300–01 (2d Cir. 2012).

sumption of access is warranted to preserve democratic self-governance.[103] Similarly, the logic prong risks over-inclusive applications of the right of access if the analysis focuses on whether access improves the government process at issue without inquiring as to whether the process itself is functioning in a democratically sustainable way. To accord with the First Amendment's concern for protecting democratic governance—which includes the functioning of governmental services—the relevant question is whether access would improve the fairness and accountability of the process and not just its efficiency.

Public school education sits at the crossroads of these three doctrines. It implicates student's right to receive pedagogically relevant ideas and information; their utter dependence on the school for obtaining the factual information necessary to make effective social, political, and economic choices; and their right of access to educational information that serves to enhance participation and faith in functioning governmental processes. The common theoretical ground these doctrines all rest on—that the free speech right serves equal popular sovereignty by ensuring citizens have access to accurate and pertinent information for making informed democratic decisions—leads ineluctably to the insight that though students do not have an affirmative right to be taught specific lessons, the government may not prohibit curricular speech on topics and theories pertinent to fostering the skills and knowledge needed for democratic self-government. Surely, understanding the relationship between race and society, history, and law is core to this foundational endeavor.

Conclusion

Weaving through various First Amendment doctrines to answer whether students, parents, or teachers have a constitutional free speech right to discuss critical race theory topics in a public school classroom illuminates a pervading anti-orthodoxy principle in First Amendment law. This anti-orthodoxy principle, in turn, exposes the distinctly political nature of the free speech right. Ensuring against the imposition of a state-sponsored political orthodoxy is integral to protecting the ability of citizens to meaningfully participate in democratic self-governance, broadly understood. Why? Because it is integral to their having the baseline knowledge, information, and communicative avenues to make informed political, economic, and social

[103] The Second Circuit has understood the test this way. *See* N.*Y.C. Transit Auth.*, 684 F.3d at 299 ("[The history prong] does not involve asking whether the proceedings in question have a history of openness dating back to the Founding. As the Sixth Circuit has stated, the 'Supreme Court effectively silenced this argument in Press–Enterprise II, where the Court relied on exclusively post-Bill of Rights history in determining that preliminary hearings in criminal cases were historically open.' . . . . More importantly, the NYCTA's claim is refuted by the reasoning of the public access cases themselves. These focus not on formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake.") (internal citations omitted).

choices that shape our communities. The anti-orthodoxy principle teaches that students have a right to receive information critical to their participation in democratic self-governance, just as it shows that all citizens have a First Amendment right to receive information and ideas in a democracy, including from the government itself. This conclusion is not just integral to protecting democratic participation, but it is critical to realizing *equal* political participation. Interpreting the First Amendment, and indeed our constitutional system of democratic governance, through the lens of equal popular sovereignty opens our understanding of how disparate political rights work in tandem to require a robust system of equal political input into how our communities run. This essay offers one case study for beginning to better fulfill this constitutional promise.