Critical Race Theory in the Classroom: Iowa's Critical Race Theory Ban and the Limits of the First Amendment

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Abstract:

In 2019, Critical Race Theory (CRT) moved from the pages of law journals to the front page of the newspaper and became the centerpiece of a partisan political battle over the classroom. In response, several states have passed laws to ban CRT from the classroom. Iowa's CRT ban directly regulates speech about race in K-12 classrooms and one Iowa university has used it to limit speech about race in college classrooms. This Article argues that this kind of viewpoint discriminatory law would usually be facially unconstitutional. However, Iowa's CRT law regulates public school teachers and college professors, who exist in a First Amendment twilight zone created by the Supreme Court's employee speech jurisprudence. Even though teachers and professors are having their speech abridged, they cannot get into court on a First Amendment Theory. To fill in this gap, Courts faced with Iowa's CRT ban should clarify the protections for professors engaged in teaching and research and recognize a student's right to receive information. These solutions would put a stop to the current rash of politically motivated tinkering with the K-12 and University curriculum and allow the education system to grapple honestly with past injustice.

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I. INTRODUCTION

Once relegated to the backwaters of legal academia, Critical Race Theory (CRT) has become a major talking point in national politics.[1] CRT is an academic theory that reframes racism as a systemic, rather than personal, issue.[2] In the wake of the murder of George Floyd, many schools, colleges, and workplaces began having conversations about racism.[3] Popular books like *How to Be an Anti-Racist* borrowed concepts from CRT to aid in these conversations and became the basis for diversity and inclusion trainings at these institutions.[4] In conservative circles, there has been a backlash against this way of talking about race. Commentators claimed that CRT was inconsistent with values of colorblindness and warned that CRT was overtaking the workplace and schools through mandatory diversity and equity trainings.[5] In response to this backlash, state legislatures created the CRT ban: legislation regulating the use of CRT concepts in the classroom and in diversity trainings.[6]

The Iowa CRT ban (HF-802) makes it illegal to "teach, advocate, . . . [or] promote" certain concepts in mandatory trainings in schools, government subdivisions, and public universities.[7] In addition, K-12 schools cannot include those concepts in their curriculum.[8] The concepts targeted by the law include race and sex stereotyping (ascribing traits to a person on account of the person's race or sex), race and sex scapegoating (stating that someone is racist or sexist on account of their race or sex or responsible for the historical

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[1] Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WK. (May 18, 2021), https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05 [https://perma.cc/MTF9-ZGDM].

[2] Janel George, *A Lesson on Critical Race Theory*, A.B.A. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory [https://perma.cc/T3WG-S6HM].

[3] Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, NEW YORKER (Jun. 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory [https://perma.cc/2QQE-34R9].

[4] Danzy Senna, *Robin DiAngelo and the Problem with Anti-Racist Self-Help*, ATLANTIC (Sept., 2021), https://www.theatlantic.com/magazine/archive/2021/09/martin-learning-in-public-diangelo-nice-racism/619497 [https://perma.cc/T4TZ-9KVL].

[5] Daniel Buck, *Where Critical Race Theory Comes From*, NAT'L REV. (Jan. 8, 2022, 6:30 AM), https://www.nationalreview.com/2022/01/where-critical-race-theory-comes-from [https://perma.cc/PH9T-PJTM].

[6] *See infra* Part II.A.2.

[7] IOWA CODE § 25A.1 (2021); IOWA CODE § 261H.8 (2021); IOWA CODE § 279.74 (2021).

[8] IOWA CODE § 279.74 (2021).

actions of their race and sex), and a grab bag of other specific concepts.[9] This Article looks at the way that Iowa's CRT ban regulates CRT in the context of classroom discussion at the university and K-12 level.[10] HF-802 regulates classroom discussion at the K-12 level directly[11] and one university, Iowa State University, has applied it to classroom discussion.[12] Instructors in K-12 classrooms and university lecture halls are finding themselves increasingly worried that they are running afoul of the statute.[13] As a result, at both levels speech in the classroom is being regulated because the state legislature disagrees with its political content.[14]

This Article argues that at both the K-12 and university levels, laws that ban classroom discussion based solely on its ideological content present serious First Amendment violations. One of the primary goals of the First Amendment is to prevent the legislature from regulating speech because of its disagreement with the speaker's content. In any other context, these laws would be easily struck down as viewpoint discrimination. However, challengers to these laws face doctrinal barriers that put CRT bans in First Amendment blind spots. At the university level, there is a loose doctrine of academic freedom that protects the teaching and research of college professors from laws seeking to impose a political orthodoxy on the university classroom.[15] However, the doctrine is poorly defined and recent court decisions have not settled whether principles of academic freedom trump the increasingly narrow band of protected public employee speech. At the K-12 level, most teachers and students affected by CRT bans face major obstacles to a viable First Amendment claim. One way to fill in this First Amendment gap is by expanding the student right to learn, which protects students from being denied access to information based on a district or legislature's desire to impose orthodoxy on the classroom.[16] This Article argues that these doctrines can and should be applied to HF-802 and other CRT bans.

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[9] IOWA CODE § 261H.8 (2021).

[10] *See infra* Parts III–IV.

[11] IOWA CODE § 279.74 (2021).

[12] Iowa State Off. of the Senior Vice President & Provost, *Updated FAQ Explores Impact of House File 802*, IOWA STATE UNIV. (Aug. 12, 2021), https://www.inside.iastate.edu/article/2021/08/12/hf802 [https://perma.cc/7853-XEM4].

[13] *See infra* Parts III–IV.

[14] *See infra* Parts III.B., IV.B.

[15] *See infra* Part III.

[16] *See infra* Part IV.

Part II of this Article will explain what exactly CRT is,[17] how it came to be a political flashpoint, and how other states have regulated CRT.[18] Next, it will focus on Iowa's CRT ban and discuss how it works.[19] Finally, it will discuss the primary First Amendment doctrines implicated by the law: public employee speech and student right to learn.[20]

Part III will analyze how Iowa's CRT ban is applied to the university classroom and argue for some steps courts can take to apply the doctrine of academic freedom to Iowa's CRT ban. First, it will examine how Iowa State University's policy bans CRT in the lecture hall[21] and how it affects the speech rights of instructors.[22] Second, it will explain why professors' speech is so important to the First Amendment, and how recent employee speech jurisprudence has put that form of speech in danger.[23] Third, it will propose a simple doctrinal change the Eighth Circuit can make to fill that gap: holding that the professors' speech claims are not barred just because they are public employees.[24] Finally, it will apply these proposed principles of law to HF-802.[25]

Part IV will analyze how Iowa's CRT ban applies to the K-12 classroom and argue that doctrinal change is needed to address its First Amendment harms. First, it will analyze how HF-802 applies to classroom speech in K-12 schools.[26] Second, it will argue that it chills speech about race in the classroom.[27] Third, it will make the practical and normative case for expanding the right to learn for K-12 students to fill the gaps left by existing doctrine.[28] Finally, it will explain how the right to learn applies to the case of

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[17] *See infra* Part II.A.1.

[18] *See infra* Part II.A.2.

[19] *See infra* Part II.B.

[20] *See infra* Part II.C.

[21] *See infra* Part III.A.

[22] *See infra* Part III.B.

[23] *See infra* Part III.C.

[24] *See infra* Part III.D. This Part is aimed at the Eighth Circuit because it is the Circuit Court of Appeals that hears cases from Iowa. Geographic Boundaries of the United States Courts of Appeals and United States District Courts, U.S. CTS., https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf [https://perma.cc/F3AG-ZL5H]. It is also one of the few circuits where the application of *Garcetti* to college professors is an unsettled question. *See infra* Part III.D.

[25] *See infra* Part III.E.

[26] *See infra* Part IV.A.

[27] *See infra* Part IV.B.

[28] *See infra* Part IV.C.

Iowa's CRT ban.[29]

II. BACKGROUND

A. Critical Race Theory (CRT)

Prior to 2020, CRT was primarily an academic theory, discussed in social scientific and legal circles—not on the national political level.[30] However, in the summer of 2020, the confluence of mass protest movements against police violence, a raucous election year, and the ability to take screenshots on Zoom thrust the theory into the national spotlight.[31]

1. CRT Past and Present

CRT as a theory has its roots in legal academia in the 1970s and 80s.[32] It was created in response to the perceived limits of legal reform coming out of the Civil Rights Era.[33] CRT has its theoretical antecedents in critical legal studies, black activism, feminism, and post-structuralism.[34] While originally developed in the context of the Black experience in the United States, scholars have applied its insights to the experience of other marginalized groups including other racial and ethnic minorities, women, and LGBTQ+ people.[35]

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[29] *See infra* Part IV.D.

[30] Benjamin Wallace-Wells, *What Do Conservatives Fear About Critical Race Theory?,* NEW YORKER (June 10, 2021), https://www.newyorker.com/news/annals-of-inquiry/what-do-conservatives-fear-about-critical-race-theory [https://perma.cc/A625-JCKG].

[31] Wallace-Wells, *supra* note 3.

[32] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 7–8 (3d ed. 2017). See generally Kimberlé W. Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011), for a description of the movement's history and key players.

[33] DELGADO & STEFANCIC, *supra* note 32.

[34] *Id.* at 4–5.

[35] *See id.* at 81–84; *see*, *e.g.*, Adrien K. Wing, *Critical Race Feminism*, *in* THEORIES OF RACE AND ETHNICITY 162, 162–67 (Karim Murji & John Solomos eds., 2015) (discussing the application of CRT to feminist analysis); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 107–13 (1999) (integrating the LGBTQ+ experience into the CRT critique of the law); Neil Gotanda, *Critical Legal Studies, Critical Race Theory and Asian American Studies*, 21 AMERASIA J. 127, 127–35 (1995) (discussing CRT's impact on Asian American studies); Jeanette Haynes Writer, *Unmasking, Exposing, and Confronting: Critical Race Theory, Tribal Critical Race Theory and Multicultural Education*, 10 INT'L J. MULTICULTURAL EDUC. 1, 2–3 (2008) (discussing the use of CRT to understand the Indigenous experience in the United States).

CRT uses the Black experience to rethink the way we talk about the law and history.[36] People who are marginalized because of their identity experience society differently and therefore recognize aspects of society that people in majority groups do not.[37] According to CRT scholars, a person's status in life is less the product of their genetics or personal qualities and more a product of their race, gender, and social class.[38] Under this view, legal outcomes are more about reproducing the interests and benefits of the powerful than reaching abstract ideals of justice.[39] From that background, CRT also developed a different political theory of racism than the standard liberal theory.[40] CRT scholars see racism less as an illness to be cured in individuals and more as the product of institutions and social arrangements.[41] The goal of policymaking and the law should be to correct those structural inequities rather than trying to produce totally colorblind outcomes.[42] To that end, CRT has been influential in discussions of employment discrimination,[43] criminal law,[44] and constitutional law.[45]

Some of the concepts from CRT have become mainstream as political movements like Black Lives Matter have drawn increased attention towards

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[36] DELGADO & STEFANCIC, *supra* note 32.

[37] *Id.* at 7–8; *see* James Davis III, *Law, Prison, and Double-Double Consciousness: A Phenomenological View of the Black Prisoner's Experience*, 128 YALE L.J.F. 1126, 1129–30 (2019) (discussing the concept of double consciousness).

[38] DELGADO & STEFANCIC, *supra* note 32, at 8–10.

[39] *Id.*; *see also* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (arguing that *Brown v. Board* is better explained by the political economy of the Cold War than the Court's genuine commitment to equality).

[40] *See generally* Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a* Difference, 82 CAL. L. REV. 787, 823–43 (1994) (contrasting how traditional liberal and CRT believe anti-discrimination law should function).

[41] *See* Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1607–13 (2011); DELGADO & STEFANCIC, *supra* note 32; Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1393–94 (1991). *See generally* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 1–14 (1992).

[42] *See generally* Brooks & Newborn, *supra* note 40.

[43] *See generally* Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics in* POLITICS OF LAW: A PROGRESSIVE CRITIQUE 195 (David Kairys ed., 1990) (arguing, in an influential essay, that antidiscrimination law misses the reality of discrimination by failing to recognize the influence of overlapping identities).

[44] *See generally* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J Davis ed., 2017) (collecting essays addressing the interaction between criminal law and race).

[45] *See generally* 13TH (Netflix 2016) (using concepts from CRT to discuss the implications of the Reconstruction Amendments, but especially the 13th Amendment).

issues of race and stimulated discussion around systemic inequalities. Take, for example, the concept of privilege—the idea that different facets of one's identity make it easier to move through the world. Privilege has its origins in the work of CRT scholar Peggy McIntosh[46] and has become a popular way of thinking and talking about the unspoken advantages and disadvantages of living with one's identity.[47] In the 2010s, "checking one's privilege" became a shorthand to prompt a person to examine how their identity has affected their everyday experiences.[48] Similarly, the concept of "microaggressions" — small actions that make members of racial minorities feel unwelcome in primarily white spaces—is associated with CRT.[49] In the 2010s, microaggressions became a popular paradigm for thinking about how to make spaces in corporate America and elite universities more welcoming to racial groups that had previously been excluded from their halls.[50] Finally, the CRT take on American history as rooted in racism towards African Americans was the basis for revisionist histories like the 1619 Project, which

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[46] *See generally* Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack Politics*, PEACE AND FREEDOM (July 1, 1989), https://psychology.umbc.edu/wp-content/uploads/sites/57/2016/10/White-Privilege_McIntosh-1989.pdf [https://perma.cc/SED5-7CV5] (discussing white privilege).

[47] *See* Paul Sehgal, *How 'Privilege' Became a Provocation*, N.Y. TIMES MAG. (July 14, 2015), https://www.nytimes.com/2015/07/19/magazine/how-privilege-became-a-provocation.html [https://perma.cc/KQ57-YSXF] (discussing how privilege became a mainstream concept); Joshua Rothman, *The Origins of "Privilege"*, NEW YORKER (May 12, 2014), https://www.newyorker.com/books/page-turner/the-origins-of-privilege [https://perma.cc/U62Z-F4NF] (discussing the popularity of the privilege framework); Leslie Margolin, *Unpacking the Invisible Knapsack: The Invention of White Privilege Pedagogy*, 1 COGENT SOC. SCIS. 1, 2 (2015) (offering a critical history of the popularization of privilege and arguing it obscures rather than clarifies structural causes of racism).

[48] *See* Sam Dylan Finch, *Ever Been Told to 'Check Your Privilege?' Here's What That Really Means*, EVERYDAY FEMINISM (July 27, 2015), https://everydayfeminism.com/2015/07/what-checking-privilege-means [https://perma.cc/P5TP-59NF] (showing how a popular blog at the time discussed privilege).

[49] *See* Daniel Solóranzo et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 J. NEGRO EDUC. 60, 61–62 (2000) (defining situating the concept of microaggression in the CRT academic literature); Daniel Solóranzo et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO LATINO L. REV. 15, 23–25 (2002); Lindsay Pérez Huber & Daniel G. Solorzano, *Racial Microaggressions as a Tool for Critical Race Research*, 18 RACE ETHNICITY & EDUC. 297, 301–02 (2014) (theorizing microaggressions from the perspective of CRT).

[50] Simba Runyowa, *Microaggressions Matter*, ATLANTIC (Sept. 18, 2015), https://www.theatlantic.com/politics/archive/2015/09/microaggressions-matter/406090 [https://perma.cc/Z3KE-JW58] (summarizing the contemporary debate over microaggressions and arguing that the concept was useful for improving the experience of minority students); Jenée Desmond-Harris, *What Exactly is a Microaggression?*, VOX (Feb. 16, 2015, 9:20 AM), https://www.vox.com/2015/2/16/8031073/what-are-microaggressions [https://perma.cc/X4PE-VXJP].

attempted to reframe American history through the lens of the Atlantic slave trade and Jim Crow laws.[51]

Some concepts of CRT are a part of the worldview of progressive young people and are popular among diversity, equity, and inclusion (DEI) consultants, who offer trainings to businesses, universities, and school districts.[52] It is quite common for DEI trainings to include language about privilege and microaggressions.[53] There is no indication that the academic theory of CRT is being taught to school children but teachers say that some parents have conflated talking about race in the classroom with teaching CRT.[54]

The current controversy over CRT has its roots in the response to the death of George Floyd in the summer of 2020.[55] The long line of police killings of Black people along with large-scale protests have led many institutions to pay attention to race.[56] While CRT-inspired ideas have been in the progressive millennial milieu for a while, the public suddenly felt the need to learn how to have a conversation about race. Books like *White Fragility* and *How to be an Anti-Racist*, which drew some inspiration from CRT thinkers, shot up the best-seller list.[57] Companies and government agencies felt the same need to talk about race and hired DEI consultants to hold trainings for

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[51] *See generally* Jake Silverstein, *The 1619 Project*, NEW YORK TIMES MAG. (Dec. 9, 2019), https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html [https://perma.cc/6NLP-YS2C] (collecting the essays from the project); Lauren Michele Jackson, *The 1619 Project and the Demands of Public History*, NEW YORKER (Dec. 8, 2021), https://www.newyorker.com/books/under-review/the-1619-project-and-the-demands-of-public-history [https://perma.cc/Y9ZM-SNK9] (summarizing the background of and the public controversy around the project).

[52] Nora Zelevansky, *The Big Business of Unconscious Bias*, N.Y. TIMES (Nov. 20, 2019), https://www.nytimes.com/2019/11/20/style/diversity-consultants.html [https://perma.cc/C7ZU-KZJ3]; Sarah Dong, *The History and Growth of the Diversity, Equity, and Inclusion Profession*, GRC INSIGHTS (June 2, 2021), https://insights.grcglobalgroup.com/the-history-and-growth-of-the-diversity-equity-and-inclusion-profession [https://perma.cc/7PY4-VDG7].

[53] Zelevansky, *supra* note 52; Dong, *supra* note 52.

[54] Phil McCausland, *Teaching Critical Race Theory Isn't Happening in Classrooms, Teachers Say in Survey*, NBC NEWS (July 1, 2021, 5:23 PM), https://www.nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945 [https://perma.cc/W8HS-BZEJ].

[55] Wallace-Wells, *supra* note 3.

[56] Gillian Friedman, *Here's What Companies Are Promising to Do to Fight Racism,* N.Y. TIMES (Aug. 23, 2020), https://www.nytimes.com/article/companies-racism-george-floyd-protests.html [https://perma.cc/W85Q-H5D3].

[57] Senna, *supra* note 4.

their employees.[58] The newfound interest in race among local governments, schools, and companies led to a backlash from conservative commentators.[59] Images from internal trainings referencing concepts like "white privilege" and "systemic racism" spread like wildfire on conservative social media.[60] Prominent right-wing publications ran opinion pieces decrying CRT as contrary to American values.[61] Conservative broadcasters turned DEI trainings into a nightly source of outrage.[62] Savvy political operatives stoked the controversy and tried to turn outrage into legislative action.[63]

2. State and Federal Efforts to Regulate CRT

The political controversy over CRT in schools and the workplace led to regulation efforts at the federal level by the Trump administration and by the states. Conservative outrage over CRT reached the ears of the White House, which engaged in a failed attempt to excise CRT from the federal bureaucracy.[64] In September 2020, the Trump administration issued an executive order attempting to ban the armed forces, federal agencies, and federal contractors from promoting "divisive concepts" in workplace diversity trainings.[65] The executive order attempted to push back against "the

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[58] Geri Stengel, *Black Lives Matter Protests Moves Corporate D&I Initiatives Center Stage*, FORBES (Jun 17, 2020, 7:00 AM), https://www.forbes.com/sites/geristengel/2020/06/17/black-lives-matter-protests-moves-corporate-di-initiatives-into-the-spotlight/?sh=1444721c7a0d [https://perma.cc/EY2V-RYE6].

[59] Wallace-Wells, *supra* note 3.

[60] *Id.*

[61] *See generally* Wallace-Wells, *supra* note 3 (summarizing the conservative objections to CRT).

[62] Jeremy Barr, *Critical Race Theory Is the Hottest Topic on Fox News. And It's Only Getting Hotter*, WASH. POST (Jun. 24, 2021, 5:06 PM), https://www.washingtonpost.com/media/2021/06/24/critical-race-theory-fox-news [https://perma.cc/493T-EMTU] ("In June, the topic has been mentioned 737 times on Fox.").

[63] Wallace-Wells, *supra* note 3; *see* Cathryn Stout & Thomas Wilburn, *Efforts to Restrict Teaching About Racism and Bias Have Multiplied Across the U.S.*, CHALKBEAT (Feb. 1, 2022, 6:20PM), https://www.chalkbeat.org/22525983/map-critical-race-theory-legislation-teaching-racism [https://perma.cc/PW4Z-UURA] (summarizing the current state of legislative action on CRT).

[64] Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

[65] *Id.* § 2 (The "[d]ivisive concepts" referenced in the order include "(1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or

pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors."[66] The executive order was quickly challenged in court by several nonprofit organizations that provide trainings to federal entities and receive federal grant funding.[67] The Northern District of California issued a nationwide preliminary injunction,[68] finding that the plaintiff organizations were likely to succeed on the merits of their First Amendment claim[69] and a due process claim that the executive order was void for vagueness.[70] The Biden administration revoked the September executive order in January 2021.[71]

The effort to turn CRT into a ballot issue has been more successful in the state houses.[72] Since 2020, 28 states have tried to regulate CRT in

sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race."). The order also required recipients of federal grant funding to ensure that their trainings did not implicate any of the banned concepts. *Id.*

[66] *Id.* § 1.

[67] Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 534–35 (N.D. Cal. 2020).

[68] *Id.* at 550.

[69] *Id.* at 541–43 (holding that the plaintiffs were likely to succeed on two First Amendment theories: (1) the prohibitions on how federal contractors could train their own employees was private speech on a matter of public concern and that the government's interest did not outweigh this free speech interest and (2) that the conditioning of unrelated grant funding on promising not to promote "divisive concepts" went beyond the scope of the funding programs).

[70] *Id.* at 545.

[71] Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

[72] *See* Stout & Wilburn, *supra* note 63.

schools.[73] Besides Iowa, ten states—Arizona,[74] Idaho,[75] New Hampshire,[76]

[73] *Id.*

[74] ARIZ. REV. STAT. ANN. § 15-717.02 (2021) (banning the teaching of certain concepts in classroom instruction). The Arizona statute allows for the revocation of teacher's certificates and civil penalties against schools who violate the section. *Id.* § 15-717.02(D), 15-717.02(F). The section also authorizes the attorney general to issue advisory opinions and peruse injunctive relief against schools who violate the section. *Id.* § 15-717.02(C), 15-717.02(E). The list of banned concepts contains many of the same concepts as HF-802. *Compare* ARIZ. REV. STAT. ANN. § 15-717.02(B) (listing concepts) *with* IOWA CODE § 261H.7 (2021) (defining targeted concepts). The Arizona CRT ban is currently blocked by the courts. Ariz. Sch. Bds. Ass'n v. State, 501 P.3d 731, 741 (Ariz. 2022). The district court held that the Arizona legislature violated the state's single subject rule by including the CRT ban (as well as other controversial topics like a mask mandate ban) in a budget reconciliation bill. *Id.* at 742.

[75] IDAHO CODE § 33-138 (2021) ("The Idaho Legislature finds that tenets outlined in subsection (3)(a) of this section, often found in 'critical race theory,' . . . exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria . . . ."). The Idaho statute goes on to ban colleges and K-12 schools from "compel[ling] students to personally affirm, adopt, or adhere" to several beliefs including "[t]hat individuals, by virtue of sex, race, ethnicity, religion, color, or national origin, are inherently responsible for actions committed in the past by other members of the same sex, race, ethnicity, religion, color, or national origin." *Id.*

[76] N.H. REV. STAT. ANN. § 354-A:31 (2021) ("No public employer . . . shall teach, advocate, instruct, or train any employee, student, service recipient, contractor, staff member, inmate, or any other individual or group . . . [t]hat an individual, by virtue of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin is inherently racist, sexist, or oppressive, whether consciously or unconsciously . . . ."). The New Hampshire statute allows a suit for damages by any person aggrieved by exposure to any unlawful training or education. *Id.* The New Hampshire statute was passed through the annual budget after a more expansive CRT ban died in the state house. Ian Lenahan, *'We Have to Talk': NH Bill on Teaching of 'Divisive Concepts' Has Itself Become Divisive*, SEACOASTONLINE (May 20, 2021, 5:00 AM), https://www.seacoastonline.com/story/news/politics/2021/05/20/new-hampshire-house-bill-544-has-become-divisive/5054009001 [https://perma.cc/T9F6-2SUH].

North Dakota,[77] Oklahoma,[78] South Carolina,[79] Tennessee,[80] Texas,[81]

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[77] N.D. CENT. CODE §15.1-21-05.1 (2021) ("Curriculum - Critical race theory - Prohibited."). The North Dakota statute bans "instruction relating to critical race theory in any portion of the district's required curriculum . . . ." *Id.* "Critical race theory" is defined as "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." *Id.* There is no enforcement mechanism in the statute, but the executive branch is granted authority to make "rules to govern this section." *Id.* After the North Dakota State University faculty expressed concern that the law would open doors to restrictions on college professors and raised academic freedom concerns, legislators indicated they were not interested in going down that path. April Baumgarten, *North Dakota Ban on Critical Race Theory for K-12 Concerns Higher Ed Professors*, DICKINSON PRESS (Dec. 11, 2021, 11:01 PM), https://www.thedickinsonpress.com/news/north-dakota-ban-on-critical-race-theory-for-k-12-concerns-higher-ed-professors [https://perma.cc/36P5-AMCQ].

[78] OKLA. STAT. tit. 70, § 24-157 (2021) (banning mandatory diversity training at Oklahoma Universities and discussion of certain concepts from courses taught in K-12 schools). The Oklahoma statute contains some of the same language as HF-802. *Compare* OKLA. STAT. tit. 70 § 24-157(B)(1) (2021) (defining target concepts) *with* IOWA CODE § 261H.8 (2021) (defining targeted concepts). The ACLU recently sued, seeking to invalidate the statute on the grounds that it is impermissibly vague, violates students' rights to receive information, overbroad, and motivated by racial animus. Amended Complaint at 66–74, Black Emergency Response Team v. O'Connor, No. 21-cv-1022-G (W.D. Okla. Nov. 9, 2021). That litigation is currently pending.

[79] The South Carolina law was passed as a clause in the general appropriations bill for FY2021. H. 4100(1B), 124th Sess., § 1.105 (S.C. 2021), https://www.scstatehouse.gov/sess124_2021-2022/appropriations2021/tap1b.htm [https://perma.cc/TH7P-RG8Q]. It stated that no funding would be provided to "inculcate any of the following concepts" and cited to the same list of concepts from the Trump executive order. *Id.* The law applies to "standards, curricula, lesson plans, textbooks, instructional materials, or institutional practices." *Id.*; *see also* Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020). The South Carolina law appropriation rider carves out unconscious bias training for teachers as well as class discussion on "issues related to the impacts of historical or past discriminatory policies." H. 4100(1B), 124th Sess., § 1.105 (S.C. 2021) The South Carolina legislature is currently considering a more complete law in committee but is taking it slow out of concern that such a law could turn into a "witch hunt for parents, teachers, or students." Jeffrey Collins, *SC Lawmakers Vow to Take Time on Critical Race Theory Rules*, AP NEWS (Jan. 26, 2022, 3:27 PM), https://apnews.com/article/education-race-and-ethnicity-south-carolina-6947a8fcbe8a069abd421c1a597aea69 [https://perma.cc/LGD7-7SGG].

[80] TENN. CODE ANN. § 49-6-1019 (2021) ("An LEA or public charter school shall not include or promote the following concepts as part of a course of instruction or in a curriculum or instructional program, or allow teachers or other employees of the LEA or public charter school to use supplemental instructional materials that include or promote the following concepts . . . ."). The list of defined concepts is the same as HF-802. *Compare id. with* IOWA CODE § 261H.8 (2021) (defining targeted concepts). The Tennessee statute has already attracted controversy with parents' groups using it to try to get certain course materials banned from the curriculum or the library, including seemingly innocuous books about the civil rights movement for grade school children. Gabriella Borter, *'Critical Race Theory' Roils a Tennessee School District*, REUTERS (Sept. 21, 2021, 12:42 PM), https://www.reuters.com/world/us/critical-race-theory-roils-tennessee-school-district-2021-09-21 [https://perma.cc/66TP-M55K].

Florida,[82] and Mississippi[83]—have passed legislation limiting CRT concepts in K-12 schools. Other states have approached the issue through action by

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[81] TEX. EDUC. CODE § 28.002(h-1)–(h-3) (West 2021). The first section of the law sets certain historical topics Texas students are required to learn about including "the fundamental moral, political, and intellectual foundations of the American experiment in self-government." TEX. EDUC. CODE § 28.002(h-1) (2021). The effects of the Texas statute have been the harshest, leading to requests for book removals and teacher firings. Andrea Zelinski, *Lone Star Parent Power: How One of the Nation's Toughest Anti-Critical Race Theory Laws Emboldened Angry Texas Parents Demanding Book Banning, Educator Firings*, 74 (Nov. 4, 2021), https://www.the74million.org/article/lone-star-parent-power-how-one-of-the-nations-toughest-anti-critical-race-theory-laws-emboldened-angry-texas-parents-demanding-book-banning-educator-firings [https://perma.cc/3CUE-ZQEM].

[82] FLA. STAT. § 1000.05 (2022). The Florida statute was passed as a part of Governor Ron DeSantis' larger project against "woke indoctrination." Kiara Alfonseca, *Florida Doubles Down on Anti-Critical Race Theory Legislation*, ABC NEWS (Jan. 19, 2022, 1:26 PM), https://abcnews.go.com/US/florida-doubles-anti-critical-race-theory-legislation/story?id=82348795 [https://perma.cc/6FJ5-6Y9B]. The Florida statute bans a list of concepts similar to the Iowa statute. *Compare* FLA STAT. § 1000.05(4)(a) (2022) (listing targeted concepts) *with* IOWA CODE § 261H.7 (2021) (defining targeted concepts). The Florida statute allows for "discussion of the concepts listed therein as part of a larger course of training or instruction" but the "instruction" must be "given in an objective manner without endorsement of the concepts." FLA. STAT. § 1000.05(4)(b) (2022). The rules are enforced by the state board of education. FLA. Stat. § 1000.05(6) (2022). The Florida statute had an immediate effect on professors who taught race related subjects. Daniel Golden, *Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching*, PROPUBLICA (Jan. 3, 2022, 7:00 AM), https://www.propublica.org/article/desantis-critical-race-theory-florida-college-professors [https://perma.cc/CFC4-9GCJ]. A federal court granted a preliminary injunction against the Florida CRT ban as applied to college professors, holding that it likely violated the First Amendment and was void for vagueness. Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1245 (N.D. Fla. 2022), *stay denied* Pernell v. Fla. Bd. of Governors, No. 22-13992, 2023 WL 2543659 (11th Cir. Mar. 16, 2023).

[83] MISS. CODE ANN. § 37-13-2 (2022) (addressing "[c]ritical race theory in public institutions of higher learning, community/junior colleges, school districts or public schools"). The Mississippi statute bars "public institutions" from "direct[ing] or otherwise compel[ing] students to personally affirm, adopt or adhere to any of the following tenets: (a) That any sex, race, ethnicity, religion or national origin is inherently superior or inferior; or (b) That individuals should be adversely treated on the basis of their sex, race, ethnicity, religion or national origin." *Id.* § 37-13-2(1). The Mississippi statute applies to in classroom instruction. *Id.* § 37-13-2(3) ("No public institution . . . shall teach a course of instruction or unit of study that directs or otherwise compels students to personally affirm, adopt or adhere to any of the tenets" listed in the statute.). The Mississippi statute was passed against the backdrop of protest by Black members of the legislature. Emily Wagster Pettus, *Black Mississippi Senators Protest Vote on Race Theory Bill*, AP NEWS (Jan. 21, 2022, 4:14 PM), https://apnews.com/article/congress-mississippi-education-race-and-ethnicity-racial-injustice-856775c710d60a1be7279143b1b13bf8 [https://perma.cc/TQY2-FZAS].

the governor,[84] state board of education,[85] or attorney general.[86] A number of these legislatures copied the divisive concepts from the Trump executive order and pasted them into their statutory language. At the same time, there has been a counter movement in other states to devote more space in social studies curriculum to the history of race in America.[87]

B. Iowa's CRT Ban

Iowa entered the fray over CRT in 2021 when it passed HF-802, a bill targeted at CRT concepts in workplace diversity trainings and curricular

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[84] Off. of Governor Glenn Youngkin & Lt. Governor Winsome Earle-Sears, Exec. Order No. 1: Ending the Use of Inherently Divisive Concepts, Including Critical Race Theory, and Restoring Excellence in K-12 Public Education in the Commonwealth (Va. 2022), https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/74---eo/74---eo/EO-1---ENDING-THE-USE-OF-INHERENTLY-DIVISIVE-CONCEPTS,-INCLUDING-CRITICAL-RACE-THEORY,-AND-RESTORING-EXCELLEN.pdf [https://perma.cc/3GAN-5JFM].

[85] FLA. ADMIN. CODE ANN. r. 6A-1.094124 (2021) ("Instruction on the required topics must be factual and objective, and may not suppress or distort significant historical events, such as the Holocaust, slavery, the Civil War and Reconstruction, the civil rights movement and the contributions of women, African American and Hispanic people to our country . . . . Examples of theories that distort historical events and are inconsistent with State Board approved standards include . . . the teaching of Critical Race Theory, meaning the theory that racism is not merely the product of prejudice, but that racism is embedded in American society . . . ."); Bobby Caina Calvan, *Florida Bans 'Critical Race Theory' from Its Classrooms*, AP NEWS (June 10, 2021, 3:28 PM), https://apnews.com/article/florida-race-and-ethnicity-government-and-politics-education-74d0af6c52c0009ec3fa3ee9955b0a8d [https://perma.cc/63XT-395H]. Florida's legislature has since acted to build on this guidance in statute. *See* Zelinski*, supra* note 81.

[86] 58 Mont. Op. Att'ys Gen. 1, 2021 WL 2228845 (2021). The Montana Attorney General focused on practices that "separate students, teachers, or employees by race" or programing focused on "whiteness" violated federal and state antidiscrimination law. *Id.* at *9. The Attorney General opined that CRT practices amounted to differential treatment on the basis of race in violation of state and federal equal protection law, a form of "race scapegoating" under antidiscrimination law, and compelled speech in violation of the First Amendment. *Id.* at *12–16; *see also* Iris Samuels, *Montana's Top Prosecutor Bans Critical Race Theory Programs*, AP NEWS (May 27, 2021, 5:46 PM), https://apnews.com/article/montana-race-and-ethnicity-racial-injustice-business-education-d8e267301cfc60af188886a6e29ca94b [https://perma.cc/5NHR-X24M] (discussing the political context for the attorney general opinion); Liz Weber, *Bozeman Schools Officials Say Curriculum Unaffected by AG's Opinion on Critical Race Theory*, BOZEMAN DAILY CHRON. (Jun. 2, 2021), https://www.bozemandailychronicle.com/news/education/bozeman-schools-officials-say-curriculum-unaffected-by-ags-opinion-on-critical-race-theory/article_adfda2cc-4ce8-5c10-9df9-de47d602910e.html [https://perma.cc/9S6B-ZKQM] (discussing the impact of the AG rule on teachers, administrators, and students).

[87] Cathryn Stout & Gabrielle LaMarr LeMee, *Efforts to Restrict Teaching About Racism and Bias Have Multiplied Across the U.S.*, PARENTS TOGETHER, (Feb. 1, 2022) https://parents-together.org/author/cathryn-stout-and-gabrielle-lamarr-lemee-chalkbeat [https://perma.cc/J3PE-YTNW].

instruction. HF-802 applies in three contexts: (1) trainings by government agencies and subdivisions,[88] (2) mandatory trainings for students, staff, and faculty in public universities,[89] and (3) trainings and curriculum in public elementary and secondary schools (K-12 schools).[90] While important to the government agencies involved,[91] the application to government agencies and subdivisions does not present the same First Amendment concerns as the application to universities and K-12 schools.[92] This Article will only substantively focus on the application to classroom instruction.

1. Legislative History

HF-802 was introduced in March 2021, in response to the growing partisan controversy over CRT. According to the bill's sponsor in the house, Representative Holt, the drafters "review[ed] the Trump executive order when writing our legislation."[93] Major conservative lobbying groups supported the bill, while major progressive groups indicated their opposition.[94] The Board of Regents of Iowa's public universities, as well as an organization of school boards, did not have a public position on HF-802.[95] HF-802 passed the Iowa House and Senate on a party-line vote[96] and was

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[88] IOWA CODE § 25A.1(2) (2021).

[89] IOWA CODE § 261H.8(2) (2021).

[90] IOWA CODE § 279.74(2) (2021).

[91] The section on state subdivisions applies to any mandatory training by any subdivision (city, county, agency, etc.) funded primarily through Iowa tax dollars. IOWA CODE § 25A.1(1)(b) (2021). The head of the subdivision needs to make sure that mandatory trainings do not "teach, advocate, encourage, promote, or act upon stereotyping, scapegoating, or prejudice toward others on the basis of demographic group membership or identity." IOWA CODE § 25A.1(2) (2021).

[92] The subdivision section applies to mandatory workplace trainings, which are during the workday for the government employees. Public employees generally do not have any First Amendment interest in speech made in the course of their employment. Garcetti v. Ceballos, 547 U.S. 410, 426 (2006). See infra Part II.C.2., for a more complete discussion of *Garcetti* and public employee speech in general.

[93] Email from Steven Holt, Iowa State Representative to John Beaty (Jan. 3, 2022) (on file with author)

[94] *See generally Lobbyist Declarations for HF-802*, IOWA LEGIS., https://www.legis.iowa.gov/lobbyist/reports/declarations?ga=89&ba=HF802 [https://perma.cc/GQW2-MENV].

[95] *Id.*

[96] Ian Richardson, *Iowa Gov. Kim Reynolds Signs Law Targeting Critical Race Theory, Saying She's Against 'Discriminatory Indoctrination,'* DES MOINES REG., (Jun. 9, 2021, 7:41 AM), https://www.desmoinesregister.com/story/news/politics/2021/06/08/governor-kim-reynolds-signs-law-targeting-critical-race-theory-iowa-schools-diversity-training/7489896002 [https://perma.cc/24VL-FVS7].

signed into law by Governor Reynolds on June 8, 2021.[97] In discussions with the media, Governor Reynolds was clear that HF-802 was meant to target CRT, stating that "Critical Race Theory is about labels and stereotypes, not education. It teaches kids that we should judge others based on race, gender or sexual identity, rather than the content of someone's character."[98]

2. Concepts Targeted by HF-802

The core of HF-802 is a list of banned concepts. As noted earlier, the list of concepts is identical to both the Trump executive order and other state laws regulating CRT.[99] The first topic area targeted by HF-802 is referred to as "race and sex stereotyping," which is defined as "ascribing character traits . . . to an individual" based on their race or sex.[100] For example, this section would cover someone assuming that a young boy is poorly behaved simply because he identifies as a boy. Taken in the context of this law, it is more likely to target the idea that someone is privileged by virtue of their race. This is consistent with the current position of many critics of CRT— that someone cannot be privileged solely because they are white and can only be judged by reference to their individual circumstances.[101] If a leader of a training were to suggest that the white participants are privileged on account of their race, it would likely be "race and sex stereotyping" under the law.

The second topic area targeted by HF-802 is referred to as "race and sex scapegoating," defined as the idea that a race or sex is inherently racist or sexist, respectively whether consciously or unconsciously.[102] An example would be to say that a man in a training thinks less of his woman colleagues because he is a man. This section of the law seems aimed at the idea—popular in progressive discourse—that people have conscious or unconscious prejudices because of their identity and background. This is consistent with the position taken by critics of CRT: the idea that "the vast

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[97] Erin Murphy, *Reynolds Signs Critical Race Theory Ban into Iowa Law*, GAZETTE (Jun. 8, 2021, 7:04 PM), https://www.thegazette.com/state-government/reynolds-signs-critical-race-theory-ban-into-iowa-law [https://perma.cc/F2YH-UD6H].

[98] *Id.*

[99] *See supra* Part II.A.2.

[100] IOWA CODE § 261H.8(b) (2021).

[101] *See* Dennis Prager, *The Fallacy of 'White Privilege*,' NAT'L REV. (Feb. 16, 2016, 5:00 AM), https://www.nationalreview.com/2016/02/white-privilege-myth-reality [https://perma.cc/L5FL-RJT4].

[102] IOWA CODE § 261H.8(a) (2021) ("'Race or sex scapegoating' means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex, or claiming that, consciously or unconsciously, and by virtue of persons' race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.").

majority of us are infested with an implicit racial bias" is a "farfetched claim."[103] If the leader of a training proposes that the training's white participants harbor implicit biases against Black people, the leader would be "race scapegoating" under HF-802.[104]

HF-802 also targets a grab bag of "[s]pecific defined concepts."[105] The listed concepts are a mixture of standard antidiscrimination principles,[106] concepts from liberal racial discourse,[107] and specific ideas that were viral

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[103] *See* Hans A. Von Spakovsky & Roger Clegg, *The Bogus Science Behind 'Implicit Racism,'* NAT'L REV. (Dec. 19, 2017, 9:00 AM), https://www.nationalreview.com/2017/12/implicit-racism-bad-science [https://perma.cc/P25Q-HMRV].

[104] IOWA CODE § 261H.8(a) (2021).

[105] *Id.*

> Specific defined concepts' includes all of the following:
>
> (1) That one race or sex is inherently superior to another race or sex.
>
> (2) That the United States of America and the state of Iowa are fundamentally or systemically racist or sexist.
>
> (3) That an individual, solely because of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
>
> (4) That an individual should be discriminated against or receive adverse treatment solely or partly because of the individual's race or sex.
>
> (5) That members of one race or sex cannot and should not attempt to treat others without respect to race or sex.
>
> (6) That an individual's moral character is necessarily determined by the individual's race or sex.
>
> (7) That an individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex.
>
> (8) That any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of that individual's race or sex.
>
> (9) That meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.
>
> (10) Any other form of race or sex scapegoating or any other form of race or sex stereotyping.

Id.

[106] *See, e.g.*, IOWA CODE § 261H.8(c)(1) (2021) ("That one race or sex is inherently superior to another race or sex."); IOWA CODE § 261H.8(c)(4) ("That an individual should be discriminated against or receive adverse treatment solely or partly because of the individual's race or sex.").

[107] *Compare* IOWA CODE § 261H.8(c)(2) (2021) ("That the United States of America and the state of Iowa are fundamentally or systemically racist or sexist.") *with* Ta-Nehisi Coates, *The*

controversies in conservative media.[108] For example, if a leader of a training were to tell the group that America is inherently racist, they would be articulating a specific defined concept under the law.

3. Application to Public Universities

HF-802 affects public universities.[109] Public universities in Iowa include the University of Iowa, Iowa State University, the University of Northern Iowa, and a system of community colleges.[110] The prohibitions in this section apply to mandatory training of staff or students offered by university employees or contractors hired by the institution.[111] This section does not apply to voluntary trainings.[112] However, at least one University has indicated that they are applying HF-802 to in-class discussions.[113] Section 261H.8(2) tasks the administrator with ensuring that mandatory trainings do "not teach, advocate, act upon, or promote specific defined concepts."[114]

Enduring Solidarity of Whiteness, ATLANTIC (Feb. 8, 2016) ("White supremacy is neither a trick, nor a device, but one of the most powerful shared interests in American history."), https://www.theatlantic.com/politics/archive/2016/02/why-we-write/459909 [https://perma.cc/ERF6-D9KD]. *Compare* IOWA CODE § 261H.8(c)(3) (2021) ("That an individual, solely because of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.") *with* Robin DiAngelo, *White Fragility*, 3 INT'L J. CRITICAL PEDAGOGY 54, 56 (2011) (discussing racism as the output of the experience of whiteness).

[108] *Compare* IOWA CODE § 261H.7(c)(9) (2021) ("That meritocracy or traits such as hard work ethic are racist or sexist, or were created by a particular race to oppress another race.") *with* Katherine Timpf, *Hiring People Based on Merit Deemed Problematic*, NAT'L REV. (Nov. 14, 2018, 6:30 AM), https://www.nationalreview.com/2018/11/university-claims-merit-based-hiring-harms-minority-groups/#:~:text=Suggesting%20that%20people%20from%20minority,because%20it%20harms%20minority%20groups [https://perma.cc/L59R-KB7H] ("In fact, oddly enough, I think that what *is* racist is the idea that hiring based on meritocracy and hiring a diverse group of candidates are mutually exclusive.") (emphasis in original).

[109] IOWA CODE § 261H.7 (2021).

[110] *Institutions*, BD. OF REGENTS, STATE OF IOWA , https://www.iowaregents.edu/institutions [https://perma.cc/9548-QNBP] (listing Iowa's public universities governed by the Board of Regents); Jeremy Varner, *Community Colleges*, IOWA DEP'T OF EDUC., https://educateiowa.gov/adult-career-comm-college/community-colleges [https://perma.cc/U6TF-F3JU] (listing Iowa's system of community colleges).

[111] IOWA CODE § 261H.8(2) (2021).

[112] *Id.*

[113] *See* Iowa State Off. of the Senior Vice President & Provost, *Frequently Asked Questions: Iowa House File 802 – Requirements Related to Racism and Sexism Trainings at Public Postsecondary Institutions*, IOWA STATE UNI. (Aug. 5, 2021), https://www.provost.iastate.edu/policies/iowa-house-file-802---requirements-related-to-racism-and-sexism-trainings [https://perma.cc/5WJ8-4VQT?type=image] (applying HF-802 to in-classroom instruction).

[114] IOWA CODE § 261H.8(2) (2021).

The statute does not provide a means of enforcing this section. There is no mechanism for removing funding from a University that violates the section, and it specifically disclaims that a private party can sue to enforce it.[115] The text of HF-802 leaves it to the University to establish procedures for compliance with the law. For example, the University of Iowa requests that a subdivision considering a mandatory training should clear it with the campus DEI office and allow the campus ombudsperson to hear and investigate complaints. [116]

4. Application to K-12 Schools

The most expansive provision of HF-802 applies to K-12 schools.[117] It applies to all public schools and binds the choices of school boards.[118] As applied to K-12 schools, HF-802 goes beyond the prohibitions at the university level by banning topics from "curriculum" as well as trainings.[119] The school administrator is tasked with "ensur[ing] that any curriculum or mandatory staff or student training . . . does not teach, advocate, encourage, promote, or act upon specific stereotyping and scapegoating toward others on the basis of demographic group membership or identity."[120] The section does allow "discussing specific defined concepts as part of a larger course of academic instruction" but does not define "discussing" or "larger course of academic discussion."[121] It is also different from the other two sections because it has one of the most serious sanctions: A school district that is found to have violated this section risks losing some or all of its state funding.[122]

C. First Amendment Doctrines Implicated by HF-802

This section considers the First Amendment rights potentially implicated

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[115] *Id.* at (4)(d).

[116] *House File (HF) 802 Information*, Univ. of Iowa Diversity, Equity, and Inclusion (July 27, 2021), https://diversity.uiowa.edu/house-file-hf-802-information [https://perma.cc/A4UA-HQ4A].

[117] *Compare* IOWA CODE § 279.74 (2021) (messaging to boards of directors of school districts about trainings *and* curriculum) *with* IOWA CODE § 261H.8 (2021) (messaging to higher education institution about trainings) *with* IOWA CODE § 25A.1 (2021) (messaging to state and local government entities about trainings).

[118] IOWA CODE § 279.74(2) (2021).

[119] *Id.*

[120] *Id.*

[121] IOWA CODE § 279.74(4)(c) (2021).

[122] IOWA CODE § 256.11(10)(c)(2)(b) (2021).

by HF-802. The First Amendment provides protections for the freedom of speech from state actors.[123] The First Amendment has been incorporated to the states through the 14th Amendment.[124]

1. Basic First Amendment Principles

The First Amendment stops the government from restricting speech and expression.[125] The goals of the First Amendment are to allow for free and open discussion in the marketplace of ideas,[126] promote democratic ideals,[127] as "an engine of equality,"[128] and protect unpopular speakers.[129] The lodestar of the First Amendment is that the government cannot discriminate against speech based on its content.[130] If a law regulates speech based on its content, there is a heavy presumption against constitutionality and the law must pass strict scrutiny.[131] Laws that discriminate based on viewpoint, saying that some points of view on a subject can be expressed but not others, face an even higher hurdle akin to a per se unconstitutional rule.[132] However, the courts have developed doctrines that depart from or modify this core rule in other contexts.[133]

Additionally, the First Amendment incorporates 14th Amendment due

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[123] *See* U.S. CONST. amend. I.

[124] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[125] *See* U.S. CONST. amend. I.

[126] *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 6–15 (1984) (summarizing the marketplace of ideas justification for the First Amendment). See *id.* at 71–84, for a criticism of the marketplace of ideas myth as entrenching existing power structures.

[127] *See generally* Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097 (2016) (summarizing the democracy rationale for the First Amendment).

[128] Leslie Kendrick, *Another First Amendment*, 118 COLUM. L. REV. 2095, 2112–15 (2018) (questioning the efficacy of viewing the First Amendment as an engine of equality).

[129] Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2153–58 (2018) (arguing the First Amendment is a potential tool for protecting marginalized speakers).

[130] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[131] *Id.*

[132] Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. REV. F. 20, 27 (2019) (surveying recent cases and arguing that the Supreme Court has adopted a functional per se rule against viewpoint discrimination).

[133] See *supra* Parts II.C.2–II.C.3, for a discussion of public employee speech and curricular speech, where the government is permitted to regulate speech based on its content and viewpoint.

process protections[134] by protecting against overly vague laws that chill speech. The tradition of striking down statutes if they are unconstitutionally vague has a long history in American law.[135] The principle goes back to Blackstone who wrote that laws must articulate "the rights to be [observed], and the wrongs to be [eschewed]" and make sure they are "clearly defined and laid down."[136] To comport with due process, a law must "provide a person of ordinary intelligence fair notice of what is prohibited"[137] and cannot invite arbitrary enforcement.[138] The rule against vagueness has particular force when First Amendment rights are involved because an imprecise law can chill protected speech.[139]

2. Public Employee Speech

Many of the parties regulated by HF-802 are public employees including district officials, teachers, and college professors. The free speech rights of public employees on the job are circumscribed compared to private citizens.[140] Government entities have broad discretion to set conditions of the speech of its employees to preserve the ability of the institution to speak

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134 U.S. CONST. amend XIV; United States v. Williams, 553 U.S. 285, 304 (2008) ("Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment.").

135 *See generally* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (discussing the common law roots and doctrinal history of the void for vagueness doctrine).

136 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 53–54 (1st ed. 1992).

137 United States v. Williams, 553 U.S. 285, 304 (2008).

138 Chicago v. Morales, 527 U.S. 41, 60–62 (1999) (holding a gang loitering statute unconstitutional because it did not provide "minimal guidelines to govern law enforcement"); *see, e.g.*, Smith v. Goguen, 415 U.S. 566, 576 (1974) (striking down a Massachusetts flag desecration statute because enforcement depended on a police officer's perception of the defendant's political motivations for misusing the flag); Kolender v. Lawson, 461 U.S. 352, 358–60 (1983) (striking down a statute that required people stopped by police to furnish "credible and reliable" identification because the law gave no definition of what made identification "credible and reliable" and left the enforcement up to the judgment of the officer who may be influenced by personal biases).

139 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.9(c) (4th ed. 2007); Buckley v. Valeo, 424 U.S. 1, 41 n.48 (1976) ("[V]ague laws . . . operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone...than if the boundaries of the forbidden areas are clearly marked.").

140 *See generally* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1 (2009) (arguing that public employees have more constrained speech rights than their private counterparts because their interests must be weighed against the government's interest in getting across its own message).

for itself.[141] The Supreme Court articulated the general test for assessing a First Amendment claim by a public employee in *Pickering v. Board of Education*. The test balances the employee's interest in commenting on matters of public concern against the employer's need for workplace efficacy.[142] In order to win on *Pickering* balancing, an employee needs to show protected First Amendment speech and that their interest in speaking is not outweighed by a legitimate interest of the state employer.[143] In *Pickering*, a schoolteacher challenged a disciplinary action based on her off-the-job letter to the local newspaper.[144] The Court held that the teacher's interest in speaking on a matter of public concern outweighed any disruption to the workplace environment.[145]

In 2006, the *Garcetti v. Ceballos* Court added another wrinkle to the analysis of public-employee speech by adding a threshold issue before courts can engage in *Pickering* balancing.[146] A sharply divided Court held that a public employee's speech in the course of their duties was not protected by the Constitution.[147] Now, a public employee trying to plead a free speech claim must show that the speech was not made in the course of their job duties.[148] In dicta,[149] the Court did suggest that the countervailing interests in academic freedom may make the case of the schoolteacher or college professor different from the run-of-the-mill public employee.[150] Lower courts have not come to a consensus on whether *Garcetti* applies to a K-12 teacher's speech,

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[141] *Id.* at 20.

[142] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); *see also* City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (per curiam) (holding that speech touches on a matter of public concern if it involves, "a subject of legitimate news interest" rather than a subject only of interests to the individuals talking to one another).

[143] Norton, *supra* note 140, at 16–20 (explaining how courts apply *Pickering* to speech claims not covered by *Garcetti*).

[144] *Pickering*, 391 U.S. at 564.

[145] *Id.* at 572–73.

[146] Garcetti v. Ceballos, 547 U.S. 410, 424–26 (2004).

[147] *Id.* at 422.

[148] STEPHEN B. THOMAS ET AL., PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 313 (6th ed. 2009).

[149] *Dicta*, BLACK'S LAW DICTIONARY (6th ed. 1991) ("Opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in [the] court's opinion which go beyond the facts before [the] court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent.").

[150] *Garcetti*, 547 U.S. at 425 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's . . . employee-speech jurisprudence. We need not . . . decide whether the analysis we conduct today would apply in the same manner to . . . speech related to scholarship or teaching.").

but the trend seems to be that a schoolteacher's in-classroom speech receives little to no First Amendment protection.[151] Even in circuits that do not apply *Garcetti* to schoolteachers and only apply *Pickering* balancing, curricular speech is usually not considered to be speech on a matter of public concern.[152]

College professors generally receive more First Amendment latitude than schoolteachers, justified in part by the idea of academic freedom.[153] For the most part, circuits have declined to apply *Garcetti* to University professors,[154] meaning the professors retain their First Amendment right to speak on matters of public concern in the workplace, which is then balanced against the institution's interest under traditional *Pickering* balancing.[155] Even after clearing the *Garcetti* hurdle, professors alleging First Amendment violations often face an uphill battle in vindicating their speech rights because most

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[151] *See* Erin M. Slater, K–12 Public School Teacher Free Speech: The Impact of Garcetti v. Ceballos on First Amendment Protections 183 (Dec. 2018) (Ed. D. dissertation, Northern Illinois University) (summarizing the post-*Garcetti* caselaw and finding that it "narrowed the scope of First Amendment free speech rights for public school teachers"). *Compare* D'Angelo v. Sch. Bd., 497 F.3d 1203, 1209 (11th Cir. 2007) (applying *Garcetti* to a principal's speech at a school function); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007) (holding that a schoolteacher's speech was during the teacher's official duties and that the teacher's First Amendment claim was barred by *Garcetti*) *with* Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694–95 (4th Cir. 2007) (declining to decide if *Garcetti* applied to in classroom speech); Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 263 (6th Cir. 2006) (holding that a school superintendent had a right to expression).

[152] *Lee*, 484 F.3d at 694–95 (holding that curricular speech was not speech on a matter of public concern and did not implicate the First Amendment).

[153] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (holding that state investigation of a college professor for espousing Marxist beliefs was "an invasion of petitioner's liberties in the areas of academic freedom and political expression -- areas in which government should be extremely reticent to tread"); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (invalidating a New York statute that required state university professors to profess loyalty oaths because, "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us"); Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("We have 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.").

[154] *See*, *e.g.*, Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014) (en banc); Adams v. Trs. of the Univ. N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011); Trudeau v. Univ. of N. Tex. 861 F. App'x 604, 609 n.5 (5th Cir. 2021); Meriwether v. Hartop, 992 F.3d 492, 504 (6th Cir. 2021). The Eighth Circuit, in dicta, has indicated that *Garcetti* may not apply to speech related to scholarship or teaching but has not directly addressed the issue of speech rights for a professor engaged in research or teaching. Lyons v. Vaught, 875 F.3d 1168, 1176 n.4 (8th Cir. 2017) (reserving the issue because "this case does not involve speech related to scholarship or teaching"); Groenewold v. Kelley, 888 F.3d 365, 371 (8th Cir. 2018) (applying *Garcetti* to the administrative director of a university research center on matters concerning the administration of the center).

[155] *See Demers*, 746 F.3d at 415 (rejecting the application of *Garcetti* then engaging in *Pickering* balancing).

courts are reticent to second guess the judgments of university officials.[156] The public employee speech rule creates a functional First Amendment blind spot, where the normal rules against content discrimination give way.

3. The Right to Learn

Students do not shed their constitutional rights at the schoolhouse door, but the classroom setting means that a student's free speech claims are subject to balancing against potentially countervailing educational interests.[157] In the canonical case *Tinker v. Des Moines,* the court held that a school district violated students' First Amendment rights when it disciplined students for wearing black armbands to protest the Vietnam War.[158] The court in *Tinker* held that students retained their substantive constitutional rights in the school setting, including in the classroom.[159] However, the Court made it clear in *Tinker* and in subsequent caselaw, that student speech rights in the school setting are circumscribed compared to rights in other contexts and need to be weighed against educational interests.[160]

Beyond their *Tinker* free speech rights[161] and a right to a secular

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[156] Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1971 (2016).

[157] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2044 (2021).

[158] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504, 514 (1969).

[159] *Id.* at 506.

[160] The Court's student speech jurisprudence has identified several areas where student speech can be regulated because of the school's unique role. A school can regulate speech if it is disrupting school educational functions or represents an "invasion of the rights of others." *Tinker*, 393 U.S. at 513. A school can regulate lewd and vulgar speech during school sponsored events and presentations. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986). A school can also regulate speech promoting illegal drug use made on school trip. Morse v. Frederick, 551 U.S. 393, 409–10 (2007) (The case colorfully known as the "bong hits for Jesus" case.). Finally, a school can regulate speech when the school is providing the forum for speech. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 269 (1988) (addressing articles written in a student newspaper). The Court has also indicated in dicta that a school may also be able to regulate certain forms of off campus speech such as "severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules" around cheating and using computers. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2045 (2021).

[161] *Tinker*, 393 U.S. at 511 (holding that students in public schools maintain their speech rights at school if those rights do not substantially interfere with the orderly operating of the school).

curriculum[162] (which likely are not implicated by HF-802[163]), students have some form of a "right to receive information and ideas" but the doctrine is underdeveloped at the Supreme Court level.[164] The right to learn case law exists against the backdrop of a state's almost plenary authority over school curriculum.[165] The Supreme Court has set some outer boundaries to the "comprehensive authority of the States . . . to prescribe and control conduct in the schools."[166] In *Meyer v. Nebraska*, the Court held that it was unconstitutional to discharge a teacher for teaching German.[167] The Court

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[162] For example, in *Epperson v. Arkansas*, the court invalidated a state statute that prohibited the teaching of evolution. Epperson v. Arkansas, 393 U.S. 97, 108–09 (1968). The Court held that banning the scientific account of evolution violated the Establishment Clause by making the religious account of human origins the school curriculum. *Id.* at 106.

[163] The language of HF-802 does not implicate a student's right to free speech. *See* IOWA CODE § 279.74(2). The plain language only refers to "employee[s]" and "contractor[s]" who teach mandatory trainings or curriculum, which would not sweep in students under most circumstances. *Id.* Unless a district were to adopt a rule applying HF-802 to in class presentations by students or limiting class discussion in a similar way, there is not a substantive *Tinker* issue. *See Tinker*, 393 U.S. at 512 (holding that the First Amendment covers in-classroom speech).

The Establishment Clause issues from *Epperson* also are not relevant because there is no indication in the history or text of HF-802 that it is religiously motivated. *See Epperson*, 393 U.S. at 106 (1968) (holding there is a constitutional issue when a state tries to use its power over the curriculum to teach religious orthodoxy). However, a reader in another state may be interested in picking up this line because many of the opponents of CRT in schools oppose it because it runs contrary to biblical teachings. *See Critical Race Theory and the Biblical Worldview*, LIFEPOINT CHURCH, https://lifepointchurch.org/crt [https://perma.cc/STB3-SLM7]; Don Beehler, *Why Critical Race Theory Doesn't Reflect the Values of Christianity*, TENNESSEAN (June 29, 2021, 8:40 AM), https://www.tennessean.com/story/opinion/2021/06/29/critical-race-theory-doesnt-reflect-values-christianity/7789946002 [https://perma.cc/33ZX-NFBN]; Sierra Boudreaux & Victoria Watson, *C3 Speaker Tackles Contradictions Between Critical Race Theory and Christianity*, LA. CHRISTIAN UNIV. (Sept. 22, 2021), https://lcuniversity.edu/c3-speaker-tackles-contradictions-in-critical-race-theory-and-christianity [https://perma.cc/5C3N-L7ZL]. In a case of religious rather than political motivation, the right to learn, described *infra* Part IV.D, would likely apply. *See* Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 1004 (W.D. Ark. 2003) (rejecting a school's argument that interest in preventing students from learning about "witchcraft religion" in striking down a school policy that required students to get a parental permission slip to check out Harry Potter from the school library). See Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2304–16 (2023), for a skeptical view on the utility of Establishment Clause arguments against overreach by reactionary state governments.

[164] THOMAS ET AL., *supra* note 148, at 84–85.

[165] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); THOMAS ET AL., *supra* note 148, at 80 ("Courts have repeatedly recognized that the state retains the power to determine the public school curriculum as long as federal constitutional guarantees are respected.").

[166] *Tinker*, 393 U.S. at 507.

[167] Meyer v. Nebraska, 262 U.S. 390, 396, 403 (1923).

reasoned that there was a substantive liberty interest in teaching and learning useful information.[168] Subsequent decades have narrowed and mostly repudiated the substantive due process analysis of *Meyer*.[169] Writing in 2000, Justice Kennedy suggested that, "*Meyer*, had [it] been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion."[170]

Since then, the Supreme Court has suggested that there may be a right to receive information in an academic context.[171] In *Board of Education. v. Pico*, the Court addressed a school that removed controversial library books (including Vonnegut's *Slaughterhouse Five* and Wright's *Black Boy*) at the behest of a conservative parents' group.[172] A group of students challenged the removal of the books under a First Amendment theory.[173] The Supreme Court did not end up resolving the question of censorship of school materials in a satisfying way.[174] Justice Brennan, writing for a three-justice plurality, indicated that the removal of books violated "the right to receive information and ideas."[175] The theory was that in order for students to meaningfully participate in free speech they needed to have "access to ideas."[176] Justice Blackmun concurred but proposed a broader conception of the First Amendment issue involved.[177] In his view, there was an additional limitation that implicated local control over the curriculum, that the "imposition of 'ideological discipline' was not a proper undertaking for school authorities."[178] His vision of the right to learn would invalidate school decisions if they were "motivated simply by the officials' disapproval of the

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[168] *Id.* at 399 ("[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

[169] Kerry v. Din, 576 U.S. 86, 93–94 (2015) ("To be sure, this Court has at times indulged a propensity for grandiloquence when reviewing the sweep of implied rights . . . . But this Court is not bound by dicta, especially dicta that have been repudiated by the holdings of our subsequent cases.").

[170] Troxel v. Granville, 530 U.S. 57, 94 (2000) (Kennedy, J., dissenting).

[171] Bd. of Educ. v. Pico, 457 U.S. 853, 866–67 (1982) (plurality opinion).

[172] *Id.* at 856 n.3 (plurality opinion); *Id.* at 898, 902 (plurality opinion).

[173] *Id.* at 859.

[174] THOMAS ET AL., *supra* note 148, at 84.

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

[176] *Id.* at 868.

[177] *Id.* at 876 (Blackmun, J., concurring).

[178] *Id.* at 877.

ideas involved."[179] Another segment of the Court, led by Justice White, concurred in judgment, holding that the record was insufficient to resolve the question and remanded for further fact finding.[180] Finally, Chief Justice Burger dissented on the grounds that the First Amendment did not imply a right to receive information.[181] The Court has not revisited the right to learn in subsequent cases and the doctrine has been criticized for a lack of consistency among the lower courts, "which causes confusion and arbitrary modifications."[182]

While the Court did not generate a majority opinion, the plurality in *Pico* about the right to learn has been influential in helping lower courts analyze a variety of school policies. The most common version of the right to learn has been used to resolve challenges to bans and removal of library materials.[183] For example, in *Pratt v. Independent School District*, the Eighth Circuit used a version of the right to learn theory to invalidate a Minnesota school district's effort to ban films for their ideological content.[184] A useful general rule from this line of cases is that courts tend to invoke the right to learn when the only reason proffered for the removal of library materials is disagreement with their ideological content.[185]

Another strain of the right to learn theory has gone beyond the library walls to invalidate a school's curricular decisions, such as the decision to

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[179] *Id.* at 879–80.

[180] *Id.* at 883 (White, J., concurring).

[181] *Id.* at 885–86 (Burger, C.J., dissenting). However, Justice Rehnquist, who joined the Chief Justice's opinion, indicated that he agreed the Constitution may constrain school boards from exercising their discretion in narrowly partisan manner or motivated by racial animus but that the facts of *Pico* did not present that situation. *Id.* at 907–08 (Rehnquist, J., dissenting).

[182] Ryan L. Schroeder, *How to Ban a Book and Get Away with It: Educational Suitability and School Board Motivations in Public School Library Book Removals*, 107 IOWA L. REV. 363, 382 (2021).

[183] STEPHEN B. THOMAS ET AL., PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 83–87 (9th ed. 2009); Pratt v. Indep. Sch. Dist., 670 F.2d 771, 776 (8th Cir. 1982) ("[T]he students here had a right to be free from official conduct that was intended to suppress the ideas expressed in these films."); Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 185, 190–91 (5th Cir. 1995) (holding a genuine issue of material fact if removal of a library book on African American religious history violated student's right to learn); Case v. Unified Sch. Dist., 908 F. Supp. 864, 875 (D. Kan. 1995) (removing library books due to ideological disagreement infringed on student's right to learn*);* Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 1005 (W.D. Ark. 2003) (library policy requiring parental permission to check out *Harry Potter* infringed on student right to learn); ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Dist., 439 F. Supp. 2d. 1242, 1272 (S.D. Fla. 2006) (removing a library book was motivated because the schoolboard "desired to impose upon their students a political orthodoxy" violated their right to receive information).

[184] Pratt v. Indep. Sch. Dist., 670 F.2d 771, 776 (8th Cir. 1982).

[185] *See id.*

remove an ethnic studies elective from the high school curriculum.[186] In 2010, in response to a long-running controversy between white and Mexican residents of Tucson, the Arizona legislature passed a law banning a Mexican-American studies elective.[187] After almost a decade of protracted litigation, the district court invalidated the statute on the ground that Arizona violated the plaintiffs' right to learn.[188] Important to the court's holding was evidence that the legislature was motivated by anti-Mexican animus.[189] The *Gonzalez* case offers an intriguing version of the right to learn, providing students a right to be free from arbitrary and politically-motivated tinkering with the curriculum. This Article refers to this approach of applying the right to learn to curricular decisions as "the curricular right to learn."

In general, while there are a few cases on point, both the right to learn and constitutional limits on state control over the curriculum are doctrinally underdeveloped and offer few guideposts for litigants and state legislatures.

III. IOWA'S CRT BAN IN THE UNIVERSITY CLASSROOM AND ACADEMIC FREEDOM

This section examines Iowa's CRT ban in the University Classroom. While most colleges in Iowa are not applying HF-802 to in-classroom instruction, at least one university has indicated its intention to administer mandatory courses consistently with the law. If enforced, this policy would infringe on the First Amendment rights of university professors. This section first makes the normative case for expanding and clarifying these protections. Second, it argues that ambiguities in the current First Amendment doctrine threaten the important speech interests associated with teaching and scholarship. Third, it argues that the Eighth Circuit should join every other circuit that has considered the issue and hold that *Garcetti* does not apply to speech associated with a college professor's teaching and research. Finally, it will apply the proposed rule to the case of Iowa's CRT ban as implemented by Iowa State University.

A. Iowa State University Has Applied HF-802 to Classroom Speech

The plain text of HF-802 does not appear to apply to classes but one of Iowa's public universities has tried to apply it to in classroom instruction. The

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

[187] *See* Nicholas B. Lundholm, Note, *Cutting Class: Why Arizona's Ethnic Studies Ban Won't Ban Ethnic Studies*, 53 ARIZ. L. REV. 1041, 1046–56 (detailing the convoluted history of Arizona's ethnic studies ban).

[188] *González*, 269 F. Supp. 3d at 974.

[189] *Id.* at 968.

text of HF-802 indicates that an "administrator of a public institution of higher education shall ensure that any mandatory staff or student training provided by an employee of the institution or by a contractor hired by the institution does not teach, advocate, act upon, or promote specific defined concepts."[190] In addition, the section later says that it "shall not be construed to . . . prohibit discussing specific defined concepts as part of a larger course of academic instruction."[191] While the text is very clear, comparing this section (referring only to "mandatory staff or student training")[192] to the section applied to K-12 schools (referring to "training and curriculum")[193] supports the reading that the university section only applies to trainings.[194] A court looking to avoid the constitutional question[195] could avoid many of the First Amendment harms by interpreting the statute to not apply to classroom instruction.

Despite the clear text of the statute, the regulated universities have come to different understandings of the law's scope. Both the University of Iowa[196] and the University of Northern Iowa[197] released guidance indicating that HF-

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[190] IOWA CODE § 261H.8(2) (2021).

[191] IOWA CODE § 261H.8(4)(c) (2021).

[192] IOWA CODE § 261H.8(2) (2021).

[193] IOWA CODE § 279.74 (2021).

[194] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 118 (1st ed. 2012) ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning."). The section applied to universities and applied to K-12 schools is materially different because of the inclusion of the word "curriculum." *Compare* IOWA CODE § 261H.8(2) (2021) *with* IOWA CODE § 279.74 (2021). Curriculum means "the courses offered by an educational institution" *Curriculum*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/curriculum [https://perma.cc/KQT3-BCQX]. If "training" standing on its own was enough to cover in classroom instruction, then the legislature would not have included language applying HF-802 to curriculum in K-12 schools. Including curriculum in the section applied to K-12 schools and not in the section applied to universities means curriculum is not covered. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 81 (1st ed. 2012) ("The expression of one thing implies the exclusion of others.").

[195] *See generally* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275 (2016) (arguing a narrowing construction is a form of judicial remedy); Gregory P. Magarian et al., *Data Driven Constitutional Avoidance*, 104 IOWA L. REV. 1421, 1440 (2019) (summarizing the doctrinal reasons for using statutory interpretation as a means of avoiding constitutional questions).

[196] *House File (HF) 802 Information*, *supra* note 116 ("House File 802 applies to mandatory DEI training on campus. It does not prohibit the voluntary training or discussions of DEI topics in the following areas: [t]eaching or discussion of DEI topics and theories in the classroom [or] [v]oluntary training (i.e., BUILD program or implicit bias faculty/staff training.")

[197] Off. of the Provost & Exec. Vice President for Acad. Affairs, *House File 802 Overview: Key*

802 had no effect on classroom instruction. However, Iowa State University released guidance indicating that HF-802 applies to mandatory classes.[198] The guidance interprets mandatory trainings to include classroom instruction, despite the specific language in the statute allowing discussion in the context of a course of academic instruction.[199] The University does not list what classes would trigger coverage of HF-802 but instead says it will consider the class is mandatory for a major if the "specific defined concepts" are "germane" to the subject being taught, and if there is the chance for open discussion.[200] The guidance does not expand on how the University will determine if the discussion is germane or provide administrable standards for regulated parties.[201] Free speech groups have raised the possibility that the University will use the law to target professors who speak about political issues in the classroom.[202] Iowa State has not changed its guidance in response to the outcry and continues to claim that the CRT ban could apply to classroom instruction. Even if Iowa's CRT ban has limited impact on the university classroom, other states have been more aggressive in targeting university classroom instruction.[203]

B. Iowa State's Policy Violates Professor's First Amendment Rights

By issuing that guidance, Iowa State has regulated the speech of university professors in a viewpoint discriminatory manner. This policy is a problem because banning some of the "specific defined concepts" amounts to forcing professors to not speak or to speak a government approved line if they hold

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Points for Faculty and Academic Administrators (2021), https://ecomm.uni.edu/Provost/UNI_OverviewStatement.pdf [https://perma.cc/6TXX-F9X8] ("House File 802 does not limit the curriculum taught by our faculty in academic courses offered at UNI.")

[198] Iowa State Off. of the Senior Vice President & Provost, *supra* note 113 ("[I]t is still prudent to be mindful of the Act. Faculty who do touch upon the specific defined concepts in their courses are encouraged to consider the key factors of student choice, germaneness, and open discussion, as described below, when assessing their courses or programs.").

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Iowa State Implementation of Iowa's Anti-Critical Race Theory Law, House File 802*, FIRE (Aug. 11, 2021), https://www.thefire.org/cases/iowa-state-university-implementation-iowas-anti-critical-race-theory-law-house-file-802 [https://perma.cc/E87D-327M].

[203] *See, e.g.*, FLA. STAT. 1000.05 (2022) (applying a CRT ban to in-classroom instruction at Florida Universities). A federal court granted a preliminary injunction against the Florida CRT ban, holding that it likely violated the First Amendment and was void for vagueness. Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1245 (N.D. Fla. 2022), *stay denied* Pernell v. Fla. Bd. of Governors, No. 22-13992, 2023 WL 2543659 (11th Cir. Mar. 16, 2023).

certain positions on hotly contested political issues.[204] The most troubling effect of the law is its ban on teaching one side of current and contentious political issues as they are debated in the public square.[205] HF-802 is a partisan effort to influence the University classroom because it targets live political issues and puts its thumb on the scale of one side by banning professors from addressing the other side. Under bedrock First Amendment principles, this is unconstitutional.[206] However, because of the target of the CRT ban—professors at public universities—this viewpoint discrimination could fall into a First Amendment blind spot. If courts treat professors like other types of public employees, a court will never get to the merits of this important and

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[204] ROTUNDA & NOWAK, *supra* note 139, at § 20.11(c) ("The government may not enter the political marketplace by forcing private persons to subscribe to or advance messages favorable to the government"); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that a school policy compelling students to salute the flag and recite the pledge of allegiance was unconstitutional); Wooley v. Maynard, 430 U.S. 705, 717 (1977) (requiring license plates to have the slogan "Live Free or Die" was unconstitutional).

[205] *Compare* IOWA CODE § 261H.8(1)(c)(2) (2021) ("That the United States of America and the state of Iowa are fundamentally or systemically racist or sexist.") *with* RICHARD ROTHSTEIN, THE COLOR OF LAW (2017) (describing the mark left by racist policies on the modern American city); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing mass incarceration is the product of structural racism); THE PRESIDENT'S ADVISORY 1776 COMM'N, THE 1776 REPORT (2021) (arguing the United States is not fundamentally racist). *Compare* IOWA CODE §261H.8(1)(c)(3) (2021) ("That an individual, solely because of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.") *with* David L. Faigman et al., *The Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1394 (2008) (arguing in favor of using implicit bias science in the context of anti-discrimination law); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO STATE L.J. 1023, 1056–58 (2006) (arguing that implicit bias is not scientifically supported and should not be used in anti-discrimination law). *Compare* IOWA CODE 261H.8(1)(c)(3) (2021) ("That meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.") *with* Note, *"Trading Action for Access": The Myth of Meritocracy and the Failure to Remedy Structural Discrimination*, 121 HARV. L. REV. 2156, 2177 (2008) (arguing that meritocracy is a myth used to legitimate existing racial structures); DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE (2019) (arguing against meritocracy); ADRIAN WOOLDRIGE, THE ARISTOCRACY OF TALENT, HOW MERITOCRACY MADE THE MODERN WORLD (2021) (arguing in favor of meritocracy).

[206] Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1245 (N.D. Fla. 2022) (concluding that Florida's CRT ban was unconstitutional viewpoint discrimination); Reed v. Town of Gilbert, 576 U.S. 155, 168 (2015) ("Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'") (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995)). The existing literature has generally concluded that CRT bans are viewpoint discrimination and would trigger the per se bar against viewpoint discrimination. *See* Dylan Saul, Note, *School Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans*, 107 MINN. L. REV. 1311, 1335–36 (2023); Tess Bissell, Note, *Teaching in the Upside Down: What Anti-Critical Race Theory Laws Tell Us About the First Amendment*, 75 STAN. L. REV. 205, 253–55 (2023).

sensitive First Amendment claim.[207]

C. The Normative Case Against Applying Garcetti *to Academic Speech*

There is, of course, the question of why professors should be treated differently than the rest of the public workforce. The answer is academic freedom. The United States Reports are filled with paeans to the importance of universities and the necessity of academic freedom.[208] The Court recognizes the importance of the freedom of speech to American universities under the theory that scholarship and teaching "cannot flourish" if the state targets their speech for its political content.[209] Partisan interference with the university lecture hall would stifle the ability of scholars to produce knowledge about the world and make society worse off in the process.[210] Later in *Keyishian*, the Court articulated this principle by calling the university a "marketplace of ideas" where students get "exposure to [a] robust exchange of ideas" and argued those interests were undercut by the imposition of political orthodoxy on the speech of professors.[211] Other scholars have suggested a different justification for academic freedom: universities fulfill an institutional role in our democracy by training students to engage in democratic debate.[212] Academic speech has a special place in our constitutional order.

By many accounts, the current doctrine does not live up to the grand promises of academic freedom that the Court has offered in dicta.[213] Courts have been ambivalent about academic freedom, often deferring to university interests when applying *Pickering*.[214] However, there are positive signals coming out of the circuits. In the last decade and a half, many circuits have

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[207] *See generally* Garcetti v. Ceballos, 547 U.S. 410, 422 (2006).

[208] Amar & Brownstein, *supra* note 156.

[209] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[210] *Id.* at 250; *see also id.* at 262 (Frankfurter, J., concurring) ("For society's good . . . inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom.").

[211] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[212] PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 112 (2013). Under the view advocated by Horwitz, it is less important that individual professors have free speech and more important that the institution fulfills its role as a mini-democracy. *See id.* at 113. As such, they should be left to self-regulate without interference from the courts and legislatures. *Id.* at 114.

[213] Amar & Brownstein, *supra* note 156; Mark Strasser, *Pickering, Garcetti, & Academic Freedom*, 83 BROOKLYN L. REV. 579, 595–611 (highlighting areas where the circuits have split applying public employee speech doctrine to professors).

[214] Amar & Brownstein, *supra* note 156.

started in that direction by rejecting the application of *Garcetti* to professors engaged in teaching and scholarship. In the leading case on the issue, the Ninth Circuit concluded en banc that interpreting *Garcetti* to say that professors' classroom speech receives no First Amendment protection would "directly conflict with the important First Amendment values previously articulated by the Supreme Court."[215]

As a doctrinal matter academic speech is different from other public employee speech because it has additional First Amendment value via academic freedom. There is good reason for courts to address a challenge to a CRT ban on college campuses as an academic freedom rather than a public employee speech case.[216]

D. The Eighth Circuit Should Not Apply Garcetti *to Academic Speech*

The Eighth Circuit may soon be presented with an opportunity to weigh in on a First Amendment challenge to HF-802 and the Iowa State University guidance. That court should use the opportunity to reject the application of *Garcetti* to college professors engaged in teaching and researching, consistent with every circuit that has ruled on the issue.[217] The Eighth Circuit, in *Lyons v. Vaught*, indicated in dicta that *Garcetti* may not apply to speech related to scholarship or teaching but that the case in front of them did "not involve speech related to scholarship or teaching."[218] A year later in *Groenewold v. Kelley*, the court applied *Garcetti* to a free speech claim by a professor who was the administrative director of a research center.[219] The court did not address or acknowledge the question left open in *Lyons* because the speech at issue concerned the professor's duties as an administrative director rather than as a teacher or scholar.[220] When squarely presented with the issue, possibly in the context of a CRT ban, the Eighth Circuit should adopt the same rule as the majority of other circuits and hold that *Garcetti* does not apply to professors engaged in research and teaching.

E. Application of Academic Freedom Principles to Iowa's CRT Ban

For an illustration of how these principles would work in practice,

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[215] Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014) (en banc).

[216] See Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1238–41(N.D. Fla. 2022), for a recent case that has taken this approach.

[217] *See supra* note 154.

[218] Lyons v. Vaught, 875 F.3d 1168, 1176 n.4 (8th Cir. 2017).

[219] Groenewold v. Kelley, 888 F.3d 365, 167, 371 (8th Cir. 2018).

[220] It is also possible that the court did not reach the issue because the parties did not raise the academic freedom issue. *See id.* at 371–72 (listing the plaintiff's contentions on appeal).

consider a hypothetical challenge by a professor acting under Iowa State's guidance. The plaintiff is a psychology professor who teaches about implicit bias in her Introduction to Psychology class. Class attendance is mandatory, and the class is large enough that she usually lectures, meaning there is no time for discussion on the issue. A student complains that the professor violated HF-802 by teaching "[t]hat an individual, solely because of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously."[221] The University applies its guidance and determines that because the class was mandatory and there was insufficient chance for discussion, the professor's class qualified as a mandatory training[222] and instructs the professor to stop teaching that content. The professor sues arguing that HF-802's prohibition on teaching specific defined concepts violated her free speech rights.[223] Without *Garcetti*, the court would not kick the claim out of court because it was made on the job.[224] Engaging in *Pickering* balancing, the court can hold that HF-802 as applied to in-classroom instruction is unconstitutional because a university's disagreement with the professor's speech or desire for ideological orthodoxy is not a legitimate employer interest.[225]

This issue goes beyond one college in Iowa. Multiple states' attempts to regulate CRT have explicitly targeted in classroom instruction by university professors.[226] Even if Iowa State University responds to public criticism and changes its guidance, the interaction between CRT bans and academic freedom is going to continue to be a recurring issue nationwide.[227] CRT bans represent a threat to the free exchange of ideas in the University and threaten to instill a pall of ideological orthodoxy over the university classroom. By

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[221] IOWA CODE § 261H.8(1)(c)(3) (2021).

[222] *See* Iowa State Off. Senior Vice President & Provost, *supra* note 113.

[223] *See infra* Part III.B.

[224] *See* Demers v. Austin, 746 F.3d 402, 415 (9th Cir. 2014) (en banc) (rejecting the application of *Garcetti* then engaging in *Pickering* balancing).

[225] Rankin v. McPherson, 483 U.S. 378, 384, 390 (1987); *see also* Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1245 (N.D Fla. 2022) (applying *Pickering* balancing and concluding that Florida's interest in ideological conformity did not outweigh the faculty's free speech interests).

[226] *See*, *e.g.*, OKLA. STAT. tit. 70, § 24-157 (2021); FLA. STAT. 1000.05 (2022); Letter from Kristi Noem, Governor of South Dakota, to John W. Bastian, President of the South Dakota Board of Regents (May 24, 2021), https://governor.sd.gov/doc/CivicsLetter-to-BORPresident.pdf. [https://perma.cc/6KUL-3TFW]; *see also* Matt Zalaznick, *Dozens of Education Groups Blast Critical Race Theory Bans*, DIST. ADMIN. (June 16, 2021), https://districtadministration.com/dozens-of-education-groups-blast-efforts-to-ban-critical-race-theory [https://perma.cc/MHC2-D3GT] (discussing legislation in the pipeline around CRT regulation targeted at the university level).

[227] Zalaznick, *supra* note 226.

rejecting *Garcetti*, the court can bring Iowa's CRT ban out from a First Amendment blind spot and allow universities in Iowa to live up to their promise as drivers of knowledge and open debate.

IV. IOWA'S CRT BAN IN K-12 CLASSROOMS AND THE RIGHT TO LEARN

This section looks at Iowa's CRT ban as it is applied to K-12 classrooms and argues that an application and potential expansion of the right to learn is a solution for courts faced with a First Amendment challenge to HF-802. As a preliminary matter, it will argue that HF-802 applies to classroom instruction. Second, it will argue that the combination of ambiguous drafting and fear of politically motivated enforcement is chilling speech about race in schools. Third, it will argue that current doctrine is not sufficient to protect the constitutional interests at stake.[228] Finally, it will apply the right to learn as it currently exists and a more curricular right to learn implied by the Court and adopted in some curriculum cases to HF-802.

A. HF-802 Applies to Classroom Discussion in K-12 Schools

HF-802 applies to in-classroom instruction because the banned concepts cannot be taught in training or curriculum.[229] Curriculum means "the courses offered by an educational institution."[230] A district employee cannot teach banned concepts in a mandatory training and a teacher cannot do so in the classroom. Comparing the language applied to K-12 schools and the language used for other contexts also supports that reading.[231] The statutes applied to subdivisions[232] and universities[233] only ban CRT speech in trainings. There are still some issues to be resolved through a court decision or administrative guidance. For example, the statute includes a carveout that indicates that the section "shall not be construed to . . . [p]rohibit discussing specific defined concepts as part of a larger course of academic instruction."[234] The difference between curriculum and a course of academic instruction is not clear. Department of Education guidance did not clarify the issue and mostly

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[228] Others writing on CRT bans have come to a similar conclusion that the current doctrine is inadequate for responding to CRT bans in K-12 schools. *See* Bissell, *supra* note 206, at 246; Saul, *supra* note 206.

[229] IOWA CODE § 279.74(2) (2021).

[230] *Curriculum*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/curriculum [https://perma.cc/G5ES-X493].

[231] *Compare* IOWA CODE § 261H.8(2) (2021) *with* IOWA CODE § 279.74 (2021).

[232] IOWA CODE § 25A.1 (2021) ("mandatory staff training").

[233] IOWA CODE § 261H.8(2) (2021) ("mandatory staff or student training").

[234] IOWA CODE § 279.74(4)(c) (2021).

restated the language of the law.[235] However, most regulated parties have adopted the understanding that it applies to in classroom instruction.[236]

B. Iowa's CRT Ban in the K-12 Classroom Discriminates by Viewpoint and is Unconstitutionally Vague.

As argued above, forced speech on active political controversies is unconstitutional viewpoint discrimination.[237] This principle applies with equal force in the K-12 context, where teachers are required to take the same side on the same political controversies. Beyond the first-order viewpoint discrimination problem, the K-12 rule suffers from vagueness concerns because they are overly ambiguous and invites arbitrary enforcement.[238] The ambiguities in the language, the politically charged nature of the subject matter, and the intense scrutiny from parents mean that speech in the classroom environment is chilled.[239]

First, the law is ambiguous and does not give notice of what is prohibited. The law states curriculum cannot "teach, advocate . . . promote, or act upon" stereotyping and scapegoating.[240] However, a latter part of the law clarifies that it does not ban "discussing specific defined concepts as part of a larger course of academic instruction."[241] A teacher making a lesson plan is put in the unenviable position of making a judgment call about the difference between teaching and discussing forbidden topics. The law does not define either of the two terms or explain what the difference between them is, and consulting the everyday meaning of the two words is unhelpful.[242] The lack of daylight between the two terms leaves the regulated parties wondering how

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[235] *See* IOWA DEP'T OF EDUC., 2021 LEGISLATIVE SESSION EQUITY, INCLUSION, AND FREE SPEECH: PRELIMINARY GUIDANCE 5 (2021).

[236] Mary Harris, *"I Heard We Can't Learn About Black People This Year,"* SLATE (Apr. 24, 2023, 10:30 AM), https://slate.com/news-and-politics/2023/04/iowa-critical-race-theory-curriculum-slavery-holocaust-teacher-quit.html [https://perma.cc/5LPT-679Y].

[237] *See supra* Part III.B.

[238] *See supra* Part II.C.1 (discussing the void for vagueness doctrine).

[239] *See generally* Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect*," 58 B.U. L. REV. 685 (summarizing the case law around the chilling effect and arguing that chilled speech is an independent form of First Amendment injury).

[240] IOWA CODE § 279.74(2) (2021).

[241] IOWA CODE § 279.74(4)(c) (2021).

[242] To teach means "to cause to know something." *Teach*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/teach [https://perma.cc/YFC5-YCP4]. To discuss means "[to] give information, ideas, opinions, etc., about (something) in writing or speech." *Discuss*, BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/discuss [https://perma.cc/4FZS-4GS6].

to comply with the law.[243] For example, in 2021, the Iowa City school district spent a substantial portion of pre-semester training focused on ensuring in-classroom compliance with HF-802 and trying to draw the lines between discussing and teaching.[244] To prepare for compliance, teachers playacted conversations with students around issues of race that thread the needle between compliance with HF-802 and a commitment to diversity and inclusion.[245] Throughout the school systems, school districts felt they would need to wait and see exactly how enforcement of HF-802 would work and how deep into the school system they would have to make changes.[246] In the absence of statutory clarity, most schools are taking a broad view of the scope of HF-802 and preparing for its potentially expansive application.

Second, HF-802 invites arbitrary enforcement because the meaning and scope of CRT are heavily dependent on the political views of the person viewing it. [247] HF-802 is aimed squarely at CRT but nobody seems to agree on what exactly CRT means.[248] To many conservative commentators, CRT is an exceptionally broad set of ideas that make the United States appear to

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[243] Aala Basheir & Lulu Roarick, *The New Laws of Teaching Race in Iowa*, LITTLE HAWK (Oct. 14, 2021), https://www.thelittlehawk.com/57358/feature/the-new-laws-of-teaching-race-in-iowa [https://perma.cc/U4EH-TSAA] ("All the large districts in Iowa brought in a law firm to sort of explain 'here's what we think might be a problem, here's what's not a problem . . . . There's no precedent, there are no court cases around it yet. [The lawyers] were sort of inventing their own case studies and sort of testing it against the language of the law and then giving us their best interpretation.") (alteration in original).

[244] *Id.*

[245] *Id.*; *see also FAQ - Iowa House File 802 - Requirements Related to Racism and Sexism Trainings in Waukee*, WAUKEE CMTY. SCH. DIST., https://waukeeschools.org/district/equity-and-inclusion/waukee-equity-standards/faq [https://perma.cc/G4X2-9FCM] ("Waukee will continue its commitment to diversity, equity, and inclusion, with the Equity Standards as the foundation for that ongoing work. The Act requires the school district to review its curriculum and mandatory training on these topics and make any necessary adjustments to ensure compliance, which WCSD continues to make a good faith effort to do."); Jayne Abraham, *Iowa House File 802 and the Future of Classroom Discussion*, SPARTAN SHIELD (Sept. 9, 2021), https://spartanshield.org/29304/opinion/approaching-bias-in-the-classroom-new-iowa-law [https://perma.cc/VQZ2-UT8B].

[246] *See* SCH. ADMINS. OF IOWA, FAQ: TEACHING AND PROMOTING EQUITY, DIVERSITY, AND INCLUSION IN SCHOOLS (2021), https://www.ia-sb.org/docs/default-source/toolbox/policy-legal-corner/legal-authority-school-calendars/equity_diversity_inclusion_faq88165b81-3b7e-46c1-9293-fc256f144bd5.pdf?sfvrsn=f5102aa6_3 [https://perma.cc/6PNY-K7RN].

[247] Anthony Zurcher, *Critical Race Theory: The Concept Dividing the US*, BBC NEWS (July 22, 2021), https://www.bbc.com/news/world-us-canada-57908808 [https://perma.cc/7X6J-RUFR].

[248] *Id.* ("For supporters, it's an important framework for understanding the way systemic racism can perpetuate discrimination and disadvantage. For opponents, it's a subversive plan to indoctrinate young Americans to reject their country and its history.").

be an inherently racist country.[249] In response, many progressive commentators seek to limit the reach of CRT, framing it as an academic theory taught in the halls of grad school, not the K-12 education system.[250] This leads to a strange situation where the question of whether a given interaction constitutes promoting race stereotyping or scapegoating depends less on the content of the interaction and more on the political affiliation of the person observing it.[251] What a progressive would argue is needed reckoning with America's past, a conservative would see as racial scapegoating.[252] This makes teachers nervous to approach race, not knowing how state officials will perceive it through the lens of their own ideology.[253] By tying HF-802 to CRT, a set of beliefs exclusively held by one side of the political spectrum but not the other, the Iowa Legislature invited arbitrary enforcement based on partisan political interests.

Third, the applicability of HF-802 depends on the subjective experience of the audience and further encourages arbitrary enforcement. One of the specific defined concepts in the law is "[t]hat any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of that individual's race or sex."[254] Guilt, anguish, and psychological distress are subjective emotions that do not lend themselves to clean line drawing. As seen in other states, the subjective distress standard has led to absurd results, including the pulling of innocuous children's books about the Civil Rights Movement.[255] The subjective emotional standard in the law is a

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[249] Buck, *supra* note 5 ("In critical pedagogy, every book, every historical event, every mathematical concept—everything becomes a means to advance the same progressive worldview.").

[250] Caitlin O'Kane, *Head of Teachers Union Says Critical Race Theory Isn't Taught in Schools, Vows to Defend "Honest History,"* CBS NEWS (July 8, 2021, 12:07 PM), https://www.cbsnews.com/news/critical-race-theory-teachers-union-honest-history [https://perma.cc/2YQG-LETN] ("[C]ritical race theory is not taught in elementary schools or high schools. It's a method of examination taught in law school and college that helps analyze whether systemic racism exists.").

[251] Kathy Frankovic, *Critical Race Theory: Who Believes it is Being Taught in Their Schools*, YOUGOV (Nov. 16, 2021, 1:11 PM), https://today.yougov.com/topics/politics/articles-reports/2021/11/16/critical-race-theory-who-believes-being-taught [https://perma.cc/C5FJ-54BJ] (summarizing survey data indicating that Republicans are more likely to have a negative view of CRT and more likely to believe it is being taught in schools).

[252] Eric Petterson, *The (White) Washing of American History*, 17 FLA. A&M U. L. REV. 1, 21–27 (2022).

[253] Fabiola Cineas, *Critical Race Theory Bans Are Making Teaching Much Harder*, VOX (Sept. 3, 2021, 11:30 AM), https://www.vox.com/22644220/critical-race-theory-bans-antiracism-curriculum-in-schools [https://perma.cc/8AXV-LC3Q].

[254] IOWA CODE § 261H.8(c)(8) (2023).

[255] Evan McMorris-Santoro & Meridith Edwards, *Tennessee Parents Say Some Books Make Students*

recipe for arbitrary enforcement.

Finally, a politically motivated parent's rights movement is actively policing compliance with CRT bans. CRT is a white-hot political issue and schools are under immense pressure to avoid accusations that they are teaching CRT in schools.[256] Parents are concerned that their children are being taught CRT and have taken extreme steps to fix the perceived problem.[257] Some educators have been fired after outcry over CRT in the classroom[258] including a teacher in Tennessee who was fired from his position in the schools for teaching a Ta-Nehisi Coates essay to a class of high schoolers.[259] In New Hampshire, an anti-CRT parents group offered monetary "bounties" to parents who reported schools for teaching CRT.[260] In other states, CRT bans have been used to justify removing library materials that discuss topics about race and racism, including seemingly innocuous children's books about the Civil Rights Movement.[261] Faced with pressure from parents, many teachers decide that discussing race in the classroom is

'Feel Discomfort' Because They're White. They Say a New Law Backs Them Up, CNN (Sept. 29, 2021, 1:45 PM), https://www.cnn.com/2021/09/29/us/tennessee-law-hb-580-book-debate/index.html [https://perma.cc/XCE4-SFKJ]; *Texas Schools Remove Children's Books Branded 'Critical Race Theory,'* REUTERS (Oct. 7, 2021, 2:44 AM), https://www.reuters.com/world/us/texas-schools-remove-childrens-books-branded-critical-race-theory-2021-10-07 [https://perma.cc/PCS2-EUXA].

[256] Christopher Hooks, *Critical Race Fury: The School Board Wars Are Getting Nasty in Texas*, TEX. MONTHLY (Nov. 2021), https://www.texasmonthly.com/news-politics/critical-race-fury-the-school-board-wars-are-getting-nasty-in-texas [https://perma.cc/G4LW-9SNX]; Borter, *supra* note 80; McMorris-Santoro & Edwards, *supra* note 255.

[257] Zelinski, *supra* note 81.

[258] Sarah Elbeshbishi, *A Critical Time: Small Handful of Educators Losing Jobs for Lessons Linked to Race, Not CRT*, USA TODAY (Dec. 7, 2021, 9:49 AM), https://www.usatoday.com/story/news/education/2021/12/04/critical-race-theory-removing-teachers/8777032002/?gnt-cfr=1 [https://perma.cc/UJ2Q-YFPD].

[259] Hannah Natanson, *A White Teacher Taught White Students About White Privilege. It Cost Him His Job*, WASH. POST (Dec. 6, 2021, 8:00 AM), https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory [https://perma.cc/3J6F-9WQN] (detailing the experience of a teacher fired for violating Tennessee's CRT ban).

[260] Matt Zalaznick, *Moms for Liberty Is Offering a $500 Bounty for Catching Any Teacher Promoting CRT*, DIST. ADMIN. (Nov. 16, 2021), https://districtadministration.com/moms-for-liberty-is-offering-a-500-bounty-for-catching-any-teacher-promoting-crt [https://perma.cc/QNA8-L9N2].

[261] McMorris-Santoro & Edwards, *supra* note 255; *Texas Schools Remove Children's Books Branded 'Critical Race Theory,'* REUTERS (Oct. 7, 2021, 2:44 AM), https://www.reuters.com/world/us/texas-schools-remove-childrens-books-branded-critical-race-theory-2021-10-07 [https://perma.cc/9Z8T-KQ4B].

simply not worth the risk.[262] Iowa's CRT ban is being enforced in the context of an upstart "parent's rights" movement that is seeking to push the boundaries of parental control over classroom instruction and the broader curriculum.[263] In this context, school districts are encouraged to interpret Iowa's CRT ban broadly to avoid the ire of parents.

The ambiguities in the language, the politically charged nature of the subject matter, and the intense scrutiny from parents mean that discussions about race in the classroom are chilled. The scope of the statute is ambiguous, and many current developments make it susceptible to arbitrary and targeted enforcement. The vagueness creates a chilling effect on classroom speech. When combined with the viewpoint discrimination inherent in the statutory language, this presents a clear case of a law that violates the First Amendment. However, as discussed below the target of regulation—public school teachers—leaves the law in a First Amendment blind spot.

C. Right to Learn as a Means of Resolving the First Amendment Blindspot.

This section explains the barriers faced by challengers to Iowa's CRT ban and argues that they leave the law in a problematic First Amendment blind spot. To fill in this gap, courts should expand on the right to learn to bar ideologically motivated changes to the K-12 curriculum.

1. Iowa's CRT Ban Exists in a First Amendment Blind Spot

HF-802 directly regulates the speech of school employees, both teachers and administrators. As a result of the increasingly restrictive public employer speech doctrine, those who are regulated by HF-802 would need to climb insurmountable doctrinal barriers to have a court hear their First Amendment challenge. Though the law has many features that are constitutionally problematic, the people it regulates are the least able to raise successful challenges to the law.

Most administrators who are affected by the laws are public employees and are unlikely to get inside the courthouse door to make a First

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[262] Cineas, *supra* note 253; Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons*, NPR (May 28, 2021, 9:04 AM), https://www.npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship [https://perma.cc/DM9G-KNYK].

[263] See Naomi Cahn, *The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory*, 53 SETON HALL L. REV. 1443, 1464–74 (2023), for a discussion of the broader "parent's rights" movement and its impact on the school curriculum.

Amendment claim.[264] Under *Garcetti*, a statement made by a public employee in the course of their jobs does not receive First Amendment protections.[265] A mandatory training is within the course of an employee's job, meaning there would be no speech interest to chill. If an administrator is disciplined for teaching a forbidden topic and tries to sue to challenge the constitutionality of HF-802, the first question the court will ask is whether the speech was made on the job. Once the court determines that it was speech in a mandatory training, they will apply *Garcetti* and kick the claim out the door without reaching the merits.

The same principle applies to teachers, the people whose speech is being directly regulated. Under the current formulation of public employee speech, teachers have little or possibly no First Amendment interests.[266] In circuits that apply *Garcetti* to in-classroom instruction by K-12 teachers, a First Amendment claim by a schoolteacher would be dead on arrival because the speech was made on the job.[267] Even in circuits that have not applied *Garcetti* to in-classroom instruction, a teacher would probably lose because those circuits hold that curricular speech is not speech on matters of public concern.[268] A chill on a teacher's in-classroom speech is not a cognizable First Amendment interest sufficient to challenge HF-802. While a teacher would be able to assert a free speech claim based on discipline for speech that took place outside of school hours,[269] that speech would probably not implicate HF-802, which regulates speech in mandatory trainings and curriculum.[270]

Nor does the chilled speech in the HF-802 context fit cleanly in the traditional protections for student speech.[271] The language of HF-802 does not implicate a student's right to free speech.[272] The plain language only refers

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[264] See Mary Lindsay Krebs, Note, *Can't Really Teach: CRT Bans Impose Upon Teachers' First Amendment Pedagogical Rights*, 75 VAND. L. REV. 1925, 1938–40 (2022), for further discussion of the current public employee speech jurisprudence as a First Amendment blind spot.

[265] Garcetti v. Ceballos, 547 U.S. 410, 426 (2004).

[266] *See supra* notes 129–31 and accompanying text.

[267] Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007) ("[The plaintiff] concedes that the current-events session, conducted during class hours, was part of her official duties; if *Garcetti* supplies the rule of decision, then the school district prevails without further ado.").

[268] Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694–95 (4th Cir. 2007).

[269] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (finding a teacher was discharged for writing a letter to the newspaper).

[270] IOWA CODE § 279.74(2) (2021).

[271] See *supra* notes 136–138 and accompanying text, for a discussion of student expressive speech rights.

[272] IOWA CODE § 279.74(2) (2021).

to "employee[s]" and "contractor[s]" who teach mandatory trainings or curriculum, which would not sweep in students under most circumstances.[273] Unless a district were to adopt a rule applying HF-802 to in-class presentations by students or limiting class discussion in a similar way, there is not a substantive *Tinker* issue.[274] Based on the statutory language a student's speech will rarely be implicated by HF-802 because their speech is not directly regulated. What is regulated instead is the ideological environment where students learn and what ideas they are exposed to.

The case of the CRT ban does not fit neatly into the existing First Amendment categories. It does not directly regulate student speech. It does regulate teacher speech, but teachers' speech is unprotected in the classroom. Responding to CRT bans may require courts to break new doctrinal ground.[275]

2. The Normative Case for Expanding the Right to Learn

Enter the right to learn. The right is based on the conception of "[f]ree public education . . . not . . . partisan or enemy of any class, creed, party, or faction."[276] Courts have recognized the importance of schools to the formation of students into citizens in a democracy who are capable of individual thought and respect for individual rights.[277] That unique role has led the courts to treat laws that "cast a pall of orthodoxy over the classroom" with suspicion.[278] The Supreme Court has consistently preached about the dangers of partisan tinkering with the schools because such tinkering

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[273] *Id.*

[274] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding that the First Amendment covers students' in-classroom speech).

[275] Others writing in this area have recognized the need to break new ground. *See* Krebs, *supra* note 265 (arguing for a new doctrine that recognizes First Amendment protection for teachers' pedological speech); Saul, *supra* note 206, at 1367 (arguing for an expansion of student right to learn); Bissell, *supra* note 206 (arguing that current doctrine is inadequate and proposing a new standard for evaluating curricular speech). My solution is consistent with Saul's approach of expanding the right to learn, rather than creating a new category of speech protection for curricular speech. I take this approach because, the right to learn is a concept that has support in the existing case law and has been developed in the lower courts. *See* Schroeder, *supra* note 182, at 373–77.

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

[277] *Id.* (rejecting a school board policy that required students to stand and salute the American flag).

[278] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (articulating a full-throated defense of the importance of schools to the First Amendment).

threatens to "strangle the free mind at its source."[279] The Court has emphatically rejected the view "that a State might so conduct its schools as to 'foster a homogeneous people.'"[280] To that end, schools cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[281] As the country grows more polarized than ever[282] the curriculum will increasingly become a site for culture war skirmishes.[283] CRT bans fit within a broader trend of laws targeting progressive ideas in the classroom and are comparable to laws targeting LBGTQ+ related content in school curriculum and libraries[284] and building additional barriers for trans youth in schools.[285]

CRT bans are a shot across the bow in this coming development as state legislatures may feel emboldened to tinker with the curriculum to impose their political orthodoxy on the classroom. The right to learn is a way to make good on the lofty principle of public education teaching rather than inculcating students. It is also useful as a response to CRT bans and other curricular devices that may be coming down the pipeline.

D. Courts Should Apply the Right to Learn to Iowa's CRT Ban

The right to learn appears to be a good fit for filling the First Amendment blind spot created by the current employee and student speech jurisprudence. There is probably some trepidation because the doctrine is underdeveloped at the Supreme Court level. This section looks at what applying the right to learn would look like practically. From the splintered decision in *Pico*, lower

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[279] *Barnette*, 319 U.S. at 637 (rejecting a school board policy that required students to stand and salute the American flag).

[280] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

[281] *Barnette*, 319 U.S. at 642.

[282] *See generally* LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY (2018) (detailing the causes and effects of our moment of extreme political polarization and geographic sorting).

[283] Jennifer C. Berkshire, *Culture War in the K-12 Classroom*, NATION (June 22, 2021), https://www.thenation.com/article/society/culture-war-classroom-teachers [https://perma.cc/YN99-7SXT]; Allan Smith, *Schools Become Political 'Battlefield' in Culture Wars Trump Cultivated*, NBC NEWS (Sept. 7, 2021, 3:30 AM), https://www.nbcnews.com/politics/politics-news/schools-become-political-battlefield-culture-wars-trump-cultivated-n1278257 [https://perma.cc/2T6V-G38C]; Chelsea Sheasley, *Can There Be a Winner in the School Culture Wars?*, CHRISTIAN SCI. MONITOR (Sept. 15, 2021), https://www.csmonitor.com/USA/Education/2021/0915/Can-there-be-a-winner-in-the-school-culture-wars [https://perma.cc/66P2-5DRP].

[284] Clifford Rosky, *Don't Say Gay: The Government's Silence and the Equal Protection Clause*, 2022 UNIV. ILL. L. REV. 1845, 1852–57 (2022).

[285] *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors,* 134 HARV. L. REV. 2163, 2171–72 (2021).

courts have further splintered on whether the right to learn only applies to library books or implicates broader protections against politically motivated tinkering with the curriculum.[286] This Article refers to the first approach as a library right to learn and the second as a curricular right to learn.

The library right to learn can be articulated as a student's right against the removal of library materials motivated by a school board or a legislature's "[desire] to impose upon their students a political orthodoxy."[287] This version of the right to learn has its roots in the *Pico* plurality opinion. The plurality in *Pico* focused on the importance of the school library, where, apart from the mandatory curriculum, a student has the freedom "to inquire, to study and to evaluate, to gain new maturity and understanding."[288] In the plurality's view, the right to learn was implicated by a partisan removal of library materials. The Eighth Circuit has already adopted a version of the library right to learn in *Pratt v. Independent School District*. The guiding inquiry in the library right to learn is: What was the district's motivation for removing the materials from the library? If the motivation was the district's political disagreement with the content of the materials, their actions constitute a violation of the right to learn.

Even under the narrow version of the right to learn, a future application of HF-802 by a school district may infringe on a student's right to receive information.[289] In Tennessee, parents and school districts have used Tennessee's CRT ban as a hook to request the removal of books, including a children's book about Ruby Bridges.[290] The justification for removal was that

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[286] *See supra* notes 161–67 and accompanying text.

[287] ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Dist., 439 F. Supp. 2d 1242, 1272 (S.D. Fla. 2006).

[288] Bd. of Educ. v. Pico, 457 U.S. 853, 868–69 (1982) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[289] *See* Pratt v. Indep. Sch. Dist., 670 F.2d 771, 776 (8th Cir. 1982) (holding that it was a violation of student right to learn when a district removed films from the library solely because I.of their political content); ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Dist., 439 F. Supp. 2d 1242, 1272 (S.D. Fla. 2006) (removing library book because the schoolboard "desired to impose upon their students a political orthodoxy" violated student's right to receive information).

[290] *See* McMorris-Santoro & Edwards, *supra* note 255; *Texas Schools Remove Children's Books Branded 'Critical Race Theory*,' REUTERS (Oct. 7, 2021, 2:44 AM), https://www.reuters.com/world/us/texas-schools-remove-childrens-books-branded-critical-race-theory-2021-10-07 [https://perma.cc/4YNA-7X2E]; Jack Dutton, *Black Authors Are Being Pulled From School Libraries Over Critical Race Theory Fears*, NEWSWEEK (Jan. 14, 2022, 9:18 AM), https://www.newsweek.com/black-authors-are-being-pulled-school-libraries-over-critical-race-theory-fears-1669403 [https://perma.cc/GJ6D-ALZZ].

they were politically discomforting and barred by the state's CRT ban.[291] A court would apply the right to learn by looking at the justification for removal and determining that it was motivated solely by disagreement with the book's political content and block the action.

In Iowa some districts have ended up removing certain books from the curriculum out of fear they could end up too close to the edges of HF-802; there has been a rise in challenges to library materials and there is additional legislation targeting library materials working their way through the legislature.[292] Having materials arbitrarily removed because of objections to their political content runs against the core of the right to learn recognized in most circuits. While the light right to learn may be triggered in the future as individual districts act on their interpretations of the statute, it is also not an exact fit for the issues involved with HF-802. On its face, HF-802 regulates the curriculum out of a " [desire] to impose upon their students a political orthodoxy" not the library.[293] Reaching the curriculum would require the court to go further and recognize a curricular right to learn.

At its most basic level, the curricular right to learn applies the principles of the light right to learn to the curriculum, to give students a right against a legislature's curriculum decisions that are motivated by a desire to impose a political orthodoxy. The roots of a substantive right to learn can be implied in the plurality in *Pico*, where the Court acknowledged a limit to the state's control over the curriculum.[294] While the plurality did not provide a test for judging a state's curricular decisions, Justice Blackmun's concurrence provides a test that looks a lot like the standard used in book removal cases. Stated simply, "the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons."[295] A

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[291] *See* McMorris-Santoro & Edwards, *supra* note 255; *Texas Schools Remove Children's Books Branded 'Critical Race Theory*,' REUTERS (Oct. 7, 2021, 2:44 AM), https://www.reuters.com/world/us/texas-schools-remove-childrens-books-branded-critical-race-theory-2021-10-07 [https://perma.cc/4YNA-7X2E]; Dutton, *supra* note 291.

[292] Katie Akin, *Iowa GOP Passes Education Bill That Bans Books with Sex and Limits LGBTQ Instruction*, DES MOINES REG. (Apr. 20, 2023, 9:05 PM), https://www.desmoinesregister.com/story/news/politics/2023/04/19/iowa-gop-bill-would-ban-school-books-with-sex-restrict-lgbtq-teaching/70130190007 [https://perma.cc/DSY3-SUG7].

[293] ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Dist., 439 F. Supp. 2d 1242, 1272 (S.D. Fla. 2006). See Schroeder, *supra* note 182, at 378–89, for a critique of the usefulness of the *Pico* framework for addressing the problem of politically motivated book removals.

[294] Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982).

[295] *Id.* at 879 (Blackmun, J., concurring).

state can regulate the curriculum for any other educational reason,[296] but that motivation must be "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[297] This is the approach used by the district court in *Gonzalez* when it held that Arizona's ban on ethnic studies violated the right to learn because the legislature was motivated by racial animus when it passed the law.[298] This is the approach the Eighth Circuit should take if it adopts the substantive right to learn in a case involving Iowa's CRT ban.

Applying the substantive right to learn to HF-802 would look something like this: A student or class of students at an Iowa public school loses out in some aspect of the curriculum. Say the district, to comply with HF-802, cuts a book about mass incarceration from a syllabus or a history teacher cancels a session of a history class where the class was going to discuss the continuing impact of redlining on their city. The students would bring a First Amendment challenge under the curricular right to learn theory. The court would look at HF-802 and conclude that the text of the statute, its legislative history, and its partisan political context single out and ban one side of an ongoing political debate from the classroom, and subsequently declare the law unconstitutional. Doing so would protect the K-12 classroom from arbitrary political influence.

V. CONCLUSION

CRT has become a national flashpoint, with strong feelings on both sides.[299] However, in response to this partisan fervor, the Iowa legislature inserted itself into the classroom and tried to impose an ideological orthodoxy on professors and students.[300] The classroom is an important space in Constitutional law, where discoveries about the world are made and citizens are formed.[301] However, because of the target of regulation—students and public employees—the speech barred by Iowa's CRT ban exists in a First Amendment blind spot. The courts can fill one blind spot by allowing professors to make their academic freedom claims in court by

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[296] *Id.* at 880 (Blackmun, J., concurring). Blackmun also suggested that a legislature could respond to ideas it did not like by adding rather than subtracting from the curriculum and allowing the students to form their own judgments through more speech. *Id.*

[297] *Id.* at 880 (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509).

[298] Gonzalez v. Douglas, 269 F. Supp. 3d 948, 968 (D. Ariz. 2017).

[299] *See supra* Part II.

[300] *See supra* Parts II.B., III.A., IV.A.

[301] *See supra* Parts III.C., IV.C.1.

rejecting the application of *Garcetti*[302] and allowing students to challenge the law under a substantive right to learn.[303] These two methods would fill in First Amendment gaps and give the courts the tools to deal with this blatantly unconstitutional law.

[302] *See supra* Part III.D.–III.E.

[303] *See supra* Part IV.D.