

[Back to Volume Thirteen Contents](#)

Do Bans on Teaching “Divisive Concepts” Interfere with Students’ Right to Know?

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Abstract

*Twelve state legislatures have passed laws prohibiting teachers from teaching critical race theory. Several school boards have already relied on these “educational gag orders” to fire teachers who have tried to cover issues such as white supremacy. This article examines precedents such as *Garcetti v. Ceballos* as applied to the question of whether or not elementary and secondary school teachers have academic freedom to determine their curriculum or whether the ultimate arbiters of school curricula are elected officials on school boards. Although courts have been reticent or antagonistic toward the idea that elementary and secondary school teachers should have the protection of academic freedom, some judges have upheld the principle that high school students have a First Amendment right to receive information.*

Twelve state legislatures have passed laws providing for sanctions against K–12 teachers who cover critical race theory in their classrooms, allowing such teachers to be fired or fined. While tenured university professors can rely on the safeguards of academic freedom, elementary and high school teachers are required to cover the curricula that school boards design; in other words, K–12 teachers do not have the academic freedom to teach material that their school board directs them not to cover.

Protections for college and university professors go back more than a century. In 1915 the AAUP defined academic freedom as comprising

“three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action” (AAUP 1915, 292). The US Supreme Court lent support to the concept of academic freedom a half century later, commenting that “the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom[, which is] peculiarly the ‘marketplace of ideas’” (*Keyishian v. Board of Regents* 1967, 603).

Legal scholar Stuart Stuller (1998, 305) has observed that high school teachers assumed that *Keyishian* afforded them a measure of academic freedom as well, but their hopes dimmed “as courts began to question whether academic freedom claims were really just arguments about who was entitled to exercise state power.” Stuller explained that although the US Supreme Court and lower courts have discussed academic freedom in eloquent terms, neither the High Court nor lower courts have “clearly defined [academic freedom’s] contours” (301–02). As a result, lower court decisions on academic freedom for K–12 teachers have been wildly inconsistent.

After analyzing case law involving high school teachers and academic freedom, Stuller (1998, 332–33) explained that “the speech of a public school teacher is unquestionably an exercise of state power. . . . Generally, state law makes the local board of education the final decision-making authority for matters of curriculum.” Stuller noted the irony in the belief, by proponents of school boards (rather than K–12 teachers) having the final say on curriculum, that “democracy is served by removing democracy from the educational decision-making process” (338). Furthermore, Stuller observed, “Teachers are routinely required to have their lesson plans approved in advance: [these are] prior restraints. [Teachers] are often called upon to teach from a text with which they have a measure of disagreement: [this is] coerced speech” (341).

Legal scholar Peter Byrne (1989, 288) agreed with Stuller, observing that “academic freedom” is a concept that “does not readily apply to in-class curricular speech at the high school level.

The *Garcetti v. Ceballos* Decision

The US Supreme Court’s 2006 *Garcetti v. Ceballos* (2006) decision dealt a blow to those who had believed that K–12 teachers had a modicum of academic freedom. Although this case involved the speech of a deputy district attorney rather than a teacher, the High Court held that the First Amendment does not apply to speech issued as part of a public employee’s routine duties.

Lower courts have relied on *Garcetti* in deciding cases involving K–12 teachers’ First Amendment rights. Indeed, in numerous cases school boards have fired teachers for their classroom speech, even when the speech concerned matters of public importance. For example, the US Court of Appeals for the Seventh Circuit relied on *Garcetti* when it upheld an Indiana school board’s decision to fire elementary school teacher Deborah Mayer after she honked her car’s horn to support protesters against the US invasion of Iraq in 2003 (*Mayer v. Monroe County Community School Corporation* 2007, 479–80). And the US Court of Appeals for the Sixth Circuit relied on *Garcetti* when it upheld an Ohio school board’s decision to fire high school teacher Shelley Evans-Marshall after she assigned Lesléa Newman’s book *Heather Has Two Mommies* (*Evans-Marshall v. Board of Education of the Tipp City Exempted Village School District* 2010, 340). Citing numerous appellate court decisions, the Sixth Circuit concluded that, “when it comes to in-class curricular speech at the primary or secondary school level, no other court of appeals has held that such speech is protected by the First Amendment” (*Evans-Marshall v. Board of Education* 2010, 343).

Court Decisions from Arizona

Whereas *Mayer* and *Evans-Marshall* involved individual teachers, in 2010 the Arizona state legislature passed the Arizona Revised Statutes §§ 15-111 and 15-112, and Governor Jan Brewer signed them into law; these statutes eliminated the Mexican American Studies (MAS) program in Tucson public schools, despite the fact that 60 percent of public school students in Tucson were Latino (*Arce v. Douglas* 2015, 973).

Ten teachers and the MAS director filed suit against Superintendent of Public Instruction Diane Douglas and the Arizona State Board of

Education, arguing that the state legislature had passed §§ 15-111 and 15-112 with discriminatory intent. They later amended their complaint to include high school student Maya Arce and her father Sean Arce. Although the US Court of Appeals for the Ninth Circuit dismissed the teachers' claims for lack of standing, it did not dismiss the Arces' claims. The appellate court explained that it had to give weight to "a student's right to receive information and ideas" (*Arce v. Douglas* 2015, 973).

Two years later, high school student Noah Gonzalez and his father Jesus Gonzalez also filed suit against Superintendent of Public Instruction Diane Douglas, arguing that the Arizona Revised Statutes targeting the MAS program were motivated by racial animus. Before he became the superintendent of public instruction, John Huppenthal was a state senator who helped pass the Arizona Revised Statutes; in 2010, using two pseudonyms, he had posted comments on political blogs such as "No Spanish radio stations, no Spanish billboards, no Spanish TV stations, no Spanish newspapers. This is America; speak English," and "I don't mind them selling Mexican food as long as the menus are mostly in English" (*González v. Douglas* 2017, 958).

Commenting on the Arizona legislature's targeting of Tucson's Mexican American Studies program, law professor Isabel Medina (2017, 58–59) has noted that "statutes that prohibit ethnic studies [such as Arizona's law terminating the Mexican American Studies program] . . . are not racially neutral, but instead subvert and subordinate the racial identities of . . . non-majority groups."

Medina's words were prophetic: state legislators who have passed laws against teaching critical race theory often argue that white children might feel guilty or uncomfortable if they learn that their ancestors (or European colonists in general) held slaves. Thus, in order to prevent feelings of guilt or tension among white students and students of color, the solution is to take the ugly but accurate reality of slavery and sweep it under the proverbial rug.

In deciding the *Gonzalez* case, federal district court Judge Wallace Tashima paid special attention to Huppenthal's anonymous blog posts: "Huppenthal's use of pseudonyms also shows consciousness of guilt. Had Huppenthal, a public official speaking in a public forum on a public

issue, felt that his inflammatory remarks were appropriate, he would not have hidden his identity” (*González v. Douglas* 2017, 965).

Judge Tashima thus held that the Tucson Unified School District had indeed violated Noah Gonzalez’ First Amendment right to receive information when it terminated the Mexican American Studies program. Judge Tashima further held that the “State of Arizona acted contrary to the Constitution of the United States in enacting Arizona Revised Statute §§ 15-112 and 15-111” (*González v. Douglas* 2017, 974); in other words, the Arizona Revised Statutes were racist and unconstitutional.

More recently, the state of Arizona passed a law banning the teaching of critical race theory, but the Arizona Superior Court struck down this law on a technicality; it violated the provision of Arizona’s single-subject rule that prohibits misleading titles of laws (*Arizona School Boards Association, Inc. v. State of Arizona* 2021).

Donald Trump’s Executive Order Against “Divisive Concepts”

When Maya Arce and Noah Gonzalez prevailed in court on the basis of “a student’s First Amendment right to receive information,” no one foresaw that a few years later political conservatives would create a cause célèbre against teaching critical race theory. In September 2020 President Donald Trump signed Executive Order 13950, which prohibited the military, federal agencies, and federal contractors from promoting “divisive concepts” in workplace trainings. The executive order directed all federal agencies to stop using taxpayer dollars to fund “divisive, un-American propaganda training sessions, and it directed federal agencies to “identify all contracts . . . related to any training on critical race theory, white privilege, or . . . any other propaganda effort that the United States is an inherently racist . . . country.” The Santa Cruz Lesbian and Gay Community Center, which provides diversity training to federal contractors, filed a lawsuit seeking declaratory and injunctive relief against enforcement of Trump’s executive order, arguing that it violated their First Amendment rights. A federal district court enjoined enforcement of the executive order, finding it impermissibly vague (*Santa Cruz Lesbian & Gay Community Center v. Trump* 2020).

When President Joe Biden took office, he rescinded Executive Order 13950. Although Trump's order had targeted businesses rather than education, it became the basis for attorneys general from twenty states to sign on to a letter objecting to teaching critical race theory in the public schools. It also provided the basis for at least ten states to ban teaching of critical race theory; for example, the Oklahoma law took the list of eight "banned concepts" verbatim from Trump's executive order even after Biden rescinded it.

After Biden took office, Indiana's attorney general Todd Rokita (2021), joined by the attorneys general of nineteen other states, wrote to US secretary of education Miguel Cardona. Rokita's letter demanded that Department of Education grants "not fund projects that are based on CRT [critical race theory]." Despite the federal government's desire to foster programs in diversity, equity, and inclusion, quite a number of state legislatures have jumped on the "ban critical race theory" bandwagon.

Litigation Involving State Laws Banning Critical Race Theory

Florida

In February 2022 the Florida House of Representatives passed House Bill 7, known as the "Stop the Wrongs to Our Kids and Employees," or Stop WOKE, Act. Although it does not mention critical race theory by name, it would prohibit Florida's public school teachers from making students feel guilty over their race or national origin, and Governor Ron DeSantis has said that it will keep critical race theory out of public schools. DeSantis signed the Stop WOKE Act into law in April 2022.

In March 2021, almost a year before the state House passed the Stop WOKE Act, high school English teacher Amy Donofrio was removed from her teaching job at Robert E. Lee High School in Jacksonville after she declined to remove a Black Lives Matter flag outside her classroom and because she gave students extra credit for activism. At Robert E. Lee High School, 70 percent of the students were Black, and in 2014 Donofrio had founded the EVAC Movement to help her at-risk students learn to

share their stories of personal growth.¹ The improvement in their academic performance was so dramatic that Donofrio’s students gave presentations at the US Department of Justice and at the White House, where they met President Barack Obama. They also met the late congressman John Lewis on Capitol Hill, made the front page of the New York Times, and gave a presentation at Harvard University after winning its KIND Schools challenge. In 2020 the *Harvard Educational Review* published “The EVAC Movement Story.”

In spite of Donofrio’s success with the EVAC Movement, Principal Scott Schneider informed her that EVAC, which had been a regular high school class, would be relegated to an after-school activity. Later a new principal, Timothy Feagins, also told her to take down the Black Lives Matter flag outside her classroom because it “might” violate the school district’s policy. When she asked which written policy it violated, a Duval County Public Schools representative informed her of two policies that were not relevant, so she left the flag up. After several months, school administrators took down the Black Lives Matter flag without consulting her. Donofrio also attended a meeting during which alumni and members of the public discussed the issue of whether the high school should be named after Confederate general and slaveholder Robert E. Lee. At the meeting, Donofrio recorded an alumnus who said, “Jesus was never against slavery. In fact, he said that slaves have an obligation to obey their masters,” and another person who said, “If there are problems at the school, it is because it is predominantly African-American.” Donofrio posted these recordings; they went viral and the news media picked up the story.

After the name-change meetings, the Duval County Public Schools administration reassigned Donofrio to paid, nonteaching duties in “teacher jail” at the Bulls Bay Consolidated Warehouse; they also banned

¹ “When 20 male freshmen began a leadership class at Robert E. Lee High School in 2015, one of Amy Donofrio’s first lessons to the class was on Plato’s ‘Allegory of the Cave.’ The class embraced the lesson and thus began EVAC, which is ‘cave’ spelled backwards, to signify their desire to evacuate other youth from the cave of hopelessness and system leaders from the cave of ignorance of the community’s realities” (Hallock 2019).

her from Robert E. Lee High School (*Donofrio v. Duval County Public Schools and Scott Schneider* 2021, 40). When Donofrio objected, they terminated her employment. One of her former students, Jayla Caldwell, circulated a petition asking the administrators to reinstate Donofrio; 17,000 former students and parents signed it.

With help from the Southern Poverty Law Center, Donofrio filed suit against the Duval County Public Schools, charging that they had discriminated against her and had violated her First Amendment rights under 42 U.S.C. §§ 1981 and § 1983 (*Donofrio v. Duval County Public Schools and Scott Schneider* 2021, 50). She argued that the First Amendment protected her desire to keep the Black Lives Matter flag hanging outside her classroom; furthermore, keeping the flag up was not disruptive. In August 2021 the Duval County Public Schools reached an out-of-court settlement with Donofrio for \$300,000 (Balevic 2021).

Tennessee

In May 2021, Tennessee governor Bill Lee signed into law Senate Bill 623, which prohibits K–12 teachers from teaching critical race theory. Immediately after the Tennessee legislature passed this law, administrators at Sullivan Central High School fired social studies teacher Matthew Hawn after he discussed “white privilege” in his class of mostly white students. After the January 6, 2021, insurrection, Hawn assigned Tanehisi Coates’ essay “The First White President,” which ties Donald Trump’s ascension to white supremacists’ efforts to negate the legacy of Barack Obama, our country’s first Black President. Although Hawn had earned tenure in 2008, the Sullivan County Board of Education fired him for “insubordination and unprofessional behavior.” After he was fired, Hawn filed an appeal (*In the Matter of Sullivan County Board of Education v. Matthew Hawn* 2021). His case is currently pending (Keeling 2022).

Oklahoma

After Oklahoma passed House Bill 1775, which prohibits teachers from covering eight banned “concepts” copied verbatim from Trump’s executive order, and Governor Kevin Stitt signed it into law (Oklahoma Administrative Code § 210: 10-1-23, 2021), the Black Emergency Response

Team and the University of Oklahoma chapter of the AAUP challenged it in court (*Black Emergency Response Team v. O'Connor* 2021, 6). John R. Wood writes at greater length about the Oklahoma law in his article for this volume of the *Journal of Academic Freedom*.

New Hampshire

In June 2021, the New Hampshire state legislature passed the Right to Freedom from Discrimination in Public Workplaces and Education Act (also called the Divisive Concepts Statute), which bans teaching critical race theory. In November 2021, the national organization Moms for Liberty tweeted that it would pay \$500 to “the person that first successfully catches a public school teacher” who violates the Divisive Concepts Statute. New Hampshire’s state website has a system for reporting teachers who appear to violate the law; if a school board determines that the teacher was teaching “divisive concepts,” the teacher can lose his or her educator’s license. The Divisive Concepts Statute creates a private right of action for anyone, whether he or she has a child in public school or not. The American Federation of Teachers’ Local 8027 mounted a legal challenge to the Divisive Concepts Statute, arguing that “such a delegation of enforcement power is troubling insofar as it turns citizen on citizen, and encourages a culture of surveillance and vigilantism” (*Local 8027, AFT–New Hampshire v. Edelblut* ^{2021, 25}).

Local 8027 and some individual teachers filed suit against Frank Edelblut, commissioner of the New Hampshire Department of Education, seeking declaratory and injunctive relief from enforcement of this law and arguing that it violates teachers’ First Amendment rights. They decried Moms for Liberty’s \$500 “bounty,” arguing that teachers, including plaintiff John Dube, “have been made the subject of online harassment, obscenities and vicious attacks as a direct result of the climate of political intimidation created by . . . the defendants” (*Local 8027, AFT–New Hampshire v. Edelblut* 2021, 3). Indeed, high school history teacher John Dube received such serious threats that “he continues to fear for his own personal safety, and has had to install personal security and safety equipment at his home in light of the threats” (5). Local 8027’s attorneys also stressed that “while the critical race theory issue is a politically

manufactured problem employed by partisan zealots without any basis in reality, teachers face the very real possibility of losing their jobs on account of the Divisive Concepts Statute” (40). Referring to Trump’s Executive Order 13950, Local 8027’s attorneys added, “And all of this is the result of a partisan political crusade to resuscitate a constitutionally flawed Presidential Executive Order that was judicially enjoined” (41). Edelblut has filed a motion to dismiss, and federal district court judge Paul Barbadoro has advised the parties that he will issue his decision by December 2022; thus, the case is pending.

Texas

In September 2021, Texas governor Greg Abbott signed into law legislation that banned the teaching of critical race theory in public schools. The AAUP filed an interested party amicus brief with the Texas attorney general, arguing that “efforts to censor the teaching of ideas about race in American history and society, including critical race theory, contravene the principle of academic freedom” (AAUP 2021, 14).

The AAUP is correct in its assessment, but at present the Texas law is being enforced, causing great confusion among teachers. For example, in October 2021 NBC News obtained an audio recording of Gina Peddy, executive director of curriculum in the Carroll Independent School District in Southlake, Texas, advising teachers that if they have a book about the Holocaust in their classroom, they should also offer students access to a book from an “opposing” perspective. A teacher asked Peddy, “How do you oppose the Holocaust?” Texas State Teachers Association spokesperson Clay Robison pushed back against Peddy’s advice: “We find it reprehensible for an educator to require a Holocaust denier to get equal treatment with the facts of history. That’s absurd. It’s worse than absurd.” An elementary school teacher offered a similar comment on Peddy’s advice: “There are no children’s books that show the ‘opposing perspective’ of the Holocaust or the ‘opposing perspective’ of slavery. Are we supposed to get rid of all of the books on those subjects?” (Hixenbaugh and Hylton 2021).

In addition to creating confusion among teachers, the Texas law has cost some educators their jobs. For example, Dr. James Whitfield, the first

Black principal at Colleyville High School, wrote a letter after George Floyd was murdered in which he said, “Education is the key to stomping out ignorance, hate and systemic racism.” Because he referred to “systemic racism” in the letter, someone accused Whitfield of advocating for critical race theory in the high school curriculum. In response, the Grapevine Colleyville Independent School District administrators voted not to renew Whitfield’s contract (Howard 2021).

Discussion

More than twenty years before anyone other than law students or graduate students had heard of critical race theory, legal scholars Stuart Stuller and Peter Byrne warned that high school teachers do not have the same degree of academic freedom that college and university professors enjoy. Indeed, as Stuller and Byrne explained, actual legal authority to determine K–12 curricula rests with school boards, meaning elected officials who oversee the public schools in their districts. This means, however, that school boards can dictate what a high school teacher may or may not cover in class. Stuller and Byrne’s explanations were prophetic in light of *Garcetti*; although *Garcetti* involved the question of a prosecutor’s freedom of speech at work, courts have subsequently relied on this decision to uphold school boards’ decisions to fire teachers such as Deborah Mayer, who “honked for peace” in Indiana, and Shelley Evans-Marshall, who assigned *Heather Has Two Mommies* in Ohio.

So far, twelve states—Arkansas, Florida, Idaho, Iowa, Montana, New Hampshire, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, and Virginia—have passed laws that ban the teaching of critical race theory. State legislators have introduced bills to ban critical race theory in many more states (AAUP 2022; see also AAUP n.d.). The laws do not always explicitly mention “critical race theory”; rather, the wording of the laws generally prohibits the teaching of “divisive concepts.” It is discouraging to see that school boards or school administrators with questionable motives can take advantage of “educational gag orders” as a pretext to harass or even fire outstanding teachers like Amy Donofrio and Matthew Hawn. Donofrio, Hawn, and principals such as James Whitfield have already lost their jobs against the backdrop of the anti–

critical race theory movement that took hold in the wake of Trump's executive order, despite the fact that a federal court in California struck down the order as violating the First Amendment.

There is a glimmer of hope, however. In *Arce* and *Gonzalez*, which responded to the Tucson Unified School District's termination of the Mexican American Studies program, the courts held that the *students'* First Amendment right to receive information was paramount. Applying *Arce* and *Gonzalez* to the current controversy over critical race theory, both white students and students of color could argue that they have a First Amendment right to learn accurate accounts of our history. This would cover not just the horrors of slavery but also of other uncomfortable history, such as European colonists' genocide against Native Americans, the internment of Japanese Americans in camps during World War II, and the Tulsa Race Massacre.

One problem, of course, is that laws against teaching critical race theory will cause teachers to self-censor. A second problem is that very few high school students and their parents have the financial resources to file suit against a school board. Furthermore, high school students are seldom in a position to know what teachers are not teaching them. In other words, in theory, high school students like Maya Arce and Noah Gonzalez could sue their respective school boards based on their First Amendment right to receive information, but in practice, such suits would be quite rare unless high school students can enlist help from the American Civil Liberties Union (ACLU) or other organizations that provide pro bono litigation support. Of course, a better solution would be for ordinary citizens to prevail upon their state legislators to repeal educational gag orders. Failing this, however, teachers and students will no doubt have to turn to the courts for redress of grievances, in the hope that judges will strike down these orders as unconstitutionally vague.

While most of the educational gag orders target K-12 schools, South Carolina's H. 4799 would ban all schools, including colleges and universities, from teaching critical race theory (Hammond 2022). Likewise, Iowa's House File 802, enacted into law in June 2021, places an educational gag order on higher education as well as K-12 schools. Adjunct professor Petra Lange, who teaches gender and race culture at

Simpson College in Iowa, explained that “she circumvented the ban on teaching critical race theory by explaining to students what's illegal for her to teach and encouraging them to ask questions” (Thaler 2021). Legislators in Missouri have introduced sixteen educational gag orders, “several of which target higher education” (“Opposition to Educational Gag Orders Grows” 2022, 8).

Because state legislators have the power to allocate funding for colleges and universities, they may believe that “he who pays the piper calls the tune.” In other words, they could strip university professors of the protection of academic freedom. The AAUP warns that “when politicians mandate curricular content, they undermine the academic freedom [which is] vital to the preservation of democracy” (“Statement on Anti-Semitism and Racism Bills” 2022, 6). If, as a society, we want our children to learn the truth about our country’s legacy of slavery, then both K–12 teachers and college and university professors must have the protection of academic freedom to teach it.

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