

Education, Orthodoxy, and the First Amendment

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ABSTRACT

Scholars, judges, and legislators have failed to recognize the broader implications of attacks on public education. Once conceived as the means to sustain American democracy, public schools are now entwined with the forces tearing it down. This Article is the first to analyze those forces and the rhetoric and policies they produce in education as a form of what international scholars call democratic erosion. This analysis provides an apolitical lens for evaluating contentious education policy debates and reveals the depth of democratic erosion occurring in the United States.

The United States Supreme Court has long warned that orthodoxy in the classroom imperils democracy and violates the First Amendment. But over time, the challenge of articulating a neutral standard that could limit orthodoxy without undermining efforts to foster civic values overtook the Court's warnings. The Court began to justify what might otherwise look like censorship or orthodoxy as normal pedagogical judgments that warrant judicial deference. The resulting doctrines have left students defenseless against policies that aim to dictate what they think about race, gender, and other controversial topics. The remedy for both students and the Court's doctrinal challenge lies in a First Amendment framework that accounts for the unique constitutional history and purpose of public education: preparing students for citizenship, preserving individual rights for the long term, empowering citizens to resist governmental tyranny, and fostering the common good.

TABLE OF CONTENTS

INTRODUCTION	764
I. THE PURPOSE OF AMERICAN PUBLIC EDUCATION	770
A. <i>The Original Theory: A Necessity of Republican Government</i>	771
B. <i>Federal and State Efforts to Enshrine the Duty</i>	773
C. <i>The Misuse of Education</i>	776
II. ERODING DEMOCRACY THROUGH EDUCATION	778
A. <i>Defining and Measuring Democratic Erosion</i>	779
B. <i>Tools of Democratic Erosion</i>	780

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C. <i>An Unidentified Tool of Erosion</i>	782
D. <i>Educational Markers of America's Democratic Erosion</i>	784
1. Shrinking Free Speech Rights and Access to Information	784
2. Demonizing Education Institutions and Actors . . .	787
3. Delegitimizing America's Most Prominent Government Institution.	789
4. Stoking Populist, Nationalist, Ethnic, and Religious Divisions	792
5. Abusing Power and Privileging Access	795
6. Resisting Constitutional Democratic Values	798
III. EDUCATION'S CONSTITUTIONAL QUAGMIRE.	799
A. <i>The Tension Between Anti-Orthodoxy and Civic Inculcation</i>	801
B. <i>Orthodoxy's Loopholes</i>	804
C. <i>The Obstacle to Challenging Curricular Legislation</i> . .	806
D. <i>The Special Problem of History</i>	809
IV. THE ANTI-ORTHODOXY SOLUTION: EDUCATION'S FOUNDING PRINCIPLES.	812
A. <i>Orthodoxy's Thin Lines: Method, Substance, and Neutrality</i>	814
B. <i>The Limiting Principle: Public Education's Essential Function</i>	816
C. <i>Identifying Public Education's Original Functions</i> . . .	817
D. <i>The Curricular Implications</i>	821
CONCLUSION	825

INTRODUCTION

Since the 2010s, the world has experienced a global assault on democracy—what scholars call democratic erosion. The number of democratic governments has shrunk,¹ and the strength of those that remain has diminished.² Though seemingly immune at first, the United

¹ THOMAS CAROTHERS & BENJAMIN PRESS, CARNEGIE ENDOWMENT FOR INT'L PEACE, UNDERSTANDING AND RESPONDING TO GLOBAL DEMOCRATIC BACKSLIDING 4 (2022), <https://carnegieendowment.org/research/2022/10/understanding-and-responding-to-global-democratic-backsliding?lang=en> [<https://perma.cc/7QZN-4GUA>]. See generally V-DEM INST., DEMOCRACY REPORT 2023: DEFIANCE IN THE FACE OF AUTOCRATIZATION (2023), https://v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf [<https://perma.cc/9UAS-YF9E>] (noting that an increasing percentage of the global population is living under autocracy).

² See, e.g., Michael J. Abramowitz, *Freedom in the World 2018: Democracy in Crisis*, FREEDOM HOUSE (2018), <https://freedomhouse.org/report/freedom-world/2018/democracy-crisis> [<https://perma.cc/629S-WPKE>].

States faces its own crisis, earning the formal labels “flawed democracy” and “backsliding” in annual democracy reports.³ But one aspect of democratic erosion has gone unnoticed—historically anomalous attacks on public education.⁴

Most experts continue to view public education as a solution to, rather than a potential catalyst for, further democratic erosion in the United States. Chief Justice John Roberts, for instance, lamented that “we have come to take democracy for granted” and called on the nation to redouble its efforts to offer civic education that equips students “to understand and improve” democracy.⁵ Scholars, politicians, bipartisan coalitions, and other jurists have echoed his plea,⁶ but their policy prescriptions suffer from a fundamental misunderstanding of the challenge confronting both democracy and education. Although public education has, in the words of the Court, helped “preserve” the health

³ Elena Holodny, *The US Has Been Downgraded to a “Flawed Democracy,”* BUS. INSIDER (Jan. 25, 2017, at 15:15 ET), <https://www.businessinsider.com/economist-intelligence-unit-downgrades-united-states-to-flawed-democracy-2017-1> [<https://perma.cc/QR87-HE2G>]; V-DEM INST., V-DEM ANNUAL DEMOCRACY REPORT 2018: DEMOCRACY FOR ALL? 21 (2018), https://www.v-dem.net/documents/17/dr_2018.pdf [<https://perma.cc/Q558-G6R3>]; SARAH REPUCCI, FREEDOM HOUSE, FROM CRISIS TO REFORM: A CALL TO STRENGTHEN AMERICA’S BATTERED DEMOCRACY 3 (2021), https://freedomhouse.org/sites/default/files/2021-03/US_Democracy_Report_FINAL_03222021.pdf [<https://perma.cc/W8W5-6RAX>]; see also Sam Levine, *US Sinks to New Low in Rankings of World’s Democracies*, GUARDIAN (Mar. 24, 2021, at 07:00 ET), <https://www.theguardian.com/us-news/2021/mar/24/us-world-democracy-rankings-freedom-house-new-low> [<https://perma.cc/34CT-ZREA>] (noting that the United States has dropped eleven points from 2020 to 2021 in the global ranking of political rights and civil liberties).

⁴ Professor Jason Stanley has connected how American public schools teach history with fascist education regimes abroad. See JASON STANLEY, ERASING HISTORY 3–5 (2024). His work, however, does not entail a broader analysis of education or democratic erosion. Likewise, scholarship on “democratic education”—or its erosion—is not about democratic erosion or political regime changes but instead about how public schools should better achieve their democratic mission. See, e.g., Robert Karaba, *Challenging Freedom: Neoliberalism and the Erosion of Democratic Education*, 24 DEMOCRACY & EDUC. 1, 3 (2016).

⁵ JOHN G. ROBERTS JR., 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2, 4 (2019), <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf> [<https://perma.cc/PH99-JC8M>].

⁶ See generally NCCE AND THE FEDERAL COURTS: REPORT ON THE NATIONAL CONFERENCE ON CIVIC EDUCATION AND THE FEDERAL COURTS (2019), https://justiceforall.ca2.uscourts.gov/wp-content/uploads/2024/06/NCCE2019_report.pdf [<https://perma.cc/2PMP-MJT8>] (explaining need for education in civics); ABA and Civic Education, A.B.A., https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/election-integrity-and-civic-education/-civics-secures-democracy-act/ [<https://perma.cc/G9ZN-U5RT>] (last visited Oct. 12, 2025) (discussing the bipartisan Civics Secures Democracy Act, S. 879, 117th Cong. (2021)); EDUCATING FOR AMERICAN DEMOCRACY INITIATIVE, EDUCATING FOR AMERICAN DEMOCRACY: EXCELLENCE IN HISTORY AND CIVICS FOR ALL LEARNERS (2021), <https://www.educatingforamericandemocracy.org/wp-content/uploads/2021/02/Educating-for-American-Democracy-Report-Excellence-in-History-and-Civics-for-All-Learners.pdf> [<https://perma.cc/L4D6-63EC>] (suggesting ideas for improving civics education).

of the United States's "representative government" for two centuries,⁷ attacks on public education are increasingly entwined with the forces affirmatively unraveling democracy. When viewed through the standard metrics of democratic erosion, attacks on public education represent alarming signs of a democracy approaching critical condition.⁸

Scholars typically analyze democratic erosion by assessing weaknesses in three main building blocks of democracy: (1) free and fair elections, (2) individual liberties, particularly freedom of speech and the press, and (3) the rule of law.⁹ This analysis highlights the strategies that autocrats typically use to undermine democracy. Such strategies include attacking the legitimacy of major public institutions, restricting free speech and information, censoring the media, undermining the judiciary, and appealing to populist instincts.¹⁰ Scholars, however, have yet to notice that America's public schools—the place where “most citizens” first “experience the power of government”¹¹—are now plagued by strategies eerily reminiscent of autocratic behavior abroad.

State legislation banning books and limiting the curriculum has constricted access to information, chilled the scope of classroom discussion, and entrenched political leaders' chosen ideologies.¹² Books that have been part of the American educational experience for decades have suddenly been deemed subversive.¹³ Teachers have been told “to

⁷ *Ambach v. Norwick*, 441 U.S. 68, 74 (1979) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

⁸ See, e.g., Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, *EDUC. WK.* (Mar. 11, 2026), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/4BMG-UARQ>] (finding that legislation to restrict teaching about racism and sexism had been introduced in forty-four states); Alana Wise, *Trump Announces “Patriotic Education” Commission, a Largely Political Move*, *NPR* (Sep. 17, 2020, at 17:59 ET), <https://www.npr.org/2020/09/17/914127266/trump-announces-patriotic-education-commission-a-largely-political-move> [<https://perma.cc/GW48-346A>].

⁹ See, e.g., TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 9 (2018); Abramowitz, *supra* note 2.

¹⁰ See GINSBURG & HUQ, *supra* note 9, at 77–119.

¹¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 385 (1985); Justin Driver, *The Coming Crisis of Student Speech*, 76 *STAN. L. REV.* 1511, 1511 (2024) (“[O]ur public school system is the foremost government entity that shapes Americans' everyday lives.”).

¹² JONATHAN FRIEDMAN & JAMES TAGER, *EDUCATIONAL GAG ORDERS: LEGISLATIVE RESTRICTIONS ON THE FREEDOM TO READ, LEARN, AND TEACH* 48–52 (Summer Lopez et al. eds., 2022), https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf [<https://perma.cc/4XGK-DAXF>]; ASHLEY WOO, MELISSA KAY DILIBERTI & ELIZABETH D. STEINER, *POLICIES RESTRICTING TEACHING ABOUT RACE AND GENDER SPILL OVER INTO OTHER STATES AND LOCALITIES* 8 (2024), https://www.rand.org/pubs/research_reports/RRA1108-10.html [<https://perma.cc/JM5S-T689>] (finding that sixty-five percent of teachers have limited discussions of political and social issues); MIKE HIXENBAUGH, *THEY CAME FOR THE SCHOOLS* 154, 191–93 (2024).

¹³ Kasey Meehan, Sabrina Baëta, Tasslyn Magnusson & Madison Markham, *Banned in the USA: Beyond the Shelves*, *PEN AM.* (Nov. 1, 2024), <https://pen.org/report/beyond-the-shelves/> [<https://perma.cc/622G-R6CZ>] (documenting 10,046 book bans during the 2023–2024 school year, a 400% increase since the 2021–2022 school year).

close their classroom libraries until they'd had a chance to review all the books in them" and to try to find books that present "opposing views," including on subjects like the Holocaust where there is no other legitimate side.¹⁴ State laws and local policies have not just banned books; they have banned ideas, like "teaching students that 'slavery and racism are anything other than deviations' from America's true founding ideals."¹⁵ One governor even targeted educators with protracted criminal investigations.¹⁶ In 2025, President Donald Trump escalated these controversies, issuing an executive order to end "[r]adical [i]ndoctrination in K-12 [s]chooling" and promote "patriotic education."¹⁷

The political rhetoric surrounding these and other issues regularly demonizes public teachers as subversives who must be purged and paints public education as an institution from which families must be freed.¹⁸ Littered throughout these attacks are populist, nationalist, ethnic, and religious appeals that pit people against one another and frame public education as a corrupt government institution to be toppled.¹⁹ When these strategies are insufficient, some executive officers have resorted to abusing their power and usurping other branches of government to achieve political ends.²⁰ President Trump, for instance, has asserted control over curriculum even though federal law specifically prohibits the federal government from "exercis[ing] any direction, supervision, or control over the curriculum, . . . library resources, textbooks, or other printed or published instructional materials."²¹ Those closest to these various actions—teachers—are simply "terrified."²² All these tactics mirror strategies that autocrats have used to undermine the building blocks of democracy in other contexts.²³

¹⁴ HIXENBAUGH, *supra* note 12, at 143–45.

¹⁵ *Id.* at 154.

¹⁶ Press Release, Off. of the Tex. Governor, Governor Abbott Directs TEA to Investigate Criminal Activity Involving Pornography in Texas Public Schools (Nov. 10, 2021), <https://gov.texas.gov/news/post/governor-abbott-directs-tea-to-investigate-criminal-activity-involving-pornography-in-texas-public-schools> [<https://perma.cc/VD5C-HU3X>].

¹⁷ Exec. Order No. 14,190, 90 Fed. Reg. 8853 (Jan. 29, 2025).

¹⁸ See, e.g., Press Release, Ron DeSantis Staff, Governor DeSantis Signs Legislation Further Enhancing Florida's Education Standards on the Evils of Communism (Apr. 17, 2024), <https://www.flgov.com/eog/news/press/2024/governor-desantis-signs-legislation-further-enhancing-floridas-education-standards> [<https://perma.cc/2PL2-FNHS>] (arguing that the legislation would prevent students from being "indoctrinated by Communist apologists in schools").

¹⁹ See *infra* Sections II.D.1–4.

²⁰ See, e.g., Derek W. Black, *The Education Power*, 110 VA. L. REV. 341, 343–45 (2024) (discussing executive overreaches on COVID-19 and critical race theory issues).

²¹ 20 U.S.C. § 1232a.

²² HIXENBAUGH, *supra* note 12, at 144.

²³ Prime Minister Viktor Orban's rise and concentration of power in Hungary is one example of this approach. See, e.g., Nick Thorpe, *Hungary's New Patriotic Education Meets Resistance*, BBC (Feb. 24, 2020), <https://www.bbc.com/news/world-europe-51612549> [<https://perma.cc/NNE2-FD39>].

Analyzing these attacks on public education as attacks on democracy serves two important ends. First, a democratic erosion analysis offers a new and apolitical framework for evaluating contentious public education debates. Viewed through a conventional lens, many public education debates, like those over private school vouchers or school curricula, may look like normal policy disputes with relatively low stakes. But through the lens of democratic erosion, certain shifts in education policy—those that destabilize schools, demonize public education, activate ethnic divisions, and entrench dominant ideological perspectives—represent warning signs for constitutional democracy. As such, a democratic erosion framework counsels against political actors adopting or pursuing certain education agendas, regardless of their immediate policy preferences. Scholars, media, and citizens should likewise move the public education conversation away from narrow or individualized outcomes and toward the structural ramifications on democracy.

Second, reframing education disputes as democratic erosion highlights the urgent need for judicial intervention. The Supreme Court has long acknowledged the possibility that overzealous state actors might abuse public education in ways that undermine democratic norms.²⁴ Such a risk, the Court has warned, requires the “scrupulous protection of Constitutional freedoms of the individual.”²⁵ The Court’s primary response has been to employ the First Amendment as a check on democratic abuse in schools, writing that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”²⁶ It has likewise denounced the idea that schools can operate as “enclaves of totalitarianism.”²⁷

Since the 1980s, however, the Court’s vigilance has waned. Its relaxed perspective on the proper scope of educational authority has reopened the door to orthodoxy and totalitarian behavior in schools. Reluctant to disrupt the important everyday work of schools, the Court has refused to apply serious checks on educational policymaking, reasoning that discretion on such matters is best left to state and local officials.²⁸ The Court may still speak of schools as “nurseries of

²⁴ See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

²⁵ *Barnette*, 319 U.S. at 637.

²⁶ *Id.* at 642.

²⁷ *Tinker*, 393 U.S. at 511.

²⁸ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (emphasizing that a “school must also retain the authority to refuse to sponsor student speech” and remain free to inculcate values); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (emphasizing the importance of respecting schools’ inculcative mission); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (relaxing constitutional standards to allow schools “freedom to maintain order”).

democracy,”²⁹ but its weakened doctrines do little to ensure public education stays true to that mission.

The quandary for the Court has always been crafting a standard that gives schools discretion to decide how best to instill democratic values but also prevents them from using that discretion in ways that encroach on students’ right to decide what to think for themselves. This problem is particularly acute with history and social studies curricula, where many of the controversies of the 2020s regarding race, sex, and divisive concepts lie. In the absence of a workable standard, these curricular bans and censorship are effectively “unreviewab[le].”³⁰

This Article argues that the solution to both educational democratic erosion and the Court’s reluctance to intervene lies in evaluating public education based on its own constitutional history and unique purposes.³¹ Before the Constitution was even ratified, Congress required territories seeking to become states to “forever . . . encourage[]” education by reserving the center lot in every town for public schools.³² When restarting democracy from the ashes of the Civil War, Congress required former Confederate states to guarantee public education in their constitutions, and never admitted another state to the Union without this guarantee.³³ From the Founding Fathers and early Congresses to state constitutional conventions, the nation agreed that public education was a necessity for developing responsible citizens in a democratic society.³⁴

Close historical analysis reveals that public education was designed to serve four specific purposes and safeguards for republican government: (1) preparing students for citizenship, (2) equipping citizens to preserve their individual rights and autonomy, (3) empowering people to resist tyranny, and (4) instilling a commitment to the common good.³⁵ These purposes and safeguards represent the grounds on which the Court can evaluate the substance of education practices without inappropriately invading the province of educators or policymakers.

²⁹ *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 190 (2021).

³⁰ Caroline Mala Corbin, *The Government Speech Doctrine Ate My Class: First Amendment Capture and Curriculum Bans*, 76 STAN. L. REV. 1473, 1478 (2024).

³¹ See generally Robert Post, *Theorizing Student Expression: A Constitutional Account of Student Free Speech Rights*, 76 STAN. L. REV. 1643 (2024) (theorizing the constitutional objectives of education to synthesize the Court’s student speech cases, although not exploring education’s constitutional history).

³² An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, art. 3 (July 13, 1787); *Papasan v. Allain*, 478 U.S. 265, 268 (1986) (discussing Congress’s policy of reserving land in every township for public schools).

³³ See Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 766 (2018) (detailing congressional mandates on Southern states).

³⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

³⁵ See *infra* Section IV.C.

When state and local officials transgress public education's originating purposes, they operate beyond their constitutional authority and forfeit the deference the Court would normally afford.

This Article proceeds in four parts. Part I explores the founding theory of public education as a necessity of republican government, the major steps Congress and states took in furtherance of that theory, and the distinction between democratic and autocratic education. Part II outlines the standard tools of democratic erosion, explores how public education might intersect with them, and then identifies six distinct public education trends that signal democratic erosion: (1) diminished free speech rights and access to information, (2) the demonization of teachers and schools, (3) the delegitimization of public education as an institution, (4) appeals to nationalist, populist, ethnic, and religious divisions, (5) abuses of power, and (6) a backlash against the democratic values that schools represent. Part III analyzes the First Amendment precedent that should limit this erosion but concludes that current precedent is insufficient to do so. Part IV draws on the founding purpose and constitutional history of public education to identify the objective principles that courts could use to check the democratic erosion infecting public education. It then highlights the ways certain policies transgress those principles.

I. THE PURPOSE OF AMERICAN PUBLIC EDUCATION

The erosion of democracy through public education is startling, given the historical role public education has played in American democracy. Since the nation's founding, public education has been understood as the means to ensure the proper functioning of democracy—what the Founders and Constitution termed a republican form of government.³⁶ Throughout the eighteenth and nineteenth centuries, federal and state leaders believed public education was so essential to republican government that they constitutionally obligated states to provide it to their citizens.³⁷ Yet although public education tends to reinforce democracy, it can be turned against democracy—and the people—when it strays from its republican roots.

Those republican roots, explored in further detail in Part IV, offer objective principles by which courts can limit state actors from eroding democracy through public education.³⁸ For now, the following Sections detail the original political and constitutional theories upon which the American system of public education was built. Section A explores the Founders' belief that democracy depends on educated voters. Section B

³⁶ See *infra* Section I.A.

³⁷ See *infra* Section I.B.

³⁸ See *infra* Part IV.

details the steps that Congress and states took to constitutionalize public education as an obligation of republican government to its citizens. Section C explains that although all governments use public education to perpetuate their particular ideology, democratic regimes differ from autocratic regimes in their toleration of free thought and dissent.

A. *The Original Theory: A Necessity of Republican Government*

The United States Constitution contemplates only one form of government and explicitly requires that the federal government “guarantee to every State in this Union a Republican Form of Government.”³⁹ Though the Constitution’s text does not mention public education, it has long been understood as a central pillar of American democracy.⁴⁰ At the nation’s founding and following the Civil War—the two most consequential junctures in American constitutional history—the Founding Fathers and constitutional Framers at the state and federal level conceptualized and established public education as a necessary component of the republican form of government they were creating.⁴¹ Like voting, separation of powers, and an independent judiciary, public education was essential to the success of democratic government.⁴²

According to Founding Father Benjamin Rush, American independence and its republican form of government thrust “a new [class] of duties to every American.”⁴³ This “peculiar form of our government” required a widespread system of education⁴⁴ or, in John Adams’s words, an education system so grand that it is “unknown to any other people

³⁹ U.S. CONST. art. IV, § 4.

⁴⁰ Delegates to the Constitutional Convention did initially propose explicitly granting Congress the power to establish educational institutions, but the proposal was narrowly excluded on the rationale that other constitutional provisions already included that power. John E. Haubenreich, *Education and the Constitution*, 87 PEABODY J. EDUC. 436, 446–48 (2012).

⁴¹ See Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1286 (2003); Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1097–102 (2019); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 112–17 (2013); Bennett Lunn, Note, *Guaranteed: The Federal Education Duty*, 125 COLUM. L. REV. 1467, 1485 (2025). See generally CARL F. KAESTLE, *PILLARS OF THE REPUBLIC* (Eric Foner ed., 1983) (detailing the early history of public schools in the United States).

⁴² KAESTLE, *supra* note 41, at 5; George Washington to the U.S. Senate and House of Representatives (Dec. 7, 1796), reprinted by NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-21-02-0142#> [<https://perma.cc/XJ57-PGXZ>] (arguing that with “the common education of a portion of our Youth from every quarter . . . the greater will be our prospect of permanent union”); THOMAS JEFFERSON, *Sixth Annual Message to Congress*, in THE WORKS OF THOMAS JEFFERSON 302, 318 (Paul L. Ford ed., 1905) (stating in an 1806 speech that public education is “necessary” to the “improvement” and “preservation” of the country).

⁴³ BENJAMIN RUSH, *Of the Mode of Education Proper in a Republic*, in ESSAYS, LITERARY, MORAL & PHILOSOPHICAL 6, 6 (Philadelphia, Thomas & Samuel F. Bradford 1798).

⁴⁴ *Id.* at 7.

ancient or modern.”⁴⁵ From George Washington and Benjamin Rush to John Adams and Thomas Jefferson, the Founders believed that America’s national experiment in democracy would fail without educated voters.⁴⁶

The Founders also believed that the public would never be widely educated without affirmative governmental steps. Adams and Jefferson were among the first to insist that government had a responsibility to educate its citizens. Adams wrote that education “ought to be the care of the public” and “maintained at the public expense.”⁴⁷ In the middle of the Revolutionary War, Adams enshrined this obligation—the first of its kind in the world—into the text of the Massachusetts Constitution, which declared that

[w]isdom, and knowledge, . . . diffused generally among the body of the people, [are] necessary for the preservation of their rights and liberties . . . [Thus,] it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the . . . public schools.⁴⁸

Five other original colonies followed Massachusetts in explicitly addressing education in their constitutions.⁴⁹

Jefferson, however, articulated an even more specific vision. His Bill for the More General Diffusion of Knowledge in the Virginia General Assembly required government “to illuminate, as far as practicable, the minds of the people at large” through public education “at the common expence of all.”⁵⁰ The bill proposed to divide the state “into wards” of about five or six square miles and “to establish in each ward a free school for reading, writing and common arithmetic.”⁵¹ It also

⁴⁵ JOHN ADAMS, A DISSERTATION ON THE CANON AND THE FEUDAL LAW, No. 3 (Sep. 30, 1765), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/06-01-02-0052-0006> [<https://perma.cc/GQM4-X6QB>].

⁴⁶ DEREK W. BLACK, SCHOOLHOUSE BURNING 54–57 (2020); Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910) (writing that “a people who mean to be their own Governors, must arm themselves with the power which knowledge gives,” and that government would crumble without popular information); LAWRENCE A. CREMIN, THE AMERICAN COMMON SCHOOL 30 (1951).

⁴⁷ John Andrew Wimpey, *Pioneer Concepts of American Public Education*, 35 PEABODY J. EDUC. 82, 83–84 (1957).

⁴⁸ MASS. CONST. pt. II, ch. V, § 2.

⁴⁹ See John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900*, 42 AM. J. LEGAL HIST. 1, 3 (1998) (noting that Pennsylvania, North Carolina, Georgia, Massachusetts, New Hampshire, and Vermont adopted constitutional education provisions).

⁵⁰ Thomas Jefferson, A Bill for the More General Diffusion of Knowledge (June 18, 1779), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079> [<https://perma.cc/5XGB-C2ZT>].

⁵¹ Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/99-02-02-6189> [<https://perma.cc/ESS6-6B2L>].

specified the election of public education officials, the construction of schools, the subjects to be taught, the appointment of school leaders, teacher compensation, and revenue generation.⁵² The ongoing costs of the Revolutionary War ultimately prevented Virginia from taking on the financial burden of education.⁵³ But, as the next Section explains, Jefferson's vision soon made its way into federal law.

B. Federal and State Efforts to Enshrine the Duty

After taking action in his home state of Massachusetts, Adams pivoted his educational attention outside the state, writing that “[t]he Education of a Nation, instead of being confined to a few schools [and] Universities, for the instruction of the few, must become the National Care and expence, for the information of the many.”⁵⁴ The Continental Congress did just that in the Northwest Ordinances of 1785⁵⁵ and 1787.⁵⁶ The Ordinances set the terms by which territories would become states and have since served as one of the United States of America's foundational documents alongside the Declaration of Independence, Articles of Confederation, and Constitution.⁵⁷ In a plan mirroring Jefferson's, the 1785 Ordinance specified that all towns be divided into thirty-six lots, that the center lot be reserved for schools, and that one-ninth of the lots and one-third of the town's natural resources be reserved for the support of the schools.⁵⁸ The Northwest Ordinance of 1787 included a soaring mandate similar to the one Adams placed in the Massachusetts Constitution: “[A]s a necessity of ‘good government and the happiness of mankind,’ [the Ordinance required that] ‘schools and the means of education shall forever be encouraged’” in the territories.⁵⁹

⁵² *Id.*

⁵³ See Letter from Thomas Jefferson to George Washington (Jan. 4, 1786), reprinted by NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/04-03-02-0419> [<https://perma.cc/RHE4-23US>] (writing that the bill received unparalleled “enthusiasm” in the legislature, “but the extreme distress of our resources prevented it's [sic] being carried into execution even during the war”).

⁵⁴ Letter from John Adams to Matthew Robinson-Morris (Mar. 23, 1786), in 18 PAPERS OF JOHN ADAMS 217, 218 (Gregg G. Lint et al. eds., 2016).

⁵⁵ An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory, 29 J. CONT. CONG. 375 (May 20, 1785).

⁵⁶ An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50 (1789).

⁵⁷ BLACK, *supra* note 46, at 62–64.

⁵⁸ *Id.*; Papasan v. Allain, 478 U.S. 265, 268–69 (1986) (discussing the 1785 Ordinance).

⁵⁹ BLACK, *supra* note 46, at 62–63. That language also made its way into state constitutions. See, e.g., MICH. CONST. art. VIII, § 1 (“Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”).

Over the next two centuries, Congress legally embedded these principles into the organic acts that carved western lands into individual territories and established their governments.⁶⁰ For instance, the 1849 Act establishing Minnesota's territorial government set aside two lots in each town to be "reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same."⁶¹ Then, in the 1857 Act authorizing Minnesota to prepare a state constitution and seek admission to the Union, Congress stipulated that Minnesota's constitution should include provisions that granted U.S. and territorial lands to the State "for the use of schools."⁶² When the Minnesota Constitutional Convention met later that year, it spoke of those school lands as the congressionally bequeathed "inheritance for every child in the Territory" that the Constitution should hold "inviolable . . . as long as the world stands," even if "every other fund should sink into the ocean."⁶³

Although not compelled by the Ordinances, existing Northern states also took concrete steps in the mid-1800s to expand public education.⁶⁴ Southern states, on the other hand, resisted public education and specifically banned education for Black people.⁶⁵ After the Civil War, congressional and state leaders recognized that the lack of education in the South was a barrier to actual democracy that would allow plantation owners to continue to dominate the political process.⁶⁶ Just as it had with the territories, Congress relied on its constitutional power to "guarantee to every State in this Union a Republican Form of Government" for a cure.⁶⁷

⁶⁰ See INST. FOR EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES 33–34, 39–44 (2008) (discussing the development of educational institutions across the nation).

⁶¹ An Act to Establish the Territorial Government of Minnesota (1849), reprinted in 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, CONSTITUTIONS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1987 (Francis Newton Thorpe ed., 1909).

⁶² *Id.* at 1989.

⁶³ T.F. ANDREWS, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINNESOTA 245–46 (Saint Paul, Minn., George W. Moore 1858).

⁶⁴ Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. REV. 1031, 1055–56 (2022).

⁶⁵ *Id.* at 1040–42.

⁶⁶ See, e.g., J. WOODRUFF, 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 688–89, 694–95 (Charleston, S.C., Denny & Perry 1868) (discussing mass illiteracy); CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Oliver Morton) (asserting that, without mass education, "the political power will remain almost entirely in the hands of the present rebel-educated classes"); Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137, 1155 (1993).

⁶⁷ U.S. CONST. art. IV, § 4.

Dictating the terms by which former Confederate states would reenter the Union,⁶⁸ Congress required Southern states to host constitutional conventions to draft new constitutions that conformed to a republican form of government and the U.S. Constitution.⁶⁹ By a republican form of government, Congress meant exactly what the Founders had meant seventy-five years earlier: a government that provides public education to its people.⁷⁰ In fact, after reviewing the constitutions of the last three former Confederate states to reenter the Union, Congress explicitly conditioned their readmission on the provision of public education, indicating in legislative text that their constitutions “shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution[s] of said State[s].”⁷¹ During this same period, Congress also established a federal Department of Education to assess “the condition and progress of education in the several States and Territories” and assist in the “establishment and maintenance of efficient school systems” across the country.⁷²

In the century following Reconstruction, thirteen territories became new states.⁷³ All of their constitutions contained an education clause.⁷⁴ Congress initially denied admission to the single territory—New Mexico—that lacked an education clause in its constitution. New Mexico gained admission after correcting that flaw and others.⁷⁵ In short, once Reconstruction began, no state ever again entered the Union without an education clause, and older states without one voluntarily added one to their constitutions by 1875.⁷⁶ With that, the United

⁶⁸ See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 412, 418 (2001).

⁶⁹ Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429 (1867). The Act also required states to ratify the Fourteenth Amendment and extend voting rights to African Americans. *Id.*

⁷⁰ Black, *supra* note 33, at 773–74, 777–78 (detailing congressional debates and identifying education as a necessary part of a republican form of government). As Senator Charles Sumner stated, “A republic without education is like the creature of imagination, a human being without a soul.” CONG. GLOBE, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Charles Sumner).

⁷¹ See An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870); An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 81 (1870); An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870).

⁷² An Act to Establish a Department of Education, ch. 158, § 1, 14 Stat. 434, 434 (1867).

⁷³ See Martin Kelly, *States and Their Admission to the Union*, THOUGHTCo. (Feb. 8, 2018), <https://www.thoughtco.com/states-admission-to-the-union-104903> [<https://perma.cc/6Q86-KQGN>].

⁷⁴ See INST. FOR EDUC. EQUITY & OPPORTUNITY, *supra* note 60, at app. 1 (summarizing the history of each state’s education clause).

⁷⁵ *Id.* at 29; ROBERT W. LARSON, *NEW MEXICO’S QUEST FOR STATEHOOD* 266 (1968) (stating the requirement that New Mexico establish schools).

⁷⁶ Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 457–59 & nn.130–33 (noting that by 1875, Connecticut was the only state without an education clause).

States's founding theory of a republican form of government was fully formalized into law.

C. *The Misuse of Education*

Although positive democratic outcomes flow from education,⁷⁷ history has also shown that public education can be put to ulterior political, ideological, and partisan ends. In fact, all types of governments use public education to reinforce their particular values, form national identities, and propagate political ideology.⁷⁸ The difference between autocratic and democratic governments is that autocratic regimes tend to use education as a means to indoctrinate and coerce, whereas democratic regimes tend to promote their values while staying open to individual dissent and inquiry.⁷⁹

The international forerunner in mass public education, Prussia, introduced its education system as a means through which “to construct a unified national polity,” where “individuals were expected to find their primary identification with the nation.”⁸⁰ When Prussia developed into the German Empire in the 1800s, the Empire, drawing on the ideas of philosopher Johann Gottlieb Fichte, used “universal, state-directed, compulsory education” to construct a new national identity and “teach all Germans to be good Germans.”⁸¹ Since then, countless other countries have introduced universal education as a solution to “fragmented social order” in struggling political regimes and a tool to propagate the political ideology and nationalist identity of new ones.⁸² In short, both

⁷⁷ Juan Botero, Alejandro Ponce & Andrei Shleifer, *Education, Complaints, and Accountability*, 56 J.L. & ECON. 959, 959 (2013) (detailing how “[b]etter-educated countries have better governments” and more educated people complain more about government misconduct); see David E. Campbell, *Civic Engagement and Education: An Empirical Test of the Sorting Model*, 53 AM. J. POL. SCI. 771, 771 (2009) (demonstrating that “a more highly educated environment amplifies the relationship between education and democratic enlightenment”). See generally Sirianne Dahlum & Carl Henrik Knutsen, *Do Democracies Provide Better Education? Revisiting the Democracy–Human Capital Link*, 94 WORLD DEV. 186 (2017) (discussing the education motives and incentives of political regimes).

⁷⁸ Ishac Diwan & Irina Vartanova, *Does Education Indoctrinate?*, 78 INT’L J. EDUC. DEV. 1, 12 (2020) (“[S]tates deliberately use education to build a national identity.”); GARY B. NASH, CHARLOTTE CRABTREE & ROSS E. DUNN, *HISTORY ON TRIAL* 15 (2000) (noting that all nations use education to “promote national cohesion and civic pride”).

⁷⁹ See *infra* notes 102–06; NASH, CRABTREE & DUNN, *supra* note 78, at 7 (detailing how the contested interpretation of history is “democracy at work”). See generally Kenneth A. Strike, *The Moral Role of Schooling in a Liberal Democratic Society*, 17 REV. RSCH. EDUC. 413 (1991) (discussing the role of education in a liberal democracy society).

⁸⁰ Francisco O. Ramirez & John Boli, *The Political Construction of Mass Schooling: European Origins and Worldwide Institutionalization*, 60 SOCIO. EDUC. 2, 3–4 (1987).

⁸¹ *Id.* at 5.

⁸² Eric M. Uslaner & Bo Rothstein, *The Historical Roots of Corruption: State Building, Economic Inequality, and Mass Education*, 48 COMPAR. POL. 227, 234 (2016); see Diren Çakmak,

democracies and autocracies perpetuate their political orders through education.⁸³

Democracies and autocracies, however, differ in the lengths they will go to achieve their goals.⁸⁴ The most intense educational indoctrination occurs in the most intense authoritarian or one-party states. North Korea and China, for instance, spend inordinate instructional time on political education to reinforce the regimes' political values.⁸⁵ Hungary took the same approach in its transition away from liberal democracy. After Viktor Orban came to power in Hungary in 2010, his political regime ordered a new and patriotic national curriculum to impart Hungarian values and revitalize national pride.⁸⁶ The new curriculum censored the country's history to create a narrative of Hungary as a strong, independent Christian country that grew out of the Christian kingdoms of old.⁸⁷ These "patriotic" changes purged authors and textbooks that did not fit the regime's reshaped ethnic and political identity.⁸⁸ When accused of ideologically purging the curriculum, the government simply indicated "[t]here's no such thing as a neutral education. Educational systems are . . . about teaching what we think are the values of Hungarian society."⁸⁹

Liberal democracies promote national values through education as well, but their approach tends to look less like coercive indoctrination and more like inculcation.⁹⁰ Whereas autocratic regimes limit access to information and perspectives that are critical of the regime and demand that students accept their values and narrative,⁹¹ democratic norms

Pro-Islamic Public Education in Turkey: The Imam-Hatip Schools, 45 MIDDLE E. STUD. 825, 826 (2009). See generally David Kerr, *Citizenship Education in England: The Making of a New Subject*, 2 J. SOC. SCI. EDUC. (2003) (discussing how Britain, responding to a cultural crisis, made citizenship instruction mandatory in 1999); E. Mark Hanson, *Educational Change Under Autocratic and Democratic Governments: The Case of Argentina*, 32 COMPAR. EDUC. 303 (1996) (contrasting educational policies under Argentina's military government with policies under its later democratic government).

⁸³ Strike, *supra* note 79, at 413; VICTORIA DE GRAZIA, *THE CULTURE OF CONSENT* 192–93 (1981).

⁸⁴ See, e.g., NASH, CRABTREE & DUNN, *supra* note 78, at 130–31 (distinguishing educational indoctrination in the Soviet Union and South Africa from the "critical inquiry as practiced in the United States").

⁸⁵ Dahlum & Knutsen, *supra* note 77, at 190–91.

⁸⁶ Thorpe, *supra* note 23.

⁸⁷ *Id.*

⁸⁸ Meilin Scanish & Norman Eisen, *History in the (Un)making: Historical Revisionism in Viktor Orbán's Hungary*, BROOKINGS (Nov. 25, 2019), <https://www.brookings.edu/articles/history-in-the-unmaking-historical-revisionism-in-viktor-orbans-hungary/> [<https://perma.cc/E7NC-AL7T>].

⁸⁹ Thorpe, *supra* note 23.

⁹⁰ NASH, CRABTREE & DUNN, *supra* note 78, at 7, 32, 71, 99; cf. Diwan & Vartanova, *supra* note 78 (discussing the use of education to build a national identity in democracies).

⁹¹ Thorpe, *supra* note 23; Dahlum & Knutsen, *supra* note 77, at 190; Mathew Y.H. Wong & Ying-ho Kwong, *Academic Censorship in China: The Case of The China Quarterly*, 52 PS: POL. SCI.

like free speech limit coercion or indoctrination.⁹² As a result, political socialization through education in a democracy is more subtle and flexible.⁹³ But even in a democracy, the temptation to abuse education discretion—in the attempt to advance democratic values themselves—always remains.⁹⁴ In fact, Part II demonstrates that American education is straying from its republican roots and suffering from tactics that authoritarian movements elsewhere have used to accumulate power.

II. ERODING DEMOCRACY THROUGH EDUCATION

American legislators, jurists, scholars, and citizens increasingly believe public schools are failing in their mission to sustain American democracy in its moment of crisis.⁹⁵ Data would seem to confirm those suspicions. States have robust curricular standards for math, science, and language arts, but their social studies mandates—in which states most directly address civics and democracy—are either nonexistent or weak.⁹⁶ As a result, elementary schools spend a mere ten percent of their instructional time on social studies.⁹⁷ Middle and high school students do better, but only one in five students is “proficient” in civics.⁹⁸

& POL. 287, 288 (2019), <https://www.cambridge.org/core/journals/ps-political-science-and-politics/article/academic-censorship-in-china-the-case-of-the-china-quarterly/A5747B5452DDBF79F-754C36A21810FE1> [<https://perma.cc/5KAB-PG7T>].

⁹² See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking down compelled pledge of allegiance as a violation of free speech); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (striking down a graduation prayer as violating the prohibition on establishment of religion).

⁹³ Strike, *supra* note 79, at 413–15; see also STANLEY, *supra* note 4, at 49–59 (discussing instances when the United States’s education system transgressed liberal democratic commitments).

⁹⁴ See NASH, CRABTREE & DUNN, *supra* note 78, at 15, 53–74 (surveying past censorship of history curriculum in the name of patriotism).

⁹⁵ See, e.g., Robert A. Katzmann, *A Republic if You Can Keep It—2016 Leslie H. Arps Lecture*, N.Y. CITY BAR ASS’N: BLOG (Dec. 12, 2016), <https://www.nycbar.org/blogs/a-republic-if-you-can-keep-it-2016-leslie-h-arps-lecture-by-robert-a-katzmann/> [<https://perma.cc/J4LB-3T96>]; DEMOCRACY PROJECT, *REVERSING A CRISIS OF CONFIDENCE* 3, 9–10 (2018), https://freedomhouse.org/sites/default/files/2020-02/FINAL_POLL_REPORT_Democracy_Project_2018_v5.pdf [<https://perma.cc/ZZ6H-KS4D>]; Civics Secures Democracy Act, S. 4384, 117th Cong. (2022); Civics Secures Democracy Act of 2021, H.R. 1814, 117th Cong. (2021).

⁹⁶ See JEREMY A. STERN ET AL., *THE STATE OF STATE STANDARDS FOR CIVICS AND U.S. HISTORY IN 2021*, at 21 (2021), <https://fordhaminstitute.org/national/research/state-state-standards-civics-and-us-history-2021> [<https://perma.cc/S6J3-QSC9>]; EDUCATING FOR AMERICAN DEMOCRACY INITIATIVE, *supra* note 6, at 4 (discussing the shift away from civics in the 2000s).

⁹⁷ Adam Tyner & Sarah Kabourek, *How Social Studies Improves Elementary Literacy*, 85 SOC. EDUC. 32, 34 (2021).

⁹⁸ See Nat’l Ctr. Educ. Stat., *U.S. History and Civics, FAST FACTS* (2022), <https://nces.ed.gov/fastfacts/display.asp?id=1160> [<https://perma.cc/Z9FF-G9NA>]; *National Survey Finds Just 1 in 3 Americans Would Pass Citizenship Test*, INST. FOR CITIZENS & SCHOLARS (Oct. 3, 2018), <https://citizensandscholars.org/resource/national-survey-finds-just-1-in-3-americans-would-pass-citizenship-test/> [<https://perma.cc/M33S-VRVX>]; Katzmann, *supra* note 95 (discussing widespread ignorance of things like the Constitution as the supreme law of the land).

Results like these are fueling a broad movement to improve civic education.⁹⁹ The movement, however, underestimates the scope of the nation's democratic crisis. The problem is not simply a failure to teach civics or inculcate democratic values. Rather, many political actors—intentionally or not—are using public education in ways that further an entirely different end: the affirmative erosion of democracy. In other words, the changes occurring in public education are not merely lost opportunities; they are flashing warning signs of widening democratic erosion.

The signs of democratic erosion are not always immediately obvious because of the subtler ways modern democracies die.¹⁰⁰ The same is true with ongoing shifts in education policy. On the surface, school choice, curricula, and the authority to decide these issues may look like run-of-the-mill education policy issues involving normal consequences. But the lens of democratic erosion reveals that they are undermining America's basic form of government.

The following Sections situate current education policies within the broader universe of democratic erosion. Section A defines democratic erosion and outlines the metrics scholars use to measure it. Section B surveys the common tools and strategies that autocratic, populist, illiberal, and other analogous movements use to erode democracy. Section C explains why public education is an attractive target for autocratic attacks. Section D examines recent trends in public education for signs of democratic erosion and finds several common autocratic strategies.

A. *Defining and Measuring Democratic Erosion*

Scholars of democratic erosion typically define democracy as liberal democracy or, more specifically, liberal constitutional democracy.¹⁰¹ Liberal democracy includes at least three core aspects: (1) free and fair elections, (2) the protection of the individual rights of free speech, free association, and free press, and (3) fidelity to the rule of law.¹⁰²

⁹⁹ See, e.g., EDUCATING FOR AMERICAN DEMOCRACY INITIATIVE, *supra* note 6, at 2; DEMOCRACY PROJECT, *supra* note 95, at 3; ROBERTS, *supra* note 5, at 4.

¹⁰⁰ See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 3 (2018); Robert Mickey, Steven Levitsky & Lucan Ahmad Way, *Is America Still Safe for Democracy? Why the United States Is in Danger of Backsliding*, 96 FOREIGN AFFS. 20, 20–21 (2017).

¹⁰¹ See V-DEM INST., *supra* note 1, at 12 (explaining the results of the Liberal Democracy Index); Mickey, Levitsky & Way, *supra* note 100, at 20–22 (referencing attacks on constitutions in democracies); CAROTHERS & PRESS, *supra* note 1, at 12 (distinguishing illiberalism from democracy); GINSBURG & HUQ, *supra* note 9, at 8.

¹⁰² GINSBURG & HUQ, *supra* note 9, at 9. See generally FREEDOM HOUSE, *FREEDOM IN THE WORLD 2024: THE MOUNTING DAMAGE OF FLAWED ELECTIONS AND ARMED CONFLICT* (2024), <https://freedomhouse.org/report/freedom-world> [<https://perma.cc/7MGD-E32Q>] (measuring and analyzing the electoral process, political pluralism and participation, the functioning of the government, freedom of expression and of belief, associational and organizational rights, the rule of law, and personal autonomy and individual rights of countries and territories).

Democratic erosion occurs when a country regresses on these measures and, cumulatively, diminishes the quality or stability of democracy.¹⁰³

Rather than displacing democracy through swift or violent action, contemporary autocrats come to power “through a series of little-noticed, incremental steps, most of which are legal and many of which appear innocuous [at the time].”¹⁰⁴ Autocratic regimes may, for instance, initially come to power through elections and continue holding future elections to maintain a veneer of democracy.¹⁰⁵ But these new autocratic regimes institute electoral changes that assure their reelection and deny voters any real choice.¹⁰⁶ Similarly, a ruling party may manipulate political discourse by restricting the opposition’s free speech rights.¹⁰⁷ At some point, these practices are so pervasive that the liberal democratic regime slips into an illiberal democracy or autocracy.

B. Tools of Democratic Erosion

The precise path of democratic erosion varies by country, but several patterns are common. The first involves consolidating power by attacking the rule of law. A primary strategy is to undermine the judiciary’s independence, which otherwise serves as a check on power.¹⁰⁸ Equally important is “politicizing state institutions and deploying them against the opposition.”¹⁰⁹ Rather than neutral law enforcement, government agencies come to reflect the personal predilections of their political leaders. Leaders often purge government agencies and pack them with loyalists to achieve this end.¹¹⁰ The private sector can undergo an analogous transformation when the government extends benefits and contracts based on loyalty to the leadership rather than

¹⁰³ GINSBURG & HUQ, *supra* note 9, at 43, 45.

¹⁰⁴ Mickey, Levitsky & Way, *supra* note 100, at 21.

¹⁰⁵ See GINSBURG & HUQ, *supra* note 9, at 42; Kevin L. Cope & Mila Versteeg, *The Procedure of Democratic Erosion*, 73 EMORY L.J. 1249, 1261 (2024).

¹⁰⁶ See INT’L REPUBLICAN INST., POLITICAL PARTIES AND OPPOSITION TO DEMOCRATIC EROSION 2 (2024), <https://www.iri.org/wp-content/uploads/2024/04/Evidence-Briefer-Political-Parties-and-Opposition-to-Democratic-Erosion.pdf> [<https://perma.cc/9ZTX-X7RS>] (discussing electoral manipulations after an authoritarian leader comes to power).

¹⁰⁷ See GINSBURG & HUQ, *supra* note 9, at 111–13; FREEDOM HOUSE, *supra* note 102, at 5–6, 8, 10 (discussing the harassment of journalists during elections).

¹⁰⁸ Hannah Baron, Robert A. Blair, Jessica Gottlieb & Laura Paler, *An Events-Based Approach to Understanding Democratic Erosion*, 57 PS: POL. SCI. & POL. 208, 210 (2024) (identifying a reduction in judicial independence as a reduction in horizontal accountability).

¹⁰⁹ Mickey, Levitsky & Way, *supra* note 100, at 21.

¹¹⁰ *Id.*; Baron et al., *supra* note 108, at 210 (identifying manipulation of the civil service as a precursor to democratic backsliding).

neutral criteria.¹¹¹ To ward off any restraint of these abuses of power, political leaders may also call for legislation or constitutional amendments to eliminate checks on the executive, claiming that the executive alone can best achieve the common good.¹¹²

The second tactic of democratic erosion involves restricting free speech and manipulating the public discourse. Political leaders often demonize or restrict the media in an attempt to silence reliable or critical information.¹¹³ Others take direct control of media outlets or only grant access to those that promise favorable coverage.¹¹⁴ For related reasons, universities are also “a frequent target of leaders who seek to shape the polity to their own making and entrench their hold on power.”¹¹⁵ Beyond just controlling these media and educational institutions, some autocratic regimes criminalize or penalize those who criticize the government.¹¹⁶

Finally, aspiring autocrats can retain their elected positions by altering electoral rules to favor themselves, restricting access to the ballot, making it harder for the opposition to exercise political power, and using government agencies to repress or jail political opponents.¹¹⁷ Changes of this sort eventually eliminate partisan conflict and any semblance of meaningful political competition.¹¹⁸ Although citizens continue to vote, they are left with only one choice: to reelect those already in power.

¹¹¹ Mickey, Levitsky & Way, *supra* note 100, at 22.

¹¹² Cope & Versteeg, *supra* note 105, at 1261 (“Perhaps the most procedurally lawful tactic for power-consolidating reform is formally amending the constitution.”).

¹¹³ LEVITSKY & ZIBLATT, *supra* note 100, at 2, 4; Kate Musgrave, *Tipping Point: Democratic Erosion and the Assault on Press Freedom*, CTR. FOR INT’L MEDIA ASSISTANCE (Oct. 27, 2021), <https://www.cima.ned.org/publication/tipping-point-democratic-erosion-and-the-assault-on-press-freedom/> [<https://perma.cc/V4XD-MLNU>] (“[W]ould-be autocrats seek to methodically dismantle press freedom and independence as an early step towards consolidating power.”).

¹¹⁴ See GINSBURG & HUQ, *supra* note 9, at 107–13; Baron et al., *supra* note 108, at 210 (identifying co-optation of the opposition as a precursor of democratic backsliding and media repression as a symptom). See generally Musgrave, *supra* note 113 (analyzing press control in autocracies).

¹¹⁵ Tom Ginsburg, *Academic Freedom and Democratic Backsliding*, 71 J. LEGAL EDUC. 238, 239 (2022).

¹¹⁶ GINSBURG & HUQ, *supra* note 9, at 45–46; Safa Ahmed, *India’s Free Speech Censorship Is Ruining Democracy*, DEMOCRATIC EROSION CONSORTIUM (Oct. 17, 2023), <https://www.democratic-erosion.com/2023/10/17/indias-free-speech-censorship-is-ruining-democracy/> [<https://perma.cc/T8W5-XH5E>] (discussing the arrest of activists and free speech erosions in India); Musgrave, *supra* note 113, at 6–7 (discussing media arrests in Turkey).

¹¹⁷ GINSBURG & HUQ, *supra* note 9, at 113–14; INT’L REPUBLICAN INST., *supra* note 106, at 2; Baron et al., *supra* note 108, at 210 (identifying various precursors and symptoms of erosion in the electoral process).

¹¹⁸ GINSBURG & HUQ, *supra* note 9, at 43–47.

C. *An Unidentified Tool of Erosion*

Although scholars occasionally examine restrictions on academic freedom in higher education as an aspect of democratic erosion,¹¹⁹ the possibility that attacks on elementary and secondary public education constitute democratic erosion has escaped their attention.¹²⁰ Yet assaults on public education may pose an even more serious threat to democracy. Particularly in the United States, public education serves broader societal functions than higher education, operates under a unique legal structure, and interacts with democracy on a more systemic level. In these respects, public education ranks alongside the other fundamental pillars of democracy and warrants serious attention.

First, as the largest government institution in the United States, public education is an obvious potential target of those aiming to undermine faith in government institutions. Public education is twice the size of the entire federal government.¹²¹ More importantly, it represents the most extensive and persistent relationship that most citizens will ever have with government.¹²² Public schools educate roughly ninety percent of Americans for more than a decade during their formative years.¹²³

Second, public schools, like the judiciary and the rule of law, normally operate above the normal political fray.¹²⁴ State constitutions have long included mechanisms designed to isolate public education from regular politics because public education should serve the general

¹¹⁹ V-DEM INST., *supra* note 1, at 6 (“Censorship of the media and repression of [civil society organizations] increases and academic freedom declines in more than 25 of the autocratizing countries.”).

¹²⁰ A few democracy watchdogs did report on how Hungary’s education changes deemphasized “critical thinking and other skills that might lead students to question the government’s narratives.” Zack Beauchamp, *It Happened There: How Democracy Died in Hungary*, PULITZER CTR. (Sep. 13, 2018), <https://pulitzercenter.org/stories/it-happened-there-how-democracy-died-hungary> [<https://perma.cc/D9WR-KMQ3>]; see also STANLEY, *supra* note 4, at 3–24 (identifying fascist historical narratives but not analyzing democratic erosion more broadly).

¹²¹ Compare USAFacts Team, *How Many People Work for the Federal Government?*, USAFACTS (Nov. 11, 2025), <https://usafacts.org/articles/how-many-people-work-for-the-federal-government/> [<https://perma.cc/B2GC-KY2W>] (stating that approximately 2.9 million people worked for federal government in 2025), with *Biggest Industries by Employment in the US in 2024*, IBISWORLD (2024), <https://www.ibisworld.com/united-states/industry-trends/biggest-industries-by-employment/> [<https://perma.cc/FJ58-MWGN>] (stating that nearly seven million people were employed by public schools in 2024). The only employment sector, public or private, to approach public elementary and secondary education in size is health care. *Id.*

¹²² See *Ambach v. Norwick*, 441 U.S. 68, 75–78 (1979).

¹²³ BRUCE D. BAKER, DANIELLE FARRIE & DAVID SCIARRA, *IS SCHOOL FUNDING FAIR?* 18–19 (7th ed. 2018).

¹²⁴ See KATHLEEN KNIGHT ABOWITZ & STEVEN R. THOMPSON, *PUBLICS FOR PUBLIC SCHOOLS* 45–49 (2013) (explaining that the politics of education do not involve “[p]olitics-as-[u]sual”).

public good, not partisan positions.¹²⁵ Likewise, state legislatures have seen fit to make local school board elections nonpartisan.¹²⁶ And although cultural controversies of the past have regularly intersected with schools,¹²⁷ public education has persevered relatively unscathed—as a “party-free zone”¹²⁸—because the general public interest in it historically has not been marred by partisan interests.¹²⁹ For instance, the No Child Left Behind Act of 2001¹³⁰ and the Every Student Succeeds Act of 2015¹³¹—the foundational laws dictating the federal role in education—passed with overwhelming bipartisan support in the House and Senate, just like other education legislation in the past.¹³² State education legislation, similarly, has long been a joint effort by Democrats and Republicans.¹³³ This history has made public education a high-trust, independent institution, like the judiciary, which is not easily captured, corrupted, or politicized. But for the same reason, public school crises—real or manufactured—present opportunities for an illiberal leader to exploit. As one leading scholar points out, “the greatest ire, and the

¹²⁵ See, e.g., 2 JONATHAN ELLIOT, *DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA* 388 (Harrisburg, Benjamin Singerly 1873) (isolating the state superintendent of public instruction “from all the contaminating influences of political manipulation and management”); Black, *supra* note 33, at 808–16 (detailing constitutional conventions’ mechanisms to shield education from political manipulation); COLO. CONST. art. IX, § 1 (requiring that the commissioner of education be appointed by the state board of education rather than by the governor).

¹²⁶ Kathleen Knight Abowitz, *School Boards, Long Locally Focused and Nonpartisan, Get Dragged into the National Political Culture Wars*, CONVERSATION (June 3, 2024, at 08:38 ET), <https://theconversation.com/school-boards-long-locally-focused-and-nonpartisan-get-dragged-into-the-national-political-culture-wars-229143> [<https://perma.cc/YA4Y-VTZ3>].

¹²⁷ See NASH, CRABTREE & DUNN, *supra* note 78, at xxi, 22. See generally ADAM LAATS, *FUNDAMENTALISM AND EDUCATION IN THE SCOPES ERA* (2010) (discussing controversy surrounding teaching evolution in schools).

¹²⁸ JENNIFER C. BERKSHIRE & JACK SCHNEIDER, *THE EDUCATION WARS* 121 (2024).

¹²⁹ See, e.g., BLACK, *supra* note 46, at 151–56 (2020) (finding that the constitutional commitment to public education survived Jim Crow segregation); ABOWITZ & THOMPSON, *supra* note 124, at 45–49.

¹³⁰ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

¹³¹ Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended in scattered sections of 20 U.S.C.).

¹³² See, e.g., Cory Turner, *President Obama Signs Education Law, Leaving ‘No Child’ Behind*, NPR (Dec. 10, 2015, at 12:59 ET), <https://www.npr.org/sections/thetwo-way/2015/12/10/459219774/president-obama-signs-education-law-leaving-no-child-behind> [<https://perma.cc/8UJC-FPQR>]; Lizette Alvarez, *House Votes for New Testing to Hold Schools Accountable*, N.Y. TIMES, May 24, 2001, at A1 (discussing significant bipartisan support for the No Child Left Behind Act in the House of Representatives).

¹³³ See, e.g., Michael J. Petrilli, *A Bridge Back to Bipartisan Education Reform*, FORDHAM INST. (Sep. 14, 2023), <https://fordhaminstitute.org/national/commentary/bridge-back-bipartisan-education-reform> [<https://perma.cc/T69P-4Q5J>].

most ruthless attacks, are usually reserved for state institutions that are not under the direct sway” of autocratic leaders.¹³⁴

Third, attacks on public education can achieve ends similar to media attacks and censorship: controlling access to information and filling information vacuums with propaganda. “One of the core strategies” of autocratic leaders is “to control the public sphere” by undermining the “epistemic arbiters” of that sphere—universities and the media.¹³⁵ Although scholars of democratic erosion have yet to squarely situate public education within this information control effort, public schools are the primary source of information for the next generation. The information they deliver has the capacity, in the long term, to shape national narratives and political power.¹³⁶ They are, in short, “an indoctrinator’s dream”¹³⁷ and offer illiberal leaders a tool to consolidate power.¹³⁸ Thus, public education is not just any state institution but one that could be a major target and barometer of democratic erosion.

D. Educational Markers of America’s Democratic Erosion

The forces of democratic erosion have manifested themselves across a wide swath of education policies in the 2010s and 2020s. From school curriculum and teacher policy to the privatization of public education and disregard for constitutional norms, schools have experienced attacks that go beyond regular education policy debate and signal a weakening of democratic norms themselves.¹³⁹ More simply, democratic erosion is masquerading as education policy. The following Sections explore six education policies and trends that align with the general strategies that autocrats have used to erode democracy in other contexts.

1. Shrinking Free Speech Rights and Access to Information

In 2021 and 2022, more than 500 anti-critical race theory (“CRT”) measures were introduced across forty-nine states, and 200 were

¹³⁴ YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY* 45 (2018) (explaining that no single policy signals the collapse of democracy, but otherwise innocuous problems collectively endanger democracy).

¹³⁵ Ginsburg, *supra* note 115, at 239.

¹³⁶ See STANLEY, *supra* note 4, at xiv, 23 (discussing how education builds political culture); NASH, CRABTREE & DUNN, *supra* note 78, at xxi; *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (indicating that public schools inculcate values that maintain democracy).

¹³⁷ Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN’S L. REV. 421, 425 n.25 (1995).

¹³⁸ See STANLEY, *supra* note 4, at 3 (discussing how fascists “doctor[] the historical record” to justify the “dominant group’s elevated status”).

¹³⁹ See generally Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (pointing out that, although not addressed in this Article, privatization narrows individuals’ constitutional protections).

enacted.¹⁴⁰ Many of these anti-CRT measures included broad prohibitions on teaching “divisive concepts.”¹⁴¹ In 2023, state legislators also introduced more than 200 education bills targeting the lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) community, passing one or more of these bills in twenty states.¹⁴² Viewed through the lens of democratic erosion, this legislative activity resembles illiberal restrictions and manipulations of information to reinforce a political regime’s power.¹⁴³ Although education necessarily involves decisions about what content to share with students, these restrictions are fundamentally different.

First, educational content standards typically do not involve the exclusion of texts or ideas. For instance, the Common Core Standards for high school literature—which several states have incorporated—offer broad categorical examples of potential books and content, “including mythology, foundational U.S. documents, and Shakespeare,” but they do not exclude categories of content, much less specific books.¹⁴⁴ Second, content restrictions and censorship emanating from the statehouse are even more unusual.¹⁴⁵ The judgment of exactly what students should learn in specific subjects is a pedagogical decision typically reserved for education officials and subject matter experts.¹⁴⁶ Legislative involvement that displaces education officials as decision-makers can turn what is normally a pedagogical decision into a political one.

¹⁴⁰ TAIHA ALEXANDER, LA TOYA BALDWIN CLARK, KYLE REINHARD & NOAH ZATZ, CRT FORWARD, TRACKING THE ATTACK ON CRITICAL RACE THEORY 4 (2023), <https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law-CRT-Report-Final.pdf> [<https://perma.cc/T56H-6Y7E>].

¹⁴¹ Nate Luce, *A Different Way to Challenge Anti-CRT Legislation: A Workable Constitutional Rule for Combatting Pedagogical Censorship*, VANDERBILT U. L. SCH. (Apr. 8, 2026, at 13:23 ET), <https://law.vanderbilt.edu/workable-constitutional-rule-for-combatting-pedagogical-censorship/> [<https://perma.cc/S76M-UZPM>].

¹⁴² *2023 Anti-LGBTQ Laws in the Classroom*, POINT FOUND. (July 14, 2023), <https://point-foundation.org/community/blog/2023-anti-lgbtq-laws#StatesList> [<https://perma.cc/4PJP-D4CW>].

¹⁴³ Stanley compares this rewriting of history to fascist education policy in Nazi Germany, Russia, India, Hungary, and more. See STANLEY, *supra* note 4, at 2–24.

¹⁴⁴ COMMON CORE STATE STANDARDS INITIATIVE, COMMON CORE STATE STANDARDS FOR ENGLISH LANGUAGE ARTS & LITERACY IN HISTORY/SOCIAL STUDIES, SCIENCE, AND TECHNICAL SUBJECTS 6, 58 (2010), <https://learning.ccsso.org/wp-content/uploads/2022/11/ADA-Compliant-ELA-Standards.pdf> [<https://perma.cc/SEY4-DCR3>].

¹⁴⁵ See Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 251 (2013) (noting that in the two major cases in which the Court struck down curricular speech policies, the state legislature “distorted [the] political process” to enact “laws that compelled patriotism in schools”).

¹⁴⁶ See, e.g., *Common Core State Standards*, CAL. DEP’T OF EDUC. (Feb. 24, 2026), <https://www.cde.ca.gov/re/cc> [<https://perma.cc/9GDH-ZPP9>] (“[T]he State Board of Education decides on the standards for all students.”).

Third, content standards are normally designed to be viewpoint neutral. Although some level of perspective is inescapable,¹⁴⁷ educational standards are open-ended by design to avoid obvious value judgments. They might, for instance, require that students explore the causes of the Civil War, but they do not exclude particular causes or dictate that one thing was “the” cause.¹⁴⁸ At most, a standard might require that students consider the role that slavery played in the War, although leaving open the possibility that teachers and students will consider a variety of other perspectives and approaches.¹⁴⁹

Legislation restricting classroom topics violates all three of these general rules. First, these laws specifically target and exclude texts, ideas, and concepts with which legislators disagree—sometimes so broadly that they ban anything that arguably resembles or relates to the targeted material and ideas.¹⁵⁰ Second, legislators, rather than the education officials who are best situated to evaluate educational content, are dictating the exclusion.¹⁵¹ Third, rather than facilitating relatively neutral instruction and open conversations, this legislation takes hard positions on matters of opinion and excludes perspectives that contest those opinions. Some laws effectively ban perspectives that emphasize the role that racism has played in America and favor those that insist that America has always been a fundamentally just society.¹⁵² In

¹⁴⁷ See generally NASH, CRABTREE & DUNN, *supra* note 78, at 9–14 (indicating that history necessarily involves interpretation).

¹⁴⁸ See generally *North Carolina Essential Standards: Eighth Grade Social Studies*, PUB. SCHS. N.C. (Dec. 2, 2010), <https://www.dpi.nc.gov/documents/ec/american-history-i/download?attachment> [<https://perma.cc/3T36-JH3Y>] (requiring that students explore the “impacts” of the Civil War); *North Carolina Standards for American History*, PUB. SCHS. N.C. (Feb. 4, 2021), <https://www.dpi.nc.gov/american-history-standards-fall-2021-implementation/open> [<https://perma.cc/AT2G-B7ZP>] (requiring students to explore the “causes” of war).

¹⁴⁹ See, e.g., *North Carolina Essential Standards: Social Studies*, PUB. SCHS. N.C. (Oct. 6, 2011), <https://www.dpi.nc.gov/documents/ec/american-history-i/download?attachment> [<https://perma.cc/PYY2-T359>] (including slavery as a cause of the Civil War but listing others as well).

¹⁵⁰ See, e.g., TENN. CODE ANN. § 49-6-1019 (2021) (including vague prohibitions on things such as “promoting division between” demographic groups); IDAHO CODE § 33-138 (2021) (banning “critical race theory”); Saving American History Act of 2021, S. 2035, 117th Cong. (2021) (proposing to terminate funding for any schools that teach “the 1619 Project curriculum”).

¹⁵¹ See generally Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons*, NPR (May 28, 2021, at 09:04 ET), <https://www.npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship> [<https://perma.cc/TEA7-9ZGT>] (emphasizing that the legislators were upending curricula that took education officials years to develop).

¹⁵² See, e.g., H.B. 1508, 67th Legis. Assemb., Spec. Sess. (N.D. 2021) (prohibiting instruction of the idea “that racism is systemically embedded in American society”); FLA. STAT. § 1003.42 (2025) (requiring that America “be defined as the creation of a new nation based largely on the universal principles stated in the Declaration of Independence”); Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), <https://www.brookings.edu/articles/why-are-states-banning-critical-race-theory/> [<https://perma.cc/E2CL-NJV2>] (discussing

short, legislators are censoring viewpoints that they deem unsavory and affirming those that align with their preferred political narrative, a tactic similar to the Hungarian effort to control historical narratives after its regime change.¹⁵³

2. *Demonizing Education Institutions and Actors*

This education rhetoric incorporates another potential marker of democratic erosion: the demonization and alleged illegitimacy of those with whom the controlling faction disagrees. Autocratic and populist leaders often come to power by claiming that current leaders, norms, and rules “weaken democracy and harm the people” and must be “set aside” or eliminated so that the people can act “in their own interest.”¹⁵⁴ The leaders frame their opponents as enemies of the state, from which the leader, or their legislative agenda, will save the people and the state.¹⁵⁵

In the 2000s and 2010s, several American political leaders began shifting the way they talked about teachers. One governor likened teachers to “terrorists.”¹⁵⁶ Another said he wanted to “punch” teacher representatives in the mouth.¹⁵⁷ Aggressive language of this sort has since spread. In 2020, U.S. Secretary of Education Betsy DeVos regularly spoke of teachers as holding students “hostage.”¹⁵⁸ Later, those who critiqued anti-LGBTQ legislation were individually vilified as

the 2023 Executive Budget Recommendation by Mississippi’s governor that urged three million dollars for “Patriotic Education”).

¹⁵³ See Beauchamp, *supra* note 120 (detailing how the new Hungarian government “reshaped the curriculum . . . to deemphasize critical thinking and other skills that might lead students to question the government’s narratives”); STANLEY, *supra* note 4, at 15–18.

¹⁵⁴ William A. Galston, *The Populist Challenge to Liberal Democracy*, 29 J. DEMOCRACY 5, 5 (2018).

¹⁵⁵ See LARRY M. BARTELS, *DEMOCRACY ERODES FROM THE TOP* 213 (Tali Mendelberg ed., 2023).

¹⁵⁶ Valerie Strauss, *Yes, Scott Walker Really Did Link Terrorists with Protesting Teachers and Other Unionists*, WASH. POST (Feb. 27, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/02/27/yes-scott-walker-really-did-link-terrorists-with-protesting-teachers-and-other-unionists/> [<https://perma.cc/B5JQ-F5H5>].

¹⁵⁷ Lyndsey Layton, *Chris Christie to Teachers Union: You Deserve a Punch in the Face*, WASH. POST (Aug. 3, 2015), https://www.washingtonpost.com/local/education/chris-christie-to-teachers-union-you-deserve-a-punch-in-the-face/2015/08/03/86358c2c-39de-11e5-8e98-115a3cf7d7ae_story.html?hhttps://perma.cc/9FXD-BNKV.

¹⁵⁸ See generally BETSY DeVOS, *HOSTAGES NO MORE* (2022) (referring to public school students as “hostages” throughout).

“pedophiles,” “groomers,” and “child abusers.”¹⁵⁹ The effect was to silence, troll, and isolate skeptics and preclude substantive debate.¹⁶⁰

Analogous attacks accompanied the anti-CRT movement. Teachers, schools, and public education defenders were labeled as “unpatriotic,” “Marxist,” “communist,” and “reverse racists” who threaten “[t]he very survival of the American Republic.”¹⁶¹ One governor accused schools of “[p]olitical indoctrination” that teaches “our children to engage in the very behavior the Constitution prohibits.”¹⁶² Another governor remarked that his anti-CRT bill was necessary to stop “the far-left woke agenda [from] tak[ing] over our schools” and using “tax dollars to teach our kids to hate this country or to hate each other.”¹⁶³ Popular commentators are even invoking militaristic language, calling on parents to join an “insurgency” or “16,000-hour war, for our kids and our country,” in which neither “Nerf guns” nor traditional methods of reform will work.¹⁶⁴

¹⁵⁹ Kiara Alfonseca, *Some Republicans Use False ‘Pedophilia’ Claims to Attack Democrats, LGBTQ People*, ABC NEWS (May 7, 2022, at 10:25 ET), <https://abcnews.go.com/US/republicans-false-pedophilia-claims-attack-democrats-lgbtq-people/story?id=84344687> [<https://perma.cc/HL4Z-SN2F>].

¹⁶⁰ Thomas Kika, *Ron DeSantis Press Secretary Compares ‘Don’t Say Gay’ Critics to Pedophiles*, NEWSWEEK (Mar. 7, 2022, at 18:05 ET), <https://www.newsweek.com/ron-desantis-press-secretary-compares-dont-say-gay-critics-pedophiles-1685697> [<https://perma.cc/A8CU-KBSC>]; Kat Tenbarger, *LGBTQ People Face ‘Groomer’ Accusations and Trolling as Culture War Rages On*, NBC NEWS (Apr. 19, 2022, at 14:31 ET), <https://www.nbcnews.com/tech/internet/lgbtq-abuse-spikes-online-fueled-intensifying-culture-war-rcna24904> [<https://perma.cc/6CZX-6N5M>].

¹⁶¹ Christopher F. Rufo, *What Critical Race Theory Is Really About*, MANHATTAN INST. (May 6, 2021), <https://manhattan.institute/article/what-critical-race-theory-is-really-about> [<https://perma.cc/G3XK-8ZKG>]; Mike Gonzalez & Jonathan Butcher, *Purging Whiteness to Purge Capitalism*, HERITAGE FOUND. (May 5, 2021), <https://www.heritage.org/progressivism/commentary/purging-whiteness-purge-capitalism> [<https://perma.cc/FC7J-SMWB>]; Daniel Kreiss, Alice Marwick & Francesca Bolla Tripodi, *The Anti-Critical Race Theory Movement Will Profoundly Affect Public Education*, SCI. AM. (Nov. 10, 2021), <https://www.scientificamerican.com/article/the-anti-critical-race-theory-movement-will-profoundly-affect-public-education/> [<https://perma.cc/YB9B-FWW3>]; PETE HEGSETH & DAVID GOODWIN, *BATTLE FOR THE AMERICAN MIND* xii, 219 (2022).

¹⁶² Va. Exec. Order No. 1 (Jan. 15, 2022), <https://www.wavy.com/wp-content/uploads/sites/3/2022/02/Executive-Order-1.pdf> [<https://perma.cc/NWF9-SYR8>]; Matthew Barakat & Sarah Rankin, *Youngkin Looks to Root Out Critical Race Theory in Virginia*, AP NEWS (Feb. 15, 2022, at 15:27 ET), <https://apnews.com/article/education-richmond-race-and-ethnicity-racial-injustice-virginia-8ad5da65b9cb05265f2b8081c41827cd> [<https://perma.cc/YU2P-LMSW>].

¹⁶³ Kiara Alfonseca, *Florida Gov. Ron DeSantis’ Anti-Critical Race Theory Law to Take Effect*, ABC NEWS (June 30, 2022, at 08:14 ET), <https://abcnews.go.com/Politics/florida-gov-ron-desantis-anti-critical-race-theory/story?id=85555497> [<https://perma.cc/J7EB-BBG9>]; Matt Papaycik & Forrest Saunders, *Florida’s Governor Signs Controversial Bill Banning Critical Race Theory in Schools*, WPTV (Apr. 22, 2022, at 17:29 ET), <https://www.wptv.com/news/education/floridas-governor-to-sign-critical-race-theory-education-bill-into-law> [<https://perma.cc/VK4Y-LDLY>].

¹⁶⁴ HEGSETH & GOODWIN, *supra* note 161, at 9, 42, 225, 233.

Those politicians and commentators demonizing educators have argued that these enemies must face consequences.¹⁶⁵ Under normal circumstances, curricular disagreements are matters between teachers and their principal or mentors that involve counseling and self-correction.¹⁶⁶ But new laws encourage outsiders to police and threaten teachers with legal penalties. Georgia's divisive concepts law authorizes parents to file complaints that trigger immediate investigations of suspected teachers.¹⁶⁷ Other states have proposed to strip teachers of their licenses, impose five-thousand-dollar fines, authorize private lawsuits, or eliminate the immunity educators normally have from lawsuits related to how they teach.¹⁶⁸ One scholar likened this to state-authorized "vigilantism."¹⁶⁹

This legislation has put teachers on the defensive, sowed fear, and chilled instruction.¹⁷⁰ The ambiguous, sweeping language in these laws provides teachers little notice of what they can or cannot teach, leaving them perpetually at risk. One terminated teacher's attorney remarked in 2023 that "[a]fter two days of trial," the state had still failed to explain "where the lines are drawn when it comes to sensitive, controversial, or divisive concepts."¹⁷¹ One thing, however, is clear: Mere allegations can disrupt a teacher's career and threaten a teacher's livelihood. As a result, many teachers have self-censored and avoided any topic that could be perceived as relating to these prohibitions, including in states where no bill has even passed.¹⁷²

3. *Delegitimizing America's Most Prominent Government Institution*

Similar to other democratic erosion efforts that undermine faith in government institutions, curricular restrictions and attacks on teachers

¹⁶⁵ *Id.* at 238.

¹⁶⁶ See JANET A. HALE, A GUIDE TO CURRICULUM MAPPING 8 (Cathy Hernandez ed., 2008) (defining curriculum development as "an ongoing process that asks teachers and administrators to think, act, and meet differently to improve their students' learning").

¹⁶⁷ H.B. 1084, 2022 Gen. Assemb., Reg. Sess. (Ga. 2022).

¹⁶⁸ See, e.g., H.B. 97, 67th Leg., Gen. Sess. (Wyo. 2022); see Peter Greene, *Florida Wanted to Take Her Teaching License over a Black Lives Matter Flag. A Judge Just Said No*, FORBES (June 13, 2024, at 08:57 ET), <https://www.forbes.com/sites/petergreene/2024/06/13/florida-wanted-to-take-her-teaching-license-over-a-black-lives-matter-flag-a-judge-just-said-no/> [<https://perma.cc/WDH3-9USB>]; Holly Yan, *Oklahoma Bill Would Revoke Teachers' Certification if They Walk Out and Protest*, CNN (Jan. 25, 2019, at 06:13 ET), <https://www.cnn.com/2019/01/24/us/oklahoma-teachers-walkout-bill/index.html> [<https://perma.cc/E4TC-82LF>].

¹⁶⁹ BERKSHIRE & SCHNEIDER, *supra* note 128, at 89 (quoting Professor Jon Michaels).

¹⁷⁰ See Woo, DILIBERTI & STEINER, *supra* note 12, at 2.

¹⁷¹ Lexi Lonas, *Georgia Teacher Fired for Reading a Book to Class About Gender Identity*, HILL (Aug. 18, 2023, at 10:37 ET), <https://thehill.com/homenews/education/4158378-georgia-teacher-fired-for-reading-a-book-to-class-about-gender-identity/> [<https://perma.cc/7GWL-VADR>].

¹⁷² *Id.*

are part of a broader effort to delegitimize public education as an institution and dislodge the longstanding perception that it operates in good faith in furtherance of the common good. Political leaders at the highest levels began by demeaning the concept of public education. Former Secretary of Education Betsy DeVos, for instance, popularized the pejorative phrase “government schools” as a replacement term for public schools.¹⁷³ The language conveyed the notion that public schools are inherently problematic and “inferior” to other options.¹⁷⁴ Accompanying rhetoric went further, arguing that government schools trap children and deny them educational freedom.¹⁷⁵ The goal was to trigger an exodus from public schools.¹⁷⁶

With the curricular controversies, the delegitimization shifted from just demeaning public schools to alleging sinister motives and plots.¹⁷⁷ Leaders and commentators claimed public education had been captured by Marxists and socialists.¹⁷⁸ In December 2023, Donald Trump promised, if elected, to root out Marxist hostility to “Judeo-Christian teachings” in public schools, terminate “the radicals who have infiltrated the federal Department of Education,” abolish teacher tenure, and “certify teachers who embrace patriotic values.”¹⁷⁹ In their book *Battle for the American Mind*, Pete Hegseth and David Goodwin argue public education is so corrupt that right-minded parents must “drive a stake through [its] heart.”¹⁸⁰

The Marxist and socialist narrative aims to “discredit the public school system” and plant the idea that something broader than a

¹⁷³ Evie Blad, ‘Government Schools’ or Public Schools? Trump, DeVos, and the Language of School Choice, *EDUC. WK.* (Feb. 5, 2020), <https://www.edweek.org/policy-politics/government-schools-or-public-schools-trump-devos-and-the-language-of-school-choice/2020/02> [<https://perma.cc/RC3Q-HRZS>].

¹⁷⁴ See Gabby Morrongiello, *Trump: Dems Trap Students in ‘Failing Government Schools,’* *WASH. EXAM’R* (Sep. 8, 2016, at 20:14 ET), <https://www.washingtonexaminer.com/trump-dems-trap-students-in-failing-government-schools> [<https://perma.cc/3J5F-2ADM>].

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., HEGSETH & GOODWIN, *supra* note 161, at 235.

¹⁷⁷ See generally MOUNK, *supra* note 134, at 39–41 (explaining the role claims of corruption and the infiltration of outside interests play in illiberal movements).

¹⁷⁸ Brent Breen, *Column: Walters Uses Age-Old Conservative Tactic*, *TAHLEQUAH DAILY PRESS* (June 8, 2023), https://www.tahlequahdailypress.com/oklahoma/column-walters-uses-age-old-conservative-tactic/article_d50bd8a8-008a-11ee-8429-530abc1bfa7c.html [<https://perma.cc/53TG-FPSW>]; PALMETTO PROMISE, *EDUCATION OR INDOCTRINATION?: HOW NATIONAL EDUCATION ORGANIZATIONS AND THEIR ALLIES TARGET SOUTH CAROLINA TEACHERS, STUDENTS, AND PARENTS AND WHAT TO DO ABOUT IT 2*, 51 (2022), https://palmettopromise.org/wp-content/uploads/2022/12/PPI_2022_Education-Dossier.pdf [<https://perma.cc/JXX3-D9FN>] (framing the fight as one of capitalism versus socialism).

¹⁷⁹ *President Trump’s Plan to Save American Education and Give Power Back to Parents*, *TRUMP VANCE 2025* (June 30, 2023), <https://www.donaldjtrump.com/news/e8800793-143f-4660-ac9d-5c19895bf6c2> [<https://perma.cc/FDF9-9H5T>].

¹⁸⁰ HEGSETH & GOODWIN, *supra* note 161, at 235.

misrepresentation of racism or sex is afoot in public schools' curricular choices.¹⁸¹ Public schools, so the argument goes, are plotting and indoctrinating students in the service of an anti-white, anti-religious, and anti-American political order.¹⁸² Invoking broader cultural and demographic issues, political leaders transformed curriculum policies from a professional, academic, or historical question—about which the average person might care very little—into a cultural and political issue with only one right side.¹⁸³

National and state leaders and organizations also used curricular controversies to transform nonpartisan local school board elections, which normally involve civic conversations about basic district management, into heated partisan affairs.¹⁸⁴ Tennessee recently made the politicization explicit, passing legislation to authorize partisan board elections.¹⁸⁵ But even in the absence of formal partisan elections, national groups and donors are heavily invested in local school board races across the country.¹⁸⁶ Their successful school board takeovers more closely resembled ideological regime purges than school board elections.¹⁸⁷ For instance, candidates endorsed by Moms for Liberty in a local school board race in South Carolina fired the superintendent and the district attorney associated with him just days after winning the election.¹⁸⁸

In sum, these attacks on public education involve direct attempts to undermine popular faith in the country's largest and normally apolitical civic institution. Public education has traditionally served as a unifying, rather than divisive, force, discharging its duties dispassionately. If it fails to do so or is castigated for doing something different,

¹⁸¹ *Id.* at 232.

¹⁸² See, e.g., PALMETTO PROMISE, *supra* note 178, at 51; Christopher F. Rufo, *Critical Race Theory in Education*, CHRISTOPHER F. RUFO (Apr. 27, 2021), <https://christopherrufo.com/p/critical-race-theory-in-education> [<https://perma.cc/7SBS-QEHA>].

¹⁸³ See LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L.J. 2139, 2147 (2023) (discussing the merger of anti-CRT with parents' rights).

¹⁸⁴ See Abowitz, *supra* note 126.

¹⁸⁵ See Marta W. Aldrich, *Tennessee's Shift to Partisan School Board Elections Faces Its First Big Test*, CHALKBEAT TENN. (July 12, 2022, at 07:00 ET), <https://www.chalkbeat.org/tennessee/2022/7/12/23204652/tennessee-partisan-school-board-race-law-elections/> [<https://perma.cc/X7PQ-GAS2>].

¹⁸⁶ See Erin Mansfield & Kayla Jimenez, *These PACs Are Funding 'Parents' Rights Advocates' Running for Local School Board Positions*, USA TODAY (Oct. 24, 2022), <https://www.yahoo.com/news/pacs-funding-parents-rights-advocates-100017559.html> [<https://perma.cc/2SQD-3XS2>].

¹⁸⁷ See Clark, *supra* note 183, at 2183 (discussing an anti-CRT call "to force ideological actors to undergo public scrutiny").

¹⁸⁸ Tyler Kingkade, *Moms for Liberty-Backed School Board Members Fire Superintendent, Ban Critical Race Theory*, NBC NEWS (Nov. 16, 2022, at 19:48 ET), <https://www.nbcnews.com/news/us-news/moms-liberty-berkeley-county-school-board-superintendent-rcna57528> [<https://perma.cc/LFQ6-TAAU>].

its stature will crumble.¹⁸⁹ Thus, its real or accused politicization—like that of the judiciary—represents a troubling sign of democratic erosion.

4. *Stoking Populist, Nationalist, Ethnic, and Religious Divisions*

The foregoing attacks on public education incorporate troubling populist appeals, including ones that pit the people or particular demographic groups against democratic institutions and individual rights.¹⁹⁰ Those altering the curriculum and attacking teachers and school leaders portray themselves as the guardians of American virtue who must redeem the schools from an oppressive regime.¹⁹¹ In their telling, the education establishment—run by elites, radicals, and the federal government—is using public education against local communities and common people.¹⁹² The federal government has supposedly stripped states of their inherent authority in education and forced radical equity on local communities and parents.¹⁹³ State constitutions that reserve funds for public schools are supposedly racist, religiously bigoted, and monopolistic.¹⁹⁴ The proposed solution is to abolish the U.S. Department of Education, end teacher tenure, and replace public education with a deregulated system of publicly funded private schools.¹⁹⁵ In short, leaders have conjured up boogeymen who have illegitimately taken public education and resources from the people.

Similar to authoritarian populist movements, certain aspects of the curricular and privatization movement also employ ethnic and white

¹⁸⁹ See Johann Neem, *Perspective: Should Public Schools Take Sides in the Culture Wars?*, in BERKSHIRE & SCHNEIDER, *supra* note 128, at 58–59.

¹⁹⁰ See MOUNK, *supra* note 134, at 11, 42–43 (explaining how populist movements attack independent institutions and individual rights, promote in-group and out-group frameworks, and stoke anger against religious and ethnic minorities).

¹⁹¹ See, e.g., *President Trump's Plan to Save American Education and Give Power Back to Parents*, *supra* note 179.

¹⁹² See *id.*

¹⁹³ See Rachel Leingang, *Trump and Project 2025 Are Attacking the Department of Education. How Might They Reshape US Schools?*, GUARDIAN (July 4, 2024, at 07:00 ET), <https://www.theguardian.com/education/article/2024/jul/04/trump-project-2025-heritage-foundation-education-department> [<https://perma.cc/FAP3-ERVV>] (describing how Project 2025 argues for the return of education authority to states and assigns blame to federal government for LGBTQ policies); Libby Stanford, *Broad Calls to Ax Education Department and Take On Teachers' Unions at 1st GOP Debate*, EDUC. WK. (Aug. 24, 2023), <https://www.edweek.org/policy-politics/broad-calls-to-ax-education-department-and-take-on-teachers-unions-at-1st-gop-debate/2023/08> [<https://perma.cc/A3CB-HYJQ>].

¹⁹⁴ See, e.g., RICHARD D. KOMER & OLIVIA GRADY, SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS 11 (2d ed. 2017), <https://ij.org/wp-content/uploads/2016/09/50-state-SC-report-2016-web.pdf> [<https://perma.cc/4BGW-5AEJ>] (indicating that limitations on vouchers are “religious and anti-immigrant discrimination”).

¹⁹⁵ See, e.g., Leingang, *supra* note 193; HEGSETH & GOODWIN, *supra* note 161, at 228–36.

nationalist undertones.¹⁹⁶ Politicians frame white students as victims, claiming that instruction related to race is divisive and emotionally injurious, as well as reverse discrimination.¹⁹⁷ Senator Ted Cruz, for instance, accused public educators of targeting “[w]hite babies” with Marxist teachings.¹⁹⁸ The subtle, if not explicit, narrative is that legislators are saving white students from an oppressive status quo.

Increased calls for “classical” education are linked to this narrative.¹⁹⁹ Classical education is, as a practical matter, the “study of dead white men, and historically, the method of instruction of (now) dead white men, [as it is] the study of Greek, Latin, and the accompanying history and culture.”²⁰⁰ This approach “leave[s] little room for inclusion of people of color and other world cultures.”²⁰¹ Although classical education has its merits, something other than substantive merit appears to be driving its sudden expansion, particularly given that this current brand is distinct from traditional classical education.²⁰² For some, classical and “patriotic” education are necessary responses to curricula that purportedly teach students to hate America.²⁰³

In 2020, President Trump established the 1776 Commission to counter those “versions of American history [that] offer a misconstrued and one-sided account of our founding in an effort to paint America as a systemically racist country.”²⁰⁴ The Commission would replace those

¹⁹⁶ See MOUNK, *supra* note 134, at 17, 210 (explaining how populist movements can be premised on a monoethnic concept of the state).

¹⁹⁷ See Brianna S. Richmond, Negin R. Toosi, Joseph D. Wellman & Clara L. Wilkins, *Ignorance of Critical Race Theory Predicts White Americans’ Opposition to It*, 80 J. SOC. ISSUES 240, 246 (2024).

¹⁹⁸ Adam Laats, *Conservatives Long Ago Lost the War Over America’s Public Schools*, WASH. POST (May 24, 2022), <https://www.washingtonpost.com/outlook/2022/05/24/conservatives-long-ago-lost-war-over-americas-public-schools/> [<https://perma.cc/T9W8-UZUS>].

¹⁹⁹ Jeremiah Poff, *Forming Minds: CRT Debate Has Some Conservatives Calling for a Return to Classical Education*, WASH. EXAM’R (Jan. 3, 2022, at 11:30 ET), <https://www.washingtonexaminer.com/news/343715/forming-minds-crt-debate-has-some-conservatives-calling-for-a-return-to-classical-education/> [<https://perma.cc/5ZWR-SBY8>].

²⁰⁰ Maggie Phillips, *The Debates Over—and Within—‘Classical Education,’* TABLET (Jan. 25, 2024), <https://www.tabletmag.com/sections/community/articles/classical-education-debate> [<https://perma.cc/DYG2-RDRY>].

²⁰¹ *Id.*

²⁰² Johnathan Roberts, *Classical Schools Are Not Really Classical*, ANCIENT LANGUAGE INST., <https://ancientlanguage.com/classical-schools-not-classical/> [<https://perma.cc/H6AY-HBT4>] (last visited May 21, 2026) (discussing how the current brand of classical education differs from truly classical education, which is anchored in the “long liberal arts tradition”).

²⁰³ See, e.g., Alana Wise, *Trump Announces ‘Patriotic Education’ Commission, a Largely Political Move*, NPR (Sep. 17, 2020, at 17:59 ET), <https://www.npr.org/2020/09/17/914127266/trump-announces-patriotic-education-commission-a-largely-political-move> [<https://perma.cc/XR7T-SBMB>].

²⁰⁴ *President Donald J. Trump Is Protecting America’s Founding Ideals by Promoting Patriotic Education*, WHITE HOUSE: FACT SHEETS (Nov. 2, 2020), <https://trumpwhitehouse.archives.gov/>

accounts with “patriotic education that celebrates the truth about our Nation’s history.”²⁰⁵ When President Trump left office, several state officials adopted the agenda as their own. Florida, for instance, implemented social studies standards that speak of the “benefit” of slavery.²⁰⁶ Tennessee’s governor partnered with a conservative college to start charter schools that would use the “1776 Curriculum” to promote “the centrality of the Western tradition,” combat “leftist” views, and teach “true American history, unbiased and nonpolitical.”²⁰⁷ Other states now rely on materials authored by politically conservative organizations that counteract “the dominant left-wing ideology in culture, media, and education”²⁰⁸ and “promote American . . . [and] Judeo-Christian values.”²⁰⁹ According to critics, these materials go so far as to question slavery as a cause of the Civil War and “dismiss[]” historical and current “racism (especially against Black Americans).”²¹⁰

briefings-statements/president-donald-j-trump-protecting-americas-founding-ideals-promoting-patriotic-education/ [https://perma.cc/7GM4-7KMB].

²⁰⁵ *Id.*

²⁰⁶ Andrew Atterbury, *Florida Sticks by Social Studies Standard Teaching ‘Benefit’ of Slavery*, POLITICO (May 29, 2024, at 16:45 ET), <https://www.politico.com/news/2024/05/29/florida-education-aapi-slavery-00160431> [https://perma.cc/Y8UZ-RYPB].

²⁰⁷ Stephanie Saul, *Hillsdale College Is Tennessee Gov. Bill Lee’s Partner for ‘Informed Patriotism’ in Education*, CHATTANOOGA TIMES FREE PRESS (Apr. 11, 2022, at 01:24 ET), <https://www.timesfreepress.com/news/2022/apr/10/conservative-college-thats-expanding-charter/> [https://perma.cc/GB5K-43DL]; Molly Olmstead, *Where the Right-Wing Attacks Against Education Finally Went Too Far—for Republicans*, SLATE (July 27, 2022, at 05:35 ET), <https://slate.com/news-and-politics/2022/07/tennessee-governor-bill-lee-hillsdale-education-charter-schools.html> [https://perma.cc/Z3QV-E483]; Adam Friedman & Liam Adams, *Gov. Lee Won’t Criticize Hillsdale President as Tennessee Colleges Push Back over Controversial Teacher Comments*, TENNESSEAN (July 6, 2022, at 21:20 ET), <https://www.tennessean.com/story/news/local/2022/07/06/gov-lee-doubles-down-after-hillsdale-president-insults-teachers/7819573001/> [https://perma.cc/6SBT-JHA3].

²⁰⁸ Lexi Lonas Cochran, *What Is PragerU? The Conservative Education Platform Now in Florida Schools*, HILL (Aug. 8, 2023, at 06:00 ET) [hereinafter Cochran, *What Is PragerU?*], <https://thehill.com/homenews/education/4141994-what-is-prageru-the-conservative-education-platform-now-in-florida-schools/> [https://perma.cc/UK7T-2SA4]; Adrienne Mahsa Varkiani, *Florida’s New School Curriculum Is Designed to Make Kids Conservative*, NEW REPUBLIC (Aug. 1, 2023, at 15:33 ET), <https://newrepublic.com/post/174762/floridas-new-school-curriculum-designed-make-kids-conservative> [https://perma.cc/LT4Z-BFPB]; Lexi Lonas Cochran, *Oklahoma Social Studies Education to Be Reformed with Help of Conservative Influencers*, HILL (July 9, 2024, at 17:33 ET), <https://thehill.com/homenews/education/4762714-oklahoma-state-social-studies-committee/> [https://perma.cc/8EAZ-4ESQ].

²⁰⁹ *The PragerU Mission*, PRAGERU, <https://www.prageru.com/about> [https://perma.cc/8X-YS-M4UU] (last visited Mar. 22, 2026).

²¹⁰ Varkiani, *supra* note 208; see Cochran, *What Is PragerU?*, *supra* note 208; see also BERKSHIRE & SCHNEIDER, *supra* note 128, at 69–71 (discussing countercultural and anti-science materials in voucher schools).

Although populist, nativist, and racist movements are distinct and do not overlap in their purest forms,²¹¹ political and cultural leaders have drawn from each of these strands. The combination of these movements is a common theme in international democratic erosion.²¹² Illiberal leaders use these themes to manufacture outrage, undermine faith in major government institutions, and thereby accrue political support for themselves. This familiar path to power has now arrived at the steps of America's largest government institution—public education.

5. *Abusing Power and Privileging Access*

Arbitrary exercises of power and disregard for the rule of law are prime examples of authoritarianism that erode democracy. On this metric, public education has experienced trouble, with politicians abusing or threatening to abuse their power in an attempt to bend public schools and education policy to their will.²¹³ For instance, during COVID-19, President Trump and Secretary DeVos, without any legitimate authority to do so, threatened to terminate federal funding to public schools that did not physically open and redirect those funds to private schools.²¹⁴ The goal was to leverage the health crisis to achieve a policy end that had eluded the administration for three years: the privatization of education.²¹⁵ When Secretary DeVos finally conceded that she could not unilaterally terminate federal funds, she ordered public schools to share federal COVID-19 funding with private schools that had no legal claim

²¹¹ LibertiesEU, *Nationalism and Populism: What Is the Difference? How Are They Connected?*, LIBERTIES (Aug. 12, 2021), <https://www.liberties.eu/en/stories/nationalism-and-populism/43717> [https://perma.cc/XK87-GX35].

²¹² See ANDREW ARATO & JEAN L. COHEN, *POPULISM AND CIVIL SOCIETY: THE CHALLENGE TO CONSTITUTIONAL DEMOCRACY* 107 (2022) (analyzing the interaction of populism and authoritarianism); JORDAN KYLE & LIMOR GULTCHIN, TONY BLAIR INST. FOR GLOB. CHANGE, *POPULISTS IN POWER AROUND THE WORLD* 3–4 (2018), <https://assets.ctfassets.net/751a1cntaeh/51CyFQnYuBWAILjVW-fvV2I/4873c8274d13d39a67a0d312deb1cca9/Populists-in-Power-Around-the-World-.pdf> [https://perma.cc/748G-EUS2] (linking populism and nativism by saying that “[c]ultural populism claims that the true people are the native members of the nation-state” and it tends to paint “migrants as enemies”).

²¹³ Black, *supra* note 20, at 343.

²¹⁴ See, e.g., Peter Baker, Erica L. Green & Noah Weiland, *Trump Threatens to Cut Funding if Schools Do Not Fully Reopen*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/08/us/politics/trump-schools-reopening.html> [https://perma.cc/CM5H-FYKB].

²¹⁵ Libby Cathey, *Education Secretary Faces Backlash After Demanding Schools Reopen Full-Time Amid Pandemic*, ABC NEWS (July 13, 2020, at 14:00 ET), <https://abcnews.go.com/Politics/education-secretary-faces-backlash-demanding-schools-reopen-full/story?id=71752468> [https://perma.cc/5NW3-DEJR]; Blad, *supra* note 173.

to the funds.²¹⁶ Upon returning to office for his second term, President Trump immediately reasserted unilateral control over public school curricula, which federal law prohibits.²¹⁷

Similar overreaches have occurred at the state level around school closures, masking, and privatization. Governors claimed unfounded unilateral authority to reopen schools, end mask mandates, and divert funds to private schools.²¹⁸ Florida's governor, for instance, threatened to withhold state funding from schools that did not physically reopen²¹⁹ and later sought to financially penalize schools that required students to wear masks.²²⁰ He threatened to terminate local superintendents who disagreed with his approach.²²¹ South Carolina's governor also sought to physically reopen schools, even though the state superintendent constitutionally retains authority over South Carolina's state schools.²²² He also unilaterally created a private school voucher program with COVID-19 funds, even though the state constitution prohibited it.²²³

These executive overreaches eventually intersected with curricular controversies. With no actual power to do so, Virginia's governor purported to ban CRT.²²⁴ He then employed scare tactics to achieve his goal, setting up a tip line for parents to report schools that taught "divisive" concepts and promising to investigate and root out the practices.²²⁵

²¹⁶ Michael Stratford, *Judge Strikes Down DeVos Plan to Boost Pandemic Relief for Private Schools*, POLITICO (Sep. 4, 2020, at 21:05 ET), <https://www.politico.com/news/2020/09/04/devos-private-school-relief-rule-struck-down-409272> [<https://perma.cc/86DK-5THC>].

²¹⁷ See *supra* note 18 and accompanying text.

²¹⁸ Black, *supra* note 20, at 344–45.

²¹⁹ Lori Rozsa, Moriah Balingit & Valerie Strauss, *A Florida School District Wanted to Wait to Reopen School Buildings. Gov. Ron DeSantis Threatened to Cut Its Funding*, WASH. POST (Aug. 14, 2020), https://www.washingtonpost.com/local/education/florida-coronavirus-schools/2020/08/14/a37b39a8-dd99-11ea-b205-ff838e15a9a6_story.html [<https://perma.cc/4HZY-BNKA>].

²²⁰ Richard Luscombe, *Florida Governor: School Districts that Defied No-Mask Mandate to Lose \$200m*, GUARDIAN (Feb. 20, 2022, at 05:00 ET), <https://www.theguardian.com/us-news/2022/feb/20/florida-ron-desantis-schools-mask-mandates-funding-covid> [<https://perma.cc/Q4QC-M6UM>].

²²¹ See *Florida Official Who Criticized DeSantis Reaches Settlement with Education Department*, ASSOCIATED PRESS (June 20, 2023, at 13:40 ET), <https://apnews.com/article/desantis-school-superintendent-lesser-punishment-85a412e689f72c056ee67e71e1198bf8> [<https://perma.cc/K2P3-6VL2>].

²²² See, e.g., Ariel Gilreath, *SC Superintendent and Teachers Push Back on Governor's Direction for In-Person Classes*, GREENVILLE NEWS (July 15, 2020, at 16:14 ET), <https://www.greenville-online.com/story/news/2020/07/15/sc-education-superintendent-pushes-back-governors-direction/5442495002/> [<https://perma.cc/5QS5-EQM8>] (describing how the governor instructed the superintendent of education to reject school plans that did not include physical reopening).

²²³ See, e.g., *Adams v. McMaster*, 851 S.E.2d 703, 706–07, 712–13 (D.S.C. 2020).

²²⁴ Va. Exec. Order No. 1 (Jan. 15, 2022), <https://www.wavy.com/wp-content/uploads/sites/3/2022/02/Executive-Order-1.pdf> [<https://perma.cc/NWf9-SYR8>].

²²⁵ Alia Wong, Nirvi Shah & Nick Penzenstadler, *Virginia's Governor Set Up a Tip Line to Crack Down on CRT. Parents Used It for Other Reasons*, USA TODAY (Nov. 3, 2022, at 11:58 ET), <https://www.usatoday.com/story/news/education/2022/11/03/youngkins-critical-race-theory-tip->

Florida's governor similarly blurred the lines of his authority over curriculum, seeking to purge materials he deemed problematic.²²⁶

Governors and executive officers have also misused their power behind the scenes, granting preferred access and treatment to private entities that align with their personal education agendas. Bypassing the state's hands-off approach to charter school curriculum and normal rules for granting charters, Tennessee's governor engaged Hillsdale College—whose prior charter applications had failed to gain approval through the normal administrative process—to be the state's preferred charter operator and to open one hundred new charters in the state.²²⁷ The governor's desire to advance a classical school model as a counterforce to “wokeness” in public schools apparently motivated the misuse of power.²²⁸ Florida officials have similarly given special treatment to Hillsdale College and other ideologically based organizations. Officials, for instance, engaged Hillsdale faculty to revamp the state's curricular standards²²⁹ and serve on the state's textbook review committees.²³⁰ Since then, publishers seeking approval for their books in ideologically led states have begun self-censoring and producing narratives that would be pleasing to state officials.²³¹

line-virginia-parents/10655007002/ [https://perma.cc/3GWA-EP2X]; *Virginia Governor Glenn Youngkin's Anti-Critical Race Theory Tip Line*, AM. OVERSIGHT: INVESTIGATION (Sep. 26, 2023), <https://www.americanoversight.org/investigation/virginia-governor-glenn-youngkins-anti-critical-race-theory-tip-line> [https://perma.cc/5ZLN-ZH9F].

²²⁶ Aaron Navarro, *DeSantis Defends Rejecting AP African American Studies Course, Says It's "Indoctrination,"* CBS NEWS (Jan. 23, 2023, at 14:36 ET), <https://www.cbsnews.com/news/ron-desantis-ap-african-american-history-florida-press-conference-today-2023-01-23/> [https://perma.cc/WRV3-PZ8J].

²²⁷ See Jackie DelPilar, *Governor Bill Lee Announces New Charter School Partnership with Private Christian College*, FOX 17 WZTV NASHVILLE (Feb. 4, 2022, at 8:05 ET), <https://fox17.com/news/local/governor-bill-lee-announces-new-charter-school-partnership-with-private-christian-college> [https://perma.cc/PYR2-8X2L].

²²⁸ See Marta W. Aldrich, *Hillsdale-Linked Charter School Group Will Try Again in Tennessee*, CHALKBEAT TENN. (Dec. 5, 2022, at 20:16 ET), <https://www.chalkbeat.org/tennessee/2022/12/5/23495563/hilldale-charter-schools-american-classical-tennessee-applications/> [https://perma.cc/Y8UE-DU48].

²²⁹ Maddy Welsh, *Hillsdale Asked to Advise on Florida Public School Curriculum*, COLLEGIAN (Sep. 17, 2020), <https://hilldalecollegian.com/2020/09/hillsdale-asked-to-advise-on-florida-public-school-curriculum/> [https://perma.cc/5TBK-F7UD].

²³⁰ See Tim Kephart, *Florida Math Textbooks Weren't Evaluated by Just Math Experts*, TAMPA BAY 28 (May 9, 2022, at 10:30 ET), <https://www.tampabay28.com/news/state/florida-math-textbooks-werent-evaluated-by-just-math-experts> [https://perma.cc/T7CL-ZB6H]; see also Dana Goldstein, *Florida Rejects Math Textbooks, Citing 'Prohibited Topics,'* N.Y. TIMES (Apr. 18, 2022), <https://www.nytimes.com/2022/04/18/us/florida-math-textbooks-critical-race-theory.html> [https://perma.cc/BE66-WKEB] (reporting the dramatic increase in math book rejections).

²³¹ See Andrew Atterbury, *Florida Approves K-12 Social Studies Textbooks After Pressing Publishers to Tweak Content*, POLITICO (May 9, 2023, at 16:10 ET), <https://www.politico.com/news/2023/05/09/florida-k-12-textbook-publisher-00096000> [https://perma.cc/KWV7-L8YN];

In short, although the power structures surrounding curricular design, COVID-19, and vouchers vary by state, one theme connects several of them. Political leaders—including the President, Secretary of Education, and governors—have shown a willingness to breach separation of powers and normal political processes to secure ends that align with their partisan objectives. The misuse of power toward these ends again aligns with democratic erosion.

6. *Resisting Constitutional Democratic Values*

The backlash against public education also comes in response to schools' attempts to redouble their efforts to uphold democratic values. To be clear, public education has never fully delivered on the promise of equal education opportunity, but it has moved in that direction over time.²³² Around 2020, many public schools began voluntarily reflecting on their historical failures, particularly regarding race, and instituting remedies under pragmatic umbrellas like restorative justice and diversity, equity, and inclusion.²³³ Whatever the flaws in implementing these measures, schools were attempting to carry out their judicially endorsed role of inculcating constitutional and democratic values.²³⁴

Much of the rhetoric pushing curricular censorship, for instance, focuses on the possibility that discussing America's constitutional failures regarding race makes white children feel bad or involves reverse discrimination.²³⁵ Against that backdrop, choice proponents now explicitly frame private school vouchers as an escape mechanism from diversity, equity, and inclusion in public schools.²³⁶ Unsurprisingly,

Pamela Paul, *There's More than One Way to Ban a Book*, N.Y. TIMES (July 24, 2022), <https://www.nytimes.com/2022/07/24/opinion/book-banning-censorship.html> [<https://perma.cc/2ZXT-B5LW>].

²³² See generally Derek W. Black, *Education's Elusive Future, Storied Past, and the Fundamental Inequities Between*, 46 GA. L. REV. 557 (2012) (discussing the history of civil rights in education).

²³³ See Maya Riser-Kositsky, Stephen Sawchuk & Holly Peele, *School Police: Which Districts Cut Them? Which Brought Them Back?*, EDUC. WK. (June 29, 2022), <https://edweek.org/leadership/which-districts-have-cut-school-policing-programs/2021/06> [<https://perma.cc/6SJT-UFR9>] (finding fifty districts that cut or ended school policing programs); Ileana Najarro, *K-12 Diversity, Equity, and Inclusion Trainings: Are They Divisive or Effective?*, EDUC. WK. (Mar. 4, 2022), <https://www.edweek.org/leadership/k-12-diversity-equity-and-inclusion-trainings-are-they-divisive-or-effective/2022/03> [<https://perma.cc/L5E2-W3PM>].

²³⁴ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (emphasizing the importance of value inculcation); see also Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORN. L. REV. 1, 7 (1992) (analyzing precedent on inculcation).

²³⁵ See Richmond et al., *supra* note 197, at 245; HIXENBAUGH, *supra* note 12, at 80–81.

²³⁶ See, e.g., Jeremy Schwartz, *Texas Is the Largest GOP Stronghold Without Pro-School Voucher Legislation. Gov. Abbott Is on a Crusade to Change That*, PROPUBLICA: SCHOOL WARS (June 21, 2024, at 06:00 ET), <https://www.propublica.org/article/texas-greg-abbott-crusade-for-school-vouchers> [<https://perma.cc/2REK-K84L>] (discussing vouchers as a response to CRT and LGBTQ issues); see also BERKSHIRE & SCHNEIDER, *supra* note 128, at 76 (discussing vouchers as religious

private school vouchers disproportionately offer white dissenters an exit option from diverse learning environments and disproportionately exclude students who do not conform to the gender norms of private religious institutions.²³⁷ Relatedly, the commitment to fully fund public education has been under heavy assault at the very moment that public education is seeking to advance the needs of students of color.²³⁸

These trends suggest that the attack on public education is occurring because of the democratic values public schools have come to stand for. Public schools have, for a century and a half, stood at the leading edge of social change and democratic norms. This has sometimes been in the worst way, such as the segregation of society, or sometimes in the best way, such as the racial desegregation of society, the inclusion of immigrants, and the breaking down of gender roles and stereotypes.²³⁹ These changes have always been controversial—and sometimes resisted by schools—but as schools have voluntarily endorsed an even wider set of democratic values, they have become practical and symbolic targets for those who would resist democracy and its constitutional norms.

III. EDUCATION'S CONSTITUTIONAL QUAGMIRE

The First Amendment should, in theory, limit certain democratic erosion practices in education, particularly those relating to instruction, curriculum, and student speech. First Amendment protections rest not simply on the notion that individual speech or a free press contribute something valuable to society, but that governmental restrictions on speech and information are inestimably dangerous.²⁴⁰ The moment that a democratic government exercises its power to decide what citizens say, hear, write, or read is the moment that it slides toward autocracy.²⁴¹

privilege and a response to equality); HIXENBAUGH, *supra* note 12, at 85 (connecting vouchers to the backlash to diversity).

²³⁷ STEVE SUITTS, OVERTURNING BROWN 12–17 (2020) (detailing how vouchers originated as a response to desegregation). See generally BLACK, *supra* note 46 (arguing that attacks on public education, such as private school vouchers, represent a threat to American democracy).

²³⁸ SUITTS, *supra* note 237, at 12–17; Najarro, *supra* note 233.

²³⁹ See *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society*, TEACHERS COLL.: COLUM. UNIV. (Oct. 14, 2004), <https://www.tc.columbia.edu/articles/2004/march/how-desegregation-changed-us-the-effects-of-racially-mixed-/> [<https://perma.cc/27KG-HJYH>]; *Fact Sheet: Educational Services for Immigrant Children and Those Recently Arrived to the United States*, U.S. DEP'T OF EDUC., <https://www.ed.gov/sites/ed/files/policy/rights/guid/unaccompanied-children.pdf> [<https://perma.cc/46TA-657T>]; *Smashing Gender Stereotypes and Bias in and Through Education*, UNESCO (Apr. 20, 2023), <https://www.unesco.org/en/articles/smashing-gender-stereotypes-and-bias-and-through-education> [<https://perma.cc/4YHC-HM9Y>].

²⁴⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

²⁴¹ See NASH, CRABTREE & DUNN, *supra* note 78, at xx (“[I]f Americans should ever find themselves coalescing around a single version of the past endorsed by government, they are also likely to discover that they no longer have a democracy.”).

These concerns extend especially to public schools. The Supreme Court has made clear that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” and has warned that one of the greatest threats to democracy lies in invading students’ freedom of thought by forcing them to adopt state-sanctioned ideology.²⁴² The possibility that schools might “strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes” demands, according to the Court, “scrupulous protection” of free speech rights.²⁴³ Thus, the Court has explicitly prohibited schools from compelling students to adopt “by word or act” state-sponsored ideas.²⁴⁴

School policies that do not involve explicit compulsion or censorship, however, still pose serious risks to democracy. Schools can easily coerce, cajole, and influence students to adopt ideas without physical compulsion.²⁴⁵ School officials make a myriad of decisions about the curriculum and history they will deliver to students, the programs and activities they will lead, and the books they will purchase—all of which have enormous impacts on the viewpoints students will adopt.²⁴⁶ Authoritarians are particularly sensitive to this dynamic and often aim to control historical narratives “by purging certain narratives from the curricula taught in schools.”²⁴⁷ But because curricular decisions are both systematic and subtle, their effect on free speech and thought can go entirely unnoticed or seem harmless.

The Supreme Court has been far less consistent in its response to these more subtle risks of autocracy. More often, the Court has discounted the risk, deferring to schools under the presumption that their speech-limiting and information-restricting practices rest on nonideological, pedagogical judgments. In fact, the Court’s standards for free speech in school have grown more deferential over time. Thus, although the Court rhetorically espouses an anti-orthodoxy approach, current precedent is unlikely to operate as a serious check on the democracy-eroding aspects of legislation that bans certain books or discussions of race or gender.²⁴⁸

²⁴² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²⁴³ *Barnette*, 319 U.S. at 637; *Tinker*, 393 U.S. at 507 (quoting *Barnette*, 319 U.S. at 637).

²⁴⁴ *Barnette*, 319 U.S. at 642.

²⁴⁵ See Post, *supra* note 31, at 1646–49 (pointing out the multiple ways that schools control student speech).

²⁴⁶ See *Ambach v. Norwick*, 441 U.S. 68, 75–80 (1979) (discussing the numerous ways that schools inculcate values).

²⁴⁷ STANLEY, *supra* note 4, at xii.

²⁴⁸ See Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts’ Imprudent Treatment of Controversial Teaching in America’s Public Schools*, 50 UCLA L. REV. 959, 1008 (2003) (stressing that the Supreme Court’s “new rubric, as applied, leaves no room for such considerations as academic freedom and the marketplace of ideas”); Marc O.

The Court, according to Erwin Chemerinsky, has “abandoned” students’ First Amendment rights, “especially as to curricular activities.”²⁴⁹ As courts treat more issues as curricular or instructional, they shrink the space in which students have a right to speak, think, and inquire freely.²⁵⁰ This approach concurrently expands the space in which a school might “pre-condition [a student’s] beliefs by indoctrinating him during childhood.”²⁵¹ In other words, the Court has left the door open to the “enclaves of totalitarianism” of which it once warned.²⁵²

The following Sections explore the doctrines most relevant to democratic erosion in education and demonstrate their practical insufficiency to meet the challenge. Section A explores the tension between the Court’s anti-orthodoxy principle and schools’ role in imparting the civic and social values that perpetuate democracy. Section B explains how this tension has translated into jurisprudence riddled with exceptions and varying fact-specific standards. Section C identifies the standards most likely to apply to recent curricular legislation and demonstrates that, rather than constraining censorship, orthodoxy, or indoctrination, current doctrine affords state actors wide latitude to ideologically manipulate public education. Section D argues that this problem is most acute with matters of history.

A. *The Tension Between Anti-Orthodoxy and Civic Inculcation*

In 1943, in *West Virginia State Board of Education v. Barnette*,²⁵³ the Supreme Court held that the First Amendment protects the right to be free from compelled orthodoxy in public education. Analyzing the state requirement that students pledge allegiance to the flag, the Court wrote that “if there is any fixed star in our constitutional constellation,

DeGirolami, *The Sickness unto Death of the First Amendment*, 42 HARV. J.L. & PUB. POL’Y 751, 773 (2019) (“[T]he Court largely has dispensed even with its prior honorific nods toward the democracy-enhancing function of speech protection.”).

²⁴⁹ Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 826 (2009).

²⁵⁰ Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 413, 426 (2009) (indicating that the implications of an expanding definition of government speech, and resultant shrinking of First Amendment protections, are “enormous”); Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1191 (2009) (indicating that if the Court “continue[s] to carve out exceptions to *Tinker* . . . [the] exceptions will eventually swallow up the *Tinker* rule”).

²⁵¹ Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 261 (1983).

²⁵² Bowman, *supra* note 145, at 214–15; Catherine J. Ross, *Are “Book Bans” Unconstitutional? Reflections on Public School Libraries and the Limits of Law*, 76 STAN. L. REV. 1675, 1723 (2024) (noting that “contemporary constitutional doctrine does not offer an obvious remedy” to the problems posed by targeted book removals and curricular warping).

²⁵³ 319 U.S. 624 (1943).

it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”²⁵⁴ Not even “national unity” or “patriotism” can justify compelled orthodoxy.²⁵⁵

The Court reaffirmed this principle in multiple cases. When New York required teachers to disavow Communist Party membership or sympathies, the Court explained that “the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”²⁵⁶ Then, in *Tinker v. Des Moines Independent Community School District*,²⁵⁷ the Court chastised public school officials for overreacting to and suppressing controversial student speech, writing that “state-operated schools may not be enclaves of totalitarianism” in which students are “regarded as closed-circuit recipients of only that which the State chooses to communicate.”²⁵⁸

The Court has directly linked these free speech concerns in schools to America’s broader democratic project, reasoning that protecting students’ First Amendment rights ensures the “discussion, debate, and the dissemination of information and ideas” necessary for democracy to function.²⁵⁹ Elsewhere, the Court has similarly characterized “America’s public schools [as] the nurseries of democracy” and reiterated that “[o]ur representative democracy only works if we protect the ‘marketplace of ideas’” and the informed public opinion that it produces.²⁶⁰

The Court, however, has yet to reconcile its anti-orthodoxy concerns with the special role that schools play in inculcating values—a role that also drives the Court’s education jurisprudence. In *Brown v. Board of Education*,²⁶¹ the Court referred to public education as “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”²⁶² In other cases, the Court has lauded schools for “inculcat[ing] fundamental values necessary to the maintenance of a democratic political system” and “society” itself.²⁶³ This

²⁵⁴ *Id.* at 642.

²⁵⁵ *Id.* at 640–41.

²⁵⁶ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

²⁵⁷ 393 U.S. 503 (1969).

²⁵⁸ *Id.* at 511.

²⁵⁹ *Bd. of Educ. v. Pico*, 457 U.S. 853, 866 (1982) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).

²⁶⁰ *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 190 (2021).

²⁶¹ 347 U.S. 483 (1954).

²⁶² *Id.* at 493.

²⁶³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)); *Ambach*, 441 U.S. at 76–77.

role has required the Court to straddle a careful line between stopping orthodoxy and allowing inculcation.²⁶⁴

Even in *Barnette*, the Court explained that although schools cannot compel students to affirm a belief, they can foster patriotism “by persuasion and example.”²⁶⁵ Similarly, in *Board of Education v. Pico*,²⁶⁶ the plurality disavowed the removal of school library books for partisan or political reasons but indicated schools are still free “to transmit community values,” whether they be “social, moral, or political.”²⁶⁷ More often than not, the Court has interpreted value-based school activities as permissible inculcation rather than unconstitutional orthodoxy.²⁶⁸

Layered beneath the inculcation-orthodoxy tension is the Court’s general reluctance, regardless of context, to interfere with school administration and policy. “The comprehensive authority . . . to prescribe and control conduct,” the Court writes, rests with school officials and not judges.²⁶⁹ Thus, just two years after extending due process protections in student discipline,²⁷⁰ the Court in *Wood v. Strickland*²⁷¹ chided a lower court for overturning a school expulsion.²⁷² The Court said, “It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.”²⁷³

In First Amendment cases, the Court has similarly indicated that state and local authorities “have broad discretion” in carrying out their education functions.²⁷⁴ Thus, “federal courts should not ordinarily ‘intervene in the resolution of conflicts which arise in the daily operation of school systems.’”²⁷⁵ As the next Section demonstrates, judicial deference to schools in inculcating values and carrying out daily functions has,

²⁶⁴ Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 771 (1995) (pointing out that “[v]alues inculcation” can violate “children’s First Amendment rights to believe in and express their own views”); see also Post, *supra* note 31, at 1655–58 (reading the Court’s cases as navigating three distinct objectives of education).

²⁶⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

²⁶⁶ 457 U.S. 853 (1982).

²⁶⁷ *Id.* at 864.

²⁶⁸ *Fraser*, 478 U.S. at 685.

²⁶⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (writing that the Court has repeatedly affirmed this principle).

²⁷⁰ *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

²⁷¹ 420 U.S. 308 (1975).

²⁷² *Id.* at 326.

²⁷³ *Id.*

²⁷⁴ *Bd. of Educ. v. Pico*, 457 U.S. 853, 863–64 (1982) (summarizing precedent).

²⁷⁵ *Id.* at 864 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969)).

over time, outweighed orthodoxy concerns²⁷⁶ and, as a practical matter, translated into expansive deference to schools on matters of speech.²⁷⁷

B. *Orthodoxy's Loopholes*

The tension between constitutional rights and school deference has produced multiple, sometimes conflicting First Amendment standards. The Court's early decisions affirming student speech quickly gave way to a series of school-friendly rules and exceptions.²⁷⁸ The Court's seminal student-speech case, *Tinker*, announced a broad standard: Schools can only restrict speech that materially and substantially disrupts the learning environment or invades other students' rights.²⁷⁹ But the Court narrowed *Tinker* in subsequent cases, indicating that *Tinker's* rule only applies to political speech.²⁸⁰ Other forms of speech, even when nondisruptive, have received little to no protection.²⁸¹ Schools can, for instance, punish immature speech, lewd and offensive language, or language that endorses drug use, even if in jest.²⁸²

When students' speech and information rights intersect with the school's curriculum or mission, they receive very little, if any, protection.²⁸³ For instance, the Court treated a student essay in the school newspaper as the school's speech or as involving an instructional decision, rather than as the student's speech.²⁸⁴ In this context, the school needs only to justify its censorship as reasonably related to a pedagogical goal.²⁸⁵ Likewise, schools can censor students' classroom commentary

²⁷⁶ See, e.g., Bowman, *supra* note 145, at 245.

²⁷⁷ Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1306 (7th Cir. 1980) (stressing that "nothing in the Constitution permits the courts to interfere with local educational discretion until [schools] begin to substitute rigid . . . indoctrination for the mere exercise of" pedagogical judgment); see Chiras v. Miller, 432 F.3d 606, 611–15 (5th Cir. 2005); Griswold v. Driscoll, 616 F.3d 53, 59 (1st Cir. 2010) (rejecting the notion that the court should limit schools' discretion); Planned Parenthood of S. Nev., Inc. v. Clark Cnty. Sch. Dist., 887 F.2d 935, 945 (9th Cir. 1989) (indicating that judicial intervention is warranted in only the narrowest of circumstances).

²⁷⁸ Calvert, *supra* note 250, at 1191 (arguing that the exceptions have nearly swallowed the rule).

²⁷⁹ See *Tinker*, 393 U.S. at 508–09, 511.

²⁸⁰ See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680, 685 (1986).

²⁸¹ See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) (declining to extend First Amendment protections to student speech published in the school newspaper).

²⁸² See *Morse v. Frederick*, 551 U.S. 393, 403–06, 409–10 (2007) (reviewing different rules for political speech, lewd and indecent speech, and school-sponsored speech, and articulating another approach to speech that advocates for drug use).

²⁸³ The legitimate-pedagogical-goal test from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), has largely subsumed *Tinker's* test, with courts applying the former to a wide swath of activity. See Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 74–80 (2008).

²⁸⁴ See *Hazelwood*, 484 U.S. at 272–73.

²⁸⁵ See *id.*

and assignments under the notion that student speech is intermixed with the school's curricular objectives.²⁸⁶ In short, schools' authority to restrict student speech and affirmatively promote ideas that align with their own objectives is at its height in the curriculum context.

The general right to receive information should theoretically serve as a check on textbook and library book policies,²⁸⁷ but there, too, the Court has extended substantial deference to schools. In *Board of Education v. Pico*, the Court distinguished the acquisition of library books from their removal, put aside the possibility that the First Amendment places any limits on acquisition, and only reached a muddled plurality as to removals.²⁸⁸ A majority indicated that schools "possess significant discretion to determine the content of their school libraries," and only a plurality would explicitly prohibit schools from removing books "in a narrowly partisan or political manner."²⁸⁹ Lower courts have since split on the precedential value of this principle.²⁹⁰ Regardless, removals for other content-based reasons remain within schools' authority.²⁹¹ The Court in *Pico* also contrasted library book removals from curricular decisions, indicating that schools possess nearly unbridled discretion to make social, moral, and political value-based choices through the curriculum.²⁹² In fact, as Professor Kristi Bowman points out, courts more often cite *Pico* to justify censorship in the classroom than to limit it.²⁹³

Reasoning that teachers' speech is not their own, but that of schools, lower courts have also allowed schools to dictate what teachers say to students.²⁹⁴ As the Seventh Circuit bluntly concluded, "[T]eachers hire

²⁸⁶ See Waldman, *supra* note 283, at 66 (analyzing how students' speech mixes with schools' speech); Dylan Salzman, Comment, *The Constitutionality of Orthodoxy: First Amendment Implications of Laws Restricting Critical Race Theory in Public Schools*, 89 U. CHI. L. REV. 1069, 1083–84 (2022) (discussing cases in which courts upheld a school's authority to require students to write about certain topics).

²⁸⁷ See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[The] right to receive information and ideas, regardless of their social worth, is fundamental to our free society." (citation omitted)).

²⁸⁸ See *Bd. of Educ. v. Pico*, 457 U.S. 853, 862 (1982).

²⁸⁹ Compare *Pico*, 457 U.S. at 870 (library books), with *Hazelwood*, 484 U.S. at 271 (curriculum).

²⁹⁰ Contrast *Gonzalez v. Douglas*, 269 F. Supp. 3d 948, 973 (D. Ariz. 2017) (treating *Pico* as controlling precedent), with *Chiras v. Miller*, 432 F.3d 606, 619 n.32 (5th Cir. 2005) (reasoning that *Pico* is of "no precedential value"), and *ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1200 (11th Cir. 2009) (same).

²⁹¹ See, e.g., *Hazelwood*, 484 U.S. at 271 (listing legitimate reasons, including "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences").

²⁹² *Pico*, 457 U.S. at 864.

²⁹³ Bowman, *supra* note 145, at 266–67. The oddity is that "[t]he school board's decision to remove a library book is a drop in the bucket; the school board's decision to use or not use a particular textbook is much more than that." *Id.* at 266.

²⁹⁴ *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 235–36 (6th Cir. 2005) ("When . . . teachers 'speak in the course of carrying out their routine, required employment obligations, they have

out their own speech and must provide the service for which employers are willing to pay”²⁹⁵ Thus, either the curricular standards noted above apply or the even more permissive government speech doctrine, which effectively exempts government speech from First Amendment scrutiny,²⁹⁶ does. By most accounts, this government speech doctrine is displacing what few student-friendly standards remain.²⁹⁷

C. *The Obstacle to Challenging Curricular Legislation*

Legislation regarding race, sex, and offensive ideas implicates several First Amendment issues. Library book removals, for instance, raise questions related to *Pico*, while laws that indirectly limit or chill student speech that is not school sponsored potentially trigger *Tinker*’s protections.²⁹⁸ But the most significant legislation involves curricular content and classroom instruction.²⁹⁹ Under the best-case scenario for students, those curricular and instructional aspects are subject to the Court’s pedagogical-goal standard.³⁰⁰ Alternatively, the government speech doctrine applies. Although the government speech doctrine comes from a non-school case in which the Court indicated the doctrine may not automatically extend to education,³⁰¹ lower courts are split—with some reasoning that the government speech doctrine, regardless of how broadly or narrowly it might apply in public schools, applies to curricular content.³⁰² Thus, a plaintiff’s first barrier in challenging curricular

no *personal* interest in the content of that speech.” (Sutton, J., concurring) (quoting *Ceballos v. Garcetti*, 361 F.3d 1168, 1189 (9th Cir. 2004) (O’Scannlain, J., concurring))).

²⁹⁵ *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007).

²⁹⁶ See *Corbin*, *supra* note 30, at 1485–87 (“The government speech doctrine[’s] . . . primary rule is straightforward: The Free Speech Clause does not constrain the government’s own speech.”).

²⁹⁷ See *Bowman*, *supra* note 145, at 237–40 (discussing how the government speech doctrine could apply in schools); *Corbin*, *supra* note 30, at 1477; *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000).

²⁹⁸ *Defending Our Right to Learn*, ACLU (Mar. 10, 2022), <https://www.aclu.org/news/free-speech/defending-our-right-to-learn> [<https://perma.cc/Z96T-YF6J>] (“[A]nti ‘CRT’ laws are thinly veiled attempts to silence discussions of race, gender, and sexuality amongst students and educators.”); *Peck v. Baldwinville Central Sch. Dist.*, 426 F.3d 617, 627 (2d Cir. 2005); *Waldman*, *supra* note 283, at 73 (reasoning that the Court has carved student speech into two zones, the larger of which allows schools to easily restrict speech).

²⁹⁹ See Dylan Saul, Note, *School Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans*, 107 MINN. L. REV. 1311, 1327–28 (2023); *Salzman*, *supra* note 286, at 1077–78.

³⁰⁰ *Saul*, *supra* note 299, at 1354.

³⁰¹ *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

³⁰² *Chiras v. Miller*, 432 F.3d 606, 616 (5th Cir. 2005) (reasoning that textbook selection involves “government speech”); *Downs*, 228 F.3d at 1012 (same); see also Rebecca Tanglen, Comment, *Local Decisions, National Impact: Why the Public School Textbook Selection Process Should*

legislation is to convince a court that the government speech doctrine does not control curricular issues.

If the government speech doctrine applies to school curricula, the reasons why a school restricted curricular and instructional speech are essentially beyond review.³⁰³ For instance, in *Chiras v. Miller*,³⁰⁴ circumstantial evidence suggested that the Texas Board of Education blocked an environmental science textbook for political reasons, but the Fifth Circuit indicated that textbook selections involved government speech, meaning that the Board's failure to provide any "formal findings or reasons for its decision" was irrelevant.³⁰⁵ If a plaintiff manages to convince a court that the curricular standard from *Hazelwood School District v. Kuhlmeier*³⁰⁶ applies instead, they still face a heavy burden of proving an improper motive.

First, circuit courts are generally dismissive of evidence that a school has censored content and instruction for illicit reasons.³⁰⁷ In *Griswold v. Driscoll*,³⁰⁸ the First Circuit upheld content removal, reasoning that curricular revision, "even if made in response to political pressure, did not implicate the First Amendment."³⁰⁹ Similarly, in *American Civil Liberties Union of Florida v. Miami-Dade County School Board*,³¹⁰ the Eleventh Circuit disregarded compelling evidence that the school board had removed a library book for political reasons, focusing instead on whether the book contained inaccuracies.³¹¹ In *Peck v. Baldwinsville Central School District*,³¹² the court acknowledged the near impossibility of distinguishing permissible curricular content discrimination from impermissible viewpoint discrimination and indicated that some state interests might be "so overriding as to justify . . . potentially viewpoint discriminatory censorship" in any event.³¹³

Second, the list of potentially legitimate pedagogical concerns is long and manipulable. The list includes obvious pedagogical concerns like grammar, substantive quality, content alignment, and factual

Be Viewpoint Neutral, 78 U. COLO. L. REV. 1017, 1037 (2007) (reviewing cases that treat "textbook selection process [as] pure government speech").

³⁰³ See *Chiras*, 432 F.3d at 616; *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007); see also Corbin, *supra* note 30, at 1478 (concluding that curricular bans are unreviewable).

³⁰⁴ 432 F.3d 606 (5th Cir. 2005).

³⁰⁵ *Id.* at 618.

³⁰⁶ 484 U.S. 260 (1988).

³⁰⁷ The one exception involved extensive evidence of racially discriminatory motives. *Arce v. Douglas*, 793 F.3d 968, 977–81 (9th Cir. 2015).

³⁰⁸ 616 F.3d 53 (1st Cir. 2010).

³⁰⁹ *Id.* at 55, 60.

³¹⁰ 557 F.3d 1177 (11th Cir. 2009).

³¹¹ *Id.* at 1221.

³¹² 426 F.3d 617 (2d Cir. 2005).

³¹³ *Id.* at 633.

accuracy, as well as more subjective judgments regarding age appropriateness, sexual explicitness, and the possibility that parents might erroneously think the school was promoting religion.³¹⁴ Even a school official's error or mistake of fact can justify curricular censorship.³¹⁵ One court, citing *Hazelwood* for support, reasoned that mistaken premises—and potential bias—for censorship were not fatal to a teacher's defense³¹⁶ because the teacher had still offered a legitimate pedagogical justification.³¹⁷ One of these pedagogical concerns will almost always be available to mask other purposes, including illegitimate ones. Thus, requiring a legitimate pedagogical justification for curricular censorship does very little, if anything, to preclude problematic motivations.

The first court decisions to examine recent race, gender, and book-banning legislation confirm the weakness of First Amendment doctrine in protecting students from potentially democracy-eroding behavior. Claims predicated on teachers' academic freedom to explore ideas or conversations with students beyond those officially approved by state or local officials have failed.³¹⁸ As one district court wrote, "[W]hen performing their official teaching duties, public school teachers are in essence the mouthpiece of the State."³¹⁹ The teachers' only potential right in these cases has been to receive notice of what they will and will not be punished for teaching.³²⁰ But one court was unwilling to even require clear notice, reasoning that teachers had no underlying speech right to violate.³²¹

³¹⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (listing legitimate reasons for concern, including when works are "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences"); *ACLU of Fla.*, 557 F.3d at 1221 (inaccuracy); *Peck*, 426 F.3d at 629 n.8 (possibility of erroneous attribution of religion to school).

³¹⁵ See *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 156 (6th Cir. 1995).

³¹⁶ *Peck*, 426 F.3d at 630 (reasoning that *Hazelwood* itself "did not inquire into the accuracy of the principal's contention that because of time concerns, censorship of the articles in question, rather than judicious editing, was required").

³¹⁷ *Id.* Per this logic, a teacher who, due to their own racial bias, believed that the Civil War was solely about state's rights might prohibit a student from writing a paper about slavery as a cause of the war because the teacher truly believed that such a paper would be inaccurate.

³¹⁸ *Walls v. Sanders*, 733 F. Supp. 3d 721, 739–41 (E.D. Ark. 2024) (rejecting a claim of academic freedom and finding no irreparable harm), *rev'd on other grounds*, 144 F.4th 995 (8th Cir. 2025).

³¹⁹ *Id.* at 739.

³²⁰ See, e.g., *Local 8027, AFT-N.H. v. Edelblut*, 651 F. Supp. 3d 444, 462 (D.N.H. 2023). The lower court in *GLBT Youth v. Reynolds*, 709 F. Supp. 3d 664 (S.D. Iowa 2023), ruled in teachers' favor on the notice claim, but the Eighth Circuit reversed, finding the lower court failed to give the statute its reasonable interpretation. *GLBT Youth v. Reynolds*, 114 F.4th 660, 670–71 (8th Cir. 2024).

³²¹ *Walls*, 733 F. Supp. 3d at 740–41 (reversed on other grounds in *Walls v. Sanders*, 144 F.4th 995, 1006–07 (8th Cir. 2025)); see also Corbin, *supra* note 30, at 1477–78 (characterizing teachers' claims in this space as weak).

Courts have recognized that students have stronger grounds than teachers to challenge curricular censorship because students do not cede their rights to the school.³²² Student claims, however, still face the “uphill battle” of identifying some protected right that has been invaded.³²³ Race, gender, and book-banning legislation does not punish students or directly limit their rights to express themselves. Thus, their claims rest on the notion that they have a right to receive certain information or books.³²⁴ The law and facts, however, are stacked against students on this claim.

Given *Pico*’s limited precedential value in several circuits, plaintiffs have been reduced to strategically filing in the Eighth Circuit, where a pre-*Pico* case, *Pratt v. Independent School District No. 831*,³²⁵ found that students do have a “right to receive information” that can only be invaded based on a “substantial and reasonable governmental interest.”³²⁶ Reasoning that *Pico* did not explicitly overturn *Pratt*, two district courts in the Eighth Circuit gave plaintiffs the benefit of the “doubt” that recent legislation had invaded their rights.³²⁷ But one of those courts explicitly acknowledged “*Pratt* is something akin to zombie precedent,” suggesting that a different result would occur at the appellate level.³²⁸ In fact, the Eighth Circuit has already reversed one of those two district courts—albeit on different grounds.³²⁹ Doctrinal challenges aside, however, plaintiffs everywhere are likely to face a fundamental factual problem unique to the historical controversies surrounding curricular legislation.

D. *The Special Problem of History*

Curricular legislation has frequently centered on what schools teach students about race, particularly in social studies and history. State officials may, ironically, have more practical latitude to censor these areas of the curriculum than others. With works of fiction, schools can exclude texts for age-inappropriate subjects or foul language,³³⁰ but their ability to censor works beyond that is more limited. By contrast, history and social studies texts are less likely to be age inappropriate but are necessarily subject to inaccuracy challenges. Even if a state actor excluded historical or social studies material for illicit reasons, the Supreme Court’s malleable standards provide a ready-made defense

³²² *GLBT Youth*, 709 F. Supp. 3d at 697–99; *Walls*, 733 F. Supp. 3d at 744–52.

³²³ Corbin, *supra* note 30, at 1478.

³²⁴ See, e.g., *Walls*, 733 F. Supp. 3d at 744.

³²⁵ 670 F.2d 771 (8th Cir. 1982).

³²⁶ *Id.* at 777.

³²⁷ *Walls*, 733 F. Supp. 3d at 746.

³²⁸ *Id.* at 745.

³²⁹ See *GLBT Youth v. Reynolds*, 114 F.4th 660, 661–62 (8th Cir. 2024).

³³⁰ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

that the censorship was in the service of historical or factual accuracy. Moreover, that defense can rest on school officials' inherently subjective interpretations.

History texts involve numerous judgments regarding what to include, what to exclude, and at what depth.³³¹ These necessary choices are always subject to charges of undercoverage or overemphasis and, thus, inaccuracy.³³² Content exclusions and inclusions also intersect with the problem of perspective. Coherent texts cannot convey every perspective,³³³ nor can an author write a text completely free of personal perspective.³³⁴ A statement that justice prevailed, a practice was normal, or a policy was effective implicitly conveys a particular perspective. And when perspectives shape basic facts into a narrative, books are open to charges of inaccuracy from someone with a different perspective. Even factual errors are, at some level, inescapable.³³⁵ Factual errors may be small, infrequent, and of no substantive consequence,³³⁶ but if any inaccuracy will suffice, those who would censor texts will have a legitimate pedagogical explanation to cover their illicit motivations.

The Eleventh Circuit's decision in *American Civil Liberties Union v. Miami-Dade* confirms the problem. Some school board and community members did not like how the book *Vamos a Cuba* portrayed Cuba, began looking for inaccuracies to justify its removal, and eventually did so.³³⁷ The court all but ignored the likelihood that the book had been removed for political reasons, focusing instead on the notion that the book was inaccurate. "Whatever else it prohibits," the court wrote, "the First Amendment does not forbid a school board from removing a book because it contains factual inaccuracies, whether they be of commission

³³¹ See NASH, CRABTREE & DUNN, *supra* note 78, at 10. See generally Ezekiel Oladele Adeoti & James Olusegun Adeyeri, *History, the Historian and His Work: Issues, Challenges and Prospects*, 3 INT'L J. EDUC. RSCH. & TECH. 36 (2012) (analyzing how one's personal perspectives affect one's study of history).

³³² See, e.g., *Griswold v. Driscoll*, 616 F.3d 53, 59–60 (1st Cir. 2010) (holding that omission of content—without any claim of factual error—was sufficient to demonstrate inaccuracy as a pedagogical justification); NASH, CRABTREE & DUNN, *supra* note 78, at 100–10 (recounting a controversy over what aspects of history to include and exclude in school).

³³³ Adeoti & Adeyeri, *supra* note 331, at 39 ("[A]bsolute objectivity in history is illusory.").

³³⁴ *Id.*; see NASH, CRABTREE & DUNN, *supra* note 78, at 108 ("I don't know of any historian who thinks he or she is writing the Truth." (quoting Diane Ravitch)). See generally C. Behan McCullagh, *Bias in Historical Description, Interpretation, and Explanation*, 39 HIST. & THEORY 39 (2000) (discussing the subjective interpretation of history).

³³⁵ Tim Lacy, *On the Failures of Historians*, SOC'Y U.S. INTELL. HIST. (Feb. 23, 2021), <https://s-usih.org/2021/02/on-the-failures-of-historians/> [<https://perma.cc/5X98-M582>] ("Errors cannot be eliminated, but they can be minimized.").

³³⁶ See *id.*

³³⁷ *ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1182, 1185–86 (11th Cir. 2009).

or omission. There is no constitutional right to have books containing misstatements of objective facts shelved in a school library.”³³⁸

This conclusion grossly oversimplified a broad spectrum of inaccuracies. The court and school board casually used the term “inaccuracy” or “error” to refer to three categorically different things: (1) a facially false statement of objective fact, (2) inaccuracy that depended on a hypertechnical reading of words, from which one could infer technical error, and (3) omissions of information.³³⁹ To make matters worse, the court failed to assess the significance or insignificance of particular alleged inaccuracies.

The single facially false fact in the book would seem to be of relatively little significance—the misattribution of a painting to the wrong artist and time period.³⁴⁰ The fatal inaccuracy that upset the school board—that “[p]eople in Cuba eat, work, and go to school like you do”—did not involve facial errors at all.³⁴¹ Rather, the supposed inaccuracy depended on the meaning that the board attributed to the sentence. Because people in both Cuba and the United States do, in fact, eat food, work, and attend school, the sentence’s purported falsity or inaccuracy rested entirely on reading some deeper meaning or unstated idea into the sentence—that cultural and political life in Cuba is the same as in America—or the personal belief that “factual information about the hardships of life in another country” must be included alongside any such sentences.³⁴² Ignoring the problem of perspective, the court simply agreed with the board’s claim that “glaring omissions” coupled with “incorrect information” amounted to a “misrepresentat[ion]” of “life in Cuba.”³⁴³

Even so, the question ought to remain as to whether inaccuracy or some other factor motivated *Vamos a Cuba*’s removal. Libraries are replete with books that contain inaccuracies and yet are never removed.³⁴⁴ Thus, the question is not simply whether an inaccuracy exists, but rather what type and level of “inaccuracy” is substantial enough to independently motivate a book’s removal. One or two major facial errors might suffice for removal, but minor errors likely need to accumulate to a level that erodes faith in the book’s overall reliability. As to inferred errors and omissions, removal may depend more on the subjective palatability of the book’s message than on any objective flaw.

³³⁸ *Id.* at 1202.

³³⁹ *Id.*

³⁴⁰ *Id.* at 1211.

³⁴¹ *Id.* at 1212.

³⁴² *Id.* at 1222.

³⁴³ *Id.* at 1221.

³⁴⁴ Elaine McArdle, *Book Bans and the Librarians Who Won't Be Hushed*, EDUC. MAG. (Nov. 6, 2023), <https://www.gse.harvard.edu/ideas/ed-magazine/23/11/book-bans-and-librarians-who-wont-be-hushed> [<https://perma.cc/RR93-HW46>] (discussing the rarity of even receiving a complaint).

As one of the Miami-Dade board members who opposed the removal explained, “[t]he 22 professional educators who reviewed this book” failed to find “serious, material, irrevocable and clear inaccuracies and biases.”³⁴⁵ Thus, this removal was “essentially a political process.”³⁴⁶

In short, under current precedent, state and local officials can use their discretion to shape the curriculum, purchase books, exclude books, censor teachers’ instruction, and indirectly coerce students to accept the state’s historical and social narrative, even when that narrative is infected with ideological and political bias. In this respect, the promise of free speech and free thought is potentially an empty one. A state slipping into orthodoxy, or at least implementing autocracy’s tools, will be relatively free to use public education to consolidate political and cultural power.

IV. THE ANTI-ORTHODOXY SOLUTION: EDUCATION’S FOUNDING PRINCIPLES

Courts’ waning vigilance may stem from the mundane nature of the education controversies that have come before the Supreme Court in recent decades.³⁴⁷ School officials in those cases may have acted impulsively but not necessarily nefariously. The underlying disputes involved imprudent misuses of state power but not totalitarianism. Only *Tinker*, which occurred at the height of the Vietnam War, intersected with broader social turmoil.³⁴⁸ Even then, the school’s motive

³⁴⁵ *ACLU of Fla.*, 557 F.3d at 1187.

³⁴⁶ *Id.*

³⁴⁷ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 264–65 (1988) (discussing school officials’ authority to make pedagogical editorial decisions regarding school newspaper publication); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (calling a boy engaging in sexual innuendo “confused”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 859–60 (1982) (discussing vulgarity); *Morse v. Frederick*, 551 U.S. 393, 402 (2007) (discussing the indeterminate meaning of a student’s “[g]libberish”). Operating within that same context, scholars tend to propose conventional fixes within the parameters of current doctrine. See, e.g., Tanglen, *supra* note 302, at 1056–57; Saul, *supra* note 299, at 1335–40 (building on *Pico*); Francesca Procaccini, (*E*)*Racing Speech in School*, 58 HARV. C.R.-C.L. L. REV. 457, 458–60 (2023) (same). Even newer scholarship fails to fully appreciate this moment’s abnormality, identifying new content and book bans as problematic but framing them in relatively conventional terms such as “political opportunism” or misconceived efforts to protect students. *Id.* at 460; Emma Postel, *Indoctrination by Elimination: Why Banning Critical Race Theory Is Unconstitutional*, 31 WM. & MARY BILL RTS. J. 581, 588–89 (2022). Others situate curricular censorship as part of a “culture war” but stop short of connecting it to democratic erosion. See Saul, *supra* note 299, at 1316; see also M. Isabel Medina, *Silencing Talk About Race: Why Arizona’s Prohibition of Ethnic Studies Violates Equality*, 45 HASTINGS CONST. L.Q. 47, 51–59 (2017) (discussing the origin and educational value of ethnic studies courses and the harmful effects on underrepresented cultural groups caused by efforts to ban such courses).

³⁴⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504, 510 (1969) (dispute involving a national “conflagration”).

was to avoid controversy rather than enforce orthodoxy.³⁴⁹ In these circumstances, the Court assumed educational good faith and saw no need to second-guess the substantive validity of the educators' decisions.³⁵⁰

The education trends described in Part II, however, defy these historic assumptions and call for a different balancing of risks.³⁵¹ Doctrines adapted to normal times are inept in the face of totalitarian behavior and orthodoxy. The solution lies not in restricting or curtailing schools' authority to inculcate democratic values, but in finally examining from whence that authority arises. Although the Supreme Court has long extolled the virtues of public education in fostering democracy and opening young people's minds, it has never identified the constitutional norm upon which schools are obligated to do so.³⁵² And the difficulty of drawing an evenhanded line between orthodoxy and legitimate civic inculcation has prevented the Court from articulating any meaningful limiting principle at all.

First Amendment doctrine cannot resolve this tension in a vacuum; it must instead account for an educational context in which students possess an affirmative right to an education that prepares them for citizenship in a republican form of government.³⁵³ State constitutions explicitly enshrine that right—and not by accident, but by virtue of the founding theory of American democracy and the guarantee of a republican form of government in the U.S. Constitution.³⁵⁴ Since the founding of the United States, Congress and states have used public education as the tool to reinforce America's republican form of government and its constitutional values.³⁵⁵ This history and the norms embedded in state constitutional provisions represent the principles by which the Supreme Court can prohibit orthodoxy and coercion in public schools without imposing its own values. The following Sections explore the inherent

³⁴⁹ *Id.* at 510.

³⁵⁰ See, e.g., *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *Griswold v. Driscoll*, 616 F.3d 53, 58–59 (1st Cir. 2010) (summarizing the Court's curricular noninterference doctrine); see also Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1651 (1986) (noting that some argue “the special relationship between teacher and student which is essential to the learning process” has been diminished by judicial intervention).

³⁵¹ See Erwin Chemerinsky, *The Underlying Issues Concerning Free Speech in Schools*, 76 STAN. L. REV. 1427, 1427 (2024) (“Having gone to college in the Vietnam War era and having participated in anti-war demonstrations, this moment seems different.”).

³⁵² See MICHAEL A. REBELL, *FLUNKING DEMOCRACY* 39–40 (2018) (noting how the Court has never “closely examin[ed] . . . the constitutional basis for the state's authority in this area”).

³⁵³ See *Post*, *supra* note 31, at 1670 (“Although a theory of rights might inform us about how to limit pedagogical control over speech, it can never alone substitute for an affirmative theory of education that generates positive educational programming.”).

³⁵⁴ See *supra* Section I.A.

³⁵⁵ See *supra* Section I.B.

challenge the Court faces in this space and the solutions that the constitutional history of public education provides.

A. Orthodoxy's Thin Lines: Method, Substance, and Neutrality

The Supreme Court has thus far identified unconstitutional orthodoxy based on the method by which government might impose it rather than content. This method makes for easier analysis because, regardless of an idea's content, compelling students to adopt an idea is beyond the government's power.³⁵⁶ But the rule against compulsion only speaks to the most extreme and egregious form of orthodoxy. State and local education officials have the capacity to restrain autonomy and freedom of thought in a myriad of ways short of explicit compulsion. The state requires students to attend school, unilaterally decides what information to share and not share, excludes other voices from schools, elevates teachers as role models to emulate, and intentionally promotes its preferred values.³⁵⁷ In short, state control of education "carries with it the ability to determine what conception of the good life shall dominate children's formative years,"³⁵⁸ making it, as noted earlier, an "indoctrinator's dream."³⁵⁹

The difficulty is determining when subtle indoctrination becomes orthodoxy that violates students' rights or transcends some other constitutional limit on schools.³⁶⁰ This orthodoxy inquiry depends, at least in part, on an evaluation of content rather than method. The Establishment Clause, for instance, treats religious instruction and practices by schools—compelled or not—as a per se form of prohibited orthodoxy.³⁶¹ Where secular instruction crosses the line, however, is more ambiguous and circumstantial.

The Court's dicta suggests that schools cross the line when they take sides on political matters on which people deeply disagree.³⁶²

³⁵⁶ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

³⁵⁷ *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (identifying how states shape students through mandatory attendance and positioning teachers as role models to emulate); Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 *DENV. U. L. REV.* 945, 950 (2010); *Ambach v. Norwick*, 441 U.S. 68, 78–79 (1979); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681–83 (1986).

³⁵⁸ Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 *U. CHI. L. REV.* 937, 947 (1996).

³⁵⁹ See Ingber, *supra* note 137, at 425 n.25.

³⁶⁰ See generally *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (en banc) (rejecting claims that school materials were inculcating ideas as truth); *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (rejecting a claim that a school indoctrinated children regarding sexual orientation).

³⁶¹ *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

³⁶² See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (referencing "shared values"); *Bd. of Educ. v. Pico*, 457 U.S. 853, 870 (1982) (objecting to "narrowly partisan or political"

Though plausible in theory, the actual line between civic democratic values on which there is little disagreement and partisan, political, and other matters on which people deeply disagree is a thin one.³⁶³ Democratic values are themselves political values.³⁶⁴ So the line, if there is one in the Court's precedent, must depend on additional nuance.

The working assumption among scholars and practitioners is that schools may promote democratic values at a high level of generality so long as they avoid taking sides on divisive issues or ideology.³⁶⁵ In other words, schools may reaffirm values around which there is a long-standing general consensus.³⁶⁶ Yet this rule of thumb only resolves the easy cases when schools encourage democracy in the abstract and avoid politics. But when abstract democratic values mix with ideology, politics, and factual judgments—as they often do—the question becomes how divisive is too divisive or how political is too political.³⁶⁷

Tough cases would require a court to draw a line or exercise judgment. Such line drawing, however, raises the possibility that the judiciary might impose its own sense of good and bad values on schools and thereby displace the role of schools.³⁶⁸ Avoiding that problem requires

motivations); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (objecting to orthodoxy regarding “politics, nationalism, religion, or other matters of opinion”); Bitensky, *supra* note 264, at 801 (suggesting that *Barnette* may “stand for the much broader proposition that public schools must be neutral on all subjects where a difference of opinion is possible”); *see also* *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (expressing concern for “common destiny”); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (same).

³⁶³ Bitensky, *supra* note 264, at 777–78; *Pico*, 457 U.S. at 890 (Burger, C.J., dissenting) (arguing that “there is no guidance whatsoever as to what constitutes ‘political’ factors”). Professor Caitlin Millat argues that even this type of value inculcation can be “subordinating and antidemocratic.” Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 *Geo. L.J.* 529, 566, 585 (2023).

³⁶⁴ *Pico*, 457 U.S. at 890 (Burger, C.J., dissenting); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 *CAL. L. REV.* 1104, 1134 (1979) (rejecting the idea that there are any uniform political values).

³⁶⁵ *See* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 *IOWA L. REV.* 1377, 1421 (2001) (“The nearest thing to neutrality would entail the selection of those subjects, and only those, which would command a high level of consensus.”); Smith, *supra* note 357, at 964 (discussing the view that government can promote “civil religion”).

³⁶⁶ *Hazelwood*, 484 U.S. at 272 (discussing how schools promote “shared values” and take positions of “neutrality on matters of political controversy”).

³⁶⁷ *See* Bitensky, *supra* note 264, at 824–25 (arguing that there is no set value upon which all Americans agree, notwithstanding the Court's contrary supposition); *Pico*, 457 U.S. at 890 (Burger, C.J., dissenting) (criticizing the plurality's failure to provide guidance “as to what constitutes ‘political’ factors”); *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (expressing concern that educators could manipulate their education functions to suppress speech with which they disagreed).

³⁶⁸ Bitensky, *supra* note 264, at 826–87 (surveying the varying scholarly proposals as to what values or norms might be appropriate for schools to inculcate); *Pico*, 457 U.S. at 890–91 (Burger, C.J., dissenting) (reasoning that the plurality's standard would turn on judges' rather than educators' evaluations of books).

a neutral principle that differentiates the type of civic inculcation that the Court encourages from the ideological indoctrination that threatens democratic norms. The next Section finds that neutral principle in the history and purpose of education.

B. The Limiting Principle: Public Education's Essential Function

Students' freedom of speech and thought is, on the surface, at odds with schools' authority to promote democratic values.³⁶⁹ A general right of access to information, for instance, would make the school the hand-servant of the students' inquiries.³⁷⁰ Similarly, a complete prohibition on censorship and value imposition would paralyze schools from making reasonable educational judgments about what to teach students.³⁷¹ Unable to reconcile these extremes, the Supreme Court's precedent has, at best, vacillated between them on a case-by-case basis.

The constitutional structure and ideology of public education can resolve this type of tension. As Professor Steven Smith convincingly argues, the parameters of government speech "depend[] on the defined proper and essential role or function of the government."³⁷² Professor Robert Post similarly analyzes the "scope of . . . authority" to regulate speech in relationship to state institutions' specific "mission."³⁷³ Government speech crosses the constitutional line not when it fails to remain neutral—which Professor Smith characterizes as a conceptual distraction—but when it suffers from institutional capture.³⁷⁴ Institutional capture is easy to spot in the case of religion and unconstitutional when, for instance, school officials lead or sponsor a sectarian prayer.³⁷⁵ Institutional capture around secular values is harder to delineate but no less threatening to individuals' freedom of conscience and speech.³⁷⁶

Applied to public schools, a proper and essential role analysis reveals the limiting principles by which to fairly distinguish civic inculcation within schools' power from the totalitarian tendencies that should be beyond their power because they are contrary to the originating purposes of education itself.³⁷⁷ The first step is to identify public education's

³⁶⁹ See Millat, *supra* note 363, at 565–67 (discussing how inculcation can subvert autonomy).

³⁷⁰ Post, *supra* note 31, at 1655.

³⁷¹ See Bezanson & Buss, *supra* note 365, at 1421 (“[G]overnment neutrality in education is not only practically impossible, it is also highly inconsistent with the general understanding of what education is trying to do.”).

³⁷² Smith, *supra* note 357, at 968.

³⁷³ Post, *supra* note 31, at 1643–44.

³⁷⁴ See Smith, *supra* note 357, at 946–51.

³⁷⁵ Smith distinguishes “civil religion” from “theological pronouncements” by the government. *Id.* at 965.

³⁷⁶ See *id.* at 964–67.

³⁷⁷ See generally Post, *supra* note 31, at 1655–56 (relying on three distinct missions of education as identified in the Court's precedent to synthesize the Court's otherwise conflicting student

proper and essential role—a role that is, fortunately, clearer than the Court’s vague and broad descriptions of education history would suggest. The Court has yet to address the full scope of education history.³⁷⁸ But careful examination reveals that public education was established to further specific constitutional principles and ideas that stretch back two centuries. That history defines the role of public education in America’s constitutional democracy and, in turn, sets the boundaries of permissible curricular choices and censorship in public education.

As detailed in Section I.A, since America’s founding, public education has served as the tool by which to reinforce a republican form of government and its constitutional principles.³⁷⁹ “No theme,” according to a seminal history of American public education, “was so universally articulated during the early decades of the Republic as the need of a self-governing people for universal education.”³⁸⁰ Not only did the Northwest Ordinances of 1785 and 1787 explicitly provide for and require education in the territories that would become states, Congress—pursuant to its Guarantee Clause power—later conditioned admission to the Union on states formalizing their education commitments in their state constitutions.³⁸¹ State constitutional provisions then further expounded on the meaning of public education in America’s constitutional democracy, proclaiming, for instance, that public education is the surest guarantee for the preservation of republican government and individual liberty.³⁸² A workable limiting principle for First Amendment purposes, however, requires more specificity than the general concept that education reinforces republican government. That specificity can be found in the five distinct but interrelated problems and challenges that the Founders and Framers saw education as solving.³⁸³

C. *Identifying Public Education’s Original Functions*

The first distinct goal of public education is to prepare young people for citizenship and self-government.³⁸⁴ Founding-era theory, federal

speech cases).

³⁷⁸ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (requiring briefing on the history of education but indicating the evidence was “inconclusive”).

³⁷⁹ See *supra* Section I.A.

³⁸⁰ LAWRENCE A. CREMIN, *AMERICAN EDUCATION* 103 (1980).

³⁸¹ See *supra* Section I.B.

³⁸² See sources cited *infra* note 393.

³⁸³ According to Professor Post, the Court has offered “three distinct” educational missions: preparing “independent democratic citizens,” instilling civic and “community norms,” and helping students acquire “the intellectual skills necessary for independent analytic thinking.” Post, *supra* note 31, at 1655–57. He labels these as democratic, civic, and critical education. *Id.* These theoretical missions are only loosely defined, but they overlap with the historical purposes detailed in this Article.

³⁸⁴ See, e.g., Benjamin R. Barber, *Education and Democracy: Summary and Comment*, in THOMAS JEFFERSON AND THE EDUCATION OF A CITIZEN 142 (James Gilreath ed., 1999) (noting that for

legislation, and presidential leadership consistently indicate that America's republican form of government depends on educated voters.³⁸⁵ More precisely, good citizenship requires access to information and deliberation, and information will only be absorbed if literacy is extended to the masses through public education.³⁸⁶ State constitutions have been equally clear that the central purpose of constitutionally mandating public education is to ensure young people are prepared to assume and discharge the duties of citizenship.³⁸⁷

Second, the Founders believed that the legitimate exercise of governmental power rests on education. The text of the Declaration of Independence indicates that governments "deriv[e] their just Powers from the consent of the Governed."³⁸⁸ The Declaration's author, Thomas Jefferson, reasoned that meaningful consent requires that individuals be able to fully understand and protect their interests in relation to government.³⁸⁹ Education makes this consent possible and, thus, the exercise of government power over the people legitimate.³⁹⁰ In its absence, individuals live under an unjust thumb.

Third, public education was intended to protect individual liberty and autonomy. Even in its most benevolent forms, government power is a threat to individuals' "free exercise of . . . natural rights."³⁹¹ Education allows people to "guard the sacred deposit of the rights and liberties

Jefferson, civic education "was the central, defining moment of his political and moral philosophy: everything else turned on it").

³⁸⁵ See, e.g., BLACK, *supra* note 46, at 54–57; HORACE MANN, LECTURES ON EDUCATION 55–56 (Boston, Ide & Dutton 1855) ("The theory of our government is, —not that all men, however unfit, shall be voters,—but that every man, by the power of reason and the sense of duty, shall become fit to be a voter. Education must bring the practice as nearly as possible to the theory."); Barber, *supra* note 384, at 142.

³⁸⁶ Letter from James Madison to W.T. Barry, *supra* note 46, at 103 (arguing effective government depends on people's access to information); Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-11-02-0047> [<https://perma.cc/9D3G-5VW8>] (preferring "newspapers without a government" to "a government without newspapers" and that "every man . . . be capable of reading them").

³⁸⁷ REBELL, *supra* note 352, at 51.

³⁸⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³⁸⁹ See, e.g., Letter from Thomas Jefferson to William Charles Jarvis (Sep. 28, 1820), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/03-16-02-0234> [<https://perma.cc/T9WJ-5A38>] (explaining the solution to the illegitimate exercise of government power was to educate the people); Jefferson, *supra* note 50 (explaining the necessity of a system of education).

³⁹⁰ Tom Lynn Richey, *An Historical Inquiry into Thomas Jefferson's Influence on the American Education System 18–19* (Aug. 2009) (Ph.D. dissertation, University of Denver) (Digital Commons) (discussing the relationship between the Declaration of Independence and Jefferson's views on education); Barber, *supra* note 384, at 138 (explaining that Jefferson believed that people need the "internal filter of education" to knowingly alienate their rights to government).

³⁹¹ Jefferson, *supra* note 50; Letter from Thomas Jefferson to George Washington (Jan. 4, 1786), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/>

of their fellow citizens.”³⁹² This idea reverberated for two centuries, not only in legislative debate, but in explicit state constitutional text.³⁹³ The Arkansas Constitution, for instance, provides that “[i]ntelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools.”³⁹⁴ In other words, public education exists not just to empower people to run the government but to empower the people to restrain the government from excess.

Fourth and related, education provides citizens with the nonviolent means by which to resist tyranny. Even republican government—warned Jefferson, Madison, Hamilton, and others—is vulnerable to tyrannical tendencies.³⁹⁵ The U.S. Constitution incorporated various checks on that tendency—limited powers, separation of powers, bicameralism, and the Bill of Rights. But as founding theorists, state constitutional conventions, and constitutional provisions indicated, public education must provide that check too—by equipping citizens, individually and collectively, with the substantive skills and knowledge to resist tyranny.³⁹⁶ Or, as one scholar succinctly puts it, public education is meant to “equip[] individuals with capabilities necessary to resist domination.”³⁹⁷

Finally, public education is meant to bind a diverse and sometimes adverse population together.³⁹⁸ Individuals, left to their own devices,

Jefferson/01-09-02-0135 [https://perma.cc/A93N-B253] (“[L]iberty can never be safe but in the hands of the people themselves, and that too of the people with a certain degree of instruction.”).

³⁹² Jefferson, *supra* note 50.

³⁹³ See IND. CONST. of 1816, art. IX, § 1 (stating that public education is “essential to the preservation of a free government”); MINN. CONST. art. VIII, § 1 (“The stability of a republican form of government depend[s] on] . . . a general and uniform system of public schools.”); N.H. CONST. pt. II, art. LXXXIII (noting that public education is “essential to the preservation of a free government”); N.D. CONST. art. VIII, § 147 (mandating education because “[a] high degree of intelligence, patriotism, integrity and morality on the part of every voter [is] . . . necessary in order to insure the continuance of that government”).

³⁹⁴ ARK. CONST. art. XIV, § 1.

³⁹⁵ Jefferson, *supra* note 50; THE FEDERALIST No. 27 (Alexander Hamilton).

³⁹⁶ Richey, *supra* note 390, at 20 (“[U]niversal education was important to maintain liberty and to keep tyranny at bay.”); Letter from Thomas Jefferson to Uriah Forrest (Dec. 31, 1787), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-12-02-0490> [https://perma.cc/XB57-TSNZ] (preferring an educated people to an “energetic” government and writing that public education “is the most certain and the most legitimate engine of government,” which would “enable [the people] to see that it is their interest to preserve peace and order”); see also ANNE PROFFITT DUPRE, SPEAKING UP 2 (Elizabeth Knoll ed., 2009) (arguing that public schools have “the important mission of educating each generation of new citizens so they will have the tools necessary to preserve and protect those tenets of democracy upon which the United States was founded”).

³⁹⁷ Kip M. Hustace, *Education, Antidomination, and the Republican Guarantee*, 30 WM. & MARY BILL RTS. J. 91, 134 (2021) (theorizing that freedom from domination requires a rather robust form of education).

³⁹⁸ CTR. ON EDUC. POL’Y, WHY WE STILL NEED PUBLIC SCHOOLS: PUBLIC EDUCATION FOR THE COMMON GOOD 6 (2007), <https://files.eric.ed.gov/fulltext/ED503799.pdf> [https://perma.cc/

struggle to see beyond the immediate needs of their own family, community, or narrow demographic, economic, or religious group.³⁹⁹ If democracy is no more than naked competition among narrow interests vying for domination through a fifty-one percent majority, it will eventually tyrannize those in the minority.⁴⁰⁰ Getting beyond these instincts requires an understanding and appreciation of a common good that outranks certain narrower individual interests.⁴⁰¹ As John Adams emphasized, public schools are the institutions through which individuals from all ranks and walks of life share a common experience and come to appreciate the common good, which is essential to protecting the nation's democratic foundations.⁴⁰² That idea is explicitly embedded in numerous state constitutional provisions, which since the 1800s have spoken not of "public schools" but "common" schools.⁴⁰³

The democratic erosion occurring through public education implicates these public education functions. Putting aside whether these functions create an affirmative obligation that students could use to demand more resources from states or the federal government,⁴⁰⁴ these functions mark the outer scope of states' authority in public education. In other words, they can define the "proper and essential role or function" for purposes of First Amendment analysis. A school that, for instance, actively undermines young people's capacity to engage in independent thought—such as teaching them that tyranny is desirable—would be acting *ultra vires* and, thus, outside of the zone of deference owed to them under the First Amendment.

TX6Z-KS6Y] (arguing that "the growth of public education during the past two centuries" is premised on "the common good").

³⁹⁹ See generally HORACE MANN, TWELFTH ANNUAL REPORT (1848), reprinted in THE REPUBLIC AND THE SCHOOL 90 (Lawrence A. Cremin ed., 1957) (theorizing that without educated citizens, democracy would become "despotism of a few succeeded by universal anarchy").

⁴⁰⁰ See Barber, *supra* note 384, at 135 (suggesting that "[w]ithout education, democracy may mean little more than the tyranny of opinion over wisdom" and "elevate ignorance to the throne"). See generally THE FEDERALIST No. 51 (James Madison) (discussing the problem of factions and oppression).

⁴⁰¹ See Barber, *supra* note 384, at 135–36 (explaining Jefferson's belief that education regarding "public rights" would mitigate the passions of the masses). See generally Kathryn M. Borman, Arnold B. Danzig & David R. Garcia, *Introduction: Education, Democracy, and the Public Good*, 36 REV. RSCH. EDUC. vii (2012) (examining the values that underlie education).

⁴⁰² John Adams, Inaugural Address (Mar. 4, 1797), reprinted by AVALON PROJECT, https://avalon.law.yale.edu/18th_century/adams.asp [<https://perma.cc/QL4L-HLNP>] (contending that education was the only way to defend against America's "natural enemies," which included "the spirit of party" and "corruption").

⁴⁰³ See, e.g., ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 3; CAL. CONST. art. IX, § 5; IDAHO CONST. art. IX, § 1; KY. CONST. § 183; OHIO CONST. art. VI, § 2.

⁴⁰⁴ Other scholarship addresses that issue directly. See, e.g., Black, *supra* note 33, at 837; Lunn, *supra* note 41, at 1503.

D. *The Curricular Implications*

These five principles have significant implications for any First Amendment assessment of curricular decisions. Although most curricular decisions involve run-of-the-mill pedagogical, nonideological decisions to which courts ought to defer, others amount to an abuse of discretion beyond the proper function of education that raises fundamental free speech and republican form of government problems.

The first significant abuse involves restricting access to information for the sake of restriction. Such a restriction is contradictory to education as a function of a republican government. If particular information is relevant to public policy debate, reflecting on the state of the nation, or other core inquiries of self-government, then restricting access to that information is an intentional interference with the preparation of students for citizenship.⁴⁰⁵ Restriction of this sort also inverts the power dynamic between the government and its citizens, denying students the opportunity to reach conclusions contrary to those that the government has preordained.⁴⁰⁶ In this respect, restricting information facilitates tyranny rather than individual citizens' liberty. Moreover, if no official, in the words of *Barnette*, shall dictate what is "orthodox,"⁴⁰⁷ no official should dictate what is unorthodox either. Both involve coerced ideology—the former by compelling adoption and the latter by prohibiting access to counter-ideology.⁴⁰⁸

This is not to suggest that schools must affirmatively provide students with unlimited information or that all curricular exclusions are constitutionally suspect, but that a school's motive matters.⁴⁰⁹ Restriction for the sake of restriction—or another illegitimate motive—is

⁴⁰⁵ See AMY GUTMANN, *DEMOCRATIC EDUCATION* 51 (1987) (stressing that students "must learn . . . to think critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens"); Millat, *supra* note 363, at 549–50 (finding the Court's theory of democratic education requires access to the "marketplace of ideas"); *A Key to Democracy: Access to Information Critical for Citizens, Governments*, CARTER CTR. (Apr. 11, 2005), <https://www.carter-center.org/news/documents/doc1860.html> [<https://perma.cc/9FZG-LT62>].

⁴⁰⁶ See, e.g., Adrian Shahbaz, *The Rise of Digital Authoritarianism*, FREEDOM HOUSE (2018), <https://freedomhouse.org/report/freedom-net/2018/rise-digital-authoritarianism> [<https://perma.cc/R4PE-JXZA>] (pointing out how information restriction and manipulation in authoritarian regimes disempower citizens); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 28–40 (2000) (discussing how government monopolization of information and skewing debates impedes individual autonomy).

⁴⁰⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁴⁰⁸ The Court has found "singl[ing] out [an idea] for prohibition" problematic. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

⁴⁰⁹ See Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 770, 832 (2001) (arguing that applying the First Amendment turns on purpose). One should not, however, discount the possibility that a school might abuse its monopoly on information in systematic ways that are not immediately obvious, but which have the effect of shrinking the universe of ideas students might consider. Greene, *supra* note 406, at 28–40.

different than exclusion for practical or pedagogical purposes.⁴¹⁰ When schools exclude materials that are age-inappropriate, obscene, or outside the subject matter of the curriculum, the likelihood of tyrannical harms to liberty interests would appear minimal.⁴¹¹ But if a school prohibits access to facts, historical narratives, or ideas because it does not want students exposed to them, the school is declaring that content ideologically unorthodox and using its monopoly on information to indirectly coerce a preferred orthodoxy.⁴¹² Many aspects of legislation targeting ideas or materials for exclusion fall in this second category of excluding information not for reasons of curricular alignment or inappropriateness, but because the state does not want students exposed to certain historical and cultural perspectives.⁴¹³

The second potential significant abuse of curricular authority involves the entrenchment of political ideology or institutional capture.⁴¹⁴ A republican form of government operates on open contests of ideas.⁴¹⁵ Education policy that actively entrenches contested ideas on one side of a debate deprives students of the opportunity to critically evaluate the facts and narratives involved in that debate.⁴¹⁶ In this

⁴¹⁰ Compare *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1154 (N.D. Miss. 1980) (“[T]he court has also found that the racial issues substantially influenced the committee in its decision.”), and *Arce v. Douglas*, 793 F.3d 968, 977–80 (9th Cir. 2015) (reviewing evidence of discriminatory motive for restriction), with *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (accepting pedagogical justification).

⁴¹¹ The possibility of pretext, however, would remain. See, e.g., Salzman, *supra* note 286, at 1104–09.

⁴¹² Under these circumstances, a school would appear to breach three of Professor Greene’s markers of unconstitutionality—monopolization, undercutting autonomy, and coercion—and breach the fourth—ventriloquism—when it affirmatively uses other texts to advance a counter-narrative. See Greene, *supra* note 406, at 27–51.

⁴¹³ See, e.g., H.B. 1508, 67th Leg. Assemb., Spec. Sess. (N.D. 2021), <https://ndlegis.gov/assembly/67-2021/special/documents/21-1078-03000.pdf> [<https://perma.cc/G3NW-GL5W>] (prohibiting instruction of the idea that “racism is systematically embedded in America”); FLA. STAT. § 1003.42 (2024) (requiring that the United States “be defined as the creation of a new nation based largely on the universal principles stated in the Declaration of Independence”).

⁴¹⁴ See, e.g., Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 ARIZ. L. REV. 45, 93–94 (2021); Greene, *supra* note 406, at 38.

⁴¹⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (stressing that government authority must “be controlled by public opinion, not public opinion by authority”). The adoption of the Constitution itself was hashed out through an open debate fostered through eighty-five essays and articles published in the newspapers. See *Federalist Papers: Primary Documents in American History*, LIBR. CONG., <https://guides.loc.gov/federalist-papers/full-text> [<https://perma.cc/PR4X-Y5EV>] (last visited May 23, 2026).

⁴¹⁶ See Bo Rothstein, *What Saved American Democracy?*, SOC. EUROPE (Jan. 13, 2021), <https://www.socialeurope.eu/what-saved-american-democracy> [<https://perma.cc/3JKM-2GMH>] (arguing that democracy depends on knowledge realism, as opposed to truth being determined by dominant culture); Ginsburg, *supra* note 115, at 240; *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938) (noting that “restraints” on “information” can corrupt the constitutional political process and inhibit voters from “bring[ing] about repeal of undesirable legislation”).

respect, it violates the citizenship preparation, liberty, and anti-tyranny principles detailed above. It is also worth noting that the possibility of manipulating the contest of ideas explains why partisans look to capture public education's mission and function.⁴¹⁷ Such capture represents not politics as usual or community values but the corruption of both public education and democratic processes.⁴¹⁸

State legislation regarding race, history, and sexual identity did not merely take a stance on a contested issue. Instead, it used the political process to entrench a particular position or worldview and silence others. Prior to the legislation, teachers and districts employed various approaches to history⁴¹⁹ and robust conversations ensued.⁴²⁰ Some classrooms exposed students to the idea that racism played a major explanatory role in American history,⁴²¹ and other classrooms presented a different perspective or avoided the issues altogether.⁴²² In Florida, for instance, a higher body, the governor and state legislature, interrupted these conversations, eliminating one set of conversations and entrenching others.⁴²³ No position other than the state's was to receive a full airing. Newer laws similarly force certain religious texts, concepts, and narratives into the curriculum, undercutting the previously settled status quo regarding how schools approach religion and instead entrenching narrow perspectives on otherwise contested ideas.⁴²⁴

⁴¹⁷ See JUSTIN DRIVER, *THE SCHOOLHOUSE GATE* 10 (2018) (detailing how public schools are often a target of partisan activists because “the cultural anxieties that pervade the larger society often flash where law and education converge”).

⁴¹⁸ Process corruption was the basis for the Supreme Court to finally intervene in the malapportionment of voting districts, reasoning that the democratic electoral process could not correct itself. See generally *Baker v. Carr*, 369 U.S. 186 (1962) (holding that redistricting claims are justiciable).

⁴¹⁹ See generally Samantha Putterman, *PolitiFact FL: DeSantis Says He Removed CRT from K-12 Schools. Districts Say It Wasn't Taught*, WLRN PUB. MEDIA (Aug. 14, 2023, at 16:04 ET), <https://www.wusf.org/education/2023-08-14/politifact-fl-desantis-says-removed-crt-from-k-12-schools-districts-say-wasnt-taught> [https://perma.cc/823D-QQJ4] (stating that Florida teachers indicated that they had never taught CRT and had followed best practices).

⁴²⁰ See, e.g., Hannah Natanson, *Her Students Reported Her for a Lesson on Race. Can She Trust Them Again?*, WASH. POST (Sep. 18, 2023), <https://www.washingtonpost.com/education/2023/09/18/south-carolina-teacher-ta-nehisi-coates-racism-lesson/> [https://perma.cc/GA7C-XJX3].

⁴²¹ *Id.*

⁴²² See, e.g., Emilee Speck, *Florida Bans Critical Race Theory Education but Most Central Florida School Districts Don't Teach It*, NEWS6 (June 10, 2021, at 18:55 ET), <https://www.click-orlando.com/news/local/2021/06/10/florida-bans-critical-race-theory-but-most-central-florida-school-districts-dont-teach-it/> [https://perma.cc/A3LJ-X6V5] (indicating the district has no “curriculum related to Black Lives Matter, critical race theory, or social justice”).

⁴²³ John Kennedy, *DeSantis Signs into Law 'Stop WOKE Act' to Restrict Race Discussions in Florida*, TALLAHASSEE DEMOCRAT (Apr. 22, 2022, at 18:11 ET), <https://www.tallahassee.com/story/news/politics/2022/04/22/florida-governor-desantis-stop-woke-act-race-bill-law-sign-discussions-republicans/7403239001/> [https://perma.cc/Y5L7-D7YC].

⁴²⁴ Adam Laats, *Perspective: The Supreme Court Has Opened a Dangerous Door*, in BERKSHIRE & SCHNEIDER, *supra* note 128, at 67–68.

This entrenching effort was more obvious when legislators sought not just to control the curriculum but to punish those who diverged from it. In the past, state laws and regulations routinely required schools to cover certain materials and ideas.⁴²⁵ But those laws and regulations, until now, did not explicitly exclude content and ideas or dictate a particular perspective.⁴²⁶ Nor did states impose sanctions or penalties on teachers who explored ideas outside of the required curriculum.⁴²⁷ Threats to fine, terminate, and strip teachers of their licenses for instructional missteps are highly unusual,⁴²⁸ suggesting that the objective is not simply to set the state curriculum, focus on particular facts, or share the merits of a particular perspective in the hope that students might accept it. Rather, the goal is to intimidate and dominate those with different perspectives, institutionally capture public education, and thereby entrench a state-level majority's narrow perspective.⁴²⁹

An anti-entrenchment principle would not favor any particular view. It should limit curricula that insist that the United States is entirely corrupt or actively exclude any perspectives to the contrary just as it should preclude anti-CRT legislation. Thus, the primary flaw in anti-CRT legislation is not that it finds fault in CRT, but that it excludes CRT and CRT-adjacent ideas from the debate and thereby entrenches a particular view. In contrast, educational content that critiques the status quo from the perspective of the oppressed invites students to engage in critical analysis rather than eliminate its possibility. Education content that goes further, even if in the name of justice, would raise an entrenchment problem.

In sum, the Supreme Court's initial prohibition on schools imposing orthodoxy has subsequently been outweighed by deference toward

⁴²⁵ See, e.g., S.C. DEP'T OF EDUC., SOUTH CAROLINA SOCIAL STUDIES COLLEGE- AND CAREER-READY STANDARDS 1–3 (2019), <https://ed.sc.gov/instruction/standards/social-studies/standards/2019-south-carolina-social-studies-college-and-career-ready-standards/> [<https://perma.cc/QZY2-EHXZ>].

⁴²⁶ See, e.g., *id.* at 28–29 (speaking about exploration, investigation, and affording teachers “flexibility” in their approach).

⁴²⁷ The closest analogy—that of forcing teachers to disavow communism or lose their job—was declared unconstitutional. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

⁴²⁸ See, e.g., Haley Yamada, *Teachers in New Hampshire Face New Legal Threats for Teaching So-Called ‘Divisive Concepts’ on Race: ‘It’s Psychological Warfare,’* ABC NEWS (Nov. 16, 2021, at 19:45 ET), <https://abcnews.go.com/US/teachers-hampshire-face-legal-threats-teaching-called-divisive/story?id=81213142> [<https://perma.cc/K677-3FUA>]; Theodore R. Johnson, Emelia Gold & Ashley Zhao, *How Anti-Critical Race Theory Bills Are Taking Aim at Teachers*, FIFTYTHREEEIGHT (May 9, 2022, at 06:00 ET), <https://fivethirtyeight.com/features/how-anti-critical-race-theory-bills-are-taking-aim-at-teachers/> [<https://perma.cc/3AUA-L96F>] (noting that “common punishments include” lawsuits “against a teacher or school district . . . and the termination of a teacher accused of promoting critical race theory”).

⁴²⁹ See Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused, and Self-Censoring*, WASH. POST (Feb. 14, 2022), <https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/> [<https://perma.cc/6X53-KUM8>] (teachers discussing that this type of law results in them narrowing content to please the legislative majority).

schools in inculcating the values of democracy. State legislatures are abusing that deference, and the First Amendment requires a neutral principle to limit this abuse. That neutral principle lies in the essential function and role of public education, which should preclude anticivic, anti-information, antiliberty, intentionally divisive, and tyrannical behavior. Legislation that limits curricula routinely transgresses these principles.

CONCLUSION

After expanding and reinforcing democracy for two centuries, public education has fallen victim to the tactics that autocratic movements have used to accrue power across the globe. Absent a broader civic awakening or judicial intervention, public education policy may hasten the pace of democratic erosion rather than cure it. Some aspects of this erosion are beyond courts' purview, but one is not: state officials, high and low, dictating what ideas shall be orthodox.⁴³⁰

The question is whether courts will appreciate—rather than trivialize—the problem and summon the courage to defend the education that a republican form of government demands. Chief Justice Roberts was correct in his recent assessment that “we have come to take democracy” and education’s role in it “for granted.”⁴³¹ But by “we,” he should have also included the Supreme Court, which has come to excuse the type of behavior that it once warned would be the downfall of democracy. Let us only hope that when future jurists reflect on this moment, they do not say that we also failed to take democratic erosion seriously.

⁴³⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁴³¹ ROBERTS, *supra* note 5, at 2.