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Social Justice Education, Academic Freedom, and the First Amendment

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Abstract

Academic freedom provides an anchor for the fundamental values of American democracy. It embodies the basic principle that freedom of knowledge for educational institutions, faculty, and students is essential to the progress of modern society through the discovery of truth and development of free and informed citizens. Academic freedom is a necessary feature of the cherished rights to freedom of thought and expression protected by the First Amendment. It is a logical extension of the constitutional recognition of freedom of thought, analysis, and debate within the context of higher education. The courts have recognized academic freedom as a basic right of intellectual inquiry and expression that enables the academic community to examine the veracity of ideas, facts, and theories. The university classroom serves as an open marketplace for the discovery of the most fruitful and truthful ideas. The constitutional right to academic freedom allows colleges and professors to decide for themselves who may teach, what subjects should be taught, how courses should be taught, and what scholarship should be pursued. The recent passage of content-based laws banning the teaching of topics related to race and gender violates the First Amendment by using political orthodoxy to undermine the intellectually honest search for knowledge and development of democratic citizenship.

Academic freedom is one of the crown jewels of American democracy. It is a deeply rooted philosophical, intellectual, and constitutional tradition, reflecting the moral conviction that freedom of knowledge for academic institutions, professors, and students is essential for discovering the truth and developing free and informed citizens. The core value of academic freedom protects the autonomy of professors to teach and conduct research within their fields of study, while protecting the freedom of students to learn within the institutional context of higher education. An important aspect of this concept involves the autonomy of colleges and universities to carry out all aspects of their educational mission (AAUP 2015). It embraces the right of the faculty while working with academic administrators to decide what and how to teach, along with what scholarly research and creative activities to pursue. Naturally, the faculty are required to practice what they preach by extending to their own students the right to receive, learn, and study meaningful information. Freedom of inquiry and expression are necessary to provide for the

educational pursuit of knowledge, along with the development of social attitudes and critical thinking essential for producing virtuous citizens. The academic community has to be free to teach students how to responsibly make political decisions for the common good, while still according equal concern and respect to the liberty, equality, and justice of every individual (Dworkin 1996, 244–60). Of course, there are limits to the protection of academic freedom. It is not a license to teach, analyze, and research whatever the members of the higher education community desire. There is no protection for academic incompetence, misconduct, or fraud. Instead, the educational community has a professional responsibility to cultivate an intellectually honest learning environment devoted to freedom of inquiry, critical analysis, and vigorous debate. After all, the primary mission of higher education is to facilitate the discovery of the current state of knowledge through the free exchange of all reasonable ideas, theories, and facts. As such, the right to academic freedom is intimately linked to the political philosophy and constitutional law of the United States. It recognizes the fundamental need to protect freedom of thought and expression within higher education, tempered by the academic commitment to intellectual honesty and civil discourse.

One of the major precedents recognizing the importance of academic freedom was *Keyishian v. Board of Regents* (1967). This decision originated from the enforcement of New York's infamous Fienberg statute, which authorized the State Board of Regents to require professors and other public employees to sign a loyalty oath declaring that they were not members of the Communist Party. Several faculty and staff were dismissed from the State University of New York at Buffalo for refusing to sign the loyalty oaths.[1] The United States Supreme Court overruled an earlier case and struck down the Fienberg Law. Writing for the majority, Justice Brennan held that the loyalty oath requirement violated the vagueness and overbreadth doctrines of the First Amendment. Justice Brennan strongly defended the value of protecting free expression and academic freedom from arbitrary government interference regarding loyalty oaths. He pointed out that "our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[2] He then argued that "the vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas, which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." Justice Brennan made clear that academic freedom is an important right protected by the First Amendment. It prohibits the state to pass laws imposing orthodoxy over teaching and learning. He understood that the faithful protection of academic freedom is

[1] Keyishian v. Board of Regents, 385 U.S. 589 (1967). See also Wieman v. Updegraff, 344 U.S. 183 (1952).
[2] *Keyishian*, 385 U.S. 603. See also Sweezy v. New Hampshire, 354 U.S. 234 (1957), majority opinion.

necessary for the education community to discover the truth and produce virtuous leaders, ones capable of rising above political prejudices and respecting different viewpoints. The *Keyishian* decision firmly established that the principle of academic freedom is worthy of special constitutional protection from state efforts to interfere with the intellectual activities of higher education.

In recent years, however, the states have again interfered with academic freedom by purging social justice education from public schools and colleges. Many states have passed laws prohibiting the teaching of race- and gender-related topics, particularly through the lens of critical race and gender theory (CRT and CGT). These critical schools of thought argue that racial and gender discrimination are baked into the history of American society and the legal system, enabling the law to treat minorities and women unfairly. They insist that the lingering effects of past discrimination are present today, requiring remedial measures to be taken to ameliorate the disadvantages faced by marginalized persons. Ironically, CRT and CGT are simply another method of inquiry, rarely taught by public primary and secondary schools. When they are taught, it is typically in law or graduate school. The critics of these academic theories claim that social justice education is being used to force the students to accept certain tenets of critical race and gender theory. But there has only been minimal anecdotal evidence presented to substantiate these exaggerated claims. Once the political rhetoric is pushed aside, the primary motivation for regulating the content of social justice education is the momentary distaste and discomfort of the political majority. Several of the new state statutes forbid teaching ideas that discuss the past historical lessons of racism and sexism, along with instruction suggesting that the repercussions of past discrimination remain present today.[3] The primary impetus behind making social justice education the modern-day bogeyman is the popular animosity of the politically powerful. This same motivation led to governmental interference with the Marxist teachings and writings of university professors during the 1950s and 1960s. Indeed, the opponents of critical race theory often describe its ideas as an outgrowth of Marxism. They want to ban academic discussions about race as a social construct or how laws and legal institutions contribute to systemic racism. At the core of the cultural war against social justice education is the idea that individuals should not be criticized for their particular advantages or for the disadvantages of marginalized groups. It is about the dominant culture wanting to whitewash their natural feelings of embarrassment and sense of personal responsibility to take steps to rectify the lingering effects of past injustices.

Certainly academic freedom protects professors teaching and students learning about the historical mistreatment of marginalized persons. America has a deplorable past of racism and sexism, along with discrimination against religious minorities, immigrants, and persons with

[3] So far twenty-six states have considered legislation to limit how and whether the impact of racism can be taught, with eight states taking legislative or administrative action to prohibit or curtail the teaching of CRT and similar concepts.

different sexual orientations and identities. An example is the segregationist history of the Jim Crow era. The racist attitudes of a dominant white culture became deeply embedded within the law despite the Civil War bringing an end to slavery. Much of American life was segregated by race to stamp an official badge of inferiority on minorities. The Supreme Court itself added judicial insult to statutory injury by upholding state segregation laws under the facade of the separate-but-equal doctrine.[4] It took fifty-eight years for the Supreme Court to recognize that racial segregation within the public schools was inherently unequal, depriving minority students of the equal protection of the law guaranteed under the Constitution. This ominous past of the United States needs to be taught, studied, and learned to prevent history from ever repeating itself. In the immortal words of Justice Oliver Wendell Holmes, "A page of history is worth a volume of logic."[5] The very future of American democracy depends on learning from past mistakes. The purpose of social justice education is to analyze past forms of de jure and de facto discrimination against oppressed groups, as well as to find meaningful ways to correct past injustices and their lingering effects. It is also important to teach about the progress made by the United States toward more fully realizing the constitutional values of democracy. Clearly there is a lot more to be done to fulfill the promise of liberty, equality, and justice for all people. It is a work in progress. Most Americans are more empathetic and eager to stand up to racism, sexism, and other injustices than ever before. There simply is no need to blame, shame, or coerce students to endorse certain ideas because the discriminatory proof is in the historical pudding. To be sure, the state has a compelling reason to educate the citizens about the mistreatment of minorities and the dangers of a tyranny of the majority. It is the responsibility of higher education to teach students about the history of discrimination to prevent future recurrences and find ways to remedy the ongoing effects of past injustices.

The First Amendment broadly protects freedom of inquiry and free expression from government regulation absent a legitimate and overriding interest of the highest order. The constitutional protection of these preferred freedoms imposes a stricter judicial standard of scrutiny over government actions. Generally speaking, the state may not interfere with First Amendment rights unless the infringing action serves a compelling governmental interest by narrowly tailored means. The law is further required to be content-neutral with regard to the subject matter of the expression, particularly for speech within a public forum and on public property traditionally available for expressive activities.[6] A state interest is compelling and overriding when necessary to maintain the public safety, health, and welfare. Of course, the protection of the rights of members of the academic community is an important government interest.[7] Other legitimate state interests may include concerns about academic mission and

[4] Plessy v. Ferguson, 163 U.S. 537 (1896). But compare Brown v. Board of Education, 347 U.S. 483 (1954).
[5] New York Trust Company v. Eisner, 256 U.S. 345, 349 (1921), Justice Holmes opinion.
[6] Rosenberger v. University of Virginia, 515 U.S. 819 (1995).
[7] Buchanan v. Alexander, 919 F.3d 847 (5th Cir. 2019).

educational integrity. No one claims that teaching and learning about critical race or gender theory somehow threatens the rights, safety, or welfare of others. No rational argument has been made that social justice education is intellectually dishonest according to the standards of the academic community. The only argument remotely connected to any legitimate state interest has involved the possibility of educators forcing their students to endorse the tenets of CRT and CGT. But the right to academic freedom cannot be extinguished or restricted based on the mere chance that some professors will indoctrinate their students. In addition, the First Amendment already forbids state universities and their faculty from compelling students to affirm political, social, or economic ideas. Many of these new laws prohibit the mere teaching of social justice by silencing any discussion about topics such as systemic oppression, white privilege, personal responsibility, and remedial measures. Even the laws masquerading as targeting compulsory instruction selectively ban the teaching of certain concepts of critical race and gender theory. If the states were genuinely concerned about indoctrination, then their new laws would target any and all forms of coercive instruction regardless of what is being taught. There simply is no compelling need to single out and forbid teaching about racism or sexism when the First Amendment already prohibits the states from compelling students to pledge their allegiance to any political orthodoxy.[8]

Equally problematic, the recent statutory efforts to curtail social justice education are content-based regulations discriminating against certain viewpoints.[9] The First Amendment requires government to remain neutral toward the individual expression of ideas. The state is denied the authority to regulate expression because of the content of its message and subject matter. A law drawing distinctions based on the message of the speaker is treated as content-biased and subject to strict scrutiny. Statutes prohibiting the teaching of social justice issues are content-based regulations, while laws banning the teaching of particular tenets of critical race theory constitute viewpoint discrimination. The law discriminates against viewpoints by regulating expression based not only on its content, but specifically on the underlying views of the message. Many of these new laws go beyond limiting expression based on the subject matter of social justice education. They single out the teaching of a particular perspective by selecting the tenets of critical race and gender theory for a special prohibition. These statutes constitute a particularly odious form of content-based regulation, discriminating against one disfavored academic viewpoint on the public property and within the public forum of higher education. They selectively target for suppression teaching about the underlying premises of critical race and gender theory. These content-biased laws suffer from the problem of being underinclusive by outlawing a specific academic view, rather than merely banning coercive instruction regardless

[8] West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).
[9] Pernell v. Florida Board of Governors, case no. 4:22cv304-MW/MAF (N.D. Florida, 2022).

of its subject matter. It is reminiscent of George Orwell's novel *1984*.[10] The selective state persecution of the tenets of CRT and CGT reveals that the Thought Police are attempting to control the free marketplace of ideas by suppressing a particular academic perspective. The Constitution stands against an omnipresent police state characterized by the Ministers of Truth insisting on historical denialism when discussing subjects of racism and sexism. It protects against the government's use of surveillance and censorship of the telltale signs of independent thought. Such viewpoint-based discrimination is repugnant to the First Amendment because Big Brother is taking sides, trying to distort social justice education by silencing a particular perspective. It is tantamount to state indoctrination by elimination.[11]

Additionally, the strict scrutiny test requires government action interfering with First Amendment rights to use the most narrowly tailored and least drastic means. It requires state regulations to be narrowly written to impose as few restrictions as possible on the exercise of constitutional rights. The government must use the least drastic means to avoid placing more restrictions on freedom of expression than is absolutely necessary to advance its compelling interest. The principle of narrow tailoring is closely connected to the overbreadth doctrine of the First Amendment. It protects against laws that sweep too broadly and inhibit protected as well as unprotected expression. Certainly the state interest in preventing coercive instruction is a compelling concern. But the means used to carry out this government interest may not be overly broad by denying rights protected by the First Amendment. It raises the classic pig-in-the-parlor problem. The state cannot use the most drastic means available and burn down the house of academic freedom to roast the pig of indoctrination, which has snuck into the parlor of instruction. Many of the new laws purging social justice education are too extreme. Some states have adopted broad prohibitions against teaching about racism and sexism, along with the ongoing repercussions of discrimination against marginalized groups. Instead of banning only the indoctrination of students, these new laws are curtailing free thought and expression inside the classroom. The states have at their fingertips the less onerous alternative of simply banning coercive instruction, rather than broadly limiting discussions on the topics of racism or sexism. The application of overly broad means to censor social justice education imposes more restrictions on the exercise of academic freedom than is absolutely necessary. The First Amendment requires government to avoid passing underinclusive laws targeting the teaching of critical race and gender theory and to refrain from enacting sweeping overinclusive laws forbidding protected forms of instruction. The house of academic freedom protects the rights of professors to teach and students to learn about controversial matters relating to racism and sexism. It cannot constitutionally be burned down by government out of general concerns for combatting possible coercive instruction—something the First Amendment already prohibits.

[10] See, for example, the eight concepts outlawed by the Stop WOKE Act, Fla. Stat. Section 1000.05 (2022).
[11] Similar logic applied to laws banning the teaching of evolution. Epperson v. Arkansas, 393 U.S. 97 (1968).

Given modern constitutional law, the state efforts to ban social justice education are a serious assault on the precious and preferred right to academic freedom. The commitment to freedom of inquiry and expression constitutes a long-standing philosophical, intellectual, and constitutional principle. It reflects the moral conviction that academic freedom is a necessary condition for the intellectual pursuit of authoritative knowledge, along with the formation of free and informed citizens—ones who are capable of making responsible political decisions for the common good, while still respecting the dignity of individuals. The First Amendment treats freedom of thought and free expression as a fundamental right, protecting the activities of the academic community from government orthodoxy. The statutory efforts to censor the content of what can be taught, learned, and studied undermine the autonomy of colleges and universities to fulfill their academic missions. At institutions of higher education, the faculty have a constitutional right to teach and research, while students have a constitutional right to learn and study any intellectually honest ideas, facts, and theories. Academic speakers enjoy a similar constitutional right to use generally available public facilities to promote their own viewpoints, even ideas considered controversial and offensive to public officials. Politically motivated efforts to purge social justice education simply cannot survive strict constitutional scrutiny. The new laws have neither a compelling nor a content-neutral justification. Clearly the states have the authority to forbid universities and professors from forcing their students to affirm or accept the veracity or falsity of ideas. But there has been only sparse anecdotal evidence and sometimes fabricated stories of coerced instruction. Singling out and banning the teaching of racism and sexism constitutes a forbidden content-biased regulation. It is a particularly odious form of content censorship aimed at selectively excluding only certain viewpoints by banning the teaching of the tenets of CRT and CGT. Many of the state laws further use the most drastic means by forbidding instruction about the causes and effects of oppression, instead of banning only the indoctrination or coerced acceptance of ideas. The Constitution forbids the states from broadly denying or curtailing the academic freedom to teach and learn simply to combat the rather remote possibility of educational browbeating.

Even more troublesome, the new state laws regulating social justice education have a chilling effect on the exercise of the First Amendment right to academic freedom. Whether by design or accident, these vague and overly broad statutes function to censor the ability of professors to teach and students to learn about truth, justice, democracy, and other important issues related to the arts, humanities, and sciences. Those most harmed by these laws are the students themselves, who are denied the opportunity to learn, think, grow, and discover what makes life meaningful for themselves and democratic society. Social justice education is an integral part of the academic enterprise to understand the historical roots and ongoing effects of discriminatory treatment. Critical race and gender theories are simply another theoretical framework to advance the academic discovery of the current state of knowledge. The First Amendment carries the torch of academic freedom for professors and students to thoroughly examine all reasonable ideas, facts,

and theories. It lights the way for the discovery of truth and the development of free and informed citizens, capable of making intelligent political choices. The education system teaches the people to respect the integrity of the individual, learning to rise above prejudices and stand up against oppression, inequality, and injustice. One of the pillars of constitutional law is that the popular animus of the governing majority is never a legitimate justification for denying preferred freedoms. Otherwise, the state could deny individual rights anytime the people wanted to legislate their sense of orthodoxy. The right to academic freedom cannot be diminished by the passions of the politically powerful because those who occupy a position to exert pressure on academic institutions might be themselves subverting democracy. Ironically, the state has a compelling justification to teach students about the history of racism and sexism. It is to learn from the past to avoid making similar mistakes and to find equitable ways to remedy the lingering effects of discrimination against certain groups. At the end of the day, the search for authoritative knowledge and the development of democratic citizenship require treating academic freedom as a fundamental right, a preferred position and fixed star within the tradition of American constitutional law.

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