INVITATION ACCEPTED: CHALLENGING ANTI-EDUCATION LAWS AT THE INTERSECTION OF CRITICAL RACE THEORY, ACADEMIC FREEDOM, AND LABOR RIGHTS

By: Simon X. Cao[1]

Introduction

In 1952, Justice Frankfurter opined that "[t]o regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole."[2] According to some state legislators and governors, the "priests of our democracy" evoke hysteria as progenitors of indoctrination.[3] Observers might think that statements like those made by Justice Frankfurter would provide educators insulation against laws restricting valid and necessary topics in history for kindergarten through twelfth grade ("K-12") educators.[4] Unfortunately, the Supreme Court's affirmations for public school educators will not provide educators with the protections they need to educate their students about the reality of our society and the true history of the United States. Instead, educators can find refuge in their unions.

This article contends that solidarity made manifest through collec-

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1 Before earning his J.D. from Penn State Law at University Park, Simon worked as a staff representative for a teachers union in New Mexico for over five and a half years. Simon is grateful to the National Lawyers Guild Review staff for their patience and guidance in making this article a reality. Simon is eternally grateful to his mentors and friends for their unwavering support, as well as his wife and daughter for their love and inspiration.

2 *Wieman v. Updegraff*, 344 U.S. 183, 197 (1952) (Frankfurter, J. concurring).

3 *See* Executive Office of Governor Ron DeSantis, *Governor Desantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations* (press release) (Dec. 15, 2021) https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/ (last accessed Feb. 6, 2022) (stating that "[w]e won't allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other. We also have a responsibility to ensure that parents have the means to vindicate their rights when it comes to enforcing state standards.").

4 *See Epperson v. State of Arkansas*, 393 U.S. 97, 105 (1968) (drawing on *Meyer v. Nebraska*, Justice Fortas opined that the statute in *Meyer* "unconstitutionally interfered with the right of the individual, guaranteed by the Due Process Clause, to engage in any of the common occupations of life and to acquire useful knowledge."); J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*,' 99 Yale L.J. 251, 257 (1989) (stating that "[t]he Court has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning.").

tive bargaining agreements and organizing provides K-12 educators their best chance to fulfill their calling.[5] This article begins by describing some of the legal attacks against educators and instruction on the curricular topic of systemic racism and implicit bias. Next, it critiques the judiciary's failure to protect educators and students through academic freedom. Finally, this article discusses strategies that advocates may use to insulate educators from the worst effects of laws prohibiting instruction on systemic racism and implicit bias, nominally called Critical Race Theory ("CRT").

I. Laws and regulations prohibiting the topic of systemic racism in K-12 schools

Recently, organizations with ties to right-wing political groups have gained notoriety for their protests at school board meetings and for making death threats against school officials for implementing Critical Race Theory in public school curricula.[6] Even though many of these groups have failed to identify CRT when questioned, state politicians have made CRT essential to their election campaigns.[7] Other elected officials use CRT as a rallying cry to buttress support from their core constituency.[8]

Even though educators dispute the existence of CRT in K-12 curricula, the driving force of legislation prohibiting CRT targets curricular

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5 *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (stating "education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare.").

6 Brandy Zadrozny, Ben Collins, *From the Capitol to the City Council: How Extremism in the U.S. has shifted since Jan. 6*, NBC News (Jan. 3, 2022) https://www.nbcnews.com/tech/internet/extremism-us-jan-6-capitol-rcna10731 (last accessed Jan. 3, 2022); Anya Kamenetz, *A Look at the Groups Supporting School Board Protests Nationwide,* National Public Radio (Oct. 21, 2021) https://www.npr.org/2021/10/26/1049078199/a-look-at-the-groups-supporting-school-board-protesters-nationwide (last accessed Jan. 3, 2022).

7 *See* Sen. Rick Scott, *An 11 Point Plan to Rescue America: What Americans Must Do to Save this Country* (2022) https://www.politico.com/f/?id=0000017f-1cf5-d281-a7ff-3ffd5f4a0000 (last accessed Apr. 26, 2022) (announcing that the number one issue under Senator Rick Scott's political platform is to "inspire patriotism and stop teaching the revisionist history of the radical left . . . [and] not indoctrinate children with critical race theory or any other political ideology."); Rep. Jim Banks, Re: Lean into the culture war, Republican Study Committee Memorandum (Jun. 24, 2021) https://www.politico.com/f/?id=0000017a-3f65-d283-a3fb-bf6f99470000 (last accessed Feb. 6, 2022); Chris Cillizza, *This is exactly how dumb our politics have gotten*, CNN Politics (Nov. 4, 2021) https://www.cnn.com/2021/11/02/politics/critical-race-theory-virginia-governor-youngkin-mcauliffe/index.html (last accessed Jan. 3, 2022).

8 *See* Executive Office of Governor Ron DeSantis, *supra* note 2 (introducing legislation that would ban using the 1619 Project and CRT in public schools).

topics such as implicit bias and structural racism.[9] Both implicit bias and structural racism are legitimate phenomena found in society.[10] However, legislation and rules prohibiting CRT's use in public schools circumscribe the breadth and depth of educational opportunities for students on both topics.[11]

In 1940, the American Association of University Professors ("AAUP") released the Statement of Principles on Academic Freedom and Tenure.[12] The statement ultimately published by the AAUP, was the culmination of work that began in 1915 but contained roots dating back to the first prototypical universities in Germany in 19th century.[13] The AAUP and the multitude of institutional signatories to the statement entitled teachers to discuss relevant subjects accurately in their classroom without interference in the pursuit of truth and knowledge.[14] The AAUP declared in 1940 that "[a]cademic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning."[15] Moreover, the AAUP and commentators stated that without providing educators tenure after a probationary period, the promise of academic freedom was essentially hollow.[16] Ultimately, the purpose of academic freedom was to preserve truth and knowledge no matter its popularity. Without the objective of pursuing knowledge and truth, one would be justified in wondering what purpose does education serve if not pursuing knowledge and truth.

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9 Rashawn Ray & Alexandra Gibbons, *Why are states banning Critical Race Theory?*, Brookings Institution (November 2021) https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/ (last accessed Feb. 6, 2022) (explaining that despite the reality that K-12 educators do not teach CRT, the efforts of some state legislatures are designed to roll-back social progress and chill educator efforts to discuss systemic racism in class).

10 *See* Eva Patterson, Kimberly Thomas-Rapp & Sara Jackson, *The Id, The Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 Conn. L. Rev. 1175, 1186-87 (2008).

11 *See* Ray & Gibbons, *supra* note 8 (relaying that as a professor in post-secondary education, many students are unprepared for class discussions regarding racial inequity).

12 *See* 1940 Statement of Principles on Academic Freedom and Tenure, with 1970 interpretive comments, AAUP (1970) https://www.aaup.org/file/1940%20Statement.pdf (last accessed Sept. 16, 2022).

13 Cary Nelson, No University is an Island: Saving Academic Freedom 1-2 (2010).

14 1940 Statement of Principles on Academic Freedom and Tenure, with 1970 interpretive comments, AAUP at 14 (1970).

15 *Id.*

16 *See* 1940 Statement of Principles on Academic Freedom and Tenure, with 1970 interpretive comments, AAUP at 14-16; Cary Nelson, No University is an Island: Saving Academic Freedom 31-32 (stating that "[y]ou cannot really have either professional authority or academic freedom if you can easily be fired or nonrenewed . . . .").

An example of an education system that does not pursue knowledge and truth, the Florida state legislature and governor enacted a statute proscribing classroom instruction that touches on topics related to systemic racism on April 22, 2022.[17] Under the enacted statute, the state of Florida declares that educators discriminate against students when the educator "espouses, promotes, advances, inculcates, or compels such student . . . to believe . . . [a] person, by virtue of his or her race, color, national origin, or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously."[18] Under the statute, Florida demands that "American history shall be viewed as factual, not as constructed, shall be viewed as knowable, teachable, and testable, and shall be defined as the creation of a new nation based largely on the universal principles stated in the Declaration of Independence."[19]

Before enacting the law proscribing CRT, the state's Board of Education promulgated rules that went further than merely prohibiting CRT in K-12 curricula.[20] Under the rules promulgated by Florida's Board of Education, educators are prohibited from teaching that the United States was founded on principles other than those stated in the Declaration of Independence.[21] Adding to the prohibition of instructing students on the attributes of systemic racism, the new law imposes penalties on educators when classroom discussions depart from the Board of Education's singular historical perspective regarding race and American history.[22]

To that end, failure to comply with the limitations on curricula in Florida public schools could result in the revocation of the educator's license or discharge of employment.[23] Under Florida law, the Florida Education Practices Commission ("EPC") adjudicates charges prosecuted by the EPC Commissioner for failing to comply with the Florida Code of Conduct.[24] The Commissioner of the EPC is empowered to investigate charges from anyone alleging educator misconduct under the Code.[25] Not only may

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17 Fla. Stat. § 1003.42(2)(h) (West 2022); Fla. Stat. § 1000.05(4) (West 2022) (taking effect Jul. 1, 2022, approximately one month before K-12 classes typically begin).

18 Fla. Stat. § 1000.05(4)(a)(2) (West 2022).

19 Fla. Stat. § 1003.42(2)(f) (West 2022).

20 Fla. Admin. Code Ann. r. 6A-1.094124(3)(b) (2021).

21 *Id.*

22 Fla. Stat. § 1012.22(1)(f) (2016). (providing school boards with the power to promulgate rules and discipine educators within their jurisdiction); Fla. Stat. § 1012.795(1)(j) (2018) (providing penalties, including the revocation of a teaching license for violating the Principles of Professional Conduct for the Education Profession ("Florida Code of Conduct") under Fla. Admin. Code Ann. r. 6A-10.081 (2016)).

23 Fla. Admin. Code Ann. r. 6A-10.08.

24 Fla. Admin. Code Ann. r. 6B-11.007(1).

25 Fla. Stat. § 1012.796(1)(a) (2002).

members of the public submit complaints against educators for allegedly violating the Code, but educators are also duty-bound to report violations.[26] The Code of Conduct states that an educator may receive a penalty ranging from a reprimand to permanent revocation of license for "unreasonably deny[ing] a student access to diverse points of view."[27] Another provision forbids educators from "intentionally suppress[ing] or distort[ing] subject matter relevant to a student's academic program."[28] In addition to the rule proscribing curricula touching on systemic racism, the rule also commands educators in Florida to engage in the "[e]fficient and faithful teaching of the required topics . . . ."[29] At bottom, adverse actions against an educator's license require the EPC Commissioner to prove the educator violated the Florida Code of Conduct by clear and convincing evidence.[30]

In addition to sanctioning an educator's license by the EPC, local school boards may impose discipline on educators using a lower quantum of proof through the preponderance of the evidence standard.[31] Because each local school board in Florida must "incorporate the Next Generation Sunshine State Standards as appropriate for subject areas contained . . . " in the school curriculum, educators must adhere to the amended rule proscribing topics concerning structural or systemic racism and implicit bias.[32] Failing to comply with the promulgated rule in Florida could lead to an adverse employment action for inefficiency, as defined by the Florida Board of Education.[33] Because local school board officials in Florida have a lower quantum of proof for imposing discipline, educators in Florida are more likely to suffer adverse employment actions at the hands of their local school board

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26 Fla. Stat. § 1012.795(1)(j) (2021); *See* Fla. Admin. Code Ann. r. 6A-10.081(c)(14).

27 Fla. Admin. Code Ann. r. 6A-10.081(2)(a)(3); Fla. Admin. Code Ann. r. 6B-11.007(2)(j)(2) (2016) (cross-referenced with the associated level of penalty).

28 Fla. Admin. Code Ann. r. 6A-10.081(2)(a)(4); Fla. Admin. Code Ann. r. 6B-11.007(2)(j)(4) (imposing a penalty of at least a reprimand against an educator's license for violating this provision).

29 Fla. Admin. Code Ann. r. 6A-1.094124(3)(a) & (c) (2021) (The FLBOE rule defines "efficient and faithful" teaching to include "not shar[ing educator's] personal views or attempt[ing] to indoctrinate or persuade students to a particular point of view that is inconsistent with the Next Generation Sunshine State Standards and the Benchmarks for Excellent Student Thinking (B.E.S.T.) Standards."); Fla. Stat. § 1003.42(2) (enabling the FLBOE to promulgate required teaching standards for educators); Fla. Admin. Code Ann. r. 6A-1.094124(3)(c) (2021).

30 *See Ferris v. Turlington*, 510 So. 2d 292, 294-95 (Fla. 1987) (determining that "the revocation of a professional license is of sufficient gravity and magnitude to warrant a standard of proof greater than a mere preponderance of the evidence.").

31 Fla. Stat. § 120.57(1)(j).

32 Fla. Admin. Code Ann. r. 6A-1.09401(3).

33 Fla. Admin. Code Ann. r. 6A-1.094124(3)(c) (2021).

rather than sanctions against their license.

Dispelling any doubt about the breadth and scope of the regulations, Florida recently rejected twenty-eight math textbooks.[34] While Florida's Board of Education officials have only revealed that twenty-eight of the proposed math textbooks "'contain[] prohibited topics,' from social-emotional learning or critical race theory."[35] One excerpt from a rejected math textbook included a graph that measured implicit biases from an implicit association test.[36] Another included a lesson about building student proficiency in empathy and social awareness.[37] The examples provided by the Florida Board of Education may provide indicia for the breadth of interpretation the agency is likely to use when regulating K-12 curricula and educator pedagogical practices.

In addition to Florida, other states also seek to tie the hands of educators who would otherwise instruct students on the topic of systemic racism and implicit bias. For context, the 1619 Project is a collection of works by preeminent scholars, published by the New York Times Magazine, marking the 400th anniversary of the first ship carrying enslaved Africans to the colonies.[38] On September 17, 2021, Texas prohibited schools and educators from "requir[ing] an understanding of the 1619 Project."[39] In addition to restricting a school's required curriculum, Texas's law precludes educators from "making part of a course the concept that: . . . an individual, by virtue of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously . . . ."[40]

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34 *See* Florida Dept. of Educaiton, *Florida Rejects Publisher's Attempts to Indoctrinate Students* (press release) (Apr. 18, 2022) https://www.fldoe.org/newsroom/latest-news/florida-rejects-publishers-attempts-to-indoctrinate-students.stml (last accessed Sept. 18, 2022); Dana Goldstein & Stephanie Saul, *A Look Inside the Textbooks that Florida Rejected*, New York Times (Apr. 25, 2022) https://www.nytimes.com/2022/04/22/us/florida-rejected-textbooks.html (last accessed Sept. 18, 2022) (reviewing twenty-one rejected textbooks to reach the conclusion that few rejected textbooks referenced race but used social-emotional learning objectives); Alia Shoaib, *Florida releases samples from math textbooks rejected over references to 'prohibited topics' such as critical race theory*, Business Insider (Apr. 23, 2022) https://www.businessinsider.com/florida-releases-samples-from-rejected-math-textbooks-with-prohibited-topics-2022-4 (last accessed Sept. 18, 2022); *See* Dana Goldstein, Florida Rejects Math Textbooks, Citing 'Prohibited Topics,' New York Times (Apr. 18, 2022) https://www.nytimes.com/2022/04/18/us/florida-math-textbooks-critical-race-theory.html (last accessed Sept. 18, 2022).

35 Goldstein & Saul, *supra* note 33.

36 Shoaib, *supra* note 33.

37 *Id*.

38 The 1619 Project, New York Times Magazine (2019) https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html (last accessed Sept. 18, 2022).

39 Tex. Educ. Code Ann. § 28.0022(4)(C) (West 2021).

40 Tex. Educ. Code Ann. § 28.0022(4)(A)(ii) (West 2021).

Like the employment penalties imposed in Florida, local school boards in Texas may impose discipline for good cause against educators who teach implicit bias in violation of the statute.[41] The Texas Supreme Court determined that when a school district presents evidence that an educator violated a local policy that implements state law, the school district has met its burden of proving that discipline for good cause.[42]

As another example, in July of 2021, New Hampshire enacted legislation prohibiting educators from using curricula that includes implicit bias and systemic racism.[43] Unlike Texas and Florida, the New Hampshire legislature determined that explicating concepts touching on systemic racism in K-12 public schools is a *per se* violation of the New Hampshire educator's code of conduct and may result in adverse actions against an educator's license.[44] To initiate the process of adverse action against an educator in New Hampshire, any person may file a complaint against an educator with the state's Commission for Human Rights.[45] In addition, members of the public are free to pursue a private right of action to enforce the provision.[46] Public post-secondary educational institutions are exempt from the New Hampshire law proscribing attributes of CRT.[47]

In a race to the bottom, many states enacting laws proscribing curricula on implicit bias and systemic racism use similar language in their regulations.[48] Each of these laws operates under the guise of curbing racism in public schools. The reality is that far right-wing ideologues are using anti-CRT legislation as a call to arms for their core constituency.[49]

II. The judiciary's failure to protect academic freedom in K-12 schools

Even though anti-CRT legislation is a recent phenomenon, the motivation for proscribing curricular topics such as systemic racism and im-

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41 Tex. Educ. Code Ann. § 28.0022(f) (West 2021); Tex. Educ. Code Ann. § 21.156(a) (West 2011) (enabling local education authorities to impose discipline for good cause meaning "the failure to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts in this state.").

42 *N. E. Indep. Sch. Dist. v. Riou*, 598 S.W.3d 243, 246 (Tex. 2020).

43 N.H. Rev. Stat. Ann. § 193:40 (2021) (titled the "Prohibition on Teaching Discrimination" statute).

44 N.H. Rev. Stat. Ann. § 193:40(IV).

45 N.H. Rev. Stat. Ann. § 193:40(III); *See* N.H. Rev. Stat. Ann. § 193:38 (2021).

46 N.H. Rev. Stat. Ann. § 193:40(III).

47 N.H. Rev. Stat. Ann. § 354-A:29(III) (2021).

48 *Compare* Tex. Educ. Code Ann. § 28.0022(4)(A)(i)-(viii) *with* Okla. Stat. tit. 70, § 24-157(B)(1)(a)-(f) (2021) *and* Tenn. Code Ann. § 49-6-1019(A)(1)-(14) (West 2021).

49 *See* Rep. Jim Banks, *RE: Lean into the culture war*, Republican Study Committee (memorandum) (Jun. 24, 2021) https://www.politico.com/f/?id=0000017a-3f65-d283-a3fb-bf6f99470000 (last accessed Feb. 6, 2022).

plicit bias is rooted in a decades-long program to roll-back social progress.[50] Indeed, this program to reverse the gains made at the zenith of the Supreme Court's jurisprudence on academic freedom in K-12 public education was in response to social movements that were creating a more equitable society.[51] In the context of social progress manifesting in Supreme Court decisions, examples of the gains made include the Supreme Court's disposition in *Epperson v. State of Arkansas*, where the Court decided that a law proscribing the existence of evolution violated the establishment clause of the First Amendment.[52] Another example where the Court progressed was in *Keyishian v. Bd. of Regents of Univ. of N.Y.*, where the Court determined that K-12 educators may not be discharged from employment when vague laws prohibit subversive advocacy and teaching.[53] Perhaps most famously, the Court's disposition in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, where the Court stated that "[i]t can hardly be argued that either students or *teachers* shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[54]

However, since the Court's high-water mark in the 1970's, the judiciary has refused to support academic freedom, and in many instances has gone in the opposite direction. One example of the Supreme Court's double speak concerning academic freedom is Justice Frankfurter's concurrence in *Sweezy v. State of New Hampshire*, where only five years after declaring that teachers were "priests of our democracy," Justice Frankfurter implied that academic freedom belonged to the employer of professors.[55] Taking Justice Frankfurter's hints, lower court decisions such as *Urofsky v. Gilmore*, have stated "that to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in

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50 *Cf.* Mark Kende, *Constitutional Law Symposium: The Role of Courts in Social Change*, 54 Drake L. Rev. 791, 791-93 (2006); Lewis F. Powell, Jr., *Powell Memorandum: Attack on the American Free Enterprise System*, Washington & Lee Univ. School of Law Scholarly Commons 1, at 26, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo (Aug. 23, 1971) (decrying that with "an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic, and political change[]" to reverse the gains made by "leftists" through social movements) (last accessed Aug. 26, 2022).

51 *See* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R. Civ. Lib. L. Rev. 373, 373-74 (2007); Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L.J. 1515, 1534-37 (1991).

52 393 U.S. at 109.

53 385 U.S. 589, 604 (1967).

54 393 U.S. 503, 506 (1969) (emphasis added).

55 354 U.S. 234, 263 (1957) (Frankfurter J., concurring).

individual professors . . . ."[56] Similarly, the Supreme Court's indifference to academic freedom led only to a plurality decision in *Island Trees Union Free Sch. Dist. v. Pico*, where the Court determined that school boards could not remove books from a school library because they were believed to be "anti-American."[57]

A. The judiciary's failure to materially protect educators and the mission of public education

In the 1980s, the Supreme Court began rolling back speech protections for public employees.[58] Starting with *Pickering v. Bd. of Ed. of Township High School Dist.*, the Court determined that when a public employee speaks as a citizen, courts must balance the interests of the public employer's need to promote efficiency with the public employee's interest in speaking as a citizen.[59] Later, in *Connick v. Myers*, the Court held that before reaching a balancing analysis under *Pickering*, a court must determine whether the public employee's speech touches on matters of public concern.[60] Finally, in *Garcetti v. Ceballos*, the Supreme Court held that irrespective of whether a public employee speaks on matters of public concern, when their speech is pursuant to their official duties, public employers may lawfully sanction them for its content.[61] All told, in the absence of a law, regulation, or contractual provision to the contrary, public employees who speak pursuant to their duties will not enjoy protections under the First Amendment.[62] Cases such as *Connick* and *Garcetti* continue to play a prominent role in diminishing the speech rights of public employees, including public school educators.[63]

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56 216 F.3d 401, 410 (4th Cir. 2000).

57 457 U.S. 853, 857, 69 (1982).

58 *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) *Connick v. Myers*, 461 U.S. 138, 146-47 (1983).

59 *Pickering v. Bd. of Ed. of Township High School Dist. 205*, 391 U.S. 563, 568 (1968).

60 *Connick*, 461 U.S. at 146 (drawing from *Pickering* that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

61 *Garcetti*, 547 U.S. at 424.

62 *Connick*, 461 U.S. at 146 (opining that "[p]erhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.").

63 *Evans-Marshall v. Bd. of Ed. of Tipp City Exempted Village Sch. Dist.,* 624 F.3d 332, 334 (6th Cir. 2010) (applying *Garcetti* to secondary school educators even when they make curricular decisions); *Mayer v. Monroe Cnty. Comm. School Corp*., 474 F.3d 477 (7th Cir. 2007) (affirming summary judgment in favor of public-school employer when a

During the downward trend in protections for educators' speech, Justice Souter identified the potential peril the Court's disposition in *Garcetti* could have on academic freedom.[64] Despite Justice Souter's concern for academic freedom, the Court has failed to match their rhetoric in support of educators[65] with a limiting principle on a K-12 public school employer's ability to sanction educators for speech related to teaching.

B. Lower court failures to protect academic freedom in K-12 education

In contrast to the positive affirmations announced by individual justices,[66] the Supreme Court has granted significant deference to public school employers to determine a school's curriculum.[67] Following suit, some appellate courts have determined that K-12 educators who deviate from their local school board's curricular choices will not find refuge under the First Amendment.[68] For example, the Sixth Circuit Court of Appeals affirmed summary judgment against a high school English teacher who initially prepared a lesson for students to investigate the censorship of specific books and later used the book Siddhartha to discuss personal growth.[69] Objecting to the lesson, several parents attended a local school board meeting to voice their concerns over sexual themes and language expressed in the book.[70]

In another instance, the same teacher asked a colleague to make copies of previous student writing samples that included a story of a rape, the desecration of a church, and the murder of a priest for use in a creative writing assignment.[71] Before the English teacher could use these writing

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teacher shared her support for demonstrators protesting the war in Iraq).

64 *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) (stating that "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to ... official duties.'").

65 *Wieman v. Updegraff,* 344 U.S. 183, 197 (1952) (Frankfurter, J., concurring).

66 *Id.*

67 *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 271, 273-73, n.7 (1988) (while the Court couched their decision in terms of an "educators" control over curricular speech, each case cited by the Court in *Hazelwood*'s footnote, including the question presented in *Hazelwood*, were restrictions originating from school officials imbued with the ability to discipline educators as opposed to classroom teachers); *Epperson*, 393 U.S. at 107.

68 *Evans-Marshall*, 624 F.3d at 334; *Mayer*, 474 F.3d at 478-480; *but see Meriwether v. Hartop*, 992 F.3d 492, 505, n.1 (6th Cir. 2021) (distinguishing *Evans-Marshall* from the facts here because *Evans-Marshall* concerned a secondary school teacher and this case involved a college professor refusing to use a student's preferred pronouns).

69 *Evans-Marshall*, 624 F.3d at 335.

70 *Id.*

71 *Id.* at 335-36.

samples, the principal discovered her plan.[72] The principal shouted at the English teacher and brought up the previous controversy where she tried to use Siddhartha.[73] Still, the teacher complied with the principal's demand not to use the student writing samples.[74] Finally, the principal objected to the English teacher's final exam and the use of a student self-evaluation.[75] In response, the teacher requested a model final exam for students so she could meet her principal's expectations.[76] Later in the school year, the principal criticized the English teacher's curricular choices, demeanor, and attitude.[77] Subsequently, the English teacher's employment contract was terminated.[78] After appealing to the school board and filing a grievance, the school board upheld the determination to terminate the teacher's contract.[79]

After pursuing her administrative remedies, the English teacher filed suit alleging her First Amendment rights were abridged when her employer retaliated against her for making curricular and pedagogical choices.[80] The Southern District Court of Ohio granted the employer's motion for summary judgment.[81] On appeal, the Sixth Circuit Court of Appeals affirmed the lower court's grant of summary judgment against the employee.[82] The Sixth Circuit reasoned that *Garcetti* applied to K-12 educators and exempted only professors at post-secondary educational institutions.[83] Because the English teacher's curricular choices were made pursuant to her duties, she was not insulated from sanctions under the First Amendment even though her curricular choices constituted speech for First Amendment purposes.[84]

Like the Sixth Circuit, the Seventh Circuit applies *Garcetti* to K-12 public school educators.[85] In the Seventh Circuit, once an educator executes an employment contract, the school district employs their speech instead of

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72 *Id.* at 336.
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.* (in response to the English teacher's request, the principal called her a "smart—" and told her that he did not like her curricular choices).
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*
81 *See id.* (the District Court and Sixth Circuit Court of Appeals initially denied the employer's motion to dismiss before ultimately granting the employer's motion for summary judgment).
82 *Id.* at 343-44.
83 *Id.* at 343.
84 *Id.* at 338.
85 *Mayer v. Monroe Cnty. Cmty. Sch. Corp.,* 474 F.3d 477, 479 (7th Cir. 2007).

regulating it.[86] For instance, in *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, an elementary school teacher, was asked by a student during a current events lesson whether she participated in demonstrations.[87] The teacher responded that she once honked her car horn in support of anti-war demonstrators protesting the war in Iraq.[88] Parents of some students learned about the teacher's response and complained to school officials leading to the termination of the teacher's contract.[89] Judge Easterbrook of the Seventh Circuit Court of Appeals affirmed the decision for summary judgment against the elementary school teacher.[90] The court reasoned that the rule in *Garcetti* applies to K-12 educators and that when a teacher speaks pursuant to their professional duties, they may not seek shelter under the First Amendment from adverse employment actions.[91] The court opined that when a school district hires a teacher, the school district employs the teacher's speech.[92] In addition, K-12 teachers must adhere to a state-approved curriculum, irrespective of their personal beliefs, because the employer pays the educator's salary to teach only state-approved curricula.[93] The Seventh Circuit also reasoned that, because school boards are elected and likely represent the majority view of their constituency, educators must comply with school board decisions on curricula.[94]

The Sixth and Seventh Circuit Court of Appeals applied *Garcetti* to K-12 educators and limited the availability of protection educators may seek under academic freedom. Instead of providing students and educators the ability to explore educational topics, lower courts have determined that when a school board promulgates curricula for schools, they are engaged in government speech.[95] In turn, school boards may lawfully sanction educators who diverge from conveying government-approved speech.[96]

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86 *Id.* at 479.
87 *Id.* at 478.
88 *Id.*
89 *Id.*
90 *Id.* at 480.
91 *Id.* at 478-79.
92 *Iid.* at 479.
93 *Id.* (citing Webster v. New Lenox Sch. Dist. No. 122*,* 917 F.2d 1004, 1007 (7th Cir. 1990)).
94 *Id.* at 479-80.
95 *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (stating that "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."); *Hazelwood Sch. Dist.,* 484 U.S. at 273; *Evans-Marshall*, 624 F.3d at 340-41; *Mayer,* 474 F.3d at 479; Boring v. Buncombe County Bd. of Ed., 136 F.3d 364, 371 (4th Cir. 1993) (determining that authority over curricular decisions belong to the school and not the teacher).
96 *See Evans-Marshall*, 624 F.3d at 340-41; *Mayer,* 474 F.3d at 479; Ward v. Hickey,

In contrast to the Sixth and Seventh Circuits, the Ninth Circuit extended the *Garcetti* exemption to K-12 public education teachers.[97] In *Demers v. Austin*, the Ninth Circuit reasoned that judges lacked the facility to determine whether disputes in the K-12 and post-secondary education context related to teaching and scholarship or whether they were employment-related.[98] Instead of encroaching into academic debates on school campuses and the special characteristics of educational institutions, the Ninth Circuit exempts public school teachers from analysis under *Garcetti* and applies a *Pickering* balancing.[99]

Like the Ninth Circuit, the Fourth Circuit refrained from applying *Garcetti* to secondary school teachers but defined the curriculum broadly.[100] In *Lee v. York Cnty. Sch. Div.*, a Highschool Spanish teacher in Virginia, posted religious materials on his classroom bulletin board which the school principal subsequently removed, despite the absence of a written rule prohibiting such materials.[101] Because removal of the items related to the school curriculum and resembled an employment dispute, the Fourth Circuit affirmed the grant for summary judgment against the teacher.[102] Although the Fourth Circuit refused to apply *Garcetti*'s "pursuant to official duties" inquiry to the teacher's appeal,[103] the court found that the school lawfully regulated the teacher's curricular speech because the teacher's speech was not a matter of public concern under the *Connick* and *Pickering* standard.[104] The court reasoned that because the removed materials were placed on the bulletin board to impart knowledge and improve student morals, the materials constituted curricular speech.[105] The court further reasoned that because curricular speech bears the school's imprimatur, the school board's prerogative was to determine the appropriate topics for imparting knowledge and morals.[106]

While the Fourth Circuit refrained from applying the *Garcetti* standard in *Lee v. York Cnty. Sch. Div.*, the Fourth Circuit primarily relied

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996 F.2d 448, 452 (1st Cir. 1993) (determining that a public school employer may regulate the classroom speech of teachers if the regulation is reasonably related to pedagogical concerns and the teacher had adequate notice that the specific classroom speech was proscribed).

97 *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014).

98 *Id.* at 413.

99 *Id.*

100 *Lee v. York Cnty. Sch. Div*., 484 F.3d 687, 694, n.11 (4th Cir. 2007).

101 *Id.* at 689-91.

102 *Id.* at 689, 700.

103 *Id.* at 694, n.11.

104 *Id.* at 694 n.11, 700.

105 *Id.* at 699-700.

106 *Id.* at 700 (citing Hazelwood Sch. Dist. v. Kuhlmeier*,* 484 U.S. 260, 273 (1988)).

on the school board's prerogative to determine curriculum as a manifestation of government speech.[107] Anchored in the political consequences of democratic elections, the manifestation of government speech is rarely overturned by the judiciary.[108] In turn, the standard for determining whether speech belongs to the government is (1) "the history of the expression at issue," (2) the public's perception of whether the government or a private person is speaking, and (3) the degree of control the government exercises over the speech.[109] However, the first and second factors used in *Shurtleff v. City of Boston* flow from the degree of control government officials exercise over the putative government speech.[110] As a countervailing force to a government official's control over speech, the Court in *Shurtleff v. City of Boston* opined that "[t]he Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks."[111] Thus, the judiciary invites objecting community members to vote against political actors responsible for decisions that distort the reality of systemic racism through a hegemonic school curriculum.[112] For this invitation, community members and educator unions should accept the challenge.

While organizing for political change, advocates should anticipate arguments that conflate proselytizing and teaching history like the arguments in *Lee v. York Cnty. Sch. Div*.[113] To be sure, plaintiffs like the one in

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107 *Id.* at 699-700.

108 *See Shurtleff v. City of Boston*, 142 S.Ct. 1583, 1589 (2022); *Boring v. Buncombe Cnty. Bd. of Ed*., 136 F.3d 364, 371 (4th Cir. 1998) (stating that "it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.").

109 *Shurtleff*, 142 S.Ct. at 1589.

110 *Shurtleff*, 142 S.Ct. at 1592-93 (opining that after weighing the factors used to determine whether the government is speaking, the City of Boston's lack of control over the putative speech was the determining factor that raising a specific flag was not government speech); *Walker v. Texas Div. Sons of Confederate Veterans Inc*., 576 U.S. 200, 207-08 (2015*); Johanns v. Livestock Marketing Ass'n*., 544 U.S. 550, 563-64 (2005); *Bd. of Regents of Univ. Wisconsin Sys. v. Southworth*, 529 U.S. 217, 235 (2000); *O'Brien v. Village of Lincolnshire*, 955 F.3d 616, 627 (7th Cir. 2020).

111 *Shurtleff*, 142 S.Ct. at 1589.

112 *See Shurtleff*, 142 S.Ct. at 1589; *Southworth*, 529 U.S. at 235 (stating that "[w] hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

113 *Lee*, 484 F.3d at 692-93 (reciting with approval that curricular speech "is nothing more than an execution of a teacher's employment duties.") (*citing* Urofsky v. Gilmore, 216 F.3d 401, 409 (4th Cir. 2000)).

Lee v. York Cnty. Sch. Div. sometimes engage in dubious speech that invites employment penalties, but academic freedom relies on taking risks.[114] Notwithstanding the objective differences between teaching history that includes historically marginalized voices and promoting a single religion in a K-12 classroom, advocates should prepare to confront arguments that conflate the two.

At any rate, teaching topics relating to systemic racism in K-12 settings are not issues confined to "red states."[115] Across the country, once sleepy school board elections have seen a deluge of money from right-wing organizations funding candidates under the banner of "parent's rights."[116] While the Supreme Court has recognized that parents have a fundamental right to raise their children as they wish,[117] these same "parent's rights" groups seek to expand the fundamental right of raising their own children as they wish to include raising other people's children too. Despite the right-wing shift in school board politics and the inherently conservative role played by the judiciary, there are still opportunities for challenging anti-CRT laws and regulations so children may learn the truth about their history.

C. Viability of constitutional challenges to overturn anti-CRT legislation

Even though the application of *Garcetti* to K-12 educators in some jurisdictions presents significant challenges, educators may challenge adverse employment actions under a void for vagueness theory. Undergirding a void for vagueness theory is the Fifth and Fourteenth Amendment's guarantee that individuals have the right to due process when serious interests are deprived.[118] Generally, when the government fails to clearly notify individuals of the potential penalties associated with specific conduct, that

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114 *See Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957) (discussing the importance of academic freedom in a post-secondary educational setting).

115 *See* Hannah Natanson, *Parent-activists, seeking control over education, are taking over school boards*, Washington Post (Jan. 19, 2022) https://www.washingtonpost.com/education/2022/01/19/parents-school-boards-recall-takeover/ (last accessed Aug. 31, 2022) (describing efforts across the country to move school boards to the political right).

116 *See id.*; James R. Copeland, John Ketcham, and Christopher F. Rufo, *Next Step for the Parents' Movement: Curriculum Transparency,* Manhattan Institute: City Journal (Dec. 1, 2021) https://www.city-journal.org/how-to-achieve-transparency-in-schools (last accessed Aug. 31, 2022); Scott, *supra* note 6, at 11, 13, 18-19, 46-47.

117 *Meyer*, 262 U.S. at 402-03.

118 *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); Cohen v. California, 403 U.S. 15, 26 (1971) (finding that "offensive conduct" clause in law was unconstitutionally vague for enforcement under the First and Fourteenth Amendment).

penalty may be unconstitutionally vague.[119] For example, in *Keyishian v. Bd. of Regents of Univ. of N.Y.*, a New York state statute prohibited teachers from membership in "subversive" organizations such as the Communist Party.[120] In addition to proscribed membership in the Communist Party, the statute prohibited all educators from uttering seditious words and advising, advocating, teaching, or embracing the duty that the government should be overthrown by unlawful means.[121] The Court determined that the scope and uncertainty of the statutory language prohibiting educators from teaching abstract doctrines were unconstitutionally vague and invalidated the statute.[122] Writing for the Court, Justice Brenan reasoned that the threatening enforcement mechanisms and the uncertain boundaries of prohibited speech constricted educators' pedagogical practices and undermined the purpose of education in a free democracy.[123] Because the resulting constraints over pedagogical practices had a chilling effect on educators' academic freedom and the First Amendment, the law was unconstitutional.[124]

Similarly, when the government imposes undefined and contradictory rules that prohibit the use of CRT, those rules likely provide insufficient notice to impose lawful sanctions. Take, for example, Florida's rule requiring that:

> [i]nstruction on the required topics must be factual and objective, and may not suppress or distort significant historical events, such as . . slavery, the Civil War and Reconstruction, the civil rights movement and the contributions of women, African American and Hispanic people to our country . . . Examples of theories that distort historical events and are inconsistent with State Board approved standards include . . . the teaching of Critical Race Theory, meaning the theory that racism is not merely the product of prejudice, but that racism is embedded in American society and its legal systems in order to uphold the supremacy of white persons. Instruction may not utilize material from the

119 *See City of Chicago v. Morales*, 527 U.S. 41, 60-61 (1999) (reasoning that a loitering ordinance's scope swept in both lawful and unlawful conduct when effectuated and was, therefore, a violation of the Due Process Clause); *Keyishian*, 385 U.S. at 599.

120 *Keyishian*, 385 U.S. at 595-96.

121 *Id.* at 597-98, 600.

122 *Id.* at 600-02.

123 *Id.* at 601-02 (the law also applied to educators' speech and conduct outside the classroom).

124 *Id.* at 604.

> 1619 Project and may not define American history as something other than the creation of a new nation based largely on universal principles stated in the Declaration of Independence. Instruction must include the U.S. Constitution, the Bill of Rights and subsequent amendments.[125]

Nevertheless, one of the required topics in the seventh-grade civics and government standards requires students to analyze how the Reconstruction Amendments impacted minority groups.[126] The putative seventh-grade civics teacher in Florida will be in the unenviable position of maintaining two positions that will likely collide. Adding to the conflicting positions is the prohibition against "attempt[ing] to indoctrinate or persuad[ing] students to a particular point of view inconsistent with . . . " Florida state education standards.[127] Here, the putative seventh-grade civics teacher in Florida is required to teach students how to think critically about the abolition of slavery's impact on minority groups without distorting the facts. However, educators are prohibited from persuading students that the over 200 years of chattel slavery and the institution of Jim Crow were systemic or had a persistent impact on minority groups. Educators have received conflicting commands containing undefined vague language in each enacted rule banning CRT. Because educators in Florida are unlikely to discern the boundaries of permissible topics of instruction without incurring penalties, the laws banning CRT may be challenged under a void for vagueness theory established by the First, Fifth, and Fourteenth Amendments.

D. Potential arguments states may employ to defeat a void vagueness theory should still fail.

On the other hand, states may try to distinguish the unconstitutional law in *Keyishian* from their laws based on the scope of regulation and permissive language held elsewhere in their respective statutes. Different from *Keyishian*, where the law applied to advocacy and teaching outside of the classroom,[128] the laws banning CRT and the 1619 Project do not venture to regulate the speech of educators outside of the classroom. Furthermore, many laws include language that encourages classroom discussion on controversial topics.[129] Finally, states may counter that because the K-12 cur-

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125 Fla. Admin. Code Ann. r. 6A-1.094124(3)(b).

126 Florida K-12 Civics and Government Standards, SS.7.C.3.7.

127 Fla. Admin. Code Ann. r. 6A-1.094124(3)(c).

128 *Keyishian*, 385 U.S. at 601-02.

129 *See e.g.* N.H. Rev. Stat. Ann. § 193:40(II) (2021) (declaring "[n]othing in this section shall be construed to prohibit discussing, as part of a larger course of academic instruction, the historical existence of ideas and subjects identified in this section."); Tex.

riculum is equivalent to government speech, educators are not being sanctioned for their speech as citizens but rather for disobeying work rules.

Although the law at issue in *Keyishian* also chilled protected speech outside of the classroom, the primary focus of *Keyishian* concerned the special characteristics of schools.[130] The fact that the law swept in speech occurring outside the confines of the educator's school in *Keyishian* only added to the unconstitutional characteristics of the law.[131] Next, the disclaiming language that permits educators to discuss controversial topics in class only adds to the contradictory commands contained in the statutes. Even though the statutes disclaim restrictions on spontaneous discussion of current events,[132] the disclaiming language does nothing to define the contours of proscribed topics in their required curriculum. Instead, educators are more likely to avoid spontaneous discussions altogether because they fear teaching proscribed topics.

Perhaps the most persuasive argument states may employ is that curriculum is equivalent to government speech. Because lower courts have applied *Garcetti* to K-12 educators and the Supreme Court has repeatedly affirmed that schools maintain the prerogative to determine school curriculum,[133] educators are likely at a disadvantage in challenging state laws banning CRT and curricular topics concerning systemic racism. Indeed, the distinguishing characteristic between post-secondary faculty and K-12 educators is the existence of a pre-determined curriculum imposed on K-12 educators.[134]

Educ. Code Ann. § 28.0022(e) (West 2021) (stating that "Nothing in this section may be construed as limiting the teaching of or instruction in the essential knowledge and skills adopted under this subchapter.").

130 *Keyishian*, 385 U.S. at 603 (reasoning 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.").

131 *Id.* at 603-04.

132 Tex. Educ. Code Ann. § 28.0022(a)(1) (prohibiting public school officials from compelling educators to "to discuss a widely debated and currently controversial issue of public policy or social affairs . . . ."); *but see* Tex. Educ. Code Ann. § 28.0022(d) (prohibiting educators from imposing "a chilling effect on reasonable student discussions involving those concepts in school or during a school-sponsored activity.").

133 *See Tinker*, 393 U.S. at 507; *Hazelwood Sch. Dist.,* 484 U.S. at 273; *Evans-Marshall*, 624 F.3d at 340-41; *Mayer,* 474 F.3d at 479; *Boring v. Buncombe County Bd. of Ed*., 136 F.3d 364, 370-71 (4th Cir. 1993).

134 *See Demers*, 746 F.3d at 413 (opining that when analyzing the interests involved, courts must evaluate "the degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a university professor.").

Considering the varying analyses used in different jurisdictions, K-12 educators should not rely on academic freedom under the First Amendment to defend their employment from penalties. Despite the Court's performative affirmations for academic freedom and the noble profession of educators, K-12 educators are unlikely to find material protections under the First Amendment once accused of teaching topics associated with systemic or structural racism. Even still, a void for vagueness theory may present a viable claim because the laws banning CRT in K-12 classrooms include contradictory commands that encroach on the special status schools play in our society. In contrast to the dour outlook for K-12 educators seeking refuge under the First Amendment and the lack of due process, protections held in collective bargaining agreements ("CBAs") and organizing efforts may provide some refuge to educators accused of teaching about systemic racism and implicit bias in their classrooms.

III. Finding refuge in solidarity and labor rights

Notwithstanding the uncertain terrain advocates will need to traverse for challenging the laws banning CRT in K-12 classrooms, educators likely have the best opportunities for success through organizing. As a corollary for successful organizing campaigns, educators may be able to leverage campaign wins into stronger collective bargaining agreements ("CBA") that defend educators accused of teaching CRT. In addition to strengthening their collective bargaining agreements to defend educators from unjust discipline, educator unions may also include CBA provisions that prevent unjust discipline arising out of allegations of teaching CRT. Finally, the method of securing organizing campaign wins depend on building intersectional coalitions from the communities in which educator's work.

A. Collective bargaining agreements include academic freedom

Despite the absence of a judicial remedy for educators to preserve some autonomy over the school curriculum, collective bargaining agreements are a viable path to limit a school board's ability to impose employment sanctions on educators.[135] Generally, CBAs are contracts with democratic properties.[136] The parties to a CBA are employers and a union, and the union is typically designated an exclusive representative which undertakes

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135 *See Cary v. Bd. of Ed. Adams-Arapahoe Sch. Dist. 28*, 598 F.2d 535, 539 (10th Cir. 1979) (determining that teachers objecting to a school board's ban on books used for curriculum did not waive or provide additional rights to academic freedom when the teacher's CBA included an aspirational declaration that recited the school board's authority to determine curriculum).

136 *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 334-36, 338-39 (1944).

the responsibility of representing employees.[137] Once the parties agree on an issue, they usually reduce that agreement into writing in a CBA document.[138] Part of the unique character of a CBA is the bargaining relationship between the parties and the processes for resolving disputes.[139] Because the First Amendment and the Constitution resemble a floor bearing the minimum degree of protection an individual can receive under the law, CBAs may be a viable way to raise the floor of protection for educators.[140]

For educator unions to raise the floor of protections for their members, they must negotiate CBA provisions that provide academic freedom to the same extent that post-secondary educational faculty enjoy.[141] However, because educator unions are obligated to negotiate with their employers, which often represent school board interests, ratifying an agreement that provides academic freedom that is coextensive with those of post-secondary faculty may be difficult.[142]

Despite the difficulty of attaining an academic freedom provision resulting in enforceable language within a CBA, educator unions may be able to increase opportunities for an enforceable provision through effective organizing and political activism. Alternatively, educator unions could advocate for a provision in their CBAs that obligates school officials to engage

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137 *See id.*

138 *See id*. at 338-39; *NLRB v. Jones Laughlin Steel Corp*., 301 U.S. 1, 44-45 (1937).

139 *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960).

140 *But see Cary*, 598 F.2d at 539 (cautioning that a CBA provision which waives a school board's right to control each aspect of the curriculum must be a deliberate).

141 *See Demers*, 746 F.3d at 406 (finding that a pamphlet prepared by a university professor critical of their university's structuring of his department was not subject to analysis under *Garcetti* because the pamphlet was related to scholarship and teaching); *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011) (determining that the *Garcetti* Court refused to apply their analysis to post-secondary educational faculty).

142 *See e.g. Bd. of Educ. Woodstown-Pilsgrove School Dist. v. Woodstown-Pilsgrove Educ. Ass'n*., 410 A.2d 1131, 1135 (N.J. 1980) (opining that "[w]hen the dominant issue is an educational goal, there is no obligation to negotiate and subject the matter, including its impact, to binding arbitration."); *but see* NLRB v. Katz, 369 U.S. 736, 742-43 (1962) (requiring good faith bargaining under the National Labor Relations Act's ("NLRA") section 8(a)(5) and finding that a refusal to bargain on mandatory subjects of bargaining is a violation of the NLRA). *School Committee of Boston v. Boston Teachers Union Local 66,* 389 N.E.2d 970, 973-74 (Mass. 1979) (establishing that because the school board as an employer may bind itself through contractual relationships, courts in Massachusetts must not overturn arbitration awards after they are deemed arbitrable); Developments in the Law: Academic Freedom, E. Collective Bargaining, 81 Harv. L. Rev. 1045, 1122-23 (1968) (discussing the legal hurdles that may prevent educators from including CBA language that provides academic freedom).

in processes for determining certain curricular choices, such as those touching on controversial topics.[143]

For example, under the CBA between the Albuquerque Teachers Federation ("ATF") and Albuquerque Public Schools ("APS"), if a school administrator has concerns over an educator's curriculum, they must first notify the educator.[144] Next, the school administrator must provide alternative means to achieve similar objectives.[145] If the alternative means are insufficient,[146] then the teacher and the school administrator must resolve the dispute through mediation between the educator's union and the superintendent's designee.[147] Finally, if the school district declines to engage in the process, the teacher's union is free to file a grievance culminating in final and binding arbitration.[148] In turn, the outcome of a final and binding arbitration proceeding may compel the employer to engage in the bargained-for process to mediate the dispute.[149]

Nevertheless, the process enumerated in the ATF and APS CBA occurs before the educator engages in teaching a controversial topic.[150] Juxtaposed to *the ex-post* accusations against teachers for violating anti-CRT regulations, the *ex-ante* processes for determining the permissibility of specific controversial topics may provide shelter for educators. Notwithstanding preventative measures that mediate disputes revolving around curricular disputes, shelter may be sought after a charge against an individual educator is filed because many laws or regulations limiting the scope of topics touch-

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143 *See LA Unified Sch. Dist. and United Teachers of Los Angeles, Academic Freedom & Responsibility*, Article XXV(1.2)-(1.3) (2019-2022) https://utla.net/app/uploads/2022/07/2019-2022_utla-lausd_collective_bargaining_agreement.pdf (last accessed Sept. 18, 2022); Albuquerque Public Schools and Albuquerque Teachers Federation, Negotiated Agreement, Article 5(F)(1)-(5) (2022-2023) https://atfunion.org/wp-content/uploads/ws-form/4/dropzonejs/117/2022-09-aps-atf-negotiated-agreement.pdf (last accessed Sept. 18, 2022).

144 Albuquerque Public Sch.s and Albuquerque Teachers Fed'n, Negotiated Agreement, Article 5(F)(6) (2021-2022).

145 *Id.*

146 *Id.* (as determined by the teacher).

147 *Id.*

148 Albuquerque Public Sch.s and Albuquerque Teachers Fed'n, Negotiated Agreement, Grievance Procedures, Article 26(B) & (Q) (1) (defining a grievance as an allegation were there "has been a violation of any provision(s) of this Agreement[]" and may result in final and binding arbitration after a grievance was denied and a hearing officer provides an adverse opinion).

149 *United Steelworkers of Am. v. Enterprise Wheel & Car Corp*, 363 U.S. 593, 596 (1960); F. Elkouri & E. Elkouri, How Arbitration Works at 7.4.G.iii (Elizabeth J. Fabrizio, 8th ed. 2021).

150 Albuquerque Public Sch.s and Albuquerque Teachers Fed'n, Negotiated Agreement, Article 5(F)(6).

ing on systemic racism and implicit bias do not provide educators adequate notice of proscribed pedagogical practices.

B. Collective bargaining agreements provide that educators may only be sanctioned for just cause.

Equally important, CBAs that include a just cause standard for imposing discipline may be used to defend educators from allegations of teaching a proscribed course of study. Unlike the at-will doctrine established as the default rule in most workplaces not governed by a CBA,[151] the just cause standard limits the employer's prerogative to impose discipline for any reason.[152] In contrast, when a CBA includes a provision requiring that an employee may only receive sanctions for just cause, the employer bears the burden of proving the employee engaged in misconduct.[153]

Under the standard of just cause, employees are obliged to receive both procedural and substantive due process modified by the character of the workplace.[154] Indeed, the hallmark of fair notice under the just cause standard is whether the employer clearly forewarned the grievant employee of the proscribed conduct and the consequences for non-conformance.[155]

When considering the confusing and contradictory language held in the laws proscribing curriculum on CRT and systemic racism,[156] educators accused of teaching topics related to systemic racism may be able to challenge any imposed discipline under an unfair notice theory before an arbitrator. A likely theory against the imposition of discipline from a putative K-12 school employer in Florida may focus on the obligation to teach history accurately while refraining from "defin[ing] American history as something other than the creation of a new nation based largely on universal

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151 *See* Restatement of Employment Law § 2.01 (2015).

152 *See* Office of Attorney General v. AFSCME Council 13, 844 A.2d 1217, 1224-25 (Pa. 2004); F.Elkouri & E. Elkouri, *supra* note 140 at 15.2.A.ii; Discipline and Discharge in Arbitration, Theories of Just Cause at 2.I (Norman Brand & Melissa H. Biren, 3d ed. 2015).

153 *See* F. Elkouri & E. Elkouri, *supra* note 140 at 7.4.G.iii & 15.3.D.i (when the union alleges that the employer breached the CBA, the union is required to prove their case).

154 *See id.* at 15.3.F.ii (sometimes referred to as industrial due process).

155 *See id.* at 15.3.F.x; Adolph M. Koven & Susan L. Smith, Just Cause: The Seven Tests at 90 (Kenneth May, 3rd ed. 2006).

156 *Compare* Fla. Admin. Code Ann. r. 6A-1.094124(3)(b), *with* Florida K-12 Civics and Government Standards, SS.912.P.10.6 (requiring as a related benchmark for high school psychology classes that students and teachers should "[d]iscuss how privilege and social power structures relate to stereotypes, prejudice, and discrimination.") *and* Florida K-12 Civics and Government Standards, SS.912.A.7.6 (including as an annual benchmark that students should be able to "[a]ssess key figures and organizations in shaping the Civil Rights Movement and Black Power Movement.").

principles stated in the Declaration of Independence."[157]

Here, the regulations in Florida require educators to teach accurate portrayals of the Civil War while simultaneously commanding educators to refrain from explaining that chattel slavery was so embedded in American society that the deadliest war in American history was fought to end the institution of slavery.[158] In the unlikely event that the public school employer can clearly define the contours of the regulation's command, the educator may be subject to employment penalties as a constitutional matter. Nevertheless, using the just cause standard in an arbitral forum may open up several defenses for the individual educator, placing the burden of proving the educator engaged in misconduct on the employer.

In addition to the just cause standard, educators may enjoy more protections where employers face even higher standards of proof, such as the clear and convincing standard under the EPC. Even though the EPC in Florida uses a clear and convincing standard to sanction an educator's license,[159] each state may require different standards of evidence necessary to sanction educator licenses.[160] In contrast to the just cause standard used to impose adverse employment actions, the clear and convincing standard requires a greater quantum of evidence to impose penalties.[161] In theory, the chilling effect of anti-CRT legislation foisted on educators could be muted by winning contractual language that implements the clear and convincing standard in CBAs.

However, union interests in increasing job security often diverge from the employer's interest. Even in areas where union density is relatively high among educators, employers prefer using the threat of discipline to ensure obedience in the workforce. For example, in 2008, the District of Columbia implemented a merit pay program that increased some educators' pay when their students achieved higher standardized test scores.[162] To

157 Fla. Admin. Code Ann. r. 6A-1.094124(3)(b).

158 *Id.*

159 *Ferris*, 510 So. 2d at 294-95.

160 *Cf. Ferris*, 510 So. 2d 292, 294-95; V.A. Code Ann. § 22.1-307 (2020); Grimes v. Pa. Dept. of Educ., A.3d 1152, 1162 (Pa. Cmwlth. 2019) (requiring the Professional Standards and Practices Commission to prove by substantial evidence that an educator engaged in immorality).

161 *See* F. Elkouri & E. Elkouri, *supra* note 140 at 15.3.D.ii.a (reporting that when a just cause provision is left undefined in a CBA, many arbitrators apply a preponderance of the evidence standard when ordinary discipline is contemplated and a clear and convincing standard when the alleged misconduct involves criminal conduct or other stigmatizing sanctions).

162 Sam Dillon, *In Washington, Large Rewards in Teacher pay*, New York Times (Dec. 31, 2011) https://www.nytimes.com/2012/01/01/education/big-pay-days-in-wash-

be eligible for the merit pay program, educators had to waive their right to job security.[163] Putting aside the strategy of dividing rank-and-file educators against each other through the use of merit pay,[164] merit pay programs that relinquished educator job security were designed to contain both positive and negative incentives.[165] Reward some educators monetarily for following directions with fidelity, fire other educators school district managers dislike,[166] and scare the rest into conformity.

On the other hand, when educators are accused of teaching CRT, educator unions may be able to set a precedent through the reasons provided in arbitration awards after an arbitrator interprets the operative CBA.[167] Similarly, educators may be able to set a state-wide precedent through administrative decisions from agencies tasked with adjudicating controversies arising out of allegations against educator licenses.[168] Even with a greater quantum of evidence necessary to impose sanctions against educator licenses, many teacher licensing boards are composed of political appointees who have expressed hostility towards educators teaching on the topic of systemic racism and implicit bias.[169] Either way, educators are likely to steer

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ington-dc-schools-merit-system.html (last accessed Sept. 18, 2022); Paul Abowd, *D.C. Teachers Divided on Merit Pay Plan*, Labor Notes (Aug. 28, 2008) https://labornotes.org/2008/08/dc-teachers-divided-merit-pay-plan (last accessed Sept. 7, 2022).

163 Sam Dillon, *In Washington, Large Rewards in Teacher pay*, New York Times (Dec. 31, 2011).

164 Abowd, *supra* note 161.

165 Erik A. Hanushek, *School Human Capital and Teacher Salary Policies*, 1 J. Pro. Cap. & Cmty. 23, 35 (2015) (stating with approval that the DC merit pay program rewarded approximately 1,000 teachers while firing 500 others).

166 Abowd, *supra* note 161 (stating that school administrators retained the final say in whether an educator was fired after student test scores dropped below a specified threshold).

167 *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960) (opining that the CBA "calls into being a new common law—the common law of a particular industry or of a particular plant.") (footnote omitted).

168 *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969) (plurality opinion) (finding that when administrative agencies adjudicate cases, the agency's disposition on an issue may guide how the agency decides a future controversy); *e.g. Fitchburg Gas & Elec. Light Co. v. Dept. of Public Utilities*, 956 N.E.2d 213, 222 (Mass. 2011) (ordinarily providing deference to administrative agencies adjudicating controversies they were empowered to decide); *McKay v. N.H. Compensation Appeals Bd*., 732 A.2d 1025, 1030-31 (N.H. 1999) (stating that agency adjudications hold the same force as judicial opinions).

169 *E.g.* Fla. Const. Art. 9 § 2 (empowering the governor to appoint members of the State Board of Education); Fla. Stat. § 1012.79(1) (empowering the State Board of Education to appoint members to the EPC); N.H. Rev. Stat. Ann. § 21-N:3 (providing the Governor of New Hampshire power to appoint members of the State Board of Education); N.H. Rev. Stat. Ann. § 186:60(VI)(a) (conveying power to the Professional Standards Board to revoke educator licenses).

their speech and classroom discussions away from topics arguably associated with systemic racism and implicit bias to avoid potential penalties.[170] Because educators are incentivized to avoid topics touching on systemic racism in their classrooms, the strategic utility of the laws restricting CRT likely served the intended purpose of silencing educators.[171] Conversely, community members affected by educational policy should consider coalescing with educator unions and other progressive organizations to challenge anti-CRT legislation and regulations locally.

Admittedly, challenging reactionary laws through union solidarity and alternative dispute resolution systems typically contained in CBAs assumes the existence of a union and the legal authority to enter into a CBA. But, even in states where public sector unions are non-existent, the activism seen in states like Arizona and West Virginia can provide a glimmer of hope in some of the most repressed jurisdictions.[172] Further research and insights into the challenges presented by organizing in traditionally anti-worker states could provide guidance to labor organizations for the best use of their limited resources. However, due to this article's self-imposed limitation on topic, further research into organizing in historically anti-worker states must be addressed in another article.

C. Organizing: what workers do best

Although educators and students face opposition from reactionary politicians, those elected leaders are still politically accountable. Accepting the invitation from the judiciary to hold elected officials democratically accountable, educator unions must strengthen their resolve to organize their communities around shared interests at the local level. Indeed, inroads between educator unions and other progressive movements have emerged recently.[173] Those inroads have established allies with Black Lives Matter,

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170 *Cf. Keyishian*, 385 U.S. at 601 (opining that "It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery.").

171 *Cf. supra* note *129*.

172 Eric Blanc, *The Red for Ed Movement: Two Years In*, New Labor Forum, https://newlaborforum.cuny.edu/2020/10/03/the-red-for-ed-movement-two-years-in/ (October 2020) (last accessed Sept. 18, 2022).

173 *See* American Fed'n. of Teachers Resolution, *Confronting Racism and in Support of Black Lives*, https://www.aft.org/resolution/confronting-racism-and-support-black-lives (2020) (last accessed Feb. 4, 2022); American Fed'n. of Teachers Resolution, *In Support of LGBTQ Youth and Educators* (2021) https://www.aft.org/resolution/support-lgbtq-youth-and-educators (last accessed Feb. 4, 2022); National Education Association, *NEA Demands Justice for Black Lives* (2022) https://neaedjustice.org/black-lives-matter-at-school/nea-demands-justice-for-black-lives/ (2022) (last accessed Feb. 4, 2022).

the NAACP, Color of Change, and LGBTQ+ communities.[174] To be sure, winning electoral contests with progressive coalitions will provide the most effective method of protecting educators and their students from revisionist and politically partisan historical narratives. However, even if the progressive groups fail to succeed at the ballot box, building coalitions and recruiting progressive allies can have a profound impact that strengthens community support and resolve for educator's labor and contractual rights.

1. Bargaining for the common good

While allyship with organizations holding intersecting values with educator unions are necessary steps when organizing for political action, the allied coalition must organize non-employee members in their local communities. Taken in isolation, the potential impact of building intersecting coalitions and recruiting progressive allies can be profound. For instance, educator unions have successfully used the strategic initiative called "bargaining for the common good" to organize local communities.[175] Bargaining for the common good is an intersectional strategy that attempts to include issues beyond traditional bargaining topics.[176] One element of bargaining for the common good is to relate traditional bargaining issues to address systemic racial injustice.[177]

Moreover, legal authority supports a broad scope for mandatory subjects of collective bargaining. For its part, the Supreme Court provided broad deference to the National Labor Relations Board ("NLRB") when determining mandatory subjects of bargaining related to working conditions and decisions that may directly impact employees.[178] The inquiry used by the NLRB is whether the change in the terms and conditions of employment was "material, substantial, and significant."[179] To be sure, NLRB

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174 *See* American Civil Liberties Union, *Banned Concepts Law Unconstitutionally Chills Discourse on Race, Gender, Sexual Orientation, Disability, and Gender Identity in Schools and Public Workplaces* (press release) (Dec. 20, 2021) https://www.aclu.org/press-releases/aclu-largest-teachers-union-nea-nh-leading-disability-and-lgbtq-advocacy-groups-file (last accessed Feb. 4, 2022) (reporting the intersectional alliance challenging New Hampshire's anti-CRT legislation); Erica L. Green, *New Leader Pushes Teachers' Union to Take on Social Justice Role*, New York Times (Dec. 12, 2021) https://www.nytimes.com/2021/12/12/us/politics/teachers-union-becky-pringle.html (last accessed Feb. 4, 2022).

175 *See* Bargaining for the Common Good Network, *Elements of Bargaining for the Common Good Campaigns*, https://www.bargainingforthecommongood.org/about/ (last accessed Feb. 4, 2022).

176 *Id.*

177 *Id.*

178 *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-96 (1979); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 209-11 (1964).

179 *Salem Hospital Corp*., 360 NLRB 768, 769 (2014).

adjudications are not binding on public sector labor boards. However, rules established through NLRB adjudications are often persuasive for state labor boards when adjudicating controversies containing similar facts and claims.[180]

Turning the bargaining for the common good concept into action, the Chicago Teachers Union ("CTU") adopted the concept when it went on strike in 2012.[181] The strike commenced when Chicago Mayor Rahm Emmanuel refused to expand art and music programs at some of Chicago's most underfunded schools, proposed closing neighborhood schools, and would not address issues with teacher evaluations based on a corporate-driven curriculum.[182] As a strategic and moral imperative, the CTU put racial justice at the heart of its demands for fair funding in predominately Black and Brown schools.[183] These issues were popular with the educators voting in favor of the strike and community members.[184] In response, the Chicago Board of Education petitioned to enjoin the strike.[185] Reticent to wade into the controversy, the chancery court refused to issue an injunction.[186] In the end, CTU won using an intersectional approach to organizing

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180 *E.g. City of Miami v. Fraternal Order of Police Lodge 20*, 511 So.2d 549, 552, n.5 (Fla. 1987) (accepting the Florida Labor Boards reliance on NLRB decisions); *Pa. Labor Relations Bd. v. Williamsport Area Sch. Dist*., 406 A.2d 329, 331 (Pa. 1979) (using NLRB and the National Labor Relations Act ("NLRA") as authority for determining an unfair labor practice); *Wapella Educ. Ass'n. v. Illinois Educ. Labor Relations Bd*., 531 N.E.2d 1371, 1376 (Ill. App. Ct. 1988); N.J. Sports and Exposition Auth*.,* P.E.R.C. No. 80-73, slip op. at n.1 (1979) (adopting the NLRB's analysis for section 8(a)(1) charges under the NLRA for New Jersey's analogous provision).

181 Sarah Jaffe, *The Chicago Teachers Union Strike was a Lesson in 21st-Century Organizing*, The Nation (Nov. 26, 2019) https://www.thenation.com/article/archive/chicago-ctu-strike-win/ (last accessed Feb. 6, 2022).

182 *Id.*; See Jason Meisner & Hal Dardick, *Court Hearing Set for Wednesday After Union Vote*, Chicago Tribune (Sept. 17, 2012) https://www.chicagotribune.com/news/breaking/chi-chicago-teachers-union-meets-on-contract-today-20120916-story.html (last accessed Feb. 5, 2022).

183 *Id.*

184 *Id.*

185 *Bd. of Educ. City of Chicago v. Chicago Teachers Union Local 1*, Verified Complaint for Temporary Restraining Order, 2012 WL 4054140, No. 12CH35003 (Sept. 17, 2012).

186 *Bd. of Educ. City of Chicago v. Chicago Teachers Union Local 1*, 2012 WL 12531760 *1 (Ill. Cir. Ct. Oct. 26, 2012) (trial order) (dismissing the complaint with prejudice); *Bd. of Educ. of the City of Chicago v. Chicago Teachers Union Local 1,* 2012 WL 12531759 *1 (Ill. Cir. Ct. Sept. 20, 2012) (trial order) (postponing the deadline for the answer to the complaint); Meisner & Dardick, *supra* note 181 (reporting that one commentator speculated that state judicial elections were on the horizon and the chancery court judge was incentivized to abstain from involvement).

when the Chicago Board of Education relented to many of their demands.[187]

The CTU had a reasonable chance to defend its strike against the Chicago Board of Education when it related its demands to working conditions. Among the stated issues educators in CTU were on strike against were school closures and corporate curriculum.[188] The schools most in danger of closing resided in historically Black and Brown neighborhoods.[189] Even though Illinois law prohibited educator strikes for permissive subjects of bargaining,[190] the CTU likely had a strong case demonstrating that their strike resulted from failing to address educator working conditions in collective bargaining.

Aside from the likelihood of success in court, the CTU strike was years in the making.[191] After years of dormancy, the organizing efforts of building solidarity among members and their communities took years to establish before the CTU voted to strike.[192] However, the CTU strike may provide a framework for challenging systemic racism through member action. To summarize the success of CTU's strategy and other progressive educator unions' rallying cry: teacher working conditions are student learning conditions.

IV. Conclusion

All told, educators must challenge anti-CRT legislation. Educators and their unions may challenge laws that undermine academic freedom nominally labeled anti-CRT laws with the legal theory that the rules are vague and thus unconstitutional. They may also challenge these anti-education laws locally through grievances culminating in final and binding arbitration when accused of violating anti-education rules. However, a more effective strategy is to challenge laws that prohibit curricular topics that touch on systemic racism and implicit bias through organizing.

Although some remedies at law may be available to defend educa-

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187 Sarah Jaffe, *The Chicago Teachers Union Strike was a Lesson in 21st-Century Organizing*, The Nation (Nov. 26, 2019).

188 Theresa Moran, *Behind the Chicago Teachers Strike*, Labor Notes (Sept. 10, 2012) https://labornotes.org/2012/09/behind-chicago-teachers-strike (last accessed Feb. 6, 2022).

189 *Id.*

190 5 ILCS 315/7 (West 2020).

191 *See* Anne Bouleanu, *US: History of Chicago Teacher Strikes*, Aljazeera (Oct. 31, 2019) https://www.aljazeera.com/news/2019/10/31/us-a-history-of-chicago-teacher-strikes (last accessed Feb. 6, 2022) (stating that the Caucus of RaRank-and-Fileducators ("CORE") replaced an entrenched union leadership and brought a focus of racial justice two years before the strike occurred in 2012).

192 *See id.*