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# The Right to Teach

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*America's public school teachers are in dire straits; the law offers little solace. The rights teachers have as public employee-citizens do not protect them as educators. A patchwork of employment, labor, and First Amendment protections that comprise the rights of teachers has thus proved inadequate against escalating threats: education budget cuts, high-stakes testing, and privatization. States have meanwhile destabilized tenure and collective bargaining laws, for added measure and leverage.*

*Against this backdrop, politicized responses to a distressing pandemic and recurrent education culture wars — lately over antiracism curriculum and fetishized parental rights — are pushing a depleted and demoralized profession to the brink. The assaults on all these fronts have tattered the strands of protections said to constitute teacher rights, exposing a threadbare mishmash of limited process rights and illusive academic freedoms.*

*Teachers deserve better because teachers' rights are education rights and education rights are teachers' rights. Following that lesson, this Article is the first to conceive the right to teach as the freedom to educate grounded in an untapped rights repository: state constitutions. State constitution education clauses, specifically, protect schoolchildren as the primary rightholders and intended beneficiaries. Yet even as the right to education imposes duties on teachers, it also confers on them certain privileges and immunities vis-à-vis their indispensable relationship with their students.*

*State actions that denigrate the teacher-student relationship are therefore constitutionally suspect. Although state actors may approve curricular content and standards, they may not, absent judicial scrutiny, interfere with*

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\* Copyright © 2022 Joshua E. Weishart. Professor of Law, West Virginia University College of Law. For their insightful comments and encouragement, I thank Scott Bauries, Derek Black, Amanda Harmon Cooley, Amy Beth Cyphert, and Catherine Ward. I also gratefully acknowledge the financial support of the Arthur B. Hodges Research Grant. This Article is dedicated to my mother who sadly was unable to fulfill her dream of becoming a teacher but who nevertheless taught me many early life lessons and to my wife who was able to fulfill her dream of becoming a teacher and who has, in turn, cultivated in our children a love for learning.

*teaching methods reasonably designed to encourage positive learning relationships and democratic experiences. Nor may state actors subject their teachers to consequences for poor student performance which can be attributed to state- created or tolerated educational inadequacies and inequities. Above all, state actors may not compel teaching practices inconsistent with the state constitutional duty to educate democratically in the classroom.*

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## INTRODUCTION

In the darkest days of a second pandemic winter of discontent with a new variant surging, some South Dakota mortgage bankers held a fundraiser for teachers during a junior league hockey game. “With everything that has gone on for the last couple of years,” the bankers figured, teachers “deserve whatever the heck they get.”<sup>1</sup> What they got was a dystopian “Squid Game” that sent ten teachers literally to their knees on the ice to stuff down their shirts as many \$1 bills as they could for their classrooms, a whopping \$5,000 for the taking.<sup>2</sup> The humiliating spectacle, “as the crowd murmured” on, went viral, typifying for many a depraved society’s indifference to chronically underfunded schools and blatant disrespect for the nation’s teaching profession.<sup>3</sup>

America’s public school teachers, once exalted as “the priests of our democracy,”<sup>4</sup> are now openly vilified as degenerates running a “K-12 cartel” that holds schoolchildren “hostage”<sup>5</sup> as that democracy careens toward illiberalism. In truth, it was high-risk teachers who felt ensnared in their own classrooms during the pre-vaccine phase of the pandemic.<sup>6</sup> Yet, even as many teachers put their lives at risk and far too many lost their lives, parents have raged at school board meetings about the supposed loss of their freedoms to public health, some unironically

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<sup>1</sup> Annie Todd, *Sioux Falls-Area Teachers ‘Dash for Cash’ for Classroom Improvements at Stampede Game*, ARGUS LEADER, <https://www.argusleader.com/story/news/2021/12/11/dash-cash-stampede-hockey-teachers-sioux-falls/6448189001/> (last updated Dec. 13, 2021, 4:48 PM CT) [<https://perma.cc/KFP6-V23D>].

<sup>2</sup> Neil Vigdor, *Hockey Team Apologizes for ‘Degrading’ Cash Grab for Teachers*, N.Y. TIMES (Dec. 13, 2021), <https://www.nytimes.com/2021/12/13/us/south-dakota-teachers-dash-for-cash.html> [<https://perma.cc/KNT3-7L63>].

<sup>3</sup> *Id.*

<sup>4</sup> *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

<sup>5</sup> See Max Eden, *The K-12 Cartel Is Holding Children Hostage*, WASH. EXAMINER (Jan. 13, 2022, 11:00 PM), <https://www.washingtonexaminer.com/restoring-america/community-family/the-k-12-cartel-is-holding-children-hostage> [<https://perma.cc/5SBJ-EXVM>]; Marc A. Thiessen, *Don’t Negotiate with Teachers Who Walk out over Covid. Fire Them*, WASH. POST (Jan. 12, 2022, 12:42 PM EST), <https://www.washingtonpost.com/opinions/2022/01/12/dont-negotiate-with-teachers-who-walk-out-over-covid-fire-them/> [<https://perma.cc/QF65-BP5N>].

<sup>6</sup> *Science Brief: Transmission of SARS-CoV-2 in K-12 Schools and Early Care and Education Programs*, NAT’L LIBR. OF MED., <https://www.ncbi.nlm.nih.gov/books/NBK570438/> (last updated Dec. 17, 2021) [<https://perma.cc/Z6ZD-YWVM>] (noting “approximately one quarter of teachers at higher risk of serious consequences of COVID-19 because of their underlying medical conditions”).

issued death threats to educators.<sup>7</sup> Undeterred, teachers strenuously advocated to keep their schools and students safe.<sup>8</sup>

As if the challenges of the pandemic were not enough, teachers have also been falsely accused of indoctrinating the youth in critical race theory, the “latest bogeyman,” in a long line of culture war ruses.<sup>9</sup> Such fearmongering once brought us teacher “loyalty oaths,”<sup>10</sup> which some lawmakers are eager to bring back in vogue today.<sup>11</sup> Worse still, lawmakers in more than 35 states have advanced censorship bills, effectively education gag orders, curtailing what teachers can say about racism and sexism, among other topics.<sup>12</sup> These bills present a variable

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<sup>7</sup> See, e.g., Timothy Bella & Devin Barrett, *Garland Asks FBI to Address Recent ‘Disturbing Spike’ in Threats Against Educators*, WASH. POST (Oct. 5, 2021, 1:35 PM EDT), <https://www.washingtonpost.com/education/2021/10/05/garland-educators-threats-masks-fbi/> [https://perma.cc/FM3Y-Z6HS] (where the Attorney General issued a memo ordering the FBI to help stop threats against educators); Katherine Fung, *Video Shows Irate Mom Threatening School Board with Guns over Mask Mandates*, NEWSWEEK (Jan. 21, 2022, 11:55 AM EST), <https://www.newsweek.com/video-shows-irate-mom-threatening-school-board-guns-over-mask-mandates-1671691> [https://perma.cc/SKN3-S6AN] (where Virginia parents threatened schoolboard members over continued mask mandates); Hannah Natanson, *Parent-Activists, Seeking Control over Education, Are Taking over School Boards*, WASH. POST (Jan. 19, 2022, 8:50 AM EST), <https://www.washingtonpost.com/education/2022/01/19/parents-school-boards-recall-takeover/> [https://perma.cc/XR3K-FLCZ] (where angry parents in Spotsylvania County, VA, seized control of the school board).

<sup>8</sup> See, e.g., Adam Dean & Jamie McCallum, *Strong Teachers Unions and School Mask Mandates Go Together, Our Research Finds*, WASH. POST (Aug. 20, 2021, 7:00 AM EDT), <https://www.washingtonpost.com/politics/2021/08/20/strong-teachers-unions-school-mask-mandates-go-together-our-research-finds/> [https://perma.cc/G29C-KZXT] (showing that in districts with strong teachers’ unions, there was a stronger likelihood of mask mandates).

<sup>9</sup> Olivia B. Waxman, *‘Critical Race Theory Is Simply the Latest Bogeyman.’ Inside the Fight over What Kids Learn About America’s History*, TIME (June 24, 2021, 1:46 AM), <https://time.com/magazine/us/6075407/july-5th-2021-vol-198-no-1-u-s/> [https://perma.cc/YF25-UD4Y]; see also Rachel Cohen, *Why Teachers Are Afraid to Teach History*, NEW REPUBLIC (Mar. 28, 2022), <https://newrepublic.com/article/165598/teachers-afraid-teach-history> [https://perma.cc/DNQ4-YKBG] (explaining that “[f]or years, the school culture wars were waged over God and prayer, and how and whether to teach evolution and sex. But over the last decade, the fights have turned more toward how we frame our nation’s past, particularly how we characterize America’s histories of racism and colonization, and their relevance to today”).

<sup>10</sup> Waxman, *supra* note 9.

<sup>11</sup> See Peter Greene, *In New Hampshire, a Push to Expand ‘Loyalty’ Requirements and Further Silence Teachers*, FORBES (Dec. 5, 2021, 3:35 PM EST), <https://www.forbes.com/sites/petergreene/2021/12/05/in-new-hampshire-a-push-to-expand-loyalty-requirements-and-further-silence-teachers/?sh=38d71c8c2927> [https://perma.cc/365J-JHXE].

<sup>12</sup> See Terry Gross, *From Slavery to Socialism, New Legislation Restricts What Teachers Can Discuss*, NPR (Feb. 3, 2022, 2:10 PM ET), <https://www.npr.org/>

“minefield for educators” some carrying stiff penalties, such as dismissal, civil liability, hefty fines, and revoking public school funding.<sup>13</sup> One mom group otherwise called for vigilante justice, putting a \$500 bounty on the heads of teachers caught defying their state’s law.<sup>14</sup> Teachers, “frightened and confused” by all this intense public scrutiny and vague legal standards, face mounting pressure to chill their speech.<sup>15</sup>

The vilification and hostility have intensified during these polarized, uncertain times, but a well-publicized “War on Teachers” has, in fact, been waging uncontrollably for decades.<sup>16</sup> Unwilling to make the necessary investments to improve educational outcomes, “politicians, philanthropists, intellectuals, business leaders, social scientists, activists on both the Right and Left, parents,” have all put the blame on teachers.<sup>17</sup> The “bad teacher” with tenure “emerged as a feared character, a vampiric type who sucks tax dollars into her bloated pension and health care plans,” who came to embody our collective “moral panic” about investing in marginalized children, like “crack babies or welfare queens” from earlier times.<sup>18</sup>

That caricature of teachers together with the rhetoric of public school “failures” propelled “education” reforms — common core, high-stakes testing, privatization — amid an era when states slashed their education budgets.<sup>19</sup> Teachers have fought back.<sup>20</sup> A statewide teacher strike in West Virginia in 2018 (and again in 2019) inspired others across the nation, from Oklahoma to Oakland, all “instrumental” in securing additional funding and other “public education support,” including

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2022/02/03/1077878538/legislation-restricts-what-teachers-can-discuss [https://perma.cc/N5YR-TW6E].

<sup>13</sup> *Id.*

<sup>14</sup> Jenna Romaine, *Moms Group Puts \$500 ‘Bounty’ on Teachers Who Teach ‘Divisive Concepts,’* HILL (Nov. 16, 2021), <https://thehill.com/changing-america/enrichment/education/581722-moms-group-puts-500-bounty-on-teachers-who-teach/> [https://perma.cc/W9AX-QEFL].

<sup>15</sup> Stephen Sawchuk, *Revising America’s Racist Past*, EDUC. WEEK (Jan. 18, 2022), <https://www.edweek.org/teaching-learning/revising-americas-racist-past/2022/01> [https://perma.cc/8UHV-J685].

<sup>16</sup> See, e.g., DANA GOLDSTEIN, *THE TEACHER WARS: A HISTORY OF AMERICA’S MOST EMBATTLED PROFESSION 1* (2014) (chronicling ideological battles and public education controversies that have embroiled teaching profession since the nineteenth century).

<sup>17</sup> *Id.* at 5.

<sup>18</sup> See *id.* at 1, 5.

<sup>19</sup> See JACK SCHNEIDER & JENNIFER BERKSHIRE, *A WOLF AT THE SCHOOLHOUSE DOOR: THE DISMANTLING OF PUBLIC EDUCATION AND THE FUTURE OF SCHOOL*, at xiii-xxii (2020).

<sup>20</sup> *Id.*

support from the public at large.<sup>21</sup> What looked to be a movement,<sup>22</sup> however, seems to have waned into a moment, as states have struck back, passing revenge anti-teacher and union legislation.

Rather than join in solidarity with teachers, our society scapegoats them “to a cult of individualism.”<sup>23</sup> No other profession works under such scrutiny and derision.<sup>24</sup> No other profession facing the threat of a pandemic is told to just “buck up” — be more like trained health professionals.<sup>25</sup> No other profession after mass shootings in their workplace is expected to carry guns to protect themselves and other people’s children — be more like trained law enforcement, preferably the type courageous enough to risk their lives.<sup>26</sup>

Teachers must labor under such contempt because we have acquiesced to the convenient, long-running narrative that “*teachers are to blame*” for education’s shortcomings and associated societal ills — “not social or institutional inequality, not inadequate funding, not any range of issues that would necessitate fundamental, structural change” — teachers.<sup>27</sup> No theme has been more pronounced in the history of education reform and the structuring of schooling itself than “teacher blame.”<sup>28</sup> “Gendered assumptions legitimized a hierarchical structure that placed teachers on the lowest rungs; with limited voice and authority, teachers were easy targets” — viewed not as professionals but as “workers.”<sup>29</sup>

For its part, the law has failed to protect teachers because its application also reflects the view that teaching is just like any other job. The law, thus, advances the perception that teacher rights merely serve

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<sup>21</sup> John Rumel, *Statewide and Local Teacher Strikes Since Spring 2018: A Comparative Analysis*, 374 EDUC. L. REP. 24, 26, 44 (2020).

<sup>22</sup> See Jon N. Hale, *On Race, Teacher Activism, and the Right to Work: Historicizing the “Red for Ed” Movement in the American South*, 121 W. VA. L. REV. 851, 856 (2019).

<sup>23</sup> Liat Olenick, *There Is Something Very Wrong with a Society that Scapegoats Its Teachers*, NATION (Jan. 11, 2022), <https://www.thenation.com/article/society/covid-school-teachers/> [<https://perma.cc/37F6-PKB4>].

<sup>24</sup> See GOLDSTEIN, *supra* note 16, at 1.

<sup>25</sup> *Teachers Respond: Should Schools Reopen?*, ATLANTIC (Aug. 12, 2020), <https://www.theatlantic.com/letters/archive/2020/08/should-schools-reopen-teachers-respond/615055/> [<https://perma.cc/H6L5-9W9E>].

<sup>26</sup> See Fabiola Cineas, “*We’re Expected to Be Human Shields*”: *Teachers Are Unprotected — and Scared*, VOX (June 13, 2022, 6:08 PM EDT), <https://www.vox.com/2022/6/12/23157849/teachers-school-shootings-uvalde-texas> [<https://perma.cc/3N4C-3APY>].

<sup>27</sup> Diana D’Amico Pawlewicz, *Teacher Blame as the Grammar of Public School Reform*, 62 HIST. EDUC. Q. 291, 292-93 (2022).

<sup>28</sup> See *id.* at 293-95.

<sup>29</sup> *Id.* at 295, 298.

to protect self-interested and motivated actors who should be hired, fired, and mistreated at work like the rest of us.

A teacher adage seems apt to reply: “When we know better, we do better.”<sup>30</sup>

This Article, like the act of teaching, is submitted with optimism.<sup>31</sup> It is optimistic that, when we know better, we will do better by our teachers. Specifically, what we need to know better, what the law should protect in practice, is the surprisingly revolutionary notion that teachers are educators, and that education is fundamentally a relational process and practice. The indispensable teacher-student relationship, therefore, makes teachers’ rights, education rights and education rights, teachers’ rights too.

This Article is somehow the first to defend the “right to teach” as an education right coextensive with the right to education. Prior justifications of teacher rights under the federal constitutional law have considered teachers simply public-employee citizens, given little effect to their pivotal role as educators, and thus have been ineffectual. This Article is the first to look to state constitutional law as a source for a right to teach because it is under state constitutions where the right to education is most honored (more often in breach, than in observance) and where courts have sufficiently developed the right for the past half century.

Alas, that doctrinal development has largely neglected teachers. “A substantial portion” of state constitution education rights decisions “do not even include the word ‘teacher’ in their opinions.”<sup>32</sup> Other decisions convey no “significant analytical importance” to teachers in adjudicating claims under the right to education.<sup>33</sup> Even the few decisions that do, “still fail to appreciate the full complexities” of teaching conditions as learning conditions.<sup>34</sup> None have entertained the notion that embedded in the right to education is the right to teach. Then again, they have not been educated about that possibility. This Article attempts that education.

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<sup>30</sup> Common adaptation of original quote by Maya Angelou (“Do the best you can until you know better. Then when you know better, do better.”).

<sup>31</sup> ROBERT D. RAMSEY, *INSPIRATIONAL QUOTES, NOTES, & ANECDOTES THAT HONOR TEACHERS AND TEACHING* 51 (2006).

<sup>32</sup> Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1604, 1628 (2016) [hereinafter *Teacher Quality*] (“[C]ourts and states should take holistic approaches to improving teacher quality.”).

<sup>33</sup> *Id.* at 1628.

<sup>34</sup> *Id.* at 1630.

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Part I first surveys the rights that teachers are already said to have under employment, labor, and First Amendment law. It aims to correct common misconceptions that these rights are robust enough to sufficiently protect teachers *as educators*. The most common misconception, that tenure provides teachers a permanent job, has become a self-fulfilling prophecy, without basis in the law of due process, which is all tenure really affords.

A second misconception is that teachers' collective bargaining rights are so strong that they allow teacher unions to extort high salaries and benefits and shield ineffective teachers from termination. The reality is that, where collective bargaining is even permitted (in some states it is prohibited), it frequently excludes teacher voice on actual education issues and denies them the right to strike, which even private sector employees enjoy. It is teachers' political strength, rather than their labor rights, that largely accounts for their influence.

The third misconception that the First Amendment protects teachers' curricular speech and academic freedom is perhaps the greatest fallacy of all. Teachers are not supposed to "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>35</sup> Yet when the school bells begin the school day, the Supreme Court's pronouncements ring hollow. These days, teachers would probably settle for any pronouncements—the Court's silence has cast much uncertainty about what teachers can and cannot express in their own classrooms. Most lower courts have filled that silence with decisions concluding teachers have *no* First Amendment rights as educators. You read that correctly.

Notwithstanding the relatively modest protections teachers actually have, Part II describes state actions, prodded by federal accountability policy, to destabilize tenure and collective bargaining laws to further exert leverage over teachers. A few states effectively eliminated teacher tenure and collective bargaining altogether. Most states did not need to go that far because the advent of high-stakes testing enabled states to adopt or alter teacher evaluation systems to have a similar effect. Teachers challenged these changes, but those suits were unsuccessful. Instead, legal challenges to tenure and union fees further destabilized teacher employment and labor rights.

That destabilization contributed to the depletion and demoralization of the teaching profession. It was no coincidence that the erosion of teacher rights corresponded with the denigration of teachers. Teacher recruitment and retention, a vexing problem *before* that destabilization,

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<sup>35</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).



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has reached crisis levels now, following the pandemic. The stripping of teacher autonomy wrought by the high-stakes testing regime, the disrespect shown in so-called school reforms, and the stress of dealing with pandemic schooling not to mention angry parents over health mandates and nonexistent anti-racism curriculum have demoralized many teachers beyond repair.

Satisfaction with teaching has hit an all-time low.<sup>36</sup> Nearly all teachers are feeling burned out, more than half are considering leaving the profession, taking the nearest exit.<sup>37</sup>

Part III envisions a different trajectory, one where the law, at long last, protects teachers as educators. This new path cannot simply retrace the worn tenure and collective bargaining protections for teachers as public-employee citizens. Rather, it must direct our attention to a singular point of focus: an *education* right of teachers that benefits their students. The state constitutional right to education paves that way. It guarantees to all students access to fair educational opportunities and democratic experiences.

Teachers are the frontline guarantors and creators of those opportunities and experiences, and thus, certain duties that the right to education imposes on the state must be fulfilled by teachers directly. Given the relationality of education — the overriding importance and interdependence of the teacher-student relationship to the learning process as confirmed by social science research — teachers can discharge those duties and effectuate those guarantees only to the extent that their freedom to educate is protected from undue interference. Teachers are therefore constitutional stakeholders in relation to the right to education, and the law ought to reflect that reality, just as the law already recognizes that children, parents, and the state are stakeholders and indeed separate holders of the right to education.

In this instance, to say that teachers are also holders of a constitutional “right” vis-à-vis education is not to say that teachers hold a legal claim-right against the state such that the state is dutybound to teachers. It is instead to say that, because their right to teach is derivative of and coextensive with the right to education, teachers hold certain educator privileges and immunities which confer a judicially enforceable freedom to educate. At a minimum, that freedom must

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<sup>36</sup> Madeline Will, *Teacher Job Satisfaction Hits an All-Time Low*, EDUCATIONWEEK (Apr. 14, 2022), <https://www.edweek.org/teaching-learning/teacher-job-satisfaction-hits-an-all-time-low/2022/04> [https://perma.cc/55CX-KN4V].

<sup>37</sup> Anya Kamenetz, *More than Half of Teachers Are Looking for the Exits, a Poll Says*, NPR (Feb. 1, 2022, 6:14 AM ET), <https://www.npr.org/2022/02/01/1076943883/teachers-quitting-burnout> [https://perma.cc/ERF9-DZ9J].

entail teacher discretion over their own teaching methods. Those methods, most conducive to positive teacher-student relationships, are most likely to progress fair opportunities and foster democratic experiences. Such freedom to educate cannot be truly experienced unless teachers are immunized from the consequences of the state's own education failures and anti-democratic teaching practices.

The resulting right to teach, like the right to education, ultimately functions to protect schoolchildren from state-caused or tolerated educational harms. Its scope extends to empower teachers to assert it, principally as a shield against state actor interferences that impermissibly intrude on the teacher-student relationship in ways that undermine or subvert state constitutional guarantees. Fidelity to those guarantees demands "holistic approaches" to improving teacher quality, "factors other than just salary," such as "the attractiveness of the profession, segregation, the teaching environment, and structural inequalities between districts."<sup>38</sup> Even if the whole of such reforms is greater than the sum of its parts, however, it will be a net loss for teachers and their students minus one integral: the right to teach.

#### I. THE RIGHTS OF TEACHERS AS PUBLIC EMPLOYEE-CITIZENS

Teacher rights are currently imbued with notions of public employment and citizenship. From that perspective, any entitlements teachers may have as professional educators are subsidiary and carry very little force on their own.<sup>39</sup> One plausible explanation for the subordinate treatment of professional educators reflects the reality that women have long been the majority of teachers and thus "society's view of teachers is largely a result of how society views all women."<sup>40</sup> In any case, the tension between teachers' rights and responsibilities as public-employee citizens versus educators "presents an ever-increasing series of legal issues, leaving a patchwork of decisions, often without clear direction."<sup>41</sup> More times than not, that ambiguity works to the disadvantage of teachers as educators because the case law favors "the

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<sup>38</sup> Black, *Teacher Quality*, *supra* note 32, at 1604.

<sup>39</sup> *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1065 (1968) (observing that "courts have paid lip service to the notion" of "special protection" for teachers but have yet been disinclined to "elevate[] the status of the teacher above that of other public employees or citizens generally").

<sup>40</sup> Elizabeth Boyle, *The Feminization of Teaching in America*, MIT PROGRAM IN WOMEN'S & GENDER STUD. (2004), <https://stuff.mit.edu/afs/athena.mit.edu/org/w/wgs/prize/eb04.html> [<https://perma.cc/E6C2-M4AY>].

<sup>41</sup> E. GORDON GEE & PHILIP T.K. DANIEL, *LAW AND PUBLIC EDUCATION: CASES AND MATERIALS* 451 (5th ed. 2014).

state's role as sovereign or employer" over its public school teachers as employee educators.<sup>42</sup>

Even as public-employee citizens, however, teachers have fewer settled legal protections than is generally understood. Myths of the strength and viability of teacher rights yet abound, shared even by teachers who tend to overestimate the extent to which the law protects them.<sup>43</sup> The following Sections surveying teacher employment, labor, and First Amendment rights should disabuse us all of the view that these rights are, in any meaningful sense, robust.

### A. *Teacher Employment & Labor Rights*

Public school teachers are entitled to most of the constitutional and statutory rights afforded to other public employees. For instance, public school teachers have all the civil rights afforded by federal and state equal protection provisions and antidiscrimination statutes, notably Title VII of the Civil Rights Act of 1964.<sup>44</sup> But talk of teacher employment and labor rights centers on those rights that differentiate public school teachers as a distinct class of public employees. Teacher rights to due process and collective bargaining stand out as the two most influential, or at least widely regarded as such.

These discreet process rights frequently fall short of expectations, however. They provide little more than a window-dressing forum for teacher grievances in some circumstances, without assurances that anyone will listen, much less take responsive action.

#### 1. Tenured Due Process Rights: Nothing's Permanent

Tenure is meant to serve multiple purposes: shield teachers from political patronage and improper partisan influences, safeguard their educational freedoms in the classroom, protect teachers from racial and sex-based discrimination, and elevate teacher input as advocates for their students in school decisions.<sup>45</sup> For one or more of these purposes,

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<sup>42</sup> *Id.* at 597.

<sup>43</sup> Michael Imber, *Pervasive Myths in Teacher Beliefs About Education Law*, 30 ACTION TCHR. EDUC. 88, 94-96 (2008).

<sup>44</sup> KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 1098-167 (9th ed. 2019).

<sup>45</sup> Richard D. Kahlenberg, *Tenure: How Due Process Protects Teachers and Students*, 39 AM. EDUCATOR 4, 6-8 (2015). *But see* *Caston Sch. Corp. v. Phillips*, 689 N.E.2d 1294, 1297 (Ind. Ct. App. 1998) (expressing the view that the purpose of tenure is "to advance the efficiency of school systems, and not to grant special privileges to teachers as a class or as individuals").

nearly all states have statutes granting tenure protections to qualified teachers who earn it after at least a three-year probationary period.<sup>46</sup> Where permitted, tenure can also be acquired through an employment contract that explicitly grants the right.<sup>47</sup> Tenure statutes or contracts confer on tenured teachers a substantive property interest in their continued employment protected by the Fourteenth Amendment.<sup>48</sup>

That protection does not mean, as is often misunderstood, that tenure secures lifetime employment or a “job guarantee so ironclad that tenured teachers can’t be fired.”<sup>49</sup> Rather, tenure affords teachers procedural due process before certain adverse employment actions (e.g., termination, demotion) can be taken to deprive them of their property interests.<sup>50</sup>

The statutory grounds for removing a tenured teacher generally “fall into two major categories: misconduct and performance.”<sup>51</sup> If the asserted ground is poor performance, “states typically require a demonstrated record of incompetent teaching over a period of time” and, in some states (but not all), the teacher is also then provided notice of the alleged teaching deficiency and then an opportunity to remediate the deficiency before any adverse action.<sup>52</sup> In either event, if remediation fails or if the state does not provide an opportunity for

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<sup>46</sup> *Teacher Contract Database*, NAT’L COUNCIL ON TCHR. QUALITY (2018), <https://www.nctq.org/contract-database/stateReport?reportId=6839776> [https://perma.cc/NEU4-FUXN]; Alyssa Rafa, Ben Erwin & Tom Keily, *50-State Comparison: Teacher Employment Contract Policies*, EDUC. COMM’N OF THE STATES (July 29, 2020), <https://www.ecs.org/50-state-comparison-teacher-employment-contract-policies/> [https://perma.cc/YD9Q-Y9ZH].

<sup>47</sup> Laura McNeal, *Total Recall: The Rise and Fall of Teacher Tenure*, 30 HOFSTRA LAB. & EMP. L.J. 489, 492 (2013).

<sup>48</sup> *Bd. of Regents v. Roth*, 408 U.S. 564, 567, 576-77 (1972). It is also possible for a school to create conditions of employment that objectively suggest an entitlement to continued employment, a sort of de facto tenure policy, that can confer a “common law” entitlement to tenure. See *Perry v. Sindermann*, 408 U.S. 593, 602 (1972).

<sup>49</sup> Valerie Strauss, *The Problem with the ‘Problem with Tenure’ for Teachers*, WASH. POST (Aug. 26, 2014, 4:00 AM EDT), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/08/26/the-problem-with-the-problem-with-tenure-for-teachers/> [https://perma.cc/NPP7-N3TP].

<sup>50</sup> Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 103 (2016) [hereinafter *Tenure*].

<sup>51</sup> *Id.* at 89. “Common statutory grounds for dismissing tenured teachers include immorality, criminal conviction, fraud, misrepresentation, incompetency, insubordination, neglect of duty, substantial noncompliance with school laws, and other good and just cause.” Joseph O. Oluwole, *Tenure and the “Highly Qualified Teacher” Requirement*, 8 WHITTIER J. CHILD. & FAM. ADVOC. 157, 175 (2009) (quotation alteration omitted).

<sup>52</sup> Black, *Tenure*, *supra* note 50, at 103.

remediation, the tenured teacher is entitled to due process, first in the form of a “formal notice of the school’s intent to terminate.”<sup>53</sup> That notice must adequately inform the teacher of all charges against him or her with enough specificity to allow for a meaningful response.<sup>54</sup>

The tenured teacher facing dismissal is also entitled to “some kind of a hearing” before discharge.<sup>55</sup> This “opportunity to contest the determination of incompetence” can take place informally in meetings with the superintendent or principal, or formally in a pretermination hearing before an impartial decision maker, typically an administrative hearing officer or school board.<sup>56</sup> During a formal hearing, the school district carries the burden of making the necessary evidentiary showing, by a preponderance of the evidence, that a teacher is incompetent or otherwise “unfit to teach.”<sup>57</sup> But the rules of evidence are lax — the decisionmaker may consider evidence that would otherwise be excluded in criminal proceedings, such as “evidenced seized in violation of the teacher’s Fourth Amendment rights.”<sup>58</sup> Counsel may still represent teachers, however, and generally are permitted to cross examine witnesses.<sup>59</sup>

But that “pretermination ‘hearing,’ though necessary, need not be elaborate” because a terminated tenured teacher can challenge the dismissal itself or the adequacy of the procedural due process that led to the dismissal in a full post-termination adversarial proceeding subject to judicial review through appeal.<sup>60</sup> Substantive due process attaches to the discharge to guarantee “some minimal level of fairness and logic in the decision to terminate a teacher,” protecting him or her “from arbitrary, capricious, and insufficiently substantiated deprivations of property, even if all the correct procedures are followed.”<sup>61</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> CHARLES J. RUSSO, REUTER’S THE LAW OF PUBLIC EDUCATION 686 (8th ed. 2012) (citing cases).

<sup>55</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

<sup>56</sup> Black, *Tenure*, *supra* note 50, at 89; *see also Loudermill*, 470 U.S. at 546 (“The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.”).

<sup>57</sup> 67B AM. JUR. 2D *Schools* § 242 (2022) (citing cases). “Statutes may be designed to protect tenured teachers from unjust dismissal, by requiring a demonstration of good cause, although some only require due process.” *Id.* § 216.

<sup>58</sup> MICHAEL IMBER, TYLL VAN GEEL, J.C. BLAKHUIS & JONATHAN FELDMAN, A TEACHER’S GUIDE TO EDUCATION LAW 279 (2014).

<sup>59</sup> RUSSO, *supra* note 54, at 688 (citing cases).

<sup>60</sup> *See Loudermill*, 470 U.S. at 545, 546-47.

<sup>61</sup> Black, *Tenure*, *supra* note 50, at 103-04.

In addition to the vested property interest, terminating a teacher “may implicate a liberty interest in reputation if the dismissal is for dishonesty, moral turpitude, or other reasons bearing such stigmata as might foreclose other employment opportunities.”<sup>62</sup> But that reputational interest is infrequently implicated because teachers are not considered stigmatized by mere allegations of incompetence or ineptitude; rather the alleged stigmatization must relate to the teacher’s private life to trigger the liberty interest in her or his reputation.<sup>63</sup> Thus, courts have generally refused to find such stigmatic injuries that would entitle teachers to “name-clearing hearings” in situations where teachers were denied tenure or not provided reasons for tenure denial and where teachers were, for example, accused of using ineffective teaching methods or chronic absenteeism.<sup>64</sup>

At first blush, the procedural and substantive due process safeguards of tenure seem to present significant barriers to adverse employment actions against teachers, most significantly, termination. It has indeed become an article of faith among critics of tenure that it is “impossible” or “too hard” to fire “bad teachers,” or that it takes “far too long” and “costly” to exhaust their due process.<sup>65</sup> These critics have not held back their hyperbole; as one put it, so long as teachers “don’t murder someone or molest a child or stop showing up for work — they are assured of being able to continue in their job for as long as they want.”<sup>66</sup>

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<sup>62</sup> Hayes v. Phoenix-Talent Sch. Dist. No. 4, 893 F.2d 235, 237 (9th Cir. 1990); see Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 567, 573 (1972).

<sup>63</sup> ALEXANDER & ALEXANDER, *supra* note 44, at 1062.

<sup>64</sup> RUSSO, *supra* note 54, at 563 (citing cases).

<sup>65</sup> See Selim Algar, *It’s Basically Impossible to Fire a New York City School Teacher*, N.Y. POST, <https://nypost.com/2016/12/08/its-basically-impossible-to-fire-a-new-york-city-school-teacher/> (last updated July 26, 2017, 9:54 AM) [<https://perma.cc/F7XM-CGY7>]; Steven Brill, *The Rubber Room*, NEW YORKER (Aug. 24, 2009), <https://www.newyorker.com/magazine/2009/08/31/the-rubber-room> [<https://perma.cc/R9GU-FPT8>]; Eric Hanushek, *Ending Tenure to More Easily Fire Bad Teachers Helps Everyone*, N.Y. TIMES, <https://www.nytimes.com/roomfordebate/2014/06/11/does-tenure-protect-bad-teachers-or-good-schools/ending-tenure-to-more-easily-fire-bad-teachers-helps-everyone> (last updated Mar. 2, 2015, 12:58 PM) [<https://perma.cc/QJ8M-URPL>]; Brenda Iasevoli, *It’s Far Too Hard to Fire Bad Teachers*, EDUCATIONWEEK (Dec. 8, 2016), <https://www.edweek.org/teaching-learning/study-its-far-too-hard-to-fire-bad-teachers/2016/12#:~:text=Many%20states%20have%20revamped%20teacher,to%20a%20study%20released%20Thursday> [<https://perma.cc/J2TN-6VWK>]; Patrick McGuinn, *The Time Is Right for Teacher-Tenure Reform*, EDUCATIONWEEK (May 3, 2010), <https://www.edweek.org/teaching-learning/opinion-the-time-is-right-for-teacher-tenure-reform/2010/05> [<https://perma.cc/9V35-EGF7>].

<sup>66</sup> TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA’S PUBLIC SCHOOLS 170 (2011).

The reality is that public school teachers are fired at roughly the same rate as private-sector employees.<sup>67</sup> To be sure, even tenure defenders recognize that the time it takes to remove a teacher charged with poor performance can “drag on too long at too great an expense.”<sup>68</sup> Some state statutes require teachers to exhaust their administrative remedies first,<sup>69</sup> thereby lengthening the time for final resolution.

But the time and expense estimates that tend to grab headlines and infographics like “Why Bad Teachers Survive,” often deceptively include the remediation period (which is not a due process requirement unless state law so provides) as well as the appeals process (which, like other civil matters including private-sector wrongful discharge cases not involving teachers, can take several years to resolve in the courts).<sup>70</sup> Those attention-grabbing overestimates are also now dated, not accounting for recent reforms which have shortened the length of the due process proceedings and capped costs of a dismissal hearing.<sup>71</sup>

School administrators tend not to fully understand the requirements of tenure and may therefore retain ineffective teachers out of sheer ignorance or convenience.<sup>72</sup> And no matter their understanding of the law of tenured due process, some school officials enact “phantom policies” that inflate tenure protections and “tie their own hands,” so as to excuse their failure to dismiss ineffective teachers.<sup>73</sup> Such phantom

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<sup>67</sup> Kahlenberg, *supra* note 45, at 5-6.

<sup>68</sup> *Id.* at 6; see DAVID GRIFFITH & VICTORIA MCDUGALD, *UNDUE PROCESS: WHY BAD TEACHERS IN TWENTY-FIVE DIVERSE DISTRICTS RARELY GET FIRED* 9 (2016) (“In eleven of our twenty-five districts, an ineffective teacher can be dismissed in a year or less, assuming that administrators take the most expeditious route possible and no grievances or appeals are filed. However, in at least twelve districts, dismissing a veteran teacher for poor performance takes a minimum of two years, and in Los Angeles and San Francisco it takes at least five years.”).

<sup>69</sup> See 78 C.J.S. *Schools and School Districts* § 414 (2022) (citing cases).

<sup>70</sup> See Erik Kain, *Firing Teachers with Due Process*, FORBES (Mar. 4, 2011, 11:38 AM EST), <https://www.forbes.com/sites/erikkain/2011/03/04/firing-teachers-with-due-process/?sh=5010fa6c6efb> [<https://perma.cc/H634-ARYX>].

<sup>71</sup> See, e.g., David Cantor, *Investigation: New Records Reveal What It Takes to Be One of the 75 NYC Teachers Fired for Misconduct or Incompetence Between 2015 and 2016*, THE74MILLION.ORG (Sept. 18, 2018), <https://www.the74million.org/article/investigation-nyc-tried-to-fire-154-teachers-for-incompetence-or-misconduct-75-were/> [<https://perma.cc/Q97N-MQ7G>] (observing from survey of New York school districts that “average disciplinary case” between 2005 and 2008 “lasted 502 days” and cost “an average of \$216,588” but following reforms by 2018 “hearings were concluded in 180 days and cost \$141,772”).

<sup>72</sup> Imber, *supra* note 43, at 95.

<sup>73</sup> Dayna Jean DeFeo, Diane Hirshberg & Matthew Berman, *Statute and Implementation: How Phantom Policies Affect Tenure Value and Support*, 34 EDUC. POL’Y 350, 367 (2020).

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policies that inflate tenure protections tend to capture public imagination, shape media portrayals of tenure, and “depictions in popular culture” and, thus, for better or worse, “they become a self-fulfilling prophecy.”<sup>74</sup>

More to the point, critics of tenure fail to account for another reality: To the extent schools retain ineffective teachers, it has less to do with the law and more to do with the difficulty of finding “qualified replacement teachers.”<sup>75</sup> Until we address that supply-side problem and the factors that contribute to it, including the declared “War on Teachers,” prioritizing tenure reform to streamline due process protections puts the cart before the horse.<sup>76</sup> Considering that a staggering 44% of new teachers leave the profession within five years<sup>77</sup> and in most states it takes at least three years to earn tenure,<sup>78</sup> eliminating or weakening due process protections hardly seems a priority at all.

As it stands, the due process protections afforded by tenure confer a relatively modest entitlement to teachers considering the following:

Unless state law provides otherwise, a school board constitutes an impartial decisionmaker for purposes of the due process hearing even when the board has prejudged the sufficiency of the grounds for dismissal or take public positions on other policy matters implicated by the dismissal — unless the teacher can make the difficult showing of actual bias arising from “personal or financial stake in the decision that might create a conflict of interest.”<sup>79</sup>

Courts have rejected charges of conflict or bias when the school board’s own attorney prosecutes the case against the teacher.<sup>80</sup> In fact, some state courts even permit the school board’s attorney, who prosecutes the dismissal hearing, to join the board’s deliberations,

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<sup>74</sup> *Id.* at 365, 370-71.

<sup>75</sup> Black, *Tenure*, *supra* note 50, at 90 (quotations omitted).

<sup>76</sup> See Black, *Teacher Quality*, *supra* note 32, at 1606, 1652-53.

<sup>77</sup> RICHARD M. INGERSOLL, ELIZABETH MERRILL, DANIEL STUCKEY & GREGORY COLLINS, CONSORTIUM FOR POL’Y RSCH. IN EDUC., SEVEN TRENDS: THE TRANSFORMATION OF THE TEACHING FORCE 20 (rev. 2018), [https://repository.upenn.edu/cgi/viewcontent.cgi?article=1109&context=cpre\\_researchreports](https://repository.upenn.edu/cgi/viewcontent.cgi?article=1109&context=cpre_researchreports) [https://perma.cc/57RA-XQRK].

<sup>78</sup> Kency Nittler & Nicole Gerber, *Tenure Decisions and Teacher Effectiveness*, NAT’L COUNCIL ON TCHR. QUALITY (Mar. 12, 2020), <https://www.nctq.org/blog/Tenure-decisions-and-teacher-effectiveness> [https://perma.cc/99N8-A5DT].

<sup>79</sup> *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass’n*, 426 U.S. 482, 492-94 (1976) (concluding school board was impartial to terminate teachers who participated in strike after unsuccessful negotiations with same board).

<sup>80</sup> See *IMBER ET AL.*, *supra* note 58, at 280.



giving the prosecutor essentially “a second chance to influence the board without the defense being given an equivalent opportunity.”<sup>81</sup>

The school board or hearing officer may also defer to “opinions of principals, curriculum supervisors, and other supervisory personnel” which courts “liberally” deem expert testimony.<sup>82</sup> And courts themselves generally defer to those administrative assessments of teachers’ performance, particularly when it has been sufficiently documented.<sup>83</sup>

Yet, even when courts find that teachers have been improperly discharged, it does not relieve those teachers of their duty to mitigate their damages, which may include accepting offers from boards for part-time teaching positions.<sup>84</sup> Teachers also assume the risk of liquidated damages provisions in their contracts, which courts have generally upheld.<sup>85</sup>

Tenure offers no protection to future teachers against state repeals or modifications of tenure *writ large*.<sup>86</sup> Nor does tenure guarantee a teacher’s salary.<sup>87</sup> Indeed, school boards can reduce tenured teachers’ salaries subject to only two conditions: (i) that the boards reasonably exercise their discretion free from “discrimination or arbitrariness” and (ii) that any salary reduction predates the start of the school’s academic year.<sup>88</sup>

Tenured teachers are also exposed to reduction-in-force policies that can result in their removal<sup>89</sup> and layoff policies can, depending on the state statute, “extinguish” the “property interest and due process

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<sup>81</sup> *Id.*

<sup>82</sup> ALEXANDER & ALEXANDER, *supra* note 44, at 952.

<sup>83</sup> Black, *Tenure*, *supra* note 50, at 90.

<sup>84</sup> RUSSO, *supra* note 54, at 690-91 (citing cases).

<sup>85</sup> Ann Blankenship-Knox, *Penalty or Damages? Are There Limits to Liquidated Damages Provisions in Teacher Employment Contracts*, 14 FLA. A&M U. L. REV. 79, 80 (2021).

<sup>86</sup> DEREK BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, & REFORM 958, 965-66 (3d ed. 2021). “Both Contracts Clause of the U.S. Constitution and analogous provisions in state constitutions prohibit states from impairing contractual obligations,” and thus, could present an obstacle to revoke tenure to those who have already earned it. However, courts have not found them to be an obstacle to altering tenure rules for future teachers. *Id.*

<sup>87</sup> See 78 C.J.S. *Schools and School Districts* § 473 (2022).

<sup>88</sup> *Id.* § 473 (citing cases); 67B AM. JUR. 2D *Schools* § 206 (2022) (citing cases).

<sup>89</sup> RUSSO, *supra* note 54, at 692-96 (citing cases). “RIFs are most commonly statutorily authorized for declines in student enrollments, financial exigencies, elimination of positions or programs, and board discretion. . . . Courts generally defer to board discretion on the good faith need for RIFs.” *Id.* at 692-93.

protections” tenure otherwise affords.<sup>90</sup> Although due process may require advance notice of changes to terms or duties of teachers,<sup>91</sup> school boards retain the power to make such changes that are “reasonable.”<sup>92</sup> Should tenured teachers refuse to accept additional duties or responsibilities “reasonably related” to the job, they may be fired for “insubordination.”<sup>93</sup>

Absent state-level constraints, tenure does not protect teachers from being transferred within a school district.<sup>94</sup> School boards enjoy “broad discretion” in teacher assignments; “tenure does not give a teacher a vested right in a particular class or school.”<sup>95</sup> And tenure is usually not transferable to another school district or state.<sup>96</sup>

None of the above is meant to diminish the importance of tenure-based due process protections. But the extent to which due process protects teachers *as educators* is too often incidental at best. Bottom line, nothing is permanent about tenure, except that it, like everything else, is subject to change.

## 2. Collective Bargaining Rights: Talk Is Cheap

Public school teachers, like all employees, have a right to associate and join a labor union under the First and Fourteenth Amendments.<sup>97</sup> But, as the Supreme Court has explained, “the First Amendment does not impose any affirmative obligation on the government to listen, to respond[,] or to recognize the association and bargain with it.”<sup>98</sup> In other words, teachers have no constitutional right to collective bargaining. Nor is there any federal statute conferring such a right on public school teachers. It is therefore state law, not federal law, that determines whether a teacher union may collectively bargain.<sup>99</sup>

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<sup>90</sup> Shankar Ramamurthy, *A Wolf in Sheep's Clothing: Chicago Public Schools' Disguised "For Cause" Termination and the Due Process Implications*, 7 DEPAUL J. FOR SOC. JUST. 235, 250 (2014).

<sup>91</sup> See Black, *Tenure*, *supra* note 50, at 103.

<sup>92</sup> 78 C.J.S. *Schools and School Districts* § 504 (2022) (citing cases).

<sup>93</sup> IMBER ET AL., *supra* note 58, at 267.

<sup>94</sup> RUSSO, *supra* note 54, at 605-07.

<sup>95</sup> IMBER ET AL., *supra* note 58, at 267.

<sup>96</sup> McNeal, *supra* note 47, at 492.

<sup>97</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“The right of ‘association,’ like the right of belief, is more than the right to attend a meeting; it includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.” (citation omitted)).

<sup>98</sup> *Smith v. Ark. State Highway Emps., Loc. 1315*, 441 U.S. 463, 465 (1979).

<sup>99</sup> ALEXANDER & ALEXANDER, *supra* note 44, at 1182.

Although the laws vary in that regard, “states fall roughly into three categories: collective bargaining prohibited, permitted, and required.”<sup>100</sup>

All but five states place public school teachers in the permitted or required category.<sup>101</sup> In at least twenty-seven “right-to-work” states, however, teachers cannot be required to contribute to the costs of union representation in order to become union members.<sup>102</sup> And it is now unconstitutional in *all states* to charge nonunion public employees anything, even “fair share” or “agency fees” for the service the union provides, according to the Supreme Court’s recent holding in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, overturning a forty-year precedent.<sup>103</sup>

Teachers enjoy no right to select their union in collectively bargaining.<sup>104</sup> Moreover, their employment agreements tend to be “standardized” for them throughout the school district, with their contractual terms either provided by statute or negotiated through collective bargaining, where permitted.<sup>105</sup> There is wide variation, nevertheless, over the scope of that collective bargaining.<sup>106</sup> To appreciate the full scope, it is helpful to group collective bargaining issues in “three categories: mandatory, permissive, and excluded.”<sup>107</sup>

*Mandatory.* These are the “bread and butter issues” of a teacher’s employment subject to collective bargaining between the teacher

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<sup>100</sup> Brigham R. Frandsen & Michael Webb, *Public Employee Pensions and Collective Bargaining Rights: Evidence from State and Local Government Finances*, 15 J.L. ECON. & POL’Y 163, 172-73 (2020).

<sup>101</sup> Benjamin M. Superfine & Jessica J. Gottlieb, *Teacher Evaluation and Collective Bargaining: The New Frontier of Civil Rights*, 2014 MICH. ST. L. REV. 737, 768 (“Only five states — Georgia, North Carolina, South Carolina, Texas, and Virginia — do not permit collective bargaining for teachers.”).

<sup>102</sup> *Id.* at 768-69; *Right-to-Work Resources*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> (last visited July 7, 2022) [<https://perma.cc/ZH4K-BBP>]].

<sup>103</sup> *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018); Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CALIF. L. REV. 1821, 1827 (2019).

<sup>104</sup> IMBER ET AL., *supra* note 58, at 286.

<sup>105</sup> William S. Koski, *Teacher Collective Bargaining, Teacher Quality, and the Teacher Quality Gap: Toward a Policy Analytic Framework*, 6 HARV. L. & POL’Y REV. 67, 70 (2012).

<sup>106</sup> Benjamin M. Superfine, Alexios Rosario-Moore & Marc DeWit, *Governance, Autonomy, and Accountability in Modern Education Reform: Implications for Educational Equity*, 50 U. MEM. L. REV. 1195, 1226 (2020).

<sup>107</sup> *Id.*; see Nandan K. Jha, Neena Banerjee & Stephanie Moller, *Assessing the Role of Teachers’ Unions in the Adoption of Accountability Policies in Public Education*, 52 URB. REV. 299, 303-04 (2019).

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unions and school districts.<sup>108</sup> They are the topics affecting “the compensation and working conditions of teachers and often include wages, hours, teacher assignment, pension and healthcare benefits, teacher preparation time, and [in a minority of states] class size.”<sup>109</sup> If an issue is subject to mandatory bargaining, then either party may demand negotiations and a refusal to negotiate then constitutes an unlawful labor practice.<sup>110</sup>

*Permissive.* Being “one step removed from core employment terms,” these are topics over which teacher unions and school districts *may* choose to negotiate.<sup>111</sup> For example, permissive topics can include certain “educational objectives and textbook selection.”<sup>112</sup> Owing to their discretionary nature, permissive topics are those “most readily subject to judicial interpretation,” with parameters set “on a case-by-case basis.”<sup>113</sup> Either party may demand, but both must agree, to negotiate a permissive bargaining topic.<sup>114</sup>

*Excluded.* Issues excluded from collective bargaining are those that “generally relate to policy or managerial decisions.”<sup>115</sup> Excluded by policy are certain statutory terms and conditions — rules governing tenure and due process protections, teacher compensation schedules, layoff procedures, and teacher evaluation and discipline.<sup>116</sup> On the flip side are those issues excluded from bargaining that fall under “managerial prerogatives” such as “who shall be hired and fired” but also “promotions, curriculum, length of school year, transfer and assignment, staff size.”<sup>117</sup> The school board unilaterally decides excluded issues.<sup>118</sup>

Although such categorization can be helpful, in practice “many potential issues for bargaining do not clearly fall into one of these three categories.”<sup>119</sup> And, on that score, there is indeed considerable variation

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<sup>108</sup> Superfine et al., *supra* note 106, at 1226.

<sup>109</sup> Koski, *supra* note 105, at 71.

<sup>110</sup> IMBER ET AL., *supra* note 58, at 294.

<sup>111</sup> Superfine et al., *supra* note 106, at 1226.

<sup>112</sup> *Id.*

<sup>113</sup> RUSSO, *supra* note 54, at 613, 615-16.

<sup>114</sup> IMBER ET AL., *supra* note 58, at 294.

<sup>115</sup> Superfine et al., *supra* note 106, at 1226.

<sup>116</sup> Koski, *supra* note 105, at 71-72.

<sup>117</sup> IMBER ET AL., *supra* note 58, at 294.

<sup>118</sup> *Id.*

<sup>119</sup> ALEXANDER & ALEXANDER, *supra* note 44, at 1198 (citing cases); Superfine & Gottlieb, *supra* note 101, at 770.

among the states — “issues that are permissive or excluded in one state may be mandatory in another.”<sup>120</sup>

On mandatory bargaining topics, protections generally take the form of (i) “exclusive representation,” (ii) a “good faith” bargaining duty, and (iii) “impasse procedures.”<sup>121</sup> Provisions for exclusive representation prohibit the school district from bargaining with teachers other than through their union representatives so that the district cannot “divide and conquer” union vs. nonunion teachers.<sup>122</sup> The duty of good faith bargaining requires the parties to negotiate in good faith through meetings and by proposing terms in an attempt to reach a compromise.<sup>123</sup> In the event of an impasse, statutes prescribe procedures that usually involve mediation or a neutral, third-party adjudicator.<sup>124</sup>

State law or the collective bargaining agreements also establish grievance procedures for alleged breaches of collective bargaining agreements.<sup>125</sup> Arbitration is another common method for resolving disputes among teacher unions and school districts.<sup>126</sup>

Yet even on mandatory bargaining topics that guarantee the above process-based remedies, assessments of teachers’ constitutional and statutory labor rights must be tempered by the fact that they “do not guarantee teachers preferential employment terms, only the right to bargain for those terms.”<sup>127</sup>

On the most significant term — compensation — teacher unions only have so much leverage they can exert. Almost all school districts adopt a “single salary schedule” for compensating teachers.<sup>128</sup> Courts have

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<sup>120</sup> Superfine & Gottlieb, *supra* note 101, at 770.

<sup>121</sup> Benjamin A. Lindy, *The Impact of Teacher Collective Bargaining Laws on Student Achievement: Evidence from a New Mexico Natural Experiment*, 120 *YALE L.J.* 1130, 1137-38 (2011).

<sup>122</sup> *Id.* at 1137.

<sup>123</sup> *Id.* at 1138.

<sup>124</sup> *Id.* See generally Koski, *supra* note 105, at 71 (noting that “[i]n the event that the parties reach an impasse on any topic of mandatory bargaining, collective bargaining statutes prescribe elaborate procedures for determining impasse”).

<sup>125</sup> IMBER ET AL., *supra* note 58, at 288, 296.

<sup>126</sup> *Id.* at 288.

<sup>127</sup> Black, *Tenure*, *supra* note 50, at 102 n.139 (citing *Smith v. Ark. State Highway Emps.*, Loc. 1315, 441 U.S. 463, 465 (1979)).

<sup>128</sup> See Herbert G. Heneman, III, Steven M. Kimball, Robin Worth, Jessica S. Arrigoni & Daniel Marlin, *Compensation Practices of School Districts When Collective Bargaining Disappears*, 18 *LEADERSHIP & POL’Y SCHS.* 544, 544 (2019). “Most states (29) leave it up to individual school districts to set their own salary schedules, but in 13 other states, the salary schedule is determined by state authority. In the remaining nine states, the state sets the minimum salary a teacher must earn.” NAT’L COUNCIL ON TCHR. QUALITY,

routinely upheld those schedules provided the classifications themselves are “are reasonable and teachers with like training and experience are treated uniformly.”<sup>129</sup> The use of salary schedules, however, does not preclude salary differentials caused by pay raises “based on subjective judgments” of school officials.<sup>130</sup> Studies on the bargaining power of teacher unions are mixed but suggest that power increases with district size in mandatory bargaining states.<sup>131</sup>

The extent of teacher union bargaining power is also influenced by anti-strike penalties.<sup>132</sup> Teachers do not have a constitutional right to strike.<sup>133</sup> Although the National Labor Relations Act confers on private sector employees the right to strike, public school teachers are exempt from that federal law protection as well.<sup>134</sup> State law, for the most part, also fails to protect public employee teachers. At least 35 states do not grant teachers a statutory right to strike or engage in a work stoppage.<sup>135</sup> And even in states that afford some protection for strike activity, that protection may be “qualified and conditional,”<sup>136</sup> or come with

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TEACHER COMPENSATION STRATEGIES 1 (2022), <https://www.nctq.org/publications/State-of-the-States-2022:-Teacher-Compensation-Strategies> [<https://perma.cc/2VHY-SFN7>].

<sup>129</sup> RUSSO, *supra* note 54, at 594-95 (citing cases).

<sup>130</sup> *Id.* at 595.

<sup>131</sup> See, e.g., Eric J. Brunner & Tim Squires, *The Bargaining Power of Teachers' Unions and the Allocation of School Resources*, 76 J. URB. ECON. 15, 17, 26 (2013) (examining how district size affects bargaining power and allocation of resources and confirming a positive relationship between district size and beginning salaries and teacher-pupil ratios); see also Laura D. Quinby, *De-Unionization and the Labor Market for Teachers: From School Boards to State Politics 3* (2017) (unpublished manuscript) (on file with Harvard University) (finding “ban on collective bargaining enhanced teacher employment at the expense of compensation”).

<sup>132</sup> See Joshua Cowen & Katharine O. Strunk, *How Do Teachers' Unions Influence Education Policy? What We Know and What We Need to Learn* 16 (The Educ. Pol'y Ctr. at Mich. St. Univ., Working Paper No. 42, 2014), <https://education.msu.edu/epc/library/documents/WP%2042%20How%20do%20teachers%20unions%20influence%20education%20policy.pdf> [<https://perma.cc/Z9PH-CMBR>] (“[T]eachers' unions may retain some of their power simply from the mere threat of strike, which, although legal in 14 states only occurs very infrequently.”).

<sup>133</sup> IMBER ET AL., *supra* note 58, at 288.

<sup>134</sup> See 29 U.S.C. § 152(2) (2018) (definition of “employer” excludes “any State or political subdivision thereof”); Diana S. Reddy, “*There Is No Such Thing as an Illegal Strike*”: *Reconceptualizing the Strike in Law and Political Economy*, 130 YALE L.J. 421, 436, 440 (2021).

<sup>135</sup> *Does State Policy Allow Teacher Strikes?*, EDUC. COMM'N OF THE STATES (July 2020), <https://reports.ecs.org/comparisons/teacher-employment-contract-policies-11> [<https://perma.cc/2Y2L-49GH>].

<sup>136</sup> See, e.g., Rumel, *supra* note 21, at 31 (examining factors that caused state- or district-wide teacher strikes and noting Colorado has substantive and procedural

“restrictions and exceptions, such as a requirement that the parties engage in alternative dispute resolution” first or that union “give a certain number of days’ notice.”<sup>137</sup>

In states where teachers are partially or completely unprotected, teachers and their unions may be subject to penalties for engaging in organized strikes including “loss of pay, fines, and even dismissal of striking employees; fines and jail terms for union leaders who defy a court order to return to work; and union reimbursement of the board for substitute teachers, legal fees, and other expenses incurred in dealing with a strike.”<sup>138</sup>

Engaging in concerted action — otherwise protected for private sector employees — can even terminate tenured teachers’ due process protections. Most state courts have indeed held there is no constitutionally required pretermination hearing for striking teachers, reasoning that they forfeit their tenure protections when they purportedly “abandoned their contracts, thus giving up any property rights to their jobs and any claims to procedural due process.”<sup>139</sup>

Collective bargaining is further impeded by the duty of fair representation teacher unions arguably owe to all teachers, including nonunion members who do not contribute to the cost of the representation.<sup>140</sup> And when that representation does occur through contract negotiations, the duty to bargain in good faith does not require any compromise from the school district’s initial position.<sup>141</sup>

Given the above limitations on teachers’ collective bargaining rights, it is fair to say that their “unions have been successful because of their political rather than legal strength.”<sup>142</sup> And it is because of the perceived political strength of teacher unions that many states exclude topics from collective bargaining for teachers even though many of those same topics would be mandatory or permissive for private sector workers.<sup>143</sup>

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conditions placed on right to strike (citing *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992)).

<sup>137</sup> GEE & DANIEL, *supra* note 41, at 496.

<sup>138</sup> IMBER ET AL., *supra* note 58, at 289.

<sup>139</sup> *Id.*

<sup>140</sup> *But see* Fisk & Malin, *supra* note 103, at 1869 (contending that duty “contemplates that the union must necessarily prioritize the interests of some employees over others”).

<sup>141</sup> IMBER ET AL., *supra* note 58, at 294.

<sup>142</sup> Black, *Tenure*, *supra* note 50, at 103 n.139. “Unions have proven adept at shifting their focus from local bargaining to state capitols and may work to replicate collective bargaining rules in codified laws.” Koski, *supra* note 105, at 88.

<sup>143</sup> See Martin H. Malin, *Education Reform and Labor-Management Cooperation: What Role for the Law?*, 45 U. TOL. L. REV. 527, 535 (2014).

In both sectors, the assumption is that “management is to control all business decisions, and the role of workers is to simply enact tasks given by management.”<sup>144</sup>

Following that logic, the laws governing collective bargaining “often narrowly circumscribe the role of teachers’ unions.”<sup>145</sup> Most relevant to this Article, the laws that structure the processes of collective bargaining fail to provide a space for educators’ input on actual educational “issues like curriculum reform, student assessment, and the allocation of resources for remedial assistance” — topics that are more difficult to classify neatly or squarely as wages and work conditions.<sup>146</sup> Never mind the obvious collateral consequence: restricting collective bargaining to exclude teacher input and buy-in on the ways and means of educating their students is counterproductive, if the actual goal is improving student performance.<sup>147</sup>

For sure, teacher unions have every incentive to characterize topics as subject to mandatory bargaining.<sup>148</sup> But that presents a formidable challenge because, although “every managerial decision in some way relates to salaries, wages, hours, and other working conditions, and is therefore arguably negotiable, . . . virtually every such decision also involves educational policy considerations and is therefore arguably nonnegotiable.”<sup>149</sup> The issue of class size “exemplifies the tension between teacher working conditions and public policy” because it affects a work condition (i.e., teacher workloads) but also affects education policy given “the educational costs and benefits of smaller class sizes.”<sup>150</sup>

Even though they have no bargaining rights over many education issues, teacher unions are often blamed for the failure of education reforms.<sup>151</sup> “The problem is not that unions are obstacles to reform,”

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<sup>144</sup> Superfine et al., *supra* note 106, at 1226.

<sup>145</sup> Superfine & Gottlieb, *supra* note 101, at 774.

<sup>146</sup> *Id.* at 773.

<sup>147</sup> *See id.*

<sup>148</sup> Koski, *supra* note 105, at 71.

<sup>149</sup> *Montgomery Cnty. Educ. Ass’n v. Bd. of Educ.*, 534 A.2d 980, 986 (Md. 1987).

<sup>150</sup> Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL’Y 885, 915 (2007).

<sup>151</sup> *See* Malin, *supra* note 143, at 537; *see, e.g.*, Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 YALE L.J.F. 685, 696 (2021) (“The campaign to reduce collective-bargaining rights of teachers had bipartisan support, for the ostensible reason that teachers’ unions make it too hard to reform education.”); Monica Teixeira de Sousa, *The State of Our Unions: How President Obama’s Education Reforms Threaten the Working Class*, 50 U. LOUISVILLE L. REV. 201, 201 (2011) (“The ‘teachers’ union’ vs.



however, “it is that they have no right to voice in the discussions of reforms.”<sup>152</sup> So naturally they focus their efforts where they can, on “protecting their members from the effects of reforms that management has decreed unilaterally.”<sup>153</sup> In those “narrow areas to which they have been channeled,” teacher unions have indeed been influential in negotiations.<sup>154</sup> But due to legal constraints on their actions, the sum total of teachers’ collective bargaining rights can amount to no more than the right to talk, and talk is cheap.

### B. *Teacher First Amendment Rights*

“The vigilant protection of constitutional freedoms,” the Supreme Court once said, “is nowhere more vital than in the community of American schools.”<sup>155</sup> And so, as the Court has long held that “First Amendment rights, applied in the light of the special characteristics of the school environment, are available to *teachers* and students.”<sup>156</sup> Teachers and students are not supposed to “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>157</sup> But the current state of the law suggests otherwise. Indeed, in some instances, “teachers’ rights are often less protected than students.”<sup>158</sup>

The Court’s once-stated esteem for teachers’ freedom of speech rings hollow, either because it has recognized very few rights for teachers to shed in the first place, or it has stealthily dishonored teacher freedoms through elusive doctrinal moves that have molted those rights over time. In either case, there are two strands of First Amendment protections said to be unique to public school teachers, curricular speech and academic freedom. In theory, other forms of teacher expression both in and out of school settings should enjoy the same or similar protections granted to public employees generally. Thus, the emphasis here will be on those forms of expression unique to teachers *qua* educators.

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‘reformer’ divide is catchy for journalists, because it fits into a familiar narrative of ‘might’ vs. ‘right.’”).

<sup>152</sup> Malin, *supra* note 143, at 537.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

<sup>156</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (emphasis added).

<sup>157</sup> *Id.*

<sup>158</sup> Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235, 292 (2014).

### 1. Curricular Speech: Empty Rhetoric?

Forms of teacher curricular speech and expression have been “characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart knowledge or skills to student participants and audiences.”<sup>159</sup> It remains unsettled whether such curricular speech warrants *any* First Amendment protection. The essential question left unanswered by the Supreme Court is whether public school teachers should be treated like any other public employee-citizen or whether they are entitled to special consideration in their role as educators.<sup>160</sup>

Down the public-employee citizen path, curricular speech would warrant virtually no protection. Down the educator path, the protections would be tenuous at best.

What makes the traditional public-employee citizen path so precarious for teacher curricular speech is the potential application of *Garcetti v. Ceballos*.<sup>161</sup> That case was not about curricular speech at all but instead involved a district attorney’s First Amendment retaliation claim against his supervisors for informing them by memo of alleged misrepresentations in a police officer’s search warrant.<sup>162</sup> The Court held that the First Amendment did not protect the district attorney’s speech from “managerial discipline” because that speech was “made pursuant to [his] official responsibilities” as a county prosecutor.<sup>163</sup> If the speech is made pursuant to official duties, then it is effectively the government’s speech to control, the Court reasoned, and thus, public “employees are not speaking as citizens for First Amendment purposes,

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<sup>159</sup> *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)). “Classroom speech can impart particular knowledge if its purpose is to convey a specific message or information to students. That specific message need not relate to, for example, Spanish instruction, but could instead constitute information on social or moral values that the teacher believes the students should learn or be exposed to.” *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 699 (4th Cir. 2007).

<sup>160</sup> RONNA GREFF SCHNEIDER, *Choosing the Analytical Model*, in 1 EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2:19, § 2:19 (2019) (“The Supreme Court has not directly determined what analytical framework should be used in assessing the scope of constitutional protection to be afforded a teacher’s classroom speech.”).

<sup>161</sup> 547 U.S. 410 (2006).

<sup>162</sup> *Id.* at 413-16.

<sup>163</sup> *Id.* at 424.

and the Constitution does not insulate their communication from employer discipline.”<sup>164</sup>

As it stared down that cliff, considering the “important ramifications” for public school teachers and college professors, the Court stepped back, a little:

There is some argument that expression related to academic scholarship or *classroom instruction* implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or *teaching*.<sup>165</sup>

This “*Garcetti* caveat,”<sup>166</sup> however, has not stopped a majority of lower courts from applying *Garcetti*’s holding to teacher speech both outside and inside the classroom.<sup>167</sup> They have reasoned that the caveat applies only to post-secondary faculty, not to elementary and secondary teachers.<sup>168</sup> And, in that K-12 setting, “the teacher is the agent of the school and the state when delivering the curriculum,”<sup>169</sup> her speech is her “stock and trade, the commodity she sells to her employer in exchange for a salary,”<sup>170</sup> and as such the “school board control over the curriculum is paramount.”<sup>171</sup>

The application of *Garcetti*, despite the caveat, means that “the First Amendment does not provide protection for teachers’ in-class, curricular speech”<sup>172</sup> in those jurisdictions — not even “the right to receive adequate notice that a category of speech is prohibited.”<sup>173</sup>

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<sup>164</sup> *Id.* at 421.

<sup>165</sup> *Id.* at 425 (emphasis added).

<sup>166</sup> *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 343 (6th Cir. 2010).

<sup>167</sup> SCHNEIDER, *supra* note 160, § 2:19 n.20.10 (collecting cases); *see also* Cooley, *supra* note 158, at 271 (noting that “majority of courts now utilize *Garcetti v. Ceballos* as a way to constrict teacher First Amendment rights”); Rosina E. Mummolo, *The First Amendment in the Public School Classroom: A Cognitive Theory Approach*, 100 CORNELL L. REV. 243, 251-52 (2014).

<sup>168</sup> Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 254 (2013); *see, e.g., Evans-Marshall*, 624 F.3d at 343 (distinguishing importance of academic freedom to post-secondary professors as opposed to elementary and secondary school teachers).

<sup>169</sup> Bowman, *supra* note 168, at 259-60.

<sup>170</sup> *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007).

<sup>171</sup> Cooley, *supra* note 158, at 270.

<sup>172</sup> *Id.* at 274.

<sup>173</sup> Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 54 (2008).

Although that conclusion is not unanimous, “the circuit splits make no difference when it comes to the outcomes of the cases — in the definitive cases in all eleven circuits, the teachers lost their free speech claims.”<sup>174</sup> For, even those courts that have not applied *Garcetti* to teacher curricular speech, have deferred nonetheless “to states and school boards, rather than to teachers, about instructional speech.”<sup>175</sup> Even before *Garcetti*, in fact, some courts had concluded that any First Amendment curricular speech protections belong to “school officials or the local board of education, as the speaker rather than the teacher.”<sup>176</sup> Still other courts “grafted restrictive speech controls enunciated by the high court for governmental employees onto teachers without addressing the unique nature of the educational scope of employment within public schools.”<sup>177</sup>

In other words, few courts have been willing to seriously entertain the notion there is anything special about teacher curricular speech — i.e., they have generally refused to venture far down the educator path. Although less treacherous, that educator path is not, by any means, smooth; it is rather “quite complicated, especially post-*Garcetti*” which “has led to similar cases being decided differently in the circuits.”<sup>178</sup>

If the First Amendment provides any protection to teachers as public employee-citizen educators, it is only when their curricular speech relates to matters of public concern.<sup>179</sup> Speech relates to matters of public concern when it regards “any matter of political, social, or other concern to the community.”<sup>180</sup> Otherwise, employee speech relating to “matters only of personal interest” enjoys no First Amendment protection “absent the most unusual circumstances.”<sup>181</sup>

It is far from obvious what type of curricular speech relates to a matter of public concern. “The circuit courts have adopted a dizzying set of rules to determine when First Amendment protections are triggered in

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<sup>174</sup> Bowman, *supra* note 169, at 258.

<sup>175</sup> *Id.* at 260.

<sup>176</sup> Benjamin C. Galea, *Getting to “Sometimes”: Expanding Teachers’ First Amendment Rights Through “Garcetti’s Caveat,”* 62 CASE W. RESV. L. REV. 1205, 1221 n.158 (2012) (citing cases).

<sup>177</sup> Cooley, *supra* note 158, at 264.

<sup>178</sup> Mark Strasser, Pickering, *Garcetti*, & *Academic Freedom*, 83 BROOK. L. REV. 579, 595 (2018).

<sup>179</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (rejecting contention that “teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools”).

<sup>180</sup> *Connick v. Myers*, 461 U.S. 138, 146 (1983).

<sup>181</sup> *Id.* at 147.

the academic context.”<sup>182</sup> In one instance, the Fourth Circuit decided, in circular fashion, that teacher curricular speech in the form of classroom postings could not relate to a matter of public concern “because they were of a curricular nature.”<sup>183</sup>

Even if the curricular speech relates to matters of public concern, the First Amendment protection is far from absolute; rather, a court must strike a balance “between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>184</sup> Significantly, in that balancing process, courts may consider a school’s pedagogical concerns for imposing restrictions on teachers’ classroom speech.<sup>185</sup> If the curricular speech is too disruptive or does not squarely align with the curriculum, then the state’s interests could outweigh the teacher’s free speech rights.

It would be a challenge for an experienced attorney, let alone a public school teacher, to predict with much confidence whether their curricular speech relates to a matter of public concern or which way a court might balance their free speech interests versus the state’s interests. Predictably, this has a chilling effect even on otherwise protected speech.<sup>186</sup> “Few subjects lack controversy,” after all, and “[i]f teachers must fear retaliation for every utterance, they will fear teaching.”<sup>187</sup>

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<sup>182</sup> Strasser, *supra* note 178, at 579.

<sup>183</sup> *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 (4th Cir. 2007).

<sup>184</sup> *Pickering*, 391 U.S. at 568.

<sup>185</sup> *See, e.g., Panse v. Eastwood*, 303 Fed. App’x 933, 935 (2d Cir. 2008) (noting restrictions on art teacher’s speech were “reasonably related to the legitimate pedagogical concerns of limiting commercial solicitation during class time and investigating potentially inappropriate discussion of material that could be construed as being of a sexual nature”); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998) (“A flat prohibition on profanity in the classroom is reasonably related to the legitimate pedagogical concern of promoting generally acceptable social standards.”).

<sup>186</sup> Mary-Rose Papandrea, *Social Media, Public School, Teachers, and the First Amendment*, 90 N.C. L. REV. 1597, 1634 (2012) (“A threshold public concern inquiry potentially chills valuable speech without requiring any showing that the expression affects the government’s ability to conduct its mission.”); Nicholas K. Tygesson, *Cracking Open the Classroom Door: Developing a First Amendment Standard for Curricular Speech*, 107 NW. U. L. REV. 1917, 1921 (2013) (“In the absence of a Supreme Court decision clarifying teachers’ rights, in-class speech is chilled and the balance of interests between school boards and teachers is impermissibly tilted in favor of the former.” (citing Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 7 (2001))).

<sup>187</sup> *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993).

Having to consider the content, form, and context of their speech, many teachers will err on the side of caution and not engage in any speech that could be questioned.<sup>188</sup> Consequently, *Garcetti* “may not have directly imperiled speech rights, but it may have done something worse — left ... school teachers in a troubling state of uncertainty about their rights.”<sup>189</sup>

Finally, even if a teacher were able to clear the public concern and balancing hurdles, she or he must still show that the constitutionally protected curricular speech was a motivating factor in the adverse employment action.<sup>190</sup> And even if the teacher clears that last hurdle, the court could still decide that the adverse employment action was lawful because the school official “would have taken the same action against the employee even in the absence of protected speech.”<sup>191</sup>

The Court’s most recent brush with teacher speech came in a school prayer case, *Kennedy v. Bremerton School District*.<sup>192</sup> Although the Court reaffirmed that teachers as “citizens” and “public school employees” do not shed their speech rights at the schoolhouse gate, it also noted “the complexity associated with the interplay between free speech rights and government employment.”<sup>193</sup> Yet the Court once again sidestepped such complexity in *Kennedy*, concluding that a high school football coach’s prayer on the field after the game, though it “implicate[d] a matter of public concern,” did not present questions about a teacher’s curricular speech in performing his official duties nor about his “academic freedom.”<sup>194</sup> Hence, the Court could continue its silence on these matters.

And so, the practical effect of the current law as it were, assuming *Garcetti* is not dispositive, is that “teachers have very little constitutional protection for their [curricular] speech.”<sup>195</sup> Indeed, talk of curricular

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<sup>188</sup> See John M. Ryan, *Teacher Free Speech in the Public Schools: Just When You Thought It Was Safe to Talk* . . . , 67 NEB. L. REV. 695, 716 (1988) (“The lesson for the educator is simple and short: Until the system changes, there is simply no way to tell whether certain speech will be protected by the Constitution.”).

<sup>189</sup> Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 262 EDUC. L. REP. 357, 388 (2011).

<sup>190</sup> See *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1207 (10th Cir. 2007).

<sup>191</sup> *Id.* at 1208.

<sup>192</sup> 142 S. Ct. 2407 (2022).

<sup>193</sup> *Id.* at 2423.

<sup>194</sup> *Id.* at 2424.

<sup>195</sup> BLACK, *supra* note 86, at 872. The one saving grace is that “tenured teachers are unlikely to be terminated for some degree of deviation from the curriculum.” *Id.* at 878. That is, unless tenure protections are weakened further.

speech as a distinctive category of protected First Amendment speech within the schoolhouse gate seems mostly empty rhetoric at this point.<sup>196</sup>

## 2. Academic Freedom: The Musings of Academics?

Curricular speech and academic freedom are often conflated because they overlap, but the two are conceptually different.<sup>197</sup> In cases where curricular speech protections are at issue, the essential question is: Has the teacher's speech or expression lawfully deviated from the approved curriculum? Academic freedom cases pose a further question: Does the teacher have any discretion, as a professional educator, in (i) selecting content relevant to the curriculum and (ii) choosing how the curriculum is taught, i.e., the teaching method?<sup>198</sup> An affirmative answer to the academic freedom question will tend to affect the answer we can give to the curricular speech question.

"As others have frequently pointed out, the Supreme Court has, in various First Amendment, substantive due process, and affirmative action cases, suggested (but not held) that there exists a constitutionally based teacher's or institution's academic freedom."<sup>199</sup> Setting aside, for now, the other possible bases for academic freedom, the Court has clearly stated that academic freedom is "a special concern of the First Amendment."<sup>200</sup> It has not clarified, however, to what extent academic freedom is coextensive with other First Amendment protections.

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<sup>196</sup> This is not to say that teachers are without *any* constitutional protections. Due process protections afforded by tenure, where it exists, still place real limits on the extent to which a teacher could be lawfully subject to discipline, even terminated, for their speech and expression. Under more limited circumstances, equal protection guarantees could functionally protect teacher curricular speech as well.

<sup>197</sup> See generally Nathan A. Adams, IV, *Resolving Enmity Between Academic Freedom and Institutional Autonomy*, 46 J. COLL. & U.L. 1, 33-36, 63-64 (2022) (contending, by way of distinguishing them, that curricular speech doctrine is actually inimical to academic freedom).

<sup>198</sup> See Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 62 (2008) ("Academic freedom issues in elementary and secondary education concern not only *what* is taught, *how* and *by whom*, but also *who* decides these matters."). See generally Donald F. Uerling, *Academic Freedom in K-12 Education*, 79 NEB. L. REV. 956, 957, 960 (2000) (delineating four essential academic freedoms, noting that some courts have suggested academic freedom encompasses the "exercise [of] professional judgment in selecting topics and materials for use in the course of the education process" but concluding that case law suggests only a modicum of constitutional protection for public school teachers' "academic expression").

<sup>199</sup> Nahmod, *supra* note 198, at 60-61.

<sup>200</sup> *Keyishian v. Bd. of Regents of Univ.*, 385 U.S. 589, 603 (1967).

Nor has the Court settled on to whom academic freedom is owed, previously referring to “a student’s right to academic freedom, to a teacher’s right to academic freedom, or to some kind of institutional academic freedom.”<sup>201</sup> Indeed, the Court has only suggested that academic freedom even applies to K-12 public school teachers — as an alternative justification in cases firmly decided instead on Establishment Clause grounds.<sup>202</sup>

In this rather immense doctrinal vacuum, the lower courts have scattered themselves in all directions, though they have been “remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom.”<sup>203</sup> The resulting “disparity of conclusions is stunning” and runs the gamut:

A school district may refuse to rehire a teacher because he assigned Aldous Huxley’s *Brave New World*. A school district may not dismiss a teacher because he assigned Kurt Vonnegut’s ‘Welcome to the Monkey House.’...A high school art teacher cannot be compelled to recite the Pledge of Allegiance, but a kindergarten teacher can be so compelled...A high school teacher has a right of academic freedom ‘in choosing a particular pedagogical method for a course, so long as the course is part of the school’s official curriculum and the teaching method serves a demonstrable educational purpose. A high school teacher has no right of academic freedom.’<sup>204</sup>

That latter view tends to win out: “courts historically have been extremely reluctant to recognize academic freedom rights for elementary and secondary teachers.”<sup>205</sup> Compulsory schooling that

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<sup>201</sup> RONNA GREFF SCHNEIDER, *Academic Freedom*, in 1 EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2:2, § 2:2 (2019) (citing cases).

<sup>202</sup> See W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 315-16 (1998) (discussing *Epperson v. Arkansas* and *Edwards v. Aquillard*); see also *Brown v. Chi. Bd. of Educ.*, 973 F. Supp. 2d 870, 877 (N.D. Ill. 2013) (“Since the time of the *Garcetti* decision, the Supreme Court has not had an occasion to address the question, nor has the Court actually ever outright held that public teachers enjoy First Amendment protection of classroom-instruction freedom at educational grades below colleges and universities.”).

<sup>203</sup> Stuller, *supra* note 202, at 302.

<sup>204</sup> See Hutchens, *supra* note 173, at 55.

<sup>205</sup> Bowman, *supra* note 169, at 254; see *id.* at 260 n.270. The applicability of academic freedom in K-12 settings is much debated among legal scholars as well. See JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit’s Post-Garcetti Jurisprudence*, 63 U. MIA. L. REV. 761, 765 (2009).



makes students captive audiences in their classrooms has persuaded courts that school officials should have more control so as not to subject students to “teachers’ idiosyncratic perspectives.”<sup>206</sup> Courts might also be discouraged from weighing in too deep, considering that “academic freedom for faculty members in higher education currently rests in a constitutional bog.”<sup>207</sup> It is just not easy to translate the doctrine to K-12 cases from higher education cases, which implicate “researchers or scholars-work not generally expected of elementary and secondary school teachers”<sup>208</sup> and also tend to involve controversies over “individual professors at public universities or institutional protections for the university itself.”<sup>209</sup>

At least one matter seems nearly settled, however: “courts have uniformly ruled, before and after *Garcetti*, that teachers in elementary and secondary education do not have a First Amendment right of academic freedom to decide for themselves *what* should be taught and *how*.”<sup>210</sup> As a result, “the school board may both write the script and demand that teachers perform it” without infringing the First Amendment, anyway.<sup>211</sup> That does not exhaust the possibility of academic freedom over content and teaching method choices consistent with the board-approved curriculum. Along those lines, it is not about “whether either the teachers or the board will make all decisions, but only who will have the final say in case of conflict.”<sup>212</sup> There is only so much the school board can script and, thus, practically speaking, teachers retain some latitude over their day-to-day teaching.<sup>213</sup>

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<sup>206</sup> Hutchens, *supra* note 173, at 52.

<sup>207</sup> *Id.* at 55.

<sup>208</sup> *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 344 (6th Cir. 2010); *see also* Bruce Maxwell, David I. Waddington & Kevin McDonough, *Academic Freedom in Primary and Secondary School Teaching*, 17 *THEORY & RSCH. EDUC.* 119, 132-35 (2019) (acknowledging differences between teaching in higher education versus a compulsory K-12 environment but contending that academic freedom is necessary for primary and secondary school teachers for sake of their professional autonomy and involvement in the regulatory frameworks that govern their work).

<sup>209</sup> Tygesson, *supra* note 186, at 1937-38.

<sup>210</sup> Nahmod, *supra* note 198, at 63-64 (emphasis added).

<sup>211</sup> *Id.* at 64; *see also* Kim Fries, Vincent J. Connelly & Todd A. DeMitchell, *Academic Freedom in the Public K-12 Classroom: Professional Responsibility or Constitutional Right? A Conversation with Teachers*, 227 *EDUC. L. REP.* 505, 510 (2008) (“The courts are typically protective of the school board’s authority to decide what curriculum is best based in large part on the values of the community.”).

<sup>212</sup> Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 *U. PA. L. REV.* 1293, 1357 (1976).

<sup>213</sup> *See id.*

But at the end of the day, teachers astutely “perceive that their academic freedom is rooted in their professional work with students and not necessarily grounded in constitutional law. To them, academic freedom is not a robust right that can be used to define practice.”<sup>214</sup> At this point, teacher rights bound up with academic freedom may be little more than the musings of academics, in higher education, where faculty still have the privilege to muse.

## II. TEACHER RIGHTS DESIDERIUM

The legal architecture underpinning the few settled rights of teachers as public-employee citizens rests on shaky ground following seismic shifts in education policy at the federal and state levels. “Education reform” over the past two decades has “increasingly translated into teacher reform and vice versa.”<sup>215</sup> Much of this “merry-go-round”<sup>216</sup> reform has been at the expense of teachers and their rights. Although states varied in the particulars of their reforms, “common elements include a focus on diminishing teachers’ collective bargaining rights” as well as “the removal of polices long prioritized by teachers,” most dramatically, tenure and layoff protections incorporating teaching evaluations.<sup>217</sup>

The wholesale assault on teacher rights began in earnest with No Child Left Behind Act (“NCLB”) which “marked the initiation of the federal accountability era” to address the perceived problem that low performing schools were dragging the nation down.<sup>218</sup> And teachers, the federal policymakers insisted, were both the “problem and solution.”<sup>219</sup> NCLB ushered in a high-stakes testing regime to hold schools (teachers) accountable for their standardized test scores. Even before NCLB, standardized testing had been a way for policymakers to exert “greater control over teaching,” to force “the state-designed curriculum,” over

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<sup>214</sup> Fries et al., *supra* note 211, at 522.

<sup>215</sup> BLACK, *supra* note 86, at 947.

<sup>216</sup> Derek W. Black, *Breaking the Norm of School Reform*, 72 ARK. L. REV. 307, 308 (2019) [hereinafter *School Reform*].

<sup>217</sup> Joshua M. Cowen & Katharine O. Strunk, *Teacher Labor Market Reforms: A Look Ahead to the Next Decade*, in THE OXFORD HANDBOOK OF U.S. EDUCATION LAW 655, 655 (Kristine L. Bowman, ed. 2021) [hereinafter *Teacher Labor Market Reforms*].

<sup>218</sup> Meredith L. Wronowski & Angela Urick, *Examining the Relationship of Teacher Perception of Accountability and Assessment Policies on Teacher Turnover During NCLB*, 27 EDUC. POL’Y ANALYSIS ARCHIVES 1, 3 (2019).

<sup>219</sup> Pawlewicz, *supra* note 27, at 305.

teacher objections, because it would be tested.<sup>220</sup> In that regard, NCLB exponentially increased policymakers' leverage over teachers by requiring testing in math and reading (later science at certain levels) from third through eighth grades and once in high school, demanding all states achieve 100 percent proficiency, and imposing sanctions on schools that failed to meet their yearly targets.<sup>221</sup>

The intense pressure to meet those targets increasingly caused schools to “teacher proof” the curriculum with “standardized lesson plans and materials across all the classrooms in a school and provide prescriptive day-to-day, even minute-to-minute schedules for teachers to follow.”<sup>222</sup>

NCLB demanded that states wield still more control over teachers, ironically to address teacher recruitment and retention problems.<sup>223</sup> As a “lynchpin” of NCLB reform “stemmed from the historical policy story of blaming teachers,” the law mandated “all teachers have a bachelor's degree, full certification, and demonstrate ‘adequate’ content knowledge.”<sup>224</sup> But this “highly qualified” teacher mandate “had little bearing on what good teaching looked like” and simply became a “catchphrase that obscured more than it clarified.”<sup>225</sup> Indeed, NCLB “left states to define and measure teacher quality themselves, creating a race to the bottom in some.”<sup>226</sup> The mandate thus exposed, but did not prompt states to address, “the high number of uncertified and low-credentialed teachers in our nation's schools,” especially concentrated in marginalized communities.<sup>227</sup> “In fact, systemic violations of the teacher quality requirements mounted quicker than violations of any other NCLB requirement, including improving student test scores.”<sup>228</sup>

Regarding standardized testing proficiency, NCLB also predictably missed its mark, with most schools “set to be labeled as failures under the Act.”<sup>229</sup> Yet rather than admit defeat, policymakers set the stage to shift the blame again to teachers. “Teachers, rather than schools, would

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<sup>220</sup> JACK SCHNEIDER, BEYOND TEST SCORES: A BETTER WAY TO MEASURE SCHOOL QUALITY 36 (2017) [hereinafter BEYOND TEST SCORES].

<sup>221</sup> *See id.* at 41.

<sup>222</sup> GOLDSTEIN, *supra* note 16, at 186.

<sup>223</sup> Black, *School Reform*, *supra* note 216, at 311.

<sup>224</sup> Pawlewicz, *supra* note 27, at 304-06.

<sup>225</sup> *Id.* at 305-06.

<sup>226</sup> Black, *Tenure*, *supra* note 50, at 85.

<sup>227</sup> *Id.* at 85-86.

<sup>228</sup> *Id.* at 86.

<sup>229</sup> Black, *School Reform*, *supra* note 216, at 309.

suffer harsh consequences when their students underperformed expectations.”<sup>230</sup>

This development came as little surprise to those who had been following the shifting political winds. In the lead up to NCLB, the dominant narrative, accepted even by some progressives, “stressed bad teachers and an absence of teacher accountability as key obstacles to reform” that would have otherwise helped poor children and children of color.<sup>231</sup> And so, “fighting teachers’ unions was framed as a civil rights and racial justice cause.”<sup>232</sup> The movement took aim specifically at “job protections associated with teachers’ unions.”<sup>233</sup>

The Great Recession and the looming threat of NCLB sanctions created the atmospheric conditions needed to strike on that agenda. With the vast majority of the nation’s schools, 80% in fact, facing NCLB sanctions for failing to meet its requirements, “the Department of Education agreed to waive state and local violations of the statute on the condition that states and districts adopt the exact policies” set forth in Race to the Top (“RTT”), a competitive \$4 billion grant program funded by an economic stimulus bill.<sup>234</sup> Among the RTT conditions, states would be required to institute teacher “evaluation and support systems” to “meaningfully [differentiate] teacher performance” based on student metrics in order to “inform [teaching] personnel decisions.”<sup>235</sup> Essentially, this “required regular statistical assessment of teachers based on their students’ standardized exam performance.”<sup>236</sup>

States dealing with budget shortfalls from the Recession had little choice but to accept these conditions to obtain the NCLB waivers, and so, Department of Education policy effectively “displaced the NCLB’s statutory policies in forty-five states.”<sup>237</sup> And the message from on high at the Department of Education was that schools should “hire, fire, and promote teachers” based largely on standardized test scores.<sup>238</sup> That message was received loud and clear as most states also promptly seized the opportunity to enact further “education” reforms — destabilizing

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<sup>230</sup> *Id.*

<sup>231</sup> Benjamin Levin, *What’s Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1363 (2020).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1329 (2017).

<sup>235</sup> *Id.* at 1330.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Black, *School Reform*, *supra* note 216, at 311.

teacher rights, depleting the teaching profession nationwide, and demoralizing educators over the concomitant loss of their autonomy and disrespect shown to them and their vocation.

#### A. *Destabilized Teacher Rights*

In just the past decade, state legislatures enacted sweeping measures affecting teacher rights. Four states — Florida, North Carolina, Kansas, and Idaho — “functionally eliminated” or phased out tenure entirely.<sup>239</sup> Wisconsin excluded teacher unions from bargaining over all issues except “base wages for approximately two-thirds of school districts” even as it demanded that teachers “significantly increase” retirement contributions and health insurance premiums.<sup>240</sup> Indiana likewise limited teacher collective bargaining to salary, wages, and related benefits.<sup>241</sup> In addition to restrictive bargaining in Wisconsin and Indiana, five states — Georgia, North Carolina, South Carolina, Virginia, and Texas — now prohibit teacher collective bargaining altogether.<sup>242</sup>

The federal push for teaching evaluation and accountability systems had a pronounced effect on both tenure and collective bargaining protections as well.<sup>243</sup> “Between 2009 and 2012, thirty-six states and the District of Columbia passed laws mandating that districts evaluate teachers based on their students’ standardized test scores.”<sup>244</sup> In some of those states, teachers could lose tenure or be dismissed for low scores.<sup>245</sup> Nineteen states have also tied teacher evaluation to decisions over whether to grant tenure in the first place.<sup>246</sup> All told, more than forty states require student performance measures to be included in teaching evaluations, “despite any evidence that the evaluations had improved teacher quality or positively impacted student performance.”<sup>247</sup>

Even as states placed more emphasis on teacher evaluations, many simultaneously excluded teaching evaluation from collective

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<sup>239</sup> Nittler & Gerber, *supra* note 78; see McNeal, *supra* note 47, at 500-01 (describing Florida and Idaho reforms as phasing out tenure).

<sup>240</sup> Superfine & Gottlieb, *supra* note 101, at 776.

<sup>241</sup> Malin, *supra* note 143, at 530.

<sup>242</sup> Superfine & Gottlieb, *supra* note 101, at 768.

<sup>243</sup> See generally BLACK, *supra* note 86, at 978 (“Whether the changes were primarily the result of federal leadership or federal leadership simply reinforced local initiatives is not clear.”).

<sup>244</sup> Black, *Teacher Quality*, *supra* note 32, at 1621.

<sup>245</sup> *Id.* at 1621-22.

<sup>246</sup> Cowen & Strunk, *Teacher Labor Market Reforms*, *supra* note 217, at 658.

<sup>247</sup> Superfine et al., *supra* note 106, at 1217.

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bargaining, silencing teachers on such topics.<sup>248</sup> Other topics over which states modified their collective bargaining laws included “tying teacher compensation to evaluation, lengthening the time it takes for teachers to achieve tenure, and streamlining procedures for teacher discipline and firing.”<sup>249</sup>

Ironically enough, restricting collective bargaining and unionization is counterproductive, if the objective is to dismiss ineffective teachers or deny tenure to probationary teachers. That is because highly unionized districts dismiss more ineffective teachers but retain more quality teachers in comparison with weakly unionized districts.<sup>250</sup> Still another significant change from policies that had given weight to collective bargaining agreements — “twenty states now require districts to consider teacher performance in their layoff decisions.”<sup>251</sup>

“The net result of reforms” taking such topics and decisions off the collective bargaining table “is that, for the first time in decades, teachers in traditional K-12 public schools face substantially weakened job security.”<sup>252</sup>

Although these changes provoked legal challenges in defense of teacher rights, they were largely unsuccessful.<sup>253</sup> The Seventh Circuit upheld Wisconsin’s restrictions on collective bargaining.<sup>254</sup> The North Carolina Supreme Court upheld the prospective elimination of teacher tenure.<sup>255</sup> The Louisiana Supreme Court upheld revisions to its tenure statutes that eliminated the requirement for a full evidentiary hearing before dismissal.<sup>256</sup> Courts of appeal in Illinois upheld changes to the RIF statute that permit, for purposes of dismissals or nonrenewals, the ordering of teachers within groups based on teaching evaluations, even

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<sup>248</sup> Cowen & Strunk, *Teacher Labor Market Reforms*, *supra* note 217, at 657.

<sup>249</sup> Superfine & Gottlieb, *supra* note 101, at 774; *see also* Koski, *supra* note 105, at 72.

<sup>250</sup> Eunice S. Han, *The Myth of Unions’ Overprotection of Bad Teachers: Evidence from the District-Teacher Matched Panel Data on Teacher Turnover*, 59 *INDUS. RELS. J. ECON. & SOC’Y* 316, 322-23 (2020).

<sup>251</sup> Cowen & Strunk, *Teacher Labor Market Reforms*, *supra* note 217, at 658.

<sup>252</sup> *Id.*

<sup>253</sup> Regina Umpstead, Ann E. Blankenship & Linda Weiss, *The New State of Teacher Evaluation and Employment Laws: An Analysis of Legal Actions and Trends*, 322 *EDUC. L. REP.* 577, 584-96 (2015).

<sup>254</sup> *Wis. Educ. Ass’n Council v. Walker*, 705 F.3d 640, 642 (7th Cir. 2013).

<sup>255</sup> *N.C. Ass’n of Educators, Inc. v. State*, 786 S.E.2d 255, 265 (N.C. 2016).

<sup>256</sup> *LaPointe v. Vermilion Parish Sch. Bd.*, 173 So.3d 1152, 1160 (La. 2015).

though as one court acknowledged that change “has resulted in a reduction of tenure protections for teachers.”<sup>257</sup>

As for challenges to the new teaching evaluation systems themselves, those too have not had much success.<sup>258</sup> These challenges took aim at teaching evaluation policies that incorporated student test scores through so-called value-added models (“VAMs”).<sup>259</sup> VAMs “use the prior performance of students on one-to-several years of standardized tests, among other factors, to compute an expected learning gain that each student should be able to accomplish in each subsequent testing year.”<sup>260</sup> The modeling then “computes the current-year test score that would be predicted based on one or more prior years of test scores, while attempting to control for student and school characteristics that are known to influence achievement, and compares the current-year test score actually obtained to that prediction to determine whether the actual score was higher or lower than what the model predicted it would be.”<sup>261</sup>

Research has demonstrated that, for purposes of teaching evaluations, the use of VAMs is notoriously “plagued with a host of well-documented validity and reliability problems.”<sup>262</sup> And yet, thus far, more courts have upheld than rejected teaching evaluation systems that employ VAMs.<sup>263</sup> In the rather perverse case of Florida’s use of VAMs, the Eleventh Circuit concluded it was rationally related to improving student achievement even though one evaluation program “rated the performance of teachers based on the test scores students *they did not*

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<sup>257</sup> Umpstead et al., *supra* note 253, at 592-93 (discussing *Frakes v. Peoria School District No. 150*, *Pioli v. North Chicago Community Unit School District No. 187*, and *Holmes v. Board of Education of Belvidere Community School District 100*).

<sup>258</sup> *See id.* at 584-86.

<sup>259</sup> *Id.* at 584.

<sup>260</sup> Scott R. Bauries, *Perversity as Rationality in Teacher Evaluation*, 72 ARK. L. REV. 325, 328-29 (2019) [hereinafter *Perversity as Rationality*].

<sup>261</sup> *Id.* at 329.

<sup>262</sup> *See* Joshua E. Weishart, *Democratizing Education Rights*, 29 WM. & MARY BILL RTS. J. 1, 19 n.129 (2020) [hereinafter *Democratizing*] (citing research or articles discussing research).

<sup>263</sup> *See, e.g.*, *Hous. Fed’n of Tchrs., Loc. 2415 v. Hous. Indep. Sch. Dist.*, 251 F. Supp. 3d 1168, 1181 (S.D. Tex. 2017) (discussing cases rejecting challenges to use of VAMs); *see also* Black, *Tenure*, *supra* note 50, at 105 (suggesting these initial decisions “may be more reflective of judicial reluctance to upset public policy and enter a political thicket than sound legal reasoning”). *But see* *State of N.M. ex rel. Stewart v. N.M. Pub. Educ. Dep’t*, D-101-CV-2015-00409, at 24-27 (Santa Fe County Ct. Dec. 2, 2015) (enjoining New Mexico’s use of VAMs, noting large numbers of errors in data used); *Lederman v. King*, 47 N.Y.S.3d 838, 846 (Sup. Ct. 2016) (striking down New York’s use of VAM as arbitrary and capricious).

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*teach the tested material*, and the other of which rated their performance based on the test scores of students *they did not teach at all*.”<sup>264</sup>

In truth, following “the initial fervor to use standardized test scores to evaluate teachers, many states quietly softened their positions, reducing their reliance on test scores, taking a more nuanced approach to incorporating them into teacher evaluations, and sometimes eliminating them altogether.”<sup>265</sup> States have been able to do so because, in replacing NCLB with the Every Student Succeeds Act (“ESSA”) in 2015, Congress ceded control over teacher quality back to states “when it became apparent that rating teachers based on their students was more of an art than science.”<sup>266</sup>

Yet, by then, the damage had been done, as explained further below. And even though ESSA “lowered the stakes for schools,” it did not significantly “alter the high stakes for teachers who are still being evaluated in a majority of states for tenure, compensation, and retention based on test scores.”<sup>267</sup>

The rhetoric of failing public schools, based in part on those test scores, has contributed to “more and more negative views of the nation’s schools,” even though most parents “feel positively about education their own children receiving.”<sup>268</sup> That rhetoric has also aided and abetted an ascendant school privatization agenda which threatens to dismantle teacher rights entirely. Charter schools, increasingly operated by for-profit entities, are seizing “an ever-growing share of the public school market, and in some urban cities anywhere from one-third to well over half of all teachers are in charters — nearly all working without collectively bargained contracts all together.”<sup>269</sup> And tenure and collective bargaining are virtually nonexistent in private schools that receive taxpayer subsidized vouchers which siphon public school funds.<sup>270</sup>

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<sup>264</sup> Bauries, *Perversity as Rationality*, *supra* note 260, at 346 (emphasis added).

<sup>265</sup> BLACK, *supra* note 86, at 985.

<sup>266</sup> Black, *School Reform*, *supra* note 216, at 311.

<sup>267</sup> Weishart, *Democratizing*, *supra* note 262, at 19.

<sup>268</sup> SCHNEIDER & BERKSHIRE, *supra* note 19, at xviii; see Anya Kamenetz, *The Education Culture War is Raging. But for Most Parents, It’s Background Noise*, NPR (Apr. 29, 2022), <https://www.kqed.org/mindshift/59348/the-education-culture-war-is-raging-but-for-most-parents-its-background-noise> [<https://perma.cc/D882-ZYQW>] [hereinafter *The Education Culture War*].

<sup>269</sup> Cowen & Strunk, *Teacher Labor Market Reforms*, *supra* note 217, at 667.

<sup>270</sup> See Jonathan P. Krisbergh, *Marginalizing Organized Educators: The Effect of School Choice and “No Child Left Behind” on Teacher Unions*, 8 U. PA. J. LAB. & EMP. L. 1025, 1035 (2006).



Given these new school choice options plus the destabilization of tenure and collective bargaining rights, “it is now possible for a teacher to leave college with a teaching certificate and enter a classroom with pay entirely dictated by non-negotiated factors, with at-will employment, and with the responsibility for growth in student achievement for which he or she will be held accountable.”<sup>271</sup>

No section on the destabilization of tenure and collective bargaining rights would be complete without noting two additional shockwaves: constitutional challenges to tenure and the uncertainty of teacher unionization left in the wake of *Janus*.

The constitutional case against teacher tenure doubled down on the assertion that there are too many ineffective teachers protected by tenure, especially in predominantly poor and minority schools, and that these bad teachers not only impede progress but violate schoolchildren’s right to an adequate and equitable education.<sup>272</sup> The first of these challenges, *Vergara v. State*, was initially successful, with the trial court agreeing that five tenure-related statutes harmed disadvantaged students and thus violated the equal protection clause of the California Constitution (under which education is a fundamental right and wealth is a suspect classification).<sup>273</sup> An appellate court later reversed, concluding that the plaintiffs failed to “show that the statutes inevitably cause a certain group of students to receive an education inferior to the education received by other students.”<sup>274</sup>

*Vergara*, nevertheless, inspired copycat challenges to tenure in New Jersey, New York, and Minnesota. The New Jersey and Minnesota challenges eventually terminated in their courts of appeal,<sup>275</sup> but the New York suit overcame successive motions to dismiss.<sup>276</sup> That these constitutional challenges may have stalled for now, however, provides

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<sup>271</sup> See Cowen & Strunk, *Teacher Labor Market Reforms*, *supra* note 217, at 667.

<sup>272</sup> See Black, *Tenure*, *supra* note 50, at 123-42 (identifying reform movement which argues “that tenure and retention policies violate students’ right to an adequate and equitable education” and explaining, that although claim is facially valid based on existing school funding precedent, it raises serious evidentiary and causation problems as well as justiciability concerns).

<sup>273</sup> *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*5-7 (Cal. Super. Ct. May 13, 2014), *rev’d*, 202 Cal. Rptr. 3d 262 (Ct. App. 2016).

<sup>274</sup> *Vergara v. State*, 209 Cal. Rptr. 3d 532, 538 (Ct. App. 2016).

<sup>275</sup> *Forslund v. State*, 924 N.W.2d 25, 35 (Minn. Ct. App. 2019); *H.G. v. Harrington*, No. A-4546-16T4, 2018 WL 3130994 (N.J. Super. Ct. App. Div. June 27, 2018).

<sup>276</sup> *Dauids v. State*, 74 N.Y.S.3d 288 (App. Div. 2018).

little assurance that tenure is a reliably secure protection, in the face of an otherwise rising tide against teacher rights.<sup>277</sup>

Meanwhile, *Janus* is expected to cut approximately \$28 million from the \$366 million annual budget of the National Education Association (“NEA”), the largest teacher union.<sup>278</sup> NEA’s membership, since *Janus*, has declined by nearly 165,000 or 6.2%.<sup>279</sup> Preliminary data has suggested that “pre-*Janus* legal changes” to collective bargaining laws had already weaken teacher unions in the states studied and “effectively reduced spending on total teacher compensation by about 6%, reduced teacher salaries by about 5%, and reduced teacher benefits by 9.7%.”<sup>280</sup> Post-*Janus*, some project that “teacher unions could lose up to one-third of their members and funding.”<sup>281</sup> Whether those early projections hold or not,<sup>282</sup> the potential for free riders to increase as more teachers leave not only their unions but their profession looms large and remains a threat to the already-diminished bargaining power of teacher unions.<sup>283</sup>

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<sup>277</sup> See Black, *Tenure*, *supra* note 50, at 82 (“[P]resuming that eliminating tenure through constitutional litigation is a solution, much less the best among competing possibilities, is dangerous.”).

<sup>278</sup> Eunice S. Han & Thomas N. Maloney, *Teacher Unionization and Student Academic Performance: Looking Beyond Collective Bargaining*, 46 LAB. STUD. J. 43, 44 (2021).

<sup>279</sup> Jamie A. Hope, *Big US Teacher Union Decline Since Supreme Court Ended Government Employee Union Dues Mandates*, MICH.’S WATCHDOG CAPITOL CONFIDENTIAL (Dec. 13, 2021), <https://www.michigancapitolconfidential.com/big-us-teacher-union-decline-since-supreme-court-ended-government-employee-union-dues-mandates> [<https://perma.cc/TQ9J-CKF8>].

<sup>280</sup> Emma García & Eunice Han, *The Impact of Changes in Public-Sector Bargaining Laws on Districts’ Spending on Teacher Compensation*, ECON. POL’Y INST. (Apr. 29, 2021), [epi.org/221896](https://perma.cc/5FYY-KRDY) [<https://perma.cc/5FYY-KRDY>]; see Bradley D. Marianno & Katharine O. Strunk, *After Janus: A New Era of Teachers’ Union Activism*, 18 EDUC. NEXT 18, 20-22 (2018).

<sup>281</sup> Matthew F. Bodeman, II, *Do Not Bite the Hand that Feeds You: Extinguishing the Duty of Fair Representation in the Public-Sector Following Janus*, 51 U. TOL. L. REV. 589, 600 (2020).

<sup>282</sup> BLACK, *supra* note 86, at 977 (observing that, at least initially post-*Janus*, “while many unions lost the ability to collect fees from non-members for contract negotiations, the reaction to *Janus* has been for more individuals to join the union”).

<sup>283</sup> See Cowen & Strunk, *Teacher Labor Market Reforms*, *supra* note 217, at 664 (“[I]t stands to reason that fewer teachers and lower revenues could weaken the ability of statewide affiliates of the [teacher unions] to . . . negotiate their contracts with local school boards. [And] reduced dues . . . could curtail efforts to influence or prevent new reforms to collective bargaining or the teaching profession itself. On the other hand, there is some hint that these legislative and judicial shifts are resurrecting what had been a weakening labor movement.”).

Whether and how diminished bargaining and unionization will affect students is the subject of much debate and speculation. *Compare id.* at 666 (noting literature “overwhelmingly, suggests that the presence (and strength) of a bargaining contract has

*B. Depleted & Demoralized Teachers*

As states were destabilizing collective bargaining and tenure rights, they were also slashing education funding to fill budget shortfalls from the Great Recession.<sup>284</sup> “Those funding cuts, along with statutory changes to teacher tenure, evaluation, rights, and pay, destabilized the teaching profession” itself, shrinking the supply of teachers during the Recession.<sup>285</sup> Even as state treasuries recovered before the COVID-19 pandemic, however, “education budgets and the teaching profession [had] not.”<sup>286</sup> At that point, pre-pandemic, funding in many states was lower in real dollar terms than before the Great Recession — “twenty to thirty percent below pre-recession levels” in some states.<sup>287</sup> Suffice to say, post-pandemic with rising inflation, funding levels are likely to remain a destabilizing force for the teaching profession, especially after federal pandemic relief funds run dry.<sup>288</sup>

We have witnessed the effects of such destabilization before: In the intervening decade, between the Great Recession and the pandemic, “prospective and existing teachers have fled the profession.”<sup>289</sup> The exodus has been at the highest rate recorded since the government

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negative effects on student outcomes”), with Han & Maloney, *supra* note 278, at 65 (concluding that diminished “unionization for teachers is likely to harm student performance, and that, although the implications for race/ethnicity differences varied, these negative impacts may be more pronounced for black students in lower grades”).

<sup>284</sup> Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 425 (2016) [hereinafter *Averting*].

<sup>285</sup> *Id.* at 431.

<sup>286</sup> *Id.*

<sup>287</sup> Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385, 1386-87 (2019) [hereinafter *Educational Gerrymandering*].

<sup>288</sup> See Charley Locke, *American Schools Got a \$190 Billion Covid Windfall. Where Is It Going?*, N.Y. TIMES MAG., <https://www.nytimes.com/2022/09/08/magazine/covid-aid-schools.html> (last updated Sept. 9, 2022) [<https://perma.cc/KN4V-XHLT>] (explaining billions in federal relief funds will expire in 2024, edging school districts towards a fiscal cliff that will make it difficult for them to cover costs of new teacher salaries); see also Emma García, Matthew A. Kraft & Heather L. Schwartz, *Are We at a Crisis Point with the Public Teacher Workforce? Education Scholars Share Their Perspectives*, BROOKINGS INST. (Aug. 26, 2022), <https://www.brookings.edu/blog/brown-center-chalkboard/2022/08/26/are-we-at-a-crisis-point-with-the-public-teacher-workforce-education-scholars-share-their-perspectives/> [<https://perma.cc/FH9X-2R28>] (noting federal relief allowed districts to ramp up hiring and stabilize educator workforce but these short-term fixes may only add to the teacher shortage problem).

<sup>289</sup> Black, *Averting*, *supra* note 284, at 431.

began collecting the data.<sup>290</sup> School districts have consequently “resorted to desperate measures” just to put “warm bodies in the classroom,” such as “billboard advertising, hiring substitutes and college interns on a full-time basis, and seeking district-wide exemptions from teacher certification requirements.”<sup>291</sup>

As is frequently the case, high-poverty schools “found it more difficult to fill vacancies than did low-poverty schools and schools overall, and they experienced higher turnover and attrition rates did low-poverty schools.”<sup>292</sup> In addition to higher numbers of teachers leaving the profession, the number of would-be teachers entering teacher preparation programs fell precipitously by nearly 30% nationally.<sup>293</sup> Although nationally “the number of education majors still exceeds by a considerable margin the number of teaching vacancies,” certain STEM subjects and certain urban-minority and rural-poor districts are more prone to vacancies compared to more affluent, suburban districts.<sup>294</sup> Special education and English language turnover are higher still, especially in high-poverty or minority schools.<sup>295</sup> A recent comprehensive analysis “makes it clear that there are currently not enough qualified teachers offering their services in the fields and locations where they are needed in all part of the county.”<sup>296</sup>

Indeed, estimates of the scale of the teacher recruitment and retention problem often “understate the magnitude” because they do not account for the loss of teacher quality over the past decade, which has seen increases in the percentage of teachers not fully certified, with less experience and educational background.<sup>297</sup> Data further demonstrate

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<sup>290</sup> Michelle Hackman & Eric Morath, *Teachers Quit Jobs at Highest Rate on Record*, WALL ST. J. (Dec. 28, 2018, 5:30 AM ET), <https://www.wsj.com/articles/teachers-quit-jobs-at-highest-rate-on-record-11545993052> [<https://perma.cc/N7WZ-M9XX>].

<sup>291</sup> Black, *Averting*, *supra* note 284, at 425.

<sup>292</sup> Emma García & Elaine Weiss, *Examining the Factors that Play a Role in the Teacher Shortage Crisis: Key Findings from EPI’s ‘Perfect Storm in the Teacher Labor Market’ Series*, ECON. POL’Y INST. (Oct. 15, 2020), [epi.org/177726](http://epi.org/177726) [<https://perma.cc/5BKT-WRSD>].

<sup>293</sup> *See id.*

<sup>294</sup> *See* Cowen & Strunk, *Teacher Labor Market Reforms*, *supra* note 217, at 662.

<sup>295</sup> *See* DESIREE CARVER-THOMAS & LINDA DARLING-HAMMOND, LEARNING POL’Y INST., *TEACHER TURNOVER: WHY IT MATTERS AND WHAT WE CAN DO ABOUT IT* 11, 13-14, 17, 30 (2017), [https://learningpolicyinstitute.org/sites/default/files/product-files/Teacher\\_Turnover\\_REPORT.pdf](https://learningpolicyinstitute.org/sites/default/files/product-files/Teacher_Turnover_REPORT.pdf) [<https://perma.cc/U6CP-SYU6>].

<sup>296</sup> Leib Satcher, Linda Darling-Hammond & Desiree Carver-Thomas, *Understanding Teacher Shortages: An Analysis of Teacher Supply and Demand in the United States*, 27 EDUC. POL’Y ANALYSIS ARCHIVES 1, 6 (2019).

<sup>297</sup> García & Weiss, *supra* note 292, at 1.

that the highest performing teachers leave the profession more frequently than low-performing teachers are retained.<sup>298</sup>

Research also confirms that the destabilization of teacher rights exacerbated teacher recruitment and retention problems.<sup>299</sup> On top of that destabilization, the education cuts and high-stakes testing effectively “dissuaded the next generation of talent from even pursuing a teaching career.”<sup>300</sup> Indeed, there is reason to believe, based in research, “that without substantial increases in teacher pay, the reforms targeting job security...could disincentivize new teachers from entering the profession.”<sup>301</sup> The resulting harm to students caused by teacher vacancies, turnover, and attrition is indisputable “given the significant body of research that demonstrates that teaching experience . . . is positively associated with student achievement gains,” particularly with low-income and minority students.<sup>302</sup>

The destabilization of teacher rights and the teaching profession has also intensified teacher demoralization. Perhaps the most significant demoralizing agent has been high-stakes testing, which was not only the single largest reason teachers reported for leaving the profession,<sup>303</sup> but also served its original purpose to limit teacher autonomy, the research shows.<sup>304</sup> Teaching to the test, forced to use a narrowed or

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<sup>298</sup> Matthew M. Chingos, *Ending Teacher Tenure Would Have Little Impact on Its Own*, BROOKINGS INST. (Sept. 18, 2014), <https://www.brookings.edu/research/ending-teacher-tenure-would-have-little-impact-on-its-own/> [<https://perma.cc/9DCX-6M78>].

<sup>299</sup> See KATHARINE O. STRUNK, NATHAN BARRETT & JANE A. LINCOVE, EDUC. RSCH. ALL. FOR NEW ORLEANS, *WHEN TENURE ENDS: THE SHORT-RUN EFFECTS OF THE ELIMINATION OF LOUISIANA’S TEACHER EMPLOYMENT PROTECTIONS ON TEACHER EXIT AND RETIREMENT 5* (2017) (“[R]emoval of tenure protections caused a significant increase in teacher attrition in both the year immediately after the reform and the following year.”); see also Cowen & Strunk, *Teacher Labor Market Reforms*, *supra* note 217, at 662.

<sup>300</sup> Black, *Averting*, *supra* note 284, at 425; see also Lindsay Bryner, *The Teacher Shortage in the United States*, 39 EDUC. & SOC’Y 69, 79 (2021) (“While there is a misconception that the only reason a qualified teacher chooses to leave the classroom is due to a low salary, many teachers choose to leave due to an overall lack of investment in the schools and their students themselves.”).

<sup>301</sup> See Cowen & Strunk, *Teacher Labor Market Reforms*, *supra* note 217, at 662.

<sup>302</sup> Wronowski & Urick, *supra* note 218, at 21.

<sup>303</sup> See CARVER-THOMAS & DARLING-HAMMOND, *supra* note 295, at 5, 17.

<sup>304</sup> See LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE 71-72* (2010); Wronowski & Urick, *supra* note 218, at 3-4. See generally TONYA R. MOON, CATHERINE M. BRIGHTON, JANE M. JARVIS & CATHERINE J. HALL, NAT’L RSCH. CTR. ON THE GIFTED & TALENTED, *STATE STANDARDIZED TESTING PROGRAMS: THEIR EFFECTS ON TEACHERS AND STUDENTS* (2007), <https://bit.ly/2T99X1e> [<https://perma.cc/LY4W-ZGQY>] (investigating impact of state testing programs on schools, teachers, and students and finding teachers feel more pressure and diminishment of professional autonomy).

scripted curriculum and methods that drill “recall and recitation,” stripped teachers of their professional autonomy to employ instructional strategies that better serve their students’ higher-order learning.<sup>305</sup> One study found that “more than two-thirds of teachers report” diminished influence over what they teach and how they teach, suggesting to them a lack of consideration for their professional knowledge and judgment.<sup>306</sup>

This stripping of teacher autonomy has been most pronounced in areas where test scores are not assured by student demographics.<sup>307</sup> “The loss of autonomy over their work combined with performance pressure of assessment and accountability policies led teachers to report increased stress and anxiety, longer work hours, and lower morale.”<sup>308</sup>

When states adopted teaching evaluation systems incorporating and giving substantial weight to standardized test scores, it “eroded teacher professional identity by reshaping notions of professional competence in ways that did not make sense to teachers.”<sup>309</sup> Educators tend to heavily discount the usefulness and accuracy of evaluation systems based on test scores.<sup>310</sup> Even when test scores are given less weight, teacher evaluation that emphasizes “vertical accountability” and a scripted, “performance management” style of teaching “contributes to demoralization.”<sup>311</sup> Either way, the constant accountability pressures and scrutiny diminish teacher morale, cooperation, and trust.<sup>312</sup> Not

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<sup>305</sup> See WAYNE AU, *UNEQUAL BY DESIGN: HIGH-STAKES TESTING AND THE STANDARDIZATION OF INEQUALITY* 82-99 (2009) (illustrating five different types of classroom control imposed by high-stakes testing); DARLING-HAMMOND, *supra* note 304, at 71-72; M. GAIL JONES, BRETT D. JONES & TRACY HARGROVE, *THE UNINTENDED CONSEQUENCES OF HIGH-STAKES TESTING* 40-43 (2003); Jason M. Smith & Philip E. Kovacs, *The Impact of Standards-Based Reform on Teachers: The Case of ‘No Child Left Behind,’* 17 *TCHRS. & TEACHING* 201, 203 (2011); see also PHILLIP HARRIS, BRUCE M. SMITH & JOAN HARRIS, *THE MYTHS OF STANDARDIZED TESTS: WHY THEY DON’T TELL YOU WHAT YOU THINK THEY DO* 35-37 (2011).

<sup>306</sup> Garcia & Weiss, *supra* note 292, at 3.

<sup>307</sup> See SCHNEIDER, *BEYOND TEST SCORES*, *supra* note 220, at 9.

<sup>308</sup> Wronowski & Urick, *supra* note 218, at 3 (citing research).

<sup>309</sup> Chris Bradford & Melissa Braaten, *Teacher Evaluation and the Demoralization of Teachers*, 75 *TEACHING & TCHR. EDUC.* 49, 49 (2018); see also Rebecca Buchanan, *Teacher Identity and Agency in an Era of Accountability*, 21 *TCHRS. & TEACHING* 700, 702, 717 (2015).

<sup>310</sup> See Bradford & Braaten, *supra* note 309, at 49; Buchanan, *supra* note 309, at 702, 717.

<sup>311</sup> Bradford & Braaten, *supra* note 309, at 58 (citing research); see also Kara Moloney, *Teaching to the Test: A Discourse Analysis of Teachers’ Perceptions of Education in the Era of No Child Left Behind*, 13 *INT’L J. LEARNING* 19, 24 (2006) (reporting that teachers feel demoralized “frustrated, ineffectual, and silenced”).

<sup>312</sup> See Kristen Erichsen & John Reynolds, *Public School Accountability, Workplace Culture, and Teacher Morale*, 85 *SOC. SCI. RES.* 1, 10 (2020).

surprisingly, such conditions can have a “corrosive influence” on teaching quality.<sup>313</sup>

Notably, the depletion and demoralization of teachers described above occurred *before* the COVID-19 pandemic. For “a brief moment” at the start of the pandemic, when in-person schooling shut down completely, “public regard for teachers soared” as parents gained newfound appreciation for how difficult it was to homeschool their own children.<sup>314</sup> Meanwhile, teacher stress and anxiety “skyrocketed as they pivoted to teaching online, ... desperately tried to engage students who were checked out or who only appeared as a black box on Zoom.”<sup>315</sup> But the early-pandemic sentiment that “teachers were heroes” soon faded as the pendulum swung quickly in “the complete opposite direction” with teachers once again in the crosshairs for daring to demand safe returns to in-person learning.<sup>316</sup>

When that in-person learning resumed, teachers were overwhelmed by the social-emotional and educational needs of students but without the capacity or assurances of any long-term investments necessary to meet those needs.<sup>317</sup> This is a “increasingly destructive cycle” because it “drives teachers to flee in frustration, leaving schools even less prepared to confront escalating challenges.”<sup>318</sup>

The pandemic has thus exacerbated the demoralization of the profession. A 2021 survey found that public school teachers were the most likely to report higher levels of anxiety, stress, and burnout during the COVID-19 pandemic.<sup>319</sup> Another survey in November 2021, amid the delta surge, found that 48% of teachers said they had considered changing jobs.<sup>320</sup> “Almost half of the public school teachers who

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<sup>313</sup> See DORIS A. SANTORO, DEMORALIZED: WHY TEACHERS LEAVE THE PROFESSION THEY LOVE AND HOW THEY CAN STAY 28 (2018).

<sup>314</sup> Jennifer C. Berkshire, *Why Teachers Are Dropping Out*, NATION (Feb. 21, 2022), <https://www.thenation.com/article/society/teachers-covid-culture-wars/> [https://perma.cc/FU88-45A6].

<sup>315</sup> Madeline Will, *Teachers Are Not OK, Even Though We Need Them to Be*, EDUC. WK. (Sept. 14, 2021), <https://www.edweek.org/teaching-learning/teachers-are-not-ok-even-though-we-need-them-to-be/2021/09> [https://perma.cc/78XS-JT5S].

<sup>316</sup> *Id.*

<sup>317</sup> See Berkshire, *supra* note 314.

<sup>318</sup> *Id.*

<sup>319</sup> RIVKA LISS-LEVINSON, MISSIONSQUARE RSCH. INST., K-12 PUBLIC SCHOOL EMPLOYEE VIEWS ON FINANCES, EMPLOYMENT OUTLOOK, AND SAFETY CONCERNS DUE TO COVID-19, at 3 (2021), [https://www.slge.org/wp-content/uploads/2021/09/k-12surveyfindings\\_sept21.pdf](https://www.slge.org/wp-content/uploads/2021/09/k-12surveyfindings_sept21.pdf) [https://perma.cc/WF4S-N7XX].

<sup>320</sup> Naaz Modan, *Survey: 48% of Teachers Considering Job Change*, K-12 DIVE (Nov. 24, 2021), <https://www.k12dive.com/news/survey-48-of-teachers-considering-job-change/610477/> [https://perma.cc/ECG6-FSLQ].

voluntarily stopped teaching in public schools after March 2020 and before their scheduled retirement left because of the COVID-19 pandemic” and the associated stress.<sup>321</sup> Burnout and demoralization may be disproportionately affecting teachers of color, who even before the pandemic exited the profession at higher rates than their white counterparts.<sup>322</sup> All told, even as the pandemic subsides, survey data continues to observe that educators “report significantly higher rates of burnout than full-time workers in any other industry.”<sup>323</sup>

The extent to which the pandemic has exacerbated the depletion of the profession remains an “open question,” in part because of still limited labor market data.<sup>324</sup> But whether “teacher shortages” are a national problem or confined to specific regions, schools, or teaching positions, and whether there will be a mass exodus or a continual, steady decline in the supply of quality teachers as we have seen for at least the past decade,<sup>325</sup> hardly seem the most pertinent questions. The situation is catastrophic not because there is a “teacher shortage” (not enough qualified people to be excellent teachers) but because of rampant “teacher alienation” (disrespect and disregard dissuading qualified people from becoming or remaining excellent teachers).

On that front, even as they have had to deal with unprecedented challenges during the pandemic there has been “a growing amount of public scrutiny over what teachers are teaching and how they run their classrooms, leaving them feeling micromanaged and disrespected.”<sup>326</sup>

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<sup>321</sup> MELISSA KAY DILIBERTI, HEATHER L. SCHWARTZ & DAVID GRANT, STRESS TOPPED THE REASONS WHY PUBLIC SCHOOL TEACHERS QUIT, EVEN BEFORE COVID-19, at 1, 6 (2021), [https://www.rand.org/pubs/research\\_reports/RRA1121-2.html](https://www.rand.org/pubs/research_reports/RRA1121-2.html) [<https://perma.cc/UN4L-XG86>].

<sup>322</sup> See DORIS A. SANTORO & OLGA ACOSTA PRICE, STRUCTURAL SUPPORTS TO PROMOTE TEACHER WELL-BEING 3 (2021), [https://annenbergbrown.edu/sites/default/files/EdResearch\\_for\\_Recovery\\_Brief\\_19.pdf](https://annenbergbrown.edu/sites/default/files/EdResearch_for_Recovery_Brief_19.pdf) [<https://perma.cc/W29P-KYMZ>].

<sup>323</sup> Meria Carstarphen, *Putting Out Teacher Burnout*, GALLUP BLOG (Sept. 8, 2022), [https://news.gallup.com/opinion/gallup/400670/putting-teacher-burnout.aspx?utm\\_source=twitter&utm\\_medium=social&utm\\_term=gallupnews&utm\\_content=db273e46-7bdc-48b8-a2a1-3401e3534a91](https://news.gallup.com/opinion/gallup/400670/putting-teacher-burnout.aspx?utm_source=twitter&utm_medium=social&utm_term=gallupnews&utm_content=db273e46-7bdc-48b8-a2a1-3401e3534a91) [<https://perma.cc/RG8S-36ZX>].

<sup>324</sup> See Joshua F. Bleiberg & Matthew A. Kraft, *What Happened to the K-12 Education Labor Market During COVID? The Acute Need for Better Data Systems* 14-15, (Annenberg Inst. at Brown Univ., Working Paper No. 22-544), [https://edworkingpapers.com/sites/default/files/Changes%20during%20COVID%20R%26R%20July%202022%20Final\\_1.pdf](https://edworkingpapers.com/sites/default/files/Changes%20during%20COVID%20R%26R%20July%202022%20Final_1.pdf) [<https://perma.cc/6UQY-UCX5>].

<sup>325</sup> See Matt Barnum, *Is There a National Teacher Shortage? Here's What We Know and Don't Know*, CHALKBEAT (Aug. 11, 2022, 4:00 AM PDT), <https://www.chalkbeat.org/2022/8/11/23300684/teacher-shortage-national-schools-covid> [<https://perma.cc/B8A4-EK LX>].

<sup>326</sup> Will, *supra* note 315.



The latest education culture wars over pandemic-related health measures, critical race theory, book bans, LGBTQ rights, even social-emotional learning have pitted parents against teachers, leaving educators in an exhausting state of uncertainty and fear and causing them to self-censor and reconsider whether their profession is so noble after all.<sup>327</sup>

### III. TEACHER RIGHTS AS EDUCATION RIGHTS

For all the consideration of teachers as public-employee citizens, lawmakers and lawyers have disregarded them as professional *educators* and have thus overlooked a most foundational basis for the right to teach — the right to education. No doubt any such suggestion will provoke immediate protests that the right to education is a right for children, not for teachers. But that protest betrays a misapprehension of the anomalous nature of the right to education, a right that transcends standard classifications.<sup>328</sup> Traversing the bonds of federal and state constitutional law is perhaps the right's most conventional feature, though even in that regard, it stands out.

To say that the U.S. Constitution does not explicitly confer a right denominated as a “right to education,” is not to say that it confers no education rights. Although a 5-4 Supreme Court majority held, nearly 50 years ago, that there is no implied right to “equal educational opportunity,” the Court has since left unsettled whether there is an implied right to “some identifiable quantum of education” necessary for the exercise of other constitutional rights (e.g., freedom of speech and right to vote).<sup>329</sup> Even still, the Court has recognized protections that can fairly be described as education rights.

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<sup>327</sup> See Katie Balevic, *Teachers and School Staff Say They're Facing Increased Threats of Violence Not Just from Students but Also Parents. Culture Wars Could Make Matters Worse*, INSIDER (Apr. 6, 2022, 1:46 PM), <https://www.insider.com/teachers-staff-faced-increased-threats-violence-during-covid-study-2022-3> [https://perma.cc/KNF4-M8WJ]; Kamenetz, *The Education Culture War*, *supra* note 268; Katie Reilly, *Culture Wars Could Be Coming to a School Board Near You*, TIME (Mar. 23, 2022, 6:00 AM EDT), <https://time.com/6159177/school-board-elections-covid-19-critical-race-theory/> [https://perma.cc/8G5H-QKCH]; Maegan Vazquez, *Biden Honors Educator Teaching Students About 'Race, Gender and Oppression' amid Classroom Culture Wars*, CNN, <https://www.cnn.com/2022/04/27/politics/biden-teacher-of-the-year-kurt-russell/index.html> (last updated Apr. 27, 2022, 5:33 AM ET) [https://perma.cc/3UG5-9JXT].

<sup>328</sup> See generally Joshua E. Weishart, *The Constitutionally Anomalous Right to Education*, in THE OXFORD HANDBOOK OF U.S. EDUCATION LAW (Kristine L. Bowman ed., 2018) [hereinafter *Anomalous*].

<sup>329</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 36 (1973).

For instance, the Court has held that children have a constitutional right not to be subjected to intentional, state-imposed, racially segregated schooling because it is “inherently unequal.”<sup>330</sup> The Court has also invalidated a statute denying a ‘basic’ public education to unauthorized immigrants to protect those children from the “social economic, intellectual, and psychological” harms occasioned by absolute educational deprivation.<sup>331</sup> Presumably, then, the right against absolute educational deprivation extends to all children. Indeed, in the context of school discipline, the Court has guaranteed students due process protections against the “total exclusion from the educational process for more than a trivial period, [e.g., suspension] for 10 days.”<sup>332</sup>

Certain education rights also extend to parents who “retain the privilege under the U.S. Constitution to decide whether their children will receive a public or private education and, in a more general sense, the privilege ‘to control the education of their own,’ including directing the religious education of their children.”<sup>333</sup>

That these education rights exist under the U.S. Constitution without there being an explicitly denominated right to education, that they implicate different aspects of education, and that these rights are held not simply by children but also, in some instances, by their parents is proof of the anomalous nature of the constitutional right to education. The anomalies only gain complexity in considering the state constitutional right to education, where the right is explicitly denominated as such. That is, “every state constitution contains an education clause mandating the provision of a free, public education and all states have fulfilled that function by providing a free, public education system.”<sup>334</sup>

The state constitutional right to education comprises three interdependent demands and guarantees: equality, freedom, and democracy.<sup>335</sup> What the state constitutional right to education cannot

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<sup>330</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 495 (1954).

<sup>331</sup> See *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982).

<sup>332</sup> *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

<sup>333</sup> Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 930 (2016) [hereinafter *Reconstituting*] (citing *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925), *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923), and *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972)).

<sup>334</sup> *Id.* at 955 (quotations, citation omitted).

<sup>335</sup> See Weishart, *Democratizing*, *supra* note 262, at 52 (“It is therefore time to draw the logical and unassailable conclusion from this long line of precedents reflecting the text and history of the education clauses: states have a constitutional duty to educate democratically through public schooling.”); Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 241 (2017) [hereinafter *Equal Liberty*]

guarantee (even as it demands them), however, are outcomes. To be sure, “courts must scrutinize both educational inputs and outcomes over time” to judge whether a state is maintaining fidelity with the state constitutional right to education.<sup>336</sup> But that right cannot guarantee that all children actually achieve constitutionally mandated outcomes.<sup>337</sup> Nor, even if it could, would a right calculated to achieve such absolute equality of outcomes be desirable.<sup>338</sup>

It is more helpful, therefore, to consider the guarantees of the state constitutional right to education as, practically speaking, promises of (i) access to all, (ii) fair opportunities, and (iii) democratic experiences. And it is along those three dimensions that we find intersections with, and grounds for, the right to teach. Here, it is necessary to understand the right to teach, like the right to education (and all other rights for that matter), as the interrelation of its three constitutive parts: form, function, and scope.<sup>339</sup>

*Form* represents the four entitlements that commonly arise from legal relationships between a rightholder and another party: claim-right, privilege, power, and immunity.

*Function* describes what the right is supposed to do for the rightholder, e.g., entitle the rightholder to demand performance of some duty or protection from some harm.

*Scope* defines the parameters by which a right is legally adjudicated and enforced, e.g., the scope of the analysis or the right’s remedy.<sup>340</sup>

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(“[C]laims under state constitutional rights to education have come to demand ‘an adequately equal and equally adequate education’ . . . a claim for equal liberty.”); Joshua E. Weishart, *Separate but Free*, 73 FLA. L. REV. 1139, 1143-44 (2021) [hereinafter *Separate but Free*] (explaining that “freedom to become full and equal citizens” and “freedom to learn in democratic, integrated, and transformative settings . . . infuses the text, history, and precedent of state education rights”).

<sup>336</sup> Joshua E. Weishart, *Rethinking Constitutionality in Education Rights Cases*, 72 ARK. L. REV. 491, 504 (2019).

<sup>337</sup> See *id.*

<sup>338</sup> See Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 484 (2014) [hereinafter *Transcending*] (“Liberty would be the first fatality of a regime pursuing equality of results. Moreover, equalizing results does not respect individuality, personal responsibility, or difference; it values only equality. On a larger scale, it is inefficient: with little or no incentive for competition, a society’s productivity and progression would stagnate.”).

<sup>339</sup> Weishart, *Anomalous*, *supra* note 328, at 68.

<sup>340</sup> *Id.*; see also Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 305 (2011)

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Given that taxonomy, state constitutional guarantees of access to all, fair opportunities, and democratic experiences impose on teachers certain duties but also confers on teachers certain privileges and immunities. The function of these privileges and immunities diverges, yet ultimately, the function of the right to teach, like the right to education, is to protect schoolchildren. The scope of the right to teach, therefore, makes actionable those claims that teachers can assert for themselves and their students to fulfill that function.

A. *The Form of the Educator's Education Rights*

When we say someone has a “right” in the legal sense, we might be describing, in fact, up to “four distinct entitlements: claim-right, privilege, power, or immunity.”<sup>341</sup> So, for instance, when we say Isla has a right to education, we could be saying she has a *claim-right* (typically made against the state), meaning the state owes a *duty* to educate her. Conversely, if Isla holds a *privilege* against the state regarding her education, then Isla enjoys a *freedom* from the state interfering in her education.<sup>342</sup>

The other two entitlements, power and immunity, are considered “higher order” because they can affect another’s claim-rights and privileges.<sup>343</sup> If, for example, the state holds a *power*, it is authorized to create or terminate Isla’s claim-rights or privileges, and thus, Isla is liable, or *duty* bound legally, to the state’s power. If Isla holds an *immunity*, however, then the state has no power to create or terminate Isla’s claim-rights or privileges, and thus, Isla enjoys a *freedom* from certain state-imposed conditions.<sup>344</sup>

To simplify matters for our purposes here, the four forms essentially entail either a duty or a freedom. That is most discernable for a claim-right which imposes a corresponding duty and a privilege which confers a freedom. But it is true for the high-order forms: A power authorizes one to alter another’s duties or freedoms, and thereby, imposes a duty on another to abide by those conditions. An immunity prohibits such

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[hereinafter *Conceptual Convergence*] (analyzing “population of reported cases from the highest state courts to identify Hohfeldian conceptions of education rights,” principally the forms of those rights).

<sup>341</sup> Weishart, *Reconstituting*, *supra* note 333, at 925.

<sup>342</sup> *See id.*

<sup>343</sup> *Id.*

<sup>344</sup> *See id.* at 925-26.

alterations, thereby, conferring freedom from those imposed conditions.<sup>345</sup>

The right to education is anomalous in that “it takes *all four forms*” thus entailing duties and freedoms.<sup>346</sup> The reason the right to education takes all four forms is because different constitutional stakeholders hold it concurrently. As construed by state courts, the right to education *held by children* takes the form of both a claim-right and an immunity, thereby spanning the positive and negative rights spectrum (another anomaly) to both compel and block state action. It compels state action by imposing an affirmative duty on the state to provide a constitutionally adequate and equitable education and restrains state action by conferring on children freedom from inadequate and inequitable educational opportunities of which the state is responsible.<sup>347</sup>

The right to education *held by parents* and guardians takes the sole form of a privilege, conferring the freedom “to elect a public or private education for their children and to maintain some degree of control over their children’s education.”<sup>348</sup>

And, although it may seem counterintuitive, the right to education is also *held by the state* taking the fourth form, a power. Education clauses in state constitutions — the explicit textual source of the “right to education” — vest states with a power to alter children’s duties and freedoms vis-à-vis education, consistent with other law.<sup>349</sup> Most state constitutions indeed grant the state plenary power over the education of its children.<sup>350</sup> The most palpable example of state power in this context is compulsory school attendance laws that authorize the state to terminate children’s privilege to not receive an education.<sup>351</sup>

Teachers have no power, in the legal entitlement sense of the word. Nor can it be said that the right to education confers on teachers any claim-right that would impose a duty on the state that runs in the direction of teachers. Yet teachers — like children, parents, and the state

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<sup>345</sup> Weishart, *Anomalous*, *supra* note 328, at 69.

<sup>346</sup> *Id.* at 70.

<sup>347</sup> See Weishart, *Reconstituting*, *supra* note 333, at 932-50 (exploring state court constructions of right to education). *But see* Bauries, *Conceptual Convergence*, *supra* note 340, at 340, 343-46, 364 (concluding that most state courts have not construed education clauses as sources of positive claim-rights correlative to legislative duties and instead have enforced education rights as modest negative immunities preventing “only legislative action that is arbitrary”).

<sup>348</sup> Weishart, *Reconstituting*, *supra* note 333, at 959.

<sup>349</sup> See *id.* at 927.

<sup>350</sup> *Id.*

<sup>351</sup> See *id.* at 928-29.

— are holders of the right to education because (i) education is a relational, moral process and practice that depends entirely on (ii) the teacher-student relationship, a special relationship, indispensable to effectuating the right to education's affirmative obligations, especially the delivery of democratic experiences.

After all, education is fundamentally relational.<sup>352</sup> The teacher-student relationship forms the social basis on which learning takes place.<sup>353</sup> “Learning involves deciphering and understanding relationships between ideas, texts, situations, and people. Teaching involves cultivating personal relationships to facilitate learning.”<sup>354</sup>

The Supreme Court has recognized as much: “The educational process centers around a continuing relationship between [teachers] and students, one in which the teacher must occupy many roles — educator, adviser, friend, and, at times, parent-substitute.”<sup>355</sup> Hence, “the personal qualities a teacher brings to bear” to educational objectives cannot be discounted.<sup>356</sup> Other courts have also acknowledged the “special” or “unique relationship”<sup>357</sup> between teachers and students as necessary to “the maintenance of a sound

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<sup>352</sup> See generally NO EDUCATION WITHOUT RELATION (Charles Bingham & Alexander M. Sidorkin eds., 2004) (discussing the relational nature of education generally).

<sup>353</sup> See, e.g., Mary Elizabeth Mullino Moore, *The Relational Power of Education: The Immeasurability of Knowledge, Value, and Meaning*, 36 INTERCHANGE 23, 42-43 (2005) (detailing case studies of different educational programs adopting new relational education curriculum).

<sup>354</sup> Melissa Newberry, Philip Riley & Andrea Gallant, *Afterword: The Teaching Fantasia*, in EMOTION AND SCHOOL: UNDERSTANDING HOW THE HIDDEN CURRICULUM INFLUENCES RELATIONSHIPS, LEADERSHIP, TEACHING, AND LEARNING 271, 275 (2013); see also Scott FitzGibbon, *Educational Justice and the Recognition of Marriage*, 2011 BYU EDUC. & L.J. 263, 274 (contending that “features of the teacher-student relationship add special fiduciary dimensions”).

<sup>355</sup> Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978) (quotations omitted).

<sup>356</sup> Ambach v. Norwick, 441 U.S. 68, 78 (1979).

<sup>357</sup> See, e.g., Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 475 (3d Cir. 2015), as amended (Oct. 25, 2019) (“[T]here is a special (perhaps even unique) relationship that exists between a public school teacher . . . on the one hand, and his or her students and their parents, on the other hand.”); Stein v. Plainwell Cmty. Schs., 822 F.2d 1406, 1409 (6th Cir. 1987) (observing “the special nature of the teacher-student relationship — a relationship that focuses on the transmission of knowledge and values by an authority figure”); M.M. v. Anker, 607 F.2d 588, 589 (2d Cir. 1979) (“We recognize, however, that teachers have a unique relationship to their students . . .”).

learning atmosphere.”<sup>358</sup> Certain state statutes and regulations affirm the same.<sup>359</sup>

The “moral dimensions of teaching” feature prominently in the teacher-student relationship.<sup>360</sup> The process and practice of education charges teachers with the sometimes “fraught task of interfering in the incidental nature of most social learning.”<sup>361</sup> Moral inquiry is inescapable terrain in that negotiated space.<sup>362</sup> “Teaching is a moral endeavor because the practice involves assisting students to broaden their horizons[,] become more knowledgeable rather than less, more interested in learning and in communicating rather than less so, and

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<sup>358</sup> See, e.g., *Gerrity v. Beatty*, 373 N.E.2d 1323, 1325 (Ill. 1978) (“[T]he orderly conduct of the schools and the maintenance of a sound learning atmosphere require that there be a personal relationship between teacher and student . . . .”); *Kobza v. Kutac*, 109 S.W.3d 89, 94 (Tex. App. 2003) (“It is common knowledge that teachers interact with students on a continual basis to improve the learning environment by establishing rapport with the students.”); *Jefferson Cnty. Sch. Dist. No. 509-J v. Fair Dismissal Appeals Bd.*, 812 P.2d 1384, 1388 (Or. 1991) (recognizing “teacher’s duty to maintain effective relationships with students, parents, and other teachers and staff”).

<sup>359</sup> See, e.g., COLO. REV. STAT. ANN. § 22-14-102 (2022) (“Elements of promoting student engagement include providing rigorous and relevant instruction, creating positive relationships with teachers and counselors . . . .”); MINN. R. § 8710.5700 (2022) (“A teacher of special education: learning disabilities cultivates and maintains positive, collaborative relationships with students, families, educators, other professionals, and the community to support development and educational progress.”); MO. ANN. STAT. § 162.626 (2022) (“The program shall seek to improve student learning by providing a long-term relationship between the student and a particular teacher.”); N.J. ADMIN. CODE § 6A:13-2.2 (2022) (“Secondary school districts shall create personalized learning environments that strengthen relationships among students, teachers, staff members, families and the larger community for students in grades six through 12.”); W. VA. CODE ANN. § 18A-1-1(c)(1) (2022) (“‘Classroom teacher’ means a professional educator who has a direct instructional or counseling relationship with students and who spends the majority of his or her time in this capacity.”).

<sup>360</sup> Doris A. Santoro, *Good Teaching in Difficult Times: Demoralization in the Pursuit of Good Work*, 118 AM. J. EDUC. 1, 4 (2011). See generally Doret J. de Ruyter & J. Jos Kole, *Our Teachers Want to Be the Best: On the Necessity of Intra-Professional Reflection About Moral Ideals of Teaching*, 16 TCHRS. & TEACHING: THEORY & PRAC. 207, 208 (2010) (“[T]eaching is inherently a *moral practice*” and thus “teachers have to take responsibility for defining the optimal dimension of their professional morality.”).

<sup>361</sup> Margaret Schmidt & Randall Everett Allsup, *John Dewey and Teacher Education*, OXFORD RSCH. ENCYCLOPEDIA (July 29, 2019), [https://oxfordre.com/education/browse;jsessionid=7822C4DD65E6FB02749869F2291954CD?avail\\_1=free&pageSize=20&sort=titlesort&subSite=education&t=ORE\\_EDU%3AREFEDU018&t\\_0=ORE\\_EDU%3AREFEDU003](https://oxfordre.com/education/browse;jsessionid=7822C4DD65E6FB02749869F2291954CD?avail_1=free&pageSize=20&sort=titlesort&subSite=education&t=ORE_EDU%3AREFEDU018&t_0=ORE_EDU%3AREFEDU003) [https://perma.cc/W8TJ-32N8].

<sup>362</sup> See Deborah Loewenberg Ball & Suzanne M. Wilson, *Integrity in Teaching: Recognizing the Fusion of the Moral and Intellectual*, 33 AM. EDUC. RSCH. J. 155, 178 (1996); Matthew N. Sanger & Richard D. Osguthorpe, *Teacher Education, Preservice Teacher Beliefs, and the Moral Work of Teaching*, 27 TEACHING & TCHR. EDUC. 569, 570 (2011).

more expansive in their thinking and in their human sympathies than less so.”<sup>363</sup>

The Supreme Court has recognized that teaching is a moral practice because teachers “educate youth respecting the information values necessary for the maintenance of a democratic political system,”<sup>364</sup> on “the habits and manners of civility,”<sup>365</sup> and thus, that education is “the principal instrument in awakening the child to cultural values,”<sup>366</sup> and to “the preservation of the values on which our society rests.”<sup>367</sup> The transmission of such values “is not confined to books, the curriculum, and the civics class,” rather teachers “must *teach* by example the shared values of a civilized social order.”<sup>368</sup>

Other courts agree that “teaching is a noble vocation which bears a fiduciary responsibility to preserve and transmit the culture of a nation.”<sup>369</sup> Teachers must “instruct children and young people in the virtues which are . . . the basis upon which the republican Constitution is structured.”<sup>370</sup> For this reason among others, “teachers are frequently required to agree to morals clauses as a condition of employment”<sup>371</sup> and immorality remains a good cause basis for dismissing teachers.<sup>372</sup> Because teachers are not meant to be “a speaking blackboard or a walking textbook” but rather are expected to “not only teach, [but]

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<sup>363</sup> See, e.g., David T. Hansen, *The Moral Is in the Practice*, 14 TEACHING & TCHR. EDUC. 643, 644 (1998) (sketching a framework on teaching as a moral activity to assuage concerns that such teaching is best left to parents or religious leaders).

<sup>364</sup> *Bernal v. Fainter*, 467 U.S. 216, 225 (1984).

<sup>365</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

<sup>366</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>367</sup> *Ambach v. Norwick*, 441 U.S. 68, 85 (1979).

<sup>368</sup> *Fraser*, 478 U.S. at 683 (emphasis added).

<sup>369</sup> *Alston v. Massachusetts*, 661 F. Supp. 2d 117, 122 (D. Mass. 2009); see, e.g., *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 384 (6th Cir. 1998) (“[T]eachers are not just role models, but mentors, friends, and in some cases, parent-figures that stand in the place of absent parents.”); *Scott v. News-Herald*, 496 N.E.2d 699, 703 (Ohio 1986) (“[P]ublic school teacher exerts a substantial role in shaping a community through his or her impact on the students both as role model and educator.”).

<sup>370</sup> See *McDuffy v. Sec’y of Exec. Off. of Educ.*, 615 N.E.2d 516, 541 (Mass. 1993).

<sup>371</sup> See, e.g., Marka B. Fleming, Amanda Harmon Cooley & Gwendolyn McFadden-Wade, *Moral Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concerns*, 2009 BYU EDUC. & L.J. 67, 68 (examining statutory morality provisions and contractual moral clauses for secondary and postsecondary school teachers).

<sup>372</sup> See IMBER ET AL., *supra* note 58, at 271-75; Fleming et al., *supra* note 371, at 72-73.



inspire the boys and girls who look to him, in addition to classroom instruction, for moral and inspirational guidance.”<sup>373</sup>

Some may wince at talk of the moral practice of teaching, given the plurality of moral theories and stated commitments to a pluralist society.<sup>374</sup> But without “some frame of reference,” education itself “is bound to be aimless, lacking a unified objective.”<sup>375</sup> And, consistent with longstanding federal and state court precedent, “[t]here exists in this country such a unified frame. It is called democracy.”<sup>376</sup> Indeed, the survival of a pluralist democracy greatly depends on democratic education which requires the cultivation of “the moral obligations of citizenship.”<sup>377</sup>

The gravity of such democratization returns us to the relationality of education, for without “strong, caring, and supportive relationships with their students, teachers are challenged to progress character education, which is both associated with higher levels of educational outcomes and critical to democratic education.”<sup>378</sup> The duty to educate democratically under the state constitutional right to education appropriately justifies the two forms of the derivative right to teach — privilege and immunity — as explained below. Because the right to teach is coextensive with the right to education and thus entails certain duties on teachers, however, it is first helpful to define those duties.

### 1. The Educator’s Duties

Tort law generally absolves teachers of any duty of care to schoolchildren for “educational malpractice” claims sounding in negligence, which have typically been brought against school districts.<sup>379</sup> Public school teachers also enjoy qualified immunity for violations of federal law under Section 1983, provided they acted in

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<sup>373</sup> Kaplan v. Sch. Dist., 130 A.2d 672, 678 (Pa. 1957); see also Faulkner v. New Bern-Craven Cnty. Bd. of Educ., 316 S.E.2d 281, 291 (N.C. 1984) (“[Teachers] are intended by parents, citizenry, and lawmakers alike to serve as good examples for their young charges.”).

<sup>374</sup> See Stephen M. Feldman, *Free Expression and Education: Between Two Democracies*, 16 WM. & MARY BILL RTS. J. 999, 1010-11 (2008); Weishart, *Democratizing*, supra note 262, at 52-53; Weishart, *Transcending*, supra note 338, at 525-26.

<sup>375</sup> John Dewey, *Education and Social Change*, 23 BULL. AM. ASS’N U. PROFESSORS (1915-1955) 472, 473 (1937).

<sup>376</sup> *Id.*

<sup>377</sup> Weishart, *Democratizing*, supra note 262, at 42.

<sup>378</sup> *Id.* at 20-21 (citations, quotations omitted).

<sup>379</sup> See Ethan Hutt & Aaron Tang, *The New Education Malpractice Litigation*, 99 VA. L. REV. 419, 425 (2013).

good faith and did not violate clearly established law that a reasonable teacher would have known.<sup>380</sup> That teachers are, in their personal and official capacities, immunized under private law and in many circumstances under federal law does not mean, however, that they owe no duty under the state constitutional right to education. Even if such a duty is not judicially enforceable or subject to remedial limitations, children would still hold a claim-right corresponding to a constitutional duty owed to them by teachers.<sup>381</sup>

The educator's duties track the guarantees of the state constitutional right to education — access to all, fair opportunities, and democratic experiences. Regarding the first two guarantees, the educator's duties arise from the power the state derives from being itself a holder of the right to education. That power has common law origins, in the form of the *parens patriae* doctrine, which states have invoked to compel children to receive an education, through compulsory education and truancy laws, under threat of discipline.<sup>382</sup> With that common law power, however, comes a greater constitutional responsibility — a “duty to protect children by educating them [as well as] the duty to protect them from any state-sanctioned harms of its compulsory education.”<sup>383</sup>

The duty to protect schoolchildren is directed at teachers to the extent they have the authority and ability to ensure access to all and fair opportunities in the classroom. The content of that state constitutional duty has been developed over the past half century primarily in the context of school finance litigation.<sup>384</sup> There, courts have construed the duty to provide (i) “adequately equal educational opportunities aimed at ensuring approximately, not strictly, equal chances for educational success,” and (ii) an “equally adequate education in that all children should have access to a quality education.”<sup>385</sup> But that duty has been understood mostly at the state government or school district level, with

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<sup>380</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Wood v. Strickland*, 420 U.S. 308, 321 (1975).

<sup>381</sup> Weishart, *Reconstituting*, *supra* note 333, at 939-49 (explaining that non-judiciability and remedial limitations do not alter the claim-right-duty correlation).

<sup>382</sup> *Id.* at 928-29.

<sup>383</sup> Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL'Y 346, 364 (2018) [hereinafter *Aligning*].

<sup>384</sup> See Weishart, *Equal Liberty*, *supra* note 335, at 224-41.

<sup>385</sup> *Id.* at 241.

little to no guidance as to how it translates to teachers in their classrooms.<sup>386</sup>

Courts instead speak in generalities about teaching apart from constitutional duties: The “three basic duties which arise from the teacher-student relationship are (1) the duty to supervise; (2) the duty to exercise good judgment; and (3) a duty to instruct as to correct procedures, . . . such “basic duties must coexist with the whole purpose for the teacher-student relationship viz. education.”<sup>387</sup>

The relationality of duty that binds it “to persons, rather than principles,”<sup>388</sup> nevertheless, requires more attention be given to how teachers can and should fulfill their state constitutional duties to ensure access to all and fair opportunities. Teachers also owe a duty to cultivate democratic experiences in their classrooms. To fulfill all of these duties, teachers must have the freedom to educate afforded by privileges and immunities under the right to education.

## 2. The Educator’s Privileges

If students are to be “free, democratic thinkers,” then, so too, should their teachers.<sup>389</sup> That was the message of progressive Chicago public school teacher and democratic education advocate, Margaret Haley, more than a century ago.<sup>390</sup> In important respects, teachers are less free in their classrooms now than they were then. Teachers have “little influence over schoolwide decisions that shape the instructional program” (i.e., the school curriculum) and “little input in decisions concerned with their course schedules and class sizes, the office and classroom space they will use, and the use of school discretionary funds

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<sup>386</sup> See generally Black, *Teacher Quality*, *supra* note 32 (observing that most courts have given teachers insufficient consideration in construing and enforcing state constitutional duties to provide adequate and equitable education).

<sup>387</sup> *Morris v. Ortiz*, 437 P.2d 652, 657 (Ariz. 1968); accord *Joseph M. v. Ne. Educ. Intermediate Unit 19*, 516 F. Supp. 2d 424, 442 (M.D. Pa. 2007).

<sup>388</sup> Cf. Linda Ross Meyer, *Unruly Rights*, 22 CARDOZO L. REV. 1, 12 (2000) (contending that rights imposing duties are relational and as such impose moral claims fundamentally about respect and dignity).

<sup>389</sup> Ann Fradkin-Hayslip, *Teacher Autonomy, Motivation, and Job Satisfaction: Perceptions of Elementary School Teachers According to Self-Determination Theory*, 20 ELEMENTARY EDUC. ONLINE 198, 199 (2021).

<sup>390</sup> *Id.* See generally Livia Gershon, *The 19th-Century Activist Who Tried to Transform Teaching*, JSTOR DAILY (Aug. 7, 2017), <https://daily.jstor.org/the-19th-century-activist-who-tried-to-transform-teaching/#:~:text=Margaret%20Haley%20argued%20for%20unionization,the%20interest%20of%20the%20teacher.%E2%80%9D> [https://perma.cc/EL65-F5JC].

for classroom materials.”<sup>391</sup> Federal accountability policies and common core standards have also increased the required use of “scripted curricula,” which “explicitly script out exactly what the teacher will say, show, and how — and often even how students are expected to respond.”<sup>392</sup>

Courts are unlikely to reverse this decades-long trend of diminishing or eliminating academic freedom for public school teachers under the U.S. Constitution, despite the Supreme Court’s recognition of the “freedom to teach” consistent with “the spirit of the First Amendment.”<sup>393</sup> State courts are not bound to interpret state constitutions in lockstep with the federal doctrine, however.<sup>394</sup> The state constitutional right to education can and should be understood as conferring educator privileges on teachers over their teaching methods; that is, *how* they teach. Arguably, no such privileges exist under the U.S. Constitution.<sup>395</sup> But those privileges are necessary to effectuating the state constitutional right to education’s guarantees because teaching methods most conducive to positive teacher-student relationships are

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<sup>391</sup> Richard M. Ingersoll, *Short on Power, Long on Responsibility*, 65 EDUC. LEADERSHIP 20, 22 (2007).

<sup>392</sup> Julie A. Fitz & A. C. Nikolaidis, *A Democratic Critique of Scripted Curriculum*, 52 J. CURRICULUM STUD. 195, 195 (2020); see Jason L. Endacott, Ginney P. Wright, Christian Z. Goering, Vicki S. Collet, George S. Denny & Jennifer Jennings Davis, *Robots Teaching Other Little Robots: Neoliberalism, CCSS, and Teacher Professionalism*, 37 REV. EDUC. PEDAGOGY & CULTURAL STUD. 414, 417, 425 (2015).

<sup>393</sup> *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

<sup>394</sup> *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.”).

<sup>395</sup> See *Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295, 1307 (S.D. Fla. 2001) (“The public educator’s task . . . demands particularized and subjective choices among diverse curricula, moral values, and political stances.”). Compare *Pratt v. Indep. Sch. Dist.* No. 831, 670 F.2d 771, 775 (8th Cir. 1982) (concluding that school board’s discretion extends to “authority to determine the curriculum that is most suitable for students and the teaching methods that are to be employed, including the educational tools to be used”), and *Hetrick v. Martin*, 480 F.2d 705, 709 (6th Cir. 1973) (rejecting contention that First Amendment protected teacher from termination for using own teaching methods), and *Millikan v. Bd. of Dirs.*, 611 P.2d 414, 417 (Wash. 1980) (noting that “teachers should have some measure of freedom in teaching techniques employed,” but where they conflict with school board’s manner of teaching, it is the board’s prerogative), with *Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858, 863 (9th Cir. 1982) (“In the high school setting, school officials and teachers must be accorded wide latitude over decisions affecting the manner in which they educate students.”), and *Cary v. Bd. of Educ.*, 598 F.2d 535, 543 (10th Cir. 1979) (“We think teachers do have some rights to freedom of expression in the classroom, teaching high school juniors and seniors.”).

most likely to progress fair opportunities to all students and foster democratic experiences.

Given the relational nature of education, research overwhelmingly confirms that positive teacher-student relationships are predictive of growth in language and conceptual knowledge and social competence, better classroom behavior and avoidance of anti-social behavior, and increased academic motivation, engagement, and performance.<sup>396</sup> That makes the teacher-student relationship “among the most important factors influencing student learning”<sup>397</sup> and thus essential to the state constitutional guarantee to provide fair opportunities to all students. Discretion over teaching methods — how the teacher relates to, and forms relationships with, her students through the curriculum — should therefore be vested in the teacher.<sup>398</sup>

Otherwise forcing a teacher to use scripted curriculum is inequitable, contrary to the guarantees of fair opportunities for all students. “By presenting every student with the exact same content in the exact same way, scripted curriculum overlooks pre-existing inequalities and does not suggest or provide space for [teaching methods] intended to amend them.”<sup>399</sup> Observational studies also suggest that scripted curriculum “tends to narrow teachers’ understanding of equity in the classroom” and narrow the curriculum itself, so as to “discourage the [teaching

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<sup>396</sup> See Christi Bergin & David Bergin, *Attachment in the Classroom*, 21 *EDUC. PSYCH. REV.* 141, 152-54 (2009); Jan N. Hughes & Qi Chen, *Reciprocal Effects of Student-Teacher and Student-Peer Relatedness: Effects on Academic Self Efficacy*, 32 *J. APPLIED DEVELOPMENTAL PSYCH.* 278, 278-79 (2011); Jung-Sook Lee, *The Effects of the Teacher-Student Relationship and Academic Press on Student Engagement and Academic Performance*, 53 *INT’L J. EDUC. RSCH.* 330, 331-32 (2012); Debora L. Roorda, Helma M.Y. Koomen, Jantine L. Spilt & Frans J. Oort, *The Influence of Affective Teacher-Student Relationships on Students’ School Engagement and Achievement: A Meta-Analytic Approach*, 81 *REV. EDUC. RSCH.* 493, 494 (2011); Jantine L. Spilt, Helma M.Y. Koomen & Jochem T. Thijs, *Teacher Wellbeing: The Importance of Teacher-Student Relationships*, 23 *EDUC. PSYCH. REV.* 457, 460 (2011) (asserting that teacher-student relationships not only have a positive impact on students but also on teachers).

<sup>397</sup> Sølvi Mausethagen, *A Research Review of the Impact of Accountability Policies on Teachers’ Workplace Relations*, 9 *EDUC. RSCH. REV.* 16, 17 (2013); see also Jeffrey Liew & Erin M. McTigue, *Educating the Whole Child: The Role of Social and Emotional Development in Achievement and School Success*, in *HANDBOOK OF CURRICULUM DEV.* 465, 468 (L.E. Kattington ed., 2010).

<sup>398</sup> Cf. *Knapp v. Hill*, 657 N.E.2d 1068, 1071-72 (Ill. Ct. App. 1995) (“Educators, of course, are entrusted with a certain degree of autonomy in discharging their obligations as teachers, including the ‘maintenance of a sound learning atmosphere’ . . . [that] encompasses . . . the entire range of the student’s course of instruction . . . [including] the manner and method of the student’s work.”).

<sup>399</sup> Fitz & Nikolaidis, *supra* note 392, at 203.

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method] interventions that are often necessary for academically struggling students to be able to access the subject-matter.”<sup>400</sup>

Teaching method discretion is even more imperative, if the teacher is to facilitate democratic classroom experiences and model for her students democratic thinking, attitudes, and dispositions. A “relational pedagogy” is demanded — democratic education must *be* the teaching method.<sup>401</sup>

The paramount importance of the democratic education project once convinced the Supreme Court that the relational nature and versatility of effective teaching should afford teachers “wide” instructional discretion:

Within the public school system, teachers play a critical part in developing students’ attitude toward government and understanding of the role of citizens in our society... [T]eachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students’ experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students [so that it] is both comprehensible and inspiring... Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities. This influence is crucial to the continued good health of a democracy.<sup>402</sup>

The performance of such tasks by public school teachers, the Court went so far as to say, “goes to the heart of representative government.”<sup>403</sup> It, thus, entitles teachers to “a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation.”<sup>404</sup> Yet, teachers cannot perform such a “special” and “noble task” of cultivating “those habits of open-mindedness and critical inquiry which alone make for responsible citizens, ... if the conditions

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<sup>400</sup> *Id.*

<sup>401</sup> See Andrew Hickey, Stewart Riddle, Janean Robinson, Robert Hattam, Barry Down & Alison Wrench, *Relational Pedagogy and Democratic Education*, in *NEW PERSPECTIVES ON EDUCATION FOR DEMOCRACY* 200, 200 (Stewart Riddle, Amanda Heffernan & David Bright eds., 2021).

<sup>402</sup> *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979).

<sup>403</sup> *Id.* at 76.

<sup>404</sup> *Bernal v. Fainter*, 467 U.S. 216, 220 (1984).

for the practice of a responsible and critical mind are denied to them” as teachers.<sup>405</sup>

The Supreme Court therefore once recognized that, to teach democratic freedom, teachers need the freedom to educate. That proposition seems less salient to the Court today, but it has not been controverted. On the contrary, it is most intuitive and reasonable: “if [public] school teachers cannot exercise intellectual independence in their classrooms, they cannot teach students to be intellectually independent.”<sup>406</sup> Put differently, “learner autonomy and teacher autonomy are interdependent,” in that “the promotion of learner autonomy depends on the promotion of teacher autonomy.”<sup>407</sup>

If, as we must, educate *through* democracy, not just *for* it,<sup>408</sup> teaching methods and practices must be reflective of the freedom we wish to cultivate in schoolchildren.<sup>409</sup> Students’ “freedom to learn,” protected under the state constitutional right to education,<sup>410</sup> depends on their teacher’s freedom to teach.<sup>411</sup> Indeed, “there is no education, no real education, without these elements of freedom.”<sup>412</sup>

### 3. The Educator’s Immunities

Teachers cannot experience freedom to educate in the face of unremitting punitive threats, be it dismissal, rights alteration, liability, or otherwise. As explained, high-stakes testing coupled with the destabilization of tenure and collective bargaining rights have made such threats real, demoralizing and depleting the teaching profession in

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<sup>405</sup> *Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952).

<sup>406</sup> AMY GUTMANN, *DEMOCRATIC EDUCATION WITH A NEW PREFACE AND DIALOGUE* 82 (Princeton Univ. Press rev. ed. 2, 1999).

<sup>407</sup> David Little, *Learning as Dialogue: The Dependence of Learner Autonomy on Teacher Autonomy*, 23 *SYSTEM* 175, 179 (1995); see also Terry Lamb, *Introduction & Epilogue*, in *LEARNER AND TEACHER AUTONOMY: CONCEPTS, REALITIES, AND RESPONSE* 10, 279 (Terry Lamb & Hayo Reinders eds., 2008) (“The development of autonomy is an attempt to (re-)establish democratic processes in teaching and learning and, as such, entails a commitment to negotiation and power sharing in this common pursuit.”).

<sup>408</sup> See Weishart, *Democratizing*, *supra* note 262, at 52.

<sup>409</sup> Fitz & Nikolaidis, *supra* note 392, at 207-08; see also Julia Collins, Michael E. Hess & Charles L. Lowery, *Democratic Spaces: How Teachers Establish and Sustain Democracy and Education in Their Classrooms*, 27 *DEMOCRACY & EDUC.* 1, 2-3, 7 (2019).

<sup>410</sup> See Weishart, *Separate but Free*, *supra* note 335, at 1155-69.

<sup>411</sup> See John Dewey, *The Social Significance of Academic Freedom*, in 11 *THE LATER WORKS OF JOHN DEWEY, 1935-1937*, at 376, 376 (Jo Ann Boydston, ed., S. Ill. Univ. Press 2008) (“Freedom of teachers is a necessary condition of freedom of students to learn.”).

<sup>412</sup> See John Dewey, *Freedom in Workers’ Education*, in *THE LATER WORKS OF JOHN DEWEY*, *supra* note 411, at 331, 332.

the process. The latest education culture wars over health mandates, anti-racism curriculum, gender and sexual orientation, and book bans serve only to aggravate an already impossible situation for teachers. These threats are not only counterproductive, but also unconstitutional, infringing state constitutional guarantees of fair opportunities and democratic experiences.

The influence of teachers in progressing fair educational opportunities to all students cannot be denied. “Although a student’s socioeconomic status, along with that of his peers, exerts an enormous influence on educational outcomes, teacher quality is generally recognized as the most important *school resource* affecting student achievement.”<sup>413</sup> The question is therefore not whether teachers matter but whether they matter *to us*. For, if they mattered to us, we would not subject teachers to sanctions for elements of student performance beyond their control, both inside and outside the school.<sup>414</sup>

This logic holds up in tort law against educational malpractice claims: “The failure to learn does not [necessarily] bespeak a failure to teach” because a multitude of factors, “social, emotional, economic, and other[s]” beyond a school’s control also shape the ability of a child to learn.<sup>415</sup>

As a matter of state constitutional law, teachers should be immunized from sanctions for poor student performance that can be attributed in substantial part to state created or tolerated resource disparities and deprivations. Most state courts have held that states ultimately bear responsibility for those educational inequalities and inadequacies, even as states delegate to local school districts to deliver that education.<sup>416</sup> States have not fulfilled their state constitutional obligations to fully and fairly fund their public schools, even when ordered by their courts to do so and even when held in contempt for not doing so.<sup>417</sup> More egregiously, states have engaged in “educational gerrymandering” —

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<sup>413</sup> Black, *Teacher Quality*, *supra* note 32, at 1607-08 (emphasis added).

<sup>414</sup> This helps to explain why the constitutional challenges to teacher tenure, see *supra* notes 273–76 and accompanying text, were so deeply flawed because they assumed too much (that tenure was the legal cause of educational deprivations and disparities) and imagined too little (that the elimination of tenure was the legal solution). See Black, *Tenure*, *supra* note 50, at 128.

<sup>415</sup> *Donohue v. Copiague Union Free Sch. Dist.*, 407 N.Y.S.2d 874, 881 (App. Div. 1978) (affirming dismissal of educational malpractice claim due to practical impossibilities of demonstrating breach was proximate cause of student plaintiff’s failure to learn).

<sup>416</sup> See Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 390 (2012).

<sup>417</sup> See Weishart, *Aligning*, *supra* note 383, at 346-48.



they have gone “to extreme lengths to manipulate and obfuscate” school funding that “advantage and disadvantage particular communities and ensure that the state never fully absorbs the costs of providing a decent education for all students.”<sup>418</sup>

In the face of such outrageous derelictions of their own constitutional duties, it is appalling that states have misplaced their own failings onto teachers, destabilizing teacher tenure and collective bargaining rights to hold teachers accountable for low student test scores, which could have been improved had states adequately and equitably funded their schools in the first place.<sup>419</sup> Indeed, more and fairer school funding could have improved teacher recruitment and retention as well as the equitable distribution of quality teachers, which again research has consistently shown improves student achievement, particularly for disadvantaged students.<sup>420</sup>

Apart from school funding, few states have made serious efforts to address school desegregation which also depresses achievement even as it widens the gap between white, more affluent students and marginalized students.<sup>421</sup> Instead, states have exacerbated segregation by permitting and publicly subsidizing segregative school choice practices.<sup>422</sup>

None of this is to suggest that teachers should avoid accountability. Rather, it is to force some perspective: teachers are “only one piece of a much larger puzzle of inadequate or inequitable education.”<sup>423</sup> The key corner and centerpieces pieces of that puzzle, which shape how all the other pieces fit together, are state controlled. To be sure, “ineffective teaching is necessarily problematic, but not necessarily a constitutional violation.”<sup>424</sup> Or, if it is a violation on a systemic scale, it is more likely the result of a state’s education funding failures and misplaced priorities.

In either case, to make good on the state constitutional guarantee of fair opportunities to all students, the priority should be on recruiting, retaining, and equitably distributing quality teachers, not punishing them for state-created and tolerated disparities and deprivations. The

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<sup>418</sup> Black, *Educational Gerrymandering*, *supra* note 287, at 1388-89.

<sup>419</sup> *See id.* at 1387 (citing studies that demonstrate the effect of school funding on student achievement).

<sup>420</sup> *See* Black, *Averting*, *supra* note 284, at 441-47.

<sup>421</sup> *See* Weishart, *Aligning*, *supra* note 383, at 346-48.

<sup>422</sup> *See* Weishart, *Separate but Free*, *supra* note 335, at 1155-69.

<sup>423</sup> Black, *Tenure*, *supra* note 50, at 126.

<sup>424</sup> *Id.* at 133.

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state constitutional right to education confers on teachers at least that much immunity.<sup>425</sup>

To secure the state constitutional guarantee of democratic experiences, teachers must also be immunized from adverse employment actions or other legal jeopardy resulting from state-compelled antidemocratic teaching practices. The teacher censorship and loyalty oath bills currently being considered spring foremost to mind as obvious examples. These bills likely violate the state constitutional right to education because they (i) breach the state's duty to educate democratically<sup>426</sup> and (ii) deprive schoolchildren of their freedom to learn in democratic and transformative settings.<sup>427</sup> But these bills, though most visible, are hardly the only threat to democratic teaching.

The narrowing of the curriculum induced by high-stakes testing and changes to teacher evaluation systems make schooling operate on "jingoistic and authoritarian models of allegiance and efficiency."<sup>428</sup> The combined effect of such policies aimed at controlling teachers "stymies critical thought and the social and philosophical growth of the student."<sup>429</sup> Adding insult to injury, the scripting of the curriculum is also "antidemocratic" indeed "autocratic," thwarting the ability of teachers to provide democratic experiences in the classroom. All the above, "undermines teacher-student relations" essential to democratic education.<sup>430</sup>

At bottom, to effectuate the state constitutional right to education's demands and guarantees, teachers must have their freedom to educate protected with educator privileges over their teaching methods and educator immunities against the consequences of the state's own education failures and anti-democratic teaching practices. Both forms of the right to teach, as explained below, must fulfill the function of the right to education.

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<sup>425</sup> The state's priorities speak to its need to fulfill its own constitutional duties respecting educating; the state's punishments for its own misplaced priorities speak to the need for teacher immunities.

<sup>426</sup> See Weishart, *Democratizing*, *supra* note 262, at 42-51.

<sup>427</sup> See Weishart, *Separate but Free*, *supra* note 335, at 1155-69.

<sup>428</sup> Jamie C. Atkinson, *Countering the Neos: Dewey and a Democratic Ethos in Teacher Education*, 25 *DEMOCRACY & EDUC.* 1, 2 (2017).

<sup>429</sup> *Id.* at 5.

<sup>430</sup> See Joe Onosko, *Race to the Top Leaves Children and Future Citizens Behind: The Devastating Effects of Centralization, Standardization, and High Stakes Accountability*, 19 *DEMOCRACY & EDUC.* 1, 5-9 (2011); see also Stephanie Schroeder, *Democratic Teacher Education: From Theory to Praxis*, 16 *PROFESSING EDUC.* 10, 19 (2017).

B. *The Function of the Educator's Education Rights*

It is a right's function, more so than its form, that "captures our ordinary understanding of what rights there are and what significance rights have for the rightholders."<sup>431</sup> Simply put, the function describes what the right does for the rightholder. Rights perform up to six distinct functions — exemption, discretion, authorization, protection, provision, and performance — depending on the form the right takes.<sup>432</sup> Because the right to teach takes the privilege-immunity forms, it is unnecessary to discuss the functions associated exclusively with a power (authorization) and a claim-right (provision and performance). That leaves for explanation three functions associated with privileges (exemption and discretion) and immunities (protection).

The exemption function can also be dispensed with quickly since, as previously explained, the right to education does not function to exempt teachers from any general constitutional duties. Rather, the function of the educator's privileges is *discretion* over some action, at the very least here over their teaching methods. Immunities denote "protection against harm," broadly speaking.<sup>433</sup> Although immunities are "passive" (meant to be experienced rather than exercised by the rightholder) and privileges are "active" (must be exercised by rightholder),<sup>434</sup> both forms advance the rightholder's freedom.

Because the freedom to educate derives from the relationality of state constitutional guarantees of access to all, fair opportunities, and democratic experiences and because the duties of teachers respecting those guarantees ultimately run in the direction of children, the overriding function of the right to teach must be the same as the function of the right to education *held by children*. Surveying state education rights decisions, that function has been primarily one of protection, "from the harms of deprivations of educational quality and disparities in educational opportunity."<sup>435</sup> In short, to protect children's "equality and liberty interests,"<sup>436</sup> their "equal liberty."<sup>437</sup> Needless to say, a state cannot fully protect such "democratic equality" without pursuing "democratic education."<sup>438</sup>

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<sup>431</sup> Weishart, *Reconstituting*, *supra* note 333, at 950.

<sup>432</sup> *Id.* at 953-54.

<sup>433</sup> *Id.* at 955.

<sup>434</sup> *Id.* at 954-55.

<sup>435</sup> Weishart, *Anomalous*, *supra* note 328, at 75.

<sup>436</sup> *Id.* at 76.

<sup>437</sup> See Weishart, *Equal Liberty*, *supra* note 335, at 241.

<sup>438</sup> See Weishart, *Democratizing*, *supra* note 262, at 41-42.

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Given the overriding, fundamental importance of those interests, the function of the educator's education rights lies, first and foremost, in service to schoolchildren, and only secondarily in support of teachers. If ever the protection of the right to teach conflicts with the right to education's protective function, therefore, the former must yield to the latter.

To acknowledge as much, that the right to teach derives from the interests protected by students' education rights, does not mean that there is no presumptive difference between a student's right to education and a teacher's right to teach. Other rights serve larger interests beyond those of the individual rightholder — the right to counsel, with the protection afforded to the interests served by the attorney-client relationship, is perhaps the closest analog.<sup>439</sup>

Again, teachers are constitutional stakeholders in the learning endeavor because of their relationship with students. The law ought to reflect that reality by recognizing the standing of teachers in the adjudication of claims accusing the state of detrimentally infringing on the teacher-student relationship. Otherwise, to exclude the teacher perspective as a necessary element in such cases is to deprive teachers the opportunity to defend themselves against such infringements that directly impact their teaching conditions (and possibly their employment). It is also to deny teachers of the opportunity to fully vindicate their interests in positive teacher-student relationships. It is, in other words, to deny teachers the right to be heard about teaching, educating, and learning — an insult to an injury they should no longer be expected to endure.

### C. *The Scope of the Educator's Education Rights*

If a right's function tells us what the right does for the rightholder, the right's scope determines the extent to which the rightholder can actually vindicate that right to fulfill its function.<sup>440</sup> That is, "scope sets parameters for the viability of a claimed rights violation and the suitability of the desired remedy."<sup>441</sup> These parameters are often set by courts through judicial doctrines, such as justiciability and standards of review.<sup>442</sup> The parameters that should guide judicial adjudication and

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<sup>439</sup> See Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 381, 425 (2009) (contending right to counsel assumes "constitutionally protected professional relationship" between defendant and attorney).

<sup>440</sup> Weishart, *Anomalous*, *supra* note 328, at 76.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*

enforcement of the right to teach may follow those that currently guide the right to education.

That the right to teach derives from and is coextensive with the right to education in this sense would not preclude a teacher's standing to assert the right primarily as a shield.<sup>443</sup> State courts adjudicating state constitutional rights are not bound by rigid federal court justiciability doctrines.<sup>444</sup> And, as it turns out, "the standing issue has not presented much of a problem" for litigants asserting the state constitutional right to education.<sup>445</sup> In fact, state courts have recognized children, parents, school districts, and associations as proper plaintiffs with standing to bring challenges asserting the right to education.<sup>446</sup>

Should courts apply the standard of review that governs adjudication of the right to education, they will employ a reasonable-fit standard of review in cases invoking the right to teach.<sup>447</sup> Most state high courts have abandoned heightened scrutiny and the tiers of scrutiny altogether, even when the right to education has been deemed fundamental.<sup>448</sup> Instead courts have scrutinized the reasonableness of the fit between the means and the ends, with little or not actual scrutiny of the means and the ends themselves.<sup>449</sup>

Applying such a standard in cases invoking the educator's privilege the question would be whether the teacher's teaching methods were reasonably likely or calculated to advance affirmative state constitutional guarantees of access to all, fair opportunities, and democratic experiences. If so, then any state actor interference would be presumptively impermissible. If not, then we could still expect teachers to be subject to discipline for, say, using teaching methods in ways that proselytize religious or political beliefs on their students.<sup>450</sup>

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<sup>443</sup> See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1065 (2015) (noting "an emerging conception of rights as swords with which to make demands on the government, and not merely use as shields against coercive mistreatment").

<sup>444</sup> See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836-37, 1844-68 (2001).

<sup>445</sup> See Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 738 (2012).

<sup>446</sup> See, e.g., *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 416 (Pa. 2017) (action brought by school districts, students, parents and guardians, and education interest groups).

<sup>447</sup> See Weishart, *Equal Liberty*, *supra* note 335, at 259.

<sup>448</sup> See *id.* at 243-59 (noting that courts have abandoned tiers of scrutiny).

<sup>449</sup> See *id.* at 260-66 (recognizing how the courts have applied the means-ends test).

<sup>450</sup> *IMBER ET. AL*, *supra* note 58, at 234.

Cases invoking the educator's immunities, on the other hand, call for a more traditional negative rights standard of review. There, the question is whether and to what extent a state actor policy burdens the teacher's freedom to educate.<sup>451</sup> A court's traditional role in such instances is "to police the outer limits of government power."<sup>452</sup>

In either case, the judicial remedy for violations of the right to teach would be straightforward: (i) enjoin the state action that interferes with the teacher's freedom to educate and (ii) rescind adverse actions, if any, taken against the teacher, along with any other appropriate relief.

#### CONCLUSION

It is difficult to imagine a bright future for America's public school teachers until, at the very least, we recognize teacher rights as education rights and protect teachers as professional educators. It is easy to imagine the alternative, dystopian future because it is already happening: Teachers on demand, in the "gig education market" for online platforms in the mode of Uber, paid comparable to a substitute (i.e., about "a third of what the average teacher [now] earns"), and relegated to "disposable status."<sup>453</sup>

We do not need to elevate teachers as "priests of our democracy" to appreciate how critical they are to the formative project of democracy. For "[n]o matter how thoughtful and thorough our curricula, policies, or procedures democratic education ultimately takes place between teachers and students."<sup>454</sup> And it is in the classroom that our democracy is remade (or not) for the next generation to address the problems of the future.<sup>455</sup> When we know teachers have the right to teach, the freedom to educate, we will do better by our teachers. And when we do better by our teachers, we do better by our children, by us all.

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<sup>451</sup> See Weishart, *Equal Liberty*, *supra* note 335, at 255, 282 (explaining differences between positive and negative rights enforcement).

<sup>452</sup> See *id.* at 255 (quoting *McCleary v. State*, 269 P.3d 227, 248 (Wash. 2012)).

<sup>453</sup> See SCHNEIDER & BERKSHIRE, *supra* note 19, at 181, 187.

<sup>454</sup> Rachel Bradshaw, *Democratic Teaching: An Incomplete Job Description*, 22 *DEMOCRACY & EDUC.* 1, 1 (2014).

<sup>455</sup> JOHN DEWEY, *The Need of an Industrial Education in an Industrial Democracy*, in *THE MIDDLE WORKS, 1899-1924*, at 139 (Jo Ann Boydston ed., 1980) ("Democracy has to be born anew every generation, and education is its midwife.").