

# SILENCING RACE & THE FIRST AMENDMENT: THE SUPPRESSION OF STUDENT EXPRESSION & CURRICULAR COVERAGE OF RACIAL IDENTITY & ETHNIC SOLIDARITY IN K-12 EDUCATION

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Consider the following scenarios. Each indicates the nature and character of suppression of racial viewpoints, racial or ethnic identity and solidarity that rarely is the subject of attention in traditional First Amendment scholarly literature:

Scenario 1:

An ‘A’ student alleges suddenly receiving lower grades from her teachers, in school suspension and being unfairly branded as “angry” after composing an essay criticizing her school for failing to raise the literacy rate of African-Americans. Her essay parallels the promotion of minority illiteracy as a means to suppress slaves with the racial inequality in minority reading rates she observes in her school community.<sup>2</sup> Thirteen

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<sup>2</sup> See Laura Hibbard, *Jada Williams, Student, Allegedly Harassed For Award-Winning Essay Comparing School To Modern Slavery*, HUFFINGTON POST (Mar. 5, 2012) available at [http://www.huffingtonpost.com/2012/03/05/jada-williams-student-allegedly-harassed-for-essay\\_n\\_1321926.html](http://www.huffingtonpost.com/2012/03/05/jada-williams-student-allegedly-harassed-for-essay_n_1321926.html); see also Tracy Fickess, *13 Year Old Jada Williams Persecuted by the Rochester City School District Over her essay on Frederick Douglass*, (Feb. 26, 2012), available at <http://www.fdfny.org/blog/2012/02/27/breaking-news-13-year-old-jada-williams-persecuted-by-the-rochester-city-school-district/> (“Miss Williams wrote an essay on her impressions of Frederick Douglass’ first autobiography the *Narrative of the Life*. This was part of an essay contest, but her essay was never entered. It offended her teachers so much that, after harassment from teachers and school administrators at School #3, Miss Williams was forced to leave the school... In her essay, she quotes part of the scene where Douglass’ slave master catches his wife teaching then slave Frederick to read. During a speech about how he would be useless as a slave if he were able to read, Mr. Auld, the slave master, castigated his wife. Miss Williams quoted Douglass quoting Mr. Auld: “If you teach that nigger (speaking of myself) how to read, there will be no keeping him. It will forever unfit him to be a slave. He would at once become unmanageable, and of no value to his master.” Miss Williams personalized this to her own situation. She reflected on how the “white teachers” do not have enough control of the classroom to successfully teach the minority students in Rochester. While she herself is more literate than most, due to her own perseverance and diligence, she sees the fact that so many of the other “so-called ‘unteachable’” students aren’t learning to read as a form of modern-day slavery. Their illiteracy holds them back in society. Her call to action was then in her summary: “A grand price was paid in order for us to be where we are today; but in my mind we should be a lot further, so again I encourage the white teachers to instruct and I encourage my people to not just be a student, but become a learner.” This offended her English teacher so much that the teacher copied the essay for other teachers and for the Principal. After that, Miss Williams’ mother and father started receiving phone calls from numerous teachers, all claiming that their daughter is “angry.” Miss Williams, mostly a straight-A student, started receiving very low grades, and she was kicked out of class for laughing and threatened with in-school suspension. There were several meetings with teachers and administrators, but all failed to answer Miss Williams’ mother’s questions. The teachers refused to show her the tests and work that she had supposedly performed so poorly on. Instead, the teachers and administrators branded her a problem. Unable to take anymore of the persecution, they pulled her from

year old Jada Williams who was pulled out of the Rochester City School District by her mother who felt she had little choice after Jada began to receive failing grades subsequent to a falling out she had from a controversial racial essay she composed about her experiences as an African-American from her Caucasian teachers. More specifically, while studying the autobiography of former slave Frederick Douglass as part of a district-wide reading initiative, Williams argued that a parallel existed between the manner in which slave masters used illiteracy and ignorance to maintain slave oppression and the current situation in her illiteracy-ridden school district where 75% of the district's students cannot read at the appropriate grade-level.<sup>3</sup> Ms. Williams noted in her essay that “[m]ost white teachers that I have come into contact with, over the last several years of my life, (have) failed to instruct us even today.”<sup>4</sup> Williams continued to write in her essay, “The teachers are not as vocal about us not learning ... but their actions speak volumes.”<sup>5</sup> While Jada indicates while she was just employing the terminology of the book, she noted that her teachers took offense by her choice of language and regarded her as mocking them. She wrote: “When the white teachers began to pass out pamphlets and packets, they expect us the black students to read the directions, complete it and hand it in for a grade... The reality of this is that most of my peers cannot read and or comprehend the material that has been provided... So, I feel like not much has changed, just different people, different era, the same old discrimination still resides in the hearts of the white man.”<sup>6</sup> This incident most certainly could have been used as a teaching moment where a constructive dialogue about the observations Jada made could have been engaged and proceeded in the most thoughtful terms possible that would enhance the nuance of Jada's analogy reasoning skills and led to an enriched, balanced discussion. However, it would seem that did not happen according to Jada who alleged a series of harrasing acts that occurred shortly after her essay composition was read by her teachers. If the alleged version taken in consideration from Ms. William's perspective were true, would such speech be regarded as disruptive to the educational process to warrant serious concern that it should be the subject of disciplinary action or punitive supression? Moreover, would the comments have been regarded as too offensive as to justify its suppression? Finally, is there a legitimate pedagogical concern that would justify supressing this type of speech when the very subject of the speech expresses a viewpoint that questions the legitimacy of pedagogical concerns relating to the very learning environment itself? In the face of an alleged precipitous drop in performance reflected in failing grades for the former A student, in school suspension and other harassing conduct, Jada and her family indicate there was little choice but to leave an inhospitable learning environment, and is

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School #3. Wanting to try another school, they were quickly informed that that school was filled and told to try “this school.” During her first day at this new school, she witnessed four fights, and other students asked her if she was put here because she fights too much. Long story short, they took an exceptional student, with the radical idea that kids should learn to read, and put her in a school of throwaway students who are even more unmanageable than the average student in her previous school. To protect their daughter, her parents have had to remove her from school, and her mother has had to quit her job so she can take care of Miss Williams. To date, the administrators of School #3 have refused to release her records, even though she no longer attends the school, and they have repeatedly given her mother the run around.”).

<sup>3</sup> See *Hibbard*, *supra* note 2.

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.*

currently being taught at home. At the end of the day, Jada simply maintains is that all she wanted to do was to be able to learn. Jada's own words probably notes best the irony that may remain at the heart of the issue.—“I feel misunderstood because grownups are making it a racial issue when it's a learning issue...I also feel hurt because I'm not in school right now. They're taking from me the one thing I do love and I feel confused...I thought I lived in a country of freedom of speech.”<sup>7</sup>

## Scenario 2:

A governor signs into law a bill that de-funds and bans the instruction of ethnic studies in the public education curriculum including of Mexican-American civil rights history less than twenty days following the enactment of anti-immigrant criminal law enforcement measures targeted mainly at Mexican immigrants in the state.<sup>8</sup> Governor Jan Brewer of the state of Arizona signed into law a bill defunding courses that “are designed primarily for students of a particular ethnic group,” or “advocate ethnic solidarity instead of the treatment of pupils as individuals.”<sup>9</sup> The bill prohibits ethnic studies and will terminate the Mexican-American studies department at the Tucson Unified School District.<sup>10</sup> Through the suppression of knowledge, free expression and civic engagement which are said to be at the core of the educational mission, some schools may conspicuously depart from that mission when it comes to minority identity and ethnic group solidarity for fear that white resentment may result. To this end, some commentators have speculated that it's not merely coincidental following the passage of Arizona's controversial anti-immigrant law, S.B. 1070, Arizona took on additional measures to weaken the Latino cultural influence and role in the public debate by limiting exposure to such knowledge in the public school curriculum. Arizona's State School Superintendent at the time, Tom Horne,<sup>11</sup> with directed emphasis that ethnic studies “infuse [children] with ethnic chauvinism about a particular race.”<sup>12</sup> In some sense, the legislative debate over the new law would seem to echo the words of Jada Williams that the issue of curricular expression is really about students learning rather than about officials construing the issue to be about race. For instance, many of those who supported Ethnic Studies, including Mexican-Americans, asserted their interest in the program was in learning the history, contributions and culture of a diverse people.<sup>13</sup> In contrast, many of the opponents,

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<sup>7</sup> *Id.*

<sup>8</sup> Andrea Christina Nill, *Arizona S.B. 1070 Latinos, and S.B. 1070: Demonization, Dehumanization and Disenfranchisement*, 14 Harv. Latino L. Rev. 35 (2011).

<sup>9</sup> H.R. 2281, 49th Leg., 2nd Reg. Sess. (Ariz. 2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf>.

<sup>10</sup> See Mary K. Reinhart, Tom Horne: Tucson Unified School District Runs Afoul of Ethnic Studies Law, *Ariz. Rep.*, Jan. 3, 2011, <http://www.azcentral.com/news/election/azelections/articles/2011/01/03/20110103arizona-ethnic-studies-tucson-tom-horne.html#ixzz1E4NZ5hNn>

<sup>11</sup> Tom Horne was elected Arizona Attorney General in November 2010. See Tom Horne Defeats Felecia Rotellini in Arizona Attorney General Race, *Ariz. Rep.*, Nov. 13, 2010, <http://www.azcentral.com/news/election/azelections/articles/2010/11/03/20101103tom-horne-leads-arizona-attorney-general-race.html#ixzz1EWvpYvoe>.

<sup>12</sup> Julianne Hing, Chicano Studies Teach “Ethnic Chauvinism,” Says AZ School Chief Tom Horne, *Colorlines* (May 13, 2010), [http://colorlines.com/archives/2010/05/az\\_superintendent\\_tom\\_horne\\_chicano\\_studies\\_teaches\\_ethnic\\_chauvinism\\_video.html](http://colorlines.com/archives/2010/05/az_superintendent_tom_horne_chicano_studies_teaches_ethnic_chauvinism_video.html).

<sup>13</sup> See generally Hil, *supra* note 8.

ironically, primarily Caucasian stakeholders in the Arizona legislative, executive and educational administration justified the ban on ethnic studies based not upon learning but upon race—namely because of the fear such learning might produce solidarity among minorities and encourage racial resentment of Caucasians over the latter’s role in historical injustices exacted on the former.<sup>14</sup> Ironically, much of the racial resentment and vulgar vitriolic language reported about the ethnic studies debate primarily came not from minority or Mexican public school students within the school house. Rather, the racial resentment and disruptive vitriolic language came from outside the school halls in the blatantly anti-Latino, white supremacist activity in Arizona following the passage of S.B. 1070, the controversial anti-immigration measures criminally targeting those of Mexican heritage.<sup>15</sup> Some might speculate the scenario with Jada Williams who was inspired to compose her essay based upon a book assignment on the Autobiography of Frederick Douglass in comparing historical injustices with the present context of how her minority peers are mis-educated and treated is perhaps exactly the kind of race consciousness in students the lawmakers of the Ethnic Studies ban in Arizona were attempting to avoid. Such race consciousness that might facilitate analogies that parallels past discrimination and the current controversial present context of anti-immigrant treatment in the state would certainly frustrate the state’s goal. However, where such critical student expression arises, it is debatable whether it is properly suppressed in light of the demands of the First Amendment, even within the schoolhouse context. Moreover, where such suppression arises, whether in the classroom or state legislature, even if deemed constitutional, it raises concerns about the legitimacy and propriety of its underlying objectives. For instance, is it not contrary to the development of an independent thinking citizenry in America to promote such suppression of ideas and expression in public schools? Should the state and school officials act to suppress student expression or a curriculum that introduces an alternative critical view of history?

### Scenario 3:

A group of African-American students sit together at the stairs in the cafeteria in a predominantly majority Caucasian school where Caucasian students elect not to socialize with them and school teachers want to encourage African-American students to break it up.<sup>16</sup> This phenomenon may be more prevalent because when students of color are faced with little other outlets of student expression, finding emotional refuge with fellow minority peers becomes even a more paramount basic human need when faced with

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<sup>14</sup> *Id.*

<sup>15</sup> See Garin Groff, *Activists: White Supremacist Activity on the Rise in Arizona*, E. Valley Trib., Aug. 1, 2010, [http://www.eastvalleytribune.com/arizona/article\\_34c30866-9c30-11df-b765-001cc4c03286.html](http://www.eastvalleytribune.com/arizona/article_34c30866-9c30-11df-b765-001cc4c03286.html); The Arizona Regional Director of the Anti-Defamation League, noted: “They [white supremacists] become more emboldened every day ... It does seem like the distance between what most of us would consider the extreme fringes of political thought and the mainstream of political thought, it seems like that distance has shrunk.”; Sarah Netter, *Hating Hispanics: Has Arizona Ignited Firestorm After Decade of Simmering Tension?*, ABC News, July 19, 2010, <http://abcnews.go.com/US/hating-hispanics-arizona-ignited-firestorm-decade-simmering-tension/story?id=11179708&page=1>; Heidi Beirich, *Neo-Nazi Official Patrolling Arizona Border Lauds Violence*, S. Poverty L. Ctr. Hatewatch (July 30, 2010), <http://www.splcenter.org/blog/2010/07/29/neo-nazi-official-patrolling-arizona-border-lauds-violence/?ondntsrc=MBQ100770HTW&newsletter=HW072910>.

<sup>16</sup> See *infra* note 51 and accompanying text.

hostility to racial identity and racial isolation in their learning environment. However, the First Amendment that grants the freedom to associate or not to associate with whomever one chooses becomes a double standard in the public school context.<sup>17</sup> This is evidenced where the freedom of Caucasian students not to associate with African-American students is respected, unquestioned and is generally not viewed as a problem at all by local educators. However, when outnumbered African-Americans students in a predominantly Caucasian school exercise their freedom to associate with each other for social, psychological and emotional support, or conversely viewed, when their freedom not to associate with Caucasian students is exercised, it is often generally viewed as problematic. While it is laudable to encourage interracial social dynamics to promote interracial dialogue and promote cross-cultural understanding, the burden for such interchanges typically fall on minority students rather than among all students alike in a one sided fashion.<sup>18</sup> Such a double standard in treatment may ultimately result in assigning blame to students of color while stigmatizing their efforts to find the needed social support from their minority peers that is lacking from those Caucasian counterparts not willing to similarly engage with them or who do not face such stigmatization since the status quo of predominant Caucasian affiliation is hardly ever questioned.<sup>19</sup>

What accounts for a harassing approach to racial viewpoints expressed in a student essay, statewide curricular ethnic bans, censorship of history discussing minority political solidarity in a Tucson school district and the singling out of minority student group identity that evinces a double standard level of hostility to such associational expressions in public schools? It may be said that much of this censorship and disciplinary actions with all its attendant deleterious effects on free speech rights are prompted by a desire to protect the societal power paradigm of dominance and sub-dominance of majoritarian Caucasian society over other ethnic and racial groups. It may also be speculated that more often than not for students of color, expressions of racial identity and solidarity are less about race itself, but a byproduct of viewpoints, opinions and experiences shaped by and in response to the very critical and hostile school environment. These student views that may be suppressed may implicate learning, the legitimacy of what is taught and the learning conditions students face than it does race. However, school and state officials may nonetheless curtail expression and ban curriculum based upon racial stereotyped fears and assumptions that should not be accorded First Amendment protection. Accordingly, if these observations hold true, there are several distinct considerations and troubling assumptions implicit in a pedagogical approach that allows minority student free speech to be curtailed through policies that promote curricular censorship of student expressions of racial identity and solidarity. If we are to take the spirit of the First Amendment at face value in its promotion of expression and its ultimate significance in promoting ideas in the educational context and in democratic society more broadly, a change is greatly needed.

While Supreme Court precedent gives recognition to school districts to regulate conduct that may be said to be disruptive or potentially disruptive to the educational process,

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<sup>17</sup> See *infra* note 70 and accompanying text.

<sup>18</sup> See *infra* note 51 and accompanying text.

<sup>19</sup> *Id.*

offensive, contrary to legitimate pedagogical concern, or outside the parameters of protected speech,<sup>20</sup> there is little scholarly attention devoted to the great degree of overreach. Expansive censorship of ethnic studies programs, and suppression of student expression of racial inequality and minority associational rights in the face of racial hostilities faced on school grounds may impermissibly impinge upon the First Amendment rights of K-12 minority public school students.<sup>21</sup> Troubling implications of curricular censorship and school disciplinary action discouraging ethnic and racial identity are beginning to unfold in ways that may seriously undermine the credibility of the educational mission to inculcate moral values or encourage informed impartial discourse and which may chill free speech exercise of associational rights embedded in the First Amendment as the above scenarios illustrate.

Moreover, such iconoclastic charges that suppression of ethnic and racial identity in curricular coverage and student expression is needed or if permitted it will otherwise inevitably lead to hostilities and resentment in the classroom, unsafe learning conditions, offensive and insulting student speech must not be categorically accepted as true or unexamined for fear of discomforting social conflict. Schools should serve as central place where teachable moments can transform perceived conflict into an empowering cultural responsive pedagogy that can promote racial identity, resilience, high academic achievement, student retention in schools, civic engagement as well as interracial dialogue and understanding. The assumptions that justify suppression of any student expression require more nuanced analysis in both legislative and pedagogical approaches that must respect student free speech rights in the public education context as developed by the courts.

Beginning with *Tinker v. v. Des Moines Independent Community School Dist.*,<sup>22</sup> the Supreme Court upheld the students' First Amendment rights in a school setting. In *Tinker*, school authorities adopted a policy indicating that any student wearing an armband to school would be asked to remove it. If a student refused to remove it, he or she would be suspended from school. The adoption of this policy occurred a few days before a group of students wore black armbands to profess their objections to the hostilities in Vietnam and their support for a truce. However, when some armband-wearing students refused to remove the armbands, the school suspended them.<sup>23</sup>

Ultimately, the Supreme Court held that the school policy prohibiting students from

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<sup>20</sup> The primary unprotected categories of speech include: obscenity, fraudulent misrepresentation, defamation, advocacy of imminent lawless behavior, and fighting words. See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

<sup>21</sup> Civil Rights Project at Harvard University & Advancement Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies 1* (2000) [hereinafter *Opportunities Suspended*] (“Zero Tolerance has become a philosophy that has permeated our schools; it employs a brutally strict disciplinary model that embraces harsh punishment over education.”); Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 Wash. U. L.Q. 65, 68-75 (2003).

<sup>22</sup> 393 US 503 (1969).

<sup>23</sup> These students sought an injunction from the District Court of Southern Iowa restraining the school officials from disciplining them in this fashion and for nominal damages.

wearing the armbands violated free speech rights under the First Amendment. A student may not be punished for merely expressing views unless the school has reason to believe that the speech or expression will “materially and substantially disrupt the work and discipline of the school.”<sup>24</sup> The Court generally refused to enable state-operated schools to become “enclaves of totalitarianism” with “absolute authority over the students,” but, importantly, it still found that “conduct by the student, in class or out of it, which for any reason ... materially disrupts classwork or involves substantial disorder or invasion of the rights of others, is ... not immunized by the constitutional guarantee of freedom of speech.”<sup>25</sup> The Court determined that because there was no reason to anticipate that the wearing of armbands would substantially interfere with the work of the school or impinge on the rights of other students, the school policy violated the students' free speech rights.<sup>26</sup> The Supreme Court struck a balance between enabling students and teachers to maintain their First Amendment rights once through the “schoolhouse gate” and acknowledging the need for affirming the authority of school officials to “prescribe and control conduct in the schools.”<sup>27</sup>

But here again, taking the lessons from *Tinker* to heart in the case of Jada Williams for instance, one need not suppress student expression of injustices expressed in a student essay when done in a non-disruptive fashion. Both within and beyond the classroom where racial identity is expressed by students as the reason for any perceived unjust treatment or where racial solidarity with others or expressed through one’s own ethnic affirmation in historical contributions does nothing to challenge the authority of school officials that would disrupt the educational process. Jada’s essay or curricular coverage of ethnic studies do not raise concerns that question the obligation to submit to the authority of school official but merely critiques how such authority is exercised. Surely, even so, such critiques are likely to be discomfoting to teachers and school officials. But as *Tinker* noted, “[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>28</sup> According to its rationale, *Tinker* established a protective standard for student speech under which it cannot be suppressed based on its content, but only because it is substantially disruptive. The majority of cases that analyze First Amendment rights in the public school context, apply the *Tinker* analysis and while it is arguable as a matter of debate whether Jada Williams’ critical essay about her school’s failure to educate her African-American peers

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<sup>24</sup> *Tinker*, 393 U.S. at 513, 89 S.Ct. 733.

<sup>25</sup> 393 U.S. at 511, 513.

<sup>26</sup> *Id.* at 514. In *Tinker*, the Court held that wearing armbands for the purpose of expressing a certain political viewpoint was the type of symbolic speech which fell within First Amendment protection and further noted that the wearing of the armbands was an act “entirely divorced from actually or potentially disruptive conduct” and involved direct, First Amendment rights akin to “pure speech.” *Id.* at 505.

<sup>27</sup> *Id.* at 506-507.

<sup>28</sup> *Id.* at 508-509; see also *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982) (plurality opinion) (observing that *Tinker* “held that students' rights to freedom of expression of their *political views* could not be abridged by reliance upon an ‘undifferentiated fear or apprehension of disturbance’ arising from such expression.” ).

could conceivably have provoked a substantial disruption to the educational process which remains dubious, it would seem to be merely undifferentiated fear at best. There is no evidence that such speech is political viewpoint speech would create such a disturbance. Moreover, the highly charged scenario in Arizona, however, may be an altogether different matter when *Tinker* is applied in that substantial disruption might be more likely, but here it ought to be noted that much of the hysteria may be attributable to external social forces extant from the school setting rather than among students within the school. To justify de-funding or banning ethnic studies programs should require something more than a speculative fear of “white resentment” from teaching the historical injustices of Mexican Americans plight for social justice. Unless state officials can show that there is a genuine concern that disruption would occur, curricular offerings should be permitted. Moreover, where concerns arise that there are legitimate pedagogical concerns, something more than speculative and discomfiting resentment should be required to be shown to justify stifling academic discourse since any departure from popular sentiment would likely have that result. This would unduly water down the applicable constitutional standards of the First Amendment in public schools established in *Tinker*.

Following *Tinker*, the Supreme Court in *Bethel School District No. 403 v. Fraser*,<sup>29</sup> articulated a new exception by distinguishing *Tinker*. In *Fraser*, a student delivered a speech to over six hundred other students during which he nominated a fellow student for a student government office.<sup>30</sup> The speech utilized sexual metaphors when referring to the candidate.<sup>31</sup> Before delivering the speech, he discussed the content of the speech with two teachers who advised him that the speech was “inappropriate,” could lead to “severe consequences,” and suggested he not deliver it.<sup>32</sup> Acting against their advice as well as a school disciplinary rule prohibiting students from “materially and substantially” interfering with the educational process including the use of obscene, profane language or gestures, Fraser, the student, nonetheless delivered his speech.<sup>33</sup> During the speech, some students in the audience hooted and yelled, some gestured graphically and simulated the sexual activities Fraser referenced in his speech.<sup>34</sup> The day after Fraser delivered the speech, one teacher reported that she had to forego a portion of her lesson plan to discuss the speech with her class. The assistant principle presented Fraser with copies of five letters from teachers. Fraser admitted that he deliberately used the sexual innuendo in his speech, received a three-day suspension, and was not permitted to speak at the school's commencement exercises.<sup>35</sup>

The District Court and the Court of Appeals, relying on *Tinker*, held that Fraser should not have been sanctioned for his speech. The Supreme Court disagreed, distinguishing *Fraser* from *Tinker*. The *Fraser* Court held that in *Tinker*, there was no speech or action that intrudes upon the functioning of the schools or the rights of other students. The

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<sup>29</sup> *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986),

<sup>30</sup> 478 U.S. at 678.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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

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

<sup>35</sup> *Id.*



*Fraser* Court determined that it was “a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse,”<sup>36</sup> and further explained that “the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or threatening to others.”<sup>37</sup> The Supreme Court deemed it “perfectly appropriate” for the school to censor the speech of the student because the Federal Constitution does not compel teachers, parents and elected school officials to surrender control of the public school system to its students. The *Fraser* Court reasoned that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”<sup>38</sup> The Court focused on earlier Supreme Court cases, which addressed protecting minors from exposure to “sexually explicit” or “vulgar and offensive” speech.<sup>39</sup>

It is arguable as a matter of debate whether Jada Williams’ critical essay about her school’s failure to educate her African-American peers could conceivably be amenable to analysis under *Fraser* due to its offensive nature.<sup>40</sup> Here again, however, “offensive” speech such as that composed by Jada Williams is not the kind of vulgar and offensive speech that was at issue in *Fraser* and so school districts, administrators or teachers ought to be cautious in engaging in conduct that might be perceived as disciplining such expression if that were indeed the case. Inculcating values from the protection of patently offensive, vulgar speech should not be regarded as tantamount to the racialized

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<sup>36</sup> 478 U.S. at 680, citing *Tinker*, 393 U.S. at 508.

<sup>37</sup> 478 U.S. at 683. In short, the *Fraser* Court drew a distinction between the different *form* or *type* of speech at issue in its own case as compared to the type of speech at issue in *Tinker*. Specifically, the *Fraser* Court stated: “Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent school officials from determining that to permit vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.” *Id.* at 685.

<sup>38</sup> *Id.* at 683, 106 S.Ct. 3159.

<sup>39</sup> See *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (holding that the Federal Communications Commission properly considered George Carlin’s “Filthy Words” monologue as “obscene, indecent or profane” within the meaning of 18 U.S.C. § 1464, while considering the medium’s (radio) availability to minors); see *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (upholding a New York statute which banned the sale of explicitly oriented materials to minors, despite the First Amendment protection of those materials for adults).

<sup>40</sup> Several cases arguably analyze student speech under *Fraser*. See *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir.2000) (holding, under the *Fraser* analysis, that Marilyn Manson T-shirts “contain symbols and words that promote values that are so patently contrary to the school’s educational mission [that] the School has the authority ... to prohibit those T-shirts”); see *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1185–86 (9th Cir.2006) (stating, in dicta, that a public school “may restrict a student from displaying a swastika or a Confederate flag” on a scheduled day of racial tolerance) *cert. granted and vacated without opinion*, 549 U.S. 1262, 127 S.Ct. 1484, 167 L.Ed.2d 225 (Mem.) (2007); see *Chandler*, 978 F.2d 524 at 529 (holding that buttons worn to protest the school district’s hiring of teachers to substitute for striking teachers and using the term “scab” were not “vulgar or offensive” under *Fraser*, and, therefore, proceeded to analyze under *Tinker*); see *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365–67 (10th Cir.2000) (denying an injunction sought by the parents of a student who was suspended for drawing a confederate flag in school); see *Broussard v. Sch. Bd. of the City of Norfolk*, 801 F.Supp. 1526, 1537 (E.D.Va.1992) (holding that the school district did not violate the First Amendment rights of a twelve year-old student by prohibiting her from wearing a t-shirt bearing the message “DRUGS SUCK” because the word “suck” is, in this context, “lewd, vulgar, or offensive”).

political expression of Jada Williams in her essay about the high illiteracy rate of her peers and the failure of her school to educate, even if those views are in artfully articulated without sufficient reasoning and nuance. Engaging in thoughtful discussions with students are perhaps a better way to improve students' reasoning skills than undertaking what might be perceived as punitive measures by allegedly lowering students' grades or subjecting them to an environment that chills the exercise of First Amendment expression that touches upon legitimate matters of pedagogical concern such as student literacy.

The Supreme Court in *Hazelwood School District v. Kuhlmeier* next addressed freedom of speech within a school environment.<sup>41</sup> In *Kuhlmeier*, certain high school students who served as staff members of the school's newspaper filed suit in federal court claiming their First Amendment rights were violated when the principal ordered the deletion of two pages of the newspaper.<sup>42</sup> The case worked its way up through the courts with conflicting holdings.<sup>43</sup> The Supreme Court held that it was reasonable for the principal to conclude that the content of the articles was not suitable for publication in the school's newspaper.<sup>44</sup> The *Kuhlmeier* Court reconciled the *Tinker* and *Fraser* holdings by concluding that even though students do not shed their constitutional rights at the schoolhouse gate, "... the First Amendment rights of students in public schools 'are not automatically coextensive with the rights of adults in other settings,' and 'must be applied in light of the special characteristics of the school environment.'"<sup>45</sup> Per the *Kuhlmeier* Court, a school can censor student speech without violating the First Amendment when the speech is "inconsistent with its basic educational mission ... even though a government could not censor similar speech outside the school."<sup>46</sup> Yet, the promotion of expression in student essays based upon assigned autobiography of Fredrick Douglass or curriculum highlighting the intellectual contributions and history of protests of Mexican-Americans in ethnic studies program are appropriate subject matter that further the educational mission to advance ideas and critiques employing critical analytical skills and even political views that run contrary to the views of teachers and school administrators.

In *Morse v. Frederick*,<sup>47</sup> the Supreme Court implicating free speech within a school environment, began its analysis by reconciling *Tinker*, *Fraser* and *Kuhlmeier* as follows:

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<sup>41</sup> *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

<sup>42</sup> One page featured an article describing school students' experiences with pregnancy, while another page featured an article discussing a student's view on the impact of divorce. The school's principal, who had final authority over the newspaper's content, objected to the pregnancy story because he believed that the text of the article would lead to the identification of those students who were pregnant and because the article's references to sexual activity and birth control were inappropriate for younger students. The principal objected to the divorce article because the student's father was not given an opportunity to comment on the sharp, critical statements made by the student about him.

<sup>43</sup> *Id.* at 263, 108 S.Ct. 562. The district court held that the students' First Amendment rights had not been violated by the two-page censorship imposed by the school's principal, but the Eighth Circuit reversed.

<sup>44</sup> *Id.* at 276.

<sup>45</sup> *Kuhlmeier*, 484 U.S. at 266.

<sup>46</sup> *Id.*

<sup>47</sup> *Morse v. Frederick*, --- U.S. ----, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007),

Our cases make clear that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’ At the same time we have held that ‘the constitutional rights of students in a public school are not automatically coextensive with the rights of adults in other settings’ and that the rights of students ‘must be applied in light of the special characteristics of the school environment’. Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.<sup>48</sup>

In *Morse*, several students unfurled a 14-foot banner at a school-sponsored event that bore the phrase, “BONG HiTS 4 JESUS.” After the principal, Morse, demanded that the banner be taken down, all of the students except for Frederick complied with her directive. Morse suspended Frederick for ten days and subsequently brought suit.<sup>49</sup> Specifically, the court set aside the application of *Tinker’s* substantial disruption test.<sup>50</sup> As in *Fraser*, the *Morse* Court reiterated that public school students’ constitutional rights are not “automatically coextensive with the rights of adults in other settings” holding that *Tinker’s* mode of analysis is not an absolute one, especially considering that neither *Fraser* nor *Kuhlmeier* used the “substantial disruption test” first articulated in *Tinker*.<sup>51</sup> Here again, it would seem the *Morse* precedent would not justify suppressing speech as in Jada’s case, the Ethnic Studies ban or interfering with group associational right of students of color to express their pride or solidarity since it is not tantamount to deterring drug use which the *Morse* court found to be a highly important, if not compelling, interest. No such compelling interests seems to warrant curtailing the kind of speech that would express ethnic pride in a diverse people or solidarity since it is not a highly important or compelling interest to suppress expressions of group affiliations, solidarity or critiques that implicate racial inequality within society or in the school environment. In synthesizing the *Tinker*, *Fraser* and *Kuhlmeier* trilogy of cases, one may conclude that: (1) schools have wide discretion to prohibit speech that is less than obscene—to wit, vulgar, lewd, indecent or plainly offensive speech; (2) if the speech at issue is “school-sponsored,” educators may censor student speech so long as the censorship is “reasonably related to legitimate pedagogical concerns”; and (3) for all other speech that is neither vulgar, lewd, indecent, or plainly offensive under *Fraser* nor school-sponsored under *Kuhlmeier*, the rule of *Tinker* applies. It is apparent from this synthesis that schools may not regulate student speech unless it would materially and substantially disrupt classwork and discipline in the school.

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<sup>48</sup> *Morse*, 127 S.Ct. at 2622.

<sup>49</sup> Frederick filed suit in federal district court claiming his First Amendment rights were violated, but the court granted summary judgment in favor of the school board finding it: (1) was entitled to qualified immunity, (2) had not violated Frederick’s First Amendment rights, and (3) the principal had reasonably interpreted the banner as promoting illegal drug use which contravened the school’s drug policy. On appeal, the Ninth Circuit reversed, concluding that the school failed to demonstrate how Frederick’s speech “gave rise to a risk of substantial disruption” as set forth in *Tinker*.

<sup>50</sup> The *Morse* Court reasoned that due to the magnitude of the interest at stake, deterring drug use was a highly important, if not compelling, interest.

<sup>51</sup> *Id.* at 2626-2627.

However, there is scant legal authority in First Amendment jurisprudence that would allow students and their parents to challenge school-sponsored speech in accord with *Kuhlmeier* when it is derogatory of minority identity or where such derogatory school-sponsored speech also threatens substantial disruption of the educational process in light of *Tinker* or may be regarded as truly offensive and vulgar in line with *Fraser*. For instance, one need not look far then the math teacher who places a question on a third grade math quiz asking students to engage in the arithmetic exercising involving the number of lashes of a whip that a cotton-picking slave receives.<sup>52</sup> A double standard here also stands when school officials express views predicated on racial stereotypes while student expression is suppressed or punished. Moreover, there are several distinct considerations and troubling assumptions implicit in a pedagogical approach that allows minority student free speech to be curtailed through policies that promote curricular censorship of student expressions of racial identity and solidarity. Each should be considered judiciously and collectively if the spirit of the First Amendment is to be taken seriously in its promotion of expression and its ultimate significance in promoting ideas in the educational context and in society.

First, a ban on such cultural studies may hardly come across as impartiality in curriculum, but rather hostility to it that may only further alienate a child from their educational setting. Restrictions on free speech in the calls for a ban on ethnic studies requires us to ignore the ties and real affiliations people have with each other in the real world context where personal identity is socially constructed and reinforced through paradigms of cultural norms and law enforcement that solidify, for instance, heritage identity, ethnic loyalty and solidarity. Where student identity is placed on being individual pupils at the total exclusion of one's own familial or cultural group does not fully honor the individual when one's own identity, culture, and ethos may be tied to those groups and individuals that have defined our sense of who we are because we often honor ourselves by acknowledging the unique sources of our identity.

Therefore, group affiliations are not irrelevant to academic discourse because this is an arena in which impartiality is not appropriate when it comes to censoring history that furthers historical and cultural ignorance which should be counter to the educational mission of public schools. Moreover, the appeal to multiculturalism does not confuse belief, which can be plural and culture-dependent, with truth, which can be reached through neutral discourse and provide an informed basis of belief. While the notion that belief can properly be the subject of loyalty, but that historical truth in curricular coverage somehow cannot, fails to recognize that often history is written by those who have won historical battles and thus the power to re-write and censor historical narrative according to its own perspective of truth and where knowledge itself can be just as partial as emotional ties when the subject matter is not related to ethnic studies. It is a form of content-based speech regulation in the name of school safety that is impermissibly over-inclusive in its reach and unjustifiable in its application. Just as we develop as individuals with affiliations to particular religions or particular nations, we also develop as individuals with limited experiences where revisionism may change our understanding

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<sup>52</sup> Georgia School Investigates 'Slave' Math Problems, ABC News (Jan 10, 2012) available at <http://abcnews.go.com/blogs/headlines/2012/01/georgia-school-investigates-slave-math-problems/>

of our own history such as the revision in American views of the relationship between Native Americans and European settlers. As one commentator noted:

It's true that teaching U.S. history and literature with an eye toward a minority experience can give students misgivings about the wisdom of the majority, past and present. But particularly in the Southwest, it's impossible to understand history without acknowledging the subjugation and marginalization of minority groups. Nor can one understand the greatness of the American experiment without seeing it as a 200-year-long struggle to overcome injustices and live up to the highest ideals of its founding documents. Surely one doesn't have to believe in the infallibility of white people to be pro-American. Besides, if teaching U.S. history means protecting the reputation of the majority by telling the story strictly from their perspective, wouldn't that be a type of ethnic studies?<sup>53</sup>

The outright banning of ethnic studies is certainly a troubling form of censorship in public schools, but the failure to see how history is taught from a Eurocentric viewpoint as a form of ethnic studies is a patent commission of intellectual dishonesty.

Second, while there may be legitimate concern in creating a dynamic of “us v them” in the school environment which can impact the ability to derive a cohesive unity among a student body, this notion ignores the fact that such group identity through social cliques in classrooms, lunch rooms, the gym and playground already naturally form. This phenomena in public school settings testify to the fact that group identity is both real and enduring no matter the efforts to regulate or censor curriculum. Anglo based speech is widely supported, pervasive and encouraged unquestionably. As a result racial “counter-spaces” as they are termed, may arise in group dynamics of “fictive kinship” independent of ethnic studies programs that are not the fundamental cause of an us v. them dynamic. As one commentator noted, counter-spaces arise “when a group of Black teens are sitting together in the cafeteria...school administrators want to know why they are sitting together, and what can be done to prevent it. We need to understand that in racially mixed settings, racial grouping is a developmental process in response to an environmental stressor, racism. Joining with one’s peers for support in the face of stress is a positive coping strategy.”<sup>54</sup>

Third, what is troubling is the notion that all group identity is viewed as antithetical to the orderly operation of the educational process when it is viewed as running contrary to the individual identity as a single pupil.— Group identity need not be necessarily viewed in such “us v. them” resentful binary terms that particularly seeks to automatically impose a negative view that such groups are a threat to school safety, offensive or contrary to

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<sup>53</sup> Gregory Rodriguez, *Why Arizona banned ethnic studies Op-Ed: Put bluntly, the state acted to protect the reputation of the white majority* (Feb. 20, 2012) available at <http://articles.latimes.com/2012/feb/20/opinion/la-oe-rodriguez-ethnic-studies-20120220>

<sup>54</sup> Dorinda J. Carter, *Why Black Kids Sit Together at the Stairs: The Role of Identity-Affirming Counter-Spaces in A Predominantly White School*, JOURNAL OF NEGRO EDUC., 542-554 (1976) available at <http://dcarter.wiki.educ.msu.edu/file/view/Carter+Identity-Affirming+Counter-spaces.pdf>

legitimate public concern when it is properly framed in lesson plans and guided by thoughtful instruction.

Fourth, it does not necessarily follow that exposure to one's history and culture through the school curriculum means that it always leads to resentful racial group identity at all as opposed to simply learning to become proud of one's heritage, background and historical accomplishments which can operate as a source of pride that empowers the individual student to see how obstacles have been overcome, how visions of a better society and standard of living have been formulated and expressed creatively through music, art, literature and protest. Further, where resentful racial group identity is formed, this critique is static and fails to see racial identity as a dynamic transitioning process. For instance, there are five stages of black identity development that include pre-change, encounter, transition, internalization, and integrative awareness.<sup>55</sup> These stages are temporary and transitional, leading to the acceptance of oneself and others while the individual constructively works to improve societal conditions that may have caused his or her racial cognizant dissonance in becoming self aware.<sup>56</sup> This final stage is perhaps one of the most important achievements that First Amendment rights in public education can achieve in promoting racial reconciliation, integrative awareness and self expression through greater civic engagement.

Fifth, schools and school district miss a critical opportunity to use culture and history to make other substantive topics of learning more engaging and relevant to the student and to reinforce the students intellectual and emotional attachment to the school they attend so as to encourage greater student retention and less student drop out as well as decreased gang involvement.<sup>57</sup> This is so where student speech is allowed to be expressed as a

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<sup>55</sup> See Kafi Kumasi, *Seeing White In Black: Examining Racial Identity Among African American Adolescents In A Culturally Centered Book Club*, available at [http://wayne.academia.edu/KafiKumasi/Papers/479966/Seeing\\_White\\_In\\_Black\\_Examining\\_Racial\\_Identity\\_Among\\_African\\_American\\_Adolescents\\_In\\_A\\_Culturally\\_Centered\\_Book\\_Club](http://wayne.academia.edu/KafiKumasi/Papers/479966/Seeing_White_In_Black_Examining_Racial_Identity_Among_African_American_Adolescents_In_A_Culturally_Centered_Book_Club)

<sup>56</sup> *Id.* ("In stage one, or pre-change, African Americans accept the dominant Anglo-European worldview and seek to become assimilated into White mainstream society. The second stage, encounter is triggered by a shattering experience that destroys the person's previous ethnic self-image and changes his or her interpretations of the conditions of African Americans in the United States. Individuals in stage three, transition, want to live totally within the black world and tend to become preoccupied with all things black (e.g. literature, clothing, forms of expression, etc. and may develop a pseudo-black identity because it is based on hatred and negation of Whites rather than on affirmation of a pro-black perspective. In stage four, internalization, the individual achieves greater inner security, self-satisfaction, a healthy sense of black identity and pride, and feels less hostility towards Whites. Individuals who move into stage five, internalization-commitment, become actively involved in efforts to bring about social justice through structural changes in society.").

<sup>57</sup> A reflection of the concerns raised by activists that ultimately led to the passage of the Mexican American Studies Program in Arizona schools lends support for this assertion. See e.g., Jeff Biggers, *Defying Arizona's Ethnic Studies Ban: Tucson Freedom Summer Draws on Mexican American Studies History*, available at [http://www.huffingtonpost.com/jeff-biggers/defying-arizonas-ethnic-s\\_b\\_1710870.html](http://www.huffingtonpost.com/jeff-biggers/defying-arizonas-ethnic-s_b_1710870.html) (quoting in an interview with activist Miguel Ortega the observation that "[w]ith the TXMC we kept forcing politicians and bureaucrats to recognize that the disparities our local Chicano youth were experiencing were connected to the lack of a quality education within our public schools; we made the case that our kids were not really dropping out in droves - they were being pushed out. Our events and actions pointed to the fact that our kids did not have enough to do; that gang violence on our Tucson streets

means to cope with the racial dissonance minority students feel in school and society at large. Permitting their expression in essays, plays, social settings and reading of their culture promotes a sense of belonging that need not be sought out through street gangs. Schools that permit such free expression allow students to reach a higher state of integrative well being where they may then begin to confront and eventually move to higher stages of interaction with peers that are not solely predicated on race or racial identity.

Sixth, greater attachment to the school helps through relevant engagement of one's history may help prevent the kind of profound intellectual, cultural and social alienation that leads students to react in erratic fashion or through violent means as seen in Columbine or other such similar events where students feelings of isolation as outsiders in the school climate animate the underlying basis for such anti-social behavior.

Seventh, a school district or a government that seeks to deny educating students about their own history in the name of preserving control for fear it may be unsafe or disruptive to the educational process reflects a both a questionable exercise of censorial power that may be repugnant to the democratic ideals of pluralism, acceptance and tolerance central to the pedagogical mission to educate and inculcate moral values. Moreover, the misguided assumption that simply hiding the truth of past history including historical injustices will mean it forever remains hidden from students' awareness is also a dubious proposition in an era of greater internet connectivity, expansive social media presence within and beyond the school house gates and furthers rather than mitigates the concerns of racial resentment of Caucasians or Caucasian society when dishonesty through censorship reveals these selective sins of omission. Schools do a disservice to themselves and to those they purport to educate when the conspicuous absence of curricular coverage and discussion of a pluralistic history of an ethnic culture that is reflective of the predominant ethnic demographic of students it mainly enrolls undermines the credibility of the school and the education it provides in the eyes of its students, their parents and the local constituency.

Eighth, schools can be the ideal place to use history to create teachable moments when analytical reasoning skills and guided contemplative reflection by classroom instructors can offer context in a balanced fashion and through constructive dialogue rather than if a student learns this content outside the classroom without such guidance or thoughtful considerations of balance. Indeed, such unguided or misguided knowledge may pose a greater threat to school safety than if the school curriculum engaged with such course material in an open, honest and fair way. In this way, students would have an intellectual counterbalance to inaccurate or false information received from less credible or accurate third party sources of information from third persons and unreliable Internet content or from those informational sources oriented to promoting a resentful world view.

Ninth, unlike cases where a student is expelled for wearing sports jerseys of a rival state, here the stakes of censorship in the intellectual, cultural, social and historical identity of a

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might be better mitigated by celebrating the cultural and historical assets of Raza so that they didn't have to belong to the dangerous and dysfunctional gangs that were beating us to the punch.”).

child are paramount to the systematic investigation and discovery of truth that should be paramount to the school mission matter most. The First Amendment objective in promoting enlightenment and the discovery of truth is perhaps best reflected in Oliver Wendell Holmes's theory of a "marketplace of ideas" in which "the ultimate good desired is ... reached by free trade in ideas,"<sup>58</sup> and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>59</sup> The marketplace theory is perhaps "the most famous and rhetorically resonant of all free speech theories,"<sup>60</sup> but it also exemplifies and embodies the democratic theory from *New York Times v. Sullivan* that there is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open."<sup>61</sup>

How is it then that thoughtful public debate on immigration law, the proper role of law enforcement, civil rights, legislative process and constitutional safeguards can be meaningfully promoted where the citizenry itself is not well equipped with knowledge to engage in such discourse. When a student is denied the exposure to one's history in order to see how it has shaped or could inform public debate of issues of import concerning public policy and the context in which they live, the educational process intellectually handicaps them. No meaningful discourse can take place in classrooms about issues of the day concerning the very same students ethnic identity in federal and state immigration policy, law enforcement impinging upon concerns of group affiliation with ethnic identity and constitutional rights where history concerning such ethnic identity is denied to them in the very same classrooms they are called to learn. This paradox runs contrary to the *Sullivan* rationale and even the *Tinker* rationale that recognizes students do not shed all their constitutional rights to free speech when entering the school house gates. This is because the limitations of free speech rights in K-12 education are curtailed in perhaps the most troubling fashion when schools withhold the very intellectual tools necessary to express such free speech rights in the first place. Such constitutional free speech safeguards recognized in public elementary and secondary schools are rendered meaningless when school curricular choices become a co-accessory with law enforcement and popular sentiment to promoting popular compliance at the expense of informed reflective discourse, student expression, and civic group engagement in the school and beyond.

Tenth, the need to expand the cultural and historical awareness of people of color is becoming more essential to a dramatically changing demographic in the United States to function as a cohesive democracy premised on civic engagement and given the demands to effectively compete in a more racially and ethnically diverse global economy that requires not only greater cultural competency of ethnic and racial minorities, but the continued presence of minorities in classrooms that ethnic studies program encourage.

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<sup>58</sup> *Abrams v. U.S.*, 250 U.S. 616, 630 (1919). *See also* *Whitney*, 274 U.S. at 375.

<sup>59</sup> *Abrams v. U.S.*, 250 U.S. 616, 630 (1919).

<sup>60</sup> RODNEY A. SMOLLA & MELVILLE B. NIMMER, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 2:13 (3d ed. 2008).

<sup>61</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), *quoted in* *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Boos v. Barry*, 485 U.S. 312, 318 (1988). The democratic variant of the marketplace of ideas theory was first discussed in *Thornhill v. Alabama*, 310 U.S. 88, 96, 101-06 (1940).



Here, the lessons gleaned from other Supreme Court jurisprudence is instructive in seeing the value of diversity of viewpoints in the classroom, which arguably can be better promoted through ethnic studies programs.

Justice O'Connor's acknowledgement in *Grutter v. Bollinger*<sup>62</sup> of increasing diversity in the classroom leads to beneficial educational benefits because it leads to more dynamic and enlightening dialogue that enhances the educational experience in the classroom when the students hail from the greatest possible variety of backgrounds is perhaps one of the key justifications for deference to admissions officials in focusing on the diversity of the entering class. The *Grutter* majority recognized that: "[A] student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a [university] experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."<sup>63</sup> The majority in *Grutter* also took judicial notice of various studies evidencing that student body diversity not only better prepares students for a more diverse workforce but also is essential in the global marketplace through exposure to widely diverse people, cultures, ideas, and viewpoints. A diverse student body which is better retained and promoted through non-censorship or ethnic curricular bans and a thoughtful versus a punitive approach to student essays critical of racial injustices in their school setting serves this end by "promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races."<sup>64</sup> Justice O'Connor also recognized that for there to be legitimacy in the leadership of a diverse nation, those leaders must themselves reflect the diversity of the nation as a whole in order to ensure both a cohesive social fabric and to ensure that all walks of life, including those underserved become better served and engaged in the nation. Each member of society "must have confidence in the openness and integrity of the educational institutions that provide this training."<sup>65</sup> The Court understood that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."<sup>66</sup> Diversity in the classroom helps engender the ideal of civic engagement, because "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."<sup>67</sup>

Eleventh, such zero tolerance censorship of curricular coverage and expressions of racial solidarity could potentially violate the associational right encompasses a right to associate for the purpose of engaging in those activities protected by the First Amendment,

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<sup>62</sup> 539 U.S. 306 (2003). While this is not a K-12 case, the rationale from the case is particularly salient given that there can be no diversity in higher education, if there is little diversity in the elementary and secondary schools that serve as a pipeline to higher educational institutions. As noted in this article, ethnic studies programs may help facilitate minority student retention to maintain a diverse student body and to discourage school drop outs.

<sup>63</sup> *Id.* at 314, 123 S.Ct. 2325.

<sup>64</sup> *Id.* at 332, 123 S.Ct. 2325.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

including speech, assembly, petition for the redress of grievances, and the exercise of religion.<sup>68</sup> However, while the right to intimate association guarantees an individual the choice of entering into an intimate relationship free from undue intrusion by the state,<sup>69</sup> it is a right that only protects expression predicated upon actual instrumental exercise of associational expression.<sup>70</sup> That is, the right to freedom of expressive association protects people's right to associate for the purpose of engaging in activities protected by the First Amendment, including petitioning the government for the redress of grievances.<sup>71</sup> In contrast, encounters that contain no element of expression are not protected.<sup>72</sup> If group engages in expressive association, constitutional protections are only implicated if the government action would significantly affect the group's ability to advocate public or private viewpoints.<sup>73</sup>

Herein lies perhaps the most troubling quandary of school curriculum so heavily censored that it renders the probability of expressive association of minority group solidarity far less likely by its outright discouragement through the banning of ethnic studies. This is likely to be the case because if racial group identity or solidarity is discouraged through curriculum and essay writing critical of exploring historical and present social injustices in public schools, it is also likely that the public school would similarly discourage assembly and instrumental expressions of solidarity if and when they ever happen if students are not even exposed to learning that leads to self-knowledge and acceptance.

Twelfth, the freedom of association rights of students of color or ethnic backgrounds has the potential to be unfairly impinged upon in ways it is not for others that may raise equal protection concerns as well. This is because the right to intimate association also implies a right not to associate.<sup>74</sup> So if, for instance, in *Apilado v. North American Gay Amateur Athletic Alliance Gay Amateur Athletic Alliance*, forcing an organization that operated "Gay Softball World Series" tournament to include an unlimited number of heterosexual players would significantly affect its expressive activity of promoting amateur sports by emphasizing the participation of the gay community and promoting athletic competition

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<sup>68</sup> *Montgomery v. Stefaniak*, 410 F.3d 933 (7th Cir. 2005). The First Amendment protects expressive association. *Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128 (9th Cir. 2004). The freedom of expressive association derives from the First Amendment. *American Legion Post #149 v. Washington State Dept. of Health*, 164 Wash. 2d 570, 192 P.3d 306 (2008).

<sup>69</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); *Sanitation and Recycling Industry, Inc. v. City of New York*, 107 F.3d 985 (2d Cir. 1997).

<sup>70</sup> *Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839, 109 Ed. Law Rep. 1145 (2d Cir. 1996). It should be noted here that instrumental associations are regarded as those that are indispensable to the preservation of other individual liberties, including those activities protected by the First Amendment. *State v. Holm*, 2006 UT 31, 137 P.3d 726, 22 A.L.R.6th 665 (Utah 2006), cert. denied, 549 U.S. 1252, 127 S. Ct. 1371, 167 L. Ed. 2d 159 (2007).

<sup>71</sup> *Krystkowiak v. W.O. Brisben Companies, Inc.*, 90 P.3d 859 (Colo. 2004); *Bowling Green v. Schabel*, 2005-Ohio-6522, 2005 WL 3337457 (Ohio Ct. App. 6th Dist. Wood County 2005).

<sup>72</sup> *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181 (5th Cir. 2009).

<sup>73</sup> *U.S.C.A. Const. Amend. I. Kuvin v. City of Coral Gables*, 45 So. 3d 836 (Fla. Dist. Ct. App. 3d Dist. 2010).

<sup>74</sup> *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012).

and physical health in support of the gay lifestyle,<sup>75</sup> it would be similarly difficult for students of color to effectively emphasize a vision of solidarity that is discouraged by teachers in a cafeteria or state ban on ethnic studies.<sup>76</sup>

Thirteenth, such a discrepancy between suppression and free speech rights could hardly stand constitutional muster without some form of racial stereotyping of expressive racial solidarity that all such solidarity may breed resentment. One could legitimately inquire whether free speech rights are significantly chilled when pondering whether a group of Mexican-American students would be comfortable in exercising their First Amendment right to wear armbands of Che Guevara in Arizona as did the students in *Tinker* wear black armbands in solidarity to Vietnam anti-war protesters. But here again, perhaps likely a more disturbing inquiry would be to ponder whether students would even have the awareness (absent external school sources) to show their solidarity to various injustices when schools fail to equip them with knowledge of their own history to draw parallels or nexus to engage in such group forms of expressive solidarity.

Fourteenth, one must be mindful that while certain forms of racial identity and solidarity expressed through book report assignments, essay writing exercises and other forms of student expression might be regarded as “offensive” to teachers and administrators, they can still operate as a form of speaking truth to power by students who find legitimate room to criticize the terms and conditions of their own learning environments. This type of suppression of student expression can and should have legal consequences if the spirit of *Tinker* and *Fraser* are faithfully adhered to in constitutional jurisprudence. So for instance, a plaintiff alleging a violation of the right to expressive association may support his or her claim by proving some form of government action to impose penalties for the expression of political views.<sup>77</sup> This form of expression may call into question the very conditions that trouble students about the quality and manner of education they are receiving and as such should be protected speech. Yet the observance of such free speech rights rests in the very hands of those who may be criticized by student expression and so there is a heightened need in the law to give due recognition of this difficulty by heightening the level of vigilance that the law scrutinizes such regulated suppression and censorship of expression.

Fifteenth, closing the racial achievement gap is a legitimate pedagogical concern and one that may very well depend upon not only upon a rigorous curriculum but one that promotes a culturally responsive pedagogy in instruction and the curriculum through ethnic studies, race critical student essays and the exercise of free association. As concerned educators, parents and policymakers, we need to begin to see the important nexus that exist between curriculum, speech, student well being fostered through healthy

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<sup>75</sup> This was required for organization to establish that its decision to disqualify a team from the tournament for having more than the two heterosexual members allowed by organization's rule was protected association under the First Amendment, *see Apilado v. North American Gay Amateur Athletic Alliance*, 792 F. Supp. 2d 1151 (W.D. Wash. 2011).

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

<sup>77</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); *Sanitation and Recycling Industry, Inc. v. City of New York*, 107 F.3d 985 (2d Cir. 1997).

expression and self-awareness that empowers and expectations of academic success. Indeed, there are compelling pedagogical concerns that counsel us to reconsider how we treat the role of racial identity and solidarity not as a form of racial resentment or victimhood, but as a strategic instrument that furthers the goals of the school mission and academic success.

## Conclusion

The need for a culturally sensitive pedagogy is just as much of a legitimate pedagogical concern that requires us to re-think the suppressive role schools play in curtailing and chilling student expression.<sup>78</sup> It requires that matters of racial equality be expressed and explored by the entire community rather than putting the burden of such speech on racial minorities alone.<sup>79</sup> Legitimate pedagogical concern should not seek to suppress racial or cultural identity, but rather encourage its free exploration and expression for effective learning to take place.<sup>80</sup> Legitimate pedagogical concern for a culturally responsive pedagogy also does not attempt to suppress racism, but to acknowledge its existence, its challenges as well as racial uplift in teaching, curriculum and student essays that allow expression and illustrations of how race has or can be overcome through racial uplift.<sup>81</sup>

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<sup>78</sup> See Mary Stone Hanley, George W. Noblit, *Cultural Responsiveness, Racial Identity and Academic Success: A Review of Literature*, available at [http://www.heinz.org/UserFiles/Library/Culture-Report\\_FINAL.pdf](http://www.heinz.org/UserFiles/Library/Culture-Report_FINAL.pdf)

<sup>79</sup> *Id.* (“Culturally responsive pedagogy and programs must have the active participation of the community. Culture is constantly changing and varied even within a racial group, and community and family members can be valuable in informing educators about the needs and resources of the children and youth whom they know in ways that educators cannot. The challenge for some professionals is to design programming and /or pedagogy for a culture that is not their own. Thus professional staff will need a better understanding of culture(s) and an awareness of how to use culture effectively. They also need skills in inquiry and the ability to listen to children and families.”).

<sup>80</sup> *Id.* (“Culturally responsive pedagogy in education requires adaptations in instructional practice, classroom organization and motivational management, as well as in curricula and espoused values. In educational and non-educational programs, the rule of thumb involves having the program involve key aspects of the home culture and focus on developing strategies to use the culture to construct a positive racial identity that promotes resilience and success in social institutions...Race in culturally responsive programming is to be an asset in learning and development. Programs should be designed so the student’s culture is a strength to be deployed in learning. Programs should not be stigmatizing but rather affirmative of the students and their cultures. Culturally responsive programming has to insure that students trust that racial stereotypes will not be used against them.”).

<sup>81</sup> *Id.* (“Programs should provide accurate information about racial oppression and racism as they promote awareness of strategies to use racial identity in service of high achievement and resilience in the face of racial oppression. This also will likely include advancing a project of racial uplift.”).