Vanderbilt Law Review

Volume 75 | Issue 6 Article 5

11-2022

Can't Really Teach: CRT Bans Impose upon Teachers' First Amendment Pedagogical Rights

Mary L. Krebs
Vanderbilt School of Law

NOTE

Can't Really Teach: CRT Bans Impose Upon Teachers' First Amendment Pedagogical Rights

The jurisprudence governing K-12 teachers' speech protection has been a convoluted hodgepodge of caselaw since the 1960s when the Supreme Court established that teachers retain at least some First Amendment protection as public educators. Now, as new so-called Critical Race Theory bans prohibit an array of hot button topics in the classroom, K-12 teachers must either preemptively censor themselves or risk running afoul of these vague bans with indeterminate legal protection. This Note proposes an elucidation of K-12 teachers' free speech rights via a two-part test to assess the reasonability of instructional speech. Rather than analogizing K-12 teacher speech to citizen speech, student speech, or public employee speech, as the leading Supreme Court cases direct lower courts to do, this test would account for the specific interests at play in K-12 education and consider the teacher's pedagogical expertise.

As school board meetings host heated arguments and state legislatures ban books, the contours of K-12 public school teachers' rights have never been more relevant. The Court continues to voice a need to maintain K-12 schools as the nurseries of democracy but does not articulate how teachers might do so in light of increasingly intrusive restrictions on speech. In higher education classrooms, professors retain academic freedom to cultivate a marketplace of ideas. In K-12 classrooms, teachers should preserve a corresponding freedom: the pedagogical freedom to teach permissible concepts in as myriad of ways. This Note argues that approaching K-12 teacher speech cases from the proposed two-step approach will clarify teachers' First Amendment pedagogical freedom rights and thereby shield the kind of teacher instructional speech that is so crucial to U.S. democratic values.

INTRODUCTION

Following the reckoning in 2020 over structural and systemic racism,[1] a national conversation has emerged surrounding how U.S. students are taught about history and race.[2] While the first change-motivated calls reverberated through the criminal justice system, this second iteration is taking place in public schools.[3] 2021 brought as many

1. *See* Ron Elving, *Will This Be the Moment of Reckoning on Race That Lasts?*, NPR (June 13, 2020, 7:00 AM), https://www.npr.org/2020/06/13/876442698/will-this-be-the-moment-of-reckoning-on-race-that-lasts [https://perma.cc/53YY-GG47].

2. Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/article/what-is-critical-race-theory.html [https://perma.cc/G3D4-FWQP].

3. Janell Ross, *2020 Forced Americans to Confront the Reality of Racism. In 2021, Many Looked Away*, TIME (Dec. 29, 2021, 10:00 AM), https://time.com/6128657/2021-american-racism

as sixty-one legislative efforts to remove "divisive" teaching in public schools,[4] and the fall of 2021 saw an "unprecedented" amount of book challenges.[5] Most of these challenges took issue with certain books' portrayal of race, gender, and sexuality, which have long been controversial topics in public education.[6] But unlike prior efforts to limit sensitive subject matter from public school curricula, this tension has become increasingly political.[7]

As of February 2022, fourteen states have passed prohibitions on teaching about race in potentially divisive manners,[8] or what are colloquially known as "anti-critical race theory" legislation or "CRT bans."[9] Conservative proponents purport that these laws protect objective, unbiased, and balanced teaching by preventing teachers from introducing concepts about racism without proper counterpoints.[10] Many of these bans expressly prohibit teachers from mentioning certain hot button issues, such as equity as preferable to equality, racial colorblindness as racist, or the ubiquity of subconscious bias.[11] In response to this legislation, critics have raised concerns about teacher self-censorship and viewpoint discrimination,[12] casting a spotlight on the interplay between teachers' instructional speech and the constitutionally protected right to free speech.

This Note will examine how First Amendment protections in the K-12 context fail to adequately recognize the factors that influence public school teachers' instructional speech. This Note will ultimately advocate for a more nuanced balancing test to determine the

---

[https://perma.cc/E9VQ-9XHP]. In 2021, amid several high-profile trials of murderers of Black men, violence against Asian-Americans, and rising hate crimes, "[c]lassrooms surged back to their place as key political battlegrounds." *Id.*

4. Sarah Schwartz & Eesha Pendharkar, *Here's the Long List of Topics Republicans Want Banned from the Classroom*, EDUC. WK. (Feb. 2, 2022), https://www.edweek.org/policy-politics/heres-the-long-list-of-topics-republicans-want-banned-from-the-classroom/2022/02 [https://perma.cc/2FNH-QEG4].

5. Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES, https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html (last updated Feb. 8, 2022) [https://perma.cc/V57J-3L4A].

6. *Id.*

7. *Id.* Experts note that current efforts to censor curricula employ new, politically oriented "tactics," like pushing for legislation, involving politicians, and organizing online. *Id.*

8. Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WK., https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 (last updated July 15, 2022) [https://perma.cc/CN7E-GPSS].

9. Hereinafter referred to as CRT bans. *See infra* Part I.A.

10. *See* Schwartz, *supra* note 8. These common themes of CRT bans originate from President Trump's executive order in September of 2020. *Id.; see infra* Part I.A.

11. Schwartz & Pendharkar, *supra* note 4; Schwartz, *supra* note 8.

12. Jennifer Schuessler, *Bans on Critical Race Theory Threaten Free Speech, Advocacy Group Says*, N.Y. TIMES, https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html (last updated Nov. 9, 2021) [https://perma.cc/RG6Z-K5TG].

permissibility of teacher speech that reflects the reality of K-12 teachers' instructional speech.

This Note will proceed in four parts. Part I provides context on CRT bans and an overview of Supreme Court cases addressing First Amendment challenges in education, noting the evolution of several tests to determine the protection afforded to a public educator's speech. Part I concludes with the Supreme Court's most recent case—*Garcetti v. Ceballos*—which lightly cautions against a wholesale application of jurisprudence on public employee free speech to education. Part II explains the differing approaches taken across several circuits to make sense of the complicated inquiry into teacher speech protection. Part II then uses a sample CRT ban from Tennessee to explore the mismatch between the available cases and the factors at play when a K-12 teacher may run afoul of a CRT ban. Part III offers a solution that encapsulates the different interests surrounding a K-12 educator's speech: the Supreme Court should elucidate how *Garcetti* applies to K-12 teachers by establishing a new balancing test of factors specific to K-12 instructional speech. This solution better accounts for longstanding Supreme Court precedent and the values of academic freedom, transposed into the K-12 context as pedagogical freedom.

I. BACKGROUND

A. Critical Race Theory Bans in Public Education

In the face of social unrest and a racial reckoning,[13] the conservative movement has latched onto a term that describes a decades old graduate-level academic theory of analysis: critical race theory ("CRT").[14] CRT emerged in the 1980s through theorists like Derrick Bell, Alan Freeman, Richard Delgado, and Kimberlé Williams

13. The death of George Floyd in May of 2020 sparked nationwide protests about police brutality toward people of color, particularly Black men like Floyd. Many refer to this moment and its impact as a "racial reckoning." In the subsequent months, outrage about racism in policing erupted into a larger consideration of the enduring legacy of the enslavement of Black men and women in the United States. With a spotlight on indicia of racism in the United States—disproportionate police violence against Black men, discrimination against Black women, the hypersexualization of Black women and children, the impact of redlining and housing policies on generational wealth, underrepresentation of Black C-level employees—conversations about subconscious bias and systemic racism permeated workplaces, screens, and homes. Debates arose among moderates and progressives about both how to reconcile the shameful moments in United States history (should people revere figures who both codified democracy and enslaved African people, or should capitol buildings contain busts of Confederate generals or members of the Ku Klux Klan?) and how to course correct from such persistent, centuries-old injustices.

14. Fortin, *supra* note 2.

Crenshaw.[15] Though CRT scholarship encompasses a wide range of interests and avenues, its theorists share a common interest in unpacking the historical underpinnings of racial inequity and describing white supremacy's ubiquity within the United States legal system.[16] These academics also share a common desire to change the relationship between law and racial power.[17] Kimberlé Williams Crenshaw, a law professor and scholar at UCLA and Columbia University, describes CRT as a "verb" or a lens to analyze the impact of race, while Mari Matsuda, a professor at the University of Hawaii, describes CRT as a "map for change" to repair and eliminate racial injustice.[18] It is this aura of "change" that has now roused the right.

Amid the aftermath of George Floyd's death in May of 2020,[19] racism—specifically *structural* racism or the ways in which history, laws, policies, practices, and customs maintain and perpetuate racism[20]—moved to the forefront of the national conversation.[21] A

---

15. Stephen Sawchuck, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WK. (May 18, 2021), https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05 [https://perma.cc/G7R5-RPW9]; Char Adams, *How Trump Ignited the Fight over Critical Race Theory in Schools*, NBC NEWS (May 10, 2021, 10:05 AM), https://www.nbcnews.com/news/nbcblk/how-trump-ignited-fight-over-critical-race-theory-schools-n1266701 [https://perma.cc/4GPF-LZN9].

16. CORNEL WEST ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); *see* Fortin, *supra* note 2:

> It is a way of seeing, attending to, accounting for, tracing and analyzing the ways that race is produced . . . the ways that racial inequality is facilitated, and the ways that our history has created these inequalities that now can be almost effortlessly reproduced unless we attend to the existence of these inequalities.

(quoting Professor Kimberlé Crenshaw).

17. CORNEL WEST ET AL., *supra* note 16.

18. *See* Fortin, *supra* note 2:

> For me . . . critical race theory is a method that takes the lived experience of racism seriously, using history and social reality to explain how racism operates in American law and culture, toward the end of eliminating the harmful effects of racism and bringing about a just and healthy world for all.

(quoting Professor Mari Matsuda).

19. *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022) https://www.nytimes.com/article/george-floyd.html [https://perma.cc/2K3J-A6E9].

20. *See generally* Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america/ [https://perma.cc/WN3L-PU5X] (describing the racism that occurs within and across institutions and noting that the 1968 Kerner Commission Report explicitly named the impact of white institutions but was "ignored"). While some authors use the terms "institutional racism," "structural racism," and "systemic racism" interchangeably, this Note uses "structural racism" to refer to the compounding effects of policies, laws, and history, and "systemic racism" to highlight racism that is *not* personal or interpersonal.

21. *Id.*:

> More broadly, the notion of "systemic racism," once confined to academic and activist circles on the left of the spectrum, has become the phrase du jour, with Google searches

summer of increased awareness and activism awakened many more Americans to the reality of racial injustice.[22] Large companies issued statements describing a new approach to combatting racism and a commitment to diversity, equity, and inclusion ("DEI").[23] Progressives touted resources like Nikole Hannah-Jones of The *New York Times'* 1619 Project—a collection of essays, podcasts, and learning tools that center American history around the consequences of slavery and contributions by Black Americans.[24] In response, some conservative leaders described these initiatives as divisive.[25] Calling teachings on historic and structural racism "toxic propaganda," then-President Trump established a committee called the 1776 Commission to counter "radicalized views" and foster patriotic education.[26]

Then, in September 2020, the Trump Administration issued a memo from the director of the Office of Management and Budget that banned "propaganda effort[s]" within federal governmental training, including lessons around CRT and white privilege.[27] The memo described CRT as "divisive, false, and demeaning" and "un-American

---

> for the term rising a hundredfold in a matter of months and [both conservatives and moderates] embracing the term to call for a national reckoning;

Matthew S. Schwartz, *Trump Tells Agencies to End Trainings on 'White Privilege' and 'Critical Race Theory,'* NPR (Sept. 5, 2020, 4:31 PM), https://www.npr.org/2020/09/05/910053496/trump-tells-agencies-to-end-trainings-on-white-privilege-and-critical-race-theor [https://perma.cc/VUQ2-2HWV] ("The directive was issued against the backdrop of the ongoing national conversation around police brutality and systemic racism.").

22. *How George Floyd Died, and What Happened Next*, *supra* note 19.

23. Marguerite Ward & Allana Akhtar, *Driving Diversity: 7 Leaders from Top US Companies like Netflix and Twitter Share how They Are Answering Calls for Racial Justice*, BUS. INSIDER (Sept. 1, 2020, 7:00 AM), https://www.businessinsider.com/chief-diversity-inclusion-officer-george-floyd-fortune-500-twitter-netflix-2020-8 [https://perma.cc/3ZU6-KELE].

24. *See* Nikole Hannah-Jones, *The 1619 Project*, N.Y. TIMES MAG., https://nyti.ms/37JLWkZ (last updated Sept. 4, 2019) [https://perma.cc/MLS2-MHJR]; Adams, *supra* note 15.

25. Schwartz, *supra* note 21.

26. Derrick Clifton, *How the Trump Administration's '1776 Report' Warps the History of Racism and Slavery*, NBC NEWS (Jan. 20, 2021, 4:00 PM), https://www.nbcnews.com/news/nbcblk/how-trump-administration-s-1776-report-warps-history-racism-slavery-n1254926 [https://perma.cc/6TPW-D58Y]. The 1776 Commission was largely symbolic and is not credited with any impact. *See, e.g.*, Colleen Flaherty, *A Push for 'Patriotic Education*, INSIDE HIGHER ED. (Jan. 20, 2021), https://www.insidehighered.com/news/2021/01/20/historians-trump-administrations-report-us-history-belongs-trash [https://perma.cc/C8CY-7GVJ] (describing a consensus among historians that the report was unsound and hurried, at best).

27. Schwartz, *supra* note 21. Two days prior to the memo, a Fox News segment decried the pervasive use of racial sensitivity trainings, specifically CRT, within the federal government as a "weapon[ ] against the American people." *Id.* Trump later retweeted the Fox News segment, saying "Not any more!" and called CRT "a sickness that cannot be allowed to continue." *Id.*; *Trump Administration Ends 'Critical Race Theory' Trainings in Move Backed by Heritage Scholars*, HERITAGE SOC'Y (Sept. 11, 2020), https://www.heritage.org/civil-society/impact/trump-administration-ends-critical-race-theory-trainings-move-backed-heritage [https://perma.cc/BVD5-MKNE].

propaganda training sessions."[28] The memo also specified criteria for banned training, forbidding "[efforts that teach] (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil."[29] These two criteria have since provided the blueprint for state bans,[30] and CRT has become conflated with teaching about DEI and race.

Over subsequent months, the political debate around CRT led many state legislatures to introduce bills targeted at banning certain types of racial dialogue in public elementary and secondary schools ("K-12 education"). While this legislation is phrased in a range of ways and targets various elements of K-12 education, the majority prohibits teachings about white privilege and historic racism.[31] Though many bills do not explicitly mention CRT, and the targeted prohibitions are not within the true meaning of CRT, these state bills are colloquially and hereinafter referred to as "CRT bans."[32] To conservative proponents of CRT bans, students deserve a factual account of history, free from politically stoked divisiveness.[33] To progressive opponents, conservatives' fear of losing power and progressive indoctrination has led to an untenable prohibition of truthful history teachings and a hostility towards classroom discourse, thereby denying the lived experiences of students of color and perpetuating harm.[34] Indeed, children are already experiencing these effects: in fear of running afoul of these bans and their heavy sanctions, teachers are censoring themselves and school administrations are "diluting" their efforts to promote diversity, equity, and inclusion.[35] This censored environment

---

28. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-20-34, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: TRAINING IN THE FEDERAL GOVERNMENT (2020).

29. *Id.*

30. *See infra* Part II.B. Inherent *evil* did not transfer to the state bans.

31. Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INST. (Nov. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory [https://perma.cc/6DD2-GUKV]; see Schwartz, *supra* note 8 for an overview of CRT bills and their content.

32. Ray & Gibbons, *supra* note 31.

33. Marta W. Aldrich, *Tennessee Governor Signs Bill Restricting how Race and Bias Can Be Taught in Schools*, CHALKBEAT TENN. (May 24, 2021, 11:24 PM), https://tn.chalkbeat.org/2021/5/24/22452478/tennessee-governor-signs-bill-restricting-how-race-and-bias-can-be-taught-in-schools [https://perma.cc/VBY3-LYL3] (reporting that Tennessee Governor Bill Lee "believes Tennessee students should be taught history and civics with facts, not divisive political commentary").

34. Adams, *supra* note 15 ("Any anti-racist effort is being labeled as critical race theory."); Julia Baker, *Critical Conversations: Panelists to Discuss the Tennessee Legislation's Ban on Critical Race Theory*, CHALKBEAT TENN. (June 14, 2021, 4:56 PM), https://tn.chalkbeat.org/2021/6/14/22533848/tennessee-ban-critical-race-theory-panel [https://perma.cc/PZ8V-DYKG].

35. Eesha Pendharkar, *Efforts to Ban Critical Race Theory Could Restrict Teaching for a Third of America's Kids*, EDUC. WK., https://www.edweek.org/leadership/efforts-to-ban-critical-

severely endangers the complex conversations necessary for student learning.[36] To legal scholars and education experts, these CRT bans cast a new light on the complicated interplay between constitutional speech protections, autonomous teaching, and state interest in education.[37]

B. A History of First Amendment Challenges in Education

1. *Keyishian* and *Tinker*: Academic Freedom and the Schoolhouse Gate

The protection of free speech in public classrooms dates back to the 1967 Supreme Court decision of *Keyishian v. Board of Regents*.[38] In *Keyishian*, a New York statute—the Feinberg Law—attempted to prohibit "subversive" teachings and required state employees, including public college professors, to sign an oath that they were not Communists.[39] Several faculty members, including Keyishian, an English professor at SUNY Buffalo, brought suit challenging the constitutionality of the Feinberg Law and its ensuing regulatory plan.[40] The court invalidated the law in a decision that emphasized the value of broad academic freedom for college professors.[41]

The court criticized the complicated law and stated that certain aspects were overly vague and, thus, created unacceptable uncertainty over the boundaries of prohibited conduct.[42] Writing for the majority, Justice Brennan noted language and phrasing in the Feinberg Law that did not sufficiently provide notice to professors.[43] Under the law, employees could lose their jobs for "seditious" teaching, but "no teacher [could] know just where the line is drawn between seditious and nonseditious utterances and acts."[44] Similarly, employees could lose their jobs for advising "the doctrine of forcible overthrow of

---

race-theory-now-restrict-teaching-for-a-third-of-americas-kids/2022/01 (last updated Feb. 4, 2022) [https://perma.cc/UX8Z-KMYB].

36. *Id.*

37. Tiana Headley, *Laws Aimed at Critical Race Theory May Face Legal Challenges*, BLOOMBERG L., https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X23NF7VO000000?bna_news_filter=us-law-week#jcite (last updated July 7, 2021, 9:24 AM) [https://perma.cc/UCQ3-3ELQ].

38. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Ronald J. Krotoszynzki Jr., *Laws Against Teaching Critical Race Theory in College Are Unconstitutional*, WASH. POST (May 26, 2021, 9:00 AM), https://www.washingtonpost.com/opinions/2021/05/26/laws-against-teaching-critical-race-theory-college-are-unconstitutional [perma.cc/NAN8-BDS4].

39. *Keyishian*, 385 U.S. at 591–92; N.Y. Educ. Law § 3022 (McKinney 1949).

40. *Id.*

41. Krotoszynzki, *supra* note 38.

42. *Keyishian*, 385 U.S. at 597–603.

43. *Id.*

44. *Id.* at 599–600 (internal quotation marks omitted).

government," which left open whether a teacher would be forbidden from advising others *about* such doctrine.[45]

Justice Brennan warned that such uncertainty could discourage free discourse in college classrooms that should be protected as a "marketplace of ideas"—a concept he labeled academic freedom.[46] In balancing the governmental interest of the Feinberg Law—to eliminate subversive teaching and communism in state institutions—against First Amendment protections in classrooms, the Court affirmed "a [deep commitment] to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[47]

Subsequent decisions have affirmed a judicial commitment to protecting academic freedom in university level classrooms,[48] but academic freedom has not been judicially recognized in K-12 public schools.[49] Instead, the Court has merely held that balancing academic freedom is different for K-12 schools because of the "special characteristics of the school environment"[50] like younger students' immaturity and the public's interest in public schooling, which recalibrate the weights of variables such as state interest, academic freedom, and individual rights to free speech.[51]

This modified K-12 academic freedom doctrine was exemplified in the 1969 case of *Tinker v. Des Moines Independent Community School District*, in which a group of middle and high school students protested the Vietnam War by wearing black armbands in violation of a school dress code policy.[52] There, the Court recognized that states and school officials have the authority to reasonably regulate conduct in schools, but "[neither students nor teachers] shed their constitutional

45. *Id.* at 599.

46. *Id.* at 603–04.

47. *Id.* at 603.

48. Krotoszynzki, *supra* note 38; Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 227 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also . . . on autonomous decisionmaking by the academy itself." (citations omitted)).

49. Walter E. Kuhn, *First Amendment Protection of Teacher Instructional Speech*, 55 DUKE L.J. 995, 999 (2006) ("The courts' reluctance to expand academic freedom rights to secondary and elementary school teachers results from the age and maturity of the students involved and the aforementioned dueling purposes of public schools to expose students to various ideas while inculcating them with societal values."); Kara Lynn Grice, *Striking an Unequal Balance: The Fourth Circuit Holds That Public School Teachers Do Not Have First Amendment Rights to Set Curricula in* Boring v. Buncombe County Board of Education, 77 N.C. L. REV. 1960 (1999).

50. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (acknowledging over forty years of Court precedent protecting First Amendment rights in K-12 education).

51. Grice, *supra* note 49, at 1994–95.

52. 393 U.S. at 504.

rights to freedom of speech or expression at the schoolhouse gate."[53] In the face of a conflict between the state's authority and individual First Amendment rights, the Court in *Tinker* explained that a regulation cannot prohibit speech unless such an expression would substantially disrupt the school environment.[54] Moreover, the Court reinforced that *viewpoint* discrimination, or prohibiting the expression of one opinion, in contrast to *content* discrimination, remains impermissible in the K-12 context.[55]

Under *Keyishian* and *Tinker*, lower courts pursued different lines of reasoning related to academic freedom in K-12 education, resulting in the formation of two tests that remain relevant yet non-dispositive of a K-12 teacher's right to free speech.[56] The first arose from the 1968 case *Pickering v. Board of Education*, which created a two-part test to determine the validity of a public employee's free speech when speaking as a citizen.[57] The second test emerged two decades later from a 1988 case, *Hazelwood v. Kuhlmeier*, regarding school censorship of student writing.[58] While neither case expressly addressed the bounds of a K-12 public-school teacher's First Amendment rights in the classroom, each case offered the court's perspective on factors that impact such a right.

2. The *Pickering* Test: Matters of Public Concern and Balancing Interests

Under the *Pickering* balancing test, a governmental employee, like a public-school teacher, maintains a qualified right to free speech on matters of public concern.[59] There, public-school teacher Mr. Pickering sent a letter to the local newspaper that attacked the school board for its handling of school fund allocation and accused the school superintendent of trying to suppress teacher criticism of the issue.[60] Mr. Pickering signed the letter as a "citizen, taxpayer and voter, not as a teacher."[61] The school fired Mr. Pickering, who then appealed his dismissal.[62] The court established a two-step test involving a threshold

53. *Id.* at 506.

54. *Id.* at 508–09 (substantial disruption must be more than unsubstantiated fear of disruption).

55. *Id.* at 510–11.

56. Grice, *supra* note 49, at 1974–75.

57. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

58. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

59. Kuhn, *supra* note 49, at 1002.

60. *Pickering*, 391 U.S. at 564–66.

61. *Id.* at 578.

62. *Id.* at 566–68.

question and a balancing test.[63] First, the court asked the threshold question: Was the public employee's speech on a matter of public concern?[64] If the public employee spoke on matters of *private* concern, the First Amendment inquiry likely stops.[65] If the public employee spoke on matters of *public* concern, the employee retains a protected interest, and the court proceeds to step two.[66] Mr. Pickering spoke on a matter of public concern—school fund allocation—and his frustration was directed toward the board rather than any direct supervisors.[67]

Because Mr. Pickering spoke on a matter of public concern, the Court proceeded to step two: balancing the public employee's interest in expression against the public employer's interest in workplace efficiency.[68] In favor of the employee's speech interest, the Court emphasized that certain public employees may be the most informed citizens on certain issues of public concern and thus need to speak on such matters without "fear of retaliatory dismissal."[69] Mr. Pickering's speech did not negatively impact workplace efficiency—it did not jeopardize his work relationships or interfere with his classroom or school operations.[70] Furthermore, the Court noted that an individual's First Amendment right is great enough to protect even certain

---

63. *Id.*

64. *Id.* at 568–69, 572. The Court did not explicitly define the term public concern but cited First Amendment precedent regarding "free and unhindered debate on matters of public importance," chiefly the landmark case, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Pickering*, 391 U.S. at 572–73. In *New York Times Co. v. Sullivan*, a unanimous Court protected "uninhibited, robust, and wide-open" discourse by requiring actual malice as an element of libel about a public official by the press. 376 U.S. at 270, 283. The speech was an "expression of grievance and protest on one of the major public issues of our time," the violent response to Civil Rights demonstrations in the South. *Id.* at 256–58, 271. In *Pickering*, the Court also referenced *Garrison v. Louisiana*, 379 U.S. 64 (1964), where the same unanimous Court applied *New York Times Co. v. Sullivan* to protect criticism made by a district attorney about judges in his jurisdiction. *Garrison*, 379 U.S. at 64–67; *Pickering*, 391 U.S. at 574.

65. Kuhn, *supra* note 49, at 1002 n.38 (any indication of the rights attached to a private concern would be dicta in *Pickering*).

66. *Pickering*, 391 U.S. at 568–69.

67. *Id.* at 569–70.

68. Kuhn, *supra* note 49, at 1002:

> The Pickering test aims to recognize the enhanced interest of schools in regulating the speech of their employees while not allowing administrators to compel teachers 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 in which they work.

(internal quotation marks omitted).

69. *Pickering*, 391 U.S. at 571–72 ("[F]ree and open debate is vital to informed decision-making by the electorate. Teachers are . . . [the] most likely [community members] to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent.").

70. *Id.* at 569–70; Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of* Garcetti v. Ceballos *on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 211 (2008).

defamatory speech and speech directed at superiors.[71] Mr. Pickering's speech interest outweighed his school's workplace efficiency interest, and therefore his speech was granted First Amendment protection.[72] Subsequent courts have added specific factors to this balancing including the extent to which the employee's speech interfered with job performance, created workplace discord or mistrust, or undermined the workplace mission.[73] Although *Pickering* does not explicitly extend to *in-class* speech and does not capture all of the elements relevant to the instructional interaction between teachers and their students, its test has nevertheless been applied in such cases.[74]

3. The *Hazelwood* Test: School-Sponsored Student Speech and Pedagogical Concern

The second line of relevant Supreme Court reasoning is founded in *Hazelwood School District v. Kuhlmeier*, which considered students' First Amendment rights.[75] In *Hazelwood*, high school students in a journalism class wrote articles for their school newspaper about pregnant teen students, divorce, and birth control.[76] Their school principal censored these articles out of both privacy and content concerns, and the students brought an action seeking a declaration that their First Amendment rights had been violated.[77] Though the Court affirmed *Tinker*'s holding that students retain First Amendment rights in the school setting, it distinguished the Hazelwood students' *school-sponsored* expression from the Tinker students' expression.[78] The Court then balanced the students' interest in free speech against the school's substantial interest in achieving its educational mission and found that the Hazelwood principal had not infringed upon the students' rights in censoring the school-sponsored newspaper.[79] In doing so, the Court

71. *Pickering*, 391 U.S. at 573–74 (summarizing the holding from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964): recovery for libelous speech requires proving at least "reckless disregard for their truth or falsity").

72. *Id.* at 574–75.

73. Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1053 (6th Cir. 2001).

74. Kuhn, *supra* note 49, at 1009.

75. 484 U.S. 260, 262 (1988).

76. *Id.* at 262–63.

77. *Id.* at 263–65.

78. *Id.* at 266–71.

79. *Id.* at 271–74:

> Educators are entitled to exercise greater control over [school-sponsored] student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.

established the *Hazelwood* balancing test, which allows an administration to restrict school-sponsored student speech "so long as [the actions of the educators were] reasonably related to [a] legitimate pedagogical concern[ ]."[80] There, the principal's legitimate pedagogical concern (maintaining the anonymity of the pregnant students discussed in the article) overcame the student writers' First Amendment rights.[81]

Several circuits then stretched the *Hazelwood* test of school-sponsored student speech to cover teacher instructional speech cases.[82] Some courts applied *Hazelwood* without modification, arguing that teacher instructional speech is analogous to school-sponsored student speech because it can be seen as promoting the educational aims of the school.[83] This was criticized as overly "infantilizing" teachers as it removes their ability to shape legitimate pedagogical concerns, despite *Hazelwood* explicitly intending for teachers to have such input.[84] The First and Second Circuits altered the *Hazelwood* standard such that a court's determination of whether teacher speech is reasonably related to legitimate pedagogical concerns must also consider "the age and sophistication of the students, the relationship between the teaching method and valid educational objectives, and the context and manner of the presentation."[85]

As neither the *Pickering* nor the *Hazelwood* test directly addressed teachers' instructional speech, a split emerged with respect to teachers' First Amendment rights.[86] For several decades, *Pickering* was applied in the Third, Fourth, Fifth, Sixth, Ninth, and D.C. Circuits, and *Hazelwood* was applied in the First, Second, Seventh, Eighth, and Tenth Circuits.[87] Though the Supreme Court's test for teacher First Amendment rights remains ultimately unresolved, the Court added a

---

80. *Id.* at 272–73 (describing a school's right to associate as extending to political neutrality, so that the school remains "a principal instrument in awakening the child to cultural values") (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)); Kuhn, *supra* note 49, at 1009.

81. *Hazelwood*, 484 U.S. at 274–76.

82. Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 12–14 (2001).

83. *Id.* at 13–15 (explaining that courts concluded that *Hazelwood* could apply to teacher speech as curricular speech without analyzing how the standard should be applied).

84. *Id.* at 16:

> The net effect of Hazelwood as applied is the subtle infantilization of teachers. The expressive rights of teachers are placed on par with those available to students, with school administrators given the power to treat employees as if they were unruly children. . . . As interpreted by the lower courts, Hazelwood is increasingly hostile to the idea of teachers as reasonably autonomous professionals.

85. *Id.* at 14.

86. *Id.* at 16–17.

87. *Id.*; *see* MARK G. YUDOF, BETSY LEVIN, RACHEL F. MORAN, JAMES E. RYAN & KRISTI L. BOWMAN, EDUCATION POLICY AND THE LAW 319, 321 (Mark Kerr ed., 5th ed. 2012).

confounding layer to public employees' speech rights nearly two decades later in the 2006 case, *Garcetti v. Ceballos*.[88]

4. Speech in Light of *Garcetti*'s Scope of Employment

The Supreme Court dramatically narrowed the scope of First Amendment rights for public employees in *Garcetti v. Ceballos*.[89] In *Garcetti*, Los Angeles County District Attorney Ceballos wrote two memos describing an affidavit from his office that contained "serious misrepresentations" due to potential governmental misconduct.[90] After a meeting with his supervisors, Ceballos experienced allegedly retaliatory actions, including reassignment and denial of a promotion.[91] In response to Ceballos's claim that these actions violated his First Amendment rights, the Court focused on a new dispositive element of public employee speech—whether the employee's speech was made "pursuant to [the employee's] official duties[.]"[92] Because Ceballos wrote the memos pursuant to his official duties as a public employee, his speech was beyond the scope of First Amendment protection.[93]

Writing for the majority, Justice Kennedy carefully distinguished *Pickering*'s holding from *Garcetti's* holding, noting that the former limited the kind of speech a public employee makes as a *citizen* while the latter limited speech in the context of the actual public *employment*.[94] Justice Kennedy clarified that in the context of their employment, public employees do not "speak[ ]as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[95] As such, a *Pickering* inquiry did not grant Ceballos's memos protection.[96]

The 5–4 *Garcetti* decision immediately generated dialogue about potential ramifications on public employees' First Amendment rights,[97]

88. Garcetti v. Ceballos, 547 U.S. 410 (2006).

89. *Id.*; McCarthy & Eckes, *supra* note 70, at 209–10.

90. *Garcetti*, 547 U.S. at 410–16.

91. *Id.* at 415.

92. *Id.* at 421.

93. *Id.*

94. *Id.* at 417–22.

95. *Id.* at 421.

96. While Kennedy initially followed both *Pickering* steps and seemed to formulate the context of employment as an exception, courts have since asked *Garcetti*'s question prior to engaging in the *Pickering* two-step. Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers' First Amendment Rights, Time for a New Beginning*, 58 AM. U. L. REV. 1285, 1305 (2009); Erica R. Salkin, *Caution in the Classroom: K-12 Teacher In-Class Speech, the Federal Courts and* Garcetti, 15 COMM. L. & POL'Y 175, 193 (2010).

97. McCarthy & Eckes, *supra* note 70, at 209; Salkin, *supra* note 96, at 176 ("In its first three years, the *Garcetti* decision has been used and discussed at length. It has been cited in more than 1,000 federal and state cases and is the central topic of more than thirty law review articles.").

which the Court appeared to have anticipated.[98] The dissenting Justices emphasized a potential for employer abuse given the discretion to broadly define the scope of employment and thereby infringe upon employee constitutional protections.[99] Justice Souter in particular cautioned against consequences for academic freedom, evoking *Keyishian*'s safeguards against a chilled marketplace of ideas.[100] While Kennedy acknowledged both concerns, he generally declined to speak on *Garcetti*'s applicability to teaching and merely conceded that "some argument" exists that academic freedom "implicates additional constitutional interests . . . not fully accounted for" by broad employee jurisprudence.[101] Justice Souter's dissenting opinion, though limited to feared repercussions for higher education, has proved remarkably prescient in the K-12 context where many courts have since applied *Garcetti* to erode or even erase educators' rights to academic expression.[102]

Scholars have made sense of *Garcetti*'s relevance to K-12 education in several ways.[103] To some scholars, *Garcetti* added a threshold question to the *Pickering* test: Was the speech within the scope of employment duties?[104] To other scholars, and indeed to some courts, *Garcetti* merely complicated the already-convoluted inquiry into free speech protections for educators.[105] Still more scholars continue to

---

Much of the response to *Garcetti* noted the explicitly addressed worry of stifling whistleblowers. *Garcetti*, 547 U.S. 410, 425–26 (2006); Salkin, *supra* note 96, at 176.

98. There were three separate dissenting opinions, and Justice Kennedy's majority opinion addressed several concerns proposed by the dissents. *See Garcetti*, 547 U.S. at 426–50.

99. *Id.* at 424–25. The Court explicitly declined to offer a test for the scope of employment duties as both parties agreed the memo was well within the scope of employment. *Id.*

100. *Id.* at 438–39 (Souter, J., dissenting) ("I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.' ").

101. *Id.* at 425 (majority opinion):

> Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. . . . 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;

see YUDOF ET AL., *supra* note 87, at 320.

102. YUDOF ET AL., *supra* note 87, at 320–21; *see* Salkin, *supra* note 96, at 190 (discussing Justice Souter's dissenting opinion in *Garcetti*).

103. YUDOF ET AL., *supra* note 87, at 320–21.

104. Mark Strasser, Pickering, Garcetti, *& Academic Freedom*, 83 BROOK. L. REV. 579, 596 (2018) ("*Garcetti* suggests that the First Amendment protections under the *Pickering* line of cases are not triggered insofar as an individual speaks as an employee.").

105. Rosina E. Mummolo, Note, *The First Amendment in the Public School Classroom: A Cognitive Theory Approach*, 100 CORNELL L. REV. 243, 249 (2014) ("The *Garcetti* holding has led to inconsistencies and apparent confusion among the circuit courts regarding the appropriate test

echo Justice Souter's concerns about a chilling effect on teacher speech, especially when instilling critical thinking skills and navigating controversial topics.[106]

In subsequent years, many courts have invoked *Garcetti* to deny First Amendment protection to educational speech, but few courts have explicitly delineated just how *Garcetti* interacts with *Pickering* and *Hazelwood*, especially in the context of K-12 teachers' classroom speech.[107]

II. ANALYSIS

Without clarity or consensus from the Supreme Court, lower courts have taken multiple avenues to synthesize public teacher speech doctrine.[108] Each court's approach depends somewhat on whether the educator in question's speech is framed as that of a citizen (*Pickering*), relating to a student (*Hazelwood*), or that of an employee (*Garcetti*). K-12 educators' instructional speech does not fit squarely into any of these boxes given that a teacher's classroom interactions with students could simultaneously be all three types of speech, yet not exclusively any one type. As both *Pickering* and *Hazelwood* employ balancing but *Garcetti* acts as a complete bar to protection, lower courts seeking to resolve the three leading cases have sought guidance from Justice Kennedy's reluctance to extend *Garcetti* to academic speech.[109] The resulting case law is a hodgepodge of different pathways to arrive at the same destination: post-*Garcetti* teacher speech is rarely protected.[110]

---

to apply in the context of public teachers' and professors' classroom speech."); Strasser, *supra* note 104, at 580 (post-*Pickering* cases have resulted in "increasingly muddled jurisprudence"); YUDOF ET AL., *supra* note 87, at 320–21.

106. YUDOF ET AL., *supra* note 87, at 320–21.

107. *Id.*; Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 342–43 (6th Cir. 2010) ("In concluding that the First Amendment does not protect primary and secondary school teachers' in-class curricular speech, we have considerable company. The Seventh Circuit invoked *Garcetti* in concluding that the curricular and pedagogical choices of primary and secondary school teachers exceed the reach of the First Amendment."); Nathan A. Adams IV, *Resolving Enmity Between Academic Freedom and Institutional Autonomy*, 46 J. COLL. & U.L. 1, 41 (2021).

108. Michael A. Sloman, Note, *"A Kind of Continuing Dialogue": Reexamining Academic Freedom from* Garcetti's *Employee Speech Doctrine*, 55 GA. L. REV. 935, 947–48 (2021).

109. *Id.* at 947–49:

> [C]ircuit courts have diverged in applying the public employee speech doctrine to educators who claim that their public institutions have infringed upon their academic freedom. Some circuits have held that postsecondary scholarship and classroom instruction are outside the scope of Garcetti's "official duties" test and therefore warrant First Amendment protection. . . . [O]ther circuits have seemingly followed the pre-Garcetti doctrine, which defers to an institution's academic freedom over the individual professor's. . . . Finally, some circuits have declined to reach the issue, but nevertheless have acknowledged the doctrinal uncertainty.

110. McCarthy & Eckes, *supra* note 70, at 219.

Consequently, it appears that K-12 educators are unlikely to garner protection for speech in violation of CRT bans, though there remains a startling lack of clarity as to why. Without a clearer approach and in the face of overreaching, vague CRT bans, a chilling effect on instruction around critical thinking and history appears inevitable.

This Part proceeds in three sections. Section A describes the circuit courts' approaches to educational speech, noting the evolving significance of academic freedom. Section B considers speech prohibited by one sample CRT ban from Tennessee, including how a hypothetical violation would fare under each approach. Section C considers the failure of any approach to encapsulate the myriad factors that influence teacher speech in K-12 education, in contrast with the persevering value of academic freedom in higher education. This Part advocates for a reimagined First Amendment analysis in the context of K-12 education that more appropriately balances the special interests of K-12 students, educators, families, and lawmakers.

A. Citizen, Student, Employee: All, Some, or None of the Above?

The Fourth and Ninth Circuits have yet to apply *Garcetti* to teaching, citing Kennedy's acknowledgement that the academic context is "not fully accounted for" by *Garcetti*.[111] In *Demers v. Austin*, the Ninth Circuit rejected *Garcetti*'s application to teaching, stating that "teaching and academic writing . . . pursuant to the official duties of a teacher and professor" are not subject to *Garcetti* before applying *Pickering* balancing.[112] In *Adams v. Trustees of the University of North Carolina-Wilmington*, the Fourth Circuit chose to apply the *Pickering* test to a professor's professions of faith.[113] Both of these cases involve higher education, where the court can invoke *Keyishian*'s admonishment against limiting academic freedom.

In contrast, both the Seventh and Sixth Circuits have recently applied *Garcetti* to deny First Amendment protection to speech made by K-12 educators in the classroom setting, though the circuits have incorporated *Pickering* differently.[114] In *Brown v. Chicago Board of Education*, the Seventh Circuit appeared to take an either-or approach—citizen or employee—when faced with both *Pickering* and *Garcetti*.[115] Mr. Brown, a sixth-grade teacher, used a racial epithet in

111. Strasser, *supra* note 104, at 594, 606–10 (quoting Garcetti v. Ceballos, 547 U.S. 410, 425 (2006)).

112. 746 F.3d 402, 412, 418 (9th Cir. 2014) (internal quotation marks omitted).

113. 640 F.3d 550, 564 (4th Cir. 2011).

114. Strasser, *supra* note 104, at 601–05.

115. 824 F.3d 713, 715 (7th Cir. 2016).

class in a misguided attempt to convey to students the potential harm of such language.[116] The school principal suspended him for violating Chicago School Board policy, leading to Brown's suit.[117]

Brown did acknowledge that it was unclear whether "*Garcetti*['s] rule applie[d] in the same way to 'a case involving speech related to scholarship or teaching,' " because that exact issue had not been before the *Garcetti* court.[118] But Mr. Brown described himself as "speaking as a teacher," and the *Brown* court relied on prior Seventh Circuit case law denying *Pickering* balancing to classroom speech.[119] Consequently, the court applied *Garcetti* and abandoned *Pickering* balancing.[120]

The Sixth Circuit applied *Garcetti* differently in *Evans-Marshall v. Board of Education*, where it first conducted a more in-depth *Pickering* analysis before applying *Garcetti*, ultimately resulting in a conclusion similar to the one in *Brown*.[121] Ms. Evans-Marshall taught high school English, where she made a series of controversial curricular decisions, including selecting challenged books, teaching *Siddhartha*—which the Board had selected and purchased for her—and sharing student writing samples about sensitive content like sexual assault.[122] Ms. Evans-Marshall's contract was not renewed and she brought suit.[123] The Sixth Circuit initially applied the *Pickering* standard to Ms. Evans-Marshall's classroom speech, finding that she satisfied *Pickering* balancing because her interest in commenting upon matters of public concern, namely the topics of her content, outweighed the school board's interest in efficiency.[124]

Nevertheless, the court determined Ms. Evans-Marshall could not overcome *Garcetti*, as her speech was made as a public employee.[125] The court emphasized the practical, negative consequences of permitting teacher autonomy as a matter of First Amendment rights.[126] In this part of the opinion, the court described cautionary scenarios

116. *Id.* at 714.

117. *Id.* at 714–15.

118. *Brown*, 824 F.3d at 715; *cf.* Pickering v. Bd. of Educ., 391 U.S. 563, 578 (1968) (noting that Mr. Pickering signed his letter as a citizen, not a teacher).

119. *Brown*, 824 F.3d at 715–16.

120. *Id.*; Strasser, *supra* note 104, at 601.

121. Evans-Marshall v. Bd. of Educ., 624 F.3d 332 (6th Cir. 2010).

122. *Id.* at 334–36.

123. *Id.* at 336.

124. *Id.* at 339; YUDOF ET AL., *supra* note 87, at 316–20.

125. *Evans-Marshall*, 624 F.3d at 340–42 ("State law gives elected officials—the school board—not teachers, not the chair of a department, not the principal, not even the superintendent, responsibility over the curriculum.").

126. *Id.* at 341 ("When educators disagree over what should be assigned, as is surely bound to happen if each of them has a First Amendment right to influence the curriculum, whose free-speech rights win?").

where teachers empowered with First Amendment protections conflicted with their school leaders, which applied neatly to Ms. Evans-Marshall's controversial book selections: if Ms. Evans-Marshall could teach whatever book she wanted, the rights of students, school leaders, and the State would be implicated when determining appropriate education.[127] But the court's concerns apply less cleanly to other aspects of Ms. Evans-Marshall's conduct, namely her implementation of *Siddhartha*.[128] There, the school board had exercised its power in selecting the book, and it is not clear that Ms. Evans-Marshall's pedagogical methods infringed upon any other party's rights.[129] The court did not explicitly address each of Ms. Evans-Marshall's choices, and instead held that K-12 educators are categorically ineligible for the *Garcetti* academic-freedom carveout.[130] Ms. Evans-Marshall's nonrenewal was upheld.[131]

That is not to say that academic freedom completely immunizes college professors against *Garcetti*, nor that there is consensus among the higher courts in how to apply *Garcetti* and *Pickering* at the university level;[132] however, even in their incongruent applications, circuit courts have uniformly acknowledged that *Garcetti* may not apply to university professors' speech, and have at least entertained academic freedom as a potential mitigating factor.[133] As a result, there is a dichotomy forming where some courts grant college professors First Amendment speech protections, rooted in the power of academic freedom to supersede employment concerns, while denying K-12 educators any protection, as they are merely employees who speak in service of school employers.[134]

Though academic freedom does not hold the same significance in K-12 education as it does in higher education, exploring the concept in both environments offers insight into the courts' perception of the relationship between public educators' job responsibilities and First Amendment rights. The contours of academic freedom have rarely been defined, but generally, the concept is rooted in students' and professors'

---

127. *Id.* at 341–42.

128. *See id.* at 335, 341–43.

129. *See id.*

130. *Id.* at 343–44 (narrowly construing the *Garcetti* academic freedom carveout as what Justice Souter cautioned against in his dissent—academic freedom in universities—and tracing the origins of academic freedom through the university-level exclusively).

131. *Id.* at 334.

132. Strasser, *supra* note 104, at 602–11 (describing the varying approaches taken by the Second, Fourth, Sixth, Seventh, and Ninth Circuits in response to professors' allegations that their First Amendment rights had been violated).

133. YUDOF ET AL., *supra* note 87, at 318–19.

134. *Id.*

right to learn, listen, and inquire.[135] Rooted in *Keyishian* (and thus preserved halfheartedly in *Garcetti*), the notion of academic freedom protects a marketplace of ideas.[136] Equally vague is to whom it belongs—institutions, professors, investors, or students?

These questions only multiply at the K-12 level. "Academic freedom issues in [K-12] education concern not only *what* is taught, *how* and *by whom*, but also *who* decides these matters."[137] Since *Keyishian*'s and *Tinker*'s assertions of academic freedom in the 1960s, lower courts have strengthened the interest of school boards in determining curriculum in K-12 education.[138] Consequently, scholars and courts conclude that while college professors may retain academic freedom at the university level, this interest is supplanted by the school boards' interest in curricular and pedagogical decision-making in the K-12 context. Interestingly, the Supreme Court's recent 2021 ruling on a high school student's off-campus speech, *Mahanoy Area School District v. B.L. ex rel. Levy*, included several allusions to academic freedom by referencing *Keyishian*'s "marketplace of ideas," expressing concern about chilling effects on speech, and saying "America's public schools are the nurseries of democracy."[139]

While the significance of academic freedom and applicability of *Garcetti* in the K-12 context remain unclear, the First Amendment protection afforded to teachers has new significance in light of the recent influx of CRT bans.[140] To analyze the validity of these bans, consider one state's CRT ban and how it may run afoul of these different case tests.

---

135. *Id.* at 318; Salkin, *supra* note 96, at 191:

> Just as they had been split between Hazelwood and Pickering-Connick analyses before the decision, so too are they split between those who believe Kennedy's academic exemption applies to schools below the university level and those who believe that in-class speech is an example of speech that would not exist were it not for the job and, therefore, lacks constitutional protection.

136. Keyishian v. Bd. of Regents, 385 U.S. 589, 603–04 (1967).

137. Sheldon Nahmod, *Academic Freedom and the Post-*Garcetti *Blues*, 7 FIRST AMEND. L. REV. 54, 62 (2008).

138. *Id.* at 65–66 ("That politically accountable school boards have broad decision-making authority over curricular and pedagogical matters is also consistent with the government speech doctrine that allows the government to engage in content and viewpoint discrimination when it speaks.").

139. 141 S. Ct. 2038, 2046–47 (2021).

140. *See supra* Part I.B.

B. History and a Hypothetical in Tennessee

Tennessee passed one of the first CRT bans in May 2021.[141] The law delineates fourteen concepts that are expressly prohibited from being taught in public schools, as well as certain related concepts that are permitted to be taught.[142] In relevant part, section 49-6-1019(a) prohibits the inclusion or promotion of the following concepts:

> (2) An individual, by virtue of the individual's race or sex, is inherently privileged, racist, sexist, or oppressive, whether consciously or subconsciously; . . . (6) An individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex; (7) A meritocracy is inherently racist or sexist, or designed by a particular race or sex to oppress members of another race or sex; (8) This state or the United States is fundamentally or irredeemably racist or sexist; . . . (10) Promoting division between, or resentment of, a race, sex, religion, creed, nonviolent political affiliation, social class, or class of people; . . . (12) The rule of law does not exist, but instead is a series of power relationships and struggles among racial or other groups; (13) All Americans are not created equal and are not endowed by their Creator with certain unalienable rights, including, life, liberty, and the pursuit of happiness . . . .[143]

Significantly, several provisions implicate the fundamental nature of the United States,[144] U.S. law,[145] the United States as a

141. The bill was signed into law by Governor Bill Lee on May 25, 2021. Lindsay Kee, *ACLU-TN on Signing of Bill Censoring Academic Discussions on History and Race*, ACLU-TENN. (May 25, 2021), https://www.aclu-tn.org/aclu-tn-on-signing-of-bill-censoring-academic-discussions-on-history-and-race/ [https://perma.cc/56Y9-SWP2/].

142. TENN. CODE ANN. § 49-6-1019 (2021).

143. *Id.* Provision (12) regarding the law as a "series of power relationships" was added later and is a close, but more extreme gloss of the central tenets of critical race theory. *See supra* Part I.A. Many of these prohibited concepts contain undefined and overlapping language, so they could theoretically prohibit either a very narrow or quite broad set of concepts.

144. Section 49-6-1019(a)(8) prohibits teaching that the United States is fundamentally racist or sexist. A teacher comparing the rights of white people, Black people, and indigenous people, or explaining the history of women gaining the right to vote, anti-discrimination law, or the pathway to gay marriage could accidentally run afoul of this prohibition.

145. Section 49-6-1019(a)(12) prohibits teaching that the law is a series of power relationships. A teacher might violate this when explaining common law or describing the United States electorate system.

meritocracy,[146] and the enduring impact of systemic inequities.[147] As such, criticism of CRT bans mostly concerns the teaching of history.[148]

Imagine a hypothetical high school U.S. History teacher explains the early United States by saying, "The Founders described the United States as a meritocracy, yet many Founding Fathers like George Washington, Thomas Jefferson, and James Madison held slaves at some point,[149] and American wealth-building relied on the continued enslavement of Africans."[150] Such conduct appears to be a prima facie violation of at least two provisions: (a)(7),[151] in describing early America as a meritocracy founded by white men who intended to maintain the enslavement of Black Africans; and (a)(8), in noting the enslavement of a race by men of another race at the time of the original United States.[152]

The Tennessee law does outline possible safe harbors for such hypothetical speech. Teachers may present materials that fall under one of four categories:

> (1) The history of an ethnic group, as described in [approved] textbooks and instructional materials . . . ; (2) The impartial discussion of controversial aspects of history; (3) The impartial instruction on the historical oppression of a particular group of people based on race, ethnicity, class, nationality, religion, or geographic region; or (4) Historical documents relevant to subdivisions (b)(1)-(3) that are permitted under § 49-6-1011.153.[154]

The documents listed in provision (4) are historically significant texts like the Constitution, writings of the Founders, and Supreme Court opinions.[155] Do the four safe harbors license the U.S. History teacher's

---

146. Section 49-6-1019(a)(7) prohibits a natural course of conversation regarding opportunity and privilege. A student could pose many questions that could carry complicated or stifled answers: how a character came to earn money or power might be explained by the figure's skills not their opportunities; why the United States uses the imperial measurement system might be answered with "just because," rather than with an explanation of U.S. industrial power relative to France; why a classmate got a special kind of seat might inadequately address ability and disability rather than adequately answer why fair is not always equal; and how another public school got a nicer soccer field could be attributed to that school's test-score driven funding, not the property tax basis for school funding coupled with decades of discriminatory property practices. While the specific topic of the inherent nature of a meritocracy might rarely arise, the concept—some might say myth—of meritocracy could tie into a myriad of classroom moments.

147. § 49-6-1019.

148. Kee, *supra* note 141.

149. Anthony Iaccarino, *The Founding Fathers and Slavery*, BRITANNICA, https://www.britannica.com/topic/The-Founding-Fathers-and-Slavery-1269536 (last visited Sept. 23, 2022) [https://perma.cc/QQ7S-LSHF].

150. *See* § 49-6-1019(a)(7) ("A meritocracy is inherently racist or sexist, or designed by a particular race or sex to oppress members of another race or sex.").

151. *Id.*

152. *Id.* § 49-6-1019(a)(8).

153. *Id.* § 49-6-1019(b).

154. *Id.* § 49-6-1019(b).

155. *Id.* § 49-6-1011.

instruction? If the teacher's statement were read verbatim from the approved textbook, it appears (b)(1) could protect the teacher.[156] If the statement was not explicitly provided in instructional materials, would the teacher need to complement the statement with false counterfactuals about the benevolent Founders to give the semblance of impartiality under (b)(2)–(3)?[157] If the teacher was accused of violating the anti-CRT statute, the penalty is withheld school funding until the "school provides evidence to the commissioner that [it] is no longer in violation" of the statute.[158]

If the instructor was dismissed for such teaching, it is unlikely that any approach to K-12 educators' First Amendment rights would immunize the teacher. Application of the *Garcetti* rule would eliminate any recourse for speech made in the context of teaching. Alternate schemes that consider a modified-*Garcetti* or a *Pickering* balancing would likely be equally fruitless. The K-12 teacher's curricular and pedagogical goals are not represented by the circuits' various schemes of applying Supreme Court precedent.

Under a Fourth or Ninth Circuit approach, a court might consider whether Justice Kennedy's language in *Garcetti* implies that *Garcetti* applies differently in the K-12 context, as with higher education.[159] If so, the court could instead default to *Pickering*'s two-step test.[160] If the teacher's speech were found to be made as a citizen, the court would balance the teacher's interest in expressing the comments about history against the government's interest in workplace efficiency.[161]

Under the Seventh Circuit's approach, the teacher's speech would either fall into speech made as a citizen or speech made as a teacher. Like Mr. Brown, this teacher was engaged in classroom instruction, so the speech would be beyond First Amendment protection under the *Garcetti* exception.[162] Unlike *Brown*, though, the speech was in pursuit of approved curricular goals, but neither *Garcetti* nor *Pickering* considers that factor relevant to the permissibility of instructional speech.[163]

Under the Sixth Circuit's approach, a court would first consider whether such instructional speech touches a matter of public concern,

156. *See id.* § 49-6-1019(b)(1).
157. *See id.* § 49-6-1019(b)(2)-(3).
158. *Id.* § 49-6-1019(c).
159. Garcetti v. Ceballos, 547 U.S. 410, 425 (2006); *see* Part I.B.4.
160. Pickering v. Bd. of Educ., 391 U.S. 563 (1968); *see* Part I.B.2.
161. *Pickering*, 391 U.S. at 572, 568–569; Kuhn, *supra* note 49, at 1002.
162. *Garcetti*, 547 U.S. at 425.
163. *Pickering*, 391 U.S. at 572; *Garcetti*, 547 U.S. at 425.

as in *Pickering* and *Evans-Marshall*. Like Evans-Marshall teaching *Siddhartha*, a K-12 educator's interest in teaching history would likely outweigh her district's interest in promoting efficiency.[164] After passing the *Pickering* standard, the court would then summarily dismiss the teacher's claim under *Garcetti*, as such instruction is pursuant to her official duties as a public employee.[165]

C. Matching: Which Factors Matter in Which Contexts?

When navigating the tangled K-12 free speech jurisprudence, there are several factors that could impact the outcome: *who* made the speech—teacher or student;[166] *to whom* was the speech made—student, superior, or parent;[167] *where* was the speech made, whether in a classroom, other school setting, or public forum;[168] and the speech's impact on workplace efficiency.[169] Unlike in the higher education context, where the value of academic freedom is a key purpose that could tip the scales in favor of permitting speech, the current legal tests have not made space for the purpose behind K-12 education beyond the state's interest in efficiency or the teacher's interest in self-expression.[170]

The balancing step in *Pickering* approaches this inquiry by weighing workplace efficiency against a teacher's expressive interest, but in the context of *Pickering*, this interest is that of the teacher in expressing her *own* viewpoint.[171] This is distinct from the teacher's interest in best expressing a concept from her curriculum—while a method of expression, it both furthers a pedagogical interest and fosters her students' academic freedom.

Our hypothetical U.S. History teacher may have paraphrased a legitimately approved curricular resource and intended to teach an unbiased, neutral account of history, but could still be disciplined as if she had created an entirely different curriculum in pursuit of some radical, personally held mission. At best, she is currently incentivized to read the curriculum verbatim and stifle class discussion, and at

164. Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 339 (6th Cir. 2010).

165. *Id.* at 340.

166. *Compare Pickering*, 391 U.S. at 564–66, 578 (teacher making the speech), *with* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262–65 (1988) (student making the speech).

167. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (a captive audience of peers impacted the student's First Amendment rights when the student delivered a speech filled with sexual innuendo).

168. *Id.*

169. *Pickering*, 391 U.S. at 572.

170. Nahmod, *supra* note 137, at 65–67.

171. *Pickering*, 391 U.S. at 572–74.

worst, she is motivated to avoid teaching history altogether. Students may become more likely to receive a sanitized presentation of nuanced topics, if lucky enough to be presented with nuanced topics at all.

Our teacher may have uttered the same phrase at a rally for new curricular materials and be immunized under *Pickering* balancing.[172] Our teacher could utter the same phrase as a guest lecturer at a public university, to students the same age as her seniors, and would likely be immunized for such a statement under the university's or professor's "right" to academic freedom.[173] Our teacher could even evade *Garcetti* if she had uttered the statement while leading a summer volunteer arts program in a class comprised of students from other schools, or if she was otherwise operating outside the scope of her employment.[174] The point is that the actual concern—the departure from approved and appropriate curricular goals—does not factor into a court's analysis; instead, the teacher's legitimate pedagogical interest is conflated with either the teacher's personal interest or the school's curricular interest.

As the majority in *Garcetti* noted, speech in the context of employment is somehow unique for educators.[175] In higher education, this is because the "workplace"—a college classroom—is "an intentionally created educational forum for the enabling of professorial (and student) speech."[176] The K-12 classroom is also a place to foster ideas in alignment with appropriate curricular goals as "nurseries of democracy;"[177] however, a teacher's intent and pedagogical expertise do not protect her from strict punishment if she accidentally runs afoul of a CRT ban such as Tennessee's.

III. SOLUTION

A. A Rationale for "Pedagogical Freedom"

Without a test that explicitly balances the notions of academic freedom relevant to young learners, teacher speech on critical topics

172. *See id.* at 568.

173. *See* Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014) (discussing the Supreme Court's recognition of the "importance of protecting academic freedom under the First Amendment"); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 553 (4th Cir. 2011) (recognizing that an assistant professor's controversial views were protected by the First Amendment and principles of academic freedom).

174. *See* Garcetti v. Ceballos, 547 U.S. 410, 424–25 (2006) ("[T]he First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities.").

175. *Id.* at 425.

176. Nahmod, *supra* note 137, at 69.

177. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046–47 (2021).

such as history, literature, and even classroom culture is discouraged. While some scholars continue to advocate for a version of academic freedom in K-12 schools that guards against governmental indoctrination, other scholars respond that the interests of public-school children are categorically distinct from young adults in higher education.[178] The latter group counters that the state's interest in prescribing the curriculum for K-12 students parallels the professor's and college student's interest in joining a "marketplace of ideas" in a public university.[179] Such a response reveals a fundamental misunderstanding of the K-12 teaching profession. Teacher speech in service of permissive curricular goals is not the same as the curriculum itself, nor is it the same as a teacher's independently held viewpoint. Teachers are frequently speaking and instructing for more than eight hours each day, making upwards of 1,500 daily decisions.[180] After a teacher plans detailed lessons of how to instruct students to master objectives using specific methods of instruction, she then will express herself in order to achieve those objectives in countless interactions with students.

Consider again our U.S. History teacher.[181] During any one moment in her instructional block, she may use proximity and nonverbal cues, like a desk tap, to ensure students are on task. Meanwhile, she verbally responds to a student's question. She may notice two students arguing during group work and interject to help deescalate the situation. While students are working on a graphic organizer, she may notice missing background knowledge and pull several students to a group at her table, modify a struggling student's worksheet, or bring the class back together to work through a challenging question or highlight a key point. At any given moment, she is exercising the authority empowered to her by the State—gathering information and making pedagogical choices not reflected by mere curricular choice in pursuit of legitimate curricular goals.[182] Dating

178. Nahmod, *supra* note 137, at 60–67.

179. *Id.* at 60–68 (claiming that parents and school boards' stake in K-12 students' moral character development, basic knowledge and skill comprehension, and learned "attachment to the political community" normatively "suggest a strong and probably determinative role under the First Amendment for the school board in deciding what is taught and how" and a "very little role, if any, under the First Amendment for the elementary and secondary teacher in making such decisions").

180. Alyson Klein, *1,500 Decisions a Day (At Least!): How Teachers Cope with a Dizzying Array of Questions*, EDUC. WK. (Dec. 6, 2021), https://www.edweek.org/teaching-learning/1-500-decisions-a-day-at-least-how-teachers-cope-with-a-dizzying-array-of-questions/2021/12 [https://perma.cc/N2AB-8H66].

181. *See supra* Part II.B.

182. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student

back to the 1923 case of *Meyer v. Nebraska*, K-12 teachers have been granted the liberty to teach.[183] In the K-12 context, perhaps a better term reflecting the unique value of academic freedom for K-12 teaching is pedagogical freedom—a teacher's right to express a permissible concept.

In higher education, the concept of academic freedom seemingly acts as a small thumb on the state-leaning scale that balances teacher speech rights, ultimately cautioning against censorship and chilled academic discourse. Perhaps the concept of academic freedom has been so enduring because it animates the core purpose behind higher education—encouraging innovation through open dialogue—and calls upon the central American tenet of independence. In K-12 education, however, we expect teachers to foster *particular ideas* and convey *particular knowledge*. While professors' expertise may be their content area, K-12 teachers' expertise must also be their pedagogy. It is this expertise that our legal tests have failed to account for. K-12 teachers do not claim permission to freely determine curriculum; but teachers are not mere conduits of curriculum, and it is a hindrance to both educators and their students for our legal tests to treat them as such.

B. A New Two-Step Approach

Without consensus across the circuits as to how to maintain *Pickering* and *Hazelwood* in light of *Garcetti*,[184] and anticipating challenges to CRT bans on behalf of teachers' First Amendment rights,[185] the Supreme Court may have occasion to resolve this split and clarify the value of academic freedom in K-12 education. Furthermore, as none of the current approaches account for pedagogical freedom, the Court should consider anew how to balance the different interests that are bound up in teachers' speech. Teacher speech can implicate several parties' interests: the local governing body in determining curricular goals in service of the youth's general welfare;[186] parents' interests in their children's safe intellectual development; teachers' interest in

---

speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

183. 262 U.S. at 400 ("Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare.").

184. *See supra* Part II.A.

185. *See supra* Part I.A.

186. *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 339 (6th Cir. 2010) (explaining that the state retains the authority to select curricula and require adherence to it).

comprehensively instructing their students through unique expertise; and children's interest in learning, hearing, and expressing ideas.[187]

With these interests in mind, the Court should first ask whether the teacher's speech was *instructional*. Neither *Pickering*'s protection of citizen speech[188] nor *Garcetti*'s prohibition of speech in the scope of employment[189] test instructional speech. This first step should consider the location and audience of the speech, but neither should be dispositive because instructional speech can take place beyond the classroom and occur even with adults present.[190] Like the *Pickering* analysis, this inquiry should also account for a teacher's intent: Was this speech intended to instruct students?[191] If the answer is no, then the existing tests for either citizen speech (*Keyishian*) or public employee speech (*Garcetti*) should be applied.

If the answer is yes, the Court should next ask whether the speech was reasonable in pursuit of instructional, legal, and factual student-based curricular goals. This question incorporates a balancing of the aforementioned interests: the State's and parents' interests are reflected in the legally established curricular goals; the teacher and students' interests are reflected in the assessment of reasonability: Was such a method of instruction appropriate for the development of students? Answering this question will involve a deeper look into the initial evidence of the teacher's intent. Supportive evidence of a permissible intent could include the curricular materials, any planning or related instructional resources, and the ability of the speech to foster the intended learning. This test is intentionally broad and fact intensive to reflect the sheer volume of speech present in a teacher's day[192] and to account for the number of factors that might influence an instructional moment.[193] Such a test would also incentivize, rather than chill, excellent instruction, as evidence to permit the teacher's speech could include the curriculum itself, as well as planning documents, emails with staff members, professional development materials, or any indication that such instruction is best practice.

---

187. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (referencing the Court's recognition of the liberty of teachers, students, and parents).

188. Pickering v. Bd. of Educ., 391 U.S. 563, 566–69 (1968).

189. Garcetti v. Ceballos, 547 U.S. 410, 417–22 (2006).

190. Teachers can instruct during conferences with parents, at dismissal, and in conversation and learning with other teachers about instruction.

191. Both the *Pickering* and *Brown* courts acknowledged their respective teacher's intent in expression to determine the applicability of *Pickering* balancing. *Pickering*, 391 U.S. at 578; Brown v. Chi. Bd. of Educ., 824 F.3d 713, 715–18 (7th Cir. 2016).

192. *See supra* Part III.A.

193. *See supra* Part III.A.

C. A New Approach Applied

Such an approach would not give teachers carte blanche to instruct however they please. Recall Mr. Brown in Chicago, who attempted to teach his students about hate speech by using a racial slur.[194] His speech was instructional, as it was misguidedly intended to teach his students about hate.[195] Was his speech reasonable in pursuit of instructional, legal, and factual student-based curricular goals? Probably not. Use of a racial epithet in teaching about racist language is not best practice.[196] He likely did not have a lesson plan or professional development to support such an instructional decision. His speech would probably remain unprotected.

Imagine a counterfactual: if Mr. Brown had instead overheard a child call someone else that racial epithet, and he had made decisions supported by his school's research-based discipline code like notifying both parents, conducting a lesson with the child that used that word, and facilitating a restorative conversation or peace circle.[197] Under this scenario, his speech may be protected as reasonable. The Court has an interest in employing tests that rationally shape behavior, as such a proposed test would. If Mr. Brown were to teach in a district subject to a CRT ban, it is likely he would fear repercussions for responding to the use of racist language. Rather than following best practice and leading a lesson with the child that used the racial epithet, Mr. Brown may fail to respond adequately or at all.

This approach would also probably protect our hypothetical U.S. History teacher.[198] Applying step one, the teacher's speech would be found instructional: she expressed the statement regarding Founding Fathers and America as a meritocracy in the course of teaching, and it was intended as part of an instructional block of U.S. History with her students. Applying step two, the teacher could point to state standards, the approved school curriculum, her lesson plans, and best practices for engaging high school students in history instruction. On balance, her

194. *See supra* notes 115–116 and accompanying text.

195. *See supra* note 116 and accompanying text.

196. *See, e.g.*, *Addressing Racist and Dehumanising Language*, FACING HIST. & OURSELVES (Sept. 13, 2021), https://www.facinghistory.org/resource-library/discussing-race-and-racism-classroom/addressing-racist-and-dehumanising-language [https://perma.cc/8XP5-8ZNC] (providing resources on addressing racist language, advising teachers against speaking racist language aloud, and considering the toll on student emotional well-being).

197. *See, e.g.*, *Handbook-Discipline*, METRO NASHVILLE PUB. SCHS., https://www.mnps.org/students-families/student-resources/handbook/handbook-discipline (last visited Aug. 14, 2022) [https://perma.cc/4JCB-453W].

198. *See supra* notes 149–165 and accompanying discussion.

expression would probably be deemed reasonable in pursuit of legitimate curricular goals.

Such a test would likely render certain CRT bans unconstitutional. Currently, some of the most sensitive topics appear rife with opportunities for teacher discipline. Imagine a middle-school bathroom is found to contain graffiti of a racist and antisemitic hate symbol. Under the Tennessee CRT ban, a teacher is incentivized to withhold discussion if there is any concern that it would not be sufficiently neutral.[199] Under the proposed two-step balancing test, the teacher would instead be incentivized to address the graffiti in a thoughtful, instructional manner. If she then connected the experience to the class's recent reading of literature describing antisemitic views during World War II, such as *Number the Stars* by Lois Lowry,[200] her speech would probably be protected as a reasonable best practice.

By considering the legitimacy of the teacher's instructional goals, this test would also incorporate the developmental appropriateness of the speech. For instance, when teaching *Separate Is Never Equal*, an award-winning book by Duncan Tonatiuh appropriate for second graders about a Mexican-American family's fight for desegregation in the 1940s,[201] a second grader may ask a number of questions about injustice and racism. Under Tennessee's CRT ban, the teacher would have to provide the student significant context to avoid making a statement involving historical beliefs about race, and therefore implicating Section 49-6-1019(a)(2) (part of which prevents conveying that an "individual, by virtue of the individual's race or sex, is inherently privileged, racist, sexist, or oppressive, whether consciously or subconsciously").[202] A second grade student might respond with discomfort or hurt that students had been treated differently based on race in the 1940s. Provision (a)(6), which prevents instructors from teaching that an "individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex," would seem to imply that the teacher should negate the child's reaction.[203] The student's teacher should instead be incentivized to respond truthfully and appropriately given the child's developmental stage and the ultimate goal of safe learning. Under the proposed approach, the teacher would instead rely on her

199. *See supra* notes 141–158 and accompanying discussion.

200. LOIS LOWRY, NUMBER THE STARS (1989).

201. DUNCAN TONATIUH, SEPARATE IS NEVER EQUAL (2014). This book is part of a group of challenged texts from the Wit & Wisdom curriculum in Williamson County, Tennessee. *See supra* notes 5–7 and accompanying discussion.

202. TENN. CODE ANN. § 49-6-1019(a)(2) (2021).

203. *Id.* § 49-6-1019(a)(6).

preparation, plans, and resources, each of which reflect her pedagogical expertise and experience.

CONCLUSION

Given the Supreme Court's tangled jurisprudence regarding educators' First Amendment rights and the increasing political attention on public K-12 curriculum, the Court should establish whether K-12 educators retain First Amendment rights to free speech, and if so, clarify their boundaries. Under current Supreme Court jurisprudence, a case involving a K-12 educator's speech could rely on *Pickering*'s holding regarding citizen speech, *Hazelwood*'s holding regarding student speech, or *Garcetti*'s holding which explicitly refrained from including educators in its key holding. The instability created by this divergence generates clear problems for K-12 teachers seeking to engage with students on topics concerning race and gender.

Instead, the Court should establish a practicable method of assessing a teacher's speech that reflects the interests of teachers, state legislators, parents, and, most importantly, students. This approach should recognize the Supreme Court's longstanding defense of academic freedom, as evidenced in *Keyishian*, and continued protection of students' and teachers' First Amendment rights within the schoolhouse gate, as noted in *Tinker*. By explicitly describing the kind of academic freedom available to K-12 teachers, here proposed as pedagogical freedom, the Court would unchill teacher speech and allow public schools to instill the critical thinking skills necessary to remain nurseries of democracy.

*Mary Lindsay Krebs**

* J.D. Candidate, 2023, Vanderbilt University Law School; B.A., 2011, Washington University in St. Louis. Thank you to both Professor Matthew Shaw and Molly Teague for reading my initial drafts and providing thoughtful guidance. I would also like to express my sincere appreciation of the *Vanderbilt Law Review* team, especially Rohit Murthy, Jacqui Pittman, Trey Ferguson, Kelly Guerin, Samantha Hunt, Kristen Sarna, Ashley Plunk, and Aaron Peterson for their exceptional edits. Additionally, I would like to voice my gratitude to my siblings and my parents, Betsy and Phil Krebs, for cultivating my love of learning and teaching, and my Nashville family for encouraging and supporting me. Finally, to my incredible former students, their families, and my educator colleagues, thank you for your wisdom, curiosity, and joy—I am so proud of you all.

***

The *Vanderbilt Law Review* is published six times a year by the *Vanderbilt Law Review*, Vanderbilt University Law School, Nashville, TN 37203-1181. Class "Periodicals" postage is paid at Nashville, Tennessee, and at an additional mailing office. Send address changes to *Vanderbilt Law Review*, Vanderbilt University Law School, 131 21st Avenue South, Nashville, TN 37203-1181.

Web Page: http://www.vanderbiltlawreview.org

Manuscripts: The *Vanderbilt Law Review* invites the submission of unsolicited articles. Authors may submit manuscripts through Scholastica at https://scholasticahq.com. Manuscripts cannot be returned. Submit articles to:

Senior Articles Editor
Vanderbilt Law Review
Vanderbilt University Law School
131 21st Avenue South
Nashville, TN 37203-1181
Email: articles.review@vanderbilt.edu

***En Banc*:** *Vanderbilt Law Review* invites all interested readers to submit short pieces for publication in *En Banc*, *Vanderbilt Law Review*'s online companion. *En Banc* offers professors, practitioners, students, and others an opportunity to respond to articles printed in the *Vanderbilt Law Review*. *En Banc* also considers comments, essays, and book reviews. For more information, please see our web page.

Subscriptions: Subscriptions are $50.00 per volume (domestic) and $55.00 per volume (international). Subscriptions commence with the January issue of each volume. All subscriptions are continued for each succeeding volume unless subscribers provide timely notice of cancellation. Address changes must be made at least six weeks before publication date. Subscription claims will be honored one year from date of issue publication date. Due to the excess cost of shipping overseas, if a foreign subscriber's address is correctly entered on our mailing list, we cannot supply another issue for that subscriber in the event it does not arrive.

Single and Back Issues: For back issues, please direct inquiries to: William S. Hein & Co., 1285 Main St., Buffalo, NY 14209 (1-800-828-7571). The price is $20.00 per issue, not including shipping and handling. Back issues are also available in PDF format through HeinOnline at http://www.heinonline.org. Single issues of the current volume are available for $20.00 per issue. Please contact Faye Johnson at faye.johnson@law.vanderbilt.edu for further information.

Inquiries and Information: Direct all subscription information, requests, and checks to:

Faye Johnson
Program Coordinator
Vanderbilt Law Review
Vanderbilt University Law School
131 21st Avenue South
Nashville, TN 37203-1181
Email: faye.johnson@vanderbilt.edu

Antidiscrimination Policy: The *Vanderbilt Law Review* abides by the Vanderbilt University Equal Opportunity Policy, available at http://www.vanderbilt.edu/student_handbook/university-policies-and-regulations/#equal-opportunity.

The *Vanderbilt Law Review* supports robust and open academic discussions on all legal topics. The viewpoints expressed by the authors, however, do not necessarily represent the views of Vanderbilt University Law School or its faculty, students, or staff.

Vanderbilt Law Review
(ISSN 0042-2533)

***