Is There Room in the Classroom for the First Amendment? Defining the Doctrine for Teachers' Classroom Speech

J.P. RILEY*

TABLE OF CONTENTS

ABSTRACT 186
I. INTRODUCTION 187
II. RESTRICTING INSTRUCTION AMIDST JUDICIAL UNCERTAINTY 192
A. State Legislation Regarding Controversial Issues in Public School 193
1. Summary of Enacted and Active Legislation 194
B. Teachers' Classroom Speech: Two Analytical Frameworks 198
1. Government-Employee Speech Analysis 198
a. Lower Court Application of the Government-Employee Speech Analysis 202
2. Student Speech Analysis 204
a. Lower Court Application of the Student Speech Analysis 206
III. CHARTING A PATH FOR TEACHERS' CLASSROOM SPEECH: NAVIGATING THE GAPS BETWEEN JUDICIAL FRAMEWORKS 208
A. Practical Issues 209
1. What Speech Is Affected? 209

 J.D. Candidate 2024, University of San Diego School of Law. Sincere thanks to Professor Michael Rappaport, Alexis Herskowitz, and Jessika Russell for their guidance throughout the research and drafting process. My appreciation also extends to Lee Ann Russo for her diligent editing and invaluable feedback. Lastly, I am grateful for the careful review and continuous encouragement of the *San Diego Law Review* publication team, with special thanks to Mike Rothberg, Ryan Haile, and Jake Moreno. As a former classroom teacher, this Comment is dedicated to all those who dedicate their time to the education of our nation's youth; teaching is truly the noblest of professions.

2. *What Are the Consequences for the Teaching Profession?* 211
B. *Legal Issues* 214
1. *Applying the Existing Government-Employee Speech Analytical Framework* 214
a. Garcetti *Likely Encompasses All Teachers' Classroom Speech* 214
b. *Teachers' Classroom Speech Likely is a Matter of Public Concern* 217
c. *Teachers' Free Speech Rights Likely Outweigh Workplace Efficiency* 218
2. *Applying the Existing Student Speech Analytical Framework* 220
a. *Curricular Speech is Likely School-Sponsored Speech* 222
b. *Courts Have Not Defined a Legitimate Pedagogical Concern* 222
c. *Teachers Likely Bear the Burden to Demonstrate the Government's Rationale for Regulating Curricular Speech* 224
IV. REFRAMING TEACHERS' CLASSROOM SPEECH ANALYSIS 225
A. *A New Threshold Determination: Curricular or Non-Curricular* 226
B. *Curricular Speech: Shifting the Burden in the* Hazelwood *Analysis* 227
C. *Non-Curricular Speech: A Rebalanced* Pickering *Test* 228
V. CONCLUSION 229

ABSTRACT

Many public school teachers face a daunting question: What are they allowed to say in the classroom? States are actively passing legislation restricting instruction and discussion regarding Critical Race Theory, sexual orientation, and gender identity. Yet, there is a circuit split in First Amendment jurisprudence regarding the bounds of teachers' classroom speech. Do these purported curricular restrictions extend to all teachers' classroom speech? Do these restrictions silence teachers' lived identities related to race, sexual orientation, and gender identity? The Supreme Court should resolve the circuit split in teachers' classroom speech analysis to provide teachers the protection to share their lived experiences without fear of termination or litigation.

This Comment carefully examines the existing circuit split that scrutinizes teachers' classroom speech claims using traditional government-employee speech analysis or student speech analysis. Then, this Comment explores recent state legislation regulating

instruction regarding Critical Race Theory, sexual orientation, and gender identity. Finally, this Comment suggests that the Supreme Court adopt an analytical compromise that respects states' paternal obligations to regulate curricular speech while extending greater protection to speech unrelated to legitimate pedagogical concerns. This proposition respects the Court's recent decision in Kennedy v. Bremerton School District *by maintaining deference to the government speech doctrine and acknowledging the importance of protecting teachers' First Amendment protections.*

I. INTRODUCTION

Two weeks after Tennessee enacted legislation restricting instruction related to Critical Race Theory,[1] a Tennessee school board fired a public school teacher whose lessons included discussions of race and white privilege.[2] According to the board, the teacher violated the new statute by assigning the Ta-Nehisi Coates article, *The First White President*, in the course syllabus[3] and showing the class a performance of Kyla Jenée

1. The Tennessee statute went into effect on May 25, 2021. TENN. CODE ANN. § 49-6-1019 (West 2021).

2. The Sullivan County School Board voted 7–1 to fire Matthew Hawn on June 8, 2021. *See Board of Education Regular Meeting*, SULLIVAN CNTY. BD. OF EDUC. (June 8, 2021, 6:30 PM), http://www.sullivank12.net/wp-content/uploads/board/minutes/minutes_6_8_21.pdf [https://perma.cc/5WFC-G26A]; Emma Green, *He Taught a Ta-Nehisi Coates Essay. Then He Was Fired.*, THE ATLANTIC (Aug. 17, 2021), https://www.theatlantic.com/politics/archive/2021/08/matt-hawn-tennessee-teacher-fired-white-privilege/619770/ [https://perma.cc/CDT5-NLEG]. After Mr. Hawn appealed the decision to an independent hearing officer, the county board of education upheld the adjudicator's affirmation of Mr. Hawn's termination. *See Board of Education Called Meeting*, SULLIVAN CNTY. BD. OF EDUC. (Dec. 14, 2021, 4:30 PM), http://www.sullivank12.net/wp-content/uploads/board/minutes/minutes_12_14_21_called.pdf [https://perma.cc/BP88-24MV]; Rick Wagner, *Watch Now: Sullivan School Board Upholds Matthew Hawn's Firing*, TIMESNEWS (Dec. 15, 2021), https://www.timesnews.net/news/education/watch-now-sullivan-school-board-upholds-matthew-hawns-firing/article_3ee267c8-5d40-11ec-8abf-e3e68b1f9766.html [https://perma.cc/6ZR2-4F53].

3. Matthew Hahn received an official letter of reprimand after assigning *The First White President*, which argues significant racial elements played into President Donald Trump's electoral victory in the 2020 presidential election. *See* Green, *supra* note 2; *see also* Ta-Nehisi Coates, *The First White President*, THE ATLANTIC (Oct. 2017), https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/ [https://perma.cc/DSM7-3GZR].

Lacy's poem, *White Privilege*.[4] The class was titled *Contemporary Issues*.[5]

Like their Tennessee counterparts, Florida teachers are unsure about the road ahead in the wake of Florida legislation restricting instruction on sexual orientation and gender identity.[6] One teacher said, "On the one hand, I feel like this job is more important than it's ever been, . . . [a]t the same time, it would be dishonest for me to say that I'm content here."[7] To avoid conflict with the new law, some teachers have taken such drastic steps as removing an entire classroom library from student access.[8]

Termination, stigma, bounties, and lawsuits. Elementary and secondary public school teachers[9] are contemplating these consequences as they encounter new laws restricting instruction and discussion on certain topics.[10]

---

4. *See* Green, *supra* note 2; *see also* Write About Now, *Kyla Jenée Lacey - "White Privilege" @WANPOETRY*, YOUTUBE (Aug. 2, 2017), https://www.youtube.com/watch?v=Qkz5UmXugzk [https://perma.cc/V7DH-HCTU].

5. Green, *supra* note 2.

6. *See* FLA. STAT. ANN. § 1001.42(8)(c)(3) (West 2023); Melissa Block, *Teachers Fear the Chilling Effect of Florida's So-Called 'Don't Say Gay' Law*, NPR (Mar. 30, 2022, 5:00 AM), https://www.npr.org/2022/03/30/1089462508/teachers-fear-the-chilling-effect-of-floridas-so-called-dont-say-gay-law [https://perma.cc/C98F-SFE4]; Ileana Najarro, *With Their Licenses in Jeopardy, Florida Teachers Unsure How the 'Don't Say Gay' Law Will Be Applied*, EDUC. WEEK (Oct. 27, 2022), https://www.edweek.org/teaching-learning/with-their-licenses-in-jeopardy-florida-teachers-unsure-how-the-dont-say-gay-law-will-be-applied/2022/10 [https://perma.cc/6W6Q-EQ6U].

7. Scott Neuman, *The Culture Wars Are Pushing Some Teachers to Leave the Classroom*, NPR (Nov. 13, 2022, 7:00 AM), https://www.npr.org/2022/11/13/1131872280/teacher-shortage-culture-wars-critical-race-theory [https://perma.cc/S44J-NY4A]. This quotation was from Alexander Ingram, a social studies teacher in Jacksonville, Florida, who characterized teaching as "a double-edged sword" in response to increasing legislation regulating instruction in Florida and across the country. *See id.*

8. The School District of Palm Beach County required teachers to review all of the books in their classroom library to ensure compliance with the new law. *See* Jo Yurcaba, *Florida Teachers Navigate Their First Year Under the 'Don't Say Gay' Law*, NBC NEWS (Aug. 19, 2022, 1:30 AM), https://www.nbcnews.com/nbc-out/florida-teachers-navigate-first-year-dont-say-gay-law-rcna43817 [https://perma.cc/3CJT-2MDF]. Due to the impracticability of going through an entire class library, one teacher removed the books from student access. *See id.*

9. For this Comment, "public school" means primary and secondary schools under publicly funded school districts subject to the laws of the territories, states, or municipalities where the school district operates. Unless otherwise identified, public school does not refer to a state-sponsored post-secondary school, college, or university. Also, this Comment will refer only to "teachers" throughout the rest of the text, which refers to public school teachers.

10. *See* @Moms4LibertyNH, TWITTER (Nov. 12, 2021, 6:28 AM), https://twitter.com/Moms4LibertyNH/status/1459166253084467205?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1459166253084467205%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fthehill.com%2Fchanging-america%2Fenrichment%2Feducation%2F581722-moms-group-puts-500-bounty-on-teachers-who-teach; [https://perma.cc/KNR7-RS5S]; *see also* Ileana Najarro, *Florida Teachers Could Lose Their Licenses Under New Rule Tied to 'Don't Say Gay' Law*, EDUC. WEEK (Oct. 14, 2022),

While the first fifteen years of the millennium featured debates about school funding and student achievement,[11] a recent cultural shift sparked parental and legislative action on appropriate student curricula and the role of public schools.[12] The consequences of this new microscope on public education—both intended and unintended—include banning books, restricting instruction, and limiting or even eliminating discussion on culturally pertinent topics.[13]

---

https://www.edweek.org/teaching-learning/florida-teachers-could-lose-their-licenses-under-new-rule-tied-to-dont-say-gay-law/2022/10 [https://perma.cc/H759-HSX2]; FLA. STAT. ANN. § 1001.42(8)(c)(7); Hannah Natanson & Moriah Balingit, *Teachers Who Mention Sexuality Are 'Grooming' Kids, Conservatives Say*, WASH. POST (Apr. 5, 2022, 9:04 AM), https://www.washingtonpost.com/education/2022/04/05/teachers-groomers-pedophiles-dont-say-gay/ [https://perma.cc/6KKH-6HMP]; Hannah Natanson & Moriah Balingit, *Caught in the Culture Wars, Teachers Are Being Forced from Their Jobs*, WASH. POST (June 16, 2022, 7:42 AM) [hereinafter Natanson & Balingit, *Culture Wars*], https://www.washingtonpost.com/education/2022/06/16/teacher-resignations-firings-culture-wars/ [https://perma.cc/CMY7-ZVNA].

11. Throughout the 2000s and 2010s, the Bush and Obama Administrations focused on student achievement by identifying specific areas where targeted intervention could alleviate achievement gaps in students; however, the primary political parties were divided over priorities and funding allocation. *See* Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEK (Apr. 10, 2015), https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04 [https://perma.cc/FG37-KD7R]; *see also* Alyson Klein, *Education Aid Emerging as Campaign Issue*, EDUC. WEEK (Aug. 20, 2012), https://www.edweek.org/policy-politics/education-aid-emerging-as-campaign-issue/2012/08 [https://perma.cc/S622-XWXZ].

12. *See* Paul Waldman & Greg Sargent, Opinion, *Teachers are Under Fire in Increasingly Bizarre Ways*, WASH. POST (Mar. 10, 2022, 4:49 PM), https://www.washingtonpost.com/opinions/2022/03/10/teachers-under-fire-censorship-books/ [https://perma.cc/6DEE-ZTXG]. Considered by some pundits to be a face of this educational reform movement, Governor Glenn Youngkin found success in the 2021 Virginia gubernatorial election by focusing on promises to ban Critical Race Theory and to give parents greater curricular control. *See* Hannah Natanson, *Youngkin Takes Office with Immediate Focus on Education, Thrilling Some and Terrifying Others*, WASH. POST (Jan. 16, 2022, 7:18 PM), https://www.washingtonpost.com/education/2022/01/16/virginia-glenn-youngkin-education/ [https://perma.cc/3AKX-U6N6].

13. *See* Alexandra Atler & Elizabeth A. Harris, *Attempts to Ban Books Are Accelerating and Becoming More Divisive*, N.Y. TIMES (Sept. 16, 2022), https://www.nytimes.com/2022/09/16/books/book-bans.html [https://perma.cc/S7WV-7G4K]; *see also* SY DOAN ET AL., STATE OF THE AMERICAN TEACHER AND STATE OF THE AMERICAN PRINCIPAL SURVEYS: 2022 TECHNICAL DOCUMENTATION AND SURVEY RESULTS 31, 37–38 (2022), https://www.rand.org/pubs/research_reports/RRA1108-3.html [https://perma.cc/WLD6-8B4L]; Anna Saavedra, Meira Levinson & Morgan Polikoff, *Survey: Americans Broadly Support Teaching About (Most) Controversial Topics in the Classroom*, BROOKINGS (Oct. 20, 2022), https://www.brookings.edu/blog/brown-center-chalkboard/2022/10/20/americans-

Being told what to teach is not new to teachers, nor is the notion that specific controversial issues are off-limits. For most of the past century, the primary curricular debate was not about Critical Race Theory[14] or sexual orientation and gender identity; instead, the controversial issue was evolution.[15] In 1925, the Tennessee Supreme Court rejected a teacher's First Amendment right to teach evolution based on the state's prohibition on the instruction of "any theory that denies the story of the divine creation of man as taught in the Bible."[16] Even after the United States Supreme Court held in 1968 that anti-evolution statutes were unconstitutional, evolution remained a controversial issue, and many states did not formally adopt evolution into curricula until the 2010s.[17]

The rationale behind legislation surrounding the controversial topics addressed in this Comment is not necessarily divorced from the motivation behind anti-evolution laws.[18] However, the new legislation presents

---

broadly-support-teaching-about-most-controversial-topics-in-the-classroom/ [https://perma.cc/NEC2-2CP6].

14. Critical Race Theory, a term coined by Kimberlé Crenshaw, is a "practice of interrogating the role of race and racism in society that emerged in the legal academy and spread to other fields of scholarship." Janel George, *A Lesson on Critical Race Theory*, A.B.A. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/ [https://perma.cc/CRR6-KHHY].

15. Adam Laats, *The Conservative War on Education that Failed*, THE ATLANTIC (Nov. 23, 2021), https://www.theatlantic.com/ideas/archive/2021/11/failed-school-ban-evolution-conservatives/620779/ [https://perma.cc/Q75Z-Q4DS]. Presently, forty-nine states require instruction on evolution or have standardized evolution curricula. *See States that Don't Teach Evolution 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/states-that-dont-teach-evolution [https://perma.cc/ED7E-C8R3]. Evolution is an optional subject in science courses in Oklahoma. Staff Rep., *Oklahoma Education to Include Biological Evolution*, SCI. TIMES (Mar. 2, 2020, 7:03 AM), https://www.sciencetimes.com/articles/24936/20200302/oklahoma-education-to-include-biological-evolution.htm [https://perma.cc/9KEV-EFK2].

16. Scopes v. State, 289 S.W. 363, 363 n.1 (Tenn. 1927); *see also id.* at 367 (upholding the state statute prohibiting the instruction of evolution but overturning the teacher's conviction on procedural grounds).

17. *See* Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (holding that anti-evolution statutes are unconstitutional under the First Amendment's Establishment Clause and by extension to the states under the Fourteenth Amendment). Also, evolution was not required instruction in Alabama until 2015, and at least through that time Alabama mandated the inclusion of an insert at the front of science textbooks which described evolution as a "controversial theory." *See* Zoë Schlanger, *Here's the Evolution-Questioning 'Sticker' Alabama Puts on its Biology Textbooks*, NEWSWEEK (Sept. 18, 2015, 10:58 AM), https://www.newsweek.com/alabama-biology-textbooks-evolution-sticker-373662 [https://perma.cc/VAJ6-7FSE].

18. *See* Adam R. Shapiro, *When Opponents Decry Critical Race Theory, They're Really Fighting Against Change*, WASH. POST (July 20, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/07/20/when-opponents-decry-critical-race-theory-theyre-really-fighting-against-change/ [https://perma.cc/LK8B-K769]; Stephen Sawchuk,

a critical distinction: the connection between the controversial issue and people's lived experiences—particularly teachers' and students' lived experiences regarding race, sexual orientation, and gender identity.[19]

As states nationwide enact laws restricting teachers' discussion and instruction of particular subjects,[20] tension exists between teachers' expression and a school district's responsibility to comply with state law and the United States Constitution. The United States Supreme Court must provide a new analytical framework that considers the fluid nature of classrooms—which includes more than simply delivering a prescribed lesson. To accommodate the unique nature of teachers' responsibilities, this framework must bridge the gap between case law specific to schools and that concerning public employees at large. Moreover, the Court must employ an analysis that does not leave teachers vulnerable to prosecution, litigation, or retaliation for their otherwise protected expressions.

This Comment examines teachers' First Amendment rights in the classroom and develops an argument for increased protection of that speech. Part II highlights trends in state legislation and the judicial framework through which courts would scrutinize that legislation. Part III argues that teachers deserve different protection for their classroom speech because they differ from other government employees and the students in the classroom.[21]

What's Driving the Push to Restrict Schools on LGBTQ Issues?, EDUC. WEEK (Apr. 19, 2022), https://www.edweek.org/leadership/whats-driving-the-push-to-restrict-schools-on-lgbtq-issues/2022/04 [https://perma.cc/GS6K-NEJR].

19. *See* 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/6HRR-N5VQ]; Hannah Slater, *LGBT-Inclusive Sex Education Means Healthier Youth and Safer Schools*, CTR. FOR AM. PROGRESS (June 21, 2013), https://www.americanprogress.org/article/lgbt-inclusive-sex-education-means-healthier-youth-and-safer-schools/ [https://perma.cc/4YMR-XNYY]; *see also* Natanson & Balingit, *Culture Wars*, *supra* note 10; Will Larkins, Opinion, *Florida's 'Don't Say Gay' Bill Will Hurt Teens Like Me*, N.Y. TIMES (Mar. 12, 2022), https://www.nytimes.com/2022/03/12/opinion/florida-dont-say-gay-bill.html?searchResultPosition=3 [https://perma.cc/794F-YMCS].

20. One type of regulation on instruction and discussion in classrooms relates to discussions of sexual orientation, gender identity, and related LGBTQ+ issues. *See* FLA. STAT. ANN. § 1001.42(8)(c)(3) (West 2023); H.B. 800, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); S. File 2024, 89th Gen. Assemb., Reg. Sess. (Iowa 2022); H.B. 322, 2022 Leg., Reg. Sess. (Ala. 2022).

21. The breadth of student First Amendment protections is another highly contested issue but is beyond the scope of this Comment. For more discussion on student First Amendment protections, see Justin Driver, Lecture, *Freedom of Expression Within the Schoolhouse Gate*, 73 ARK. L. REV. 1 (2020); David L. Hudson, Jr., *Unsettled Questions in Student Speech Law*, 22 U. PA. J. CONST. L. 1113 (2020); Dylan Salzman, Comment,

Finally, Part IV proposes a new framework through which the Supreme Court should analyze First Amendment protection of teachers' classroom speech. The new framework will extend additional protections to teachers by providing different tests for curricular and non-curricular speech and elevating the burden when a government seeks to restrict teachers' free speech rights.

II. RESTRICTING INSTRUCTION AMIDST JUDICIAL UNCERTAINTY

Many teachers are entering—or leaving—the profession amidst uncertainty.[22] Increasingly, states are proposing and passing laws restricting instruction and discussion on particular topics, but many of these laws do not clarify what is allowed.[23] Further, these restrictions exist amidst judicial ambiguity from courts' failure to provide meaningful guidance.[24] Section A discusses the development of recent legislation regulating the instruction of so-

---

The Constitutionality of Orthodoxy: First Amendment Implications of Laws Restricting Critical Race Theory in Public Schools, 89 U. CHI. L. REV. 1069 (2022).

22. *See* Natanson & Balingit, *Culture Wars*, *supra* note 10; Nadra Nittle, *The National Teacher Shortage is Growing. In Florida, Controversial Laws Are Making it Worse*, 19TH NEWS (July 21, 2022, 3:00 AM), https://19thnews.org/2022/07/national-school-teacher-shortage-florida-controversial-laws/ [https://perma.cc/H5QE-92QK]; Anna Merod, *Survey: 37% of Teachers Will Likely Quit if K-12 Censorship Laws Reach Them*, K–12 DIVE (Jan. 24, 2022), https://www.k12dive.com/news/survey-37-of-teachers-will-likely-quit-if-k-12-censorship-laws-reach-them/617581/ [https://perma.cc/EDW3-UEL6].

23. *See* Travis Loller & Acacia Coronado, *New Laws Steer Some Teachers Away from Race-Related Topics*, ASSOCIATED PRESS (Nov. 18, 2021, 8:30 AM), https://apnews.com/article/entertainment-business-education-race-and-ethnicity-racial-injustice-cc00d3bfecc7c286a268998b50533d17 [https://perma.cc/9DP9-C8C2]; Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring*, WASH. POST (Feb. 14, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/ [https://perma.cc/5FEN-XDS2]; Brian Lopez, *The Law That Prompted a School Administrator to Call for an "Opposing" Perspective on the Holocaust is Causing Confusion Across Texas*, TEX. TRIB. (Oct. 15, 2021, 7:00 PM), https://www.texastribune.org/2021/10/15/Texas-critical-race-theory-law-confuses-educators/ [https://perma.cc/9Y8U-WUCC]; Jacqueline Jones & James Grossman, Opinion, *State Laws Are Corrupting the Study of History by Forcing 'Opposing Viewpoints' in the Classroom*, THE HILL (Oct. 20, 2021, 8:30 AM), https://thehill.com/opinion/education/577464-state-laws-are-corrupting-the-study-of-history-by-forcing-opposing/ [https://perma.cc/58QY-E4WQ].

24. For an overview of existing case law and the standing circuit split regarding teachers' speech, see *infra* Sections II.B. and III.B. Notably, one federal district court in Florida ordered a temporary injunction on parts of Florida's "Stop W.O.K.E." Act, which restricts how school districts can teach about race; however, that injunction applied only to higher education. *See* Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1287–89 (N.D. Fla. 2022); *see also* Ben Brasch, *Judge Nixes Higher Education Portions of Florida's Stop WOKE Act*, WASH. POST (Nov. 17, 2022, 11:38 PM), https://www.washingtonpost.com/nation/2022/11/17/judge-nixes-higher-education-portions-floridas-stop-woke-act/ [https://perma.cc/36UH-4NFQ].

called controversial issues, including Critical Race Theory, sexual orientation, and gender identity. Section B identifies the two distinct judicial frameworks through which courts analyze First Amendment challenges to teachers' speech.

A. State Legislation Regarding Controversial Issues in Public School

As referenced above, the concept of curricular restriction in public schools is not a new phenomenon. The restriction on the instruction of controversial topics has existed for virtually as long as public education, including notable topics such as evolution and sexual health.[25] Less controversially, established doctrine supports the ability of states and local school districts to regulate curriculum with broad discretion.[26]

Although there are parallels between the restrictions on the instruction and discussion of issues surrounding race, racism, sexual orientation, and gender identity to those regarding evolution and sexual health,[27] the attention to today's "controversial" issues[28] appears to stem primarily from two

25. *See* Eric Plutzer, Glenn Branch & Ann Reid, *Teaching Evolution in U.S. Public Schools: A Continuing Challenge*, 13 EVOLUTION: EDUC. & OUTREACH, June 9, 2020, at 1, 1; DAVID MASCI & MICHAEL LIPKA, PEW RSCH. CTR., FIGHTING OVER DARWIN, STATE BY STATE 1 (2009), https://www.pewresearch.org/religion/2009/02/04/fighting-over-darwin-state-by-state/ [https://perma.cc/VJ7P-XKRX]; PLANNED PARENTHOOD, HISTORY OF SEX EDUCATION IN THE U.S. 1 (2016), https://www.plannedparenthood.org/uploads/filer_public/da/67/da67fd5d-631d-438a-85e8-a446d90fd1e3/20170209_sexed_d04_1.pdf [https://perma.cc/8F3C-KWGW]; Libby Nelson, *The Controversial History of Sex Ed Around the World*, VOX (Mar. 15, 2015, 11:00 AM), https://www.vox.com/2015/3/15/8217691/too-hot-to-handle-sex-education [https://perma.cc/4P9S-XWCZ].

26. *See The Federal Role in Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/fed/role.html [https://perma.cc/9FH5-YFC2]; Julie Underwood, *The Legal Balancing Act Over Public School Curriculum*, KAPPAN (Feb. 25, 2019), https://kappanonline.org/legal-balancing-act-public-school-curriculum-underwood/ [https://perma.cc/4TSB-L7ZA].

27. *See* Valerie Strauss, *The Culture War Over Critical Race Theory Looks Like the One Waged 50 Years Ago Over Sex Education*, WASH. POST (July 25, 2021, 7:00 AM), https://www.washingtonpost.com/education/2021/07/25/critical-race-theory-sex-education-culture-wars/ [https://perma.cc/ZP55-F858]; Andrew Ujifusa, *Critical Race Theory Puts Educators at Center of a Frustrating Cultural Fight Once Again*, EDUC. WEEK (May 26, 2021), https://www.edweek.org/leadership/critical-race-theory-puts-educators-at-center-of-a-frustrating-cultural-fight-once-again/2021/05 [https://perma.cc/QV3M-BJCT].

28. The phrases "controversial" and "controversial issues" are often used in related legislation, which likely stem from President Trump's 2020 executive order, which defined "divisive concepts." *See* Exec. Order No. 13950, Combatting Race and Sex Stereotyping, 85 Fed. Reg. 60683, 60685 (Sept. 22, 2020); *see also* Sarah Schwartz, *Who's Really Driving Critical Race Theory Legislation? An Investigation*, EDUC. WEEK (July 19, 2021),

sources. First, in September 2020, President Donald Trump issued an executive order banning certain types of diversity training in federal agencies.[29] Second, during the COVID-19 pandemic, families had a more direct look into the classroom when most public schools provided virtual instruction for a significant time.[30] These catalysts led to the proposal of nearly 200 bills that aim to prohibit certain types of instruction or discussion, often based on what the drafters of the legislation consider to be "controversial" or "divisive" issues.[31]

1. Summary of Enacted and Active Legislation

A discussion of all proposed legislation since January 2021 is not feasible for this Comment; therefore, this Section will provide a brief overview of enacted and active legislation and the consequences in the respective states.[32] At least nine states enacted laws with virtually identical language prohibiting the instruction of what the states consider to be

---

https://www.edweek.org/policy-politics/whos-really-driving-critical-race-theory-legislation-an-investigation/2021/07 [https://perma.cc/3ETM-YECY].

29. *See* Exec. Order No. 13950, 85 Fed. Reg. at 60685; Schwartz, *supra* note 28; Char Adams, *How Trump Ignited the Fight over Critical Race Theory in Schools*, NBC NEWS (May 10, 2021, 3:05 AM), https://www.nbcnews.com/news/nbcblk/how-trump-ignited-fight-over-critical-race-theory-schools-n1266701 [https://perma.cc/K9CP-6GPP]; Hailey Fuchs, *Trump Attack on Diversity Training Has a Quick and Chilling Effect*, N.Y. TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html [https://perma.cc/5WNF-5YFD]. President Biden revoked the executive order during his first day in office. *See* Exec. Order No. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009, 7012 (Jan. 20, 2021).

30. Shelina Bhamani et al., *Home Learning in Times of COVID: Experiences of Parents*, 7 J. EDUC. & EDUC. DEV. 9, 19–23 (2020); Katharine C. Gorka, *The Great Parent Revolt*, HERITAGE (Aug. 12, 2021), https://www.heritage.org/education/commentary/the-great-parent-revolt [https://perma.cc/T7NC-AK88]. Then-Virginia-gubernatorial candidate Terry McAuliffe also ignited parents when he said, "I don't think parents should be telling schools what they should teach." *See* Joe Concha, Opinion, *Education Blunder Igniting Suburban Parents Driving McAuliffe Panic in Virginia*, THE HILL (Oct. 28, 2021, 12:30 PM), https://thehill.com/opinion/campaign/578885-education-blunder-igniting-suburban-parents-driving-mcauliffe-panic-in/ [https://perma.cc/5JV8-23QX].

31. *See PEN America Index of Educational Gag Orders*, PEN AM., https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=107383712 [https://perma.cc/8K3C-8FAC]; *see also* Jeffrey Sachs, *Steep Rise in Gag Orders, Many Sloppily Drafted*, PEN AM. (Jan. 24, 2022), https://pen.org/steep-rise-gag-orders-many-sloppily-drafted/ [https://perma.cc/LHG4-EMER]; Cathryn Stout & Thomas Wilburn, *CRT Map: Efforts to Restrict Teaching Racism and Bias Have Multiplied Across the U.S.*, CHALKBEAT (Feb. 1, 2022, 4:20 PM), https://www.chalkbeat.org/22525983/map-critical-race-theory-legislation-teaching-racism [https://perma.cc/6RN7-E6MS].

32. For an index of all relevant proposed, active, and enacted legislation since January 2021, see *PEN America Index*, *supra* note 31.

Critical Race Theory,[33] and North Dakota, Kentucky, and Arkansas enacted similar laws but with different statutory language.[34] Most of these laws are similar to ordinary curricular or administrative pronouncements in that they do not carry with them any express consequences for violation of the law.[35] Some of the laws do include such consequences, however, such as monetary penalties, disciplinary action, and private rights of civil action.[36]

Idaho's statute provides exemplary language for the states prohibiting instruction on Critical Race Theory.[37] The statute prohibits public schools from "direct[ing] or otherwise compel[ling] students to personally affirm, adopt, or adhere" to specific tenets that the legislature identifies as part of Critical Race Theory.[38] Those tenets include: (i) "[t]hat any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior"; (ii) "[t]hat individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin"; and (iii) "[t]hat individuals, by virtue of sex, race, ethnicity, religion, color, or national origin, are

33. *See* ARIZ. REV. STAT. ANN. § 41-1494 (2021); FLA. STAT. ANN. § 1000.05(4)(a) (West 2022), *invalidated by* Pernell v. Fla. Bd. of Governors, 641 F.Supp.3d 1218 (N.D. Fla. 2022); GA. CODE ANN. § 20-1-11 (West 2022); IDAHO CODE ANN. § 33-138 (West 2021); H. File 802, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); N.H. REV. STAT. ANN. § 354-A:29 (2021); MISS. CODE ANN. § 37-13-2 (West 2022); H.B. 4100, 2021 Leg., 124th Sess. (S.C. 2021); TENN. CODE ANN. § 49-6-1019 (West 2021). The Arizona Supreme Court struck down the Arizona law based on the unconstitutionality of the legislative process through which the bill was passed, leaving the possibility that Arizona could ban Critical Race Theory through different legislative channels. *See* Ariz. Sch. Bds. Ass'n, Inc. v. Arizona, 501 P.3d 731, 741–42 (Ariz. 2022); Jeremy Duda, *The Supreme Court Struck Down More than a Ban on School Mask Mandates. Here's Everything That's No Longer Law*, TUCSON WKLY. (Nov. 5, 2021, 6:45 AM), https://www.tucsonweekly.com/TheRange/archives/2021/11/05/the-supreme-court-struck-down-more-than-a-ban-on-school-mask-mandates-heres-everything-thats-no-longer-law [https://perma.cc/A9U9-PUP5].

34. *See* N.D. CENT. CODE ANN. § 15.1-21-05.1 (West 2023); KY. REV. STAT. ANN. § 161.164 (West 2022); ARK. CODE ANN. § 6-16-156 (West 2023).

35. *See* ARIZ. REV. STAT. ANN. § 41-1494 (2021); IDAHO CODE ANN. § 33-138 (West 2021); H. File 802, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); MISS. CODE ANN. § 37-13-2 (West 2022); H.B. 4100, 124th Gen. Assemb., Reg. Sess. (S.C. 2021); N.D. CENT. CODE ANN. § 15.1-21-05.1; KY. REV. STAT. ANN. § 161.164. Although, violation of the state law could likely lead to professional disciplinary action for a violator. *See, e.g.*, *Educator Discipline: FAQs*, TEX. EDUC. AGENCY, https://tea.texas.gov/texas-educators/investigations/educator-discipline-faqs [https://perma.cc/7WTK-YCZB].

36. *See* GA. CODE ANN. § 20-1-11(e)(1) (West 2022); N.H. REV. STAT. ANN. § 354-A:34 (2021); TENN. CODE ANN. § 49-6-1019(c) (West 2021).

37. *See* IDAHO CODE ANN. § 33-138 (West 2021). Idaho was one of the first states to enact this type of legislation. *See PEN America Index*, *supra* note 31.

38. IDAHO CODE ANN. § 33-138(3)(a).

inherently responsible for actions committed in the past by other members of the same sex, race, ethnicity, religion, color, or national origin."[39]

Only North Dakota, Kentucky, and Arkansas's laws vary meaningfully from the language in the Idaho statute.[40] North Dakota's law states that "a school district or public school may not include instruction relating to critical race theory in any portion of the district's required curriculum."[41] Similarly, Arkansas's law prohibits any requirement of a public school employee or student "to attend trainings or orientations based on prohibited indoctrination or Critical Race Theory."[42] In contrast, Kentucky's law enumerates a list of ideals and concepts related to race, sex, and American history and culture with which public schools must align their instruction.[43] At least fifteen additional states have active legislation that follows the examples of the laws discussed above.[44]

Only Florida and Arkansas have enacted legislation regulating the instruction and discussion on sexual orientation and gender identity.[45] The principal text of Florida's law reads,

> Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8, except when required by [sections] 1003.42(2)(n)3.[sic] and 1003.46. If such instruction is

---

39. The Idaho statute also prohibits the "distinction or classification of students . . . on account of race or color." *Id.* § 33-138(3)(b). The relevant language in the Arizona, Florida, Georgia, Idaho, Iowa, New Hampshire, Mississippi, North Dakota, South Carolina, Tennessee, and Texas statutes is virtually identical. *See* sources cited *supra* note 33.

40. *See supra* note 34 and accompanying text.

41. N.D. CENT. CODE ANN. § 15.1-21-05.1 (West 2023).

42. ARK. CODE ANN. § 6-16-156(e) (West 2023).

43. *See* KY. REV. STAT. ANN. § 161.164(2), (4) (West 2022). Also, teachers may not "requir[e] or incentiviz[e] a student to advocate . . . on behalf of a perspective with which the student or the parent or guardian of a minor student does not agree." *Id.* § 161.164(6).

44. *See* H.B. 7, 2023 Leg., Reg. Sess. (Ala. 2023); H.B. 2189, 56th Leg., Reg. Sess. (Ariz. 2023); S.B. 280, 2023 Leg., Reg. Sess. (Conn. 2023); H.B. 2184, 103d Gen. Assemb., Reg. Sess. (Ill. 2023); H.B. 1338, 2023 Leg., Reg. Sess. (Ind. 2023); H. File 1269, 2023 Leg., 93d Sess. (Minn. 2023); S.B. 42, 2023 Leg., Reg. Sess. (Mo. 2023); Leg. B. 374, 108th Leg., Reg. Sess. (Neb. 2023); S.B. 2685, 220th Leg., Reg. Sess. (N.J. 2022); H.B. 187, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023); S.B. 348, 59th Leg., Reg. Sess. (Okla. 2023); H.B. 5739, 2023 Gen. Assemb., Reg. Sess. (R.I. 2023); H.B. 3464, 2023 Gen. Assemb., 125th Sess. (S.C. 2023); H.B. 571, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); H.B. 1033, 88th Leg., Reg. Sess. (Tex. 2022).

45. FLA. STAT. ANN. § 1001.42(8)(c)(3) (West 2023); ARK. CODE ANN. § 6-16-157(c)(1)–(5) (West 2023). Officially named the "Parental Rights in Education Act," but often referred to by critics as the "Don't Say Gay" law, Florida's statute addresses more than just the restriction on instruction regarding sexual orientation and gender identity. For a closer examination of the statute's full text, see FLA. STAT. ANN. § 1001.42; Amelia Nierenberg, *What Does 'Don't Say Gay' Actually Say?*, N.Y. TIMES (Mar. 23, 2022), https://www.nytimes.com/2022/03/23/us/what-does-dont-say-gay-actually-say.html [https://perma.cc/MN7D-3W7A].

> provided in grades 9 through 12, the instruction must be age-appropriate or developmentally appropriate for students in accordance with state standards.[46]

The law also contains a procedure for parental notification of the school of alleged violations of the law and how the school should respond.[47] Then, if the school fails to resolve the concern adequately, a parent may initiate a review by a special magistrate or bring an action against the school district.[48] At least eleven states have proposed legislation similar to Florida's law.[49]

---

46. FLA. STAT. ANN. § 1001.42(8)(c)(3). The two exceptions listed in Florida's statute include the following: (1) "For students in grades 6 through 12, awareness of the benefits of sexual abstinence as the expected standard and the consequences of teenage pregnancy," *id.* § 1003.42(2)(o)(3); and (2) instruction regarding acquired immune deficiency syndrome (AIDS), *id.* § 1003.46. This Author believes that Section 1001.42(8)(c)(3) incorrectly references section 1003.42(2)(n)(3), which does not exist. Section 1003.42(n) requires students receive instruction on "[t]he conservation of natural resources."

Arkansas's law differs in that it simply enumerates the prohibition on teaching certain topics: "Before grade five (5), a public school teacher shall not provide classroom instruction on the following topics: (1) Sexually explicit materials; (2) Sexual reproduction; (3) Sexual intercourse; (4) Gender identity; or (5) Sexual orientation." ARK. CODE ANN. § 6-16-157(c)(1)–(5). Florida's law was the first of its kind to be successfully enacted and has survived multiple rounds of litigation. *See* Anthony Izaguirre, *LGBTQ Groups Sue Florida Over So-Called 'Don't Say Gay' Law*, AP NEWS (Mar. 31, 2022, 2:03 PM), https://apnews.com/article/education-florida-tallahassee-ron-desantis-gender-identity-261dca455c4027d5fc5ce10fd1d7f012 [https://perma.cc/67YL-9CFW]; Jim Saunders, *A Federal Judge Has Rejected a Challenge to the Law Opponents Call 'Don't Say Gay*,*'* WUSF PUB. MEDIA (Oct. 3, 2022, 3:19 PM), https://wusfnews.wusf.usf.edu/courts-law/2022-10-03/a-federal-judge-has-rejected-a-challenge-to-the-so-called-dont-say-gay-law [https://perma.cc/6EYX-SY76]; Mike Schneider, *Judge Tosses Challenge to Florida's 'Don't Say Gay' Bill*, AP NEWS (Feb. 16, 2023, 11:37 AM), https://apnews.com/article/florida-tallahassee-education-lawsuits-c568376af04807379346b23e0e2d7769 [https://perma.cc/GL3E-Z48V].

47. FLA. STAT. ANN. § 1001.42(8)(c)(6).

48. *Id.* § 1001.42(8)(c)(7)(b)(I)–(II). Regardless of the outcome, the school district must pay for the costs associated with the special magistrate proceeding, and if the parent is awarded declaratory relief after filing a private action, the school district is required to pay for the parent's attorney fees. *See id.* Also, teachers who violate the law are likely subject to professional disciplinary action. *See Professional Practices*, FLA. DEP'T OF EDUC., https://www.fldoe.org/teaching/professional-practices/ [https://perma.cc/786K-WC7V].

49. *See* H.B. 2189, 56th Leg., Reg. Sess. (Ariz. 2023); H.B. 509, 32d Leg., Reg. Sess. (Haw. 2023); S.B. 386, 2023 Leg., Reg. Sess. (Ind. 2023); S. File 159, 90th Gen. Assemb., Reg. Sess. (Iowa 2023); H.B. 466, 2023 Leg., Reg. Sess. (La. 2023); H.B. 634, 102d Gen. Assemb., Reg. Sess. (Mo. 2023); S.B. 413, 68th Leg., Reg. Sess. (Mont. 2023); Assemb. B. 4042, 220th Leg., Reg. Sess. (N.J. 2022); S.B. 30, 59th Leg., 1st Sess. (Okla. 2023); H.B. 571, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); H.B. 631, 88th Leg., Reg. Sess. (Tex. 2023); *see also* Dustin Jones & Jonathan Franklin, *Not Just Florida. More than a Dozen States Propose So-Called 'Don't Say Gay' Bills*, NPR (Apr. 10, 2022, 7:01 AM), https://www.npr.org/2022/04/10/1091543359/15-states-dont-say-gay-anti-transgender-bills [https://perma.cc/G4WW-BEFX].

B. Teachers' Classroom Speech: Two Analytical Frameworks

Although the Supreme Court promulgated a standard for protecting teachers' speech outside the classroom in *Kennedy v. Bremerton School District*, this decision may bear little impact on teachers' classroom speech.[50] In *Kennedy*, the focus of the First Amendment inquiry was on the moments after a football game and whether or not the coach's actions were pursuant to his official duties as a coach.[51] But the factual inapplicability to the classroom setting leaves the Court without an analytical framework for First Amendment protections of teachers' classroom speech.[52] Currently, lower courts use two analytical frameworks to scrutinize teachers' classroom speech: the government-employee speech framework restated in *Kennedy*[53] and the student speech framework.[54]

1. Government-Employee Speech Analysis

When examining teachers' speech under the government-employee framework, a reviewing court uses a three-step analysis.[55] First, the court must determine whether the employee's speech was made pursuant to their official duties; if so, that speech is not protected by the First Amendment.[56] Second, if the speech was not made pursuant to the employee's official duties, the court must determine whether the speech is related to a matter

---

50. Even though the school employee in *Kennedy* was a high school football coach, the Court repeatedly employed the phrases "teachers and coaches," "teacher or coach," and "teacher," explicitly extending the application of the holding to both teachers and coaches. *See* 142 S. Ct. 2407, 2419, 2423, 2425, 2431 (2022).

51. *Id.* at 2423–24.

52. The *Kennedy* opinion focuses on the teacher as a government employee via the analyses established by *Pickering v. Board of Education of Township High School District* and *Garcetti v. Ceballos*. *Id.* at 2423; *see also* Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Garcetti v. Ceballos, 547 U.S. 410 (2006).

53. *See* Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176–77 (3d Cir. 1990); Lee v. York Cnty. Sch. Div., 484 F.3d 687, 700 (4th Cir. 2007); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 340 (6th Cir. 2010); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 964–65 (9th Cir. 2011).

54. *See* Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723–24 (2d Cir. 1994); Miles v. Denver Pub. Schs., 944 F.2d 773, 776 (10th Cir. 1991).

55. In *Kennedy*, the Court described the analysis as only two steps, but the Court itself moved through three steps. *See* 142 S. Ct. at 2423.

56. *Garcetti*, 547 U.S. at 426 ("Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.").

of public concern;[57] if not, that speech is not protected.[58] Third, if the speech is related to a matter of public concern, the court must employ the *Pickering* balancing test, which weighs the employee's interest in expression related to the issue against the employer's interest in promoting the efficiency of the public services performed through its employees.[59]

The Supreme Court established the first inquiry—whether the speech was made pursuant to the government employee's official duties—in *Garcetti v. Ceballos*.[60] Although *Garcetti* did not establish a precedential framework for future determinations, the Court found that a disposition memorandum written by a deputy prosecutor was made pursuant to the deputy prosecutor's official duties.[61] In later rulings applying the *Garcetti* framework, the Court announced that the "critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties."[62]

The Supreme Court established the second inquiry—whether the speech is related to a matter of public concern—in *Pickering v. Board of Education of Township High School District*.[63] In *Pickering*, a high school teacher sent a letter to a local newspaper critical of the school district's process for considering proposals for revenue-raising taxes to fund the schools.[64]

---

57. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 466 (1995) ("[W]e have applied *Pickering*'s balancing test only when the employee spoke '*as a citizen* upon matters of public concern' rather than '*as an employee* upon matters only of personal interest.'" (quoting Connick v. Myers, 461 U.S. 138, 147 (1983))).

58. *See id.*

59. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

60. 547 U.S. at 426.

61. *Id.* at 421. In *Garcetti*, the parties stipulated that the statement in question was made pursuant to the employee's official duties, so the Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 424 (opting for a simpler approach by asserting that "[t]he proper inquiry is a practical one."). The Court did clarify that employers cannot take advantage of the breadth of the practical inquiry by rejecting Justice Souter's concern that "employers can restrict employees' rights by creating excessively broad job descriptions." *Id.* at 424.

62. Lane v. Franks, 573 U.S. 228, 240 (2014); *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022) (citing *Lane*, 573 U.S. at 240).

63. The *Pickering* balancing test only applies when a teacher is speaking as a citizen upon matters of public concern instead of as an employee upon matters only of personal interest. *See Pickering*, 391 U.S. at 568; *see also* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 466 (1995) (citing Connick v. Myers, 461 U.S. 138, 147 (1983)).

64. The teacher's letter criticized the school board's "allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real

There, the Court ruled that the teacher's speech was a matter of public concern because the issue of school funding is inherently political, supporting the notion that speech on political issues should require additional scrutiny before making any restrictive determination.[65]

The Supreme Court clarified the public concern determination in *Connick v. Myers*, where an assistant district attorney was terminated after complaining about a proposed transfer, distributing a questionnaire regarding the district attorney's employment practices, and ultimately refusing the transfer.[66] There, the Court emphasized that speech made in a government workplace is not automatically a matter of public concern.[67] Rather, if the employee's speech "cannot be fairly considered as relating to any matter of political, social, or other concern to the community," the rationale for the action by the employer will not be scrutinized.[68] The Court established that the public concern determination requires that this type of speech be "determined by the content, form, and context of a given statement, as revealed by the whole record."[69]

In *Pickering*, the Supreme Court also established the third and final part of the government-employee speech analysis—known as the *Pickering* balancing test.[70] This test considers "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[71] The Court identified two key factors when applying the test: (1) whether the employee's speech would interfere with the employee's responsibilities;[72] and (2) whether the relationship

---

reasons why additional tax revenues were being sought for the schools." *Pickering*, 391 U.S. at 569.

65. *See id.* at 571–72 ("On such a question free and open debate is vital to informed decision-making by the electorate.").

66. 461 U.S. at 140–41.

67. *Id.* at 143. The Court has also concluded that private conversations, even between a teacher and their principal, are subject to the public concern determination. *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414–15 (1979).

68. *Myers*, 461 U.S. at 146. The Court further notes that the *Pickering* line of cases recognizes the sentiment that "government offices could not function if every employment decision became a constitutional matter"; therefore, courts should not give additional First Amendment protection to speech not about a matter of public concern. *Id.* at 143.

69. *Id.* at 147–48. Although there are factual elements considered as a part of the public concern decision, this determination is a matter of law. *Id.* at 150 n.10.

70. 391 U.S. at 568.

71. *Id.* The *Pickering* balancing test applies not only to teachers but also to other government employees. *See Myers*, 461 U.S. at 140.

72. *Pickering*, 391 U.S. at 572–73 (1968). *Pickering* provides a strong example of speech that did not interfere or have the potential to interfere with the employee's job duties: the teacher's letter regarding funding did not relate to the teacher's ability to perform their duties in the classroom because the letter was unrelated to the teacher's daily work. *See id.* However, in *Foote v. Town of Bedford*, the court noted that when one of the employee's

between the speaker and the receiver of the speech would be adversely affected.[73]

As applied to the facts in *Pickering*, the Court did not consider the teacher's letter to interfere with their teaching responsibilities because it was outside the scope of their role as a teacher.[74] Also, the Court found that although the relationship between the teacher and the school board was important, the funding decision directly impacted teachers, so it was essential for teachers to speak freely on the matter without fear of retribution.[75] Ultimately, the Court considered the teacher's First Amendment rights to outweigh any impact the teacher's statements about school funding might have had on the school district's ability to provide its services efficiently.[76]

Since establishing the *Pickering* balancing test, the Supreme Court has clarified the application of the test through a series of cases spanning five decades.[77] For example, a determination that the First Amendment protects a teacher's speech does not provide the teacher carte blanche protection from all disciplinary action if there are sufficient additional grounds for that disciplinary action.[78] Also, the Court has recognized contextual differences

---

essential functions is coordinating policy with other officials, vocal criticism of those officials meets the constitutional threshold of interfering with the employee's responsibilities. 642 F.3d 80, 86 n.4 (1st Cir. 2011).

73. *Pickering*, 391 U.S. at 569–70; *see also Myers*, 461 U.S. at 151–52 ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.").

74. 391 U.S. at 569–70.

75. *Id.* at 571–72. The school board fired the teacher because the letter was considered "detrimental to the best interests of the schools" and because the letter contained some false assertions, which the school board believed "would tend to foment 'controversy, conflict, and dissension' among teachers, administrators, the Board of Education, and the residents of the district." *Id.* at 567.

76. *Id.* at 572–73.

77. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977), *superseded on other grounds by statute*, 5 U.S.C. § 1221(e)(2) (2017); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415 n.4 (1979); *Myers*, 461 U.S. at 143; Waters v. Churchill, 511 U.S. 661, 690 (1994); Garcetti v. Ceballos, 547 U.S. 410, 434 (2006); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423 (2022).

78. In *Mt. Healthy City School District v. Doyle*, the Court qualified previous rulings by explaining that if the teacher successfully demonstrates their conduct was constitutionally protected and was also a substantial or motivating factor for their termination, the burden shifts to the school district to demonstrate that the teacher's termination would have occurred notwithstanding the protected conduct of the teacher. 429 U.S. at 287; *see also* Perry v. Sindermann, 408 U.S. 593, 598 (1972). Therefore, the *Mt. Healthy* and *Perry* rulings maintain protection for teachers when exercising constitutionally protected rights; however, adverse action against the teacher may be justified if there is sufficient evidence to demonstrate

between speech made in private and speech made in public, which requires further analysis to assess the impact the teacher's speech might have on the school district's ability to execute its mission.[79] Further, the Court established that courts should apply the *Pickering* balancing test to what the government employer thought was said, not to what the trier of fact determines was said.[80]

a. Lower Court Application of the Government-Employee Speech Analysis

In *Garcetti*, the Supreme Court acknowledged that it did not determine whether the "pursuant to official duties" analysis would apply to teachers' classroom speech,[81] and in *Kennedy*, the Court affirmed the appropriate analysis for teachers' expression outside the classroom.[82] Nevertheless, lower courts differ in the application of the government-employee speech analysis.[83]

Some lower courts have applied the *Garcetti* analysis to teachers' classroom speech.[84] The Sixth Circuit found that "*Garcetti*'s caveat" applies only to colleges and universities, where academic freedom is recognized for each

---

the adverse action is based on other, unprotected actions of the teacher. *See Mt. Healthy*, 429 U.S. at 287.

79. For speech made in public, courts assess the statement to determine whether the speech "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Pickering*, 391 U.S. at 572–73. However, speech made in private may warrant additional factors for consideration, including whether the employer's "institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." *Givhan*, 439 U.S. at 415 n.4; *see also* Rankin v. McPherson, 483 U.S. 378, 390–92 (1987) (examining the scope of the employee's duties and the nature of the relationship between the employee and the person to whom they were speaking in applying the *Pickering* balancing test to a private conversation between coworkers); Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 686 (1996) (extending the *Pickering* line of cases to independent contractors, not just traditionally categorized employees).

80. *Waters*, 511 U.S. at 681 (holding that the appropriate version of the speech at issue should be what the supervisor believed was said, even though a third party told the supervisor about the conversation); *see also* Heffernan v. City of Paterson, 578 U.S. 266, 273 (2016) ("[T]he government's reason for demoting [the employee] is what counts here.").

81. 547 U.S. at 425 ("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.").

82. *See* 142 S. Ct. at 2423–24.

83. The Southern District of New York identified some of the circuit splits involving *Garcetti*'s application to teachers' classroom speech. *See* Lee-Walker v. N.Y.C. Dep't of Educ., 220 F. Supp. 3d 484, 491 n.2 (S.D.N.Y. 2016).

84. *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 344 (6th Cir. 2010); Brown v. Chi. Bd. of Educ., 824 F.3d 713, 718 (7th Cir. 2016); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 961 (9th Cir. 2011).

teacher; therefore, *Garcetti* can be applied to teachers' classroom speech because the Supreme Court only intended to exclude higher education teachers.[85] On more than one occasion, the Seventh Circuit also "concluded that a teacher's in-classroom speech is not the speech of a 'citizen' for First Amendment purposes."[86] Also, the Ninth Circuit stated that primary and secondary public school teachers' classroom speech is subject to the *Garcetti* analysis.[87] Conversely, the Fourth Circuit expressly rejected the application of the *Garcetti* analysis to teachers' classroom speech.[88]

Regardless of whether courts apply *Garcetti* to teachers' classroom speech, they must also determine whether the speech is a matter of public concern to trigger the *Pickering* balancing test.[89] Courts must consider the expression's context, form, and content to make this determination.[90]

Although the Supreme Court has not applied the public concern determination to teachers' classroom speech,[91] several circuit courts have

85. "*Garcetti*'s caveat" is the exclusion of teaching from *Garcetti* analysis because the Court had no reason to address teaching in that case. *See Evans-Marshall*, 624 F.3d at 343–44; *Garcetti*, 547 U.S. at 425. However, there are existing First Amendment distinctions—primarily regarding academic freedom—between elementary and secondary public school teachers and public university teachers. *See* RACHEL LEVINSON, AM. ASS'N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND THE FIRST AMENDMENT 14 (2007), https://www.aaup.org/ NR/rdonlyres/57BFFE5E-900F-4A2A-B399-033ECE9ECB34/0/AcademicfreedomandFirstAmenoutline0907doc.pdf [https://perma.cc/BW2T-J378]; Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 CATH. U. L. REV. 125 (2009); Lauren K. Ross, *Pursuing Academic Freedom After* Garcetti v. Ceballos, 91 TEX. L. REV. 1253 (2013).

86. *Brown*, 824 F.3d at 715 (citing Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007)).

87. *See Johnson*, 658 F.3d at 966 n.12.

88. The Fourth Circuit declined to apply the *Garcetti* analysis to content a teacher published on their classroom bulletin board. Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694 n.11 (4th Cir. 2007).

89. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). If the Supreme Court's ruling in *Garcetti* regarding the inapplicability to teachers' classroom speech is accepted, then analysis from the public-employee analytical framework would necessarily fall back squarely to *Pickering* without the "pursuant to official duties" consideration. Alternatively, if a court applies *Garcetti* to teachers' classroom speech, it must also determine whether that speech is a matter of public concern. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423–24 (2022).

90. Connick v. Myers, 461 U.S. 138, 148–49 (1983).

91. The Supreme Court's application of the *Pickering* analysis in the cases discussed above does not address the classroom context, which is the focal point of this Comment's consideration. *See* Perry v. Sindermann, 408 U.S. 593 (1972); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979); *Myers*, 461 U.S. at 138; Rankin v. McPherson, 483 U.S. 378 (1987);

implemented the determination in relevant factual settings. The Fourth, Sixth, Seventh, and Ninth Circuits have all found the public concern determination to trigger the *Pickering* balancing test.[92] Notably, the lower courts did not automatically assume that the speech was a matter of public concern simply because the speech occurred in the context of the classroom —they analyzed the speech to make that determination.[93] Some of the courts did emphasize that curricular speech ordinarily is considered to be of public concern.[94] Therefore, *Pickering* and its progeny offer guidance for the public concern analysis.

2. Student Speech Analysis

When analyzing teachers' speech using the student speech analytical framework, the reviewing court makes an initial determination: whether the speech is purely personal speech or school-sponsored speech.[95] Purely personal speech is that which is expressed outside of a school-sponsored activity or outside a school-sponsored publication.[96] School-sponsored speech is that which is expressed during school activities, as a part of a class, or is representative of the school.[97]

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court established the principal test for purely personal speech: the substantial disruption test.[98] School districts can regulate speech that "materially and substantially interfere[s] with the requirements of appropriate

---

Waters v. Churchill, 511 U.S. 661 (1994); Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668 (1996).

92. *Lee*, 484 F.3d at 700 (material posted on a classroom bulletin board); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 340 (6th Cir. 2010) (teacher selection of classroom textbooks and methods of instruction); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007) (teacher's in-class expression of political beliefs); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 964, 965 (9th Cir. 2011) (in-class display of banners with text related to religion).

93. *See, e.g.*, *id.* at 965 (considering the content of the speech as the most important factor in making the "public concern" determination).

94. *See Evans-Marshall*, 624 F.3d at 339; *see also Mayer*, 474 F.3d at 478–79.

95. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

96. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (students wearing armbands in opposition of the Vietnam War); Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 526 (9th Cir. 1992) (students wearing buttons displaying anti-strike slogans).

97. *See Hazelwood*, 484 U.S. at 263 (article in a school newspaper); Morse v. Frederick, 551 U.S. 393, 396 (2007) (banner displayed by students on a school field trip).

98. 393 U.S. at 512–13 (holding that a policy that prevented students from wearing armbands expressing opposition to the Vietnam War violated the students' First Amendment rights because the students' expression did not "materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school" (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966))).

discipline in the operation of the school."[99] Later, in *Bethel School District v. Fraser*, the Court expanded school districts' ability to regulate speech: courts should assess the reasonableness of such regulation in consideration of the age and maturity of the students.[100]

In *Hazelwood Independent School District v. Kuhlmeier*, the Supreme Court established the standard against which courts analyze school-sponsored speech.[101] In *Hazelwood*, the school's principal censored several pages of the official school newspaper containing a story describing three students' experiences with pregnancy and another story discussing the impact of divorce on students.[102] The Court distinguished speech that is part of a school-sponsored activity—speech that "members of the public might reasonably perceive to bear the imprimatur of the school"—from other speech.[103] The Court held that schools could restrict school-sponsored speech as long as the restrictions are "reasonably related to legitimate pedagogical concerns," which included the principal's rationale to deliver

99. *Id.* at 509 (quoting *Burnside*, 363 F.2d at 749). The Court clarified that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

100. 478 U.S. 675, 683–84 (1986); *see also Hazelwood*, 484 U.S. at 272. Although the Supreme Court decided *Fraser* before it delineated the school-sponsored speech sub-analysis in *Hazelwood*, the speech at issue took place at an assembly, which would likely fall under the school-sponsored speech sub-analysis. *Id.* at 677, 684–85; *see also Hazelwood*, 484 U.S. at 271. Further, the standard in *Fraser* has also been applied to non-school-sponsored speech. *See, e.g.*, *Chandler*, 978 F.2d at 529 ("[S]chool officials may suppress speech that is vulgar, lewd, obscene, or plainly offensive without a showing that such speech occurred during a school-sponsored event . . . ."). Such regulation includes "the use of obscene [or] profane language or gestures" sufficient to satisfy the substantial disruption test. *Fraser*, 478 U.S. at 678 (holding that a student's use of "elaborate, graphic, and explicit sexual metaphor" during a presentation to a group of fourteen-year-old students substantially disrupted the educational process such that the school could freely regulate such speech).

101. 484 U.S. at 271–72.

102. *Id.* at 263–64. The principal had three concerns regarding the articles: (1) that the pregnant students, though unnamed, could be identified; (2) that the material in the pregnancy article, including references to birth control and sexual activity, was inappropriate for some of the younger students; and (3) that the divorce story included quotations from a student about their parents, which should be presented to the parents for comment. *Id.* at 263.

103. *Id.* at 271. "Imprimatur" in original Latin means "let it be printed," and in contemporary parlance, "imprimatur" is used to describe a "general grant of approval." *Imprimatur*, BLACK'S LAW DICTIONARY (11th ed. 2019). Here, the Supreme Court emphasizes that school-sponsored activities like a school newspaper, theatrical production, yearbook, or other sources of speech that bear the school's sponsorship or approval are under the school's "imprimatur." *See Hazelwood*, 484 U.S. at 268, 272.

age-appropriate information to students by removing the stories from the school newspaper.[104]

Morse v. Frederick is the most recent major case in which the Supreme Court examined First Amendment doctrines in a school setting.[105] Although *Morse* did not delineate a new standard, it illustrated the scope of a school's ability to regulate student speech by drawing on those test-setting precedents established by *Tinker*, *Fraser*, *and Hazelwood*.[106] In *Morse*, the school administration suspended a student for displaying a banner that read, "BONG HiTS 4 JESUS."[107] The Court defended the school's decision because the banner could be rationally understood to promote illicit drug use, which was against the school's policy.[108]

Although the Court recognized the seriousness of illicit drug use by children as a valid compelling reason for prohibiting student speech, the Court stopped short of considering the message on the banner to violate the "offensive" standard from *Fraser*.[109] This decision illustrates the contextualized nature of prohibiting or punishing speech expressed at school. It underscores the balance between respecting the constitutional rights students maintain even when they are in school and applying those rights "in light of the special characteristics of the school environment."[110]

a. Lower Court Application of the Student Speech Analysis

Although the *Pickering* balancing test applies to teachers in their capacity as government employees, an examination of classroom-specific speech reveals two judicial approaches: (1) teachers and students have the same expressive rights and restrictions; or (2) teachers and students do not have

---

104. *Hazelwood*, 484 U.S. at 273. In retrospect, the speech in *Fraser* likely would be considered under the *Hazelwood* standard of school-sponsored speech, although the standard in *Fraser* has been applied to non-school-sponsored speech as well. *See, e.g.*, Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) ("[S]chool officials may suppress speech that is vulgar, lewd, obscene, or plainly offensive without a showing that such speech occurred during a school-sponsored event.").

105. 551 U.S. 393 (2007).

106. *See id.* at 396; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969) (establishing the substantial disruption test); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684–85 (1986) (evaluating the reasonableness of speech regulation based on the age and maturity of the students); *Hazelwood*, 484 U.S. at 273 (stating that the regulation must be reasonably related to a legitimate pedagogical concern).

107. 551 U.S. at 397.

108. *Id.* at 407–08.

109. *Id.* at 409 ("*Fraser* . . . should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.").

110. *See id.* at 397 (quoting *Hazelwood*, 484 U.S. at 266).

the same expressive rights and restrictions.[111] The cases discussed above are notable examples of judicial standards that courts have applied directly to students and teachers or have implied could be extended to both students and teachers.

Even though the Supreme Court decided both *Tinker* and *Hazelwood* in response to student speech issues, the Court implied its analysis would apply equally to teachers' speech.[112] In *Tinker*, the Court emphasized that the First Amendment rights in schools "are available to teachers and students."[113] And in *Hazelwood*, the Court held that "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community," at least within the scope of curricular activities.[114]

Lower courts have also applied student speech analyses to teachers' speech. The First, Second, and Tenth Circuits have extended the analysis in *Hazelwood* to teachers' classroom speech in cases where schools have legitimate pedagogical concerns.[115] However, a Fourth Circuit judge

111. *Compare* Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993) (applying the standard for student speech from *Hazelwood* to teachers' speech), *and* Miles v. Denver Pub. Schs., 944 F.2d 773, 777 (10th Cir. 1991) ("There [is] no reason to distinguish between students and teachers where classroom discussion is concerned."), *with* Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990) ("Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected, her in-class conduct is not."). Also, some courts have even applied both approaches. *See* Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 798–801 (5th Cir. 1989) (relying on *Pickering*-related cases regarding the use of a supplemental reading list without obtaining the required district approval, but also applying *Hazelwood* to recognize that the district can place restrictions on teachers' speech similar to students); Columbus Educ. Ass'n v. Columbus City Sch. Dist., 623 F.2d 1155, 1159–60 (6th Cir. 1980) (using both lines of analysis to find that under either approach the teacher's rights were violated); Russo v. Cent. Sch. Dist. No. 1, 469 F.2d 623, 630–33 (2d Cir. 1972) (utilizing both public employment analysis and student speech analysis in holding that the school district violated the teacher's First Amendment rights).

112. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."); *Hazelwood*, 484 U.S. at 267.

113. 393 U.S. at 506.

114. 484 U.S. at 267.

115. *See Ward*, 996 F.2d at 453 (applying the *Hazelwood* analysis to determine whether the teacher's discussion of abortion of fetuses with Down Syndrome was within the control of the school district); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723–24 (2d Cir. 1994) (holding that a guest lecturer's presentation of a film was school-sponsored speech under the *Hazelwood* standard); *Miles*, 944 F.2d at 776 (holding that a teacher's comments made in the classroom regarding a school rumor about

encouraged restraint in applying the student standard adopted in *Hazelwood* to teachers' speech because not "every word uttered by a teacher in a classroom is curriculum."[116]

Other lower courts have applied *Fraser* to teachers' classroom speech. The Second and Eighth Circuits have extended the student doctrine to teachers similar to *Hazelwood*—the focus is on the relationship to a legitimate pedagogical concern.[117] However, most lower courts have neither applied the student speech framework to teachers' speech nor explicitly stated it as such; instead, those courts have opted for the government-employee analysis.[118]

III. CHARTING A PATH FOR TEACHERS' CLASSROOM SPEECH: NAVIGATING THE GAPS BETWEEN JUDICIAL FRAMEWORKS

Without a clear judicial doctrine to rely on, the increasing legislation restricting areas of instruction and discussion puts teachers in a precarious position as they attempt to comply with the law and perform their jobs.[119] This Section will address questions the Supreme Court should resolve so teachers can meet their obligations to the nation's youth: What speech is affected by the new legislation? What are the consequences of complying

---

students were school-sponsored speech under *Hazelwood*). Under the *Hazelwood* analysis, a legitimate pedagogical concern is something related to learning such that it falls under the regulation of the school, school district, or state government. *See Hazelwood*, 484 U.S. at 271 (finding that material that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences" would be a sufficient pedagogical concern such that a school could regulate it); *see also* Fleming v. Jefferson Cnty. Sch. Dist., 298 F.3d 918, 925 (10th Cir. 2002).

116. Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 373 (4th Cir. 1998) (Luttig, J., concurring) ("In the . . . context of teacher in-class noncurricular speech, the teacher assuredly enjoys some First Amendment protection. In the . . . context of teacher in-class curricular speech, the teacher equally assuredly does not.").

117. *See* Conward v. Cambridge Sch. Comm., 171 F.3d 12, 22–23 (1st Cir. 1999) (applying *Fraser* and *Hazelwood* in analyzing teachers' speech via the distribution of lewd materials to students); *see also* Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 724 (8th Cir. 1998) (relying on *Fraser* to uphold the termination of a teacher for not exercising more control in prohibiting students from using profanity in an assignment).

118. *See* discussion *supra* Section II.B.

119. *See* Brooke Migdon, *Restrictive Curriculum Bills Nearly Tripled in 2022, Report Finds*, THE HILL (Aug. 17, 2022), https://thehill.com/changing-america/enrichment/education/3605287-restrictive-curriculum-bills-nearly-tripled-in-2022-report-finds/ [https://perma.cc/QFK9-ZUHU]; Anna Merod, *Proposed Curriculum Censorship Bills Increased 250% in 2022*, K–12 DIVE (Aug. 17, 2022), https://www.k12dive.com/news/proposed-curriculum-censorship-bills-increased-250-percent-in-2022/629926/ [https://perma.cc/H9T7-78Q6].

with and violating the new legislation? What legal doctrine should teachers rely on to understand their First Amendment protections?

A. Practical Issues

1. What Speech Is Affected?

One issue arising from regulating Critical Race Theory instruction and discussion is the difference between the language used by the proponents of Critical Race Theory and that of many of the statutes claiming to prohibit its instruction. Critical Race Theory includes several tenets. Among those relevant to this analysis include (1) race is a socially constructed concept rather than a biological concept; (2) racism is structurally and systemically embedded within society rather than exhibited only by a few individuals who stray from societal norms; and (3) the inclusion and recognition of the lived experiences of people of color, rather than excluding the realities of those persons' experiences and histories.[120] A comparison of these tenets to the text of the Idaho statute[121] reveals no direct connection between Critical Race Theory and the statutory language.[122]

Instead, the statutes mirror President Trump's September 2020 executive order, which also did not expressly refer to Critical Race Theory.[123] The only meaningful difference between the executive order and the text of

120. *See* George, *supra* note 14. For a more comprehensive exploration of Critical Race Theory, see Part II of KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 123–252 (2019).

121. The Idaho statute regulating the instruction of Critical Race Theory represents the language of most related enacted legislation. *See* IDAHO CODE ANN. § 33-138 (West 2021).

122. *Compare* George, *supra* note 14, *with* IDAHO CODE ANN. § 33-138 (referencing Critical Race Theory, but the tenets listed in the statute do not align textually with the tenets of Critical Race Theory). The only statute that expressly prohibits the instruction of Critical Race Theory is North Dakota's. N.D. CENT. CODE ANN. § 15.1-21-05.1 (West 2023) ("A school district or public school may not include instruction relating to critical race theory in any portion of the district's required curriculum . . . .").

123. Exec. Order No. 13950, Combatting Race and Sex Stereotyping, 85 Fed. Reg. 60683 (Sept. 22, 2020). The executive order defined "divisive concepts," to include the following:

> that (1) one race or sex is inherently superior to another race or sex . . . (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex . . . [or] (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex.

Id. at 60685.

the Idaho statute is that the executive order includes a longer list of prohibited divisive concepts, and the Idaho statute extends the prohibition to sex, race, ethnicity, religion, color, and national origin.[124] Through this connection to the executive order, teachers could infer that they are not to teach Critical Race Theory or any of its tenets,[125] while a plain reading of the statutes likely does not yield that result.[126] As a consequence, teachers may be confused about what is appropriate to teach.[127]

Another issue created by the text of Florida's law regulating instruction regarding sexual orientation and gender identity is the resulting confusion about when these regulated topics are off limits.[128] The text states that "classroom instruction" is the regulated subset of speech; however, the legislative pretext to the bill references "classroom discussion."[129] Courts often look to the legislative intent or history when analyzing the application of a statute, and here, the definition of *instruction* could be determinative.[130] Instruction might be understood to include curricula, lesson plans, books, and other materials teachers use to execute their lessons.[131] If courts interpret instruction to include discussion, however, the law's scope potentially broadens to include organic dialogue between teachers and students or informal discussions outside the delineated lesson.[132] Although litigation often settles statutory ambiguities like this, teachers must attempt to anticipate the statute's meaning to avoid a violation, thereby substantially chilling their speech.[133]

Last, the Florida statute presents the potential for a moving target through significant delegation to the Florida Department of Education. The statute

---

124. *Compare id.*, *with* IDAHO CODE ANN. § 33-138.

125. *See* Adams, *supra* note 29.

126. *See* Jonathan Feingold, *POV: What the Public Doesn't Get: Anti-Critical Race Theory Lawmakers Are Passing Pro-CRT Laws*, BOS. UNIV. TODAY (Dec. 3, 2021), https://www.bu.edu/articles/2021/pov-anti-critical-race-theory-lawmakers-are-passing-pro-crt-laws/ [https://perma.cc/S2FP-84KS]; JONATHAN FRIEDMAN & JAMES TAGER, EDUCATIONAL GAG ORDERS 8 (2022), https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf [https://perma.cc/5G8F-UGHF].

127. *See* Meckler & Natanson, *supra* note 23.

128. *See* FLA. STAT. ANN. § 1001.42 (West 2023).

129. *See* H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) ("An Act relating to . . . prohibiting classroom discussion about sexual orientation or gender identity in certain grade levels or in a specific manner.").

130. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330 (2006); Jones v. Thomas, 491 U.S. 376, 385 (1989); Whalen v. United States, 445 U.S 684, 692–93 (1980); Watson v. Buck, 313 U.S. 387, 396–97 (1941).

131. *See* Nierenberg, *supra* note 45.

132. *See id.*

133. *See* Block, *supra* note 6; *see also* Spencer Robertson, *"Don't Say Gay" Now in Effect & Consequences Abound*, VICTORY FUND (July 17, 2022), https://victoryfund.org/dont-say-gay-now-in-effect-consequences-abound/ [https://perma.cc/BS5C-ZUTN].

delegates the determination of what information is "age-appropriate or developmentally appropriate" to the Florida Department of Education,[134] which promulgated this guidance in the Principles of Professional Conduct for the Education Profession in Florida:

> [Teachers] shall not intentionally provide classroom instruction to students in grades 4 through 12 on sexual orientation or gender identity unless such instruction is either expressly required by state academic standards . . . or is part of a reproductive health course or health lesson for which a student's parent has the option to have his or her student not attend.[135]

The current state academic standards do not include any requirements for instruction on sexual orientation or gender identity.[136] Although the current guidance provides a brighter line for teachers, the Florida Department of Education could move that line in this or future gubernatorial administrations.

As other state legislatures craft laws using these enacted statutes as a model, the risk of replicating ambiguities is high.[137]

2. What Are the Consequences for the Teaching Profession?

Statutes regulating Critical Race Theory and instruction regarding sexual orientation and gender identity intend to empower parents, combat anti-racism, and eliminate divisive or controversial topics from schools.[138] But the realized consequences vary. These laws often create confusion, restraint, and in some cases, resignation.[139]

---

134. FLA. STAT. ANN. § 1001.42(8)(c)(3) (West 2023).

135. FLA. ADMIN. CODE ANN. r. 6A-10.081 (2023).

136. *Browse and Search Standards*, CPALMS, https://www.cpalms.org/Public/search/Standard [https://perma.cc/PM65-MMLL]; *see also Comprehensive Health Education*, FLA. DEP'T OF EDUC., https://www.fldoe.org/schools/healthy-schools/comprehensive-health-edu.stml [https://perma.cc/9RPS-4EBT].

137. *See* Jones & Franklin, *supra* note 49.

138. *See* Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory*, BROOKINGS (Nov. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/ [https://perma.cc/TP3H-WSDS]; *Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education*, FLA. GOVERNOR (Mar. 28, 2022), https://www.flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/ [https://perma.cc/6GPQ-WTRJ].

139. *See* Loller & Coronado, *supra* note 23; Meckler & Natanson, *supra* note 23.

Confusion is likely a result of the ambiguities addressed in the Section above.[140] This confusion chills teachers' speech because teachers do not want to violate the law, and they temper their lessons to ensure compliance.[141]

Also, these laws encourage restraint in a more personal way. Many teachers use their own lives as examples in lessons or as a way to relate to students; through shared stories or experiences, teachers develop rapport with students, which contributes to a more positive learning environment.[142] However, teachers working in states with restrictive statutes do not feel safe discussing their personal experiences related to race or sexual orientation, which are often considered essential parts of those teachers' identities.[143] The consequences of this restraint can be detrimental not only to the learning environment but to the teacher's professional satisfaction and mental health.[144] Unsurprisingly, some teachers would not want to continue working in such an environment.[145]

Additional consequences directly impact teachers, including the private right of action and loss of funds, which some statutes expressly include.[146]

---

140. *See* discussion *supra* Section III.A.1.

141. *See* Olivia B. Waxman, *Anti-'Critical Race Theory' Laws Are Working. Teachers Are Thinking Twice About How They Talk About Race*, TIME (June 30, 2022, 12:37 PM), https://time.com/6192708/critical-race-theory-teachers-racism/ [https://perma.cc/5KKF-V88K].

142. *See* Nancy Barile, *Sharing Personal Experiences When Teaching, How Much is Too Much?*, HEY TEACH!, https://www.wgu.edu/heyteach/article/sharing-personal-experiences-when-teaching-how-much-is-too-much1909.html [https://perma.cc/9QEG-NAXD]; Ryan Colwell, *Teaching Writing From the Inside Out: Teachers Share Their Own Children's Books as Models in Elementary School Classrooms*, 57 READING HORIZONS 17 (2018); The Learning Network, *What Students Are Saying About How Their Teachers Have Shaped Them*, N.Y. TIMES (Oct. 20, 2022), https://www.nytimes.com/2022/10/20/learning/what-students-are-saying-about-how-their-teachers-have-shaped-them.html [https://perma.cc/VTC8-3EGN].

143. *See* Sarah Mervosh, *Back to School in DeSantis's Florida, as Teachers Look Over Their Shoulders*, N.Y. TIMES (Aug. 27, 2022), https://www.nytimes.com/2022/08/27/us/desantis-schools-dont-say-gay.html [https://perma.cc/HB28-CJHG].

144. *See* Bryan J. Duarte et al., *Understanding the Progression and Impact of Anti-LGBTQ+ Legislation: A Community Conversation*, 5 J. FAMILY DIVERSITY EDUCATION 59, 60–61 (2022); *see also Teachers in Crisis: Understanding Mental Health Through Maslow's Hierarchy of Needs*, SEATTLE ANXIETY SPECIALISTS (Aug. 15, 2022), https://seattleanxiety.com/psychiatrist/2022/8/12/teachers-in-crisis-understanding-mental-health-through-maslows-hierarchy-of-needs [https://perma.cc/CPD6-WFUB].

145. *See* Hannah Natanson, *This Florida Teacher Married a Woman. Now She's Not a Teacher Anymore*, WASH. POST (May 19, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/05/19/gay-florida-teacher-desantis-lgbtq/ [https://perma.cc/S55Z-MWTV]; *see also* Daniel Villarreal, *Death Threats and Fights Over Critical Race Theory Have Driven at Least Six Educators to Resign*, NEWSWEEK (July 14, 2021, 12:26 AM), https://www.newsweek.com/death-threats-fights-over-critical-race-theory-have-driven-least-six-educators-resign-1609461 [https://perma.cc/P849-C85L].

146. *See* FLA. STAT. ANN. § 1000.05(4)(a) (West 2022), *invalidated by* Pernell v. Fla. Bd. of Governors, 641 F. Supp.3d 1218 (N.D. Fla. 2022); GA. CODE ANN. § 20-1-11 (West

The private right of action leaves teachers feeling vulnerable not only to the supervision of their administrators but also to that of parents and, in some cases, uninvolved taxpayers.[147] Potential litigation turning on determinations about what a teacher said during a class period is a daunting prospect for many educators.[148] Also, the cost of litigation and the potential to lose school funding places increased burdens on teachers, who are already operating in an underfunded environment.[149]

Lastly, although the consequences of these restrictive statutes fall primarily at the feet of teachers and school districts, they also impact students.[150] Ultimately, without stronger protections for teachers and more precise guidance from the Supreme Court, teachers will have to live with the consequences of these statutes or resign.

2022); N.H. REV. STAT. ANN. § 354-A:29 (2021); TENN. CODE ANN. § 49-6-1019 (West 2021).

147. *See* Andrew Ujifusa, *How Politics Are Straining Parent-School Relationships*, EDUC. WEEK (Feb. 10, 2022), https://www.edweek.org/leadership/how-politics-are-straining-parent-school-relationships/2022/02 [https://perma.cc/AFN7-6ASC]; *see also* Hannah Natanson, *Trust in Teachers is Plunging Amid a Culture War in Education*, WASH. POST (Sept. 6, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/09/06/teachers-trust-history-lgbtq-culture-war/ [https://perma.cc/7KK9-BZPB].

148. Considering that courts apply the *Pickering* standard to what the employer believed was said, student testimony could be dispositive in these determinations because there were likely no other adults in the room to corroborate what a teacher said. *See* Waters v. Churchill, 511 U.S. 661, 681–82 (1994).

149. *See* Melissa Smith, *I Work at One of America's Underfunded Schools. It's Falling Apart*, THE GUARDIAN (May 26, 2018, 6:00 AM), https://www.theguardian.com/education/2018/may/26/us-school-funding-what-its-like-work-oklahoma-teacher [https://perma.cc/G6UD-5N4J]; LISETTE PARTELOW ET AL., FIXING CHRONIC DISINVESTMENT IN K-12 SCHOOLS 1–2 (2018), https://www.americanprogress.org/wp-content/uploads/sites/2/2018/09/K12DisinvestmentBrief.pdf [https://perma.cc/88RU-6UN9].

150. The discussion of the impact on students is beyond the scope of this Comment. For commentary on student impact, see Robert Kim, *'Anti-Critical Race Theory' Laws and the Assault on Pedagogy*, KAPPAN (June 28, 2021), https://kappanonline.org/anti-critical-race-theory-laws-and-the-assault-on-pedagogy/ [https://perma.cc/92TX-UNCZ]; Eesha Pendharkar, *Efforts to Ban Critical Race Theory Could Restrict Teaching for a Third of America's Kids*, EDUC. WEEK (Feb. 4, 2022), https://www.edweek.org/leadership/efforts-to-ban-critical-race-theory-now-restrict-teaching-for-a-third-of-americas-kids/2022/01 [https://perma.cc/ZT7N-42AN]; Ariel Gilreath, *In the Wake of 'Don't Say Gay,' LGBTQ Students Won't Be Silenced*, HENCHINGER REP. (June 13, 2022), https://hechingerreport.org/in-the-wake-of-dont-say-gay-lgbtq-students-wont-be-silenced/ [https://perma.cc/YN33-WEB6]; Cady Stanton, *As 'Don't Say Gay' and Similar Bills Take Hold, LGBTQ Youths Feel They're 'Getting Crushed*,*'* USA TODAY (May 11, 2022, 3:45 PM), https://www.usatoday.com/story/news/education/2022/05/09/dont-say-gay-lgbtq-youth-reaction/7398468001/ [https://perma.cc/UWU6-AU2C].

B. Legal Issues

As legislation increases surrounding curricular speech, the Supreme Court must resolve the circuit split of approaches to analyzing teachers' classroom speech to provide teachers the clarity they need to execute their duties. As discussed briefly above, lower courts have applied inconsistent analytical frameworks to teachers' classroom speech.[151] This Section addresses the issues and consequences of applying the existing analytical frameworks. Throughout, each Subsection will apply Florida's Parental Rights in Education Act to illustrate potential issues with the analyses.

1. Applying the Existing Government-Employee Speech Analytical Framework

Kennedy v. Bremerton School District provides the Supreme Court's most recent application of the government-employee speech analysis applied to school employees.[152] The Court outlined an analysis that first applies *Garcetti*—whether the speech is pursuant to the official duties of the teacher—and subsequently applies *Pickering*—whether the teacher's speech is a matter of public concern, and if so, whether the school's interest in maintaining an efficient workplace outweighs the teacher's right to free speech.[153]

a. Garcetti *Likely Encompasses All Teachers' Classroom Speech*

The threshold issue in applying this analytical framework to teachers' classroom speech is the incompatibility of *Garcetti* with teachers' classroom speech. First, one part of the *Garcetti* opinion states, "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."[154] Many lower courts and scholars have understood this carve-out to apply only to public post-secondary teachers related to academic freedom—a constitutional protection elementary and secondary public school teachers do not enjoy.[155] Yet one circuit has extended this *Garcetti*

151. *See* discussion *supra* Sections II.B.1.a, II.B.2.a.
152. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).
153. *Id.* at 2423.
154. Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) (recognizing Justice Souter's argument in his dissent 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.").
155. *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 343 (6th Cir. 2010); Brown v. Chi. Bd. of Educ., 824 F.3d 713, 716 (7th Cir. 2016); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966 n.12 (9th Cir. 2011).

carve-out to elementary and secondary teachers' classroom speech.[156] The applicability of *Garcetti* to teachers' classroom speech is significant because teachers' work often extends beyond the scope of the job duties listed in their job descriptions.[157]

Second, if *Garcetti* does apply to teachers' classroom speech, the result would be inconsistent with other Supreme Court precedents on teachers' First Amendment rights. If applied to teachers' classroom speech, *Garcetti* would likely establish that virtually everything a teacher says in the classroom is unprotected speech because virtually everything a teacher does in the classroom is pursuant to their official duties.[158] If teachers' duties include instruction, supervision, mentorship, crisis management, communication of non-curricular information, advising, grading, and discipline—among other things—then it is hard to imagine what a teacher could do that would not be in some way pursuant to their official duties.[159]

Also, the Supreme Court has issued opinions with strong statements about teachers' First Amendment rights that are cited many times across its decisions:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.[160]
>
> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that

156. Lee v. York Cnty. Sch. Div., 484 F.3d 687, 689, 700 (4th Cir. 2007).

157. Although teacher job descriptions are relatively comprehensive regarding the breadth of a teacher's duties, a job description rarely delves into the scope of a teacher's permissible actions within each assigned duty. *See* L.A. UNIFIED SCH. DIST., CLASS DESCRIPTION: SECONDARY TEACHER 1–2 (2019), https://www.lausd.org/cms/lib/CA01000043/Centricity/domain/280/class%20descriptions/0736.pdf [https://perma.cc/L44S-PSZ7]; MIAMI-DADE CNTY. PUB. SCHS., JOB DESCRIPTION 1 (2009), https://platform-e.teachermatch.org/1200390/JobDescription/TCHR.pdf [https://perma.cc/ZV7E-H2G4]; *Full-Time Teachers Position Description*, D.C. PUB. SCHS., https://dcps.dc.gov/page/full-time-teachers-position-description#:~:text=Develops%20and%20implements%20curricula%20and,variation%20of%20work%20when%20necessary [https://perma.cc/JU4C-KZM2].

158. *See Garcetti*, 547 U.S. at 421.

159. *See id.* at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.").

160. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (citation omitted); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (citation omitted); Healy v. James, 408 U.S. 169, 180 (1972) (citation omitted).

> either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[161]

Applying *Garcetti* to teachers' classroom speech would directly contradict the notion that teachers retain any First Amendment rights related to free speech.

Third, from a factual standpoint, *Kennedy* does not provide guidance for analyzing teachers' classroom speech. Even though the Court included both coaches and teachers in the opinion, the relevant facts in *Kennedy* were limited to the moments after the end of a football game in a gray area of obligation for the coach regarding his official duties.[162] If a court applied the holding in *Kennedy* to teachers' classroom speech, their speech would only be protected at the end of class when students are transitioning from one class to another and the teacher is between official duties.[163]

To illustrate one potential application of recent legislation under the *Garcetti* analysis, a relevant section of Florida's Parental Rights in Education Act reads, "Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 8 . . . . If such instruction is provided in grades 9 through 12, the instruction must be age-appropriate or developmentally appropriate for students in accordance with state standards."[164] Here, the reviewing court's interpretation of *instruction* could be determinative as to whether the speech was made pursuant to the teachers' official duties.[165] If the teacher's speech related to sexual orientation or gender identity was part of a prepared lesson and delivered during regular instruction, that speech likely would be made pursuant to the teacher's official duties and would not be protected.[166] If the teacher's speech was part of an informal discussion with a student, however, the reviewing court could either make an interpretive decision that includes discussion within the instruction definition or gather additional factual information to determine the scope of the teacher's official duties.[167] Ultimately, either path could leave that teacher's speech unprotected because

---

161. *Tinker*, 393 U.S. at 506; Jones v. State Bd. of Educ., 397 U.S. 31, 35 (1970) (Douglas, J., dissenting) (citation omitted); Morse v. Frederick, 551 U.S. 393, 403 (2007) (citation omitted); Mahoney Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2044 (2021) (citation omitted).

162. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2418 (2022).

163. *See id.* at 2423–25.

164. FLA. STAT. ANN. § 1001.42(8)(c)(3) (West 2023).

165. *See supra* notes 128–32 and accompanying text.

166. Instruction is almost certainly related to the official duties of a teacher. *See* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

167. *See supra* notes 128–33 and accompanying text.

a court could reasonably consider informal discussions with a student to be "'ordinarily within the scope' of a[] [teacher's] duties."[168]

b. Teachers' Classroom Speech Likely is a Matter of Public Concern

If a teacher's classroom speech survived the *Garcetti* threshold and was not pursuant to the teacher's official duties, the subsequent inquiry would be whether the speech was a matter of public concern.[169] A court would not automatically consider teachers' classroom speech a matter of public concern simply because it happened on public property at school or because teaching is a publicly funded profession.[170] However, a court would likely consider teachers' classroom speech a matter of public concern because of the connectedness between teachers' classroom speech and the social and political fabric of the community.[171]

Most parents, and likely many community members, would consider teachers' classroom speech to be a matter of public concern because teachers are working with minor children and directly impacting the child's life, development, and subsequently, their participation in the family unit and the community.[172] Moreover, if a teacher is providing classroom instruction related to Critical Race Theory or sexual orientation and gender identity in a state that has regulated such speech, the classroom speech is likely to

168. *See Kennedy*, 142 S. Ct. at 2424 (quoting Lane v. Franks, 573 U.S. 228, 240 (2014)). Even the fear of the lack of protection for informal conversations between teachers and students could detract from teacher-student relationships and negatively impact teachers and students. *See* Amaris Ramey, Opinion, *STUDENT VOICE: 'Don't Say Gay' Bills Will Make it Harder for Teachers to Support Students Like Me*, HECHINGER REP. (June 27, 2022), https://hechingerreport.org/student-voice-dont-say-gay-bills-will-make-it-harder-for-teachers-to-support-students-like-me/ [https://perma.cc/APK6-7NTE]; Michael Sainato, *'It's Had a Chilling Effect': Florida Teachers Anxious About 'Don't Say Gay' Bill*, THE GUARDIAN (Aug. 31, 2022, 5:00 AM), https://www.theguardian.com/us-news/2022/aug/31/florida-dont-say-gay-bill-teachers-lgbtq [https://perma.cc/GU6A-G5YE].

169. *See Kennedy*, 142 S. Ct. at 2423; *see also* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

170. *See* Connick v. Myers, 461 U.S. 138, 146–47 (1983).

171. *See id.*

172. *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 339 (6th Cir. 2010) ("'The essence of a teacher's role is to prepare students for their place in society as responsible citizens,' and the teacher that can do that *without* covering topics of public concern is rare indeed, perhaps non-existent." (quoting Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001))); *see also* Isaac M. Opper, *Teachers Matter: Understanding Teachers' Impact on Student Achievement*, RAND CORP. (2019), https://www.rand.org/education-and-labor/projects/measuring-teacher-effectiveness/teachers-matter.html [https://perma.cc/9ATB-A8MA].

be considered a political issue sufficient to meet the matter of public concern threshold.[173] The legislation regulating those topics is politically divisive, and it is difficult to separate the political motivations for these regulations from their pedagogical implementation.[174]

Further, statutory language from Florida's Parental Rights in Education Act directly implicates public concern.[175] The Act requires school districts to adopt procedures through which parents can lodge complaints directly to the school district, and if the school district does not resolve the concerns, the Act enables parents to request action by the Florida Commissioner of Education or bring an action for declaratory judgment against the school district.[176] The Florida legislature's inclusion of a remedy available for parents, directly related to teachers' classroom speech, is a strong indicia that teachers' classroom speech related to sexual orientation and gender identity is a matter of public concern.[177]

c. Teachers' Free Speech Rights Likely Outweigh Workplace Efficiency

Assuming a court finds teachers' classroom speech to be a matter of public concern, the last inquiry weighs the teacher's right to free speech against the school district's interest in "promoting the efficiency of the public services it performs through its [teachers]."[178] Considering the enumeration of the freedom of speech in the First Amendment and the

---

173. *See Evans-Marshall*, 624 F.3d at 339 (referencing the fact that "[m]embers of the community had a lot to say about the topics discussed in [the teacher's] class" as support for the determination that the teacher's speech was a matter of public concern); *see also* Amna Nawaz, Courtney Norris & Vika Aronson, *Why Americans Are So Divided Over Teaching Critical Race Theory*, PBS (June 24, 2021, 6:25 PM), https://www.pbs.org/newshour/show/why-americans-are-so-divided-over-teaching-critical-race-theory [https://perma.cc/W678-5DXJ]; Sawchuk, *supra* note 18.

174. *See* Maria Caspani & Dawn Chmielewski, *Florida Set to Strip Disney of Self-Governing Status in Dispute Over LGBTQ Law*, REUTERS (Apr. 21, 2022, 5:48 PM), https://www.reuters.com/world/us/florida-lawmakers-pass-bill-that-would-revoke-disneys-special-status-2022-04-21/ [https://perma.cc/SCD5-R9U4] (stating that Disney's opposition to the Parental Rights in Education Act "set off a storm of condemnation against the company by many Republicans"); Eesha Pendharkar, *Is Florida's 'Don't Say Gay Law' Legal? A New Lawsuit Argues No*, EDUC. WEEK (Apr. 12, 2022), https://www.edweek.org/policy-politics/is-floridas-dont-say-gay-law-legal-a-new-lawsuit-argues-no/2022/04 [https://perma.cc/R59H-TCMZ] (quoting Governor DeSantis's communications director, who called the lawsuit against the Parental Rights in Education Act a "political Hail-Mary to undermine parental rights in Florida").

175. *See* FLA. STAT. ANN. § 1001.42(8)(c)(7) (West 2023).

176. *See id.*

177. *See* Connick v. Myers, 461 U.S. 138, 146–47 (1983). As more laws are proposed and enacted across different circuits, not only is the language regulating instruction being duplicated from one jurisdiction to another, but also the language enabling parental enforcement of the laws. *See supra* note 49 and accompanying text.

178. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

depth of First Amendment jurisprudence, teachers' free speech rights likely outweigh a school district's interest in workplace efficiency.[179]

Returning to the foundations of the First Amendment is essential in considering the deference given to the speaker compared to the government's intervention.[180] The restriction of governmental intervention to promote the public good defines the burden on the government to overcome any interest in the teacher's free speech rights in favor of protecting the public.[181]

A school district has a governmental protectionary interest in regulating a teacher's classroom speech due to the nature of adult teachers instructing a captive youth audience.[182] But that protectionary interest is not apparent in promoting an efficient workplace. Here, the interest in promoting an efficient workplace is restricted to employee management akin to a private business through regulating employees' speech because the government has employed those persons "for the very purpose of effectively achieving its goals."[183]

In *Connick v. Myers*, the Supreme Court indicated that a "stronger showing [by the government] may be necessary if the employee's speech more substantially involved matters of public concern."[184] As discussed above, teachers' classroom speech almost always involves matters of public concern, but further analysis would be needed to determine whether a teacher's classroom speech more substantially involves a matter of public concern than in *Connick*.[185]

In *Connick*, the Court considered this question to be a matter of public concern: "Do you ever feel pressured to work in political campaigns on

179. *See id.*

180. *See id.* at 573 (first citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); and then citing St. Amant v. Thompson, 390 U.S. 727 (1968)) (discussing how a core value of the First Amendment is "[t]he public interest in having free and unhindered debate on matters of public importance").

181. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 304–08 (2017).

182. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677–78 (1986) (considering the impact of "elaborate, graphic, and explicit sexual metaphor" on fourteen-year-old high school students).

183. Waters v. Churchill, 511 U.S. 661, 675 (1994).

184. 461 U.S. 138, 152 (1983).

185. Speech between a teacher and a student is likely considered to be of social concern to the community—and also political concern—because taxpayer funds finance public schools; therefore, teachers' classroom speech is virtually always regarding a matter of public concern. *See id.* at 146.

behalf of office supported candidates?"[186] Teachers' classroom speech likely surpasses that speech in *Connick* regarding its substantiality as a matter of public concern.[187] First, a teacher's classroom speech likely substantially involves a matter of public concern because of the community's investment in public education.[188] Second, if a teacher's classroom speech was related to the regulated topics discussed in this Comment—Critical Race Theory, sexual orientation, and gender identity—that speech likely substantially involves a matter of public concern because it is part of significant political and social debate and discourse throughout the country.[189] Third, a teacher's classroom speech likely substantially involves a matter of public concern because public education is compulsory. The children and families participating in public education have little choice but to be subject to their teachers' classroom speech for more than a decade.[190] To accommodate the public concern generated by teachers' classroom speech, the Court simply needs to recalibrate the *Pickering* balancing test.

2. Applying the Existing Student Speech Analytical Framework

Beyond the issues regarding *Garcetti*'s application to teachers' classroom speech is the circuits' conflict in their application of *Pickering*. As discussed above, courts have applied varying standards to teachers' classroom speech.[191] The primary difference between the circuits' decisions is whether the court treats the teacher like other government employees—*Pickering*—or whether the court places teachers on equal footing with students—*Hazelwood*.[192]

One obvious distinction between students and teachers is that teachers are subject to the government speech doctrine as public employees and do

186. *Id.* at 155.
187. *See id.* at 152.
188. *See* KIM PARKER ET AL., PEW RSCH. CTR., PARENTING IN AMERICA: OUTLOOKS, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 53–64 (2015), https://www.pewresearch.org/social-trends/2015/12/17/4-child-care-and-education-quality-availability-and-parental-involvement/ [https://perma.cc/HEX3-BCE3].
189. *See supra* notes 169–70 and accompanying text.
190. All fifty states have compulsory education laws. *See, e.g.*, CAL. EDUC. CODE § 48200 (West 1977) ("Each person between the ages of 6 and 18 years . . . is subject to compulsory full-time education."); *see also State Education Practices: Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT'L CTR. FOR EDUC. STAT. (2017), https://nces.ed.gov/programs/statereform/tab1_2-2020.asp [https://perma.cc/5HF2-HUGK].
191. *See* discussion *supra* Section II.B.
192. *Compare* Pickering v. Bd. of Educ., 391 U.S. 563 (1968), *with* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

not enjoy the same freedoms as students.[193] While the government speech doctrine is subject to the application described above, it does not apply to students.[194] But in the context of classroom speech, several circuits have assigned the same speech rights to teachers and students.[195] Further underscoring the issue, several relevant Supreme Court decisions have conflated students and teachers.[196] The equation of teachers and students would imply more balanced First Amendment protections between the two groups.

Indeed, the Court also has stated that "the First Amendment rights of students in the 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.'"[197] Thus, students' speech rights may equal the teacher's outside of school, where neither is subject to any limiting doctrines, while in school, teachers and students are not equal, but for different reasons.

In *Kennedy v. Bremerton School District*, the Supreme Court specifically addressed the decision to coaches and teachers, implying that courts should treat teachers like other government employees for First Amendment purposes.[198] Considering the recency of the Court's equation of teachers to government employees—rather than to students—if the Court had the opportunity to apply *Hazelwood* to teachers' speech, the Court might reevaluate its analytical steps to tailor them more precisely to teachers' speech.[199]

193. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991))).

194. *See* discussion *supra* Section II.B.2. Instead, courts apply *Hazelwood* and related cases to student speech. *See* discussion *supra* Section II.B.2.

195. *See* Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723–24 (2d Cir. 1994); Miles v. Denver Pub. Schs., 944 F.2d 773, 778 (10th Cir. 1991).

196. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503, 506 (1969); *Hazelwood*, 484 U.S. at 267.

197. *See Hazelwood*, 484 U.S. at 266 (first citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986); and then citing *Tinker*, 393 U.S. at 506). For a deeper exploration of students' free speech rights, see Marshall H. Tanick & Phillip J. Trobaugh, *From* Tinker *to "Bong,"* 64 BENCH & BAR MINNESOTA 18 (2007); Sarah J. Loquist-Berry, *Regulating Speech Behind the Schoolhouse Doors*, 83 J. KAN. BAR ASS'N 22 (2014).

198. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423, 2425, 2431 (2022).

199. *See id.* at 2424.

a. Curricular Speech is Likely School-Sponsored Speech

The initial determination in *Hazelwood* is whether the speech is purely personal speech or school-sponsored speech.[200] Likely, the Court would consider the speech in *Kennedy*—a personal prayer after the end of a football game—to be an example of purely personal speech because the Court considered the speech to occur outside the scope of the football game and also that it was not representative of the school.[201] There, the Court applied the *Pickering* analysis to the coach's speech; therefore, if the Court considered the application of *Hazelwood* to teachers' speech, the Court would more likely apply *Pickering* to purely personal speech.[202] In so doing, the Court would likely reserve the substantial disruption test applied to purely personal speech for student speech analysis and leave the remaining *Hazelwood* analysis for school-sponsored speech.[203]

In the context of teachers' classroom speech, the distinction between school-sponsored and purely personal speech resembles that between curricular and non-curricular speech. For example, if the Court were to apply *Hazelwood*'s initial analytical step to Florida's Parental Rights in Education Act, the Court would be assessing what is or is not part of instruction—in other words, the Court would be deciding whether the speech is curricular or non-curricular.[204] For this reason alone, the Court should reconsider the scope of the initial inquiry into teachers' classroom speech.

b. Courts Have Not Defined a Legitimate Pedagogical Concern

Extending the remainder of the *Hazelwood* analysis to teachers' classroom speech would require the teacher to show that the government lacked a legitimate pedagogical concern in regulating the teacher's speech.[205] But the *Hazelwood* decision and its progeny did not clearly define the phrase "legitimate pedagogical concern."[206]

---

200. *See Hazelwood*, 484 U.S. at 271.

201. *See Kennedy*, 142 S. Ct. at 2418, 2433.

202. *See id.* at 2423. Purely personal speech is analogous to speech not made pursuant to the person's official duties in *Garcetti*. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). Therefore, the *Pickering* analysis would likely apply to such speech. *See id.* at 417 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

203. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969); *Hazelwood*, 484 U.S. at 273.

204. *See* FLA. STAT. ANN. § 1001.42(8)(c)(3) (West 2023).

205. *See Hazelwood*, 484 U.S. at 272–73.

206. *See id.* at 273. Several parallels exist between "legitimate pedagogical interests" in *Hazelwood* and "legitimate penological interests" in *Turner v. Safely*. *Compare id.* at 273, *with* Turner v. Safely, 482 U.S. 78, 89–90 (1987).

While not expressly defining legitimate pedagogical concern, the Court did provide examples of the rationale for which censorship of student speech would be constitutional: speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[207] Still, the Court has left to the lower courts the extension of *Hazelwood's* application to teachers' classroom speech and its assessment of a legitimate pedagogical concern.[208]

The lack of Supreme Court guidance presents a crucial issue as states across different circuits adopt legislation with similar language. For example, Florida's Parental Rights in Education Act—which other states are using as a template for similar legislation—includes little language about the pedagogical rationale for the law.[209] One apparent rationale for the law is identifying specific ages for which instruction may or may not be appropriate.[210] At the same time, the legislative pretext and the law's title indicate that its purpose is to enhance and secure parental rights in education.[211]

Under the current *Hazelwood* analysis, the Florida law imposes upon the teacher the burden to demonstrate that the restriction was unrelated to a legitimate pedagogical concern.[212] The Court would then need to determine whether the rationale regarding age appropriateness was sufficient because it

207. *Hazelwood*, 484 U.S. at 271.

208. *See* Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993) ("It stands to reason that whether a regulation is reasonably related to legitimate pedagogical concerns will depend on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation."); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723 (2d Cir. 1994) (citing *Ward*, 996 F.2d at 453); Miles v. Denver Pub. Schs., 944 F.2d 773, 778 (10th Cir. 1991) ([P]edagogical interests include[] preventing speech that was not sufficiently sensitive to students' privacy interests or that was inappropriate for the maturity level of the adolescent audience." (citing *Hazelwood*, 484 U.S. at 274)).

209. *See* FLA. STAT. ANN. § 1001.42(8).

210. *See id.* § 1001.42(8)(c)(1), (3) (identifying the particular age restriction as "prekindergarten through grade 8" or in a manner that comports with certain provisions of law for notifying a student's parent of specified information; and further requiring such procedures to "reinforce the fundamental right of parents to make decisions regarding the upbringing and control of their children").

211. *See* H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) ("An act relating to parental rights in education . . . requiring such procedures to reinforce the fundamental *right* of parents to make decisions regarding the upbringing and control of their children in a specified manner. . . .").

212. *Hazelwood*, 484 U.S. at 273.

is the only rationale related to pedagogy.[213] Although the age-appropriateness rationale is pedagogical, its legitimacy may be a more contentious question considering the political rhetoric surrounding the bill and educators' arguments that the restriction was unnecessary because the regulated topics were not addressed in schools even before the legislature enacted the law.[214]

c. Teachers Likely Bear the Burden to Demonstrate the Government's Rationale for Regulating Curricular Speech

Another issue with the *Hazelwood* analysis, as previously applied, is the standard of review. Courts apply the *Hazelwood* standard like rational basis review: the teacher must show that the government does not have a legitimate pedagogical concern in regulating the speech.[215] But the Supreme Court applies strict scrutiny, not rational basis review to viewpoint or content speech restrictions.[216] Under strict scrutiny review, the government bears the burden of demonstrating its interest in regulating the particular speech.[217] Curricular restriction is a form of content speech restriction; therefore, the Court's application of the current burden from *Hazelwood* does not align with other First Amendment jurisprudence.[218]

Imposing this burden on the teacher does not align with the foundations of the First Amendment. A historical examination of the developments

---

213. *See id.*

214. *See* Anthony Izaguirre & Adriana G. Licon, *'Don't Say Gay' Law Confuses Some Florida Schools*, AP NEWS (Aug. 15, 2022, 10:46 AM), https://apnews.com/article/health-education-ron-desantis-gender-identity-49dfb9a4f63b2497846df8e96fd652cc [https://perma.cc/JK7M-L9XZ] ("[O]ne of the key reasons critics cited in saying the law was unnecessary was that teachers do not cover such subjects in early grades anyway."); Madeleine Carlisle, *LGBTQ Teachers Struggle to Navigate Florida's So-Called 'Don't Say Gay' Law*, TIME (Aug. 25, 2022, 12:01 PM), https://time.com/6208554/florida-lgbtq-teachers-dont-say-gay-education-law/ [https://perma.cc/4CTY-LS69] ("[C]ritics argue they're responding to a problem that doesn't exist . . . ."). Statements by Florida legislators and the Florida Governor underscore that the purpose of the bill was to "reinforce[] parents' fundamental rights to make decisions regarding the upbringing of their children." *See* FLA. GOVERNOR, *supra* note 138; JUDICIARY COMM. ET AL., HOUSE OF REPRESENTATIVES STAFF ANALYSIS 2–5 (2022), https://www.flsenate.gov/Session/Bill/2022/1557/Analyses/h1557b.JDC.PDF [https://perma.cc/N886-4ZXM] (discussing the rationale behind the Florida law, rooted in expanding parents' rights over their children's education); *see also* Mark Walsh, *What Do 'Parents' Rights' Mean Legally for Schools, Anyway?*, EDUC. WEEK (Oct. 20, 2022), https://www.edweek.org/policy-politics/what-do-parents-rights-mean-legally-for-schools-anyway/2022/10 [https://perma.cc/Z6LE-BTJA].

215. *See Hazelwood*, 484 U.S. at 273; *see also* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1318–23 (2018).

216. *See* Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 291–93 (2015).

217. The burden is on the government even under intermediate scrutiny—between rational basis review and strict scrutiny. *See id.* at 310.

218. *See id.* at 317.

and societal understandings of the freedom of speech reveals an understanding of this right as one that the government could regulate only to promote the public good.[219] The freedom of speech was considered an inalienable natural right immune from governmental interference, and the Founders intended that a declaration of that right significantly limited any legislative authority to undermine it.[220]

Regardless of the approach applied by a hypothetical future Supreme Court case, the issue remains that the Court has yet to address whether teachers' classroom speech would be treated similarly to speech of other government employees, to student speech, or a hybrid of the approaches.

IV. REFRAMING TEACHERS' CLASSROOM SPEECH ANALYSIS

The Supreme Court has recognized that "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"[221] and that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[222] However, the Court also recognized that school officials have the power to control conduct occurring in schools,[223] and "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."[224]

In this light, state governments and school districts must balance their paternal obligation with their duty to sustain an educational environment

---

219. *See* Campbell, *supra* note 181. Campbell also considers alternative interpretations of the original meaning of the First Amendment. *See id.* at 308–14.

220. This is particularly convincing considering that the Founders based the federal Bill of Rights in part on state bills of rights, which were used to restrain state government intervention. *See id.* at 252 (citing Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87 (2016)) (reviewing RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016)); *see also id.* at 306 (citing 1 ANNALS OF CONG. 454 (1789) (statement of Rep. James Madison), *in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 818, 823 (Charlene B. Bickford et al. eds., 1992)).

221. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

222. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

223. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423 (2022) ("[N]one of this means the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish."); *see also Tinker*, 393 U.S. at 503; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); New Jersey v. T.L.O., 469 U.S. 325 (1985).

224. *Tinker*, 393 U.S. at 507.

that supports developing various skills, including knowledge and appreciation of the First Amendment.[225] Moreover, state entities must apply their power such that teachers are not stripped of their First Amendment protections as soon as they cross the threshold into the classroom.[226]

This Section proposes an updated First Amendment analysis for teachers' classroom speech. The proposal includes a blend of existing analytical frameworks because the Supreme Court has not announced an analytical framework specific to teachers' classroom speech, and circuits differ in their approaches.[227] The proposed analysis creates a novel framework specific to teachers' classroom speech by merging the government-employee speech and student speech analytical frameworks and shifting a greater burden to the government.

A. A New Threshold Determination: Curricular or Non-Curricular

First, the analysis should not include the "official duties" determination, thus separating teachers' classroom speech from the analysis in *Garcetti*.[228] Instead, the initial determination should hinge on whether the teacher's classroom speech is curricular or non-curricular. As discussed above, if the Supreme Court were to apply *Garcetti* to teachers' classroom speech, one could imagine a scenario where the teacher could only get First Amendment protection if they shirked their official duties and made statements that would otherwise be protected.[229] The court should rely primarily on the curriculum established by the school district and any instructional materials or methodologies used by the teacher to determine whether the speech at issue is curricular.[230] Then, the court would determine whether the speech in the dispute was related to those materials available.

Some nuances may arise in this determination if, for example, the teacher speaks freely about an unrelated matter aside from what a court

---

225. *See* Morse v. Frederick, 551 U.S. 393, 405 (2007).

226. *See Tinker*, 393 U.S. at 506–07.

227. *See* discussion *supra* Sections II.B.1.a, II.B.2.a.

228. Under *Garcetti*, the reviewing court makes a protection determination based solely on whether the speech was made pursuant to the official duties of the government employee. *See* Garcetti v. Ceballos, 547 U.S. 410, 423 (2006).

229. *See* discussion *supra* Section III.B.1; *Garcetti*, 547 U.S. at 421. This hypothetical would likely result in disciplinary action for the teacher even without the speech at issue, so there is no protection in shirking the responsibilities. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (holding that regardless of First Amendment protection, adverse action against the teacher may be justified if there is sufficient evidence to demonstrate the action is sufficiently based on other, unprotected actions of the teacher); *see also* Perry v. Sindermann, 408 U.S. 593, 594–95, 599 (1972).

230. *See* Lee v. York Cnty. Sch. Div., 418 F. Supp. 2d 816, 825 (E.D. Va. 2006) (considering teaching methodology as part of the consideration for a curricular speech determination).

would otherwise clearly classify as curricular speech. It may be even more practical for the court to rely on a more straightforward understanding of curricular speech like the definition Justice Brennan articulated in his dissent in *Hazelwood*: curricular speech is simply speech that is designed to teach something.[231]

B. Curricular Speech: Shifting the Burden in the Hazelwood *Analysis*

If the court determines the speech is curricular, the first branch of sub-analysis would be subject to a new standard that overrules the holding in *Hazelwood*.[232] The new standard would shift the burden from the teacher to the government to demonstrate the legitimate pedagogical concern related to the speech restriction.[233] Shifting the burden to the government entity is more consonant with the notions espoused by the First Amendment jurisprudence discussed above.[234] Because a curricular restriction is a form of content speech restriction and the Founders established the First Amendment to prevent the government from infringing upon citizens' rights, it is appropriate to place the burden on the government to overcome allegations of First Amendment violations.

Although this burden shift gives teachers more protections, it does not leave state governments and school districts without legitimate avenues to regulate speech. Those state entities could bolster their curricular regulation with a more thorough consideration of pedagogical value and be proactive in demonstrating the rationale behind their curricular regimes.[235] Indeed,

---

231. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 283 (1988) (Brennan, J., dissenting) (articulating that a "curricular activity" is "one that 'is designed to teach' something.").

232. *See id.* at 273 (majority opinion).

233. Previously, the teacher bore the burden of demonstrating that the government's regulation lacked pedagogical value. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423 (2022) (discussing the two-step framework for adjudicating matters involving government employees' free speech rights); *see also* Salzman, *supra* note 21, at 1102–04 (positing a reframing of the *Hazelwood* analysis as applied to students' First Amendment rights).

234. *See supra* notes 216–22 and accompanying text.

235. Stakeholders—especially parents—would likely appreciate pedagogically-focused and transparent curricular decisions from the state legislatures and local school districts. *See* Rick Hess, *Let's Make Transparency the Pandemic's Educational Legacy*, EDUC. WEEK (Aug. 4, 2021), https://www.edweek.org/policy-politics/opinion-lets-make-transparency-the-pandemics-educational-legacy/2021/08 [https://perma.cc/KV4G-MUYN]; Emily Riordan, *Children's Safety, School Transparency Are Top Concerns for Nearly Half of American Parents*, BUS. WIRE (Aug. 1, 2022, 8:30 AM), https://www.businesswire.com/news/home/

the Supreme Court has already recognized several areas where the legitimate pedagogical value of regulating particular speech is demonstrated, including regulating obscenity,[236] student privacy,[237] and the advocacy of drug use.[238]

C. Non-Curricular Speech: A Rebalanced Pickering *Test*

If the court determines the speech is non-curricular, the second branch of sub-analysis would be subject to a new standard that overrules the holding in *Pickering*.[239] First, the court would maintain the initial public concern determination.[240] The court would then recalibrate the balancing test to reflect the realities of teachers' classroom speech.[241] Because of the inherent imbalance between teachers' free speech rights and a school district's interest in the efficiency of the workplace, the new standard would require the governmental interest in promoting efficiency to substantially outweigh the teacher's free speech rights.[242]

The government as an employer does have a valid interest in regulating its employees' speech in the name of efficiency because the government has employed those persons for "the very purpose of effectively achieving its goals."[243] By adjusting the balance to require the government's interest to substantially outweigh the teacher's free speech interest, the teacher can benefit from more robust speech protection. The new standard is flexible enough to allow courts to rule for the government when factual peculiarities and public policy encourage application, accommodating both the government and the teachers' interests.

In sum, there are two steps to each analysis. First, the court analyzes the teacher's classroom speech to determine whether the speech is curricular or non-curricular. Second, the court applies the *Hazelwood* analysis to curricular speech with the burden shifted to the government. In contrast,

---

20220801005151/en/Childrens-Safety-School-Transparency-Are-Top-Concerns-for-Nearly-Half-of-American-Parents [https://perma.cc/J3UD-NNPC] (referencing a study by Stride, Inc. that noted educational transparency was a leading concern for a majority of the study's respondents).

236. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680–86 (1986).

237. *See Hazelwood*, 484 U.S. at 274.

238. *See* Morse v. Frederick, 551 U.S. 393, 408–10 (2007); *see also* Salzman, *supra* note 21, at 1102–03.

239. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574–75 (1968).

240. *See* Connick v. Myers, 461 U.S. 138, 147 (1983).

241. *See Pickering*, 391 U.S. at 568.

242. *See id.* If the Supreme Court applied the current *Pickering* balancing test to teachers' classroom speech, the Court could impose a greater burden on the government because the teachers' classroom speech is a substantial matter of public concern. *See Myers*, 461 U.S. at 152. A Court-delineated rule for teachers' classroom speech as a subset of speech would be preferable to the *Pickering* balancing test.

243. *See* Waters v. Churchill, 511 U.S. 661, 675 (1994).

the court applies the reworked *Pickering* balancing test to non-curricular speech that concerns a matter of public interest. By creating this new framework, curricular speech, which is closely related to pure government speech, would be afforded a different level of protection than non-curricular speech, which is less likely to be to the government's interests.

V. CONCLUSION

Before the Tennessee school district fired its teacher for showing the performance of *White Privilege*, the teacher said to their students, "I will probably get fired for showing this."[244] They were right. Without action by the Supreme Court, teachers nationwide will be left without guidance as state legislatures continue to pass laws directly impacting what teachers can say. This Comment's proposal offers one solution to increase protections for teachers working in a unique and dynamic environment, which deserves particular consideration. Notably, the proposal also increases the transparency required of state governments as they enact legislation, which should be expected from all legislatures, particularly when the legislation could implicate the First Amendment. Hopefully, as more teachers operate under the purview of these laws, the Supreme Court will consider relevant litigation and delineate the extent of First Amendment protections for teachers' classroom speech.

244. Hannah Natanson, *A White Teacher Taught White Students About White Privilege. It Cost Him His Job.*, WASH. POST (Dec. 6, 2021, 8:00 AM), https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory/ [https://perma.cc/7SKZ-RJGM].