



NOTE

Teaching in the Upside Down: What Anti-Critical Race Theory Laws Tell Us About the First Amendment

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Abstract. Since January 2021, forty-two states have introduced “anti-critical race theory” (anti-CRT) bills that restrict discussions of racism and sexism in public schools. As teachers, administrators, and civil rights organizations scramble to interpret these bills, many wonder: How can this be constitutional? At the heart of this broader question is a legal problem that remains unaddressed by both scholars and the Supreme Court: Is K-12 teacher speech, particularly instructional speech, protected under the First Amendment? This Note seeks to fill this gap in legal scholarship and jurisprudence, using anti-CRT laws as a lens through which to evaluate the constitutional protections afforded to K-12 teacher speech.

Part I of this Note provides a qualitative survey of anti-CRT laws, unpacking the speech and activity that the laws restrict. Part II reviews the major doctrinal approaches available to courts for analyzing K-12 teacher speech. Part III analyzes how those existing doctrinal approaches apply to anti-CRT laws, concluding that existing doctrine is inadequate for the task. Education law and policy operate under the implicit assumption that the government may regulate the “what” of teaching by setting curriculum, but the “how” of teaching is largely left up to teachers as certified professionals. Anti-CRT laws, however,

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The landscape of anti-CRT laws and related litigation is still shifting under our feet. This Note is up-to-date as of November 19, 2022.

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represent a sharp departure from that approach. In making that departure, they impermissibly infringe on K-12 teachers' First Amendment rights. This Note argues that courts can remedy this problem by making the implicit doctrinal distinction between the "what" and the "how" of teaching explicit and striking down anti-CRT laws as unconstitutional in violation of the First Amendment.

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Introduction

In the popular television series Stranger Things, the “upside down” describes a parallel dimension containing a distorted version of our world. Recently, Florida has seemed like a First Amendment upside down. Normally, the First Amendment bars the state from burdening speech, while private actors may burden speech freely. But in Florida, the First Amendment apparently bars private actors from burdening speech, while the state may burden speech freely.

—Chief Judge Mark E. Walker, Northern District of Florida¹

When Anthony Crawford, a high school English teacher in Oklahoma City, learned his state had passed H.B. 1775, it felt personal.² H.B. 1775 is an “anti-critical race theory” (anti-CRT) law that restricts teaching about the concepts of racism and sexism in public schools.³ “I felt like it was a shot at teachers like me who really want to see Black and brown kids really do something with their lives,” said Crawford.⁴ “Because they need this part of history. They need to understand what happened to their people.”⁵

The story of the anti-CRT laws is a story of many things. It is a story of a national political debate,⁶ a story of a brewing legal battle,⁷ and a story of a

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1. Honeyfund.com, Inc. v. DeSantis, No. 22-cv-00227, 2022 WL 3486962, at *1 (N.D. Fla. Aug. 18, 2022) (citation omitted).
 2. See Tyler Kingkade & Antonia Hylton, *Oklahoma’s Anti-Critical Race Theory Law Violates Free Speech Rights, ACLU Suit Says*, NBC NEWS (updated Oct. 20, 2021, 10:35 AM PDT), <https://perma.cc/5B8D-ML99>.
 3. OKLA. STAT. tit. 70, § 24-157 (2022). A brief note about terminology: Whether anti-critical race theory laws in fact have anything to do with critical race theory (CRT) is a subject of debate that I take up later in this Note. I use the terms “anti-CRT bills” and “anti-CRT laws” not to suggest they do ban CRT, but because that is how they are commonly known in the media and within school districts.
 4. Kingkade & Hylton, *supra* note 2 (quoting Crawford).
 5. *Id.*
 6. See Katie Rogers, *Cruz and Jackson Spar over Antiracism Curriculum at a Private School*, N.Y. TIMES (Mar. 22, 2022), <https://perma.cc/M7QH-DRWV>; Christopher F. Rufo (@realchrisrufo), TWITTER (Nov. 2, 2021, 5:41 PM), <https://perma.cc/6VVJ-6ESL> (“Glenn Youngkin made critical race theory the closing argument to his campaign and dominated in blue Virginia. We are building the most sophisticated political movement in America—and we have just begun.”); Tyler Kingkade, Brandy Zadrozny & Ben Collins, *Critical Race Theory Battle Invades School Boards—with Help from Conservative Groups*, NBC NEWS (June 15, 2021, 1:30 AM PDT), <https://perma.cc/M5XF-4VW3>; Anthony Zurcher, *Critical Race Theory: The Concept Dividing the US*, BBC NEWS (July 22, 2021), <https://perma.cc/WVS2-SQYL>; Olivia B. Waxman, “Critical Race Theory Is Simply the Latest Bogeyman.” *Inside the Fight over What Kids Learn About America’s History*, TIME (updated July 16, 2021, 7:42 PM EDT), <https://perma.cc/RG9J-MY3S>.
 7. See, e.g., Complaint ¶ 1, Black Emergency Response Team v. O’Connor, No. 21-cv-01022 (W.D. Okla. Oct. 19, 2021), ECF No. 1 [hereinafter *O’Connor Complaint*]; Complaint ¶¶ 1-4, Local 8027, American Federation of Teachers v. Edelblut, No. 21-cv-01063 (D.N.H. Dec. 13, 2021), 2021 WL 5918383, ECF No. 1 [hereinafter *Local 8027 Complaint*];
footnote continued on next page

distraction.⁸ For hundreds of thousands of K-12 educators and students in forty-two states, however, it is also a deeply personal story.⁹ And to the extent that the laws force us to ask fundamental questions about how we understand and teach our nation's history, and how our government treats its educators and students, the laws are personal to us all.

But this personal story—the story of K-12 educators and students—has gone largely untold in the legal arena. Scholars have argued that anti-CRT laws are unconstitutional as applied to higher education.¹⁰ So far, at least one court has agreed. College professors and students challenging Florida's anti-CRT law won a partial preliminary injunction against the law in November 2022.¹¹ In a scathing opinion, the district court called the law “positively dystopian,” writing that “the First Amendment does not permit the State of Florida to muzzle its university professors, impose its own orthodoxy of viewpoints, and cast us all into the dark.”¹² However, while the constitutionality of anti-CRT laws as applied to K-12 public schools remains uncertain, scholars have assumed that the laws may survive in this context given states' “broad

Complaint for Injunctive Relief ¶¶ 1-3, *Mejia v. Edelblut*, No. 21-cv-01077 (D.N.H. Dec. 20, 2021), ECF No. 1; Verified Complaint ¶ 14, *Falls v. DeSantis*, No. 22-cv-00166 (N.D. Fla. Apr. 22, 2022), 2022 WL 1202438, ECF No. 1; Verified Complaint ¶¶ 1-2, 4-5, *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, No. 22-cv-00304 (N.D. Fla. Aug. 18, 2022), 2022 WL 3573123, ECF No. 1 [hereinafter *Pernell* Complaint]; *Honeyfund.com, Inc. v. DeSantis*, No. 22-cv-00227, 2022 WL 3486962, at *1-2 (N.D. Fla. Aug. 18, 2022) (granting in part a preliminary injunction against a Florida anti-CRT law).

8. See Sarah Mervosh & Giulia Heyward, *The School Culture Wars: “You Have Brought Division to Us,”* N.Y. TIMES (updated Nov. 8, 2021), <https://perma.cc/W3FN-U32Z> (“‘This is not really about critical race theory,’ said Dorinda Carter Andrews, a professor of race, culture and equity at Michigan State University, where she teaches such a course. ‘It’s really a distraction,’ she said, ‘to suppress the ways in which educators engage young people in race dialogue.’”); Elizabeth Dohms-Harter, *Critical Race Theory Debate Has Nothing to Do with Education, Professor Argues*, WIS. PUB. RADIO (Sept. 7, 2021, 6:15 AM), <https://perma.cc/FNR6-K9CP> (describing the anti-CRT movement as “a weapon of mass distraction” and “a political ploy to distract folks from doing work in classrooms that may meet the needs of populations who historically have been underserved”).
9. See Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUCATIONWEEK (updated Sept. 28, 2022), <https://perma.cc/46FC-ZUB7> (showing that forty-two state legislatures have introduced anti-CRT bills, and seventeen have adopted them into law); *Enrollment in Public Elementary and Secondary Schools, by Region, State, and Jurisdiction: Selected Years, Fall 1990 Through Fall 2030*, NAT’L CTR. FOR EDUC. STAT. (July 2022), <https://perma.cc/4RVE-2GG9>.
10. See, e.g., Ronald J. Krotoszynski Jr., *Opinion, Laws Against Teaching Critical Race Theory in College Are Unconstitutional*, WASH. POST (May 26, 2021, 9:00 AM EDT), <https://perma.cc/XW2F-RBGW>.
11. See *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, No. 22-cv-00304, 2022 WL 16985720, at *2-3, *52-54 (N.D. Fla. Nov. 17, 2022).
12. See *id.* at *1, *52.

constitutional authority” over curriculum.¹³ “I am reluctant to come to this conclusion,” stated one former law professor, “but in the K-12 sector, teachers do not really have any academic freedom.”¹⁴

The assumption that anti-CRT laws are valid as applied to K-12 education stems from the Supreme Court’s ruling in *Garcetti v. Ceballos*, where the Court dramatically circumscribed public-employee speech protections.¹⁵ As one commentator put it, “[w]hen workers sign in, rights—mostly—sign out.”¹⁶ Thus, when teachers engage in instructional speech—“speech by which teachers present the curriculum to students” in the classroom¹⁷—the First

13. Krotoszynski, *supra* note 10; see *Falls v. DeSantis*, No. 22-cv-00166, 2022 WL 2303949, at *1-2, 10 (N.D. Fla. June 27, 2022) (finding that K-12 plaintiffs lacked standing to challenge Florida’s anti-CRT law, but emphasizing that the court “[was] not determining whether the challenged regulations are constitutional, morally correct, or good policy” and “*should not* be interpreted as endorsing” the law); see also *Pernell Complaint*, *supra* note 7, ¶¶ 212-17, 221-25 (arguing that Florida’s anti-CRT law violates the First Amendment rights of university professors and students, but bringing no explicit claims on behalf of K-12 teachers or students).

14. Mark Walsh, *If Critical Race Theory Is Banned, Are Teachers Protected by the First Amendment?*, EDUCATIONWEEK (June 10, 2021), <https://perma.cc/S6PV-M53W>; see also W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 335 (1998) (“[T]he theory underlying academic freedom was not developed for the pedagogical model represented by the public schools. The high school is not the university writ small and failure to take full account of the differences between the two settings is a disservice to the university, diminishing its unique function and independence.”).

15. See *Garcetti v. Ceballos*, 547 U.S. 410, 423-24, 426 (2006); see also Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4 (observing that courts use *Garcetti* “to dispose of the First Amendment claims of a wide range of public employees”); Frank LoMonte, *Lawsuits over Bans on Teaching Critical Race Theory Are Coming—Here’s What Won’t Work, and What Might*, CONVERSATION (July 21, 2021, 8:16 AM EDT), <https://perma.cc/6WQ3-SFGR> (“Normally, once a state sets the rules for acceptable on-the-job speech, public employees have no choice but to comply. That’s a product of the U.S. Supreme Court’s 2006 *Garcetti* ruling, in which the justices said government employees can’t rely on the First Amendment if they’re punished for on-duty speech that is part of an official work assignment.”); *4 Things You Can’t Say in the K-12 Classroom*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Aug. 26, 2020), <https://perma.cc/4XJR-DFTZ> (“You are generally considered to speak for the school district when you are in your classroom. . . . According to the ruling in *Garcetti v. Ceballos* (2006), K-12 teachers’ speech is regarded as the expression of a public employee pursuant to official duties. Hence, ‘curricular’ speech is regarded as ‘hired speech,’ not entitled to protection by the First Amendment.”).

16. LoMonte, *supra* note 15.

17. *Cal. Tchrs. Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1148 (9th Cir. 2001) (defining “instructional speech”). Note, however, that this terminology is chronically imprecise. Scholars and courts may instead refer to “classroom speech” or “in-class curricular speech,” and they may do so interchangeably. See, e.g., Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 2 (2001); *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 229 (6th Cir. 2005); see also *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671 (7th Cir. 2006) (referring to “classroom or
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Amendment “seems unlikely to rescue a teacher fired for teaching a forbidden subject.”¹⁸

Is this a fair assessment? I argue that it is not. Scholars have been too quick to assume that K-12 teachers have no First Amendment recourse. Their arguments ignore a central, though often implicit, tenet of education law and policy: The government may regulate the “what” of teaching by setting curriculum, but the “how” of teaching is largely left up to teachers as certified professionals.¹⁹ Anti-CRT laws represent a sharp departure from this approach, reaching beyond mere curriculum to regulate the very words that come out of a teacher’s mouth. Legal scholarship has yet to grapple with how this important and troubling aspect of anti-CRT laws may impact their constitutionality under the First Amendment. That is the gap this Note seeks to fill.²⁰

Part I of this Note provides a qualitative survey of anti-CRT laws, tracing their shared history and unpacking the kinds of speech the laws restrict. Part II reviews the major doctrinal approaches available to courts for analyzing K-12 teacher speech. Part III then asks how these doctrinal approaches apply to anti-CRT laws, concluding that existing legal tests are inadequate for the task. Part III therefore argues for a new First Amendment theory of K-12 teacher instructional speech: Courts should make explicit the doctrinal distinction between the “what” and the “how” of teaching and strike down anti-CRT laws as unconstitutional in violation of the First Amendment.

It is a strange moment to be an educator in America.²¹ In the context of a challenge to Florida’s anti-CRT law, a federal district judge referred to the state as “a First Amendment upside down”—a distorted, parallel dimension where even the basics of constitutional law are inverted.²² It is an apt metaphor. This Note advocates for a new First Amendment framework. But perhaps more

instructional speech”). This Note adopts the term “instructional speech,” as defined by the Ninth Circuit above, for purposes of clarity and consistency.

18. LoMonte, *supra* note 15.

19. *See infra* Part III.C.1.

20. K-12 teachers and other parties may seek to challenge anti-CRT laws under various federal and state theories, but this Note only focuses on potential First Amendment claims that could be brought by or on behalf of educators. *See, e.g., Local 8027 Complaint, supra* note 7, ¶ 2 (arguing that New Hampshire’s anti-CRT law violates not only the First Amendment, but also the Fourteenth Amendment, the state’s constitution, and state statutes).

21. *See, e.g.,* Laura Meckler, *Public Education Is Facing a Crisis of Epic Proportions*, WASH. POST (Jan. 30, 2022, 6:00 AM EST), <https://perma.cc/5R8D-PN59> (describing the many challenges schools and educators face, including pandemic learning loss, teacher shortages, absenteeism, gun violence, and political polarization and backlash).

22. Honeyfund.com, Inc. v. DeSantis, No. 22-cv-00227, 2022 WL 3486962, at *1 (N.D. Fla. Aug. 18, 2022).

importantly, it asks courts to step into the reality educators face: the reality of teaching in the upside down.

I. Unpacking Anti-Critical Race Theory Laws

A. State Anti-CRT Laws: A Brief History

The story of state anti-CRT laws begins not in a social studies classroom in Texas, nor on the floor of the Oklahoma State Legislature, but on Fox News.

On September 1, 2020, conservative scholar Christopher Rufo appeared on Fox News to sound the alarm: A “cult” had “pervaded every institution in the federal government.”²³ This “default ideology of the federal bureaucracy” was “now being weaponized against the American people.”²⁴ The “cult” in question: critical race theory.²⁵

The next morning, Rufo received a phone call from President Donald Trump’s chief of staff: The President had seen Rufo’s segment on Fox News and he was ready to act.²⁶

On September 4, the Trump Administration released a memo adopting much of Rufo’s language.²⁷ The memo called CRT “divisive, false, and demeaning propaganda . . . [that] is contrary to all we stand for as Americans and should have no place in the federal government.”²⁸

Rufo responded to the President’s memo via Twitter, stating: “On Tuesday, I called on the President to abolish critical race theory in the federal government. Tonight, he delivered. This executive action is the first successful counterattack against critical race theory in American history. Tonight, we celebrate; tomorrow, back to war.”²⁹

23. See Sam Dorman, *Chris Rufo Calls on Trump to End Critical Race Theory “Cult Indoctrination” in Federal Government*, FOX NEWS (Sept. 2, 2020, 12:02 AM EDT) (quoting then-Discovery Institute Research Fellow Christopher Rufo), <https://perma.cc/3T94-VQ6D>.

24. *Id.* (quoting then-Discovery Institute Research Fellow Christopher Rufo).

25. *Id.*

26. Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), <https://perma.cc/BRR2-YWQH>.

27. Peter Baker, *More than Ever, Trump Casts Himself as the Defender of White America*, N.Y. TIMES (updated Sept. 10, 2020), <https://perma.cc/38MG-FZBB>.

28. Memorandum from Russell Vought, Dir., Off. of Mgmt. & Budget, to Heads of Exec. Dep’ts & Agencies 2 (Sept. 4, 2020), <https://perma.cc/K42H-EU4N>.

29. Christopher F. Rufo (@realchrisrufo), TWITTER (Sept. 4, 2020, 5:45 PM), <https://perma.cc/N2BJ-5HBJ>.

On September 22, President Trump signed Executive Order 13,950 (EO 13,950), which Rufo had helped draft.³⁰ The order's stated purpose was to "combat offensive and anti-American race and sex stereotyping and scapegoating" in workplace trainings provided by federal agencies, the United States uniformed services, and government contractors.³¹ It therefore prohibited federal agencies and the United States uniformed services from promoting the following "divisive concepts" in workplace trainings:

(1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (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; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term "divisive concepts" also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.³²

On November 2, advocacy organizations impacted by EO 13,950 sued for injunctive relief.³³ They argued that the order's "divisive concepts" prohibition unlawfully impaired their First Amendment right to free speech and was unconstitutionally vague in violation of due process.³⁴ On December 22, a federal court agreed that the plaintiffs' claims were likely to succeed on the merits, granting preliminary injunctive relief as to two sections of EO 13,950.³⁵

On January 20, 2021, President Joe Biden revoked EO 13,950, calling for the federal government to "pursue a comprehensive approach to advancing equity for all," and instructing federal agencies to "recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity."³⁶

30. Exec. Order No. 13,950, 3 C.F.R. 433 (2021), *revoked by* Exec. Order No. 13,985, 3 C.F.R. 409 (2022); Wallace-Wells, *supra* note 26.

31. *See* Exec. Order No. 13,950, 3 C.F.R. at 433-36.

32. *Id.* at 436, 438-39. The executive order imposes nearly identical requirements on government contractors with respect to their employees. *See id.* at 436-48.

33. *See* Complaint ¶¶ 2-8, 144, Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, No. 20-cv-07741 (N.D. Cal. Nov. 2, 2020), 2020 WL 6482101, ECF No. 1; Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 550 (N.D. Cal. 2020).

34. Complaint, *supra* note 33, ¶¶ 144-53, 155-67.

35. *See* Santa Cruz, 508 F. Supp. 3d at 540-45, 550.

36. Exec. Order No. 13,985, 3 C.F.R. 409, 410, 413 (2022).

But the brief history of EO 13,950—signed, enjoined, and revoked in roughly four months—did not end there.

When George Floyd was murdered on May 25, 2020 by Minneapolis police officer Derek Chauvin, elementary and secondary students sought out opportunities to discuss issues of police brutality, racism, and bias in their schools.³⁷ Educators responded.³⁸ Many began introducing lessons and learning opportunities focusing on these topics.³⁹ Proponents of anti-CRT laws cite Floyd’s murder and educators’ response as the “spark” that led to the flurry of anti-CRT laws.⁴⁰ And so, EO 13,950 and the rhetoric surrounding it found a second life in state legislatures across America.⁴¹ Following the 2020 election, conservative organizations including Citizens for Renewing America, Alliance for Free Citizens, the America First Policy Institute, and the Heritage Foundation put out model legislation targeting schools and educators, and consulted with states on proposed anti-CRT bills.⁴² It is therefore no surprise that many state bills closely mirror the language of the model legislation and other guidance these organizations produced.⁴³

B. A Qualitative Survey of State Anti-CRT Laws

As of September 28, 2022, forty-two states “have introduced bills or taken other steps” that would limit discussions of racism and sexism in public schools.⁴⁴ Seventeen of these forty-two states have successfully passed laws or taken other legally binding action.⁴⁵ Twelve states have enacted restrictions through legislation: Florida, Georgia, Idaho, Iowa, Kentucky, Mississippi, New

37. See Sarah Schwartz, *Who’s Really Driving Critical Race Theory Legislation? An Investigation*, EDUCATIONWEEK (July 19, 2021), <https://perma.cc/K9K5-VNUB>; O’Connor Complaint, *supra* note 7, ¶¶ 81, 83.

38. See O’Connor Complaint, *supra* note 7, ¶¶ 79-81, 83-86, 88-89.

39. *Id.* ¶¶ 84-86, 88-89; see also Schwartz, *supra* note 37.

40. Schwartz, *supra* note 37 (quoting former Maine state representative Larry Lockman).

41. See *id.*

42. *Id.*

43. See *id.*

44. Schwartz, *supra* note 9. These states are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

45. *Id.*

Hampshire, North Dakota, Oklahoma, South Carolina, Tennessee, and Texas.⁴⁶ The governors of South Dakota and Virginia have imposed anti-CRT restrictions via executive order.⁴⁷ And three states have taken other state-level action that is legally binding on public schools: Alabama and Utah issued state board of education (SBE) rules, and Montana issued a legally binding attorney general opinion.⁴⁸ This Part explores the different ways and degrees to which these seventeen laws restrict the teaching of CRT and the teaching of racism and sexism in public schools.

1. Banned concepts

The majority of the seventeen state anti-CRT laws or legally binding actions reproduce some or all of EO 13,950's prohibited concepts.⁴⁹ The following table identifies which of the executive order's "divisive concepts" the following states have adopted:⁵⁰ Alabama,⁵¹ Florida,⁵² Georgia,⁵³ Iowa,⁵⁴

46. *Id.* Arizona also enacted an anti-CRT law, but it was struck down by the Arizona Supreme Court on procedural grounds. *See* *Ariz. Sch. Bds. Ass'n, Inc. v. State*, 501 P.3d 731, 734-36, 738-39 (Ariz. 2022). The Arizona State Legislature proposed a new anti-CRT bill in 2022, but it failed to pass. *See* Schwartz, *supra* note 9.

47. *See* Schwartz, *supra* note 9. South Dakota also passed an anti-CRT law that applies only to institutions of higher education. *Id.* This Note focuses instead on the executive order, which applies to K-12 education.

48. *See id.* Florida's and Georgia's bills were preceded by state board of education rules or resolutions. *Id.* While a state attorney general's opinion is legally binding in Montana, this is not the case in every state. *Compare* *Attorney General's Opinions*, MONT. JUD. BRANCH, <https://perma.cc/J438-9NGQ> (archived Oct. 16, 2022) ("The opinions carry the weight of law, unless they are overturned by a court or the legislature changes the law or laws involved."), *with* *Legal Opinions of the Attorney General—Frequently Asked Questions*, STATE OF CAL. DEP'T OF JUST. OFF. OF THE ATT'Y GEN., <https://perma.cc/F5G3-46AL> (archived Oct. 16, 2022) ("The Attorney General's opinions are advisory, and not legally binding on courts, agencies, or individuals.").

49. *See supra* text accompanying note 32.

50. Kentucky, Montana, and North Dakota do not use the divisive-concepts format and therefore are not included in the chart. *See* KY. REV. STAT. ANN. § 158.196 (West 2022); Letter from Austin Knudsen, Att'y Gen. of Mont., to Elsie Arntzen, Superintendent of Pub. Instruction of Mont., Op. No. 1, 58 Mont. Op. Att'y Gen. 1 (May 27, 2021); N.D. CENT. CODE § 15.1-21-05.1 (2021).

51. Ala. Bd. of Educ. Res. (2021) ("Declaring the Preservation of Intellectual Freedom and Non-Discrimination in Alabama's Public Schools"); *see also* ALA. ADMIN. CODE r. 290-040-040.02 (2022).

52. FLA. STAT. §§ 760.10, 1000.05 (2022).

53. GA. CODE ANN. § 20-1-11 (2022). Note that Georgia's law deals only with race, not sex. *See id.*

54. IOWA CODE §§ 25A.1, 261H.8, 279.74 (2022).

Idaho,⁵⁵ Mississippi,⁵⁶ New Hampshire,⁵⁷ Oklahoma,⁵⁸ South Carolina,⁵⁹ South Dakota,⁶⁰ Tennessee,⁶¹ Texas,⁶² Utah,⁶³ Virginia.⁶⁴ “Y” indicates that the state has a very similar provision to the executive order, although precise language may vary. “N” indicates that the state does not ban the divisive concept at issue. A simplified version of this table can be found in Appendix A below.

55. IDAHO CODE § 33-138 (2022).

56. MISS. CODE ANN. § 37-13-2 (2022).

57. N.H. REV. STAT. ANN. §§ 193:40, 354-A:31 (2022).

58. OKLA. STAT. tit. 70, § 24-157 (2022).

59. H.R. 5150, 124th Gen. Assemb., 2d Reg. Sess. (S.C. 2022). South Carolina’s anti-CRT law was passed as part of the state’s annual budget bill and was subsequently reenacted for the current fiscal year. *See id.*; H.R. 4100, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021).

60. S.D. Exec. Order No. 2022-02 (Apr. 5, 2022), <https://perma.cc/K2XG-PKZQ>.

61. TENN. CODE ANN. § 49-6-1019 (2022).

62. TEX. EDUC. CODE ANN. § 28.0022 (West 2021).

63. UTAH ADMIN. CODE r. 277-328-3 (LexisNexis 2021).

64. Va. Exec. Order No. 1 (Jan. 15, 2022), <https://perma.cc/PH5U-N4AL>.

Table 1
Divisive Concepts By State

Divisive Concept	AL	FL	GA	IA	ID	MS	NH	OK	SC	SD	TN	TX	UT	VA
(1) One race or sex is inherently superior to another race or sex ⁶⁵	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
(2) The United States is fundamentally racist or sexist ⁶⁶	N	N	Y	Y	N	N	N	N	N	N	Y	N	N	N
(3) An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously ⁶⁷	N	Y	Y	Y	N	N	Y	Y	Y	Y	Y	Y	N	Y

65. All fourteen states include a version of this divisive concept. Some states add other protected categories. For example, New Hampshire’s law provides that:

No pupil in any public school in this state shall be taught . . . [t]hat one’s age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion or national origin is inherently superior to people of another age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin.

N.H. REV. STAT. ANN. §§ 193:40, 354-A:31 (2022). Georgia’s law, on the other hand, mentions only race and does not discuss sex in any prohibited concept. *See* GA. CODE ANN. § 20-1-11 (2022). Alabama’s SBE rule contains a similar, additional prohibition against “indoctrinat[ing] students in social or political ideologies that promote one race or sex above another.” *See* Ala. Bd. of Educ. Res. (2021) (“Declaring the Preservation of Intellectual Freedom and Non-Discrimination in Alabama’s Public Schools.”). Florida’s law replaces “inherently superior” with “morally superior.” *See* FLA. STAT. §§ 760.10, 1000.05 (2022).

66. In contrast to the fourteen states’ unanimous prohibition of the executive order’s first divisive concept, only three states—Georgia, Iowa, and Tennessee—embrace its second concept. *See* GA. CODE ANN. § 20-1-11 (2022); IOWA CODE §§ 25A.1, 261H.8, 279.74 (2022); TENN. CODE ANN. § 49-6-1019 (2022). Iowa and Tennessee prohibit educators from teaching that the state itself, in addition to the United States, is fundamentally racist or sexist. *See* IOWA CODE §§ 25A.1, 261H.8, 279.74 (2022); TENN. CODE ANN. § 49-6-1019 (2022).

67. Tennessee’s law goes one step further, prohibiting instruction about the concept that “[a]n individual, by virtue of the individual’s race or sex, is inherently *privileged*, racist, sexist, or oppressive, whether consciously or subconsciously.” TENN. CODE ANN. § 49-6-1019 (2022) (emphasis added). Georgia’s law removes “unconsciously.” GA. CODE ANN. § 20-1-11 (2022).

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Divisive Concept	AL	FL	GA	IA	ID	MS	NH	OK	SC	SD	TN	TX	UT	VA
(4) An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex ⁶⁸	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
(5) Members of one race or sex cannot and should not attempt to treat others without respect to race or sex	N	Y	N	Y	N	N	Y	Y	N	N	N	N	N	Y
(6) An individual's moral character is necessarily determined by his or her race or sex ⁶⁹	N	Y	Y	Y	N	N	N	Y	Y	Y	Y	Y	Y	Y

68. As with the first divisive concept, some states add other protected categories. For example, Idaho's law provides that "[n]o . . . school district, or public school . . . shall direct or otherwise compel students to personally affirm . . . [t]hat individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin." IDAHO CODE § 33-138 (2022). Mississippi prohibits adverse treatment but does not use the word "discrimination." See MISS. CODE ANN. § 37-13-2 (2022). Florida prohibits teaching that an individual "should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion." FLA. STAT. §§ 760.10, 1000.05 (2022) (emphasis added).

69. South Carolina replaces "moral character" with "moral standing or worth." H.R. 5150, 124th Gen. Assemb., 2d Reg. Sess. (S.C. 2022). Tennessee and Florida have broader laws. In addition to prohibiting teaching the concept that "[a]n individual's moral character is determined by the individual's race or sex," Tennessee also prohibits "[a]scribing character traits, values, moral or ethical codes, privileges, or beliefs to a race or sex, or to an individual because of the individual's race or sex." TENN. CODE ANN. § 49-6-1019 (2022). Florida prohibits teaching that "[a] person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex." FLA. STAT. § 1000.05 (2022); see also *id.* § 760.10.

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Divisive Concept	AL	FL	GA	IA	ID	MS	NH	OK	SC	SD	TN	TX	UT	VA
(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 ⁷⁰	Y	Y	Y	Y	Y	N	N	Y	Y	Y	Y	Y	Y	Y
(8) Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex	N	Y	Y	Y	N	N	N	Y	Y	N	Y	N	N	N

70. Florida prohibits teaching that an individual “bears responsibility for, or *should be discriminated against or receive adverse treatment because of*, actions committed in the past by other members of” their protected class(s). FLA. STAT. §§ 760.10, 1000.05 (2022) (emphasis added). Alabama’s SBE rule elaborates on this divisive concept, providing that:

[S]lavery and racism are betrayals of the founding principles of the United States, including freedom, equality, justice, and humanity, and . . . individuals living today should not be punished or discriminated against because of past actions committed by members of the same race or sex, but . . . we should move forward to create a better future together.

See Ala. Bd. of Educ. Res. (2021) (“Declaring the Preservation of Intellectual Freedom and Non-Discrimination in Alabama’s Public Schools.”).

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Divisive Concept	AL	FL	GA	IA	ID	MS	NH	OK	SC	SD	TN	TX	UT	VA
(9) Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race ⁷¹	N	Y	Y	Y	N	N	N	Y	Y	Y	Y	Y	N	Y
The term “divisive concepts” also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating ⁷²	N	N	Y	Y	N	N	N	N	Y	N	N	N	N	N

Some states add prohibited concepts or other provisions that do not appear in the original executive order. For example, Tennessee’s law adds the following prohibited concepts:

- (9) Promoting or advocating the violent overthrow of the United States government;
- (10) Promoting division between, or resentment of, a race, sex, religion, creed, nonviolent political affiliation, social class, or class of people;
-
- (12) The rule of law does not exist, but instead is a series of power relationships and struggles among racial or other groups; [and]
- (13) All Americans are not created equal and are not endowed by their Creator with certain unalienable rights, including, life, liberty, and the pursuit of happiness.⁷³

71. Tennessee removes “work ethic,” so that its provision reads as follows: “A meritocracy is inherently racist or sexist, or designed by a particular race or sex to oppress members of another race or sex.” TENN. CODE ANN. § 49-6-1019 (2022). Florida expands the divisive concept beyond work ethic and meritocracy, sweeping in “[s]uch virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness.” FLA. STAT. §§ 760.10, 1000.05 (2022).

72. While the executive order does not assign this statement a number, I analyze it here because several state bills and laws make mention of it. For example, South Carolina’s law prohibits the concept that “fault, blame, or bias should be assigned to a race or sex, or to members of a race or sex because of their race or sex.” H.R. 5150, 124th Gen. Assemb., 2d Reg. Sess. (S.C. 2022).

73. TENN. CODE ANN. § 49-6-1019 (2022).

Texas’s law adds two prohibited concepts that do not appear in EO 13,950:

(vii) [T]he advent of slavery in the territory that is now the United States constituted the true founding of the United States; [and]

(viii) with respect to their relationship to American values, slavery and racism are anything other than deviations from, betrayals of, or failures to live up to the authentic founding principles of the United States, which include liberty and equality.⁷⁴

Notice: Of the seventeen state laws or legally binding actions, only five—Idaho, Montana, North Dakota, South Dakota, and Virginia—mention CRT by name.⁷⁵ Additionally, Florida’s SBE rule, which predates the state’s anti-CRT law, names CRT—along with “denial or minimization of the Holocaust”—as “[e]xamples of theories that distort historical events and are inconsistent with State Board-approved standards.”⁷⁶ The rule defines CRT as “the theory that racism is not merely the product of prejudice, but that racism is embedded in American society and its legal systems in order to uphold the supremacy of white persons.”⁷⁷

In considering the legal implications of anti-CRT laws, it is important to recognize that each state’s law has its own idiosyncrasies that plaintiffs and litigators must account for. This Note does not purport to offer a comprehensive analysis of every anti-CRT law on the books. However, as discussed above, these laws do share a common political lineage and reproduce much of the same language. Although each law must ultimately be analyzed on its own terms, considering them in the aggregate can teach us a lot about how First Amendment doctrine applies to K-12 teacher speech. That is the project of this Note.

2. Do these laws ban CRT?

To determine whether state anti-CRT laws do in fact ban or restrict CRT in K-12 public education, we must first define CRT and ask whether it is currently taught in K-12 classrooms.

74. TEX. EDUC. CODE ANN. § 28.0022 (West 2021).

75. See IDAHO CODE § 33-138(2) (2022); Letter from Austin Knudsen, Att’y Gen. of Mont., to Elsie Arntzen, Superintendent of Pub. Instruction of Mont., Op. No. 1, 58 Mont. Op. Att’y Gen. 1, 18 (May 27, 2021); N.D. CENT. CODE § 15.1-21-05.1 (2021); S.D. Exec. Order No. 2022-02 (Apr. 5, 2022), <https://perma.cc/K2XG-PKZQ>; Va. Exec. Order No. 1, at 1-3 (Jan. 15, 2022), <https://perma.cc/PH5U-N4AL>.

76. FLA. ADMIN. CODE ANN. r. 6A-1.094124 (2022); see Schwartz, *supra* note 9.

77. FLA. ADMIN. CODE ANN. r. 6A-1.094124.

a. “More a verb than a noun”: defining CRT

CRT emerged in the 1980s as a critique of the legal profession’s traditional approach to civil rights.⁷⁸ Early critical race theorists resisted the idea that the law has been an engine for equality, and instead emphasized the law’s role in the development and maintenance of racial inequality in the United States.⁷⁹ In particular, CRT pushed back against critical legal studies (CLS), which scholars believed focused on socioeconomic inequality to the exclusion of racial inequality.⁸⁰ As scholar Andrew Haines wrote in 1987, “the [critical legal studies movement] maintains its exclusionary character; it continues to *talk to* and not *dialogue with* (or *talk about* and not *talk with*) persons of color.”⁸¹

CRT has since expanded beyond the law to address the intersections of race with language, immigration status, gender, sexuality, disability, and more.⁸² Ask a CRT scholar to define CRT, and you may hear a range of related, though not identical, answers. Richard Delgado and Jean Stefancic describe CRT as “a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power.”⁸³ Kimberlé Crenshaw, who coined the term “critical race theory,” has said that CRT is “more a verb than a noun,” describing it as:

A way of seeing, attending to, accounting for, tracing and analyzing the ways that race is produced[,] . . . the ways that racial inequality is facilitated, and the ways that our history has created these inequalities that now can be almost effortlessly reproduced unless we attend to the existence of these inequalities.⁸⁴

78. See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiv, xix, xxii-xxiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

79. See Joshua Jamerson, *Critical Race Theory: What It Means for America and Why It Has Sparked Debate*, WALL ST. J. (June 17, 2021, 2:57 PM ET), <https://perma.cc/RW4Y-F8LD>.

80. See Subini Ancy Annamma, Yolanda Anyon, Nicole M. Joseph, Jordan Farrar, Eldridge Greer, Barbara Downing & John Simmons, *Black Girls and School Discipline: The Complexities of Being Overrepresented and Understudied*, 54 URB. EDUC. 211, 216 (2019) [hereinafter Annamma et al., *Black Girls and School Discipline*]; Subini Ancy Annamma, David Connor & Beth Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1, 1 (2013) [hereinafter Annamma et al., *Dis/ability Critical Race Studies (DisCrit)*].

81. Andrew W. Haines, *The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Scepticism and Solipsism?*, 13 WM. MITCHELL L. REV. 685, 719 (1987).

82. Annamma et al., *Black Girls and School Discipline*, *supra* note 80, at 216; Annamma et al., *Dis/ability Critical Race Studies (DisCrit)*, *supra* note 80, at 1.

83. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 2 (2001).

84. See Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021) (quoting Columbia and UCLA law professor Kimberlé Williams Crenshaw), <https://perma.cc/YWJ6-5B6H>.

To Mari Matsuda, CRT is “a map for change”⁸⁵ and “a method that takes the lived experience of racism seriously, using history and social reality to explain how racism operates in American law and culture, toward the end of eliminating the harmful effects of racism and bringing about a just and healthy world for all.”⁸⁶ Derrick Bell, “the godfather of critical race theory,”⁸⁷ who influenced Crenshaw, Matsuda, and countless other scholars, once said of CRT: “To me, it means telling the truth, even in the face of criticism.”⁸⁸

Even in laying out the core tenets of CRT in their book, *Critical Race Theory: An Introduction*, Delgado and Stefancic acknowledge the diversity of opinion within the field: “What do critical race theorists believe? Probably not every member would subscribe to every tenet set out in this book, but many would agree on the following propositions.”⁸⁹ The six propositions that Delgado and Stefancic identify as key themes of CRT are as follows: (1) the idea that racism is “ordinary, not aberrational,” which makes it difficult to address;⁹⁰ (2) the concept of “interest convergence,” which argues that “racism advances the interests of both white elites . . . and working-class people” who therefore “have little incentive to eradicate it”;⁹¹ (3) the “social construction” thesis, which argues that race is a social invention rather than a biological one;⁹² (4) the idea of “differential racialization,” which posits that “each race has its own origins and ever evolving history”;⁹³ (5) “the notion of intersectionality and anti-essentialism,” which advances that “[n]o person has a single, easily stated, unitary identity”;⁹⁴ and (6) the “voice-of-color thesis,” or the idea that people of color are uniquely qualified to speak on behalf of their group(s) about the form and effects of racism.⁹⁵

85. *Id.*

86. *Id.* (quoting University of Hawaii law professor Mari Matsuda).

87. *Id.*

88. Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021) (quoting former Harvard law professor Derrick Bell), <https://perma.cc/84DR-WXXN>.

89. DELGADO & STEFANCIC, *supra* note 83, at 6-7.

90. *Id.* at 7.

91. *Id.* at 7; *see also* Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).

92. DELGADO & STEFANCIC, *supra* note 83, at 7-8.

93. *Id.* at 8.

94. *Id.* at 8-9.

95. *See id.* at 9.

b. Is CRT taught in K-12 public schools?

Is CRT, as defined by scholars, being taught in public-school K-12 classrooms? While it is impossible to survey every classroom in every public school in America, the answer seems to be a resounding no. According to Randi Weingarten, head of the American Federation of Teachers (AFT), the second-largest teachers' union in the United States, "critical race theory is not taught in elementary schools or high schools."⁹⁶ Rather, it is "a method of examination taught in law school and college that helps analyze whether systemic racism exists—and, in particular, whether it has an effect on law and public policy."⁹⁷

At the state level, those who argue that CRT is being taught in K-12 public schools seem to rely primarily on isolated anecdotes—many of which are unfounded or unrelated to classroom instruction. In Texas, for example, State Representative Steve Toth claimed that he created H.B. 3979—the precursor to Texas's anti-CRT law, S.B. 3⁹⁸—to help children after a parent in Highland Park, Texas sent him a copy of a book entitled "Not My Idea: A Story About Whiteness," which her eight-year-old son had been asked to read.⁹⁹ The school district could not find this book in any of its school library catalogs or on any of its campuses, and it denied teaching CRT.¹⁰⁰ State Senator Nathan Johnson, who represents Highland Park, responded that he did not see the need for Texas's anti-CRT bill because no school districts in Texas teach CRT.¹⁰¹

c. Confronting the "do nothing" hypothesis

If CRT is not being taught in public schools, then why challenge anti-CRT laws in court? Because these laws have teeth: There are consequences for

96. Caitlin O'Kane, *Head of Teachers Union Says Critical Race Theory Isn't Taught in Schools, Vows to Defend "Honest History,"* CBS NEWS (July 8, 2021, 12:07 PM) (quoting AFT president Randi Weingarten), <https://perma.cc/8M5G-3EXZ>; *Nation's 2nd-Largest Teachers Union Says It's Time for In-Person Learning*, NPR (May 17, 2021, 5:07 AM ET), <https://perma.cc/2V5D-AULK>; see also Phil McCausland, *Teaching Critical Race Theory Isn't Happening in Classrooms, Teachers Say in Survey*, NBC NEWS (July 1, 2021, 3:23 PM PDT), <https://perma.cc/R76C-Z6S4> (reporting that more than 96% of teachers who responded to a survey conducted by the Association of American Educators said that their schools did not mandate instruction about CRT).

97. O'Kane, *supra* note 96 (quoting AFT president Randi Weingarten).

98. SB 3, the updated version of HB 3979, passed in December 2021. See Schwartz, *supra* note 9; TEX. EDUC. CODE ANN. § 28.0022 (West 2021).

99. Bill Zeeble, *The Texas Legislature Has Targeted Critical Race Theory, but Is It Being Taught in Public Schools?*, HOUS. PUB. MEDIA (July 9, 2021, 7:27 AM) (quoting Texas state representative Steve Toth), <https://perma.cc/M73U-UUKM>. The book that State Representative Toth references is in fact titled *Not My Idea: A Book About Whiteness*. See ANASTASIA HIGGINBOTHAM, NOT MY IDEA: A BOOK ABOUT WHITENESS (2018).

100. *Id.*

101. *Id.*

allowing anti-CRT laws to remain on the books. Educators who violate their state's anti-CRT law can face disciplinary action or even lose their teaching license.¹⁰² Schools and school districts that violate their state's anti-CRT law can be sued, lose their accreditation, or even lose state funding.¹⁰³

According to teachers themselves, the serious consequences of anti-CRT laws have already had a chilling effect on instructional speech.¹⁰⁴ An Oklahoma school district has banned teachers from using the words “diversity” and “white privilege.”¹⁰⁵ A Texas school district told its teachers to “avoid any controversial issues and only teach the ‘facts’ of anything that might be divisive.”¹⁰⁶ In Idaho, some educators are “afraid” to engage in discussions about “Black Lives Matter, LGBTQ+ Pride, [and] gender/sexuality (sex education).”¹⁰⁷ In Florida, teachers attended a training on the state's new civics standards that “downplay[ed] the role of slavery” in American history.¹⁰⁸ Some educators and advocates believe that the laws effectively ban a different CRT: culturally responsive teaching,¹⁰⁹ which “us[es] the cultural knowledge, prior

102. See, e.g., N.H. REV. STAT. ANN. § 193:40(IV) (2022); OKLA. ADMIN. CODE § 210:10-1-23(j) (2022).

103. See, e.g., N.H. REV. STAT. ANN. § 193:40(III) (2022); OKLA. ADMIN. CODE § 210:10-1-23(h) (2022); TENN. CODE ANN. § 49-6-1019(c) (2022).

104. See *Local 8027 Complaint*, *supra* note 7, ¶ 7 (“[T]he Divisive Concepts Statute has had the effect of chilling Mr. Richman’s ability to provide his students with the nature, content and quality of education guaranteed and mandated by the New Hampshire Constitution and laws.”); *O’Connor Complaint*, *supra* note 7, ¶ 70 (“Teacher B.B. reported that [Oklahoma’s anti-CRT law] is so vague and confusing that they do not understand what conduct is prohibited under the law, and fear that school officials will make examples of certain teachers. They worry these punishments will disproportionately fall on teachers of color.”); Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons*, NPR (May 28, 2021, 9:04 AM ET), <https://perma.cc/J3JE-DLP5>; see also Eesha Pendharker, “You’re Not Going to Teach About Race. You’re Going to Go Ahead and Keep Your Job,” EDUCATIONWEEK (Dec. 10, 2021), <https://perma.cc/67K3-DDD9> (“As a teacher, especially with the threat of losing your teacher license, what are you going to do? You’re not going to teach about race[.] . . . You’re going to go ahead and keep your job.” (quoting Oklahoma high school English teacher Regan Killackey)).

105. *O’Connor Complaint*, *supra* note 7, ¶ 67.

106. MICA POLLOCK, JOHN ROGERS, ALEXANDER KWAKO, ANDREW MATSCHINER, REED KENDALL, CICELY BINGENER, ERIKA REECE, BENJAMIN KENNEDY & JALEEL HOWARD, THE CONFLICT CAMPAIGN: EXPLORING LOCAL EXPERIENCES OF THE CAMPAIGN TO BAN “CRITICAL RACE THEORY” IN PUBLIC K-12 EDUCATION IN THE U.S., 2020-2021, at 67 (2022) (quoting an anonymous Texas public-school teacher), <https://perma.cc/M47J-LLX4>.

107. *Id.* at 67-68 (quoting an anonymous Idaho public-school teacher).

108. See Greg Allen, *Florida Gov. DeSantis Takes Aim at What He Sees as Indoctrination in Schools*, NPR (July 13, 2022, 10:27 AM ET), <https://perma.cc/NJP6-QMJX>.

109. See *O’Connor Complaint*, *supra* note 7, ¶¶ 84, 147-54 (“[T]he Act’s censorship of Inclusive Speech inflicts disproportionate injury on students of color, with compounded harms for LGBTQ+, women, and girls of color. Inclusive Speech and related programs serve
footnote continued on next page

experiences, frames of reference, and performance styles of ethnically diverse students to make learning encounters more relevant to and effective for them.”¹¹⁰ A Tennessee educator had blunt advice for other teachers dealing with the effects of anti-CRT laws: “Get out now before it gets worse.”¹¹¹ Even if CRT is not being taught in K-12 schools, anti-CRT laws are doing real harm at a time when educators and students are already hurting.¹¹²

But the decision of whether to challenge anti-CRT laws in court is still a difficult one. Bringing such lawsuits requires educators and young people to be incredibly brave in the face of hateful and even dangerous backlash.¹¹³ Is it

to close existing opportunity gaps and inequalities faced by students of color and other historically marginalized groups. Research demonstrates that increasing cultural proficiency among teachers and introducing culturally responsive teaching practices and pedagogy can provide effective support for students of color.”); see also Cheryl Holcomb-McCoy, Opinion, *The “Other CRT”—Culturally Responsive Teaching—Can Truly Make a Difference*, HILL (Aug. 7, 2021, 7:00 AM ET), <https://perma.cc/27LT-2ZKB> (“Campaigns that ban teachers from teaching a broader U.S. history and new state legislation may drive educators away from learning how to impart lessons in a culturally responsive way. Worst of all, we risk having teachers ignore the potential of their students. This conundrum between the ‘two CRTs’ could widen the gap in educational outcomes.”).

110. JENNY MUÑIZ, NEW AM., *Understanding Culturally Responsive Teaching*, in CULTURALLY RESPONSIVE TEACHING: A 50-STATE SURVEY OF TEACHING STANDARDS (2019) (quoting GENEVA GAY, CULTURALLY RESPONSIVE TEACHING: THEORY, RESEARCH, AND PRACTICE 31 (2d ed. 2010)), <https://perma.cc/VMF6-V3KS>.
111. POLLOCK ET AL., *supra* note 106, at 67 (quoting an anonymous Tennessee public-school teacher).
112. See Wynne Davis, Ailsa Chang, Karen Zamora & Courtney Dorning, *Teachers Thought 2021 Would Be Better. Instead, Some Say It's Their Toughest Year Yet*, NPR (Dec. 23, 2021, 1:03 PM ET), <https://perma.cc/X35M-GSD3> (“Between COVID cases climbing because of the omicron variant and behavioral issues in the classroom, some teachers are ready to quit while others are breaking down in school bathrooms amid overwhelming pressure.”); Gema Zamarro, Andrew Camp, Dillon Fuchsman & Josh B. McGee, *How the Pandemic Has Changed Teachers’ Commitment to Remaining in the Classroom*, BROOKINGS: BROWN CTR. CHALKBOARD (Sept. 8, 2021), <https://perma.cc/597G-YQRJ> (“[T]eachers’ levels of stress and burnout have been high throughout these unusual pandemic times, raising concerns about a potential increase in teacher turnover and future teacher shortages.”); Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis & Ellen Viruleg, *COVID-19 and Education: The Lingering Effects of Unfinished Learning*, MCKINSEY & CO., <https://perma.cc/GUP7-T9XT> (to locate, select “View the live page”) (“[T]he impact of the pandemic on K-12 student learning was significant, leaving students on average five months behind in mathematics and four months behind in reading by the end of the school year. The pandemic widened preexisting opportunity and achievement gaps, hitting historically disadvantaged students hardest.”).
113. See, e.g., 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 EDT), <https://perma.cc/8TYZ-ESXK>; Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Justice Department Addresses Violent Threats Against School Officials and Teachers (updated Oct. 4, 2021), <https://perma.cc/38FZ-2RST>.

worth it? In jurisdictions with particularly unfavorable case law or where the personal risk to named plaintiffs is overwhelming, litigators and civil rights organizations may decide that the answer is no. This Note does not purport to offer a comprehensive roadmap for litigators in every (or any) jurisdiction. However, construing anti-CRT laws as mere political theater, or dismissing them because CRT is not taught in K-12 schools, may lead advocates to forego litigating anti-CRT laws for the wrong reasons. As this Note argues, anti-CRT laws ban valuable, legitimate instruction, and letting these laws stand sets a dangerous precedent.

- d. Do the state laws ban CRT, and if not, what activities or speech do they target?

In asking whether anti-CRT laws have anything to do with CRT, it is useful to begin with states whose laws or actions explicitly define CRT.

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."¹¹⁴ The law defines CRT as "the theory that racism is not merely the product of learned individual bias or prejudice, but that racism is systemically embedded in American society and the American legal system to facilitate racial inequality."¹¹⁵ While not necessarily a comprehensive definition of the entire field, North Dakota's definition does closely track the words of CRT scholars, who consider racial discrimination to be systemic rather than purely a product of individual prejudice.¹¹⁶ Thus, North Dakota's law may in fact ban "instruction relating to critical race theory" in K-12 public schools.¹¹⁷

Montana, on the other hand, articulates a definition of CRT that does not closely track the words of CRT scholars. According to Montana's Attorney General, CRT demands "the complete and total acceptance of a specific worldview," which includes the notion that "there is one, and only one, correct

114. N.D. CENT. CODE § 15.1-21-05.1 (2021).

115. *Id.*

116. See, e.g., *Critical Race Theory: Frequently Asked Questions*, NAACP LEGAL DEF. FUND, <https://perma.cc/X8ZM-NB3Z> (archived Oct. 21, 2022) ("Critical Race Theory recognizes that racism is more than the result of individual bias and prejudice. It is embedded in laws, policies and institutions that uphold and reproduce racial inequalities."); see also CRITICAL RACE THEORY, *supra* note 78, at xiv (asserting that "[t]he construction of 'racism' from . . . the 'perpetrator perspective' restrictively conceived racism as an intentional, albeit irrational, deviation by a conscious wrongdoer from otherwise neutral, rational, and just ways of distributing jobs, power, prestige, and wealth" and countering that "[w]ith its explicit embrace of race-consciousness, Critical Race Theory aims to reexamine" this perspective).

117. See N.D. CENT. CODE § 15.1-21-05.1 (2021).

stance on standardized testing, drug legalization, Medicare for All, and even the capital gains tax rate.”¹¹⁸ But according to Kimberlé Crenshaw, CRT is not one specific worldview—it is a “way of seeing.”¹¹⁹ Many CRT scholars who engage in this “way of seeing” might come to similar conclusions about policy challenges like standardized testing and health care, but they also might come to differing conclusions or no conclusion at all.

This confusion about what CRT is (and is not) has been borne out across the nation. Virginia’s executive order insists that CRT “instruct[s] students to only view life through the lens of race.”¹²⁰ South Dakota’s executive order similarly states that CRT “compels students to view the world through a purely racial lens.”¹²¹ This would seem to directly conflict with CRT’s core tenet of intersectionality—the idea that no person has a “single, easily stated, unitary identity.”¹²² As Crenshaw has said of the rhetoric surrounding anti-CRT bills, “[i]t should go without saying that what [proponents of anti-CRT bills] are calling critical race theory is a whole range of things, most of which no one would sign on to, and many of the things in it are simply about racism.”¹²³

And this confusion over CRT’s definition is intentional—a fact about which the architects of the anti-CRT bills have been upfront. In March, Christopher Rufo tweeted:

We have successfully frozen their brand—“critical race theory”—into the public conversation and are steadily driving up negative perceptions. We will eventually turn it toxic, as we put all of the various cultural insanities under that brand category.

The goal is to have the public read something crazy in the newspaper and immediately think “critical race theory.”¹²⁴

118. See Letter from Austin Knudsen, Att’y Gen. of Mont., to Elsie Arntzen, Superintendent of Pub. Instruction of Mont., Op. No. 1, 58 Mont. Op. Att’y Gen. 1, 11 (May 27, 2021).

119. Fortin, *supra* note 84 (quoting Columbia and UCLA law professor Kimberlé Williams Crenshaw).

120. See Va. Exec. Order No. 1, at 1 (Jan. 15, 2022), <https://perma.cc/PH5U-N4AL>.

121. See S.D. Exec. Order No. 2022-02 (Apr. 5, 2022), <https://perma.cc/K2XG-PKZQ>.

122. See DELGADO & STEFANCIC, *supra* note 83, at 8-9.

123. Wallace-Wells, *supra* note 26 (quoting Columbia and UCLA law professor Kimberlé Williams Crenshaw); see also 2021—HB 377—*Academic Censorship*, ACLU OF IDAHO, <https://perma.cc/M5R5-33SN> (archived Oct. 21, 2022) (“This bill shows a fundamental misunderstanding of Critical Race Theory. There are already nondiscrimination statutes in place to protect students from discrimination. The vague language of the statute only serves to further chill and censor discourse about implicit bias and racism and sexism in public schools and institutions.”).

124. Christopher F. Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021, 12:14 PM), <https://perma.cc/6UYB-JS46>; see also Wallace-Wells, *supra* note 26 (“Rufo said that the bureaucracy had been dominated by liberals, and he thought that the debates over critical race theory offered a way for conservatives to ‘take some of these essentially

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Rufo has led a successful conservative movement to redefine CRT “to refer to a whole swath of progressive trends in sociocultural life, ranging from diversity trainings to history curricula emphasizing the role of racism in American history.”¹²⁵ For example, in May 2021, a member of Utah’s state school board offered a list of several words that she stated were “euphemisms” for CRT, including “social justice,” “critical self-reflection,” and “Social Emotional Learning.”¹²⁶ As discussed above, virtually no K-12 public school actually teaches CRT—but some may place an increased focus on diversity and multiculturalism, add important historical events like the Tulsa race massacre to their curricula, or seek to better support students of color.¹²⁷ Proponents of anti-CRT bills have successfully conflated these activities with CRT.¹²⁸

Thus, the seemingly straightforward question of whether anti-CRT laws actually ban CRT is complicated, if not impossible, to answer. Attempting to find an answer leads down a rabbit hole of Christopher Rufo’s design and elides

corrupted state agencies and then contest them, and then create rival power centers within them.” (quoting Manhattan Institute senior fellow Christopher Rufo)).

125. See Zack Beauchamp, *Did Critical Race Theory Really Swing the Virginia Election?*, VOX (Nov. 4, 2021, 1:00 PM EDT), <https://perma.cc/2MGS-636A>.
126. Maggie Rivera, *Creating a Crisis: The Debate over Critical Race Theory*, GATE (Dec. 5, 2021, 4:48 PM) (quoting Utah state school board member Natalie Cline), <http://perma.cc/7QCD-EF7M>.
127. See O’Connor Complaint, *supra* note 7, ¶ 7; Daniella Silva, *Once Overlooked in Classrooms, Tulsa Race Massacre Now Seen as “Important” Lesson in Oklahoma Schools*, NBC NEWS (updated May 28, 2021, 11:30 AM PDT), <https://perma.cc/GS3M-ZCDV>; Altheria Caldera, Opinion, *No, Love Won’t Fix Institutional Racism in Education*, EDUCATIONWEEK (Nov. 18, 2021), <https://perma.cc/N654-ESC9> (“[Attempts to ban certain books] are reflections of a larger attack on schools’ efforts to make education more representative of the cultures and histories of students of color, who are the majority of public school students in the United States.”). It is important to recognize that critical race theorists may themselves disagree about whether such efforts by K-12 schools are promoting CRT. See Marisa Iati, *What Is Critical Race Theory, and Why Do Republicans Want to Ban It in Schools?*, WASH. POST (May 29, 2021, 5:00 AM PDT), <https://perma.cc/HVZ8-V8LK> <https://perma.cc/HVZ8-V8LK> (“Bridges said she would not characterize the increased focus on diversity and multiculturalism as critical race theory, while Thomas said critical race theory ‘is defined by this more expansive view of history now taught in classrooms.’” (first citing Berkeley law professor Khiara Bridges and then quoting Columbia law professor Kendall Thomas)).
128. See Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUCATIONWEEK (May 18, 2021), <https://perma.cc/59XJ-E4LM> (“[T]here is a good deal of confusion over what CRT means, as well as its relationship to other terms, like ‘anti-racism’ and ‘social justice,’ with which it is often conflated. To an extent, the term ‘critical race theory’ is now cited as the basis of all diversity and inclusion efforts regardless of how much it’s actually informed those programs.”); see also Wallace-Wells, *supra* note 26 (“[Anti-CRT sentiment] is a post-George Floyd backlash,” Crenshaw said. “The reason why we’re having this conversation is that the line of scrimmage has moved.” (quoting Columbia and UCLA law professor Kimberlé Williams Crenshaw)).

an even bigger legal problem. As this Note will argue, anti-CRT laws do much more than ban or attempt to ban CRT: They are “bans on truth and history”¹²⁹ that impinge on K-12 educators’ First Amendment rights and threaten to upend the structure of education law and policy.

II. Doctrinal Approaches Available to Federal Courts for Analyzing K-12 Teacher Speech

In this Part, I ask whether a K-12 public-school educator could successfully challenge a state anti-CRT law on First Amendment grounds under existing federal doctrine. A plaintiff bringing a First Amendment challenge against an anti-CRT law would be successful if a court found that the law discriminated on the basis of viewpoint or that the law was unconstitutionally vague or overbroad.¹³⁰ But both viewpoint discrimination and vagueness or overbreadth challenges lead to the same central question: Is the underlying speech—in this case K-12 instructional speech¹³¹—itself protected? As I will demonstrate in this Part, the answer to that question is undetermined and heavily circuit-dependent. The Supreme Court has held that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹³² But the Court has never explicitly ruled whether, or to what extent, K-12 teachers’ instructional speech is protected by the First Amendment.¹³³ Instead, lower courts adjudicating teacher-speech claims, and parties bringing or defending such claims, are confronted with a patchwork of case law governing related issues, including public-employee speech and student speech. Scholars and circuit courts are split on which, if any, of these doctrines can and should apply to K-12 teachers’ instructional speech, and many circuits have yet to address the question.

129. *Critical Race Theory: Frequently Asked Questions*, *supra* note 116 (to locate, select “View the live page,” and then select “What does recent legislation regarding Critical Race Theory seek to ban”).

130. *See* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that content-based discrimination violates the First Amendment); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (holding that vague laws may violate the First Amendment); *United States v. Stevens*, 559 U.S. 460, 473 (2010) (holding that overbroad laws violate the First Amendment).

131. *See supra* note 17 and accompanying text.

132. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506-07 (1969).

133. *See* RONNA GREFF SCHNEIDER, *EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION* § 2:18 (West 2022) (noting that the Supreme Court has “explicitly declined to determine whether its holding and reasoning [in *Garcetti v. Ceballos*] would apply to ‘scholarship or teaching’ because of the ‘additional constitutional interests [implicated] that are not fully accounted for by [the] Court’s customary employee-speech jurisprudence.’” (second and third alterations in original) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006))).

Content or Viewpoint Discrimination

The First Amendment severely limits the government's ability to enact content-based restrictions on speech.¹³⁴ As the Supreme Court wrote in *West Virginia State Board of Education v. Barnette*, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹³⁵ Thus, a law restricting ordinary citizens from discussing the concepts outlined in state anti-CRT laws would almost certainly violate the First Amendment.

However, viewpoint discrimination works differently in the context of government speech. While the government cannot discriminate against the viewpoints of citizens, it can control its own message.¹³⁶ Thus, in asking whether the government has committed viewpoint discrimination in a teacher-speech case, the key question is whether teacher speech is ever extricable from government speech.

Vagueness or Overbreadth

A policy may be impermissibly vague in violation of the Fourteenth Amendment's Due Process Clause and the First Amendment "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or "if it authorizes or even encourages arbitrary and discriminatory enforcement."¹³⁷ In the First Amendment context, courts may apply "[s]tricter standards of permissible statutory vagueness" because of the special concerns associated with chilling speech.¹³⁸ A law may be struck down as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."¹³⁹

Considering that at least one court found that EO 13,950 was likely unconstitutionally vague, there is a strong argument that the state anti-CRT laws—which repeat many of the provisions of the executive order

134. See *Simon & Schuster, Inc.*, 502 U.S. at 115-16.

135. 319 U.S. 624, 642 (1943).

136. See Caroline Mala Corbin, Essay, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 227 (2021).

137. *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 50 (10th Cir. 2013) (quoting *Jordan v. Pugh*, 425 F.3d 820, 824-25 (10th Cir. 2005)). For the relationship between vagueness under the Due Process Clause and vagueness under the First Amendment, see *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976).

138. See *Hynes*, 425 U.S. at 620 (quoting *Smith v. California*, 361 U.S. 147, 151 (1959)).

139. *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

verbatim¹⁴⁰—are also unconstitutionally vague.¹⁴¹ However, the district court in *Santa Cruz Lesbian & Gay Community Center v. Trump* avoided a government-speech issue because of its finding that EO 13,950 likely restricted contractors’ training of their own employees “regardless of whether the federal contract has anything to do with diversity training or the identified ‘divisive concepts.’”¹⁴² In other words, the executive order clearly implicated at least some speech that could not be deemed government speech, allowing the court to ultimately find for the plaintiffs.¹⁴³ But because state anti-CRT laws directly regulate public-school teachers in their capacity as government employees, a key question in the context of a vagueness or overbreadth claim would again be whether K-12 teachers’ instructional speech is ever extricable from government speech and therefore may be protected by the First Amendment.

Thus, under either a viewpoint-discrimination or vagueness-or-overbreadth theory, we must determine whether K-12 teachers’ instructional speech can ever find refuge in the First Amendment. Because scholars and circuit courts are split on this question, this Note reviews the major doctrinal approaches available for analyzing K-12 teachers’ classroom speech: (1) pure *Garcetti*, (2) pre-*Garcetti* *Pickering* balancing, and (3) tailoring student-speech tests to apply to teachers.¹⁴⁴

A. Approach #1: Pure *Garcetti*

The Supreme Court announced a new standard for assessing whether public-employee speech is protected by the First Amendment in 2006 in *Garcetti v. Ceballos*.¹⁴⁵ The Court considered whether the Los Angeles County

140. See *supra* Part I.B.1.

141. See *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 543-45 (N.D. Cal. 2020); see also *Honeyfund.com, Inc. v. DeSantis*, No. 22-cv-00227, 2022 WL 3486962, at *11-14 (N.D. Fla. Aug. 18, 2022) (granting a preliminary injunction in part after finding that Florida’s anti-CRT law was unconstitutionally vague, although not overbroad).

142. See *Santa Cruz*, 508 F. Supp. 3d at 540-42.

143. See *id.*

144. See SCHNEIDER, *supra* note 133, § 2:19 (“Courts have struggled with determining whether issues involving the freedom of expression of teachers, at least in the classroom setting, should be analyzed using the same framework as cases involving other public employees or whether constitutional questions involving teacher expression should be analyzed like those cases involving student expression. Various lower courts have used each of these approaches. Some lower court decisions are also unclear as to which approach should be used or have used both approaches.”).

145. 547 U.S. 410, 421-22 (2006) (“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.”); Norton, *supra* note 15, at 3-4 (describing the “key . . . doctrinal shift” brought on by *Garcetti*).

District Attorney's Office could retaliate against its employee Richard Ceballos, a Deputy District Attorney, for writing an internal memo expressing concerns about inaccuracies in an affidavit supporting a particular search warrant.¹⁴⁶ In a 5-4 decision, the Supreme Court held that Ceballos's memo was not protected speech under the First Amendment because public employees making statements "pursuant to their official duties" are not "speaking as citizens for First Amendment purposes."¹⁴⁷ They are speaking for the government, and the government can control its own speech without violating the First Amendment.¹⁴⁸

While K-12 public-school teachers are undoubtedly public employees, the Supreme Court has never stated whether and how *Garcetti* might apply to them.¹⁴⁹ Justice Kennedy, writing for the majority in *Garcetti*, explicitly reserved the question of whether *Garcetti* applies in the context of education:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.¹⁵⁰

These two sentences form *Garcetti*'s "academic exception," but circuits and scholars differ on whether and how to apply the exception to K-12 public-school teachers.¹⁵¹

While several courts have applied *Garcetti* to teacher speech outside the classroom or to noninstructional speech,¹⁵² only two circuits have explicitly applied *Garcetti* to K-12 teachers' instructional classroom speech.¹⁵³ The Sixth

146. 547 U.S. at 413-15.

147. *Id.* at 421.

148. *See id.* at 421-22; Corbin, *supra* note 136, at 227.

149. *See* SCHNEIDER, *supra* note 133, § 2:18.

150. *Garcetti*, 547 U.S. at 425.

151. *See* SCHNEIDER, *supra* note 133, § 2:18.

152. Susan P. Stuart, *Citizen Teacher: Damned if You Do, Damned if You Don't*, 76 U. CIN. L. REV. 1281, 1327 (2008) ("[M]any cases applying *Garcetti* to school district retaliation against teachers really do not involve curricular disputes."); *see, e.g.*, *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1257, 1262-64 (9th Cir. 2016) (holding that a public-school teacher's complaints to supervisors regarding the administration of services for special-education students were not protected by the First Amendment); *Umoren v. Plano Indep. Sch. Dist.*, 457 F. App'x 422, 426 (5th Cir. 2012) (holding that the plaintiff's complaints about the school district's policies were not protected by the First Amendment).

153. Lower courts in the Second Circuit have held that "[t]eacher instruction is public employee speech." *See, e.g.*, *Kramer v. N.Y.C. Bd. of Educ.*, 715 F. Supp. 2d 335, 357 (E.D.N.Y. 2010). However, the Second Circuit itself has not explicitly addressed whether *Garcetti* applies to K-12 teachers' instructional speech. *See* *Panse v. Eastwood*,
footnote continued on next page

Circuit held in *Evans-Marshall v. Board of Education* that “the right to free speech protected by the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools made ‘pursuant to’ their official duties”¹⁵⁴ and that “[a] teacher’s curricular and pedagogical choices are categorically unprotected.”¹⁵⁵ The Seventh Circuit relied on *Garcetti* in *Mayer v. Monroe County Community School Corp.* to hold that “the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.”¹⁵⁶

A number of scholars agree with the Sixth and Seventh Circuits, arguing that *Garcetti*’s public-employee-speech doctrine can and should apply to K-12 teachers’ instructional speech.¹⁵⁷ Some argue that, absent any Supreme Court ruling to the contrary, courts should treat K-12 teachers as they treat all other public employees under *Garcetti*.¹⁵⁸ Others construe the *Garcetti* academic exception to apply to teaching and scholarship in higher education, which they deem “high-value speech in a democracy,” but not to the K-12 level.¹⁵⁹

But there are also serious drawbacks to applying *Garcetti* to K-12 teachers’ instructional speech. Scholars have argued that extending *Garcetti* to cover curricular speech would lower the quality of classroom instruction by chilling educators’ creativity, remarking that students are “unimpressed” by teaching that is strictly confined to enumerated curricular matters.¹⁶⁰ They point out that teachers’ classroom speech often extends far beyond curriculum given the many obligations of teachers to their students, schools, and administrators.¹⁶¹

303 F. App’x 933, 934-35 (2d Cir. 2008) (“It is an open question in this Circuit whether *Garcetti* applies to classroom instruction. . . . But we need not resolve the issue of whether *Garcetti* or some other standard applies here because Panse does not raise this issue on appeal and his claim would fail regardless of the standard.”); *Lee-Walker v. N.Y.C. Dep’t of Educ.*, 712 F.App’x 43, 44-45 (2d Cir. 2017) (declining to rule on whether *Garcetti* applies to K-12 teachers’ instructional speech and stating that “[n]either *Garcetti* nor *Hazelwood* clearly governs this case”).

154. 624 F.3d 332, 334 (6th Cir. 2010) (quoting *Garcetti*, 547 U.S. at 421).

155. *Id.* at 342; *see also* *Savage v. Gee*, 665 F.3d 732, 738-39 (6th Cir. 2012) (referring to the *Garcetti* academic exception as “dicta”).

156. 474 F.3d 477, 480 (7th Cir. 2007).

157. *See, e.g.*, Paul Forster, *Teaching in a Democracy: Why the Garcetti Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 688 (2011); Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 66 (2008).

158. *See* Forster, *supra* note 157, at 688.

159. Nahmod, *supra* note 157, at 55, 66, 68.

160. *See, e.g.*, Stuart, *supra* note 152, at 1328-30.

161. *See, e.g., id.* at 1341 (“Teachers have so many obligations to their students, their schools, their administrators and their colleagues that are peripheral to the actual instruction that they have a hard time enunciating what is *not* professional speech in any particular teaching assignment.”).

Garcetti, they argue, would severely constrain teachers' abilities to support students and serve as role models.¹⁶² Educators are "never really off the job of an institution that is ubiquitous and essential,"¹⁶³ so a test that asks only whether a teacher is speaking "pursuant to their official duties" seems a poor fit.¹⁶⁴ And although *Garcetti* may seem to be a relatively straightforward legal test, applying *Garcetti* to K-12 teachers' instructional speech could in fact result in bizarre doctrinal outcomes. For example, if public employees receive protection only when speaking as citizens, this might afford protection to "an offhand remark" a teacher makes during a lesson, but not "the thoughtfully assembled content of her lesson plans."¹⁶⁵

Scholars and courts that find *Garcetti* doctrinally or normatively inappropriate for analyzing teacher speech may instead turn to pre-*Garcetti* *Pickering* balancing, or tailor established student-speech tests to apply to teachers. I address these alternative legal tests in turn.

B. Approach #2: Pre-*Garcetti* *Pickering* Balancing

Before *Garcetti*, courts used a balancing test established in *Pickering v. Board of Education* to determine whether a teacher's speech was protected under the First Amendment.¹⁶⁶ *Pickering* balancing weighs "the interests of the [employee], 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."¹⁶⁷ In *Pickering*, a public-school teacher was fired after "sending a letter to a local newspaper" about proposed tax increases, criticizing the way that the school board had "handled past proposals to raise new revenue" for schools.¹⁶⁸ The Court held that the teacher's letter was protected by the First Amendment:

[T]he question [of] whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to

162. See, e.g., Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235, 280-81 (2014) ("If teachers are role models, as has been stated by the courts, then it stands to reason that they should be able to model dissent or at least have a modicum of protection to freely express themselves.").

163. Stuart, *supra* note 152, at 1318, 1341.

164. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

165. Nicholas K. Tygesson, Note, *Cracking Open the Classroom Door: Developing a First Amendment Standard for Curricular Speech*, 107 NW. U.L. REV. 1917, 1934 (2013).

166. 391 U.S. 563, 568 (1968).

167. *Id.*

168. *Id.* at 564.

popular vote, be taken as conclusive. . . . [I]t is essential that [teachers] be able to speak out freely on such questions without fear of retaliatory dismissal.¹⁶⁹

The *Garcetti* court added an extra step to *Pickering* balancing, creating the “*Garcetti-Pickering* balancing test”: If the public employee was speaking “pursuant to their official duties,” then under *Garcetti* there is no First Amendment protection.¹⁷⁰ But if the employee was not speaking “pursuant to their official duties,” then courts engage in *Pickering* balancing.¹⁷¹

Despite the change wrought by *Garcetti*, there are two routes by which a court could apply *Pickering* balancing without the added obstacle imposed by *Garcetti*. First, as discussed above, a court may use *Garcetti*’s “academic exception” to evade the *Garcetti* inquiry altogether. Second, because courts analyzed public-employee speech under *Pickering* before *Garcetti* and because the Supreme Court has never explicitly stated whether *Garcetti* applies to K-12 teachers’ instructional speech, some courts have continued to analyze teacher speech under *Pickering* without making any claims about *Garcetti*’s “academic exception.”¹⁷² For example, the Fourth Circuit held in a case concerning K-12 teacher speech that it would continue to apply *Pickering* balancing in the absence of a statement by the Supreme Court that *Garcetti* applies to K-12 instructional speech.¹⁷³ The Ninth Circuit has also continued to apply *Pickering* to K-12 teacher speech, reasoning that where the government “acts as both sovereign and employer,” *Pickering* rather than *Garcetti* controls.¹⁷⁴ *Pickering* may also carry particular doctrinal weight because, unlike *Garcetti*, the case explicitly concerned a K-12 public-school teacher.

Various scholars see *Pickering* as a normatively appropriate approach for analyzing K-12 teachers’ instructional speech, preferring *Pickering*’s “chisel” to the “blunt . . . instrument” of *Garcetti*.¹⁷⁵ *Pickering*’s more nuanced approach, some have argued, allows schools to “inculcat[e] [the] fundamental values”¹⁷⁶ necessary to maintain a democratic system while still allowing teachers to expose students

169. *Id.* at 563, 571-72.

170. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

171. See Joseph O. Oluwole, *The Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133, 142-43 (2008) (quoting *Garcetti*, 547 U.S. at 421).

172. See, e.g., *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007) (emphasis omitted).

173. See *id.* at 689, 694 n.11.

174. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir. 2011).

175. See, e.g., Stephen Elkind & Peter Kauffman, *Gay Talk: Protecting Free Speech for Public School Teachers*, 43 J.L. & EDUC. 147, 149-50 (2014).

176. Benjamin C. Galea, Note, *Getting to “Sometimes”: Expanding Teachers’ First Amendment Rights Through “Garcetti’s Caveat,”* 62 CASE W. RES. L. REV. 1205, 1235-36 (2012) (first alteration in original) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)).

to the “robust exchange of ideas.”¹⁷⁷ But in a circuit that does not apply *Garcetti*’s academic exception to K-12 teachers, it may be difficult—if not impossible—to make a doctrinal argument that *Pickering* survives post-*Garcetti*.

C. Approach #3: Tailoring *Hazelwood* to Teacher Speech

While the Supreme Court has never ruled on whether K-12 teachers’ instructional speech is protected by the First Amendment, the Court’s student-speech jurisprudence is far more robust.¹⁷⁸ Some lower courts have applied student-speech tests to teacher speech, particularly the test articulated in *Hazelwood School District v. Kuhlmeier*.¹⁷⁹ In *Hazelwood*, the Court held that a high school principal’s censorship of a student newspaper did not violate students’ First Amendment rights because “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”¹⁸⁰

Some lower courts have flipped this test to apply to teachers, holding that schools can control a *teacher’s* classroom speech in order to serve a legitimate pedagogical purpose.¹⁸¹ For example, in *Miles v. Denver Public Schools*, a public high school teacher was disciplined for repeating a rumor about two students during class.¹⁸² The Tenth Circuit found that the school had asserted a number of legitimate pedagogical reasons for disciplining the teacher, including “an interest in preventing Miles from using his position of authority to confirm an

177. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969)).

178. *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that it was unconstitutional to require public-school students to recite the Pledge of Allegiance); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (“In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that a school principal “may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use”); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2042-43 (2021) (holding that a public school violated a student’s First Amendment rights by disciplining her for off-campus speech).

179. 484 U.S. 260 (1988).

180. *Id.* at 262-64, 273, 276.

181. *See, e.g.*, *Kramer v. N.Y.C. Bd. of Educ.*, 715 F. Supp. 2d 335, 357-8 (E.D.N.Y. 2010) (finding that a teacher’s speech was “school-sponsored” and therefore could be regulated under *Hazelwood*); *Kirby v. Yonkers Sch. Dist.*, 767 F. Supp. 2d 452, 460-61 (S.D.N.Y. 2011) (same).

182. 944 F.2d 773, 774 (10th Cir. 1991).

unsubstantiated rumor,” and “an interest in providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers.”¹⁸³ Further, the school took action “reasonably related” to those legitimate pedagogical concerns when it placed Miles on paid administrative leave and put a letter of reprimand in his file, and therefore the school’s actions did not violate Miles’s First Amendment rights.¹⁸⁴ Thus, the Tenth Circuit applied the test articulated in *Hazelwood*—a case that only considered student speech—to teacher speech.

Even before *Garcetti* was decided in 2006,¹⁸⁵ many courts analyzed teacher speech under *Hazelwood* rather than *Pickering*.¹⁸⁶ In *Miles*—decided pre-*Garcetti*—the Tenth Circuit explicitly rejected arguments made by both the plaintiff and the defendant that *Pickering* “and its progeny” should apply to K-12 teachers’ classroom speech.¹⁸⁷ The court reasoned that *Pickering* “does not address the significant interests of the state as educator,” and the “peculiar responsibilities” of the state to provide educational services warranted the use of *Hazelwood* instead.¹⁸⁸ Thus, in circuits that have found *Hazelwood* rather than *Pickering* to control the analysis of teachers’ instructional speech, there is a doctrinal argument that *Garcetti* does not overrule that approach.

Many scholars have championed *Hazelwood* (or a version of *Hazelwood*) as the best approach for analyzing K-12 teachers’ instructional speech, arguing that it strikes an appropriate balance “between the competing interests of school boards, teachers, and students,” while allowing teachers some discretion to control how they teach state-prescribed curriculum.¹⁸⁹ At the very least,

183. *Id.* at 778.

184. *See id.* at 778-79.

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

186. *See, e.g., Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 17, 22-23 (1st Cir. 1999) (applying *Hazelwood* to analyze whether the First Amendment protected a high school teacher’s distribution of lewd materials to a student and determining that “[k]eeping scatological documents away from impressionable youngsters is certainly a reasonable educational objective”); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (applying *Hazelwood* and declaring that “[a] school committee may regulate a teacher’s classroom speech if . . . the regulation is reasonably related to a legitimate pedagogical concern”); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722-24 (2d Cir. 1994) (applying *Hazelwood* and holding that a guest lecturer’s showing of a film that included bare-chested women to a tenth-grade math class was school-sponsored speech); *Cal. Tchrs. Ass’n v. Davis*, 64 F. Supp. 2d 945, 953-54 (C.D. Cal. 1999) (applying both *Pickering* and *Hazelwood* to analyze a constitutional challenge to an English-only-education law).

187. *Miles*, 944 F.2d at 776-77.

188. *Id.* at 777.

189. Kimberly Gee, *Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression*, 38 J.L. & EDUC. 409, 452-53 (2009); *see also* Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 52-53 (2001)
footnote continued on next page

they point out, *Hazelwood* is more nuanced than *Garcetti*, where the fact of the employer-employee relationship virtually ends the analysis.¹⁹⁰ That said, applying a test designed for student speech to K-12 teacher speech can also flatten out important differences between student and teacher expression. Unlike their students, teachers are “professional pedagogues” who may have “legitimate pedagogical differences” with school districts or administrators—differences for which *Hazelwood* offers no First Amendment protection.¹⁹¹ And courts applying *Hazelwood* in teacher-speech cases often fail to inquire into “what constitutes a legitimate pedagogical concern,” deferring instead to the judgement of the school or district.¹⁹² Thus, *Hazelwood* generally provides much greater protection to schools and districts than it does to teachers.¹⁹³

D. The Future of Teacher Speech

Even before *Garcetti*, scholars and advocates were calling for courts to overhaul their approach to K-12 teacher speech under the First Amendment.¹⁹⁴ As scholar Kevin Welner has argued, we need “a new constitutional framework” that “allow[s] courts to view classrooms as they truly are and to understand the daily struggles of teachers as they try to create a stimulating

(“My proposed test puts a different twist on *Hazelwood* in cases where teacher speech is most deserving of protection by establishing a presumption of educational legitimacy and reasonableness that school boards are required to overcome.”); Alison Lima, Comment, *Shedding First Amendment Rights at the Classroom Door?: The Effects of Garcetti and Mayer on Education in Public Schools*, 16 GEO. MASON L. REV. 173, 174 (2008) (recommending the adoption of the traditional student-speech analysis for “teacher speech inside the classroom,” arguing that “[t]his approach results in a more equitable balancing of teachers’ First Amendment rights against the interests of schools, while considering the realities of the educational system and the interests of students”).

190. See Stuart, *supra* note 152, at 1326-27.

191. Tygesson, *supra* note 165, at 1935; see also *Kramer v. N.Y.C. Bd. of Educ.*, 715 F. Supp. 2d 335, 357-58 (E.D.N.Y. 2010) (“The school board has a legitimate interest in ensuring that teachers devise and implement lesson plans in a way it considers effective and appropriate.”); cf. *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (en banc) (“The makeup of the curriculum . . . is by definition a legitimate pedagogical concern.”).

192. Tygesson, *supra* note 165, at 1932; see Daly, *supra* note 189, at 13 (“The undefined nature of ‘legitimate pedagogical concerns,’ coupled with judicial deference to the judgment of school officials, creates the potential for abuse.”).

193. See Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 67 (2008) (“[C]ourts have generally relied on *Hazelwood* as a means to emphasize the authority of school authorities to control teachers’ in-class speech.”).

194. See, e.g., Daly, *supra* note 189, at 1-4 (“Currently, courts rely on either the precedent established in *Hazelwood* or *Pickering* to resolve cases addressing the First Amendment protection accorded to teachers’ in-class speech. For differing reasons, neither standard is appropriate.”).

and meaningful educational experience for their students.”¹⁹⁵ The conundrum of teacher speech will not be resolved by the Supreme Court merely choosing from the three available approaches discussed above. As I will argue, applying the First Amendment to anti-CRT laws demonstrates a deeper problem: Existing First Amendment doctrine does not account for the daily realities of teacher speech.

III. A New Approach to Analyzing K-12 Teachers’ Instructional Speech

A. Hypothetical: Teaching the Tulsa Race Massacre Under Oklahoma’s Anti-CRT Law

Imagine: You’re an eleventh-grade U.S. history teacher in Oklahoma, and it is a normal school day¹⁹⁶—well, as normal as it can be when you are teaching during a global pandemic.¹⁹⁷ It is only 7:00 AM but you already have a lot on your mind: For each of the 140 eleventh graders you teach,¹⁹⁸ there is an unserved need, an unanswered question.¹⁹⁹ And then there is H.B. 1775²⁰⁰: a law recently passed by the Oklahoma State Legislature banning—well you’re not

195. Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking out School Reform: Courts’ Imprudent Treatment of Controversial Teaching in America’s Public Schools*, 50 UCLA L. REV. 959, 1024 (2003).

196. This hypothetical, including all student names, is purely fictional. However, it is loosely inspired by the writings and statements of real teachers across the United States. See, e.g., Jania Hoover, *Critical Race Theory Hysteria Overshadows the Importance of Teaching Kids About Racism*, VOX (July 9, 2021, 7:10 AM PDT), <https://perma.cc/BUB2-VJWF>; Brittany Wong, *“Critical Race Theory”? Here’s What Teachers Say They’re Actually Teaching*, HUFFPOST (July 14, 2021, 10:45 PM PDT), <https://perma.cc/RD9M-FSTF>; David Rosas, *I Am an Elementary School Educator, and I Embrace Critical Race Theory*, CHALKBEAT (Aug. 23, 2021, 8:00 AM PDT), <https://perma.cc/AFK6-GN97>.

197. See Natasha Singer, *Teaching in the Pandemic: “This Is Not Sustainable,”* N.Y. TIMES (updated Dec. 3, 2020), <https://perma.cc/7KR8-7ZCS>; Kavitha Cardoza, *“We Need to Be Nurtured, Too”: Many Teachers Say They’re Reaching a Breaking Point*, NPR (Apr. 19, 2021, 12:00 PM ET), <https://perma.cc/5AKP-2GM2>.

198. Rebecca Fine, *Beyond Teacher Pay: Class Size Matters*, OKLA. POL’Y INST.: OK POL’Y BLOG (updated May 2, 2019), <https://perma.cc/MXM5-3DTB> (noting that an Oklahoma law imposes “a limit of 140 students a day for middle and secondary teachers,” although “class sizes have likely grown” since that law was passed).

199. Oklahoma has the third-most students with Adverse Childhood Experiences in the United States. OKLA. STATE DEP’T OF EDUC., OKLAHOMA PUBLIC SCHOOLS FAST FACTS: 2020-21, at 19 (2021), <https://perma.cc/K68J-PY78>.

200. Oklahoma’s anti-CRT bill, H.B. 1775, was codified at OKLA. STAT. tit. 70, § 24-157 (2022). In this hypothetical, I refer to the law as “H.B. 1775” because that is how the law is referred to in ongoing litigation and in media coverage. See, e.g., *O’Connor Complaint*, *supra* note 7, ¶ 1; Lenzy Krehbiel-Burton, *State Pushes Back in HB 1775 Lawsuit over Race, Gender Instruction*, TULSA WORLD (updated Oct. 23, 2022), <https://perma.cc/ER6W-UK75>.

sure what, exactly, but the Oklahoma State Board of Education has made it clear that anyone who violates the law's restrictions on teaching about racism and sexism could lose their teaching license.²⁰¹

Amidst all this, you were up late last night finalizing today's lesson plan on the Tulsa race massacre.²⁰² This is one of the toughest lessons of the year, but also one of the lessons that is most rewarding for you as an educator. You want to make sure you get it right.

You begin your lesson by having students break up into pairs and analyze a primary source²⁰³: the *New York Times*' first report about the Tulsa race massacre.²⁰⁴ One student, Oscar, points out that most of the present-day sources you'd assigned as homework refer to the event as the "Tulsa race massacre," while the 1921 article instead uses the word "riot"²⁰⁵ (as do the Oklahoma standards themselves²⁰⁶—an irony that is not lost on you). As usual, your students are two steps ahead of you: One goal of today's lesson is to cover OKH 5.2(F), the provision of Oklahoma's Academic Standards for Social Studies that asks students to "[e]xamine multiple points of view regarding the evolution of race relations in Oklahoma, including . . . the role labels play in understanding historic events, for example 'riot' versus 'massacre.'"²⁰⁷ You ask the students to turn back to their partners and discuss Oscar's comment: How might labeling this historical event as a "riot" as opposed to a "massacre" influence our contemporary understanding of the event itself?

201. See OKLA. STAT. tit. 70, § 24-157 (2022); OKLA. ADMIN. CODE § 210:10-1-23 (2022).

202. See OKLA. STATE DEP'T OF EDUC., OKLAHOMA ACADEMIC STANDARDS FOR SOCIAL STUDIES 47, 61, <https://perma.cc/5ZJ8-ATXL> (archived Nov. 19, 2022) (including the Tulsa race massacre in Oklahoma's academic standards). These standards provide that students should learn to "[e]xamine multiple points of view regarding the evolution of race relations in Oklahoma, including . . . [the] causes of the Tulsa Race Riot and its continued social and economic impact." *Id.* at 45. Students should also be able to "[d]escribe the rising racial tensions in American society including . . . race riots as typified by the Tulsa Race Riot." *Id.* at 57.

203. See *id.* at 78 (stating that students should learn to "[g]ather, organize, and analyze various kinds of primary and secondary source evidence on related topics, evaluating the credibility of sources" and "[e]valuate the usefulness of primary and secondary sources for specific inquiry, based on the author, date, place of origin, intended audience, and purpose").

204. See Nicole Daniels & Natalie Proulx, *Teaching About the Tulsa Race Massacre with the New York Times*, N.Y. TIMES (updated Sept. 17, 2021), <https://perma.cc/3GG5-MZJW>. This hypothetical lesson plan draws heavily on one published by the *New York Times*. See *id.* For the article referenced, see *85 Whites and Negroes Die in Tulsa Riots as 3,000 Armed Men Battle in Streets; 30 Blocks Burned, Military Rule In City*, N.Y. TIMES, June 2, 1921, at 1.

205. See *85 Whites and Negroes Die in Tulsa Riots as 3,000 Armed Men Battle in Streets*, *supra* note 204.

206. See OKLA. STATE DEP'T OF EDUC., *supra* note 202, at 45, 57.

207. *Id.* at 45.

Then something happens. Some might call it a “teachable moment,” while you’d probably just call it a moment; an average day in eleventh-grade U.S. history. Anita, one of your quietest students, raises her hand for the first time in two weeks. “But who cares what we call it?” she asks. “Riot, massacre, whatever. It’s just a word, right?”

Her comment ripples across the classroom. You see interest: Some students are nodding their heads, leaning forward in their seats. But you also see discomfort, even anger: For your students here in Oklahoma, this is a question not just about language, but about lives. Their lives.

There’s so much to unpack in Anita’s question, which gets to the core of OKH 5.2(F), and indeed, to the core of any high school humanities course: Why and how do words shape the fabric of our lives? You imagine moments like this as a balancing act. You are surfing the rolling, unpredictable wave of your students’ emotions, interests, and needs; steering the class discussion in a way that affirms Anita’s participation, addresses each of the OKH standards in your lesson plan, and feels both intellectually honest and developmentally appropriate for this room of sixteen-year-olds. In short: This is why you teach.

You take a deep breath, and begin.

B. Evaluating Teacher Speech Under Existing First Amendment Doctrine

This fact pattern is not so hypothetical. In October 2021, organizations including the ACLU of Oklahoma and the Lawyers’ Committee for Civil Rights Under Law filed a lawsuit alleging that classroom instruction about racism and sexism in Oklahoma’s public schools has been severely limited by H.B. 1775.²⁰⁸ Educators across the state have removed books by authors of color from their curricula—and even books by white authors that touch on the existence of racism, like *To Kill a Mockingbird*.²⁰⁹ At least one school district has instructed teachers to comply with H.B. 1775 “by avoiding terms such as ‘diversity’ and ‘white privilege.’”²¹⁰ Students of all races feel that their education has suffered as a result.²¹¹

Below, the Note uses the hypothetical fact pattern to explore how H.B. 1775 might constrain this teacher’s response to Anita’s question. The discussion serves as a proxy for a very real question: Does the First Amendment protect Oklahoma’s educators against a law like H.B. 1775, and if so, how?

208. See Lacy Crawford, Jr., *Lawyers’ Committee Files First Federal Lawsuit Challenging Oklahoma Classroom Censorship Bill*, LAWS’ COMM. FOR C.R.S. UNDER L. (Oct. 19, 2021), <https://perma.cc/G5EC-GJZ5>.

209. See O’Connor Complaint, *supra* note 7, ¶ 3.

210. *Id.*

211. See *id.* ¶¶ 16, 18.

1. Under *Garcetti*, none of the teacher’s speech is protected

Our hypothetical Oklahoma teacher may engage in many different types of speech almost simultaneously. In a span of mere minutes, she might enforce a government policy by reminding students to wear their masks, engage in a personal conversation with a student about a challenge they’re facing at home, and offer an answer to Anita’s big question. But under *Garcetti*, all of this speech is likely made pursuant to the teacher’s official duties—particularly in a circuit like the Tenth, which reads *Garcetti* quite expansively.²¹² Therefore, it is all equally unprotected by the First Amendment.²¹³

Garcetti collapses many ways of engaging with students into a single category: “government speech.”²¹⁴ And perhaps some of the speech described above is government speech: For example, if a teacher does not herself believe that students need to wear a mask—but the state, county, or school district mandates mask-wearing—it is still the teacher’s job to ensure compliance with that policy. But when the teacher answers Anita’s big question, it is unlikely that she is reciting from a state-approved fact sheet. The teacher must navigate her students’ various needs, manage the classroom environment, and offer a compelling answer in a developmentally appropriate way. No state-approved binder could possibly supply such nuanced, differentiated responses across an entire school district or state. Rather, the teacher will likely draw on primary and secondary sources, her own teacher training, approved curricula, and even personal experience.²¹⁵ Is such speech “government speech” worthy of zero First Amendment protection? Under *Garcetti*, a court would not even reach this question: Virtually any classroom speech is automatically deemed government speech and is therefore unprotected by the First Amendment.

212. See Raj Chohan, Survey, *Tenth Circuit Interpretations of Garcetti: Limits on First Amendment Protections for Whistle-Blowers*, 85 DENV. U. L. REV. 573, 574 (2008) (stating that some courts, including the Tenth Circuit, have “interpreted the Court’s decision in *Garcetti* broadly, declaring more speech to be unprotected”).

213. See *supra* text accompanying note 147.

214. See *supra* text accompanying notes 147-48.

215. See John H. Bickford III, *The Curriculum Development of Experienced Teachers Who Are Inexperienced with History-Based Pedagogy*, J. SOC. STUD. EDUC. RSCH., Spring 2017, at 146 (“Educators largely rely on understandings developed as preservice candidates, personal beliefs, and in [sic] the extended, disconnected professional development offered by school districts.”); see also OECD, CREATING EFFECTIVE TEACHING AND LEARNING ENVIRONMENTS: FIRST RESULTS FROM TALIS 91 fig.4.1 (2009), <https://perma.cc/SX66-8ZEA> (demonstrating the complex relationships between variables that influence teaching practices).

2. Pre-Garcetti Pickering balancing leaves much instructional speech unprotected

If a court finds that *Garcetti*'s academic exception applies to K-12 teachers, it will analyze the teacher's speech under *Pickering* balancing.²¹⁶ A crucial question under *Pickering* is whether the teacher is speaking on a "matter of public concern."²¹⁷ Some of the speech in the hypothetical may fall into this category: for example, reminding students to wear masks in compliance with local policy, or discussing systemic racism as it relates to the Tulsa race massacre.²¹⁸ But what about Anita's question, which is unlikely to appear in a newspaper headline, and may implicate the personal experiences and emotions of many students? What about a private conversation with a student about challenges they are facing at home? It is difficult to map the language of "public concern" onto the private, interpersonal conversations that make up such an essential element of K-12 teachers' jobs.²¹⁹ Thus, while *Pickering* balancing likely protects some of the speech in the hypothetical, its key distinction between private and public concern elides the reality of K-12 teaching. Teacher speech vacillates constantly between matters of private and public concern because educators must attend to the personal, individual needs of students in order to do their jobs effectively.²²⁰

216. See *supra* notes 166-72 and accompanying text.

217. See *supra* text accompanying notes 167-69.

218. See *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 541 (N.D. Cal. 2020) (finding that because "the restricted speech [under EO 13,950], addressing issues of racism and discrimination, goes to matters of public concern," the plaintiffs were likely to prevail on the first prong of *Pickering* balancing).

219. See Elise Cappella, Bridget K. Hamre, Ha Yeon Kim, David B. Henry, Stacy L. Frazier, Marc S. Atkins & Sonja K. Schoenwald, *Teacher Consultation and Coaching Within Mental Health Practice: Classroom and Child Effects in Urban Elementary Schools*, 80 J. CONSULTING & CLINICAL PSYCH. 597, 598, 607 (arguing that "[t]he primary mechanisms of psychosocial and academic development in elementary school are proximal interactions between teachers and children in classrooms" and that "[c]hildren may feel more successful in classrooms with emotional support (i.e., respectful and responsive interactions)"); see also Karyn E. Miller, *A Light in Students' Lives: K-12 Teachers' Experiences (Re)building Caring Relationships During Remote Learning*, ONLINE LEARNING J., Mar. 2021, at 115, 116-17 ("'Authentic care' in education is labor-intensive and requires teachers to move beyond building superficial rapport[.] . . . Caring teachers engage students in dialogue about their interests and needs, listen attentively, and express empathy[.] . . . The relational bonds that grow from authentic care are vital to students' sense of belonging." (citations omitted)).

220. This is especially true for teachers of color, who are often asked to take on additional responsibilities to support students of color. See John King, Opinion, *The Invisible Tax on Teachers of Color*, WASH. POST. (May 15, 2016), <https://perma.cc/SU7M-M7QA>; James Paterson, *When Educators of Color Are Asked to Be "Everything" for Students of Color*, NAT'L EDUC. ASS'N. (Oct. 9, 2019), <https://perma.cc/QUS8-AZYZ>.

Furthermore, even speech on matters of public concern still may not be protected under *Pickering* if a court finds that the school's efficiency interests outweigh the teacher's interest in the expression.²²¹ The Tenth Circuit has held that avoiding disruptions to workplace morale is a strong efficiency concern, noting that supervisors are "not required to tolerate open insubordination."²²² Such a standard could spell trouble for plaintiffs challenging Oklahoma's anti-CRT law under *Pickering*. Oklahoma educators have expressed fear that "school officials will make examples of certain teachers" and that "punishments will disproportionately fall on teachers of color."²²³ Thus, if schools or districts argue that educators, particularly educators of color, who violate H.B. 1775 have undermined morale or been insubordinate, a court in the Tenth Circuit may find that the government's authority outweighs the teacher's interest in the expression.²²⁴

Therefore, *Pickering* is best understood as a modest but insufficient improvement over *Garcetti*. It may protect some teacher speech, but it leaves a great deal of valuable instructional speech out in the cold.

3. *Hazelwood* protects instructional speech in theory, but not always in practice

Under *Hazelwood*, if a restriction on speech is reasonably related to a "legitimate pedagogical purpose," then a court will find that the underlying speech is not protected by the First Amendment.²²⁵ But in practice, courts

221. See *supra* text accompanying note 167; see also Hutchens, *supra* note 193, at 75 ("[E]ven those courts that are sympathetic to teachers' speech rights consistently recognize the authority of school boards and officials to determine curricular standards and to regulate teachers' in-class communications."). Even beyond the strong weight given to the government's efficiency concerns, some courts find that, in general, teachers' instructional speech is worthy of "very little First Amendment protection" under *Pickering*. Galea, *supra* note 176, at 1211-12.

222. See *Weaver v. Chavez*, 458 F.3d 1096, 1103 (10th Cir. 2006).

223. See *O'Connor Complaint*, *supra* note 7, ¶ 70.

224. Black employees are already more likely to be deemed insubordinate by or receive extra scrutiny from employers. See Daphna Motro, Jonathan B. Evans, Aleksander P.J. Ellis & Lehman Benson III, Research Report, *Race and Reactions to Women's Expressions of Anger at Work: Examining the Effects of the "Angry Black Woman" Stereotype*, J. APPLIED PSYCH. 142, 142 (2022) (analyzing the impact of the "angry black woman" stereotype in the workplace, and arguing that others "attribute the anger of black women to internal factors, which are then expected to negatively influence perceptions of her performance and leadership capabilities"); Gillian B. White, *Black Workers Really Do Need to Be Twice as Good*, ATLANTIC (Oct. 7, 2015), <https://perma.cc/5C5V-B5VL>. Thus, a standard that relies on a school's own determinations of disruption to morale and insubordination may disproportionately restrict the First Amendment rights of Black educators and educators of color.

225. See *supra* notes 180-81 and accompanying text.

nearly always defer to the pedagogical purpose stated by the school district or state in determining a restriction's legitimacy.²²⁶ Our hypothetical Oklahoma teacher must teach the content required by the Oklahoma Academic Standards for Social Studies while also balancing the diverse needs of the students in her classroom. She might believe that it is pedagogically legitimate—indeed, pedagogically necessary—for students to engage with the concept of “white privilege” in order to “[e]xamine multiple points of view regarding the evolution of race relations in Oklahoma” such as “the role labels play in understanding historic events.”²²⁷ But in some Oklahoma school districts, using the term “white privilege” would constitute a violation of H.B. 1775.²²⁸ *Hazelwood* gives no room for the teacher, a licensed professional educator, to weigh in on what the “legitimate pedagogical concern” at issue should be.²²⁹ Under existing case law, absent evidence of pretext, a court would likely decline to “second-guess the pedagogical wisdom or efficacy” of H.B. 1775.²³⁰

4. Existing First Amendment teacher-speech doctrine is inadequate

Applying the three existing doctrinal approaches to the H.B. 1775 hypothetical demonstrates that none of the available tests adequately protect teachers' First Amendment rights. A pure *Garcetti* approach is logical only if one believes that teaching is merely the act of communicating the government's message to students. This is an extremely narrow vision of teaching that ignores the reality of teacher speech on the ground. *Pickering*

226. See *supra* note 192 and accompanying text. Courts have interpreted *Hazelwood* itself to counsel “substantial deference” to “stated pedagogical concerns” in determining whether a restriction on speech is for a legitimate pedagogical purpose. *Fleming v. Jefferson Cnty. Sch. Dist.*, 298 F.3d 918, 925 (10th Cir. 2002); see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 & n.7 (1988). And lower courts take this substantial deference seriously. In the Tenth Circuit, for example, the restriction on speech “may not be *necessary* to the achievement of its goals and it may not even be the most effective means of teaching, but it can still be ‘reasonably related’ to pedagogical concerns.” *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292 (10th Cir. 2004). Thus, the success of a *Hazelwood* claim often turns on whether the plaintiff can prove that the restriction is pretextual, and therefore does not serve a legitimate pedagogical purpose. See *id.* at 1292-93 (“Although we do not second-guess the *pedagogical* wisdom or efficacy of an educator’s goal, we would be abdicating our judicial duty if we failed to investigate whether the educational goal or pedagogical concern was *pretextual*.”); see also *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) (“So long as the teacher limits speech . . . in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.”).

227. OKLA. STATE DEP’T OF EDUC., *supra* note 202, at 45.

228. *O’Connor Complaint*, *supra* note 7, ¶ 67.

229. See *Tygesson*, *supra* note 165, at 1935.

230. *Axson-Flynn*, 356 F.3d at 1292 (emphasis omitted).

balancing at least acknowledges that there might be situations in which teachers are not necessarily speaking for the government, but rather are engaging in speech on a matter of public concern that is more akin to the speech of a regular citizen.²³¹ But *Pickering* also misunderstands the nature of teacher speech. It fails to account for speech on matters of *private* concern that a teacher will inevitably engage in countless times a day, and thus offers artificially narrow protection at best. And finally, *Hazelwood* asks whether a restriction on speech is due to “legitimate pedagogical concerns”²³² but often ignores the purposes and choices of professional pedagogues. As in the Oklahoma hypothetical, teachers are constantly engaging in their own “balancing” as they navigate ever-changing classroom dynamics and diverse student needs. But *Hazelwood* sidesteps this reality, instructing courts to focus only on the stated purpose of the entity imposing the speech restriction.

C. A New First Amendment Standard for K-12 Instructional Speech²³³

Attempting to apply existing First Amendment doctrine to anti-CRT laws demonstrates that K-12 teacher speech is far more complex than any existing test accounts for. There is, however, already a key distinction implicit in education law and policy that courts could turn to instead: a distinction between the “what” and the “how” of teaching. States can and do regulate content—the “what” of teaching—but rarely, if ever, reach into the classroom itself to regulate exactly how that content is communicated to students.²³⁴ Anti-CRT laws demonstrate that we cannot take this distinction for granted anymore. State legislatures have begun to blur the line between the “what” and the “how” of teaching in an impermissible attempt to restrict valuable instruction in public schools. It is incumbent upon courts to uphold this

231. See *supra* note 162 and accompanying text.

232. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

233. Some teacher speech in a K-12 classroom falls outside the scope of instructional speech. If our hypothetical Oklahoma teacher reminds her students to wear a mask in compliance with government policy, the teacher is communicating and enforcing the government’s message. In such a case, it is logical that the government can control its own speech and prevent the distortion of that message. Thus, noninstructional speech pursuant to official duties is appropriately regulated by *Garcetti*. However, the vast majority of speech in the hypothetical is what I would term “instructional speech.” See *supra* note 17 and accompanying text.

234. See, e.g., Ill. Star Net, Ill. State Bd. of Educ. & The Ctr.: Resources for Teaching & Learning, Lesson Planning FAQ (2020), <https://perma.cc/LZ7Q-URSZ> (demonstrating that the state expects teachers to create their own lesson plans and imposing few requirements on those plans). In fact, when legislators in some states sought to control educators’ lesson plans, teachers reacted with shock, anger, and derision. See Marina Whiteleather, *Bill Could Require Posting a Year’s Worth of Lesson Plans. Teachers Aren’t Happy*, EDUCATIONWEEK (Feb. 10, 2022), <https://perma.cc/N6CF-CLJZ>.

distinction which, although often unspoken, is essential to how educators do their jobs.

1. States can and do regulate the content of K-12 teaching, but teachers decide how to communicate that content to students

First, an important distinction: “Curriculum” and “instruction” (or “instructional speech”) are not synonyms. As one scholar explains, curriculum is “what to teach,” and instruction is “how to teach.”²³⁵ This Note argues that *curriculum* is government speech, but *instructional speech* is not—and therefore, instructional speech may receive First Amendment protection.

There is little doubt that states have broad authority to regulate the content—the “what”—of K-12 teaching by setting curriculum.²³⁶ While there are “certain constitutional limits upon the power of the State to control even the curriculum,”²³⁷ courts generally recognize that since “[s]omeone must fix the curriculum of any school . . . it is far better public policy . . . that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible” to the public via the democratic process.²³⁸

235. John A. Laska, *The Relationship Between Instruction and Curriculum: A Conceptual Clarification*, 13 INSTRUCTIONAL SCI. 203, 210 (1984); see also Tygesson, *supra* note 165, at 1935-36 (“[T]he government generally does not prescribe specific speech to educators. . . . Teachers take the general topic or concept to be illustrated and create a lesson by independently drawing from a variety of resources.”); Grant Wiggins, *How Much Freedom Should Teachers Have?*, TEACHTHOUGHT, <https://perma.cc/6D4E-B42Y> (archived Oct. 21, 2022) (“Content can be mandated while teaching can still vary . . .”).

236. See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”); *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (en banc) (“We agree with Plato and [Edmund] Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum.”); *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 341 (6th Cir. 2010) (“The Constitution does not prohibit a State from creating elected school boards and from placing responsibility for the curriculum of each school district in the hands of each board.”); *Pack v. State*, 330 P.3d 1216, 1216 (Okla. 2014) (mem.) (per curiam) (upholding an Oklahoma state law repealing Common Core standards under the state constitution); *Hutchens*, *supra* note 193, at 74 (“Even courts sympathetic to teachers’ speech have recognized the dominant role of school boards in determining curricular and pedagogical matters.”).

237. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 861 (1982); see also *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking down a state statute prohibiting the teaching of foreign languages in schools); *Epperson*, 393 U.S. at 109 (striking down a state statute prohibiting the teaching of evolution in schools).

238. *Boring*, 136 F.3d at 371; see also *Evans-Marshall*, 624 F.3d at 341 (“State law gives elected officials—the school board—not teachers, not the chair of a department, not the principal, not even the superintendent, responsibility over the curriculum. . . . [This] ensures the citizens of a community have a say over a matter of considerable

footnote continued on next page

Perhaps, then, it is unsurprising that where circuit courts have addressed the question of K-12 teachers' classroom speech, they have considered only the "what" of teaching, and have not ventured into the "how." For example, in *Evans-Marshall v. Board of Education*, the Sixth Circuit held that a teacher's speech was categorically unprotected by the First Amendment.²³⁹ But that case considered a question of *curriculum*: a teacher's choice of the novel *Siddhartha* for a high school English class.²⁴⁰ In *Mayer v. Monroe County Community School Corp.*, the Seventh Circuit similarly held that teachers may not "depart from the *curriculum* adopted by the school system."²⁴¹ As the *Mayer* court opined:

A teacher hired to lead a social-studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor, when the approved program calls him one; a high-school teacher hired to explicate *Moby-Dick* in a literature class can't use *Cry, The Beloved Country* instead, even if Paton's book better suits the instructor's style and point of view; a math teacher can't decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz.²⁴²

Again, the Seventh Circuit is correct that the state has the power to regulate content. And where the state is directly regulating curriculum (undoubtedly government speech) one of *Garcetti*, *Pickering*, or *Hazelwood*—depending on the circuit—likely controls. But this does nothing to resolve the question of whether the state can reach into the classroom and regulate instructional speech—the *way* that teachers deliver mandated content to students.

This theory—that states have historically regulated only the "what" rather than the "how" of teaching, and therefore courts have addressed only states' ability to do the former—is difficult to prove where case law is the only acceptable evidence. The case law is limited; that is the point. But law is not made by courts alone.²⁴³ If courts look to the overarching structure of regulations within which teachers operate, they will see that states traditionally and consistently have left the "how" of teaching to teachers.

Let's begin in the state where our hypothetical is set. Oklahoma sets social studies standards that include content such as the Tulsa race massacre, but the Oklahoma State Board of Education itself states that such standards "[d]o not

importance to many of them—their children's education—by giving them control over membership on the board.").

239. 624 F.3d at 341-42.

240. *See id.* at 335.

241. 474 F.3d 477, 480 (emphasis added).

242. *Id.* at 479.

243. In the words of a Supreme Court Justice, "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Harvard Univ. Press 2009) (1881).

dictate how teachers should teach.”²⁴⁴ Oklahoma can tell our hypothetical history teacher *what* to teach by including the Tulsa race massacre in its state standards, but it does not regulate her instructional speech, or *how* she communicates curricular content to students. Florida, too, may do well to look to its own decades-old guidance to teachers, which differentiates “curriculum” from “instruction”:

Curriculum contains the knowledge and skills that you teach. The State of Florida contributes to curriculum by establishing the Sunshine State Standards and expected student outcomes. The district translates those standards and other critical content into what is to be taught at specific grade levels or in courses. . . .

Instruction represents the methods you use to present the content to students. States and districts identify effective instructional practices and purchase instructional materials. At the classroom level, where instruction takes place, *you determine which methods and materials are actually used.*²⁴⁵

The State of Florida also delegates to teachers the task of “[d]esigning effective lesson plans” to meet the needs of diverse learners.²⁴⁶ This includes changing “how information is presented” (translation: changing how curriculum is delivered) to accommodate students with disabilities, as required by their Individual Educational Plans (IEPs), and “build[ing] flexibility into the activities to make adjustments for diverse learners.”²⁴⁷ Florida may determine curriculum, but teachers are charged with communicating that curriculum on the ground. And Florida and Oklahoma are not alone: Today’s federal and state education standards require teachers “not only to meet new curriculum standards but also to personally select and create instructional materials.”²⁴⁸

This distinction between the “what” and the “how” of teaching is by design. There is good reason to vest instructional discretion in educators themselves, who are licensed professionals.²⁴⁹ Effective teachers do not—as the *Garcetti* Court seems to imagine—simply recite the government’s message from a

244. See OKLA. STATE BD. OF EDUC., *supra* note 202, at 45, 57; *Oklahoma Academic Standards*, OKLA. STATE DEPT’ OF EDUC., <https://perma.cc/7UWL-PRZX> (last updated Aug. 9, 2022).

245. DEBBY HOUSTON & MARTY BEECH, *DESIGNING LESSONS FOR THE DIVERSE CLASSROOM: A HANDBOOK FOR TEACHERS* 4 (2002) (emphasis added), <https://perma.cc/UF8F-6H8H>.

246. *Id.* at 5.

247. *Id.* at 5–6.

248. Press Release, Nat’l Acads. of Scis., Eng’g, & Med., *New Report Finds K-12 Teachers Face New Expectations and More Demands; Training and Workforce Changes Could Help* (Feb. 12, 2020), <https://perma.cc/NJH2-MF6W>.

249. Each state sets its own certification requirements for elementary and secondary teachers. See *Required Testing for Initial Certification of Elementary and Secondary School Teachers, by Type of Assessment and State: 2017 and 2018*, NAT’L CTR. FOR EDUC. STATS. (Apr. 2020), <https://perma.cc/4SL4-58PA>.

binder. They design their own lesson plans,²⁵⁰ draw on their own lived experiences,²⁵¹ and make difficult decisions on the fly.²⁵² Great teachers—educators who excel at the “how” of teaching—are also creative teachers.²⁵³ And teachers who leverage their own creativity in the classroom are more likely to “observe higher-order cognitive skills in their students.”²⁵⁴

Vesting teachers with the professional discretion to make instructional choices also enables them to tailor lessons so that they are relevant to students. Relevance is an essential component of student engagement: “For students to feel motivated, they must see the work they are doing in the classroom as interesting, valuable, and useful to their present lives.”²⁵⁵ Consider the hypothetical lesson on the Tulsa race massacre. If that lesson were taking place in Tulsa, Oklahoma, then surely relevance would take on a different meaning than if the lesson were taking place in another county or state.

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250. See Jonathan Sapers, *Common Core’s Unintended Consequence? More Teachers Write Their Own Curricula*, PBS NEWSHOUR (Feb. 26, 2015, 2:07 PM EDT), <https://perma.cc/G3PA-EY29>.
251. See, e.g., Danah Henriksen & Punya Mishra, *We Teach Who We Are: Creativity in the Lives and Practices of Accomplished Teachers*, 117 TCHRS. COLL. REC., no. 7, July 2015, at 1, 15, 34 (“Outside pursuits always factor into your thinking about your classroom or your students—all the time. . . . I think that we teach who we are, and I know that I teach who I am.” (emphasis omitted) (quoting a high school English/language arts teacher)); see also Ken Zeichner, *The Importance of Teacher Agency and Expertise in Education Reform and Policymaking*, 32 REVISTA PORTUGUESA DE EDUCAÇÃO, no. 1, June 2009, at 5, 6 (“Individual teachers have knowledge and skills that they have brought to and have acquired in their initial teacher education programs, in their teaching, and in their ongoing professional learning experiences, that are often underutilized by education systems.”).
252. See, e.g., Larry Cuban, *Jazz, Basketball, and Teacher Decision-Making*, LARRY CUBAN ON SCH. REFORM & CLASSROOM PRAC. (June 16, 2011, 1:00 AM), <https://perma.cc/5KBE-3MCF> (“Effective teachers, then, like top jazz musicians and basketball rebounders improvise—decide on the spot—as they deal with both the routine and unexpected in the art of teaching.”); see also *The Art of Teaching*, YALE POORVU CTR. FOR TEACHING & LEARNING, <https://perma.cc/6LW5-Q29D> (archived Oct. 21, 2022) (“Teaching is rarely a predictable act. Woven into it are a million threads of impression, expectation, feeling, and narrative construction for which teachers cannot plan.”).
253. See Henriksen & Mishra, *supra* note 251, at 3-4 (“[T]here is a strong body of thinking in educational research that essentially equates effective teaching with creative teaching.”).
254. Lydia Saad, *Teachers Who Promote Creativity See Educational Results*, GALLUP (Oct. 28, 2019), <https://perma.cc/3VSH-TJXC>; see also Elizabeth Bloom & Kjersti VanSlyke-Briggs, *The Demise of Creativity in Tomorrow’s Teachers*, 10 J. INQUIRY & ACTION EDUC., no. 2, 2019, at 90, 92-93 (“When students are not exposed to teachers presenting content in novel and creative ways, as opposed to highly scripted and standardized ways, they lose the necessary vicarious experiences that contribute to growing their confidence in being creative themselves.”).
255. *What Teachers Can Do to Boost Student Motivation*, EDUCATIONWEEK, <https://perma.cc/HVH7-FV9J> (archived Oct. 21, 2022).

In sum, excellent teaching takes artistry—artistry rooted in pedagogical science.²⁵⁶ It is no wonder that states generally stay out of the “how” of teaching given the complexity, nuance, and unpredictability of an educator’s task.

Thus, the structure of education law, which allows the state to regulate the “what” but not the “how” of teaching, offers a doctrinal loophole for K-12 teachers bringing First Amendment challenges to anti-CRT laws. Educators can argue that the laws impermissibly attempt to regulate not curriculum (since CRT is not actually part of K-12 curriculum), but instructional speech. And although courts have treated curriculum as government speech, they have made no such finding about instructional speech.

However, this theory is a limited one. It does not address every “anti-CRT” action a state might take. States can still revise their curriculum—control their own government speech—without offending educators’ First Amendment rights. Oklahoma cannot ban teachers from using the words “white privilege” when educating students about the Tulsa race massacre because this would be an impermissible infringement on the “how” of teaching. But Oklahoma could excise the Tulsa race massacre—the “what”—from its curriculum altogether.²⁵⁷ Florida and Texas have banned teachers from assigning the *1619 Project*²⁵⁸—a *New York Times Magazine* initiative that “plac[es] the consequences of slavery and the contributions of black Americans at the very center of our national narrative,”²⁵⁹ which has been linked to and conflated with CRT.²⁶⁰ Because Florida and Texas can regulate the “what” of teaching, an educator is unlikely to succeed in challenging those provisions. However, the provisions may still run afoul of other aspects of First Amendment doctrine—notably, the Supreme Court’s holding in *Board of Education, Island Trees Union Free School District No. 26 v. Pico* that school boards may not remove books from school libraries simply because they disagree with them.²⁶¹ Thus, distinguishing the “what”

256. See *The Art of Teaching*, *supra* note 252 (“Where the ‘science’ of teaching describes *how* teaching should go, ‘art’ suggests *the unique way* teaching unfolds as a teacher pursues these and other practices. In this way, every successful teacher is an artist.”).

257. And in fact, Oklahoma did so for decades. See Nuria Martinez-Keel, “A Conspiracy of Silence”: *Tulsa Race Massacre Was Absent from Schools for Generations*, OKLAHOMAN (updated May 26, 2021, 9:36 AM CT), <https://perma.cc/UF6G-SU35>.

258. See FLA. ADMIN. CODE ANN. r. 6A-1.094124(3)(b) (2022); TEX. EDUC. CODE ANN. § 28.0022(a)(4)(C) (West 2021).

259. *The 1619 Project*, N.Y. TIMES MAG., <https://perma.cc/8ZRC-6XEH> (archived Oct. 21, 2022).

260. See Cathryn Stout, Sam Park, Dan Lyon & Mónica Rhor, *How Nikole Hannah-Jones’ 1619 Project Ignited the Critical Race Theory Backlash*, CHALKBEAT TENN. (updated Mar. 21, 2022, 9:16 AM PDT), <https://perma.cc/F7HL-KT2M>.

261. 457 U.S. 853, 871 (1982); see *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, No. 22-cv-00304, 2022 WL 16985720, at *7 n.13 (N.D. Fla. Nov. 17, 2022) (suggesting that the Supreme Court’s decision in *Meyer v. Nebraska*, a case about a teacher’s instructional speech in *K-12 schooling*, may impose limits on the state’s ability to set curriculum).

from the “how” of teaching is by no means a panacea, but it may give educators a far greater chance of prevailing on at least some First Amendment claims.²⁶²

Finally, exploiting this doctrinal loophole—limited as it may be—could have unintended consequences. Teachers are real people with their own thoughts and opinions. They will make mistakes. They will make choices that others disagree with. But as this proposed legal test points out: *That is already the reality of teaching.* This test does not vest new discretion with educators that they did not previously have. It merely recognizes a truth that educators and education policymakers already operate under every day.

2. Under this proposed standard, anti-CRT laws violate K-12 teachers’ First Amendment rights

This Subpart analyzes how an educator’s First Amendment claims would fare if a court adopted the proposed distinction between the “what” and the “how” of teaching.

While states can and do regulate content in K-12 classrooms by setting standards and curriculum,²⁶³ CRT is generally not taught at the K-12 level.²⁶⁴ It is not “content” in the way that, say, calculus or the *1619 Project* or the Tulsa race massacre are content. Therefore, if CRT is entering the classroom at all, it is entering through instructional speech, not through curriculum. If instructional speech is not government speech, then states cannot justify their anti-CRT laws under the theory that the underlying educator speech receives no First Amendment protection.²⁶⁵ Anti-CRT laws are then vulnerable to First Amendment challenges under two theories: viewpoint discrimination, and vagueness or overbreadth.²⁶⁶

a. Anti-CRT laws are a form of viewpoint discrimination

“Our Constitution does not permit the official suppression of *ideas*.”²⁶⁷ And if CRT plays any role in K-12 education, it is as an idea or a collection of ideas that a teacher might draw upon in communicating content to students.

262. Educators and advocacy organizations contemplating such claims might be encouraged by the success of college professors and students in Florida. See *Pernell*, 2022 WL 16985720, at *2-3, *52-54. There, the district court affirmed Florida’s ability to set curriculum, but found that the state’s anti-CRT law reached beyond mere curriculum to impermissibly “impose its own orthodoxy of viewpoint about the content it allowed within university classrooms.” See *id.* at *37.

263. See *supra* notes 236-38 and accompanying text.

264. See *supra* note 96 and accompanying text.

265. See *supra* notes 134-44 and accompanying text.

266. See *supra* notes 134-39 and accompanying text.

267. *Pico*, 457 U.S. at 871.

Imagine that our hypothetical Oklahoma teacher, in answering students' questions about the Tulsa race massacre, references the concept of systemic racism. Or as a CRT scholar might put it: the idea that racism is "ordinary, not aberrational."²⁶⁸ An anti-CRT law that bans such speech constitutes viewpoint discrimination in violation of the First Amendment.²⁶⁹ Even if a state finds a particular viewpoint to be abhorrent—for example, the belief that "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"²⁷⁰—restricting such speech would still constitute viewpoint discrimination.

In *Keyishian v. Board of Regents*, the Supreme Court held that a state cannot discriminate against public-school employees on the basis of membership in "subversive organizations," particularly the Communist Party.²⁷¹ Despite the state's interest in "protecting its education system from subversion," and even though teachers "have captive audiences of young minds," the law still violated the First Amendment.²⁷² As the Court emphasized, "[t]he principle is not inapplicable because the legislation is aimed at keeping subversives out of the teaching ranks."²⁷³ Much like the state law in *Keyishian*, anti-CRT laws aimed at keeping disfavored instructional speech out of the classroom discriminate on the basis of viewpoint.

Recent decisions suggest that federal courts are receptive to this argument. In *Santa Cruz Lesbian & Gay Community Center v. Trump*, a district court concluded that the plaintiffs were likely to prevail on their First Amendment claim that EO 13,950 constituted viewpoint discrimination.²⁷⁴ In *Honeyfund.com, Inc. v. DeSantis*, a district court called Florida's anti-CRT law, with respect to the plaintiff employers, "a naked viewpoint-based regulation on speech that does not pass strict scrutiny."²⁷⁵ And even in *Falls v. DeSantis*, in which a district court partially dismissed the plaintiffs' motion for injunctive relief against Florida's anti-CRT law for lack of standing,²⁷⁶ the court closed its opinion with this warning:

268. See DELGADO & STEFANCIC, *supra* note 83, at 7.

269. See *supra* notes 134-35 and accompanying text.

270. *Supra* text accompanying note 70.

271. See 385 U.S. 589, 591-93, 595-96, 609-10 (1967).

272. See *id.* at 602, 607.

273. *Id.* at 602.

274. *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 540-42 (N.D. Cal. 2020).

275. No. 22-cv-00227, 2022 WL 3486962, at *1-2 (N.D. Fla. Aug. 18, 2022).

276. No. 22-cv-00166, 2022 WL 2303949, at *1-2 (N.D. Fla. June 27, 2022).

For those who applaud state suppression of ideas that the government finds displeasing—such as the *1619 Project*—this Court offers the following observation, made by Justice Jackson over half-a-century ago:

As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.²⁷⁷

b. Anti-CRT laws are unconstitutionally vague and overbroad

The anti-CRT laws make the same mistake as EO 13,950: They are unconstitutionally vague.²⁷⁸ A district court has already found Florida's anti-CRT law to be unconstitutionally vague as applied to higher education.²⁷⁹ The court described one prohibited concept as “mired in obscurity, bordering on the unintelligible,” to the point that “[i]t is unclear what is prohibited and even less clear what is permitted.”²⁸⁰ If an anti-CRT law bans “requir[ing] or mak[ing] part of a course,” the concept that “one race or sex is inherently superior to another race or sex,”²⁸¹ does that prevent a teacher from discussing the existence of racism, or the history of the Holocaust? If a teacher cannot “make part of a course” the concept that “members of one race or sex cannot and should not attempt to treat others without respect to race or sex,”²⁸² does that prevent a class debate about affirmative-action policies? The laws are so broad and vague that they chill valuable—indeed, essential—instructional speech.²⁸³ A fifth-grade teacher in Iowa explained that:

A history lesson she was teaching about Native Americans asked the students to think about how they could honor the cultural history of the land where the

277. *Id.* at *10 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943)).

278. *See Santa Cruz*, 508 F. Supp. 3d at 543-45 (finding that EO 13,950 was likely unconstitutionally vague in violation of due process because it was “impossible for Plaintiffs to determine what conduct is prohibited”).

279. *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, No. 22-cv-00304, 2022 WL 16985720, at *44-45 (N.D. Fla. Nov. 17, 2022).

280. *Id.* at *44.

281. OKLA. STAT. tit. 70, § 24-157(B)(1) (2022).

282. *Id.*

283. *See Epperson v. Arkansas*, 393 U.S. 97, 116 (1968) (Stewart, J., concurring in the result) (arguing that for a state to “make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought . . . would clearly impinge upon the guarantees of free communication contained in the First Amendment”).

United States now stands. “Where are the Native Americans now?” her students wanted to know.

In the past, the Iowa City teacher would tell her class more about why Indian reservations were established, discuss the term genocide, and talk about what Native culture looks like today. This time, she held back. On her mind was a new Iowa law that restricts how schools can teach about topics like systemic racism and white privilege.

“That’s where I’m like, well, I’m not really sure how to answer that,” [the teacher] said. “I kind of stuck to the lesson and if they didn’t understand, I just kept moving forward—which is not best practice.”²⁸⁴

At least one federal judge would seem to agree with this characterization of anti-CRT laws. Finding Florida’s anti-CRT law to be unconstitutionally vague with respect to employers, Judge Walker made the stakes clear: “With no guidance on the line between ‘objective discussion’ and ‘endorsement’ or what those poles mean, Plaintiffs will self-censor their speech.”²⁸⁵

Some anti-CRT laws also seem to make teachers responsible for the effects of lessons on students, banning the concept that “any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex.”²⁸⁶ If a student leaves their history class feeling “discomfort” or “anguish” after learning about the Tulsa race massacre or the Holocaust, has the educator then violated the law? Again, the laws are so vague that it is impossible to know. Educators “are entitled to know what the rules are before they are sanctioned for going beyond unmarked boundaries they reasonably believed did not exist,” and the anti-CRT laws fail to establish those clear boundaries.²⁸⁷ In doing so, they impermissibly chill valuable and constitutional instructional speech, harming both teachers and students.

Conclusion

Anti-CRT laws harm students and educators at a time when they are already hurting. Teachers fear the consequences of violating these vague and overbroad laws: losing their jobs, their teaching licenses, and their ability to make pedagogically sound choices in the classroom. The individual stakes are thus incredibly high. But litigating against anti-CRT laws is also an

284. Kalyn Belsha, Matt Barnum & Marta W. Aldrich, *Not Getting Into It: How Critical Race Theory Laws Are Cutting Short Classroom Conversations*, CHALKBEAT (updated Dec. 17, 2021, 11:34 AM PDT) (quoting Iowa fifth-grade teacher Melanie Hester), <https://perma.cc/KU6Q-BNSL>.

285. Honeyfund.com, Inc. v. DeSantis, No. 22-cv-00227, 2022 WL 3486962, at *13 (N.D. Fla. Aug. 18, 2022).

286. OKLA. STAT. tit. 70, § 24-157 (2022).

287. Kramer v. N.Y.C. Bd. of Educ., 715 F. Supp. 2d 335, 342 (E.D.N.Y. 2010).

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opportunity, a chance to reexamine the illogical patchwork of K-12 teacher-speech jurisprudence and reimagine how the First Amendment applies to instructional speech. Once courts account for the realities of teacher speech on the ground, it becomes clear that anti-CRT laws violate the First Amendment and must be struck down.

Appendix

Table 2
Divisive Concepts by State

Divisive Concept	AL	FL	GA	IA	ID	MS	NH	OK	SC	SD	TN	TX	UT	VA
(1) One race or sex is inherently superior to another race or sex	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
(2) The United States is fundamentally racist or sexist	N	N	Y	Y	N	N	N	N	N	N	Y	N	N	N
(3) An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously	N	Y	Y	Y	N	N	Y	Y	Y	Y	Y	Y	N	Y
(4) An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
(5) Members of one race or sex cannot and should not attempt to treat others without respect to race or sex	N	Y	N	Y	N	N	Y	Y	N	N	N	N	N	Y
(6) An individual's moral character is necessarily determined by his or her race or sex	N	Y	Y	Y	N	N	N	Y	Y	Y	Y	Y	Y	Y

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Divisive Concept	AL	FL	GA	IA	ID	MS	NH	OK	SC	SD	TN	TX	UT	VA
(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	Y	Y	Y	Y	Y	N	N	Y	Y	Y	Y	Y	Y	Y
(8) Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex	N	Y	Y	Y	N	N	N	Y	Y	N	Y	N	N	N
(9) Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race	N	Y	Y	Y	N	N	N	Y	Y	Y	Y	Y	N	Y
The term “divisive concepts” also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating	N	N	Y	Y	N	N	N	N	Y	N	N	N	N	N