Banned in the USA: Teachers' Free Speech in the Classroom

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INTRODUCTION

In the United States, each state provides free education to children and young adults.[1] As the government provides the public with education, it remains a contentious question who determines the scope of classroom discussion and what is taught—the government, the teachers, or the students' parents?[2] Currently, there is a particularly heated debate over whether there can be state-imposed limitations over classroom discussions.[3]

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[1] EMILY PARKER, EDUC. COMM'N OF THE STATES, CONST. OBLIGATIONS FOR PUB. EDUC. 1 (2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf.

[2] NAT'L CTR. FOR EDUC. STATS., WHO INFLUENCES DECISIONMAKING ABOUT SCHOOL CURRICULUM? 1 (July 1995).

[3] Akilah Alleyne, *Book Banning, Curriculum Restrictions, and the Politicization of U.S. Schools*, CTR. AM. PROGRESS (Sept. 19, 2022), https://www.americanprogress.org/article/book-banning-curriculum-restrictions-and-the-politicization-of-u-s-schools/.

A proliferation of policies banning books and teachings on race and gender are spreading nationwide. The fuel behind these bills are predominantly white parent groups such as Moms for Liberty and Parents Defending Education, who argue that "classroom teachings about race can serve to divide students and give them a pessimistic view of the country's history . . . [and] LGBTQ materials can make students vulnerable to sexual predation."[4] For example, during the final debate for the Virginia Gubernatorial election, Democratic candidate Terry McAuliffe voiced his adamant opposition to so-called parental interference in schools, stating "I'm not go[ing] to let parents come into schools and actually take books out. . . ."[5] Republican candidate Glenn Youngkin seized on McAuliffe's statement by making parents' involvement in education the centerpiece of his campaign.[6] Youngkin, a little-known figure before the election,[7] ultimately won the election by two points.[8] Exit polls revealed that education was the third most important issue to Virginia voters, preceded only by the economy and the COVID-19 pandemic.[9]

Virginia is not alone; voters in many other states have expressed an interest in limiting the content that teachers can teach. During 2022, thirty-six state legislatures considered 137 "educational gag orders," a term opponents used to describe the "state legislative efforts [that] restrict teaching about topics such as race, gender, American history, and LGBTQ+ identities in K–12 and higher education."[10] Most notably in Florida, Governor Ron DeSantis championed and signed The Parental Rights in Education Bill, described by opponents as the "Don't Say Gay Bill," and the Individual Freedom Act, which the DeSantis Administration titled as the

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[4] Asher Lehrer-Small, *The ACLU's Fight Against Classroom Censorship, State by State*, THE 74 (Sept. 16, 2022), https://www.the74million.org/article/the-aclus-fight-against-classroom-censorship-state-by-state/.

[5] S. Ernie Walton, *Why Virginians Should Be Terrified of Terry McAuliffe*, THE AM. SPECTATOR (Oct. 3, 2021, 11:05 PM), https://spectator.org/mcauliffe-echoes-totalitarians-in-debate-comments-and-virginia-voters-should-be-terrified/ ("McAuliffe was likely referencing the situation in Virginia's Fairfax County Public Schools, which were forced to pull two books, 'Gender Queer' and 'Lawn Boy,' after explicit material was revealed by the mother of one of the students during a school board meeting.").

[6] *See* Michael Stratford & Zach Montellaro, *Youngkin Tries to Harness Virginia Parent Anger in Possible '22 GOP Preview*, POLITICO (Oct. 22, 2021, 4:30 AM), https://www.politico.com/news/2021/10/22/virginia-governor-youngkin-education-gop-516625 ("Youngkin's messaging on education has extended well beyond his 'parents first' rallies and has been an almost singular focus of his campaign's TV ads in the final weeks.").

[7] Kathryn Watson, *Who Is Glenn Youngkin, the Republican Who Will Be the Next Governor of Virginia?*, CBS NEWS (Nov. 3, 2021, 7:54 AM), https://www.cbsnews.com/news/who-is-glenn-youngkin-virginia-governor-republican/ ("Until recently, most Americans—and most Virginians—had never heard of him. So who is Youngkin?").

[8] *2021 Virginia Governor Election Results,* CNN, https://www.cnn.com/election/2021/results/virginia/governor (Dec. 3, 2021, 10:21 AM).

[9] Associated Press, *Exit Poll Results: Virginia Voters Explain Which Issues Mattered Most to Them*, ABC7 NEWS, https://wjla.com/news/local/exit-poll-results-virginia-voters-explain-what-mattered-most-to-them (Nov. 2, 2021, 11:45 PM).

[10] Jeremy C. Young & Jonathan Friedman, *America's Censored Classrooms*, PEN AM. (Aug. 17, 2022), https://pen.org/report/americas-censored-classrooms/.

Stop WOKE (Wrong Against Our Kids and Employees) Act.[11] These laws limit the range of acceptable topics that public teachers can discuss as part of their official duties.[12] Since the Parental Rights in Education Bill bans "classroom instruction on gender identity and sexual orientation" without ever defining what constitutes "instruction," if a teacher is teaching about family, and a student with two mothers talks about their family dynamic, it could place a teacher in jeopardy of losing their job.

Opponents of the bills are currently challenging these restrictions, claiming that they unconstitutionally impinge upon the local teachers' First Amendment right to free speech.[13] However, the scope of teachers' First Amendment right while instructing students is unsettled.

Under *Garcetti v. Ceballos*, the Supreme Court determined that public employees enjoy no First Amendment protection for communications made pursuant to their official employment duties.[14] The Supreme Court intentionally did not decide whether this analysis would apply to public educators, allowing circuit courts to decide for themselves.[15] This intentional

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[11] Dana Goldstein, *Opponents Call It the 'Don't Say Gay' Bill. Here's What It Says*, N.Y. TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/us/dont-say-gay-bill-florida.html.; *see also* Press Release, Ron DeSantis, Governor, State of Florida, Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (Apr. 22, 2022), https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/.

[12] Sam LaFrance & Jonathan Friedman, *Educational Intimidation: How "Parental Rights" Legislation Undermines the Freedom to Learn*, PEN AM. (Aug. 23, 2023), https://pen.org/report/educational-intimidation/#:~:text=Educational%20gag%20order%20component%3A%20Teachers,so%20by%20official%20school%20curricula (analyzing the social, political, and economic impact of these various state bills).

[13] M.A. v. Fla. State Bd. of Educ., No. 4:22-CV-134-AW-MJF, 2023 WL 2631071, at * 1–2 (N.D. Fla. Feb. 15, 2023) (dismissing plaintiff's amended complaint challenging the Don't Say Gay Bill due to lack of standing). Following the plaintiffs' appeal and defendant's cross-appeal, M.A. v. Fla. State Bd. of Educ., No. 23-11016 (11th Cir. Mar. 29, 2023) (the Florida State Legislature passed an expansion of H.B. 1557, which banned lessons on LGBTQ issues for grades 4-12 and the previous version only banned instruction on such issues in grades K-3). Brandon Girod, *Florida's 'Don't Say Gay' (HB1557) Expanded to All Grades. Everything You Need to Know:*, PENSACOLA NEWS J., https://www.pnj.com/story/news/education/2023/04/19/floridas-dont-say-gay-bill-expanded-through-all-grades-explainer/70132520007/ (Apr. 20, 2023, 12:05 PM). On March 11, 2024, the plaintiffs and the State of Florida entered into a settlement agreement, which clarified the practical ramifications of the Bill, outlining that it only bans classroom *instruction* on the subject of sexual orientation or gender identity, but does not limit teachers from discussing or referencing such topics in the classroom. Patricia Mazzei, *Legal Settlement Clarifies Reach of Florida's 'Don't Say Gay' Law*, N.Y. TIMES (Mar. 11, 2024), https://www.nytimes.com/2024/03/11/us/florida-dont-say-gay-law-settlement.html.; *see also* Cousins v. Sch. Bd. of Orange Cnty., Fla., 636 F. Supp. 3d 1360, 1381 (M.D. Fla. 2022) (dismissing a case challenging the Don't Say Gay Bill for lack of standing and that bullying is "simply a fact of life"). Plaintiff's second amended complaint was similarly dismissed. Cousins v. Sch. Bd. of Orange Cnty., Fla., No. 6:22-CV-1312-WWB-LHP, 2023 WL 5836463, at *14 (M.D. Fla. Aug. 16, 2023); Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1229 (N.D. Fla. 2022) (issuing an order that immediately blocked Florida's "Stop W.O.K.E." Act, which curbs classroom discussion on race and gender, from being enforced at the college level). The Eleventh Circuit subsequently denied a request to stay the injunction, pending appeal from a final district court decision. Pernell v. Fla. Bd. of Governors of State Univ., No. 22-13992-J, 2023 WL 2543659, at *1 (11th Cir. Mar. 16, 2023).

[14] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[15] *Id.* at 425 ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

ambiguity has led to broadly different approaches to the question across jurisdictions.[16]

Part I will examine the analysis of free speech rights of public employees before and after *Garcetti*. Part II will examine the two-tier circuit split over whether *Garcetti* has an exception for public educators and whether that exception only applies to educators at the university level, thus exploring how (or if) these bills will withstand First Amendment challenges. Part III will discuss the harm that can be incurred if *Garcetti* is applied to teachers' speech, allowing these bills to move forward, and perhaps potential avenues students can take to protect themselves from these bills.

I. DUAL PERSONALITY OF A GOVERNMENT PUBLIC EMPLOYEE

This discusses the established free speech rights of public employees. Part I.A. discusses the *Pickering-Connick* standard. Part I.B discusses the *Garcetti* opinion and its effect on the free speech rights of public employees. *Garcetti* changed the landscape of public employee speech by creating a bright-line test—but along with its clarity, it severely limited public employees' speech.

A. Pickering-Connick *Standard*

The First Amendment of the United States Constitution grants the right to free speech, stating: "Congress shall make no law . . . abridging the freedom of speech . . . ."[17] But the protections afforded to speech are *not* absolute. Expressions that fall within certain limited categories deemed to lack the values that the First Amendment is designed to protect, e.g. fighting words, are therefore not granted its protection.[18] Because of the Court's adherence to a narrow limit to free speech, there is a reluctance to abridge free speech, as it is regarded as fundamental to the country's style of democracy.[19]

Despite the government having sharp limits on its ability to restrict speech of private citizens, an individual who works for the government is not merely a private citizen, but also a public employee of the government.[20] Employers are allowed to restrict what their employees say because employees are deemed to be agents of their employers.[21] Therefore, when it

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[16] *See infra* Part II.

[17] U.S. CONST. amend. I.

[18] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992) ("fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.")

[19] *See, e.g.*, Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.")

[20] *Garcetti*, 547 U.S. at 418 ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.").

[21] *Garcetti*, 547 U.S. at 411.

acts as an employer, the government *does* have the power to restrain or discipline its employees for their speech.[22] This dual personality of public employees — representatives of the state and private citizens — has made it difficult for the courts to draw a clear line between when the public employee does or does not have a right to free speech.[23]

For most of the 1900s, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights."[24] However, in 1968, the court changed this rule dramatically in *Pickering v. Bd. of Ed*.[25] In *Pickering*, the Supreme Court considered whether a high school teacher who wrote a letter to a local newspaper criticizing the school board's budgetary decisions was justly fired.[26] In its analysis, the Court created a test to balance the speech of public employees "commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[27] If a public employee is speaking on a matter of public concern, the court will weigh their statement against the potential harm and interference it causes to the employer.[28]

The Court's balancing test ultimately weighed in favor of the teacher because the letter did not encumber "the teacher's proper performance of his daily duties in the classroom or [] have interfered with the regular operation of the schools generally."[29] Even though the teacher was an employee of the school, the Court reasoned that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[30]

Fifteen years later, in *Connick v. Myers*, the Court clarified the *Pickering* decision by reiterating its emphasis that the right of a public employee to speak as a citizen is implicated when they are speaking on matters of public concern.[31] *Connick* concerned an Assistant District Attorney who prepared a critical questionnaire about his office's transfer policy, internal pressure on employees to work on political campaigns, and

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[22] *Id.*
[23] *Id.*
[24] Connick v. Myers, 461 U.S. 138, 143 (1983).
[25] Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).
[26] *Id.* at 566–67.
[27] *Id.* at 568.
[28] *Id.* at 569–70 n.3 (discussing some considerations of the State that may limit a teacher's right to speak discussed throughout the opinion: (1) the need to maintain "discipline by immediate superiors or harmony among coworkers;" (2) the need to curtail conduct which "impede[s] the teacher's proper performance of his daily duties in the classroom;" and (3) the need to foster a close and personal "relationship between superior and subordinate . . .[and not] undermine the effectiveness of the working relationship between them").
[29] *Id.* at 572–73.
[30] *Id.* at 563.
[31] Connick v. Myers, 461 U.S. 138, 140 (1983).

general office morale.[32] The Court reiterated that this right to such dissent occupies the "highest rung of the hierarchy of First Amendment values."[33] However, the Court placed limits on what constitutes a matter of public concern: "employee expression [that] cannot be fairly considered as relating to any matter of political, social, or other concern of the community," is deemed not public concern.[34] The Court ultimately held that the District Attorney's office was justified in terminating the attorney who prepared and published the questionnaire, determining that his actions constituted "employee grievance concerning internal office policy" rather than a matter of public concern.[35] To reach this conclusion, the Court set up a two-step test to evaluate free speech claims of government employees.

The first prong of the test asks whether the public employee is speaking on a matter of public concern, using the definition provided that encompasses political, social, and community concerns."[36] If the first prong is satisfied, the next step in determining who prevails is to balance the interests of the speaker, as a citizen, in commenting upon matters of public concern against the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[37] Under this evaluation, the Court determined Connick's interest in his questionnaire did not overcome his employer's interest in the efficiency of its services. The Court asserted that the District Attorney's office "should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[38] The *Pickering-Connick* test subsequently became the governing standard for free speech claims from public employees.

B. Garcetti *Altering the* Pickering-Connick *Standard*

The *Pickering-Connick* test governed free speech claims of public employees for the following two decades, until *Garcetti v. Ceballos*[39] shifted the landscape. Richard Ceballos, a Deputy District Attorney for the Los Angeles County District Attorney's Office, was working on a pending criminal case.[40] Believing that there were inaccuracies in an affidavit used to obtain a critical search warrant, Ceballos relayed his concerns to his

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[32] *Id.* at 138.

[33] *Id.* at 145 (quoting Carey v. Brown, 477 U.S. 455, 467 (1980)).

[34] *Id.* at 146.

[35] *Id.* at 154.

[36] *Id.* at 138–39 (determining whether an employee's speech addresses a matter of public concern, one must look at "content, form, and context of a given statement, as revealed by the whole record").

[37] *See generally* Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979) (finding in favor of employee because the communication concerning the school district's allegedly racially discriminatory policies involved a matter of public concern that was not outweighed by employer discipline); Rankin v. McPherson, 483 U.S. 378 (1987) (finding in favor of employee because the communication when viewed in context addressed the policies of the President's administration; therefore, it was considered a matter of public concern that was not outweighed by employer discipline).

[38] *Connick*, 461 U.S. at 146.

[39] Garcetti v. Ceballos, 547 U.S. 410, 410 (2006).

[40] *Id.* at 413.

supervisors, wrote a memo about it, and submitted a request to dismiss the case.[41] Rather than dismissing the case, the District Attorney retaliated against Ceballos by transferring him to another courthouse, reassigning him from deputy to trial position, and denying him a promotion.[42]

Ceballos was a government employee and therefore faced the dilemma of the dual personality that encompasses that title—a citizen who works for the government and therefore is required to comply with the employer's limitations, but nonetheless deserves the full rights of a citizen. The Court resolved this issue by reasoning that "restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employees might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[43] Therefore, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[44] Since Ceballos' expressions were made pursuant to his official duties as calendar deputy, they were afforded no First Amendment protection.[45] The decision in *Garcetti* drastically altered the *Pickering-Connick* analysis; even if public employees are speaking on a matter of public concern, if they speak pursuant to their official duties, they no longer have the privilege to speak as a citizen on that matter. Only if the public employee is not speaking pursuant to their official duties would the *Pickering-Connick* analysis be employed.

In his dissenting opinion joined by Justices Ginsberg and Stevens, Justice Souter worried about the implications of this decision to "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"[46] Although the majority gave credence to Justice Souter's dissent by recognizing that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests," the majority explicitly declined to decide whether the analysis in *Garcetti* would apply to a case involving speech related to scholarship or teaching.[47] Accordingly, when cases implicating teacher's free speech arise, circuit courts have the individual discretion to curtail or broaden teachers' free speech rights by opting in or out of applying *Garcetti.*

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[41] *Id.* at 414.
[42] *Id.* at 415.
[43] *Id.* at 422–23.
[44] *Id.* at 421.
[45] *Garcetti*, 547 U.S. at 421.
[46] *Id.* at 438 (Souter J., dissenting).
[47] *Id.* at 425 (majority opinion).

II. TWO-TIER CIRCUIT SPLIT

The blank space that *Garcetti* left for speech related to scholarship and teaching has not been addressed by the Supreme Court since the 2006 decision. In its wake, the circuit courts have taken advantage of their discretion to decide for their circuits whether *Garcetti* should apply to speech of public teachers.[48] A circuit split has emerged on the speech of teachers in lower schools — elementary, middle, and high schools—as well as the speech of university professors.

A. *Tier I: Does* Garcetti *Apply to Lower Schools?*

The Sixth, Seventh, and Ninth Circuits have applied *Garcetti* to primary and high school public educators' speech while teaching, thereby removing any potential privilege a teacher had on any speech made by the teacher during the course of teaching.[49] The Tenth Circuit has not addressed whether *Garcetti* would apply in the classroom, but has gone so far to apply it to a school teacher's speech about curriculum and pedagogy outside the classroom.[50] The Second, Third, and Fourth Circuits declined to resolve the applicability of *Garcetti*, but these Circuits view a teacher's curricular and pedagogical choices as categorically unprotected speech, intended to further the goals of the schools, rather than as an arena for private speech.[51]

The Sixth Circuit took a different approach. In *Evans-Marshall v. Board of Education*, the Sixth Circuit held that *Garcetti* established a new threshold requirement that applied to a high school teacher's curricular speech—despite the speech being on matters of public concern and the Pickering balance requirement ruling in the teacher's favor. [52] In *Evans-*

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[48] *See generally* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 332 (6th Cir. 2010); Brown v. Chicago Bd. of Educ., 824 F.3d 713, 714 (7th Cir. 2016); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 964 (9th Cir. 2011); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1204 (10th Cir. 2007); Borden v. Sch. Dist., 523 F.3d 153, 171 n.13 (3d Cir. 2008); Edwards v. Cal. Univ. of Pa., 156 F. 3d 488, 491 (3d Cir. 1998); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990); Lee-Walker v. N.Y.C. Dep't. of Educ., 220 F. Supp. 3d 484, 492 (S.D.N.Y. 2016), *aff'd,* 712 F. App'x 43 (2d Cir. 2017); Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694 (4th Cir. 2007).

[49] *Evans-Marshall*, 624 F.3d at 332; *Brown*, 824 F.3d at 714; *Johnson*, 658 F.3d at 964.

[50] *Brammer-Hoelter*, 492 F.3d at 1204 (discussing how a group of teachers would meet off-campus and after hours to discuss concerns and grievances about the operation, management, and mission of the Academy). The Tenth Circuit applied the *Garcetti-Pickering* analysis and held that the vast majority of the matters were related to their duties as teachers and therefore enjoy no First Amendment protection and can be freely regulated by the Academy. *Id.* For the remaining matters discussed that were unrelated to teachers' employment duties, the court went through the traditional *Pickering-Connick* test to determine if the speech was a matter of public concern and outweighed the interest of the state as the employer. *Id.*

[51] *See Borden*, 523 F.3d at 171 n.13 (applying *Garcetti* to coach's speech since speech is not on a matter of public concern); *Edwards*, 156 F. 3d at 491 ("[A]lthough [a teacher] has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom."); *Bradley*, 910 F.2d at 1176 ("Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected . . . her in-class conduct is not."); *Lee-Walker*, 220 F. Supp. 3d at 492 (deciding not to apply *Garcetti* because of the dubiousness of it applying to classroom instruction); *Lee*, 484 F.3d at 694 (choosing explicitly to not apply *Garcetti* as well).

[52] *Evans-Marshall*, 624 F.3d at 332.

Marshall, a high school teacher assigned her students to read Fahrenheit 451, in accordance with the school's standard curriculum.[53] To explore the book's central theme of censorship, the teacher assigned her students into groups and instructed them to choose a book from "100 Most Frequently Challenged Books"[54] and to lead an in-class debate about that book and why it was seemingly viewed as controversial.[55] Two student groups picked *Heather Has Two Mommies*,[56] which led to parent complaints.[57] When the teacher assigned *Siddhartha*[58] several parents complained about its explicit language and sexual themes.[59] The principal also received complaints about the teacher's choice of student writing samples which she shared with students seeking guidance for assignments.[60] The school subsequently did not renew the teacher's annual contract, and she sued for violation of her free-speech rights.[61] The Sixth Circuit acknowledged and quickly dispensed with Justice Souter's dissent with the majority's ruling in *Garcetti* imperiling academic freedom, because it addressed professors at the university and college level.[62] Moreover, the court opined that *even if* academic freedom "could somehow apply to primary and secondary schools, that does not insulate a teacher's curricular and pedagogical choices from the school board's oversight, as opposed to the teacher's right to speak and write publicly about academic issues outside the classroom."[63] As the school board is the one who hires the teachers, the court held that the board therefore has the ultimate decision as to what is discussed and taught in the classroom.[64] The teacher—like any other ordinary citizen—has no more free-speech right than anyone else to dictate the school's curriculum.[65] This is notably in contrast to the teacher in *Pickering* who, like other private citizens, did have a right to criticize the school board in its funding choices. The Sixth Circuit held that the *Evans-Marshall* teacher made her curricular and pedagogical choices about how to teach English to fifteen-year-old

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[53] RAY BRADBURY, FAHRENHEIT 451 (1953) (chronicling a world where books are outlawed by the government, follows the protagonist, a fireman, whose job is to burn books, and his disillusionment in censoring literature and destroying knowledge).

[54] *100 Most Frequently Challenged Books: 1990-1999*, AM. LIBR. ASS'N., https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/decade1999 (last visited Mar. 23, 2024).

[55] *Evans-Marshall*, 624 F.3d at 334–35.

[56] LESLÉA NEWMAN, HEATHER HAS TWO MOMMIES 3 (Allison Books 3d ed. 2009) (1989).

[57] *Evans-Marshall*, 624 F.3d at 335.

[58] HERMAN HESSE, SIDDHARTHA (Susan Bernofsky trans., Modern Library 2006) (1922) (chronicling the spiritual journey of a man named Siddhartha during the time of the Gautama Buddha).

[59] *Evans-Marshall*, 624 F.3d at 335.

[60] *Id.* at 336 (describing how some writing samples included a first account rape and a story about a young boy who murdered a priest and desecrated a church).

[61] *Id.*

[62] *Id.* at 343.

[63] *Id.* at 344.

[64] *Id.* at 340 (*quoting* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) ("And if it is the school board that hires that speech, it can surely 'regulate the content of what is or is not expressed' . . . . Only the school board has ultimate responsibility for what goes on in the classroom, legitimately giving it a say over what teachers may (or may not) teach in the classroom.").

[65] *Evans-Marshall*, 624 F.3d at 340.

students in connection with her official duties as a teacher, and therefore, under *Garcetti*, had no First Amendment claim.[66]

The Seventh Circuit mirrored this logic in *Brown v. Chicago Board of Education*.[67] The court held that, because of *Garcetti*, a teacher's "First Amendment claims fail right out of the gate."[68] In *Brown*, the teacher confiscated a note passed during class.[69] After reading the note's inappropriate use of the n-word, the teacher decided to use this as an opportunity to teach his students about the harmful nature of the word.[70] By chance, the school principal was observing this lesson and swiftly suspended the teacher for violating sections of the Employee Discipline and Due Process Policy which prohibits "[u]sing verbally abusive language to or in front of students."[71] The court applied *Garcetti* to the teacher's speech, holding that in-classroom instruction—whether an impromptu lesson or part of the curriculum—constitutes statements pursuant to the teacher's official duties and therefore the teacher enjoyed no First Amendment claim.[72]

This decision was not the first time the Seventh Circuit applied *Garcetti* to narrow the scope of acceptable curricular instruction. In *Mayer v. Monroe County Community School Corp.*,[73] a former public-school teacher brought a § 1983 claim against her former school for terminating her after speaking about personal political stances in a current events lesson. The court held that the teacher's current events lesson was part of her assigned tasks in the classroom and therefore *Garcetti* applied.[74] In fact, the court went so far as to state that restricting the speech of teachers—who are specifically hired for their speech—is "an easier case for the employer than *Garcetti*, where speech was not what the employee was being paid to create. . . ."[75]

The last circuit to apply *Garcetti* to limit teacher's instructional speech in elementary and high schools was the Ninth Circuit in *Johnson v. Poway Unified School District*.[76] In *Johnson*, a high-school calculus teacher was forced to remove banners displayed in his classroom that were viewed as espousing religion.[77] The court held that since the teacher's "speech 'owe[d]

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[66] *Id*.

[67] *Brown*, 824 F.3d at 713.

[68] *Id.* at 715.

[69] *Id.* at 714.

[70] *Id*.

[71] *Id.* at 714–16.

[72] *Id.* The court also notes that maintaining classroom order is part of a teacher's duties and this lesson was an attempt to manage student behavior and therefore was pursuant to the teacher's official duties. Brown v. Chicago Bd. of Educ., 824 F.3d at 715 (relying on Weintraub v. New York Bd. of Educ., 593 F.3d 196, 198 (2d Cir. 2010)).

[73] Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007).

[74] *Id.* at 480. Mayer involved an elementary school teacher talking about her involvement in a political demonstration during her current-events class.

[75] *Id.* at 479.

[76] *Johnson*, 658 F.3d at 964.

[77] *Id.* at 958. There were two banners under review—one had stripes in red, white, and blue and in each stripe had one of the following verses: "IN GOD WE TRUST," "ONE NATION UNDER GOD," "GOD BLESS AMERICA," and "GOD SHED HIS GRACE ON THEE." The other stated: "All men are

its existence' to his position as a teacher, then Johnson spoke as a public employee, not as a citizen, and our inquiry is at an end."[78] Just like other specific actions of teachers —such as taking attendance, supervising students, and teaching the curriculum—the hanging of the decorative banners in a teacher's classroom was an act that *only* a teacher—a government employee, not an ordinary citizen—could do.[79] In this decision, the Ninth Circuit extended *Garcetti* to implicate a teacher's choice of decorations in the school. This seems to be beyond the pale of the Sixth and Seventh Circuit which just applied *Garcetti* to teacher's classroom instruction and assignments.

In contrast, the Second and Fourth Circuits have both intentionally declined to apply *Garcetti* to educator's speech in their teaching capacity. In *Lee-Walker v. N.Y.C Department of Education*,[80] the Second Circuit was confronted with whether to apply *Garcetti* to a teacher's § 1983 action for First Amendment retaliation. The ninth grade English teacher was fired for teaching about the Central Park Five case,[81] to "highlight 'an American societal tendency to rush to adverse legal conclusions against black males.'"[82] The court, declined to apply *Garcetti* to the case at hand, relying on the reluctance of the majority opinion in *Garcetti* to decide if the analysis of "pursuant to . . . official duties" would apply to speech related to scholarship teaching.[83] Instead, the Second Circuit relied on its pre-*Garcetti* standard that allows school administrators to "limit the content of school-sponsored speech so long as the limitations are 'reasonably related to legitimate pedagogical concerns.'"[84] To determine "[w]hether a school official's action is reasonably related to a legitimate pedagogical concern will depend upon, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation."[85] Through this alternate test, the Second Circuit is recognizing that school administrators have a need to limit the content of school-sponsored speech, but not at the complete expense of teacher's rights to speech.

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created equal, they are endowed by their CREATOR." On that banner, the word "creator" occupied its own line, and each letter of "creator" was capitalized and nearly double the size of the other text.

[78] *Id.* at 966 (quoting *Garcetti*, 547 U.S. at 419).

[79] *Id.* at 968.

[80] Lee-Walker v. N.Y.C. Dep't of Educ., 220 F. Supp. 3d 484 (S.D.N.Y. 2016), *aff'd*, 712 F. App'x 43 (2d Cir. 2017).

[81] *Id.* at 487 (discussing the Central Park Five case about the aggravated assault and rape of a white woman in Manhattan's Central Park in which five Black and Latino youths were convicted for the crime and served sentences ranging from six to twelve years before being exonerated). *See generally,* People v. Wise, 752 N.Y.S.2d 837 (N.Y. Sup. Ct. 2002).

[82] *Lee-Walker*, 220 F. Supp. 3d at 488.

[83] *Id.* at 493; *see also* Panse v. Eastwood, 303 F. App'x 933, 934 (2d Cir. 2008) ("[i]t is an open question in this Circuit whether *Garcetti* applies to classroom instruction[]" in determining whether *Garcetti* would deny First Amendment protection to an art teacher who encouraged his students to attend a sketching class involving nude models).

[84] *Id.* at 493 (quoting Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 722 (2d Cir. 1994)).

[85] *Id.* at 492 (quoting *Silano*, 42 F.3d at 722–23 (internal quotation marks omitted)).

Similar to the Second Circuit, the Fourth Circuit in *Lee v. York County School Division*,[86] declined to adopt *Garcetti* to a case about a high school teacher being forced to remove his religious classroom bulletin boards and instead applied the pre-*Garcetti*, *Pickering-Connick* standard.[87] Unlike the Ninth Circuit which applied *Garcetti* to the teacher's religious bulletin boards, thereby quickly dismissing the teacher's claim to his right of classroom decoration, the Fourth Circuit undertook a thorough analysis in determining whether the teacher had a right to keep his religious articles on a bulletin board posted in his classroom. The court recognized the teacher's compelling argument that the items removed from the bulletin "constitutes speech concerning a public matter, because each item involves either a political issue or a matter of interest to the community."[88] For example, the removed article outlining religious and philosophical differences between President George W. Bush and his challenger, John Kerry, explains political information on presidential candidates.[89] However, precedent dictates that public schools possess the right to regulate speech that occurs in the classroom, and that speech curricular in nature are per se not a matter of public concern.[90]

B. *Tier II: Does* Garcetti *Apply to Universities?*

The circuit courts further split on whether *Garcetti* applies to educators in a university or college setting. Universities provide a wholly different context for teachers and their level of instruction. Unlike the compulsory settings of lower schools, students decide for themselves whether they want to attend college or university, and what type of school they would like to attend. The students are usually of age (adults), and therefore can apply their sophistication and maturity in listening to the professors' teachings and forming their own conclusions on the material. Additionally, the professors at universities are usually scholars or researchers and therefore need protection to insulate their opinions and findings from non-academic judgment by college administrators.[91]

In this determination, the Fourth Circuit maintains its position of not applying *Garcetti* to professors.[92] The Sixth and Ninth Circuits, which

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[86] *See generally* Lee v. York Cnty. Sch. Div., 484 F.3d 687 (4th Cir. 2007).

[87] *Id.* at 694 n.11 ("The Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching . . . . Thus, we continue to apply the *Pickering-Connick* standard."); *see also* Borden v. Sch. Dist. of E. Brunswick, 523 F.3d 153, 171 n.13 (3d Cir. 2008) (engaged in the hypothetical that if *Garcetti* applied to this case, the football coach's bowing of head and taking a knee during the pre-game meal prayer would not be protected as they were made pursuant to his official duties as coach of the team, but does away with the hypothetical because the coach's speech was not a matter of public concern and therefore enjoys no First Amendment protection regardless).

[88] *Lee*, 484 F.3d at 694–95.

[89] *Id*. at 690.

[90] *Id*. at 693–95.

[91] J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 288 n.137 (1989).

[92] *See* Adams v. Tr. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 563–64 (4th Cir. 2011).

maintain that *Garcetti* does apply to teachers in lower schools, both held that it does not apply to professors at the college level.[93] The Third and Seventh Circuit apply *Garcetti* to university professors but to cases that do not involve speech related to scholarship and teaching.[94]

The Fourth Circuit in *Adams v. Trustees of the University of N.C.-Wilmington*,[95] reiterated its position in *Lee* that *Garcetti*'s "pursuant to duties" analysis does not apply to teachers' First Amendment rights in the classroom.[96] Moreover, the court highlighted that the language in the *Garcetti* opinion is specifically concerned with the *Garcetti* analysis applying in the academic context of a public university; therefore, the court held that it surely should not apply to the scholarly writings of this university's assistant professor.[97] To note, the court considered that *Garcetti* may apply to "instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching."[98] This consideration unfolded when the Third and Seventh Circuits applied *Garcetti* to a university professor's speech in which the speech was unrelated to scholarship and teaching.[99]

In *Meriwether v. Hartop*, Nicholas Meriwether, a philosophy professor at Shawnee State University, sued the school for being forced to refer to his students by their preferred pronouns, claiming that the school's gender-identity policy violated the Free Speech Clause of the First Amendment.[100] Recognizing that the Supreme Court expressly declined to address whether its analysis in *Garcetti* would apply to cases involving speech related to scholarship or teaching, the Sixth Circuit invoked two prior Supreme Court's opinions: *Sweezy v. State of New Hampshire*[101] and *Keyishian v. Board of Regents*.[102] In both cases, the Supreme Court established that the First

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[93] *See* Demers v. Austin, 746 F.3d 402, 412–13 (9th Cir. 2014); Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021).

[94] *See* Borden v. Sch. Dist. of E. Brunswick, 523 F.3d 153, 171 n.13 (3d Cir. 2008); *see also* Gorum v. Sessoms, 561 F.3d 179, 186 (3d Cir. 2009) (applying *Garcetti* to university professor's speech when he assisted a student at his disciplinary hearing); Renken v. Gregory, 541 F.3d 769, 774 (7th Cir. 2008) (applying *Garcetti* to university professor's speech when he complained about the school's use of grant funds).

[95] Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011) (regarding an assistant professor of criminology at University of North Carolina who published two papers: *Welcome to the Ivory Tower of Babel*: *Confessions of a Conservative College Professor,* and co-authored *Indoctri-Nation: How Universities are Destroying America*, which vocalized his views on political and social issues at the university and in society at large).

[96] *Id.* at 562 ("Our conclusion is based on the clear reservation of the issue in *Garcetti,* Fourth Circuit precedent, and the aspect of scholarship and teaching reflected by Adams' speech.").

[97] *Id.* at 563.

[98] *Id.*

[99] Gorum v. Sessoms, 561 F.3d 179, 186 (3d Cir. 2009) (applying *Garcetti* to university professor's speech when he assisted a student at his disciplinary hearing); Renken v. Gregory, 541 F.3d 769, 774 (7th Cir. 2008) (applying *Garcetti* to university professor's speech when he complained about the school's use of grant funds).

[100] Meriwether v. Hartop, 992 F.3d 492, 502 (6th Cir. 2021).

[101] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[102] Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

Amendment protects the free-speech rights of college professors when they are teaching.[103] The protections of the First Amendment are afforded to facilitate a marketplace of ideas that encourages freedom of thought and expression, and the Courts specially noted that "the classroom is *peculiarly* the 'marketplace of ideas.'[104] The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[105] Therefore, to "impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[106] Recognizing the importance of the college classroom in the free exchange of ideas, the Sixth Circuit invoked the hypothetical academic-freedom exception in *Garcetti* to "cover[] all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[107]

Likewise, in *Demers v. Austin*,[108] the Ninth Circuit held that *Garcetti* does not apply to a university professor's teaching and scholarly writings due to the caveat in *Garcetti* of a possible exception for university professors and that "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court."[109]

A majority of the Circuit Courts — Sixth, Seventh, Ninth, and Tenth — have applied *Garcetti* to teachers' speech at the primary and secondary level, and those who opted not to directly apply *Garcetti*—Third, Fourth, and Fifth—can rely on their pre-*Garcetti* decisions that hold pedagogical and in-class conduct to be in control of the institution, not the teachers. Despite the way each court comes to their conclusion, the common thread running through them is that in-class curricular speech at the primary or secondary level is not protected by the First Amendment. However, at the college level, the majority of courts that have addressed this question—

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[103] *Sweezy*, 354 U.S. at 250; *Keyishian*, 385 U.S. at 603.

[104] *Keyishian*, 385 U.S. at 603 (emphasis added).

[105] *Id.* (alteration in original) (emphasis added) (quoting United States v. Assoc. Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

[106] *Sweezy*, 354 U.S. at 250.

[107] Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021). The court went through a *Pickering-Connick* analysis. It found that the speech was a matter of public concern as "[p]ronouns can and do convey a powerful message implicating a sensitive topic. . . ." *Id.* at 508. Since the professor came to a compromise that he would call the student by their last name and this facilitated the student's participation, the court found that the school's interest was minimal as the teacher's speech did not "inhibit[] his [daily] duties in the classroom, hamper[] the operation of the school, or [deny the student] any educational benefits." *Id.* at 511. Therefore, the Pickering balance came in favor of the teacher, and the court held that the university violated the teacher's free-speech rights when they fired the teacher, "flout[ing] that core principle of the First Amendment." *Id.*

[108] Demers v. Austin, 746 F.3d 402 (9th Cir. 2014).

[109] *Id.* at 411 (David Demers, associate professor at Washington State University, brought action alleging that university administrators retaliated against him in violation of the First Amendment for distributing a short pamphlet called "The 7-Step Plan" which discusses a proposal for the school to restructure departments and included drafts from an in-progress book titled "The Ivory Tower of Babel" which examined the role and function of social science research in society).

Fourth, Sixth, and Ninth—hold that *Garcetti* does not apply to professors, and the Third and Seventh Circuit apply *Garcetti* narrowly to professors when it does not involve speech related to scholarship and teaching.

The Eleventh Circuit has not yet been confronted with a case that would involve applying *Garcetti*. This is likely to change, considering the number of lawsuits being filed in response to the Don't Say Gay Bill and Stop WOKE Act.[110] If these cases make it to the appeals court, they are likely to follow the majority of its sister courts in holding that *Garcetti* applies to the primary and secondary school, thereby allowing the Don't Say Gay Bill to succeed in any First Amendment challenges. The Eleventh Circuit may hold that *Garcetti* does not apply to teachers at the university level, allowing the Stop WOKE Act to apply only to lower schools.[111] These decisions can impact the scope and implementation of the Florida bills.

III. FLORIDA BILLS CENSORING TEACHERS' SPEECH

The Eleventh Circuit should not adopt *Garcetti*. Teachers are deserving of First Amendment rights; applying *Garcetti* to teachers strips them of that right. Moreover, in a state such as Florida where these bills exist, a teacher can be fired for a loose, vague translation of violating the bill and therefore needs the protection of the court. Florida's ban could even potentially curtail efforts from teachers to use pride symbols and posters in their classroom to build a safer environment for queer kids. Accordingly, the court should rely on the *Pickering- Connick* standard, which would allow for some nuance. Cases where the teacher is staying in line with class curriculum, but a question or discussion on gender or race arises from an assigned book, can

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[110] *See* M.A. v. Fla. State Bd. of Educ., No. 4:22-CV-134-AW-MJF, 2023 WL 2631071, at *1–2 (N.D. Fla. Feb. 15, 2023) (dismissing plaintiff's amended complaint challenging the Don't Say Gay Bill due to lack of standing). Following the plaintiffs' appeal and defendant's cross-appeal, M.A. v. Fla. State Bd. of Educ., No. 23-11016 (11th Cir. Mar. 29, 2023) (the Florida State Legislature passed an expansion of H.B. 1557, which banned lessons on LGBTQ issues for grades 4-12 and the previous version only banned instruction on such issues in grades K-3); *see also* Cousins v. Sch. Bd. of Orange Cnty., Fla., 636 F. Supp. 3d 1360, 1381 (M.D. Fla. 2022) (dismissing a case challenging the Don't Say Gay Bill for lack of standing and that bullying is "simply a fact of life"); Cousins v. Sch. Bd. of Orange Cnty., Fla., No. 6:22-CV-1312-WWB-LHP, 2023 WL 5836463, at *14 (M.D. Fla. Aug. 16, 2023); Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1229 (N.D. Fla. 2022) (issuing an order that immediately blocked Florida's "Stop W.O.K.E." Act, which curbs classroom discussion on race and gender, from being enforced at the college level). The Eleventh Circuit subsequently denied a request to stay the injunction, pending appeal from a final district court decision. Pernell v. Fla. Bd. of Governors of State Univ., No. 22-13992-J, 2023 WL 2543659, at *1 (11th Cir. Mar. 16, 2023).

[111] Pernell v. Fla. Bd. of Governors of State Univ. Sys., 2022 WL 16985720, at *1290 (quoting Paul Farhi, *The Washington Post's New Slogan Turns Out to Be an Old Saying*, WASH. POST, (Feb. 24, 2017) https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html.) (citing Austin v. Univ. of Fla. Bd. of Tr., 580 F. Supp. 3d 1137, 1175 (N.D. Fla. 2022)) (granting a preliminary injunction to not enforce the Individual Freedom Act at the university level and noting, "[It is] "crystal clear [that] both robust intellectual inquiry and democracy require light to thrive. Our professors are critical to a healthy democracy, and the State of Florida's decision to choose which viewpoints are worthy of illumination and which must remain in the shadows has implications for us all. If our 'priests of democracy' are not allowed to shed light on challenging ideas, then democracy will die in darkness. But 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.")

be protected under the *Pickering-Connick* standard. Additionally, a history or current events lesson *should* be able to mention the racist undertones behind the event. Florida's ban on "race superiority" is an attempt at erasing Black history and limiting instruction on critical race studies.[112]

The issue of whether to apply *Garcetti* has escalated not just by court cases and individual teacher actions, but legislative action on behalf of conservative states seeking to constrain teacher instruction on certain topics.[113] Recently, Governor Ron DeSantis of Florida enacted two bills that would censor the speech of school teachers: The Parental Rights in Education bill which "prohibits classroom discussion about sexual orientation or gender identity in certain grade levels"[114] and the Stop Wrongs Against Our Kids and Employee, intentionally acronymic to be called the Stop WOKE Act, which prevents discriminatory instruction in the workplace and public schools, by:

> subjecting any K-20 public education student or employee to training or instruction, that espouses, promotes, advances, inculcates, or compels such individual to believe the following concepts constitutes an unlawful employment practice or unlawful discrimination:
> 1. Members of one race, color, national origin or sex are morally superior to members of another race, color, national origin or sex.
> 2. A person by virtue of his or her race, color, national origin, or sex is inherently racist, sexist or oppressive, whether consciously or unconsciously.
> 3. 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 .
> 4. Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex.
> 5. A person, by virtue of his or her race, color, national origin, or sex bears responsibility for, or should be discriminated against or receive adverse treatment because

[112] The Stop WOKE Act specifies that students should not be subjected to the following concept: "members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex." FLA. STAT. § 1000.05(e)(4)(1)(1) (2023); *see also* Janai Nelson, *Ron DeSantis Wants to Erase Black History. Why?*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/opinion/ron-desantis-black-history.html ("Florida's rejection of the A.P. course and Mr. DeSantis's demand to excise specific subject areas from the curriculum stand in stark opposition to the state-issued mandate that all students be taught 'the history of African Americans . . . .'").

[113] Young, *supra* note 10, at 1.

[114] H.B. 1557, § 1001.42 Fla. H.R. (2022) (requiring schools to notify parents about changes in student services, such as if a transgender or nonbinary student wants to use new bathrooms or locker facilities, or seeks to change their name or pronouns at school). Due to the bill's discriminatory nature towards gay students, it has been coined the "Don't Say Gay" bill. *Id.*

> of, actions committed in the past by other members of the same race, color, national origin, or sex.
> 6. A person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse diversity, equity, or inclusion.
> 7. A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.
> 8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.
> However, training or instruction may include a discussion of such concepts if they are presented in an objective manner without endorsement.[115]

DeSantis signed these bills to assure "that public schools should focus on teaching core academics, not on pushing a liberal ideology."[116] These two bills have received considerable backlash for draconian censorship. The Stop WOKE bill is a direct response to the racial justice movement of 2020 that brought attention and focus on Critical Race Theory.[117] These bills are DeSantis' attempt not just to limit instruction on these topics, but to galvanize conservative voters around grievance politics, and racist and homophobic sentiments. Lawsuits challenging these laws have been filed.[118]

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[115] H.B. 7, § 1000.05(4), 2022 Fla. Laws.

[116] Sarah Mervosh, *Back to School in DeSantis's Florida, as Teachers Look Over Their Shoulders*, N.Y. TIMES (Aug. 27, 2022), https://www.nytimes.com/2022/08/27/us/desantis-schools-dont-say-gay.html.; *see also* Press Release, Ron DeSantis, Governor of Fla., Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (Apr. 22, 2022), https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/.

[117] Laura Ansley, *Don't Say Gay, Stop WOKE, Banned Books, and Anti-Trans Laws*, AM. HIST. ASS'N (Feb. 10, 2023), https://www.historians.org/research-and-publications/perspectives-on-history/february-2023/dont-say-gay-stop-woke-banned-books-and-anti-trans-laws-the-ahas-teaching-through-the-backlash-webinar.

[118] *See* M.A. v. Fla. State Bd. of Educ., No. 4:22-CV-134-AW-MJF, 2023 WL 2631071, at *1–2 (N.D. Fla. Feb. 15, 2023) (dismissing plaintiff's amended complaint challenging the Don't Say Gay Bill due to lack of standing). Following the plaintiffs' appeal and defendant's cross-appeal, M.A. v. Fla. State Bd. of Educ., No. 23-11016 (11th Cir. Mar. 29, 2023) (the Florida State Legislature passed an expansion of H.B. 1557, which banned lessons on LGBTQ issues for grades 4-12 and the previous version only banned instruction on such issues in grades K-3); *see also* Cousins v. Sch. Bd. of Orange Cnty., Fla., 636 F. Supp. 3d 1360, 1381 (M.D. Fla. 2022) (dismissing a case challenging the Don't Say Gay Bill for lack of standing and that bullying is "simply a fact of life"); Cousins v. Sch. Bd. of Orange Cnty., Fla., No. 6:22-CV-1312-WWB-LHP, 2023 WL 5836463, at *14 (M.D. Fla. Aug. 16, 2023); Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1229 (N.D. Fla. 2022) (issuing an order that immediately blocked Florida's "Stop W.O.K.E." Act, which curbs classroom discussion on race and

These bills are extremely worrisome due to concerns of the chilling effect they can have on teachers, thereby posing a direct negative impact on their students.

A. *The Harm That Can Be Caused From These Bills*

Laws, such as Florida's, which severely restrict teachers from discussing gender identity and expression in the classroom, can lead to a hostile and discriminatory environment for students with minority sexual orientations.[119] This can lead to irrevocable harm. The Trevor Project, a nonprofit suicide prevention organization for LGBTQ[120] youth—who are more prone to suicide risk because of their mistreatment and stigmatization in society—found that 45% of LGBTQ youth seriously considered attempting suicide in the past year.[121] This "hateful bill" could likely put LGBTQ students at greater risk.[122] This discrimination and isolation of LGBTQ youth, can lead to them experiencing even lower levels of self-esteem and higher levels of depression.[123]

Additionally, the Don't Say Gay Bill would preclude teachers from effectively helping or supporting students with minority sexual orientations. Teachers play a pivotal role in a student's life, and many students consider their teachers as much more than their educators.[124] Particularly for students

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gender, from being enforced at the college level). The Eleventh Circuit subsequently denied a request to stay the injunction, pending appeal from a final district court decision. Pernell v. Fla. Bd. of Governors of State Univ., No. 22-13992-J, 2023 WL 2543659, at *1 (11th Cir. Mar. 16, 2023); *see also* Ansley, *supra*, note 117; Mervosh, *supra* note 116 ("In response to a lawsuit challenging the law, state officials said that gay teachers could display family photos, employees could intervene against bullying based on gender and sexuality, and schools could host clubs for LGBTQ students. The law does not ban 'incidental references in literature to a gay or transgender person or to a same sex couple,' according to court documents. Still, the law has left some educators wondering: Where does discussion end and instruction begin?").

[119] Hannah Natanson & Mariah Balingit, *Teachers Who Mention Sexuality Are "Grooming" Kids, Conservatives Say*, WASH. POST (Apr. 5, 2022, 9:04 AM), https://www.washingtonpost.com/education/2022/04/05/teachers-groomers-pedophiles-dont-say- gay/ (since the bill passed the Florida Senate, there have already been reports of Florida teachers being instructed to remove pro-LGBTQ signage from their classrooms, marginalizing LGBTQ- plus students); *see also* Matt Lavietes, *Education Culture War Finds a New Target: Pride Flags in Classrooms*, NBC NEWS, https://www.nbcnews.com/nbc-out/out-news/education-culture-war-finds-new-target-pride-flags-classrooms-rcna2501 (Oct. 5, 2021, 11:44 AM) (gay student expressing that the rainbow sticker on his classroom door made him feel that he "[would] not be hated for who you love or what you identify as" and the ban of the stickers sent the message that "[he] do[es] not fit in here, [he] should not be here.").

[120] An acronym for lesbian, gay, bisexual, transgender, and queer.

[121] *2022 National Survey on LGBTQ Youth Mental Health*, The Trevor Project, https://www.thetrevorproject.org/survey-2022/ (last visited Feb. 12, 2024).

[122] President Joe Biden (@POTUS), TWITTER (Feb. 8, 2022, 6:07 PM), https://twitter.com/potus/status/1491186973511458818?lang=en.

[123] *See generally*, JOSEPH G. KOSCIW, CAITLIN M. CLARK, & LEESH MENARD., THE 2021 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCE OF LESBIAN, GAY, BISEXUAL, AND TRANS YOUTH IN OUR NATION'S SCHOOLS (2021), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf.

[124] *See* Lee v. York Cnty. Sch. Div., 484 F.3d 687, 691–92 (4th Cir. 2007) ("Because of his position as a teacher, Lee felt responsible for more than just the academic well-being of his students. He stated, 'I'm accountable in that classroom for [the students'] welfare and their attitudes and their feelings, which are sensitive and fluctuate daily, and I find the hope embodied in some images to be beneficial.'"); *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2425 ("Teachers and coaches often serve as vital

grappling with their sexuality that may not receive support or acceptance from home, teachers can foster a safe space for advice and mentorship otherwise unavailable to them. Under the Florida bill, a teacher who themselves is part of the LGBTQ community would have to keep that private, barring any chance of serving as a role model for a child struggling with their gender identity and expression.[125] Indeed, even a cisgender heterosexual teacher might restrain themselves from mentoring a student who is part of the LGBTQ community, out of concern that the teacher might be accused of facilitating discussions about gender identity during classroom instruction—and thus run afoul of the strict Floridian laws.

Courts have recognized this kind of harm by emphasizing the importance of protecting the vulnerable LGBTQ youth. Recently, in *Tingley v. Ferguson,* the Ninth Circuit upheld laws banning conversion therapy[126] due to the harm that such therapies can inflict on children, whom are "a vulnerable group in the eyes of the law."[127] The court relied on a report that "concluded that there is a 'fair amount of evidence that conversion therapy is associated with negative health outcomes such as depression, self-stigma, [and] cognitive and emotional dissonance. . . .'"[128] This report illuminates both the harm that can be caused by conversion therapy and the court's consideration of harm in deciding the case.

B. *Can This Harm Prevail Over* Garcetti*?*

Applying *Garcetti* would render *all* classroom speech—curricular or impromptu lessons—pursuant to the teacher's official duties and therefore not in their control. With these government bills, teachers in Florida cannot talk about racism—and its role in history and society—or gender expression without suffering repercussions. To be sure, teachers never had control to

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role models.").

[125] *See* Natanson & Balingit, *supra* note 119 ("In classrooms, LGBTQ teachers are reconsidering how much of themselves they are willing to share with their students—including LGBTQ children who might be searching for mentors.").

[126] Therapy to minors with the goal of changing their sexual orientation and/or gender identity. *See Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx (last visited Feb. 29, 2024).

[127] Tingley v. Ferguson, 47 F.4th 1055, 1083 (9th Cir. 2022). *Cf.* Otto v. City of Boca Raton, Fla., 981 F.3d 869 (11th Cir. 2020) (holding that protecting children does not justify therapists' First Amendment rights being violated by the city ordinances banning conversion therapy. The court discussed how the research on the harm caused by conversion therapy is inconclusive due to its lack of rigor and recent research that "there are individuals [who have participated in conversion therapy] who perceive they have been harmed and others who perceive they have benefitted." Not only did the court determine the research inconclusive, but also noted that research by the American Psychiatric Association is subject to change; it was only 35 years ago that this organization removed homosexuality from being listed as a paraphilia, disorder, or disturbance. The court also pointed out that upholding this ban and its attendant speech restriction would mean that it would also have to uphold inverse laws, such as a law that prohibits validating and supporting a client's same sex attractions or gender identification. Lastly, the court quoted Texas v. Johnson, 491 U.S. 397, 414 (1989) that if there is a "bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[128] *Tingley*, 47 F.4th at 1078.

decide what and how to teach:

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.[129]

Teachers are hired to teach the curriculum in the manner decided by the school. Teachers who deviate from that—personal discussions on a current event (*Lee-Walker*), creative assignment to teach assigned book (*Evans-Marshal*), banners in the classroom that espouse viewpoints (*Johnson*)—open themselves to discipline and retaliation. This position is not only in line with Supreme Court case-law, but it is the logical outcome: "[i]f some risk of indoctrination exists no matter who controls the content of teaching, better to entrust that power with the democratically elected school board than to leave students 'subject to teachers' idiosyncratic perspectives.'"[130]

However, it is not clear that *Garcetti* should be applied to totally limit teacher's free speech in the classroom.[131] "By assuming that teachers always act as teachers between the first and last bell of the school day. . . [there is] little left of the First Amendment. . . for public school employees."[132] Accordingly, there should be some distinction between deviating from the curriculum completely and leading a thoughtful discussion about issues that the teacher wishes to discuss, while complying with the required curriculum and suggested textbooks. For example, an eighth-grade teacher may use her school's required curriculum to assign her students *To Kill a Mockingbird*,[133] and when discussing character development, focus on the protagonist of the novel, Scout Flinch—who is described as enjoying rough outdoor play with her brother and regularly wearing overalls instead of dresses[134]—to springboard into a discussion of gender identity. Or perhaps, the teacher could use the book, which is about a lawyer defending a local Black man

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[129] Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.").

[130] Paul Forster, *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 704 (2010) (quoting *Mayer*, 474 F.3d at 479).

[131] *See generally* Maya McGrath, *Teacher Prayer in Public Schools*, 90 FORDHAM L. REV. 2428, 2460 (2022) (arguing that broadly applying *Garcetti* is extremely troublesome for public school employees who can be fired for privately practicing their religious beliefs on the school campus).

[132] *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 935 (9th Cir. 2021) (O'Scannlain, J., statement regarding denial of rehearing en banc).

[133] HARPER LEE, TO KILL A MOCKINGBIRD (1960) (published during the Civil Rights movement and hailed as an exposé of Southern racist society).

[134] *Id.* at chapter 9 (1960). ("Aunt Alexandra was fanatical on the subject of my attire. I could not possibly hope to be a lady if I wore breeches; when I said I could do nothing in a dress, she said I wasn't supposed to be doing things that required pants. Aunt Alexandra's vision of my deportment involved playing with small stoves, tea sets, and wearing the Add-A-Pearl necklace she gave me when I was born. . .").

accused of raping a white woman and the unjust consequences of prejudice and hate from the community, to delve into a class discussion about white privilege and the discrimination faced by people of color.

Peter Kauffman and Stephen Elkind argue that "*Garcetti* is too blunt an instrument to regulate the speech of public school teachers" and urge for the reinstatement of the *Connick- Pickering* balancing test.[135] They contend that this test as applied to homosexuality and gender identity would likely satisfy the first prong of the test as this speech involves matters of public concern.[136]

After establishing that the speech would be considered a matter of public concern, Kaufman and Elkind then argue that for the second prong of the *Connick-Pickering* test—which requires courts to involve themselves in a balancing test weighing the interests of the teacher as a citizen in commenting versus the government, the employer, in promoting the efficiency of its responsibilities to the public—to consider whether the school board has spoken on the matter at issue.[137] If the school board, or legislature, is silent on the subject, then the teacher's speech should fare better in the balancing test.[138] In states such as Florida, where the legislature has directly regulated whether teachers can speak about homosexuality and gender identity, then perhaps there is a more persuasive argument that the school's interests outweigh that of the teacher, but it is not definitive, as the balancing prong is highly fact-specific.[139]

Based on its prior rulings, it seems that if the Supreme Court would allow exception to *Garcetti*, it would likely only apply to university teachers. Justice Souter limited his concerns about *Garcetti*'s impact on academic freedom to the college level.[140] Moreover, academic freedom has

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[135] Stephen Elkind & Peter Kauffman, *Gay Talk: Protecting Free Speech for Public School Teachers*, 43 J. L. & EDUC. 147, 170 (2014). *See Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 935 (9th Cir. 2021) (O'Scannlain, J., statement regarding denial of rehearing en banc) (in a statement regarding the denial of a rehearing en banc, O'Scannlain wrote "[f]or as Kennedy rightly observes in his brief, '*Garcetti* applied *Pickering*; it did not overrule it'").

[136] Elkind & Kauffman *supra* note 135, at 173. ("Connick recognized that some issues are 'inherently of public concern,' citing 'racial discrimination' as one example. I think it is impossible not to note that a similar public debate is currently ongoing regarding the rights of homosexuals. The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate. Speech that 'touches upon' this explosive issue is no less deserving of constitutional attention than speech relating to more widely condemned forms of discrimination.") (citing *Rowland v. Mad River Loc. Sch. Dist.*, 470 U.S. 1009, 1012 (1985) (cert denied) (Brennan, J. dissenting) (in a case involving the dismissal of a non-tenured guidance counselor after revealing she was bisexual to fellow colleagues and superiors); *see also* Snyder v. Phelps 562 U.S. 443, 454 (2011) (a case involving picketers at a military funeral with signs about homosexuality in the military, such as "God Hates the USA/Thank God for 9/11," "F[**] Troops," "Thank God for Dead Soldiers") (holding, in an 8-1 decision, that although constitutionally protected, the "[picketers'] signs plainly relates to broad issues of interest to society at large, rather than matters of 'purely private concern.'").

[137] Elkind & Kauffman, *supra* note 135, at 179.

[138] *Id.*

[139] *Id.*; *see also* Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. OF FREE SPEECH L. 615, 616 (2022) (a teacher purposefully misgendering a student would be viewed as being highly disruptive to the school's responsibilities and goals of educating students, and therefore fail the balancing test).

[140] Garcetti v. Ceballos, 547 U.S. 410, 438 (2006) (Souter, J., dissenting) ("This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public

traditionally been defined as "scholarship and pedagogy called liberal education, a concept indigenous to the university."[141] This aligns with the Supreme Court's long-established views of "the important purpose of public education and the expansive freedom of speech and thought associated with the university environment, [thereby granting] universities [to] occupy a special niche in our constitutional tradition."[142]

This perspective also aligns with the Supreme Court's view of lower schools falling under the principle of "in loco parentis," a view that parents delegate authority over children to the public schools, overriding students' rights to free speech.[143] Although *in loco parentis* originated at a time when education was not compulsory, "the logic of the doctrine still applies because the fundamental right to educate children in the United States lies with the parents, and parents are still free to decide whether to send their children to public school, private school, or educate them at home."[144] Unlike a university, lower schools have state-mandated educational missions which essentially require the schools to oversee the curriculum and the power to decide what is considered deviating or distracting from the curriculum.[145]

A New York Times Opinion article encapsulates the clash between the support for and the backlash against the bill and their view of harms.[146] The article begins with a striking statistic: almost 21% of Generation Z (young adults born between 1997 and 2003) identifies as LGBTQ— as compared to 10.5% of the Millennials (young adults born between 1981-1996) and 4.2% of Generation X (born between 1965-1980) identifying as LGBTQ.[147] Ross Douthat provides three possible readings of the statistics.[148] The first interpretation is "*This is great news.*"[149] Our society is progressively stopping the suppression of sexual fluid, transgender, and nonbinary experiences, allowing us to finally see the accurate spectrum of sexual attractions and gender identities.[150] The second interpretation is "*We*

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university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'").

[141] Byrne, *supra* note 91, at 283.

[142] Grutter v. Bollinger, 539 U.S. 306, 329 (2003); *see also* Healy v. James, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.").

[143] *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2042–43 (2021).

[144] S. Ernie Walton, *In Loco Parentis, the First Amendment, and Parental Rights—Can They Coexist in Public Schools?*, TEXAS TECH. L. REV. (forthcoming 2023).

[145] *See Mahanoy*, 141 S. Ct. at 2052 (Alito, J., concurring) (explaining that *in loco parentis* to modern-day schools means the parents implicitly delegate and relinquish "the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission.").

[146] Ross Douthat, *How to Make Sense of the New LGBTQ Culture War*, N.Y. TIMES, (Apr. 13, 2022), https://www.nytimes.com/2022/04/13/opinion/transgender-culture-war.html.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

shouldn't read too much into it."[151] It is the nature of youth to explore themselves and try differentiating themselves from their parents.[152] The third interpretation is "*this trend is bad news* . . . a form of social contagion which our educational and medical institutions are encouraging and accelerating."[153] Ross Douthat provides three possible readings of the statistics.[154] The first interpretation is "*This is great news*."[155] Our society is progressively stopping the suppression of sexual fluid, transgender, and nonbinary experiences, allowing us to finally see the accurate spectrum of sexual attractions and gender identities.[156] The second interpretation is "*We shouldn't read too much into it*."[157] It is the nature of youth to explore themselves and try differentiating themselves from their parents.[158] The third interpretation is "*this trend is bad news* . . . a form of social contagion which our educational and medical institutions are encouraging and accelerating."[159]

The Don't Say Gay bill is the third view clashing with the first view. Ross ultimately argues that society is "running an experiment on trans-identifying youth without good or certain evidence, inspired by ideological motives rather than scientific rigor, in a way that future generations will regard as a grave medical-political scandal."[160]

How is harm defined? In *Tingley*, the harm to children was conversion therapy and with the Florida bill, the harm to children is talking about gender identity and expression too much. Both are trying to protect children, but the outcomes are ironically opposite. This leads to the next question, who should be the ultimate decider of what constitutes harm. It seems, the answer lies with the legislators. Similar to abortion, this will become a state by state or city to city issue, which involves inherent inequities. For example, those living in some states will be afforded more rights than those living in others. Furthermore, those who have more money will have the means to resolve and expand their otherwise limited rights—whether by flying to other states that allow abortion or paying for a private education that is less restrictive. In *Mahoney*, the Court rationalized that *in loco parentis* can still apply to schools—despite education being compulsory—because parents still have the option to send their children to private schools or educate them at home.[161] In reality, private or home education is not an available alternative for everyone. Accordingly, these bills will need to be challenged in the courts, and if the First Amendment

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[151] *Id.*
[152] Douthat, *supra* note 146.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] Douthat, *supra* note 146.
[159] *Id.*
[160] *Id.*
[161] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2051–52 (2021).

challenges continue to fail, the bills will have to be contested through a different constitutional framework.

CONCLUSION

Teachers are deserving of First Amendment protection. Applying *Garcetti* to teachers would encompass all speech they make while at school, severely restricting their First Amendment rights. Although this may seem stringent, this Note argues that teachers never had free reign in the classroom and perhaps it is better to entrust the democratically elected school board or legislature to have carte blanche over the content of teaching instead of teachers.

Accordingly, the opponents of the Florida bills, which restrict teachers from discussing race and gender, will likely fail in challenging the bills from a First Amendment perspective.