CRITICAL RACE THEORY THROUGH THE LENS OF *GARCETTI V. CEBALLOS*

Hannah Daigle*

INTRODUCTION

The First Amendment states no law shall be made "abridging the freedom of speech."[1] The Supreme Court has repeatedly protected contentious forms of speech and expression including allowing flag burning,[2] brandishing offensive signs during the picketing of a funeral for a deceased veteran,[3] and the burning of a cross on an African American family's lawn.[4] Despite each of these controversial decisions, all of which broadly protect free speech and expression, the Court has taken issue with an area that on its face, appears far less controversial. In *Garcetti v. Ceballos*,[5] the Court held the First Amendment does not shield a government employee's speech and expression made pursuant to their professional duties from employer discipline.[6] This ruling drastically narrowed the scope of First Amendment protections that public employees had previously enjoyed.[7]

To be considered a public employee or a public sector employee, one must work for the government of the United States, a state, a territory in possession of the United States, a city, a municipality, a county, or a similar government.[8] The broad category of public employee encompasses many professions, including police officers, public health care workers, bus drivers, and teachers.[9] Because the category of "public employee" is extremely broad, *Garcetti* implicated thousands of workers. Among the many fields of public employees, public school teachers stood out as a special category to the Court.[10]

---

* Hannah Daigle, Staff Member, *First Amendment Law Review*, University of North Carolina School of Law.

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

[2] *See* Texas v. Johnson, 491 U.S. 397 (1989).

[3] *See* Snyder v. Phelps, 562 U.S. 443 (2011).

[4] *See* R.A.V. v. St. Paul, 505 U.S. 377 (1992).

[5] 547 U.S. 410 (2006).

[6] *See id.* at 426.

[7] Ruben J. Garcia, *Against Legislation:* Garcetti v. Ceballos *and the Paradox of Statutory Protection for Public Employees*, 7 FIRST AMEND. L. REV. 22, 24 (2008).

[8] *I Am a Public Sector Employee*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/ffcra/benefits-eligibility-webtool/employee/employee-4 (last visited Apr. 28, 2022).

[9] Elizabeth McNichol, *Some Basic Facts on State and Local Government Workers*, CTR. ON BUDGET AND POL'Y PRIORITIES (June 15, 2012), https://www.cbpp.org/sites/default/files/atoms/files/2-24-11sfp.pdf.

[10] *See Garcetti*, 547 U.S. at 425.

Notably, the majority points to additional factors they believe to be relevant in a school setting which could potentially carve out an exception to teachers' speech being controlled by public employers.[11]

However, the Court does not individually discuss these additional factors; instead, it refers to the Court's previous acknowledgement that teachers possess increasingly informed and definite opinions in an academic environment specifically regarding school expenditures compared to other members of the population.[12] Despite the Court singling out teachers in the majority opinion, the Court falls short of actually providing this differentiated class with any individualized protection.[13] Instead, the *Garcetti* Court declined to decide if the *Garcetti* analysis would apply to issues involving teaching in a classroom, presumably leaving this determination to the discretion of lower courts.[14]

Schools are often the first place young students learn about race, America's racial history, and their own racial identity. Research indicates that teachers have a very important role to play in educating their students: "[e]arly childhood educators can support the unlearning of racism—and minimize later breathing in of racism—by intentionally teaching about race and related issues."[15] In addition, "[t]eachers who intentionally plan curricula that affirm children's racial identities have seen the benefits this produces in supporting children's growth and learning across many domains of development."[16]

One way teachers may aim to educate their students about race and racial history in the United States is through incorporating elements of Critical Race Theory (CRT) in the

---

[11] *See id.* ("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.").
[12] *See id.* at 417 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).
[13] *See id.* at 425.
[14] *See id.* ("[T]oday's decision may have important ramifications for academic freedom, at least as a constitutional value. . . . 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.").
[15] Kirsten Cole & Diandra Verwayne, *Becoming Upended: Teaching and Learning about Race and Racism with Young Children and Their Families*, YOUNG CHILD. (May 2018), https://www.naeyc.org/resources/pubs/yc/may2018/teaching-learning-race-and-racism.
[16] *Id.*

classroom.[17] CRT emphasizes the systemic and enduring nature of racism in the United States.[18] The theory "argues that historical patterns of racism are ingrained in law and other modern institutions, and that the legacies of slavery, segregation and Jim Crow still create an uneven playing field for Black people and other people of color."[19] As racial issues remain a topic of public concern and receive media attention, schools have been incorporating information about systemic racism and equitability, concepts that fall in line with CRT's teachings, within classroom settings.[20] However, this has recently received strong pushback, particularly from conservative states.

Since January 2021, 42 states have introduced bills or taken other steps to restrict or limit the ability of teachers to discuss racism and sexism, particularly through the lens of CRT.[21] At least 17 of these states have imposed restrictions limiting or banning CRT itself;[22] though it is worth noting that these conservative states often use CRT as an "all-encompassing umbrella term that covers seemingly any racial issue[.]"[23] These laws target the discussion and orientation that the U.S. is inherently racist and any conversations "about conscious and unconscious bias, privilege, discrimination, and oppression."[24]

---

[17] *But see* Lauren Jackson, *What is Critical Race Theory?*, N.Y. TIMES (Aug. 18, 2021), https://www.nytimes.com/2021/07/09/podcasts/the-daily-newsletter-critical-race-theory.html?.?mc=aud_dev&ad-keywords=auddevgate&gclid=CjwKCAjwndCKBhAkEiwAgSDKQZ9-JeooqxQv-wPgvldbbGIJ48XYxg_apDjUuSoJo3sRi8qFiboghoCJfYQAvD_BwE&gclsrc=aw.ds ("You'd have to look long and hard to find any K-12 classroom where the term 'critical race theory' comes up. Instead, what critics tend to target is the influence of concepts derived from C.R.T. that infuse the equity training field . . . . This kind of training has been offered by various school districts to teachers in the name of combating implicit bias.").

[18] *See* Janel George, *A Lesson on Critical Race Theory*, A.B.A. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.

[19] Jackson, *supra* note 17.

[20] *See* Marisa Iati, *What is Critical Race Theory, and Why do Republicans Want to Ban it in Schools?*, WASH. POST (May 29, 2021, 8:00 AM), https://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/.

[21] *See* Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK, https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 (May 9, 2022).

[22] *See id.*

[23] Brian Hiro, *Ask the Expert: The Rise and Meaning of Critical Race Theory*, CSUSM (Sept. 16, 2021), https://news.csusm.edu/ask-the-expert-the-rise-and-meaning-of-critical-race-theory/.

[24] Rashawn Ray & Alexandra Gibbons, *Why are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021),

The Heritage Foundation, an outspoken critic of CRT, believes it should not be taught in schools because it "demoralizes K through 12 students, polarizes higher ed students, guilts on working Americans, and condones cancel culture. [CRT] stokes grievances with the purpose of creating victims."[25] With this perspective in mind, notable conservatives have made it abundantly clear that CRT is unwelcome in public school classrooms.[26] For example, Republican Governor of Florida, Ron DeSantis stated: "In Florida we are taking a stand against the state-sanctioned racism that is [C]ritical [R]ace [T]heory. . . . We won't allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other."[27]

These targeted aims at CRT in schools by conservative states and politicians are an indirect result of the *Garcetti* decision and its explicit failure to take a stance on the First Amendment's freedom of speech rights for public school educators.[28] If the Court had carved out an exception for school teachers, distinguishing their First Amendment rights from other government employees, there would be less room for ambiguity and debate on the issue of incorporating elements of CRT into lesson plans. There are dangerous implications of *Garcetti*'s failure to explicitly protect teachers' speech in the classroom: the holding allows politicians to whitewash American history and impose ignorance on a new generation. These implications indicate at the very least, the *Garcetti* framework must be altered

---

https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/.

[25] *Combatting Critical Race Theory* THE HERITAGE FOUND. (May 21, 2021), https://www.heritage.org/civil-society/commentary/combatting-critical-race-theory.

[26] *See* Jackson, *supra* note 17; *see also* Stephanie Saul, *Energizing Conservative Voters, One School Board Election at a Time*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/2021/10/21/us/republicans-schools-critical-race-theory.html ("Glenn Youngkin, [as a Republican nominee for Governor of Virginia] . . . promised to abolish critical race theory on 'Day 1' in office.").

[27] See News Release, Ron DeSantis, Governor of Florida, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/.

[28] Mark Walsh, *If Critical Race Theory is Banned, Are Teachers Protected by the First Amendment?*, EDUC. WEEK (June 10, 2021), https://www.edweek.org/policy-politics/does-academic-freedom-shield-teachers-as-states-take-aim-at-critical-race-theory/2021/06 (stating the *Garcetti* decision "has been really hostile to the view that K-12 teachers have any control over the curriculum or even their teaching style.").

or replaced altogether in the educational context to protect the freedom of speech rights of K-12 public school teachers and their ability to educate students about the issues of race and racism in America.

I. ANALYSIS OF *GARCETTI V. CEBALLOS* AND SIMILAR CASES

In *Garcetti v. Ceballos*, the plaintiff, Richard Ceballos, had been employed as a deputy district attorney for over a decade at the Los Angeles County District Attorney's Office.[29] While on the job, Ceballos determined that an affidavit used to obtain a search warrant contained serious misrepresentations.[30] He spoke with a deputy sheriff from the local Sheriff's Department but ultimately felt unsatisfied with the answers he received regarding the perceived inaccuracies.[31] Despite Ceballos writing a disposition memo which included the recommendation to dismiss the case due to the alleged false statements in the affidavit, his supervisors determined they would proceed with the prosecution.[32] During the trial, the defense called Ceballos to testify about the misrepresentations on the affidavit.[33] After this testimony, Ceballos claimed he was "subjected to a series of retaliatory employment actions."[34] These retaliatory actions included "reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion."[35] Ceballos sued in federal district court, alleging that petitioners had violated his First and Fourteenth Amendment rights guaranteed by the Constitution by retaliating against him based on his memo.[36]

The Court relied on *Pickering v. Board of Education*[37] to formulate a two-part test to analyze a public employee's speech protections.[38] First, courts must determine whether the employee

---

[29] Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).
[30] *Id.* at 414.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 414–15.
[34] *Id.* at 415.
[35] *Id.*
[36] *Id.*
[37] 391 U.S. 563 (1968). In *Pickering*, the Supreme Court held that a high school teacher had a right under the First Amendment to send a letter to a local newspaper editor. *Id.* at 574. The Court stated: "[i]n these circumstances we conclude 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." *Id.* at 573.
[38] *See Garcetti*, 547 U.S. at 418.

spoke as a citizen on a matter of public concern.[39] If not, "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech."[40] If the employee did speak on a matter of public concern, the second question should become "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[41]

The Court concluded the "controlling factor in Ceballos's case is that his expressions were made pursuant to his duties as a calendar deputy."[42] It was ultimately held that when public employees make statements pursuant to their official duties, they do not speak as citizens for First Amendment purposes, and there is not constitutional protection against employer discipline.[43] Accordingly, Ceballos's claim was unsuccessful.[44]

The dissent disagreed that there was a categorical difference "between speaking as a citizen and speaking in the course of one's employment[.]"[45] Instead, the dissent would have held that "private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy[.]"[46] The dissent expressed grave concerns about *Garcetti*'s far-reaching implications, noting there are significant issues with this new standard's breadth of coverage.[47] In particular, the dissent was concerned about how the majority handled teachers' academic freedoms and free speech rights within the classroom.[48] These concerns are valid as the majority explicitly denied

---

[39] *Id.*
[40] *Id. See* Connick v. Myers, 461 U.S. 138, 147 (1983) ("We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.").
[41] *Garcetti*, 547 U.S. at 418.
[42] *Id.* at 421.
[43] *See id.*
[44] *See id.*
[45] *Id.* at 427.
[46] *Id.* at 428.
[47] *See id.* at 448.
[48] *See id*. at 438 ("This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor . . . .").

deciding whether public school teachers should have the same First Amendment protections as other government employees.[49]

Decisions involving teachers' freedom of speech in their academic capacity have thus been left for lower courts to decide. Just as the dissenters in *Garcetti* feared, "[w]hen *Garcetti* is applied to public education, the teachers generally lose."[50] Examples of teachers losing out on First Amendment protections include a 2010 Sixth Circuit decision in which a high school teacher was allegedly fired for teaching books that included information on LGBTQ+ issues and spirituality.[51] The court reasoned the teacher "[could not] overcome *Garcetti*"[52] because "she made her curricular and pedagogical choices in connection with her official duties as a teacher."[53] Further, the Sixth Circuit stated in light of *Garcetti*, "it is clear that the First Amendment does not generally 'insulate' [the teacher] 'from employer discipline,' even discipline prompted by her curricular and pedagogical choices and even if it otherwise appears . . . that the school administrators treated her shabbily."[54] The Court reasoned that "[o]nly 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."[55]

Similarly, a plaintiff in a Second Circuit case claimed she was fired for teaching her students about race and law enforcement.[56] The teacher, Jeena Lee-Walker, was observed by an assistant principal as she taught a lesson about the Central Park Five[57] and the trend in the United States to rush to judge

---

[49] *See 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.").
[50] Nathaniel Levy, *Garcetti's Impact on Teachers*, ONLABOR (June 3, 2019), https://onlabor.org/garcettis-impact-on-teachers/.
[51] *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 335 (6th Cir. 2010) (stating Evans-Marshall distributed a book list that included the books *Fahrenheit 451*, *Heather Has Two Mommies*, and *Siddhartha*).
[52] *Id.* at 340.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Levy, *supra* note 50.
[57] Aisha Harris, *The Central Park Five: 'We Were Just Baby Boys'*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us.html ("In 1989 [five teenagers] were arrested in connection with the rape and assault of a white female jogger, and eventually convicted in a case that came to symbolize the stark injustices black and brown people experience within the legal system and in media coverage. They were convicted based partly on police-coerced

Black men.[58] The assistant principal told the teacher she should present a more balanced viewpoint and her lesson "would rile up Black boys in the class."[59] The Court noted *Garcetti*'s lack of guidance regarding public school teachers: "there was no clearly established law premised on *Garcetti* under which the defendants would understand that Lee-Walker's speech was protected by the First Amendment, and the defendants could have reasonably believed that *Garcetti* stripped her of those protections."[60] The Court sided with the defendants and dismissed the case on qualified immunity grounds.[61] This holding clearly demonstrates the failure to recognize a teacher's free speech rights in a classroom due to the notable ambiguity provided by *Garcetti*.

In these two cases, it did not matter that the teachers were trying to educate students on LGBTQ+ and racial issues within the United States: "[a]s sympathetic as these plaintiffs are, the cases are easily decided under *Garcetti*."[62] Furthermore, these two cases demonstrate instances in which courts, through *Garcetti*, have prevented teachers from engaging in their First Amendment rights while teaching in the classroom. It follows that the *Garcetti* decision has and continues to negatively impact young students and their ability to learn about modern and important issues, thereby hindering their ability to become increasingly well-rounded and informed citizens.

In contrast, educators in college or university settings are more likely to succeed in exercising their freedom of speech in the classroom. Several circuits have noted their concern that "if *Garcetti* applied to college professors, universities could compel uniformity of thought."[63] The Supreme Court has granted considerable leeway to institutions of higher education when compared to other schools. The Court has noted the importance

---

confessions, and each spent between six and 13-plus years in prison for charges including attempted murder, rape and assault. The men maintained their innocence throughout the case, trial and prison terms, and all were exonerated after Matias Reyes, a convicted murderer and serial rapist, confessed to the crime in 2002.").

[58] Levy, *supra* note 50.

[59] *Id.*

[60] Lee-Walker v. N.Y. City Dep't of Educ., 712 F. App'x 43, 45 (2d Cir. 2017).

[61] Levy, *supra* note 50.

[62] *Id.*

[63] David L. Hudson, Jr., *Sixth Circuit Rejects Garcetti in Context of University Professor's Classroom Speech*, FIRST AMEND. WATCH (Apr. 6, 2021), https://firstamendmentwatch.org/sixth-circuit-rejects-garcetti-in-context-of-university-professors-classroom-speech/.

of a college classroom, calling it a "marketplace of ideas,"[64] and explaining that "[t]he 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.'"[65]

Multiple cases demonstrate courts' commitment to upholding the integrity of the collegiate atmosphere and the marketplace of ideas in the higher education realm through the preservation of professors' speech rights. For example, in *Meriwether v. Hartop*,[66] Nicholas Meriwether, a philosophy professor at Shawnee State University, became concerned after reading a university policy that required professors to refer to students by their "preferred pronoun[s] . . . regardless of the professor's convictions or views on the subject."[67] After Meriwether misgendered a student and was corrected, Meriwether expressed doubt about whether he could refer to the student by their preferred pronouns due to his long-held religious beliefs.[68] Meriwether continued to misgender the student,[69] and after multiple complaints from the student and an investigation, the University reprimanded Meriwether and directed him to change the way he addressed transgender students.[70] If he refused to comply, he was told he would be subject to disciplinary and punitive actions.[71]

The University argued that *Garcetti* barred Meriwether's free-speech claim because his actions in the classroom as a public university professor fell within the realm of government job-duty speech.[72] However, the Sixth Circuit disagreed,[73] and honed in on *Garcetti*'s explicit silence when it came to scholarship or teaching.[74] In the absence of instruction from the Supreme Court in *Garcetti*, the Sixth Circuit turned to prior decisions by the Supreme Court for guidance.[75] "Those decisions have 'long recognized that, given the important purpose of public education

---

[64] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
[65] *Id.*
[66] 992 F.3d 492 (6th Cir. 2021).
[67] *Id.* at 498.
[68] *See id.* at 499.
[69] *See id.*
[70] *Id.* at 501.
[71] *Id.*
[72] *See* Hudson, *supra* note 63.
[73] *Id.*
[74] *See Meriwether*, 992 F.3d at 504.
[75] *Id.*

and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.'"[76] Based on its analysis of two previous Supreme Court cases, the Sixth Circuit concluded "that the First Amendment protects the free-speech rights of professors when they are teaching."[77] The Sixth Circuit emphasized its concern that controlling speech in a higher education environment can lead to and "compel ideological conformity."[78] The Fourth, Fifth, and Ninth Circuits have reached similar conclusions regarding public university professors' freedom of speech rights.[79] Some legal analysts found these decisions to be encouraging, stating that "[a]cademic freedom should be the rule, not the exception."[80]

While these decisions have far-reaching and positive implications for higher educational settings, they do not appear to address public elementary, middle, or high school educational facilities. In collegiate settings, federal judges have granted professors increased protection to teach without fear of employment consequences because college professors are meant to "explore edgy topics that push the boundaries of students' comfort zones."[81] Conversely, curriculum decisions are more standardized in public K-12 schools when compared to college settings, and federal judges have refrained from granting the

---

[76] *Id.* (citing Grutter v. Bollinger*,* 539 U.S. 306, 329 (2003)).
[77] *Id.* at 505 (stating that *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), establish this principle).
[78] *Id.* at 506.
[79] *Id.* at 505 ("In *Adams v. Trustees of the University of North Carolina–Wilmington*, the Fourth Circuit held that *Garcetti* left open the question whether professors retained academic-freedom rights under the First Amendment. It concluded that the rule announced in *Garcetti* does not apply 'in the academic context of a public university.' The Fifth Circuit has also held that the speech of public university professors is constitutionally protected, reasoning that 'academic freedom is a special concern of the First Amendment.' Likewise, the Ninth Circuit has recognized that 'if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.'" (first citing *Adams*, 640 F.3d 550 (4th Cir. 2011); then citing Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694 n.11 (4th Cir. 2007); then citing Buchanan v. Alexander, 919 F.3d 847, 852–53 (5th Cir. 2019); and then citing Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014))).
[80] *See* Hudson, *supra* note 63.
[81] Frank LoMonte, *Lawsuits Over Bans on Teaching Critical Race Theory are Coming—Here's What Won't Work, and What Might*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (July 26, 2021), https://www.mtsu.edu/first-amendment/post/2006/lawsuits-over-bans-on-teaching-critical-race-theory-are-coming-here-s-what-won-t-work-and-what-might.

same autonomy to public K-12 teachers.[82] This indicates that K-12 educators who aim to instruct their students about racism and CRT are likely banned from doing so due to *Garcetti*'s ambiguities and courts' failure to recognize an exception for public school teachers as they have for college-level professors.

Clearly, there are notable differences between collegiate environments and K-12 classrooms, including parental involvement, tuition, and a differing emphasis on the marketplace of ideas. However, these differences do not excuse *Garcetti*'s distinction between the two educational spheres which can shield K-12 students from receiving a well-rounded education through the teachings of a variety of different perspectives. Furthermore, the distinction between the two educational contexts could create an exclusionary problem in which only students who are able to attain higher education may be exposed to perspectives like CRT.

II. WHAT IS CRITICAL RACE THEORY?

CRT began in the 1970s, after a group of activists, lawyers, and scholars realized the advances of the 1960s civil rights movement had begun to lose momentum and progress began rolling back.[83] The movement continued to gain traction in the 1980s and 1990s.[84] CRT is a theory that "recognizes that racism is not a bygone relic of the past. Instead, it acknowledges that the legacy of slavery, segregation, and the imposition of second-class citizenship on Black Americans and other people of color continue to permeate the social fabric of this nation."[85] Despite proponents of CRT stating that in and of itself, the theory is not divisive, the theory "becomes divisive when people use it for particular kinds of political ends."[86] This has proven to be true, whether it be an executive order signed by President

[82] *Id.*; *see also* Walsh, *supra* note 28 ("While K-12 teachers retain some protections for their comments on issues of public concern, they don't have much in the way of academic freedom to veer from the curriculum or infuse their own experiences and views into the classroom.").
[83] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 4 (3d ed. 2017).
[84] George, *supra* note 18.
[85] *Id.*
[86] Edirin Oputu, *Untangling the Controversy Around Critical Race Theory*, TEMPLE UNIV., (Aug. 5, 2021), https://news.temple.edu/news/2021-08-05/untangling-controversy-around-critical-race-theory.

Donald Trump or a state-wide school ban, CRT has faced its fair share of political criticism and backlash in recent years.[87]

In many ways, CRT builds on and gains insight from two previous movements, Critical Legal Studies and radical feminism.[88] Critical Legal Studies rejects the idea that the law is a neutral practice dissociated from social and political ideas.[89] This movement is where CRT derived the idea that "the law could be complicit in maintaining an unjust social order."[90] However, CRT departs from Critical Legal Studies because the movement acknowledges the answer to the enduring issues of racism is not necessarily destabilizing the law; rather, "critical race theorists recognized that, while the law could be used to deepen racial inequality, it also held potential as a tool for emancipation and for securing racial equality."[91] CRT built on ideas surrounding power and the construction of social roles from radical feminism, CRT acknowledges the largely invisible patterns of historical domination in the United States, such as the patriarchy.[92] CRT also incorporates ideas from conventional civil rights thought, including the instinct to correct historical wrongs and an understanding for community empowerment.[93]

An early description of CRT, coauthored by four of the theory's foundational figures, included six defining elements of the theory,[94] including:

> 1. CRT recognizes that racism is endemic to American life.
> 2. CRT expresses skepticism toward dominant legal claims of neutrality, objectivity, colour-blindness, and meritocracy.

---

[87] *See* George, *supra* note 18 ("In September 2020, President Trump issued an executive order excluding from federal contracts any diversity and inclusion training interpreted as containing 'Divisive Concepts,' 'Race or Sex Stereotyping,' and 'Race or Sex Scapegoating.' Among the content considered 'divisive' is Critical Race Theory (CRT).").
[88] DELGADO & STEFANCIC, *supra* note 83, at 5.
[89] George, *supra* note 18.
[90] *Id.*
[91] *Id.*
[92] DELGADO & STEFANCIC, *supra* note 83, at 5.
[93] *Id.* at 6.
[94] DAVID GILLBORN & GLORIA LADSON-BILLINGS, CRITICAL RACE THEORY 3 (Paul Atkinson et al. eds., 2019).

> 3. CRT challenges ahistoricism and insights on a contextual/historical analysis of the law.
> 4. CRT insists on recognition of the experiential knowledge of people of colour.
> 5. CRT is interdisciplinary and eclectic.
> 6. CRT works toward the end of eliminating racial oppression as a part of the broader goal of ending all forms of oppression.[95]

CRT does more than simply examine the Black/white racial binary; it recognizes "racism has impacted the experiences of various people of color."[96] To this effect, CRT now encompasses branches that have evolved to focus on the experiences of many minorities in the United States, including Indigenous, Latino, and Black individuals and communities.[97] CRT's continued expansion signifies its strength as a living and evolving theory.[98]

Criticism of CRT has grown as the theory has matured,[99] it can be divided into two camps – internal and external criticism.[100] Randall Kennedy is an external critic of CRT.[101] Kennedy states that legal scholarship can be compared to a marketplace, good work is acknowledged by recognition; therefore, "pointing out that certain texts have fallen into a void does not, by itself, prove discrimination."[102] Instead, it must be proven that the works were "of high quality and deserved recognition."[103] Additionally, Daniel Farber and Suzanna Sherry are external CRT critics, they cite to other minorities and how they have achieved great levels of success despite their disadvantages.[104]

---

[95] *Id.*
[96] George, *supra* note 18.
[97] Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/article/what-is-critical-race-theory.html.
[98] *See id.*
[99] *See* DELGADO & STEFANCIC, *supra* note 83, at 102 ("During the movement's early years, the media treated [CRT] relatively gently. As it matured, however, critics felt freer to speak out.").
[100] *See id.* at 102–08.
[101] *Id.* at 102.
[102] *Id.* at 103.
[103] *Id.*
[104] *Id.* ("Citing the example of Jews and Asians—two minority groups that have achieved high levels of success by conventional standards—they argued against the idea that the game is rigged against minorities. If conventional tests and standards are unfair and biased against minorities, as the crits assert, how can one account for the success of these two groups?").

In response, advocates of CRT believe Kennedy entirely misses the idea of the theory.[105] Ironically, Kennedy approached the theory through conventional criteria, meaning he wholly avoided the opportunity to engage in the analysis that CRT supports.[106] Perhaps the work of minorities is not best analyzed under a lens that has overwhelmingly benefitted those in the majority. As for Farber and Sherry, CRT advocates responded by saying the two had "confused criticism of a standard with criticism of individuals who performed well under that standard."[107]

Internal criticisms of CRT include criticisms within the community of those who contribute to the theory and are often outside of the public's view. One such criticism is that CRT does not take enough of an activist stance and that its value is minimized if it simply points out issues without providing solutions.[108] To this point, most advocates agree the theory and practice should work together and are currently developing ways to implement it.[109] Another internal critique argues the theory strays from its roots and dwells on concerns that only pertain to middle-class minorities such as "microaggressions, racial insults, unconscious discrimination, and affirmative action in higher education."[110]

III. DESCRIPTIONS OF CONSERVATIVE BACKED BILLS BANNING CRITICAL RACE THEORY

From local to federal government, many conservative politicians have made a concerted effort to prevent public school educators from incorporating CRT into their lessons. "These campaigns are not just based on ignorance of how critical race theory developed and is now applied, but also represent an attempt to stoke a reactionary resistance, rather than a broader understanding."[111] Conservative efforts against CRT began as

---

[105] *See id.* at 103–04.
[106] *See id.*
[107] *Id.* at 104.
[108] *See id.* at 105.
[109] *See id.* at 106 (discussing "Derrick Bell's theories of cultural and educational self-help[,]" and "Lani Guinier's efforts to reform electoral democracy . . . .").
[110] *Id.* at 106–07.
[111] *What Is Critical Race Theory, and Why is Everyone Talking About It?*, COLUM. NEWS (July 1, 2021), https://news.columbia.edu/news/what-critical-race-theory-and-why-everyone-talking-about-it-0.

racial justice and Black Lives Matter protests occurred throughout the summer of 2020.[112] During this time, Fox News featured segments with conservative activist, Christopher F. Rufo.[113] Rufo disparaged CRT on air on multiple occasions.[114] In August of 2020, Rufo tweeted: "My goal is simple; to persuade the President of the United States to issue an executive order abolishing critical race theory in the federal government."[115]

Rufo found quick success with his goal. A month after Rufo's statement, the Trump administration became one of the first to attack CRT.[116] The September 2020 Office of Management and Budget memorandum details M-20-34, a memorandum issued at President Trump's direction.[117] The memo states that agencies are permitted and guided to search "for terms including, but not limited to: 'critical race theory,' 'white privilege' . . . and 'unconscious bias.' When used in the context of diversity training, these terms may help to identify the type of training prohibited by the E.O. [executive order][.]"[118] These federal memorandums sent a message to conservative lawmakers—CRT is dangerous and should not be taught.[119] Furthermore, Donald Trump's "exit from office didn't put an end to the assault on critical race theory . . . it only amplified it."[120]

---

[112] Fabiola Cineas, *What the Hysteria Over Critical Race Theory is Really All About*, VOX (June 24, 2021, 10:50 AM), https://www.vox.com/22443822/critical-race-theory-controversy.
[113] *Id.*
[114] *See id.* (stating that in mid-August, "[Rufo] told Tucker Carlson that he was 'declaring a one-man war against critical race theory in the federal government, and I'm not going to stop these investigations until we can abolish it within our public institutions.'").
[115] *Id.*
[116] Stephen Kearse, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, PEW (June 14, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/14/gop-lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools.
[117] Memorandum from Russell T. Vought on Ending Employee Trainings that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for the Heads of Executive Departments and Agencies 1 (Sept. 28, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-37.pdf.
[118] *Id.* at 2.
[119] *See* Char Adams, *Republicans Announce Federal Bills to "Restrict the Spread" of Critical Race Theory*, NBC NEWS (May 12, 2021, 4:54 PM), https://www.nbcnews.com/news/nbcblk/republicans-announce-federal-bills-restrict-spread-critical-race-theory-n1267161 ("Conservative leaders began focusing on critical race theory after Trump used the decades-old academic term in a September 2020 memo . . . .").
[120] Cineas, *supra* note 112.

Despite President Joe Biden's recission of the order, "Republican state legislators have renewed the charge[ ]" when it comes to the banning of CRT.[121] Multiple conservative state representatives have made public comments criticizing CRT and promising their constituents that they will work to keep it out of public schools.[122] Though not all of the bills specifically name CRT, many of the bills mirror each other in their effort to stop schools from teaching about the country's history of racism, sexism, and other "divisive concepts."[123] 17 states have passed legislation to that effect,[124] and at least 12 additional states have introduced similar legislation.[125]

Beyond the outright ban on teaching CRT that some of these bills propose, many of them also penalize teachers and schools that allow CRT to be taught.[126] For example, in Michigan, if schools teach students that the Declaration of Independence or the United States Constitution are "fundamentally racist[,]" up to 5% of their funding will be withheld.[127] West Virginia's bill is particularly harsh, as it declares that a "teacher may be dismissed or not reemployed for teaching, instructing or training any student to believe any of the divisive concepts."[128]

According to critics, many of these proposed laws make one thing clear – the conservative politicians instituting these bills do not understand CRT. "The critical race theory cited by Republican lawmakers and conservative pundits is often nebulous, comprising equity and diversity initiatives, workplace trainings, school curricula, reading lists and selectively edited quotations of critical race theorists."[129] Rather than taking issue with specific texts or pillars of the theory, critics of the bills argue

---

[121] Kearse, *supra* note 116.
[122] *See id.* ("Missouri state Rep. Brian Seitz, a Republican, said in a phone interview that teaching critical race theory in schools would create 'another great divide in America.' He introduced a bill that would ban critical race theory from all publicly funded schools, including universities . . . . Tennessee state Sen. Brian Kelsey also argued that critical race theory will split Americans. 'Critical Race Theory creates divisions within classrooms and will cause irreversible damage to our children who hold the future of our great country . . . .'").
[123] *Id.*
[124] *See* Schwartz, *supra* note 21.
[125] *See id.*
[126] *See* Kearse, *supra* note 116.
[127] *Id.*
[128] *Id.*
[129] *Id.*

that "critical race theory has seized the attention of legislators because it's 'a provocative term' that evokes a sense of challenge, especially to people unfamiliar with it."[130] Rather than receiving attention for the actual content of the theory, CRT "is just now receiving widespread attention because it has morphed into a catchall category, one used by Republicans who want to ban anti-racist teachings and trainings in classrooms and workplaces across the country."[131]

This misunderstanding is demonstrated by various state laws' definitions of CRT. For example, the Florida law defines CRT as any "theory that racism is not merely the product of prejudice."[132] Idaho defines CRT as a "teaching that treats people as 'inherently responsible for actions committed in the past by other members of the same . . . race.'"[133] These laws do not offer clear guidance on what it means to ban CRT, and when "taken literally, some of the definitions also extend absurdly far."[134] The Florida and Idaho bills are similar in that they both "target suggestions that someone should be responsible for disadvantages now faced by Blacks and other minorities, beyond a narrowly defined coterie of 'bad' discriminators."[135]

Beyond the limitation of teachers' speech rights implicated by each of these bills, they also act as a censor to an entire emerging school of thought. "The idea that audience discomfort provides a justification for censorship, that is, is at profound odds with our free speech tradition."[136] With a new standard or outright overruling of *Garcetti*, this would be a completely different conversation.

---

[130] *Id.*
[131] Cineas, *supra* note 112.
[132] Aziz Huq, *The Conservative Case Against Banning Critical Race Theory*, TIME (July 13, 2021, 7:00 AM), https://time.com/6079716/conservative-case-against-banning-critical-race-theory/.
[133] *Id.*
[134] *Id.* ("Florida's [law] could prohibit Nobel Prize-winning University of Chicago economist Gary Becker's work on discrimination, because Becker identifies market concentration and education (not 'merely' prejudice) as causal predicates of discrimination.").
[135] *Id.*
[136] *Id.*

IV. SCHOOLS AND CRITICAL RACE THEORY IN THE CONTEXT OF *GARCETTI V. CEBALLOS* AND FUTURE IMPLICATIONS

As discussed above, *Garcetti* has dangerous implications for teachers generally, but more specifically, in relation to the teachings of CRT. A real-life example involves Tennessee public high school teacher, Matt Hawn.[137] Hawn was teaching his contemporary issues class in August 2020 when he faced major consequences.[138] Hawn was discussing recent events in Kenosha, Wisconsin in which protests began as a result of a police officer shooting a young black man in the back.[139] The teacher went on to discuss Kyle Rittenhouse, the white 17-year old accused of shooting and killing two of the protestors.[140] Hawn asked his students: "What are we going to do about racism in the U.S.?"[141] He faced criticism for this lesson from parents and a county official.[142] Later on, Hawn ran into additional issues after he assigned an *Atlantic* article by Ta- Nehisi Coates after the January 6th insurrection.[143] The article, titled *The First White President*, argued that President Trump was elected on "the strength of white grievances."[144] After another parent complained, Hawn was issued an official reprimand.[145] Finally, after showing his students a poem performance entitled *White Privilege*, Hawn received notice that he was being fired.[146]

Hawn's firing took place shortly after Tennessee passed anti-Critical Race Theory legislation; this is likely to have shaped the environment around Hawn's firing.[147] He expressed concern over the silencing of this type of material. Hawn stated:

> I just want [the students] to be able to understand and develop those critical-thinking skills that they

---

[137] Emma Green, *He Taught a Ta-Nehisi Coates Essay. Then He Was Fired*, THE ATLANTIC (Aug. 17, 2021), https://www.theatlantic.com/politics/archive/2021/08/matt-hawn-tennessee-teacher-fired-white-privilege/619770/.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *See id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *See id.*

> can take out into the world . . . I've never graded a student based on their attachment to an idea that we discuss in class . . . [m]y goal as a teacher is to have them be able to evaluate a claim, think critically about it, and then articulate how they feel about that claim.[148]

Hawn's story demonstrates that even in a class about contemporary issues, which one would assume regularly involves difficult conversations, a teacher can be fired for providing his students with relevant information to critically analyze for themselves. Not only can this discourage great teachers from bringing up important topics, but it can also discourage passionate individuals from pursuing the teaching profession altogether.[149] Furthermore, there have been documented instances of teachers quitting specifically due to the debate regarding CRT.[150]

Alternatively, some argue *Garcetti* should be explicitly applied to classrooms because "it is in students' best interests to vest ultimate power over the classroom with democratically accountable school boards[.]"[151] This argument places a great amount of blind trust in school boards. With the recent efforts from conservative lawmakers to regulate what teachers can and cannot teach their students, trusting that school boards will protect students' rights to well-rounded educations cannot be considered an automatic luxury. Treating teachers' First Amendment rights differently than other government employees would allow for extra protection to ensure that students'

---

[148] *Id.*

[149] *See id.*; Tony Mauro, *Perspective: Can The First Amendment Protect Educators From Being Fired For Teaching About Race?*, FREEDOM F. (Aug. 18, 2021), https://www.freedomforum.org/2021/08/18/perspective-can-the-first-amendment-protect-educators-from-being-fired-for-teaching-about-race/.

[150] *See* Shani Saxon, *Critical Race Theory Battles are Driving Black Educators Out of Their Jobs*, COLORLINES (July 13, 2021, 10:31 AM), https://www.colorlines.com/articles/critical-race-theory-battles-are-driving-black-educators-out-their-jobs ("Rydell Harrison, southwestern Connecticut's first Black school superintendent, resigned from his job in June after parents started to complain that he was an 'activist' and that the district's newly implemented diversity efforts represented Harrison's 'agenda.'"); Gabriela Miranda, *Connecticut Elementary School Teacher Resigns Over Critical Race Theory Curriculum*, USA TODAY (Sept. 2, 2021, 11:25 AM), https://www.usatoday.com/story/news/education/2021/09/02/teacher-quits-over-critical-race-theory/5693550001/ ("Jennifer Tafuto, a Manchester Public School teacher for six years, resigned over the district's critical race theory curriculum. Tafuto said the curriculum pinned students against one another[.]").

[151] Paul Forster, *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 688–89 (2011).

exposure to various concepts are not being limited solely due to the political demographics within the state in which they reside. Another argument for *Garcetti*'s rightful application to teachers highlights the idea that "students are a captive audience[.]"[152] The response to this argument begs the question: would allowing teachers the ability to discuss CRT potentially expose students and their parents to topics they may disagree with? Perhaps, but the alternative is far more dangerous: state-imposed, politically motivated censorship.

This state-imposed censorship goes beyond CRT and will likely remain a topic of conversation as various bills make their way through state governments. For example, Florida House Bill 1557, dubbed the "Don't Say Gay" bill, limits discussions about sexual orientation or gender identity in public school classrooms.[153] This is not an isolated problem as other states are taking similar steps. In early March of 2022, Georgia introduced a strikingly similar bill that took aim at discussions of sexual orientation and CRT in public schools.[154] These bills undoubtedly rely upon the limitations imposed on teachers by *Garcetti* and could have the effect of both silencing teachers and isolating young students.

Granting public school teachers an exception under *Garcetti* comes with valid concerns. If we grant teachers the ability to discuss CRT in their classrooms under the First Amendment, what happens when a teacher does not agree with CRT and refuses to discuss it? The answer to this question is quite simple: granting teachers a First Amendment exception under *Garcetti* would not present a compelled speech issue, as the First Amendment would also guarantee teachers the right not to speak.[155]

V. POSSIBLE REMEDIES BEYOND *GARCETTI V. CEBALLOS*

Even with *Garcetti*'s current shadow cast over any litigation regarding educators' ability to teach CRT in public

---

[152] *Id.* at 697.
[153] *See* H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022).
[154] *See* Brooke Migdon, *'Don't Say Gay' Bill is Introduced in Georgia*, THE HILL (Mar. 9, 2022), https://thehill.com/changing-america/respect/equality/597533-dont-say-gay-bill-is-introduced-in-georgia.
[155] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Wooley v. Maynard, 430 U.S. 705 (1977).

schools, other avenues may be available to fight the newly implemented conservative bills. One potential argument involves the Fourteenth Amendment's Due Process Clause.[156] The Fourteenth Amendment does not allow the government to arbitrarily revoke citizens' privileges or benefits, including a public school job.[157] Arguably, many of the newly instituted CRT laws are unclear, leaving educators to guess what they can and cannot teach.[158] If teachers have to guess what lessons may or may not result in their firing, it not only creates a potential due process claim, but it also instills fear among a class of people tasked with educating a new generation. The vagueness of many of these new laws may present a legitimate due process claim and could be a strong argument for teachers in the context of incorporating CRT in public schools as these newly instituted anti-CRT laws are challenged in court.[159]

However, emphasizing students' and not teachers' rights may be the most promising legal strategy that allows for the teaching of CRT in schools.[160] "Students . . . could challenge these broader laws by arguing they have a First Amendment right to take in lessons and information from schools."[161] This strategy invokes an interesting question – do students have more First Amendment protections than teachers?[162] In *Tinker v. Des Moines*, the 1969 Supreme Court implied equality between the two: "students (n)or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[163] However, *Garcetti* shifted the balance.[164] One expert pointed out that after *Garcetti*, if a teacher and a student wore identical political t-shirts to class, the teacher could be asked to change while the student could not.[165]

This strategy's potential is demonstrated in *González v. Douglas,* in which a student successfully challenged broad laws prohibiting educators from teaching divisive race issues.[166] In this

---

[156] *See* Mauro, *supra* note 149.
[157] LoMonte, *supra* note 81.
[158] Mauro, *supra* note 149.
[159] *See* LoMonte, *supra* note 81.
[160] Mauro, *supra* note 149.
[161] *Id.*
[162] *Id.*
[163] *Id.* (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
[164] *See id.*
[165] *See id.*
[166] *Id.*

case, an Arizona law banned classes "designed primarily for pupils of a particular ethnic group[.]"[167] The district court held the First Amendment protects rights to receive information and ideas.[168] More specifically, the court found this right applies in the context of school curriculum design.[169] "The right is infringed if the state 'remove[s] materials otherwise available in a local classroom unless [that] action[ ] [is] reasonably related to legitimate pedagogical concerns.'"[170] The court found evidence that the defendants were pursuing the discriminatory ends of the law in order to make political gains.[171] The court concluded "decisions regarding the [program at issue] were motivated by a desire to advance a political agenda by capitalizing on race-based fears."[172] This case demonstrates while "[i]t wasn't clear that teachers or administrators had a constitutional right to offer particular courses[,] . . . it was clear that students had a right to receive information, which couldn't be taken away for a discriminatory reason."[173]

The idea that students have a right to receive information is rooted in Supreme Court precedent. In the 1982 case, *Board of Education v. Pico*,[174] the Court found the First Amendment bars public schools from intentionally depriving students of educational access to ideas the school does not agree with.[175] The Court held the school board "rightly possess[ed] significant discretion to determine the content of their school libraries. But that discretion [could] not be exercised in a narrowly partisan or political manner."[176] Whether or not the students' rights were violated turned on the motivation behind the petitioners' actions.[177] "If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners ha[d] exercised their discretion in

[167] González v. Douglas, 269 F. Supp. 3d 948, 957 (D. Ariz. 2017).
[168] *Id.* at 972.
[169] *Id.*
[170] *Id.*
[171] *Id.* at 973.
[172] *Id.* at 974.
[173] LoMonte, *supra* note 81.
[174] 457 U.S. 853 (1982).
[175] *See id.* at 871 ("Our Constitution does not permit the official suppression of *ideas*.").
[176] *Id.* at 870.
[177] *Id.* at 871.

violation of the Constitution."[178] Impermissible motivations included racial animus.[179] The Court further clarified its decision had no impact on a school board's choice to *add* books, but rather only implicated a school board's decision to *remove* books.[180]

Both *González* and *Pico* are clearly applicable to public educators' dilemma when it comes to teaching CRT. It seems unlikely states will have a legitimate, non-discriminatory reason for banning teachings of CRT that will pass a court's scrutiny, just as the school board failed to possess in *González*.[181] Furthermore, as in *González*, it does not seem particularly challenging for plaintiffs to establish that school boards and states are instituting bans on CRT for political gain. Each of these laws followed from a staunchly conservative executive's declaration, and each of these laws have been enacted by conservative lawmakers.[182] This is no coincidence; this issue is political.

Pico appears even more relevant for students who seek to challenge the bans on CRT. *Pico* holds students may not be deprived of access to information simply because school boards disagree with the material.[183] Therefore, just because a state or school board disagrees with the fundamental teachings of CRT does not mean it can outright ban educational access to it. Furthermore, the defendants in a CRT case would clearly meet the test laid out in *Pico* – the states/school boards that are implementing CRT bans are putting them in place (1) with the clear *intention* of depriving students with access to information about CRT and, (2) this intent was a driving factor, if not, *the* driving factor behind the bans themselves. Furthermore, the

---

[178] *Id.*
[179] *Id.*
[180] *Id.* at 871–72.
[181] *See* González v. Douglas, 269 F. Supp. 3d 948, 974 (D. Ariz. 2017).
[182] *See* Jennifer Schuessler, *Bans on Critical Race Theory Threaten Free Speech, Advocacy Group Says*, N.Y. TIMES, https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html (Nov. 9, 2021) ("Republican legislatures have rushed to introduce bills banning [CRT] . . . [b]ut the measures have been widely assailed by Democrats[.]"); s*ee also* Adams, *supra* note 119 ("Some 30 GOP representatives have signed on to . . . the Stop CRT Act."). Those who have authored or sponsored legislation in their state include Kentucky GOP state Rep. Lynn Bechler, Republican Idaho state Rep. Wendy Horman, Republican state Rep. John Ragan of Tennessee, and Republican Missouri state Rep. Brian Seitz. *See* Allan Smith, *Republicans Newly Alarmed by Critical Race Theory See Bans as 'More of a Preventative'*, NBC NEWS (July 23, 2021, 6:55 PM), https://www.nbcnews.com/politics/politics-news/republicans-newly-alarmed-critical-race-theory-see-bans-more-preventative-n1271024.
[183] *Pico*, 457 U.S. at 871.

context of *Pico* should not make a difference to CRT. Just as a library may not *remove* books with concepts the school board disagrees with as demonstrated by *Pico*, it follows a principal should not be allowed to *remove* a lesson plan from a teacher's schedule or an assigned reading on a syllabus.

These cases demonstrate how a student may be able to sue for the right to learn about CRT in public schools. This idea, coupled with potential for a Fourteenth Amendment Due Process claim by a teacher, demonstrate two alternative avenues that may allow for the teaching of CRT in public schools to continue. While these secondary avenues demonstrate hope for the future of CRT, they also highlight significant frustration. The right to teach CRT and other "divisive concepts" should not be at the mercy of creative litigation and legal loopholes. The problem would be made far simpler, and in fact be no problem at all, if *Garcetti* did not leave teachers' free speech rights at the mercy of legal loopholes. This concept is far too important to be left to creative lawyering.

CONCLUSION

Critical Race Theory is a decades-old school of thought rooted in important and widely recognized historical movements and philosophies. The public school system has a distinct duty to equip its students with access to information so they can develop and shape their own personal opinions. This duty includes access to subject matter like CRT. Beyond a distinct failure in their responsibility to their students, when officials and school boards decide to ban students from accessing information or ideas with which the school board disagrees, they act unconstitutionally. Despite this act being described as unconstitutional by decades-old cases such as *Board of Education v. Pico*, K-12 teachers may still face serious consequences, such as losing their job, if they choose to teach, or even mention CRT in their classrooms. Given the subject matter of CRT, and those who have been disciplined for teaching it, this issue has and will continue to have a disproportionate effect on students and teachers of color.

This point of contention between long-standing Supreme Court case precedent and modern conservative legislation is in large part due to *Garcetti*'s failure to carve out a needed exception for public school teachers. Ironically, in *Garcetti*, the Court

specifically recognized teachers and their unique situations in comparison to other government employees. Even so, the Court skirted the responsibility of resolving this predicament, instead deciding that simply pointing out the problem would be sufficient.

Until the Supreme Court decides to remedy the discrepancy it created, students and teachers are left to the mercy of creative lawyering and legal loopholes. Two promising remedies stand out. First, a teacher may succeed against one of the newly instituted anti-CRT laws with a potential claim of unconstitutional vagueness under the Due Process Clause. Second, students may succeed in a suit against anti-CRT legislation by relying on their First Amendment right to have access to information. Lawsuits using these techniques may become more commonplace as conservative lawmakers continue to pass anti-CRT laws. Even so, without a change to K-12 teachers' First Amendment rights under *Garcetti*, the ability to teach students about CRT in public K-12 schools remains in serious danger.