



The Very Foundation of Good Citizenship:

The Legal and Pedagogical Case For Culturally Responsive and Racially Inclusive Public Education for All Students



A joint report by:
National Education Association and the Law Firm Antiracism Alliance

NATIONAL EDUCATION ASSOCIATION

The National Education Association is the nation's largest professional employee organization, representing more than 3 million elementary and secondary teachers, higher education faculty, education support professionals, school administrators, retired educators and students preparing to become teachers.

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An established body of research affirms what educators have long known: a culturally responsive and racially inclusive education benefits all students - and is the most effective pedagogical approach. These studies show that students who participate in ethnic studies and a curriculum that is culturally responsive and racially inclusive are more academically engaged, perform better academically, and graduate at higher rates. This pedagogical approach also facilitates many of the core goals of public education: promoting democracy by preparing children for citizenship and voting, teaching cultural literacy, developing citizens' capacities for critical thinking and self-directed learning, and cultivating a workforce that can compete in the global marketplace.

Teaching ethnic studies and a culturally responsive and racially inclusive curriculum is also consistent with federal and state law. Moreover, prohibiting culturally responsive and racially inclusive education harms students and likely violates federal law. Nevertheless, law and policymakers across the country are attempting to prohibit honest curricula, chill classroom instruction, stoke discrimination, and undermine faith in public education and our nation's educators. But as politicians mischaracterize and stoke fears about what is taught in schools, educators are holding firm in their support for a proven, research-based, and culturally responsive and racially inclusive education for all students.

This joint report with the Law Firm Antiracism Alliance is a reflection of the National Education Association's longstanding belief that no matter their color, background, or zip code, all children deserve an education that imparts honesty about who we are, integrity in how we treat others, and courage to do what's right. We hope this report generates new advocacy strategies and ideas about how to pushback against attempts to inhibit with teachers' ability to do their jobs and students' ability to learn and grow.

- Rebecca S. Pringle President, National Education Association

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I. Executive Summary

This paper documents the multiple proven benefits of culturally responsive and racially inclusive education, as well as the multiple ways in which such efforts are permitted and even required by federal and state constitutional mandates, in order to show why the political attacks on such educational practices are misguided, at best. Responsive and inclusive education does not shy away from the nation's past, but it is not shackled by it. By acknowledging the truths of our past and present, it moves us toward the future imagined in the Declaration of Independence and first made possible during the Reconstruction Era. At its core, culturally responsive and racially inclusive education is the renewal of a commitment to public education as a vehicle for social transformation.



Social science research shows that by embracing the process of revelation and reflection that culturally responsive and racially inclusive education affords, students of all backgrounds benefit from a rigorous and enriched education that more readily achieves the fundamental goals of public education. Building critical thinking skills, preparing for active democratic participation, instilling cultural values, being exposed to diverse epistemologies, and cultivating a culturally literate workforce that can compete in the global marketplace are among the most important goals of public education. Culturally responsive and racially inclusive education serves these goals by developing students whose sense of self and sense of the world foster informed, critical, and socially responsible citizenship. A core value of this country's form of government is the right to freely and publicly critique the government and public officials.¹ This value is supported by educational curricula that teach students to challenge and question themselves and the world they inhabit. Students taught through a responsive and inclusive pedagogy are

prepared for vigorous civic engagement, which requires facility in understanding, debating, and reconciling conflicting ideas. Culturally responsive education can expand students' critical thinking and hone students' reasoning, inference-making, and analytical skills.² Culturally responsive education is also associated with those indicators of competence that reflect adequate preparation for productive employment—increased standardized test scores; improved math, science, and reading achievement; higher GPAs; higher attendance rates; and higher rates of high school graduation.

Racially inclusive education similarly promotes the development of students who are better equipped to meet the demands of a changing and increasingly globalized world. The benefits of racially inclusive education are reaped by students across all ethnic and racial classifications. Children who are in the ethnic majority learn to resist racial discrimination and negative racist stereotyping, value racial equality, see cultural and racial differences positively, and embrace a multifaceted individual complexity that includes, but is not defined by, race. Black, Indigenous, and People of Color (“BIPOC”) students become more intellectually engaged and empowered, experience enhanced self-efficacy, develop a positive sense of racial identity, have higher individual and group self-esteem, experience a sense of social belonging, and become more securely attached to themselves and the social community. All students gain a capacity for cross-cultural understanding that finds personal truth along an axis of social differences and in the spirit of social cooperation.

Culturally responsive and racially inclusive education is also consistent with, and arguably even required by, the First Amendment of the United States Constitution, the Equal Protection Clause of the United States Constitution, and Title VI of the Civil Rights Act of 1964. It fulfills the promise of this country's laws by advancing the free flow of ideas, interrupting systemic discrimination, disrupting the persistent racial caste system, promoting equal access to all the benefits of social citizenship, and enabling the protection of BIPOC students against non-physical violence. It also permits students equal access to the truth of a shared history. Truth, as much as inclusion, is a pinnacle of culturally responsive and racially inclusive education—it is in this process of receiving and accepting truth that the nation can find its way toward reconciliation.

II. Teaching ethnic studies and a culturally responsive and racially inclusive curriculum is the most effective educational approach.

A. *Benefits to BIPOC students: Ethnic studies and a culturally responsive and racially inclusive curriculum benefit BIPOC students.*

Teaching ethnic studies and a curriculum that is culturally responsive and racially inclusive is particularly important for students of color. As the country grows more diverse, the student population does too. Today, the majority of public school students are BIPOC: “In fall 2018, of the 50.7 million students enrolled in public elementary and secondary



schools, 23.8 million were white, 13.8 million were Hispanic,* 7.7 million were Black,** 2.7 million were Asian, 2.1 million were of two or more races, 0.5 million were American Indian/Alaska Native,*** and 186,000 were Pacific Islander.”³ Racial disparities in public education have deep roots in the nation’s history, and the historical and cultural contexts differ across states. Given the entrenchment of structural racism in our culture and political economy and the multiple ways it may manifest, it is not possible to identify easy solutions to these racial disparities. Inclusive education practices are one key tool for addressing and remedying these racial disparities.

* This report uses the terms “Hispanic,” “Chicano,” “Latino,” and “Latinx” at different points as necessary to be consistent with the term(s) used in the sources being cited. We acknowledge that several of these terms are pan-ethnic terms used to group distinct ethnic groups together. We further acknowledge that these terms have a complicated history, are not necessarily interchangeable, and do not always foster a sense of community among the people they supposedly describe.

** At various points, this report uses the term “Black American” or “African American,” rather than “Black,” as necessary to be consistent with the term(s) used in the sources being cited. We acknowledge that many individuals view “Black,” “Black American,” and “African American” as distinct markers of racial and ethnic identity. Our goal is not to homogenize these markers, or the experiences of individuals from across the African diaspora. Rather, we hope to focus attention on institutionalized racism as it operates within the United States which erases complex racial, ethnic, and cultural identities in furtherance of the country’s racial hierarchy.

*** This report also uses the terms “Indigenous,” “Native people,” “American Indian,” “Native American” and “Alaska Native” at different points as necessary to be consistent with the term(s) used in the sources being cited. We acknowledge that, as scholar Elizabeth Cook-Lynn of the Crow Creek Indian Tribe wrote, “Native populations in America are not ‘ethnic’ populations; they are not ‘minority’ populations, neither immigrant nor tourist, nor ‘people of color.’ They are the indigenous peoples of this continent. They are landlords, with very special political and cultural status in the realm of American identity and citizenship. Since 1924, they have possessed dual citizenship, tribal and U.S., and are the only population that has not been required to deny their previous national citizenship in order to possess U.S. citizenship. They are known and documented as citizens by their tribal nations.” Hayn, Kaplan & Clemmons, *Teaching Young Adult Literature Today: Insights, Considerations, and Perspectives for the Classroom Teacher*, 2d ed., p. 242 (2017).

"[S]tudies in brain science and education find that drawing on learners' background knowledge shapes comprehension.⁴ Accordingly, instructional materials, assignments, and texts that reflect BIPOC students' backgrounds and experiences are critical to engagement and deep, meaningful learning . . ."⁵ Data show that Black male students can struggle to attain proficiency in reading comprehension.⁶ One theory for why that is so is because the dominant pedagogy fails to allow for an understanding of those students' accompanying cultural histories.⁷ There is a growing scholarly consensus that "critical literacy"—the integration of "social, political, and historical contexts [to] allow students to examine the influence of institutions on their everyday lives"—improves student engagement by displacing the authoritative knowledge that typically comes from a place of privilege in favor of knowledge built from lived cultural experience.⁸ Indeed, "[a]n established body of research affirms what educators have long known intuitively: . . . [BIPOC] students who participate in ethnic studies are more academically engaged, develop a stronger sense of self-efficacy and personal empowerment, perform better academically and graduate at higher rates."⁹ Examples of improved academic performance include increased attendance, math achievement, reading achievement, science achievement, GPA, and standardized test scores:¹⁰

- In Cammarota, 2009 and Cabrera, 2014, researchers evaluated the impact of Mexican American Studies ("MAS") on graduation rates and achievement scores of eleventh- and twelfth-grade students in Tucson, Arizona.¹¹ They found that although students in MAS courses entered, on average, with lower ninth- and tenth-grade GPAs and achievement test scores than control students, by twelfth grade they attained significantly higher passing and graduation rates than their non-MAS peers.¹²
- In Lipka, 2005, researchers evaluated the impact of a program called "Math in a Cultural Context" ("MCC"), which grew from a collaboration between Alaska Yup'ik Native elders, teachers, and math educators to develop an elementary-level curriculum supplement for second through seventh grades that connects Yup'ik culture and knowledge with the National Council of Teachers of Mathematics standards.¹³ They found that students in classrooms using the MCC curriculum made more progress toward the state mathematics standards than comparison students.¹⁴
- In McCarty, 2014 and McCarty, 1993, researchers evaluated the Native American Community Academy ("NACA") that serves middle and high school students in Albuquerque, New Mexico and the Rough Rock English-Navajo Language Arts Program, respectively.¹⁵ Once again, they found that student achievement improved. Test scores of NACA eighth graders, for example, increased over the previous year by 21% in math, 20% in reading, and 9% in writing.¹⁶ Likewise, after four years in the Rough Rock English-Navajo Language Arts Program, the students' achievement on locally developed measures of comprehending spoken English increased from 51% to 91%, and their scores on standardized reading tests rose steadily after the second year.¹⁷

- In Au, 1980, Au, 1977, and Tharp, 1988, researchers evaluated the Kamehameha Elementary Education Program (“KEEP”), which was designed to improve literacy achievement of Native Hawaiian students, and grew from research on communication and participation structures in Native Hawaiian families and community settings.¹⁸ They found that, after the first year, students moved from 60% below grade level and 40% at grade level, to 32% below and 68% above grade level.¹⁹ They also found huge and consistent achievement differences. For example, while the average reading achievement of first-graders was above the 50th percentile in KEEP classrooms, it hovered around the 37th percentile in traditional classrooms.²⁰ Students in KEEP classrooms were also more academically engaged, and their teachers gave them far more positive academic feedback and less negative behavioral feedback than teachers gave students in traditional classrooms.²¹
- In numerous studies, researchers evaluated the impact of African American curricula on African American students.²² Not surprisingly, in each of these studies, they found that student achievement improved.
 - In Green-Gibson, 2014, for example, researchers evaluated the achievement of first- through third-grade students in two predominantly African American schools in Chicago, using Adequate Yearly Progress (“AYP”) reports.²³ They found significantly lower performance in third-, fourth-, fifth-, and sixth-grade students’ AYP results in a school that did not infuse African culture into the curriculum, as compared to students who attended a school that did have such a curriculum.²⁴
 - In Duncan, 2012, researchers evaluated the impact of an Afrocentric U.S. history curriculum on the self-efficacy, connection to the curriculum, and academic achievement of 217 eighth-grade students, 97% of whom were African, African American, or Hispanic, using New York State Social Studies Test data.²⁵ They found a positive correlation in all three areas.²⁶
 - In Rickford, 2001, a researcher evaluated the impact of culturally relevant literature on African American middle school students and found improved comprehension and higher-order thinking.²⁷
 - In Gay, 2018, researchers evaluated the Webster Groves Writing Project (Krater, 1994 and Krater, 1995), in which 14 middle and high school English teachers worked to improve the writing proficiency of their African American students using various literary works by African American authors.²⁸ They found that participating students made greater gains in writing than nonparticipating students on the local writing assessment, and then again later on the state writing test.²⁹

- In Adjapong, 2015, Hall, 2013, and Stone, 2016, researchers evaluated the use of Hip-Hop pedagogy in classrooms comprising primarily African American students.³⁰ They found that it increased student engagement and willingness to participate, deepened their content knowledge, and decreased the number of students failing to complete the course, particularly its required assessments.³¹
- In Byrd, 2016, researchers evaluated whether culturally relevant teaching works by considering student perceptions of classrooms that varied in the amount of culturally relevant practices.³² They found that elements of culturally relevant teaching were significantly associated with positive academic outcomes and ethnic-racial identity development.³³

Culturally inclusive approaches to teaching also promote critical thinking and view students as active contributors to knowledge, at once respecting those contributions and conveying an expectation that students will succeed in formulating knowledge.³⁴ They ask students to examine presuppositions, to be cognizant of social problems, and even to engage in action to address these issues.³⁵ They also encourage students to view education as a means for overcoming obstacles in their own lives.³⁶

In Halagao, 2004 and Halagao, 2010, for example, researchers evaluated the impact of a curriculum that focused on Philippine and Filipino American history and culture.³⁷ In addition to describing the curriculum as “filling in the blanks,” students exposed to the curriculum expressed interest in learning about their own history in relationship to that of other groups and in building a shared sense of community.³⁸ They also developed a sense of confidence and empowerment to stand up to oppression and to work for their own communities.³⁹ Similar findings are described in Thomas, 2008, Belgrave, 2000, and Wiggan, 2017 for African American students, and in Vasquez, 2005 for Latinx students.⁴⁰ As Gay explains, “Content about the histories, heritages, contributions, perspectives, and experiences of different ethnic groups and individuals, taught in diverse ways, is essential to culturally responsive teaching.”⁴¹

Unfortunately, school curricula generally present a Eurocentric view of a variety of subjects that do not adequately include BIPOC perspectives and figures.⁴² Curricula still primarily highlight white authors,⁴³ and texts that feature European American and white figures are still disproportionately the focus of textbook narratives.⁴⁴ Black, Latinx, and Native American figures appear primarily as victims, or in oversimplified, stereotypical, or sanitized roles.⁴⁵ Controversial perspectives are glossed over, and ongoing racism and racial issues in American society may be ignored entirely.⁴⁶

These problems are not new. In 1935, historian W. E. B. Du Bois noted the tendency of textbooks to promote certain narratives while leaving out differing or controversial information about historical figures and events:

One is astonished in the study of history at the recurrence of the idea that evil must be forgotten, distorted, skimmed over. We must not remember that Daniel Webster got drunk but

only remember that he was a splendid constitutional lawyer. We must forget that George Washington was a slave owner, or that Thomas Jefferson had mulatto children, or that Alexander Hamilton had Negro blood, and simply remember the things we regard as creditable and inspiring. The difficulty, of course, with this philosophy is that history loses its value as an incentive and example; it paints perfect men and noble nations, but it does not tell the truth.⁴⁷

As argued in Alridge, 2006, however, this failure to tell the truth “denies students a complicated, complex, and nuanced portrait of American history.”⁴⁸ As a result, “students find history boring, predictable, or irrelevant.”⁴⁹

More important, this failure to tell the truth omits entirely the viewpoints and experiences of Black, Latinx, and Native American people.⁵⁰ This is unacceptable. “If students have been taught implicitly that people like themselves are incapable and unimportant, doing well in school has little meaning.”⁵¹ In Duncan, 2012, for example, researchers describe a traditional U.S. history curriculum for students in Harlem, New York, in which the scope and sequence of the curriculum paid lip service to gender and ethnicity issues, but the overall approach was premised on one point of view and resulted in gaps in historical context and events.⁵² This approach resulted in student and parent ambivalence, failure to meet testing standards, and loss of teacher morale.⁵³

Child development researchers speak of these experiences as impacting students’ sense of “group esteem” that children form through observations of the world around them and how they perceive that their group fits into the social order.⁵⁴ A positive, educationally oriented sense of group esteem is correlated with higher achievement. For example, in Chavous, 2003, researchers found that African American high school students most likely to graduate and go on to college expressed high awareness of race and racism, and high regard for being African American, while those least likely to stay in school expressed low awareness of race and racism, and low personal regard for being African American.⁵⁵ Similarly, in Altschul, 2008, researchers found that Latinx eighth-graders (ranging from recent to second- and third-generation immigrants) earning higher grades tended to have bicultural identities, while those earning lower grades identified either little or exclusively with their cultural origin.⁵⁶

Culturally inclusive education also recognizes that racial identity is a central part of a student’s perspective. Personal aspects of racial identity have significance, particularly for BIPOC students’ academic well-being across various indicators including academic persistence, academic curiosity, and academic achievement. A survey-based study of middle and high school adolescent Black female students found that private regard (e.g., responses such as “I am happy I am Black”) was linked to academic persistence (e.g., the ability to rebound after failing an exam) and academic curiosity (e.g., interacting during classroom discussion); and national origin ideology, measured by the extent to which a student was surrounded by Black art and Black literature, was linked to academic persistence.⁵⁷ A longitudinal study of Black students similarly found a positive association between private regard and racial centrality and three academic outcomes—high school

attendance, high school graduation, and college attendance.⁵⁸ Comparatively, public regard was not significantly associated with these outcomes, which the researchers suggest may be explained by negative experiences with teachers, other students, or the community at large.⁵⁹ This view is supported by research investigating the impact of culturally inclusive education on a multiracial cohort of middle and high school students. Researchers found an association between culturally inclusive teaching methods (e.g., teacher use of student culture in the classroom and teacher efforts to create a climate of respect) and greater student interest in school; as well as an association between positive school racial socialization (e.g., schools providing opportunities to learn about a student's culture and other cultures; and teacher encouragement of interracial interaction) and feelings of belonging and ethnic identity exploration.⁶⁰ This data strongly suggest that culturally inclusive teaching supports students by fostering positive personal perceptions of racial identity while also helping to mediate the effects of negative public social attitudes about a student's racial group.

In sum, there is no reasonable doubt that ethnic studies and a culturally responsive and racially inclusive curriculum benefit BIPOC students in a myriad of ways, ranging from enhanced group- and self-perception to positive correlations with traditional measures of academic achievement.



B. *Benefits to all students: Ethnic studies and a culturally responsive and racially inclusive curriculum benefit all students and broader communities.*

The educational mission of our nation's public schools is to instill in all students "the values on which our society rests,"⁶¹ and to provide those students with the skills and knowledge necessary to realize their full potential. As part of that mission, schools are tasked with promoting "cross-racial understanding" and helping "to break down racial stereotypes"—all with the goal of "better prepar[ing] students for an increasingly diverse workforce and society."⁶² Businesses and other stakeholders have recognized for some time that diversity and cross-racial understanding are sources of strength and creativity in American society and in the American workplace. Indeed, the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."⁶³

Evidence suggests that shifting pedagogical orientations to include culturally inclusive education, such as critical literacy, benefits students in ways that permit schools to move toward the goal of serving all students equally. Culturally inclusive education is linked to enhanced student critical thinking skills, the development of individually and mutually affirming student racial awareness, improved academic proficiency based on multiple indicators of success, increased school attendance, and improved graduation rates in students from all racial and ethnic backgrounds.

Culturally inclusive education also improves students' critical thinking. Critical thinking has been defined as the ability to "reach[] conclusions based on sound evidence and reasons," which is enriched in "an environment which necessita[t]es to include a variety of opportunities and ideas, analysis and applications for the purpose of supporting value judgments and organizing ideas."⁶⁴ The way an individual engages in critical thinking is the result of learned cultural notions of how to engage in thinking.⁶⁵ In a multicultural context, multiple cultural norms can be integrated in a process that requires deeper engagement in problem solving and more sophisticated critical thinking.⁶⁶ Critical thinking in a multicultural environment also includes the ability to think critically about social difference.⁶⁷ A study of fourth-grade students who were provided an interdisciplinary culturally inclusive curriculum demonstrated that this approach to teaching was significantly associated with improved critical thinking skills, including the ability to make inferences, analyze events, and engage in reasoned rhetoric.⁶⁸ The fourth graders were asked to explore the cultural myths of their own culture and those of other cultures, research the problem of violence against women, write a slogan for the prevention of violence against women, and create visual images about the problem.⁶⁹ The students scored significantly higher on an assessment of critical thinking skills and tolerance levels after participating in the culturally inclusive curriculum compared with their scores before participation.⁷⁰

As discussed in Section II.A, *supra*, numerous studies have found an association between culturally inclusive education and student GPA, school attendance, academic credits earned, student mathematics performance, standardized test performance, and graduation rates—associations that exist not just for BIPOC students, but for *all* students.

Culturally inclusive education also facilitates many of the core goals of public education: promoting democracy by preparing children for citizenship and voting, teaching cultural literacy, developing citizens' capacities for critical thinking and self-directed learning, and cultivating a workforce that can compete in the global marketplace. Specifically, "interdisciplinary ethnic studies, or the study of the social, political, economic and historical perspectives of our nation's diverse racial and ethnic groups, help foster cross-cultural understanding among [all] students and aid[] students in valuing their own cultural identity while appreciating the differences around them."⁷¹

At the early childhood level (age 8 and younger), instruction about racial diversity has a positive impact primarily on the attitudes of children in an ethnic majority.⁷² Lessons teaching about racism, and about successful challenges to it, improve racial attitudes among majority children, allowing them to see how racism affects everybody, to value racial fairness, and to engage in less stereotyping. Furthermore, curriculum designed to help elementary children talk about race reduces prejudice, especially among highly prejudiced children, by directing attention toward individual qualities rather than group membership only, offering positive information about a group, and directly addressing a listener's concerns.⁷³

Research reveals that positive racial attitudes can be developed best by directly confronting young children's actual questions and assumptions about race, racism, and differences they see among people. "It is also helpful to draw young children's attention to the complexity of individuals, as well as to examples of people like themselves who challenge racial discrimination."⁷⁴ Importantly, "teaching that impacts students' racial attitudes at the early childhood level is what provides a basis for ethnic studies at the elementary and secondary levels."⁷⁵

For pre-K-12 students, multicultural curriculum that is part of the regular instructional program "brought about more positive changes in students' racial attitudes than did exposure to traditional instruction."⁷⁶ Examples of positive changes include more nuanced thinking, more positive attitudes towards other children, and the reconceptualization of one's identity and knowledge in a way that takes into consideration the lives, knowledge, and perspectives of others.

Finally, in higher education, "[t]he overwhelming and most consistent finding" by researchers is that required diversity courses (e.g., ethnic studies, women's studies, and general diversity courses) "have a positive impact on students."⁷⁷ And the positive impacts increase with the number of diversity courses taken.⁷⁸ Examples of positive impacts include reducing the likelihood of students in the majority claiming to be "color-blind," greater racial awareness, and more positive attitudes about members of other ethnic groups as well as cross-group understanding and cooperation. Ethnic studies classes have also been shown to significantly increase academic outcomes and student engagement: a 2017 study found that assignment to an ethnic studies course increased ninth-grade attendance by 21 percentage points, GPA by 1.4 grade points, and credits earned by 23;⁷⁹ and a 2021 study found that ninth-grade students' enrollment in an ethnic studies course substantially increased high school graduation, attendance, and the probability of enrolling in college.⁸⁰

C. *Culturally biased education harms students and broader communities.*

Research shows that a culturally biased education presents a Eurocentric view that privileges white figures and narratives over all others, and harms students and broader communities. This starts with the materials that students are offered. Educational materials largely continue to reflect and amplify only limited aspects of American culture, which can have the effect of entrenching stereotypes and bigotry.⁸¹ This sort of culturally biased education reinforces dangerous tropes and, in turn, endangers students.



Materials that do not provide culturally competent or accurate representations can have long-term negative effects on students. "If children are consistently exposed to books and other media that negatively represent their culture, then it is likely they will internalize these social messages and develop a poor sense of self."⁸² This negative messaging can be detrimental, as it can stay with young children "for the rest of their lives."⁸³

Overall, the ways in which identities are represented in the classroom through materials presented by educators affect student achievement and students' ability to learn. Generally, "a lack of representation and narrow and stereotypical portrayals create missed opportunities for all students, preventing them from fully understanding how various racial, ethnic, and gender groups have been a part of and are a part of the American narrative."⁸⁴ This is the risk that a culturally biased education runs, which impedes the opportunity for all students to grow and thrive.

When educational materials or curricula perpetuate stereotypes or otherwise fail to be inclusive and representative of students' backgrounds, their educational progress suffers. Ultimately, "[r]esearch shows that learning processes and academic behaviors are disrupted when we feel anxious or threatened. Unfortunately, schools often present students of color with emotional perils such as stereotype threat, which can make them feel stigmatized based on their social identity."⁸⁵ Failing to present material in an inclusive manner, thus, can have real effects on student aptitude and achievement.

For example, studies show that "culturally bound prior knowledge"—or prior knowledge about certain subjects that a student has developed through their culture and upbringing—can have an important effect on students' reading comprehension, or ability to meaningfully understand text.⁸⁶ Specifically, "students with lower reading levels but higher levels of cultural knowledge have higher reading comprehension scores than the students with higher reading levels but lower levels of culturally bound prior knowledge."⁸⁷

Materials that take advantage of such culturally bound knowledge are more relatable, because they are more familiar to a student. Conversely, culturally biased educations that include limited ranges of literature and material necessarily make use of a lesser range of students' culturally bound knowledge. Fewer students will find such materials accessible and meaningful. The key is to provide material that allows students to make use of their lived experiences.

Failing to provide culturally accessible material, therefore, can have a detrimental effect on academic success. This can have a significant effect on students whose stories or life experiences are not reflected in regular lessons or educational materials. Conversely, then, providing culturally accessible material can have the effect of boosting student engagement and achievement. As one study found, "prior knowledge not only plays a supportive role in reading comprehension for African American students, but it also has a leveraging effect for readers at different achievement levels."⁸⁸

Culturally biased educations also limit the opportunity for students to meaningfully understand diversity and issues attendant to diversity and inclusion. Across disciplines and even at higher levels of education, rejecting critical conversations about diversity and inclusion in classrooms can lead to student disengagement and disinterest in their learning environments, which can entrench inequity.⁸⁹ This can have a harmful effect on how students perceive achievement and "merit," and, subsequently, how they relate to one another.⁹⁰

Creating a culturally responsive and racially inclusive education extends, of course, not just to the content, but also to the way it is communicated by educators. Failing to communicate effectively with students can harm student success. This requires a sensitivity on the part of educators to the ways in which students can best receive and process information. For example, studies have found that emergent bilingual students in classrooms where only English is used score lower on tests than emergent bilingual students in classrooms where a home language is used.⁹¹ In such situations, creating a culturally responsive education would encourage the use of a multilingual classroom where possible, in order to maximize student achievement and growth.

When teachers do not attempt to familiarize themselves with a school's community—which can occur when staff do not reflect the demographic makeup of the student community—academic performance can lag and disciplinary issues may result.⁹² When teachers and staff exhibit an interest in students' backgrounds and community, then student achievement improves as students increasingly feel a sense of belonging.⁹³

D. *Many states and school districts recognize the benefits of ethnic studies and culturally responsive and racially inclusive curriculum.*

At the time of publication, at least 16 states have acted to expand education on racism, sexism, the contributions of specific racial or ethnic groups to American history, and issues of equality and justice in public schools.⁹⁴ These efforts range from creating working groups or committees to make recommendations for new state education standards to mandating culturally responsive and racially inclusive curricula. In some

states, educators are now required to complete training programs meant to provide pro-diversity, inclusive environments in schools.

States such as California, Connecticut, Delaware, Illinois, Maine, New Jersey, and Rhode Island have introduced curriculum standards requiring the teaching of certain culturally responsive and racially inclusive education programs. For example, Connecticut became the first state to require high schools to offer African American studies and Latino studies starting in 2022 and, starting in the 2023-24 school year, will also require that Native American studies be taught as part of the required social studies curriculum in public schools.⁹⁵ Delaware will require all K-12 public schools to implement a curriculum on Black history starting in the 2022-23 school year.⁹⁶ In 2021, California adopted a statewide ethnic studies curriculum for high schools, which is already being implemented.⁹⁷ Illinois has also passed its own legislation regarding such inclusive efforts and will require the teaching of Asian American history, including “the study of the wrongful incarceration of Japanese Americans during World War II,” starting in the 2022-23 school year.⁹⁸

Washington State has taken a different approach in its culturally responsive and racially inclusive efforts. In May 2021, Washington passed legislation requiring ongoing training programs for staff, teachers, administrators, school directors, and superintendents.⁹⁹ Meanwhile, states such as New Mexico, Vermont, and Virginia have established working groups or policy committees as part of their culturally responsive and racially inclusive education efforts. For example, New Mexico’s Black Education Act (HB 43) created an advisory council of members “knowledgeable about and interested in the education of Black students.”¹⁰⁰

III. Legality of responsive and inclusive curriculum: Teaching ethnic studies and a culturally responsive and racially inclusive curriculum is consistent with federal and state law.

Culturally responsive and racially inclusive education is consistent with the First Amendment of the United States Constitution,¹⁰¹ the Equal Protection Clause of the United States Constitution,¹⁰² and Title VI of the Civil Rights Act of 1964.¹⁰³ Legislation that jeopardizes culturally responsive and racially inclusive education practices, by contrast, cannot find support in the history, values, or ideals enshrined in the United States Constitution or in Title VI.

A. *First Amendment: Such teaching is consistent with the First Amendment’s established role protecting free speech in public school education.*

Courts have recognized the important role of schools in providing students with a diverse education espousing different viewpoints, including those of a range of cultures and races. “The Nation’s future,” the Supreme Court has highlighted, “depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues.’”¹⁰⁴ Racially inclusive and accurate teaching about the history of America and its relevance to today’s society not only benefits students of color,

whose families' histories and experiences are finally acknowledged, but also ensures that all students are exposed to diverse viewpoints and experiences. Preventing schools from utilizing culturally responsive and racially inclusive approaches to educate students suppresses lawful educational efforts necessary for providing accurate education, for addressing and preventing racism, for preparing students for life in a diverse world, and for establishing good citizenship that values the experiences and contributions of everyone.

Courts have likewise recognized the critical function of public schools to instill in all students "the values on which our society rests."¹⁰⁵ The "importance of education to our democratic society . . . is the very foundation of good citizenship" by being the "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."¹⁰⁶

America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection.¹⁰⁷

Indeed, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁰⁸ Moreover, students have a First Amendment right to receive information and ideas in the context of curriculum design.¹⁰⁹

"Our Constitution does not permit the official suppression of *ideas*."¹¹⁰ If "the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one."¹¹¹ Nor can the discretion that rests with the state in choosing curricula "be exercised in a narrowly partisan or political manner."¹¹² Attempts to exclude culturally responsive and racially inclusive approaches to education unlawfully prescribe what shall be "orthodox in politics, nationalism, religion, or other matters of opinion."¹¹³ Accordingly, the teaching of culturally responsive and racially inclusive education theory finds support in the First Amendment.

B. *Fourteenth Amendment: The history and purpose of the Fourteenth Amendment supports such teaching.*

The history of the Fourteenth Amendment's Equal Protection Clause, which prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws,"¹¹⁴ favors education initiatives that include culturally responsive and racially inclusive education.

The Fourteenth Amendment was enacted contemporaneously with legislation promoting racial equality and, indeed, its purpose was to end racial suppression. In fact, just before the ratification of the Fourteenth Amendment, Congress enacted a series of laws for Black Americans, including the 1864 Freedmen's Bureau Bill, the 1865 Freedmen's Bureau Act, and the 1866 Freedmen's Bureau Act.¹¹⁵ These laws, and others, were designed to benefit "persons of African descent," "such persons as have once been slaves,"

and “colored women and children.”¹¹⁶ They were necessary to address the ongoing legacy of enslavement.¹¹⁷

Legislators rejected arguments that the Freedmen’s bills and the Fourteenth Amendment constituted “discrimination” against white Americans.¹¹⁸ Similarly, the U.S. Supreme Court found “the one pervading purpose” of the Fourteenth Amendment to be “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”¹¹⁹

The major purpose of the Equal Protection Clause of the Fourteenth Amendment was to protect Black citizens from discriminatory state laws and discriminatory policies and practices “emanating from official sources in the States.”¹²⁰ “Its central mandate is racial neutrality in governmental decision making,”¹²¹ and “the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.”¹²² A culturally responsive and racially inclusive education is necessarily consistent with the Fourteenth Amendment.

Culturally responsive and racially inclusive education, including antiracist education, is associated with efforts to more consciously address the role of race, racism, and its legacy in America. Antiracist education is not premised on discrimination on the basis of race, nor does it have the effect of discriminating on the basis of race.¹²³ Instead, classroom instruction about racism in the United States is part of an effort to foster an inclusive and equitable educational environment and does not constitute a racial classification that would trigger strict scrutiny under an Equal Protection analysis.¹²⁴ Nor are efforts to provide truth, historical accuracy, and an equitable and inclusive learning environment motivated by a discriminatory purpose.¹²⁵ On the contrary, culturally responsive and racially inclusive education is designed to enable students to remedy the effects of past discrimination against BIPOC communities, for “[t]he history books do not tell stories of white children struggling to attend black schools.”¹²⁶

C. *Title VI: Title VI of the Civil Rights Act of 1964 does not prohibit efforts to ensure a culturally responsive and racially inclusive education.*

Like the Fourteenth Amendment, the history of Title VI supports the teaching of a culturally responsive and racially inclusive education. Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹²⁷

Because segregation and Jim Crow laws persisted even after *Brown v. Board of Education*, Title VI was enacted to prevent the exclusion of people of color by “private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.”¹²⁸ Title VI was intended to “end a century of mistreatment of black Americans.”¹²⁹ Thus, for private entities receiving federal funding, Title VI was intended to fulfill the promise of nondiscrimination envisioned by the Fourteenth Amendment.¹³⁰

But Title VI was not intended to prohibit any consideration of race:

The debates reveal that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation or providing them with separate facilities. Again and again supporters of Title VI emphasized that the purpose of the statute was to end segregation in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes.¹³¹

That Title VI's purpose is to protect people of color from discriminatory educational practices is further illustrated by the U.S. Department of Education's and U.S. Department of Justice's interpretations, both of which have promulgated rules governing the applicability of Title VI to education systems.¹³² The regulations recognize that Title VI prohibits not only intentional discrimination but also disparate impact actions that "have the effect of subjecting individuals to discrimination because of their race, color, or national origin."¹³³

The Department of Education's Office for Civil Rights ("OCR") has repeatedly issued guidance to school districts affirming Title VI's mandate of ensuring equal educational opportunities in education for students of color, in particular, and opposing systemic racism.¹³⁴ OCR's training efforts on implicit and explicit racial bias, stereotypes, and other related threats to students of color further evidence the lawfulness of such antiracist practices.¹³⁵

Given this history, ethnic studies and culturally responsive and racially inclusive education initiatives that teach the true history of racism and its continuing effect on people of color are consistent with Title VI's purpose of ensuring that recipients of federal funds do not discriminate on the basis of race, color, or national origin. Schools that confront racism through the use of antiracist approaches that include more accurate and racially inclusive lessons advance the overriding purpose of Title VI.

D. *State constitutions: Education that seeks to address racial inequities is consistent with the equal rights guarantees in state constitutions.*

More than half of states have enshrined equal rights guarantees in their constitutions. Constitutional equal rights guarantees, across states, mandate just that: equal rights for all. State equal rights protections provide similar and often greater protections than are afforded to individuals under the Equal Protection Clause of the U.S. Constitution.

Of the 26 states whose constitutions memorialize equal rights guarantees, 12 expressly prohibit infringement of equal rights based on race, color, and/or national origin, with two additional states providing equal rights guarantees on these bases for specific purposes (e.g., in political or employment contexts).¹³⁶ New York State's Constitution, for example, provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof" and "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person . . .

. or by the state or any agency or subdivision of the state.”¹³⁷ Texas’s Constitution likewise provides that “[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.”¹³⁸ Certain state constitutions also declare that “[t]he dignity” of every human being is “inviolable.”¹³⁹

Education that incorporates the history of systemic racism and antiracism efforts powerfully effectuates equal rights under state law, while the prohibition of such education compromises and may violate such rights. This is true especially, but not only for, individuals who have been underserved, marginalized, or directly targeted for discrimination based on their race.

Certain state constitutions expressly mandate equality in educational contexts by treating education, directly or indirectly, as a civil right. In those states—if not in all states with broad constitutional equal rights guarantees—prohibiting or failing to accommodate inclusive education may violate state law. Nebraska’s constitution, for example, provides that “[t]he state shall not discriminate against . . . any individual or group on the basis of race . . . in the operation of . . . public education.”¹⁴⁰ Accordingly, at least in states with such laws, the prohibition of or failure to accommodate curricula that are inclusive may give rise to a claim that the state (or municipality) is violating state constitutional rights by discriminating against students of color (and others) through (i) the operation of public education in a racially discriminatory manner, and/or (ii) a failure to provide equality of opportunity to obtain education without discrimination.

Even in states whose constitutions do not expressly memorialize an equal right to education, the broad right to equality that is memorialized in more than half of state constitutions is powerfully effectuated through inclusive education. Inclusive education strives to afford white and non-white students alike an equal opportunity to be exposed to and learn the events, circumstances, and challenges that comprise their own and their peers’ histories and lives. It does not compel schools to engage in curricular gerrymandering. Inclusive education also does not isolate, marginalize, or stigmatize students of certain races and backgrounds by erasing fundamental constituents of their histories from the educational experience. Instead, inclusive curricula effectuate what state constitutions require: equal and nondiscriminatory treatment by states and their subdivisions and honoring the dignity of every human being. Case law construing state constitutional equal rights clauses reinforces the proposition that inclusive education promotes equal rights under the law and that anti-diversity and inclusion laws jeopardize such rights.¹⁴¹

The Connecticut Supreme Court has aptly summed up the matter: “Schools bear central responsibility for inculcating [the] fundamental values necessary to the maintenance of a democratic political system.”¹⁴² Education seeking to address racial inequalities advances the equal rights commitments and educational obligations under state constitutions.

IV. Prohibiting culturally responsive and racially inclusive education harms students and likely violates federal law.

A. *Such prohibitions restrict racially inclusive and culturally responsive curriculum.*

At the time of publication, at least 42 states have introduced bills or proposals to limit, chill or ban the teaching of antiracism and culturally responsive and racially inclusive curricula in schools, or to restrict how teachers can discuss racism, sexism, and issues of equality and justice.¹⁴³ These efforts by lawmakers and state boards of education have led to enacted bans and restrictions in 17 states, although one bill (Arizona’s HB 2898) has already been overturned.¹⁴⁴ In at least 6 other states, there is pending or pre-filed legislation seeking to limit and/or penalize the teaching of inclusive and diverse subject matter, with each state taking its own approach on how such subject matter is restricted.¹⁴⁵ Other states have introduced legislation that has ultimately stalled, failed, or been withdrawn.¹⁴⁶ (See Table 1 below.) Many of the bills that have been introduced seek to prohibit the teaching of allegedly “divisive” or “prohibited” concepts related to race, racism, gender, and American history primarily in K-12 public schools, but also in some colleges and universities, and state agencies.¹⁴⁷

Of course, public school educators do not indoctrinate students with religious, political, or socioeconomic principles or points of view. This is not the role of public school educators. Nor is it the purpose of public education. Nevertheless, state lawmakers seek to censor educators and restrict public school curriculum.

Table 1 - Overview of Anti-Diversity and Inclusion Curriculum Bills¹⁴⁸

Target of Legislation	Number of Bills*	Bill Status	Scope of Bills
K-12 Schools	157	Passed: 14 Failed: 143	The 14 passed laws include prohibitions on teaching and training directed to allegedly “divisive concepts.”
Colleges and Universities	62	Passed: 7 Failed: 55	The 7 bills that became law impose prohibitions on training or orientations. Idaho’s law further extends the ban to academic instruction. Most of these bills explicitly impose restrictions on academic courses and/or curricula.
State Agencies, Institutions, Contractors	32	Passed: 6 Failed: 26	The bills prohibit the teaching, training, and use of materials directed to allegedly “divisive” concepts by state entities. However, the scope of many of these bills is ambiguous, making it unclear if the provisions extend to public schools, colleges, and universities.

*** Some pieces of legislation target more than one group and are therefore counted multiple times in this table. As a result, the total tally in this table exceeds the actual number of introduced bills.**

The most extreme bills explicitly ban teaching certain academic concepts such as critical race theory (“CRT”) or lessons based on “The 1619 Project,” an initiative by *The New York Times Magazine* that explores the history and continuing legacy of slavery.¹⁴⁹ Others, ban teaching that the U.S. or a particular state is systematically or fundamentally racist or sexist. The subject matter of the proposed legislation is summarized in Table 2.

Table 2 - Types of Proposed Legislation Seeking to Ban or Limit Instruction ¹⁵⁰

Number of Bills	Banned Subject Matter
23	Explicitly prohibit schools from using <i>The New York Times Magazine's</i> “The 1619 Project”
19	Mention CRT; some bills mention CRT only in the introductory language while others incorporate CRT into the actionable legislative text
16	Prohibit schools, teachers, and/or instructors from “compelling” an individual to affirm a belief in a “divisive concept”
10	Bans curricula related to sexual orientation, gender identity, and LGBT issues or lifestyles
16	Mandate the “balanced” teaching of “controversial” political or social topics, or the equal presentation of “diverse and contending views”

The most punitive of these proposed bills impose automatic budget cuts or the firing of teachers for violations. Some also create a civil cause of action for schools to be sued and provide for the recovery of attorneys’ fees and costs for successful lawsuits.¹⁵¹ Others authorize civil penalties on teachers and subject educators to discipline, including the suspension or revocation of their certifications.

The most notorious legislation of its kind to date. On December 15, 2021, Florida Governor Ron DeSantis held a press conference and announced a legislative proposal entitled the “Individual Freedom Act” for the stated purpose of “fight[ing] back against woke indoctrination” and to “take on . . . corporate wokeness.” Florida’s governor originally called the legislation the “Stop the Wrongs to Our Kids and Employees Act” or “Stop W.O.K.E. Act” (hereinafter the “Stop W.O.K.E. Act”).¹⁵² The Florida Legislature passed the law in spring 2022, and it will go into effect July 1, 2022.¹⁵³

The new law defines prohibited discrimination to include “training or instruction that espouses, promotes, advances, inculcates, or compels a student or employee” to believe any of eight prohibited concepts, including that “[a] person, by virtue of his or her race, color, national origin, or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously.”¹⁵⁴ Proponents of the law also claimed that it “[p]rohibits school districts, colleges and universities [sic] from hiring [CRT] consultants,” and “[p]rotects employees against a hostile work environment due to critical race theory training.”¹⁵⁵ The “Stop W.O.K.E. Act” comes on the heels of a 2021 Rule adopted by the Florida Board of Education that prohibits teaching “critical race theory” in schools, which the Rule defines as teaching that “racism is not merely the product of prejudice, but that

racism is embedded in American society and its legal systems.”¹⁵⁶ The 2021 Rule also prohibits the use of any materials from “The 1619 Project” in K-12 instruction.¹⁵⁷

A successful challenge to Arizona’s HB 2898. In August 2021, plaintiffs including the Arizona School Boards Association and the Arizona Education Association filed a lawsuit contending that Arizona’s HB 2898 violated state constitutional requirements that prevented the inclusion of unrelated substantive legislation in budget reconciliation bills.¹⁵⁸ In September 2021, Maricopa County Superior Court Judge Katherine Cooper ruled that the bill violated these procedural protections in the state constitution explaining, among other things, that the Act’s title—AN ACT AMENDING [approximately 100 statutes identified by number only] APPROPRIATING MONIES; RELATING TO KINDERGARTEN THROUGH GRADE TWELVE BUDGET RECONCILIATION¹⁵⁹—did not provide notice of its restrictions on how teachers can discuss race and sex in the classroom and the disciplinary action and financial penalties it imposed.¹⁶⁰ Judge Cooper voided the bill, asking, “What do these measures have to do with the budget?”¹⁶¹ In November 2021, Judge Cooper’s ruling was unanimously upheld by the Arizona Supreme Court.¹⁶²

A first-of-its-kind challenge to Oklahoma’s HB 1775. On October 19, 2021, a group of students, educators, and civil rights organizations filed a lawsuit “challenging the state legislature’s unprecedented and unconstitutional censorship of discussions about race and gender in schools and higher education institutions through the passage of House Bill 1775.”¹⁶³ The plaintiffs requested that the court declare Oklahoma’s HB 1775 unconstitutional under the First and Fourteenth Amendments, and that preliminary and permanent injunctions be issued to restrain enforcement of the law.¹⁶⁴ The lawsuit, which is backed by the American Civil Liberties Union, the ACLU of Oklahoma, and the Lawyers Committee for Civil Rights Under Law is the first to constitutionally challenge a state law that purports to prohibit the teaching of or training on certain concepts related to racism and sexism in K-12 schools and higher education institutions.

Plaintiffs’ allegations that the Oklahoma Legislature passed HB 1775 “with the racial and partisan intent to chill speech” have been dismissed by proponents of the law.¹⁶⁵ The law’s sponsor, Representative Kevin West, described the lawsuit as “radical leftist organizations supporting the racist indoctrination of our children.”¹⁶⁶ Governor Kevin Stitt’s office has echoed this sentiment, describing it as “par for the course” for “activist groups . . . to come into Oklahoma and challenge our laws and our way of life.”¹⁶⁷

Recently filed challenges. Since October 2021, at least six more lawsuits have been filed raising similar challenges to new state measures restricting instruction in K-12 schools on racism and sexism. Two lawsuits filed in New Hampshire challenge a classroom censorship law, contained within state budget bill HB2, which discourages public school teachers from teaching and talking about race, gender, sexual orientation, disability, and gender identity in the classroom.¹⁶⁸ The lawsuits have since been consolidated and briefing on the defendants’ motion to dismiss is underway.

The third lawsuit challenges Florida’s “Stop W.O.K.E. Act.”¹⁶⁹ Plaintiffs in the case, including educators and parents of a rising kindergartner, contend that the Act is impermissibly vague and a gross infringement on their fundamental rights to academic

freedom, freedom of expression and access to information under the First Amendment. The fourth lawsuit was filed by a private employer and two diversity, equity, inclusion, and justice consultants, alleging Florida's "Stop W.O.K.E. Act" is impermissibly vague and overbroad and infringes on the plaintiffs' First Amendment right to freedom of expression.¹⁷⁰ At the time of publication, two additional lawsuits were filed, challenging Florida's "Stop W.O.K.E. Act" on behalf of Florida educators and students in higher education.¹⁷¹

Book banning. Book banning, traditionally associated with fragile, fascist regimes as a method of censorship and control, is experiencing a disturbing proliferation through recent anti-diversity and inclusion movements. Since the start of the 2021–22 school year, at least seven states have made efforts to remove books challenged by community members from public school libraries.¹⁷² The legislatures in Florida and Georgia have even gone so far as to require the state's department of education and/or local school systems to adopt book banning procedures for public school libraries.¹⁷³ This surge in censorship proposals prompted the American Library Association to release a statement that it had seen "an unprecedented volume of [censorship] challenges in the fall of 2021."¹⁷⁴ For example, in October 2021, State Representative Matt Krause of Texas emailed Texas superintendents a 16-page list of approximately 850 book titles that he contended should be reviewed because they "might make students feel discomfort, guilt, anguish, or any other form of psychological distress because of their race or sex or convey that a student, by virtue of their race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously."¹⁷⁵ These books covered topics like race, gender, and sexuality, and many were written by BIPOC, women, and/or LGBTQ+ authors.¹⁷⁶ Rep. Krause requested that, as part of their review, the superintendents provide information concerning how many copies of the books are held in libraries and how much money their districts spend on them.¹⁷⁷

These book-banning efforts extend beyond measures aimed at public school systems. For example, Gene McGee, Mayor of Ridgeland, Mississippi, withheld board-approved funds from the Ridgeland Public Library due to its collection of books with "LGBTQ+ themes, stories, and identities."¹⁷⁸ Mayor McGee later threatened to continue to withhold the funds until the library removed these books, which Mayor McGee described as going "against his Christian beliefs."¹⁷⁹

Tip lines for reporting teachers suspected of teaching divisive concepts. Some states, including New Hampshire and Virginia, have gone a step further in their anti-diversity and inclusion efforts—they have established phone or online tip lines for reporting teachers of allegedly "divisive concepts," including CRT.¹⁸⁰ These tip lines allow parents to report suspected violations of their respective state's ban on antiracism and inclusive curricula in public schools.¹⁸¹

The New Hampshire Department of Education launched a Web page in November 2021 for parents to file a complaint if they "believe that they, or their child, was discriminated against because their child's school was teaching and/or advocating that one identified group is: [i]nherently superior . . . [or] [i]nherently racist, sexist, or oppressive," among other things.¹⁸² The complaint would then be investigated by the New

Hampshire Commission for Human Rights.¹⁸³ If teachers are found to have violated the teaching ban, they could have their teaching licenses revoked.¹⁸⁴

Virginia followed New Hampshire's lead when Governor Glenn Youngkin announced in January 2022 that parents could email a dedicated "Help Education" tip line to report any public school teachers who they believed were "behaving objectionably."¹⁸⁵ Governor Youngkin described the purpose of the tip line as allowing Virginia to "be aware of [children] being denied their rights" so that the state can "catalog it all" and "make sure [it is] rooting it out."¹⁸⁶ Parents are encouraged to file a report in any instances where they feel "that their fundamental rights are being violated, where their children are not being respected," or where there are allegedly divisive concepts being taught in Virginia's public schools.¹⁸⁷

B. *Such prohibitions promote intolerance among students and the broader community.*

The recent anti-diversity and inclusion laws have the effect of chilling discourse in classrooms on important topics such as race, thereby promoting intolerance. The vagueness and breadth of these laws generate uncertainty, which in turn constrains teachers who want to help their students explore sensitive issues. Classrooms must remain laboratories for exploration concerning sensitive topics. Culturally responsive and racially inclusive education requires that students be exposed to worldviews and perspectives that might challenge their own. Laws that prohibit the teaching of "divisive concepts" are, by their very design, overly broad and thus prohibit educators from teaching perspectives that would otherwise help expand students' perspectives. Sweeping in such topics will leave students unable to effectively combat intolerance and bias. Failing to include critical worldviews and perspectives promotes a culturally biased education, because such an education would selectively elevate and curate certain narratives and histories over others.

Students are increasingly vulnerable to experiencing racism and extremism online, which means that these views must be combatted in the classroom.¹⁸⁸ Classrooms devoid of culturally responsive and racially inclusive curricula—which can help students learn the vocabulary and tools to recognize and combat bias—leave such digital intolerance unabated, which in turn means that classrooms can become incubators for intolerance. Indeed, as one report stated, "[t]he advocates of racially integrated schools understand that much of the recent racial tension and unrest in this nation—from Ferguson to Baltimore to Staten Island—may well have been avoided if more children had attended schools that taught them to address implicit biases related to racial, ethnic, and cultural differences."¹⁸⁹ Anti-diversity and inclusion laws chill the ability of teachers to offer the tools that students need to fight such intolerance.

Moreover, education that is not inclusive fails to effectively combat bias because it limits the perspectives that students are offered. It is well settled that "[t]here is a pedagogical value inherent in having multiple vantage points represented in classrooms to help all students think critically about their own views and to develop greater tolerance for different ways of understanding issues."¹⁹⁰ Failure to offer such perspectives, therefore, can have the effect of promoting intolerance in the community. Thus, widely recognized

curricular programs such as the International Baccalaureate program—which integrate diverse perspectives and modalities of learning into the classroom—are premised on the idea that tolerance and respect must be an active part of the learning process in order to combat intolerance on a global level.¹⁹¹ “Global competence,” which is a recognized priority of the international community in educating students, starts with curricula that promote a broad worldview.¹⁹² Anti-diversity and inclusion laws cast doubt on the ability of public schools to incorporate these learning modalities and internationally recognized educational priorities.

By preventing teachers from offering students diverse perspectives, anti-diversity and inclusion laws will promote, rather than combat, intolerance and bias.

C. *Such prohibitions raise serious First Amendment concerns.*

1. Such prohibitions impose content- and viewpoint-based discrimination that serve no legitimate pedagogical purpose.

The recently enacted anti-diversity and inclusion laws constrict, or make off-limits altogether, the viewpoints and content that can be taught in schools.¹⁹³ And while the state has broad latitude to prescribe the required curriculum at the K-12 level, it remains the case that a state may not censor curriculum for political reasons that bear no reasonable relation to a legitimate pedagogical end.¹⁹⁴ There are sound bases to argue that the decision to place off-limits certain approaches to U.S. history, such as The 1619 Project, run afoul of this basic requirement. Certainly there is a strong case to be made that no legitimate pedagogical interest is served by refusing to allow students to consider the viewpoint that the enslavement of African people in North America is a critical framework



for understanding our nation's history. Instead, such prohibitions reflect a naked censorship effort.

Outside of schools, content-based restrictions on speech are presumptively unconstitutional and subject to strict scrutiny. These restrictions on speech include laws that "appl[y] to particular speech because of the topic discussed or the idea or message expressed."¹⁹⁵ Viewpoint-based restrictions on speech are a form of content-based restrictions that restrict a particular opinion or set of ideas, rather than a broad topic.¹⁹⁶ And while the governing standard is more lenient in K-12 schools, it remains the case that some anti-diversity and inclusion laws are vulnerable to challenge on the ground that they serve no legitimate pedagogical interest.

2. Such prohibitions are impermissibly vague and overbroad.

At its core, the First Amendment is designed to prevent laws from chilling permissible speech. This means that laws cannot be vague or overbroad. Both the First Amendment and Due Process Clause of the Fourteenth Amendment prohibit governmental efforts to penalize speakers, where the government fails to give clear notice of the type of speech that is impermissible. Yet that is the case with many of the new anti-diversity and inclusion laws.

As a group of opinion writers spanning the ideological and political spectrum wrote in the *New York Times*, "[b]ecause these [anti-diversity and inclusion] laws often aim to protect the feelings of hypothetical children, they are dangerously imprecise."¹⁹⁷ The issue is that "[t]he laws differ in some respects but generally agree on blocking any teaching that would lead students to feel discomfort, guilt or anguish because of one's race or ancestry, as well as restricting teaching that subsequent generations have any kind of historical responsibility for actions of previous generations."¹⁹⁸ Teachers subject to these laws will be unable to tell what is permissible and impermissible. These laws are thus designed to be implemented inconsistently, based on subjective and vague guidelines that threaten to stifle the sort of rigorous exchange of ideas that teachers require in order to provide students with meaningful educations.

There is a compelling argument that these laws are vague. As the Supreme Court has stated, "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."¹⁹⁹ The ambiguity inherent in the language of anti-diversity and inclusion laws is what gives them their power: the scope of their application is in the eyes of the individual enforcing them, which is an invitation for inconsistent and discriminatory application. In the realm of vagueness, "[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."²⁰⁰ The Supreme Court has been clear that where laws invite "wholly subjective judgments" without well-defined meaning or boundaries, they run afoul of constitutional guarantees.²⁰¹ Anti-diversity and inclusion laws are, by design, open to a broad range of interpretation.

These laws also threaten to chill protected speech. Such a threat alone is inimical to the core guarantees of the First Amendment, because the intended effect of the laws is to deter otherwise legitimate conduct. “[D]eterrence emanating from the existence of a statute purporting to prohibit constitutionally protected expression is itself plainly inconsistent with the First Amendment, which was intended to protect vigorous, robust, and unpopular speech without a threat of punishment under state law.”²⁰² Regardless of how these laws might be enforced, “[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.”²⁰³

Many of these laws are also likely overbroad. Statutes that are unconstitutionally overbroad are those that, for example, prohibit “a substantial amount of protected expressive activity,”²⁰⁴ or where “a substantial number of [the law’s] applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”²⁰⁵ The question about whether a statute is impermissibly overbroad in the First Amendment context, thus, is an inquiry into whether a statute transforms too much legitimate conduct into illegal conduct.²⁰⁶ There is no question that assisting students in learning about themselves and history that is relevant to their own lived experiences is an essential part of providing an effective and robust education, and it is protected conduct. And as discussed above, the laws’ subjective guidelines mean that they can throw legitimate pedagogical practices into uncertainty.

3. Such prohibitions infringe students’ right to receive and access information.

The U.S. Constitution, particularly through the First Amendment, also “protects the right [of students] to receive information and ideas.”²⁰⁷ This includes the right of students to receive and access educational information.²⁰⁸ This right is not limited by the government’s views on what should and should not be shared with individuals. In fact, laws that censor students’ ability to access and receive information, without being “reasonably related to legitimate pedagogical concerns,” violate students’ constitutional rights.²⁰⁹

The First Amendment provides the public access to “discussion, debate, and the dissemination of information and ideas.”²¹⁰ Students’ right to access and receive information is present, and arguably the most important, in the school setting. In *Pico*, for example, the Supreme Court held that school libraries are “especially appropriate for the recognition of the First Amendment rights of students.”²¹¹ The Court held that the Board of Education in that case could not restrict the availability of books in its libraries simply because the Board members disagreed with their content.²¹²

Anti-diversity and inclusion laws directly inhibit the ability of students to receive crucial information related to race, racism, gender, and American history. By restricting the educational instruction that students can receive, these laws raise serious First Amendment concerns regarding the right of students to receive and access information.

4. Such prohibitions infringe the academic freedom of university professors.

Although the law is still evolving, the First Amendment also protects academic freedom at the higher education level,²¹³ or the right “to speak freely about political or ideological issues without fear of loss of position or other reprisal.”²¹⁴ College and university students and professors must be able “to inquire, to study and to evaluate, to gain new maturity and understanding.”²¹⁵ In some cases, university professors also have First Amendment rights over the content they teach in their classrooms.²¹⁶ Although the Supreme Court held in 2006 that public officials generally do not have First Amendment protections for speech that they express as part of their official duties, it refused to determine whether “expression related to academic scholarship or classroom instruction” enjoyed additional First Amendment protections and hinted that the concept of academic freedom could constitute “another level of constitutional concern” regarding the rights of academics.²¹⁷ Anti-diversity and inclusion laws implicate these constitutional concerns by interfering with professors’ ability to address important issues without the risk of discipline or loss of employment.

D. *Such prohibitions contradict the spirit and purpose of the Fourteenth Amendment.*

Anti-diversity and inclusion laws ban efforts by educators to prevent harm to students of color when they are taught an American history that excludes, erases, or denigrates them and their ancestors. This harms students by erasing or excluding the history of BIPOC children, and it contravenes the primary goal of the Equal Protection Clause of the Fourteenth Amendment: ending racial subjugation.

1. The framing of the Fourteenth Amendment: sovereign protection for natural rights

Section 1 of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²¹⁸

The Fourteenth Amendment overturned what had become the constitutional basis for the country’s caste system—the Supreme Court’s *Dred Scott* decision—by establishing birthright citizenship.²¹⁹ And the Fourteenth Amendment also prohibited the states from continuing to deny to Black Americans enjoyment of the rights enumerated in the Bill of Rights and provided the procedural protection of “due process of law” to any “person” subjected to state deprivations. Most important, Section 1’s Equal Protection Clause did not merely “d[o] away with the injustice of subjecting one caste of persons to a code not applicable to another” but also suggested a positive right to protection from the state.²²⁰

The fundamental right to equal protection has long been a part of Anglo-American legal and political theory.²²¹ Sir William Blackstone conceptualized the state's role as one that ensured the protection of a citizen's natural rights to life, liberty, and property.²²² The protection of life encompassed "enjoyment of [one's] life, [one's] limbs, [one's] body, [one's] health, and [one's] reputation" and the protection of liberty included "the power of . . . removing one's persons [sic] to whatsoever place one's own inclination may direct; without imprisonment or restraint," and the right to property was defined as "the free use, enjoyment, and disposal of all [one's] acquisitions, without any control or diminution save only by the laws of the land"²²³ In accordance with social contract theory, the duty of protection "followed from presumptive consent to be governed."²²⁴ Equal protection in the Anglo-American tradition cannot, therefore, be divorced from natural rights theory. And it was uncontroversial, at the time of the Fourteenth Amendment's drafting, to consider equal protection a right that had already been conferred on all U.S. citizens.²²⁵

The Equal Protection Clause has, accordingly, come to be embraced as affirming not only the right to protection from physical violence but also the right to equal protection of economic and welfare rights.²²⁶ Both the language and the spirit of the Equal Protection Clause support this interpretation. The decision of the framers to include an "equal protection" provision, though one was not a part of the Fourteenth Amendment's early drafts, was a conscious choice to invoke the Anglo-American natural rights tradition of equal protection.²²⁷

2. Inclusive education as the effectuation of equal protection guarantees

The Supreme Court affirmed the guarantee of Equal Protection in public education a generation ago. Since then, the Court's jurisprudence has illustrated that both tangible and intangible indicia of inherent inequality in school settings can deprive students of their Fourteenth Amendment rights. Anti-diversity curriculum mandates bear hallmarks of the constitutional infirmities that caused the Court to strike down prior mandates bearing such indicia and, especially for BIPOC students, there is a compelling case that the Equal Protection Clause mandates inclusive public education.

The Supreme Court declared for the first time in *Brown v. Board of Education* that segregating students by race was "inherently unequal" and thus caused Black children to be "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."²²⁸ In identifying the harm that Black children suffered as a result of segregation, the Court focused significantly on "intangible considerations,"²²⁹ highlighting the stigmatizing and psychologically damaging effects of segregating students by race: "To separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."²³⁰ Relying on psychological and sociological studies, the Court concluded that *the fact* of school segregation itself—putting aside whether or not the segregated groups received tangibly equivalent educational resources—caused the Black children to suffer harm, including the loss of a sense of personal worth and dignity, defeatist attitudes, an arrestment of personal ambitions, anxiety, and antisocial and personality inhibitive behaviors.²³¹ Later, in *Plyler v.*

Doe, the Court invoked *Brown* to similarly conclude that tangible and intangible consequences of a statute denying undocumented children the right to enroll in public school gave rise to an equal protection violation:²³² “The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.”²³³

This framework for Equal Protection analysis established in *Brown*, and deployed in later cases such as *Plyer*—making a showing of discriminatory intent where the law does not facially discriminate on the basis of a suspect classification, but has a discriminatory impact—remains a viable method by which to claim that educational policy that has harmful tangible and/or intangible consequences affecting a protected class of students violates the Equal Protection Clause. As detailed above, the harmful effects of anti-diversity and inclusion laws impact BIPOC public school students in both tangible and intangible ways. The stigmatizing, isolating, and other adverse psychological effects of subjecting BIPOC students to an education that has erased or excluded their own histories resemble the intangible adverse effects of school segregation that gave rise to the decision in *Brown*. These effects, including how BIPOC students perceive their own status in the community, are magnified by a wealth of evidence illustrating how Black Americans, including Black students, are subjected to unequal treatment in other contexts (in and outside of educational settings). Data consistently illustrate, for example, that schools disproportionately discipline Black students, especially Black boys, and further stigmatize them by making negative assumptions about their academic abilities.²³⁴ Data also show an association between psychological distress and segregation for Black Americans who live in high-poverty neighborhoods,²³⁵ with no comparative association for white Americans.²³⁶ The harmful effects of anti-discrimination and inclusion laws on BIPOC students would therefore compound the effects of existing inequities that at least certain BIPOC students’ experience.

Accordingly, just as states moved to integrate public schools in the wake of *Brown* to remedy the inherent inequality arising from the intangible effects of the segregation of Black students, states today should similarly perceive inclusive curricula as an effectuation of Equal Protection for students (particularly BIPOC students) who may otherwise be subjected to inherently unequal education. This is reinforced by research demonstrating that, contrary to the suggestion that discussions of race and racism cause harm to children, children are in fact harmed by the refusal to speak openly about racism.²³⁷ This is especially so for Black children who must process racial stress resulting from direct experiences with racism and indirect exposure to racialized violence that pervades contemporary culture.²³⁸

As evidence of the inherent inequality produced by anti-diversity and inclusion laws continues to build—especially as data is generated over time by education systems and communities that operate under those laws—states and municipalities should expect an ever-growing number of Equal Protection and other legal challenges to these laws.

V. Conclusion

Culturally responsive and racially inclusive education not only benefits students pedagogically, but also is consistent with federal and state law. Embracing culturally responsive and racially inclusive education affords students of all backgrounds the benefit of a rigorous and enriched education that more readily achieves the fundamental goals of public education. Culturally responsive and racially inclusive education develops better equipped students who can meet the demands of a globalized world. It is a benefit for students across all ethnic and racial classifications.

Racially inclusive education recognizes that racial identity is a central part of a student's perspective, and that personal aspects of racial identity have significant meaning, particularly for BIPOC students' academic well-being. Such education benefits students in ways that would otherwise be impracticable without such learning. Culturally responsive education also encourages critical thinking skills, development of individual identity, affirms student racial awareness, and improves academic proficiency.

Rather than attempt to censor educators, discriminate against antiracist viewpoints, or block efforts to improve and expand school curricula, legislatures and school boards should support efforts to make curricula culturally responsive and racially inclusive and improve public education for all students. Doing so is key to the very foundation of public education: preparing all students for strong citizenry.



APPENDIX: TERMINOLOGY

Below is a list of terms used throughout this report. Unless otherwise indicated, all definitions were taken and/or adopted from the Racial Equity Tools Glossary,²³⁹ or otherwise adapted by the authors.

The **1619 Project** is an ongoing initiative from *The New York Times Magazine* that began in August 2019—the 400th anniversary of the beginning of American slavery. The 1619 Project aims to reframe U.S. history by placing the consequences of slavery and the contributions of Black Americans at the center of our national narrative.²⁴⁰

Anti-Diversity and Inclusion Laws, as used herein, describe laws enacted to limit and/or penalize the teaching and/or promotion of inclusive and diverse concepts in K-12 schools, colleges and universities, and state agencies. For example, some of these laws prohibit teachers from discussing racism, sexism, and issues of equality and justice. Others prohibit a student or employee from being “compelled” to affirm critical race theory or a belief in an allegedly “divisive” concept, including that one race or sex is inherently racist, sexist, or oppressive.

Antiracism is a term referring to the work of actively opposing racism by advocating for changes in political, economic, and social life. Antiracism tends to be an individualized approach, and is set up in opposition to individual racist behaviors and impacts. However, as discussed herein, state-level antiracism efforts have recently been made across the United States to address systemic racism.

BIPOC is a term referring to “Black, Indigenous, and People of Color.” While “POC” or “People of Color” is often used as well, BIPOC explicitly leads with Black and Indigenous identities, which helps to counter anti-Black racism and invisibilization of Native people and communities.

Critical Race Theory (CRT) is an intellectual movement and framework of legal analysis that argues that race is a socially constructed category, and that racism is inherent in the law and institutions of the United States.²⁴¹

Cultural Racism is a term referring to representations, messages, and stories that convey the idea that behaviors and values associated with white people are automatically “better” or more “normal” than those associated with other racially defined groups.

Culturally Biased Education is a term, as used herein, to describe educational practices and curricula that promote a particular culture—typically the dominant culture—and that favor students familiar with that culture’s rules (both spoken and unspoken), values, beliefs, habits, patterns of thinking, behaviors, and styles of communication. For example, some states limit the subject matter taught in schools, purposefully excluding topics that address the United States’ history of racism.

Culturally Responsive Education is a term, as used herein, to describe educational practices and curricula that promote all cultures, not just the dominant culture, by being mindful of the rules, values, and beliefs of various cultures, and the needs of all students within those cultures. For example, some states have introduced efforts to create committees to

address the needs of students of color and to explore how to meet those needs in public school education.

Discrimination is a term referring to the unequal treatment of members of various groups based on race, gender, social class, sexual orientation, physical ability, religion, and other social categories.

Diversity is a term referring to the ways in which people differ, encompassing all of the different characteristics that make one individual or group different from another. Diversity can be based on race, gender, sexual orientation, class, age, country of origin, education, religion, or geography, for example.

Ethnic Studies is the interdisciplinary study of the social, political, economic, and historical perspectives of the United States' diverse racial and ethnic groups. Ethnic studies helps foster cross-cultural understanding among both students of color and white students, and aids students in valuing their own cultural identity while appreciating the differences around them.²⁴²

Inclusion is a term referring to authentically inviting traditionally excluded individuals and/or groups to participate in processes, activities, and decision- and policy-making in a way that shares power with those individuals and/or groups.

POC, or "People of Color," is a collective term referring to non-white racial groups. While the term "People of Color" is generally accepted as a way of connecting, unifying and building power across diverse communities, it can result in the erasure of distinct identities and often oversimplifies the complexities of race in America.

Racial Equity is a term referring to the condition that would be achieved if one's racial identity no longer predicated, in a statistical sense, how one fares, which would include the elimination of policies, practices, attitudes, and cultural messages that reinforce differential outcomes by race or that fail to eliminate them.

Racial Inequity is a term referring to a condition in which two or more racial groups do not stand on approximately equal footing, such as the percentages of each ethnic group in terms of dropout rates, single-family home ownership, access to health care, etc.

Racial Justice is a term referring to the systematic fair treatment of people of all races, resulting in equitable opportunities and outcomes for all. Racial justice requires not only the absence of discrimination and inequities, but also the presence of deliberate systems and supports to achieve and sustain racial equity through proactive and preventative measures.

Racially Inclusive Education is a term, as used herein, to describe educational practices and curricula that welcome students and educators from traditionally excluded groups into the learning and teaching process. For example, some states have introduced requirements for public schools to offer courses on Black, Native American, Asian American, or Latinx history and/or studies.

Racism is a term referring to a historically rooted system of power hierarchies based on race in which one group has the power to carry out systematic discrimination through the

institutional policies and practices of the society, and to shape cultural beliefs and values that support those racist policies and practices.

Structural Racism is a term referring to the normalization of historical, cultural, institutional, and interpersonal dynamics that routinely advantage white people while producing cumulative and chronic adverse outcomes for Black people, Indigenous peoples of America, and/or People of Color.

White Privilege is a term referring to the unearned set of advantages, entitlements, benefits, and choices bestowed on people solely because they are white.

CITATIONS

- ¹ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275-76 (1964).
- ² See Serkan Aslan & Birsal Aybek, *Testing the Effectiveness of Interdisciplinary Curriculum-Based Multicultural Education on Tolerance and Critical Thinking Skill*, 6 INT'L J. EDUC. METHODOLOGY 43 (2020).
- ³ *Racial/Ethnic Enrollment in Public Schools*, NAT'L CTR. EDUC. STAT. (last updated May 2021), <https://nces.ed.gov/programs/coe/indicator/cge>.
- ⁴ JENNY MUÑIZ, NEW AM., UNDERSTANDING CULTURALLY RESPONSIVE TEACHING: A 50-STATE SURVEY OF TEACHING STANDARDS 10-11 (2019, rev. 2020), https://d1y8sb8igg2f8e.cloudfront.net/documents/Culturally_Responsive_Teaching_2020-09-23_140033_qKd2fgA.pdf (discussing and citing studies).
- ⁵ See, e.g., Summer Wood & Robin Jocius, *Combatting "I Hate This Stupid Book!": Black Males and Critical Literacy*, 66 READING TCHR. 661 (2013) [hereinafter Wood & Jocius]; James Earl Davis, *Early Schooling and Academic Achievement of African American Males*, 38 URB. EDUC. 515 (2003); Ailing Kong & Ellen Fitch, *Using Book Club to Engage Culturally and Linguistically Diverse Learners in Reading, Writing, and Talking About Books*, 56 READING TCHR. 352 (2002); Barbara Comber, *Negotiating Critical Literacies*, 6 SCH. TALK, no. 3, Apr. 2001, at 1; Lee Heffernan & Mitzi Lewison, *Making Real-World Issues Our Business: Critical Literacy in a Third-Grade Classroom*, 9 PRIMARY VOICES K-6, no. 2, Oct. 2000, at 15; CHRISTINE E. SLEETER & MIGUEL ZAVALA, NAT'L EDUC. ASS'N, WHAT THE RESEARCH SAYS ABOUT ETHNIC STUDIES: CHAPTER 3 FROM TRANSFORMATIVE ETHNIC STUDIES IN SCHOOLS: CURRICULUM, PEDAGOGY, AND RESEARCH (2020), <https://www.nea.org/sites/default/files/2020-10/What%20the%20Research%20Says%20About%20Ethnic%20Studies.pdf> [hereinafter Sleeter & Zavala]; Jeane F. Copenhaver, *Listening to Their Voices Connect Literary and Cultural Understandings: Responses to Small Group Read-Alouds of Malcolm X: A Fire Burning Brightly*, 14 NEW ADVOC. 343 (2001).
- ⁶ Wood & Jocius, *supra* note 5, at 661.
- ⁷ *Id.* at 663.
- ⁸ *Id.* at 663-68; cf. Oseela Thomas et al., *An Evaluation Study of the Young Empowered Sisters (YES!) Program: Promoting Cultural Assets Among African American Adolescent Girls Through a Culturally Relevant School-Based Intervention*, J. BLACK PSYCH. 281 (2004); P.E. Halagao, *Holding Up the Mirror: The Complexity of Seeing Your Ethnic Self in History*, THEORY & RSCH. IN SOC. EDUC. 459 (2004); P.E. Halagao, *Liberating Filipino Americans Through Decolonizing Curriculum*, RACE, ETHNICITY & EDUC. 495 (2010); Jessica M. Vasquez, *Ethnic identity and Chicano literature: How ethnicity affects reading and reading affects ethnic consciousness*, ETHNIC & RACIAL STUD. 903 (2005).
- ⁹ Sleeter & Zavala, *supra* note 5, at iv.
- ¹⁰ See generally *id.* (summarizing numerous studies); CHRISTINE E. SLEETER, NAT'L EDUC. ASS'N, THE ACADEMIC AND SOCIAL VALUE OF ETHNIC STUDIES: A RESEARCH REVIEW (2011) [hereinafter Sleeter, 2011] (same); JENNY MUÑIZ, NEW AM., CULTURALLY RESPONSIVE TEACHING: A REFLECTION GUIDE (2020), https://d1y8sb8igg2f8e.cloudfront.net/documents/Culturally_Responsive_Teaching_A_Reflection_Guide_2021_WAMBwaO.pdf (same); Thomas S. Dee & Emily K. Penner, *The Causal Effects of Cultural Relevance: Evidence from an Ethnic Studies Curriculum*, 54 AM. EDUC. RSCH. J. 127 (2017) [hereinafter Dee, 2017]; Nolan L. Cabrera et al., *Missing the (Student Achievement) Forest for All the (Political) Trees: Empiricism and the Mexican American Studies Controversy in Tucson*, 51 AM. EDUC. RSCH. J. 1084 (2014) [hereinafter Cabrera, 2014]; Julio Cammarota & Augustine F. Romero, *The Social Justice Education Project: A Critically Compassionate Intellectualism for Chicana/o Students*, in HANDBOOK OF SOCIAL JUSTICE IN EDUCATION 465 (William Ayers et al. eds., 2009) [hereinafter Cammarota, 2009]; Ellen Eliason Kisker et al., *The Potential of a Culturally Based Supplemental Mathematics Curriculum to Improve the Mathematics Performance of Alaska Native and Other Students*, 43 J. RSCH. MATHEMATICS EDUC. 75 (2012) [hereinafter Kisker, 2012]; JERRY LIPKA ET AL., TRANSFORMING THE CULTURE OF SCHOOLS: YUP'IK ESKIMO EXAMPLES (1998) [hereinafter Lipka, 1998]; Jerry Lipka et al., *Math in a Cultural Context: Two Case Studies of a Successful Culturally Based Math Project*, 36 ANTHROPOLOGY & EDUC. Q. 367 (2005) [hereinafter Lipka, 2005]; Jacque Ensign, *Including Culturally Relevant Math in an Urban School*, 34 EDUC. STUD. 414 (2003); William F. Tate, *Returning to the Root: A Culturally Relevant Approach to Mathematics Pedagogy*, 34 THEORY INTO PRAC. 166 (1995); Eric Gutstein, *Teaching and Learning Mathematics for Social Justice in an Urban, Latino School*, 34 J. RSCH. MATHEMATICS EDUC. 37 (2003); ROBERT P. MOSES & CHARLES E. COBB, JR., RADICAL EQUATIONS: MATH LITERACY AND CIVIL RIGHTS (2001); Teresa L. McCarty & Tiffany S. Lee, *Critical Culturally Sustaining/Revitalizing Pedagogy and Indigenous Education Sovereignty*, 84 HARV. EDUC. REV. 101 (2014) [hereinafter McCarty, 2014]; Teresa L. McCarty, *Language, Literacy, and the Image of the Child in American Indian Classrooms*, 70 LANGUAGE ARTS 182 (1993) [hereinafter McCarty, 1993]; Catherine E. Matthews & Walter S. Smith, *Native American Related Materials in Elementary*

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- ¹¹ Cammarota, 2009, *supra* note 10; Cabrera, 2014, *supra* note 10; *see also* López, 2016, *supra* note 10 (finding that teachers who reported culturally responsive teaching behaviors in terms of language and cultural knowledge were both significantly and positively related to Latinx students' reading outcomes); López, 2017, *supra* note 10 (same); López, 2018, *supra* note (same).
- ¹² Cammarota, 2009, *supra* note 10; Cabrera, 2014, *supra* note 10, at 1101-02.
- ¹³ Lipka, 2005, *supra* note 10.
- ¹⁴ Lipka, 2005, *supra* note 10; *see also* Lipka, 1998, *supra* note 10; Kisker, 2012, *supra* note 10, at 100 (evaluating the impact of MCC modules on second graders' mathematics achievement and finding the impact of MCC curriculum "positive, statistically significant, and moderate to large in terms of effect sizes," with a positive impact on both Alaska Native and mixed-ethnic student groups).
- ¹⁵ McCarty, 2014, *supra* note 10; McCarty, 1993, *supra* note 10; *see also* Matthews & Smith, *supra* note 10 (finding improved science achievement by Native American students exposed to Native American science materials).

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- 16 McCarty, 2014, *supra* note 10.
- 17 McCarty, 1993, *supra* note 10.
- 18 Sleeter & Zavala, *supra* note 5, at 15.
- 19 *Id.*
- 20 *Id.*
- 21 *Id.*
- 22 See Lee, 1993, *supra* note 10 (finding improved literary analysis skills); Lee, 1995, *supra* note 10 (finding that students taught using Cultural Modeling gained more than twice on pretest to posttest scores than the control group students); Lee, 2001, *supra* note 10 (finding that when Cultural Modeling is used, students gradually learn to direct discussions interpreting and analyzing texts); Lee, 2006, *supra* note 10 (same); Christianakis, *supra* note 10 (same).
- 23 Dee, 2017, *supra* note 10; Bonilla, 2021, *supra* note 10.
- 24 *Id.* at 35.
- 25 Duncan, 2012, *supra* note 10, at 93.
- 26 *Id.* at 94-95.
- 27 Rickford, 2001, *supra* note 10; see also Tyson, 2002, *supra* note 10 (documenting students' developing understanding of the complexities of social action, as well as their ability to use text to derive meaning, after exposure, in a social studies class, to adolescent novels about social issues).
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- 29 Gay, 2018, *supra* note 10.
- 30 Adjapong, 2015, *supra* note 10; Hall, 2013, *supra* note 10; Stone, 2016, *supra* note 10. Adjapong, 2015 defines Hip-Hop pedagogy "as a way of authentically and practically incorporating the creative elements of Hip-Hop into teaching, and inviting students to have a connection with the content while meeting them on their cultural turf by teaching to, and through[,] their realities and experiences." Adjapong, 2015, *supra* note 10, at 67.
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58 Chavous, 2003, *supra* note 10.
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63 *Id.* at 324 (citations omitted).
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65 *Id.*
66 *Id.* at 44, 49.
67 *Id.* at 44.
68 *Id.* at 45, 49.
69 *Id.* at 45-46.
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- ⁸⁶ Ruanda Garth-McCullough, *Untapped Cultural Support: The Influence of Culturally Bound Prior Knowledge on Comprehension Performance*, 49 READING HORIZONS 1, 19 (2008).
- ⁸⁷ *Id.* at 19.
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- ⁹⁰ See *id.*
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- ⁹² See Denisa R. Superville, *To Root Out Racism in Schools, Start With Who You Hire*, EDUC. WK. (Oct 13, 2020), <https://www.edweek.org/leadership/to-root-out-racism-in-schools-start-with-who-you-hire/2020/10>.
- ⁹³ See *id.*
- ⁹⁴ Those states are California (approving a statewide ethnic studies curriculum and requiring all students to complete a course in ethnic studies to receive a diploma), Colorado (civics education law that tasks a commission with recommending updates to learning standards for the history, culture, and social contributions of people of color, religious minorities, and LGBTQ people), Connecticut (requiring that all high schools offer African American Studies and Latino Studies), Delaware (requiring all K-12 public and charter schools to establish and implement a curriculum on Black History), Illinois (mandating the teaching of Asian American history in addition to African American history and that of other ethnic groups and incorporating culturally responsive teaching standards), Louisiana (allowing African American history to fulfill the state scholarship's eligibility requirements), Maine (mandating instruction in African American studies and the history of genocide), Massachusetts (requiring the development of a curriculum that addresses systemic racism in literature and culture, the white genocide of Native Americans, the origins of slavery and white supremacist ideology in America, and the internment of Japanese Americans and racism towards Asian people, among other topics), Nevada (requiring instruction in K-12 schools on the history and contributions to science, the arts, and humanities of Native Americans and Native American tribes, persons of marginalized sexual orientation or gender identities, persons from various racial and ethnic backgrounds, and other diverse groups), New Mexico (creating an advisory council comprised of members "knowledgeable about and interested in the education of Black students"), New Jersey (requiring school districts to include instruction on diversity and inclusion), New York (encouraging school districts to take steps to "elevate[] the issues of diversity, equity and inclusion"), Rhode Island (requiring African Heritage History education), Vermont (creating a working group to study updates to standards that "recognize fully the history, contributions, and perspectives of ethnic groups and social groups"), Virginia (creating a Culturally Relevant and Inclusive Practice Committee to review and provide recommendations on the state's history and social science standards, as well as anti-bias education), and Washington (providing ongoing training programs relating "to equity, cultural competency, and dismantling institutional racism").
- ⁹⁵ Press Release, Gov. Ned Lamont, Governor Lamont Announces Connecticut Becomes First State in Nation to Require High Schools Provide Courses on Black and Latino Studies (Dec. 9, 2020), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/12-2020/Governor-Lamont-Announces-Connecticut-Becomes-First-To-Require-Courses-on-Black-and-Latino-Studies>; Natasha Ambriz-Villela, *In the Midst of National Debates, Connecticut Teachers Take on Anti-Racist Education*, YALE NEWS (Dec. 3, 2021, 2:20 AM), <https://yaledailynews.com/blog/2021/12/03/in-the-midst-of-national-debates-connecticut-teachers-take-on-anti-racist-education/>; Conn. Pub. Act No. 19-12, 2, <https://www.cga.ct.gov/2019/act/pa/pdf/2019PA-00012-R00HB-07082-PA.pdf>.
- ⁹⁶ H.B. 198, 151st Gen. Assemb. (Del. 2021), <https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=48487&legislationTypeId=1&docTypeId=2&legislationName=HB198>.
- ⁹⁷ *Ethnic Studies Model Curriculum*, Curriculum Frameworks & Instructional Materials, California Dep't of Educ., <https://www.cde.ca.gov/ci/cr/cf/esmc.asp> (last visited May 26, 2022).
- ⁹⁸ S.B. 0648, 102nd Gen. Assemb. (Ill. 2021), <https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=110&GA=102&DocTypeId=SB&DocNum=648&GAID=16&LegID=&SpecSess=&Session=>

⁹⁹ S.B. 5044, 67th Leg., 2021 Reg. Sess., at 1 (Apr. 20, 2021), <https://lawfilesexternal.leg.wa.gov/biennium/2021-22/Pdf/Bills/Senate%20Passed%20Legislature/5044-S.PL.pdf#page=1>.

¹⁰⁰ H.R. 43, 2021 Leg. Reg. Sess. (N.M. 2021), <https://www.nmlegis.gov/Sessions/21%20Regular/final/HB0043.pdf>.

¹⁰¹ U.S. Const., amend. I.

¹⁰² *Id.* amend. XIV, § 1.

¹⁰³ 42 U.S.C. § 2000d.

¹⁰⁴ *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

¹⁰⁵ *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

¹⁰⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), *supplemented*, 349 U.S. 294 (1955); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681-84 (1986) (affirming that the essence of public education is “prepar[ing] pupils for citizenship in the Republic” through “inculcation of [fundamental] values”).

¹⁰⁷ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

¹⁰⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁰⁹ *González v. Douglas*, 269 F. Supp. 3d 948, 972 (9th Cir. 2017).

¹¹⁰ *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion).

¹¹¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995).

¹¹² *Pico*, 457 U.S. at 870-71 (plurality opinion) (establishing that “an all-white school board, motivated by racial animus, [cannot] decide[] to remove all books authored by Blacks or advocating racial equality and integration”).

¹¹³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹¹⁴ U.S. Const. amend. XIV, § 1.

¹¹⁵ *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 755 n.6 (1985).

¹¹⁶ *Id.* at 755-56 & n.6.

¹¹⁷ *See id.* at 758.

¹¹⁸ *See id.* at 756-58. During the debates on the Freedmen’s Bureau bills, Senator Lyman Trumbull proposed the Civil Rights Act of 1866, which previewed the equal protection language in the Fourteenth Amendment. *See id.* at 762. President Johnson vetoed the Act in part because it provided blacks with what Johnson regarded as unprecedented and unwarranted special treatment. *Id.* at 769-71. It was nevertheless enacted by Congress when “[t]he House voted 104 to 33 to override the veto, and the Senate voted the bill into law by a margin of 33 to 12.” *Id.* at 775.

¹¹⁹ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873); *see also Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (the purpose of the Fourteenth Amendment was “to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons . . . whenever it should be denied by the States”), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975).

¹²⁰ *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964).

¹²¹ *Miller v. Johnson*, 515 U.S. 900, 904 (1995); *see, e.g., Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin*, 379 U.S. at 191-192; *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹²² *Miller*, 515 U.S. at 928 (O’Connor, J., concurring).

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¹²⁵ *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

¹²⁶ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 799 (2007) (Stevens, J., dissenting).

¹²⁷ 42 U.S.C. § 2000d.

¹²⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 328-29 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

¹²⁹ Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining ‘Discrimination,’* 70 GEO. L.J. 1, 9 (1981).

¹³⁰ Senator Humphrey, the Senate floor manager, stated the purpose of Title VI as follows: “The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. *In many instances* the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. . . . *In all cases*, such discrimination is contrary to national policy, and to the moral sense of the Nation.” 110 Cong. Rec. 6544 (1964) (emphases added); *see also Bakke*, 438 U.S. at 418 n.21 (Stevens, J., concurring in the judgment in part and dissenting in part) (quoting the same).

¹³¹ *Bakke*, 438 U.S. at 334 (Brennan, J., concurring in the judgment in part and dissenting in part).

- 132 28 C.F.R. § 42.101 *et seq.* (Department of Justice); 34 C.F.R. §100.1 *et seq.* (Department of Education).
- 133 28 C.F.R. § 42.104(b)(2); 34 C.F.R. § 100.3(b)(2); *see also Alexander v. Choate*, 469 U.S. 287, 292-94 (1985).
- 134 *See, e.g.*, 59 Fed. Reg. 11,448, 11,448-54 (Mar. 10, 1994); Letter from Russlynn Ali, Assistant Sec’y for C.R., Off. for C.R., U.S. Dep’t of Educ. (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.
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- 136 The states addressing equal rights guarantees based on race generally include Alaska, Connecticut, Florida, Louisiana, Massachusetts, Montana, Nebraska, New Hampshire, Rhode Island, Texas, and Virginia.
- 137 N.Y. Const. art. I, § 11.
- 138 Tex. Const. art. I, § 3a.
- 139 Mont. Const. art. II, § 4.
- 140 Neb. Const. art. I-30.
- 141 *Campaign for Fiscal Equity, Inc. v. State*, 616 N.Y.S.2d 851, 856 (Sup. Ct. 1994) (construing the Equal Rights Clause in New York State’s Constitution and concluding that “[t]he opportunity to obtain education . . . without discrimination because of . . . race, creed, [or] color . . . is hereby recognized as and declared to be a civil right” and that “[a] system which is discriminatory in effect albeit not in intent may violate civil rights recognized by the statute” and, accordingly, a claim of discrimination in an educational context in violation of the New York’s Equal Rights Clause was viable even “without an allegation of discriminatory intent” (first alteration and first omission in original) (quoting N.Y. Exec. Law § 291), *aff’d as modified*, 619 N.Y.S.2d 699 (App. Div. 1994), *and aff’d as modified*, 655 N.E.2d 661 (N.Y. 1995)).
- 142 *Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 359 (Conn. 2010) (Schaller, J., concurring) (alterations in original) (quoting *Sheff v. O’Neill*, 678 A.2d 1267, 1285 (Conn. 1996)).
- 143 Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WK. (June 11, 2021; updated Mar. 16, 2022), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [hereinafter Schwartz, *Map*]; *see also TruthBeTold | Legislative Tracker*, AFRICAN AM. POL’Y F., <https://docs.google.com/spreadsheets/d/10QuklhAyztEHKjT3OGU7MV3XhiOGXHqUnyuNgQfkz38/edit#gid=1449112869>.
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- 152 News Release, Ron DeSantis, Governor of Fla., 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/>.
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- 154 *Id.*
- 155 Ron DeSantis, Governor of Fla., Stop W.O.K.E. Act, <https://web.archive.org/web/20211215164306/https://www.flgov.com/wp-content/uploads/2021/12/Stop-Woke-Handout-1.pdf> (last visited Mar. 17, 2022).
- 156 Florida Admin. Code, 6A-1.094124 (2022).
- 157 *Id.*
- 158 *Ariz. Sch. Bds. Ass’n, Inc. v. State*, No. CV-2021012741, 2021 WL 4487632, at *1 (Ariz. Super. Ct. Sept. 27, 2021), *aff’d*, No. CV-21-0234-T/AP, 2021 WL 5105289 (Ariz. Nov. 2, 2021), *opinion issued*, 501 P.3d 731 (Ariz. 2022).
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