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## School Curriculum: The Sigmatic Harm to Students and the Responsibility of Congress to Act Again

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# SCHOOL CURRICULUM: THE STIGMATIC HARM TO STUDENTS AND THE RESPONSIBILITY OF CONGRESS TO ACT AGAIN

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## TABLE OF CONTENTS

OPENING THOUGHTS .....	227
INTRODUCTION .....	229
I. DETRIMENT OF STATE DECISIONS IN CURRICULUM.....	231
A. <i>The State’s Role</i> .....	231
B. <i>Constitutional Limitations on the State</i> .....	232
i. First Amendment Limitation .....	232
ii. Fourteenth Amendment .....	233
C. <i>The Troublesome Curriculum</i> .....	233
i. The Truth about Critical Race Theory and the 1619 Project .....	237
II. FEDERAL ACTION AS THE SOLUTION.....	242
A. <i>Remedy: First Amendment</i> .....	243
B. <i>Remedy: Fourteenth Amendment</i> .....	244
C. <i>Remedy: Taxing and Spending Power</i> .....	244
CONCLUSION .....	246

## OPENING THOUGHTS

The integration of public schools after the *Brown v. Board of Education II* (1955) mandate was limited to the physical integration of school districts.<sup>2</sup> However, school curriculum and materials continued to center around a “White America,” failing to show children the contri-

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2. See Jonathon Zimmerman, *Brown-ing the American Textbook: History, Psychology, and the Origins of Modern Multiculturalism*, 44 HIST. OF EDUC. Q., 46, 60 (2004) (stating that Brown did not address issues of curriculum); See also *McCleskey v. Kemp*, 481 U.S. 279, 314-19 (1986) (stating that equal protection only guarantees equal opportunity, not equal results, in its decision to ignore statistical evidence of disparate treatment of Black people in capital sentencing determinations).

butions of non-white actors in American society.<sup>3</sup> There has been a movement for a more diverse curriculum since *Brown*, which has been met with extreme pushback on the basis that ideals rooted in Critical Race Theory and the 1619 Project are indoctrinating students and creating a racial divide.<sup>4</sup> These programs are challenging both the historical method of downplaying the presence of a non-white perspective and the insistence on pretending race is no longer a concern of this country, while students are faced with the consequences of their race each day outside the classroom.<sup>5</sup> The continuous exclusion of minorities from the curriculum carries a similar harm to minority students as those in *Brown*—where black students were excluded from public schools.<sup>6</sup> The psychological harm manifests in internalized doubt, which stunts a minority student’s motivation and ability to pursue further education and seek positions of influence.<sup>7</sup>

When *Brown* was decided, the Supreme Court felt that it could not trust the States to encourage and facilitate equality on its own, which was proven true in the subsequent, decades-long resistance against integration following the *Brown II* mandate.<sup>8</sup> Once again, the

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3. LaGarrett J. King, *Black History is Not American History: Toward a Framework of Black Historical Consciousness*, 84(6) NAT’L COUNCIL FOR SOC. Stud. 335, 336 (2020); see Zimmerman, *supra* note 2; see generally Samantha Washington, *Diversity in Schools Must Include Curriculum*, CENTURY FOUND. (Sept. 17, 2018), <https://tcf.org/content/commentary/diversity-schools-must-include-curriculum/?session=1> (<https://tcf.org/content/commentary/diversity-schools-must-include-curriculum/?session=1>) (discussing the historical and ongoing Eurocentric nature of school curriculum and recent revisions to AP World History courses that exacerbate the lack of diversity).

4. See Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUCATION WEEK (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05>; Danielle J. Brown, *DeSantis: Parents Could Sue if Kids Are Taught ‘Critical Race Theory’ in FL Public Schools*, FLORIDA PHOENIX (Dec. 15, 2021, 11:16 AM), <https://floridaphoenix.com/2021/12/15/desantis-parents-could-sue-if-kids-are-taught-critical-race-theory-in-fl-public-schools/>; See generally *The Fatal Flaw of the 1619 Project Curriculum*, AM. REVOLUTION INST.: HIST. EDUC. (Aug. 14, 2020), <https://www.americanrevolutioninstitute.org/fatal-flaw-of-the-1619-project-curriculum/>

5. Janel George, *A Lesson on Critical Race Theory*, A.B.A. (Jan. 11, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/) (“CRT recognizes that racism is not a bygone relic of the past. Instead, it acknowledges that the legacy of slavery, segregation, and the imposition of second-class citizenship on Black Americans and other people of color continue to permeate the social fabric of this nation.”); see also Nikole Hannah-Jones et al., *The 1619 Project*, N.Y. TIMES MAG. (Aug. 14, 2019) (placing “the consequences of slavery and the contributions of black Americans” at the center of the nations’ story).

6. Zimmerman, *supra* note 2, at 47.

7. See Zimmerman, *supra* note 2, at 60 (“The individual Negro is inhibited in his thoughts, aspirations, and activities by his own mental concepts of himself and his racial group . . . .” (quoting a 1957 Springfield, Mass., guidance counselor)).

8. See *Green v. Cnty Sch. Bd.*, 391 U.S. 430, 432-33 (1968) (“The respondent School Board continued the segregated operation of the system after the *Brown* decisions, presum-

States cannot be trusted to move towards equality and away from backward community norms and bias without federal intervention. This is currently being exemplified by states like Florida—explicitly banning public schools from teaching Critical Race Theory.<sup>9</sup> The Supreme Court does not seem willing to extend *Brown* any further, but the federal government may encourage and facilitate curriculum equality under its enumerated Taxing and Spending Power.<sup>10</sup> Resisting efforts to diversify the curriculum will continue to harm students and prevent minority communities from progressing by giving all students a false representation of the society they must live in outside the classroom. This burdens both the students’ First Amendment right to information deemed to be of educational value by their educators as well as burdening their educators’ First Amendment right to free speech.<sup>11</sup>

#### INTRODUCTION

Curriculum decisions have historically been left to the states and local governments.<sup>12</sup> The federal government has essentially taken a backseat through Jim Crow, waves of immigration, and the Civil Rights Movement.<sup>13</sup> The Supreme Court unanimously found it necessary to intervene on the matter of race in public schools in the 1954

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ably on the authority of several statutes enacted by Virginia in resistance to those decisions.”); *see also* *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (the court didn’t trust fundamental rights to the political process, doubting the majority will push towards equality quick enough to ensure all Americans may participate in essential aspects of society on an equal basis providing Constitutional protection of same-sex marriage amidst State’s attempts to prohibit such unions.).

9. *See* S.B. 148, 124th Leg., Reg. Sess. 2022 (Fla. 2022); *see also* Danielle J. Brown, *supra* note 3 (describing the Governor Ron DeSantis’s legislation giving parents the right to sue if schools teach CRT).

10. U.S. CONST. art 1, § 8, cl. 1 (giving Congress the power to lay and collect taxes for the general welfare); *see* *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) (“Such measures ‘encourage a state to regulate in a particular way, [and] influenc[e] a State’s policy choices.’” (quoting *New York v. United States*, 505 U.S. 144, 160 (1992))).

11. *See* Zimmerman, *supra* note 2, at 62.

12. The Federal Role of Education, UNITED STATES DEP’T OF EDUC. (June 15, 2021), <https://www2.ed.gov/about/overview/fed/role.html>; *see* *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S. Ct. 686, 691 (1954).

13. Thomson Reuters, *The Roles of Federal and State Governments in Education*, FINDLAW (Mar. 21, 2018), <https://www.findlaw.com/education/curriculum-standards-school-funding/the-roles-of-federal-and-state-governments-in-education.html>; *see* Douglas N. Harris et al., *A Principled Federal Role in PreK-12 Education*, BROWN CTR. ON EDUC. POL’Y THE BROOKINGS, INSTITUTION (Dec. 2016), [https://www.brookings.edu/wp-content/uploads/2016/12/gs\\_20161206\\_principled\\_federal\\_role\\_browncenter1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/gs_20161206_principled_federal_role_browncenter1.pdf) (“During much of the past 200 years, the government restrained itself from direct involvement in the basic functions of teaching and learning in the schools.”).

decision of *Brown v. Board of Education*, subsequently requiring school districts across the Nation to integrate with “all deliberate speed.”<sup>14</sup> However, that was as far as the mandate went. The exclusionary practice of public school curriculum has largely remained unchanged while minority populations continue to grow and gain political recognition.<sup>15</sup> Minority students are growing up in a diverse country where they rarely see themselves reflected in a meaningful manner before they enter society.<sup>16</sup> This directly impacts minority students’ ability and motivation to continue their education or take on influential positions in society.<sup>17</sup> The same stigmatic harm to minorities that motivated the *Brown* decision is still present, only now multi-racial classrooms are being taught overwhelmingly from the white perspective of “White America.”<sup>18</sup> The federal government has had to step in to mandate equality before and should do so again. School districts have failed to go beyond physical integration.<sup>19</sup> The federal government should approach this problem with the same conviction as *Brown*, using its Taxing and Spending power to encourage and facilitate true educational equality throughout the Nation without usurping the States’ role. When left to their own devices, the states rarely seek to go against community norms, which includes racial bias and prejudicial ideals. This is especially true when most fail to recognize their own biases.<sup>20</sup>

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14. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (“At stake is the personal interest of plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. . . [T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling”).

15. See Zimmerman, *supra* note 2, at 60 (“Emphasizing legal separation of the races, *Brown* did not address issues of curriculum.”).

16. *Id.* at 60 (a guidance counselor stated that a black student “is unaware of a culture which can give him pride and self-respect; he knows only a civilization in which the contributions of his race . . . have been either discredited or forgotten.” (quoting a 1957 Springfield, Mass., guidance counselor)).

17. See NYC Coalition EJ-ROC, *supra* note 6 (analyzing the impact of Eurocentric textbooks on minority students).

18. Zimmerman, *supra* note 2, at 47 (“Borrowing directly from *Brown*, they argued that racist textbooks, like segregated classrooms, were ‘psychologically damaging’ to black children . . . textbooks injured Black self-concept, Black self-identification, and especially Black self-esteem.”); see also Sarah B. Shear et al., *Manifesting Destiny: Representations of Indigenous Peoples in K-12 U.S. History Standards*, 43 THEORY & RSCH. IN SOC. EDUC., 2015, at 68, 70 (Feb. 19, 2015) (“both studies demonstrated that the states in question promoted a Eurocentric narrative of Indigenous Peoples’ experiences in U.S. history.”).

19. See Zimmerman, *supra* note 2, at 60 (stating that *Brown* did not address issues of curriculum); see generally *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (arguing that focusing on the physical separation of learning facilities for the races, despite the quality of education provided, causes an inferiority complex in black children); see Zimmerman, *supra* note 2.

20. See *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 433-34 (1968) (providing an example of states enacting statutes to undermine the *Brown* decision and continue a segregated dual-

Until a more diverse and inclusive curriculum is accepted that embraces the differing experiences and contributions of non-white groups in America, minority students will continue to be denied opportunities. This comes as a result of being taught a curriculum that erases their existence and teaches them that they are a harm to society as a collective.<sup>21</sup> Pretending that this country does not have a dark history does not protect students. Accurate knowledge is the best way to prepare students for the world and to participate in being part of the solution.<sup>22</sup>

## I. DETRIMENT OF STATE DECISIONS IN CURRICULUM

### A. The State's Role

Education is within the domain of the States, which is subject to the constitutional restrictions of the First and Fourteenth Amendment rights of students.<sup>23</sup> From the standard, selection, and regulation of curriculum to the teaching methods and instructional material, it is within the States' authority to determine educational policy.<sup>24</sup> Quoting the petitioner School Board's brief, the Court, in accordance with *Board of Education v. Pico*, stated that "local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,'" and that "there is a legitimate and substantial community interest in promoting traditional, social, moral, and political values."<sup>25</sup> The role of the federal government in public education has historically been limited to collecting information and responding to emergencies in times of national crisis.<sup>26</sup>

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school system); e.g. ., *Cowan v. Bolivar Cnty. Bd. of Educ.*, 186 F. Supp. 3d 564, 598-99 (N.D. Miss. 2016) (providing an example of school districts still desegregating over 50 years after the Brown mandate)

21. See NYC Coalition EJ-ROC, *supra* note 2 (describing the impact on minority students of Eurocentric curriculum).

22. See Kate Shuster, *Teaching Hard History: American Slavery*, S. POVERTY L. CTR., Center 1, 20-21 (Jan. 31, 2018), [https://www.splcenter.org/sites/default/files/tt\\_hard\\_history\\_american\\_slavery.pdf](https://www.splcenter.org/sites/default/files/tt_hard_history_american_slavery.pdf) (discussing the need for confrontation and honest discussion of America's history with slavery and racial injustice in the classroom); see also Alejandro Diasgranados, *Our Kids Deserve the Honest Truth About U.S. History*, TEACH FOR AMERICA (June 15, 2021), <https://www.teachforamerica.org/one-day/opinion/our-kids-deserve-the-honest-truth-about-us-history> (discussing how honest and accurate discussions about history have allowed students to competently participate in society).

23. U.S. DEP'T OF EDUC., LAWS & GUIDANCE, OVERVIEW, U.S. DEP'T OF EDUC., <https://www2.ed.gov/policy/landing.jhtml?src=LN> (last visited Mar. 24, 2021).

24. Thomson Reuters, *supra* note 13.

25. *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982).

26. The Federal Role in Education (2021), U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/overview/fed/role.html> (last visited Oct. 30, 2021).

The establishment of education is one of the powers reserved to the States under the Tenth Amendment.<sup>27</sup> However, curriculum decisions are made at the local level by school administrators and boards of education in each school district, and they must balance the competing interests of the community.<sup>28</sup> The State may impose limits and obligations on the local school districts and parents in these decisions.<sup>29</sup> However, most of the limitations placed on school boards are merely standardized minimum curricular requirements.

### B. Constitutional Limitations on the State

The Constitution does not guarantee a right to education, but, if a state decides to provide public education, it must do so in compliance with the Constitution.<sup>30</sup>

#### i. First Amendment Limitation

A school district's power to remove books from the library due to the library's content is limited by the First Amendment right of the students to inquire and gain understanding.<sup>31</sup> A school board may not, consistent with the Constitution, suppress the ideas of its students nor make its decisions on access to knowledge based on racial animus.<sup>32</sup> Justice Brennan, writing for the plurality in *Board of Education v. Pico*, stated that local school boards may not remove books simply because they dislike the ideas contained in them and seek their removal to "prescribe what shall be orthodox in politics, nationalism, religion,

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27. See U.S. CONST. amend. X (powers not delegated to the federal government nor prohibited to the state by the Constitution is reserved to the state); U.S. DEPT OF EDUC., *supra* note 23.

28. Thomson Reuters, *Curriculum Decisionmaking*, FINDLAW (June 20, 2016), <https://www.findlaw.com/education/curriculum-standards-school-funding/curriculum-decisionmaking.html> (June 20, 2016) (explaining the interests at stake and struggles in designing curriculum).

29. Julie Underwood, *Under the Law: The Legal Balancing Act over Public School Curriculum*, PHI DELTA KAPPAN (Feb. 25, 2019), <https://kappanonline.org/legal-balancing-act-public-school-curriculum-underwood/> (exploring the competing interests and authority of various groups as it relates to curriculum decisions).

30. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973); Douglas N. Harris et al., *A Principled Federal Role in PreK-12 Education*, THE BROOKINGS INSTITUTION (Dec. 2016), [https://www.brookings.edu/wp-content/uploads/2016/12/gs\\_20161206\\_principled\\_federal\\_role\\_browncenter1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/gs_20161206_principled_federal_role_browncenter1.pdf)? (explaining that a state must provide education on equal terms regardless of the fact that education is not a constitutional right).

31. *Bd. of Educ. v. Pico*, 457 U.S. 853, 871-72 (1982) (stating that library books cannot be removed simply because a school board dislikes the ideas contained within the books).

32. *Id.* at 871.

or other matters of opinion.”<sup>33</sup> Similarly, in *West Virginia Board of Education v. Barnette*, the Court held that it is a violation of Freedom of Speech to compel school children to salute the flag because unanimity of opinion is not an interest that trumps the students’ First Amendment rights.<sup>34</sup>

## ii. Fourteenth Amendment

Schools may not deprive students of equal educational opportunities without violating the Equal Protection Clause of the Fourteenth Amendment.<sup>35</sup> The Court made it clear that the Constitution only guarantees equal opportunity but not equal results.<sup>36</sup> The decision has only been interpreted to impose an affirmative duty on the State to operate a unitary school system.<sup>37</sup> Although the school districts found in violation of *Brown* were issued desegregation decrees, were the measures taken effective considering the continued resistance to give minorities true equality?

The same values and traditions that the school board was given the discretion to protect included adherence to a hierarchy of the races, socially, morally, and politically. Although the First and Fourteenth Amendments serve as limitations, does it go far enough to fulfill the promise imagined at the time *Brown* and *Pico* were decided?

### C. *The Troublesome Curriculum*

Researchers found that school integration “must go beyond creating schools with diverse enrollment.”<sup>38</sup> The curriculum must be so that educators may truly use the educational benefits of diversity. In *Bakke*, The Supreme Court recognized the educational benefits of diversity in higher education as a compelling government interest.<sup>39</sup> The detriment of racial isolation is not just attributed to physical separation. Another detriment includes mental separation involved with the

33. *Id.* at 872 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

34. *Barnette*, 319 U.S. 624, at 641.

35. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954).

36. *McCleskey v. Kemp*, 481 U.S. 279, 314-19 (1986).

37. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437-38 (1968); *see also* *Brown I*, 347 U.S. at 493 (1954); *Brown v. Bd of Educ. (Brown II)*, 349 U.S. 294, 299-301 (1955).

38. Amy Stuart Wells et al., *How Racially Diverse Schools and Classrooms Can Benefit All Students*, CENTURY FOUND. (Feb. 9, 2016), <https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/>.

39. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978).



stigmatic harm to minority children addressed in *Brown*. The same stigmatic harm may persist from the purposeful exclusion of diversity in curriculum when minority children fail to see themselves reflected in the nation's history and progress.

When those who have the power to name and to socially construct reality choose not to see you or hear you. . .when someone with the authority of a teacher, say, describes the world and you are not in it, there is a moment of psychic disequilibrium as if you looked in the mirror and saw nothing. It takes some strength of soul—and not just individual strength, but collective understanding—to resist this void, this non-being, into which you are thrust, and to stand up, demanding to be seen and heard.<sup>40</sup>

Curriculum has not meaningfully changed much since the early part of the century. Most school districts are still using outdated, “white-washed” teaching materials, which have functioned to deny the perspective of Black, Asian, Native American, and Hispanic Americans and provide inconsistent historical practices that favor the Euro-Christian American view.<sup>41</sup>

The lack of diversity in curriculum creates an environment of internalized bias. This often translates to an outcast-complex, resulting in minority students believing they do not belong in the academic environment.<sup>42</sup> The Supreme Court has acknowledged the role of the educator as one of great discretion and influence over children's educational goals, political views, and perception about the nation and their responsibilities within it.<sup>43</sup> It is well known that learning about the country's mistakes is the only way to keep them from being repeated. If the goal is inclusivity, then society must learn about the circumstances that led to and encouraged exclusivity if they are to be avoided. If teachers lack the ability to teach such materials to educate themselves and their students, this directly inhibits students' growth.

Under the current curriculum, researchers have concluded that most students lack a “basic understanding of slavery, geography, or the history of indigenous people.”<sup>44</sup> What children are learning is not an

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40. ADRIENNE RICH, *BLOOD, BREAD, AND POETRY: SELECTED PROSE*, (1994).

41. Joshua Ddamulira, *The Case for More Diverse School Curricula*, *NEW AM.* (Jan. 11, 2018), <https://www.newamerica.org/weekly/case-more-diverse-school-curricula/>.

42. Brenda Alvarez, *Educators Step Up Demand for Racially Diverse Curriculum*, *NEA NEWS* (Apr. 11, 2021), <https://www.nea.org/advocating-for-change/new-from-nea/educators-step-demand-racially-diverse-curriculum>.

43. *Ambach v. Norwick*, 441 U.S. 68, 718-79 (1979).

44. Samantha Washington, *Diversity in Schools Must Include Curriculum*, *CENTURY FOUND* (Sept. 17, 2018), <https://tcf.org/content/commentary/diversity-schools-must-include-curriculum/?session=1>.

inclusive American history. They are leaning that their history and values are not “American” if they do not fall in line with the dominant Euro-Christian narrative.<sup>45</sup>

Studies done by the NYC Coalition for Educational Justice have shown that, even in schools with a predominantly minority population, the educational materials and textbooks are predominantly white-centered.<sup>46</sup> This includes the author and the characters contained within.<sup>47</sup> This was deemed problematic, specifically in middle school curriculum. Racial and religious minority children are failing to find themselves reflected positively in their material during a time that is critical to finding their identity and value in society.<sup>48</sup> This directly affects a student’s academic motivation, academic persistence, and academic achievements.<sup>49</sup> Students are very much aware of the bias underlying the curriculum and are deprived of the opportunity to connect. The study concluded that minority students become disengaged from academic learning prior to entering high school.<sup>50</sup> The study also shed light on the negative impact that this has on white students growing up with a constant reflection of themselves, leading to “an exaggerated sense of their importance and value in the world.”<sup>51</sup>

Lately, non-white students are becoming the majority in the average American public-school population.<sup>52</sup> This shift in population and societal values has not moved states to accommodate as much as one would expect. In the midst of social tensions surrounding race, certain states have responded with attempts to hide the complex state of affairs from young students by targeting Critical Race Theory and the

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45. Jonathon Zimmerman, *Brown-ing the American Textbook: History, Psychology, and the Origins of Modern Multiculturalism*, 44 HIST. OF EDUC. Q., 46, 47 (2004) (stating that Brown did not address issues of curriculum); Derrick P. Aldridge, *The Limits of Master Narratives in History Textbooks: An Analysis of Representations of Martin Luther King, Jr.*, 108 TCHRS. COLL. REC. 662, 662-63 (2006).

46. The NYC Coalition for Educational Justice, *Diverse City, White Curriculum: The Exclusion of People of Color from English Language Arts in NYC Schools*, EDUC. JUST. RSCH. AND ORG. COLLABORATIVE (2020), <http://www.nycej.org/wp-content/uploads/2019/12/Diverse-City-White-Curriculum-3.pdf> (last visited Mar. 25, 2022) [hereinafter NYC Coalition].

47. *Id.*

48. *Id.*

49. *Id.*

50. Ddamulira, *supra* note 41.

51. NYC Coalition, *supra* note 46.

52. Sarah B. Shear et al., *Manifesting Destiny: Re/presentations of Indigenous Peoples in K-12 U.S. History Standards*, 43 THEORY & RESEARCH RSCH. IN SOC. EDUC. 68, 74 (Feb. 19, 2015) (“Indigenous Peoples as relics of a distant past, void of complexity and a voice in modern America.”); *see also* Public School Review, *Average Public School Minority Breakdown*, PUB. SCH. REV., <https://www.publicschoolreview.com/average-diversity-minority-stats/national-data> (last visited Oct. 31, 2021).

1619 Project. Teachers are discouraged or inhibited from teaching students the role that African Americans have played in fully building the country's economy.<sup>53</sup> Even far less consideration is given to the experience of Asian Americans and Hispanic Americans whose labor and businesses contributed substantially to the strength of the nation's economy. Native American students are taught that their people have zero relevance outside of standing in the nation's way of Manifest Destiny.<sup>54</sup>

The complete rejection of programs involving ideals related to Critical Race Theory and the 1619 Project has proven to be detrimental. In one Florida county, parents attacked certain approved textbooks on the notion that it was teaching critical race theory and inspiring Marxist ideas.<sup>55</sup> Although parents should have a say in their child's education, they are conflating issues because they themselves do not understand them.<sup>56</sup> The school examined the challenged textbooks and found that they contained no tenets of Critical Race Theory, yet the parents still insisted that it did merely because it contained rhetoric that the vestiges of past discrimination still exist in American institutions.<sup>57</sup> This kind of censoring is against American principles of Freedom of Speech and Freedom of the Press. Keeping information away from a group of people in the hopes that they will take up a certain view or avoid one entirely is just as indoctrinating as the parent's argument that Critical Race Theory would be indoctrination if it were permitted in the school curriculum.<sup>58</sup> As pointed out by The Highlanders Editorial Board in their comparison of German schools accurately teaching lessons on the Holocaust to students as young as nine years old, it is education that teaches people how to make the best decisions

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53. Brenda Alvarez, *Educators Step Up Demand for Racially Diverse Curriculum*, NEA NEWS (April 11, 2021), <https://www.nea.org/advocating-for-change/new-from-nea/educators-step-demand-racially-diverse-curriculum>.

54. Shear, *supra* note 54, at 87.

55. Drew Hill, *Parents in Collier County heated at school board meeting after claims that textbooks teach critical race theory*, WINK (June 15, 2021, 10:51 AM), <https://www.winknews.com/2021/06/07/parents-in-collier-county-heated-at-school-board-meeting-after-claims-that-textbooks-teach-critical-race-theory/>.

56. Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WEEK (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05>.

57. Hill, *supra* note 55; The District School Board of Collier County, *June 7, 2021: Special Board Meeting/Hearing*, COLLIER SCHS., <https://www.collierschools.com/Page/16055> (last visited Nov. 12, 2022) (hearing on parental objections raised against purchased instructional material and textbooks by the school board).

58. See The Editorial Board, *Children Need to Learn the Dark Side of American History Too*, HIGHLANDER (February 22, 2021), <https://www.highlandernews.org/81845/children-need-to-learn-the-dark-side-of-american-history-too/>

for themselves and their nation.<sup>59</sup> Parents and politicians who are uncomfortable with this discussion have waged war against any racially-centered materials or lessons, which is possibly related to the lack of discussion in their own upbringings.<sup>60</sup> Parents ask that politics be kept out of the classroom, but it is a political act when they actively keep minority students from learning their own history and place in society.<sup>61</sup> It is a political act when classrooms only teach topics of government, history, and innovation from a one-sided point of view.<sup>62</sup> Students are impacted by politics every day of their lives. It is best that they learn about its full nature, especially when many of these children will go into politics themselves and become active voters.<sup>63</sup> Society must first acknowledge that the curriculum is limited to a Euro-Christian perspective. With this acknowledgment, society will understand how balance is achieved. Diversity and Inclusion programs are not being introduced to take over but to achieve balance.

i. The Truth about Critical Race Theory and the 1619 Project

Critical Race Theory (“CRT”) is a legal framework developed in the 1970s that evaluates the legal construction of ‘race’ and how the law, policies, and institutions uphold systemic racial inequality.<sup>64</sup> It merely points out that, despite the success of the Civil Rights Movement and constitutional and statutory protections against discrimination, there still exists facially race-neutral laws and policies embedded in our institutions, operating to undermine the goal of racial equality.<sup>65</sup> The goal of CRT is to provide a framework to examine society for what it is, how it got here, and how it might create more

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59. Editorial Board, *supra* note 58.

60. See Brian Lyman, *Southern Schools’ History Textbooks: A Long History of Deception, and What the Future Holds*, MONTGOMERY ADVERTISER (Dec. 2, 2020, 9:00 PM), <https://www.montgomeryadvertiser.com/story/news/education/2020/12/03/southern-history-textbooks-long-history-deception/6327359002/> (the lost cause myth and dismissal of non-white perspectives on American history were embedded in school textbooks and material, not seriously re-evaluated until the 1980’s despite challenges for decades prior).

61. See Editorial Board, *supra* note 58.

62. See Shear, *supra* note 52, at 59.

63. Alejandro Diasgranados, *Our Kids Deserve the Honest Truth About U.S. History*, TEACH FOR AM. (June 15, 2021), <https://www.teachforamerica.org/one-day/opinion/our-kids-deserve-the-honest-truth-about-us-history>.

64. Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1485 (2004); see *Critical Race Theory: Frequently Asked Questions*, NAACP, <https://www.naacpldf.org/critical-race-theory-faq/> (last visited Mar. 23, 2022).

65. Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1639 (1999); Sawchuk, *supra* note 56; see Critical Race Theory, *supra* note 64.

equitable systems.<sup>66</sup> Today, the theory includes addressing racism and oppression against women, Black Americans, Hispanic Americans, Native Americans, and Asian Americans.<sup>67</sup>

The complex theory is not taught in K-12 public schools.<sup>68</sup> It is generally taught, if at all, in higher education and law schools. However, its findings do influence some educational materials in public schools as new truths are being uncovered. Recent uproar on the matter is based on the term being more expansive than it actually is.<sup>69</sup> It has been weaponized to shut down any discussions of race or systemic racism in the classroom, whether it reflects accurate knowledge or not, by casting it under the umbrella of the “big, bad critical race theory.”<sup>70</sup> What actually might be introduced into schools is not CRT but what CRT uncovers about our nation’s structures that are pertinent to fulfilling the promises of our Constitution.<sup>71</sup> CRT itself is not what these parents are protesting but what it stands for: an unromanticized view of America.<sup>72</sup> In reality, whether society likes it or not, slavery did exist. Jim Crow did exist. The Indian Removal Act did exist. The Chinese Exclusion Act did exist. Japanese internment camps did exist. American Indian Residential Schools did exist. And all the systems that allowed them to exist, continue to also exist today.<sup>73</sup> In effect, by rejecting this reality, society is denying children of their opportunity to learn America’s true history and, therefore, denying them of their patriotic duty to fulfill our Constitution’s promise of equality.

The 1619 Project is a collection of writings that evaluate our nation’s foundation and progression from the perspective of the Black American experience, starting from slavery into all the now existing

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66. Brown, *supra* note 64, at 1485; see Critical Race Theory, *supra* note 64.

67. TARA J. YOSSO & DANIEL G. SOLORZANO, BLACKWELL COMPANION TO SOC. INEQ. 120 (Mary Romero & Eric Margolis eds., 2005); Neil Gotanda, *Critical Race Theory: The Key Writings that Formed the Movement*, 85 CALIF. L. REV. 1647, 1649 (1997) (“[T]he black[-white] identity position no longer exclusively frames CRT evaluative judgement.”).

68. Critical Race Theory, *supra* note 64.

69. Sawchuk, *supra* note 56.

70. Sawchuk, *supra* note 56.

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

72. Peter Greene, *The Conversation About Critical Race Theory In Schools Is Over*, FORBES (Nov. 5, 2021, 11:59 AM), <https://www.forbes.com/sites/petergreene/2021/11/05/the-conversation-about-critical-race-theory-in-schools-is-over/?sh=1ebf15d46f04>.

73. See Tennille Larzelere Marley, *Segregation, Reservations, and American Indian Health*, 33 WICAZO SA REV. 49, 49 (2018) (through focusing on health consequences on Native American reservations, it points out the structural policies, codes, culture, institutions, and ideologies that maintain segregation of Native Americans and Black Americans, lasting from colonial time to present day.).

institutions from which Black Americans have contributed.<sup>74</sup> It is not meant to undermine the positive principles on which the country was built. The project aims to bring awareness to the fact that there are other perspectives derived from an experience that may not be as positive as the dominant narrative. It is not meant to undermine the positive principles on which the country was built, but it is just as important.<sup>75</sup> This opens the door for so many other racial, ethnic, and religious groups to have their stories told with the same respect, thoroughness, and admiration as the dominant Euro-Christian perspective. The Zinn Education Project, another targeted education program, seeks only to help teachers approach history “from a perspective of people whose stories have been marginalized or ignored in dominant narratives.”<sup>76</sup>

In Florida, Ron DeSantis has pushed the Stop WOKE Act, which bans CRT from public schools and provides individual parents the right to sue schools that they believe has violated the ban.<sup>77</sup> Ron DeSantis sold this Act by riding a wave of political fear, arguing that this theory seeks to delegitimize the country’s institutions and is so extreme that it will completely destroy the country if not stopped.<sup>78</sup> First, this is not true since the theory has existed for over 40 years in higher education and is still standing. This is not a new phenomenon. Second,<sup>79</sup> One particular example is the campaign of the United Daughters of the Confederacy following the Civil War called the “Lost Cause Myth.”<sup>80</sup> The Lost Cause Myth sought to rewrite history by

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74. Nikole Hannah-Jones et al., *The 1619 Project*, 1619 N.Y. MAG. (Aug. 18, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> (placing “the consequences of slavery and the contributions of black Americans” at the center nations’ story).

75. See Hannah-Jones, *supra* note 74.

76. Sarah Schwartz, *Four States Have Placed Legal Limits on How Teachers Can Discuss Race. More May Follow*, EDUC. WEEK (May 17, 2021), <https://www.edweek.org/policy-politics/four-states-have-placed-legal-limits-on-how-teachers-can-discuss-race-more-may-follow/2021/05>.

77. SB 148, Reg. Sess. 2022 (Fla. 2022).

78. Danielle J. Brown, *DeSantis: Parents Could Sue if Kids are Taught Critical Race Theory’ in FL Public Schools*, FLA PHX. (Dec. 15, 2021, 11:16 AM), <https://floridaphoenix.com/2021/12/15/desantis-parents-could-sue-if-kids-are-taught-critical-race-theory-in-fl-public-schools/>.

79. Greg Huffman, *Twisted Sources: How Confederate Propaganda Ended up in the South’s Schoolbooks*, INST. FOR S. STUD. (Apr. 10, 2019), <https://www.facingsouth.org/2019/04/twisted-sources-how-confederate-propaganda-ended-souths-schoolbooks>.

80. Caitlin McCarthy, *The “lessons” of the United Daughters of the Confederacy still have influence today in the Mid-South*, ABC 24 (Sept. 8, 2020, 10:29 PM), <https://www.localmemphis.com/article/news/local/the-lessons-of-the-united-daughters-of-the-confederacy-still-have-influence-today-in-the-mid-south/522-aa3185da-142b-48b2-b64e-f44fa70e5309#:~:text=Local%20News>.

blacklisting and setting guidelines for acceptable school textbooks throughout the South which ultimately reflected a version of history that is now established as historically inaccurate by scholars.<sup>81</sup> The Lost Cause Myth was further solidified in southern public schools by segregationists in the 1950s as resistance against integration and the Civil Rights Movement.<sup>82</sup> This version remains despite its erasure of the Black American experience, praise of Ku Klux Klan terrorists, and inaccurate teachings of the country's civil war.<sup>83</sup> Accurate history is being contested in school district meetings in a similar fashion to the white mobs that harassed and abused minority children attending schools after the Brown decision. Unfortunately, most southern parents who are protesting CRT in school district meetings today were raised on the inaccurate narrative of the Lost Cause Myth and other products of biased agendas. This has led them to hold a false ideology that the country could do no wrong. Naturally, there is a belief that there is nothing to fix.<sup>84</sup>

Some of the arguments made today are echoes of those made well into the 1980s. In the 1980s, southern school districts made an effort to ban historically accurate textbooks that "focused too much on black history" and focused on unsavory issues, "like the treatment of slaves, lynchings, segregation, and violence against civil rights protesters," in favor of textbooks consistent with the Lost Cause.<sup>85</sup> Within the last decade, the same practice has taken place when banning textbooks as part of a mission to downplay, or outright ignore, the role of slavery in Southern States. This is despite how far our nation has come in recognizing the historical inaccuracies of the Lost Cause.<sup>86</sup>

Many anti-CRT parents quote Rev. Dr. Martin Luther King, Jr.'s I Have a Dream Speech. This is under the belief that our Nation has fulfilled his dream. It presumes that society has come to a place where it has the privilege of judging people by the content of their character. To introduce lessons involving the wrongdoings of the nation against its own citizens of color is an act of racism.<sup>87</sup> From the perspective of racial minorities, however, America has never stopped being judged by the color of its skin. Dr. King later clarified that his speech was merely aspirational, and, before society gets there, it will

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81. McCarthy, *supra* note 80.

82. Huffman, *supra* note 79.

83. McCarthy, *supra* note 80.

84. See generally Huffman, *supra* note 79.

85. *Id.*

86. *Id.*

87. Sawchuk, *supra* note 56.

fall on much more difficult times of self-reflection.<sup>88</sup> Now is the time for self-reflection. This starts with allowing children the opportunity to learn from the country's mistakes and *choose* to do better. From his work, it may be concluded that Dr. King would likely have agreed with the teachings that these parents are using his quotes to ban.<sup>89</sup> Although individuals may not believe themselves to be racist or prejudiced, they become part of the problem when they perpetuate and protect systems that are detrimental to racial equality.<sup>90</sup>

Some scholars have referred to legislation like the WOKE Act as an attempt to suppress the speech of educators. This is because the manner in which the legislation is written makes it impossible to interpret what exactly is being banned.<sup>91</sup> Most of the legislation bans CRT or any teaching that may lead to a feeling of guilt or assertions that certain races are inherently racist or privileged.<sup>92</sup> In contradiction, most educators would agree that they are not teaching students to feel burdened by the past, so they are not sure what the legislature truly means to target.<sup>93</sup> Teachers inevitably must refrain from educating students on race in fear of litigation. Despite this, teachers acknowledge that the true victims here are the students of color who are actively seeing adults fight against making space for them in the classroom in an effort to protect white children from a fictitious enemy.<sup>94</sup> Feelings of discomfort, guilt, or anguish are not necessarily a bad thing in all contexts. These feelings may be essential in teaching empathy, self-awareness, and how to listen to others at a vital age of emotional development.<sup>95</sup>

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88. Andrew K. Franklin, *King in 1967: My dream has 'turned into a nightmare*, NBC NEWS (Aug. 27, 2013, 11:52 AM), <https://www.nbcnews.com/nightly-news/king-1967-my-dream-has-turned-nightmare-flna8c11013179>.

89. See generally Rev. Dr. Martin Luther King, Jr., *Remaining Awake Through a Great Revolution*, SEE ME ONLINE, <https://www.seemeonline.com/history/mlk-jr-awake.html> (acknowledged that racism is embedded in society and politics, regardless of whether White Americans acknowledge the truth of their biases)

90. See The Editorial Board, *Children Need to Learn the Dark Side of American History Too*, HIGHLANDER (Feb. 22, 2021), <https://www.highlandernews.org/81845/children-need-to-learn-the-dark-side-of-american-history-too/>.

91. See generally Schwartz, *supra* note 76.

92. See H.B. 8, 2022 Reg. Sess. (Ala. 2022) (pending committee action in house of origin).

93. Schwartz, *supra* note 76.

94. *Id.*

95. *Id.* at 76.



## II. FEDERAL ACTION AS THE SOLUTION

The federal government's role has been voluntarily restricted to the collection of data on effective skills and techniques that further the goal of an educated population since the late 1860s.<sup>96</sup> This data may be relied upon by school districts when determining its curriculum. However, it is not controlling on states under its Tenth Amendment authority to ultimately determine what skills, techniques, and materials are best suited for the local citizenry.<sup>97</sup>

Only recently has the federal government provided financial assistance towards programs for veterans, the impoverished, and the disabled.<sup>98</sup> These programs and other educational assistance may be rejected by the States.<sup>99</sup> The most prominent federal regulations concerning education is the mission of equal access and protecting the rights of students and teachers.<sup>100</sup> National standards are generally voluntary standards developed by independent organizations.<sup>101</sup> Nationwide movements for more inclusion in curriculum have largely been rejected on at the state level.<sup>102</sup> Some schools have introduced small scale experimental courses teaching ethnic appreciation and different racial history which has exhibited major benefits to the attending students, such as increases in attendance and in the class Grade Point Average (GPA).<sup>103</sup> Outside of these single elective courses, the overall education of these middle schools and high schools remain white-washed with some schools going as far as to ban ethnic studies courses altogether.<sup>104</sup>

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96. U.S. DEP'T OF EDUC., *The Federal Role in Education*, U.S. DEP'T OF EDUC. (June 15, 2021), <https://www2.ed.gov/about/overview/fed/role.html>.

97. Douglas N. Harris et al., *A Principled Federal Role in PreK-12 Education*, BROOKINGS INST. (Dec. 2016), [https://www.brookings.edu/wp-content/uploads/2016/12/gs\\_20161206\\_principled\\_federal\\_role\\_browncenter1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/gs_20161206_principled_federal_role_browncenter1.pdf).

98. U.S. DEP'T OF EDUC., *supra* note 96.

99. FindLaw, *The Roles of Federal and State Governments in Education*, FINDLAW (Mar. 21, 2018), <https://www.findlaw.com/education/curriculum-standards-school-funding/the-roles-of-federal-and-state-governments-in-education.html>.

100. FindLaw, *supra* note 99.

101. FindLaw, *National School Curriculum Standards*, FINDLAW (June 20, 2016), <https://www.findlaw.com/education/curriculum-standards-school-funding/national-school-curriculum-standards.html>.

102. *See generally* Schwartz, *supra* note 76.

103. *See generally* Joshua Ddamulira, *The Case for More Diverse School Curricula*, NEW AM. (Jan. 11, 2018), <https://www.newamerica.org/weekly/case-more-diverse-school-curricula/>.

104. Julie Underwood, *Under the law: The legal balancing act over public school curriculum*, PHI DELTA KAPPAN: UNDER THE LAW (Feb. 25, 2019), <https://kappanonline.org/legal-balancing-act-public-school-curriculum-underwood/>.

“It is the very foundation of good citizenship. Today it is a 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.”<sup>105</sup>

#### A. *Remedy: First Amendment*

The Supreme Court rejected the argument that education is a fundamental right despite its close nexus to free speech.<sup>106</sup> Yet, it was found that free speech protects access to information to some degree in *Pico*.<sup>107</sup> Although it may not be deemed a fundamental right on its own, that particularly close relationship to protected liberties and privileges, as acknowledged by the Court, may be grounds to expand constitutional or federal protection relating to public school curriculums.

The banning of Critical Race Theory and the 1619 Project may be equated to the banning of certain materials from a school library. It denies children access to information that its school educators have deemed to be of educational value simply because parents or politicians do not like its message. This is the kind of policing of information that was found unconstitutional under *Pico*, warranting federal intervention.<sup>108</sup> However, States that are banning such diversity and inclusion programs are getting around the constitutional challenges by allowing private citizens to sue schools for including these materials in their curriculum.<sup>109</sup> A successful constitutional challenge requires state action.<sup>110</sup> In contradiction, an argument could be made using *Shelley v. Kraemer* and *Lugar v. Edmondson* that there is state action when a school is sued because it is the State that created the right or privilege to sue, and it is the state courts that enforce the action.<sup>111</sup>

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105. *Brown v. Bd. of Educ.*, 347 U.S. at 493.

106. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

107. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

108. *Id.* at 867-72 (students have a First Amendment right to receive ideas and information in order to exercise freedom of speech, which cannot be abridged for political reasons); See *Monteiro v. Temple Union High Sch. Dist.*, 158 F.3d 1022, 1028-29 (9th Cir. 1998) (“[A] student’s First Amendment rights are infringed when books that have been determined by the school district to have legitimate educational value are from a mandatory reading list because of threats of damages, lawsuits, or other forms of retaliation.”).

109. See also S.B. 148, 148th Reg. Sess. 2022 (Fla. 2022).

110. U.S. CONST. art. IV, § 1.

111. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (holding there is state action where the state created the right or privilege causing the deprivation and was enforced by state officials); see also *Shelley v. Kraemer*, 334 U.S. 1, 19-21 (holding that there is state action includes action of the state courts and state judicial officers in enforcing contracts that would be unconstitutional if a party of the contract were the state).

### B. Remedy: Fourteenth Amendment

The Court has been reluctant to expand *Brown* under the Equal Protection Clause, stating that Equal Protection only guarantees equal opportunity, not equal results.<sup>112</sup> The explicit goal of *Brown* was to end a dual system of education and end de jure segregation in public schools.<sup>113</sup> However, the underlying hope of *Brown* must have been more than this. Equal opportunity has not been obtained. Students are still made to feel stigmatized, inferior, and incapable due to the decisions of the school district. The issue arises in finding intent to discriminate against minority students. The days of facial race discrimination are over, but hidden discrimination is just as harmful and just as prevalent.<sup>114</sup> There is circumstantial evidence of intent: an explicit ban of race-centered discussions, curriculums that exclude minorities from the student's perception of American society, and racial disparities in treatment and expectations by school officials.<sup>115</sup> It is unlikely, however, that this will be enough with so many actors involved. Although some scholars are making an interesting argument, the curriculum, as it stands today, is a vestige of de jure segregation in violation of the *Brown* mandate.<sup>116</sup> Under this argument, these school districts would not be free of their mandate of integration, requiring further action on the part of the states to afford equal opportunity to all students.<sup>117</sup> If busing and quotas were insufficient, school districts will have to consider restructuring its other methods of operation, including access to information and curriculum.

### C. Remedy: Taxing and Spending Power

The Constitution grants Congress the authority to tax and spend for the general welfare.<sup>118</sup> Congress may use its spending power to indirectly implement national policies, even in areas where Con-

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112. *Washington v. Davis*, 426 U.S. 229, 239 (1976); *McCleskey v. Kemp*, 481 U.S. 279, 322 (1987).

113. *Green v. County School Bd.*, 391 U.S. at 437-38 (1968); *see also Brown v. Bd. of Educ.*, 347 U.S. at 494 (1954).

114. Rita Kohli et al., *The "New Racism" of K-12 Schools: Centering Critical Research on Racism*, 41 REV. RSCH. EDUC. 182, 184-185 (Mar. 2017); Sawchuk, *supra* note 56.

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

116. Wendy Brown Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. GENDER RACE & JUSTICE. 315 (1999).

117. *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 244-250 (1990).

118. U.S. CONST. art. I, § 8, cl. 1.

gress lacks the power to legislate directly.<sup>119</sup> When Congress imposes conditions on the States receipt of federal funds, the exercise of spending power must be (1) in pursuit of the general welfare; (2) the conditions must be unambiguous so as to enable the states to exercise their choice knowingly, cognizant of the consequences of their participation; (3) the conditions must be related to the federal interest in particular national projects or programs; and (4) must not conflict with other constitutional provisions.<sup>120</sup> When determining whether a particular expenditure is intended to serve the general welfare, the court will defer substantially to the judgment of Congress.<sup>121</sup>

Although Congress has no power to regulate local political activities, it does have power to fix the terms upon which its money allotments to states shall be disbursed.<sup>122</sup> Currently, the federal government contributes about 8% to public school funding to be allotted towards education.<sup>123</sup> According to *National Federation of Independent Business v. Sebelius*, Congress may use its spending power to create incentive for the state to act in accordance with federal policy but cannot require the states to regulate.<sup>124</sup> A mere dictation of how the funds are to be spent is not a condition.<sup>125</sup> An increase in federal spending to support a movement towards a more diverse and inclusive curriculum across the country is in line with the federal government's objective of obtaining an educated population of voters and political participants.

Although a First or Fourteenth Amendment argument may not be raised in the Court successfully, it is still a concern that these rights are burdened to some degree. Along with the stigmatic harm, socioeconomic burdens of unmotivated minority school students, and policy concerns of the States unwillingness to foster true equality outside of the *Brown II* mandate, the burdens on the students and teachers constitutional right of free speech should warrant the federal government to take a larger role and a firmer stance equivalent to the Civil Rights Act of 1964 or the conditioning of federal funds to fund state black colleges in 1890.<sup>126</sup> If it is done correctly under the Taxing and Spending Power, it is unlikely to usurp the role of the State in education deci-

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119. *S.D. v. Dole*, 483 U.S. 203, 207 (1987) (citing *United States v. Butler*, 297 U.S. 1, 66 (1936)).

120. *Id.*

121. *Id.* (citing *Helvering v. Davis*, 301 U.S. 619, 640-641 (1937)).

122. *Id.* at 210.

123. Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (Aug. 2, 2021), <https://educationdata.org/public-education-spending-statistics>.

124. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579-82 (2012).

125. *Id.*

126. Morrill Act, ch. 841, 1, 26 Stat. 417 (1890) (codified as amended at (1980)).

sions by merely encouraging a movement towards a diversified curriculum that accurately reflects the make-up and journey of the country.<sup>127</sup>

The change does not have to include the use of Critical Race Theory or the 1619 Project in public schools, but the federal government should not tolerate a wholesale ban of its use where educators find it has educational value to its students. In *Monteiro v. Temple Union High School District*, the court found that where a school determines there is educational value in learning materials, the school may not avoid its use simply because of a parent's concern that its terms or message may be harmful to a group of students.<sup>128</sup> This case may be used to push back on parent's arguments against implementing teachings that may fall in line with Critical Race Theory and the 1619 Project, but its central goal is diversity and inclusion in lessons. This case was used when parents wanted to keep "classic" literature in school materials that included racial epithets and depictions of discrimination.<sup>129</sup> It could equally be used to keep material that teaches real history, including the wrongdoings of Americans towards minorities and how American society can do better as a nation.

#### CONCLUSION

There is an inherent discriminatory nature in treating everyone the same because it does not work for everyone when there are real, natural differences. There is value in recognizing differences amongst people, just as there is in recognizing similarities. With everything, there must be balance. Currently, limiting black history to Dr. Martin Luther King Jr. and Rosa Parks is not balance but an insult and an inaccurate portrayal of the struggles of American history in this Nation.<sup>130</sup> The same is to be said of the lessons that limit the Native American experience to Thanksgiving, teaching from the oppressors' perspective.<sup>131</sup> Acquiescence to a romanticized, one-sided, and domi-

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127. Sebelius, 567 U.S. at 576 ("such measures encourage a state to regulate in a particular way, and influence a State's policy choices.").

128. *Monteiro v. Temple Union High School District*, 158 F.3d 1022, 1028-29 (9th Cir. 1998).

129. *Id.* at 1027-29 ("the book's use of the word "nigger" some 215 times").

130. Derrick P. Aldridge, *The Limits of Master Narratives in History Textbooks: An Analysis of Representations of Martin Luther King, Jr.*, TCHR. COLL. REC. 108.4, 662 (2006) ("[H]istory textbooks present discrete, heroic, one-dimensional, and neatly packaged master narratives that deny students a complex, realistic, and rich understanding of people and events in American history).

131. Sarah B. Shear et al., *Manifesting Destiny: Re/presentations of Indigenous Peoples in K-12 U.S. History Standards*, THEORY & RSCH. SOC. EDUC., 43:1, 68-10184-85 (Feb. 19,

nant Euro-Christian narrative erases and denies the different experiences and contributions of American citizens from different backgrounds. It is not a one-size fits all situation. America cannot prevent the struggles of Americans of other races and religions to be in vain by disallowing its educational value to be squandered.

Unfortunately, Americans live in a country that links race to behavior and morality, despite information to the contrary. Simply ignoring the conversation of race in a learning environment does a disservice to the people of America and is likely the reason that they must still have this conversation today. Ultimately, public school curriculums neglect to name racism in critical discussions as a real problem to be addressed. Critical Race Theory arose during the time of desegregation to acknowledge that institutions, including public schools, are devoted to serving the interests of white Americans.<sup>132</sup> Although CRT itself is not taught in public schools, until American society accepts the disease of white supremacy for what it is, it will continue to merely treat the “superficial symptoms.”<sup>133</sup> White parents first asserted that black people were “too sensitive” when black parents complained that school materials containing inaccurate and offensive representations of the black community would harm their children’s psyche. Now, white parents are asserting accurate school material representing Americans of every color is somehow giving their children a “guilt complex.”<sup>134</sup>

Justice Warren stated in *Brown* that education “is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.”<sup>135</sup> American children should be prepared for their diverse society and flawed structures. America should make note of the massive resistance to desegregation on the part of the States and school officials that resulted in a wait for equality spanning over several decades.<sup>136</sup> That spirit does not just go away. There were schools

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2015), [https://www.teachingforchange.org/wp-content/uploads/2015/11/SHEAR\\_ManifestingDestiny.pdf](https://www.teachingforchange.org/wp-content/uploads/2015/11/SHEAR_ManifestingDestiny.pdf).

132. Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1485-87 (2004).

133. Rita Kohli et al., *The “New Racism” of K-12 Schools: Centering Critical Research on Racism*, SAGE JOURNALS (June 23, 2017), <https://journals.sagepub.com/doi/full/10.3102/0091732X16686949>.

134. Livia Gershon, *The Racism of History Textbooks*, JSTOR DAILY (Oct. 20, 2015), <https://daily.jstor.org/racism-history-textbooks/>.

135. *Brown v. Bd. of Educ.*, 347 U.S. at 493.

136. See *Green v. Cty Sch. Bd.*, 391 U.S. 430, 433 (1968) (continued the segregated operation of the system after the *Brown* decisions, “presumably on the authority of several statutes enacted by Virginia in resistance to those decisions.”).

still desegregating in 2016 with the court finding that school districts have failed to “meaningfully” integrate.<sup>137</sup> Segregation is not a remnant of the past that society shoves under the rug in shame; it is present in the form of mental segregation. The history and culture of erasing the minority experience in an effort to “protect” white students or to “instill a unified patriotic pride” did not go quietly in the night with the Brown decision or the enactment of the Civil Rights Act of 1964. The Supreme Court ordered states to dismantle segregation from “root to branch” in 1968, using “every facet of school operation.”<sup>138</sup> Diversity and inclusion in curriculums and courses are part of ripping out the roots that allowed segregation to exist and persist. The resistance of true educational integration has lived parallel to the resistance of physical integration. The former is still living in its shadow. Federal intervention was required then to address segregation, and it is required now. America is still in a fight for equality, and the federal government must take a role in nudging the States in the right direction. Concerns about teaching ideas based on Critical Race Theory and the 1619 Project should go to how matters of race are taught in the classroom, not whether they should be taught at all. America’s shifting demography warrants that American society questions why attending a non-required college course continue to be the only way students get a formal education on diversity, other cultures, and the real issues facing society today. Education is the key to truly dismantling the institutions of racism in this country. Otherwise, America will continue to have these discussions for years to come.

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137. *Cowan v. Bolivar Cty. Bd. of Educ.*, 186 F. Supp. 3d 564, 580 (N.D. Miss. 2016) (“[C]ompliance alone does not satisfy the district’s continuing obligations to take further action to effectuate meaningful desegregation.”); Antonia Cirjak, *What Was the Last Segregated School in America?*, WORLD ATLAS (June 16, 2020), <https://www.worldatlas.com/articles/what-was-the-last-segregated-school-in-america.html/>.

138. *Green*, 391 U.S. at 435-38.