Indigeneity in the Classroom: Avenues for Native American Students to Challenge Anti-Critical Race Theory Laws

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Native American students in public schools face barriers to educational achievement due to racism, prejudice, and ignorance from fellow students, teachers, and administrators. Native students have endured various forms of discrimination that range from forcible cutting of braids by peers to administrative bans on traditional regalia at graduation ceremonies. In addition to experiencing overt acts of racism, Native students often feel disengaged from school due to the negative or non-existent portrayals of their tribal heritage in classroom curricula. Literature suggests that much of the gap in educational outcomes between Native students and their white peers could be mitigated through the incorporation of appropriate curricular materials on Indigenous history and culture, leading numerous states to pass laws requiring such programs to be developed and implemented in classrooms. In contrast, other states have proposed or passed legislation restricting the manner in which educators may discuss race, gender, and systemic inequality. These "anti-critical race theory" laws have the potential to chill or directly inhibit much-needed teaching of Native American culture and history in public school classrooms through both minimizing conversations about historical white supremacy and racism against Native Americans and limiting the visibility of Native figures and culture in public school curricula.

This Note proposes that Native students attending public schools in states that have passed anti-critical race theory legislation may be able to seek judicial relief from such laws. The Note will examine potential claims under the Fourteenth Amendment to the U.S. Constitution and, depending on where the students live, their respective state constitutions. Part I

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provides background on the importance of culturally competent education for Native students. Part II discusses the chilling effect that bills banning discussion of systemic inequality or race-related topics have on ethnic studies programs, the specific barriers that they raise to teaching Native culture and history, and the ensuing harm caused to Native students. Part III examines potential avenues for judicial relief.

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INTRODUCTION

In late 2021, a public elementary school in South Texas punished a Native American[1] kindergartener for violating a school district policy prohibiting long hair for male students.[2] The five-year-old, who wore his hair long because of his cultural heritage and religious beliefs, was penalized with an in-school suspension and isolated from his peers for over a month.[3] The school district subsequently denied the student's request for a religious exemption from the short-hair policy, requiring his family to "prove" Native American ancestry and genuine religious beliefs.[4] This is just one of many contemporary examples of a longstanding pattern of Native students being alienated from educational institutions for their backgrounds, beliefs, and appearances.[5]

There are approximately 600,000 Native Americans students in U.S. public schools, comprising roughly 1.2% of the country's total public-school student population.[6] Those 600,000 students represent slightly more than 90% of Native American school-age youth,[7] with most of the remaining 10% attending tribal schools operated by the Bureau of Indian Education (BIE).[8] Public schools

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1. This Note uses the term "Native American" to refer to a member of any of the Indigenous tribes or nations residing in the United States, including Alaska Natives.

2. *See* Mia Montoya Hammersley et al., *Indigenous Erasure in Public Schools*, 58 ARIZ. ATT'Y 22, 26 (2022).

3. *See* Darren Thompson, *Native American Kindergarten Student Punished for Having Long Hair*, NATIVE NEWS ONLINE (Nov. 18, 2021), https://nativenewsonline.net/currents/native-american-kindergarten-student-punished-for-having-long-hair [https://perma.cc/KC4C-2RQR].

4. *Id.*

5. *See, e.g.*, Bryan McKinley Jones Brayboy et al., *Sovereignty and Education: An Overview of the Unique Nature of Indigenous Education*, 54 J. AM. INDIAN EDUC. 1, 5 (2015).

6. STRIVING TO ACHIEVE: HELPING NATIVE AMERICAN STUDENTS SUCCEED, NAT'L CAUCUS OF NATIVE AM. STATE LEGISLATORS 8 (2008), https://documents.ncsl.org/wwwncsl/LegislativeStaff/Quad-Caucus/strivingtoachieve.pdf [https://perma.cc/D6D8-LR4B]. According to the National Center for Education Statistics, about 49.4 million students were enrolled in primary and secondary American public schools in fall 2021, the most recent year for which data is publicly available. *See Fast Facts: Back to School Statistics*, NAT'L CTR. EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=372 [https://perma.cc/NC5L-FRH3].

7. *See* Patricia D. Quijada Cerecer, *The Policing of Native Bodies and Minds: Perspectives on Schooling from American Indian Youth*, 119 AM. J. EDUC. 591, 595 (2013).

8. *See* Alden Woods & Agnel Philip, *The Bureau of Indian Education Hasn't Told the Public How Its Schools are Performing. So We Did Instead*, PROPUBLICA (June 9, 2021), https://www.propublica.org/article/the-bureau-of-indian-information-hasnt-told-the-public-how-its-schools-are-performing [https://perma.cc/QKL9-Z9LW] (finding that about 45,000 students, roughly 10% of Native students nationwide, are enrolled in BIE schools and dormitories).

and BIE schools have different forms of governance, which has implications for curricular implementation. Public schools are funded and governed by states and their subunits, while BIE schools are under the purview of a federal agency that funds 183 elementary and secondary schools spread across sixty-four reservations in twenty-three states.[9] Many BIE schools are tribally controlled and operated under BIE contracts or grants.[10] Although the BIE has drawn criticism for providing substandard education,[11] it operates under the mission of providing Native students with "quality education opportunities . . . in accordance with a tribe's need for cultural and economic well-being."[12] There is no similar mandate for public schools, many of which have historically failed to recognize and preserve the cultural and religious heritage of their Native students.[13]

Native students in public schools academically underperform relative to their non-Native peers in nearly every metric traditionally used to measure scholastic achievement. In 2015, the Education Trust found that, unlike outcomes for other major ethnic groups in the United States, educational achievement for Native students has "remained nearly flat in recent years" as they fall even further behind their white peers.[14]

Underlying this achievement gap is the reality that Native students face unique, well-documented barriers to educational success, including a lack of cultural and historical knowledge from their peers and educators. Many American children enter elementary schools conceptualizing Native Americans as "warlike"

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9. *See About Us*, U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN EDUC., https://www.bie.edu/topic-page/bureau-indian-education [https://perma.cc/9GFY-NNN8]. While Native students enrolled in public schools tend to have higher test scores than their counterparts at BIE schools, this is likely due to confounding variables, such as students starting school at a learning deficit due to lack of access to early childhood education and a dearth of learning opportunities outside of school. However, there is some evidence that Native students learn faster in BIE schools; a study comparing Arizona schools found BIE students to learn about 13% to 18% more of a grade level per year than their counterparts at geographically similar public schools. Other avenues for improving education at BIE schools, however, are beyond the scope of this Note. *See* Woods & Philip, *supra* note 8.

10. *See About Us*, *supra* note 9.

11. *See* Woods & Philip, *supra* note 8.

12. *About Us*, *supra* note 9.

13. *See infra* Part I.B.

14. Jordan T. Ramharter, *A Meeting of the Minds: Utilizing Maine's State Education System to Promote the Success of Its Native Students While Maintaining Tribal Sovereignty*, 72 ME. L. REV. 379, 380–81 (2020) (quoting Susan Brenna, *Why Are Native Students Being Left Behind*, ONE DAY (Dec. 11, 2014), https://www.teachforamerica.org/one-day/magazine/why-are-native-students-being-left-behind [https://perma.cc/4JU4-PAHS]).

and "savage," a depiction frequently stemming from cartoons and Hollywood depictions.[15] Students' knowledge of Native culture generally plateaus around fifth grade when history lessons turn to the American Revolution and subsequent development of the nation.[16] The lack of culturally appropriate education creates an environment where peers of Native students feel entitled to make racist comments and where educators and school districts implement racist policies, often without the intent to do so.[17] School districts throughout the country have enacted discriminatory policies, such as enforcing dress and grooming codes against indigenous students, preventing Native athletes from wearing their hair in specific traditional styles, and banning religious and culturally significant regalia at school graduations.[18] If educational institutions became more knowledgeable about the cultural context surrounding indigenous peoples and nations, they would likely gain a better understanding of the diverse and varied backgrounds of their students and develop strategies to create better learning environments.[19]

Despite indications that implementing Native American history in public school curricula would lead to better academic performance and a more positive educational environment for Native students, several states have been moving in the opposite direction by passing legislation that prevents or limits discussions of race and inequality in classrooms.[20] This process has been designed by its political advocates to, in the words of Florida Governor Ron DeSantis, ban "the state-sanctioned racism that is critical race theory [CRT]."[21] While critical race theorists come

15. Wayne Journell, *An Incomplete History: Representation of American Indians in State Social Studies Standards*, 48 J. AM. INDIAN EDUC. 18, 20 (2009).

16. *See id.*; *see also* Jere Brophy, *Elementary Students Learn About Native Americans: The Development of Knowledge and Empathy*, 63 SOC. EDUC. 39, 40 (1999) (finding that young students interviewed individually and asked open-ended questions about "Indians" answer with negative and stereotyped views of Native Americans).

17. *See, e.g.*, Hammersley et al., *supra* note 2, at 26.

18. *See id.*

19. *See* Brayboy et al., *supra* note 5, at 6.

20. As of April 2023, 28 states have passed measures against the teaching of "Critical Race Theory," and only California, Vermont, and Delaware had yet to see such a policy proposed at the state level. *See* Katharina Buchholz, *Anti-CRT Measures Adopted by 28 U.S. States*, STATISTA (Apr. 19, 2023), https://www.statista.com/chart/29757/anti-critical-race-theory-measures [https://perma.cc/6LQ7-45FH].

21. Daniel Golden, *Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching*, PROPUBLICA (Jan. 3, 2023) https://www.propublica.org/article/desantis-critical-race-theory-florida-college-professors [https://perma.cc/4D7P-5ARJ].

from a variety of academic fields, they share a common belief that racism is entrenched in the fabric of our society and that American institutions of power function to maintain the status quo of white privilege at the expense of people of color.[22] Therefore, curricula structured around critical race theory aim to identify the ways in which white supremacy oppresses people of color, help students to identify and critique causes of social inequality, and describe "what is and what ought to be" in American society.[23] By banning discussions of race and inequality, advocates for such action (henceforth referred to as "anti-CRT" legislation) intend to prevent such pedagogy in the classroom regardless of its positive effect on the learning environment of minority students. Anti-CRT legislation also has the secondary effect of limiting diversity and representation in classroom curricula. Because so much of Native American history is intertwined with settler colonialism and oppression, banning lessons about the racism entrenched in American society effectively bans teaching an accurate portrayal of Native American history in the United States.[24]

One of the most prominent examples of anti-CRT legislation, Oklahoma House Bill 1775 (2021), states in part that classroom lessons are prohibited from making students "feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex."[25] Enacted in a state with a particularly dark history regarding its treatment of both Native American and Black communities,[26] this vague provision is structured to silence discussion of a large part of Oklahoma's history, giving students an incomplete picture and rendering the curriculum less accessible for members of minority groups.[27]

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22. *See* Prentice T. Chandler, *Critical Race Theory and Social Studies: Centering the Native American Experience*, 34 J. SOC. STUD. RSCH. 29, 35 (2010).

23. *Id.*

24. *See* Lourdes Medrano, *States Were Adding Lessons About Native American History. Then Came the Anti-CRT Movement*, HECHINGER REP. (Apr. 12, 2023), https://hechingerreport.org/states-were-adding-lessons-about-native-american-history-then-came-the-anti-crt-movement [https://perma.cc/HH48-7DB2].

25. H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021).

26. Among other events, atrocities committed against minority groups in the state include the complete destruction of the Black community of Greenwood during the 1921 Tulsa race riots and the forcible displacement of more than 13,000 Cherokee during the 1838 "Trail of Tears." *See* Chris M. Messer, *The Tulsa Race Riot of 1921: Toward an Integrative Theory of Collective Violence*, 44 J. SOC. HIST. 1217, 1217–18 (2011); Marion Blackburn, *Return to the Trail of Tears*, 65 ARCHAEOLOGY 53, 53 (2012).

27. H.B. 1775 contains other general prohibitions, such as bans on discussing the principles that "[a]n individual, by virtue of [their] race or sex, is inherently racist, sexist,

Because critical race theory calls attention to how the color-blind conception of formal equality has been used to oppose governmental efforts to improve conditions for nonwhite Americans, anti-CRT laws further ensure that students have a harder time recognizing, and therefore combating, such political discourse.[28]

Other legislators of states with large Native populations have made similar statutory proposals, although most have yet to actually enact the same kind of sweeping legislation as Oklahoma. For example, Arizona Senate Bill 1412 (2022) would have banned teachers and guest speakers from providing instruction to students or other employees that promotes or advocates for numerous concepts relating to the topics of race or ethnicity.[29] While the legislation stalled in the Arizona Senate, it foreshadows future attempts to limit discussions of race and inequality in the state with the third-largest population of Native Americans in the country.[30] Meanwhile, Montana, which has the fifth-largest population of Native Americans as a proportion of state population,[31] is governed by a legally binding 2021 state attorney general opinion banning critical race theory and "antiracism" in public schools.[32] Texas' Senate Bill 3 and Florida's "Stop W.O.K.E. Act" are further examples of state legislation purporting to ban the

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or oppressive, whether consciously or unconsciously" and "[m]embers of one race cannot and should not attempt to treat others without respect to race or sex." The bill requires public schools to develop a process for parents, teachers, school staff, and members of the public to file a complaint alleging violations and requires the school and/or the State Board of Education to investigate all complaints filed. H.B. 1775, 58th Leg., 1st Sess. (Okla. 2021). Subsequent regulations promulgated by the Oklahoma Department of Education also provide the right to "inspect curriculum, instructional materials, classroom assignments, and lesson plans" to all parents and legal guardians of public school students. Okla. Admin. Code tit. 210, ch. 10, § 1-23.

28. *See* Desmond S. King & Rogers M. Smith, *"Without Regard to Race": Critical Ideation Development in Modern American Politics*, 76 J. POL. 958, 959 (2014).

29. The bill, similar to H.B. 1775, would have prohibited instruction that "promotes or advocates" for vague concepts such as "judgment on the basis of race or ethnicity" and allowed students, employees, and parents to launch complaints that would trigger mandatory investigations. S.B. 1412, 55th Leg., 2nd Sess. (Ariz. 2022).

30. *Native American Population 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/native-american-population [https://perma.cc/HD5Y-8M9V].

31. *Id.*

32. Attorney General Austin Knudsen reasons that such concepts assign "immutable negative characteristics to individuals solely based on their race or ethnicity," amounting to a violation of the U.S. Constitution, the Montana Constitution, and Title VII of the Civil Rights Act. 58 Op. Mont. Att'ys Gen. 1, 10, 18 (2021), https://dojmt.gov/wp-content/uploads/AGO-V58-O1-5.27.21-FINAL.pdf [https://perma.cc/ML2F-5JUH].

teaching of critical race theory and related concepts in public school classrooms.[33] Overall, between January 1, 2021, and June 13, 2023, forty-four states introduced bills or took other steps restricting critical race theory pedagogy or limiting how teachers can discuss racism and sexism in the classroom, with eighteen of those states actually imposing restrictions through legislation or other avenues.[34] This Note argues that anti-CRT legislation may violate the Fourteenth Amendment equal protection and substantive due process rights of Native American students, as well as the right to a basic minimum level of education provided in state constitutions. Part I details the importance of culturally competent school curriculum for Native students and their educational success. Part II highlights the effect that anti-CRT legislation has on ethnic studies and the subsequent harm caused to Native students in public schools. Part III proposes potential causes of action that could be brought as a response to the passage of anti-CRT legislation.

I. BACKGROUND

A. THE ACHIEVEMENT GAP BETWEEN NATIVE AND WHITE STUDENTS

A wide range of studies measuring academic outcomes for students of different racial and socioeconomic backgrounds indicate that Native students have historically lagged behind their peers in academic achievement. This gap is persisting—and even growing—in many areas. From 2000 to 2013, average fourth grade reading scores for Native students in public schools decreased by

33. The Texas legislation ranges from broad prohibitions such as teaching that "members of one race or sex cannot and should not attempt to treat others without respect to race or sex" and "slavery and racism are anything other than . . . deviations from the authentic founding principles of the United States" to specifically banning the New York Times' 1969 Education Project. H.B. 3979, 87th Leg., 1st Sess. (Tex. 2021). The "Stop W.O.K.E. Act," also known as Florida H.B. 7, contains broad prohibitions that are word-for-word identical to the previous bills discussed, and creates a private right of action for parents, employees, and students against violations. *See* H.B. 7, 27th Leg., 2nd Sess. (Fla. 2022).

34. The eighteen states that have restricted such classroom pedagogy are Alabama, Arkansas, Florida, Georgia, Idaho, Iowa, Kentucky, Mississippi, Montana, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Utah. *See* Sarah Schwartz, *Map: Where Critical Race Theory is Under Attack*, EDUC. WEEK (June 13, 2023), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 [https://perma.cc/L76H-8BFV].

nine points, while average scores for Hispanic, Asian, and Black students all increased by at least eleven points.[35] More recent data support this pattern, as the public high school graduation rate for Native students stood at 74.9% in 2020, lower than any other racial group, including white students, who had a graduation rate of 90.2%.[36] Studies examining New Mexico, a state with, proportionally, one of the highest populations of Native students in the country, indicates similarly alarming patterns: the New Mexico Standard Based Assessment (NMSBA) from 2007 to 2014 showed that between 62.4% and 71.1% of Native American fourth graders did not demonstrate proficiency in reading, while 66.5% to 74.8% were not proficient in math.[37] This too was lower than their peers; the 2014 NMSBA found that only 56.2% of all fourth graders did not demonstrate reading proficiency and 57.3% of all fourth graders were not proficient in math.[38] This discrepancy mirrors the racial demographics of students pursuing advanced degrees. At the national level, the rate of Native Americans with a bachelor's degree or higher stood at 16.1% in 2019.[39] In 2021, 28% of eighteen- to twenty-four-year-old Native American students were enrolled in college, compared to 38% of the overall U.S. population in that age range.[40] These discrepancies persist despite an increasingly vocalized desire by Native students to complete a bachelor's degree: the percentage of Native tenth-graders

35. *See* Bryan McKinley Jones Brayboy & Margaret J. Maaka, *K–12 Achievement for Indigenous Students*, 54 J. AM. INDIAN EDUC. 63, 66 tbl.1 (2015).

36. *See Public High School 4-Year Adjusted Cohort Graduation Rate (ACGR), by Race/Ethnicity and Selected Demographic Characteristics for the United States, the 50 States, the District of Columbia, and Puerto Rico: School Year 2019–20*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/ccd/tables/ACGR_RE_and_characteristics_2019-20.asp [http://perma.cc/Q3BL-8NKR].

37. *See* Preston Sanchez & Rebecca Blum-Martinez, *A Watershed Moment in the Education of American Indians: A Judicial Strategy to Mandate the State of New Mexico to Meet the Unique Cultural and Linguistic Needs of American Indians in New Mexico Public Schools*, 27 AM. U. J. GENDER, SOC. POL'Y, & L. 183, 192 (2019).

38. *See* N.M. LEGIS. EDUC. STUD. COMM., FACT SHEET: PARTNERSHIP FOR ASSESSMENT OF READINESS FOR COLLEGE AND CAREERS (PARCC) ASSESSMENT RESULTS 5 (2015), https://www.nmlegis.gov/handouts/ALESC%20111915%20Item%206%20Fact%20Sheet%20PARCC%20Assessment%20Results.pdf [https://perma.cc/CM9Q-EXLX].

39. *See* Zuzana Bednarikova, *Educational Attainment of American Indians and Alaska Natives Has Risen in Midwest*, N. CENT. REG'L CTR. FOR RURAL DEV. (Dec. 8, 2021), https://ncrcrd.ag.purdue.edu/2021/12/08/educational-attainment-of-american-indians-and-alaska-natives-has-risen-in-midwest/ [https://perma.cc/5SWP-7DZT].

40. *See* POSTSECONDARY NAT'L POL'Y INST., NATIVE AMERICAN STUDENTS IN HIGHER EDUCATION 1 (2023), https://pnpi.org/wp-content/uploads/2023/11/NativeAmericanFactSheet-Nov-2023.pdf [https://perma.cc/23E9-9VNT].

expecting to complete at least a bachelor's degree increased from 41% in 1980 to 76% in 2002.[41] This is roughly in line with students of other races and ethnicities, as the survey found that 81% of white students, 77% of Black students, and 75% of Hispanic students expected to complete at least a bachelor's degree.[42] The National Indian Education Study confirmed these findings, noting that 78% of Native eighth graders aspire to attend college.[43] These data demonstrate that student desire to pursue additional education cannot, by itself, explain the substantial difference in educational attainment between racial groups, and that other environmental factors are likely at play.

B. TEACHER AND ADMINISTRATOR TREATMENT OF NATIVE STUDENTS

Failure to include comprehensive education on the history and culture of Native peoples in school curricula fosters an educational environment where some administrators and teachers—often following official school or school district policy—actively discriminate against Native students' culture or religion.[44] Sharon Vegh Williams, in a qualitative study of a school bordering the Mohawk Nation at Akwesasne in New York State, found that teachers' lack of knowledge and cultural misunderstanding of Mohawk expressions of self-determination and sovereignty created barriers for Mohawk student success.[45] This often took the form of school policies applied in a manner which prevented Mohawk students from asserting or expressing their sovereignty.[46]

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41. *See* Brayboy & Maaka, *K–12 Achievement*, *supra* note 35, at 64.

42. *See Indicator 18: Educational Aspirations*, NAT'L CTR. FOR EDUC. STAT. (July 2005), https://nces.ed.gov/programs/youthindicators/Indicators.asp?PubPageNumber=18&ShowTablePage=ShowTable [https://perma.cc/3AY9-DL9E].

43. *See* Brayboy & Maaka, *K–12 Achievement*, *supra* note 35, at 64.

44. *See* Hammersley et al., *supra* note 2, at 26.

45. Williams finds that preserving and practicing traditional Mohawk lifeways are "necessary for upholding a sovereign and uniquely Mohawk nation," claiming that a "symbiotic relationship exists between supporting cultural practices and maintaining tribal sovereignty." It is within this context and meaning that Williams employs the term "sovereignty." Sharon Vegh Williams, *Sovereignty and Scholarship: Mohawk Self-Determination in Mainstream Schooling*, 52 J. AM. INDIAN EDUC. 3, 9 (2013).

46. Through interviews, participant observation, surveys, and focus groups, Williams found that self-determination, including sovereignty rights, played a significant role in the lives of Mohawk students. Many school policies disrupted engagement in academics by minimizing or prohibiting cultural expression. *See id.* at 8–9.

Examples of conflict included student objections to being forced to say the Pledge of Allegiance, a mandate to stand for the national anthem at school events, and a prohibition on hanging the Haudenosaunee flag—symbolizing the Iroquois Confederacy, an alliance between six Native American Nations—inside the school.[47]

Such incidents are part of a broader pattern of discriminatory actions against Native students. Although the Supreme Court has never determined whether schools can regulate student hair length and style specifically, schools are allowed to regulate expression to prevent serious disruptions, which has been used as a justification for hair policies.[48] In addition to the aforementioned example of a Texas school disciplining a five-year-old kindergarten student with long hair, several other schools around the country have been accused of allowing administrators or students to cut Native students' hair.[49] For example, the largest school district in New Mexico was sued by the American Civil Liberties Union (ACLU) in 2020 over an incident where a teacher allegedly forcefully cut a Navajo student's hair in class.[50] The ACLU has also issued a warning letter to officials at the Classical Charter Schools of Leland in North Carolina, who have demanded that Native American first graders cut their traditional hairstyles to conform with strict grooming standards.[51] These actions hearken

47. *See id.* at 14.

48. *See* Hammersley et al., *supra* note 2, at 26; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

49. *See* Ashley Moss, *Controversy Continues Over Del City Native American First Grader's Unwanted Haircut*, KFOR (Mar. 25, 2022), https://kfor.com/news/local/controversy-continues-over-del-city-native-american-first-graders-unwanted-haircut [https://perma.cc/FT67-9JT4]; *see also* Chris Bowling, *A Nebraska School Says It Was a Lice Check. Lakota People Sense Centuries of Repressions*, USA TODAY (Sept. 18, 2021), https://www.usatoday.com/story/news/nation/2021/09/18/nebraska-lakota-culture-school-hair-cut-lice-check/8399799002 [https://perma.cc/F237-VW2F].

50. *See ACLU Sues School District, Says Native American Students Faced Discrimination*, VOICE OF AM. (Jan. 9, 2020), https://www.voanews.com/a/student-union_aclu-sues-school-district-says-native-american-students-faced-discrimination/6182325.html [https://perma.cc/2PV2-L66Y]; *see generally* Plaintiff's Complaint, Johnson v. Bd. Educ. Albuquerque Pub. Sch., No. D-202-CV-2020-00121, 2020 WL 113137 (D.N.M. Jan. 8, 2020).

51. *See ACLU Warns Classical Charter Schools That Short Hair Rule for Boys Discriminates Against Native American Students*, AM. C.L. UNION (Mar. 20, 2023), https://www.aclu.org/press-releases/aclu-warns-classical-charter-schools-that-short-hair-rule-for-boys-discriminates-against-native-american-students [https://perma.cc/5TJ3-

back to the boarding school era, when schoolmasters would cut Native students' hair to strip them of their identity and attempt to forcibly assimilate them into white culture.[52]

Other limitations on Native student appearance have included prohibitions on traditional regalia at graduations and other school ceremonies.[53] While such ceremonies provide opportunities for Native students and their families to celebrate religion, culture, and scholastic achievement through regalia such as eagle feathers or beaded caps, many schools prevent students from expressing themselves in this way.[54] For example, an Indigenous student sued an Arizona high school in 2019 for allegedly refusing to accommodate a beaded graduation cap that included a sacred eagle plume blessed in a religious ceremony.[55]

While bans on hairstyles and traditional regalia are based on distinct elements of one's appearance, students' mere existence as Native Americans engenders disproportionate disciplinary punishment from school administrators. Investigations into the discipline of Native students in New Mexico demonstrate that they are expelled from the state's public schools at a much higher rate than other children, and at least four times as often as white students.[56] The Gallup-McKinley County School District, which enrolls the largest number of Native students in the United States, has the highest frequency of student discipline in New Mexico since 2016, and accounts for 90% of Native student expulsions within the state in that same time frame.[57] Native students in the district are subjected to punishment at twice the rate of their white peers, often for "disorderly conduct," an infraction that is not

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YQML]; *Classical Charter Schools Decries New ACLU Attack; Defends Boys Grooming Standards*, CLASSICAL CHARTER SCHS. (Mar. 21, 2023), https://ccsam.net/2023/03/22/school-news-3-22-2023 [https://perma.cc/3WAL-Q6WL].

52. *See* Hammersley et al., *supra* note 2, at 26.

53. *See id.*

54. *See id.*

55. Although the suit was initially dismissed for failure to state a claim, the Ninth Circuit reversed and remanded the District Court's decision, holding that the student stated valid claims for violations of Free Exercise and Free Speech Clauses. *See* Waln v. Dysart Sch. Dist., 54 F.4th 1152, 1164 (9th Cir. 2022).

56. *See* Bryant Furlow, *This School District Is Ground Zero for Harsh Discipline of Native Students in New Mexico*, PROPUBLICA (Dec. 21, 2022), https://www.propublica.org/article/gallup-mckinley-schools-native-student-discipline [https://perma.cc/T642-D479].

57. *See* Savannah Peat, *UNM Researcher Fights Unfair School Discipline for Native American Students*, UNM NEWSROOM (Feb. 6, 2023), https://news.unm.edu/news/unm-researcher-fights-unfair-school-discipline-for-native-american-students [https://perma.cc/6KXK-ZJSX].

defined in state education policies and is described only generally in the Gallup-McKinley student handbook as "action(s) which substantially disrupt(s) the orderly conduct of a school environment."[58] Native student violations of this vague policy have even led to the involvement of New Mexico law enforcement 193 times between the 2016–17 and 2019–20 academic years, with about 90% of those instances occurring in Gallup-McKinley schools.[59] The pattern of disproportionately harsh punishment for Native students has caught the attention of the New Mexico attorney general, who recently opened an investigation into the school district.[60] As school suspension and expulsion are clear indicators of future under-education, unemployment, and incarceration, this discriminatory treatment has a direct effect on the future educational outcomes and livelihoods of Native students.[61]

Native students frequently operate in an educational environment where they face continuous microaggressions that negatively affect their learning experience. These microaggressions commonly take the form of assumptions about the intellectual inferiority of students of color, the linkage of students of color to criminality, and the assumed inferiority of non-white cultural values and communication styles.[62] Native students participating in a qualitative study at a public high school with a two-thirds Native student body, Hilltop High, described being negatively affected by microaggressions from their school administration.[63] Hilltop hired a school police officer despite minimal history of disciplinary issues and enforced a dress code with assimilationist underpinnings.[64] Students expressed that

58. *See* Furlow, *supra* note 56.

59. *See id.*

60. *See* Bryant Furlow, *New Mexico AG to Investigate Gallup-McKinley School District for Harsh Discipline of Native American Students*, PROPUBLICA (Sept. 11, 2023), https://www.propublica.org/article/gallup-mckinley-school-investigation-native-student-discipline [https://perma.cc/3CGJ-ZR5K].

61. Although direct causation is difficult to prove due to numerous confounding variables in this instance, it is easy enough to draw an inference between being suspended, expelled, and having one's education disrupted and lower future educational outcomes. *See, e.g.*, DeWitt Scott, *Developing the Prison-to-School Pipeline: A Paradigmatic Shift in Educational Possibilities During an Age of Mass Incarceration*, 68 J. CORR. EDUC. 41, 43 (2017).

62. *See* Cerecer, *supra* note 7, at 592–93.

63. *See id.* at 601–04.

64. Students were required to wear a uniform of khaki pants every day, rather than denim jeans or other possible options. *See id.* at 606.

these decisions treated them as violent youth, placing them in opposition to school authority figures and marginalizing them from their schoolwork and other educational opportunities.[65]

In summary, the cultural insensitivity of school administrators creates a difficult academic environment for many Native Americans in public schools, contributing to the disparity in educational outcomes relative to white students.[66] Students that experience discrimination in the classroom are more likely to have negative attitudes about school, lower academic motivation and performance, and are more likely to drop out of high school.[67] This troubling pattern of discriminatory incidents is indicative of the difficulties that Native students face in public schools, which necessitates a proactive solution. An altered school curriculum incorporating culturally responsive pedagogy could serve as part of a strategy to alleviate some of the negative experiences afflicting Native student learning.

C. NATIVE HISTORY AND CULTURE IN SCHOOL CURRICULA

In addition to overtly discriminatory actions and policies that school districts and administrators have taken, contemporary public-school curricula create additional barriers for Native student learning. American students are frequently taught a one-sided view of their country's history without appropriate or accurate acknowledgement of Native culture, reinforcing stereotypes about Native Americans and downplaying their positive contributions to the development of the American nation.[68] To illustrate, a 2019 study found that twenty-seven states did not name a single Native American in their required K–12 curricula, while 87% of states failed to even mention Native American history

65. *See id.* at 592.

66. *See supra* Part I.A.

67. *See, e.g.*, CHRISTIA SPEARS BROWN, MIGRATION POL'Y INST., THE EDUCATIONAL, PSYCHOLOGICAL, AND SOCIAL IMPACT OF DISCRIMINATION ON THE IMMIGRANT CHILD 1 (2015), https://www.migrationpolicy.org/sites/default/files/publications/FCD-Brown-FINALWEB.pdf [https://perma.cc/3277-DD83].

68. *See* Chandler, *supra* note 22, at 42 ("Oftentimes, the study of Native groups in American history or social studies is a truncated, simplified version of actual events, time periods, and personalities. Not only are students left with their stereotypes about Native people reinforced, the coverage of their impact upon the creation of the United States is downplayed. The fact that Native ideas about government and politics had a profound impact on the creation of our own democracy is completely missing from our textbooks and public consciousness.").

after 1900, allowing myths and stereotypes to persist in contemporary society.[69] Without a historically complete and accurate curriculum in public school classrooms, the story of Native Americans and Europeans tends to become dangerously dichotomized into "good guys" versus "bad guys," with the former serving as the villain in the traditional story of manifest destiny.[70]

When Indigenous cultures receive any recognition in the classroom, they are too often treated as a collective entity and only addressed near the Thanksgiving holiday through exaggerated or inaccurate stories about the relationship between Native tribes and European settlers.[71] Such instruction is often coupled with crafts depicting headdresses or references to Pocahontas.[72] Native students are often compelled to participate in other culturally insensitive lessons, such as reenacting the 1889 Land Run,[73] which glorifies the western expansion period of U.S. history, during which Indigenous peoples were forcibly displaced.[74]

This manner of curriculum is harmful, because culturally insensitive content or inaccurate Native representation may cause Native students to experience sentiments of oppression, leading them to question their self-worth or the value of their heritage.[75] Racist curricula serve to advance the status quo, in which the dominant group—in this case, white Americans—retains its power and privilege.[76] Due to the ongoing harms of inaccurate Native

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69. NAT'L CONG. OF AM. INDIANS, BECOMING VISIBLE: A LANDSCAPE ANALYSIS OF STATE EFFORTS TO PROVIDE NATIVE AMERICAN EDUCATION FOR ALL 8 (2019), https://www.ncai.org/policy-research-center/research-data/prc-publications/NCAI-Becoming_Visible_Report-Digital_FINAL_10_2019.pdf [https://perma.cc/S6FS-MQF6].

70. *See* Chandler, *supra* note 22, at 42.

71. *See* Journell, *supra* note 15.

72. *See id.*

73. The 1889 "Land Run" was the result of the U.S. government's removing most of Oklahoma's "Indian territory" from tribal control and opening it up for white settlers to claim. Reenactments involve students dressing up as settlers staking claims to areas of land. *See Native Land Rights and the Land Runs of 1891*, POTAWATOMI.ORG (Nov. 18, 2020), https://www.potawatomi.org/blog/2020/11/18/native-land-rights-and-the-land-runs-of-1891 [https://perma.cc/HG7B-ZL8E].

74. *See* Amended Complaint at 63, Black Emergency Response Team v. O'Connor, No. 5:21-cv-01022-G (W.D. Okla. Nov. 9, 2021) (a lawsuit brought by the ACLU and various other parties challenging HB 1775, Oklahoma's anti-critical race theory bill). As of April 2024, the case is still pending in the Western District of Oklahoma.

75. *See, e.g.*, Journell, *supra* note 15, at 24–25 (finding that instruction based on racist educational standards may have damaging effects for students, causing them to "question their heritage or self-worth").

76. *See, e.g.*, Michael Dantley, *Racist Curricula in the 21st Century Do Exist*, AM. ASS'N COLLS. FOR TCHR. EDUC., https://aacte.org/2019/12/racist-curricula-in-the-21st-century-do-exist [https://perma.cc/4C3F-JTF8] (suggesting that racist curricula are written from a

portrayal in the classroom, preventing the incorporation of critical race theory curriculum not only halts the process of improving outcomes for Native students by preventing them from learning about institutional racism, but also perpetuates a harmful learning environment by presenting demeaning and alienating depictions of Native culture.

While this Note primarily focuses on how banning critical race theory in public school classrooms perpetuates harm to Native students by allowing the continuation of harmful educational practices, it also aims to address how these anti-CRT laws cause spillover effects by proscribing other types of important pedagogical practices that are not CRT studies. Ethnic studies programs and culturally competent education are not synonymous with critical race theory, yet would be banned under many anti-CRT laws. Vague anti-CRT legislation with uncertain enforcement practices serves to chill a variety of classroom conversations that could ameliorate harm to Native students.[77] As such, this Note aims to expand the conversation beyond critical race theory—specifically into the value of adjacent programs that can benefit minority and white students alike.

Though many states have implemented anti-CRT legislation in recent years, others have moved in the opposite direction by incorporating new curricula focused on the Native American experience. In recognition of the marginalization of Native American history and culture in public schools, such states now require the development and implementation of lesson plans that address these topics with heightened rigor and historical accuracy. Oregon, for example, passed a law in 2017 requiring the state department of education to develop a K–12 curriculum that teaches Native American issues in a culturally relevant and appropriate manner, while also requiring school districts to

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dominant societal viewpoint and present diverse individuals as less than and/or silent, to perpetuate power and control of the dominant group).

77. *See* Robby Korth & Elizabeth Caldwell, *'We Need to Keep Some Level of Decorum': Oklahoma State Board of Education Meeting Features Political Theatrics, Little Policy Talk*, NPR (July 28, 2022), https://www.kosu.org/education/2022-07-28/we-need-to-keep-some-level-of-decorum-oklahoma-state-board-of-education-meeting-features-political-theatrics-little-policy-talk [https://perma.cc/X6SM-SE2Y] (demonstrating that Oklahoma's anti-CRT bill has already been used to sanction school districts for in-class team building activities intending to show that "each student has a different experience in life," which is a conversation that could lead to increased cross-cultural understanding and less racist behavior directed toward Native students).

implement the lessons.[78] The law also requires that federally recognized tribes in Oregon are provided with the opportunity to collaborate in developing the curriculum, and that funding is available to support such efforts.[79] Similarly, Washington state has instituted teacher training programs to integrate a mandatory curriculum on Native American peoples, while California has required that the state develop a model curriculum centered on Native American studies by September 1, 2025.[80] Other states, including Connecticut, North Dakota, and Montana, have statutory requirements relating to the mandatory teaching of Native American studies in K–12 schools, although Montana's statute makes such instruction discretionary.[81]

States also have the opportunity to take a critical race theory-based approach toward educating their students on Native issues, incorporating into classroom discourse the idea that the American legal system and institutions of power are part and parcel of a society that serves the status quo of the white majority at the expense of people of color.[82] Recently, critical race theorists have incorporated empirical methods to support their claims, and the pedagogy continues to develop at the nexus of sociology, social psychology, anthropology, economics, law, psychology, business, and political science.[83] As critical race theory involves acknowledgement and elucidation of race relations throughout American history, it necessarily includes increased visibility of minority group struggles and representation of racism to students,

78. The curriculum must be "[r]elated to the Native American experience in Oregon, including tribal history, sovereignty issues, culture, treaty rights, government, socioeconomic experiences and current events" and must be "[h]istorically accurate, culturally relevant, community-based, contemporary and developmentally appropriate." Curriculum Relating to Native American Experience in Oregon, OR. REV. STAT. § 329.493 (2017).

79. *See id.*

80. *See* S.B. 5028, 65th Leg., 2018 Sess. (Wash. 2018); Model Curriculum in Native American Studies, CAL. EDUC. CODE § 51226.9 (WEST 2021).

81. A Montana statute simply states that "every Montanan, whether Indian or non-Indian, be encouraged to learn about the distinct and unique heritage of American Indians in a culturally responsive manner." Whitney Saunders, *Resisting Erasure in Rhode Island: The Need for Compulsory Native American History in Rhode Island Schools*, 27 ROGER WILLIAMS U. L. REV. 379, 390–94 (2022).

82. *See* Chandler, *supra* note 22, at 35.

83. *See* Adrien K. Wing, *Is There a Future for Critical Race Theory?*, 66 J. LEGAL EDUC. 44, 52 (2016) (introducing the ideal of critical race theory and empirical methods ("eCRT") to push back on a common critique of critical race theory, which is that it fails to focus on evidentiary support for some of its claims and relies too heavily on narrative and anecdotal evidence).

many of whom have daily experience with race and its impacts.[84] Because critical race theory includes the origins of race-based discrimination and social structures in North America, implementation of the curricula should start with the experience and treatment of indigenous peoples in North America.[85] While racism and oppressive societal structures remain prevalent in America, the work to uplift minority students into positions of power and to educate them about the steps needed to enact change can be furthered by the implementation of critical race theory curricula and other education programs which similarly address Native American history with heightened accuracy.[86]

The implementation of critical race theory and adjacent programs in classrooms has increased Native student success in practice. One of the most successful programs of this kind is the Mexican-American/Raza Studies (MAS) program in the Tucson Unified School District of Arizona. The MAS program is based on Latino and Indigenous teachings that promote love, truth, and respect for living things, and seeks to encourage critical thinking and honest dialogue regarding the history of the United States.[87] It also aims to ensure that Native students see themselves reflected in the curriculum by highlighting historical accomplishments of Indigenous Native Americans and Indigenous Latinos and Latinas.[88] Notably, the MAS curriculum intentionally incorporated components of critical race theory, centering race in classroom discussions while concurrently examining other forms of oppression in students' lived experiences.[89]

Designed with the goal of improving educational outcomes in a district with a high population of Native students, the MAS program appears to have been an academic success; according to one analysis of the program, MAS students are "three times more

84. *See* Chandler, *supra* note 22, at 40.

85. *See id*. at 42.

86. *See id*. at 42–43 (advocating for a critical race theory-based curriculum that alters the traditional narrative of Natives as the "bad guys" and Europeans as the "good guys," by including the genocide of Native Americans and theft of Native lands to improve social studies curricula and learning outcomes).

87. *See* Jessica A. Solyom & Bryan McKinley Jones Brayboy, *Memento Mori: Policing the Minds and Bodies of Indigenous Latinas/os in Arizona*, 42 CAL. W. INT'L L.J. 473, 482–83 (2012).

88. *See id*. at 483.

89. *See* 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, 1091 (2014).

likely to pass [Arizona reading assessments], four times more likely [to pass writing assessments], and two and a half times more likely [to pass math assessments]" compared to other Arizona students.[90] Students in the program are also more likely to graduate high school and pursue a college degree.[91] A study conducted by the University of Arizona College of Education found sufficient empirical evidence of a significant relationship between participation in the MAS program and both student proficiency and graduation rates.[92] Despite generally entering the program with lower GPAs than their non-MAS peers, students in the program outperformed their non-MAS peers on Arizona state standardized tests and graduated high school at a higher rate.[93]

The MAS program is a curriculum that is not squarely within the definition of critical race theory, but would likely still be banned by anti-CRT legislation. The program, in fact, became the target of conservative legislation. In a precursor to the more contemporary political debate over critical race theory, Arizona Republican lawmakers drafted and passed Arizona House Bill 2281 in May 2010, in a targeted attempt to end the MAS program.[94] The bill, which decreased funding for schools that are not compliant with "Arizona's vision and pedagogy for what makes an 'ideal' citizen," was subsequently declared unconstitutional in federal court in 2017 due to clear evidence that it was motivated by racial animus.[95]

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90. Solyom & Brayboy, *supra* note 87, at 501.

91. Notably, this includes students of all races that participated in the program, suggesting an overall beneficial effect of diverse and inclusive scholarship. *See id.*

92. *See* NOLAN L. CABRERA ET AL., ARIZ. COLL. OF EDUC., AN EMPIRICAL ANALYSIS OF THE EFFECTS OF MEXICAN AMERICAN STUDIES PARTICIPATION ON STUDENT ACHIEVEMENT WITHIN TUCSON UNIFIED SCHOOL DISTRICT 7 (2012), https://old.coe.arizona.edu/sites/default/files/MAS_report_2012_0.pdf [https://perma.cc/9QCF-AN43]. The study compared students enrolled in MAS courses to students not enrolled in MAS courses at the same high school over the span of four years. The dependent variables examined included graduation rate, Arizona state examinations on writing, math, and reading ("Arizona Instrument to Measure Standards"), while the study tracked independent variables including income, race, and gender. Although the study found more modest benefits than Solyom & Brayboy, *supra* note 87, the benefits of MAS were still notable. In 2012, students participating in the program were roughly 1.7 times more likely to pass reading assessments, twice as likely to pass writing assessments, and 1.2 times as likely to pass math assessments (as shown by Table 2 of the study).

93. *See* Cabrera et al., *supra* note 89, at 1102.

94. *See* H.B. 2281, 49th Leg., 2nd Sess. (Ariz. 2010); Solyom & Brayboy, *supra* note 87, at 479.

95. Solyom & Brayboy, *supra* note 87, at 479; Gonzalez v. Douglas, 269 F. Supp. 3d 948, 972 (D. Ariz. 2017) ("Considering the evidence, the Court is convinced that [H.B. 2281] was enacted and enforced with a discriminatory purpose.").

The success of the MAS program is amplified by additional evidence that more inclusive school curricula, which can be driven conjunctively by critical race theory and ethnic studies programs, lead to educational empowerment and positive academic outcomes for students.[96] The recent implementation of an ethnic studies course in San Francisco public schools increased graduation rates and college enrollment for lower-performing students of all races, while simultaneously decreasing absenteeism in the classroom.[97] Students at a majority Black school using "critical multiculturalism and anti-racism education" in its curriculum demonstrated greater academic achievement,[98] with interviewed students explaining that the curriculum gave them a greater understanding and appreciation for multicultural education.[99] Wrestling with issues of racial justice and multiculturalism helps students to grow and succeed academically—a pattern borne out both anecdotally and empirically. Yet, despite their clear benefits to students, both critical race theory and related ethnic studies curricula are in severe danger of becoming banned under the new wave of anti-CRT laws.

II. THE HARM OF ANTI-CRITICAL RACE THEORY LAWS

Akin to the Arizona legislature targeting the MAS program in 2010, states across the country have taken action in recent years to prevent any effort to teach critical race theory in public school classrooms. Anti-CRT legislation, such as the aforementioned Oklahoma House Bill 1775, are designed to limit classroom conversations and lesson plans that discuss race and inequality. Therefore, since an accurate account of Native American history is

96. *See, e.g.*, Samuel D. Museus & Kiana Shirona, *Understanding the Relationship between Culturally Engaging Campus Environments and College Students' Academic Motivation*, 12 EDUC. SCI. 785, 794 (2022) (finding that culturally engaging academic environments correlate to feelings of belonging and academic motivation and success); *see also* Sabrina Toppa, *How Schools are Building a More Inclusive Curriculum*, TEACH FOR AM. (Jan. 24, 2022), https://www.teachforamerica.org/one-day/ideas-and-solutions/how-schools-are-building-a-more-inclusive-curriculum [https://perma.cc/3JBY-DZEZ] (summarizing efforts to incorporate ethnic studies programming into a variety of school districts across the country and sharing anecdotal evidence of their early successes).

97. *See* Sade Bonilla et al., *Ethnic Studies Increases Longer-Run Academic Engagement and Attainment*, 118 PROC. NAT'L ACAD. SCIS. 1, 9 (2021).

98. Greg Wiggan & Marcia J. Watson Vandiver, *Pedagogy of Empowerment: Student Perspectives on Critical Multicultural Education at a High-Performing African American School*, 22 RACE, ETHNICITY & EDUC. 767, 769 (2019).

99. *See id.* at 776.

crucial to improve educational outcomes for Native students, anti-CRT laws necessarily stand in opposition to curricular changes that would improve these students' educational success.[100] Banning discussions of institutional racism, white supremacy, and the historical challenges that Native Americans have faced due to their race and ethnicity creates a less inclusive—or even actively hostile—climate for students of color due to misunderstanding and prejudice that could be ameliorated by the kind of discussions that anti-CRT bills seek to prevent.[101]

While publicly billed as "anti-CRT" laws, such legislation is written broadly enough that it serves to deter other effective forms of curricula about the history and culture of minority students. Proponents of these laws have taken steps to ban a variety of books that provide an honest chronicling of the country's brutal history of oppressing racial minorities.[102] Many supporters of anti-CRT laws have also conflated ethnic studies courses with "un-American" or "anti-white" teachings, rendering African American studies and related programs in danger of becoming limited by anti-CRT legislation.[103] Crucially, these laws restrict the perspectives and discussions of the lived experience of students of color through a variety of avenues and inflict harm on students who do not see their communities reflected in school curriculum and, in turn, feel disengaged and disconnected from classroom discussions.[104]

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100. *See* Hammersley et al., *supra* note 2, at 27 (arguing that anti-CRT laws prevent teachers from teaching indigenous history, which necessarily includes topics such as massacres of Indigenous people, forced relocations such as the Long Walk of the Diné people, and the Boarding School Era); *see* Amended Complaint, Black Emergency Response Team v. O'Connor, *supra* note 74 (arguing that H.B. 1775 chills classroom conversations that cultivate an educationally inclusive environment that best supports Native American students' safety and scholastic success).

101. *See* Chandler, *supra* note 22, at 42 (discussing the "embarrassing" treatment of Native Americans in American history curricula, including stereotypes, caricatures, and villainous portrayals, that lead to a misguided understanding of Native American peoples and culture for American students).

102. *See* Michelle Goldberg, *A Frenzy of Book Banning*, N.Y. TIMES (Nov. 12, 2021), https://www.nytimes.com/2021/11/12/opinion/book-bans.html [https://perma.cc/ECG2-LLKK].

103. *See, e.g.*, Hayley Smith, *Orange County Debates Ethnic Studies: Vital Learnings or 'Anti-White' Divisiveness?*, L.A. TIMES (Apr. 28, 2021), https://www.latimes.com/california/story/2021-04-28/ethnic-studies-slammed-as-anti-white-in-orange-county [https://perma.cc/4VPA-EGAF].

104. *See* Journell, *supra* note 15, at 21.

A. THE PRACTICAL EFFECT OF ANTI-CRT LEGISLATION

While the recency of anti-CRT laws renders it difficult to examine any long-term effects on public education, educators have reported the predicted effects of chilling classroom discussion and limiting teacher discretion. Following the implementation of H.B. 1775, some Oklahoma English teachers decided against having their students read *Killers of the Flower Moon*, a book about members of the Osage Nation murdered by white Oklahomans over the rights to oil leases.[105] Multiple school districts across the state have likewise been sanctioned under H.B. 1775 for vague reasons, as there is no requirement to produce evidence of sanctionable activity.[106] For example, Mustang Public Schools was issued a warning under the law due to an in-class team building activity designed to show that students have different experiences in life and emphasize that it is hard to know what challenges one's peers are experiencing.[107] The broad language in H.B. 1775 results in such basic exercises becoming sanctionable under law, with broad discretion for the State Board of Education to adjudicate and enforce potential violations.[108]

Even if schools or districts are not being actively penalized, the threat of vague legislation without explicit guidelines for enforcement has a chilling effect on race-related speech in classrooms, as teachers do not want to expose themselves or their schools to lawsuits.[109] Paula Lewis, Chair of the Oklahoma City School Board, has acknowledged that the plain text of H.B. 1775

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105. *See* Robby Korth, *FAQ: What We Know About Teaching Since Oklahoma's So-Called Critical Race Theory Ban Went Into Effect*, STATEIMPACT OKLA. (Sept. 8, 2022), https://stateimpact.npr.org/oklahoma/2022/09/08/faq-what-we-know-about-teaching-since-oklahomas-so-called-critical-race-theory-ban-went-into-effect/ [https://perma.cc/DZ88-2P3W].

106. *See* Korth & Caldwell, *supra* note 77.

107. The "classroom activity included a question along the lines of 'if you've ever been made fun of or picked on because of your race or ethnicity, take a step forward or take a step back,'" which allegedly made students uncomfortable. Kaylee Douglas & Natalie Clydesdale, *Mustang Public Schools Challenges Accreditation Downgrade*, KFOR (Aug. 16, 2022), https://kfor.com/news/oklahoma-legislature/mustang-public-schools-challenges-accreditation-downgrade [https://perma.cc/JYZ7-BAJZ].

108. *See* Korth & Caldwell, *supra* note 77 (for example, the Board voted to add a warning to Tulsa Public School's accreditation without releasing any evidence of a violation under H.B. 1775).

109. *See* Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons*, NPR (May 28, 2021), https://www.npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship [https://perma.cc/9Q2D-DXMV].

almost entirely bans activity that was already not occurring in classrooms, meaning that the primary effect of the law is to create fear that its vague rules and penalties could be applied to any manner of discussions of race or inequality.[110] It does not take much for educators to come under scrutiny; a teacher in Texas giving a virtual lesson on race and prejudice in American society had the father of a student overhear and complain to the administration that the teacher was "accusing his child of being racist."[111] The Texas law, Senate Bill 3, is enough for some teachers to self-censor and intentionally avoid discussions of race entirely, regardless of the impact on the student learning experience.[112]

Florida's "Individual Freedom Act," also known as the "Stop W.O.K.E. Act," is impacting course offerings in higher educational institutions. Professors have canceled classes exploring racial ideologies and color-blindness because of the apparent risk involved of running afoul of the Florida law, which "prohibits teachers from making students feel guilty for past discrimination of members of their race."[113] Rather than outright canceling classes, other professors have adjusted lesson plans. A professor of environmental justice, for example, changed a class project on a Canadian pipeline harming indigenous communities by "making sure to include the company's perspective" and shifting his teaching method from lecturing toward class discussion to avoid potential complaints about his rhetoric.[114] The new Florida law is affecting teacher behavior and curricular choices throughout the system—moving educators away from explicitly addressing race, class, and past harm, despite indications that such conversations are helping to engage minority students and benefiting students across the board.[115]

Preliminary studies about the effects of anti-CRT laws have found them to limit a wide array of classroom discussions, resulting in teachers self-censoring to avoid liability. A UCLA School of Law study surveying nearly 300 educators and 21 equity officers resulted in several anecdotes about teachers avoiding

110. *See id.*
111. *Id.*
112. *See id.*
113. Golden, *supra* note 21.
114. *Id.*
115. *See supra* Part I.C.

lessons on race.[116] A co-author of the study described seeing "a lot of fear and descriptions of self censorship, as well as administrators cautioning educators to tiptoe around certain topics."[117] Teachers are afraid to discuss race, racism, gender, and sexual identity topics in the classroom, and many schools and districts have abandoned diversity, equity, and inclusion initiatives that they committed to during the summer of 2020.[118] While the enacted legislation itself does not limit diversity and representation in public schools, the chilling effect that it has on a wide variety of areas, thanks to vague language and enforcement policies, ensures that the impact of anti-CRT theory laws will extend far beyond what is facially prevented by their language.

B. THE HARMFUL EFFECTS OF BANNING CRITICAL RACE THEORY

Preventing the implementation of ethnic studies and curricula about race and inequality can have detrimental effects on students from minority backgrounds. Anthropologist and Professor John Ogbu contends that members of racial minority groups will be more engaged in their education if they are positively represented in school curriculum.[119] This is particularly relevant for "involuntary minorities"—groups that were either forcibly brought to the United States or systematically oppressed by Europeans, such as African Americans and Native Americans.[120] For public schools in a majority-white, highly racialized society to provide minority students with the best chance to thrive in the educational system, the school curriculum should be providing students with fully-realized and accurate examples of people like themselves, which has not historically occurred in traditional American social studies education.[121] This is particularly true for Native American

116. *See* TAIFYA ALEXANDER ET AL., CRT FORWARD, TRACKING THE ATTACK ON CRITICAL RACE THEORY 24 (2023), https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf [https://perma.cc/3FQD-GSRJ] (finding that superintendents are explicitly, though unofficially, informing principals "in no uncertain terms" that they cannot "address issues of race and bias etc. with students or staff this year").

117. Eesha Pendharkar, *Efforts to Ban Critical Race Theory Could Restrict Teaching for a Third of America's Kids*, EDUC. WEEK (Jan. 27, 2022), https://www.edweek.org/leadership/efforts-to-ban-critical-race-theory-now-restrict-teaching-for-a-third-of-americas-kids/2022/01 [https://perma.cc/9RXH-GQD7].

118. *See id.*

119. *See* Journell, *supra* note 15, at 21.

120. *Id.*

121. *See id.*

students, who are often treated as a collective unit and rarely have the opportunity to learn about Native peoples and their successes in contemporary American society.[122] While the primary purpose of critical race theory curricula is not necessarily to provide examples of minority success, it can serve as a tool of empowerment by providing a more historically accurate account of events, including more positive examples of minority group success or perseverance that are often downplayed in traditional curricula. Through such empowerment, these educational strategies can help ameliorate or limit some of the aspects of academic environments hostile to Native students.

While critical race theory and ethnic studies classes have demonstrable benefits to minority students, critics have argued that such curricula will harm the education of white students by making them feel bad or uncomfortable.[123] Counter to these claims, a litany of evidence suggests that ethnic studies and diversity programming benefits white students socially and academically.[124] Studies conducted in higher education settings found that required diversity courses have an even greater positive impact on white students than students of color.[125] Contrary to hindering white students, critical race theory and adjacent curricula help such students to bridge differences in experiences and perspectives.[126]

Although anti-CRT legislation may not prevent racially diverse figures from appearing in school curricula, visibility alone is not enough to change student stereotypes and attitudes. Classroom lessons about racism improve racial attitudes among white children by allowing them to see how racism affects everybody and offering them a framework to address it.[127] Likewise, university students who completed an intercultural course focused on

122. *See* Chandler, *supra* note 22, at 42.

123. *See* Rachel Scully, *Bill to Ban Lessons Making White Students Feel 'Discomfort' Advances in Florida Senate*, HILL (Jan. 20, 2022), https://thehill.com/homenews/state-watch/590554-bill-to-ban-lessons-making-white-students-feel-discomfort-advances-in/ [https://perma.cc/SN59-WWKP].

124. *See* CHRISTINE E. SLEETER, NAT'L EDUC. ASS'N, THE ACADEMIC AND SOCIAL VALUE OF ETHNIC STUDIES 20 (2011), https://vtechworks.lib.vt.edu/bitstream/handle/10919/84024/AcademicSocialValue.pdf [https://perma.cc/ZCR8-ZDJM] (a collection and synthesis of numerous studies regarding the impact of ethnic studies programs on learning outcomes).

125. *See, e.g.*, Nicholas A. Bowman, *College Diversity Courses and Cognitive Development Among Students from Privileged and Marginalized Groups*, 2 J. DIVERSITY HIGHER EDUC. 182, 191 (2009).

126. *See* Sleeter, *supra* note 124, at 20.

127. *See id.* at 16.

awareness and communication competence made significant gains in empathy.[128] This is in contrast to smaller, or negligible, gains from programs that simply infuse representation of diverse people into curricula, suggesting that concrete discussions about race and racism are required to change student attitudes and provide them with tools to combat societal white supremacy.[129]

For students of Native American descent, feeling a constant sentiment of oppression due to their school's curriculum will likely cause them to question their self-worth or the value of their heritage.[130] If the only examples that schools provide Native students of their history center around being oppressed by societal structures, such pedagogy can "act as a form of oppression in itself."[131] At the same time, when sympathy is the only characteristic assigned to a certain group, it can cause peers and teachers of Native students to "subconsciously look down upon members of that group."[132] In this manner, a social studies curriculum that fails to provide fully-realized, and therefore more positive, examples of Native Americans coupled with discussions of the racism and inequality entrenched in American society can both alienate Native students from their learning environment and engender negative or patronizing feelings from their peers.

Decades of research on the education of Native American students reinforces the idea that "students will learn better and be more engaged in schooling when they can make connections" to the classroom lessons.[133] Cultural discontinuity and the absence of relevant or affirming curricula may alienate Native students and result in lower academic achievement.[134] In particular, not recognizing tribal differences may create resentment for Native students, particularly those students who have been raised with strong ties to their heritage.[135]

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128. *See id.*
129. *See id.*
130. *See* Journell, *supra* note 15, at 24–25 (finding that instruction based on racist educational standards may have damaging effects for students, causing them to "question their heritage or self-worth").
131. *Id.* at 25.
132. *Id.*
133. Brayboy & Maaka, *supra* note 35 at 82 (quoting Angelina E. Castagno & Bryan McKinley Jones Brayboy, *Culturally Responsive Schooling for Indigenous Youth: A Review of the Literature*, 78 REV. EDUC. RSCH. 941, 981 (2008)).
134. *See id.* at 83.
135. *See* Journell, *supra* note 15, at 26.

Underlying curricular issues are often compounded by teachers who are not equipped to educate in a culturally competent manner. Williams' study of Mohawk students attending public schools in Farmingdale, New York revealed Native students' self-reported barriers to achievement created by teachers' lack of cultural competency and ability to talk about race in an appropriate manner.[136] A survey of non-Native teachers at the Farmingdale school revealed that 81% wanted to know more about Mohawk culture but were unsure how to access the information or did not have time to seek it out on top of their regular workload.[137] In comparison, only 15% of teachers actively objected to the inclusion of additional cultural knowledge because they believed it prioritized Native students over others.[138] Designing a culturally competent curriculum, ideally including some level of teacher training along with implementation, is a practicable solution to overcome the barrier of teachers not having the time or knowledge to seek out relevant information on their own, and could reduce microaggressions committed against Native students due to teacher ignorance.[139] If Williams' study is reflective of larger patterns, then the barrier for many educators arises from having a limited capacity rather than internal opposition to these changes in pedagogy.

Ultimately, anti-CRT laws support white supremacist ideologies by limiting society's ability to identify and combat them, repeating a common pattern throughout American history of a white majority preserving their power by limiting racial minorities' access to knowledge.[140] In doing so, anti-CRT legislation actively continues the subjugation of Indigenous peoples. This results in broad, long-term systemic harms such as lower life expectancies and generational poverty borne out of

136. *See* Williams, *supra* note 45, at 3.

137. *See id.* at 10.

138. *See id.*

139. *See, e.g.*, MAX MARCHITELLO & JUSTIN TRINIDAD, BELLWETHER EDUC. PARTNERS, PREPARING TEACHERS FOR DIVERSE SCHOOLS 4–5 (2019), https://files.eric.ed.gov/fulltext/ED596443.pdf [https://perma.cc/L99G-WAL2] (arguing in part that most teachers are unprepared to work in diverse classrooms and communities of color, which contributes to large race-based educational achievement gaps in the American educational system).

140. *See* Whitney Bunts & Kayla Tawa, *How Abolishing Critical Race Theory Preserves White Power*, CTR. L. & SOC. POL'Y (Feb. 10, 2022), https://www.clasp.org/blog/how-abolishing-critical-race-theory-preserves-white-power [https://perma.cc/XN3B-ERAW].

societal racism and white supremacist ideologies.[141] As such, the harm of anti-CRT laws on Native American students ranges even farther and deeper than simple educational disparities caused by inappropriate curricula.

III. POTENTIAL CAUSES OF ACTION FOR NATIVE STUDENTS

Based on evidence that ethnic studies programs uplift minority students academically, and that Native children benefit from accurate classroom lessons about their cultures, is it possible that Native students could demonstrate tangible harm caused by the implementation of anti-CRT laws. Such demonstration of harm could lead to legal claims under the Fourteenth Amendment to the U.S. Constitution, either as a violation of a substantive due process right to a minimum standard of education, or as a violation of equal protection. Depending on where a student lives, they may also have a claim under their state constitution. This section explores Fourteenth Amendment claims and causes of action under state constitutional provisions.

A. FOURTEENTH AMENDMENT EQUAL PROTECTION

Although the Supreme Court has not deemed the right to an education to be "fundamental" under the Constitution, it has delivered a consistent message that the Fourteenth Amendment mandates that all students in a public education setting be treated with equal respect and equal dignity.[142] As such, an Equal Protection violation could be established by demonstrating that public school students are being treated with differing levels of respect or dignity based on their race or other protected characteristics. The Court's rhetoric has emphasized the importance of diversity in the classroom and that all students, regardless of race or gender, have equal access to education so that they may "study, engage in discussions" and "exchange views with

141. There is a plethora of research linking societal racism to adverse health and economic outcomes for minority groups in America. *See, e.g.*, Naomi Priest & David Williams, *Structural Racism and Discrimination: Impact on Minority Health and Health Disparities*, 31 ETHNICITY & DISEASE 285 (2021) (a source commenting on several studies linking racism to negative health outcomes).

142. *See* Jordan T. Ramharter, *A Meeting of the Minds: Utilizing Maine's State Education System to Promote the Success of its Native Students While Maintaining Tribal Sovereignty*, 72 ME. L. REV. 379, 383 (2020).

other students."[143] In *Grutter v. Bollinger*, the Court further emphasized the importance of diversity in achieving the democratic ideals of public education, stating that "participation by members of all racial and ethnic groups in the civic life of our Nation is essential."[144] The Court has recently returned to diversity in education in *Students for Fair Admissions v. Harvard* (2023) through invalidating "affirmative action" in public school admissions.[145] Although such admissions programs now run afoul of the Fourteenth Amendment, the holding was based in part on the idea that affirmative action standards "lack sufficiently focused and measurable objectives warranting the use of race . . . and lack meaningful end points."[146] To ensure they can distinguish critical race theory curricula from affirmative action programs, complainants would likely need to demonstrate measurable objectives through academic outcomes. Despite the Court growing increasingly conservative in the twenty years since *Grutter* was released,[147] such rhetoric provides a basis for Fourteenth Amendment challenge to anti-CRT bills, both now and as the Court's composition changes in the future.

The aforementioned MAS program, implemented in the Tucson Unified School District, gives an example of how an ethnic studies program can help educate students from racially underrepresented backgrounds and provides a template that lawsuits against contemporary anti-CRT legislation might emulate. The decision, *González v. Douglas*, held that Arizona House Bill 2281 was a targeted attempt to end the MAS program and was motivated by a discriminatory purpose, therefore violating the Fourteenth

143. Brown v. Board of Ed., 347 U.S. 483, 493 (1954) (quoting McLaurin v. Okla. State Regents, 339 U.S. 637, 641 (1950)).

144. Grutter v. Bollinger, 539 U.S. 306, 332 (2003).

145. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 230 (2023).

146. *Id.*

147. Although the Court currently has six Justices that tend to vote in a politically conservative fashion, with track records of disregarding precedential or persuasive opinions to vote for conservative causes, recent decisions have bucked that expected trend, particularly when the case concerns Native American issues. *See, e.g.*, McGirt v. Oklahoma 140 S. Ct. 2452 (2020) (holding that land reserved to the Muscogee Nation by Congress in the nineteenth century was never disestablished and continues to constitute "Indian Country" for the purposes of the Major Crimes Act, meaning that states cannot prosecute Native Americans for crimes committed in the territory); *see also* Haaland v. Brackeen 599 U.S. 255 (2023) (upholding the constitutionality of the Indian Child Welfare Act, thereby reaffirming the unique political status of tribal nations and their sovereignty).

Amendment.[148] For District Court Judge Wallace Tashima, the racism behind the enactment of the law was made clear by the language and actions of its proponents, who made a variety of racist statements toward Mexican Americans in both personal blogs and during legislative floor debates.[149] Judge Tashima also found that Arizona's legislative investigations into the MAS program drew "tenuous conclusions that were based on thin and admittedly one-sided evidence" and were marred by numerous procedural irregularities, for which racial animus was a motivating factor.[150] The holding in *González* relied on the 1977 Supreme Court decision *Village of Arlington Heights v. Metro Housing Development Corporation*, which established that a law that is not discriminatory on its face may nonetheless be unconstitutional if its enactment or subsequent enforcement is motivated by a discriminatory purpose.[151] Notably, challengers do not have to demonstrate that legislation was passed with racial animus as its sole purpose, just that such animus was one of multiple motivating factors.[152]

Of course, most instances of discriminatory intent do not involve the same level of overt racism expressed by the policymakers behind H.B. 2281, which makes determining the motivations behind a piece of legislation more difficult to parse. In addressing this problem, the Supreme Court created a test to determine whether there was a discriminatory purpose behind the act being challenged: (1) whether the impact of the action more heavily affects a single race, (2) the historical background of the action, (3) the sequence of events leading to the challenged action, (4) the defendant's departure from normal procedures, and (5) the legislative or administrative history of the action.[153] Through an examination of these factors, a court can infer discriminatory purpose behind a legislative enactment and subsequently

148. *See* González v. Douglas, 269 F. Supp. 3d 948, 964 (D. Ariz. 2017).

149. For example, Senator John Huppenthal disparaged Mexican-Americans and the Spanish language in multiple posts on his personal blog, while also making public comments about the MAS program such as "[t]he rejection of American values and embracement of the values of Mexico in La Raza classrooms is the rejection of success and embracement of failure." Because such comments were made soon after the legislature debated and voted on the bill, Judge Tashima found them to be "highly probative of Huppenthal's state of mind during the relevant period" of time. *Id.* at 965.

150. *Id.* at 969.

151. Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

152. *Id.* at 265.

153. *See id.* at 266–68.

invalidate it for a violation of the Fourteenth Amendment right to equal protection.

In addition to *González*, other decisions have applied the *Arlington Heights* factors in the context of public education. In *United States v. Yonkers Board of Education*, the Second Circuit found the Yonkers Board of Education liable for violating the Equal Protection Clause of the Fourteenth Amendment due to its district-wide decisions relating to faculty assignments, special education programs, and selective adherence to a neighborhood-school policy.[154] The Second Circuit upheld the finding of discriminatory intent by the Board on account of the segregative outcomes and foreseeability of such outcomes, the discriminatory nature of some of its affirmative decisions, and its failure to institute any policies to implement steps that would have aided desegregation.[155] Despite the absence of overtly racist rhetoric from the Board, the obvious effect of both its action and strategic inaction was enough for the court to find intent to discriminate in the areas of de facto school segregation and unequal distribution of educational resources.

The 1994 case *Hodges by Hodges v. Public Building Commission of Chicago* provides an additional example of inferred discriminatory intent in the realm of public education. The Northern District of Illinois applied the *Arlington Heights* factors to action taken by the Chicago Board of Education, among other defendants, which blocked the construction of a needed addition to a high school composed predominantly of minority students.[156] While the court found that the plaintiffs lacked standing for their Title VI claim, it determined that plaintiffs adequately stated a claim of discriminatory intent under the Equal Protection Clause despite no clear evidence of animus from the decision makers themselves.[157] The court determined that the policy had an outsized impact on students of color, and that there were sufficient allegations of racial animus to survive a motion to dismiss.[158]

154. *See* United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1184 (2d Cir. 1987).

155. *See id.* at 1227.

156. *See* Hodges by Hodges v. Pub. Bldg. Comm'n, 864 F. Supp 1493, 1497 (N.D. Ill. 1994).

157. *See id.* at 1503.

158. The plaintiffs' allegation that the revision of the construction plans was due to community input motivated by racial animus, in addition to their allegations regarding other state actions such as "the cap on enrollment, the local recruitment provision, the limitations on the physical size of the building and its ability to expand economically, and the limitations placed on the future uses of the land" were all factors contributing to the

Although *Hodges by Hodges* did not focus on curricular choices, it demonstrated that students can adequately plead and show a racial animus claim even without specific racist language from legislators that evinces discriminatory intent.

The starting point for inferring discriminatory intent behind a piece of legislation is whether the impact of the official action "bears more heavily on one race than another."[159] Disproportionate impact alone can trigger constitutional violations in extreme cases, but is usually just a relevant factor to the analysis rather than the sole touchstone of "invidious racial discrimination."[160] Although anti-CRT legislation has the potential to harm all students, this Note has specifically focused on how critical race theory and ethnic studies work to ameliorate specific barriers that Native students face in public schools, and therefore, how anti-CRT legislation has a particular impact on such students. Although white students benefit from CRT and ethnic studies as well, the current education system fails Native students in specific ways, and anti-CRT legislation prevents educators from providing Native students an education equal to that of their white peers. Chilling speech about racism and inequality in classrooms—and preventing adequate education of Native culture and history—is shown to harm Native students.[161] There is evidence of successful strategies to improve the educational experience of Native students, as well as metrics indicating that such students lag behind their white peers in test scores, graduation rates, and advanced degree attainment.[162] The educational harms and microaggressions fostered in an environment where conversations about race are quashed have a clear disproportionate effect on Native youth compared to their white peers.

For the purposes of this Note, Oklahoma's H.B. 1775 is the most fruitful piece of legislation to analyze under the *Arlington Heights* framework because of its direct effect on Native students; Oklahoma has the second highest number and second highest

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court's conclusion that the plaintiffs had adequately plead racially motivated action. *See id.* at 1504.

159. Washington v. Davis 426 U.S. 229, 242 (1976).

160. *See* Yick Wo v. Hopkins 118 U.S. 356, 367 (1886); *Davis*, 426 U.S. at 242.

161. *See supra* Part II.B.

162. *See supra* Part I.

proportion of Native Americans of any state in the country.[163] In addition to the generalized harms to Native students discussed in this Note,[164] an *Arlington Heights*-based challenge to H.B. 1775 would need to evince specific disproportionate harm to Native students in Oklahoma public schools. This could be demonstrated through a showing of how the enforcement of H.B. 1175 has a disproportionate effect on students of color—such as the manner in which targeting and erasing the perspectives of historically marginalized communities and ideas lead to lower educational outcomes for students of color, and appear to have a significant effect on Native students specifically.[165]

A complete analysis of discriminatory intent behind anti-CRT bills must also examine the procedure and legislative history underlying the action.[166] The background of H.B. 1775, for example, indicates some irregularities, as the initial version of the bill was about medical preparedness measures for schools; however that focus was replaced after the bill's third reading and engrossment in the Oklahoma House of Representatives and reconstituted into its final form.[167] The new language, added by Senator David Bullard, prohibiting the teaching of certain concepts and topics, closely mirrored proposals in other states rather than addressing Oklahoma-specific educational issues.[168] When asked about the specific issues in Oklahoma schools that he was trying to solve, Senator Bullard declined to specify school names, courses, or curricula necessitating the bill.[169] Subsequent legislative history offers no further explanation of statutory necessity, nor complaints from schools or parents that prompted the legislation.[170] While the lack of rational explanation for the bill

163. *See Native American Population by State 2024*, WORLD POPULATION REV. (2024), https://worldpopulationreview.com/state-rankings/native-american-population [https://perma.cc/GH58-7BFD].

164. *See supra* Part II.B.

165. *See supra* Part II.B.

166. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

167. *See* Jennie A. Hill, *Legitimate State Interest or Educational Censorship: The Chilling Effect of Oklahoma House Bill 1775*, 75 OKLA. L. REV. 385, 386 (2023). Replacing a bill after multiple readings, including drastically changing the topic, is not normal procedure for major legislation and "[d]epartures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267.

168. *See, e.g.*, H.B. 3979, 87th Leg., 1st Sess. (Tex. 2021).

169. *See* Hill, *supra* note 167, at 386.

170. *See id.* at 407.

does not necessarily indicate discriminatory intent, it does speak to an unusual or irregular process behind the law's passage, and thus should be accounted for in an *Arlington Heights* analysis.[171] Furthermore, the fact that the legislative sponsor acted to change long-standing educational laws in Oklahoma at a time of heightened American racial consciousness without offering a cogent explanation as to why such changes were needed could suggest discriminatory purpose.[172] Thus, multiple *Arlington Heights* factors demonstrate that, at the very least, there is a genuine issue of material fact as to discriminatory intent behind H.B. 1775.[173] Although this specific analysis is tailored toward anti-CRT legislation in Oklahoma, equal protection claims against H.B. 1775 could likely be replicated and applied to other anti-CRT laws as well.

B. FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS

The Supreme Court's Fourteenth Amendment jurisprudence has protected rights that are "so fundamental the state must accord them its respect," determined through, but not limited to, an analysis of the history and tradition of such rights.[174] However, the Supreme Court has yet to embrace an application of substantive due process protections for education. Despite public education's central role in the history and tradition of the United States, the Supreme Court declined to apply Fourteenth Amendment protections to a broad, generalized right to education in the 1973 case *San Antonio Independent School District v. Rodriguez*.[175] In a 5-4 decision, the Court found that there was no fundamental right to education because it is "not among the rights afforded explicit protection under the Federal Constitution" nor is there "any basis for saying it is implicitly so protected."[176]

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171. In analyzing whether constitutionally discriminatory behavior had taken place, the *Arlington Heights* court indicated that "if the property . . . always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing" it would have suggested discriminatory purpose. *Arlington Heights*, 429 U.S. at 264.

172. Hill, *supra* note 167, at 406–07.

173. *See id.* at 408.

174. Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

175. *See* Caroline A. Veniero, *Education's Deep Roots: Historical Evidence for the Right to a Basic Minimum Education*, 88 U. CHI. L. REV. 981, 990 (2021).

176. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). In *Rodriguez*, Mexican-American parents brought a class action suit on behalf of schoolchildren

Since *Rodriguez*, the Supreme Court has occasionally revisited the idea of a right to a basic education, yet only in incidental or indirect fashion.[177] Notably, the 1986 case *Papasan v. Allain* involved Mississippi students and school officials in twenty-three counties claiming, in part, that unequal funding between different areas of the state deprived students in certain counties of their right to a minimally adequate education.[178] The Supreme Court dismissed the lawsuit due to a lack of factual support for these claims.[179] While *Papasan* did not affirm a positive basic right to a minimally adequate public education, the Court's statement that the plaintiffs "allege[d] no actual facts in support of their assertion" that they have been deprived of such a right has led at least one legal scholar to suggest that the existence of a right to a minimum level of education is at least still an open question, even after the *Rodriguez* decision.[180]

The debate about a Fourteenth Amendment right to a basic level of public education has been reignited in recent years by the Sixth Circuit's decision in *Gary B. v. Whitmer*, in which the court found that students of Detroit, Michigan had a fundamental right to a "basic minimum education" by analyzing the Supreme Court's substantive due process jurisprudence.[181] While the majority of the circuit judges voted en banc for a rehearing to vacate the initial opinion, leading the case to settle before a rehearing could occur, *Gary B.* caused a twenty-six day period wherein all students in Ohio, Kentucky, Tennessee, and Michigan could claim a fundamental right to, at minimum, "an education sufficient to provide access to a foundational level of literacy" under the Fourteenth Amendment.[182] Although the ruling failed to reach the Supreme Court or survive as Sixth Circuit precedent, it provides further evidence of a persisting debate as to whether the right to a basic minimum education "is so deeply rooted in this Nation's

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throughout the state of Texas, alleging that disparities in public education funding and quality of education among school districts violated their children's rights under the Equal Protection Clause. *See id.* at 4–6. The Supreme Court held that there was no implicit or explicit guarantee of a right to education in the Constitution. *See id.* at 35.

177. *See* Veniero, *supra* note 175, at 992.
178. *See id.* at 993.
179. *See id.* at 993–94.
180. *See id.* at 994; *see also* Papasan v. Allain, 478 U.S. 265, 286 (2021).
181. Gary B. v. Whitmer, 957 F.3d 616, 621 (2020).
182. Veniero, *supra* note 175, at 982–83.

history and tradition as to meet the historical prong of the Supreme Court's substantive due process test."[183]

Despite *Gary B.*, challenging anti-CRT legislation under a substantive due process framework would likely be an uphill battle. The complaint in *Gary B.* centered around systemic funding issues resulting in low-quality and unsafe school buildings, a lack of qualified teachers, and poor academic outcomes for students.[184] Other education-based constitutional claims, including those found in *Papasan*, have focused on insufficient school funding rather than inappropriate or racially-biased curricular choices.[185] As such, there is no precedent for courts granting categorical relief to students from an adequately-funded school district who bring claims of discriminatory conduct or insensitive school curricula on substantive due process grounds. Yet, as anti-CRT laws become more prevalent and the evidence of their insidious impact on Native students compounds, the reasoning of *Gary B.* remains relevant should students be able to demonstrate tangible harm.

The Supreme Court's recent jurisprudential shift in substantive due process rights further complicates the prospect of successful claims in this area. The 2022 decision in *Dobbs v. Jackson Women's Health Organization* eliminating constitutional protections for the right to terminate a pregnancy narrowed the *Obergefell* test for finding a right protected under Fourteenth Amendment substantive due process to those "deeply rooted in [American] history and tradition," rather than considering such history in the context of contemporary developments.[186] While the Supreme Court has historically emphasized the importance of education to American life, the narrowing of Fourteenth Amendment protections combined with the denial of such protections in *Rodriguez* renders it unlikely—though not impossible—for a substantive due process right to a certain level of education to gain recognition from the current Supreme Court.[187]

183. *See Gary B.*, 957 F.3d at 652.
184. *See id.* at 625–26.
185. *See Papasan*, 478 U.S. at 265.
186. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022).
187. *See* Veniero, *supra* note 175, at 987–88.

C. MONTANA'S STATE CONSTITUTION

Another potential avenue for lawsuits against anti-CRT legislation is through challenges based on state constitutional provisions. Although all fifty state constitutions have incorporated some right to education for their public school students,[188] Montana is the only state with a requirement to ensure that its educational system respects and preserves the culture of Native students specifically, and therefore offers a unique lens through which to begin such an analysis.[189] Montana is also of particular importance to this conversation because Native students make up 10.8% of the state's public school population—more than any other racial minority group in Montana—due to the seven reservations and twelve Tribal Nations located throughout the state.[190] Article X, Section 1, clause 2 of the Montana Constitution recognizes "the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity."[191] The Montana Supreme Court has held that Article X "establishes a special burden in Montana for the education of American Indian children."[192] The court's finding has been reaffirmed in the twenty-first century and remains good law today.[193]

Article X, Section 1 was supplemented by the passage of the Indian Education for All Act (IEFA) in 1999, which "encouraged" Montana public schools to ensure that children of the state learn about the history and culture of Native American tribes in the

188. *See* Hammersley et al., *supra* note 2, at 28.

189. *See* Jovonne Wagner, *Indian Caucus Priorities Signed Into Law*, MONT. FREE PRESS (May 25, 2023), https://montanafreepress.org/2023/05/25/tribal-priorities-signed-into-montana-law/ [https://perma.cc/C2UB-7T2C] ("Montana is the first and to date only state to constitutionally require the teaching of Indian education to all students in its public schools").

190. *See Facts About Montana Education (2021)*, MONT. OFFICE OF PUB. INSTRUCTION, https://opi.mt.gov/Portals/182/Superintendent-Docs-Images/Facts%20About%20Montana%20Education.pdf [https://perma.cc/XY7E-CG6D].

191. MONT. CONST. art. X, § 1(2).

192. Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690, 692–93 (Mont. 1989) (finding that the system of funding public education in Montana was unconstitutional due to large differences, unrelated to "educationally relevant factors," in per pupil spending amounts between various school districts).

193. *See* Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 314 (Mont. 2005) (finding that the system of funding public education in Montana was constitutionally deficient due to its poor quality, indicated by qualified educators leaving the state, programs being cut, and the deterioration of school buildings, among other issues).

area.[194] The Act—proposed after the state legislature asked the Montana Committee on Indian Affairs to evaluate compliance with the Indian Education Clause of Article X[195]—stipulates that "every educational agency and all educational personnel will work cooperatively with Montana tribes [. . .] when implementing an educational goal or adopting a rule related to the education of each Montana citizen, to include information specific to the cultural heritage and contemporary contributions of American Indians."[196] Montana's constitutional requirement and statutory encouragement that it must educate its Native constituents in a culturally appropriate and adequate manner provide potential grounds for legal challenges.

Furthermore, ample evidence demonstrates that Montana is failing to establish and meet standards for schools to be constitutionally compliant under Article X. The four-year graduation rate of Native high schoolers was just 69.2% in the 2020–21 academic year, compared to 89.1% for white students.[197] In the same year, the dropout rate in grades 9–12 was 8% for Native students, relative to 2.9% for white students.[198] Montana's 2018 American Indian Student Achievement Data Report illustrated additional troubling trends for Native students: the mean fourth grade reading and math scores for Native Americans in Montana public schools reached their lowest point since before 2005, lagging well behind both white students in the state and nationwide Native American averages.[199] Math and reading scores for eighth grade students followed similar patterns, although they were not at the lowest point since 2005.[200] In all, Montana public schools are inadequately serving their Native students despite statutory and constitutional imperatives that they do so.

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194. *See* Saunders, *supra* note 81, at 393 (quoting MONT. CODE ANN. § 20-1-501(2)(a)–(b) (2023)).

195. *See* S.J.R. No. 11, 54th Leg., Reg. Sess. (Mont. 1995).

196. Saunders, *supra* note 81, at 393 (quoting MONT. CODE ANN. § 20-1-501(2)(a)–(b) (2023)).

197. *See Growth and Enhancement of Montana Students*, MONT. OFF. OF PUB. INSTRUCTION, https://gems.opi.mt.gov/ [https://perma.cc/TUT7-RCUW].

198. *See id.*

199. *See* MONT. OFF. OF PUB. INSTRUCTION, MONTANA AMERICAN INDIAN STUDENT ACHIEVEMENT DATA REPORT 4 (2018), https://leg.mt.gov/content/Committees/Interim/2017-2018/Education/Meetings/Sept-2018/AI%20Student%20Data%20Report%20Fall%202018.pdf [https://perma.cc/QT2U-YPMC].

200. *See id.* at 6.

In schools and districts where the IEFA has been implemented, teachers and administrators report positive benefits to students' cultural awareness.[201] Districts and schools have reported that the programming increased respect for diversity—causing teachers and students to make fewer assumptions and to exhibit an increased willingness to explore issues of cultural responsiveness.[202] Despite this, the ACLU, in conjunction with Native students and several tribes, has filed a class-action lawsuit demanding better implementation, reporting, and monitoring of the program.[203] Since the lawsuit was filed, the Montana House has introduced and passed a bill that would require school districts to implement IEFA and enact stricter reporting guidelines about how IEFA funds are being used.[204]

The failure to adequately educate Native children is already leading to legal challenges in Montana, and attempts to restrict discussions of racial inequality and discrimination against Native Americans in the state could lead to further lawsuits under Article X. A movement toward banning critical race theory in the state reached an apex in 2021, with a legally binding opinion from Montana Attorney General Austin Knudsen declaring that the use of "critical race theory" and "antiracism" programming in schools is discriminatory and therefore violates federal and state law.[205] Knudsen's opinion included references to incidents in other states of alleged discrimination in the name of anti-racist education.[206] The opinion has effectively skirted around the need for legislative activity by determining that such educational programming is already contrary to current law; however, should an attorney

201. *See* SHAWN DEANNE BACHTLER, MONT. OFF. OF PUB. INSTRUCTION, MONTANA INDIAN EDUCATION FOR ALL EVALUATION 30 (2015), https://opi.mt.gov/Portals/182/Page%20Files/Indian%20Education/Indian%20Education%20101/IEFA%20Evaluation.pdf [https://perma.cc/229S-AP96].

202. *See id.*

203. The lawsuit, *Yellow Kidney et al. v. Montana Office of Public Instruction et al.*, remains pending in the Montana Eighth Judicial District Court. *See* Caleb Symons, *Mont. Bill Would Strengthen Teaching of Indigenous History*, LAW360 (Feb. 8, 2023), https://www.law360.com/articles/1574277/mont-bill-would-strengthen-teaching-of-indigenous-history [https://perma.cc/86PK-RGKC]. For updates, see *Court Cases:* Yellow Kidney, et al. v. Montana Office of Public Instruction, et al., AM. C.L. UNION, https://www.aclu.org/cases/yellow-kidney-et-al-v-montana-office-public-instruction-et-al [https://perma.cc/EZ4G-KYG9].

204. *See* H.B. 338, 68th Leg., 2023 Sess. (Mont. 2023).

205. *See* Op. Mont. Att'ys Gen, *supra* note 32, at 1.

206. Such incidents include separating Black and white individuals during anti-racist trainings, or telling students that they must learn to deal with "white emotionalities" or "white fragility." *See id.* at 12–13 n.34.

general with a different perspective assume office and issue a new interpretive opinion, Montana could follow other conservative states and take legislative action to prevent discussions of race and inequality in classrooms. As it stands, "Knudsen's opinion carries the weight of law unless overturned in court," opening up the possibility of a claim that the opinion violates Article X of the Montana Constitution or renders it impossible to fully and properly implement the IEFA.[207]

D. OTHER STATE CONSTITUTIONS

While the remaining forty-nine states do not have educational guarantees specific to Native Americans, each one has incorporated some right to education for public school students within their state constitutions.[208] For example, Oklahoma—one of the most prominent sites of the battle between advocates for ethnic studies programs and anti-CRT legislation—guarantees a certain minimum standard of public education in Article XIII, Section 1 of the Oklahoma Constitution. This provision states that "[t]he Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated."[209] The Oklahoma Supreme Court has interpreted this provision to mean that the state has a duty to require a system of public education with competent teachers, necessary general facilities, and school terms of sufficient duration.[210] The Court has stated that the education system should provide "equal rights and privileges to all its youth to obtain such mental and moral training as will make them useful citizens in our great commonwealth."[211] Article XIII is an example of a state-level provision that could become the underlying cause of action against H.B. 1775 for lowering the quality of public education in the state to an unacceptable level for its population of Native, school-age children.[212]

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207. Mara Silvers, *How Austin Knudsen is Flipping the Script of Attorney General*, MONT. FREE PRESS (June 15, 2021), https://montanafreepress.org/2021/06/15/austin-knudsen-flipping-the-script/ [https://perma.cc/GJ69-BJBF].

208. *See* Hammersley et al., supra note 2, at 28.

209. OKLA. CONST. art. XIII, § 1.

210. *See* Miller v. Childers, 238 P. 204, 206 (Okla. 1924).

211. *See id.*

212. *See, e.g.*, Sch. Dist. No. 25 v. Hodge, 183 P.2d 575, 581 (Okla. 1947) ("[The State Aid Fund] is intended to aid in assuring a minimum educational program for all children of the state [and] adopted to insure uniformity of opportunity to all children in the state to receive

Article XII, Section 1 of the Texas state constitution provides another example of such a provision in a state determined to enforce anti-CRT legislation. This provision states in relevant part that "it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."[213] The Texas Supreme Court has interpreted this provision to require efficiency, adequacy, and suitability of the public school system.[214] Furthermore, the system must be both "qualitatively" and "quantitatively" efficient to be constitutional (the latter measure also being referred to as "financial efficiency").[215] Despite the vague nature of these terms, they confirm that the Texas Constitution requires a certain minimum standard of education in the state.

Although the Texas Supreme Court has held that the school system is financially inefficient multiple times, it has never found Texas public schools to be qualitatively inefficient enough to be unconstitutional, nor has it found the system to be inadequate or unsuitable under this standard.[216] Although the constitutional language grants the Texas legislature significant discretion over policy choices, courts have the ultimate authority to determine whether the legislature is acting arbitrarily and unreasonably, and therefore, unconstitutionally.[217] Arbitrary action can be evinced by legislative choices concerning education that are not "informed by guiding rules and principles properly related to public education."[218] Should challengers be able to demonstrate the arbitrary nature of Texas' anti-CRT bill, or attack the substandard adequacy of education provided to Native American students once the legislation has made a long-term impact, they may have a state constitutional claim.

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at least that degree of instruction embraced by the minimum program made available to all districts[.]"); *see also* Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135, 1149 (Okla. 1987) ("Thus, the right guaranteed in Article 13 § 1 *is a basic, adequate education according to the standards that may be established by the State Board of Education*.").

213. TEX. CONST. art. XII, § 1.

214. *See* Neeley v. West Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 752–53 (Tex. 2005).

215. *See id.* at 753.

216. *See* Morath v. Tex. Taxpayer & Student Fairness Coal., 490 S.W.3d 826, 845 (Tex. 2016).

217. *See id.* at 847.

218. *See Neeley*, 176 S.W.3d at 785.

Similarly, Article IX, Section 1 of the Florida Constitution states that it is "a paramount duty of the state to make adequate provision for the education of all children residing within its borders . . . for a uniform, efficient, safe, secure, and high quality system of free public schools."[219] However, legal assertions that this standard is not being met in the state have been rejected by the Florida Supreme Court, which has ruled that no one challenging the law has offered a "manageable standard by which to avoid judicial intrusion into the powers of the Legislature."[220] Despite these rulings, the court has left open the idea that such a standard could exist, with the majority writing that it does "not necessarily agree with [the] conclusion that an Article IX challenge could never be justiciable."[221]

While the recency of anti-CRT bills renders it hard to track their statistical effect on educational outcomes, there is ample evidence of Native students struggling in public school settings.[222] Even prior to the implementation of H.B. 1775, the Oklahoma public school system, for example, historically struggled to serve its population of Native students. The National Indian Education Study of 2019 found that reading scores for both fourth and eighth grade Native students in Oklahoma had declined since 2015 and lagged behind their white peers, although the students' math scores improved over their 2015 results.[223] Furthermore, the effects of the law are already being felt by Native students, which has led to Osage Nation Congress unanimously passing a resolution urging Oklahoma legislators to repeal H.B. 1775 due to its imposition on the accurate teaching of Native history in the state.[224]

For the most part, however, Native American students in Oklahoma scored better than their Native peers in other states,

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219. FLA. CONST. art. IX, § 1.

220. Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ., 262 So. 3d 127, 141 (Fla. 2019); *see also* Coal. for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996).

221. *Citizens for Strong Schs., Inc.*, 262 So. 3d at 135.

222. *See supra* Part I.

223. *See* B.D. RAMPEY ET AL., U.S. DEP'T OF EDUC., NATIONAL INDIAN EDUCATION STUDY 2019 55–56 (2019), https://nces.ed.gov/nationsreportcard/subject/publications/studies/pdf/2021018.pdf [https://perma.cc/XY3P-E9RH].

224. Benny Polacca, *Congress Passes Resolution Urging Oklahoma State Legislators to Repeal HB 1775*, OSAGE NEWS (Oct. 7, 2022), https://osagenews.org/congress-passes-resolution-urging-oklahoma-state-legislators-to-repeal-hb-1775/ [https://perma.cc/6V9V-SDFL].

indicating that there are some success stories to take from the current system.[225] Many of these successes can be connected to efforts to incorporate a culturally-inclusive curriculum on Native issues, including the 2014 introduction of the Oklahoma Indian Education Resource, an online database containing lesson plans for teaching about Oklahoma's Indian tribes.[226] Dwight Pickering, Director of the Office of American Indian Education at the time, described the resource as "an ongoing repository that will [be supplemented by] additional information that is brought forward by our tribes."[227] These efforts stand in stark contrast to the manner in which the education of Oklahoma's Native population has been treated throughout history, and are threatened to be undone by the sweeping language included in H.B. 1775.

Evidence of arbitrary decisions by state policymakers, or simply that anti-CRT legislation has led to an inadequate or substandard quality of education for certain students, could feasibly lead to successful state constitutional challenges. This preliminary discussion of constitutional provisions and relevant precedent in Oklahoma, Texas, and Florida could be expanded on or transposed onto another state with anti-CRT laws to develop litigation strategies for state court challenges.

CONCLUSION

This Note has provided an analysis of the adverse effect of anti-CRT legislation on Native American youth in public schools. It has likewise offered preliminary analyses of potential legal challenges to such laws under the Fourteenth Amendment of the U.S. Constitution and various state constitutions. Although implementation and enforcement of anti-CRT laws are still in a nascent stage, these policies will likely lower the quality of public education for Native students across the country. Advocates should therefore consider bringing challenges to these laws under the Fourteenth Amendment or state constitutional provisions to protect the educational rights of Native students.

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225. *See* RAMPEY ET AL., *supra* note 223, at 55–58.

226. *See* Bah-He-Toya-Mah Davenport, *Oklahoma has a Tragic History When It Comes to Indian Education. Here's How We're Turning It Around*, OKLA. POL'Y INST. (Aug. 3, 2015), https://okpolicy.org/oklahoma-has-a-tragic-history-when-it-comes-to-indian-education-heres-how-were-turning-it-around [https://perma.cc/E9VL-SAZY].

227. *Id.*