

Legal Talking Points

Anti-diversity & Inclusion Proposed Policies

These talking points are intended to share some general legal and constitutional issues arising from the increasing number of anti-diversity and inclusion laws and policies (also known as education gag orders or classroom censorship mandates) spreading across the states. These talking points do not address any specific legislation or proposed policy and should not be interpreted as supporting or denying any such legislation or policy. Advocates should feel free to amend these as they best see fit for their purposes, keeping in mind the specific restrictions and scope of the proposed policies and bills. Although the talking points below include some mixed general/legal, other general talking points should be sought out for support by advocates and include those found [here](#). For questions, please contact David Hinojosa (dhinojosa@lawyerscommittee.org) or Genzie Bonadies Torres (gbonadies@lawyerscommittee.org) at the Lawyers' Committee for Civil Rights Under Law.

Mixed Overarching General/Legal Points

1. Our children deserve an honest and accurate education that enables them to learn from the past struggles of different communities to help create a better future. However, this proposed policy/bill leaves educators unable to discern what honest and accurate information may and may not be discussed with students, and will lead to unnecessary censorship of critical classroom discussions.
2. This proposed policy/bill undermines democratic discourse, deprives students of a true understanding of history and deeper learning, and likely abridges rights guaranteed by the First and Fourteenth Amendments of the U.S. Constitution. By seeking to prescribe what parts of our nation's history—checkered with discrimination and oppression—can be taught to today's multiracial students, they intend to deny students the right to receive information and ideas that cultivate deeper thinking and learning.
3. To be clear – this proposed policy/bill does not protect against racism and discrimination in schools. It seeks to ban *speech* that can help counteract racism and discrimination, including bans on students and teachers talking about race, sex, and notions of equality. Anti-discrimination is plainly not the bill's true purpose since there are already federal civil rights laws like Title VI and Title IX, and similar state laws, that prohibit racism, discrimination, and harassment in schools.
4. This proposed policy/bill disregards the lived experiences of historically marginalized students, who have—time and time again—asked for their communities' contributions and struggles to be acknowledged. Ultimately, it will limit all children's ability to understand current events, and learn the life skills needed to navigate these complex situations.

Serious Concerns with First Amendment Violations

1. The bill raises serious vagueness and due process concerns under the First and Fourteenth Amendments. The vaguely-worded “banned concepts” do not allow educators to know when they are crossing the line into illegal conduct. As a result, the vague language will cause educators to steer clear of complex topics, depriving students of analytical thinking skills needed to work, lead, and succeed in our diverse, pluralistic society.
2. By prohibiting certain concepts to be taught and by seeking to “reconstruct history,” the bill “cast[s] a pall of orthodoxy over the classroom” in violation of the First Amendment. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

3. The bill also raises dreadful overbreadth problems under the First Amendment by sweeping in protected speech.
4. State legislatures do not enjoy unrestricted discretion in prescribing and censoring curriculum for students. The Supreme Court has been clear in holding that a state cannot “impose upon the teachers in its schools any conditions that it chooses” and cannot prohibit teaching a “theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.” *Epperson v. State of Arkansas*, 393 U.S. 97, 107 (1968) (striking down law prohibiting teaching evolution).
5. Bills that affect higher education teaching and learning also raise serious constitutional concerns. “Academic freedom” has been consistently “viewed as a special concern of the First Amendment.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).
6. Academic freedom is not limited to “merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach.” *Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Stevens, J., concurring).

Restricting student access to information and ideas under the First Amendment

7. Students have a right to receive information and ideas under the First Amendment as education “prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (plurality opinion).
8. The bill seeks to *constrict* students’ access to honest and accurate information with restrictions that are unrelated to any legitimate pedagogical basis in violation of well-established First Amendment principles. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).
9. The “Constitution does not permit the official suppression of ideas” based upon “narrowly partisan or political” interests, “racial animus,” or a desire to “deny [students] access to ideas with which [the governmental actor] disagree[s].” *Pico*, 457 U.S. at 870-72.
10. The bill’s banishment of certain ideas from the classroom and overriding local educators’ curricular decisions in service of the state legislature’s political and ideological agenda violates students’ right to receive information and ideas under the First Amendment.
11. Among other laws held unconstitutional, the Courts have struck down legislation and policies:
 - Prohibiting the teaching of the theory of evolution, *Epperson v. State of Arkansas*, 393 U.S. 97, 107 (1968).
 - banning ethnic studies programs in Arizona, holding that “limitations on school curricula that restrict a student’s access to materials otherwise available may be upheld only where they are reasonably related to legitimate pedagogical concerns,” *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015).
 - removing a film at the direction of the school board solely because it objected to the ideas expressed in the film, *Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn.*, 670 F.2d 771, 777 (8th Cir. 1982).

Undermining Core Democratic Principles and Good Citizenship

12. America's schools are vital for "prepar[ing] citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). This bill's censorship and indoctrination contradicts these fundamental democratic principles.
13. As recognized in *Brown v. Board of Education* "[education] is the very foundation of good citizenship." *Brown v. Board of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 493 (1954). The censored, anti-truth education advocated for in this bill mirrors tactics used by fascist nations to undermine good citizenship.
14. Students and teachers must be free "to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die," *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).
15. As recently as 2021, the Supreme Court recognized that schools have an interest in protecting even "unpopular expression" because "America's public schools are the nurseries of democracy." *Mahanoy Area Sch. Dist.*, 141 S.Ct. 2038, 2046 (2021).
16. In higher education, preserving academic freedom is essential because "to impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Serious Concerns with the Fourteenth Amendment and Discrimination

17. A law is unconstitutional under the Equal Protection Clause so long as race/sex/gender is a "motivating" factor in its enactment; the motivating factor does not have to be "the 'dominant' or 'primary' one." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("*Arlington Heights*"). Let's be frank. One of the main reasons why these policies are proposed is to silence critical discussions and training that benefit all students, but especially historically marginalized students of color, women and girls, and LGBTQ+ students.
18. Although the bill may appear to be race- and gender-neutral on its face, it may still be held unconstitutional. "[W]hen a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 273 (1979).
19. It is clear from the bill's language, its sponsors, and its effect that the bill will negatively impact learning, particularly for students of color. Actions having a foreseeable and anticipated disparate impact can indicate a discriminatory purpose is at play. *Columbus Bd. of Ed. V. Penick*, 443 U.S. 449 (1979).
20. The bill expressly singles out restrictions on speech related to race and sex. The bill's explicit, differential treatment of race- and sex-based concepts further exposes the discriminatory motives behind the legislation.
21. This bill will worsen an already uneven playing field for students of color in education. The censorship of race- and sex-based concepts will imperil current efforts that address opportunity gaps and curricular gaps faced by students of color, thereby inflicting pronounced harm on Black, Indigenous, and other historically marginalized communities. Creating a safe environment to talk about tough issues, and helping kids of all backgrounds feel accepted and valued, increases trust and ensures that schools can be a ladder of opportunity for all students.