Curricular Preemption: The New Front of An Old Culture War

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Schools are currently at the epicenter of a culture war, stemming from an unwillingness to acknowledge our nation's history of structural racism and movement toward a more pluralistic society.

This choice of battleground is not accidental. Schools shape the mindset of the next generation of Americans. They can be institutions that foster greater understanding and inclusion or stand for exclusion. Curricular choices have long excluded and minimized the histories and perspectives of marginalized communities in America. The movement to make curricula more inclusive is instrumental to building an America that is more inclusive.

But as local school districts have increasingly moved to embrace culturally responsive teaching, states have intervened to control the content of local curricula to prevent honest discussions of race as well as sexuality and gender identity. In the 2021 and 2022 legislative sessions, 46 states proposed at least 274 laws impacting the honest teaching of America's history and enduring legacy of racism in local curricula or pedagogy, 34 of which have passed.[1] Just this year, at least another 28 bills have been proposed that would impact the discussion of LGBTQ+ issues or use of pronouns in classrooms.[2] This is part of a growing trend of states abusing preemption—where a higher level of government (here states) displace the authority of a lower level of government (here local school districts)—to wage culture wars without regard to the priorities and values of local communities. This paper discusses the growing trend of curricular preemption and its impact on local school districts.

1. *See CRT Forward Tracking Project*, UCLA School of Law, https://crtforward.law.ucla.edu/ (last visited Jan. 10, 2023).
2. *See Education & Schools*, Equality Federation, https://www.equalityfederation.org/tracker/education (last visited Jan. 23, 2023).

Introduction

In the mid-to-early 1990s, educational researchers such as Dr. Geneva Gay (culturally responsive teaching)[3] and Gloria Ladson-Billings (culturally relevant pedagogy)[4] introduced frameworks aimed at making the schooling process more meaningful and productive for Black and Brown students.[5] Research on culturally responsive teaching and culturally relevant pedagogy calls upon schools and school districts to make significant structural reforms to pave a pathway to a curriculum and a teaching strategy that is more inclusive of peoples from historically and contemporarily marginalized, disenfranchised, and otherwise oppressed identity groups. The hope was to build instructional frameworks that would pave the way for a more socially just educational system, which would ultimately lead to a more pluralistic society.

Although the concepts included in culturally responsive teaching and culturally relevant pedagogy were slow to transition into widespread practice, more recent curricular decisions in schools and schooling have trended towards a more culturally responsive and relevant experience for Black and Brown students. However, recent movements towards an inclusive curricula and pedagogy have come under partisan attack in many states. Specifically, these states have sought to preempt local public schools' and school districts' ability to manage their own day-to-day operations in the context of curricular oversight. In the 2021 and 2022 legislative sessions, 46 states proposed at least 274 bills to preempt local school boards' adopting a more pluralistic approach to instructing students, 34 of which ultimately passed.[6] These bills ranged in focus, with some bills banning named curricula, others naming critical race theory or similar theoretical frameworks, and others prohibiting general discussion of issues related to race and gender. Just as importantly, these bills have become entry points for additional bans, especially those around regulating the teaching of LGBTQ+ curricula as well as bans related to transgender youths' participation in schools.

While this wave of curricular preemption is still new and mostly selective in scope (targeting Critical Race Theory and other named curricular options), state preemption of schools and school districts is of great concern to local school boards and communities. These

bills target curricula related to Black and Indigenous Peoples of Color, explicitly aiming to prevent any form(s) of culturally relevant pedagogy or culturally responsive teaching in the name of protecting white students, parents, and communities from purported discomfort. More specifically, these bills take aim at teachers who are tasked with making learning relevant and engaging to an increasingly diverse population of students by disrupting the ability of teachers to employ teaching practices that are proven to improve student engagement, performance, and perceptions of schools and schooling. Instead of seeking to promote (or demand) curricular options that will improve academic outcomes for student populations who comprise the majority of students in public schools, these bills are transparently partisan, invoking conservatives' culture wars even if those culture wars diminish the welfare of Black and Brown communities.

3. *See generally,* Geneva Gay, *Culturally Responsive Teaching: Theory, Practice, and Research* (2000); *see also,* Gevena Gay, *Preparing for Culturally Responsive Teaching*, 53 J. Teacher Educ. 106 (2002).
4. *See generally,* Gloria Ladson-Billings, Towards a Theory of Culturally Relevant Pedagogy, 32 Am. Educ. Res. J. 465 (1995).
5. More recently, scholars have considered how other peoples of color, particularly Indigenous and Asian communities, engage in pedagogical practices that leverage culture(s). For instance, Teresa L. McCarty and Tiffany S. Lee considered how instructional practices could lead to revitalizing Indigenous cultures, *Critical Culturally Sustaining/Revitalizing Pedagogy and Indigenous Education Sovereignty,* 84 Harv. Educ. Rev. 101 (2014). Likewise, Asian-American scholars have encouraged culturally analyses of Asian American and Pacific Islanders to interrogate and (re)consider differences in cultures for the broad coalition of peoples counted as Asian (*see, e.g.*, Robert T. Teranishi, *Asian Pacific Americans and Critical Race Theory: An Examination of the School Racial Climate*, 35 Equity & Excellence in Educ. 144 (2002)."
6. *See CRT Forward Tracking Project, supra* note 1.

State leaders have been clear about their purposes in signing laws that ban the discussion of systemic oppression in public schools: to shield white students and parents from enduring the discomfort associated with addressing our nation's history of overt and covert racism.[7] For instance, Mississippi Governor Tate Reeves noted, "In too many schools...CRT is running amok. It threatens the integrity of education and aims to only humiliate...That's why I signed legislation that will help keep CRT where it belongs – out of (Mississippi) classrooms."[8] To be clear, there are no cited examples of Critical Race Theory nor the espoused tenets of Critical Race Theory being taught in K-12 schools. Yet, state legislatures have clamored to ban the discussion of Critical Race Theory and other racial frameworks in primary and secondary schools. Conservatives appear to conflate the teaching of racism in American history with Critical Race Theory,[9] a theory that emanates from legal scholarship and is most prevalently discussed in institutions of higher education. This conflation allows states to blur the lines about what concepts they are targeting, discouraging schools and teachers from having necessary conversations about racism and its role in American history and society.

While curricular preemption is not new and states have the power to regulate primary and secondary schools (inclusive of curricular offerings), this wave of preemption efforts has broader and deeper implications than preventing the teaching of Critical Race Theory or other racial frameworks in primary and secondary schools. According to the National Center for Educational Statistics, public schools in 2009 were predominantly white while in 2020, public school enrollment was predominantly composed of students from minoritized and marginalized races and ethnicities.[10] This trend – that white students' proportion of public school enrollment will decrease – is likely to continue.[11] Conservative fears about America's changing demographics and embrace of racist rhetoric about the *Replacement Theory*[12] underlie their fervor to cement a white-washed curriculum that excludes the perspectives of communities of color.

Moreover, many of these bans on the teaching of Critical Race Theory or similar theories allow and sometimes require states and school districts to terminate the employment of teachers who are accused of violating these laws. Such actions are particularly detrimental as many school districts are struggling to hire and retain teachers due to significant shortfalls in outputs from teacher preparation programs and fewer students enrolling in and completing teacher preparation programs.[13] Ultimately, these new preemption measures bring states into parts of the schooling process once reserved for local school boards: curriculum and human resources.

Given the rapid uptick in bills designed to snuff out not only Critical Race Theory but also other types of culturally responsive teaching and culturally relevant pedagogy, it is time to pay attention to and respond to this new trend in preemption. Nearly all state legislatures have considered such bills, and though only 15 states (all traditionally conservative) have enacted these bills into law, left unattended, such preemption strategies are likely to spread from traditionally conservative states to swing states. And without more direct action, some states, namely conservative states, will feel emboldened to further extend their preemption of local school boards' authority, management, and reform strategies.

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8. Jamiel Lynch & Jeremy Grisham, *Mississippi Governor Signs Into Law Prohibition on Schools Teaching Critical Race Theory,* CNN, (Mar. 14, 2022), https://www.cnn.com/2022/03/14/politics/mississippi-critical-race-theory-law/index.html.
9. Critical Race Theory developed as a critique of Critical Legal Studies, which interrogated how law interacts with class to sustain subjugation. Critical Race Theory included a racial critique of the legal system (and society more broadly). Specifically, Critical Race Theory seeks to explore and explain how law reproduces an d reinforces racial caste structures.
10. According to the National Center for Educational Statistics, white students comprised 54% of all public primary and secondary school students in 2009 while they only comprised 46% of that same population in 2020. *See Racial/Ethnic Enrollment in Public Schools,* Nat'l Ctr. Educ. Statistics, https://nces.ed.gov/programs/coe/indicator/cge/racial-ethnic-enrollment (last updated May 2022).
11. While white students were 54% (2009) and 46% (2020) of the public primary and secondary school enrollment in the United States, they are projected to only comprise 43% of that same population in 2030. *See id.*
12. Replacement Theory suggests that contemporary policy, specifically in the context of immigration, aims to change the racial mix of the United States, effectively diluting the percentage of United States citizens with European ancestry in favor of immigrants from racially diverse backgrounds. Those who subscribe to Replacement Theory also suggest that a new wave of immigrants is going to shift prevailing cultural and political conditions in the United States.
13. *See* Am. Ass'n Coll. for Teacher Educ., *Colleges of Education: A National Portrait* (2d Ed.) (2022).

Part I Overview of the Intergovernmental Administration of Education Policy and Practice

The U.S. Constitution is silent on the matter of education and schooling; thus, education is and has historically been treated as a matter of states' police powers. Although the federal government has powers to regulate areas of schools and schooling that intersect with constitutional rights (i.e., student speech, searches and seizures of students, various forms of unlawful discrimination, etc.) and education federalism has led to the federal government having increased power—primarily through spending—to regulate public schools and school systems, states retain the most significant and substantial power to regulate education law and policy. Generally, states make decisions on issues related to the overall functioning of schools and school districts. These decisions include matters related to appropriate statewide standards of instruction and assessment, overall disciplinary frameworks, general student and teacher rights and responsibilities, and standards for the accreditation of individual schools and school districts among other things. Traditionally, states have afforded local school districts the leeway to operate freely within state requirements on matters related to school: specifically, states have allowed local school districts to develop and implement education policies that best address the needs of their local stakeholders.

Despite the fact that states set the parameters of acceptable education policy, the development and implementation of education policy happens at the local level via local school boards' decision-making processes. The various and layered governmental entities and actors engaged in the process of developing and implementing education policy vary across states; however, there are some near-universal commonalities. Generally, states are likely to have a state-level administrator (superintendent, commissioner, etc.) of education who is often the head of the state department of education. These entities most often have the task of promulgating and enforcing statewide policies related to the administration of schools. At the same time, most states have local school districts that have the task of making local policies that do not run afoul of or breach the boundaries that state departments of education promulgate. Likewise, these local school districts typically are tasked with selecting district-level administrators of schools. These district-level administrators are responsible for fulfilling the role of the chief executive officer of the local school district. Local school districts are the creation of the state, as states are not typically constitutionally obligated to create and empower local school districts. However, the constitutions of Colorado, Florida, Georgia, and Virginia mandate the creation of school districts. In these states, local school boards are locally controlled because a) these states are constitutionally required to create school boards and endow those school boards with specifically named authority and b) the school boards are charged with facilitating the development and implementation of education policies necessary to meet local priorities so long as those priorities.

Generally, local governments also collect and allocate property taxes to local school boards. Local school boards, thereafter, craft policies aimed at addressing local educational priorities, ensuring that schools and schooling are responsive to local needs. Local school boards, though designed to address local concerns, are nevertheless charged – at least in part – with implementing and enforcing state law and policy.[14] Depite receiving the largest share of financial assistance from states (generally speaking), local school districts are inherently dependent on local property taxes to enable the operation of local public schools.[15]

The use of preemption to control aspects of local education policy is not new. Instead, it is historical in

14. For instance, local school districts are often required to directly administer state standardized tests, abide by state laws related to discipline, etc.
15. Recent data suggests that more than 80% of local funding for public schools is the result of local property taxes. *See Public School Revenue Sources* 4, Nat'l Ctr. Educ. Statistics (2020), https://nces.ed.gov/programs/coe/pdf/coe_cma.pdf. Notably, these data shifts annually and is different across states.

nature. This is particularly the case regarding curricular preemption.[16] The most notable past effort at curricular preemption is the standards-based education movement, which led to states developing and implementing state academic standards that are tested, curricular and pacing guides to which educators must adhere, and accountability apparatuses in the case(s) that local schools and school districts failed to produce student success on the state academic standards. The standards-based education movement rose to prominence after the 1983 release of *A Nation at Risk*.[17] Other iterations of and arguments for standards-based education existed prior to *A Nation at Risk,* which warned the nation of dire economic results because of poor academic performance among students in the United States.[18] Even states that resisted the standards-based education movement could not resist for long. Recent federal law and policy have required states to develop, implement, and assess rigorous academic standards or forego federal dollars.[19] States moved to regulate, guide, and restrict – or otherwise preempt – local school districts' decisions about curriculum and instruction because of these more recent federal education laws and policies. While state academic standards and assessment practices and strategies vary by state, each state, by nature of directly restricting and guiding curricular and instructional decisions, limits the discretion and decision-making policies of local school boards.

> *"The consistent and persistent takeover of public schools and school districts in urban areas is an example of weaponizing state preemption to punish Black and Brown districts.*

While states have primary responsibility for education policy and practice within their borders, there have been multiple examples of state intervention in local policy and practice in education. These examples often implicate conservative state legislatures weaponizing state preemption either: a) to punish predominantly Black and Brown districts; or b) to engage in culture wars that pit more liberal, larger urban centers against suburban and rural areas. The battle to desegregate the Little Rock School District is an example of a conservative state weaponizing state preemption to engage in culture wars, creating a rift between Little Rock, which wanted to desegregate its schools, and the state of Arkansas, which required – by statute – Little Rock remain segregated.[20] The consistent and persistent takeover of public schools and school districts in urban areas is an example of weaponizing state preemption to punish Black and Brown districts.[21] In the case of state takeovers of public schools and school districts in urban areas, states have mostly targeted predominantly Black and Brown districts for unilateral reconstitution, often displacing locally elected school boards and shifting the politics of education by removing the democratic apparatus for choosing political representation.[22]

16. The chief argument here is not that curricular preemption is illegal or always inappropriate. Instead, the chief argument is against abusive preemption, or preemption that is wielded for the purpose of oppressing a group based on political beliefs or objectives. For example, curricular preemption that requires certain objectives or topics are covered in schools and in curricula is not an issue. The issue is that recent bans have sought to ban the teaching of topics that those in power find objectionable on political grounds alone.
17. Report to Sec'y of Educ., A Nation at Risk: The Imperative for Educational Reform (Apr. 1983), http://edreform.com/wp-content/uploads/2013/02/A_Nation_At_Risk_1983.pdf.
18. *Id.*
19. The No Child Left Behind Act of 2001 explicitly required states to engage in certain policy practices that regulated and restricted local schools and school districts. More recent education has freed many states of the requirement to strictly enforce the strict provisions of No Child Left Behind; yet, many states have opted to continue relying upon standardized testing and punitive responses to poor academic outputs in the age of the Every Student Succeeds Act, signed into law in 2015. *See* Derek W. Black, *Abandoning the Federal Role in Education,* 105 Cal. L. Rev. 1324 (2017); see also Patrick McGuinn, Assessing State ESSA Plans: Innovation or Retreat? 11-12 (2019). (suggesting that states—per requirements of the Every Student Succeeds Act—are still focused on testing although some states are expanding their individual definitions of student success and achievement).
20. *Cooper v. Aaron*, 358 U.S. 1, 20-22 (1958) (Frankfurter, concurring).
21. Steven L. Nelson, *Racial Subjugation By Another Name: Using the Links in the School-to-Prison Pipeline to Reassess State Takeover District Performance,* 9 Geo. J. L. & Modern Critical Race Persp. 1, 2 (2017).
22. Domingo Morel, *Takeover: Race, Education, and American Democracy* (2017).

Part II The New Wave of Curricular Preemption

Although states have most recently used preemption to influence local school boards' policies and practices around curriculum, this is not typically the case. Historically, states have generally left local school boards to determine what education policies and practices (as well as curriculum, usually chosen from several state approved) best serve the needs of their local communities. More importantly, states have not used curricular preemption to impose and encourage partisan philosophies about what should and should not be allowed as subject matters, course content, or instructional strategies in local classrooms — until recently.

Recent State Preemption of Curricula Aimed at Racial Justice

Since 2020, a significant number of states, spurred by mostly conservative state legislators, have introduced legislation to limit the content of curricula within their respective states: 46 states proposed at least 274 laws impacting the discussion of race and racism in schools, 34 of which have passed.[23] Spurred by conservative interest groups including the American Legislative Exchange Council that seed model bills in red state legislatures, these pieces of legislation have unabashedly targeted – by name – particular theories and curricula.[24] For instance, much of the proposed and/or passed legislation has sought to limit the teaching of critical race theory or the 1619 Project,[25] an initiative introduced in the *New York Times Magazine* to recenter the consequences of slavery and contributions of Black Americans in the American historical narrative. Both critical race theory and the 1619 Project seek to better understand or convey the relationship between power and race in the United States, especially as the relationship between power and race has been a cornerstone of the United States' history and development as a nation. Ironically, the proposed or passed legislation banning Critical Race Theory and the 1619 Project are often filed under civil rights headings (among other headings).[26] Additionally, many of the proposed or passed laws have purported to list the tenets of Critical Race Theory, banning the teaching of the theory itself or any of its tenets in isolation.[27] However, what's clear is that the listed tenets, for the most part, are not actually components parts of Critical Race Theory.[28]

Moreover, some state legislatures have put forth legislation that seeks to hold educators and educational institutions civilly liable for teaching concepts that are viewed as divisive (or otherwise, concepts that contextualize the racialized and gendered history of the United States).[29] To ensure that educators abide by these proposed or passed laws, state governments are requiring that educators provide open access to their curricular materials, sometimes semesters or academic years in advance.[30]

23. *See CRT Forward Tracking Project,* UCLA School of Law, https://crtforward.law.ucla.edu/ (last visited Jan. 10, 2023).
24. For example, MI SB 0460 (2021), MO HB 1474 (2021), MS HB 1491 (2022), and WY HB 0097 (2022).
25. For example, MO HB 1474 (2021) and OK HR 1038 (2021).
26. For instance, ID H 0488 (2022) is titled, "Dignity and Nondiscrimination in Public Education) while KS SB 515 requires "nondiscrimination in school district classroom instruction".
27. While almost all of the recent bills banning Critical Race Theory purport to ban the tenets of Critical Race Theory, Minnesota is a notable standout. MN HF 3301 goes much further than most bills, banning school districts from requiring an examination of the role of race and racism in society.
28. For a more accurate list of the tenets of Critical Race Theory, see Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction (2001).
29. For instance, Alabama threatens to terminate educators for running afoul of its anti-Critical Race Theory bill (AL HB 11 (2022)) and states like Idaho (ID H 0488 (2022)) and Missouri (MO HB 1634 (2021); MO SB 694 (2021)) will withhold funds from schools that allow educators to run afoul of their anti-Critical Race Theory bills. Meanwhile, a failed Oklahoma Senate Bill would have disqualified a teacher who ran afoul of its anti-Critical Race Theory bill from qualified immunity while also permanently disqualifying the teacher from teaching in the state of Oklahoma (OK SB 1401 (2022)).
30. For instance, IN HB 1134 (2021).

II

These bills have been fairly consistent in their aims and language, and the examples below represent a snapshot of the bills that have arisen:

Tennessee HB 580 *(Bill Passed)*

Tennessee lawmakers passed a bill that prohibits the teaching that certain individuals or groups are "inherent privileged," that the United States has fundamental issues relating to racism or sexism, or that could make an individual feel "discomfort, guilt, anguish, or another form of psychological distress" on account of race or sex.[31] If the state commissioner of education finds that these concepts are being taught in schools, they may withhold state funds from the school district or charter school.[32]

Missouri HB 1474

The Missouri bill is one of the most specific forms of curricular pre-emption. While many states have chosen to ban curricula that are similar to Critical Race Theory, the state of Missouri proposed to ban not only curricula that are associated with or related to an expansive definition of Critical Race Theory, but also a wide swath of multicultural curricula that fall significantly short of the critical nature of Critical Race Theory. Like its counterparts in Idaho, Missouri's proposed bill would have issued financial consequences to educational institutions that violate one of its many bills banning Critical Race Theory: either 10%[40] or 50%[41] of the institution's state funding. This would have made Missouri particularly punitive, even among states banning Critical Race Theory. The proposed Missouri bill, however, did differ from Idaho's proposed bill in that the former would not have explicitly established a private cause of action. Ultimately, this bill did not pass, although the Missouri state legislature and executive officials have adopted statements condemning Critical Race Theory.

Alabama HB 11

In Alabama, lawmakers proposed a bill to "respect the dignity of others," "acknowledge the right of others to express differing opinions," and "defend intellectual honesty, freedom of inquiry and instruction, and freedom of speech and association."[33] Notwithstanding these stated intention, the bill would have banned teachers from requiring students to adopt the tenets of Critical Race Theory, an aim that the legislature offered no evidence to support was a problem.[34] Alabama's proposed legislation would have required educational institutions to terminate the employment of those who violate the state's edicts around teaching about oppression.[35] Alabama's proposed legislation was one model of contemporary curricular pre-emption: establishing bans on certain controversial topics while also immediately requiring the termination of employees that breach the legislation, without an option for remediation. Ultimately, this bill did not pass, although Alabama adopted a statement condemning Critical Race Theory.

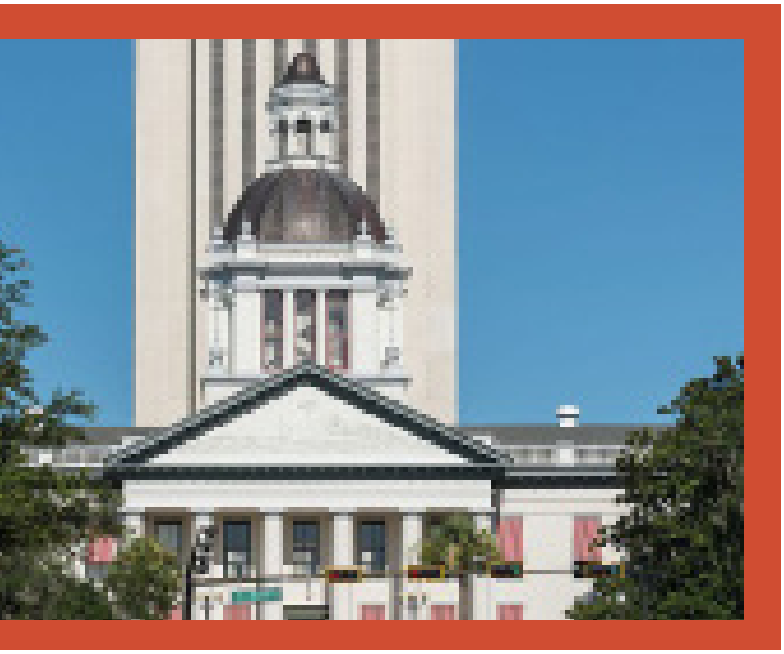
Idaho HB 488

While an Idaho resolution banning the discussion of Critical Race Theory purports to encourage Idaho schools to teach the "whole and honest history of our nation,"[36] a companion bill would have established a private cause of action and a mandated reduction in state funding for schools that teach concepts often associated with Critical Race Theory.[37] On its face, the proposed bill offered little evidence supporting its claim that the tenets of Critical Race Theory "inflame divisions" that are contrary to "the unity of the nation and the well-being of the state."[38] The proposed bill in Idaho exemplifies one group of legislation: those that ban the teaching of Critical Race Theory (and other critical theories that address identity politics) and establish private causes of actions and institutional penalties until the breach of the legislation is corrected. Ultimately, this bill did not pass, although the resolution remains.

31. Tenn. HB 580 (2021).
32. *Id.*
33. Ala. HB 11 (2022).
34. *Id.*
35. *Id.*
36. Idaho SCR 118 (2022).
37. Idaho HB 0488 (2022).
38. *Id.*
39. Mo. HB 1474 (2021).
40. Mo. HB 1634 (2021).
41. Mo. SB 694 (2021).

II

More recent legislative activity has sought to overburden educators with process, effectively making the teaching of purportedly controversial content an unmanageable and tedious task. For instance, recent legislation passed in Arizona and Florida require that school districts implement procedures to allow parental input in decisions on textbook selection and what materials are offered in school libraries.[42] Rather specifically, school districts in Arizona and Florida are required to publish these processes and procedures publicly and make concerted efforts to inform parents of these processes and procedures.[43] Importantly, in Arizona, these efforts are required for both curricular and extracurricular activities, including those activities which their children are not involved.[44] Arizona's legislation allowed parents to shield their children from academic content that the parent thought would be harmful.[45] In this context, harmful includes any material that is offensive to the parents' beliefs or practices.[46] Thus, these pieces of legislation do not aim to protect students from physical, emotional, or psychological harm; they merely protect students from materials to which their parents object. Notably, the expectation in Arizona and Florida fail to provide any safeguards to ensure sincerity, fidelity, or earnestness in terms of the parental objection.[47] Thus, it is reasonable to assume that a malicious compliance campaign could be an effective response to this legislation. In other words, parents and students of color could file complaints arguing that learning about George Washington or Thomas Jefferson, both slaveowners, is harmful or offensive.



> *"These bills all aim – through different pathways — to prevent schools, school districts, and educators from discussing the role of race and racism of schools and schooling."*

These bills all aim – through different pathways – to prevent schools, school districts, and educators from discussing the role of race and racism of schools and schooling, and they roll back local control of public schools and school districts. Specifically, these bills go beyond the more recent trend of states dictating state academic standards and plainly restrict school districts from choosing specific curricula. In the Alabama and Idaho examples, states proposed to place general bans on critical discussions of and teaching about race and racism while Missouri would have gone a step further, banning critical discussions of race and racism as well as discussions of multiculturalism and pluralism. That states are seeking to extend their previous interventions into local educational matters through curricular preemption is alarming and signals an increasing propensity for state authorities to preempt local decision-makers and their decisions. Equally alarming, however, is the fact that states – via curricular preemption – are involving themselves in employment matters, requiring the censuring, sanctioning, and termination of teachers who challenge the status quo and/or embrace pathways to a more culturally responsive and relevant instructional framework. In other words, the core of each of these bills (and all others put forth during recent legislative sessions) is to stifle discussions of race and racism while purporting to protect the intellectual engagement, academic discussion, and freedom of speech and association.

42. Ariz. HB 2439 (2022) (Arizona's legislation required parental notice and review of even supplemental instructional materials, perhaps limiting teacher's flexibility to include current events and/or simple worksheets at the last minute); Fla. HB 1467 (2022) (Florida's legislation required the selection of instructional and library materials to comply with some components of administrative law, namely notice and public comment).
43. Ariz. HB 2439 (2022) (Arizona allows for electronic communication of its required parental consent and objection policies); Fla. HB 1467 (2022) (Florida requires that school districts post the forms necessary to file a complaint are posted on their website).
44. Ariz. HB 2439 (2022).
45. *Id.*
46. *Id.*
47. However, Florida's recent legislation does require that parents, at a minimum, provide justification for their claim that the challenged instructional material violates state law.

Photo by The Gender Spectrum Collection

Recent State Preemption of Curricula Aimed at the LGBTQ+ Community

Conservative state legislatures have not stopped at banning the teaching of a historically accurate history of the United States. Bans on teaching Critical Race Theory, the 1619 Project, and similar curricula have led to similar, if not identical, bans on instructional and curricular decisions related to the LGBTQ+ community.

Most prominent among these early proposals was Florida's HB 7, also known as the *"Don't Say Gay"* bill. This law passed, restricting discussions of race and racism in Amerian history and establishing a private cause of action for parents against schools that engaged in discussions about the LGBTQ+ community between kindergarten and 3rd grade or in an otherwise non-age-appropriate manner beyond 3rd grade.[48]

Following Florida, other states proposed similar legislation, with at least 28 proposals circulating in state legislatures in the 2023 session. Some of these proposals would allow far more egregious breaches into classroom curricular decisions. For instance, many of the states considering curricular pre-emption to ban discussion of LGBTQ+ issues prohibit the types of books that can be included on school curricula or in public libraries, including school libraries[49] – specifically, information that would make conservative populations upset – or target students based on their gender identity or use of pronouns, such as Virginia's proposed bill requiring administrators to notify parents if their children are self-identifying with pronouns other than those assigned at birth.[50] Bans on curricula related to the LGBTQ+ community are equally nefarious as bans on CRT and related theories and curricula. These bans have led to additional bans outside of education, often requiring that schools acknowledge only students' genders that are given at birth.[51] Likewise, there are numerous examples of states banning transgender students from competing in sports if they wish to compete with students of their gender.[52]

Laws banning discussion of LGBTQ+ issues in schools shows that curricular preemption is becoming a strategy that conservative state legislatures will continue to seize on to inculcate their partisan views in schools and invalidate the experiences of marginalized communities.

> ***"Laws banning discussion of LGBTQ+ issues in schools shows that curricular preemption is becoming a strategy that conservative state legislatures will continue to seize on to inculcate their partisan views in schools and invalidate the experiences of marginalized communities."***

48. Fla. HB 7 (2022).
49. For a very concrete example, see North Dakota HB 1205 (2023), prohibiting libraries from carrying books that include primary discussion or images of "sexually explicit materials," defined to include "gender identity."
50. Va. HB 1707 (2023).
51. *See* Ariz. SB 1165 (2022) (disallowing transgendered athletes from participating on their appropriate and proper interscholastic sports teams); *but see,* Ariz. SB 1138 (2022) and Mo. SB 843 (2022), which go further (prohibiting physicians from performing gender reassignment surgery for people under the age of 18).
52. *See* Ariz. SB 1165 (2022); *see also,* Tenn. HB 2316 (2022).

Part III The Path Toward Local Control of Curricula

Historically, local governance has been seen as the best avenue for assuring and ensuring that schools and school districts are responsive to the needs of local communities. Even in upholding a school funding scheme with a racially disparate impact against a Fourteenth Amendment challenge in *San Antonio v. Rodriguez*, Justice Powell noted:

> *The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to "serve as a laboratory; and try novel social and economic experiments." No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.*[53]

Even if the outcome of the **Rodriguez** case is troubling in that it created a substantial barrier to pursuing educational equity in the face of white flight, there is some merit in entertaining Justice Powell's notion that local governance of schools is important. State curricular preemption will hijack opportunities to establish laboratories to better understand the most effective and impactful materials for and manners of instruction. Likewise, local tax dollars are an indispensable component of the educational system, local control of schools affords citizens the opportunity to decide how to best spend local monies. Finally (and likely most importantly), local control of schools affords citizens the opportunity to directly test the outcomes of diverse and pluralistic perspectives, including those perspectives concerning the history of our nation.[54] By banning, the discussion of critical conversations about race and racism and their roles in historical and contemporary society, state legislatures in conservative and conservative-leaning states are committing the very offense that they allege to address: denying the right to free expression and association while also discouraging inquiry in the service of truth, intellectual freedom, and individual dignity.

Because state constitutions vary in their delegation of authority to local school boards, there is no one consistent strategy for fighting curricular preemption. However, there are states that afford stronger legal pathways to challenge curricular pre-emption on state constitutional grounds. Specifically, the states of Colorado, Florida, Georgia, and Virginia provide state constitutional grounds to challenge their respective states' involvement in local school governance. Each of these states require the establishment of local school boards and charges those school boards to oversee local public schools.

53. *San Antonio v. Rodriguez*, 411 U.S. 1, 50-51 (1973).

54. While the aforementioned arguments in favor of local control exists, communities and school districts in the United States have also leveraged local control to deny equitable and/or equal access to educational opportunities. For instance, local communities and school districts argued for local control of public schools and school districts to prevent desegregation and contemporary efforts to maintain any semblance of desegregated school districts is thwarted when predominantly white and affluent communities secede from larger school districts in an attempt to rollback previous attempts at desegregation. For more information on this topic, see Erika K. Wilson, *The New School Segregation,* 102 Cornell L. Rev. 139 (2016). *See also,* Ericka S. Weathers & Victoria S. Sosina, *Separate Remains Unequal: Contemporary Segregation and Racial Disparities in School District Revenues,* 59 Am. Educ. Res. J. 905 (2022) (for information on the potential financial consequences of such successions). Separately yet still importantly, it is particularly egregious if local control and tests of processes and outcomes associated with developing a pluralistic and diverse society are limited for Black and Brown peoples while white, particularly conservative white people, are allowed to offer critiques and pushback around ideas associated with developing and sustaining a pluralistic and diverse society.

For instance:

Virginia requires the establishment of school boards and makes school boards the official supervisors of public schools. The Virginia constitution notes, "The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law."[55]

Florida's constitution is similar, requiring that "school board[s] shall operate, control and supervise all free public schools within the school district."[56]

Similarly, **Georgia**'s constitution necessitates local school boards and provides those school boards with certain powers to control local education policy. Specifically, Georgia's constitution states, "Each school system shall be under the management and control of a board of education."[57]

Colorado's constitution also requires local school boards. The Colorado constitution provides, "The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts."[58]

> *"State preemption of classroom instructional and curricular decisions is another example of the many ways that teachers are no longer entrusted with making the best decisions for their students."*

In each of these cases, the state constitution is clear: the state is not allowed to encroach upon the curricular decisions of local school boards as local school boards are constitutionally assigned control and supervision of education in their local jurisdictions. In these states, residents should consider state-based causes of action to limit the power of the state to encroach upon the authority of local school boards.

Beyond these states, there are also opportunities for political advocacy against states' uses of preemption to regulate how educators instruct their students. For instance, one significant argument to reconsider preemption rests on the deprofessionalization of education and the concomitant reduction in the teacher force. Specifically, state preemption of classroom instructional and curricular decisions is another example of the many ways that teachers are no longer entrusted with making the best decisions for their students. In other words, teachers are not trusted to be professionals and to positively leverage their professional expertise. Currently, the deprofessionalization of the teaching force is routinely cited as a reason for the shrinking of the teaching force. Likewise, the high level of accountability combined with the low level of pay is another cited reason why the teaching force is shrinking. In this argument, the ways that teachers are held accountable and are underpaid have led to decreased interest in the field. States' decisions to make educators' jobs dependent on whether a student is offended or worse, states' decisions to make educators civilly liable for "harm" done to an offended student is yet another example of holding teachers to extreme account while also underpaying them. This simply cannot bode well for the teaching force. It is primarily for these two reasons that political advocacy may be a point of leverage to make states second guess or reconsider their efforts to preempt classroom instructional and curricular decisions, both deprofessionalizing the field of teaching and creating undue pressure on teachers.

55. Va. Const. Art. VIII, § 7.
56. Fla. Const. Art IX, § 4(a-b).
57. Ga. Const. Art, XIII, § 5(2).
58. Co. Const. Art IX, § 14.

Conclusion

Curricular preemption has escalated at a time when our nation is most divided among political lines. This is no coincidence. It is important to put modern curricular preemption into historical perspective. In our current historical moment, conservative ideology is moving the country backward, to a time in which the rights of marginalized and disenfranchised peoples were limited or nonexistent. Contemporary curricular preemption, which takes aim at any discussion of race, racism, pluralism, or multiculturalism, is preparatory work. While these bills have mostly targeted primary and secondary education (with some targeting higher education), the long game is to teach and encourage a cadre of conservative-minded students to challenge these notions at a later point in their lives, namely in college and at the voting booth. Many of the Critical Race Theory bans have noted that education is the preparation for engagement in a constitutional democracy; thereby, training young students to resist, reject, and refuse pluralistic and multicultural societies while also discouraging inquiry into the role(s) of race and racism in said societies is preparation for the rollback of civil and human rights. It is thus critical that advocates for social justice take heed of this rising trend of curricular preemption and work to protect the authority of local school boards to craft curricula that are reflective of the diversity of experiences in their communities.

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