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From Governance to the Classroom: Rethinking Large-Scale School Reform to Improve Educational Opportunity and Equity

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FROM GOVERNANCE TO THE CLASSROOM: RETHINKING LARGE-SCALE SCHOOL REFORM TO IMPROVE EDUCATIONAL OPPORTUNITY AND EQUITY

BENJAMIN M. SUPERFINE, PHD* & MARK PAIGE, PHD**

ABSTRACT

For decades, governmental institutions have focused on improving and equalizing the educational opportunities for students. Courts, legislatures, and chief executive officers at federal and state levels have spearheaded a range of large-scale educational reform efforts, including desegregation, school finance reform, educational improvement for students with disabilities, charter schools, and standards-based accountability systems. However, many assessments of these efforts reflect limited or mixed success. This Article takes a bird's-eye view examination of not simply why a single type of educational reform has failed to reach its goals in a particular area, but instead at why such efforts have failed to reach their goals more generally. Drawing insights from both the history of these reform efforts and educational research, this Article analyzes cross-cutting challenges from a perspective that highlights the horizontal and vertical governance structures underlying these reforms. Based on the analysis of these reforms, this Article presents principles for rethinking educational governance in a way that has a greater potential for equalizing and improving students' learning opportunities and performance.

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I. INTRODUCTION

Over a number of decades, our governmental institutions—courts, legislatures, and chief executive officers at federal and state levels—have advocated numerous educational reforms. These include efforts to desegregate schools, revise school finance systems, improve the education of students with disabilities, and introduce alternatives to traditional public schools (e.g., charter schools). Proposed changes have approached the problems facing schools in different ways and with different theories of action. Some are centered on students’ rights and deficiencies of resources provided by the government, while others emphasize a systems approach to reform. Still, some have turned to the market as an engine for educational change on a theory that

government fundamentally lacks the capacity to address needed improvements or reforms.

Despite this ongoing churn of reform, sober assessments of these efforts range from dismal to limited success. School desegregation, perhaps the most visible and foundational large-scale educational reform effort, has fallen far short of its goal.¹ As Professor Heise argued, “the Court’s successful defeat of de jure school desegregation did not translate into a defeat of de facto segregation.”² Scholarly assessments of large-scale educational reform efforts as a whole yield similar results.³ Recognition of the limitations of educational change have even begun to appear in the popular press as newspapers, such as the *New York Times*, have highlighted disappointing performance and widening achievement gaps among U.S. students in international tests.⁴ Moreover, the constant barrage of new reform ideas and efforts has resulted in

¹ See, e.g., CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 181 (2004) (discussing the legal and demographic forces that restrained interracial contact); Erica Frankenberg, *The Role of Residential Segregation in Contemporary School Segregation*, 45 *EDUC. AND URB. SOC’Y* 548, 548 (2013) (analyzing the relationship between residential and school segregation); Gary Orfield & Erica Frankenberg, *Increasingly Segregated and Unequal Schools as Courts Reverse Policy*, 50 *EDUC. ADMIN. Q.* 718, 719 (2014) (analyzing legal changes and data on changing demographics and intensifying segregation).

² See Michael Heise, *Litigated Learning and the Limits of Law*, 57 *VAND. L. REV.* 2417, 2424 (2004).

³ See BENJAMIN M. SUPERFINE, *EQUALITY IN EDUCATION LAW AND POLICY: 1954–2010*, at 8 (2013) (“[D]espite the significant resources accompanying intensive judicial and legislative efforts to equalize educational opportunities, these efforts have often failed to achieve their goals.”).

⁴ See Dana Goldstein, *‘It Just Isn’t Working’: PISA Test Scores Cast Doubt on U.S. Education Efforts.*, *N.Y. TIMES* (Dec. 3, 2019), <https://www.nytimes.com/2019/12/03/us/us-students-international-test-scores.html> (“Low-performing students have been the focus of decades of bipartisan education overhaul efforts, costing many billions of dollars, that have resulted in a string of national programs . . . but uneven results.”). The test results further indicated that the reading achievement gap is widening between low and high performers, specifically because the bottom 10th percentile lost ground.

a system described as “fragmented”⁵ and filled with “faddish”⁶ education policies that come and go.⁷

Responding to such challenges, legal scholars have proposed a range of solutions. For example, they have argued for the recognition of a federal right to education in the U.S. Constitution;⁸ the explicit creation of such a right by statute⁹ or constitutional amendment;¹⁰ overturning particularly important educational cases;¹¹ molding litigation or statutes toward what are viewed as more promising areas of reform, such

⁵ Several scholars have focused on the problems that arise from incoherent or fragmented education policies and have generally argued that policymakers should focus on creating more coherent legal and policy arrangements. *See, e.g.*, David K. Cohen et al., *The Influence of Practice on Policy*, in SHAPING EDUCATION POLICY: POWER AND PROCESS 63, 67 (Douglas E. Mitchell et al. eds., 2011) (discussing the relationship between federalism, educational governance, and the resulting problems plaguing efforts aimed at influencing educational practice); Jennifer A. O’Day & Marshall S. Smith, *Systemic Reform and Educational Opportunity*, in DESIGNING COHERENT EDUCATION POLICY 250 (Susan H. Fuhrman ed., 1993) (proposing “systemic reform” as a remedy to the problems of legal and policy incoherence).

⁶ *See* Brian Rowan, *The School Improvement Industry in the United States: Why Educational Change is Both Pervasive and Ineffectual*, in THE NEW INSTITUTIONALISM IN EDUCATION 67, 67 (Heinz-Dieter Meyer & Brian Rowan eds., 2006) (discussing why instruction and educational outcomes had changed little for at least a decade despite systemic approaches to reform).

⁷ *See* Gary Orfield, *Strengthening Title I: Designing a Policy Based on Evidence*, in HARD WORK FOR GOOD SCHOOLS: FACTS NOT FADS IN TITLE I REFORM 4 (Gary Orfield & Elizabeth H. DeBray eds., 2001) (explaining the failure of various educational reforms to close racial disparities).

⁸ *See, e.g.*, Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 111–13 (arguing that a fundamental right to education in the U.S. Constitution is critical for addressing educational problems); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 94 (2013) (arguing that the U.S. Constitution should be interpreted to include a right to an adequate education).

⁹ *See, e.g.*, Kimberly J. Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1712 (2007) (arguing that Congress should enact spending legislation guaranteeing a federal right to education).

¹⁰ *See* Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1381 (2010) (discussing efforts to amend the U.S. Constitution to provide a federal right to education).

¹¹ *See, e.g.*, Christopher R. Lockard, *In the Wake of Williams v. State: The Past, Present, and Future of Education Finance Litigation in California*, 57 HASTINGS L.J. 385, 420–21 (2005) (advocating for the Supreme Court to overrule *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), a fundamental school finance decision).

as enhancing students' literacy¹² or preschool opportunities;¹³ and reconstructing educational federalism more generally.¹⁴ While such proposals are based on a detailed understanding of the legal environment, they generally have been limited by insufficient attention to the empirical research that highlights the complicated range of factors and interactions among them that influence law and policy change in education. Indeed, we need educational reform that not only promotes significant changes in law and policy, but also improves and equalizes the learning opportunities for and performance of students at the classroom level, which is what ultimately matters.

This Article accordingly takes a bird's-eye view examination of not simply why a single type of educational reform has failed to reach its goals in a particular area, but instead at why such efforts have failed to reach their goals more generally. Based in both a detailed understanding of the law and empirical research, this Article argues that, while each major educational reform area has been beset by unique challenges, some types of educational problems are so systemic that they cross reform efforts. These cross-cutting challenges are most usefully conceptualized in terms of educational governance. Such a conceptualization operates at the level of the fundamental structure framing various educational reform efforts, throws empirically identified problems into stark relief, and is addressable on a practical level through the law.

This Article particularly argues that educational governance should be considered in two major ways to best understand the types of central challenges that span across reform efforts. First, educational governance should be considered horizontally, or involving the explicit or implicit choice to seek reform through various alternative institutions at the same general level, like federal courts or legislatures.¹⁵ Second, educational governance should be considered vertically, or from governing institutions like federal and state governmental institutions to law and policy implementers, like school administrators or teachers. It is at this level that any victory or reform achieved at the horizontal level will be implemented. Some have referred to such a view of educational governance as "from the capitol to the classroom."¹⁶

¹² See William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1919 (2017) (framing cases focused on enhancing students' literacy opportunities as "next-generation resource litigation[s]").

¹³ See James E. Ryan, *A Constitutional Right to Preschool?*, 94 CALIF. L. REV. 49, 77 (2006) ("[P]reschool may be one of the most cost-effective and efficient inputs that a court could order.").

¹⁴ See Kimberly J. Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 983 (2015) ("Education federalism should be restructured to embrace greater federal leadership and responsibility for a national effort to provide equal access to an excellent education.").

¹⁵ See NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 27 (1994) (discussing a comparative institutional analysis approach to foreground the role of governance in law and policy problems).

¹⁶ See CTR. ON EDUC. POL'Y, *FROM THE CAPITAL TO THE CLASSROOM: YEAR 2 OF THE NO CHILD LEFT BEHIND ACT* i, xi–xii (2004) (articulating various levels from the federal through school levels to be examined when charting education policy implementation).

Indeed, this type of focus on governance not only highlights major obstacles facing reform efforts but efficacious paths for change as well.

To examine the fundamental challenges to educational reform efforts and the governance issues they raise, this Article is divided into four primary Parts. First, this Article offers a theory of educational governance grounded in both the law and empirical research on educational policy. Second, this Article employs this theory of governance to analyze four major areas of large-scale educational reform: school finance reform, education of students with disabilities, standards-based accountability policies, and charter schools. This Part highlights the applicable law and institutional context in which the reforms have occurred, and what we know about the successes and challenges of these reforms. Third, this Article articulates implications about the operation of educational governance across educational reform areas and offers principles for how educational governance should be restructured to promote more efficacious efforts moving forward. Finally, this Article offers concluding thoughts about the necessity of educational governance reconceptualization and reform.

Still, it is worth noting that any recommendations for improving large-scale education reform should be given with a sense of modesty. As this Article discusses throughout, effective and sustainable education reform through law and policy faces significant challenges of design and implementation. As decades of research reveal, no “magic potion” for improving and equalizing students’ learning opportunities and performance exists. In addition to the many challenges this Article highlights, education is inextricably intertwined with a handful of other policy areas, such as health, economics, housing, and voting.¹⁷ Moreover, no plan for sweeping educational reform can be designed, introduced, and implemented effectively unless the political context is ripe.¹⁸ Still, promoting effective, large-scale educational reform requires a clear-eyed view of the major challenges educational reform efforts have faced in the past, which are precisely the sorts of challenges this Article examines.

II. A THEORY OF EDUCATIONAL GOVERNANCE

While several challenges have historically plagued large-scale educational reform efforts in law and policy, some of the most important challenges can be usefully

¹⁷ See *Public Health and Education: Working Collaboratively Across Sectors to Improve High School Graduation as a Means to Eliminate Health Disparities*, AM. PUB. HEALTH ASS’N (Nov. 9, 2010), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/09/14/35/public-health-and-education-working-collaboratively-across-sectors-to-improve-high-school-graduation> (“Health and education are inextricably intertwined, and a lack of education is one of the social determinants of poor health.”); JEAN ANYON, *RADICAL POSSIBILITIES: PUBLIC POLICY, URBAN EDUCATION, AND A NEW SOCIAL MOVEMENT* 7–10 (2005) (discussing the relationship between policies involving poverty, housing, transportation, residential segregation, and education). See also Bruce Meredith & Mark Paige, *Reversing Rodriguez: A Siren Call to a Dangerous Shoal*, 58 HOUSE L. REV. 355, 384 (2020) (arguing that securing voting rights is an important, but often overlooked, path to education reform because it will create the type of political will to change the interconnected policy areas that impact educational opportunity, such as housing and health care).

¹⁸ See, e.g., Lorraine M. McDonnell, *A Political Science Perspective on Education Policy Analysis*, in *HANDBOOK OF EDUCATION POLICY RESEARCH* 57, 57 (Gary Sykes et al. eds., 2009) (providing an overview of how politics influence education policy design).

described in terms of educational governance, the oversight of public education by government institutions. Such challenges are both systemic and cut across reform efforts. This Part draws on legal and empirical literature to conceptualize educational governance horizontally and vertically, and it provides a foundation for the analysis of specific education reform efforts and underlying factors that have influenced them.

A. *Horizontal Governance*

When legal scholars refer to educational governance, they sometimes refer to it in the horizontal sense. That is, they generally conceptualize it in terms of allocating legal decision-making authority to different governmental institutions at approximately the same level, like courts, legislatures, or the head of the executive branch.¹⁹ In doing so, scholars have highlighted persistent educational reform challenges plaguing certain institutions. For example, unproductive politics have weakened legislative attempts at educational reform in cases involving test-based accountability,²⁰ while the lack of clearly defined educational rights at federal²¹ and state²² levels, in addition to the lack of scientific expertise,²³ have weakened school finance reform litigation in the courts. However, such challenges are neither considered simultaneously nor relatively.

Institutional choice theory offers an approach for strategically considering such challenges when crafting an educational reform strategy.²⁴ As Professor Komesar argued, because different institutions like courts and legislatures have different characteristics with regard to particular policy issues, “deciding who decides” constitutes one of the most important, though often unrecognized, issues in the educational policy process.²⁵ When reformers ignore the influence of institutional

¹⁹ See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 502 (2005) (discussing how power is allocated in the same governmental “tier”).

²⁰ See Charles Barone & Elizabeth DeBray, *The Role of Congress in Education Policy*, EDUC. WK. (May 2, 2012), <https://www.edweek.org/policy-politics/opinion-the-role-of-congress-in-education-policy/2012/05>.

²¹ See KIMBERLY JENKINS ROBINSON, A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 2 (2019).

²² See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 104–66 (providing a detailed overview of different school funding schemes and relevant state constitutional provisions).

²³ See Molly S. McUsic, *The Law’s Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUALITY 88, 91 (Jay P. Heubert ed., 1999) (arguing for the use of standards in school finance lawsuits because it enables courts to rely on “polic[ies] established by education experts”).

²⁴ See KOMESAR, *supra* note 15, at 5 (discussing the characteristics of various institutions for the purpose of making policy decisions).

²⁵ See Benjamin M. Superfine, *Deciding Who Decides Questions at the Intersection of School Finance Litigation and Standards-Based Accountability Policies*, 23 EDUC. POL’Y 480, 482 (2009) (applying institutional choice theory to educational policy questions).

context on the accomplishment of specific policy goals, like equalizing educational opportunities for students, they miss a critical element shaping how policies are designed and implemented, as well as their ultimate effectiveness. Highlighting that no single institution is perfect for any particular issue and wisely displaying a sense of modesty toward a complex area, Komesar also argued that “the choice is always a choice among highly imperfect alternatives.”²⁶

Given the courts’ highly visible role in education reform, scholars noted the courts’ institutional strengths and limitations, finding a muddled record of success. Citing issues such as courts’ limited abilities to oversee implementation of their rulings and the requirement to take only cases that come to them, Professor Rosenberg argued, “U.S. courts can almost never be effective producers of significant social reform” in areas including education.²⁷ Moreover, although the courts have some tools to help them sort through technical matters of educational policy, they have also faced many challenges understanding scientific arguments undergirding factual claims.²⁸ Perhaps most obviously, the relevant legal rules and principles guiding judicial decision-making in education cases—or lack thereof—can limit courts’ abilities to leverage particular types of reform.²⁹ As discussed below, such challenges have weakened courts’ reform capacity in areas ranging from the education of students with disabilities to school finance reform. Prompted by these obstacles, some commentators specifically have advocated for a federal right to education to guide judicial decision-making.

Still, the courts can be a very useful venue for bringing large-scale education reform claims in particular instances. Given their comparative insulation from the political process and the impetus to craft reasoned decisions following the law, courts can offer reformers a potential means to overcome political inertia and affect governmental decision-making in education, particularly for underserved minority groups without significant political power.³⁰ As such, the courts have brought legitimacy to efforts to address educational problems that might not otherwise have been addressed at all.³¹

²⁶ See KOMESAR, *supra* note 15, at 5.

²⁷ See GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 422 (2d ed. 2008).

²⁸ See Kevin G. Welner & Haggai Kupermintz, *Rethinking Expert Testimony in Education Rights Litigation*, 26 *EDUC. EVALUATION AND POL’Y ANALYSIS* 127, 132–40 (2004) (arguing that courts may be led into a false sense of security about claimed facts in education litigation).

²⁹ See discussion *infra* Part III.

³⁰ See Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O’Neill—And a Proposed Solution*, 29 *CONN. L. REV.* 1115, 1146 (1997) (describing the use of the courts in school finance reform litigation to effectively influence educational policy). *But see* Kevin G. Welner, *Scholars as Policy Actors: Research, Public Discourse, and the Zone of Judicial Constraints*, 49 *AM. EDUC. RES. J.* 7, 7 (analyzing the role of popular sentiment and political pressure in education litigation).

³¹ See CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004) (generally describing the impact of *Brown I*).

In contrast, legislatures possess much more flexibility in their decision-making processes and have access to a wider range of information. In addition to the power of legislators to interact with various interest groups and interested parties on informal bases, legislatures have looser rules than courts for presenting and receiving information.³² As such, they are often well positioned for making decisions that depend on an array of complex information, balancing competing political interests, and crafting complex reform packages. However, they are also comparatively more subject to the vagaries of the political process, such as pressure from powerful political minorities (e.g., interest groups) or powerful majorities (e.g., unusually motivated voters).³³ Moreover, legislatures too may have issues dealing with scientific evidence (in contrast to, say, agencies).³⁴ As discussed below, legislatures have produced striking examples of ineffective and harmful educational reform based on inherently flawed theories of action grounded more in politics than social science, such as the sweeping testing and accountability provisions of the No Child Left Behind Act of 2001.³⁵

Of course, there are several more institutions that are critical to consider in public policy and particularly education law and policy. Various executive branch institutions, such as the presidency, governorships, and agencies, are all critical components of educational governance. Given the prevalence of charter schools and vouchers, one could even argue that market should be seen as its own institution for an institutional choice theory analysis. This Article will address such other institutions throughout. However, given the centrality of courts and legislatures in large-scale education reform, these institutions constitute the focus of this Article's analysis.

In short, a major lesson from institutional choice theory may exhort reformers to be strategic about the institution (or mix of institutions) through which they attempt to push reform to effectively cut through the political process and draw on expertise to craft nuanced reform packages. However, as the following Part illustrates, it is also critical not to fall into the trap of believing that achieving even a significant victory in any institution results in frictionless implementation of efficacious reform that automatically equalizes and increases students' learning opportunities. Indeed, while expertise is critical in education, it is not a field where one could find "philosopher kings" that effectively operate through wise, top-down rule.³⁶

³² See KOMESAR, *supra* note 15, at 141–42 (“The tradeoff is between a political process that integrates far more information but with a more significant risk of bias and an adjudicative process that suppresses information but decreases distortions in its presentation. The adjudicative process hears and considers less, but is more evenhanded in what it . . . considers.”).

³³ See *id.*

³⁴ See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1176 (1999) (“[L]egislatures in many states suffer from numerous institutional deficits that affect their ability to focus on complex issues in a sustained and informed manner.”).

³⁵ See No Child Left Behind Act of 2001, 20 U.S.C. § 6316.

³⁶ See KARL POPPER, *THE POVERTY OF HISTORICISM* X, 42 (2013) (discussing the political philosophy of Plato).

B. *Vertical Governance*

Although a favorable court decision or passage of a law is arguably a necessary part of large-scale education reform and often seen as a critical victory, actual change for students resulting from these sorts of wins is far from guaranteed.³⁷ While it might be particularly tempting for lawyers to frame victories in such a fashion, educational policy research highlights the many challenges of effective educational reform as it is implemented “from the capitol to the classroom.”³⁸ As such research repeatedly illustrates, effective educational reform is not simply a matter of telling practitioners what to do at various levels and then holding them accountable; it is a complex process that involves the application of professional discretion at multiple levels and thus implicit decisions about how to divide decision-making authority “vertically” from policymakers to teachers.³⁹

Myriad factors alter the path of any reform as it moves from governmental institutions into the classroom. For example, administrative structures and norms in the various organizations and institutions through which reforms gestate—such as state departments of education and school districts—can block or facilitate even the best-intentioned changes.⁴⁰ Individuals within organizations interpret legal and policy signals to decide whether and/or how to ignore, adapt, or adopt reforms in practice.⁴¹ School-level factors are also critical, as variation in the implementation of reform at the school level is the norm rather than the exception.⁴² In response to factors such as the will and skill of school leaders, and how policies fit with existing practices, norms, and goals of schools, schools construct different interpretations of how reforms should be enacted and accordingly which components should be emphasized.⁴³ Teachers and

³⁷ Indeed, as we note, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) is an excellent example of a much-heralded decision failing to achieve its goals. See CLOTFELTER, *supra* note 1, at 201.

³⁸ See, e.g., CTR. ON EDUC. POL’Y, FROM THE CAPITAL TO THE CLASSROOM: YEAR 4 OF THE NO CHILD LEFT BEHIND ACT (2006) (generally examining federal, state, and local implementation of the No Child Left Behind Act).

³⁹ See SUPERFINE, *supra* note 3, at 31–34 (discussing the institutional, organizational, and individual level factors influencing education policy implementation).

⁴⁰ *Id.*

⁴¹ See James P. Spillane, *Cognition and Policy Implementation: District Policymakers and the Reform of Mathematics Education*, 18 COGNITION AND INSTRUCTION 141, 142 (2000) (examining how educational practitioners interpret and act on policy and legal signals).

⁴² See Jennifer A. Mueller & Katherine H. Hoyde, *Theme and Variation in the Enactment of Reform: Case Studies*, in THE IMPLEMENTATION GAP: UNDERSTANDING REFORM IN HIGH SCHOOLS 21 (Jonathan A. Supovitz & Elliot H. Weinbaum eds. 2008) (highlighting the inescapability of variation in educational policy implementation).

⁴³ See *id.* at 42 (surveying the types of variation in the implementation of educational reforms across different schools).

local administrators act as “street level bureaucrats” and arguably are the most important actors in the education policy process.⁴⁴

Local adaptation and implementation of reform to local context, which can differ across states, districts, schools, and even classrooms, is critical for success. As Professor Bryk and colleagues argued, education reform efforts should “move away from simplistic thinking about solutions in terms of “What Works?”” toward a more realistic appraisal of “What works, for whom, and under what conditions?”⁴⁵ Indeed, even “scientifically-based” reforms must undergo adaptations that are faithful to their underlying principles as they move to different contexts.⁴⁶ Given the range of factors influencing education reform implementation, such adaptation requires the active application of professional discretion at all levels of the education policy process from the capitol to the classroom.

To be sure, some education reforms are simply designed poorly and virtually destined to fail. As discussed below, the stringent test-based accountability provisions of No Child Left Behind were based on a flawed theory of action about school improvement—that unrelenting evaluation, punitive measures, and pressure from outside forces would change educational conditions in schools and classrooms. This theory was based more in politics and ideology than in evidence about effective educational reform.⁴⁷ As a result, the law failed to promote positive change in students’ learning opportunities and exacerbated existing equity issues. Even if practitioners respond to such flawed legal and policy signals with “fidelity,” the likelihood for effective educational reform would be small at best.

However, other sorts of reforms have a better chance of success. While more funding might not improve conditions at the classroom level with as much consistency as one might hope, the wise use of extra resources in relation to local problems of practice could certainly be productive.⁴⁸ Indeed, what it would take to strategically promote such decision-making at all levels is precisely the question of vertical governance. In the following Parts, this Article traces how major educational reforms have fared with a direct eye toward issues of horizontal and vertical governance, and what it might take to strengthen the fundamental structure in which education reform sits.

⁴⁴ See MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 3 (1980) (coining the term “street-level bureaucrats” to describe the importance of ground-level policy implementers).

⁴⁵ See ANTHONY S. BRYK ET AL., *LEARNING TO IMPROVE: HOW AMERICA’S SCHOOLS CAN GET BETTER AT GETTING BETTER* 11 (2015) (articulating the theoretical underpinnings for educational reform using improvement science principles).

⁴⁶ See William R. Penuel et al., *Organizing Research and Development at the Intersection of Learning, Implementation, and Design*, 40 *EDUC. RES.* 331 (2011) (arguing for the utility of design research to support productive adaptation as reforms go to scale).

⁴⁷ See *infra* notes 175–180.

⁴⁸ See *infra* notes 80–90.

III. MAJOR LARGE-SCALE EDUCATION REFORMS

A. *School Finance Litigation and Policy*

School finance reform has long been a primary area of education reform aimed at increasing and equalizing students' educational opportunities. This area is particularly useful to examine because it spans across governmental institutions and involves efforts situated at the highest levels of state government to influence students' learning opportunities. Appearing in the wake of desegregation litigation, school finance reform litigation emerged in the late 1960s and has appeared in at least 45 states.⁴⁹ Because local property value or wealth has generally been the major driver of school funding, significant per pupil spending differences have consistently emerged across school districts and states.⁵⁰ Reformers accordingly have focused on using the courts to change this structure by equalizing and increasing funding allocated to the education of students in less wealthy districts. When plaintiffs win, courts largely issue orders to state legislatures to modify school funding formulas with the hope that students' learning opportunities and performance will be augmented and equalized.⁵¹

Scholars have described the early history of school finance litigation as appearing in three waves.⁵² Following the trail blazed by desegregation cases, the first wave of school finance cases appeared in federal court and featured arguments that educational funds must be provided equally to all students under the 14th Amendment of the U.S. Constitution.⁵³ However, in *San Antonio Independent School District v. Rodriguez*, the Supreme Court found that the 14th Amendment does not provide a valid basis for challenging funding differences across school districts.⁵⁴ The Court specifically found that education is not a fundamental right and wealth is not a suspect class, and accordingly applied the rational basis test instead of strict scrutiny.⁵⁵ Directly attending to issues of vertical governance, the Court further stated that it lacks expertise in education policy issues, and states and local school boards are better

⁴⁹ See *A Project of the Center for Educational Equity at Teachers College*, SCHOOLFUNDING.INFO, <http://schoolfunding.info> (last visited Feb. 24, 2022).

⁵⁰ See Koski, *supra* note 12, at 1901–07 (discussing the basis for the various waves of school finance litigation).

⁵¹ See *id.*

⁵² See William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. EDUC. 219, 222 (1990). Thro suggested the metaphor of “waves” to describe the history of school finance litigation. While this metaphor is useful for summarizing the early history of this litigation in short form, it is important to note that the idea of waves to describe school finance litigation is arguably imperfect. See William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1193 (2003).

⁵³ U.S. CONST. AMEND. XIV.

⁵⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973) (“[W]e find neither the suspect-classification nor the fundamental-interest analysis persuasive.”).

⁵⁵ See *id.* at 35.

positioned to address complex educational issues that differ across local areas.⁵⁶ The Court therefore concluded that the 14th Amendment does not constitute a viable basis for equalizing school funding differences.⁵⁷

Following *Rodriguez*, reformers litigated school finance cases in state courts in the second wave through the end of the 1980s, primarily arguing that educational funds must be provided equally to all students under the equal protection clauses of state constitutions.⁵⁸ However, plaintiffs experienced only limited success in these cases. State supreme courts often faced much difficulty defining “equality,” continued to express that making such decisions would require them to delve too deeply into the inner workings of local schools, and often followed the Supreme Court’s general reasoning in *Rodriguez* about the limits of equal protection.⁵⁹ Focused on horizontal governance, many state cases have turned on the non-justiciable political question doctrine, which provides that courts should not decide on issues more appropriately left to another governmental branch.⁶⁰ Courts relying on this doctrine have found that defining an adequate or equal education with specificity would require courts to articulate standards that are neither judicially discoverable nor manageable, and they have therefore dismissed school finance cases.⁶¹ Indeed, even where plaintiffs prevailed in such lawsuits, courts often crafted vague remedies, necessitating legislative action. Consequently, legislatures faced strong pressure from local districts not to interfere in the governance of schools. As a result, legislatures often failed to engage in significant reform even under court order.⁶²

Beginning in the early 1990s, third-wave cases emerged in state courts, that instead focused on arguments that students should receive “adequate” educations under state

⁵⁶ See *id.* at 32 (“[T]his Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.”).

⁵⁷ See *id.* at 1.

⁵⁸ Most state constitutions contain their own equal protection clauses, which often include language very similar to the federal Equal Protection Clause. See Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985).

⁵⁹ See Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: *From Equity to Adequacy*, 68 TEMPLE L. REV. 1151, 1159–62 (1995) (analyzing the strengths and limitations of second wave school finance cases).

⁶⁰ See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (articulating six criteria to determine whether a case involves a non-justiciable political question and particularly indicating that courts should not rule on issues where there is a lack of judicially discoverable and manageable standards).

⁶¹ See, e.g., *Comm. for Educ. Rts. v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Coal. For Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979).

⁶² See, e.g., Jennifer Imazeki & Andrew Reschovsky, *School Finance Reform in Texas: A Never-Ending Story?*, in *HELPING CHILDREN LEFT BEHIND: STATE AID AND THE PURSUIT OF EDUCATIONAL EQUITY* 251, 252 (John Yonger ed., 2004) (examining the history of school finance reform in Texas); Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021, 1034–48 (2006) (describing the history of school finance reform litigation and legislation in Kansas).

constitutions' education clauses, which require states to provide students with a "sound basic" education, "thorough and efficient" education, or something similar.⁶³ Such arguments were more successful for several reasons, such as their tendency to generate less political opposition than those focused more narrowly on equality and reliance on education clauses instead of equal protection clauses.⁶⁴ Moreover, these cases allowed courts an opportunity to creatively grapple with difficult governance issues that emerged in second-wave cases. In response to the challenges of defining equality and perception of judicial expertise, several state courts have looked to legislatively mandated student learning standards to articulate precisely what an education clause requires.⁶⁵ In addition to fleshing out the meaning of educational adequacy, standards are generally aligned with assessments that can provide a wealth of evidence about student learning directly in relation to such standards.⁶⁶ While such courts have not gone so far as to cite standards as the final word on educational adequacy, because doing so would arguably cede power to the legislative branch to define constitutional requirements, courts repeatedly have construed standards as a useful resource.⁶⁷

Courts crafting remedial orders in school finance cases similarly have been most successful when working in coordination with other governmental branches. Instead of dictating precisely how legislatures should modify their states' school funding systems, courts have been most effective in promoting changes to states' school funding structures when they have given legislatures meaningful targets without dictating means. As such, school finance decisions have been most effective when

⁶³ See Enrich, *supra* note 22, at 106.

⁶⁴ See Heise, *supra* note 59, at 1168 (analyzing how adequacy arguments responded to weaknesses in equity arguments in school finance litigation).

⁶⁵ See James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1224 (2008) (describing how state standards can conceptually help courts define equality).

⁶⁶ See, e.g., *Hancock v. Driscoll*, No. 02-2978, 2004 WL 877984, at *126 (Mass. Super Ct., Apr. 26, 2004) (repeatedly reviewing student performance on assessments aligned to standards); *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997) ("Another factor which may properly be considered in this determination is the level of performance of the children of the state and its various districts on standard achievement tests.").

⁶⁷ See, e.g., *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 484 (N.Y. Sup. 2001) (closely examining student performance against standards but stating "the court must heed the Court of Appeals' direction to use the new standards with 'prudence'"); *Hancock*, 2004 WL 877984, at *16, *rev'd*, *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) ("We shall presume at this time that the Commonwealth will fulfil [sic] its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally required education." (quoting *McDuffy v. Sec'y of the Exec. Off. of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993))); *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 326 Mont. 304, 312 (2005) ("Unless funding relates to needs such as academic standards, teacher pay, fixed costs, costs of special education, and performance standards, then the funding is not related to the cornerstones of a quality education.").

they have served as “policy blueprints” for legislative action.⁶⁸ Indeed, many scholars have highlighted the utility of school finance reform litigation that positions the courts as institutions overseeing reform instead of serving as top-down decision-makers.⁶⁹ In this reform role, courts set agendas, engage in ongoing negotiations with stakeholders and use accountability systems defined by non-judicial entities. This approach is fluid, changing as the content of reforms developed by nonjudicial institutions moves in line with shifting reform goals.

When courts in school finance cases take this approach, they display sensitivity to issues of horizontal governance. This sensitivity recognizes courts’ lack of expertise and capacity to manage every detail of reform while foregrounding courts’ abilities to cut through politics preventing reform, particularly when such reform is well-suited to address underserved groups’ needs and likely requires politically challenging funding redistribution. However, as discussed above, getting “right” the institutional arrangements is only the first step in creating meaningful reform for students.

1. Recent Developments in School Finance Litigation

Although school finance litigation has largely focused on restructuring states’ school funding systems, courts have more recently focused on specific reform strategies that move closer to instruction. As discussed below, school finance litigation has persisted for years in some states as legislatures and courts took turns responding to each other, and some courts have begun to highlight this problem in their decisions.⁷⁰ Moreover, there has been limited evidence that court orders consistently improved or equalized student learning opportunities or performance. Accordingly, some courts have ordered states to channel funds into specific reform strategies.

For example, state courts hearing school finance cases since the late 1990s have ordered the implementation of class size reduction programs,⁷¹ whole school reforms,⁷² and free preschool programs.⁷³ More recently, plaintiffs have gone back to

⁶⁸ See DOUGLAS REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 171 (2001).

⁶⁹ See, e.g., James F. Liebman & Charles F. Sabel, *A Public Laboratory Dewy Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 192 (2003) (characterizing such reform as “non-court-centric”); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019 (2004) (characterizing such reform as “experimentalist”).

⁷⁰ See, e.g., Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 349 (N.Y. 2003) (stating that the court was attempting to “learn from our national experience and fashion an outcome that will address the constitutional violation instead of inviting decades of litigation”).

⁷¹ Courts have ordered the implementation of class size reduction programs in at least two states. See *Abbott v. Burke*, 710 A.2d 450, 514 (N.J. 1998); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1278 (Wyo. 1998).

⁷² Courts have ordered the implementation of whole school reform programs in at least one case. See *Abbott*, 710 A.2d. at 460.

⁷³ Courts have ordered free preschool for children in at least five cases. See *Lake View Sch. Dist. No. 25 v. Huckabee*, 257 S.W.3d 879 (Ark. 2005); *Abbot*, 710 A.2d at 462; *Hancock v. Driscoll*, 822 N.E.2d 1134, 1157 (Mass. 2005); *Hoke County Bd. of Educ. v. State*, No. 95CVS1158, 2000 WL 1639686, at *100 (N.C. Super. Oct. 12, 2000); *Abbeville Cnty. Sch.*

federal court with 14th Amendment claims structured in similar ways as first wave school finance litigation to argue for particular reforms, such as stronger literacy⁷⁴ and civics education⁷⁵ programs for underserved and minority students. Such cases are aimed at establishing new educational rights with enhanced precision under the U.S. Constitution, such as the right of “access to literacy.”⁷⁶ As in many traditional school finance cases, plaintiffs in these newer cases have grounded their arguments in documentation about a range of deplorable educational conditions in students’ schools⁷⁷ often persisting in light of ineffective legislative responses sometimes spanning years.⁷⁸

From a governance standpoint, such moves are particularly notable because they center much decision-making power in the court to determine the “best” use of funds and oversee their implementation. On one hand, these types of moves seem to make much sense—such strategies appear promising, are directly aimed at influencing students’ educational opportunities, and could result in precise orders to states. On the other hand, they require courts to make difficult decisions about the desirability and appropriateness of reform strategies in the face of complex educational evidence. As the North Carolina Supreme Court stated in a school finance case regarding the idea of free preschool, “a single or definitive means for achieving constitutional compliance . . . has yet to surface from the depths of the evidentiary sea.”⁷⁹ As such, these moves are grounded in a theory of action that assumes the courts can not only select an appropriate educational reform strategy, but also oversee one sufficiently well to ensure its effective implementation across various administrative levels and down to schools and classrooms that exist in inevitably varying contexts.

2. Empirical Research on School Finance Reform

Although school funding has been the subject of significant scholarly attention over the decades, research on the effects of school funding is mixed and ultimately limited. In the 1990s, researchers directly debated the question of whether “money matters” in the pages of high-profile educational research journals and particularly

Dist. v. State, 767 S.E.2d 157, 191 (S.C. 2014).

⁷⁴ See Gary B. v. Whitmer, 957 F.3d. 616, 649 (6th Cir. 2020).

⁷⁵ See A.C. v. Raimondo, 94 F. Supp. 3d 170, 174 (D.R.I. 2020).

⁷⁶ See Gary B., 957 F.3d. at 624 (“The core of Plaintiffs’ complaint is that the conditions in their schools are so bad—due to the absence of qualified teachers, crumbling facilities, and insufficient materials—that those schools fail to provide access to literacy.”).

⁷⁷ For example, the plaintiffs in Gary B. v. Whitmer highlighted issues such as the lack of evidence-based literacy instruction and intervention programs, insufficient curriculum materials, unsafe physical conditions, and unqualified teaching staff. Complaint at 132, Gary B. v. Whitmer, 957 F.3d. 616 (6th Cir. 2020) (Nos. 18-1855, 18-1871).

⁷⁸ See Gary B., 957 F.3d. at 621–24 (discussing the history of Detroit schools and state control).

⁷⁹ Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365, 394–95 (N.C. 2004).

critiqued each other's work on methodological grounds.⁸⁰ Still, even the strongest opponents of the idea that there is a strong relationship between school funding and student performance have concluded that money likely matters if it is wisely spent.⁸¹ Moreover, there is arguably some consensus that student performance has risen as a result of school funding decisions and increases in school funding, particularly in the case of students living in poverty.⁸²

However, research currently provides few clear and consistent recommendations about how educational resources should be deployed to effectively boost school performance or student learning opportunities, or achieve other specific results, such as increasing graduation rates.⁸³ While several courts and legislatures have ordered cost studies for making decisions about educational funding, some researchers have labeled these studies as politicized and grounded in unscientific methods.⁸⁴ Moreover, while researchers have underscored that we are learning more about the various types of strategies that can increase educational opportunities,⁸⁵ there are few studies

⁸⁰ For arguments that money does not matter, see Eric A. Hanushek, *The Impact of Differential Expenditures on School Performance*, EDUC. RESEARCHER, May 1989, at 45, 49 (conducting a meta-analysis of school finance studies); Eric A. Hanushek, *Money Might Matter Somewhere: A Response to Hedges, Laine, and Greenwald*, EDUC. RESEARCHER, May 1994, at 5, 8 (defending a meta-analysis of school finance studies). For arguments that money does matter, see Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Students Outcomes*, EDUC. RESEARCHER, Apr. 1994, at 5, 13 (conducting a meta-analysis of school finance studies); Larry V. Hedges et al., *Money Does Matter Somewhere: A Reply to Hanushek*, EDUC. RESEARCHER, May 1994, at 9, 10 (defending a meta-analysis of school finance studies).

⁸¹ See, e.g., Eric A. Hanushek, *The Quest for Equalized Mediocrity: School Finance Reform without Consideration of School Performance*, in WHERE DOES THE MONEY GO? RESOURCE ALLOCATION IN ELEMENTARY AND SECONDARY SCHOOL 20, 37–38 (Lawrence O. Picus & James L. Wattenbarger eds., 1996) (“[M]oney spent wisely, logically, and with accountability would be very useful indeed.”).

⁸² See, e.g., WILLIAM J. MATHIS, NAT’L EDUC. POL’Y CTR., DOES MONEY MATTER? 3 (2016), <https://nepc.colorado.edu/sites/default/files/publications/Mathis%20RBOPM-8%20Money%20Matters.pdf>.

⁸³ See Steven W. Raudenbush, *Learning from Attempts to Improve Schooling: The Contribution of Methodological Diversity*, EDUC. RESEARCHER, June 2005, at 25, 26 (“Knowledge about how to use resources in instruction is key, yet woefully lacking.”); Maris Vinovskis, *Missed Opportunities: Why the Federal Response to a Nation at Risk Was Inadequate*, in A NATION REFORMED? 115, 130 (David T. Gordon ed., 2003) (highlighting the lack of a research base for educational policy decision-making).

⁸⁴ See William Duncombe, *Responding to the Charge of Alchemy: Strategies for Evaluating the Reliability of Costing-out Research*, 32 J. EDUC. FIN. 137, 138 (2006) (arguing that costing out research “should move away from the advocacy environment to the realm of social science research, where methods can be evaluated without pressure to produce only one answer”); Jay P. Greene & Julie R. Trivitt, *Can Judges Improve Academic Achievement?*, 83 PEABODY J. EDUC. 224, 227 (2008) (“Refutation of the validity of [cost study] techniques has been ably done in previous work . . .”).

⁸⁵ See Diana Pullin, *Ensuring an Adequate Education: Opportunity to Learn, Law, and Social Science*, 27 B.C. THIRD WORLD L.J. 83, 113–14 (2007) (stating that we now more about

analyzing cost effectiveness or the comparative cost efficiency of such strategies.⁸⁶ Indeed, efforts to increase and equalize school funding are ultimately aimed at improving what happens in classrooms, but there are several powerful influences outside the classroom that influence student learning besides funding. Because teachers are often powerless to manipulate these influences, effectively scaling up educational interventions that may work in one setting has proven extremely challenging in another.⁸⁷

This challenge of scaling reform strategies has emerged with regard to the specific strategies used in school finance litigation. For example, while some “model” preschool programs have been found to be effective for improving students’ learning opportunities, scaling such programs is difficult because similar levels of expertise and resources are not widely available.⁸⁸ Similarly, while class-size reduction may be particularly efficacious for students living in poverty, it is also clear that shrinking class size does not necessarily change students’ learning opportunities, given the influence of any number of contextual factors, like teachers’ ability and willingness to shift their teaching practices to take advantage of the opportunities offered by small class size.⁸⁹ Indeed, the literacy programs suggested by the plaintiffs in recent litigation focused on establishing a federal right of access to literacy. While based on well-established research findings, they “undersold the complexity and difficulty of translating research evidence into interventions that can consistently improve literacy opportunities and outcomes at the scale of a district like Detroit.”⁹⁰ So, although one would hope that educational research would direct courts hearing school finance cases to particular interventions that they could simply order states to implement, challenges rooted in both horizontal and vertical governance demand a more nuanced approach for promoting actual change for the students that need it the most.

students’ opportunities to learn, instructional leadership, and what educators need to know and be able to do).

⁸⁶ See Patrice Iatrola & Norm Fruchter, *An Alternative Method for Measuring Cost-Effectiveness: A Case Study of New York City's Annenberg Challenge Grant*, 32 J. EDUC. FIN. 276, 276 (2006) (“[N]either policymakers nor researchers habitually use analyses measuring school reform cost-effectiveness.”).

⁸⁷ See Sarah-Kathryn McDonald et al., *Scaling-up Exemplary Interventions*, 35 EDUC. RESEARCHER 15, 17 (2006) (“It is the variability introduced by these contextual differences that creates uncertainty regarding the potential of an intervention to be brought to scale.”).

⁸⁸ See JANET CURRIE, BROOKINGS ROUNDTABLE ON CHILD. EARLY CHILDHOOD INTERVENTION PROGRAMS: WHAT DO WE KNOW?, at 10–24 (2000), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.492.8316&rep=rep1&type=pdf> (citing the Abecedarian Project and the Perry Preschool Program as model programs, but also discussing problems with scaling up such programs).

⁸⁹ See, e.g., DOUGLAS D. READY, CLASS-SIZE REDUCTION: POLICY, POLITICS, AND IMPLICATIONS FOR EQUITY 23 (2008) (“[T]he efficacy of social policies often depends on the contexts in which they are implemented.”).

⁹⁰ Benjamin M. Superfine, Susan R. Goldman & Meagan S. Richard, *Toward a Synergistic Model for Improving the Use of Research in Court-Driven Educational Reform: Examining Gary B. v. Snyder and Literacy Improvement in Detroit*, 48 EDUC. RESEARCHER 543, 546 (2018).

B. Education of Students with Disabilities

This Part examines efforts of large-scale reform in the context of special education. It traces its legal origins, continued court involvement, and federal legislative efforts. This Part also assesses the empirical research on special education as it relates to students' educational opportunities and performance. Assessing reform in the education of students with disabilities is particularly salient for this Article. Courts and legislatures have both played—and continue to play—an integral role in shaping the nature and scope of education rights for students with disabilities, and local administrators and educators are tasked to implement the education students receive in the classroom.

1. Legal Origins of Special Education Reform

While federal courts first played a defining role in guaranteeing a legal right to an education for students with disabilities, Congress codified significant court decisions shortly later.⁹¹ Both continue to determine important facets of special education. Importantly, assessing efforts to ensure equal educational opportunity in the special education context requires a deep consideration of factors situated at the local level where highly legal and technical concepts or standards must be applied. It is here that special education presents specific implementation and governance challenges⁹² and reflects the limits of reform initiated and maintained through courts and Congress.⁹³

The rights of students with disabilities in modern day public education can be largely traced to two major class action lawsuits. In *Pennsylvania Ass'n of Retarded Children (PARC)*, a federal district court held that mentally disabled children with disabilities must be educated in regular education classrooms wherever possible.⁹⁴ In *Mills v. Board of Education*, a federal district court expanded *PARC* to

⁹¹ Two important federal court decisions ushered in modern day special education law. *See Pa. Ass'n for Retarded Child. (PARC) v. Commonwealth*, 334 F. Supp. 1257, 1266 (E.D. Pa. 1971); *Pa. Ass'n for Retarded Child. (PARC) v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 878 (D.D.C. 1972). Congress codified these cases with the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (EAHCA). *See infra* notes 93–96 and accompanying text.

⁹² For example, the IDEA and its implementing regulations require the delivery of an “appropriate” education, a term that can create considerable disagreement between practitioners, parents, and those in the field. *See also* 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (defining “Free Appropriate Public Education” or FAPE). *See also* *Andrew F. v. Couglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 997–98 (2017) (discussing the level of benefit required for a school district to satisfy its FAPE obligation).

⁹³ *See* Judith Welch Wegner, *Variations on a Theme—The Concept of Equal Educational Opportunity and Programming Decisions Under the Education for All Handicapped Children Act of 1975*, 48 L. AND CONTEMP. PROBS. 169, 172–73 (1985) (describing the interpretive difficulties for courts and Congress in defining what programmatic services are required under special education law to provide equal educational opportunity).

⁹⁴ *See Pa. Ass'n for Retarded Children*, 334 F. Supp. at 1266; *Pa. Ass'n for Retarded Children*, 343 F. Supp. 279.

require procedural due process protections to all children with disabilities.⁹⁵ Both cases reflect what courts can do well: identify and articulate in broad strokes the educational rights of marginalized citizens,⁹⁶ in this case the rights of students with disabilities and, in the process, spur legislative action.⁹⁷

Congress ultimately codified essential principles enunciated in *PARC* and *Mills* with the passage of Education for All Handicapped Children Act (EAHCA).⁹⁸ The EAHCA has evolved over time. Congress renamed the EAHCA the Individuals with Disabilities Education Act (IDEA) in 1990, and the IDEA is the operative law governing the education of students with disabilities today.⁹⁹ Congress substantively amended the IDEA in 1997 and, most recently, in 2004.¹⁰⁰ The IDEA and its implementing regulations include a complicated array of procedural safeguards intended to ensure the substantive right to a free appropriate public education (FAPE) delivered through an individual student's Individual Education Program (IEP).¹⁰¹ The IEP is the operative document that reflects the services, programming, and the like, to be delivered in the education setting and by educators.

⁹⁵ See *Mills*, 348 F. Supp. at 877.

⁹⁶ See, e.g., NEIL KOMESAR, *THE LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 3 (2001) ("Courts are most needed where alternative decisions makers such as political processes, markets, and informal communities work least well.").

⁹⁷ See, e.g., Liebman & Sabel, *supra* note 69, at 192.

⁹⁸ Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975).

⁹⁹ The IDEA has been termed a "model of 'cooperative federalism.'" *Little Rock Sch. Dist. v. Mauney*, 183 F. 3d 816, 830 (8th Cir. 1999). Congress sets aspirational goals, disburses funds intended to support states and localities in meeting those goals. It provides technical assistance and compliance monitoring intended. States, in turn, must oversee the implementation of the law at the local level and report compliance to the federal government. See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 183 (1982) ("[The IDEA] leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility.").

¹⁰⁰ Individuals with Disabilities Education Act, Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified as amended at 20 U.S.C. §§ 1400-1485) (codification of discipline amendments).

¹⁰¹ In brief, these provisions require that students with disabilities receive a FAPE to be delivered in the least restrictive environment (the LRE). 34 C.F.R. § 300.101 (2021). Importantly, the statute requires that the local education agency (LEA) reduce to writing the elements of the students FAPE within an Individualized Education Program (IEP). 34 C.F.R. § 300.17 (2021). The IEP distills practitioners' belief of what services and instruction must be delivered to satisfy its obligations under the IDEA.

2. Continued Court Oversight of Special Education

Federal courts continue to interpret important provisions of IDEA and its application.¹⁰² Through both class and individual civil actions, federal courts (including the Supreme Court) have addressed school districts' delivery on the core of IDEA's intent to provide equal educational opportunity for students with disabilities, such as the guarantees of a FAPE.¹⁰³ The Supreme Court has decided important cases with national importance, including those deciding the burden of proof in special education hearings,¹⁰⁴ and defining "related services" to include catheterization,¹⁰⁵ and the costs of services required under a special education and related services.¹⁰⁶

Court involvement in special education exposes both the strength and limitations of that institution as a reform agent. Class actions have highlighted courts' struggles in technical matters of educational policy or to command change without the power to tax and spend reserved to a legislative body.¹⁰⁷ Similarly, such suits have led to protracted court involvement that raise separation of powers issues and can invariably result in an insufficient remedy.¹⁰⁸ To be sure, it must be recognized that certain class actions—including *PARC* and *Mills*—raised the awareness of the public, educational practitioners, and governmental entities about the complete denial of educational opportunity for an entire class of children, reinforcing an important role of courts to secure rights of minority populations.

Indeed, many court-driven changes intended to reform special education have arisen from individual actions reflecting the use of private rights as a tool for civil rights enforcement and policy reform.¹⁰⁹ The IDEA creates a private right of action in federal courts that can achieve significant reform or change depending on how far a particular case proceeds in the federal court system. For instance, the Supreme Court

¹⁰² The IDEA sets forth a host of administrative remedies that must be followed but ultimately permits any party (including a school district) the right to bring a civil action in federal court. 20 U.S.C. § 1415(g)(i)(2)(A).

¹⁰³ The Court first beginning with *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180–81 (1982) and, most recently, in *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 993 (2017).

¹⁰⁴ See *Schaeffer v. Weast*, 546 U.S. 49, 62 (2005).

¹⁰⁵ See *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 889–90 (1984).

¹⁰⁶ See *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66, 77 (1999).

¹⁰⁷ See *id.* (noting that plaintiffs seeking to pressure change through class actions should concentrate efforts on programmatic issues and new institutional mechanisms).

¹⁰⁸ See e.g., Erica L. Green, *City Schools Special Education Legal Fight Ends*, BALT. SUN (Sept. 20, 2012, 9:51 PM), <https://www.baltimoresun.com/education/bs-md-ci-vaughn-g-ends-20120920-story.html> (documenting the end of a lawsuit filed in 1984 which reached a final settlement in 2012). See also Joshua Weishart, *Rethinking Constitutionality in Education Rights Cases*, 71 ARK. L. REV. 495, 495 (2019) (describing, generally, the reluctance of courts to get involved in constitutional questions concerning education because of the difficulty to extricate the judicial branch).

¹⁰⁹ See Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 308 (1996).

has adjudicated numerous disputes involving key elements of the IDEA that have had significant implications for the delivery of special education on a national scale.

The private enforcement mechanism has its limits with respect to achieving large scale reform.¹¹⁰ For example, the high transaction costs associated with private enforcement favor the wealthy¹¹¹ or those who can burden the initial costs of bringing a complicated lawsuit through state and then federal processes.¹¹² Litigation through individual private rights of action pressure school districts to redirect precious resources away from programming and toward costly legal battles (or insurance premiums), diluting resources available to other programs for non-disabled peers.¹¹³ As a general matter, fear of a special education lawsuit contributes to an adversarial nature between parents and district officials.¹¹⁴ Still some even suggest that parents of non-disabled children feel that children with disabilities enjoy preferential treatment to the exclusion of their children because of a right to sue.¹¹⁵

3. Recent Congressional Amendments to the IDEA

Congress amended the IDEA in substantive ways in 2004 with an eye to addressing the issues identified as problematic by researchers and some court cases. For example, Congress attempted to address the disproportionate disciplinary actions being taken against students with disabilities through zero-tolerance policies,¹¹⁶ responding to data suggesting such policies were harming students.¹¹⁷ Similarly, Congress adopted

¹¹⁰ Eloise Pasachoff, *Special Education Poverty and the Limits of Judicial Enforcement*, 86 NOTRE DAME L. REV. 1413, 1443–50 (2011) (noting the limitations of a private right of action in enforcing the rights under the IDEA).

¹¹¹ See, e.g., Julie F. Mead & Mark A. Paige, *Board of Education v. Rowley: Examining Its Precedential Impacts*, 37 J.L. & EDUC. 329, 341 (2008); LaDonna Boeckman, *Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on Disabled and Nondisabled Students*, 46 DRAKE L. REV. 855, 876 (1998).

¹¹² See Pasachoff, *supra* note 110, at 1419; Superfine, *supra* note 25, at 486.

¹¹³ See Perry Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169, 169 (2017) (concluding that the IDEA is “the most active source of litigation within the K-12 school context.”). It is important to note, however, that school districts typically carry some form of liability insurance that covers portion of direct costs of litigation. Of course, the rates of such policies may be impacted by an increased level of litigation.

¹¹⁴ See, e.g., Marjorie Coeyman, *Are Schools More Afraid of Lawsuits than They Should Be?*, CHRISTIAN SCI. MONITOR (May 27, 2003), <https://www.csmonitor.com/2003/0527/p21s01-lepr.html>.

¹¹⁵ Bruce Meredith & Julie Underwood, *Irreconcilable Differences: Defining the Rising Conflict Between Regular and Special Education*, 24 J.L. & EDUC. 195, 211 (1995).

¹¹⁶ See 20 U.S.C. § 1415(k)(1)(A). See also Mark Weber, *Reflections on the New Individuals with Disabilities Act*, 58 FLA. L. REV. 7, 8 (2006) (summarizing amendments to the Individuals with Disabilities Act).

¹¹⁷ See Weber, *supra* note 116, at 8.

Response to Intervention, an innovative and progressive model to identify students with disabilities that was widely recognized in the field of education to efficiently reach students in need.¹¹⁸

Yet, at the same time, the 2004 amendments reflected Congress's susceptibility to political pressure and embracing politically popular—but untested—ideas. In particular, the reauthorization of the IDEA in 2004 was aligned with the accountability goals and provisions of the recently passed No Child Left Behind (NCLB) Act.¹¹⁹ Tightening the connection between accountability-based reform and special education law presented unintended negative consequences.¹²⁰ Despite Congress's best intentions, the issues related to eligibility and discipline for students with disabilities continue to frustrate both parents of students with disabilities and local level educators' efforts to fulfill the promise of the IDEA.

4. Empirical Research on Special Education

Educational scholars have long studied the impact of special education on students with disabilities. As researchers have noted, Congress's enactment of special education law exponentially increased access to education for students with disabilities, as one would hope.¹²¹ Similarly, it has reduced the intentional exclusion of students with disabilities from public education.¹²² Researchers have noted that

¹¹⁸ See 20 U.S.C. § 1414(b)(6)(A). Specifically, the Response to Intervention model permits school districts the ability to reach struggling students more efficiently and its short- and long-term effects have been measured by educational researchers. See e.g., Sally L. Grapin et al., *Longitudinal Effects of RtI Implementation on Reading Achievement Outcomes*, 56 PSCYH. SCHS. 2, 242–54 (2020) (describing the use of Response to Intervention in schools and its demonstrated benefits in the context of both regular and special education as well as reporting on long-term academic gains attributable to the use of Response to Intervention).

¹¹⁹ See Weber, *supra* note 116, at 15.

¹²⁰ See Joshua Bleiberg & Darrell West, *Special Education: The Forgotten Issue in No Child Left Behind Reform*, BROOKINGS (June 18, 2013), <https://www.brookings.edu/blog/up-front/2013/06/18/special-education-the-forgotten-issue-in-no-child-left-behind-reform/> (describing the complications associated with requirement that students with disabilities take standardized tests under NCLB and offering various amendments for Congress to consider).

¹²¹ See, e.g., David Egnor, *Individuals with Disabilities Education Act Amendments of 1996: Overview of the U.S. Senate Bill (S.1578)*, 11 FOCUS ON AUTISM & OTHER DEV. DISABILITIES, 194, 194 (1996) (noting that prior to 1975, “[m]ost children with disabilities who went to school were segregated from their peers, and most young people with severe disabilities were destined to spend their lives in an institution”); Antonis Katsiyannis et al., *Reflections on the 25th Anniversary of the Individuals with Disabilities Education Act*, 22 REMEDIAL AND SPECIAL EDUC. 324, 324–25 (2001). For a more recent overview of the progress and limitations of special education law, see Marian Patricia Bea Francisco et al., *Inclusion and Special Education*, EDUC. SCI., at 7–8 (Sept. 7, 2020), <https://www.mdpi.com/2227-7102/10/9/238/htm> (describing the relative achievements in the education of children with disabilities because of special education law, but also highlighting the continued problems associated with ensuring inclusion and provision of least restrictive environment).

¹²² See William Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and Several Gaps of Analysis*, 48 L. AND CONTEMP. PROBS. 7, 18 (1985) (noting “the sharp rise in the number of children who are receiving an

mandated inclusion of students with disabilities has helped lead to innovative methods of identification and assessment that have benefitted both disabled and non-disabled students.¹²³

Educators have adjusted curriculum to ensure students with disabilities access the general curriculum which, in turn, has led to innovations benefiting the regular education population too.¹²⁴ Likewise, resources and efforts have been targeted, in great part because of legal requirements, to identifying students early so as to provide interventions even before students reach compulsory education age and enter public schools. Thus, education researchers and professionals have contributed to the access and quality of education for students with disabilities since those rights were identified by the courts and codified under the IDEA.

However, scholars continue to identify opportunity and achievement gaps with respect to special education students, a signal that inequities persist in special education despite the significant court and legislative achievements.¹²⁵ Academic outcomes of students with disabilities, while improving, have not met certain standards set forth by other sometimes conflicting education law and policy goals driven by political agendas.¹²⁶ At the same time, the nature of certain disabilities can be quite complicated, making it difficult to devise and implement certain programs,¹²⁷ especially in context of schools with limited resources.¹²⁸

appropriate, or at least more appropriate, education” since the passage of the first special education law).

¹²³ See John J. Hoover & Emily Love, *Supporting School-Based Response to Intervention: A Practitioner’s Model*, 43 *TEACHING EXCEPTIONAL CHILD*. 40, 47 (2011).

¹²⁴ See, e.g., Suk-Hyang Lee et al., *Impact of Curriculum Modifications on Access to the General Education Curriculum for Students with Disabilities*, 76 *EXCEPTIONAL CHILD*. 213, 213 (2010).

¹²⁵ See, e.g., Mark Weber, *The IDEA Eligibility Mess*, 57 *BUFF. L. REV.* 83, 145 (2009) (highlighting racial inequities concerning identification of students of color as students with disabilities).

¹²⁶ See Mark Weber, *Reflections on the New Individuals with Disabilities Education Act*, 58 *FLA. L. REV.* 7, 15 (2006) (noting that the 2004 Reauthorization of the IDEA attempts to align with the accountability goals of No Child Left Behind).

¹²⁷ For example, the law provides some catch-all definition for disabilities, including “[s]pecific learning disability” and “[o]ther health impair[ed].” 34 §§ C.F.R. 300.8(c)(9)–(10) (2017). However, these terms are difficult to apply in context. See, e.g., *Attention Deficit/Hyperactivity Disorder (ADHD): Symptoms and Diagnosis*, *CTRS. FOR DISEASE CONTROL AND PREVENTION*, <https://www.cdc.gov/ncbddd/adhd/diagnosis.html> (last visited Apr.13, 2021) (noting the difficulty in diagnosing ADHD). Researchers have noted that determining a specific reading disability among English learners can be difficult. See Dara Shifrer et al., *Disproportionality and Learning Disabilities: Parsing Apart Race, Socio-Economic Status, and Language*, 44 *J. LEARNING DISABILITIES* 246, 246 (2011).

¹²⁸ See, e.g., *The Burden of Underfunded Mandates*, *N.J. SCH. BDS. ASS’N* (2016), <https://www.njsba.org/news-publications/school-leader/july-august-2016-volume-47-1/burden-underfunded-mandates/> (describing a host of unfunded mandates including special education); see also RICHARD N. APPLING, *CONG. RSCH. SERV.*, RL30810, *INDIVIDUALS WITH*

Inequality based on race, disability, and language stubbornly persists within the special education context. For instance, the appropriate special education identification of students of color varies and depends on factors unique to a particular local context.¹²⁹ This, in turn, perpetuates a host of other negative consequences, such as disciplinary practices that reflect racial bias.¹³⁰ Likewise, and despite procedural due process protections grounded in the law, students with disabilities continue to be disciplined disproportionately when compared to non-disabled peers,¹³¹ although gains have been made. Nevertheless, biased discipline and exclusionary practices remain a concern of researchers and civil rights advocates in the special education context,¹³² as well as a persistent issue for the general education student population.

At the same time, federal policymakers have enacted other laws that frustrate the implementation of the IDEA and send mixed messages to special education professionals.¹³³ Researchers have cited the passage of No Child Left Behind (NCLB) on this point.¹³⁴ NCLB's focus on proficiency outcomes on standardized tests scores¹³⁵ presented conflicts to practitioners of special education who, under the IDEA, were directed to tailor educational goals and services based on the individual needs of the students.¹³⁶ Further, the promotion of charter schools through federal law

DISABILITIES EDUCATION ACT (IDEA): ISSUES REGARDING "FULL FUNDING" OF PART B GRANTS TO STATES (2001) (documenting the history of federal underfunding of special education).

¹²⁹ See, e.g., Paul Morgan et al., *Minorities are Disproportionately Underrepresented in Special Education: Longitudinal Evidence Across Five Disability Conditions*, 44 EDUC. RESEARCHER 278, 278 (2015); Jacob Hibbel et al., *Who is Placed in Special Education?*, 83 SOC. EDUC. 312, 312 (2010); Paul L. Morgan et al., *Racial and Ethnic Disparities in ADHD Diagnosis from Kindergarten to Eighth Grade*, 132 PEDIATRICS 85, 86 (2013) (finding that black children are only two-thirds as likely as white children to be diagnosed with attention-deficit/hyperactivity disorder).

¹³⁰ See Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 317 (2002). See also Dan Losen & Kevin Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Service for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 447-48 (2001).

¹³¹ U.S. DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014). *But cf.* Paul Morgan et al., *Are U.S. Schools Discriminating When Suspending Students with Disabilities? A Best-Evidence Synthesis*, 86 EXCEPTIONAL CHILD. 7, 7 (2019).

¹³² See, e.g., *Dear Colleague Letter: Preventing Racial Discrimination in Special Education*, U.S. DEPT. OF EDUC. (Dec. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf>.

¹³³ See Weber, *supra* note 116, at 8.

¹³⁴ See, e.g., *id.*

¹³⁵ See *id.* at 15 n.47.

¹³⁶ See Jennifer Russell & Laura Bray, *Crafting Coherence from Complex Policy Messages: Educators' Perceptions of Special Education and Standards-Based Accountability Policies*, 21

incentivized such schools to exclude students with disabilities to avoid any negative impact on a school's performance on accountability metrics.¹³⁷ Put another way, the policy incoherence has, in some cases, perpetuated the very inequities the IDEA was intended to remediate.

In addition, local school districts have struggled to satisfy the demands of the IDEA because of insufficient funding from the federal and state government, further reflecting the problems that arise when entities situated horizontally attempt to structure change that demands significant funding from other layers of vertical governance structure.¹³⁸ When Congress passed the IDEA and its predecessor statute, it assured states that federal funding would cover a full 40% of each state's "excess costs" of education for students with disabilities.¹³⁹ While the federal government has increased spending in recent years, it has never satisfied its initial promise to the states.¹⁴⁰ Such underfunding, which has been labeled an unfunded mandate by some,¹⁴¹ has yielded unintended consequences that diminish the quality of special education services for both those students with and without disabilities.¹⁴²

Finally, studies have consistently identified problems with respect to implementation of special education at the classroom level, thus raising issues when examining special education from a vertical governance perspective. These

EDUC. POL'Y ANALYSIS ARCHIVES, no. 12, 2013, at 17 (documenting the confusion among teachers created by conflicting theories of action between NCLB and IDEA).

¹³⁷ See, e.g., Natalie Lacireno-Paquet et al., *Creaming Versus Cropping: Charter School Enrollment Practices in Response to Market Incentives*, 24 EDUC. EVALUATION AND POL'Y ANALYSIS 145, 145 (2002) (finding that charter schools tend to "crop off" students who might be higher needs and more costly, including students with disabilities). See also John Tedesco & Shelby Webb, *Charter Schools Lag Behind in Special Education*, HOUST. CHRON. (Nov. 18, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-Charter-schools-denied-special-education-14837752.php> (describing how charter schools in Texas have lower rates of students with disabilities than traditional public schools).

¹³⁸ See Rebecca W. Goldman, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 243 (1994).

¹³⁹ See APPLING, *supra* note 128, at 3.

¹⁴⁰ See *id.*

¹⁴¹ See, e.g., Evie Blad, *Why the Feds Still Fall Short on Special Education Funding*, EDUC. WK. (Jan. 21, 2020), <https://www.edweek.org/ew/articles/2020/01/15/why-the-feds-still-fall-short-on.html>.

¹⁴² Wade F. Horn & Douglas Tynan, *Time to Make Education "Special" Again*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 23, 26 (Chester E. Finn, Jr. et al. eds., 2001) (discussing the "extraordinary growth" of special education "often at the expense of regular education"); Gregory F. Corbett, *Special Education, Equal Protection and Education Finance: Does the Individuals with Disabilities Act Violate a General Education Student's Fundamental Right to Education?*, 40 B.C. L. REV. 633, 634 (1999) (noting that studies demonstrate that "the share of all spending received by general education declined from approximately eighty percent in 1967 to fifty-six percent in 1996" while the "expenditures devoted to special education more than quadrupled from four percent to seventeen percent").

implementation issues have been evident since the very beginning of special education law. In a classic study of policy implementation, researchers applied a “street-level bureaucracy” analysis to assess how special education teachers managed a state law intended to reform special education.¹⁴³ These researchers identified problems that continue to persist today, including lack of training and planning support from state agencies, inadequate training for classroom teachers, and a lack of resources that prevented full implementation of the statute’s requirements.¹⁴⁴ Other scholars have similarly noted the difficulties practitioners face in satisfying the goals of special education in the “real world” context of a school or classroom.¹⁴⁵ Still others have called attention to some of the chasms that have developed between parents of students with disabilities and those of non-disabled students based on a perception of preferential treatment and rights for some students with disabilities.¹⁴⁶ Indeed, satisfying the demands of the IDEA can be difficult, depending on the resources and capacity of school districts,¹⁴⁷ and pose unique challenges to state and local practitioners.

C. *Standards-based Reform and Accountability*

Perhaps no other area of education reform illustrates the essential issues of horizontal and vertical governance, and their relationship with student learning opportunities and performance, more than efforts to remake schools through standards-based reform and accountability.¹⁴⁸ The massive shift to a strict reform and accountability model without attention to factors at the local level has created significant unintended consequences and, more importantly, failed to achieve the goals of reducing inequities. By way of brief background, the Russian launching of Sputnik in 1957 sharpened both policymakers’ (particularly those in Washington) and the public’s concern with the quality of science and math instruction in public

¹⁴³ See Richard Weatherley & Martin Lipsky, *Street Level Bureaucrats and Institutional Innovation: Implementing Special Education Reform*, 47 HARV. EDUC. REV. 171, 171–72 (1977); see also Clune & Van Pelt, *supra* note 122, at 8 (describing “human interactions” and outlining a “political method” to evaluate how special education practitioners implement the law and concluding that there can be wide variations).

¹⁴⁴ See Weatherley & Lipsky, *supra* note 143, at 195.

¹⁴⁵ See, e.g., James H. Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477, 478 (1982) (lamenting that the goals of federal special education law could not be achieved within the terms by which public education is funded which created conditions of resource scarcity).

¹⁴⁶ See Meredith & Underwood, *supra* note 115, at 196.

¹⁴⁷ See *id.*

¹⁴⁸ We use the terms standards-based reform to suggest that there is some level of knowledge or skills that should be attained through public education and that attainment can be measured. To be sure, standardization of instruction of schools to address perceived social issues, such as massive immigration, is nothing new as a historical matter. In the earliest stages of the Republic, state governments attempted to reform and standardize education at the local level. See CARL KAESTLE, *PILLARS OF THE REPUBLIC* 134 (1983).

education.¹⁴⁹ In the 1980s, a national commission published a scathing rebuke of the quality of the country's public schools in the report *A Nation at Risk*.¹⁵⁰ The report concluded that, among other things, some degree of standardization of education and some assessment of "outcomes" was needed so that the country could compete, maintain, and secure its economic and national security.¹⁵¹ *A Nation at Risk* also ushered in a new focus on education policy that placed standards, assessment, and accountability at its core.¹⁵² This emphasis on standards, assessment, and accountability ultimately manifested in the federal No Child Left Behind Act of 2001, the Race to the Top Fund, and the Every Student Succeeds Act in the 2000s.

1. Federal Education Policy in the 2000s

Federal emphasis on standards-based accountability reached its apex during Presidents George W. Bush and Barack Obama administrations with the passage of NCLB in 2002 and the Race to the Top Program (RtT) in 2009, respectively. NCLB, President Bush's signature legislative achievements, reauthorized the Elementary Secondary Education Act (ESEA) and represented a historic shift in the federal role in education.¹⁵³ NCLB codified educational policy goals of standards and accountability and linked federal funding to the achievement of specific metrics. In particular, the law required states to adopt certain standards in core academic subjects of math and reading and ensure that all students achieve proficiency by 2014.¹⁵⁴ It further required that schools annually demonstrate that students and schools were achieving certain academic progress by meeting Adequate Yearly Progress (AYP) goals—essentially incremental progress that would culminate in full student

¹⁴⁹ See Larry Abramson, *Sputnik Left Legacy for U.S. Science Curriculum*, NPR (Sept. 30, 2007), <https://www.npr.org/templates/story/story.php?storyId=14829195>.

¹⁵⁰ See DIANE RAVITCH, *DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM* 22 (2010).

¹⁵¹ The report, although without any force of law itself, is frequently cited as playing a crucial role in a policy and law emphasis on standards and accountability. See *id.* at 22–30.

¹⁵² At the urging of various national commissions and some federal laws, states began to implement standards-based reform, including the use of curriculum standards, but shied away from any national standards for curriculum. See, e.g., *id.* at 19 (discussing the Clinton administration's program "Goals 2000 Program," a federal initiative incentivizing states to develop their own standards).

¹⁵³ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified as amended at 20 U.S.C. § 6301 *et seq.*). President Lyndon B. Johnson signed the Elementary Secondary Education Act of 1965 which provided significant federal funding to state and local school districts as part of his larger "War on Poverty." Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

¹⁵⁴ For an excellent overview of this provision of NCLB, see Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WK. (Apr. 10, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04>.

proficiency by 2014.¹⁵⁵ Student results were to be reported publicly according to various “subgroups” such as race, special education, or income level.¹⁵⁶

Schools that failed to satisfy AYP faced numerous penalties, and the punitive nature of the law represented a distinguishing feature of NCLB. Sanctions included providing parents with options to choose other schools,¹⁵⁷ requiring the use of supplemental services (e.g., tutoring provided by private entities),¹⁵⁸ instituting curricular changes, and replacing personnel, and school closure. The theory of action of NCLB—that accountability as measured through student test achievement would reform public education on a large scale—has been widely criticized¹⁵⁹ even by some of those who originally supported the high-stakes accountability model.¹⁶⁰

Less than a decade later, President Obama’s RttT program extended the federal emphasis on standards and accountability embodied in NCLB. Indeed, RttT took NCLB’s accountability provisions and extended them directly to individual teacher job security. To receive RttT funds, states were required to commit to linking teacher employment and personnel decisions to student growth on assessments, a controversial and unproven idea.¹⁶¹ Many states significantly altered teacher evaluation components of state statutes and collective bargaining agreements (where applicable) to satisfy conditions for receipt of RttT funds.¹⁶² Similarly, the U.S.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ 20 U.S.C. § 6316(b)(1)(E).

¹⁵⁸ *Id.* § 6316(b)(5)(B).

¹⁵⁹ *See* Richard Rothstein, *Leaving “No Child Left Behind”*, THE AM. PROSPECT (Dec. 15, 2007), <https://prospect.org/features/leaving-no-child-left-behind-behind> (writing that the law “ignored well-established statistical and management theories predicting perverse consequences for test-based accountability.”); *see also* David Hursh, *Exacerbating Inequality: The Failed Promise of No Child Left Behind*, 10 RACE ETHNICITY & EDUC. 295, 295 (2007) (noting that NCLB’s focus on accountability turned attention away addressing the impact of poverty on educational achievement); Richard Rothstein, *NCLB Bill: The Problem with Continuous Improvement*, THE WASH. POST (Oct. 12, 2011), https://www.washingtonpost.com/blogs/answer-sheet/post/nclb-bill-the-problem-with-continuous-improvement/2011/10/11/gIQA7nzdL_blog.html (criticizing proposals to continue large scale, one-size-fits-all policy reforms from the federal level following the experiences with NCLB).

¹⁶⁰ Steve Inskeep, *Former ‘No Child Left Behind’ Advocate Turns Critic*, NPR (Mar. 2, 2010), <https://www.npr.org/templates/story/story.php?storyId=124209100>.

¹⁶¹ *See* Mark A. Paige, *Moving Forward While Looking Back: How Can VAM Lawsuits Guide Evaluation Policy in the Age of ESSA?*, 28 EDUC. POL’Y ANALYSIS ARCHIVES, no. 64, 2020, at 3, <https://epaa.asu.edu/ojs/article/view/5067/2429> (discussing the Race to the Top requirement to use test scores for teacher evaluation as part of a larger commentary about ways to move beyond such evaluation mechanisms).

¹⁶² *See* Patrick McGuinn, *Stimulating Reform: Race to the Top Competitive Grants*, 26 EDUC. POL’Y 136, 146 (2002) (noting Race to the Top prompted an “unprecedented wave” of reforms for teacher tenure and evaluation policy).

Department of Education married RttT to national standards such as the Common Core.¹⁶³ As such, RttT reflected the continuation of federal government's attempt to create large-scale change in educational policy through standards and accountability,¹⁶⁴ but without detailed attention to how those policies would manifest at the local and classroom level.

In 2015, finally recognizing the failures of NCLB, Congress replaced important provisions of the statute with the Every Student Succeeds Act (ESSA), the most recent reauthorization of the Elementary and Secondary Education Act (ESEA).¹⁶⁵ To many, ESSA represented a correction to what some viewed as too much involvement in state and local education through NCLB because ESSA returned many decisions to states that were previously determined by federal law under NCLB.¹⁶⁶ Still, important provisions of ESSA include the continuing NCLB requirement for content and achievement standards in certain subject areas,¹⁶⁷ alignment of state standards, and coursework to higher education or career standards.¹⁶⁸ ESSA also continues to require some degree of remedial action for schools identified as underperforming.¹⁶⁹

To be sure, ESSA also replaced the AYP metric used under NCLB. Nevertheless, states are now required to design their own accountability regimen that includes goals for all students and student subgroups used under NCLB.¹⁷⁰ States must use results generated under these accountability systems to identify schools in need of some form of intervention or reform.¹⁷¹ While NCLB was highly prescriptive as to the interventions used to underperforming schools, ESSA allows for some flexibility in this regard.¹⁷²

¹⁶³ See, e.g., Joe Onosko, *Race to the Top Leaves Children and Future Citizens Behind*, 19 DEMOCRACY & EDUC., issue 2, no. 1, 2011, at 1–3, <https://democracyeducationjournal.org/home/vol19/iss2/1> (noting the close linkages between RttT and Common Core and concluding that such highly centralized and standardized approaches hurt schools and democracy).

¹⁶⁴ See *id.*

¹⁶⁵ Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1807 (2015).

¹⁶⁶ See Michael Heise, *From No Child Left Behind to Every Student Succeeds: Back to a Future for Education Federalism*, 117 COLUM. L. REV. 1859, 1874 (2017) (concluding that ESSA “reverses the previous educational federalism boundaries established by NCLB.”).

¹⁶⁷ See *id.* at 1872.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* at 1874.

¹⁷⁰ See *The Every Student Succeeds Act: Explained*, EDUC. WK. (Dec. 8, 2015), <https://www.edweek.org/policy-politics/the-every-student-succeeds-act-explained/2015/12>.

¹⁷¹ The statute requires a state to identify at least 5% of its Title I schools for comprehensive intervention. *Id.*

¹⁷² See *id.* For instance, states have some flexibility in developing the criteria used to identify schools and tailoring corrective actions.

2. Empirical Research on No Child Left Behind and Race to the Top

NCLB faced immediate obstacles and resistance at the state and local levels charged with implementing its commands. The highly prescriptive standardized testing, accountability systems, and associated costs with the law (e.g., supplemental services through outside providers, testing preparation materials) placed considerable strain on state and local education budgets.¹⁷³ Some states and teacher associations challenged the constitutionality of the law in federal court, arguing that NCLB constituted a prohibited “unfunded mandate” and violation of the Spending Clause under the Constitution.¹⁷⁴ While these plaintiffs were unsuccessful, their decision to litigate the matter reflects the intensity of their opposition to the law’s implementation.

Yet, NCLB significantly impacted instruction at the classroom level in ways that did not resolve—and perhaps worsened—inequity. NCLB’s exclusionary focus on certain core subjects (math and reading) diluted the breadth and depth of other course offerings for schools.¹⁷⁵ Its punitive, zero-sum game theory of action pitted teachers and districts against one other. Research and popular press reported that teachers and administrators sought to “game the system” by negotiating to teach in high-performing schools and, in the most egregious instances, engaging in criminal behavior by altering student test answers.¹⁷⁶

Results regarding the attainment of NCLB’s ultimate goal—student test score improvement in certain subject areas—are inconclusive, at best. Despite its highly prescriptive nature, NCLB permitted states to set their own standards and corresponding tests to demonstrate proficiency. Accordingly, many simply set the bar quite low, allowing for the appearance of success.¹⁷⁷ Yet claims of incredible student growth on state tests were not generally borne out when student proficiency was measured by the National Assessment of Education Progress (NAEP), an assessment used across all states.¹⁷⁸ Worse yet, to the extent modest gains were demonstrated during the implementation of NCLB, researchers have doubted that any gains in

¹⁷³ See William Mathis, *No Child Left Behind: Costs and Benefits*, 84 PHI DELTA KAPPAN 679, 679–82 (May 2003) (concluding that the costs to implement NCLB exceeded the funds provided by the federal government).

¹⁷⁴ See, e.g., *Sch. Dist. v. Sec’y of the U.S. Dep’t of Educ.*, 584 F.3d 253, 256 (6th Cir. 2009) (upholding dismissal of challenge to NCLB on Spending Clause grounds).

¹⁷⁵ See Richard Rothstein & Rebecca Jacobsen, *The Goals of Education*, 88 PHI DELTA KAPPAN 264, 265 (Dec. 2006) (discussing the effects of NCLB on various subjects).

¹⁷⁶ See Richard Faussett & Alan Blinder, *Atlanta School Workers Sentenced in Test Cheating Case*, N.Y. TIMES (Apr. 14, 2015), <https://www.nytimes.com/2015/04/15/us/atlanta-school-workers-sentenced-in-test-score-cheating-case.html> (discussing examples of cheating on standardized assessments).

¹⁷⁷ See SUPERFINE, *supra* note 3, at 194 (discussing the ability of states to set low standards of accountability).

¹⁷⁸ See Jackyung Lee & Todd Reeves, *Revisiting the Impact of NCLB High-Stakes School Accountability, Capacity, and Resources: State NAEP 1990–2009 Reading and Math Achievement Gaps and Trends*, 34 EDUC. EVAL. POL’Y ANALYSIS 209, 209 (2012).

student achievement should be attributed to the federal law and not to other factors.¹⁷⁹ Moreover, the achievement gap between black and white children on standardized tests, according to some, actually expanded following the implementation of NCLB.¹⁸⁰

Evidence suggesting any lasting or even positive reform on student achievement and opportunity through the RttT is similarly thin.¹⁸¹ To be fair, some credit RttT as a success because it was successful in shifting state priorities to a more aggressive emphasis on standards and accountability.¹⁸² Yet, at the same time, scholars noted *at the time it was adopted*, the reforms encouraged by RttT lacked empirical support in terms of the aspirational goals and chosen means to reach those goals,¹⁸³ which perhaps should have cautioned federal policymakers to take a less aggressive approach. In addition, it failed to account for the significant costs and logistical coordination needed to translate common standards into materials and practices that could be used in the classroom.¹⁸⁴

As a result, many of the efforts flowing from RttT to improve both the quality of teachers and schools were largely unsuccessful and only led to frustration at the local and classroom level.¹⁸⁵ RttT's emphasis on linking teacher employment status to student performance on test scores with the use of the highly controversial Value-Added Models ("VAMs") has largely been discredited as a means to improve teacher quality.¹⁸⁶ VAMs in education employment decisions are riddled with significant

¹⁷⁹ See *id.* at 211.

¹⁸⁰ See *id.* at 224.

¹⁸¹ See Elaine Weiss, *Mismatches in Race to the Top Limit Educational Improvement*, ECON. POL'Y INST. (Sept. 12, 2013), <https://www.epi.org/publication/race-to-the-top-goals/>.

¹⁸² See William G. Howell, *Results of President Obama's Race to the Top Program*, EDUC. NEXT, Fall 2015, at 58, 58, https://www.educationnext.org/wp-content/uploads/2022/03/ednext_XV_4_howell.pdf (asserting that the Race to the Top was successful because of a "marked surge" of adoption of new education policies following the introduction of Race to the Top, but not commenting on the efficacy of these policies). See also Patrick McGuinn, *Stimulating Reform: Race to the Top, Competitive Grants and the Obama Education Agenda*, 26 EDUC. POL'Y 1, 136, 136–59 (2012) (recognizing that states adopted a number of education strategies because of Race to the Top but arguing that any long-term impact would be blunted by obstacles at the state and local level).

¹⁸³ See Weiss, *supra* note 181 (highlighting the various shortcomings of Race to the Top and noting that where educational opportunity expanded required a comprehensive approach that encompassed other areas of social policy, not just educational).

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* (noting that Race to the Top frustrated relationships between unions and management, making teachers suspicious of the underlying objectives of the reform).

¹⁸⁶ See, e.g., Mark A. Paige & Audrey Amrein-Beardsley, *Houston, We Have a Lawsuit: A Cautionary Tale for the Implementation of Value-Added Models for High-Stakes Employment Decisions*, 49 EDUC. RESEARCHER 350, 350 (2020) (generally noting the research that questions that validity of VAMs as a means to accurately assess teacher contributions to student outcomes).

shortcomings because of their demonstrated lack of reliability.¹⁸⁷ RttT forced use of VAMs in employment relationships immediately upset labor-management relationships as well, creating animosity between local unions and school boards.¹⁸⁸

The drastic “turnaround” strategies embraced by RttT have also been criticized by scholars. The ideas promoted by then U.S. Secretary of Education Arne Duncan (e.g., removing principals and teachers and shuttering “failing” schools) were to provide sweeping change to the personnel and leadership composition of entire schools and districts.¹⁸⁹ Yet such “reforms” ignored labor-market dynamics that are commonly understood and accepted in the private sector, such as whether a supply of better teachers or principals even existed to replace those moved or terminated.¹⁹⁰ The adoption of other extreme reforms—such as complete state takeover of a local school district—similarly did not align with education research that cast doubt about the capacity or success of such strategies.¹⁹¹

In addition, RttT opened the door to “choice” options, such as charter schools.¹⁹² While the calls for increased choice and the efficiency of the market are sometimes politically popular, the empirical research on successful reform through charters is muddy, at best. Indeed, as discussed below, the extent to which charter schools can improve educational performance equity is in doubt—in some cases, their use could promote resegregation of schools.¹⁹³ Worse yet, they have been prone to closures, costing taxpayers hundreds of millions of dollars,¹⁹⁴ and a loss of local control. When

¹⁸⁷ See, e.g., *id.* at 352–53.

¹⁸⁸ Numerous teachers unions sought relief in federal court, arguing that the use of VAMs were unconstitutional. While generally unsuccessful at the federal court level, courts expressed skepticism of the use of VAMs as a matter of policy. See *Cook v. Stewart*, 28 F. Supp. 3d 1207, 1216 (N.D. Fla. 2014) (commenting that although the use of VAMs may be “unwise” as a matter of policy, they were not unconstitutional).

¹⁸⁹ See Lesli A. Maxwell & Michelle McNeil, *Rules Ease Overhaul Strategies*, EDUC. WK., Dec. 2, 2009, at 1 (noting that U.S. Secretary of Education Duncan targeted schools for large school personnel reorganization or shutdown).

¹⁹⁰ See Sam Dillon, *U.S. Plan to Replace Principals: Who Will Replace Them?*, N.Y. TIMES (Feb. 7, 2011), <https://www.nytimes.com/2011/02/08/education/08education.html>; see also *Position Statement: Principal Shortage*, NAT’L ASS’N OF SECONDARY SCH. PRINCIPALS, https://www.nassp.org/wp-content/uploads/2020/06/Principal_Shortage.pdf (Mar. 27, 2017) (highlighting the lack of supply to meet the demand for principals).

¹⁹¹ See DOMINGO MOREL, TAKEOVER: RACE, EDUCATION AND DEMOCRACY 47 (2018) (assessing some state takeover models and concluding that state takeover can have a *disempowering* effect on marginalized communities).

¹⁹² See *infra* notes 194–205 and accompanying text.

¹⁹³ See ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, CIV. RTS. PROJECT, EQUITY OVERLOOKED: CHARTER SCHOOLS AND CIVIL RIGHTS POLICY 3 (2019) (discussing the need for safeguards against the segregating effects of charters schools).

¹⁹⁴ See Valerie Strauss, *U.S. Government Wasted Up to a \$1 Billion on Charter Schools and Still Fails to Adequately Monitor Grants*, WASH. POST (Mar. 25, 2019),

considered with RttT's focus on linking VAMs and teacher employment decisions, RttT demonstrated the negative consequences of the federal government's continued embrace of a command-and-control model of action that ignored state and local governance factors. If anything, RttT seemed to "double-down" on the NCLB model that assumed directives from federal and state legislatures regarding standards, and accountability would flow vertically through the educational system writ large and translate into classrooms without friction.

D. Charter Schools

Charter schools have spread quickly and widely around the United States. State laws generally authorize the creation of charter schools, and the statutory schemes governing them can differ across states.¹⁹⁵ Between the passage of the first charter school law in 1992 and 2017, 44 states and Washington, D.C. permitted charter schools,¹⁹⁶ and the number of students attending charter schools reached almost 3.2 million.¹⁹⁷ As such, charter schools have become one of the primary approaches to educational improvement for underserved students and educational systems more broadly.

Charter schools arguably represent the logic of local governance more than any other major reform currently being implemented. At their most basic level, state laws authorize the creation of charter schools by giving governing bodies the power to grant charters to independent, private school operators.¹⁹⁸ Parents and students then act as consumers by choosing which schools to attend, which theoretically increases competition between schools and thereby promotes educational innovation. Charter schools are also generally subject to less regulation than traditional public schools under the notion that they trade heightened accountability for less regulation because their charters must be renewed, but they still continue to receive public funding.

<https://www.washingtonpost.com/education/2019/03/25/report-us-government-wasted-up-billion-charter-schools-still-fails-adequately-monitor-grants/>.

¹⁹⁵ See Natalie Lacireno-Paquet, *Charter School Enrollments in Context: An Exploration of Organization and Policy Influences*, 81 PEABODY J. EDUC. 79, 82 (2006) (discussing the strong influence of state laws on the characteristics of charter schools).

¹⁹⁶ See Alyssa Rafa et. al, *50-State Comparison: Charter School Policies*, EDUC. COMM. OF THE STATES (Jan. 28, 2020), <https://www.ecs.org/charter-school-policies/>.

¹⁹⁷ See REBECCA DAVID & KEVIN HESLA, NAT'L ALLIANCE FOR PUB. CHARTER SCHS., ESTIMATED PUBLIC CHARTER SCHOOL ENROLLMENT, 2017-2018, at 1 (2018), <https://www.publiccharters.org/sites/default/files/documents/2018-03/FINAL%20Estimated%20Public%20Charter%20School%20Enrollment%2C%202017-18.pdf>; *Choice and Charter School Facts*, CTR. FOR EDUC. REFORM, <https://edreform.com/issues/choice-charter-schools/facts/> (last visited Jan. 8, 2022).

¹⁹⁸ As argued by education researchers Douglas N. Harris, John F. Witte, and Jon Valant, there are "key elements" retained by charter schools that together continue to distinguish them from their traditional public counterparts: "(a) public funding; (b) agreements or contracts that specify the organization, management, and goals of the school; and (c) less regulation than traditional public schools." See Douglas N. Harris et al., *The Market for Schooling*, in SHAPING EDUCATION POLICY—POWER AND PROCESS 95 (Douglas E. Mitchell et al. eds., 2011) (discussing the evolution of market-based reforms in U.S. education reform).

Because they have characteristics of public and private organizations, they have been labeled as “quasi-public” or “hybrid public schools.”¹⁹⁹ As such, charter schools are generally grounded in the neoliberal logic that the “marketplace can provide more efficient solutions than the public sector to pressing social problems.”²⁰⁰

While charter schools have proven politically contentious, they have received support from both conservative and liberal sectors focused on the perceived benefits of decentralizing governance power. RttT was enacted during President Obama’s time in office as part of the American Recovery and Reinvestment Act of 2009,²⁰¹ and RttT used the lure of federal funding to loosen state-level restrictions on charter schools.²⁰² In 2016, President Barack Obama continued to frame charter schools as playing “an important role in our country’s education system.”²⁰³ A decade later, President Donald Trump included an allocation of \$1.1 billion for school choice in the budget for FY 2019, with a stated goal of \$20 billion annually for the same purpose.²⁰⁴ Indeed, charter schools have amassed supporters from a range of conservative sources that include proponents of free market approaches and those who favored school voucher policies and viewed charter schools as a second-best option.²⁰⁵

Proponents have specifically argued that moving authority away from unresponsive, centralized bureaucracies to schools and neighborhoods should increase teacher autonomy and efficiency.²⁰⁶ Some liberal advocacy organizations have also argued that charter schools benefit underserved minority groups by moving power

¹⁹⁹ See Catherine LoTempio, *It’s Time to Try Something New: Why Old Precedent Does Not Suit Charter Schools in the Search for State Actor Status*, 47 WAKE FOREST L. REV. 435, 437, 440 (2012) (discussing charter schools in relation to the public/private distinction).

²⁰⁰ See Katherine E. Bulkley & Patricia Burch, *The Changing Nature of Private Engagement in Public Education: For-Profit and Nonprofit Organizations and Educational Reform*, 86 PEABODY J. EDUC. 236, 236 (2011).

²⁰¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

²⁰² See Leslie A. Maxwell, *Obama Team’s Advocacy Boosts Charter Momentum*, EDUC. WK. (June 16, 2009), <https://www.edweek.org/policy-politics/obama-teams-advocacy-boosts-charter-momentum/2009/06> (summarizing warnings made by Secretary Duncan to the states regarding charter school policies).

²⁰³ See Proclamation No. 9437, 81 Fed. Reg. 26, 985 (Apr. 29, 2016).

²⁰⁴ See OFF. OF MGMT. AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2019, at 40 (2019).

²⁰⁵ See JEFFREY R. HENIG, SPIN CYCLE: HOW RESEARCH IS USED IN POLICY DEBATES 42 (2008) (discussing how charter schools became a “surrogate battlefield” for vouchers).

²⁰⁶ See, e.g., Jeffrey R. Henig, *School Choice Outcomes*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 68, 71 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (diagramming the theory of action underlying charter school policies). Notably, many conservatives also supported charter schools as a second-best option when it became clear that school voucher policies would not be enacted at the federal level. See HENIG, *supra* note 205, at 42 (2008) (discussing how charter schools became a “surrogate battlefield” for vouchers).

away from unresponsive governmental entities and to schools that are more responsive to community needs.²⁰⁷ However, critics of charter schools have often highlighted perceived issues that flow from charter schools such as the collapse between the public and private spheres in education,²⁰⁸ weakening of teachers unions,²⁰⁹ and segregation that results from parental choice.²¹⁰

Despite political statements that make sweeping generalizations about charter schools, it is worth noting that charter schools can vary greatly, particularly given their comparative autonomy and differences in state law. Researchers have highlighted at least five different organizational forms of charter schools: (1) stand-alone charters, (2) for-profit education management organization charters, (3) virtual charters, (4) clusters of loosely affiliated charters, and (5) charter management organization charters.²¹¹ As such, charter schools or networks may reflect managerial, curricular, linguistic, cultural, and operational variations. Indeed, given the logic of charter schools, they reflect the educational reform strategy most aligned with a theory of vertical governance that locates decision-making power at the extreme local level. However, an examination of the empirical research tells a more ambiguous story than the proponents and critics seem to suggest.

1. Empirical Research on Charter Schools

Given what can be highly charged rhetoric from charter school proponents and critics, the research on charter schools tends to be highly politicized and mixed.²¹² As some education researchers recently argued, “[s]ome of America’s highest achieving schools are charters, but so are some of its worst.”²¹³ Researchers have specifically found mixed results for charter school performance and that charter students on

²⁰⁷ See HENIG, *supra* note 205, at 52.

²⁰⁸ See Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 350 (2003) (discussing the fuzzy boundaries between public and private schools as reflected in the case of charter schools).

²⁰⁹ See Peter Kauffman, *Unionized Charter School Contracts as a Model for Reform of Public School Job Security*, 88 N.Y.U. L. REV. 1379, 1385 (discussing how charter schools weaken teachers unions).

²¹⁰ See HENIG, *supra* note 205, at 95–101 (analyzing empirical studies on the relationship between charter schools and school segregation).

²¹¹ See Rand Quinn et al., *Getting to Scale: Ideas, Opportunities, and Resources in the Early Diffusion of the Charter Management Organization, 1999-2006*, TCHRS. COLL. REC. (2016), <https://www.tcrecord.org/Content.asp?ContentId=21524>.

²¹² See Sandra Vergari, *The Politics of Charter Schools*, 21 EDUC. POL’Y 15, 30 (2007) (“[T]here is a lack of relatively neutral researchers willing to confront research findings that may conflict with their own biases and willing to consider the complexity of the charter school phenomenon in an open-minded manner.”).

²¹³ Chester E. Finn et al., *The District and Charter Sectors of American K-12 Education: Pros and Cons*, 11 J. SCH. CHOICE 9, 9 (2017) (concluding that charter schools are producing results equal to those of traditional public schools).

average perform about the same as their public school peers.²¹⁴ At the same time, some studies have found that charter school students perform better on certain standardized tests.²¹⁵

Disagreements have emerged over issues of educational equity. Experimental studies of specific models like “No Excuses” charter school attendance programs targeted at low-income students found a positive impact on literacy and math scores.²¹⁶ For example, the high profile Knowledge is Power Program (KIPP), a nationwide charter school operator, positively impacted student achievement in one study.²¹⁷ At the same time, some researchers have highlighted how this model can enforce behavioral standards misaligned with the cultures of low-income students attending those schools.²¹⁸ More broadly, while one study argued that the charter model has the potential to benefit underserved students in urban areas,²¹⁹ another argued that charter schools have an unacceptably high school closure rate and destabilize the traditional public school system for underserved communities.²²⁰ Moreover, although some have criticized charter schools for increasing segregation in

²¹⁴ See CTR. FOR RSCH. ON EDUC. OUTCOMES, STAN. UNIV., CHARTER SCHOOL PERFORMANCE IN TEXAS 3 (2017), https://credo.stanford.edu/wp-content/uploads/2021/08/texas_2017.pdf (report for Texas, showing stronger annual growth in reading for charter students, but similar results in math); CTR. FOR RSCH. ON EDUC. OUTCOMES, STAN. UNIV., CHARTER SCHOOL PERFORMANCE IN THE STATE OF WASHINGTON 2019, at 2 (2018), https://credo.stanford.edu/wp-content/uploads/2021/08/2019_report_wa.pdf (report for Washington, showing growth “on par” with traditional schools); CTR. FOR RSCH. ON EDUC. OUTCOMES, STAN. UNIV., CHARTER SCHOOL PERFORMANCE IN NEW YORK 11 (2017), https://credo.stanford.edu/wp-content/uploads/2021/08/ny_state_report_2017_06_01_final.pdf (report for New York, showing “no difference” except for students at charters governed by a charter management organization).

²¹⁵ See U. OF CHI. CONSORTIUM ON SCH. RSCH., CHICAGO’S CHARTER HIGH SCHOOLS: ORGANIZATIONAL FEATURES, ENROLLMENT, SCHOOL TRANSFERS, AND STUDENT PERFORMANCE 45 fig.21 (2017), <https://consortium.uchicago.edu/sites/default/files/2018-10/Chicagos%20Charter%20High%20Schools-Nov2017-Consortium.pdf>.

²¹⁶ See Albert Cheng et al., “No Excuses” Charter Schools: A Meta-Analysis of the Experimental Evidence on Student Achievement, 11 J. SCH. CHOICE 209, 210 (2017).

²¹⁷ See Philip M. Gleason et al., *Do KIPP Schools Boost Student Achievement*, 9 EDUC. FIN. & POL’Y 36, 37 (2014) (detailing conclusions of empirical analysis of KIPP schools).

²¹⁸ See Frederico R. Waitoller et al., *The Irony of Rigor: “No-Excuses Charter Schools at the Intersections of Race and Disability”*, 32 INT’L J. QUALITATIVE STUD. EDUC. 282, 283 (2019) (recounting critiques of “no-excuses” charter schools).

²¹⁹ See Philip M. Gleason, *Let the Search Continue: Charter Schools and the Public Interest*, 38 J. POL’Y ANALYSIS & MGMT. 1053, 1055 (2019) (discussing studies that have found positive impacts of charter schools in urban areas).

²²⁰ See Maria Paino et al., *The Closing Door: The Effect of Race on Charter School Closures*, 60 SOCIOLOGICAL PERSPECTIVES 747, 748 (2017) (arguing that the likelihood of charter school closing increases with the proportion of black students in the school).

schools and screening out racial and ethnic minorities,²²¹ the evidence for such claims is mixed.²²²

The evidence regarding what actually happens inside charter schools is similarly mixed. Given their comparative organizational autonomy, one might expect a significant amount of variation at the school level in ways that are tailored to communities that consider those schools as viable options. On one hand, charter schools have implemented certain innovations, such as use of technology for distance learning²²³ and extended time in school.²²⁴ On the other hand, researchers have found that there is little in charter schools that has not been piloted in the traditional school system.²²⁵ So, while charter schools have proven to be a popular and politically feasible education reform strategy, they highlight the limits of simply devolving governance authority to the local level and are by no means a sure thing for improving educational equity and, in some cases, might exacerbate it.

IV. PRINCIPLES FOR RETHINKING EDUCATIONAL GOVERNANCE

Since at least *Brown v. Board of Education*, large-scale efforts to equalize and improve students' learning opportunities have become a centerpiece of domestic law and policy reforms. However, for all the time and energy devoted to such efforts, their outcomes have been limited or mixed at best. While each of these efforts have faced unique challenges, thorny issues related to educational governance span across them all. In addition to the challenges of horizontal governance, challenges of vertical governance that have been highlighted by educational research but often missed by legal scholars loom large as well. More efficacious education reform should be strategically designed to account for both types of governance challenges.

While many recommendations make much sense from a purely legal or educational perspective, this Article argues that both are needed to have any prospect of making critical improvements at the classroom and student level at scale with any kind of consistency. This Part accordingly draws on both perspectives to lay out two principles for rethinking educational governance to promote more effective approaches for increasing and equalizing students' learning opportunities. This Part also discusses the development of an "educational improvement infrastructure" as a way to integrate these principles and put them into action.

²²¹ See HENIG, *supra* note 205, at 95–101 (reporting research findings on the interactions of charter school policies with racial and ethnic minority students).

²²² See Tomas Monarrez et al., *Do Charter Schools Increase Segregation?*, EDUC. NEXT, <https://www.educationnext.org/do-charter-schools-increase-segregation-first-national-analysis-reveals-modest-impact/> (July 24, 2019) (arguing that the current empirical evidence fails to provide a definitive answer about the impact of charter schools on segregation).

²²³ See HENIG, *supra* note 205, at 113 (discussing the expanded classroom time in KIPP charter schools).

²²⁴ See Kevin Brady et al., *Uncharted Territory: The Current Legal Landscape of Public Cyber Charter Schools*, 2010 BYU EDUC. & L.J. 191, 194–98 (providing an overview of the cyber charter school landscape).

²²⁵ See HENIG, *supra* note 205, at 114 (stating that charter schools produce innovations much less than many argue).

A. *Account for Strengths and Weaknesses of Governmental Institutions*

A careful analysis of the history of large-scale education reform highlights the importance of attending to the strengths and weaknesses of governmental institutions spearheading reform. On one level, effective reform in this area must be able to cut through the dense political thicket that inevitably surrounds it. As efforts focused on reforming school funding and the education of students with disabilities starkly reflect, such reform can be costly and involve redistribution of resources. It often involves efforts focused on educational improvement for poor and minority groups that have been long underserved and often lack political power. Educational reformers have long looked to the courts precisely because they offer a viable alternative to the political process. Moreover, such a recognition has spurred legal academics to recommend reforms like a federal right to an education, which can provide courts with more solid legal grounding to act. Indeed, some recent cases like those focused on a right of access to literacy have focused directly on the establishment of such a right.

On the other hand, effective educational reform must also be grounded in expertise and spearheaded by institutions with the capacities to manage complex educational issues that vary and change over time. Acting alone, courts demonstrably lack these critical capacities and have sometimes underscored their own limitations by looking to legal principles like those governing political questions. Legislative and executive institutions have the capacities to manage more complex problems, but as their efforts with test-based accountability and the education of students with disabilities reflect, they too have faced challenges in designing effective education reform. At the same time, abdicating responsibility to manage reform to more local entities like charter schools has proven problematic as well.

Strategically accounting for the strengths and weaknesses of these governmental institutions in large-scale education reform likely requires a careful blend of institutions. As the most effective attempts at school finance reform reflect, “non-court-centric” reform, which positions the courts as agenda-setters and monitors of reform, in addition to serving as a venue for ongoing communication with stakeholders, can serve as a useful starting point.²²⁶ Taking this stance, courts can require legislatures and other necessary institutions to engage with the specifics of reform while ensuring that reforms are responsive to changes across locales and variations over time. Given that such a role is far from the norm in educational reform cases, judicial willingness to oversee such a process over time would be critical. Still, even if such a strategic approach to horizontal governance is adopted, there is little guarantee of success. This approach would only help set the conditions for effective reform, which is more directly undertaken by the range of organizations and institutions involved in the vertical governance process.

B. *Design Education Reform Strategies that Account for Local Variation*

As an examination of major, large-scale education reform strategies reveals, effective vertical governance is not a matter of simply setting up a system that allows for the enactment of clear and concise mandates by governmental institutions that can be implemented with fidelity. A long line of education research has clearly revealed

²²⁶ See Sabel & Simon, *supra* note 69, at 1055 (“The judge’s role changes from that of directly determining the merits to facilitating a process of deliberation and negotiation among the stakeholders.”).

that education policy implementation and success are the products of complex interactions among policies, people, and places.²²⁷ For effective reform to occur at various levels—from governmental institutions to ground-level practitioners—individual implementers like teachers and school administrators should be viewed as professionals who actively make decisions based on both broader goals and rules, and the varied and changing contexts around them. Educators have demonstrated a remarkable ability to operate in environments rife with conflicting policies. It is worth recalling education Professor Bryk’s contention that education reform should “move away from simplistic thinking about solution in terms of ‘What Works?’ toward a more realistic appraisal of ‘what works, for whom, and under what conditions?’”²²⁸

At the same time, effective vertical governance is not a matter of simply providing local educators and administrators with as much freedom as possible. The expansion of charter schools is perhaps the approach most strongly grounded in this theory of action, but as educational research also reveals, being more “hands-off” does not necessarily result in educational improvement with any consistency at scale—it ignores key issues of individual and organizational capacity to improve instruction.²²⁹ Indeed, the more modest instructional reform policies that have been successful have often been responsive to problems faced by practitioners at the ground level, offered solutions, and provided tools, guidance, and resources.²³⁰ As such, the success of educational reform likely relies on the thoughtful consideration of how individuals and organizations at various levels have the ability and decision-making power to productively adapt educational reforms to their local settings.

The importance of local actors in addition to governmental institutions is precisely why such a key piece of effective educational reform is framed in terms of vertical governance instead of merely policy implementation. Thoughtful strategies for improving instruction should be developed and implemented at local levels to account for variation, but they also should be aligned with broader goals, reflective of educational research, and overseen by governmental institutions, particularly given the imperative to improve educational equity. Integrating a focus on both horizontal and vertical governance into education reform efforts is critical for any educational reform effort, no matter the sub-domain of education in which that reform occurs.

²²⁷ See Meredith I. Honig, *Complexity and Policy Implementation: Challenges and Opportunities for the Field*, in *NEW DIRECTIONS IN EDUCATION POLICY IMPLEMENTATION 1* (Meredith I. Honig ed., 2006) (highlighting the variation necessarily inherent in policy implementation).

²²⁸ See BRYK ET AL., *supra* note 45, at 13–14.

²²⁹ See Dorothy Shipps et al., *The Politics of Urban School Reform: Legitimacy, City Growth, and School Improvements in Chicago*, 13 *EDUC. POL’Y* 518, 542 (1999) (arguing that the efficacy of education reforms focused only on governance can be limited when they devote little attention to developing educators’ skills and knowledge).

²³⁰ See David K. Cohen & Jal D. Mehta, *Why Reform Sometimes Succeeds: Understanding the Conditions That Produce Reforms That Last*, 54 *AM. EDUC. RES. J.* 644, 646–47 (2017) (analyzing successful reform in policy areas including Advanced Placement, International Baccalaureate, and Montessori).

C. *Develop Educational Improvement Infrastructure*

While one could imagine any number of ways to integrate principles of effective horizontal and vertical governance into educational reform, the idea of educational infrastructure is particularly useful for conceptualizing how such integration might look. As educational researcher William Penuel argued, targeting infrastructure rather than innovations in isolation can help provide more capacity to produce a “more reliable strategy for promoting transformational change in educational systems.”²³¹ While educational researchers have conceived the development of such infrastructure largely at local levels to support improvements in teaching and learning, the concept could usefully be attuned to the challenges of both horizontal and vertical governance.

If courts are to be key institutions driving educational reform because of their ability to cut through the political thicket, they require help understanding the notion of productive adaptation and how to ensure that it is being operationalized in the educational systems they ultimately oversee. Certain tools are already available for courts to more readily employ in education reform cases to help them understand the nature of effective reform as highlighted by educational research. For example, courts have sometimes appointed expert panels, ordered additional fact finding or negotiations among parties, or appointed “special masters” to provide them with additional knowledge relevant to complex cases.²³² Given courts’ limitations with understanding research, independent research institutions could be created to help courts better understand and rule on legal issues related to educational reform.²³³ Such institutions could particularly help the courts in their role as agenda setters that manage the process of developing an educational improvement infrastructure that spans vertically across governmental levels while maintaining a focus on educational equity.

The vertical educational improvement infrastructure would be directly aimed at creating and implementing educational reform strategies responsive to varying local conditions—the sort of capacity developed “through intentional efforts to develop organizational routines and processes that help innovations travel through a system.”²³⁴ Indeed, these are precisely the sorts of capacity-building efforts that would promote the use of tools, guidance, and resources shown to be effective for promoting reform. Such infrastructure development efforts would not be aimed at promoting a specific type of reform, but instead the conditions for continuous

²³¹ William R. Penuel, *Co-Design as Infrastructuring with Attention to Power: Building Collective Capacity for Equitable Teaching and Learning through Design-Based Implementation Research*, in *COLLABORATIVE CURRICULUM DESIGN FOR SUSTAINABLE INNOVATION AND TEACHER LEARNING* 387, 388 (Jules Pieters et al. eds., 2019).

²³² See Rebell and Hughes, *supra* note 30, at 1150.

²³³ Some commentators have specifically suggested the creation of independent research institutions to help courts understand issues of science and technology. See, e.g., Jason Tashea, *Courts Need Help When It Comes to Science and Tech*, *ABA J.* (Nov. 2, 2017), https://www.abajournal.com/lawscribbler/article/courts_need_help_when_it_comes_to_science_and_tech (analyzing courts’ lack of capacities to deal effectively with scientific evidence).

²³⁴ See William R. Penuel et al., *Organizing Research and Development at the Intersection of Learning, Implementation, and Design*, 40 *EDUC. RES.* 331, 334 (2011).

improvement as local situations change.²³⁵ At the school and district levels, improvement plans would be useful vehicles for articulating what sort of infrastructure would be useful. State plans, historically used in response to statutes like the ESEA that require states to spend money for particular purposes, would similarly be useful to detail how districts and schools would be required to structure their infrastructure development plans and implement educational improvement strategies inside this infrastructure. State or federal departments of education would then need to approve such plans and ensure that localities are being held responsible for implementing them robustly. While such accountability for state plans has not always been the norm,²³⁶ courts, acting in their role as agenda setters and managers of reform, could help ensure that states perform this function, particularly with the help of research institutions to keep the process aligned with educational research.

Still, it is clear that such large-scale reform is sure to be costly. Two examples discussed here, NCLB and the IDEA, demonstrate the yawning gap between the money provided by the federal government to local districts for the purpose of a reform and the actual costs incurred by districts to try to meet the laws' respective objectives. Indeed, as discussed throughout this Article, shortfalls of federal funding tied to specific statutory requirements have impacted local school district budgets to varying degrees.²³⁷ Forcing some discussion concerning the actual costs—and impact on local district budgets—may focus some attention on how a desired large-scale reform as it travels through vertical governance structures.

V. CONCLUSION

Large-scale education reform is not easy. While an examination of major education reform efforts reveals critical successes, honest evaluations also reveal far too many failures. An analysis of some of the major reform efforts reveals that problems of educational governance drive some of the fundamental problems that these reforms have faced. Without addressing such problems head on—without attending to issues of both horizontal and vertical governance from the very inception of education reform efforts—it is unlikely that future reform efforts will prove significantly more successful. Doing so would require integrating lessons from both legal and educational research in a way that fully accounts for both the characteristics of governmental institutions and the educational system more broadly. Such a reconceptualization is critical for educational reform efforts to move forward in a way that has not only the potential to make changes at the level of law and policy, but in students' learning opportunities and performance as well.

²³⁵ See MARK A. SMYLYE, CONTINUOUS SCHOOL IMPROVEMENT 2 (2009) (explaining the call for schools to adopt organizational properties and processes of continuous improvement).

²³⁶ See, e.g., SUPERFINE, *supra* note 3, at 91 (discussing problems in implementation and accountability of Title I funds, including buying color televisions instead of enhancing school instructional programs); *id.* at 116 (discussing how the federal government allowed states to continue receiving Goals 2000 funds even without submitting plans to the federal government).

²³⁷ See, e.g., *supra* notes 128 and 143.