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The Last Wave: The Rise of the Contingent School District

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THE LAST WAVE: THE RISE OF THE CONTINGENT SCHOOL DISTRICT

AARON JAY SAIGER*

Spurred in part by state court cases holding that states bear a constitutional duty to educate all children adequately, and making creative use of the arguments of school choice advocates, the states and other policy actors have in recent years recast the problem of deficient schooling as one of government structure rather than one of individual rights. This reorientation has contributed to a dramatic erosion of the traditional role of the local school district as the leading administrative, policymaking, and legal unit of American school government. A new, polyarchic distribution of power has arisen in place of district primacy, bearing potentially momentous consequences for education litigation and for the realization of education rights generally. Interests that currently wield disproportionate power over urban school district management, especially teachers' unions, will likely find their influence reduced. Structural change will also likely blunt the ability of courts to guide further the course of school reform. Finally, the shift toward polyarchy may well begin to erode the power of suburban interests that have long dominated education law and politics.

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INTRODUCTION

Nearly every account of the thirty-year-old effort to litigate conditions in distressed public schools adopts a construct, coined by William Thro in 1990, that categorizes the cases into three, roughly chronological “waves.”¹ The first and second waves consisted of claims that poorly funded, poorly performing school districts violate the equal protection guarantees of the national and state constitutions, respectively. Third-wave plaintiffs alleged that the same conditions violate a right to an adequate public education that children enjoy under state constitutions apart from equal protection.²

Thro clearly introduced the term “wave” to convey the idea of successive theories, each rising to prominence as its predecessor faltered. Thus, the first wave ended with *San Antonio v. Rodriguez*,³ which held even substantial differences in school quality to be consistent with federal equal protection.⁴ Similarly, the third-wave

1. 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, 222–32 (1990). Among the numerous and diverse adopters of Thro’s construct are MATTHEW H. BOSWORTH, *COURTS AS CATALYSTS: STATE SUPREME COURTS AND PUBLIC SCHOOL FINANCE EQUITY* 28–41 (2001); Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995); Michael A. Rebell, *Fiscal Equity Litigation and the Democratic Imperative*, EQUITY & EXCELLENCE EDUC., Dec. 1999, at 5, 7–8.

2. See Thro, *supra* note 1, at 239–41.

3. 411 U.S. 1 (1973).

4. *Id.* at 54–55.

adequacy theory was crafted after second-wave state equal protection arguments sustained several prominent defeats.⁵

The ubiquitous wave paradigm has provided scholars with a metaphor both picturesque and compelling. As I have written previously, even spectacular waves soon recede, altering the contours of the beach barely if at all—a nice parallel to state school-finance litigation, where splashy legal victories have been followed by little change on the ground and, sometimes, by judicial backpedalling.⁶ The image of breakers crashing and then retreating also evokes the evanescence and froth that Frederick Hess and others bemoan as educational “‘policy churn’—an endless stream of new initiatives, with the schools and teachers never having time to become comfortable with any given change.”⁷ The three-wave construct is further notable for the irresistible invitation that it extends to academics and law students to imagine a fourth wave.⁸ The metaphor even stretches nicely when it is noticed that the transition between the second and third waves was really no succession at all: equity and adequacy have proven to be related concepts, and many prominent contemporary cases rely upon state constitutional guarantees both of

5. See Heise, *supra* note 1, at 1174–76.

6. See Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830, 1833 (1999).

7. FREDERICK M. HESS, SPINNING WHEELS: THE POLITICS OF URBAN SCHOOL REFORM 52 (1999); see also, e.g., Melissa Marschall & Paru Shah, *Keeping Policy Churn Off the Agenda: Urban Education and Civic Capacity*, 33 POL’Y STUD. J. 161, 162, 165 (2005) (criticizing policy churn).

8. See, e.g., Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 18–19 (2002) (“Title VI of the Civil Rights Act of 1964 . . . promised to become the source of what I would identify as nothing less than a ‘fourth wave’ of school finance litigation.”); Michael A. Rebell, *Adequacy Litigations: A New Path to Equity?*, in BRINGING EQUITY BACK 291, 292 (Janice Petrovich & Amy Stuart Wells eds., 2005) (“[A]dequacy’ litigations are a harbinger of a new wave of reform initiatives that may merge equity and excellence.”); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 307–10 (1999) (proposing a fourth wave of school-finance litigation in which plaintiffs demand “socioeconomic or racial integration” and/or school choice); Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 519 (1995) (noting that equity based on student outcomes is a potential criterion for a “fourth wave of school finance reform litigation”); Sarah S. Erving, Note, *New York’s Education Finance Litigation and the Title VI Wave: An Analysis of Campaign for Fiscal Equity v. State*, 10 J.L. & POL’Y 271, 312 (2001) (arguing that statutory claims based upon Title VI will create “solid precedent upon which the fourth wave can be built”); Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts’ Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867, 1896–1902 (1998) (suggesting that *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996), is a harbinger of a fourth wave).

equal protection and of educational adequacy.⁹ The role of state equal protection arguments in such cases can be thought of as an undertow, the receding remnants of the second wave mixing with the onrushing third.¹⁰

Notwithstanding all its virtues, however, the wave metaphor has outlived its usefulness and should be laid to rest. The future, and perhaps the repair, of substandard public schools no longer depend upon specifying the substantive features of the constitutional right to education. This is because policy actors—states, the federal government, and other groups—have recast the constitutional problem of deficient schooling as one of government structure rather than of individual rights. In particular, they have undertaken to weaken, and even undermine, the school district, which for decades enjoyed unassailable status as the leading institution of school governance and as a monopoly provider of public education. Many district powers have been redistributed to a range of other public and private institutions. Those powers that remain, moreover, have been made contingent. Several reforms usually analyzed separately—including state accountability regimes, the Federal No Child Left Behind Act,¹¹ school choice, and mayoral control of schools—have collectively forced school districts to exercise those powers they retain in ways that further the policy agendas of external actors rather than in accordance with their own preferences.

This is a new structural paradigm for education governance, and it alters not only the way that schools are governed but the constraints that will shape further education reform in the future. After arguing in Part I that the shift is genuine, dramatic, and momentous, I ask two questions: How can this structural change be accounted for? And what are its likely implications? In Part II, I argue that in some important part the recasting of the role of the school district was spurred by school-finance litigation, and particularly by the third-wave cases. The school-finance cases have not, as some commentators have argued, simply been “disentrenching,” openendedly forcing states to abandon policies of inaction and to take

9. See James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL'Y REV. 463, 465–68 (2004) (noting this phenomenon in the context of the “wave metaphor and its limits”); *infra* notes 204–08 and accompanying text.

10. See Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, 1710 (2005).

11. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–6578 (Supp. II 2002).

responsibility for education.¹² The announced doctrine of the third wave pushed state governments to identify any constitutional deficiencies in their schools with the structural primacy of school districts, and to reduce that primacy accordingly. I argue further that states were helped in making this identification by the contemporaneous rise of school choice advocacy, which gave currency and support to the idea that the failings of public schools are rooted in their mode of governance.

Part III assesses the implications of structural reform for the realization of education rights. I focus on three institutions threatened by the transition from school district primacy to educational polyarchy: the local leadership of urban school districts, the state courts, and suburbanites. Interests that wield disproportionate power over urban school district management, especially teachers' unions, will naturally find that attacks on the district as an institution reduce their influence. Less straightforwardly, structural change reduces the ability of courts to further influence the course of school reform. When power was concentrated in school districts, at least there was a locus for a remedial order. In a polyarchic distribution of power among districts, mayors, state departments of education, federal bureaucrats, charter schools, and parents choosing schools in markets, even the address for school reform is unclear, and the nature of potential remedies even less so. Finally, I argue that the ascension of polyarchy has begun slowly to erode the power of suburban interests that have long dominated education politics.

State courts' endorsement of the third-wave claim that children are guaranteed an adequate public education has not led to substantial amelioration of the gross inadequacies that many American students face. But its result has been nonetheless momentous: it has catalyzed a new set of governmental arrangements for schools that have supplanted school districts' place as the single, pivotal focus of any hope for fixing schools' problems. In this new structure, with its new distribution of power, lies the future of school reform. The third wave is the last not because school reform is no longer urgent but because it no longer depends on further

12. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 191–92 (2003) (“[T]he courts seem to have stumbled upon a way to realize their virtues as disentrenching institutions, exposing encrusted inequalities through public and constitutional scrutiny, without, however, directly administering the positive reforms that they have proved unable to command successfully.”).

refinements of judicial understandings of precisely what the right to education guarantees. Instead the problem becomes how to effect educational improvement in a new environment of district contingency and wide distribution of authority and influence.

I. A PAROXYSM IN THE ADMINISTRATIVE STATE OF SCHOOLING

Public primary and secondary schools cost approximately \$390 billion in 2001, "more than defense and not too much less than Social Security."¹³ As the comparison to defense and Social Security brings to mind, government undertakings of such magnitude perforce generate enormous bureaucracies; and with substantial bureaucracy invariably comes the basic question of how to organize all that government.

In the case of schools, this question had been settled in American public education for many decades. The primary administrative, bureaucratic, policymaking, and legal unit was the local school district. Backstopping district activities were the states, which provided funding, coordinated district activities, and made policy in defined areas like textbook selection, but which otherwise were districts' junior partners. In addition, beginning in the mid-1960s, the federal government began to target special funding at the education of poor and disabled children, and, through its courts and later its Department of Justice, fitfully to enforce a policy against school segregation. Otherwise Washington left school districts more or less alone.¹⁴

No longer. This district-centered organizational paradigm is imploding. Although the nation's roughly 15,000 school districts continue to play a vital role in education governance, their autonomy and their primacy have both been sharply eroded. New legislation has arrogated numerous powers that were once assigned to districts to agencies at the state, federal, and school levels, constraining district flexibility and ratcheting up their accountability. Other legislation has required districts to compete for students and funds with ever-increasing numbers of charter schools and sometimes with private schools as well. Even the corporate identity of districts has been rendered tenuous. Districts deemed inadequate are now subject to consolidation with their neighbors or, more commonly, to disestablishment, whereby their local leadership is discharged and

13. JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 20 (2003).

14. See *infra* notes 47–51 and accompanying text.

their duties assumed by the states or their designates.¹⁵ In several troubled urban districts, state legislatures have replaced the state-district structure wholesale, shifting responsibility for school operations and management to the urban mayorality.¹⁶

In short, the school district is no longer what it was. Once stable, central, and in control, today it finds its powers eroding, its monopoly terminated, and its very jurisdiction contingent. In view of both the magnitude of the public education enterprise in dollars and its importance to the replication of civil society, the shift is particularly striking. As the balance of this Part demonstrates, it is no exaggeration to describe the changes in school governance over the past few decades, taken together, as portending a shift of "constitutional moment."¹⁷

A. *The Layer-Cake Model*

American education begins with localities. Local control of schools is a nationwide and longstanding American practice.¹⁸ In the colonial period education was profoundly local, growing from the ground up into a system of neighborhood schools and coalescing only slowly into what contemporary observers would recognize as public school districts.¹⁹ Although early state constitutions asserted state

15. See *infra* notes 80–87 and accompanying text.

16. See *infra* notes 135–41 and accompanying text.

17. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1055 (1984). Like the New Deal, the contemporary education realignment involves "a sustained period of extraordinary institutional conflict" that may, in the end, "contribute to the legitimacy accorded to the final constitutional resolution." *Id.* at 1053 (citing CHARLES BLACK, *THE PEOPLE AND THE COURT* 56–67 (1960)).

18. Hawaii is often cited as an exception to this "universal" pattern, since, unlike any other state, it has a single statewide school district that operates and finances all schools. E.g., David K. Cohen & James P. Spillane, *Policy and Practice: The Relations Between Governance and Instruction*, in *DESIGNING COHERENT EDUCATION POLICY: IMPROVING THE SYSTEM* 35, 38–39 (Susan H. Fuhrman ed., 1993). However, Hawaii's decision to adopt a single-district system is administrative. The Hawaii Code authorizes the state education department to create school districts at its discretion. HAW. REV. STAT. § 302A-1142 (Supp. 2004). Hawaii does decentralize some administrative responsibility, not including school finance, to local subdivisions of its one district. See EDGAR L. MORPHET ET AL., *EDUCATION ORGANIZATION AND ADMINISTRATION: CONCEPTS, PRACTICES, AND ISSUES* 237 n.1 (4th ed. 1982). The current Governor of Hawaii, Linda Lingle, "has tried unsuccessfully throughout her term to break up Hawaii's single, 181,000-student school system into smaller districts with locally elected boards." Linda Jacobson, *Hawaii Moves Forward with New School Finance Formula*, EDUC. WK., Nov. 30, 2005, at 24.

19. See CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860*, at 13 (1983); Michael Kirst, *A History of American School Governance*, in *WHO'S IN CHARGE HERE? THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY* 14, 18 (Noel Epstein ed., 2004).

power over education and a state duty to provide it,²⁰ that nominal assignment of power assumed that education would continue to be organized and administered by preexisting local school districts.²¹ This assumption was borne out.²² In later entrants to the union, local districts quickly displaced more centralized structures as the governmental institution of choice.²³ Through much of American history—until quite recently—the primacy of local school districts was not only sustained but strengthened.²⁴

Contemporary state education codes continue to reflect a broad delegation of power to districts. The Texas Code is fairly typical, stating that “[t]he school districts . . . created in accordance with the laws of this state have the primary responsibility for implementing the state’s system of public education.”²⁵ States’ sweeping grants of authority to districts generally include power to tax (a power primarily exercised through the property tax); to budget and to spend; to hire and to fire, powers especially important vis-à-vis the appointment of the district superintendent and the conduct of collective bargaining with teachers; to set curricula; and to establish general policies for the conduct of all aspects of the educational program.²⁶ Arkansas, to take another typical state, catalogues the duties of a local school board at length: to keep school grounds in good repair; to hire and fire; to prescribe curricula; to establish budgets; to receive, disburse, and manage funds; and to incur debt.²⁷

Nor should enumerations of particular school district powers obscure the general. A contemporary handbook for school district personnel summarizes the duties of the school board as creating a “sufficient number of policies to provide a map for directing activity in the school or district.”²⁸ Legislative catch-all provisions grant to

20. See ROSEMARY C. SALOMONE, VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION 13–14 (2000).

21. See MORPHET ET AL., *supra* note 18, at 238.

22. See KAESTLE, *supra* note 19, at 22 (“The notion of a state system of education—that is, of a central authority with coercive power to establish, finance, and regulate schools—did not gain much ground in the early national period.”).

23. See *id.* at 112.

24. See MORPHET ET AL., *supra* note 18, at 238–39. Indeed, in many communities the traditional school district is properly described as “the central public institution in the local community.” GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION 2 (1969).

25. TEX. EDUC. CODE ANN. § 11.002 (Vernon 1996).

26. MORPHET ET AL., *supra* note 18, at 248–49.

27. ARK. CODE ANN. § 6-13-620 (Supp. 2005).

28. PATRICIA C. CONRAN, SCHOOL SUPERINTENDENT’S COMPLETE HANDBOOK 3 (1989).

the school board and the superintendent it selects the power to lead the district, exercising control over the district's policy agenda and priorities. Thus Arkansas's extensive list of delegated powers is supplemented by several general provisions: the board is to "[v]isit classrooms frequently, but no less than annually, in the schools in their district while the children are present, see to the welfare of the pupils, encourage them in their studies, and assist the teachers in the work so far as they can" and to "[d]o all other things necessary and lawful for the conduct of efficient free public schools in the district."²⁹ Similar provisions to Arkansas's are in place in other states.³⁰ These general powers are overtly "political": districts make decisions on allocating goods and services in ways that necessitate choices among individuals, groups, and values.³¹ This is consistent with the dominant practice of determining school board membership by local election.

The characterization of states as junior partners to local districts can appear inconsistent with the source of districts' capacious district powers, namely the state codes. What powers the state gives, one might think, it may take away. This is a straightforward application of the foundational principle of local government law that local governments lack sovereign power; rather they are mere "creature[s] of the state," permitted to exercise only such authority as the state specifically delegates to them, and subject to establishment, restriction, and abolition at state discretion.³² School districts are

29. ARK. CODE ANN. § 6-13-620.

30. *E.g.*, ARIZ. REV. STAT. ANN. § 15-341 (Supp. 2005) (designating various board responsibilities, including managing and controlling school property, disciplining students, and prescribing curricula and criteria for the promotion and graduation of pupils, and also authorizing the board to "[p]rescribe and enforce policies and procedures for the governance of the schools, not inconsistent with law or rules prescribed by the state board of education"); FLA. STAT. ANN. § 1001.43 (West 2004) (categorizing board's duties into twelve categories such as fiscal management, student management, facilities management, and personnel); N.Y. EDUC. LAW § 1709 (McKinney Supp. 2005) (outlining the board's duties down to the amount of milk that must be provided for students, followed by a catch-all provision: "To have in all respects the superintendence, management and control of the education affairs of the district, and, therefore, [to] have all the powers reasonably necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes").

31. See LAURENCE IANNA CONNE & FRANK W. LUTZ, *POLITICS, POWER AND POLICY: THE GOVERNING OF LOCAL SCHOOL DISTRICTS* 12 (1970).

32. Richard Briffault, *The Local School District in American Law*, in *BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS* 24, 28 (William Howe ed., 2005) ("As a local government, a school district is a creature of the state."); see also JOHN F. DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* § 55, at 173 (1872) (setting out "Dillon's Rule" that local governments enjoy only those powers either expressly granted by the states, "those necessarily or fairly implied in, or incident to, the powers expressly granted," and "those essential to the declared objects and purposes of the

quintessential local governments of this kind—more so than general local governments, for which home rule³³ and other constitutional or legislative provisions³⁴ can provide a certain independence.³⁵ The independence of school districts has no parallel constitutional foundation.³⁶ Nor is it implied by state education codes, which explicitly assert states' ability to delineate the borders and powers of school districts.³⁷

Much more important than the latent power of the state to refrain from delegating power or to withdraw power from districts, however, is states' policy of delegation in fact.³⁸ In 1978 Professor Frederick Wirt wrote that although "state government . . . exercises complete legal authority over all local governments, including schools, . . . for ideological reasons, the state has done little with its formal power."³⁹ Indeed, states rely so heavily upon districts for

corporation—not simply convenient, but indispensable"); HAROLD M. HYMAN, A MORE PERFECT UNION 232 (1975) (noting that Dillon's treatise is still in general use fifty years after its publication); DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 13 (2001) (noting contemporary vitality of Dillon's Rule).

33. See KRANE ET AL., *supra* note 32, at 476–77 tbl.A1.

34. See *id.* at 15–16. See generally DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES 70–76 (2003) (arguing that home rule provisions seek to "create an *imperium in imperio* for municipalities by making them a state within a state and to construct a strict division between state and local powers comparable to the notion of dual federalism," but that nevertheless home rule doctrine is applied to raise "few practical barriers to state intervention into what one might consider local affairs").

35. See Briffault, *supra* note 32, at 31–32 (arguing that in contrast to general local governments, which sometimes enjoy home rule authority, Dillon's Rule is strictly applied to school districts).

36. See *id.* at 41; Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 733, 779–80 (1992). A few state constitutions mention school districts, which may suggest that districts must exist in some form. *E.g.*, ME. CONST. art. VIII, pt.1, § 1 ("The Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools . . ."); OHIO CONST. art. VI, § 3 (referring to "each school district embraced wholly or in part within any city").

37. See, *e.g.*, CAL. EDUC. CODE §§ 2601, 3550 (West Supp. 2005) (setting out limitations on the ability of county officials to alter school district boundaries or recognize districts); CONN. GEN. STAT. § 10-241 (West 2002 & Supp. 2005) (listing the "[p]owers of school districts"); FLA. STAT. ANN. § 1001.42 (West 2004 & Supp. 2005) (listing powers and duties of "district school board[s]"); N.Y. EDUC. LAW § 1525 (McKinney 2000) (reserving final authority to alter school district boundaries to the state commissioner of education); *accord, e.g.*, Sheff v. O'Neill, 678 A.2d 1267, 1273 (Conn. 1996) ("[D]irectly or indirectly, the state has always controlled public elementary and secondary education.").

38. See Briffault, *supra* note 36, at 781–85 ("[L]ocal control is state policy.").

39. Frederick M. Wirt, *What State Laws Say About Local Control*, PHI DELTA KAPPAN, Apr. 1978, at 517, 517. In hindsight, scholars can trace the beginnings of the erosion of district power to the middle of the last century, although that erosion has accelerated only recently. See, *e.g.*, DOUGLAS M. ABRAMS, CONFLICT, COMPETITION, OR COOPERATION? DILEMMAS OF STATE EDUCATION POLICYMAKING 18 (1993) (noting

service provision, policymaking, and the raising of funds that it is hard to imagine how states could abandon their policy of delegation. To delocalize education would mean to create a very large state bureaucracy to perform multitudinous functions with which states are unfamiliar and for which they are ill-suited. It would demand that states reconceptualize their tax system, and dramatically raise state tax rates.⁴⁰ It would also invite direct conflict with those interest groups whom educational localism strongly favors. Professor James Ryan and others have argued extensively and persuasively that the primary beneficiaries of educational localism are relatively prosperous suburbanites.⁴¹ For those wealthy enough to choose among suburban residences, educational localism provides a method for realizing the Tieboutian benefits of segregation by wealth and taste for education;⁴² the concomitant ability to wall themselves off

that as early as the 1960s, "state education agencies and their administrators [began] playing a more visible and influential role in their interactions with local school districts," although "[t]he local superintendent and school board remained the senior partner"; David Tyack, *Forgotten Players: How Local School Districts Shaped American Education*, in *SCHOOL DISTRICTS AND INSTRUCTIONAL RENEWAL* 9, 10 (Amy M. Hightower et al. eds., 2002) ("Since the 1950s, local school districts and their boards have faced continuing erosion of their powers.").

40. See John Yinger, *State Aid and the Pursuit of Educational Equity: An Overview*, in *HELPING CHILDREN LEFT BEHIND: STATE AID AND THE PURSUIT OF EDUCATIONAL EQUITY* 22–25 (John Yinger ed., 2004). A few states, under pressure from their courts, delocalized school taxes even as they retained other aspects of localism. Michigan repealed its existing local property tax in 1993, and in 1994 voters approved a constitutional amendment replacing it with a sales tax system. See Michael F. Addonizio et al., *Blowing Up the System: Some Fiscal and Legal Perspectives on Michigan's School Finance Reform*, 107 EDUC. L. REP. 15, 16–18 (1996). In the majority of Michigan districts the result was that the state, not the district, set per-pupil spending; some districts were allowed to supplement funds subject to state caps. See Paul N. Courant & Susanna Loeb, *Centralization of School Finance in Michigan*, 16 J. POL'Y ANALYSIS & MGMT. 114, 114–19 (1997). Kansas and Wyoming have also effectively eliminated their local property tax systems. See KAN. STAT. ANN. § 72-6431 (LEXIS through 2005 legislation); WYO. STAT. ANN. § 21-13 (2003); see also Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. U. L.Q. 755, 809 (2004) (analyzing these provisions). Washington has established a statewide retail sales tax augmented by property taxes and other state revenues to generate approximately seventy-five percent of school district fund revenue. See *id.*; Sch. Apportionment & Fin. Servs., Office of Superintendent of Pub. Instruction, *Washington School Finance Primer 3* (Sept. 1999), available at <http://www.k12.wa.us/safs/PUB/PRI/primer99.pdf>.

41. See James E. Ryan, Brown, *School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635, 1646 (2004); accord, e.g., Maurice R. Dyson, *Playing Games with Equality: A Game Theoretic Critique of Educational Sanctions, Remedies, and Strategic Noncompliance*, 77 TEMP. L. REV. 577, 579–81 (2004); Peter D. Enrich, *Race and Money, Courts and Schools: Tentative Lessons from Connecticut*, 36 IND. L. REV. 523, 532–50 (2003); Reynolds, *supra* note 40, at 809.

42. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

from responsibility, both fiscal and political, for less fortunate school systems;⁴³ and a way to capitalize their tax investments in public school into privately held home values.⁴⁴ Urban school districts also generate strong constituencies for localism; although local control of these generally larger, poorer, and more heterogeneous districts does not offer urban residents the same deal available to citizens in small, tight, rich, suburban districts, localism in the urban setting does provide political power and control over remunerative jobs and budgetary resources to groups otherwise without much of either.⁴⁵ In light of all these considerations, the state power to abandon educational localism is not just latent but nominal: states could do it in theory, but not in practice.⁴⁶

Federal interest in schools was, until recently, limited to particular questions of education policy rather than schools' general management. The United States Supreme Court has repeatedly and controversially decided the scope of in-school expressive and religious freedom, but these issues are at the periphery of school districts' and states' academic and pedagogical responsibilities; indeed, "the more a particular policy has to do with academic function of schools, the more likely it is that the Court will uphold the policy, even if it means truncating a constitutional right."⁴⁷ Numerous early proposals for federal aid to schools failed,⁴⁸ and those that passed carefully avoided

43. See DOUGLAS REED, *ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY* 128 (2001).

44. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE AND LAND-USE POLICIES* 39-97 (2001).

45. See Saiger, *supra* note 10, at 1665-70.

46. See *id.* at 1662-64.

47. James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1340 (2000). Ryan argues that the Court has been willing to intervene when access to schools is at issue but hesitant to interfere in matters involving the educational process within schools, because regulatory decisions concerning access "do not themselves involve academic considerations, but rather social considerations of who deserves to receive public education." *Id.* at 1420-22. Salomone approaches these cases somewhat differently, concluding that speech and access cases do indeed have major academic and pedagogical implications; she calls the United States Supreme Court a "schoolmaster" and argues that it "has established standards that profoundly affect the structure and substance of schooling"—even as it "has failed to develop a coherent and stable theory of schooling." SALOMONE, *supra* note 20, at 75-76. Erwin Chemerinsky reads recent Supreme Court cases to support an across-the-board policy of deference to the discretion of local school administrators that varies relatively little with the policy arena. Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 112, 124-27 (2004).

48. See KEVIN R. KOSAR, *FAILING GRADES: THE FEDERAL POLITICS OF EDUCATION STANDARDS* 79-81 (2005).

intruding upon local prerogatives.⁴⁹ Deference to localism persisted even as federal funding was targeted to disabled and poor students.⁵⁰ Indeed, in one respect, Federal Title I aid actually increases district power. Because states must distribute funds to districts according to complex federal algorithms, rather than at their own discretion, the program gives districts access to two separate, independent flows of intergovernmental transfer payments, one from the state and one from Washington.⁵¹

Much more intrusive has been federal administrative and judicial regulation in the areas of disability⁵² and desegregation.⁵³ With special education costs now exceeding twenty percent of some districts' total expenditures,⁵⁴ and with districts spending years under

49. See ORFIELD, *supra* note 24, at 8, 14.

50. See TASK FORCE ON NO CHILD LEFT BEHIND, NAT'L CONFERENCE OF STATE LEGISLATURES, FINAL REPORT 5 (2005), available at http://www.ncsl.org/programs/educ/nclb_report.htm.

51. See MARTHA DERTHICK, KEEPING THE COMPOUND REPUBLIC 27 (2001) (noting that, unlike federal grants for welfare and highways, federal education grants did not clearly enhance state power at localities' expense, and in particular that certain Title I grants "administered directly to local districts . . . were conceived of in Washington as a means to outflank the state educational agencies, which were presumed to be stagnant and conservative"); John F. Jennings, *Title I: Its Legislative History and Its Promise*, in TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS 1, 5 (Geoffrey D. Borman et al. eds., 2001) (stating that the legislative purpose of Title I was "to provide financial assistance to school districts serving concentrations of poor children"); 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 EQUITY 88, 94 (Jay Heubert ed., 1999); Michael Janofsky, *Federal Spending Increases, but More Schools Will Get Less Money for Low-Income Students*, N.Y. TIMES, July 4, 2005, at A9 (summarizing impacts of recent changes in federal rules for distributing Title I aid).

52. The Individuals with Disabilities Education Act requires states to provide disabled children with a "free appropriate public education." 20 U.S.C. §§ 1400(d)(1)(A), 1401(8) (2000).

53. See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430, 437–38 (1968) (holding that a school district that had maintained schools that were de jure racially discriminatory bore an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"). Michael Kirst dates a national erosion in "confidence in local school boards and administrators" to *Brown v. Board of Education*, 347 U.S. 483 (1954). See Kirst, *supra* note 19, at 22.

54. See, e.g., Brenda J. Buote, *Special Needs Expense Mounts*, BOSTON GLOBE, Aug. 1, 2004, at Globe North 1 (reporting that six Boston-area school districts allocated more than twenty percent of their total budgets to special education in 2002–03); Editorial, *D.C.'s Special Special-Ed Crisis*, WASH. TIMES, Feb. 28, 2005, at A20 (noting that thirty-nine percent of fiscal year 2006 school budget in Washington, D.C. will go to special education); James Fuller, *Full-Day Kindergarten Growing in Popularity*, CHI. DAILY HERALD, Apr. 5, 2004, at 1 (reporting that at least twenty percent of the budget of the Prospect Heights, Illinois Elementary School District consistently goes to special education).

desegregation orders that subject the most minute details of their spending and administration to the supervision of federal judges,⁵⁵ it cannot be said that these federal incursions into state and local authority are de minimis. Indeed, school desegregation and the Individuals with Disabilities Education Act ("IDEA")⁵⁶ are in an important sense harbingers of the more ambitious, recent federal intrusions into district power discussed below. At the same time, these federal initiatives were consciously limited to providing equality of educational opportunity to outsider groups of students who might otherwise be ignored by districts and states. In that sense, Washington's traditional involvement in schooling was marginal; the federal government's focus was minority student populations, and it was satisfied to leave everything else to the vagaries of majority-ruled political institutions.⁵⁷ Even when dealing with minority rights, moreover, when cases involved a direct challenge to educational localism, the Court repeatedly "confronted the bedrock of localism and drew back."⁵⁸

The closest analogue in American politics to the system here described is dual federalism, which political scientists also call "layer-cake federalism."⁵⁹ Operationally, dual federalism is an arrangement whereby multiple, hierarchically organized governments share sovereignty over a given area, but in which each operates within its own, well-defined sphere.⁶⁰ Dual federalism has been largely

55. See REED, *supra* note 43, at 129; see also, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 78-79 (1995) (describing a particularly "ambitious and expensive" court-ordered remedial program).

56. 20 U.S.C. §§ 1400-1487.

57. In Orfield's perspicacious description, "[t]he 1964 Civil Rights Act made the central government responsible for active protection of certain Negro rights, even while the generally passive relationship with local authority in other fields was to continue." ORFIELD, *supra* note 24, at 311.

58. DERTHICK, *supra* note 51, at 24. The Court has held repeatedly that states' delegation of authority and power to school districts is a practice with a history, pedigree, and practical importance so substantial as to limit the scope of potential remedies for what are arguably federal constitutional violations. See *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

59. See MORTON GRODZINS, *THE AMERICAN SYSTEM* 60-80 (1966); DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARDS WASHINGTON* 23 (1995).

60. For this purpose I adopt the "operational version of dual federalism," rather than a version grounded in constitutional theory. See WALKER, *supra* note 59, at 23-34 (describing an "operational version of dual federalism"); cf. WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 11 (1964) (discussing an operationalized version of federalism generally). Schooling is unlike the federalism of the American states in that it has no constitutional version: while dual federalism is based in the U.S. Constitution as well as in government practice, see JEFFREY R. HENIG, *PUBLIC*

debunked as an inadequate description of general American governmental practice by political scientists who emphasize the interpenetration of various levels of government across a very wide range of government activities.⁶¹ But American schooling was long an exception to this pattern; instead it long retained the genuinely, though not absolutely, dual character that once described much of state and local government.⁶² The traditional system of educational governance continued to be characterized by a hierarchy clear in theory and somewhat blurred in practice; by substantial implementation power assigned to the bottom layer; and by important but quite restricted arenas in which an individual or group dissatisfied by the decision of one layer might find recourse by appeal to another.⁶³ De jure, the state may have been the boss, and appeals to its supremacy from those unhappy with their districts could occasionally succeed; but de facto, the street-level bureaucrats working for the district ran the show.

B. No More Layers

Recent events have taken a mixmaster to the orderly layer cake of school governance. Although the layers remain identifiable, school government is starting to look more like the rest of American local government: "[T]he functions of government are not in neat layers. Rather, they are all mixed up: marbled, to use the baker's term. And in no neat order: chaotic, to use the reformer's term."⁶⁴

POLICY AND FEDERALISM: ISSUES IN STATE AND LOCAL POLITICS 14-15 (1985), the "federal" structure of states and districts exists independent of, indeed in spite of, written state constitutions, which grant plenary power to states and render districts legally contingent. But as a matter of positive political science, federalism need not be constitutionalized. See BERMAN, *supra* note 34, at 5 (quoting Harvey C. Mansfield's statement that the institutions of state and local politics "make state-local relations usually in fact federal, whatever the theoretical plentitude of state powers") (citing Harvey C. Mansfield, *Functions of State and Local Governments*, in *THE 50 STATES AND THEIR LOCAL GOVERNMENTS* 108 (James W. Fester ed., 1967)); *supra* notes 32-37 and accompanying text.

61. See RIKER, *supra* note 60, at 10.

62. See DERTHICK, *supra* note 51, at 45 ("Historically, then, the states did not actually do very much. Having created a framework of law within which local governments functioned, they did not closely supervise its application."); cf. *id.* at 13-17 (discussing historical changes in localism generally). In the context of education, one might describe the role played by Washington as a third, thin layer, perhaps the icing on the layer cake.

63. See generally THOMAS J. ANTON, *AMERICAN FEDERALISM AND PUBLIC POLICY: HOW THE SYSTEM WORKS* (1989) (describing interrelationships between different actors in the federal system).

64. RIKER, *supra* note 60, at 10. Riker, followed by many others, identifies this as a "marble cake" model.

1. The New Accountability

The first dramatic change, in the 1980s, was a new education activism in state capitals. Pushed in several instances by state courts, legislatures and governors found themselves providing an increasingly large share of a growing education budget.⁶⁵ Where prior to 1930 states provided twenty percent of all school funds to districts' eighty percent,⁶⁶ state spending for schools surpassed local spending in the mid-1970s.⁶⁷ In 2002–03 states provided 48.7% of all school funds while districts provided 42.8%.⁶⁸ With states' growing financial stakes came renewed interest in controlling the use of state monies,⁶⁹ and a period of "unprecedented [state] legislative activity" began.⁷⁰ The quantity and scope of state legislative and administrative rules governing school district activity exploded.⁷¹ Areas for new initiatives and regulation included "increased high school graduation requirements, more student testing, changes in teacher certification and compensation[,] . . . new ways of assessing student performance, and efforts to encourage school-based innovation."⁷² In some states, the initiatives in this last group also included school-based management ("SBM"), which devolves budgeting, purchasing, and policy decisions once held at the district level to building principals.⁷³

65. See Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789, 790 (1998) ("We find court-mandated reform of school-finance systems reduces within-state inequality in spending by 19 to 34 percent In aggregate, nearly all additional funds came from state sources."). Nationwide, spending per pupil increased fifty-three percent from 1972 to 1992, from \$3,642 to \$5,576. *Id.* at 799.

66. John Meyer et al., *Centralization, Fragmentation, and School District Complexity*, 32 ADMIN. SCI. Q. 186, 186 (1987) (citing Denis P. Doyle & Chester E. Finn, Jr., *American Schools and the Future of Local Control*, 77 PUB. INT. 77 (1984)).

67. DERTHICK, *supra* note 51, at 27.

68. JASON HILL & FRANK JOHNSON, U.S. DEP'T OF EDUC., REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2002–03, 5 fig.1 (2005), available at <http://nces.ed.gov/pubs2005/2005353.pdf>.

69. See BERMAN, *supra* note 34, at 33.

70. Susan H. Fuhrman, *Legislatures and Education Policy*, in THE GOVERNANCE OF CURRICULUM 30, 31 (Richard F. Elmore & Susan H. Fuhrman eds., 1994).

71. See Briffault, *supra* note 32, at 30–35.

72. Susan H. Fuhrman & Richard F. Elmore, *Governors and Education Policy in the 1990s*, in THE GOVERNANCE OF CURRICULUM, *supra* note 70, at 56, 57.

73. See generally James M. Ferris, *School-Based Decision Making: A Principal-Agent Perspective*, 14 EDUC. EVALUATION & POL'Y ANALYSIS 333 (1992); E. Mark Hanson, *School-Based Management and Educational Reform in the United States and Spain*, 34 COMP. EDUC. REV. 523 (1990); Priscilla Wohlstetter & Susan Albers Mohrman, *School-Based Management: Promise and Process*, CPRE FIN. BRIEFS (Consortium for Policy Research in Educ. Fin. Ctr., Madison, Wis.), Dec. 1994, available at <http://www.cpre.org/Publications/fb05.pdf>.

SBM is noteworthy because while in one aspect its decentralized approach opposes the centralizing trend, in another light the policy shares with centralizing initiatives a state decision to reassign to other actors responsibilities that had belonged to districts.

As important as the substance of state forays into what had traditionally been areas of local authority was a view in the states that these steps were necessitated by failure at the local level. Professor Susan Fuhrman, for example, complained that states' new activism was confrontational rather than collaborative, many legislators having concluded that "local educators would not improve in the absence of stringent state standards and severe sanctions."⁷⁴ Fuhrman concluded that prospects for her preferred approach, few-strings-attached state aid to local districts based upon "trust," were dim.⁷⁵

Fuhrman was right. By the mid-1990s, the dominant mood in the states was that it was time to get tough with local districts that would not or could not perform.⁷⁶ Most states adopted programs that required districts to meet or exceed floors for standardized test scores, attendance rates, graduation rates, and other indicators.⁷⁷ Under these programs, which came collectively to be known under the rubric of the "New Accountability," failure is accompanied by requirements for reorganization and technical assistance, and repeated failure by an escalating series of sanctions.⁷⁸ Such sanctions limit district autonomy quite onerously. For example, several New Accountability statutes permit the "reconstitution" of inadequate schools, requiring the district to dismiss and replace the faculty and staff of schools whose performance is found to be inadequate.⁷⁹

74. Fuhrman, *supra* note 70, at 44.

75. *See id.* at 45.

76. *See* Saiger, *supra* note 10, at 1674–75.

77. *See* Amy Stuart Wells, *Introduction* to WHERE CHARTER SCHOOL POLICY FAILS 1, 4–5 (Amy Stuart Wells ed., 2002); Saiger, *supra* note 10, at 1675 & n.70; *cf.* Herbert J. Walberg, *Real Accountability*, in OUR SCHOOLS AND OUR FUTURE: ARE WE STILL AT RISK? 305, 306–17 (Paul E. Peterson ed., 2003) (surveying provisions of state accountability programs that regulate curriculum and testing).

78. *See* Saiger, *supra* note 10, at 1656–58 nn.2–4, 1674–76.

79. *See* ARK. CODE ANN. § 6-15-430(a)(5) (Supp. 2003) (authorizing the State Board of Education to require the reconstitution of a school district in academic distress); GA. CODE ANN. § 20-14-41(a)(4) (Supp. 2004) (authorizing "complete reconstitution" of any school that "has received an unacceptable rating for a period of three consecutive years or more"); 105 ILL. COMP. STAT. ANN. 5/34-8.3(d) (Supp. 2005) (authorizing the dismissal of the principal, faculty, and other personnel of a nonperforming school after a probationary period); MD. CODE ANN., EDUC. § 4-309 (2004) (outlining the local school administration's role in Baltimore City for aiding schools put on reconstitution notice); MICH. COMP. LAWS § 380.528 (Supp. 2005) (authorizing reconstitution of urban high school academies, defined as public schools under Michigan's constitution, if the academy

New Accountability sanctions also directly take on the very institution of district governance. Since 1989, nearly half the states have, under their New Accountability rules, disestablished, or “taken over,” at least one school district that has failed to perform under a New Accountability program.⁸⁰ Disestablishment takes reconstitution one step further: it involves a state’s dismissal of local district leadership deemed corrupt or incompetent and replacing it with state officials or their designees.⁸¹ Disestablishment sanctions continue to be used actively.⁸²

A variant of this policy with similar effects is school district consolidation. States, while respecting the institution of the school district and its traditional authority, have long engaged in merging neighboring school districts, a process that reduced the number of districts nationwide from 117,108 in 1940 to 15,367 in 1992.⁸³ Only a few of these consolidations were demanded by federal courts in the context of desegregation decrees;⁸⁴ most were orthogonal both to

fails to meet educational goals established under contract); R.I. GEN. LAWS § 16-7.1-5 (Supp. 2004) (granting Board of Regents authority to restructure schools’ governance, budget, program, and personnel); cf. MISS. CODE ANN. § 37-17-6(14)(a)(i) (Supp. 2004) (giving an appointed conservator assigned to a school failing to meet accreditation standards the authority to terminate, deny renewal, or reassign any certified or noncertified personnel within a district); NEV. REV. STAT. § 385.3773(1)(c) (LexisNexis Supp. 2002) (authorizing dismissal of district employees identified as having contributed to a school’s failure); WYO. STAT. ANN. § 21-2-304(a)(vi)(D) (Supp. 2004) (“Teacher and administrator quality and student remediation are the focus of consequences imposed upon schools failing to meet school improvement and performance criteria and target levels.”).

80. More than fifty districts have been disestablished as a sanction for poor performance since 1989. See BERMAN, *supra* note 34, at 121; Saiger, *supra* note 10, at 1689 & n.137.

81. See Saiger, *supra* note 10, at 1674.

82. For a disestablishment since the publication of the last compilation, referenced in note 80, see David J. Hoff, *Texas Chief Ousts Troubled District’s Elected Board*, EDUC. WK., May 18, 2005, at 3 (reporting that an elected board of education and appointed superintendent in Wilmer-Hutchins, Texas were “deposed” by the state Commissioner of Education and replaced with her own appointees because of “financial and academic problems”).

83. See Kathleen Cotton, *School Size, School Climate, and Student Performance* (May 1996), <http://www.nwrel.org/scpd/sirs/10/c020.html>. The consolidation trend lost steam in the 1970s; by 1977 there were already fewer than 17,000 districts nationally. See MORPHET ET AL., *supra* note 18, at 241.

84. See, e.g., *Evans v. Buchanan*, 416 F. Supp. 328, 352 (D. Del. 1976); LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 146–59 (1976) (collecting United States Supreme Court decisions in which districts were forced either to split or consolidate in service of desegregation); see also Leland Ware, *Brown’s Uncertain Legacy: High Stakes Testing and the Continuing Achievement Gap*, 35 U. TOL. L. REV. 841, 844 (2004) (citing *Evans* and noting its remedy as unusual).

questions of race and achievement, being justified instead by pedagogical and efficiency concerns.⁸⁵ With the New Accountability, however, consolidation has joined disestablishment as a sanction for nonperformance.⁸⁶

Both disestablishment and consolidation make local control itself contingent upon satisfying the state. Their imposition is thus not only a punishment for districts that have failed to meet state requirements, but also a threat hanging over struggling districts and an incentive for them to improve.⁸⁷

2. No Child Left Behind

With the passage of the Federal No Child Left Behind Act of 2001 (“NCLB” or “the Act”),⁸⁸ federal as well as state law came to incorporate the basic principles of the New Accountability’s assault upon district autonomy. As noted above,⁸⁹ Washington has for decades intervened in school management in order to protect marginalized student populations, most notably racial minorities, the disabled, and to a lesser extent girls and women. Desegregation decrees, the Individuals with Disabilities Education Act,⁹⁰ and Title IX⁹¹ trump districts’ discretion over such core matters as pupil placement, tracking, discipline, and budgets.⁹² Notwithstanding these

85. See BERMAN, *supra* note 34, at 132; MORPHET ET AL., *supra* note 18, at 240–41; Tyack, *supra* note 39, at 15; Wirt, *supra* note 39, at 518.

86. See, e.g., MISS. CODE ANN. § 37-17-13 (1999 & Supp. 2004) (providing that after a school district is abolished due to failure and the failures have been corrected, the state board of education shall reconstitute, reorganize or change the boundaries of the previous district); N.M. STAT. § 22-4-3(c)(3) (2003) (providing that state board can order consolidation if the school district receives a disapproval accreditation status); TEX. EDUC. CODE ANN. § 39.131(a)(10)(A) (Vernon 1996 & Supp. 2004–05) (providing that the state may “annex [a] district to one or more adjoining districts” if the “district has been rated as academically unacceptable for a period of two years or more”); see also David J. Hoff, *Tiny Border District in Texas Ordered by State To Dissolve*, EDUC. WK., May 11, 2005, at 4 (reporting on a district dissolved “by the state because of its poor academic performance and an unsafe facility”).

87. See Saiger, *supra* note 10, at 1677–90.

88. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–6578 (Supp. II 2002).

89. See *supra* notes 47–58 and accompanying text.

90. 20 U.S.C. §§ 1400–1487 (2000 & Supp. 2005).

91. *Id.* § 1681 (prohibiting discrimination “on the basis of sex” in “any educational program or activity receiving Federal financial assistance”).

92. Regarding desegregation, see, for example, *Missouri v. Jenkins*, 515 U.S. 70, 78–79 (1995) (describing budgetary implications of desegregation order); *Ho ex rel. Ho v. San Francisco Unified School District*, 147 F.3d 854, 859 (9th Cir. 1998) (voiding local pupil placement policies because they perpetuate racially identifiable schools); *People Who Care v. Rockford Board of Education*, 851 F. Supp. 905, 912–15 (N.D. Ill. 1994) (same); and *Hobson v. Hansen*, 269 F. Supp. 401, 406–07 (D.D.C. 1967) (voiding a local tracking system because it perpetuates racially identifiable schools).

incursions, NCLB represents a new and unprecedented ratcheting up of federal involvement in the day-to-day affairs of school districts.⁹³ NCLB requires schools and school districts to make “adequate yearly progress” in student performance as measured by standardized tests.⁹⁴ Progress, defined increasingly stringently as time passes,⁹⁵ must be achieved not only for the student population as a whole but also for federally-designated racial and demographic subgroups of students.⁹⁶ For schools that receive federal funds, failure to make progress as defined triggers an escalating series of sanctions; these include not only public designation as a “failing” school or district but such draconian punishments as school reconstitution and district takeover.⁹⁷

This scheme dramatically restricts districts’ freedom both to set policy goals and to select educational methods. Curricular priorities are driven by the content and difficulty of the standardized tests,

Regarding students with disabilities, see, for example, 20 U.S.C. § 1412(a)(5)(A) (Supp. 2005) (requiring districts to place disabled children in mainstream environments “to the maximum extent appropriate”); *Cedar Rapids Community School District v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 76–78 (1999) (describing the budgetary implications of IDEA); UNITED STATES GEN. ACCOUNTING OFFICE, STUDENT DISCIPLINE: INDIVIDUALS WITH DISABILITIES EDUCATION ACT 4–10 (2002), available at <http://www.gao.gov/new.items/d01210.pdf> (noting implications of IDEA for disciplinary policy, but arguing that in actual practice IDEA constrains discipline relatively little); and Lauren Zykorie, *Reauthorizing Discipline for the Disabled Student: Will Congress Create a Better Balance in the Individuals with Disabilities Education Act (IDEA)?*, 3 CONN. PUB. INT. L.J. 101, 150 (2003) (arguing against IDEA’s dual disciplinary system).

Regarding Title IX, see, for example, Barbara Osborne & Clare Duffy, *Title IX, Sexual Harassment, and Policies at NCAA Division IA Athletics Departments*, 15 J. LEGAL ASPECTS OF SPORT 59, 63 (2005) (describing budgetary and disciplinary implications of Title IX); Cynthia Lee A. Pemberton, *Wrestling with Title IX*, 14 MARQ. SPORTS L. REV. 163, 168–69 (2003) (describing additional budgetary implications of Title IX); and Gary J. Simson, *Separate But Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443, 447–48 (2005) (discussing the role of Title IX in the transformation of public single-sex schools into co-educational schools during the 1970s and 1980s).

93. See Patrick McGuinn, *The National Schoolmarm: No Child Left Behind and the New Educational Federalism*, 35 PUBLIUS 41, 59 (2005) (noting state opposition to NCLB as overintrusive, and citing a 2004 resolution of Virginia House of Delegates arguing that NCLB “represents the most sweeping intrusions into state and local control of education in the history of the United States”); *id.* at 66 (concluding that NCLB marks “a significantly transformed and expanded national role in our country’s schools”); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937 (2004) (describing the Act as “remarkably ambitious and unusually intrusive”).

94. 20 U.S.C. § 6311(b)(2) (Supp. II 2002).

95. See *id.* § 6311(b)(2)(H); see also Ryan, *supra* note 93, at 946–47 (noting that states can delay but not foreclose the bite of the average yearly progress requirements).

96. § 6311(b)(3)(C)(xiii).

97. *Id.* § 6316(b); see also Saiger, *supra* note 10, at 1720–21 (cataloging sanctions under NCLB).

which under the NCLB are set by the state, not the district.⁹⁸ And although nominally agnostic about the means by which districts are to achieve average yearly progress, teaching to the test is a predictable response of districts facing high-stakes sanctions. Moreover, NCLB's agnosticism with respect to means is spotty, as evidenced by its requirements that districts having difficulty use only teaching methods "based on scientific research"⁹⁹ and that children be taught by "highly qualified" teachers¹⁰⁰—two provisions that have inspired particular acrimony among educators.¹⁰¹ Finally, NCLB subjects districts not only to pressure from Washington but to additional regulation from state education officials anxious to assure compliance with its terms.¹⁰²

In short, NCLB has greatly constrained districts' behavior as they struggle with its mandates.¹⁰³ That curriculum and teaching have been substantially affected is further evident from the quantity and volume of browbeating about the Act among educators, who have worried publicly and loudly that teaching to state-set standardized tests blights pedagogy, favoring mindless rote learning and drill over higher-order

98. See Ryan, *supra* note 93, at 941–42. Kevin Kosar notes disapprovingly that regulations under the NCLB still allow certain local variations notwithstanding the Act's mandate for consistent statewide standards. See KOSAR, *supra* note 48, at 208–09.

99. § 6316(b)(3)(A).

100. *Id.* § 6319.

101. See, e.g., Marcella L. Kysilka, *No Child Left Behind: What Does It Really Mean?*, 5 CURRICULUM & TEACHING DIALOGUE 99, 101–02 (2003) (describing NCLB's definition of "scientifically-based research" as "unfortunate" and "narrow," and expressing strong skepticism about its requirement that teachers be highly qualified); Elizabeth Adams St. Pierre, *Refusing Alternatives: A Science of Contestation*, 10 QUALITATIVE INQUIRY 130, 133 (2004) ("[T]he federal government and certain 'scientists' are once again attempting to reduce science to a narrow scientism that does not foster the democratic values of diverse epistemological and methodological approaches to knowledge production.").

102. See Teresa Dahmus, Note, *The Effects of the No Child Left Behind Act on the Balance of Power Among Local, State, and Federal Educational Authorities*, 16 LBJ J. PUB. AFF. 20, 21 (2003).

103. See, e.g., James Harvey, *The Matrix Reloaded*, 61 EDUC. LEADERSHIP 18, 20 (2003) ("[NCLB] makes a mockery of local control [It] has moved education decisions as far as possible from the classroom. Federal officials can now make decisions that would have been unimaginable even a few years ago. They have established the criteria for disciplining schools; removing principals and teachers; and even defining appropriate curriculum, reading materials, and instructional practice."); George J. Petersen & Michelle D. Young, *The No Child Left Behind Act and Its Influence on Current and Future District Leaders*, 33 J.L. & EDUC. 343, 352–54 (2004) (arguing that NCLB imposes "a loss of control" upon low-performing schools that "makes school improvement very difficult, if not impossible").

critical thinking and creativity.¹⁰⁴ At a more quotidian level, reports abound that schools concerned about their NCLB performance have rearranged their curriculum to focus on reading and mathematics exams at the expense of music, art, field trips, and even recess.¹⁰⁵ The federal government's fingerprints are now everywhere in district governance.¹⁰⁶

3. Choice and Charters

Power, then, is being rearranged among the layers of government involved in education. The states have transferred power from districts to themselves and, sometimes, to individual schools; the federal government too has transferred power from districts, and also from states, to itself.¹⁰⁷ But intergovernmental power shifts are only part of the story. The other major erosion of district power and autonomy is associated with the rise of school choice. In the layer-

104. See Robert J. Sternberg, *Good Intentions, Bad Results: A Dozen Reasons Why the No Child Left Behind Act Is Failing Our Schools*, EDUC. WK., Oct. 27, 2004, at 42 (NCLB causes schools to "regress[] to . . . the drill-and-kill education method of many years ago [S]chools have become, to a large extent, test-preparation courses."); George Wood, *A View from the Field: NCLB's Effects on Classrooms and Schools*, in MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS 33, 39 (Deborah Meier & George Woods eds., 2004) ("Teachers across the map complain that the joy is being drained from teaching as their work is reduced to passing out worksheets and drilling children as if they were in dog obedience school."); Anne C. Lewis, *An 'Incomplete' for the New Brand of Federalism*, PHI DELTA KAPPAN, Sept. 2003, at 3 (noting that federal grants encourage the exclusive adoption of phonics curricula for beginning readers).

105. In a survey of elementary school principals, twenty-five percent reported decreased instructional time dedicated to the arts because of NCLB, and thirty-three percent predict future decline. An estimated forty percent of elementary schools have reduced or eliminated recess in favor of test preparation and drills. Margaret McKenna & David Haselkorn, *NCLB and the Lessons of Columbine*, USA TODAY, May 1, 2005 (Magazine), at 20; accord Wood, *supra* note 104, at 42-43.

106. But see KOSAR, *supra* note 48, at 195 (arguing that, notwithstanding its unprecedented ratcheting up of federal involvement in education, NCLB "left the heart of education, curricula, where it always has been: in the hands of localities and states").

107. States and districts both are beginning to resist the encroachments on their own authority associated with NCLB. See *Sch. Dist. v. Spellings*, No. 05-CV-71535-DT, 2005 U.S. Dist. LEXIS 29,253, at *1 (E.D. Mich. Nov. 23, 2005) (dismissing, for failure to state a claim, challenge to NCLB brought by eight local school districts and the National Education Association). Connecticut was the first state to file a legal challenge to the Act. Complaint for Declaratory and Injunctive Relief, *Connecticut v. Spellings*, No. 305CV1330 (D. Conn. Aug. 22, 2005); see also Sam Dillon, "Soccer Mom" Education Chief Plays Hardball for Bush Team, N.Y. TIMES, Apr. 28, 2005, at A1 (in 2004 "Connecticut was disputing the law's testing requirements, Texas the rules on disabled students, North Dakota its teacher certification procedures, Utah what the authorities there consider its usurpation of local educational control, and California its system for labeling failing schools."); cf. TASK FORCE ON NO CHILD LEFT BEHIND, *supra* note 50, at 6-8, 11 (endorsing the view that NCLB unconstitutionally encroaches upon state prerogatives).

cake days, school districts were monopolists, and all parents unwilling to pay for private education were by law required to be their customers. State redistribution of district power across state agencies, districts, and schools, however momentous for districts, works no change in the reality of this public-school monopoly. But choice does. Choice forces school districts to compete for students and for funds. A daydream for libertarians only fifteen years ago, choice today is a major feature of the educational landscape and the competition it engenders has vital consequences for school districts.

"Choice" describes a multitude of policies.¹⁰⁸ The most sweeping of these is state-funded private school choice, an approach made famous by the voucher program in Cleveland that was held constitutional in 2002 by the United States Supreme Court.¹⁰⁹ Vouchers allow parents to direct funding that would otherwise have gone to their child's home public school district to other institutions both public and private.¹¹⁰ Each cashed voucher both directs money to the chosen institution and takes it away from the home district.¹¹¹ Moreover, although the state may regulate schools that wish to redeem vouchers,¹¹² such regulation is generally minimal.¹¹³ Private schools accepting vouchers remain private and give parents access to a wide range of education options and approaches that the district does not (and in the case of religious education, cannot) offer. Voucher schools thus offer parents a way to escape district policies across a range of issues—from curriculum and tracking to discipline and class size—that they dislike. As proponents of choice argue, parents gain through such programs a way to exit the public-school monopoly without having to relocate, which is the way that wealthier families traditionally exercise their exit option.¹¹⁴

108. See HOCHSCHILD & SCOVRONICK, *supra* note 13, at 107–32.

109. *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002).

110. In Cleveland at the time of the *Zelman* case, private schools within the city of Cleveland and public, but *not* private, schools outside of Cleveland, were permitted to participate in the program. *Id.* at 647. Fifty-six Cleveland private schools were participating when the case was decided. *Id.* at 613. Not surprisingly, none of Cleveland's neighboring public school districts had accepted the state's invitation to educate the city's children. See *id.* at 647; *infra* notes 324–27 and accompanying text.

111. See, e.g., *Zelman*, 536 U.S. at 645 (describing this feature of the Cleveland program).

112. See Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 972–82 (2003).

113. See R. KENNETH GOODWIN & FRANK R. KEMERER, *SCHOOL CHOICE TRADEOFFS* 222–24 (2002).

114. See Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY* 1, 14–17 (Stephen D. Sugarman

In theory, vouchers pose an existential threat to school districts. Sovereign parent-consumers, armed with the public resources that society has chosen to devote to the education of their children, have no reason in choosing among competing schools to care if a school is public or private, or which “district” runs it. To a consumer in a market, a school district is indistinguishable from other educational providers: if it attracts students it thrives, and if it fails it collapses. But the threat of vouchers has not bridged the chasm from theory to fact. Real-world voucher programs are hedged with restrictions: they limit who can receive voucher money,¹¹⁵ cap the total number of vouchers available, restrict the categories of institutions that can redeem vouchers,¹¹⁶ and limit the amount of the voucher to a fraction

& Frank R. Kemerer eds., 1999) (“Many families first decide precisely where they want their children to go to school, and having done that, they find a house or apartment in the right location,” but the power to choose is unequally distributed with “income and wealth”); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2064 (2002) (“[T]he overwhelming majority of well-to-do parents . . . have already exercised a form of school choice” by “select[ing] where to live based on the quality of public schools.” (citing Henig & Sugarman, *supra*)); *supra* notes 41–44 and accompanying text; cf. *Zelman*, 536 U.S. at 680 (Thomas, J., concurring) (voucher program “simply gives parents a greater choice as to where and in what manner to educate their children. This is choice that those with greater means have routinely exercised.” (citation omitted)).

115. At the time of *Zelman*, poor families resident in Cleveland had priority to participate in the voucher program. *Zelman*, 536 U.S. at 644, 646. Ohio has since extended the program to include students who attend any school that has been in “academic emergency for three consecutive years.” Christina Samuels & Karla Scoon Reid, *Ohio OKs Vouchers for Pupils in Low-Rated Schools*, EDUC. WK., July 13, 2005, at 23. Milwaukee’s voucher program limits eligible students to those whose family income does not exceed 1.75 times the federal poverty line. *Jackson v. Benson*, 578 N.W.2d 602, 608 (Wis. 1998). Florida’s voucher program, until the Florida Supreme Court held it to be unconstitutional in 2006, see *Bush v. Holmes*, Nos. SC04-2323, SC04-2324, SC04-2335, 2006 WL 20584 (Fla. Jan. 5, 2006), made eligible all students enrolled in a public school found to be failing by the state for two years in a four-year period. FLA. STAT. § 1002.38(1) (Supp. 2005). Vouchers made available by Congress to students in Washington, D.C. are also limited to poor students whose assigned public schools underperform. See Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 813 n.106 (2005); Patrick Wolf, *Evaluation of the DC Opportunity Scholarship Program*, 10 GEO. PUB. POL’Y REV. 85, 85 (2005).

During the 1999–2000 school year, 7,900 of all eligible Milwaukee students, 3,600 of all eligible Cleveland students, and 119 of all eligible Florida students were granted vouchers. See NANCY KOBER, CTR. ON EDUC. POLICY, SCHOOL VOUCHERS: WHAT WE KNOW AND DON’T KNOW . . . AND HOW WE COULD KNOW MORE 13 & tbl.1 (2000), available at <http://www.ctredpol.org/vouchers/schoolvouchers.pdf>. In the first year of the Washington program, 2004–05, 1,366 vouchers were awarded and 1,027 were used. Wolf, *supra*, at 86–87. Cleveland’s, Milwaukee’s, and Washington’s programs allow vouchers to be redeemed at private and religious schools; Florida’s program also included public schools with acceptable ratings. See KOBER, *supra*, Wolf, *supra*, at 85, 87.

116. See, e.g., *Zelman*, 536 U.S. at 645 (describing this feature of the Cleveland program).

of the market price for private schooling.¹¹⁷ Notwithstanding *Zelman*, voucher programs continue to be subject to challenges under state constitutional law.¹¹⁸ And voucher programs are not always popular. Voters have rejected them in California and Michigan,¹¹⁹ the NCLB's choice sanctions have been implemented only sporadically,¹²⁰ and the Florida Supreme Court declared that state's voucher law unconstitutional.¹²¹ Thus, while the voucher threat to public school districts remains vivid in the abstract, vouchers have not created a crisis for districts on the ground.

The same cannot be said of charter schools. Charters are publicly-funded schools whose ties to the school district in which they are located are nonexistent or de minimis. They are founded, organized, and run not by the district or the state but by self-organizing groups of education entrepreneurs—parents, teachers, or third parties.¹²² In various surface ways, charters finesse the ideological challenge posed by voucher programs. Charter schools receive only public funds, and may not require tuition or tuition copayments; they are thus “public schools.”¹²³ In some states the same institutions that accredit school districts also certify charter schools, and in others charter schools must apply for their authorizing “charter” to the local school district with which they plan to

117. At the time of *Zelman*, the Cleveland voucher was for \$2,250 and when used in its entirety required an additional \$250 parental copayment. *Id.* at 646. The new Ohio program sets the voucher amount at \$5,000. Samuels & Reid, *supra* note 115, at 22. Milwaukee's voucher was for \$5,553 in 2001–02. Milwaukee Parental Choice Program, Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 2001–02 2 (Feb. 2002), <http://dpi.wis.gov/sms/doc/mpc01fnf.doc>. Florida's was \$4,000. KOBER, *supra* note 115, at 13.

118. See *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 936 (Colo. 2004) (voiding a Colorado voucher program that allowed children struggling academically to receive private school vouchers as inconsistent with the Colorado Constitution's local control provisions); *Holmes*, 2006 WL 20584, at *8 (voiding Florida's voucher program as inconsistent with the Florida Constitution's requirement that the state maintain a “uniform . . . and high quality system of free public schools” (emphasis and citation omitted)); cf. Lupu & Tuttle, *supra* note 112, at 957–72 (discussing post-*Zelman* challenges to voucher programs under state constitutions).

119. Alan Wolfe, *The Irony of School Choice: Liberals, Conservatives, and the New Politics of Race*, in *SCHOOL CHOICE: THE MORAL DEBATE* 31, 38–39 (Alan Wolfe ed., 2003).

120. See, e.g., Laura Diamond, *Student Transfers Almost Double*, ATLANTA J.-CONST., Aug. 4, 2005, at Gwinnett News 1JJ (describing transfers in Gwinnett County, Georgia).

121. *Holmes*, 2006 WL 20584, at *2.

122. See Bruce Fuller, *Growing Charter Schools, Decentering the State*, in *INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION* 1, 6–7 (Bruce Fuller ed., 2000).

123. See CHESTER E. FINN, JR. ET AL., *CHARTER SCHOOLS IN ACTION* 15 (2000).

compete.¹²⁴ Regardless of the chartering authority, from districts' point of view, charters pose the same market-based threat as voucher programs. Charters are more thoroughly regulated than voucher schools—they cannot teach a sectarian curriculum, for example¹²⁵—but they are still exempt from many of the regulations and policies that govern district-run schools.¹²⁶ In about half the states, the exemption is general, holding charters “accountable only for the terms of their charters plus health, safety, and civil rights requirements.”¹²⁷ In most states it extends to the seniority-based teacher selection and placement policies enshrined in district schools' union contracts.¹²⁸ Equally important is that funding follows the charter school student, as it does voucher students. If a student in district *X* enrolls in a charter school, the charter, not the school district, gets the per-pupil amount that the state would otherwise provide to district *X*, and, in some states, gets some or all of the district's per-pupil allocation as well.¹²⁹

Like voucher schools, then, charter schools expand parents' exit options.¹³⁰ In search of education policies more to their liking, they

124. It of course runs precisely counter to the idea of charter schools that school districts control the charters of their competitors. See, e.g., PAUL T. HILL & ROBIN J. LAKE WITH MARY BETH CELIO, CHARTER SCHOOLS AND ACCOUNTABILITY IN PUBLIC EDUCATION 22 (2002) (noting that California charter schools' effectiveness was seriously compromised by “requiring [charter] schools to negotiate with their sponsor district for . . . flexibility”); Sebastian Mallaby, *A Bridge for the Underclass*, WASH. POST, June 13, 2005, at A19 (“[G]iving school boards power over charter schools' facilities is like entrusting decisions on Wal-Mart to Costco.”).

125. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 647 (2002) (noting this requirement for Cleveland's charter schools).

126. See GOODWIN & KEMERER, *supra* note 113, at 206–10; HILL & LAKE, *supra* note 124, at 20–21.

127. HILL & LAKE, *supra* note 124, at 22.

128. In public schools, these seniority-based systems result in the least experienced and most poorly-paid teachers being disproportionately assigned to schools and classes with particularly difficult-to-teach populations. See Fuller, *supra* note 122, at 6; see also FINN ET AL., *supra* note 123, at 175 (quoting California charter school advocate's view that power to avoid collective bargaining with teachers is “the most important freedom that charter schools have”).

129. See Fuller, *supra* note 122, at 6; Amy Berk Anderson et al., Educ. Comm'n of the States, Charter School Finance (Apr. 2003), <http://www.ecs.org/clearinghouse/24/13/2413.htm>; cf. Stephen D. Sugarman, *School Choice and Public Funding*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY, *supra* note 114, at 121–24 (comparing implications of funding charters with both district and state funds to funding with state monies only).

130. Although home schooling predates the choice movement, it shares its animating idea, that parents should be able to exit the school district without moving or paying for private school. (Home schoolers, of course, pay with their time.) Thus the rise in home schooling also demonstrates an expanding use of exit. See J. Gary Knowles et al., *From Pedagogy to Ideology: Origins and Phases of Home Education in the United States, 1970–*

can leave their local public school system without relocating, and public funds will follow their children to their new schools. Unlike voucher schools, however, the growth of charter schools has been explosive, transforming charters into an ubiquitous feature of the education landscape. The first charter school opened in Minnesota in 1992.¹³¹ By 1995, eighteen more states had passed charter school legislation.¹³² Today, forty-one states and the District of Columbia have charter school laws, and approximately 3,000 charter schools are operating.¹³³

When they were monopolists, public school districts could do as they pleased, subject only to state regulation and to the satisfaction of a noticeably uninvolved electorate. As competitors, however, school districts have no choice but to respond to charters, and for that matter to voucher schools if they exist in reasonable numbers. Substantial research demonstrates that districts perceiving a charter or voucher threat believe themselves constrained to alter their policies in order to retain parent-customers, and take steps to do so.¹³⁴ Depending on the robustness of a district's competitors, it is easy to see how in some districts the preferences of parents perceived as likely to exit, rather than of district officials, could come to dominate a district's policy agenda. Just as district policymaking is less independent and more constrained as it is regulated more heavily by aggressive states and by Washington, so is it less independent and more constrained as it is forced to accommodate the preferences of its customer base.

4. Mayoral Participation

Choice expands the critique of districts by suggesting not only that districts might not be competent, but that they might not be necessary. Proponents of choice view the market as an institution that can compete with and even supplant the school district as an

1990, 100 AM. J. EDUC. 195, 201–02, 204, 206 (1992) (discussing the diversity of parental motivations for removing children from public school).

131. See Deb Moore, *Charter Schools: A Grand Experiment*, SCH. PLAN. & MGMT., Dec. 2004, <http://www.peterli.com/archive/spm/799.shtm>.

132. See *id.*

133. See *id.*

134. See Saiger, *supra* note 10, at 1678–80 & nn.82–96 (collecting research). That public schools feel constrained by competitive threats, and act in light of the constraints they perceive, does not imply that the changes they make will be successful in the short term, or in the long term for that matter. See MATTHEW CARNOY ET AL., *THE CHARTER SCHOOL DUST-UP: EXAMINING THE EVIDENCE ON ENROLLMENT AND ACHIEVEMENT* 95–97 (2005) (noting studies that argue that test scores for students in traditional public schools rise when charters are active, but arguing that the weight of the research tends to show that charters have no positive “competition effect” on public school achievement).

organizing principle for publicly-funded education.¹³⁵ The suggestion that districts are optional has had an impact outside of the choice context as well. Most dramatically, governors and legislators in a number of states have recently transferred control of distressed urban public school systems not to themselves but to local mayors.¹³⁶ Since 1990, a dramatic number of American cities have instituted mayoral control, including two of the three largest cities in the nation—New York and Chicago.¹³⁷ In other states and cities, the possibility of mayoral control has been prominent in school politics although it has not been actualized.¹³⁸

135. See JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 27 (1990).

136. This phenomenon is thoroughly explored in *MAYORS IN THE MIDDLE: POLITICS, RACE, AND MAYORAL CONTROL OF URBAN SCHOOLS*, (Jeffrey R. Henig & Wilbur C. Rich eds., 2004) [hereinafter *MAYORS IN THE MIDDLE*].

137. See Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 346 (N.Y. 2003) (discussing mayoral control in New York City); Anthony S. Bryk et al., *Chicago School Reform*, in *NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION* 164, 187–89 (Diane Ravitch & Joseph P. Viteritti eds., 1997). Other cities with mayoral control include Anniston (Ala.), Oakland, Hartford, the District of Columbia, Baltimore, Detroit, Boston, Cleveland, Philadelphia, and Harrisburg. See *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1083 (Pa. 2003); Susan L. DeJarnatt, *The Philadelphia Story: The Rhetoric of School Reform*, 72 U. MO. KAN. CITY L. REV. 949, 952 (2004); Jeffrey Mirel, *Detroit: "There is Still a Long Road to Travel, and Success is Far from Assured,"* in *MAYORS IN THE MIDDLE*, *supra* note 136, at 120, 130–49 (discussing Detroit's mayoral control, which began in 1999); Marion Orr, *Baltimore: The Limits of Mayoral Control*, in *MAYORS IN THE MIDDLE*, *supra* note 136, at 27, 27–54; John Portz, *Boston: Agenda Setting and School Reform in a Mayor-centric System*, in *MAYORS IN THE MIDDLE*, *supra* note 136, at 96, 96–117 (discussing Boston's mayoral control, which began in 1992); Wilbur C. Rich & Stefanie Chambers, *Cleveland: Takeovers and Makeovers Are Not the Same*, in *MAYORS IN THE MIDDLE*, *supra* note 136, at 159, 159–86 (discussing increases in mayoral authority in Cleveland, beginning in 1990); Rachel Gottlieb, *City Schools: Goodbye Trustees; Nation Will Be Watching New Board*, HARTFORD COURANT, Dec. 2, 2002, at B1 (discussing mayoral control in Hartford); Del Stover, *Conflict with Mayor Leads to Ouster of Anniston, Ala., School Board*, NAT'L SCH. BD. ASS'N SCH. BD. NEWS, July 22, 1997 (discussing mayoral control in Anniston); Michael W. Kirst, Consortium for Policy Research in Educ., *Mayoral Influence, New Regimes, and Public School Governance* 5, 9 (May 2002), available at <http://www.cpre.org/Publications/rr49.pdf> (discussing minimal mayoral control over Oakland public schools, beginning in 1999, and resulting low to moderate mayoral influence). Special note should be taken of the District of Columbia, which lacks state officials, although it is its own school district and has a mayor. In Washington, members of Congress advanced the mayoral control policy, first imposing a control board on the school district, see *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 784 (D.C. Cir. 1998) (upholding the takeover of the school district by the control board), and then in 2000 legislating mayoral control, see Jeffrey R. Henig, *Washington, D.C.: Race, Issue Definition, and School Board Restructuring*, in *MAYORS IN THE MIDDLE*, *supra* note 136, at 191, 191–213.

138. These cities include Compton (Cal.), Los Angeles, West Sacramento, Indianapolis, New Orleans, Kansas City (Mo.), Newark, Buffalo, Rochester, Albany, Syracuse, Akron, Pittsburgh, Memphis, and Dallas. See Blake Fontenay, *Let Mayor Pick*

In its milder version, mayoral control means mayoral appointment of some or all school board members;¹³⁹ in its more drastic form, independent school governance is abolished and the schools become one among many city departments rather than a discrete special government.¹⁴⁰ Such policies, especially the latter variety, depart radically from tradition. A “fundamental change in the way schools are governed,”¹⁴¹ mayoral control is a direct attack upon the progressive-era principle that schools are special and should be governed specially, apart from the rough-and-tumble of ordinary urban politics. To institute mayoral control, especially in the service of reform, is to identify discrete and specialist governance as part of the problem, and to proffer ordinary, general-government politics as a solution.

5. After the Flood

All of the innovations discussed thus far have been widely, but separately, noticed and analyzed. But their effects are cumulative as well as individual: collectively, they have rendered school districts

Board, Run Schools, Herenton Suggests; Also Proposes Head Start Takeover by City, MEMPHIS COM. APPEAL, Jan. 22, 2000, at A1; Catherine Gewertz, *L.A. Mayor Steps Up Bid to Control Schools*, EDUC. WK., Jan. 4, 2006, at 3; Chris Gray, *Morial Drops Bid for School Takeover; Mayor Urges Giving New Chief Free Hand*, TIMES-PICAYUNE (New Orleans), July 29, 1999, at A1, available at 1999 WLNR 1162188; James Heaney, *Pushing For Power: Masiello Seeks More Control over City Schools*, BUFFALO NEWS, Jan. 10, 1999, at A1; Carmen J. Lee & Eleanor Chute, *Mayors in the Schools: Will City Join in Trend to Give More Control over Board Members?*, PITTSBURGH POST-GAZETTE, Jan. 21, 2004, at A1; Andrea Neal, Editorial, *Mayors in Control of Schools*, INDIANAPOLIS STAR, Apr. 22, 1999, at 22A; *Two Visions for Kansas City: Questioning the Candidates*, KAN. CITY STAR (Mo.), Mar. 28, 1999, at A1 [hereinafter *Two Visions*]; Kirst, *supra* note 137, at 4–5 (discussing mayoral threats in Sacramento and Akron to push for control of the public schools).

139. This is the approach in Oakland, Baltimore, and Philadelphia. See DeJarnatt, *supra* note 137, at 957–58 (discussing Philadelphia); Orr, *supra* note 137, at 53 (noting that after 1997, Baltimore’s “mayor and the governor jointly appoint the nine-member school board, [but] school policy is no longer directed by city hall”); Kirst, *supra* note 137, at 5 (noting that Oakland mayor appointed three of ten board members). Also notable is a “new governance twist” in Hartford, where the mayor, entitled to appoint five of nine school board members, selected himself as one of the five and was made the board’s chairman. Catherine Gewertz, *Hartford Mayor Heads Board*, EDUC. WK., Jan. 4, 2006, at 3.

140. This is the approach in Chicago and New York. See Dorothy Shipp, *Chicago: The National “Model” Reexamined*, in MAYORS IN THE MIDDLE, *supra* note 136, at 59, 76–80; Editorial, *Mayoral Control of City Schools*, N.Y. TIMES, June 7, 2002, at A26.

141. Jeffrey R. Henig & Wilbur C. Rich, *Mayor-Centrism in Context*, in MAYORS IN THE MIDDLE, *supra* note 136, at 3, 6.

beleaguered, even besieged.¹⁴² While local power remains substantial, it is less broad, less certain, and less consistent across jurisdictions. Districts have lost power to state agencies, to the federal government, and to their constituent schools. Districts' very existence is contingent rather than guaranteed, with adequate performance as the standard for survival. Local general governments have risen as real competitors to school districts for control over local education. And institutions other than governments—charters, voucher schools, and home schooling—now compete with district schools for enrollments and the associated financial resources.

All these trends came together strikingly in the aftermath of Hurricane Katrina, which, in August 2005, devastated the city of New Orleans and its already beleaguered school district. Katrina battered the district's schools, scattered its students, and demolished the local property tax base upon which its finances depend; only a handful of the district's schools will open at all during the academic year 2005–06,¹⁴³ and the district estimates its losses in the billions of dollars.¹⁴⁴ Many people, however, joined Louisiana's Governor Kathleen Blanco in discerning in the destruction a "golden opportunity" to relieve the district of power and responsibility.¹⁴⁵ Notwithstanding the many failures of general municipal government in New Orleans, it was the city's schools and not the city itself that became the immediate target for governmental reorganization.¹⁴⁶ Proposals along these lines were promptly advanced at local, state, and federal levels, with school-based management, disestablishment, charters, and vouchers all in the mix.

142. See William G. Howell, *Introduction* to *BESIEGED*, *supra* note 32, at 21; Kirst, *supra* note 19, at 32.

143. See Catherine Gewertz, *New Orleans Reopens an Elementary School*, *EDUC. WK.*, Dec. 7, 2005, at 9.

144. David J. Hoff, *Tallying the Costs, Striving to Move Ahead*, *EDUC. WK.*, Sept. 14, 2005, at 1.

145. Erik W. Robelen, *Louisiana Eyes Plan To Let State Control New Orleans Schools*, *EDUC. WK.*, Nov. 9, 2005, at 1; see also Editorial, *A Fresh Chance*, *SAN DIEGO UNION-TRIB.*, Nov. 10, 2005, at B-12, available at 2005 WLNR 18296576 ("If you're looking for some good news amid all the bad news caused by Hurricane Katrina, here's the best we can do: . . . [T]he storm also swept away the city's public school system, which has long been among the worst in the nation. It's not much, but it's something."); Editorial, *A New Beginning*, *TIMES-PICAYUNE* (New Orleans), Nov. 19, 2005, at 6, available at 2005 WLNR 18707987 (editorializing that New Orleans "has an unprecedented opportunity to remake its schools"); Robelen, *supra* (quoting Louisiana's State Superintendent of Education describing the destruction of the school system as "a silver lining and a once-in-a-lifetime opportunity").

146. On externally imposed takeovers, receiverships, and restructurings of general municipal government, see BERMAN, *supra* note 34, at 114–20.

A special commission organized by New Orleans Mayor Ray Nagin, at the local level, proposed divesting the school board of power by embracing school-based management combined with decentralized administration. School principals should control hiring and eighty percent of their school's funds, it suggested;¹⁴⁷ coordinating administration would be accomplished by "clusters of 8 to 14 schools that will function as semiautonomous units,"¹⁴⁸ and central district activity would be "pared to a minimum."¹⁴⁹ The commission argued that its network model provides flexibility and properly rejects "comprehensive control" by the district in favor of "strategic management."¹⁵⁰

This proposal has a certain air of unreality,¹⁵¹ coming two months after a special session of the Louisiana Legislature. During that November 2005 session, the legislature passed, and the governor subsequently signed, a measure that, although not quite a blanket disestablishment of the New Orleans district (which had also been proposed),¹⁵² took over the district in most essential respects.¹⁵³ The Act ("Act 35") provided for the transfer of all public schools in school districts that the state had declared to be "academically in crisis" and that had school scores below the *state* (not the district) average to a statewide and state-managed "Recovery School District."¹⁵⁴ Although written in general language, the reference to districts "in academic crisis" unambiguously targeted New Orleans,¹⁵⁵ and the transfer of schools from local to state hands, unlike in the pre-Katrina system, was to be automatic.¹⁵⁶ Under Act 35's criteria, 110 New Orleans schools would come under state jurisdiction, while the local school board would retain authority over thirteen.¹⁵⁷ And the

147. Catherine Gewertz, *New Orleans Panel Rethinks School System*, EDUC. WK., Jan. 11, 2006, at 5.

148. Gary Rivlin, *New Orleans Commission to Seek Overhaul of Schools and Transit*, N.Y. TIMES, Jan. 11, 2006, at A1.

149. Gewertz, *supra* note 147.

150. *Id.*

151. *See id.* (noting consultant's view that commission's proposal is complicated "in a district where most of the schools will answer to state-contracted groups").

152. *See* Robelen, *supra* note 145, at 26 (noting proposal of State Representative Jeffrey Arnold).

153. Act effective Nov. 30, 2005, 2005 La. Acts No. 35, § 1 (to be codified at La. Rev. Stat. Ann. § 17:10.7(A)(1)).

154. *Id.*

155. Erik W. Robelen, *Louisiana Heads for New Orleans Takeover*, EDUC. WK., Nov. 30, 2005, at 22.

156. § 1, 2005 La. Acts No. 35.

157. Laura Maggi, *State to Run Orleans Schools*, TIMES-PICAYUNE (New Orleans), Nov. 23, 2005, at 1, available at 2005 WLNR 18934995. Prior to Act 35, the state had taken

“recovery district shall retain jurisdiction over any school transferred to it for a period of not less than five school years,”¹⁵⁸ with the potential for lengthy extensions.¹⁵⁹

Although some of these schools will likely be managed by the state directly, Louisiana is only somewhat better situated than the local school district to manage scores of schools in a flood zone. Act 35 neatly converts that deficiency into an asset by embracing the charter school model.¹⁶⁰ The state promptly granted several initial charters and appears poised to grant more.¹⁶¹ This permits the state to avoid an enormous management challenge and simultaneously creates a constituency of groups that stand to benefit from the government reorganization.¹⁶² Moreover, the local school board is itself depending on charters to manage those few schools that remain under its jurisdiction.¹⁶³

The interest in charters was also spurred by activity in Washington, where Katrina was widely seen as an opening for introducing choice into the system. Thus Washington provided \$21 million to Louisiana for the explicit purpose of opening charter schools.¹⁶⁴ Moreover, advocates of private-school vouchers seized the “opportunity” of Katrina to explain that market forces could renew education in New Orleans more quickly and efficiently than any government.¹⁶⁵ Their views found partial resonance in Congress, which, after a strenuous debate,¹⁶⁶ voted to direct federal aid to

over five New Orleans schools. Robelen, *supra* note 155, at 26; *see also* Jessica L. Tonin, *New Orleans Charter Network Gets Underway*, EDUC. WK., Jan. 18, 2006, at 1 (describing opening of locally chartered schools).

158. § 1, 2005 La. Acts No. 35 (to be codified at La. Rev. Stat. Ann. § 17:10.7(C)(1)).

159. *Id.* (to be codified at La. Rev. Stat. Ann. § 17:10.7(C)(2)(b)(ii)) (after five years, the Recovery District may recommend either that it retain control of the school, close the school, or return it to local control “with proposed stipulations and conditions for the return”).

160. *See id.* (to be codified at La. Rev. Stat. Ann. §§ 17:3973(2)(b), 17:3982(A)(1)(b), 17:3983(A)(1)(g), 17:3997(A)(1)(c)) (adjusting the Louisiana Education Code to permit the Recovery District to issue charters in New Orleans).

161. *See* Editorial, *A New Beginning*, *supra* note 145 (referring to Act 35 as establishing a “new charter-based system”); Thomas Frank, *New Orleans Puts Charter Schools to the Test*, USA TODAY, Nov. 28, 2005, at 10A; Robelen, *supra* note 155.

162. *See* Rebecca Catalenno, *Katrina Gives Schools Fresh Slate*, ST. PETERSBURG TIMES (Fla.), Nov. 29, 2005, at 1A.

163. *See* Tonin, *supra* note 157.

164. *See* Frank, *supra* note 161.

165. Milton Friedman, *The Promise of Vouchers*, WALL ST. J., Dec. 5, 2005, at A20; Kathryn Jean Lopez, *Vouch for the Kids*, NAT’L REV. ONLINE, Oct. 5, 2005, <http://www.nationalreview.com/lopez/lopez200510050813.asp>.

166. Compare 151 CONG. REC. S12292 (daily ed. Nov. 3, 2005) (statement of Sen. Bingaman that Senate aid to private schools “establishes the first national voucher

private religious schools, as well as public and secular private schools, that took in students displaced by the hurricane.¹⁶⁷

Still, the New Orleans School District survives. Even presented with the “opportunity” of Katrina’s devastation, neither the mayor’s commission nor the Louisiana Legislature was willing to dissolve the New Orleans district in toto, as a relic of an institutional form that had outlived its usefulness and deserved extinction. A fortiori other districts not ripped apart by wind and water.¹⁶⁸ Except for the strong urban mayoralty, a governmental form entirely absent in many places in the United States,¹⁶⁹ the district remains the only available unit of governance that is local enough to control education policy implementation.¹⁷⁰ Exceptional circumstances like New Orleans aside, districts continue to be a critical locus for reform,¹⁷¹ if only they can be induced to become “reforming districts,” to take “[*them*]/selves as the focus for change and ha[ve] a clear theory of change for the system.”¹⁷² But school districts are changing, and are likely to change even more as a result of pressures put upon them by their deteriorating legal status. School districts no longer enjoy their power by virtue of being school districts; rather they must fight for the power they have and justify its exercise—to other governments, to individual schools both within and outside of their control, and to parent-consumers—by virtue of what they do with it. Today the power of the school district is whatever power it can earn and keep for the time being.

program”), with *id.* (statement of Sen. Enzi that the bill does not “resolve the voucher issue”). See also Neela Banerjee, *Senate Votes \$1.66 Billion for Storm-Displaced Pupils*, N.Y. TIMES, Nov. 4, 2005, at A22 (discussing the debate).

167. See Eric W. Robelen & Michelle R. Davis, *Hurricane Aid Is on the Way to Districts, Private Schools*, EDUC. WK., Jan. 11, 2006, at 1 (describing the legislation and reporting predictable interest group reaction to its inclusion of private schools: the National School Boards Association’s disappointed characterization of the legislation as an ill-advised “voucher program,” and hope from the Alliance for School Choice that the legislation would be a “milestone” in the “voucher wars”).

168. See Kirst, *supra* note 19, at 33.

169. See *id.* at 35.

170. See Larry Cuban, *A Solution that Lost its Problem: Centralized Policymaking and Classroom Gains*, in WHO’S IN CHARGE HERE?, *supra* note 19, at 113; Milbrey W. McLaughlin & Joan E. Talbert, *Reforming Districts*, in SCHOOL DISTRICTS AND INSTRUCTIONAL RENEWAL, *supra* note 39, at 173, 173 (“For better or for worse, districts matter fundamentally to school reform outcomes and without effective district engagement, school-by-school reforms are bound to disappoint.”).

171. See generally SCHOOL DISTRICTS AND INSTRUCTIONAL RENEWAL, *supra* note 39 (describing districts’ role as agents of reform).

172. McLaughlin & Talbert, *supra* note 170, at 178 (coining the term “reforming districts”).

The contrast with the old layer-cake approach to educational governance could not be more stark. For decades, education policy rested on the principle that autonomous school districts would be the primary implementor, and therefore shaper, of policy initiatives and a virtually insurmountable obstacle to reforms that they disfavored. Education policy generated elsewhere, within the courts and without, had to accommodate the fact of district power, whether by persuasion, co-optation, or hierarchical regulation—all tactics to which, particularly with regard to reform efforts, recalcitrant districts proved more than equal. In the changed, evolving constitutional structure of education, district power instead is displaced in part and what remains is transformed. In many ways, school districts have become in fact the junior partners they always were in theory.¹⁷³

The consequences of the structural rearrangement of educational governance remain to be seen. For reformers, the hope is that making district power contingent will compel them to become “reforming districts,” so that children need not rely on districts’ freely choosing that path. This seems a reasonable hope for the new structures—although polyarchy, with its plenitude of institutions striving against one another for their own ends, guarantees little beyond complexity. But before making, in Part III, some observations regarding how this complexity is likely to express itself going forward, I turn to a different question: How did structural change arise?

II. THE STATES ESCAPE THE ADEQUACY TRAP

The upheaval in educational governance described in Part I resulted from neither progressive triumph nor random accident. State governments did not carefully weigh policy alternatives or conduct cost/benefit analyses to conclude analytically that the best way to improve public education was to displace school districts from their privileged position in the intergovernmental web. But neither did states, and later the federal government, stumble at random into a policy of eroding district power. Instead, I argue in this Part, among the causes of the transformation of the school district were two legal developments. The first, generated by liberals working through the courts, was third-wave school-finance doctrine. The third-wave cases hold that states have a constitutional duty to guarantee an adequate public education to all children, a duty they cannot escape by delegating it to school districts. The second development, founded in

173. See *supra* text accompanying notes 32–37.

libertarian thinking, was legal advocacy for school choice. No one advocating these positions sought the administrative rearrangement that their ideas generated; indeed, third-wave proponents likely would have opposed it and boosters of choice seen it largely as a distraction. Nevertheless adequacy theory and choice advocacy interacted in the crucible of state policymaking to produce significant, if unintended, structural change.

A. *Equity, Adequacy, and the Tactics of the Third Wave*

The path to the disempowerment of school districts began with school-finance plaintiffs rebuffed in their quest for equity and searching for a new approach. The first and second wave failed to secure dramatic increases in state aid to distressed school districts.¹⁷⁴ The second wave overcame *Rodriguez*'s rejection of the first:¹⁷⁵ there were,¹⁷⁶ and there remain today,¹⁷⁷ state courts prepared to hold that inequitable school-finance arrangements violate state requirements of equal protection. But, it turns out, second-wave victories were largely pyrrhic. Notwithstanding early judicial victories, equality in school finance proved an elusive and retreating target.

Genuine equality may be so overwhelmingly expensive to secure that it is for practical purposes unrealizable. It is, after all, formalistic in the extreme to think that equality of inputs—of funds—can fairly be said to constitute true equality.¹⁷⁸ Distressed schools function in environments more expensive than suburban schools, and, more important, serve student populations much more difficult to teach.¹⁷⁹ Therefore many discussions of school finance note that equality reasonably defined demands fiscal equality-plus, or vertical equity: poor districts should be given greater per-student resources than rich ones.¹⁸⁰ The obvious rejoinder is “How much more?”—and while there is no a priori answer, it seems very likely that much, much more would be required. We have known since the Coleman report that a

174. See *supra* notes 1–5 and accompanying text.

175. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

176. See *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977); *Bismark Pub. Sch. Dist. v. State*, 511 N.W.2d 247, 259 (N.D. 1994).

177. See *Brigham v. State*, 692 A.2d 384, 390 (Vt. 1997).

178. See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 149–52 (1995); David N. Figlio, *Funding and Accountability: Some Conceptual and Technical Issues in State Aid Reform*, in *HELPING CHILDREN LEFT BEHIND*, *supra* note 40, at 87, 88–89.

179. See *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 377 (N.J. 1990).

180. See *id.* at 402–03; Ryan & Saunders, *supra* note 9, at 468–70 (citing, *inter alia*, Underwood, *supra* note 8, at 495).

much greater portion of the gap between rich and poor in academic achievement is explained by differences in family circumstances than by differences in schools;¹⁸¹ this result suggests that many multiples of what is spent on the schools of the wealthy would need to be spent on poor schools in order to erase that gap. Certainly the dramatic increases in inputs in recent years in districts like Newark, New Jersey have not brought corresponding gains in academic achievement.¹⁸² Indeed, it seems likely that even if states were to abolish school districts¹⁸³ and allocate school funding in proportion to student needs, educational outcomes would still not be equalized so long as rich and middle-class parents can otherwise compensate for the failings of public schools by, for example, enriching their home environments, providing extracurricular opportunities, and exercising their constitutionally guaranteed right to choose private schooling. Even if this were untrue, and all that were required for equality is that every dollar spent by the rich be matched by twenty dollars, or even just ten dollars, for the poor, the resulting budgets start to seem the stuff of fantasy rather than realizable policy reform.

Indeed, in the American political economy even the more modest goal of equality of inputs—spending as much on each poor student as we spend on a rich student—is fantastic. In Professor Laurie Reynolds's recent formulation, a "never-ending upward spiral of spending by wealthy districts . . . leaves state legislatures in a permanent scramble to patch together funds for the poorer districts for which the discretion to tax and spend is a meaningless catchall phrase."¹⁸⁴ "Scramble" nicely suggests stopgap solutions and

181. JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 290-325 (1966) (Sup. Doc. No. FS 5.238:38001); see also Selcuk R. Sirin, *Socioeconomic Status and Academic Achievement: A Meta-Analytic Review of Research*, 75 REV. EDUC. RES. 417, 422, 438 (2005) (metaanalysis of fifty-eight studies concluding that "parents' location in the socioeconomic structure has a strong impact on students' academic achievement . . . both by directly providing resources at home and by indirectly providing the social capital that is necessary to succeed in school").

182. Per-pupil spending in Newark increased from \$5,713 in the 1992-93 school year to \$14,694 in 2000-2001; this 150 percent increase dwarfs the corresponding twenty-seven percent increase in statewide spending per pupil, from \$9,415 to \$11,960. See Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Digest of Education Statistics tbls.90, 91, 164, 171, <http://nces.ed.gov/programs/digest> (last visited Feb. 19, 2006). Similar data for other locations is also available; for example, during the same period per-pupil spending in Hartford rose fifty-four percent against thirty-two percent statewide. *Id.*

183. For the most carefully thought-out proposal along these lines, see KATHRYN A. MCDERMOTT, CONTROLLING PUBLIC EDUCATION: LOCALISM VERSUS EQUITY 122-41 (1999).

184. Reynolds, *supra* note 40, at 817.

temporary fixes poorly thought through, but the metaphor is inapt to whatever extent it suggests legislative energy or enthusiasm. Legislatures are structurally dominated by suburban interests that fundamentally oppose both redirecting funds from richer to poorer districts and capping the ability of the rich to finance their own schools.¹⁸⁵ Legislatures are therefore constitutionally averse to the sort of education reform second-wave doctrine requires.¹⁸⁶ When determined courts have successfully extracted reforms from defiant legislatures and balky governors, the new laws fall short of providing genuine equality, and, just as important, are implemented in a desultory and half-hearted fashion. As Reynolds notes, there appears to be no way to equalize education spending without restricting the ability of some school districts to raise education funds on their own behalf via the property tax, because that capability is so vast in certain property-rich school districts that it is beyond the capacity of many other districts to match.¹⁸⁷ Clever financial formulas designed to mitigate this problem in ways relatively palatable to the suburbs have proved unavailing. The only solution is the "Robin Hood" approach of requiring the rich to share most of whatever additional dollars they choose to raise with poor school districts.¹⁸⁸ But Robin Hood plans generate superheated political opposition,¹⁸⁹ and also, some argue, reduce statewide political support for public education in general.¹⁹⁰

It is no surprise, then, that over time more courts came to view judicial demands for fiscal equity as misguided. The second wave, hailed as a breakthrough at its apogee, began to fade.¹⁹¹ Some courts dismissed second-wave cases by holding that fiscal equity was a nonjusticiable "political question," consigned to the exclusive

185. See, e.g., REED, *supra* note 43, at 128–29 (describing suburban opposition to reductions in state aid to their districts and to interdistrict transfers of locally-raised tax monies); Rebell, *supra* note 1, at 13 ("Legislatures tend to respond to entrenched interests, and, increasingly, affluent suburban districts control the politics of educational funding."); cf. FISCHER, *supra* note 44, at 120 (Section titled "Locals View the Property Tax Base as Their Own").

186. See REED, *supra* note 43, at 135 ("[T]he geographic nature of property taxes . . . intersects with the geographic nature of state electoral representation, yielding a political logic that can produce intense opposition to . . . the reform of school financing.").

187. See Reynolds, *supra* note 40, at 810.

188. See *id.* at 788–97, 811.

189. See, e.g., Yinger, *supra* note 40, at 22 ("explicitly restrict[ing] supplementation by high-wealth districts [is] . . . often politically unpopular"); Maurice Dyson, *The Death Of Robin Hood? Proposals for Overhauling Public School Finance*, 11 GEO. J. ON POVERTY L. & POL'Y 1, 52 (2004) (predicting the effective termination of "Robin Hood" redistribution in Texas).

190. See McUsic, *supra* note 51, at 112–14; Enrich, *supra* note 178, at 158, 161.

191. See BOSWORTH, *supra* note 1, at 36–37.

jurisdiction of the elected branches.¹⁹² Commentators continue to debate the legal basis for such reasoning,¹⁹³ but the realpolitik that recourse to political question doctrine reflects is spot-on. One way to read claims of nonjusticiability is as embodying a judicial recognition that the political forces massed behind the preservation of inequality were more than a match for judicial power. Second-wave doctrine truly forced elected officials to navigate between the Scylla of the courts and the Charybdis of political support for the status quo. They got eaten either way; and judges came to see their preprandial half-measures less as Reynolds's scramble than as the flailing of the drowned.

School-finance plaintiffs, confronted with judges unwilling to embrace the equality holding of the second wave, reacted with lawyerly élan. Their immediate goal, in both first- and second-wave cases, had been to force states to cough up additional resources for their poorest school districts. If a direct appeal to equality could not generate that result, a more circuitous argument might.¹⁹⁴ The shift

192. See, e.g., *McDaniel v. Thomas*, 285 S.E.2d 156, 168 (Ga. 1981) (stating that funding disparities among school districts are an issue exclusively for legislature); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1193 (Ill. 1996) ("[T]he question of whether the educational institutions and services in Illinois are 'high quality' is outside the sphere of the judicial function."); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 54 (R.I. 1995) (finding that the legislature holds constitutional power over the establishment and maintenance of the school funding system); see also Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 585-94 (2004) (analyzing differing reactions of state courts in regard to the judicial role in school funding policy); Rebell, *supra* note 1, at 7 (noting that most courts deciding second-wave cases "declined to issue remedial orders because of a core institutional concern—expressed in a variety of specific doctrinal rationales such as 'judicial manageability,' separation of powers, or the courts' inability to devise appropriate remedies for complex social problems").

193. Compare Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999) ("When a state constitution creates a right to a government-provided social service, the relevant judicial question should be whether a challenged law achieves, or is at least likely to achieve, the constitutionally prescribed end," rather than "whether the law is within the bounds of state legislative power."), with Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 304 (1998) (arguing that state court justiciability of school finance is a close question).

194. Molly McUsic explains:

[B]ecause a minimum standards claim does not demand that every school district be made 'equal' to the wealthiest school district, a successful claim need result only in boosted funding to substandard schools; it need not divert funds from richer districts, overthrow the state financing system, or otherwise disrupt local control of schools.

from second to third wave was thus tactical rather than strategic.¹⁹⁵ The third-wave claim—that states must ensure that all school districts have the financial resources to educate all students adequately, irrespective of interdistrict equality—was designed to offer judges a different, more palatable, somewhat less ambitious, and more judicially manageable justification for ordering the financial reforms that plaintiffs had sought all along.¹⁹⁶

To be sure, the limited ambitions of adequacy gave some pause. A state could, for example, ensure that all districts are adequate and still permit those of the rich to be superlative; such a policy passes muster under the third, but not the second, wave. This possibility led some commentators to bemoan the third wave as an ideological retreat to a position tolerant of inequality.¹⁹⁷ But most observers recognized that, given the desperate state of most suffering school districts, worrying that adequate schools might remain unequal was a mostly theoretical exercise. If courts unwilling to force money from the legislature in the name of equality could be convinced to do so in the name of adequacy, then that seemed a promising way forward.¹⁹⁸

Moreover, as adequacy cases moved through the courts, it became clear that adequacy is a fuzzy concept not at all distinct from equality. What level of knowledge of mathematics or history is adequate, after all, is not an objective question. One natural place to look for criteria is to the curricula and performance levels of good schools, and to the aspirations for all schools set out by the

Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 310 (1991); see also Enrich, *supra* note 178, at 173 (arguing that, while third-wave “strategy may not suffice to ensure levels of state financial commitment commensurate to the needs of poorer districts or the hopes of litigants, it may often suffice to support a finding that an existing state system for financing education is impermissible”).

195. Although some commentators describe the shift from equity to adequacy claims as “strategic,” see, e.g., ELAINE M. WALKER, EDUCATIONAL ADEQUACY AND THE COURTS 25 (2005) (noting that “litigants strategically shifted their focus from emphasizing equity and fiscal neutrality to emphasizing equity”); Rebell, *supra* note 1, at 7 (discussing the “strategic advantage . . . emphasized by the wave theorists”), this is a pure difference of usage and does not imply disagreement with the claim here that it was “tactical.” I think Walker and especially Rebell would agree that second- and third-wave plaintiffs shared common strategic goals.

196. See Enrich, *supra* note 178, at 166–70. But cf. Coalition for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (refusing to adjudicate school finance because of risk of judicial usurpation of legislative power, although plaintiffs presented an argument based upon “adequacy”).

197. See, e.g., Enrich, *supra* note 178, at 181 (“I remain troubled by . . . the question of whether aiming at adequacy is simply aiming too low.”).

198. See *id.* at 166–70.

legislature.¹⁹⁹ Thus adequacy takes on a comparative element.²⁰⁰ This element is intensified by the commonly made argument that a primary goal of education is to prepare students for a competitive job market.²⁰¹ Students from poor districts cannot compete adequately with students from elsewhere unless the two groups are roughly similarly situated. Adequacy thus defined incorporates an equalizing ratchet. Were enough communities to fund local schools to be "superlative," as suggested above, the superlative standards they adopt might come to be accepted by the courts as a revised benchmark for adequacy. In these ways comparative definitions of adequacy permit equality to reassert itself.²⁰² Thus equality language often stubbornly reappears even in judicial opinions that ostensibly reject equality arguments in favor of narrower adequacy standards.²⁰³

Third-wave litigation brought plaintiffs many victories. Courts that had declined to endorse full-throated equality endorsed adequacy.²⁰⁴ "Each child, *every child*, in this Commonwealth must be provided with an equal opportunity to have an adequate education," wrote the Kentucky Supreme Court in the leading third-wave case.²⁰⁵ Third-wave courts also repeatedly emphasized that to educate all students adequately was a duty incumbent upon the state, imposed by the state constitution. States were entitled to discharge this duty by creating a system of local school districts only if those local districts in

199. See James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1720 (2003).

200. See REED, *supra* note 43, at 128; Avidan Y. Cover, Note, *Is "Adequacy" a More "Political Question" than "Equality?"*: *The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J.L. & PUB. POL'Y 403, 405 (2002) ("[E]quality concerns inform the adequacy argument.").

201. See, e.g., Ala. Coal. for Equity v. Hunt, 624 So.2d 107, 137 (Ala. 1993) (basing a finding of inadequacy in part upon evidence of poor preparation of students for the workforce); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 330 (N.Y. 2003) (concluding that the state constitutional standard of educational adequacy includes "some preparation for employment"); Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (concluding that the state constitutional standard of educational adequacy requires schools to provide students "sufficient academic and vocational skills to enable the student to compete on an equal basis with others in . . . gainful employment in contemporary society"); HOCHSCHILD & SCOVRONICK, *supra* note 13, at 17 (noting that preparation for employment is a primary goal of public schooling).

202. See Underwood, *supra* note 8, at 518.

203. See Ryan & Saunders, *supra* note 9, at 467; Saiger, *supra* note 10, at 1710.

204. See Rebell, *supra* note 8, at 297 (noting "extraordinary" reversal of state supreme courts from rejecting second-wave theories to endorsing third-wave ones). Rebell argues provocatively that a classical liberal opposition to equality of results helped doom the second wave, but that the same impulse later combined with republican ideology to favor adequacy plaintiffs. See Rebell, *supra* note 1, at 10.

205. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211 (Ky. 1989).

fact generated the adequacy the state constitution requires; localism would not exempt states from responsibility should school districts fail. “[B]oth the Board of Education and the City” of New York, wrote the Court of Appeals of New York, “are ‘creatures or agents of the State,’ which delegated whatever authority over education they wield. Thus, the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights.”²⁰⁶ Advocates had reason to celebrate such rhetoric, which appeared to compel substantial state aid to districts that could not raise sufficient funds on their own—especially as it became clear that the third wave would not entirely displace equity arguments.

Initially the third-wave cases also appeared to reconfigure state politics in a mold more friendly to poor districts. State court judges accepted plaintiffs’ suggestion that adequacy is jurisprudentially different from equality, depending on different constitutional text and making different demands on elected officials.²⁰⁷ Now that state courts were demanding “only” adequacy, rather than full-blown equality, judges expected some matching flexibility on the part of state elected officials and became less tolerant of legislative resistance. Nor should the difficulty of politically justifying inadequacy be discounted. While it is possible to endorse interdistrict inequalities with a straight face, citing the tradition and values of educational localism, it is much harder to defend a policy of maintaining inadequate schools in impoverished communities.²⁰⁸

The problem, however, was that the third wave was purely tactical rather than strategic. The goal of the third wave was no different from that of the second: to secure substantial new public resources for poor schools. The third wave worked no change on the opposition to that goal from legislatures, executives, or their suburban constituencies. Especially as it became clear that adequacy and equality were related, the foundational suburban preference for spending education money locally resisted the third wave as it had the second. Therefore, with the ascendancy of third-wave doctrine, state defendants began to search for their own tactical innovations. Just as

206. *Campaign for Fiscal Equity*, 801 N.E.2d at 343; accord *DeRolph v. State*, 677 N.E.2d 733, 746 (Ohio 1997) (“Our state Constitution makes the state responsible for educating our youth. Thus, the state should not shirk its obligation by espousing clichés about ‘local control.’”).

207. See Rebell, *supra* note 8, at 297, 300–01.

208. Cf. Dyson, *supra* note 41, at 625–27 (discussing the importance to school reform outcomes of articulating politically attractive norms).

plaintiffs adopted third-wave tactics in order to accommodate judicial regard for the constraints of state electoral politics with their own policy goals, so too would state officials respond to the success of the third wave with tactical moves that would preserve their primary policy goal, the satisfaction of suburban education constituencies.

B. Blaming Inadequacy on Inadequate Agents: The Rhetoric of Choice

States found their tactical solution in the school-choice rhetoric that was becoming more audible just as third-wave plaintiffs began to see victories in state courts of last resort.²⁰⁹ Milton Friedman had much earlier described a market mechanism to displace state provision of primary and secondary education. If parents could direct a state-issued voucher to any private school of their choice, Friedman proposed, the market would generate a wide variety of schools, untrammelled consumer sovereignty would increase overall citizen satisfaction, and government-run schools would be disciplined by parent preferences.²¹⁰ It was in 1990, however, that a prominent reformulation of Friedman's ideas offered choice as the singular solution to what its authors identified as the pathologies of public schooling. In *Politics, Markets, and America's Schools*, John Chubb and Terry Moe made a splash by arguing that public schools were doomed by their publicness: they were of low quality because they were democratically governed.²¹¹ Chubb and Moe argued that while market-based schools naturally focus on what parents demand—schools that teach effectively and run well—government-run schools just as naturally accede to the claims of organized interest groups and metastasizing bureaucracies.²¹² Choice thus offers not a method for disciplining government excess so much as an end-run—the only end-run—around its pathologies. “The way to get schools with effective

209. See Michael Heise, *Equal Educational Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle*, 14 J.L. & POL. 411, 413 (1998) (noting that interest in school choice exploded in the 1990s).

210. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 91–93 (1962); Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST 123, 127 (Robert A. Solo ed., 1955); see also James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1309–12 (2005) (describing school choice plans proposed by Christopher Jencks and other “[p]rogressive voucher proponents” in the 1960s).

211. CHUBB & MOE, *supra* note 135, at 188–90 (“America’s traditional institutions of democratic control . . . inherently breed bureaucracy and undermine autonomy. This is not something that is temporary or the product of mistakes. It is deeply anchored in the most fundamental properties of the system.”).

212. *Id.* at 189–90.

organizations is not to insist that democratic institutions should do what they are incapable of doing," but to replace the institutions of government with those of the marketplace.²¹³

Elected state officials do not offer a natural constituency for such government-bashing. But one prominent element of Chubb and Moe's argument was tailor-made for states facing school-finance plaintiffs: that schools' failures were due primarily to how they were run. One need not accept Chubb and Moe's implication that *most* schools suffer from being established and managed by bureaucrats rather than entrepreneurs to claim that the failings of *deficient* public schools are properly attributed to substandard governance rather than a dearth of resources.²¹⁴ This argument met states' tactical requirements: it preserves the status quo of suburban public schools, which largely satisfy their constituencies, while shifting the onus for unsatisfactory public schools from an external source—states that deny them sufficient funding—to the internal problem of local governance and management. It also resonated with trends in other areas of state public administration, whereby states sought to regulate loosely coupled, local bureaucrats by holding them accountable for achieving high standards rather than simply regulating their methods—in short, by insisting that the state's local agents be competent.²¹⁵

213. *Id.* at 191.

214. See Larry Cuban & Michael Usdan, *Learning from the Past*, in POWERFUL REFORMS WITH SHALLOW ROOTS: IMPROVING AMERICA'S URBAN SCHOOLS 1, 6 (Larry Cuban & Michael Usdan eds., 2003) [hereinafter POWERFUL REFORMS] ("[N]ational and state reformers argued that what urban districts needed was not more money or more staff but what all districts needed: a good dose of better governance and efficient management").

215. This has long been the paradigm for state oversight of the financial administration of general municipal governments, to which states generally permit self-management until bankruptcy or other distress requires states to step in. See BERMAN, *supra* note 34, at 114–20. The approach is also visible in those administrative arenas where states have a strong interest in the effectiveness of a service that nevertheless requires substantial local discretion to be effective. Two good examples are welfare and policing. See, e.g., *id.* at 31 (giving examples of states where legislatures "set basic policies regarding [welfare] eligibility and benefits . . . but give counties considerable discretion in designing plans to meet federal work requirements"); Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559, 1607 (2001) (describing "double-devolution" programs in which states conduct outcome-based monitoring of local welfare reform efforts); William Bratton, *Great Expectations*, in MEASURING WHAT MATTERS 11, 11 (1999) (arguing that community policing programs that set demanding goals for local police departments can generate "ambitious results"); Mark H. Moore & Margaret Poethig, *The Police as an Agency of Municipal Government: Implications for Measuring Police Effectiveness*, in MEASURING WHAT MATTERS, *supra*, at 151, 151–52 (identifying

It is important to be clear that this move is distinct from a wholesale embrace of school choice, which as noted above, has had considerable but far from overwhelming success in displacing existing policies. States did not become school-choice advocates.²¹⁶ Rather, the intellectual apparatus that choice advocates erected offered states a plausible and targeted way to respond to educational inadequacy that did not involve new funding: they could identify the root cause of educational failure as poor institutional design rather than stingy budgeting.²¹⁷ Interest in choice, moreover, helped generate solid, if not uncontroversial, economics and political science that justified a focus on reforming educational institutional arrangements rather than multiplying grants in aid. Choice proposals have galvanized a hotly disputed econometric literature that investigates the relationship between school expenditure and education achievement. Some economists insist that one cannot consistently demonstrate a significant, positive correlation between the two, and even those passionately convinced of the converse agree that efficient management and proper incentives are necessary for the correlation to hold.²¹⁸ And political scientists argue persuasively that the unique circumstances of poor, urban school districts lead them to be governed as “cartell[s]” or “employment regime[s]” that privilege the economic role of schools as providers of jobs, resources, and patronage over the educational mission generally emphasized in the suburbs.²¹⁹ A state can therefore hold itself out as responsive to third-

society’s goals for policing as complex and demanding, and noting the need for outcome measures that reflect that complexity).

Charles Sabel, working with several colleagues, has explicitly identified public education as one of several areas of public administration that comprise a trend he calls “democratic experimentalism,” a “pragmatist” approach to local government based upon “learning-by-monitorin[g], benchmarking, simultaneous engineering, and error detection.” Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314 (1998); see also *id.* at 318 (identifying aspects of current educational practice as experimentalist); Liebman & Sabel, *supra* note 12, at 184 (identifying New Accountability with the experimentalist paradigm, and analyzing it in detail); cf. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1025–28 (2004) (identifying judicial remedies in school-finance cases as experimentalist in character).

216. See *infra* notes 324–27 and accompanying text.

217. See Saiger, *supra* note 10, at 1694.

218. See TIMOTHY A. HACSI, CHILDREN AS PAWNS: THE POLITICS OF EDUCATIONAL REFORM 188–94 (2002) (reviewing economists’ debates); Ryan, *supra* note 8, at 268–70 (same).

219. See WILBUR C. RICH, BLACK MAYORS AND SCHOOL POLITICS: THE FAILURE OF REFORM IN DETROIT, GARY, AND NEWARK 5, 207–08 (1996); Clarence N. Stone, *Urban Education in Political Context*, in CHANGING URBAN EDUCATION 1, 8–9 (Clarence N. Stone ed., 1998); Saiger, *supra* note 10, at 1667 n.38 (collecting these and other studies).

wave requirements not by supplementing inadequate district budgets but by reforming inadequate district governments. And to the extent that inadequate governance is (to use Chubb and Moe's words) "anchored in the most fundamental properties" of distressed district governments²²⁰—a possibility that the work like that of Professors Clarence Stone and Wilbur Rich strongly suggests²²¹—a state properly responds by replacing those districts with a different kind of institution not susceptible to the same problematic incentives.

Such a response, moreover, fits like a key into the lock of third-wave doctrine. One proposition repeatedly emphasized by those courts that have adopted the third-wave theory is that a state, by delegating the provision of education to school districts, does not relieve itself of its own duty to educate all children adequately.²²² Absent such a claim, courts could not order states to supplement the budgets of districts unable to fund education adequately on their own. But if one's agent is not successfully deploying the resources it is given, then it is just as reasonable—arguably even more reasonable—to crack down on that agent before sending the existing agent more money.²²³ One might reduce the agent's power, or supervise the agent more aggressively, or replace the agent with a different sort of agent with different sorts of incentives. These options are essentially the policy changes described in Part I. Thus the third-wave theory, helped along by the school choice movement, made an important contribution to the decline of district governance and the rise of education polyarchy.

This is not to claim direct causation between the third-wave cases and the structural shift in educational governance; rather it is to assert that the cases had a particular kind of influence. Given the complex "ecology of games" that characterizes education politics,²²⁴ causation is never simple. As I note above, in some respects the erosion of district primacy was part of a broader trend.²²⁵ It is certainly unlikely that the sudden spike in presidential, gubernatorial, and state legislative interest in school accountability in the 1990s²²⁶ can be

220. CHUBB & MOE, *supra* note 135, at 189–90.

221. *See supra* note 219.

222. *See supra* text accompanying note 206.

223. *See* Saiger, *supra* note 10, at 1694–95.

224. *See* William A. Firestone, *Education Policy as an Ecology of Games*, 18 EDUC. RESEARCHER 18, 18 (1989); Marilyn Gittell, *School Reform in New York and Chicago: Revisiting the Ecology of Local Games*, 30 URB. AFF. Q. 136, 136 (1994); Saiger, *supra* note 10, at 1687 & nn.130–31.

225. *See supra* note 215 and accompanying text.

226. *See* Saiger, *supra* note 10, at 1656.

explained in its totality by the third-wave cases. But those cases did pose a serious and pressing problem for state elected officials, and the doctrine the cases announced shaped political and policy responses. The victories won by school-finance plaintiffs in the 1990s were more than "disentrenching."²²⁷ They did not simply put governors and legislators on notice that they had to abandon their policy of complacency about failing schools and do something.²²⁸ Rather, the precise doctrinal content of the third-wave cases importantly shaped the particular policy states chose to adopt. However anxious (or recalcitrant) legislators and governors were to do good by urban schools, they were also anxious to placate courts that were clearly willing to impose very unattractive remedies under a third-wave theory. They undertook the particular reforms they did in no small part because those reforms were genuinely responsive to the third-wave rule that states had to take direct responsibility for urban education and could not hide behind district failure.

Observers on the ground in particular states have taken note of this dynamic. A student describing the adoption of the pathmaking New Jersey law authorizing the state to take over poorly performing school districts understood it to be an "innovative attempt to . . . fulfil[l] [judicial] mandate[s]."²²⁹ Supporters of a similar takeover bill in New Hampshire argued that their proposal was "crucial to carrying out the [state] Supreme Court edict that all children have access to an adequate education."²³⁰ In Connecticut the state takeover of Hartford's schools was similarly understood to be a straightforward attempt to respond to the Connecticut Supreme Court's controversial *Sheff v. O'Neill*²³¹ decision that required the amelioration of racial isolation in that state's urban schools.²³² In the 2002 Virginia governor's race, the Republican candidate countered his opponent's plan to enhance education-finance equity through additional state

227. Liebman & Sabel, *supra* note 12, at 191-92; see also BOSWORTH, *supra* note 1, at 43 (collecting scholarship articulating a disentrenchment theory).

228. See BOSWORTH, *supra* note 1, at 207-16.

229. F. Clinton Broden, Note, *Litigating State Constitutional Rights to an Adequate Education and the Remedy of State Operated School Districts*, 42 RUTGERS L. REV. 779, 781 (1990).

230. Clare Kittredge, *Fears Hamper Effort to Set School Standards*, BOSTON GLOBE, Mar. 19, 2000, at N.H. Weekly 1.

231. 678 A.2d 1267 (Conn. 1996).

232. See HOCHSCHILD & SCOVRONICK, *supra* note 13, at 46-47; Jeff Archer, *Hartford Seeks State Help in Running Schools*, EDUC. WK., Mar. 19, 1997, at 3.

spending with a proposal that his state take over failing local schools.²³³

A thicker account of the relationship between adequacy suits and state-sponsored governance reform comes from Cleveland, Ohio. In 1991, several Ohio school districts (not including Cleveland's) filed a third-wave challenge to the state's school-finance system, ultimately styled *DeRolph v. State*.²³⁴ By the mid-1990s it was clear that the case would be both momentous and hotly contested. In 1994, the trial court applied an adequacy theory, held Ohio's entire school-finance scheme to be unconstitutional, and decreed institutional reform.²³⁵ The trial court required "the State Board of Education to prepare legislative proposals for submission to the General Assembly to eliminate wealth-based disparities among Ohio's public school districts," and "retained jurisdiction in the matter only for a period of time to ensure that the order was followed and that appropriate steps were taken to institute a totally new system of school funding."²³⁶ A divided state intermediate court, however, then reversed,²³⁷ and the case headed to the Ohio Supreme Court.

Before that court could issue a decision, however, another line of litigation came to a head involving a challenge in federal court to the Cleveland school district's compliance with longstanding desegregation consent decrees. In 1995, a federal district court that had retained jurisdiction over the desegregation case declared a "crisis of magnitude" involving the district's "total . . . collapse," and took the very unusual step of placing the entire Cleveland school district under direct state control.²³⁸ The remedy is notable as a judicial departure from the district-centered paradigm,²³⁹ but of greater interest here is the response of the State of Ohio, aware that its finance system was at risk of being declared illegal and confronted with sudden authority over the Cleveland system. The state fairly quickly passed two very significant governance reforms affecting the district.²⁴⁰ The first was its now-famous voucher program, under

233. Editorial, *Good Sense, Mostly*, RICHMOND TIMES-DISPATCH, Dec. 15, 2002, at E2, available at 2002 WLNR 1452039.

234. 677 N.E.2d 733 (Ohio 1997).

235. *Id.* at 734-35.

236. *Id.*

237. *Id.*

238. *Reed v. Rhodes*, 934 F. Supp. 1459, 1468, 1473 (N.D. Ohio 1996).

239. *See Saiger, supra* note 10, at 1715 n.232.

240. Both during the litigation of *DeRolph* and after the Ohio Supreme Court's decision, Ohio's governor and legislators "focused not only on complying with *DeRolf* [sic], but also towards solving various non-monetary problems as well." Larry J. Obhof, *DeRolph v. State and Ohio's Long Road to an Adequate Education*, 2005 B.Y.U. EDUC. &

which Cleveland public school students could receive a publicly funded education at participating private schools within city limits.²⁴¹ The second was to institute mayoral control of Cleveland's schools.²⁴²

Vouchers and mayoral control share several characteristics. First, notwithstanding the looming *DeRolph* litigation, neither involved new school funding for Cleveland: both were revenue-neutral reforms that targeted governance exclusively.

Second, both reformed governance through unapologetic attempts to undermine the existing institution of local control in the district, i.e., the school board. The Cleveland voucher program was explicitly designed to offer an alternative to the board,²⁴³ each voucher student representing a loss to the public school budget. In any city, assignment of control to the mayor similarly constitutes a direct attack upon the existing institution of the school district; a fortiori in Cleveland, where district leaders and the mayor had been publicly feuding.²⁴⁴

Finally, the governance reforms were fully consistent with the maintenance of suburban prerogatives. In this respect the legislature's reforms could not have less resembled the statewide remedies sought by the *DeRolph* plaintiffs.²⁴⁵ Neither the voucher

L.J. 83, 113; see also *id.* at 139 (cataloguing non-fiscal reforms and arguing that by 2002 Ohio's legislature and bureaucracy "had made efforts to comply with the Ohio Supreme Court's holdings, but had long since shifted its primary focus to such things as accountability, early educational attainment, and stronger curricula"). Obhof's implication that "non-monetary" reforms are orthogonal to compliance with *DeRolph*, see *id.* at 113, 139, seems misplaced.

241. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (noting that the voucher program was enacted "against th[e] backdrop" of the educational crisis condemned in *Redd*); *id.* at 647 (noting vouchers enacted "in response to the 1995 takeover").

242. See *Mixon v. Ohio*, 1999 FED App. 0347P, 5, 193 F.3d 389, 395 (6th Cir. 1999) (quoting OHIO REV. CODE ANN. §§ 3311.71-.77 (1998)); cf. Rich & Chambers, *supra* note 137, at 171-73 (recounting the history of mayoral involvement in the Cleveland schools leading to the passage of Ohio House Bill 269 "granting the mayor control of the schools").

243. Justice Thomas describes it:

Faced with a severe educational crisis, the State of Ohio enacted wide-ranging educational reform that allows voluntary participation of private and religious schools in educating poor urban children otherwise condemned to failing public schools. The program . . . simply gives parents a greater choice as to where and in what manner to educate their children. This is a choice that those with greater means have routinely exercised.

Zelman, 536 U.S. at 680 (Thomas, J., concurring); see also *id.* at 647 (stating that the voucher "program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren").

244. See *Mixon*, 193 F.3d at 394.

245. See *DeRolph v. State*, 677 N.E.2d 733, 747 (Ohio 1997).

nor the mayoral control legislation²⁴⁶ were to have application outside of urban Cleveland.²⁴⁷ In particular, the voucher program's gesture to extra-urban participation was not just nominal but cynically so: although the legislation could have required school districts adjacent to Cleveland's to accept Cleveland residents as voucher pupils, it instead merely invites them to do so.²⁴⁸ As the legislature knew full well, the likelihood that a suburban district would voluntarily import urban voucher students was utterly remote.²⁴⁹

With *DeRolph* looming,²⁵⁰ a state legislature forced to act thus looked immediately not to fiscal support but to quite dramatic governance reforms—vouchers and mayoral control—that nevertheless could be easily restricted to particular districts. Such reforms are simply much more attractive to states than the systemic reforms that third-wave plaintiffs seek.

In another example, Baltimore, takeover and school-finance politics were connected even more explicitly. Maryland had initially responded to a third-wave suit brought by Baltimore and private plaintiffs by arguing “that pervasive mismanagement in Baltimore, rather than a lack of resources, was responsible for the deficiencies of

246. Mayoral control did formally affect areas outside of Cleveland proper because the Cleveland school district included some urbanized areas outside of, but adjacent to, city limits. Thus public schools in these areas would be controlled by a mayor for whom their residents could not vote. See *Mixon*, 193 F.3d at 395, 403–06 (describing and upholding the limited “extraterritoriality” involved).

247. See *Zelman*, 536 U.S. at 644–45 (discussing vouchers made available to parents only in districts “‘under federal court order requiring supervision and operational management of the district by the state superintendent’” (quoting OHIO REV. CODE ANN. § 3313.975(A))); *Mixon*, 193 F.3d at 395 (noting that mayor is to take control over school boards only in “‘a school district that is or has ever been under a federal court order requiring supervision and operational, fiscal, and personnel management of the district by the state superintendent of public instruction’” (quoting OHIO REV. CODE ANN. § 3311.71(A)(1))). These elaborate but precise ways of saying “Cleveland” are formalisms designed to comply with Ohio’s no-special-legislation requirement. See *id.* at 408–09.

248. See *Zelman*, 536 U.S. at 645 (citing OHIO REV. CODE ANN. § 3313.976(C)).

249. See *id.* at 707 & n.17 (Souter, J., dissenting).

250. Wilbur Rich and Stefanie Chambers, in their thorough account of Cleveland school politics during this period, have little to say about *DeRolph* beyond noting its holding. See Rich & Chambers, *supra* note 137, at 181. Much more significant to their account are local fiscal distress and the local electoral politics of school bond issues. See *id.* at 170–71, 180–82. This emphasis may explain the contrast between Rich and Chambers’s sophistication in accounting for local political behavior and their apparent puzzlement regarding the roots of state support for mayoral control. See *id.* at 172 (“Interestingly, the Republican-dominated state legislature was quite willing to hand over control of the schools over to the Democratic mayor.”).

the City school system.”²⁵¹ Baltimore’s mayor and Maryland state officials then engineered a “trade” in which the state would provide new resources, the mayor would take responsibility for the system in place of the existing school board, and the city would drop its pending school-finance suit.²⁵² The so-called Baltimore “cohabitation” bill, in which the state and mayor agreed to share power over the schools, was eventually passed under the shadow of the expectation that, absent an agreement, the state would displace local power and begin to reform schools directly pursuant to school-finance doctrine.²⁵³

[T]he decision to focus on mismanagement . . . signaled that the State cared about the Baltimore schools and was not simply being obstructionist by denying its constitutional duty altogether. Indeed, it allowed the state to portray itself as acting in the best interest of the school children in Baltimore by insisting that any infusion of resources be well spent.²⁵⁴

A similar trade was made in Philadelphia, where a 2000 takeover threat was averted in part by the city’s promise to drop a federal lawsuit claiming that the state’s school-finance formulae discriminated against minorities.²⁵⁵

An increase in state aggressiveness and district vulnerability is not necessarily an undesirable result of adequacy litigation, but it is surely an ironic one, both for third-wave plaintiffs and proponents of school choice. The goal of third-wave suits, as of second-wave suits before them, was to strengthen local districts by procuring additional financial support from the state. But the unavoidable emphasis of the third-wave courts upon states’ nondelegable duties appears to have weakened distressed districts instead, making them less powerful and more dependent. Thus the gulf between urban districts and their suburban counterparts is magnified: already far apart in the nature of their student populations, their resources, and the quality of the

251. Thomas Saunders, *Settling Without “Settling”: School Finance Litigation and Governance Reform in Maryland*, 22 YALE L. & POL’Y REV. 571, 581 (2004).

252. Jessica Portner, *State Takeover of Baltimore Schools Mulled*, EDUC. WK., Jan. 31, 1996, at 1; see also James G. Cibulka, *The City-State Partnership to Reform Baltimore’s Public Schools*, in POWERFUL REFORMS, *supra* note 214, at 125, 125 (determining that what Baltimore’s Mayor “reluctantly settled for in the partnership was a Faustian bargain in which he gave up mayoral authority and historic autonomy of the city’s public schools from state intrusion, in exchange for more money to support the cash-strapped system”).

253. See William F. Zorzi, Jr., *A Statesman Rises to the Occasion*, BALT. SUN, Apr. 15, 1997, at 2C.

254. Saunders, *supra* note 251, at 583.

255. See Robert C. Johnson, *Settlement Averts School Shutdown in Philadelphia*, EDUC. WK., June 7, 2000, at 3.

education they deliver, rich and poor districts are further distinguished by a differential lack of local autonomy in educational decisionmaking. This is precisely the opposite of what third-wave plaintiffs were seeking.

Nor did the school choice movement mean to provide either inspiration or an empirical basis for states to destabilize the layer-cake format of educational governance in favor of more powerful state agencies and a more fractured distribution of local power. Their goal had been to break the connection between government management and schools, not to remake it. But their argument that governance was a key variable in school performance, and the empirical exploration of that idea by economists and political scientists,²⁵⁶ seem in retrospect naturally to have spurred the rearrangement of government power rather than its reduction. Once states had embraced that rearrangement, moreover, it was perhaps not unexpected that an administration in Washington ideologically allied with voucher proponents would ultimately embrace a federal education reform law whose central theme was to limit district discretion, even as it accepted a role for vouchers per se that was quite marginal.²⁵⁷

Going into the third wave, then, nobody intended to reconfigure educational governance on a polyarchic model. Rather, polyarchy emerged from education's ecology of games, spurred by the details of third-wave doctrine and ideas about the nature of the educational marketplace. That the emergence of polyarchy was unplanned, however, does not mean that it was not serendipitous. It may well be true that the problems of distressed schools are due primarily not to states' stinginess with aid, and not to immutable features of democratic governance per se, but to the particular shape of governing institutions in urban school districts. School district autonomy may well be an obstacle to effective school reform, and education polyarchy a good strategy for improving reform's chances. As a hypothesis about school reform, this seems plausible but far from established. Nevertheless, it is the path that the system has taken: regardless whether it ultimately proves beneficial, education polyarchy—the proximate result of the third wave—will determine the potentials and constraints of the next generation of urban school reform.

256. See *supra* notes 218–21 and accompanying text.

257. See No Child Left Behind Act, 20 U.S.C. § 6316(c)(10)(C)(vii) (Supp. II 2002).

III. A REVISED ECOLOGY FOR SCHOOL REFORM

To this point I have argued that various interests pursued strategies that interacted in the educational "ecology of games" to produce a momentous result that none anticipated. Education-finance plaintiffs wanted to force states to provide additional resources to distressed school districts; courts sought to accede to that request in ways consistent with judicial power, judicial competence, and respect for coordinate branches of state government; and choice advocates hoped to supplant governments with markets. States searched for a response that could maintain suburban educational advantage, mollify state court judges, and not bust their budgets. The result was a new view of the proper constitutional *structure* of education, one that cabined school districts' once capacious power and transformed their role from that of an entitled monopolist to that of a constrained and contingent manager.

This structural change cannot but in turn affect future school reform efforts. Just as states restructured school governance in response to third-wave doctrine and choice advocacy, various interests will seek to advance their goals within the altered structure of educational governance. This Part identifies some of the ways that structural changes will shape various interests' strategies and tactics in order to shed some light upon the possible directions that school reform will take in these new circumstances.

A. *Pressure on Employment Regimes*

The new approach to educational governance has, especially in distressed, underperforming school districts, greatly reduced the power and autonomy once enjoyed by the urban, educational employment regime.²⁵⁸

This has been accomplished largely by methods other than traditional, top-down rulemaking. Cognizant of districts' implementation power, many of the new directives instead require districts to meet various outcome requirements. Thus many state New Accountability programs require districts to reach or exceed minimal rates of attendance, test passage, and graduation.²⁵⁹ The NCLB, with its Washington-designed definitions of average yearly progress in terms of standardized test passage rates, is the apotheosis of this trend: it sets out detailed criteria for success, and the consequences that will follow upon failure, without mandating that a

258. See *supra* note 219 and accompanying text.

259. See Saiger, *supra* note 10, at 1674-75.

particular curriculum or student-placement process be followed.²⁶⁰ Scholars of regulatory design have expressed the hope that various features of this outcome-based approach make it a more promising strategy for inducing improved school district performance than classical command-and-control regulation.²⁶¹ It is also clear that it is, and will, remain difficult for regulatory authorities consistently to resist regulating inputs along with outcomes;²⁶² the tension is particularly vivid in the context of NCLB, where some requirements are purely outcome-based and agnostic as to methods, while others, like the requirement that all instruction be provided by “qualified” teachers, regulate inputs and process quite exactly.²⁶³

The question of the effectiveness of regulatory strategies is vital for reformers; but, from the point of view of districts, the simple fact of outcome regulation is the critical development. Districts now must do many things that were previously de facto optional. Under the old layer-cake approach an urban school district could afford to take a lackadaisical approach to the quality of mathematics and reading instruction; although this likely violated numerous top-down directives, low quality brought no untoward consequence to the district itself and was, for students and their parents, just a fact of life. Under accountability rules that emphasize math and reading test scores and impose sanctions of consequence to the regime for failure, that district now must focus on instructional quality. Of course, this external, regulatory reorganization of a district’s priorities can do more than shake the district out of its inexcusable, if fully explicable, inertia; regulators’ preferences have also, according to critics, led districts to overregiment and bureaucratize instruction²⁶⁴ and to

260. See Liebman & Sabel, *supra* note 199, at 1723; Andrea K. Rorrer, *Intersections in Accountability Reform*, in EDUCATIONAL EQUITY AND ACCOUNTABILITY: PARADIGMS, POLICIES, AND POLITICS 251, 253 (Linda Skrla & James Joseph Scheurich eds., 2004) (“Although NCLB seemingly has provisions for states to retain their individualism and authority, the specific requirements stipulated for state standards, assessments, and accountability systems throughout the United States are likely to induce more similarity between state policies over the next 3–5 years.”).

261. See Liebman & Sabel, *supra* note 12, at 191–92 (proposing that New Accountability programs show promise because they incorporate methods for feedback, benchmarking, and institutional learning); Saiger, *supra* note 10, at 1705–06 (proposing that New Accountability programs show promise because they combine vague implementation standards with sanctions that create effective incentives).

262. See Ryan, *supra* note 93, at 985–86 (arguing that NCLB’s regulatory regime is likely unstable).

263. See *supra* notes 99–101 and accompanying text.

264. See Mary Bushnell, *Teachers in the Schoolhouse Panopticon*, 35 EDUC. & URB. SOC’Y. 251, 259–61 (2003).

shortchange nonregulated priorities, like recess and the arts.²⁶⁵ These are two sides of the same regulatory coin.

The market-based regulatory strategy of charters and other schools of choice have a similar dynamic. Regardless whether market-based institutions catalyze more effective school reform than intergovernmental regulation, both strategies genuinely constrain school districts. Just as districts must privilege core-subject instruction once the state or federal government decides to sanction them for failure, they must privilege whatever activities are necessary to keep too many parents from defecting to their competition.

All this regulation—whether intergovernmental or market, state or federal, input- or outcome-focused—significantly constrains the ability of employment interests to pursue their own goals. To be sure, they are not without resources; teachers' unions, in particular, have the geographical scope and institutional capacity to organize effectively at the state as well as the local level. Nevertheless, while in many distressed local districts employment interests essentially were the regime, in state politics they must compete with other claimants. With state control the regime no longer has the luxury to pursue employment interests unfettered. In order to continue to serve those interests, it must please newly aggressive regulators and newly empowered parent-consumers.

One major component of the transformation of the school district cannot be described as regulatory: mayoral control. Nevertheless mayoral administration presents urban employment regimes with challenges even more serious than those posed by regulation. Indeed, because mayoral control substitutes as the authority over schooling an institution just as local as school boards but dramatically less susceptible to capture by employment interests, it is a frontal attack upon the authority of such regimes.²⁶⁶

Mayors are different from school boards. They are politically accountable where boards are not.²⁶⁷ Unlike school districts, mayors offer a single, visible address for voters' pleasure or discontent; New

265. See *supra* note 105 and accompanying text.

266. Kenneth J. Meier, *Structure, Politics, and Policy: The Logic of Mayoral Control*, in MAYORS IN THE MIDDLE, *supra* note 136, at 221.

267. See Michael Kirst & Katrina Bulkley, "New, Improved" Mayors Take Over City Schools, PHI DELTA KAPPAN, Mar. 2000, at 538, 543. Indeed, voters tend to hold mayors accountable for schools regardless whether mayors are in fact in control. See Fontenay, *supra* note 138; see also Kenneth R. Wong & Francis X. Shen, *Measuring the Effectiveness of City and State Takeover as a School Reform Strategy*, 78 PEABODY J. EDUC. 89, 114 (2003) (citing evidence that mayors who take over schools administer "additional tests" in order "to [e]nhance [p]ublic [c]onfidence").

York City's Michael Bloomberg, for example, has "insisted that his mayoralty . . . be judged by the state of the city's public schools."²⁶⁸ Perhaps more important, mayors are politically accountable outside the ballot box to a constituency different and broader than the employment regime's. Kenneth Meier emphasizes that a citywide electorate replaces the "ward-based constituencies of school board members," with important distributional consequences.²⁶⁹ Moreover, as scholars of urban politics have argued, urban mayoralties are also supported by regimes, in the usual case ones dominated by urban business and development interests.²⁷⁰ Mayoral control thus entails the substitution of one regime for another.²⁷¹ That business and real estate interests might have privileged access to the mayor's ear naturally makes professional educators suspect that mayoral control invites into school governance crass politicization and shortsighted policymaking,²⁷² but compared to the complacency and insularity of the employment regimes, the typical urban regime likely will seem benign to outside observers.²⁷³

At the same time, mayors are particularly suited to upend employment regimes because of institutional advantages that both share: mayors are politically powerful, administratively flexible, and emphatically local—like school districts but unlike individual parents, judges, state-level officialdom, or the NCLB bureaucracy in Washington.²⁷⁴ Where state education departments lack the capacity and credibility needed to manage troubled school systems directly,

268. Jennifer Steinhauer, *Pupils Wait for the Bell; Mayor Waits for His Test*, N.Y. TIMES, Aug. 25, 2003, at B1.

269. Meier, *supra* note 266, at 224.

270. Indeed, the concept of "employment regimes" originates with scholarship on urban regimes. See CLARENCE N. STONE, REGIME POLITICS: GOVERNING ATLANTA, 1946–1988, at 4 (1989); see also Orr, *supra* note 137, at 35–36 (describing the mayoral regime and priorities of Baltimore's Mayor Schafer).

271. Henig and Rich, in general agreement with the conclusion that a shift from school boards to mayors changes the power calculus of educational governance, nevertheless note the possibility that employment interests could retool under a mayoral regime and so gain leverage over mayors similar to the power they had over school boards. Jeffrey Henig & Wilbur Rich, *Concluding Observations: Governance Structure as a Tool, Not a Solution*, in MAYORS IN THE MIDDLE, *supra* note 136, at 249, 252–53.

272. See Richard C. Hunter, *The Mayor Versus the School Superintendent: Political Incursions into Metropolitan School Politics*, 29 EDUC. & URB. SOC'Y 217, 223–25, 229–30 (1997) ("The mismatch of power between educators and politicians practically invites the latter to scapegoat the educators.").

273. But cf. Meier, *supra* note 266, at 227 (reasoning that merely enlarging constituencies of elected officials, in hopes of staunching the power of parochial concerns, "is no guarantee that the representative of that constituency is more competent—or less corrupt—than the representatives of the smaller constituency").

274. See Marschall & Shah, *supra* note 7, at 165.

sprawling street-level bureaucracies are mayors' lifeblood. External regulatory power is irreducibly constrained by the local power over policy implementation; mayoral power is not.

Finally, mayoral power can increase state power over schools without requiring states to regulate them directly. Mayoral control over schools, bestowed by the state, can be withdrawn by the state as well; so when mayors and districts both seek power over schools, the state's role shifts from that of a constrained regulator to that of kingmaker, in the position, as the bestower of the desired prize, to extract concessions from all sides. To be sure, mayors are not powerless either. The state can enjoy a kingmaker role only if there are at least two genuine contenders for authority, and thus actual or feigned mayoral reluctance to accept responsibility for schools has permitted mayors in many cases to extract concessions from the state.²⁷⁵ But if the mayoral interest is in fact genuine—as it is particularly likely to be whenever mayoral control has been once bestowed—states gain leverage by being able to threaten whichever institution is in power that the other might soon replace it.²⁷⁶ In this

275. Mayors at one time “preferred to avoid entanglement in schools.” Michael N. Danielson & Jennifer Hochschild, *Changing Urban Education: Lessons, Cautions, Prospects*, in *CHANGING URBAN EDUCATION*, *supra* note 219, at 277, 284. Under current circumstances neither this generalization nor its opposite seems reliable. Compare Lolis Eric Elie, *Oakland's Mayor Is Still in Orbit*, *TIMES-PICAYUNE* (New Orleans), June 14, 1999, at B1, available at 1999 WLNR 1224715 (reporting that Oakland Mayor Jerry Brown, asked whether his efforts to gain the power to appoint some members to the school board constituted a “naked power grab,” responded: “Most people in politics prefer more power to less power”), with Susan Snyder, *Heydt Wants To Take Over Allentown School District; School Officials, Mayors of Easton, Bethlehem Recoil at the Prospect*, *ALLENTOWN MORNING CALL* (Pa.), Nov. 8, 1996, at A1 (quoting Bethlehem (Pa.) Mayor Ken Smith analogizing running the schools to being handed “a bag of snakes”), and *Two Visions*, *supra* note 138 (reporting Kansas City Mayor Kay Barnes' statement: “We can't even keep Kemper Arena clean. I don't know why we have the audacity to believe we can take on another full plate when we already have one.”). Mayors might desire control over the schools because voters expect it of them, *see supra* note 267, because important business or other constituencies desire it, *see, e.g.*, Shipps, *supra* note 140, at 69–71; James Heaney, *Mayors in Charge*, *BUFFALO NEWS*, Jan. 24, 1999, at A1; Neal, *supra* note 138; *Q&A: Improvement Board Would Have Muscle*, *PATRIOT-NEWS* (Harrisburg, Pa.), May 4, 2000, at A12, or because they simply think they can help, *see Rich & Chambers, supra* note 137, at 172–73.

Mayors sometimes disavow interest in control over public schools as part of a dynamic which leads to mayoral control and state concessions. *See Mirel, supra* note 137, at 131–32 (discussing Detroit mayor); *cf. Orr, supra* note 137, at 47 (discussing Baltimore mayor acquiescing in reductions in his power in return for extra resources for schools). It is impossible to determine whether such initial disavowals and subsequent changes of heart are sincere or strategic.

276. For example, in the 1990s a newly assertive state considerably reduced longstanding mayoral authority over Baltimore schools. *See Orr, supra* note 137, at 27, 46–47.

way, districts under mayoral control are made just as contingent as traditionally managed school districts. In this new era of school governance, no institution—neither mayoral regimes nor employment regimes—has access to the kind of unquestioned power that was once school districts' by birthright.

B. State Courts Sidelined

If, as I have argued, plaintiffs' third-wave victories catalyzed the reallocation of power to the detriment of school districts, then one consequence of the third wave has special irony. Plaintiffs advocated third-wave theories as a way to overcome state courts' reluctance to embrace equity theory and so maintain a strong judicial voice in education reform. But the structural reforms that the third wave has wrought do just the opposite. They decrease districts' willingness to litigate school reform cases. In the medium term they will increase the frequency of judicial abstention. Finally, they will vastly complicate the already difficult questions of remedy that bedevil such judicial interventions as do occur.

The first effect of structural change is to reverse districts' incentives to support the litigation of school reform cases, by undermining an alliance between reform-oriented plaintiffs and distressed school districts that first arose after the second *Milliken v. Bradley* case.²⁷⁷ In *Milliken II*, the Supreme Court ratified as a remedy for segregation the practice of funneling substantial external funds to districts for the purpose of eliminating all traces of their segregated education systems.²⁷⁸ Because these funds could be and were used for a wide range of programs, both curricular and capital, districts recognized that substantial advantages could flow from a finding that they were segregated.²⁷⁹ Districts, though nominal defendants in desegregation cases, quickly found that their interests were better aligned with the plaintiffs who sought to expand their resources.²⁸⁰

277. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977).

278. *See id.* at 290.

279. *Missouri v. Jenkins*, 515 U.S. 70 (1995), is the textbook case. The Kansas City, Missouri School District ("KCMSD") entered that desegregation case as a plaintiff, with the state of Missouri as a defendant. *Id.* at 74. Although the trial court "realigned the KCMSD as a nominal defendant," *id.*, it accepted the district's remedial recommendations, *id.* at 75, and ordered "massive expenditures" that "allowed the District planners to dream and provided the mechanism for th[ose] dreams to be realized," *id.* at 79–80.

280. *See* MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 416 (4th ed. 2002) (collecting cases).

A similar dynamic is at work in education-finance cases. Those cases aim explicitly to bring more dollars to distressed districts, funds that districts want. Districts accordingly have been willing to accept judicial findings not only that they educate students unequally, but that they do so inadequately. The cash remedy is well worth the scarlet label.²⁸¹ Indeed, when additional aid is at stake, adequacy litigation is a win-win situation for districts governed by employment regimes. Either they will be declared to be adequate or, even better, sent money. But when states begin to respond to findings that a district is educating its students inadequately by stripping the district of power, rather than by (or even in addition to) increasing state aid, the calculus for districts shifts dramatically. The possibility of a loss of district power is the worst possible outcome for employment regimes; new resources are not valuable to the regime if the regime cannot direct their use.²⁸²

Education-finance plaintiffs will in the future, therefore, increasingly need to overcome opposition, not only from the state, but from districts, who were once their allies and whom they are ostensibly trying to help.

This opposition, moreover, is the least of plaintiffs' problems. The erosion of district power will also likely strengthen a judicial policy of abstention. As noted above, a major obstacle to the success of second-wave cases was judges' concern that to adjudicate them would require them to supervise a large chunk of states' tax collection and resource allocation functions; several courts concluded that the cases therefore should be treated as nonjusticiable "political questions."²⁸³ Third-wave theory was designed to blunt the political question argument.²⁸⁴ Because it imposes no distributional requirements once the floor of adequacy is satisfied for all, it leaves distributional politics above the floor to the politicians. Moreover,

281. Shame does appear to be a nontrivial motivator of district behavior, and regulators have adopted strategies of regulation by information and of public excoriation of deficient districts in order to harness shame to reformist ends. See, e.g., Peter Marks, *Legislators Pass Bill To Seize a School District in Nassau*, N.Y. TIMES, July 1, 1995, at 1, 22 (reporting ex-member of Roosevelt (N.Y.) school board explaining his old colleagues' resistance to reform as a "shame thing"); Michael J. Petrilli, *School Reform Moves to the Suburbs*, N.Y. TIMES, July 11, 2005, at A17 (noting that NCLB's "primary mechanisms are sunshine and shame: gathering statistics and alerting the community when a school is not doing right"); cf. Dyson, *supra* note 41, at 625-27 (noting the possibility of using "negative gossip" and "poor media coverage" to encourage elected officials to cooperate with school finance reform efforts).

282. See Saiger, *supra* note 10, at 1676.

283. See *supra* note 192 and accompanying text.

284. See *supra* note 196 and accompanying text.

third-wave plaintiffs suggest that because adequacy is a less slippery concept than equality, and especially because adequacy is itself routinely defined by legislators, the standards that it does impose are more judicially manageable than those put in place by the second wave.²⁸⁵

These advantages of adequacy are not just attenuated but actually reversed if states respond to the doctrine by adjusting how power is distributed across organs and levels of government. Any court inclined to view the distribution of tax burdens and resources among communities as a nonjusticiable political question is a fortiori guaranteed so to view the distribution of power among governmental institutions; and even courts not convinced of the former might well endorse the latter. Indeed, it is extremely hard to imagine any court that would be willing to intervene outright in a reallocation of powers once districts' to other institutions, absent evidence that the shift was meant to evade its orders. Although there is room to doubt whether mayoral control will in fact bring about educational improvement,²⁸⁶ for example, that question has apparently played no role in arriving at the judicial consensus, unanimous at this writing, that states have the power to reconfigure independent school boards as dependent agencies of city government so long as their action has a rational basis.²⁸⁷ If courts accept states' plausible argument that management rather than money is at the heart of distressed schools' woes, this sort of rational basis deference to decisions about governmental structure could easily blossom into the reemergence of political question abstinence.

Mayoral control raises political question problems in another way as well. One justification for nonabstention that has been suggested by state courts is that state constitutions privilege education above other government services. This is clearest in New Jersey, whose high court has been piling remedial orders upon the state and its school districts for decades²⁸⁸ without seeing substantial results. That court has acknowledged that "perhaps nothing short of substantial social and economic change affecting housing,

285. See *supra* note 199 and accompanying text.

286. See Kenneth K. Wong & Francis X. Shen, *When Mayors Lead Urban Schools: Assessing the Effects of Mayoral Takeover*, in *BESIEGED*, *supra* note 32, at 81, 83.

287. See *Moore v. Detroit Sch. Reform Bd.*, 2002 FED App. 0205P, 10, 293 F.3d 352, 358–63 (6th Cir. 2002); *Mixon v. Ohio*, 1999 FED App. 0347P, 30–31, 193 F.3d 389, 408–09 (6th Cir. 1999); *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1089–91 (Pa. 2003).

288. See generally Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL'Y REV. 615 (2004) (cataloguing the evolving mandates in the *Abbott* cases).

employment, child care, taxation, and welfare will make the difference" for poor students.²⁸⁹ Nevertheless, the court argued, because education alone among "essential governmental services" is mentioned in its state constitution, education alone is within the remedial power of its judiciary.²⁹⁰

This argument is presented to justify the court's continuing insistence on growing education budgets notwithstanding highly plausible arguments that funds would better be used elsewhere. But the wellsprings of the argument lie in the political question problem. Courts could, after all, have read constitutional education clauses to permit them to regulate "housing, employment, child care, taxation, [and] welfare"²⁹¹—a list of policy areas to which I would add land use and environmental regulation—because such regulations directly affect equality of educational opportunity. But this would have come de facto to a near-complete takeover of municipal policymaking. Courts manage to avoid such a course, which presents the political question problem four-square, in large part because the unique status their doctrine gives to schools has been accompanied by a policy on the ground of organizing special governments—school districts—whose exclusive business is schooling. Because different government institutions handle education and other public functions, judicial remedies regarding education can be directed towards school districts and so confined to schooling. Ramifications for the rest of general-government policy and polity are real but second-order.

This strategy loses bite when on-the-ground exceptionalism is attenuated or abandoned. Professors Henig and Rich argue that mayoral control puts

decisions about schools in the hands of a leader in a position to steer decisions about child welfare, safety, public health, recreation, job training, and economic development—issue areas that bear heavily on the tasks that schools are expected to perform but which typically are outside the sphere of influence of superintendents and school boards.²⁹²

The turn to mayors thus reinforces the connection, which courts have sought to sever, between education and the rest of the municipal budget. If a judicial demand that education budgets be increased directly requires concomitant reductions in the sanitation,

289. *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 403 (N.J. 1990).

290. *Id.* at 375, 403; *accord* *Brigham v. State*, 692 A.2d 384, 392 (Vt. 1997).

291. *Abbott II*, 575 A.2d at 403.

292. Henig & Rich, *supra* note 141, at 7.

transportation, welfare, and library services available to poor children, as Henig and Rich appear to suggest, courts making such demands seem again to be displacing the core political function that is supposed to belong to municipal government.

Although I think that structural change increases the probability that judges will increasingly frequently retreat from the adjudication of education rights under the political question doctrine, some courts will persevere. They will continue to adopt reasoning like that of the New Jersey Supreme Court, which has reiterated in several of its many *Abbott v. Burke* cases that, even in the face of substantial doubt that additional funding for distressed districts will bring about adequate education for children in those districts—indeed even in the face of doubt that *any* educational practice can erase their disadvantages—there is nevertheless a constitutional, justiciable state obligation to provide those funds.²⁹³ New funds are required notwithstanding that they “may fail to achieve the constitutional object, [in] that no amount of money may be able to . . . make the difference for these students [in poor districts].”²⁹⁴ On an *Abbott*-like view of the law, a court could accept nonjusticiable state authority over noneducation policy and over the arrangement of educational governance while continuing to insist that other educational areas, such as finance and the nature of schools’ remedial and support programs,²⁹⁵ remain subject to court jurisdiction.

The problem with which governance change confronts courts like New Jersey’s is not justiciability but remediability—already the Achilles’ heel of the school-finance movement. If power over distressed schools is widely distributed, at whom should the court direct its remedial instructions? Not all state arrogations of power raise this quandary. For example, that the New Jersey governor and legislature disestablished several *Abbott* districts and imposed direct state control upon their affairs did not affect those districts’ corporate identity; the courts could and did order the state to supplement the budgets of state-run districts just as it was required to do for locally-

293. *Abbott II*, 575 A.2d at 403 (“[E]ven if not a cure, money will help If the claim is that additional funding will not enable the poorer urban districts to satisfy the thorough and efficient test, the constitutional answer is that they are entitled to pass or fail with at least the same amount of money as their competitors.”).

294. *Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 439 (N.J. 1997).

295. Remedial and support programs became part of the *Abbott* remedy with *Abbott v. Burke (Abbott V)*, 710 A.2d 450, 473 (N.J. 1998) (ordering the state to ensure that distressed districts provide, inter alia, services such as full-day kindergarten and college transition programs).

run ones.²⁹⁶ However, had the state arrogated particular powers of those districts to itself in the name of reform—to take a hypothetical example, the power to develop detailed curricula and select instructional materials—the problem would have been much different. Would the *Abbott* court have been prepared to order the state department of education to reallocate its budget internally so as to increase support for that function as applied to the *Abbott* districts? Obversely, would the court have been prepared to order the state to *decrease* support of that same function if the court felt that the department's activities were not supportive of reform? Either way, it is hard to see any basis upon which the ordering court could reasonably expect its actions to have the desired remedial results.

A sound remedial approach is even more elusive if one imagines a state reacting to local distress by facilitating the establishment of scores of charter schools in a distressed district, what Professor Bruce Fuller calls “decentering the state.”²⁹⁷ Would a court be prepared to order substantial extra funding across the board when much of it would flow to charter entrepreneurs whose *raison d'être* is freedom from government regulation; or would the courts then be tempted to begin regulating charters' practices as they have regulated those of district schools? Obversely, would the court be prepared to restrict extra funds to traditional district-run schools, and in so doing gut the foundational market mechanism by which charter schools are made viable and district schools forced to compete? Would it matter that parents “choose” their children's charters, notwithstanding the often weak academic performance of such schools, so that judicial regulation would work to obviate parental choice? Is there a conceptually satisfying distinction between charter parents' choice and the way that other parents “choose” to remain in district schools?²⁹⁸ Would the relevance of choice in fact depend on whether charter schools' academic performance was worse than district

296. Cf. Nat'l Ctr. for Educ. Statistics, *supra* note 182, at tbls.90–91 (listing data for expenditure increases in Newark N.J., which has been state-run since 1995).

297. See Fuller, *supra* note 122, at 1.

298. The question whether these two types of “choice” were different, and whether that difference mattered to the question before it, tied the Supreme Court in knots in the Cleveland vouchers case, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2001). Compare the treatment of charters, called “community schools” in Cleveland, *id.* at 647, 654, 655, 659, and *id.* at 673–76 (O'Connor, J., concurring), and *id.* at 681 (Thomas, J., concurring), with *id.* at 685 (Stevens, J., dissenting), and *id.* at 700–01 & nn.9–10 (Souter, J., dissenting).

schools' instead of better?²⁹⁹ Again no logical or even reasonable way to direct remedial funds under such circumstances presents itself.

A less hypothetical example of this problem arises if one again considers a state that responds to inadequacy by establishing mayoral control. This has not happened in any of the *Abbott* districts, or anywhere else in New Jersey; but it has occurred in neighboring New York City,³⁰⁰ another school district whose education program has been deemed inadequate by the state's highest court and where a financial remedy has been decreed.³⁰¹ It is instructive to compare the New Jersey and New York cases on the critical question of what level of government is responsible for raising the new resources the court requires. This was an easy question for the New Jersey Supreme Court: funding for distressed schools must come from state rather than local treasuries, because poor cities are "already over-taxed to exhaustion."³⁰² Contrast the hands-off view of the New York Court of Appeals that "how the [funding] burden is distributed between the State and [New York] City [is a] matter for the Legislature desiring to enact good laws" rather than the courts³⁰³—this notwithstanding the *Abbott*-like argument of the city of New York that

the State's obligation to provide the sound basic education funds cannot be sloughed off to the City. The State is the cause of the Constitutional problem, and must be the source of the required funds, both in light of the unique circumstances surrounding the City's financial affairs—e.g., the City's fiscal dependency and the fact that the City already pays more than its fair share of its incredibly high public assistance costs—and also as a matter of law, equity, and elemental fairness.³⁰⁴

299. In Cleveland, charter schools operating when the *Zelman* record was made were reporting test scores lower than those of district schools. See *id.* at 702 n.10 (Souter, J., dissenting). The import of this fact and its relationship to the nature of choice also frustrated the *Zelman* court. Compare *id.* at 670–71, 673–75 (O'Connor, J., concurring), with *id.* at 702 n.10 (Souter, J., dissenting).

300. See *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 346 (N.Y. 2003) (placing adoption of mayoral control in New York in the context of other "federal and state measures directed at identifying and improving bad schools").

301. *Id.* at 343.

302. *Abbott II*, 575 A.2d 359, 394 (N.J. 1990).

303. *Campaign for Fiscal Equity*, 801 N.E.2d at 348.

304. Findings of Fact, Conclusions of Law, and Memorandum of Law of the City of New York at 3, *Campaign for Fiscal Equity, Inc. v. State*, No. 111070/93 (N.Y. Sup. Ct. Oct. 29, 2004), available at <http://www.cfequity.org/compliance/citybrief102904.pdf> [hereinafter *CFE Brief of NYC*]; see also *id.* para. 45–53, at 10 (quoting, inter alia, Mayor Bloomberg's averral that "[i]t would be 'very difficult, if not impossible' to raise taxes in New York City"); *id.* at 36, 39 (it is "nearly impossible for [the City] to raise the additional

The trial court also ducked this key, contested question on remand,³⁰⁵ thus postponing its consideration until after the appeal now pending to await some future, undoubtedly prolonged, round of litigation.

One explanation for this contrast is that New York is a wealthy city, where the cities coterminous with the *Abbott* districts—Newark, Camden, Trenton, Jersey City—are desperately poor. But mayoral control is another explanation. There is of course no jurisprudential barrier to demanding that a city, just as a state, spend massively on education to meet a constitutional requirement, whatever the impact on its nonconstitutional obligations. But it is much more palatable to demand that a state divert funds spent educating the privileged to schools for the poor than to require a city generously to fund its schools at the expense of libraries, policing, parks, and sanitation.³⁰⁶ The mayor of New York runs a city, not just a school system; he is accountable to voters for his spending trade-offs; and he navigates an intricate political web of intergovernmental aid of which education funding is but one strand.³⁰⁷ As noted above, courts are (properly) far more reluctant to enter such a minefield than to demand new state aid for thirty-odd small and impoverished New Jersey districts.

But more than that, courts are (again properly) unsure if such a remedy will actually remediate. Even if a city budget is not a zero-sum game—a claim that the city of New York has emphatically rejected throughout the *Campaign for Fiscal Equity* litigation³⁰⁸—does it benefit poor children fully to fund their schools if some or

funding necessary for its schools.”); Bonnie A. Scherer, Comment, *Footing the Bill for a Sound Basic Education in New York City*, 5 FORDHAM URB. L.J. 901, 923–25 (2005) (cataloging arguments against funding school spending increases with City-raised funds).

305. The New York Court of Appeals remanded *Campaign for Fiscal Equity* to the trial court for the design of a remedial order; the trial judge in turn delegated the job to a panel of special masters. The panel recommended an expansive remedial plan that would increase the total funding of city schools half again from their current levels; but it followed the Court of Appeals and declined to offer an opinion regarding whether city or state should pay, so long as “the State Legislature . . . [is not] arbitrary or unreasonable in its allocation to the City of New York of a funding burden.” Report and Recommendations of the Judicial Referees para. 85–87, *Campaign for Fiscal Equity, Inc. v. State*, No. 111070/93 (N.Y. Sup. Ct. Nov. 30, 2004), available at <http://www.cfequity.org/compliance/RefereeFinalReport11.30.04.pdf>. The trial judge then elided much of this complexity, choosing to read the language of the Court of Appeals quoted above as “categorically provid[ing] that it is for the Legislature to determine how school funding should be distributed between State and City.” See *Campaign for Fiscal Equity, Inc. v. State*, No. 111070/93, at 8 (N.Y. Sup. Ct. Feb. 14, 2005) (order confirming report and recommendations of the judicial referees), available at <http://www.cfequity.org/degrasse021405.pdf>.

306. See *supra* notes 288–90 and accompanying text.

307. See *CFE Brief of NYC*, *supra* note 304, para. 35–40, at 8–9.

308. See *id.* para. 45–61, at 9–11.

most of those monies will come from their parks, their libraries, their police protection, and their public health, welfare, and employment services? That “no” is the most probable answer to this question must give a responsible court pause.

Therefore, once courts accept the nonjusticiability of government structure—a position that seems unavoidable—they will find themselves either unwilling to continue to oversee education policy, or unable to do so even if they have a mind to try. By substituting the chaos of polyarchy for the orderliness of layer-cake educational governance, states have effectively made the control of education policy too inchoate an undertaking to get judicial hands around.

C. *Suburban Dominance at Risk?*

Potentially, the most momentous consequence of the redefinition of the school district’s role may be to initiate the erosion of the ability of suburban communities to quarantine themselves from the problems of others while investing in their own systems of public education.³⁰⁹ In many ways, this would be (again) an ironic development: it was suburban opposition to second-wave equity claims, and then to third-wave remedies inimical to their interests, that encouraged states to undertake school governance reform. But in another respect the consequence seems utterly straightforward. The school district is the institution through which suburbanites have been able to build and preserve islands of privileged educational localism. Inroads into district power challenge localism everywhere.

It is easy to see how governance reform seemed safe to suburbanites; indeed today suburban school districts remain, for the most part, quite secure in their power. This is because the revolution in school governance has less frequently withdrawn powers from school districts absolutely, preferring to make existing powers contingent. A district need not change anything about what it does so long as it can continue to satisfy New Accountability targets, NCLB mandates, and parents shopping among district and charter schools. Governance reform thus has initially targeted districts that cannot, or otherwise prefer not to, meet these externally-imposed goals.³¹⁰ The result has been to introduce a great deal of variance into governance arrangements: Even as distressed districts lose local autonomy in ways both dramatic and subtle, prosperous, successful suburban

309. See *supra* notes 41–44 and accompanying text.

310. On the distinction between school districts’ reform capacity and reform preferences, see Saiger, *supra* note 10, at 1677–84.

districts carry on mostly as before.³¹¹ Indeed, the popularity of governance reform among policymakers has arguably depended on its variability,³¹² since elected officials both state and national depend on suburban constituencies who prefer their school districts as they are.

Nevertheless, to exercise contingent powers successfully is a different matter, even for districts powerful and prosperous, than to exercise power as of right. Early rumblings that the new modes of educational governance might come to endanger the successful districts of the suburbs, as well as the distressed districts urban and rural, are beginning to be heard. Most of these rumblings emanate from two areas: the implementation of the No Child Left Behind Act and school choice.

With the No Child Left Behind Act, the tentacles of federal regulation have started to sting not just distressed, underperforming districts but school districts that have long viewed themselves as highly successful.³¹³ The detailed demands of NCLB regarding the frequency of standardized testing,³¹⁴ the populations and subpopulations to be tested, and what counts as annual progress in test scores³¹⁵ result in generally high-achieving schools sometimes being labeled as needing improvement—as “failing,” in the popular argot³¹⁶—notwithstanding generally high scores, if, for example, they use unacceptable testing rubrics or schedules, exempt sizable populations of non-native English speakers or disabled students from testing, or cannot demonstrate achievement for every federally-defined subgroup of the student population.³¹⁷ The “failing” label infuriates suburban schools that view themselves as anything but—a view perhaps complacent in part, but, in light of overall levels of achievement, defensible.³¹⁸ For the many suburban schools that

311. See *id.* at 1730–31 (discussing this phenomenon in context of New Accountability).

312. See *id.* at 1694–95.

313. See *supra* notes 93–98 and accompanying text.

314. 20 U.S.C. § 6311(b)(2) (Supp. II 2002).

315. See *id.* § 6311(b)(3)(C)(xiii).

316. See Ryan, *supra* note 93, at 945.

317. See Linda Darling-Hammond, *From “Separate but Equal” to “No Child Left Behind”: The Collision of New Standards and Old Inequalities*, in *MANY CHILDREN LEFT BEHIND*, *supra* note 104, at 3, 15–16; Ryan, *supra* note 93, at 944 (“[A] large number of schools in every state are likely to be deemed ‘failing’ because of the [NCLB] Act.”); Petrilli, *supra* note 281.

318. See Petrilli, *supra* note 281 (“[I]n the suburbs, bad news [generated by NCLB] about local schools captures the quick attention of politicians (and residents worried about their property values).”); see also Ryan, *supra* note 93, at 942 (emphasizing that NCLB disseminates information on the performance of all schools, including those not receiving Title I funds). For a discussion of state efforts to block provisions of NCLB unfriendly to the suburbs, see *supra* note 107.

receive federal Title I funds,³¹⁹ the label also subjects them to the NCLB's sanctions regime.³²⁰

Such federal incursions into suburban district autonomy are particularly striking when they are based upon the underperformance of racial, language, or special-needs minorities whose problems were previously masked by strong test performance by a larger student majority. To many, it is a cardinal virtue of the NCLB that it demands high performance, not only overall, but for individual subgroups that otherwise are "basically invisible."³²¹ One can demur to this policy judgment and still recognize that, in imposing stigma and, perhaps worse, sanctions on suburban districts as a result of minority underachievement, NCLB represents a signal of political failure for the cause of suburban educational autonomy. Especially given the Act's origins in and hard-line enforcement by a Republican administration whose base does not lie in minority communities,³²² the Act demonstrates how governance reform, once unleashed, can turn on suburban districts who initially imagined themselves beyond its purview.³²³ Suburban interests remain very powerful in both state and national politics. Nevertheless, suburban districts, organized to provide education with only minimal regard for the problems of poor communities, are now being ordered by state and national administrations—elected with suburban support—to pay heed, and allocate resources, to the poor and to other minorities within their borders. To be sure, the NCLB and its advocates nowhere suggest that this obligation might cross district lines, or that it be applied to a state allocating resources among districts as well as to districts allocating resources across and within schools. But the first sort of

319. See Ryan, *supra* note 93, at 942.

320. See Saiger, *supra* note 10, at 1720–21, 1725.

321. See Petrilli, *supra* note 281. But see James S. Kim & Gail L. Sunderman, *Measuring Academic Proficiency Under the No Child Left Behind Act*, 34 EDUC. RESEARCHER 3, 12 (Nov. 2005) ("[T]he NCLB subgroup policy puts racially diverse schools at greater risk of failing.").

322. For a discussion of the Act's base in Republican support, and for the strange-bedfellows bipartisan coalition that permitted its passage, see KOSAR, *supra* note 48, at 186.

323. The political point is not obviated by recent moves by the Federal Department of Education to conciliate its previously hardline approach and grant suburbs some additional flexibility. See Lynn Olson, *Florida Gains Flexibility on NCLB Provisions: Fewer Schools Likely to Miss Annual Progress Goals Under Changes*, EDUC. WK., May 25, 2005, at 18; Lynn Olson, *Requests Win More Leeway Under NCLB: Ed. Dept. Gives 16 States Approval on Changes*, EDUC. WK., July 13, 2005, at 1; Christina A. Samuels, *Special Education Test Flexibility Detailed*, EDUC. WK., May 18, 2005, at 22. But see Liebman & Sabel, *supra* note 199, at 1725 & n.85 (suggesting, contrary to generally accepted opinion, that NCLB regulation has consistently been flexible).

interference is politically unpalatable enough; and in its light these more alarming possibilities suddenly appear less fantastic.

A similar dynamic is associated with school choice. Suburbanites had acquiesced in the use of choice as shock therapy and/or an accountability sanction for poor schools, but choice was for other people. The schools of the suburbs were not to be made available as schools of choice for nonresident students,³²⁴ nor were in-district students to be offered vouchers that would permit exit from suburban district schools.³²⁵ Suburbanites, the primary beneficiaries of the status quo, have economic, political, and educational incentives to preserve both the localism and the publicness of their local, public schools.³²⁶ Indeed, many commentators have advocated properly designed choice programs as a means of eroding suburban advantage, because choice can attenuate the relationship between place and education.³²⁷ Suburbanites are wary of choice for just this reason.

Nevertheless choice, in the form of charter schools, has arrived in the suburbs. Although the suburban aversion to choice classically extends to charters,³²⁸ such schools have proliferated sufficiently to kick up dust in districts far from America's urban core.³²⁹ In several once-complacent districts, prosperous parents, dissatisfied with what they regard as curricular vagueness and faddism in district schools,³³⁰ have launched charters; such efforts can, as in the widely noted case of Princeton, New Jersey, elicit fierce opposition from the district side.³³¹ Such opposition is clearly due not merely to the transfer of

324. See *supra* note 110; Ryan, *supra* note 41, at 1646.

325. See Ryan & Heise, *supra* note 114, at 2045, 2080–81.

326. See *id.*

327. E.g., GOODWIN & KEMERER, *supra* note 113, at 5 (advocating the “use of choice to promote equity”); RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 116–35 (2001) (advocating program of controlled choice); MCDERMOTT, *supra* note 183, at 121, 131–34 (proposing that states abolish school districts, and replace them with a regime involving centralized finance, school-level discretion, and school choice); Forman, *supra* note 210, at 1311 (noting proposals for voucher implementation designed to achieve “race and class integration”); Liu & Taylor, *supra* note 115, at 809–11 (promoting the exercise of choice as an approach with potential “desegregative impact”); Ryan, *supra* note 8, at 310–15 (arguing that choice can be responsive to structural inequities in education).

328. See Ryan & Heise, *supra* note 114, at 2077.

329. See *supra* text accompanying note 133.

330. See HOCHSCHILD & SCOVRONICK, *supra* note 13, at 117; Kate Zernike, *Selling Air: New England Parents Spark a New Revolution*, in INSIDE CHARTER SCHOOLS, *supra* note 122, at 126 (“[d]issident suburban parents” organize charter to avoid the overemphasis on rote learning they perceive in local district schools); CHIARA R. NAPPI, THOMAS B. FORDHAM FOUND., WHY CHARTER SCHOOLS?: THE PRINCETON STORY 3–4 (1999), available at <http://www.edexcellence.net/doc/wcs.pdf>.

331. See NAPPI, *supra* note 330, at 12–16.

students from district to charter but to the concomitant loss of power. No longer can districts like Princeton's be uniformly responsive to their familiar, internal constituencies; instead they must attend to the market, and in particular to the preferences of parent-consumers with the power to choose between charter and district schools. Thus, choice-induced changes in governance bring new constraints to suburban schools.

For now, the incursions of choice into suburban district autonomy are limited to charters; but the reality of these early incursions cannot but make suburbanites wonder whether other, less palatable intrusions might be in the offing.³³² What is to prevent, for example, state or federal regulators from pegging a district's accountability status to academic performance outside district lines, perhaps to a metropolitan average? Regionalization or redistricting have not had much success as judicial remedies, but a bureaucracy might easily adopt a backdoor to regionalization by incorporating regional performance indicators into individual districts' accountability scores. Perhaps one day a sufficiently visionary and energetic urban mayor might even convince a state legislature, as the price for his acquiescence in mayoral control, to use the district consolidation sanction and hand over to her not just city schools but some neighboring suburban ones as well.³³³ Or a state might pick up the NCLB's lead and threaten to disestablish rich districts that fail to meet bureaucratic requirements for minority achievement or racial integration.

I do not mean to suggest that these possibilities are not somewhat farfetched, much less that they are actually waiting in the wings. At the present time, none is politically viable. But they are not bad ideas; and in the new, polyarchic ecology of education, they seem less fanciful than they would have in the era when districts ruled. After all, it is no longer farfetched to imagine that regulators in far-off Washington threaten suburban districts across the country that unless their migrant students, their English language learners, and their African-American pupils show annual academic progress, district leaders will feel genuine pain.

CONCLUSION

That the third wave of school-finance reform is in all likelihood the last does not imply any erosion in the centrality of education

332. I am indebted for this point to Michael Danielson.

333. See *supra* note 275 and accompanying text.

rights. It means only that the task of identifying and pressing for the adoption of an effective, judicially cognizable statement of the precise contours of those rights is an undertaking whose usefulness—whose feasibility—may be at an end. Educational power is ever more widely distributed over a bewildering array of governmental and nongovernmental actors: state and federal regulators, governors and legislatures, parent-consumers, and urban mayors have joined the weakened traditional players—courts, school boards, and their supporting regimes. Advocates seeking to advance education rights must therefore turn their attention to ways to influence all of these institutions as they continuously jockey for power in the newly polyarchic educational ecology. This certainly will be no easy task. The era of waves has ended, but no one should expect smooth sailing ahead.