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Legislating Accountability: Standards, Sanctions, and School District Reform

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LEGISLATING ACCOUNTABILITY: STANDARDS,
SANCTIONS, AND SCHOOL DISTRICT REFORM

AARON J. SAIGER*

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INTRODUCTION

“Hold the public schools accountable!” This clarion cry, first heard in state capitals in the late 1980s, has since been repeated and amplified by many states, by the courts, and most recently, by the federal government. Only where school districts and schools are held to “account,” the theory goes, ought one expect any program of school reform to be truly effective. Because unaccountable school districts lack incentives to succeed, waves of school reform have been able to wash over the nation’s most troubled school districts for decades without substantially ameliorating their dismal and disgraceful performance.¹

There can be no doubt that the programs grouped under the general rubric of the “New Accountability” mark an important shift in efforts to reform these troubled districts.² Accountability reforms operate in the public sphere, implicitly denying the claim that only markets can solve the problems of failing schools. They rely upon legislative and executive action, rather than locating the power to reform troubled schools in judges, who have limited control over schools’ activities, no ongoing experience with education, and a constrained repertoire of remedies. And instead of regulating top-down, accountability reforms encourage flexibility at the local level

1. See, e.g., FREDERICK M. HESS, *REVOLUTION AT THE MARGINS: THE IMPACT OF COMPETITION ON URBAN SCHOOL SYSTEMS* 7-8 (2002) (noting agreement for decades that “urban school systems are in crisis” but that many reform efforts have “failed to produce the desired results”); Jennifer L. Hochschild, *Three Puzzles in Search of an Answer from Political Scientists (with Apologies to Pirandello)*, 37 *POL. SCI. & POL.* 225, 227 (2004) (“Urban school districts, with occasional exceptions in particular schools or along particular substantive dimensions, are largely a disaster.”). The assertion of disaster holds whether disaster is defined comparatively, against the standard set by the mass of public schools that serve the relatively rich and white students of America’s suburbs, or by some reasonable aspiration of what public education ought to be. See CLARENCE N. STONE ET AL., *BUILDING CIVIL CAPACITY: THE POLITICS OF REFORMING URBAN SCHOOLS* 10-11 (2001) (describing how urban schools fail relative to suburban schools in reading, math, and science, and how they fail to meet the requirements of the twenty-first century job market).

2. “The New Accountability” is “new” because “accountability [wa]s an ‘in’ word among educators” as early as 1972. EDWARD WYNNE, *THE POLITICS OF SCHOOL ACCOUNTABILITY: PUBLIC INFORMATION ABOUT PUBLIC SCHOOLS*, at ix (1972). In 1972, as it does today, the word had various connotations; Wynne defined it as “systems or arrangements that supply the general public ... with accurate information about school output performance—test scores and other data that show how well groups of children are learning in school.” *Id.*

where educational programs are implemented; they impose demands regarding outcomes and information sharing but leave local officials to find the best ways to reach the standards the programs impose.

This Article argues that accountability programs indeed offer a new and promising way to catalyze the reform of schools in crisis, but not by virtue of the features of the programs that have dominated public controversy. The most important innovation through which the New Accountability addresses the problems of distressed schools has to date been relegated to the sidelines. Public debate has focused on the wisdom and validity of testing students to measure their performance, the risks of regimenting education across a diversity of schools and modes of inquiry, the proper measurement of educational improvement, and the educational legitimacy of setting standards for schools in the first place.³ The debate has come—implicitly in many cases and explicitly in some—largely to identify the New Accountability entirely with the practices of standard-setting, testing, and the dissemination of information about results.⁴

3. See, e.g., Eric A. Hanushek & Margaret E. Raymond, *Lessons About the Design of State Accountability Systems*, in *NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 127, 144-47 (Paul E. Peterson & Martin R. West eds., 2003) [hereinafter *NO CHILD LEFT BEHIND?*] (describing possible consequences of various testing regimes); Frederick M. Hess, *Refining or Retreating? High-Stakes Accountability in the States*, in *NO CHILD LEFT BEHIND?*, *supra*, at 55, 63-64 (discussing concerns in wealthy districts that accountability will lower elite standards and misstate elite educational achievement); Teresa Dahmus, *The Effects of the No Child Left Behind Act on the Balance of Power Among Local, State, and Federal Educational Authorities*, 16 *LBJ J. OF PUB. AFF.* 20, 23 (2003) (expressing concerns regarding the standardization and regimentation of reform mandated in the No Child Left Behind Act); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 *N.Y.U. L. REV.* 932, 934-35, 941 (2004) (objecting to measurement of student achievement based upon "uniform benchmarks"); Jay Mathews, *A Swing Away from Recess: Demands of Education Law Squeeze Out Downtime*, *WASH. POST*, Apr. 9, 2004, at B1 (reporting the concerns of parents and educators that accountability programs prompt elimination or curtailment of recess, field trips, and enrichment).

4. See, e.g., WYNNE, *supra* note 2, at ix (defining accountability with a focus on testing and supplying information about results); Diana Rhoten et al., *The Conditions and Characteristics of Assessment and Accountability*, in *THE NEW ACCOUNTABILITY: HIGH SCHOOLS AND HIGH-STAKES TESTING* 13, 14 (Martin Carnoy et al. eds., 2003) ("Accountability is the use of ... tests, procedures, methods, or series of tasks to measure what is taught and learned."); Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, in *NO CHILD LEFT BEHIND?*, *supra* note 3, at 23, 26-27 (alluding briefly to "[b]roader consequences" for failing districts but concluding that accountability under the No Child Left

To make such an identification is to miss the reason that policymakers adopted a banner of “accountability” rather than simply one of “standards”: American schools and school districts are peculiarly unaccountable institutions. They are insulated from the consequences of malfeasance by their natural monopoly over policy implementation, which ultimately must occur in classrooms widely dispersed and difficult to monitor; they are even more insulated by the peculiar intergovernmental structure of American education, which distributes responsibility for schools across two types of governments—states and school districts.⁵ Although the state is the locus of constitutional authority over school policy, school districts enjoy virtually total power over policy implementation. This gives districts unusual freedom to pursue their own self-interest, which often diverges from the state’s educational agenda.⁶ District resistance to externally motivated policy change is the shoal upon which many previous education reform efforts have foundered. The fundamental task of accountability is to undermine district power to resist reform—not so much to define standards as to discover how to hold schools and school districts to whatever standards are established.

To do this requires attention above all not to standards but to sanctions.⁷ At the intuitive heart of the term “accountability” is that

Behind Act “centers in two areas: in the requirements that must be met in return for federal money and in creating information that can drive parental demands of, and choice within, the public schools”).

5. Three levels of government participate in education if one considers the relatively small, but increasingly vital, federal role. *See infra* Part II.B.

6. *See* Andrea K. Rorrer, *Intersections in Accountability Reform: Complexity, Local Actors, Legitimacy, and Agendas*, in EDUCATIONAL EQUITY AND ACCOUNTABILITY: PARADIGMS, POLICIES, AND POLITICS 251, 256 (Linda Skrla & James Joseph Scheurich eds., 2004) (“[I]t is imperative to consider impending environmental influences on local actor preferences and their decisions to act. For instance, as schools and districts navigate responsibility for the education of all children, they must continuously contend with competing values and interests in what can be contested territory.”); GAIL L. SUNDERMAN, IMPLEMENTING A MAJOR EDUCATIONAL REFORM: NO CHILD LEFT BEHIND AND FEDERAL-STATE RELATIONSHIPS: FIRST IMPRESSIONS 2 (The Civil Rights Project, Working Paper, 2003), available at <http://www.okea.org/ESEA/actionresources/CivilRightsFederal.pdf> (“[E]ach level of government typically has its own priorities”).

7. *See* Hess, *supra* note 3, at 57 (“[I]t is important to distinguish between high-stakes accountability systems that include sanctions for students, teachers, or both and those nonintrusive standards-based systems that do not.”).

failure should compel consequences.⁸ The new accountability programs the states have adopted do not merely set standards for districts and schools to meet—they impose punishments for failure. In order to confront local leaders with genuine incentives to reform, moreover, these punishments are of a particular kind. Accountability sanctions are designed to curtail or eliminate local power. The ultimate sanction is “disestablishment”: the school board and superintendent in a district failing persistently are unseated, and authority over all school matters reverts to the state.⁹ Unlike judicial reform decrees or hierarchical diktats from state education departments, for which less-than-faithful implementation by a district carries few consequences, or market reforms, where the consequences of poor performance are attenuated, a disestablishment threat is vivid. Local officials at risk of losing their authority to manage district affairs have every reason to align their activities to an extent with state preferences.

The qualification—that states can force district realignment *to an extent*—is crucial. Accountability programs and threats of disestablishment do not magically transform districts into states’ faithful agents. Just as numerous districts have resisted judicially-imposed school reform by taking advantage of the restricted palette and limited capacity of judicial actors,¹⁰ districts seek to resist state-imposed reform as well. To be sure, districts will be appalled by the prospect of disestablishment and will undertake a variety of feasible but ambitious reforms in order to avoid its realization. But districts also recognize that imposing disestablishment sanctions carries political, educational, and financial costs for states. States may not be as enthusiastic about disestablishment as state officials would like districts to believe. Aware that disestablishment is painful for states as well as for themselves, districts must assess, rather than

8. See, e.g., Lynn Olson, *Shining a Spotlight on Results*, EDUC. WK., Jan. 11, 1999, at 8 (noting that, in pursuit of “a very American set of ideas: Take responsibility for your actions. Focus on results. And reap—or rue—the consequences,” education “policymakers are moving to reward success and punish failure in an effort to ensure that children are getting a good education”); Amy M. Reichbach, Note, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. REV. 667, 674 (2004) (describing how the No Child Left Behind Act equates “accountability” with “rewarding and sanctioning districts and schools based on students’ academic achievement”).

9. See *infra* Part I.A.

10. See *infra* Part II.A.

assume, the credibility of state threats to disestablish them. Unsure of the magnitude of the costs states face and the weight that states assign to those costs, such credibility determinations must necessarily be made in an environment characterized by incomplete information.

That districts must arrive at their own, uncertain conclusions about states' true intentions does not deprive state threats of the power to induce reform. Indeed, reform will likely be undertaken in a wider variety of districts than the state has actually targeted. Reform, however, will probably fall short of both the demanding standards of adequacy that states articulate in their accountability provisions and states' genuine preferences, which themselves are reflected imperfectly in statutory language. Incomplete information brings other costs as well: states must find ways to signal their seriousness about sanctions to districts that have reasons to doubt them, and it becomes impossible for states and districts to communicate directly and openly to one another what their goals and preferences are.

These very real costs notwithstanding, the structural limitations of accountability sanctions also work to benefit troubled public schools. Threats of disestablishment characterized by incomplete information vastly ameliorate the otherwise overwhelming difficulty faced by standards-based school reform: determining how high to set the bar. If standards are too low, desirable reforms go unimplemented; if too high, districts may be sanctioned unfairly and sometimes give up all effort. External policymakers, however, lack reliable methods by which to distinguish between standards that districts and schools cannot achieve—for the woes of urban education are complex and overwhelming—and those that they will not achieve—whether from want of incentives, institutional inertia, lack of creativity, or simply diverging preferences.

Because disestablishment threats allow districts to know the criteria for disestablishment only imperfectly, however, this problem is ameliorated substantially. Districts are more apt to try when there is a reasonable likelihood that some success plus good-faith effort will forestall sanctions, but are still motivated to try their best for fear that a lesser effort will yield a disastrous sanction. States are better positioned to reward the best efforts,

punish the worst, and galvanize future reform if the criteria they use are specified imperfectly and known incompletely. On the other hand, states are also constrained by the need to keep their threats credible; districts only reform if they are convinced that the risks of noncompliance are genuine.

Part One of the Article elaborates upon this argument. The subsequent Part analyzes efforts by two governmental institutions other than the states to promote school accountability: the courts and the federal government. Although the New Accountability has been embraced by both—in the case of the federal government, embraced with a vengeance¹¹—neither is likely to be able to use new accountability policies with much success, notwithstanding the conceptual similarities of their efforts to the state programs that are so promising. Key characteristics of state-district interaction—the shared incentives of both parties to avoid sanctions and incomplete information about credibility—are absent when disestablishment is threatened by judges or by Washington. The Article first considers judicial efforts to demand accountability, concluding that the political economy that accountability creates exacerbates the institutional disadvantages courts already face in the education reform field. The Article then considers the federal government, which sought to transform the New Accountability from a state to a national policy with the No Child Left Behind Act of 2001. Here again, a close analysis of the Act and its intergovernmental context suggests that accountability decreed from Washington will be considerably less successful at reforming very troubled districts than ostensibly similar programs initiated by states—although Washington may have a role to play in improving particular deficits in districts where overall performance is already adequate.

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

I. ACCOUNTABILITY, DETERRENCE, AND SIGNALING

A. School District Nonaccountability and the Disestablishment Incentive

The unaccountable school district has long been a feature of American public education. This is surprising in light of the black-letter principle that states are principals and school districts merely their agents,¹² empowered solely at the state's convenience and perpetuated entirely at its pleasure.¹³ Nevertheless, for a variety of historical, legal, bureaucratic, and political reasons, districts have enjoyed a long tradition of near-total autonomy.

History plays a large role. Public schools were first founded locally, with various communities setting up their own provisions for local schooling. The general principle of state plenary authority over districts is one of constitutional, not historical, primacy.¹⁴ The historical centrality of local districts is at the root of the assumption—still a basic norm in contemporary American political culture—that public education is properly a local affair. Thus, as localism of various kinds became an important line of defense for opponents of integrating public schools, the Supreme Court asserted famously in *Milliken v. Bradley*¹⁵ that “[n]o single tradition in public education is more deeply rooted than local control over the operation of

12. In the context of education, the “principal-agent” nomenclature of organization theory is a recipe for ruinously graceless expression at best and utter confusion at worst. At the school level, teachers are “agents” of the building’s “principal”—hence the latter’s title. (The title of course reflects a formal principle less actualized today than previously; collective bargaining for teachers has often meant that principals lack a “principal’s” authority over teacher-agents.) At the district level, however, school principals (the people) are the “agents” of the school district, which is the policy-setting “principal.”

13. See *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967) (extending to regional school districts the Court’s prior description of general local governments as “convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,” and the “number, nature and duration of the powers conferred upon [them] ... and the territory over which they shall be exercised rest[ing] in the absolute discretion of the State” (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907))).

14. See David Tyack, *Forgotten Players: How Local School Districts Shaped American Education*, in *SCHOOL DISTRICTS AND INSTRUCTIONAL RENEWAL* 9, 11-20 (Amy M. Hightower et al. eds., 2002).

15. 418 U.S. 717 (1974).

schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process.”¹⁶

History and tradition, however, do not fully explain the continuing force of localism. Several structural features of public education help to assure the continuing vitality of local control. One such feature flows from the nature of schooling itself: school districts control policy implementation in ways the state cannot match. As Jean Madsen notes, “[d]istrict administrators can either impede or enable educational reform policies to be implemented” in local schools.¹⁷ Possibilities for effective monitoring, moreover, decrease exponentially with the distance of the supervisor from school classrooms and corridors. The principal-agent relationship between schools and higher levels of government has long been recognized by scholars of organizations as “loosely coupled.”¹⁸ This unsupervisable discretion of district officials gives them a measure of power

16. *Id.* at 741–42. *Milliken* ignored pointedly the view of school districts that the Court articulated in *Sailors*. It seems scarcely controversial to attribute the difference to *Sailors*’ being a voting-rights case without obvious racial implications, where *Milliken* asked the Court to require both suburban and urban school districts to participate in remedies for metropolitan school segregation. In the face of that demand, *Milliken* treated individual school districts as independent entities that, although themselves duty-bound to avoid racial discrimination, had no duty to remedy the racist practices of other districts. Richard Briffault usefully calls this *Milliken* view of local governments—that their existence is a received tradition rather than the result of government action—“pregovernmental.” Richard Briffault, *Our Localism: Part II-Localism and Legal Theory*, 90 COLUM. L. REV. 346, 387 (1990). This attitude pervades state as well as federal jurisprudence about education. *But see* *Sheff v. O’Neil*, 678 A.2d 1267, 1288 (Conn. 1996) (placing the onus on state government to provide equality in educational opportunity); James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 544 (1999) (discussing *Sheff* and localism).

17. JEAN MADSEN, EDUCATIONAL REFORM AT THE STATE LEVEL: THE POLITICS AND PROBLEMS OF IMPLEMENTATION 141 (1994); *see also* JAMES P. SPILLANE, STANDARDS DEVIATION: HOW SCHOOLS MISUNDERSTAND EDUCATION POLICY 4 (2004).

18. JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 158 (1984); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 224 (1989). Indeed, Hochschild and Wilson locate the largest measure of discretion with classroom teachers themselves; when a teacher closes the classroom door, teaching and learning by their nature become difficult to observe. District authorities, however, appear to be sufficiently local to monitor teachers effectively and exert significant policy control over their work. *See* Mary Bushnell, *Teachers in the Schoolhouse Panopticon: Complicity and Resistance*, 35 EDUC. & URB. SOC’Y 251, 259–61 (2003) (documenting techniques for monitoring teacher compliance with curricular and pedagogical standards); *id.* at 264 (“A teacher’s work is inherently public”).

over state officials that the state cannot decree away.¹⁹ Indeed, as states become more ambitious in the range of educational mandates they impose upon districts and in the policy initiatives they sponsor, the very scope and diversity of state ambition expands district discretion and makes state monitoring even more difficult.²⁰

Further complicating the connection between high-level policymaking and on-the-ground implementation are the fuzzy specifications of good teaching. Good educational practice is sufficiently complex to defy the regulator's toolbox of prescription and regulation.²¹ A state seeking to impose a reform agenda hierarchically—say, by issuing regulations that govern teacher practice—would need to alter the practices of a large number of teachers “over whom it has little, if any, direct control and to whom it has no proximity,” and to “try[] to make this change in a profession where good practice is nearly impossible to clearly specify.”²² In short, although we sometimes know good teaching when we see it, we do not understand it well enough to describe—much less mandate—its components. Remote command-and-control regulation fails both because monitoring is unavoidably imperfect and because the regulations themselves cannot be well specified.

School districts' political advantages are as important as their bureaucratic ones. Like many other governmental institutions, school districts have political constituencies committed to their survival and their continued autonomy. The most prominent such constituency for school districts is suburban parents and suburban voters.²³ Suburbanites, whose school districts are insulated from the

19. See James P. Spillane, *School Districts Matter: Local Educational Authorities and State Instructional Policy*, 10 EDUC. POL'Y 63, 77 (1996) (“[C]ompliance with state policy ... did not mean relinquishing [school administrators'] instructional policy-making functions. If anything, compliance meant making more district policy.”).

20. See David K. Cohen, *Policy and Organization: The Impact of State and Federal Educational Policy on School Governance*, 52 HARV. EDUC. REV. 474, 477 (1982); Spillane, *supra* note 19, at 65.

21. David Glenn, *No Classroom Left Unstudied*, CHRON. HIGHER EDUC., May 28, 2004 (quoting Robert E. Stake, Professor of Education at the University of Illinois at Urbana-Champaign, for the view that idiosyncratic and nonreplicable variables determine educational outcomes).

22. SUSAN FOLLETT LUSI, THE ROLE OF STATE DEPARTMENTS OF EDUCATION IN COMPLEX SCHOOL REFORM 10-11 (1997).

23. See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 12

poverty and other bedeviling problems of urban education by geography and by decisions like *Milliken*,²⁴ have every incentive to keep the borders of their districts closed to outside interference. They resist entanglement not only with other districts²⁵ but also with the state. Even childless suburbanites are keenly aware that the quality of their local school districts is capitalized into their property values and, therefore, as a general matter, prefer to keep power over district affairs as localized as possible.

It is less commonly recognized that suburbanites devoted to the autonomy of their school districts have counterparts in distressed urban and rural districts. In these places, constituencies support school district autonomy not because of a perceived need to defend quality or exclusiveness against outside encroachment, but in order to protect the professional and economic interests of local elites. Scholars first noted such interests in the late 1960s and early 1970s, when political scientists and sociologists began to gather case study data on large urban school systems. These early researchers' agenda was twofold: first, to explode the then-prevalent myth that school government was somehow separate from, or above, politics; and second, working with Dahlian models of pluralism and interest-group models of local politics, to determine the extent to which school government offered an example of grassroots American democracy.²⁶ One of their earliest observations was the enormous potential for interest-group capture of the school board, especially by appointed superintendents and their professional staffs.²⁷ Scholars even documented cases of superintendents who

(2001) (asserting that homeowners' "[c]oncern about the vulnerability of their largest asset" spurs special attention to public school affairs); DOUGLAS REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 128 (2001); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2046 (2002) ("When suburbanites perceive a threat to their schools, they fight back, and they usually win.").

24. *Milliken v. Bradley*, 418 U.S. 717 (1974).

25. See Ryan & Heise, *supra* note 23, at 2057 (describing current opposition to interdistrict busing in Connecticut); *id.* at 2060 (discussing opposition of local citizens to the attempted economic equalization of school districts brought about by capping local expenditures on schools or recapturing local revenues and distributing them among other school districts within the state).

26. See, e.g., L. HARMON ZEIGLER ET AL., GOVERNING AMERICAN SCHOOLS: POLITICAL INTERACTION IN LOCAL SCHOOL DISTRICTS 1-22, 95-118 (1974).

27. Samuel B. Bacharach, *Organizational and Political Dimensions for Research on School*

were able to shape permanently the membership of the school boards that employed them by influencing the boards' electoral politics.²⁸

A variety of reasons were adduced to account for professional capture. The research emphasized in particular the nonpartisan nature of school board politics: absent political parties, no institutions existed around which opposing viewpoints or expertise could be organized.²⁹ This led to heavily consensus-based governance.³⁰ In addition, part-time board members were relatively ignorant about educational issues and impressed easily by the professional status of their educator-employees. Educators, and the education schools that trained them, encouraged this susceptibility. Educators saw that they could obtain and hold power, notwithstanding the democratic form of American education, by "sanctifying" the position of the educational professional[.]³¹ A haze composed of equal parts inviolability, professionalism, and complexity surrounded educational practice, exacerbating the already grave principal-agent problems that lay school boards faced in supervising the professionals they hired to run their systems.³²

Though the ability of school professionals to cow their lay employers with a mythos of disinterested professional expertise has waned since the 1960s,³³ the constellation of interest groups that influence school districts remains structured to confer systematic advantage upon professional and other employees. Clarence Stone and others describe contemporary "employment regime[s]" that dominate school district policy choices.³⁴ This concept draws upon

District Governance and Administration, in ORGANIZATIONAL BEHAVIOR IN SCHOOLS AND SCHOOL DISTRICTS 3, 6 (Samuel B. Bacharach ed., 1981).

28. LAURENCE IANACCONE & FRANK W. LUTZ, POLITICS, POWER AND POLICY: THE GOVERNING OF LOCAL SCHOOL DISTRICTS 23-24 (1970).

29. *See id.* at 22-23.

30. *See id.* at 27.

31. JOHN THOMAS THOMPSON, POLICYMAKING IN AMERICAN PUBLIC EDUCATION: A FRAMEWORK FOR ANALYSIS 77 (1976).

32. *See id.* at 82 ("Schools have adapted to conflict between professionals and lay groups ... by defining certain decisions as being in the professional sphere and thus to be made only in the bureaucratic system. Th[is] technique[] ha[s] largely enabled educators to control both their own concerns and those of their students.").

33. *See id.*

34. Clarence N. Stone, *Introduction: Urban Education in Political Context*, in CHANGING URBAN EDUCATION 1, 9 (Clarence N. Stone ed., 1998).

Stone's earlier elaboration of a regime model of business dominance in urban governance. In his pathmarking study of Atlanta politics, Stone defines a "regime" as an "informal yet relatively stable group *with access to institutional resources* that enable it to have a sustained role in making governing decisions."³⁵ The business regimes that Stone observed with these characteristics—informality, stability, and access to resources—were able to exert sustained influence, though not necessarily hegemonic power, in multiple policy areas. The "city's major business enterprises control too many vital resources, organizational as well as economic, to be excluded" from policymaking; thus, policy is skewed toward their interests, "work[ing] against any tendency for nonbusiness interests to come together and challenge the governing role of business elites."³⁶ Stone's point in using the phrase "regime" is to suggest that the system is systematically skewed, although not absolutely dominated, by the regime's agenda. Policies that serve regime interests are consistently, but not invariably, adopted.

Stone's application of this theory to school districts is edifying. Just as urban governance is skewed towards business and its interests, Stone argues, school governance is animated similarly by the goals of preserving contracts and especially jobs in the school system, creating an "employment regime."³⁷ As Stone and others point out,³⁸ the public school system is a vital source of jobs and

35. CLARENCE N. STONE, *REGIME POLITICS: GOVERNING ATLANTA, 1946-1988*, at 4 (1989).

36. *See id.* at 231-32.

37. *See Stone, supra* note 34, at 8-10.

38. Scholars other than Stone have discerned the fingerprints of employment regimes without using his terminology. They emphasize school boards' focus upon the employment and career needs of administrators and employees to the frequent detriment of academic and other educational needs of broader constituencies. Jeffrey Henig and his colleagues note "long traditions of bureaucratic autonomy and norms of professionalism that between them can create an institutional and ideological buffer zone that holds private actors at arm's length." JEFFREY R. HENIG ET AL., *THE COLOR OF SCHOOL REFORM: RACE, POLITICS, AND THE CHALLENGE OF URBAN EDUCATION* 17 (1999). Wilbur Rich characterizes the school boards in three large cities with black mayors as "cartel-like" organizations, "co-opt[ed]" by white educational establishments, and selected in elections "biased toward incumbents, union-backed candidates, and middle-class professionals." WILBUR C. RICH, *BLACK MAYORS AND SCHOOL POLITICS: THE FAILURE OF REFORM IN DETROIT, GARY, AND NEWARK* 5, 207-08 (1996). Stone identifies Rich's analysis as consistent with his own employment regime approach. *See Stone, supra* note 34, at 9; *see also* Charles Mahtesian, *Whose Schools?*, *GOVERNING*, Sept. 1997, at 34, 37 (describing the Jersey City and Newark school districts as "well-lubricated employment agenc[ies]"); Derek W. Meinecke & David W. Adamany, *School Reform in Detroit*

other "immediate benefits."³⁹ Some poor school districts are the biggest employers in town.⁴⁰ As Wilbur Rich puts it: "Schools are one of the major linchpins of the urban economy.... School districts have big budgets, hiring thousands of local residents and purchasing a variety of products and services.... School districts generate millions of dollars for the local economy."⁴¹

The size and immediacy of the economic benefits schools offer their workers, Stone argues, provides a ready principle around which school politics can be organized and maintained.⁴² Those interested in such benefits, moreover, have stability and resources. The superintendent and her professional staff, whose ability to capture the lay leadership has already been noted, are by training, temperament, and background often friendly to the interests of teachers.⁴³ Employees' (particularly teachers') unions and contractors are themselves the premier organized interest groups. They want schools run for their benefit and their cooperation is vital to the smooth running of the educational enterprise. Teachers' unions also control a large bloc of voters who will turn out even in low-salience school board elections. Unions—a paradigmatic example of the geographically dispersed interest group—enjoy particular political advantages because they can organize effectively at both the state and district levels.⁴⁴

Other interest groups also have a stake in education and play a role in district politics: local businesses, interested both in overall business climate and in employing school graduates; taxpayers;

and Public Act 10: A Decisive Legislative Effort with an Uncertain Outcome, 47 WAYNE L. REV. 9, 11-12 (2001) (claiming that the Detroit school board "drained Detroit Public Schools resources [and] ... allowed itself to be influenced by outside entities when making hiring, purchasing and other operating decisions"); Charles Strum, *Trenton Names Auditor to Rule Newark Schools*, N.Y. TIMES, May 14, 1993, at B1 (quoting Dr. Elena Scambio, an assistant education commissioner, as stating "Newark is a jobs market disguised as a school system").

39. See Stone, *supra* note 34, at 10.

40. See JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 20 & n.29 (2003); PATRICIA FRY ET AL., *KENTUCKY'S PROGRAM FOR EDUCATIONALLY DEFICIENT SCHOOL DISTRICTS: A CASE STUDY* 15 (Consortium for Policy Research in Educ., No. TC-005, 1992).

41. RICH, *supra* note 38, at 4-5.

42. See Stone, *supra* note 34, at 10.

43. See *supra* notes 27-32 and accompanying text.

44. See Terry M. Moe, *Politics, Control, and the Future of Social Accountability*, in *NO CHILD LEFT BEHIND?*, *supra* note 3, at 80, 92-93; STONE, *supra* note 35, at 138-39.

parent-teacher associations; schools of higher education and universities; and national interest groups with local branches, such as the NAACP and veterans' organizations.⁴⁵ Interest groups have particular room to maneuver in educational politics because political parties, which offer a partial alternative to interest-group-based political organization,⁴⁶ are absent in nonpartisan school districts. Interest group power has also grown at the expense of superintendent autonomy. As early as 1972, Frederick Wirt and Michael Kirst quoted a "former big-city superintendent" expressing a "commonly held view":

It used to be that a school superintendent, if he was at all successful, would have the feeling that he had the ability to mount a program and carry it through successfully. I think at the present time very few superintendents would be able to say honestly that they have this feeling. They are at the beck and call of every pressure that is brought to them. They have lost initiative.⁴⁷

None of these groups, nevertheless, can muster the sustained focus and resources required to compete with the employment regime. As Stone notes, the school-related "concerns of parents and other stakeholders tend to be highly fragmented."⁴⁸ Parents are the preeminent losers, because they would reap the most direct benefits from replacing employment concerns with academic achievement as the primary goal of school districts. Parental interests in achievement, however, are not structured in ways that permit effective influence upon district policy.⁴⁹ First, as Terry Moe reports, "[p]eople who are low in education and expectations, many of them located in low-performing districts, are more satisfied with their schools" than average American parents, who themselves typically

45. See EDGAR L. MORPHET ET AL., *EDUCATIONAL ORGANIZATION AND ADMINISTRATION: CONCEPTS, PRACTICES, AND ISSUES* 157 (4th ed. 1982).

46. DAVID R. BERMAN, *STATE AND LOCAL POLITICS* 114-15 (9th ed. 2000).

47. FREDRICK M. WIRT & MICHAEL W. KIRST, *THE POLITICAL WEB OF AMERICAN SCHOOLS* 86-87 (1972).

48. See Stone, *supra* note 34, at 12.

49. See STONE, *supra* note 35, at 82-83, 86 (detailing obstacles to parental effectiveness including educators "largely inattentive" to parental participation and only "sporadic" parental involvement in controversial or personal issues).

report satisfaction with the public education provided to their children.⁵⁰ Parents lack direct control over school funding and generally do not vote in district elections.⁵¹ For even moderately dissatisfied parents, moreover, exit is often a more attractive option than voice. Rather than organizing their peers, they can, if they have the financial means, move either to the private school system or to a different school district.⁵² All of these factors keep employment concerns ascendant.

The practice of local educational autonomy is thus sustained from many sources. It is based upon districts' bureaucratic power to guide policy implementation, a power that ultimately derives from the loose coupling of teachers and their supervisors. It is buttressed by political constituencies with very strong reasons to resist outside influence. And it is protected by a long historical tradition that has come to enjoy substantial legal deference. All these factors make localism resilient in the face of reform.

In light of localism's strengths, nonlocal actors seeking educational reform perforce must attend to "accountability." Some way has to be found not only to specify how schools might change for the better but to make sure that schools do in fact change.

The strategy that is perhaps the most obvious—cash rewards for good district performance—is, alas, full of pitfalls. Although rewards for top performers are in use, they relate only marginally to the problems that accountability must address. Districts whose performance is poor or very poor will perceive accurately that they have little chance of receiving rewards and therefore are unaffected by them.⁵³ Employment regimes in such districts, moreover, may recognize that the magnitude of performance bonuses falls far below the cost to regime interests of obtaining them. In addition, rewards to high-performing districts have the collateral effect of exacerbating interdistrict inequities, as more successful schools, likely to be

50. See TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* 345-46 (2001).

51. See IANNACONE & LUTZ, *supra* note 28, at 22.

52. See STONE, *supra* note 35, at 40 (describing the "ability of middle-income parents to practice the exit option" and remove a child from a given school jurisdiction).

53. See Hanushek & Raymond, *supra* note 3, at 139 (noting that schools are not affected equally by incentives; "schools that have scores close to a threshold might be expected to alter their behavior more than schools further away from the established critical threshold").

richer given the correlation of wealth with achievement, are made richer still.⁵⁴

The converse of cash rewards for the best performers is reductions in state or federal aid for the worst. Recasting prizes as fines has the advantage of focusing the incentive on the sector with the biggest problems. Withholding aid is a sanction that can get the attention of poorly performing districts and the regimes that control them. In many ways, however, prizes and fines have similar drawbacks. Like rewards, financial penalties exacerbate inequity. In addition, an ideal accountability sanction penalizes the deficient providers of education but still helps, or at least does not harm, victimized students who are unwilling and innocent recipients of an abysmal education. Financial sanctions do just the opposite, by withdrawing resources from students whose schools perform the least well while leaving regime interests substantially intact.⁵⁵

These practical and theoretical limitations of cash incentives helped buttress arguments for educational privatization, choice, and other market-based reforms. In their famous brief for educational markets, John Chubb and Terry Moe claim poor school management is "inherent" in "institutions of democratic control."⁵⁶ No matter what bureaucratic incentives (like prizes and fines) are applied, Chubb and Moe argue, schools subject to popular government will bow to constituencies with interests other than the education of children. Bureaucracy responds only to the interest-group incentives of bureaucratic politics; attention to non-educational criteria is "deeply anchored in the most fundamental

54. The effect of rewards is further muddled in those states where the highest courts have mandated school finance equalization to support exclusively the most distressed public schools. See, e.g., *Abbott v. Burke* (Abbott II), 575 A.2d 359, 408 (N.J. 1990) (requiring that "poorer urban districts' educational funding [be made] substantially equal to that of property-rich districts," while ignoring equity for districts in between). If both the worst and best are rewarded, only the mediocre middle remains uncompensated.

55. Cash sanctions for underperformance are particularly difficult to maintain in an environment where courts require subsidies for underperforming districts. See *Abbott II*, 575 A.2d at 408-11. But subsidies, while focusing resources upon the neediest students, create incentives for districts that could not be more perverse. As more states experiment with funding equalization, moreover, the view that additional resources do not systematically translate into performance gains empirical support. See *infra* note 228.

56. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 188 (1990).

properties of the system.”⁵⁷ For Chubb, Moe, their allies, and even some who retain some doubts about choice, the only way to privilege educational goals in public schools is to substitute market-based mechanisms for top-down district management, so that educators who do not respond to consumer needs lose their customers and their jobs.⁵⁸

Educational privatization has not become the juggernaut for which its proponents hoped in the early 1990s. The only way to provide genuine market alternatives to urban public schooling in the short term was to include religious schools in a voucher system; consequently, early choice plans operated under a constitutional cloud that may have rendered potential sister efforts stillborn.⁵⁹ Although the Supreme Court has now held that religious and nonreligious private schools alike may accept publicly issued educational vouchers,⁶⁰ constitutional doubt persists at the state level,⁶¹ and, more important, it has become clear that the programs are quite unpopular.⁶² Suburbanites, whose political power has already been noted,⁶³ never backed the idea. As a group they like their public schools as they are, and are also sufficiently perspicacious

57. *Id.*

58. *See id.* at 33; *see also* Paul E. Peterson, *School Choice: A Report Card*, in *LEARNING FROM SCHOOL CHOICE* 3, 7-23 (Paul E. Peterson & Brian C. Hassel eds., 1998). *But see* JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 20-25, 188-95 (1994).

59. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 656 n.4 (2002) (“[A] principal barrier to entry of new private schools is the uncertainty caused by protracted litigation which has plagued the program since its inception.”).

60. *Id.* at 662-63.

61. *See* Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 123-24 (2000).

62. *See, e.g.,* STONE ET AL., *supra* note 1, at 161 (claiming that voucher proposals have “[w]ith very few exceptions ... encountered deep resistance”); Jennifer Hochschild, *Rethinking Accountability Politics*, in *NO CHILD LEFT BEHIND?*, *supra* note 3, at 107, 108 (2003) (“The only proposed reform that has, so far, mostly met defeat in a hostile political environment is vouchers for use by public school students in school districts outside their own or in private or parochial schools.”); Ryan & Heise, *supra* note 23, at 2079 (“More voucher plans have been rejected than passed.... Every proposal to provide vouchers on a large scale has failed. Between 1990 and 1993 alone, for example, fourteen state legislatures considered and ultimately rejected voucher proposals.”). *But see* Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1376 (2004) (“Scathingly rejected in *Griffin v. County School Board*, the voucher program is now, after decades of relentless writing and speaking by its supporters, popular public policy.”).

63. *See supra* notes 23-25 and accompanying text.

cious to recognize ways in which widespread adoption of voucher programs might threaten their ability to exclude urban students from their schools.⁶⁴

Although there was no privatization revolution, its advocates' exposition of the inadequate incentives that face school professionals penetrated discourse about public education. One of its successes was somewhat ironic: representatives of the public education establishment, where choice is anathema, sometimes sounded much like the privatizers in touting school-based decision making and radical decentralization as solutions to America's educational woes because decentralization would displace bureaucrats.⁶⁵ TheodoreSizer, for example, associates "state governments becom[ing] more involved in the regulation of the schools" with "hierarchical bureaucracy finally run totally amok."⁶⁶

So, too, the focus on incentives influenced the development of accountability programs. States "becom[ing] more involved in the regulation of the schools,"⁶⁷ insistent that local school districts rise to meet new state standards for academic achievement, were newly interested in making sure that proper incentives for such performance were in place. State policymakers thus endorsed the privatizers' view that good incentives were critical.⁶⁸ At the same

64. The Cleveland voucher program upheld in *Zelman* permitted, but did not require, public schools in suburban districts abutting Cleveland to accept voucher students. See *Zelman*, 536 U.S. at 707 & n.17 (Souter, J., dissenting) ("[P]ublic schools in adjacent districts hardly have a financial incentive to participate in the Ohio voucher program, and none has [chosen to do so.]). Given suburban interests, this policy was hardly a surprise. That voucher programs in the future might constrain risk-averse suburbanites' preference for exclusion, however, was nevertheless easy to contemplate. See Ryan & Heise, *supra* note 23, at 2082 ("The possibility that school choice might introduce a substantial number of urban students into suburban schools ... makes choice threatening to many suburban parents and homeowners alike.").

65. See Janet M. Ferguson & Paul Nochelski S.J., *The Power of Letting Go*, AM. SCH. BD. J., Apr. 1996, at 37; Starita Smith, *School by School*, AM. SCH. BOARD J., June 1998, at 22.

66. THEODORE R. SIZER, *HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL* 206 (1984).

67. *Id.*

68. Some of the initial rhetoric surrounding the provisions described in this paragraph suggests a certain innocence with regard to deterrence. Some proponents of disestablishment appeared to believe, or at least thought it wise to articulate for public consumption, that its purpose was simply to improve failing school districts by replacing their incompetent managers with able ones. This version of disestablishment takes it as simply a policy of "substitute administration," which states continue to apply to floundering local governments in a variety of substantive areas. CHARLES M. KNEIER, *CITY GOVERNMENT IN THE UNITED*

time, policymakers rejected the conclusion that such incentives were unique to markets and impossible to create within a public system. Nor did they abandon hierarchy. Instead, recognizing that control could not be asserted effectively by issuing top-down directives, and that cash awards and penalties were likely to be both ineffective and counterproductive, states have turned to a third possibility. They include in their accountability programs a provision that a district that fails to perform can be disestablished, its local officials deprived of power and its affairs made the responsibility of the state department of education.⁶⁹ Although state

STATES 130-31 (3d ed. 1957); see also David R. Berman, *Takeovers of Local Government: An Overview and Evaluation of State Policies*, *PUBLIUS: J. FEDERALISM*, Summer 1995, at 55, 57-60 (describing the nature of takeover policies); Vincent L. Marando & Mavis Mann Reeves, *State Responsiveness and Local Government Reorganization*, 69 *SOC. SCI. Q.* 996, 997, 1002-03 (1988). Thomas Guskey argues along these lines that states adopted the term "academic bankruptcy" to describe failing schools and school districts in an explicit effort to analogize distressed school districts with bankrupt corporations. Thomas R. Guskey, *Policy Issues and Options When States Take over Local School Districts*, 2 *INT'L. J. EDUC. REFORM*, Jan. 1993, at 68, 69. Just as the court appoints a receiver when private management fails, in order to uphold a firm's economic obligations, the state removes local management incapable of meeting the requirement to provide adequate education. See *id.* at 69; see also Ronald T. Hyman, *State-Operated Local School Districts in New Jersey*, 96 *WEST'S EDUC. L. REP.* 915, 919-20 (1995). Even if disestablishment was not conceived initially as a policy of deterrence, however, the incentives it creates quickly became central to the policy's operation. See Berman, *supra*, at 67 (noting that New Jersey state officials "have discovered that the mere threat of takeover can sometimes get the attention of local school officials and galvanize them into taking corrective action without further state involvement"); SUSAN H. FUHRMAN & RICHARD F. ELMORE, *TAKEOVER AND DEREGULATION: WORKING MODELS OF NEW STATE AND LOCAL REGULATORY RELATIONSHIPS* 27 (Consortium for Policy Research in Educ., No. RR-024, 1992) (noting the possibility of deterrence).

69. See ALA. CODE § 16-6B-3(c)-(d) (2001); ARK. CODE ANN. § 6-15-430 (Michie 1999); CAL. EDUC. CODE § 52055.5 (West Supp. 2004); COL. REV. STAT. § 22-7-609 (2003); FLA. STAT. ANN. § 229.0535 (West 1998); GA. CODE ANN. § 20-14-41 (2001); 105 ILL. COMP. STAT. ANN. §§ 5/2-3.25f (West 1998); IND. CODE ANN. § 20-3.14-5 (West 2004); IOWA CODE ANN. § 256.11 (West 2003); KY. REV. STAT. ANN. §§ 158.780, 158.785 (Michie 2001); MD. CODE ANN., EDUC. § 4-303 (2001); MD. REGS. CODE tit. 13A, § 01.04.07 (2004); MASS. ANN. LAWS ch. 69, §§ 1I-1K (Law. Co-op. 2002); MASS. REGS. CODE tit. 603, § 203 (2004); MICH. COMP. LAWS ANN. § 380.1280 (West 1997); MISS. CODE ANN. § 37-17-6 (1999); MO. ANN. STAT. § 160.538 (West 2000); N.J. STAT. ANN. §§ 18A:7A-15 to -16, 18A:7A-29 to -34 (West 1999); N.M. STAT. ANN. § 22-2-2W (Michie 1978); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(p) (2004); 1995 N.Y. LAWS ch. 145; N.C. GEN. STAT. § 115C-105.39 (2003); OHIO REV. CODE ANN. §§ 3302.01-3302.08, 3316.01-3316.20, 3311.71-3311.77 (West 2002); OKLA. STAT. ANN. tit. 70, § 1210.541 (West 2003); 24 PA. CONS. STAT. ANN. § 6-692 (West 1992); R.I. GEN. LAWS § 16-7.1-5 (2001); S.C. CODE ANN. § 59-18-1520 (Law. Co-op. 2004); TENN. CODE ANN. § 49-1-602(c) (2002); TEX. EDUC. CODE ANN. § 39.131 (Vernon 1996); W. VA. CODE ANN. § 18-2E-5 (Michie 2003); W. VA. CODE ST. R. § 126-13-3 (2004).

criteria for displacing district governments vary,⁷⁰ as do the procedures for dealing with districts once disestablished,⁷¹ the incentive structure remains the same—the leadership of a district can be required to step aside when a state identifies it as inadequate and unwilling or unable to implement, with state help, an effective reform program.

This application of deterrence to public education marks a genuine shift in approach. It punishes local officials directly, rather than their budgets; therefore, it avoids harming students already

70. The state codes set out various criteria that, if unmet, qualify districts as potential disestablishment targets. These criteria are usually objective, incorporating measures such as test scores, attendance, and dropout rates. *See, e.g.*, ALA. CODE § 16-6B-3(c) (2001) (defining districts “in need of assistance,” which are ultimately subject to state administration, in terms of student performance on standardized tests); CAL. EDUC. CODE §§ 52050.5–52056.5 (West Supp. 2004) (specifying an “Academic Performance Index” for the measurement of academic performance that includes specified standardized test scores, attendance rates, and graduation rates); COL. REV. STAT. § 22-7-604 (2003) (requiring the assignment of a percentile-based “academic performance grade” of A, B, C, D, or F, to each public school, based on student performance on subject tests); FLA. STAT. ANN. § 229.57 (West 2001) (assigning school districts grades of A through F on the basis of standardized test scores, the “degree of measured learning gains of the students,” attendance and dropout rates, disciplinary statistics, “student readiness for college,” and other performance data selected by the state Board); GA. CODE ANN. §§ 20-2-281, 20-14-30, 20-14-80 (2001) (identifying under-performing schools on the basis of student performance on tests in reading, language, mathematics (grades 1-8), science and social studies (grades 3-8), participation in and scores on various high school tests, dropout rates, attendance rates, school completion rates, and any other indicator the board feels appropriate); 703 KY. ADMIN. REGS. 3:205 § 1(1) (1999) (specifying a state review of instructional data in first-stage assessments); TEX. EDUC. CODE ANN. § 39.051 (West 1996 & Supp. 1999) (allowing for performance evaluation to include dropout and attendance rates as well as test scores). In Iowa, the criteria include subjective as well as objective measures. *See* IOWA CODE ANN. § 256.11(10) (West 1996).

71. *See, e.g.*, ALA. CODE § 16-6B-3(c)-3(d) (2001) (requiring the state superintendent to “assume the direct management and day-to-day operation of the local board of education”); ARK. CODE ANN. § 6-20-1609 (Michie 1999) (allowing for a variety of steps including: waiver of most provisions of Arkansas law as they apply to the district; appointment of a state superintendent responsible to the state; transfer of all the powers and duties of the local school board to the state department of education; disestablishment of the school board and allowance for the local administration to proceed without board supervision; re-empowerment of a former board; calling of new board elections; and annexation of the district to a neighboring district); OKLA. STAT. ANN. tit. 70, § 1210.541 (West 2003) (permitting state intervention through a variety of methods that include providing funds and technical assistance, but may also include reassignment of district personnel, transfer of students, operation of the school by personnel employed by the state department of education, mandatory annexation of all or part of the local school district, and placing operation of the school with an institution of higher learning).

victimized by abysmal schooling.⁷² Indeed, disestablishment sanctions harness the very deficiency of public educational systems that the privatizers identified, namely a preoccupation with interest-group machinations and political power at the expense of educational goals.⁷³ Local officials who are willing to sacrifice excellence for political expediency are precisely the kind of officials unwilling to sacrifice their own jobs. The view that elected officials make policy choices in order to preserve their tenure and power is now commonplace in political science.⁷⁴ In the context of school districts that are run as employment regimes, the assumption seems particularly strong. Regime interests can be served only if friendly district officials preserve their power. Patrons' interests are best served by maintaining such officials in power, even if those officials must be less than fully responsive if they are to keep their jobs.⁷⁵ By making effective practices the price of power, states can induce the regime to shift in the service of effectiveness.

Although disestablishment creates a realistic incentive for inducing school districts to reform, the resulting changes are not straightforward. As will be seen, states cannot simply announce a minimum level of district performance and in so doing compel successfully all districts to achieve that level.⁷⁶ Instead, disestablishment threats deter district malfeasance to some extent. The nature and magnitude of change depend on the capabilities and preferences of both states and districts. To these the analysis now turns.

72. See *supra* note 58.

73. See *supra* notes 29-52 and accompanying text.

74. See, e.g., R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 7 (1990) ("I assume that when legislators have to make a decision they first ask which alternative contributes more to their chances for reelection. If they see a significant difference, they choose the alternative which better serves that cause."); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 916, 929 & n.41 (2005).

75. Any doubt that disestablishment is inimical to regime interests should be put to rest by cases like that of Detroit, where one of the earliest acts of the mayorally appointed and state-backed superintendent who replaced the elected school board was to persuade the Michigan legislature to remove the union protections of principals and other school administrators. See Meinecke & Adamany, *supra* note 38, at 45-47.

76. See *infra* Part I.D. (describing the effect of incomplete information on the efficacy of reforms).

B. District Responsiveness to Incentive Systems

Troubled school districts, almost by definition, do not implement the kinds of educational improvements that states want. The previous section argued that states nevertheless can move districts in the direction of reform by threatening disestablishment. This implies that the status quo ante in troubled districts is in some sense voluntary, that districts set their policies and choose to alter them in response to threats. This preliminary claim requires justification. Some recent scholarship on educational change challenges this assumption in two opposite ways: by arguing that poorly performing districts will not respond to incentives at all and by arguing that threats are unnecessary to induce school district reform.⁷⁷

Begin with arguments that school districts will not respond rationally to genuine incentives that states place before them. School districts are, like other governmental bureaucracies, complex organizations.⁷⁸ Their behavior is driven not by the rational calculation of a single interest but by the competing efforts and interests of various officials and groups.⁷⁹ Troubled school districts, moreover, are often described as *dysfunctional* organizations, unable to act effectively in their own interests. On either account, districts are institutionally incapable of responding rationally to disestablishment threats.

A line of educational scholarship stretching over several decades supports the position that school districts are an unnecessary layer of bureaucracy interposed between states and schools that lack influence, capacity, and interest in educational goals and are

77. To say that district choices are voluntary is to say that districts can be made *accountable*—they can be forced to alter their behavior by others. The claims that districts cannot change if they want to (on the one hand) or that they would change eagerly if only shown the way (on the other) are thus essentially rejections of the concept of accountability itself: the one argues that districts cannot be made accountable, and the other that they need not be.

78. See STONE ET AL., *supra* note 1, at 145 (“[T]he bureaucratic resistance paradigm presumes that we already have a good idea what needs to be done, but that self-interested education professionals, wielding disproportionate power, scuttle or emasculate any efforts that interfere with their comfortable routines.”); *id.* at 145–47.

79. See SARAH F. LIEBSCHUTZ, *BARGAINING UNDER FEDERALISM: CONTEMPORARY NEW YORK* 9 (1991).

therefore irrelevant to education reform.⁸⁰ This position was popularized during the enthusiasm for site-based management, which sought to cut districts out of school governance entirely. A recent review concludes:

Until recently, education reform movements have paid little attention to school districts. State and federal policies have concentrated on schools as central units of change, rendering local districts virtual nonactors in the educational improvement process.... Critics claim that districts play no significant role, are inconsistent with sound policy, and are inefficient bureaucratic institutions.⁸¹

The weight of contemporary evidence, however, is that school districts are able to respond rationally to changing circumstances that affect their interests. Caroline Hoxby demonstrates econometrically that public school districts respond to variation in levels of competition from the private-school sector, a basic threat to their interests.⁸² School districts in areas where competition for students is greater invest more in teachers and other educational resources and produce higher student performance. "[C]ompetition among public schools," Hoxby reports, "appears to increase productivity in such a way that costs are reduced while student perfor-

80. See, e.g., KATHRYN A. McDERMOTT, CONTROLLING PUBLIC EDUCATION: LOCALISM VERSUS EQUITY 121-22 (1999) (concluding that school districts are an anti-egalitarian makeweight interposed between states and individual schools and should be abolished).

81. Julie A. Marsh, *How Districts Relate to States, Schools, and Communities: A Review of Emerging Literature*, in SCHOOL DISTRICTS AND INSTRUCTIONAL RENEWAL 25 (Amy M. Hightower et al. eds., 2002) (citations omitted).

82. See CAROLINE MINTER HOXY, DOES COMPETITION AMONG PUBLIC SCHOOLS BENEFIT STUDENTS AND TAXPAYERS?, at 13-23 (Nat'l Bureau of Econ. Research, Working Paper No. 4979, 1994) [hereinafter HOXY, DOES COMPETITION AMONG PUBLIC SCHOOLS BENEFIT STUDENTS AND TAXPAYERS?]. Because increasing private-school enrollment does not immediately result in pro rata reduction in public-school budgets, private competition may in fact offer short-term fiscal benefits to public schools even as it poses a long-term threat. In later work, Hoxby argues that the primary "short to medium term" mechanism by which private school competition affects public school expenditure and productivity is not school district responsiveness to competitive threats but changes to the tax base brought about by different resident preferences that are capitalized into property values. With regard to the long term, however, she maintains that school districts do react to competition for students and political support. See Caroline Minter Hoxby, *The Effects of Private School Vouchers on Schools and Students*, in HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION 177, 180-81 (Helen F. Ladd ed., 1996).

mance is improved.”⁸³ Separate studies by John Bohte and Eric Rofes conclude similarly that school districts respond when charter schools begin to compete with them for students.⁸⁴ Bohte, analyzing data from Texas generated between 1997 and 2001, finds that competition from charters results in small but significant performance gains in traditional public schools.⁸⁵ Rofes conducted twenty-five comparative case studies of school districts to assess their responses to the establishment of charter schools in their regions. He reports that “[a]lmost one-quarter of the districts studied (24%)” reacted energetically to the advent of charter schools by altering significantly their educational programs.⁸⁶ Most of the districts in the Rofes sample did not respond to charters “with swift, dramatic improvements” at the time of the study, but instead went “about business as usual, responding to charters slowly and modestly.”⁸⁷ This group of slow responders included most, but not all, of the large, urban districts in the sample. Thus, a substantial fraction of districts in the Rofes sample not only had the capacity, but felt the need to undertake at least some reform in response to charter schools, though that response was in many cases small in scale. That the responses were not more vigorous is explained straightforwardly by a relatively small perceived threat rather than by a low capacity to respond.

Recent research that identifies the capacity of districts to catalyze instructional improvement in response to accountability programs imposed by the states is more directly relevant to disestablishment incentives. Julie Marsh reviews a number of studies that suggest that districts have the capacity to interact productively with states above and schools below.⁸⁸ John Sipple and his colleagues report

83. See HOXB, DOES COMPETITION AMONG PUBLIC SCHOOLS BENEFIT STUDENTS AND TAXPAYERS?, *supra* note 82, at 25.

84. See John Bohte, *Examining the Impact of Charter Schools on Performance in Traditional Public Schools*, 32 POLY STUD. J. 501, 515 (2004); Eric Rofes, *The Catalyst Role of Charter Schools*, SCH. ADMIN., Aug. 1999, at 14.

85. Bohte, *supra* note 84, at 515.

86. Rofes, *supra* note 84, at 16; see also Frederick Hess et al., *Small Districts in Big Trouble: How Four Arizona School Systems Responded to Charter Competition*, 103 TCHRS. C. REC. 1102, 1107 & n.2., 1108-09, 1111-12 (2001) (documenting both policy change and the replacement of district superintendents and school principals in response to competition from charter schools in four small school districts).

87. Rofes, *supra* note 84, at 16.

88. See Marsh, *supra* note 81.

that the imposition by the New York State Board of Regents of stricter standards backed by a testing regimen "clearly stimulated aggregate change in local districts outcomes."⁸⁹ Patricia Burch catalogues several studies that document ways in which district policies both shape and are shaped by "school-level agendas."⁹⁰ Richard Elmore and Susan Fuhrman report that districts have responded "constructively" to state accountability policies by, *inter alia*, improving their evaluation, professional development, and curricular capacities to serve schools at risk of state sanctions.⁹¹ H. Dickson Corbett and Bruce Wilson find that districts in two states adapted to state accountability programs that required schools to publish the results of high-stakes student testing.⁹² Using a two-state comparative case study design, they argue that districts, perceiving increasingly high stakes associated with standardized tests, changed curricula to meet the testing standards.⁹³ Indeed, for Corbett and Wilson, "[t]he policy challenge is to encourage local attention to reform without instigating counterproductive responses."⁹⁴ When districts perceived sufficient pressure associated with the tests, they began to supplement their initial reforms with counterproductive ones, "teaching to the test" in ways disruptive to broader educational goals and programs.⁹⁵ James Spillane, who conducted two case studies of Michigan districts responding to a state initiative that sought to impose particular instructional policies, also argues forcefully that districts respond to state

89. John W. Sipple et al., *Adoption and Adaptation: School District Responses to State Imposed Learning and Graduation Requirements*, 26 EDUC. EVALUATION & POL'Y ANALYSIS 143, 161 (2004).

90. Patricia Ellen Burch, *Constraints and Opportunities in Changing Policy Environments: Intermediary Organizations' Response to Complex District Contexts*, in SCHOOL DISTRICTS AND INSTRUCTIONAL RENEWAL, *supra* note 81, at 111.

91. Richard F. Elmore & Susan H. Fuhrman, *Holding Schools Accountable: Is It Working?*, 83 PHI DELTA KAPPAN 67, 70 (2001).

92. H. Dickson Corbett & Bruce Wilson, *Raising the Stakes in Statewide Mandatory Minimum Competency Testing*, in THE POLITICS OF REFORMING SCHOOL ADMINISTRATION: THE 1988 YEARBOOK OF THE POLITICS OF EDUCATION ASSOCIATION 27, 29-36 (Jane Hannaway & Robert Crowson eds., 1989).

93. *See id.*

94. *Id.* at 27.

95. *Id.* at 36-37 ("[T]he indicator of performance becomes the goal itself.").

programs but that in doing so they sometimes undermine, rather than advance, state goals.⁹⁶

That some districts can respond, however, does not imply that *all* districts can respond. Some of the research demonstrating the ability of districts to respond to outside threats preserves the caveat that not every district has the capacity to respond effectively.⁹⁷ On this view, overwhelming crisis and pervasive dysfunction combine to prevent particularly troubled districts—the sort that make likely disestablishment targets—from reforming themselves in relevant ways. Elmore goes so far as to make a rational-choice argument about distressed schools, one that he would surely apply to distressed districts as well: “*Low-performing schools aren’t coherent enough to respond to external demands for accountability.... Low-performing schools, and the people who work in them, don’t know what to do. If they did, they would be doing it already.*”⁹⁸

The weight of the evidence, however, is that this view is too pessimistic. As Jeffrey Henig and his colleagues argue, “[t]o be sure, [distressed urban] school districts face daunting problems and limited resources. Nevertheless, there is a significant capacity for local action given the autonomy of local educational actors; moreover, each district operates with a substantial budgetary base.”⁹⁹ Henig’s conclusion that even very troubled school districts have the capacity to act in their own interests finds additional support from Frederick Hess’s recent work on the ways in which school districts respond to voucher programs.¹⁰⁰ Hess relies on case studies of three districts—Cleveland, Milwaukee, and Edgewood, Texas—all of which are highly distressed (and one of which, Cleveland, has been disestablished).¹⁰¹ He finds that the competitive pressure posed by voucher programs induced in districts a “limp response” that fell short of systematic change in educational practices.¹⁰² Hess documents some “generally mild” changes at the margins, often produced by giving entrepreneurial employees

96. See SPILLANE, *supra* note 17, at 168-70; Spillane, *supra* note 19, at 77-83.

97. See, e.g., Elmore & Fuhrman, *supra* note 91, at 70.

98. Richard F. Elmore, *Testing Trap*, HARV. MAG., Sept.-Oct. 2002, at 37; see also SUNDERMAN, *supra* note 6, at 10.

99. HENIG ET AL., *supra* note 38, at 64.

100. See HESS, *supra* note 1, at 217-18.

101. See *id.* at 18-19.

102. *Id.* at 197.

within the districts somewhat more latitude to innovate.¹⁰³ In Milwaukee, where the most change occurred, Hess concludes that "competition had shown significant signs of chipping away at the barriers to entrepreneurship."¹⁰⁴ Hess also shows that the Milwaukee and Cleveland districts, where the voucher programs were government-supported rather than private, devoted a great deal of energy to undermining the voucher program politically, rather than improving their own services.¹⁰⁵

Hess, like Rofes, reports that troubled districts do respond to external threats but that their responses are weak.¹⁰⁶ Hess, however, argues convincingly that severely distressed districts have the *ability* to respond to external threats, rejecting Elmore's view that districts' attenuated, "limp" responses should be attributed to lack of capacity. Although districts "are heavily burdened by balky structures, executives lacking effective tools, and a culture that insulates educators," Hess argues, "these constraints ... can be relaxed by policymakers or may evolve with time."¹⁰⁷ He emphasizes that the weakness of district reactions may be due to the fact that "competition depends largely on producers reacting to anticipated—not just existent—threat," offering educators "insulation from sanctions" that encourages inaction.¹⁰⁸ The threat of disestablishment, of course, is far more immediate than that posed by competition.

Both Rofes and Hess also note that district responses have some variance. Rofes, for example, emphasizes the importance of leadership in distinguishing districts that change substantially in response to charters from those that change only marginally.¹⁰⁹ This suggests that some troubled districts have reform capacity, and that capacity is related to a factor under school districts' control. Finally, Hess's interpretation of his own data has too constrained a definition of response. It is eminently rational for a threatened district to

103. *Id.* at 217.

104. *Id.* at 135.

105. *See id.* at 52, 203-05 (arguing that "[w]hen faced with a significant threat, [urban school officials] are likely to concentrate on mobilizing popular sentiment or on taking marginal actions that will allay the concerns of vocal constituencies").

106. *See id.*

107. *Id.* at 17.

108. *Id.* at 199.

109. *See Rofes, supra* note 84, at 16-17.

respond with political activity designed to relax or undermine state demands.¹¹⁰

Finally, it should be emphasized that the claim that troubled school districts have the capacity for reform does not imply that they have the capacity to produce instantaneous, precisely targeted, or brilliantly conceived reforms. School districts' problems are not susceptible to easy solutions. For deterrence to be relevant, however, districts need only be able to perceive a threat and try to respond to it reasonably. That sort of capacity does appear to inhere even in troubled districts, and such capacity ought to be sufficient to permit districts to respond effectively to disestablishment threats. Disestablishment is preceded by an escalating set of state interventions, the timetable for which is lengthy by design and even further elongated in practice. Districts subject to disestablishment receive early warnings, and disestablishment is preceded by a probationary period during which technical assistance is available from the state. Districts, required to develop remedial plans jointly with the state, can shape—though not determine—the nature of the reform program that will be imposed.¹¹¹ In addition, what will

110. *Cf. infra* notes 154-62 and accompanying text (describing political resistance to federal accountability mandates).

111. *See, e.g.*, ALA. CODE § 16-6B-3(c)-(d) (2001) (allowing for a probationary period of three years to develop and implement an improvement plan); CAL. EDUC. CODE § 52053 (West Supp. 2004) (allocating \$50,000 to each participating school to be used to create an action plan during the three- to four-year probationary period); COL. REV. STAT. § 22-7-609 (2003) (allowing a one- to two-year probationary period during which the district must create a "school improvement plan" using local discretion, subject to state suggestions); GA. CODE ANN. § 20-14-41(a) (2001) (mandating a state audit for any school with a grade of D or F on either the absolute or within-school improvement scale, resulting in the recommendation of various levels of state intervention including public notice, public hearings, and ordering "the preparation of an intensive student achievement improvement plan" to be approved by the state); 105 ILL. COMP. STAT. ANN. §§ 5/2-3.25d (West 1998) (requiring a state-approved School Improvement Plan for each school on the watch list, with measurable goals and timetables during the two-year probationary period); MASS. ANN. LAWS ch. 69, § 1J (Law. Co-op. 2002) (establishing a probationary period of at least thirty months, during which the district must develop and implement a remedial plan for improvement); MO. ANN. STAT. § 160.538 (West 2000) (creating a probationary period of two years, during which the school may be required to develop new plans for personnel recruitment and retention and be subject to the monitoring of a "school accountability council"); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(m) (2003) (requiring a probationary period of three years for the superintendent to prepare and implement a corrective action plan in cooperation with the school and the state); TENN. CODE ANN. § 49-1-602(c) (2002) (requiring school districts to create a school improvement plan based on the state study conducted during the first year of the three-year probationary period).

satisfy the state depends, among other things, on the difficulty of the problem. Even small reforms well within the reach of troubled school districts may satisfy states.¹¹² Districts are often not disestablished unless and until their inadequacies transcend the dramatic to approach the farcical.¹¹³ Partial reform of these problems surely seems within the reach of troubled districts.

Quite unlike those who deny the capacity of districts to reform,¹¹⁴ other scholars suggest that external prodding is unnecessary to induce them to do so. Instead, these scholars suggest, even troubled districts are ready partners for reform, willing to respond to a state's agenda not because their parochial interests are threatened but because they perceive a genuine and respectful partner who can help them resolve an educational crisis that, they concede, they cannot tackle on their own.¹¹⁵ All that is needed on this version is the right sort of intergovernmental institutions to channel districts' willing spirit effectively.

The most prominent expositors of this view are James Liebman and Charles Sabel, who argue that public education is undergoing a "vast and promising reform"¹¹⁶ based upon a model of intergovernmental problem solving that they and their colleagues have elsewhere described as "democratic experimentalism."¹¹⁷ Liebman

112. See *infra* Part I.C.

113. In districts that have been subjected to disestablishment sanctions, abysmal test scores and spiraling debt have typically been only a backdrop for more spectacular shortcomings. Compton (CA), Baltimore (MD), and Allendale (SC) were the lowest-ranked districts in their respective states when they were disestablished. See Karen Diegmueller, *Academic Deficiencies Force Takeover of Calif. District*, EDUC. WK., Sept. 16, 1992, at 21 (Compton); Alan Richard, *Starting from Scratch*, EDUC. WK., Oct. 13, 1999, at 30, 32 (Allendale); Jessica L. Sandham, *Despite Takeover Laws, States Moving Cautiously on Interventions*, EDUC. WK., Apr. 14, 1999, at 21 (Baltimore). Jonathan Kozol, in his jeremiad for American urban education, describes a school system in East St. Louis, Illinois, that leaves children "poisoned in their bodies and disfigured in their spirits." JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 39 (1991). He cites labs with no running water, bathrooms that are nonfunctional and putrid, and a class called "Introductory Home Ec." supervised by a teacher who explains "that students do no work on Friday, which, she says, is 'clean-up day.'" *Id.* at 27-36. Similar accounts abound.

114. See *supra* notes 97-98 and accompanying text.

115. See *infra* notes 116-31 and accompanying text.

116. 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, 184 (2003).

117. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (examining a "new form of government" in

and Sabel, associating experimentalism with “The New Accountability,”¹¹⁸ describe the latter as follows:

The core architectural principle of the emergent system is the grant by higher-level authorities—federal government, states, and school districts—to lower level ones of autonomy to pursue the broad goal of improving education. In return, the local entities—schools, districts, and states—provide the higher ones with detailed information about their goals, how they intend to pursue them, and how their performance measures against their expectations.¹¹⁹

These elements—intergovernmental goal setting, local autonomy regarding methods, feedback, and benchmarking—have, Liebman and Sabel argue, already borne fruit in troubled schools that had long resisted reform.¹²⁰

Liebman and Sabel are perceptive observers of the educational scene, and have helpfully identified many aspects of education-reform politics missed by others, especially in their penetrating analysis of the limitations of court-instigated reforms¹²¹ and their identification of “the district as a key actor in reform.”¹²² Puzzling, however, is the experimentalists’ broad assumption that districts and states share not only “the broad goal of improving education,” but that they are also jointly committed to a common high-level understanding of what it means to improve education.¹²³ For the experimentalists, the only question is *how* best to improve. To be sure, the experimentalists argue that improvement is not and

which power is decentralized, but in which governmental bodies help coordinate information sharing); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (characterizing experimentalism as a system based upon negotiation, performance measures, and transparency).

118. Liebman & Sabel, *supra* note 116, at 229.

119. *Id.* at 184. But see Terry M. Moe, *Politics, Control, and the Future of School Accountability*, in NO CHILD LEFT BEHIND?, *supra* note 3, at 80, 81 (“The movement for school accountability is essentially a movement for more effective top-down control of the schools.”).

120. See Liebman & Sabel, *supra* note 116, at 184; cf. Sabel & Simon, *supra* note 117, at 1020 (discussing “[d]estabilization rights,” which are “claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability”).

121. See Liebman & Sabel, *supra* note 116, at 192-207.

122. *Id.* at 244.

123. See *supra* notes 17-22 and accompanying text.

should not be a concept defined precisely; under their model, states adopt standards sufficiently ambiguous to allow local experimentation and input and must make room for local variation. Experimentalism assumes, however, that improving academic achievement is everyone's primary desideratum.¹²⁴ This is not at all clear in school districts that are governed by employment regimes. Similarly, experimentalism posits an intergovernmental agreement to avoid prior commitments about means: whichever tactics the processes of experimentation, feedback, and benchmarking identify as effective should be retained, and whichever fail should be discarded.¹²⁵ This is even less plausible, as it requires states and districts to distinguish between goals and means similarly and to have no extrapedagogical commitments to techniques. Regime theory suggests that, to the contrary, the conceptual frameworks applied by local policy actors to the task of reform will be ones that continue to privilege employment goals.

Put differently, policies seen as instrumental by the state are goals from the perspective of districts. Employment is a means to the educational end for education reformers, but education is a means to the employment end for the district regime. No collaborative process, with or without feedback, should be expected to bridge that chasm.

Although Liebman and Sabel acknowledge the potential for state and district interests to diverge¹²⁶ and also emphasize the role of broad dissemination of performance information in checking district behavior,¹²⁷ these observations cannot cure an account that, as Liebman and Sabel recognize, "reeks of utopianism."¹²⁸ The primary utopianism of the experimentalist case is not, however, one to which Liebman and Sabel demur.¹²⁹ Experimentalists do acknowledge that

124. See Liebman & Sabel, *supra* note 116, at 184.

125. See *id.*

126. See *id.* at 272 ("[I]t would be foolhardy to think that the reformed professionals, while reviling the hierarchies built by their Progressive ancestors, have no selfish or shortsighted interests themselves").

127. See *id.* at 290.

128. 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, 1715 (2003).

129. See Liebman & Sabel, *supra* note 116, at 191 ("Some readers may suspect that the disentanglement of interests and other transformations ... magically suspend iron laws of politics and the fundamental limits of collective action."); *id.* at 232 (arguing that the experimentalist account explains "what in the light of standard theories appear to be

their account involves the suspension of principles of inertia and resistance to change associated ordinarily with public bureaucracies. They argue, however, that the extraordinary emergency faced in some public school districts induces desperation, which motivates officials to shed the ordinary baggage of self-interest and turf to embrace cooperation and innovation.¹³⁰ They fail to acknowledge, however, that in many ways the leadership of failing school districts may be well served by unreformed practices. It is *not* realistic to expect desperation to turn school district regimes against their fundamental interests, especially in highly distressed districts where union and patronage concerns may dominate the local agenda.¹³¹

Liebman and Sabel document several case studies where they argue systems of feedback, benchmarking, and state/district cooperation have produced promising results.¹³² That districts have responded to state standards, worked with state officials, and experimented with various reform strategies does not, however, imply either their agreement with state goals or a commitment to experimentalist process. This Article argues that a reform-oriented

improbable, even impossible, outcomes”).

130. See *id.* at 267 (“Robbed of any public legitimacy, entrenched interests are exposed as only self-seeking and can be pushed aside by diffuse coalitions that can claim substantial resources for reform projects in the name of the public good.”). This contention has some support in the work on civic capacity and education reform performed by Clarence Stone and his colleagues. See generally MARION ORR, *BLACK SOCIAL CAPITAL: THE POLITICS OF SCHOOL REFORM IN BALTIMORE, 1986-1998*, at 113-19 (1999); CLARENCE N. STONE ET AL., *supra* note 1, at 12-13; Stone, *supra* note 34, at 9. Stone and his colleagues define “civic capacity” as “the mobilization of varied stakeholders in support of a communitywide cause” of educational improvement in ways that transcend ordinary interest group politics. See Stone, *supra* note 34, at 15. In Stone’s view, civic capacity is a vital ingredient of successful school reform, and its development is possible, though often stymied by conflicting group interests, especially identity differences centering upon race and the urban/suburban divide.

131. See Hochschild, *supra* note 62, at 116 (“[B]y mandating standards with accountability, elected officials of all political stripes and at all levels of government have eschewed deniability, narrowed their maneuvering room, and offended a powerful interest group—all for the sake of tackling a contentious and perhaps intractable problem. Why?”); see also Jennifer L. Hochschild, *Comments on James S. Liebman and Charles F. Sabel, A Public Laboratory Dewey Barely Imagined*, 28 N.Y.U. REV. L. & SOC. CHANGE 327, 327 (2003) (“[N]ationwide systemic school reform as described by Liebman and Sabel should not have occurred, according to conventional political wisdom. By the same logic, the further reforms they predict and hope for are unlikely to transpire.”).

132. See Liebman & Sabel, *supra* note 116, at 231-66. But see *id.* at 268 (“These campaigns, of course, sometimes fail. In Alabama and Ohio, for example, they have been checked by the established interests”).

process of local experimentation and learning can arise as easily in response to conventional power politics as from a collective intergovernmental commitment to suspend political self-interest. Districts may conform to state preferences not out of agreement or consensus but out of fear in order to preserve their own interests.¹³³ A corollary of that conclusion is that the experimental process should not be expected to yield continuous improvements over time, as the experimentalist account appears to suggest. Districts may seek to do as little as possible, rather than improve continually, in meeting accountability standards. Where partial or halfhearted reform appears to the experimentalist as a failure of creativity or institutional organization, this Article recognizes in it a district effort to preserve regime interests in the face of state demands.

To be sure, neither Elmore's axiom of complete failure of district capacity,¹³⁴ the experimentalist assumption of shared understanding in the face of crisis,¹³⁵ nor the assumption of rationalist maximization of regime interests¹³⁶ applies across the board. Each account offers a valuable perspective. Nevertheless, in seeking to understand education reform it seems more prudent to explain the

133. Proponents of the experimentalist paradigm might also argue that the assumption that districts prefer the status quo to reform is so stylized as to be blind to the obvious desire of failing schools to improve. And, of course, distressed districts do seek improvement. State and district goals do not ineluctably diverge. Numerous district officials, principals, and teachers regularly demonstrate their commitment to offering students their best efforts. Indeed, it is this commitment that leads Elmore to conclude, "[l]ow-performing schools, and the people who work in them, *don't know what to do*. If they did, they would be doing it already." See Elmore, *supra* note 98, at 37. Elmore's conclusion that reform fails because of lack of local capacity dovetails with the experimentalist view that districts embrace states' goals of educational improvement. Liebman and Sabel, however, properly characterize this passage as an example of undue pessimism about the "limited capacities of states and schools." Liebman & Sabel, *supra* note 116, at 291. This rejoinder to Elmore makes vivid their common assumption, shared with Stone and his colleagues, that the central problems are ones of *capacity*.

Elmore, the experimentalists, and this Article fall along a continuum of positions regarding district goals and district competence. Elmore and the experimentalists agree that reform goals are common to states and districts. They disagree whether distressed districts have the capacity to reform: Elmore thinks not, but the experimentalists argue that a process of local experimentation and feedback can both realize and refine reform goals. This Article agrees with the experimentalists that local innovation can produce effective reform but rejects the initial assumption of shared goals.

134. See *supra* notes 97-98 and accompanying text.

135. See *supra* note 123 and accompanying text.

136. See *supra* notes 34-41 and accompanying text.

data, including the cases of relatively successful reform, as consistent with the parties' political needs than to assume the suspension of the pursuit of self-interest. The balance of this Article proceeds in that vein, by assuming that school districts have some capacity to undertake reforms desired by the state and a preference not to do so. This preference is driven by local interests in reelection, patronage, employment, and power, which are either allowed explicitly to trump policy concerns or, more likely, systematically to color local understanding of what constitutes desirable educational practice.

The preceding two sections have established that self-interested district officials should seek to moderate their most egregious practices in order to avoid forestalling the immeasurably worse outcome of losing control over the district, and that they have the capacity to move toward that goal. Their calculus is simple: stripped of their powers and jobs, district leadership can reap no benefits from their unreformed practices. The advantages associated with running a reformed district may be fewer than those associated with running an unreformed district, but they are still better for district officials than powerlessness and unemployment. Better to undertake reform in response to disestablishment threats, thus at least retaining (partial) control over the schools, (perhaps reduced) access to school resources, and their official positions.

That this account remains too simple is made clear by one piece of empirical data: nearly all states that have disestablishment sanctions on the books have invoked them at least once.¹³⁷ If districts are both anxious to avoid sanctions and capable of reform, why have so many districts been taken over? Clearly, the effects of the disestablishment sanction are more complex than simple deterrence. The next two sections offer a model of that complexity.

137. The best compilation of state takeovers records the disestablishment of some fifty districts, spread over twenty states, since 1989. TODD ZIEBARTH, POLICY BRIEF: STATE TAKEOVERS AND RECONSTITUTIONS (Educ. Comm'n of the States, 1998), at <http://www.ecs.org/clearinghouse/13/59/1359.pdf> (last updated Apr. 2002).

C. State Incentives and Capacity

Where disestablishment is the worst possible outcome for districts, it is undesirable, but not overwhelmingly so, for states. States prefer to avoid it, but not at any cost.

On the one hand, imposing a disestablishment sanction is quite unattractive to states. Lacking the administrative capacity to manage schools directly on any scale, states must create such capacity for any district they plan to take over directly or identify a third party willing and able to take on the burden.¹³⁸ It is especially surprising that a state would seek out such a burden when the political tradition of localism and the presence of elected local school boards insulate states from political accountability for educational failure.¹³⁹ States may reasonably expect some policy change to result from the actual management of the schools by the state or its designee rather than by ousted district officials, but these could be realized by *local* as much as by state reform if districts could be induced to improve their own performance. Clear-sighted states should not expect that they or their agents could do much better than willing districts could do themselves.¹⁴⁰

Particularly in recent years, aware of the mixed experience of early state takeovers like that of Jersey City in 1989,¹⁴¹ state

138. See, e.g., Robert A. Dentler, *Ambiguities in State-Local Relations*, 16 EDUC. & URB. SOC'Y 145, 162 (1984).

139. See Hochschild, *supra* note 131, at 329:

[G]overnors ... built institutional mechanisms and cultivated public expectations (e.g., of schools as the province of nonpartisan professionals) to insulate themselves from responsibility for the outcomes of schooling. That makes very good political sense: politicians who must face reelection almost always seek to avoid measures that will provide strict and clear accountability for the results of complex and only partially controllable social processes

140. See Levinson, *supra* note 74, at 928 (stating that government officials "will often find that their preferred policies can be more effectively implemented by a *different* government institution.... They will prefer to defer to some 'competing' institution").

141. See generally SUSAN H. FUHRMAN & RICHARD F. ELMORE, TAKEOVER AND DEREGULATION: WORKING MODELS OF NEW STATE AND LOCAL REGULATORY RELATIONSHIPS 14-18 (1992) (reporting little substantive change in the wake of the Jersey City takeover); Kevin Bushweller, *Under the Shadow of the State*, 185 AM. SCH. BOARD J. 16, 16-19 (1998) (suggesting some, but insufficient, progress in Jersey City); Andy Newman, *Jersey City Schools Improve*, N.Y. TIMES, Aug. 8, 1996, at B1 (same); Michael David Rettig, Policy Adaptation and Change: The Case of the State Takeover of the Jersey City, New Jersey Public Schools (1992) (unpublished Ph.D. dissertation, University of Virginia) (reporting little substantive change in the wake of the Jersey City takeover).

officials must worry that to disestablish is to wade into a quagmire.¹⁴² Indeed, lacking the community roots of local officials, state appointees may be less effective school managers than local officials.¹⁴³ A taking-over state confronts the same students, physical plant, community environment, and, in a few cases, teaching and administrative staff that confronted the district.¹⁴⁴ States other than the very earliest adopters should be quite skeptical that state-appointed managers can open hitherto unexplored vistas of educational achievement and organizational competence in distressed schools.¹⁴⁵

There are also political costs and benefits to disestablishing a district, some of which are roughly orthogonal to educational improvement. By disestablishing a district, states not only accept direct responsibility for its performance but likely alienate important swaths of the electorate.¹⁴⁶ These include, most obviously, the leaders of disestablished districts, satisfied or risk-averse parents in those districts, and politicians responsible to those constituencies. Protest, lawsuit, and political opposition are reasonably certain concomitants of disestablishment.¹⁴⁷ Suburban

142. See *supra* note 113 (describing the conditions that state officials face following disestablishment).

143. See Berman, *supra* note 68, at 70 ("[T]here is little reason to believe that state administrators can do a better job than local administrators with regards to education achievement").

144. See Richard J. Carson, *Perceptions of Educational and Political Leaders of the Creation of a State Operated School District in New Jersey* 62-63 (1991) (unpublished Ph.D. dissertation, Temple University) (on file with author); Moe, *supra* note 119, at 89 ("States can intervene ... but they may know less about running the schools than local employees do"); Rettig, *supra* note 141, at 288-92 (quoting a Jersey City teacher saying: "It will take the state fifteen years to figure out this city. Jersey City is going to be the state's Vietnam because they don't even know who the Viet Cong are.").

145. See, e.g., Berman, *supra* note 68; Richard C. Hunter & Jeff Swann, *School Takeovers and Enhanced Answerability*, 31 EDUC. & URB. SOC'Y 238 (1999); Charles Mahtesian, *Whose Schools?*, GOVERNING, Sept. 1997, at 34, 38; Lynn Olson, *Veterans of State Takeover Battles Tell a Cautionary Tale*, EDUC. WK., Feb. 12, 1997, at 25.

146. See Levinson, *supra* note 74, at 935 ("With jurisdiction comes responsibility and blame.").

147. See, e.g., ORR, *supra* note 130, at 168-70 (noting a "firestorm" of local protest follows state involvement in Baltimore schools); *Ex-Schools Chief Denied Job*, EDUC. WK., Dec. 10, 1997, at 4 (discussing the lawsuit to block a school takeover in Mississippi); Robert C. Johnston, *Justice Dept. Investigates Takeover of Calif. District*, EDUC. WK., Mar. 26, 1997, at 18 (discussing a lawsuit to block a school takeover in Compton, California); Charles E. Strum, *Newark School Officials Remain Opposed to State Takeover*, N.Y. TIMES, May 11, 1993, at B5 (noting protest in Newark, New Jersey).

parents and politicians may also resist, seeing in disestablishment a crack in the wall of local control that protects them and their interests even if they themselves are not at immediate risk. Joining them will almost certainly be the teachers' unions, as accountability programs in general, and disestablishment in particular, threaten teacher tenure and work rules.¹⁴⁸ Union opposition to disestablishment manifests on a statewide, rather than a districtwide, basis, even if only a handful of districts are at risk. Perhaps the most dramatic example of such opposition was seen in New Jersey, where accountability legislation that included a disestablishment sanction nearly failed due to the opposition of the New Jersey Education Association, "[t]he most active special interest group."¹⁴⁹ The union's support, and the legislation's passage, was secured not only by a dramatic concession—that state-appointed officials could not replace or reassign teachers—but also by the insertion of statutory language that strongly limited state-appointed superintendents' ability to remove tenured principals.¹⁵⁰ In other states, of course, teachers and principals alike are at risk when districts are disestablished.¹⁵¹

At the same time, disestablishment offers states some benefits. Most obviously, it gives state officials power over funds, contracts, and jobs—the same power and control that motivate local officials to resist disestablishment and to frustrate other sorts of educational reform.¹⁵² As noted above, a lot of money is involved.¹⁵³ Electoral realpolitik can also play a role. For example, the support of the Democratic (and term-limited) leader of the California state assembly for a 2003 state takeover of the Oakland schools was attributed to his desire to decimate the political base of the president of the Oakland school board, his likely opponent in a

148. See Hess, *supra* note 3, at 61-62 (describing potential teacher opposition); *supra* note 75 (discussing removal of union protection for principals and administrators in Detroit).

149. Carson, *supra* note 144, at 62.

150. See *id.* at 62-64.

151. See, e.g., *supra* note 75.

152. Oakland (CA) Mayor Jerry Brown, asked whether his efforts to gain additional control over the Oakland school system following a possible disestablishment constituted a "naked power grab," responded, "[m]ost people in politics prefer more power to less power." Lolis Eric Elie, *Oakland's Mayor Is Still in Orbit*, TIMES-PICAYUNE, June 14, 1999, at B1.

153. See *supra* notes 37-41 and accompanying text.

future Oakland mayoral race.¹⁵⁴ More systematically, Republican governors with suburban constituencies may see advantage in assaulting educational mismanagement in Democratic cities and may be comparatively more willing to offend teachers' unions.¹⁵⁵ Similar considerations apply to another motivation commonly cited in communities where schools are disestablished: racist preferences on the part of state officials.¹⁵⁶ The claim that disestablishment is a colonialist policy informed by racist motives is often heard.¹⁵⁷

154. See Robert Gammon, *600 Turn Out in Support of Chaconas*, OAKLAND TRIB., Jan. 19, 2003.

155. See Margaret Dolan-Dabrowski, *A Case Study of the First Year of State Control of the Jersey City Public Schools 12-14 (1992)* (unpublished Ed.D. dissertation, Rutgers Graduate School of Education).

156. See Beth Reinhard, *Racial Issues Cloud State Takeovers*, EDUC. WK., Jan. 14, 1998, at 1.

157. See, e.g., *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 369 (6th Cir. 2002). The plaintiffs in *Moore*, seeking to strike down a law authorizing disestablishment in Detroit, complained of "disrespectful treatment" of Detroit representatives during legislative debates and objected to the legislature's refusal to hold hearings in Detroit. See also, e.g., HENIG ET AL., *supra* note 38, at 270 (quoting an African American opponent of Maryland's increasing role in Baltimore schools as stating: "You want to know how [the state's involvement] comes across? It comes across as racist. The undercurrent I see is, 'These black people can't learn, so why spend money on them?'"); Tamara Henry, *School Takeovers: Officials and Activists Collide*, USA TODAY, Mar. 30, 1999, at 10D (quoting a Detroit activist as stating that disestablishment is "apartheid legislation"); Psyche Pascual, *State Appointee Takes over Compton Schools*, L.A. TIMES, July 10, 1993, at A1 (quoting Amen Raah, member of the disestablished Compton School Board, as stating that state education officials are "coming in [to Compton] with the attitude of a slave master, and the slave master never takes advice from a slave"); Reinhard, *supra* note 156, at 18 (quoting Rev. Michael DeBose, a Cleveland activist, as stating, "When you've got black people in charge and a majority-black district, people think they don't know what they're doing.").

The heat evident in these comments should surprise no one. Disestablishment has especially high stakes in districts with a majority black population and black leadership because it entails the loss of control not just over schools but over one of the central and most symbolic institutions of black political power. See Stone, *supra* note 34, at 262 ("For African Americans ... public education occupies a central place symbolically, as a policy area closely associated with the expansion of opportunity."). A disestablishment threat in such a community becomes racially fraught simply by virtue of the big loss that it imposes. See HENIG ET AL., *supra* note 38, at 267. It is even more fraught because it expresses the failure to realize high hopes that black control of school boards would herald a more locally aware, child- and community-oriented, and reformist brand of school politics. See *id.* at 4-6.

This picture may be different in school districts with Latino majorities. See James Sterngold, *In a Largely Latino City, 2 Governments Emerge*, N.Y. TIMES, Feb. 23, 2002, at A10 (describing a complex relationship between the city council and school board in a city with a growing Latino population). See generally Rodney Hero & Susan E. Clarke, *Latinos, Blacks, and Multiethnic Politics in Denver*, in RACIAL POLITICS IN AMERICAN CITIES 309 (Rufus Browning et al. eds., 3d ed. 2003). More research on Latino school politics is needed. A full

Race, as well as political partisanship, may motivate state politicians to challenge local control in particular districts—and bear the associated costs—even if officials have no expectation that doing so will improve education.

Perhaps most enticing to states, however, is that disestablishment offers a way to stimulate educational change in distressed districts without interfering with the localism of its relatively more affluent districts. Suburbanites who enjoy good schools protect that localism vigilantly.¹⁵⁸ They oppose interference with local taxing and spending, not only for the real limitations they would impose upon educational services, but for symbolic reasons perhaps at least as potent. As Douglas Reed argues, “efforts to widen educational opportunities to low-income areas are seen as dangerously threatening to the interests of middle- and upper-middle-class students and parents.”¹⁵⁹ For example, school finance reform proposals, by requiring substantial spending increases and/or equalization in school funding across rich and poor districts, affect the educational interests of the relatively rich directly.¹⁶⁰ The concomitant political untenability of finance reform has forced its advocates to seek it in the courts rather than the legislature.¹⁶¹ By arguing that the problems of distressed schools are about management rather than money, and by simultaneously demonstrating that they are taking serious and drastic action to root out educational mismanagement where it exists, states can respond to a mandate to attack educational deficiencies without reslicing the politically sacrosanct school-budget pie or interfering with suburban prerogatives.¹⁶² For

treatment of the racial dimensions of disestablishment is beyond the scope of this Article.

158. See *supra* notes 23-25 and accompanying text.

159. See REED, *supra* note 23, at xv.

160. See Ryan & Heise, *supra* note 23, at 2060.

161. See Thomas Corcoran & Nathan Scovronick, *More than Equal: New Jersey's Quality Education Act*, in STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY 70-83 (Marilyn J. Gittell ed., 1998); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 458-63 (1999). But see David J. Hoff, *Voters Weigh K-12 Finance at Ballot Box*, EDUC. WK., Oct. 20, 2004, at 1 (indicating voter support as well as opposition to initiatives to increase school funding).

162. Dyson finds an earlier version of this argument “arguable” and “contradict[ory].” See Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830, 1854 (1999) (“Because ... intervention in troubled districts leaves most other districts unaffected—a characteristic emphatically not shared by financial or substantive remedies—potential political fallout is mitigated”). Dyson doubts

state-elected officials, a plausible remedial package that is both revenue-neutral and preserves the status quo in most suburban school districts is a Holy Grail.

In a nutshell, then, what do states want? Recognizing possible exceptions to this account that can arise from the idiosyncracies of local school politics, it seems fair to generalize as follows. Above all, states would like to see reform. The courts mandate it, the electorate desires it, their political needs compel it. If disestablishment appears to be the only way to get that reform, states will impose it, but they do so aware that the reform gains of doing so may well be small. For this reason, and in order to avoid the political and financial problems disestablishment brings, states prefer strongly to avoid disestablishment if local reform can somehow be secured.

This, however, brings us back to the initial puzzle: why so many disestablishments, when districts have every reason to offer states reform in order to maintain their own power? These incentives seem to be a recipe for a world without disestablishment. The next section seeks to capture that intuition in a model of state and local interaction that can also explain where the intuition goes wrong. In doing so, it identifies many of the important features of the disestablishment sanction.

D. A Two-Player Model of Deterrence

School districts and states are complex institutions with vast and varied motivations; their interactions are correspondingly complex. Even if states and districts always followed simple strategies—and they do not—the behavior of the resulting system might be unpredictable.¹⁶³ This insight has been applied to the “complex

whether disestablishment would “mitigate rather than exacerbate political fallout in minority neighborhoods where poor performing schools typically operate,” and claims that “for some minority communities there is likely to be great political fallout.” Maurice R. Dyson, *A Covenant Broken: The Crisis of Educational Remedy for New York City's Failing Schools*, 44 *How. L.J.* 107, 182 (2000). Dyson here confuses local and state incentives. The “fallout” he describes is local, confined to the affected community; the political consequence states are keen to avoid, by contrast, is objection from the mass of relatively prosperous, suburban districts seeking to preserve their local prerogatives.

163. See ROBERT JERVIS, *SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE* 7 (1997).

intergovernmental system" of education by several scholars¹⁶⁴ who characterize intergovernmental educational policymaking as

an "ecology of [local] games" that are largely separate, but do interact and provide inputs to each intergovernmental unit. For example, there is a state legislative game, a state administrative game, a district and school administration game, and a teaching game. Each game has separate players, rewards, inputs to other games, and provides outcomes to other games.¹⁶⁵

There obviously can be no complete census of the complex educational ecology. The purpose of this section is to explicate the strategic underpinnings of but one of many educational games: the interaction between states seeking educational reform (preferably reform implemented by localities) and districts seeking survival (preferably at the cost of as little reform as possible). The strategies associated with this game do not determine outcomes—there are too many other games—but they do shape the rewards, inputs, and consequences that the game generates in the overall ecology.¹⁶⁶

A few concepts from elementary game theory suggest the strategic elements of disestablishment. The state/district interaction can be stylized as a sequential two-player game in which districts threatened with disestablishment first decide whether and how much to reform, and states next decide whether to disestablish.¹⁶⁷ Assume—as the previous sections argue one

164. See, e.g., William A. Firestone, *Educational Policy as an Ecology of Games*, 18 EDUC. RESEARCHER 18 (1989); Marilyn Gittell, *School Reform in New York and Chicago: Revisiting the Ecology of Local Games*, 30 URB. AFF. Q. 136 (1994).

165. FREDRICK M. WIRT & MICHAEL W. KIRST, *THE POLITICAL DYNAMICS OF AMERICAN EDUCATION* 286 (1997) (citation omitted); see also STONE ET AL., *supra* note 1, at 6 & n.5 (applying the "ecology of games" concept and attributing its first use to Norton Long, *The Local Community as an Ecology of Games*, 64 AM. J. SOC. 251-61 (1958)).

166. The complexity of the overall system does not mean that the strategic issues associated with a single interaction cannot be analyzed systematically. Marando and Reeves, in their useful model of urban consolidations and other types of local government reorganizations, argue persuasively that both state and local behavior must be treated as endogenous when modeling intergovernmental politics. Marando & Reeves, *supra* note 68, at 997 ("[T]he study of local reorganization cannot be approached by examining exclusively either state- or local-level actions."). They note in the local-reorganization context much of what is argued here with regard to disestablishment: that even though states have the legal authority to act unilaterally, they will rarely do so, because they must take into account local needs, preferences, and political power. See *id.*

167. Sequential play seems to be the right model in light of the drawn-out timetables and

should—that the state prefers to disestablish if the alternative is no local reform at all, but prefers the district to reform itself so that the state need not bear the costs of actually imposing the disestablishment sanction.¹⁶⁸ Districts approach a disestablishment threat with a strong preference to reform rather than to see the threat carried through. Aware, however, that states also prefer local reform to costly disestablishment, a rational district will reform exactly up to the point that would satisfy the state sufficiently so that it would not impose the disestablishment sanction. That is, districts depart just enough from their own preferences and toward the preferences of states to convince states that disestablishment is not necessary.

In the sequential game, districts are never disestablished: the district's dominant strategy is always to reform just enough to induce state regulators to leave them alone. This simple sequential game is thus analytically trivial, interesting only insofar as it captures the intuition that disestablishment is a surprising phenomenon. As noted above,¹⁶⁹ districts facing disestablishment are usually guilty of quite egregious malfeasance, are given ample opportunities to ameliorate deficiencies, and can escape the sanction by demonstrating relatively modest improvements. When states do not attach positive political value to the act of takeover itself, districts *ought* to seize the opportunity, every time, to reform themselves at least enough to satisfy the state authorities and keep their jobs. In more than a few cases—though still a very small number relative to the number of districts nationwide—however, they do not do so.¹⁷⁰

Yet if one reconceptualizes the game as a standard signaling game with asymmetric information, the occasional disestablishment is consistent with rational and capable players. In this more realistic game, the district continues to choose whether to reform and by how much. This choice is then visible to the state, which

repeated state warnings that characterize the disestablishment process. *See supra* note 71 and accompanying text.

168. If a state prefers to disestablish a particular district regardless of whether the district reforms on its own, it always does so. In such a case, district preferences do not matter and there is no “game” at all, only a foregone conclusion determined by the state’s political and policy preferences.

169. *See supra* notes 111–13 and accompanying text.

170. *See supra* note 137 and accompanying text.

decides whether to disestablish. Although state officials know their own preferences, the district does *not* know, when it makes reform decisions, enough about the shape of state preferences to determine how serious the state is about disestablishment and what level of reform is necessary to forestall state action.

There can be no doubt that districts have only incomplete information about state standards. Most state accountability programs include elaborate "academic watch lists" and similar early warning and probationary systems.¹⁷¹ It is at this early phase that performance criteria enshrined in legislation or regulation come into play. The typical result is that a very large number of districts or schools are put on probation—far more than can be realistically subjected to sanctions. In New Jersey in 1988, as the state readied a takeover plan for the Jersey City school system in the full public eye, it also placed eight other districts at the highest level of monitoring, making them eligible for similar sanctions.¹⁷² In 1996, Arkansas identified thirteen "academic[ally] distress[ed]" districts subject to sanctions under its year-old takeover law.¹⁷³ In 1999, New Mexico announced that the eleven "lowest performing" schools in the state were eligible for takeover if they did not improve.¹⁷⁴ As of February 2000, Maryland's list of "reconstitution eligible" schools had ninety-six entries, although these spanned only three school districts.¹⁷⁵ In each of these states, districts or schools so listed were required to work with state officials to ameliorate their deficiencies.

Assigning probationary status to a school or district is not a full-scale sanction. Precisely because of its systematic and widespread use, probationary listing is not particularly threatening. Of the eight districts other than Jersey City that New Jersey listed in 1988, the state disestablished only two more in the next seven years (and no more have been disestablished since).¹⁷⁶ The thirteen

171. See *supra* note 111.

172. See Janet Gardner, *Jersey City Schools Face State Action*, N.Y. TIMES, Sept. 13, 1987, § NJ, at 4.

173. David J. Hoff, *Takeovers Threatened*, 25 Ark. Districts Address Deficiencies, EDUC. WK., Oct. 2, 1996, at 17.

174. Matthew Franck, *Struggling Schools May Face Takeover by State: 'Fix-It-or-Else' Law New to N.M.*, ALBUQUERQUE J., Apr. 12, 1999, at A1.

175. Darcia Harris Bowman, *Private Firms Tapped to Fix Md. Schools*, EDUC. WK., Feb. 9, 2000, at 1, 22.

176. See ZIEBARTH, *supra* note 137.

Arkansas districts listed in 1996 surely knew that the state was not about to invoke an untried and controversial law by sanctioning them *all*, and may well have suspected—as in fact occurred—that it would sanction none. In New Mexico, the eleven schools listed under the untried takeover law had grounds for similar optimism. Even if they wondered whether school takeovers might be more palatable to the state than, say, district disestablishment, they could read in the local *Albuquerque Journal* assurances from state school superintendent Michael Davis and his staff that they would “do whatever is necessary to avoid using such sanctions, which they believe could do more harm than good if employed too liberally.”¹⁷⁷ In the case of the Maryland reconstitution eligibility list, it was possible to imagine the state actually reconstituting many schools.¹⁷⁸ The districts nevertheless knew that the state was unlikely to reconstitute half of the Baltimore school system when, in six years of the reconstitution program, Maryland had listed numerous schools but reconstituted none.¹⁷⁹

Of course, listing is not inconsequential. It is a true management reform, a way of injecting outside technical expertise into the affairs of schools and school systems in perennial distress. Listing also carries some probability of sanctions, even if small. Three of the ninety-six Maryland schools deemed “reconstitution eligible” in 2000 may well have been shocked when the state announced that they would be the first actual reconstitutions under the state’s academic bankruptcy regime.¹⁸⁰ Their ninety-three luckier peer institutions who were spared the axe may have been surprised as well to learn that the likelihood of being disestablished was only one in thirty-two. Still, most schools and districts will beat such long odds, and they know it.

177. See Franck, *supra* note 174. Officials in other states have made similar statements. See Joe Hainthaler, *Ridge Plan Has Ultimatum for City School Districts that Failed to Improve, Under the Governor’s Proposal Would Come Under State Control*, YORK DAILY REC. (Pennsylvania), Feb. 10, 2000, at 1; Stephen Hegarty, *Failing Schools Search for Ways to Make Grade*, ST. PETERSBURG TIMES (Florida), Aug. 16, 1999, at 1B. Of course, such statements are only evidence of state preferences, to be evaluated critically by districts analyzing the state’s seriousness.

178. See Bowman, *supra* note 175.

179. See *id.*

180. See *id.*

Absent perfect knowledge, a district's willingness to reform depends on its beliefs about state preferences. It may happen that a district, believing incorrectly that disestablishment is a realistic possibility, will reform unnecessarily in order to avoid it. The state, presumably, is glad of such outcomes. Sometimes, a district will reform less than is necessary, believing falsely that its state is relatively disestablishment-averse, only to have its officials ousted by a somewhat disappointed state. Disestablishment thus has both more and less of an influence than it would if states and districts did not suffer from information problems. Disestablishment, rather than local reform, happens sometimes even to rational states and school districts; but the possibility of disestablishment also induces reform in districts where states had no intention of using the sanction.

This account bears a strong resemblance to the classic model of international deterrence that Robert Jervis presented in 1976.¹⁸¹ In that analysis, Jervis concludes both that existential threats can deter destructive conflict and that their efficacy is not guaranteed.¹⁸² International relations is of course an inexact analogy to state-district relations; in particular, it presumes "juridically equal actors,"¹⁸³ which states and districts emphatically are not.¹⁸⁴ Nevertheless, Jervis's analysis suggests that disestablishment threats will have real but imperfect power to deter, but that their efficacy can be undermined.

Jervis argues, for example, that deterrence is served when the threatened party "is relatively weak or vulnerable [or] places an especially high subjective value on preserving the lives and property of its citizens."¹⁸⁵ This description applies with great force to district governments that have no constitutional protection but every incentive to protect the interests of the employment regime. At the same time, Jervis writes that it serves deterrence when the threatening party permits "the other [to] retreat without breaking important commitments" and "refrains from humiliating the other, inflicting gratuitous punishment, raising demands that lack

181. ROBERT JERVIS, *PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS* (1976).

182. *See id.* at 96-102.

183. *See id.* at 101.

184. *See supra* note 12 and accompanying text.

185. JERVIS, *supra* note 181, at 100.

any legitimacy, or asking for something that is of significantly greater value to the other than it is to the threatening party.”¹⁸⁶ Disestablishment threats always sting, because they incorporate the claim that district self-government has failed; but states often compound the insult during the lead-up to disestablishment, accusing targeted districts of both incompetence and venality.¹⁸⁷ Humiliation, therefore, plays a considerable role in takeover politics.¹⁸⁸ Jervis notes similarly that “threats can fail if they are applied in a case where the other side has situational advantages and can ‘design around’ them”—not a bad description of the implementation power—and failed threats may “increase the other side’s hostility by revealing the existence of great conflicts of interest.”¹⁸⁹

Perhaps most important, “deterrence may fail because the threat is not believed. Deterrence theory stresses both the importance and the difficulty of establishing credibility”¹⁹⁰ Players’ beliefs are vital. In the disestablishment game, the state knows that the probability that a troubled district will reform itself depends on its beliefs about the credibility of the states’ disestablishment threat. A state will therefore strive to affect districts’ beliefs, in order to maximize the probability that districts will reform themselves. Taking state efforts to change district beliefs into account, disestablishment becomes a standard three-move signaling game. In the first move, the state seeks to signal its type, i.e., whether it is resolute when it threatens disestablishment. In the second, the district selects a reform program based on its beliefs about state type. In the final move, the state decides whether to disestablish, based on its true type and on the district’s choice of how much to reform.¹⁹¹

186. *Id.* at 101.

187. See, e.g., Kimberly J. McLarin, *New Jersey Prepares a Takeover of Newark’s Desperate Schools*, N.Y. TIMES, July 23, 1994, at A1.

188. See Paul Weaver, *The Whitley County Story: A Study of State Intervention into a Poor, Rural Appalachian County School District* 20-21 (1991) (unpublished Ed.D. dissertation, University of Kentucky, Lexington) (on file with the University of Kentucky Library).

189. See JERVIS, *supra* note 181, at 79-80.

190. *Id.* at 79.

191. For a general account of games of limited information and signaling, see JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* 222-44 (1994).

The central feature of such signaling games is that signals must be credible to be effective. States cannot simply announce their types and expect to be believed; it is too easy to lie. Districts simply ignore such "cheap talk."¹⁹² States seeking to signal their willingness to disestablish districts *credibly* have to do so by incurring some of the costs of disestablishment that disestablishment-averse states would be less willing to tolerate.¹⁹³

One such signal is the passage of legislation authorizing disestablishment, with its associated challenge to the institution of local control and concomitant expenditure of political capital. The politics surrounding the passage of such legislation carry real costs for state officials; consequently, the signal functions effectively. Efforts to pass such a law, if accompanied by logrolling, media publicity, and incendiary rhetoric lauding its wisdom and necessity, galvanize political opponents—especially interest groups like suburbanites, teachers, and superintendents, whose opposition to disestablishment is generalized rather than tied to any specific district. Passing legislation allows opponents to mobilize resources and solidify resistance even before any particular disestablishment is contemplated. A failure to pass legislation, of course, is a fairly reliable signal that a state is not planning on disestablishment.

That passing disestablishment legislation may be a credible signal is illustrated by litigation that Texas pursued all the way to the Supreme Court.¹⁹⁴ Texas's suit asked the Court to declare that legislation authorizing disestablishment, which it had not yet invoked, did not violate the provisions of the Voting Rights Act of 1965, under which Texas is a covered jurisdiction.¹⁹⁵ Neither the U.S. Justice Department nor the federal district court had been willing to issue such a declaration, although they did not invalidate the law; instead, they ruled that Texas must take its chances with voting rights lawsuits should it disestablish a district.¹⁹⁶ The Supreme Court upheld the lower court's view completely and

192. David Austen-Smith, *Strategic Models of Talk in Political Decision Making*, 13 INT'L POL. SCI. REV. 45 (1992). Mere talk may be credible in situations where both players share certain common interests, but such situations do not resemble disestablishment. See *generally id.*

193. See MORROW, *supra* note 191, at 241.

194. *Texas v. United States*, 523 U.S. 296 (1998).

195. See *id.* at 299.

196. See *id.*

unanimously, ruling the case “[un]ripe” for decision because “Texas has not pointed to any particular school district in which the application of [the disestablishment provisions at issue] is currently foreseen or even likely.”¹⁹⁷

Why did Texas press a suit it knew would likely be held non-justiciable? After all, when the state took over the Wilmer-Hutchins district in Dallas in 1996, it had asked for and received—after a three-month delay—voting rights approval from the Justice Department.¹⁹⁸ The most plausible explanation is that Texas was seeking to strengthen its signal. It wanted districts to know that it could make disestablishment decisions free of second-guessing by the Justice Department. Given that doubts existed, and that it had applied to the Justice Department before, Texas thought that the threat of disestablishment would be enhanced if the federal government announced a nonintervention policy in advance. It wanted that declaration, quite reasonably, even though it had no particular disestablishment in mind.¹⁹⁹

While legislating may not be cost-free, it is still largely talk and in that sense “cheap.”²⁰⁰ Serious signals, by contrast, are usually expensive. A state, *S*, wishing to convince a district, *D*, that it is not disestablishment-averse must incur costs that disestablishment-averse states would not tolerate.²⁰¹ The obvious way to do this is for *S* to disestablish *another* deficient school district, *D*'. Such a move has obvious consequences for *D*'; but it is also a strong signal to *D* that the state might seriously consider disestablishing it as well, and that *D* accordingly should undertake more aggressive reforms. The extent to which the disestablishment of *D*' will affect the beliefs of *D* depends critically, though by no means exclusively, on *D*'s beliefs about how similar *S*'s attitudes are towards *D* and *D*'. If *D*

197. *Id.* at 300.

198. See Alexei Barrionuevo & Aline McKenzie, *Troubled Schools Taken over by State; Wilmer-Hutchins Official 'Disgusted' by TEA Move*, DALLAS MORNING NEWS, June 7, 1996, at 1A.

199. Ironically, precisely the facts that motivated Texas's suit—that the state had solicited Justice Department approval for the Wilmer-Hutchins takeover and that Texas had no particular districts targeted for takeover at the time of the suit—were cited by the Supreme Court in denying Texas's claim. See *Texas*, 523 U.S. at 301.

200. See Austen-Smith, *supra* note 192.

201. See, e.g., Dani Rodrik, *Promises, Promises: Credible Policy Reform Via Signaling*, 99 ECON. J. 756, 757-58 (1989).

is similar to D' in its educational problems and political circumstances, beliefs might change a good deal; but if D is worlds apart from D' , its fate may be irrelevant.²⁰²

This section has not offered a formal model of disestablishment. The ecology of games makes impossible a model that is both useful and formal. Even the stylized interaction described here, in which the final move of a state's game with any given district also functions as the first signaling move in that state's game with other districts, defies useful mathematization. Moreover, the game between a state and each of its districts is repeated an indeterminate number of times, and the status of ongoing games may affect the optimal strategies in other games in each iteration—with results that then feed back.²⁰³ Similarly, the necessary vagueness of state preferences, which depend on fairly amorphous notions of political advantage, provides little insight into the precise location of an equilibrium in a well-defined policy space.

The intention here, by applying elementary game theory to the disestablishment interaction, is to argue that an accountability program consisting of performance standards and disestablishment sanctions allows states to move distressed local districts in the direction of reform. Local power over implementation generally dooms state efforts to impose reform hierarchically; and local autonomy has led to the development of an entrenched educational establishment organized primarily around the goal of bringing economic benefits, and especially employment benefits, to their

202. One more observation is necessary to complete the classic signaling narrative: states' first move requires them to balance the costs they incur by signaling and the benefits associated with the district's receipt of the signal. Whether signaling is in states' strategic interest depends on the particular equilibrium of the signaling game, which is a function of the players' beliefs and incentives. Signaling games may have equilibria in which the signaling player signals its type with 100% accuracy, not at all, or something in between ("separating," "pooling," and "semiseparating" equilibria, respectively). See MORROW, *supra* note 191, at 225. That about half the states authorize disestablishment in varying degrees, see *supra* note 69, is consistent with a semiseparating equilibrium. States are not "pooling," because twenty-five of fifty states have sent the relatively cheap signal of passing a disestablishment law, while the rest have not; and they are not "separating," because in a separating equilibrium, states would signal their type perfectly and districts would be able to act to forestall disestablishment in all cases. See MORROW, *supra* note 191, at 225-26. A semiseparating equilibrium is consistent with the strong role of uncertainty in accountability politics: states are unable to communicate clearly their intentions to districts, and districts must base their actions on their best guesses about what states really intend.

203. See *supra* note 165 and accompanying text.

districts—an “employment regime.”²⁰⁴ Nevertheless, if a state threatens to unseat local district governments whose performance it deems inadequate, even an employment regime—with its extraordinarily strong preferences for unreformed employment-oriented practices—has overwhelming incentives to embrace educational change and thus to avoid the penalty. This does not, however, make accountability a straightforward policy of deterrence, in which states explain to districts what they must do and districts then do it in order to avoid greater pain. To be sure, the system *is* characterized by deterrence: districts are deterred by disestablishment threats into undertaking reforms that they otherwise would strongly prefer to avoid. Yet because disestablishment is costly for states, because those costs vary, because states vary both in their own reform agendas and in their willingness to impose disestablishment sanctions, and because these differences are difficult for districts to detect reliably, states cannot simply tell districts what they want and expect to be believed. Districts will be suspicious that states are trying to bluff them into too much reform. States can only seek to signal their intentions to districts as credibly as possible.

For reform, this has both positive and negative implications. On the negative side, it implies that some districts are disestablished not only, or even primarily, because of their own performance but because the state seeks to send a signal to other districts. Such an instrumental application of sanctions is unfair. Perhaps even more troubling, adopting a system which unavoidably creates an atmosphere of incomplete information between states and districts conflicts with the reasonable goal of improving communication between state and district. Disestablishment sanctions “institutionalize distrust between levels of government.”²⁰⁵ This seems particularly undesirable when one of the linchpins of accountability

204. See *supra* notes 34-41 and accompanying text.

205. Richard F. Elmore, *Education and Federalism: Doctrinal, Functional, and Strategic Views*, in *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION* 166, 183 (David L. Kirp & Donald N. Jensen eds., 1986). Elmore finds that federal expenditures for education, accompanied by “accusatory rhetoric” about local education policies, “institutionalized distrust” between the federal and state governments. See *id.* at 183-84. Similarly, disestablishment threats by states often include accusatory rhetoric about school officials, breeding distrust between states and districts. See *supra* notes 186-89 and accompanying text.

programs is the establishment of clear standards. When accountability plays out in the real world of politics, clarity dissipates.

The positives, however, outweigh the negatives. Districts facing a threat of disestablishment—the probability of which they cannot know with total confidence—face internalized incentives, rather than simply external directives, to reform. They will not undertake the impossible, but given the overwhelming cost of the sanction they have good reason to push themselves quite hard (even if they think the probability of punishment is substantially less than unity). States, of course, can utilize districts' incomplete information to push districts fairly aggressively in desired directions, without having to invent top-down regulations that might be infeasible, unnecessary, or easily subverted. Particularly good for states is that this applies to all districts that fear disestablishment, a substantially larger group than the set of all districts that a state could realistically disestablish. Accountability induces reform across all of a state's most troubled school districts.

Those who bemoan educational bureaucracy have attributed its failures too quickly to overarching approaches to governance—hierarchical control on the left, public management of any kind on the right—rather than asking, more conservatively, how existing institutions might be modified to create more salutary incentives. When Chubb and Moe argue that society should move to market-based education, their claim is that publicly governed schools are inevitably captured by interests other than those of children.²⁰⁶ This Article argues that the problems these critics identify are concomitants not of bureaucracy *per se*—or even of state bureaucracy *per se*—but of particular bureaucratic arrangements. Incentives within a given bureaucratic and political structure are not fixed. Educational competition can be enhanced, not stymied, by way of political institutions rather than by way of markets. Accountability offers an alternative both to hierarchical bureaucracy and to the market by institutionalizing intergovernmental competition for control of the schools. Like school choice, it relies on the self-interest of district officials, rather than on top-down bureaucratic pronouncements, to produce results. At the same time, by harnessing the state-district intergovernmental structure of

206. See *supra* notes 56-58 and accompanying text.

American education, the approach offers those who eschew private educational markets a thoroughly public approach to structural reform.

Most likely this path to reform was not anticipated fully by those who advocated accountability policy. But it is the path that accountability offers, and it is a promising one.

II. OTHER ACTORS

Institutions other than states have sought to promote school reform through accountability. Advocates of judicially mandated school reform have welcomed accountability with interest, and it has generated a genuine paroxysm in federal education policy, which was recast around accountability principles by the No Child Left Behind Act of 2001.²⁰⁷ Judicial and federal institutions, however, have assumed that if states can induce district reforms through accountability policies, they can as well. This Article suggests that this is not necessarily so. States can catalyze reform effectively not only because accountability is their policy but also because of the incentives states face and districts' partial knowledge of those incentives. This Part analyzes the quite different circumstances associated with efforts by courts and the federal government to insist upon district accountability. Not only are these institutional arrangements less likely than state accountability programs to yield reforms in very distressed districts, but they may well undermine state accountability programs that do have potential for success.

A. Courts

Judicial policing of intergovernmental relationships is a familiar American practice. It is therefore unsurprising that districts subject to disestablishment have litigated various claims that the sanction violates statutory or constitutional law. It is scarcely more surprising that they have had almost no success.²⁰⁸ Cases that address

207. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-7941 (Supp. II 2002).

208. Disestablishment has been held consistent with the due process rights of removed local officials so long as prior notice and informal pre-removal hearings are given. *See, e.g.,*

disestablishment *per se*, however, are at the periphery of judicial involvement in accountability policy. Rather, the essential cases are those that address whether a state's public schools meet state constitutional guarantees of equal protection and of adequate public education. A judicial declaration that a state school-finance system, or the set of educational services it provides, is unconstitutional requires both states and districts to shift in order to meet, or to resist, judicial demands.

E. St. Louis Fed'n of Teachers, Local 1220 v. E. St. Louis Dist. No. 189 Fin. Oversight Panel, 687 N.E.2d 1050, 1061-62 (Ill. 1997). Courts have also rejected arguments that legislation permitting disestablishment of only certain districts, i.e., those in large cities, violates state constitutional guarantees against special legislation. *See Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 358-63 (6th Cir. 2002); *Mixon v. Ohio*, 193 F.3d 389, 408-09 (6th Cir. 1999); *cf. Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 781-84 (D.C. Cir. 1998) (holding that Congress has authority to abrogate home rule in the District of Columbia, and to give plenary power over education to a control board, but that the control board lacked statutory power to delegate its authority further to a board of trustees). As to equal protection claims, courts have (properly) evaluated states' differential treatment of schools with similar levels of distress—disestablishing some but not others—under a rational basis standard rather than by applying heightened scrutiny, and concluded that such treatment does not of itself violate equal protection guarantees. *See McKnight v. Hayden*, 65 F. Supp. 2d 113, 121 (E.D.N.Y. 1999) ("While other school districts may have been in distress, the Legislature is not constitutionally required to respond to every district."). When plaintiffs have argued that disestablishment of their predominantly minority districts was due to racial animus against nonwhite residents or leaders, the courts have held such allegations to be without factual basis in the record. *See, e.g., Moore*, 293 F.3d at 370; *McKnight*, 65 F. Supp. 2d at 120-21. Each of these cases seems decided correctly and none has generated any substantial legal controversy.

Finally, the Sixth Circuit understands disestablishment of a school district as shifting that district from an elected to an appointed system of school government. *See Mixon*, 193 F.3d at 404. It therefore holds that disestablishment cannot violate Section 2 of the federal Voting Rights Act, 42 U.S.C. § 1973 (2000), which forbids any "standard, practice, or procedure" that, *inter alia*, provides to racial minorities "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* Although "Section 2 of the Voting Rights Act requires only a showing of discriminatory effect" rather than one of discriminatory intent, "Section 2 only applies to elective, not appointive, systems," and the system in disestablished districts is made an appointive one; therefore, there is no violation. *Mixon*, 193 F.3d at 407. Of course, Section 5 of the Voting Rights Act, which deals with *alterations* in voting procedures that work to minorities' electoral disadvantage, "applies also to ... state decisions as to which offices shall be elective." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 501 (1992) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 564-65 (1969)). This seems to include disestablishment. The Assistant Attorney General of the United States, prior to the filing of *Texas v. United States* in federal court, took the position that takeover "may" implicate Section 5. *Texas*, 523 U.S. at 299. To date, however, the merits of this question have not been litigated in a jurisdiction covered by Section 5.

The extensive history of state court involvement in mandating education reform has been told well, and analyzed at length, by many commentators.²⁰⁹ A précis: the past three decades have seen numerous lawsuits filed with the goal of forcing improvement in deficient school districts. After the federal courts' refusal to order the equalization of school finance across poor and wealthy districts,²¹⁰ a refusal that marked the end of the so-called first wave of school reform litigation,²¹¹ reformers shifted their attention to the state courts, seeking to take Justice William Brennan's invitation to find rights or protections in state constitutions that are stronger than those guaranteed by the federal document. They brought a second wave²¹² of education-finance cases, arguing that interdistrict inequities in education spending violated state constitutional guarantees of equal protection.²¹³ These were followed by a third wave of cases claiming that distressed districts' failure to provide an adequate education contravened state constitutional language guaranteeing public education that can be characterized as "thorough," "efficient," "suitable," or by some similar adjective.²¹⁴

Both equal protection and adequacy claims continue to be made in state courts today, although the "second wave" equality theory is generally thought to be in decline²¹⁵ and the "third wave" adequacy theory ascendant.²¹⁶ As Michael Heise notes, the third wave of school equality lawsuits takes up *Rodriguez's* suggestion that there

209. See, e.g., REED, *supra* note 23, at 11-14; Liebman & Sabel, *supra* note 116, at 201-07; James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 266-72 (1999); 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).

210. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973). The *Rodriguez* Court, reasoning that public education is not a fundamental constitutional right and wealth not a suspect class, applied rational basis scrutiny to uphold wealth differentials across school districts. *Id.*

211. See Ryan, *supra* note 209, at 266.

212. The "wave" metaphor originates with William Thro and has been widely adopted. See Thro, *supra* note 209, at 222.

213. See *id.* at 266.

214. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 333-39 (1991).

215. See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 143 (1995) (stating that the second wave was dismissed as a "disappointing" failure).

216. See *id.* at 183 ("adequacy arguments should be the tools of ... education finance reform").

might be an "identifiable quantum of education [that] is a constitutionally protected prerequisite to the meaningful exercise of educational rights."²¹⁷ Third wave suits fasten upon these clauses as guarantees of an *adequate* education that low-performing districts fail to meet. In *Rose v. Council for Better Education*, generally regarded as dating the beginning of the third wave and as the leading third-wave case,²¹⁸ the Kentucky Supreme Court held that "[e]ach child, *every child*, in this Commonwealth must be provided with an equal opportunity to have an adequate education."²¹⁹ The Kentucky court's pronouncement that "[e]quality is the key word here"²²⁰ was merely the undertow of the second wave pulling at the hems of the judges' robes. In fact, the key word is "adequate": "every child" in Kentucky has an equal right to an education only up to the point of adequacy.²²¹

The second and third wave theories, however, have not been embraced universally. In many states, courts have refused to intervene in educational reform, insisting that the issue is essentially a political question or is otherwise nonjusticiable.²²² In those states where courts have endorsed a second or third wave theory, implementation has been spotty and political resistance substantial.²²³

Clearly, the realignment of educational practice brought about by accountability programs has important implications for these lines

217. Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1163 n.102 (1995) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973)).

218. See Ryan, *supra* note 209, at 268 & n.80.

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

220. *Id.*

221. Equity and adequacy are, of course, related concepts even as they are doctrinally distinct. The definition of what constitutes adequate education depends heavily upon the practices and outcomes of other school districts. See REED, *supra* note 23, at 13; 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) ("equality concerns inform the adequacy argument").

222. See Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 90 (Jay P. Heubert ed., 1999) ("In fact, judges often feel unqualified to decide how much money it would take to give children of unequal needs an equal education and so would return the issue to the legislature").

223. See *supra* notes 155-62 and accompanying text.

of cases. One enticing view is that accountability programs buttress the third wave theory by mooting a common objection: defining adequacy is an essentially political judgment for which courts are unequipped, either because they are institutionally incapable of sound definition or because the decision is properly assigned to popularly elected branches of state government. State legislatures, the argument goes, have now through their accountability statutes specified standards that define what constitutes an adequate education. Judges facing third wave claims therefore are relieved of the duty to define adequacy. Instead, courts can simply measure the achievements of the schools against standards that the political branches themselves have laid out²²⁴—or, in the alternative, insist that lawmakers define adequacy legislatively.²²⁵

This Article, however, takes the opposite position: the rise of accountability programs makes judicial policymaking regarding educational quality a shakier endeavor than ever before. To convert legislative accountability standards into a judicial yardstick for the constitutional adequacy of school performance is to misuse legislated educational standards. Such legislation is not merely aspirational or hortatory, but neither does it set out criteria against which states intend that the performance of all schools at all times be judged. Instead, as Part I argues, states should be able to set a high formal bar for accountability expecting that many districts will not reach that bar. This permits them to signal their intentions and induce as many districts as possible to undertake reforms.

The gap between official standards and states' genuine expectations is clearest from the districts' perspective. From their point of view, a state's true standard of adequacy is defined by what the state *does* rather than by what it says. What levels of funding, educational inputs, minimum test scores, and basic educational

224. See James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 415-16 (1990); Liebman & Sabel, *supra* note 116, at 282 ("[N]ew standards and the associated accountability regime substantially reduce the possibility for judicial caprice by giving substance to the interpretation of rights and remedies that courts cannot derive from doctrine alone."); McUsic, *supra* note 222, at 90-91; 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, 472-73 (2004).

225. See Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2251 (2003).

policies will, if not achieved, be deemed by the state so utterly unacceptable that the state will be willing to invest in disestablishing the district? Districts seek to learn that standard and to meet it because otherwise they face genuine and painful consequences. Similarly, districts consider themselves successful if they meet that standard and avoid the consequences, regardless of whether they fail to meet the state's official "standards" or whether the state might *prefer* the district to reform even more.

As Part I argues, states' genuine preference—the adequacy standard defined by what it is prepared to do—can be known by districts only with less-than-complete confidence. This standard, by definition, does not match the more demanding standards that states articulate in their education codes. Because the latter is effectively a ceiling for the former, states would be foolish to make them identical. By articulating high standards, states have the potential to galvanize a wide range of districts to undertake reform—including many districts that the state has neither the desire nor the capability to sanction.

Because states make the final decision whether to disestablish based on their private judgment rather than on public legislation articulating objective standards, they can reward such districts for a wide range of efforts and encourage their continuation. A policy that would actually hold all districts to very high public standards, however, lacks this advantage. Districts, aware that the state cannot disestablish all (or even many) of them effectively, would recognize in standards not fully attainable except by the few an essentially hortatory, unenforceable message. With that recognition, the districts would not feel compelled to reform, and the state standards would be dismissed as cheap talk.

Courts, therefore, are ill-advised to treat educational standards articulated by the legislature as a good rubric for assessing the adequacy of school districts for three reasons. First, the legislature does not mean to define adequacy when it defines academic

standards; it is doing something else.²²⁶ To use legislated standards to define adequacy is, thus, to misstate the legislature's opinions.

Second, establishing a very high, largely unattainable bar for district performance discourages districts from experimenting with reforms that do seem feasible. If the courts hold every district to adequacy as defined formally by the legislature, they define an individual right. When defining a right, courts cannot, unlike state governments, say one thing and mean another. Should a plaintiff choose to bring suit against a district, that district must be judged against the defined district obligations.²²⁷ That a district is improving in particular ways cannot justify its failure to meet constitutional standards.

Finally, adoption of legislated standards, as a measure of constitutional adequacy, declaws a state's own ability to use accountability to wrest widespread reform from a range of districts. States must embrace whatever standard the judiciary announces as the floor for an adequate education. Once it does so, districts need not wonder what state standards are. This makes it impossible for states to take advantage of incomplete information, using the threat of disestablishment to deter complacency among districts anxious to avoid sanctions from a state of whose intentions they are unsure.

That would not be a bad result if the courts could compel straightforwardly all districts to comply with judicially ratified legislative sanctions. This is not, however, the likely outcome. Regardless of whether judges can define adequacy more accurately and more legitimately using legislative standards than they did

226. This argument gains additional force as some states remake their academic standards under pressure from the federal No Child Left Behind Act. States have formal discretion under the Act to define their standards at will. *See infra* note 276 and accompanying text. Some may find it politically difficult to legislate overtly loose standards, and instead articulate standards they do not plan to reach while plotting bureaucratic noncompliance. *See generally infra* Part II.B (discussing the requirements of the federal No Child Left Behind Act 20 U.S.C. §§ 6301–6578, and possible state actions regarding compliance). Others may choose, under pressure from the Act, to legislate standards that they believe are less demanding than adequacy requires. *See Ryan, supra* note 3, at 947–48; *infra* note 274 and accompanying text (stating that some states are considering foregoing federal education dollars because they are unwilling to comply with the Act's adequacy standards).

227. The courts themselves have recognized the particular power of the state to act arbitrarily vis-à-vis its districts. *See McKnight v. Hayden*, 65 F. Supp. 2d 113, 121 (E.D.N.Y. 1999) ("While other school districts may have been in distress, the Legislature is not constitutionally required to respond to every district."); *supra* note 208.

when defining it on their own, legislation does not address the primary flaw of the third wave theory: the paucity and ineffectiveness of judicial remedies. Financial remedies, which through a variety of schemes sought to buttress the budgets of distressed districts, have met substantial political resistance and have not proven to result in school improvement.²²⁸ Some courts, like the bellwether New Jersey Supreme Court, have supplemented financial remedies with directives that districts establish a range of specific programs;²²⁹ but there is no reason to expect courts to be more able than state departments of education to overcome successfully the monopoly over program implementation that local officials enjoy. There are myriad ways for local officials and teachers to ignore, foot-drag, or subvert externally imposed reform programs. This is true *a fortiori* about orders from the courts, where the problems are multiplied by the fact that the party ordered to reform

228. See Ryan, *supra* note 209, at 458-71; see also Kimberly D. Bartman, Comment, *Public Education in the 21st Century: How Do We Ensure that No Child Is Left Behind?*, 12 TEMP. POL. & CIV. RTS. L. REV. 95, 109 (2002). A growing literature in educational economics demonstrates that levels of per-pupil expenditure lack a consistent, statistically significant relationship with levels of student achievement. See generally DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS (Gary Burtless ed., 1996) (applying a variety of evidence and methods and failing to reach consensus regarding the impact of school spending on achievement). Although it is clear that a child's individual school assignment can have a substantial and significant impact on that child's educational achievement, growing the budgets of distressed schools is, in general, dubious medicine. To be sure, the issue is debated hotly on both technical and policy grounds, see generally *id.* (documenting disagreement on the influence of school spending), and the courts have been generally unsympathetic to econometric evidence suggesting that new resources do not systematically translate into school improvements. See, e.g., Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 498-99 (Ark. 2002):

[T]he State makes the implausible argument that more money spent on education does not correlate to better student performance.... The State's argument is farfetched in this court's opinion. We are convinced that motivated teachers, sufficient equipment to supplement instruction, and learning in facilities that are not crumbling or overcrowded, all combine to enhance educational performance.... All of that takes money.

Id.; see also Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 340-41 (N.Y. 2003); Abbott v. Burke (Abbott IV), 693 A.2d 417, 439 (N.J. 1997). But as achievement stagnates in a growing number of distressed districts—notwithstanding large budget increases over the past decade, several of which were court ordered—courts may yet come to acknowledge that when “policymakers [cannot] reliably identify programs that do and do not work,” there is little sense in providing additional funds to educators whose “judgments have not been accurate in the past.” Eric A. Hanushek, *Conclusions and Controversies About the Effectiveness of School Resources*, 4 FED. RES. BANK OF N.Y. ECON. POL'Y REV. 11, 23 (1998).

229. See Abbott v. Burke (Abbott V), 710 A.2d 450, 473 (N.J. 1998).

is the state, while the party that must carry out reforms is the local district.²³⁰ Intergovernmental implementation of complicated and difficult-to-assess education reforms lends itself well to delay, confusion, conflict, and the "token compliance," which Donald Kettl describes as "meeting the terms of the rules without conforming with their goals."²³¹ None of these problems are obviated by using a legislatively rather than judicially crafted definition of adequacy. All courts can know with confidence is that whatever programs they mandate will be implemented by the same personnel who run the inadequate system that courts seek to change—hardly a cause for optimism.

The argument of this Article might suggest one other potentially efficacious, although ultimately unavailing, tactic for courts. Courts could copy the tactic that states use to subvert the local implementation monopoly; they could, like states, order disestablishment of districts that they deem inadequate.²³² Court-ordered disestablishment would replicate the salutary incentives for districts associated with state disestablishment: districts would confront a

230. See HENIG, *supra* note 58, at 180-84; Paul Berman, *From Compliance to Learning: Implementing Legally-Induced Reform*, in SCHOOL DAYS, RULE DAYS, *supra* note 205, at 46-49; Cohen, *supra* note 20, at 476-86, 488-89.

231. DONALD F. KETTL, *THE REGULATION OF AMERICAN FEDERALISM* 8 (1987); see also Sipple et al., *supra* note 89, at 161-62 (reporting that some school districts responded to escalating graduation requirements imposed by New York State with "passive compliance" and "gaming and reporting tricks").

232. See generally Saiger, *supra* note 162, at 1831 (arguing that courts should require states to disestablish inadequate school districts in states where the legislature has authorized the practice). Courts have, in fact, adopted this remedy in a very small number of cases. See *id.* at 1853 & nn.111-14. In the most prominent instance, a federal district court that had retained jurisdiction over the desegregation of the Cleveland school district declared a "crisis of magnitude," *Reed v. Rhodes*, 934 F. Supp. 1533, 1560 (N.D. Ohio 1996), involving the district's "total ... collapse," *id.* at 1539, and ordered the school system placed under direct state control. *Id.* at 1558-61. A federal court in Kansas City threatened similar action, urging state oversight of the Kansas City school district's operations as the district moved toward unitary status on the grounds that its district leadership was "not up to th[e] task." *Jenkins v. Missouri*, 959 F. Supp. 1151, 1178 (W.D. Mo. 1997). The Kansas City threat, however, was never actualized. There has also been at least one court-ordered disestablishment in the context of a second and third wave claim not involving desegregation: the Supreme Court of California affirmed a lower court's order requiring the state to take over a district that had threatened to close its schools six weeks before the scheduled end of the school year for lack of funds. The California court based its decision on the second wave rationale that states owe a "constitutional duty, aside from the equal allocation of educational funds, to prevent the budgetary problems of a particular school district from depriving its students of 'basic' educational equality." *Butt v. State*, 842 P.2d 1240, 1243 (Cal. 1992).

system where their deficient performance would result not in new court-ordered funds or programs, but in real pain. Districts would, therefore, become attentive to, and seek to meet, judicial standards of adequacy. Moreover, because the court could order the state to disestablish the district and appoint a substitute administration, the judiciary would avoid the myriad problems, noted by Susan Sturm in a different context, of direct judicial involvement in institutional management: high visibility and controversy, inflexibility, polarization of opposing interests, perceived illegitimacy, and limited control over the bureaucracy.²³³

When disestablishment is ordered judicially, however, the court does not simply substitute itself for the state as the source of the preferences districts must address, whereupon states and districts otherwise proceed identically as they would if preferences emanated from the state. This is true for the same reasons that judicial reliance on state legislative standards is counterproductive.²³⁴ It is much more difficult for courts than states to maintain ambiguity regarding their preferences. Judicial disestablishment orders must announce, or at least rely upon, coherent, public, and consistent reasons for holding a target district's educational practices legally inadequate.²³⁵ Districts will be relatively less unsure whether the courts will come after them next if they know the judges must hew to their stated rationales. The public nature of judicial preferences alone should result in less diverse deterrence than incompletely revealed state preferences can achieve.

Similarly, courts lack a state's institutional power to act arbitrarily or not at all. States can decide with impunity whether and where to pursue disestablishment. This permits states to leverage a threat, inducing reform in several districts at the cost of unseating only one. Districts may assume that they are targets when in fact they are not; or, unsure which district among several candidates the state prefers to disestablish, a potentially targeted district

233. See Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 905-06 (1990) (discussing court direction of prison systems).

234. See *supra* notes 226-31 and accompanying text.

235. See LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 200-01 (2004) (arguing that the constitutional judge engages in "reflective equilibration," a process of "mov[ing] back and forth between general propositions and specific cases, with the goal of finding those general propositions that seem satisfactory as the basis for her decisions over the run of cases").

may undertake partial reform in hopes that even should it fail fully to address the state's concerns, it might convince the state to turn its attention elsewhere. This ambiguity as to target is unavailable to courts. A court that finds a violation and orders disestablishment cannot avoid doing likewise in materially similar cases arising in other districts.²³⁶ Moreover, because courts, unlike states, lack control over their own agendas, such cases "arise" in the passive voice. Courts cannot reliably prevent suits from being brought nor avoid deciding them. If a plaintiff brings a suit in a state where the adequacy theory has been ratified and judicial disestablishment embraced as a remedy, a court may be compelled to act. A regime of court-ordered disestablishment thus gives substantial power to private plaintiffs.

Rather than buttressing the third wave, then, the rise of accountability systems should be understood to constrain further the ability of state courts to influence educational policymaking. The embrace of legislative standards as the salvation of the third wave understands accountability as yet another step in the Progressive-era quest to depoliticize education²³⁷ and render schooling a professionalized, technocratic endeavor immune from the passions, vagaries, and unfairnesses of the political rough-and-tumble.²³⁸ In truth, however, accountability must function in school districts that are thoroughly politicized, with actors interested in furthering their own agendas and preserving their power.²³⁹ It is both unavoidable and, from the state's perspective, desirable for accountability-based reforms to be fundamentally political. Indeed, accountability programs offer states the opportunity to put politics back into education.²⁴⁰ They operate by facing districts with the political threat that some other politically elected body will deprive

236. *See id.*

237. For a discussion of Progressive-era education reform, see DAVID TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 182-88 (1974).

238. The No Child Left Behind Act, 20 U.S.C. §§ 6301-6587 (Supp. II 2002), with its emphasis upon standardized measurement and its devotion to "[s]cientifically based" pedagogical methods, reveals similar Progressive-style commitments. *See infra* Part II.B.

239. *See supra* notes 34-41 and accompanying text.

240. Stone and his colleagues argue: "America spent most of the twentieth century trying to take politics out of education. That was a mistake.... [W]e see the solutions as well as the problems as lying within the political realm." STONE ET AL., *supra* note 1, at 1, 3-4.

them of their own political power. With its progressive veneer stripped away, accountability is as political as a program can be.

This understanding gives new resonance to the views of those state courts that have abstained from the question of how to improve school quality. "[I]t is no part of the duty of the courts of the State," declared the Illinois Supreme Court, to define adequate education "by judicial construction."²⁴¹ Such definition, said the court, "may be and doubtless is a proper question for the determination of the legislature," and "must be undertaken in a legislative forum rather than in the courts."²⁴² Today's public school systems are characterized not only by problems courts have already recognized—goals understood incompletely, best practices difficult to specify, bureaucrats unresponsive to direction, and institutions beset by huge and ever-worsening problems largely not of their own making—but also, in today's era of accountability, by intergovernmental sanctions, threats, posturing, signaling, and incomplete information. One can demur to Professor Helen Hershkoff's argument that state courts are institutions with rightful roles in the political and policymaking process who owe less deference than their federal counterparts to executives and legislatures,²⁴³ and still doubt whether courts can harness these forces effectively.

B. Washington

In a striking development, the rise of accountability in the states spurred national authorities to intervene in details of school governance that not long ago would have been understood univer-

241. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1190 (Ill. 1996) (citation omitted).

242. *Id.* at 1190, 1196; *see also* *Fair Sch. Fin. Council of Okla. v. Oklahoma*, 746 P.2d 1135, 1150 (Okla. 1987) ("When the[] methods [exercised by the Legislature in providing a school system for the state] are challenged, the only justiciable question is whether the Legislature acted within its power."); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995) (stating that the court "believe[s] the proper forum for [] deliberation is the General Assembly, not the courtroom"); *cf. Ex parte James*, 713 So. 2d 869, 904 (Ala. 1997) (Hooper, C.J., dissenting) (comparing judicial interference in efforts by the "legislative and executive branches ... to balance the competing educational philosophies vying for supremacy in Alabama" to the actions of "a 'strong man' dictator who coercively enforces one philosophy upon all the people"); *see also* Saiger, *supra* note 162, at 1834-35 & nn. 15-19 (citing these and other cases).

243. *See generally* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (rejecting the applicability of federal-style rationality review to claims of right under state constitutions).

sally to be purely local matters. The federal No Child Left Behind Act (NCLBA),²⁴⁴ which extends standards-based accountability requirements to all states as a condition of their receipt of the major source of federal school aid, has shaken up educational politics and policy nearly to the point of concussion.²⁴⁵ The Act alters Washington's role in education perhaps as significantly as did the Elementary and Secondary Education Act of 1965 (ESEA),²⁴⁶ which inaugurated substantial federal funding for public schooling²⁴⁷ and whose programs the NCLBA reauthorizes. Every public school in the country is subject to accountability standards under the new Act.²⁴⁸ The preferences of regulators in Washington now dominate the school-reform agenda.

The strong influence of the accountability laws of Texas and other states upon the NCLBA is immediately apparent.²⁴⁹ The NCLBA makes "adequate yearly progress" its central accountability metric,²⁵⁰ defining it as annual improvement in the number of students scoring at or above a cutoff on criterion-referenced tests.²⁵¹ Identified racial and demographic subgroups of students, along with the student population as a whole, must each demonstrate adequate yearly progress.²⁵² Both schools and "local educational agencies"—school districts for the most part—must make adequate yearly progress or face sanctions.²⁵³ States rather than the federal

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

245. Although the Act passed with support from both parties, *see Rudalevige, supra* note 4, at 37-42, bipartisanship quickly evaporated. *See also* SUNDERMAN, *supra* note 6, at 9. In the current environment, the Act is remarkable for its ability to make ardent states-righters out of its liberal opponents and to make champions of both activist government and class-based categorization of children out of its Republican supporters. But perhaps these contradictions are illusory. *See* Hochschild, *supra* note 1, at 228 ("Republicans are pretending to be compassionate in order to be conservative, and Democrats are pretending to be tough-minded in order to be tender-hearted."); Liebman & Sabel, *supra* note 128, at 1727 (noting charges on the left that the Act is a "shill for privatization").

246. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (current version at 20 U.S.C. §§ 6301-7941 (Supp. II 2002)).

247. *See* Dahmus, *supra* note 3, at 21.

248. *See* Ryan, *supra* note 3, at 932-33. Accountability sanctions, however, are limited to school systems receiving ESEA funds.

249. *See* Liebman & Sabel, *supra* note 128, at 1721.

250. 20 U.S.C. § 6311(b)(2)(A) (Supp. II 2002).

251. *See id.* § 6311(b)(2)(C).

252. *See id.* § 6311(b)(3)(C)(xiii).

253. *Id.* § 6311(b)(2)(A)(iii).

government, however, have the power to design their own tests and define what constitutes a passing score.²⁵⁴

In contrast to the toothless federal legislation that preceded it, the NCLBA follows the states' lead and punishes poor performance by limiting or withdrawing authority over governance from officials who fail to improve as required. Individual schools receiving federal monies that fail to make adequate yearly progress are first subject to the sanction pioneered by the State of Florida: pupils must be offered the opportunity to enroll in other schools.²⁵⁵ A program of technical assistance to the school from the district must also follow. Should a school nevertheless continue to fall short of adequacy for two years after being identified as nonperforming, the NCLBA requires the local district to take "corrective action" with respect to that school.²⁵⁶ Among the actions districts may consider are to "[s]ignificantly decrease management authority at the school level"²⁵⁷ and "[r]estructure the internal organizational structure of the school."²⁵⁸ A third year of failure then triggers automatic "alternative governance" sanctions: either conversion to a charter school, reconstitution, private management, or state takeover.²⁵⁹ State takeover may be imposed so long as "permitted under State law and agreed to by the State."²⁶⁰

254. *See id.* § 6311(b)(1).

255. *Compare* 20 U.S.C. § 6316(b)(1)(E)(i) (Supp. II 2002) *with* 1999 Fla. Sess. Law Serv. ch. 99-398 § 2 (West) (repealed 2003). For districts, this sanction operates as a financial penalty for underperformance: departing with a transferring student is her allocation of per-pupil state resources, an amount likely in excess of the marginal cost to the district of her education. Transfer, however, has been greeted coolly by both parents and districts. "Only 1% of eligible children in school year 2002-03 and just 2% in school year 2003-04 have taken advantage of the NCLB choice option and moved to another public school." CENTER ON EDUCATION POLICY, FROM THE CAPITAL TO THE CLASSROOM: YEAR 2 OF THE NO CHILD LEFT BEHIND ACT vii (Jan. 2004) [hereinafter YEAR 2 REPORT]. Districts seek to discourage choice in order to prevent failing schools from emptying and successful ones from being overwhelmed by transfers. *See* Elissa Gootman, *City Will Limit Chance to Leave Failing Schools*, N.Y. TIMES, July 17, 2004, at A1 (discussing limitations on transfers in New York City and Chicago).

256. 20 U.S.C. § 6316(b)(1)(D) (Supp. II 2002).

257. *Id.* § 6316(b)(7)(C)(iii).

258. *Id.* § 6316(b)(7)(C)(vi).

259. A catch-all provision permits states to impose governance changes not specifically enumerated. *Id.* § 6316(b)(8)(B)(v).

260. *See id.* § 6316(b)(8)(B)(iv).

Similar provisions apply to school districts.²⁶¹ School districts are identified as needing improvement if they fail to make adequate yearly progress for two consecutive years.²⁶² If a district needing improvement again fails to make adequate yearly progress for two more years, notwithstanding local plans and the required technical assistance from the state, the state must undertake corrective action.²⁶³ This must include at least one of several interventions, including “[r]emoving particular schools from the jurisdiction of the local educational agency and establishing alternative arrangements for [their] governance;”²⁶⁴ “[a]ppointing, through the State educational agency, a receiver or trustee to administer the affairs of the local educational agency in place of the superintendent and school board;”²⁶⁵ “[a]bolishing or restructuring the local educational agency;”²⁶⁶ and providing students in the school district the opportunity to transfer to other public schools.²⁶⁷ There is no effort to disentangle whether the school or district is at fault; poor test scores in a particular school count against both the school and its parent district.

This system certainly looks like a state new accountability program writ large. It seems fairly clear that the NCLBA’s proponents felt they had recognized a successful initiative hatched in the Brandeisian “laboratory” of the states²⁶⁸ and sought to mandate its use nationwide. Because of the NCLBA, *all* states, even those not already doing so, must hold their districts and schools accountable under a standards-based policy and utilize sanctions that include restricting or abolishing local governance.²⁶⁹

Like a shift from state-ordered to court-ordered accountability, however, a nationalized accountability policy does not simply ratify existing state accountability systems and provide for their replica-

261. See MORPHET ET AL., *supra* note 45, at 13-14 (noting that educational governance occurs at “federal, state, intermediate, local, and site” levels).

262. 20 U.S.C. § 6316(c)(3) (Supp. II 2002).

263. *Id.* § 6316(c)(10).

264. *Id.* § 6316(c)(10)(C)(iv).

265. *Id.* § 6316(c)(10)(C)(v).

266. *Id.* § 6316(c)(10)(C)(vi).

267. *Id.* § 6316(c)(10)(C)(vii).

268. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (coining the phrase).

269. See *supra* text accompanying notes 244-45 and 262-67.

tion elsewhere.²⁷⁰ Close examination demonstrates that the NCLBA's accountability program will have effects quite different from the state legislation upon which it is based. Suburban districts, at little risk of disestablishment under state accountability programs, may under the NCLBA discover good reason to reform their treatment of difficult-to-educate students, in order to forestall outside intervention in their efforts. The NCLBA does not, however, share the potential of state new accountability programs to push very distressed districts to realign themselves toward the goal of reform and to search for effective strategies for improvement. Instead, the NCLBA will likely function in those districts in a fashion similar to other command-and-control regulatory programs—which is to say, with little effect. Indeed, the federal provisions may well have the collateral effect of torpedoing the genuine hopes for such reform that state-based accountability programs offer.

These conclusions rest on the reality that, notwithstanding its rhetoric, the NCLBA is quite rigid as to state behavior. States have genuine flexibility only as to two major decisions, neither of which gives them much real control over the course of reform. First, states may opt out of the program entirely; states are bound by the governance sanctions in the NCLBA only if they wish to receive ESEA funds.²⁷¹ This is more or less a paper power, however; ESEA is an important component of state school budgets, particularly for the distressed schools and districts which serve populations in which poverty is concentrated.²⁷² It is difficult, perhaps impossible, for a state to decline vital funds in order to avoid external accountability.²⁷³ What is striking is that some states, after a few years of

270. *Contra* Sabel & Simon, *supra* note 117, at 1072 (claiming that the Act "partly nationalize[s]" Texas's new-accountability program).

271. See Reichbach, *supra* note 8, at 669, 679 n.103.

272. Federal spending accounts for approximately 7% of nationwide educational spending. See Rudalevige, *supra* note 4, at 25, 45. This percentage is considerably larger in districts with high concentrations of poverty and students with disabilities.

273. Witness, for example, the enormous public outcry when the Los Angeles Unified School District failed to apply for a relatively small state grant that required districts, as a condition of funding, to accept disestablishment-like sanctions if educational outcomes did not improve. See Doug Smith, *Up to \$20 Million Lost as L.A. Schools' Gamble Fails*, L.A. TIMES, Oct. 8, 1999, at B1.

participation in the program, have begun to wonder aloud whether forgoing ESEA funding might be the best course.²⁷⁴

Second, the NCLBA permits states to define their own academic standards for adequacy.²⁷⁵ These must be achievement standards based on testing; the power afforded the states is effectively to select a criterion-based exam and then select the exam score that represents "adequacy."²⁷⁶ The absolute requirement that there be average yearly progress in standardized test performance—regardless which additional criteria are employed—imposes a considerably more narrow definition of adequacy than that used by some states.²⁷⁷ States may not, moreover, apply different standards to different groups of students; nor are they granted more than short-term flexibility to let those standards be ignored, to accept progress on one front as evidence of good faith, to stretch the timetables, or to make similar *ad hoc* modifications. Once the standard for adequate yearly progress is established, it is essentially fixed.

In short, the NCLBA severely limits the discretion of higher-level governments to decide whether to apply corrective measures, including disestablishment, to entities below. Every school must meet the NCLBA's definition of adequate yearly progress or face corrective action.²⁷⁸ Districts, therefore, cannot countenance long-term experiments in particular schools, or select individual schools for demonstration projects, or choose to ignore problems associated with particular schools, areas, or subpopulations. States cannot

274. See YEAR 2 REPORT, *supra* note 255, at 8, 9 (documenting serious proposals to reject NCLBA funds or accept them with conditions in Louisiana, Minnesota, Nebraska, New Jersey, New Hampshire, and Vermont); Chuck Haga, *Ruling Ignites Schools Debate; Wisconsin Bucked No Child Left Behind; Other States Are Reacting*, STAR-TRIBUNE (Minneapolis), June 17, 2004, at 1A (noting that "state Attorney General Peg Lautenschlager issued an opinion that Wisconsin has no legal obligation to implement the [NCLBA] law because it fails to adequately fund the testing and other activities it requires"); Ryan, *supra* note 3, at 933 n.9 (documenting state opposition to NCLBA).

275. 20 U.S.C. § 6311(b)(2)(B) (Supp. II 2002).

276. See Ryan, *supra* note 3, at 941-42 ("Although the Act is quite strict in defining AYP, it is remarkably loose with regard to state standards and tests.... States are free to determine their own standards, to create their own tests, and to determine for themselves the scores that individual students must receive in order to be deemed 'proficient.'"). For proposals to amend the NCLBA to require a federally specified test in reading and math, see Lynn Olson, *No Child Left Behind Act Changes Weighed*, EDUC. WK., Sept. 22, 2004, at 31, 34.

277. See *supra* note 70.

278. 20 U.S.C. § 6311(b)(2)(B) (Supp. II 2002).

elect to forgive low district test scores because of innovative programs, select different subgroups for testing than the NCLBA requires, focus exclusively on the worst-performing districts, reward a district making dramatic but partial progress, or exclude special-education students from testing. After corrective action is triggered, states have only limited discretion as to what sort of action to undertake against districts,²⁷⁹ and most options for corrective action are quite draconian.

The NCLBA contemplates unambiguously that the threats of school reconstruction and district disestablishment will spur creative local reforms. It is presumably for this reason that the statute is agnostic as to pedagogical method, with the very important exception that once districts are identified as needing improvement they must implement "strategies based on scientifically based research,"²⁸⁰ a requirement denounced loudly in the educational establishment.²⁸¹ It is certainly for this reason that governance-based sanctions, twinned with "rewards" for high performance, are incorporated into the NCLBA.²⁸²

As argued above, however, threats of disestablishment spur district experimentation through a process also affected by districts' incomplete information regarding state intentions and districts' knowledge that states prefer to avoid imposing the sanction.²⁸³ The NCLBA, in contrast to the state legislation upon which it is modeled, but similar to judicial mandates of school adequacy, leaves little room for doubt as to what state standards are and under what circumstances sanctions will be imposed. The combination of disestablishment threats, clear standards, and a lack of state discretion results in a very different pattern than the one observed in the states. In fact, it creates two different patterns: one for districts that are relatively successful and one for those that are not.

279. *Id.* § 6316(b)(3)(A). Districts face similar constraints vis-à-vis their constituent schools.

280. *Id.* § 6316(b)(3)(A)(i).

281. For examples of the establishment reaction to the regulatory preference for "randomized experimental trial[s]" and against "qualitative evidence," see Elizabeth Adams St. Pierre, *Refusing Alternatives: A Science of Contestation*, 10 *QUALITATIVE INQUIRY* 130, 132 (2004); Glenn, *supra* note 21 (quoting skeptics of randomized trials in education research).

282. 20 U.S.C. § 6311(b)(2)(A)(iii) (Supp. II 2002).

283. *See supra* Part I.D.

Relatively successful districts are at little risk from state accountability programs, which focus their firepower upon a state's worst-performing districts.²⁸⁴ Under the NCLBA, however, even districts with high test scores have been designated routinely as failing because particular subgroups of students fail to demonstrate adequate yearly progress.²⁸⁵ Such districts are no less anxious than those described in Part I to forestall limits upon their own authority; knowing such consequences to be inevitable, they gain every incentive to reform their treatment of hard-to-educate students. This is one of the most attractive features of the NCLBA. It forces attention to underserved groups of students whose poor performance had previously been obscured by good results in the mainstream. It is a nice example of the rule that though programs which allocate services to citizens are well-handled locally, only the national government is positioned to insist successfully on redistribution.²⁸⁶ The NCLBA redistributes the attention of school officials to students who would not get it otherwise.

The NCLBA has a second effect on relatively well-performing districts: it makes enemies of them. Whatever their willingness to try to reform the education they provide the poor, or special-education students, there is a real possibility of failure. Such districts—and the states, which generally serve suburbanites' educational interests—will surely embrace Ryan's prediction that the NCLBA may lack staying power in a world where "education reform is notoriously beset by fads."²⁸⁷ But they will not stop there. Instead, they will actively seek to weaken, delay, undermine, or abolish the NCLBA and especially its sanctions provisions.²⁸⁸

284. See Moe, *supra* note 119, at 89.

285. See YEAR 2 REPORT, *supra* note 255, at vi.

286. See, e.g., PAUL E. PETERSON, CITY LIMITS 77 (1981).

287. See Ryan, *supra* note 3, at 985.

288. See Hess, *supra* note 3, at 63-64. The emphasis in states' critiques upon the claim that the Act labels too many districts as failing suggests suburban power. See YEAR 2 REPORT, *supra* note 255, at 24; Lynn Olson, *States Dicker Over Changes to AYP Plans*, EDUC. WK., July 14, 2004, at 1. Suburban power, in turn, explains why states would consider forgoing Title I funds rather than submit to the Act's requirements. See *supra* note 274 and accompanying text.

The response of the federal government to date has been to try to signal its commitment to the NCLBA and its sanctions program. The Department of Education has cultivated a hardline position, see Rudalevige, *supra* note 4, at 25, 45-46; SUNDERMAN, *supra* note 6, at 7. But see Liebman & Sabel, *supra* note 128, at 1725 & n.85 (arguing that "regulations ... thus

Improving education in generally adequate districts is well and good, but "[t]he American public education system is not in crisis" overall; the crisis lies in those relatively few, poor school districts where "schools are failing miserably."²⁸⁹ Those districts are the primary targets of state disestablishment threats: the threats as to them are the most realistic, and the possibility that they could avert those threats through achievable reform is also realistic. This is simply not so under the NCLBA. Elmore may be wrong that distressed districts are utterly paralyzed in the face of their problems,²⁹⁰ but he is likely right that they have no plausible hope of meeting a stiff requirement to maintain average yearly progress over time. In light of this, the threat of governance sanctions is essentially meaningless. It is easy to see why: just as districts that are sure that they can avoid sanctions need not reform, districts with no realistic hope of avoiding sanctions need not try. As Part II.A observes in connection with judicial mandates, when standards are both demanding and fixed, districts see no advantage in expending resources to achieve partial victories.²⁹¹ A district in an all-or-nothing bind will behave similarly if it is certain of all and if it is certain of nothing. The average yearly progress requirement looks to these districts just like another unrealistic regulatory demand from Washington's distant bureaucracy.

This is not to say that distressed districts are unmoved by the looming sanctions. They are quite appalled by them, but reform is not a realistic strategy for avoiding them. Instead, such districts should be expected to concentrate on resistance, lending their efforts to the campaign against federal sanctions.²⁹² In this respect, their interests coincide with those of the suburbs—a rare event. They may, like suburban districts, make efforts to demonstrate that

far have served to relax, not stiffen, the NCLB's monitoring and enforcement mechanisms"), relenting on some issues but so far refusing to weaken many implementing regulations widely viewed as anachronistic or counterproductive. Particularly troubling is the potential for sampling error caused by the testing provisions of the NCLBA that may overwhelm actual information about a school's average yearly progress. See Gregory J. Fritzberg, *Revise and Resubmit: A Critical Response to Title One of the No Child Left Behind Act*, 184 J. EDUC. 69, 78-80 (2004); Thomas J. Kane et al., *Randomly Accountable*, 2 EDUC. NEXT 57, 58-59 (2002).

289. HOCHSCHILD & SCOVRONICK, *supra* note 40, at 77.

290. See *supra* note 98 and accompanying text.

291. See discussion *supra* Part II.A.

292. See *supra* note 105 (describing the use of public sentiment as a resistance tactic).

some reform is possible, in order to buttress arguments that the NCLBA's demands are unnecessary as well as unreasonable. Such reforms, however, are not of the scope that the NCLBA seeks.

The NCLBA is in only the third year of its implementation.²⁹³ No governance sanctions have been imposed; as yet all that has happened is that some districts and schools have been required to open themselves up to technical assistance and develop remedial plans.²⁹⁴ It is an open question, therefore, whether the governance sanctions with bite will ever be imposed.²⁹⁵ Put differently, schools and districts may know the standards to which the federal government intends to hold them, but are not yet sure if the federal government is the taking-over type. Will Washington, as it is now intimating, go through with imposing governance sanctions on a vast number of schools? Or will it back down—delaying sanctions or introducing new flexibility—in the face of the number and power of the failures?

If the federal government is not ultimately dissuaded from its sanction threats, it will not only fail to spur reform in distressed districts but also do serious harm to the state efforts to encourage reform that might actually bear fruit. The federal government is in a position vis-à-vis these districts much like that of state courts contemplating disestablishment orders. Neither contemplates taking direct responsibility for disestablished systems. Rather, each hopes to offload that responsibility upon the only institution capable of handling it, the state. Even less than state courts, the federal government is not in a position to run schools directly. The NCLBA, however, will not—it cannot—transform the state into a faithful agent of the federal government. States, as Part I argues, do not want to bear the costs of disestablishing a district.²⁹⁶ They are willing to bear that cost in a few districts nevertheless to foment reform elsewhere; but wholesale

293. YEAR 2 REPORT, *supra* note 255, at v.

294. *See id.* at ix, 57-58; Alan Richard, *NCLB Law's Focus Turns To Districts: States Must Identify Lagging Systems*, EDUC. WK., Sept. 15, 2004, at 1 ("More than two years after President Bush signed the No Child Left Behind Act, the far-reaching federal education law is beginning to bear down on school district performance.... [T]his year marks the first time many districts could bump up against the designation [as "needing improvement"] under the new law's more stringent formula.").

295. *See* Ryan, *supra* note 3, at 985-86.

296. *See supra* Part I.C.

disestablishments of numerous underperforming districts do not offer that upside, and disestablishing suburban districts has no upside at all. Facing a federal demand to disestablish nevertheless, the natural response of the state is to behave as a nonfaithful bureaucratic agent and engage in paper compliance. The state will implement, but halfheartedly. The record of disestablishments in the states suggests that in districts actually subject to the sanctions, progress is hard to come by even when the state pursues it enthusiastically.²⁹⁷ *A fortiori* states engaged in "token compliance"²⁹⁸ are not going to create much educational progress.

The tragedy of the NCLBA is that, while leaving the problems of distressed school systems essentially untouched, it requires states to act in ways that undermine their own power to create change by threatening disestablishment. It is in the making of threats, not in their occasional execution, that the power of states to effect change lies. Yet such threats lose their power if the threatened sanctions will be swamped by a wave of bureaucratic disestablishments that the state will be forced to implement anyway. If disestablishment is inevitable, districts have no reason to try to forestall it. In addition, if districts expect the states—unenthusiastic and perhaps unwilling to take on the governance of so many places at once—to implement those sanctions halfheartedly, then they have virtually nothing to worry about. Instead of a loss of power, personnel will churn; figureheads may fall but the essential power structure of implementation will survive.²⁹⁹ This is a result that the educational regime, looking out for its employment interests, can learn to live with.

CONCLUSION: WHITHER THE EDUCATIONAL POLITY?

A final question must be posed. Instead of undertaking, with uncertain success, the job of holding school districts accountable, why not just abolish them? The most straightforward solution to the

297. See *supra* note 141-45 and accompanying text.

298. See KETTL, *supra* note 231, at 8.

299. See, e.g., Rettig, *supra* note 141, at 241-45 (describing the persistence of local politics in Jersey City despite the presence of state agents, the maneuvering and jockeying that took place in Jersey City to capture power upon the exit of state officials, and the efficacy of passive resistance).

problem of the unaccountable school district and the difficulty of breaking its monopoly over implementation would be to abandon educational localism entirely. Such localism, after all, has confounded the effective implementation of a wide range of state and federal priorities.³⁰⁰ Localism also reinscribes inequality. When localities are racially segregated and unequal in wealth and power, schools reflect those divisions. Localism privileges the interests of the wealthy, the well-organized, and the broadly dispersed groups with interests that often diverge from those of the less-advantaged students who need good public schools so desperately.³⁰¹ And, as this Article demonstrates, local governance introduces vast complexity into education.

There is room to suggest that under conditions of substantial local variation, government is more effective when its decisions are made locally by people familiar with the facts on the ground.³⁰² This is not, however, sufficient to commend educational localism. A centralized system can organize itself into local offices that use local expertise to tailor programs to local needs but that are in no sense sovereign. In other words, central systems can employ street-level bureaucrats. Welfare, for example, is run in this fashion; local welfare offices, responding to local labor market conditions and client population characteristics, implement a large number of strategies to get clients back to work, but governance and policymaking remains entirely at the state and federal levels. This is also the paradigm for public education in most European nations, making it particularly difficult to contend that local control is the only possible model for effective service delivery.³⁰³ Finally, the experience of local resistance to major educational policy initiatives—desegregation, most prominently—demonstrates that knowledge of local conditions and needs is too often accompanied by excessive sympathy for them.

300. To take two very different examples in addition to the efforts to improve pedagogy and educational outcomes discussed *supra*, localism has vastly complicated efforts to desegregate schools and ban school prayer.

301. See McDERMOTT, *supra* note 80, at 22-25.

302. See *id.* at 18-20.

303. See William Lowe Boyd & Bonnie C. Johnson, *Intergovernmental Relations in Education*, 4 ENCYCLOPEDIA OF EDUC. 1215, 1216 (James W. Guthrie ed., 2d ed. 2003).

American political culture, however, assigns loftier meaning to local control than efficiency or effectiveness. For many decades, Americans have regarded as a component of their political liberty that they may participate as part of a local community in shaping that community's educational system.³⁰⁴ David Tyack critiques the progressive "apolitical corporate model" of education, which opposed "[t]he whole notion of representative lay democracy ... in urban public education."³⁰⁵ Although he does not use the term, for Tyack school districts are *polities*, "communities' ... through which people define the objectives of their collective life."³⁰⁶ The polity function of school districts is important enough to Tyack that he, for one, would apparently opt to retain educational localism if given the choice: "Although districts and their school boards are flawed instruments of democracy, if they disappeared, we would probably reinvent something similar. Local control offers a chance to make collective decisions about an important matter: the education of the next generation."³⁰⁷ Michael Walzer's pluralist commitments similarly lead him to "prefer[]" schools that are "enclosure[s] within a neighborhood ... where children are brought together as students exactly as they will one day come together as citizens" and that are governed "close to home, among friends and familiar enemies."³⁰⁸

As new accountability programs reshape educational federalism and the broader ecology of games that defines education policy, it is worth considering how these changes affect school districts qua *polities*. On one account, accountability and its disestablishment sanction leaves most school district *polities* intact while constraining severely those found in poor, distressed communities. The programs thus exacerbate the existing outcome, resource, and racial inequalities of educational federalism by creating new, additional inequalities in governance. The archetypal suburban school district—a white-dominated institution with adequate budgets and relatively easy-to-educate students—retains its traditional power

304. See MCDERMOTT, *supra* note 80, at 13-14.

305. See Tyack, *supra* note 14, at 18.

306. Martha Derthick, *How Many Communities? The Evolution of American Federalism*, in *DILEMMAS OF SCALE IN AMERICA'S FEDERAL DEMOCRACY* 126 (Martha Derthick ed., 1999).

307. See Tyack, *supra* note 14, at 21 (citation omitted).

308. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 225 (1983).

over its own affairs. Poor, minority-dominated districts in central cities, rural areas, and first-ring suburbs, facing problems that sometimes seem intractable—aging physical plants, students physically and cognitively unready to learn, raging social problems—are now told that local control is contingent upon performance. Where wealthy local elites may govern freely the schools their residents choose, the poor, without the funds to exit systems that victimize their children, are now to be denied voice as well. The unfairness, especially because it carries obvious racial dimensions,³⁰⁹ is palpable.

In the final analysis, however, accountability is a more subtle policy than this view suggests. The conflict between educational quality and local control that it mediates mirrors a deeper tension in American law and society regarding the nature of the school district. A school district *is* a polity, in which a local community comes together to provide what is not just a service but is the cradle of its hopes and values, the foundation of its civic culture, and the institutional glue of its community.³¹⁰ But the school district is *also* a state social-services agency, a technocratic agent that state principals use to distribute educational services throughout a state.³¹¹ Which is the district's true role? Accountability gives the only reasonable answer to this question—it is both. Sensitive to the susceptibility of local districts to capture by union and other educational interests, and understanding that a community that fails to educate its youth can enjoy only hollow self-governance, it properly grants primacy to districts in their service aspect, insisting that inadequate districts must reform. Accountability, nevertheless, invites not only continued local experimentation regarding educational means but continued pursuit of local goals, even goals not shared by state officials. It not only invites and encourages localities to implement reform, but it permits them to help shape the reform agenda.

309. See *supra* notes 156-57 and accompanying text.

310. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973) ("In part, local control means ... the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs.").

311. See *Sailors v. Bd. of Educ.*, 387 U.S. 105, 110 (1967) ("[T]he County Board of Education performs essentially administrative functions....").

To be sure, accountability is costly. Districts trying to satisfy both themselves and the state may choose a reform package that fails to do one or the other, or even both. Districts must operate under considerable and unavoidable uncertainty. Relationships between state and district become more tense, racially fraught, and guarded. Some districts, disestablished not primarily for their own failings but in order to send a signal to their compatriots, may find that they have been used as a means toward state goals having little to do with them. None of these consequences is consistent with either the goal of local self-governance or the goal of educational improvement.

Nevertheless, a system based on deterrence respects districts' role as polities even as it insists that they respect their own role as educational bureaucracies. Accountability offers a compelling institutional structure in which to seek both educational reform and local control. Localities retain the power not only to implement but to make policy, even as they face greater accountability for their policy choices. Some localities fail, at the cost of their self-determination, but others succeed. Certainly such a structure has far more potential than judicially- or centrally-ordered reforms, which have not only failed routinely to bring educational improvement where it is most needed but have also, imposed from above, undermined local control as much as disestablishment ever could.