

# The State Role in K–12 Education: From Issuing Mandates to Experimentation

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*Betheny Gross\* and Paul T. Hill\*\**

## INTRODUCTION

In recent years, a backlash against federally mandated testing and school accountability has reinforced demands that school improvement be left to the states. The December 2015 passage of the Every Student Succeeds Act (ESSA), which reauthorized the long-standing Elementary and Secondary Education Act (ESEA), intended to return policy authority back to legislatures, governors, and state education agencies. With this act, the federal government reversed many of the policy requirements of the 2001 reauthorization of ESEA, known as No Child Left Behind (NCLB), as well as subsequent NCLB waiver provisions made around teacher evaluation, testing, charter schools, curriculum standards and school turnaround, and the Race to the Top competition. The federal government still requires states to test students in grades three through eight and in a high school grade, but they have much more leeway to judge results and decide what to do to improve schools.<sup>1</sup>

As states prepare to take on more authority, they face a range of challenges that are rooted in state-specific economic and demographic realities. States must find ways to address these challenges in their own ways, but too often states' current capacities are not well matched to today's challenges. In this paper we argue that states, singly and in combination, can meet today's challenges if they build greater problem-solving and leadership capacities.<sup>2</sup> Our goal is to examine the roles states are accustomed to playing, the capacities states have developed through the last century-and-a-half of educational policy making, and the capacities they will need moving forward. In the sections below we:

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\* Research Director at the Center on Reinventing Public Education at the University of Washington Bothell, Ph.D., Education Policy Studies, University of Wisconsin-Madison, 2002.

\*\* Research Professor of Public Affairs, University of Washington Bothell and Founder of the Center on Reinventing Public Education, Ph.D., Political Science, The Ohio State University, 1972.

<sup>1</sup> See *Every Student Succeeds Act (ESSA)*, U.S. DEPT OF EDUC., <http://www.ed.gov/essa> [<https://perma.cc/HM6M-TEY5>].

<sup>2</sup> Every state constitution accepts primary responsibility for public education but leaves it to legislators and governors to develop strategies and capacities. States create education agencies led by elected or appointed superintendents, but these agencies' roles and powers are defined by legislation, which, along with appropriations for state administration, are constantly changing. In the literature on educational administration the word "state" is commonly used to mean "state education agency." In this paper, however, "state" means the combination of elected and appointed officials who make rules, appropriate money, and set priorities. When we write about state education agencies (SEAs), we refer to them specifically.

- Describe the complex challenges states face as ESSA shifts authority back to them, challenges that we argue states are unlikely to overcome with a policy regime that favors centralization;
- Review how states—initially leaders in establishing our system of public schools—in the mid-twentieth century were first forced by federal policy to focus on the resources put into schools (ensuring that fully-staffed and -resourced schools were available in every locality) and then to focus on performance and equitable outcomes of schools;
  - Argue that the shift in attention to student performance and results has created a momentum of its own that is likely to continue, even as the federal government becomes less prescriptive and states reclaim their leadership role;
  - Show that states in recent years have developed the capacity and now are creating policy demonstrating that they are on the threshold of democratic experimentalism, a governance regime organized to promote innovation and learning;
  - Discuss how the policy preconditions for democratic experimentalism emphasize deregulation, flexibility, and expectations for performance outcomes over mandates;
  - Show how states, possibly in partnership with the U.S. Department of Education, can gather and share lessons to accelerate progress toward more effective schooling for all students in this less prescriptive federal policy environment; and
  - Finally, discuss the potential risks of deregulation—a precondition of democratic experimentalism—and how transparency, a performance focus, and a mandate for learning and policy revision in a democratic experimentalism regime are meant to mitigate these risks.

## 1. STATES FACE INCREASINGLY COMPLEX EDUCATIONAL CHALLENGES

States are assuming more responsibility at a challenging time. Public schools are serving an increasingly diverse, low-income, and more heavily minority group of students than ever before. The U.S. Department of Education (USDOE), for example, estimated that 2012 was the first year in which the percentage of non-white students enrolled in public schools in the United States exceeded the percentage of white students.<sup>3</sup> The USDOE also reports that in 2013, 51.3% of the nation's students were eligible for free or reduced lunch (a federal program available to students from low-income families), up thirteen percentage points from 2001.<sup>4</sup> Large gaps between the performance of white and minority students also persist. For example, in 2015, 51% of white fourth graders scored proficient or better in math but only 19% and

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<sup>3</sup> *Table 203.50, Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/digest/d13/tables/dt13\\_203.50.asp](https://nces.ed.gov/programs/digest/d13/tables/dt13_203.50.asp) [https://perma.cc/U5KL-2X66].

<sup>4</sup> *Table 204.10, Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/digest/d13/tables/dt13\\_204.10.asp](https://nces.ed.gov/programs/digest/d13/tables/dt13_204.10.asp) [https://perma.cc/6YSN-YS5W].

26% of African-American and Hispanic students, respectively, scored as high.<sup>5</sup> In 2015, for the first time in decades, overall student performance dropped on the National Assessment of Educational Progress (NAEP), known popularly as the nation’s report card.<sup>6</sup> Although graduation rates are on the rise nationally, in 2012–13, the National Center on Education Statistics reports that five states—Alaska, Georgia, Louisiana, New Mexico, and Nevada—graduated fewer than 75% of their students state-wide.<sup>7</sup> That same year, 29% of African-American and 25% of Hispanic students nationwide failed to graduate from high school in four years. Thirty-nine percent of students who are English language learners failed to graduate in four years.<sup>8</sup>

Behind these discouraging outcomes are circumstances in states that are unlikely to be susceptible to a uniform set of policies. Our own state of Washington, for example, illustrates how complex and varied local education can be.

In the economically booming Puget Sound region, Washington confronts vast inequalities in students’ access to quality schools. In Seattle, for example, our analysis shows that African-American students are six times more likely than the city’s white students to be enrolled in one of the city’s lowest scoring schools.<sup>9</sup> The city’s low-income students are over four times

<sup>5</sup> See *National Achievement Level Results, Achievement Levels by Student Groups*, THE NATION’S REPORT CARD, U.S. DEP’T OF EDUC. (2015), [http://www.nationsreportcard.gov/reading\\_math\\_2015/#mathematics/acl?grade=4](http://www.nationsreportcard.gov/reading_math_2015/#mathematics/acl?grade=4) [https://perma.cc/Z22V-4WTV]. For additional data on the performance gap between minority and white students, see *2015 Reading and Math Grades 4 and 8 Assessment Report Cards: Summary Data Tables for National and State Average Scores and Achievement Level Results*, NAT’L CTR. FOR EDUC. STAT. (2015), <http://nces.ed.gov/datatools/index.asp> [https://perma.cc/8ESU-KVE4]. For a discussion of long-term performance gaps between white and minority students, see generally F. CADELLE HEMPHILL ET AL., *ACHIEVEMENT GAPS: HOW HISPANIC AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS* (2011), <http://nces.ed.gov/nationsreportcard/pdf/studies/2011459.pdf> [https://perma.cc/6QDK-JEK4]; ALAN VANNEMAN ET AL., *ACHIEVEMENT GAPS: HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS* (2009), <http://nces.ed.gov/nationsreportcard/pdf/studies/2009455.pdf> [https://perma.cc/5VCS-BCYC].

<sup>6</sup> USDOE reports that the mean scaled score in reading showed a statistically significant decline of two points in eighth grade between 2013 and 2015 but no statistically significant decline in fourth grade. See *Average Reading Score for Fourth-Grade Students Not Significantly Different in Comparison to 2013; Eighth-Grade Students Score Lower than 2013*, THE NATION’S REPORT CARD, U.S. DEP’T OF EDUC., [http://www.nationsreportcard.gov/reading\\_math\\_2015/#reading?grade=8](http://www.nationsreportcard.gov/reading_math_2015/#reading?grade=8) [https://perma.cc/5BMJ-UGVP]. The mean scaled score in math showed a statistically significant decline of one point in fourth grade and two points in eighth grade during the same time period. See *Both Fourth- and Eighth-Grade Students Score Lower in Mathematics than in 2013; Scores Higher than in 1990*, THE NATION’S REPORT CARD, U.S. DEP’T OF EDUC., [http://www.nationsreportcard.gov/reading\\_math\\_2015/#mathematics?grade=8](http://www.nationsreportcard.gov/reading_math_2015/#mathematics?grade=8) [https://perma.cc/2JF6-TLCE].

<sup>7</sup> See *SY 2012–2013 Consolidated State Performance Report, Part I and Part II*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/admins/lead/account/consolidated/index.html#sy12-13> [https://perma.cc/R77W-TVVP].

<sup>8</sup> *Id.*

<sup>9</sup> See MICHAEL DEARMOND ET AL., *MEASURING UP: EDUCATIONAL IMPROVEMENT AND OPPORTUNITIES IN 50 CITIES*, CTR. ON REINVENTING PUB. EDUC. 33–34 (2015), [http://www.crpe.org/sites/default/files/measuringup\\_10.2015\\_0.pdf](http://www.crpe.org/sites/default/files/measuringup_10.2015_0.pdf) [https://perma.cc/24TW-94D2].

more likely than affluent students to be enrolled in the city's lowest scoring schools.<sup>10</sup> To remedy these gaps, Seattle must find a way to not only turn around its lowest performing schools, but also to design policy whereby the city's low-income and minority students have equal opportunity to attend the city's highest scoring schools.

In the Central Valley, Washington must help districts contend with a constantly shifting population of low-income, migrant worker families. In 2015, for example, the percentage of students eligible for migrant student funding in the area was 24.1% in Wapato School District and 14.9% in the larger Yakima School district. Compare this to the only 1.9% of students state-wide who were eligible for migrant student funding.<sup>11</sup> Central Valley districts must figure out how to provide a strong academic curriculum alongside a suite of social services that support a highly mobile population.

In the northern part of Washington, districts must support the needs of students and educators in isolated small mountain towns. These small school districts contend with a limited (and sometimes shrinking) educator workforce and the challenge of providing a diverse curriculum on a small budget.<sup>12</sup>

Given such variation, it is unsurprising that school leaders in Washington can bristle at mandates from the state. For example, when Washington mandated that all districts adopt a new four-point rating scale for teacher evaluation and incorporate measures of student progress in a teacher's evaluation in 2012, principals across the state struggled to implement the reforms in different contexts.<sup>13</sup>

All of this suggests that states and our nation are unlikely to make dramatic progress on our challenges by issuing centralized directives for change. But is there any evidence in the history of U.S. public schooling that

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<sup>10</sup> See *id.* at 31–32.

<sup>11</sup> See *Washington State Report Card 2014–15*, OFF. SUPERINTENDENT PUB. INSTRUCTION, <http://reportcard.ospi.k12.wa.us/Summary.aspx?groupLevel=District&schoolId=1&reportLevel=State&year=2014-15> [https://perma.cc/D8NY-MJPT].

<sup>12</sup> For up-to date analysis of rural district challenges in a collection of studies produced for the Rural Opportunities Consortium Idaho, see, e.g., LARS D. JOHNSON, ASHLEY LIBETTI MITCHEL & ANDREW J. ROTHERHAM, *FEDERAL EDUCATION POLICY IN RURAL AMERICA* (2014), [http://www.rociidaho.org/wp-content/uploads/2015/01/ROCI\\_2014FedEdPolicy\\_FINAL\\_0115.pdf](http://www.rociidaho.org/wp-content/uploads/2015/01/ROCI_2014FedEdPolicy_FINAL_0115.pdf) [https://perma.cc/Q2GG-E6S6]; SAMUEL R. SPERRY & PAUL T. HILL, *THE POLITICS OF K-12 EDUCATION IN SMALL RURAL DISTRICTS: THE CASE FOR IDAHO* (2015), [http://www.rociidaho.org/wp-content/uploads/2015/01/ROCI\\_2014\\_K-12Politics\\_FINAL.pdf](http://www.rociidaho.org/wp-content/uploads/2015/01/ROCI_2014_K-12Politics_FINAL.pdf) [https://perma.cc/FD2C-RCC6]; MARGUERITE ROZA, *INNOVATION AMID FINANCIAL SCARCITY: THE OPPORTUNITY IN RURAL SCHOOLS* (2015), [http://www.rociidaho.org/wp-content/uploads/2015/02/ROCI\\_2015\\_InnovationAmidScarcity\\_Final.pdf](http://www.rociidaho.org/wp-content/uploads/2015/02/ROCI_2015_InnovationAmidScarcity_Final.pdf) [https://perma.cc/7KG8-H7CR]; DANIEL PLAYER, *THE SUPPLY AND DEMAND FOR RURAL TEACHERS* (2015), [http://www.rociidaho.org/wp-content/uploads/2015/03/ROCI\\_2015\\_RuralTeachers\\_FINAL.pdf](http://www.rociidaho.org/wp-content/uploads/2015/03/ROCI_2015_RuralTeachers_FINAL.pdf) [https://perma.cc/U5DD-EM7A].

<sup>13</sup> See MICHAEL DEARMOND, PATRICK DENICE & CHRISTINE CAMPBELL, *MISSING OUT ON STRONG SCHOOL LEADERS? A SURVEY OF PRINCIPAL HIRING AND SUPPORT IN WASHINGTON STATE*, CTR. ON REINVENTING PUB. EDUC. 1 (2014), [http://www.crpe.org/sites/default/files/CRPE\\_Strong-school-leaders\\_Survey-of-principal-hiring-and-support-in-wa-state.pdf](http://www.crpe.org/sites/default/files/CRPE_Strong-school-leaders_Survey-of-principal-hiring-and-support-in-wa-state.pdf) [https://perma.cc/9WM5-4MC6].

states have the capacity and disposition to do something different in their policymaking?

## 2. REGULATORY HISTORY OF U.S. PUBLIC EDUCATION: THE STATES' CHANGING ROLE IN LEADING PUBLIC EDUCATION POLICY

States entered educational policy only in the mid-nineteenth century, but once engaged, they led the way in setting the basic foundations of our nation's public education system. Decades later, in the mid-twentieth century, the federal government's influence began to reshape the states' role in public schools. Federal courts, Congress, and the administrative arm of the United States government emerged as major forces in the 1950s and 1960s. At first, federal regulation focused on schooling inputs (the resources and allocation of resources in districts and schools), and was demanding and specific in ways that state governments had not been. From the late 1970s until the present, federal regulation has increasingly emphasized outcomes over inputs, and state policy has evolved in similar ways. Now, as federal influence recedes, states are reclaiming their leadership role in driving educational policy even as they retain strong remnants of recent federal policies. In important ways, the current state of affairs demands a new state policy regime that emphasizes innovation, collective problem-solving, and learning: democratic experimentalism.

### *a. States Lead the Establishment of the Modern Public School System*

Through the nineteenth century, United States public schools were fragmented across thousands of communities and were funded by a patchwork of public and private entities.<sup>14</sup> Few standards existed for who should go to school, when, and for how long (much less who was qualified to teach or what should be taught). In 1837, Massachusetts established the first board of education, naming Horace Mann its secretary and setting the precedent for a state body devoted to education in the state.<sup>15</sup>

Through the first half of the twentieth century, state agencies prioritized setting the basic foundations of the free public education system and administrative efficiency, leaving most curriculum and instruction decisions to local school boards.<sup>16</sup> States codified key functions in public schooling, such

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<sup>14</sup> See DAVID TYACK & ELISABETH HANSOT, *MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820–1980* 15–19 (1982).

<sup>15</sup> See PAUL E. PETERSON, *SAVING SCHOOLS: FROM HORACE MANN TO VIRTUAL LEARNING* 21 (2010).

<sup>16</sup> Susan H. Fuhrman et al., *Educational Governance in the United States: Where Are We? How Did We Get Here? Why Should We Care?*, in *THE STATE OF EDUCATION POLICY RESEARCH* (Susan H. Fuhrman et al. eds., 2007).

as improvements to compulsory attendance laws,<sup>17</sup> financing for schools, and the certification of teachers.<sup>18</sup> States also consolidated school districts, reducing the number of local school districts from about 127,000 in 1932 to less than 20,000 in the early 1970s. (Today there are about 13,500 school districts.)<sup>19</sup>

Union politics also started to emerge during the first half of the twentieth century, increasing the pressure on states to define conditions of entry to the profession and working conditions. For example, in the 1920s, states began to extend tenure protections to K–12 teachers, primarily to protect pregnant women from losing their positions.<sup>20</sup>

From the 1920s until the 1950s, states continued to focus on developing schools and districts and creating higher education institutions to train teachers and administrators. According to scholar Jal Mehta, this period launched what would become a nearly century-long effort to rationalize the public education system.<sup>21</sup>

*b. Growing Federal Influence Forces States to Define and Measure the Inputs of Schooling*

Until the 1960s, the federal government essentially played no regulatory role in public education. It had promoted vocational education starting with the Smith-Hughes Act of 1917,<sup>22</sup> but the rules and subsidies for vocational education did not affect the operation of regular K–12 schools.

The federal role fundamentally changed in the 1960s. The Supreme Court decision in the case of *Brown v. Board of Education*<sup>23</sup> imposed new requirements on school systems and ushered in an era of rights-based litigation and legislative advocacy.<sup>24</sup> President Lyndon Johnson's Great Society legislative agenda included precedent-breaking legislation that created a federal role in K–12 education with the ESEA, which established the federal government as a partner of states in funding K–12 schools.<sup>25</sup>

<sup>17</sup> See Michael S. Katz, *A History of Compulsory Attendance Laws*, PHI DELTA KAPPA EDUC. FOUND., <http://files.eric.ed.gov/fulltext/ED119389.pdf> [<https://perma.cc/2MN6-GVMX>].

<sup>18</sup> See Anthony C. Labue, *Teacher Certification in the United States: A Brief History*, 11 J. TCHR. EDUC. 147, 152 (1960).

<sup>19</sup> TYACK & HANSOT, *supra* note 14, at 19.

<sup>20</sup> See MARJORIE MURPHY, *BLACKBOARD UNIONS: THE AFT AND THE NEA 1900–1980* 177 (1992).

<sup>21</sup> JAL MEHTA, *THE ALLURE OF ORDER: HIGH HOPES, DASHED EXPECTATIONS AND THE TROUBLED QUEST TO REMAKE AMERICAN SCHOOLING* 3 (2013).

<sup>22</sup> Pub. L. No. 64-347, 39 Stat. 929 (1917).

<sup>23</sup> 347 U.S. 483 (1954).

<sup>24</sup> See JAMES T. PATTERSON & WILLIAM W. FREEHLING, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE* XXI (2001).

<sup>25</sup> See John F. Jennings, *Title I: Its Legislative History and Its Promise*, in *TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS* 1 (Geoffrey D. Borman et al. eds., 2001).

The main funding provision of ESEA, Title I, allocated over \$1 billion of federal funds to schools serving low-income children in 1965.<sup>26</sup> Though ESEA imposed few regulations at first, Congress and the United States Office of Education soon began imposing preconditions on the use of funds.<sup>27</sup> Although states distributed most of the federal funding to districts and schools, ESEA held state agencies responsible for monitoring a growing list of conditions related to the use of Title I funding in schools.<sup>28</sup>

In addition, vocational education became more regulated as Congress tried to insert vocational education into regular high school curricula (in 1963) and ensure that particular vocational courses were available to low-income and disadvantaged children (in 1968).<sup>29</sup>

In 1975, Congress enacted the Education for All Handicapped Children Act.<sup>30</sup> Like ESEA, this program provided federal subsidies and thereby created new opportunities for legislators and regulators to impose conditions on grant funds. It also created entitlements to services and access to courts for parents who thought their children were not receiving appropriate services to meet their unique needs.<sup>31</sup> Since federal funds did not cover the cost of all special services that handicapped children might need, the act was partly an unfunded mandate that forced reallocation of state and local funds.<sup>32</sup> Though other federal programs have changed dramatically over time, the core elements of the Act remain in effect today.

Aside from the Education for All Handicapped Children Act, the most demanding new regulations to emerge in the fifteen years after the enactment of ESEA also affected local spending on education. For example, in response to evidence that some localities were pulling local funding away

<sup>26</sup> This appropriation had grown to \$14.5 billion by 2015. *Fiscal Year 2016 Budget*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf> [https://perma.cc/V3VP-JMHM].

<sup>27</sup> See generally Paul T. Hill, *The Federal Role in Education*, 11 BROOKINGS PAPERS ON EDUC. POL'Y 3 (2000).

<sup>28</sup> See generally PAUL BERMAN ET AL., RAND CORP., FEDERAL PROGRAMS SUPPORTING EDUCATIONAL CHANGE: VOL. V, EXECUTIVE SUMMARY (1975), <http://www.rand.org/content/dam/rand/pubs/reports/2006/R1589.5.pdf> [https://perma.cc/W2SZ-GNY6]. Notably, during the same period, teachers unions started pressing for state laws that required school districts to collectively bargain over pay and working conditions and entry into the profession. See LORRAINE McDONNELL & ANTHONY PASCAL, RAND CORP., TEACHERS UNIONS AND EDUCATIONAL REFORM (1988), <http://hdl.handle.net/2027/pur1.32754050018674> [https://perma.cc/3K7Q-GXBL]; see also LORRAINE McDONNELL & ANTHONY PASCAL, RAND CORP., ORGANIZED TEACHERS IN AMERICAN SCHOOLS (1979), <http://www.rand.org/pubs/reports/R2407.html> [https://perma.cc/2SPA-B3QV].

<sup>29</sup> See Vocational Education Act of 1963, Pub. L. No. 88-210, 77 Stat. 403 (1963); Carl D. Perkins Vocational and Applied Technology Amendments of 1998, Pub. L. No. 1105-332, 20 U.S.C. § 2301 (2012).

<sup>30</sup> Pub. L. No. 94-142, 89 Stat. 773 (1975).

<sup>31</sup> On parents' rights under Pub. L. No. 94-142, see *Parental Rights Under IDEA PL 94-142*, POPSMIN, <http://popsmmin.tripod.com/yourrights.html> [https://perma.cc/9BP6-KZVT].

<sup>32</sup> See *Special Education Funding*, NAT'L CONF. OF ST. LEGISLATORS, <http://www.ncsl.org/documents/standcomm/sceduc/FedFundSpecialEd2.pdf> [https://perma.cc/9U2S-M6L5].

from schools slated to receive federal Title I subsidies,<sup>33</sup> Congress enacted local *maintenance of effort*, *non-supplanting*, and *comparability* requirements.<sup>34</sup> These requirements meant that localities receiving ESEA funds had to show that they were maintaining overall spending on K–12 from state and local sources, had not pulled state and local funds away from particular schools receiving federal funds, and provided comparable local services and staffing to all schools before adding federal funds.

Though the United States Office of Education had little access to data on state and local school spending, regulators introduced rules of thumb for monitoring the use of federal funds. Schools receiving ESEA funds were required to show, for example, that the services purchased with federal money (e.g., tutoring and remedial instruction) went only to intended beneficiaries. In response, schools and districts created pull-out programs that separated children who were eligible to receive federally-funded help from their classmates. Such programs had perverse effects, whereby some children were pulled out of regular reading or math classes to get supplementary instruction on the same subjects and some classroom teachers found that they seldom saw all of their students at the same time.<sup>35</sup>

The courts also played a role in forcing states to focus on school resources and inputs. A wave of school finance litigation beginning in the early 1970s challenged the long-standing tradition of financing schools primarily through local property taxes.<sup>36</sup> In response, state agencies and state legislatures sought more equitable ways to fund local school districts. Eventually, debates about school finance and equity started to focus on the concept of adequacy, questioning whether states were spending enough money to ensure that every school was able to be staffed according to an inputs-based model and able to deliver all the elements of a state-prescribed curriculum.<sup>37</sup> This logic forced many states to develop a more consistent approach to resourcing schools.<sup>38</sup>

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<sup>33</sup> See generally *Title I of ESEA: Is It Helping Poor Children?*, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, OFF. OF EDUC. (1969), <http://files.eric.ed.gov/fulltext/ED036600.pdf> [<https://perma.cc/FG5D-6HHR>].

<sup>34</sup> These requirements were introduced in the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143.

<sup>35</sup> See JACKIE KIMBROUGH & PAUL T. HILL, *THE AGGREGATE EFFECTS OF FEDERAL EDUCATION PROGRAMS*, RAND CORP. 14–15 (1981), <http://www.rand.org/content/dam/rand/pubs/reports/2005/R2638.pdf> [<https://perma.cc/6NUH-EWC4>].

<sup>36</sup> The first school finance case in this modern era was *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

<sup>37</sup> See Allan R. Odden et al., *A 50-State Strategy to Achieve School Finance Adequacy*, 24 EDUC. POL'Y 628, 630 (2010). For a critique of “adequacy” as a basis for policy and litigation, see generally ERIC HANUSHEK & ALFRED LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS* (2013).

<sup>38</sup> In the wake of court-ordered finance reform between 1971 and 1997, nineteen states reduced within-state inequality by an average of thirty-four percent as measured by the Theil index. See William N. Evans et al., *The Impact of Court-Mandated School Finance Reform in Equity and Adequacy*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 72, 73 (Helen F. Ladd et al. eds., 1999).



The net effect of federal policy in public education, beginning with ESEA, was that states had no choice but to focus on how many resources they allocated to districts, schools, and students and on how schools used these resources. Despite the introduction of landmark legislation and growing federal presence in public education, NAEP performance showed little improvement.<sup>39</sup> This lack of improvement set up another pivot in public education policy that we describe in the next section.

*c. A Nation at Risk: Federal Influence Deepens but Begins to Focus on Students' Performance; States Follow Suit*

By the late 1970s, the educational and political costs of extensive federal regulation and the nation's stagnating performance started to take center stage in policy debates. In 1966, James Coleman drafted a report entitled *Equity of Educational Opportunity*, which questioned the premise that educational outcomes hinged on inputs (an idea that started to resonate more loudly in the 1970s).<sup>40</sup> In 1983, the National Commission on Excellence in Education issued its landmark report, *A Nation at Risk: The Imperative of Education Reform*, which called out the failure of the nation's educational systems and policies. *A Nation at Risk* highlighted the lagging results of United States students, called for higher standards for high school diplomas and college entry, and proposed the use of standardized assessments to measure student outcomes.<sup>41</sup> As these reports highlighted, monitoring the inputs of education would not be enough to improve the nation's schools.

Subsequent ESEA reauthorization bills, in response, allowed more flexibility in the use of resources. Specifically, reauthorizations lifted requirements that Title I funds be exclusively applied to low-income students and allowed schools with at least 75% of their students in poverty to commingle local and federal funds and create integrated school-wide programs. The Reagan, Bush, and Clinton eras brought continued deregulation, so that by 1995 school-wide programs were allowed when half or more students were in poverty.<sup>42</sup> Evaluations of Title I-funded instructional programs, however, continued to show at best modest results.<sup>43</sup>

Beginning late in the George H.W. Bush Administration and continuing through the Clinton years, the effort to fix federal regulations took a back seat to a concern over standard-setting. Academic analysts argued that stag-

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<sup>39</sup> See *Trends in Academic Progress, Reading 1971–2012, Mathematics 1973–2012*, NAT'L CTR. FOR EDUC. STAT. 1 (2012), <http://nces.ed.gov/nationsreportcard/subject/publications/main2012/pdf/2013456.pdf> [<https://perma.cc/Q2AC-NAKB>].

<sup>40</sup> MEHTA, *supra* note 21.

<sup>41</sup> See *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM*, NAT'L COMM'N ON EXCELLENCE IN EDUC. 8–9, 13, 27–28 (1983), <http://hdl.handle.net/2027/mdp.39015004170224> [<https://perma.cc/92Z9-U6QY>].

<sup>42</sup> *Schoolwide Programs*, U.S. DEP'T OF EDUC., [http://www2.ed.gov/legislation/ESEA/Title\\_I/swpguid1.html](http://www2.ed.gov/legislation/ESEA/Title_I/swpguid1.html) [<https://perma.cc/HW44-8VAT>].

<sup>43</sup> See, e.g., GEOFFREY D. BORMAN, SAMUEL C. STRINGFIELD & ROBERT E. SLAVIN, *TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS* 25–59 (2001).

nant school performance was due to a lack of clarity about what children should be learning. If expectations were clearer (and higher), schools educating disadvantaged children would know what to accomplish. Researchers could show educators how to “align” different courses and student experiences so all children could learn.<sup>44</sup>

This thinking motivated a national goal-setting exercise that culminated in the Goals 2000 Educate America Act.<sup>45</sup> The act set goals for school readiness, school completion, teacher education, professional development, mathematics and science, adult literacy and lifelong-learning, safe, disciplined, and drug-free schools, and parent participation in schools. This first foray into performance goals tended toward generalizations and shied away from defining how results would be measured. For example, the goal for student achievement and citizenship read:

By the year 2000, all students will leave grades 4, 8, and 12 having demonstrated competency over challenging subject matter including English, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography, and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our Nation’s modern economy.<sup>46</sup>

Later federal legislation became more specific about measurement with the 1994 reauthorization of ESEA, called The Improving America’s Schools Act (IASA). IASA left most of the regulatory structure of earlier ESEA laws intact but allowed states and districts greater leeway in designing education programs for disadvantaged students.<sup>47</sup> However, IASA required states to set high standards, create standards-based assessments, and test students at least once in grades three through five, grades six through nine, and grades ten through twelve. IASA also introduced the requirement that states use test results to assess performance based on Adequate Yearly Progress (AYP), a measure of the rate of student growth from one year to the next. States were to report the number of students not meeting AYP and the number of schools not meeting AYP for two consecutive years.<sup>48</sup>

The federal government increasingly called for more attention to be placed on the performance of students, schools, and districts, and many states adopted new test-driven accountability systems. Florida, Texas, and North Carolina, states that had historically lagged behind others, seemed to show significant improvement with these reforms.<sup>49</sup> States also adopted cur-

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<sup>44</sup> Marshall Smith & Jennifer O’Day, *Systemic School Reform*, 5 J. EDUC. POL’Y 233, 234–35 (1990).

<sup>45</sup> Pub. L. No. 103-227, 108 Stat. 125 (1994).

<sup>46</sup> *Id.* § 102(3)(A).

<sup>47</sup> Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518.

<sup>48</sup> *See id.* § 1111(b)(2)(A)(i).

<sup>49</sup> A 2011 analysis of NAEP results between 1992 and 2011 found that Florida’s average annual improvement in NAEP performance ranked second across forty-two states with availa-

riculum standards that set annual learning objectives for students, in keeping with the recommendations of the National Commission on Educational Excellence.<sup>50</sup> States often accompanied these standards with specific approved curriculum tools. A survey of state agencies by Goertz and Duffy, for example, found that state agencies significantly increased their influence over the work of schools between 1983 and 2001 by doing more to define what is taught in schools.<sup>51</sup>

*d. The NCLB Era: The Federal Government Finally Forces a Focus on Academic Performance*

Eight years after the Clinton-era reauthorization of Title I, a bipartisan coalition including Democratic Senator Edward Kennedy and President George W. Bush passed a dramatic revision of Title I, the No Child Left Behind Act (NCLB).<sup>52</sup> The new law downplayed the regulation of spending and process and emphasized performance-based accountability instead. It required states to collect and analyze data on the reading and math performance of subgroups of students (based on income, race, ethnicity, and language minority status) in every elementary school. In schools where all students, or a definable subgroup of at least twenty students, were not making AYP, NCLB required states to respond. As Patrick McGuinn explains:

Crucially and controversially, a school that does not meet the proficiency target for any one of these [student] groups is placed “in need of improvement status” and states are required to take an escalating series of steps and interventions (including the offering of public school choice, tutoring, technical assistance, and restructuring) aimed at schools and districts that persistently fail to meet AYP targets.<sup>53</sup>

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ble data. See ERIC A. HANUSHEK ET AL., *ACHIEVEMENT GROWTH: INTERNATIONAL AND U.S. STATE TRENDS IN STUDENT PERFORMANCE* (2012), [http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG12-03\\_CatchingUp.pdf](http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG12-03_CatchingUp.pdf) [<https://perma.cc/JA2L-UAWG>]. A 2002 analysis of accountability ratings and NAEP performance found a positive relationship between accountability ratings and student outcomes, a result that persisted across several model robustness checks. In this analysis Texas, North Carolina, and New York showed the highest ratings across twenty-six states and each of these states also saw some of the largest gains in NAEP results. See Martin Carnoy & Susanna Loeb, *Does External Accountability Affect Student Outcomes? A Cross-State Analysis*, 24 *EDUC. EVALUATION & POL'Y ANALYSIS* 305, 324–25 (2002).

<sup>50</sup> See LAURA S. HAMILTON, BRIAN M. STECHER & KUN YUAN, *STANDARDS-BASED REFORM IN THE UNITED STATES: HISTORY, RESEARCH, AND FUTURE DIRECTIONS* 22 (2008), [http://www.rand.org/content/dam/rand/pubs/reprints/2009/RAND\\_RP1384.pdf](http://www.rand.org/content/dam/rand/pubs/reprints/2009/RAND_RP1384.pdf) [<https://perma.cc/7EQW-BVVJ>].

<sup>51</sup> See MARGARET E. GOERTZ ET AL., *ASSESSMENT AND ACCOUNTABILITY SYSTEMS IN THE 50 STATES: 1999–2000*, CONSORTIUM POL'Y RES. EDUC. (2001), [http://www.cpre.org/images/stories/cpre\\_pdfs/rr46.pdf](http://www.cpre.org/images/stories/cpre_pdfs/rr46.pdf) [<https://perma.cc/3WSE-UMTU>].

<sup>52</sup> No Child Left Behind Act of 2001, 20 U.S.C. § 6319 (2012).

<sup>53</sup> Patrick McGuinn, *Schooling the State: ESEA and the Evolution of the U.S. Department of Education*, 1 *RSF: RUSSELL SAGE FOUND. J. SOC. SCI.* 77, 86 (2015).

States were required to set targets that would ensure 100% proficiency by 2014. To achieve that goal, Congress also required states to ensure that every child had a “highly qualified teacher,” a condition the legislation allowed states to define.<sup>54</sup>

States set about responding to the NCLB mandates. They invested significant resources in new accountability systems that administered assessments, measured and reported the results, and followed through with various support and penalties structures for schools and districts requiring improvement. A recent analysis of state spending in eight states found that state agencies assigned, on average, 16% of their resources to these assessment and accountability functions.<sup>55</sup>

NCLB was controversial from the start. Critics claimed that schools serving disadvantaged children were forced to narrow the curriculum and focus on test preparation. Teachers unions opposed NCLB on the grounds that some of the remedies it mandated (e.g., school restructuring) could lead to teacher firings. Researchers criticized the AYP measure as too static and too likely to flag schools serving disadvantaged children. What was originally perceived as a bipartisan step toward program effectiveness and more equitable student outcomes was increasingly perceived as a “test and punish” approach to public education.<sup>56</sup> Despite NCLB’s unpopularity,<sup>57</sup> political gridlock in Congress made it impossible to form a coalition to propose an alternative and Congress allowed NCLB to stay in effect for fourteen years.

The federal government’s response to the Great Recession in 2008 brought a new round of federal investment in K–12 and another expansion of regulation. The Obama Administration’s economic stimulus package empowered the Secretary of Education to give more than eight billion dollars in grants to states in support of K–12 education. The resulting grant programs—Race to the Top (RTTT), School Improvement Grants (SIG), and Investing in Innovation (I3)—required states to enact new policies favoring charter schools, adopt annual tests that would produce value-added measures for schools, students, and teachers, and enact performance-based teacher accountability systems. Though only thirty-five states won these grants, many

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<sup>54</sup> See Susanna Loeb & Luke Miller, *A Federal Foray into Teacher Certification: Assessing the Highly Qualified Teacher Provision of NCLB*, STAN. CTR. FOR EDUC. POL’Y ANALYSIS (2006), [https://cepa.stanford.edu/sites/default/files/98\\_LoebMiller\\_%20Nov%201.pdf](https://cepa.stanford.edu/sites/default/files/98_LoebMiller_%20Nov%201.pdf) [https://perma.cc/VZ3D-58N2].

<sup>55</sup> See PATRICK MURPHY & MONICA OUIJANI, STATE CAPACITY FOR SCHOOL IMPROVEMENT: A FIRST LOOK AT AGENCY RESOURCES, CTR. ON REINVENTING PUB. EDUC. (2010), [http://www.crpe.org/sites/default/files/pub\\_states\\_statecap\\_Aug11\\_0.pdf](http://www.crpe.org/sites/default/files/pub_states_statecap_Aug11_0.pdf) [https://perma.cc/9QJ8-KZFY].

<sup>56</sup> For a summary of the major critiques of NCLB, see generally DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* (2010); ERIC PATASHNIK, *REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED* (2008).

<sup>57</sup> Andrew Rotherham, *In Defense of No Child Left Behind*, TIME (Jan. 6, 2012), <http://ideas.time.com/2012/01/06/in-defense-of-no-child-left-behind/> [https://perma.cc/HSN8-XDBF].

losers, like Washington and Colorado, made significant changes in statutes and regulations in order to become eligible.<sup>58</sup>

United States Secretary of Education Arne Duncan asserted his authority further when he offered states a waiver from sanctions associated with NCLB's performance requirements in exchange for adopting other policy changes, including the adoption of the Common Core Standards. Although all state waivers (later referred to as flexibilities) gave relief from NCLB's "proficiency by 2014" requirement, Secretary Duncan negotiated other elements of state waivers state-by-state.<sup>59</sup> This represented a fundamental shift in the federal role, from administering common requirements for all states to reaching different bargains with different states.<sup>60</sup>

In this environment, the backlash against federal education policy became intense enough to overcome Congressional inertia.<sup>61</sup> In late 2015, Congress enacted a new version of ESEA, this time called the Every Student Succeeds Act (ESSA).<sup>62</sup>

The new act's chief congressional sponsor, Senator Lamar Alexander, described it as "the single biggest step toward local control of public schools in 25 years . . . . [I]t will unleash a flood of innovation and student achievement across America, community by community and state by state."<sup>63</sup> The newest version of ESEA maintains the state obligation to test students but, unlike NCLB, it eliminates the AYP requirement and does not specify how states will use performance data or what states must do when schools and groups of students fall behind. At the time this paper was written, the Department of Education was just beginning to develop detailed regulations.<sup>64</sup>

The decades-long shift from a concern with inputs to a focus on performance reflected a growing awareness that public schools were, despite

<sup>58</sup> See Patrick McGuinn et al., *Incentives, Information, and Infrastructure: The Federal Role in Educational Innovation*, in *CARROTS, STICKS, AND THE BULLY PULPIT: LESSONS FROM A HALF-CENTURY OF FEDERAL EFFORT TO IMPROVE AMERICA'S SCHOOLS* (Fredrick Hess & Andrew Kelly eds., 2012).

<sup>59</sup> See Morgan S. Polikoff et al., *The Waive of the Future? School Accountability in the Waiver Era*, 43 *EDUC. RES.* 45, 47 (2014); see also JOHN CHUBB & CONSTANCE CLARK, *THE NEW STATE ACHIEVEMENT GAP: HOW FEDERAL WAIVERS COULD MAKE IT WORSE—OR BETTER* (2013), <http://educationpolicy.air.org/sites/default/files/publications/NewStateAchieve-Gap-RELEASED.pdf> [https://perma.cc/E349-9J54].

<sup>60</sup> For a description of the NCLB flexibility provisions, see *ESEA Flexibility*, U.S. DEP'T OF EDUC. (June 2012), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> [https://perma.cc/MP9R-BHWY].

<sup>61</sup> See Benjamin Riley, *Waive to the Top: The Dangers of Legislating Education Policy from the Executive Branch*, 1 *AEI EDUC. OUTLOOK* 1, 2 (2012); Stephen Sawchuck, *Teachers and the Race to the Top Fund*, *EDUC. WK.* (Jul. 24, 2009), [http://blogs.edweek.org/edweek/teacherbeat/2009/07/teacher\\_provisions\\_in\\_the\\_race.html](http://blogs.edweek.org/edweek/teacherbeat/2009/07/teacher_provisions_in_the_race.html) [https://perma.cc/S2G5-X7MZ].

<sup>62</sup> See *Every Student Succeeds Act (ESSA)*, *supra* note 1.

<sup>63</sup> Lyndsey Layton, *Senate Overwhelmingly Passes New National Education Legislation*, *WASH. POST* (Dec. 9, 2015), [https://www.washingtonpost.com/local/education/senate-overwhelmingly-passes-new-national-education-legislation/2015/12/09/be1b1f94-9d2a-11e5-a3c5-c77f2cc5a43c\\_story.html](https://www.washingtonpost.com/local/education/senate-overwhelmingly-passes-new-national-education-legislation/2015/12/09/be1b1f94-9d2a-11e5-a3c5-c77f2cc5a43c_story.html) [https://perma.cc/9QNP-FXGM].

<sup>64</sup> For the Department of Education's notice of negotiated rule making, see Meeting Notice, 81 *Fed. Reg.* 5969 (Feb. 4, 2016), [http://www2.ed.gov/policy/elsec/leg/essa/2016-02224\\_essanegregs.pdf](http://www2.ed.gov/policy/elsec/leg/essa/2016-02224_essanegregs.pdf) [https://perma.cc/682R-FANW].

decades of federal funding, still not meeting the needs of all children. The fact that Congress never prescribed a curriculum or instructional method during this period suggests disagreement and uncertainty about what curriculum and methods would work in the most challenging circumstances.<sup>65</sup> Congress expected states to face this disagreement and uncertainty, and to resolve it via many steps if necessary.

Some states sought options earnestly and some half-heartedly. For example, researchers found considerable variation across states in the assessments used in response to NCLB, the performance standards they set, and the consequences they imposed on schools for failing to meet required improvements.<sup>66</sup> National analyses of state standards put in place after NCLB also found wide variation in skills and knowledge expected for students to be rated as proficient.<sup>67</sup> By this point, however, NCLB blocked all states from claiming that it was sufficient to provide schools that were properly assembled and resourced.

*e. States Focus on Performance Even as the  
Federal Government Recedes*

The federal government's influence over state and local policy is receding. ESSA now offers states more latitude in how states structure and implement accountability systems and pursue educational improvement. NCLB faced harsh criticism for placing so much emphasis on standardized testing, encouraging teaching-to-the-test (sometimes leading to score tampering), and threatening consequences (some punitive) without helping schools and districts improve.<sup>68</sup> With powerful interests levying these critiques, pressure on states to shift course as they gain more authority is likely to be strong. Will states act on their own to sustain activities they adopted during the NCLB era, particularly monitoring performance and intervening to transform the opportunities of children who are not learning in their schools, or will they revert to a pre-NCLB, input-oriented approach to oversight?

Turning back the clock seems unlikely. Federal pressure has permanently remodeled state politics and capabilities, and has brought a new brand of activist individuals into the leadership of state education agencies. The data systems and analytical capacities states have developed will not go away. To be sure, a particular governor or state schools chief might choose to neglect those capacities and functions for a while, but independent ana-

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<sup>65</sup> See generally Richard E. Matland, *Synthesizing the Implementation Literature: The Ambiguity-Conflict Model of Policy Implementation*, 5 J. PUB. ADMIN. RES. & THEORY 145 (1995) (discussing purposeful policy ambiguity to avoid conflict and to manage a lack of agreement across policy constituents).

<sup>66</sup> See generally GOERTZ ET AL., *supra* note 51.

<sup>67</sup> V. BANDEIRA DE MELLO ET AL., *MAPPING STATE PROFICIENCY STANDARDS ONTO NAEP SCALES: RESULTS FROM THE 2013 NAEP READING AND MATHEMATICS ASSESSMENTS* (NCES 2015-046), U.S. DEP'T OF EDUC. 1 (2015), <http://nces.ed.gov/nationsreportcard/subject/publications/studies/pdf/2015046.pdf> [https://perma.cc/TE5U-FM8C].

<sup>68</sup> For a detailed and highly-cited critique, see generally RAVITCH, *supra* note 56.

lysts and advocacy groups that appeared during the NCLB era probably will not. We expect analysts and interest groups will keep officials under pressure to acknowledge achievement gaps and the existence of consistently unproductive schools. Though some officials might be able to ignore these pressures, it is likely that at least some governors and chief state school officers will continue to use school and district performance information and take actions to improve options for children being left behind.

The prediction that tools and postures created in the NCLB era will continue, even after the federal government reduces its role, is consistent with the theory of policy feedback.<sup>69</sup> Policy feedback theory argues that policies leave behind remnants—beneficiaries, governmental capacities and routines, and advocacy organizations—that continue to have influence even after policies change or are abandoned.<sup>70</sup>

The accountability provisions of NCLB have left many such remnants. These include expanded data infrastructure and bureaucratic units with the capacity to provide growth measures for students. For example, in 2014, the Data Quality Campaign (DQC), a nonprofit that tracks the data capacity of states, reported that forty-six states had statewide data repositories including student-level data, a feature required for analyses of the growth of students over time.<sup>71</sup> The DQC also reported that forty-five states produced and made available on public websites annual reports showing school and district performance trends.<sup>72</sup>

Educators and parents saw the value of accountability, even if they were critical of NCLB. For example, the nation's largest teachers unions (the American Federation of Teachers and the National Education Association) both had official policy positions that support educator and school accountability even as they challenged the state accountability provisions implemented under NCLB.<sup>73</sup> The nation also now boasts many national and local advocacy organizations that emerged during the NCLB era and press for

<sup>69</sup> See generally PATASHNIK, *supra* note 56.

<sup>70</sup> For a theoretical discussion of policy feedback and the resilience of policy programs illustrated through the attempted conservative retrenchment of social programs during the Thatcher and Reagan administrations, see generally PAUL PIERSON, *DISMANTLING THE WELFARE STATE?: REAGAN, THATCHER AND THE POLITICS OF RETRENCHMENT* (1995). In an educational context, John Meyer and Brian Rowan describe the resilience of policies and practices as the result of tradition and familiarity, more than the evidence of institutionalization's efficacy. See generally John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977).

<sup>71</sup> See DATA QUALITY CAMPAIGN, *PAVING THE PATH TO SUCCESS 19* (2014), <http://data-qualitycampaign.org/wp-content/uploads/2015/06/DataForAction2014.pdf> [<https://perma.cc/6K8T-CMNH>] (a more detailed account of the data infrastructure in states).

<sup>72</sup> See *id.*

<sup>73</sup> See *Real Accountability for Equity and Excellence in Public Education*, AM. FED'N OF TCHRS. (2014), <http://www.aft.org/resolution/real-accountability-equity-and-excellence-public-education> [<https://perma.cc/HXW5-NC5M>] (advocating for an accountability system that is more substantively connected to a school support system and calling for the use of qualitative and quantitative measures to identify schools in need of improvement, instead of testing student outcomes); *ESEA Reauthorization Goals: More Opportunity and Learning for Students*, NAT'L EDUC. ASS'N (2015), <http://www.nea.org/home/61944.htm> [<https://perma.cc/2QMH-592Q>] (calling for testing limited to selected grades and supplemented by other quali-

transparency about school performance and the creation of new options for children being left behind.<sup>74</sup>

The RTTT grants of the late-2000s laid further groundwork for strong policy feedback. The nineteen states that won RTTT grants enacted laws to become eligible for federal funds, and the capacities they built with their RTTT grants (e.g., data and analytical capacities) survive today.<sup>75</sup> Unsuccessful applicants (e.g., Washington) also made legislative and administrative changes in preparation for the RTTT competitions, including changing their teacher evaluation and development systems, lifting caps on charter school growth, and raising expectations for student learning standards.<sup>76</sup>

Some remnants from NCLB are still buttressed by the new ESSA. For example, ESSA still requires states to test children and report test results. Although it does not prescribe remedies for low performance as explicitly as NCLB did, the new law establishes a framework of actions to identify, transform, or replace consistently unproductive schools.<sup>77</sup> Critics argue that these ESSA provisions lack the “teeth” available in NCLB, but they exist in a world in which state-level remnants from NCLB are already activated in ways that support ESSA’s agenda.<sup>78</sup>

Of course, how many of the NCLB and RTTT policies persist will vary from state to state. Research shows that states that competed for and/or won RTTT grants also made more significant bureaucratic changes and built new capacities to collect and analyze data and intervene in low-performing schools than states that did not. These new capacities will likely help to carry the NCLB and RTTT policies forward.<sup>79</sup>

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tative assessments of school conditions as well as increased state support to low-performing schools and districts).

<sup>74</sup> For an analysis of advocacy organizations’ influence in education policymaking post-NCLB in three states, see generally GROVER J. (RUSS) WHITEHURST ET AL., MEASURING AND UNDERSTANDING EDUCATION ADVOCACY, BROWN CTR. ON EDUC. POL’Y, BROOKINGS (2015), [http://www.brookings.edu/~media/research/files/reports/2015/03/04-ed-advocacy/measuring-and-understanding-education-advocacy\\_final.pdf](http://www.brookings.edu/~media/research/files/reports/2015/03/04-ed-advocacy/measuring-and-understanding-education-advocacy_final.pdf) [https://perma.cc/9PBF-KWDT].

<sup>75</sup> A 2015 report found that RTTT awardees were more likely than non-awardees to display policies that aligned with the grant provisions, including improved data systems and growth measurement capacity, capacity to support school improvement, expanding charter school growth and opportunities, adopting college- and career-ready standards and assessments, and improving educator and leader effectiveness. See generally LISA DRAGOSET ET. AL., USAGE OF POLICIES AND PRACTICES PROMOTED BY RACE TO THE TOP (NCEE 2015-4018), DEP’T OF EDUC. (2015), <https://ies.ed.gov/ncee/pubs/20154018/pdf/20154018.pdf> [https://perma.cc/A6AG-6GNE].

<sup>76</sup> See generally William Howell, *President Obama’s Race to the Top: Win or Lose, States Enacted Education Reform*, 15 EDUC. NEXT 58 (2015).

<sup>77</sup> See *Every Student Succeeds Act (ESSA)*, *supra* note 1.

<sup>78</sup> See *What’s in the Every Student Succeeds Act?—Accountability*, EDUC. TRUST (Jan. 13, 2016), <https://edtrust.org/resource/whats-in-the-every-student-succeeds-act-accountability/> [https://perma.cc/TB5Q-TUE7].

<sup>79</sup> See *id.*



### 3. IN A POST-NCLB ERA, STATES BEGIN TO RECLAIM THEIR LEADERSHIP IN EDUCATION

To this point, we have established that states, largely under pressure from the federal government, began abandoning their earlier focus on regulating inputs in favor of a diffuse—and to date not yet coherent—search for mechanisms of performance improvement. The direct and indirect impacts of federal policy are, however, not the whole story. In this section, we argue that states also acted on their own initiative during and after the NCLB era in ways that demonstrate an understanding that defining the inputs of education does not improve results and that policy must also expand the search for solutions.

Some states, utilizing the policy and administrative capacity they developed over the years, have taken actions that were consistent with the spirit of NCLB and RTTT, but not caused by either. An example is Louisiana's creation of a statewide Recovery School District (RSD), which became the vehicle for chartering the vast majority of New Orleans public schools after Hurricane Katrina.<sup>80</sup> The Louisiana legislature passed this law in 2003, after NCLB but six years before RTTT came into existence. Nothing in NCLB requires states to take such an action.<sup>81</sup> Members of the Louisiana State Board of Education who drafted the law were, no doubt, familiar with NCLB and the accountability system in their neighboring state of Texas (which was a model for NCLB). But they acted under the influence of the zeitgeist that led NCLB, not the legislation itself.

More recently, other states—including Michigan, Tennessee, and Nevada—created authorities patterned on the Louisiana RSD.<sup>82</sup> Of these, only Tennessee adopted its state recovery district law as an element of its RTTT program.<sup>83</sup> Proposals for similar arrangements are pending before legislators or voters in Georgia, South Carolina, and Pennsylvania.<sup>84</sup> RTTT did not re-

<sup>80</sup> See LA. STAT. ANN. § 17:1990 (2014 West, Westlaw through the 2015 Reg. Sess.).

<sup>81</sup> See generally DEBRA VAUGHAN ET AL., TRANSFORMING PUBLIC EDUCATION IN NEW ORLEANS: THE RECOVERY SCHOOL DISTRICT, 2003–2011 (2011).

<sup>82</sup> See generally NELSON SMITH, REDEFINING THE SCHOOL DISTRICT IN AMERICA (2015). On the differences among states' recovery districts, see Nelson Smith, *Turnaround School Districts*, EDUC. NEXT (Apr. 1, 2015), <http://educationnext.org/turnaround-school-districts/> [<https://perma.cc/NC76-D4YP>].

<sup>83</sup> See SMITH, *supra* note 82, at 6. Michigan proposed a recovery district in its RTTT proposal but was not awarded the grant. See *id.* After losing the RTTT grant competition, Michigan's governor continued to pursue a recovery district. See *id.* Michigan ultimately established the Education Achievement Authority but did so without requirement of or with funding from the federal government. See *id.*

<sup>84</sup> The terms of these bills are being negotiated and are therefore in flux. See Martha Dalton, *Gov. Deal Promotes School Takeover Plan to School Leaders*, WABE ATLANTA (Sept. 11, 2015), <http://news.wabe.org/post/gov-deal-promotes-school-takeover-plan-school-leaders> [<https://perma.cc/8WYQ-ZCGF>]; Paul Bowers, *Push for Charter Takeover of Failing Schools Comes to South Carolina*, POST & COURIER (Mar. 6, 2016), <http://www.postandcourier.com/article/20160306/PC16/160309726> [<https://perma.cc/6UBZ-NCBR>]; Billy Ball, *Controversial Plan to Allow For-Profit Charter School Takeovers of Low-Performing NC Schools Re-*

quire this action from these states.<sup>85</sup> Indeed, the most recent adoptions of recovery districts have been in response to local emergencies and state-focused advocacy rather than the federal government.<sup>86</sup>

Recovery districts are far from the only example of states taking results-focused action on their own. Consider, for example, the 2002 New York state law authorizing Mayor Michael Bloomberg to take over the New York City schools. That bill empowered Bloomberg and his appointed chancellors, first Joel Klein and then Dennis Walcott, to adopt performance-based accountability, new school creation (including partnerships with charter schools), and school closure policies that anticipated NCLB and went far beyond its requirements.<sup>87</sup> Chancellor Joel Klein also negotiated with the local teachers union for more school-based flexibility to manage staff resources and time, and he developed a new school-funding model that provided school leadership with more control over resources in the school building. As of this writing, more than forty districts in nineteen states are pursuing “portfolio” strategies modeled on those used in New York City and New Orleans.<sup>88</sup> Though such initiatives often come from civic leaders and mayors, as we have noted elsewhere, they have required changes in state laws, policies, and administrative routines as well.<sup>89</sup>

The expansion of RSDs and portfolio-related policy shifts are the most vivid illustrations of the shift toward outcomes and the search for strategies to change the schooling options for disadvantaged children. But there are more, including:

- Charter school laws in forty-two states. Charter schools are public schools that are generally open to any child who seeks enrollment. These schools, however, are operated by non-school district entities under charters making their continuation contingent on the school’s academic performance and fiscal viability. Charter school laws began in Minnesota in 1991. Since then, forty-one states and the District of Columbia have followed Minne-

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*Emerges*, NC POL’Y WATCH (Jan. 27, 2016), <http://www.ncpolicywatch.com/2016/01/27/controversial-plan-to-allow-for-profit-charter-school-takeovers-of-low-performing-nc-schools-re-emerges/> [https://perma.cc/9KJK-5F6F]; Emmanuel Felton, *Pa. Considers Creating a Turnaround School District*, PHILLY (Oct. 19, 2015), [http://www.philly.com/philly/education/20151019\\_Pa\\_considers\\_creating\\_a\\_turnaround\\_school\\_district.html](http://www.philly.com/philly/education/20151019_Pa_considers_creating_a_turnaround_school_district.html) [https://perma.cc/2YAH-27E8].

<sup>85</sup> For an analysis of state actions in response to RTTT, see generally U.S. DEP’T OF EDUC., *FUNDAMENTAL CHANGE: INNOVATIONS IN AMERICA’S SCHOOLS UNDER RACE TO THE TOP* (2015), <http://www2.ed.gov/programs/racetothetop/rttfinalrpt1115.pdf> [https://perma.cc/EE3C-XGW7]. On actions taken to turn around low-performing schools, see *id.* at 48–55.

<sup>86</sup> One piece of evidence for the claim that the most recent legislation was not motivated by RTTT requirements is that legislatures were still considering possible recovery district legislation in early 2016. Race to the Top grants to all states but Hawaii expired in 2015. See *id.* at viii.

<sup>87</sup> See *EDUCATION REFORM IN NEW YORK CITY: AMBITIOUS CHANGE IN THE NATION’S MOST COMPLEX SCHOOL SYSTEM* 1–19 (Jennifer A. O’Day et al. eds., 2011).

<sup>88</sup> See *Portfolio Strategy*, CTR. ON REINVENTING PUB. EDUC. (2014), <http://www.crpe.org/research/portfolio-strategy/network> [https://perma.cc/694C-2B97].

<sup>89</sup> See, e.g., PAUL T. HILL ET AL., *STRIFE AND PROGRESS: PORTFOLIO STRATEGIES FOR MANAGING URBAN SCHOOLS* 113–16 (2012).

sota's lead. In addition, amendments to existing laws have steadily increased the numbers of charter schools allowed.<sup>90</sup>

- Student-based funding laws that increase school leaders' freedom of action by allocating real dollars based on the number and characteristics of students enrolled. These funds are often weighted so that school districts and schools serving disadvantaged or handicapped students receive extra funding. "Strings" on the uses of funds are also removed via repeal or consolidation of categorical programs. California adopted this scheme in 2013.<sup>91</sup>

- Alternative certification programs allowing individuals who did not attend traditional education school programs to be certified as teachers or principals if they take some courses and train in a school under the supervision of a veteran teacher. This encourages career-switchers (e.g., scientists and engineers who want to teach math and science or business leaders who want to become principals) and allows school heads to transform quality interns and volunteers into permanent teachers. It also creates a career track for Teach for America volunteers and other elite college graduates who earn teaching certificates on the job.<sup>92</sup>

- New forms of student performance assessment that measure mastery of subjects and allow students to receive credits without spending fixed amounts of time taking a particular course. These assessments allow schools to seek competency-based standards, certifying students' mastery of content whenever they attain it. New Hampshire is beginning to pilot a competency-based assessment.<sup>93</sup>

Not all of these efforts are paying off for states. For example, recent research shows that students' academic performance has improved in Louisiana's RSD,<sup>94</sup> but an early analysis from Tennessee's recovery district (known

<sup>90</sup> See CHARTER SCHOOL LAWS ACROSS THE STATES: 2015 RANKINGS AND SCORECARD (Alison Consoletti Zgainer & Kara Kerwin eds., 2015) (listing states with charter school laws and summaries of each state's laws).

<sup>91</sup> See *Local Control Funding Formula Overview*, CAL. DEP'T OF EDUC., <http://www.cde.ca.gov/fg/aa/lc/lcffoverview.asp> [<https://perma.cc/B86K-8TS4>]. See generally MAC TAYLOR, UPDATED: AN OVERVIEW OF THE LOCAL CONTROL FUNDING FORMULA, LEGIS. ANALYST'S OFF. (2013), <http://www.lao.ca.gov/reports/2013/edu/lcfl/lcfl-072913.pdf> [<https://perma.cc/8WMW-MGQ8>].

<sup>92</sup> See JILL CONSTANTINE ET AL., AN EVALUATION OF TEACHERS TRAINED THROUGH DIFFERENT ROUTES TO CERTIFICATION (NCEE 2009-4043), U.S. DEP'T OF EDUC. (2009), <http://ies.ed.gov/ncee/pubs/20094043/pdf/20094043.pdf> [<https://perma.cc/3RVS-9JY2>] (describing alternative certification programs and reviewing research on their impact).

<sup>93</sup> Dale Frost & Susan Gentz, *States Considering Policies Supporting Competency-Based Education*, INT'L ASS'N FOR K-12 ONLINE LEARNING (June 26, 2015), <http://www.inacol.org/news/states-considering-policies-supporting-competency-based-education/> [<https://perma.cc/2HTB-KQ4B>].

<sup>94</sup> See generally DOUGLAS N. HARRIS & MATTHEW LARSEN, THE EFFECTS OF THE NEW ORLEANS POST-KATRINA SCHOOL REFORMS ON STUDENT ACADEMIC OUTCOMES, EDUC. RES. ALLIANCE OF NEW ORLEANS (2016), <http://educationresearchalliancena.org/files/publications/The-Effects-of-the-New-Orleans-Post-Katrina-School-Reforms-on-Student-Academic-Outcomes.pdf> [<https://perma.cc/MF7L-EHQJ>].

as the Achievement School District) is less favorable.<sup>95</sup> A meta-analysis on the impact of charter schools shows that the most rigorous studies tend to find that charter schools have positive to neutral effects on student performance, but the impact varies significantly across states, regions, and even the types of students.<sup>96</sup> Evidence on alternative certification programs varies by the type of program and the background of the teaching candidate.<sup>97</sup> State-wide adoption of mastery-based assessment is so new that we have yet to see its impact.

While the ultimate goal of states and districts is to find strategies that improve opportunities for students, these actions, both successful and unsuccessful, illustrate how states are asserting leadership in educational policymaking. They also show the lasting effects of NCLB provisions, despite the demise of NCLB itself.

Whatever the federal role in moving states to pay attention to performance, it is now clear that many states have gone far beyond the minimum requirements of NCLB. The question is, will these trends continue and how far will they go? Although firm prediction would be folly, in the next section we suggest directions in which states are likely to move, and how those directions might affect educational practice and children's opportunities.

#### 4. STATES ON THE THRESHOLD OF DEMOCRATIC EXPERIMENTALISM

We have shown that states, with lingering influence of federal policy and greater analytic, bureaucratic, and policy capacity, are taking a great deal of initiative and borrowing ideas from one another. This is consistent with the ideal of cooperative federalism, which argues that states act independently but pay attention to one another's initiatives and imitate the most appealing ones. Of course, what is appealing can be defined in many ways; cooperative federalism can lead to the spread of ideas based on the politics or dominant ideology of the time rather than their ability to support improvements in student learning or reduce achievement gaps.

Based on the foregoing observations about policy feedback, we think it is safe to say that in the future few, if any, states will confine their roles to setting input requirements and funding levels. Consistent with the zeitgeist

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<sup>95</sup> See generally RON ZIMMER ET AL., EVALUATION OF THE EFFECT OF TENNESSEE'S ACHIEVEMENT SCHOOL DISTRICT ON STUDENT TEST SCORES, TENN. CONSORTIUM ON RES., EVALUATION & DEV. (2015), [http://www.tnconsortium.org/data/files/gallery/ContentGallery/ASD\\_Impact\\_Policy\\_Brief\\_Final\\_12.8.15.pdf](http://www.tnconsortium.org/data/files/gallery/ContentGallery/ASD_Impact_Policy_Brief_Final_12.8.15.pdf) [https://perma.cc/M55N-6DS7].

<sup>96</sup> See generally Daniel C. Humphrey & Marjorie E. Wechsler, *Insights into Alternative Certification: Initial Findings from a National Study*, 109 TCHRS. C. REC. 483 (2007).

<sup>97</sup> See generally JULIAN R. BETTS & Y. EMILY TANG, A META-ANALYSIS OF THE LITERATURE ON THE EFFECT OF CHARTER SCHOOLS ON STUDENT ACHIEVEMENT, CTR. ON RE-INVENTING PUB. EDUC. (2014), [http://www.crpe.org/sites/default/files/CRPE\\_meta-analysis\\_charter-schools-effect-student-achievement\\_workingpaper.pdf](http://www.crpe.org/sites/default/files/CRPE_meta-analysis_charter-schools-effect-student-achievement_workingpaper.pdf) [https://perma.cc/QS8B-NBGZ].

of NCLB, at least some states will adopt positive leadership roles focused on improving education for all and reducing achievement gaps.

At the same time, states will have to respect differences in local needs and capacities and acknowledge real uncertainties about how to reduce achievement gaps and integrate emerging technologies into everyday practice. To resolve these uncertainties, states will need to foster internal experimentation in areas ranging from instructional methods and educator preparation to uses of technology in the classroom and motivating and engaging students. States, districts, and researchers will need to carefully evaluate and compare these experiments, so that educators and policymakers clearly know what a new idea can and cannot deliver. These internal experiments will be important steps toward improvement, but they will not be enough. To take full advantage of the natural diversity of our federal system, states must do something new and deliberate: learn from one another.

If states want to improve the outcomes of schooling, they will have to do more than imitate one another's politically popular ideas. The informal process of imitation via connections among legislators and governors or advocacy organizations is well established. Such connections are generally focused on particular remedies. Although ideas exchanged in these ways can be constructive, most are identified with individual officeholders or factions and remain prominent only as long as their sponsors stay on the scene. There is no screening function to vet ideas according to their impact elsewhere, and there is little disciplined exchange about the conditions under which particular ideas work as promised or fail.

To make real progress in the common search for instructional improvements and greater equity, states need to adopt a collaborative, evidence-based project like *democratic experimentalism*, an idea pioneered by Columbia University law professor Charles Sabel and used by the European Community.<sup>98</sup> As explained by Sabel and colleagues, democratic experimentalism is appropriate for situations in which independent entities like U.S. states can collaborate and benefit from one another's experience without giving up their freedom of action to some higher level of government. Proponents do not claim that it is always more efficient than centralized decision-making, but rather that it is a way to make progress when, as is the case with state governments, the entities involved will not or cannot give up their independence.

Under democratic experimentalism, independent communities (e.g., states) engage in four related activities: (a) they work together to test out alternative approaches to reach a goal that none has yet attained, (b) they rigorously assess the results and evidence about conditions leading to success and failure, (c) they create a mechanism by which these results are fully

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<sup>98</sup> See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

shared, and (d) they commit to using past results as the starting point for further experimentation.<sup>99</sup>

Charles Sabel and his colleague Michael Dorf have shown how democratic experimentalism has been used in the European Community and suggest how it can work in the United States. As they argue, it is ideal for a federal system in which all units are struggling with a problem that none has solved.<sup>100</sup> As Sabel writes:

The more uncertain the world—the harder it is to know what it can become—the riskier and potentially more costly it is to rely on familiar strategies (and associated conceptions of self-interest) resting on complex assumptions about the way the world must be; the more prudent it becomes to the contrary to entertain the possibility of elaborating next steps with others similarly at sea, on condition that they share what they learn and bear a share of the costs of exploration.<sup>101</sup>

In the United States, this approach has been used in environmental resource management,<sup>102</sup> environmental regulation, treatment of substance abusers, provision of child-protective and other services to at-risk families, and reform of sentencing and police practices.<sup>103</sup> Sabel also cites the 1989 devolution of governance of Chicago city schools to local site councils as an example of democratic experimentalism. In the European Union, democratic experimentalism has been used in refinement of social service delivery and, in Britain, a broad devolution of governing power from Whitehall to Scotland.<sup>104</sup>

The established United States tradition of cooperative federalism, with its independent action and lack of disciplined analysis, “falls short of creating an experimentalist regime. What is missing is the continuous pooling, at the national level, of local experience and ongoing revision of norms [e.g., of what can be accomplished] at various levels in the light of it.”<sup>105</sup>

Democratic experimentalism goes beyond mutual imitation and sharing of fads in two ways.<sup>106</sup> First, entities (e.g., states) have to create internal conditions under which diverse experimental initiatives can be fully imple-

<sup>99</sup> See Jamison E. Colburn, “Democratic Experimentalism”: A Separation of Powers for Our Time?, 37 SUFFOLK U.L. REV. 287, 350–62 (2004).

<sup>100</sup> See generally Charles Sabel, *Dewey, Democracy, and Democratic Experimentalism*, 9 CONTEMP. PRAGMATISM 35 (2012).

<sup>101</sup> *Id.* at 44.

<sup>102</sup> See Christopher Ansell, *What Is a Democratic Experiment*, 9 CONTEMP. PRAGMATISM 159, 169–72 (2012).

<sup>103</sup> See generally Charles F. Sabel & Rory O’Donnell, *Democratic Experimentalism: What to Do About Wicked Problems After Whitehall (and What Scotland May Just Possibly Already Be Doing)*, Paper Presented to the OECD Conference on Devolution and Globalization Implications for Local Decision-makers (Feb. 28–29, 2000), <http://www2.law.columbia.edu/sabel/papers/Democratic%20Experimentalism.pdf> [https://perma.cc/5752-Y5M4].

<sup>104</sup> See generally *id.*

<sup>105</sup> Sabel, *supra* note 100, at 49.

<sup>106</sup> Ansell, *supra* note 102, at 166.

mented and tested. In K–12 education, states need to make it possible for localities, and even individual schools, to experiment with factors that in the past have been standardized by law and regulation. In many respects, this approach is a departure from the inputs-driven policy of the first part of the twentieth century, but potentially consistent with the more recent performance orientation sparked in part by NCLB.

Second, states must commit to serious analysis of results and sharing them through an objective mechanism that no single set of states or policy advocates controls. Professors Dorf and Sabel suggest that federal entities like the European Union or the United States national government can perform this function.<sup>107</sup> Again, many states are currently well positioned to participate in this function, given the data and analytic capacity they have developed through NCLB and RTTT.

##### 5. POLICY PRECONDITIONS FOR DEMOCRATIC EXPERIMENTALISM: ESTABLISHING THE INTERNAL CONDITIONS

As Sabel writes, “the law has to encourage adaptation and revision when applied in context; the contextual adaptation has to . . . permit learning across contexts.”<sup>108</sup> States need to recognize the huge differences across the districts they oversee and allow experimentation. This means, for example, avoid mandating policies that are appropriate for urban and suburban localities but unworkable for remote rural areas.<sup>109</sup> Even more importantly, it means not mandating policies that prevent districts from experimenting with new solutions to their problems and from changing what they do in light of shifting needs. More specifically, this approach would involve giving districts and schools flexibility in:

- How schools spend money;
- Who is hired to teach, how they are trained, where they are assigned, and how they are paid;
- How student time is set and structured;
- How courses are defined and organized; and
- How students are assessed for progress.

Democratic experimentalism also means that any current practice or policy should be considered tentative and constantly open to revision based on new evidence or new contexts. In practice, this means governments must craft policy that only limits practices that are known to be harmful and respect the local actors’ competence to craft and implement initiatives that match their local context. It also means any policy should be scheduled for periodic evaluation and revision.<sup>110</sup>

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<sup>107</sup> Colburn, *supra* note 99.

<sup>108</sup> Sabel, *supra* note 100, at 44.

<sup>109</sup> See JOHNSON ET AL., *supra* note 12 (discussing the intersection and mismatch between federal policy and rural education).

<sup>110</sup> Colburn, *supra* note 99.

Echoing the principle of subsidiarity,<sup>111</sup> Sabel writes, “[w]hat is expected of the lower-level officials [e.g., superintendents and school principals] . . . is not conformity to a rule, but active investigation of superior solutions . . . .”<sup>112</sup> Others more focused on education than Sabel, including the current authors, have made similar points, arguing the need for deregulation of schools coupled with close tracking of performance, abandonment of failures, and reproduction of successful practices.<sup>113</sup>

## 6. HOW STATES CAN GATHER EVIDENCE AND SHARE RESULTS

Despite unending controversy over its role and warrant for existence, USDOE seems equipped to manage and fund the aggregation and use of data from state and local experiments. The USDOE’s Institute for Educational Sciences (IES), for example, is a comprehensive center that provides funding for research on a wide range of educational priorities. IES also funds Regional Education Labs that provide research and analysis capacity to multi-state geographic regions. These labs operate with a mandate to evaluate state and district policies and to aggregate and disseminate this research throughout the region. In addition, the USDOE has funded a system of Comprehensive Centers, including five special content centers and fifteen geographically-organized regional centers. The USDOE charges Content Centers with synthesizing the latest research and policy thinking in their respective domains, including Capacity and Productivity, College and Career Readiness, Early Learning, Teachers and Leaders, Innovations in Learning, School Turnaround, and Standards and Assessments. These Content Centers then funnel what they learn to states via the Regional Centers, which work directly with state agency staff to design and implement educational policy.<sup>114</sup>

Alternatives to these USDOE analysis and dissemination networks might include interstate compacts. To some extent, such groups already exist. The Council of Chief State School Officers (CCSSO)<sup>115</sup> and the Education Commission of the States,<sup>116</sup> for example, are long-standing organizations that provide research syntheses on a variety of state policy concerns. More recently, a consortium of state agency chiefs formed the

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<sup>111</sup> *The Principle of Subsidiarity*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aai0017> [<https://perma.cc/AA3N-CJRA>] (defining the principle and explaining its assumption that actors closest to a problem should take action).

<sup>112</sup> Sabel, *supra* note 100, at 45.

<sup>113</sup> See generally PAUL T. HILL ET AL., *REINVENTING PUBLIC EDUCATION* (1997); HILL, *supra* note 90; TED KOLDRIE, *THE SPLIT SCREEN STRATEGY: HOW TO TURN EDUCATION INTO A SELF-IMPROVING SYSTEM* (2015).

<sup>114</sup> *Comprehensive Centers Program*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/newccp/index.html> [<https://perma.cc/DUC5-BMLR>].

<sup>115</sup> *Who We Are*, COUNCIL CHIEF ST. SCH. OFFICERS (2015), [http://www.ccsso.org/Who\\_We\\_Are.html](http://www.ccsso.org/Who_We_Are.html) [<https://perma.cc/U3ZK-JYUJ>].

<sup>116</sup> *Leadership*, EDUC. COMM’N OF STS. (2015), <http://www.ecs.org/about-us/leadership/> [<https://perma.cc/GT3H-63BV>].



Innovation Lab Network<sup>117</sup> as a subgroup within CCSSO to pursue a collective effort to design new accountability and assessment methods, among other projects. Innovation Lab Network members, including New Hampshire and Kentucky, have stepped forward to pilot new methods in their own states.<sup>118</sup>

Of course, the analytic capacity to support democratic experimentalism can come from the federal government, interstate consortia, or both. Indeed, both approaches offer complementary advantages and disadvantages. The USDOE is highly resourced and has historically allocated significant resources to its research arm, IES. For fiscal year 2016, the federal government appropriated \$68 billion of discretionary funding to the USDOE with almost \$620 million to IES.<sup>119</sup> Department leadership and management, however, are often distant from the day-to-day issues in public school systems, making it difficult for them to judge the most pressing priorities facing states, districts, and schools.<sup>120</sup> Likewise, USDOE has a history of operating prescriptive grant programs and enforcement processes, and has been staffed largely with those purposes in mind, rather than supporting democratic experimentalism.<sup>121</sup> Still, if the enactment of ESSA moves the USDOE away from centralized program administration, it could play an important role in promoting and sustaining democratic experimentalism.

A cross-state consortium might more credibly claim a commitment to evidence-based improvement. Unlike the USDOE, current state leaders are often active participants in these networks, providing the consortium with a direct connection to those who are sorting through the challenges of educational policy in their local context. CCSSO, for example, regularly convenes state leaders to engage in dialogue on salient policy issues from across the country. The Innovation Lab Network provides a forum for self-selected states committed to piloting innovative policy solutions to share and learn from others' experiences.<sup>122</sup>

At the same time, these organizations often do not have ready access to government funds and would either have to gain stable foundation support or depend on states' contributions. These sources of support could prove too

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<sup>117</sup> *Innovation Lab Network*, COUNCIL CHIEF ST. SCH. OFFICERS (2015), [http://www.ccsso.org/What\\_We\\_Do/Innovation\\_Lab\\_Network.html](http://www.ccsso.org/What_We_Do/Innovation_Lab_Network.html) [https://perma.cc/HR3B-XRCD].

<sup>118</sup> Andrew Ujifusa, *States Collaborate in Pursuit of Fresh Accountability Ideas; The Innovation Lab Network Connects States Working to Redesign Their Approaches*, EDUC. WK. (Jan. 7, 2016), <http://www.edweek.org/ew/articles/2016/01/07/states-collaborate-in-pursuit-of-fresh-accountability.html> [https://perma.cc/MYR9-9WGZ].

<sup>119</sup> *Budget News—U.S. Department of Education*, U.S. DEP'T OF EDUC. (2015), <http://www2.ed.gov/about/overview/budget/news.html> [https://perma.cc/APT9-FC3B].

<sup>120</sup> See, e.g., Thomas J. Kane, *Frustrated with the Pace of Progress in Education? Invest in Better Evidence*, 101 BROWN CTR. CHALKBOARD SERIES ARCHIVE (Mar. 5, 2015), <http://www.brookings.edu/research/papers/2015/03/05-education-evidence-kane> [https://perma.cc/8WMS-YYZR] (arguing that IES funds for regional funds might be better spent on evidence building by state entities).

<sup>121</sup> See Fuhrman, *supra* note 16, at 44.

<sup>122</sup> *Innovation Lab Network*, *supra* note 117.

small and unstable to be the sole source of analytic capacity for the nation. They could, however, provide early proving grounds for small-scale experiments and a forum for state leaders to share new knowledge and innovation.

#### 7. THE RISKS OF DEREGULATION AND THE EXPERIMENTALISM REGIME

Deregulation, a key feature of a democratic experimentalism regime, comes with risks. The new federal education law, ESSA, eliminates requirements that states take specific actions on behalf of children in low-performing schools. This opens up the possibility that some or all states will adopt a *laissez-faire* approach toward local schools and districts. Given that low-performing schools are most likely to serve low-income and disadvantaged students, deregulation puts those students at risk. Compared to a rule-based system, which requires states do something to avoid charges of noncompliance and loss of federal subsidies, deregulation relies heavily on state- and local-level motivation and capacity. Though the new federal policy is risky in these ways, democratic experimentalism neither causes nor exacerbates these hazards. Experimentalism ensures that states share their experiences and measure results.

Critics of democratic experimentalism contend that the certainty of mandates protects policies that might be vulnerable to competing political interests. David Super, for example, argues that under a decentralized anti-poverty policy the nation failed to reach consensus on goals, left under-resourced government agencies in control of enforcement, and created lengthy negotiations and debates on policy that consumed the resources of anti-poverty advocates.<sup>123</sup> While we agree with Super's argument, it is not clear that a mandate-based regime would have been more effective without a very different political environment and a great deal more money. Nor is it likely that a mandate-based regime would have allowed the diversity of practice that could lead to innovation and long-term improvement. Top-down rights enforcement can reallocate money and access, but it cannot mandate the discovery of a solution to a heretofore unsolved problem.

Local education leaders who lack capacity or motivation will also not make progress. States will differ in whether they have the leadership, intellectual capacity, and political support necessary to move intransigent localities. Such realities of a decentralized system are not caused by democratic experimentalism, which creates some transparency and pressure for improvement. Low-performing localities that refuse to experiment will be identifiable through the outcome data that states are still required to gather. But identifying such jurisdictions and overcoming high-inertia organizations takes time, and in the meantime, improvements in schooling for low-income and disadvantaged students might not happen.

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<sup>123</sup> David A. Super, *Laboratories of Democratic Experimentalism and the Failure of Anti-Poverty Law*, 157 U. PA. L. REV. 541, 547 (2008).

It is safe to say that not all states will seize the opportunity that ESSA provides. Some will charge ahead, learning, adapting, and improving. The aggregation and sharing of knowledge via democratic experimentalism may accelerate their progress. But, as has been the case in every reform movement before, other states will not move. Just as states varied tremendously in their response to the more prescriptive requirements of NCLB, some will undoubtedly change as little as they can under ESSA.

Proponents of democratic experimentalism do not expect policy to remain stagnant, or for higher levels of government never to play any role. As Sabel explains, a democratic experimentalism regime requires an “ongoing revision of norms at various levels in the light of [what is learned from the continuous pooling of experiences].”<sup>124</sup> With this expectation, state and national leaders may revise policy to reflect new knowledge as they draft laws, construct programs, and allocate money. One possible result of a period of experimentalism would be federal incentives to move states and districts that have been stagnant to adopt particular programs or policies that have proven to be successful elsewhere.

#### CONCLUSION

States seem to be on a course that better suits both the diversity that exists across our nation’s communities and schools and the education field’s limited knowledge and agreement about what works under what circumstances. NCLB was criticized for putting too much emphasis on testing and too little on building capacity for improvement. And yet, NCLB does seem to have moved states from a decades-long emphasis on inputs to a focus on performance. Compared to the pre-NCLB era, states are now more inclined to search for options to increase school effectiveness, and to open public education up to new ideas, school providers, and sources of talent.

The new federal ESSA presses states further in this direction of performance-focused problem solving. Democratic experimentalism offers a useful policy framework for coordinating experimentation, so learning can be less haphazard and policymaking can be driven more by evidence and less by interest group politics.

There is still work to be done to build a system around the principles of democratic experimentalism. Every state must deal with the residue of input-based policy, from compliance oriented bureaucracies and risk-averse educators and administrators to fixed expectations about how money is allocated and used. Such policy residue—coupled with the employees, professional cultures, and interest groups organized to defend it—will continue to value compliance over experimentalism. The USDOE will likely need to reconsider its programs and processes (and possibly funding allocations) if it is to become a nimble, relevant, and effective knowledge manager for states.

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<sup>124</sup> Sabel, *supra* note 100, at 49.

It is also worth remembering that the new, flexible regime created by ESSA is not permanent. Key Title I constituencies—civil rights groups and advocates for poor and minority children—suspect that states will neglect disadvantaged children unless they are under strong federal pressure. These groups will not go away. They will be on alert for any evidence that states have used the new flexibility under ESSA to reallocate federal funds away from poverty-area schools, or have allowed struggling schools and districts to decline further. If states' actions confirm these advocates' suspicions, the coalition that steadily built up the regulatory burden associated with federal aid to K-12 schools could become dominant again. Whether democratic experimentalism catches hold or becomes a footnote in the history of state and federal relations will depend on whether states seize the new opportunities they now have.