

# Governance, Autonomy, and Accountability in Modern Education Reform: Implications for Educational Equity

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## ABSTRACT:

*For decades, governmental institutions at both the federal and state levels have focused intensely on modifying educational governance to influence what happens in schools. Following trends that began in the 1980s, several modern educational reforms particularly have operated under the rationale that increasing performance accountability and decreasing governmental regulation will improve and equalize students' learning opportunities and performance. The ex-*

*pansion of charter schools, changes to teacher evaluations, and limitations on the influence of teacher unions have been implemented in concert with each other and directly under this rationale. However, there is scant evidence that this package of reforms has realized its goals, and these reforms have arguably exacerbated existing inequities. Drawing insight from both the history of these recent reform efforts and educational research, this Article provides an analysis of how these efforts have influenced governance, the linked theories of action underlying them, and their impact on educational equity. Based on the analysis of these reforms, this Article presents a new model of educational governance that has a greater potential for actually equalizing and improving students' learning opportunities and performance.*

## I. INTRODUCTION

The governance of schooling has long been a central issue in education law and policy. A variety of institutions and actors—including courts, legislatures, and chief executive officers at both federal and state levels—have taken the lead on education reform at various points in time. Such activity has created a system that scholars have described as “fragmented”<sup>1</sup> and filled with “faddish”<sup>2</sup> education policies intended to improve and equalize educational opportunities and outcomes.<sup>3</sup>

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1. Several scholars have focused on the problems that arise from incoherent or fragmented education policies and have generally argued that policymakers should focus on creating more coherent legal and policy arrangements. *See, e.g.,* David K. Cohen & Susan L. Moffitt, *The Influence of Practice on Policy*, in *SHAPING EDUCATION POLICY: POWER AND PROCESS* 63, 67 (Douglas E. Mitchell et al. eds., 2011) (discussing the relationship between federalism, educational governance, and the resulting problems plaguing efforts aimed at influencing educational practice); Jennifer A. O'Day & Marshall S. Smith, *Systemic Reform and Educational Opportunity*, in *DESIGNING COHERENT EDUCATION POLICY* 250, 250–52 (Susan H. Fuhrman ed., 1993) (proposing “systemic reform” as a remedy to the problems of legal and policy incoherence).

2. *See* Brian Rowan, *The School Improvement Industry in the United States: Why Educational Change Is Both Pervasive and Ineffectual*, in *THE NEW INSTITUTIONALISM IN EDUCATION* 67, 67–68 (Heinz-Dieter Meyer & Brian Rowan eds., 2006) (discussing why “instruction and instructional outcomes” had changed little for at least a decade despite “systemic approaches to educational reform”).

3. *See* Gary Orfield, *Strengthening Title I: Designing a Policy Based on Evidence*, in *HARD WORK FOR GOOD SCHOOLS: FACTS NOT FADS IN TITLE I REFORM*, 1,

However, such policies seem to come and go without any coherent or overarching vision for reform. Making issues of educational governance even more complex, opponents of reform have often attacked the legitimacy of various institutions for engaging in reform. Concerns like those over activist courts in desegregation<sup>4</sup> and school finance reform litigation,<sup>5</sup> as well as federal overreach in the creation of laws like No Child Left Behind,<sup>6</sup> are common in educational politics. Despite this ongoing churn of law and policy, several major reforms since the 1980s have been animated by a broad theory of action positing that less regulation over how to educate combined with more accountability for actual performance will improve school and teacher performance, ultimately improving and equalizing students' educational opportunities and performance as well.<sup>7</sup>

This notion has driven a range of recent and widespread education law and policy reform efforts, including those focused on promoting charter schools, enhancing teacher evaluation, and weakening teachers unions. Operating under the idea that more local and school-level autonomy can boost school and student performance, charter schools that entail less oversight than traditional public schools have spread quickly.<sup>8</sup> Between the passage of the first charter school law in

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4 (Gary Orfield & Elizabeth H. DeBray, eds., 1999) (explaining the failure of various educational reforms to close racial disparities).

4. See Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441, 1472–73 (2004) (discussing the history of the term "judicial activism").

5. See Madeline Davis, *Off the Constitutional Map: Breaking the Endless Cycle of School Finance Litigation*, 2016 BYU EDUC. & L.J. 117, 156 (2016) (discussing critiques of judicial action in school finance cases on the basis of separation of powers concerns).

6. See Richard F. Elmore, *Unwarranted Intrusion*, EDUC. NEXT, Spring 2002, at 31, 32 (analyzing the expansion of federal power in educational governance and policy with the passage of the No Child Left Behind Act of 2001). Elmore highlights not only political and governance issues raised by No Child Left Behind's enactment, but also substantive concerns grouped around a narrow focus on testing and accountability to drive education reform. *Id.*

7. See BENJAMIN M. SUPERFINE, EQUALITY IN EDUCATION LAW AND POLICY, 1954-2010, at 100–38 (2013).

8. See PAUL T. HILL ET AL., CHARTER SCHOOLS AND ACCOUNTABILITY IN PUBLIC EDUCATION 3–4 (2002). To be sure, charter schools are accountable to various groups, including government agencies, parents, teachers, and community members. They also must meet certain performance goals set by policy and their performance

1991 and 2018, forty-four states have allowed charter schools, and seven percent of schools were charter schools by the 2015–2016 school year.<sup>9</sup> During the 2010s, laws incentivizing and governing modifications to teacher evaluation systems spread quickly as well.<sup>10</sup> During this time, a majority of states passed laws requiring school districts to develop systems for evaluating and holding teachers accountable specifically for student growth in achievement on standardized tests.<sup>11</sup> This widespread modification of teacher evaluation systems followed a range of legislative efforts since the 1980s to formulate and enhance standards, testing, and accountability for students and schools.<sup>12</sup>

Under the argument that both charter schools and enhanced teacher evaluation harm teachers and the quality of education—in addition to the difficulties that charter schools pose to unionization efforts—teachers unions have generally opposed both of these types of reforms.<sup>13</sup> However, along with other public-sector unions, teachers

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agreements with governmental units. However, charter schools are generally free from a range of regulation governing traditional public schools. *Id.* at 3–5.

9. *Key Facts about Charter Schools*, IN PERSPECTIVE, <http://www.in-perspective.org/pages/introduction#sub2> (last updated 2018) (surveying the history and growth of charter schools).

10. *See* KATHRYN M. DOHERTY & SANDI JACOBS, NAT'L COUNCIL ON TEACHER QUALITY, STATE OF THE STATES 2015, at 6–7, 25–28 (2015) (surveying the state of laws governing teacher and principal evaluation throughout the U.S.).

11. *See id.* at 6.

12. *See* Diane Ravitch, *The Search for Order and the Rejection of Conformity: Standards in American Education*, in LEARNING FROM THE PAST 167, 167, 180–85 (Diane Ravitch & Maris A. Vinovskis eds., 1995) (analyzing the history of standards in U.S. education). *See generally*, Maris A. Vinovskis, *History of Testing in the United States: PK–12 Education*, 683 ANNALS AM. ACAD. POL. & SOC. SCI. 22 (2019) (analyzing the history of testing and accountability in the U.S., particularly with regard to the shifting state and federal roles).

13. *See* Benjamin M. Superfine & David S. Woo, *Teacher Unions, Charter Schools, and the Public/Private Distinction in Education Law and Policy*, 120 TCHRS. C. REC. 1, 11 (2018) (focusing on teachers unions' use of litigation and administrative proceedings to attack charter schools and discussing the incentives for teachers unions in these cases). Teachers union leaders have also harshly criticized teacher evaluation systems. For example, Chicago Teachers' Union (CTU) former president Karen Lewis argued during the 2012 CTU strike that policies enhancing teacher evaluation and accountability on the basis of student achievement deskill teachers. Monica Davey & Steven Yaccino, *Teachers End Chicago Strike on Second Try*, N.Y. TIMES (Sept. 18, 2012), <http://www.nytimes.com/2012/09/19/us/vote-scheduled-on-chicago-teachers-contract.html?p-agewanted=all&pagewanted=print>. Randi

unions have come under continual fire in both legislative<sup>14</sup> and judicial arenas.<sup>15</sup> Attempts to weaken public sector unions recently appeared in *Janus v. AFSCME, Council 31*, in which the Supreme Court ruled that it is unconstitutional for public sector unions to mandate agency fees from nonmembers.<sup>16</sup> Indeed, the recent promotion of charter schools, modifications to teacher evaluation systems, and various attacks that teachers unions have faced have often occurred in concert with one another.

Although these efforts to decrease regulation about how to educate and increase accountability continue to gain traction in both legislative and judicial spheres, there is little indication that they actually have the potential to accomplish their ultimate goals of improving and equalizing students' educational opportunities and performance. As decades of research on education law and policy have revealed, it is very difficult to improve learning opportunities for all public school

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Weingarten, President of the American Federation of Teachers, similarly argued that teacher evaluation systems are better for students when aimed at the continuous improvement of teachers' practices instead of annual personnel decisions. See Press Release, Randi Weingarten, President, Am. Fed'n of Teachers, Statement on the NCTQ Report on Teacher Evaluation (Oct. 26, 2011), <http://www.aft.org/newspubs/press/2011/102611.cfm>.

14. See Martin H. Malin, *Sifting Through the Wreckage of the Tsunami That Hit Public Sector Collective Bargaining*, 16 EMP. RTS. & EMP. POL'Y J. 533, 538–49 (2012) (discussing widespread changes to public sector collective bargaining laws, including those governing education, beginning in 2011).

15. Perhaps the most high-profile case of attacks directly on teachers unions was *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam). In *Friedrichs*, the Supreme Court considered whether agency fees are constitutional. However, Justice Scalia died shortly after oral arguments, and an equally divided court released a non-precedential per curiam opinion affirming the lower court decision that agency fees are constitutional. See also Benjamin M. Superfine, *Judging Teacher Evaluation: The Legal Implications of High-Stakes Teacher Evaluation Policy*, in STUDENT GROWTH MEASURES IN POLICY AND PRACTICE 223, 227–32 (Kimberly K. Hewitt & Audrey Amrein-Beardsley eds., 2016) (surveying how teachers unions have become active players in various types of litigation that involve teacher evaluation systems).

16. 138 S. Ct. 2448, 2459–60 (2018). The legal theories used by the plaintiffs in *Janus* were similar in most respects to those used by the plaintiffs in *Friedrichs*. See *id.* at 2475–76.

students and decrease race-based performance disparities at scale.<sup>17</sup> Highlighting that no education policy is completely successful and implemented with fidelity everywhere all the time, education researcher Meredith Honig argued that implementation and success are the products of complex “interactions among policies, people, and places.”<sup>18</sup> At first glance, the idea of less regulation and increased accountability might seem well attuned to the well-established importance of local context in education law and policy. However, education laws and policies that are simply “hands off” of what happens in schools have often failed; those that have worked have generally been responsive to problems faced by professionals at the school level and offered solutions, tools, guidance, and resources.<sup>19</sup> At the same time, without such capacities to improve in place, increased accountability has often exacerbated existing inequities among students and schools.<sup>20</sup> In fact, evidence suggests that the achievement gap widened during accountability

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17. See ANTHONY S. BRYK ET AL., *LEARNING TO IMPROVE: HOW AMERICA'S SCHOOLS CAN GET BETTER AT GETTING BETTER* 5–6 (2015) (discussing the reasons underlying the “chronic failure of promising reform ideas” in education).

18. Meredith I. Honig, *Complexity and Policy Implementation: Challenges and Opportunities for the Field*, in *NEW DIRECTIONS IN EDUCATION POLICY IMPLEMENTATION* 1, 1–2 (Meredith I. Honig ed., 2006) (discussing the wide range of factors influencing education policy implementation and the importance of attending to local context).

19. See David K. Cohen & Jal D. Mehta, *Why Reform Sometimes Succeeds: Understanding the Conditions That Produce Reforms That Last*, 54 AM. EDUC. RES. J. 644, 645–46, 650–60 (2017) (examining several historical reforms that proved sustainable and the reasons underlying their sustainability).

20. See, e.g., NAT'L RESEARCH COUNCIL, *UNDERSTANDING DROPOUTS: STATISTICS, STRATEGIES, AND HIGH STAKES TESTING* 38–45 (Alexandra Beatty et al. eds., 2001) (examining equity-related problems resulting from high stakes testing); Thomas S. Dee & Brian A. Jacob, *The Impact of No Child Left Behind on Students, Teachers, and Schools*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2010, at 149, 152 (identifying several problems plaguing testing and accountability systems); Nicole B. Kersting et al., *Value-Added Teacher Estimates as Part of Teacher Evaluations: Exploring the Effects of Data and Model Specifications on the Stability of Teacher Value-Added Scores*, 21 EDUC. POL'Y ANALYSIS ARCHIVES 1, 5–6 (2013), <https://epaa.asu.edu/ojs/article/view/1167/1353> (noting that the validity of value-added teacher evaluation scores can vary based on factors like students' academic background and other background variables).

reforms of the 1990s.<sup>21</sup> The current attacks on teachers unions and the fundamental legal structure underpinning them have also weakened the capacity of teachers unions to promote needed improvements in teaching and learning.<sup>22</sup>

This Article accordingly examines the interrelated promotion of charter schools, modification of teacher evaluation systems, and weakening of teachers unions in both legislative and judicial spheres to enhance educational equity and quality. This Article particularly focuses on the ideological underpinnings of these reforms, which animates the promotion of increased accountability and deregulation in service of educational equity. Additionally, this Article highlights what we actually know about these reforms from educational research and how these reforms have operated in concert with one another. Based on the analysis of these reforms, this Article proposes the following three guiding principles for large-scale educational improvement: an evidence-based approach to governance reform; a focus on problems of practice within a local context; and a recognition that higher-level governmental institutions still have a critical role to play in helping frame educational problems and providing critical support and accountability structures for local improvement efforts. Fundamentally, the Article argues for a more coherent, systematic, and dynamic model of educational governance recognizing that educational reforms must be guided by evidence and tailored to meet local needs in order to equalize and improve student learning opportunities and performance.

## II. THE CONVERGENCE OF THREE REFORMS

While reforms aimed at charter schools, teacher evaluation, and teachers unions involve different underlying theories of action, they have directly converged with each other since at least the 2000s. The charter school movement, promotion of teacher evaluation reforms,

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21. See Douglas N. Harris & Carolyn D. Herrington, *Accountability, Standards, and the Growing Achievement Gap: Lessons from the Past Half-Century*, 112 AM. J. EDUC. 209, 210 (2006) (exploring the widening of the achievement gap during the rise of accountability policies).

22. See Benjamin M. Superfine & Jessica J. Gottlieb, *Teacher Evaluation and Collective Bargaining: The New Frontier of Civil Rights*, 2014 MICH. ST. L. REV. 737, 784 (2014) (arguing that the legal structure underlying collective bargaining for teachers is “more closely aligned with industrial work” than professional work).

and efforts to weaken teachers unions share political underpinnings, assumptions about effective educational governance, and a stated focus on promoting educational equity. Accordingly, these three reforms have become intertwined across federal and state levels and within legislative and judicial spheres.

The direct confluence of these reforms appears perhaps most obviously with the American Recovery and Reinvestment Act (ARRA).<sup>23</sup> Aimed at stimulating and stabilizing the American economy in the wake of the 2008 financial crisis, the ARRA devoted \$97.4 billion of its \$787.2 billion total to education.<sup>24</sup> While the ARRA's education-oriented parts were intended to keep school systems afloat in difficult financial times, the law was also aimed at sparking particular types of educational reforms.<sup>25</sup> To this end, the ARRA included the Race to the Top initiative (RTT), which began with a \$4.35 billion fund that eventually rose to \$5.05 billion with Congressional appropriations.<sup>26</sup> RTT was billed as one of the largest investments in education reform in U.S. history and the "largest competitive grant program ever" managed by the U.S. Department of Education.<sup>27</sup>

The final regulations and applications for RTT funds heavily favored enhanced teacher evaluation policies.<sup>28</sup> As President Obama neatly summarized, "Better standards. Better teaching. Better schools.

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

24. Benjamin M. Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 81, 82 (2011).

25. See, e.g., Christina A. Samuels, *As Stimulus Tap Turns On, Districts Can't Escape Cuts*, EDUC. WK. (Apr. 6, 2009), <https://www.edweek.org/ew/articles/2009/04/08/28districts.h28.html> (reporting that Arne Duncan, the then U.S. Secretary of Education, called stimulus funds "a once-in-a-lifetime opportunity to lay the groundwork for a generation of educational reforms").

26. See U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (2009) (providing an overview of the Race to the Top Fund); INST. OF EDUC. SCIS., STATE REQUIREMENTS FOR TEACHER EVALUATION POLICIES PROMOTED BY RACE TO THE TOP 1 (2014).

27. See INST. OF EDUC. SCIS., *supra* note 26, at 2.

28. See *id.*



Data-driven results.”<sup>29</sup> To this end, the RTT application criteria directly encouraged modifications to the teacher evaluation process and specifically, the evaluative criteria used.<sup>30</sup> Each of the 14 states that won RTT grants accordingly “promised to use student achievement data as a significant part of teacher evaluation . . . to make personnel decisions.”<sup>31</sup> RTT also promoted policies that favored charter schools. U.S. Secretary of Education Arne Duncan “warned the 26 states” that “impose[d] caps on the numbers of charter schools, and the 10 states that [did] not permit charter schools at all” that they would be less likely to receive RTT funds, and states accordingly foregrounded charter school reforms in their RTT applications.<sup>32</sup> Cognizant of the likely pushback to RTT from groups like teachers unions, federal officials also required states to generate “buy-in” from key stakeholders like teachers unions that would be especially concerned about the impact of these new reforms.<sup>33</sup> However, some states had much trouble getting teachers unions on board and were docked a significant amount of points in the scoring of their applications.<sup>34</sup>

Immediately after the passage of the ARRA at the federal level, reforms aimed at teacher evaluation and collective bargaining directly converged at the state level. In states that permit collective bargaining between school districts and teachers unions, collective bargaining laws generally frame the employment decisions that flow from teacher evaluation systems and must be modified for the full operation of newly

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29. See Katherine Brandon, *The President on “Race to the Top,”* THE WHITE HOUSE: PRESIDENT BARACK OBAMA (July 24, 2009, 5:43 PM), <https://obamawhitehouse.archives.gov/blog/2009/07/24/president-race-top>.

30. See DEP’T OF EDUC., RACE TO THE TOP ASSESSMENT PROGRAM GUIDANCE AND FREQUENTLY ASKED QUESTIONS 24 (rev. 2014).

31. See Benjamin M. Superfine et al., *The Expanding Federal Role in Teacher Workforce Policy*, 26 EDUC. POL’Y 58, 64 (2012) (discussing the governance implications of RTT).

32. See Lesli A. Maxwell, *Obama Team’s Advocacy Boosts Charter Momentum*, EDUC. WK. (June 16, 2009), [https://www.edweek.org/ew/articles/2009/06/17/35charter\\_ep.h28.html](https://www.edweek.org/ew/articles/2009/06/17/35charter_ep.h28.html) (summarizing warnings made by Secretary Duncan to the states regarding charter school policies).

33. See Lesli A. Maxwell, *District Stances on Race to Top Plans Vary*, EDUC. WK. (Jan. 19, 2010), <https://www.edweek.org/ew/articles/2010/01/20/18mous.h29.html>.

34. For example, only 42 local school unions out of approximately 600 total “signed on” to Michigan’s RTT application. See *id.*

redesigned teacher evaluation systems.<sup>35</sup> Since 2010, at least twelve states have modified their laws to restrict the range of issues over which public employees can bargain.<sup>36</sup> In education, these issues include streamlining procedures for teacher discipline and firing and tying teacher compensation to evaluation.<sup>37</sup>

Such convergence between the reforms has also arisen in the courts. In *Vergara v. State*, plaintiffs attacked the constitutionality of California statutes that articulate and protect teachers' rights to tenure and from dismissal without certain processes.<sup>38</sup> The plaintiffs used teacher evaluation data to argue that the state's system resulted in "grossly ineffective" teachers obtaining and sustaining permanent employment and the disproportionate representation of these teachers in low-income/high-minority schools.<sup>39</sup> As such, the case was built around the idea that conditioning teacher employment on newly developed teacher evaluation systems could provide for a more effective and even rational system. Teachers unions were critical parts of the case, as the California Teachers Association and California Federation of Teachers joined California as intervenors. Because the case was directly aimed at the sorts of protections teachers unions have long sought to maintain, one commentator labeled *Vergara* an "existential threat" to teachers unions.<sup>40</sup> Conversely, teachers unions have repeatedly worked with teachers in litigation to defend them against the consequences of teacher evaluation systems, such as dismissal.<sup>41</sup> Notably, high profile teachers union leaders like Randi Weingarten, president of the American Federation of Teachers, and Karen Lewis, president of

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35. See Preston C. Green et al., *The Legal and Policy Implications of Value-Added Assessment Policies*, 2012 BYU EDUC. & L.J. 1, 15–16, 26–27 (2012).

36. See Malin, *supra* note 14, at 538–39.

37. See *id.* at 542–43.

38. 209 Cal. Rptr. 3d 532, 539–42 (Cal. Ct. App. 2016).

39. See *id.* at 540, 544–545.

40. See Andy Smarick, *Vergara, Harris, and the Fate of the Teacher Unions*, EDUC. NEXT (July 8, 2014), <https://www.educationnext.org/vergara-harris-fate-teacher-unions/>.

41. See Superfine, *supra* note 15, at 227.

the Chicago Teachers Union, have publicly criticized teacher evaluation for problems such as deskilling teachers through a narrow focus on student achievement.<sup>42</sup>

Over the past couple decades, courts and administrative agencies also have increasingly considered cases that involve clashes between charter schools and teachers unions. In *State ex rel. Ohio Congress of Parents & Teachers v. State Board of Education*<sup>43</sup> and *League of Women Voters of Washington v. State*,<sup>44</sup> teachers unions challenged the fundamental constitutionality of charter schools by arguing that they were not public and were thus receiving public funding illegally.<sup>45</sup> Similarly, charter schools and teachers unions clashed in an National Labor Relations Board (NLRB) case about whether charter schools were public or private for collective bargaining purposes.<sup>46</sup>

Indeed, much as the logic of cases like *Vergara* represents a natural threat to teachers unions, charter schools also represent such a threat.<sup>47</sup> Because charter schools are often treated like school districts from a governance perspective, teachers unions must form in each charter school (or network) instead of a traditional district that includes several schools. Accordingly, charter school teachers are often not unionized, lowering union membership and dues.<sup>48</sup> Given the lack of collective bargaining protections, charter school teachers are also often employed at will, and administrators possess greater power to terminate them than in unionized school districts.<sup>49</sup> Moreover, charter school teachers also often work longer hours and have lower pay.<sup>50</sup>

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42. See, e.g., Davey & Yaccino, *supra* note 13; Press Release, Am. Fed'n of Teachers, *supra* note 13.

43. 857 N.E.2d 1148, 1162–64 (Ohio 2006).

44. 355 P.3d 1131, 1133 (Wash. 2015) (en banc).

45. See Superfine & Woo, *supra* note 13, at 12–16 (discussing clashes between teachers unions and charter schools over whether charter schools should be considered public or private).

46. Chi. Mathematics & Sci. Acad. Charter Sch. Inc., 359 N.L.R.B. 455, 455 (2012).

47. See Peter Kauffman, Note, *Unionized Charter School Contracts as a Model for Reform of Public School Job Security*, 88 N.Y.U. L. REV. 1379, 1384 (2013).

48. See *id.* at 1384–85.

49. See *id.*

50. See Amy Auletto, *Students Pay the Price for Unequal Treatment of Charter School Teachers*, MICH. ST. U. C. OF EDUC.: GREEN & WRITE (Mar. 17, 2016),

In addition to this basic political calculus that has pitted charter school and teacher evaluation proponents against teachers unions, broader theories of governance also seem to be implicitly at work. All three efforts often appear wrapped in the logic of educational quality and particularly equity. As some reformers argue, teacher evaluation can enhance educational quality and equity by providing accountability for outcomes without directly dictating what should happen in the classroom.<sup>51</sup> Charter schools can enhance educational quality and equity by freeing schools and teachers from restrictive public regulation. In contrast, some reformers argue that teachers unions result in overly complex, overly regulated, and inefficient systems that protect poor teachers and weaken serious attempts at reform.<sup>52</sup> So, at its heart, the convergence of these three reforms is grounded in a particular notion of who should be given control to drive key parts of the educational system. Yet, despite the quick political ascendancy of this perspective, it appears to be grounded much more in ideology than empirical evidence. The following Parts focus on each of these three reforms in turn, charting both their ideological roots and empirical evidence underlying them. In doing so, this examination can help us not only better understand the convergence of three major educational reforms ostensibly in the service of educational quality and equity but also develop more efficacious principles for educational reform moving forward.

### III. CHARTER SCHOOLS

Over the past two decades, charter schools have grown dramatically in popularity and have become a major feature of the U.S. educational landscape. In the 2000–2001 school year, the National Center for Education Statistics (NCES) identified 448,343 students enrolled in

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<https://edwp.educ.msu.edu/green-and-write/2016/students-pay-the-price-for-unequal-treatment-of-charter-school-teachers/>.

51. See Eric S. Taylor & John H. Tyler, *Can Teacher Evaluation Improve Teaching?*, EDUC. NEXT, Fall 2012, at 79, 83, [https://www.education-next.org/files/ednext\\_20124\\_taylorTyler.pdf](https://www.education-next.org/files/ednext_20124_taylorTyler.pdf).

52. See Andrew J. Coulson, *The Effects of Teachers Unions on American Education*, 30 CATO J. 155, 163–65 (2010).

charter schools in the United States.<sup>53</sup> By the 2017–2018 school year, the number of students attending charter schools reached almost 3.2 million.<sup>54</sup> In 1995, nineteen states had laws governing charter schools.<sup>55</sup> Currently, forty-five states and D.C. had charter school laws, with West Virginia most recently passing charter school legislation in 2019.<sup>56</sup> Cultivating this charter-friendly landscape is a seemingly bipartisan commitment to charter schools. Former President Barack Obama, in a proclamation during National Charter Schools Week in 2016, referred to charter schools as playing “an important role in our country’s education system.”<sup>57</sup> More recently, President Donald Trump’s budget for fiscal year 2019 included an allocation of \$1.1 billion for school choice, with a stated goal of \$20 billion annually for the same purpose.<sup>58</sup>

Charter schools are grounded in three fundamental principles: accountability, autonomy, and choice.<sup>59</sup> Perhaps more than any other major modern educational reform effort, the charter school movement actualizes the “less regulation” argument, with early supporters seeking to conceptualize charter schools and their structures of governance as

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53. See NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., PUBLIC ELEMENTARY/SECONDARY SCHOOL UNIVERSE SURVEY (1990–2019) (presenting a wide range of publicly available educational data).

54. See REBECCA DAVID & KEVIN HESLA, NAT’L ALL. FOR PUB. CHARTER SCHS., ESTIMATED PUBLIC CHARTER SCHOOL ENROLLMENT, 2017-2018, at 1 (2018), <https://www.publiccharters.org/sites/default/files/documents/2018-03/FINAL%20Estimated%20Public%20Charter%20School%20Enrollment%2C%202017-18.pdf>.

55. See CTR. FOR EDUC. REFORM, THE ESSENTIAL GUIDE TO CHARTER SCHOOL LAW: CHARTER SCHOOL LAWS ACROSS THE STATES 2012, at 87–88 (Alison Consoletti ed., 13th ed. 2012), [https://www.edreform.com/wp-content/uploads/2012/04/CER\\_2012\\_Charter\\_Laws.pdf](https://www.edreform.com/wp-content/uploads/2012/04/CER_2012_Charter_Laws.pdf).

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

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

58. See OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 2019, at 40 (2019), <https://www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf>.

59. See *Charter School FAQ*, PUB. BROAD. SERV., [www.pbs.org/closingthe-achievementgap/faq.html](http://www.pbs.org/closingthe-achievementgap/faq.html) (last visited Mar. 1, 2020) (providing a broad overview of charter schools in relation to the achievement gap).

mechanisms for innovation and increased equity, especially for historically marginalized students.<sup>60</sup> However, the contentions underlying the actual effects of charter schools are varied and further complicate an already contentious landscape of politicization, research, and activism.<sup>61</sup> This Part outlines the predominant philosophical underpinnings of charter schools, expansion of charter schools, and the research around the effectiveness of the charter model.

### A. *Theory and History of Charter Schools*

Former American Federation of Teachers President Albert Shanker, regarded as a “founding father of the charter school movement,” supported early ideations of the charter model in hopes of cultivating a sense of collaboration with local public schools.<sup>62</sup> Shanker conceptualized the charter school structure as conducive to innovation, promotive of teacher initiative, and foundational for future efforts to depart from the historically rigid operational architecture of American schools while maintaining a semblance of local control.<sup>63</sup> In cooperation with Shanker, the state of Minnesota became the first state to authorize charter schools in 1991. This initiative to explore new models of schooling led to the opening of the country’s first charter school in 1992 in the city of St. Paul.<sup>64</sup> As additional states sought to pass their

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60. See Richard D. Kahlenberg & Halley Potter, *The Original Charter School Vision*, N.Y. TIMES (Aug. 30, 2014), <http://www.nytimes.com/2014/08/31/opinion/sunday/albert-shanker-the-original-charter-school-visionary.html> (discussing 1988 American Federation of Teachers’ President Albert Shanker’s support for charter schools as able to “help reinvigorate the twin promises of American public education: to promote social mobility for working-class children and social cohesion among America’s increasingly diverse populations”).

61. See generally JEFFREY R. HENIG, *SPIN CYCLE: HOW RESEARCH IS USED IN POLICY DEBATES: THE CASE OF CHARTER SCHOOLS* (2008) (examining the extent of politicization around the charter school movement and the impact both politics and research have had on each other and on the movement more generally).

62. See DIANE RAVITCH, *REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA’S PUBLIC SCHOOLS* 156–57 (2013) (arguing against privatization-friendly education reform efforts).

63. See *id.*; see also HENIG, *supra* note 61, at 36–37 (highlighting the distinction between pro-privatization support of charter schools and charter school advocates).

64. See Douglas N. Harris & John F. Witte, *The Market for Schooling* (discussing the evolution of market-based reforms in U.S. education reform), in *SHAPING*

own charter school laws, charter schools began evolving into different forms with varying degrees of state regulation. However, as argued by education researchers Douglas N. Harris and John F. Witte, there are “key elements” retained by charter schools that together continue to distinguish them from their traditional public counterparts: (a) public funding; (b) agreements or contracts that specify the “organization, management, and goals of the school;” and (c) less “regulation than traditional public schools.”<sup>65</sup>

Following Minnesota’s lead, subsequent states’ charter school legislation took different forms and appeared to advance outside of such guiding philosophical parameters. Ensuing charter school models deviated from the notion of cooperation advanced by early advocates of charter reform like Shanker and gravitated increasingly towards notions of competition and efficiency in the provision of education.<sup>66</sup> This emphasis on competition positions the public—or consumer—to ultimately exercise management and control over school operations through school choice. The idea of introducing the concept of competition into public education is thought to have originated with Milton Friedman’s 1962 work *Capitalism and Freedom*. Friedman, in a chapter devoted to education, expounded upon his earlier notions of the importance of establishing a market for education—a voucher-supported landscape of choice wherein parents decide what type of school to send their children.<sup>67</sup> Friedman argued that traditional arguments for nationalizing schools, such as the “technical monopoly” experienced in rural single-school districts, were increasingly invalid, and that increased competition would transmit both flexibility and variety in an otherwise static and unresponsive system.<sup>68</sup> Inherent in a market-based model is

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EDUCATION POLICY: POWER AND PROCESS 94–95 (Douglas E. Mitchell et al. eds., 2011).

65. See *id.* at 95.

66. See RAVITCH, *supra* note 62, at 160, 167.

67. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 93 (1962); see also Harris & Witte, *supra* note 64, at 101 (discussing “[t]he modern intellectual origin of education choice” as being introduced in 1955 by Milton Friedman in the form of a “voucher proposal,” which was later included in his “more widely circulated” 1962 work).

68. See FRIEDMAN, *supra* note 67, at 91–93. Due to “improvements in transportation and increasing concentration of the population in urban communities,” the “technical monopoly” argument for nationalizing schools has been “greatly weakened.” *Id.* at 93. The “technical monopoly” argument states that because certain rural

a level of flexibility and option detached from the governmental stranglehold on public schools, allowing parents to navigate a system more conducive to a robustly heterogeneous field of consumer-responsive education providers.<sup>69</sup> Friedman's voucher system of school choice provided the ideological underpinnings from which future ideations of choice (e.g., charters) would emerge.

Advancing the call for choice and market-driven school reforms, later education researchers echoed Friedman's exhortations and encouraged policymakers to relieve government from the responsibility of school governance.<sup>70</sup> John E. Chubb and Terry M. Moe, often-cited representatives of these later choice proponents, highlighted both the theoretical benefits of a market-based education system and the crippling inefficiencies and improvement-inhibiting nature of democratic (governmental) control of schools.<sup>71</sup> Departing from the pro-district collaboration model of charters espoused by Shanker, Chubb, and Moe viewed the districts themselves and their organizational and bureaucratic structure as the primary reason for suffering achievement scores. Therefore, increased choice and schools independent of the stagnating democratically controlled bureaucracies of traditional schools would better service U.S. students.<sup>72</sup>

Grounded in this theory of action, both federal and state law heavily promoted charter schools in the decades following Minnesota's original charter school law. Following Minnesota's lead, California became the second state to authorize charter schools in 1992, with thirty-six states total passing charter school legislation before the year

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districts do not have enough students to benefit from increased school choice/alternatives, then it would be technically more efficient to nationalize these schools. *Id.*

69. *See id.* at 93 ("The injection of competition would do much to promote a healthy variety of schools. It would do much, also, to introduce flexibility into school systems.").

70. *See* JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 2 (1990) (tracing the inability of schools to evolve and stagnating to worsening school performance to the "direct democratic control over their schools").

71. *See* Harris & Witte, *supra* note 64, at 102 (attacking "the bureaucratic paralysis of public education" instead of pursuing "the economic efficiencies to be gained from vouchers or other choice reforms").

72. *See* CHUBB & MOE, *supra* note 71, at 2 (stating that "the specific kinds of democratic institutions by which American public education has been governed for the last half century appear to be incompatible with effective schooling").



2000.<sup>73</sup> When President Obama signed the ARRA into law in 2009, twenty-six states' charter legislation capped the number of charter schools and ten did not have charter legislation at all.<sup>74</sup> Since then, 45 states and the District of Columbia have enacted charter legislation, with organizations such as The Center for Education Reform<sup>75</sup> and the National Alliance for Public Charter Schools (NAPCS)<sup>76</sup> documenting state-level charter activity and ranking state charter programs and legislation on a variety of factors. The NAPCS reports that since 2010, thirty-seven states have improved their ranking with charter-friendly legislative improvements such as lifting the caps on the number of charter schools allowed.<sup>77</sup>

Particularly given variations in state law and the regulatory freedom charter schools maintain, researchers have identified variance in charter school structures, noting five distinct organizational forms: (1) virtual charters, (2) "stand-alone" charters, (3) for-profit education management organization charters, (4) "cluster" of "loosely affiliated" charters, and (5) charter management organization charters.<sup>78</sup> Among these forms, researchers find curricular, managerial, cultural, linguistic, and operational differences, all reflective of the autonomy afforded to charters as part of a wider effort to reform educational governance in

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73. See CTR. FOR EDUC. REFORM, *supra* note 55, at 87–88.

74. See SUPERFINE, *supra* note 7, at 183–85 (discussing federal use of RTT funds to promote charter growth, such as conditions to eliminate state caps on charter schools).

75. See CTR. FOR EDUC. REFORM, NATIONAL CHARTER SCHOOL LAW RANKINGS & SCORECARD, 9–11 (Cara Candal ed., 2018), [https://edreform.com/wp-content/uploads/2019/01/CER\\_National-Charter-School-Law-Rankings-and-Scorecard-2018\\_screen\\_1-30-19.pdf](https://edreform.com/wp-content/uploads/2019/01/CER_National-Charter-School-Law-Rankings-and-Scorecard-2018_screen_1-30-19.pdf) (ranking charter school laws by four categories: (1) "authorizing," (2) "growth," (3) "operational autonomy," and (4) "funding equity").

76. See TODD ZIEBARTH, NAT'L ALL. FOR PUB. CHARTER SCHS., MEASURING UP TO THE MODEL: A RANKING OF STATE PUBLIC CHARTER SCHOOL LAWS 6–7 (10th ed. 2019), [https://www.publiccharters.org/sites/default/files/documents/2019-01/napcs\\_model\\_law\\_2019\\_web.pdf](https://www.publiccharters.org/sites/default/files/documents/2019-01/napcs_model_law_2019_web.pdf) (ranking charter school laws by 21 categories).

77. See *id.* at 3 ("Between 2010 and 2018, 37 states made policy improvements that resulted in increases in their scores in the report. States made the most progress in lifting caps, strengthening charter school and authorizer accountability, and making significant improvements to their facilities policies for charter schools.").

78. See Rand Quinn, Carrie R. Oelberger & Debra Meyerson., *Getting to Scale: Ideas, Opportunities, and Resources in the Early Diffusion of the Charter Management Organization, 1999-2006*, 118 TCHRS. C. REC. 1, 5–8 (2016).

hopes of addressing issues of equity and improving student outcomes.<sup>79</sup> Yet, certain fundamental similarities continue to stretch across charter schools in these states. While they continue to receive public funding, charter schools generally are subject to less regulation than traditional public schools.<sup>80</sup> They are held accountable for their performance partly through the charters that they operate under, which are issued by state authorizers, but their ability to compete with other charter schools for students largely drives their ability to innovate, survive, and ultimately thrive. In short, they operate under the idea that an educational marketplace will promote both educational quality and equity through enhanced freedom, competition, and innovation. However, despite the quick expansion of charter schools and popularity of the ideas underlying them, the empirical research on charter schools tells a murky story.

### B. Charter Schools and Educational Research

In 2017, pro-charter education scholars succinctly characterized research around charter school performance: “Some of America’s highest achieving schools are charters, but so are some of its worst.”<sup>81</sup> Research into charter schools has not only increased in quantity, but also in complexity and variation. As the concept of charter schools increased in popularity, the movement began to represent larger political ideas of privatization and assumed a more personalized and publicized character.<sup>82</sup> Therefore, studies objectively appraising charter school performance in the spirit of political neutrality were rare, often resulting in advocacy-driven studies from organizations ideologically

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79. See *id.* at 5–8, 12.

80. See RAVITCH, *supra* note 62, at 159.

81. Chester E. Finn, Jr., et al., *The District and Charter Sectors of American K-12 Education: Pros and Cons*, 11 J. SCH. CHOICE 9, 9 (2017) (discussing mixed results for charter school performance with recommendations for pro-market reforms for improvement and concluding “that charters are producing results equal to those of district schools”).

82. See HENIG, *supra* note 61, at 53 (“Charter schools became a high stakes issue in national politics because the issue has been defined as one that pits markets against government.”).

adherent to one camp or another.<sup>83</sup> However, despite this politicization, a number of studies on charter achievement in specific localities have emerged to provide additional pieces to the puzzle.

One organization, the Center for Research on Education Outcomes (CREDO) at Stanford University, seeks to produce “rigorous, non-partisan research and evaluation” to help “driv[e] . . . policy decisions” across the United States.<sup>84</sup> An area of focus for CREDO is charter school student performance. Looking at Texas, New York state, and Washington state, among others, CREDO has found mixed results for charter school performance, with charter students on average performing the same as their traditional school counterparts.<sup>85</sup> At the University of Chicago Consortium on School Research—another organization professing its commitment to neutrality<sup>86</sup>—researchers found that Chicago charter school students scored higher on average than Chicago non-charter school students.<sup>87</sup> For example, researchers reported

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83. See Sandra Vergari, *The Politics of Charter Schools*, 21 EDUC. POL’Y 15, 30 (2007) (stating that “there is a lack of relatively neutral researchers willing to confront research findings that may conflict with their own biases and willing to consider the complexity of the charter school phenomenon in an open-minded manner”).

84. See *About Us*, CREDO at Stanford Univ., <https://credo.stanford.edu/about-us> (last visited June 16, 2020).

85. See Press Release, CREDO AT STAN. U., CREDO at Stanford University Releases First In-Depth Examination of Charter School Impacts in Washington State, [https://credo.stanford.edu/sites/g/files/sbiybj6481/f/wa\\_2018\\_press\\_release.pdf](https://credo.stanford.edu/sites/g/files/sbiybj6481/f/wa_2018_press_release.pdf) (Washington, showing growth “on par” with traditional schools); Press Release, CREDO, Stanford Univ., CREDO at Stanford University Releases New York Statewide Charter School Study (Sept. 26, 2017), [https://credo.stanford.edu/sites/g/files/sbiybj6481/f/ny\\_statewide\\_press\\_release.pdf](https://credo.stanford.edu/sites/g/files/sbiybj6481/f/ny_statewide_press_release.pdf) (New York, showing “no difference” except for students at charters governed by a charter management organization); CREDO, STAN. U., CHARTER SCHOOL PERFORMANCE IN TEXAS 3 (2017), [https://credo.stanford.edu/sites/g/files/sbiybj6481/f/texas\\_2017.pdf](https://credo.stanford.edu/sites/g/files/sbiybj6481/f/texas_2017.pdf) (Texas, showing “stronger annual growth in reading” for charter students, but similar results in math).

86. See *Policy on Neutrality*, U. OF CHI. CONSORTIUM ON SCH. RES. (Jan. 31, 2017), <https://consortium.uchicago.edu/sites/default/files/2018-11/Consortium%20Neutrality%20Policy.pdf>.

87. See U. OF CHI. CONSORTIUM ON SCH. RES., CHICAGO’S CHARTER HIGH SCHOOLS: ORGANIZATIONAL FEATURES, ENROLLMENT, SCHOOL TRANSFERS, AND STUDENT PERFORMANCE 4 (2017), <https://consortium.uchicago.edu/sites/default/files/2018-10/Chicagos%20Charter%20High%20Schools-Nov2017-Consortium.pdf>.

“significantly higher” scores on standardized tests for tenth and eleventh grade students in charter schools.<sup>88</sup> The National Education Association (NEA) website, however, reports local news stories regarding charter school performance,<sup>89</sup> with titles such as “Florida Charters Fall Short on State Assessments,”<sup>90</sup> “State Takeovers of Low-Performing Schools: A Record of Academic Failure, Financial Mismanagement, & Student Harm,”<sup>91</sup> and “System Failure: Louisiana’s Broken Charter School Law.”<sup>92</sup> Despite efforts to provide unbiased information, conflicting data by locality and region as well as continued biased, advocacy-driven reporting muddle the already conflicting research around charter schools, particularly around their ultimate effects on student performance.

Although much of the research literature suggests little aggregated performance variation between charter schools and traditional public schools, a robust review of experimental studies of the impact of “No Excuses” charter school attendance on student achievement estimated a positive impact on math and literacy scores.<sup>93</sup> While the significance of the term “No Excuses” is itself the topic of political debate, the authors defined the key characteristics as: enrolling low-income students of color; employing a strict disciplinary code; expressing high

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88. See *id.* at 45 fig.21.

89. *Charter Schools*, NAT’L EDUC. ASS’N, <http://www.nea.org/home/16332.htm> (last visited Mar. 2, 2020).

90. *Florida Charters Fall Short on State Assessments*, CTR. FOR POPULAR DEMOCRACY (Jan. 23, 2017), <http://populardemocracy.org/news/publications/florida-charters-fall-short-state-assessments-0> (claiming that Florida’s charter schools have “failed to live up to the state’s mandate for ‘high standards of student achievement’”).

91. See *State Takeovers of Low-Performing Schools: A Record of Academic Failure, Financial Mismanagement & Student Harm*, CTR. FOR POPULAR DEMOCRACY (Feb. 5, 2016), <http://populardemocracy.org/news/publications/state-takeovers-low-performing-schools-record-academic-failure-financial> (discussing corporate threat to “local control of schools”).

92. See *generally* CTR. FOR POPULAR DEMOCRACY, *SYSTEM FAILURE: LOUISIANA’S BROKEN CHARTER SCHOOL LAW* (2015), [http://populardemocracy.org/sites/default/files/Charter-Schools-Louisiana-Report\\_web3.pdf](http://populardemocracy.org/sites/default/files/Charter-Schools-Louisiana-Report_web3.pdf) (discussing Louisiana charter school problems, including financial fraud and academic shortcomings).

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

expectations for students; and providing “extend[ed] instructional time” and targeted supports.<sup>94</sup> Specific “No Excuses” organizations, such as the Knowledge is Power Program (KIPP)—a nationwide charter management organization operating 242 charter schools focused on low-income communities—have been found to positively impact student achievement relative to traditional public school counterparts when controlling for a variety of factors.<sup>95</sup> Still, researchers have not ignored the potential drawbacks of this model for communities serving low-income students, arguing that this model rigidly enforces standards of behavior inconsistent with the cultures of the students serviced within the schools.<sup>96</sup> And in contrast, a recent U.S. Department of Education report focused on charter middle schools and post-secondary college outcomes and found no significant effect of middle school charter enrollment on college completion and/or achievement.<sup>97</sup>

Taking a bird’s-eye view of charter school research, Philip Gleason asserts, “Charter schools have not been a magic bullet for the U.S. public school system.”<sup>98</sup> However, research has demonstrated that despite wide variance in performance between charter schools themselves, the charter model has shown promising capacity to benefit “disadvantaged students in urban areas” and that this should warrant further exploration of the model itself.<sup>99</sup> On the other hand, some argue against the charter model as a mechanism for addressing inequity and racial justice, indicating the rate of school closure relative to traditional public schools and associated elevated educational instability imposed upon serviced communities negate any potential benefit charters may

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94. *See id.*

95. *See* Melissa A. Clark et al., *Do KIPP Schools Boost Student Achievement?*, 37 EDUC. EVALUATION & POL’Y ANALYSIS 419, 420 (2015); *How Is KIPP Structured?*, KIPP <https://www.kipp.org/schools/structure/> (last visited Mar. 14, 2020).

96. *See* Federico R. Waitoller et al., *The Irony of Rigor: ‘No-Excuses’ Charter Schools at the Intersections of Race and Disability*, 32 INT’L J. QUALITATIVE STUD. IN EDUC. 282, 292 (2019).

97. KATE PLACE & PHILIP GLEASON, NAT’L CTR. FOR EDUC. EVALUATION AND REG’L ASSISTANCE, INST. OF EDUC. SCI., *DO CHARTER MIDDLE SCHOOLS IMPROVE STUDENTS’ COLLEGE OUTCOMES?* 5–10 (2019).

98. Philip M. Gleason, *Charter Schools and the Public Interest*, 38 J. POL’Y ANALYSIS & MGMT. 1053, 1055 (2019).

99. *See id.*

otherwise bestow.<sup>100</sup> Moreover, despite some claims that charter schools significantly increase school segregation, this evidence too is mixed, and it appears that charter schools currently lead only to small increases in segregation at the most.<sup>101</sup>

Although charter schools are sometimes subjected to closing, they largely maintain wide-ranging autonomy and are detached from the direct instructional oversight and mandated curriculum otherwise experienced within the traditional public environment.<sup>102</sup> As performance outcomes vary between charter models across the United States, and the implications and effects of charter proliferation to the wider community are better understood, it remains uncertain as to what extent charter schools can deliver on promises of increased educational equity and performance. Still, despite a decline in the rate of charter school growth since 2013,<sup>103</sup> overall charter numbers continue to increase. With time, researchers should be more equipped to appraise the overall efficacy of the model and whether it will serve as a tenable alternative to traditional governance with respect to equity and educational opportunity.

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100. See Maria Paino et al., *The Closing Door: The Effect of Race on Charter School Closures*, 60 SOC. PERSP. 747, 747–48 (2017).

101. See Tomas Monarrez et al., *Do Charter Schools Increase Segregation?*, EDUC. NEXT (2009), <https://www.educationnext.org/do-charter-schools-increase-segregation-first-national-analysis-reveals-modest-impact/> (“How do charter schools affect segregation? The current empirical evidence fails to provide a definitive answer . . . . We find that, on average, an increase in the percentage of students going to charter schools leads to a small increase in the segregation of black and Hispanic students. . . .”).

102. See, e.g., Hannah Leone, *Chicago Public Schools Proposal to Close 2 Charter Schools Slammed as “Racist and Irresponsible” by Teachers Union*, CHI. TRIB. (Dec. 10, 2019), <https://www.chicagotribune.com/news/breaking/ct-cps-charter-school-closures-recommended-20191210-fqm25fny5fhmdlgedhvlhfc7ai-story.html>.

103. See Robin J. Lake et al., *Why Is Charter Growth Slowing? Lessons from the Bay Area*, EDUC. NEXT (2018), <https://www.educationnext.org/why-is-charter-school-growth-slowing-lessons-from-bay-area/> (discussing how the rate of charter expansion has declined from 6–8% annually to less than 2% since 2013).

## IV. TEACHER EVALUATION

Like reforms focused on strengthening charter schools, teacher evaluation reforms have quickly spread. Particularly, a wave of state laws in the late 2000s and early 2010s increased the frequency of teacher evaluations, specified in detail the ways in which teachers must be evaluated, and increased accountability for teachers' performance. In doing so, these laws formally tied teacher evaluation to student performance on standardized tests and grounded major decisions about teacher tenure and employment in these evaluations. From 2009 to 2013, as many as twenty-six states passed new legislation requiring teacher evaluations to include student achievement data, and by 2013, eighteen states and the District of Columbia tied evaluation to teacher tenure decisions.<sup>104</sup> By 2015, the number of states requiring objective measures of student performance to be included in teacher evaluations had grown to forty-three despite any evidence that the evaluations had improved teacher quality or positively impacted student performance. In response to the redesigned teacher evaluation systems, teachers in at least eight states have brought lawsuits challenging the new evaluations.<sup>105</sup> As of 2019, teacher evaluation systems in many states are in flux, with 34 states requiring "teacher evaluations to include objective measures of student growth[.]"<sup>106</sup>

Given their focus on improving teacher performance through enhanced consequences for failure to perform, teacher evaluation reforms are clearly grounded in the ideology that enhanced accountability can ultimately improve and equalize student performance. Yet, much like the case of charter schools, the fast spread of teacher evaluation quickly outstripped its empirical research base. This Part examines the history and theory of teacher evaluation reform, in addition to

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104. KATHRYN M. DOHERTY & SANDI JACOBS, NAT'L COUNCIL ON TEACHER QUALITY, STATE OF THE STATES 2013: CONNECT THE DOTS: USING EVALUATIONS OF TEACHER EFFECTIVENESS TO INFORM POLICY AND PRACTICE 5–6 (2013).

105. See Helen M. Hazi, *VAM Under Scrutiny: Teacher Evaluation Litigation in the States*, 90 CLEARING HOUSE 184, 184–85 (2019) (surveying legal challenges to teacher evaluation laws).

106. See NAT'L COUNCIL ON TEACHER QUALITY, STATE OF THE STATES 2019: TEACHER AND PRINCIPAL EVALUATION POLICY 6 (2019), [https://www.nctq.org/dmsView/NCTQ\\_State\\_of\\_the\\_States\\_2019\\_print\\_ready](https://www.nctq.org/dmsView/NCTQ_State_of_the_States_2019_print_ready).

the empirical research underlying it, and highlights the underlying governance issues that it entails.

*A. Theory and History of Teacher Evaluation*

Although teachers have long been considered one of the most important factors in shaping students' educational experiences, legal reforms directly aimed at improving teacher quality and effectiveness largely appeared only recently. The 1983 report *A Nation at Risk*, commissioned by President Reagan, provided one of the most visible early arguments for the value of teacher evaluation. This report argued that the educational system was failing to produce highly skilled workers, which would harm the ability of the U.S. to compete in a global economy.<sup>107</sup> The report recommended that the promotion and retention of teachers should be tied to an evaluation system that "includes peer review so that superior teachers can be rewarded, average ones encouraged, and poor ones either improved or terminated."<sup>108</sup> The 1983 report *Action for Excellence*, published by the Education Commission of the States, echoed such concerns around economic competitiveness and proposed a comprehensive framework for educational reform that included "systems for fairly and objectively measuring the effectiveness of teachers and rewarding outstanding performance."<sup>109</sup> While these recommendations did not propose the inclusion of the student performance data in teacher evaluations, the report promoted greater autonomy for principals through "sufficient discretion over personnel and fiscal planning."<sup>110</sup>

Later reports directly connected teacher evaluation to improvements in race-based disparities in student achievement. The highly influential 1998 publication *Good Teaching Matters: How Well-Qualified Teachers Can Close the Gap* claimed that "[i]f we but took the

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107. See NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 6–11 (1983), <https://files.eric.ed.gov/fulltext/ED226006.pdf> (comparing U.S. economic competitiveness to countries like Japan).

108. *Id.* at 30.

109. EDUC. COMM'N OF THE STATES, TASK FORCE ON EDUC. FOR ECON. GROWTH, *ACTION FOR EXCELLENCE: A COMPREHENSIVE PLAN TO IMPROVE OUR NATION'S SCHOOLS* 39 (1983).

110. *Id.* at 40.



simple step of assuring that poor and minority children had teachers of the same quality as other children, about half of the achievement gap would disappear.”<sup>111</sup> This argument—that poor teaching was the cause of the achievement gap—ultimately fueled local and national efforts to reform teacher evaluation policies in the years to come. Indeed, the No Child Left Behind Act of 2001 (NCLB) institutionalized the mission of “closing the achievement gap” by requiring states, districts, and schools to make “adequate yearly progress” (AYP) in the performance of racial and ethnic subgroups.<sup>112</sup> Schools that did not meet AYP were subject to a range of escalating consequences, such as being reconstituted by replacing teachers and administration, closed and reopened as a charter school, or being contracted with an outside organization to manage the school. NCLB specifically focused on enhancing teacher quality by requiring states to place a highly qualified teacher (HQT) in every public school classroom where core academic subjects are taught.<sup>113</sup> While NCLB granted states some flexibility, it generally defined an HQT as having a bachelor’s degree, being fully certified, and having demonstrated knowledge and skills in his or her field.

In 2009, a report from The New Teacher Project coupled teacher evaluation and student performance on standardized assessments in arguably its most influential form. The report stated that most traditional teacher evaluation systems have resulted in almost every teacher receiving a satisfactory rating. The report specifically found in its study of twelve school districts that more than 99% of teachers at schools with binary rating systems were rated as satisfactory.<sup>114</sup> It accordingly recommended a “comprehensive performance evaluation and development system that fairly, accurately and credibly differentiates teachers based on their effectiveness in promoting student achievement[.]”<sup>115</sup> The central implication of the report was that ineffective teachers were allowed to remain in the classroom and that administrators needed a standardized and objective measure of teacher performance to inform

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111. KATI HAYCOCK, *GOOD TEACHING MATTERS: HOW WELL-QUALIFIED TEACHERS CAN CLOSE THE GAP* 3 (1998).

112. *See* 20 U.S.C.S. § 6311(b)(2)(C)(v)(II)(bb) (2002).

113. *See* 20 U.S.C.S. § 7801(23) (2002) (prior to 2015 amendment).

114. *See* DANIEL WEISBERG ET AL., *THE NEW TEACHER PROJECT, THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE AND ACT ON DIFFERENCES IN TEACHER EFFECTIVENESS* 11 (2d ed. 2009).

115. *Id.* at 27.

retention and dismissal. Overall, the report advocated for a radical reform of how district and school administrators manage teachers by challenging due process rights, seniority, and assignment guidelines articulated in many collective bargaining agreements. In this proposed paradigm, teachers require a highly structured managerial regime that includes more robust measures of performance, with the potential of performance pay as an incentive and reassignment or termination as a disincentive.

The month after the report's publication, while states were reeling from the financial crisis of 2008, President Obama and U.S. Secretary of Education Arne Duncan announced the ARRA and RTT.<sup>116</sup> However, the push for increased teacher evaluation and accountability spread beyond the scope of RTT funding distribution. By 2012, 30 states required objective measures of student performance to be included in teacher evaluations; 11 states required that student growth be the preponderant criterion in teacher evaluations; and 9 states required that evidence of teacher performance be included in tenure decisions.<sup>117</sup> While there are several potential approaches for states to link student and teacher data, states generally have focused on value-added modeling (VAM)—a process aimed at linking students' test score growth over a period of time (such as a school year) to an individual teacher.<sup>118</sup> Many laws also require evaluation systems to incorporate administrator observations and student ratings of teachers into evaluations.<sup>119</sup> By 2013, forty-five states accordingly required classroom observations of teachers to be incorporated into the teacher evaluation.<sup>120</sup> So, promoted by forces at both state and federal levels, enhanced accountability to improve teacher effectiveness and

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116. See *supra* notes 23–33 and accompanying text.

117. See DOHERTY & JACOBS, *supra* note 10, at 2 (summarizing state requirements for various education policies).

118. See Audrey Amrein-Beardsley & Jessica Holloway, *Value-Added Models for Teacher Evaluation and Accountability: Commonsense Assumptions*, 33 EDUC. POL'Y 516, 516–17 (2019).

119. See STEVEN GLAZERMAN ET AL., BROWN CTR. ON EDUC. POLICY AT BROOKINGS, PASSING MUSTER: EVALUATING TEACHER EVALUATION SYSTEMS 3 (2011) (discussing components of modern teacher evaluation systems).

120. See DOHERTY & JACOBS, *supra* note 104, at 14 (surveying the state of teacher evaluation laws).

ultimately close student achievement gaps quickly burst onto the educational policy landscape.

### *B. Teacher Evaluation and Educational Research*

Although newly designed teacher evaluation reforms focused on student achievement have quickly spread, educational research has revealed that they entail several problems that have not been addressed. They particularly raise significant psychometric issues. The Standards for Educational and Psychological Testing, developed jointly by the American Educational Research Association, American Psychological Association, and National Council on Measurement in Education, state that testing practices must be validated and have sufficient reliability for each intended use.<sup>121</sup> However, recently developed teacher evaluation systems generally incorporate data from student achievement assessments that have not been deemed reliable or valid for such uses.<sup>122</sup> As such, it is inappropriate to simply incorporate existing student achievement tests into new teacher evaluation systems. To validate these teacher evaluation systems appropriately, states would need to conduct validity studies, which draw in part on “student data from large-scale field tests [and], if necessary, from operational administrations of the assessments and on special research studies[.]”<sup>123</sup>

Given these kinds of issues, estimates of teacher performance have proven very inconsistent and can differ from test to test, year to

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121. AM. EDUC. RESEARCH ASS'N, AM. PSYCHOLOGICAL ASS'N & NAT'L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 9–36 (1999) (discussing principles for appropriate test interpretation and use).

122. Audrey Amrein-Beardsley, *Methodological Concerns About the Educational Value-Added Assessment System*, 37 EDUC. RESEARCHER 65, 66–67 (2008) (addressing causes of test invalidity).

123. JOAN L. HERMAN ET AL., NAT'L CTR. FOR RESEARCH ON EVALUATION, STANDARDS, & STUDENT TESTING, GUIDANCE FOR DEVELOPING AND SELECTING ASSESSMENTS OF STUDENT GROWTH FOR USE IN TEACHER EVALUATION SYSTEMS 4 (2011) (raising considerations for using student achievement growth in teacher evaluation).

year, and class to class.<sup>124</sup> Evaluations can similarly differ when various statistical models are employed. Many factors besides teachers can influence student performance.<sup>125</sup> Modern teacher evaluation systems generally do not account for student characteristics that can influence academic progress, including family income, ethnicity, and a range of other extra-school influences.<sup>126</sup> As such, teachers who teach several English language learners or students with disabilities have shown lower student achievement gains than when they teach other students.<sup>127</sup> Moreover, there are several factors inside schools that influence the capacity of VAMs to score teacher effectiveness well, such as students' other teachers, students' previous teachers, tutors, curriculum materials, and other resources like libraries.<sup>128</sup> Generally examining such evidence, the National Research Council's Board on Testing and Assessment stated, "VAM estimates of teacher effectiveness should not be used as the sole or primary basis for making operational decisions because the extent to which the measures reflect the contribution of the teachers themselves . . . is not understood."<sup>129</sup>

Aside from such psychometric issues, there is little indication that the accountability mechanisms of teacher evaluation systems actually constitute incentives with the potential to significantly influence teachers' performance. The variety of factors that can influence student performance in concert with teacher accountability can discourage

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124. See EVA L. BAKER ET AL., ECON. POLICY INST., PROBLEMS WITH THE USE OF STUDENT TEST SCORES TO EVALUATE TEACHERS 2 (2010) (presenting a particularly strong summary of evidence on the instability in teacher evaluation scores).

125. See Urie Brofenbrenner, *Ecological Models of Human Development*, in INTERNATIONAL ENCYCLOPEDIA OF EDUCATION 1643 (1994).

126. See Rodney S. Whiteman et al., *Revamping the Teacher Evaluation Process*, 9 CTR. FOR EVALUATION & EDUC. POL'Y 1, 8 (2011).

127. See LINDA DARLING-HAMMOND, STANFORD CTR. FOR OPPORTUNITY POLICY IN EDUC., CREATING A COMPREHENSIVE SYSTEM FOR EVALUATING AND SUPPORTING EFFECTIVE TEACHING 22–23 (2012) (highlighting the equity implications of teacher evaluation); GENE V. GLASS, ARIZONA STATE UNIV. COLL. OF EDUC., TEACHER EVALUATION 7.9–7.11 (2004) (policy brief examining factors influencing teacher evaluation ratings with particular student subgroups).

128. See DARLING-HAMMOND, *supra* note 127, at 21.

129. NAT'L RESEARCH COUNCIL, LETTER REPORT TO THE U.S. DEPARTMENT OF EDUCATION ON RACE TO THE TOP FUND 10 (2009).

teachers from wanting to work in schools with poor and minority students.<sup>130</sup> Further, teachers have historically placed much value on self-determinism and authority over classroom work.<sup>131</sup> External controls, such as teacher evaluation policies, tend to reduce teacher control and self-determinism and shift the focus of their work in ways that may reduce its perceived success of students and the intrinsic rewards that teachers highly value.<sup>132</sup> As such, teacher evaluation may negatively influence retention and professional engagement, particularly in high-poverty and high-minority schools.

In short, educational research reveals that current teacher evaluation systems are riddled with problems and might actually do more harm than good. Yet, they are grounded in ideological underpinnings that connect heightened accountability with increased performance, particularly in service of educational equity. At the very least, they highlight the appeal that the concept of accountability has for educational reform efforts and the danger entailed by proceeding with reform when ideology and not evidence leads the way.

## V. TEACHERS UNIONS

Public sector unions and teachers unions in particular have long held a central place in U.S. political debates. Vocal proponents have underscored their virtues, while critics have decried the problems they raise. Indeed, these broad claims have undergirded many of the arguments that pit teachers unions against charter school and teacher evaluation reforms. However, such arguments have rarely occurred in the context of discussions grounded strongly in evidence about the types of governance power that teachers unions actually wield or evidence about their effects, including on educational equity.

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130. See BAKER ET AL., *supra* note 124, at 4.

131. See LARRY CUBAN, *HOW TEACHERS TAUGHT: CONSTANCY AND CHANGE IN AMERICAN CLASSROOMS: 1890-1990*, at 262–64 (1984).

132. See Linda Darling-Hammond & Elle Rustique-Forrester, *The Consequences of Student Testing for Teaching and Teacher Quality* (noting the effects of student testing on teachers' job satisfaction), in *USES AND MISUSES OF DATA FOR EDUCATIONAL ACCOUNTABILITY AND IMPROVEMENT, THE 104TH YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION: PART II*, at 289, 309–10 (Joan L. Herman & Edward H. Haertel eds., 2005).

Proponents of public sector unions generally argue that collective bargaining raises wages and reinforces governmental employees' due process protections.<sup>133</sup> As a result, these employees become more satisfied and work more efficiently. Those who support teachers unions sometimes argue that they serve a key role in promoting social justice for students, particularly those from minority and high-poverty backgrounds.<sup>134</sup> Professors Richard D. Kahlenberg and Jay P. Greene specifically argue that, because teachers work closely with students and parents, teachers' interests largely converge with students' interests on the most important education policy issues.<sup>135</sup> Some have also framed teachers unions as critical for ensuring that teachers are treated like other professionals and not treated arbitrarily by administrators.<sup>136</sup> Indeed, self-governance and the ability to exercise discretion are hallmarks of the traditional professions, like law and medicine.<sup>137</sup>

On the other hand, critics have often argued that public sector unions lead to significant distortions in democratic governance that ultimately create inefficiency.<sup>138</sup> This critique flows from the idea that managers in public sector jobs are either elected officials or responsible to them, while union leaders are accountable only to their membership.

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133. See Dan Goldhaber, *Are Teachers Unions Good for Students?*, in COLLECTIVE BARGAINING IN EDUCATION 141, 153 (Jane Hannaway & Andrew J. Rotherham eds., 2006); Frederick M. Hess & Andrew P. Kelly, *Scapegoat, Albatross, or What? The Status Quo in Teacher Collective Bargaining* (examining arguments for and against teachers unions), in COLLECTIVE BARGAINING IN EDUCATION 53, 53 (Jane Hannaway & Andrew J. Rotherham eds., 2006).

134. See LOIS WEINER, *THE FUTURE OF OUR SCHOOLS: TEACHERS UNIONS AND SOCIAL JUSTICE* 3–4 (2012) (discussing the efforts of teachers unions to promote social justice).

135. See Richard D. Kahlenberg & Jay P. Greene, *Unions and the Public Interest*, EDUC. NEXT, Winter 2012, at 60, 63 (arguing for more expansive collective bargaining rights for teachers).

136. See Richard D. Kahlenberg, *The History of Collective Bargaining Among Teachers* (describing how principals may abuse authority in a school to discipline teachers), in COLLECTIVE BARGAINING IN EDUCATION 4, 9–10 (Jane Hannaway & Andrew J. Rotherham eds., 2006).

137. See Robert Schultze, *What Does It Mean to Be a Self-governing Regulated Profession?*, 4 J. PROP. TAX ASSESSMENT & ADMIN., no. 3, 2012, at 41, 41–44 (articulating attributes of self-governing professions).

138. See Martin H. Malin, *William R. Stewart Lecture: The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1389 (2009) (providing an overview of public sector union critiques).

As such, unions and public sector management create work rules that are beneficial to a smaller interest group than the broader public that has chosen their leaders.<sup>139</sup> Exacerbating this problem, teachers unions can exercise an outsized influence on school board elections, thus giving management strong incentives to make a deal with teachers unions that is better than teachers would otherwise receive.<sup>140</sup> As a result, unproductive workers become unreasonably protected and inefficient.<sup>141</sup>

Despite these strong claims on both sides about public sector and specifically teachers unions, the number of unionized public sector workers has grown dramatically. The proportion of public sector workers has grown far greater than that of private sector workers.<sup>142</sup> Still, the number of teachers in unions has recently begun to decrease, particularly given the increasingly hostile political and policy environment.<sup>143</sup>

#### A. Theory and History of Teachers Unions

Collective bargaining laws—generally enacted by states in the 1960s—have structured the distribution of governance power over the work of public sector employees, including teachers.<sup>144</sup> To date, 38 states have granted at least some of their public sector workers the right

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139. See David Brooks, Opinion, *Make Everybody Hurt*, N.Y. TIMES (Feb. 21, 2011), <https://www.nytimes.com/2011/02/22/opinion/22brooks.html?mtr-ref=www.google.com&gwh=BC1C8ABD40E38D986CD1CA5EBFC70A02&gwt=pay&assetType=REGIWALL>.

140. See generally Terry M. Moe, *The Union Label on the Ballot Box*, EDUC. NEXT (2006), <https://www.educationnext.org/the-union-label-on-the-ballot-box/>.

141. See Stephen Sawchuck, *Relationship Between Advocacy Groups, Unions Uneasy*, EDUC. WK. (May 21, 2012), [http://www.edweek.org/ew/articles/2012/05/23/32adv-union\\_ep.h31.html](http://www.edweek.org/ew/articles/2012/05/23/32adv-union_ep.h31.html).

142. In 2012, 35.9% of public sector workers were represented by unions, while 6.6% of private sector were represented by unions. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2012 Jan. 23, 2012), [https://www.bls.gov/news.release/archives/union2\\_01232013.pdf](https://www.bls.gov/news.release/archives/union2_01232013.pdf).

143. For example, in 2017, “44.9 percent of U.S. elementary and middle school teachers were union members,” while 46.9% were in unions in 2016. Mike Antonucci, Opinion, *As Union Membership Drops Among Teachers, Will Weaker States Survive Janus?*, THE74MILLION (Jan. 31, 2018), <https://www.the74million.org/article/as-union-membership-drops-among-teachers-will-weaker-states-survive-janus/>.

144. See Kahlenberg, *supra* note 136, at 14–15.

to unionize.<sup>145</sup> However, the fundamental ideas underlying these public sector collective bargaining laws extend back to those originally driving the private sector. The Wagner Act, which was originally passed in 1935 and later became the National Labor Relations Act (NLRA), provided the right to form unions and collectively bargain to many groups of private sector workers.<sup>146</sup> The fundamental assumptions about governance underlying the NLRA generally turn on the idea that collective bargaining takes place in an industrial workplace.<sup>147</sup> As such, management is to control all business decisions, and the role of workers is to simply enact tasks given by management.<sup>148</sup>

State laws governing teachers unions differ across states, but they generally track the logic of the NLRA.<sup>149</sup> Still, state statutes vary widely over the scope of what can be bargained and therefore what is appropriately conceptualized as governable purely by the state. Under state statutes and court decisions, the issues for bargaining generally can be divided into three categories: mandatory, permissive, and excluded.<sup>150</sup> Mandatory issues must be bargained and primarily relate to employee working conditions. These “bread and butter” issues generally include compensation and working conditions like hours and benefits. Permissive issues are usually a step away from core employment issues and can include matters close to education policy, like textbook selection. Issues prohibited from bargaining generally relate to policy or managerial decisions, such as setting staffing needs. However, classifying issues as either relating to working conditions or managerial authority or policy is complex and laden with value judgments. As the Court of Appeals of Maryland stated, “[E]very managerial decision in

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145. See Chris Edwards, *Public-Sector Unions*, CATO INST. TAX & BUDGET BULL., Mar. 2010, [https://www.cato.org/sites/cato.org/files/pubs/pdf/tbb\\_61.pdf](https://www.cato.org/sites/cato.org/files/pubs/pdf/tbb_61.pdf).

146. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449.

147. See Martin H. Malin & Charles T. Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL’Y 885, 897–902 (2007) (analyzing the underpinnings of charter schools and teachers unions in relation to each other).

148. See *id.* at 898.

149. See Superfine & Gottlieb, *supra* note 22.

150. See Charles J. Russo, *A Cautionary Tale of Collective Bargaining in Public Education: A Teacher’s Right or Tail Wagging the Dog?*, 37 U. DAYTON L. REV. 317, 330 (2012) (examining the conflict between public sector unions and their employers in Wisconsin and Ohio).



some way relates to ‘salaries, wages, hours, and other working conditions,’ and is therefore . . . negotiable.”<sup>151</sup> On the other hand, “virtually every such decision also involves educational policy considerations and is . . . arguably nonnegotiable.”<sup>152</sup>

Teacher evaluation particularly reflects the problems in making such decisions. As Professor Martin H. Malin argued, “Evaluations can affect job security, pay, and assignments. However, how evaluations are conducted also raises questions of educational policy.”<sup>153</sup> As a result, states have treated teacher evaluation differently. States like Florida, Michigan, and Wisconsin have statutorily prohibited bargaining over the “process and substance of teacher evaluations,”<sup>154</sup> but courts and labor boards in Connecticut, Maine, and New Hampshire found that teacher evaluation systems are a permissive bargaining area subject.<sup>155</sup> Indeed, although teachers often want to give input on important policy issues, they cannot because collective bargaining laws are not geared for such action.<sup>156</sup> Some proponents of collective bargaining accordingly argue that the industrial approach to teaching promoted by state law does little to support teacher buy-in to education policy and administrative decision-making, which is a critical factor in school performance.<sup>157</sup> Moreover, when stopped from negotiating over issues, teachers unions have means available to them to block the passage and implementation of education reforms.<sup>158</sup>

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151. *Montgomery Cty. Educ. Ass’n v. Bd. of Educ.*, 534 A.2d 980, 986 (Md. 1987).

152. *Id.*

153. Malin & Kerchner, *supra* note 147, at 917.

154. See Mark Paige, *Applying the “Paradox” Theory: A Law and Policy Analysis of Collective Bargaining Rights and Teacher Evaluation Reform from Selected States*, 2013 BYU EDUC. & L.J. 21, 30 (2013).

155. *Wethersfield Bd. of Educ. v. State Bd. of Labor Relations*, 519 A.2d 41, 44 (Conn. 1986); *In re Pittsfield Sch. Dist.*, 744 A.2d 594, 597 (N.H. 1999); *Saco-Valley Teachers Ass’n v. MSAD #6 Bd. of Dirs.*, No. 79-56, at \*4 (Me. L.R.B. Aug. 7, 1979).

156. See Malin, *supra* note 138, at 1389–90.

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

158. See Mark Paige, *Applying the “Paradox” Theory: A Law and Policy Analysis of Collective Bargaining Rights and Teacher Evaluation Reform from Selected States*, 2013 BYU EDUC. & L.J. 21, 28 (2013).

As noted above, teachers unions have come under heavy attack in both legislatures and courts. One of the most powerful attacks recently came in the form of the Supreme Court's 2018 *Janus v. AFSCME, Council 31* decision. In *Janus*, the Court deemed unconstitutional the collection of "agency fees" from non-union public sector workers, including teachers.<sup>159</sup> The decision immediately signaled the demise of the laws of the twenty-one states that permitted the agency fee collections.<sup>160</sup> Without the funds provided by agency fees and associated incentives to join unions, union membership and capacity have already begun to decrease in states like Wisconsin that have already undergone such changes.<sup>161</sup> In light of other such attacks and the rise of charter schools, the long-term future for teachers unions has become unclear.

### B. Teachers Unions and Educational Research

Despite the often highly politicized claims by critics and proponents of teachers unions, there is very little empirical research on their effects on instruction or equity in particular. As scholars Jane Hannaway and Andrew J. Rotherham argued, "the lack of empirical evidence on the effects of collective bargaining by teachers on educational practice, finance, and operations is striking."<sup>162</sup> Given proponents' arguments, one might expect teachers unions to influence educational equity issues through advocacy work. As the logic goes, if teachers' interests align with students' interests, equity would be at the forefront of union activities in locations that face serious equity issues and in

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159. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018).

160. See Mike Antonucci, *Teachers Unions at Risk of Losing "Agency Fees,"* EDUC. NEXT (2016), <https://www.educationnext.org/teachers-unions-risk-losing-agency-fees-friedrichs-california/>.

161. For example, Wisconsin union members "made up 14.2% of workers before" the passage of the state's right-to-work law but 8.3% after. Dave Umhoefer, *For Unions in Wisconsin, a Fast and Hard Fall Since Act 10*, MILWAUKEE J. SENTINEL (Nov. 27, 2016), <https://projects.jsonline.com/news/2016/11/27/for-unions-in-wisconsin-fast-and-hard-fall-since-act-10.html>.

162. Jane Hannaway & Andrew J. Rotherham, *Conclusion*, in COLLECTIVE BARGAINING IN EDUCATION 257, 260 (Jane Hannaway & Andrew J. Rotherham eds., 2006).

lobbying efforts. Indeed, some teachers unions have foregrounded social justice concerns in their organizing.<sup>163</sup> However, the research base is mixed. Some studies have found that union members perceive their unions as too political or extreme,<sup>164</sup> but other studies suggest that members want their unions to be more politically active, to fight for policy changes, or to support their professional lives.<sup>165</sup>

There is some evidence supporting claims that teachers unions decrease the efficiency of school systems to increase and equalize student learning and achievement for every dollar spent. Collective bargaining generally appears to increase operational costs, primarily in terms of leveraging smaller class sizes and higher teacher compensation.<sup>166</sup> Moreover, collective bargaining agreements can constrain managerial decision-making in areas like teacher evaluation and transfer,<sup>167</sup> and it can result in back-loaded teacher salaries that reward teachers for time spent in a district rather than performance.<sup>168</sup> However, there is no consistent evidence that these constraints or costs result in stronger teacher performance or better outcomes for any group of students.<sup>169</sup> Although teachers unions are sometimes accused of preventing the assignment of highly effective teachers to struggling schools (and thus widening the disparity between schools that serve

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163. See LOIS WEINER, *THE FUTURE OF OUR SCHOOLS: TEACHERS UNIONS AND SOCIAL JUSTICE* 57–58 (2012).

164. See MARJORIE MURPHY, *BLACKBOARD UNIONS: THE AFT & THE NEA, 1900–1980*, at 252, 255 (1990).

165. See Kara Popiel, *Classroom, Community, and Contract: A New Framework for Building Moral Legitimacy and Member Activism in Teacher Unions*, in *TEACHER UNIONS IN PUBLIC EDUCATION* 121, 129–31 (Nina Bascia ed., 2015).

166. See Goldhaber, *supra* note 133.

167. See Katharine O. Strunk & Jason A. Grissom, *Do Strong Unions Shape District Policies? Collective Bargaining, Teacher Contract Restrictiveness, and the Political Power of Teachers' Unions*, 32 *EDUC. EVALUATION & POL'Y ANALYSIS* 389, 401–02 (2010) (finding that districts with stronger unions allow administrators less flexibility).

168. See Eric Brunner et al., *Teacher Labor Market Responses to Statewide Reform: Evidence from Michigan*, 41 *EDUC. EVALUATION & POL'Y ANALYSIS* 403, 405 (2019).

169. See Katharine O. Strunk, *Are Teachers' Unions Really to Blame? Collective Bargaining Agreements and Their Relationships with District Resource Allocation and Student Performance in California*, 6 *EDUC. FIN. & POL'Y* 354, 356–57 (2011) (finding that districts with more restrictive contracts have higher spending but that this spending is often driven by administrator compensation and instruction).

high-minority communities and those that do not), the evidence is also mixed on this issue.<sup>170</sup>

To be sure, “professional unionism” might have some potential to strengthen student learning opportunities and particularly equity. This approach focuses on “joint custody” between districts and unions of any reform; collegial working relations, collaboration, and ongoing-problem solving rather than periodic negotiations; and a shared concern for public interest.<sup>171</sup> Though, this evidence too is limited about the actual impact on student learning opportunities and outcomes, including issues of equity. Moreover, this approach is atypical and certainly not encouraged by the legal framework underlying collective bargaining.<sup>172</sup> So, despite the central place of teachers unions in political and legal dialogues around teacher evaluation and charter schools, there is only a limited and mixed evidentiary base to support both the strong positive and negative claims about role of teachers unions in educational governance.

## VI. TOWARD A NEW MODEL OF EDUCATIONAL GOVERNANCE

In the twenty-first century, several major educational reform approaches have been built on the notion that shifts in governance will lead to improvements in teaching and ultimately stronger and more equitable student outcomes. These approaches are generally animated by the broad theory of action that school, teacher, and student performance will improve with a combination of less regulation about how to educate but more accountability for actual performance. The promotion of charter schools, expansion of teacher evaluation systems, and attacks on teachers unions are strongly rooted in this theory of action. While each of these three efforts were built on their own theory of action, they have operated partially in coordination with one another by design.

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170. See Lora Cohen-Vogel et al., *Seniority Provisions in Collective Bargaining Agreements and the “Teacher Quality Gap,”* 35 EDUC. EVALUATION & POL’Y ANALYSIS 324, 334 (2013) (finding little evidence of within-district variation in teacher quality between more and less disadvantaged schools in Florida given union contract rules).

171. See generally CHARLES T. KERCHNER & JULIA E. KOPPICH, A UNION OF PROFESSIONALS: LABOR RELATIONS AND EDUCATIONAL REFORM (1993).

172. See TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA’S PUBLIC SCHOOLS 246 (2011).

This overall strategy has been very effective in transforming school systems, dominating the public and professional discourse, and embedding its logic in both political and policy spheres. Both charter schools and teacher evaluation systems have proliferated under the rhetoric of improving and equalizing student outcomes. Conversely, public sector unions—and particularly teachers unions—have faced a series of significant setbacks, partially under the same rhetoric. Indeed, the approaches conceptually tie into the broader political idea of neoliberalism, wherein the private sector, given sufficient room to operate, can be effectively harnessed to promote public good.<sup>173</sup> Additionally, the approaches complement each other in distinct ways, such as the rollback of teachers unions' collective bargaining rights in certain states that enacted new teacher evaluation legislation. Without these changes it is unlikely that charter schools would proliferate as rapidly or that value-added teacher evaluation would become a standard model across the country. Moreover, the reforms are at least grounded in the notion that autonomy at the local level is a crucial element of effective educational improvement.

However, the political power of these approaches appears to have far outstripped the evidentiary base underlying each of them, which is limited or mixed at best. Although charter schools have been partly aimed at improving student performance and equity, there is no clear and consistent finding that they actually do so, and they may in fact exacerbate preexisting equity issues. The research underlying teacher evaluation is also far from clear and arguably suggests that recent teacher evaluation reforms have the potential to do more harm than good, particularly regarding minority and low-income students. Indeed, rather than ensuring every child has a well-trained teacher, this component of the reform may have decreased the retention of early-career teachers in the most high-need schools.<sup>174</sup> The research underlying the effects of teachers unions is similarly limited, mixed, and ambiguous. While certain forms of collective bargaining might lead to

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173. See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2007) (tracing the development of neoliberal ideology in the twentieth and twenty-first centuries).

174. See Brunner et al., *supra* note 168, at 413 (providing empirical evidence that early-career teachers at hard-to-staff schools were more likely to leave the profession after evaluation and tenure reforms).

stronger and more equitable student learning and outcomes, this research too is limited, and the current structure of collective bargaining laws weighs against such forms. In short, these approaches to educational policy and governance appear to be driven much more by an ideological commitment to less regulation and more accountability than an actual understanding of what it might take to improve teaching and learning.

Despite the failure of these much-hyped and heavily resourced reforms to significantly impact race-based performance and attainment gaps, there are a few interrelated principles that may help reform educational governance in improving teaching and learning in high-need districts and schools. First, reformers should proceed from the notion that modifying educational governance in ways that will theoretically influence the classroom is not enough. Unlike efforts centering on charter schools, teacher evaluation, and teachers unions, legislation to modify educational governance should foreground changes in teaching and learning through a theory of action that demonstrates how governance can most directly and sustainably positively impact teaching and learning.<sup>175</sup> Decades ago, Professor Richard Elmore highlighted the utility of “backward-mapping” when designing educational reform—beginning with sharply conceiving the intended ground-level changes in teaching and learning, and then tracing them back to the organizational and policy structures needed to promote such changes, instead of the other way around.<sup>176</sup> Such an approach foregrounds the clear establishment of an evidentiary base over theories of governance that are untethered from empirical reality, and should animate efforts to promote greater educational quality and equity.

Second, educational governance reform efforts should be sensitive to the need to tailor reform to local context. Education reform is complex precisely because it requires the active adaptation of law and policy to local contexts, which can differ across states, districts,

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

176. See Richard F. Elmore, *Backward Mapping: Implementation Research and Policy Decisions*, 94 POL. SCI. Q. 601, 602–05 (1979) (arguing for the utility of conceptualizing desired change at the ground level in implementation research).

schools, and even classrooms. Professor Anthony Bryk and colleagues accordingly argue that educational reform efforts should move “away from simplistic thinking about solutions in terms of ‘What Works?’ toward a more realistic appraisal of ‘What works, for whom, and under what set of conditions?’”<sup>177</sup> The existence of such variation across local contexts is partly the attraction of reform efforts focused on less regulation about what should happen at the local level and heightened accountability for outcomes. It also drives the recognition that treating teachers as professionals who should exercise discretion to deal with the variation in local conditions is critical.

Third, educational governance reform should not simply abandon attention at higher-level governmental institutions, but instead devote significant attention to what it might take to promote effective reform at the local level in a way that is much more nuanced than simply requiring performance for particular outcomes. As noted above, the educational reform policies that have “worked” have generally been responsive to the problems that educational practitioners actually face in schools and classrooms by offering directly relevant tools, guidance, and resources. However, a completely “hands-off” approach to what should happen at local levels and the lack of attention to the implementation of educational reform at local levels have proven to be major educational policy problems for decades. Indeed, by rewarding states that swiftly push through standardized reform packages, RTT has provided a case study in the range and limits of federal policy reforms to increase performance and mitigate disparities. As such, authority at higher levels should devote significant attention to broadly framing local problem definition activity, providing localities with needed support, and holding localities accountable for engaging specifically in this process. In short, educational governance reform efforts should maintain a coherent focus on educational improvement and equity in particular across all levels, permit a certain amount of variation even in defining equity to effectively promote reform, and ensure that localities not only have the incentives to engage in effective reform, but the evidence-based support they need as well.

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177. See BRYK ET AL., *supra* note 17, at 11–14 (2015) (articulating the theoretical underpinnings for educational reform using improvement science principles).

## VII. CONCLUSION

For decades, governmental institutions at both the federal and state levels have focused intensely on modifying educational governance to influence what happens in schools. Following trends that began in the 1980s, several modern educational reforms have operated under the rationale that increasing performance accountability and decreasing governmental regulation will improve classroom instruction and reduce race-based disparities in student performance and attainment across a diverse range of districts and schools within varying state political and organizational contexts. The expansion of charter schools, changes in teacher evaluations, and limitations on the influence of teachers unions have been implemented in concert with each other directly under this rationale. However, there is scant evidence that this package of reforms has realized these goals, and such reforms have arguably exacerbated existing inequities. While efforts to reform educational governance should not be abandoned, they should be reconceptualized to reflect an evidence-based approach to the relationships between local context and governmental institutions in ways that actually have the potential to effectively promote educational improvement and equity.