

# MANDATED MEDIOCRITY: MODERNIZING EDUCATION LAW BY REDUCING MANDATES AND INCREASING PROFESSIONAL DISCRETION

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*“[S]chools have not changed since their design nearly a century ago, when the economic rage was the mass production system. In this factory model of education, students are viewed as products, teachers as assembly workers, and school administrators as floor supervisors.”*

—Adam Urbanski, former high-school teacher and local teacher’s union president.<sup>1</sup>

*“[T]here are no uniform answers. . . . You have to ask yourself, what is the right answer for a particular situation and school.”*

—Anthony Alvarado, San Diego school administrator.<sup>2</sup>

*Public education in the United States is a favorite target of ambitious policymakers. Repeated rounds of reform have attempted to modernize public schools by imposing new mandates—new tests, new curricular requirements, new teacher training. But rather than being helpful steps forward, these efforts simply reiterate the nineteenth-century assembly-line approach to public schooling. Mandates constrain the discretion of teachers, standardizing instructors with the goal of churning out standardized students. This Article argues that policymak-*

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<sup>1</sup> Adam Urbanski, *Real Change is Real Hard: Lessons Learned in Rochester*, 4 STAN. L. & POL’Y REV. 123, 123–24 (1992–1993).

<sup>2</sup> James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 223 (2003).

*ers would better foster educational achievement by restricting the mandates they impose on public schools. I distinguish between regulatory-zone subjects, which generally are appropriate to address with mandates, and discretionary-zone subjects, which generally are not appropriate to address with mandates.*

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## INTRODUCTION

Mandates are an unmistakable feature of public schooling in the United States. Across-the-board directives dictate educational practice on matters affecting the entire scope of school operations. These rules heavily constrain the discretion of staff at the school level to make judgments about the best means of meeting the needs of individual students.<sup>3</sup>

These mandates affect virtually all school functions, including fundamental decisions about hiring, selecting, retaining, and promoting staff. Rules, for example, limit the pool of teachers and administrators to those who have passed specified benchmark tests and taken prescribed coursework, even though these requirements have little demonstrated relationship to effective practice.<sup>4</sup> Mandates limit the classrooms to which staff can be assigned, superseding school-based discretion to match staff to individual student needs.<sup>5</sup> Mandates specify in minute detail the terms of teacher and administrator evaluation, constraining school-based discretion to assess performance based on school-specific and student-specific priorities.<sup>6</sup> Mandates dictate the terms of staff compensation, usually requiring lockstep pay regardless of an individual educator's

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<sup>3</sup> By "mandate," I mean any obligation imposed on individual schools or districts for which applicable law demands compliance. I will use the term "rule" interchangeably with "mandate," so I thus do not intend to refer to rules in their narrow, administrative sense, but in a less formal sense to encompass those external duties requiring compliance. In this way, legally enforceable mandates or rules can be reduced to the term law, since it is legal sanction that compels compliance with a particular mandate. This definition, finally, focuses on the existence of the mandate and its substance, and not the source of it. As discussed throughout the paper, my focus here is on mandates themselves and the discretion they remove from individual schools and districts, not the particular external author of the rule.

<sup>4</sup> See, e.g., Thomas Kane et al., *What Does Certification Tell Us About Teacher Effectiveness? Evidence from New York City* 42 (Nat'l Bureau of Econ. Research, Working Paper No. 12155, 2006), available at <http://www.nber.org/papers/w12155.pdf>.

<sup>5</sup> See, e.g., JESSICA LEVIN ET AL., THE NEW TEACHER PROJECT, UNINTENDED CONSEQUENCES: THE CASE FOR REFORMING THE STAFFING RULES IN URBAN TEACHERS UNION CONTRACTS 40 (2005), available at <http://tntp.org/assets/documents/UnintendedConsequences.pdf> (finding that rules regarding school staffing "undermine [school-level] efforts to hire and keep the teachers they believe can best meet the needs of their students.").

<sup>6</sup> See DANIEL WEISBERG ET AL., THE NEW TEACHER PROJECT, THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE AND ACT ON DIFFERENCES IN TEACHER EFFECTIVENESS 10, 24 (2009), available at <http://widgeteffect.org/downloads/TheWidgetEffect.pdf> (noting that "teacher evaluation systems devalue instructional effectiveness by generating performance information that reflects virtually no variation among teachers at all" and this scarcity of information "severely limit[s] the ability of schools . . . to consider performance when answering critical questions or making strategic decisions about their teacher workforce.").

ability to meet school-specific or student-specific needs.<sup>7</sup> Mandates dictate retention, promotion, and layoff practices, usually through rigid seniority and tenure rules that preempt discretion, undermining administrators' ability to retain staff based on demonstrated effectiveness in meeting individual student needs.<sup>8</sup>

Rule-based uniformity also governs core functions of teaching and learning. Lockstep directives, for example, limit public schools' academic programs to a specific number of hours and days, thereby precluding schools from using the school day and year flexibly to meet diverse student needs.<sup>9</sup> Mandates governing permissible textbooks and instructional materials preempt school-based educators' authority to use their professional judgment to select the particular instructional tools best suited to engaging particular students.<sup>10</sup> Even basic teaching practices are subject to rule-based standardization, as government increasingly requires schools to use scripted, off-the-shelf curricula that specify instructional practice on a minute-by-minute basis.<sup>11</sup> These mandates preempt more individualized, discretionary practice, substituting the wisdom of an across-the-board directive for classroom and school-level professional judgment.

This discretion-stripping was arguably reasonable, historically, given the motivations informing public schools for much of American history. Traditionally, public schools sought to instill in students a basic set of low-level skills and to inculcate civic values that were deemed essential to fostering a common American cultural identity.<sup>12</sup> Nineteenth- and early twentieth-century labor markets did not require large

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<sup>7</sup> See JULIE KOWAL ET AL., CTR. FOR AMERICAN PROGRESS, TEACHER COMPENSATION IN CHARTER AND PRIVATE SCHOOLS: SNAPSHOTS AND LESSONS FOR DISTRICT PUBLIC SCHOOLS 4 (2007), available at [http://www.americanprogress.org/wp-content/uploads/issues/2007/02/pdf/teacher\\_compensation.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2007/02/pdf/teacher_compensation.pdf).

<sup>8</sup> See WEISBERG ET AL., *supra* note 6, at 2.

<sup>9</sup> See, e.g., Dave E. Marcotte & Benjamin Hansen, *Time for School?*, EDUC. NEXT, Winter 2010, at 52, 59, available at [http://educationnext.org/files/ednext\\_20101\\_52.pdf](http://educationnext.org/files/ednext_20101_52.pdf) (noting that "a small number of schools and districts are modifying or extending the academic year. . . . However, such initiatives remain rare, with no systemic change in the instructional time. . . .").

<sup>10</sup> See MATTHEW M. CHINGOS & GROVER J. "RUSS" WHITEHURST, BROWN CTR. ON EDUC. POLICY AT BROOKINGS, CHOOSING BLINDLY: INSTRUCTIONAL MATERIALS, TEACHER EFFECTIVENESS AND THE COMMON CORE 1 (2012), available at [http://www.brookings.edu/~media/research/files/reports/2012/4/10%20curriculum%20chingos%20whitehurst/0410\\_curriculum\\_chingos\\_whitehurst.pdf](http://www.brookings.edu/~media/research/files/reports/2012/4/10%20curriculum%20chingos%20whitehurst/0410_curriculum_chingos_whitehurst.pdf); AMANDA DATNOW ET AL., EXTENDING EDUCATIONAL REFORM: FROM ONE SCHOOL TO MANY 20 (2002); JAMES RAPP, EDUCATION LAW ch. 7-R1, tbl.17 (2013) (describing various textbook-related mandates).

<sup>11</sup> See, e.g., Barbara Beatty, *The Dilemma of Scripted Instruction: Comparing Teacher Autonomy, Fidelity, and Resistance in the Froebelian Kindergarten, Montessori, Direct Instruction, and Success for All*, 113 TCHRS. C. REC. 395, 397 (2011) (discussing use of scripted, discretion preempting curricula, and teachers' reactions to such autonomy stripping).

<sup>12</sup> See *infra* Part I.A.

numbers of workers with higher-level skills of complex reasoning and analysis, and public school instruction, likewise, reflected these limited expectations.<sup>13</sup> For much of the twentieth century, barely 5% of jobs required special skills necessitating education beyond high school,<sup>14</sup> and so high school graduation, let alone college graduation, was a luxury reserved for a precious few<sup>15</sup>—the proverbial “reading, writing, and ‘rithmetic” was all that was intended for the masses.<sup>16</sup>

This low-level skill orientation, moreover, was amenable to then-prevailing industrial production methods that emphasized uniformity, repetition, and compartmentalization as prime virtues of organizational management. The industrial age assembly line dominated early twentieth-century thoughts about governance, and these methods well served the limited objectives of public schools. Low civic expectations, and labor-market requirements, for the skill level of public school graduates, coupled with factory-line operational practices,<sup>17</sup> produced a system of public schools that were designed to uniformly produce fungible students, with each possessing basic skills and common understandings about American culture.

Even if this model was reasonably effective in meeting the goals it was designed for, this traditional design is ill suited to meet the demands of today’s parents and citizens and to the needs of present-day labor markets. Globalization and technological innovation together have dramatically increased the need for higher-skill graduates. Globalization means that firms no longer limit themselves to domestic markets for workers, investment, and purchases—instead searching throughout the globe for the most profitable returns on their investments.<sup>18</sup> Continuous innovations in information technology and production methods require individuals to learn more, faster, and to permanently and adaptably pursue knowledge, as global competition and innovation continually reshape labor markets.<sup>19</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE 2* (2010).

<sup>15</sup> KATHLEEN STASSEN BERGER, *THE DEVELOPING PERSON THROUGH CHILDHOOD AND ADOLESCENCE* 480 (6th ed. 2003).

<sup>16</sup> *See, e.g.*, FREDERICK M. HESS, *THE SAME THING OVER AND OVER: HOW SCHOOL REFORMERS GOT STUCK IN YESTERDAY’S IDEAS* 21–22 (2010).

<sup>17</sup> *Id.* at 104.

<sup>18</sup> *See* Fareed Zakaria, *The New Crisis of Democracy*, FAREED ZAKARIA (Jan. 11, 2013), <http://fareedzakaria.com/2013/01/11/the-new-crisis-of-democracy> (“Technology and globalization have made it possible to do simple manufacturing anywhere, and Americans will not be able to compete for jobs against workers in China and India who are being paid a tenth of the wages that they are.”). *See generally* THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (1st updated and expanded ed. 2006) (examining globalization and its effect on business and employment).

<sup>19</sup> *See infra* Part II.A.

Policymakers and their constituents today thus expect public schools to prepare students for this dynamic, global economy, where the higher-order skills of thinking, writing, and critical reasoning are primary, and where the capacity to nimbly adapt to change and innovation are indispensable. As one bit of evidence, in contrast, as noted above, to early twentieth century labor markets where barely 5% of jobs required specialized skills necessitating education past high school, 75% of today's jobs do, and a large proportion require university degrees, in addition to ongoing post-baccalaureate training.<sup>20</sup> The kind of education needed for today's students, simply put, is radically different than the one needed historically.

But law and governance have failed to keep up. America's public schools remain moored to traditional practices misaligned with current needs. Traditional rule-based governance preempts the more nimble, creative, and organic interplay of professional educator and student, which is essential for students to learn the higher-order skills now expected of them. Teaching and learning is an organic, interactive process requiring ongoing alignment of curriculum and pedagogy to the ever-evolving and diverse needs of each child. Each child's receptivity to learning is affected by a range of cultural, social, and personality factors that manifest themselves in unique ways in each child on each day, and often in each minute of each day. In addition, each child enters a classroom daily with a different knowledge base, and thus with diverse capacities to understand and internalize instruction. In the context of present-day needs for graduates with higher-order skills and post-secondary training, the most effective teaching requires constant discerning of a child's receptivity to instruction, and constant adaptation of instructional methods to these ever-changing needs.<sup>21</sup>

Traditional mandates, however, preempt this sort of teaching. Lockstep personnel rules, for example, preclude both the hiring of the professionals possessing the higher-order skills needed to deliver the kind of organic teaching kids today require and, at the same time, ignore current labor markets and thus poorly position schools for recruiting the most talented graduates into teaching. Lockstep rules also preclude schools from using the school day in ways that meet the individualized needs of students in a particular school or from grouping kids in learning communities that flexibly respond to kids' changing needs. Likewise for rigid rules concerning textbook use, class size, student grouping, and various other practices that preclude principals and teachers from flexibly and nimbly addressing individual student needs.

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<sup>20</sup> DARLING-HAMMOND, *supra* note 14, at 2.

<sup>21</sup> See *infra* Part II.

The problem, to be clear, is not with any particular rule or with rules generally. Rules are important and sometimes necessary. Instead, the harm arises from an approach to school law that overemphasizes mandates and under-appreciates professional discretion. This mandates-first approach causes policymakers too often to impose rules in contexts in which greater professionalization is better suited to achieve the goals policymakers seek.

In place of mandate-based governance that often ignores the autonomy-stripping implications of uniformity for teaching and learning, this Article reframes school governance around professionalization, while preserving a residual space for mandates for those purposes for which uniformity is essential. My version of professionalized school governance requires policymakers to affirmatively consider the benefits and costs of mandates on educator discretion as a threshold matter, before engaging the merits of a particular policy choice. Unlike prevailing rule-based governance, in which the benefits of mandates are assumed without sufficiently purposeful consideration, my suggested approach requires policymakers to first evaluate whether the subject area under consideration is one appropriate for regulation. In this analysis, I differentiate between what I call “regulatory-zone subjects,” for which mandates are appropriate, and “discretionary-zone subjects,” for which they are not.

Regulatory-zone subjects prototypically include matters involving fundamental public values that apply to all government institutions, like non-discrimination, and matters involving fundamental public values unique to education, like goal-setting in terms of the skills and perspectives public school children ought to learn. Regulatory-zone subjects also include a limited set of best practices for which there is negligible professional dissent about the universal effectiveness of a particular practice, as well as mandate-making on a temporary, emergent basis where strong evidence shows that particular staff members are simply incapable of using professional discretion effectively. Discretionary-zone subjects, on the other hand, cover essentially everything else, empowering professional educators to have much more autonomy than is available today for the means employed to fulfill the goals set by regulatory-zone mandates.

After evaluating the subject-matter appropriateness of regulation, rule makers should consider scope, tailoring rules purposefully in ways that further legitimate regulatory purposes without unduly impinging upon those areas that ought to be reserved to school-based discretion. By purposefully considering subject-matter appropriateness and scope, the kind of modernized school governance I call for will both reduce the number of rules specifying education practice and, more importantly, al-

locate rules in intentional ways to those areas that maximize their benefits and minimize their costs.

Part I below discusses the history of mandates and standardization in public schools, summarizing the focus on uniformity and assembly-line production methods characterizing the Common School and Progressive Eras when the foundations were laid for today's public schools. This Part also describes more recent efforts to reform public schools through race-neutral student assignment, increased funding, programmatic reforms, and the current standards-and-testing movement. None of these modern initiatives revisit the mandate-based foundations undergirding American public schools—in fact, new mandates encompassing new priorities are often grafted onto pre-existing ones. Finally, Part I describes impulses intrinsic to the modern regulatory state that impel policymakers to impose mandates. Taken together, these historic and contemporary factors produce a modern set of public schools that are substantially constrained by externally imposed, legally enforceable mandates.

Part II describes the degree to which a substantial amount of professional discretion is required, at the school and classroom level, to achieve the objectives of modern public schools, which are dramatically bolder than those motivating public schools traditionally. This Part describes the diverse factors affecting the availability and receptivity of each individual student to instruction, and summarizes the importance of meaningful school-level autonomy to flexibly address these diverse and evolving needs, given the ambitious goals of today's schools. Part II argues further that policymakers generally ignore the relationship of mandates to discretion, and thus both regulate matters that should be better left to school- or classroom-level discretion, or, even where a particular subject matter should be regulated, craft mandates that sweep indiscriminately and counterproductively beyond their appropriate scope.

Part III, finally, offers a theory that balances mandates and discretion in a way that recognizes the benefits of both mandates and discretion. This theory differentiates between regulatory-zone subject matter and discretionary-zone subject matter, recognizing mandates as most appropriate for fulfilling four discrete purposes: (1) identifying the objectives of public schools, (2) anchoring schools to fundamental public priorities, (3) rooting educational methods in indisputably effective best practices, and (4) rectifying targeted areas of staff incompetence. But this theory, as fleshed out in Part III, generally reserves to the professional discretion of school-level educators all other matters concerning the methods employed to fulfill these objectives.

Part III concludes by urging policymakers, even if they reject this approach or parts of it, to adopt an alternate approach to education law



and mandates that affirmatively acknowledges the discretion-stripping implications of proposed mandates and that seeks either to justify lost discretion by specifically identifying superseding benefits of uniformity or to minimize the costs of lost discretion by crafting each mandate's scope carefully.

### I. THE HISTORICAL AND INSTITUTIONAL ROOTS OF UNIFORMITY IN CONTEMPORARY PUBLIC SCHOOLS

Contemporary public schools are highly uniform, bureaucratic, and rule-bound. The heavily standardized character of American public schools is rooted both in history and in the mandate-making tendencies of the modern regulatory state. This uniformity spans not only policymaking, operational, and personnel functions, but also core elements of teaching and learning.

This institutional design derives from Common School and progressive era antecedents in which public schools' primary purpose was to assimilate children, particularly immigrants, into American culture.<sup>22</sup> To the extent skills were taught, they were low-level, repetitive ones, which were all that contemporaneous labor markets required.<sup>23</sup> The learning of higher-order skills was a luxury reserved for a privileged minority.<sup>24</sup> Industrial-age reforms in the early part of the twentieth century assumed these purposes for public schools, but introduced progressive-era ideas around organizational efficiency, applying to schools the same assembly-line operational practices that worked effectively in other areas of the industrial economy.<sup>25</sup> These core structural characteristics form the operational foundation for today's public schools.

Yet, in the last generation or so, the nation has realized with increasing urgency that the outcomes of its public schools are misaligned with the country's competitive needs, and this realization has spurred government to responsive action. These responses, however, have fundamentally left untouched the mandate-based uniformity built into the foundations of American public education. The modern era of education policymaking is defined, primarily, by two economic imperatives that have upended traditional thoughts about schools: globalization and tech-

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<sup>22</sup> See Joseph P. Viteritti, *The Inadequacy of Adequacy Guarantees: A Historical Commentary on State Constitutional Provisions That Are the Basis for School Finance Litigation*, 7 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 58, 73 (2007) ("Mann, more than anything else, sought to make Americans of the foreign masses that had come to the city, but his notion of what it meant to be an American was a narrow one."); see also HESS, *supra* note 16, at 85–87 (discussing how nineteenth century schools inculcated "American" values).

<sup>23</sup> See Viteritti, *supra* note 22, at 73.

<sup>24</sup> HESS, *supra* note 16, at 22; see also DARLING-HAMMOND, *supra* note 14, at 2.

<sup>25</sup> See *infra* Part I.A; see, e.g., DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 148–66 (1974).

nological change, each of which has accelerated the need for better educated citizens. International competition and technological advancements have produced a global economy where growth depends increasingly on the ability of individuals and teams to reason, think, and innovate—skills inextricably tied to the quality and quantity of education.

This growing awareness of the need for better educated people has motivated policymakers to seek to improve the quality of public school outcomes in the last few decades. Mid-to-late twentieth century policy debates around educational effectiveness were devoted substantially to issues of racial integration and equity. The racial-equity struggle was then succeeded by a wave of fiscal-equity litigation and policymaking. That wave birthed policymaking and litigation challenging the adequacy of educational programs, curricula, and instruction, given the chronically poor results of prior reform efforts. Finally, the current standards-and-assessment regime has focused on requiring schools to ensure all children—regardless of race, gender, or educational disability—meet achievement benchmarks as measured by performance on standardized tests.

But, as discussed below, each of these waves of educational policymaking has largely assumed, rather than interrogated, public schools' core structural elements. The racial-equity and school-finance waves largely ignored questions about the operational character of schools, focusing instead on the distribution of students and resources in racially equitable ways. The educational-adequacy and standards-and-assessment waves also take for granted current structural arrangements. In fact, policymaking premised on standards and assessment reinforces uniformity by imposing additional mandates on top of prior ones, often relying on consultant-based curricular and instructional models that prescribe teaching practice in standardized ways.

Education policymaking by rule is also amplified, in the modern era, by the mandate-making impulses of the contemporary regulatory state. The political need for policymakers to demonstrate responsiveness to intense public priorities—coupled with the number of federal, state, and local actors with the power to impose mandates on schools—fuels additional rulemaking. These mandates, moreover, rarely supplant pre-existing ones but usually supplement them, further preempting school-based discretion and often sowing confusion for local educators seeking to reconcile unclear and sometimes conflicting duties. And districts and schools disproportionately serving stigmatized minority groups are especially susceptible to government by rule, given the interplay of these dynamics and racial stigma, among other things.

This Part will expound upon these points by first describing the historical roots of standardized schools, and then the modern factors that exacerbate these historic conditions.

### A. *The Historical Roots of Standardized Schools*

The core structural elements of contemporary public schools are anchored in common school and industrial-age beliefs about the ways in which public schools ought to be structured. Common schools were designed primarily to assimilate the growing number of nineteenth and twentieth century immigrants into American society and values. In the mid-nineteenth century, immigration to the United States had skyrocketed. A nation of 13 million people in 1830 saw 19 million new immigrants enter the country between 1830 and 1900.<sup>26</sup> Motivated primarily by concerns that the country would disintegrate culturally, school reformers proposed free, public common schools as a means of assimilating these new arrivals.<sup>27</sup> This assimilationist motivation was so strong that common schoolers pursued laws barring private school attendance to preclude immigrant parents from circumventing school-based Americanization.<sup>28</sup>

Although skill development and poverty mitigation were relevant factors for common schoolers, these considerations were decidedly secondary to cultural assimilation.<sup>29</sup> And to the limited degree that common schools sought to develop academic skills, a basic set of skills was all that was intended as contemporary labor markets did not require more, and, philosophically, common schoolers neither intended nor expected that higher-level training was sensible for the masses of American children.<sup>30</sup> High school graduation was uncommon, and college attendance even rarer—and neither was expected for the broad range of students.

The strong impulse to Americanize immigrants around core American cultural values led to a corresponding uniformity in structure and method. The curriculum of common schools was standardized and, given the strong cultural imperatives motivating their operation, policy-makers mandated Bible reading and related courses on Christianity. Stu-

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<sup>26</sup> HESS, *supra* note 16, at 86.

<sup>27</sup> See, e.g., Viteritti, *supra* note 22, at 73; Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Up School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 U.C.L.A. L. Rev. 959, 976–77 (2003) (finding that common schoolers “stressed the importance of education in controlling and restraining the populace so that they would not threaten social harmony”).

<sup>28</sup> See, e.g., Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 N.Y.U. ANN. SURV. AM. L. 413, 416–18 (2003).

<sup>29</sup> See, e.g., Viteritti, *supra* note 22, at 73.

<sup>30</sup> See DARLING-HAMMOND, *supra* note 14, at 2; HESS, *supra* note 16, at 22.

dents were sorted and assigned to teachers in rigid ways that disallowed variance. Policymakers required students to be transitioned from one teacher to the next at pre-determined intervals, also without permitting individualized deviation based on local needs.<sup>31</sup>

The standardization of public schools was reinforced during the industrial age of the late nineteenth and early twentieth centuries. Industrial-age progressives applied to public schools the same factory-model conceptions of organizational design used in the manufacturing sector. To industrial-age progressives, flexibility and discretion were anathema: progressives sought to minimize human variance as an input in organizational design, and thus autonomy itself was thought inconsistent with the goal of maximizing productive efficiency.<sup>32</sup> The following description of early twentieth century perspectives on school design is illustrative:

Our schools may be looked upon as a great system of education in which the children are both the raw material and the workers . . . . The problem in the school, as in any other factory, is to secure the largest output with the least waste of material and labor.<sup>33</sup>

Schools were factories, designed to produce reliably uniform outputs cheaply and efficiently. Progressives, consequently, sought to systemize the range of school operations in uniform, assembly-line ways that intentionally sought to minimize discretion in favor of top-down mandates. Progressives not only prescribed curricular objectives, but also instructional methods through mandated textbooks and assessments, which in turn were linked to class time and day, so that specified portions of textbooks were to be covered at prescribed times.<sup>34</sup>

Progressives also imposed discretion-stripping rules on time. Not only was the total amount of minutes in the school day and the number of days in the school year regulated, but also the way in which the school day itself was structured, as school days were divided into time-limited

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<sup>31</sup> HESS, *supra* note 16, at 82–88.

<sup>32</sup> See DARLING-HAMMOND, *supra* note 14, at 4 (noting that the school system in the early 1900s “was based on the factory model then made popular by Henry Ford’s assembly line” and that “[t]his transmission-oriented curriculum was designed to be delivered in large, impersonal factory-model schools”); HESS, *supra* note 16, at 211 (noting that Progressives “rejected flexibility in the name of efficiency and uniformity,” and that “[t]heir legacy of rigidity and uniformity suffuses management, staffing, compensation, and the educational enterprise down to this day”). See generally DAVID B. TYACK, *THE TRANSFORMATION OF GREAT AMERICAN SCHOOL DISTRICTS: HOW BIG CITIES ARE RESHAPING PUBLIC EDUCATION* (William Lowe Boyd et al. eds., 2008) [hereinafter *THE TRANSFORMATION OF GREAT AMERICAN SCHOOL DISTRICTS*].

<sup>33</sup> HESS, *supra* note 16, at 105 (citing GEORGE HERBERT BETTS, *SOCIAL PRINCIPLES OF EDUCATION* 86 (1912)).

<sup>34</sup> See, e.g., Liebman & Sabel, *supra* note 2, at 184–85; Molly O’Brien, *Free at Last? Charter Schools and the “Deregulated” Curriculum*, 34 AKRON L. REV. 137, 145–48 (2000).

blocks in which all students were exposed to the same material each day. Progressives further cemented assembly-line approaches to student growth initiated during the common-school era, requiring the promotion of children to the next grade after exposure to a teacher and textbook for a specified amount of time, and structuring promotion so that in advancing through grades, students were passed from one teacher to the next, with the process renewing itself at the next grade level.<sup>35</sup>

Progressives organized personnel management similarly to eliminate school and classroom-level autonomy. Progressives created top-down bureaucracies to ensure school leaders and classroom teachers uniformly implemented prescribed policies and practices. These bureaucracies focused on inputs—number of students taught, amount of time taught, school-level fidelity to textbook-prescribed practice and assessment—and so school-level practitioners, the line-level workers in this factory model, oriented their priorities too around the activities prescribed by rule and for which supervisors would seek proof of compliance.<sup>36</sup>

Because these practices specifically sought to eliminate school- and classroom-level autonomy, school leadership and teaching were fungible, assembly-line functions for which professional skill was immaterial.<sup>37</sup> Progressives designed teaching to be routine and teachers to be indistinguishable.<sup>38</sup> The following description is illustrative:

Teaching work was designed to be routine, with little need for professional skill and judgment, and no built-in structures for developing these abilities. Instead of investing directly in teachers' knowledge, a bureaucracy was constructed to prescribe, manage, and control the work of teachers . . . .<sup>39</sup>

## *B. Uniformity in the Modern Era: The Mandate-Making Impulses of the Modern Regulatory State*

### 1. The Mid-Century Focus on Racial Equity Ignores Standardized Schools

The common-school and progressive eras produced mid-twentieth-century public schools that were highly uniform in structure and operations, and that also were designed to pursue assimilationist objectives

<sup>35</sup> O'Brien, *supra* note 34, at 146–48.

<sup>36</sup> LINDA DARLING-HAMMOND, *THE RIGHT TO LEARN: A BLUEPRINT FOR CREATING SCHOOLS THAT WORK* 7 (2001) (“Large impersonal factory-model schools with rigid tracking systems were created to teach rudimentary skills and unwavering compliance . . . .”).

<sup>37</sup> DARLING-HAMMOND, *supra* note 14, at 237.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

and to teach children a basic set of skills relevant to existing industrial labor markets. This structure came under mid-century stress not because policymakers sought to revisit its uniformity or low-skill orientation but instead because of concerns that students and resources were distributed to individual districts and schools in racially discriminatory ways. The fight for racially integrated student-assignment policies would yield, later in the twentieth century, to a push for equitable school funding, and then, later, to a thrust for standards-and-assessment reform. But these modern reforms fundamentally assume the structural elements inherited from the Common School and Progressive Eras, and in fact largely seek to impose additional prescriptions on top of these, rather than reevaluating the ongoing effectiveness of these traditional mandates in light of modern goals.

For much of the twentieth century, national policymaking concerning public schools focused principally on racial and ethnic equity. A series of legal challenges, culminating in the landmark *Brown v. Board of Education* decision,<sup>40</sup> required student and resource integration in public schools across racial lines.<sup>41</sup> For much of the next twenty years, lawyers, judges, and policymakers struggled to implement *Brown* in the face of both outright defiance and indirect circumvention.<sup>42</sup> *Milliken v. Bradley* then sounded *Brown*'s death-knell by prohibiting desegregation remedies that reached beyond the boundaries of a school district or municipality.<sup>43</sup> This decision rendered *Brown* unresponsive to accelerating white flight from cities in the 1970s.<sup>44</sup> *Milliken* became the legal explanation for the isolated and overwhelmingly minority inner-city school systems that persist to this day, as it placed patterns of residential segregation beyond *Brown*'s purview.<sup>45</sup>

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<sup>40</sup> 347 U.S. 483 (1954).

<sup>41</sup> See *id.* at 493; see, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18–20 (1971) (affirming judicial power to issue extraordinary remedies to facilitate desegregation); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439 (1968) (emphasizing need for immediate remedies to address desegregation); see also Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 181–83 (2005).

<sup>42</sup> See, e.g., DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* § 3.7.4 (6th ed. 2008); see also *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 221–23 (1964) (describing shutting down of all schools in a county to avoid desegregation).

<sup>43</sup> 418 U.S. 717, 744–45 (1974).

<sup>44</sup> *Milliken* would be the beginning of the end for *Brown*-style integrationist remedies, as the Supreme Court held that desegregation mandates stopped at a school district's borders. *Id.* This decision foreclosed so-called metropolitan desegregation remedies, in which courts would include adjacent majority-white suburban school districts in decrees designed to remedy one-race schools in neighboring districts. *Id.*

<sup>45</sup> Public schools today are highly segregated—by some indicators, even more so than during the desegregation era. See, e.g., ERICA FRANKENBERG ET AL., *THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* 31 (2003), available at <http://civilrightsproject.ucla.edu/research/k-12->

As racially integrated schools became less plausible after *Milliken*, advocates brought lawsuits demanding that states increase funding or dramatically enhance program offerings in majority-minority schools.<sup>46</sup> Where successful, these actions either required states to pump additional funds into poorly funded, racially isolated school districts<sup>47</sup> or to provide additional services or resources—from upgraded facilities to universal pre-school to magnet schools to curricular transformations—designed to improve the quality of educational services delivered by demographically isolated districts.<sup>48</sup>

Ultimately, the Post-Progressive Era school litigation battles were about the distribution of resources within a structural framework essentially unchanged from the uniform factories bequeathed by the Common School and Progressive Eras. The generations of litigation and policymaking involving racial integration ignored questions of organizational design, uniformity, and educator autonomy, focusing instead on the racial distribution of students in schools. Likewise, school funding and program adequacy efforts bypassed these questions by focusing on instructional programs that operated within the standardized confines of traditional mandates.

## 2. Late Twentieth Century Efforts Focusing on Standards and Accountability

Although litigation-based education advocacy drove national school policymaking for the majority of the twentieth century, the latter part of the century saw a flurry of legislative action as leaders became increasingly aware of the misalignment between the preparedness of America's public school graduates and the demands of the modern economy. This lawmaking effort, originally prompted by the equity-based imperatives underlying the earlier lawsuits, was spurred by the increasing urgency

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education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream (showing that the percentage of white students in the school of an average black student was lower in 2000 than it was in the early 1970s); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1461 (2003) ("Schools are more segregated today than they have been for decades, and segregation is rapidly increasing."); Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 55–56 (2002) (finding that "the nation's inner cities are more segregated today than they were 50 years ago").

<sup>46</sup> See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 266–68 (1999).

<sup>47</sup> See *id.*

<sup>48</sup> See generally Paul A. Minorini & Stephen A. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in EQUITY AND ADEQUACY IN SCHOOL FINANCE: ISSUES AND PERSPECTIVES 175, 188–89 (Helen F. Ladd et al. eds., 1999); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave"*: *From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1163 (1995).

brought to bear by the civil rights movement.<sup>49</sup> Successful legal and political advocacy triggered related remedial legislative action in the form of Title VI of the Civil Rights Act of 1964 and Title I of the Elementary and Secondary Education Act of 1965, which were then followed by laws extending protection to students with disabilities in the form of Section 504 of the Rehabilitation Act of 1973 and the Individuals with Disabilities in Education Act in 1975.<sup>50</sup> These laws sought to fulfill both *Brown's* commitment to non-discrimination—extending beyond race to include other prejudices, including gender and disability—and the civil rights movement's commitment to class-based equity, as reflected in Title I's provisions granting additional federal funds to educate poor children. Most pertinent here, like the litigation and social-justice goals motivating these legislative actions, these measures either ignored or simply assumed the structurally uniform character and operation of America's public schools.

As lawyers, post-*Milliken*, began looking at lawsuits premised on the inadequacy of student outcomes, so too did policymakers increasingly move from a focus on racial equity and toward a focus on improved student achievement. In 1981, concerned with high dropout rates and low levels of achievement by American students on international tests, the United States Department of Education asked a blue-ribbon panel of educators, called the National Commission on Excellence in Education, to examine the quality of American public education and to report to Congress and to the president on the panel's findings and recommendations.<sup>51</sup> The subsequent report, entitled *A Nation at Risk*, called "one of the most important federal education efforts in American history,"<sup>52</sup> found that America's public schools were underperforming dramatically, so much so that they were endangering the country's economic viability and its competitive future. The panel's findings were stark:

"If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that

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<sup>49</sup> See Jack M. Balkin, 90 VA. L. REV. 1537, 1548–49 (2004) (describing how the civil rights movement's advocacy for equality and educational opportunity spurred responsive legislative action).

<sup>50</sup> See *id.*; see also Lia Epperson, *Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities*, 7 STAN. J. C.R. & C.L. 213, 233–234 (2011).

<sup>51</sup> See DAVID P. GARDNER ET AL., NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* iii (1983), available at <http://eric.ed.gov/?id=ED226006>.

<sup>52</sup> SUSAN FUHRMAN & MARVIN LAZERSON, *Introduction to THE PUBLIC SCHOOLS*, at xxvi (Susan Fuhrman & Marvin Lazerson eds., 2005).



exists today, we might well have viewed it as an act of war.”<sup>53</sup>

*A Nation at Risk* crystallized public concern with the state of American public schools, and prompted a flurry of federal and state action designed to respond to the grave, even existential, concerns outlined by the report’s authors.<sup>54</sup> In particular, states increased graduation standards, teacher-certification requirements, student assessment and testing, and specified particular kinds of courses—particularly in mathematics and science—required for graduation.<sup>55</sup> These efforts generally focused on substantially increasing the state-specified standards students needed to satisfy to obtain a high-school diploma, and increasing testing and assessment to determine, at regular intervals, whether students were on track to achieve those standards.

The federal government followed suit. In 1994, Congress enacted the Improving America’s Schools Act, which required schools to raise standards for all students, regardless of income, race, or other indicators of risk.<sup>56</sup> Congress doubled down on standards and accountability with the 2002 enactment of the No Child Left Behind Act (“NCLB”), which requires states to ensure that all children, including racial minorities, students with disabilities, and English Language Learners, meet state-determined proficiency benchmarks. NCLB requires states to test students broadly, and these scores, including the test scores of discrete student subgroups, determine whether a district is satisfactorily addressing student needs.<sup>57</sup>

In 2009, the United States Department of Education announced its Race to the Top program, which conditions receipt of federal grant funding on whether a state increases graduation standards to enable graduates to compete globally; invests in teacher training, retention, and performance-based accountability; and engages in aggressive efforts, including restructuring, charter-school conversion, and closure, for persistently failing schools.<sup>58</sup>

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<sup>53</sup> GARDNER, *supra* note 51.

<sup>54</sup> See FUHRMAN & LAZERSON, *supra* note 52, at xxvii (describing various federal and state education-reform initiatives triggered by *A Nation at Risk*).

<sup>55</sup> *Id.* at xxvii–xxviii.

<sup>56</sup> See Kenneth K. Wong, *Federal Educational Policy as an Anti-Poverty Strategy*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 421, 435–37 (2002); see also Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 81, 134 n.9 (2011).

<sup>57</sup> See, e.g., Craig Livermore & Michael Lewchuck, *Centralized Standards and Decentralized Competition: Suggested Revisions for No Child Left Behind to Create Greater Educational Responsiveness Toward Disempowered Minority Groups*, 33 SETON HALL LEGIS. J. 433, 457–59 (2009).

<sup>58</sup> U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY 2 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

Yet, similar to prior reforms involving racial integration, school funding, and programmatic adequacy, the legislative changes of the last twenty years also sidestepped structural questions of uniformity and discretion-stripping. On the contrary, standards and accountability has, in many ways, produced greater uniformity in operations and practice by detailing the curricular standards public school bureaucracies must fulfill and then requiring frequent standardized testing to determine whether students are mastering the content specified by those standards. In addition, as lawmakers have increasingly specified curricular standards and related assessment tools, government has likewise increasingly required the use of paint-by-numbers instructional materials aligned with these standards and assessments—many of which circumscribe teachers’ instructional practice in precise detail.<sup>59</sup>

The standards-and-accountability push, codified most prominently by NCLB but also present in states’ increasing adoption of baseline curricular standards, thus leaves untouched the fundamentals of traditional public school structure and operations. Even more, standards and accountability grafts onto traditional structures additional uniform obligations that affect student outcomes as well as the means used by schools to reach those outcomes. And Race to the Top’s tangential efforts at structural reform, as discussed further below, represent a narrow and tentative exception that proves the rule.<sup>60</sup>

*C. Uniform Rulemaking Is Inherent to the Modern Regulatory State and Has Exacerbated the Structural Inflexibility Established in the Common School and Progressive Eras*

I wrote a prior article that discusses the ways that compliance through mandates is inherent to the modern regulatory state.<sup>61</sup> And by regulatory state here, I am not referring only to what is traditionally meant—namely, the administrative state—but also the full range of ways that policymakers impose legally enforceable duties on schools.<sup>62</sup>

As I have written before, mandates are a central feature of modern policymaking. First, they represent publicly discernible evidence of a policymaker’s attempts to vindicate substantial public concerns.<sup>63</sup> Few policy priorities today are of greater voter concern than the quality of public education. Mandates represent tangible evidence that political authorities can point to as responsive to those concerns.

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<sup>59</sup> See *infra* Part II.

<sup>60</sup> See *infra* Part I.E.

<sup>61</sup> Shavar D. Jeffries, *The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies*, 34 HASTINGS CONST. L.Q. 1, 46–59 (2006).

<sup>62</sup> *Id.*

<sup>63</sup> See *id.* at 47–48, 51–52.

Second, mandates provide policymakers with the power to perpetuate their own priorities across future administrations. New legal dictates—particularly statutory ones, which are harder to change than administrative rules—provide policymakers with the opportunity to force future actors to comply with their policies.<sup>64</sup>

Third, mandates, self-evidently, enable standardized compliance with a policymaker's priorities. The uniformity prescribed by a mandate is, often, precisely the point: policymakers seek to compel those actors subject to the mandate to comply with its terms uniformly. Local discretion empowers other actors to pursue practices that might not align with a policymaker's preferred course, and so mandates protect policymakers against local deviation from their priorities.<sup>65</sup>

These impulses toward mandates are amplified by the number of authorities with the power to impose legally enforceable obligations on schools. Federal, state, county, and municipal legislative bodies may impose mandates on schools. Parallel administrative authorities at each of these levels also have mandate-making power, including the school district itself. Moreover, the school district's interactions with its labor force, in many states and districts, are codified in collective-bargaining agreements that generally sweep well beyond the nuts and bolts of salaries and benefits and impose mandates on a range of matters affecting the classroom.<sup>66</sup>

Courts, also, are a growing source of uniformity. The proliferation of mandates generates associated legal rights that, in turn, fuel private lawsuits seeking compliance with a mandate's terms. Courts, then, issue remedial orders that require districts to take prescribed steps and thus further limit school-based discretion. Although court orders traditionally focused on student assignment or resource distribution, as education law and associated mandates transitioned to programmatic and curricular matters, courts too have correspondingly issued orders more frequently that specify the kinds of programs and even instructional methods that ought to be used in individual schools to facilitate student achievement.<sup>67</sup>

Finally, districts disproportionately serving stigmatized racial minorities are especially subject to external rulemaking because of lingering doubts about the capacity of minority leadership to effectively govern schools and districts. Also, for various historic and current reasons, majority-minority districts disproportionately underperform and, thus, uniquely create conditions susceptible to mandates. Racial stigma conveys that minorities are less competent than others, and those perceptions

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<sup>64</sup> *See id.* at 48–50.

<sup>65</sup> *See id.*

<sup>66</sup> *See id.* at 36–45.

<sup>67</sup> *See id.* at 45–46.

impel policymakers to impose mandates as a substitute for local discretion. Likewise, because racially isolated, inner-city school districts perform demonstrably worse than the average American public school, these schools uniquely present conditions that are conducive to mandates, as policymakers seek to demonstrate to stakeholders responsive action to important public concerns about underperforming schools.<sup>68</sup>

*D. What These Traditional and Structural Practices Yield Today in Application: The Examples of School Structure, Personnel, and Teaching and Learning*

The historic practices discussed in the previous sections, coupled with the structural impulses toward mandates intrinsic to the modern regulatory state, yield a set of education mandates that affect broad aspects of school operations and student learning.<sup>69</sup> Yet to paint a more specific picture of the regulatory context faced by school-level educators, I will highlight here three particular areas—school structure, personnel, and teaching and learning—that vividly reveal the degree to which rules preempt school-based professional discussion to address particular student needs.

Mandates require school operations to be structured in uniform ways. Rules governing instructional time, including the distribution and availability of time during the school day and year, constrain school-level flexibility to format instructional time in response to the particular needs of the local student population.<sup>70</sup> Among other things, these mandates governing time inhibit the flexible use of extended-learning-time

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<sup>68</sup> See *id.* at 46–54.

<sup>69</sup> See PAUL S. GROGAN & TONY PROSCIO, *COMEBACK CITIES: A BLUEPRINT FOR URBAN NEIGHBORHOOD REVIVAL* 176, 223–24 (2000); JEFFREY C. HENIG ET AL., *THE COLOR OF SCHOOL REFORM: RACE, POLITICS, AND THE CHALLENGE OF URBAN EDUCATION* 28–29, 274 (1999); WILBUR C. RICH, *BLACK MAYORS AND SCHOOL POLITICS: THE FAILURE OF REFORM IN DETROIT, GARY, AND NEWARK* 9, 13, 203–08 (1996); see also JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* 58–59 (1990) (“[T]he public world of educational practice is a world of rules imposed on the schools by local, state, and federal authorities.”); FREDERICK M. HESS, *COMMON SENSE SCHOOL REFORM* 6 (2004) (“Rules, procedures, and collective bargaining agreements have rendered public school systems heavy-footed and sluggish.”); *Law and Public Education: The Paralyzing Effects of Excessive Bureaucracy*, COMMON GOOD (Aug. 1, 2004), <http://web.archive.org/web/20041026101924/http://cgood.org/schools-reading-cgpubs-factsheets-7.html> (“The morass of legal bureaucracy in America’s public schools is undermining the ability of teachers and school administrators to use their best judgment to create effective learning environments. The nearly endless bureaucratic rules crush teachers’ spirits, and legal rules prevent school administrators from effectively operating their schools.”) (accessed by searching for <http://cgood.org/schools-reading-cgpubs-factsheets-7.html> in the Internet Archive index).

<sup>70</sup> See, e.g., Thomas Corcoran & Margaret Goertz, *The Governance of Public Education*, in *THE PUBLIC SCHOOLS*, *supra* note 52, at 37; see also Liebman & Sabel, *supra* note 2, at 221–22 (discussing opportunities for increasing proficiency for individual student populations with increased learning time).

strategies, either for all students or for certain discrete student populations. In addition, rules requiring grade-level promotion after a student has sat in class for the required number of days and hours, even if the student fails to obtain the knowledge expected for that school year, undermines school-level educators' ability to more flexibly use instructional time to meet individualized needs.<sup>71</sup>

The regulation of personnel decisions is particularly restricting. Mandates rooted in state and local law, as well as collectively bargained contracts, significantly constrain school-level discretion in hiring, evaluation, pay, retention, promotion, assignment, and termination—the fundamentals of performance-based management for any large organization. Teacher hiring is limited generally to those individuals who are “certified” and thus legally eligible to be hired by school districts.<sup>72</sup> This seems reasonable on its face but is less so given substantial evidence showing most states' certification practices have little correlation to teacher effectiveness.<sup>73</sup>

Teacher and principal evaluation, moreover, are too often bureaucratic exercises in rule compliance, instead of professional, thoughtful assessments of educational practice.<sup>74</sup> Educator evaluation is heavily

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<sup>71</sup> See generally Elizabeth M. King et al., *Promotion with and Without Learning: Effects on Student Enrollment and Dropout Behavior* (World Bank, Policy Research Working Paper No. 4722, 1999), available at <http://go.worldbank.org/ZPKGFIYLH0>.

<sup>72</sup> Donald Boyd et al., *The Effect of Certification and Preparation on Teacher Quality*, FUTURE CHILD., Spring 2007, at 45, 45–68, available at <http://futureofchildren.org/publications/journals/article/index.xml?journalid=34&articleid=75> (discussing the effectiveness of requiring teacher certification).

<sup>73</sup> See Chaim Karczag, *Undermining Teacher Quality: The Perverse Consequences of Certification*, in EDUCATIONAL FREEDOM IN URBAN AMERICA: *Brown v. Board* after Half a Century, 109, 110–13 (David Salisbury & Casey Lartigue, Jr. eds., 2004). State laws, moreover, dictate the substantive content of certification, requiring candidates to attend pre-approved post-baccalaureate programs, and take pre-determined courses. See *id.* Certification, however, is weakly linked to student achievement. See, e.g., JAY P. GREENE ET AL., EDUCATION MYTHS: WHAT SPECIAL INTEREST GROUPS WANT YOU TO BELIEVE ABOUT OUR SCHOOLS—AND WHY IT ISN'T SO 61-70 (2005); Karczag, *supra*, at 119 (“[T]here is little evidence linking teacher certification to student achievement.”). Even worse, growing evidence suggests certification lowers teacher quality by deterring talented candidates. See Howard Fuller & George A. Mitchell, *A Culture of Complaint*, EDUCATION NEXT, Summer 2006, at 18, 21 (“Inflexible staffing rules . . . ‘undermine the ability of urban schools to hire and keep the best possible teachers.’”); Richard W. Riley, U.S. Sec’y of Educ., *New Challenges, a New Resolve: Moving American Education into the 21st Century* (Feb. 16, 1999), available at [http://heartland.org/sites/all/modules/custom/heartland\\_migration/files/pdfs/2757.pdf](http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/2757.pdf) (“Too many potential teachers are turned away because of the cumbersome process that requires them to jump through hoops and lots of them.”). But see Mary E. Diez, *In Defense of Regulation*, in CHOICE AND COMPETITION IN AMERICAN EDUCATION 43, 43–45 (Paul E. Peterson ed., 2006) (noting that teacher certification “has served its basic purpose” in ensuring, teacher competency and that a well-designed program could improve teacher quality).

<sup>74</sup> See, e.g., WEISBERG ET AL., *supra* note 6, at 6 (“Evaluations are short and infrequent . . . conducted by administrators without extensive training, and influenced by powerful cultural forces.”).

constrained by mandates, arising both out of state law and collective-bargaining agreements.<sup>75</sup> These mandates, among other things, restrict evaluation criteria in ways that preempt assessments of educators' effectiveness in meeting the individualized needs of students, often prohibiting consideration of student achievement or other evidence of an educator's actual performance in delivering services to individual students.<sup>76</sup> Mandates also specify the staff authorized to conduct or otherwise participate in evaluations; the evidence that may support evaluations; and the timing, duration, and frequency of school and classroom visits for evaluation purposes.

Teacher assignment to classrooms is also characterized by lockstep mandates that broadly constrain discretion. Teachers are often assigned to classrooms based on rules that prioritize a teacher's years of experience instead of the individual needs of classrooms or discrete student populations.<sup>77</sup> Class-size mandates that ignore local context amplify these constraints. Rigid class-size rules undercut school-level discretion to flexibly assign teachers based on the relationship of an individual teacher's particular strengths to the specific needs of student groups. Such rules preclude principals, for example, from assigning a more experienced or better performing teacher to a larger class while assigning less proficient teachers to smaller classes or other classes a weaker teacher might handle competently. Class-size mandates also require more teachers to be spread over more classes, exacerbating existing shortages for schools in hiring and retaining high-performing teachers.<sup>78</sup> Moreover, in the absence of a corresponding change in labor markets that proportionately increase the number of high-performing teachers, class-size mandates assume fungibility in teaching and, thus, ignore the school- and classroom-level costs to student achievement of its across-the-board mandate.

Compensation practices are comparably rule-bound. Educators generally are paid lockstep based on years of experience or the possession of specified credentials, with mandates precluding school-based staff from considering additional factors. Such precluded factors include whether the educator is effective in meeting student needs, whether the educator

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<sup>75</sup> *Id.*

<sup>76</sup> *See id.* at 10.

<sup>77</sup> *See id.*

<sup>78</sup> *See, e.g.,* HESS, *supra* note 16, at 85; GREENE ET AL., *supra* note 73, at 50–51 (discussing attempts in Florida and New York to reduce class sizes statewide); *Class Size*, EDUCATION WEEK (Aug. 3, 2004), <http://www.edweek.org/rc/issues/class-size/?levelId=1000>; *see also* Matthew Chingos, *The Impact of a Universal Class-Size Reduction Policy: Evidence from Florida's Statewide Mandate* (Program on Educ. Policy & Governance Harvard Kennedy Sch., Working Paper No. 10–03, 2010), available at [http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG10-03\\_Chingos.pdf](http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG10-03_Chingos.pdf).

serves in a hard-to-fill position, or whether the position is extraordinarily important in light of local student needs (for example, a literacy coach or teacher for a school with a disproportionate number of students struggling with reading).<sup>79</sup>

Similarly, tenure rules preempt retention and termination decisions. Rigid tenure rules in practice amount to a lifetime guarantee of employment, regardless of district- or school-based perspectives about a principal's or teacher's effectiveness in meeting student needs.<sup>80</sup> Just the same, mandates remove performance-based discretion in layoffs, generally requiring layoff decisions to be based only or primarily on years of experience, regardless of whether more individualized decisions might better serve student needs.<sup>81</sup>

These personnel mandates create a managerial environment where rule-based uniformity broadly precludes case-by-case decisions that permit districts and schools to hire, assign, pay, retain, fire, or lay off educators in ways that reflect the actual needs of affected students. These rules create the so-called Widget Effect, a school environment where individual educators are so fungible that individualized professional practice is superseded by rule-based governance in which the mandate essentially supplies decisions.<sup>82</sup> This organizational context of heavily standardized and rule-bound personnel management legislates away the managerial tools necessary to ensure that school-based staff identify and address the needs of individual students. Given the consistent research showing that effective teachers are the most important in-school factor contributing to student achievement, such straitjacketed personnel mandates are particularly impactful on student educational outcomes.<sup>83</sup>

Teaching and learning—the core instructional interaction between teacher and student—is also heavily regulated. Rules governing instructional materials, pedagogy, and testing limit school and classroom level flexibility in core areas. These rules prescribe the particular textbooks,

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<sup>79</sup> See WEISBERG ET AL., *supra* note 6, at 29.

<sup>80</sup> See *id.* at 2 (“[T]eacher tenure and due process protections render dismissal a practical impossibility, shielding ineffective teachers from removal in all but the most egregious instances.”); see also DINAH FREY, EDUC. COMM’N OF THE STATES, STATE TEACHER TENURE/CONTINUING CONTRACT LAWS (2010), available at <http://www.ecs.org/clearinghouse/88/28/8828.pdf>.

<sup>81</sup> See, e.g., CARRIE HAHNEL ET AL., THE EDUC. TRUST—WEST, VICTIMS OF THE CHURN: THE DAMAGING IMPACT OF CALIFORNIA’S TEACHER LAYOFF POLICIES ON SCHOOLS, STUDENTS, AND COMMUNITIES IN THREE LARGE DISTRICTS (2011), available at <http://www.edtrust.org/sites/edtrust.org/files/ETW%20Victims%20of%20the%20Churn%20Report.pdf>; THE NEW TEACHER PROJECT, A SMARTER TEACHER LAYOFF SYSTEM 1–2 (2010), available at [http://ntp.org/assets/documents/TNTP\\_Smarter\\_Teacher\\_Layoffs\\_Mar10.pdf](http://ntp.org/assets/documents/TNTP_Smarter_Teacher_Layoffs_Mar10.pdf).

<sup>82</sup> See generally WEISBERG ET AL., *supra* note 6.

<sup>83</sup> See, e.g., CHARLES M. PAYNE, SO MUCH REFORM, SO LITTLE CHANGE: THE PERSISTENCE OF FAILURE IN URBAN SCHOOLS 72 (2008).

materials, and teaching methods available to principals and teachers.<sup>84</sup> These rules may prevent school-level staff from selecting textbooks and instructional materials that might best serve the particular needs of the students they serve or from flexibly using different materials for different students, or from using different materials at different times, as appropriate for a particular student's needs at a particular time. So, for example, if a particular student is struggling with a particular mathematics task, educators are too often confined to the pre-determined regulatory script in terms of how to address that student's needs.

The increasing focus on testing and accountability, moreover, has fueled a consultant-driven industry in which vendors have developed programs that tightly integrate daily school and classroom practice with standardized curricula and testing. Consultant-driven models, like Success for All, among others, provide out-of-the-box directives that specify, often on a minute-by-minute basis, precisely how teachers ought to instruct students, use classroom time, and employ instructional materials.<sup>85</sup> The heavily regulated character of teaching and learning has "teacher proofed" education in important ways, subordinating flexible instructional exchanges between teacher and student to these uniform mandates.<sup>86</sup>

In these ways, school structure, personnel management, and even the nuts and bolts of teaching and learning illustrate the extent to which mandates constrain school-based discretion to deliver educational services directly responsive to the actual and evolving needs of students. The problem is not necessarily with any particular rule—although, to be

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<sup>84</sup> See DAVID T. CONLEY, WHO GOVERNS OUR SCHOOLS: CHANGING ROLES AND RESPONSIBILITIES 1 (2003); Corcoran & Goertz, *supra* note 70, at 37; DATNOW ET AL., *supra* note 10, at 20; RAPP, *supra* note 10, at ch. 7–R1, tbl.17; Herbert J. Walberg, *Real Accountability, in OUR SCHOOLS & OUR FUTURE: ARE WE STILL AT RISK?* 305, 309 (Paul E. Peterson ed., 2003) (discussing state regulation of public school curriculum); ELAINE M. WALKER, EDUCATIONAL ADEQUACY AND THE COURTS: A REFERENCE HANDBOOK 131, 155–56 (2005).

<sup>85</sup> See, e.g., WILLIAM G. OUCHI, MAKING SCHOOLS WORK: A REVOLUTIONARY PLAN TO GET YOUR CHILDREN THE EDUCATION THEY NEED 76–78 (2003) (describing the lockstep approach of Open Court, a structured reading program adopted by the states of California & Texas, as well as numerous districts and schools around the country); *The Reading Edge Middle Grades*, SUCCESS FOR ALL FOUNDATION, <http://www.successforall.org/Middle-High/Powerful-Instruction/The-Reading-Edge-Middle-School/>, (last visited Sept. 2, 2013) (describing the Reading Edge program, created by the Success for All Foundation, which provides teachers with detailed lesson plans, necessary student materials, assessment tools, instructional strategies, and goal-setting assistance); see also *Abbott v. Burke*, 710 A.2d 450, app. II at 529–31 (N.J. 1998) (endorsing New Jersey's adoption of the Success for All program for urban districts); Martin Haberman, *Urban Education: The State of Urban Schooling at the Start of the 21st Century*, EDUCATION NEWS, (Nov. 1, 2004), <http://www.educationnews.org/articles/urban-education-the-state-of-urban-schooling-at-the-start-of-the-21st-century.html>.

<sup>86</sup> See, e.g., Beatty, *supra* note 11; Linda Darling-Hammond, *Changing Conceptions of Teaching and Teacher Development*, TCHR. EDUC. Q., Fall 1995, at 9, 10, available at [http://www.teqjournal.org/backvols/1995/22\\_4/F95\\_darling%20hammond.pdf](http://www.teqjournal.org/backvols/1995/22_4/F95_darling%20hammond.pdf).



sure, many them are counter-productive by themselves—but with the sheer weight of the mandates and the degree to which they are unreflective of a purposeful consideration of their benefits and costs. Policymakers rarely balance the discretion-stripping consequences of education mandates, instead imposing uniformity when in fact more individualized practices would often better serve the objectives a mandate purports to serve.

*E. Tentative Efforts at Structural Reform—Primarily Through Charters, Portfolio Approaches to Governance, and Vouchers—Are Rare Exceptions Proving the Rule of Command-and-Control Governance and Also Largely Re-Crete the Uniform Operational Structure Characterizing Traditional Governance*

The above shows the highly uniform character of public schools, both generally and in the specific context of school structure, operations, and teaching and learning. Some might suggest that recent education innovations—primarily public charter schools, portfolio approaches to governance, and school vouchers—show that law and education governance is moving away from the uniformity described above.<sup>87</sup> But, in fact, these exceptions both reinforce and prove the rule.

States, to varying degrees, have experimented with public charter schools as a means to provide alternate and more flexible governance and operational templates for public schools.<sup>88</sup> The federal government, too, has nudged states toward a tentative engagement with charter schools by specifying, under NCLB, the conversion of a district school to a charter school if the school fails persistently and, under Race to the Top, more specifically earmarking the receipt of federal grant funds to more flexible practices concerning charter-school growth.

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<sup>87</sup> See, e.g., THE TRANSFORMATION OF GREAT AMERICAN SCHOOL DISTRICTS, *supra* note 32 (arguing that more recent efforts to grant parents more choice imply an imminent transition to radically restructured schools).

<sup>88</sup> See LOIS HOLZMAN, SCHOOLS FOR GROWTH: RADICAL ALTERNATIVES TO CURRENT EDUCATIONAL MODELS 81 (1997); PAUL THOMAS HILL ET AL., CHARTER SCHOOLS AND ACCOUNTABILITY IN PUBLIC EDUCATION 4 (2002). Charter schools are public schools usually operated by non-profit providers (a few states permit for-profit providers). *Charter Schools: Overview*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/educ/charter-schools-overview.aspx> (last visited Sept. 4, 2013). They are usually either independent of the traditional local public school bureaucracy or at least able to exercise some flexibility from the range of bureaucratic rules applicable to traditional district schools. HILL ET AL., *supra*, at 14.

In addition to the fact that charters comprise barely 5% of American public schools,<sup>89</sup> charters, by definition, ignore the ways that traditional district schools are operated and governed, carving out an isolated space for experimentation that by its terms generally has no bearing on district practice.<sup>90</sup> Moreover, states vary widely in terms of the operational flexibility actually available to charters. Some, by rule or by practice, yield charters in name only, requiring them to comply with the same uniform mandates applicable to district schools.<sup>91</sup> Others, while granting more operational flexibility, either restrict funding available to charters<sup>92</sup> or deny charters access to facilities—forcing charters to use scarce operating dollars for facilities costs—in ways that, in practice, undermine a charter’s ability to experiment with alternate governance or operational arrangements. Others, apparently seeking to emphasize in no uncertain terms that these alternate programs are merely outliers, specifically limit the number of charters that may open in a jurisdiction or in practice do so through authorizers that infrequently approve charter applications.<sup>93</sup>

In addition to charter schools, a small number of school districts have experimented with portfolio approaches to school governance<sup>94</sup> and, to a lesser extent, voucher programs enabling students to attend private schools with public funds. Both portfolio and voucher approaches are exceptions to the traditions described above, as students attending

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<sup>89</sup> SUSAN AUD ET AL., NAT’L CTR. FOR EDUC. STATISTICS, *THE CONDITION OF EDUCATION 2012*, at 22 (2012), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2012045>.

<sup>90</sup> See, e.g., Brian Gill et al., *Rhetoric Versus Reality: What We Know and What We Need to Know About Vouchers and Charter Schools 2–4* (updated ed. 2007), available at [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2007/RAND\\_MR1118-1.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/RAND_MR1118-1.pdf) (noting that charter schools, unlike traditional district schools, “aim to induce reform by changing the fundamental organization of the school system” and serve only as isolated “laboratories” for reform).

<sup>91</sup> See O’Brien, *supra* note 34 at 156–57 (discussing ways in which traditional constraints are imposed on charter schools); Ctr. for Educ. Reform, *The Essential Guide to Charter School Law: Charter School Laws Across the States 2012* (Alison Consoletti ed., 13th ed. 2012), available at <http://www.edreform.com/wp-content/uploads/2012/12/CER-CharterLaws2012.21.2012.pdf> (noting the differences between every state’s approach to charter school autonomy).

<sup>92</sup> See *id.* (comparing the differences in state laws in terms of their funding options for charters, and concluding that many states do not have laws providing for fiscal equity between charter and district schools.).

<sup>93</sup> See, e.g., Julie Davis Bell, *Charter School Caps*, Nat’l Conf. St. Legislatures (Dec. 2011), <http://www.ncsl.org/documents/educ/CharterSchoolCaps.pdf> (discussing various state and local ceilings on the number and/or growth of charter schools).

<sup>94</sup> See Katrina E. Bulkey, *Introduction—Portfolio Management Models in Urban School Reform*, in *BETWEEN PUBLIC AND PRIVATE: POLITICS, GOVERNANCE, AND THE NEW PORTFOLIO MODELS FOR URBAN SCHOOL REFORM* 3, 7 (Katrina E. Bulkey et al. eds., 2010); Kenneth J. Saltman, *Urban School Decentralization and the Growth of “Portfolio Districts”*, GREAT LAKES CTR. FOR EDUC. RES. & PRAC. (June 2010), [http://greatlakescenter.org/docs/Policy\\_Briefs/Saltman\\_PortfolioDistricts.pdf](http://greatlakescenter.org/docs/Policy_Briefs/Saltman_PortfolioDistricts.pdf).

either a portfolio or voucher school are exceedingly rare—dramatically fewer, for example, than the number of students attending public charters, which as discussed above is itself a small percentage.<sup>95</sup> Moreover, both portfolio and voucher schools largely adopt traditional approaches to school structure, operations, and practice.

In portfolio approaches to school governance, a governance approach that a few large, urban districts are beginning to implement, district central offices are reconfigured from the prime source of instructional, curricular, and operational practice to an overseer of performance and outcomes. District offices become managers, in theory, of a diverse range of school options, and a central office's responsibility is not to ensure compliance with central-office mandates, but uniform results in terms of student achievement.<sup>96</sup> In theory, this approach should lead to a greater diversity of individual schools, to the degree it relies less on traditional command-and-control practices of central-office governance. In practice, however, portfolio schools generally fall within the existing web of federal, state, county, and collective-bargaining mandates that apply to all public schools, and so portfolio-based flexibility is available only to the limited degree permitted by positive law. Although some jurisdictions purposefully exclude public charters from some number of mandates, portfolio schools, by and large, do not have that luxury.<sup>97</sup>

Similarly, vouchers are exceedingly rare, currently in place in only a handful of jurisdictions in the nation.<sup>98</sup> So these programs are so uncommon that they have no meaningful bearing on the reconceptualization of structural practice in public schools. Moreover, private schools participating in voucher programs often reproduce the structural framework of traditional public schools, producing better outcomes not because of reformed institutional practices, but because of stronger inputs—school-leader and teacher quality, students more ready to learn, after-school programs, more-engaged parents, smaller class sizes, better instructional materials and technological aids—that mitigate the inefficiencies produced by structural practices ill-fitting the contemporary needs of schoolchildren.<sup>99</sup>

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<sup>95</sup> See Saltman, *supra* note 94.

<sup>96</sup> See Bulkey, *supra* note 94, at 9–12.

<sup>97</sup> See *id.* at 14–15.

<sup>98</sup> See, e.g., Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 NOTRE DAME L. REV. 1917, 1933–34 (2012) (discussing exceedingly small number of jurisdictions with active voucher programs and that, even within these limited bounds, these programs are further constrained either as “pilot” or time-limited programs).

<sup>99</sup> See, e.g., Harold Wenglinsky, *Are Private High Schools Better Academically than Public High Schools?*, Ctr. on Educ. Pol’y, 19–21 (Oct. 2010), [http://www.cep-dc.org/cfcontent\\_file.cfm?Attachment=Wenglinsky%5FReport%5FPrivateSchool%5F101007%2Epdf](http://www.cep-dc.org/cfcontent_file.cfm?Attachment=Wenglinsky%5FReport%5FPrivateSchool%5F101007%2Epdf).

To summarize, American public schools are standardized, first, because of the regulatory history that gave birth to American public schools, particularly the goals of cultural assimilation motivating common schools and the assembly-line operational practices of the industrial age. This foundation was largely untouched during the mid-twentieth century focus on racial integration and funding equity. More modern efforts premised on programmatic reform and standards-and-assessment not only fail to revisit the structural assumptions undergirding public schools, but largely superimpose new curricular and testing mandates on top of pre-existing rules. These traditional antecedents for uniformity, in addition, are amplified by the ways in which mandate-making is intrinsic to the modern regulatory state, factors that apply with unique force to public education, especially for districts disproportionately serving racial minorities.

Part II will explore the ways highly standardized public schools are inconsistent with the expectations motivating public education today. This Part will also discuss how education mandates undermine the very professional discretion needed to achieve the goals of modern public schools—goals radically different from those informing American public schools for most of their history.

## II. HEAVY MANDATES COMPROMISE THE PROFESSIONAL DISCRETION NEEDED TO MAXIMIZE STUDENTS' ABILITY TO OBTAIN THE HIGHER-ORDER SKILLS REQUIRED FOR COMPETITIVENESS IN THE MODERN, GLOBAL ECONOMY

This Part contends, first, that education, at the levels demanded today, requires a substantial amount of school-level discretion, given the individual and ever-evolving needs of students, and because the higher-order skills expected of today's students are not amenable to standardized pedagogy in the same way as basic skills. This Part claims, further, that policymakers have ignored the degree to which a window of school-level discretion is necessary for effective education in light of today's skill-level expectations, and as such education mandates needlessly compromise school-level discretion in ways that often undermine the objectives they purport to serve.

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This of course does not mean that voucher programs are not beneficial for individual students. My claim is simply that voucher programs generally do not reflect a fundamental reorientation of school practice in light of this Article's critiques of standardized schools.

A. *Educators Require Significant Amounts of Professional Discretion Given the Unique Challenges of Instilling in Large Numbers of Children the Higher-Order Skills Expected Today*

The education of children is unique among the responsibilities of government. This is so both because children bring with them unique and ever-evolving challenges to the educational enterprise, and because education itself—and, more to the point, effectively instilling in young people the skills, competencies, and values motivating public schooling today—also presents special challenges.

Public schooling is unique, first, because it is one of the few areas in which government assumes direct responsibility over the care, cultivation, and value inculcation of children. Outside of foster care, in which government takes responsibility for the entire scope of a child's life, public schools are unique in terms of the primary role government plays in directing a child's nurturing and development. Yet unlike even the foster-care context, public education involves the cultivation and value inculcation of children on a mass scale. Every state in the union requires children to enroll in school, and for parents unable to access private schools, the only way to comply with this mandate is to send their child to government-run schools.<sup>100</sup> The large majority of American children therefore attend public schools.<sup>101</sup>

Education is distinct, in addition, because public education, as discussed earlier, is motivated by particular aims about the kind of human beings sought to be produced by public schools—a young person who not only has certain technical skills relevant to contemporaneous labor markets, but who also embodies those social, cultural, and civic sensibilities that public authorities have decided serve the public interest.

The uniqueness of these objectives brings equally special challenges for the government. First, the processes by which students internalize information are dynamic and complex and vary from child to child.<sup>102</sup> Children, among other things, have different learning styles and thus process instruction differently.<sup>103</sup> Some students learn best by seeing, and others by doing; some children best process information through repeti-

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<sup>100</sup> See, e.g., Adriana Lleras-Muney, *Were Compulsory Attendance and Child Labor Laws Effective? An Analysis from 1915 to 1939*, 45 J.L. & ECON. 401, 403 (2002).

<sup>101</sup> See AUD ET AL., *supra* note 89, at 24 (“Some 10 percent of all elementary and secondary school students were in private schools in 2009–10 . . .”).

<sup>102</sup> See generally HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (1983) (arguing that there are a wide range of cognitive abilities); Susan S. Stodolsky & Pamela L. Grossman, *Changing Students, Changing Teaching*, 102 TCHRS. C. REC. 125 (2000) (discussing the changing racial and ethnic composition of students in United States as a reason to rethink traditional teaching methods).

<sup>103</sup> See GARDNER, *supra* note 102.

tion—others by applying knowledge to real-world situations.<sup>104</sup> For some students, these differences in learning styles may rise to the level of diagnosable special education disabilities, triggering special legal processes that, among other things, presumptively require children with disabilities to be taught alongside general education students, and thus require general education teachers to respond to these distinct needs as well.<sup>105</sup> In addition, a child's receptivity to instruction also varies based on the particulars of the child's economic, social, and cultural conditions.<sup>106</sup>

Second, the difficulty of teaching students in ways that respond to their diverse learning styles is amplified because a student's responsiveness to teaching is ever-evolving.<sup>107</sup> Neither children nor the way they process instruction is static. Instead, children are continually evolving physically, socially, and emotionally throughout their school-age years.<sup>108</sup> Each of these factors affect a child's receptivity to learning, and each situates a child differently, at different points in their development, for instruction. In addition to transformations arising from a child's personal maturation, the conditions in which children find themselves change regularly, often dramatically. For instance, the death of a parent, a caregiver's loss of income, the illness of a loved one, and other familial or community disruptions can alter a child's receptivity to learning, often in ways that are not obvious to others, but usually in ways that require tailored pedagogical interventions.<sup>109</sup>

Third, and especially important today, the technical skills required for success in the twenty-first century require high levels of critical thinking, reasoning, and analysis, raising the bar on the rigor of instruction and thus the rigor of the instructional methods.<sup>110</sup> The twin engines

<sup>104</sup> *Id.*

<sup>105</sup> To the maximum extent possible, IDEA requires students with disabilities to be taught in a general-education classroom. Individuals with Disabilities Education Act of 2004 § 612(a)(5)(A), 20 U.S.C. § 1412(a)(5)(A) (2006).

<sup>106</sup> *See, e.g.*, PEDRO A. NOGUERA, *THE TROUBLE WITH BLACK BOYS: AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION* 18 (2008); DARLING-HAMMOND, *supra* note 36, at 13 (recognizing need for teachers to instruct students improvisationally to meet their diverse and evolving needs).

<sup>107</sup> *See* Liebman & Sabel, *supra* note 2, at 218 ("Because each student is achieving mastery by applying an idiosyncratic bundle of skills, the teacher's job is to find ways of continuously assessing each student's assembly of strategies and to suggest new ones for overcoming the weaknesses.").

<sup>108</sup> *Id.* at 215–18.

<sup>109</sup> *See, e.g., id.* at 215 (emphasizing the need for individualized learning because children are "incurably idiosyncratic").

<sup>110</sup> THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, *THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK* 111 (expanded ed. 2012) ("[W]e need our education system not only to strengthen everyone's basics . . . but to teach and inspire all Americans to start something new, to add something extra, or to adapt something old in whatever job they are doing.").

of globalization and information technology have radically changed contemporary labor markets and, correspondingly, the skills required for graduates to effectively navigate current labor markets.<sup>111</sup> In this new “flat world,” to use Thomas Friedman’s metaphor, the ability to think, create, innovate, and adapt—along with dexterity in science and mathematics—are essential to the twenty-first century competitiveness of individuals.<sup>112</sup>

These higher-order analytical skills, moreover, require a different kind of teaching than that informing the agricultural and manufacturing skills needed historically for prior labor markets.<sup>113</sup> Industrial-age labor markets, as discussed above, required workers able to manage the highly standardized, assembly-line factory positions that drove the contemporaneous economy.<sup>114</sup> These skills, which emphasize repetition and uniformity, are amenable to discretion-free instructional methods in ways that are not true for the more cognitively rigorous skill set relevant to modern labor markets.<sup>115</sup>

The large number of children served by individual teachers and schools compound these three factors. Teachers face classrooms ranging from twenty to twenty-five students, and often many more, with each child representing his or her own special combination of the factors discussed above. An individual teacher thus confronts not only the difficulties inherent in teaching higher-order skills and prescribed civic virtues to children who present evolving availabilities for learning, but also the challenge of managing each individual child and his or her individual complexities along with twenty or twenty-five others, who each bring their own idiosyncratic context to bear on the learning process.

For these reasons, among others, school-level educators require substantial amounts of professional discretion to effectively instill in students the higher-order technical skills expected of modern public schools.<sup>116</sup> Principals and schools need the flexibility to tailor curricu-

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<sup>111</sup> *Id.* at 56 (“This merger [of globalization and the IT revolution that coincided with the transition from the twentieth to the twenty-first century] has raised the level of skill a person needs to obtain and retain any good job, while at the same time increasing the global competition for every one of those jobs.”).

<sup>112</sup> *Id.* at 104–05 (noting that “continuous innovation is not a luxury anymore” and companies must “practice constant innovation” or “fall behind farther and faster than ever before.”); see also DARLING-HAMMOND, *supra* note 14, at 237–38.

<sup>113</sup> See, e.g., *id.* at 237–39 (demonstrating ways that competitive requirements of the flat world require a teaching method fundamentally different from that at work in the Common School and Progressive Eras).

<sup>114</sup> See *supra* Introduction.

<sup>115</sup> See *id.*

<sup>116</sup> DARLING-HAMMOND, *supra* note 14, at 218–19, 237–41; see also CHUBB & MOE, *supra* note 69, at 36 (emphasizing the need, in light of modern expectations of public schools, for educators to have the discretion to tailor their practice “to the infinitely varying individuals and circumstances that make up their jobs”).

lum, instruction, and assessment in ways that respond to the learning styles represented by the students in a school or classroom.<sup>117</sup> Too much standardization thus yields a round-peg-in-square-hole problem, where rule-dominant educational practices preclude schools from adapting educational practices to students' individual needs.

Likewise, the ever-evolving nature of students' receptivity to learning means that educators face dynamic school and classroom environments where what was effective yesterday may be ineffective tomorrow. In such a fluid environment, professional discretion enables educators to flexibly adapt their practices to the diverse circumstances they face each day.

Discretion-stripping thus tends to freeze in place educational practices that not only fail to meet the individualized needs of many students but also outlive their usefulness. A rule requiring the use of a particular lesson plan for reading instruction, for example, may at some point be useful for some number of kids. But as kids evolve, that particular mandate may no longer meet their needs. Yet a mandate requiring the continuing use of that reading program, regardless of a principal's or teacher's view about the continuing utility of that program for the affected students, locks into place a practice that both fails to meet the needs of many kids in the first instance, and that, over time, outlives its usefulness for others.

The connection between school-based professional discretion and higher-order skill development is so strong that the distribution of professional discretion corresponds to the distribution of educational opportunity in many ways.<sup>118</sup> For example, racial and class-based differences in school performance, in some ways, reflect the distribution of professional discretion of the better trained and better qualified educators charged with teaching the privileged elite for whom high-skill training is desired.<sup>119</sup> In contrast, the broad mass of students trained to serve as cogs in the industrial age manufacturing economy typically receive a more standardized educational experience in which professional discretion is less important precisely to the degree to which high-skill training is unimportant.<sup>120</sup>

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<sup>117</sup> See, e.g., John S. Wills & Judith Haymore Sandholtz, *Constrained Professionalism: Dilemmas of Teaching in the Face of Test-Based Accountability*, 111 TCHRS. C. REC. 1065, 1108 (2009) (finding that "teachers' discretion in their work is being minimized," which has negative effects for student learning).

<sup>118</sup> See, e.g., DARLING-HAMMOND, *supra* note 36, at 9 (discussing how rote drill and practice instruction characterizes lower-performing schools, while more professionalized discretionary practice characterizes higher-performing ones).

<sup>119</sup> See Beatty, *supra* note 11 (describing ways in which scripted, discretion-preempting curricula are disproportionately imposed in schools where the majority of students come from low-income backgrounds).

<sup>120</sup> See DARLING-HAMMOND, *supra* note 36, at 4–5.



Finally, the multiplier effect of the number of students in classrooms and schools magnifies the importance of professional discretion. The aggregated needs of students, in terms of their learning styles, the ever-evolving nature of their receptivity to learning, and the different ways in which they learn higher-order skills cannot be met without significant amounts of professional discretion. Moreover, discretion-stripping uniform rules do not permit nimble responsiveness to the diverse, evolving ways in which individual students, placed within a larger group of students, respond to instruction.

Principals and teachers require a meaningful amount of professional discretion to achieve the ambitious goals expected of today's public schools. Yet the need for a discretionary space effectively free from inflexible mandates at both the school and classroom level does not necessarily imply that across-the-board rules should never be imposed. Rules are not only important but, as discussed further in Part III, are necessary in many instances. Rules, among other things, ensure that schools remain "public" in terms of their fidelity to core civic values. Moreover, when crafted appropriately, rules ensure that public schools act consistently with the best educational practices and protect against the incompetent or biased delivery of educational services. Thus, the harm to the public school system does not come from modern educational rules themselves but from the degree to which these rules counterproductively extend into spheres better left to professional discretion. The proliferation of overbroad and ill-fitting mandates built on historic traditions leaves individual schools and classrooms facing a morass of rules that too often bear little relation to effective educational practice. These rules undermine the capacity of individual public schools, and thus the public school system as a whole, to deliver on the promises of public schooling.

*B. The Need for Professional Discretion Rarely Informs Education Decision Making, Let Alone Rulemaking, so Education Policy Infrequently Takes the Need for Discretion into Account*

Although educators need a significant amount of professional discretion to fulfill the goals motivating today's public schools, policymakers, ranging from those in federal, state, and county governments to those in local school districts and those in management and labor through collective-bargaining agreements, rarely recognize the tension between rules and professional discretion and the direct relationship between this tension and the ability of public schools to effectively educate children in light of current expectations. Educational policymakers rarely identify the degree to which their rules undermine discretion and the reasons why those costs are outweighed by the benefits of standardization. As a result, educational rules seldom account for the tension between rules and

discretion, and yield mandates that either affect entire subject areas that should be left to the professional discretion of educators or, where a subject area is appropriate for regulation, counterproductively extend into spheres better left to professional discretion.

The overbroad nature of educational mandates reflects policymakers' failure to meaningfully acknowledge the particular ways in which professional discretion is important for public schools to achieve their goals. This shortfall also demonstrates how policymakers have failed to articulate a vision of the appropriate way to balance the use of education mandates with the use of school-level discretion. The absence of such a vision causes education mandates to operate recklessly, without an anchoring theory to distribute mandates to the areas in which they would be most useful and to preserve professional school-level discretion in areas in which flexibility is important.

To this end, Part III provides an approach to educational rulemaking that, first, acknowledges the need for a meaningful amount of school-based professional discretion in order for public school students to obtain the higher-order skills expected of them today. Second, Part III offers an intellectual framework to guide policymakers in crafting education mandates that effectively balance uniformity and discretion.

### III. REORIENTING EDUCATION POLICYMAKING TOWARD PURPOSEFUL RULEMAKING THAT EFFECTIVELY BALANCES MANDATES AND DISCRETION, GIVEN THE UNIQUE IMPORTANCE OF DISCRETION TO EFFECTIVE MODERN-DAY EDUCATION

This Part provides a set of principles to guide rule makers, first, in determining when across-the-board mandates are appropriate and, second, in crafting rules that effectively balance the important and often essential benefits of mandates with the significant and often necessary benefits of school and classroom discretion. Specifically, I suggest that policymakers, as a threshold matter, should consider whether the subject matter covered by a proposed mandate is one for which across-the-board rulemaking is appropriate. Here I distinguish between regulatory-zone subjects, for which mandates are generally appropriate, and discretionary-zone subjects, for which they are not. However, even when a subject matter falls within the regulatory zone, policymakers should carefully craft mandates that specifically focus on regulatory-zone purposes and do not needlessly impinge upon discretionary-zone prerogatives.

First, policymakers should limit education mandates to four discrete sets of categories in which rule-based uniformity routinely outweighs the benefits of discretion. These categories concern: (1) matters involving fundamental public values that apply to all government institutions; (2) matters concerning fundamental public values unique to education; (3)

matters for which an overwhelming consensus of experts finds that a particular practice is necessary to effectively educate a broad majority of students; and (4) emergent, time-limited situations in which individual staff are too incompetent to effectively exercise discretion and mandates can replace professional discretion for a fixed, temporary period.

Rulemaking is appropriate, first, to ensure that schools uphold core public priorities that generally apply to all government institutions. These values reflect priorities that are fundamental to the way in which government interacts with citizens, involving among other things, the most hallowed traditions of American law—due process, equal protection, non-discrimination, the accommodation of individuals with disabilities, free speech, and access to public records and public facilities. These values also include less lofty, but nonetheless vital interests, such as health and safety, environmental protection obligations, instrumental priorities like plain English requirements for rulemaking, and mandates to publish public information electronically. Broad-based civic imperatives that universally apply to government conduct should generally apply with equal force to schools because these values embody the core foundational principles through which American government discharges its responsibilities. Recognizing the legitimacy of mandates in this sphere effectively acknowledges that rules covered by this category are not fundamentally education mandates but rather core democratic imperatives that embody the foundational values that inform government action.

Second, education discretion-stripping mandates are appropriate to fulfill fundamental public purposes unique to education. Of these, the outcomes pursued by public schools are the most obvious because schools must maintain uniform core educational goals to be “public” in any meaningful sense. Government finances schools to achieve public purposes and those purposes must constrain public schools’ activities. It is thus not only justified, but in fact necessary, for government to identify the goals and expectations of public schools in terms of the values that schools ought to embody as public institutions and the kind of skills and sensibilities public school students ought to possess. Mandates falling within this second category include government directives concerning public school outcomes, including standards covering the kind of academic skills and civic values graduating students ought to possess. This category also includes state mandates covering the courses, knowledge, and competencies expected of students at various grade levels. Testing also falls under this purview, as a constituent part of determining the outcomes and purposes of public education is the ability to determine whether those goals have been achieved.

In addition to these first two regulatory zone categories, I also suggest a narrow third category authorizing policymakers to require the use

of best practices supported by the irrefutable consensus of educational experts. To be clear, this authority is narrow and should only be employed when a broad consensus of education experts empirically finds that a particular practice is necessary for the effective education of a large majority of students. If, for example, a broad consensus of educational experts empirically finds that students need at least three hours of instruction to obtain the skills expected of them, then this principle justifies a corresponding rule. Likewise, if a broad consensus empirically concludes that prospective teachers require a college degree in order to effectively wield discretion to advance student achievement, a corresponding rule should also apply.

Professional activity is subject to constant reflection, study, and research on the best practices. Accordingly, this third category recognizes an obvious justification for mandates—imposing methodological uniformity where overwhelming evidence reveals that the most effective means of accomplishing an objective is through a particular course of action. While a substantial amount of learning cannot be fostered by across-the-board rulemaking, the converse is also true. Thus, mandates are generally justified when a clear, unquestionable factual basis supports implementing a specific practice. This authority, however, must be used carefully and infrequently, recognizing that methodological practices are rarely supported by an unambiguous predicate that justifies universal application.

Finally, mandates are appropriate on an emergency basis to constrain the discretion of educational staff incapable of effectively discharging professional discretion. This authority recognizes the power to remove discretion from specific employees who have not shown the capacity to effectively use professional discretion to promote the goals of public education. However, this power may only be implemented by policymakers who maintain the most regular contact with affected districts or schools. Moreover, this power should rarely, if ever, be exercised by state authorities and should never be implemented by federal authorities. Since competence justification is only directed at the particular areas in which competence is a challenge, it will not be a source for wide-ranging discretion-stripping based on indiscriminate assumptions about school-based competence or, even worse, stereotypical bias about district or school-based capacity, a particular challenge faced by districts serving racial minorities.<sup>121</sup>

This category is narrow and discrete because competence-based discretion-stripping is a crude and ultimately counterproductive way of ad-

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<sup>121</sup> See generally *supra* Part I (discussing stereotypical views government actors often have about the competence of district and school-based staff serving minority students, particularly where the supervisory leadership is primarily minority).

dressing performance-related challenges. Since effective education requires educators who possess a high level of professional discretionary skill, public schools cannot escape the necessity of attracting, developing, and retaining highly skilled and competent educators. Thus, this source of authority must be used only on an emergent, targeted basis, where the incompetence of specific school-based staff leaves particular students more vulnerable to poor instruction than rule-based uniformity would. This competence justification would, for example, support specific directives to require particular educators to use specified instructional materials or lesson plans on a short-term basis if local supervisors find them incapable of delivering instruction proficiently with greater discretion.

The competence justification would also support the imposition of particular teacher evaluation criteria and instruments if, for example, particular school leaders were found incapable of effectively evaluating staff in more discretionary ways.<sup>122</sup> This approach would also validate rule-based seniority mandates regarding key personnel decisions in cases where individual educators were found incapable of effectively making personnel decisions—such as those involving hiring, salary, and terminations—in ways that best serve the individual needs of students. Again, the most important aspect of the competence justification approach is that these decisions are both short-term and specific. The short-term aspect of the competence justification approach recognizes the necessity of professionally exercised discretion and, thus, acknowledges that competence justification is not a substitute for hiring staff with the skills to effectively use that discretion. Moreover, the specificity requirement recognizes that discretion-stripping rules in this context should be based on particular findings about individual staff rather than on indiscriminate mandates informed by general assumptions about local capacity.

While these four categories represent subject matter for which mandates are justified, policymakers charged with regulating these areas must carefully tailor their regulations in light of these objectives to ensure that rulemaking does not sweep beyond these legitimate goals. For example, a rule designed to enact a universal civic imperative applicable throughout government, such as a mandate requiring nondiscrimination on the basis of sexual orientation, ought to be crafted to only advance

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<sup>122</sup> To be clear, teacher evaluation criteria might also be justified by the regulatory-zone justification for mandates where a broad consensus of education experts support a particular set of practices. Yet, the more particularized teacher evaluation criteria become (for example, requiring an administrator to evaluate a teacher based on a predetermined rubric that assigns weights to various competences), the more likely they are to fall into an area where a more debatable consensus of experts support the practice. To that extent, using the competence justification as a backstop would support further regulation to the degree that particular staff members are incapable of effectively using professional discretion.

that interest and should not needlessly interfere with other interests, except for those falling within the same regulatory zone. This principle simply acknowledges longstanding jurisprudential questions concerning tailoring and recognizes that only those rules that are tightly tethered to their purposes can reasonably be regarded as embodying those goals.<sup>123</sup>

Education practices falling outside of these four regulatory zone categories generally ought to be left to school-based discretion. Regulatory-zone subjects, save for exceptions justifying the adaptation of methodological uniformity to advance broadly recognized best practices or to relieve specific areas of staff incompetence on a short-term basis, generally concern the outcomes of public education. The means individual schools use to pursue the goals and purposes of public schools, as determined by regulatory-zone mandates, broadly ought to be left to the professional discretion of school-based educators. These instrumental practices fall within the discretionary-zone and should generally be free from across-the-board rulemaking precisely because these practices generally depend upon the organic, flexible, and proficient use of discretion in relation to individual, ever-changing student needs.

Discretionary-zone practices concern the heart of school-based staffs' instructional and pedagogical interaction with students and include: the selection of curricular tools; the selection of instructional methods or techniques that are best able to engage a particular student or set of students; the amount of time particular students or sets of students need to proficiently internalize required skills; how many staff members ought to be assigned to a particular set of students for those students to progress academically; and the ways in which school-based administrators, such as principals, vice-principals, and department chairs, support and supervise teachers and other school-based staff in pursuit of school outcomes. These practices are currently heavily regulated, and uniform-

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<sup>123</sup> Due to the important interests at stake, constitutional law uses narrow tailoring to ensure that the government pursues legitimate purposes using means that are closely related to those purposes. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (noting that all racial classifications imposed by the government must be “narrowly tailored to further compelling governmental interests”); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that the government can restrict protected speech as long as the restrictions are narrowly tailored to serve a significant governmental interest and leave open alternative channels of communication). The proximity between legitimate purpose and regulatory scope largely turns on whether an individual or governmental interest holds more sway in a particular context. Thus, as it relates to an individual right to be free from racial discrimination, constitutional law requires an exceedingly tight link under the narrow tailoring jurisprudence between means and purpose. See, e.g., *Grutter*, 539 U.S. at 326. In contrast, because constitutional law emphasizes the government’s ability to regulate broadly on economic matters, individual rights in this context, for example, are less weighty and constitutional law grants government a wider regulatory authority. See, e.g., *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (noting that the Equal Protection Clause grants states wide discretion when economic legislation is at issue).

ity in these instances is necessarily counterproductive because it attempts to routinize the unpredictable. Decisions affecting discretionary-zone practices involve dynamic and evolving human interactions for which there is no substitute for effectively trained professionals who understand which particular approach, from a range of permissible approaches, best suits a particular student or particular sets of students at a particular time. In short, these situations demand qualified educators and no rule or mandate can systematically replicate the professional craft and judgment of a well-trained professional educator.

### CONCLUSION

Education policymakers should engage in purposeful rulemaking that specifically considers the appropriateness of education mandates in light of the need for appropriate levels of school-based professional discretion. This is particularly important now, given the intense public and political interest in improving student outcomes that has fueled a growing number of education mandates. Policymakers' failure to recognize the educational necessity of meaningful school-based discretion has caused them to ignore the implications of across-the-board discretion-stripping school mandates. More importantly, this oversight has caused policymakers to fail to consider whether those effects undermine professional discretion in ways that compromise student outcomes.

To be clear, this framework does not suggest that educational mandates are inherently bad or good. Instead this framework allocates rules to areas that will be strengthened by the application of educational mandates and keeps rules out of those areas in which mandates are unhelpful and counterproductive. This framework, of course, is no panacea; it will not always yield ideal results, nor will it alone ensure that schools will produce greater student outcomes. What this framework provides, however, is a set of principles aimed at rebalancing the relationship between uniformity and school-based discretion in education law and policy to better meet the contemporary needs of modern American public schools.

Today's uniformity–discretion continuum largely reflects a prior ordering rooted in Common School and Progressive Era perspectives regarding school performance, which themselves were based on historical expectations about student achievement and the purposes of education. Yet today, because schools are expected to prepare students for a highly competitive, technologically advanced, and evolving international labor market, more highly qualified and trained educators are required to use their discretion and professional training to effectively pursue student outcomes.

Rules are good and necessary as far as they are useful and productive. As previously discussed, they are essential in anchoring the out-

comes sought by public schools, ensuring that public schools uphold core public priorities, tethering public schools to indisputably beneficial best practices, and providing a backstop function in areas where specific staff are incapable of effectively using discretion. However, mandates can only go so far and alone cannot yield public schools that are responsive to the demands of today's public and current labor markets.

Given the exigencies of an international economy driven by global competition and technological change, the gap between mandates and effective education can only be filled by competent, highly skilled professional educators who are prepared to use their discretion to achieve the objectives of today's schools. This requires policymakers to forego grafting new rules and approaches onto a mandate-based foundation that has its roots in an entirely different context. Modern school objectives require policymakers to reimagine public schools in light of current expectations and enact laws that serve those expectations by recognizing the appropriate place for education rules and the residual space that must be reserved for professional discretion.

This Article seeks to participate in a conversation about the relationship of law and discretion to public schools. Even if others critique my particular account or reject it altogether, I hope that this piece will engender a renewed consideration of the role of mandates and discretion in schools in light of the heightened expectations for today's graduates and spur policymakers to think purposefully and specifically about the discretion-stripping implications of mandates, both in determining whether to enact a particular mandate in the first place and in crafting its scope.