

# SCHOOL REFORM OUTSIDE LABORATORY CONDITIONS

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When the Supreme Court announced its decision in *Brown v. Board of Education*,<sup>1</sup> it declared equality of public education, from kindergarten through high school, to be a constitutional commitment. In this response to decades of careful advocacy by scores of lawyers, social scientists, parents and citizens, the Court framed the next fifty years of advocates' work to reform American schools and, indeed, to reform American society. For by its example, as much as by its pronouncement, the Court signaled advocates to pursue 1) federal oversight of public schooling; 2) judicial rather than legislative focus for reform of racial, economic, and social inequities, and 3) a convergence of challenge to and remedies for racial discrimination, economic discrimination, and social segregation.

Fifty years later, the symbolic significance of *Brown* remains, but its roadmap for advocates generated frustration, disappointment, and in some respects even counterproductive results. As James Liebman and Charles Sabel detail, the "sad history of education in the last fifty years" includes deteriorating quality measured internationally and in light of demands of the changing economy, and declining rather than increasing public expenditures.<sup>2</sup> Others document increasing racial segregation stemming from both white flight from court-supervised desegregating schools and judicial retrenchment from the enterprise of racial desegregation.<sup>3</sup> Public schooling in the United States needs serious improvement. While claims of crisis are probably both overstated and constant, the disparities in opportunities across districts and between racial and economic groups are astonishing and persistent, and underachievement is a problem across the entire nation.<sup>4</sup> More general disillusionment with court-supervised reforms and with command-and-control public law has mounted during the same period. Starting in the 1980s, it became clear that people struggling for equality in schooling and throughout society needed new ideas and new strategies.

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1. 347 U.S. 483 (1954).

2. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 184 (2003); see also CARNEGIE TASK FORCE ON LEARNING IN THE PRIMARY GRADES, CARNEGIE CORP. OF N.Y., YEARS OF PROMISE: A COMPREHENSIVE LEARNING STRATEGY FOR AMERICA'S CHILDREN (1996).

3. See, e.g., GARY ORFIELD, THE CIVIL RIGHTS PROJECT OF HARVARD UNIV., SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION (2001); GARY ORFIELD & JOHN YUN, THE CIVIL RIGHTS PROJECT OF HARVARD UNIV., RESEGREGATION IN AMERICAN SCHOOLS (1999).

4. See CARNEGIE TASK FORCE ON LEARNING IN THE PRIMARY GRADES, *supra* note 2, at viii, 17.

Reformers have not been idle. School reforms since 1980 include state-wide standards-driven reforms, intended to align curricula, student assessment, and teacher preparation and evaluation; decentralized site-based management, intended to afford more discretion to local administrators and teachers; and experiments with school choice, bridging public and private institutions and intended to promote innovation and accountability through competition.<sup>5</sup> Marked by seemingly competing ideas of centralization and decentralization, deference to school experts and increased power to parents and others outside of the education business, and generating more uniformity versus opening more room for variety, these reforms can be harmonized through a focus on centralized outcome measures with greater variety and discretion about means.

It is precisely this conception that makes schools an appealing case study for an emerging theory of public law, sometimes known as democratic experimentalism,<sup>6</sup> advanced here by James Liebman and Charles Sabel. An alternative to either top-down command-and-control regulation or laissez-faire market choice, in theory democratic experimentalism preserves and enhances power at the local level to push for local solutions while enabling people to share information across the country to promote mutual learning and greater accountability.<sup>7</sup> Framed by state and now federal mandates to improve school accountability by testing students, new school reforms look like the perfect context for generating information for use by consumers, advocates, and administrators who then can press for exit for students from failing schools and local internal changes to improve inadequate schools, while sharing models of success across districts and states. This is an attractive way to read the current school reforms and reflects the most promising new ideas in public law. But the theory obscures large practical problems and also understates the complexity of competing goals and the theoretical and practical demands in pursuing equality in American schooling. To model the kind of responsive and critical assessment advocated in their conception of contemporary school reform, Liebman and Sabel need more critical engagement with community dialogue, practical problems, and normative debate than they have revealed thus far.

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5. For a thoughtful overview of these developments, see Karen Seashore Louis, *'A Light Feeling of Chaos': Educational Reform and Policy in the United States*, 127 DAEDALUS 704 (1998).

6. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 90 COLUM. L. REV. 267 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1 (1997); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Bradley C. Karkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903 (2002); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

7. Dorf & Sabel, *supra* note 6.

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Public law and public life need new ideas, informed by practice. Studies of public policy and democracy emphasize the self-interest of the political figures, declining confidence in government and shrinking political engagement by voters. People with divergent worldviews share disillusionment with judicial leadership in articulating and enforcing public norms. Massive efforts to privatize public programs reflect comparative confidence in competitive markets, successful advocacy by conservative interest groups, and the failure of the left to come up with anything else. Hierarchical policies, dictated from external governmental entities, seldom reflect the needs and desires of those who must carry them out and neglect the information those very frontline workers have about what goes wrong and what could be changed. Is it possible to devise modes of governance that summon public commitment and action in pursuit of ideals of equality and liberty without producing practices that fail or undermine precisely these ideals? Is it possible to devise policies that elicit the commitment and participation of those entrusted with carrying them out without abandoning ideals—like constitutional ideals—meant to constrain and direct what majorities may want?

Liebman and Sabel suggest that the emerging combination of student testing and school-based experimentation illustrates precisely such alternative governance. The tests can be used not chiefly to test students but to assess schools, and to develop accountable professionalism among teachers.<sup>8</sup> Rather than imposing rules from above, the testing information can support diagnostic evaluations and invite corrective action by the teachers themselves, even while allowing teachers and others in the system to revise the standards that inform the testing.<sup>9</sup> Liebman and Sabel indicate that in this new context, the very jobs of teaching and running schools should and will change. "The teacher no longer executes instructions set at the state or district level, but rather monitors the learning strategies of individual students and helps them correct difficulties as they arise."<sup>10</sup> The job of school administrators is to enable teachers to do this work with the appropriate supports, standards, and testing apparatus.

The same developments could be understood as part of a revolution in the application of social scientific study to the learning process itself. Rather resembling changes that health care has undergone in recent decades, education seems to be moving from intuition and anecdote to evidence-based practice. Teachers and school administrators can draw upon research in cognitive development and brain processes as well as research on teaching practices to tailor instruction for individual students and to adjust instructional settings and exercises in light of student performance. Governing curricular standards themselves can be adjusted in light of successive class performances.

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8. See Liebman & Sabel, *supra* note 2, at 189.

9. *Id.*

10. *Id.*

Yet at least two practical problems—and a third normative one—stand in the way. First, even assuming that tests are administered and results come in a timely fashion to teachers, most teachers lack the knowledge and understanding to perform the new role imagined for them. Student test scores offer at best partial evidence about when and how different instructional methods work. Linking test scores to alternative curricular materials and instructional techniques requires levels of knowledge and skill that are not currently widely distributed. Diagnostic tools that are nuanced and yet easy to use should be keyed to instructional materials suited to a student's needs and strengths, yet teachers are not equipped to devise such links. Nor have school systems or schools of education devised such links in forms that are either comprehensive or accessible to classroom teachers. This is even true in the field of special education, where individualized diagnosis and instruction has been federally mandated since 1975. Second, most teachers operate in schools without the kinds of materials, classroom aids, and school organization to produce evidence-based tailored instruction plans responsive to individual students even if their learning issues can be spotted.

Analogous versions of the first two problems occurs for parents and community advocates; how are they to acquire the capacity to understand and use the testing information to assess, monitor, and improve the schools? What alternatives are they to pursue, even with a statutory right to move a child from a failing school, when empty spaces exist only at other inadequate schools rather than at sought-after urban magnet or suburban schools? Although Liebman and Sabel acknowledge that a vital role remains for grassroots and community advocacy,<sup>11</sup> nothing in their theory will equip parents and other community members to develop the expertise and options necessary for them to hold the other actors to account. Generating information like test scores can bring community groups to the table—but where in the new scheme is the table where decisions about instruction and curriculum will be made? How can parents, especially in impoverished and immigrant communities, come to comprehend and advocate effectively based on emerging data—or even have the time, while working two jobs, to come to a meeting? Where states attach high-stakes—meaning no diploma—to students who do not pass mandated tests, many community members feel disenfranchised and punished for longstanding school failures.

The third and normative problem is even more profound. What should schools do—and how should we resolve competing answers? Americans have debated the purposes of schooling ever since moving to make it compulsory. Should schools prepare students for jobs that exist or for jobs that could exist? Should schools identify and cultivate student talents or remedy a student's deficits? Should schools encourage critical reexamination of the beliefs students learn at home or instead serve as partners with parents in cultivating beliefs that

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11. Liebman & Sabel, *supra* note 2.

parents embrace? Should schools socialize students to join a common culture—and if so, is that a common culture that currently exists or one that should change in light of the contributions of new students and new groups? Competing views on these issues have generated intense struggles over curricular reforms, teacher qualifications, and school governance.<sup>12</sup> A familiar criticism of the testing movement is that it squeezes out curricular and teacher concerns with anything not on the tests. Besides disagreements about topics and skills that warrant school time, people legitimately differ over the priority to be given to analytic tools, content knowledge, social skills, critical thinking, civic engagement, the arts and sports. Some of these disagreements arise even among people who share the same goal, such as maximizing students' success in obtaining and keeping secure and well-paying jobs. Thus, music and visual arts instruction can be defended as relevant to improving math and language skills; enhancing supporting and mentoring relationships similarly can be given priority as a central method to promote cognitive learning. Even screening for health problems can be defended as essential for identifying students with hearing and vision problems, which, if unidentified, place them at risk for school failure.

Yet, some of the disagreements indicate deeper differences in the purposes of schooling. People can and do disagree about the relative importance of job preparation, preparation for citizenship or developing individual freedom of expression and thought. Some are thrilled when schools focus on raising scores on tests focused on math, language arts, and social studies facts, while others protest how these tests eliminate study of peer pressure, prejudice, or the arts. Improving student understanding and protecting their own health, equipping students to resolve conflicts, and enabling them to become informed consumers of products and mass media each appear as priorities, as registered by curricula mandated by states and localities. In some schools, all of these goals jostle alongside the rival purposes of physical safety where fellow students, neighbors, or family members pose dangers at times.

No less contestable is the meaning of equality as an ideal for education in America. Should equality mean access to comparable opportunities, equal dollar expenditures per pupil, or assurance of a minimum standard of instructional quality even though schools will vary enormously in how much they exceed that minimum? Should equality mean bringing up the bottom test scores? Offering diplomas to students with mental disabilities who successfully complete life-skills courses and diplomas for other students who successfully complete a college preparation curriculum? Access to advanced placement classes for all students or instead for all of those who meet a minimum level of excellence? Racial and ethnic integration of classrooms in line with the racial and ethnic mix

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12. See, e.g., DIANE RAVITCH, *THE TROUBLED CRUSADE: AMERICAN EDUCATION 1945–1980* (1983); DAVID TYACK & ELIZABETH HANSOT, *MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA 1820–1980* (1982). See also essays collected in *American Education: Still Separate, Still Unequal*, 124 *DAEDALUS* 1 (1995).

of the surrounding population? Or termination of explicit policies of racial exclusion? Equal opportunity for localities to choose how much to spend on their schools or redistribution of an entire state's tax revenues to provide a common minimum expenditure across the states? Or across the country? What could equality in education possibly mean in the absence of equal funding and equally qualified teachers across school districts—or when students come to school with profoundly different preparation based on the opportunities provided by their families and available pre-school experiences?

Democratic experimentalism or collaborative governance has a fine chance to work where there is agreement or assent given to identify purposes. Then, local schools and teachers can exercise discretion around means while they join parents, administrators, and community members in studying and using test results and other evidence about the effects of practices. Where the goals are complex and multiple, this process is much less likely to generate clear and comparable results and cross-community learning. Indeed, where goals are complex and multiple, there remain important roles for old-fashioned democratic deliberation and judicial interpretation of overarching legal values.<sup>13</sup>

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Liebman and Sabel offer an appealing way to read contemporary school reforms as an illustration of new governance techniques, elsewhere called democratic experimentalism. The practical and normative worries raised here reflect the spirit they exhibit. That spirit combines commitments to improving schools as places of equal opportunity with reliance on the capacities of courts and legislatures to help establish structures for teachers, administrators, parents and community members to monitor and prod internal reforms. To enable such engagement by teachers, administrators, parents, and communities, much more must be added beyond the testing apparatus and accountability systems of federal and state law. Teachers need actual and direct expert aid in reading and using testing results, linking to curricular materials and instructional techniques. Administrators need help making the new systems work and redesigning schools and school days to permit more effective instruction. Parents and community members need opportunities to learn about evidence-based instruction and to participate in key decisions about educational priorities. And all of these efforts must be part of a broader public debate about what it would take to make schools work—a debate framed with enough experimentalism so the costs of failure are not borne, as they have been, by disadvantaged students and overburdened teachers.

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13. For examples of judicial interpretation in the context of challenges to high-stakes testing, see *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981); *Brookhart v. Illinois State Board of Education*, 697 F.2d 179 (7th Cir. 1983); *Crumpp v. Gilmer Independent School District*, 797 F. Supp. 552 (E.D. Tex. 1992).