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The Legal Impact of Emerging Governance Models on Public Education and Its Office Holders

Robert A. Garda, Jr.* and David S. Doty**

The idea that changing the formal structure of governance can lead to better schools is rooted in American political and intellectual history.¹ In a seminal 1984 book on the landscape of school reform, Stanford professor and former chair of the California State Board of Education Michael Kirst concluded:

Setting priorities is essentially a struggle for control, and there will never be an end to the struggle for control of America’s public schools. The values and philosophies of the contestants are deeply rooted and conflicting. An approach we have used since the 1920s to resolve this conflict is to make our schools provide something for everybody. No one is to be disappointed. In governance, the approach of giving everyone a voice in running the schools has often fragmented power to the point where everyone and no one seems in charge. The schools have been giving Americans what they want, but few people are satisfied and many are disappointed.²

Nearly thirty years later Kirst’s words still ring true. Politicians, career educators, parents, business leaders, and investors continue to wrangle over the control of public schools all across the country.

With these battles for control have come more lawsuits, more laws, and more administrative regulations dictating the governance structures of educational institutions. Indeed, one could argue that, in recent years, debates over how schools and school districts should be governed have subsumed the curriculum debates over how and what children should be taught. Leadership matters, and therefore, stakeholders throughout the education community are experimenting with

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governance innovations as they attempt to dramatically improve student achievement and patron engagement.

Charter schools are the most ubiquitous example of the transformation, but states and districts are implementing a variety of other governance reforms ranging from the modest to the extreme. At the modest end, many school districts are decentralizing administrative control from the school board to individual schools and granting site-level autonomy over budgeting, personnel, curriculum, and instruction. In the middle of the spectrum, the role of the school board itself is changing, with mayoral control over education policy and appointment power on the rise. While some states and communities are innovating through consolidation or division of school districts, others have eliminated local school boards altogether by wresting control over the operation and management of schools under accountability measures, as seen most recently in Detroit. And at the extreme end, the school systems in New York City, Chicago, Denver, Hartford, New Orleans, and the District of Columbia have implemented a portfolio strategy, where public schools are run by multiple providers and governed by a myriad of entities.

Regardless of the governance model pursued, stakeholders must be aware that a major challenge to the status quo model of traditional public schools operating under the direction of a locally elected school board.

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4. New York, San Diego, New Orleans, Detroit, and Philadelphia are examples of districts experimenting with administrative decentralization.
5. Fourteen cities, including New York City and Boston, have significant mayoral control over education. THE SCOTT S. COWEN INST. FOR PUB. EDUC. AT TULANE UNIV., CREATING A GOVERNING FRAMEWORK FOR PUB. EDUC. IN NEW ORLEANS: SCH. DIST. POLITICAL LEADERSHIP 17-23 (2009).
board is likely to come to a neighborhood near them very soon.\(^9\) This Article discusses some of these new education governance models and the emerging legal issues they present. The new governance landscape is somewhat of a Wild West frontier, and state and local governments traversing governance reform must be prepared for often treacherous terrain.

Part I of this Article discusses the federal efforts at spurring governance reform at the local level through the No Child Left Behind Act (NCLB) and the Race to the Top. This section identifies the educational governance reform mandated by NCLB, how those reforms were not achieved, and what may be expected at the federal level in the future. Part II discusses the legal issues arising out of efforts to divest decisionmaking authority from traditional elected school boards. This part identifies legal challenges related to key reforms: mayoral control, portfolio school districts, and pushing authority from school boards to individual schools or to superintendents. Finally, Part III identifies the legal issues when school districts consolidate or detach. The sections collectively show that some consistent legal challenges arise in any type of reform that changes the authority of the elected school board. The first challenge is allegations of equal protection violations under the Fourteenth Amendment because reforms are typically targeted at only a few of the underperforming districts within a state while others are left untouched. The divestment of voting power from the electorate to select a school board also raises issues under the Voting Rights Act, state constitutions, and the Federal Constitution. Finally, various state constitutional provisions dealing with education often present barriers to governance reform.

**I. Federal Efforts at Spurring Governance Reform**

Many states experimented with alternative education governance structures for decades, but the No Child Left Behind Act of 2001 (NCLB)\(^10\) compels all states to implement far ranging governance reforms for failing school districts and Title I schools. But NCLB and other federal measures such as Race to The Top have proven ineffective

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at spurring meaningful governance reforms at schools and school districts. This section will discuss the legal issues that arise when schools or districts are required to alter their governance structure under NCLB accountability systems and look at the future of federal efforts to induce governance reforms.

A. Legal Issues Arising from AYP and Sanction Determinations

NCLB requires states to establish “challenging” academic standards in reading, math, and science, and test all students regularly to ensure they are meeting those standards. Test scores are tabulated for schools in the aggregate and are also disaggregated by subgroups, including migrant students, disabled students, English-language learners, and students from all major racial, ethnic, and income groups. These scores, and other school indicators, such as attendance and graduation rates, are then used to determine if a school is making “adequate yearly progress” (AYP) towards the Act’s goal of one hundred percent student proficiency by the year 2014.

Schools that receive Title I funding—about half of all schools in the nation—and fail to make AYP are deemed “in need of improvement” and face increasingly harsh sanctions for every year they fail to make AYP. After four consecutive years of failure to make AYP, schools enter the “corrective” phase and are compelled to undergo one of the listed reforms, such as replacing the school staff, decreasing management at the school level, and changing the internal organizational structure of the school. A fifth consecutive year of failure triggers the “restructuring” sanctions, which require districts to implement

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12. Id. §§ 6311(b)(3)(C)(xiii), (v)(II)(aa)-(cc).
13. To make AYP, the student population as a whole as well as each subgroup must meet the proficiency goal, i.e., a sufficient percentage of students must perform proficiently on state tests. Id. § 6311(b)(2)(C); 20 U.S.C. § 6316(b)(1)(A) (2006). All students must score at proficient levels by 2014, and in the interim states must establish intermediate goals that require an ever-increasing percentage of students to demonstrate proficiency. 20 U.S.C. § 6311(b)(2)(F) (2006). All schools in a state must make AYP and each district must disseminate information about each school’s AYP status. Id. §§ 6311(b)(2)(C)(v), (G)(iii), (I).
one of the “alternative governance arrangements” for the school, such as conversion to a charter school, “replacing all or most of the school staff,” converting to private management, or state takeover of the school.16

Similar provisions apply to school districts receiving Title I funds. States must undertake corrective action for districts that fail to make AYP for four consecutive years.17 The corrective action must be one of the enumerated interventions, such as:

[r]eplacing the local educational agency personnel . . . [:] [r]emoving particular schools from the jurisdiction of the local educational agency and establishing alternative arrangements for [their] . . . governance . . . [:] [a]ppointing, through the State educational agency, a receiver or trustee to administer the affairs of the local educational agency in place of the superintendent and school board . . . [:] [a]bolishing or restructuring the local educational agency.18

NCLB “mandates these interventions only for schools and districts”19 receiving Title I funds, but state accountability systems can extend these interventions to all schools.20 In short, NCLB compels states to adopt significant governance reforms for the most persistently failing school districts and Title I schools.

The triggering events and resulting mandated reforms raise numerous legal issues. First, individual schools and school districts may administratively contest the finding that they have failed to make AYP.21 In Reading School District v. Department of Education,22 for example, a school district appealed the decision of the Pennsylvania Department of Education’s (“Department”) decision to identify thirteen schools as failing to achieve AYP. The district complained that the state’s AYP determinations were incorrect because the Department had failed to provide the schools technical assistance, the standardized test used to determine proficiency was “discriminatory because it [did] not provide native language testing[,]” and “[t]he Department’s ‘N’ number” for determining what subgroups were of statistically significant size to

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16. 20 U.S.C. § 6316(b)(8)(B) (2006). According to the most recent data, 21% of Title I schools are in restructuring status and the number is increasing. DOE REPORT, supra note 15, at 76.
18. Id. § 6316(c)(10)(C)(iii)-(vi). The number of districts subject to corrective action has dramatically increased in recent years. DOE REPORT, supra note 15, at 73, 86-87, 155.
20. Id.
be individually reported was “arbitrary and . . . not developed using appropriate statistical methodology[.]”\textsuperscript{23} The court rejected the argument that failure to provide technical assistance rendered the AYP determination incorrect because some technical assistance was provided and “[t]echnical assistance is a consequence of the identification, not a condition precedent to that identification, and the Department’s obligation to provide technical assistance does not commence until after schools are identified as in need of improvement.”\textsuperscript{24} The court also rejected the claim that the failure to provide native language testing on standardized tests rendered the AYP determinations inaccurate because NCLB only requires that native language testing be provided “to the extent practicable,” and deferred to the Secretary’s judgment that “it [was] not practicable . . . to provide native language testing.”\textsuperscript{25} Finally, the court refused to determine if the Department used the proper “N” number, instead deferring to the procedures used to ascertain the number and the expertise of the Department.\textsuperscript{26} The \textit{Reading} case illustrates how difficult it is for schools and districts to contest AYP findings because of the extreme deference given to administrators in making these determinations.

If the finding of failure to achieve AYP is correct, the next step in the process is to identify what governance reforms identified in NCLB are mandated under state law. NCLB lists school reforms that states and districts must undertake, but does not mandate that each reform be available in every state. In fact, many of the corrective action and restructuring strategies in NCLB are excluded by state laws. For example, fifteen states prohibit state takeover of local schools, eight states prohibit schools or districts from entering into governance contracts with private entities, seven states prohibit replacing school staff, and seven states prohibit reopening the school as a public charter school.\textsuperscript{27}

\textsuperscript{23} \textit{Id.} at 169.

A school district must account for the scores of each subgroup if the number of students in that subgroup exceeds a certain state-designated number. This is called the “N” number. In Pennsylvania, the “N” number is 40. This means that if a school in Pennsylvania has a subgroup with more than 40 students, the school must separate out the scores of those students, and those students as a group must meet AYP.

\textit{Id.} at 168.

\textsuperscript{24} \textit{Id.} at 171.

\textsuperscript{25} \textit{Id.} at 172.

\textsuperscript{26} \textit{Id.} at 172-73.

\textsuperscript{27} DOE REPORT, \textit{supra} note 15, at 122.
The last step in the process is to ascertain which governance reform, if any, will apply to the school or district. States, districts, and schools have successfully resisted implementing the governance reform remedies of NCLB. A vast majority of schools in corrective action status are simply revising curriculum or being provided expert consultation instead of the more significant changes of replacing the school staff, decreasing management at the school level, and restructuring the internal organizational structure of the school.\textsuperscript{28} Even schools subject to restructuring are avoiding governance reform. Instead, they are often “implementing a new curricular program, providing instructional coaching, establishing a school improvement council, implementing a comprehensive school reform model, offering merit pay to retain exemplary staff, or reconfiguring the school day or school year”\textsuperscript{29} under the “other major restructuring of school governance” remedy.\textsuperscript{30} States and districts are simply not implementing NCLB’s restructuring reforms for most of the 1,199 Title I schools in restructuring status.\textsuperscript{31} And almost no states have implemented NCLB governance reform consequences for non-Title I schools.\textsuperscript{32}

When a school district is subject to corrective action, the legal considerations change slightly. District identification policies for corrective action vary widely across states. States may identify districts for corrective action if the district fails to make AYP for two consecutive years and must take corrective action after four years of AYP failure.\textsuperscript{33} State policies vary widely as to when they will implement permissive corrective action for a district and as to what constitutes a district’s failure to make AYP.\textsuperscript{34}

There is also an interesting wrinkle at the district level in that a school district may be in a corrective phase even though none of its individual schools are in a corrective phase. This occurs because individual schools may have insufficient numbers to create statistically significant subgroups for AYP calculations, but the district as a

\textsuperscript{28} Id. at 122, 148; Brian M. Stecher et al., Reauthorizing No Child Left Behind: Facts and Recommendations, RAND CORP., at 37 (2010), http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG977.pdf [hereinafter RAND REPORT].
\textsuperscript{29} DOE REPORT, supra note 15, at 122.
\textsuperscript{30} Id. “One state reported dissolving old schools and opening new schools with different grade spans.” Id.; see also RAND REPORT, supra note 28, at 37-38.
\textsuperscript{31} DOE REPORT, supra note 15, at xxii, 8, 113, 151, 154.
\textsuperscript{32} Id. at 80.
\textsuperscript{34} DOE REPORT, supra note 15, at 87.
whole has a statistically significant subgroup that may not be making AYP. Currently, 25% of the school districts in need of improvement under NCLB do not have a school in need of improvement.35 Because school improvement funds can only be distributed to districts with schools in need of improvement, these districts technically cannot receive this money.36

School districts, like individual schools, have also avoided the most punitive structural reforms. Most states have simply reduced funds flowing to the failing district or required implementation of a new curriculum. Very few states have implemented structural governance reforms for districts, such as abolishing a district or appointing a receiver.37 And enforcement of structural reforms for districts has been almost nonexistent. Nearly sixty percent of the Title I districts identified for corrective action have received none of NCLB’s mandated interventions.38

B. The Future of Federal Efforts to Trigger Governance Reform

Courts consistently hold that NCLB is enforceable only by the federal government through cutting off Title I funding to states or localities. Parent lawsuits claiming that school districts violate the supplementary education services, school choice, disclosure, or accountability provisions of the NCLB are routinely dismissed by courts on the grounds that the statute does not confer a private right of action.39 But the federal threat of withholding Title I funds may become practically nonexistent considering that the current administration is backing off enforcing governance reforms through the Race to the Top and the granting of waivers under NCLB.

The central feature of President Obama’s education agenda is the Race to the Top (RTT).40 The competitive grant program allocated

35. Id. at 88.
36. Id.
37. Id. at 162-63; RAND REPORT, supra note 28, at 40.
38. DOE REPORT, supra note 15, at 163; RAND REPORT, supra note 28, at 40.
money to states that met specific criteria, one of which was implementing strategies to turn around failing schools.\textsuperscript{41} The program initially envisioned that failing schools would be closed, have their principal replaced, or be transformed into charter schools. But the 2009 revised guidelines adopted a “softer alternative” of working with existing staff through training and curriculum development before taking more drastic measures.\textsuperscript{42} The Race to the Top is a strong indication that the federal government is abandoning its efforts to compel governance reform from the top down.

The Department of Education’s granting of waivers to states for compliance with NCLB offers further evidence that federal accountability measures will abandon mandated governance reform. The ESEA Flexibility Plan provides that states granted NCLB waivers need not undertake any of the school or LEA governance mandates of NCLB.\textsuperscript{43} States still need “meaningful interventions designed to improve academic achievement”\textsuperscript{44} at failing schools, but only one of the numerous acceptable interventions is a governance reform—replacing principals.\textsuperscript{45} To date, thirty-four states and the District of Columbia have been granted NCLB waivers and nine are pending review.\textsuperscript{46}

In sum, the federal effort to compel governance reform through accountability systems has not been effective and is being abandoned. This failure has not occurred because of complex legal issues or resistance through lawsuits; it is instead the result of strong political resistance at the state and local level. Meaningful governance reform, it seems, must be created from the ground up instead of demanded from the top down. And this might occur, as many states may keep the governance reform penalties in their state accountability systems irrespective of changes in federal law.


\textsuperscript{42} Joseph P. Viteritti, \textit{The Federal Role in School Reform: Obama’s ‘Race to the Top’, 87 NOTRE DAME L. REV. 2087, 2112 (2012)}.


\textsuperscript{44} Id. at 10.

\textsuperscript{45} Id. at 10-11.

II. Education Reform Focused on Changing the Decisionmakers

Much of the ground up education reform focuses on changing “who” runs the schools. Charter schools, the most ubiquitous governance reform, are a perfect example. In charter schools decision-making over nearly every aspect of a school is divested from the traditional school board and chartered to private decisionmakers. State takeover of failing schools similarly changes the decisionmaking authority and private school vouchers could indirectly be placed in the same category. The legal issues surrounding these reforms are not looked at in this Article because they are examined in detail by Professors Bowman and DeJarnatt. Instead, this Article focuses on the legal issues that arise when mayors take control of schools, when legislation pushes decisionmaking from the school board down to individual schools, and when districts adopt a portfolio approach to managing schools.

A. Mayoral Control

Larger cities such as Boston, Chicago, and New York have shifted control of their school systems from elected school boards to mayors. In a “mayoral takeover” mayors do not directly run the schools as a superintendent but instead control the school board by appointing the members, effectively displacing the electorate’s choice of school board composition. Over a dozen major urban school districts permit mayors appointment power over most or all of the school board and there is expected to be a “‘new wave’ of switches to mayoral authority.” While this mayor-centric approach is sometimes adopted and promoted by local interests, more often than not it involves intervention by governors and state legislatures who maintain that they must take “extraordinary steps in order to rescue a faltering system unable to

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48. MICHAEL W. KIRST, CONSORTIUM FOR PUB. RESEARCH IN EDUC., MAYORAL INFLUENCE, NEW REGIMES, AND PUBLIC SCHOOL GOVERNANCE 1-6 (2003).


The result is typically state legislation targeted at a specific major urban school district granting the mayor power to appoint the school board. This type of mayoral control legislation consistently raises three main legal issues: whether such legislation violates a state or federal constitutional right to vote for a school board; whether it violates citizens’ rights under the Voting Rights Act; and whether targeted legislation violates uniformity clauses in state constitutions.

All three of these issues were present in *Mixon v. State of Ohio*, in which the Sixth Circuit upheld state legislation vesting power in Cleveland’s mayor to appoint school board members. In 1997 the Ohio Legislature passed H.B. 269, creating a new type of school district—a municipal school district—and granting mayors of such districts power to appoint the school board. After the appointed board has been in existence for four years, the statute mandates that a referendum election be held to determine whether the electorate wants to continue with the appointed school board. The Cleveland School District was the only district in Ohio to fall under the narrow definition of municipal school district and taxpayers and voters in the district challenged the legislation on four principal grounds: it violated the referendum and uniformity provisions of the Ohio Constitution, the Equal Protection Clause of the Ohio and United States Constitutions, and the Voting Rights Act.

The Sixth Circuit first held that the targeted legislation divesting voters of elective powers did not violate the Ohio Constitution. The Ohio Constitution provides that “each school district . . . shall have the power by referendum vote to determine for itself the number of members and the organization of the [board].” The court held that H.B. 269 did not violate this provision because it did not deny the right to vote on the school board, it only delayed the referenda for a reasonable time. This seemingly strange decision was based on Ohio precedent regarding timing of elections. Plaintiffs also alleged that the law, which in effect applied only to Cleveland, violated the Ohio Constitution which requires that “[a]ll laws, of a general nature, shall have a uniform operation throughout the state.” The court held that the law did not violate this uniformity clause because

52. 193 F.3d 389 (1999).
53. *Id.* at 395.
54. *Ohio Const.* art. VI, § 3.
55. *Mixon*, 193 F.3d at 400-01.
Although many school districts in Ohio may never qualify as a municipal school district, H.B. 269 need not apply to all school districts in Ohio, but rather must apply uniformly to those that fall within its limits. Simply because the Ohio Legislature drafted H.B. 269 with Cleveland as its target does not suggest that the legislation will not apply uniformly to other school districts that fit within the definition of municipal school district.57

With respect to the equal protection claim, the court began by noting that strict scrutiny applies when a legislative classification involves a fundamental right, and that the right to vote is such a right.58 The Sixth Circuit concluded, however, that the legislation did not infringe on a right to vote and was subject to only rational basis review because “[a]lthough plaintiffs have a fundamental right to vote in elections before them, there is no fundamental right to elect an administrative body such as a school board, even if other cities in the state may do so.”59 To reach this conclusion, the Sixth Circuit relied on a Supreme Court case implying that voters do not have a fundamental right to an elected school board.60 The Sixth Circuit found that there was a rational basis for appointed rather than elective school boards because “appointed school boards may provide significant benefits in a State’s attempt to improve local schools” and states have a legitimate interest in experimenting with different governance systems.61

Finally, the court quickly dispatched the claim that the legislation violated the provision of the Voting Rights Act prohibiting some members of a class of citizens from having “less of an opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”62 The court held that this section “only applies to elective, not appointive, systems” because the term “representatives” means winners of an election.63 Appointed school board members did not fall under this definition.

57. Mixon, 193 F.3d at 408-09.
58. Id. at 402.
60. Sailors v. Bd. of Educ., 387 U.S. 105, 108-10 (1967); see also Irby v. Virginia State Bd. of Elections, 889 F.2d 1352 (4th Cir. 1989) (holding that Virginia’s system of appointing school boards did not violate the Constitution); Cohanim v. New York City Bd. of Educ., 204 F. Supp. 2d 452 (E.D.N.Y. 2002) (appointed school boards are not subject to the “one person, one vote” requirement).
61. Mixon, 193 F.3d at 403.
63. Mixon, 193 F.3d at 407.
Similar challenges to Michigan’s School Reform Act (the “Act”), which targeted Detroit Public Schools and permitted mayoral appointment of the school board, were rejected in Moore v. School Reform Board.64 The court first rejected the claim that the Act violated the Michigan Constitution’s requirement that “local acts” be subject to special referendum and passed by two-thirds of the legislature.65 Though the Act defined qualifying school districts in a way that at the time only included Detroit, the court found it was not local legislation because “the Act is not directed to a single city, but instead applies to all school districts based on their population.”66 The court also found that treating districts differently based on their populations was reasonably related to the purpose of education reform because “districts of different sizes present different management issues.”67

The court next rejected the claim that the Act violated the “home rule” provision of the Michigan Constitution, which provides that the electors of each city “shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city.”68 The court did not believe that permitting the mayor to appoint the school board amended the Detroit City Charter, even though it was not one of the enumerated powers of the mayor in the charter, because the charter contained nothing about school governance.69

Next, the court rejected the Voting Rights Act and equal protection claims, instead adopting the reasoning in Mixon: the Voting Rights Act does not apply to appointed positions and there is no fundamental right to vote for a school board under the U.S. Constitution.70 Finally, the court rejected the claim that the Act violated plaintiffs’ right to equal protection because it deprived them of the right to vote due to their race. The mere fact that the Act was targeted at a district that was predominantly African-American was insufficient to establish a discriminatory intent, so the court refused to apply strict scrutiny. Following the reasoning in Mixon, the court held the Act passed rational basis review.71

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67. Id. at 691.
68. Id. at 692; Mich. Const. art. 7, § 22.
69. Moore, 147 F. Supp. 2d at 692.
70. Id. at 693-94.
71. Id. at 695.
Similar issues were decided in *Harrisburg School District v. Zogby*, when a school district challenged Pennsylvania’s Educational Empowerment Act (EEA) allowing mayors in certain medium-sized cities called empowerment districts to appoint school board members. The court first rejected the claim that the EEA’s narrow definition of empowerment district, which effectively included only Harrisburg, did not violate the Pennsylvania Constitution’s prohibition against special laws. Utilizing an equal protection analysis, the court held that the legislature had a rational basis to treat cities of different sizes differently and that it could “limit the program’s initial reach to a small group of districts before prescribing the same procedures more generally throughout the state.”

The court also rejected a claim that the EEA improperly altered the “form” of the local government without an election in violation of the state constitutional provision allowing municipalities to select their form of government by vote. The court held that the EEA did not improperly change the “form” of the government because granting authority to the mayor to appoint the school board did not “interfere with the existence, structure, or powers of the mayor or any other branch or function of city government.”

There are several striking aspects about these cases. First, it is clear that uniformity or specialized legislation clauses in state constitutions and notions of equal protection are practically non-existent barriers even when legislation is targeted at one specific school district. Second, the right to vote on an elected school board is non-existent unless there is a state constitutional or statutory requirement, and even then, it can be circumscribed as in *Mixon*. Finally, the concepts of home rule or local control are more ideals than actual legal barriers to changing local educational governance structures through state legislation.

One of the few cases striking down state legislation granting mayoral control is *Mendoza v. State*. In 2006, the California legislature passed the Romero Act transferring significant power from the Los Angeles Unified School District Board of Education (the “Board”)

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73. Id. at 1090.
74. PA. CONST. art. IX, § 3.
75. *Harrisburg Sch. Dist.*, 828 A.2d at 1093.
76. 57 Cal. Rptr. 3d 505 (Cal. Ct. App. 2007). Many other methods for selecting school boards have been found to violate equal protection, but this Article focuses exclusively on laws granting control to mayors appointing school board members. *See, e.g.*, *Turner v. Fouche*, 396 U.S. 346 (1970) (holding that method of selecting school board that had racially discriminatory effects was unconstitutional); *Searcy v. Williams*, 656 F.2d 1003 (5th Cir. 1981) (same).
to the superintendent, granting the mayor the authority to ratify the choice of the superintendent, and transferring direct authority over three failing clusters of schools from the Board to a partnership led by the mayor. The court first held that the Romero Act violated the California Constitution provision that cities may choose to elect or appoint their boards of education, even though the Act did not give the mayor appointment power over the board. The court reasoned that the “constitutional provision would be annulled if the Legislature could simply bypass it by taking the powers of the Board away . . . and giving them to the mayor, or the Mayor’s appointee. This is nothing more than an end run around the Constitution.” The court essentially concluded that the constitutional right to elect a board implicitly encompassed a right to elect a board with the unfettered power to choose the superintendent.

The court also held that the Romero Act violated the California Constitution provision prohibiting placement of any part of the school system “under the jurisdiction of any authority other than one included within the Public School System.” The transfer of the control over three clusters of failing schools to a partnership run by the mayor violated this provision because the partnership was not within the “public school system.” The court also held that the effective grant of veto power over the selection of the superintendent was an improper transfer of part of the public school system to an entity that is not part of the public school system.

Several important lessons can be gleaned from these cases. First, state constitutional provisions present the largest barrier to legislation granting mayoral control. The Federal Constitution does not grant a fundamental right to elect a school board and equal protection does not prohibit legislation granting mayoral control over school board appointments in one targeted district even if all other districts in the state elect school boards. State constitutional provisions, however, may grant an express right to elect school boards and may vest boards with nontransferable powers. But as seen in Mixon, even

77. Mendoza, 57 Cal. Rptr. 3d at 509.
78. Id. at 518-20; CAL. CONST. art. IX, § 16 (granting cities the power to choose to either elect or appoint their boards of education). Los Angeles chose in their charter to have an elected school board.
79. Mendoza, 57 Cal. Rptr. 3d at 519.
80. Id. at 519-20.
81. CAL. CONST. art. IX, § 6.
82. Mendoza, 57 Cal. Rptr. 3d at 525-27.
83. Id. at 527-28.
these provisions may not be violated by carefully crafted mayoral control legislation. Second, the Voting Rights Act is not a significant obstacle to mayoral control legislation because it does not apply to appointed positions, even if they were elected positions prior to the new legislation. The primary barrier to mayoral control is political opposition rather than legal challenges.

B. Site Level and Superintendent Autonomy

“For most of the 20th century, school systems in the United States have operated as highly centralized organizations that concentrated most authority and decision-making in a district-level administrative office.”84 While decisionmaking authority varies by district, the district administrative office is typically in charge of implementing policies set by the school board as well as overseeing academic programs, making personnel decisions, controlling budget and financial decisions, and providing services to schools, such as transportation and meals. Many education reformers argue that this centralized structure prevents meaningful education reform and seeks to divest school boards of authority to decide matters of curriculum, finances, and staffing. This reform is not new, as calls to decentralize authority have fallen in and out of favor since public education began in the United States.85 But the recent trend is to push authority regarding budgeting, personnel, curriculum, and purchasing to either the school level or to the superintendent.86

For example, California’s Romero Act attempted to move authority over numerous matters from the school board to the superintendent. Numerous school districts are voluntarily shifting authority over spending, hiring, and curriculum to individual schools.87 San Diego, Philadelphia, and New Orleans have all experimented with various models of decentralization in recent years.88 The site level autonomy

84. COWEN INST., supra note 5, at 1.1 (2009).
86. COWEN INST., supra note 5, at 4.
88. COWEN INST., supra note 5, at 14-19.
or site based management, while often voluntary at the local level, is finding purchase in state legislation.

In 2012, the Louisiana legislature passed Act 1, which makes numerous changes to laws governing public elementary and secondary education, but most significantly prohibits school boards from participating in hiring decisions. The law requires superintendents to delegate all hiring and placement decisions to principals subject to superintendent approval. The law sustains school board authority over the number of schools to be opened, the location of schools, and the number of teachers and other school personnel in each school, but gives schools autonomy over hiring decisions. The Act also dramatically changes teacher tenure law, vesting the superintendent with significant power over deciding tenure status and whether to fire tenured teachers. Finally, the law gives superintendents the power to fix teacher salaries and negotiate collective bargaining agreements—obligations traditionally reserved for the school boards.

Considering that Act 1 is a tremendous usurpation of traditional school board powers and dramatically affects teacher pay and tenure, it is no surprise that the law was challenged on state constitutionality grounds by several teachers unions. The lawsuit alleges that Act 1 violates the Louisiana Constitutional provision requiring Acts to have a “single object.” While this challenge to compelled site level management may be unique to this legislation and Louisiana, it could certainly run afoul of state constitutional provisions that grant certain decisionmaking authority to school boards, such as in California.

90. Id.; see also LOUISIANA STATE SUPERINTENDENT OF EDUCATION JOHN WHITE, OVERVIEW OF ACT 1, 8 (July 2012), available at http://www.louisianaschools.net/lde/uploads/19949.pdf (providing an overview of Act 1 and explaining required action resulting from Act 1).
92. LOUISIANA STATE SUPERINTENDENT OF EDUCATION JOHN WHITE, OVERVIEW OF ACT 1, at 14 (July 2012).
94. Id. Another interesting measure passed in Louisiana in 2010 allowed the state board of education to grant “waivers” from compliance with state laws to districts and individual schools. H.R. 1368, 2010 Leg., 10th Sess. (La. 2010). While this measure did not change “who” governed the schools, it certainly changed “what” laws governed the schools. The law has also been challenged by teachers unions as a violation of the separation of powers under the Louisiana Constitution. Louisiana Federation of Teachers Challenges New Law Allowing State Rule Waivers, NOLA.com (July 1, 2010), http://www.nola.com/politics/index.ssf/2010/07/louisiana_federation_of_teache.html.
Another more radical trend is to transfer the powers of state superintendents to governors. Oregon Governor John Kitzhaber will soon become the state’s superintendent of public instruction. Since 1873 governance of K-12 schools in Oregon has been the responsibility of an independently elected state superintendent. However, under legislation pushed by Kitzhaber, and passed by the Oregon Legislature in June 2011, the ability of voters to elect the state superintendent will end in 2014, when the current superintendent’s term expires. At that time, Kitzhaber will assume control of a new Education Investment Board, which will have broad authority to recommend education funding and policy for all K-12 students.

A similar power transfer was attempted in Wisconsin which, with the backing of Governor Scott Walker, passed legislation in 2011 requiring state agencies to get gubernatorial approval before drafting new administrative rules. The legislation was a significant departure from past practice, which required the legislature to actively object to a proposal to stop it. A circuit judge recently struck down the statute because it gave the governor more power over public instruction than the elected superintendent of public instruction in violation of the Wisconsin Constitution.

C. Portfolio School Districts

A growing number of urban districts such as New York, New Orleans, and Chicago are pursuing what is known as the “portfolio strategy,” which profoundly changes the role of the school district and its relationship to the school. The portfolio district approach merges four strategies: (1) decentralization; (2) charter school expansion; (3) reconstituting/closing “failing” schools; and (4) test-based accountabil-

98. Id.
In theory, a portfolio school district’s primary concern is not the management of district-run schools, but instead to encourage good schools to expand and to close, or re-form under new management, poorly-performing schools. In practical effect, schools in portfolio school districts do not answer to one centralized bureaucracy.

The legal issues that arise in a portfolio school district are the same or similar as those that arise when employing site level management, state takeover of failing schools, charter schools, and mayoral control. These reforms are not mutually exclusive and are often implemented together, particularly in portfolio districts. But one unique legal issue that arises in portfolio districts relates to complying with legal obligations to students with disabilities.

In New Orleans and the District of Columbia (both model “portfolio districts” because of the vast array of governance structures), there are allegations that students with disabilities are not being properly served under the portfolio approach. The Southern Poverty Law Center recently filed a class action lawsuit alleging that students in the portfolio system are being counseled out of charter schools, are being denied a free appropriate public education, and are being denied their due process rights when suspended or expelled. Parents raised similar allegations in a complaint filed by the Bazelon Center to the Department of Justice regarding the District of Columbia Schools.

Portfolio districts will continue to face special education lawsuits because their decentralized nature makes coordination of special education extremely challenging. The Individuals with Disabilities

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Education Act\textsuperscript{106} and Section 504 of the Rehabilitation Act\textsuperscript{107} form the backbone of special education law and both presuppose the existence of a centralized bureaucracy overseeing numerous schools and collective action to address the needs of students with disabilities.\textsuperscript{108} Neither of these important pillars exist in a portfolio district. Unless, and until, decentralized and diversely managed school districts can ascertain how to properly govern special education services, they will continue to face legal challenges.

III. Education Reform through School District Consolidation and Detachment

Governance reform occurs not only by changing the makeup and authority of school boards and superintendents, but also by changing the schools over which they have control. Apart from the creation of charter schools, which effectively removes control of the school from the board, this is often achieved by either consolidating school districts (turning two districts into one) or detaching school districts (turning one district into two). Each of these reforms raises a variety of legal issues.\textsuperscript{109}

A. School District Consolidation

School district consolidation is historically the most popular governance reform measure because it is believed to create economies of scale and efficiencies that result in significant financial savings.\textsuperscript{110} District consolidation represents one of the most significant changes in “education finances, governance and management in the United

\textsuperscript{108} Garda, \textit{supra} note 103, at 670-79.
\textsuperscript{109} One common issue that applies to both is Section 5 of the Voting Rights Act, which prohibits covered jurisdictions from adopting changes in an election practice or procedure without securing federal pre-clearance. 42 U.S.C. § 1973ee-4 (1995). Because a school district detachment or consolidation can alter the size and composition of the voter base for the school board, the change may require Section 5 pre-clearance. 42 U.S.C. § 1973c (1994). This issue is beyond the scope of this Article, which focuses more on actions that can block or prevent governance reform rather than merely change the system of voting within the new structure. For a detailed discussion of this issue, see Steve Bickerstaff, \textit{Voting Rights Challenges to School Boards in Texas: What Next?}, 49 \textit{Baylor L. Rev.} 1017, 1037-47 (1997) (discussing applicability of Section 5 to consolidations, detachments, and annexations).
States during the twentieth century.” In 1939-40 there were 117,108 school districts providing elementary and secondary education. By 2007, this number dropped by eighty-eight percent to 13,862. While the rate of consolidation has slowed in the recent years, at least a few districts consolidate every year in many states. Indeed, “[d]uring the past ten years, district consolidation has been on the table in Arizona, Indiana, Kansas, Maine, Mississippi, Montana, Nevada, New York, Pennsylvania, South Carolina, Vermont, Washington, Wyoming, and West Virginia.”

States achieve school district consolidation in two ways: by statutorily compelling it in certain circumstances or by creating financial incentives to spur voluntary local consolidation. The latter method is much more popular, and states typically prompt consolidation but it is rarely finalized without the consent of local school district voters or their representatives. These local consent consolidations are politically explosive and contain numerous legal landmines. One of the
most controversial and litigated consolidations of this type is occurring in Memphis, Tennessee, and is discussed at length by Professor Kiel in this issue. But most legal challenges to consolidations approved at the local level are based on some defect in the statutorily mandated procedures for consolidation, such as improper notice to the public, background studies, or an improper referendum.

States are more frequently compelling school district consolidation without approval from local electorates. In Illinois, for example, Governor Pat Quinn introduced legislation mandating that Illinois’ 869 school districts be consolidated into only 300 school districts in two years in order to save over $100 million dollars in salaries. Smaller districts and their residents resist compelled consolidation “persistently and mightily,” often through lawsuits relying on creative state and federal constitutional theories.

In 2005, the Nebraska legislature passed L.B. 126 compelling certain school districts to consolidate. The compelled consolidation scheme was almost immediately contested with a referendum petition and a lawsuit. The court held that the statute did not violate a federal or state fundamental right to vote on compelled consolidation. It reasoned that “the constitutionally protected right to vote is limited to the right to participate in representative government. Because the right to participate in representative government is not implicated by a referendum proceeding, plaintiff’s constitutional right to vote has not been violated by the state constitution’s procedures allowing enactment of the statute before a referendum can occur. The court also rejected the claim that the consolidation of schools prior to the
referendum vote violated plaintiffs’ free speech rights because the statute did “not impose any restrictions or conditions on plaintiffs’ right to communicate with voters about the political change they seek.”

Plaintiffs pursued more traditional claims when contesting New Jersey’s Uniform Shared Services and Consolidation Act of 2007, amended in 2009, which mandated the elimination and merger of all non-operating school districts (districts that existed but sent their students to neighboring districts by agreement). Pursuant to the statute, thirteen non-operating districts were merged with neighboring districts. Two of these districts challenged the statute on state and federal constitutional grounds. The court’s analysis rejecting the claims aligns closely with the typical reasoning in the mayoral control cases discussed above. The court first held that the legislation did not violate equal protection of voting rights under the Fourteenth Amendment or the New Jersey Constitution because “one person, one vote is not offended by the creation of an at-large school district out of the merger of two districts” where the voting for the new board is “at-large.”

Because the statute did not infringe on a fundamental right, the court employed a rational basis review and easily found that the legislature had a legitimate interest in creating larger, more efficient school districts. The court next rejected the claim that the statute violated a constitutional prohibition against taxation without representation because no such right exists and because residents were properly represented in ascertaining apportionment formulas. Finally, the court held that the statute did not violate the prohibition against special legislation in the New Jersey Constitution because the law “applies to all of the state’s non-operating school districts; none are excluded.”

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126. Id. at 624.
129. Id. at 669. The court conceded that large districts with at-large board elections may raise issues of voter dilution, but that claim was not raised in the case. Id. at n.5.
130. Id. at 670.
131. Id. at 672-73.
132. Id. at 674; see also Tecumseh Sch. Dist. No. 7 v. Throckmorton, 403 P.2d 102 (Kan. 1965) (upholding Kansas School Unification Law granting power to state superintendent to compel consolidation against several state constitutional law challenges); Fruit v. Metro. Sch. Dist., 172 N.E.2d 864 (Ind. 1961) (holding that the School Reorganization Act compelling consolidation was not invalid under the state constitution, even as to township whose schools were consolidated with those of city, notwithstanding township vote against consolidation).
Act 60 in Arkansas compelling administrative consolidation or annexation of school districts below a certain size or of districts in academic or fiscal distress faced numerous lawsuits.\textsuperscript{133} Act 60 was initially challenged as violating the Fourteenth Amendment in \textit{Friends of Lake View Sch. Dist. Inc. No. 25 County v. Beebe}.\textsuperscript{134} The Eighth Circuit refused to apply strict scrutiny to the law because there is no federal fundamental right to an education, the law drew no racial classifications, and the law was not motivated by a racial purpose.\textsuperscript{135} The court upheld the dismissal of the complaint for failing to state a claim upon which relief could be granted, reasoning that “Act 60 survives rational basis review because the State of Arkansas has a legitimate governmental interest in consolidating school districts to achieve economies of scale and other efficiencies and the classification drawn between school districts based on their average daily membership is rationally related to advancing that interest.”\textsuperscript{136}

A parade of lawsuits followed, each failing to survive a motion to dismiss. In \textit{Friends of Eudora Public School District v. Beebe},\textsuperscript{137} plaintiffs alleged that Act 60 violated the Voting Rights Act, the Arkansas Constitution, and the Fourteenth Amendment, among other claims. The claim of vote dilution under the Voting Rights Act was dismissed because “[t]he general desire to preserve ‘local control’ or to preserve the status quo of a political subdivision of a community is not a concern that falls within the [VRA]. . . . There is no ‘fundamental’ constitutional or other right to maintain ‘local control’ of school districts or to maintain or preserve the identity of a school district or community.”\textsuperscript{138} The due process claim was also dismissed because “sufficient process was afforded” and the allegations in the complaint were insufficient.\textsuperscript{139} Finally, the court adopted the reasoning in the \textit{Friends of Lake View} decision to dismiss the Fourteenth Amendment claim.\textsuperscript{140}

\textsuperscript{134} 578 F.3d 753 (8th Cir. 2009).
\textsuperscript{135} Id. at 761-62.
\textsuperscript{136} Id. at 763.
\textsuperscript{137} No. 5:06CV0044SWW, 2008 WL 828360 (E.D. Ark. Mar. 25, 2008).
\textsuperscript{138} Id. at *7.
\textsuperscript{139} Id. at *8.
\textsuperscript{140} Id. at *9.
In *James v. Williams*, the plaintiffs alleged that consolidation with a school on academic probation, combined with longer bus rides, led to a less adequate education than before the consolidation. The complaint was dismissed for numerous procedural deficiencies. In *Walker v. Arkansas State Board of Education*, parents claimed that consolidation led to excessive bus rides in violation of the right to an adequate education under the Arkansas Constitution. The court held that the schools were closed under proper statutory authority, and that constitutionality could not be challenged because the state was not a party. In short, the procedural infirmities of the complaints prevented them from being heard on the merits. At least one commentator believes that claims under the Arkansas Constitution or the Fourteenth Amendment, even if fully litigated, will likely fail.

Unlike the cases discussed above, plaintiffs succeeded at the trial court level when contesting West Virginia legislation that essentially denied capital funding to districts that could not show sufficient economies of scale and distributed state education funding favorably to larger districts. In a class action lawsuit challenging the state’s consolidation program, the trial court found it violated the state constitutional right to an education because small community based schools produced significant educational benefits to rural children in poverty and the consolidation program failed to achieve its goals. The West Virginia Supreme Court disagreed, holding that the consolidation program fulfilled the compelling interests of spending education funds economically, ensuring that students have access to enhanced curricular offerings, providing modern safe, physical facilities, and achieving greater statewide equality and adequacy of education.

The court held that the program was narrowly tailored to serve these interests, stating that the lower court failed to consider whether less

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143. *Id. at* 910-11; see also *Deer/Mt. Judea Sch. Dist. v. Beebe*, 2012 Ark. 93 (2012) (upholding dismissal of claim that long bus rides violated funding statute because there was no final, appealable order).
147. *Id. at* 681.
injurious and more narrowly tailored feasible alternatives existed to achieve the goals of the consolidation program.\footnote{Id. at 682. This decision has been heavily criticized. See Bastress, supra note 118, at 43-48.}

Based on these cases it is apparent that courts are not an effective forum to resist state compelled school district consolidation. Equal protection and due process claims are particularly unfruitful; the only viable legal theory appears to be claims that the negative effects of consolidation are so serious as to deny students their state constitutional rights to an adequate education. But this likely requires nearly overwhelming evidence as shown by the West Virginia and Arkansas decisions.

B. School District Detachment

While school district consolidation is the trend, school district detachment still persists.\footnote{Julius Menacker, Illinois Detachment Legislation: A Device for Creating Manageable Urban School Districts, 81 EDUC. L. REP. 411, 412-13 (1993) (noting the pushback against larger districts and calls for detachment into smaller educational units).} For example, the City of Trussville, Alabama, which was at the time part of the Jefferson County School District, initiated the process to create their own smaller school district, in part due to disputes over the county district’s financial management. Under an Alabama statute that allows cities of 5000 or more residents to establish city boards of education and operate city school systems, the Trussville City School District took charge of its own schools, pursuant to the parameters of a court order, for the 2005-06 academic year.\footnote{Order of Court at 9, Stout v. Jefferson Cnty. Bd. of Educ., Civ. No. CV65-J-396-S (N.D. Ala. 2005), available at http://www.clearinghouse.net/chDocs/public/SD-AL-0001-0009.pdf.}

As with school district consolidation, detachment is a creature of state statutes that typically delineate the procedures citizens must follow, such as obtaining signatures, public hearing, and a vote on the detachment.\footnote{Menacker, supra note 149, at 412-13.} The most often litigated detachment issues involve whether the proper procedures under state statutes were followed and whether the administrative body considered all relevant factors in making its decision.\footnote{See, e.g., Wilmot Union High Sch. Dist. v. Rothwell, 133 N.W.2d 782 (Wis. 1965) (evaluating statutory construction of a Wisconsin statute on appeal periods following denial of transfer by the school board); Union Title Co. v. State Bd. of Educ., 555 N.E.2d 931 (Ohio 1990) (determining whether school board hearing for
During the desegregation era, courts often prohibited detachments and creation of new districts that led to segregated school districts.\footnote{Gayle Binion, \textit{Racial Discrimination by Alteration or Refusal to Alter School District Boundaries}, 54 U. DET. J. URB. L. 811, 812-24 (1977) (discussing cases in the 1960s and 70s finding that school district detachment or splintering violated federally protected individual rights, both constitutional and statutory, by causing segregation).} In \textit{United States v. Scotland Neck City Board of Education},\footnote{United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 489 (1972).} for example, the Supreme Court held that a detachment creating a new school district in order to avoid a desegregation order violated the Fourteenth Amendment. The Court noted that detachments could impede the process of school desegregation by effectively “create[ing] a refuge for white students.”\footnote{Wright v. Council of Emporia, 407 U.S. 451, 470 (1972) (holding that a city’s detachment from a county school system two weeks after the entry of a county desegregation order would undermine the effectiveness of the desegregation remedy).} Numerous courts prohibited school district detachments on these grounds.\footnote{See, e.g., United States v. Texas, 321 F. Supp. 1043, 1048, 1056-59 (E.D. Tex. 1970), \textit{aff’d as modified by} 447 F.2d 441 (5th Cir. 1971) (holding that the state education agency had declined consolidations, and deployed detachments and transfers to segregate black students into nine school districts and ordering the state to devise a reorganization plan for desegregating the districts); Aytch v. Mitchell, 320 F. Supp. 1372 (E.D. Ark. 1971) (striking down a school district detachment, based in part on the financial impact to the residual district, which would become ninety-six percent black); Burleson v. Cnty. Bd., 308 F. Supp. 352 (E.D. Ark. 1970) (enjoining a detachment in a case brought by white residents who would be left behind in a resulting, majority black district).} But to violate the Fourteenth Amendment the detachment must be motivated by race or a resistance to desegregation, a showing that has proven quite difficult and relegated such challenges to the historical dustbin.\footnote{Michelle Wilde Anderson, \textit{Mapped Out of Local Democracy}, 62 STAN L. REV. 931, 975 (2010).}

But an intriguing voting rights claim under the Fourteenth Amendment was raised in a recent detachment in Utah. In 2007 voters in five wealthy municipalities elected to detach from the Jordan School District and create a new Canyons School District. Mayors, legislators, and parents advocated for the new district primarily because of a contentious dispute over the allocation of capital budgets in the Jordan
The Utah state legislation, allowing for the detachment of smaller school districts, provides that when the new school district is proposed by an interlocal agreement of municipalities, only those registered voters within the boundaries of the proposed district can vote in the referendum. This provision provoked a federal lawsuit by voters and municipalities in the remaining part of the Jordan School District, who argued they were being denied equal protection because “while a state may limit local voting rights to residents in a particular electoral district, strict scrutiny review applies when the state defines that particular district so as to exclude voters who are ‘substantially interested in and affected by’ the election at issue.”

The plaintiffs claimed they were substantially interested in and affected by the detachment election because of the financial consequences of the split, including both short- and long-term property tax increases, an abiding property tax disparity with the detaching school district, debt servicing obligations, and approximately $40.5 million in division costs (as opposed to $25.8 million for the new district). On top of these financial costs lie significant logistical and administrative burdens, including appointing a transition team, allocating property between the districts, and transferring educators and personnel. Finally, the detachment affects the Jordan School District’s self-governance in the short-term—the district must hold elections for its new school board as a result of the separation, as well as in the long term.

After a long and intricate analysis of case law, the Tenth Circuit concluded:

[The Supreme Court has left a state’s ability to change the boundaries of its local governmental entities largely undisturbed. In the equal protection context, the question is not whether there will be extraterritorial effects or what the magnitude of those effects will be. The question is whether the distinctions were made based on governmental units or electoral districts wherein the voters had genuinely different interests. . . . Utah made a determination that the geographical areas that would comprise the new school district would be most directly affected, and thus provided them with the franchise. All the residents of that political entity were allowed to vote. While it may have been better for the legislature to expand the electoral district to include all residents of the existing district, this is a question best left to the legislature, not a federal court. We therefore find rational basis review applies here.]

160. City of Herriman v. Bell, 590 F.3d 1176, 1180 (10th Cir. 2010) (internal citation omitted).
161. \textit{Id.} (internal citations omitted).
162. \textit{Id.} at 1193-94.
The court did not wrestle long in holding the detachment statute satisfied rational basis review, because creating community based schools, smaller districts more responsive to parent and student needs, and promoting the localized use of tax revenues, were legitimate justifications. The fact that the detachment statute contained inconsistent voting methods—sometimes requiring a vote of all residents in the existing district and at other times requiring only a vote in the new district—did not render the statute irrational because there were valid reasons for the differential treatment.

Detachment and consolidation raise significantly different legal issues but both are undertaken in the name of improving schools. It’s interesting to note that consolidation is supported by the compelling justifications of efficiency and enhanced curricular offerings cases whereas detachment is justified by local responsiveness and local use of taxes. The fact that these diametrically opposed ideals are sufficient constitutional justifications is strong evidence of the hands-off approach courts take when reviewing challenges to governance reforms.

IV. Conclusion

The historic backbone of education governance in the United States is “local control”—the notion that cities, towns, and localities control their schools. The public at-large strongly supports local control over schools. But there is rarely a legal “right” to local control over education. Rather, local control exists merely because states delegate their control over schools and governance to local agencies, not because the United States Constitution, or most state constitutions, compel it. In the words of Justice Marshall, “education is not
inherently a part of the local self-government of a municipality . . . Control of our public school system is a State matter delegated and lodged in the State legislature by the Constitution.’ ”168 Accordingly, when states decide to change local governance structures over education—either by granting mayoral control, divesting boards of authority, or consolidating and detaching school districts—the law is not a significant barrier. The cases discussed in this Article prove that despite the perception of local control, “local school districts are subservient to state law. This legal status means that courts will seldom intervene to protect districts if the state legislature acts to alter their powers, borders, or their very existence.”169

But the strong support for local control means that residents and school districts will fight tooth and nail, using both political and legal forums, to retain power over their schools. The breadth of lawsuits discussed is a testament to this conclusion. But only certain types of challenges have much chance of success. Claims based on substantive due process or equal protection, the Voting Rights Act, or state constitutional prohibitions against special legislation have not been effective. The best chance for victory appears to be where the state constitution specifically enumerates powers of school boards or grants local power to determine how a board is selected (as in California), or if the effects of any governance change harms student performance in violation of minimum educational standards found in state constitutions or federal statutory law. Even these claims have proven nearly impossible to win. Despite the uphill odds one thing is certain: the “struggle for control” over schools noted by Michael Kirst in the introduction will not wane in either the political arena or the courtroom.

169. Fischel, supra note 117, at 192.