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Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education

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Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education

*Benjamin Michael Superfine**

ABSTRACT

The American Recovery and Reinvestment Act (ARRA), aimed at stimulating and stabilizing the American economy during the worst financial crisis since the Great Depression, reflects significant new dimensions of federal action in the area of educational reform. In addition to saving jobs in the educator workforce, the ARRA was designed to spark the implementation of specific reform strategies in states and schools and lay a foundation for the Obama administration's subsequent educational reform efforts, including the impending reauthorization of the No Child Left Behind Act of 2001. While the goals of the educational reform provisions of the ARRA are laudable, the ARRA oversteps the limits of effective federal action. The educational reform provisions of the ARRA face many potential pitfalls given the historical characteristics of federal educational reform "from the capitol to the classroom," the scientific evidence underlying the reforms encouraged by the ARRA, and the current political climate. Although many of these pitfalls are now unavoidable, reform efforts that build on the ARRA but focus on managing the teacher workforce, balance issues of local and federal authority in a more nuanced way, and draw more strongly on educational research offer much promise for more effective federal action in education.

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I. INTRODUCTION

The American Recovery and Reinvestment Act of 2009 (ARRA) is primarily aimed at stimulating and stabilizing the American economy during the worst financial crisis since the Great Depression and reflects significantly new dimensions of federal action in the area of educational reform.¹ The ARRA devotes approximately one-eighth of its \$787.2 billion total, or \$97.4 billion, to education.² Of this \$97.4 billion, \$80.2 billion is devoted to K-12 public education.³ While the ARRA is designed to keep school systems afloat in difficult financial times,⁴ it is also aimed at fixing existing educational

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1. The American Recovery and Reinvestment Act of 2009 is intended “[t]o preserve and create jobs and promote economic recovery”; “assist those most impacted by the recession”; “provide investments needed to increase economic efficiency”; “invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits”; and “stabilize [s]tate and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.” American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 3, 123 Stat. 115, 115-16 (2009).

2. U.S. DEP’T OF EDUC., AMERICAN RECOVERY AND REINVESTMENT ACT – SPENDING REPORT BY PROGRAM 1 (2011), available at <http://www2.ed.gov/policy/gen/leg/recovery/reports.html> (detailing the funding allocated under the ARRA to educational programs).

3. See *id.*

4. U.S. DEP’T OF EDUC., AMERICAN RECOVERY AND REINVESTMENT ACT REPORT: SUMMARY OF PROGRAMS AND STATE-BY-STATE DATA 4 (2009), available at <http://www2.ed.gov/policy/gen/leg/recovery/spending/arra-program-summary.pdf> (“As the economy slowed in 2008, State revenues declined dramatically and many were unable to fully fund their planned and approved education budgets for the 2008-

policy problems and sparking future educational reform efforts.⁵ As such, the ARRA will frame the Obama administration's subsequent educational reform efforts, including the impending reauthorization of the No Child Left Behind Act of 2001 (NCLB).⁶

The ARRA provisions designed to spark legal and policy change represent a subtle but considerable expansion of the federal role that builds on NCLB and other recent educational reform efforts. In light of both political tradition and the belief that states and localities are best positioned to make decisions about education, the federal role in education historically has been small.⁷ When the federal government has become deeply involved in education, it has focused primarily on civil rights issues and providing financial resources for the education of poor and minority students.⁸ However, especially since the mid-1990s, the federal government increasingly has focused on student performance and sanctioning schools when students fail to demonstrate particular levels and types of performance.⁹ The ARRA further ex-

09 school year.”). Emphasizing such difficulties states have faced in education, twenty-six states reported making cuts to K-12 education in 2009. NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF THE STATES 3 (2009), available at <http://www.nga.org/Files/pdf/FSS0906.PDF>.

5. See, e.g., Christina A. Samuels, *As Stimulus Tap Turns On, Districts Can't Escape Cuts; New Federal Aid Will Help, but Many Local Administrators are Still Facing Tough Choices*, EDUC. WK., Apr. 4, 2009 (reporting that Arne Duncan, the U.S. Secretary of Education, called stimulus funds “a once-in-a-lifetime opportunity to lay the groundwork for a generation of educational reforms”).

6. The No Child Left Behind Act of 2001 is the most recent reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA). Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965). Title I of the ESEA, which contains most of the No Child Left Behind provisions discussed in this Article, is found at 20 U.S.C. §§ 6301-6578 (2006). U.S. Secretary of Education Arne Duncan has explicitly emphasized that the Obama administration aims to build the reauthorization of NCLB on the priorities embedded in the ARRA. Alyson Klein, *Duncan Aims to Make Incentives Key Element of ESEA; Education Secretary Weighs Priorities for Law's Renewal*, EDUC. WK., Dec. 9, 2009 (reporting on statements made by Secretary Duncan regarding the NCLB reauthorization process).

7. See Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: From Equity to Adequacy, 68 TEMP. L. REV. 1151, 1169-71 (1995) (highlighting the historical significance of local control in education and repeated judicial recognition of this principle).

8. See Susan H. Fuhrman et al., *Educational Governance in the United States: Where Are We? How Did We Get Here? Why Should We Care?*, in THE STATE OF EDUCATION POLICY RESEARCH 41, 43 (David K. Cohen et al. eds., 2007) (discussing the evolution of educational governance in the U.S.).

9. In 1994, the U.S. Congress enacted both the Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994), and the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994). Both of these laws heavily focused on the state-level implementation of standards-based accountability systems and prefigured NCLB. Goals 2000: Educate America Act § 2; Improving

pands the federal focus on student performance and contains an unprecedented emphasis at the federal level on spurring the development of particular state-level policies, especially affecting the organization of schools, which more directly targets the improvement of students' learning opportunities and achievement. In addition to strongly encouraging states to improve student learning standards and assessments, link student and teacher performance data, and develop teacher incentive systems based on such data,¹⁰ the ARRA stresses specific school "turnaround" strategies and the implementation of robust charter school policies as the keys to large-scale educational reform.¹¹

Given historical concerns about the expansion of the federal role in education, recent critiques of this expansion as specifically embodied by NCLB, and the extent to which the ARRA will likely frame NCLB's impending reauthorization, it is imperative to understand the ways in which the ARRA expands the federal role in education and the implications of this change for schools. Accordingly, this Article analyzes the educational provisions of the ARRA. In particular, it examines the educational reform provisions of the ARRA given the history of the federal role in education, the historical implementation of federal education laws, and the educational research on the substantive policies supported by the ARRA.

This Article argues that in addition to stabilizing financially beleaguered school systems,¹² the ARRA effectively draws on the significant political and financial strengths of the federal government to leverage educational reform.¹³ Moreover, certain parts of the law are built to respond to important concerns about the historical ineffectiveness of the federal government in this area and directly respond to some of the most common and important critiques NCLB has faced.¹⁴ However, building on the legal and policy foundation of NCLB, the ARRA continues the federal government's recent trend of identifying and pushing particular reform strategies without sufficient evi-

America's Schools Act of 1994 § 1001(d). However, it is also worth noting that the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §§ 1001, 1015(b), 102 Stat. 130 (1988), changed the ESEA for the first time to include a small emphasis on student performance and school accountability.

10. See *infra* Part IV.C-D.

11. See *infra* Part IV.A.

12. See *supra* note 4 and accompanying text.

13. See John F. Jennings, *Title I: Its Legislative History and Its Promise*, in *TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS* 1, 14 (Geoffrey D. Borman et al. eds., 2001) (discussing the history of the ESEA).

14. The ARRA specifically targets the uneven quality of state standards implemented under NCLB and the difficulties that states have faced implementing robust educational data systems. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14005(d)(1)-(4), 123 Stat. 115, 282 (2009) (requiring grant applications under the \$53.6 billion State Fiscal Stabilization Fund to include assurances that steps will be taken to improve state content standards and academic achievement standards); see also *infra* note 121 and accompanying text.

dence or nuance at the federal level.¹⁵ Additionally, the law was designed without adequate attention to the significant problems associated with the implementation of education laws “from the capitol to the classroom.”¹⁶ In this way, the ARRA reflects an overly simplistic approach to educational reform that has historically plagued federal involvement in this area. Given such problems, the ARRA may actually exacerbate existing educational inequities among schools in some respects.¹⁷ As a result, the federal educational reform efforts embodied by the ARRA are unlikely to prove effective at ultimately boosting students’ learning opportunities and outcomes at scale, or across a large number of schools. Based on this analysis, this Article suggests ways in which the federal role could be restructured during the impending NCLB reauthorization to take better advantage of federal strengths and minimize federal weaknesses in this area.

In order to analyze the ARRA and its implications on the federal role in education, this Article is divided into four primary parts. Part II provides an overview of educational governance in the U.S., including a historical overview of the growth of the federal role in education and the major difficulties that have traditionally faced the implementation of education law “from the capitol to the classroom.” In addition to broadly fleshing out the historical background of the ARRA in order to frame the major issues reflected in the design and implementation of the Act, this Part includes a narrower discussion of NCLB, which articulates major policy problems to which the ARRA particularly responds. Part III discusses the major purposes and requirements of the provisions of the ARRA devoted to education and how these provisions have been implemented thus far. Part IV examines the relevant educational research, particularly regarding standards and assessments, teacher quality, educational data systems, school turnaround models, and charter schools. Finally, Part V analyzes the ARRA in light of the history of the federal role in

15. See Benjamin M. Superfine, *New Directions in School Funding and Governance: Moving from Politics to Evidence*, 98 KY. L.J. 653, 686-92 (2010) (describing attempts to integrate knowledge from educational research into federal educational policy).

16. The expression “from the capitol to the classroom” has been used by several different education researchers to connote the implementation of educational law and policy. See, e.g., Susan H. Fuhrman, *Introduction*, in FROM THE CAPITOL TO THE CLASSROOM: STANDARDS-BASED REFORM IN THE STATES 1, 1 (Susan H. Fuhrman ed., 2001) (discussing the implementation of standards, tests, and accountability mechanisms across states). For a broad historical analysis of the problems associated with the implementation of federal educational policy, see Maris A. Vinovskis, *Do Federal Compensatory Education Programs Really Work? A Brief Historical Analysis of Title I and Head Start*, 107 AM. J. EDUC. 187, 189-98 (1999) (analyzing the effectiveness of major federal education programs since the 1960s).

17. See David C. Berliner, *Our Impoverished View of Educational Research*, 108 TCHRS. C. REC. 949, 950-56 (2006) (discussing structural inequities in U.S. society that are reflected in education).

education and educational research and accordingly provides recommendations for the NCLB reauthorization process.

II. THE EDUCATIONAL GOVERNANCE LANDSCAPE

Education in the United States has traditionally been considered a function of state and local governments and thus is very decentralized compared to most other industrialized nations.¹⁸ For most of U.S. history, the federal role in education has been small,¹⁹ and the “[n]otion[] of ‘local control’ over education[al] policy [has] occup[ie]d an exalted place in American lore.”²⁰ The states primarily possess the legal authority to govern education. While the U.S. Constitution does not mention education, every state constitution specifies at least some vague legal duty that a state has to provide its students with a system of public schooling.²¹ For example, many state constitutions contain “education clauses” that require states to provide citizens with an “efficient” system of education.²² The Supreme Court has further underscored that “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools,”²³ and its jurisprudence generally evinces the notion that states and local school boards are better positioned than other institutions to set educational policy.²⁴ Teachers have long

18. See Fuhrman et al., *supra* note 8, at 41 (stating that key decisions in the U.S. are influenced by over 14,000 school districts, almost 96,000 schools, and more than three million teachers).

19. See Michael W. Kirst, *Who's in Charge? Federal, State, and Local Control*, in *LEARNING FROM THE PAST* 25, 29 (Diane Ravitch & Maris Vinovskis eds., 1995). Still, it is worth noting that the federal government did maintain a small role in education throughout U.S. history. For example, in the late eighteenth century, the U.S. Congress reserved millions of acres for public education. See Northwest Ordinance of 1787, *available at* [http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field\(DOCID+@lit\(bdsdcc22501\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field(DOCID+@lit(bdsdcc22501))). In addition, the federal government has long been responsible for maintaining statistics about education. See MARIS A. VINOVSIS, *CHANGING FEDERAL STRATEGIES FOR SUPPORTING EDUCATIONAL RESEARCH, DEVELOPMENT, AND STATISTICS* 3-5 (1998).

20. Michael Heise, *The Political Economy of Education Federalism*, 56 *EMORY L.J.* 125, 130 (2006).

21. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 *VAND. L. REV.* 101, 105 (1995) (indicating that the Mississippi Constitution is the only state constitution that arguably does not contain an education clause).

22. Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 *GA. L. REV.* 543, 576 (1998) (discussing major types of school finance reform litigation).

23. *Milliken v. Bradley*, 418 U.S. 717, 742 (1974).

24. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (discussing the importance of understanding local conditions in setting educational policy effectively).

been considered among the most important decision-makers in the educational policy process, as they have traditionally made decisions independently of much government oversight when they “close the classroom door.”²⁵ Indeed, even though legal authority over education has technically rested with states, school boards and local communities have exercised much of the power to make educational decisions.²⁶ Still, especially in the second half of the twentieth century, this governance structure began to change considerably.

A. *The Growth of the Federal Role in Education*

Since the Supreme Court decided *Brown v. Board of Education* in 1954,²⁷ the role of the federal government in education has grown dramatically. Federal involvement in education in the 1950s largely centered on civil rights issues. In *Brown* and the wave of cases that followed, federal courts found various instances of segregation in public schools unconstitutional.²⁸ In 1958, in the wake of Sputnik’s launch, the U.S. Congress enacted the National Defense Education Act, which directed funds to localities in order to promote innovation in education, especially in the areas of science and foreign languages.²⁹ Congress expanded its reach with the passage of the Civil Rights Act of 1964, which articulated educational rights that apply to all students.³⁰ In 1965, Congress enacted the Elementary and Secondary Education Act (ESEA), which has provided and continues to provide billions of dollars of grants for the compensatory education of economically disadvantaged students under programs such as Title I.³¹ The ESEA has historically served as

25. See William Lowe Boyd, *The Changing Politics of Curriculum Policy-Making for American Schools*, 48 REV. OF EDUC. RES. 577, 605 (1978) (highlighting the extent to which teachers have traditionally exercised professional autonomy).

26. See Paul T. Hill, *The Federal Role in Education*, BROOKINGS PAPERS ON EDUCATION POLICY 11, 13-15 (2000) (discussing pitfalls and opportunities of the growth of the federal role in education policy).

27. 347 U.S. 483 (1954).

28. See *Brown*, 347 U.S. at 495; see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-22 (1971) (upholding a district court’s determination that the local school board’s desegregation plan was unacceptable and its subsequent appointment of an expert to fashion a desegregation plan); *Green v. Bd. of Educ.*, 391 U.S. 430, 439-42 (1968) (striking down a school’s “freedom of choice” desegregation plan); *Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958) (refusing to postpone the desegregation of schools in Little Rock).

29. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958).

30. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 401-410, 78 Stat. 241, 246-49 (1964) (codified as amended 42 U.S.C. §§ 2000c-2000c-9 (2006)).

31. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965); see also *supra* note 6 and accompanying text.

the flagship federal education law.³² Congress expanded its focus on civil rights with the passage of the Education for All Handicapped Children Act in 1975, which required states receiving federal funds to implement policies assuring students with disabilities a free appropriate public education.³³

Despite this increasing federal presence in education through the 1970s, the role of the federal government remained limited in several important respects. Although the federal government focused on civil rights issues, it largely employed a hands-off approach to what actually went on in schools and classrooms.³⁴ The charter of the U.S. Department of Education (ED), created in 1979, accordingly prevented federal officials from exercising any control over the instructional program of a school.³⁵ Moreover, in *San Antonio Independent School District v. Rodriguez*, the Supreme Court found that the Equal Protection Clause of the U.S. Constitution does not comprise a viable basis for equalizing differences in school funding and redirected school finance litigation – one of the most pervasive forms of large-scale educational litigation – from federal courts to state courts.³⁶

In the 1990s, however, the federal role in education began to shift significantly again. During this time, the federal government began to focus not just on educational equality but also more broadly on educational quality, educational outcomes (such as student achievement), and the governance arrangements needed to address such issues.³⁷ The policies that prefigured federal involvement in these issues began in the mid-1980s, as the standards-based reform movement started sweeping through the states.³⁸ Under this movement, states generally enacted policies requiring the development and

32. See Jennings, *supra* note 13, at 14-21 (discussing the history of the ESEA and modifications made to it through different reauthorizations).

33. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975). The Education for All Handicapped Children Act was renamed the Individuals with Disabilities Education Act and still serves as one of the primary legal protections for the education of students with disabilities. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997).

34. To be sure, some have interpreted federal educational policy in the 1960s and 1970s as intrusive upon states, schools, and districts. For example, the National Science Foundation's MACOS project and the development of regional laboratories generated some criticism from concerned legislators and citizens. See PETER B. DOW, SCHOOLHOUSE POLITICS: LESSONS FROM THE SPUTNIK ERA 229 (indicating that the National Science Foundation's MACOS project and regional language laboratories generated some criticism from concerned legislators and citizens).

35. Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668, 670-71 (1979).

36. 411 U.S. 1, 18 (1973) (finding that education is not a fundamental right and that wealth is not a suspect classification under an equal protection analysis).

37. See BENJAMIN MICHAEL SUPERFINE, THE COURTS AND STANDARDS-BASED EDUCATION REFORM 22-56 (2008).

38. See *id.* at 22-27.

implementation of standards, which are written specifications of what students should know and be able to do.³⁹ These standards were intended to serve as anchors for other sorts of educational policies, such as those governing curriculum, testing, professional development, and accountability, in order to increase the quality of instruction and make educational policies more coherent.⁴⁰ In 1994, Congress specifically became involved in the standards-based reform movement with the passage of the Goals 2000: Educate America Act⁴¹ (Goals 2000) and the Improving America's Schools Act⁴² (IASA). While Goals 2000 provided grants to states to help them develop their own standards and assessment systems,⁴³ the IASA conditioned the continued receipt of Title I funds on the development of standards, assessment, and accountability systems in each state.⁴⁴ As at least a partial result, every state began to develop such systems, and testing students on material included in standards became a major focus of educational policy around the U.S.⁴⁵

B. *The No Child Left Behind Act*

With the passage of NCLB in early 2002,⁴⁶ the federal focus on educational quality, outcomes, and governance arrangements further intensified. As a reauthorization of the ESEA, NCLB imposes heightened requirements for states to continue receiving Title I funds – NCLB requires states not only to implement standards and assessment systems in reading, mathematics, and

39. See Marshall S. Smith & Jennifer A. O'Day, *Systemic School Reform*, in THE POLITICS OF CURRICULUM AND TESTING: THE 1990 YEARBOOK OF THE POLITICS OF EDUCATION ASSOCIATION 233, 245-61 (Susan H. Fuhrman & Betty Malen eds., 1991) (articulating central elements of standards-based, or systemic, reform).

40. See *id.* at 249-53.

41. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994). Goals 2000 was aimed at providing a standards-based reform framework for the passage of subsequent federal educational reforms, such as the IASA. *Id.* § 2; see also *supra* note 9 and accompanying text.

42. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994). The IASA was a reauthorization of the ESEA and incorporated the standards-based reform principles that appeared in Goals 2000. *Id.* §§ 101, 1001; see also *supra* note 9 and accompanying text.

43. Goals 2000: Educate America Act § 308 (authorizing grants to states for the development of standards and assessments).

44. Improving America's Schools Act of 1994 § 1111(a)-(b) (requiring states to submit plans detailing the development and implementation of standards and assessments).

45. See SUPERFINE, *supra* note 37, at 32-47 (discussing the effects of federal education laws in the 1990s).

46. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001).

science,⁴⁷ but also to implement accountability systems that comport with a range of federal requirements.⁴⁸ Under the accountability system requirements, schools must make “adequate yearly progress” (AYP).⁴⁹ In order to satisfy the AYP requirements, states must define for themselves what constitutes an acceptable yearly increase of student performance on tests aligned with state standards.⁵⁰ This increase must include separate objectives for “economically disadvantaged students,” “students from major racial and ethnic groups,” “students with disabilities,” and “students with limited English proficiency.”⁵¹ States further must ensure that each of these student subgroups is fully proficient by 2014.⁵² If schools fail to make AYP, they face a range of possible sanctions. These sanctions include allowing the failed school’s students to participate in systems of public school choice,⁵³ requiring the school to offer “supplemental educational services” to students,⁵⁴ and restructuring the school itself.⁵⁵

NCLB has been the object of much praise and criticism since its enactment. For example, some have hailed NCLB as a vehicle for enhancing the effectiveness of federal funds for improving schools,⁵⁶ while others have claimed that NCLB is dramatically underfunded.⁵⁷ Moreover, the accountability requirements of NCLB arguably exacerbate existing educational inequities by overly emphasizing test preparation in schools that serve high populations of poor and minority students.⁵⁸ As NCLB was created in a federalist

47. 20 U.S.C. § 6311(a)(1), (b)(1)(C) (2006). NCLB requires states to adopt “challenging academic standards” in reading, mathematics, and science that must “specify what children are expected to know and be able to do.” *Id.* § 6311(b)(1)(C)-(D)(i)(I).

48. *Id.* § 6311(b)(2). NCLB accountability systems are based on the requirement that states administer reading and mathematics tests at least once annually to students in grades three through eight and once in high school. *Id.* § 6311(b)(3)(C)(vii).

49. *Id.* § 6311(b)(2)(A)-(C).

50. *Id.* § 6311(b)(2)(B).

51. *Id.* § 6311(b)(2)(C)(v).

52. *Id.* § 6311(b)(2)(F).

53. *Id.* § 6316(b)(1)(A), (E)(i).

54. *Id.* § 6316(b)(5)(B).

55. *Id.* § 6316(b)(8)(B).

56. *See, e.g.,* Michael A. Fletcher, *Test Shows Wider Gap in Reading Skills; Paige Cites Results as Evidence of Need to Pass President’s Education Plan*, WASH. POST, Apr. 7, 2001, at A2 (reporting that U.S. Secretary of Education Rod Paige argued that NCLB would enhance the effectiveness of Title I funds).

57. *See, e.g.,* Bess Keller, *NEA Seeks Allies to Bring Lawsuit on ESEA Funding*, EDUC. WK., Aug. 6, 2003 (discussing the history of a lawsuit that addressed NCLB funding levels and reporting that the president of the National Education Association labeled NCLB the “granddaddy of all underfunded federal mandates”).

58. *See* SUPERFINE, *supra* note 37, at 53 (stating that teachers face increased pressure to “teach to the test,” especially in high-poverty areas where schools face increased pressure to make AYP).

system that has traditionally placed significant authority in the hands of states and localities, the law allows for significant flexibility in key areas. For example, NCLB allows states to set their own standards,⁵⁹ adopt their own assessments,⁶⁰ and largely define for themselves what constitutes AYP.⁶¹

As at least a partial result of this flexibility, the implementation of key NCLB requirements has been very inconsistent across the United States. Perhaps most notably, the quality of the standards that states have developed has been varied and sometimes quite low.⁶² Similarly, states have implemented a range of different assessments to satisfy NCLB requirements, and many of these assessments have failed to be consistently aligned with state standards.⁶³ Because it is technically difficult and expensive to develop and administer assessments that can yield valid inferences of higher order thinking skills, many statewide assessment systems have focused on basic skills instead of the more difficult skills included in some state standards.⁶⁴ Based on differences across state standards and tests and in conjunction with the flexibility given to states to define AYP, states' formulations and determinations of whether schools make AYP have differed.⁶⁵ Indeed, the ARRA directly targets such problems related to the quality of state standards and assessments.⁶⁶

Perhaps even more problematic, many schools simply lack the capacities to respond to NCLB requirements to improve student achievement.⁶⁷ Al-

59. 20 U.S.C. § 6311(b)(1).

60. *Id.* § 6316(a)(1)(A).

61. *Id.* § 6311(a)(2)(B).

62. *See, e.g.*, G. GAGE KINGSBURY ET AL., NW. EVALUATION ASS'N, THE STATE OF STATE STANDARDS: RESEARCH INVESTIGATING PROFICIENCY LEVELS IN FOURTEEN STATES 11, 19 (2004) (stating that proficiency levels on state standards and assessments can differ dramatically).

63. *See Andrew C. Porter, Measuring the Content of Instruction: Uses in Research and Practice*, 31 EDUC. RESEARCHER 3, 7 (2002) (indicating that alignment between the types of state assessments and standards later used to satisfy NCLB requirements has sometimes been so weak that tests used in one state have had a greater alignment with standards used in another state).

64. *See Drew H. Gitomer & Richard A. Duschl, Establishing Multilevel Coherence in Assessment*, in EVIDENCE AND DECISION MAKING 288, 311, 315 (Pamela A. Moss ed., 2007) (noting the potential cost constraints in developing a more effective testing system).

65. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, NO CHILD LEFT BEHIND ACT: IMPROVEMENTS NEEDED IN EDUCATION'S PROCESS FOR TRACKING STATES' IMPLEMENTATION OF KEY PROVISIONS 12-13 (2004), available at <http://www.gao.gov/new.items/d04734.pdf> (indicating that states set AYP goals at different starting points and increasing at different rates).

66. *See American Recovery and Reinvestment Act of 2009*, Pub. L. No. 111-5, § 14005(d)(2), 123 Stat. 115, 283; *see also infra* note 129 and accompanying text.

67. *See Heinrich Mintrop & Gail L. Sunderman, Predictable Failure of Federal Sanctions-Driven Accountability for School Improvement – And Why We May Retain*

though the notion of “capacity” is vague, certain broad categories of capacities, including those of a financial, organizational, and instructional nature, stand out as among the most important. Indeed, as discussed further below, specific school capacities, such as effective teachers and principals, can help increase school performance.⁶⁸ However, many schools continue to lack such capacities, even to the limited extent that they possess the knowledge about the sorts and blends of capacities that are useful for increasing student performance and how to ensure that schools have these capacities.⁶⁹

To be sure, NCLB includes certain provisions aimed at boosting schools’ capacities to improve student performance. Most notably, the law requires states to ensure that there is a “highly qualified” teacher (HQT) in every public school classroom.⁷⁰ While the definition of HQT varies for different types of teachers, this mandate generally requires HQTs to have a bachelor’s degree, be fully certified, and have demonstrated their knowledge and skills in their field.⁷¹ NCLB also provides for financial and technical support to schools and districts that have failed to make AYP.⁷² To encourage data-driven decision-making about school practices, NCLB encourages states to implement longitudinal data systems to track various educational performance indicators.⁷³ However, states have faced significant difficulties complying with the HQT requirements,⁷⁴ and the HQT requirements have been strongly criticized for being far too narrow in their approach to improving teacher quality. For example, several commentators have argued that the HQT requirements are not nearly robust enough to ensure that teachers are

It Anyway, 38 EDUC. RESEARCHER 353, 358 (2009) (discussing the lack of schools’ capacity to respond to NCLB mandates to improve).

68. See *infra* notes 292-96 and accompanying text.

69. See David K. Cohen et al., *Resources, Instruction, and Research*, 25 EDUC. EVALUATION AND POL’Y ANALYSIS 119, 132-34 (2003) (discussing the knowledge base about educational resources and how they are used in the organizational context of schools).

70. 20 U.S.C. § 6319(a)(2) (2006).

71. *Id.* § 7801(23).

72. See, e.g., *id.* § 6303(g)(5)(A) (providing grants to states for the implementation of school improvement measures); *id.* § 6317(a)(1) (requiring states to “establish a statewide system of intensive and sustained support and improvement” to increase the opportunities for states to meet standards).

73. *Id.* § 6311(b)(3)(B) (“Each State . . . may incorporate the data from the assessments . . . into a State-developed longitudinal data system that links student test scores, length of enrollment, and graduation records over time.”). NCLB also provides funding opportunities to states to help develop such data systems. See *id.* § 6311.

74. U.S. GEN. ACCOUNTING OFFICE, NO CHILD LEFT BEHIND ACT: MORE INFORMATION WOULD HELP STATES DETERMINE WHICH TEACHERS ARE HIGHLY QUALIFIED 3 (2003), available at <http://gao.gov/new.items/d03631.pdf> (discussing teacher shortages in high-need subject areas such as mathematics, science, and special education, and indicating that there are too few programs to support new teachers).

consistently effective⁷⁵ and that improving teaching requires a more nuanced and systemic treatment of the problems in the educator workforce.⁷⁶ Moreover, the support provided to schools has been implemented inconsistently and has generally proven insufficient to provide schools with the capacities they need to improve.⁷⁷ Similarly, states have faced significant difficulties in effectively implementing longitudinal data systems, especially with regard to the collection and analysis of student data.⁷⁸ As a result, while student achievement has improved in some respects since the passage of NCLB, it is very difficult to conclude definitively that NCLB itself has improved students' learning opportunities and achievement,⁷⁹ and in certain cases, it appears to have exacerbated existing educational inequities.⁸⁰

C. Federal Education Law “from the Capitol to the Classroom”

Although federal education laws, and the ESEA in particular, have faced several problems over the past half century, a certain class of difficulties persistently stands out: those based in governance of educational reform “from the capitol to the classroom.”⁸¹ As research has long indicated, federal education law is not self-executing; a range of actors across a variety of administrative levels must design and implement it. Accordingly, there are several places across the educational governance landscape where problems in the design and implementation of education law can occur.

Many of these problems can emerge at the federal level itself. Policy actors at the federal level conceive of the goals of reform and thus target particular policy problems in certain ways. As such, the tractability of problems themselves has proven to significantly influence the effectiveness of educa-

75. See, e.g., BARNETT BERRY ET AL., CTR. FOR TEACHING QUALITY, NO CHILD LEFT BEHIND AND THE ‘HIGHLY QUALIFIED’ TEACHER: THE PROMISE AND THE POSSIBILITIES 2-3 (2006), available at http://www.teachingquality.org/legacy/NCLB_HQT_CEP_20061002.pdf (discussing limitations of the HQT provisions in NCLB).

76. See *infra* notes 294-300 and accompanying text.

77. See LAURA S. HAMILTON ET AL., STANDARDS-BASED ACCOUNTABILITY UNDER NO CHILD LEFT BEHIND: EXPERIENCES OF TEACHERS AND ADMINISTRATORS IN THREE STATES 113 (2007), available at <http://www.lrdc.pitt.edu/publications/pdfs/201002221640010.Standards-based%20Accountability%20Under%20No.pdf> (stating that many schools have not received sufficient funding support, instructional resources, and technical assistance to improve).

78. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 65, at 24 (indicating concerns about data, especially concerning the reliability and quality of student data, such as racial and ethnic characteristics).

79. See CTR. ON EDUC. POL'Y, FROM THE CAPITAL TO THE CLASSROOM: YEAR 4 OF THE NO CHILD LEFT BEHIND ACT 35-36 (2006) (discussing several analyses of the relationship between NCLB and student test score gains).

80. See *supra* note 17 and accompanying text.

81. See *supra* note 16.

tional policy, especially where there is a large diversity of behavior of the targeted population, significant behavioral change is required, and there is little solid scientific basis for reform.⁸² A range of factors related to the structure of statutes can also significantly influence the educational policy process, such as the incorporation of an adequate causal theory of reform, the ambiguity of policy directives, financial resources, and the decision-rules of implementing agencies.⁸³ The leadership skills of federal policy implementers (such as the U.S. Secretary of Education), along with the broader political climate and the will of these policy implementers to enforce laws robustly in such climates, also play major roles in implementation of reform efforts.⁸⁴

Similarly, significant problems can emerge at the state level, especially where state programs have grown directly in response to changes at the federal level. Beginning with the passage of the ESEA in 1965, state departments of education grew exponentially to implement federal laws and programs.⁸⁵ However, much of this early growth of state departments of education reflected a marked lack of cooperation with federal officials and the growth of educational programs in “silos,” as states developed their own categorical programs in response to local needs and pressures.⁸⁶ While the relationships between federal and state governments generally became more cooperative as federal programs matured,⁸⁷ the explosion of authority at the federal and state levels resulted in a governance system that was (and to a large extent remains) very fragmented and incoherent.⁸⁸ Moreover, like those at the federal level, state and local implementers act in political climates that can support or undermine policy reform efforts, and they can possess a range of the will, knowledge, skills, and resources needed to comply faithfully with reform

82. See Paul Sabatier & Daniel Mazmanian, *The Implementation of Public Policy: A Framework of Analysis*, 8 POL’Y STUDIES J. 538, 542 (1979) (discussing a range of factors that influence policy implementation).

83. See *id.*

84. See Benjamin M. Superfine, *The Politics of Accountability: The Rise and Fall of Goals 2000*, 112 AM. J. OF EDUC. 10, 23-25 (2005) (discussing the effect of a hostile political climate on the political will of federal officials to enforce the requirements of a federal educational statute).

85. See David K. Cohen, *Policy and Organization: The Impact of State and Federal Education Policy on School Governance*, 52 HARV. EDUC. REV. 474, 476-82 (1982) (discussing the growth of federal and state education programs).

86. See Fuhrman et al., *supra* note 8, at 46 (describing the development of state educational programs in response to federal mandates).

87. See Paul E. Peterson et al., *The Maturation of Redistributive Programs*, in EDUCATION POLICY IMPLEMENTATION 65, 73 (Allan Odden ed., 1991) (stating that the implementation of Title I matured to reflect a tolerance of local diversity and a recognition that no single programmatic thrust is clearly preferable).

88. See Cohen, *supra* note 85, at 495 (tracing the historical roots of fragmentation in educational governance). To be sure, the standards-based reform movement partly attempts to make educational governance less fragmented and more coherent. However, educational governance remains fragmented to a large extent.

efforts.⁸⁹ Potentially compounding such problems is the varied political landscape of states, which can influence the implementation of law in idiosyncratic ways.⁹⁰

“Policy tools” that structure the relationship between state and federal governments can significantly influence the implementation of policy as well.⁹¹ For example, federal laws aimed at educational reform have traditionally involved a range of policy tools to shape the behavior of educators and administrators, including mandates, inducements, capacity-building efforts, and system-changing efforts.⁹² More recently, such laws have incorporated policy tools focused on introducing competition and choice into the education system and on accountability schemes that build incentives for action based on performance-based rewards and sanctions.⁹³ Indeed, NCLB heavily relies on tools involving both choice and accountability to improve educational performance.⁹⁴ But as discussed above, such tools can involve complex problems and may not consistently yield their intended consequences.⁹⁵

Several factors at the local level (i.e. the district and school level) can significantly influence the implementation of federal educational reforms as well. The administrative structures of school districts and the division of authority and duties across district-level personnel can block or facilitate reforms aimed at changing schools.⁹⁶ In particular, district personnel must interpret legal and policy mandates in order to decide whether and/or how to ignore, adapt, or adopt reforms in practice.⁹⁷ Moreover, district-level personnel tend to focus on piecemeal changes mandated by reforms that come from

89. See, e.g., Superfine, *supra* note 84, at 25-28 (identifying the roots of Title I implementation problems in the 1990s).

90. See, e.g., DAVID K. COHEN & HEATHER C. HILL, *LEARNING POLICY: WHEN STATE EDUCATION REFORM WORKS* 9 (2001) (analyzing the effects of California’s particular educational governance structure on an educational reform effort).

91. See Lorraine M. McDonnell & Richard F. Elmore, *Getting the Job Done: Alternative Policy Instruments*, 9 *EDUC. EVALUATION & POL’Y ANALYSIS* 133, 135 (1987) (comparing alternative policy tools used in statutes to leverage reform).

92. *Id.*

93. See Jane Hannaway & Nicola Woodroffe, *Policy Instruments in Education*, 27 *REV. OF RES. IN EDUC.* 1, 3 (2003) (arguing for the inclusion of new policy instruments in educational policy literature).

94. See *id.* at 8-13 (directly applying the concept of policy instruments to NCLB).

95. See *supra* notes 62-66 and accompanying text.

96. See Meredith I. Honig, *Street-Level Bureaucracy Revisited: Frontline District Central-Office Administrators as Boundary Spanners in Education Policy Implementation*, 28 *EDUC. EVALUATION & POL’Y ANALYSIS* 357, 365 (2006) (discussing the power of school districts to influence educational policy implementation).

97. James P. Spillane, *Cognition and Policy Implementation: District Policymakers and the Reform of Mathematics Education*, 18 *COGNITION & INSTRUCTION* 141, 166-68 (2000) (analyzing the cognitive factors influencing the interpretation and ultimately implementation of educational policy mandates).

higher levels, and, as a result, they can lack a holistic approach to the implementation of such changes.⁹⁸ In communicating with schools and gathering information from them, even the precise content of the objects that cross administrative levels, such as memoranda, assessments, and curricular documents, can be crucial for fostering effective implementation of laws.⁹⁹

Schools and teachers play perhaps the most important roles in the implementation of federal education laws. As researchers have noted, variation in the implementation of reform at the school level is the norm rather than the exception.¹⁰⁰ Due to factors such as how reforms fit with existing practices and policies and the will and skill of school leaders, individual schools fashion different interpretations of how reforms should be enacted, and schools accordingly emphasize different components of reforms.¹⁰¹ Similarly, individual teachers interpret reforms in light of their individual experiences, beliefs, skills, and knowledge, and as a result can interpret the same policy ideas in various ways.¹⁰² In fact, “street level bureaucrats” like teachers have been found to be perhaps the most important types of implementers in the entire educational policy process.¹⁰³

In sum, several factors can influence the implementation of federal educational law “from the capitol to the classroom.” Indeed, given this range of factors, it is difficult to find strong evidence that major federal education laws, such as the ESEA, have achieved their primary goals or that it is even possible to achieve deep instructional reform consistently across schools in the U.S. when reforms are mandated by law at the federal level.¹⁰⁴ Accordingly, in addition to legal and political concerns, such issues have raised serious concerns about the expansion of federal power; regardless of whether

98. See *id.* at 168.

99. See Mary Kay Stein & Cynthia E. Coburn, *Architectures for Learning: A Comparative Analysis of Two Urban School Districts*, 114 AM. J. EDUC. 583, 590 (2008) (arguing for the important role that “boundary objects” can play in educational policy implementation).

100. Jennifer A. Mueller & Katherine H. Hovde, *Theme and Variation in the Enactment of Reform: Case Studies*, in THE IMPLEMENTATION GAP: UNDERSTANDING REFORM IN HIGH SCHOOLS 21, 21 (Jonathan A. Supovitz & Elliot H. Weinbaum eds., 2008) (commenting on the variation in implementation of educational policy in fifteen high schools).

101. See *id.* at 41-44 (identifying the dimensions along which the implementation of educational policy varied).

102. See ROBERT J. MARZANO, WHAT WORKS IN SCHOOLS 71-77 (2003) (articulating factors influencing teachers’ practices and responses to policy).

103. Richard Weatherly & Michael Lipsky, *Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform*, 47 HARV. EDUC. REV. 171, 193 (1977) (reporting on the ground-level implementation of federal education law).

104. See Vinovskis, *supra* note 16, at 189 (discussing evaluations of federal educational programs).

this expansion is legally or politically justifiable, its consistency and effectiveness as a tool for leveraging educational reform are far from clear.

III. THE AMERICAN RECOVERY AND REINVESTMENT ACT

Although the ARRA's purpose was to stabilize and stimulate the U.S. economy, a significant portion of the ARRA focuses on public education.¹⁰⁵ In particular, the ARRA is intended to save jobs in education¹⁰⁶ and spur policy reform in specific areas considered by the Obama administration to be of high priority.¹⁰⁷ Given the large amount of ARRA funding devoted to the educational policy areas that are targeted for reform and repeated statements by the Obama administration, the ARRA will likely frame the impending reauthorization of NCLB.¹⁰⁸ Accordingly, this Part examines the education provisions of the ARRA with a particular emphasis on the provisions that are targeted not simply at saving jobs, but also at ultimately improving student learning opportunities and achievement through school improvement and reform.

A. Key Provisions

1. Funds for Existing Federal Educational Programs

The provisions of the ARRA aimed at education cover a wide range of programs and reform areas. The ARRA devotes a significant portion of its educational funding to existing federal education programs that fall under major statutes, such as the ESEA and the Individuals with Disabilities Education Act (IDEA).¹⁰⁹ The ARRA includes three large funding streams for programs that fall under Title I of the ESEA.¹¹⁰ First, the ARRA provides funds for Title I grants to increase the amount of money available for the education of **economically disadvantaged children**.¹¹¹ Second, the ARRA provides funds for Education Finance Incentive Grants, which are distributed based on

105. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 801-806, 14001-14013, 123 Stat. 115, 186-90, 279-86 (2009).

106. See *supra* note 4 and accompanying text.

107. See *supra* note 5 and accompanying text.

108. It is worth noting that Goals 2000 was passed before the IASA and accordingly framed the ESEA reauthorization process as well. See Superfine, *supra* note 84, at 18-19. Indeed, the passage of Goals 2000 arguably led to one of the most significant changes in the history of ESEA. See *id.* at 10 (discussing the use of Goals 2000 as a standards-based reform framework for the IASA).

109. The IDEA reauthorized the Education for All Handicapped Children Act. See *supra* note 33 and accompanying text.

110. American Recovery and Reinvestment Act of 2009, Title VIII, 123 Stat. at 181 (devoting \$13 billion to Title I of the ESEA).

111. *Id.* (distributing \$5 billion under § 1125A of the ESEA).

a range of factors, such as the extent to which educational expenditures among districts in a state are equalized.¹¹² Third, the ARRA provides funds for School Improvement Grants with the goal of increasing the capacities of schools that have not made AYP to improve.¹¹³ These funds are generally distributed by the federal government to states and then distributed by states to districts under pre-existing statutory formulas.

The ARRA also provides significant additional funding for existing federal programs under the IDEA.¹¹⁴ In particular, the ARRA includes funding streams to increase spending under Part B of the IDEA, which is generally aimed at ensuring that students with disabilities are provided with “free appropriate public educations.”¹¹⁵ The ARRA includes funding for IDEA preschool grants¹¹⁶ and for implementing statewide, comprehensive systems that provide early intervention services for infants and toddlers with disabilities.¹¹⁷ Moreover, the ARRA provides funds to a range of smaller education programs, such as those aimed at supporting homeless children.¹¹⁸

Notably, the ARRA directs funds to existing programs that reflect the educational priorities highlighted by President Obama on the campaign trail.¹¹⁹ The ARRA devotes funds to teacher incentive project grants.¹²⁰

112. *Id.* (devoting \$5 billion to education finance incentive grants, specifically designed so that school districts with higher proportions of poor children receive greater funding).

113. *Id.* (distributing \$3 billion by formula under § 1003(g) of the ESEA). These funds are specifically aimed at helping schools that are considered to be in “school improvement” or “corrective action” phases under NCLB for continuing failure to make AYP. *Id.*

114. *Id.* (devoting \$12.2 billion to funding under the IDEA).

115. *Id.* (distributing \$11.3 billion under § 611 of the IDEA). In order to receive these funds under the IDEA, states must submit plans assuring that they are implementing policies to provide disabled students between the ages of 3 and 21 with free appropriate public educations. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 611(a)(2)(A), 111 Stat. 37, 49 (1997).

116. American Recovery and Reinvestment Act of 2009, Title VIII, 123 Stat. at 183 (distributing \$400 million under § 619 of the IDEA). These grants are generally aimed at providing preschool services to students with disabilities between the ages of 3 and 5. Individuals with Disabilities Education Act Amendments of 1997 § 619(a), 111 Stat. at 102.

117. American Recovery and Reinvestment Act of 2009, Title VIII, 123 Stat. at 183 (distributing \$500 million under Part C of the IDEA). These grants are generally aimed at supporting children with a diagnosed physical or mental condition. Individuals with Disabilities Education Act Amendments of 1997 § 632, 111 Stat. at 106-08.

118. American Recovery and Reinvestment Act of 2009, Title VIII, 123 Stat. at 182 (distributing \$720 million under subpart D of Title II of the ESEA and subtitle B of Title VII of the McKinney-Vento Homeless Assistance Act, Pub. L. 100-77, 101 Stat. 482 (1987)). These grants generally help states provide free and appropriate public educations to homeless children.

119. *See infra* notes 120-22 and accompanying text. While President Obama discussed several types of educational reform on the campaign trail, he specifically

These grants are aimed at developing and implementing “performance-based teacher and principal compensation systems in high-need schools,” and ED makes these grants competitively to districts, states, or partnerships between districts and nonprofit organizations.¹²¹ These compensation systems specifically must incorporate information about gains in student achievement.¹²² Moreover, the ARRA provides funds for the development and implementation of statewide longitudinal data systems that stretch from when students enter school through college, include indicators for college readiness and postsecondary remedial coursework, and link student-level data to individual-teacher data.¹²³ As a result, the funds aimed at existing programs maintain the flow of funds to school systems while emphasizing programs that reflect the stated educational priorities of the Obama administration.

2. The State Fiscal Stabilization Fund

In addition to directing funds to existing programs, the ARRA includes the State Fiscal Stabilization Fund (SFSF), which is intended to stabilize state and local government budgets in order to minimize and avoid reductions in education and other essential public services.¹²⁴ Funded at \$53.6 billion, the SFSF constitutes the largest educational appropriation in the ARRA.¹²⁵ The SFSF is composed of three funding streams. The first stream, which includes the bulk of SFSF funds and generally allocates funds to schools based on pre-existing statutory formulas,¹²⁶ is intended to help states avoid spending cuts in education and in retention of school personnel.¹²⁷ In order to receive these funds, governors must submit applications to ED that include several assurances.¹²⁸ In particular, states must commit to engaging in four types of edu-

highlighted the importance of improving teacher quality and making data systems more robust. *See, e.g.,* OBAMA FOR AMERICA, BARACK OBAMA’S PLAN FOR LIFETIME SUCCESS THROUGH EDUCATION 5-9 (2008), available at <http://www.elementarysciencecoalition.org/PreK-12EducationFactSheet.pdf>.

120. American Recovery and Reinvestment Act of 2009, Title VIII, 123 Stat. at 182 (distributing \$200 million under subpart 1, part D of Title V of the ESEA).

121. *See* U.S. DEP’T OF EDUC., GUIDE TO U.S. DEPARTMENT OF EDUCATION PROGRAMS 294 (2009), available at <http://www2.ed.gov/programs/gtep/gtep2009.pdf> (describing the goals of the program and types of projects generally funded).

122. *Id.*

123. American Recovery and Reinvestment Act of 2009, Title VIII, 123 Stat. at 183-84 (distributing \$250 million under § 208 of the Educational Technical Assistance Act, Pub. L. No. 107-279, 116 Stat. 1985 (2002)).

124. *Id.* §§ 14001-14013, 123 Stat. at 279-86.

125. *Id.* at Title XIV, 123 Stat. at 279.

126. *Id.* § 14002(a)(2)(A)(i), 123 Stat. at 279-80.

127. States must devote 81.8% of these funds directly to the support of education and 18.2% to other government services, which can include the renovation of school buildings. *Id.* § 14002(a)(1), (b)(1), 123 Stat. at 279-80.

128. *Id.* § 14005(d), 123 Stat. at 282-83.

cational reform: (1) achieving equality in the distribution of highly qualified teachers between high- and low-poverty schools, (2) establishing a longitudinal data system of the type described above, (3) enhancing the quality of standards and assessments, and (4) supporting struggling schools.¹²⁹ Again, these assurances closely reflect the educational priorities consistently stressed by the Obama administration.¹³⁰ In order to ensure that states comply with their assurances, states are to receive only 67% of their allocation under this strand within two weeks of the receipt of their application and receive the remaining 33% after the approval of the educational plan contained in their application.¹³¹ However, if a state demonstrates a pressing need for more than 67%, ED may award up to 90% of the state's allocation immediately.¹³²

Although states are the units directly responsible for applying to ED for SFSF funds,¹³³ governors have little control over this spending stream – states must divide this pool of money by formula and distribute the funds to school districts,¹³⁴ which in turn have significant discretion in how funds should be used.¹³⁵ Because districts can use SFSF funds for activities authorized by the ESEA, they have almost unlimited discretion over how these funds can be used.¹³⁶ Impact Aid, a program authorized by the ESEA that traditionally aims to help districts that are financially burdened by federal activities, allows districts extreme flexibility in use of educational funds,¹³⁷ and ED has explicitly clarified that districts can use SFSF funds for Impact Aid purposes.¹³⁸

129. *Id.* § 14005(d)(2)-(5), 123 Stat. at 283.

130. OBAMA FOR AMERICA, *supra* note 119, at 5-9 (detailing a range of educational reform plans, such as improving the quality and distribution of teachers).

131. U.S. DEP'T OF EDUC., GUIDANCE ON THE STATE FISCAL STABILIZATION FUND PROGRAM 4 (2009), available at <http://www2.ed.gov/programs/statestabilization/guidance.pdf>.

132. *Id.*

133. American Recovery and Reinvestment Act of 2009 § 14005(a), 123 Stat. at 282. Notably, in order to receive SFSF funds, school districts must submit applications to states. U.S. DEP'T OF EDUC., *supra* note 131, at 16. Despite this fact, governors generally do not have the discretion to restrict districts' use of SFSF funds or to deny funds to districts for purposes that are not clearly articulated in the ARRA. *Id.* at 17.

134. American Recovery and Reinvestment Act of 2009 § 14002(a)(2)(A)(i), 123 Stat. at 279-80. States must provide SFSF funds to districts under states' existing primary, elementary, and secondary education funding formulas. *Id.*

135. *Id.* § 14003(a), 123 Stat. at 281.

136. *Id.* Under the SFSF, school districts may use funds for activities authorized by the ESEA, IDEA, the Adult Education and Family Literacy Act, Pub. L. No. 105-220, 112 Stat. 1059 (1998), or the Carl D. Perkins Career and Technical Education Improvement Act of 2006, Pub. L. No. 109-270, 120 Stat. 683 (2006). *Id.*

137. 20 U.S.C. §§ 7701-7705 (2006) (describing the Impact Aid provisions of the ESEA).

138. U.S. DEP'T OF EDUC., *supra* note 131, at 19-20. However, the ARRA explicitly prohibits certain uses of funds, such as payment of maintenance costs or for

Nevertheless, as noted below, most states have used such funds to avoid personnel cuts.¹³⁹

The SFSF also includes the “Race to the Top Fund” (RTTTF), or a \$4.35 billion fund targeted at spurring innovation in education.¹⁴⁰ The U.S. Secretary of Education determines which states receive grants under the fund based on the information provided in the state applications for SFSF funds and other criteria that the Secretary deems appropriate, such as applications submitted specifically for RTTTF funding.¹⁴¹ As discussed below, ED has stressed the importance of attention to the four reform areas included in SFSF applications and also has emphasized that states should support charter schools for the purposes of receiving RTTTF funding.¹⁴² The potential to receive money under the RTTTF constitutes the primary incentive for states and districts to engage in educational reforms under the ARRA consistent with the priorities of the Obama administration. Finally, the SFSF includes some smaller funding streams. For example, a comparatively small “innovation fund” provides money to school districts or partnerships between non-profit organizations, districts, and school consortia that have demonstrably increased student achievement.¹⁴³

In short, the educational provisions of the ARRA are aimed at the twin goals of enabling states to avoid significant financial cuts and spurring reform in areas highlighted by the Obama administration. While school districts receive the bulk of ARRA funds and are given a significant amount of discretion to decide how the funds should be used, the requirements of the SFSF and the RTTTF, in particular, provide financial incentives to reinforce the reform priorities of the administration.

B. Implementation of the ARRA Educational Provisions

Since the enactment of the ARRA, the Obama administration has implemented the statute in a way that reflects the law’s goals: saving jobs of members of the education workforce and leveraging reform in a handful of targeted areas. Formal documents published by ED strongly reflect this approach, and communications with less formal weight, such as speeches by the U.S. Secretary of Education Arne Duncan, have reinforced these priorities as well. Given the implementation of the ARRA thus far, it is clear that these actions have begun to effect changes in some states’ educational priorities.

stadiums. American Recovery and Reinvestment Act of 2009 § 14003(b), 123 Stat. at 281.

139. See *infra* note 171 and accompanying text.

140. American Recovery and Reinvestment Act of 2009 § 14006, 123 Stat. at 284.

141. *Id.* § 14006(b), 123 Stat. at 284.

142. See *infra* notes 166-70 and accompanying text.

143. American Recovery and Reinvestment Act of 2009 § 14007, 123 Stat. at 284.

1. ARRA Guidance for Distribution and Use of Funds

Soon after the passage of the ARRA, ED began an ongoing process of drafting and publishing guidance to provide detailed information to states and districts about how the ARRA educational provisions should be implemented.¹⁴⁴ For example, while guidance for the ARRA funds flowing through Title I focused on several very specific and technical aspects of how states and districts can use these funds,¹⁴⁵ it also highlighted the dual purposes of the ARRA, including improving student achievement through school improvement and reform.¹⁴⁶ This guidance also emphasized that states should use their portion of Title I funding on short-term investments with the potential for long-term benefits, such as building sustainable capacity at state and local levels to improve student achievement.¹⁴⁷ Additionally, the guidance stressed that school districts should use these funds to implement evidence-based strategies to help build sustainable capacity for improving teaching and learning in high-poverty schools.¹⁴⁸ While states, districts, and schools generally must follow the existing statutory requirements of Title I when spending these funds, the guidance also provided a process for these entities to apply for waivers from even these requirements.¹⁴⁹ As a result, states, districts, and schools have more flexibility to use Title I funds provided by the ARRA than they ordinarily would have.

Like the Title I guidance, the SFSF guidance contains several specific and technical requirements about how SFSF funds should be distributed and used.¹⁵⁰ However, the SFSF guidance also emphasizes that states may only receive SFSF funds in exchange for their assurances in their application to advance educational reform in four particular areas: (1) making improvements in teacher effectiveness and the equitable distribution of qualified teachers for all students; (2) establishing pre-K to college and career data

144. *E.g.*, U.S. DEP'T OF EDUC., GUIDANCE: FUNDS UNDER TITLE I, PART A OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 MADE AVAILABLE UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (2009), available at <http://www2.ed.gov/policy/gen/leg/recovery/guidance/title-i.pdf>.

145. *Id.* at 39 (detailing the information states are required to include in quarterly ARRA reports).

146. *Id.* at 9 (discussing the purpose of Title I funds under the ARRA).

147. *Id.* at 9-10 (articulating the factors that SEAs and LEAs must take into consideration in determining how to use Title I funds under the ARRA).

148. *Id.* at 9 (emphasizing the dangers of the "funding cliff" that SEAs and LEAs could face when ARRA funding ends).

149. *Id.* at 40. For example, schools that have failed to make AYP can apply for waivers from the requirement that they spend 10% of their Title I funds on professional development, and districts may apply for waivers from the requirement to pay for students to transfer among public schools. *Id.*

150. *See, e.g.*, U.S. DEP'T OF EDUC., *supra* note 131, at 41 (discussing the extent to which a state or district may use SFSF funds to meet maintenance of efforts requirements of other federal programs).

systems that track progress and foster continuous improvement; (3) making progress toward rigorous standards and high-quality assessments; and (4) providing targeted, intensive support and interventions for the lowest performing schools.¹⁵¹ Moreover, the guidance indicates that state applications must include baseline data demonstrating their current status in each of the educational reform areas.¹⁵²

States must report on the number and percentage of teachers and principals scoring at each performance level on local districts' evaluation instruments, and they must indicate whether their evaluation tools take student performance into account.¹⁵³ Indeed, ED proposed several requirements in the Federal Register for states that apply while the SFSF is in effect, including requirements for states to collect and report data in several areas. These areas include the status of systems for evaluating the performance of teachers; whether such systems include student achievement outcomes; the ability of longitudinal data systems to track student performance; the quality of states' standards and assessments; the number of schools that have failed to make AYP that have been turned around, consolidated, or closed in the last year; and the number of charter schools currently operating in the state.¹⁵⁴ Thus, while the SFSF funds are largely designed to save existing jobs in the education workforce, the Obama administration has devoted significant attention to using the SFSF funding process as a tool for leveraging educational reform, particularly in the areas of building data systems and improving teacher quality, standards, assessments, and low-performing schools.

The final regulations for the RTTTF reflect similar reform priorities. In order to be eligible for a RTTTF award, states must have committed to the four priority areas of the SFSF.¹⁵⁵ In determining the proper distribution of RTTTF funds, ED additionally awards points to states' RTTTF applications based on a range of factors, including states' commitments to improve stan-

151. *Id.* at 4 (highlighting the importance of states' assurances for making educational reform).

152. *Id.* at 3 (outlining the U.S. Department of Education's process for awarding SFSF funds to Governors).

153. U.S. DEP'T OF EDUC., APPLICATION FOR FUNDING FOR PHASE II OF THE EDUCATION FUND UNDER THE STATE FISCAL STABILIZATION FUND PROGRAM 19-28, available at <http://www.ksde.org/LinkClick.aspx?fileticket=TBUuAzER1bo%3d&tabid=3495> (last visited Jan. 21, 2011). In a letter sent to states with the SFSF guidance, Secretary Duncan further clarified that while states only need to submit assurances that they plan to make such reports, they must show that they have developed the capacity to file such reports in order to receive the second round of SFSF funds. See Stephen Sawchuk, *Quality of Evaluations Draws New Attention as Stimulus Aid Flows*, EDUC. WK., Apr. 22, 2009, at 8.

154. See State Fiscal Stabilization Fund Program, 74 Fed. Reg. 37,837, 37,842-44 (July 29, 2009) (reporting proposed regulations for implementing the SFSF).

155. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14006(b), 123 Stat. 115, 284 (2009); Race to the Top Fund, 74 Fed. Reg. 59,688 (Nov. 18, 2009).

dards and assessments, build more robust data systems to support instruction, improve the performance of teachers and leaders, and advance the “turnaround” of the lowest achieving schools.¹⁵⁶ The regulations specifically emphasize the importance of instituting school turnaround strategies,¹⁵⁷ improving teacher and principal effectiveness based on performance,¹⁵⁸ and adopting standards common to other states.¹⁵⁹

In this sense, the RTTTF extends and potentially enhances the approach to improving teacher quality that was previously embedded in NCLB. While NCLB narrowly required an HQT to be present in every public school classroom, the SFSF and RTTTF broadly allow states and districts the flexibility to implement a range of strategies tied to improving the quality of the educator workforce.¹⁶⁰ To be sure, ED will favor strategies that incentivize educators to improve their performance, as indicated by the data systems that states are concomitantly encouraged to develop.¹⁶¹ However, even if ED favors such strategies, the approach championed by the ARRA at least appears to facilitate more systemic and coherent practices for improving the educator workforce than do the HQT provisions of NCLB.¹⁶² Still, it is worth noting that in response to critiques solicited during the notice and comment period, the final regulations allow states more flexibility than originally anticipated. Indeed, while the proposed regulations initially focused on using charter school operators and external providers and replacing school leaders and staff as viable turnaround strategies, the final regulations allow states and districts to implement professional development and make changes to curriculum and instruction as well.¹⁶³

156. Race to the Top Fund, 74 Fed. Reg. at 59,688-99 (clarifying the changes made to the “State Success Factors”).

157. *Id.* at 59,813 (listing the maximum number of points that may be assigned to each RTTTF selection criterion and indicating that turning around the lowest-achieving schools is worth 50 out of 500 possible points).

158. *See id.* (listing the maximum number of points that may be assigned to each RTTTF selection criterion and indicating that improving teacher and principal effectiveness based on performance is worth 58 out of 500 possible points).

159. *Id.* (listing the maximum number of points that may be assigned to each RTTTF selection criterion and indicating that adopting common standards is worth 40 out of 500 possible points).

160. *Id.* at 59,755 (discussing the range of strategies that could be implemented to improve the effectiveness of the educator workforce).

161. *Id.* at 59,749 (highlighting the importance of tying educator improvement strategies to performance-based incentive systems).

162. Even though the ARRA provisions focused on improving the effectiveness of the educator workforce may be more comprehensive and systemic than the HQT provisions of NCLB, the ARRA provisions still raise many problems. For more on this point, see *infra* notes 294-300 and accompanying text.

163. *See* Race to the Top Fund, 74 Fed. Reg. at 59,688 (describing activities that can be considered part of a school turnaround plan).

In addition to implementing particular reform strategies, the regulations notably emphasize the importance of states' commitment to reform. In order to demonstrate such commitment, states must articulate a coherent educational reform strategy and show that they will build a strong statewide capacity to implement, scale up, and sustain their proposed plan.¹⁶⁴ Indeed, the only absolute priority for an RTTTF award is the articulation of a comprehensive approach to educational reform.¹⁶⁵ Therefore, in addition to dovetailing with the substantive reform priorities of the SFSF, the RTTTF focuses on the underlying ability and commitment of states to enact lasting reform.

Given the structure of the ARRA educational reform provisions and their implementation thus far, the ARRA involves potentially significant advances over other federal education laws, such as NCLB. While NCLB largely focuses on the implementation of accountability mechanisms to leverage educational improvement, the ARRA at least appears to involve some sort of overarching strategy focused on building the capacities of states, districts, and schools to meet performance goals. In addition to focusing on the quality and consistency of state standards themselves, the ARRA emphasizes the broad improvement of the educator workforce and the development of data systems, linked to state standards, that can facilitate this improvement effort. Despite these important features, the ARRA does include a handful of seemingly unconnected reform priorities, such as those focused on charter schools or turnaround strategies. And although the SFSF and RTTTF provide financial incentives to generally reinforce the reform priorities of the Obama administration, localities are also given a significant amount of discretion to decide how ARRA funds should be used.

2. Informal Federal Communications

While ED has released several formal documents to implement the educational provisions of the ARRA, it has also engaged in less formal means of communication aimed at using the ARRA to leverage educational reform in the states. Secretary Duncan has made several statements focusing on the types of educational policies states must have in place in order to be competitive for receiving money under the RTTTF.

Reflecting President Obama's statements on the campaign trail that were highly supportive of charter schools, Secretary Duncan "warned the 26 states that currently impose caps on the numbers of charter schools, and the 10 states that do not permit charter schools at all" that they will be less likely to

164. *Id.* at 59,813 (listing the maximum number of points that may be assigned to each RTTTF selection criterion, and indicating that state success factors are worth 125 out of 500 possible points).

165. *Id.* at 59,695 (distinguishing an "absolute priority" from "competitive preference priority" and "invitational priority").

receive money under the RTTTF.¹⁶⁶ Moreover, Secretary Duncan publicly singled out certain states, such as Illinois, Indiana, and Maine, as being unacceptably hostile to charter schools.¹⁶⁷ Reflecting the administration's educational reform priorities concerning the ARRA, Secretary Duncan indicated his disapproval of states that have laws barring the use of student achievement data in teacher evaluation decisions.¹⁶⁸ He specifically cited California, New York, and Wisconsin as states that maintain a "firewall" between student and teacher data, which he said constitutes "a grave disservice to the teaching profession and to our nation's children."¹⁶⁹ In addition, Secretary Duncan singled out states for failing to maintain high quality standards and pushed them to sign on to a movement of states to develop common standards.¹⁷⁰

3. States' Responses to Federal Efforts to Push Reform

In light of the requirements in the ARRA and the variety of federal communications about the types of educational reform needed to receive ARRA funds, states have engaged in a range of responses. As of 2010, states have received a significant portion of ARRA educational funds and have channeled almost all of these funds to plug budget holes and save jobs.¹⁷¹ Throughout this process, some states appear to have faced significant difficul-

166. See Lesli A. Maxwell, *Obama Team's Advocacy Boosts Charter Momentum*, EDUC. WK., June 17, 2009, at 24-25 (summarizing warnings made by Secretary Duncan to the states regarding charter school policies).

167. See Michele McNeil, *Racing for an Early Edge: States Jockey for Position as the U.S. Education Department Readies Billions of Dollars in 'Race to the Top' Awards – The Stimulus Program's Grand Prize*, EDUC. WK., July 15, 2009, at 22 (discussing statements made by Secretary Duncan about changing state-level education policies).

168. See Michele McNeil, *Rich Prize, Restrictive Guidelines: Criteria Would Set High Bar for 'Race to the Top' Eligibility*, EDUC. WK., Aug. 12, 2009, at 1 (reporting Secretary Duncan's statements that linking teacher and student data is "absolutely fundamental").

169. *Id.*

170. See Michele McNeil, *46 States Agree to Common Academic Standards Effort*, EDUC. WK., June 10, 2009, at 16 (particularly noting that Alaska, Missouri, South Carolina, and Texas have not signed onto a new effort to develop national standards).

171. See CONGRESSIONAL BUDGET OFFICE, ESTIMATED IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT ON EMPLOYMENT AND ECONOMIC OUTPUT AS OF SEPTEMBER 2009, at 3 (2009), available at <http://www.cbo.gov/ftpdocs/117xx/doc11706/08-24-ARRA.pdf> ("640,329 total jobs – more than half of them in education – were created or retained with ARRA funds through the end of September [2009]."); GOV'T ACCOUNTABILITY OFFICE, RECOVERY ACT: STATES' AND LOCALITIES' CURRENT AND PLANNED USES OF FUNDS WHILE FACING FISCAL STRESSES 2 (2009), available at <http://www.gao.gov/new.items/d09908t.pdf> (stating that states largely used education funds to help maintain staffing for existing programs and to minimize or avoid tax increases and reductions in services).

ties managing ARRA educational funds and have been cited for problems involving cash management.¹⁷² Given that states have generally focused on general budget concerns instead of school improvement, ED has indicated that several states are undermining the educational reform aims of the ARRA.¹⁷³ However, a report from the American Association of School Administrators highlighted how difficult it is to use ARRA funds for educational reform while avoiding layoffs – ARRA funds are limited, so there is very little money left for educational reform.¹⁷⁴

A significant pushback against the educational strategy embedded in the ARRA has emerged in several states. For example, while still the governor of Alaska, Sarah Palin stated that she would not accept ARRA money for education because it would permanently swell the budget.¹⁷⁵ Texas similarly refused to follow the lead of the Obama administration in key reform areas such as standards,¹⁷⁶ and along with eight other states, signaled that it will not apply for RTTTF funding.¹⁷⁷ Echoing historical concerns about the expansion of the federal role in education, Republican leaders in Congress have argued that the reform provisions of the ARRA could result in an undesirable expansion of federal power.¹⁷⁸ Furthermore, federal pressure to enact policies supportive of charter schools has failed to generate change in several states.¹⁷⁹

172. See GOV'T ACCOUNTABILITY OFFICE, RECOVERY ACT: FUNDS CONTINUE TO PROVIDE FISCAL RELIEF TO STATES AND LOCALITIES, WHILE ACCOUNTABILITY AND REPORTING CHALLENGES NEED TO BE FULLY ADDRESSED 54 (2009), available at <http://www.gao.gov/new.items/d091016.pdf> (identifying California, Illinois, Michigan, and Texas as at high risk for economic stimulus spending problems).

173. *Id.* at 28 (focusing on the difficulties states have faced complying with the “maintenance-of-effort” provision of the ARRA, which requires states to preserve education funding at least at 2006 levels).

174. See NOELLE M. ELLERSON, AM. ASS'N OF SCHOOL ADM'RS, SCHOOLS AND THE STIMULUS: HOW AMERICA'S PUBLIC SCHOOL DISTRICTS ARE USING ARRA FUNDS 3 (2009), available at http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/files/AASASTimulusSurveyAug09.pdf (reporting on the results of a survey sent to school administrators).

175. See Sean Cockerham, *Palin Rejects over 30% of Stimulus Money*, ANCHORAGE DAILY NEWS, Mar. 19, 2009, available at <http://www.adn.com/palin/story/729504.html> (reporting that Governor Palin was unwilling to accept money that would expand government).

176. See McNeil, *supra* note 167.

177. See CTR. ON EDUC. POL'Y, AN EARLY LOOK AT THE ECONOMIC STIMULUS PACKAGE AND THE PUBLIC SCHOOLS 2 (2010), available at http://www.cepd.org/index.cfm?fuseaction=document_ext.showDocumentByID&nodeID=1&DocumentID=299 (reporting that forty-one states plan to apply for RTTTF grants even though the requirements governing the program are stricter than those for other ARRA programs).

178. See Alyson Klein, “Race to Top” Standards Link Questioned; Some in Congress Worry Federal Intrusion Ahead Through Money for Testing, EDUC. WK., Aug. 16, 2009, at 13. In particular, Republican leaders on the House Education and Labor

On the other hand, the lure of ARRA money and federal pressure appear to have sparked the impetus for reform in several other states. For example, Colorado, which already had in place several educational policies comports with the Obama administration's priorities, created a "bid team" focused on the four assurances needed to receive SFSF funds to ensure that the state receives a share of the RTTTF.¹⁸⁰ Former Colorado Governor Bill Ritter set aside \$10 million from the state's SFSF funds for efforts such as expanding the state's data system and letting more districts experiment with alternative-compensation systems for teachers.¹⁸¹ Other states have directly responded to the statements made by federal officials. Two months after Secretary Duncan publicly called on Illinois to lift its charter school cap and increase the quality of its standards, Illinois legislators doubled the cap on the number of charter schools allowed in the state.¹⁸² Tennessee, Indiana, and Louisiana have taken actions similarly supportive of charter schools.¹⁸³ Still, some states have taken the different approach of simply arguing that their policies comport with those espoused by the Obama administration when they, in fact, may not. One of these instances occurred after Secretary Duncan publicly rebuked California for putting a firewall between teacher and student data.¹⁸⁴ California officials responded that the state law actually does not prohibit certain uses of student achievement data to evaluate teachers and staff.¹⁸⁵ However, in the face of continuing political pressure, California ultimately eliminated its statutory prohibition against linking student and teacher data.¹⁸⁶ Indeed, the Obama administration appears to have made strong use of the bully pulpit as an effective lever for educational reform.

Committee have argued that parts of the ARRA "could lead to a de facto national curriculum – and even a national test." *Id.*

179. See Erik W. Robelen, *State Picture on Charter Caps Still Mixed; Some Easing Restrictions as Federal Officials Urge, Though Others Reluctant*, EDUC. WK., Aug. 12, 2009, at 19 (stating that states such as Maine, Texas, New Hampshire, and Oregon did not enact new policies favorable to charter schools or instead enacted policies hostile to charter schools).

180. McNeil, *supra* note 167 (stating that the Colorado "bid team" follows "every single speech on education" and attempts to analyze them like "literary critics").

181. *Id.*

182. *Id.* (reporting that reform group led by a former state governor and Secretary of Commerce stated that federal statements "gave those negotiations [over the charter school cap] a kick in the pants"); see also 105 ILL. COMP. STAT. 5/27A (2009) (raising the charter school cap in Illinois).

183. See Robelen, *supra* note 179 (reporting that several states have taken legislative steps to support charter schools).

184. See Lesli A. Maxwell, *California "Fire Wall" Becomes Hot Issue*, EDUC. WK., Aug. 12, 2009, at 19 (stating that principals and superintendents in two California school districts have stated that they evaluate teachers using student achievement data).

185. *Id.*

186. See CAL. EDUC. CODE §§ 10601, 10601.5, 10802, 10804 (West 2009).

4. Distribution of RTTTF Money

As of July 15, 2010, ED had completed only one round of the RTTTF competition.¹⁸⁷ In this first round, ED awarded approximately \$500 million to Tennessee and \$100 million to Delaware.¹⁸⁸ Given the Obama administration's priorities, Tennessee was well positioned for an RTTTF award – the state had recently enacted legislation mandating the use of student achievement as half of a teacher's annual evaluation and was already implementing a "value added" data system that would facilitate the use of student achievement data to make decisions about teacher performance.¹⁸⁹ And shortly before the first round of RTTTF decisions, Tennessee increased the limit on charter schools in the state and broadened the pool of students eligible to attend these schools.¹⁹⁰ Like Tennessee's plan, Delaware's RTTTF plan requires a reworking of the teacher evaluation policy, interventions in low performing schools, and the hiring of data coaches to work with teachers and principals.¹⁹¹ In addition, recently passed legislation allows teachers with tenure to be removed from their jobs if they are rated as "ineffective" for two to three consecutive years.¹⁹² Notably, some states applying for RTTTF awards had trouble generating "buy-in" from key stakeholders especially concerned about the impact of teacher evaluation systems, such as teachers' unions, and were accordingly docked a significant amount of points in the scoring of their applications.¹⁹³

Because ED selected only two states for RTTTF awards, \$3.4 billion remains for the second round of the RTTTF competition.¹⁹⁴ In the second round, thirty-five states applied after securing more buy-in of teachers' unions through strategies such as offering more money to school districts.¹⁹⁵ States nonetheless had difficulty securing the buy-in of school districts to expand the number of students affected by the states' education reform

187. This Article does not include information about implementation of the ARRA after July 15, 2010.

188. Lesli A. Maxwell & Michele McNeil, *\$3.4 Billion is Left in Race to Top Aid; Grants to Del., Tenn. Set Dynamic for Round 2*, EDUC. WK., Apr. 7, 2010, at 1.

189. Michele McNeil & Lesli A. Maxwell, *Race to Top Enters Home Stretch with 16 Finalists*, EDUC. WK., Mar. 10, 2010, at 1.

190. *Id.*

191. Lesli A. Maxwell, *Race to Top Win Poses \$100 Million Test for Delaware*, EDUC. WK., Apr. 7, 2010, at 29.

192. *Id.*

193. *See, e.g.*, Lesli A. Maxwell, *District Stances on Race to Top Plans Vary; Some Refuse to Sign States' Plans*, EDUC. WK., Jan. 20, 2010, at 1 (reporting that only 42 local school unions out of approximately 600 total signed on to Michigan's RTTTF application).

194. Michele McNeil & Lesli A. Maxwell, *States Up Ante on Applications for Race to Top*, EDUC. WK., June 9, 2010, at 1.

195. *Id.*

plans.¹⁹⁶ Initiatives to reform teacher evaluations systems have thus played heavily in the implementation of the RTTTF, not only in the decisions actually made by ED and the responses of state policymakers, but also in the politics between various stakeholders in the states.

Accordingly, while movement toward reform under the ARRA has been inconsistent, such movement has occurred in several states and has at least placed certain types of reform firmly under the political spotlight. These types of reform markedly contrast with the educational reform efforts that the federal government heavily stressed in the past. Although previous federal reform efforts, such as the ESEA, were generally aimed at improving students' educational opportunities and ultimately student achievement, the federal government has traditionally employed strategies focusing on enacting civil rights mandates and the infusion of resources. While NCLB does focus on standards and accountability for achieving these goals, the major reform levers of NCLB are largely incentive systems focused on improving the bottom line of student achievement results; the core provisions of NCLB generally do not emphasize particular strategies that states and localities should implement to increase the educational opportunities available to students. However, with its focus on linking student and teacher data, charter schools, and turnaround policies, the ARRA firmly focuses on a handful of strategies that more directly structure students' educational opportunities than NCLB or the federal reform efforts that preceded it, especially at the school level. The ARRA thus reflects significantly new dimensions of federal action in education.

IV. EDUCATIONAL RESEARCH ON THE REFORM STRATEGIES OF THE ARRA

Given the expansion of the federal role in education and the new dimensions of federal action as a tool for leveraging changes in schools, it is critical to examine the state of scientific knowledge in this area. As discussed above, research on the implementation of federal education law "from the capitol to the classroom" has highlighted a range of problems that have weakened reform efforts in sometimes highly politicized contexts. In addition to these sorts of problems, which can arguably influence the implementation of reforms in a large range of policy areas, it is important to consider the substance of the educational reform efforts themselves.

As many researchers have noted, the particular educational reforms pushed by the federal government have often lacked a robust research base.¹⁹⁷

196. Michele McNeil, *Race to Top Buy-In Level Examined*, EDUC. WK., June 16 2010, at 1.

197. See, e.g., Maris A. Vinovskis, *Missed Opportunities: Why the Federal Response to a Nation at Risk Was Inadequate*, in *A NATION REFORMED?* 115, 130 (David T. Gordon ed., 2003) (highlighting the lack of a research base for educational

For example, in an effort to increase the effectiveness of schools with high numbers of poor and minority students, the federal government has provided billions of dollars to schools under Title I of the ESEA since 1965.¹⁹⁸ However, there historically has been little evidence that simply boosting educational funding provides students with enhanced learning opportunities.¹⁹⁹ Moreover, recent reform efforts to tighten the link between funding and learning opportunities, such as NCLB, appear to be based more on politics and ideology than evidence.²⁰⁰ Seemingly aware that the scientific knowledge to create effective education reform at scale has been historically limited, the federal government has begun to respond to this problem. In NCLB and the Education Sciences Reform Act (ESRA), Congress defined “scientifically based research” in education, mandated that federally funded research to comport with this definition, and required a range of federal reform efforts to be based on research that comports with this definition as well.²⁰¹ However, legal mandates requiring educational programs to be grounded in scientifically based research have been harshly criticized for failing to account for the complex and heavily contextualized nature of education.²⁰² As a result of such problems, even modern reform efforts crafted with an awareness of the federal government’s historical inattention to educational research appear to lack a robust scientific base. This section examines the scientific research on the reforms emphasized by the ARRA with a particular focus on whether these reforms continue this unfortunate pattern of federal action.

policy decision-making); *see also* DAVID K. COHEN & SUSAN L. MOFFITT, *THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS?* 229 (2009) (arguing that successful implementation of federal education law requires extensive knowledge that is currently lacking).

198. *See* Jennings, *supra* note 13, at 14.

199. Superfine, *supra* note 15, at 671-72 (discussing the research relating educational funding to educational opportunities).

200. *Id.* at 692 (discussing the incompleteness of scientific evidence and influence of politics on the enactment of federal education law).

201. 20 U.S.C. § 7801(37)(A) (2006) (defining “scientifically based research” with reference to the application of “rigorous, systematic, and objective procedures”); Education Sciences Reform Act of 2004, Pub. L. No. 107-279, 116 Stat. 1940 (2002). The ESRA specifically defines “scientifically based research standards” with reference to “rigorous, systematic, and objective methodology.” 20 U.S.C. § 9501(18)(A).

202. *See, e.g.*, Daniel Liston et al., *NCLB and Scientifically-Based Research: Opportunities Lost and Found*, 58 J. TCHR. EDUC. 99, 100 (2007) (arguing that while the principles underlying scientifically based research are important, other types of research are both necessary and relevant); Sarah-Kathryn McDonald et al., *Scaling-Up Exemplary Interventions*, 35 EDUC. RESEARCHER, 15, 16 (2006), available at http://www.aera.net/uploadedFiles/Publications/Journals/Educational_Researcher/3503/3592-02_McDonald.pdf (“It is the variability introduced by these contextual differences that creates uncertainty regarding the potential of an intervention to be brought to scale.”).

A. School Turnaround Policies

School turnaround policies reside at the heart of the Obama administration's plan for leveraging educational reform through the ARRA. Driven especially by the growing wealth of data about inequities in schooling, policymakers, educators, and other parties interested in educational reform have called for dramatic actions to "turnaround" schools that appear to be performing poorly.²⁰³ Although school turnaround policies have been defined and implemented in many different ways, they are often defined as those that replace the leaders and/or staff in a poorly performing school.²⁰⁴ Ideally, a turnaround school will dramatically increase student performance by fundamentally changing how classrooms in the school operate in a relatively short period of time, such as a few years.²⁰⁵ Across industries other than education, turnarounds are often seen as a strategy of last resort to be used when less drastic interventions have failed to improve organizational performance.²⁰⁶

A significant number of U.S. schools have already begun implementing turnaround strategies.²⁰⁷ As discussed above, NCLB requires schools that fail to make AYP to implement particular reform strategies as a way to hold schools accountable for their performance.²⁰⁸ If schools fail to make AYP for

203. See Joseph Murphy, *Turning Around Failing Schools: Policy Insights From the Corporate, Government, and Nonprofit Sectors*, 23 *EDUC. POL'Y* 796, 803-16 (2009) (discussing the theory and research of school turnaround strategies).

204. See *CTR. ON INNOVATION & IMPROVEMENT, SCHOOL TURNAROUNDS 4* (2009), available at <http://www.centerii.org/survey/downloads/Turnaround%20Actions%20and%20Results%203%2024%2008%20with%20covers.pdf> (discussing the common elements of school turnaround strategies).

205. See *INST. OF EDUC. SCIENCES, TURNING AROUND CHRONICALLY LOW-PERFORMING SCHOOLS 5* (2008), available at http://ies.ed.gov/ncee/wwc/pdf/practice_guides/Turnaround_pg_04181.pdf ("[S]chool turnaround involves quick, dramatic improvement within three years, while school improvement is often marked by steady, incremental improvements over a longer time.").

206. See *CTR. FOR COMPREHENSIVE SCH. REFORM & IMPROVEMENT, SCHOOL RESTRUCTURING OPTIONS UNDER NO CHILD LEFT BEHIND: WHAT WORKS WHEN? TURNAROUNDS WITH NEW LEADERS AND STAFF 5* (2005) (discussing the implementation of turnaround strategies in sectors other than education).

207. For example, out of the forty-six schools in the second year of restructuring in New York in the 2008-2009 school year, six schools replaced their staffs and forty made "other" major changes in school governance. *CTR. ON EDUC. POLICY, DIFFERENTIATING AND SIMPLIFYING: TRANSFORMING SCHOOL RESTRUCTURING UNDER NO CHILD LEFT BEHIND IN NEW YORK 2* (2009). Similarly, out of the forty-nine schools in Georgia in the restructuring phase during the 2006-2007 school year, two schools replaced their staffs, and forty-six made "other" major changes in school governance. *CTR. ON EDUC. POLICY, UNCHARTED TERRITORY: AN EXAMINATION OF RESTRUCTURING UNDER NCLB IN GEORGIA 8* (2008), available at <http://www.eric.ed.gov/PDFS/ED503714.pdf>.

208. 20 U.S.C. § 6316 (2006); see also *supra* notes 49-55 and accompanying text.

five consecutive years, they must engage in “restructuring.”²⁰⁹ When schools enter this phase, school districts must choose between five possible strategies aimed at fundamentally shifting governance in these schools, including the replacement of school leaders and/or staff.²¹⁰ According to one count, approximately five percent (or 5,000) of U.S. schools were on track to fall into this category by the end of the 2009-2010 school year, and this number is quickly growing as NCLB continues to be implemented.²¹¹

Despite the increasing prevalence and popularity of school turnarounds as a strategy for reform, there is markedly little evidence about the efficacy or effectiveness of this strategy. There is limited educational research directly concerning the benefits of replacing school leadership or staff, and the extant evidence largely emerges from the limited experience with school turnarounds under NCLB.²¹² Moreover, this evidence primarily consists of short case studies of schools that have engaged in turnarounds.²¹³ This evidence does not include information about whether turnaround schools are able to sustain improvement over time²¹⁴ and does not reflect the “high-quality” standard of experimental and quasi-experimental research used by the federal government under the scientifically based research standards of the ESRA.²¹⁵ As such, there is little evidence “that specific turnaround practices produce significantly better academic outcomes.”²¹⁶

Given this lack of direct research on school turnaround policies, researchers looking for evidence about school turnarounds have looked to examples of turnarounds of non-educational organizations, such as churches, hospitals, universities, governmental entities, for-profit firms, and not-for-

209. See 20 U.S.C. § 6316(b)(8).

210. 20 U.S.C. § 6316(b)(8)(B)(i)-(v). When in the restructuring phase, the options that schools must choose between are: (1) “[r]eopening the school as a public charter school”; (2) “[r]eplacing all or most of the school staff (which may include the principal)”; (3) “contract[ing] with an [external] entity . . . to operate the public school”; (4) “[t]urning the operation of the school over to the State”; and (5) engaging in other types of restructuring that make fundamental reforms. *Id.*

211. MASS INSIGHT EDUC. & RESEARCH INST., INC., THE TURNAROUND CHALLENGE 2 (2007), available at http://www.massinsight.org/publications/turnaround/51/file/1/pubs/2010/04/15/TheTurnaroundChallenge_MainReport.pdf (describing the increasing number of schools failing to make AYP every year).

212. See INST. OF EDUC. SCIENCES, *supra* note 205, at 4-6.

213. INST. OF EDUC. SCIENCES, *supra* note 205, at 6 (emphasizing that the amount of relevant evidence is limited because none of the studies examined is based on a research method that yields valid causal inference).

214. CTR. ON INNOVATION & IMPROVEMENT, *supra* note 204, at 5 (“In the literature reviewed here, however, case studies often were not able to take such a long term view.”).

215. INST. OF EDUC. SCIENCES, *supra* note 205, at 1 (“We could not find any studies that fit the high-quality experimental and quasi-experimental studies of the What Works Clearinghouse . . .”).

216. *Id.* at 4.

profit entities.²¹⁷ While these examinations have indicated that turnarounds can be successful, it also appears that turnaround efforts are perhaps much more likely to fail than succeed and can be very difficult on both organizations and the individuals in them.²¹⁸ Indeed, given such problems with turnaround strategies, some researchers have suggested that long-term processes of continuous improvement are more effective, because they help organizations recognize and address problems before the problems become so great that major change is needed.²¹⁹

Despite these potential problems with turnarounds, researchers have identified several elements of effective turnaround strategies based on the limited evidence of cases in which turnarounds have dramatically increased school performance over a short period of time. For example, the Center on Innovation and Improvement suggested fourteen actions that school leaders should take when engaging in turnarounds, such as collecting and analyzing data, requiring all staff to change, and gaining the support of key influencers.²²⁰ Similarly, the Institute of Education Sciences cited four actions for effective turnaround leadership, such as signaling the need for dramatic change and maintaining a consistent focus on improving instruction.²²¹ Given the differences among such lists of practices, it appears that the research on turnarounds is not only unclear, but that turnarounds are also a very complicated type of reform to implement effectively. Simply replacing school leaders or staff does not appear sufficient to turn around a school; leaders and staff must engage in specific practices, which are thus far poorly understood, in order for a school turnaround to have a real chance of success. Indeed, the governance, environmental, and organizational contexts of schools can differ greatly,²²² and tailoring turnarounds to such contextual factors also appears critical for implementing successful school turnarounds.²²³ Moreover, there has been little attention in this body of research to the organizational state that should ultimately be established by a turnaround. While replacing school

217. See, e.g., JOSEPH MURPHY & COBY V. MEYERS, TURNING AROUND FAILING SCHOOLS 8-9 (2008) (emphasizing the utility of drawing evidence on the effectiveness of turnarounds from sectors other than education).

218. *Id.* at 29, 254 (reviewing literature on school turnaround policies).

219. MARK A. SMYLIE, CONTINUOUS SCHOOL IMPROVEMENT 31 (2010) (discussing the benefits of continuous improvement processes in schools).

220. CTR. ON INNOVATION & IMPROVEMENT, *supra* note 204, at 6-7 (listing fourteen qualities of effective turnaround leaders).

221. INST. OF EDUC. SCIENCES, *supra* note 205, at 8 (listing four key elements of successful turnaround actions).

222. See CTR. FOR COMPREHENSIVE SCH. REFORM & IMPROVEMENT, *supra* note 206, at 11 (discussing the key success factors and challenges of school turnarounds).

223. See Murphy, *supra* note 203, at 819 (“[I]f there is anything close to a law in the turnaround literature, it is that context is critical both in relation to the causes of organizational decline and failure and in terms of the role it plays in turning around declining enterprises. Indeed, these contingencies will help determine the power of specific turnaround strategies in particular situations.”).

leaders or staff and engaging in particular practices may be sufficient under some conditions to facilitate the development of a higher performing school, there is still much uncertainty about exactly what such a school should look like. Thus, while school turnarounds appear to have been successful in isolated cases, the evidence underlying school turnarounds is sparse, and it appears that significantly more is needed to improve school performance at scale than simply replacing school staff and leaders.

Given that the final regulations for the RTTTF indicate that acceptable forms of school turnaround strategies include conversion of a school to a charter school, contracting with an education management organization (EMO) to run a school, or instituting professional development,²²⁴ it is useful to briefly consider the research on these strategies. Because charter schools constitute a central element of the approach in the ARRA to leveraging educational reform,²²⁵ research on charter schools is considered in detail below. EMOs are for-profit or non-profit private providers that contract with a school district to take over the management operations of a school, and they have become increasingly popular over the last decade.²²⁶ Although there is not a substantial amount of research on EMOs, some research indicates that student achievement in schools managed by EMOs is about the same as student achievement in traditional public schools.²²⁷ While some researchers have found that EMO-managed charter schools may have a very modest positive effect on students' mathematics achievement and reading vocabulary scores, these researchers have also found that these schools focused on basic skills at the expense of higher order thinking skills.²²⁸ Research on professional development strategies has yielded similarly mixed results. While research has found that certain forms of professional development for teachers likely can increase teachers' skills and knowledge and help boost student achievement,²²⁹ the quality and types of professional development that teach-

224. See *supra* notes 160-65 and accompanying text.

225. See *infra* Part III.B.

226. GUILBERT C. HENTSCHE ET AL., WEST ED, TRENDS & BEST PRACTICES FOR EDUCATION MANAGEMENT ORGANIZATIONS 1-11 (2003), available at http://www.wested.org/online_pubs/PP-03-02.pdf (defining education management organizations and analyzing factors supporting and hindering their growth).

227. See, e.g., BRIAN GILL ET AL., RAND CORP., STATE TAKEOVER, SCHOOL RESTRUCTURING, PRIVATE MANAGEMENT, AND STUDENT ACHIEVEMENT IN PHILADELPHIA xiii (2007), available at http://www.rand.org/pubs/monographs/2007/RAND_MG533.sum.pdf ("There were no statistically significant effects, positive or negative, in reading or math, in any of the four years after takeover.").

228. See, e.g., David R. Garcia et al., *Profiting From Public Education: Education Management Organizations and Student Achievement*, 111 TCHRS. C. REC. 1352, 1352 (2009) (reporting findings from a study on education management organizations in Arizona).

229. See, e.g., COHEN & HILL, *supra* note 90, at 171 (finding, in a study of the implementation of California's mathematics curriculum frameworks, that high-quality

ers receive can be very varied.²³⁰ Therefore, in line with the research on the replacement of school leadership and staff, the research on the other forms of school turnaround strategies sanctioned under the ARRA is also mixed and ultimately limited.

B. Charter Schools

In addition to school turnaround strategies, the increased proliferation of charter schools represents a fundamental element of the Obama administration's educational reform plan and is highlighted in the administration's implementation of the ARRA.²³¹ Generally, charter schools are created when a governmental entity contracts with, or grants a charter to, an independent school operator.²³² Although rules for student attendance are not consistent across charter schools, students and their parents generally choose if they want to attend a charter school and which school to attend.²³³ Charter schools then receive a certain amount of money for each student who attends the school, and these schools maintain significant control over key issues, such as personnel, budget, and curriculum in exchange for meeting goals detailed in the charter.²³⁴ State laws generally authorize the creation of charter schools, and as a result, the statutory schemes governing charter schools can differ significantly across states.²³⁵ Because schools that fail to continuously make AYP have the option of converting to charter schools under NCLB, charter school policies already have some grounding in federal law, like school turnaround strategies.²³⁶

Given the presence of independent school operators and the increased flexibility given to these operators, charter school laws arguably blur the dis-

professional development was key in spurring changes in teachers' instructional practices).

230. See Heather C. Hill, *Professional Development Standards and Practices in Elementary School Mathematics*, 104 *ELEMENTARY SCH. J.* 215, 216-18 (2004) (discussing the variability of the types of professional development that teachers actually receive).

231. Race to the Top Fund, 74 *Fed. Reg.* 59,688, 59,691 (Nov. 18, 2009).

232. Jennifer T. Wall, *The Establishment of Charter Schools: A Guide to Legal Issues for Legislatures*, 1998 *BYU EDUC. & L.J.* 69, 69 (defining a charter school with relation to divesting state boards of education of control over school functions).

233. See JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 4 (1994) (discussing the fundamental characteristics of charter schools).

234. See Wall, *supra* note 232, at 71-72 (discussing the increased authority given to charter schools to manage themselves in comparison to traditional public schools).

235. Natalie Lacireno-Paquet, *Charter School Enrollments in Context: An Exploration of Organization and Policy Influences*, 81 *PEABODY J. OF EDUC.* 79, 82 (2006) (discussing the strong influence of state laws on the characteristics of charter schools).

236. See 20 U.S.C. § 6316(b)(8)(B)(i)-(v) (2006).

tinctions between public and private schools.²³⁷ As a result, proponents of charter schools have made several different arguments that draw from the logic of privatization and have especially focused on the potential benefits of decentralizing authority away from unresponsive, centralized bureaucracies to schools and neighborhoods in order to increase teacher autonomy and ultimately efficiency.²³⁸ As a result of the choice and flexibility involved in charter school policies, proponents have also argued that these schemes ideally generate competitive effects that drive up the quality of both charter and traditional public schools.²³⁹ Moreover, after it became clear to conservatives that school voucher policies would not be enacted at a federal level, many conservatives supported charter school policies as a second-best option.²⁴⁰ On the other hand, many liberal advocacy organizations have supported charter schools because they arguably empower minority groups through the decentralization of authority away from unresponsive governmental entities.²⁴¹ Accordingly, charter school policies have become a very popular educational reform strategy supported by many differently oriented interest groups, and these policies are currently authorized in forty states.²⁴²

Despite the ability of charter school policies to draw political support from varied interest groups, the debate surrounding charter schools has been highly public and politicized. Because charter schools represent a threat to traditional public schools, several parties have challenged the legality of charter schools through litigation.²⁴³ Although such challenges have been largely

237. See Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 350 (2003) (discussing the fuzzy boundaries between public and private schools as reflected in the case of charter schools).

238. See, e.g., Jeffrey R. Henig, *School Choice Outcomes*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 68, 71 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (diagramming the theory of action underlying charter school policies).

239. See JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 206-15 (1990) (discussing the theoretical benefits of school choice and competitive effects on school performance).

240. See JEFFREY R. HENIG, SPIN CYCLE: HOW RESEARCH IS USED IN POLICY DEBATES 42 (2008) (discussing how charter schools became a "surrogate battlefield" for vouchers).

241. *Id.* at 52.

242. See CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES (2010), available at <http://www.edreform.com/download/CER-Charter-Laws-2010.pdf> (detailing the characteristics of charter school laws in the U.S.).

243. See, e.g., *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 747 (Cal. Ct. App. 1999); *Council of Orgs. & Others for Educ. About Parochial, Inc. v. Governor of Mich.*, 566 N.W.2d 208, 211 (Mich. 1997); *In Re Grant of the Charter Sch. Application of Englewood on Palisades Charter Sch.*, 727 A.2d 15, 20 (N.J. 1999); see also Gerard Toussaint Robinson, *Can the Spirit of Brown Survive in the Era of School Choice? A Legal and Policy Perspective*, 45 HOW. L.J. 281, 295-307 (2002)

unsuccessful, they highlight the politically sensitive nature of this type of reform.²⁴⁴ Moreover, major news outlets have reported conflicting research of suspect methodological quality about the effectiveness of charter schools, and charter school proponents and opponents have cited the conflicting research in policy debates.²⁴⁵ As such, “[a]dvocates at each extreme [of this polarized debate] wave studies to support their position and claim that their proponents are willfully perverting the canons of social science methodology”²⁴⁶

Outside of the public eye, a quiet consensus among educational researchers about the weaknesses and benefits of charter schools seems to have emerged.²⁴⁷ Although some have criticized charter schools for contributing to increasing segregation in schools and for screening out racial and ethnic minorities and poor students, empirical research generally does not support these claims in the aggregate.²⁴⁸ Moreover, research on the effectiveness of charter schools to boost student performance has revealed that some charter schools produce students with high test scores, such as those in the high-profile national charter school network, known as the Knowledge is Power Program.²⁴⁹ But at the same time, many charter schools are riddled with organizational and personnel problems and produce students with very low test scores.²⁵⁰ When examined in the aggregate, it appears that charter schools produce students who, on average, perform the same as or slightly lower than traditional public school students on standardized tests.²⁵¹ Nonetheless, parents who send their children to charter schools are generally happier with their schools than parents who send their children to traditional public

(generally addressing whether charter schools unconstitutionally authorize the allocation of private funds for public purposes).

244. See Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 935-936 (2007) (stating that state supreme courts have generally found that charter schools are public and that charter school authorizing laws are constitutional under this logic).

245. See HENIG, *supra* note 240, at 56-127 (reporting on the presentation of charter school research in the public eye and in policy debates).

246. *Id.* at 90.

247. See generally *id.*

248. *Id.* at 95-101 (reporting research findings on the interactions of charter school policies with racial and ethnic minority students).

249. See MARTIN CARNOY ET AL., *THE CHARTER SCHOOL DUST-UP: EXAMINING THE EVIDENCE ON ENROLLMENT AND ACHIEVEMENT* 51 (2005) (discussing evidence on the performance of students in Knowledge is Power Program charter schools).

250. See HENIG, *supra* note 240, 103-04 (detailing problems with poorly performing charter schools).

251. See HENRY BRAUN ET AL., *NAT'L ASSESSMENT OF EDUC. PROGRESS, A CLOSER LOOK AT CHARTER SCHOOLS USING HIERARCHICAL LINEAR MODELING* iii-iv (2006) (generally analyzing student test score data to determine the effectiveness of charter schools).

schools.²⁵² Despite such evidence, it remains very difficult to make robust comparisons between charter schools and traditional public schools on the basis of student achievement; many statistical issues, such as the selection bias related to differences among students who attend charter schools and those who do not, are difficult to conclusively eliminate from large-scale analyses of charter schools.²⁵³

The evidence is similarly mixed about the extent to which charter schools actually support and spur innovation in schooling. Given charter schools' comparative organizational autonomy, charter school proponents argue that these schools are well positioned to change the basic operations of schools and classrooms.²⁵⁴ As a result, charter schools also would create competition among schools, which in turn would increase the overall quality of schooling.²⁵⁵ Although charter schools have emphasized certain innovations, such as extended time in school²⁵⁶ and the use of technology to facilitate distance learning,²⁵⁷ there is little activity in charter schools that has not been piloted within the traditional public school system.²⁵⁸ Moreover, some researchers have found that charter schools have positive competitive effects for school systems,²⁵⁹ while other researchers have found that such effects are negligible.²⁶⁰ So, despite the fact that charter school policies have proven to be a politically feasible reform strategy, there is little evidence that they can serve as a "magic bullet" to dramatically improve learning opportunities for students around the U.S.

252. See Jack Buckley & Mark Schneider, *Are Charter School Parents More Satisfied With Schools? Evidence From Washington D.C.*, 81 PEABODY J. OF EDUC. 57, 67-69 (discussing the range of factors, such as extracurricular offerings in charter schools, that can contribute to parents' happiness with children's schooling).

253. See BRAUN ET AL., *supra* note 251, at 4 (discussing limitations in making causal inferences regarding the effects of charter schools).

254. *E.g.*, Hannaway & Woodroffe, *supra* note 93, at 11 (indicating the potential benefits of charter schools).

255. *Id.* at 10 (characterizing market-based policies as policy tools in education).

256. HENIG, *supra* note 240, at 113 (discussing the expanded classroom time in KIPP charter schools).

257. See Kevin Brady et al., *Uncharted Territory: The Current Legal Landscape of Public Cyber Charter Schools*, 2010 BYU EDUC. & L.J. 191, 194-98 (providing an overview of the cyber charter school landscape).

258. See HENIG, *supra* note 240, at 114 (stating that charter schools produce innovations much less than many argue).

259. See, e.g., Caroline M. Hoxby, *Rising Tide: Critics of School Choice Have Grossly Underestimated the Public School System's Ability To Respond to Competition*, 1 EDUC. NEXT 69, 70-74 (2001) (analyzing the competitive effects of charter schools in Michigan).

260. See generally RON ZIMMER & RICHARD BUDDIN, RAND CORP., MAKING SENSE OF CHARTER SCHOOLS: EVIDENCE FROM CALIFORNIA (2006), available at http://www.rand.org/pubs/occasional_papers/2006/RAND_OP157.pdf (analyzing the competitive effects of charter schools in California).

C. Standards and Assessments

In addition to focusing on reform strategies aimed at improving education at the local school level, the ARRA includes a significant emphasis on change at the state level. Responding to common critiques that NCLB (and federal laws prefiguring NCLB, such as Goals 2000 and the IASA) have faced, one goal of the ARRA is to improve the quality of state standards and assessments, and especially to push states to adopt common standards.²⁶¹ As discussed above, state standards are aimed at increasing the coherence of education policies in states by providing a high quality vision of what students should know and be able to do.²⁶² While the mere passage of high quality standards and assessments aligned to them is clearly not sufficient to effect deep educational reform at scale, standards and aligned assessments arguably constitute a very important building block, especially given the problems that have historically plagued educational governance.²⁶³

While NCLB requires every state to have standards and assessments aligned to these standards, the law does not control the content of these standards.²⁶⁴ As a partial result, the quality of state standards has been inconsistent and sometimes low across states,²⁶⁵ and assessments have failed to be consistently aligned with state standards.²⁶⁶ Moreover, standards as a whole do not appear to have improved since NCLB was enacted.²⁶⁷ Underscoring such problems is the fact that students in some states who perform very poorly on state tests could perform at a very high level on tests in another state.²⁶⁸ Also problematic is that many states with improved scores on state tests since the enactment of NCLB have shown declines or flat results on the National

261. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14005(d)(4), 123 Stat. 115, 283 (2009); see also *supra* note 129 and accompanying text.

262. See *supra* note 39 and accompanying text.

263. See Smith & O'Day, *supra* note 39, at 236-38 (discussing systemic barriers to educational change and how standards can help overcome these barriers).

264. See 20 U.S.C. § 6311(a)(1) (2006).

265. See *supra* note 62 and accompanying text.

266. See *supra* note 63 and accompanying text.

267. See generally CHESTER E. FINN ET AL., THOMAS B. FORDHAM FOUND., THE STATE OF STATE STANDARDS 2006, at 6 (2006), available at http://www.edexcellence.net/detail/news.cfm?news_id=358&pubsubid=1276#1276 (arguing that standards in 2006 generally have not improved in at least 6 years and grading state standards at an average of "C-minus").

268. See, e.g., KINGSBURY ET AL., *supra* note 62 (stating that students who score at the 36th percentile on the eighth grade Montana state test would score at the 89th percentile on the eighth grade Wyoming state test).

Assessment of Educational Progress (NAEP), a nationally administered assessment.²⁶⁹

In order to combat such problems, federal laws have included some provisions focused on the development of national standards and assessments. Goals 2000 originally required the creation of the National Education Standards and Improvement Council (NESIC), a body appointed by the President that would certify and review national and state standards.²⁷⁰ While state adoption of nationally certified standards was strictly voluntary under Goals 2000, the public discharge of NESIC's duties would have constituted a weak, but clearly federal, form of accountability for the quality of state standards. However, due to political pressure hostile to the role of the federal government in education, NESIC was never formed, and an appropriations bill passed approximately two years after Goals 2000 had been enacted eliminated all references to NESIC in Goals 2000.²⁷¹ Congress charted a different course with NCLB. It requires all states to administer the NAEP biannually,²⁷² in part to spotlight state standards and tests that are not sufficiently rigorous – if students perform well on a state test but poorly on the NAEP, public and political pressure could create an incentive for a state to improve its standards and tests.²⁷³ However, given the persistently inconsistent quality of standards, it is clear that states have not reacted in this manner.²⁷⁴ It is clear that despite the potential of standards and assessments to at least form a foundation for the improvement of educational governance, significant problems with standards still remain. The ARRA is aimed at remedying these problems by increasing the consistency and quality of standards and assessments.

D. The Educator Workforce and Linking Student and Teacher Data

In addition to improving standards and assessments, the ARRA includes **another focus on state level reform strategies – states must commit to establishing longitudinal data systems that stretch from when students enter school through college and that link student level data to individual teachers.**²⁷⁵ Like turnaround and charter school strategies, this strategy is based at least in ex-

269. See CTR. ON EDUC. POLICY, ANSWERING THE QUESTION THAT MATTERS MOST: HAS STUDENT ACHIEVEMENT INCREASED SINCE NO CHILD LEFT BEHIND? 61 (2007) (analyzing student performance on state and national assessments).

270. See Goals 2000: Educate America Act, Pub. L. No. 103-227, § 212, 108 Stat. 125, 139-40 (1994).

271. See Superfine, *supra* note 84, at 23 (discussing the hostile political context in which Goals 2000 was implemented).

272. 20 U.S.C. § 6311(c)(2) (2006).

273. See, e.g., 147 CONG. REC. H2407 (daily ed. May 22, 2001) (Senator Eshoo arguing for the use of the NAEP to avoid promoting low standards).

274. See *supra* note 62 and accompanying text.

275. See *supra* note 129 and accompanying text.

isting federal law and dramatically extends the existing federal approaches in this area. The requirement builds on the extensive data collection, accountability, and highly qualified teacher (HQT) requirements of NCLB, and not only requires the collection of more robust evidence about the teacher workforce but also lays the foundation for ultimately holding teachers accountable (or rewarding them) for the performance of their students.²⁷⁶

In focusing so heavily on teacher quality, the ARRA moves deeply into a policy domain that states have traditionally controlled. While the federal government has long collected longitudinal student data, such data has been limited and generally has not been used to regulate teacher quality.²⁷⁷ For example, all states already require teachers to hold licenses.²⁷⁸ But given that states make licensure decisions independently, the nature and quality of licensing standards and assessments vary widely – every state requires teachers to hold college degrees, but requirements vary with regard to the mix of college courses taken, clinical experiences, and scores on assessments measuring general knowledge, subject matter knowledge, and pedagogical knowledge.²⁷⁹ Similarly, states maintain the authority to approve teacher education and training programs, but they vary in whether programs are approved by the state or must meet national accreditation standards.²⁸⁰ Likewise, although states have long maintained much of the authority over the professional development of teachers,²⁸¹ requirements for professional development vary widely across states.²⁸²

276. For a more extensive discussion of NCLB requirements see *supra* notes 46-61 and accompanying text.

277. For example, the U.S. Department of Education has been associated with the High School and Beyond Study, the National Education Longitudinal Study of 1988, the Educational Longitudinal Study of 2002, and the High School Longitudinal Study of 2009. See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., ABOUT HSLS: 09 – SELECTED FINDINGS FROM PREVIOUS NCES HIGH SCHOOL COHORT STUDIES (2009), available at https://surveys.nces.ed.gov/hsls/static_files/SelectedFindings.pdf. While these studies included several different types of data, they generally focused on the areas of science, technology, engineering, and mathematics. *Id.* Moreover, while such studies generally included information about certain teacher characteristics, such studies did not include detailed information about methods used in the classroom. *Id.*

278. Thomas B. Corcoran, *The Changing and Chaotic World of Teacher Policy*, in THE STATE OF EDUCATIONAL POLICY RESEARCH 307, 309 (David K. Cohen et al. eds., 2007).

279. *Id.* (specifically noting that “in 2005, 48 states required teachers to pass one or more tests to obtain a teaching license” and that states set different standards for knowledge that must be exhibited on tests).

280. See MICHAEL ALLEN, EDUC. COMM'N OF THE STATES, EIGHT QUESTIONS ON TEACHER PREPARATION: WHAT DOES THE RESEARCH SAY? A SUMMARY OF THE FINDINGS 3, 9 (2003) (discussing research on the impact of state and national teaching standards).

281. Corcoran, *supra* note 278, at 324-25. Several researchers have especially emphasized the importance of high-quality professional development for teacher

States have long set teacher compensation policies as well, which generally dictate teacher pay according to state or local salary schedules on the basis of experience, credentials, and college credits earned.²⁸³ While some states have attempted to modify teacher compensation policies through strategies such as career ladders²⁸⁴ and merit pay schemes,²⁸⁵ more recent efforts vary significantly and include elements such as signing bonuses, housing supplements, higher pay in shortage areas such as mathematics, higher pay for teachers in hard-to-staff or low-performing schools, and elaborate knowledge- and skill-based incentives.²⁸⁶ Indeed, given the increasing business influence on education law and policy, the push for accountability, and the focus on teachers, teacher compensation schemes have gained significant political traction in states as a means to improve performance in high-poverty schools, even if such strategies have not been fully implemented.²⁸⁷

In order for policymakers to assess the effectiveness of such strategies, and particularly to implement reforms that reward or punish teachers for their performance, states need to develop robust data systems. At this point, states generally have fragmented data systems without the ability to provide a range of data needed to understand and manage the implementation of such strategies.²⁸⁸ However, especially in the wake of NCLB, several states recently have made improvements in their data systems. For example, an increasing number of states have begun to implement essential elements of a robust longitudinal data system, including “[a] unique student identifier that connects students to data across key . . . years,”²⁸⁹ “[a] teacher identifier system with

performance. See, e.g., COHEN & HILL, *supra* note 90, at 41 (analyzing the impact of high quality professional development on teachers’ instructional practices).

282. See EdCounts Database, <http://www.edweek.org/rc/2007/06/07/edcounts.html> (reporting that 30 states required districts to align professional development programs with local priorities and goals, and only 16 states required a specific amount of time to be set aside for professional development).

283. See Corcoran, *supra* note 278, at 316 (discussing that policymaking authority for teacher education policies ultimately resides at the state level in most states).

284. See generally HARRY P. HATRY ET AL., ISSUES AND CASE STUDIES IN TEACHER INCENTIVE PLANS (2d ed. 1994) (generally discussing various types of teacher incentive plans and providing specific examples of these plans in action).

285. See Bob Peterson, *Merit: To Pay or Not to Pay*, RETHINKING SCHOOLS, 2000, http://www.rethinkingschools.org/archive/14_03/mert143.shtml (analyzing the theory and history of teacher merit pay policies).

286. See Corcoran, *supra* note 278, at 316-21 (discussing the range of modern teacher compensation and evaluation policies).

287. *Id.* at 317 (discussing the political allure of teacher compensation policies, especially for state governors).

288. See SE. CTR. FOR TEACHING QUALITY, NCLB TEACHING QUALITY MANDATES: FINDINGS AND THEMES FROM THE FIELD (2004) (providing an overview of the state of longitudinal data systems).

289. See DATA QUALITY CAMPAIGN, ANNUAL PROGRESS REPORT ON STATE DATA SYSTEMS 4 (2009) (fifty states reported this ability).

the ability to match teachers to students,”²⁹⁰ and “[t]he ability to match student records between the P-12 and postsecondary systems.”²⁹¹

Although the research base on such strategies to improve the performance of the teacher workforce is not extensive, certain findings have begun to emerge. Perhaps most importantly, a growing consensus has emerged that the quality of teachers significantly influences student learning and achievement.²⁹² Moreover, it appears that teacher quality is especially important for boosting the performance of poor and minority students.²⁹³ Despite this, the research on how teacher quality influences student performance is generally limited, sometimes conflicting, and ultimately inconclusive. For example, teacher quality can be defined in many ways and is thought to be linked to characteristics such as qualifications and experience, subject matter knowledge, ability to create a classroom environment encouraging to students, and motivation to help students achieve at high levels.²⁹⁴ However, with very limited exceptions, there is no consistent finding across studies about the teacher qualities that facilitate student learning and performance at high levels.²⁹⁵ Accordingly, although policies such as merit pay, which are designed to reform the teacher workforce, theoretically *can* improve teacher quality, there is very limited evidence for the claim that they do so. Indeed, there does not appear to be persuasive research on the effects of any alternative compensation scheme on student learning and achievement.²⁹⁶

290. *Id.* (twenty-four states reported the ability to match teachers to students in their data systems).

291. *Id.* (thirty-one states reported this ability).

292. See generally BRIAN ROWAN ET AL., CONSORTIUM FOR POLICY RESEARCH ON EDUC., WHAT LARGE-SCALE, SURVEY RESEARCH TELLS US ABOUT TEACHER EFFECTS ON STUDENT ACHIEVEMENT: INSIGHTS FROM THE PROSPECTS STUDY OF ELEMENTARY SCHOOLS (2002) (using statistical analyses of a large database to analyze the influence of teachers on student achievement).

293. See, e.g., LAURA GOE, NAT’L COMPREHENSIVE CTR. FOR TEACHER QUALITY, THE LINK BETWEEN TEACHER QUALITY AND STUDENT OUTCOMES: A RESEARCH SYNTHESIS 4, 44 (2007) (synthesizing research on the relationship between teacher quality and student outcomes).

294. *Id.* at 2 (discussing the state of the research base on the relationship between teacher quality and student performance).

295. While there is no consistent finding across studies regarding the most important characteristics that make up teacher quality, it does appear that courses and certification in high school mathematics can consistently contribute to student learning. See, e.g., JULIAN R. BETTS ET AL., PUB. POLICY INST. OF CAL., DETERMINANTS OF STUDENT ACHIEVEMENT: NEW EVIDENCE FROM SAN DIEGO 89, 106, 117-118 (2003); see also DONALD BOYD ET AL., HOW CHANGES IN ENTRY REQUIREMENTS ALTER THE TEACHER WORKFORCE AND AFFECT STUDENT ACHIEVEMENT 1, 8 (2005) (discussing the influence of teacher certification and coursework on student achievement).

296. See Corcoran, *supra* note 278, at 320 (analyzing the evidence underlying alternative teacher compensation strategies, such as career ladders and merit pay).

Given such limited information about strategies to reform the teacher workforce and the consensus about the importance of teachers for student learning, longitudinal data systems linking teachers and students seem promising. If carefully designed and robustly implemented, these systems could offer researchers and policymakers more evidence about the qualities of effective teachers, and policymakers could tailor their reform strategies more closely to the realities of the teacher workforce. Data from such systems could then be used to drive cycles of continuous improvement in schools.²⁹⁷ However, several concerns persist. The data systems required by federal law and constructed by states potentially could focus on indicators of student and teacher quality that are too narrow. While statistics like student achievement on standardized tests and teacher certification status are important, they do not reflect what teachers actually do in the classroom.²⁹⁸ Moreover, such indicators do not account for influence of local context and the variation that may be necessary to teach effectively in different contexts.²⁹⁹ Several factors compound these problems: few states currently use existing data to drive educational decision-making, implementers of the data systems (such as administrators in schools, districts, or state departments of education) may not have the technical capacities to do so, and there is currently almost no culture of data-driven decision-making in education.³⁰⁰

Ultimately, the ARRA's focus on building more robust data systems with particular regard to the teacher workforce appears to focus on a high-leverage area of reform. Indeed, the focus on gathering robust data about students and teachers to guide decisions appears to be a much more nuanced and measured approach than simply instituting quick-fix organizational reform policies, such as those focusing on charter schools or school turnaround strategies. The push to develop data systems and improve the educator workforce generally appears to work as a coherent strategy for enhancing

297. See DATA QUALITY CAMPAIGN, *THE NEXT STEP: USING LONGITUDINAL DATA SYSTEMS TO IMPROVE STUDENT SUCCESS 2* (2009) (discussing the potential to use data to drive continuous improvement in schools). As discussed *supra* note 219 and accompanying text, cycles of continuous improvement appear significantly more promising than quick turnarounds for increasing the quality of schools.

298. See, e.g., ALFIE KOHN, *THE CASE AGAINST STANDARDIZED TESTING: RAISING THE SCORES, RUINING THE SCHOOLS* (2000) (arguing that standardized test scores are of limited value for assessing educational quality and student performance).

299. See David K. Cohen et al., *Resources, Instruction, and Research*, 25 EDUC. EVALUATION & POL'Y ANALYSIS 119, 122-24 (2003) (highlighting the importance of local context in decisions about instruction).

300. See DATA QUALITY CAMPAIGN, *supra* note 297, at 5-15 (identifying barriers from simply complying with data collection mandates to using data effectively); see also Michael S. Knapp et al., *Understanding the Promise and Dynamics of Data-Informed Leadership*, in EVIDENCE AND DECISION MAKING 74, 81-84 (Pamela A. Moss ed., 2007) (emphasizing problems such as leaders' data literacy, the quality of available data, and the lack of organizational cultures to enable and motivate data-informed leadership).

teacher and principal quality. As these data systems are currently being developed, there is little indication that they can provide the range of evidence needed to make more effective decisions about how to reform policies governing the teacher workforce. Moreover, there is little indication that such data systems, as they currently stand, can serve as a solid foundation for reform strategies focused on measuring teacher performance for the purposes of making effective decisions about teacher compensation.

V. MOVING FROM THE ARRA TO THE REAUTHORIZATION OF NCLB

A. *Research, Politics, and the Stimulation of Educational Reform*

In addition to stabilizing the U.S. economy through saving jobs in the educational sector of the workforce, the ARRA builds on federal reform efforts of the past, and especially on NCLB, to leverage educational reform. While some of the reform strategies employed in the design and implementation of the ARRA emphasize reform at the state level (such as the implementation of longitudinal data systems focused on linking student and teacher performance), the ARRA contains an unprecedented emphasis at the federal level on spurring the development of policies that especially affect the organization of schools (such as charter school and turnaround policies). In this way, the ARRA reflects an increased willingness to expand federal power deeply into the decision-making process regarding the operations of schools. Given that the ARRA was passed at the federal level, it also entails a complex implementation process that spans several administrative levels and involves a range of actors. As such, the ARRA involves new dimensions of federal action that are strongly focused on developing systems to structure students' educational opportunities and ultimately enact changes from the capitol to the classroom.

Considering the requirements and implementation of the ARRA thus far, the history of the federal role in education, and relevant educational research, the ARRA's goals are laudable, but it oversteps the limits of effective federal action. Drawing on some of the major strengths of the federal government, the Obama administration has effectively used the power of the bully pulpit and financial incentives to influence state-level policymaking, at least with regard to targeted areas such as eliminating charter school caps and barriers to linking student and teacher data. Moreover, the ARRA is aimed at instituting reforms that generally show at least some signs of promise. Despite their centrality on the policy landscape for decades and potential for increasing the coherence of educational policies, standards have long maintained an inconsistent and sometimes low quality. The ARRA in part is intended to remedy this problem.

Similarly, the longitudinal data systems specified in the ARRA can produce useful and needed knowledge for effective policymaking, and there are some high profile examples where reform efforts like charter schools and turnaround policies have been extremely successful under difficult condi-

tions.³⁰¹ Furthermore, the RTTTF emphasizes the importance of states' and localities' capacities for and commitment to educational reform, responding to a significant problem that federal educational reform has consistently faced upon implementation. Perhaps most notably, the ARRA attempts to increase the quality of the educator workforce, which appears to be a critical element for improving school and student performance. Indeed, in marked contrast to NCLB, the ARRA appears to involve a fairly coherent approach to improving the quality of the educator workforce based on its provisions aimed at improving standards and instituting data systems.

However, the ARRA overly relies on these reform strategies as “magic bullets,” or the types of faddish reform strategies that have far too often emerged and quickly disappeared on the educational reform landscape.³⁰² As discussed in Part III, evidence of the effectiveness of all these reforms is mixed, often limited, and ultimately unclear. Complicating the state of scientific evidence underlying these reforms (and in part driving the state of this scientific evidence), these strategies themselves are ambiguous. For example, although the ARRA generally pushes the implementation of charter school policies, there are several different ways to structure these policies. Similarly, because states and districts have much latitude in how they craft their turnaround policies, the shape and effects of the turnaround options have the potential to vary significantly as well.³⁰³ In light of both the state of scientific evidence underlying these strategies and the lack of clarity about what is entailed by each of these strategies, the ARRA reflects a common problem that federal educational reform statutes historically face – the lack of a clear causal theory of reform. Indeed, the focus on charter schools, school turnarounds, and data systems as written in the law reflects an emphasis on the political middle ground and capitalizes on recent political victories scored in the passage of NCLB instead of employing nuanced, evidence-based decision-making about the effectiveness of various educational reform strategies.

At the same time, the educational reform provisions of the ARRA depend on somewhat weak incentives, namely the bare assurances states must make in order to receive SFSF funding and the substantial but ultimately limited amount of money in the RTTTF. Underscoring the limitations of this incentive mechanism, several states have not yet followed the lead of the Obama administration in key reform areas, such as standards and charter schools, and some have signaled that they will not apply for RTTTF funding.³⁰⁴ While some states' refusals to follow the Obama administration's lead likely stem from objections to the general shape and principles underlying the educational reform provisions of the ARRA, the precise policy tools em-

301. *See, e.g., supra* notes 220-23 and accompanying text.

302. *See generally* DIANE RAVITCH, *LEFT BACK: A CENTURY OF FAILED SCHOOL REFORM* (2000) (arguing that education reforms are generally short lived and rarely effect change on a deep level).

303. *See supra* note 160 and accompanying text; *see also supra* Part IV.A.

304. *See supra* notes 175-77 and accompanying text.

ployed in these provisions likely play a significant role as well. Given that the RTTTF is only a limited inducement, there is little reason to expect the RTTTF to leverage reform to the same extent as a policy tool with sharper teeth, such as accountability mechanisms or mandates.

There is significant room for discretion and flexibility in how each of the reform strategies can be implemented, which compounds these issues. For example, federal efforts like those involving charter schools trickle down across administrative levels, are channeled through the lenses of quite varied state law requirements (most aspects of which are not directly influenced by federal law), and then are implemented by a variety of administrators and teachers in a range of different and allowable ways. Similarly, several provisions of the SFSF drive down much of the important decision-making authority over the use of ARRA funding to the district level, and Title I funds under the ARRA can be used by localities for almost any educational purpose.³⁰⁵ Indeed, policy tools focused on ensuring that such funds are used effectively at local levels, such as accountability mechanisms, are notably absent from the ARRA. As a result, state leaders have expressed more certainty about their plans for implementing reform efforts more easily accomplished by state actions (such as improving standards) than about efforts that depend more on local conditions and priorities.³⁰⁶

On one hand, the large amount of discretion accorded to states and local actors and the lack of robust incentives or policy tools to enforce the implementation of these strategies arguably constitute important strengths of the educational reform approach of the ARRA. Because the reform strategies hold some promise and there is significant value in local actors making key policy decisions, the risk of inconsistent and poor exercise of discretion is arguably the price of enacting reform in this area. As discussed above, variation in the implementation of federal law is simply a feature of large-scale, complex educational policymaking and is ultimately inevitable.³⁰⁷

On the other hand, such discretion and the lack of robust incentives to implement reforms in a particular way are undesirable artifacts of political compromise rooted in the history of the federal role. Because such local discretion has historically contributed to inconsistent and ineffective federally driven reform in the past, this discretion perhaps should be limited and ultimately avoided. Indeed, given the combination of educational reform strategies in the ARRA and the federal approach to implementing them thus far, the ARRA appears strongly reminiscent of NCLB. When Congress considered NCLB, Democrats and Republicans overwhelmingly agreed that the

305. See *supra* notes 133-39 and accompanying text.

306. See CTR. ON EDUC. POLICY, AN EARLY LOOK AT THE ECONOMIC STIMULUS PACKAGE AND THE PUBLIC SCHOOLS: PERSPECTIVES FROM STATE LEADERS 2 (2009) (reporting results from a survey of state leaders about implementing the educational provisions of the ARRA).

307. See *supra* Part II.C.

fundamental strategies of NCLB would effectively leverage reform.³⁰⁸ Congress then enacted NCLB as a reform that overly relied on imperfect policy tools without an adequate research base (such as large-scale accountability systems), while allowing states a significant degree of latitude to implement the law and failing to ensure that state and local actors had the capacities needed to meet the goals of the law.³⁰⁹ As a result, NCLB probably inflicted more harm than good, and within a few years of its passage, the political consensus underlying the law shattered as the problems with this sort of unmeasured approach, implemented on a very large scale, became clear.³¹⁰

Given the need for a more measured approach, the federal government should cut a path down the middle of allowing discretion and being directive in order to engage in effective educational reform. Variation in light of local conditions is both inevitable and desirable, but such variation must be framed and managed well “from the capitol to the classroom” in order for educational reform to be effective. At the same time, the federal government should use its considerable power to leverage educational reform strategies that at least have substantial evidence underlying claims about their efficacy instead of just political consensus. Without cutting such a path in the ESEA reauthorization and beyond, federal education law likely will continue to face significant problems grouped around the intersection of the growing federal role and the substance of the reforms specifically embedded in the law.

B. Recommendations for Reauthorizing NCLB

In light of the problems that NCLB has faced and those that the ARRA appears likely to face, the reauthorization of NCLB presents an especially important opportunity for addressing problems in federal education law and restructuring it to better leverage educational reform.³¹¹ Because others have amply examined the problems of NCLB, this section does not intend to cover every aspect of NCLB that should be addressed in the next ESEA reauthorization;³¹² instead, this section focuses on the major aspects of NCLB that

308. 147 CONG. REC. S6672 (2001). Underscoring the bipartisan political consensus underlying NCLB at its passage, the U.S. Senate overwhelmingly voted for NCLB 91-8. *Id.*

309. *See supra* notes 59-61 and accompanying text.

310. For example, at least 145 bills calling for changes in NCLB have been introduced in the U.S. Congress. *See* National Education Association, Urge Congress to Support Bills to Improve NCLB, <http://www.nea.org/home/14920.htm> (last visited Nov. 22, 2010).

311. Throughout this section, the terms NCLB and ESEA reauthorization will be used interchangeably. The NCLB is a reauthorization of the ESEA, but the ESEA again will be reauthorized and renamed.

312. *See, e.g.,* Robert L. Linn, *Conflicting Demands of No Child Left Behind and State Systems: Mixed Messages about School Performance*, 13 EDUC. POL’Y ANALYSIS ARCHIVES (2005), available at <http://epaa.asu.edu/epaa/v13n33/>

should be addressed in light of the approach taken to educational reform in the ARRA.

As discussed above, standards and assessments constitute central elements of NCLB, and problems of quality and consistency have riddled its implementation.³¹³ Given the near certainty that standards and assessments will continue to play a central role in the next reauthorization of NCLB, the ARRA focuses on improving the quality and consistency of standards in an especially important area for reform.³¹⁴ To this end, the ARRA nicely lays a foundation for addressing a key issue in NCLB. Indeed, a national movement toward developing joint standards has already begun among the states, and federal encouragement to move in a particular policy direction works best when politics at the state level already support such change.³¹⁵ Still, even if standards and assessments are dramatically improved, significantly more change is needed in order to help schools improve their performance.

To this end, the ARRA directly targets perhaps the most major problem facing NCLB: the lack of capacity to dramatically improve student performance in the lowest-performing schools around the country. As discussed above, NCLB largely aims at improving low-performing schools through the imposition of accountability systems³¹⁶ and a handful of other tools aimed at more directly impacting students' learning opportunities, such as the mandates that an HQT must be present in every classroom.³¹⁷ However, such strategies have generally proven too narrow and ultimately ineffective.³¹⁸ The ARRA rightly focuses on improving these capacities at the school level.³¹⁹ The ARRA's coherent approach to improving the quality of the educator workforce, as reflected in both its provisions addressing the quality of state standards and the development of data systems, appears particularly promising. Nevertheless, as discussed above, the approach to improving capacity through various strategies has significant weaknesses. Given that the ARRA is in part designed to frame the reauthorization of NCLB, the reauthorization should improve and extend the approach used in the most promising parts of ARRA.

v13n33.pdf (discussing problems facing NCLB accountability systems); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004) (citing several problems with the design of NCLB).

313. See *supra* Part IV.C.

314. See David J. Hoff, *National Standards Gain Steam: Governors' Embrace Rooted in Competitive Concerns*, EDUC. WK., Mar. 2, 2009, at 1 (reporting on the increased political traction the idea of national standards has gained at the federal level and with Secretary Duncan).

315. See McNeil, *supra* note 167 (reporting that forty-six states have agreed to take part in an effort to develop a common set of standards).

316. See *supra* note 48 and accompanying text.

317. See *supra* note 70 and accompanying text.

318. See *supra* notes 74-80 and accompanying text.

319. See *supra* notes 144-59 and accompanying text.

Accordingly, the reauthorization process should avoid mandating the imposition of particular reforms like turnaround and charter school policies, and should focus instead on improving and extending the ARRA approach of using data to make evidence-based decisions about the teacher workforce. As discussed previously, the collection and use of data to understand and make decisions about the teacher workforce has thus far been limited and problematic in many ways.³²⁰ However, teacher quality has long appeared to be one of the most important factors influencing student performance, and the use of data to leverage evidence-based educational improvement appears very promising. By linking data with decisions about the teacher workforce, federal law can build on the coherent approach in the ARRA aimed at what should be one of the major targets of federal action – teachers’ engagement in effective instructional practices.

Because variation in light of local context is both desirable and necessary, it is very difficult, if not impossible, to precisely define these practices in this Article and in federal law more broadly. Indeed, flowing from the notion that federal law should embrace variation in instructional practices, data systems that focus on teacher quality should include nuanced measures that allow for and embrace such variation. Federal law that focuses on teacher quality should frame the reform and improvement of teachers’ instructional practices without precisely dictating the content. To be sure, strategies such as school turnaround – and especially charter school policies – broadly involve this sort of reform. However, the extant research on these types of strategies and the federal approach to them suggest that they allow for too much variation and have thus far revealed little potential as guiding principles for framing reform at scale. Strategies focused directly on improving teacher quality, especially by tying decisions about the teacher workforce with the ongoing collection of evidence about teachers’ instructional practices, are significantly more promising.

Accordingly, the reauthorization of the ESEA should involve the development of broad, evidence-based principles linked to content standards that could serve as a general guide for instructional practices and a framework for monitoring and managing the teacher workforce.³²¹ Although much modern governmental regulation depends on regimes requiring implementers to en-

320. *See supra* notes 288-91 and accompanying text.

321. In other work, I have similarly called for the creation of “opportunity to learn” standards, which would be linked to content standards. *See SUPERFINE, supra* note 37, at 192. Moreover, I have also called for the creation of broad, evidence-based principles to guide decisions about educational resources. *See Superfine, supra* note 15, at 700-01. The call for such principles here represents an attempt to think further about how such principles could be implemented and the role they could play in the ESEA reauthorization, given the focus of the ARRA and the Obama administration.

gage in “best practices,” such schemes strongly appear to be inappropriate.³²² While these regimes nominally allow for some flexibility in implementation, they generally include sets of practices that must be applied fairly rigidly and generally promote uniformity among implementers in practice.³²³ Instead, evidence-based principles should serve as broad guidelines for teachers and local administrators who need to actively make decisions about how such principles should be applied in their local contexts. Given that the evidentiary basis for articulating such principles is currently weak³²⁴ and that the federal government has long engaged in the funding of educational research,³²⁵ the reauthorization of the ESEA presents an important opportunity for integrating such an approach into the monitoring and evaluation of the teacher workforce.

Without precisely specifying how such principles would be used for the monitoring and management of the teacher workforce, it is useful to note a few major tenets. As literature on both the teacher workforce and other types of large workforces indicates, effective monitoring and management does not simply involve targeting a small handful of “high leverage” practices and ensuring that they are performed well. Instead, monitoring and management should emphasize the “coherent, congruent, and strategic use of different combinations of practices over time” because these workforces exist in ever

322. *But see* Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1719-20 (2007) (recommending a best practices approach while eschewing a “one-size-fits all approach”).

323. *See* David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 300 (2006) (“[T]he process of copying that marks best practices makes them well-suited for achieving sameness.”).

324. *See* James W. Guthrie, *Next Needed Steps in the Evolution of American Education Finance and Policy: Attenuating a Judicially Imposed Policy Distraction, Activating a Balanced Portfolio of K-12 School Reforms, Advancing Rationality as a Goal in Pursuing Productivity, Advocating Change in a Responsible and Effective Manner*, 83 PEABODY J. OF EDUC. 259, 278 (2008) (decrying the “absence of empirical research findings that could compose a technical base for which to construct productive educational policy”); Charles Clotfelter et al., *High-Poverty Schools and the Distribution of Teachers and Principals*, 85 N.C. L. REV. 1345, 1378 (2007) (“More experimentation and evaluation . . . are clearly needed if good policies are to be developed.”).

325. The federal government has collected, analyzed, and published education statistics for over a century and has significantly increased its funding commitment to educational research since Sputnik’s launch in 1957. *See* David L. Featherman & Maris Vinovskis, *Growth and Use of Social and Behavioral Science in the Federal Government Since World War II*, in SOCIAL SCIENCE AND POLICY-MAKING 40, 46 (David L. Featherman & Maris Vinovskis eds., 2001). Moreover, the federal government strongly intensified its commitment to and focus on educational research under the ESRA. *See supra* note 201 and accompanying text.

changing contexts.³²⁶ As such, comprehensive legislation and regulation should address a wide range of functions related to the teacher workforce, including developing the supply of potential teachers, credentialing, promoting quality of initial preparation, recruiting and hiring, induction, promotion, on-the-job training and development, evaluation, retaining, terminating, and compensating.³²⁷ The evidence-based principles discussed above should constitute the core of a coherent monitoring and management system designed to incorporate data about instructional practices into decisions about all of these functions. In this way, a reauthorized ESEA could continue to employ accountability mechanisms as a core policy tool, but would structure this tool in a way that better accounts for the historical character of federal action from the capitol to the classroom and educational research.

As it stands, researchers are far from developing the evidentiary base needed to develop such principles, and the data management systems existing at the state level and even promoted by the ARRA are not nearly robust enough to support such monitoring and management. Moreover, teacher workforce policies at the state level are far from coherently and strategically integrating the various functions of the teacher workforce,³²⁸ and the statutory prohibition on the federal government that controls the instructional programs of schools would likely need to be modified.³²⁹ However, such an approach would accord with the strengths of the federal government to promote and frame reform, while avoiding the pitfalls of precisely specifying particular actions upon implementation. Moreover, such an approach would build on the political foundation established in NCLB and the ARRA and would focus on extending and improving promising developments in these policies. In this way, the ESEA reauthorization could significantly transform the educational reform landscape to dramatically increase school capacity to improve learning opportunities for students.

VI. CONCLUSION

Although the ARRA is primarily aimed at stabilizing the American economy in a time of serious financial crisis, this law is also intended to spark particular types of educational reform and frame future reform efforts. In doing so, the ARRA builds on recent reform efforts, such as NCLB, to expand the federal role in education and strongly encourages the implementation of particular reform strategies in states and schools. While the goals of the educational reform provisions of the ARRA are laudable, the ARRA ap-

326. Benjamin Superfine et al., *Promising Strategies for Improving K-12 Education in Illinois: Improving the Educator Work Force*, in THE ILLINOIS REPORT 49, 54 (Robert F. Rich ed., 2009).

327. *See generally id.* (discussing key elements that should be included in comprehensive reform of the educator workforce).

328. *Id.* at 56-57 (discussing ongoing problems facing the educator workforce).

329. *See supra* note 35 and accompanying text.

pears to overstep the limits of effective federal action. Given the historic characteristics of federal educational reform, the particular reforms encouraged by the ARRA, the current political climate, and the ways in which such factors influence each other, the educational reform provisions of the ARRA face many potential pitfalls. Although many of these pitfalls are now unavoidable, future reform efforts that build on the ARRA, focus more narrowly on managing the teacher workforce, are more strongly grounded in scientific research, and balance issues of local and federal authority in a more nuanced way offer promise for more effective federal educational reform.