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AND EQUITY IN THE URBAN CHARTER SCHOOL

Equality, Centralization, Community, and Governance in Contemporary Education Law

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EQUALITY, CENTRALIZATION, COMMUNITY, AND GOVERNANCE IN CONTEMPORARY EDUCATION LAW

Eloise Pasachoff

A response to Robert Garda, *Searching for Equity Amid a System of Schools: The View from New Orleans*, 42 FORDHAM URB. L.J. 613 (2015).

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INTRODUCTION

Professor Garda tells a fascinating story about the rise of charter schools and the emerging system of schools in contemporary New Orleans, where, as of the 2014–2015 school year, one hundred percent of the public schools are charter schools.¹ This is an important story with national implications, not only for districts like the one I live in, Washington, D.C., where almost half of our public school students are

* Associate Professor, Georgetown University Law Center. Many thanks to Aaron Saiger and the editors of the Fordham Urban Law Journal for inviting me to participate in the 2014 Cooper Walsh Colloquium. I am grateful for thoughtful comments on earlier versions of this essay from Kimberly Jenkins Robinson and Aaron Saiger. My thanks also to Robert Garda for welcoming my comments on his important Article.

1. Robert Garda, *Searching for Equity Amid a System of Schools: The View from New Orleans*, 42 FORDHAM URB. L. J. 613, 615 (2015).

now served by charter schools,² but also for districts with many fewer charter schools, or even none at all.

And here is why: the story Professor Garda is telling is not really about charter schools, or about a tension between charter schools and typical public schools. The main issues he has identified run much deeper than that. These issues may be characterized as falling within three key themes: a tension between what Professor Garda calls “inclusion equality”³ and “empowerment”⁴ or “outcome equality”;⁵ a tension between centralization and decentralization; and the relationship between community and governance structures.

In this brief response, I take each of these themes in turn and situate them in the broader context of American education law; in so doing I argue that these are the core preoccupations of American education law writ large. To that extent, Professor Garda’s characterization of the open questions confronting New Orleans somewhat oversimplifies matters. I close by connecting the road ahead for New Orleans with the path forward for education law more generally. In particular, I argue, any decision made by New Orleans (or any jurisdiction) to resolve these tensions is not likely to be permanent, even though education lawyers continually engage in efforts to resolve them. Moreover, the likely venues for such efforts, Professor Garda’s Article teaches, include the state legislature, state agencies, and local governance structures.⁶ By focusing on these venues, Professor Garda’s Article underscores the need for contemporary legal education about education law to systematically address questions about law design and legislative and administrative processes, and not simply case law.

I. INCLUSION EQUALITY VERSUS OUTCOME EQUALITY

Professor Garda traces the idea of inclusion equality back to *Brown v. Board of Education*,⁷ saying that this is the core concern of the major education civil rights statutes that trace their genesis to

2. See, e.g., *Historical Enrollment—Public Schools*, D.C. PUB. CHARTER SCH. BOARD, <https://data.dcpcsb.org/dataset/Historial-Enrollment-to-SY-2014-15/3db5-ujzr> (last visited Feb. 6, 2015) (during the 2014–2015 school year in Washington, D.C., about 38,000 students attended charter schools out of close to 86,000 students in public and charter schools overall).

3. Garda, *supra* note 1, *passim*.

4. *Id. passim*.

5. *Id.* at 660, 669–70.

6. See *infra* notes 102–12 and accompanying text.

7. 349 U.S. 294 (1955).

Brown.⁸ This view, he says, “demands that every school attempt to educate every type of student regardless of ability, aptitude, race, or socioeconomic status.”⁹ In contrast, he says, empowerment or outcome equality dates back to the Reagan-era report *A Nation At Risk*,¹⁰ and is linked to choice because, so the theory went, empowering parents with choice would lead to improved student outcomes, regardless of the homogeneity of the students in a school.¹¹

Professor Garda acknowledges that the current all-charter model in New Orleans is “as far from achieving the new equality as the old New Orleans schools were from achieving inclusion equality.”¹² But he does not sufficiently acknowledge that the tension between these visions of equality is embedded in the civil rights statutes themselves, as well as in developments in traditional public schooling completely outside the context of charters.¹³

Consider, for example, one of the sayings often associated with *Brown*: that one of the theories animating *Brown* was that “green follows white.”¹⁴ Under this theory, money and everything it could buy in terms of educational quality would follow from the integration of black and white students—not just that integration was the end goal.¹⁵

Or think about Title VI of the Civil Rights Act of 1964¹⁶ and disparate impact theory.¹⁷ Under this theory, Title VI precludes not

8. Garda, *supra* note 1, at 655–56.

9. *Id.* at 656.

10. *Id.* at 660 (citing NAT'L COMM'N ON EXCELLENCE IN EDUC., U.S. DEP'T OF EDUC., *A NATION AT RISK* 5 (1983)).

11. *Id.*

12. *Id.* at 664.

13. See generally MARTHA MINOW, *IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* 33 (2010) (articulating post-*Brown* questions over whether, in a variety of settings for a variety of student demographics, “equality is to be realized through integrated or separate settings”). Professor Garda also focuses on “inclusion equality” at the school level without considering the extent to which even schools that serve diverse student populations engage in practices that either undercut or promote the value of school-level inclusion. See, e.g., James Moody, *Race, School Integration, and Friendship Segregation in America*, 107 AM. J. SOC. 679, 707–10 (2001).

14. Martha Minow, *We're All for Equality in U.S. School Reform: But What Does It Mean?*, in *JUST SCHOOLS: PURSUING EQUALITY IN SOCIETIES OF DIFFERENCE* 21, 25 (Martha Minow et al. eds., 2010).

15. *Id.*

16. 42 U.S.C. §§ 2000d–2000d-7 (2012).

17. Until the Supreme Court's 2001 decision in *Alexander v. Sandoval*, private litigants could pursue disparate impact claims under Title VI in court. 532 U.S. 275 (2001). After *Sandoval*, only agencies may enforce disparate impact Title VI claims. See U.S. DEP'T JUSTICE, *TITLE VI LEGAL MANUAL* (2001), available at

just segregation or intentional differential treatment, but also policies that result in different outcomes.¹⁸ The contemporary focus on disparities in school discipline and in access to educational resources directly results from using Title VI to promote equal outcomes.¹⁹ Nor is this some new-fangled gloss on the statute's original meaning; it is what President Johnson famously said at Howard University about the point of the civil rights laws: "We seek not just . . . equality as a right and a theory but equality as a fact and equality as a *result*."²⁰

Professor Garda also talks about the Equal Educational Opportunities Act,²¹ which is often used for assessing the legality of programs serving English Language Learners (ELLs).²² Here, too, while segregation is not permitted,²³ neither is it permissible to pay no attention to effective outcomes; the legal framework under this Act requires that a program serving ELLs must be *proven effective* in overcoming language barriers.²⁴

<http://www.justice.gov/crt/about/cor/coord/vimanual.pdf>; Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 131 (2014).

18. Johnson, *supra* note 17, at 136–39.

19. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleagues 2, 8–10 (Oct. 1, 2014), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf> (discussing disparate impact theory under Title VI as applied to school resource comparability as a way to close achievement gaps); Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleagues 4, 6, 11–13 (Jan. 8, 2014), *available at* <http://www.justice.gov/crt/about/edu/documents/dcl.pdf> (discussing disparate impact theory under Title VI as applied to school discipline policies and practices as a way to reduce a loss of instructional time).

20. Lyndon B. Johnson, President, U.S., Commencement Address at Howard University: "To Fulfill These Rights" (June 4, 1965) (emphasis added), *available at* <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>; *see also* Johnson, *supra* note 17, at 136–39 (describing contemporaneous agency interpretation of Title VI to encompass the outcome-oriented disparate impact, not simply the input-oriented disparate treatment).

21. Garda, *supra* note 1, at 652–56 (citing 20 U.S.C. § 1703(a) (2012)).

22. 20 U.S.C. § 1703(f) (2012) (providing that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs"); *see also* *Horne v. Flores*, 557 U.S. 433, 438–41 (2009) (describing claim brought under the Equal Educational Opportunities Act to improve instruction for ELLs).

23. 20 U.S.C. § 1703(a) (precluding "deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools").

24. *See, e.g., Horne*, 557 U.S. at 477–78 (Breyer, J., dissenting) (describing the widely used three-prong test under 20 U.S.C. § 1703(f) set forth in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), and noting that no party challenged the district court's use of the *Castaneda* test); *see also The Provision of an Equal Educational*

As for the treatment of students with disabilities, Professor Garda is correct that the law requires education in the least restrictive environment²⁵—that is, education as much as possible with general education students²⁶—but it nonetheless permits, even in traditional public schools, specialized and essentially segregated classrooms, such as dedicated autism classes.²⁷ Moreover, the Individuals with Disabilities Education Act (IDEA)²⁸ permits parents to sue school districts to pay for private placements in specialized schools for children with disabilities under certain circumstances.²⁹ More generally, IDEA empowers parents with the ability to bargain with schools over the services their children should receive.³⁰ And nothing in the civil rights laws got rid of state-run and state-funded specialized schools for the blind or the deaf.³¹ The value of the integration

Opportunity to Limited-English Proficient Students, U.S. DEP'T EDUC., OFFICE FOR C.R., <http://www2.ed.gov/about/offices/list/ocr/eolep/index.html> (last modified Mar. 14, 2005) (describing the Office for Civil Rights's inquiry into whether school districts' services for ELLs are successful, not simply into whether ELLs are sitting in class with fluent English speakers).

25. See Garda, *supra* note 1, at 656.

26. See 20 U.S.C. § 1412(a)(5) (2012).

27. See, e.g., *id.* (permitting separate schooling for children with disabilities “when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily”); U.S. DEP'T OF EDUC., 35TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 2013, 46–48 (2013), available at <http://www2.ed.gov/about/reports/annual/osep/2013/parts-b-c/35th-idea-arc.pdf> (describing percentages of students with various kinds of disabilities placed in different settings for different portions of the day); see also *Schools with Dedicated Autism Classrooms: SY 2012–2013*, D.C. PUB. SCHS., <http://dcps.dc.gov/DCPS/In+the+Classroom/Special+Education/Autism+Program+and+Resources/Schools+with+Dedicated+Autism+Classrooms> (last visited Feb. 24, 2015) (listing twenty-seven such schools).

28. Pub. L. No. 101-476, 104 Stat. 1141 (1990) (codified as amended at 20 U.S.C. §§ 1400–1482 (2012)).

29. See, e.g., *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); see also *Recognized Schools for Children with Autism*, BEST SCH., <http://www.thebestschools.org/blog/2012/03/10/schools-children-autism/> (last visited Feb. 2, 2015) (noting that “many parents desire to place their autistic children in private schools specifically dedicated to helping children with that disability” and that local school districts may sometimes be required to pay the cost of tuition).

30. See, e.g., Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1435–50 (2011) (describing inequities that result from this bargaining process).

31. See, e.g., *Schools and Programs for Deaf and Hard of Hearing Students in the United States*, GALLAUDET UNIV. LAURENT CLERC NAT'L DEAF EDUC. CENTER, http://www.gallaudet.edu/clerc_center/information_and_resources/info_to_go/resources/websites_of_schools_and_programs_for_deaf_students_.html (last visited Feb. 2, 2015) (providing links to state-run and other specialized schools for deaf and hard of

presumption in educational disability law (what Professor Garda calls more generally “inclusion equality”) is in fact deeply contested, as is its relation to outcomes for students with disabilities.³²

Professor Garda mentions Title IX only in passing and only in a footnote,³³ but there is a tension even within Title IX about inclusion and outcome equality. On the one hand, the statute says you cannot be subjected to discrimination in educational programs that receive federal funds on the basis of sex.³⁴ On the other hand, the statute contains numerous exceptions.³⁵ And, as Professor Garda notes, the Title IX regulations as redrafted almost a decade ago now explicitly permit single-sex classrooms and schools in the traditional public school system, as well as the charter school system, where the purpose of that exclusionary focus is to improve academic achievement.³⁶ Here, too, the relationship between inclusion equality and outcome equality is vigorously debated.³⁷

hearing students); Carmen Willings, *Schools for the Blind*, TEACHINGVISUALLYIMPAIRED.COM, <http://www.teachingvisuallyimpaired.com/schools-for-the-blind.html> (last visited Feb. 2, 2015) (providing links to state-run and other specialized schools for blind and visually impaired students).

32. Compare, e.g., Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789 (2006) (questioning the value of an individualized integration presumption for all students with disabilities in light of potentially better outcomes in less inclusive settings), with, e.g., Samuel R. Bagenstos, Response, *Abolish the Integration Presumption? Not Yet*, 156 U. PA. L. REV. PENNUMBRA 157 (2007), <http://www.pennlawreview.com/online/156-U-Pa-L-Rev-PENnumbra-157.pdf> (arguing that “many children with disabilities should be in more integrated settings than school officials think”), and Mark C. Weber, Response, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. PENNUMBRA 174 (2007), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1005&context=penn_law_review_online (arguing in support of both integration and educational outcomes).

33. See Garda, *supra* note 1, at 656 n.244.

34. 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

35. *Id.* § 1681(a)(1)–(9) (identifying exceptions for certain admissions policies; religious organizations; military training institutions; fraternities and sororities; scouting, boy or girl conferences; father/son or mother/daughter activities; and scholarship awards given by beauty pageants).

36. 34 C.F.R. § 106.34 (2014); see also OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

37. Compare, e.g., Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15 (arguing that single-sex education is particularly dangerous for children of color), with, e.g., Rosemary Salomone, *Rights and Wrongs in the Debate Over Single-Sex Schooling*,

Moving beyond contested visions of equality embedded in the civil rights laws, magnet programs in traditional public schools also offer a useful comparison with the charter school model. Admission to magnet schools is often subject to certain criteria, whether by academic test,³⁸ by specialized skill or talent,³⁹ by subject-matter interest,⁴⁰ or sometimes even by identity or affinity group.⁴¹ So inclusion for all-comers need not be the core focus of a system of traditional public schools. At the same time, magnet schools and related methods of providing a variety of public school offerings within a school system may be used to promote racial and socioeconomic integration.⁴² Indeed, it is often argued that magnet schools designed properly can encourage both integration and improved academic outcomes.⁴³

For that matter, one early plan for charter schools themselves was that they were supposed to be inclusive.⁴⁴ When Albert Shanker

93 B.U. L. REV. 971 (2013) (arguing that, while single-sex education can further equality, context matters).

38. See, e.g., *Exam Schools*, BOS. PUB. SCHS., <http://www.bostonpublicschools.org/exam> (last visited Feb. 2, 2015).

39. See, e.g., *Mission and History*, FIORELLO H. LAGUARDIA HIGH SCH. MUSIC & ART & PERFORMING ARTS, <http://laguardiahs.org/mission-history/> (last visited Feb. 2, 2015).

40. See, e.g., *Phelps Architecture, Construction, and Engineering High School*, D.C. PUB. SCHS., <http://profiles.dcps.dc.gov/Phelps+Architecture%2c+Construction%2c+and+Engineering+High+School> (last visited Feb. 2, 2015).

41. See, e.g., *The Harvey Milk High School*, HETRICK MARTIN INST., <http://www.hmi.org/page.aspx?pid=230> (last visited Feb. 6, 2015).

42. See, e.g., RICHARD D. KAHLBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 115–130 (2001) (explaining the value of “magnetiz[ing]” a whole school system with specialized schools which parents must choose in order to promote integration); Genevieve Siegel-Hawley & Erica Frankenberg, *Reviving Magnet Schools: Strengthening a Successful Choice Option*, C.R. PROJECT (Feb. 3, 2012), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-magnet-schools-strengthening-a-successful-choice-option>.

43. See Richard D. Kahlenberg, *Turnaround Schools and Charter Schools that Work: Moving Beyond Separate but Equal*, in *THE FUTURE OF SCHOOL INTEGRATION: SOCIOECONOMIC DIVERSITY AS AN EDUCATION REFORM STRATEGY* 288–96 (Richard D. Kahlenberg ed., 2012) (discussing research on effective and integrative magnet schools).

44. RICHARD D. KAHLBERG & HALLEY POTTER, *A SMARTER CHARTER: FINDING WHAT WORKS FOR CHARTER SCHOOLS AND PUBLIC EDUCATION* 9–10 (2014). Whether this was the central goal of all founders of the charter school movement is doubtful. See John E. Coons, *A Little Context for Al Shanker’s “Original Charter School Vision,”* REDEFINED (Sept. 2, 2014), <http://www.redefinedonline.org/2014/09/a-little-context-for-al-shankers-original-charter-school-vision/>. While the vision of inclusive charter schools was not universally shared, it was certainly Shanker’s own vision.

outlined a vision for this new kind of school in the mid-1980s, he touted what he perceived as the superior ability of this new kind of school to ensure that students of all backgrounds would learn together, in contrast to traditional public schools that were failing at that mission.⁴⁵

At the same time, traditional public schools have long been focused—or have had that focus thrust upon them, depending on how you look at it—on outcomes. Think about the now longstanding focus on achievement gaps.⁴⁶ Title I of the Elementary and Secondary Education Act, now No Child Left Behind, has from its inception funded compensatory education, to supplement state and local funding; its goal has not been to ensure inclusive classrooms.⁴⁷ Think about the standards and accountability movement.⁴⁸ Think about the decades and decades of school finance litigation;⁴⁹ whether under theories of resource equity or adequacy, these cases have been focused on the inputs required to achieve the desired outcomes of academic success.⁵⁰

All of this is to say that Professor Garda oversimplifies matters in saying that the traditional view dating back to *Brown* and the original civil rights legislation has been focused on inclusion equality, that all traditional public schools have had to educate all comers, and that inclusion is the core focus of the education civil rights laws.⁵¹ Instead, the debate between inclusion equality and outcome equality in New

45. KAHLBERG & POTTER, *supra* note 44.

46. *See, e.g., From the ECS State Policy Database: Student Achievement—Closing the Achievement Gap*, EDUC. COMM'N STATES ST. POL'Y DATABASE, <http://www.ecs.org/html/Document.asp?chouseid=5939> (follow “From the ECS State Policy Database: Student Achievement—Closing the Achievement Gap” hyperlink) (last visited Feb. 24, 2015) (listing state laws focused on reducing the achievement gap).

47. *See* Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, § 201 (codified as amended 20 U.S.C. § 6301 (2012)). To be sure, this federal money was the hook that was to make the equity-focused Title VI effective in schools that until then had been almost entirely non-reliant on federal funds, but it is nonetheless true that the federal grant money itself has always discussed educational needs rather than inclusion equality.

48. *See, e.g.,* Aaron J. Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 872–875 (2006) (describing this movement).

49. *See, e.g.,* JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 145–90 (2010).

50. *See, e.g., id.* at 151; *see also* William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 595–604 (2006); Saiger, *supra* note 48, at 891–98.

51. Garda, *supra* note 1, at 655–56.

Orleans reflects a tension that goes far beyond charters schools versus traditional public schools. It is a tension at the core of the field of education law. Professor Garda's claim that the traditional view of inclusion equality is lost in the move to an all-charter district⁵² thus makes the problem seem both too easy and too recent.

II. CENTRALIZATION VERSUS DECENTRALIZATION

Professor Garda argues that part of the problems with the current system of schools in New Orleans is the loss of centralization associated with traditional public schools.⁵³ I agree with Professor Garda that centralization is more typically associated with traditional public schools, while decentralization is more typically associated with charter schools. But this arrangement is merely typical and contingent, not required of either system, and the reverse arrangements exist. Consider, for example, decentralized school-based management efforts⁵⁴ or the earlier community control movement⁵⁵ in traditional public schools, in contrast to charter management organizations that have centralized certain services and teaching standards.⁵⁶

Nor is it always clear whether centralization or decentralization better promotes equality as a general matter. Professor Garda gives some good examples of why New Orleans's recent move towards centralization of the school admissions process, the expulsion process, and a system for serving special education students have been important steps to promoting equality for students of color and students with disabilities.⁵⁷ But consider other centralizing moves that have less of an equality-promoting result. Centralizing budgets so that all schools in a district get a certain number of teaching lines and fixed set of services for its student body can result in unequal

52. Garda, *supra* note 1, at 664.

53. Garda, *supra* note 1, at 620.

54. Saiger, *supra* note 48, at 873.

55. James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1305–09 (2005).

56. See, e.g., KIPP FOUND., KIPP FRAMEWORK FOR EXCELLENT TEACHING (2011), available at <http://kipp.org/files/dmfile/07022012KFET.pdf> (presenting unified framework for KIPP schools nationwide); *What is a Charter Management Organization?*, UNCOMMON SCHS., <http://www.uncommonschools.org/our-approach/how-we-work> (last visited Feb. 6, 2015) (describing centralized services provided to schools in this charter network nationwide).

57. Garda, *supra* note 1, at 638, 641–43, 649–52.

distribution of funds, to the extent that some schools attract more senior, and therefore more highly paid, teachers.⁵⁸

As for the line Professor Garda chooses to mark as an indication of centralization—the city of New Orleans—this line is consistent with the standard way of organizing the delivery of American educational services,⁵⁹ but it is at another level arbitrary, or even itself harmful. There are inherent inequalities in the fact that our school systems are organized around school district, local jurisdictional lines.⁶⁰ This is the core premise of the state-level school finance cases: that funding variations from district to district are unfair with educationally disastrous consequences.⁶¹ Different districts also gain reputations for serving particular populations of students particularly well and so attract those students,⁶² similar to a dynamic Professor Garda identifies in different charter schools⁶³—but that might mean that the other districts continue to serve that population of kids just as poorly, with little internal pressure to change. That inter-jurisdiction variation seems no less troublesome than the intra-jurisdiction variation that troubles Professor Garda.

For that matter, state-by-state inequities are also vast. There is more funding inequality between states than there is within states.⁶⁴

58. See, e.g., Marguerite Roza & Paul T. Hill, *How Within-District Spending Inequities Help Some Schools Fail*, in BROOKINGS PAPERS ON EDUCATION POLICY 201, 204 (Diane Ravitch ed., 2004).

59. James E. Ryan, *The Tenth Amendment and Other Paper Tigers: The Legal Boundaries of Education Governance*, in WHO'S IN CHARGE HERE? THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY 42, 57–58 (2004).

60. See, e.g., RYAN, *supra* note 49, at 1–17; Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism*, 79 U. CHI. L. REV. 427, 439–47 (2012); Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 495–96 (2010) (arguing that periodic redrawing of school district boundary lines would help mitigate these inequities).

61. See, e.g., RYAN, *supra* note 49, at 145–90; Robinson, *supra* note 60, at 445–47.

62. See, e.g., *Noteworthy Special Education: Elementary Schools*, INSIDESCHOOLS, <http://insideschools.org/special-education/noteworthy-special-ed-elementary> (last visited Feb. 2, 2015) (identifying programs in each of New York City's five boroughs that do a particularly good job at serving students with disabilities); Vicky Nguyen et al., *Public Schools Delay or Deny Special Education Services for Most Vulnerable Students*, NBC BAY AREA (Nov. 21, 2013), <http://www.nbcbayarea.com/news/local/Public-Schools-Delay-Deny-Special-Education-Services-231960511.html> (describing a school district with a well-regarded program for children with autism that rejected an interview for fear of publicizing the program and attracting too many families to the district).

63. Garda, *supra* note 1, at 662–63.

64. See Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2047 (2006).

There is great variation on how students in each state perform on national tests.⁶⁵ And yet, much in federal education law protects these various decentralized lines.⁶⁶ No Child Left Behind, for example, required states to implement a standardized testing regime, but it permitted states to design their own tests.⁶⁷ Some federal education funding formulas are based in part on how much the states themselves spend.⁶⁸ And federal special education law permits districts to determine what is appropriate for each child without requiring any kind of standardized best practices approach.⁶⁹

Yet, as federal education law protects these aspects of state- and district-level deference, the very same laws require states and districts to follow other centralized requirements—a tension that James Ryan, now Dean of the Harvard Graduate School of Education, calls “the federalism fence.”⁷⁰ State education law, too, contains conflicting tendencies towards centralization and decentralization at the same time.⁷¹

The question of centralization versus decentralization is thus, like the meaning of equality, one of the core preoccupations of American education law, not just a distinction between traditional public schools and charter schools.⁷² In this light, Professor Garda’s focus on

65. *See id.* at 2074–77.

66. *See generally* Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. (forthcoming 2015); Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287 (2013). For an argument that federal education law should protect these lines still further, see, e.g., Roderick M. Hills, Jr., *The Case for Educational Federalism: Protecting Educational Policy from the National Government’s Diseconomies of Scale*, 87 NOTRE DAME L. REV. 1941 (2012).

67. *See, e.g.*, James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 944–61 (2004).

68. *See* Liu, *supra* note 64, at 2094–2100.

69. Pasachoff, *supra* note 30, at 1474–77.

70. Ryan, *supra* note 67, at 987; *see also* Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 151–56 (2006) (responding to Professor Ryan with the counter-suggestion that the federal government should “get off the federalism fence” only if it is willing to fund the full extent of its conditional spending laws).

71. *See, e.g.*, Ryan, *supra* note 59, at 58–60 (describing “divergent and somewhat contradictory trends in state education governance” over the last few decades, in which state law has both centralized certain functions of education law and, sometimes in the same states, decentralized others).

72. Louisiana governor Bobby Jindal’s recent lawsuit against the federal Department of Education alleges that Race to the Top’s support of the Common Core State Standards is an impermissible federal intrusion into state and local matters and falls neatly within this line of controversy, and lies outside the context of charter schools. *See* Complaint at 1, *Jindal v. U.S. Dep’t of Educ.*, No. 3:14-cv-00534-SDD-RLB, 2014 WL 4211009 (M.D. La. Aug. 27, 2014).

centralization of services within the New Orleans jurisdictional lines seems incongruous with the broader scope of his concerns.

III. COMMUNITY AND GOVERNANCE

Professor Garda concludes by saying that New Orleans “must decide what type of equality it wants to pursue: inclusion equality, empowerment and outcome equality, or a mix of the two,” using the tools of centralization or decentralization to get there.⁷³ This point seems fair enough. But to say that New Orleans has to make these decisions is to beg the questions of who constitutes New Orleans and how New Orleans should reach its decisions. This brings me to the third theme of Professor Garda’s Article that is a core preoccupation of American education law: the relationship between community and governance structures.

Professor Garda does not identify who in New Orleans should be making these decisions, but he does refer to a likely cast of characters throughout the Article, including parents, teachers, students, school administrators, elected officials in the city, elected officials in the state, bureaucrats at each level in a number of entities, community organizers, and charter management operators. “No-kids-in-school voters” might usefully be added to this list.⁷⁴

Of course, there is likely to be much diversity of viewpoint among these groups, and even within each group itself. For example, among parents in New Orleans, there are no doubt parents who are perfectly happy with their choice of school.⁷⁵ There are parents who are unhappy with their choice, whether because the school is not meeting their child’s needs,⁷⁶ because their child did not get into one of the schools they actually wanted,⁷⁷ because their child was expelled or suspended in a trigger-quick kind of way,⁷⁸ or some other reason entirely. There are parents who might be happy with their own child’s school but who nonetheless find problems with the system overall and so contribute to filing a complaint with the federal

73. Garda, *supra* note 1, at 669.

74. See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 148 (2001).

75. Garda, *supra* note 1, at 632 (noting that eighty percent of parents receive one of their top three choice schools).

76. *Id.* at 646–52 (describing ways many charter schools fail to meet the needs of students with disabilities).

77. *Id.* at 633 (describing parent help centers overwhelmed with requests to change schools after the lottery).

78. *Id.* at 639–43 (describing problems with expulsions and suspensions).

Department of Education's Office for Civil Rights, the Department of Justice, or the state.⁷⁹ There are parents who did not really choose to send their child anywhere, given the large number of parents for whom the system of choice is little more than a mirage.⁸⁰ And those are just the parents.

As to teachers, there are the traditional teachers who were fired en masse from the old system, whom Professor Garda describes as the black middle class, who presumably among themselves have a variety of different views about the public good.⁸¹ There are the newer teachers, whom Professor Garda describes as largely white, non-local, and Teach-For-America-affiliated.⁸² These "TFA'ers,"⁸³ too, probably have a bunch of different views. And the same variation in viewpoint can likely be made for any subset of the broader New Orleans community.

How should the authority to decide what the community wants from its educational offerings be allocated among these various members of the community? This question permeates much of the foundational constitutional doctrine in American education law.⁸⁴ Should parents be allowed to opt their children out of public school in favor of religious, other, or no formal education; or should schools protect children against their parents' wishes and socialize them into the public school system?⁸⁵ Should students be allowed to voice their views without fear of punishment inside the schoolhouse gates,⁸⁶ or should teachers and administrators be allowed to limit these views to educate the student speakers or protect other students from their speech?⁸⁷ Should a student's right to attend a racially integrated school extend across jurisdictional boundaries, or should local

79. *See generally id.* at 637–38, 640–41, 653 (describing complaints).

80. *Id.* at 630–39 (describing barriers to making effective school choices).

81. *Id.* at 625–26.

82. *Id.*

83. *Id.*

84. *See, e.g.*, MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW xi–xii (5th ed. 2012) (identifying as “one of the great themes of educational policy and the law . . . the scope of liberty that students, teachers, and families have with respect to schooling,” and identifying “tensions among the interests of the state, the family, and the child in education”).

85. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

86. *See, e.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278 (1988) (Brennan J., dissenting); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

87. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood*, 484 U.S. at 276; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker*, 393 U.S. at 503.

officials be able to treat their geographic lines as inviolate?⁸⁸ How should a school system balance the rights and interests of competing groups of students,⁸⁹ or competing groups of parents,⁹⁰ or competing groups of teachers?⁹¹

Given the breadth in the membership of the community and the variety of views held by each subset, it is unclear what it means to say that the community needs to decide what its vision of equality is. This is why the issue of community is closely related to the issue of governance. Community members can make decisions only within governance structures, after all. And although Professor Garda refers to the transformation of governance structures in New Orleans from a school system to a system of schools,⁹² I remain uncertain about exactly what governance structure or processes Professor Garda envisions as being the right locus for New Orleans's decision about what kind of equality it wants. Modifying the state statute that designed the charter sector's primacy in New Orleans? Modifying the regulations governing the charter sector promulgated by the state agency? Enlisting the support of courts or civil rights agencies to issue rulings or oversee compliance agreements? Street-level protests to pressure one of these? Community organizing to work with the new "parent trigger law" to pressure the system, or to expand that law, or to rescind it?⁹³

This open set of possibilities in New Orleans parallels a broader shift in education governance over the course of the last half of the twentieth century. One of the major developments in American education law during this time has been the expansion of governance models beyond the school district as the main source of control over schools to a multitude of players: the state education bureaucracy, federal agency oversight, mayoral control, state takeover, school-

88. *See* *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Milliken v. Bradley*, 418 U.S. 717 (1974).

89. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

90. *See* *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).

91. *See* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

92. Garda, *supra* note 1, at 615, 620–25.

93. *See* Lauren McGaughy, *Bobby Jindal Signs RSD "Parent Trigger" Bill into Law*, *TIMES-PICAYUNE*, June 17, 2013, http://www.nola.com/politics/index.ssf/2013/06/jindal_rsd_failing_petition_la.html.

based management, and more.⁹⁴ As a recent work on education governance put it, “who leads when everyone is in charge?”⁹⁵

Professor Garda may be right, then, that New Orleans needs to decide what vision of equality it wants,⁹⁶ but the community is a vast and a varied one; there are any number of governance structures it could adopt, contest, or work within to make and implement that decision, and the choices before it would exist even without the all-charter system of schools.

IV. WHAT NEXT FOR NEW ORLEANS? WHAT NEXT FOR EDUCATION LAW?

To say that equality, decentralization, community, and governance are the key preoccupations of education law, as I have done, is itself, in a way, to beg the question: What next for New Orleans? I will not pretend to have the answer. But in response to Professor Garda’s observation that New Orleans needs to decide what kind of equality it wants, my instinct is that, in a way, New Orleans—or at least some subset of it—*has* already decided what vision of equality it wants. In other words, the status quo did not just happen; it reflects legal and policy judgments about what the schools should look like.

Implicit in Professor Garda’s largely descriptive piece, then, is the normative judgment that New Orleans has thus far made the wrong choice, or at least that the choice is an insufficient one. Instead, he seems to suggest, inclusion equality should not be abandoned;⁹⁷ more centralization of education policy is necessary in order to protect vulnerable populations within the city;⁹⁸ and community voices that have not prevailed (that is, the parents and former teachers ill served

94. See generally Robert A. Garda, Jr., & David S. Doty, *The Legal Impact of Emerging Governance Models on Public Education and Its Office Holders*, 45 URB. LAW. 21 (2013); Patrick McGuinn & Paul Manna, *Education Governance in America: Who Leads When Everyone Is in Charge?*, in EDUCATION GOVERNANCE FOR THE TWENTY-FIRST CENTURY REFORM: OVERCOMING THE STRUCTURAL BARRIERS TO SCHOOL REFORM (Paul Manna & Patrick McGuinn eds., 2013); Saiger, *supra* note 48, at 862–85.

95. McGuinn & Manna, *supra* note 94, at 1.

96. Garda, *supra* note 1, at 665.

97. Cf. Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 652 (2011) (arguing in favor of “multiracial schools where individual cultures flourish rather than subordinate, assimilate, or segregate”).

98. Cf. Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655 (2012) (arguing that special education students’ civil rights would be better protected in charter schools by a number of changes to centralized law at the federal level, the state level, and in charter authorizer agreements).

by the current system) should push for different governance structures where their input will be implemented going forward.⁹⁹

Whether or not this is in fact Professor Garda's conclusion about what should be next for New Orleans, this possibility gives rise to two implications, both of which I offer in the form of responses to a question: What next for education law?

First, these tensions that preoccupy education law are impossible to resolve in any lasting way. Both inclusion equality and outcome equality are valuable, depending on context. Both centralization and decentralization have their place, depending on circumstances. All members of a community can make important contributions to the process of educational decision-making, both as distinct groups and as individuals with different viewpoints within any given group. And many different governance structures can be worthwhile. Because there is value on all sides, any decision in any given context is likely to be shifting and contingent. The tensions are, thus, not likely to be resolved permanently, in New Orleans or anywhere else.

Second, attempting to resolve these tensions in the context of specific policy and legal choices is what education lawyers do. It is, therefore, critical for those of us who teach education law to give our students the tools they need to move forward in this endeavor. In this regard, while I have suggested that Professor Garda has somewhat oversimplified matters, he has nonetheless done a service to the field by framing the immediate and critical question of New Orleans's path in the context of these broader questions about equality, centralization, and community and governance. Because of the importance of these themes to the field of contemporary education law, I can imagine using Professor Garda's Article as the introductory reading to an education law course, previewing the questions that will recur over the semester.

The Article sets up one more critical element for such a course: it highlights the need for an expanded toolkit for the twenty-first century education lawyer. It is striking the way the legal landscape has shaped education in New Orleans—less by courts than by legislatures and agencies. Professor Garda does reference a few lawsuits under both federal¹⁰⁰ and state law.¹⁰¹ But although these are

99. Cf. Robert A. Garda, Jr., *The Politics of Education Reform: Lessons from New Orleans*, 40 J.L. & EDUC. 57, 97 (2011) (describing racial and socioeconomic divide in New Orleans schools, suggesting that low-income parents need to be better included, and identifying governance changes that could help do so).

100. See Garda, *supra* note 1, at 638, 650.

101. *Id.* at 625 n.57.

the typical tools law students learn about in education law (and other) classes, in reality, it has not been judicial opinions that have shaped the New Orleans educational system.

Instead, it seems to me that Professor Garda is telling a story of the importance of extra-judicial legal processes in contemporary education law. The story is one of law design—the statutes,¹⁰² regulations,¹⁰³ and system-wide¹⁰⁴ or school-level policies¹⁰⁵ that can be crafted in any number of ways.¹⁰⁶ It is a story about the importance of legislative lawyering.¹⁰⁷ It is a story about the importance of using the administrative machinery,¹⁰⁸ whether through a complaint process¹⁰⁹ or through the process of regulatory development.¹¹⁰ It is also a story about negotiation, conflict resolution, and coalition building,¹¹¹ important skills that lawyers can take with them to transform systems.¹¹²

102. *Id.* at 626, 634–35, 656 (describing legislature’s actions in crafting the charter statute).

103. *Id.* at 636–37 (describing regulations on lottery preferences); *id.* at 667 (describing new regulations on charter renewal and revocation).

104. *Id.* at 639–40, 641–42 (describing such policies).

105. *Id.* at 641 (describing such policies).

106. *Cf.* Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 488 (2013) (arguing that charters and vouchers can be “appropriately structured” to “serve any end that we wish”); Forman, Jr., *supra* note 55, at 1316–19 (arguing that vouchers in the abstract are “neither and both” “good or bad”—“it all depends on how the plan is constructed”).

107. *See* Garda, *supra* note 1, at 658 (describing efforts to enlist the legislature to make changes). *See generally* Chai Rachel Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 34 MCGEORGE L. REV. 785 (2003) (describing and explaining the importance of, and outlining pedagogy for, legislative lawyering).

108. *Cf.* Eloise Pasachoff, *Advocates, Federal Agencies, and the Education of Children with Disabilities*, 29 OHIO ST. J. ON DISP. RESOL. 461 (2014) (arguing that education law students and education lawyers should be taught more explicitly to take advantage of the work of federal agencies).

109. *See* Garda, *supra* note 1, at 637–38, 640–41, 653 (describing civil rights complaints to the state, to the U.S. Department of Education, and to the U.S. Department of Justice).

110. *Id.* at 636, 667 (describing relevant regulations).

111. *Id.* at 622–24, 657–59 (describing a tense relationship between the educational administrative oversight bodies in New Orleans); *id.* at 650–51 (describing a cooperative agreement reached between these two entities).

112. *See generally In Memoriam: Roger Fisher*, 126 HARV. L. REV. 875 (2013) (describing the importance of teaching these skills in law school through written tribute to the founder of the field); THE HANDBOOK OF DISPUTE RESOLUTION (Michael L. Moffitt & Robert C. Bordone eds., 2005).

Those TFA'ers that Professor Garda describes as taking over the New Orleans school system¹¹³ often leave teaching to go to law school, after all.¹¹⁴ TFA recruits' short-term commitment to teaching before going to graduate or professional school is, indeed, one of the main critiques of Teach for America.¹¹⁵ Professor Garda's Article helps identify what they—and many others—need to learn when they take an education law class.

Outside the classroom, the Article helps identify the breadth of arenas, the variety of skills, and the complexity of issues with which practicing education lawyers need to engage—in New Orleans and beyond. Professor Garda's "View from New Orleans" turns out to be a wide-angle lens.

113. See Garda, *supra* note 1, at 625–26.

114. See, e.g., *Graduate School and Employer Partnerships*, TEACH FOR AM., <https://www.teachforamerica.org/why-teach-for-america/compensation-and-benefits/graduate-school-and-employer-partnerships> (last visited Feb. 9, 2015) (describing partnerships with fifty-eight law schools, among other graduate programs, that "actively recruit corps members and alumni"). Fordham University School of Law, at which this Colloquium took place, treats Teach for America experience as "very desirable" in the admissions process, according to a dean in the J.D. admissions office. *Interview with Stephen Brown, Associate Dean of Admissions at the Fordham University School of Law*, TOP-LAW-SCHOOLS.COM (Nov. 2009), <http://www.top-law-schools.com/stephen-brown-interview.html>. My own institution, Georgetown Law, counts fifty-six Teach for America alumni in its current J.D. program. Email from Andrew Cornblatt, Dean of Admissions, Georgetown Univ. Law Ctr., to Eloise Pasachoff (Dec. 5, 2014, 14:57 EST) (on file with author); see also Caroline M. McKay, *Continuing the Corps Mentality: From TFA to HLS*, HARVARD CRIMSON, Apr. 14, 2011, available at <http://www.thecrimson.com/article/2011/4/14/school-law-tfa-corps/> (stating that Georgetown Law, the University of Pennsylvania Law School, and Harvard Law School are the three most commonly attended law schools by Teach for America alumni).

115. See, e.g., Zach Schonfeld, *Meet the Teach for America Resistance Movement That's Growing from Within*, WIRE (July 12, 2013), <http://www.thewire.com/national/2013/07/meet-teach-america-resistance-movement-s-growing-within/67125/>.