

# EFFECTIVENESS IS NOT A CRITERION HERE: THE CURRICULUM MARKETPLACE AND THE STUDENTS IT LEAVES BEHIND

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## INTRODUCTION

Despite widespread concern over literacy outcomes,<sup>1</sup> the legal system offers few meaningful mechanisms for holding anyone accountable when curricular choices fail students. The core dysfunction is rooted in the curriculum marketplace,<sup>2</sup> where incentives favor marketability and standards alignment rather than proof of instructional value. Since the creation of the Department of Education (“ED”), federal involvement in academic standards has helped shape the publishing industry, often privileging compliance over demonstrated effectiveness.<sup>3</sup> Over time, a handful of companies consolidated control of the market, producing materials tailored to satisfy textbook-adoption committees, especially in large, influential states like Texas and California.<sup>4</sup> Those committees, constrained by short timelines and political pressures, often reward glossy presentation and standards coverage rather than proven instructional value.<sup>5</sup> In fact, a chairman of a state’s curriculum commission is quoted stating that “[e]ffectiveness, while certainly something that we all look at as consumers, is not a criterion here.”<sup>6</sup> Meanwhile, smaller publishers rarely survive the prohibitive costs of aligning products with multiple state frameworks.<sup>7</sup> The result is a system in which ineffective programs can circulate for years, while students, families, and taxpayers bear the costs of remediation.

One might expect tort law to deter instructional failure, but educational malpractice claims have gone nowhere. Courts reason that pedagogy is too contested, causation too diffuse, and judicial intervention too intrusive.<sup>8</sup> As a result, tort law, which elsewhere deters negligence, offers no remedy in the education context.

State legislatures have tried the *ex ante* approach. “Right to Read” statutes reflect the growing political urgency surrounding literacy rates.<sup>9</sup> But

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<sup>1</sup> Press Release - U.S. Adults Score on Par With International Average in Literacy Skills, Below International Average in Numeracy and Problem-Solving Skills in Survey of Adult Skills, NAT’L CTR. FOR EDUC. STAT. (Dec. 10 2024), [https://nces.ed.gov/whatsnew/press\\_releases/12\\_10\\_2024.asp](https://nces.ed.gov/whatsnew/press_releases/12_10_2024.asp) [<https://perma.cc/3L8X-4PXR>].

<sup>2</sup> Curriculum Definition, R.I. DEP’T OF EDUC., <https://ride.ri.gov/instruction-assessment/curriculum/curriculum-definition> [<https://perma.cc/CM34-AYTH>] (“Curriculum is a standards-based sequence of planned experiences where students practice and achieve proficiency in content and applied learning skills.”).

<sup>3</sup> See discussion *infra* Section I.A.1.

<sup>4</sup> See discussion *infra* Section II.

<sup>5</sup> See discussion *infra* Section II.B.

<sup>6</sup> See *infra* note 229.

<sup>7</sup> See discussion *infra* Section II.B.

<sup>8</sup> See discussion *infra* Section I.A.

<sup>9</sup> NAT’L CTR. FOR EDUC. STAT., *supra* note 1; Natalie Wexler, *Covid Hasn’t Disrupted Educational Progress. Test Scores Were Already Falling*, FORBES (Sep. 5, 2022), <https://www.forbes.com/sites/nataliewexler/2022/09/05/covid-hasnt-disrupted-educational-progress-test->

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these statutes are difficult to enforce in classrooms and risk transforming ideological debates over pedagogy into a legal command.<sup>10</sup> As such, neither courts nor legislatures have been able to provide a workable framework for ensuring instructional quality.

A different kind of ex ante safeguard is therefore necessary. Borrowing from the Food and Drug Administration’s regulatory model, it proposes a labeling and disclosure regime for K-12 instructional materials. Publishers would be required to commission studies under uniform methodological standards, subject to review by the What Works Clearinghouse<sup>11</sup> or a comparable body. Textbooks would then carry a clear designation of the strength of supporting evidence. This system would preserve local control while shifting the burden of proof to publishers, aligning their incentives with pedagogical effectiveness rather than marketability.

This Note proceeds in four Parts. Part I situates the problem in the “Reading Wars” and uses the collapse of educational-malpractice litigation and the limits of “Right to Read” laws to show why existing accountability tools do not readily translate into effective instruction. Part II turns from doctrine to design, explaining how standards-based reforms and state-adoption procedures structure the curriculum marketplace and channel publishers’ behavior, often toward approval signals rather than learning outcomes. Part III explains why current infrastructures have not meaningfully disciplined curriculum purchasing decisions and develops this Note’s proposed disclosure regime and the methodology that must be in place for it to be effective. To be clear, this proposal does not suggest prescribing classroom content or dictating how teachers must instruct. Instead, it requires publishers to substantiate their claims with credible studies subject to independent review.<sup>12</sup>

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scores-were-already-falling [https://perma.cc/YC59-49QD] (“[A]s officials overseeing . . . national tests . . . recognize, . . . scores have been stagnant or declining since at least 2009, and gaps between high- and low-scorers have been widening.”).

<sup>10</sup> See discussion *infra* Section I.B.

<sup>11</sup> See discussion *infra* Section I.B; see also *infra* notes 235-236 and accompanying text.

<sup>12</sup> This distinction is critical. The argument advanced here should not be read as support for politically motivated mandates, such as Oklahoma’s recent efforts to require Bibles in classrooms, nor as an endorsement of broader federal regulation over debates surrounding diversity, equity, or inclusion. Murray Evans, *Oklahoma schools superintendent: Bibles will be in classrooms despite lack of funding*, USA TODAY (May 21, 2025), <https://www.usatoday.com/story/news/education/2025/05/21/oklahoma-superintendent-bibles-classrooms-funding/83760053007> [https://perma.cc/CD2S-GHCR]; Troy Closson, *3 School Districts to Lose \$65 Million Over Gender and D.E.I. Policies*, N.Y. TIMES (Sep. 25 2025), <https://www.nytimes.com/2025/09/25/nyregion/trump-dei-schools-federal-money.html#> [https://perma.cc/N7LF-F354]; Improving Education Outcomes by Empowering Parents, States, and Communities, 90 Fed. Reg. 13679 (Mar. 20, 2025). The proposal is limited to regulating the production and disclosure of evidence regarding teaching strategies and instructional effectiveness—the methods by which children are taught—rather than the substantive content of what they learn.

## I. THE FAILURES OF CURRENT EX POST AND EX ANTE REGIMES IN DETERRING EDUCATIONAL MALPRACTICE

### A. *The Failure of a Legal Theory*

#### 1. Background: The Reading Wars

One potential avenue for addressing failures in the K-12 textbook industry is litigation, as illustrated by *Conley v. Calkins*; however, this approach has repeatedly failed to achieve real accountability.<sup>13</sup> The *Conley* plaintiffs attempted to reframe a long-running instructional dispute as a claim about misrepresentation and consumer deception.<sup>14</sup> In doing so, the suit inevitably entered one of education's most enduring controversies: whether children learn best through whole language or through explicit phonics instruction.

The core idea of whole language is that students develop a stronger understanding of, and interest in, reading when they begin with complete stories and sentences.<sup>15</sup> Dr. Marie Clay used this theory as the foundation for her Reading Recovery<sup>®</sup> program, which went on to shape the approaches of the defendants in the *Conley v. Calkins* lawsuit, including Irene Fountas and Gay Su Pinnell's Guided Reading programs,<sup>16</sup> and Lucy Calkin's Teachers College Reading and Writing Project at Columbia University.<sup>17</sup> Clay developed Reading Recovery<sup>®</sup> out of a concern that, despite good teaching and well-designed curricula, teachers failed to help struggling readers.<sup>19</sup> A year later, Gay Su Pinnell and her colleague introduced Reading Recovery<sup>®</sup>

<sup>13</sup> Complaint, *Karrie Conley et. al. v. Calkins et. al.*, No. 2484-cv-03147 (Mass. Super. Ct. Suffolk Cnty. Dec. 4, 2024).

<sup>14</sup> *Id.*

<sup>15</sup> Emily Hanford, *Sold a Story Episode 2: The Idea*, AMERICAN PUBLIC MEDIA (Oct. 20, 2022) <https://www.apmreports.org/episode/2022/10/20/sold-a-story-e2-the-idea> [<https://perma.cc/D6BC-24FF>].

<sup>16</sup> Emily Hanford, *Sold a Story Episode 3: The Battle*, AMERICAN PUBLIC MEDIA (Oct. 20, 2022) <https://www.apmreports.org/episode/2022/10/27/sold-a-story-e3-the-battle> [<https://perma.cc/8SRH-NJZN>].

<sup>17</sup> Emily Hanford, *Sold a Story Episode 4: The Superstar*, AMERICAN PUBLIC MEDIA (Oct. 20, 2022) <https://www.apmreports.org/episode/2022/11/03/sold-a-story-e4-the-superstar> [<https://perma.cc/FN29-XNVS>]; Dana Goldstein, *Amid Reading Wars, Teachers College Will Close a Star Professor's Shop*, N.Y. TIMES (Sep. 8 2023), <https://www.nytimes.com/2023/09/08/us/lucy-calkins-teachers-college.html> [<https://perma.cc/XMH2-6XRV>].

<sup>18</sup> INSTITUTE OF EDUCATION SCIENCES, *READING RECOVERY 1* (2013) ("Reading Recovery<sup>®</sup> is a short-term intervention that provides one-on-one tutoring to first-grade students who are struggling in reading and writing.")

<sup>19</sup> Janet S. Gaffaney & Billie Askew, *Marie Clay 2*, READING RECOVERY COMMUNITY, <https://readingrecovery.org/reading-recovery/teaching-children/marie-clay> [<https://perma.cc/9PZP-E8ZZ>].

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to the United States.<sup>20</sup> During the 2017-18 calendar year, the program reached 964 school districts across 42 states.<sup>21</sup>

The whole language approach instructs through real-life experiences and removes the barriers between reading, writing, listening, and speaking.<sup>22</sup> Supporters of this method use practices such as repeated exposure to words, memorization of sight words (e.g., that, now, have), and cues to help recognize words.<sup>23</sup> The cuing method, commonly referred to as “three-cueing,” consists of the following: (1) semantic cues, which hint at the meaning of a word via connecting words in a sentence; (2) syntax cues, which reduces the word to what grammatically would make sense; (3) and graphophonic cues, which consist of spelling patterns a child may recognize.<sup>24</sup> Facially, this makes sense: have a child explain what they are reading to forge a deeper sense of word recognition. Research, however, suggests statistically significant and considerably negative long-term impacts of Reading Recovery<sup>®</sup>.<sup>25</sup> Since its inception, many have argued that the program did not include enough explicit and systematic instruction for decoding words.<sup>26</sup>

In the 2022 *Sold a Story* podcast, the history and impact of Dr. Clay’s research in American schools are investigated.<sup>27</sup> Episode 1 begins with Charlie, a kindergartener from Rhode Island.<sup>28</sup> It is the middle of the COVID-19 pandemic, and Charlie’s mother, Corrine, is observing his class over Zoom.<sup>29</sup> While Corrine watches, the teacher directs the students to

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<sup>20</sup> *The History of Reading Recovery*, OHIO STATE UNIV., <https://readingrecovery.osu.edu/about.html#:~:text=It%20was%20introduced%20in%20the,Watson%20began%20t%20eaching%20Columbus%20children> [https://perma.cc/2WSW-AUMZ].

<sup>21</sup> *Id.*

<sup>22</sup> Karen E. Patzelt, *PRINCIPLES OF WHOLE LANGUAGE AND IMPLICATIONS FOR ESL LEARNERS*, 4 (1995).

<sup>23</sup> *Whole Language vs. Structured Language Approach to Teaching Reading*, STERN CTR. FOR LANGUAGE & LEARNING (Apr. 6, 2023), <https://sterncenter.org/whole-language-vs-structured-language-approach-to-teaching-reading> [https://perma.cc/P3PP-WN2B].

<sup>24</sup> Timothy Shanahan, *Three-Cueing and the Law*, SHANAHAN ON LITERACY (Nov. 16, 2024), <https://www.shanahanonliteracy.com/blog/three-cueing-and-the-law> [https://perma.cc/3FU2-VRM7].

<sup>25</sup> Henry May, Aly Blakeney, Pragma Shrestha, Mia Mazal & Nicole Kennedy, *Long-Term Impacts of Reading Recovery through 3rd and 4th Grade: A Regression Discontinuity Study*, 17 J. RES. ON EDUC. EFFECTIVENESS 433, 458 (2024).

<sup>26</sup> William E. Tunmer & James W. Chapman, *Reading Recovery: Distinguishing Myth from Reality*, in *OUR MISSION TO LITERACY: 54TH ANNUAL CONFERENCE COMMEMORATIVE BOOKLET* (2008).

<sup>27</sup> Holly Korbey, *How a Podcast Toppled the Reading Instruction Canon*, EDUTOPIA (Aug. 9 2024), <https://www.edutopia.org/article/how-a-podcast-toppled-the-reading-instruction-canon> [https://perma.cc/M3JS-7QX4].

<sup>28</sup> Emily Hanford, *Sold a Story Episode 1: The Problem*, AMERICAN PUBLIC MEDIA, (Oct. 20, 2022) <https://www.apmreports.org/episode/2022/10/20/sold-a-story-e1-the-problem> [https://perma.cc/23X3-2L4F].

<sup>29</sup> *Id.*

follow along with her as she reads the sentence on the screen.<sup>30</sup> The teacher then halts on a word covered with a sticky note, the students cannot see the word.<sup>31</sup> She asks, “What could this word be? Let’s look at the picture.”<sup>32</sup> Later, she summarizes the story’s plot and asks a leading question, prompting students to answer with a word that could logically fit under the yellow sticky note.<sup>33</sup> Corrine recognized that this method of teaching was used whenever the class read a book, but Charlie was not improving in his reading.<sup>34</sup>

Later in episode 1, we meet Lee Gaul and his daughter Zoe, who attends a reputable school on the Upper East Side of Manhattan.<sup>35</sup> The school uses the same reading curriculum as Charlie’s school.<sup>36</sup> Lee, concerned his daughter was falling behind, began to independently teach her how to read using “decodable” books, containing words with similar spelling patterns, thereby significantly enhancing her reading skills.<sup>37</sup> The episode has an *almost* happy ending. While both Lee and Corrine course-correct the trajectory of their child’s reading capability through home-school instruction,<sup>38</sup> not every child was as fortunate.

Decades earlier, the whole language controversy had already entered the political sphere, shaping debates over how reading should be taught and setting the stage for federal involvement. While he was still the governor of Texas in the 90’s, President George W. Bush attended a conference where Susan Neuman<sup>39</sup> promoted the use of phonics in classroom instruction.<sup>40</sup> Phonics refers to the connection between the sounds of spoken language and the letters or spelling that represent those sounds in writing.<sup>41</sup> In the years that followed, Bush’s presidential campaign promised \$5 billion to enhance reading instruction.<sup>42</sup> A few years later, Neuman became the Assistant Secretary of Education for the Bush administration.<sup>43</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *supra* notes 30-33.

<sup>37</sup> *Sold a Story Episode 1: The Problem*, *supra* note 28.

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

<sup>39</sup> *Susan B. Neuman: Professor of Childhood and Literacy Education*, N.Y.U. STEINHARDT SCH. OF CULTURE, EDUC. & HUM. DEV., <https://steinhardt.nyu.edu/people/susan-neuman> [<https://perma.cc/8RNY-VKM6>] (a “specialist in early literacy development”).

<sup>40</sup> Hanford, *supra* note 16.

<sup>41</sup> *Phonics—An Overview*, CHILDREN’S LITERACY INITIATIVE, <https://learn.cli.org/building-blocks/phonics> [<https://perma.cc/K76M-NQGK>].

<sup>42</sup> Hanford, *supra* note 16.

<sup>43</sup> Neuman oversaw the Office of Elementary and Secondary Education, “one of the largest and most important divisions in the education department.” She was a proponent of school choice and charter

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President Bush’s presidential campaign in 2000 zeroed in on the deficiencies in American education and attacked the whole language approach.<sup>44</sup> After the release of the National Reading Panel’s 2000 report (“NRP”), recommending the integration of systematic phonics instruction,<sup>45</sup> the battle of phonics vs. whole language intensified. Findings of this report influenced the goals of President George Bush’s Reading First Initiative,<sup>46</sup> which *Sold a Story* relays as the beginning of bipartisan political opposition to whole language.<sup>47</sup> Reading First—a program authorized by No Child Left Behind (“NCLB”)<sup>48</sup>—used the “scientifically-based reading research” of the NRP report to shell out grants to Title I<sup>49</sup> schools using phonics-based approaches.<sup>50</sup> Despite resistance from researchers and government officials, as well as legislative challenges, Clay, Calkins, Fountas, and Pinnell persisted in promoting their whole language programs.<sup>51</sup> Their publisher, Heinemann, even disseminated content in retaliation against Bush’s Reading First Initiative—claiming it was an attempt by publishing companies to monetize public education.<sup>52</sup>

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schools—a known movement for pushing market forces in the education sector. Michael J. Petrilli, *Lessons for the next education secretary*, THOMAS B. FORDHAM INST. (June 9, 2008), <https://fordhaminstitute.org/national/commentary/lessons-next-education-secretary> [<https://perma.cc/FFP3-5Y6J>].

<sup>44</sup> David Waters, *Politics of Phonics: How Power, Profit and Politics Guide Reading Policies*, INST. FOR PUB. SERV. REPORTING AT THE UNIV. OF MEMPHIS (May 10, 2021), <https://www.psrmemphis.org/politics-of-phonics-how-power-profit-and-politics-guide-reading-policies> [<https://perma.cc/P25G-CZ7K>].

<sup>45</sup> NATIONAL READING PANEL, *TEACHING CHILDREN TO READ: AN EVIDENCE-BASED ASSESSMENT OF THE SCIENTIFIC RESEARCH LITERATURE ON READING AND ITS IMPLICATIONS FOR READING INSTRUCTION 2-137* (2000).

<sup>46</sup> Reading First directed the ED to ensure that states and districts used funds for curricula and practices grounded in “scientifically based reading research,” as defined by the 2000 NRP report. Shepard Barbash, *The Reading First Controversy: Promise and Perils of Federal Leadership*, EDUC. NEXT, Summer 2008, at 6-7, <https://www.educationnext.org/the-reading-first-controversy> [<https://perma.cc/JHG9-6WBP>].

<sup>47</sup> Hanford, *supra* note 16.

<sup>48</sup> *See infra* notes 158169.

<sup>49</sup> *Title I of ESEA: Targeting Funds to High-Poverty Schools and Districts*, ALLIANCE FOR EXCELLENT EDUC., <https://all4ed.org/publication/title-i-of-esea-targeting-funds-to-high-poverty-schools-and-districts> [<https://perma.cc/623N-374W>] (“Title I, Part A (Title I) of the Elementary and Secondary Education Act (ESEA) is the primary source of federal financial assistance for K–12 education, supplementing state and local funding in schools with high concentrations of children from low-income families to enable these students to meet state achievement standards.”).

<sup>50</sup> Will Callan, *How the Media-Including NPR-Overlooked the Significance of a Landmark Study on Reading Education*, CURRENT (Nov. 9, 2022), <https://current.org/2022/11/how-the-media-including-npr-overlooked-the-significance-of-a-landmark-study-on-reading-education> [<https://perma.cc/9NE2-7MBT>].

<sup>51</sup> Hanford, *supra* note 16.

<sup>52</sup> Emily Hanford, *Sold a Story Episode 5: The Company*, AMERICAN PUBLIC MEDIA (Nov. 10, 2022), <https://www.apmreports.org/episode/2022/11/10/sold-a-story-e5-the-company> [<https://perma.cc/G6LK-EBDJ>]. (Such books include *Big Brother and the National Reading Curriculum: How Ideology Trumped Evidence* and *In Defense of Our Children: When Politics, Profit, and Education*

The Reading Recovery Council of North America urged the ED's inspector general to investigate the distribution of Reading First grants—alleging a “pervasive misinformation campaign” against whole language.<sup>53</sup> In 2006, the inspector released a damaging audit of the program.<sup>54</sup> Headlines from that period often carried sentiments such as, “Bush’s cronies are pushing phonics to make money.”<sup>55</sup> While the extent to which federal employees broke the law is debatable, the impact this report had on Reading First’s demise is well established.<sup>56</sup>

Additionally, many teachers never subscribed to the push for phonics: (1) the instruction was overly structured and often boring;<sup>57</sup> (2) they thought whole language was adequately backed by scientific research, or were unaware of the evidence supporting phonics;<sup>58</sup> (3) Reading First was a grant program for low-income schools,<sup>59</sup> many teachers from non-Title I schools never heard of it;<sup>60</sup> and (4) many outright rejected it for political reasons.<sup>61</sup>

Many commentators suggest Reading First may have been successful if implemented properly; however, not enough research has been done on districts where the program was successful.<sup>62</sup> Enforcing federal mandates in

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*Collide*); see also Valerie Strauss, *Relying on Science in Teaching Kids to Read*, WASH. POST (Feb. 26, 2002), <https://www.washingtonpost.com/archive/politics/2002/02/26/relying-on-science-in-teaching-kids-to-read/7e4c8c10-b08c-4736-bf4a-4799fad297f1> [https://perma.cc/K7X2-RU3T]. (“[P]rograms such as McGraw-Hill’s Open Court—with a healthy dose of phonics, a careful script for teachers and a claim to a research basis—are poised to reap millions from the federal mandate.”).

<sup>53</sup> Sean Cavanagh, *Group Seeks Federal Probe of Reading First*, EDUC. WK. (Aug. 5, 2005), <https://www.edweek.org/teaching-learning/group-seeks-federal-probe-of-reading-first/2005/08> [https://perma.cc/QQ7X-V8YY].

<sup>54</sup> Kathleen Kennedy Manzo, *Scathing Reports Casts Cloud Over ‘Reading First’*, EDUC. WK. (Sep. 29, 2006), <https://www.edweek.org/teaching-learning/scathing-report-casts-cloud-over-reading-first/2006/09#:~:text=The%20findings%20of%20a%20scathing,their%20gravity%20and%20potential%20impact> [https://perma.cc/QH4Q-UL6Q].

<sup>55</sup> Hanford, *supra* note 16.

<sup>56</sup> Manzo, *supra* note 54.

<sup>57</sup> Hanford, *supra* note 16; Jessica Winter, *The Rise and Fall of Vibes-Based Literacy*, THE NEW YORKER (Sep. 1, 2022), <https://www.newyorker.com/news/annals-of-education/the-rise-and-fall-of-vibes-based-literacy> [https://perma.cc/Y7WM-CS69] (“For many teachers, balanced literacy was a welcome turn away from lesson plans in which all children at a certain grade level read the same stories and answered the same predetermined questions, leaving teachers with less room for creativity and spontaneity.”).

<sup>58</sup> Hanford, *supra* note 16.

<sup>59</sup> Barbash, *supra* note 46.

<sup>60</sup> Hanford, *supra* note 16.

<sup>61</sup> *Id.* (describing a teacher’s account from a school district outside of Seattle: “I wasn’t necessarily rejecting the curriculum as much as I was rejecting Bush . . . You know the sense of war with reading wars is very true. That you just absolutely reject other pieces of evidence coming at you because you can’t believe their source.”); Barbash, *supra* note 46.

<sup>62</sup> Timothy Shanahan, *Did Reading First Reveal Phonics Instruction to be Futile?*, SHANAHAN ON LITERACY (Jan. 18, 2020), <https://www.shanahanonliteracy.com/blog/did-reading-first-reveal-phonics-instruction-to-be->

public education often fails due to the complexities of the public school system, particularly the multiple layers of interpretation and adaptation required as reforms move from federal directives down to districts, schools, and individual teachers.<sup>63</sup> Depending on the procedures already in place or the tendencies of school leaders, the follow-through on government initiatives may vary.<sup>64</sup> This point in American history points to the catastrophic consequences of politicizing education.<sup>65</sup>

It is crucial to note that both strategies can coincide; students need both a strong curriculum in phonics, as well as in language and comprehension skills.<sup>66</sup> Political agendas centered on education further polarize existing ideologies. Saying we should just “let teachers teach” sounds appealing; however, it ignores the realities described above. Teachers don’t work in a vacuum—their approach is shaped by a mix of politics, money, and institutions. Pedagogy is not a free choice made in the classroom, it is filtered and constrained by larger systems. Despite research demonstrating the failure of whole language, it endured for years, sustained by the institutional power of teacher preparation programs and publishing companies, beyond the reach of political remedies.<sup>67</sup>

## 2. The Legal Standard

In *Conley v. Calkins*, plaintiffs sought to challenge the misinformation campaign underpinning the whole language movement and hold its publishers accountable.<sup>68</sup> The case’s inevitable failure underscores the broader legal doctrine that insulates publishers from responsibility.

Under state law, educational malpractice claims typically involve a plaintiff asserting that an academic institution tortiously failed to adequately

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futile#:~:text=Reading%20First%20did%20not%20produce,grades%20one%2C%20two%20or%20three [https://perma.cc/4KEW-XUAT].

<sup>63</sup> Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 82, 96 (2011); Shanahan, *supra* note 62 (describing how Chicago districts receiving Reading First funding told schools they did not even need to open the boxes of the programs).

<sup>64</sup> Superfine, *supra* note 63, at 96.

<sup>65</sup> Manzo, *supra* note 53 (“Many educators and observers said the blistering review of the implementation and management of Reading First, though justified, could damage a program that is showing initial signs of effectiveness.”).

<sup>66</sup> Elizabeth M. Ross, *What Exactly Is the Science of Reading?*, HARV. GRADUATE SCH. EDUC. (Jun. 25, 2024), <https://www.gse.harvard.edu/ideas/usable-knowledge/24/06/what-exactly-science-reading> [https://perma.cc/6S6Q-SK2T].

<sup>67</sup> Michael J. Petrilli, *Put “Whole Language” on Trial*, EDUC. NEXT, Spring 2020, at 86-87, <https://www.educationnext.org/put-whole-language-on-trial-case-against-reading-instruction-illiteracy> [https://perma.cc/9XDK-UUNJ].

<sup>68</sup> Complaint, *supra* note 13.

educate its student(s).<sup>69</sup> These types of claims are grounded in consumer-oriented negligence theories surrounding a school district's failure to equip students with fundamental academic skills.<sup>70</sup> "An educational [malpractice] claim posits that a school district owes its students a duty to provide a basic education and, by failing to exercise the degree of professional skill required of an ordinarily prudent educator, harms the student's learning and life prospects."<sup>71</sup> *Theoretically*, this claim's ex ante "deterrence function"<sup>72</sup> will prevent future ineffective teaching and its ex post remedial effects will compensate students already harmed.<sup>73</sup> The following two foundational cases, however, rejected both the duty and causation elements of educational malpractice claims, cementing a doctrine of educational abstention and foreclosing repeated attempts to establish the theory.<sup>74</sup>

In *Peter W. v. San Francisco*, a recent high-school graduate who attended district schools for twelve years sued for negligence, alleging the district failed to provide qualified reading instruction and allowed him to graduate "with a reading ability of only the fifth grade."<sup>75</sup> The California Court of Appeals held that "a person who claims to have been inadequately educated, while a student in a public school system may [not] state a cause of action in tort against the public authorities who operate and administer the system."<sup>76</sup>

In addition to its notion that "wrongs and injuries" involved in "educational malfeasance" lack comprehensibility and accessibility under existing legal standards of tort liability, the court cites multiple policy reasons for its refusal to recognize a duty.<sup>77</sup> First, "science of pedagogy is fraught with different and conflicting theories of how or what a child should be taught."<sup>78</sup> Additionally, influences outside educators' authority—"physical, neurological, emotional, cultural, [and] environmental"—blur proximate

<sup>69</sup> *Soueidan v. St. Louis Univ.*, 926 F.3d 1029, 1034 (8th Cir. 2019); *Delisle v. McKendree Univ.*, 73 F.4th 523, 525 (7th Cir. 2023).

<sup>70</sup> Stephen D. Sugarman, *Accountability Through the Courts*, 82 SCH. REV. 233 (1974) (citing Gary Saretzky & James Mecklenburger, *See You in Court?*, SATURDAY REV., 50 (Oct. 14, 1972)).

<sup>71</sup> Shana Hurley, *The Remediless Reading Right*, 40 YALE L. & POL'Y REV. 276, 308 (2021).

<sup>72</sup> Sugarman, *supra* note 70, at 233-34 ("The threat of liability will serve a deterrence function and provide an incentive for school success, while the availability of the damage claim in cases of failure will permit victims to be compensated for their loss.")

<sup>73</sup> *See supra* notes 35-38 (discussing the private tutoring necessary to remediate ineffective teaching practices).

<sup>74</sup> Hurley, *supra* note 71, at 282, 307-11; Mark Dynarski, *Can Schools Commit Malpractice? It Depends.*, BROOKINGS (July 26, 2018), <https://www.brookings.edu/articles/can-schools-commit-malpractice-it-depends> [<https://perma.cc/YW6K-E9HT>].

<sup>75</sup> *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 818 (Ct. App. 1976).

<sup>76</sup> *Id.* at 817.

<sup>77</sup> *Id.* at 824.

<sup>78</sup> *Id.*

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causation and prevent a workable rule; an “actionable ‘duty of care’” is negated.<sup>79</sup> The “inability to read and write,” therefore, is not an injury.<sup>80</sup> And in more “practical terms,” endorsing these claims would foreseeably flood the courts with the task of supervising district operations, compounding pressures on schools “already beset by social and financial problems.”<sup>81</sup>

*Donohue v. Copiague Union Free School District* tells a similar story, directly addressing the doctrine of “educational malpractice.”<sup>82</sup> The plaintiff alleged that his high school failed “to perform its duties and obligations to educate [him],” and continuously passed him through to the next grade without adequately assessing his “intellectual absorption.”<sup>83</sup> The New York Court of Appeals recognized the possibility of a duty on the part of educators to teach children to read and acknowledged the undeniable harm of a student graduating high school without the ability to comprehend English: the “creation of a standard with which to judge an educator’s performance of that duty [does not] necessarily pose an insurmountable obstacle.”<sup>84</sup> The court, however, ultimately declined to recognize a cause of action for educational malpractice, citing policy considerations.<sup>85</sup> Namely, it would force judges to evaluate educational policy and supervise day-to-day school operations, which are roles assigned by constitution and by statute to education agencies.<sup>86</sup> Students and parents already have an administrative remedy: they can petition the Commissioner of Education to challenge school officials’ acts or decisions.<sup>87</sup>

Together, these cases form the basis for the “educational abstention doctrine,” and effectively preclude any accountability of educational institutions in the courtroom.<sup>88</sup> The recent dismissal of the *Conley* class action lawsuit<sup>89</sup> illustrates again the courts’ continuing reluctance to interject in educational “best practices” and the improbability that judicial intervention can ever serve as a viable avenue for holding publishing companies liable for producing ineffective curricula.

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 825.

<sup>82</sup> *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 442 (1979).

<sup>83</sup> *Id.* at 442.

<sup>84</sup> *Id.* at 443.

<sup>85</sup> *Id.* at 444.

<sup>86</sup> *Id.* at 445.

<sup>87</sup> *Id.*

<sup>88</sup> Hurley, *supra* note 71, at 279; Office of Governor Gretchen Whitmer, *Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case*, State of Mich. Office Gov. (May 14, 2020), <https://www.michigan.gov/whitmer/news/press-releases/2020/05/14/governor-whitmer-and-plaintiffs-announce-settlement-in-landmark-gary-b-literacy-case> [<https://perma.cc/F6J3-3K66>].

<sup>89</sup> Order of Dismissal, *S.C. v. Calkins*, No. 1:25-cv-10007 (D. Mass. May 22, 2025).

## 3. Malpractice Without Redress

Filed in Massachusetts on December 4, 2024, approximately two years after the release of the *Sold a Story* podcast, the *Conley v. Calkins* complaint names HMH, Heinemann’s parent company, and several related individuals and entities—including Lucy Calkins, Irene Fountas, and Gay Su Pinnell as defendants.<sup>90</sup> The plaintiffs in *Conley v. Calkins*, rather than targeting academic institutions, sought to hold curriculum developers and their publishers accountable for adopting instructional methods deemed ineffective by decades of research.<sup>91</sup> An attorney from the case stated that he listened to *Sold a Story* and knew it was “an injustice that cried out for redress.”<sup>92</sup> The suit claims that the defendant’s “deceptive” and “defective” curriculum failed to “include systematic instruction or practice with the phonetic tools that undisputed research long has shown allows children to learn to read.”<sup>93</sup> Plaintiffs Karrie Conley and Michele Hudak argued that the whole language curriculum negligently sold to schools nationwide resulted in developmental and emotional injuries to their children, as well as financial loss for tutoring and private school tuition to make up for literacy deficiencies.<sup>94</sup>

The complaint specifically cites the NRP,<sup>95</sup> claiming that Defendants “ignor[ed] scientific consensus” and “peddled a raft of products and curricula that sought to diminish and even exclude systematic and daily phonics instruction.”<sup>96</sup> Plaintiffs claimed that “Defendants failed to warn parents or school districts that their alleged literacy training products did not include meaningful phonics instruction, the one thing essential to literacy success.”<sup>97</sup>

For the first time, claims were directed not just at educators but at a publishing company, striking directly at the curriculum.<sup>98</sup> Relying on Massachusetts Unfair and Deceptive Acts and Practice Laws,<sup>99</sup> Plaintiffs

<sup>90</sup> Complaint, *supra* note 13.

<sup>91</sup> *Id.* at ¶¶ 25-26.

<sup>92</sup> Christopher Peak, *Lawsuit calls reading curriculum ‘deceptive’ and ‘defective’*, APM REPORTS (Dec. 4, 2024), <https://www.apmreports.org/story/2024/12/04/lawsuit-calls-heinemann-reading-curriculum-deceptive-defective> [<https://perma.cc/F5KF-LGPV>].

<sup>93</sup> Complaint, *supra* note 90 at ¶37.

<sup>94</sup> *Id.* at ¶¶ 63-66.

<sup>95</sup> *Supra* note 45 and accompanying text.

<sup>96</sup> Complaint, *supra* note 90 at ¶3.

<sup>97</sup> *Id.*

<sup>98</sup> Joshua Dunn, *The Reading Wars Go to Court*, EDUC. NEXT, Spring 2025, at 6-7, <https://www.educationnext.org/reading-wars-go-to-court-balanced-literacy-parents-sue-authors-publishers-columbia> [<https://perma.cc/C2YN-DZM7>]; Evie Blad, *Parents Sue Lucy Calkins, Fountas and Pinnell, and Others Over Reading Curricula*, EDUC. WK. (Dec. 4, 2024), <https://www.edweek.org/teaching-learning/parents-sue-lucy-calkins-fountas-and-pinnell-and-others-over-reading-curricula/2024/12> [<https://perma.cc/2E59-NVPQ>].

<sup>99</sup> MASS. GEN. LAWS ch. 93A, § 2 (1967).

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claimed that Defendants (1) “market[ed], [[sold], and profit[ed] from the sale of defective and deficient” programs; (2) “fail[ed] to provide adequate or complete disclosures and warnings regarding the deficient reading curricula and other training . . . products”; and (3) “falsely claim[d] that their products were supported by credible evidence and research.”<sup>100</sup> Plaintiffs also brought a negligence claim stating that “Defendants ha[d] a duty to exercise reasonable care and competence in marketing and selling their early-literacy products.”

Though the lawsuit reflected years of parental frustration, not all observers viewed it as a positive development. A reading researcher at Stanford suggested that the “lawsuit could undo opportunities to come to an agreement on the factors that matter for student success in reading,” noting how deeply partisan the issue has become.<sup>101</sup> He suggested that the best solution for the never-ending war on reading ideologies is for professionals with expertise to call out misinformation<sup>102</sup> and come to find common ground in their research.<sup>103</sup> Diane Ravitch stated that “it’s far too early to reach a definitive judgement about the efficacy of either Whole Language or the ‘science of reading’ [phonics-based approach].”<sup>104</sup>

These critics align with the precedent of *Peter W.*: courts are ill-equipped to determine the appropriateness of specific instructional methods. Ultimately a district court judge agreed. Four months after its removal to federal court, on May 22, 2025, the judge granted defendants’ motion to dismiss, reasoning that “the court begins (and ends) its analysis with the educational malpractice bar,” since the suit would require the court to effectively determine a question best left to educators: what is the best method to teach a child to read?<sup>105</sup> Although “[p]laintiffs contend that their claims survive the educational malpractice bar because they are based on misrepresentations used in the marketing of defendant’s products, not on the

<sup>100</sup> Complaint, Karrie Conley et. al. v. Calkins et. al., No. 2484-cv-03147, at 20 (Mass. Super. Ct. Suffolk Cnty. Dec. 4, 2024).

<sup>101</sup> Blad, *supra* note 98.

<sup>102</sup> Blad, *supra* note 98.

<sup>103</sup> *SIE6 Finding Common Ground Among the Many Sides of the Reading Wars With Dr. Claude Goldenberg*, LEXIA (July 5, 2023), <https://www.lexialearning.com/resources/all-for-literacy-podcasts/finding-common-ground-among-the-many-sides-of-the-reading-wars-with-dr-claude-goldenberg> [<https://perma.cc/73Y8-KG85>].

<sup>104</sup> *Massachusetts: Angry Parents Sue Lucy Calkins and Others for Promoting Whole Language Instead of Phonics*, DIANE RAVITCH’S BLOG (Dec. 5, 2024), <https://dianeravitch.net/2024/12/05/massachusetts-angry-parents-sue-lucy-calkins-and-others-for-promoting-whole-language-instead-of-phonics> [<https://perma.cc/M7BC-TB2H>].

<sup>105</sup> Order of Dismissal, *supra* note 89; Carmela Guaglianone, *Judge scuttles lawsuit over Massachusetts reading curriculum*, APM REPORTS (May 23, 2025), <https://www.apmreports.org/story/2025/05/23/judge-scuttles-lawsuit-over-massachusetts-reading-curriculum> [<https://perma.cc/5P92-9H8W>].

educational quality of those products,” the court is being asked to adjudicate on the research cited in their complaint.<sup>106</sup> The court, citing defendant’s reply, suggested that “[a]ny inquiry into causation for such injuries would necessarily require the court to assess ‘the quality of the educational program offered by the Plaintiffs’ schools and the degree to which deficiencies, if any, are attributable to the content of the Literacy Materials.’”<sup>107</sup>

Questions of pedagogy are inseparable from politics and ideology—educational philosophies ebb and flow. The court’s refusal to adjudicate such claims illustrates a refusal to referee that debate. But where do we draw the line between ideological debate and blatant negligence? The dismissal of *Conley v. Calkins* underscores how little protection the current legal frameworks offer to students. Courts simply avoid questions that resemble educational malpractice. If teachers are simply following what they’ve been trained to do, and what administrators and publishers have given them, the law effectively prevents parents from challenging systemic failures.

### B. *The Right to Read*

Although state statutes addressing curriculum offer an alternative to private lawsuits, they too fall short for reasons similar to the courts’ educational abstention doctrine. “Right to Read” laws, for instance, represent statutory, *ex ante* attempts to prevent harm by requiring evidence-based reading instruction before students fall behind.<sup>108</sup> As awareness of whole language’s impact on American literacy grew, many states passed laws mandating “evidence-based methods” for reading instruction, often associated with the “Science of Reading” movement, which emphasizes phonics.<sup>109</sup> Mississippi spearheaded this approach in 2013 with the Literacy-Based Promotion Act (LBPA), which requires teacher training in scientifically based reading instruction and the early identification of struggling readers in grades K-3.<sup>110</sup> More recently, Indiana state senator Aaron Freeman introduced legislation in direct response to the *Sold a Story*

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<sup>106</sup> Order of Dismissal, *supra* note 89.

<sup>107</sup> *Id.*

<sup>108</sup> Tom Greene, *From Policy to Action: Early Literacy Laws 10 States Passed in 2023*, EXCELINED IN ACTION (Jan 10, 2024), <https://excelinedinaction.org/2024/01/10/from-policy-to-action-early-literacy-laws-10-states-passed-in-2023> [<https://perma.cc/T5BV-TND4>].

<sup>109</sup> Sarah Schwartz, *Which States Have Passed ‘Science of Reading’ Laws? What’s in Them?*, EDUC.WK. (July 20, 2022), <https://www.edweek.org/teaching-learning/which-states-have-passed-science-of-reading-laws-whats-in-them/2022/07> [<https://perma.cc/6D47-FX9G>].

<sup>110</sup> MISS. CODE ANN. § 37-177-9 (2024); *see also supra* note 24.

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podcast, requiring schools to adopt Science of Reading curricula and banning the cueing theory.<sup>111</sup>

Lucy Calkins responded to this movement by stating that “no one interest group gets to own science.”<sup>112</sup> She eventually agreed that “kids need phonics”; however, she writes that “differences of opinion between phonics-centric and balanced literacy are fewer and more nuanced than some would have us believe.”<sup>113</sup> Her remarks failed to impede political initiatives to reform reading instruction. For example, in 2021, Arkansas specifically banned the cueing theory from its list of approved curriculum.<sup>114</sup> Most recently, in the 2025-2026 legislative session, New York senators introduced Senate Bill S7454, which would, among other things, prohibit the approval of curricula relying on the three-cuing method.<sup>115</sup> While Calkins has been rightly criticized for her role in advancing whole language, her caution against rigid state mandates has teeth. Policymakers conceivably may risk miscalculating their corrective efforts—“thr[owing] the baby out with the bathwater”<sup>116</sup>—by oversimplifying complex pedagogical debates into absolute bans.

Many of the state-wide preventative regimes (“Right to Read” laws) were promoted through state lobbies, often consisting of parents with children who have dyslexia.<sup>117</sup> Today, these statutes consist of requirements for (1) teaching methods; (2) teacher licensure, development, and preparation programs;<sup>118</sup> and (3) interventions to support readers, specifically in K-3.<sup>119</sup> However, unlike enforcement regimes seen in statutes such as the Individuals

<sup>111</sup> Emily Hanford, *Sold a Story E8: The Impact*, APM REPORTS (May 18, 2023), <https://www.apmreports.org/episode/2023/05/18/sold-a-story-e8-the-impact> [<https://perma.cc/Q4EX-EKRC>].

<sup>112</sup> Lucy Calkins, *No One Gets to Own the Terms “The Science of Reading,”* TEACHERS COLLEGE READING AND WRITING PROJECT (2019).

<sup>113</sup> Calkins, *supra* note 112.

<sup>114</sup> ARK. CODE ANN. § 6-17-429 (West 2021); ARK. CODE ANN. 6-15-2914 (West 2021); Greene, *supra* note 108.

<sup>115</sup> S. 7454, 2025-2026, Reg. Sess. (N.Y. 2025) (in S. Educ. Comm.).

<sup>116</sup> Nick Covington, *Unsettling the Science of Reading: Who is Being Sold a Story?*, HUMAN RESTORATION PROJECT (Nov. 30, 2023), <https://www.humanrestorationproject.org/writing/who-is-being-sold-a-story-unsettling-the-science-of-reading> [<https://perma.cc/BQ3T-RX6G>].

<sup>117</sup> Hurley, *supra* note 71, at 296.

<sup>118</sup> See Hurley, *supra* note 71, at 296-99 (discussing various state statutes requiring teacher training and evaluation in science of reading instruction or “best practices identified by the National Reading Panel in their standards for teacher preparation programs”).

<sup>119</sup> See generally Hurley, *supra* note 71 (describing various state requirements concerning reading assessments); see also STEPHANIE ROSE & KAREN SCHIKE, *THIRD GRADE LITERACY POLICIES: IDENTIFICATION, INTERVENTION, RETENTION* (Educ. Comm’n of the States, 2012) (discussing the importance of early intervention to prevent lifelong illiteracy).

with Disabilities Education Act,<sup>120</sup> Right to Read laws lack such mechanisms,<sup>121</sup> often leaving violations without any robust avenue for redress.<sup>122</sup> Even in jurisdictions where state boards of education allow formal complaints from individual students and parents, the absence of an appeals process renders their final decisions effectively unreviewable.<sup>123</sup>

State-level education reform initiatives require rigorous, uniform implementation to yield demonstrable, lasting success.<sup>124</sup> Classroom enforcement procedures are inherently challenging, and the notion of policymakers creating statutory laws that dictate how students should learn is concerning. Not only are these statutes difficult to enforce, but they also risk enabling legislatures to control the methods by which students learn to read, which is an overreach that could lead to unintended and potentially harmful consequences.

The current legal framework offers students little meaningful protection. First, existing Right to Read statutes are largely unenforceable and questionable in their scope. Second, courts routinely decline to intervene, reasoning that they are not institutionally suited to resolve pedagogical disputes. This Note does not claim that these two points, standing alone, explain why so many American students struggle to read. Rather, it exposes a deeper structural failure: the system contains few mechanisms to ensure that effective instructional methods are adopted in the first place. Right to Read statutes miss the mark, and teachers, already burdened with the daily demands of teaching, cannot reasonably be expected to sift through the ever-expanding supply of instructional resources. School boards ostensibly control these choices, but their discretion is far less independent than it appears. In practice, curriculum publishers—actors with growing influence but minimal oversight—exert substantial control over classroom instruction.<sup>125</sup>

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<sup>120</sup> Individuals with Disabilities Act, 20 U.S.C. § 1415 (2018) (entitling students with disabilities to due process rights if their right to a free appropriate public education is encroached upon).

<sup>121</sup> *L.M. v. State of Michigan*, 862 N.W.2d 246 (Mich. Ct. App. 2014) (referencing the court’s lack of competence in evaluating academic instruction).

<sup>122</sup> *Id.*, at 303-04 (“For example, the largest school district in the nation—the New York City Department of Education—identifies seven categories of appeals. Not one offers a student ineligible for a formal plan arising under Section 504 of the federal Rehabilitation Act a basis to challenge the reading curriculum or insufficient reading interventions.”).

<sup>123</sup> *Id.*; Conn. Gen. Stat. §10-4b (2021).

<sup>124</sup> Schwartz, *supra* note 109.

<sup>125</sup> See discussion *infra* Section II.

## II. WHERE HAS AMERICAN EDUCATION GONE WRONG?

A. *State and Federal Mandates*

The failure to adequately equip teachers with a strong foundation in their subject matter has contributed to an overreliance on textbooks as the primary means of constructing classroom curriculum.<sup>126</sup> Classroom instruction reflects a two-fold reality: districts generally choose the materials and teachers often rely on them as a de facto scope and sequence.<sup>127</sup> That reliance is most acute in under-resourced communities, where limited investments in professional development and instructional support leave educators with few alternatives.<sup>128</sup> What many teachers and administrators often fail to recognize is the need to critically evaluate the content to which they subscribe; the prevailing assumption that subject-matter experts author textbook materials is, in reality, a misconception.<sup>129</sup> This reliance reflects a broader systemic flaw: an emphasis on standards and testing has encouraged teachers to depend on textbooks they assume align with state goals, resulting in instruction that is often superficial and fragmented.

From the mid-twentieth century onward, the core problem of American public education has been a pattern of misguided federal legislation that seeks to direct how schools should function, with little improvement in student outcomes. After the Soviet Union launched Sputnik during the Cold War, confidence in the education system declined amid fears that the nation lacked the capacity to compete in the Space Race.<sup>130</sup> Despite a longstanding tradition of federal abstention from public education, the National Defense

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<sup>126</sup> See CHESTER E. FINN, JR. & DIANE RAVITCH, *THE MAD, MAD WORLD OF TEXTBOOK ADOPTION* 1 (Thomas B. Fordham Inst., 2004) (“A 2002 survey of elementary and high school teachers found that about 80 percent use textbooks in their classrooms. Nearly half of student class time was spent using textbooks.”).

<sup>127</sup> See *Id.* at 1, 5 (“[E]specially when teaching core subjects for which students and schools will be held accountable, they are likely to be pressed by principal, department head, or district curriculum director to use ‘approved’ textbooks.”).

<sup>128</sup> Timothy Scott & Farhat N. Husain *Textbook Reliance: Traditional Curriculum Dependence Is Symptomatic of a Larger Educational Problem*, J. EDUC. ISSUES, Apr. 2021 at 243 (“Communities with solvency issues invest considerably less in teachers’ professional development and resource allocation for class instruction. Unequipped to personalize information, teachers in many communities rely entirely on a single information source, state-designed textbooks, to foster learning in their classroom. Engagement suffers without differential instruction, as a one-size-fits-all approach lacks a multi-dimensional presentation needed to embrace the complexities of lived experiences in many communities.”).

<sup>129</sup> Michael G. Watson, *Research on the Textbook Publishing Industry in the United States of America*, I-ARTEM E-JOURNAL 3, Aug. 2007 at 1, 14-15; BEVERLEE JOBRACK, *TYRANNY OF THE TEXTBOOK* 6-12 (2017).

<sup>130</sup> *Sputnik Spurs Passage of the National Defense Education Act*, U.S SENATE (Oct. 4, 1957), [https://www.senate.gov/artandhistory/history/minute/Sputnik\\_Spurs\\_Passage\\_of\\_National\\_Defense\\_Education\\_Act.htm](https://www.senate.gov/artandhistory/history/minute/Sputnik_Spurs_Passage_of_National_Defense_Education_Act.htm) [<https://perma.cc/9YB8-GHXT>].

Education Act marked a pivotal shift.<sup>131</sup> It expanded federal involvement by providing low-cost student loans and by justifying increased federal investment in education as a matter of national interest.<sup>132</sup>

Later, increased scrutiny on civil rights and the shifting attitude on federal involvement in education laid the groundwork for a watershed moment in American education.<sup>133</sup> As part of President Lyndon B. Johnson's War on Poverty,<sup>134</sup> the 1965 Elementary and Secondary Education Act ("ESEA") pioneered the effort "to induce compliance with the federal government's nondiscrimination policies"<sup>135</sup> and "make good on *Brown v. Board of Education*'s desegregation mandate."<sup>136</sup> In the words of the former President: "education is the only valid passport from poverty."<sup>137</sup> Today, ESEA remains the primary source of federal funding for K-12 education, with its most recent reauthorization being the Every Student Succeeds Act ("ESSA").<sup>138</sup>

The Carter administration solidified the federal role in education by establishing the ED under the Department of Education Organization Act in 1979, a politically motivated creation of a cabinet-level education department backed by significant support from the National Education Association.<sup>139</sup>

<sup>131</sup> National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580.

<sup>132</sup> David A. Gamson, Kathryn A. McDermott & Douglas S. Reed, *The Elementary and Secondary Education Act at Fifty: Aspirations, Effects, and Limitations*, RUSSEL SAGE J. SOC. SCI., no. 3, December 2015, at 6.

<sup>133</sup> Erica Frankenberg & Kendra Taylor, *ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation*, RUSSEL SAGE J. SOC. SCI., no. 3, December 2015, at 32, 32-33. ("Key elements of the success of the legislative approach were the social and political context that allowed for expanding federal involvement and the foresight of those crafted the acts in order to maintain their viability to affect local change well after the conditions that were favorable to their passage had disappeared.")

<sup>134</sup> See Gamson, McDermott, & Douglas, *supra* note 132, at 6.

<sup>135</sup> Gamson, McDermott, & Douglas, *supra* note 132, at 11.

<sup>136</sup> Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309, 1317, 1319 (2017) ("Driving funds to the high-poverty schools not only created the opportunity for resource equality, but also gave the federal government the ability to financially coerce schools to stop discriminatory practices."); ANDREA BOYLE & KATELYN LEE, TITLE I AT 50: A RETROSPECTIVE (Am Inst. for Rsch., 2015), <https://www.air.org/sites/default/files/downloads/report/Title-I-at-50-rev.pdf> [<https://perma.cc/BD56-9QGS>] ("When Lyndon Johnson assumed the presidency in 1963, he created the Gardner Commission to tackle these obstacles and devise strategies to expand federal aid to schools.")

<sup>137</sup> Johnson's Remarks on Signing the Elementary and Secondary Education Act, LBJ PRESIDENTIAL LIBR. (Apr. 11, 1965), <http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/johnsons-remarks-on-signing-the-elementary-and-secondary-education-act> [<https://perma.cc/3W6K-93ZS>].

<sup>138</sup> Rebecca R. Skinner, Cong. Rsch. Service., R45977, THE ELEMENTARY AND SECONDARY ACT (ESEA), AS AMENDED BY THE EVERY STUDENT SUCCEEDS ACT (ESSA): A PRIMER (Feb. 12, 2024), <https://www.congress.gov/crs-product/R45977> [<https://perma.cc/9LC5-FYQT>]. ESEA did not overhaul academic standards or teaching practices; it centered on Title I funding. Black, *supra* note 136 at 1318

<sup>139</sup> Britton Kovachevich, *Making It to Class: Socioeconomic Diversity and the Statutory Authority of the Department of Education*, 16 N.Y.U. J. Legis. & Pub. Pol'y 757, 774-75 (2013) (citing 125 Cong.

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The agency today describes itself as a “means of filling gaps in State and local support for education when critical national needs arise.”<sup>140</sup> This support, the ED claims, fosters both “educational excellence” and “ensure[s] equal access.”<sup>141</sup>

Considered “tenuous since its inception,” the ED is frequently criticized as a contested federal intrusion into responsibilities the Tenth Amendment reserves to the states.<sup>142</sup> Former United States Secretary of Education, Lauro F. Cavazos,<sup>143</sup> described two conflicting goals of the ED’s role in education: (1) “the need to avoid oppressive federal regulation,” and (2) “the need to impose controls on the use of federal funds.”<sup>144</sup> Cavazos argues that burdensome “legalization” of education distracts teachers “from what should be their highest priority: teaching children.”<sup>145</sup> At the same time, he understood the importance of ensuring American tax dollars were well spent.<sup>146</sup> Cavazos’ remarks portray the political divide in American perspectives on the ED’s role, which is remarkable considering federal funds account for less than 10% of K-12 education—a reality largely unbeknownst to the public.<sup>147</sup>

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Rec. 25, 824-32, 26, 535-36 (1979)); Jill Anderson, *Unpacking the U.S. Department of Education: What Does It Actually Do?*, Harv. Ed. Mag. (Feb. 6, 2025), <https://www.gse.harvard.edu/ideas/edcast/25/02/unpacking-us-department-education-what-does-it-actually-do> [<https://perma.cc/B4LV-F427>] (“NEA . . . issu[ed] its first ever endorsement in a presidential contest”); Marjorie Hunter, *Congress Approves Dept. of Education; Victory for Carter*, N.Y. Times, Sep. 28, 1979, <https://www.nytimes.com/1979/09/28/archives/congress-approves-dept-of-education-victory-for-carter-house-backs.html>.

<sup>140</sup> The DOE website describes itself as an “emergency response system,” through the targeting of its funds. *Federal Role in Education*, U.S. DEP’T OF EDUC. (June 17, 2025), <https://www.ed.gov/about/ed-overview/federal-role-in-education> [<https://perma.cc/8VX4-BKHZ>]. See also Brendan Pelsue, *When it Comes to Education, the Federal Government is in Charge of . . . Um, What?*, HARV. ED. MAG. (Aug. 29, 2017), <https://www.gse.harvard.edu/ideas/ed-magazine/17/08/when-it-comes-education-federal-government-charge-um-what> [<https://perma.cc/55XV-P2UR>] (discussing the federal government’s use of the Fourteenth Amendment to “work around” the Tenth Amendment, which delegates authority of education to the states).

<sup>141</sup> *Federal Role in Education*, *supra* note 140.

<sup>142</sup> Anderson, *supra* note 139.

<sup>143</sup> Lauro Cavazos served as U.S. Secretary of Education from 1988 to 1990 under President Reagan and George H.W. Bush and was the first Latino cabinet secretary. Robert D. McFadden, *Lauro Cavazos, First Hispanic Cabinet Member, Dies at 95*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/16/us/lauro-cavazos-dead.html> [<https://perma.cc/K3PU-J963>].

<sup>144</sup> Lauro F. Cavazos, *Regulation of Education from a Federal Perspective*, 1988 DET. C.L. REV. 885, 888 (Winter 1988).

<sup>145</sup> *Id.* at 887 (“In designing and administering federal education programs, we must not smother local control of educational policy making. We in the federal government must not dictate particular teaching methods. We also must not subject local school officials to overly burdensome and time-consuming federal legal requirements that divert their attention away from teaching.”).

<sup>146</sup> *Id.*

<sup>147</sup> Anderson, *supra* note 139.

In the early 1990s, in response to *A Nation at Risk* (“ANAR”), a historically significant report documenting a decline in educational performance in the U.S.,<sup>148</sup> the ED awarded grants to professional educators and scholars to develop national standards in various subjects, including English language arts, history, civics, and science.<sup>149</sup> The initiative quickly fell apart after conservatives vilified the history standards, claiming they offered a “warped view” of American history crafted by liberal Californians.<sup>150</sup> These “liberal” viewpoints of historians at the University of California tainted the idea of national standards, making it “political suicide” to support.<sup>151</sup> The Clinton administration shifted from promoting federal academic standards to advancing Goals 2000: Education America Act<sup>152</sup> and the Improving America’s School Act,<sup>153</sup> which built the framework for standards-based accountability.<sup>154</sup> Marshall Smith, the Undersecretary of Education at the time, explained that the “fundamental idea [of standards] was that in order to have an efficient system, it was necessary to align resources around some goals . . . so that some measurement of progress could take place.”<sup>155</sup> These statutes mandated the design of state-created standards and corresponding assessments in reading and mathematics, and the uniform application to both Title I students and their peers.<sup>156</sup> Yet national studies

<sup>148</sup> Published in 1983, *ANAR* responded to the school-reform waves of the 1960s and 70s that sought to reshape the traditional classroom. DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 23-24 (2010). It documented declines in U.S. education and proposed reforms across “content, standards and expectations, time, teaching, leadership and fiscal support.” NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM*, DEPARTMENT OF EDUCATION (1983) (quoted from the abstract).

<sup>149</sup> Ravitch, *supra* note 148, at 16; *see also* Debra Viadero, *U.S. Awards Grants To Help Set Standards in Civics, Geography*, EDUC. WK. (Aug. 5, 1992), <https://www.edweek.org/education/u-s-awards-grants-to-help-set-standards-in-civics-geography/1992/08> [<https://perma.cc/CKH8-M7NL>].

<sup>150</sup> Ravitch, *supra* note 148, at 17 (citing Jo Thomas, *Revised History Standards Disarm the Explosive Issues*, N.Y. TIMES (Apr. 3, 1996), <https://www.nytimes.com/1996/04/03/us/revised-history-standards-disarm-the-explosive-issues.html>).

<sup>151</sup> Ravitch, *supra* note 148, at 18.

<sup>152</sup> Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (providing grants for the standards-based movement).

<sup>153</sup> Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (“The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”).

<sup>154</sup> Superfine, *supra* note 63, at 83-84.

<sup>155</sup> Juliana Hanna, *The Elementary and Secondary Education Act: 40 Years Later*, HARV. ED. MAG. (Aug. 18, 2005), <https://www.gse.harvard.edu/ideas/news/05/08/elementary-and-secondary-education-act-40-years-later> [<https://perma.cc/3Q57-47NF>].

<sup>156</sup> Boyle & Lee, *supra* note 136, at 3; Ravitch, *supra* note 148, at 19.

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found little evidence that these reforms translated into meaningful academic gains.<sup>157</sup>

In 2002, President George W. Bush reauthorized ESEA by signing NCLB, a bipartisan law that sought to preserve local control of schools and equalize opportunity for all students.<sup>158</sup> Like its predecessors, NCLB left states to set academic standards and develop aligned assessments,<sup>159</sup> but it differed in its singular emphasis on “accountability.”<sup>160</sup> Schools were required to satisfy “adequate yearly progress” (“AYP”) measures defined by states and aligned with their standards.<sup>161</sup> NCLB’s mandate that all states achieve 100% proficiency in meeting AYP—a goal doomed from the start—propelled the accountability movement initially inspired by *ANAR*.<sup>162</sup> These accountability goals ultimately led to the creation of state-wide K-12 “report cards,” which relied primarily on test performance.<sup>163</sup> While testing data can be valuable when used and administered properly, the tests themselves are not exact measures.<sup>164</sup> Elected officials failed to give any thought to whether these tests were accurate or reliable.<sup>165</sup> NCLB’s fixation on mastering state standards through the analysis of “objective metrics” allowed other academic and abstract goals, such as “critical thinking, open-mindedness, maturity, and citizenship,” to fall through the cracks.<sup>166</sup> Teachers, often those serving “racial and ethnic minorities, low-income students, English language learners, and those with learning disabilities,” faced high pressures to meet these goals.<sup>167</sup> The consequences of these pressures often meant “teaching to the test” and, in extreme situations, also led to cheating scandals.<sup>168</sup> NCLB

<sup>157</sup> Boyle & Lee, *supra* note 136, at 7.

<sup>158</sup> *Fact Sheet: No Child Left Behind Has Raised Expectations*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH, <https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/factsheets/No-Child-Left-Behind.html> [<https://perma.cc/8QDM-ZTN3>].

<sup>159</sup> Superfine, *supra* note 63, at 89.

<sup>160</sup> Ravitch, *supra* note 148.

<sup>161</sup> Superfine, *supra* note 63, at 89-90; David J. Deming & David Figlio, *Accountability in US Education: Applying Lessons from K-12 Experience to Higher Education*, J. ECON. PERSP., Summer 2016, at 33, 38. Under NCLB, repeated failure to meet AYP triggered sanctions, including student transfers and school restructuring. Ravitch, *supra* note 148 at 95-101.

<sup>162</sup> Deming & Figlio, *supra* note 161, at 33-35.

<sup>163</sup> Deming & Figlio, *supra* note 161, at 38.

<sup>164</sup> Ravitch, *supra* note 148, at 150-52.

<sup>165</sup> Ravitch, *supra* note 148, at 95.

<sup>166</sup> Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1814 (2015); Deming & Figlio, *supra* note 161, at 38.

<sup>167</sup> Anya Kamenetz, *When Teachers, Not Students, Do the Cheating*, NPR (Sep. 29, 2014), <https://www.npr.org/sections/ed/2014/09/29/352494603/when-teachers-not-students-do-the-cheating> [<https://perma.cc/UXC2-Q5XL>].

<sup>168</sup> Kamenetz, *supra* note 167.

bred resentment by tying educators' careers and schools' reputations to student test scores.<sup>169</sup>

President Barack Obama's eventual replacement of NCLB with ESSA appeared to roll back the high-stakes testing measures of the Bush administration, shifting authority back to state and local governments.<sup>170</sup> ESSA, however, is functionally a "watered-down version" of NCLB, and retreats from its enforcement of the phonics-based approach.<sup>171</sup> Under the statute, states must adopt "challenging" standards, such as Common Core State Standards ("CCSS").<sup>172</sup> But the support of CCSS faced well-deserved backlash<sup>173</sup> for its failure to include specifics on what a student must master in order to accomplish proficiency in a subject, and "reassert[ed] the division between outcome goals and curriculum."<sup>174</sup> That disconnect shifts the burden of translation onto teachers: the craft of teaching becomes turning broad outcome targets into concrete, sequenced instruction that enables all students to reach them.<sup>175</sup> Using standards to measure student success or analyzing test data is not inherently problematic; on the contrary, these tools can be valuable in addressing achievement gaps, particularly in a nation with a growing population of low-income students.<sup>176</sup> States, however, diverge significantly in their "student success indicators" and academic standards.<sup>177</sup> At least in practice, standards and test-based accountability have often undermined educational quality, particularly where the standards are vague, inconsistent, or otherwise subpar.

<sup>169</sup> Ravitch, *supra* note 148, at 152.

<sup>170</sup> Jack Jennings, *It's Time to Redefine the Federal Role in K-12 Education*, PHI DELTA KAPPA INT'L, Sep. 2018 at 8, 9.

<sup>171</sup> *Id.* at 10.

<sup>172</sup> Alyson Klein, *The Every Student Succeeds Act: An ESSA Overview*, EDUC. WK. (Mar. 30, 2016), <https://www.edweek.org/policy-politics/the-every-student-succeeds-act-an-essa-overview/2016/03> [<https://perma.cc/E278-JL95>].

<sup>173</sup> Because Common Core covered only math and English language arts, tying it to high-stakes testing narrowed the curriculum and pushed out subjects like history, science, and the arts. Peter Greene, *Further Evidence That Common Core Did Real Harm To U.S. Education*, FORBES (Aug. 9, 2021), <https://www.forbes.com/sites/petergreene/2021/08/09/further-evidence-that-common-core-did-real-harm-to-us-education> [<https://perma.cc/6WWB-BY6S>].

<sup>174</sup> Timothy Shanahan, *Educational Policy and Literacy Instruction: Worlds Apart?*, 68 READING TEACHER 7, 11 (2014) ("Previous standards were so thorough that they specified everything that students had to accomplish. In that, past standards were less like goals and more like a curriculum or a scope and sequence guide to daily instruction."); Caroline E. Burks, *Cultivating Minds, Not Data Points: A Critical Examination of Education Policy*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 1, 6-8 (2020).

<sup>175</sup> See Charles L. Glenn, *Case Studies: the USA, Laws, Regulations, Decisions in American Education*, 6 INT'L J. EDUC. L. POLICY 95 (2010).

<sup>176</sup> Jennings, *supra* note 170, at 10.

<sup>177</sup> *Id.* ("States will vary greatly in their goals for student achievement, their indicators of success, and their approaches to holding educators accountable and assisting underperforming schools"). CONG. RSCH. SERVICE., R45977, *supra* note 138.

Ultimately, effective instruction becomes difficult when teachers are expected to teach standards that do not clearly specify what students must know and be able to do.<sup>178</sup> Inadequate content preparation in teacher preparation programs, combined with vague and inconsistent state standards, makes it nearly impossible to anticipate what a teacher candidate will be required to teach upon certification.<sup>179</sup> This dynamic is self-reinforcing: many candidates were never adequately taught the very content they are later responsible for teaching, and those deficits follow them into their professional practice.<sup>180</sup>

### B. *How Adoption and Standards Shape the Market*

The push for schools to meet state standards creates a steady demand for prepackaged curricula, a need that private publishers have been eager to exploit. But this is not a case of market efficiency; in fact, it reflects a market failure. Districts and teachers operate with limited information about the quality of materials, while a handful of large publishers dominate the market, creating quasi-monopolies that bundle textbooks, assessments, and digital platforms.<sup>181</sup> What results is not competition driving innovation, but an information-poor marketplace where profit incentives outweigh educational integrity.

Two distinctly contrasting political ideologies influence the structure and governance of American education: (1) market forces overpower any state effort to promote social good,<sup>182</sup> and (2) states must ensure social security and well-being for its citizens against competing market forces.<sup>183</sup> This second point, the social state, is grounded in the drive for “gradual betterment of all citizens.”<sup>184</sup> The Supreme Court historically has emphasized the tradition for local control in public education,<sup>185</sup> stating that

<sup>178</sup> See Hurley, *supra* note 71, at 288, 289 (“Despite high-file efforts to reform supervision through teacher evaluations, much supervision remains perfunctory. And, although teacher coaching is effective, it is financially and logistically costly and is therefore rare. Lacking support from above, many educators are effectively on their own.”).

<sup>179</sup> NATALIE WEXLER, *BEYOND THE SCIENCE OF READING: CONNECTING LITERACY INSTRUCTION TO THE SCIENCE OF LEARNING* 75 (2025).

<sup>180</sup> See *Id.* More than half of aspiring teachers fail licensure exams on their first attempt. *Id.*

<sup>181</sup> Corporate mergers shifted textbook production from contracted authors to in-house editorial teams, potentially weakening accountability and quality. Watson, *supra* note 129, at 14. Globalization in the 1980s accelerated this consolidation as multinational media and entertainment companies acquired independent publishers. *Id.*

<sup>182</sup> ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (W. Strahan and T. Cadell, 1776).

<sup>183</sup> Kathleen D. Hall, *Science, Globalization, and Educational Governance: The Political Rationalities of the New Managerialism*, 12 *IND. J. GLOB. LEGAL STUD.* 153, 153 (2005).

<sup>184</sup> Hall, *supra* note 183, at 154.

<sup>185</sup> *Milliken v. Bradley*, 418 U.S. 717, 742 (1974).

“[L]ocal control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages ‘experimentation, innovation, and healthy competition for educational excellence.’”<sup>186</sup> Yet, Lyndon B. Johnson’s War on Poverty marked a departure from this tradition, laying the groundwork for an ever-expanding federal role in K-12 education.<sup>187</sup> Decades later, Bush’s No Child Left Behind, often dubbed “no consultant left behind,”<sup>188</sup> accelerated the growth of the entrepreneurial education sector, as market forces rushed to meet the accountability demands created by the obsession with state standards.<sup>189</sup> Ideological shifts in how children learn, combined with market-based reforms in public education,<sup>190</sup> created a fertile environment for publishing companies to profit from an ever-evolving, growing demand for curriculum and testing materials. As a result, the profit-driven nature of corporations has flooded classrooms with mountains of misinformation, which today’s teachers lack the wherewithal to navigate.<sup>191</sup>

This is a classic market failure. The entities creating curricula are not the same actors who bear the long-term costs of ineffective instruction, which are instead externalized onto students, families, and taxpayers through remediation and lost learning time. Information asymmetry prevents educators and districts from evaluating the quality of materials, while a handful of dominant publishers maintain near-monopoly power.<sup>192</sup> Consumer choice cannot ensure quality, and corporate incentives prioritize sales over effective curriculum.

Curriculum is the organized package of materials, learning activities, and assessments through which a subject is taught, and it significantly shapes educational outcomes.<sup>193</sup> Standards “are the goals for instruction,” while

<sup>186</sup> *Milliken*, 418 U.S. at 743 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

<sup>187</sup> See *supra* notes 134-136.

<sup>188</sup> Diane Ravitch, *No Consultant Left Behind*, DIANE RAVITCH’S BLOG (Oct. 14, 2025), <https://dianeravitch.net/2012/07/27/no-consultant-left-behind> [<https://perma.cc/JE7A-JKHC>].

<sup>189</sup> Ravitch, *supra* note 148, at 246.

<sup>190</sup> *Hall*, *supra* note 183, at 159 (“Business management inspired governance strategies champion the cause of making the public sector more citizen or consumer-centered, results-oriented, and market based. Reform and renewal efforts are directed toward improving public sector performance (effectiveness and efficiency) through an emphasis on ‘results-based accountability.’”).

<sup>191</sup> WEXLER, *supra* note 179 (generally speaking on the difficulty for teachers to navigate the surplus of information and implement it correctly into their classrooms; especially considering the failure of teacher prep programs to train them on how to do so); Scott & Husain, *supra* note 128, at 240-41 (“Many teachers lack the equipment, training, and flexibility to offer differential instruction for their students. With many classes only equipped with a single textbook, classes rarely engage the material content beyond rote-learning for test-taking strategies.”).

<sup>192</sup> Deming & Figlio, *supra* note 161, at 28.

<sup>193</sup> JOBRACK *supra* note 129, at 2-3; see also Grover J. Whitehurst, Don’t Forget Curriculum, Brookings (Oct. 14, 2009), <https://www.brookings.edu/articles/dont-forget-curriculum> [<https://perma.cc/8WD7-QBF4>].

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curriculum “provide[s] content and instructional approaches.”<sup>194</sup> Pedagogy is the instructional approach used by a teacher (or set out in a curriculum), such as whole language and phonics, to guide students in mastering a skill.<sup>195</sup>

While publishers may propagate certain pedagogical trends in the market, such as Heineman’s support for whole language or the debate between procedural and conceptual education in math,<sup>196</sup> rarely is there as much debate concerning a specific curriculum.<sup>197</sup> This ambivalence is primarily attributable to the textbook adoption process, along with the assumption that it naturally yields a meticulously vetted selection of the most effective materials.<sup>198</sup>

The textbook adoption process is utilized by twenty states, all of which rely on a centralized process for the approval of textbooks in public schools (adoption committees).<sup>199</sup> The remaining states are “open territories,” meaning they allow for local control over the selection of textbooks.<sup>200</sup> The primary concern of an adoption committee is to ensure coverage of standards.<sup>201</sup> Considerations of “quality” and “instructional effectiveness” are often overlooked.<sup>202</sup> This failure to guarantee that programs incorporate research-backed best practices or adhere to a developmentally appropriate scope and sequence is further exacerbated by the exceedingly limited time frame allotted for committee review.<sup>203</sup>

The endorsement of a program through the adoption process engenders a misleading perception of credibility and pedagogical soundness.<sup>204</sup> Insufficient timelines, biased opinions, and unqualified reviewers result in curricula being endorsed based on the influence of sales, marketing, and

<sup>194</sup> S. REG’L EDUC. BRD, STANDARDS V. CURRICULUM: WHAT’S THE DIFFERENCE? (2022), [https://www.sreb.org/sites/main/files/file-attachments/2022standards\\_vs\\_curriculum\\_page1.pdf?1644497345](https://www.sreb.org/sites/main/files/file-attachments/2022standards_vs_curriculum_page1.pdf?1644497345) [https://perma.cc/DQ4R-JLYY].

<sup>195</sup> Rajendra Kumar Shah & Sanothimi Campus, *Conceptualizing and Defining Pedagogy*, IOSR J. RSCH. & METHOD IN EDUC., Jan.-Feb. 2021 at 6, 2.

<sup>196</sup> Jennifer Pignolet, *Debates Shaping Math Instruction: What to Know*, EDUC. WRITERS ASSOC., <https://ewa.org/educated-reporter/conceptual-vs-procedural-math-education-which-is-best> [https://perma.cc/YKV3-LBAM].

<sup>197</sup> See JOBRACK *supra* note 129, at 6, 21.

<sup>198</sup> *Id.*; FINN & RAVITCH, *supra* note 126, at 6 (“Origins of the textbook adoption process dates back to the aftermath of the Civil War, when southern states wanted to ensure anti-confederate books stayed out of their schools.”).

<sup>199</sup> Kyle Zinth, *State Textbook Adoption*, EDU. COMM’N OF THE STATES (Jan. 2005), <https://www.ecs.org/clearinghouse/57/75/5775.pdf> [https://perma.cc/MEF4-ZKPT].

<sup>200</sup> *Id.*; see also FINN & RAVITCH, *supra* note 126.

<sup>201</sup> JOBRACK *supra* note 129, at 12-16.

<sup>202</sup> *Id.* at 15 (“Content specialists . . . typically evaluate the accuracy of the content, rather than whether the instructional strategies are effective.”).

<sup>203</sup> *Id.* at 16-19.

<sup>204</sup> *Id.* at 16-21.

finance managers.<sup>205</sup> Publishers must appeal to the selection committee, which they do by conveying a false sense of resource variety available to teachers.<sup>206</sup> The most commonly adopted curricula are the ones offering convenience rather than effectiveness, as reflected in elements such as large page counts, increased attention to cross-curricular connections, number of components, and minimal teaching requirements.<sup>207</sup> Rather than challenging ineffective practices, publishers capitalize on them, tailoring materials to what teachers already know from their training programs—most notably whole language.

Textbook adoption processes typically follow a similar structure: (1) publishers and advocacy groups present to a textbook review committee (often teachers from around the state) at a public hearing; (2) the committee reviews instructional materials to ensure they align with state standards and curriculum guidelines; (3) members are often “wooded” by sales representatives through perks like free trips and special seminars;<sup>208</sup> (4) the committee recommends curriculum to the state board of education; and (5) the board makes a final decision on whether to accept or reject the books.<sup>209</sup>

California’s adoption process appears exhaustive. Instructional Materials Reviewers (classroom teachers, administrators, etc.) and Content Review Experts (often university professors) independently evaluate the programs; however, they must reach unanimity to approve a program,<sup>210</sup> often leading to conflicts rooted in personal allegiances.<sup>211</sup> Texas has recently revamped its “Instructional Materials Review and Approval Process” and now requires state-trained reviewers to evaluate curriculum submissions using State Board of Education-approved rubrics.<sup>212</sup> More significantly, beginning in the 2026-27 school year, local districts in Texas will be restricted from buying or using instructional materials that appear on the State Board’s rejected list—shifting the adoption framework from guidance to an enforcement mechanism.<sup>213</sup>

<sup>205</sup> *Id.* at 21.

<sup>206</sup> JOBRACK *supra* note 129, at 16-21.

<sup>207</sup> *Id.*

<sup>208</sup> FINN & RAVITCH, *supra* note 126, at IV (“Adoption serves the interests of the textbook-publishing cartel (though not the small ‘boutique’ houses); of political pressure groups on the left and right; of elected officials who have somehow been persuaded that they know better than educators . . .”).

<sup>209</sup> FINN & RAVITCH, *supra* note 126, at 19

<sup>210</sup> *Instructional Materials Evaluation and Adoption*, CAL. DEPT. OF EDUC, <https://www.cde.ca.gov/ci/cr/cf/cefimadoptprocess.asp> [<https://perma.cc/9T5W-85GX>].

<sup>211</sup> JOBRACK *supra* note 129, at 16-21.

<sup>212</sup> Tex. H.B. 1605, 88<sup>th</sup> Leg., R.S. (2023).

<sup>213</sup> Tex. H.B. 100, 89<sup>th</sup> Leg., R.S. (2025); David Saleh Rauf, *Texas’ Revamped Adoption System Raises Stakes for Publishers, With First Curriculum Bans Looming*, EDWEEK: MARKET BRIEF (Jan. 15, 2026), <https://marketbrief.edweek.org/regulation-policy/texas-revamped-adoption-system-raises-stakes->

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The consequence of the massive market in adoption states like California and Texas, is an influential financial incentive for publishers “not to mess with Texas—or California.”<sup>214</sup> Open territories, therefore, often receive a version of programs created for adoption states since it is rarely profitable for publishers to design curriculum tailored specifically for small states because the upfront investment is too prohibitive.<sup>215</sup> As a result, a small group of individuals hold a formidable influence over what students learn across the United States and how they learn it.<sup>216</sup> This dynamic explains why traditional economic principles of competition fail to keep publishers in check: the adoption system consolidates demand around a handful of approved products, insulating companies from sustained market pressure. In fact, the Association of American Publishing lobbies against legislative proposals to dismantle the textbook adoption processes, reflecting how the current system makes it difficult for smaller publishers to enter the market.<sup>217</sup>

The compound effect of the publishing industry’s consolidation and increasing investment costs to include more state standards has eliminated small, niche publishers,<sup>218</sup> thereby shrinking competition.<sup>219</sup> As investment costs rise, so too does the imperative to achieve profitability. Realistically, programs are published when a major state calls for it or federal funds are tied to it, which squashes innovation in curriculum.<sup>220</sup>

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for-publishers-with-first-curriculum-bans-  
looming/2026/01#:~:text=The%20latest%20twist%20in%20Texas%E2%80%99,27%20school%20year.

<sup>214</sup> FINN & RAVITCH, *supra* note 126, at 4; Emily Schmidt, *Required Reading: How Textbook Adoption in 3 States Influences the Nation’s K-12 Population*, APM RSCH. LAB (June 2, 2022), <https://www.apmresearchlab.org/10x-textbook-adoption> [<https://perma.cc/C6SZ-BNPU>] (“[California, Texas, and Florida] accounted for around about one-quarter of pre-k-12 resource revenue for publishers” from “March 2020 to March 2021.”).

<sup>215</sup> JOBRACK *supra* note 129, at 15 (For example “some states, California and Florida . . . are now rejecting programs that have extraneous content, that is, content that is not required in their state standards.”). See generally FINN & RAVITCH, *supra* note 126.

<sup>216</sup> Schmidt, *supra* note 214.

<sup>217</sup> Diane Ravitch, *The Harm Done by Textbook Adoption*, THOMAS FORDHAM INSTIT. (Sep. 29, 2004), <https://fordhaminstitute.org/national/commentary/harm-done-textbook-adoption> [<https://perma.cc/RYT3-EDYH>].

<sup>218</sup> JOBRACK, *supra* note 129, at 36 (“As the industry consolidated, McGraw-Hill acquired at least seven different spelling programs . . . By 2000, each company produced only one spelling program. With this consolidation came the absence of alternative approaches, any diversity, or broader choice.”); Michael G. Watt, *Research on the Textbook Publishing Industry in the United States of America*, IARTEM e-J., August 2007, at 12-13, <https://files.eric.ed.gov/fulltext/ED498713.pdf> [<https://perma.cc/8K3R-RGU2>] (“[S]mall publishing companies faced difficulties in affording sufficient sales staff to cover the market, applying computer technology, responding to changing attitudes resulting from the impact of various minority groups, and applying resources to current educational research in order to improve their products.”).

<sup>219</sup> JOBRACK *supra* note 129, at 33 (“A larger company would seldom consider investing in a small targeted program if they were already developing a larger program for the subject area”).

<sup>220</sup> *Id.* at 55 (“[I]f Florida calls for science one year and Indiana calls for it the following year, a publisher will produce a major program for Florida and then adapt it the following year to meet the Indiana

Districts, therefore, rely on publishers' claims, which emphasize glossy design, broad "standards alignment," and ease of implementation rather than instructional quality. Sales incentives and the outsized power of major adoption states push publishers toward mass appeal at the expense of pedagogy. New ideas and approaches rarely reach the market because publishers are often reluctant to invest in content that significantly departs from what educators are accustomed to using.<sup>221</sup> Additionally, the individuals responsible for developing and marketing these curricula often lack expertise in cognitive science, limiting their awareness of how their decision may negatively impact student learning.<sup>222</sup> Renowned authors and experts may contribute to a program, but their authority is often minimal.<sup>223</sup> One math author recalled how an editorial team abandoned a research-based restructuring of a curriculum after a marketing manager insisted teachers only cared about manipulatives and would resist major changes in scope and sequence.<sup>224</sup> "If customers demand effective materials that incorporate the latest educational research, educational publishers would focus on creating those types of materials."<sup>225</sup>

As the *Sold a Story* investigation documented, approaches lacking strong evidence were adopted widely despite a longstanding scientific consensus in favor of explicit phonics instruction. By the time the harm became clear, students lost critical years of literacy development, leaving families and taxpayers to absorb the cost of remediation. In short, the consumers of curricula—districts, teachers, parents—cannot adequately assess quality, producers lack incentives to improve it, and the costs of failure are externalized onto society.

Effectiveness is simply not a criterion in the textbook adoption process.<sup>226</sup> Former Chief Executive Officer of Saxon Publishers, reported that the company was barred from the 2001 California adoption cycle.<sup>227</sup> Saxon Math was particularly controversial due to its emphasis on mastering

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specifications." This means that "all programs that might address a new curricular area, such as twenty-first century skills, law, technology, anthropology, or medicine, do not stand a chance of being published, regardless of how effective they may be.").

<sup>221</sup> See *Id.* at 43-58.

<sup>222</sup> Mark Seidenberg, "About the Science in 'The Science of Reading,'" MARK SEIDENBERG: BLOG (Mar. 31, 2023), <https://www.seidenbergreading.net/blog/2023/03/31/about-the-science-in-the-science-of-reading> [<https://perma.cc/9WRQ-7N7K>].

<sup>223</sup> JOBRACK *supra* note 129, at 46.

<sup>224</sup> *Id.* at 46.

<sup>225</sup> *Id.* at 54.

<sup>226</sup> FINN & RAVITCH, *supra* note 126, at 26-27

<sup>227</sup> *Id.*; *Eight Cato Briefings on Capitol Hill*, CATO POLICY REPORT, Mar-Apr. 2004, at 4, 6, <https://www.cato.org/sites/cato.org/files/serials/files/policy-report/2004/3/cpr-26n2.pdf> [<https://perma.cc/LL6J-8K82>].

basic skills and repetitive math drills.<sup>228</sup> Critics of Saxon’s methods, mirroring the same type of argument leveled against phonics, found it boring and rudimentary but this raises the question: boring and rudimentary for whom? For students who often benefit from structure and repetition? Or for teachers, who may prefer more engaging, less prescriptive approaches? At the textbook adoption committee hearing, the chairman of the curriculum commission stated that “[e]ffectiveness, while certainly something that we all look at as consumers, is not a criterion here.”<sup>229</sup> Should effectiveness not always be a criterion? If the market does not hold publishing companies accountable for producing the most effective methodology, then who does?

### III. PROPOSAL: FEDERAL REGULATION OF PUBLISHING COMPANIES

#### A. *The Current Research Regime*

Federal law already recognizes the importance of evidence-based instruction. The Department of Education Organization Act, for example, identifies as a core purpose of the ED “to promote improvements in the quality and usefulness of education through federally supported research, evaluation, and *sharing* of information.”<sup>230</sup> This evidence-based orientation is reinforced in later statutes, including NCLB which conditioned federal funding on programs supported by a “scientific track record,” thereby placing education research alongside research in fields such as medicine, technology, agriculture, and the physical sciences.<sup>231</sup> One year later, Congress enacted the bipartisan Education Sciences Reform Act of 2002 (“ESRA”),<sup>232</sup> which established the Institute of Educational Sciences (“IES”) as an independent, non-partisan arm of the ED,<sup>233</sup> and charges it with promoting “the use,

<sup>228</sup> FINN & RAVITCH, *supra* note 126, at 26-27

<sup>229</sup> *Id.*

<sup>230</sup> Department of Education Organization Act 20 USCA § 3402 (emphasis added).

<sup>231</sup> Michael Feuer, Lisa Towne, & Richard J. Shavelson, *Scientific Culture and Educational Research*, EDUC. RES., Nov. 2002, at 4. *See also* Goals 2000: Educate America Act, H.R. 1804, 103rd Cong. §912 (1994).

The Congress declares it to be the policy of the United States to provide every individual in equal opportunity to receive an education of high quality . . . To achieve [that] goal . . . requires the continued pursuit of knowledge about education through research, development, improvement activities, data collection, synthesis, technical assistance, and information dissemination. While the direction of American education remains primarily the responsibility of State and local governments, the Federal Government has a clear responsibility to provide leadership in the conduct and support of scientific inquiry into the educational process.

*Id.*

<sup>232</sup> Education Sciences Reform Act, 20 U.S.C. §9512(3) (2002).

<sup>233</sup> *About IES*, INST. EDUC. SCI., <https://ies.ed.gov/about> [<https://perma.cc/L72B-AVQ4>].

development, and application of knowledge gained from scientifically valid research.”<sup>234</sup>

IES describes its mission as “provid[ing] scientific evidence on which to ground education practice and policy and to share this information in formats that are useful and accessible to educators, parents, policymakers, researchers, and the public.”<sup>235</sup> To advance that mission, IES created the What Works Clearinghouse (“WWC”),<sup>236</sup> a centralized resource that applies rigorous methodological standards to identify, review, and synthesize education research.<sup>237</sup> WWC products—including intervention reports and practice guides—distill the existing literature and evaluate “what works,” often in policy-salient areas such as language instruction and early childhood education.<sup>238</sup> By aggregating studies from across the country and making its reviews freely available, the WWC offers educators concrete, research-based guidance for adapting classroom practice. Yet this federal evidence infrastructure accounted for only a small share of the ED’s budget.<sup>239</sup>

The post-NCLB emphasis on evidence-based practice initially prompted many publishers to fund studies of their own curricula and interventions.<sup>240</sup> WWC frequently functioned as a gatekeeper for methodological rigor, assessing whether those studies satisfied its methodological standards.<sup>241</sup> Publishers often hesitated to subject their programs to independent evaluation, in part because they questioned whether educational research could reliably control for confounding variables in real-world classroom settings.<sup>242</sup> That reluctance also tracks a broader hesitation

<sup>234</sup> 20 U.S.C. §9512(3).

<sup>235</sup> The IES does the following: (1) provides statistical data on conditions of education, including carrying out the National Assessment of Educational Progress (NAEP); (2) conducts surveys and research projects to better understand needed education improvements; (3) funds the development for improving conditions in the classroom, including instruction and teacher preparation; (4) supports the advancement of statistics and research; and (5) encourages the use of data and research by providing resources for education decision makers. *About IES*, *supra* note 233.

<sup>236</sup> A clearinghouse is a “central agency for the collection, classification, and distribution especially of information.” *Clearinghouse*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, <https://www.merriam-webster.com/dictionary/clearinghouse> [<https://perma.cc/NWR4-RXQN>].

<sup>237</sup> Chad Lykins, *Why “What Works” Still Doesn’t Work: How to Improve Research Syntheses at the What Works Clearinghouse*, 87 PEABODY J. EDUC. 500, 500-09 (2012).

<sup>238</sup> INST. OF EDUC. SCI. NAT’L CTR. FOR EDUC. EVALUATION & REG’L ASSISTANCE, U.S. DEP’T EDUC., WHAT WORKS CLEARINGHOUSE, PROCEDURES AND STANDARDS HANDBOOK, VERSION 5.0 (2022).

<sup>239</sup> At the time this Note was written, Trump’s administration canceled contracts with IES. The Federal Drive, *What Nearly a Billion in Canceled Federal Contracts Could Mean for Education*, FED. NEWS NETWORK (Mar. 4, 2025), <https://federalnewsnetwork.com/workforce/2025/03/what-nearly-a-billion-in-canceled-federal-contracts-could-mean-for-education> [<https://perma.cc/7RGH-CD2P>].

<sup>240</sup> JOBRACK *supra* note 129, at 11

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

among schools to participate in experimental research: administrators and teachers may resist random assignment out of concern that some students will be placed in a control group or otherwise receive inferior instruction.<sup>243</sup>

Very few textbooks are independently field-tested for their effectiveness.<sup>244</sup> And even when they are, the results are often sidelined.<sup>245</sup> “Teaching, like medicine, is an art,” but artistry alone cannot justify ignoring evidence.<sup>246</sup> Like medicine, education depends on grounding practice in research if it is to make sustained progress.<sup>247</sup> The point is not that publishers are incapable of producing or supporting rigorous studies. Rather, absent meaningful requirements, they often lack sufficient incentive to do so. Publishing companies should therefore be held to a higher standard: verifying the effectiveness of their products through credible evidence and giving educators the tools to exercise their craft with materials that are not only innovative but also empirically validated.<sup>248</sup>

### *B. Proposed Reform: An FDA-Inspired Labeling Regime*

Borrowing from the Food and Drug Administration (“FDA”) model, curriculum oversight could focus on labeling and disclosure rather than pre-clearance of every textbook. Unlike drugs or medical devices—where rigorous trials establish safety and efficacy before reaching consumers<sup>249</sup>—curricular effectiveness is largely opaque at the point of purchase. Under this system, publishers would be required to conduct and submit their own studies using uniform methodological standards. WWC would then evaluate those studies for rigor and compliance, ultimately issuing an evidence designation.

Textbooks would carry a visible statement of their evaluation status. Where WWC confirms that a publisher’s study used approved methods and satisfied the relevant standards, the label would include a clear designation of the level of evidence, such as “strong,” “moderate,” or “insufficient.” Where studies fail to meet standards, or where no review has been

<sup>243</sup> *Id.*

<sup>244</sup> FINN & RAVITCH, *supra* note 126, at iv.

<sup>245</sup> See *Sold a Story Episode 5*, *supra* note 52. In 2007, the report on Elementary School Math reviewed 237 studies and only 9 met WWC’s evidence standards. Everyday Math was found to have “potentially positive effects on math achievement,” but the remaining curricula has “no discernable effects on math achievement.” Compounded with the fact that research reports often have little effect on sales, meaning publishers are not penalized for ineffective materials, they neglect their obligation to ensure their programs are holistically effective. JOBRACK *supra* note 129, at 11.

<sup>246</sup> David C. Berliner, *Knowledge is Power: A Talk to Teachers About a Revolution in the Teaching Profession*, 24 EQUITY & EXCELLENCE EDUC, 3, 4 (1988).

<sup>247</sup> *Id.*

<sup>248</sup> See generally JOBRACK *supra* note 129.

<sup>249</sup> PHILLIP ZHANG, PREETI PATEL & NICOLE R. WINSTON, FEDERAL MEDICATION DEVELOPMENT REGULATION (2024), <https://www.ncbi.nlm.nih.gov/books/NBK574558> [<https://perma.cc/76DQ-X7UR>].

undertaken, the label would include a disclaimer: “This program has not been independently validated for effectiveness.”

The analogy to FDA labeling is instructive. Just as warning labels on drugs or dietary supplements convey critical information to consumers, the WWC stamp becomes information itself. Publishers would face reputational incentives to seek independent validation rather than relying solely on marketing. An inherent challenge, however, is that the FDA’s regulatory regime is backed by intellectual property protections.<sup>250</sup> Drug manufacturers benefit from “data exclusivity,” which allows them to recover the steep costs of clinical trials before competitors can rely on their findings.<sup>251</sup> This system encourages innovation. Curriculum publishers operate in a very different market. Their products are seldom truly new, often consisting of recycled or lightly rebranded materials.<sup>252</sup> Without exclusivity of a property right, such as a patent, they have little protection for the value of investments in independent research.

One possible solution is to permit publishers to cite prior evidence of recycled curriculum, while requiring genuinely new curricula to undergo independent validation. Over time, evidence production might itself become a competitive advantage: adoption committees would be more willing to approve “research-based” materials backed by credible data. And because many jurisdictions operate on roughly six-year adoption cycles, an approved product can enjoy a period of relative market security—helping publishers recoup the up-front costs of rigorous evaluation. In that sense, adoption cycles can function as temporary market protection for approved products.<sup>253</sup> For such a system to function, adoption cycles must evolve as well. States and districts should hire and train curriculum specialists who can interpret evidence designations and translate them into concrete adoption recommendations. Without that expertise, committees may overlook evidence labels altogether or revert to familiar products and vendor relationships. This ensures that evidence labels become an integral part of the decision-making process rather than an ignored appendix.

This approach works for several reasons. First, it respects local control: districts would not be compelled to adopt federally approved materials, but would instead receive transparent, comparable information to inform their choice. Second, it forces publishers to internalize the cost of producing

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> See generally JOBRACK *supra* note 129.

<sup>253</sup> This raises an additional question: would such a system disadvantage smaller publishers who lack resources to fund rigorous studies? If so, reforms must account for this risk by creating pathways that allow smaller publishing companies to participate. Otherwise, the very process designed to promote accountability could entrench the dominance of an already consolidated industry.

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credible evidence, aligning incentives toward pedagogical effectiveness rather than mere marketability. Third, it equips adoption committees with reliable data, reducing reliance on glossy marketing campaigns, vendor relationships, or political pressures. Finally, it builds on the WWC's authority in promoting evidence-based practice and strengthens the federal evidence infrastructure without triggering the perception of a national curriculum.<sup>254</sup>

### C. *Strengthening the Evidence Infrastructure*

For this labeling system to work, the underlying research must be conducted by publishers and held to strict methodological standards. WWC would not generate the research itself but would act as the neutral arbiter.

In November 2002, the Coalition for Evidence-Based Policy recommended that the ED use the statutory authority in NCLB, backed by the law's definition of scientifically-based research as a preference for randomized trials, to create an infrastructure utilizing the receipt of federal education funds to advance evidence-based policy.<sup>255</sup> That same month, the Coalition sponsored a forum discussing the lessons the education sector could take from medicine, welfare, and various other fields.<sup>256</sup> The forum promoted the use of random assignments to experimental treatment groups and a control group, arguing that this was the only way to draw causal inferences on an observed intervention.<sup>257</sup> This methodology is the same experimental design used for testing drugs—any type of variation caused by “potentially relevant omitted variables is relegated to statistical noise in their models.”<sup>258</sup>

In its 2002-2007 *Strategic Plan*, the ED states that “the field of education operates largely on the basis of ideology and professional consensus.”<sup>259</sup> It goes on to say that the current educational framework is “subject to fads and is incapable of the cumulative progress that follows from

<sup>254</sup> *An Overview of the U.S. Department of Education: What is Not Part of ED's Role?*, U.S. DEP'T OF EDUC. (Jan. 17, 2025), <https://www.ed.gov/about/ed-overview/an-overview-of-the-us-department-of-education—pg-3> [<https://perma.cc/59JQ-C5RF>] (stating that the ED is not authorized to develop curricula).

<sup>255</sup> COAL. FOR EVIDENCE-BASED POL'Y, BRINGING EVIDENCE-DRIVEN PROGRESS TO EDUCATION: A RECOMMENDED STRATEGY FOR THE U.S. DEP'T OF EDUC. (2002), <https://eric.ed.gov/?id=ED474378> [<https://perma.cc/8L7A-L6BE>] (supporting the use of randomized-controlled field trials).

<sup>256</sup> Hall, *supra* note 183, at 173; Kathryn Newcomer, Jeremy L. Hall, Sanjay K. Pandey, Travis Reginal & Ben White, *From Noise to Knowledge: Improving Evidentiary Standards for Program Efficacy to Better Inform Public Policy and Management Decisions*, 83 PUB. ADMIN. REV. 1051 (2023).

<sup>257</sup> Newcomer et al., *supra* note 256, at 1054.

<sup>258</sup> Newcomer et al., *supra* note 256, at 1054.

<sup>259</sup> U.S. DEP'T OF EDUC., STRATEGIC PLAN 2002-2007 61 (2002), <https://www.govinfo.gov/content/pkg/ERIC-ED466025/pdf/ERIC-ED466025.pdf> [<https://perma.cc/WPG3-7YWQ>].

the application of the scientific method.”<sup>260</sup> Empirical methods, like those used for testing drugs, are simply incapable of causal connections since human action cannot be casually determined.<sup>261</sup> Studies attempting to provide casual explanations through the use of multiple methods go ignored when clearinghouses are limited to accepting experimental designs, or “quasi-experiments.”<sup>262</sup>

In a recent study, a heightened set of standards for evidence was applied to a total of forty-nine high-quality studies published by WWC between 2017 and 2022, namely: “(1) perspective on causation; (2) context; (3) equity; (4) fit between questions and methods; and (5) methodological rigor and reflexivity.”<sup>263</sup> The application of these qualitative studies found a strong need to move beyond the “canonical view of validity in research” and that “evidence is not just numbers, and neither are people.”<sup>264</sup>

Publishing companies must utilize effective, non-biased research methods to properly hold themselves accountable. A 2013 WWC report of Reading Recovery failed to flag any negative consequences of the program’s usage—in fact, the report cited Gay Su Pinnell’s own research.<sup>265</sup> Vetted studies currently listed on WWC’s website neither provide information sufficient for districts to understand whether an intervention will work for their population, nor suggest ways to adapt for local contexts.<sup>266</sup> Factors that influence a curriculum’s evaluation may include but are not limited to “geographic location and conditions; political, technological, environmental, and social climate; cultures; economic and historical conditions; language, customs, local norms, and practices; [or] timing.”<sup>267</sup>

Only 30% of the 2017-22 studies reviewed encompassed the perspective of impacted individuals through focus groups or interviews.<sup>268</sup> WWC, as a federally funded agency, must require its evaluations to represent the broader population of the United States. This can be achieved by ensuring that evaluators are held accountable for capturing the complexity of educational experiences and for analyzing variations across diverse

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<sup>260</sup> STRATEGIC PLAN 2002-2007, *supra* note 259, at 61.

<sup>261</sup> Lykins, *supra* note 237 at 502.

<sup>262</sup> Newcomer et al., *supra* note 256, at 1054.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 1068.

<sup>265</sup> Reading Recovery, *supra* note 18.

<sup>266</sup> Newcomer et al., *supra* note 256, at 1054.

<sup>267</sup> *Id.* at 1063; *see also* AM. EVALUATION ASS’N, GUIDING PRINCIPLES (2025), [https://www.eval.org/Portals/0/Docs/AEA\\_289398-18\\_GuidingPrinciples\\_Brochure\\_2.pdf](https://www.eval.org/Portals/0/Docs/AEA_289398-18_GuidingPrinciples_Brochure_2.pdf) [<https://perma.cc/L893-S7KA>].

<sup>268</sup> Newcomer et al., *supra* note 256, at 1063.

populations.<sup>269</sup> This will require educational researchers to adopt mixed-method research designs, using both quantitative and qualitative methods to reflect the pragmatic realities of educational inquiry.<sup>270</sup>

In this model, WWC would act as a regulatory checkpoint. Publishers would carry the burden of proof, while WWC would ensure the integrity of that proof. Adoption committees, now equipped with specialists trained to interpret these evaluations, could make decisions grounded in evidence rather than marketing. The result is a marketplace where claims of “evidence-based” instruction must be substantiated.

### CONCLUSION

American education has no shortage of “accountability” language. Yet when curricular choices fail students, especially in early literacy, the legal system fails to hold anyone accountable. The modest aim of this Note has been to shift responsibility without nationalizing curriculum.

Recent developments in Texas underscore the urgency of making evidence legible.<sup>271</sup> By tying adoption status to districts’ ability to use instructional materials, Texas has heightened the consequences of noncompliance and, in practice, increased the power of a single state’s standards and review decisions to shape national publisher behavior. That shift may improve alignment with state requirements, but it also risks further intensifying the very dynamic this Note identifies: publishers optimizing for the criteria that determine market access, whether or not those criteria track learning outcomes. A disclosure-based evidence label helps correct that drift by ensuring that “approval” is not merely a proxy for standards coverage, but a decision informed by transparent, independently assessed proof of effectiveness.

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<sup>269</sup> For example, one evaluation paired quantitative results with interviews of key stakeholders—students, parents, staff, and administrators—to assess how the model was implemented in practice. *Id.* at 1063.

<sup>270</sup> *Id.* at 1064.

<sup>271</sup> *See supra* note 213.

