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The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda

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THE FEDERAL NO CHILD LEFT BEHIND ACT AND THE POST-DESEGREGATION CIVIL RIGHTS AGENDA

JAMES S. LIEBMAN* AND CHARLES F. SABEL** ***

Despite many deficiencies, the No Child Left Behind Act ("NCLB" or "Act") extends to the federal level and diffuses to the states an innovative system of publicly monitored decentralization of school governance known as the "New Accountability." This Article argues that, given background changes in the understanding of effective classroom teaching, accountability systems of the type imposed by the NCLB can enable willing school districts to build the capacity for school-level reform upon which the ultimate improvement of public schooling depends. It claims further that activists can accelerate the reforms and ensure respect for the requirements of racial and economic fairness by using the accountability handholds the NCLB provides as tools for a new civil rights strategy. By officially documenting racially disparate impacts, and by distinguishing similarly situated schools and districts that reduce these disparities from those that do not, the Act authoritatively defines many of the worst existing disparities as avoidable and, therefore, invidious. The Act thus can trigger just the kind of locally, experientially, and consensually generated standards whose absence in the past has kept courts from carrying through with their initial commitments to desegregated, educationally effective schools.

We argue that these emergent standards open new possibilities to courts adjudicating the constitutional acceptability of public schools in the light of the NCLB. Rather than following Brown v. Board of Education in attempting by themselves to set the rules

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for constitutionally sufficient behavior, courts can follow the innovative decisions of, for example, the Texas Supreme Court in developing a form of judicial review through which judges superintend articulation of justiciable standards by those most directly concerned with the reconstruction of classrooms, schools, and school districts. This new form of judicial review could supplant *Brown* as a new pattern for judicial protection of positive, social rights and for the judicial supervision of complex institutional reform that due respect for such rights may require.

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INTRODUCTION

In declaring state-mandated segregation of the races in schools unconstitutional, *Brown v. Board of Education*¹ transformed American schools and established the judiciary as a principal protector of the constitutional rights of minorities bereft of political defense.² In the manner of all fundamental Supreme Court decisions, *Brown* may be considered a “soft” constitutional amendment or a quasi-national consent decree. A central premise was that, in the words of one current commentator, “public education is a privilege of American citizenship.”³ This conclusion followed from the principle

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

2. For a recent discussion of *Brown*'s importance, see Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION* 3, 3–25 (Jack M. Balkin ed., 2001) [hereinafter *WHAT BROWN SHOULD HAVE SAID*] (discussing *Brown*'s status as a judicial “icon”).

3. Bruce Ackerman, *Ackerman, J., concurring*, in *WHAT BROWN SHOULD HAVE SAID*, *supra* note 2, at 100, 101. Among the many commentators who have interpreted

“of equality of membership in the civil community,” in the words of another.⁴

If *Brown* may be seen as having clarified the Constitution, then the recently enacted No Child Left Behind Act of 2001 (“NCLB” or “Act”),⁵ and the national education reform movement and the judicial innovations from which it grows, may be seen as clarifying *Brown* in two closely related ways. First, the NCLB emphatically specifies that American citizenship entails not just the privilege of access to public schools on formally equal terms but also the privilege of an adequate education.⁶ Second, it requires that the definition of adequacy be set and periodically revised through a process organized by the states and the engaged actors (parents, teachers, principals,

Brown to recognize a fundamental interest in a public education that, in the wake of segregation, the states could provide to blacks students only by giving them the same education as white students are BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 246–47 (1980); AMY GUTMANN, DEMOCRATIC EDUCATION 161–63 (1987); JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 172–73 (1984); Derrick Bell, *Brown and the Interest-Convergence Dilemma*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 90, 98–101 (Derrick Bell ed., 1980) [hereinafter SHADES OF BROWN]; Robert Carter, *A Reassessment of Brown v. Board*, in SHADES OF BROWN, *supra*, at 20, 26–27; Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 588–89 (1965); Charles Lawrence, “One More River to Cross”—Recognizing the Real Injury in *Brown*: A Prerequisite to Reshaping New Remedies, in SHADES OF BROWN, *supra*, at 48, 51–52; Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1133 (1989); Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1084–85 (1984).

4. Frank I. Michelman, *Michelman, J., concurring in part and concurring in the judgment*, in WHAT BROWN SHOULD HAVE SAID, *supra* note 2, at 124, 124. Commentators who have interpreted *Brown* to identify “equal citizenship” as a core constitutional principle include C. Edwin Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1030–48 (1980), Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 (1960), Paul Brest, *The Supreme Court, 1975 Term: Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7, 34–36, 42 (1976), Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 729 (1986), and Kenneth L. Karst, *The Supreme Court, 1976 Term: Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5–6 (1977).

5. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (to be codified at 20 U.S.C. §§ 6301–6578). The NCLB was introduced by the Bush Administration and adopted by Congress in 2001 with bipartisan support. See Ronald Brownstein, *Bush Moves to Reposition Republicans on Education*, L.A. TIMES, Jan. 24, 2001, at A12.

6. See *infra* notes 25–86 and accompanying text (discussing the understanding of an adequate education that underlies the New Accountability movement in American public education).

and superintendents) and subject to continuing, comparative review by the federal government and the public at large.⁷

Because the NCLB, along with many other deficiencies,⁸ provides no real enforcement mechanism,⁹ it may well fall to the courts, as in the period following *Brown*, to enforce the many obligations of school officials that are rendered justiciable by the Act. To do so, however, the courts will have to abandon the practice, adopted in the wake of *Brown* and with limited success, of setting rules for constitutionally acceptable behavior. Instead, following the lead of recently innovative state supreme courts and the logic of the NCLB itself, other courts will have to develop a form of judicial review in which they superintend the articulation of justiciable standards by those most directly concerned with the reconstruction of classrooms, schools, and school districts.¹⁰ The Act triggers this process by requiring school officials routinely to document racially disparate impacts and to distinguish similarly situated schools and districts that reduce these disparities from those that do not. Doing so authoritatively defines many of the worst disparities as avoidable and, therefore, invidious.¹¹ The NCLB thus encourages the development of just the kind of locally, experientially, and consensually generated standards whose absence in the past has discouraged courts from carrying through with their initial commitments to desegregated, educationally effective schools.¹² For

7. See *infra* notes 25–86 and accompanying text (describing how the meaning of an adequate education is refined by the governance and decisionmaking mechanisms that characterize the New Accountability movement).

8. See *infra* notes 76–86 and accompanying text (discussing the weakness in the NCLB). See generally CITIZENS' COMM'N ON CIVIL RIGHTS, ANALYSIS OF PRESIDENT GEORGE W. BUSH'S EDUCATION PLAN 7–17 (2001) (criticizing several aspects of President Bush's education proposals as limiting educational opportunities), available at <http://www.cccr.org/BushPlan.pdf>.

9. See *infra* notes 76–86, 103 and accompanying text (detailing weaknesses in the NCLB, particularly in its enforcement mechanisms).

10. See *infra* notes 44–57 and accompanying text (discussing the Texas Supreme Court's innovative role in the development of school reform standards in that state).

11. See *infra* notes 25–86, 144–68 and accompanying text (describing the reformed governance systems contemplated by the NCLB).

12. See generally Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 1, 1–38 (Jay P. Heubert ed., 1999) [hereinafter LAW AND SCHOOL REFORM] (documenting the recent unwillingness of the courts to pursue desegregation policies to the conclusions compelled by their underlying principles); Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623 (2003) (same). For evidence of the courts' debilitating concerns that court-ordered desegregation interferes with local control, requires action beyond the educational expertise of judges and even educators themselves,

closely related reasons, this Article argues, the NCLB can also serve activists as the foundation for a new civil rights strategy that seeks racial justice directly through increasingly equitable educational outcomes, rather than indirectly through racial balance.¹³

Part I of this Article describes the broad movement for school accountability that underpins the NCLB and explains why the Act removes two jurisprudential obstacles to court engagement with educational reform. Part II presents the relevant features of the NCLB itself. Part III addresses the objections that the NCLB surreptitiously opens the door to privatization of currently public schools or to deregulation of the controls on federal funding for education. The privatization worry, we claim, overlooks the

and lacks public support, see *Missouri v. Jenkins*, 495 U.S. 33, 69–70 (1990) (Kennedy, J., concurring in part and dissenting in part) (cautioning against transforming desegregation into a hands-on structural remedy); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 42–105 (1991) (arguing that courts lack the public support and enforcement capacity needed to bring about meaningful legal and institutional reform); Donald R. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1287 (arguing that courts lack the expertise and control over the range of activities competing for public funding and government attention that are needed to achieve effective institutional reform); *infra* notes 52–55 and accompanying text (discussing the Supreme Court’s doubts about federal district courts’ capacity to manage broadscale reform of school systems).

13. See *infra* notes 128–62 and accompanying text. The NCLB and its associated reforms also invite school personnel and activists sympathetic to desegregation to demonstrate that schools and districts with mixed populations do better by desegregating their classrooms than similar but segregated districts. Desegregation would thereby set the benchmark that other strategies must reach. See, e.g., CITIZENS’ COMM’N ON CIVIL RIGHTS, *WILL TITLE I LEAVE NO CHILD BEHIND?* 42–45 (2002) (noting prospects for parents and advocates to use the New Accountability as a lever for requiring districts and schools to improve the educational outcomes of poor and minority children), available at http://www.temple.edu/PPP/rfd/Will_TitleI_Leave_No_Child_Behind.pdf; James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE (forthcoming June 2003) (manuscript at 98–99, 109–12, on file with the North Carolina Law Review) (discussing several initiatives, at least partly focused on desegregation, proposed by civil rights and community activists that were triggered by and relied upon data and comparisons generated by New Accountability regimes in Kentucky and nationwide, which aim to close achievement gaps between white and black and male and female students); William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751, 1755–62 (2003) (suggesting that civil rights groups use provisions of the NCLB permitting children in failing public schools to transfer to other public schools as a mechanism to achieve desegregation and educational improvement on behalf of poor and minority children); Ann Majestic, *Address at the North Carolina Law Review Symposium: The Resegregation of Southern Schools?* (Aug. 30, 2002) (describing a comprehensive plan in operation in the Wake County (North Carolina) School District to desegregate students on the basis of economic status and test scores in order to improve the educational outcomes of poor and minority children).

enormous costs of shortchanging the public school system, while the deregulatory worry overlooks the possibility of using the NCLB's disclosure requirements to control local discretion.

Parts IV and V consider the additional objections that the NCLB overestimates the capacity of states and schools to meet the demands the Act places on them, and that the Act diverts public attention from the goals of the Civil Rights Movement. In Part IV, we argue to the contrary that experience to date suggests that state and school capacity can be built simultaneously with the reforms the NCLB contemplates and with the help of those reforms. Part V argues that, far from diverting attention from a vindication of civil rights, the Act provides an opportunity to revivify and give new direction to a series of community organizing and litigation strategies pioneered by the Civil Rights Movement. We conclude that the NCLB affords an unexpected and welcome second chance to respond to the claim of some prominent civil rights advocates that the Movement subordinated the struggle for better educational opportunities for minorities to an effort to racially balance the schools.

I. THE NEW ACCOUNTABILITY

The NCLB is informed by an innovative system of publicly monitored decentralization of school governance,¹⁴ crystallized in Clinton Administration initiatives in 1994,¹⁵ that is commonly referred to as the "New Accountability."¹⁶ The New Accountability resulted

14. See generally CITIZENS' COMM'N ON CIVIL RIGHTS, *supra* note 13, at 24–46 (describing the basic structure and content of the "No Child Left Behind" legislation).

15. *Id.*; see, e.g., MICHAEL COHEN, THE ASPEN INST., IMPLEMENTING TITLE I STANDARDS, ASSESSMENTS AND ACCOUNTABILITY: LESSONS FROM THE PAST, CHALLENGES FOR THE FUTURE (2002) (discussing implementation of the 1994 legislation and its relationship to the "No Child Left Behind" legislation), available at <http://www.edexcellence.net/NCLBconference/Cohen.pdf>; see also Paul Weckstein, *Social Reform and Enforceable Rights to Quality Education*, in LAW AND SCHOOL REFORM, *supra* note 12, at 306, 308–10 (explaining the framework for school reform adopted by Congress in 1994).

16. See SUSAN H. FUHRMAN, THE NEW ACCOUNTABILITY (Consortium for Policy Research in Educ., Pol'y Briefs No. RB-27, 1999); DIANE MASSELL, STATE STRATEGIES FOR BUILDING CAPACITY IN EDUCATION: PROGRESS AND CONTINUING CHALLENGES (Consortium for Policy Research in Educ., Res. Rep. Series No. RR-41, 1998); DIANE MASSELL ET AL., PERSISTENCE AND CHANGE: STANDARDS-BASED SYSTEMIC REFORM IN NINE STATES (Consortium for Policy Research in Educ., Pol'y Briefs No. RB-21, 1997); New American Schools' Standard of Quality for Design-Based Assistance (Nov. 1999) (draft, on file with the North Carolina Law Review) (setting out standards that are followed by a nonprofit school improvement organization that is aligned with the New Accountability movement and providing assistance to reforming schools). We sketch out the attributes of the New Accountability below, *infra* notes 17–57 and accompanying text, and describe it in greater detail in Liebman & Sabel, *supra* note 13 (manuscript at 59–99).

from the mutual transformation of two apparently contradictory clusters of piecemeal reforms.¹⁷ The first cluster—minimum standards and high-stakes testing—went in the direction of increased centralization, even nationalization, of the public school system. Its central element was a drive to set minimum standards for school and student performance at the state and federal levels, to rank pupils and schools accordingly, to deny promotion and diplomas to persistently failing students, and to reconstitute persistently failing schools.¹⁸ Advocates of such high-stakes testing hoped that the penalties of failure would induce both individuals and institutions to improve their performance.¹⁹

17. See, e.g., JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* 194–201 (1990) (claiming that the contradictory impulses to improve school bureaucracies doom reform efforts within public educational institutions); Diane Ravitch & Joseph P. Viteritti, *Introduction to CITY SCHOOLS: LESSONS FROM NEW YORK* 1, 8 (Diane Ravitch & Joseph P. Viteritti eds., 2000) [hereinafter *CITY SCHOOLS*] (noting the same contradiction between these same two impulses in the context of particular reforms in New York City public schools).

18. See WILLIAM H. CLUNE ET AL., *THE IMPLEMENTATION AND EFFECTS OF HIGH SCHOOL GRADUATION REQUIREMENTS: FIRST STEPS TOWARD CURRICULAR REFORM* (Consortium for Policy Research in Educ., Res. Rep. Series No. RR-011, 1989) (describing state legislative and administrative attempts in the 1980s to reform public educational systems through high-stakes testing and more demanding curricula); NAT'L RESEARCH COUNCIL, *HIGH STAKES TESTING FOR TRACKING, PROMOTION, AND GRADUATION* 15 (Jay P. Heubert & Robert M. Hauser eds., 1999) (assessing the role of standardized tests in reforming schools); *THE EDUCATIONAL REFORM MOVEMENT OF THE 1980S: PERSPECTIVES AND CASES* (Joseph Murphy ed., 1990) (collecting articles addressing numerous aspects of educational reform movement of the 1980s); Jennifer Hochschild & Bridget Scott, *The Polls-Trends, Governance and Reform of Public Education in the United States*, 62 *PUB. OPINION Q.* 79, 87 (1998) (analyzing recent trends in American educational reform); Richard J. Murnane & Frank Levy, *Will Standards-Based Reforms Improve the Education of Students of Color?*, 54 *NAT'L TAX J.* 401, 412–14 (2001) (reaching a cautiously optimistic conclusion about the ability of standards-based reforms to change incentives and trigger meaningful improvements in American public education); Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 *COLUM. L. REV.* 1830, 1853–64 (1999) (proposing reform strategy based on states' power to disestablish entire school districts); Chris Pipho, *Tracking the Reforms, Part 5: Testing—Can It Measure the Success of the Reform Movement?*, *EDUC. WK.*, May 22, 1985, at 19 (pointing out that “[n]early every large education reform effort of the past few years has either mandated a new form of testing or expanded uses of existing testing”).

19. By high-stakes tests, which are to be distinguished from what we are calling the New Accountability, we mean “tests that states and school districts use in deciding whether individual students will receive high school diplomas or be promoted to the next grade.” Jay P. Heubert, *High-Stakes Testing in a Changing Environment: Disparate Impact, Opportunity to Learn, and Current Legal Protections* 1 (2002) (unpublished manuscript, on file with the North Carolina Law Review) (taking a nuanced view of standardized testing as potentially beneficial if used diagnostically and in connection with other educational improvements but as harmful if high-stakes consequences are emphasized). For a careful examination of high-stakes testing regimes, see Jay P.

The second cluster—the professionalization, site-based management, and chartering of schools—went in the direction of a new localism. Its key element was the devolution of authority for classroom instruction away from state education administrations and toward districts, principals, teachers (especially those professionally mortified by the rigidities of the traditional system), and sometimes parents. Other elements included increased willingness by educational authorities to allow teachers and parents to create new schools, particularly small and specialized ones, within the public system, and to allow parents to send their children to schools outside the assigned catchment area.²⁰

As these two sets of reforms intersected, they changed in complementary ways. High-stakes testing, it became clear to many close observers, was not a reliable measure of the performance of either individual pupils or of institutions. Often, the incentives created were perverse—teaching to the test, or excluding from the testing pool those vulnerable students most in need of help—and poor and minority students were penalized for the failings of institutions over which the students and their parents had no substantial control.²¹ Above all, the results of the test provided little

Heubert, *High-Stakes Testing and Civil Rights: Standards of Appropriate Test Use and a Strategy for Enforcing Them*, in *RAISING STANDARDS OR RAISING BARRIERS?: INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION* 179 (Gary Orfield & Mindy L. Kornhaber eds., 2001) [hereinafter *RAISING STANDARDS OR BARRIERS*].

20. See WILLIAM H. CLUNE & PAULA A. WHITE, *SCHOOL-BASED MANAGEMENT: INSTITUTIONAL VARIATION, IMPLEMENTATION, AND ISSUES FOR FURTHER RESEARCH* 1–3 (Consortium for Policy Research in Educ., Res. Rep. Series No. RR-008, 1988); PAUL T. HILL ET AL., *HIGH SCHOOLS WITH CHARACTER* 57–82 (1990); PRISCILLA WOHLSTETTER & NOELLE GRIFFIN, *CREATING AND SUSTAINING LEARNING COMMUNITIES: EARLY LESSONS FROM CHARTER SCHOOLS* 4–8 (Consortium for Policy Research in Educ., Occasional Paper Series No. OP-03, 1998); Jane L. David, *School-Based Decision Making: Kentucky's Test of Decentralization*, 75 *PHI DELTA KAPPAN* 706, 706–12 (1994); Pearl Rock Kane, *The Difference Between Charter Schools and Charterlike Schools*, in *CITY SCHOOLS*, *supra* note 17, at 65; Tom Loveless & Claudia Jasin, *Starting from Scratch: Political and Organizational Challenges Facing Charter Schools*, 34 *EDUC. ADMIN. Q.* 9, 14–15 (1998); Molly O'Brien, *Free at Last? Charter Schools and the "Deregulated" Curriculum*, 34 *AKRON L. REV.* 137, 152–74 (2000); Sharon Elder, *The Power of the Parent*, *YALE MAG.*, Oct. 1990, at 50, 53.

21. See ALFIE KOHN, *THE CASE AGAINST STANDARDIZED TESTING: RAISING THE SCORES, RUINING THE SCHOOLS* 40 (2000); LINDA M. MCNEIL, *CONTRADICTIONS OF SCHOOL REFORM: EDUCATIONAL COSTS OF STANDARDIZED TESTING* 153–271 (2000); NAT'L RESEARCH COUNCIL, *supra* note 18, at 178–79; SUSAN OHANIAN, *ONE SIZE FITS FEW: THE FOLLY OF EDUCATIONAL STANDARDS* 1–127 (1999); John Jacob Cannell, *Nationally Normed Elementary Achievement Testing in America's Public Schools: How All 50 States Are Above the National Average*, 7 *EDUC. MEASUREMENT: ISSUES & PRAC.* 5, 6–9 (1988); M. Gail Jones et al., *The Impact of High-Stakes Testing on Teachers and Students in North Carolina*, 81 *PHI DELTA KAPPAN* 199, 200–02 (1999); Linda McNeil &

or no indication of how to reorganize ineffective schools or to aid those students who did not measure up. In response to these criticisms, a new class of diagnostic standards emerged with the express aim of using tests both to direct local reform and to orient pedagogic attention to individual students.²²

The new localism contributed to the development of these diagnostic standards and pioneered methods of using disaggregated testing data as a tool of self-assessment.²³ In so doing, however, the movement for professional regeneration and control had to give up its initial antipathy to assessments and acknowledge the need for professionals to be accountable for ensuring not just that teachers taught well but that students (especially poor and minority students) actually learned. This insight led in turn to the recognition that accountable professionalism required new forms of peer monitoring and transparent outcome measures.²⁴

The New Accountability emerged from this joinder of diagnostic standards and accountable professional pedagogy.²⁵ In the best cases, this recombination of reform has resulted in a system of education that turns the traditional school topsy-turvy. The teacher's job is no longer to execute instructions set at the state or district level, but rather to collaborate with colleagues in monitoring the learning strategies of individual students and the teaching strategies of peers,

Angela Valenzuela, *The Harmful Impact of the TAAS System of Testing in Texas: Beneath the Accountability Rhetoric*, in *RAISING STANDARDS OR BARRIERS*, *supra* note 19, at 127, 129–50; D. Monty Neill & Noe J. Medina, *Standardized Testing: Harmful to Educational Health*, 70 *PHI DELTA KAPPAN* 688, 689–92 (1989).

22. See MASSELL ET AL., *supra* note 16, at 2–9 (providing an overview of the standards-based reform movement and the drift from punitive to diagnostic measures). For a helpful critique of performance standards used in isolation and a guide to using them diagnostically, see *COMM. ON TITLE I TESTING AND ASSESSMENT*, NATIONAL ACADEMY OF SCIENCES, *TESTING, TEACHING AND LEARNING: A GUIDE FOR STATES AND SCHOOL DISTRICTS* 22–101 (Richard F. Elmore & Robert Rothman eds., 1999); see also Liebman & Sabel, *supra* note 13 (manuscript at 39–40) (discussing the difference between diagnostic and punitive standards).

23. See *infra* notes 26–28 (detailing the role of self-assessment in locally focused educational reforms).

24. See RICHARD F. ELMORE & DEANNA BURNEY, *INVESTING IN TEACHER LEARNING: STAFF DEVELOPMENT AND INSTRUCTIONAL IMPROVEMENT IN COMMUNITY SCHOOL DISTRICT #2*, NEW YORK CITY 24 (1997) (quoting an interview with Anthony Alvarado, Superintendent of Schools, District 2, New York City, Nov. 15, 1995); KATE MALOY, *BUILDING A LEARNING COMMUNITY: THE STORY OF NEW YORK CITY COMMUNITY SCHOOL DISTRICT #2* 15–16 (May 1998), available at <http://www.lrdc.pitt.edu/hplc/publications/building%20portrait.pdf>; Liebman & Sabel, *supra* note 13 (manuscript at 41–59).

25. See sources cited *supra* notes 16, 22.

and to help correct difficulties as they arise.²⁶ The principal's job is to assure that classrooms and teaching can be organized to facilitate this collaborative monitoring of students and peers.²⁷ The superintendent's responsibility is to provide the conditions that principals need to succeed at that task.²⁸ The state, finally, stops writing detailed rules and regulations for the operation of schools and districts. Instead, on the one hand, the state sets and periodically revises school standards and the means for assessing them. On the other hand, the state aids schools that are struggling to improve and when necessary reconstitutes those that persistently prove unable to do so.²⁹

The outward face of the New Accountability is a reporting system in which each district and school publicizes outcomes each year on shared measures or metrics, not only on average for the entire institution, but also disaggregated to highlight the outcomes of its poor, African-American, limited English proficiency, and other categories of pupils.³⁰ Measures of student outcomes are

26. See RICHARD F. ELMORE & DEANNA BURNEY, CONTINUOUS IMPROVEMENT IN COMMUNITY DISTRICT #2, NEW YORK CITY 6-9 (1998) [hereinafter ELMORE & BURNEY, CONTINUOUS IMPROVEMENT]; RICHARD F. ELMORE & DEANNA BURNEY, SCHOOL VARIATION AND SYSTEMIC INSTRUCTIONAL IMPROVEMENT IN COMMUNITY SCHOOL DISTRICT #2, NEW YORK CITY 3 (1997) [hereinafter ELMORE & BURNEY, SCHOOL VARIATION].

27. See RICHARD F. ELMORE & DEANNA BURNEY, LEADERSHIP AND LEARNING: PRINCIPAL RECRUITMENT, INDUCTION AND INSTRUCTIONAL LEADERSHIP IN COMMUNITY SCHOOL DISTRICT #2, NEW YORK CITY 16-20 (Jan. 2000); ELAINE FINK & LAUREN B. RESNICK, DEVELOPING PRINCIPALS AS INSTRUCTIONAL LEADERS 8-15 (2000); INST. FOR EDUC. LEADERSHIP, LEADERSHIP FOR STUDENT LEARNING: REINVENTING THE PRINCIPALSHIP 2-3 (2000); Richard F. Elmore, *Building a New Structure for School Leadership*, AM. EDUCATOR, Winter 1999-2000, at 10-13, available at http://www.aft.org/american_educator/winter99-00/NewStructureWint99_00.pdf.

28. See ELMORE & BURNEY, *supra* note 24, at 23-26 (discussing the new role and the need for district-level support for principals); FINK & RESNICK, *supra* note 27, at 5-22 (describing the support central administrative staff provide to principals in effectively reforming schools); MARY KAY STEIN ET AL., OBSERVATIONS, CONVERSATIONS, AND NEGOTIATIONS: ADMINISTRATOR SUPPORT OF LITERACY PRACTICE 6-7 (Nov. 1998); Anthony Alvarado, *Professional Development Is the Job*, AM. EDUCATOR, Winter 1998, at http://www.aft.org/american_educator/winter98/ProfessionalDevelopment.html (on file with the North Carolina Law Review).

29. For a number of examples of state-level educational activities of this sort, see Liebman & Sabel, *supra* note 13 (manuscript at 70-73, 89-96).

30. Texas's accountability system provides an example of the reporting system characteristics of the New Accountability that we discuss here. TEX. EDUC. CODE ANN. §§ 39.021-.131 (Vernon 1996); see OFFICE OF POLICY PLANNING & RESEARCH, TEXAS EDUCATION AGENCY, 2000 ACCOUNTABILITY MANUAL: THE 2000 ACCOUNTABILITY RATING SYSTEM FOR TEXAS PUBLIC SCHOOLS AND SCHOOL DISTRICTS § VII (2000), at <http://www.tea.state.tx.us/perfreport/account/2000/manual/sec07.html> (on file with the North Carolina Law Review) (describing the operation of the Texas statutory and

continuously revised based on how well or poorly they align with successful learning, teaching, and organizing. Each district's and school's strengths and weaknesses are diagnosed by comparing changes in outcomes among its target populations to improvements among those populations in all other districts and schools in the state and especially those that are most economically and ethnically like themselves.

If districts or schools and their various populations do not progress at rates consistent with, or better than, the rates achieved at demographically and economically similar institutions, improvement plans are devised. Typically, these plans are developed by professionals working in teams, with input from parents and peer advisors from coordinate districts and schools. The goal is to identify underutilized strategies, including ones that have succeeded in similar institutions elsewhere, and to guide efforts to use them effectively. Effectiveness is monitored in the same data-driven, outcome-focused way. If failure recurs, plans are changed based on what works elsewhere, under threat of sanction if failure persists.

Notably, the emergent structure is not a hybrid combining elements of the two types of governance structures that are often assumed to exhaust the available options: traditional hierarchy (in the public sphere, bureaucracy) and economic or political markets. In a hierarchy, there is a clear distinction between the superiors who set the rules and the subordinates who execute them.³¹ In school systems reformed on the principles of the New Accountability, rules are in effect provisional frameworks for action that are corrected at the urging of "subordinates" in light of their experience "implementing" those frameworks: ends are revised in light of means and vice versa.³² Markets in theory know neither superiors nor subordinates. They are governed by purely voluntary choice. Sellers adjust their behavior in response to buyers' decisions to purchase from them or their

administrative system by which state and local officials and the public monitor improvement at, and among populations at, schools and districts and intervene with improvement plans, intensified monitoring, and ultimately, takeovers if progress is not made). For additional discussion of Texas's accountability scheme and those in other states and school districts, see Liebman & Sabel, *supra* note 13 (manuscript at 70–73, 89–96).

31. See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 329–41 (A. Henderson & Talcott Parsons trans., 1947) (describing the efficacy of legal arrangements resting on the principle that one official has the authority to establish a rule that other members of the bureaucratic administrative staff must obey).

32. For examples, see Liebman & Sabel, *supra* note 13 (manuscript at 47–59, 73–78).

competitors; elected officials respond to the electorate's actual and anticipated choices between themselves and opposing candidates.

In schools that are reforming along New Accountability lines, on the contrary, service providers at all levels respond to continuing, publicly and governmentally facilitated comparisons of their performance with that of their peers, where the dimensions of the comparison and the definition of "peer" are themselves subject to public and governmental discussion and revision.³³ In recent writings, we and other authors argue that the ongoing questioning of institutional routines that results from the continuing revision of means and ends in light of comparative assessment of performance is best understood as an application of philosophical pragmatism.³⁴ This "continuous improvement" approach to governing institutions is observable today in contexts as varied as environmental regulation, community policing, and drug courts, where the problems for public action have much in common with the problems of school reform.³⁵

33. See, e.g., MASSELL ET AL., *supra* note 16, at 7 (describing a process through which local school districts are disciplined by comparisons of their performance to that of other districts on state and national standards); THE CHARLES A. DANA CTR., UNIV. OF TEX., EQUITY-DRIVEN ACHIEVEMENT-FOCUSED SCHOOL DISTRICTS: A REPORT ON SYSTEM SCHOOL SUCCESS IN FOUR TEXAS SCHOOL DISTRICTS SERVING DIVERSE STUDENT POPULATIONS 18–36 (2000) (linking rapidly improving outcomes of poor and minority students in four Texas school districts to the districts' utilization of governance techniques associated with New Accountability). For additional examples, see Liebman & Sabel, *supra* note 13 (manuscript at 45–59, 73–78).

34. Susan Helper, John Paul MacDuffie & Charles Sabel, *Pragmatic Collaborations: Advancing Knowledge While Controlling Opportunism*, 9 INDUS. & CORP. CHANGE 443, 443–83 (2000); Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 137, 138–59 (Neil J. Smelser & Richard Swedberg eds., 1994).

35. See generally ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS? (2001) (advocating a system of third-party monitored self-monitoring of overseas working conditions by corporations operating global supply chains); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (describing the potential role of democratic experimentalism in resolving difficult questions of constitutional interpretation); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Experimentalist Government*, 53 VAND. L. REV. 831 (2000) (discussing recent innovations in the use of court-monitored treatment plans for drug-addicted offenders); Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001) (advocating a system of monitored information collection, sharing, and comparison among police departments as a means of combating racial profiling); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001) [hereinafter Karkkainen, *Information as Environmental Regulation*] (championing the systematic use of performance monitoring and benchmarking as regulatory tools in the environment and other areas); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Environmental Performance*, 102 COLUM. L. REV. 903 (2002) (proposing that NEPA be retooled as a mechanism for progressively redefining government projects to

This kind of stylization reeks of utopianism. Its vision of a fully diagnostic and continuously self-correcting system of public education ignores the persistent enthusiasm of some states for high-stakes testing; the scattered, but ferociously defended, claim that the public schools are beyond repair and have to be privatized; and the unavoidable reality that the nation as a whole is far from the ideal adumbrated in the New Accountability.³⁶ The account also ignores a host of more specific objections to the stated and suspected goals of the New Accountability and doubts about the capacity of educational institutions to realize those goals—objections and doubts to which Parts III through V of this Article respond. But based on our close observation of the New Accountability at work in Texas, Kentucky, and Community District 2 in New York City—observations we describe in detail in a companion study³⁷—we are convinced that this method of organizing schools offers the best hope of improved educational outcomes for those most neglected by the current school system. We believe the New Accountability provides this hope both directly, by triggering a race to the top in educational performance within the school system, and indirectly, by facilitating political and legal redress from outside the system for those schools and populations that do not benefit initially from that race to improve.

Four findings from our companion study are relevant here. First, when schools are organized to use the results of diagnostic tests to adjust teaching to individual needs, the performance gaps between poor and minority students and white and affluent ones become a matter of explicit public concern and tend to diminish.³⁸

moderate their environmental effects to the extent currently possible); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997) (exploring the uses of community-based planning and monitoring as a method of managing police discretion); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (advocating a multitiered and interactive “regulatory” framework for use by trial courts in managing the compliance process in employment discrimination lawsuits). For a general overview of this literature, see WILLIAM H. SIMON, *SOLVING PROBLEMS V. CLAIMING RIGHTS: THE PRAGMATIST CHALLENGE TO LEGAL LIBERALISM* (forthcoming 2003) (describing a new school of pragmatist thought that advocates carefully monitored problem-solving, instead of the announcement and enforcement of fixed entitlements, as the most effective means of reforming social institutions and responding to the needs of disadvantaged communities).

36. See *infra* notes 104–09 and accompanying text (noting gaps in the diffusion and enforcement of the New Accountability).

37. See Liebman & Sabel, *supra* note 13.

38. For examples from Kentucky, New York, Texas, and elsewhere, see *id.* (manuscript at 54–57, 78–81); sources cited *supra* note 33.

Second, the combination of organizational and classroom-level reforms that constitute the New Accountability can arise in widely different contexts. For example, New York City's District 2 began as a movement of professional reform and was gradually transformed through its encounters with the (changing) standards movement.³⁹ Texas began with a governance reform focused on the kind of reporting system just described. Within this framework, lead districts found ways to reorganize schools so as to facilitate the kinds of instructional practices that had emerged in New York City's District 2.⁴⁰ Kentucky began with a statewide governance system deeply informed by the movement for diagnostic standards and is developing school-level practices that resemble those in District 2 and a reporting system that resembles the one in Texas.⁴¹

Third, initial defects in governance structures and classroom practices have thus far proven to be addressable within the deliberately open framework created by the initial round of reforms.⁴² Sometimes such correction has proceeded at the insistence of a new type of public advocacy group. These groups are defined by the novel ways in which they fuse the grassroots mobilization characteristic of traditional social movements and community-based organizations

39. See, e.g., sources cited *supra* notes 24, 26, 27 (describing the content and evidence of the success of the District 2 reforms).

40. Liebman & Sabel, *supra* note 13 (manuscript at 62–70); Julissa Reynoso & Tiffany Wong, Education Reform: A Case Study of Texas 1–2 (Apr. 2000) (unpublished manuscript, on file with the North Carolina Law Review).

41. Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 497–98 (1999); Liebman & Sabel, *supra* note 13 (manuscript at 81–89); Jonathan Shafter & Alexander Greenawalt, Education Reform in Kentucky 9–31 (Apr. 12, 2000) (unpublished research paper, Columbia Law School) (on file with the North Carolina Law Review). See generally RONALD G. DOVE, JR., ACORNS IN A MOUNTAIN POOL: THE ROLE OF LITIGATION, LAW AND LAWYERS IN KENTUCKY EDUCATION REFORM (1991) (describing the litigation campaign that contributed to educational reform in Kentucky); Jacob E. Adams, Jr., *School Finance Reform and Systemic School Change: Reconstituting Kentucky's Public Schools*, 18 J. EDUC. FIN. 318 (1993) (reporting the history of Kentucky's systematic education reform); Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE 136, 155–57 (Helen F. Ladd et al. eds., 1999) (explaining the politics of school finance in Kentucky); Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARV. J. ON LEGIS. 367 (1991) (relating the history of legal and community organizations that culminated in the comprehensive revision of the Kentucky public school system); Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984–1995*, 26 LAW & SOC. INQUIRY 631, 646–69 (2001) (describing the interaction of political mobilization and litigation in achieving educational reform in Kentucky).

42. See Liebman & Sabel, *supra* note 13 (manuscript at 47–59, 73–78) (providing a number of examples of this process from New York and Texas).

with the close involvement in the details of institutional reorganization that in the past has been confined to professional reform movements.⁴³

Fourth, the creation of New Accountability regimes has often gone hand in hand with the gradual consolidation of a new relationship between courts faced with educational-reform lawsuits, standards, and institutional practices. This relation promises to remove longstanding obstacles to judicial vindication of civil rights in the context of complex, comprehensive institutional reform. The new relationship and its innovative potential are clearest in Texas. A finance-equity suit requesting redistribution from rich districts to poor ones was presented to the Supreme Court of Texas in 1992.⁴⁴ After a torturous to-and-fro, the court eventually required the legislature to establish a system of student assessment geared to

43. For examples of educational reform initiatives undertaken by these new public advocacy groups, see CITIZENS' COMM'N ON CIVIL RIGHTS, *supra* note 8; ANNE C. LEWIS, EDNA MCCONNELL CLARK FOUNDATION, THE COMMUNITY ACCOUNTABILITY TEAM IN LOUISVILLE: WAKING A SLEEPING GIANT (Aug. 2002), available at http://www.prichardcommittee.org/pubs/cat/sleeping_giant.pdf; KAVITHA MEDIRATTA & NORM FRUCHTER, N.Y. UNIV. WITH CAL. TOMORROW, DESIGNS FOR CHANGE & SOUTHERN ECHO, MAPPING THE FIELD OF ORGANIZING FOR SCHOOL IMPROVEMENT: A REPORT ON EDUCATION ORGANIZING IN BALTIMORE, CHICAGO, LOS ANGELES, THE MISSISSIPPI DELTA, NEW YORK CITY, PHILADELPHIA, SAN FRANCISCO AND WASHINGTON D.C. (Aug. 2001), at http://www.nyu.edu/iesp/publications/cip/mapping/mapping_final_report.pdf; RAISING STANDARDS, CLOSING GAPS, FINDINGS FROM THE CITIZENS' COMMISSION ON CIVIL RIGHTS TITLE I MONITORING PROGRAM (Spring 2002) [hereinafter RAISING STANDARDS], available at http://www.temple.edu/CPP/rfd/Raising_Standards_Closing_Gaps.pdf; RESEARCH FOR DEMOCRACY, A RIGHT TO KNOW: A PARENT-TEACHER STRATEGY TO IMPROVE TEACHING AND LEARNING IN THE PHILADELPHIA PUBLIC SCHOOLS (Sept. 26, 2002), available at <http://www.temple.edu/CPP/content/reports/arighttoknowreport.pdf>; ELAINE SIMON & EVA GOLD, RESEARCH FOR ACTION, CASE STUDY: AUSTIN INTERFAITH, STRONG NEIGHBORHOODS, STRONG SCHOOLS (Mar. 2002), available at http://www.crosscity.org/pdfs/ccsite_austin_r.pdf; Anne T. Henderson & Beverly Raimondo, *Every Child Counts: Citizens Tackle School District's Achievement Gap*, MIDDLE GROUND, Feb. 2002; Community Collaborative to Improve [New York City] District 9 Schools, Platform for Educational Improvement in District 9 (undated draft, on file with the North Carolina Law Review); Majestic, *supra* note 13. For a discussion of these initiatives, see Liebman & Sabel, *supra* note 13 (manuscript at 98-99, 109-12). See also RUTH S. JOHNSON, USING DATA TO CLOSE THE ACHIEVEMENT GAP: HOW TO MEASURE EQUITY IN OUR SCHOOLS xv-xvii, 1-52, 249-70 (2002) (developing both an advocacy strategy for parents and community members and a data-driven instructional strategy for using test scores and other evidence of unequal distribution of satisfactory educational outcomes by race as a basis for closing the "achievement gap" between students on the basis of race, ethnicity, and gender).

44. Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992); see J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 608 (1999) (describing the procedural history of the Texas educational equity lawsuit).

broadly defined education goals and then to condition the accreditation of each school district on its progress toward meeting the goals.⁴⁵ This dramatically shifted the emphasis of the lawsuit and the remedy from the definition of inputs to that of outputs. Instead of simply requiring an equalized or adequate level of financing, the court required the state to provide an adequate education for each child. And the court assumed that the definition of adequacy would emerge from continual revision of the broad goals of education. At the same time, the decision shifted the role of the court in relation to the other actors concerned with education and reform. In previous reform cycles, the courts were unrealistically expected to function as, in effect, a purpose-built administrative agency, establishing detailed rules for reformed schools and monitoring compliance with them.⁴⁶ In its recent school-reform decision, the Supreme Court of Texas has instead superintended the process by which standards are initially set by the legislature and the Texas Education Agency, and by which the performance of schools in meeting those standards—along with the standards themselves—is continuously evaluated and corrected.⁴⁷

These developments address two potentially showstopping worries about judicial supervision of institutional reform in the name of constitutional values. The first of these worries is of particular moment to the redistributivist left; the other is more salient to the property-minded right. The worry on the left, articulated by Frank Michelman, among others, is that inequality-based arguments for

45. Liebman & Sabel, *supra* note 13 (manuscript at 62–70) (discussing *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995)). The court's action in 1995 was originally suggested in a single justice's separate opinion when the case was previously before the court in 1992:

An "efficient" education [as required by the Texas Constitution] requires more than elimination of gross disparities in funding; it requires the inculcation of an essential level of learning by which each child in Texas is enabled to live a full and productive life in an increasingly complex world [The reasoning of the court's prior opinions] requires . . . the legislature to articulate the requirements of an efficient school system in terms of educational results, not just in terms of funding.

Carrollton-Farmers Branch Indep. Sch. Dist., 826 S.W.2d at 525–27 (Cornyn, J., concurring in part and dissenting in part).

46. The classic description of these expectations for reformist courts is found in Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). For a critique, see CHARLES F. SABEL & WILLIAM SIMON, *DESTABILIZATION RIGHTS: HOW THE NEW PUBLIC LAW SUCCEEDS* (forthcoming 2003) (on file with the North Carolina Law Review).

47. See *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 728–31 & nn. 7, 8 & 10 (Tex. 1995); see also Farr & Trachtenberg, *supra* note 44, at 670 n.340 (describing the transformation of the Texas litigation and remedy from focusing on financial equity to focusing on about educational equity).

school reform, and social reform generally, are doomed by conceptual indeterminacy.⁴⁸ On the one hand, the state could meet a constitutional obligation to treat all citizens equally by providing all with *none* of some good or service, leaving those unable to provide for themselves no better (or even worse) off than without the right to equal treatment.⁴⁹ On the other hand, arguments that the state is obligated to provide citizens with some level of “minimum protection”—i.e., with adequate amounts of goods and services necessary to citizenship (such as education)—although conceptually sound, seem legally impracticable. As Michelman concludes,

[T]he “advantage” of the minimum protection hypothesis (if we would so regard it) remains utterly theoretical until (if ever) we can develop a “justiciable” standard for specifying the acceptable minimum and the acceptable gap. Absent such standards, the supposed duty of minimum protection cannot be directly enforced; in fact, its violation cannot even be coherently alleged. Evidently, some notion of equality or nondiscrimination is needed to provide a foothold for litigants and judges intent upon defining a grievance and fashioning a remedy.⁵⁰

Below we argue that the new standards and the institutional architecture that generates them help resolve this problem by fleshing out the abstract requirement that schools ensure adequate outcomes for all students with a working, corrigible definition of the actual practices by which they can do so.⁵¹

The corresponding concern on the right, often expressed in the opinions of Chief Justice Rehnquist, is that court-ordered institutional reform untethered from doctrinal constraints will violate the bedrock principle of private law that remedies be directly deduced from infringed rights.⁵² In *Missouri v. Jenkins*,⁵³ for example, it was precisely this argument that underlay Chief Justice Rehnquist’s opinion for the Court, which overturned several central components of a wide-ranging program of educational reconstruction that the

48. Frank I. Michelman, *The Supreme Court, 1968 Term: Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 57–59 (1969).

49. *Id.* at 11.

50. *Id.* at 57.

51. See *infra* notes 144–68 and accompanying text.

52. *Missouri v. Jenkins*, 515 U.S. 70, 87–102 (1995); see, e.g., *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417 (1977) (limiting school desegregation remedies to curing the “incremental segregative effect” of the precise violation that was proved); see also *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (barring multidistrict remedy for violation occurring within a single school district).

53. 515 U.S. 70 (1995).

district court had ordered in connection with a desegregation suit.⁵⁴ In doing so, Chief Justice Rehnquist cited, with approval, a lower court judge's complaint that "this case, 'as it now proceeds, involves an exercise in pedagogical sociology, not constitutional adjudication.'" ⁵⁵

The New Accountability helps effective court-sponsored educational reform avoid this criticism as well. The new standards and the associated accountability regime substantially reduce the possibility for judicial caprice by giving substance to the interpretation of rights and remedies that courts previously could not derive from doctrine alone.⁵⁶ To continue with the Texas example, a constitutionally *inadequate* education comes to mean an education in which particular schools are not closing achievement gaps between any identifiable, poorly performing subpopulation and the best-performing groups, where outcomes at other comparable schools show this improvement to be possible.⁵⁷ The remedy is accordingly for the laggards to adopt strategies with effects equivalent to those pursued by the leading schools and districts.

The successes, broad adaptability, and capacity to reenlist the judiciary in the cause of school reform that the New Accountability has thus far demonstrated require that attention be paid to efforts to place that reform at the center of the nation's program for renovating its public schools. The NCLB is, in our view, just such an effort. The remainder of this Article defends this view against reasonable criticisms, and tries to show how engagement with the Act can provide civil rights advocates with new and effective tools for significantly improving the educational outcomes of poor and minority children.

54. *Id.* at 97-103.

55. *Id.* at 83 (quoting *Jenkins v. Missouri*, 19 F.3d 393, 404 (8th Cir. 1994) (Beam, J., dissenting)).

56. SABEL & SIMON, *supra* note 46 (manuscript at 6-8).

57. Closing such gaps will often involve improving the performance of poor and minority children in relation to affluent and white ones, but in theory a rich white group, if it was somehow being systematically disserved by its school, could ultimately come under the protection of the act as well. Thus if *any* identifiable group, or any school as a whole, no matter how well endowed, fails to improve at a pace commensurate with that achieved at other, comparable schools, the affected parents and children will have recourse to many of the same remedies—improvement plans, community activism, and public outcry—as other parents and children have.

II. THE NO CHILD LEFT BEHIND ACT

The NCLB was inspired by developments in Texas.⁵⁸ It inherits from that state the attractively transparent governance structure of districts and schools that exemplify the New Accountability. It also, however, inherits Texas's inattention to mechanisms by which states, districts, and schools can share effective practices and learn directly from one another. Despite its defects, we think the NCLB provides important handholds for improvement.

For the most part, the NCLB imposes obligations on states and local education agencies ("LEAs"), typically school districts, that receive federal funds under Title I of the Elementary and Secondary Education Act of 1965.⁵⁹ Those funds are directed to schools with the highest proportions of low-income families.⁶⁰ Under the NCLB,

58. See, e.g., Brownstein, *supra* note 5 (describing how the development of the NCLB by George W. Bush's Presidential Administration was influenced by the reform efforts in Texas while he was Governor).

59. Title I is an \$8 billion per year program created as part of Lyndon Johnson's War on Poverty in large measure as a consequence of the Civil Rights Movement. GARY ORFIELD & ELIZABETH DEBRAY, EDUCATION FOR THE POOR: LESSONS FROM NEW RESEARCH ON THE U.S. PROGRAM TO AID CONCENTRATED POVERTY SCHOOLS 1-2 (2000) (paper prepared for research conference on Poverty and Education in the Americas, Harvard University, May 3-4, 2000) (on file with the North Carolina Law Review). The core idea of Title I was to make supplemental funds available to schools serving the most impoverished children so the schools could provide assistance that the pupils' families and their schools could not. Originally, much of the money went to highly specialized programs directed to students judged to have different kinds of learning disabilities. Categorizing students in this way, with the result that they were often required to leave their regular classes to receive additional services, has more recently been found to be disruptive to the point of being counterproductive. Accordingly, when Title I was reauthorized in 1994, it was amended to give state and local educators more discretion to use funds for purposes they defined in the name of "whole school reforms." Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 1002(g)(2), 1502, 108 Stat. 3518, 3522, 3604-3605 (codified as amended at 20 U.S.C. §§ 6302(g)(2), 6492 (2000)); see Weckstein, *supra* note 15, at 314-18. In return Congress, imposing the bargain that was repeatedly attempted in this period but was only brought to fruition by the 2001 reauthorization, encouraged states (albeit ineffectually) to adopt accountability systems, created test-based improvement standards of its own, and insisted on increased evaluation and monitoring of results. Improving America's Schools Act of 1994, §§ 1001-1119, 108 Stat. at 3519-3557 (codified as amended at 20 U.S.C. §§ 6301-6320 (2000)); see Tammi J. Chun & Margaret E. Goertz, *Title I and State Educational Policy: High Standards for All Students?*, in HARD WORK FOR GOOD SCHOOLS: FACTS NOT FADS IN TITLE I REFORM 120, 120 (Gary Orfield & Elizabeth H. DeBray eds., 1999) [hereinafter HARD WORK FOR GOOD SCHOOLS]; Gary Natriello & Edward L. McDill, *Title I: From Funding Mechanism to Educational Program*, in HARD WORK FOR GOOD SCHOOLS, *supra*, at 31, 35; Weckstein, *supra* note 15, at 324-41.

60. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, §§ 1113-1115, 115 Stat. 1469, 1469-79 (2002) (to be codified at 20 U.S.C. §§ 6313-6315). Based on their proportions of low-income children, some schools qualify for funding for schoolwide programs. See *id.* § 1114, 115 Stat. at 1471. Others qualify only for programs providing

states must: set “challenging academic content standards” and “student academic achievement standards” defining an adequate education for all schools and students in the state;⁶¹ create annual standardized tests in literacy and mathematics (and, subsequently, science) in grades three through twelve that are aligned with those standards;⁶² report the results of performance on these tests and other valid indicators for individual schools and for all relevant ethnic and socioeconomic subpopulations within those schools;⁶³ set goals for “annual yearly progress” (“AYP”) so that students in all the relevant subpopulations can be expected to meet the state standard of adequacy within twelve years;⁶⁴ require LEAs to present annual “report cards” ranking the performance of each of the relevant subpopulations at all of their schools on the state’s tests;⁶⁵ integrate these activities into a broader accountability system for assuring that schools and school districts meet these obligations to provide an adequate education to all subpopulations;⁶⁶ along with LEAs, provide technical assistance premised “on scientifically based research” to schools that have persistently failed to meet their AYPs, including through state-organized peer-support teams of master teachers;⁶⁷ and provide academic achievement awards for schools that “significantly

services to low-income children within otherwise nonqualifying schools. *See id.* § 1115, 115 Stat. at 1475. Still other schools do not qualify for any funds at all, because the school’s proportion of children from low-income families is lower than the proportion in the district as a whole. *See id.* § 1113, 115 Stat. at 1469.

61. *Id.* § 1111(b)(1)(A), 115 Stat. at 1444 (to be codified at 20 U.S.C. § 6311); *see infra* notes 94–103 and accompanying text (discussing limitations on the capacity of states to avoid the requirements of the NCLB by adopting weak standards or watering down existing standards).

62. *Id.* § 1111(b)(3), 115 Stat. at 1449.

63. *Id.* §§ 1111(b)(2)(C)(v), 1111(b)(2)(G)(iii), 1111(b)(2)(I), 1111(b)(10), 115 Stat. at 1446, 1448, 1454. For thoughtful discussions of the diagnostic value of, but also the technical difficulties posed by, disaggregating educational outcomes and measuring success in regard to a variety of ethnic, socioeconomic, and developmentally defined groups—and of the need, even given the disaggregation, to assure that individual children are not lost in the averages—see DAVID FIGLIO, AGGREGATION AND ACCOUNTABILITY (Feb. 13, 2002), *available at* <http://www.edexcellence.net/NCLBconference/Figlio.pdf>; RICHARD J. WENNING ET AL., NO CHILD LEFT BEHIND: WHO IS INCLUDED IN NEW FEDERAL ACCOUNTABILITY REQUIREMENTS (Feb. 13, 2002), *available at* <http://www.edexcellence.net/NCLBconference/Wenning%20Herdman%20and%20Smith.pdf>; Thomas J. Kane et al., *Randomly Accountable*, EDUC. NEXT, Spring 2002, at 57, *available at* <http://www.educationnext.org/20021/56.pdf>; Lynn Olson, *Testing Researchers Make Pitches for Refining ESEA Rules*, EDUC. WK., Sept. 25, 2002, at 10.

64. § 1111(b)(2)(B)–(G), 1111(b)(2)(I), 115 Stat. at 1446–48.

65. *Id.* §§ 1111(c)(1), 1111(h), 115 Stat. at 1454, 1457.

66. *Id.* § 1111(b)(2), 115 Stat. at 1445–49.

67. *Id.* §§ 1111(c)(3), 1111(c)(4), 1116(b)(4), 1117, 115 Stat. at 1455, 1482, 1498–1501 (to be codified at 20 U.S.C. §§ 6311, 6316, 6317).

closed the achievement gap” between students from different ethnic groups.⁶⁸

Each year, LEAs are required to use the results of the annual statewide standardized tests and other indicators to review the progress of each of their schools and each of the school’s relevant subpopulations under the improvement criteria set by the state.⁶⁹ LEAs must

publicize and disseminate the results of the local annual review . . . to parents, teachers, principals, schools, and the community so that the teachers, principal, other staff, and schools can continually refine, in an instructionally useful manner, the program of instruction to help all children served under this part meet the challenging State student academic achievement standards established under [the Act].⁷⁰

Schools that fail to meet their obligations must present a plan for doing so.⁷¹ Parents and staff must actively participate in the planning process.⁷² In presenting the Act, the Bush Administration has explicitly characterized it as a “‘flexibility for accountability’ bargain.”⁷³ The states receive substantial flexibility in combining funds received under various federal programs. In return, the states must discipline schools and LEAs that fail to improve at an acceptable rate.⁷⁴ Schools that fail to meet their annual improvement goals for five years must be completely reconstituted under a restructuring plan that may include the engagement of private management companies to take over failing schools.⁷⁵ Students in schools that fail to meet state improvement standards for two consecutive years may transfer to a different public school of their choice located in the same LEA, with transportation provided by the LEA.⁷⁶ Schools that fail to meet state improvement standards for at

68. *Id.* § 1117(b)(1)(B)(i), 115 Stat. at 1500.

69. *Id.* § 1116(a), 115 Stat. at 1478–79.

70. *Id.* § 1116(a)(1)(C), 115 Stat. at 1478–79.

71. *Id.* § 1116(b)(3), 115 Stat. at 1480–82.

72. *Id.* § 1118(a)(2)(A), 115 Stat. at 1501.

73. U.S. Dept. of Educ., *The No Child Left Behind Act of 2001: Executive Summary*, at <http://www.ed.gov/offices/OESE/esea/exec-summ.html> (last visited Apr. 1, 2003) (on file with the North Carolina Law Review).

74. §§ 1116(b), 1116(c), 115 Stat. at 1479–91.

75. *Id.* § 1116(b)(8), 115 Stat. at 1485.

76. *Id.* §§ 1116(b)(1)(E), 1116(b)(9), 1116(b)(10), 115 Stat. at 1479, 1486. The Act requires LEAs to use up to twenty percent of their Title I allocations to pay for transportation in support of choice options, or to fund supplemental educational services,

least three of the four preceding years must permit all their low-income students to use federal funds to which the schools and their LEAs would otherwise be entitled to purchase supplemental education services; these services may be obtained from any accredited public or private sector providers chosen by the students and their parents.⁷⁷

Although the NCLB establishes these detailed obligations for schools and districts to report their performance and progress, it fails to establish in any corresponding detail the federal government's own responsibilities to monitor and foster these developments and to sanction LEAs that do not meet their obligation to improve educational outcomes.⁷⁸ To receive funds under the flexible provisions of the NCLB, the state educational agency must do little more than submit a consolidated plan setting forth how its challenging academic content standards, test regime, and so forth will be constituted and implemented as "a single statewide state accountability system that will be effective in ensuring that all local education agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined [by the NCLB]."⁷⁹ The Secretary of Education then has only 120 days from the submission of the plan to convene a peer review process and, based on the resulting recommendations, demand necessary modifications.⁸⁰ Because many states will submit initial plans nearly simultaneously during 2003,⁸¹ it seems unlikely, except in cases of willful and blatant defiance of statutory provisions, that the Secretary will closely scrutinize state plans.

Statutory provisions for the subsequent review of plans deemed acceptable, and other forms of monitoring and oversight, are nonexistent, and the NCLB has next to no discussion of enforcement. If a state fails to meet any requirement of the NCLB, "the Secretary may withhold funds for State administration . . . until the Secretary

for students assigned to schools that have failed to meet their improvement goals for the requisite period. *See id.* §§ 1116(b)(9), (10), 115 Stat. at 1479.

77. *Id.* §§ 1116(b)(5), 1116(e), 115 Stat. at 1482–83, 1491–94. The operational details for these remedial mechanisms are still being worked out.

78. For a discussion of the kinds of assistance and monitoring the federal government ought to be providing, see *supra* notes 25–29 and accompanying text.

79. § 1111(b)(2)(A), 115 Stat. at 1445–46. *See generally id.* § 1111, 115 Stat. at 1444–62 (setting out the standards for state plans).

80. *Id.* § 1111(e), 115 Stat. at 1456.

81. *See* Letter from Rod Paige, Secretary of Education, to State Education Officials, at <http://www.ed.gov/News/Letters/020724.html> (July 24, 2002) (on file with the North Carolina Law Review) (noting that "States will be required to submit their AYP for review at the beginning of 2003").

determines that the State has fulfilled those requirements.”⁸² The only mandatory enforcement mechanism is triggered when a state fails entirely or in a timely manner to put “in place” the “challenging academic content standards and student achievement standards, and a system for measuring and monitoring adequate yearly progress” that we describe above.⁸³ In that event, “the Secretary shall withhold 25 percent of the funds that would otherwise be available to the State for State administration under this part.”⁸⁴ Except for this single mandate in response to a state’s unlikely failure even to pretend to comply, all the important matters are left to the discretion of the Secretary of Education in regulations that thus far have served to relax, not stiffen, the NCLB’s monitoring and enforcement mechanisms.⁸⁵ The NCLB thus offers little hope of ending the Department of Education’s (and the predecessor Department of Health, Education and Welfare’s) long history of weak enforcement of federal requirements for school reform.⁸⁶

III. REASONS FOR SUSPICION ABOUT THE NO CHILD LEFT BEHIND ACT AND RESPONSES

The NCLB’s insistence on school improvement, in combination with its disinclination to monitor, let alone enforce, its own accountability provisions raise suspicions for some that the Act is a Trojan horse for nefarious political designs. Others, while not doubting the good faith of the Bush Administration and Congress,

82. § 1111(g)(2), 115 Stat. at 1457.

83. *Id.* § 1111(g)(1)(A), 115 Stat. at 1457; *supra* notes 61–66 and accompanying text.

84. § 1111(g)(1)(A), 115 Stat. at 1457.

85. See Lynn Olson, *Long-Awaited ESEA Rules Are Released*, EDUC. WK., Aug. 7, 2002, at 1; Erik W. Robelen, *Senate Panel Examines Ed. Department Efforts to Enforce New ESEA*, EDUC. WK., May 1, 2002, at 24; Diana Jean Schemo, *Schools Face New Policy on Transfers*, N.Y. TIMES, Dec. 10, 2002, at A26; see also *infra* note 103 (describing the Department of Education’s limited statutory authority to bar states from diluting their educational standards in order to inflate the number of evidently successful schools).

86. *E.g.*, COHEN, *supra* note 15, at 10–11. According to Professor Cohen:

No one believes the Education Department will really enforce Title I requirements. . . . The fact of the matter is that the Education Department does not have a strong track record of compliance monitoring of [Elementary and Secondary Education Act] programs, and hasn’t for decades spanning Administrations of both parties. There is a widespread view that the Department has few effective sanctions to apply, since no one believes that it will ultimately withhold funds from states or local districts . . . [and because] it lacked both the staff capacity and clear focus to pay attention to the most important requirements.

Id.

fear that the legislation will have disastrous unintended consequences for the public schools and especially their poor and minority pupils.

For those adopting the suspicious reading of the NCLB, its “accountability-for-flexibility bargain” is a sham. Either the states are getting flexibility without giving anything in return—in which case the NCLB amounts to the deregulation of federal funds spent on education, which in turn delivers students, particularly poor and minority students, into the hands of selfish local oligarchs⁸⁷—or, the standards and accountability system are real enough, but are not actually intended to achieve reform. The suspicion in this latter event is that the NCLB’s true purpose is to speed privatization by exposing the incapacity of schools and districts to meet their annual improvement goals.⁸⁸

The concerns about disastrous unintended consequences go to the capacity of the states and schools to advance reform under the conditions established by the NCLB⁸⁹ and to the fear that the Act will undercut the nation’s remaining commitment to desegregation.⁹⁰ The suspicious interpretations of the NCLB do not, we think, stand up to scrutiny. The reasons for rejecting those suspicions in turn help limit—but do not fully banish—concerns about state and school

87. *E.g.*, Dan Goldhaber, *What Might Go Wrong with the Accountability Measures of the “No Child Left Behind Act”?*, Paper presented at the Conference on “Will No Child Truly Be Left Behind? The Challenges of Making this Law Work,” at <http://www.edexcellence.net/NCLBconference/Goldhaber.doc> (Feb. 13, 2002) (on file with the North Carolina Law Review) (discussing fears that states will be able to game the system without achieving meaningful results, especially for poor and minority children).

88. Inveterate opponents of public education consider that failure to be inevitable. *E.g.*, Abigail Thernstrom, Comments in response to papers prepared for Conference on “Will No Child Truly Be Left Behind? The Challenges of Making this Law Work,” at <http://www.edexcellence.net/NCLBconference/Thernstromcomments.doc> (Feb. 13, 2002) (on file with the North Carolina Law Review).

89. Articles arguing that the ambitious demands of the NCLB doom many schools and districts to failure because of their lack of institutional capacity to reform include Richard F. Elmore, *Unwarranted Intrusion*, EDUC. NEXT, Spring 2002, at 31, available at <http://www.educationnext.org/20021/30.pdf>; Kane, *supra* note 63, at 57; Matthew Gandal, *Multiple Choices, How Will States Fill in the Blanks in Their Testing Systems?*, Paper presented at the Conference on “Will No Child Truly Be Left Behind? The Challenges of Making this Law Work,” at <http://www.edexcellence.net/NCLBconference/Gandal.doc> (Feb. 13, 2002) (on file with the North Carolina Law Review).

90. See John Charles Boger, *Education’s “Perfect Storm?” Racial Resegregation, High-Stakes Testing, and School Inequities: The Case of North Carolina*, 81 N.C. L. Rev. 1375, 1449–50 (2003). *But see* Taylor, *supra* note 13, at 1755–62 (arguing that the NCLB provisions that permit students in poorly performing schools to transfer to more successful schools at state expense provides an important new mechanism for racially desegregating schools with predominantly white student bodies).

capacity for reform and also about the effects of the NCLB on the ongoing campaign for racial equality.

We begin with the reading of the NCLB as a shill for privatization. In focusing on long-term consequences, this suspicion overlooks the enormous and probably self-limiting political disruption that punitive use of the accountability system would almost surely provoke. Recall that the first obligation of LEAs with schools failing to meet their improvement goals is to provide more local choice among schools. Districts with poorly performing schools may be forced to provide space for poor and minority students in presumably richer and whiter schools within the district and to pay to transport them there.⁹¹ The political costs of transferring small numbers of students in a few districts scattered across the state may be containable. But the pressures released by the failure of schools in many districts statewide would be incalculably great—especially if the ferment in the cities implementing this part of the NCLB in its first year of operation is any guide.⁹² Given the great flexibility accorded states in setting standards and annual improvement goals, the more

91. See *supra* note 76 and accompanying text. For an argument that this provision provides a potentially powerful tool for civil rights advocates, see Taylor, *supra* note 13.

92. When it was signed into law by President Bush with the “vow[] to free ‘children trapped in schools that will not change and will not teach,’ . . . students in 8,652 chronically low-performing schools” were given the option “to jump ship,” forcing “school districts [to] scramble to accommodate thousands of students eligible to seize that option,” including nearly 125,000 pupils in the Chicago district alone. Mary Lord, *The New School Choice: Suddenly, Thousands of Students Can Transfer*, U.S. NEWS & WORLD REP., Aug. 5, 2002, at 38. For other articles describing the disruption caused by the transfer provisions of the NCLB in its first year of operation, see Marjorie Coeyman, *Just When You Thought You Knew the Rules . . .*, CHRISTIAN SCI. MONITOR, July 9, 2002, at 11; Derrick Z. Jackson, *The Big Lie: “No Child Left Behind,”* BOSTON GLOBE, Aug. 2, 2002, at A19; Robert Kelly, *Brooklyn Hopes That Parents Will Stick with the District*, ST. LOUIS POST-DISPATCH, July 17, 2002, at B1; Susan Levine, *Few Families Seek School Switch in Montgomery*, WASH. POST, June 22, 2002, at B1; Lori Olszewski, *Few Pupils Who Sought Switch Got Their Wish*, CHICAGO TRIB., Aug. 24, 2002, at 1; Michael Resnick, *‘Choice’ Cannot Be Rushed*, USA TODAY, July 9, 2002, at A14; Erik W. Robelen, *Few Choosing Public School Choice for this Fall*, EDUC. WK., Aug. 7, 2002, at 1; Jen Sansbury, *Obstacles Hold Kids in Bad Schools*, ATLANTA J.-CONST., Sept. 15, 2002, at A1; Megan Tench & Anand Vaishnav, *Payzant Faults Bush Plan as Impractical: Transfer Rule Called a Logistical Problem*, BOSTON GLOBE, June 12, 2002, at B1. Despite strong bureaucratic pressures to the contrary, the new Chancellor of the New York City School System, Joel I. Klein, recently issued a statement committing the district to full “citywide” implementation of the NCLB’s transfer provisions. See Press Release, Citywide Public School Choice Process, at http://www.nycenet.edu/press/02-03/n50_03.htm (Dec. 9, 2002) (on file with the North Carolina Law Review) (stating that the New York City “Department of Education will establish a citywide public school transfer process for eligible children under the No Child Left Behind Act” that aims “to provide these [transfer] options in a more efficient, equitable and cost effective way”).

likely response to this threatened dislocation would be to diminish these standards or goals, so that widespread failure, and the privatization to follow, does not occur.⁹³ Similar reactions are likely to be triggered by efforts to use the NCLB as nothing more than a pretext for the imposition or extension of high-stakes testing.

Nor does the availability of these responses validate the deregulation reading of the NCLB as a mechanism for eventually freeing local schools and districts from any accountability for their treatment of students, particularly poor and minority students. This suspicion, for its part, overlooks the possibility that there is more to accountability than rule-following. Before the NCLB, school officials were in compliance with federal requirements if they could document, for example, that they had provided the number of hours of remedial education per pupil or of professional development per teacher required by statute for qualifying schools. At first blush, the grant of money in the absence of such rules, and hence of any efforts to verify compliance with them, looks like deregulation. But, as is detailed at greater length in our companion study of classroom practices in New York City's Community District 2⁹⁴ and of developments at both the classroom and district levels in Texas,⁹⁵ continuous, diagnostic monitoring of performance can provide a new and different kind of accountability. These mechanisms not only expose bad actors who do not do what they are supposed to do—the strength of the traditional rule-based system—but also rely on experimentation and the diffusion of its lessons to prove that underperforming professionals at

93. Some such adjustment is already taking place. Schemo, *supra* note 85; Diana Jean Schemo, *Sidestepping of New School Standards Is Seen*, N.Y. TIMES, Oct. 15, 2002, at A21. For the reasons why any such dilution of standards is unlikely to succeed over the long run, see *infra* note 103 and accompanying text. For sources arguing that large scale privatization is unlikely for either economic or political reasons, see Henry M. Levin & Cyrus E. Driver, *Costs of an Educational Voucher System*, 5 EDUC. ECON. 265, 280–81 (1997) (stating that school choice will never be a comprehensive solution because the cost of a voucher system of that scale is prohibitive); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2085–91 (2002) (arguing that the preferences of the large numbers of families with children enrolled in suburban school districts pose a substantial political obstacle to the adoption of comprehensive educational choice plans because of the families' opposition both to giving up their current public school subsidy and to large-scale transfers of poor and minority children from urban schools to their own schools); Henry M. Levin, *Thoughts on For-Profit Schools 4–7* (Nat'l Ctr. for the Study of Privatization in Education, Occasional Paper No. 14, 2001), available at http://www.ncspe.org/publications_files/7_OP14.pdf (questioning whether there is a sound basis for expecting for-profit schools to achieve the economies of scale needed to make them succeed economically).

94. Liebman & Sabel, *supra* note 13 (manuscript at 45–57).

95. *Id.* (manuscript at 73–81).

comparable schools *can* do what they are supposed to do and to show them *how*.

The NCLB rests on these same foundations. The provisions for information to be presented in the annual state and LEA “report cards”⁹⁶ are as detailed as the provisions for enforcement⁹⁷ (which immediately precede them in the statute) are scant. Thus, in addition to reporting the results of standard tests disaggregated by each of the relevant ethnic and socioeconomic subpopulations, the state report cards must compare the actual achievement of each of those subgroups to the state’s annual goal for that subgroup. The state also must report the percentage of students in each group not tested,⁹⁸ and must require LEAs to do the same for themselves and for each of their schools.⁹⁹ Consequently, the citizens in the state will easily be able to determine whether all the state’s school children are progressing as desired, and whether some students are being excluded from the tests with the purpose or effect of inflating scores.

Even more important, parents and students will potentially be able to make Texas-style comparisons of the performance of their schools in serving families like them against the performance of demographically similar schools throughout the district and state. Moreover, parents and the public nationwide will be able to make more reliable judgments about the academic performance of individual states. True, the NCLB requires only that the standards each state chooses to adopt be “challenging,”¹⁰⁰ and forbids the Secretary of Education to impose any particular standard on states as a condition for approval of its consolidated plan.¹⁰¹ But a separate provision of the NCLB takes an important first step toward establishing the *comparability* of state standards, and thus their accountability systems. The NCLB does this by requiring all states receiving Title I money to administer at federal expense the National Assessment of Educational Progress (“NAEP”) in reading and mathematics to samples of fourth and eighth graders.¹⁰² If a state’s

96. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1111(h), 115 Stat. 1425, 1458 (2002) (to be codified at 20 U.S.C. § 6311).

97. *Id.* § 1111(g), 115 Stat. at 1457.

98. *Id.* § 1111(g)(1)(C), 115 Stat. at 1457.

99. *Id.* § 1111(h)(2)(B), 115 Stat. at 1458.

100. *Id.* § 1111(b), 115 Stat. at 1444.

101. *Id.* § 1111(e)(1)(F), 115 Stat. at 1456.

102. *Id.* § 1111(c), 115 Stat. at 1454. NAEP is a federally constructed assessment tool that has been used by the U.S. Department of Education and predecessor agencies since 1969 to provide “results regarding subject-matter achievement, instructional experiences, and school environment for populations of students (e.g., fourth-graders) and subgroups

standards are so low that all students are easily proficient, but a sample of these students shows poorly on this demanding national diagnostic test, substantial pressure is likely to arise to bring that state's standards and its students' performance in line with those elsewhere in the nation.¹⁰³

IV. INVIGORATING, NOT INCAPACITATING, EDUCATIONAL REFORM

A far more substantial concern is that, as currently configured, schools and states lack the capacity to build an adequate school governance system and achieve classroom-level reform. Few states have accountability systems nearly as sophisticated as those in Texas¹⁰⁴ and Kentucky,¹⁰⁵ both of which are likely to satisfy many or most of the NCLB's requirements. As of early 2002, for example, only sixteen states had the grade-by-grade tests that the NCLB

of those populations (e.g., female students, Hispanic students).” Nat’l Ctr. for Educ. Statistics, *What is NAEP?*, at <http://nces.ed.gov/nationsreportcard/about/> (last visited Apr. 1, 2003) (on file with the North Carolina Law Review). “Since 1990, NAEP assessments have also been conducted to give results for participating states. Those that choose to participate receive assessment results that report on the performance of students in that state.” *Id.* The NCLB requires states receiving federal money to participate in the NAEP program but does not require them to use NAEP assessments as their own measure of educational progress. Just for the Kids, a Texas intermediary organization discussed *infra* notes 122–27 and accompanying text, has already begun mapping proficiency levels as measured on state tests to the proficiency levels defined by NAEP. Nat’l Ctr. for Educ. Statistics, *supra*. For example, with regard to the Texas test for fourth grade mathematics, “the state’s passing standard is comparable to the NAEP basic standard but easier than the NAEP proficiency standard.” Just for the Kids, *Other States*, at http://www.just4kids.org/us/us_otherstates.asp (last visited Apr. 1, 2003) (on file with the North Carolina Law Review).

103. In response to reports that states were dumbing down their educational standards to avoid the full force of the NCLB, e.g., Schemo, *supra* note 93, Secretary of Education Rod Paige sent a “blistering warning to school commissioners across the country” cautioning against efforts to sidestep the intent of the Act. Diana Jean Schemo, *States Get Federal Warning on School Standards*, N.Y. TIMES, Oct. 24, 2002, at A25; see Press Release, Dan Langan, Letter Released from U.S. Education Secretary Paige to State School Chiefs on Implementing *No Child Left Behind Act*, at <http://www.nclb.gov/media/news/102302.html> (Oct. 23, 2002) (on file with the North Carolina Law Review). Confirming the weakness of the Act’s formal enforcement mechanisms, *supra* notes 78–86 and accompanying text, but also predicting—and acting to provoke—the public intolerance for weak standards and results that we anticipate, Secretary Paige called state officials who water down educational standards “enemies of equal justice and equal opportunity” and “apologists for failure,” and forecast that “they will not succeed” because, “[o]nce parents discover that children in their local schools are not learning as well as they could, they will demand results—no matter how much one state tries to buck accountability.” Press Release, *supra*.

104. See TEX. EDUC. CODE ANN. §§ 39.021–204 (Vernon 1996 & Supp. 2003).

105. See KY. REV. STAT ANN. §§ 156.005–990 (Michie 2001 & Supp. 2002).

requires in reading and mathematics. In only nine of those states are the tests aligned with curricular standards, as is also required by the NCLB, and, in any event, is necessary to permit test results to inform instructional improvements. One estimate is that over two hundred new state-level tests will need to be created in the next several years to meet federal requirements.¹⁰⁶ And without an adequate assessment regime in place, it will be hard for states to set proficiency levels and annual improvement goals as required by the NCLB. Given that the U.S. Department of Education is unlikely to provide much assistance to struggling states,¹⁰⁷ it is not unreasonable to worry that a governance-based reform will fail because the governance it supposes will not be in place to guide the reform.

The related worry about the lack of capacity for ground-level reform grows out of the experience of the pioneers of the new classroom practices, such as New York City's Community District 2.¹⁰⁸ The fear here is that even good governance will produce reform only if schools and districts are already reforming, in the sense of having made some determination about the need to change themselves and about the direction change should take. As Professor Elmore puts it:

[I]nternal accountability precedes external accountability. That is, school personnel must share a coherent, explicit set of norms and expectations about what a good school looks like before they can use signals from the outside to improve student learning. . . . Low-performing schools, and the people who work in them, don't know what to do. If they did, they would be doing it already.¹⁰⁹

These worries are hardly frivolous. Many states will have a hard time implementing an accountability system, and some states will almost surely fail to do so within the limits imposed by the NCLB, however leniently interpreted. By the same token, many schools and districts will have trouble reorganizing to meet the demands placed on them even by well-designed governance systems, and some will fail.

But the inevitability of these kinds of difficulties diverts attention from the crucial question: Is the NCLB so demanding in relation to the limited capacities of states and schools that its implementation is

106. See Gandal, *supra* note 89, at 1.

107. See *supra* notes 78–86, 103 and accompanying text.

108. David K. Cohen & Susan L. Moffitt, *Title I: Politics, Poverty, and Knowledge*, in *THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY AND SECONDARY EDUCATION* 77, 87–88 (2001); Richard F. Elmore, *Testing Trap*, *HARVARD MAG.*, Sept.–Oct. 2002, at 35; sources cited *supra* note 89.

109. Elmore, *supra* note 108, at 37.

more likely to paralyze reforms in the more advanced jurisdictions than it is to help laggards advance and to improve inducements for reform at the state and national levels? Answers to this question are necessarily tentative. But the record of capacity-building detailed in the account of standards-based reform in New York's District 2 on the one side, and changes in school and district-organization in Texas on the other, suggest that these worries are overblown and even mischaracterize the obstacles to reform.

Consider first the concern with the cultural preconditions for change. The lesson of District 2 is precisely that the culture of change is as much a product of change—including especially change in governance systems—as a precondition for it. District 2 might well have remained a case of anti-institutional or cultural professional revolt—with engaged professionals free to run their classrooms and schools as they saw fit, but without any ongoing evaluation of whether the results for children were good—had it not been for the intervention of a new governance regime personified by key administrators, such as Anthony Alvarado and Elaine Fink.¹¹⁰ Moreover, the decision to adopt this monitoring and assessment regime was the starting point, not the conclusion, of change. As is developed in detail in our companion study, District 2 is still figuring out “what to do”; and school reformers there do their figuring by trying different things and evaluating the results, not by deducing actions from settled principles. Indeed, the vicissitudes of culture in District 2 raise a serious question whether a high level of traditional professionalism might obstruct reform more than aid it.¹¹¹

In any case, many of the consistently improving Texas districts do quite well at adopting the team-based diagnosis and response to individual learning difficulties that are key to the New Accountability and the success of District 2 without having the latter's progressive tradition of pedagogy.¹¹² More exactly, the Texas example supports

110. See Liebman & Sabel, *supra* note 13 (manuscript at 49–54) (discussing RICHARD F. ELMORE, BRIDGING THE GAP BETWEEN STANDARDS AND ACHIEVEMENT: THE IMPERATIVE FOR PROFESSIONAL DEVELOPMENT IN EDUCATION (2000)); ELMORE & BURNEY, CONTINUOUS IMPROVEMENT, *supra* note 26; ELMORE & BURNEY, *supra* note 27; ELMORE & BURNEY, SCHOOL VARIATION, *supra* note 26); Elmore, *supra* note 27.

111. Liebman & Sabel, *supra* note 13 (manuscript at 45–54).

112. One well-documented example is the Margo Elementary School in the Westlaco School District in the Rio Grande Valley on the border between Texas and Mexico. A substantial majority of the school's overwhelmingly Hispanic students is from families poor enough to qualify for federal lunch subsidies. But ninety-seven percent passed and eighty percent were proficient on the fourth grade reading test. In math, one hundred percent passed and seventy-one percent were proficient. The principal attributes much of the success to “our individual reading program. We ensure that every child in

two interpretations, both of which belie any showstopping incapacity for ground-level reform. The first is that there are more, and more widely diffused, “cultures of reform” than a simple extrapolation of the District 2 experience would suggest. Although we do not know how many cultures there are or how widely they are diffused, that is simply because we have not looked for them. But given the diversity of the robustly improving Texas districts, it is unlikely that the list of effective cultures of reform is short or the boundaries very narrowly drawn. Until they succeeded in improving, for example, the Texas school districts we have observed, such as Westlaco and its Margo Elementary School, were not on anyone’s list of learning communities well endowed for robust improvement.¹¹³

A second, compatible interpretation is that it is wrong to think of capacity as a cultural endowment or community heritage that is either present or not. Our analysis of Texas shows that many schools and districts are bootstrapping their way to systemic reform. Changes in the framework of governance at the state level, such as improvement goals for racially and economically identified groups of pupils,

kindergarten through second grade reads with a teacher, one-on-one, every day.” Daily progress is carefully monitored, and where there are problems, “I have to find resources quickly,” a first grade teacher says. S.C. Gwyne, *How Good Is Your Kid’s School?*, TEX. MONTHLY, Nov. 2001, at 124, 126, available at <http://www.texasmonthly.com/mag/issues/2001-11-01/feature-2.php>. Another example is the North East School District in San Antonio. For a collection of materials documenting the effective capacity-building process in that district, see DIVISION OF INSTRUCTION, NORTH EAST INDEPENDENT SCHOOL DISTRICT, PRINCIPAL’S BRIEF 2002–2003 (undated) (on file with the North Carolina Law Review); NORTH EAST INDEPENDENT SCHOOL DISTRICT, INSTRUCTIONAL DIVISION PLAN 2002–2003: GUIDE FOR MEETING THE HIGHER LEARNING STANDARDS (2002) (on file with the North Carolina Law Review); NORTH EAST SCHOOL DISTRICT, DISTRICT INSTRUCTIONAL IMPROVEMENT PLAN 2002–2003 (2002) (pamphlet on file with the North Carolina Law Review); see also THE CHARLES A. DANA CTR., *supra* note 33, at 3, 6–7 (study identifying seven, and investigating four relatively large (at least 5,000 students) and robustly improving Texas school districts that met demanding selection criteria; attributing the districts’ success to causal clusters that reflect the key aspects of the reform architecture under discussion here: changes in the accountability system; local use of information revealed by the accountability system to pressure districts into improving; the emergence of new reform leaders; the transformation, as a result of all this, of district organization; and, ultimately, changes in educators’ understanding of equity and excellence); Stephanie Surles, Education Innovation Network, Phase II: Evaluation Conducted in 2001–2002 9–12, Presentation at the Education Improvement Network Team Meeting (June 25, 2002) (Power Point presentation on file with the North Carolina Law Review) (describing the capacity-building work of a network of improving school districts in Texas that are members of the Educational Innovation Network of the Charles A. Dana Center at the University of Texas, which is described *infra* notes 123–24 and accompanying text).

113. See generally THE CHARLES A. DANA CTR., *supra* note 33, at 3 (studying the rapidly improving Texas school districts of Aldine, Brazoport, San Benito, and Wichita Falls).

provoke halting reforms at the school and district level, such as monitoring by principals of classroom implementation of curricular reform.¹¹⁴ The upshot is that the lack of a prebuilt culture of reform, successful program of professional development, or completed blueprint for restructuring does not disqualify schools or districts from achieving these results.

This latter suggestion does *not* mean that governance reform is self-effectuating in the sense that a once-and-for-all change of incentives at the top is sufficient to produce real reform at the bottom. Professor Elmore is right to emphasize the need for coordinated investments in professional development and other institutional changes as conditions for the success of the reforms.¹¹⁵ But if we are accurately interpreting our case studies, they reveal that schools and districts will be more capable of making these investments correctly while implementing the NCLB than they were before its adoption. More speculatively, it may turn out that it is easier to raise the monies to pay for reform with an effective accountability system in place than without such a system because the taxpaying public can tell whether their tax dollars are well spent.

A similar argument about capacity as a property or attribute that emerges from the process of reform, rather than as a precondition for it, applies to state-level governance systems. The pessimistic view compares the current state-level governance capacity to the ideal envisioned by the NCLB at the point of full national implementation and concludes that nearly all states are seriously, even fatally, capacity constrained. But assuming that capacity can be built on the fly, the NCLB's full-implementation ideal is the wrong baseline for assessment. On the assumption that it might be possible to build governance capacity *during* the implementation of the NCLB, states' ability to address the prospective governance-capacity gap is more accurately gauged by looking at their recent responses to demands for better school governance under any circumstances in which it was explicitly required.

From that perspective, the situation is delicate but not dire. It is widely acknowledged that a sea change in state attitudes toward public education accompanied general acceptance of standards-based accountability in the early 1990s. "In 1993, when the Clinton Administration took office," writes Michael Cohen, former Assistant Secretary of Education in that administration, "only a handful of

114. *Id.* at 6–7.

115. See Elmore, *supra* note 89.

states were developing standards and aligned assessments Nine years later, every state is organizing its K–12 system around standards-based reform.”¹¹⁶ Moreover, there has been a substantial accumulation of expertise about how to deal with technical problems of the New Accountability, such as year-to-year volatility in test scores that is a statistical artifact and not a reflection of actual changes, and the unreliability of data that is disaggregated by racial and economic groups with only a few members in given schools.¹¹⁷ At the same time, the successes of states, such as Texas and North Carolina, in implementing NCLB-style governance reforms have been widely discussed.¹¹⁸ This combination of a general orientation

116. See COHEN, *supra* note 15, at 4.

117. See sources cited *supra* notes 15, 16, 61, and 87.

118. E.g., DAVID GRISSMER ET AL., IMPROVING STUDENT ACHIEVEMENT: WHAT STATE NAEP TEST SCORES TELL US 58–73 (2000) (finding that NAEP test scores of public school students in North Carolina and Texas have improved more substantially than in any other states and linking those successes to the two states’ implementation of systematic reforms); Jonathan Fox, *Old-Style Tests May Hamper School Reform, Experts Say*, EDUC. DAILY, Apr. 14, 1999 (crediting the 1995 Texas reform plan with some of “the highest test score gains this decade on the National Assessment of Educational Progress (NAEP), catapulting [Texas] from lower-than-average NAEP standards to near the national average”); *Improving Student Performance: The Role of District-Level Staff*, EVALUATION BRIEF (Pub. Sch. of N.C., State Bd. of Educ., Raleigh, N.C.), March 2000, at 5–6, available at <http://www.ncpublicschools.org/accountability/evaluation/evalbriefs/vol2n4-role.pdf> (identifying schools and districts in the state where minority students have made large gains over a number of years, or where the achievement gap between white and black students has been closed, and linking those successes to governmental reform); Martin Carnoy et al., *Do Higher Test Scores in Texas Make for Better High School Outcomes?* 2, Paper presented at the American Educational Research Association Annual Meeting (Apr. 24–28, 2000) (on file with the North Carolina Law Review) (reporting generally favorable findings in regard to effect of Texas reforms); Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL’Y ANALYSIS ARCHIVES, 41 § 3.4 (2000), at <http://epaa.asu.edu/epaa/v8n41/index.html> (on file with the North Carolina Law Review) (citing “considerable publicity for the apparent success of education reform in [Texas]” based on test score data); see ORFIELD & DEBRAY, *supra* note 59, at 29–32 (noting that Texas had the largest increase on fourth grade mathematics scores between 1992 and 1996 of the thirty-five states participating in the NAEP, although progress in reading has been roughly average for the country and has not accelerated since 1992); cf. STEPHEN P. KLEIN ET AL., WHAT DO TEST SCORES IN TEXAS TELL US? 12, 13–14 (Rand Corp., Issue Paper No. IP-202, 2000) (finding that “the reading and math skills of Texas students improved since the full implementation of the TAAS program in 1994” but stating that the NAEP and TAAS results give “very different” answers to the questions “whether the improvement in reading was comparable to what it was in math, and whether Texas reduced the gap in scores among racial and ethnic groups”). But see, e.g., McNeil & Valenzuela, *supra* note 21, at 147 (concluding that the TAAS test is a “ticket to nowhere”); Eric A. Hanushek, *Deconstructing RAND*, EDUC. NEXT, Spring 2001, at 65, <http://www.educationnext.org/2001sp/65.html> (on file with the North Carolina Law Review) (criticizing main study touting Texas gains for relying on insufficiently detailed family backgrounds of Texas students who took the NAEP and doubting conclusions that

towards standards-based reform, accumulating expertise in the use of diagnostic data, and leading examples of how to link classroom-level reform via attention to disaggregated diagnostic data to governance systems is likely to encourage rapid learning among new generations of reformers. Rapid learning is especially likely to occur if, as we expect, the quality of testing and reporting in one state will be a goad to improvement in others.¹¹⁹

There thus is evidence that capacity to reform classrooms and build governance systems can be built even as reform proceeds.¹²⁰ The provision of information on school and district performance in Texas touched off a statewide movement for school- and district-level improvement, and there is reason to hope that the provision of equivalent information through the NCLB will touch off a mutually reinforcing race to the top nationwide both in statewide school governance and in district, school, and classroom reform.

But in arguing that the NCLB may set off a race to the top, we do not suggest that the law as enacted provides all that is required for a general and continuing improvement of education in all schools and districts in the country at large. Like all races, races to the top produce losers as well as winners, even if we know too little about the enabling conditions of reform to predict who will place where. Accordingly, we can assume that the NCLB and its implementation will have to be modified to provide additional, context-driven support to the stragglers. But, as in the case of the corresponding legislation in Texas and Kentucky, the NCLB creates a framework that appears to be corrigible based upon the experience it induces. This next

smaller class size and higher teacher salaries connected with Texas reforms contributed to increases in NAEP test scores). McNeil and Valenzuela conclude:

The TAAS is harmful to instruction by its rigid format, its artificial treatment of subject matter, its embodiment of discredited learning theories, its lack of attention to children's cultures and languages, and its emphasis on the accounting of prescribed learning. The test itself and the system of testing and test preparation have in poor and minority schools come to usurp instructional resources and supplant the opportunity for high-quality, meaningful learning.

McNeil & Valenzuela, *supra* note 21, at 147.

119. Our expectation is shared by private service providers that compete with each other to assist states in implementing high quality testing and reporting schemes, and that interest officials in their services in part by identifying states whose schemes do and do not measure up to those in operation in, for example, Texas and to those contemplated by the NCLB. See *infra* notes 122–27 and accompanying text. For a careful analysis of the often considerable regulatory value of the release of comparative data on the harmful by-products and successful self-regulation of regulated entities, see Karkkainen, *Information as Environmental Regulation*, *supra* note 35, at 265.

120. See Liebman & Sabel, *supra* note 13 (manuscript at 54–57, 78–81); THE CHARLES A. DANA CTR., *supra* note 33, at 18–19; sources cited *supra* notes 24, 33, and 112.

generation of framework reform could be in substantial part the work of the U.S. Department of Education or of public-private intermediary groups. Or, as we argue in the next Part, this reform might emerge in response to community and legal pressure occasioned by public evaluation of schools, districts, states, and the federal government itself in the light of the new accountability systems. And this public engagement may in turn provide new tools and perhaps even a new direction for the civil rights movement.

For starters, the Federal Department of Education, acting under its own steam, could periodically convene the states to review experience under their consolidated plans and to revise their standards, assessments and accountability systems accordingly. The Secretary of Education could report the results of this deliberation periodically to Congress and explain how, through its own enforcement activities, the Department itself is drawing framework lessons from developments triggered by the NCLB. Such a process could in time cause the relationship of the federal government to the states to approximate the cascading relation of states to school districts, school districts to schools, and schools to classrooms. In each case, the higher order unit creates a framework for the initiative of the lower level ones and an infrastructure that allows the latter to revise the framework in light of their pooled experience.¹²¹

V. THE ROLE OF NONGOVERNMENTAL, COMMUNITY, AND CIVIL RIGHTS ACTIVISM

Thus far, we have suggested that the contribution of the New Accountability and the NCLB to preserving or dooming the public schools and to closing or maintaining the gap between the educational outcomes of poor and minority children and those of other children will depend upon administrative action at the federal, state, and local levels. The Texas and Kentucky experiences suggest, however, that it may be possible, and indeed necessary, to build key elements of a national system of educational accountability without direct action by the federal government, through the work of nongovernmental, community, and civil rights activism.

121. See *supra* notes 26–29 and accompanying text. For thoughtful convergent views of the possible reorientation of the federal role in educational reform and a concomitant use of its enforcement policies, see Margaret C. Wang et al., *The Need for Developing Procedural Accountability in Title I Schoolwide Programs*, in *HARD WORK FOR GOOD SCHOOLS*, *supra* note 59, at 175, 175–91; Weckstein, *supra* note 15, at 314–18.

A. *Nongovernmental Organization Monitoring and Benchmarking*

In Texas, for example, an intermediary organization, Just for the Kids, provides parents with the most useful data for building a constituency for reform and most effectively culls best practices from the successes of leading schools and districts for use by less successful institutions.¹²² Another intermediary organization, the Educational Innovation Network (“EIN”) team at the Dana Center of the University of Texas, links leading districts in a network that facilitates “inter-visitation” and other forms of ongoing peer review.¹²³ Just for the Kids is already making a determined effort to become a national provider of detailed comparable information on school performance for districts and states across the nation,¹²⁴ and it also is beginning to coordinate efforts with the Dana Center. Similarly, *Education Week* began publishing a report card on state education policy, student performance, and standards and accountability systems six years ago.¹²⁵ Additionally, academic comparisons of state accountability and assessment systems are also being published.¹²⁶

122. For information about Just for the Kids, see Gwyne, *supra* note 112; David J. Hoff, *Group to Take Texas Reform Tools Nationwide*, EDUC. WK., Nov. 14, 2001, http://www.edweek.org/ew/ew_printstory.cfm?slug=11ecs.h21 (on file with the North Carolina Law Review); Bess Keller, *Texas Group Makes News with Data*, EDUC. WK., Nov. 28, 2001, http://www.edweek.org/ew/ew_printstory.cfm?slug=13kids.h21 (on file with the North Carolina Law Review).

123. See EDUC. INNOVATION NETWORK, *supra* note 112. For information on the Dana Center, see its Web site, <http://www.utdanacenter.org/ein/> (last visited Apr. 1, 2003), and Liebman & Sabel, *supra* note 13 (manuscript at 74–78). The authors are currently collaborating with EIN on a research project designed to measure effective implementation of reform strategies and to determine whether it is linked to improved outcomes.

124. As the home page of the Web site of Just for the Kids explains, the organization “analyze[s] state test data to identify how well individual schools are performing,” “stud[ies] the highest-performing schools to find out what works,” and develops “tools and instruction [to] help others replicate educational best practice.” Just for the Kids, *US Home*, at http://www.just4kids.org/us/us_home.asp (last visited Apr. 1, 2003) (on file with the North Carolina Law Review). The organization’s Web site already lists the additional information that each state needs to collect to make Texas-style reporting available there. See Just for the Kids, *New York*, at <http://www.just4kids.org/us/newyork.asp> (last visited Apr. 1, 2003) (on file with the North Carolina Law Review).

125. See Lori Meyer et al., *The State of States*, EDUC. WK., Jan. 10, 2002, at 68.

126. E.g., MARGARET E. GOERTZ & MARK C. DUFFY, ASSESSMENT AND ACCOUNTABILITY ACROSS THE 50 STATES 8–12, 18–35 (Consortium for Policy Research in Educ., Pol’y Briefs No. RB-33, 2001) (presenting detailed comparisons of states based on how well they: (1) measure student performance and report it to the public; (2) hold schools and districts accountable for student outcomes; (3) have aligned their accountability systems for Title I and non-Title I schools; (4) and assist low-performing schools).

Presumably, there will be competition among these and other rating bodies to command national attention and the resources that go with it.¹²⁷ Similarly, several competing national analogues to EIN networks will likely emerge linking high-performance districts and state education agencies, and these networks are likely to compete with the rating agencies as providers of best practices and performance benchmarks to educators and the public.

B. Community Action

Provision of these kinds of services may both emerge from and contribute to grassroots engagement of parents and students in school reform. One model of such engagement is the Community Accountability Team in Louisville, Kentucky. The Team was created in 1999 with the help of the Prichard Committee, a statewide advocacy group that had been instrumental in securing legislative approval and modifications of Kentucky's landmark accountability reforms.¹²⁸ The purpose of the Team is to look into the cause of, and help correct, the persistent achievement gaps between white and black, male and female, and rich and poor students in the Jefferson County School District, which encompasses Louisville and its suburbs.¹²⁹ Several of the parents, community volunteers, Prichard Committee members, and business leaders who make up the team are graduates of the Commonwealth Institute for Parent Leadership, which the Prichard Committee created two years earlier to train parents and community activists across the state in building

127. For analogous competition among forestry codes and the learning that occurs through detailed comparisons of their features as judged by users, see CATHERINE M. MATER ET AL., CERTIFICATION ASSESSMENTS ON PUBLIC & UNIVERSITY LANDS: A FIELD-BASED COMPARATIVE EVALUATION OF THE FOREST STEWARDSHIP COUNCIL (FSC) AND THE SUSTAINABLE FORESTRY INITIATIVE (SFI) PROGRAMS 3-5, 49-51 (June 2002), available at http://www.pinchot.org/pic/Pinchot_Report_Certification_Dual_Assessment.pdf.

128. Henderson & Raimondo, *supra* note 43, at 22-23; Press Release, Prichard Committee for Academic Excellence, Every Child Counts: CAT Team Releases Report on Jefferson County Middle Schools (Jan. 18, 2001), <http://www.prichardcommittee.org/news/010118catreport.html> (on file with the North Carolina Law Review); JEFFERSON COUNTY COMMUNITY ACCOUNTABILITY TEAM, EVERY CHILD COUNTS: RAISING STUDENT ACHIEVEMENT IN THE MIDDLE GRADES 2 (2001), http://www.prichardcommittee.org/pubs/cat/every_child.pdf; THE COMMONWEALTH INSTITUTE FOR PARENT LEADERSHIP, PRICHARD COMMITTEE FOR ACADEMIC EXCELLENCE, 2000-2001 BIENNIAL REPORT 6, available at <http://www.cipl.org/pubs/report2000-2001.pdf>.

129. JEFFERSON COUNTY COMMUNITY ACCOUNTABILITY TEAM, *supra* note 128, at 2; LEWIS, *supra* note 43, at 5-8; Henderson & Raimondo, *supra* note 43, at 23.

partnerships with teachers and principals to implement educational reforms at the local level.¹³⁰

The Community Accountability Team (“The Team”) used the accountability and assessment framework created by the Kentucky legislation on school governance to undertake a sustained review of all of the middle schools in Jefferson County, where the district’s achievement gaps are the greatest. The Team began by disaggregating the schools’ achievement data in a way that has already become routine in high-performing Texas districts. This step revealed dramatic disparities in the performance of subpopulations that previously had escaped attention in a district where aggregate achievement compares favorably with that in other large urban school systems.¹³¹ The Team then undertook a “shadowing” study of five representative middle schools to uncover the reasons for the differences in performance—again adopting a type of comparative assessment of school practices that is routine in the robustly improving districts we observed in Texas and New York City.¹³² The Team’s key recommendations were to refocus staff development to enable teachers to devise engaging lessons linked to demanding standards and to provide more individualized instruction—structures and principles, once again, that are regarded as fundamental in successful Texas districts and in New York City’s District 2.¹³³

Insofar as they remain local, movements of this sort may create pressure and facilitate efforts to improve schools and districts.¹³⁴ But as the connection of the Community Accountability Team to the Commonwealth Institute for Parent Leadership and the Prichard Committee suggests, these local movements can also go hand in hand with movements for reform of the statewide accountability system.¹³⁵ Indeed, an upshot of these organizations’ work was the passage in 2002 of a law requiring the Kentucky Department of Education to provide every school in the state with data on student performance on

130. JEFFERSON COUNTY COMMUNITY ACCOUNTABILITY TEAM, *supra* note 128, at 2, 12; LEWIS, *supra* note 43, at 2–4; Henderson & Raimondo, *supra* note 43, at 23.

131. JEFFERSON COUNTY COMMUNITY ACCOUNTABILITY TEAM, *supra* note 128, at 3; LEWIS, *supra* note 43, at 5–7; Henderson & Raimondo, *supra* note 43, at 23.

132. JEFFERSON COUNTY COMMUNITY ACCOUNTABILITY TEAM, *supra* note 128, at 3; LEWIS, *supra* note 43, at 10–11; Henderson & Raimondo, *supra* note 43, at 23.

133. JEFFERSON COUNTY COMMUNITY ACCOUNTABILITY TEAM, *supra* note 128, at 6–7. For an evaluation of the Accountability Team’s work by one of its funders, with a dissenting view contending that the main report unjustly accused Jefferson County School District officials of tolerating disparate treatment in the past and failing to collaborate effectively with the Accountability Team, see LEWIS, *supra* note 43.

134. See Liebman & Sabel, *supra* note 13 (manuscript at 98–99, 109–12).

135. *Id.*

statewide tests that is disaggregated by race, sex, and economic status.¹³⁶ In turn, schools are required to involve parents, faculty, and staff in setting biennial targets for eliminating achievement gaps and in reviewing and adjusting these plans as needed.¹³⁷ This measure does Texas one better by making the data-driven reduction of achievement gaps a central focus of school organization and assessment.

Other inchoate but proliferating efforts by community organizations broadly understood to promote and shape school reform reveal a variety of horizontal coalitions connecting, for example, reforming schools and districts in different cities and states, along with vertical alliances connecting local reform with state and national efforts. Some of these initiatives are designed to break down barriers between community groups supposedly interested primarily, or even exclusively, in school safety and facilities improvement and reformist professionals ostensibly interested in building learning communities based on new forms of professional collaboration. For example, the Cross City Campaign for Urban School Reform, an alliance of school reform organizations in Baltimore, Chicago, Denver, New York, Oakland, and other major cities, is defining indicators of school improvement that reflect the “reciprocal accountability” of community activists and professional reformers in the new setting of standards-based reform.¹³⁸

Another careful and incisive effort to locate the common ground between school reformers and community parents is the Research for Democracy project. This project is jointly directed by the Temple University Center for Public Policy and the Eastern Pennsylvania Organizing Project, a coalition of community and faith-based democratic organizations working for neighborhood improvement in Philadelphia.¹³⁹ Instead of focusing on the views of representative *institutions*—community-based organizations on the one hand and the

136. Act of Apr. 9, 2002, ch. 302, § 1, 2002 KY. REV. STAT. & R. SERV. 972, 972 (Banks-Baldwin) (codified at KY. REV. STAT. ANN. § 158.649 (Supp. 2002)). Here, as elsewhere, economic status is determined based on whether students qualify for the hot lunch program.

137. *Id.* § 1, 2002 KY. REV. STAT. & R. SERV. at 973.

138. EVA GOLD & ELAINE SIMON, RESEARCH FOR ACTION, SUCCESSFUL COMMUNITY ORGANIZING FOR SCHOOL REFORM, STRONG NEIGHBORHOODS, STRONG SCHOOLS (Mar. 2002) (describing community intervention efforts linked to standards-based reforms in six major urban school districts), *available at* <http://www.crosscity.org/pdfs/strnbrhdsstrschls.pdf>; *see also Executive Summary*, BEYOND FINGER-POINTING AND TEST SCORES iii–xii, xix–xx, *available at* <http://www.crosscity.org/pdfs/beyondfinger.pdf>.

139. *See* Eastern Philadelphia Organizing Project, <http://www.epopleaders.org/> (last visited Apr. 1, 2003) (on file with the North Carolina Law Review).

elite school reformers on the other—Research for Democracy conducted a random survey in Philadelphia in 2002 of the underlying constituencies of both types of groups: parents and school teachers. Based on the survey, the researchers concluded that “the traditional view of parents as only concerned with safety and building conditions is inaccurate.”¹⁴⁰ Perhaps most surprising is the finding that Philadelphia parents have substantially more ambitious educational goals for their children than do their teachers. More than eighty percent of parents thought that schools should put more emphasis on teaching students to think critically and preparing them for college, whereas only forty percent of the teachers agreed with this assessment.¹⁴¹ A deep divide over the importance of educational enhancement may thus run within the professional community itself, rather than between communities and reforming schools; and the efforts of groups, such as the Cross City Campaign and Research for Democracy, may therefore prove crucial to creating the parent-professional collaborations through which, and the resulting political context within which, reform can flourish.

Something analogous could be emerging at the national level. Groups, such as the Citizens’ Commission on Civil Rights (a collaborator with Research for Democracy in the Philadelphia parent-teacher survey discussed above), are comparing states’ ability to meet the new federal accountability requirements.¹⁴² The Citizens’ Commission also advises advocates on the use of the Act’s information-disclosure provisions in assessing school performance, and on the use of data-rich studies of rapidly improving schools in pressuring less successful schools.¹⁴³ In time, the Citizens’ Commission and other organizations like it might provide just the kinds of services to subnational advocacy groups that the Prichard Commission is beginning to provide to local advocacy groups in Kentucky.

Together or separately, these new publics could lead the Federal Department of Education to take a more active role in monitoring school reform under the NCLB than the legislation now mandates. Alternatively, the government could partner with some of the new

140. RESEARCH FOR DEMOCRACY, *supra* note 43, at 17.

141. *Id.* at 21–22.

142. See RAISING STANDARDS, *supra* note 43, at 18–27; sources cited *supra* notes 8, 13; Citizens’ Commission on Civil Rights Web site, at <http://www.cccr.org> (last visited Apr. 1, 2003).

143. See CITIZENS’ COMM’N ON CIVIL RIGHTS, *supra* note 13, at 38, 42–43; RAISING STANDARDS, *supra* note 43, at 15, 32–36.

entities that are already monitoring school reform. If the government fails to act, a national coalition of these entities could urge Congress to amend the NCLB to require federal officials to act.

C. *Civil Rights Activism Through the Courts*

The political correctives to the NCLB could be supplemented by new, accountability-based variants of the legal strategies developed by the Civil Rights Movements over a half century ago. And those strategies can then be used to enhance the NCLB's enforcement regime.

A first potential strategy builds on the tradition of private litigation by aggrieved parties vindicating civil rights under the equal protection provisions of the Fifth and Fourteenth Amendments¹⁴⁴ and Title VI of the Civil Rights Act of 1964,¹⁴⁵ which forbids racial discrimination by recipients of federal funds. Under both the Equal Protection Clause and Title VI, privately enforceable claims require proof that, as a result of *deliberate* discrimination, a minority group has suffered harm from the racially disparate impact of a government policy.¹⁴⁶ Proving intentional discrimination directly is, of course, nearly impossible. Few bigots with official responsibility are foolhardy enough to make bigotry an express motive for their official acts. In most cases, therefore, racial animus must be proved circumstantially: Officials may be found to be deliberately discriminating if they adopt policies with racially disparate impacts when they know of, but ignore, at least equally beneficial alternatives to the chosen policies that would have avoided or moderated the disparities.¹⁴⁷

144. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

145. 42 U.S.C. § 2000d (2000).

146. *Alexander v. Sandoval*, 532 U.S. 275, 280–81, 289–91 (2001) (limiting private actions under Title VI to deliberate discrimination, which also is required to establish a violation of the equal protection provisions of the Fifth and Fourteenth Amendment).

147. *E.g.*, *Rogers v. Lodge*, 458 U.S. 613, 622–27 (1982) (upholding a vote dilution challenge to a facially neutral at-large election system based on a variety of circumstantial indications of discriminatory intent); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 536 n.9 (1979) (noting that “proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose”); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 461–62, 464–65 (1979) (recognizing that “foreseeable and anticipated disparate impact” is relevant evidence to prove discriminatory purpose); *Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977) (describing circumstantial evidence of discriminatory purpose, including patterns of disparate impact, the historical background of legislative decisions, and procedural or substantive departures from typical governmental practices and decisions); *Washington v. Davis*, 426 U.S. 229, 241–43 (1976) (stating that discriminatory purpose may be inferred from the totality of the circumstances, including the disparate impact of a facially neutral statute); *James S.*

The accountability systems required by the NCLB can greatly facilitate such circumstantial demonstrations of intentional discrimination. Until now, circumstantial claims of racial discrimination were necessarily conjectural. Courts could never be sure there was a feasible alternative to the impugned policy that would more nearly equalize the benefits of a government service across all protected groups. But the whole thrust of the NCLB and the New Accountability is to make both the public and school officials inescapably aware of such proven equality-enhancing alternatives. Under the NCLB, schools and districts are required to (1) bring all subpopulations of students up to a state-defined level of educational adequacy and (2) improve the performance of those subpopulations at a threshold rate defined by state law; and states are routinely required to (3) divide those institutions into similarly situated cohorts (ones with racially and socioeconomically comparable student bodies), and (4) publicly identify the institutions in each cohort that do and do not satisfy those adequacy and improvement requirements. Given these mandates and the information they generate, the difficult burden will no longer be the one on the plaintiff class of minority children to show that school officials willingly ignored policies and practices that are demonstrably superior based on the school system's own criteria. Information generated by the state's own accountability system will do this *for* the plaintiffs. The more demanding burden will be the one the administrative scheme itself places on persistently poorly performing schools and districts: to explain to courts and administrators why they have not been able to meet the state's adequacy and improvement goals for their students when schools that the state and federal legislatures have formally defined to be similarly situated (ethnically, economically, and the like) are able to do so.¹⁴⁸

Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1576 n.483 (1990) (listing types of circumstantial evidence of discriminatory intent that the courts have recognized and citing lower court cases). See generally John Benjes et al., *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964*, 15 HARV. C.R.-C.L. L. REV. 537, 594-604 (1980) (arguing that past intentional discrimination raises the presumption that present disparate impact is causally connected to past discrimination and discussing the viability of equal protection challenges to minimum competency tests based on this and other circumstantial evidence of discriminatory purpose).

148. This same argument works to the advantage of minority plaintiffs in suits filed under state analogues to the federal Equal Protection Clause in those states—the majority—where such provisions likewise require proof of intentional discrimination.

The NCLB may also smooth the way for litigants pursuing relief through two additional types of causes of action under which a showing of "disparate impact," regardless of official intent, is sufficient to establish liability. The first cause of action is available in suits brought by the U.S. Department of Education to enforce its longstanding regulations¹⁴⁹ permitting the government to withhold federal funds from schools, districts, and states whose programs have harmful disparate impacts on minority children. The Supreme Court has explicitly left these regulations intact and invited the department to continue enforcing them through law suits and administrative actions.¹⁵⁰ The second cause of action is available in a minority of states, where disparate impact is an alternative basis for relief under their state equal protection clauses.¹⁵¹

The typical response of defendant officials in pure disparate-impact cases has been to attribute uneven outcomes to the individual motivations of poorly performing students or to the inadequate endowments of their families and communities, thus absolving state actors of responsibility.¹⁵² Under the NCLB, however, state actors are required to acknowledge their responsibility to enable all subpopulations of students to reach threshold levels of performance and ongoing improvement. Moreover, the fact that some schools and

149. See *Sandoval*, 532 U.S. at 281–82 (citing and discussing the relevant regulations).

150. *Id.* at 279–81, 289–91 (limiting private, but not public, actions under Title VI to deliberate discrimination).

151. See, e.g., *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996) (holding that Connecticut has an affirmative responsibility under the state's constitution to remedy segregation in public schools regardless of whether segregation has occurred de jure or de facto); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1144 & n.60 (1999) (citing cases); Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM, *supra* note 12, at 88, 103–04 & n.93 (citing state cases); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 844–54 (1998) (discussing the interpretation of the equality provision in New Jersey's Constitution); Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 301 (1977) (citing cases).

152. E.g., *Missouri v. Jenkins*, 515 U.S. 70, 87–97 (1995) (discussing circumstances in which a school district operating under a desegregation order may establish compliance, notwithstanding continuing racial disparities, by linking those disparities to conditions beyond its control); *Freeman v. Pitts*, 503 U.S. 467, 496 (1992) (noting that demographic changes sometimes cause racial imbalance in a school district that is not attributable to school officials); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 243 (1991) (concluding that the residential and resulting school segregation in the Oklahoma School District was the result of private decisionmaking and economics, not state action); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 416 (1977) (absolving school boards of responsibility for segregation that is not the result of the board's conduct of its business).

districts fail to do so while comparable institutions are succeeding is conclusive proof under the NCLB that it is the former institutions' corrigible educational practices, not children, parents, and communities, that are to blame for their pupils' racially disparate outcomes.¹⁵³

In urging passage of the NCLB, the Bush Administration characterized the legislation as an attack on the "soft bigotry of low expectations" and "committed [the government] to eliminating the achievement gap, not hiding it within school or statewide averages."¹⁵⁴ In keeping with these undertakings, the NCLB subverts many of the traditional defenses to racially disparate outcomes. These undertakings also arguably place a special responsibility on the U.S. Department of Education to interpret and enforce its own regulations in this spirit.

The same logic applies in spades with respect to suits premised on a state constitutional right to an adequate education.¹⁵⁵ We saw earlier how rulings in Texas and Kentucky solve the justiciability problem long associated with claims that the state has failed to provide adequate levels of education.¹⁵⁶ The NCLB now makes it incumbent on *all* states to define educational adequacy, to describe and measure sufficient progress towards it, and to make (via the accountability system) institutional corrections when the progress is insufficient. Each step that states take to comply with these requirements provides plaintiffs in failing schools and districts, and judges adjudicating their claims, with the definition of an adequate education and possible ways of achieving it. By provoking states to

153. See *supra* notes 60–77 and accompanying text (discussing relevant provisions of NCLB).

154. *Reaching Out . . . Raising African American Achievement*, No Child Left Behind Fact Sheet, available at http://www.nclb.gov/start/facts_pdf/achievementgap_aa.pdf (on file with the North Carolina Law Review).

155. See, e.g., William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376 (1994) (describing a shift in education reform litigation from equity in school finance to the adequacy of school performance); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMPLE L. REV. 1151 (1995) (arguing that "as a tool to reform school finance systems, adequacy arguments are comparatively less threatening and more firmly rooted in a constitutional base"); Hershkoff, *supra* note 151, at 1186–91 (finding that "state courts increasingly rely on a consequentialist approach to review the sufficiency of public school systems under state education clauses"); Deborah A. Verstagen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, 24 J. EDUC. FIN. 51 (1998) (concluding that most state courts have understood the concept of an adequate education as going well beyond a basic or minimum educational program).

156. See *supra* notes 48–51 and accompanying text.

provide that definition, the NCLB once again removes what in the past has been a major obstacle to successful adequacy suits.¹⁵⁷

Finally, this change of evidentiary contexts may invigorate private tort claims in education that until now have proved singularly unsuccessful. Modeled on medical and legal malpractice suits, these actions typically have sought monetary damages based on claims that individual teachers and principals breached professional duties of care by, for example, authorizing a functionally illiterate student to be passed up through the grades and awarded a high school diploma.¹⁵⁸ Courts almost always rejected these claims on the ground that in teaching, unlike in medicine and law, there is no settled view—not even within particular communities—of the due standard of care.¹⁵⁹

Again, however, the whole thrust of the classroom-level reforms prompted by the NCLB and the New Accountability is precisely to establish local and statewide standards of professional care, even as the focus of responsibility shifts from individual teachers to more encompassing institutions. It is conceivable, therefore, that a new generation of educational tort claims might be used to obtain injunctive relief from failing educational institutions. To underscore the legitimacy and utility of these standards, these suits can refer directly to the NCLB, to the obligations that states assume in accepting funds under it, and to state legislation or regulations adopted to implement those obligations.

For each of these litigation strategies, the NCLB and associated state reforms provide the same compelling enforcement logic: Failing schools and districts are now required by federal and state law to learn from other institutions that are demographically like themselves but are doing better. Schools and districts that persistently fail at this manifestly feasible task are reconstituted.¹⁶⁰ An equivalent logic can also be applied to *state* educational administrations that are found to be similarly failing in whole or in part.¹⁶¹ By relying on the

157. See James S. Liebman, *Implementing Brown in the Nineties: Political Reorganization, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 414–15 (1990).

158. John Elson, *A Common Law Remedy for Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U. L. REV. 641, 693–97 (1978); see Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 851–58 (1985).

159. Liebman, *supra* note 157, at 385–97.

160. See *supra* note 30 and accompanying text.

161. For discussions of educational reform litigation that could be enhanced by the strategies discussed here, see, e.g., Helen Hershkoff, *School Finance Reform and the Alabama Experience*, in STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY 24, 35 (Marilyn J. Gittell ed., 1998) (discussing recent

responsibilities and information generated by state accountability systems adopted pursuant to the NCLB, courts can thus enforce rights and remedies that are more encompassing, and yet less intrusive and difficult for courts to determine, than has typically been true of earlier phases of educational reform litigation.¹⁶²

CONCLUSION: THE CIVIL RIGHTS MOVEMENT REVISITED

From the vantage point established here, the NCLB may give the Civil Rights Movement that rarest of gifts: a historic second chance. As observers starting with W.E.B. DuBois have noted, formal equal access to public schooling does not by itself secure equality of educational outcomes.¹⁶³ The civil rights community has long been divided between those who emphasize the first (hoping that it will produce the second) and those who reverse the emphasis.¹⁶⁴ For

educational reform litigation in Alabama state courts); Liebman, *supra* note 157, at 370–435 (proposing litigation strategies designed to extract justiciable standards from high-stakes testing); James E. Ryan, Sheff, *Segregation and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 537 (1999) (discussing recent educational reform litigation in Connecticut state courts, e.g., Sheff v. O’Neill, 678 A.2d 1267 (Conn. 1996)); Weckstein, *supra* note 15, at 314–18 (proposing litigation strategies geared to changes made by a 1994 federal act that is a precursor to the NCLB).

162. See *supra* notes 48–57 and accompanying text. Because of the difficulty of implying a right of action under federal legislation, we have not discussed suits filed in federal court to enforce the NCLB directly. Two suits attempting to do just that in actions filed in state court under a combination of federal and state causes of action are *Californians for Justice Education Fund v. California State Board of Education*, Case No. CPF-03-502274 (California Super. Ct. for City and County of San Francisco, filed Jan. 23, 2003) (seeking an order directing the California State Board of Education and the California Department of Education to follow requirements of the NCLB and the *California Administrative Procedure Act* in adopting a definition for a “highly qualified teacher”), and *Staton v. New York City Department of Education*, Index No. 101491/2003 (N.Y. Sup. Ct., N.Y. County, filed Jan. 28, 2003) (suing two New York districts to enforce parents’ right under the NCLB to transfer their children out of failing schools and to receive supplemental educational services for their children).

163. In DuBois’s view, “[a] mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad.” W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935). He might well have extended the point to mixed schools with racially segregated tracks, classrooms, and in-class groupings. DuBois also recognized that “[a] segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad,” and that “[o]ther things being equal, the mixed school is the broader, more natural basis for the education of all youth” because “[i]t gives wider contacts; it inspires greater self-confidence; and suppresses the inferior complex.” *Id.* Given, however, that “things seldom are equal,” DuBois opted for improved but separate schools. *Id.* The hope expressed here is that the New Accountability reforms and the NCLB offer a mechanism for making those other things equal.

164. Compare Brest, *supra* note 4 (arguing that an antidiscrimination principle focused on treating individuals as equals without insisting upon equal results rectifies racial injustices without subordinating other important values), with Bell, *supra* note 3 (arguing

reasons we need not rehearse, the movement opted primarily for the first strategy and got too little of the benefits of either. The NCLB presents a historic opportunity to fight on favorable terms for the second strategy in a way that could redefine, and is likely to increase its ability to fight for, the first.

In voicing this hope, we no doubt slight the obstacles and enlarge the gains to such a reconceptualization of the role of the courts. But even a much more cautious reading than our own of the NCLB, and the New Accountability generally, reveals possibilities for reform denied by a view of the Act as another nail in the coffin of the hope for racial justice in American schools. Imperfect as the NCLB is, it provides some of the crucial tools for overcoming its own defects. In a world where even the most effective reformers never get all they want all at once, this feature of the Act alone should compel serious attention.¹⁶⁵ One thing is for sure: Unless the civil rights community is as willing as other actors in school reform to scrutinize, and scrutinize anew, the relations of its traditional ends to its traditional legal means,¹⁶⁶ it risks losing a historic opportunity to use the courts to reinvigorate the heritage of *Brown*.

that school plans focusing on educational components and educational outcomes are superior to plans focusing on “racial-balance”).

165. On the dangers of aiming to solve major social problems once and for all, see the failure of the recent effort to give the Federal Food and Drug Administration full authority to regulate tobacco products. MICHAEL PERTSCHUK, *SMOKE IN THEIR EYES: LESSONS IN MOVEMENT LEADERSHIP FROM THE TOBACCO WARS* 255–98 (2001).

166. See *supra* note 13 and accompanying text.