

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

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Despite many deficiencies, the No Child Left Behind Act (“NCLB”) 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 paper 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 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

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justiciable standards by those most directly concerned with the reconstruction of classrooms, schools, and school districts. If the courts achieve this, their practices 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

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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*

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Court decisions, *Brown* may be considered a “soft” constitutional amendment or a quasi-national consent decree. Its central holding was that, in the words of one current commentator, “public education is a privilege of American citizenship.”³ This conclusion followed from the principle “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

NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 3–25 (Jack M. Balkin ed., 2001) [hereinafter WHAT BROWN SHOULD HAVE SAID].

3. Bruce Ackerman, *Ackerman, J., concurring, in WHAT BROWN SHOULD HAVE SAID, supra* note 2, at 101. <<JL: One of the editors is a little concerned that you state this as a “central holding.” This seems to be a big leap.>>

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.

Behind Act of 2001 (“NCLB”),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 and superintendents) and subject to continuing, comparative review by the federal

5. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C.A. §§6301-6578 (West Supp. 2002)). 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 25–84 and accompanying text.

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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 **themselves** setting **judicially-imposed** rules for constitutionally acceptable behavior. Instead,

7. See *infra* notes 25–84 and accompanying text.

8. See *generally*, CITIZENS' COMMISSION 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>; *infra* notes 76–84 and accompanying text.

9. See *infra* notes 76–84, 101 and accompanying text.

following the lead of recently innovative state supreme courts and the logic of the NCLB itself, other courts will **have need** 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

10. See *infra* notes 44–56 and accompanying text.

11. See *infra* notes 25–84, 142–58 and accompanying text.

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effective schools.¹² For closely related reasons, **we**

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* 1–38 (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 Decision Making: School Desegregation and District Court Judges*, 81 *N.C. L. REV.* (forthcoming 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, and does not have the support of the public, 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*

will 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

COURTS BRING ABOUT SOCIAL CHANGE? 42–105 (1991); Donald R. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1287 (1983); *infra* notes 52-53 and accompanying text.

13. See *infra* notes 126-58 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., Ann Majestic, President, Wake County (North Carolina) Board of Education, Address at North Carolina Law Review Symposium: The Resegregation of Southern Schools? (Aug. 30, 2002)

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(describing comprehensive plan in operation in 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) <<KES: Ask Carter about this. It has been formatted according to BBR 17.1.5 and assumed they were not published anywhere>>; CITIZENS' COMMISSION ON CIVIL RIGHTS, WILL TITLE I LEAVE NO CHILD BEHIND? 42-45 (2002) (noting prospects for parents and advocates to utilize **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_Title1_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 **MONTH?** 2003) <<JL: When will this be published?>> (manuscript at 98-99, 109-12, on file with the North Carolina Law Review) (discussing

Part I of this paper 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 way to privatization of

several initiatives, at least partly focused on desegregation, proposed by civil rights and community activists that were triggered, 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 Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. (forthcoming 2003) (suggesting that civil rights groups utilize 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).

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currently public schools or to deregulation of the controls on federal funding for education. The privatization worry, we claim, overlooks the enormous costs of short-changing 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~~ argues 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. ~~In~~ Part V, ~~we~~ argues that, far from diverting attention from a vindication of civil rights, the Act provides an opportunity to ~~revivify~~ **revise** 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 governance¹⁴ that was crystallized in 1994 in Clinton Administration initiatives¹⁵ and is commonly referred

14. See *generally* CITIZENS' COMMISSION 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 INSTITUTE, IMPLEMENTING TITLE I STANDARDS, ASSESSMENTS AND ACCOUNTABILITY: LESSONS FROM THE PAST, CHALLENGES FOR THE FUTURE (2002), *available at* <http://www.edexcellence.net/NCLBconference/Cohen.pdf> (discussing implementation of the 1994 legislation and its relationship to the “No Child Left Behind”

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to as the New Accountability.¹⁶ The New

legislation); see also Paul Weckstein, *Social Reform and Enforceable Rights to Quality Education*, in *LAW AND SCHOOL REFORM*, *supra* note 12, at 308–10 (explaining the framework for school reform adopted by Congress in 1994).

16. See Susan H. Fuhrman, *The New Accountability*, CPRE POLICY BRIEFS (Consortium for Policy Research in Education, University of Pennsylvania) (Jan. 1999) <<**KES: This (and other CPRE sources) are cited as Newsletter (16.6.7), but it may be more properly a pamphlet (15.1.3) or nonconsecutively paginated journal (16.4)—check this>>**; Diane Massell, *State Strategies for Building Capacity in Education: Progress and Continuing Challenges*, CPRE RESEARCH REPORT SERIES (Consortium for Policy Research in Education, University of Pennsylvania) (1998); Diane Massell et al., *Persistence and Change: Standards-Based Systemic Reform in Nine States*, CPRE POLICY BRIEFS (Consortium for Policy Research in Education, University of Pennsylvania) (March 1997); New

Accountability resulted from the mutual transformation of two apparently contradictory clusters of piecemeal reforms.¹⁷ The first cluster—

American Schools' Standard of Quality for Design-Based Assistance (Nov. 1999) (draft, on file with the North Carolina Law Review) <<JL: I did not really see the relevance of this article. Could you provide a pinpoint or parenthetical?>>. We sketch out the attributes of the New Accountability below, *infra* notes 17-55 and accompanying text, and describe it in greater detail in Liebman & Sabel, *supra* note 13 (manuscript at 59–99).

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 8 (Diane Ravitch & Joseph P. Viteritti eds., 2000) [hereinafter CITY SCHOOLS] (noting the same contradiction between these same two impulses in context of particular reforms in New

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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 level; to rank pupils and schools accordingly; ~~and~~ to deny promotion and diplomas to students, and to reconstitute schools that persistently failed to meet the new requirements. <<JL: **One of the editors suggested that this seemed more like 4 parts rather than 3. I have suggested a change to reflect that, but you may certainly reject it.>>¹⁸**

York City public schools).

18. See NATIONAL 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 1980'S: PERSPECTIVES AND CASES* (Joseph Murphy ed., 1990) (collecting articles addressing numerous aspects of educational reform movement of the eighties); W. Clune et al., *The Implementation and*

Effects of High School Graduation Requirements: First Steps Toward Curricular Reform, CPRE RESEARCH REPORT SERIES (Consortium for Policy Research in Education, University of Pennsylvania) (1989); 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 Children of Color?* 64 NAT'L TAX J. 401 (2001); *Changing Course: A 50-State Survey of Reform Measures*, EDUC. WK., Feb. 6, 1985, at 11 (noting, as of the mid-1980's, that virtually all 50 states had adopted testing regimes) <<KES: This has been requested through ILL>>; Piphos, *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”)

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Advocates of such high stakes testing hoped that the penalties of failure would induce both individuals and institutions to improve their performance.¹⁹

<<KES: This has been requested through ILL>>
<<KES: previously cite-checked by Columbia L Rev. Check with CA.>>; Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830 (1999) (proposing reform strategy based on states' power to disestablish entire school districts).

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 (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

The second cluster—the professionalization, site-based management, and chartering of schools—went in the direction of a new localism. Its key elements were devolution of authority for classroom instruction away from state education administrations and towards districts, principals, teachers (especially those professionally mortified by the rigidities of the traditional system), and sometimes parents. Other elements were increased willingness by educational authorities to allow teachers and parents to create new schools, particularly small and specialized ones, within the public system, and increased acceptance of a parent's right to choose to send his or her child to a school outside the assigned **catchment area** <<JL:

educational improvements but as harmful if high stakes consequences are emphasized). For a careful examination of high-stakes testing regimes see Jay P. Heubert, *High-Stakes Testing and Civil Rights: Standards of Appropriate Test Use and a Strategy for Enforcing Them* (2002) (unpublished manuscript, on file with the North Carolina Law Review) <<KES: **Check with CA on this.>>.**

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district?>>.20

20. See PAUL T. HILL ET AL., *HIGH SCHOOLS WITH CHARACTER* xxx (1990); PRISCILLA WOHLSTETTER & NOELLE GRIFFIN, *CREATING AND SUSTAINING LEARNING COMMUNITIES: EARLY LESSONS FROM CHARTER SCHOOLS* xxx, CPRE Occasional Paper Series (Consortium for Policy Research in Education, University of Pennsylvania) (1998); WILLIAM P. CLUNE & PAULA A. WHITE, *SCHOOL BASED MANAGEMENT: INSTITUTIONAL VARIATION, IMPLEMENTATION, AND ISSUES FOR FURTHER RESEARCH*, CPRE Research Report Series xxx (Consortium for Policy Research in Education, University of Pennsylvania) (1988); Pearl Rock Kane, *The Difference Between Charter Schools and Charterlike Schools*, in *CITY SCHOOLS*, supra note 17, at 65; Molly O'Brien, *Free at Last? Charter Schools and the "Deregulated" Curriculum*, 34 AKRON L. REV. 137, 152-74 (2000); Jane L. David, *School-Based Decision Making: Kentucky's Test of Decentralization*, 75 PHI DELTA KAPPAN 706, xxx (1994); Sharon Elder, *The Power of the Parent*, YALE MAG., Oct. 1990, at 50, 53; Tom Loveless & Claudia

As these two sets of reforms intersected, they changed in complementary ways. High stakes testing, it became clear to many, was not a reliable measure of the performance of either individual pupils or of institutions. Often, the incentives it created were perverse—teaching to the test, or excluding from the testing pool just those vulnerable students most in need of help—and it unfairly penalized very poor and minority students for the failings of institutions over which neither they nor their parents had any substantial control.²¹ Above all, the results of the

Jasin, *Starting from Scratch: Political and Organizational Challenges Facing Charter Schools*, 34 EDUC. ADMIN. Q. 9, 14-15 (1998).

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); NATIONAL RESEARCH COUNCIL, *supra* note 18, at 178-79; SUSAN OHANIAN, ONE SIZE FITS FEW: THE FOLLY OF EDUCATIONAL STANDARDS 1-127 (1999); John Jacob

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test provided little or no indication of how to reorganize ineffective schools or to aid those students who did not measure up. In response to these

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*, PHI DELTA KAPPAN, Nov. 1999, at 199-203 <<JL: We have not been able to locate this source yet. Do you have a copy?>> <<KES: This has been requested through ILL>>; Linda McNeil & Angela Valenzuela, *The Harmful Impact of the TAAS System of Testing in Texas: Beneath the Accountability Rhetoric*, in RAISING STANDARDS OR RAISING BARRIERS: INEQUALITY AND HIGH STAKES TESTING IN PUBLIC EDUCATION 127-50 (Gary Orfield & Mindy L. Kornhaber eds., 2001). <<KES: This book was checked out. See n. 116>>; D. Monty Neill & Noe J. Medina, *Standardized Testing: Harmful to Educational Health*, 70 PHI DELTA KAPPAN 688, 689-92 (1989).

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

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 TESTING, TEACHING AND LEARNING: A GUIDE FOR STATES AND SCHOOL DISTRICTS 22-101, COMMISSION ON TITLE I TESTING AND ASSESSMENT, NATIONAL ACADEMY OF SCIENCES (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 sources cited and *infra* notes 26-28

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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

(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 interview with Anthony Alvarado, Superintendent of Schools, District Two, New York City, November 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%20>

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, and to help correct difficulties as they arise.²⁶

portrait.pdf (on file with the North Carolina Law Review); Liebman & Sabel, *supra* note 13 (manuscript at ~~40-41~~-59).

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

26. See RICHARD F. ELMORE & DEANNA BURNEY, CONTINUOUS IMPROVEMENT IN COMMUNITY DISTRICT #2, NEW YORK CITY 6-9 (Dec. 1998); RICHARD F. ELMORE & DEANNA BURNEY, SCHOOL VARIATION AND SYSTEMIC INSTRUCTIONAL IMPROVEMENT IN COMMUNITY SCHOOL DISTRICT 2, NEW YORK CITY 3 (Oct. 1997); ELAINE FINK & LAUREN B. RESNICK, DEVELOPING PRINCIPALS AS INSTRUCTIONAL LEADERS (May 2000).

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The principal's job is to assure that classrooms and teaching in general at his or her school can be organized to facilitate this collaborative monitoring of students and peers.²⁷ And the superintendent's responsibility is to provide the conditions that principals need to succeed at that task.²⁸ The state

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); FINK & RESNICK, *supra* note 26, at 8-15; INSTITUTE FOR EDUCATIONAL 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.

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 26, at 5-22 (describing the support central administrative staff provide to principals in effectively reforming schools); MARY KAY STEIN ET AL., OBSERVATIONS,

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 means for assessing them. On the other, 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

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.

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).

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English proficiency, and other identifiable categories of pupils.³⁰ Measures of student outcomes are continuously revised based on how well or poorly they align with successful learning, teaching, and organizing. Each district's and school's strengths and

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. §§ 39.021-39.131 (Vernon 1996). See 2000 Accountability Manual, Texas Education Agency, April 2000, Section VII, at <http://www.tea.state.tx.us/perfreport/account/00/manual/> (describing the operation of the Texas statutory and 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 places, see Liebman & Sabel, *supra* note 13 (manuscript at 70-73, 89-96).

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 under-utilized 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

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structures that are often assumed to exhaust the available options: traditional hierarchy (in the public sphere, bureaucracy) and economic or political markets. In a **classic?** 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 and corrected at the urging of “subordinates” in **the** light of their experience **of** “implementing” them: ends are revised in **the** light of

31. The classic statement of the rule-driven division in bureaucratic organizations is in **Max Weber, *Wirtschaft and Gessellschaft* 622 (1920)**<<<<JL: **We have not been able to locate this source yet. Do you have a copy?>>** . See also MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 329-41 (A. Henderson & Talcott Parsons trans., 1947) **(describing the efficacy of legal authority resting on the theory that one person has the authority to establish a rule and other members of the bureaucratic administrative staff must obey it).**

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

<<New paragraph>> 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

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

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

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recent writings, we and other authors argue that the **routine customary** questioning of institutional **routines** that results from the continuing revision of means and ends in **the** light of comparative assessment of performance is best understood in **the** light of pragmatist principles.³⁴ This “continuous

national standards); Linda Skrla et al., *Equity-Driven Achievement-Focused School Districts: A Report on System School Success in Four Texas School Districts Serving Diverse Student Populations* xxx (The Charles A. Dana Center, Univ. of Texas, Sept. 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) <<JL: Please provide a pinpoint.>> <<KES: Check with CA on BB’ing.>>. For additional examples, see Liebman & Sabel, *supra* note 13 (manuscript at 45-59, 73-78).

34. Charles F. Sabel, *Learning by Monitoring*, in HANDBOOK OF ECONOMIC SOCIOLOGY 137-65 (Neil Smelser & Richard Swedberg eds. 1994) <<KES: This book was checked out.>>; Susan Helper, John

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

Paul MacDuffie & Charles Sabel, *Pragmatic Collaborations: Advancing Knowledge While Controlling Opportunism*, 9 INDUS. & CORP. CHANGE 443, 443-883 (2000).

35. *E.g.*, 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

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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 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*

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

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 multi-tiered and interactive “regulatory” framework for use by trial courts in managing the compliance process in employment discrimination lawsuits). For a general overview, 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).

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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 It 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-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 abused in the current school system. We believe the New Accountability provides this hope both directly, by triggering a race to the top in educational

36. *Supra* notes 17, 20 and accompanying text; *infra* notes 102-07 and accompanying text.

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

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 gap between poor and minority students and between white and affluent ones becomes a matter of explicit public concern and tends to diminish.³⁸

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

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

39. See, e.g., sources cited *supra* note 24

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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

(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 (March 27, 2000) (unpublished manuscript, on file with the North Carolina Law Review).<<**KES: Ask CA about verifying author and date.**>>

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** (April 12, 2000) (on file with the North Carolina Law Review) <<**JL: This source is missing page 9.>>** <<**KES: This is a paper.>>**. 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 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 history of legal and community organizations that culminated in the comprehensive revision of the Kentucky public school

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

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).

43. For examples of educational reform initiatives

undertaken by these new public advocacy groups, see CITIZENS' COMMISSION ON CIVIL RIGHTS, *supra* note 8; 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 (draft, undated, on file with the North Carolina Law Review) <<**KES: This is a pamphlet.**>> ; **Majestic, *supra* note 13**; Research for Democracy, *A Right to Know: A Parent-Teacher Strategy to Improve Teaching and Learning in the Philadelphia Public Schools* (a joint project of the Temple University Center for Public Policy and the Eastern Pennsylvania Organizing Project), at <http://www.temple.edu/PPP/content/reports/arighttoknowreport.pdf> (Sept. 26, 2002) (on file with the North Carolina Law Review); Anne C. Lewis, *The Community Accountability Team in Louisville: Waking a Sleeping Giant*, Edna McConnell Clark Foundation, at http://www.prichardcommittee.org/pubs/cat/sleeping_

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giant.pdf (August 2002) (on file with the North Carolina Law Review); Kavitha Mediratta & Norm Fruchter, *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.*, Institute for Education and Social Policy, New York University with California Tomorrow, Designs for Change, and Southern Echo, 5, *at* http://www.nyu.edu/iesp/publications/cip/mapping/mapping_final_report.pdf (August 2001) (on file with the North Carolina Law Review); Patrick O'Hearn Elementary School Web Site, *at* <http://boston.k12.ma.us/schools/rc373.asp#intro> (last visited January 17, 2003) (on file with the North Carolina Law Review); *Raising Standards, Closing Gaps, Findings from the Citizens' Commission on Civil Rights Title I Monitoring Program*, *at* http://www.temple.edu/PPP/rfd/Raising_Standards_Closing_Gaps.pdf (Spring 2002) (on file with the North Carolina Law Review) [hereinafter *Raising*

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

Standards]; Elaine Simon & Eva Gold, *Case Study: Austin Interfaith, Strong Neighborhoods, Strong Schools*, www.crosscity.org/pdfs/cccsite_austin_r.pdf (March 2002) (on file with the North Carolina Law Review). 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).

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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 broadly defined education goals and then to condition the accreditation of each school district on its progress **towards** meeting **the those** goals.⁴⁵ This dramatically shifted the

44. J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE J.L. & POL'Y 607, **608** (1999).

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

emphasis of the lawsuit and the remedy from the definition of inputs to 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 it 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

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. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 525-27 (Tex. 1992) (Cornyn, J., concurring in part and dissenting in part).

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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 Texas Supreme Court 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

46. The classic description of these expectations for reformist courts is 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).

47. See *Meno*, 917 S.W.2d at 728-31 & nn. 7, 8, 10; see also Farr & Trachlenberg, *supra* note 44, at 670, n.340 (describing the transformation of the Texas

These developments address two potentially show-stopping 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 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,

litigation and remedy from **concerns ones** about financial equity to **ones concerns** about educational equity).

48. Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

49. *Id.* at 11.

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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

As we argue below, the new standards and the institutional architecture that generates them help

50. *Id.* at 57.

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*, 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 district court had ordered in connection with a desegregation suit. In

51. *Infra* notes 142-58 and accompanying text.

52. *E.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 87-102 (1995); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417 (1977); see also *Milliken v. Bradley*, 418 U.S. 717, 746 (1974). <<JL: Please provide a parenthetical for each of these cases.>>

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doing so, 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.'"⁵³

The New Accountability helps effective court-sponsored educational reform avoid this criticism as well. **Thus,** 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.⁵⁴ To continue with the Texas example, a constitutionally *inadequate* education comes to mean one in which particular schools are not closing achievement gaps between any identifiable, poorly performing sub-population and the best-performing groups, where outcomes at other comparable schools show this to

53. *Jenkins*, 515 U.S. at 83 (quoting *Jenkins v. Missouri*, 19 F.3d 393, 404 (8th Cir. 1994) (Beam, J., dissenting)).

54. **SABEL & SIMON, *supra* note 46** <<JL: **Please provide pinpoint**>>.

be possible.⁵⁵ 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

55. This 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, public outcry) as other parents and children have.

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is, in our view, just such an effort. The remainder of this paper 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.

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The NCLB was inspired by developments in Texas.⁵⁶ It generalizes to the nation both the attractively transparent governance structure of districts and schools that exemplify the New Accountability, and those institutions' **as yet insufficient attention to mechanisms by which states, districts, and schools across the nation can learn directly from one another** <<JL: The editors were very unclear on the meaning of **this.**>> about their respective successes and failures. Despite its defects, we think the NCLB provides important handholds for improvement.

For the most part, the NCLB imposes obligations

56. See, e.g., Brownstein, *supra* note 5.

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 1965.⁵⁷ Those funds are targeted

57. <<JL: Please cite to the Public Law in this footnote.>> Title I is an \$8 billion a 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 was to provide supplemental funds to schools serving the most impoverished children in order to provide assistance that their 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

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they often were removed from regular classes in order to provide the 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.” 20 U.S.C. §§ 6302(g)(2), 6492(c) (1994). 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. 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*

en to schools with the highest proportions of low-income families.⁵⁸ Under the NCLB, states must: set

GOOD SCHOOLS]; Gary Natriello & Edward L. McDill, *Title I: From Funding Mechanism to Educational Program*, in *HARD WORK FOR GOOD SCHOOLS*, *supra*, 31, 35-36; Weckstein, *supra* note 15, at 324-41. By 1996, nearly 10,000 schools were registered as having failed to improve at rates required by the 1994 Act. Orfield & DeBray, *supra*, at xxx.

58. See No Child Left Behind Act of 2001, Pub. L. No. 107-110 §§ 1113-1115, 115 Stat. 1469, 1469-79 (2002) (codified at 20 U.S.C.A. §§6313-6315 (West Supp. 2002)). Based on their proportions of low-income children, some schools qualify for funding for school-wide programs. See § 1114, 115 Stat. at 1471. Others qualify only for programs providing services to low-income children within otherwise non-qualifying schools. See § 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. § 1113, 115 Stat. at 1469.

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“challenging academic content standards” and “student academic achievement standards” defining an adequate education for all schools and students in the state;⁵⁹ create annual standardized tests in literacy and mathematics (and, subsequently, science) in grades 3-12 that are aligned with those standards;⁶⁰ report the results of performance on these tests and other valid indicators for individual schools and for all relevant ethnic and socio-economic subpopulations within those schools;⁶¹ set

59. *Id.* § 1111(b)(1)(A), 115 Stat. at 1444 (codified at 20 U.S.C.A. §6311 (West Supp. 2002)). See *infra* notes 89-101 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).

60. § 1111(b)(3), 115 Stat. at 1449.

61. §§ 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

goals for “annual yearly progress” (“AYP”) so that students in all the relevant subpopulations can be expected to meet the state standard of adequacy

success in regard to a variety of ethnic, socio-economic and developmentally defined groups—and of the need, even given the disaggregation, to assure that individual children are not lost in the averages—see Thomas J. Kane, *Randomly Accountable*, EDUCATION NEXT xx (Spring 2002), <http://www.educationnext.org>; Lynn Olson, *Testing Researchers Make Pitches for Refining ESEA Rules*, EDUC. WK., Sept. 25, 2002, at 10; David Figlio, *Aggregation and Accountability*, available at <http://www.edexcellence.net/NCLBconference/Figliodf> (Feb. 13, 2002) (on file with the North Carolina Law Review); Richard J. Wenning et al., *No Child Left Behind: Who Is Included in New Federal Accountability Requirements*, available at <http://www.edexcellence.net/NCLBconference/Wenning%20Herdman%20and%20Smith.pdf> (Feb. 13, 2002) (on file with the North Carolina Law Review).

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within twelve years;⁶² 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;⁶³ 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;⁶⁴ 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;⁶⁵ and provide academic achievement awards for schools that “significantly closed the achievement gap”

62. §§ 1111(b)(2)(B)-(G), 1111(b)(2)(I), 115 Stat. at 1446-48.

63. §§ 1111(c)(1), 1111(h), 115 Stat. at 1454, 1457.

64. § 1111(b)(2), 115 Stat. at 1445-49.

65. *Id.* §§ 1111(c)(3), 1111(c)(4), 1116(b)(4), 1117, 115 Stat. at 1455, 1482, 1498-1501 (codified at 20 U.S.C.A. §§6311, 6316, 6317 (West Supp. 2002)).

between students from different ethnic groups.⁶⁶

Each year, LEAs are required to use the results on 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.⁶⁷ 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].⁶⁸

Schools that fail to meet their obligations must

66. § 1117(b)(1)(B)(i), 115 Stat. at 1500.

67. § 1116(a), 115 Stat. at 1478-79.

68. § 1116(a)(1)(C), 115 Stat. at 1478-79.

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present a plan for doing so.⁶⁹ Parents and staff must actively participate in the planning process.⁷⁰ In presenting the Act, the Bush Administration has explicitly characterized it as a “‘flexibility for accountability’ bargain”:⁷¹ **Because** 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.⁷² 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

69. § 1116(b)(3), 115 Stat. at 1480-82.

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

71. 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 Aug. 2, 2002) (on file with the North Carolina Law Review).

72. §§ 1116(b), 1116(c), 115 Stat. at 1479-91.

schools.⁷³ 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.⁷⁴ Schools that fail to meet state improvement standards for at 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

73. § 1116(b)(8), 115 Stat. at 1485.

74. §§ 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, 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.

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and their parents.⁷⁵

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.⁷⁶ In order 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

75. *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.

76. On the kinds of assistance and monitoring the federal government ought to be providing, see *supra* notes 25-29 and accompanying text.

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schools, and public secondary schools make adequate yearly progress as defined [by the NCLB].”⁷⁷ 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 peer reviewers’ recommendations, demand necessary modifications.⁷⁸ As many states will submit initial plans nearly simultaneously during 2003,⁷⁹ it seems unlikely, except in cases of willful and blatant defiance of statutory provisions, that the Secretary will closely scrutinize state plans.

77. § 1111(b)(2)(A), 115 Stat. at 1445-46. See *generally* § 1111, 115 Stat. at 1444-62 (**setting out the standards for the state plan**).

78. § 1111(e), 115 Stat. at 1456.

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

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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 under this part until the Secretary determines that the State has fulfilled those requirements.”⁸⁰ 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.⁸¹ 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.”⁸² Except for this single mandate in response to a State’s unlikely

80. § 1111(g)(2), 115 Stat. at 1457.

81. § 1111(g)(1)(A), 115 Stat. at 1457; *supra* notes 59-64 and accompanying text.

82. § 1111(g)(1)(A), 115 Stat. at 1457.

failure even to pretend to comply, all the important matters are left ~~up~~ 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.⁸³ 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.⁸⁴

83. 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 101 <<JL: Please provide parenthetical>>.

84. E.g., COHEN, *supra* note 15, at 10-11:

No one believes the Education Department will really enforce Title I requirements. . . . The fact of the matter is that the Education Department

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III. REASONS FOR SUSPICION ABOUT THE NCLB, 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 Bush Administration's and Congress's good faith, fear that the legislation will have disastrous unintended consequences for the public

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.

schools and especially their poor and minority pupils.

On To the suspicious reader reading, the accountability-for-flexibility bargain legitimating the legislation 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 oligarchs.⁸⁵ 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

85. *E.g.*, Dan Goldhaber, *What Might Go Wrong with the Accountability Measures of the "No Child Left Behind Act?"*, paper delivered 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) (discussing fears that states will be able to game the system without achieving meaningful results, especially for poor and minority children).

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purpose is to speed privatization by exposing the incapacity of schools and districts to meet their annual improvement goals.⁸⁶

The concerns about disastrous unintended consequences go to the capacity of the states and schools to advance reform under the conditions established by the NCLB⁸⁷ and to the fear that the

86. 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).

87. See, Richard F. Elmore, *Unwarranted Intrusion*, EDUC. NEXT (Spring 2002), www.educationnext.org (on file with the North Carolina Law Review); Kane et al., *supra* note 61, at 57-61; Matthew Gandal, *Multiple Choices, How Will States Fill in the Blanks in Their Testing Systems?*, paper delivered at the Conference on “Will No Child Truly Be Left Behind? The

Act will undercut the nation's remaining commitment to desegregation.⁸⁸ 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 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

Challenges of Making this Law Work”, at <http://www.edexcellence.net/NCLBconference/Gandal.doc> (Feb. 13, 2002). <<JL: **Please provide parenthetical for each cite.>>**

88. See John Charles Boger, *Education's 'Perfect Storm?' Racial Resegregation, 'High Stakes' Testing, & School Inequities: The Case of North Carolina*, 81 N.C. L. Rev. xxx, xxx (forthcoming 2003). But see Taylor, *supra* note 13, at xxx.

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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.⁸⁹ 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.⁹⁰ The political costs of doing this 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.⁹⁰ Given the great

89. See *supra* note 74 and accompanying text. For an argument that this provision provides a potentially powerful tool for civil rights advocates, see Taylor, *supra* note 13.

90. See Marjorie Coeyman, *Just When You Thought You Knew the Rules . . .*; CHRISTIAN SCIENCE 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; Mary Lord, *The New School Choice: Suddenly, Thousands of Students Can Transfer*, U.S. NEWS & WORLD REP., Aug. 5, 2002, at 38 (noting that after President Bush signed the NCLB, “vowing to free ‘children trapped in schools that will not change and will not teach,’ . . . students in 8,652 chronically low-performing schools . . . must weigh whether to jump ship in the next few days—while school districts scramble to accommodate thousands of students eligible to seize that option,” including nearly 125,000 pupils in the Chicago district alone); Lori Olszewski, *Few Pupils Who Sought Switch Got Their Wish*, CHICAGO TRIBUNE, 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.-

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flexibility accorded states in setting standards and annual improvement goals, the more likely response to this threatened dislocation would be to diminish these standards or goals, so that widespread failure,

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”).

and the privatization to follow, does not occur.⁹¹

91. Some such adjustment is already taking place. Schemo, *supra* note 83; 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 101 and accompanying text. For sources arguing that large scale privatization is unlikely for either economic or political reasons, see Henry M. Levin, *Thoughts on For-Profit Schools*, Working Paper: National Center for the Study of Privatization in Education (2001), 4-7, at <http://www.ncspe.org> (on file with the North Carolina Law Review) (questioning whether there is a sound basis for expecting for-profit schools to achieve the economies of scale needed to make them succeed economically); Henry M. Levin & Cyrus E. Driver, *Costs of an Educational Voucher System*, 5 EDUCATION ECONOMICS 265, 303-311 (1997) <<KES: This has been checked online. Request thru ILL.>> (stating that school choice will never be a comprehensive solution because the cost of a

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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

voucher system 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 their 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**).

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 we develop at greater length in our companion study based on observation of classroom practices in New York City's Community District 2⁹² and of developments at both the classroom and district levels in Texas,⁹³ 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 under-performing professionals at

92. Liebman & Sabel, *supra* note 13 (manuscript at 45-57).

93. *Id.* (manuscript at 73-81).

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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”⁹⁴ are as detailed as the provisions for enforcement⁹⁵ (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 socio-economic 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,⁹⁶ and must require LEAs to do the same for themselves and for

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

95. § 1111(g), 115 Stat. at 1457.

96. § 1111~~(h)~~**(g)**(1)(C)~~(iii)~~, 115 Stat. at 1457.

each of their schools.⁹⁷ 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 school 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,"⁹⁸ and forbids the Secretary of Education to impose any particular standard on states as a condition for approval of its

97. § 1111(h)(2)(B), 115 Stat. at 1458.

98. § 1111(b)(~~1~~), 115 Stat. at 1444.

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consolidated plan.⁹⁹ But a separate provision of the NCLB takes an important first step towards 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.¹⁰⁰ If a state's standards are so low

99. § 1111(e)(1)(F), 115 Stat. at 1456.

100. § 1111(c)(~~2~~), 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 of those populations (e.g., female students, Hispanic students).” National Center for Education Statistics, What is NAEP?, <http://nces.ed.gov/nationsreportcard/about/> (last visited Mar. 4, 2003) (on file with the North Carolina

that all students are easily proficient, but a sample of

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 in *infra* notes 120–25 and accompanying text, has already begun mapping proficiency levels as measured on state tests to the proficiency levels defined by NAEP. *Id.* 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, *US Home*, at http://www.just4kids.org/us/us_otherstates.asp (last visited Jan. 17, 2003) (on file with the North Carolina Law Review).

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these students shows poorly on this demanding national diagnostic test, substantial pressure is likely to arise to bring that state's standards and its student's performance in line with those elsewhere in the nation.¹⁰¹

101. In response to reports that states were dumbing down their educational standards to avoid the full force of the NCLB. See, e.g., Schemo, *supra* note 91 (**describing actions taken by federal, state, and local officials to soften the effect of the law**); 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 Rod Paige, U.S. Education Secretary, U.S. Department of Education, Letter Released from U.S. Education Secretary Paige to State School Chiefs on Implementing *No Child Left Behind Act* (Oct. 23, 2002), at <http://www.nclb.gov/media/news/102302.html>.

Confirming the weakness of the Act's formal

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 we observed in Texas¹⁰² and Kentucky,¹⁰³

enforcement mechanisms, *supra* notes 76–84 and accompanying text, but also predicting—and acting to provoke—the public intolerance for weak standards and results that we too 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.” *Id.*

102. See TEX. EDUC. CODE ANN. §§ 35.001 et seq. (1996) <<KES: get range and check year>>.

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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 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 200 new state-level tests will **have need** to be created in the next several years to meet federal requirements.¹⁰⁴ 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,¹⁰⁵ it is not unreasonable to worry that a governance-based

103. See KY. REV. STAT ANN. §§ 156.001 et seq. (1996). <<**KES: get range and check year**>>

104. See Gandal, *supra* note 87, at 1.

105. See *supra* notes 76-84, 101, and accompanying text.

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 2.¹⁰⁶ 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

106. DAVID K. COHEN & SUSAN L. MOFFITT, TITLE I: POLITICS, POVERTY, AND KNOWLEDGE, IN THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY AND SECONDARY EDUCATION 78, 87-88 (2001) <<JL: We have not been able to locate this source yet. <<KES: This has been requested through ILL>> ; Richard F. Elmore, *Testing Trap*, HARVARD MAG., Sept.-Oct. 2002, at 35; sources cited *supra* note 87.

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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.¹⁰⁷

These are hardly frivolous worries. Many states will have a hard time implementing an accountability system, and some 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 more likely to paralyze reforms in the more advanced jurisdictions than it is to help

107. Elmore, *supra* note 106, at 37.

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

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such as Anthony Alvarado and Elaine Fink.¹⁰⁸ Moreover, the decision to adopt this monitoring and assessment regime was the starting point, not the conclusion, of change. As we develop in detail in our companion study, District 2 is still figuring out “what to

108. 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); Richard F. Elmore, *Building a New Structure for School Leadership*, 23 *AM. EDUCATOR* 6 (Winter 1999-2000); Richard F. Elmore & Deanna Burney, *Continuous Improvement in Community District #2, New York City* (Dec. 1998); Richard F. Elmore & Deanna Burney, *Leadership and Learning: Principal Recruitment, Induction and Instructional Leadership in Community School District #2, New York City* (Jan. 2000); Richard F. Elmore & Deanna Burney, *School Variation and Systemic Instructional Improvement in Community School District 2, New York City* 3 (1997)).

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 not obstruct reform more than aid it.¹⁰⁹

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 District 2’s success without having the latter’s progressive tradition of pedagogy.¹¹⁰ More exactly,

109. Liebman & Sabel, *supra* note 13 (manuscript at 45-54).

110. 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 are from families poor enough to qualify for federal lunch subsidies. But ninety-seven percent passed and eighty percent

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were proficient on the fourth grade reading test. In math, 100 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 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?*, TEXAS 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 <<**KES: Double check title to be sure this is not just a graphic.**>> [1-2-3], North East Independent School District, Instructional Division Plan 2002-2003: Guide for Meeting the Higher Learning Standards (July 29, 2002); 1-2-3, North East Independent School District, Division of Instruction, Principal’s Brief 2002-2003 (Revised April

2, 2002); North East Independent School District, North East Academy for Excellence in Teaching (undated) (pamphlet on file with the North Carolina Law Review). See also Skrla et al., *supra* note 33, at 3, 6-7 (study identifying seven, and investigating four, 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); EDUCATIONAL INNOVATION NETWORK, *Phase II: Evaluation Conducted in 2001-2002 9-12* (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

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the Texas example admits of two interpretations, both of which belie any show-stopping incapacity for ground-level reform. The first is that there are more, and more widely diffused, “cultures of reform” than simple extrapolation of 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.¹¹¹

Innovation Network of the Charles A. Dana Center at the University of Texas, which is described *infra* notes 121-22 and accompanying text).

111. See Skrla et al., *supra* note 33, at 3 (**studying only the Texas districts of Aldine, Brazoport, San**

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 as changes in the framework of governance at the state level provoke halting introduction of reform practices. ~~—for~~ **An example of this bootstrapping is** the imposition of improvement goals for racially and economically identified groups of pupils, and improvement-planning requirements and (eventually) sanctions if the goals are not met. ~~—provoke halting introduction of reform practices.~~ These practices in turn prompt changes in the governance structures in schools and districts, ~~—for example,~~ **such as** increased monitoring by principals of the implementation and success of curricular reforms in classrooms ~~—and so on.~~¹¹² This ~~means analysis demonstrates~~ that not having “already” built a culture of reform, invested in professional development, or

Benito, and Witchita Falls).

112. *Id.* at 6-7.

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completed a blueprint for restructuring is not a disqualification for doing so. It 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.¹¹³ 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 one 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-

113. See Elmore, *supra* note 87.

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 towards 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 states were

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developing standards and aligned assessments
Nine years later, every state is organizing its K-12 system around standards-based reform.”¹¹⁴ 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.¹¹⁵ At the same time, the successes of states such as Texas and North Carolina in implementing NCLB-style governance reforms have been widely discussed.¹¹⁶ This combination of a

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

115. See sources cited *supra* notes 15, 16, 61, and 85.

116. *E.g.*, 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”); Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL’Y ANALYSIS ARCHIVES, No. 8, § 3.4 (2000), at <http://epaa.asu.edu/epaa/v8n41/index.html> Aug. 19, 2000, (citing “considerable publicity for the apparent success of education reform in [Texas]” based on test score data) (on file with the North Carolina Law Review); Martin Carnoy et al., **Susanna Loeb & Tiffany L. Smith**, *Do Higher Test Scores in Texas Make for Better High School Outcomes?* 2 (2001) (paper presented at the American Educational Research Ass’n Annual Meeting, April 24-28, 2001¹⁰) (reporting generally favorable findings in regard to effect of Texas reforms) (on file with the North Carolina Law Review); David W. Grissmer et al., *Improving Student Achievement: What NAEP State Test Scores Tell Us* 58-73 (**Rand Report MR-924-Edu 2000**) <<KES: Check BB’ing.>>; see Orfield & DeBray, *supra* note 57, at 29-32 (Texas had the largest increase on fourth grade mathematics scores between 1992 and 1996 of the 35 states

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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?***, Rand Corp. Issue Paper (Nov. 6, 2000), at 13-14 **<<KES: check page number and date.>>** (“[W]e found that the reading and math skills of Texas students improved since the full implementation of the TAAS program in 1994. However, the answers to the questions of how much improvement occurred, 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 depend on whether you believe the NAEP or TAAS results. They tell very different stories.”). *But see, e.g.,* Eric A. Hanushek, *Deconstructing RAND*, EDUC. MATTERS, _____ (Spring 2001), at <http://www.edmatters.org/2001sp/65.html> (criticizing main study touting Texas gains for relying on insufficiently detailed family backgrounds of Texas students who took the NAEP and doubting conclusions that smaller class size and higher

teacher salaries connected with Texas reforms contributed to increases in NAEP test scores); Linda McNeil & Angela Valenzuela, *The Harmful Impact of the TAAS System of Testing in Texas: Beneath the Accountability Rhetoric*, THE CIVIL RIGHTS PROJECT, Harvard University 19 (2000), at http://www.law.harvard.edu/groups/civilrights/conferences/testing98.../mcneil_valenzuela.htm

www.ruf.rice.edu/~ctreduc/TAASArticle.pdf <<JL: I was not able to find this article on the Harvard Civil Rights website because they have changed it. I did find it on this other website. However, this copy says that it cannot be cited without permission. How would you like to proceed?>>

In conclusion, the TAAS is a ticket to nowhere. It is harmful to instruction by its rigid format, its artificial treatment of **subject matter**, its embodiment of discredited learning theories, its ignoring of 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

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general orientation 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. This is especially likely to be true if, as we expect, the quality of testing and reporting in one state will be a goad to improvement in others.¹¹⁷

There thus is evidence that capacity to reform

poor and minority schools come to usurp instructional resources and supplant the opportunity for high quality, meaningful learning.

Id.

117. See Liebman & Sabel, *supra* note 13 (manuscript at xxx) <<JL: **Please provide pinpoint**>>. 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.

classrooms and build governance systems can be built even as reform proceeds.¹¹⁸ 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 **say predict** who will place

118. *E.g.*, sources cited *supra* notes 102, 106, and 112. Liebman & Sabel, *supra* note 13 (manuscript at xxx) <<JL: Please provide pinpoint>>; Skrla, *supra* note 33, at 18-19.

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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 in the light of the experience that it induces. This next-generation framework **of** reform could be in substantial part the work of the U.S. Department of Education or of public-private intermediary groups. But as we develop in the next part, it might emerge as well 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 **Department** <<JL: If you would like to use this as a short form, then we should define it the first time you use Dept of Ed and then use only Department after that. If not, we should write it out each time.>>, 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 the light of their pooled experience.¹¹⁹

119. 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*

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V. THE ROLE OF NON-GOVERNMENTAL, 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 level. 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 non-governmental, community, and civil rights activism.

A. *NGO Monitoring and Benchmarking*

In Texas, for example, ~~it is~~ an intermediary

Developing Procedural Accountability in Title I Schoolwide Programs, in HARD WORK FOR GOOD SCHOOLS, *supra* note 57, at 175; Weckstein, *supra* note 15, at 314-18.

organization, Just for the Kids, ~~that~~ 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.¹²⁰ 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.¹²¹ Just for the Kids is

120. On Just for the Kids, see S.C. Gwyne, *supra* note 110; David J. Hoff, *Group to Take Texas Reform Tools Nationwide*, EDUC. WEEK (Nov. 14, 2001), http://edweek.org/ew/ew_printstory.cfm?slug=11esc.h21; Bess Keller, *Texas Group Makes News with Data*, EDUC. WEEK (Nov. 28, 2001), http://www.edweek.org/ew/ew_printstory.cfm?slug=13kids.h21.

121. See EDUCATIONAL INNOVATION NETWORK, *supra* note 110 <<KES: this is the Powerpoint presentation.>>. For information on the Dana Center, see its Web site,

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already making a determined effort to become a national provider of detailed comparable information on school performance for districts **and** states across the nation,¹²² and it also is beginning to coordinate

<http://www.utdanacenter.org/ein/> (last visited Jan. 16, 2003) (on file with the North Carolina Law Review) 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.

122. 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*, http://www.just4kids.org/us/us_home.asp (last visited Jan. 17, 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

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.¹²³ And academic comparisons of state accountability and assessment systems are also being published.¹²⁴

to make Texas-style reporting available there. See, e.g., Just for the Kids, New York, <http://www.just4kids.org/us/newyork.asp> (last visited Jan. 16, 2003) (on file with the North Carolina Law Review).

123. E.g., Quality Counts 2002: Building Blocks for Success, EDUC. WK., Jan. 10, 2002, at 68, <http://www.edweek.org/sreports/qc02/> (last visited Jan. 16, 2003) (on file with the North Carolina Law Review).

124. E.g., Margaret E. Goertz & Mark C. Duffy, *Assessment and Accountability Across the 50 States*, CPRE Research Report Series, RR-046, Mar. 2001, at 8-12, 18-35 (presenting detailed comparisons of states based on how well they: (1) measure student performance and report it to the public; (2) hold

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Presumably, there will be competition among these and other rating bodies to command national attention and the resources that go with it.¹²⁵ Similarly, it is likely that there will emerge several competing national analogues to EIN networks linking high-performance districts and state education agencies, and these networks are likely to compete with the rating agencies as providers of best practices

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).

125. 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*, at 3-5, 49-51, available at http://www.pinchot.org/pic/Pinchot_Report_Certification_Dual_Assessment.pdf (June 2002).

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.¹²⁶ The

126. Henderson & Raimondo, *supra* note 43, at 22-23; *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); *Every Child Counts: Raising Student Achievement in the Middle Grades, A Report from the*

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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.¹²⁷ 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

Jefferson County Community Accountability Team, at 2 (Jan. 2001), <http://www.cipl.org/pubs/cat/every-child.pdf> (on file with the North Carolina Law Review) [hereinafter *Every Child Counts*]; Prichard Committee for The Commonwealth Institute for Parent Leadership: Where Parents Are Powerful, 2000-2001 Biennial Report, at 6, <http://www.cipl.org/pubs/report2000-2001.pdf> (last visited Jan. 16, 2003) (on file with the North Carolina Law Review).

127. Henderson & Raimondo, *supra* note 43, at 23; *Every Child Counts*, *supra* note 126, at 2; Lewis, *supra* note 43, at 5-8.

Leadership, which the Prichard Committee created two years earlier to train parents and community activists across the state in building partnerships with teachers and principals to implement educational reforms at the local level.¹²⁸

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. Doing so 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

128. Henderson & Raimondo, *supra* note 43, at 23; *Every Child Counts*, *supra* note 126, at 2, 12; Lewis, *supra* note 43, at 2-4.

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large urban school systems.¹²⁹ 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.¹³⁰ 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 2.¹³¹

129. Henderson & Raimondo, *supra* note 43, at 23; *Every Child Counts*, *supra* note 126, at 3; Lewis, *supra* note 43, at 5-7.

130. Henderson & Raimondo, *supra* note 43, at 23; *Every Child Counts*, *supra* note 126, at 3; Lewis, *supra* note 43, at 10-11.

131. *Every Child Counts*, *supra* note 126, at 6-7. For an evaluation of the Accountability Team’s work by

Insofar as they remain local, movements of this sort may create pressure and facilitate efforts to improve schools and districts.¹³² 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.¹³³ Indeed, an upshot of these organizations' work was the passage in 2002 of a law requiring the Kentucky Department of Education ("KDE") to provide every school in the state with data on student performance on statewide tests that is

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.

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

133. *Id.*

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disaggregated by race, sex, and economic status.¹³⁴ 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.¹³⁵ 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, say, reforming schools and districts in different cities and states, along with vertical alliances connecting local reform with state and national efforts. Some of these

134. Act of April 9, 2002, ch. 302, § 1, 2002 KY. REV. STAT. & R. SERV. 456, 456 (Michie) (codified at KY. REV. STAT. ANN. § 158.649 (Michie 2000)). Here, as elsewhere, economic status is determined based on whether students qualify for the hot lunch program.

135. Act of April 9, 2002, ch. 302, § 1, 2002 KY. REV. STAT. & R. SERV. at 456-57.

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.¹³⁶

136. Eva Gold & Elaine Simon, Successful Community Organizing for School Reform, paper prepared for Strong Neighborhoods, Strong Schools, The Indicators Project on Education Organizing, *available at* <http://www.crosscity.org/pdfs/strnbrhdsstrschls.pdf> (Mar. 2002) (describing community intervention efforts linked to standards-based reforms in six major

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Another careful and incisive effort to locate the common ground between school reformers and community parents is Research for Democracy. 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.¹³⁷ Instead of focusing on the views of representative *institutions*—community-based organizations on the one hand and the 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:

urban school districts) (on file with the North Carolina Law Review); see also ~~Lauren E. Allenn & Anne C. Hallett~~, *Beyond Finger-Pointing and Test Scores, Executive Summary* (1998), available at <http://www.crosscity.org/pdfs/beyondfinger.pdf>.

137. See Eastern Philadelphia Organizing Project, <http://www.epopleaders.org/> (last visited Jan. 16, 2003) (on file with the North Carolina Law Review).

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.”¹³⁸ 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.¹³⁹ 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.

138. Research for Democracy, *supra* note 43, at 17.

139. *Id.* at 21-22.

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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.¹⁴⁰ 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.¹⁴¹ In time the Citizens' Commission on Civil Rights and other organizations like it might provide just the kinds of services to sub-national advocacy groups that the Prichard Commission is beginning to provide to local advocacy

140. See <http://www.cccr.org>; Raising Standards, *supra* note 43, 18-27; sources cited *supra* notes 8, 13.

141. See Raising Standards, *supra* note 43, at 15, 32-36; CITIZENS' COMMISSION ON CIVIL RIGHTS, *supra* note 13, at 38, 42-43.

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 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 it to do so.

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 Fifth and Fourteenth Amendment equal protection provisions and Title VI of the Civil Rights Act of 1964, which forbids racial discrimination

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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.¹⁴² 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 a racially disparate impact when they know of, but ignore, at least equally beneficial alternatives to the chosen policy that would have avoided or moderated the disparity.¹⁴³

142. *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 Fifth and Fourteenth Amendment equal protection provisions).

143. *E.g.*, *Rogers v. Lodge*, 458 U.S. 613, 622-27

(1982) (upholding vote dilution challenge to 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); *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. Liebman, *Desegregating Politics:*

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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 ÷ **because** 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

“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).

groups. But the whole thrust of the NCLB and the New Accountability is to make both the public and school officials inescapably aware of just such proven equality-enhancing alternatives. Under the NCLB, schools and districts are required to (1) bring all sub-populations of students up to a state-defined level of educational adequacy and (2) improve the performance of those sub-populations 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 socio-economically 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

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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.¹⁴⁴

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 United States Department of Education to enforce its longstanding regulations¹⁴⁵ permitting the government to withhold

144. 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.

145. See *Sandoval*, 532 U.S. at 281-82 (2001) (citing

federal funds from schools, districts and states whose programs have a harmfully disparate impact 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.¹⁴⁶ The second cause of action is available in those states—a minority—where disparate impact is an alternative basis for relief under their **state** Equal Protection Clauses.¹⁴⁷

and discussing the relevant regulations).

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

147. *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

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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.¹⁴⁸ Under the

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).

148. *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

NCLB, however, state actors are required to acknowledge their responsibility to enable all sub-populations of students to reach threshold levels of performance and ongoing improvement. Moreover, the fact that some schools and 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

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 decision-making 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).

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children, parents, and communities, that are to blame for their pupils' racially disparate outcomes.¹⁴⁹

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.”¹⁵⁰ 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

149. See *supra* notes 58-75 and accompanying text (discussing relevant provisions of NCLB).

150. Reaching out . . . Raising African American Achievement—“No Child Left Behind,” at http://www.nclb.gov/start/facts/achievement_aa.html (last visited July 30, 2002) (on file with the North Carolina Law Review).

adequate education.¹⁵¹ We saw earlier how rulings

151. 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 147, 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).

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in Texas and Kentucky solve the justiciability problem long associated with claims that the state has failed to provide adequate levels of education.¹⁵² 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 provide that definition, the NCLB once again removes what in the past has been a major obstacle to successful adequacy suits.¹⁵³

Finally, this change of evidentiary contexts may invigorate private tort claims in education that until

152. See *supra* notes 48-51 and accompanying text.

153. 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).

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.¹⁵⁴ Courts almost always rejected these claims on the grounds that in teaching, unlike in medicine and law, there is no settled view—not even within particular communities—of the due standard of care.¹⁵⁵

Again, however, the whole thrust of the classroom-level reforms prompted by the NCLB and the New Accountability is precisely to establish local

154. 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 (1985).

155. Liebman, *supra* note 153, at 385-97.

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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. If they persistently fail at this manifestly feasible task, they are reconstituted.¹⁵⁶ An equivalent logic can also be applied to *state* educational administrations that are

156. *Supra* note 30 and accompanying text.

found to be similarly failing in whole or in part.¹⁵⁷ By relying upon the responsibilities and information generated by state accountability systems adopted pursuant to the NCLB, therefore, courts can now

157. 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 educational reform litigation in Alabama state courts); Liebman, *supra* note 153, 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).

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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.¹⁵⁸

158. *Supra* notes 48-55 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 Educ. Fund v. California St. Bd. of Educ.*, Case No. xxxx (California Super. Ct. for City and County of San Francisco, filed Jan. 23, 2003) (**seeking to require the California State Board of Education and the California Department of Education to follow the notice and public comment requirements of the *California Administrative Procedure Act* in its adoption of a definition for a “highly qualified teacher”**); *Staton v. New York City Dept. of Educ.*, Index No. xxxx (N.Y. Sup. Ct., N.Y. County., filed Jan. 27, 2003 (suing two New York districts to enforce

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.¹⁵⁹ The civil rights

parents' right to transfer their children out of failing schools and to receive supplemental educational services for their children) <<**KES: Check with CA about BB'ing**>>.

159. In Du Bois'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. Du Bois also recognized that "[a] segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad," and that

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community has long been divided between those who emphasize the first (hoping that it will produce the second) and those who reverse the emphasis.¹⁶⁰

“[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,” Du Bois 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.

160. Compare, e.g., Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 34-36, 42 (1976) (arguing that an anti-discrimination principle focused on treating individuals as equals without insisting upon equal results rectifies racial injustices without subordinating other important values) with Derrick A. Bell, Jr., *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN, NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 90,

For 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 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

98-101 (Derrick Bell ed., 1980) (arguing that school plans focusing on educational components and educational outcomes are superior to plans focusing on “racial-balance”).

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attention.¹⁶¹ 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,¹⁶² it risks losing a historic opportunity to use the courts to reinvigorate the heritage of *Brown*.

161. 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).**

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