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**Publication Date**

2002-08-01

**A PUBLIC LABORATORY DEWEY BARELY IMAGINED:  
THE EMERGING MODEL OF SCHOOL GOVERNANCE  
AND LEGAL REFORM**

**By James S. Liebman and Charles F. Sabel**

**Table of Contents**

(Draft under construction; page numbers approximate)

Introduction .....	3-10
I. The Judicial Reform Cycle and its Limits .....	10-13
A. School Desegregation .....	13-22
B. Equitable Funding .....	22-31
II. Standards, Learning Communities and the New Accountability	
A. Top-Down Reform: Standards, State and Federal .....	31-39
B. Bottom-Up Reform: From the School as Teachers' Cooperative to District as Accountable Learning Community	
1. Networks and Small Schools: The Professional Collegium .....	39-42
2. Towards the District as an Accountable Learning Community: Community School District 2 .....	42-59
C. Synthesis: The New Accountability .....	59-62
III. Two Case Studies of the New Accountability in Practice: Texas and Kentucky	
A. Texas	
1. History .....	63-71
2. Operation .....	71-83
B. Kentucky	
II History .....	83-91
II Operation .....	91-101
II	
IV. Why the New Collective Action Works: Some First Notes on Politics in the Age of Non-Court-Centric Judicial Review	
A. New Publics? .....	101-109
B. The New Isomorphism .....	109-112
C. The New Meaning of Judicial Review .....	112-121
V. The Federal Role in the Reform of Public Education: The No Child Left Behind Act and its Implications .....	121-131
VI. Conclusion .....	131-134

## Introduction

After decades of apparent decay and immobilism, the American public school system is in the midst of a vast and promising reform. The core architectural principle of the emergent system is the grant by higher level authorities—federal government, states, school districts—to lower level ones of autonomy to pursue the broad goal of improving education. In return, the local entities—schools, districts, states—provide the higher ones with detailed information about their goals, how they intend to pursue them, and how their performance measures against their expectations. The core substantive commitment of the emergent system is the provision to all students, and particularly to racial and other minorities whom the public schools have traditionally short-changed, of an adequate education, where the definition of adequacy is continuously revised in the light of the improving performance of the best schools. At bottom, the reform seeks to provide an education that builds on the curiosity and needs of diverse students and uses the school system as a whole as a vast laboratory to determine how best to achieve this end. If it succeeds, it will attain on a national scale and with the help of robust institutions the goals that John Dewey’s famous Laboratory School in Chicago was able to approximate for roughly a hundred students for a few years.<sup>1</sup>

The new reform grows out of and is contributing to a new form of collaboration between courts, legislatures, and administrative agencies on the one side and between these organs of government and new forms of public action on the other. It thus redefines the separation of powers, and recasts the administrative state more generally, while opening the way to new forms of citizen participation in the orientation and operation of key public institutions. At the limit, school reform raises the prospect of a broader redefinition of our very democracy.

The sad history of education in the last 50 years, and particularly the story of vigorous efforts to improve public education in its closing decades, suggests that such claims be met with incredulity. For most of the twentieth century, administrators—local, state, and then federal—tried to control classroom behavior through uniform rules and hierarchy.<sup>2</sup> Teachers retained significant autonomy over their day to day activities, but

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<sup>1</sup>See, e.g., John Dewey, *A Pedagogical Experiment* (1896), in 5 *John Dewey: The Early Works: 1882-1889*, at 245 (Jo Ann Boydston ed. 1972); John Dewey, *The School and Society* (1899), in 1 *Dewey, The Middle Works, 1899-1924*, at 44 (Jo An Boydston ed. 1976); John Dewey, *The University School* (1896), in 5 *Dewey, The Early Works*, at 436. See also Ellen Condliffe Lagemann, *An Elusive Science: The Troubling History of Education Research* 47-56 (2000).

<sup>2</sup>See Larry Cuban, *How Teachers Taught: Constancy and Change in American Classrooms, 1890-1990* (1993); Molly O’Brien, *Free at Last? Charter Schools and the “Deregulated” Curriculum*, 34 *Akron L. Rev.* 137, 139, 140-52 (2000) (discussing the evolution of “one size fits all” public schools in the United States and arguing that this “factory model” departs from democratic ideals); David B. Tyack, *The One Best System:*

only at the high cost of using standard textbooks and regimenting students in accordance with administrative precept.<sup>3</sup> Periodic efforts to introduce what could very broadly be conceived as Deweyite reforms, or otherwise to address the needs of at risk students, left traces in individual classrooms and schools<sup>4</sup> but changed next to nothing at the higher levels of the school administration or even at the leading institutions that trained school administrators.<sup>5</sup>

If this stalemate demonstrated the limited reform capacities of state legislatures and district and state school administrations, the successes of school desegregation and then school finance-equity suits revealed clear limits to the judiciaries' capacity to compensate directly for defects of the other branches. As the Supreme Court, recognizing this, absented itself from the debates about school reform in the 1970s and 1980s, advocates sought to redress the inequities of American schooling at the state level.<sup>6</sup> There, too, judicial findings of liability proved extraordinarily difficult to translate into actual improvements in schooling. Judges in many states found that wide disparities in per pupil expenditures on education as between rich and poor districts were inconsistent either with state constitutional equal protection provisions or with state

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A History of American Urban Education 126-76 (1974).

<sup>3</sup>See David Tyack & Larry Cuban, *Tinkering Toward Utopia: A Century of Public School Reform* 85-109 (1995).

<sup>4</sup>See Cuban, *supra* note xx, at 75 ("No more than an estimated one of four elementary teachers, and an even smaller fraction of high school teachers, adopted progressive teaching practices, broadly defined, and used them to varying degrees in the classroom. The dominant mode of instruction remained a combination of teacher-centered and mixed patterns.").

<sup>5</sup>See Lagemann, *supra* note xx, at 60-63.

<sup>6</sup>See, e.g., William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 Conn. L. Rev. 721, 722 (1992); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 Temp. L. Rev. 1151(1995); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality*, 112 Harv. L. Rev. 1131, 1186-91 (1999); Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial Finance Rulings*, 28 Harv. J. Legisl. 507 (1991); Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in *Law and School Reform, Six Strategies for Promoting Educational Equity* 88 (Jay R. Heubert ed. 1999); Michael A. Rebell, *Education Adequacy, Democracy and the Courts* 15-23 & nn.52, 53 (December 2000), at <http://www.law.columbia.edu/dorf/faculty/lunch/rebell.pdf>, Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. Mich. J.L. Reform 493 (1995); *infra* notes xx-xx and accompanying text.

constitutional guarantees of “an efficient education” or the like. But the substantial redistribution of public funding for education that courts ordered as a result sometimes led to a reduction in overall state spending on schools: equalizing down. It nearly always triggered protracted acrimony between state legislatures and courts.<sup>7</sup>

From the 1980s onward the performance of the school system deteriorated both in international comparison and as measured against the needs of an ever more knowledge-intensive economy.<sup>8</sup> Poor and African-American communities became more and more embittered by the failures of desegregation and finance-equity reform.<sup>9</sup> Frustration with the public schools gave rise to a more ferocious debate between those who would improve existing school systems, locally based in theory but bureaucratically organized in fact, and those who would replace those schools with privately controlled ones.<sup>10</sup> Advocates of public schools argued that their shortcomings could ultimately be traced to failures of political will that had thwarted successive reform efforts in the courts and legislatures. If the public would dedicate the resources to reduce class size, add

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<sup>7</sup>See McCusick, *supra* note xx, at 105 (“What successful school finance suits have failed to do . . . is translate success in the courtroom into success in the classroom. Instead, often after prolonged and bruising legislative battles, a somewhat more equitable funding system is devised, but for a variety of reasons even this system does not result in measurably greater educational achievement for low-income students. Ironically, it appears that the more plaintiffs succeed in weaning the school funding system from its dependence on local property taxes, the less money will be spent overall on education.”); Douglas S. Reed, *The People v. the Court: School Finance Reform and the New Jersey Supreme Court*, 4 *Cornell J.L. & Pub. Pol’y*, 137, 172 (1994); *infra* notes xx-xx and accompanying text.

<sup>8</sup>See Eric A. Hanushek, *Making Schools Work: Improving Performance and Controlling Costs* 39-48 (1994).

<sup>9</sup>See Peter W. Cookson, Jr., *School Choice: The Struggle for the Soul of American Education* 64-65 (1994) (characterizing voucher movement as, in part, a “poor people’s revolt”); John F. Witte, *The Market Approach to Education: An Analysis of America’s First Voucher Program* xx (2000); Scott S. Greenberger, *Many Blacks Seek Choice of Schools*, *Boston Globe*, Feb. 26, 2001, at B5 (citing poll showing that 57 percent of African Americans support vouchers, compared to 49 percent of the general population). See also Robert Berne, *Educational Input and Outcome Inequities in New York State*, in *Outcome Equity in Education* 1, 12-21 (Robert Berne & Lawrence O. Picus, eds.).

<sup>10</sup>See, e.g., 1 *Choice and Control in American Education: The Theory of Choice and Control in American Education* (William H. Clune & John F. Witte, eds. 1990); 2 *Choice and Control in American Education: The Practice of Choice, Decentralization and School Restructuring in American Education* (William H. Clune & John F. Witte, eds. 1990); *Holding Schools Accountable: Performance-Based Reform in Education* (Helen F. Ladd 1996).

specialized programs, or simply increase federal funding, public schools would work for all.<sup>11</sup> Advocates of privatization maintained, on the contrary, that public control always invites self-dealing by entrenched interests. Their selfishness explains why public schools inevitably seem to waste the resources they have. Provision of more would only encourage further profligacy. The only remedy from this point of view is privatization.<sup>12</sup>

Broadened educational markets might be achieved by the contractual transfer of control of public schools to private management companies, see, e.g., Paul T. Hill, Lawrence C. Pierce & James W. Guthrie, *Reinventing Public Education: How Contracting Can Transform Americas Schools* (1997), or by the direct expansion of enrollments in private and parochial schools through the use of tax subsidies for the tuition payments of pupils otherwise unable to afford a private education. See, e.g., Chubb & Moe, *supra*; Milton Friedman, *Capitalism and Freedom* (1962); Paul E. Peterson & William G. Howell, *When Low-Income Students Move from Public to Private Schools*, in *City Schools: Lessons from New York* 339 (Diane Ravitch & Joseph P. Viteritti eds. 2000).

But this debate, too, is stalemated. School-management companies have repeatedly failed to meet the goals agreed in their contracts with public authorities, leaving the advocates of privatization without evidence that private schools can outperform public institutions unless they handpick their students.<sup>13</sup> Court-ordered redistribution of state financing mechanisms have seldom met the plaintiffs' expectations that more spending on education would by itself produce better schools.<sup>14</sup> These failures weigh heavily against the idea that privatization is a necessary and sufficient condition for educational reform and the contrary belief that political will is the way to better schools.

But even as these discouraging reverses dimmed prospects for better public schools, a new and promising model of school governance was arising out of two apparently contradictory clusters of piecemeal reforms, each with only a loose connection to the large choices that have long framed public debate.<sup>15</sup> The first cluster

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<sup>11</sup>See, e.g., Jonathon Kozol, *Savage Inequalities: Children in American Schools* (1991); articles collected in *Law and School Reform*, *supra* note xx.

<sup>12</sup>See, e.g., John E. Chubb & Terry M. Moe, *Politics, Markets and America's Schools* (1990); John Coons & Stephen Sugarman, *Education by Choice* (1978); Myron Lieberman, *Privatization and School Choice* (1989); Jay P. Greene, Paul E. Peterson & Jiangtao Du, *Effectiveness of School Choice: The Milwaukee Experiment*, 31 *Educ. & Urb. Soc.* 190 (1999); articles collected in *Learning from School Choice* (Paul Peterson & Brian Hassel, eds. 1998); articles collected in *School Choice and Social Controversy: Politics, Policy, and Law* (Stephen D. Sugarman & Frank R. Kemerer, eds. 199x).

<sup>13</sup> See, e.g.,

<sup>14</sup> See *infra* notes xxx and accompanying text.

<sup>15</sup> See, e.g., Chubb & Moe, *supra* note xx, at 194-201 (identifying these contradictory trends and claiming they doom reform efforts within public educational institutions);

went in the direction of increased centralization, even nationalization. Its central element was a drive to set minimum standards for school performance at the state and federal level; to rank schools accordingly; and to place in receivership schools that persistently failed to meet the new requirements.<sup>16</sup> The second cluster 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 parents' right to choose to send his or her school outside the assigned catchment area.<sup>17</sup>

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Ravitch & Viteritti, Introduction, in *City Schools*, supra note xx, at 8 (noting same contradiction in context of particular reforms in New York City public schools).

<sup>16</sup> See, e.g., Amy R. Argetsinger, *State Plans School Takeovers; Education Officials Looking to Baltimore for First Targets*, Wash. Post, Jan. 5, 2000, at B9; Rochelle Carter, *School Watch: No Stranger to Change, New Superintendent in Step with Predecessors' Moves*, Atlanta Const., July 1, 1999, at JD8 (discussing Atlanta School Superintendent's policy of taking over and reconstituting poorly performing schools); B. G. Gregg, *State Plans Second School Takeover*, Detroit News, Feb. 11, 2000, at C1 (reporting that State of Michigan is considering takeover of Benton Harbor School District, after previously having taken responsibility for restructuring the Detroit school systems); Lori Olszewski, *School District Takeovers Take Off; Oakland Effort Follows U.S. Educational Trend*, S.F. Chron., Apr. 14, 1999, at A17 (reporting on proposed legislation that could give Oakland mayor responsibility for distressed city schools); Diane Ravitch, *Left Back: A Century of Failed School Reforms 408-52* (2000); infra notes xx-xx and accompanying text (use of state takeover procedure in connection with Chicago reforms). See also, 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).

<sup>17</sup>See, e.g., Pearl Rock Kane, *The Difference Between Charter Schools and Charterlike Schools*, in *City Schools*, supra note xx, at 65; Tom Loveless & Claudia Jasin, *Starting from Scratch: Political and Organizational Challenges Facing Charter Schools*, 34 Educ. Admin. Q. 9, 9-30 (1998) (concluding that eight Massachusetts charter schools under study typically began as informal organizations with scanty resources and had substantial difficulty converting the early endeavors to robust institutions with stable relations to the states); O'Brien, supra, note xx, at 152-74 (discussing trend towards, and reform goals of, charter schools); Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 Tul. L. Rev. 563, 574-80 (2001) (discussing distinguishing characteristics and procedures generally used to establish charter schools); Priscilla Wohlstetter & Noelle Griffin, *Creating and Sustaining Learning Communities: Early Lessons from Charter Schools*, CPRE Occasional Paper Series, OP-03 (1998); other authority discussed infra notes xxx and accompanying text.



As these reforms intersected, they changed in complementary ways. Standards and the tests associated with them developed so that they could serve as diagnostic guides to local reform as well as general measures of proficiency.<sup>18</sup> The new localism, in using these or other standards as a method of self-assessment, came to see itself as accountable for ensuring not just that teachers taught well but that students actually learned.<sup>19</sup> In the best cases, the result of this recombination of reform efforts is 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 monitor the learning strategies of individual students and help them correct difficulties as they arise. The principal's job is to assure that classrooms at his or her school can be organized in this way. And the superintendent's responsibility is to provide the conditions that principals need to succeed at that task. The job of the state is no longer to write 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, it aids schools that are struggling to improve and ultimately to reconstitute those that persistently prove unable to do so. The emergent structure is not a hybrid combining elements of economic or political markets and elements of traditional hierarchy, but rather, a distinctive form of governance, best understood in the light of certain pragmatist principles, and observable today in contexts as different as environmental regulation and community policing where the problems for public action have much in common with the problems of school reform.

The federal No Child Left Behind Act of 2001<sup>20</sup> requires states to adopt a general accountability scheme of this sort as a condition for receiving federal funds for education. The wide bipartisan support for this complex legislation<sup>21</sup> is a measure of the extent to which the assumptions embedded in the familiar public debate diverted much explicit reform effort—legal and otherwise—from the actual course and possibilities of renewal of the schools. Indeed, at least for the moment, agreement on the broad outlines of the new reform agenda is so deep and widespread that participants and commentators seem to oscillate between wondering how bitter antagonisms could have evaporated overnight and doubting that the old debates reflected abiding disagreements at all.<sup>22</sup>

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<sup>18</sup> See *infra* notes xxx and accompanying text.

<sup>19</sup> See *infra* notes xxx and accompanying text.

<sup>20</sup> Pub. Law 107-110, xxx Stat. xxx (2001).

<sup>21</sup> For an interesting discussion of the new thinking that went into the new act, see Ronald Brownstein, *Bush Moves to Reposition Republicans on Education*, L.A. Times, Jan. 24, 2001, at A12; other articles cited *infra* notes xx.

<sup>22</sup> See, e.g., Brownstein, *supra* note xx, at xx; Sue Kirchhoff, *Federal Roles Is Switch in GOP Policy*, Boston Globe, Jan. 24, 2001, at A1; Jodi Wilgoren, *Education Plan by Bush Shows New Consensus*, N.Y. Times, Jan. 23, 2001, at A1. See also Ronald Brownstein, *For a Start, Education Reform Offers Bush a Policy Path of Least*

The aim of this essay is precisely to rethink legal strategies for reforming the public schools in the light of the unanticipated developments and the possibilities they reveal. Our intent is at once explanatory and programmatic. In Part I, focusing on desegregation and school finance litigation, we trace two successive reform cycles in which courts first determined to recast existing institutions to conform to constitutional values, recognized the limits of doctrinally directed interventions, and, disheartened, retreated to defending the integrity of judicial institutions at the cost of their original ameliorative ambitions. We will see, however, that at the end of both cycles, and most especially in connection with recent litigation asserting a broad right to an “adequate” education, courts were led to collaborate with nonjudicial actors in an attempt to give substance to their understanding of constitutional obligations and corresponding remedies.

Part II traces the top-down movement for standards-based reform and the bottom-up movement of professional protest in favor of new classroom practices, especially as it emerged in New York’s Community School District 2. It then shows how states seeking to reform their school systems in the mid-1990s fused elements of both into the “New Accountability.” In Part III we present detailed case studies of school reform in Texas and Kentucky to show how the new forms of governance are linking change in the classroom to new forms of administrative oversight, and to provide as well some measure of the relation between the ambitions and the new reforms and their achievement so far.

To some readers, the disentanglement of interests and other transformations described in Parts II and III may seem to suppose an historically unlikely, not to say nearly magical, suspension of iron laws of politics and the fundamental problems of collective action.<sup>23</sup> But we argue in Part IV that this hard-nosed realism overlooks the possibilities for innovative collective action that occur when the parties, having exhausted familiar programmatic solutions, continue to face urgent requirements for action under conditions where success or failure will have palpable effects on their life chances or those of their families and their communities. Indeed, we will see that educational reform succeeded in Texas and Kentucky because of explicit alliances that, ignoring traditional ideological and institutional divisions, aimed expressly between top-down standards and bottom-up school-based reforms for an incremental, but cumulatively transformative, exploration of the possibilities that remained obscured as long as the parties respected existing boundaries.

Part IV ends by considering the role of the courts in creating these new publics and reform school systems. We argue in general that a central lesson of the emerging school reforms is that neither the separation of powers, the traditional forms of

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Resistance; What Would an Education Compromise Between President-Elect George W. Bush and Centrist Democrats Look Like? It Would Start with Bush’s Top Education Priority: A Restructuring of Federal Education Programs that Offered States a Trade of Flexibility for Accountability, *L.A. Times*, Dec. 18, 2000, at A5.

<sup>23</sup>See, e.g., James Traub, What No School Can Do, *N.Y. Times Mag.* Jan. 16, 2000, at 52; sources cited *infra* notes xx.

regulation associated with it, nor even the fundamental distinction between public and private—or political and technical---spheres can today be assumed. Consequently, the process of continuing regulatory adjustment requires a more profound and pervasive process of institutional renovation and a larger circle of participation in public decision making that redraws the distinction between public and private. The courts in particular may have stumbled upon a way to realize their virtues as disentrenching institutions, able to expose encrusted inequalities through public and constitutional scrutiny without, however, having themselves to take in hand the administration of positive reforms that they until now have proved unable to command successfully. At the limit, these developments suggest the possibility of a non-court-centric form of judicial review that preserves the capacity for constitutional deliberation as a form of reflection on the deepest norms of the political community, while substantially lessening the intrusiveness of the judiciary and so tempering the “counter-majoritarian dilemma.”

Part V focuses on rethinking legal and other reform strategies at the federal level. We argue that the new No Child Left Behind Act is neither a trojan horse for privatization nor an elaborately disguised deregulation of federal funding to poor and minority students. We argue, rather, that because of the strict accountability and reporting requirements that it imposes on the states, the NCLB should be seen as a national decree with the potential to transform American education as profoundly as the decrees that followed *Brown v. Board of Education*.<sup>24</sup> These accountability requirements are likely to trigger a race to the top both by facilitating exchanges of experience among states that are already progressing rapidly towards effective reform of their school systems and by exposing laggards to political reprisals by an aggrieved well-informed citizenry. These same accountability systems will effectively shift the demanding burden of proof from plaintiff minority school children to defendant officials in reform litigation premised on claims arising under federal and state equal protection provisions (including Title VI) and state adequate-education provisions. In combination, the race to the top, political mobilization and the corresponding litigation strategy are likely to correct the serious limitations in federal enforcement in the current legislation. By way of conclusion, we argue that the new reform can be seen as a legitimate legatee of the movement for desegregation of the schools.

## **I. The Judicial Reform Cycle and its Limits**

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<sup>24</sup> 347 U.S. 483 (1954).

During the last half century, educational reformers have used the courts and the law to pursue racial justice and better schools.<sup>25</sup> Assessments of their impact diverge wildly.<sup>26</sup> For those, mainly on the left, who see the courts' intervention as a substantial success, law-driven reforms were single-handedly responsible for ending state-sponsored racial segregation of the schools from South Carolina to Seattle in the quarter century after *Brown v. Board of Education*.<sup>27</sup> Later judicial interventions were also crucially responsible for equalizing the monetary support for poor and rich schools from Connecticut to California.<sup>28</sup> From this general vantage point, the only failure of court-driven reform was that it didn't go far enough. Judges lacked the courage of office to apply principles they themselves had announced with the rigor required to extend their reforms far and deep enough into society to become self-reinforcing.<sup>29</sup>

Observers, mainly on the right, who see the courts' intervention as instead a substantial failure, point chiefly to two aspects of the current record: First, high and (since 1980) actually increasing proportions of African-American and Latino children are attending schools with few or no white children.<sup>30</sup> Second, even in states where

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<sup>25</sup>See generally articles collected in *Law & School Reform*, supra note xx.

<sup>26</sup>For more optimistic views, see, e.g., *Law & School Reform*, supra note xx; James S. Liebman, *Desegregating Politics: "All-Out" Desegregation School Desegregation Explained*, 90 *Colum. L. Rev.* 1463, 1614-35 (1990); Jennifer L. Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation* (1984); ; Michael Rebell & Arthur Bloch, *Educational Policy Making and the Courts* (1986). For more pessimistic views, see, e.g., Chubb & Moe, supra note xx, at 6; Lino Graglia, *Disaster by Decree: The Supreme Court Decisions on Race and the Schools* (1976); Donald Horowitz, *The Courts and Social Policy* (1977). For a recent more nuanced view, see [cite recent Kain & Hanushek paper.]

<sup>27</sup> See, e.g., Willis Hawley & Mark A. Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in *Eliminating Racism: Profiles in Controversy* 281, 289 (P. Katz & D. Taylor eds. 1988); Hochschild, supra note xx, at 26-34, 46-70, 177-90; James, *City Limits on Racial Equality: The Effects of City-Suburb Boundaries on Public-School Desegregation, 1968-1976*, 54 *Am. Soc. Rev.* 963, 974-82 (1989); Gary Orfield, *Public School Desegregation in the United States, 1968-1980*, at 1-12 (1983).

<sup>28</sup>See, e.g., Rebell, *Education Adequacy*, supra note xx, at 20 & n.53.

<sup>29</sup>See, e.g., Hochschild, supra note xx, at 146-205; James, supra note xx, at xx; Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, in *Law & School Reform*, supra note xx, at 39-83; Gary Orfield, *Turning Back to Desegregation*, in *Dismantling Desegregation: The Quiet Reversal of *Brown v. Board of Education** 1-22 (Gary Orfield, Susan Eaton & The Harvard Project on Desegregation 1996).

<sup>30</sup>See, e.g., David J. Armor, *Forced Justice: School Desegregation and the Law* 163-210, 221 (1995); *After Busing, Education and Choice*, *Pub. Interest*, Spring 1989, 2, at 24-27; John E. Coons, *School Choice as Simple Justice*, *First Things* 15 (1992); John E.

judicially sponsored reform efforts resulted in higher and increasingly equalized funding for all public school students, poor and minority children continue to achieve educational results far below those of white and Asian-American children.<sup>31</sup> From the point of view of this criticism, the failures of court-driven reform grew directly out of courts' disregard for their institutional competence as defined by the constitutional separation of powers.<sup>32</sup> By presuming to supplant the political branches, or (in later versions) by intruding into spheres more properly left to private ordering, the courts encouraged a poisonous mixture of bureaucratization and political and racial polarization of American public education that thwarted the very reforms they intended to advance.<sup>33</sup> From this point of view, the courts' unwillingness to extend their reforms was a result not of a failure of nerve but of a renewed respect for the logic of the separation of powers.<sup>34</sup>

In looking closely at these two crucial cycles of court-driven educational reform--- federal court sponsored school desegregation from 1954 to 1990, and state court sponsored funding equalization since the early 1970s---this section concludes that both evaluations are partially correct and yet, more fundamentally, neither is. As we demonstrate below, when judges could plausibly think that ending a wrong was itself a sufficient remedy for a grave social injustice, they were relentless in their willingness to stop the wrong. But when it became clear that forbidding a wrong, far from being tantamount to correcting a harm, instead required choices among complex and competing ideas of the right, judges withdrew from the struggle as relentlessly as they had initiated it. Casting the issue as one of the boldness or timidity of courts thus misses the mark.

But equally wide of the mark is the opposing view, which sets great store by the ability of political branches and private actors to remedy grave social problems if only left free of judicial meddling. These branches' and actors' tolerance of school segregation and egregious disparities in public school funding suggests otherwise. Even

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Coons & Stephen D. Sugarman, *Scholarships for Children* (1992); Cookson, *supra* note xx, at 30-31, 65-66; Catherine F. Dwyer & Christopher J. Sutton, *Brown Plus Forty: The Denver Experience*, 15 *Urb. Geog.* 421 (1994); Pierre DeVise, *Integration in Chicago Forty Years After Brown*, 15 *Urb. Geog.* 454 (1994).

<sup>31</sup>See, e.g., Berne, *supra* note xx, at 12-20; Thomas Sowell, *Civil Rights: Rhetoric or Reality?* 13-35 (1984).

<sup>32</sup>See, e.g., David Kirp, *Just Schools: The Idea of Racial Equality in American Education* (1982).

<sup>33</sup>See, e.g., Graglia, *supra* note xx, at xx; Horowitz, *supra* note xx, at xx; Ravitch, *supra* note xx, at 382-84; Sowell, *supra* note xx, at 12-35; R. Wolters, *The Burden of Brown: Thirty Years of School Desegregation* 6-7, 138-39, 288 (1984). For an early criticism of the Court's lack of legal competence to desegregate the schools, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 33 (1959).

<sup>34</sup>See Charles Cooper, *The Coercive Remedies Paradox*, 9 *Harv. J.L. & Pub. Pol'y* 77, 80-81 (1986).

after judges broke the logjam and forced consideration of these issues, but then withdrew from the remedial field, politicians and private actors made only halting and partial progress towards effective correctives. Excoriating judges for zealous meddling is no more help to understanding the successes and failures of school reform than berating them for timidity.

These symmetrical misunderstandings grow out of common assumptions, rooted in the American Legal Process School, about the institutional strengths and weaknesses of our democratic order.<sup>35</sup> In the American Legal Process view, the Constitution, as refined by the New Deal, creates through the separation of powers a ensemble of public and private institutions well-suited to the changing problems of complex democracies.<sup>36</sup> But it is not immediately clear which branch or branches of government, if any, should have responsibility for solving emergent problems. Misallocating responsibility compounds the original problem because the appropriate institution is paralyzed, while the inappropriate one uses its authority to make a bad situation worse. Only by presuming that we already have the right institutional tools for the job, but sometimes mistakenly select the wrong one, is it possible to transform the controversies of two vast cycles of educational reform into a dispute over who the best actor would have been, rather than over which actions would have been best.

To these common assumptions corresponds a common blind spot regarding the capacity of our democratic order to innovate in its basic institutions and in the relationship among them. In assuming that the basic features of our institutions are fixed, the left and right adherents of this view miss the possibility of fundamental innovation in the tasks of the judiciary and public administration and the relation between citizens and their government. We will argue below that even as the courts were failing to complete the reforms they initiated, they were incidentally facilitating a process of just this sort of innovation in the possibilities for democratic problem solving.

This section retells the story of the successes and failures of these two cycles of educational reform, focusing not on the fidelity of courts and other institutions to their putative roles but rather on their actual reform capacities and limitations and the relation between these and the encouragement the courts eventually gave to the emergence of some of the innovations upon which a comprehensive and enduring reform of the public schools may be built.

## **A. School Desegregation**

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<sup>35</sup>See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Tent. Ed. 1958).

<sup>36</sup> See Hart & Sacks, *supra* note xx, at 179-98.

For some observers, the federal courts' desegregation of schools in the six years between 1968 and 1973 qualify as among the most expeditious, successful and broad-ranging social reforms in the entire course of American history.<sup>37</sup> In the preceding decade and a half, the Court repeatedly ruled that the Equal Protection Clause barred racial segregation of public schools, even if nominally voluntary, because public education was a crucial governmental service that was rendered inferior for black children when it was provided separately for whites and blacks.<sup>38</sup> But from the outset it undercut the resolve implicit in these affirmations by its constant hand-wringing about supplanting local political decision making and making schools do too much too fast, prompting it to run the remedial apparatus at "all deliberate speed."<sup>39</sup> This allowed States to block any movement at all toward reformed schools, first through aggressive public massive resistance, then through more furtive, privately concerted passive resistance.<sup>40</sup> Finally, convinced that its deference to the self-reforming capacities of civil society was being used for mean ends, the Court with the help of the Department of Health, Education and Welfare ordered integration "forthwith."<sup>41</sup> The result was the almost instantaneous integration of schools attended by millions of children in the 1968-69 to the 1971-72 school years.<sup>42</sup> A longer-term result was that rising SAT scores of

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See Orfield [Law & School Reform], supra note xx, at 41-43.

<sup>38</sup>See, e.g., *Monroe v. Board of Comm'rs*, 391 U.S. 450, 459 (1968); *Green v. County School Bd.*, 391 U.S. 430, 441 (1968); *Brown v. Board of Education*, 347 U.S. 483, 494-95 & n.11 (1954); Liebman, supra note xx, at 1476-77.

<sup>39</sup>*Brown v. Board of Education II*, 349 U.S. 294, 301 (1955). See Jack Greenberg, *Crusaders in the Courts* 206, 389-91 (1994); Liebman, supra note xx, at 1486, 1587.

<sup>40</sup>See, e.g., N. Bartley, *The Rise of Massive Resistance* 97-81, 237-50 (1969); Greenberg, supra note xx, at 217-55; Anthony Lewis, *Portrait of a Decade, The Second American Revolution* 32-45, 208-10 (1964); Orfield [Reconstruction], supra note xx, at 102-50; J. Harvey Wilkinson, *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978*, at 51-52, 61-127 (1979).

<sup>41</sup>See, e.g., *Alexander v. Holmes County Bd. Of Educ.*, 396 U.S. 19, 20 (1969) (per curiam); *Green*, 391 U.S. at 437-39 & n.4; Greenberg, supra note xx, at 383-81; Liebman, supra note xx, at 1466 n.5, 1472-73; S. Wasby, Anthony D'Amato, Rosemary Metrailler, *Desegregation from Brown to Alexander xxx* (1977). On HEW's role, see Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 *Law & Contemp. Probs.* 7, 20-26 (1975); H. Rodgers & C. Bullock, *Law and Social Change* 18 (1972); Orfield [Reconstruction], supra note xx; Note, *The Courts, HEW, and Southern School Desegregation*, 77 *Yale L.J.* 321, 356-64 (1967).

<sup>42</sup>See, e.g., Greenberg, supra note xx, at 383-91, 398-401; H. Horowitz & Kenneth Karst, *Law, Lawyers and Social Change* 239-40 (1969); Orfield [Law & Reform], supra note xx, at 42; Wasby, D'Amato & Metrailler, supra note xx, at xx, Marc Yudof, David L. Kirp & Betsy Levin, *Educational Policy and the Law* 486 (3d ed. 1992).

black children who entered desegregated schools during this period caused the gap between black and white SAT scores to narrow substantially by the 1980s.<sup>43</sup> No wonder that many observers came to the conclusion that courts had an indispensable role to play as a forum of last resort and an instrument of dramatic social reform.<sup>44</sup>

But this success obscured a set of highly particular circumstances on which it was ultimately based. What nationally went by the name of desegregation was in fact desegregation of county-wide school districts in the rural South that were segregated by force of explicit state statutes.<sup>45</sup> This was largely by lawyerly design, given how easy it was to demonstrate that rural southern schools for black, though separate from, were nowhere close to being equal to, those for whites.<sup>46</sup> Not surprisingly, therefore, when the Court's three famous orders to integrate "now" finally came, they were directed to just these kinds of districts.<sup>47</sup>

A deeper consequence of this strategy was that, once racial integration was finally ordered, it occurred almost automatically.<sup>48</sup> Because each county essentially operated a single set of publicly acceptable white schools and of clearly inferior black schools, shutting down the latter left black children with nowhere to go but to the former. In such a setting, ending segregation achieved racial justice in schools that satisfied a standard of quality agreeable to the entire community. It also improved black educational achievement: Much of the improvement in black test scores during the

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<sup>43</sup>See Liebman, *supra* note xx, at 1624-25 & n.675.

<sup>44</sup>See sources cited *supra* notes xx.

<sup>45</sup>See, e.g., Willis Hawley, *Strategies for Effective Desegregation: Lessons from Research 4* (1983) ("The greatest progress in desegregation has been in the South where changes have been dramatic and lasting"); Gary Orfield, *Public School Desegregation in the United States, 1968-80*, at 1-12 (1983); Gary Orfield, *School Desegregation in the 1980s, Equity & Choice*, Feb. 1988, at 25-26 ("as of 1984," which was about the height of public school desegregation in the United States, less than 30% of all black children in the south attended 90%-plus minority schools compared to over 55% in the Northeast"); F. Welch & A. Light, *New Evidence on School Desegregation*, 6, 8, 18-21 & Tables 8-11, 61 (U.S. Comm'n on Civil Rights, Clearinghouse Publication 92, 1987). See also, Liebman, *supra* note xx, at 1465-66, 1470-72 (comparing great progress of school desegregation in rural South to poor progress in urban North and West).

<sup>46</sup>See, e.g., Greenberg, *supra* note xx, at 116-32; Richard Kluger, *Simple Justice* xxx (1975).

<sup>47</sup>*Carter v. West Feliciana School Dist.*, 396 U.S. 290 (1970); *Alexander v. Holmes County Bd. Of Educ.*, 396 U.S. 19 (1969); *Green v. New Kent County Bd. Of Educ.*, 391 U.S. 420 (1968). See Greenberg, *supra* note xx, at 383-87, 582.

<sup>48</sup>See Greenberg, *supra* note xx, at 383-81, 388-91, 398-401; Liebman, *supra* note xx, at 1466 n.5; Wilkinson, *supra* note xx, at xx.



period is traceable to graduates of rural southern schools that had desegregated by the early 1970s.<sup>49</sup>

Soon desegregation moved to southern cities and from there to the urban North and West. Under the more complex conditions encountered there, ambiguities in the goals of desegregation<sup>50</sup> became more and more apparent, prompting concerns, as well, about the availability of corresponding remedies.<sup>51</sup> In these settings, it was possible to see the same schools either as segregated along racial lines like those in the rural South prior to the late 1960s, or as the result of the legitimate principle of assigning children to schools in their home neighborhoods.<sup>52</sup> If the goal of the original *Brown* decision was to end deliberate segregation, then neighborhood schools, even if segregated in fact, might be constitutionally acceptable. If the goal, instead, was to end state-created racial separation, then a neighborhood assignment principle resulting in segregation was no more acceptable than an explicitly segregative principle.

Such questions were merely the invitation to still more confounding ones. Suppose there is agreement that a multi-racial society is the aim because people draw benefits from interaction with members of other races.<sup>53</sup> But does that require mere

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<sup>49</sup>See, e.g., Jomills Braddock & McPartland, *The Social and Academic Consequences of School Desegregation*, *Equity & Choice*, Feb. 1988, at 7 (African Americans account for about 40% of recent overall gains in SAT scores; “most significant gains have come in the South, where school desegregation has had its greatest impact”); U.S. Dep’t of Educ., *The Reading Report Card, 1971-1988: Trends from the Nation’s Report Card 14-15 (1989)* (in 1971, white high school students on average scored 53 points (10%) higher than black on prestigious testing group’s 500-point reading scale; in 1988, the gap was 20 points (4%)).

<sup>50</sup>*Brown I* appears today as a confusing melange of explanations for desegregation—ending explicit, state-mandated racial discrimination; forbidding any technique the state uses to favor one group of citizens and demean another; creating a multi-racial society; enhancing educational opportunity for African Americans. See Liebman, *supra* note xx, at 1472-540 & n.353.

<sup>51</sup>*Brown II* looks today like a mealy-mouthed concoction of high-minded remedial aspirations, naive deference to presumptively well-intentioned state actors, buck-passing discretion to lower courts, and a dispensation all around from any but deliberate speed. See, e.g., Greenberg, *supra* note xx, at 389-91. See generally Wilkinson, *supra* note xx, at 132 (“The problem is that we are no longer certain what kind of question public school desegregation really is. Twenty years ago we were convinced it was a matter of showing southern school segregation to be morally wrong. But with busing, good moral arguments exist on both sides. To the extent that desegregation has become less a moral question, or at least more a moral standoff, is it also less clearly a constitutional requirement the Supreme Court is entitled to impose?”)

<sup>52</sup>See Liebman, *supra* note xx, at 1472.

<sup>53</sup>See, e.g., Christopher Jencks, et al., *Inequality: A Reassessment of the Effect of*

occasional mixing? Enforced homogenization?<sup>54</sup> Or access to a particular (but which?) set of crucial pathways to economic and political power?<sup>55</sup> Or suppose the goal is not a multi-racial society but to eradicate government implication in racial separation.<sup>56</sup> But what counts as government implication? Is the state implicated if segregation is a result of lines the state drew?<sup>57</sup> If there was malice in the heart of the bureaucratic line-drawer?<sup>58</sup> Smugness or resentment in the minds and hearts of the people, white or black, on either side of the line?<sup>59</sup> Or suppose the goal is simply to improve the public education of black children.<sup>60</sup> But what would count as an improvement? Higher test scores? Higher completion rates in white-dominated institutions of higher learning? Lower teen-age pregnancy and delinquency rates? Better jobs as adults?<sup>61</sup> Nor, courts

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Family and Schooling in America 106 (1982); Michael Walzer, Spheres of Justice 217, 223-24(1983); Robin West, Liberalism, Rediscovered: A Pragmatic Definition of the Liberal Vision, 46 U. Pitt. L. rev. 673, 716, 735 (1985); Marc Yudof, Equal Educational Opportunity and the Courts, 51 Tex. L. Rev. 411, 456-58 (1973).

<sup>54</sup> See, e.g., Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049, 1073-75 (1978) (criticizing this assumed goal of Brown as seeking a society in which “everybody is a creamy shade of beige”).

<sup>55</sup> See Richard Parker, The Past of Constitutional Theory—and Its Future, 42 Ohio St. L.J. 223, 245, 249-51 (1981); see also Liebman, *supra* note xx, at 1495-500.

<sup>56</sup> See, 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); Frank Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif. L. Rev. 275, 277, 286, 298-310 (1972).

<sup>57</sup> See, e.g., Paul Dimond, School Segregation in the North: These Is But One Constitution, 7 Harv. C.R.-C.L. L. Rev. 1, xxx (1972); Owen M. Fiss, The Charlotte-Mecklenburg Case: Its Significance for Northern School Desegregation, 38 U. Chi. L. Rev. 697, 698 (1971); Owen M. Fiss, The Uncertain Path of the Law, 4 Phil. & Pub. Aff. 3, 18, 26, 35 (1974).

<sup>58</sup> See, e.g., Brest, *supra* note xx, at xx.

<sup>59</sup> See, e.g., Charles Lawrence, The Id., the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987).

<sup>60</sup> See, e.g., Bruce Ackerman, Social Justice in the Liberal State 246-47 (1980); Derrick A. Bell, Jr., *Brown* and the Interest-Convergence Dilemma, in *Shades of Brown*, New Perspectives on School Desegregation 90, 98-101 (Derrick Bell ed. 1980); Owen M. Fiss, The Jurisprudence of Busing, 39 Law & Contemp. Probs. 194, 200, 207 (1975); Freeman, *supra* note xx, at 1067; Amy Gutmann, Democratic Education 161-63 (1987).

<sup>61</sup> See, e.g., Liebman, *supra* note xx, at 1485-95.

discovered, could they avoid these political and philosophical difficulties by choosing higher SAT scores as the most neutral goal, for doing so simply raised a host of more difficult empirical questions. Do black children in fact learn more when in schools with white children? Do blacks and whites have to be in the same classes? Is the difference enough to offset harms (if there are harms) caused by longer rides to school? By schools located in different neighborhoods from residences? By interracial conflict?

Even as the Court cautiously struggled with these questions, anxious to husband its legitimacy by emphasizing points of agreement rather than raising potentially divisive questions,<sup>62</sup> academic commentators were grimly determined to render the ambiguities of the Court's opinions as fundamental differences of principle.<sup>63</sup> First came a debate raising doubts whether desegregation could be justified as the application of any neutral principle, meaning a rule applicable to all citizens in the same situation regardless of the particulars of their person, such as their race.<sup>64</sup> From the perspective of such neutrality, any order requiring citizens of one named group to associate with citizens of another named group was suspicious by definition.<sup>65</sup> The counterargument focused not on the compulsion required to achieve desegregation but rather on the manifest insult to democratic principles, and beyond that to the rule of law, implicit in state validation of a caste system.<sup>66</sup> A next round of commentary, associated with the work of Owen Fiss, attempted to break this logjam by identifying tasks---among them the education of an informed citizenry---so fundamental to the functioning of a well-ordered democracy that the state could impose obligations on particular groups in order to fulfil its larger responsibilities to the public. As arguably did the Court and many others, Fiss assumed that this required state-enforced desegregation.<sup>67</sup>

The debate ramified again, however, when others brandished new research

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<sup>62</sup>See Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 611 n.62 (1983); Denis Hutchinson, Unanimity and Desegregation: Decision-making in the Supreme Court 1948-1958, 68 Geo. L. J. 1, 61 (1979); Wilkinson, *supra* note xx, at 61-62, 78-102 (discussing Court's cases and criticizing Court for emphasizing apparent consensus while depriving nation of needed guidance).

<sup>63</sup>See sources cited in Liebman, *supra* note xx, at 1480 n.104.

<sup>64</sup>Compare Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 33 (1959) with Charles Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960).

<sup>65</sup>See Wechsler, *supra* note xx, at xx. See also Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, xxx (1976).

<sup>66</sup>See Black, *supra* note xx.

<sup>67</sup>See Fiss, Charlotte-Mecklenburg, *supra* note xx; Fiss, Jurisprudence of Busing, *supra* note xx; Owen M. Fiss, School Desegregation: The Uncertain Path of the Law, 4 Phil. & Pub. Aff. 3, 33-35 (1974), reprinted in *Equality and Preferential Treatment* 155 (M. Cohen, Thomas Nagel & T. Scanlon eds. 1977) [hereinafter, *Uncertain Path*].

findings disputing the link between desegregation and improved educational outcomes for black children.<sup>68</sup> One view carried forward the idea of fundamental obligations, including to provide adequate public education. Some in this group defined adequate simply to mean equal to whatever white middle class children received.<sup>69</sup> Others separated the putative right to adequate schools from considerations of the equal distribution of educational resources among different racial groups, leaving open the question of the standard of adequacy and therefore its practicality as a guide to actual decision making.<sup>70</sup> The other view despaired of the empirical judgments courts would have to make in order to provide equalized or adequate educations to all children and returned to the idea of a racial caste system as a self-evident insult to democracy.<sup>71</sup> For some in this group, the abolition of the caste system was associated with the positive goal of fomenting a multiracial society.<sup>72</sup> Others advocated desegregation only because it was a visible marker that the democratic state had desisted from unconscionably according some citizens more respect than others.<sup>73</sup>

No wonder, then, that undertaking to reengineer the nation's schools and school districts, one by one, in service of an educational, social or political reform that nobody could define with compelling precision eventually proved too much for the Court. After tarrying with the idea of "disestablishing" previously segregated urban schools without requiring formulaic integration,<sup>74</sup> the Court was finally overtaken by the ambiguities of its earlier decisions when it ventured into northern and western desegregation. The Court

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<sup>68</sup>See, e.g., Armor, *supra* note xx, at 76-112, 221; James Coleman, et al., *Equal Educational Opportunity* (1966) (attributing achievement deficits to family background, home environment and other factors beyond the reach of schools); Edgar G. Epps, *The Impact of School Desegregation on the Self-Evaluation and Achievement Orientation of Minority Children*, 42 *Law & Contemp. Probs.* 57 (1978); Garfinkel, *Social Science Evidence and the School Desegregation Cases*, 21 *J. Pol.* 37 (1959); Donald F. Krol, *A Meta Analysis of the Effects of Desegregation on Academic Achievement*, 12 *Ur. Rev.* 211, 220-24 (1980).

<sup>69</sup>See sources cited in Liebman, *supra* note xx, at 1485 nn.123-25.

<sup>70</sup>See, e.g., Robert L. Carter, *A Reassessment of Brown v. Board*, in *Shades of Brown*, *supra* note xx, at 20, 27; other citations cited in Liebman, *supra* note xx, at 1489-90 & nn.140, 142.

<sup>71</sup>See, e.g., Brest, *supra* note xx, at xx; Liebman *supra* note xx, at 1614-35; Ronald Dworkin, *Social Sciences and Constitutional Rights: The Consequences of Uncertainty*, in *Education, Social Science, and the Judicial Process* 21, 25-31 (Ray Rist & R. Anson eds. 1977).

<sup>72</sup>See sources cited *supra* note xx [Jencks, Yudof].

<sup>73</sup>See, e.g., Dworkin, *supra* note xx, at 28-31.

<sup>74</sup> See *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 22-23 (1971).

consequently adopted three legal rules in the mid-1970s that radically constrained and eventually stopped the movement for desegregation. First was the 1973 holding in the Denver case, that the state's operation of schools in which children in fact were segregated by race did not by itself violate equal protection and justify judicial intervention.<sup>75</sup> State-operated schools—however segregated by race and however educationally inferior as a result—were beyond judicial help unless suing plaintiffs could prove that responsible state agencies subjectively (or, in the word of the day, “invidiously”) intended to operate the schools on a racial basis.<sup>76</sup> Doing so ruled out the philosophically more controversial goals such as multi-racialism and educational adequacy. It also absolved the courts of remedial responsibility for the many racially segregated schools that only “happened” to end up that way as an application of a neighborhood, choice or other “race-neutral” assignment principle —however *predictable* this outcome might be.

Second, in the 1974 *Detroit* case, the Court ruled that state officials who *had* invidiously segregated black children in Detroit from white children in the suburbs had no legal duty to remedy the situation, unless plaintiffs proved that the affected suburban school districts had *themselves* intentionally segregated the *city district's* schools.<sup>77</sup> The Court justified this curious ruling on the ground that its remedial powers were limited by respect for the tradition of “local control” of school districts (even if state officials had ignored that tradition in reaching the discriminatory decisions that the Court was refusing to reverse).<sup>78</sup>

As constricting as these first two rules were, they did not preclude relief, given that racial discrimination in urban public schools, housing, real estate and banking regulation, and transportation was pervasive and blatant. It took a third rule (defined in a

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<sup>75</sup>Keyes v. School District No. 1, 413 U.S. 189, 208 (1973).

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See *id.*; see also *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979).

<sup>77</sup>Milliken v. Bradley, 418 U.S. 717, 733 & n.14, 745, 753 (1974); see *Missouri v. Jenkins*, 515 U.S. 70, 87, 91-97 (1995).

<sup>78</sup> See *Milliken*, 418 U.S. at 741-44; see also *Jenkins*, 515 U.S. at 97-98. This ruling exacerbated the fault lines already running through the legal doctrine and the communities affected by it. To give only two examples, urban working class white families stuck with forced busing *within* the city from which their suburban equivalents were immune saw the ruling and its aftermath as an example of gross class discrimination. See J. Anthony Lukas, *Common Ground: A Turbulent Decade in the Lives of Three American Families* xx (1985). Commentators determined to explain desegregation as designed to cure the demonstrable effects of intentional segregation chalked it up to an ill-defined and admittedly uncontrollable doctrine of “remedial limits” that allowed or even required major effects of desegregation to unremedied. See, e.g., Gewirtz, *supra* note xx, at 646-48.

series of cases from *Pasadena* to *Kansas City*<sup>79</sup>) requiring plaintiffs to match particular state decisions to specific segregative outcomes to make relief effectively unattainable. Under that requirement, plaintiff children first had to prove that school districts, housing, urban renewal and relocations authorities, real estate and banking regulators, and transportation agencies had invidiously tried to separate whites from blacks. Then they had to prove that those efforts—exclusive of the imperatives of wealth, economically and socially spawned migration, public policy considerations besides race, and private preferences—“caused” substantial existing school segregation.<sup>80</sup> In the two decades since the Court made causation a crucial issue, no court has even attempted to identify the multivariate or other analysis sufficient for this demonstration. Although the effort to accomplish the necessary analysis nearly bankrupted the NAACP Legal Defense Fund and other civil rights organizations, it produced little permanent educational reform.

The upshot was to limit intervention to cases where officials made a public show of their desire to discriminate and a public exhibition of their segregative successes. There was nothing half-hearted about the Court’s retreat from an expansive program of desegregation, just as there had been nothing half-hearted about its original embrace of one. When its decisions produced self-evident remedies, as in the rural South, the Court was fully prepared to mobilize the coercive powers of the state. When its own decisions raised more questions than it answered, it was not. Its turn-about was the fruit of a complex and inarticulate decision about its own capacity to define and solve problems, not a matter of intestinal fortitude nor a fully considered judgment about the relevant capacities of other branches of government.

Even in the urban north and west, however, a few multidistrict desegregation cases suggested a distinct potential of courts. When they undertook to redistribute children among schools and redefined districts, not as an end in itself but instead as a way to reform and open up the processes through which local, county and state officials and educators interacted to administer and design schools, federal judges from Wilmington, Delaware to Charlotte, North Carolina, to Louisville, Kentucky were able for a time to energize surprising coalitions of actors, both inside and outside the schools, to revitalize entire regional educational systems and even the cities they

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<sup>79</sup>See, e.g., *Jenkins*, 515 U.S. at 87-97; *Freeman v. Pitts*, 503 U.S. 467, 491-92, 496 (1995); *Board of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991); *Dayton Bd. of Educ. v. Brinkman*, 344 U.S. 406, 417 (1977); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976).

<sup>80</sup> The *Keyes* and *Swann* presumptions moderated these proof burdens a bit, but not much in the end. This completed the Court’s switch from *Brown*’s systemic analysis of racial and educational problems to an ungainly individualized analysis of “invidious” government torts, which began with the demand for proof of the subjective intentions of public agencies that in fact had no subjectivities (*Spangler*, *Dayton I*, even *Dayton II* and *Columbus*, the unitariness decisions, and *Kansas City*) and the assumption that school district lines of convenience lying entirely within or criss-crossing city boundaries and across which families constantly moved for racial and educational reasons impregnably constituted the only school “systems” of legal interest.

straddled.<sup>81</sup> Liebman, *supra* note xx, at 1621. These remedies operated by reconfiguring previously segregated metropolitan school districts into new sets of racially mixed districts, then turning the reorganized units loose, under the guidance of newly interlocked local, regional and state officials and a variety of actors from the private sector, to reorganize the governance, administrative, and pedagogical structures of the newly reconfigured schools and districts. Hochschild attributes the success simply to the capacity of desegregation to shake up previously hide-bound bureaucracies. A closer look reveals, however, that the catalyst for change was not just the shake-up of the schools but also the new combinations of social actors (cutting not only across racial but also jurisdictional and disciplinary lines) that the remedies mobilized and organized and, indeed, a new form of interracial politics. See Liebman, *supra* note xx, at 1614-66; Raffel, *supra* at xx. More generally, it is clear in retrospect that emphasizing the limits of the courts' ability to disambiguate equality norms in a variety of diverse settings undersells their crucial capacity to productively disentrench institutions that are brutally unequal yet effectively buffered from the normal controls of democratic politics.

Two decades later state courts were to stumble again upon the advantages of this form of external collaboration as they worked themselves through the complexities of school finance reform, to which we turn next.

## **B. Equitable Funding**

Even as the sequence of advance and retreat was being played out in the federal courts, legal reformers drawn to the idea of the provision of an adequate public education as a fundamental governmental obligation turned to state courts to pursue equalization of per-pupil funding across school districts within states. The focus on the state courts was compelled by the Supreme Court's preemptive declaration of its own

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<sup>81</sup>See Jennifer Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation* 80-82 & nn.140-44 (1984); J. Raffel, *The Politics of School Desegregation: The Metropolitan Remedy in Delaware 174-95* (1980); Subcommittee on Civil and Constitutional Rights of the House Judiciary Comm., 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., *Report on School Desegregation* 10 (Comm. Print 1981); Willis Hawley and xxxx Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration in Eliminating Racism: Profiles in Controversy* 281, 285 (P. Katz & D. Taylor eds. 1988); Sinclair, *Desegregation's Quiet Success*, *Wash. Post*, June 17, 1978, at A1, col. 4. These school districts:

experience[d] an educational renaissance characterized by curricular reform, modernized grade structures . . . , revitalized teaching staffs, enhanced parental involvement and financial support for the schools, and—perhaps most importantly—a revived administrative bureaucracy. This effect . . . prompted [black opponents of integration] to criticize desegregation as a screen for enhancing the education opportunities for *white* children.

unwillingness to entertain claims of this sort.<sup>82</sup> Readers schooled in this literature will notice that we have compressed and partially reconfigured the usual description of the “three waves” of school-finance litigation. The effort to promote finance equalization under the Equal Protection Clause of the Fourteenth Amendment, ending disastrously in the *Rodriguez* decision is the first wave. Below we address the other two waves—state equal protection claims and “adequate education” claims. For more comprehensive treatments of this history, see William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 *Educ. Pol’y* 376 (1994); Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: From Equity to Adequacy, 68 *Temple L. Rev.* 1151 (1995); McCusick, *supra* note xx; Deborah A. Verstagen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy*, 24 *J. Educ. Fin.* 51 (1998).

Developments in the state funding equity cases paralleled those in the federal desegregation cases in that judges in many jurisdictions advanced confidently as long as it appeared that there was a straightforward remedy for any offensive disparity in the deployment of public resources, but broke stride once their own exploration of the situation revealed unexpected complexities in goals and remedies. The chief difference was the somewhat larger set of state courts that, like the multi-district school desegregation courts mentioned above, responded to this complexity by willy nilly mobilizing various combinations of social actors in novel ways to address problems they

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<sup>82</sup>Taking seriously the Court’s recognition in *Brown* of public education’s fundamental importance to developing “hearts,” “minds,” and citizenship, see *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954), and citing established equal protection doctrine forbidding States to distribute fundamentally important public services unequally on the basis of wealth, see, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956), San Antonio school children attacked Texas’ system of distributing educational resources among children based on the taxable property-wealth of the districts in which they lived. See *San Antonio Indep’t School Dist. v. Rodriguez*, 411 U.S. 1 (1973). The Court declined to intervene—suddenly demoting public education to nonfundamental status, and placing wealth discrimination *absent* a fundamental interest beyond equal protection scrutiny. See *id.* at 18-31. Central to the Court’s explanation for doing so was its lack of competence to identify either the educational resources that might be deemed fundamental—or, indeed, whether levels of *any* resources could be meaningfully linked to desirable educational outcomes—or the proper fiscal measures for making sure that those resources were evenly distributed. See *id.* at 41-44 & n.86, 56-59 (“the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues”; “[i]n addition to matters of fiscal policy, this case involves the most persistent and difficulty questions of educational policy, another area in which this Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels”). Instead, the Court extolled the comparative policy-making advantages of the political branches and particularly, in the educational sphere, of “local [political] control.” *Id.* at 44.



could not satisfactorily resolve themselves.<sup>83</sup> Whereas the Supreme Court reacted to the experience of its own limits in matters of desegregation with a strategy of self-immunization,<sup>84</sup> a small number of state judges began to provoke reconsideration of the way courts in combination with other institutions could help correct wrongs that otherwise appeared intractable.

The equalization claims that at least nominally succeeded in state court appealed to one or a combination of two legal theories. The first is grounded in state equal protection provisions and is typified by California's, Connecticut's, and all but the most recent stages of New Jersey's experience.<sup>85</sup> It issued in a series of judicial directives to equalize per pupil expenditures across districts, which States eventually satisfied by vastly expanding their role in school funding.<sup>86</sup> The second theory is grounded in provisions found in nearly all state constitutions that the state provide an "an adequate education,"<sup>87</sup> a "thorough and efficient system of free public schools,"<sup>88</sup> or "an educational program of high quality."<sup>89</sup> Typified by the Texas, Kentucky, and recent stages of New Jersey's experience, this second theory resulted in orders to provide levels of funding that were educationally "sufficient" or "adequate," regardless of whether they were equal.<sup>90</sup> The earlier cases tended to invoke equality theories, while the later ones chiefly advanced adequacy theories.<sup>91</sup> Adequacy theories arguably found somewhat greater favor with courts,<sup>92</sup> but this could be because courts were more willing to criticize an existing regime for being inadequate than to affirmatively replace one regime with another and, by some measure, certifiably equal one.<sup>93</sup> Or, the shift

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<sup>83</sup>See infra notes xx-xx and accompanying text.

<sup>84</sup>See supra note xx (discussing *Rodriguez*).

<sup>85</sup>See Heise, supra note xx, at 1157-63.

<sup>86</sup>See Alan Hickrod et al., *The Effect of Constitutional Litigation on Education Finance*, 18 J. Educ. Fin. 180, 181-89 (1986); McUsic, supra note xx, at 108-15.

<sup>87</sup> Ga. Const., art. VIII, § 1, pt. 1.

<sup>88</sup>W. Va. Const., Art. XII, § 1; see N.J. Const. Art. VIII, § 4.

<sup>89</sup>Va. Const. art. VIII, § 1. See Heise, supra note xx, at 1158-59 & n.64; Rebell, *Education Adequacy*, supra note xx, at 19-20.

<sup>90</sup> See, e.g., Rebell, *Education Adequacy*, supra note xx, at 19-20 & n.31.

<sup>91</sup> See, e.g., Heise, supra note xx, at 1157-65.

<sup>92</sup>See, e.g., Rebell, *Education Adequacy Litigation*, supra note xx, at 19.

<sup>93</sup>See, e.g., Clune, supra note xx, at xx (explaining the switch from equity to adequacy as aimed at finding new "tools which are more firmly grounded on the constitutional base, more closely matched to the task at hand, and less threatening in their reach and power"); McCusick, supra note xx, at 105-08, 115-19 (explaining the shift as providing a

from equality to adequacy theories may simply have coincided with a perception of increasing deterioration of American schools, enhancing the urgency of finding a remedy.<sup>94</sup>

Initial nuances of doctrine aside, all but the most recent outcomes of finance equity litigation tended to have crucial features in common. First, they resulted in greater equality of per pupil spending across districts.<sup>95</sup> Equalization was a mixed blessing, however. Although it usually provided *more* money to poor districts, it potentially turned equal funding into a cap on how *much*. See, e.g., Patricia F. First & Louis F. Miron, *The Social Construction of Adequacy*, 20 *J.L. & Educ.* 421, 428 (1991) (“Research has shown undesirable consequences of improving measures of equity (i.e., fairness in distribution resources) without, at the same time, improving on those resources. The result is an undesirable ‘leveling-down’ of the acceptable minimum of educational offerings.”). Another problem is that “[s]tudents from different backgrounds

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more bounded and targeted focus of judicial activity than did judges’ notions of “equality” and “equal protection”). Likewise, the focus on “sufficient school funding rather than the consequences of local property tax revenue suggests that local property tax revenue is more likely to remain an important source of school funds, thus helping to preserve local control.” Heise, *supra* note xx, at 1175. Although “indeterminacy of the measure of an adequate education poses a . . . challenge to efforts to deploy adequacy arguments in the courts” at least as “daunting” as the challenge posed by indeterminate equality measures, Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 *Vand. L. Rev.* 101, 172 (1995), litigants and judges partially obscured the problem, at least initially, by defining “educational adequacy” in terms of adequate (if not necessarily equalized) *funding*. In the logic of this approach, “all children are entitled to an education of at least a certain quality and . . . more money is necessary to bring the worst school districts up to the minimum level mandated by the state education clause.” William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 *B.C. L. Rev.* 597, 603 (1994). See also Heise, *supra* note xx, at 1176 (measuring success of educational adequacy lawsuits by their “impact on school finance systems”).

<sup>94</sup> See McUsic, *supra* note xx, at 117.

<sup>95</sup> For example, by the mid-1980s, there was less than a \$200 difference in the amount California spent each year on 90% of the state’s public school children. See, e.g., William N. Evans, Sheila E. Murray & Robert M. Schwab, *The Impact of Court-Mandated Finance Reform*, in *Equity and Adequacy in Education Finance: Issues and Perspectives* (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen, eds., 1999); Joseph T. Henke, *Financing Public Schools in California: The Aftermath of Serrano v. Priest and Proposition 13*, 21 *U.S.F. L. Rev.* 1, 22-23 (1986); Bradley W. Joondeph, *The Good, the Bad and The Ugly: An Empirical Analysis of Litigation Prompted School Finance Reform*, 35 *Santa Clara L. Rev.* 763, xxx (1995). This forced equalization was an astounding feat, given the huge differences among districts that were typical before the California suit was filed.

and possessing varying educational needs and learning styles impose varying costs on school systems constitutionally charged with a duty to educate them.” Heise, *supra* note xx, at 1169. See McUsic, *supra* note xx, at 106. Second, they produced an increase in the funding of at least some poorly financed schools and districts.<sup>96</sup> Third, they increased the state’s share of the burden of funding schools, and reduced the share borne at the local level—in the process establishing significantly more centralized, statewide control over all aspects of the educational system<sup>97</sup> at the expense of the American tradition of local control over education.<sup>98</sup> But, fourth, where these effects were most pronounced, overall expenditures on education stagnated or declined, so that equalization of spending within the state did not result in an improvement in the state’s place in the national league table of state education spending. Finally, even some prominent cases where there were increases in per pupil spending on education in poor districts as a result of finance equity suits achieved no or disappointing levels of educational improvement in schools attended by the children victimized by the previous system.<sup>99</sup> Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, And The Separation of Powers Doctrine*, 33 *Land &*

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<sup>96</sup> See, e.g., Evans, Murray & Schwab, *supra* note xx, at xx; Joondeph, *supra* note xx, at xx.

<sup>97</sup> See, e.g., Robert C. Johnston & Jessica L. Sandham, *States Increasingly Flexing Their Policy Muscles*, *Educ. Week*, Apr. 14, 1999, at xx; Evans, Murray & Schwab, *supra* note xx, at xx; Hickrod, *supra* note xx, at 189; Joondeph, *supra* note xx, at xx; McUsic, *supra* note xx, at 111 (“state legislative response to school finance suits almost always involves some shift from local to state financing”); Neil D. Theobald & Faith Hann, *Ample Provision for Whom? The Evolution of State Control Over School Finance in Washington*, 17 *J. Educ. Fin.* 7, xx (1991); Theobald & Picus, *supra* note xx, at xx.

<sup>98</sup> See, e.g., *San Antonio Indep’t School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *Wright v. Council of the City of Emporia*, 407 U.S. 451, 469 (1972); *supra* notes xx, xx.

<sup>99</sup> See, e.g., James S. Liebman, *Implementing Brown in the Nineties: Political Reorganization, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 *Vir. L. Rev.* 349, 392-93 (1990) [hereinafter, *Implementing Brown*]; McUsic, *supra* note xx, at 105-15; *Note Unfulfilled Promises: School Finance Remedies and State Courts*, 104 *Harv. L. Rev.* 1072, 1075-78 (1994). In the standard account, this one focusing on the New Jersey case as of 1998, the suit was

not enough to induce the development of a constitutionally acceptable school finance system. That such legislative measures were not adequate, particularly in light of the almost three decades of effort, fuels unflattering debates over judicial efficacy. By struggling to achieve what it sets out to achieve, the New Jersey Supreme Court risks eroding precious capital relating to its legitimacy as a political institution.

Water L. Rev. 281, xxx [tan230] (1998).

The evolution of litigation efforts in the Connecticut and New Jersey cases starkly documents this disappointment. In Connecticut, the father of the named plaintiff in the successful finance-equity suit found it necessary several years later to file a second major suit challenging the adequacy of the education provided poor and African-American children by the state's now financially equalized school districts.<sup>100</sup> In New Jersey, the same thing happened within the confines of the same lawsuit. Passage of that suit's quarter-century mark found the plaintiffs back in court arguing that improved educational funding had not improved educational outcomes in poor and urban districts and asking the court to supplement its orders saying how much public educators should spend with additional orders saying what they should spend it on.<sup>101</sup> McUsic, *supra* note

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<sup>100</sup> See James E. Ryan, *Sheff*, Segregation and School Finance Litigation, 74 N.Y.U. L. Rev. 529, 537 (1999) ("Plaintiffs thus did not file *Sheff* because earlier school finance litigation had been unsuccessful in equalizing resources; rather, plaintiffs filed *Sheff* because equalizing resources was not enough."). Compare *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (granting finance-equity relief to class represented by children of Wesley Horton) with *Sheff v. O'Neill* 678 A.2d 1267 (Conn. 1996) (permitting adequacy-based lawsuit brought by Wesley Horton and other lawyers to proceed to trial). On the failure of the "successful" *Horton* suit to improve the education of poor children in the states, see, e.g., *Sheff v. O'Neill*, 678 A.2d at 1273, 1296-97 n.2, 1334 (Borden, J., dissenting); McUsic, *supra* note xx, at 111 ("Despite the millions of dollars in state resources spent on the Hartford schools, students attending them had the lowest test scores and the highest dropout rates in the state"); George P. Richardson & Robert E. Lamitie, *Improving Connecticut School Aid: A Case Study with Model-Based Policy Analysis*, 15 J. Educ. Fin. 169, 170-71 (1988) (concluding that much of increased state aid prompted by successful finance-equity suit did not go into improved educational programs but, instead, to tax relief in high-tax urban areas).

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See, e.g., *Abbott v. Burke*, 575 A.2d 359, 366 (N.J. 1990) (describing lack of any apparent increase in student achievement despite years of increased spending on public schools prompted by ongoing school-finance litigation); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 Rutgers L.J. 827, 925-31 (1998) (giving account by school children's lawyer of the failure of the early rounds of the New Jersey finance equity suit to improve the education of poor children, and the plaintiffs' more recent efforts to secure orders prescribing "whole school" and other substantive reforms).

Notably, Professor McUsic relies on precisely "the plaintiffs' position" in the latest Connecticut lawsuit and in the later stages of the New Jersey litigation as support for the following conclusion:

Unfortunately, after decades of lobbying and litigating for every dollar they could find in increased funding and special programs, advocates on behalf of . . . high-poverty districts acknowledged that students still received inadequate

xx, at 129, 157 n.200.

The developments in these cases are hardly singular but reveal a doctrinal broadening and institutional opening of school reform litigation generally. The doctrinal broadening has meant that adequacy no longer connotes financial adequacy but instead an adequate education as determined by the demands of contemporary society. Whether or not a school requires less or more funding than the median district in the state, what counts is the adequacy of the outcome, not inputs.<sup>102</sup> This doctrinal broadening goes hand in hand with an institutional opening. Because the idea of an adequate outcome and the means for achieving it are elusive and hard to define, courts have begun to rely on open-ended definitions proposed by varieties of informed actors with expert knowledge of schooling and school reform to establish standards for measuring progress towards the goal of adequacy.

This collaboration with outside institutions has taken various forms. In some cases the court benchmarked existing measures of school performance, extracting standards specifying general outcomes that the states' schools would have to meet. In other cases, courts selected a model for thoroughgoing school reform recommended by credible authorities, ordering school districts to implement this model or, possibly, an alternative of their own choice provided that it deliver superior results. In yet other cases, the court stood firm in rejecting solutions that clearly did not meet its broadened adequacy standard, without specifying that standard, still less informing the parties about how to attain it. Eventually, this obligated the parties to identify their own qualifying standard and means to achieve it.

In the first category is Kentucky. In 1990, its Supreme Court declared not only the state's educational financing mechanism but its entire "system of common schools" constitutionally deficient and ordered the state to replace it with a system enabling Kentucky students to graduate with seven educational skills and categories of knowledge.<sup>103</sup> *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989). (These

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education.

<sup>102</sup>For legal observers, there is an irony in this, that although adequacy appealed to courts because of the simplicity of the demands it placed on legal institutions and because it seemed legally more tractable and less ambitious, see, e.g., Heise, *supra* note xx, at 1163-76; McUsic, *supra* note xx, at 115-20, 134-37, it turned out to embroil them more deeply in complex and novel collaborations with outside institutions.

<sup>103</sup>The seven are:

- B. sufficient oral and written communication skills to enable [the] student[] to function in a complex and rapidly changing civilization;
- ii. sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- iii. sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;

were derived from a catalogue of essential competencies for citizens of a democracy compiled and widely circulated by a statewide movement for educational reform that we discuss in detail below.<sup>104</sup>) In response, the Kentucky General Assembly adopted the Kentucky Education Reform Act in 1990,<sup>105</sup> one of the “most far-reaching” state educational reform efforts in the nation, which not only adopted new tax legislation increasing revenues for all school districts in the state by at least 8 percent and those for some districts by 25 percent,<sup>106</sup> but also “reshaped the curriculum [and] governance . . . of Kentucky schools.”<sup>107</sup>

The second category of reforms is exemplified by New Jersey. In 1998, after years of failed finance-equalization efforts, the New Jersey Supreme Court gave the state three years to implement “whole school” reform programs (or, possibly, alternative programs of the districts’ own choosing) in several hundred urban schools.<sup>108</sup> Broadly speaking these involved a bottom-up, needs assessment in the poorest districts culminating in the elaboration of comprehensive school- and district-wide reform plans.<sup>109</sup>

Typifying the third category is the Texas case in which the state’s high court thrice ordered the state legislature to develop a new mechanism for funding schools

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- iv. sufficient self-knowledge and knowledge of his or her mental and physical wellness;
  - v. sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
  - vi. sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
  - vii. sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

<sup>104</sup> Compare *id.* with The Prichard Committee for Academic Excellence, *Gaining Ground: Hard Work and High Expectations for Kentucky Schools 24-25* (Nov. 1999), [www.prichardcommittee.org/pubs/gground.pdf](http://www.prichardcommittee.org/pubs/gground.pdf) (discussed *infra* notes xx-xx and accompanying text).

<sup>105</sup> 1990 Ky Acts 476, Ky. Rev. Stat. Ann. §§ 156.005-156.990 (1990).

<sup>106</sup> Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 *J.L. & Educ.* 485, 497-98 (1999).

<sup>107</sup> McCusic, *supra* note xx, at 136.

<sup>108</sup> Caroline Hendrie, *N.J. Schools Put Reform to the Test*, *Educ. Week*, Apr. 21, 1999, at 1.

<sup>109</sup> See Trachtenberg, *supra* note xx, at 323-27.

sufficient, in the language of the state Constitution, to permit an “efficient” public school system and “a general diffusion of knowledge” to its students.<sup>110</sup> Its deference to the political branches was so extravagant that one frustrated state legislator, summoned to yet another special legislative session, complained that he was ready to “surrender” to the Texas Supreme Court if it would only tell him where to turn himself in.<sup>111</sup> We tell the torturous story of the back-and-forth between the Texas courts and legislature below. It culminated in 1995 in the revision of the entire Texas Education Code, removing many regulatory constraints on individual districts and replacing them with a two-pronged program of local control over curriculum, educational materials, and instructional philosophy coupled with a powerful rating system for districts and schools based on test scores on criterion-referenced achievement tests of the state’s own design, attendance, and drop-out rates.<sup>112</sup>

As these examples suggest, school reform litigation in its current phases, although originating from familiar starting points, has come to engage a much broader range of actors and indeed to lay the foundation for new institutions that are hard even to survey and harder still to comprehend from the vantage point of courts or the legal system generally. It thus is accurate to say that the courts are instigating and creating a public forum in which to discuss comprehensive reforms of American education that draw on linked innovations in school governance, performance measurement, the reconceptualization of the teaching profession and pedagogy. In some limited and thus far poorly understood way, they are also coordinating the debate that they instigate and enable. There is thus at least the possibility that the courts will break out of the cycle of courageous efforts to improve existing institutions, followed by the disheartening recognition of the limits of doctrinally directed interventions and a retreat to caution that preserves the judiciary by sacrificing its original ameliorative ambitions. To make sense of this possibility, it is necessary to step outside the boundaries of the school reform debate as it is posed within the confines of the judicial system and to look directly at the broader and convergent developments on which that debate increasingly has drawn.

We do this in four steps. The first focuses on what very generally might be called top-down reforms — innovations in educational standards that allow measurement of school performance and thus ultimately put pressure on school administrators to undertake meaningful reform. The second focuses, again very generally, on what can be thought of as reform from the bottom up — innovations in classroom practice, and school organization more comprehensively, that lead in the best cases to the creation of

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<sup>110</sup> See, e.g., William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 Conn. L. Rev. 721, 738-40, 747 (1992).

<sup>111</sup> See *id.* at 754.

<sup>112</sup> See, e.g., Jonathan Fox, *Old-Style Tests May Hamper School Reform, Experts Say*, *Educ. Daily*, Apr. 14, 1999; Robert C. Johnston & Jessica L. Sandham, *Educ. Week*, Apr. 14, 1999; *infra* notes xx-xx and accompanying text.

“learning communities” capable of serving the most disparate school populations. In the third, we show how these two developments intersect and transform one another. The result is “the new accountability” — a synthesis in which standards are used to diagnose problems in the performance of individual students, teachers and schools and in which the clinical practice of the “master teacher” is informed and disciplined by the systematic comparisons to peer performance that standards enable. Fourth, we show how this synthesis creates the context within which new forms of judicial activism are proving successful.

## **II. Standards, Learning Communities and the New Accountability**

### **A. Top-Down Reform: Standards, State and Federal**

The innovations in standards that form the framework for the new accountability system were the late flower of a series of linked reform movements at the state and national levels that date to the early 1980s. These movements were motivated by the recognition that American educational systems ranked miserably in international comparisons. At the national level, these concerns crystalized in numerous reports on the parlous state of U.S. education. Among these, the most influential was *A Nation at Risk*, by the President’s National Commission on Excellence in Education.<sup>113</sup> At the

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<sup>113</sup>In 1983, the President's National Commission on Excellence in Education galvanized the so-called "Excellence Movement" with its conclusions that a "rising tide of mediocrity" threatens public education in this country and that "[o]ur Nation is at risk." Nat'l Comm'n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform* 5 (1983) [hereinafter *A Nation at Risk*]. The Commission's report noted, inter alia, an increase in the number of functional illiterates, a decline in SAT and other achievement scores, and the increasing demand for remedial education. *Id.* at 8-9; accord Carnegie Task Force on Teaching as a Profession, *A Nation Prepared: Teachers for the 21st Century* (1986) [hereinafter *Carnegie Task Force*] (decline in teacher salaries, autonomy, status, and competency); Nat'l Governors' Ass'n Center for Policy Research and Analysis, *Time for Results: The Governors' 1991 Report on Education* 97-109 (1986) [hereinafter *Time for Results*] (solely inadequate education available to "at risk" children); Task Force on Educ. for Economic Growth, *Educ. Comm'n of the States, Action for Excellence: A Comprehensive Plan to Improve Our Nation's Schools* 10-11, 30 (1983) [hereinafter *Action for Excellence*] (damage to personal and national economic prospects caused by inadequate educational development of vast amounts of human resources); Twentieth Century Fund Task Force on Fed. Elementary and Secondary Educ. Policy, *Making the Grade* 4-5, 15 (1983) [hereinafter *Making the Grade*] (demands on schools complicated by increase in truancy, dropout rates, and violent crimes); see Passow, *Tackling the Reform Reports of the 1980's*, 65 *Phi Delta Kappan* 674 (1984); see also Walsh, *In Poll, College Faculty Say Students Are Unprepared in Basic Skills*, *Educ. Week*, Nov. 8, 1989, at 5, col. 5 (Carnegie Foundation poll of 5000 college faculty members revealing overwhelming consensus that entering freshmen are seriously ill-prepared for college in terms of their



state level, where early reform partly antedated and partly responded to this report, this took the form of legislation imposing standards of minimum competency on students and teachers. Within a few years of *A Nation at Risk*, nearly all 50 states had adopted some version of comprehensive standards.<sup>114</sup>

Conceived as a sincere effort to list the indispensable building-blocks of an effective modern education, this combination of national and state level reforms was initially misdirected. Above all, the resulting standards and tests focused on individual teachers and pupils,<sup>115</sup> with the aim of creating incentives, mainly negative, for them to

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basic skills); Weinraub, Bush and Governors Set Education Goals, N.Y. Times, Sept. 29, 1989, at A10, col. 1 ("consensus with [in] the Government and the education establishment that American schools [are] in turmoil and that the education system [is] increasingly lagging behind those of other industrial democracies"); Fiske, Impending U.S. Jobs "Disaster": Work Force Unqualified to Work--Schools Lagging Far Behind Needs of Employers, N.Y. Times, Sept. 25, 1989, at A1, col. 1 (reporting consensus in business community that American schools are graduating students without the skills needed for sophisticated new jobs).

These nationally focused reports, see, e.g., *A Nation at Risk*, supra at 32; *Time for Results*, supra at 97-109; *Making the Grade*, supra at 8-20, and a separate set of more targeted studies particularly documented the dismal educational prospects of poor, minority, and limited English proficiency children. See, e.g., College Entrance Examination Bd., *Equality and Excellence: The Educational Status of Black Americans* (1985); W. Grant & T. Snyder, *Digest of Educational Statistics 1983-84* (1984); H. Hodgkinson, *All in One System: Demographics of Education--Kindergarten Through Graduate School* (1985); *The Same Client*, supra note 44; Nat'l Coalition of Advocates for Students, *Barriers to Excellence: Our Children at Risk* (1985) [hereinafter *Barriers to Excellence*]; Nat'l Comm'n on Secondary Educ. for Hispanics, 2 "Make Something Happen": Hispanics and Urban High School Reform (1984) [hereinafter *Make Something Happen*]; Office of Educ. Research & Improvement, U.S. Dep't of Educ., *Poverty, Achievement and the Distribution of Compensatory Education Services 11-30* (1986)

<sup>114</sup>See, e.g., *Changing Course: A 50-State Survey of Reform Measures*, *Educ. Week*, Feb. 6, 1985, at 11 (noting, as of the mid-1980's, that virtually all 50 states had responded to the reports by adopting some sort of statewide assessment program to measure student achievement); Pipho, *Tracking the Reforms, Part 5: Testing--Can it Measure the Success of the Reform Movement?*, *Educ. Week*, 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"). See generally *The Educational Reform Movement of the 1980's: Perspectives and Cases* (J. Murphy ed.1989) (collecting articles addressing numerous aspects of educational reform movement of the eighties).

<sup>115</sup> See, e.g., Jay P. Heubert, *High-Stakes Testing and Civil Rights: Standards of Appropriate Test Use and a Strategy for Enforcing Them* (paper on file with xxx); supra note xx.

do what was needed to provide and profit from an effective education:<sup>116</sup> Students who failed the tests could lose their right to matriculate, graduate or attend state colleges; teachers who did so could lose their jobs.<sup>117</sup> Schools---which presumably had a profound impact on the performance of both teachers and students---were not themselves assessed in any way.<sup>118</sup> Still less could the assessments guide improvement of school performance. To the extent that the minimum competency standards had any immediate practical consequence, it was to narrow the range of what is teachable or even discussable by focusing attention obsessively on whatever is defined as a “minimum competency.”<sup>119</sup> Critics of minimum competency tests (“MCTs”)

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<sup>116</sup> Among the negative or exclusionary consequences that minimum-standards legislation initially imposed on students falling below standard are placement in lower tracks and denial of eligibility for promotion to a higher grade, to matriculate to another school, to take part in extracurricular activities, to receive a diploma or graduate, to receive a driver's license, and to attend a state university. See, e.g., Margaret E. Goertz, *State Educational Standards: A 50-State Survey* 10, 27-134 (1986); cf. Birmingham Drops Skills Test as Requirement for Promotion, *Educ. Week*, Nov. 1, 1989, at 3, col. 1 (test scores eliminated as decisive basis for determining promotion to second through eighth grades because its principal effect was to prevent hundreds of students who passed all their courses from passing to the next grade).

<sup>117</sup> Most of the national reports advocated performance standards for students and teachers. See, e.g., Carnegie Task Force, *supra* note 93, at 55-103; *A Nation at Risk*, *supra* note 93, at 27-28, 20-31. The vast majority of those programs relied primarily upon mandatory minimum competency tests in reading, writing, and mathematics and, somewhat less frequently, citizenship, social studies, and science. See Goertz, *supra* note xx, at 9 (as of 1985, at least 42 states required local school districts to administer some sort of basic skills test to students at some time during their school careers). In addition to test-based performance standards, most modern legislative reforms included curriculum-based performance standards that increased the number and difficulty of courses students had to complete satisfactorily before receiving diplomas or other benefits. See W. Clune, P. White & J. Patterson, *The Implementation and Effects of High School Graduation Requirements: First Steps Toward Curricular Reform* (Center for Policy Research in Educ., Report No. RR-011, 1989); Goertz, *supra*, at 13-16.

<sup>118</sup> See Liebman, *Implementing Brown*, *supra* note xx, at 375-77. See also the discussion of diagnostic standards at *infra* note xx-xx and accompanying text. As it turned out, the tests did not even serve the goal of individual assessment, because they typically were valid only in the aggregate for populations of school size or larger. They were not valid as measurements of individual competency. See *High Stakes*, *supra* note xx, at 30; other authority cited *supra* note xx.

<sup>119</sup> See, e.g., *High Stakes*, *supra* note xx, at 38-39; Jones, *supra* note xx, at 200-02; Alfie Kohn, *The Case Against Standardized Testing: Raising the Scores, Ruining the Schools* (2000); Linda C. McNeil, *Contradictions of School Reform: Educational Costs of*

have long questioned the tests' ability to do what they claim to do---measure mastery of important daily life skills—and have argued that MCTs are of dubious reliability and validity, are premised on meaningless and incompatible scales and reference points, and can measure only a single day's performance with regard to a limited range of testable skills that are not actually important to students and adults. See, e.g., Bracey, *The \$150 Million Redundancy*, 70 *Phi Delta Kappan* 698 (1989); Cannell, *Nationally Normed Elementary Achievement Testing in America's Public Schools: How All Fifty States Are Above the National Average*, 7 *Educ. Measurement: Issues & Prac.* 5 (1988); Darling-Hammond, *Mad-Hatter Tests of Good Teaching*, in *Great School Debate*, supra note xx, at 247; Haney, *Validity, Vaudeville, and Values: A Short History of Social Concerns over Standardized Testing*, 36 *Am. Psychologist* 1021, 1029-32 (1981); Richard Murnane, *Improving Education Indicators and Economic Indicators: The Same Problems?*, 9 *Educ. Evaluation & Pol'y Analysis* 101 (1987); Neill & Medina, *Standardized Testing: Harmful to Educational Health*, 70 *Phi Delta Kappan* 688, 689-92 (1989). For all these reasons, the standards had marginal impact on American education as of the early 1990s.<sup>120</sup> At their worst, minimum competency standards were

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Standardized Testing (2000); Susan Ohanian, *One Size Fits Few: The Folly of Educational Standards* (1999); 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 (Nov. 11, 2000), <[http://www.law.harvard.edu/groups/civilrights/conferences/testing98.../mcneil\\_valenzuela.htm](http://www.law.harvard.edu/groups/civilrights/conferences/testing98.../mcneil_valenzuela.htm)>; Kathleen Kennedy Manzo, *NAEP Drops Long-Term Writing Data: 'Trend' Test Unreliable*, *Governing Board Says*, *Educ. Week*, Mar. 15, 2000, at 1.

<sup>120</sup>Partly out of concern that the state-level reforms had not succeeded, see, e.g., W. Firestone, Susan F. Fuhrman & Michael Kirst, *The Progress of Reform: An Appraisal of State Educational Initiatives 23-26* (Center for Policy Research in Educ., Report No. RR-014, 1989) (stating that the 1980's school reforms have had only "modest" beneficial impact); Cohen, supra note 93, at 20, col. 2 (quoting Marshall Smith, dean of education at Stanford University, expressing "frustration with the progress of reforms" and Ernest Boyer, president of the Carnegie Foundation for the Advancement of Teaching, lamenting that "with all of the effort at school reform in the last few years, we still have not found the formula to move forward"); Johnson, *Bush Will Back National Goals on Education*, *N.Y. Times*, Sept. 24, 1989, at 24, col. 1 (quoting statement by Roger Porter, domestic policy advisor to President George Herbert Bush, that, recent reforms notwithstanding, "we have seen little if any improvement"); Olson, *Despite Years of Rhetoric, Most Still See Little Understanding, Inadequate Efforts*, *Educ. Week*, Sept. 21, 1988, at 1; Miller, Bennett: *Despite Reform, "We Are Still at Risk,"* *Educ. Week*, May 4, 1988, at 15, President Bush and the governors of all fifty states unanimously adopted a "Jeffersonian Compact on Education" calling for development and implementation in the 1990s of "an ambitious, realistic set of [national] performance goals" that provide "a common understanding and a common mission" for all schools in the nation. "A Jeffersonian Compact": *The Statement by the President and Governors*, *N.Y. Times*, Oct. 1, 1989, at E22, col. 2 [hereinafter *Jeffersonian Compact*]. See Walker & Olson, *With Goals in Place, Focus Shifts to Setting Strategy*, *Educ. Week*, Mar. 7,

exploited as a politically expeditious way of demonstrating the moral depravity of American youth---and minority communities---and the way self-serving educational bureaucracies contributed to their condition.<sup>121</sup>

But flawed as it was, the standards movement was profoundly transformative both politically and institutionally in ways that together eventually led to the transformation of the standards themselves. Politically, the standards were perturbing because they lay outside the spectrum of familiar remedies pursued by the usual constituencies. As such, the standards movement distressed advocates of school reform on the left and the right, bringing to light deep ambiguities in their respective camps. Opponents of public schooling saw in standards a regressive reassertion of state control over education.<sup>122</sup> Advocates of poor and minority children saw a dangerous legitimization of a system of evaluation that, intentionally or not, lent official weight to, and thereby aggravated rather than attacking, the consequences of deprivation and racism.<sup>123</sup>

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1990, at 1, col. 1 (discussing education goals set in early 1990 by President Bush and governors).

<sup>121</sup>See, e.g., Ravitch, *supra* note xx, at 408-15.

<sup>122</sup>See, e.g., Chubb & Moe, *supra* note xx, at 197-98. Critics contend, among other things, that, because of their rigidity, tests and other fixed measures of quality have harmful educational effects. These negative effects include: the numbing constraints imposed on curriculum and teaching methods by the necessity of enabling children above all else to pass tests; the devaluation of such untestable subjects and goals as writing, graphic and performing arts, critical thought, problem solving, creativity, and leadership; repression of bright students; deemphasis on learning for its own sake and trivialization of knowledge and thinking into matters of multiple choice; and the devolution of control over education from the local to the state level of government. See, e.g., Comm. of Correspondence, *Education for a Democratic Future*, in *The Great School Debate: Which Way for American Education?* 374, 381-83 (Beatrice Gross & Ronald Gross eds., 1985); *Barriers to Excellence*, *supra* note xx, at 47; Down, *Assassins of Excellence*, in *Great School Debate*, *supra* at 273, 278 (characterizing minimum competency testing as "new version of mediocrity masquerading as excellence"); Haney & Madaus, *Searching for Alternatives to Standardized Tests: Whys, Whats, and Whithers*, 70 *Phi Delta Kappan* 683 (1989).

<sup>123</sup>See, e.g., 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; Liebman, *Implementing Brown*, *supra* note xx, at 374-77 & nn.98, 100, 104 (citing sources); 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 [http://www.law.harvard.edu/groups/civilrights/conferences/testing98.../Mcneil\\_valenzuela.htm](http://www.law.harvard.edu/groups/civilrights/conferences/testing98.../Mcneil_valenzuela.htm) (visited November 11, 2000). Nat'l Research Council, *High Stakes: Testing for Tracking, Promotion, and Graduation* (Jay P. Heubert & Robert M. Hauser, Eds. 1999). According to this critique, performance standards were used to mark poor and minority

But conversely and crucially, the standards movement created an implicit alliance among and allowed the mutual recognition of those for whom the battle for improved school performance was a goal in itself, and not primarily an occasion to demonstrate the superiority of market over plan, or vice versa. For the pragmatic middle left by the subtraction of the polar positions, the new arrangements suggested the broad outline of a more effective system of governance that increased possibilities for systemwide learning while heightening accountability.

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children as failures and thereby to deprive them of higher educational and employment opportunities. See, e.g., *Barriers to Excellence*, supra note 94, at 46; Serow, *Effects of Minimum Competency Testing for Minority Students*, 16 *Urb. Rev.* 67, 73-74 (1984) (finding that blacks have a substantially lower pass rate than other groups on minimum competency tests and are disproportionately likely to be sanctioned by loss of diploma for failure to pass tests); McDill, Gary Natriello & Pallas, *A Population at Risk: Potential Consequences of Tougher School Standards for Student Dropouts*, 94 *Am. J. Educ.* 135 (1986) (expressing concern about the negative self- concept caused by the failure to satisfy performance standards and the anticipated denial of the only tangible benefit disadvantaged students have to gain from competing in school will "push" those students out of school).

The emergent consensus took early, and at first ineffective, form in monographs prepared by university-based educational research centers funded by the federal government beginning in the mid-1980s.<sup>124</sup> It was further articulated in meetings orchestrated by the National Governors' Association and then between it and the first President Bush in Charlottesville in 1990.<sup>125</sup> Perhaps its clearest expression was in a resulting report called *Raising Standards for American Education*, prepared by the National Council on Educational Standards and Testing.<sup>126</sup> This report lists both general political principles that should guide standard setting and the kinds of complementary standards to be set. According to the report, standard setting should be by mechanisms that are nonfederal ("To maintain the Nation's tradition of state and local authority over education, any new oversight entity should be part of a cooperative national effort") and broad-based ("The coordinating structure should be bipartisan, engage government at all levels, and involve the many constituencies that have an interest in improving education").<sup>127</sup> Subject to these principles, the Council urged the development of nationally applicable standards for content, student performance, school delivery, and system performance. Particularly with respect to school delivery standards—criteria for measuring whether a school provides the services students need to meet substantive performance standards—the authors of the report contemplated peer reviews that anticipated current developments.<sup>128</sup> Testimony of Marshall S. Smith, U.S. Congress,

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<sup>124</sup>See, e.g., Jennifer A. O'Day & Marshall S. Smith, Systemic Reform and Educational Opportunity, in *Designing Coherent Education Policy* 251 (Susan H. Fuhrman, ed. 1993); Stewart C. Purkey & Marshall S. Smith, School Reform: The District Policy Implications of the Effective Schools Literature, 85 *Elem. Sch. J.* 353 (1985); Michael S. Smith, Selecting Students and Services for Chapter I, in *Federal Aid to the Disadvantaged: What Future for Chapter 1*, at 119 (Denis P. Doyle & Bruce S. Cooper, eds., 1998); Marshall S. Smith & Jennifer O'Day, Systemic School Reform, in *The Politics of Curriculum and Testing, 1990 Yearbook Pol. Educ. Ass'n* 234 (Susan H. Fuhrman & Barbara Malem, eds., 1991); Marshall S. Smith, Jennifer O'Day & David K. Cohen, A National Curriculum in the United States, 49 *Educ. Leadership* 74 (1991); See generally Maris A. Vinovskis, An Analysis of the Concept and Uses of Systemic Education Reform, 33 *Am. Educ. Res. J.* 53, 56-61 (1996).

<sup>125</sup>See Vinovskis, *supra* note xx, at 56.

<sup>126</sup>National Council on Educational Standards and Testing, *Raising Standards for American Education, A Report to Congress, the Secretary of Education, the National Education Goals Panel, and the American People* 34 (1992). The ad hoc council was chaired by two governors, Roy Roemer of Colorado and Carol Campbell, Jr. of South Carolina. Its membership was a high-level microcosm of the ideological and professional diversity that would characterize the broad state-level reform movements we will examine below. Among its active participants was Governor Bill Clinton of Arkansas.

<sup>127</sup>See *Raising Standards for American Education*, *supra* note xx, at 34.

<sup>128</sup> The school delivery standards, on the other hand, would be developed collectively by the States. Now, what is something that's developed collectively by the States?

House, Subcommittee on Elementary, Secondary, and Vocational Education, Oversight Hearings on the Report of the National Council on Education Standards and Testing, 102<sup>nd</sup> Cong., 2<sup>nd</sup> Sess., Serial No.102-105, at 50 (1992).

The upshot was a partial shift from global performance measures to internal, strategic, or diagnostic standards that assess both student and institutional performance, and prompt debate about their improvement.<sup>129</sup> Whereas the former focus on outcomes, the latter focus on the practices that together are expected to improve overall performance. Performance measure tend to be low dimensional, using one aspect of a competence to proxy the others (the right answer to a multiple choice question indicates mastery of the body of knowledge the question tests). Diagnostic standards are high dimensional, measuring the portfolio of skills of needed for a particular competence (the ability to formulate a problem, translate the formulation into formalisms, manipulate these, and so on). The business analogue to outcome standards would be the price-earnings ratio of a corporation's equity, or its year-over-year quarterly earnings. The business analogues to strategic or diagnostic measures would be the number of times a firm turns over its inventory each year, the time it takes to get a product from development to market, or the error or scrap rates of its manufacturing facilities.<sup>130</sup> Moreover, both performance and diagnostic standards could be either keyed to the particularities of small groups—local—or applicable to encompassing groups—general. By

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That certainly seems to be national to me. It's a different form of national. It is collectively by the States and then used by the States themselves to oversee, to audit the kinds of schools, to ensure the kinds of opportunities to learn that's called for in the report.

<sup>129</sup> See, e.g., Liebman, Implementing *Brown*, supra note xx, at 376 n.102; Diane Massell, Michael Kirst & Margaret Hope, Persistence and Change: Standards-Based System Reform in Nine States, CPRE Policy Briefs, RB-21 (March 1997) (providing overview of standards-based reform movement and the drift from punitive to diagnostic measures). For a thoughtful criticism of performance standards used in isolation and a guide to their use as diagnostic assessments, see Testing, Teaching and Learning: A Guide for States and School Districts 22-101 (Commission on Title I Testing and Assessment, Nat'l Research Council, Richard F. Elmore & Robert Rothman, eds. 1999). For a review of the different accountability systems that distinguishes sharply between the use of standards for punitive high-stakes evaluation of individual students and for diagnosis of possibilities for school reform and professional development, see Darling-Hammond, Transforming Urban Public Schools, supra note xx.

<sup>130</sup> In theory, improvement on the strategic measures leads to improvement on global outcomes, even though there is no robust theory of the connection between the two before the link is actually established. For an account of how apparently isolated strategic improvements can produce an encompassing change in organization, see Frederick H. Abernathy et al., *A Stitch in Time: Lean Retailing and the Transformation of Manufacturing—Lessons from the Apparel and Textile Industries* (1999).

the early 1990s, a number of influential educators had come to see general, diagnostic standards—elaborated, in the most thoughtful versions, through federal-state collaboration<sup>131</sup>—as the key to comprehensive restructuring of school systems: “systemic reform.”<sup>132</sup> (See for orientation Table 1, which also looks ahead to the cases treated next.)

	Local	Supra-local/Uniform
Low dimensional	Local Control: Emphasize the 3R's	<i>Nation at Risk</i> -Style National Standards
High dimensional	Progressive Local Control: Seizer-Meier  District 2	Systemic Reform: Texas (TEKKS), Kentucky

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<sup>131</sup>Coordinate this with note 128 supra.

<sup>132</sup>See Vinovskis, supra note xx.