ADEQUACY, ACCOUNTABILITY, AND THE IMPACT OF “NO CHILD LEFT BEHIND”

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I. NCLB: Change and Continuity

The rhetoric that greeted the enactment of the No Child Left Behind Act of 2001 was commensurate with the sweep of the new law’s ambition – embodied in its very name – and its proposed impact on the American educational system. No Child Left Behind (NCLB) was the most systematic revision of the federal education statutes since the original passage of the Elementary and Secondary Education Act (ESEA) in 1965. As such it struck many observers as likely to fundamentally rework American education policy, and politics. Secretary of Education Rod Paige called it “revolutionary … a powerful change of culture.” In signing NCLB into law, Paige’s boss, President George W. Bush, said that “today begins a new era, a new time in public education in our country. As of this hour, America’s schools will be on a new path of reform, and a new path of results.”

Since that day in January 2002, the “new path” has prompted both praise and abuse. The latter has probably been more salient of late. State governments have been particularly vocal critics of NCLB, their hostility extending in some cases past rhetoric to legislation and lawsuit aimed at the tasks the law mandates and the level of funding it provides to accomplish those tasks. As the National Conference of State Legislatures (NCSL) concluded in a major report issued in February 2005, states want much more federal money, and much more freedom to spend it. For NCSL, in fact, “states should be allowed to develop any system they choose as long as it meets the spirit of NCLB.”

The politics of NCLB, then, have been rather raucous, threatening to drown out several important continuities across the boundaries of the “new era” the president
proclaimed. First, despite NCLB, educating students remains the basic responsibility of states and localities, not the federal government. Even with increased federal appropriations, national spending is just eight percent or so of the overall education funding pie. Second, the heart of the law – content-based standards and accountability for achieving student proficiency against those standards, as measured by regular testing – was being implemented at the state level (albeit unevenly) long before NCLB came into effect. In short, as NCSL stressed, “constitutionally and historically, states are responsible for public education” and that “states initiated and led the standards-based reform movement.”

Those two facts are important for a third. Indeed, they combine to highlight a third continuity – one less salient, but perhaps equally important to education reform. Since 1980, forty-five of the fifty states have been sued by advocates of increased and/or redistributed education funding at the state level. The lawsuits have argued that state appropriation levels and formulae for education failed to meet state constitutions’ commitment to their children of a “thorough and efficient” education (or some variant thereof) – that is, states were not providing an equitable or adequate education, in violation of their duty to do so. Over time, these became known as “adequacy” suits, and they continue apace: twenty-five such suits were pending, at wildly different stages of completion, as of August 2005.

This paper will discuss the impact of NCLB on this steady, but so far relatively stealthy, brand of education reform in the United States. How has accountability politics, at the national level, intersected adequacy politics at the state level? One easy answer might be, not at all: the adequacy movement long predates NCLB, and only a handful of
these suits to date have been filed since NCLB’s enactment. They are grounded in state, not federal, constitutional language.

Despite this, though, NCLB has made a difference — though the evidence is necessarily preliminary and in some areas a question of degree rather than of kind. It builds on an extant trend: that adequacy advocates’ legal success rate has skyrocketed since 1989 or so, when President George H.W. Bush’s National Education Summit heralded state and federal commitment to standards-driven accountability. By providing judges with what have been called “judicially manageable standards” for gauging the adequacy of state education systems (and thus of state education funding), student proficiency measurements have added greatly to judicial willingness both to pass judgement on legislative behaviour and impose sanctions to remedy it. NCLB adds fuel to this fire. Indeed, NCLB, by providing more, and more consistent, data on student performance – disaggregated by racial and income subgroups -- gives adequacy advocates new ammunition. By requiring every student to reach proficiency on challenging content standards by 2014, by requiring a “highly qualified” teacher in every classroom and a variety of interventions when students fail to make progress, NCLB effectively declares that every child can learn, if only given the resources to do so. Small wonder that a draft report from a major adequacy advocacy group, the Campaign for Educational Equity (CEE), is entitled “Opportunity Knocks.” Or that the NCSL’s response, in the words of the director of its education committee, has been, “We’re very afraid.”

This development is a key aspect of NCLB’s impact on education politics. However, it is important to note that adequacy advocates’ dealings with the states are
only one leg of a triangle of relationships that also includes the politics of state-federal relations in the education arena generally and the advocates’ new interest in, and concerns about, federal policymaking. Adequacy politics, in short, go beyond traditional adequacy lawsuits. NCLB may not serve as legal tender in the same way in each set of relationships, but it both drives and constrains behavior, and contributes to political pressures, that may accomplish some of the same ends.

After a brief review of NCLB’s provisions and history, the remainder of this essay examines in turn each leg of the state-federal-advocacy triangle noted above. It develops speculative thoughts about how those relationships may develop and morph in the near future, especially with an eye towards NCLB’s first reauthorization in 2007. The rhetoric embedded in the very title “No Child Left Behind” implies a base equality of educational outcome: as the President put it, “we owe the children of America a good education.” But who is “we”? What does “good” education require? And who will pay to make sure they get it? Those sorts of distributive questions are at the very heart of what politics are all about. And those questions remain on the table – in courthouse, in state house, and in the White House -- as that reauthorization debate draws near.

II. Leaving No Child Behind: From the State Houses to the White House

The tale of the standards movement in American education needs no detailed reiteration here. However, in order to assess the impact of NCLB’s brand of accountability on adequacy politics it is worth reviewing what the law does, and where it came from.
NCLB did not spring full-blown from the mind of Congress or president in 2001. Indeed, it served in some ways as the cumulative manifestation of nearly two decades of prior effort. The most visible starting point is the 1983 *A Nation at Risk* report produced by the Reagan administration’s National Commission on Excellence in Education. The commission, concluding there was little such excellence to be had, at least in the United States, blasted American schools for drowning in a “rising tide of mediocrity that threatens our future as a Nation and a people.” A rigorous required curriculum and higher benchmarks for high school graduation were among its recommendations. Bipartisan reform efforts began to take hold in many states as substantive standards and assessments were developed; in 1989 the National Council of Teachers of Mathematics published detailed national math standards. That same year President George H.W. Bush and the fifty governors agreed to establish broad performance goals for American schools and students – committing themselves to the aims, as Bush put it in his 1990 State of the Union address “mak[ing] sure our schools’ diplomas mean something.” American students were to be “skilled, literate workers and citizens,” competent in a range of challenging subjects and, by 2000, “first in the world in science and mathematics.”

These goals were exhortatory, but they implied tangible standards – else, how to know whether competency, or challenge, had been achieved? While a 1991 effort to tie voluntary national testing to “world class” standards was unsuccessful, in 1994 came the Goals 2000 law (P.L. 103-227), which was to provide grants to states developing content standards. This was followed later that year by the Improving America’s Schools Act (IASA, P.L. 103-382), that year’s reauthorization of ESEA. IASA tied federal aid to economically disadvantaged schoolchildren through ESEA’s Title I to the creation of
demanding content and performance standards for students receiving such aid by the 1997-98 school year. States would then be required to make “adequate yearly progress” (AYP) towards student proficiency on those standards. A series of tests (one in grades 3-5, another in grades 6-9, and a third in grades 10-12) would measure, it was hoped, “continuous and substantial yearly improvement” in academic achievement. Corrective action was to be imposed upon schools failing to attain AYP.

Most of the details of all this were left up to the states. And state implementation of this effort varied widely. Some had developed challenging standards and high stakes assessments even before IASA was passed, sometimes in response to adequacy legal processes and/or judgments. In Texas, for example, the state supreme court declared the state’s school funding structure unconstitutional, leading to the 1993 creation of new finance and accountability systems. The latter included the Texas Assessment of Academic Skills (TAAS) tests as a measure of school performance and improvement. Massachusetts, likewise, created the Massachusetts Comprehensive Assessment System (MCAS) as a legislative task force assigned to formulate a comprehensive education reform package worked in tandem with ongoing court proceedings. Still, by 1997 the American Federation of Teachers reported that only seventeen states had “clear and specific standards” in English, math, social studies, or science; standards, tests, and teaching time were rarely well-aligned. The Clinton administration chose not to withhold Title I aid to states that failed to meet IASA deadlines, seeking instead to support the states with technical assistance that would aid the development of standards and assessments.8
Adequacy lawsuits continued steadily on, sometimes driving the debate and sometimes, as we shall see, benefiting from it. Neither were legislators satisfied with state progress on standards and assessments as Congress sought once again to reauthorize ESEA in the late 1990s. As a result they sought to fortify the underpinnings of AYP, requiring annual numerical goals and measuring performance not just as a whole but by disaggregated subgroups, and to beef up the corrective actions required of states and districts. Others proposed clearing out the underbrush of categorical grant programs that scattered Title I funding, or encouraging charter schools or public school choice to put competitive pressures on stagnant districts.

Many of these provisions would find their way into NCLB in 2001. The congressional forces favoring a more stringent accountability regime received a boost when new President George W. Bush made Title I a legislative priority, bringing to bear a campaign blueprint that borrowed heavily from ideas championed by “new Democrats” and “compassionate conservative” Republicans alike, as well as from state-level experiences (especially in Florida and, of course, Texas) with standards-based reform. Bush decried the “soft bigotry of low expectations” that hindered the academic achievement of poor and minority students and urged – borrowing the Children’s Defense Fund slogan – that no child be left behind. After passing both chambers of Congress by large margins, NCLB survived a grueling conference committee process and became law in January 2002 (P.L. 107-110).9

In the end, the new law required (among many other things):

- that all students be taught by “highly qualified” teachers;
that all states devise “challenging,” “coherent and rigorous” academic standards;

that all students be judged at least proficient on those standards within twelve years (that is, by school year 2013-14);

that this judgment be based on assessing all students annually in reading and math between grades three and eight, and again in high school, the results to be publicized via school “report cards” and vetted, though only informally, by mandatory participation on the National Assessment of Educational Progress (NAEP) in grades four and eight;

that a specified level of adequate yearly progress be achieved, not just overall but disaggregated by race, economic status, English proficiency, and disability; and

that schools failing to make such progress be subject to a variety of corrective actions that escalate each year, ranging from technical assistance and the provision of publicly-funded supplemental services to intra-district school choice to the replacement of staff or curriculum to school restructuring.

Thus, while NCLB built on the progress many states had made toward defining and enforcing standards, it had a substantial independent impact. States were given flexibility to determine their standards and requirements for proficiency, subject to Department of Education review, but nonetheless faced a good deal of work to revise their accountability systems. If nothing else, NCLB added additional tests, and made sure that the results of those assessments were clear, comparable, detailed, and public. It
increased the mandated proportion of students who must be proficient on those tests to 100%, where many states had aimed at 70 or 80 percent -- and shortened the schedule for achieving that end. In Massachusetts, for example, state timetables had called for all students to reach proficiency by 2020; NCLB requires it by 2014. Penalties for failing to such benchmarks were more stringent than before, and methods for assisting (and sanctioning) schools more specific. In short, NCLB raised both the stakes for schools aiming to narrow gaps in student achievement, and the profile of the federal government in education policy generally.\(^{10}\)

### III. NCLB and Adequacy Politics

The new mandates that showered down upon the states from Washington with NCLB landed in an ongoing stream of policy and politics. Adequacy lawsuits had for some years been a major force shaping that stream. What impact, then, might NCLB have on the extant politics surrounding adequacy? Has it re-directed the flow, or been borne along with it?

As suggested earlier, it is valuable to disentangle the discussion by considering three sets of relationships, as laid out schematically in Figure 1: those between adequacy advocates and state education policymakers, those between state and federal officials, and those between the advocates and the federal government. This section will examine those three sets of interactions in turn.
A. ADEQUACY ADVOCATES AND STATE GOVERNMENTS: “A SIGNIFICANT COMPLEMENT”

The theme of “adequacy” in education has evolved from the landmark *Brown v. Board of Education* decision in 1954 to the ongoing state suits grounded in standards-based accountability. For present purposes its first exposition took the form of “equity” demands in the 1960s and 1970s, which aimed to curb the huge variances in school spending that arose from the historical reliance on the property tax to support public education. Students in districts with a smaller tax base tended to receive fewer resources (and worse schools); equity advocates argued that educational opportunity should not depend on where a student happened to live. As a practical matter (and legal strategy),
this equated equal opportunity with equal spending. And in the *Serrano v. Priest* cases, the California Supreme Court did indeed find that funding disparities violated the state constitution’s equal protection clause, even after the U.S. Supreme Court held in the *San Antonio School District v. Rodriguez* case (1973) that such divergence was permissible under the Fourteenth Amendment.

In California, however, the equity that ensued was of the lowest common denominator variety: per pupil spending statewide went from 5th in the nation in the mid-1960s to 42nd by the mid-1990s. This was a political problem (the tax increases *Serrano* implied were blocked by the adoption of anti-tax referenda) but not necessarily a legal one: as Michael Heise notes, “under an equity theory, a school system could be judged legally satisfactory even if students are receiving a poor education as long as all students in the state are receiving the same poor education.” Nor, many argued, was equity – in this narrow fiscal sense – itself truly fair. Some students and districts, given their pre-existing and ongoing needs (fiscal, physical, civic, family), would require additional resources to actually receive an adequate education. Thus the grounding of lawsuits began to shift gears, exploring what became known as “adequacy” on its own terms. Put simply, as Paul Minorini and Stephen Sugarman have observed, “If ‘‘equity’ cases are about getting worse treatment than someone else… ‘adequacy’ cases … seem instead to be centrally about getting worse treatment than one is entitled to as determined by reference to some absolute standard and not in comparison with others.”

But what should that absolute standard be? Fiscal equity, whatever its substantive faults, had the virtues of mathematical clarity: funding was equal, or it was not. Judges (not to mention governors, legislators, newspaper editorial boards, crusading authors, and
the public) could look at the numbers and see what was what. But once adequacy was mandated, its connection to funding seemed less linear. One could make adjustments to a funding formula that gave needy students more weight (some studies argued for weighting them at 200 or 250% of a “normal” student) or encompassed the non-educational costs burdening some districts. But this was complicated, as extant efforts at weighting make abundantly clear; nor was it always politically palatable, since the (usually urban) districts that would receive much of the weighted aid already, on the face of it, had relatively high per pupil spending (and often average overall wealth above the state mean.)

This was doubly true when proposed remedies meant the effective pooling of property tax revenues in order to directly redistribute them from rich districts to poor ones. One systematic legal analysis concluded that “one disadvantage is that cases that focus on adequacy lack the judicially manageable standard of fiscal equity, and judges in these cases find themselves in murky waters when they try to define what constitutes an ‘adequate’ education.” Judges were tempted not to wade into those waters at all, or to demand adequacy and let the state legislature define it, a strategy that ran the risk of legislative determination that the status quo was just fine.

So by 1988, the initial flurry of court success had faded (just 7 of 22 suits had succeeded, only two in the 1980s). But the standards movement traced in Section II breathed new life into equity/adequacy cases. If “at its heart, adequacy refers to a shift in the emphasis of school finance from inputs to outcomes, e.g. from dollars to student achievement,” then the standards movement began to define student achievement in a crucially specific way. Michael Rebell, an attorney active in the adequacy movement, holds that
The extensive education reform initiatives most states adopted to meet this challenge [after *A Nation at Risk*] provided the courts workable criteria for developing the ‘judicially manageable standards’ that were necessary to craft practical remedies in these litigations … Standards based reform substantially enhanced the fledgling educational adequacy notions alluded to in… early fiscal equity cases. ‘Adequate education’ was no longer a vague notion that could be assumed almost in passing to describe almost any state education system.\(^{17}\)

Instead, it was being defined on paper in terms of actual things that people had to know – along with ways of testing whether they knew them. (Mostly, they didn’t. But, unsurprisingly, the populations of most concern to adequacy advocates knew even less.) It was a short logical step from requiring proficiency against state standards to assuming that proficiency was what an adequate education entailed. Once educational output could be measured, inequitable outputs provided a rationale for finding state education funding systems unconstitutional. And judges could say they were simply following political actors’ own determinations: in Kansas, for example, the court said it would “not substitute its judgment of what is ‘suitable’, but will utilize as a base the standards enunciated by the legislature and the state department of education.” Thus, as Rebell wrote later with Jessica Wolff, “standards-based reforms are integral to the adequacy movement and vice versa.”\(^{18}\)

Proficiency is an output, of course, but it has distinct implications for inputs (as that “vice versa” implies). When states accept -- through legislating, and/or by judicial fiat -- that they are accountable for student performance, to be measured by standardized assessments against specified content standards, they may be assumed to accept the fiscal responsibility for making that performance possible. The 2002 final report to the Maryland Commission on Education, Finance, Equity, and Excellence (the Thornton Commission) notes the circular nature of the input/output relationship in finding that
“schools are being adequately funded when the amount of funding provided is sufficient to allow students, schools, and school systems to meet prescribed state performance standards.” Or, as a Montana district court judge wrote in 2005: “For the standards-based approach to have any chance of success, the state must assure that districts have sufficient resources available so that they can reasonably be expected to meet the state’s standards concerning student performance.”19 The small industry devoted to “costing out” an adequate education is still very much in business.

Thus adequacy, having sprung from equity, merged with accountability. Taking 1989 as a break point – both because the national education summit is often taken as a symbolic watershed highlighting a broad, fifty-state commitment to standards, and because of the Kentucky case Rose v. Council for Better Education decided that year – advocates point out that plaintiffs have won twenty of twenty-six cases since then. In short, as Heise recently observed, “this output-driven movement has made it easier for activists to appeal to the courts for more inputs.”20

NCLB: What Value Added? On the face of it, one might reasonably conclude that NCLB matters little to the evolution of adequacy recounted above. After all, the legal basis for state adequacy suits is states’ alleged failure to live up to the education promised all their citizens in their own state constitutions. The constitutional clauses parsed by advocates and judges remains in place, as does the lack of such language in the U.S. Constitution. NCLB is thus neither necessary nor sufficient to fuel new state-level suits. The plaintiffs in the Georgia case brought in 2004, for example, barely mention
NCLB in their basic recital of the state’s supposed dereliction of duty; Article VIII, Section 1, of the Georgia Constitution is front and center.\textsuperscript{21}

But even something not strictly necessary, and of itself insufficient, can make a contribution to a cause or cement the terms of a debate. Indeed, adequacy advocates have applauded the passage of NCLB. New York State’s Campaign for Fiscal Equity (CFE), for example, which has become a central player in organizing the adequacy movement nationally, calls it a “significant complement” to that movement. (Michael Rebell, formerly of CFE and now executive director of the CEE, calls it “enormously helpful to us from a litigation point of view.”) David Sciarra, executive director of the New Jersey group that represented parents in \textit{Abbott v. Burke}, argues that NCLB “is reinforcing the trend that the states are ultimately responsible for making sure there’s a rigorous education system in place. The courts are saying: ‘now that you’ve assumed the responsibility for the substance of education, you’ve got to make sure there are resources to support that.’”\textsuperscript{22}

From the other side, states, too, see NCLB as significant. NCSL hired a Washington law firm in 2003 to examine the law’s impact, which warned that “NCLB is likely to accelerate those kinds of [adequacy] lawsuits.” The NCSL Task Force on No Child Left Behind likewise noted two years later its “concern that NCLB could embolden the advocates who see school finance court challenges as the answer to the social disparities that underscore much of the achievement gap.”\textsuperscript{23}

At least three aspects of NCLB make it an important – emboldening -- addition to the adequacy arsenal: its principles, its data, and its deadlines.
Principles of Governance. First, quite simply, is the moral clout NCLB implies for those seeking to enforce the promise of its name. As Rebell and Wolff note, “the fundamental principle that all American children are entitled to the opportunity for a high quality education is now the law of the land.”

Indeed, the terms of the debate over NCLB were congruent with – at times, identical to – the arguments made on behalf of educational adequacy. Consider the “statement of purpose” laid out in Section 1001 of the law: “The purpose of [Title I] is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.” This could be achieved, Congress went on to declare, by aligning “high-quality academic assessments [and] accountability systems” with “challenging State academic standards” to make it easy to “measure progress against common expectations for student academic achievement.” Special attention was to be paid to “meeting the educational needs of low-achieving children in our Nation’s highest poverty schools” and “closing the achievement gap between high- and low-performing children, especially … between minority and nonminority students, and between disadvantaged students and their more advantaged peers,” as well as “providing children an enriched and accelerated educational program.” President Bush consistently pressed these themes as well. Districts with average high performance, the president argued over and over again, concealed pockets of neglect. “An equal society begins with equally excellent schools,” Bush told the National Urban League in August 2001. CFE or CEE could not have put it better – and would not have put it much differently.
Judicially Manageable Standards. It is true that grand statements of principle only go so far in court (though, as the next section discusses, they have clear extra-judicial utility.) However, NCLB also provides adequacy advocates with more tangible benefits. Most of all, the law is a boon to the “judicially manageable standards” so crucial to the adequacy argument. While many states had begun to implement accountability systems prior to 2002, progress was often glacial within states and very uneven across them.

But NCLB is, above all, about measurement: about setting clear state standards, making them the primary means of evaluating adequate yearly progress (and thus, by implication, adequacy), testing that progress frequently, and publishing the results. It assumes that progress on these terms is possible, and that educators doing a good job should welcome the scrutiny: as recently as April 2005, the president commented in a press conference that “I’ve heard some states say, well, we don’t like [measurement]. Well, you know, my attitude about not liking it is this: If you teach a child to read and write, it shouldn’t bother you whether you measure. That’s all we’re asking.” In parallel fashion, during Congressional debate over NCLB, much attention was given to the nature of measurement, including a surprisingly long colloquy of “weighing the pig” as a means of assessing its health.

NCLB advocates, led by President Bush, have consistently equated measurement with testing. Thus, instead of six tests (across two subjects) between grades three and twelve, then, by 2005-06 there are at least fourteen (across three). Those test results must provide data broken down by income, race, and special needs. And by elevating (some would say, reifying) those tests as the principal element of adequate yearly progress, NCLB enshrines their results as the juridically appropriate unit of analysis. The robust
academic debate over the validity of standardized tests as assessments of performance is not reflected in the calm print of the law: they are defined in statute as indicative of a school’s value. The states have objected “that it is inappropriate to impose high stakes on schools and districts based primarily, if not entirely, on the annual test results of students.” That is an argument lost, thus far at least. However, other aspects of AYP may not give states much comfort either. Consider high school graduation rates. At present, as a legal defense, the states must generally say that their own standards are “aspirational” -- not definitive measures of student abilities or education inputs. They must argue, as North Carolina did in the Hoke case, that an education failing to enable children to meet the state’s own standards was nonetheless “adequate.” Likewise New York argued that the equivalent of an eighth grade education would be sufficient for constitutional adequacy. Yet adequacy attorneys were able to point out that this was strikingly at odds with “the fact that Congress recently enacted legislation providing for assessments based, in part, on high school graduation rates.”

The results of those measures of AYP must, of course, be made very public. Even now, early in the NCLB timetable, a survey by the journal Education Week in late 2003 found the law had “produced one unambiguous result: an avalanche of data on the performance of public schools in the United States.” It suggested this was NCLB’s “most visible change so far.” The data themselves do not guarantee change; but they can be organized to lead to change. Among other things, they help advocates locate possible plaintiffs – since organizers can see where the worst performance is, school by school, group by group. “With the supplemental disaggregated data on certain student populations,” NCSL analyst Steven Smith noted, “plaintiffs will be able to narrowly
focus and highlight specific damage accrued by certain populations and bring claims on their behalf.”

And they will be able to use the data subsequently as courtroom ammunition mustered to bolster substantive claims. In South Carolina, for example, the plaintiffs’ lead attorney looked to NCLB’s requirement for “highly-qualified” teachers (a requirement, it must be said, thus far rather toothlessly regulated) and noted that in court, “we are showing that our school districts have the least experienced teachers.” As a result, as one local superintendent put it, “our students aren’t being given the opportunity to attain an adequate education.”

Recent filings in Nebraska’s Douglas County School District vs. Johanns case highlight the broader point: the districts bringing suit, note the plaintiffs, “are required to comply with state academic standards, assessment measures, and reporting requirements” and “are held accountable for whether students are meeting the expected level of proficiency on state standards.” Further, “the state of Nebraska requires significant increases over time in the number of students meeting proficiency levels as a measure of ‘adequate yearly progress’ until it requires by 2013-14, that all students are at least ‘proficient.’” Further, “state law requires that all students … be assessed individually. The data is then required to be reported by demographic groups.” And “the state of Nebraska requires schools to have a graduation rate of 83.97% in the aggregate, and in each separate category of students, in order to be considered to have made [AYP]…” All this, of course, is required by NCLB -- but when translated as state requirements they have direct relevance to the state’s constitutional duties toward education. “Thousands of students” in the plaintiff districts, the brief continues, “are not proficient … are not graduating from high school; and are not meeting [AYP] standards as defined by
Nebraska’s Department of Education and the No Child Left Behind Act.” The answer? “Improving student achievement requires increased funding.” Other ongoing cases (as in Georgia) follow similar reasoning, and reach like conclusions.33

**Hard Deadlines.** Finally, as the Nebraska brief notes, under NCLB all students must be proficient against state standards no later than 2014. These intertwined aspects of the NCLB mandate – its titular commitment to literally every child, and its hard deadline -- clearly aid the adequacy cause. They are not accidental. In his April 2005 press conference, President Bush recalled that in formulating NCLB “we said, ‘let’s change the attitude. We ought to start with the presumption every child can learn, not just some’; and therefore, if you believe every child can learn, then you ought to expect every classroom to teach.” The deadline was shifted around during legislative debate (the Senate proposed ten years) but was consistent with key legislators’ desire to limit the regulatory discretion of the Department of Education as AYP was implemented.34

The notion that every child, facing no matter what impediments, must receive an education sufficient to make her proficient (and thus resources sufficient to do so) is, again, congruent with the adequacy movement’s roots in the Brown case, with education as a civil right. In New York, adequacy attorneys argued that NCLB language meant states were responsible not only for overall performance but also “specifically for the achievement of ‘economically disadvantaged students,’ ‘students from major racial and ethnic groups,’ ‘students with disabilities’ and ‘students with limited English proficiency’”; any extra services these subgroups required became “an inherent part” of any curriculum “intended to impart minimal competency.”35
Clearly, this line of argument raises the stakes for the states. NCSL criticizes the “possible confusion” that arises from state cases that “us[e] adequacy and proficiency indistinguishably,” and warns that adequacy should not be equated to 100% proficiency, given that judicial analysis had previously rested on lower figures. For example, Ohio had planned to achieve a level of 75% proficiency under its pre-NCLB standards; now it must raise that aim dramatically.\(^{36}\) The last five or ten percent of students will be the most difficult, and most expensive, to make proficient; many argue that 100% is simply utopian, and must be amended.

At present, though, the universality of the law, backed by a date certain, is at the least a powerful ideal. At worst (for the states), it is a powerful legal instrument aimed at them a decade hence. As such its consequences are in the here and now, creating urgency and potentially pressuring states to settle adequacy suits. Rebell and Wolff conclude that even if one hundred percent is unrealistic, the adequacy movement at present has little incentive to settle on a lower standard.\(^{37}\)

**Summary.** All parties to the adequacy lawsuits agree that NCLB matters. The law intersects with, and accelerates, adequacy advocates’ ongoing strategy of alliance with the accountability movement. We may see more suits still, as NCLB continues to produce more data, and more schools are deemed failing, revisiting even states where adequacy judgments have already been pursued.

Some interesting intra-state political side effects may ensue. One, already implied, is the “Baptist-bootlegger” coalition that has evolved to promote standards-based reform.\(^{38}\) Such reform, especially as it pushed high-stakes testing combined with
state spending flexibility and various forms of school choice, has often (though not always accurately) been associated with the right of the political spectrum. This dynamic was not created by NCLB, but NCLB reinforces it. During the 1990s, at least, most on the left eschewed standards and testing in favor of pushing the “opportunity to learn” to be achieved by the trinity of lower class sizes, school renovation and construction, and teacher training. But as standards-based reform and adequacy became more closely intertwined, even those who dislike testing were constrained from criticizing it too vocally – lest readily measurable (read: judicially manageable) standards be lost and resources with them. Will they remain thus constrained? Likewise, though advocacy attorneys have no interest in defining proficiency down below 100%, other allies of the movement (e.g., school districts and teachers) do have such incentive, given that they are judged by their students’ AYP. As in other aspects of the intertwining of standards-based reform with state-by-state court battles, NCLB does not change the theme of the adequacy movement’s coalition politics. But it does add harmonic depth to its arrangement.

B. STATE GOVERNMENTS AND THE FEDERAL GOVERNMENT: SCOPES OF CONFLICT

The NCSL’s 2003 analysis of NCLB argued that “as a result of No Child Left Behind, the states will likely face court challenges to their school finance systems just as the federal government could face federal court challenges to the fiscal implication of the law.” The “just as” is misleading: these are not parallel legal arguments. But one lesson of state accountability systems is that any such system becomes a tool for leverage over resources; there is no reason not to expect that to be true at the federal level as well.
An Unfunded Mandate? Complaints by states about federal funding and flexibility are certainly nothing new, nor are they limited to education policy. The governor who cried “unfunded mandate” is a bipartisan phenomenon, as Lance Fusarelli amply documents in a recent collation of state-level reactions to NCLB.41

But the sheer size of the NCLB-related numbers is striking. Congressman George Miller (D-CA), ranking member on the House Education and the Workforce Committee, argues that “students were shortchanged” by $40 billion in the six fiscal years (2002-2006) since the law’s passage. The National Education Association claims that educators needed some $42 billion in fiscal 2004 alone, implying a gap closer to $25 billion per year. The states, given their practice in the “costing out” exercise inherent in adequacy suits, came up with the biggest number of all, suggesting modal spending increases of 30 to 40 percent: indeed, NCSL concluded, “new costs to give all students adequate standards-based opportunities to achieve proficiency could add up to $139 billion per year.”42 (This figure, if added in fiscal 2004, would have given the Department of Education budget over a third of that year’s entire domestic discretionary spending.)

In contemplating (and threatening) legal action, states have looked eagerly to Section 9527(a) of NCLB, which says: “Nothing in this act shall be construed to authorize an officer or employee of the federal government to … mandate a state or any subdivision thereof to spend any funds or incur any costs not paid for under this act.” The National Education Association (NEA), filing suit along with a scattering of school districts in three states, claimed that state and local funds had been diverted to meet NCLB mandates and that even the authorized level of Title I funding (much less what
was actually appropriated) fell well short of NCLB’s demands. Costs included in the suit included the revision of curriculum standards, test development and administration, calculation of AYP and enforcement of sanctions thereafter, as well as providing qualified personnel, for the purposes of raising student achievement to full proficiency. But when a state itself (Connecticut) sued the federal government in August 2005 the claim was narrower, claiming mainly that the additional funding granted the state was insufficient to carry out the law’s new testing regime, including administrative support. That shortfall was estimated at some $6.4 million per year through fiscal 2008.

The states, after all, had committed to raising their achievement levels before NCLB came along, through state law and as guided by IASA. As regards adequacy, to claim NCLB is an unfunded mandate is to say that NCLB requires proficiency, but that state constitutions don’t; state courts, at least, have already dismissed the latter half of that.

Nor should the Tenth Amendment offer much hope. While Congress cannot regulate local education directly, except as it plausibly affects interstate commerce, the federal government’s spending power encompasses the power to place strings on the funds it sends the states. The Supreme Court’s most thorough recent discussion of this point, in the highway funds/drinking age case of South Dakota v. Dole in 1987, suggested that the ability of Congress to spend on behalf of the general welfare is sufficiently permissive as to resist judicial enforcement. Even the Unfunded Mandates Reform Act (UMRA), passed with great fanfare by the 104th Congress, excludes from its treatment the cost of complying with legislative conditions for receipt of federal aid.
But even if the states can’t make same legal claim as adequacy advocates, they can nonetheless make analogous political arguments that themselves could have real bite. As NCSL admits, “by federal statutory definition, NCLB is technically not a mandate…. [But] at the very least… the section is a clear statement of Congress’s intent not to shift costs to the states. The language, therefore, should give state officials leverage in their efforts to ensure that NCLB is not an unfunded or underfunded federal mandate.” The very size of the NCSL funding claim seems designed to gain attention for those efforts. Likewise governors and state lawmakers have begun to seed the press with comments painting NCLB as a “well-intentioned” but inflexible (even “dangerously arbitrary”) “federal grab” pushed on states “without the resources” to make it work. These arguments seem designed to gain regulatory breathing room for NCLB implementation as much as they are grounded in a passion for states’ rights. It is no coincidence that the 2005 Connecticut lawsuit complains about the “rigid, arbitrary and capricious” manner in which the Department of Education has interpreted NCLB in denying Connecticut waivers of the law’s requirements – including the annual testing provision.

“Watch the Crowd”? A useful injunction comes from political scientist E.E. Schattschneider, who argued that political winners and losers could often be determined by the skillful manipulation of the scope of conflict. “If a fight starts,” he advised, “watch the crowd.” Expanding that conflict to the national level has long been a part of education politics. As early as 1965 and the original ESEA, states-rights advocates argued, as Rep. John William (D-DE) put it, “The needy are being used as a wedge to
open the floodgates … [Y]ou may be absolutely certain that the flood of Federal control is ready to sweep the land.” NCLB certainly doesn’t stem that tide.51

Yet the very scope of the federal commitment, which aids adequacy advocates vis-à-vis the states, may also aid the states vis-à-vis the federal government. In Schattscheider’s theory, “every change in scope changes the equation” and what may seem the stronger force may lose control.52 In practical terms, the Bush administration has strong incentives to keep its signature domestic policy achievement on track – and certainly to forestall its ideological allies from turning on the administration. “The White House does not want the state that had the largest margin for Bush backing out of a program,” observed Utah Congressman Chris Cannon.53 The publicity of pulling a state’s entire allotment of Title I funding (as opposed to the smaller penalties imposed thus far) would almost certainly provoke a backlash. After all, as described above, NCLB makes clear a commanding commitment to education that transcends localism. “Education is a local responsibility,” President Bush noted in 2001, “yet improving our public schools is a national goal.” He asked his audience to “join me in building a system of education worthy of all America’s children, so that every child has a chance in life, and not one single child, in the greatest land on the face of this Earth, is left behind.”54 NCLB does not change the Constitution, of course, nor can statute author the compelling interest the Rodriguez Court failed to find. But some legislators have sought to make just those changes.55 And even short of that, such soaring rhetoric goes some way towards a promise, towards making compelling the states’ case for enhanced federal funding or increased local flexibility in the court of public opinion.
In that venue the jury is still out; “the crowd” is still open to persuasion. Even as of June 2005, only forty percent of respondents claimed to know “a fair amount” or more about the requirements of NCLB; the rest said they knew “very little” or “nothing at all.” Those who were most informed tended toward extreme views, either favorable or unfavorable. Familiarity, then, showed at least the potential for breeding contempt. The notion of testing and its role in AYP (an area, as noted above, with real legal teeth for the states) is particularly contentious. At the same time polls consistently show that the public would favor spending more on education — a Pew survey found, for example, that nearly three-quarters of Americans claim they would increase federal spending on education. And in the open-ended question that led off the most recent Phi Delta Kappa/Gallup Poll of the Public’s Attitudes toward the Public Schools, respondents deemed lack of financial support the top problem facing schools in their community by a fairly wide margin.56

Astute states might be able to combine these trends into a compelling case for federal funds and/or flexibility in return for loud support of NCLB, or at least complaints pitched at lower volumes. With 36 governorships on the ballot in 2006, political pressure is likely to ramp up accordingly. It should be noted, however, that the moral leverage NCLB gives states to extract additional funding from the federal government may be offset by the simple fact that the federal government has little money to give. The federal budget deficit hit record nominal levels in fiscal 2005, spurred by the war in Iraq, Hurricane Katrina, increased health care costs, and successive waves of tax cuts between 1997 and 2004. And it is at least possible that states concerned about setting a federal price tag on proficiency may actually help adequacy advocates make their case locally.
If so, an alternate and more ominous path would see the states continue to quietly lower their standards or avoid testing special needs students (either with or without federal collusion) so that widespread proficiency can more readily be achieved. After all, missing AYP is punished; but undercutting its substance is not. This in turn, obviously, undercuts adequacy suits, but also the promise of accountability. Yet to prevent it requires more assumption of authority by the federal government, a difficult political position given the current congressional majority’s preferences about states’ rights. It may be no accident that some states have added AYP to extant standards measures, rather than replacing them. When this practice results in two contradictory state “grades” assigned to a single school, state policymakers can argue that school is not really underperforming, except by the unfair measures imposed by the federal government.

Of course, some states may welcome the federal pressure NCLB provides even as they quarrel over its specific requirements. Sometimes this may reflect the local political context; the Pennsylvania Department of Education, for example, went so far as to call “the timing of NCLB… fortuitous, because it speaks to the urgent need to act on the Governor’s education plans,” in the face of a recalcitrant legislative majority. More generally, though, we might also expect to see the centralizing changes in the federal-state relationship paralleled by intra-state shifts. After all, despite the long history of local control over education, state governments have real incentive to tighten their authority over schools failing to meet NCLB performance markers. If states are legally responsible not just for the existence of schools but their performance, they cannot simply set standards and let districts have their head; when North Carolina argued, for example, that it was providing sufficient funds to achieve the adequacy goals set by the court, the
court held that the state was also responsible for ensuring that districts spent that money in effective, efficient ways, to the point of sending state personnel to the districts to help them implement such policies.\textsuperscript{60} Even before NCLB, state takeovers of “failing” districts and shift to appointed school boards under mayoral control had become a familiar part of the landscape. NCLB may push additional accountability to governors; at the least, we may see more consistent, tightly aligned state systems. In states with decentralized systems of education (Pennsylvania has over 500 school districts with independent fiscal and curricular authority) this could be a promising development for reform generally; and governors more plausibly able to pledge statewide compliance to agreements with the Department might well have more leverage when bargaining over their terms.\textsuperscript{61}

\textbf{C. ADEQUACY ADVOCATES AND THE FEDS}

An interesting development across the adequacy movement – which relies, after all, on a state-by-state, locally-grounded legal approach – is the degree to which it has become a national movement. The states may be “laboratories of democracy,” but they are also laboratories of litigation: the sheer number of adequacy cases facilitates the transfer of expertise and the sequential development of legal arguments. The Advocacy Center for Children’s Educational Success with Standards (ACCESS), for example, a coalition of school finance lawyers and policy advocates, holds conferences and maintains an extensive website devoted to disseminating information about state suits. The newly-formed Campaign for Educational Equity, which will house the ACCESS project, is in turn housed at Teachers College of Columbia University with a board chaired by Laurie Tisch and ambitious fundraising goals.\textsuperscript{62} The infrastructure is there,
then, for a national lobbying presence; and NCLB provides an important rationale for building that presence.

Such advocates don’t, fundamentally, trust the states to do the right thing. That philosophy is likewise implied by NCLB’s existence, creating immediate common ground. Indeed, the adequacy movement loves NCLB’s strict standards, and wants them to be even stricter in some areas. On the other hand, there are aspects of the law some advocates feel undercut adequacy’s success – that undercut the movement’s traditional grounding in equity. Thus, as NCLB’s 2007 reauthorization approaches, ACCESS and others have begun developing strategies for shaping its development.

One priority for adequacy advocates will be the maintenance of high standards and fending off of the potential “race to the bottom” noted above. A series of state court decisions have coalesced around what an adequate education might mean substantively as it relates to the state interest in education in the first place: the creation of productive citizens, able to serve as competent jurors, voters, and deliberators and compete in the modern economy. Rebell and Wolff argue that the standards and resources underwriting these skills should be written into NCLB. Likewise, they worry that state end-runs around the “highly qualified” teacher requirement, a standard that at best varies wildly, will water down the benefit of providing teachers so labeled. In both cases, advocates hope for additional centralization of federal authority – though also for additional funds that can build long-term capacity in needy districts.⁶³

On the other hand, many advocates are dubious about NCLB’s focus on testing and the sanctions it prescribes as accountability mechanisms, especially as regards privately provided supplemental services and school choice. Testing, they feel, does not
necessarily assess the civic ability described above. Many civil rights activists, noting the trend towards re-segregation in the growing suburbs, are uneasy generally about standardized tests. Others complain that NCLB conceives of schools as a place of business unconnected to their community context – it demands production targets, and when they are not met, looks within the school for change rather than to the wider, societal concerns that affect one’s ability to learn: poverty, racism, access to health care, and the like.\textsuperscript{64}

Here equity and adequacy may yet splinter. As Peter Schrag has observed, “The joining of conservative educational practice to liberal objectives is almost entirely new and still widely misunderstood” – not least, perhaps, by adequacy advocates themselves.\textsuperscript{65} The battle for resources clearly remains at the heart of the movement; indeed, ameliorating the broad problems noted above is a more expansive, expensive undertaking than even most adequacy suits contemplate, envisioning as it does a sort of policy heaven on earth. But NCLB’s pragmatic obsession with measurement and assessments help provide the objective measures so helpful to courtroom success; its push for disaggregated data provides both the evidence and the motivation for closing the achievement gap across race and class. Can advocates of each vision cooperate in the short run, and in the long? And who is the adequacy movement’s natural partner in a partisan, polarized polity? Adequacy advocates aiming to make state standards more uniformly rigorous must team with federal actors, mainly conservative; those aiming to pry more federal funding towards at-risk schools to promote traditional equity concerns must seek out state allies, mainly liberal. Whether President Bush favors “adequacy” when it comes to finance, he certainly favors it when it comes to measurement. It’s far
from clear that a President Kerry would have been an improvement. Whether the movement can manage to transcend its differences will have a lot to say for its future political success, and for the success of NCLB.

**IV. Summing Up**

It comes as little surprise that the consensus forged around NCLB back in 2001 has begun to unravel. The surprise was rather that such a consensus was achieved at the time – but doing so required, besides hard work, an appeal to ambiguity during the legislative process that could not be sustained once implementation of the law began. Everyone likes “accountability”; everyone likes the “spirit” of the law. But the various actors quickly part ways when describing how they see that spirit in corporeal form. The psychological distance between state and federal actors may be as wide as the huge fiscal discrepancy that also divides them.

It is to be hoped that bridging these gaps will rely on explication rather than exorcism. There are, after all, areas where the sides share common ground: better tracking of state results, for example, might allow for AYP shifts with wide support, such as a move to measure the “value added” to individual students’ education by schools or teachers. Over time, too, NCLB might allow the funding question to be settled by compelling data rather than competing testimony.

Yet the observation that closed the preceding section can, in fact, stand as the broader conclusion of this essay. Court decisions may shape the direction of policy outcomes, but if they are not to serve, ultimately, as a “hollow hope,” politics and political actors must follow suit. NCLB has not rewritten the basis for adequacy
lawsuits. But it has created new dynamics within which adequacy politics, more broadly conceived, must navigate. Accountability-driven reform generally has created new coalitions and incited new relationships; NCLB in turn has pulled state-level battles into the national spotlight, as well as provided new directions for those battles.

How things develop now may well hinge on whether the adequacy movement can be as adroit in the public sphere as in its recent legal maneuverings. As suggested above, it is time to “watch the crowd”: the public reaction to NCLB will have a lot to do with the shape of the 2007 reauthorization. Will the public be persuaded that the law is useful and effective? Who will win the battle framing the issues involved? State politicians, federal policymakers, and interest groups of all stripes will all be engaged in the arena; and this time around, adequacy advocates may have a crucial voice. Adequacy suits have normally involved a colloquy between courts, legislators, and educators; but in the recent (and ongoing) New York case, at least, there were serious efforts as well at grassroots organizing and public participation as the shape of the CFE lawsuit was formulated. How deeply those efforts took hold, and how well they can be replicated in other places, will shape the volume and effectiveness of adequacy politics in education politics generally.

There is a lot at stake in that determination for the adequacy movement as a whole. It will, most broadly, shape the tangible gains realized from the 2007 reauthorization for adequacy strategies nationally. But it will also show how unified the movement is around the definition of its historic goal of equity, and how committed to using the tactics of standards and assessments toward that goal. And, most fundamentally, it will show whether it is a movement centered on judicial decisions that could likely not be attained through representative politics – or whether its claims to
represent the democratic ideal through the substantive connections between an
“adequate” education and civic and economic empowerment can gain real leverage in the
democratic process.

Justice Powell observed presciently in *Rodriguez* that “just as there is nothing
simple about the constitutional issues involved in these cases, there is nothing simple or
certain about predicting the consequences of massive change in the financing and control
of public education.”

Three decades later we have some idea of the consequences
wrought to date. But there is much more to come.

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1 Lynn Olson, “In ESEA Wake, School Data Flowing Forth,” *Education Week* 23 (December 10, 2003), 1;
“President Signs Landmark No Child Left Behind Education Bill,” Office of the White House Press
Secretary, January 8, 2002.
cited below as “NCSL.” For a general treatment of state complaints, see Amanda Ripley and Sonja
3 NCSL, 4.
4 David J. Hoff, “Federal Law Bolsters Case for Aid Suits,” *Education Week* (October 1, 2003); Molly A.
Hunter, *Litigations Challenging Constitutionality of K-12 Funding in the 50 States* (Campaign for Fiscal
Equity, 2005), available at [www.schoolfunding.info](http://www.schoolfunding.info) [accessed September 10, 2005]. For a description of
various states’ constitutional language, see Allen Hubsch, “Education and Self Government,” *Journal of
Law and Education* 18 (1989), 134-40.
5 Michael Rebell and Jessica Wolff, *Opportunity Knocks: Applying Lessons from the Education Adequacy
Movement to Reform NCLB* (draft manuscript, Campaign for Educational Equity (CEE), Columbia
University, forthcoming November 2005). I am grateful to Michael Rebell for permission to quote from
this document prior to its formal release. Rebell is executive director of CEE; Wolff is CEE’s director of
policy development. David L. Shreve of NCSL quoted in Hoff, “Federal Law Bolsters Case.” See also
Rebell, “Educational Adequacy, Democracy, and the Courts,” in Timothy Ready, Christopher Edley, Jr.,
and Catherine E. Snow, eds., *Achieving High Educational Standards For All* (Washington: National
Research Council, 2001), 228-231.
6 For more detailed discussion see Diane Ravitch, *National Standards in American Education* (Brookings,
1995); Andrew Rudalevige, “Forging a Congressional Compromise,” in Paul E. Peterson and Martin West,
eds., *No Child Left Behind?* (Brookings, 2003).
7 Ravitch, 52-8; George H.W. Bush, Address to a Joint Session of Congress on the State of the Union,
8 In Texas, see *Edgewood Independent School District v. Kirby* (1989); in Massachusetts, see *McDuffy v. Secretary* (1993). Massachusetts’s Education Reform Act was subsequently passed just three days after the
McDuffy decision was handed down.
9 For a detailed discussion of the legislative process that led to NCLB, see Rudalevige, “Forging.”
10 Massachusetts Supreme Judicial Court, *Hancock v. Driscoll* (02-2978), February 2005; NCSL, 47; Susan


14 See, e.g., Kevin Carey, State Poverty-Based Education Funding (Washington, DC: Center on Budget and Policy Priorities, November 2002); Minorini and Sugarman, “Educational Adequacy and the Courts.”


18 Unified School District No. 229 v. Kansas (1994); and see the 1993 Idaho decision in Idaho Schools for Equal Educational Opportunity v. Evans, where the court noted that “Balancing our constitutional duty to define the meaning of the thoroughness requirement …with the political difficulties of the task has been made simpler for this Court because the executive branch of government has already promulgated educational standards pursuant to the legislature’s directive.” Rebell and Wolff, Opportunity Knocks, 30; David J. Hoff, “States on Ropes in Finance Lawsuits,” Education Week 24 (December 8, 2004), 1. As Hoff notes, standards are not the only reason adequacy attorneys give for their recent success – another is the spate of education research detailing specific intervention techniques for at-risk students and schools, ranging from class-size reductions in the early grades to enhanced teacher certification.

19 Maryland Commission on Education, Finance, Equity, and Excellence, Final Report (Annapolis, MD: Department of Legislative Services, January 2002), x; Columbia Falls Elementary School District No. 6 v. State [BDV-2002-528];

20 Michael Heise, “Educational Jujitsu,” Education Next (Fall 2002), 31; and see Dayton and Dupre, “School Funding Litigation.”

21 Complaint, CASFG v. Georgia, especially ¶¶8-21, 126-39; NCLB does not appear until ¶106 on page 45. Rebell and Wolff, Opportunity Knocks, 16; phone interview with Michael Rebell, September 9, 2005; Sciarra quoted in David J. Hoff, “States on Ropes.”

22 Pamela Prah, “No Child Law Could Spawn State Lawsuits,” Stateline.org (July 9, 2003); NCSL, 47.

23 Rebell and Wolff, Opportunity Knocks, 42.


25 As late as 2003, only half the states had testing systems fully approved under 1994’s IASA, not NCLB.

26 “Press Conference of the President,” Office of the White House Press Secretary (April 28, 2005); Rudalevige, “Forging.”

27 See NCLB, §1111(b)(2), (C) and (D). Graduation rates, as noted below, are also included; but non-testing measures a state may propose can be used only if they increase the number of schools that fail to make AYP. Nebraska, however, received a waiver and may use student portfolios as an alternative measure. See NCSL, 17-18.

28 Schrag, Final Test, 159-66, 189, 196-204; Plaintiffs’/Appellants’ Opening Brief, Court of Appeals, Campaign for Fiscal Equity (CFE), et al. v. State of New York (January 31, 2003), 41, 49. Plaintiffs also noted that the requirement for “highly qualified” teachers reinforced and even transcended a lower court’s order that New York provide “sufficient numbers of qualified teachers… and other personnel.”

29 Lynn Olson, “In ESEA Wake, School Data Flowing Forth,” Education Week 23 (December 10, 2003), 1.


31 Steve Morrison and Superintendent Everette M. Dean quoted in Michael Dobbs, “Poor Schools Sue for Funding: Higher Standards Are Basis for Seeking ‘Educational Adequacy,’” Washington Post (June 7,


NCSL, 47; David J. Hoff, “Debate Grows on True Costs of School Law,” Education Week 23 (February 4, 2004), 1.

Rebell and Wolff, Opportunity Knocks, 40n58.

The phrase refers to the odd bedfellows created during Prohibition – as between Baptists who supported banning legal liquor sales for religious reasons, and bootleggers who supported the ban for rather more worldly reasons.

Rudalevige, “Forging,” 33; Schrag, Final Test, 83. Note that the NEA, in suing the Department of Education in 2005, claimed it had standing to contest NCLB because its members had suffered from the “stigma” attached to those who worked in schools not meeting AYP.

Memorandum of the National Conference of State Legislatures on Legal Questions Regarding the NCLB (July 7, 2003); and see Prah, “No Child Law Could Spawn State Lawsuits.”


Plaintiff’s complaint, especially Section III, and Memorandum in Opposition to Defendant’s Motion to Dismiss, 11, in School District in the City of Pontiac, MI v. Spellings (Case No. 2:05-CV-71535, 2005). The Department of Education immediately asked that the suit be dismissed on the basis that none of the plaintiffs had been harmed by NCLB. The case is pending in U.S. district court.


“Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

James E. Ryan, “The Tenth Amendment and Other Legal Tigers,” in Epstein, Who’s in Charge Here?, 47- 51; see also the 1992 case New York v. United States; 2 U.S.C. §658(5)(A). Note that NEA disputes this interpretation of the UMRA. But former Secretary of Education Rod Paige noted in 2002 that, if he received requests for waivers based on funding, “I hope to be very pleasant as I firmly say, ‘not in this century.’” Quoted in Pontiac complaint, p. 13.

NCSL, 10.

Governors Martz (R-MT) and Richardson (D-NM), Johanns (R-NE), and Rendell (D-PA), respectively, quoted in Fusarelli, “Gubernatorial Reactions”; and see House Resolution 118 of 2003, state of Hawaii.


Schattschneider, 4.

Quoted in Fusarelli, “Gubernatorial Reactions.” Indeed, these incentives are all the greater as the president’s political difficulties in other areas (Iraq, Hurricane Katrina, et al) mount.

“President’s Speech to the National Urban League,” Office of the White House Press Secretary, August 1, 2001.
See, for example, the “Student Bill of Rights” (H.R. 2178 in the 109th Congress) proposed by Rep. Chaka Fattah (D-PA) with Senate co-sponsor Christopher Dodd (D-CT), which seeks to create a basis for suing in federal court states who did not meet the bill’s guarantees of an “ideal or adequate” education. The language has had as many as 188 co-sponsors (in its 2003 incarnation). Rep. Jesse Jackson (D-IL) has proposed adding a constitutional amendment providing that “all citizens of the United States shall enjoy the right to a public education of equal high quality” (H. J. Res. 29, 109th Congress).

On the other hand, a 2004 poll suggested that six in ten Americans felt that the average per student spending level “seems like enough” to “provide an adequate education”; and support drops across the board for specific proposals when “an increase in taxpayer funds” is included as part of the reform. See the surveys collected at [http://www.publicagenda.org/issues/images/education](http://www.publicagenda.org/issues/images/education) [accessed September 20, 2005]; Lowell C. Rose and Alec M. Gallup, “The 37th Annual Phi Delta Kappa/Gallup Poll of the Public’s Attitudes Toward the Public Schools,” Phi Delta Kappan 87 (September 2005): 41-57.


For example, even in NCLB the use of national (e.g., NAEP) testing as a consequential national check on state results was forbidden – even though doing so would allow for additional local flexibility by creating a way to consistently vet results without Department of Education micromanagement.

Pennsylvania Department of Education, Pennsylvania’s No Child Left Behind Position Paper (April 8, 2004), 4; see also Fusarelli, “Gubernatorial Reactions.”

Of course, governors might also have incentives to flee such accountability – who wants to be the ‘education governor’ as the list of “failing” schools expands? See Fusarelli, “Gubernatorial Reactions.”


Rebell and Wolff, Opportunity Knocks, Part II, 43-68.

See, for example, the summary of Jan Resseger’s comments at the 2005 ACCESS Education Adequacy Conference, available at [http://www.schoolfunding.info/news/policy/7-11-05conferenceroundup.php3](http://www.schoolfunding.info/news/policy/7-11-05conferenceroundup.php3) [accessed August 26, 2005].

See the essays in Janice Petrovich and Amy Stuart Wells, eds., Bringing Equity Back: Research for a New Era in American Educational Policy (New York: Teachers College Press, 2005); Schrag, Final Test, 241.


As Frederick Hess has commented, “whether proponents can find a way to persuade the public that NCLB is necessary, effective, and sensibly defined will likely determine [its] fate.” Quoted in Rose and Gallup, “37th Annual Poll,” 47.