

REPLY

THE FRAGILE PROMISE OF PROVISIONALITY

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It is a pleasure to address such well-informed, insightful and well-intentioned responses to our Article. Intellectual predispositions and differing assessments of the prospects of reform aside, it is striking that so many participants have firsthand experience of the new model school, the new politics in all their mystery, and even non-court-centric judicial review.¹ It is clear that something is afoot, and not just in academic circles, when observers as different as Diane Ravitch, the critic of Deweyan latitudinarianism, and Gordon Whitman, the community organizer, are both surprised to discover that standardized testing can go hand in hand with individualized education in improving schools for the most vulnerable students.² In the main, therefore, we are engaged in an intramural discussion about how to characterize and assess the developmental possibilities of a new species of public institution whose mere appearance confounds traditional taxonomies.

Because reactions to this novelty nonetheless strongly reflect the educational, political or policy, and legal expertise of the respondents, we divide our own necessarily selective commentary accordingly. We begin, however, with a compressed restatement of our core argument, emphasizing what we take to be its most attractive institutional feature: the ability to make progress on apparently intractable problems even in the absence of anything like a fully specified concept of the eventual solution or a rich consensus on the ultimate goals of education.

I.

REPRISE OF OUR ARGUMENT

We argue first that the new architecture of educational reform has emerged from the fusion of a top-down national movement for standards and bottom-up

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1. See *infra* notes 2, 18, 43, 52, 79 and accompanying text (discussing examples of the new reforms observed by Murnane, Elmore, Ravitch, Hochschild, Adams, Whitman, and Hershkoff & Kingsbury).

2. Diane Ravitch, *Comments on Liebman and Sabel: A Public Laboratory Dewey Barely Imagined*, 28 N.Y.U. REV. L. & SOC. CHANGE 353, 356 (2003) (discussed *infra* notes 37–42 and accompanying text); Gordon Whitman, *Making Accountability Work*, 28 N.Y.U. REV. L. & SOC. CHANGE 361 (2003) (discussed *infra* notes 53–57 and accompanying text).

initiatives, some of the latter associated with Deweyan progressivism.³ A key feature of the reform architecture is its use of error-detection to compensate for design deficiencies. No one initially knows how to build a school system that enables poor and minority students to read and do mathematics at levels attained by rich white students. But following experimentation, error-detection and correction at the lowest levels to find out what works, higher level structures can be adjusted to generalize what is learned and encourage more refined error detection, and so on.⁴ With regard to reading, for example, all students learn by some idiosyncratic combination of decoding strings of letters/phonemes (phonics) and derivation of the meaning of words and sentences from context (“whole language” method).⁵ Teachers in the new system identify the strengths and weaknesses of each student’s mixture of strategies by sampling their skills in brief, daily sessions, and suggest improvements. The performance of students in the same grade then is measured periodically statewide by a standardized test, allowing for the comparison of the performance of teachers within classrooms, schools, and districts.⁶ The job of principals is to create conditions in the school for generalizing the successes of the most effective teachers, and the job of the principals’ superior—the district superintendent—is to create conditions for diffusing the successes of the most effective principals.⁷

In this way the reformed school system is invented through the piecemeal but eventually comprehensive improvement of a crude but serviceably provisional starting structure that supposes only the broadest, non-vapid agreement on goals and methods. The goal is that educational achievement by mainstream measures should not vary across groups in culturally salient hierarchies, and gaps should be closed by leveling up, not down. The method is that teachers must aid students to improve their individual bundles of learning strategies, and administrators must aid teachers and other administrators in doing this.⁸

We claim further that a precondition of these educational changes is the politically consequential diffusion of a new calculus of consent. People disserved by the current system are sufficiently aggrieved by the resulting costs that it is worth their while to coalesce to disentrench established interests, provided that there is a minimally acceptable prospect of success and accountability.⁹ The diffusion of this new calculus of consent goes hand in hand with the creation of what we tentatively call “the new publics”: new forms of community-based organization that pressure individual schools and districts, and civic and

3. James S. Liebman & Charles Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 214 (2003).

4. *Id.* at 219.

5. *Id.* at 218.

6. *Id.* at 221.

7. *Id.* at 219.

8. *Id.*

9. *Id.* at 267.

professional associations and business groups that pressure the courts, the legislature, and the political class generally.¹⁰

We argue, third, that the federal No Child Left Behind Act¹¹ (NCLB) is the legislative reflection of all of these changes taken together. Despite important limitations, the Act obliges states to create the kinds of governance and reporting mechanisms that at least in some instances are likely to set in motion the bottom-up reconstruction of schools directed towards the goal of closing the achievement gap.¹² Above all, we take the NCLB, like the institutional reforms that it triggers, to be provisional and corrigible in the light of the initial isolated successes that it encourages.¹³

Finally, we argue that courts can, but need not, play an important role in coordinating the articulation of systemic reform at both the state and national levels.¹⁴ To do this, however, courts—emulating in their own way the innovations of the Texas Supreme Court in the *Edgewood* suite of decisions¹⁵—will have to reform their own role in superintending the reorganization of complex institutions in the name of constitutional values.¹⁶ Instead of themselves revising the new rules of a reformed school or delegating this task to a group of experts and parties convened for the purpose of such rulemaking, the courts will have to oversee the process by which schools, the interests most affected by schooling, and civil society in general collaborate in the process of devising and periodically correcting performance standards and metrics for measuring progress under them.¹⁷

With these ideas recalled to mind, we turn to the reactions of those most knowledgeable about the internal mechanisms, results and political background of school reform: the education experts.

II.

THE ARCHITECTURE OF EDUCATIONAL REFORM

Only a fool dismisses a friend's concern for her well-being. And given Professor Murnane's evident and welcome sympathy for our general position, his two worries are especially weighty.¹⁸ One, reflecting Murnane's work over the last two years with the Boston public schools, is that, successful as current

10. *Id.* at 267–71.

11. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

12. Liebman & Sabel, *supra* note 3, at 283.

13. *Id.* at 299.

14. *Id.* at 278.

15. *See, e.g.,* Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 495 (Tex. 1992); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 493–94 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

16. Liebman & Sabel, *supra* note 3, at 280.

17. *Id.* at 280–83.

18. Richard J. Murnane, *Standards-Based Educational Reforms: Progress, but Enough to Sustain Momentum?*, 28 N.Y.U. REV. L. & SOC. CHANGE 339 (2003).

reforms are compared to earlier reform waves, they are not so overwhelmingly successful as to be self-validating. In particular, the slow gains they produce may not immunize the reforms against the intentional or unintentional effects of belt-tightening in hard times.¹⁹ The second concern, reflecting Murnane's experience as an economist, is that bad incentives disincentivize reform efforts, and that it is all too easy in constructing standards-based governance systems to misspecify incentives or to create spurious data for evaluating performance relative to them.²⁰

Murnane's concern about the slow pace at which the achievement gap is being closed and the consequent inability to secure politically self-reinforcing success is a deep concern and one we fully share. Melissa Clark's finding, reported in her contribution to this Symposium, that Kentucky's governance reforms (but not, interestingly, its recent fiscal redistribution) have closed one-third of the achievement gap between black and white students without changing the situation of students in poor districts relative to those in rich ones gives an idea of what has, and has not, been accomplished.²¹ But such results are not of course a show-stopping argument or proof of the inevitable failure of reform. We insist on what might seem a pettifogging distinction between deep concern and a show-stopping demonstration of futility because we can do something about the worries that beset us but not about an ineluctable fate.

Professor Murnane naturally knows this, as his exceptional and deeply admirable engagement with the Boston schools demonstrates. His concern for this problem and his reaction to it seem to us exemplary. And indeed crafty readers who scope out exchanges of the present sort by reading from back to front would be well-advised to read his essay first, for it captures better than anything we wrote the precarious race between renewal and disaster characteristic of the current moment in school reform. Bearing in mind this precariousness, or if you will, this upper bound to optimism, we think it is nonetheless possible to respond to many of the more specific concerns about the reform program raised by Murnane himself and the other commentators.

Murnane's worry about incentives is easier to address. A precise account of the problem of mistaken incentives, which Professor Murnane himself supplies,²² is often a first and crucial step towards correcting the mistakes. For example, if year-by-year sampling of student performance in some class of schools is demonstrably unreliable, there is a strong argument for relying on moving averages of performance or other devices for more reliable assessment.²³ Similarly, if incentives discourage teachers by unreasonably penalizing them for

19. *Id.* at 342.

20. *Id.* at 339–41.

21. Melissa Clark, *Response to A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 311 (2003).

22. Murnane, *supra* note 18, at 340–41.

23. A variety of experts and other interested actors are currently addressing exactly these kinds of measurement issues. See Liebman & Sabel, *supra* note 3, at 211–14 & nn.119, 124.

failing to produce an absolute level of student performance, rather than (as in Texas) rewarding them for achieving some appropriately contextualized rate of improvement, there is good reason to switch from the former method to the latter.²⁴

We understand that even apparently sophisticated arguments about incentive structures can be connected to simple, even simple-minded and ideologically tinged, beliefs about, for example, the need to punish teachers or students who “irresponsibly” fail to meet “reasonable” social demands. But given side-by-side examples of incentive systems that work by inducing actors to achieve the desired results and ones that fail to do this, we think there are good chances that officials and citizens will often choose the effective system, rather than the one that corresponds to their unreflective expectations about how an incentive system “should” work. Recall that Texas—which we are treating here as in some sense the nation in microcosm—started out with an extremely crude “No Pass, No Play” system of incentives, which penalized individual students for institutional failures. Yet, Texas eventually developed a sophisticated system for the improvement of whole institutions judged against their peers.²⁵ Clark notes similar capacities for major course corrections in her review of Kentucky’s experience under its educational reform act.²⁶ The current national crazy quilt of good and bad incentive systems should make it easier (although hardly inevitable, given familiar problems of public choice and unintended consequences) for school systems nationwide to learn today what Texas and Kentucky learned in the last two decades.

Elmore’s concerns are related. He too suggests the success of reform is balanced on a knife’s edge: The devil is in the details, he says.²⁷ This conviction goes hand in hand with the idea that successful reform must result from process of organic quasi-spontaneous adjustment that allows the uniquely workable solution to win out over its rivals.²⁸ Against the backdrop of these assumptions, Elmore naturally sees the NCLB as a ham-handed effort to force a transformation that must develop by its own rhythms and devices. By thus overtaxing the current fragile capacities for reform, the Act will destroy invaluable seeds that would have borne fruits if left without this kind of attention.²⁹

We think Elmore’s own detailed and compelling account of New York City’s District 2 belies both assumptions he makes here about the character of the reform process.³⁰ On the basis of our reading of his account of District 2,

24. See Liebman & Sabel, *supra* note 3, at 241 (discussing Texas’s incentive structure).

25. *Id.* at 239–43.

26. Clark, *supra* note 21, at 312 (discussing revisions made to Kentucky’s testing scheme in response to complaints that it did not effectively measure improvement and could be gamed).

27. Richard Elmore, *Details, Details, Details*, 28 N.Y.U. REV. L. & SOC. CHANGE 315, 318 (2003).

28. *Id.* at 316–17.

29. *Id.* at 317.

30. See Liebman & Sabel, *supra* note 3, at 224–26, 291–92 (discussing the work of Professor

therefore, we come to different conclusions about the potential of the NCLB. Recall that in Elmore's account of District 2, organic experimentation did not lead to anything approaching continuous systemic reform, any more than it had in the precursor schools founded by Deborah Meier in a neighboring New York City school district. It took the imposition by superintendent Anthony Alvarado of an accountability regime focusing on closing achievement gaps for at-risk populations to transform District 2 from a district that produced master teachers to a district that actually succeeded at teaching at-risk pupils.³¹

Furthermore, the governance and accountability regime created by Alvarado was not fixed once and for all. On the contrary, it both enabled local experimentation and continued to be reshaped by it over the years.³² Seen this way the successes of District 2 were neither knife-edged nor organic. And, as we describe in our main Article, they were not knife-edged—dependent upon discovering a uniquely correct solution from the start—in part because of the particular ways in which they systematically, not organically, allowed for recovery from mistakes.³³

Still from this perspective, Alvarado mandated the equivalent of the NCLB in District 2. Assuming *arguendo* the validity of this comparison, it is hard to be quite so vehemently opposed to the Act as Elmore is here. In fact, he seems to be reacting to the NCLB less as the leading expositor of the architecture of the new school reform and more in the manner of Alvarado's chronic doubters: veteran master teachers who saw the need for systemic reform in principle but doubted that it could be accomplished in practice by others less sensitive to the mysteries of learning than themselves.³⁴

Professor Elmore may turn out to be right in practice about the effects of the NCLB. We can't agree to Murnane's upper bound on optimism without accepting as much.³⁵ But we would be more willing to accept Elmore's assessment if it were grounded in a fuller evaluation of the range of innovative contexts beyond District 2 that seem capable of generating reform,³⁶ and an account of the NCLB itself that was more consistent with his own writings on the reform process up until now.

Professor Ravitch's remarks provide an additional reminder that favored assumptions are a poor guide to evaluating situations that are open and designed to be opened further.³⁷ Her assumptions are the opposite of Elmore's. She thinks that any reform with a progressive ancestor is doomed to failure. So, New York City's District 2 is doomed once because of its connection to Deborah Meier and

Elmore and his colleagues).

31. *Id.* at 217–26.

32. *Id.* at 227.

33. *Id.* at 220–21.

34. *Id.* at 221.

35. See *supra* note 22 and accompanying text.

36. See Liebman & Sabel, *supra* note 3, at 231–66.

37. Ravitch, *supra* note 2.

doomed again because of Meier's connection to John Dewey.³⁸ Professor Ravitch seems unable to see what Elmore documented: that District 2 deserves to be at least as known for data-driven reforms of the kind she herself stumbled upon and came to admire based on a chance encounter in a Boston suburb as for any Deweyan progressivism.³⁹

Ravitch's account of how teachers in that suburb, still superficially irritated by standardized tests, had come to see them as a valuable device for focusing attention "like a laser" on the weakest groups is especially interesting here because it is an example of just the possibility that Elmore and many other critics besides seem to dismiss: a positive unanticipated (not directly planned) response to standards-based governance reforms.⁴⁰ Like Ravitch, we do not think that such changes will always "occur automatically or easily."⁴¹ But ideological lineages aside, we certainly agree with the lesson she draws from her Boston experience that "the potential for change is surely there."⁴²

III.

REFORM POLITICS

We turn now to the politics of school reform, starting with a response—Professor Hochschild's—that puts more precisely than we did the puzzles posed by the success of the reforms so far, however fragile their future may prove.⁴³ Like us, Professor Hochschild thinks that the reformers' success in dislodging entrenched interests cannot be accounted for by "conventional political wisdom."⁴⁴ So we need new, unconventional explanations that enlarge our sense of political possibilities. But she presents the theoretically baffling circumstances in a way that generously underscores this shared conclusion while diverting attention from confusions and omissions in our own presentation of the problem. To help orient the research that we all agree that these questions urgently demand, we quickly review our account of the politically perplexing aspects of the current reforms and show how her version corrects and improves it.

At bottom, our argument was simply that under the pressure of the growing education crisis, dissatisfied professionals—some high education officials, many more professionally revolted teachers—coalesced with some combination of community-based organizations and high-powered business-backed civic groups to throw the bums out.⁴⁵ Hochschild points out that there in fact was no general

38. *Id.* at 354.

39. *Id.* at 355–56.

40. *Id.* at 356.

41. *Id.*

42. *Id.*

43. Jennifer L. Hochschild, *Comments on James Liebman and Charles Sabel, A Public Laboratory Dewey Barely Imagined*, 28 N.Y.U. REV. L. & SOC. CHANGE 327 (2003).

44. *Id.* at 327.

45. See Liebman & Sabel, *supra* note 3, at 267.

perception among US citizens of an educational crisis of the sort that this argument naturally supposes. Nor was this a matter of indifference or ignorance. For example, in the last 20 years or so, changes in the results of nationwide tests have been at least as assuring as alarming.⁴⁶ Where there was incontestably a crisis—in inner-city schools—the response was stinting at best.⁴⁷

But while the public pressure for reform in this direct sense was almost surely less than we suggested, the possibilities for institutional obstruction of the reform movements were probably greater. Thus, Hochschild points out that despite affirmations of the need for reform by high-ranking officers of the teachers unions, school-level union officers and the rank and file in the classrooms have responded to innovation by charging “violations of the union contract and filing grievances that prevent reforms.”⁴⁸

Similarly, it is hard to see why politicians from either party would have joined a movement to make schools and ultimately the political system accountable for reforms in favor of at-risk students. Hochschild reminds us that, partisan affiliation aside, acceptance of accountability is not a distinguishing mark of politicians. What’s more, the Democratic Party is beholden to unions that are in de facto opposition to reform. And the Republicans have little to gain from governance reforms revealing that the groups most served by the school system just happen to be those whose parents do not typically vote Republican.⁴⁹ Finally, it is clear, as Hochschild also observes, that the sophistication of the new publics invoked in our description of the reform process is only a concomitant or effect of the successful politics of reform and certainly is not an independent root cause of it.⁵⁰

So, assuming, as both Hochschild and we do, that the reforms are for real,⁵¹ just how *did* the apparently resistible force of reform dislodge the apparently immovable object of traditional self-interest? Sharpened by Hochschild’s comments, this is a really good question. Without the substantial empirical research surely required to answer it, we can only return to a hunch that grows out of our understanding of developments in Texas and Kentucky. The hunch is reinforced by Adams’ account of why previous reform cycles failed, while the work of the Prichard Committee in the latter state and other groups has unexpected staying power. We thus suspect that the new accountability systems lower the bar for reform—reduce, if you will, the amount of force needed to overcome the inertia of traditional bureaucracy—by allowing the politicians, professionals, and public alike to commit themselves to reform without committing themselves to any particular reform once and for all and maintaining

46. Hochschild, *supra* note 43, at 327–28.

47. *Id.* at 328.

48. *Id.* at 329.

49. *Id.* at 330.

50. *Id.* at 331; see Liebman & Sabel, *supra* note 3, at 271–72.

51. Hochschild, *supra* note 43, at 330; see Liebman & Sabel, *supra* note 3, at 272.

credibly that they can learn from failure as well as success.⁵²

Gordon Whitman's thoughtful analysis of the role of community-based organizations in school reform⁵³ suggests that even those who approach the problem of new publics and new politics on the basis of extensive grassroots experience are as much at sea in these matters as the rest of us. Whitman makes two points. The first is that, as the role of the Eastern Pennsylvania Organizing Project in the continuing reform of the McClure School in Philadelphia shows, community-based organizations can sometimes turn New Accountability systems to the advantage of their constituents—and this although such neighborhood organizations traditionally avoided public education issues.⁵⁴ Second, Whitman emphatically joins us in warning that absent some independent community-based power with the capacity to assess—and if necessary redirect—the restructuring of local schools, the long-term prospects of sustained reform in the interest of at-risk students are dim.⁵⁵

But having concretized the promise of community-based participation in reform and underscored the dangers of proceeding without it, Whitman breaks off before posing the questions that immediately press themselves on those, like us, who fully accept his framing of the problem: Just how are community-based organizations supposed to make use of and enlarge the current possibilities for participation? Community-based organizations, including many of those that Whitman names, are skilled at using a mobilized membership to intimidate local power elites to give the organizations' leaders the proverbial seat at the table. Until now, however, they have not needed and thus have not mastered the capacity to train their members to participate in the day-to-day restructuring of institutions that the new reforms require. How should the recruitment and training methods of traditional community-based organizations change in response to this challenge? What about their mechanisms of assuring accountability with respect to their constituents and the wider public? What about their choice of alliance partners and their understanding of the demands of partnership? In particular, how will they cooperate with professionals, whose expertise is indispensable to evaluating progress under the new system, without becoming hostage to them?⁵⁶

52. Jacob E. Adams, Jr., *Results or Retrenchment: The Real Race in American Educational Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 305 (2003). As Adams puts it, the new reforms "enable[] policy refinements within a coherent public commitment to student performance . . . and demonstrate[] that success depends as much on how we manage the process as it does on the attributes of policy." *Id.* at 310. For convergent conclusions, see CLARENCE N. STONE ET AL., BUILDING CIVIC CAPACITY: THE POLITICS OF REFORMING URBAN SCHOOLS 161–62 (2001) (cited by Professor Hochschild, *supra* note 43, at 331).

53. Whitman, *supra* note 2.

54. *Id.* at 362.

55. *Id.* at 364.

56. The best discussion on this point from the community-based perspective remains Michael Katz's decade-old article on the background of current school reforms in Chicago. Michael B. Katz, *Chicago School Reform as History*, 94 TCHRS. C. REC. 56, 61 (1992). In this piece, which

From discussions with leaders of community-based organizations, we know that all of these questions are today regarded as legitimate and sometimes even as urgent: Given the experience of the Eastern Pennsylvania Organizing Project at the McClure School and the other developments that are noted both in Whitman's response⁵⁷ and our original Article,⁵⁸ it could hardly be otherwise. But the salience of such questions makes the absence of anything like a sustained internal debate on these matters all the more puzzling and troubling. For it raises the worrisome prospect that, somehow stuck in their ways, the traditional community-based organizations about which Whitman writes may prove to be as incapable of adjusting to changed circumstances as conventional trade unions in the United States and elsewhere have sadly shown themselves to be. But night is always darkest just before the dawn, and we truly hope that we are overlooking in Whitman's response and in the broader canvas on which he draws the first traces of a new participatory light.

IV. REFORMING LAW

Having faced the darkness, we are ready to face the lawyers' gloom. They share the other respondents' worries about the fragility of the reforms and the fickleness of the public but have none of the hope that comes from seeing justice, against all odds, being done at times in schools and classrooms. In part, perhaps, this pessimism reflects their general situation. The last years have not been kind to left liberals, and they have been especially unkind to left liberal legal academics.⁵⁹ But the pessimism mainly reflects our failure to convince them of the way in which the joint evolution of school reform and judicial vindication of the right to an adequate education may renew their transformative

Whitman rightly calls "brilliant," Whitman, *supra* note 2, at 364 n.7, Katz initially assimilates school reforms to familiar social movements for civil rights and environmental protection. But he goes on to observe that

[R]ecent social movements have called on a new body of alternative experts. Whether they are protesting the environmental impact of an expressway, the dangers of a nuclear power plant, or the impact of urban renewal on affordable housing, activists require data. They need it not only to argue for alternatives but, as well, to challenge the experts supporting the agencies and institutions they oppose. Alternative experts based in advocacy groups, new institutes, and universities now provide them with sophisticated support. At first, reliance on experts seems to contradict the demystification of professionalism and "objectivity" and the emphasis on grass-roots citizen participation and control at the core of urban social movements. The point, though, is more subtle, for recent social movements are helping to redefine the meaning and role of professionals and expert knowledge rather than to simply reproduce conventional relationships between knowledge and action. This redefinition, however, remains experimental, inchoate, still lacking clear formulations and models.

Katz, *supra*, at 61.

57. Whitman, *supra* note 2, at 361.

58. Liebman & Sabel, *supra* note 3, at 275.

59. See, e.g., Michael Dorf, *The Chastening of Critical Legal Studies* (Review of MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003)), 71 U. CHI. L. REV. (forthcoming 2004).

projects. So, here we go again.

Professor Tushnet, to begin with, makes two divergent, not to say contradictory, points. The first is that there is less to school reform than what we present to the eye.⁶⁰ The second is that we offer no strategy for infusing the broader “democratic experimentalism” that helped underwrite these allegedly inconsequential reforms into judicial and other politics.⁶¹ We think that this ambivalence—deriding democratic experimentalism as ineffectual but wishing, too, that it become politically effective, if not dominant—grows out of deeply rooted confusions in Tushnet’s broad understanding of the current moment in constitutional politics. After a word about the empirical status of the reforms, we will try to try to clarify that understanding from our point of view.

Tushnet complains that we hide repeatedly behind the word “emergent” to suggest that the reforms are about to be more developed than any observer not from Cloud Cuckoo Land would allow.⁶² He is right about the overuse of the word, but the criticism goes to a defect of style not substance. We use “emergent” to stand for something close to “more change than is theoretically cognizable given current theory but not so extensive that the new paradigm is unquestionably stable.” Notice that, even while underscoring how difficult it is to progress, none of the educational specialists raises question about the extent or profundity of the changes so far. Their worries and ours concern the effects of efforts, like the NCLB, to dramatically quicken the pace of change especially in areas that have been slow to innovate on their own. It is true that we have not given ethnographically or analytically compelling accounts of the micro-mechanisms by which, say, higher-level frameworks such as statewide curriculum or standardized tests are revised in the light of lower-level experience with their diagnostic capacities in schools, districts and classrooms. But, as we argue in our original Article, the shift from the TAAS to the TEKS tests in Texas and the recent legislation requiring schools and districts to monitor the achievement gap in Kentucky are certainly evidence that large-scale corrigible experimentalist frameworks exist.⁶³

Now to Tushnet’s ambivalence. Tushnet began his academic career as part of the Critical Legal Studies movement.⁶⁴ Like the other “Crits,” Tushnet believed that the law is a kind of screen or shade covering the window of politics.⁶⁵ Stripping aside the drapery of law, one could peer through the window

60. Mark Tushnet, *A New Constitutionalism for Liberals?*, 28 N.Y.U. REV. L. & SOC. CHANGE 357 (2003).

61. *Id.* at 358. On democratic experimentalism, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

62. Tushnet, *supra* note 60, at 358. See generally ARISTOPHANES, *BIRDS* (Jeffrey Henderson trans., Focus Classical Library 2d ed. 2003) (414 B.C.).

63. Liebman & Sabel, *supra* note 3, at 249–50, 265, 266.

64. See, e.g., Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

65. See, e.g., Mark V. Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1328

and see the conflicts and power struggles that are the real stuff of social life.⁶⁶ The familiar slogan "law is politics" called attention to what is really important.⁶⁷

In his most recent writings, Tushnet has come to grips with the fact that politics, far from being a window into or the very seat of social vitality, has itself been immobilized. Familiar changes in party structure, campaign finance, and congressional redistricting produce a gridlock: Despite increasingly vociferous ideological clashes, neither party is able to achieve major reform.⁶⁸ The Democrats cannot extend the New Deal administrative state, but neither can the Republicans systematically dismantle it.⁶⁹ Notwithstanding appearances of a rightwing putsch by the Rehnquist Court, Tushnet contends that the peculiarities of the process by which Supreme Court Justices are appointed make the Court more likely to ratify this gridlock than to tip the scales in favor of either side or to use congressional immobilism to impose its own will.⁷⁰

The big projects characteristic of the New Deal and the Great Society—dear to Tushnet's heart, as well as the hearts of many non-Crit left liberals who saw the Warren Court as the guarantor of positive social rights—are consequently off the table.⁷¹ One of the very few strategies still open to would-be reformers, therefore, is democratic experimentalism, which Tushnet has recently called "the most promising candidate for a theory of government activity in the new constitutional order."⁷² Because it is in some ways an incrementalist reform strategy, and because, as we have seen, democratic experimentalism escapes conventional ideological categorization, democratic experimentalism can work even if—perhaps even because—traditional partisan politics is gridlocked.⁷³

The problem, of course, from Tushnet's point of view, is that democratic experimentalism is very much a second-best strategy, inherently inferior to the big New Deal and Great Society projects that are no longer feasible.⁷⁴ At times, this seems like very thin gruel. And at other times it promises to be more nourishing provided it is pursued more energetically and with greater political sophistication than heretofore.⁷⁵ Tushnet's response here wavers between these

(1990) (reviewing SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* (1989)).

66. *Id.* ("One could account for perhaps ninety percent of Chief Justice Rehnquist's bottom-line results by looking, not at anything in the United States Reports, but rather at the platforms of the Republican Party.")

67. *See, e.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 14–38 (1999).

68. *Id.* at 14–38.

69. *Id.*

70. *Id.* at 28–35.

71. *Id.* at 30–35.

72. *Id.* at 172.

73. *Id.* at 171–73.

74. *Id.* at 169.

75. *Id.* at 169–72.

competing perceptions.⁷⁶

We think the story of education reform should cause Tushnet to rethink his background understanding of political immobilism and the ambivalent view of current reform possibilities that it suggests. In his story, gridlock emerges from institutional corruption and a sheer clash of evenly-matched wills.⁷⁷ But as we understand the recent history of educational reform, clashing ideological projects—more money for poor schools and pupils versus privatization of all schools—led to a broad understanding on both sides that neither solution was actually viable. Experimentalism arose not out of a desire to do something small because nothing big was in the cards but rather from the realization that it was necessary to learn from many small successes and failures in order to accomplish large broadly-defined common goals.⁷⁸ From this point of view, democratic experimentalism is not the second-best strategy, available to those who don't have the political wherewithal to do what they know correctly to be right. It is the strategy for citizens and courts to pursue when there is no clear strategy for doing what practically and constitutionally needs to be done.

If we are right about this, then it follows that the best means for propagating democratic experimentalism generally, and to the judicial elites in particular, is surely not to organize an ideological counter-offensive to the Federalist Society, as Tushnet would have us do. Instead, if democratic experimentalism really is a promising (we nearly said “emergent”) solution to the problem of substantive exhaustion and not just a second-best accommodation to political gridlock, then we ought to be identifying the actors, judicial and otherwise, who are edging towards democratic experimentalism on their own. With them, we should try to forge a common language that allows learning across domains, while addressing the constitutional and legal problems that this shift in our democracy presses on us in terms that engage non-specialist citizens. (We don't, by the way, claim we are already pursuing this strategy with the dedication it would surely require. But this, and not a counter-putsch, is the line of action consistent with our own analysis.)

Is this a fool's errand? Do there actually exist the potential allies, interlocutors, and interested citizens that it supposes? With qualifications, Professors Hershkoff and Kingsbury, two knowledgeable observers, seem to think so.⁷⁹

Hershkoff and Kingsbury make two oddly disconnected points. Their response begins by claiming that our proposals threaten certain rights of ascriptive as opposed to voluntary groups in multicultural societies.⁸⁰ Recent discussion

76. Compare Tushnet, *supra* note 60, with TUSHNET, *supra* note 59.

77. TUSHNET, *supra* note 59, at 14–38.

78. Liebman & Sabel, *supra* note 3, at 207, 214–15.

79. Helen Hershkoff & Benedict Kingsbury, *Crisis, Community, and Courts in Network Governance: A Response to Liebman and Sabel's Approach to Reform of Public Education*, 28 N.Y.U. REV. L. & SOC. CHANGE 319 (2003)

80. *Id.* at 322.

has not been kind to the concept of ascriptive groups' rights, but we leave it to the interested reader to adjudicate this dispute.⁸¹ The Hershkoff-Kingsbury response ends with the argument that the experimentalist transformation of education-reform litigation on which we focus is less novel than we think. Rather, the changes we highlight are the expression of broad innovations by traditional public interest lawyers, developing in the light of their own successes and failures the framework that Abram Chayes years ago called "public law litigation."⁸²

Presumably Hershkoff and Kingsbury would neither be praising the learning capacities of the public interest bar, nor chiding us for imposing our program on a movement that has anticipated our conclusions in its own terms, if they truly thought those conclusions endangered vulnerable right-bearers. So we take their remarks about our inattention to the reflexive capacities of the legal practitioners as an informed, if roundabout, report that, *pace* Tushnet,⁸³ non-court-centric litigation—or, more generally, democratic experimentalism⁸⁴—is not alien to the world of practice and legal politics because politically engaged public lawyers are already inventing it.⁸⁵

With respect to the "folk" discovery of experimentalism—without which, of course, it would be impossible to diffuse such innovations through alliances rather than putsches⁸⁶—Hershkoff and Kingsbury are, we suspect, more right than they know. In a related article, Sabel and Simon revisit Chayes' original distinction between the "traditional" lawsuit and "public law litigation."⁸⁷ The former typically involves two parties in a dispute over contractual obligations.⁸⁸ By contrast, the latter involves amorphous party structures, broad challenges to the operations of large public institutions (school systems, prisons, mental health facilities, police departments, and public housing authorities), and long-term remedies requiring restructuring and monitoring of these institutions.⁸⁹

Despite some initial successes, public-law litigation was, as we saw in the case of desegregation, widely criticized by commentators and the Supreme Court for overtaxing the administrative capacities and doctrinal resources of the

81. For recent experimentalist interventions in the relevant debate, see Cristie L. Ford, *In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Quebec Secession Reference*, 39 ALBERTA L. REV. 511 (2001); Kirsty Gover & Natalie Baird, *Identifying the Maori Treaty Partner*, 52 U. TORONTO L.J. 39 (2002).

82. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Hershkoff & Kingsbury, *supra* note 79, at 325.

83. Tushnet, *supra* note 60; see *supra* notes 60–63 and accompanying text.

84. See *supra* note 81 and accompanying text.

85. Hershkoff & Kingsbury, *supra* note 79, at 325.

86. See *supra* notes 70 & 78 and accompanying text.

87. Charles F. Sabel & William Simon, *Destabilization Rights: How New Public Law Litigation Succeeds*, 117 HARV. L. REV. (forthcoming 2004) (manuscript on file with authors).

88. Chayes, *supra* note 82, at 1282–83.

89. *Id.* at 1283–84.

judiciary.⁹⁰ How could courts, the general argument ran, administer complex institutional reforms when administrative agencies with the appropriate mandates routinely failed to do so? How could courts in any case oversee such reforms when in public law litigation, in contrast to contractual disputes, there is no close doctrinal link between the infringed right and the remedy?⁹¹

Looking at contemporary suits involving the same public institutions Chayes investigated, Sabel and Simon do indeed see consistent evidence of the development of the public law framework to which Hershkoff and Kingsbury allude.⁹² Mirroring our own obstinate ostentation of novelty, however, Sabel and Simon characterize these changes as a shift to experimentalist, or “new” public law, and argue that this shift suggests revisions to Chayes’ account of the public-law process as well as responses to the critics.⁹³

Two linked examples of these revisions highlight the difference between the old and new public law, and show how the latter generalizes claims raised here in regard to the re-orientation of school-reform litigation. Chayes tended to collapse the liability and remedial phases of public-law adjudication: The former, in addition to condemning the illegality of current circumstance, contains a “prediction” of the corrective regime to be elaborated in the latter.⁹⁴ In our new public law, the two phases are more distinct. The liability determination is open-ended in that the remedial implications of a judicial finding of systemic wrongdoing are indeterminate.⁹⁵ The finding of a right to an adequate education is just such an open-ended liability determination.⁹⁶

This change is connected to a second in the remedial phase. Early public law remedies were largely the work of an ad hoc group drawn by the court from parties and outside experts. The group’s chief task was to periodically monitor the reforming institution through occasional reports, primarily addressed to the judge, that comprehensively evaluated the institution’s compliance with the

90. Liebman & Sabel, *supra* note 3, at 200, 280.

91. *Id.* at 200; Sabel & Simon, *supra* note 87, at 3–4.

92. Sabel & Simon, *supra* note 87, at 7–38.

93. *Id.* at 5–7, 41–47. In his last work on international public law, Chayes himself described a trend in that field toward arrangements of the sort we call experimentalist. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995). The book argues that sovereignty in this realm has come to mean less the power to command from above and more the power to engage others in discussion of what needs to be done. The book describes numerous international regimes of collaborative standard-setting, monitoring, and continuous revision based in part on comparisons with the experiences of others. Our project can thus be seen as revising Chayes’ early efforts to understand linked changes in the judiciary and the administrative state in the light of his later intuitions of a more encompassing transformation of the character of democratic sovereignty.

94. Chayes, *supra* note 82, at 1294 (“The liability determination is not simply a pronouncement of the legal consequences of past events, but to some extent a prediction of what is likely to be in the future.”).

95. Sabel & Simon, *supra* note 87, at 51–57.

96. Liebman & Sabel, *supra* note 3, at 280.

minimal standards.⁹⁷ In the new public law, monitoring is likely to be continuous. It addresses not just the judge but the staff and clients of the reforming institution, and often the legislature and public at large. Reports focus on the status of constitutionally aggrieved groups in the light of key performance indicators, rather than presenting a wholesale evaluation of institutional compliance with legal requirements.⁹⁸

Together these changes may enable the new public law to address the information-burden and rule-of-law concerns that dogged the old. The undisguised indeterminacy of the liability phase destabilizes the parties' pre-litigation expectations, provoking political, cognitive, and psychological effects that increase their disposition to experimentalist collaboration.⁹⁹ In the subsequent remedial phase, the regime of standards and monitoring encourages the parties to learn jointly—and in ways inaccessible to traditional, bureaucratic administration—from what this disruption reveals. This learning incrementally reshapes their legal obligations, allowing rights or ends to be reinterpreted in light of effective remedies or means, and vice versa. So, the argument continues, the openness of the finding of liability provides, in the new public law, a precondition to establishing the link between rights and remedies that eluded the old.¹⁰⁰

Of course, if we have mischaracterized the sources and implications of changes in school-reform litigation here, it is likely that a generalization influenced by this work will be misdirected as well. On the other hand, assuming that we are not wholly blinded by our preconceptions, it is reassuring to find developments in policing, public housing, and the like¹⁰¹ converging with the findings in school litigation, and with assertions by Hershkoff and Kingsbury that public law is evolving in a way that resonates with both. Just how to interpret that evolution remains an open question—but it is an open question that public interest lawyers in our view should be most concerned to answer.

Like Tushnet and Hershkoff and Kingsbury, Professor Minow is torn between sympathy for our project and fear of being led down the garden path.¹⁰² In the end, anxiety conquers, and she spends the bulk of her response raising the reasonable concern that experimentalist reforms presuppose a consensus on complex goals that is nearly impossible to attain in our profoundly pluralistic society.¹⁰³

We agree for starters that the new education reforms will almost certainly fail when the concerned parties have irreducibly antagonistic ideas of what education or other such fundamental or citizen goods should be. *All* forms of

97. Sabel & Simon, *supra* note 87, at 51–57.

98. *Id.* at 5–6.

99. *Id.* at 58–65.

100. *Id.* at 38–41; *see also* Liebman & Sabel, *supra* note 3, at 282.

101. Sabel & Simon, *supra* note 87, at 14–37.

102. Martha Minow, *School Reform Outside Laboratory Conditions*, 28 N.Y.U. REV. L. & SOC. CHANGE 333, 334, 338 (2003).

103. *Id.* at 336–38.

self-government will fail under these conditions. But as we tried to show in our main Article through the case studies of reform in Texas, Kentucky and New York City's District 2 and in the passage of the NCLB, we don't think that such irreducible antagonism is in fact characteristic of the debate about education (and probably much else) in the U.S.¹⁰⁴ Rather, at least in part through the failure of the traditional contrasting reform strategies, the current situation is marked by a thin consensus admitting of and reinforced by experimentalist reforms.

The thin consensus is the one that we reprised at the outset of this rejoinder.¹⁰⁵ Whatever other goals education serves, it must reduce performance disparities in reading and mathematics between at-risk subpopulations and the dominant group. Vague and incomplete though it surely is, this consensus is also robust enough to support wide-ranging reform. But it is the beginning, not the end, of a process that will just as surely revise our understanding of the goals of education as well as the means by which we pursue them.

Take as one example from the many conflicts among goals that Minow lists the possibility of an intolerable trade-off between the regimentation of education that equality-focused comparison of outcomes seems to require and the encouragement of individual creativity that has long been a goal of progressive education.¹⁰⁶ How, in advance of actually implementing the thin consensus, will we know if there really is a such a trade-off and if so whether it is intolerable or not? Experimentalist reform is a way of addressing these conflicts, not avoiding them—and in the case of education, addressing them from a starting point that has been democratically validated. Minow's concerns with the capacities of various at-risk groups to participate in the ensuing conflicts are all well-taken.¹⁰⁷ But as Gordon Whitman's response suggests, and as we tried to show in addressing like concerns above, the new reforms create possibilities for capacity-building even if they do not ensure egalitarian outcomes.¹⁰⁸

But thin as the thin consensus supposed by experimentalism is, it would be meaningless if it included everybody. The response by Powell and Spencer tests its limits with regard to school reform.¹⁰⁹ Our disagreement with them is not about ends. We think ourselves as committed to a fully deracialized society as they are.¹¹⁰ The difference between us concerns, rather, the apparently arcane

104. Liebman & Sabel, *supra* note 3, at 216–29, 231–65, 283–300.

105. See *supra* note 9 and accompanying text.

106. See Minow, *supra* note 102, at 337.

107. See Minow, *supra* note 102, at 336.

108. See Whitman, *supra* note 2; *supra* notes 53–57 and accompanying text. On the question of the capacity of parents of at-risk children to participate in the reform of schools, it is comforting to know that the new accountability regimes have inspired impressive manuals for using the data the regimes generate to support a compelling demand for reforms. See, e.g., RUTH JOHNSON, USING DATA TO CLOSE THE ACHIEVEMENT GAP (2002).

109. John A. Powell & Marguerite L. Spencer, *Brown is not Brown and Educational Reform is not Reform if Integration is not a Goal*, 28 N.Y.U. REV. L. & SOC. CHANGE 343 (2003).

110. For deeply and currently held integrationist views that are, if anything, more strident than those offered by Powell and Spencer, see James S. Liebman, *Desegregating Politics: All-Out*

matter of the relation between means and ends. powell and Spencer insist that the global end—"integration" or the elimination of all disparities in the treatment of persons of color—must be fully reflected in the choice of all the steps to that goal.¹¹¹ The aim of this strategy is to ensure as far as possible that incrementalism or stepwise change results in social transformation, not in incremental embellishment of the status quo. But from our point of view, this strategy comes at an unacceptably high price. For it excludes the continuing mutual adjustment of means and ends that enables actors to discover what it is that they really want and how best to attain it.¹¹² To see why, consider the commitments entailed by powell and Spencer's "integration" program.

At bottom, powell and Spencer present a racial version of a radical social democratic reform strategy. Where the radical social democrats emphasized class hierarchies, powell and Spencer emphasize racial ones.¹¹³ But like these social democrats, powell and Spencer argue that the master hierarchy manifests itself in all aspects of social life: education, employment, housing, health care, and so on. For both, therefore, the response to omnipresent discrimination must be a comprehensive redistribution of opportunities or resources.¹¹⁴ Neither the radical social democrats nor powell and Spencer believe that this comprehensive redistribution can be accomplished all at once. That's why they are not revolutionaries. But both insist that partial reforms anticipate as fully as possible the final transformative outcome. That's a good part of what makes them radical.¹¹⁵ Thus, powell and Spencer argue:

True integration, however, also requires metropolitan-wide strategies that will deconcentrate poverty, integrate our neighborhoods, and equalize wealth and opportunity. . . . We must also develop employment, transportation and health care opportunities more equitably throughout a region. This will require strong metropolitan governing bodies. In the meantime, until we achieve integrated neighborhoods, we must reconsider retooled mandatory, metropolitan-wide desegregation plans—not simply the good will of parents and districts to stem the increasing resegregation of our schools. Only then can we move beyond voluntary choice toward the transformative task of truly integrating.¹¹⁶

Leaving aside the question of whether powell and Spencer have their political monitors turned towards anything resembling the contemporary U.S., we have our doubts about the rigidity of their program and the corresponding

School Desegregation Explained, 90 COLUM. L. REV. 1463 (1990).

111. powell & Spencer, *supra* note 109, at 349–50.

112. Liebman & Sabel, *supra* note 3, at 300–04. See generally JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927).

113. powell & Spencer, *supra* note 109, at 345.

114. *Id.* at 350.

115. *Id.* at 351.

116. *Id.* at 350 (footnote omitted).

rigidity of the strategy derived from it. The evidence to date, we argued in our main Article, is that redistribution of resources by itself does not produce educational improvement.¹¹⁷ powell and Spencer would presumably reply that redistribution in favor of poor schools failed because it was not accompanied by other elements of their deracializing, redistributivist program.¹¹⁸ Unwillingness to take this argument on faith, they seem to suggest, excludes us from the party of racial progress.¹¹⁹

But the story of perpetually provisional yet always corrigible school reorganization told in our main Article teaches, we think, an entirely different lesson about the possibilities of truly radical reform. That story, and experimentalism generally, suggest that there are ways of dislodging racial and other hierarchies in which the redistribution of power and other resources is an outcome, not the starting point and sole concern, of transformative ambitions. In the experimentalist alternative, disciplined efforts actually to reconstruct failing institutions enlarge the actors' sense of possibilities (including their sense of what it means to have a deracialized society) and of strategic alliances (hence their understanding of the politics of achieving such a society). The prospect is thus of reform so truly radical that we cannot fully imagine what it will produce, even if we can be reasonably confident all along the way that we are elaborating and enriching our original commitments to a just society.

powell and Spencer will say that only a fatuous optimist or an apologist for existing racial hierarchies could believe such a thing. But we think this reply dogmatically dismisses what is most promising in current experience, as inconclusive as it may be. On this point, moreover, we think that the exchange here has produced something close to a (thin) consensus: Given the failures of reform programs, including programs like the ones powell and Spencer advocate, it is precisely to the thin reed of experimentalist school reform that many of us—nomenclature, political differences, and estimates of success aside—are now clinging.

117. Liebman & Sabel, *supra* note 3, at 204–05.

118. powell & Spencer, *supra* note 109, at 350–51.

119. *Id.* at 348–49.

