The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 10 | Number 1 Article 4

12-1-2007

Revealing the Impurities of Ivory Soap: A Legal Analysis of the Validity of the Implementation of the No Child Left behind Act.

Andrea Rodriguez

REVEALING THE IMPURITIES OF IVORY SOAP: A LEGAL ANALYSIS OF THE VALIDITY OF THE IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT

ANDREA RODRIGUEZ*

I. INTRODUCTION

On August 30, 2006, Education Secretary, Margaret Spellings, described the No Child Left Behind Act (NCLBA) as nearly perfect.[1] Spellings painted a comforting picture of the law's renewal by comparing its purity to Ivory soap.[2] Her announcement echoed similar sentiments

* St. Mary's University School of Law, Candidate for J.D., May 2008; Trinity University, B.A. Economics and Sociology, *magna cum laude* May 2005. First, I would like to thank my parents, Ernest and Angie Rodriguez, for supporting me throughout my life. In particular, I would like to thank my mother and sister for providing endless love and encouragement throughout law school as well as my fiancé, Curtis Morris, for his constant support, advice, and motivation to do well. A special thank you to my aunt, Dolores White, for helping me select and edit my paper and whose political awareness and social activism continues to encourage me.

1. *Education Sec'y: No Child Act Needs No Changes*, MSNBC, Aug. 30, 2006, http://www.msnbc.msn.com/id/14589472/ ("Education Secretary Margaret Spellings said Wednesday [August 30, 2006] the No Child Left Behind Act is close to perfect and needs little change as its first major update draws near.").

2. *Id.* ("I talk about No Child Left Behind like Ivory soap: It's 99.9 percent pure or something . . . .") (quoting Education Secretary Margaret Spellings).

across the nation. In California, Hemet and San Jacinto Unified School Districts commended the law's positive role in improving their academic statuses.[3] In addition, Lyon County School District in Nevada noted the positive monetary incentives the law created in its academic environments.[4] Given the continual tide of uphill battles the education system faces, Spellings's confidence in the NCLBA's seeming improvement of public education is more than encouraging.

However, Spellings's outlook is not shared by everyone, most notably, educators and lawmakers. "Four Million Left Behind,"[5] "No Child Left Behind? Yet Some Are Left Out,"[6] and "No Child Left Behind Remains Flawed"[7] are a few of the recent public outcries by school officials who urge that the Act must be changed. In Houston, Texas, school board members described the law as a disaster and advocated for U.S. Rep. Jack Kingston to co-sponsor the No Child Improvements Act.[8] With the NCLBA up for renewal in 2007, as many as eighty organizations united

---

3. *See* Valerie Detwiler-Clark, *Schools' Test Scores on the Rise*, VALLEY CHRON., Sept. 8, 2006, http://www.thevalleychronicle.com/articles/2006/09/08/news/schools/01edapi.txt.

4. Keith Trout, *School District's Success at Meeting AYP Earns Staff Cash*, RENO GAZETTE J., Aug. 7, 2006, http://www.rgj.com/news/stories/html/2006/09/07/111792.php (explaining that AYP status will translate into pay raises due to a negotiated agreement between the District and teacher's union).

5. *See* Clint Bolick, *Four Million Left Behind*, OPINION J., Sept. 7, 2006, http://www.opinionjournal.com/cc/?id=110008906 (reporting that over 300,000 children in the Los Angeles Unified School District attend schools labeled as failing). Despite the NCLBA's reporting requirement, the District avoided notifying families about their option to transfer for schools and insisted that many families did not want to change schools. *Id.* On the contrary, a local poll revealed that only eleven percent of parents knew of the district's failing status, and eighty-two percent wished to move their children. *Id.*

6. *See* Jeff Gill, *No Child Left Behind? Yet Some Are Left Out to an Extent*, GAINESVILLE TIMES, Sept. 3, 2006, http://www.gainesvilletimes.com/news/stories/20060903/localnews/121828.shtml (showing how schools with small subgroups can bury these children's scores in total aggregates). Gill points out that some schools continue to meet AYP status even though their individual subgroups fail to meet AYP status because their subgroups "jump through other hoops" and avoid individual tracking due to their small size. *Id.*

7. *See No Child Left Behind Remains Flawed*, LAKE OSWEGO REV., Aug. 23, 2006, http://www.lakeoswegoreview.com/opinion/story.php?story_id=115637908982072600 (advising parents to remain weary of NCLBA's results since the standardized testing methods under the NCLBA remain particularly troubling because one or two students can skew the results).

8. *See* Jake Jacobs, *Houston Officials Plead for Change to the No Child Left Behind Act*, MACON.COM, Aug. 26, 2006, http://www.macon.com/mld/macon/news/local/states/georgia/counties/houston_peach/15362350.htm (describing U.S. Rep. Don Young's No Child Left Behind Improvements Act, which would modify the way in which adequate yearly progress is measured, sanctions are implemented, and scores are reported).

their efforts to promote changes to the Act.[9] Despite the Act's objective of promoting high quality education, many schools experience only negative consequences by losing federal school funding and being branded as "in need of improvement."

This growing opposition originates from a number of studies that corroborate the Act's ineffectiveness in improving student achievement. In June of 2006, The Civil Rights Project at Harvard University released *Tracking Achievement Gaps and Assessing the Impact of NCLB on the Gaps: An In-depth Look into National and State Reading and Math Outcome Trends.*[10] By comparing student assessment levels between "pre-NCLBA" years (1990-2001) and "post-NCLBA" years (2002-2005), the report criticizes the Act as unsuccessful and costly.[11] Repeatedly, schools that do not meet their state assessment standards are publicly labeled as inadequate and left with little help from the federal government for improvement.[12] The report concludes that the achievement gap between White and minority children will hardly close by the promised 2014 date, given the current trend.[13] In fact, the study ends by stating that the

9. *Education Sec'y: No Child Act Needs No Changes*, MSNBC, Aug. 30, 2006, http://www.msnbc.msn.com/id/14589472/ (listing the National Education Association, the country's largest teachers union, as one of the groups).

10. JAEKYUNG LEE, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS 10 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_naep_lee.pdf] (offering a statistical analysis concerning trends between pre-NCLBA and post-NCLBA in fourth and eighth grade students as well as providing statistical evidence of states lowering their academic standards in order to meet adequate yearly progress standards to avoid sanctions).

11. *Id.* at 10–11 (explaining how federal cutbacks to schools that are unable to meet adequate yearly progress create serious problems for minority children as well as showing how states manipulate counting students to give "false impressions of progress").

12. *See* 20 U.S.C. § 6311(g) (2006) (indicating the Secretary may withhold federal funds if a school does not meet assessment standards).

13. JAEKYUNG LEE, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS 11 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_naep_lee.pdf (highlighting how the current, post NCLBA, not only leaves the nation far behind, but also goes against the NCLBA's target goal of one hundred percent proficiency by 2014); *see generally* 20 U.S.C. § 6311(b)(2)(F) (2006) ("Each State shall establish a timeline for adequate yearly progress. The timeline shall ensure that not later than 12 years after the end of the 2001-2002 school year, all students in each [sub]group . . . will meet or exceed the State's proficient level of academic achievement . . . .").

NCLBA leaves many minority and poor students far behind.[14] These findings simply confirm educators' growing concern about the Act.

Every American child has a right to equal access to public education.[15] Deprivation of that right not only denies children an opportunity to develop intellectually and creatively,[16] but also the American public of a more successful future.[17] The right to equal access to public education is both a way by which all children are promised equal future opportunities and guaranteed an important, firm foundation. In fact, the United States Supreme Court has described this right as a "principal instrument" in succeeding in life.[18] Since *Brown v. Board of Education*,[19] the United States Supreme Court has recognized that the denial of equal access to education affects the hearts and minds of young children.[20] In essence, the building animosity toward the NCLBA serves as a public reminder to the federal government of the *Brown* ruling.

---

14. *See* JAEKYUNG LEE, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS 11 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_naep_lee.pdf (pointing out how discrepancies between National Assessment of Education Progress scores and state assessment results were particularly high for poor, Black and Hispanic children); *see also* John Fullinwider, Letter to the Editor, *Rod Paige's Remark*, N.Y. TIMES, Mar. 1, 2004 http://query.nytimes.com/gst/fullpage.html?res=9C04EED8113CF932A35750C0A9629C8B63 (voicing Dallas public schoolteachers' concerns that the NCLBA is fine "except for children who don't measure up, children in overcrowded classrooms, children speaking languages other than English, children growing up in grinding poverty and children who, for whatever reason, learn at other than the 'standard' pace.").

15. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[W]here the state has undertaken to provide [public education], [it] is a right which must be made available to all on equal terms.").

16. Serin Ngai, *Painting Over the Arts: How the No Child Left Behind Act Fails to Provide Children with a High-Quality Education*, 4 SEATTLE J. FOR SOC. JUST. 657, 657 (2006) (promoting the integration of art programs into daily school curriculums). Describing art as a means of communication and medium for sharing important experiences, Ngai argues that the deprivation of a well rounded education denies children an opportunity to learn creative and social skills inherent in art programs. *Id.*

17. *Brown*, 347 U.S. at 493 (recognizing the instrumentality of education to professional training).

18. *Id.* ("Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.").

19. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (overruling *Plessy v. Ferguson* and holding that separate-but-equal educational facilities are inherently unequal and therefore, violate the Fourteenth Amendment's Equal Protection and Due Process Clauses).

20. *Id.* at 494 ("To separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

Congress enacted the NCLBA "to ensure that all children have a fair, equal, and significant opportunity to obtain high-quality education . . . ."[21] As part of the education reform movement, which began in the 1980s, the NCLBA emerged as a product of federal legislation dealing with improvements in public education.[22] Revising the Elementary and Secondary Education Act of 1965 (ESEA), the NCLBA sets out to improve the academic achievement levels of disadvantaged schools.[23] The Act promises to end the achievement gaps between high and low-performing children, minority and non-minority children, and disadvantaged and non-disadvantaged children that plague the education sector.[24] It pledges a commitment to "ensuring high quality academic assessments" and "meeting the educational needs of low-achieving children" in high-poverty schools by holding schools and states accountable for their academic environments.[25] As such, the Act provides a system of accountability by requiring each state to individually design its own challenging academic standards in order to meet national yearly assessment levels and narrow the achievement gaps.[26]

Under the Act, states usually implement standardized testing as an accountability method to calculate the academic achievement levels of its students.[27] Because the Act requires schools to obtain assessment levels in an array of subjects such as "math, reading or language arts, and science[,]" states have developed annual tests to measure achievement.[28]

---

21. 20 U.S.C. § 6301 (2002).

22. Serin Ngai, *Painting Over the Arts: How the No Child Left Behind Act Fails to Provide Children with a High-Quality Education*, 4 SEATTLE J. FOR SOC. JUST. 657, 659–660 (2006) (providing that the NCLBA represents the result of years of political concern surrounding the nation's educational state). As early as 1983, President Ronald Reagan commented on the dismal state of secondary education and initiated a nationwide campaign for higher educational standards. *Id.*

23. Erin Kucerik, *The No Child Left Behind Act of 2001: Will it Live Up to its Promise?*, 9 GEO. J. ON POVERTY L. & POL'Y 479, 479–480 (2002) (describing the NCLBA as the beginning of fundamental reforms in American classrooms).

24. 20 U.S.C. § 6301(3) (2002).

25. *Id.* § 6301 (promising to identify and turn around low-performing schools to ensure high-quality education for all children).

26. 20 U.S.C. § 6311(b)(1)(A)–(D) (2006) (specifying that the challenging academic standards should include "challenging academic content[,]" "contain coherent and rigorous content[,]" and "encourage the teaching of advanced skills").

27. Erin Kucerik, *The No Child Left Behind Act of 2001: Will it Live Up to its Promise?*, 9 GEO. J. ON POVERTY L. & POL'Y 479, 480 (2002) (describing the Act's procedure of implementing annual testing based on state-created performance standards).

28. Ryan S. Vincent, *No Child Left Behind, Only the Arts and Humanities: Emerging Inequalities in Education Fifty Years After* Brown, 44 WASHBURN L.J. 127, 132 (2004) (summarizing the requirements of each state to implement under the NCLBA); *see* 20 U.S.C. § 6311(b)(3)(A) (2006) ("Each State plan shall demonstrate that the State educational agency . . . has implemented a set of high-quality, yearly student academic assessments that

All students are tested in selected subjects,[29] and an annual report for each school district that is organized by subgroup determines if a school meets Adequate Yearly Progress (AYP).[30] Schools unable to meet AYP are earmarked as academically deficient and receive lower federal funding.[31] Using a tough-love approach, the Act requires all schools to meet state proficiency levels by 2014.[32] Not surprisingly, the Act's approach sparked vigorous debate.

This comment examines whether the recent findings of the NCLBA, particularly those regarding the continuing achievement gaps between White and minority students, provide evidence that the Act's implementation of standardized testing is discriminatory in violation of Title VII of the 1964 Civil Rights Act. The first section of this comment provides legal background concerning the role of the federal and state governments in public education, the right to equal access to public education, and the applicability of the 1964 Civil Rights Act. This overview ends with a summary of pertinent case law that addresses the achievement gap. The second section analyzes the numerous legal issues raised by the NCLBA, including potential Equal Protection challenges and Civil Rights violations by questioning the discriminatory nature of the Act and the possible misuse of federal funds. Finally, this comment offers an overview of possible reform solutions and proposals currently under consideration.

II. LEGAL BACKGROUND

A. *Federal and State Involvement in Public Education*

The federal government's involvement in education precedes the ratification of the Constitution.[33] More than two centuries ago, the Congress

---

include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the State . . . .").

29. Ryan S. Vincent, *No Child Left Behind, Only the Arts and Humanities: Emerging Inequalities in Education Fifty Years After* Brown, 44 WASHBURN L.J. 127, 131 (2004) (pointing out that the requirement for all students to be tested is one of the major differences of the NCLBA from other federal education laws).

30. *Id.* at 132 (adding President Bush's intention to look at each group of students to find out whether all children are meeting the high standards).

31. 20 U.S.C. § 6311(g)(2) (2006) (explaining the Secretary of Education's ability to withhold funds if a state is unable to meet the federal requirements).

32. 20 U.S.C. § 6311(b)(2)(F) (2006) ("Each state shall establish a timeline for adequate yearly progress. The timeline shall ensure not later than 12 years after the end of the 2001-2002 school year, all students in each group . . . will meet or exceed the State's proficient level of academic achievement . . . .").

33. *See* Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 998 (2001) (pointing out the Congress of the Confeder-

of the Confederation instituted a practice of reserving land for educational use.[34] More than likely, the Congress of the Confederation developed the practice primarily to encourage the early American townships to promote education.[35] As a result, a history of school land grants formed early public education systems.[36] While many schools relied on private donations and tuition fees, the United States government eventually established a taxpayer-supported school system.[37]

Congress's involvement in education increased throughout the early twentieth century, but its role remained limited to financing aspects.[38] While Congress administered the distribution of land grants, it started to set aside federal funding for education.[39] From the New Deal Acts in 1933 to the G.I. Bill in 1944 and the National Defense Education Act in 1958, Congress played an increasingly aggressive role in managing school funding.[40] The passage of the NCLBA in 2001 by Congress elevated its

---

ation's involvement in education policy through the reservation of land grants in the Northwest Territory of the United States); *see also* Papasan v. Allain, 478 U.S. 265, 267–68 (1986) (reviewing the history of the federal government's involvement in education in order to determine whether school children in northern Mississippi counties were being denied "the economic benefits of public school lands granted by the United States"). In *Papasan v. Allain*, the United States Supreme Court examined the Land Ordinance of 1785, which created a land surveying practice of dividing townships into numbered sections and reserving section number sixteen for public education use. *Id.* at 269.

34. *See* Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 998 (2001) (adding that the land reservations intended to encourage settlers to settle rather than create a permanent public education system); *see also Papasan*, 478 U.S. at 268–69 (highlighting the multiple purposes of the land reservations, which included not only encouraging education, but also increasing the price of western lands and creating uniformity between the newly acquired western territories and the states).

35. *Papasan*, 478 U.S. at 269 (noting that the exact reasons for the land reservation policy remain unclear, but also indicating that the support of public education was probably a key factor).

36. *Id.* at 270 (describing the basic practice of land reservations as uniform across the states with only minor variations over time).

37. Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 998 (2001) (describing the transition from the privately-funded system to the taxpayer-supported system as smooth and relatively effortless).

38. *Id.* (explaining that in conjunction with overseeing land grants reserved for education, Congress began authorizing the use of federal funds for education).

39. *Id.* at 998–99 (recognizing "vocational educational grants during World War I" as one of the first federal set asides).

40. *Id.* (highlighting the increase in educational opportunities created by the federal government's financial involvement in public education). Moreover, since the passage of these acts, Congress passed the Elementary and Secondary Education Act (ESEA), which after recent reauthorization in 2001, is known as the No Child Left Behind Act; *see* U.S. Dep't of Educ., Executive Summary of No Child Left Behind, http://www.ed.gov/nclb/overview/intro/execsumm.pdf (last visited July 17, 2007) (providing an executive summary

role from a financial distributor to a financial decision maker, authorizing the Secretary of Education to withhold federal funding to public schools.[41]

However, state and local governments regulate the majority of education issues.[42] The Constitution does not specifically mention education as an area under the purview of the federal government.[43] In order for the federal government to act, the Constitution must either explicitly or implicitly give Congress authority.[44] On the other hand, state and local governments may exercise their "police powers" by adopting any law that is not prohibited by the Constitution.[45] Because education policy is neither explicitly nor implicitly delegated to the federal government by the Constitution, state and local governments govern a wide array of issues surrounding education.[46]

B. *The Right to a Public Education*

Education is one of the most heavily contested topics in legal issues. The vast amount of litigation that surrounds education issues simply accentuates the increasing importance of public education. In fact, the United States Supreme Court continues to make rulings not only concerning current education issues, but also affecting future laws surrounding education. Despite the Court's significant attention given to

---

of the No Child Left Behind Act and describing the Act as a vehicle for addressing the public concern that too many needy children are left behind).

41. *See* 20 U.S.C. § 6311(g) (2006).

42. Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 999 (2001) (acknowledging the early recognition of education as an area governed by the state and local governments). In fact, before the Constitution's ratification, Massachusetts and Connecticut already established a property tax system to support public education. *Id.* Moreover, in 1852, Massachusetts passed the first mandatory attendance law, revealing the early recognition that education was an area regulated by the state. *Id.*

43. *Id.* (noting both the federal government's financial involvement in education and the state and local governments' authority over education issues).

44. CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 230 (Erwin Chemerinsky ed., Aspen Publishers 2d ed. 2002) (quoting Article I of the U.S. Constitution, which designates all legislative powers in Congress).

45. CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 230 (Erwin Chemerinsky ed., Aspen Publishers 2d ed. 2002) (pointing out a key difference between the roles of the federal and state governments by explaining the states' possession of police powers). While the federal government may act only when explicitly or implicitly authorized by the Constitution, the states may act so long as the action is not expressly prohibited by the Constitution. *Id.* In fact, the Tenth Amendment provides that powers not assigned to or prohibited by the federal government are reserved for the states. *Id.*

46. Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 999 (2001) (describing the states' early commitment to overseeing education).

education, the Court refuses to describe or protect education as a constitutional guarantee.[47]

In a series of landmark decisions, the Court repeatedly refused to recognize education as a fundamental right.[48] The Court defines fundamental rights as those liberties that are so important, they merit heightened protection.[49] Designating a right as fundamental significantly affects the treatment of a law relating to that right. Fundamental rights are subject to a strict scrutiny standard,[50] the most stringent form of judicial review.[51] "Under strict scrutiny, a law will be upheld if it is necessary to achieve a compelling government purpose."[52] In other words, the law must be a necessary means to accomplish a compelling end.[53] Laws limiting or depriving people of a fundamental right rarely survive a strict scrutiny analysis.[54] On the other hand, laws that are not limiting or depriving people

47. *See id.* at 1002 (outlining the judiciary's involvement in education since *Brown* and commenting on the Court's reluctance to define education as a fundamental right).

48. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (stating that the undisputed importance of public education will not automatically cause the Court to deviate from its usual rational basis standard for reviewing social legislation); *see also* Plyler v. Doe, 457 U.S. 202, 221 (1982) (distinguishing education from a mere governmental benefit and highlighting its fundamental role in society). In *Plyler*, the Court employed a heightened standard of review by stating that the denial of education must be justified by a *substantial* state interest. *Id.* at 230.

49. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938) (maintaining that legislation dealing with rights in the first ten Amendments or directed against religious or racial groups or discrete and insular minorities shall be subjected to a higher standard of judicial review). In *Carolene Products*, the Court held that economic liberties shall be subjected to a rational basis review; however, the Court reserved its ability to implement a higher standard of review for fundamental liberties explicitly stated or implied in the Constitution. *See id.* at 152, 153 n.4. Famously known as "the *Carolene Products* Footnote," footnote four reserved the Court's right to subject different rights to different levels of scrutiny. CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 517 (Erwin Chemerinsky ed., Aspen Publishers 2d ed. 2002).

50. CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 762 (Erwin Chemerinsky ed., Aspen Publishers 2d ed. 2002) (explaining the government's limited ability to infringe upon fundamental rights).

51. *Id.* at 520 (describing strict scrutiny as "strict in theory and fatal in fact") (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)). *But see* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("Strict scrutiny is *not* 'strict in theory, but fatal in fact.'") (emphasis added) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 202 (1995) ("It is *not* true that strict scrutiny is strict in theory, but fatal in fact.") (emphasis added)).

52. CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 519 (Erwin Chemerinsky ed., Aspen Publishers 2d ed. 2002) (explaining that the governmental purpose must be vital for a law to be upheld under strict scrutiny).

53. *Id.* at 520 (describing a necessary means as a least restrictive alternative).

54. *Id.* (explaining that a case's outcome highly depends on the level of scrutiny applied).

of a fundamental right are either subjected to an intermediate scrutiny or rational basis standard.[55]

In *San Antonio Independent School District v. Rodriguez*,[56] the Court held that the right to public education was not a fundamental right; therefore, laws related to education are subjected to only a rational basis standard.[57] In *Rodriguez*, Mexican-American parents attacked the constitutionality of the Texas public school financing system under the Fourteenth Amendment's Equal Protection Clause.[58] At that time, Texas implemented the Texas Minimum Foundation School Program, which paid for one-half of the public education expenses in Texas.[59] In turn, school districts financed the remaining half of school expenses from local property taxes.[60] As a result of the disparity in local property values, parents argued that the system discriminated against minority children in low-income areas.[61]

---

55. *Id.* at 764 (referencing footnote four in *Carolene Products*).

56. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

57. 411 U.S. at 33 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart form the usual standard [of rational basis] for reviewing a State's social and economic legislation.").

58. 411 U.S. at 1 (explaining that the class action suit was brought on behalf of poor minority school children residing in school districts with low property tax bases). The children of the Mexican-American parents, who initiated the suit, attended the schools of the Edgewood Independent School District, a locally known urban school district. *Id.* at 4–5.

59. *Rodriguez*, 411 U.S. at 9–10 (outlining the twofold purposes of the Texas Minimum Foundation School Program: to equalize expenditure levels among school districts and to force each school district to supply funds for public education). Under the Program's fifty percent contribution system, the state supplied eighty percent of the funds and school districts, as a whole, provided the remaining twenty percent. *Id.* at 9. Each district's share to the Program was calculated based on its taxpaying ability in order to place heavier burdens on wealthier schools. *Id.* at 9–10. In addition to the twenty percent contribution to the Program, each school district was also responsible for providing the remaining half of total expenses for their *own* schools from local property taxes. *Id.* at 10–11.

60. *Id.* at 10–11 (explaining a school district's responsibility to contribute to the Program through the collection of property taxes and to use any excess amounts to provide for their own school district).

61. *Rodriguez*, 411 U.S. at 1 (1973) (showing the disparities in amounts between per-pupil expenditures). After contributing to the Program, Edgewood I.S.D. contributed a remaining $26 per-pupil, while Alamo Heights I.S.D. contributed a remaining $333 per-pupil primarily due to property tax disparities. *Id.* at 12–13. Even with the addition of the Program and federal funds, Edgewood I.S.D. obtained only $356 per-pupil while Alamo Heights obtained $594 per-pupil. *Id.*

However, the Court upheld the validity of the financing system after analyzing the status of education as a fundamental right.[62] Noting the social importance and the judiciary's historic dedication to public education, the Court continued to follow the standard for designating fundamental rights:[63] "whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[64] However, since education was neither explicitly nor implicitly stated in the Constitution, the Court held that education was not a fundamental right, but left room for argument.[65] The Court suggested, hypothetically, that if education is a protected right, then it could not determine at that time whether Texas's financing system was valid.[66] As such, arguments advocating access to basic education as a fundamental right continue to be entertained by the Court.

Despite the Court's recognition of this possibility, it upheld Texas's financing system by applying a rational basis test and giving state officials great deference in their education planning.[67] For the most part, under a rational basis standard, "a law meets rational basis review if it is rationally related to a legitimate government purpose."[68] Furthermore, the Court defers to state legislatures when reviewing the law, finding any conceivable purpose that is legitimate as sufficient.[69] In *Kadrmas v.*

---

62. *Id.* at 62 (pointing out that the Texas school financing system does not impinge on any liberty or constitutional interests because the system fails to create a suspect class necessary to apply strict scrutiny).

63. *Id.* at 35 (noting its refusal to deviate from the traditional standard of rational basis for social or economic legislation).

64. *Id.* at 33 (emphasizing its loyalty to precedent by not expanding its province).

65. Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1003 (2001) (pointing out that the Constitution may require some minimum type of basic education).

66. *Rodriguez*, 411 U.S. at 36–37 ("Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditure in Texas provide an education that falls short.") The Court pointed out that the plaintiffs' lack of evidence prevented a further analysis of education as a fundamental right. *Id.* at 36–37. This explanation indicates that the lack of evidence rather than education's status as a fundamental right provided the basis for the Court's refusal to overturn the financing system. *Id.*

67. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973).

68. CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 651 (Erwin Chemerinsky ed., Aspen Publishers 2d ed. 2002) (listing the various ways the rational basis test is phrased). In some cases, the Court upholds state legislation that meets any conceivable purpose, while in other cases, the Court implements a more rigorous form of rational basis by requiring legislation to meet a substantial purpose. *Id.*

69. *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78–79 (1911) (explaining that an opponent bears the burden of showing that a law is arbitrary).

Dickinson Public Schools,[70] the Court continued to refuse to define education as a fundamental right, and again, applied a rational basis standard.[71] In effect, the Court upheld a state law that authorized a school district to charge a bus transportation fee.[72]

However, in 1982, the Court acknowledged education as a matter of supreme importance.[73] In *Plyler v. Doe*,[74] the Court struck down a Texas law that authorized the state to withhold education funds used for illegal immigrant children attending public schools and allowed the local public schools to refuse enrollment to illegal immigrant children.[75] While the Court did not designate education as a fundamental right, Justice Brennan wrote "But neither is [education] merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[76] Describing education's fundamental role, the Court held that education laws must further some substantial interest.[77] Although the *Plyler* decision revealed the Court's unwillingness to elevate the status of education

---

70. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 464 (1988) (upholding a school district's practice of charging certain students a bus fee).

71. 487 U.S. at 457–58 (explaining that laws subjected to a rational basis analysis usually are upheld). The Court pointed out that the bus fee did not actually deprive school children of educational access, but instead placed an obstacle in front of poor school children. *Id.* at 458. Furthermore, the Court refused to apply a higher standard of scrutiny in this case since the Equal Protection Clause does not guarantee free transportation to school. *Id.*

72. *Id.* at 462 (clarifying that a school district's option to provide bus transportation to students does not automatically guarantee those students *free* transportation to school).

73. Plyler v. Doe, 457 U.S. 202, 221 (1982) ("The 'American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.'") (quoting Meyer v. Nebraska, 262 U.S. 390, 400 (1923)). In *Plyler*, the Court outlined past cases in which it identified the importance of public education. *Id. See also* Ambach v. Norwick, 441 U.S. 68, 75–76 (1979) (Brennan, J., concurring) (defining public education as the primary vehicle for teaching core values in our society); *see also* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (explaining the necessity of some degree of education for preparing citizens to participate intelligently and effectively in society); *see also* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (distinguishing public education as a vital civic institution in a democratic society).

74. Plyler v. Doe, 457 U.S. 202 (1982).

75. 457 U.S. at 205 (pointing out the never-ending tide of illegal immigrants entering the United States, especially Texas). Despite the numerous legal restrictions surrounding immigration, Texas experiences influxes of illegal immigrants, which induced the Texas Legislature to revise its education laws. *Id.*

76. *Id.* at 221 (adding that education's importance in sustaining democratic institutions and its lasting impact on deprived children make education distinct from other American benefits).

77. *Id.* at 230 (rejecting a rational basis review).

to a fundamental right, the Court clearly recognized education as an essential factor in achieving equality.[78]

Whether there is a fundamental right to at least a minimal and adequate education remains unanswered.[79] In *B.H. Papasan v. Allain*,[80] school district members contended that Mississippi violated the Equal Protection Clause due to the state's deprivation of a minimally adequate education to local school children.[81] They outlined the state's history of the school funding system and emphasized the resulting disparity in funding between Chickasaw Cession schools and remaining schools in the state.[82] Analyzing the Equal Protection issue, the Court noted their inability to define education as a fundamental right and further acknowledged the possibility "that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise" of other fundamental rights.[83] As such, neither *Rodriguez* nor *Plyler* represent a final opinion concerning the status of education as a fundamental right. Today, the possibility remains that at least some elevated

78. CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 888 (Erwin Chemerinsky ed., Aspen Publishers 2d ed. 2002) (noting the United States Supreme Court's recognition of education as an essential right because it provides a nexus to exercising other fundamental rights and obtaining promising economic opportunities); *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U. S. 1, 35 (1973) (outlining petitioner's argument that education "bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution.").

79. Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1009 (2001) (commenting that the United States Supreme Court and lower courts have simply outlined the scope of education as a right without stating whether Americans are entitled to a "minimally adequate education").

80. 478 U.S. 265 (1986).

81. Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1005 (2001) (pointing out a funding disparity of $75 per-pupil between school districts). In Mississippi, a system of land reservations maintained the public education system; however, when Mississippi acquired new lands from the Native Americans, it did not immediately set aside any of this additional land for education. *Id.* at 1004. When Mississippi finally set aside more land for education, the new sections did not generate any income, and the state refused to equalize funding between the new districts and the former districts. *Id.; See* Papasan v. Allain, 478 U.S. 265, 267–70 (1986).

82. *Papasan*, 478 U.S. at 273 (comparing an average of $0.63 per-pupil in the Chickasaw Cession schools to an estimated $75.34 per-pupil in other schools throughout Mississippi). The disparity resulted from the lack of compensation Chicksaw Cessions schools failed to receive from Mississippi. *Id.* The disparity calculation even took into account the annual interest the state paid to the Chicksaw Cession schools. *Id.*

83. *Id.* at 284 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973)).

protection may surround the right to a minimally adequate public education.[84]

In lower courts, the status of education as a fundamental right also remains undecided.[85] In fact, several United States Courts of Appeal confirmed their uncertainty on this issue.[86] Like the United States Supreme Court in *Papasan*, the Fifth and Sixth Circuit courts of appeal declined to resolve the status of education as a fundamental right by pointing out the plaintiff's inability to prove the denial of a minimally adequate education.[87] Likewise, the Seventh Circuit Court of Appeals recognized the unsettled question, but it evaded an answer since the interscholastic activities at issue were not a necessary element to a minimally adequate education.[88] More recently, the Southern District Court of New York refused to decide whether the right to a minimally adequate public education was fundamental since the plaintiffs did not initially plead factual allegations of an inadequate education.[89]

While the United States Supreme Court's ongoing dialogue about fundamental rights and the right to equal access to public education grows more complex, it remains committed to its ideals expressed in *Brown*.[90] The *Brown* opinion ended a chapter of segregation in American public schools and laid the foundation for all education decisions. *Brown* represents the first time the Court explained the importance of education and the obligation of the state to provide every child with equal access to

---

84. *See* Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 994–95 (2001) (advocating the existence of a "fundamental right to a minimally adequate education").

85. *Id.* at 1009 (adding that some states preserve the right to a minimally adequate education in their state constitutions).

86. *Id.* at 1006 (outlining the Fifth Circuit's treatment of the issue).

87. *See* Sch. Bd. of the Parish v. La. State Bd. of Elementary and Secondary Educ., 830 F.2d 563, 568–69 (5th Cir. 1987) (explaining that plaintiffs failed to show evidence of an inadequate education and upholding public school financing system based on property values under rational basis); *see also* Kelley v. Metro. County Bd. of Educ., 836 F.2d 986, 993 & 1001 (6th Cir. 1987) (reversing a district court's order that required the state to pay a percentage of desegregation costs after distinguishing the case from *Papasan* to show the irrelevance of a fundamental right analysis).

88. Griffin High Sch. v. Ill. High Sch. Ass'n, 822 F.2d 671, 675 n.2 (7th Cir. 1987) (holding the correct standard of review as rational basis and citing *Papasan*, where the United States Supreme Court failed to definitively settle whether access to a minimally adequate education constitutes a fundamental right).

89. African Am. Legal Def. Fund v. N.Y. State Dep't of Educ., 8 F. Supp. 2d 330, 336 (S.D. N.Y. 1998) (comparing the case to *Papsan* by stating that the plaintiffs failed to provide any proof that children were receiving unequal treatment).

90. *See Brown*, 347 U.S. at 493 (emphasizing the importance of education and highlighting its critical role in instilling values of responsibility, good citizenship, and professionalism in American citizens).

education.[91] In a unanimous decision, the Court described education as one of the state and local governments' most important functions and recognized it as an instrumental mechanism in a successful life.[92] As such, the Court struck down the separate-but-equal doctrine as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[93] Clearly, *Brown* signifies a pivotal step to ending discrimination in American public schools.[94]

C. *The Civil Rights of 1964*

Under federal law, it is illegal for a federally funded program to discriminate on the basis of "race, color, or national origin."[95] The Civil Rights Act of 1964 specifically provides that "[n]o [p]erson in the United States shall, on the ground of race, color, or national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."[96] On June 23, 2000, the Act was amended to include a provision that applied the same principles to federally assisted education programs.[97] The amendment sets out a nonexhaustive list of education programs;[98] also, the list can change at the discretion of the Attorney General.[99] As such, the amended Act stands as a milestone in the effort to provide everyone with an equal opportunity to an education.

The primary purpose of the Act is to avoid the use of federal monies to support racially discriminatory practices, particularly in the education

---

91. *See id.* (asserting that a child's success depends on education).

92. *Id.* (adding that the mandatory attendance laws and government's large expenditures on education demonstrate society's recognition of the significance of education).

93. *Id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

94. Molly A. Hunter, *Requiring States to Offer a Quality Education to All Students*, 32 HUM. RTS. 10, 10 (2005) (underlining the decrease in the achievement gap between Blacks and Whites in the 1970s and 1980s due to *Brown*, but also showing the continual unequal opportunities for minority children).

95. Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (2007).

96. *Id.*

97. Civil Rights Act of 1964, 42 U.S.C.A. § 2000d(1-101) (2007) ("The Federal Government must hold itself to at least the same principles of nondiscrimination in educational opportunities as it applies to the education programs and activities of State and local governments, and to private institutions receiving Federal financial assistance.").

98. Civil Rights Act of 1964, 42 U.S.C.A. § 2000d(2-202) (2007) (including formal schools, academic programs, extracurricular activities, occupational training programs, scholarships, internships, and enrichment camps).

99. Civil Rights Act of 1964, 42 U.S.C.A. § 2000d(2-203) (2007) (authorizing the Attorney General to make the final determination of whether a program falls under the definition for educational programs).

sector. In *Regents of the University of California v. Bakke*,[100] the United States Supreme Court provided a comprehensive discussion of Congress's intent in passing the Act.[101] The Court analyzed the meaning of the Act by reading it in light of the tense racial relations at the time the Act was passed.[102] The Court explained the context of the Act "reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination."[103] Thereafter, a series of federal district court decisions revealed the judiciary's devotion to the Act's purpose of preventing racial discrimination.

In a variety of discrimination claims, such as federally funded housing programs,[104] public university practices,[105] and access to public education[106] courts continue to emphasize the federal government's effort to avoid assisting racial discrimination in all publicly funded institutions, especially public schools. In *Doe v. Kamahameha Schools/Bernice Pauahi Bishop Estate*,[107] the Hawaii Federal District Court referred to the Act's central purpose when determining whether a remedial affirmative action

---

100. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271, 317 (1978) (striking down an affirmative action system based on quotas, but also holding that race may be a factor in determining admissions).

101. 438 U.S. at 284–87 (summarizing the legislative history of the Act and highlighting the purpose of the Act was to address specifically racial discrimination).

102. *Bakke*, 438 U.S. at 285 ("Over and over again proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs."). The Court emphasized the Legislature's effort to avoid using federal monies to support discrimination. *Id.*

103. *Id.* at 284. (pointing out that pieces of legislative history, if read alone, may indicate the Act was purely colorblind, but also emphasizing the importance of reading the Act in the context of society at the time).

104. *See* Joy v. Daniels, 479 F.2d 1236, 1241 (4th Cir. 1973) (striking down a lease provision in a federal housing claim that gave a landlord power to terminate a lease without cause and highlighting a citizen's right to be free from discriminatory action by the federal government).

105. *See* Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 602–03, 608 (D.S.C. 1974) (analyzing a private school's receipts of federal funds and forbidding their use toward funding segregation practices); *see also* United States v. El Camino Cmty. Coll. Dist., 454 F. Supp. 825, 831 (C.D. Cal. 1978) (authorizing the Office for Civil Rights to investigate alleged discriminatory employment practices in a public university, a recipient of federal funds). By defining a public university as a recipient of federal funding and regulated by the Civil Rights Act, the Court is highly likely to apply the Civil Rights Act to public schools regulated under the NCLBA, which authorizes the distribution of federal funding to public schools able to meet adequate yearly progress.

106. *See* Brown v. Weinberger, 417 F. Supp. 1215, 1219 (D.D.C. 1976) (finding that the Northern-Western school districts failed to enforce their statutory obligations under the Civil Rights Act). As such, the courts' investigations of discrimination claims in a wide range of practices involving federal assistance reveals their interest in ensuring that the federal government is not involved in the promotion of discrimination.

107. Doe v. Kamehameha Sch., 295 F. Supp. 2d 1141 (D. Haw. 2003).

program was discriminatory.[108] As such, the Act stands as the federal government's effort to discourage discriminatory practices through the use of federal monies.

Moreover, a liberal interpretation of the Act's language reinforces its principal purpose. In *Bakke*, the United States Supreme Court recognized the majestic sweep of the Act and commented on the wide range of unequal types of treatment the Act may cover.[109] Furthermore, federal district courts reaffirmed the Act's liberal construction as necessary to effectuate the remedial purposes of the Act. For example, in both *Bob Jones University v. Johnson*[110] and *United States v. El Camino Community College*,[111] federal district courts relied on the sweeping nature of the Act to question the use of federal monies.[112] Accordingly, courts continue to favor a broad and inclusive list of discriminatory practices that can be challenged under the Act.

D. *The Achievement Gap*

Courts are reluctant to hold that evidence of an achievement gap provides proof of discrimination. In the past, cases examining the achievement gap involved de jure segregation issues. After *Brown*, public schools implemented integration policies in order to achieve unitary status.[113] However, simple integration of White and minority children did not suf-

---

108. *See Doe*, 295 F. Supp. 2d at 1164–65 (discussing the applicability of the Civil Rights Act and § 1981 in remedial programs). In *Kamehameha*, the Court faced an exceptionally unique situation in which the plaintiff, John Doe, alleged Kamehameha Schools rejected his application due to his non-Native Hawaiian race. *Id.* at 1145. On the other hand, the school argued that their admissions policy complied with § 1981, a federal remedial statute. *Id.* The Court concluded its opinion by pointing out that it would make little sense to read § 1981 against the Civil Rights Act in favor of the defendant, and therefore, it only granted partial summary judgment for the defendant. *Id.* at 1174–75.

109. 438 U.S. at 284 (comparing the Civil Rights Act's language to the Equal Protection Clause).

110. Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 608 (D.S.C. 1974) (holding the inability of the federal government to provide grants to private institutions that discriminate).

111. United States v. El Camino Cmty. Coll. Dist., 454 F. Supp. 825, 832 (C.D. Cal. 1978) (issuing a permanent injunction against a public community college to prevent the discriminatory use of federal funds).

112. *Bob Jones*, 396 F. Supp. at 604 (commenting that a narrow interpretation of the Civil Rights Act is inappropriate); *El Camino Cmty. Coll. Dist.*, 454 F. Supp. at 829 (explaining that a liberal construction of the Civil Rights Act achieves its beneficial objectives).

113. Deborah Sprenger, Annotation, *Circumstances Warranting Judicial Determination or Declaration of Unitary Status with Regard to Schools Operating Under Court-Ordered or Supervised Desegregation Plans and the Effects of Such Declarations*, 94 A.L.R. FED. 667 (1989) (clarifying that unitary status is achieved once a school shows a good faith commitment to erasing any signs of segregation).

fice; desegregation decrees were judged on their effectiveness.[114] As a result, a number of desegregation cases arose in which parents argued that the vestiges of discrimination continued in seemingly integrated schools.[115] Nevertheless, mere complaints of an achievement gap failed to provide ample proof that a school persisted to discriminate.

Today, civil rights groups continue to pursue discrimination claims by offering evidence of a lingering achievement gap decades after *Brown*. As recently as 2002, an Arkansas Federal District Court entertained evidence of an achievement gap and granted only partial unitary status to the Little Rock School District in *Little Rock School District v. Pulaski County Special School District No. 1*.[116] While the Court devoted a lengthy discussion over how to treat findings of an achievement gap, it affirmed prior holdings that evidence of an achievement gap should not preclude a school from attaining unitary status unless there is a causal link between desegregation methods and the achievement gap.[117] In fact, the Court recognized that a host of factors–such as birth weight, socioeconomic status, parental involvement in school, as well as parental upbringing–may cause an achievement gap.[118] Therefore, it seems unlikely that the remaining achievement gap after the implementation of the NCLBA constitutes direct evidence of discrimination.

Nevertheless, the implementation methods of the NCLBA, which have not improved the achievement gap, continue to raise questions concerning discrimination. Whether the effects of the NCLBA violate a possible fundamental right and in effect, are a discriminatory use of federal funds under the Civil Rights Act remains at issue. Before dismissing possible discrimination claims, a further analysis is crucial.

---

114. Deborah Sprenger, Annotation, *Circumstances Warranting Judicial Determination or Declaration of Unitary Status with Regard to Schools Operating Under Court-Ordered or Supervised Desegregation Plans and the Effects of Such Declarations*, 94 A.L.R. FED. 667 (1989) (finding only intentional segregation unlawful as opposed to de facto segregation). The presence of intent remains a critical factor in determining whether a school achieves unitary status in light of its school composition. *Id.*

115. *See id.* (outlining the federal cases involving school segregation and unitary status).

116. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 237 F. Supp. 2d 988, 1089 (E.D. Ark. 2002) (adding that the court will continue to supervise the school's desegregation efforts). In *Little Rock*, the Little Rock School District sought unitary status after implementing desegregation methods based on a previous settlement case. *Id.* at 992–97.

117. *Id.* at 1037 (relying on the test articulated in *Missouri v. Jenkins* (*Jenkins II*), which shifts the focus from whether an achievement gap exists to determining *to what extent* the achievement gap is a direct result of de jure segregation) (emphasis added).

118. *Id.* at 1037 (providing an overview of factors that complicate the court's task of determining whether a school's achievement gap is a direct result of de jure segregation). The Court also added that evidence of an achievement gap in nondiscriminatory schools further complicates the issue. *Id.*

III. LEGAL ANALYSIS

A. *The Constitutionality of the NCLBA Under the Equal Protection Clause*

The concern that the NCLBA endorses discrimination by reducing federal funding to public schools based on distinctions made between students raises Equal Protection issues. In order to effectively challenge the constitutionality of the NCLBA as a violation of the Equal Protection Clause, success depends upon the level of scrutiny applied.[119] To subject the NCLBA to the most rigorous form of judicial review, strict scrutiny must be triggered.[120] To invoke strict scrutiny, either racial discrimination or interference with a fundamental right must be shown.[121]

Claims of racial discrimination based solely on the NCLBA's implementation of discriminatory standardized testing procedures fails to prompt equal protection laws.[122] In fact, "courts have been reluctant to recognize violations of equal protection rights in the general context of standardized testing procedures in schools."[123] To sustain a claim that minority children under the NCLBA are denied equal protection of the laws because of discriminatory standardized testing methods, the challenger has the burden to show that the NCLBA is either facially discriminatory or has a discriminatory impact and purpose.[124] A mere showing of

---

119. CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 517 (Erwin Chemerinsky ed., Aspen Publishers 2d ed. 2002) ("In a sense, the level of scrutiny is instructions for balancing. It informs the courts as to how to arrange the weights on the constitutional scale in evaluating particular laws.").

120. *See id.* at 520 (explaining strict scrutiny's use in evaluating discrimination claims against racial groups or the interference of a fundamental right).

121. *Id.* (listing examples of fundamental rights like the right to travel, the right to vote, and the right to privacy).

122. Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 872 (2002) (summarizing Equal Protection challenges to standardized testing procedures). In *Parents in Action on Special Education v. Hannon*, an Illinois district court upheld the use of standardized testing as not culturally biased and therefore, nondiscriminatory because other criteria helped classify children. Parents in Action on Special Educ. v. Hannon, 506 F. Supp. 831, 883 (N.D. Ill. 1980) ("[T]he WISC, WISC-R and Stanford-Binet tests, when used in conjunction with the statutorily mandated '(other criteria) for determining an appropriate educational program for a child' do not discriminate against black children in the Chicago public schools.") (quoting 20 U.S.C. § 1412(2)(D)(5) (2005)).

123. Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 871–72 (2002) (adding a summary of Due Process challenges to standardized testing methods).

124. *See* CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 669 (Erwin Chemerinsky ed., Aspen Publishers 2d ed. 2002) (describing facially discriminatory laws as those that draw distinctions between groups of people based on race, whereas facially neutral laws draw express distinctions between groups of people in their administration).

disparity as a result of the use of standardized testing falls short under the Equal Protection Clause.[125]

While the NCLBA explicitly draws distinctions between groups of students,[126] it does not *expressly* discriminate against minority children. The law does not purposely deny federal funding to minority children in low-income schools; instead, the law simply requires schools to measure achievement levels of each subgroup in order to access the progress of each group and determine which schools receive federal funding.[127] Under its accountability methodology, the NCLBA defines types of subgroups and penalties in two different areas of § 6311.[128] Then it explains that a subgroup's failure to meet AYP status will result in a withholding of federal funding from that school.[129] The Act does not treat a minority subgroup's failure to meet AYP status differently from another subgroup's failure. Furthermore, the Act does not state that the purpose of tracking a subgroup's academic levels is to treat minority subgroups differently by denying those schools federal funding. To be a facially discriminatory law under the Equal Protection Clause, there must be a distinction between racial groups and an express statement to treat the groups differently.[130] Consequently, the requirement to track the academic progress of a subgroup lacks any explicit mention of purposeful mistreatment. It is only after looking at the Act's implementation that mistreatment becomes apparent.

---

125. Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 873 (2002) (explaining the court's endorsement of a school's use of standardized tests for placement purposes due to the lack of evidence of intent among school officials to discriminate against black children) (citing Larry P. v. Riles, 793 F.2d 969, 984 (9th Cir. 1980)).

126. *See* 20 U.S.C. § 6311(b)(2)(C) (2006) ("'Adequate yearly progress' shall be defined by the State in a manner that . . . includes separate measurable annual objectives for continuous and substantial improvement for each of the following . . . the achievement of economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency.").

127. *Id.* (authorizing states to measure the academic progress of public schools).

128. *See* 20 U.S.C. § 6311(b)(2)(C)(v)(II) (2006) (defining subgroups); *see also* 20 U.S.C. § 6311(g) (2006) (outlining the penalties for failing to meet the projected 2014 deadline).

129. 20 U.S.C. § 6311(g)(2) (2006) ("If a State fails to meet any of the requirements of this section, other than the requirements described [above], then the Secretary may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements.").

130. CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 670–74 (Erwin Chemerinsky ed., Aspen Publishers 2d ed. 2002) (elaborating there are three types of facially discriminatory laws: "race-specific classifications that disadvantage racial minorities," "racial classifications burdening both Whites and minorities," and "laws requiring separation of the races").

While the Act's implementation may unequally affect minority children, the inability to prove intent evades the applicability of the Equal Protection Clause.[131] The lack of circumstantial or direct evidence to show discriminatory intent precludes an Equal Protection Clause challenge that the NCLBA has a discriminatory purpose.[132] In fact, the Court of Appeals for the Eleventh Circuit upheld a grouping procedure that disproportionately placed African-American children in one group due to the plaintiffs' inability to show that the assignment method purposefully intended to treat African-American students differently.[133] Accordingly, it is unlikely that a court will strike down the methodology of the NCLBA without any evidence of purposeful intent to treat minority or low-income children differently. Such evidence is highly unlikely to appear in any federal committee report. In fact, the law outlines its purpose of improving academic standards of all groups of children, especially minority and low-income children, as well as improving the achievement gap.[134] Therefore, an Equal Protection claim based on racial discrimination does not invalidate the discriminatory nature of the NCLBA.

Also, successfully invoking strict scrutiny by contending that the NCLBA interferes with a fundamental right remains uncertain. Despite the *Brown* decision's promise of equal access to education, the struggle of categorizing equal access to education as a fundamental right remains problematic to make a successful argument. While the status of equal access to a minimally adequate education as a fundamental right remains unclear, challenging the NCLBA as a denial of a fundamental right presents several risks. Raising such an argument places a heavy burden on a challenger. First, the challenger must successfully argue that equal access to a minimally adequate education is a fundamental right. However, the United States Supreme Court may use the chance as a way to

131. *See* Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 873 (2002) ("Evidence of discriminatory intent is also necessary [to an Equal Protection challenge].").

132. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (stating the necessity to show discriminatory impact and intent to withstand an Equal Protection challenge). In fact, proof of discriminatory intent precludes a court from giving judicial deference to state legislators and requires the court to evaluate the merits of the law. *Id.* at 265–66.

133. Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 874 (2002) (explaining the mere fact that more African-American students were assigned to EMR (educable mentally retarded) classes due to their results on standardized testing did not invoke equal protection of the laws) (citing Ga. State Conference of Branches of NAACP v. Georgia 775 F.2d 1403, 1428–29 (11th Cir. 1985)).

134. 20 U.S.C. § 6301 (2002) (specifying the Act's commitment to improving access to a high-quality education for all children, particularly low-achieving children, minority children, and disadvantaged children).

finalize the status of education as not being a fundamental right, severely limiting the treatment of education issues. Second, the challenger must also show how the NCLBA denies children access to a minimally adequate education. However, the NCLBA only reduces federal funding to public education; accordingly, the state continues to fund public education, ensuring a minimally adequate education.

While the argument remains that access to a minimally adequate education is a fundamental right, trying to invalidate the NCLBA through this mechanism generates an uncertain outcome. In order to successfully form a claim against the legitimacy of the NCLBA, it is important for a challenger to construct a legal argument that will result in a predictable outcome. An argument must be tightly crafted and counter any potential opposition before it is made. Due to the requirements of either discriminatory intent or fundamental status under the Equal Protection Clause, arguments against the NCLBA remain vulnerable. Despite the NCLBA's potential immunity to an Equal Protection challenge, it presents a clear violation of the Civil Rights Act of 1964 and destroys the *Brown* decision's purpose of providing an integrated education to all American children.

B. *The NCLBA's Use of Standardized Testing As a Discriminatory Mechanism Under the Civil Rights Act of 1964*

The NCLBA employs discriminatory standardized testing methods to unfairly assess student and school achievement levels, and consequently, it violates the Civil Rights Act of 1964. Standardized testing continues to remain a controversial assessment measure. While proponents point out its statistical benefits, opponents criticize its over-generalizations and inaccurate predictions. In particular, proponents support the use of standardized testing as an accountability device and believe its use will encourage schools to provide high-quality education.[135] Standardized testing offers reliable and valid results, which can be generalized and replicated in other studies.[136] As a result, standardized tests create an aggregate of information that can be statistically calculated to either predict or assess a student body's academic progress.[137] Thus, proponents of the NCLBA's use of standardized tests argue the tests will provide schools

135. Serin Ngai, *Painting Over the Arts: How the No Child Left Behind Act Fails to Provide Children with a High-Quality Education*, 4 SEATTLE J. FOR SOC. JUST. 657, 673–74 (2006).

136. Nathan R. Kuncel & Sarah A. Hezlett, *Assessment: Standardized Tests Predict Graduate Students' Success*, 315 SCI. 1080–81 (2007).

137. *Id.*

with a basis to compare themselves with other schools, motivating them to progress academically.[138]

On the other hand, opponents of standardized tests contend the testing methods are culturally biased.[139] In fact, sociologists explain that the pervasive use of standardized tests can potentially lead to a self-fulfilling prophecy.[140] To explain, using standardized tests as a key tool in mapping assessment generates feeling of inferiority and inequality in school children and their parents when results are low.[141] Also, opponents point out that test results do not accurately quantify academic achievement.[142] Thus, the NCLBA's use of standardized tests does not accurately measure assessment levels because standardized tests themselves inaccurately assess student achievement, and consequently, the NCLBA uses a faulty mechanism to distribute federal funding. Nevertheless, exemplified by decades of executive support, President George W. Bush's strong belief in the advantages of standardized testing is channeled into the NCLBA's heavy reliance on standardized testing.[143]

However, the NCLBA's use of standardized tests extends beyond their traditional role. Under the Act, standardized tests closely parallel "high stakes" tests because they not only measure student competency, but also help schools draw critical conclusions about their students.[144] In other words, test scores play a key role in determining a school's status under the NCLBA; the state reports standardized test scores to the federal gov-

---

138. Serin Ngai, *Painting Over the Arts: How the No Child Left Behind Act Fails to Provide Children with a High-Quality Education*, 4 SEATTLE J. FOR SOC. JUST. 657, 673–74 (2006) (adding that requiring students to pass standardized tests gives meaning and substance to high school diplomas).

139. Fair Test: The National Center for Fair and Open Testing, *What's Wrong with Standardized Testing*, http://www.fairtest.org/facts/whatwron.htm (last visited July 17, 2007) (listing alternatives to evaluating student achievement such as teacher observation, recording student work, and assessing performance levels based on hands-on tasks).

140. *See* Helen A. Moore, *Testing Whiteness: No Child or School Left Behind?*, 18 WASH. U. J. L. & POL'Y 173, 182 (2005) (describing the consequential latent functions of standardized testing by explaining how schools fail minority students by relying heavily on standardized tests).

141. *See id.* at 182-83 (explaining standardized tests provide schools with a tool to label children as failures and the government's unwillingness to invest in them).

142. Serin Ngai, *Painting Over the Arts: How the No Child Left Behind Act Fails to Provide Children with a High-Quality Education*, 4 SEATTLE J. FOR SOC. JUST. 657, 674 (2006) (explaining that standardized testing teaches students test-taking skills rather than produces substantive learning). Ngai also indicates that standardized tests only focus on a small sample of subjects such as math, reading, and writing. *Id.*

143. *Id.* at 659–661 (providing a chronology of political events addressing the bleak state of the nation's education system and support of standardized testing).

144. Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 863 (2002) (differentiating high stakes tests from mere standardized tests).

ernment, and schools are held accountable for their students' progress.[145] Accordingly, states are either sanctioned or rewarded by the federal government through the receipt of federal funding.[146] Therefore, under the NCLBA, standardized tests function not only as a primary tool for improving education standards, but also as an instrumental condition precedent for federal funds.

Unlike the Equal Protection Clause, the Civil Rights Act considers actions that have a disparate impact on protected minority groups as potentially discriminatory.[147] As such, an act does not need to be intentionally discriminatory to come under the scope of the Civil Rights Act.[148] In order to raise a practice's effect into question, a plaintiff only needs to show that a facially neutral practice causes an unequal effect on a particular racial group.[149] Accordingly, the use of standardized testing under the NCLBA negatively affects minority children by approving the reduction of federal funds to low-performing schools. Thus, under a liberal construction of the Civil Rights Act of 1964, the NCLBA discriminates against minority children.

The NCLBA's use of standardized testing for accountability disproportionately burdens high-poverty schools made up largely of minority children.[150] Students attending high poverty-schools are predominantly minority children from urban areas.[151] In fact, Harvard University's Civil Rights Project reports that minority and low-income children make up

---

145. *Id.* at 864 (emphasizing President George W. Bush's legislation's heavy reliance on standardized testing).

146. 20 U.S.C. § 6311(g) (2006) (explaining that federal funds may be withheld if a school does not meet assessment standards); *see also* Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 865 (2002) (adding that states may also sanction or reward school districts).

147. Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 876 (2002) (pointing out a key difference between an Equal Protection challenge and a Civil Rights Act challenge); *see* Leland Ware, Brown's *Uncertain Legacy: High Stakes Testing and the Continuing Achievement Gap*, 35 U. TOL. L. REV. 841, 849–50 (2004) ("[T]he statute [the Civil Rights Act] expressly prohibit[s] actions that have a disparate impact on groups, even when those actions are not intentionally discriminatory.").

148. Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 876 (2002) (highlighting that a plaintiff must first show the law's implementation places an unequal and adverse impact on minority groups).

149. *Id.* (explaining when the burden shifts to the defendant).

150. Ryan S. Vincent, *No Child Left Behind: Only the Arts and Humanities: Emerging Inequalities in Education Fifty Years After* Brown, 44 WASHBURN L.J. 127, 138 (2004) (comparing the NCLBA's effect on poverty-stricken schools to an assault).

151. *Id.* at 137 (showing that current demographics reveal a segregated American population).

more than three-fourths of the student body in high-poverty schools.[152] Black and Hispanic children primarily attend large, overcrowded urban schools.[153] In 2000, the five largest urban school districts reported that Blacks and Hispanics made up eight-five to ninety percent of their student bodies.[154] While children in predominantly White public schools experience middle-class lifestyles, minority children typically live in poor households and attend low-income public schools.[155] As a result of de jure segregation, low-income school districts face a higher probability of sanctions because "the failure of *any* subgroup" – minority, low-income, or disabled – triggers less federal funding.[156] Therefore, "schools enrolling subgroups including minority, low-income, and limited English proficiency students are more likely to need improvement under the NCLBA than less diverse schools without multiple subgroups" due to basic probability.[157] Consequently, low-income schools face greater risks.

In fact, because of an inverse relationship between academic results and poverty, students who need the most federal funding attend schools

---

152. *Id.* (citing GAIL L. SUNDERMAN & JIMMY KIM, INCREASING BUREAUCRACY OR INCREASING OPPORTUNITIES?: SCHOOL DISTRICT EXPERIENCE WITH SUPPLEMENTAL EDUCATIONAL SERVICES 12 (Cambridge, MA: The Civil Rights Project at Harvard University 2004), http://www.civilrightsproject.harvard.edu/research/esea/increasing_bureaucracy.pdf). To analyze the impact of supplemental educational services established during the first year of the NCLBA, Sunderman and Kim studied eleven school districts with predominantly low-income minority students; the sample included some of the largest school districts in the nation and explained that low-income and minority students typically made up a significant portion of student bodies with estimates between seventy-two percent to ninety percent. GAIL L. SUNDERMAN & JIMMY KIM, INCREASING BUREAUCRACY OR INCREASING OPPORTUNITIES?: SCHOOL DISTRICT EXPERIENCE WITH SUPPLEMENTAL EDUCATIONAL SERVICES 12 (Cambridge, MA: The Civil Rights Project at Harvard University 2004), http://www.civilrightsproject.ucla.edu/research/esea/nclb_naep_lee.pdf.

153. Sheryll D. Cashin, *American Public Schools Fifty Years After* Brown*: A Separate and Unequal Reality*, 47 HOW. L.J. 341, 352–53 (2004) (adding that Hispanic children are more segregated than Black children, that nearly forty percent of minority schoolchildren face intense racial isolation because they attend schools composed of at least ninety percent of minority students, and that White children are, ironically, the "most racially segregated group" because they mostly attend schools made up of approximately eighty percent of other White children).

154. *Id.* at 353 (explaining that racial disparity in school results from the urban-suburban divide).

155. *Id.* at 354 (adding that the majority of urban schoolchildren receive reduced or free lunch).

156. Ryan S. Vincent, *No Child Left Behind: Only the Arts and Humanities: Emerging Inequalities in Education Fifty Years After* Brown, 44 WASHBURN L.J. 127, 138 (2004) (emphasis added) (showing that the more diverse a schools is, the more likely its subgroups will be held accountable).

157. *Id.* (showing how Illinois and New York schools identified as "in need of improvement" contained more than two times the number of minority, low-income, and limited English proficiency students than other schools meeting the assessment requirements).

punished by lower federal funding.[158] While the inverse relationship does not indicate that minority or low-income children always test low on standardized tests, it reveals that under this facially neutral Act's use of standardized testing, there is an unequal effect on low-income schools due to their demographic composition.[159] Low-income schools face a higher probability of sanctions due to their composition of multiple subgroups and each subgroup's potentially low results. On the other hand, high-income schools face a lower probability of sanctions due to their lack of students to trigger subgroup reporting; therefore, these schools can bury any low scores in their total aggregate scores.

Using standardized tests as a statistical measure to determine federal funding by measuring subgroups inaccurately reflects a school's need for resources and disproportionately treats minority children unequally. Rather than focusing on the underlying causes of low performance in low-income schools, the NCLBA's sole reliance on standardized tests inadequately measures student achievement.[160] Accordingly, the wide scope of the Civil Rights Act aims to prevent this type of inequality. The majestic sweep of the Civil Rights Act includes types of unequal treatment like placing higher burdens on low-income schools. Because of the judiciary's devotion to the remedial purpose of the Civil Rights Act, the use of standardized testing under NCLBA as a tracking mechanism is discriminatory.

Furthermore, the NCLBA's standardized testing procedures designed by the states are questionable. While some schools proudly publicize their testing success, increases in state scores fail to coincide with results in other national tests.[161] For example, college entrance exams and ad-

158. *Id.* at 140 (revealing how poor urban schools face both financial burdens in conjunction with meeting AYP status under the NCLBA).

159. *See id.* at 138–40 ("Since urban schools are disproportionately impoverished, their academic performance generally lags behind suburban schools. Moreover, schools with a higher concentration of poor students have lower test scores, more inexperienced teachers, and higher drop out rates.").

160. Leland Ware, Brown's *Uncertain Legacy: High Stakes Testing and the Continuing Achievement Gap*, 35 U. TOL. L. REV. 841, 855 (2004) (revealing that African-Americans and Hispanics continue to make up a disproportionate number of children grouped in special education programs and continue to be tracked into low-level programs even when they attend racially mixed schools).

161. Helen A. Moore, *Testing Whiteness: No Child or School Left Behind?*, 18 WASH. U. J. L. & POL'Y 173, 194 (2005) (adding that national test scores should actually increase after standardized testing is implemented). Moore explains that the preparation for the state administered exams fails to prepare students sufficiently for most national exams, and some studies indicate that SAT and ACT scores have actually decreased for students tested under the NCLBA. *Id.*

vanced placement tests do not reflect similar results.[162] In fact, as recently as June 2006, reports indicate discrepancies between the National Assessment of Education Progress (NAEP) and state assessment results for each racial group.[163] More specifically, disparity for Blacks as well as Hispanics is larger than any other minority group, revealing that Black and Hispanic students continue to consistently struggle to meet NAEP standards.[164] "Students should perform well on both tests because they cover the same subjects. . . . [However,] the higher the stakes of the assessment, the higher the discrepancies in the results."[165] Within the past five years of the NCLBA's implementation, there remains no evidence of

---

162. Helen A. Moore, *Testing Whiteness: No Child or School Left Behind?*, 18 WASH. U. J. L. & POL'Y 173, 194 (2005) (suggesting students are learning only the subject matter of the standardized tests rather than other important topics). For example, Chicago and Texas schools reconfigured curriculum material to teach tested subjects rather than poetry, art, music, and foreign language. *Id.*

163. JAEKYUNG LEE, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS 47–49 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_naep_lee.pdf (providing a table analysis of discrepancies between NAEP and state assessment scores with Blacks, Hispanics, and poor students having the largest discrepancies and also showing that the discrepancies "are consistent across grades and in both reading and math."). The National Assessment of Education Progress (NAEP) is an independent national test known as the "nation's report card" that is administered to random samples of students throughout the country, reporting achievement levels in reading and math among racial groups. *Id.* at 12–13.

164. JAEKYUNG LEE, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS 47 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_naep_lee.pdf (concluding that NAEP standards are more challenging than state implemented assessments) "There were discrepancies between the NAEP and state assessments for every racial group; the discrepancy tends to be especially large for Blacks (about 4 times larger) and Hispanics (about 3 times larger) in comparison with Whites and Asians (about 2 times larger)". *Id.*

165. The Civil Rights Project at Harvard University, *Testing the NCLB: Study Shows that NCLB Hasn't Significantly Impacted National Achievement Scores or Narrowed the Racial Gaps*, http://www.civilrightsproject.harvard.edu/news/pressreleases/nclb_report06.php (last visited July 17, 2007) (quoting Jaekyung Lee, professor and author of *Tracking Achievement Gaps and Assessing the Impact of NCLB on the Gaps: An In-Depth Look into National and State Reading and Math Outcome Trends*). After the implementation of the NCLBA, fourth grade NAEP reading scores did not improve and eighth grade NAEP readings scores showed a marked decline. JAEKYUNG LEE, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS 20 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_naep_lee.pdf. On the contrary, NAEP math scores showed improvement in both grade levels. *Id.* Yet, Lee explains that the gains are modest and are not indicative

narrowing the achievement gap between high-performing and low-performing students.

While proof of an achievement gap alone does not reveal discrimination, the possible causal link between the inaccurate use of standardized testing and the receipt of federal funding raises suspicion. As mentioned earlier, existing case law holds that a causal link must exist between desegregation methods and an achievement gap in order to show discrimination.[166] As such, the NCLBA's use of standardized tests to measure accountability disproportionately affects minority students' receipt of federal funding and continues to generate the lingering achievement gap. This link reveals the Act's unequal treatment of minority children and is clearly within the wide range of unequal types of treatment the Civil Rights Act covers. By showing that the NCLBA, a facially neutral practice, causes an unequal effect on a protected group, minority children, a plaintiff can successfully shift a court's focus to the federal government for a legitimate explanation.

In order to rebut a discrimination claim under the Civil Rights Act, the federal government must show that the Act is rationalized by an "educational necessity."[167] On the surface, the phrase "educational necessity" conveys a stringent burden; however, courts apply a broad standard to define educational necessity.[168] To use standardized testing, a school district only needs to show that the testing serves a legitimate educational goal of the institution.[169] A defendant simply must show there is a de-

---

of any change in student achievement because the growth pattern parallels that which existed before the NCLBA. *Id.* at 6.

166. *Little Rock*, 237 F.Supp. 2d at 1037 (explaining a court's need to examine *how much* of an effect desegregation methods have on the achievement gap).

167. Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 876 (2002) (clarifying that educational necessity exists once a defendant shows that the practice serves an educational goal that is legitimate); *see* Leland Ware, Brown's *Uncertain Legacy: High Stakes Testing and the Continuing Achievement Gap*, 35 U. TOL. L. REV. 841, 850 (2004) (explaining that the Department of Education must show the NCLBA has a "substantial legislation justification" by proving its "educational necessity"); *see also* GI Forum Image De Tejas v. Texas Educ. Agency, 87 F.Supp. 2d 667, 679 (W.D. Tex. 2000) (describing a defendant's burden of production to show educational necessity).

168. Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 882 (2002) (describing the *GI Forum* court's analysis of educational necessity as a mere showing that a law must serve a legitimate goal); *see* GI Forum, 87 F.Supp. 2d at 679 (describing educational necessity as a misnomer).

169. *GI Forum*, 87 F.Supp. 2d at 679 (clarifying that a defendant only needs to show a manifest relationship between standardized testing and a legitimate goal). In *GI Forum*, parents challenged "the use of the TAAS test under the Due Process Clause" and the implementation of using the TAAS test as an exit-level test to obtaining high school diplo-

monstrable relationship between standardized testing and classroom instruction.[170] Such arguments have been successful in district courts.[171] However, there is a major distinction between a school district and the federal government meeting this burden. For schools, standardized testing serves an educational necessity because it holds them accountable,[172] especially under the NCLBA. On the other hand, the NCLBA does not serve the same educational necessity for the federal government since it does not hold the federal government accountable for a state's report. While a school district, and even the state, can easily rationalize the use of standardized, "high stakes" testing as serving a legitimate goal,[173] there is not a legitimate explanation for the federal government to reproduce inequality.

As a product of inequality, the NCLBA holds no legitimate explanation. While the Act focuses on an admirable goal, its methodology and social meaning exacerbates decades of inequality.[174] By diverting resources from low-income schools based on standardized testing scores, the Act reinforces social class hierarchies by denying minority children equal access to education.[175] Rather than equalizing funding and access

---

mas. *Id.* at 668. As defendants, the Texas Education Agency, met their burden of production by showing the educational necessity of the TAAS test in ensuring all Texas students received the same learning opportunities. *Id.* at 679.

170. Leland Ware, Brown's *Uncertain Legacy: High Stakes Testing and the Continuing Achievement Gap*, 35 U. TOL. L. REV. 841, 850–51 (2004) (adding that this analysis concentrates on the reliability and validity of standardized tests).

171. *See* GI Forum, 87 F.Supp. 2d at 679 (holding that the use of the TAAS test serves a legitimate educational purpose by effectively measuring a student's academic achievement).

172. *See id.* (explaining school accountability is considered a legitimate goal to establish educational necessity).

173. *See id.* at 681 ("The Court finds that the TEA has shown that the high-stakes use of the TAAS test as a graduation requirement guarantees that students will be motivated to learn the curriculum tested. . . . The use of a standardized test to determine whether those standards are met and as a basis for the awarding of a diploma has a manifest relationship to that goal.").

174. Charles R. Lawrence, *Who Is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 SUFFOLK U. L. REV. 699, 700 (2006) (commenting that the NCLBA focuses primarily on segregated schools and the racial achievement gap). Lawrence compares a recent picture of President Bush with three Black schoolchildren to Jim Crow signs, describing that the racial text of the picture as a celebration of racial segregation. *Id.* at 699–700. Lawrence goes on to explain the NCLBA as a product of conservative agenda, which implements a foreign policy approach to either "bring 'em on" or leave 'em behind. *Id.* at 701.

175. Charles R. Lawrence, *Who Is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 SUFFOLK U. L. REV. 699, 706 (2006) (adding that the Act ignores the underlying reasons for the achievement gap and speaks only of race, maintaining racial boundaries between children). The NCLBA fails to address the "history of segregation, of

to resources, the Act places pressure on states to implement testing schemes in order to hold schools accountable for poor results.[176] Such a strategy unduly burdens schools, especially low-income schools, because it threatens schools with a reduction in federal funding without providing necessary resources to aid children. As such, the Act aids in the reproduction of inequality through its reliance on standardized testing. While standardized tests may be considered to serve a rational objective, the reproduction of inequality under the NCLBA's use of standardized testing as an accountability mechanism is not a legitimate educational objective.

Moreover, in light of the *Brown* decision's significance, the NCLBA's use of standardized testing and its reproduction of inequality calls into question the Act's initial purpose. While *Brown* and the NCLBA share a similar objective of ensuring that every child has access to high-quality education, the NCLBA's use of standardized testing encourages separate but seemingly equal facilities.[177] The NCLBA gives parents the option of removing their children from schools identified as inadequate and placing them in another school within the district.[178] As a result, the NCLBA uses a market-based approach to foster competition among schools to ensure a child's access to a high-quality education.[179] Consequently, this procedure allows parents to separate their children from publicly labeled inadequate schools. Parents interested in their children's education unintentionally perpetuate the separate-but-equal doctrine by transferring

---

inadequate funding, of white flight, [and] of neglect," which plague the educational sector and contribute to the racial achievement gap. *Id.*

176. *Id.* at 708 (pointing out that the choice to change schools is "limited to schools within the same district," and consequently if a school is suffering lack of resources, then fellow schools within that district are also probably suffering).

177. Dan. J. Nichols, Brown v. Board of Education *and the No Child Left Behind Act: Competing Ideologies*, 2005 BYU EDUC. & L.J. 151, 151–52 (2005) (highlighting the ideological tension between the *Brown* decision and the NCLBA). Whether *Brown* held that separate-but-equal facilities are inherently unequal or feelings of inferiority created by segregation violates the Equal Protection Clause remains debated. *Id.* at 165. Under the first rationale, federally imposed segregation violates the Equal Protection Clause because it is inherently unequal. *Id.* Under the second rationale, any federally imposed segregation that generates feelings of inferiority violates the Equal Protection Clause. *Id.* Regardless of the rationale one adopts, the NLCBA is a federal mechanism in which the government encourages segregation and generates feelings of inferiority in schoolchildren. *See id.* at 177.

178. Dan. J. Nichols, Brown v. Board of Education *and the No Child Left Behind Act: Competing Ideologies*, 2005 BYU EDUC. & L.J. 151, 173 (2005) (quoting U.S. Dep't of Educ., Executive Summary of No Child Left Behind, http://www.ed.gov/nclb/overview/intro/execsumm.pdf (last visited July 17, 2007)).

179. *Id.* (explaining that educationally oriented parents act like consumers with school choice).

their children to another school within the district. Rather than directly elevating the quality of education in schools labeled as inadequate, the NCLBA encourages a separation doctrine on the competitive notion that the market will absorb inadequate schools. While schools should be competing for students by elevating their academic criteria, schools labeled as inadequate suffer lower federal funding, which makes achieving AYP tougher. By emphasizing the positive role incentives play in this market-based approach,[180] the NCLBA ignores the damaging sense of inferiority left on a negatively labeled school.[181]

Consequently, the labeling methodology performs a counterproductive role.[182] Once a school is marked as inadequate, the children of that school are also marked as inadequate, damaging the academic ability of students and "job quality of teachers and administrators at those schools."[183] Furthermore, not all parents have the option of removing their children from a school marked as inadequate and transferring them to another school.[184] Many children who attend failing schools are poor, urban minority children, whose parents do not have the means to send their child to another school.[185] In theory, the NCLBA increases a parent's choices; however, in reality many disadvantaged children who attend low-income schools that are unable to meet AYP status do not have a choice to move.[186] Under this market-based approach, not only are low-income schools driven out, but children attending these schools are

180. *Id.* at 176 (highlighting the benefit of incentives in market-based approaches and explaining how "conservatives criticize affirmative action programs for their lack of incentives").

181. *Id.* at 177 (pointing out that students' perceptions of their school, teachers, and themselves is an instrumental component of educational quality).

182. *Id.*

183. Dan. J. Nichols, Brown v. Board of Education *and the No Child Left Behind Act: Competing Ideologies*, 2005 BYU EDUC. & L.J. 151, 177 (2005) (highlighting *Brown's* emphasis on segregation's "the damaging sense of inferiority").

184. *Id.* (concluding that primary and secondary schools are not promising markets).

185. *See* Dan. J. Nichols, Brown v. Board of Education *and the No Child Left Behind Act: Competing Ideologies*, 2005 BYU EDUC. & L.J. 151, 177 (2005) (adding that students in poor school districts have no real market choices). In effect, the market-based approach does not promote interdistrict competition, but instead keeps students without any means in poor quality schools with little hope of improvement due to the lack of additional funding. *Id.* Nichols also points out it is highly unlikely that parents of wealthier students will send their children to struggling schools, revealing that under market forces, a cycle of privilege and opportunity separates children. *Id.* at 179–180.

186. *Id.* at 177 (pointing out that the incentive based approach fails to motivate school districts to compete with one another and instead fosters intradistrict markets). Consequently, a school district may not actually lose any students if parents are simply moving their children within the district. *Id.*

left behind. These children remain part of ostracized schools, perpetuating feelings of inferiority among minority children.[187]

While the NCLBA aims to guarantee high-quality education to every child, it counteracts the *Brown* decision's promise of providing all children with an integrated education.[188] Moreover, the NCLBA's accountability strategy emphasizes the Act's inability to meet its own goal. In fact, the Act's use of standardized testing to ensure its promise is discriminatory under the Civil Rights Act. The use of standardized testing as an accountability mechanism not only treats minority populated schools unequally, but also encourages segregation and feelings of inferiority in minority children. As such, standardized testing plays a discriminatory role under the NCLBA by inadequately measuring the levels of academic performance in public schools and branding low-income schools, usually populated by minority children, as inadequate.

C. *The NCLBA and Misuse of Federal Funds*

The NCLBA authorizes the misuse of federal funds by using federal monies to support the unequal treatment of minority children. The implementation of discriminatory testing procedures increases the vulnerability of low-income schools with large numbers of minority children to lose federal funds. Under the NCLBA, failure to meet AYP entitles the Secretary of Education to withhold twenty-five percent of apportioned federal funds.[189] In the event that the state demonstrates exceptional circumstances preventing a school's compliance with the Act, the Secretary may provide for a one-year extension.[190] However, a school must produce a public report to parents of children attending the school to allow parents the option of removing their children from the school.[191] As

187. *Id.*

188. *Id.* at 171–72 (pointing out that the NCLBA concentrates solely on ensuring every child access to a high-quality education and promotes any effort to racially integrate among or between schools). In fact, the absence is not accidental. *Id.* at 172. Nichols describes the NCLBA as a product of a conservative agenda aimed at using high stakes testing to hold schools accountable and increase academic performance among school children where they live; accordingly, the NCLBA's failure to use racial integration as a means of increasing the quality of education simply reflects their antagonistic attitude towards affirmative action. *See id.* at 172.

189. 20 U.S.C. § 6311(g)(2) (2006).

190. 20 U.S.C. § 6311(c)(1) (2006) (supplying a non-exhaustive list of exceptional circumstances such as natural disasters or unforeseeable declines in financial resources).

191. 20 U.S.C. § 6311(h) (2006) (making states present school report cards in a uniform and understandable format, including bilingual reports). The Act requires states to provide information such as an overall average of its proficiency level, comparisons of actual achievement levels between subgroups, percentages of students not tested, and descriptions of teachers' professional qualifications. *Id.*

such, low-income schools are more likely than other schools to be earmarked as academically deficient, lose students, and consequently, be deprived of federal funding, contrary to the central purpose of the Civil Rights Act. Authorizing the financial management of federal monies set aside for education, the NCLBA places unequal financial burdens on minority schools.

In fact, the NCLBA stands as an under-funded mandate, overwhelming the public education sector.[192] The NCLBA's inability to appropriate enough federal money to public schools places heavy financial burdens on poor schools, struggling to meet AYP.[193] To explain, the requirements involved with creating an accountability scheme are expensive. The costs of developing standardized tests that annually measure student progress varies from $1.9 billion to $3.9 billion, depending on the adopted design of the test.[194] Furthermore, the Act's requirement of hiring and keeping highly qualified teachers remains particularly difficult due to the low salaries, lack of incentives, and unavailability of career paths that a school, especially a high-poverty urban school can offer.[195] Additionally, the costs of remedial and intervention programs to assist academically struggling students only adds to the financial burden placed on the public education sector.[196] While an appropriately funded federal program would ensure equal access to public education for all children, the systematic requirements of the Act financially burdens public schools, particularly low-income schools in dire need of federal funding.[197] As a result, the

192. L. Darnell Weeden, *Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate Under Federal Law?*, 31 T. MARSHALL L. REV. 239, 239 (2006) (describing the NCLBA as an unconstitutional unfunded mandate, violating the Tenth Amendment and Spending Clause of the Constitution).

193. Amanda K. Wingfield, *The No Child Left Behind Act: Legal Challenges as a Underfunded Mandate*, 6 LOY. J. PUB. INT. L. 185, 186 (2005) (explaining the inability of poor schools to reject the NCLBA due to their low property tax base and heavy reliance of federal funds to finance public education). Unable to reject the NCLBA, poor schools must comply with the NCLBA in order to receive federal funding. *Id.* However, their "inadequate funding impedes their compliance with the NCLBA," creating a Catch-22. *Id.*

194. *Id.* at 196 (comparing the costs between purely multiple tests and combination tests made up of short essay and multiple choice). Wingfield relies on data collected from the General Accounting Office (GAO). *Id.*

195. *Id.* at 197 (detailing the major hindrances to meet the NCLBA's highly qualified teacher standards).

196. *See id.* at 198 (projecting a $1.3 billion costs for intervention programs according to an Ohio study).

197. L. Darnell Weeden, *Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate Under Federal Law?*, 31 T. MARSHALL L. REV. 239, 241–42 (2006) (revealing criticism from supporters of the NCLBA, who argue that Congress has shortchanged public schools). "The national discontent with the implementation of the NCLBA has produced nontraditional alliances, such as that formed between conservative state of Utah and the liberal National Education Association ('NEA')." *Id.* at 242.

deprivation of federal funds directly affects the types of resources provided to a school, hindering the achievement ability of students in schools labeled as inferior. While increasing a public school's financial expenses, the NCLBA fails to adequately fund public schools, furthering inequity in public education through the abuse of the allocation of federal funds.

In addition to the discriminatory implementation of standardized tests and financial burdens, the NCLBA encourages states to design questionable accountability systems, furthering the unequal treatment of minority schoolchildren and misuse of federal funds. Under the NCLBA, Congress fails to supply states with a federal mandate that explains how to hold schools accountable,[198] leaving states to create their own achievement standards to track progress.[199] In fact, under the NCLBA, Congress intended to designate states as the creators of their own accountability systems rather than implement a federal mandate.[200] In addition to designing assessment plans to measure student progress, states are responsible for reporting whether a school meets AYP as designed by the state before the school can receive federal funds.[201] Accordingly, schools unable to meet yearly target levels have cleverly devised ways to inflate progression levels in order to receive funds.[202]

Due to the NCLBA's heavy emphasis on decreasing the achievement gap by tracking proficiency levels of subgroups, schools artificially inflate their academic progression by manipulating subgroup sizes. The NCLBA requires states to measure the progress of not only all their students, but also the achievement levels of the following designated subgroups: "economically disadvantaged students; students from major racial and ethnic groups; students with disabilities; and students with limited English speaking skills."[203] However, before a subgroup is separately tracked, the Department of Education allows states to determine the necessary

198. *See id.* at 245 (referring to the plain language of § 7907 of the NCLBA that Congress did not intend to create a federal mandate for public schools to follow).

199. 20 U.S.C. § 6311(a)(1) (2006) (outlining the general requirements of state plans).

200. *See* L. Darnell Weeden, *Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate Under Federal Law?*, 31 T. MARSHALL L. REV. 239, 245 (2006) (clarifying Congress's disinterest in creating federal mandates unfunded by federal money under the NCLBA); *see also* 20 U.S.C. § 7907(a) (2002) (specifying the prohibition of a federal agent to construct state assessment plans).

201. 20 U.S.C. § 6311(b)(2)(B) (2006) (stating that each state shall implement an academic assessment program as well as define adequate yearly progress).

202. *See* Evan Stephenson, *Evading the No Child Left Behind Act: State Strategies and Federal Complicity*, 2006 BYU EDUC. & L.J. 157, 158 (2006) (describing three techniques: balloon scheduling, manipulating minimum number requirements, and confidence intervals states have implemented in order to inflate their students' assessments and avoid sanctions).

203. 20 U.S.C. § 6311(b)(2)(C) (2006).

number of students required for a subgroup.[204] As a result, states have the option of increasing the minimum number of children required for a subgroup to avoid holding certain subgroups individually accountable by assessment levels.[205] Therefore, to exclude a subgroup from being individually identified, a state may increase the minimum number of students required for a subgroup.[206] The larger a subgroup, the less likely a school will fail to meet adequate yearly progress because it may not have enough students to trigger individual subgroup reporting.[207]

Adjusting subgroup sizes for reporting purposes induces the federal government to fund schools that are simply not counting minority students individually. Rather than improving a subgroup's academic capability and effectively decreasing the achievement gap, the NCLBA provides state and federal governments with an inaccurate comparison of students' levels of achievement. Because the failure of *any* subgroup prevents a school from achieving adequate yearly progress, states strategically alter the minimum number of students required for a subgroup to be reported.[208] The NCLBA allows states to determine which students will represent a school's academic achievement level, counteracting the overall goals of the NCLBA and violating the Civil Rights Act. As such, the federal funding of inequity results from the inaccurate reporting methods implemented by schools, perpetuating the federal government to continue to finance discriminatory treatment of minority children.

Moreover, in order to avoid cuts in federal funding, many state school authorities have simply lowered testing standards, permitting the furtherance of inequality with federal resources.[209] In fact, the discrepancies

---

204. *See* Evan Stephenson, *Evading the No Child Left Behind Act: State Strategies and Federal Complicity*, 2006 BYU EDUC. & L.J. 157, 158 (2006) (showing how states can adjust subgroup sizes to avoid reporting subgroup scores individually).

205. *Id.* (showing how a state can evade the federal government's watch over its disadvantaged students).

206. *Id.* at 158–59 (posing hypothetically that Missouri could effectively exclude special education subgroups of twenty-nine or less members from being individually accounted by raising the number of students required for that subgroup to thirty).

207. *Id.* (showing how a large subgroup size requirement will allow some schools to avoid reporting subgroups' scores individually and consequently, bury their subgroups' achievement levels in the school's total averages).

208. *Id.* at 171 (comparing subgroup sizes and likelihood of achieving AYP status among different states). Stephenson notes Washington's and New Jersey's increase of subgroup size for disabled students and limited English-speaking students from thirty to forty and twenty to thirty-five, respectively. *Id.* at 171. If Washington and New Jersey had raised these subgroup levels in 2003, then it would have drastically reduced the number of schools unable to meet adequate yearly progress. *Id.*

209. Gina Austin, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*, 27 T. JEFFERSON L. REV. 337, 342 (2005) (listing logistical problems with the NCLBA).

among states between the NAEP and state standards not only reveal the discriminatory nature of standardized testing, but also indicate the different academic standards between states.[210] In other words, the report by the Harvard Civil Rights Project reveals not only discrepancy levels among racial groups between NAEP results and state standards, but also discrepancy levels among states between NAEP results and state standards.[211] To ensure equal access to education to all children, states should be implementing similar academic standards, and therefore have similar discrepancy levels, if any, between NAEP results and state standards; however, the Harvard Civil Rights Project reports substantial variations among discrepancies between states and NAEP levels, indicating states are designing different assessment goals.[212]

Analyzing the discrepancies among states between NAEP scores and state-implemented standards, the report's statistical data suggests that states are employing different levels of academic assessment.[213] In fact, the direct relationship between a state's assessment levels and the size of its discrepancy with NAEP results shows that states are inflating proficiency levels by "water[ing] down [their] own performance standards in anticipation of massive failure."[214] In other words, schools with high state standards typically are schools with students who are more likely to successfully pass the NAEP; therefore, these states have low discrepancy results.[215] On the other hand, schools with low state standards are typi-

---

210. *See* JAEKYUNG LEE, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS 55 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_naep_lee.pdf (suggesting that the gap between state and NAEP results is attributable to state designed plans under the NCLBA).

211. *See id.* at 11 ("NCLBA's reliance on state assessment as the basis of school accountability is misleading since state-administered tests tend to significantly inflate proficiency levels and proficiency gains as well as deflate racial and social achievement gaps in the states. The higher the stakes of state assessments, the greater the discrepancies between NAEP and state assessment results. These discrepancies were particularly large for poor, Black and Hispanic students.").

212. *Id.* at 35 (outlining reading and math NAEP scores and comparing them to state standards under the NCLBA as well as calculating growth patterns among states).

213. *See id.* at 55.

214. *Id.* at 51 (using correlation analysis to test whether state accountability methods and the size of NAEP discrepancies are statistically related).

215. *See* JAEKYUNG LEE, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS 51–52 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_naep_lee.pdf (highlighting Maine's implementation of high state standards in which eighteen percent satisfied state requirements in comparison to the twenty-nine percent that superseded NAEP math requirements).

cally schools with students who are less likely to pass the NAEP test; resulting in high discrepancy results.[216] The direct relationship between these two variables indicates that the inverse relationship between a state's assessment and the size of its discrepancy between NAEP and state assessment is more than simply correlated. Consequently, the high-stakes testing methodology influences states to adopt standards that enable their students to meet state standards and national AYP rather than genuinely progress academically.[217] The employment of standardized testing not only discriminates against minority children in low-income schools, but also allows a school to design testing procedures that students are more likely capable of passing.[218] Consequently, the NCLBA's reliance on state-designed assessment measures as a basis of accountability not only employs discriminating standardized testing practices, but also misleads the federal government to fund unequal educational programs.

IV. CONCLUSION

In recognition of the growing opposition to the NCLBA, the U.S. Department of Education has allowed states to change their accountability plans to reduce the number of schools identified as "in need of improvement."[219] In late 2003 and early 2004, the Department responded to the public's concerns about the law despite their initial loyalty to strictly enforcing the provisions of the Act.[220] As recently as 2004, the Department designed a series of policies geared toward addressing how disabled and limited-English speaking students are counted in subgroup calcula-

---

216. *See id.* (describing the lower performance standards implemented by Kentucky, in which thirty-one percent of Kentucky students satisfied the Kentucky math requirements in comparison to the twenty-four percent that satisfied the NAEP math requirements). Accordingly, Maine set standards more difficult than NAEP standards, whereas Kentucky implemented lower standards than the NAEP. *Id.*

217. *Id.* at 55 (adding that the implementation of universal NAEP testing standards by all states would create greater alignment in academic goals).

218. *See* Gina Austin, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*, 27 T. JEFFERSON L. REV. 337, 342 (2005) (describing the Texas State Board of Education's method of lowering the number of correct questions a student must answer from twenty-four to twenty out of thirty-six questions). In a more drastic example, Michigan lowered the percentage of students that must pass statewide tests from seventy-five to forty-five percent. *Id.* at 343.

219. GAIL L. SUNDERMAN, THE UNRAVELING OF NO CHILD LEFT BEHIND: HOW NEGOTIATED CHANGES TRANSFORM THE LAW 9 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_unraveling.php (describing the administration's efforts as a temporary solution to the growing concerns among states and schools labeled as inadequate).

220. *Id.* (explaining the Department of Education's refusal to implement immediate changes in the law in order to address initial concerns raised about the law).

tions.[221] Furthermore, in April 2005, the Department took a fresh approach in evaluating state accountability plans.[222] Labeled "Raising Achievement: A New Path for No Child Left Behind," the Department currently requires states to adhere to certain principles when making requests to change their accountability plans.[223] However, the new initiative remains vague and lacks any mention of how the federal government will evaluate changes in state accountability plans or whether students are truly meeting a state plan's requirements.[224] As a result, the use of standardized testing as a progress measurement as well as the implementation of questionable accountability standards continue to remain unaddressed flaws of the NCLBA.

Moreover, state-initiated policy changes continue to affect the implementation of the Act.[225] "Negotiated on a state-by-state basis," changes in individual state accountability plans remain unguided by the lack of a uniform federal standards assessing student progress across states.[226] In fact, the Department continues to fail in providing states with uniform guidelines of the types of changes allowed, information on how a request will be evaluated, or any guarantee that changes in one state will be similarly followed by another state.[227] Consequently, by allowing states to constantly change target levels for subgroups and qualifications for AYP, the federal government continues to provide states with an incentive to alter assessment measurements, especially by subgroup, in order to meet

---

221. *Id.* (adding that the new policies also relaxed the requirements for highly qualified teachers).

222. *Id.* (hoping to alleviate political opposition to the law through implementing minor adjustments).

223. *Id.* ("This new initiative took a different approach than the initial rule changes [of late 2003 and early 2004]").

224. GAIL L. SUNDERMAN, THE UNRAVELING OF NO CHILD LEFT BEHIND: HOW NEGOTIATED CHANGES TRANSFORM THE LAW 9 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_unraveling.php ("It is unclear, however, what would count as evidence or how [the Department of Education] would evaluate whether states met these principles."). The meager efforts by the Department to reevaluate the Act reflect their inability to address the Act's underlying problems, further accentuating the core problems in the Act such as its use of arbitrary guidelines. *Id.* at 10.

225. *Id.* at 10 (revealing that as the Department implemented policy changes, states began taking individual initiatives to improve the Act).

226. *Id.* ("The state initiated amendments were extensive and varied, and included amendments that determined adequate yearly progress (AYP), allowed states to set different targets for different subgroups, and increased the kinds of statistical techniques states could use when calculating AYP, among others. These behind-the-scene agreements further eroded consistency in how the law was being applied across states.").

227. *Id.* ("There was no guidelines on the types of changes states could request, no information on how the requests would be judged, and no guarantees that changes approved in one state would be approved in another.").

AYP and receive federal funding.[228] Although state-initiated efforts reveal an attempt to address problems in the Act, these assorted varieties continue to erode consistency between states, reinforcing the underlying flaws of the Act.[229]

Additionally, the Department's efforts reveal its realization of the ineffectiveness of the Act.[230] In fact, opposition to the Act cuts across political boundaries despite the conservative ideologies heavily reflected in the Act's design.[231] As a result, the Department walks a fine line between remaining loyal to its conservative ideals and also showing some effort to address concerns. Consequently, the political motivation behind addressing concerns about the Act prevents the Department from systematically addressing the underlying flaws of the Act.[232] Problems with state inconsistency in AYP levels, varying accountability methods, and uses of standardized testing remain key features of the Act.[233] Rather than addressing its attention to these key features or supplying financial resources to academically challenged schools to ensure high-quality education to each child, the Department remains politically rooted in supporting the Act as nearly perfect.[234]

---

228. *See id.* ("The allowable statistical techniques states have adopted add complexity to the NCLBA accountability system by complicating the meaning of AYP and obscure the ability of states, districts, and schools to show improvements in student performance."). Consequently, the state initiated changes only reduce the number of schools identified as inadequate without addressing ways to raise student achievement. *Id.*

229. *See* GAIL L. SUNDERMAN, THE UNRAVELING OF NO CHILD LEFT BEHIND: HOW NEGOTIATED CHANGES TRANSFORM THE LAW 10 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_unraveling.php (implying that the lack of uniformity between states gives the notion of accountability little meaning). "Accountability now depends on which subgroups are included in the system, how each state calculates adequate yearly progress, and which district, school, or subgroup benefit from the various changes states adopted." *Id.*

230. *Id.* at 9 (highlighting the Department's concession that the Act is not working and lacks consistency).

231. *Id.* (adding that some of the strongest opposition roots within the Republican party).

232. *Id.* at 10.

233. *Id.* (listing other underlying problems such as double counting some students in subgroups, the heavy reliance on statistical averages, meaningless timelines, unrealistic goals, and the implementation of heavy sanctions prevent schools from receiving the necessary resources for improvement).

234. *See* GAIL L. SUNDERMAN, THE UNRAVELING OF NO CHILD LEFT BEHIND: HOW NEGOTIATED CHANGES TRANSFORM THE LAW 52 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_unraveling.php ("Instead of correcting policy errors in the design of the law, the administration has called them the 'bright lines' or core principles of NCLB. . . . [The administration] portends to use these core principles in deciding which states will be given additional flexibility with the NCLB, yet it is far from clear what will count as evidence in meeting these core principles or how this evidence will be used.").

However, a skillfully detailed and calculated argument attacking the current implementation of the NCLBA reveals its violation of the Civil Rights Act due to its endorsement of discrimination with the misuse of federal monies. In fact, other more effectively accurate and less discriminatory methods besides standardized testing can achieve the NCLBA's goal and prevent the misuse of federal funds. As a matter of fact, a claim against the discriminatory use of standardized testing under the NCLBA can succeed by showing "that an equally effective alternative is available to meet the educational goal and would result in less racial disproportionality."[235] Under the NCLBA, children are ensured access to a "fair, equal, and significant opportunity to obtain a high-quality education."[236] However, the heavy emphasis on standardized testing and implementation of ineffective accountability measures to meet this goal are unnecessary when other options are available to meet the NCLBA's central purpose.

Accordingly, a de-emphasis on standardized testing as the sole indicator of a group's progression in conjunction with a more detailed set of federal guidelines to direct states in creating more uniform accountability measures not only ensures a high-quality equal education to all students, but also provides an equally effective alternative to achieving the Act's purpose. If the federal government insists on designing educational plans for the states, then its federal role must remain dedicated to ensuring civil rights objectives.[237] As it stands, the Act's current methodology fails to merge with goals of equality and effectively raise student achievement. The Act employs discriminatory mechanisms to dictate the amount of fu-

---

235. Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 876 (2002) (showing how a plaintiff may prevail in the event the defendant meets his burden of production by showing educational necessity of a discriminatory practice); *see* GI Forum, 87 F. Supp. 2d at 677 (describing the burden shifting analysis for Title VII cases in which the plaintiff must initially show how the implementation of a facially neutral law disproportionately affects minority students, causing the defendant to show the educational necessity of such practice, in which the plaintiff may respond with a showing that other equally effective alternatives exist). In *GI Forum*, parents challenged the implementation of using the TAAS test as an exit-level test to obtaining high school diplomas. *Id.* at 668. Despite the parents' showing of other available alternatives, the Court was not convinced that the parents' suggestions were equally as motivating as the current system. *Id.* at 681.

236. Serin Ngai, *Painting Over the Arts: How the No Child Left Behind Act Fails to Provide Children with a High-Quality Education*, 4 SEATTLE J. FOR SOC. JUST. 657, 658 (2006) (quoting 20 U.S.C.S. § 6301 (2002)).

237. *See* GAIL L. SUNDERMAN, THE UNRAVELING OF NO CHILD LEFT BEHIND: HOW NEGOTIATED CHANGES TRANSFORM THE LAW 53 (Cambridge, MA: The Civil Rights Project at Harvard University 2006), http://www.civilrightsproject.ucla.edu/research/esea/nclb_unraveling.php (recognizing that the changes implemented by the Department raise questions concerning federalism).

ture financial resources a school receives without raising student achievement or providing a means for inadequate schools to improve.

While the Act's main goal of ensuring a high-quality education and decreasing achievement gaps among all classes of students stands as a commonly shared ideal, the controversy surrounding the Act centers upon the Act's implementation. The Act's implementation crosses the line by supporting the use of discriminatory standardized testing measures with federal funds; subsequently, the Act's implementation entirely misses its own prescribed goals by relying on discrimination. To remain dedicated to a united effort to provide all children with an equal public education in light of the *Brown* holding, the core assumptions underlying the Act must be reevaluated. Rather than a "tinkering at the edges," the Act requires a complete reevaluation of the means it uses to more effectively reach its end.[238] Outcries from educators, experts, community leaders, as well as civil rights groups must be addressed by the Department not only to ensure legitimacy in the political process, but also to initiate reform in the Act's implementation in order to improve public schools and student achievement.[239]

238. *Id.* at 54 (calling for a major overhaul of the Act).

239. *Id.* at 10 (encouraging an honest and open debate between parties and groups in order to facilitate more effective policies).