SCHOOL RECONSTITUTION UNDER NO CHILD LEFT BEHIND: WHY SCHOOL OFFICIALS SHOULD THINK TWICE

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The No Child Left Behind Act (the Act or NCLB) was enacted with the laudable aim of improving education through a system of accountability for schools and school districts. The Act provides for a system of escalating punishments for schools that fail to make adequate yearly progress toward the goal of full student proficiency in core subjects. One of the options that districts have for dealing with repeatedly failing schools is reconstitution, in which most or all of a school's staff are replaced. This Comment argues that significant legal liability may fall on those districts that choose reconstitution over NCLB's less harsh provisions. The prospect of arbitrariness or perceived inequity in deciding which schools will face reconstitution, the inherent problems in using existing standardized tests to determine which teachers are retained at struggling schools, and potential conflicts with contracts and collective bargaining agreements all suggest potential legal challenges that school staff and other parties affected by reconstitution could pursue to stop the implementation of reconstitution.

Furthermore, this Comment contends that a number of practical considerations counsel against choosing reconstitution over NCLB's less harsh penalty provisions. In particular, the negative effect that reconstitution is likely to have on the quality of teachers and instruction at failing schools—those that most desperately need high-quality teachers and instructional methods—should give school officials pause before choosing this option. And the choice, in many states, to demand increasing levels of improvement in later years of NCLB reform threatens to expose more and more schools to this negative effect. The loss of legitimacy and morale that would attend the labeling of a large number of schools as failing, and the upheaval caused by reconstitution in so many schools counsel further against reconstitution. While NCLB and the concept of accountability are valid, school officials need to take care that the methods used to hold schools accountable do not end up punishing the children that the Act is intended to help. This Comment warns that reconstitution threatens to do just that.

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INTRODUCTION

The U.S. Department of Education has called the No Child Left Behind Act (the Act or NCLB),[1] signed into law in 2002, "the most important federal education reform in more than three decades."[2] The Act vastly expanded the

1. 20 U.S.C. §§ 6301–7941(2003).

2. William Beaver, *Informed Commentary: Can "No Child Left Behind" Work?*, AM. SECONDARY EDUC., Spring 2004, at 3, 3 (citing Press Release, U.S. Dep't of Educ., The Facts About No Child Left Behind: A Guide to the Future (Nov. 26, 2002), http://www.ed.gov/news/pressreleases/2002/11/fact_sheet.html); *see also* Chester E. Finn, Jr. & Frederick M. Hess, *On Leaving No Child Behind*, PUB. INT., Fall 2004, at 35, 35 (calling the No Child Left Behind Act (the Act or NCLB) "the

federal government's role in regulating education, providing increased funding, school choice, guidance for schools concerning the intersection of schools and religion, and, most importantly, a system of accountability for public schools never attempted on such a large scale.[3] The accountability provisions mandate that, in order to receive federal education funds, states must institute standardized testing, set as a target that every child be proficient (according to state standards) in reading, math, and science by 2013–14, and make "adequate yearly progress" (AYP) towards that goal.[4] Schools that fail to make AYP are subject to an escalating system of punishments, culminating in their reorganization.[5] After four consecutive years of failing to make AYP, schools are forced to devise a plan to restructure the organization of the school, and, after one more year, may be forced to adopt a new curriculum, change administration, or undergo reconstitution.

Now, five years into the life of the Act, schools are becoming eligible to face these most extreme penalties, including reconstitution, in which most or all of a school's staff are replaced.[6] Though controversial, "[a]t its best, reconstitution serves to refocus a school on solidifying commitment to providing an effective education for students through consensus and collaboration between teachers, students, administrators, and parents."[7] Reconstitution serves as the measure of last resort under NCLB, the bogeyman intended to drive schools to reform themselves to make AYP and avoid such drastic intervention.[8]

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most ambitious federal education statute in decades," which serves to "radically overhaul the federal role in education, rewrite the rules, and reassign power").

3. 20 U.S.C. §§ 6301–7941. *See generally* STUART BIEGEL, EDUCATION AND THE LAW 456 (2006) ("[NCLB] represents a giant shift in the role of federal officials with regard to K–12 education governance. While individual states retain substantial autonomy and significant decision-making authority, they no longer have the final say in shaping educational policy across the board."); Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 788–89 (2006) ("The sanctions that flow from failure to make AYP [Adequate Yearly Progress] are markedly more demanding than any type of accountability sanctions that have previously been prescribed by a federal law.").

4. 20 U.S.C. § 6311(b)(2) (2003 & Supp. 2006).

5. 20 U.S.C. § 6316(b)(7)–(8) (Supp. 2006). For a more detailed description of the punishment structure, see Finn & Hess, *supra* note 2, at 39–40; Larry Lashway, *The Mandate: To Help Low-Performing Schools*, TCHR. LIBR., June 2004, at 25, 26; James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 940–41 (2004); Superfine, *supra* note 3, at 787–89.

6. 20 U.S.C. § 6316(b)(8)(B)(ii).

7. Kelly C. Rozmus, *Education Reform and Education Quality: Is Reconstitution the Answer?*, 1998 BYU EDUC. & L.J. 103, 114.

8. *See* Meredith Pierce, *LAUSD Moves Ahead With Superintendent's Plans to Reform Struggling Schools*, CITY NEWS SERVICE, Apr. 11, 2005 (quoting Los Angeles Unified School District (LAUSD) School Board member Julie Kornstein as justifying district reforms because "'No Child Left Behind is breathing down our necks'").

However, significant questions remain about implementing reconstitution. First, the language of NCLB itself leaves a great deal of room for interpretation—for example, while schools may replace staff "relevant to the failure" of the school to make AYP, the Act contains no definition of or standards for defining "relevant."[9] The prospect of arbitrariness or perceived inequity in the interpretation of such provisions may leave schools, school districts, and even state boards of education open to due process and equal protection challenges by affected staff.[10]

Furthermore, schools and districts could face legal challenges on due process, equal protection, and Title VI/§ 1983 grounds if they base corrective action on standardized tests that arguably do not accurately reflect the content taught, contain grading flaws, or are culturally biased. It is also possible that protection of tenure statutes, collective bargaining agreements, and teacher contracts may conflict with the removal of staff under NCLB's reconstitution provisions.

These potential legal challenges are exacerbated by the practical concern that reconstitution may actually run counter to other NCLB provisions, especially the mandate that every classroom in which core subjects are taught has a "highly qualified" teacher.[11] The experience of schools that have been subject to reconstitution prior to NCLB shows that such schools have great difficulty retaining good teachers. Particularly since those schools that are likely to be labeled underperforming and to be subject to NCLB's penalty provisions have disproportionately large poor and minority student populations, and since such schools typically have less experienced teachers already and more trouble retaining the ones they have, the negative effect on recruitment, retention, and morale of high-quality teachers makes reconstitution a great concern.

Other policy concerns regarding reconstitution include (1) the need for "carrots" to go along with the measure's "sticks"; (2) the current lack of necessary analyses of which teachers are effective; (3) the impact that such a strong emphasis on standardized testing has on educational quality; and (4) the common practice of balloon mortgage–type schedules of AYP targets that many states have established. Commentators have expressed the concern that the requirement of greater gains in student achievement in the later years of these plans has set up numerous schools for failure and

9. 20 U.S.C. § 6316(b)(7)(C)(iv); *id.* § 6316(b)(8)(B)(ii).

10. *See infra* Part II.

11. NCLB refers repeatedly to the need for "highly qualified teachers." *See, e.g.*, 20 U.S.C. §§ 6311(h)(1)(C)(viii), 6314(b)(1)(C), 6314(b)(1)(E), 6314(c)(1)(E), 6491(v), 6601(a)(1).

corrective action. If this is true, all of the other concerns about NCLB and its mandated corrective actions will be exacerbated in coming years as a vast number of public schools are labeled underperforming.

While commentators have separately raised many of these policy concerns, no scholar has comprehensively examined the potential legal challenges to reconstitution under NCLB, and no article has examined together the legal and policy issues that widespread implementation of NCLB's penalty provisions would raise. This Comment seeks to fill that gap.

Part I of this Comment examines the history of reconstitution prior to NCLB and some early legal challenges to those reconstitution efforts. It then briefly summarizes NCLB's corrective actions and the few legal challenges to the Act that have appeared so far. Part II sets out the potential legal challenges to the Act, arguing that significant due process difficulties are inherent in the vague language of the Act; that equal protection and Title VI challenges are possible and could be successful based on the likely discriminatory impact of reconstitution; and that teacher tenure and collective bargaining agreements also raise potential conflicts with corrective action. Part III then sets out the various policy issues raised by reconstitution, arguing that reconstitution risks seriously demoralizing teachers, resulting in a negative impact on teacher recruiting and retention. Because reconstitution is likely to occur in schools that most desperately need better teachers, such drastic measures should be a very rare last resort, implemented only in carefully spelled out circumstances with procedural due process protections in place and "carrots" to help negate the negative impact of the Act's "sticks."

I. HISTORY OF LEGAL CHALLENGES TO RECONSTITUTION AND NCLB

A. Reconstitution Prior to NCLB

In 1982, in response to a lawsuit filed by the National Association for the Advancement of Colored People (NAACP), a consent decree was reached requiring the desegregation of the San Francisco Unified School District. The decree explicitly provided for the reconstitution of underachieving schools as a means to achieve the twin goals of integration and academic excellence

for all students in the district.[12] In the first year of the plan, four schools were completely overhauled—all staff were "vacated" and new staff were hired; instructional materials were updated; "Philosophical Tenets" were adopted; and additional resources were provided, among other reforms.[13] In subsequent years, additional schools were reconstituted, using various combinations of the methods used for the original four schools.[14]

Though some stakeholders felt that these actions led to improvement in the affected schools,[15] not all parties were pleased. Teachers, in particular, frequently objected to such drastic measures.[16] In San Francisco, "years of opposition to reconstitution" by the local teacher's union led to negotiations resulting in "modifications . . . aimed at preventing the overhaul of school staff that is the signature of reconstitution."[17] As a result, no new district schools were reconstituted after 1997.

In the years following San Francisco's experiment, school districts in other cities began to see reconstitution as a method for achieving sweeping education reform.[18] In places ranging from Maryland to Wisconsin and Oakland to Philadelphia, school districts decided to hire "new personnel who [were] committed to the objectives of education reform set out for that particular district."[19] In Chicago, for example, schools that were labeled "in

12. Rozmus, *supra* note 7, at 112. *See generally* STUART BIEGEL, SAN FRANCISCO UNIFIED SCHOOL DISTRICT DESEGREGATION: REPORT NO. 14 1996–1997, at 90–107 (1997) [hereinafter SFUSD 1997 REPORT], *available at* http://www.gseis.ucla.edu/courses/edlaw/sfrept14.pdf.

13. Rozmus, *supra* note 7, at 112–114.

14. Rozmus notes that the original "Phase I" reconstitutions met with "mixed success," while subsequent schools faced reconstitution, "but did not receive specially tailored plans for guidance nor the same level of funding as Phase I schools." *Id.* at 116–17. She recounts how the court-appointed committee of experts who evaluated the implementation of the consent decree "urged the district to provide reconstituted schools with the same support and resources Phase I schools received." *Id.* at 17. In all, sixteen San Francisco Unified School District (SFUSD) schools were reconstituted from 1982 to 1997. STUART BIEGEL, SAN FRANCISCO UNIFIED SCHOOL DISTRICT DESEGREGATION: REPORT NO. 16 1998–1999, at X.G n.104 (1999), [hereinafter SFUSD 1999 REPORT], *available at* http://www.gseis.ucla.edu/courses/edlaw/sfrept16.htm (follow "HTML File #4" hyperlink).

15. *See, e.g.*, SFUSD 1997 REPORT, *supra* note 12, at 96, 98, 101 (recounting the positive reports of administrators, principals, and parents in the wake of SFUSD reconstitution efforts).

16. *See, e.g.*, *id.* at 100 (quoting a teacher at one reconstituted school calling the reconstitution process "the most demoralizing, heartbreaking experience of his life"); Rozmus, *supra* note 7, at 103 ("Reconstitution is a euphemism for blaming teachers for low performance." (citing Peter Schmidt, *Rojas Seeks to "Reconstitute" 3 Underachieving S.F. Schools*, EDUC. WK. ON WEB, Feb. 23, 1994)); *see also* SFUSD 1999 REPORT, *supra* note 14, at X.G.1 (reporting that reconstitution was being phased out as a remedy, in part because of resistance from teachers and parents).

17. SFUSD 1999 REPORT, *supra* note 14, at X.G.1.

18. SFUSD 1997 REPORT, *supra* note 12, at 90 & n.106; Rozmus, *supra* note 7, at 129–33.

19. Rozmus, *supra* note 7, at 104.

educational crisis . . . face[d] complete employee reassignments without any hearings, evaluations, or terminations."[20]

1. Legal Challenges

In Maryland, a 1993 state law provided that when a school failed to meet all standards at a level of satisfactory or better in key student performance areas, the state board of education could "require the overall program and management of a school to be placed under the direct control of the local school board"[21] (an early example of reconstitution). When the state board entered into a contract with a third party to operate and manage three public Baltimore elementary schools, the teacher's union sought a declaratory judgment and injunction alleging that the board lacked the statutory authority to do so.[22] The state appellate court affirmed a lower court ruling that, even if there had been no original specific authority for the hiring of a third party, later legislative actions had ratified the Board's actions.[23] The union did not, however, raise any legal issues about the constitutionality of the underlying law itself or its implementation.

In Milwaukee in 1995, the school superintendent attempted to implement a reconstitution plan similar to that of San Francisco, citing as authority a state law authorizing superintendents to override normal procedure and reconstruct public school facilities.[24] In response, the local teachers' union filed for and received an injunction against the State of Wisconsin prohibiting implementation of the plan because it would have imposed involuntary teacher transfers in violation of their contracts and collective bargaining agreements, particularly their seniority rights.[25] A similar

20. *Id.* at 130–31.

21. Balt. Teachers Union v. Md. State Bd. of Educ., 840 A.2d 728, 730 (Md. 2004).

22. The union argued that the 1993 law only authorized local school board control, not the hiring of a third party. *Id.* at 731.

23. *Id.* at 733. The court held that legislation enacted in 1997, 1999, and 2000—after the state board had entered into the contract at issue—all "demonstrate[ ] the General Assembly's awareness and approval that the State Board would be entering into contracts with private vendors in accordance with the reconstitution regulations." *Id.* at 735.

24. Alan J. Borsuk, *A Breather: MPS Reforms Proceed Slowly*, MILWAUKEE J. SENTINEL, June 2, 1996, at A1. The plan was similar to that of San Francisco in that "the entire staff [was] dismissed, or reassigned, the curriculum [was] revamped, but the students remain[ed] the same." Rozmus, *supra* note 7, at 132.

25. *See* Borsuk, *supra* note 24, at A1; Curtis Lawrence, *MPS 'Closings' Blocked*, MILWAUKEE J. SENTINEL, Mar. 9, 1996, at A1.

legal challenge based on contracts and collective bargaining agreements took place when a Philadelphia school district proposed reconstitution.[26]

Other than these skirmishes concerning issues of statutory authority and implementation, however, no affected teachers, administrators, or staff members seem to have raised substantive legal challenges to local reconstitution efforts in the period leading up to the passage of NCLB.

B. NCLB "Corrective Actions" and Reconstitution

NCLB was passed by a bipartisan Congress[27] and signed into law in January 2002.[28] In response to the widely perceived failure of public education[29] and the wide achievement gaps between different racial[30] and socioeconomic groups,[31] the Act strove "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."[32]

The Act's major emphasis is on standardized testing and the requirement that each state (and, by extension, each school district and each school) bring all students up to the required level of proficiency in math and English by 2014.[33] This is to be accomplished by the tabulation of

26. *See* Rozmus, *supra* note 7, at 133–34, 134 n.155. In Nashville, the school district sought more teacher input and compromised with the teachers' union in scrapping its prior reconstitution plan in favor of a modified approach, at least in part to avoid such lawsuits. *See id.* at 143. This program "may still close failing schools, [but] more stakeholders have input and more support services are available than under the former plan." *Id.* This type of collaboration may be needed for reconstitution to be successful, given the potential for lawsuits based on breach of contract and collective bargaining agreements. *See infra* Part II.E.

27. *See, e.g.*, BIEGEL, *supra* note 3, at 456 (calling NCLB a "wide-ranging, bipartisan statutory framework").

28. 20 U.S.C. § 6301–7941 (2003). The No Child Left Behind Act is the short title for the reauthorization of the Elementary and Secondary Education Act (ESEA), first passed in 1965.

29. *See, e.g.*, C. Joy Farmer, Note, *The No Child Left Behind Act: Will It Produce a New Breed of School Financing Litigation?*, 38 COLUM. J.L. & SOC. PROBS. 443, 443–44 (2005).

30. *See* Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 245 (2004) ("In passing NCLB, a bipartisan Congress added explicitly race-conscious accountability requirements to Title I in order to redress severe racial disparities in educational achievement.").

31. *See* Losen, *supra* note 30, at 244 ("NCLB provides the largest single source of federal education funding targeted to help the states meet the needs of socioeconomically disadvantaged students."); Press Release, The White House, Press Conference with President George W. Bush and Education Secretary Rod Paige to Introduce the President's Education Program (Jan. 23, 2001), https://www.whitehouse.gov/news/releases/2001/01/20010123-2.html ("We must confront the scandal of illiteracy in America, seen most clearly in high-poverty schools, where nearly 70 percent of fourth graders are unable to read at a basic level.").

32. 20 U.S.C. § 6301.

33. *Id.* § 6311(b)(2)(F).

standardized test scores, which are used to determine whether or not schools are making AYP toward full student proficiency.[34] Those schools that fail to make AYP for two or more consecutive years are subject to a series of escalating penalty provisions, or "corrective actions."[35] The most drastic of these, coming after five years of failure to make AYP, is the "restructuring" or "reconstitution" of the offending school.[36] This requires the local educational agency to either reopen the school as a charter school, engage a private management company to operate the school, turn the operation of the school over to the state educational agency, replace "all or most of the school staff . . . who are relevant to the failure to make adequate yearly progress," or undertake any other "major restructuring of the school's governance arrangement that makes fundamental reforms, such as significant changes in the school's staffing and governance."[37]

As of yet, few schools have become subject to NCLB's reconstitution provisions.[38] In those states with schools that have reached the final stage of sanctions (in many instances because of accountability plans that predate NCLB's enactment and therefore have accelerated timetables for sanctions), most school districts have chosen not to undertake wholesale reconstitution or external takeover, but instead have opted for less intrusive methods.[39]

34. *Id.* § 6311(b)(2)(C). This section of the Act also requires that defined subpopulations, based on race and economic status, make AYP as well, and calls for accountability actions based on these subpopulations. This Comment addresses accountability provisions and corrective actions uniformly, distinguishing those based on subpopulations only where necessary. For the most part, the legal and policy issues resulting from reconstitution are the same regardless of whether the impetus for reconstitution is the failure of the entire school or of one subpopulation to make AYP.

35. 20 U.S.C. § 6316(b) (Supp. 2006). For a good concise overview of the penalty provisions, see Finn & Hess, *supra* note 2.

36. 20 U.S.C. § 6316(b)(8).

37. *Id.* For the purposes of this Comment, reconstitution refers to any of the above options if they include reorganization of the school administration, dismissal of teachers, or any other measures affecting the employment status of teachers, administrators, or other staff.

38. *See also* CHRISTOPHER A. TRACEY ET AL., THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., CHANGING NCLB DISTRICT ACCOUNTABILITY STANDARDS: IMPLICATIONS FOR RACIAL EQUALITY 7 (2005), *available at* http://www.civilrightsproject.harvard.edu/research/esea/NCLB_District_%20Report.pdf (writing that most states identified school districts for sanctioning for the first time during the 2004–05 school year). This may reflect the fact that districts were given a chance to bring schools up to speed before they began facing punishment.

39. *States Reluctant to Take Over Struggling Schools*, YOUR SCH. & L., Sept. 8, 2004, *available at* http://www.lexis.com (search for article title within "Law Reviews, CLE, Legal Journals & Periodicals, Combined" source, which can be accessed within the "Secondary Legal" tab on the "Sources" page). For example, in Georgia, the state education agency has assigned improvement specialists to its fifty-one schools facing reconstitution; in Michigan, principals have been replaced, but teachers are being retrained and professional development is being "overhauled." *Id.* As of September 2004, there were thirteen states with schools that faced reconstitution. *Id.* On the other hand, there appears to be some

Nevertheless, these options continue to loom on the horizon for schools and districts that continue to fail to meet AYP requirements. And, given the prospect for an ever greater number of schools being designated for corrective action in the future,[40] it is likely that at least some local educational agencies will opt for some of the more extreme measures.

A handful of legal challenges to NCLB accountability provisions have already begun to make their way through the courts, with varying results. In one unsuccessful challenge, *Kegerreis v. United States*,[41] a teacher tried to sue the U.S. government, seeking a ruling that the Act is unconstitutional.[42] Finding that sovereign immunity preempted the suit, the court dismissed the case.[43]

In *Reading I*,[44] the Reading School District appealed the Pennsylvania Department of Education's decision to identify thirteen schools as failing to make AYP and to designate them for "School Improvement I."[45] The trial court affirmed the Department's ruling that native language testing was not required under the law.[46] The court also held that "[t]he adequacy of the Department's technical assistance does not affect whether the District's schools were identified correctly as in need of improvement."[47]

After *Reading I* was decided, the Pennsylvania Department of Education set up a Bureau of Assessment and Accountability to coordinate determinations of schools' failure to make AYP, and a procedure for appealing the Bureau's decisions to the Department. When the Bureau designated six

momentum in favor of cities taking over school districts, a form of overhaul somewhat akin to reconstitution. *See* Joel Rubin & Richard Fausset, *Mayor Talks Tough to Push School Takeover*, L.A. TIMES, Nov. 21, 2005, at A1 (discussing newly elected Mayor Villaraigosa's proposal to take over management of LAUSD in light of similar moves by mayors in New York and Chicago).

40. *See infra* Part III.D.1 (arguing that many states have set up plans by which many more schools will be labeled as failing to make AYP in coming years, thus making many more schools eligible for corrective action); TRACEY ET AL., *supra* note 38, at 9 (arguing that NCLB requires "schools and districts to make test score gains at a rate that ha[s] never been achieved on a large scale").

41. No. 03-2232-KHV, 2003 U.S. Dist. LEXIS 18012 (D. Kan. Oct. 9, 2003).

42. *Id.* at *1.

43. *Id.* at *4, *9.

44. Reading Sch. Dist. v. Dep't of Educ., 855 A.2d 166 (Pa. Commw. Ct. 2004).

45. *Id.*

46. *Id.* at 169, 172.

47. *Id.* at 171. The district had argued that its schools should be removed from the failing list because the Department of Education failed to provide it with "necessary, adequate technical assistance" required under NCLB. Such assistance includes "assistance in analyzing assessment data, identifying and addressing problems in instruction, identifying and implementing professional development, instructional strategies, and assistance in analyzing and revising the school's budget so that school resources can be more effectively allocated." *Id.* at 170–71 (citing 20 U.S.C. § 6316(b)(4)(B) (2003)).

schools in the Reading School District and the district itself as failing to achieve AYP the following year, the district appealed that determination to the Department of Education.[48] Pursuant to a new policy restricting appeals to certain narrow situations, the Department dismissed the appeal.[49] The district filed suit contesting the policy. Finding that the state's constitution "guarantees the right of appeal from an administrative agency decision," the court held that the policy's limit on the right to appeal the schools' designation as failing was a clear violation of the district's due process rights.[50] This seems to be the only substantial victory that teachers or other school officials have won in any lawsuit challenging NCLB.

The other major issue that courts have settled relating to the Act is the question of who can enforce its provisions. In 2003, the U.S. District Court for the Southern District of New York dismissed the claim of a parents' group that had sued the New York City Department of Education for not complying with the Act's requirement that parents be notified of the option to transfer their children out of schools designated as failing.[51] Citing precedent holding that Congress must give individuals a cause of action "in clear and unambiguous terms," the court held that there is no individual cause of action under NCLB.[52]

This opinion was echoed by the D.C. Circuit in 2005. The court upheld the lower court's dismissal of claims brought by private organizations and individuals against the U.S. Department of Education. The claims had challenged the composition of a negotiated rulemaking committee assembled by the Department to propose regulations as required by NCLB.

48. Reading Sch. Dist. v. Dep't of Educ., 875 A.2d 1218, 1219 (Pa. Commw. Ct. 2005), *appeal granted* Reading Sch. Dist. v. Dep't of Educ., 889 A. 2d 1219 (Pa. 2005) ("Reading II").

49. *Id.* at 1219–20. The Department's policy allowed appeals only on the basis that "1) the data upon which the Department made the determination were incorrect; 2) significant growth has been made toward meeting the goals of [NCLB]; or 3) an unforeseen circumstance beyond a district's control prevented it from achieving AYP." *Id.*

50. *Id.* at 1221–22.

51. Ass'n of Cmty. Orgs. for Reform Now v. N.Y. City Dep't of Educ., 269 F. Supp. 2d 338, 342, 347 (S.D.N.Y. 2003).

52. *Id.* at 344 (citing Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002)); *see also* Losen, *supra* note 30, at 248 (writing that there is likely no private cause of action to force a particular remedial structure); *cf.* Amy M. Reichbach, Note, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. REV. 667, 703 (2004) (arguing that "it is essential that parents of children attending . . . failing schools explore their options for private enforcement" of NCLB and arguing that the "most promising theory for enforcement of NCLB is *third-party beneficiary* theory," described in detail) (emphasis added).

The court held that the plaintiffs lacked standing since NCLB did not clearly create procedural rights to a private cause of action.[53]

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Considering the potentially seismic impact of NCLB on schools and school districts, this is a relatively small amount of litigation. Apart from the largely procedural questions decided in *Kegerreis*, the *Reading* cases, and the private cause of action decisions, courts have otherwise been silent on the impact of NCLB's corrective action provisions. Part II of this Comment provides an overview of potential legal challenges that courts may soon be forced to consider and analyzes the potential success of those claims.

II. POTENTIAL LEGAL CHALLENGES TO NCLB ACCOUNTABILITY PROVISIONS

A. Procedural Due Process

NCLB provides that after a school fails to make AYP for five consecutive years, the local school district must do one of the following: (1) Close the school and reopen it as a charter school; (2) cede control to the state or a private management company; (3) replace all staff relevant to the failure of the school to make AYP; or (4) undertake "[a]ny other major restructuring of the school's governance arrangement that make fundamental reforms."[54] Even before this, after two years of consecutive failure, districts may "[r]eplace the school staff who are relevant to the failure to make [AYP]."[55] In traditional reconstitution, teachers are all relieved of their duties and must reapply for positions at the school.[56] These actions, as well as the

53. Ctr. for Law & Educ. v. Dep't of Educ., 396 F.3d 1152, 1157 (D.C. Cir. 2005). This decision, however, also rested on the plaintiffs' inability to show injury or causation from the makeup of the committee. *Id.* at 1160–61; *see also* Fresh Start Acad. v. Toledo Bd. of Educ., 363 F. Supp. 2d 910, 916 (N.D. Ohio 2005) (holding that nothing in NCLB confers a benefit or entitlement upon an individual, and thus no private cause of action existed).

Note, however, that some have argued that it may yet be possible for courts to find a private cause of action in NCLB. *See, e.g.*, Reichbach, *supra* note 52.

54. 20 U.S.C. § 6316(b)(8)(B) (Supp. 2006).

55. *Id.* § 6316(b)(7)(C).

56. In most cases, tenured teachers that are not rehired at the reconstituted school are assigned to other district schools because of union collective bargaining agreements, tenure statutes, or other regulations that guarantee tenured teacher employment. *See, e.g.*, SFUSD 1999 REPORT, *supra* note 14, at X.G.1; SFUSD 1997 REPORT, *supra* note 10, at 91.

wide range of latitude afforded by those provisions, may potentially raise procedural due process concerns.

In order to establish a violation of procedural due process, teachers and staff would first need to prove the existence of a protected property or liberty interest.[57] In *Board of Regents v. Roth*,[58] the U.S. Supreme Court held that the Fourteenth Amendment does not require an opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract, unless he could show that the nonrenewal deprived him of an interest in liberty, or that he had a property interest in continued employment, despite the lack of tenure or a formal contract.[59] At the same time, the Court held in *Perry v. Sindermann*[60] that a college professor who was dismissed had the right to prove that the school had a de facto tenure policy in order to establish a protected interest.[61] Taken together, these cases indicate that provisional or nontenured teachers will be unlikely to show that they have a protected interest in their employment, unless they can show that there is some sort of de facto tenure or other policy that creates such an interest.[62] On the other hand, teachers can develop property interests in their jobs through tenure or unexpired contracts.[63] Thus, school districts would be required to comport with due process in the dismissal of any tenured teachers (actual or de facto) or of any teacher under current contract.

In reality, though, most reconstitution plans deployed so far have called for the continuing employment of all tenured teachers somewhere in the district, though at other locations if they do not reapply for or are not accepted back at the reconstituted school.[64] In such cases, significant precedent suggests that no protected interests are implicated because teachers have no right to

57. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569 (1972) ("When protected interests are implicated, the right to some kind of prior hearing is paramount.").

58. 408 U.S. 564.

59. *Id.* at 578.

60. 408 U.S. 593 (1972).

61. *Id.* at 598.

62. This might be especially important in states like Iowa that do not have teacher tenure statutes. It may be that in such states, long-term teachers may succeed in establishing that there is a de facto tenure policy. However, the Eight Circuit held, in a case brought by a dismissed Iowa teacher, that "in the absence of a tenure statute a local school board has the right to decline to employ or to re-employ any teacher for any reason or for no reason as long as such a decision is not violative of a specific constitutional right." Scheelhaase v. Woodbury Cent. Cmty. Sch. Dist., 488 F.2d 237, 242 (8th Cir. 1973).

63. CHARLES J. RUSSO, REUTTER'S THE LAW OF PUBLIC EDUCATION 661 (6th ed. 2006).

64. *See, e.g.*, SFUSD 1997 REPORT, *supra* note 12, at 91 (reporting that, under San Francisco's reconstitution plan, "[t]eachers and administrators may apply for their former job, and in some cases they are rehired. Tenured educators are guaranteed a teaching position somewhere in the district").

an assignment in a particular classroom or a particular school.[65] In *Thomas v. Smith*,[66] the Fifth Circuit examined the claim of a teacher and coach who was transferred to another school within the district and stripped of his coaching duties.[67] Holding that the plaintiff had "presented neither a viable property interest claim nor a liberty interest claim," the court affirmed the lower court's dismissal of the case.[68] The court held that "reassignment to different schools and different duties . . . did not infringe any secured property interest"[69] and that "[t]he internal transfer of an employee, unless it constitutes such a change of status as to be regarded essentially as a loss of employment, does not provide the additional loss of a tangible interest necessary to give rise to a liberty interest."[70] As such, it seems clear that any teacher or staff member who is offered a job in a similar position at another school will be unable to claim a protected interest requiring a hearing under the Due Process Clause.

However, it is possible that some smaller districts may not have positions in other schools for all teachers who lose their positions through reconstitution.[71] In those circumstances, such districts are likely to opt to retain all protected teachers and choose other corrective actions (such as turning the school into a charter school or allowing state intervention). If the districts instead choose reconstitution and terminate tenured teachers or nontenured teachers who can meet the *Sindermann* test, those teachers will have valid property interests at stake and will be able to

65. Leithliter v. Bd. of Trs. of Lancaster Sch. Dist., 91 Cal. Rptr. 215, 218–19 (Ct. App. 1970) (holding that assignments within the scope of a teacher's certificate are up to the discretion of the school board); Matthews v. Bd. of Educ., 18 Cal. Rptr. 101, 105 (Ct. App. 1962); Maupin v. Indep. Sch. Dist. No. 26, 632 P.2d 396, 399 (Okla. 1981); RUSSO, *supra* note 63, at 579.

66. 897 F.2d 154 (5th Cir. 1989).

67. *Id.* at 154–55.

68. *Id.* at 156.

69. *Id.* at 155–56.

70. *Id.* at 156.

71. Furthermore, it is unclear whether or not the reassignment of a teacher that is dismissed from one failing school to another failing school would satisfy the dictates of NCLB's definition of corrective action. 20 U.S.C. § 6316(b)(7) (Supp. 2006) ("[T]he term 'corrective action' means action . . . that is designed to increase substantially the likelihood that each group of students described in . . . this title enrolled in the school identified for corrective action will meet or exceed the State's proficient levels of achievement on the State academic assessments . . . ."). This is a real possibility in districts where significant numbers of schools will potentially be labeled as failing and face reconstitution at or about the same time. If a teacher has been labeled as relevant to the failure of one school to make AYP, transferring that teacher to another failing school would certainly seem to go against the intent of NCLB. This may be another pressure that leads either to the choice of less intrusive forms of restructuring or to the decision to dismiss outright those teachers who are relevant to the school's failure. It is in the latter situation that due process concerns would likely be implicated.

demand procedural due process protections. These protections include, at a minimum, notice and a hearing at which the teacher has the "chance to address the charges that they face."[72] The teacher must have been given notice of the charges in advance, and the charges must be specific enough for the teacher to be able to prepare a response.[73] In such circumstances, it is unclear what evidence a school district would be able to muster to show that the teacher was relevant to the failure of the school to make AYP. Dismissed teachers may be able to argue that such a test itself is vague and thus does not give adequate notice.[74]

Regardless of the contents of the hearing, it is clear that dismissed teachers who could show a protected interest would have a due process claim if no such hearing were given. In such cases, it is unclear what remedy would be awarded, though at least some teachers would likely seek reinstatement. Such pressures may in fact simply lead districts to abandon the more harsh forms of restructuring in favor of the less intrusive remedial structures.

B. Substantive Due Process

The removal of teachers from their positions may also implicate substantive due process concerns. Here, as with procedural due process, plaintiffs would need to show either a legitimate property or liberty interest. While any teacher who is reassigned to a similar position at a different school in the district would not be able to show a property interest (for the same reasons as given above), all people have a liberty interest in being free from actions that are arbitrary and capricious.[75] Therefore, teachers removed from their positions through reconstitution could potentially bring claims of arbitrary state action against the districts based on the decision to remove those teachers.

One potential avenue for arguing arbitrariness would be to attack the procedures by which the school district decides which teachers are to be

72. RUSSO, *supra* note 63, at 662.

73. *See, e.g.*, Blackburn v. Bd. of Educ., 564 S.W.2d 35 (Ky. Ct. App. 1978) (holding that a notice indicating that the teacher was "inefficen[t] in the classroom" was insufficiently specific).

74. *See also* Scheelhaase v. Woodbury Cent. Cmty. Sch. Dist., 488 F.2d 237, 245 (8th Cir. 1973) (Bright, J., concurring) (writing that the court had "no disagreement" with the district court's finding that "[a] teacher's professional competence cannot be determined solely on the basis of her students' achievement" on standardized tests). Teachers could point to this language to argue against the inclusion of or reliance on test scores in determining which teachers are relevant to the school's failure.

75. Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (writing that the U.S. Constitution, specifically the Due Process Clause, is a "bulwark[ ] . . . against arbitrary legislation" (quoting Hurtado v. California, 110 U.S. 516, 532 (1884))).

removed from the school. In most individual actions, teachers could argue that district authorities lack the necessary information to make an informed decision. In one case of reconstitution prior to NCLB, the San Francisco Unified School District decided to reconstitute Aptos Middle School. The district put in place a new principal and a team that took an entire year to evaluate the school staff and curriculum in order to decide who and what were effective and should be retained.[76] Such lengthy analysis, however, might be impossible under the timeline of NCLB corrective actions, and most districts likely lack the resources to conduct such thorough analysis. Rather, districts are likely to receive testing results toward the end of the school year (or later) and need to reconstitute the school by the start of the next school year. Districts are likely to be pressed into using student test scores and administrative evaluations of teachers to decide which teachers to retain and which to dismiss. Teachers could attack this as an insufficient basis on which to determine who is relevant to the failure of the school. Absent an opportunity for significant observation like that done in the case of Aptos Middle School, a decision based on test scores and administrative evaluations is likely to be highly arbitrary and perhaps capricious, involving factors such as popularity, administrative approval, and connections. In such cases, it is probable that teachers could raise valid claims that such procedures end up being wholly inaccurate and arbitrary.

Teachers could also attack the validity of the use of student test scores for the purposes of teacher evaluation in general. In *Scheelhaase v. Woodbury Central Community School District*,[77] the Eighth Circuit dismissed the claim of a nontenured teacher who was not retained for the coming school year based on her students' low test scores.[78] While the court found that no constitutional concerns were implicated, largely because the teacher was not tenured and thus could not show any protected interest, the concurrence wrote that the court had "no disagreement" with the district court's holding that "[a] teacher's professional competence cannot be determined solely on the basis of her students' achievement on [standardized tests], especially where the students maintain normal educational growth rates."[79] This suggests that the use of student test scores in making teacher employment

76. SFUSD 1999 REPORT, *supra* note 14, at X.G.1.

77. 488 F.2d 237.

78. *Id.* at 245. The school seems to have been placed on a sort of primitive form of NCLB-like corrective action whereby teachers could be dismissed if their students failed to improve.

79. *Id.* (Bright, J., concurring). Judge Bright also wrote that "[t]he superintendent, in concluding on his experience that these test results reflected adversely upon the teaching competence of [the plaintiff], may have been erroneous but the conclusion was not an unreasoned one, and that is the test." *Id.*

decisions could be considered capricious in certain situations. Certainly, such use fails to take into account numerous other factors that lead to student achievement and failure.[80] This claim of arbitrariness would be even more sound if the district were to fail to take into account any comparison of current student achievement to student achievement prior to entering the teacher's class, but instead merely looked in the abstract at student performance at the time of the testing.[81]

Even if the use of test scores in general is not found to be arbitrary, an argument could be made that the particular tests used to measure student performance are inadequate measures and that basing teacher retention on those inaccurate measures is thus arbitrary and capricious. In *Debra P. v. Turlington*,[82] students brought a class action challenging the State of Florida's basic proficiency test that students were required to pass in order to receive a diploma.[83] The Fifth Circuit held that the state could not constitutionally deprive students of their diplomas without "proof of the curricular validity of the test."[84] In the absence of such proof, the test would bear no rational relationship to the state's interest in ensuring educational quality. Teachers affected by reconstitution likely could be successful in arguing that, just as the students in *Debra P.* could not be constitutionally deprived of their diplomas without a guarantee of curricular validity, neither may teachers lose their jobs or suffer other deprivations based on unverified tests.[85]

Indeed, the tests that states have implemented to comply with NCLB do appear to lack verifiable curricular validity. External reviewers have been highly critical of current state assessments, finding that there is a "lack of alignment" between state standards (and thus what is

80. *See infra* Part III.C.1.

81. *See* Finn & Hess, *supra* note 2, at 50 (arguing for a "value-added" measure of AYP that measures current student performance against student performance the prior year as a more accurate measure of school effectiveness); Ryan, *supra* note 5, at 978–85 (same); David Nash, Note, *Improving No Child Left Behind: Achieving Excellence and Equity in Partnership With the States*, 55 RUTGERS L. REV. 239, 259–60 (2002) (arguing that the failure to include a "value-added" measure of AYP amounts to an "unfair bias against schools with disproportionate numbers of limited English proficient and/or learning disabled students" who enter school at lower levels of proficiency). These same arguments would be equally valid when applied to an examination of individual teachers' effectiveness via students' test scores. *See infra* Part III.C.2.

82. 644 F.2d 397 (5th Cir. 1981).

83. *Id.* at 400–01.

84. *Id.* at 400.

85. This assumes, of course, that plaintiffs could show a protected interest.

being taught) and what is being tested.[86] Worse, "many states do not have the capacity to implement needed improvements to current state tests, let alone develop a wide array of new federally required tests" that will accurately evaluate students.[87] Rather, most states are likely to use existing (often old) tests developed by national testing companies without specific reference to the actual curriculum being taught in particular districts and without regard for state definitions of proficiency for the purposes of NCLB. Therefore, teachers dismissed at least in part as a result of their students' test scores could argue that, like the plaintiffs in *Debra P.*, their substantive due process rights are violated by the arbitrariness of using a test without established curricular validity.[88]

This argument could be supplemented with the claim that the tests are culturally biased, leading to lower scores for poor or minority students. In *Larry P. v. Riles*,[89] the Ninth Circuit upheld a district court ruling that standardized IQ tests used to determine which children should be designated as mentally retarded were culturally biased and thus invalid.[90] Though the holding *Larry P.* was limited to the facts of the case, the court's reasoning that standardized tests are culturally biased stands as a valid and useful argument. Therefore, teachers dismissed from failing schools with a large population of minority or poor students would have further ammunition for an argument of arbitrariness in the use of student test scores in making retention or dismissal decisions if they could show that the tests are not only poorly aligned with state standards but also fundamentally discriminatory.

The other major avenue for arguing arbitrariness in the decision to retain or dismiss certain staff members and teachers is the vague nature of the statutory language in NCLB. The law itself provides for four possible methods of required restructuring after five years of failure to make AYP, and

86. *See* Lynn Olson, *Balancing Act: Finding the Right Mix*, EDUC. WK., Jan. 11, 2001, at 17 (reporting that states "tend to stress the less demanding knowledge and skills, rather than the more ambitious content"); Nash, *supra* note 81, at 256 n.140 ("Most external reviewers of [state] standards . . . conclude that at least some of [the standards] are not clear or are not challenging . . . ." (quoting INDEP. REVIEW PANEL, IMPROVING THE ODDS: A REPORT ON TITLE I FROM THE INDEPENDENT REVIEW PANEL 11–12 (2001))).

87. Nash, *supra* note 81, at 256; *see also* Superfine, *supra* note 3, at 795 ("[I]t appears that many states lack the funds they need to ensure that they engage in sufficiently valid testing practices—the cost of test development and administration already exceeds NCLB funding in several states . . . .").

88. To date, courts have not yet involved themselves significantly in the question of the validity of current tests. Nash, *supra* note 81, at 263 ("[F]ew state courts have yet taken the step of reviewing state assessment instruments to ensure that they are properly measuring student achievement.").

89. 793 F.2d 969 (9th Cir. 1984).

90. *Id.*

gives districts discretion whether to replace staff relevant to the failure after only two years of failure. A school district decision to forego the Act's less intrusive options and to instead reconstitute a school—resulting in the loss of employment and stigmatization of the school and teachers—may violate the U.S. Constitution's prohibition against arbitrary and capricious action (thus triggering a liberty interest sufficient for a due process claim), unless the district can articulate valid reasons for the decision. Again, judicial evaluation of such a claim would be a particularly fact-specific inquiry; nevertheless, the intrusiveness of a particular method is certainly a consideration that school districts and state educational agencies would need to factor into their analysis before deciding to choose NCLB's most drastic punishments.[91] Districts desiring to avoid litigation would be wise to first consider some of NCLB's other options, or at least have well-articulated motivations for rejecting those other options, before choosing reconstitution.

C. Equal Protection

NCLB accountability measures target schools that fail to make AYP toward the goal of 100 percent student proficiency by the year 2014. Because schools with larger populations of poor or minority students are more likely to have lower levels of proficiency to begin with, the gains in proficiency that are necessary to satisfy AYP are therefore greater for those schools with large populations of poor or minority students. As a result, such schools are much more likely to fail to make the necessary gains, and thus, are more likely to be subject to NCLB's accountability provisions. Furthermore, as discussed below,[92] those schools whose students begin at lower proficiency levels are likely to have a more difficult time raising their proficiency levels because of external factors not addressed in NCLB, thus making it more likely that those schools will continue to fail to make AYP. As a result, schools with large poor or minority populations are more likely to face reconstitution. This disparity could be the basis for a claim that reconstitution as implemented violates the Constitution's equal protection guarantee.

If students were to bring this claim, however, they would need to surmount the hurdle of showing discriminatory impact. While it is

91. How this decision is made is an area ripe for further inquiry. Such an inquiry would need to include analysis of school districts where reconstitution has been chosen, how the decisions were made, why other less intrusive means were not chosen, and whether, in those cases, a legitimate claim of arbitrariness might be brought.

92. *See infra* Part III.C.1.

unclear just yet what the effects of reconstitution will be on individual schools, this Comment argues below[93] that schools undergoing reconstitution are likely to face significant trouble hiring and retaining highly qualified teachers. They are also likely to suffer harm from the psychological impact of the labeling of the school as a failure. It is also possible that schools facing corrective action will suffer negative consequences in school and student morale, leading to lower achievement, disparities in resource allocation, and disparities in classroom instruction. This, however, would require significant factual inquiry in each individual case.[94]

More importantly, because the Act itself is neutral as to race, a showing of discriminatory intent is required to trigger strict scrutiny.[95] This would be very difficult to show. Because the Act itself contains accountability provisions that specifically seek to address the significant lag in achievement level of students of color, and because the Act includes a statement of intent to close "the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers,"[96] such a showing of discriminatory intent is highly unlikely.[97] If discriminatory intent cannot be shown, then no equal protection claim is possible.[98] However, it might be possible to pursue such litigation under state constitutions' equal protection clauses, some of which have been interpreted

93. *See infra* Part III.C.1.

94. Of course, the government will argue not only that there is no disparate impact, but also that any disparate impact that does exist is in fact *positive*. Given that the purpose of NCLB, as evidenced by its statements of intent, is to improve the education of all groups, including protected minorities, *see* 20 U.S.C. § 6301 (2003), the government is sure to argue that if NCLB's corrective actions disproportionately affect minority groups, that is because it is intended to help those groups. Plaintiffs challenging such actions would have to argue that, despite the intention of those that passed the Act, the implementation of reconstitution—as opposed to the other corrective actions authorized by NCLB—in fact ends up negatively impacting the affected groups. It is unclear how a court would evaluate such an argument, though Part III of this Article presents a number of practical reasons why reconstitution would, indeed, have a negative effect on those schools with large populations of poor or minority students that the Act hopes to help. I thank Brady Dewar for raising this argument.

95. Washington v. Davis, 426 U.S. 229, 240 (1976) (holding that equal protection claims under the Constitution must show discriminatory intent on the part of the state actor where the challenged law does not facially discriminate).

96. 20 U.S.C. § 6301(3).

97. It is highly unlikely that a *Gomillion v. Lightfoot* or *Yick Wo v. Hopkins* exception—where intent is inferred from nearly 100 percent discriminatory impact—is possible, given that student populations affected by reconstitution are unlikely to be anywhere near approaching 100 percent minority or poor. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

98. *Davis*, 426 U.S. at 240.

as not requiring any showing of discriminatory intent and embracing a disparate impact cause of action.[99]

If discriminatory intent could be shown or, more likely, is not required (under a state constitution's equal protection provision), strict scrutiny would be applied. In those cases, plaintiffs would need merely to show that the state lacked a compelling governmental interest in the classification or that the means to further such an interest were not narrowly tailored. While such a showing would require certain facts, the state might have a difficult time showing a compelling interest in a policy that negatively impacts certain groups more than others, particularly where NCLB gives districts other options that would arguably have less discriminatory effects. Furthermore, since NCLB contains a range of corrective actions, all of which Congress must have believed to be potentially effective, it is possible that plaintiffs could show that reconstitution, with its negative effects on students, is not narrowly tailored to achieve the ends of educational improvement and reform.

Teachers might attempt to bring a similar claim based on the discriminatory impact to teachers of large percentages of minority students. In order to do so, they would need to argue that, although they themselves are not necessarily impacted along racial lines, they are impacted because of the discriminatory treatment of minority students. Though this is a tricky argument to make, plaintiffs could point to the recent Supreme Court decision in *Jackson v. Birmingham Board of Education*[100] as precedent. In *Jackson*, the plaintiff, a male, was the girls' basketball coach at a public high school. After complaining unsuccessfully about unequal funding and access for his team, he began receiving negative work evaluations and was ultimately removed from his coaching position.[101] When he filed a Title IX claim of retaliation, the district court dismissed the claim, and the Eleventh Circuit affirmed.[102] The Supreme Court reversed, however, holding that the plaintiff was entitled to assert a claim of discrimination even though he was an "indirect

99. *See, e.g.*, Butt v. State, 842 P.2d 1240, 1251–52 (Cal. 1992) (holding that discriminatory intent is not required for a claim that plaintiffs' California state equal protection rights were violated, where students claimed that they were denied an education fundamentally equivalent to that of other state students); *see also* Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387, 401 n.41 (1999) ("The equal protection clauses in some state constitutions have been interpreted to prohibit decisions having disparate impacts as well as those motivated by discriminatory intent.").

100. 544 U.S. 167 (2005).

101. *Id.* at 171–72.

102. Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333 (11th Cir. 2002).

victim" of sex discrimination.[103] As such, plaintiff-teachers, even if nonminorities, might argue that they are the indirect victims of racial discrimination as a result of the racial classification of their students, on whose performance the decision to reconstitute the schools was based.[104]

Litigants might also be able to challenge the U.S. Department of Education's decision to significantly soften its requirement that each subpopulation (such as certain minority groups) make AYP at each grade level.[105] The Department's decision has allowed some schools to avoid being identified as failing that would have been under the former rules. Because this has resulted in a large number of relatively white, affluent schools being taken off the list of failing schools, districts that remain eligible for NCLB's corrective actions may argue that the decision to alter the rules was made specifically to spare more white, affluent districts from being labeled as failing and from corrective action. However, a similar analysis to that above would be required; in particular, plaintiffs would be required to show discriminatory intent. This would be difficult to prove, given that the Department of Education is likely to show valid reasons for limiting the number of schools designated as failing. This claim, however, would at least be worth exploring for plaintiffs.

D. Title VI/§ 1983

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin. Because Title VI implementing regulations prohibit discrimination both as the result of explicit discriminatory treatment and where facially neutral policies and practices have a disparate impact, this was used for a number of years as an avenue for challenging regulations having a disparate

103. *Jackson*, 544 U.S. at 1507 ("Where the retaliation occurs because the complainant speaks out about sex discrimination, the 'on the basis of sex' requirement is satisfied. The complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint.").

104. It remains to be seen, however, how far the Supreme Court will allow *Jackson* to be stretched. The Court noted, for example, that "[i]f the statute provided instead that 'no person shall be subjected to discrimination on the basis of *such individual's* sex,' then we would agree with [defendants]." *Id.* Thus, plaintiffs would need to convince the court that the language of the equal protection clause invoked (state or federal) is analogous to that of Title IX invoked by the plaintiff in *Jackson*.

105. *See* TRACEY ET AL., *supra* note 38, at 9 (discussing "major compromises" that led to the changing of AYP requirements such that they "no longer looked at student performance at every grade and for every year but, in a number of states, allowed districts to avoid being identified for improvement even if they were failing at some grade levels," resulting in more impoverished districts remaining on the list of those failing while sparing more affluent districts).

impact on minorities.[106] Since reconstitution is likely to have a disparate impact on minority students and those educators who work with minority students, advocates might be tempted to look toward Title VI as a potential avenue for legal action.

However, in *Alexander v. Sandoval*,[107] the Supreme Court held that there is no private right of action to enforce disparate impact regulations implemented under Title VI.[108] As such, students and teachers would be foreclosed from raising a disparate impact claim unless alternate methods for bringing a cause of action could be found.

Some have suggested that the *Sandoval* decision could be circumvented by making a claim under § 1983 of the Civil Rights Act of 1871, which specifically provides a remedy for constitutional violations and allows for a private cause of action.[109] To sue under § 1983, a plaintiff must show that she has suffered a violation of a federal right (not just a federal law).[110] A statute creates an enforceable federal right where the three-part *Blessing* test can be met.[111] Even once this test is met, however, a defendant is offered the opportunity to show that Congress "specifically foreclosed a remedy under § 1983," either expressly or impliedly, by providing a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."[112] It is under this prong that some courts have found that Title VI disparate impact

106. *See generally* Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 18–25 (2002).

107. 532 U.S. 275 (2001).

108. *Id.* at 293.

109. *See, e.g.*, Dyson, *supra* note 106, at 25–32; Bradford C. Mank, *Using Section 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321, 332 (2001). In fact, the *Sandoval* minority itself suggested that federal rights could be enforced through § 1983 even where, as with Title VI under the majority's holding, the right cannot be enforced directly. *Sandoval*, 532 U.S. at 299–300 (Stevens, J., dissenting).

110. Wright v. City of Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 430–32 (1987).

111. Blessing v. Freestone, 520 U.S. 329, 340–41 (1997). Under the test, plaintiff must show that: (1) Congress intended that the provision in question benefit the plaintiff; (2) the right protected by the statute is not so "vague and amorphous that its enforcement would strain judicial competence"; and (3) the statute unambiguously imposes a binding obligation on the states. *Id.* According to at least one commentator, "educational litigants and stakeholders may be able to successfully withstand all three prongs of the *Blessing* test." Dyson, *supra* note 106, at 30.

112. *Blessing*, 520 U.S. at 341. For a more thorough discussion of this issue, see Dyson, *supra* note 106, at 25–31.

regulations may not be vindicated through § 1983.[113] Indeed, while this is still unsettled territory, some observers are pessimistic about the prospects of using § 1983 to vindicate rights under Title VI.[114]

If, on the other hand, use of § 1983 is viable, students in schools that undergo reconstitution could argue that they have suffered disparate impact under Title VI. As argued below,[115] schools that are more likely to face reconstitution are those that began the process of school improvement at lower levels of student proficiency. These schools have disproportionate levels of minority enrollment. Furthermore, as argued below,[116] reconstitution is bound to have negative effects on school quality, teacher quality, school morale, targeting of school resources, allocation of classroom time, and other areas. Therefore, if it is shown that, as predicted, those who attend reconstituted schools are disproportionately minority, those students could potentially argue disparate impact under Title VI. So long as the use of § 1983 for enforcement of this right is not foreclosed, this is a potentially valid claim.

E. Breach of Contract and Collective Bargaining Agreements

An additional concern for any school district or state educational agency attempting to implement NCLB's reconstitution provisions is the terms of many teacher contracts and collective bargaining agreements (CBAs)—in particular, tenure provisions.[117] As discussed above, prior to

113. *See, e.g.*, S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771 (3rd Cir. 2001) (holding that § 1983 could not be used because Congress did not intend to create a federal right under Title VI to be free from disparate impact discrimination); Ceaser v. Pataki, No. 98 CIV. 8532 (LLM), 2002 WL 472271 (S.D.N.Y. Mar. 26, 2002) (holding that plaintiffs have no right to sue under § 1983 for alleged disparate impact violations under Title VI).

114. *See generally* Dyson, *supra* note 106, at 31–32 (discussing the limits of § 1983 for use in Title VI disparate impact claims); Bradford Mank, South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection: *Will Section 1983 Save Title VI Disparate Impact Suits?*, 32 ENVTL. L. REP. 10454 (2002).

115. *See infra* Part III.

116. *See infra* Part III.

117. Collective bargaining agreements (CBAs) are contractual agreements negotiated, in the education context, between teachers' unions and school district management. There were 199 teacher CBAs on file at the Bureau of Labor Statistics as of January 2005. FREDERICK M. HESS & MARTIN R. WEST, A BETTER BARGAIN: OVERHAULING TEACHER COLLECTIVE BARGAINING FOR THE 21ST CENTURY 9, *available at* http://www.ksg.harvard.edu/pepg/PDF/Papers/BetterBargain.pdf (last visited May 16, 2007). These agreements "shape nearly everything public schools do." *Id.* As such, this Subpart refers to both teacher contracts in their capacity to dictate the terms of individual teachers' rights and CBAs in their ability to dictate the rights of whole groups of teachers within a district.

NCLB, reconstitution efforts were halted in Milwaukee and Philadelphia because the proposed involuntary transfer of teachers violated the rights of teachers under their contracts and CBAs (particularly seniority clauses).[118] Most teacher contracts and CBAs include guaranteed employment for teachers with tenure, and some include protections for employment at particular locations. Teacher contracts and CBAs also typically include seniority rules guaranteeing those teachers with the most experience their choice of school sites. As such, any plan that forces a tenured teacher with seniority to lose her job at a particular school site, even while retaining employment within the district, may potentially violate that teacher's contractual or CBA rights. NCLB does not contain any authority that can render moot previously negotiated contractual tenure and seniority rights. On the contrary, it specifically states that "[n]othing in this section shall be construed to alter or otherwise affect the rights, remedies, and procedures afforded school or school district employees under Federal, State, or local laws."[119] As such, existing contracts and CBAs could trump NCLB.[120] While each individual circumstance will be different (thus rendering any more detailed discussion here inappropriate), this is a concern that must be incorporated into any reconstitution plan.[121]

III. THE PRACTICAL EFFECTS OF RECONSTITUTION

A. The Effect of Reconstitution on Teacher Recruitment and Retention

While reconstitution, at its best, is meant to be a fresh start that breathes new life into a school's atmosphere, refocusing teachers on a common

118. *See supra* notes 25–27 and accompanying text.

119. 20 U.S.C. § 6316(d) (2003).

120. For a more detailed discussion of this topic, see Jonathan P. Krisbergh, *Marginalizing Organized Educators: The Effect of School Choice and 'No Child Left Behind' on Teacher Unions*, 8 U. PA. J. LAB. & EMP. L. 1025, 1041–44 (2006). Indeed, this entire topic warrants more detailed analysis examining the exact terms of individual teacher CBAs, tenure statutes, and contractual seniority provisions throughout the country. This Comment merely mentions this as an additional area of concern for districts and states hoping to implement NCLB's corrective action provisions, and notes that this is yet another potential legal challenge that suggests that reconstitution should be a worst-case, last-ditch effort only.

121. One possible solution is to engage teachers in a collaborative process similar to that employed in Nashville, where a more draconian reconstitution plan was scrapped in favor of one in which teachers were "directly engage[d] . . . in the planning and implementation process." Rozmus, *supra* note 7, at 143; *see also* Lady Hereford & Dana Pride, *Desegregation Victory Launches Major Fight for Funding: "Commitment" Plan Wins Board's Approval*, NASHVILLE BANNER, July 24, 1996, at B1.

plan of action,[122] in reality, it tends to be "the most demoralizing, heartbreaking experience" of a teacher's life.[123] The result of this demoralization, unfortunately, can tend to be an exacerbation of the very problem—difficulty hiring and retaining quality teachers at low-performing, often low-income or predominantly minority schools in which achievement tends to be lower[124]—that is a large reason for the schools' failure in the first place. In fact, this theme occurs often in the literature on NCLB and reconstitution: the belief that "an unintended effect of the NCLB accountability system is that it will make it more difficult to attract and retain teachers to low-performing schools."[125]

1. Reasons for the Negative Effect

Schools facing or undergoing reconstitution are likely to have difficulty attracting or keeping quality teachers for a number of reasons. First, there is the demoralizing effect mentioned above. The rhetoric of NCLB itself creates and exacerbates this. Schools are considered to have failed to make AYP. Schools are labeled as "failing" or, only somewhat more benignly, "needing improvement." The Act refers to teachers who are relevant to the "failure to make" AYP.[126] All of this stigmatization leads to negative

122. *See, e.g.*, Rozmus, *supra* note 7, at 114.

123. SFUSD 1997 REPORT, *supra* note 12, at 100 (citing Interview with a High School Teacher of SFUSD (Mar. 15, 1997)).

124. *See* TRACEY ET AL., *supra* note 38, at 7 (finding that "NCLB district accountability has a disparate impact on districts with large low-income and minority populations").

125. GAIL L. SUNDERMAN & JIMMY KIM, TEACHER QUALITY: EQUALIZING EDUCATIONAL OPPORTUNITIES AND OUTCOMES 7 (2005); *see also, e.g.*, SFUSD 1999 REPORT, *supra* note 14, at X.G.3.b (reporting that reconstituted schools hired overwhelmingly inexperienced teachers, including the statement of one principal that "[n]obody applies for the jobs" teaching at reconstituted schools); SFUSD 1997 REPORT, *supra* note 12, at 97, 100 (reporting that it is "difficult to attract dedicated, experienced teachers to reconstituted schools" and noting, as an example, one principal's statement that "she had extreme difficulty attracting seasoned teachers to her school after reconstitution"); Marilyn Cochran-Smith, Editorial, *No Child Left Behind: 3 Years and Counting*, 56 J. TCHR. EDUC. 99, 101 (2005) (noting the "increased difficulty schools labeled 'failing' have in attracting qualified teachers"); Ryan, *supra* note 5, at 934, 974 (arguing that NCLB and its corrective actions "may deter some from teaching altogether and divert others away from the most challenging classrooms, where they are needed the most," thus reinforcing "the trend of good teachers exiting challenging schools"); Sarah Greenblatt, *Area Schools Plan for Overhaul*, COURIER-POST (Cherry Hill, N.J.), Nov. 14, 2005, at 1A (quoting a local school district official in Camden, New Jersey, saying that "if the district replaces many teachers, it would find itself with an abundance of hard-to-fill vacancies").

126. 20 U.S.C. § 6316(b)(7)(C)(iv)(I) (2000).

consequences on the morale of teachers.[127] A principal at a San Francisco school, which twenty of twenty-four teachers left as a result of pre-NCLB corrective actions, explained that the teachers "felt they worked really hard and yet [achieved] nothing."[128] It appears that many teachers share the view that "[r]econstitution is a euphemism for blaming teachers for low performance."[129] Because of this stigmatization, the challenge of teaching at a low-performing school—already a bar to many potential teachers—creates an additional barrier to bringing in the high-quality teachers who are so needed to bring all students up to the required level of proficiency in the next eight years (the goal set by NCLB).

Another reason for the teacher "brain drain"[130] at reconstituted and penalized schools is the excessive pressure to raise test scores.[131] Schools undergoing NCLB corrective action spend great amounts of classroom time drilling and preparing students for standardized tests.[132] This activity tends to be the least rewarding type of work that a teacher does.[133] Making this

127. *See, e.g.*, John Ambrosio, *No Child Left Behind: The Case of Roosevelt High School*, 85 PHI DELTA KAPPAN 709, 711 (May 2004) (discussing how the punitive effects of NCLB are harming a school that was providing an impressive array of services to a diverse, low-income population, in large part because "[h]aving your school repeatedly labeled as 'needing improvement' and your teachers pilloried as 'not highly qualified' is humiliating and demoralizing. It provides a strong incentive for families to flee the school.").

128. SFUSD 1999 REPORT, *supra* note 14, at X.G.2.b. The report also notes that area schools run by a private management company report the same teacher retention problem because of long hours and a longer school year. *Id.* at X.G.3.b.

129. Caroline Hendrie, *S.F. Reforms Put on the Line in Legal Battle*, EDUC. WK., Dec. 11, 1996, at 1, 1 (quoting Professor Gary Orfield), *quoted in* Rozmus, *supra* note 7, at 103; *accord* Marsha Ginsburg, *"Reconstituted" Schools Blasted at Board Meeting: Parents, Students, Teachers Say Starting Over Isn't the Answer*, SAN FRANCISCO EXAMINER, Mar. 2, 1994, at A7 (quoting a school employee who called reconstitution a "scapegoating of teachers for a failed system").

130. "Brain drain" is a common expression used to describe the danger of high-quality teachers leaving schools. *See, e.g.*, Erin O'Donnell, *Blackboard Brain Drain: Left in the Chalk Dust*, HARV. MAG., Sept.–Oct. 2004, at 19–20, *available at* http://www.harvardmagazine.com/on-line/090422.html ("When children return to classrooms this fall, they're less likely than ever to find a very smart teacher standing at the front of the class.").

131. *See* SFUSD 1997 REPORT, *supra* note 12, at 97 (noting that, even where positive changes were made at reconstituted schools, "the pressure to raise test scores sometimes seemed to eclipse the positive affective gains made at the school").

132. *See, e.g.*, TRACEY ET AL., *supra* note 38, at 9 (finding that NCLB's focus on test scores and the threat of punishment leads teachers to "too often disrupt[ ] serious reform efforts in favor of short-term test preparation and drill strategies"); Ambrosio, *supra* note 127 (noting that one high school spent eight weeks during the 2003 school year on administering required testing alone and arguing that such "narrowing" of the curriculum takes "time and energy away from those subjects that are not tested").

133. *See* Ryan, *supra* note 5, at 974 ("At the very least, teaching will be less attractive in those schools where teachers must spend a great deal of time preparing for the tests.").

worse, it is precisely those more experienced and more highly qualified teachers who are most likely to have developed distinct and creative pedagogical methods and lessons and who thus are most discouraged and dissuaded by the possibility of spending increased amounts of time drilling test prep at the cost of ignoring their other curriculum.

Finally, reconstituted schools, by definition, have a high degree of turmoil. These schools are likely to have had a change in administration. Teachers are likely to have been replaced. Even where the state does not formally take over the school, state and local district bureaucrats are likely to be heavily involved in school affairs. All of this upheaval is a further hindrance to the creation of a stable work environment that leads to high levels of employee satisfaction and retention.

2. The Need for "Carrots" Along With NCLB's "Sticks"

Unfortunately, NCLB contains no provisions to counteract this inevitable "brain drain" from reconstituted schools.[134] In fact, although NCLB contains provisions requiring that all schools have highly qualified teachers in all classrooms teaching core subjects, the law itself "does not provide the policies, support, or flexibility needed to meet this goal."[135] Indeed, many have argued that the corrective action provisions, including reconstitution, in fact work against the highly qualified teacher provisions by discouraging highly qualified teachers from teaching at low-performing schools.[136] More than one scholar, recognizing this problem, has argued that NCLB will only be effective in achieving its goals if "carrots" for teachers to work in low-performing schools are added to the Act's ample "sticks" for those districts, schools, and teachers who fail to increase performance.[137] Possible methods for doing so

134. *See ED Postpones Penalties for Highly Qualified Teacher Deadline*, YOUR SCH. & L., Nov. 16, 2005, *available at* http://www.lexis.com (search for article within "Law Reviews, CLE, Legal Journals & Periodicals, Combined" source, which can be accessed within the "Secondary Legal" tab on the "Sources" page) ("NCLB does not spell out strategies for recruiting and retaining experienced teachers in hard-to-staff schools . . . .").

135. SUNDERMAN & KIM, *supra* note 125, at 7.

136. *See, e.g.*, *id.* at 6 (arguing that NCLB's sanctions "create an additional disincentive for highly qualified teachers to remain" in low-performing schools, thus complicating the goal of a highly qualified teacher in every classroom); Ryan, *supra* note 5, at 934 (arguing that NCLB's "fatal flaw is that it creates incentives that work against the Act's goals," including by deterring people from teaching in challenging schools).

137. *See* SUNDERMAN & KIM, *supra* note 125, at 8 (recommending that NCLB be reformed "to create recognition and rewards for teachers that make a difference and for schools that make improvement"); Dyson, *supra* note 106, at 68 (arguing that the danger of a teacher "exodus" from schools "stigmatized as low performing . . . may only be adequately guarded against not only with a stick but with powerful carrots that will ensure that low performing school districts remain competitive in attracting the most talented and dedicated educators from the most selective teacher applicant pools").

might include monetary bonuses for highly qualified teachers at schools labeled as underperforming; additional training, support staff, and access to materials at such schools; the hiring of more teachers at such schools to lower student-teacher ratios and to increase teacher preparation time; or programs of mandatory parental involvement to create a collaborative team effort that is missing for the vast majority of children in underperforming schools.[138] In the absence of such carrots, the effect of NCLB's sticks is likely to be the loss of many excellent teachers from reconstituted schools, and such schools are likely to be forced to hire predominantly new and inexperienced teachers, thus exacerbating those schools' cycles of underperformance and making it even more difficult for them to meet NCLB's proficiency targets.[139]

3. The Downward Spiral

The negative effect described above does not happen in a vacuum. Instead, it is exacerbated by the fact that schools that are underperforming and are thus already subject to NCLB corrective actions are home to more inexperienced teachers than their more high-performing counterparts to begin with.[140] In other words, a downward-spiral effect is likely, in which schools that tend to have less qualified teachers are more likely to face reconstitution, and reconstitution makes it likely that highly qualified teachers will leave the school and not be recruited. Given the well-documented high correlation between teacher quality and

138. This Comment makes no attempt to analyze these potential carrots in any great detail. This is an area that is ripe for thorough study and analysis to determine what methods might be most effective and cost-efficient. This Comment merely argues that, in the absence of such carrots, the danger noted by more than one commentator that NCLB's reconstitution provisions will work against the Act's more laudable goals is a real one.

139. *See* SFUSD 1997 REPORT, *supra* note 12, at 100 (reporting that the result of reconstitution was "a surplus of new and inexperienced . . . teachers").

140. THE EDUC. TRUST—WEST, CALIFORNIA'S HIDDEN TEACHER SPENDING GAP: HOW STATE AND DISTRICT BUDGETING PRACTICES SHORTCHANGE POOR AND MINORITY STUDENTS AND THEIR SCHOOLS, (rev. Mar. 2005) [hereinafter CALIFORNIA'S HIDDEN TEACHER SPENDING GAP], *available at* http://www.hiddengap.org/resources/report031105.pdf (reporting that, while school districts report school expenditures based on the district's average teacher pay, in reality, the most experienced and credentialed teachers are clustered in both the highest-performing districts and in the highest-performing schools within districts); SUNDERMAN & KIM, *supra* note 125, at 6 ("Large, urban districts and districts serving low-income students were more likely to have teachers that did not meet the NCLB teacher qualifications.").

student performance,[141] this cycle would seem to create a real danger that NCLB's proficiency goals will become harder and harder to meet for schools that undergo significant corrective action.

These negative effects on teacher recruitment and retention are likely to be even greater in schools with large minority and low-income populations, because such schools already face greater difficulty in attracting top teaching talent. Scholars have long noted the "challenges of attracting and retaining teachers to schools serving large numbers of minority and low-income students."[142] One study has found that "high-poverty and high-minority schools spend tens of thousands of dollars less on teacher salaries than low-poverty and low-minority schools of similar size and in the same school districts every year."[143] If these schools start with worse teachers and face reconstitution at greater rates[144]—even further discouraging teachers from working at these schools—then a downward spiral is indeed a significant risk.

4. Tension Between Reconstitution and Highly Qualified Teacher Requirements

In addition, NCLB mandates that every school have a qualified teacher in every classroom where core subjects are being taught. The Act contains no punishments for schools and districts that fail to comply with this

141. *See, e.g.*, Dyson, *supra* note 106, at 16 ("Recent research . . . confirms the intuitive conclusion that a student's performance . . . is significantly tied to the level of their teacher's experience and that minority and low-income students tend to have teachers with the least experience."); Robert P. Strauss & Elizabeth A. Sawyer, *Some New Evidence on Teacher and Student Competencies*, 5 ECON. EDUC. REV. 41, 47 (1986) (finding that "teacher quality makes an enormous difference in affecting" student failure rates, that "teacher quality also makes a difference with regard to average performance in the classroom," and that, therefore, "teachers matter far more than has been previously documented by other researchers in the field").

142. SUNDERMAN & KIM, *supra* note 125, at 6; *see also* CALIFORNIA'S HIDDEN TEACHER SPENDING GAP, *supra* note 140, at 3 (finding that "students in California's highest minority schools are a full five times more likely to have an under-prepared teacher . . . than their peers" and that "[l]ow-income students are twice as likely" to have one as their more affluent peers); Beaver, *supra* note 2, at 97 ("Poor districts will be hit the hardest. 'Teacher shortage is the worst where the need is most desperate.'" (quoting Karen Macpherson, *Teaching-As-Second-Career Program Off to Slow Start*, PITTSBURGH POST-GAZETTE, Dec. 9, 2001, at A7)); Cochran-Smith, *supra* note 125, at 101 (discussing the "growing evidence that despite the fact that NCLB is designed to improve the achievement of disadvantaged students, these are the very students who are least likely to get well-qualified and experienced teachers"); Ryan, *supra* note 5, at 934.

143. CALIFORNIA'S HIDDEN TEACHER SPENDING GAP, *supra* note 140, at 5. According to the report, the average gap between schools with high and low minority student populations is $3014 per teacher. *Id.* at 6.

144. *See* TRACEY ET AL., *supra* note 38, at 7 (finding that "NCLB district accountability has a disparate impact on districts with large low-income and minority populations").

requirement (unlike failure to make AYP); if punishments were doled out, however, schools and districts might be successful in arguing that, in fact, the proximate cause of the failure to meet the highly qualified teacher provisions are the Act's reconstitution and other penalty provisions. Though it is unclear whether such an argument would provide sufficient legal grounds to render unlawful any enforcement of penalties for violating the highly qualified teacher provisions, it at least points out the potential conflict between the Act's provisions. This may lead to political pressure against the use of NCLB's more invasive penalty provisions, such as reconstitution. If the point of the law is to improve educational quality, driving good teachers out of the schools in which they are needed most certainly seems an odd way of achieving such a goal.[145]

B. The Effect of Reconstitution on Educational Quality

While reconstitution in particular and NCLB in general have the potential to improve (and certainly the goal of improving) educational quality at schools that have not been performing adequately according to standardized tests, there are some indications that the threat of reconstitution or such restructuring itself could instead have deleterious effects on educational quality.

1. Test Preparation Instead of Real Learning

One way in which reconstitution (or just its threat) could negatively affect the quality of education is through an excessive emphasis on test preparation over other affective learning components. The danger is that such an emphasis threatens to disrupt or shortchange "serious reform efforts in favor of short-term test preparation and drill strategies."[146] In this way, even if test scores rise, it may be simply that children get better at test-taking strategies, without any actual gain in their substantive knowledge, critical

145. This is not to say that NCLB's definition of a highly qualified teacher necessarily equates with a high-quality teacher. *See, e.g.*, Ryan, *supra* note 5, at 976 ("[T]he criteria that make a teacher 'highly qualified' for purposes of the NCLBA are not perfect, or even very good, proxies for actual quality."). In fact, because of difficulty meeting NCLB's highly qualified teacher mandate, "many states have developed low standards for defining what constitutes a highly qualified teacher." Superfine, *supra* note 3, at 794. While this subject is an important one, it is beyond the scope of this Comment.

146. TRACEY ET AL., *supra* note 38, at 9.

thinking, or analytical skills.[147] The team monitoring reconstitution efforts in San Francisco before NCLB found evidence that the pressure to raise test scores detracted from an emphasis on affective gains in schools and nonmeasurable improvements in student learning, behavior, and socialization.[148] Lost in the rush to raise student scores is a serious discussion on whether such gains are actually worth anything. It may be that raised test scores actually indicate that other aspects of a child's education have been further stunted with an improvement only in test-taking ability.

2. Teacher Stress

It also seems likely that the pressure to raise standardized test scores, along with the specter of reconstitution and perhaps job loss or transfer hanging over their head, will lead to more stress on teachers and, at least for some, less effective pedagogy. It may, in fact, drive some to leave the teaching profession altogether or discourage others from entering, exacerbating the problem of teacher retention and recruitment detailed above. While this could also be true of NCLB's other corrective actions, the threat of reconstitution with the possibility of job loss or transfer and general school upheaval certainly increases this effect more than less intrusive means.[149]

147. One anecdotal piece of evidence suggesting that, indeed, the test-score frenzy has had an ill effect on school culture is the report that teachers have been increasingly accused of cheating on and helping students to cheat on these mandated tests. Erika Hayasaki, *Some of Biggest Test Cheaters Are Teachers*, MIAMI HERALD, May 23, 2004, at 8A (reporting that, as of May 2004, more than two hundred California teachers had been investigated for helping students on standardized tests, with at least seventy-five cases having been proven, while pointing to the threat of corrective action under NCLB as a likely reason).

148. SFUSD 1997 REPORT, *supra* note 12, at 97.

149. This Comment makes no claim to assert that this is true. However, this is an area that could use some empirical data. The ranks of those questioning whether standardized tests are a valid measure of anything are legion. *See, e.g.*, Dyson, *supra* note 106, at 36 ("Too often, while 'middle-class children in white, middle-class schools are reading literature, learning a variety of forms of writing, and studying mathematics aimed at problem-solving and conceptual understanding . . . poor and minority children are devoting class time to practice test materials whose purpose is to help children pass the [standardized test].'" (quoting Angela Valenzuela, *When It Comes to Education, Has State Government Become Its Own Worst Enemy?*, TEXAS ALCALDE, Sept./Oct. 2000, at 31)); Nash, *supra* note 81, at 257 (writing that large numbers of educational stakeholders have reached the conclusion that the "inherent limitations" of standardized tests "make it impossible to use standardized tests alone to fairly and accurately measure student achievement of state standards").

3. Watered-down Standards

Another potential negative impact of NCLB's corrective actions on educational quality is the lowering of standards and the watering down of tests that states are left to create under NCLB's accountability system.[150] This incentive to lower academic standards to meet the requirement of full student proficiency is one of the "perverse incentives and unintended consequences" of NCLB to which some researchers have pointed.[151] Because states are allowed to define "proficient" and are left to develop and implement their own measures, NCLB's most invasive penalties—reconstitution especially—create possibly insurmountable "pressure to make the targets easier to meet by dumbing down the tests or making scoring systems more generous."[152]

One possible method for ensuring that this watering down of standards does not take place would be to institute a national test. Although it seems clear that NCLB did not do so at least in part because of federalism concerns[153] and perhaps because of concern about the institutional ability of the Department of Education to design and implement such a test, some observers have argued that such standardization across the country is the only way to avoid the temptation to meet NCLB's mandate through

150. This assumes, of course, that states even have the resources to implement new tests and study their results rather than simply purchasing and using an old test created by one of the testing companies and not necessarily aligned in any way with state standards or what is actually being taught in state classrooms. *See* Nash, *supra* note 81, at 256.

151. Ryan, *supra* note 5, at 944; *see also* Nash, *supra* note 81, at 258 ("No Child Left Behind creates a perverse system of incentives for states to develop less than rigorous assessments.").

152. Ryan, *supra* note 5, at 934; *see also* Cochran-Smith, *supra* note 125, at 100 (referring to a 2004 report concluding that "NCLB's narrow emphasis on content knowledge coupled with lack of funding have resulted in many states lowering rather than raising their standards for teachers" (citing SE. CTR. FOR TEACHING QUALITY, UNFULFILLED PROMISE: ENSURING HIGH QUALITY TEACHERS FOR OUR NATION'S SCHOOLS (2004))). *Contra* James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1729–30 (2003) ("If a state's standards are so low that all students are easily proficient, but a sample of these students shows poorly on [the nationally mandated National Assessment of Educational Progress (NAEP)], substantial pressure is likely to arise to bring that state's standards and its students' performance in line with those elsewhere in the nation."). This optimistic assessment of the ability and inclination of the Department of Education to stringently monitor the assessment regimes put in place by the various states seems at odds with the following: (1) the fact that NCLB "provides no real enforcement mechanism," *id.* at 1706; (2) the reality that "the U.S. Department of Education has a poor track record since 1994 in enforcement of federal testing requirements," Nash, *supra* note 81, at 258–59; and (3) the probability that states would be able to lower standards without doing so in such a way that the Department of Education would intervene based on striking disparities between state achievement test results and NAEP results.

153. Ryan, *supra* note 5, at 987 ("In an attempt to drive education policy without intruding too greatly upon state authority, the federal government has combined regulatory stringency regarding AYP with regulatory laxity regarding the quality of standards and assessments.").

lowered standards.[154] In advancing this idea, two scholars have posited that "most Americans would likely welcome a single set of academic standards in these most basic of skills rather than inviting states to play games with passing scores and performance targets."[155] Whether or not this statement is true, it is undoubtedly true that, short of the (unlikely) vigorous oversight of state tests by the Department of Education, such a national test is the only way to ensure that states are adequately and equally testing for a true measure of proficiency in the basic skills.[156] Otherwise, states may claim full proficiency by 2013–14 merely because they have set the bar so low that all can jump over it. This is certainly not what the Act's bipartisan authors intended.

4. Segregation

Finally, reconstitution may also conflict with NCLB's desire to achieve more educational equality between different racial, language, and economic groups.[157] The threat of reconstitution may give administrators at white, middle- or upper-class schools a reason to exclude poor or minority students who, according to some commentators, traditionally do not perform as well as more affluent or white students.[158] This potential is exacerbated by the fact that schools may be subject to NCLB corrective actions based on the failure of individual subgroups to make AYP.[159] Though school and district administrators are unlikely to openly discourage or reject minority or poor student enrollment where it is possible, the pressures caused by the threat of reconstitution may decrease support in the educational establishment for

154. *See* Finn & Hess, *supra* note 2, at 49 ("Using the [NAEP] as a benchmark, Washington could easily set clear and uniform expectations regarding student mastery in these subjects for the fourth, eighth, and (perhaps) twelfth grades."); Ryan, *supra* note 5, at 988–89.

155. Finn & Hess, *supra* note 2, at 49.

156. *See* Ryan, *supra* note 5, at 988 ("To be sure, national standards and tests may be political nonstarters, despite apparent public support for them in polls. But they are the only real solution if states, left to their own devices, would set academic standards too low. Both the first President Bush and President Clinton appear to have grasped this, at least partially, which is presumably why each advocated (voluntary) national standards and tests.").

157. *See generally* Losen, *supra* note 30.

158. *See, e.g.*, Ryan, *supra* note 5, at 961 (discussing NCLB's requirement that schools meet performance goals for various groups of students, such as those who are poor and those who are racial and ethnic minorities, and writing that, in so doing, NCLB "promises to shine a needed spotlight on the performance of [these] traditionally disadvantaged and underperforming students").

159. 20 U.S.C. § 6316(b)(2)(C) (Supp. 2006).

school choice and integration programs. Without this support, it is likely that the current trend toward resegregation of schools will continue.[160]

C. The Failure of Standardized Tests to Accurately or Adequately Measure Teacher Quality

NCLB's reconstitution provisions strive to rid schools of teachers and administrators who are relevant to the failure of the school to make AYP. As such, poor student performance on state-administered standardized tests may trigger an examination of teacher quality and a purge of those teachers whose students scored badly. This process presupposes two things: (1) that student performance on standardized tests accurately reflects teacher quality; and (2) that test scores can be used to adequately determine which teachers are relevant to the school's and the students' failure.

1. Inaccuracy of Testing as a Measure of Teacher Quality

NCLB's accountability provisions, by focusing on the elimination of teachers who are "relevant to the failure" of the school to make AYP,[161] equate student performance with teacher quality. The Act's penalty provisions focus exclusively on teachers and administrators for corrective action. In so doing, the Act suggests that it is school personnel who are to blame when a child, school, or district fails.[162]

This approach fails to take into account the numerous other important factors that arguably lead to poor student performance on standardized tests, and, thus, to the failure of the school to make AYP. First, educational funding has seen a dramatic fall in real dollars in recent years. According to a

160. Liebman & Sabel, *supra* note 152, at 1726 (discussing the "fear that the Act will undercut the nation's remaining commitment to desegregation"); Ryan, *supra* note 5, at 964 ("Given that court-ordered desegregation is fading from existence, the only real hope for integration in the near future is through the expansion of voluntary programs, which would generate political controversy even under the best of circumstances. If increased diversity within a school raises the chances that the school will fail to make AYP, the already considerable political obstacles to racial and socioeconomic integration may become insurmountable."). *But see* William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751, 1755–62 (2003) (arguing that NCLB provisions permitting students in underperforming schools to transfer to more successful schools may lead to racial desegregation at schools with predominantly white student populations).

161. 20 U.S.C. § 6316(b)(7)(C)(iv)(I).

162. *See* Cochran-Smith, *supra* note 125 ("To a very great extent, NCLB equates teaching quality and students' learning with high-stakes test scores."). This is certainly the perspective of many teachers and administrators. *See, e.g.*, Ginsburg, *supra* note 129, at A7 (quoting a teacher calling reconstitution a "scapegoating of teachers for a failed system").

recent congressional survey of forty-eight state education budget officers, state leaders cut real funding for elementary and secondary education by $11.3 billion in 2001 alone.[163] Both scholars and school personnel cite lack of resources as one of the major reasons for student failure.[164] Perhaps even more importantly, funding inadequacies are not equal across all schools. Instead, it is "low-performing schools in low-income areas [that] are frequently plagued by a lack of resources."[165] Despite numerous lawsuits over the years challenging state funding for education and the unequal distribution of resources that results from most state school financing schemes,[166] recent studies find that schools with high numbers of poor and minority students still receive significantly less state and local money than schools attended by a high number of wealthy and white students.[167] One way in which school funding continues to be unevenly

163. Dyson, *supra* note 106, at 2–3 (citing U.S. Senate Committee on Health, Education, Labor and Pensions and the U.S. House of Representatives Committee on Education and the Workforce, Education In Crisis: The State Budget Crunch & Our Nation's Schools (2002)).

164. *See, e.g.*, DIANE PAN ET AL., EXAMINATION OF RESOURCE ALLOCATION IN EDUCATION: CONNECTING SPENDING TO STUDENT PERFORMANCE, at vi (2003), *available at* http://www.sedl.org/rel/policydocs/Examination.pdf (finding a "strong relationship between resources and student success"); Ginsburg, *supra* note 129.

165. Lashway, *supra* note 5, at 3.

166. *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002) (holding that Arkansas's system of funding violated the education and equality articles of the state's constitution); Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400 (Fla. 1996) (claiming that Florida's public school system violated a state constitutional requirement of adequate provision for uniform public schools); McDaniel v. Thomas, 248 Ga. 632 (Ga. 1981) (holding that Georgia's system of school financing satisfied the rational basis test and was thus not unconstitutional); Thompson v. Engelking, 537 P.2d 635 (Ida. 1975) (holding that neither equal protection nor the Idaho state constitution required that public schools be financed so that equal amounts were expended per pupil); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996) (affirming the dismissal of a complaint that alleged that Illinois's funding of public schools violated the state constitution); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989) (upholding a finding that Kentucky's school system was unconstitutional); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973) (holding that Michigan's school financing system did not violate equal protection guarantees); Columbia Falls Elem. Sch. Dist. No. 6 v. Montana, 109 P.3d 257 (Mont. 2005) (challenging Montana's system of school funding); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993) (challenging funding disparities in Nebraska's public education system); Stubaus v. Whitman, 770 A.2d 1222 (N.J. Super. Ct. App. Div. 2001) (dismissing claims challenging New Jersey school financing system); Campaign for Fiscal Equal. v. State, 86 N.Y.2d 307 (1995) (dismissing claims challenging constitutionality of New York's school financing system).

167. *See, e.g.*, GREG F. ORLOFSKY, THE FUNDING GAP: LOW-INCOME AND MINORITY STUDENTS RECEIVE FEWER DOLLARS (2002), *available at* http://eric.ed.gov/ERICDOCS/data/ericdocs2/content_storage_01/00000006/80/27/68/3a.pdf. This is by no means a complete discussion of school financing disparities and lawsuits arising therefrom. The literature on the subject is vastly more complete than this discussion, which is meant only to briefly highlight other factors that lead to educational failure (in arguing that student performance inadequately reflects teacher quality).

distributed is through a differential between the amount of money spent on teachers' salaries at some schools compared to others, even within the same school district. Although teacher salaries are reported based on district averages (thus giving the impression that all schools with the same number of teachers spend the same amount on those teachers), one California study found that "high-poverty and high-minority schools spend tens of thousands of dollars less on teacher salaries than low-poverty and low-minority schools of similar size and in the same school districts every year."[168] As such, poor schools are spending far less on paying their teachers as compared to schools with more affluent and more white students.

One interesting proposal to address this inequity is to provide each school within a school district the same amount of money to be spent on teachers, allowing each school the opportunity to hire some highly experienced and credentialed teachers.[169] This "NBA salary cap" model[170] would ensure a much more even spread of the pool of experienced teachers, but is likely to be vehemently opposed by affluent schools, parents of students at those schools, and teacher unions. Another approach would be to accurately assess the amount spent by each school on teachers, and

168. CALIFORNIA'S HIDDEN TEACHER SPENDING GAP, *supra* note 140, at 5. This differential, of course, is a result of the "concentration of more experienced and more highly credentialed teachers (along with their corresponding high salaries) in whiter and more affluent schools." *Id.* at 1; *see also* Lisa Schiff, *School Beat: School Budgets and Teacher Salaries*, BEYOND CHRON, Oct. 6, 2005, http://www.beyondchron.org/news/index.php?itemid=1957 (discussing CALIFORNIA'S HIDDEN TEACHER SPENDING GAP, *supra* note 140, and arguing that either: (1) salaries should be balanced among all schools in a a given district; or (2) each school in a district should pay only for the actual salary of its teachers, with more money left for schools with relatively lower-salaried teachers to spend on other things).

169. *See* CALIFORNIA'S HIDDEN TEACHER SPENDING GAP, *supra* note 140, at 14 (arguing, moreover, that formulas could be used to ensure that schools with the most need for the best teachers get more dollars to spend on them).

170. The National Basketball Association (NBA) was the first American sports league to adopt a salary cap limiting the amount of money that each team could pay its players each year. The idea was to diminish the disparity in quality between those teams that could afford to pay players much more than other teams (particularly those teams in cities with smaller markets and, thus, smaller revenue bases). Similarly, an "NBA salary cap" model for school financing would place a limit on the amount that teachers at each school within a district could be paid, with the intent and likely effect of more evenly distributing those teachers that are more experienced (and thus more highly paid). In light of the fact that relatively small-market cities like San Antonio and Detroit have won NBA titles in recent years, the hope of this model of salary allocation for schools would be that schools in relatively poor areas of large school districts would have the opportunity perform as well as or better than those schools in more wealthy areas.

then allow schools that spend less to make up the difference by providing them money to spend on other resources.[171]

A second major factor in student failure is a lack of preparation for school. Gaps in achievement do not begin in our nation's public schools, but take root at a very early age. According to one study, a "dramatic national achievement gap takes firm root as early as pre-kindergarten."[172] Before starting kindergarten, cognitive scores of children in the highest socioeconomic status (SES) group are 60 percent above those in the lowest SES group.[173] Studies indicate that attendance at a center-based childcare before kindergarten is highly correlated with high cognitive scores and is more prevalent among children from higher SES families.[174] There are clearly patterns of achievement and failure that begin before a child even gets to a public school that impact how that child will perform on standardized tests.

As any teacher will attest, parents also make a huge difference in student performance. In fact, school personnel affected by NCLB have often pointed to parents as a reason for student failure, while expressing frustration that it is teachers and administrators who are punished.[175] Poor student discipline, sometimes made worse by poor discipline procedures at the school, often reflects poor discipline in the home.[176] In addition, transient student populations in certain neighborhoods, either because of immigration or because of instability in the home, also hinder student performance.[177]

None of these alternative explanations mean that teachers do not have an effect on student learning. However, these other factors, all of which have a tremendous impact on students' ability to learn and on their performance (both in the classroom and on performance assessments), demonstrate

171. CALIFORNIA'S HIDDEN TEACHER SPENDING GAP, *supra* note 140, at 14; Schiff, *supra* note 168.

172. Dyson, *supra* note 106, at 2.

173. VALERIE E. LEE & DAVID T. BURKAM, INEQUALITY AT THE STARTING GATE 2 (2002) (cited in Dyson, *supra* note 106, at 2 nn.4–5).

174. *Id.*

175. Rachel Gottlieb, *Troubled School's Leadership Changed*, HARTFORD COURANT, Aug. 4, 2005, at B1 (reporting a dismissed principal as being "disturbed by the poor attendance by parents at meetings she called to discuss the school's problems" and the "culture of poor student behavior" at the school); Dana Tofig & Mark Bixler, *Upheaval for Failing Schools: More Teachers, Staff May Have to Reapply for Jobs Under Federal Act*, ATLANTA J.-CONST., May 22, 2004, at A1 (citing "children whose family problems follow them into the classroom" as a major reason for the failure of a school to make AYP).

176. *See, e.g.*, Kathleen Cotton, *Schoolwide and Classroom Discipline*, at "Research Findings" (Sch. Improvement Research Series No. 9, 1990), *available at* http://www.nwrel.org/scpd/sirs/5/cu9.html (citing research indicating that when students were given rewards and sanctions at home, their behavior at school improved).

177. *See* Tofig & Bixler, *supra* note 175, at A1.

that student standardized test scores alone are not an accurate way of assessing teacher competency.[178] It is entirely possible that teachers of the same competency at different schools or in different classrooms will have students who perform at vastly different levels on standardized tests as a result of these other factors. As such, it is unfair to rely exclusively on these test results to determine at which schools teachers should face penalties such as reconstitution.

2. Inadequacy of Student Test Scores to Determine Which Teachers Are Relevant to the School's Failure

Student test scores are also an inadequate measure for deciding which teachers fall into NCLB's nebulous definition of "relevant to the failure" of the school to make AYP. Because of the reasons listed above, it is entirely possible that a high-quality teacher could have students who score very poorly on state assessments (while conversely, very poor teachers could have students who still perform very well because of external factors). Instead of only using student test scores, decisions about a teacher's relevance must incorporate other factors and constitute an informed analysis of the school, the students, the teachers, and the various factors that influence student performance. One good example of how this seems to have been done effectively was in San Francisco Unified School District, in which Aptos Middle School was reconstituted in 1996 (prior to NCLB), as mentioned above.[179] There, a new administrative team was put in place a year prior to the reconstitution of the school faculty. This team "used the year before reconstitution to evaluate teachers and existing programs . . . . After one year of familiarity, the administration was able to retain the most effective and dedicated teachers."[180] Only with a comprehensive analysis like this can decisions be made in such a way as to ensure that excessive emphasis is not placed on standardized test scores and that decisions to retain, fire, or transfer teachers are not made in an arbitrary manner.[181]

178. *See* Ryan, *supra* note 5, at 978–79 ("A student's score on a standardized test is the result of both school and teacher inputs, as well as a host of exogenous factors, including innate ability, socioeconomic status, parental involvement, community stability, and peers. Because of the influence of these exogenous factors, looking to whether students in a school hit a uniform benchmark of achievement—the current approach to measuring AYP—actually tells us very little about the quality of the school itself.").

179. SFUSD 1999 REPORT, *supra* note 14, at X.G.3.b; *see supra* text accompanying note 76.

180. SFUSD 1999 REPORT, *supra* note 14, at X.G.3.b.

181. One way to ensure that analysis is comprehensive would be to integrate peer review into the equation. *See* Barbara Miner, *Teachers Evaluating Teachers*, RETHINKING SCHOOLS, Spring 1992, *available at* http://www.rethinkingschools.com/special_reports/union/uneval.shtml (discussing Cincinnati public schools' teacher peer evaluation program and arguing that it is both effective at evaluating teachers and even more rigorous than administrative review). Another possibility would be to include student evaluations as well.

Perhaps the major reason why standardized test scores are so inadequate for measuring teacher (and school) quality is that they measure student performance in a vacuum, usually at the end of a school year, without any baseline to which the performance can be compared. As such, it is impossible to know how much of the student's performance reflects the amount she learned from the teacher and how much reflects prior knowledge. One obvious way in which this could be solved would be to move to a value-added measurement for test scores. More than one scholar has argued that such a measurement, as opposed to the current scheme, would be an accurate (though perhaps not adequate by itself) way of measuring school quality.[182] This argument could certainly be extended to teachers as well. At the very least, it would be a better way to assess how much a district, school, or teacher's children have learned in a school year—as opposed to the current system, which simply provides a snapshot with no reference point from which to judge student progress. While districts, schools, and individual teachers with students who are already high performing would obviously not be able to show as much value added as those whose students start lower on the scale, this could easily be factored into the equation so as to recognize that student performance is being maintained at an already sufficient level.[183] No matter how implemented, such a value-added measure of student performance, as part of a holistic approach aimed at achieving an informed analysis of school personnel's strengths and weaknesses, would be a step toward making decisions about which teachers are to be replaced and which are to be retained under reconstitution more palatable.

182. *See* Finn & Hess, *supra* note 2, at 49 ("[A] school's (and district's and state's) performance should be measured and judged not just in relation to absolute standards but also in terms of how much students are learning during the course of a school year. Adequate yearly progress should be gauged based primarily on the academic value schools add . . . that is, the achievement gains their pupils make . . . ."); Ryan, *supra* note 5, at 978, 978–85 (arguing that "a value-added system of accountability would provide a more accurate picture of school quality," while discussing some of the potential drawbacks of such an approach); Nash, *supra* note 81, at 259 (arguing that one of the "structural deficiencies" of NCLB is its "failure to provide an effective measurement of the 'value added' to a student's achievement level by an individual school" and noting that this "will make it impossible to track . . . the impact a particular school is having on student performance").

183. *See* Finn & Hess, *supra* note 2, at 50 (arguing that, on a school level, a "safe harbor" could be created for high-performing schools so that, for example, "so long as 90 percent of students are reading at grade level, a school might be deemed adequate whatever its gains in reading scores"). For a thorough discussion of other potential problems with a value-added measure of AYP and ways of getting around those problems, see Ryan, *supra* note 5, at 978–87.

D. Escalating Achievement Targets and Mass Failure

The problems noted above may seem like minimal concerns, given the few number of schools that have so far become eligible for NCLB's most hard-hitting corrective actions. However, two factors seem likely to lead to an increasingly large number of schools being labeled as failures, and thus, to an escalating number of schools and school personnel being subject to NCLB's punishments.

1. Balloon Mortgage–type Progress Goals

NCLB explicitly requires that each school and district make steady progress[184] toward the goal of full proficiency by 2013–14.[185] Despite this, the Department of Education has granted states great flexibility to set their own schedules for AYP.[186] This has led many states to take an approach that sets up a great number of districts, schools, and school personnel to be labeled as failures, which thus leads to corrective action. Using this approach, often called the balloon mortgage approach (an analogy to balloon mortgages and their requirement for large payments at the end of the mortgage period), states set small AYP goals in the initial years of the Act with demands for much larger gains later.[187] More than twenty states have instituted such an approach.[188] The result of this is that, here in the early years of the Act's twelve-year cycle, during which there are relatively easy targets to reach, comparatively few schools and districts have been labeled as failing. However, as we move into the middle and later years of the Act, it is likely that an escalating number of schools will begin to fail to

184. 20 U.S.C. § 6311(b)(2)(H)(i) (2003) (stating that AYP targets "shall . . . increase in equal increments" over the twelve-year period leading up to full proficiency).

185. *Id.* § 6311(b)(2).

186. *See* Ryan, *supra* note 5, at 946–47. For a detailed discussion and criticism of the reasons why states sought to use this balloon mortgage approach and why the Department of Education approved such plans, see Evan Stephenson, *Evading the No Child Left Behind Act: State Strategies and Federal Complicity*, 2006 BYU EDUC. & L.J. 157.

187. Cochran-Smith, *supra* note 125, at 101–02; Finn & Hess, *supra* note 2, at 42–43 ("[A] state can 'backload' most of the requisite gains into the final bits of the 12-year period, not unlike a balloon mortgage, leaving the heaviest lifting to those who will be in office long after the designers of that state's plan have departed the scene."); Ryan, *supra* note 5, at 946 (describing states that set up "a system akin to a balloon mortgage" for AYP targets); *see also* JOEL PACKER, NO CHILD LEFT BEHIND AND ADEQUATE YEARLY PROGRESS FUNDAMENTAL FLAWS: A FORECAST FOR FAILURE 5 fig.2 (2004), *available at* http://www.cep-dc.org/pubs/Forum28July2004/JoelPackerPaper.pdf (charting the escalating AYP targets set in Connecticut).

188. Ryan, *supra* note 5, at 947; *see also* Stephenson, *supra* note 186, at 158 (noting furthermore that fifteen of these states "have scheduled *two-thirds* of all student proficiency gains in the last four years of the twelve-year timeline") (emphasis added).

meet their targets.[189] As this happens, the specter of a large number of schools undergoing corrective action and even reconstitution becomes more likely.

If so, three things are likely. First, criticism of NCLB and its requirements is likely to increase from all quarters.[190] The Act and its implementation risk losing legitimacy in the eyes of the public if a massive number of schools are labeled as failing.[191] Second, states and districts are even more likely to try to manipulate their definitions of proficiency, exacerbating the watering down of standards described above.[192]

Third, it is likely that as more schools come under NCLB's corrective provisions and more schools become eligible for reconstitution, the problems of teacher recruitment and retention and educational quality described above[193] will worsen. If our public schools already have a difficult time hiring and retaining highly qualified teachers, what will happen when a large number of schools are labeled as failing and a large number of teachers are displaced through reconstitution? What will be the effect on educational quality if more and more emphasis shifts away from analysis, critical thinking, and other important curricular areas in favor of test prep, drilling,

189. *See* ROBERT L. LINN, RETHINKING THE NO CHILD LEFT BEHIND ACCOUNTABILITY SYSTEM (2004), *available at* http://www.cep-dc.org/pubs/Forum28July2004/BobLinn.pdf; Cochran-Smith, *supra* note 125, at 102 ("As the balloon payments become due, more and more schools will be deemed failing. Some researchers predict that in the next few years, most of the nation's public schools will be labeled 'failing' according to AYP regulations." (citing Linda Darling-Hammond, *From "Separate but Equal" to "No Child Left Behind": The Collision of New Standards and Old Inequalities*, *in* MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS 3–32 (D. Meier & G. Wood eds., 2004))); Melodee Hall Blobaum, *Tests Hang Bad Labels on Even the Best Schools*, KAN. CITY STAR, Oct. 12, 2005, at A1 (quoting a district administrator as saying that it is "not surprising at all that we would see the number of schools not making AYP increase as performance targets continue to climb"). *But see* Stephenson, *supra* note 186, at 168–69 (citing arguments by state departments of education that student proficiency *is* likely to accelerate as instruction is aligned with standards, districts institute reforms, NCLB's highly qualified teacher requirements are met, and educational norms and expectations are improved).

190. *See, e.g.*, Finn & Hess, *supra* note 2, at 46 ("By April 2004, 21 state legislatures had considered bills or resolutions that criticized the law or sought significant waivers from the Department of Education."); Ryan, *supra* note 5, at 958 (describing the "anxiety" NCLB labeling of schools as failing is likely to cause in parents and homeowners and the possible political effects of such anxiety). The balloon mortgage system itself has already received criticism in the literature. *See, e.g.*, Finn & Hess, *supra* note 2, at 43 (describing back-loaded AYP targets as "freedom for states to flout the spirit of NCLB while nominally complying with its letter").

191. Some have suggested, in fact, that this was the hidden agenda of the Act from its inception. *See* Darling-Hammond, *supra* note 189, at 5. According to this theory, the major forces behind NCLB included those who advocated private schools, charter schools, and vouchers. These people are said to have desired the breakdown of public schools as a means to their goals. *See id.*

192. *See supra* Part III.B.3.

193. *See supra* Part III.A–III.B.

and rote exercises? What effect on teacher and student morale? It seems apparent that our public schools would have a difficult time withstanding such an eventuality. In fact, it is possible—if not probable—that, faced with the prospect of such widespread punishments, teacher unions and other school personnel will begin to mobilize more effectively against the Act and its penalty provisions. All of this further suggests that reconstitution and the other more intrusive forms of NCLB's corrective actions ought to be used sparingly if at all.

2. Unrealistic Goals

Above and beyond the balloon mortgage approach that sets up more schools for failure in the later years of the Act, an even more fundamental problem with NCLB makes reconstitution suspect. Many scholars have noted that the goal of 100 percent proficiency itself is unrealistic, if not impossible.[194] Certainly nothing even resembling full proficiency has been achieved in American education despite the best efforts of generations of educators.[195] As such, reconstitution, with its disruptive effect on educators, seems a particularly hard pill to swallow if it is punishment for the failure to achieve something that many consider unrealistic or impossible. Though there are certainly teachers, schools, and even school districts that fail to do their best and fail to educate children to the level they should, setting a bar that cannot be jumped over, and then punishing some for failing to jump over it, is no way to reform our school system.

The unrealistic nature of NCLB's goals has even been recognized, if indirectly, by the Department of Education itself. NCLB requires not only that entire schools and districts make AYP toward full proficiency, but also

194. *See* ROBERT L. LINN, ACCOUNTABILITY: RESPONSIBILITY AND REASONABLE EXPECTATIONS 9 (2003), *available at* http://cresst96.cse.ucla.edu/reports/R601.pdf (writing that for schools to achieve 100 percent proficiency would be "miraculous"); Ryan, *supra* note 5, at 945 (agreeing with the proposition that 100 percent proficiency is "utterly unrealistic"); Stephenson, *supra* note 186, at 176–77 ("The true underlying problem may be that NCLB's timeline and goals, though laudable in their intent, do not derive from sound research. . . . Nearly all education experts see NCLB's 100 percent proficiency goal and its timeline as unrealistic . . . . Researchers forecast that by 2014 'nearly all schools in all states will fail under the law.'" (quoting Diana Jean Schemo, *Effort by Bush on Education Hits Obstacles*, N.Y. TIMES, Aug. 18, 2004, at A1)). A state supreme court judge has even noted that "[n]othing short of dramatic progress will be needed if schools . . . are to meet performance goals . . . [required] under the No Child Left Behind Act." Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1169 n.3 (Mass. 2005) (Greaney, J., dissenting).

195. As one commentator put it, NCLB requires "schools and districts to make test score gains at a rate that [has] never been achieved on a large scale." TRACEY ET AL., *supra* note 38, at 9 (citing LINN, *supra* note 194, at 3–13).

that every subgroup in the school and district do so as well.[196] If any subgroup fails to meet its goals, the school or district as a whole is labeled as failing.[197] According to one thorough study, this result left the Department of Education in a tough political position:

> As states began to identify districts for improvement under NCLB, growing numbers of middle class suburban systems, including some of the most highly regarded districts, were to be labeled as failing and faced possible sanctions. These districts were in communities with considerable power and influence, posing a serious challenge to the enforcement process. In the face of this pressure, major compromises were made that radically changed the . . . requirement that all subgroups of students be tested and make [AYP] . . . . The Administration changed this concept to one that no longer looked at student performance at every grade and for every year but, in a number of states, allowed districts to avoid being identified for improvement even if they were failing at some grade levels.[198]

This change in policy suggests that federal education officials anticipate that the goal of full proficiency, particularly of every subgroup at every school in every district, is an untenable one. As more and more schools fail to make AYP and more and more are subject to corrective actions, the problems of legitimacy, educational quality, and teacher recruitment and retention threaten to become exacerbated by an overarching crisis of confidence in NCLB if this is not recognized. In such a case, it is unlikely that reconstitution will remain politically feasible (let alone wise) if it is seen as punishing school personnel for failing to achieve something impossible.

CONCLUSION

NCLB is a bold law aimed at solving what is widely seen as a crisis in public education in this country today. Attempting to fight difficult problems with hard-hitting reforms, the bipartisan Congress that enacted NCLB

196. 20 U.S.C. § 6316(b)(2)(C) (Supp. 2006).

197. *See, e.g.*, Blobaum, *supra* note 189, at A1 (describing a Kansas school district "known for high test scores and academic achievement" being labeled as failing only because "English-language learners . . . didn't meet the math [AYP] targets"). *See generally* TRACEY ET AL., *supra* note 38, at 17.

198. TRACEY ET AL., *supra* note 38, at 9. The authors go on to note that this change "tended to leave [poorer] districts under sanctions while the more privileged districts were no longer being identified for improvement," and conclude that this policy "compounds the harm done by absolute performance standards that penalize districts serving low-income and minority students and perpetuate misunderstandings of what is required to achieve deep and lasting school reform." *Id.*

intended to light a fire under the education establishment, indicating that complacency and resignation to the failure of a large number of children were no longer acceptable.

While laudable in its aims, the Act is overreaching in its focus on penalizing teachers for the performance of their students. First, the law uses overly broad language to describe those teachers who should be replaced if a school fails to make AYP. Both on legal (due process) grounds and for policy reasons (effect on teacher recruitment, retention, morale, and teaching quality), such a wide scope is unfair, unwise, and likely unconstitutional.

Furthermore, the Act's punishment of teachers, schools, and districts whose students fail to make AYP may leave the agencies responsible for the implementation of those corrective actions open to equal protection claims, given that those students affected seem likely to be disproportionately minority and economically disadvantaged. On top of this potential legal worry, the practical policy concern that such corrective actions will, in fact, hurt such schools in the long run by making it more difficult to attract and retain quality teachers is enough to give pause before choosing reconstitution.

Finally, teacher contracts, collective bargaining agreements, and tenure agreements seem likely to conflict with reconstitution's method of wholesale dismissal of staff from those schools labeled as failing.

Given the potential legal challenges outlined in this Comment, plus the multiple policy and practical factors that argue against the use of reconstitution, such drastic measures are ill-advised for educational agencies concerned with avoiding protracted legal battles, maintaining the allegiance of educators, ensuring that the best teachers are employed to teach those students who most need them, and making sure that classrooms are places where more than rote test prep drilling is commonplace. While NCLB has many aspects that contain promise for helping revive public education in this country, its most drastic penalty provision—reconstitution—puts that possibility in jeopardy. Because of this fact, reconstitution should be limited to very few extreme cases, in which all other possibilities have been exhausted, justifications for choosing reconstitution over less intrusive options are clearly articulated, and the impact of reconstitution will not be discriminatory or negatively impact either the students or the educators who struggle mightily to educate our nation's youth.

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