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Unintended Educational and Social
Consequences of the No Child Left Behind Act
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I. INTRODUCTION

The rules and regulations of the No Child Left Behind Act (NCLB or “the Act”) have not reduced the gap in student academic achievement as much as Congress originally intended. The great promise of NCLB is that, once held accountable, schools will finally focus on the education of low-achieving students, thus reducing the gap in student academic achievement between White students and African-American, Hispanic, and Native American student populations.¹ Congress devised a series of punishments and rewards designed to encourage schools to find innovative ways to reach the children that schools have historically “left behind” in traditional public education. The creators of NCLB intended the Act to provide schools with rewards and punishments, in an effort to encourage schools to give extra assistance to the poor and minority students that public schools traditionally allowed to struggle or drop out.² The punishments provided in the Act range from the loss of federal Title I funding to complete school takeovers.³ The rewards include additional money for after-school programs and increased teacher pay for performance.⁴

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1. U.S. DEP’T OF EDUC., HOW NO CHILD LEFT BEHIND BENEFITS AFRICAN AMERICANS 1 (2005), available at <http://www.ed.gov/nclb/accountability/achieve/nclb-aa.pdf>; U.S. DEP’T OF EDUC., HOW NO CHILD LEFT BEHIND BENEFITS HISPANIC AMERICANS 1 (2005), available at <http://www.ed.gov/nclb/accountability/achieve/nclb-hisp.pdf>; U.S. DEP’T OF EDUC., HOW NO CHILD LEFT BEHIND BENEFITS AMERICAN INDIANS 1 (2005), available at <http://www.ed.gov/nclb/accountability/achieve/nclb-amind.pdf>.

2. U.S. DEP’T OF EDUC., HOW NO CHILD LEFT BEHIND BENEFITS AFRICAN AMERICANS, *supra* note 1.

3. See FREDERICK M. HESS & MICHAEL J. PETRILLI, NO CHILD LEFT BEHIND PRIMER 17, 42 (2006).

4. *Id.* at 17.

However, the way in which the Act has been implemented has failed to promote the Act's initial goals. Despite the ideology that schools should be held accountable for unequal academic progress, children who attend inner-city schools with the highest poverty rates must still overcome the second-rate education they receive in overcrowded classrooms in school facilities that are badly in need of repair. This disconnect between the goals of the Act and the real-world consequences of its implementation may be due to the current policy focus on student testing as the primary remedy for the achievement gap.

Legislation that establishes a formal policy of colorblindness—a post-modern assertion that race is no longer worthy of consideration in our merit-based society—and that asserts that social class is the most serious obstacle to mobility in America contributes to the Act's ineffectiveness.⁵ The rationale behind this school improvement rhetoric is that if schools and teachers in high poverty areas would do a better job educating their students, then there would be equal opportunities for all children, regardless of race. The most obvious flaw in this logic is that the inequities in our society extend beyond public schooling and are absolutely bound up in race.

In order to provide a historical context for NCLB, this article will first explore the history of school reform movements in America that have sought to redress unequal educational opportunities. These movements will then be framed using critical race theory to understand how colorblindness as a national policy has led to unintended educational and social consequences. Next, the article will review the unintended consequences of the Act, including shifts in the enacted curriculum, increased segregation of schools, the waste of thoughtful, research-based programs that had been in place before NCLB, the unintended effects on teachers, and the diversion of resources to testing instead of to teaching.

II. THE HISTORY OF U.S. SCHOOL REFORM FOR EQUAL EDUCATIONAL OPPORTUNITIES

Modern American school reform at the federal level has been primarily motivated by the idea that education leads to social mobility.⁶ For example, the 1944 Servicemen's Readjustment Act,⁷ known informally as the GI Bill,⁸ subsidized college tuition, subsistence, books and supplies, equipment, and counseling services for returning war veterans of World War II to continue their

5. Eric Freeman, *No Child Left Behind and the Demigration of Race*, 38 EQUITY & EXCELLENCE EDUC. 190, 190-94 (2005).

6. See *infra* Fig. 1.

7. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1944).

8. *Id.*

education.⁹ Subsequent attempts at education reform, specifically the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965, although targeted at a broader segment of society than the GI Bill, were also attempts by the federal government to promote upward social mobility through federal education legislation.¹⁰ Early federal attempts at education reform approached the issue by acknowledging the existing inequalities in society and attempting to counteract them through increased funding or increased access to higher education.¹¹ While these programs had their flaws, on balance, they were successful in narrowing the achievement gap between poor or minority students and White students.¹² In contrast, NCLB has ignored the remaining social inequality that is primarily responsible for the achievement gap by instituting a “color blind” mechanism.¹³ Consequently, the Act has struggled to achieve its goals, precisely because it has chosen to ignore the realities of racial inequalities in America.

A. An Overview of Federal Attempts At Education Reform

The GI Bill, one of the earliest federal attempts at education reform, was very successful at giving returning servicemen the opportunity to achieve upward social mobility through access to advanced education. Two years before World War II, approximately 160,000 U.S. citizens were in college.¹⁴ By 1950, only six years after Congress passed the GI Bill, the figure had risen to nearly 500,000.¹⁵

Many veterans had gone to war before graduating from high school, and policy makers believed not only that college would ease the transition back to

9. Wilbur J. Cohen, *The Federal Government's Program for Ex-Servicemen*, 238 ANNALS AM. ACAD. POL. & SOC. SCI. 63, 63–64 (1945).

10. See Richard Rothstein, *Equalizing Education Resources on Behalf of Disadvantaged Children*, in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 31, 40–63 (Richard D. Kahlenberg ed., 2000); see generally Elizabeth R. Cole & Safiya R. Omani, *Race, Class and the Dilemmas of Upward Mobility for African Americans*, 59 J. SOC. ISSUES 785 (2003).

11. Howard A. Glickstein & William L. Want, *Inequality in School Financing: The Role Of The Law*, 25 STAN. L. REV. 335, 338–41 (1973).

12. Luther Spoehr, *Where Did NCLB Come From? The True Story of the Federal Role in Education*, EDUC. NEXT, Sept. 22, 2008, at 80.

13. Dawn G. Williams & Roderic R. Land, *The Legitimation of Black Subordination: The Impact of Color-Blind Ideology on African American Education*, J. NEGRO EDUC., Oct. 2006, at 579.

14. Reginald Wilson, *G.I. Bill and the Transformation of America*, NAT. FORUM, Fall 1995, at 20, available at http://findarticles.com/p/articles/mi_qa3651/is_199510/ai_n8720508 (stating that in 1942 veterans accounted for forty-nine percent of college enrollments).

15. *Id.*

civilian life for these young men, but also that college would prepare a generation of engineers and technicians for the new economy.¹⁶ In the ensuing seven years, approximately eight million veterans received educational benefits;¹⁷ “of that number, approximately 2,300,000 attended colleges and universities, 3,500,000 received school training, and 3,400,000 received on-the-job training.”¹⁸ By 1951, the GI Bill had cost the government approximately \$14 billion.¹⁹

Before the GI Bill, college was primarily reserved for the White, wealthy elite.²⁰ However, as opportunities for veterans to access higher education were expanding, so too were the opportunities for African-American students. The class action suit *Brown v. Board of Education of Topeka*,²¹ was the watershed decision that declared Kansas laws establishing separate public schools for Black and White students to be inherently unequal.²² The ruling required school districts across the country to reverse their policies of racial segregation in public schools.²³ It was not until the Civil Rights Act of 1964 that other public places (i.e., restrooms and restaurants) would be desegregated; however, it was the belief that access to quality education could provide children with the tools they needed to be successful, productive members of society that drove both the GI Bill and the desegregation movement of the 1960s.²⁴

Along these lines was the two-part paradigm that guided the Elementary and Secondary Education Act (ESEA) of 1965. The ESEA is premised upon the ideas that, first, education is the key to social mobility and, second, the schools that serve students from disadvantaged backgrounds need to be equipped to cope with the unique needs of their student populations.²⁵ The roots of NCLB can be traced back to the ESEA; in fact, NCLB is the reauthorization of the

16. Jenny J. Lee, 1944 GI Bill of Rights,

<http://www.oise.utoronto.ca/research/edu20/moments/1944gibil.html> (last visited Oct. 9, 2008).

17. GI Bill of Rights: A Profitable Investment for the United States, http://www.freehighered.org/h_gifact.html (last visited Oct. 9, 2008).

18. Lee, *supra* note 16.

19. GI Bill of Rights: A Profitable Investment for the United States, *supra* note 17.

20. Daniel A. Clark, “*The Two Joes Meet—Joe College, Joe Veteran*”: *The G.I. Bill, College Education, and Postwar American Culture*, 38 HIST. EDUC. Q. 165, 165–89 (1998).

21. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

22. *Id.*

23. PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965–2005, at 25 (2006).

24. *Id.*

25. Elementary and Secondary Education Act of 1965, Pub. L. No. 89–10, 79 Stat. 27 (1965) *amended by* 20 U.S.C. §§ 6301 *et seq.*

ESEA.²⁶ The ESEA represented the first time the federal government demonstrated a willingness to provide federal dollars to improve public schools.²⁷ Policymakers believed that while school governance is the responsibility of local governments and most public schools were doing fine, the schools in poor areas were in need of improvement.²⁸ As a result, the ESEA was created to send additional federal dollars to poor areas to assist those children as part of Lyndon Johnson's War on Poverty.²⁹ Title I of the ESEA provides extra funding to schools where forty percent or more of students are from families that qualify under the United States Census' definition of "low-income."³⁰

As illustrated by the GI Bill, the Civil Rights Act, and the ESEA, all of Congress's previous attempts at federal education reform were driven by evidence indicating that a particular social or racial group faced an educational disadvantage. While Congress's goals were admirable, one of the side effects of using federal funding for public education is that the government began to take a more active role in education, asking for evidence that the tax dollars sent to schools were being spent wisely.³¹ This push for spending accountability in federal education led to the production of a deeply flawed, yet tremendously influential government commission report that laid the groundwork for NCLB's need-blind, as opposed to need-based, approach to educational funding: The *Nation at Risk* report.

B. A Nation at Risk (1983)

The National Commission of Excellence in Education was created in 1981 by Reagan's Secretary of Education T.H. Bell, ostensibly due to "the widespread public perception that something is seriously amiss in our educational system."³² The Commission's 1983 report, entitled *A Nation at Risk*, represented a call for higher standards in education and cited several indicators that, in the wake of the Sputnik challenge, our schools were unable to prepare America's children for either a technological work force or for a global

26. U.S. Dep't of Educ., *The No Child Left Behind Act of 2001: Executive Summary*, <http://www.ed.gov/nclb/overview/intro/execsumm.html> (last visited Oct. 9, 2008) [hereinafter *Executive Summary*].

27. Leslie Standerfer, *Before NCLB: The History of ESEA*, 6 *PRINCIPAL LEADERSHIP*, Apr. 2006, at 26.

28. MCGUINN, *supra* note 23, at 22.

29. JOHN L. RURY, *EDUCATION AND SOCIAL CHANGE* 191 (2005).

30. *Id.*

31. MCGUINN, *supra* note 23, at 135.

32. NAT'L COMM'N ON EXCELLENCE IN EDUC., U.S. DEP'T OF EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM I* (1983) [hereinafter *A NATION AT RISK*].

village economy.³³ What is more, the report “charged that American students never excelled in international comparisons of student achievement and that this failure reflected systematic weaknesses in our school programs and lack of talent and motivation among American educators.”³⁴

The Commission cited several indicators as the primary evidence for this decline in education. These indicators included the number of adults and seventeen-year-olds who were reported to be functionally illiterate, declining scores from standardized achievement tests like the SAT, College Board Achievement tests, and the National Assessment of Educational Progress (NAEP), and the growing costs of remedial education for recent military recruits who cannot understand safety instructions written at the ninth grade level.³⁵ In short, school-based literacy skills were used as the measure of public school failure. The Commission did not factor into the analysis the fact that college entrance test scores were declining due to the changing demographics of a more inclusive university system.³⁶

Most importantly, the *Nation at Risk* report further reinforced in the public’s mind that individual achievement test scores could be used as evidence of the effectiveness of a nation’s educational system, despite educators’ insistence to the contrary.³⁷ The effects of the language in the report on the American public have been long-lasting: “The symbolic association of the status of U.S. schools with disease or national defense is by now so ingrained that one rarely notes that its concrete referent is only distantly related to its symbolic forms.”³⁸ For example, since tax dollars fund public education, the rhetoric around outcome-based school reform usually focuses on getting our money’s worth from our ailing schools.³⁹

The Commission relied both on the nation’s sense of civic pride and the bottom line throughout the final report, citing the economic implications for industry of other nations making superior products than America. The apparent solution, as determined by the Commission, was for schools to have higher academic standards, and for high schools to put an end to “undemanding and

33. *Id.*

34. DAVID C. BERLINER & BRUCE J. BIDDLE, *THE MANUFACTURED CRISIS: MYTHS, FRAUD, AND THE ATTACK ON AMERICA’S PUBLIC SCHOOLS* 3 (1995); see *A NATION AT RISK*, *supra* note 32, at 4.

35. *A NATION AT RISK*, *supra* note 32, at 4–5.

36. GERALD BRACEY, *THE PROPAGANDA OF “A NATION AT RISK”* (1999), *available at* <http://www.america-tomorrow.com/bracey/EDDRA/EDDRA8.htm>; NEL NODDINGS, *WHEN SCHOOL REFORM GOES WRONG* 14 (2007).

37. NODDINGS, *supra* note 36, at 3–4.

38. Mary Lee Smith et al., *Assessment Policy And Political Spectacle*, 101 *TCHRS. C. REC.* 157, 187 (1999).

39. NODDINGS, *supra* note 36, at 80.

superfluous high school offerings” and return to a classic curriculum.⁴⁰

C. *A Historical Perspective: The Politics of NCLB*

In 1988, four years after the *Nation at Risk* Report, President George H.W. Bush ran for election with an education platform that called for the use of school vouchers to allow publicly available money to be used for private K-12 education.⁴¹ The Republican education platform was based on the premise that if parents were dissatisfied with their neighborhood public schools, they should have the right to use government money to pay for an alternative or private school.⁴² The thinking was that pressure from the marketplace would force schools to improve in order to keep their families, who would in turn be viewed as clients.⁴³ Democrats opposed the use of school vouchers on the grounds that this diversion of precious resources would only serve to further disenfranchise the children in failing schools by providing them with even less money than they already had.⁴⁴

Within four years, education became one of the five most important issues to the voting public.⁴⁵ In 1992, Bill Clinton was able to defeat President George H.W. Bush with the help of the teacher’s union, the National Education Association, which is one of the most powerful unions in the nation. Consequently, Congress reauthorized the ESEA in 1994.⁴⁶ Under pressure to initiate school reform, President Clinton called for states to codify K-12 academic content standards in the 1994 Educate America Act (also known as Goals 2000).⁴⁷ This was voluntary, and only three states actually complied with the request from the Clinton Administration, as education was still largely seen as a local endeavor, not a state-controlled one.⁴⁸

In 1996, Bob Dole ran for president on a platform of eliminating the Department of Education, a move that Clinton was deftly able to redefine as

40. A NATION AT RISK, *supra* note 32, at 7–9.

41. MCGUINN, *supra* note 23, at 68–69.

42. *Id.*

43. Henry M. Levin, *A Comprehensive Framework for Evaluating Educational Vouchers*, 24 EDUC. EVALUATION AND POL’Y ANALYSIS 159, 162 (2002).

44. MCGUINN, *supra* note 23, at 70.

45. *Id.* at 81–82.

46. *Id.* at 80.

47. RAYMOND A. HORN, STANDARDS PRIMER 20 (2004); *see, e.g.*, Goals 2000: Educate America Act, H.R. 1804, 103d Congress § 912 (1994).

48. Benjamin Michael Superfine, *The Politics Of Accountability: The Rise and Fall of Goals 2000*, 112 AM. J. EDUC. 10, 23 (2005).

anti-education with the “soccer mom” constituency.⁴⁹ The Clinton campaign was able to depict Republicans as apathetic to education and children.⁵⁰ Moreover, for the first time, education was considered a federal election issue.⁵¹

III. ABOUT NCLB

The stage was set for the election of 2000; neither Republicans nor Democrats wanted to be seen as against education reform.⁵² As a result, there was wide bipartisan support for NCLB.⁵³ Consequently, Congress included everything suggested by either side of the aisle as part of the consensus, even if accepting all ideas created a contradiction.⁵⁴ School choice, charter schools, state standards, mandatory testing, and funding tied to performance were all part of the new education package.⁵⁵ The lesson from the 1996 election cycle was that politicians could not risk being labeled “anti-education” by voting against NCLB, and by 2000, education had become the number one national issue for voters.⁵⁶

The new requirements under NCLB removed the option for states to decide whether or not to have state-wide academic content standards.⁵⁷ Now, in addition to detailed grade level expectations for student achievement in reading and math, states were also required to set academic achievement standards with cut-scores for basic, proficient and advanced performance.⁵⁸ Moreover, by 2014 all students must be performing at or above the proficient level.⁵⁹ Many of the unintended consequences of NCLB are rooted in the ideologies that guide the discourse about race in the legislation. To further explore this idea, it is important to first define the theoretical framework that will guide this discussion.

49. MCGUINN, *supra* note 23, at 120.

50. *Id.* at 124–25.

51. *Id.* at 128.

52. *Id.* at 146–51.

53. *Id.* at 168.

54. *Id.* at 177.

55. Executive Summary, *supra* note 26.

56. MCGUINN, *supra* note 23, at 128.

57. HORN, *supra* note 47, at 20.

58. *Id.*

59. HESS & PETRILLI, *supra* note 3, at 29.

A. Colorblindness, Race, and NCLB

One of the stated goals of NCLB is to close the achievement gap between White and minority children.⁶⁰ In pursuit of this goal, NCLB counter-intuitively applies a “color-blind” approach to education reform. Color-blind public policies claim to treat individuals of all races equally based on a system of merit. However, recent scholarship asserts that these policies simply replace pigment-based racism with culturally-based racism. As a result, the implementation of policies based on this color-blind approach perpetuate the existing inequality between the White majority and minorities in the United States. Consequently, NCLB’s provisions consistent with a policy of colorblindness virtually ensure that the Act will fail in its goal to close the existing achievement gap between White and minority students.

Michael Omi and Howard Winant provide a description of the roots of public support for NCLB’s color-blind reform policy in their historical text, *Racial Formation in the United States from the 1960s to the 1990s*.⁶¹ Omi and Winant theorize that race is an ideological construct,⁶² and they trace the way that race functions in America from the Civil Rights Movement in the 1960s to the 1980s and 1990s, when the predominant view of racial equality shifted politically.⁶³ Voices from the conservative right claimed that affirmative action and social programs that legitimated group rights were actually shifting racial discrimination to white males.⁶⁴ The newly-fashioned transformation under the Clinton Administration was a vision of a “‘color-blind’ society where racial considerations were never entertained in the selection of leaders, in hiring decisions, and in the distribution of goods and services in general.”⁶⁵ Under the neoconservative Bush administration, racial ideology has been transformed into a set of public policies that is essentially blind to race, particularly with respect to post-secondary education and race preference for admission.⁶⁶

60. U.S. DEP’T OF EDUC., HOW NO CHILD LEFT BEHIND BENEFITS AFRICAN AMERICANS, *supra* note 1.

61. See generally MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S 95–159 (1994) [hereinafter OMI & WINANT, RACIAL FORMATION IN THE UNITED STATES].

62. Michael Omi & Howard Winant, *On the Theoretical Status of the Concept of Race, in RACE, IDENTITY AND REPRESENTATION IN EDUCATION* 3, 4 (Cameron McCarthy & Warren Crichlow eds., 1993) [hereinafter Omi & Winant, *On the Theoretical Status of the Concept of Race*].

63. OMI & WINANT, RACIAL FORMATION IN THE UNITED STATES, *supra* note 61, at 128.

64. *Id.* at 117.

65. *Id.*

66. See OFF. FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., RACE-NEUTRAL ALTERNATIVES IN POSTSECONDARY EDUCATION: INNOVATIVE APPROACHES TO DIVERSITY 5–10, 24–29, 32–40 (2003).

This vision of color-blindness as a means of eliminating racial discrimination is founded on the seemingly paradoxical notion that it is noble to ignore race while simultaneously honoring diversity.⁶⁷ As Omi and Winant observed, the appeal of this ideology is not simply about “fairness,” but also about the maintenance of existing social positions and political stability.⁶⁸ Similarly, Eduardo Bonilla-Silva writes about color-blind racism, white racial ideology in the United States, and the post-modern support of the racial status quo.⁶⁹ The dominant frames of color-blind racial matters are subtle, and many Whites do not believe that racism is a problem in today’s United States.⁷⁰ He writes that, “because whites believe that discrimination is no longer a salient factor in the United States, they believe that blacks’ plight is the result of blacks’ cultural deficiencies (e.g., laziness, lack the proper values, and disorganized family life).”⁷¹ In other words, it is the opinion of many Whites that different immigrant groups in American history have managed their success not because of the whiteness of their skin, but because of their ability to pull themselves up by their figurative bootstraps more effectively than immigrants with darker skin.⁷²

The normalization of race, then, is a tendency for White people to ignore color differences and the privileges they enjoy as a result of their membership in the dominant culture.⁷³ Bonilla-Silva calls this the “New Racism”:

The elements that make up this new racial structure are: (1) the increasingly covert nature of racial discourse and racial practices; (2) the avoidance of racial terminology and the ever growing claim by whites that they experience ‘reverse racism’; (3) the elaboration of a racial agenda over political matters that eschews direct racial references; (4) the invisibility of most mechanisms to reproduce racial inequality; and finally, (5) the rearticulation of a number of racial practices characteristic of the Jim [C]row period of race relations.⁷⁴

The color-blind approach to education reform taken by NCLB illustrates

67. *Id.* at 32–33.

68. Omi & Winant, *On the Theoretical Status of the Concept of Race*, *supra* note 62, at 130.

69. EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA 137–39 (2001) [hereinafter BONILLA-SILVA, WHITE SUPREMACY].

70. *Id.* at 140–46, 151–53, 161.

71. *Id.* at 161–62.

72. See Eduardo Bonilla-Silva, *The New Racism: Racial Structure in the United States, 1960s–1990s*, in RACE, ETHNICITY AND NATIONALITY IN THE UNITED STATES: TOWARD THE TWENTY-FIRST CENTURY 68–72 (Paul Wong ed., 1999) [hereinafter Bonilla-Silva, *The New Racism*].

73. BONILLA-SILVA, WHITE SUPREMACY, *supra* note 69, at 193–204.

74. Bonilla-Silva, *The New Racism*, *supra* note 72, at 56.

how the Act has adopted aspects of this New Racism, while still claiming that its goal is to equalize achievement between White and minority students. Critical Race Theory (CRT) illustrates how the subtly racist policies in NCLB are perpetuating the existing achievement gap, instead of narrowing it. CRT originated in the late 1980s in the field of jurisprudence, rooted in the desire to find legal justice for people of color and draws from law, sociology and history.⁷⁵ According to founding scholars in the field, “critical race theory not only dares to treat race as central to the law and policy of the United States, it dares to look beyond the popular belief that getting rid of racism means simply getting rid of ignorance, or encouraging everyone to ‘get along.’”⁷⁶ For example, CRT has been vital to scholars who have argued against racial profiling by law enforcement officials because it is based on the premise that Blacks and Latinos commit crimes at a greater rate than Whites.⁷⁷ CRT “not only tries to understand our social situation, but to change it; it sets out not only to ascertain how society organizes itself along racial lines and hierarchies, but to transform it for the better.”⁷⁸ CRT’s commitment to social justice, and its goal of political and social change on behalf of communities of color, makes it particularly useful for understanding NCLB.

Ladson-Billings and Tate first argued for implementing CRT in education as a means for talking about school inequities based on race.⁷⁹ As evidence, they cite the disproportionate number of African-American youths who are suspended or expelled from school for violating the dress code.⁸⁰ In addition, they argue that the use of property taxes to fund public education serves to perpetuate school inequity, and that the desegregation of schools increased White flight and served to segregate Black students even more.⁸¹ More importantly, they critique the trend of multicultural education to include gender, sexual orientation, ability, and any other difference, and they view CRT as “a radical critique of both the status quo and the purported reforms.”⁸² Similarly, Dixon and Rousseau argue that CRT provides a theoretical framework for an

75. Garrett Albert Duncan, *Critical Race Theory and Method: Rendering Race in Urban Ethnographic Research*, 8 QUALITATIVE INQUIRY 85, 86–90 (2002).

76. Angela Harris, *foreword* to CRITICAL RACE THEORY: AN INTRODUCTION xvii, xvii–xxi (Richard Delgado & Jean Stefancic eds., 2001).

77. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 2–3 (2001).

78. *Id.* at 3.

79. G. Ladson-Billings & W. Tate, *Toward a Critical Race Theory of Education*, 97 TCHRS. C. REC. 47, 47–68 (1995).

80. *Id.* at 51–52.

81. Ladson-Billings & W. Tate, *supra* note 80, at 53–56.

82. *Id.* at 62.

examination of the material effects of whiteness, particularly an analysis of the tangible ways that schooling is affected by whiteness as a construct of privilege.⁸³ They write that this privilege manifests itself “in tangible ways that affect schooling—through curricula, school choice, and even student behavior that sets standards for ‘normal’ and ‘acceptable’ actions.”⁸⁴

IV. UNINTENDED CONSEQUENCES OF ACCOUNTABILITY

The single-minded concentration on school improvement policies that use punishments and rewards based on student test scores has had unintended educational and social consequences. Not only have teachers and school administrators shifted the curricular focus in an effort to raise test scores, but in some cases they have also abandoned thoughtful, research-based classroom practices in exchange for test preparation. The unintended consequences of these reforms have acted to subvert the primary goals of NCLB.

A. Shifts In The Enacted Curriculum In The Classroom

What is new about the present version of the ESEA is the focus on accountability. Schools are now subjected to a loss of funding (i.e., Title I) if the reading, math, and science test scores of traditionally low-achieving students are not raised to the proficient level. As a result, schools that are struggling to raise test scores are narrowing the curriculum and abandoning innovative interdisciplinary curricula to focus on math, reading, and science because of high-stakes testing.⁸⁵ Other important curricular areas (e.g., history, music, physical education, and art) are not part of the accountability system for schools and are therefore receiving short shrift.⁸⁶ The Center on Education Policy surveyed 299 school districts and reported that seventy-one percent of schools had reduced instructional time in one or more subjects to increase the time spent on reading and math because of the pressures of NCLB.⁸⁷ In Jonathan Kozol’s book, *The Shame of the Nation*, he writes that, “in some schools, the principals and teachers tell me that the tests themselves and

83. Adrienne D. Dixon & Celia K. Rousseau, *And We are Still Not Saved: Critical Race Theory in Education Ten Years Later*, 8 RACE, ETHNICITY & EDUC. 7, 7 (2005).

84. *Id.* at 24.

85. George Wood, *A View from the Field: NCLB’s Effects on Classrooms and Schools*, in MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS 33, 42–44 (Deborah Meier & George Wood eds., 2004).

86. Ctr. on Educ. & Pol’y, *From the Capital to the Classroom: Year 4 of the No Child Left Behind Act*, <http://www.cep-dc.org/index.cfm?fuseaction=Feature.showFeature&featureID=7> (last visited Oct. 9, 2008).

87. *See id.*

preparation for the tests control more than a quarter of the year.”⁸⁸

B. Increased Segregation

As educators like Kozol have noted, NCLB is leading to further segregation as inner-city schools find themselves faced with punitive remedies that do not actually improve the schools, increase student learning, or raise test scores.⁸⁹ The options that have not worked include: restructuring the school administration, replacing teaching staff, providing school choice for families, and requiring mandatory tutoring programs.⁹⁰ The end result is that schools serving students from low socio-economic areas in this country are faced with fewer financial resources for more limited academic programs, which is precisely the opposite effect the ESEA was intended to have on public education for low-income children.⁹¹

C. Wasting Existing, Thoughtful Programs

Worse still, states like Iowa that already had thoughtful, voluntary diagnostic assessment systems in place have had to abandon them to be in compliance with NCLB. Linda Darling-Hammond, a Stanford professor and outspoken critic of the NCLB legislation, writes that a number of states have replaced “instructionally rich, improvement-oriented systems with more rote-oriented punishment-driven approaches—and it has thrown many high-performing and steadily improving schools into chaos rather than helping them remain focused and deliberate in their ongoing efforts to serve students well.”⁹² This is a tragic and ironic consequence of the legislation—that teachers and schools would be undermined in the school improvement work to which school improvement legislation committed them.

88. JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* 113 (2005).

89. Frederick M. Hess & Chester E. Finn, Jr., *Conclusion to LEAVING NO CHILD BEHIND?: OPTIONS FOR KIDS IN FAILING SCHOOLS* 287, 294–96 (Frederick M. Hess & Chester E. Finn, Jr. eds., 2004).

90. See Tara Malone, *Educators Question No Child Left Behind Penalties*, DAILY HERALD (Arlington Heights, IL), Feb. 18, 2006, at 8.

91. Stan Karp, *Band-Aids or Bulldozers*, RETHINKING SCHOOLS ONLINE, Spring 2006, http://rethinkingschools.org/archive/20_03/band203.shtml.

92. 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, 5 (Deborah Meier and George Wood eds., 2004).

D. Unintended Effects On Teachers

No Child Left Behind has also caused unintended effects on the teaching workforce, particularly in schools with the School in Need of Assistance (SINA) designation. Highly qualified teachers with experience are leaving high-poverty schools, especially when teacher salaries are tied to student academic performance, which reinforces the unequal educational opportunities.⁹³ “Nearly 40% of all teachers leaving high-poverty schools reported either job dissatisfaction or the desire to pursue a better job or improve job opportunities as a reason for departing.”⁹⁴ The definition of a Highly Qualified Teacher (HQT) according to NCLB is someone who:

Has full state certification as a teacher and does not have certification or licensure requirements waived on an emergency, temporary, or provisional basis; Holds a minimum of a bachelor’s degree; and has demonstrated subject matter competency in each of the academic subjects in which the teacher teaches, in a manner in compliance with Section 9101(23) of ESEA and determined by the state.⁹⁵

Further regulations associated with the HQT have clarified that a teacher must hold a bachelor’s degree in the subject that they are assigned to teach.⁹⁶ An unforeseen result of this definition has been that Special Education teachers, who have special credentials and training in how to teach special needs students, do not generally hold bachelor’s degrees in every subject they teach.⁹⁷ As a result, they are labeled “unqualified” to teach anything outside of the subject in which they hold their degree.⁹⁸

Many teachers, demoralized from the HQT provisions, would also argue that the law employs a view of motivation that they find objectionable. Nel Noddings argues that, “as educators, we would not use threats, punishments, and pernicious comparisons to ‘motivate’ our students, but that is how the No Child Left Behind law treats the school establishment.”⁹⁹ Noddings opines that

93. Terry E. Spradlin & Kelly A. Prendergast, *Emerging Trends in Teacher Recruitment and Retention in the No Child Left Behind Era*, EDUC. POL’Y BRIEF, Fall 2006, at 1, 4, available at http://www.ceep.indiana.edu/projects/PDF/PB_V4N12_Winter_2006_Recruitment.pdf.

94. *Id.*

95. La. Dep’t of Educ., NCLB Highly Qualified Educators: A National Perspective, <http://www.louisianaschools.net/1de/tsac/1784.html> (last visited Dec. 1, 2008) [hereinafter Highly Qualified Educators].

96. Highly Qualified Teachers, <http://www.knea.org/profession/highlyqualified.html> (last visited Oct. 29, 2008).

97. Lorie A. Shane, *Districts Look for Ways to Meet Special Ed HQT Standards*, MICH. EDUC. REPORT, Sept. 2, 2008, <http://www.educationreport.org/pubs/mer/article.aspx?id=9758>.

98. *Id.*

99. Nel Noddings, *Rethinking a Bad Law: One Scholar’s Indictment of the No Child Left*

“a good law does not demoralize good people.”¹⁰⁰

E. Diversion of Resources to Testing Instead of Teaching

Perhaps the most shocking effect of NCLB has been the diversion of resources (i.e., education dollars) to testing. This has led to capacity building, in which new state bureaucracies manage large-scale testing programs and report to the federal Department of Education.¹⁰¹ The United States General Accounting Office reported that between \$1.9 billion and \$5.3 billion (depending on the item type selected) would be spent on state testing programs between 2002–08.¹⁰² As educational policy analysts have observed, the spending on assessment has often been at the expense of building repairs and facility maintenance.¹⁰³ Indeed, NCLB prescribes the budget expenditures from the federal funds, and as a result, as Darling-Hammond notes, “most of the federal money has to be spent for purposes other than upgraded facilities, textbooks, or teachers’ salaries.”¹⁰⁴

V. CONCLUSIONS

NCLB’s focus on gaps between different groups of students is both novel and important. However, the policy of academic achievement testing as a remedy for the social and economic problems that have plagued our schools has not evened the playing field for our children in failing schools. As Congress debates the best strategies for reforming NCLB in this election year, we need to be wary of policy innovations that amount to simply rearranging the deck chairs on the Titanic. We need to be prepared to rethink the paradigm that tells policymakers that high-stakes testing is an adequate tool for school reform. What is more, we need to be ready to have the hard conversations about race and ideology in this country before we are going to truly be prepared to close the achievement gaps. This cannot happen when we ignore White privilege and lump together the problems of the poor children with the problems of minority children, as if these two are always intertwined.

Behind Act, EDUC. WEEK, Feb. 23, 2005, at 38.

100. *Id.*

101. Heinrich Mintrop, *Low-Performing Schools’ Programs and State Capacity Requirements: Meeting the NCLB Educational Goals*, in HOLDING NCLB ACCOUNTABLE: ACHIEVING, ACCOUNTABILITY, EQUITY & SCHOOL REFORM 137, 144 (Gail L. Sunderman ed., 2007).

102. U.S. GEN. ACCT. OFFICE, TITLE I: CHARACTERISTICS OF TESTS WILL INFLUENCE EXPENSES; INFORMATION SHARING MAY HELP STATES REALIZE EFFICIENCIES 3 (2003), available at <http://www.gao.gov/new.items/d03389.pdf>.

103. Liz Hollingworth, *How We Spend Our Money: An NCLB Commentary*, 3 ASCD EXPRESS 6, 6 (2007).

104. Darling-Hammond, *supra* note 93, at 8.

The persistence of the achievement gap between White and minority children in our public schools has more to do with the inequities in social opportunities than it does with the need for more educational testing. But it is much easier to insist that teachers and students need more carrots and sticks to keep them from being so lazy than it is to say that major social reform cannot occur until we confront the issues of race and class head on, and not merely expect schools to be the institution that can cure the social problems that face our youngest generation. Social remedies like NCLB that fail to recognize this are doomed to fail.

TIMELINE OF MODERN SCHOOL REFORM

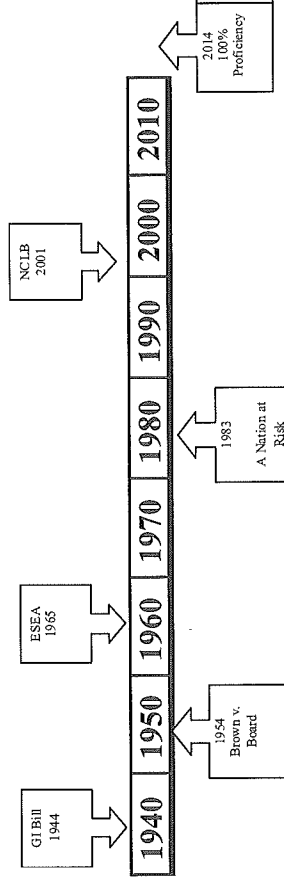


Figure 1. Significant dates in the history of American public school reform for equal educational opportunities

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