THE NO CHILD LEFT BEHIND ACT: DO WE REALLY WANT IT TO LEAVE ALL RELIGION BEHIND?

By Theresa Lelinski

Introduction

There are certain topics that will always be controversial, on which opinions will always be divided. In most cases, this occurs over issues that have a widespread effect on all types and classes of people. Education fits squarely into this category. Practically every citizen has been through the United States educational system or has children who are currently enrolled. Thus, the enactment of the No Child Left Behind Act (NCLBA/the Act), the country's most expansive educational legislation, has elicited strong reactions from every corner of the population:

> Putting a mandate out that says "You're going to produce children who are exactly the same," is very unfair. It's unfair to the people who are trying to help children, and it's unfair to the children . . . . In our school systems we're cutting teachers, we're cutting programs, because of budget crunches, but yet we are expected to spend all this money to test children . . . The real key ingredient here is to make sure that all of our children are equipped to pursue their dreams, and if we have a situation where they don't have the skill to pursue their dreams, then we have a problem with our system.[1]

[1] NO CHILD LEFT BEHIND (Boondoggle Films 2005). After spending his senior year of film school tutoring students at PS217 as part of a work-study program, New York University film student Lerone Wilson decided to create a documentary that reflected educators' discontent with the NCLBA. The film, which was recently picked up by the National Educational Telecommunications Association (NETA), was intended to present a balanced look at all the issues surrounding the NCLBA, and has had a highly polarizing effect on the educational community, sparking intense reactions on each end of the political spectrum. Press Release, Boondoggle Films, Filmmaker Takes on 'No Child Left Behind,' http://www.boondogglefilms.net/kits/nclb/pbsrelease.pdf (last visited Jan. 19, 2009).

Such statements represent the variety of complaints regarding the NCLBA, which has been criticized heavily, almost since its conception.[2] Due to the nature of the Act and its implications that involve virtually all children, liberals and conservatives alike, who have vested interests in the Act, have voiced their opinions; many of which tend towards the negative.[3] Critics of the NCBLA take issue with everything from its misappropriation of federal funding[4] to what is thought to be the inappropriate interference by the federal government in what should be state-governed matters.[5] However, there are several other matters that some consider to be equally distressing, yet are often overlooked, possibly because of their religious connotations.

At the heart of the NCLBA is the policy that funding granted to school districts is conditioned on the schools qualifying according to standardized testing.[6] Any public school receiving funds under the Act must submit to yearly assessments to review the performance of the institution and "determine whether [it] is making adequate annual progress."[7] Each school must also submit to any extra assessments deemed necessary according to the individual local educational agency's discretion,[8] as well as allowing all results to be published and made available to "parents, teachers, principals, schools, and the community."[9] Additionally, each public school district that qualifies for funding according to the above specifications must then share its appropriations with any private

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[2] *Id*.
[3] *Id*.
[4] *San Diego Unified Sch. Dist. v. Comm'n on State Mandates*, 33 Cal. 4th 859, 882-83 (2004). The California Supreme Court held that the costs of enforcing the mandatory expulsion of a student found in possession of a firearm on school grounds fall within the meaning of the phrase "a higher level of service," and thus are reimbursable to a school district. *Id*. at 891. Within the context of this decision, the court discusses the procedures and steps unrelated to education that schools must follow in order to retain their funding under the NCLBA, the influence this gives the government, and whether such influence is proper. *Id*. at 882-83.
[5] *No Child Left Behind: A Debate on the Privatization of Education* (March 12, 2004), (Democracy Now! Broadcast Mar. 12, 2004), http://www.democracynow.org/2004/3/12/no_child_left_behind_a_debate. It has been argued that no portion of the Constitution gives Congress the power to regulate education, and that the Framers intended for this power to rest solely with the states. *Id*. Under this theory, the NCLBA is a violation of the Constitution and an impermissible usurpation of the states' authority. *Id*.
[6] No Child Left Behind Act of 2001 § 1116(a)(1)(A), 20 U.S.C. § 6316(a)(1)(A) (2002).
[7] *Id*.
[8] No Child Left Behind Act § 1116(a)(1)(B) of 2001, 20 U.S.C. § 6316(a)(1)(B) (2002).
[9] No Child Left Behind Act of 2001 § 1116(a)(1)(C), 20 U.S.C. § 6316(a)(1)(C) (2002). The philosophy behind this requirement is based on the idea that if parents, teachers, schools and principals have access to the assessments of other institutions, they can continually refine their own programs by learning from schools that have high success rates. *Id*.

school within its district, including parochial schools, to be used for any benefits that "address their needs."[10]

Despite private schools' entitlement to a portion of their public school district's funding, parochial students are not required to submit to any form of testing.[11] In fact, the only form of assessment parochial schools must complete is a consultation with educational agency officials to determine how much funding they can reasonably expect.[12] This aspect of the NCLBA seems to be quite contradictory to the very purpose of the Act, in several different ways. If one of the NCLBA's primary goals is to ensure that both schools and students of all backgrounds are pushed to achieve higher standards of performance and education,[13] why are parochial institutions left out of this plan? Can private schools reach the same levels of success as public schools if they are not pushed to meet the same requirements? If not, can the government really claim that no child has been left behind?

The standard answer to some of these questions is to cite the Establishment Clause,[14] claiming that while the government may provide certain general services for religious schools,[15] it is precluded from engaging in the actual management of parochial school

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[10] No Child Left Behind Act of 2001 § 1120(a)(1), 20 U.S.C. §6320(a)(1) (2002). The phrase "address their needs" has been extended to include such items as radios, television, computer equipment, mobile educational equipment, and the cost of dual enrollment for students in both public and parochial schools. *Id*. This is consistent with past case law, which has held that public schools must use their federal funding to provide transportation and general programs to parochial schools within their district. *Everson v. Board of Ed.*, 330 U.S. 1, 17-18 (1947).

[11] No Child Left Behind Act of 2001 § 1120(a)(3), 20 U.S.C. 6320(a)(3) (2002).

[12] *Id*. According to subsection (b), consultations must be "timely and meaningful," and focus mainly on identifying the children's needs and how such needs can be best satisfied. No Child Left Behind Act of 2001 § 1120(b)(1)(A), 20 U.S.C. 6320(b)(1)(A) (2002).

[13] Martin R. West & Paul E. Peterson, *The Politics and Practice of Accountability*, *in* NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 2 (Paul E. Peterson & Martin R. West eds., 2003). While the NCLBA has several different goals, the use of achievement tests to encourage higher success rates among students is its most commonly known aim. W. JAMES POPHAM, AMERICA'S "FAILING" SCHOOLS 13-14 (2005).

[14] U.S. CONST. amend. I.

[15] *Everson*, 330 U.S. at 18. In this landmark case, the Supreme Court held that it did not constitute impermissible interference in religious education for public schools to use their federal funding to provide transportation to students attending religious schools within their districts. *Id*.

programs.[16] Reliance on such reasoning ensures that the government does not violate the separation of church and state.[17] In all actuality, this easy solution appears to raise further questions. When the government provides funding to parochial schools, no matter how general the intended purpose for this money may be, is it still helping the institution give its students an improved religious education? Under such a theory, the relevant portion of the NCLBA, mandating that public school districts must share their federal appropriations with private schools within their districts, is a violation of the Establishment Clause. By indirectly improving the quality of parochial education, it could be construed that the government is endorsing the religion that is being taught within the schools.

A final issue that has been raised in terms of the NCLBA is the Act's view on Intelligent Design. An amendment to the NCLBA, proposed by Pennsylvania Republican Senator Rick Santorum, promoted the teaching of Intelligent Design alongside the theory of Evolution.[18] The rationale behind this amendment rested on the idea that children should be taught a full range of scientific views, and how to distinguish testable theories of science from religious and philosophical claims.[19] While the amendment was ultimately excluded from the Act,[20] Intelligent Design advocates continue to claim that the terms of the NCLBA encourage, if not mandate, the teaching of Intelligent Design.[21] While the law clearly holds that public schools may not endorse any religious views, and has

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[16] *See Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973). In this case, the Supreme Court addressed the issue of a state providing aid to religious schools for the first time. It established the "Lemon test," which instructed courts to determine whether the action in question was secular in nature, had an effect that advanced or inhibited religion, and "excessively entangled" religion and government. *Id*. at 195, 201. In 1997, the Supreme Court modified this test by combining the last two elements into one question. *Agostini v. Felton*, 521 U.S. 203, 240 (1997).

[17] *Id*.

[18] Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL'Y 417, 478 (2006). While proponents of the Santorum Amendment assert that they are in favor of an objective approach to teaching the opposing theories, it has been argued that by singling out Evolution as a uniquely controversial issue, the amendment reveals its anti-Evolutionary intentions. Glenn Branch, *Farewell to the Santorum Amendment*?, 22 Rep. Nat'l Center Sci. Educ., Jan.-Apr. 2002, *available at* http://www.ncseweb.org/rncse/22/1-2/farewell-to-santorum-amendment (last visited Jan. 17, 2009).

[19] Bowman, *supra* note 18.

[20] *Id*. Though omitted from the final text of the NCLBA, the Santorum Amendment was included in the initial bill adopted by the Senate, passing after only brief discussion, with a vote of 91-8. *Id*.

[21] *Id*. at 476.

specifically excluded the teaching of Intelligent Design,[22] the question remains whether the teaching of this theory would successfully advance the scientific goals of the NCLBA.

I. Historical Overview of Education in the United States and Summary of the No Child Left Behind Act

Although the No Child Left Behind Act did not officially become law until 2002, its history and beginnings can be traced back almost four decades.[23] While the NCLBA incorporates many new regulations, it is actually a reauthorization of the Elementary and Secondary Education Act (ESEA) that was initially passed as part of President Lyndon Johnson's "Great Society"[24] program of 1965.[25] The ESEA was the first federal statute to provide a "substantial, precedent-setting amount of federal money to local schools," with the intention of securing a better education for "historically underserved student groups such as minority and low income students."[26] Initially, the plan appropriated about two billion dollars for this purpose, and by 1975, federal funding for education had grown by 200 percent.[27] However, this progress slowed drastically over the next five years,[28] and by 1985, federal funding for education had decreased by twenty-one percent.[29] No significant progress was made until President Bill Clinton revised the ESEA in 1994 with the Improving America's Schools Act (IASA), which began the focus

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[22] *Kitzmiller v. Dover Area Sch. Dist*., 400 F. Supp. 2d 707, 765 (M.D.Pa. 2005). In the most recent case banning the teaching of Intelligent Design in public schools, the court came to the specific conclusions that an objective observer would recognize Intelligent Design as a form of Creationism, that an objective observer would view the teaching of Intelligent Design as an endorsement on the part of the public institution, and that Intelligent Design does not qualify as a legitimate science. *Id*. at 721-46.

[23] POPHAM, *supra* note 13, at 14.

[24] At the time of its passage, Johnson's Great Society program represented one of the most extensive legislative plans in the Nation's history. *See Lyndon B. Johnson*, http://www.whitehouse.gov/history/presidents/lj36.html (last visited Jan. 17, 2009). Among the many programs it provided aid to were education, Medicare, crime control and prevention, urban renewal, and a widespread attack on poverty. *Id*.

[25] POPHAM, *supra* note 13, at 4.

[26] *Id*. at 14. Before to the enactment of the ESEA, almost all public school funding had to be collected directly from local tax dollars. *Id*.

[27] National Conference of State Legislatures, http://www.ncsl.org/statefed/NCLB/NCLBHistory.htm (last visited Jan. 19, 2009) [hereinafter *National Conference*].

[28] From 1975 to 1980, educational appropriations increased by a mere two percent. *Id*.

[29] *Id*. This staggering decline resulted from President Ronald Reagan's fierce opposition of an expanded federal role in education. *Id*. During his administration, Reagan not only severely cut back federal spending on education, but he also went so far as to campaign for the termination of the U.S. Department of Education. *Id*.

on individual accountability among schools, and invested the federal government in the standards of public schooling more than ever before.[30]

As the effects of the IASA became apparent, the federal government sought to build on its success.[31] As the 2000 presidential election approached, candidates Al Gore and George W. Bush both voiced their support of "some sort of rigorous accountability system that relied on an expanded use of educational tests."[32] While their individual positions differed in some ways,[33] they shared in the underlying belief that public schools should be obligated to provide evidence that they were performing at a high level.[34] Both candidates also agreed that schools showing poor test scores should be placed on some form of an improvement track.[35] Due to the substantial similarities between the two programs, Bush had little trouble securing bipartisan congressional support for the No Child Left Behind Act after his 2000 election.[36] Both, the House and Senate, overwhelmingly passed the Act in late 2001, and Bush signed the statute into law in January 2002.[37]

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[30] *Id*. In order to encourage schools to become accountable for their weaknesses, the IASA required each state to develop challenging content and performance standards, create a unitary system of assessment, and track students' yearly progress. *Id*. States were still allowed to develop their own educational systems, but if they did not comply with the guidelines, the IASA denied them federal funding. *Id*.

[31] *Id*.

[32] POPHAM, *supra* note 13, at 13.

[33] The primary difference between the two plans is that Gore's program stressed the need for additional teachers and a universal preschool system, as opposed to Bush, who felt that a stronger focus needed to be placed on improving reading skills. Sahm Adrangi, *For Gore and Bush, Education a Top Priority*, YALE HERALD, Oct. 20, 2000, *available at* http://www.yaleherald.com/archive/xxx/2000.10.20/news/p7education.html (last visited Feb. 6, 2006).

[34] Both candidates agreed that the primary evidence schools should be required to provide are students' test scores.

[35] POPHAM, *supra* note 13, at 13-14.

[36] *Id*.

[37] *Id*. at 13. The House and Senate initially passed similar, but slightly different versions of the bill, and agreed to form a conference committee to resolve their conflicts. National Conference, *supra* note 27. The committee took about five months to revise the language of the bill to incorporate the ideas of both versions, and both chambers passed the final copy on December 18, 2001, with votes of 87-10 in the Senate and 381-41 in the House. *Id*.

Upon signing the Act, President Bush declared, "As of this hour, America's schools will be on a new path of reform, and a new path of results."[38] This new path was evidenced by the NCLBA's twenty-four percent rise in funding during its first year of operation, and the unprecedented increase in federal involvement and control that followed.[39] It was hoped that the increased money and control would achieve success based on four main principles: accountability for results, more freedom for states and communities, proven education methods, and more choices for parents.[40] It is the first principle that is widely considered to be the most significant.[41]

The accountability provisions of the NCLBA are intended to hold public schools directly responsible for the effectiveness of their educational programs, and to assure tax payers that schools will provide them with reliable proof of their effectiveness.[42] Districts are driven to make the necessary improvements through the requirements of annual standardized testing in grades three through eight,[43] the passing of a high school exit exam by all graduates, and participation in the National Assessment of Educational Progress (NAEP).[44] The results of the tests and improvements made under the NAEP help determine whether schools have met their Adequate Yearly Progress (AYP); schools that do not meet AYP standards are labeled as failing.[45] The enforcement of AYP targets

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[38] Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, *in* NO CHILD LEFT BEHIND: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 23 (Paul E. Peterson & Martin R. West eds., 2003).

[39] National Conference, *supra* note 27. Lawmakers have said these two effects were intended to send a clear message to educators: "'We have ample federal money to send your way, but in order to get that money, you must follow the new rules that we've established.'" POPHAM, *supra* note 13, at 14.

[40] U.S. Department of Education, http://www.ed.gov/nclb/overview/intro/4pillars.html (last visited Jan. 17, 2009) [hereinafter *U.S. Department*].

[41] POPHAM, *supra* note 13, at 15.

[42] *Id*.

[43] Students from the third to eighth grades must pass annual tests. Frederick M. Hess, *Refining or Retreating? High-Stakes Accountability in the States*, *in* NO CHILD LEFT BEHIND: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 55 (Paul E. Peterson & Martin R. West eds., 2003). Beginning in the 2007-2008 school year, schools will also be required to administer science tests at least once in grades three through five, six through nine, and ten through twelve. *Id*.

[44] *Id*.

[45] POPHAM, *supra* note 13, at 22. Schools that do not meet AYP targets for two years in a row are classified as "in need of improvement," and are to implement "scientifically" developed improvement plans. *Id*. at 41. Districts are also placed in the failing category if they do not test at least ninety-five percent of all enrolled students. *Id*. at 40.

is one of the main ways in which the drafters of the NCLBA envisioned reaching the Act's ultimate goal of one hundred percent proficiency among the nation's students.[46]

As the accountability aim is considered the most significant aspect of the NCLBA, the other three pillars are logically designed to lend it their support. While there certainly exists a high level of federal involvement, the second aim is achieved by provisions that offer states and school districts flexibility in how they decide to spend federal appropriations.[47] One rationale for giving them this authority is that districts are more accountable when they have adopted their own organizational control mechanisms.[48] The third pillar, proven education methods, centers on the implementation of educational practices that have been proven effective through research.[49] Both schools and districts are required to prepare and distribute annual "report cards" to parents and the general public,[50] in order for comparisons to be drawn between schools using successful methods and schools that need to alter their practices.[51] Schools are thus held publicly accountable for their results and can direct their funding to develop programs that incorporate successful methods of improvement.[52] The final aim gives parents of students in failing schools the option of transferring their children to a better-performing school within their district.[53] Giving parents this choice encourages accountability by

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[46] *Id*. at 23. The focus of the NCLBA is that *every* child is successful, and critics have joked about the possible ramifications of "an ESEA reauthorization entitled 'Only Five Percent of Children Left Behind.'" *Id*. Thus, the ultimate goal is that twelve years from the end of the 2001-02 school year, every student returns test results of at least "basic" proficiency. *Id*. at 23-24.

[47] U.S. Department, *supra* note 40. Under these provisions, up to fifty percent of funds granted to the Improving Teacher Quality State Grants, Educational Technology, Innovative Programs, and Safe and Drug-Free Schools Programs can be transferred among these programs as the schools believe to be necessary. *Id*.

[48] Terry M. Moe, *Politics, Control, and the Future of School Accountability*, *in* NO CHILD LEFT BEHIND: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 81 (Paul E. Peterson & Martin R. West eds., 2003). Although states and districts are adopting their own controls, authorities are still instructed to put the emphasis of their actions on student achievement. *Id*.

[49] U.S. Department, *supra* note 40.

[50] Report cards regarding school quality are required to be presented in a concise and understandable form. POPHAM, *supra* note 13, at 38. The NCLBA specifies what must be included in these reports, such as the actual achievement rates in each district, compared to the achievement level that is required by the Act. *Id*. This information must also be broken down into levels of ability according to "race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged." *Id*.

[51] *Id*.

[52] U.S. Department, *supra* note 40.

[53] *Id*. The same provisions also allow parents to transfer their children if they currently attend a "persistently dangerous school," or have been the victim of a violent crime while on school grounds. *Id*.

providing schools with incentives to raise their standards.[54] This aim puts institutions on notice that inadequate results will have severe consequences.[55] Not only will they lose students, but they will also lose money as their enrollments shrink.[56]

While there are many sub-goals the NCLBA hopes to achieve, the four pillars of the Act illustrate that the main objective is to force schools and districts to take responsibility for ensuring that their students perform as well as possible. As the target for results will not arrive until the 2013-2014 school year,[57] it remains to be seen how effective the various provisions and requirements actually are, and whether they serve the best interests of the children.

II. Historical Overview and Summary of Intelligent Design and the Santorum Amendment

Just as the No Child Left Behind Act can trace its origins back through several decades, the beginnings of the Intelligent Design movement can be traced back as far as the 1920s, when the first public debate over the competing views of the origin of life took place in the well-known *Scopes V. State* trial.[58] This controversy has taken place in several

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[54] Moe, *supra* note 48, at 101.
[55] *Id*.
[56] *Id*. Critics of the NCLBA have identified a problem with the school choice provisions. Unions have become aware that the parents' options threaten their own interests, and respond by pressuring authorities to oppose this aspect of the Act. *Id*. However, they have yet to garner much success in this respect, as parents fiercely support the choice movement. *Id*.
[57] POPHAM, *supra* note 13, at 26. The federal legislature specified that progress occurring throughout this timeline must be made in equal increments, so that educators could not claim to have satisfied the accountability requirements during the early years of the law's existence by making only small improvements. *Id*. Educators strongly disagree with this stipulation, complaining that lawmakers are insisting on "unattainable perfection." *Id*.
[58] T. Mark Moseley, *Intelligent Design: A Unique Perspective to the Origins Debate*, 15 REGENT U. L. REV. 327, 327 (2003). The first and most notorious public confrontation over which view could be taught in public school classrooms occurred in the 1925 "Scopes Monkey Trial." *Id*. John Thomas Scopes, a high school biology teacher, was convicted for teaching the theory of Evolution in violation of Tennessee State law. Gabriel Acri, *Persistent Monkey on the Back of the American Public Education System: A Study of the Continued Debate Over the Teaching of Creationism and Evolution*, 41 CATH. LAW. 39, 42-43 (2001). The Supreme Court of Tennessee later reversed Scopes's conviction on a technicality, but upheld the constitutionality of the Anti-Evolution Act. *Id*. at 44 n.23; *see Scopes v. State*, 289 S.W. 363 (Tenn. 1927). The controversy caused such a public stir, that it was later dramatized in a classic 1960 movie, *Inherit the Wind*. Douglas O. Linder, *State v. John Scopes ("The Monkey Trial")*, http://www.law.umkc.edu/faculty/projects/ftrials/scopes/evolut.htm (last visited Jan. 17, 2009).

different settings over the years,[59] typically focusing on two main sides: Creationism[60] and Evolution.[61] Advocates for each viewpoint are constantly battling for their beliefs to be presented in public school classrooms, with the public taking several different stances on the issue.[62] However, in the early 1990s, a new approach was introduced and began to garner national recognition.[63] This new movement, known as "Intelligent Design" or "Design Theory," re-ignited the old controversy and became a third contender in the debate.[64]

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[59] The most notable case following the *Scopes* trial took place forty-three years after the Supreme Court of Tennessee handed down its decision. *Id*. In *Epperson v. Arkansas*, the United States Supreme Court held Anti-Evolution laws to be unconstitutional, noting that the Anti-Evolution statute "was a product of the upsurge of 'fundamentalist' religious fervor of the twenties." *Epperson v. Arkansas*, 393 U.S. 97, 98 (1968).

[60] Creationism is a theory that many religious persons follow, believing that God created the entire universe, including the galaxies, solar system, and all life on Earth. STEERING COMM. ON SCI. AND CREATIONISM, NAT'L ACAD. OF SCI., SCIENCE AND CREATIONISM: A VIEW FROM THE NATIONAL ACADEMY OF SCIENCES 7 (2d ed. 1999)[hereinafter *STEERING COMM.*]. Creationism strictly follows the account found in Genesis, which states that, "the earth was created in a single week of six twenty-four hour days no more than ten thousand years ago; the major features of the earth's geology were produced by Noah's flood, and there have been no major innovations in the forms of life since the beginning." Moseley, *supra* note 58, at 328. Some creationists argue for a form of Creation Science or Theistic Evolution, which is in agreement with scientific evolution and reflects the religious view of creation, as revealed by paleontology, molecular biology, and many other scientific disciplines. *Id*.

[61] The most commonly held understanding of Evolution is that man descended from apes and monkeys, although the theory actually holds that all life is related, based on findings in genetics and molecular biology. JOAN ROUGHGARDEN, EVOLUTION AND THE CHRISTIAN FAITH 13-14 (2006). While popular opinion is that Charles Darwin pioneered the idea in 1859, in his famous book, *On the Origin of the Species*, scholars have found records indicating that ancient Greek philosophers believed that similar species evolved from a common ancestor. STEERING COMM., *supra* note 60, at 9. Darwin's twist on the theory was his idea that "evolution could be explained by the differential survival of organisms following their naturally occurring variation," which is a process he referred to as natural selection. *Id*. Evolutionists believe that chance, as opposed to a Creator or intelligent force, is the cornerstone of evolutionary theory. Moseley, *supra* note 58, at 330.

[62] Moseley, *supra* note 58. The results of a 2005 survey showed that sixty-four percent of the population polled "were open to the idea of teaching creationism in addition to evolution," while thirty-eight percent believed Creationism should replace Evolution entirely. David R. Bauer, *Resolving the Controversy Over "Teaching the Controversy": The Constitutionality of Teaching Intelligent Design in Public Schools*, 75 FORDHAM L. REV. 1019, 1019 (2006). In terms of government officials, doctor and Tennessee Republican leader, Senator Bill Frist also endorsed teaching both sides, because such an approach "doesn't force any particular theory on anyone," and is the "fairest way to go about education." ROUGHGARDEN, *supra* note 61, at 7.

[63] Moseley, *supra* note 58.

[64] *Id*.

While Intelligent Design arguments have existed for centuries,[65] they have only recently been given serious consideration and attention.[66] This newfound confidence in Intelligent Design results from the discovery of "precise methods for distinguishing intelligently caused objects from unintelligently caused ones," which occurred only in the past decade.[67] In its most basic definition, Intelligent Design is the theory that humans are too complex to be "the result of anything but an intelligent designer,"[68] and "provides a means to analyze nature in an attempt to determine what may be inferred about its origin."[69] The theory utilizes various scientific methods to detect a design and the underlying information that the design implicates,[70] and then uses that information as a "reliable indicator of intelligent causation," and as the object of scientific investigation.[71] In other words, Intelligent Design aims to scientifically detect and measure information, rationally explain its origins, and trace its informational pathway.[72] The empirical results and consequences produced by this formula are entirely devoid of religious significance and commitments, which is what separates the theory from Creationist viewpoints.[73]

Like many controversial new theories, Intelligent Design has been confronted with opposition from many different corners. Creationists view the theory as merely an alternative to evolution, which still runs contrary to their religious beliefs, while Evolutionists think it is "simply biblical creationism updated and disguised to sneak

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[65] One of the leading advocates for Intelligent Design traces its origins back as far as "the third and fourth centuries." WILLIAM A. DEMBSKI, INTELLIGENT DESIGN: THE BRIDGE BETWEEN SCIENCE AND THEOLOGY 105 (1999).

[66] *Id*. One of the main catalysts for the Intelligent Design movement was the publication of law professor Phillip E. Johnson's, *Darwin on Trial*, in 1993. *Primer: History of Intelligent Design and the Creation-Evolution Controversy*, http://www.ideacenter.org/contentmgr/showdetails.php/id/1119 (last visited Jan. 17, 2009). This book was followed by Michael Behe's, *Darwin's Black Box*, in 1996, which popularized the phrase "Intelligent Design" throughout the country. *Id.*

[67] Moseley, *supra* note 58, at 336.

[68] Bauer, *supra* note 62.

[69] Moseley, *supra* note 58, at 336.

[70] Examples of such methods include Michael Behe's "irreducible complexity," Marcel Schutzenberger's "functional complexity," and William Dembski's "specified complexity," which are based on different principles of biochemistry and mathematics. *Id*. at 336 n.58.

[71] *Id*. at 336. The method employed to determine whether design has been implicated is called the "explanatory filter." *Id*. According to this method, any observable fact is the result of law, chance, or design. *Id*.

[72] *Id*.

[73] William A. Dembski, *Intelligent Design as a Theory of Information* (1998), *available at* http://www.arn.org/docs/dembski/wd_idtheory.htm (last visited Jan. 17, 2009).

evangelical Christianity past the First Amendment."[74] However, the negative opinions of the opposing factions are not nearly as important as the Government's attitude in terms of the fight to get Intelligent Design introduced into public school classrooms. In 2005, President Bush weighed in on the issue by supporting the teaching of both evolution and Intelligent Design in public schools.[75] Furthermore, since 2001, the state legislatures or boards of education in approximately twenty-five states have considered proposals that would alter the teaching of evolution by incorporating theories of Intelligent Design.[76] The debate has also reached the courts, as a variety of lawsuits regarding the constitutionality of incorporating alternative theories to Evolution are currently pending.[77]

In 2001, the Intelligent Design movement made an additional political stride when Pennsylvania Senator Rick Santorum introduced a non-binding amendment to the No Child Left Behind Bill that promoted the teaching of Intelligent Design alongside the theory of Evolution.[78] According to Senator Santorum, the amendment expresses the basic fact that scientific theories need to be continuously tested in order to promote

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[74] Jerry A. Coyne, *Intelligent Design: The Faith That Dare Not Speak Its Name*, *in* INTELLIGENT THOUGHT: SCIENCE VERSUS THE INTELLIGENT DESIGN MOVEMENT 4 (John Brockman ed., 2006). Evolutionists cite an internal memo of the Discovery Institute in Seattle, known as the "Wedge Document," as justification for their claim. *Id*. The document, which leaked to the Internet in 1999, has been acknowledged by the Institute as authentic, states:

> The social consequences of materialism have been devastating . . . in order to defeat materialism, we must cut it off at its source. That source is scientific materialism . . . . If we view the predominant materialistic science as a giant tree, our strategy is intended to function as a 'wedge' that . . . can split the trunk when applied . . . . Design theory promises to reverse the stifling dominance of the materialistic worldview, and to replace it with a science consonant with Christian and theistic convictions.

Id.

[75] Bauer, *supra* note 62, at 1019. When asked to comment at a press conference, the President stated his belief that Intelligent Design should be taught, "so people can understand what the debate is about." *Id*.

[76] *Id*. at 1020. Of all proposals, "the Kansas Board of Education's modification of its state science curriculum . . . has received the most attention." *Id.* In 2005 the Board approved the changes, but in 2006 the members who voted in favor of the changes were voted out of office, with the new members vowing to restore the old curriculum. *Id*.

[77] *Id*. To date, only one Intelligent Design case has been decided. *See Kitzmiller*, 400 F. Supp. 2d 707. The *Kitzmiller* trial generated so much publicity that on the 2005 Election Day, only one month before the court handed down its decision, the entire school board was voted out. Bauer, *supra* note 62, at 1021.

[78] Anne Marie Lofaso, *Does Changing the Definition of Science Solve the Establishment Clause Problem for Teaching Intelligent Design as Science in Public Schools? Doing an End-Run Around the Constitution*, 4 PIERCE L. REV. 219, 258 (2006).

critical thinking and scientific progress.[79] The Senator further claimed that his amendment promotes "intellectual freedom" and the "open and fair discussion of using science - not philosophy and religion within the context of science but science - as the basis for this determination."[80]

The Senate included the Santorum Amendment in its initial Bill, passing it with a vote of 91-8,[81] but Congress ultimately enacted the NCLBA without the provision.[82] While the movement both gained and lost proponents after this setback, one of the most interesting effects can be seen in a select group of politicians, including Senator Santorum himself, who continue to operate as if the amendment had actually been enacted into law.[83] Despite the many strange reactions, the Intelligent Design movement has retained a strong base of supporters who continue to assert that the ideas embodied in the Santorum Amendment would benefit students, as well as the general public as a whole, and are consistent with the aims of the NCLBA.[84]

III. Analysis of the Assessment and Accountability Portions of the No Child Left Behind Act and Private Schools' Exemption from the Requirements

One of the most commonly recognized aspects of the NCLBA is the requirement that all public schools comply with the Act's achievement standards by way of yearly standardized testing.[85] The intended purpose of this provision is to measure both

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[79] *Id*. Evolutionists took issue with the fact that Senator Santorum singled out the theory of Evolution as needing to be tested, without giving any justification for the selection. *Id*. Senator Santorum also stated that, "where biological evolution is taught, the curriculum should help students to understand why this subject generates so much continuing controversy." *Id*. This sentiment appears to reflect President Bush's opinions on presenting both evolution and Intelligent Design to public school students. *See* Bauer, *supra* note 62, at 1029 n.75.

[80] Lofaso, *supra* note 78, at 259.

[81] Bowman, *supra* note 18.

[82] Lofaso, *supra* note 78, at 259. Some of the amendment's original supporters distanced themselves from the proposal after they became uncomfortable with the broad proclamations of other advocates that the amendment sent a message to educators that Congress believed concepts conflicting with evolution should be taught in science classes. *Id*.

[83] *Id*. In the spring of 2002, Senator Santorum, Ohio Representatives John Boehner and Steve Chabot, and several other politicians made prominent public statements declaring that the Santorum Amendment was good law. Bowman, *supra* note 18, at 479. More recently, the district attorney for the school in *Kitzmiller* referred to the amendment in his opening statement, calling it a binding provision of the NCLBA. *Id*. at 479-80.

[84] Lofaso, *supra* note 78, at 259.

[85] POPHAM, *supra* note 13, at 13.

students' and schools' improvements in order to determine where adjustments are needed, thus ensuring that no child is "left behind."[86] If a district does not comply with this requirement, it is denied its federal appropriation under the Act.[87] However, as previously noted, the Act mandates that public school districts share their funding with private and parochial schools within their boundaries, despite the fact that these institutions do not have to comply with the assessment provisions.[88] This presents an interesting question: If the purpose of the assessment requirement is to ensure proficiency among all students,[89] should the Act not require the same standardized tests of private schools that it does of public institutions?

A. Examination of the Assessment Requirement and the Results it has Generated

To answer the above question, an examination of the assessment requirement and the results it has accomplished to date is necessary. The phrase most often used by educators in relation to this requirement is "standards based assessment,"[90] which is intended to be an approach to determine whether students have mastered a certain set of skills, and a guide to shaping a state's curriculum.[91] Each state's education officials and curriculum specialists use this approach to ascertain what they view as broad curricular aims for each grade level, which students then must achieve with their standardized test results.[92] The official rationale is that it is not unrealistic to expect students to eventually attain basic proficiency in each area of the curriculum, as the required standards-based assessments offer broad parameters in which the students can qualify.[93] However, a closer inspection

[86] *Id*. at 23.
[87] No Child Left Behind Act of 2001 § 1116(a)(1)(A), 20 U.S.C. § 6316(a)(1)(A) (2002).
[88] No Child Left Behind Act of 2001 § 1120(a)(3), 20 U.S.C. 6320(a)(3) (2002).
[89] POPHAM, *supra* note 13, at 23.
[90] The phrase "standards based assessment," derived from the phrase "content-standards," was a popular term in the past decade for describing what skill sets educators believed students needed to possess. POPHAM, *supra* note 13, at 76. Today's educators disapprove of this phrase, the general opinion being that it is too vague or broad of a description. *Id*.
[91] *Id*.
[92] *Id*. at 77.
[93] *Id*. Many educators are of the opinion that states need to find alternative ways for setting the standards. *Id*. Convening panels of curriculum specialists in each subject currently set the standards. *Id*. Educators believe this serves to create unrealistic and, in some cases, unnecessary standards. *Id*. For example, if the state builds a panel of mathematics experts to divine what mathematics content the state's students should master, these experts want the state's students to master *everything* that is remotely mathematical. *Id*.

reveals that there are specific descriptors[94] hidden underneath the broad standards that each student must attain, and each teacher must individually address in the classroom.[95] This results in many curricular aims that educators are expected to successfully promote within a given school year,[96] and a vastly wide assessment to be made by hour-long standardized tests.[97]

Despite the many criticisms and the extra strain placed on educators and students alike, the government justifies any complaints or negative effects by boasting improved results throughout the United States.[98] According to the most recent available data,[99] every state but seven[100] show an overall increased academic proficiency at the elementary school level of at least three percent in either reading or mathematics.[101] These states were also able to close the black-white, Hispanic-white, and poor-not poor achievement gaps by at least three percent.[102] According to the government, these results, which were made

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[94] In order to soften the blow of what some feel are too stringent standards, state officials have used language such as "benchmarks," "indicators," and "expectancies," as opposed to "requirements." *Id*.
[95] *Id*.
[96] *Id*. at 78. This expectation has been criticized for being far too unrealistic. *Id*. at 79. Instead of focusing on the best curriculum for the students, educators end up teaching defensively. *Id*. at 80. This means they are resorting to attempts at guessing what assessments will appear on the standardized tests, as a result of the great pressure to boost their students' scores. *Id*. at 79. Unfortunately, individual teachers are not equipped to makes such guesses, and the consequence is that students are studying content that is not assessed, and are not prepared for the content that is measured. *Id*.
[97] *Id*. The time limits of the tests have also been harshly criticized, as many think that there is no way for one or two hour long tests to accurately measure the excessively ambitious standards set for students. *Id*.
[98] ED.gov, *Making a Difference: No Child Left Behind*, http://www.ed.gov/nclb/overview/importance/difference/index.html (last visited Jan. 18, 2009) [hereinafter *Making a Difference*].
[99] The majority of states are currently showing results from assessments based on the 2002-2005 school years. *Id*.
[100] The seven states not showing improved results are Iowa, Missouri, Montana, North Dakota, Utah, West Virginia, and Wisconsin. *Id*.
[101] The majority of states show an improvement in both areas of study. The state to boast the highest overall results is Arkansas, which increased its mathematics proficiency by sixteen percentage points, and its reading proficiency by twelve percentage points. ED.gov, *NCLB Making a Difference in Arkansas*, http://www.ed.gov/nclb/overview/importance/difference/arkansas.pdf (last visited Jan. 18, 2009).
[102] Policy-makers also used the enactment of the NCLBA to confront long-standing differences in test performance by race and ethnicity. Thomas J. Kane and Douglas O. Staiger, *Unintended Consequences of Racial Subgroup Rules*, *in* NO CHILD LEFT BEHIND: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 152 (Paul E. Peterson & Martin R. West eds., 2003). In addition to leaving no child behind, the Act also aims to leave no group behind, and has set goals for subgroups according to race/ethnicity, economic disadvantage, disability, and "English language learner status." *Id*. The two strategies adopted to achieve this goal are to set a single performance expectation applying to schools overall and the subgroups within them, or to set a uniform standard for growth in performance and apply it to schools and their subgroups. *Id*. at 153. While the minimum improvement rate in this area was three

public in the July 2005 National Report Card, represent an all-time high in achievement among elementary school students.[103]

If the assessment requirements of the NCLBA are garnering the intended results and having such a positive impact on public schools, which is certainly the spin that the government is putting on the situation,[104] what is the reasoning for exempting private and parochial schools from the standardized testing that public school students are subjected to, even though they receive the same federal funding? If the Act is going to such great lengths to ensure that no child or group is left behind, why does it neglect the children and groups that attend religious institutions?

B. Governmental Incentives for Including Nonpublic Schools in all Provisions of the NCLBA

Some may assert that the government does not need to concern itself with the quality of private education, as private schools have a strong history of outperforming their public counterparts.[105] However, recent statistics have shown that while private schools have maintained higher achievement rates, public schools have begun to progress at a more rapid pace and are making serious moves to close the gap.[106] This trend could pose

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percentage points, the majority of the states that were able to reduce the achievement gaps exceeded that result. Making a Difference, *supra* note 98.

[103] ED.gov, *No Child Left Behind is Working*, http://www.ed.gov/nclb/overview/importance/nclbworking.html(last visited Jan. 18, 2009).

[104] In the face of all the negative reactions to the NCLBA, the government has gone out of its way to emphasize its positive results. *Id*. U.S. Secretary of Education Margaret Spellings personally wrote op-ed pieces on the Act's achievements for twelve different national newspapers in 2006 alone. ED.gov, *Fact Sheets, Op-Eds*, http://www.ed.gov/news/opeds/edit/index.html?src=ln (last visited Jan. 18, 2009) [hereinafter *Fact Sheets*]. In an article that appeared in the *Washington Post*, Margaret Spellings stated that "Today, there is more reason for optimism" than ever before. Margaret Spellings, *What's Behind Student Success*, WASHINGTON POST, Oct. 19, 2006, *available at* http://www.ed.gov/news/opeds/edit/2006/10192006.html.

[105] Joe Price, *Educational Reform: Making the Case for Choice*, 3 VA. J. SOC. POL'Y & L. 435, 463 (1996). Extensive research has indicated that private schools regularly boast higher scores on achievement tests and higher attendance rates than public schools, as well as claiming to face less behavioral problems. *Id*. at 464.

[106] National Center for Education Statistics, *Nonpublic (Private) Schools and the Nation's Report Card*, http://nces.ed.gov/nationsreportcard/about/nonpublicschools.asp#results (last visited Jan. 18, 2009). While maintaining their overall higher scores, the success rates of eighth graders in non-public schools went up by only two points in mathematics, two points in reading, and three points in writing from 1990 to 2003. *Id*. In those same areas, public schools increased their rates by thirteen, twenty, and four points, respectively. *Id*. The only deviation from this trend is seen in the writing scores among twelfth graders from 1998 to 2002, in which non-public schools increased their rates by three points, and public schools decreased by

problems, as it has been shown that the government has strong incentives in improving the quality of parochial school education.[107] The argument has been made that public schools benefit from meaningful competition and challenges from private institutions.[108] The United States Supreme Court saw fit to endorse this point by stating that in its decisions regarding education, there "has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience."[109] According to this theory, if the public school system continues to improve and reform under the NCLBA and private education does not keep up, public schools will have fewer capable competitors, resulting in less pressure to continue progressing.[110] This idea that private and parochial schools can be used to keep the public system alert and aware of its deficiencies appears to be in line with the NCLBA's primary principle of promoting accountability and holding districts responsible for ascertaining and correcting their shortcomings.[111]

Aside from the benefits public schools gain from having competent private and parochial counterparts, there is a more general justification for the government's interest in ensuring the continued progress of private education.[112] As education is an essential element of social welfare, the quality of each individual's educational experience, public or private, is of vital interest to the state.[113] If the government has found a way to further

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two. H. R. Persky, M. C. Daane & Y. Jin, U.S. Dept. of Educ., *The Nation's Report Card: Writing 2002*, *available at* http://nces.ed.gov/nationsreportcard/pdf/main2002/2003529.pdf (last visited Jan. 19, 2009).

[107] Price, *supra* note 105, at 464.

[108] *Id*.

[109] *Bd. of Educ. v. Allen*, 392 U.S. 236, 247 (1968). In this case, the court was called upon to interpret the validity of a New York statute requiring districts to "lend free of charge" textbooks for students enrolled in parochial schools, along with public and private schools. *Id*. at 238. The Court did not find that this law violated the First and Fourteenth Amendments, and the opinion placed emphasized the fact that much of a parochial school education mirrors what is being taught in public schools. *Id*. at 248, 49.

[110] Price, *supra* note 105, at 464.

[111] Another program that supports competition between public and non-public institutions is the school voucher program. Allen M. Brabender, *The Crumbling Wall and Free Competition: Formula for Success in America's Schools*, 79 N.D. L. REV. 11, 12 (2003). However, like the assessment and accountability provisions of the NCLBA, school voucher programs have faced constitutional obstacles, since a substantial number of non-public schools are religious establishments. *Id*.

[112] E. Vance Randall, *Private Schools and State Regulation*, 24 URB. LAW. 341, 344 (1992).

[113] *Id*. Court decisions have stated that while private and public institutions may have different ideas on what can and cannot be taught, both share the fundamental interest of knowing children are attending school in a "safe and healthy environment" where they are being sufficiently prepared "to be a productive worker and effective citizen in our democracy." *New Life Baptist Church Acad. v. East Longmeadow*, 666

this vital interest through the NCBLA, it would follow that it should want all students to be able to advance through its guidance.

C. Does the Government Have a Duty to Impart Successful Methods Onto Nonpublic Schools, and Do Nonpublic Schools Have a Duty to Accept Said Methods?

The argument can also be made that the government has a duty to impart unto private and parochial schools that which has been proven to work in public schools, and that non-public schools have a duty to accept the guidance.[114] Since the 1970s, two broad classifications of tort-like injuries have emerged: failure to adequately educate students, and failure to properly evaluate students.[115] Together, these two categories represent the majority of cases that are known as "educational malpractice."[116] Although courts were at first reluctant to recognize such claims,[117] they have gradually begun to acknowledge educational malpractice as a valid cause of action,[118] specifically in instances of negligent

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F. Supp. 293, 307 (D. Mass. 1987). Other shared interests include protecting parents and children from educational fraud, and preventing the teaching of anything "manifestly inimical to the public welfare." *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534 (1925).

[114] Randall, *supra* note 112, at 373.

[115] Jennifer C. Parker, *Beyond Medical Malpractice: Applying the Lost Chance Doctrine to Cure Causation and Damages Concerns With Educational Malpractice Claims*, 36 U. MEM. L. REV. 373, 394 (2006). These issues emerged during a time in which the symptoms of an inadequate school system became part of a national debate. *Id*. Low test scores, high illiteracy and dropout rates, and over-worked teachers were several of the indicators demonstrating that the system had begun to fail. *Id*.

[116] *Id*.

[117] The California Court of Appeals was the first forum to consider educational malpractice. *Id*. In *Peter W. v. San Francisco Unified School District*, a student graduated high school without possessing a twelfth grade skill set. *Peter W. v. S.F. Unified Sch. Dist.*, 131 Cal. Rptr. 854, 855 (Cal. Ct. App. 1976). As part of his seven causes of action, the student alleged that the school district "negligently and carelessly" failed to ascertain his reading disability, permitted him "to pass and advance from a course or grade level," knowing that he lacked the skills "necessary for him to succeed or benefit from subsequent courses," and allowed him to graduate from high school, despite the fact that he was "unable to read above the eighth grade level, as required by Education Code section 8573." *Id*. at 856. The court declined to create a duty for educators to provide students with an adequate education based on a lack of a professional standard of care for educator's to follow and the potential for burdensome litigation against school districts, among several other policy concerns. *Id*. at 859.

[118] PARKER, *supra* note 115, at 398. The Supreme Court of Montana was the first court to recognize an educational malpractice claim. *Id*. In *Burger v. Montana*, an incorrectly classified student was placed in a program for the "educable mentally retarded," and was switched to a separate class and segregated from the students receiving education on her actual level. *Burger v. Montana*, 649 P.2d 425, 426 (Mont. 1982). The court held that a school district has a statutory duty of reasonable care towards its students. *Id*. at 427. The most recent court to apply the *Burger* holding was the Supreme Court of Iowa, finding in favor of a student alleging reliance on inaccurate information from his high school pertaining to the requirements to compete in intercollegiate athletics at a National Collegiate Athletic Association (NCAA) Division I university,

misrepresentation,[119] violation of the implied contract between the school district and its students and their parents,[120] and negligence.[121] It is the last two categories that could most affect the NCLBA and its connections to private and parochial schooling.

Given the dynamic of private education, it seems likely that non-public institutions could be susceptible to educational malpractice claims based on the contract theory of recovery. While the law says that a child is entitled to an appropriate education, it does not guarantee the *best* education possible.[122] However, when parents send their children to private and parochial schools, they do so with the implied intention of "purchasing" what they perceive to be best education.[123] With this exchange of money for services, an implied contractual duty is created for the school to provide the best education it can deliver.[124] When a parochial school accepts federal appropriations from a public district despite the separation of church and state mandated by the Establishment Clause,[125] it does so because the funding allows it to provide better, and sometimes necessary, services for its students.[126] Under this reasoning, it could be argued that if the assessment and accountability provisions of the NLCBA have been proven to work, non-public

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causing him to be ineligible to participate in college athletics and to lose his athletic scholarship. *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 118 (Iowa 2001).

[119] *Sain v. Cedar Rapids* illustrates one application of negligent misrepresentation in educational malpractice cases, but the theory has been expanded beyond that case. Parker, *supra* note 115, at 400. Another example of such a claim would be a teacher who misrepresents a pupil's development through inaccurate report cards or parent-teacher conferences. *Id*. This theory of misrepresentation does not require proof of intent; it merely requires that the defendant have had knowledge that the injured party came to the defendant for information, and intended to rely on any information given. *Id*. at 401.

[120] The contract theory of recovery is based on an implied contract between either (1) the student and the school board, or (2) the tax-paying parents and the school board, with the students as third-party beneficiaries. Karen H. Calavenna, *Educational Practices*, 64 U. DET. L. REV. 717, 724 (1987). The first judicial recognition of this theory occurred in *Zumbrun v. University of Southern California*. *Zumbrun v. Univ. of S. Cal.*, 101 Cal. Rptr. 499 (Cal. Ct. App. 1972).

[121] The negligence theory of recovery has been the most successful and popular educational malpractice option to date, although it has been limited by policy concerns and reluctance on the part of the judiciary to find that its elements have been met. Parker, *supra* note 115, at 402.

[122] Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 177 n.42 (2005).

[123] *Id*.

[124] *Id*.

[125] U.S. CONST. amend. I.

[126] *Everson*, 330 U.S. 1.

schools have a contractual duty to integrate these governmentally designed methods into their curriculums in order to better provide for its students' needs.[127]

In that same vein, it can be argued that the negligence theory applies to the government's role as well. The four accepted elements of an educational malpractice claim based on the negligence theory of recovery are: (1) a legal duty on the part of the educator to act with reasonable care in educating the student; (2) a breach of that duty; (3) an injury to the plaintiff proximately caused by the defendant's breach; and (4) a judicially compensable injury.[128] If the federal government is viewed as the "educator,"[129] it must "act with reasonable care in educating the student." If assessment and accountability provisions the NCLBA are as successful as the government would have the public believe[130], does the "reasonable care" requirement command that that which has been proven to work be imparted onto all of the nation's students?

D. The NCLBA, *Lemon*, and *Agostini*

The standard arguments against private and parochial schools being subject to the assessment and accountability provisions of the NCLBA are premised on the assumption that the government cannot regulate non-public schools.[131] This, however, is not true.[132] The reality is that there are government regulations of private schools currently in

[127] The traditional obstacle to recovery under the contract theory has been the requirement of unjust enrichment. Parker, *supra* note 115, at 401. However, it has been asserted that it is now easier for a plaintiff to prove unjust enrichment to "the teacher who falls below the standard of professional care owed to the student" as a result of legislation that "bestows benefits on teachers whose students reach high levels of achievement on standardized tests." *Id*. at 402. According to this argument, the NCLBA may actually promote educational malpractice claims by offering salary incentives to teachers whose students achieve high test scores, thus encouraging the doctoring of test scores and unjustly enriching the teachers and administrators who do so. Doug Gavel, *Study Identifies Ways to Prevent Test Score Manipulation*, Nov. 17, 2003, *available at* http://www.hks.harvard.edu/news-events/news/press-releases/study-identifies-ways-to-prevent-test-score-manipulation (last visited Jan. 19, 2009).
[128] Parker, *supra* note 115, at 402.
[129] Under federal law, the government is required to provide the public with an appropriate education. Caruso, *supra* note 122. If an educator is viewed as a person tasked with providing students with an education, the government could arguably fit within this definition.
[130] *See* Fact Sheets, *supra* note 104.
[131] Brian P. Marron, *Promoting Racial Equality Through Equal Educational Opportunity: The Case for Progressive School-Choice*, 2002 BYU EDUC. & L.J. 53, 108 (2002).
[132] *Id*.

effect,[133] and some critics assert that even stricter regulations are justified in situations involving "compelling governmental and societal interests in providing adequate education for the most at-risk children."[134] If government regulation is acceptable in some situations, how does this affect the conditions of the NCLBA?

One of the main problems is the idea of the federal government having any sort of control over religious schooling.[135] It is generally thought that whenever the government gives money to religious groups or activities, like the NCLBA diverting funds to parochial education, various controls and strings are attached.[136] In order to avoid the appearance of any inappropriate control, the government tends to shy away from offering any sort of guidance to religious institutions.[137] The standard for determining when this is and is not proper is found in the holding of *Agostini v. Felton*.[138]

As previously mentioned, the decision in *Agostini* re-interpreted what is commonly known as the Lemon test put forth in *Lemon v.Kurtzman*.[139] The Court parted with *Lemon* by choosing to apply an "endorsement test,"[140] which asks two questions: Did the government act "with the purpose of advancing or inhibiting religion?" and did the "aid ha[ve] the 'effect' of advancing or inhibiting religion?"[141] In order to determine the

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[133] *Id*. It is incorrect to say that the government can in no way regulate private institutions. *Id*. An example of one such regulation currently in effect is the Maryland law requiring all schools to obtain an approval certificate from the State Board of Education in order for them to remain in operation. MD. ANN. CODE, EDUC. § 2-206 (2001).
[134] Marron, *supra* note 131.
[135] Rebecca E. Lawrence, *The Future of School Vouchers in Light of the Past*, 55 U. MIAMI L. REV. 419, 440 (2001).
[136] *Id*. This argument is most often employed to oppose the idea of governmentally provided school vouchers to send students to parochial schools. *Id*.
[137] *Id*.
[138] *Agostini*, 521 U.S. at 203.
[139] *Lemon*, 411 U.S. at 192.
[140] The test is labeled the "endorsement test" because its key requirements are that the government not convey a message of endorsement or disapproval of religion, and that the government action not have any such endorsing effect. Robyn D. Kotzker, *Constitutional Law— Departing From the Supreme Court's Traditional Establishment Clause Analysis in the Context of Government Funding to Religious Schools- Agostini v. Felton*, 71 TEMP. L. REV. 1045, 1073 (1998). Supreme Court Justice Sandra Day O'Connor had developed this test throughout several concurring opinions in prior Establishment Clause cases. *See Wallace v. Jaffree*, 472 U.S. 38, 69 (1985), *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Capital Square Rev. & Advisory Bd. v. Pinette*, 15 U.S. 753 (1995).
[141] *Agostini*, 521 U.S. at 222-23. With its ruling in *Agostini*, the United States Supreme Court overturned an earlier decision in *Aguilar v. Felton*, finding that a New York statute providing federal Title I funds to

effect of the aid on religion, the Court laid out three further questions: Did the funding (1) result in government indoctrination of religion; (2) define recipients by reference to religion; or (3) create an excessive entanglement in religion?[142]

The court's reasoning in *Agostini* can be used to help interpret these elements in terms of the assessment and accountability provisions of the NCLBA. In determining whether governmental indoctrination of religion results, the Court held that it no longer presumed that all government funding "directly assist[ing] the educational function of religious schools" advanced religion.[143] It also explicitly rejected the presumption that the presence of public employees at a parochial school leads to impermissible government indoctrination.[144] This view can be extended to the applicable provisions of the NCLBA, which only mandates that the standardized tests used to assess the students' progress be administered in parochial schools.[145] If parochial students take the same tests that are given to public students, this necessarily means that they will not be exposed to any material relating to religious doctrine, as such tests would not be allowed in public districts.[146]

In analyzing the question of whether government action defined recipients by reference to religion, the *Agostini* court focused on whether the public program financially encouraged students to embrace a certain religion.[147] As parochial schools are already permissibly receiving federal funding under the NCLBA for any benefits "that address [the students'] needs."[148] The added incentive of performing well to keep said funding created by imposing the assessment requirements would not in any way encourage students to embrace a certain religion.

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religious schools did not violate the Establishment Clause. *Id*. at 241-54. This statute allowed public employees to teach secular subjects to disadvantaged students in parochial schools. Kotzker, *supra* note 140, at 1045.

[142] *Agostini*, 521 U.S. at 234.

[143] *Id*. at 225.

[144] *Id*. at 223.

[145] No Child Left Behind Act of 2001 § 1116(a)(1)(A), 20 U.S.C. § 6316(a)(1)(A) (2002).

[146] The Supreme Court in *Everson* held that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers," which extends to not including religious material in public teachings. *Everson*, 330 U.S. at 18.

[147] *Agostini*, 521 U.S. at 231.

[148] No Child Left Behind Act of 2001 § 1120(a)(1), 20 U.S.C. §6320(a)(1) (2002).

The analysis for determining whether a government action involves excessive entanglement with religion is similar to the question of government indoctrination.[149] In examining this question, the *Agostini* court chose to reiterate that the presence of public employees at parochial schools did not create a presumption of religious indoctrination.[150] In applying this breakdown, it follows that the provisions of the NCLBA are not excessively entangled with religion.

A final argument in defense of applying the requirements for funding under the NCLBA is that the Act's standards are intended to promote accountability among schools.[151] Schools are to be held directly responsible for the effectiveness of the education they provide, and districts are driven to make necessary improvements for any shortcomings that are identified.[152] If one of the primary goals of the NCLBA is to have each school held individually accountable for the quality of its education, parochial schools will merely be called upon to fulfill this aim. Instead of impermissible government involvement in the way religious institutions choose to educate their students, it seems that the government will simply monitor parochial school methods to ensure that the internal improvements they choose to make are achieving the desired results.

IV. Analysis of the Law Governing the Teaching of Intelligent Design in Public Schools and the Proposed Santorum Amendment to the No Child Left Behind Act

A final controversial aspect of the NCLBA is one that has nothing to do with assessment, accountability, or funding and regulating parochial schools. Instead, it has to do with a much more common debate. The issue of what theory of mankind's origins can be taught in public school classrooms has been hotly contested over the years.[153] One of the most notable moves in the dispute occurred when Senator Rick Santorum attempted to insert an amendment into the NCLBA that would promote the teaching of Intelligent Design

[149] Kotzker, *supra* note 140, at 1059.
[150] *Agostini*, 521 U.S. at 234.
[151] POPHAM, *supra* note 13, at 15.
[152] *Id*.
[153] Moseley, *supra* note 58.

alongside the theory of Evolution in public schools.[154] The proposal was ultimately rejected,[155] but the dispute over whether the amendment should have been included continues to this day.[156]

A. *Kitzmiller v. Dover Area School District*

In the view of some critics, the Intelligent Design debate did not really take off until October 18, 2004, when the school district in Dover, Pennsylvania became the first in the nation to require that its students learn about the concept of Intelligent Design alongside the theory of Evolution.[157] The required instruction was limited and consisted only of one statement to be read to biology students studying evolution:

> The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and to eventually take a standardized test of which evolution is a part. Because Darwin's Theory is a theory, it is still being tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations. Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, Of Pandas and People, is available for students to see if they would like to explore this view in an effort to gain an understanding of what Intelligent Design actually involves. With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life up to individual students and their families. As a standards-driven district, class instruction focuses on the standards and preparing students to be successful on standards-based assessments.[158]

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[154] Bowman, *supra* note 18.
[155] *Id*.
[156] *See supra* text accompanying note 83.
[157] Bowman, *supra* note 18, at 419.
[158] Dover Area Board of Directors, *Board Press Release for Biology Curriculum*, (Nov. 19, 2004), http://ncseweb.org/webfm_send/437. The Board claimed that the statement was carefully developed to provide only a balanced view of the debate and an opportunity for critical discussion, which it feels is at the heart of any scientific practice. *Id*. Superintendent Dr. Richard Nilsen specifically directed teachers not to discuss Creationism, Intelligent Design, or any other religious beliefs held by themselves or the Board members. *Id*.

Parents of Dover students challenged the constitutionality of this statement before Dover educators even had the chance to introduce it in the classroom, and the resulting proceeding was the first to ever directly address the Evolution-Intelligent Design conflict.[159] After the twenty-one day trial concluded, the district court found firmly for the plaintiffs, holding that the Board's policy on Intelligent Design presented a clear violation of the Establishment Clause.[160]

In deciding *Kitzmiller v. Dover Area Sch. Dist.*, the court relied on both the *Lemon* test and the endorsement test, and placed great emphasis on its opinion that an objective observer would identify the Dover Intelligent Design policy as one that "stemmed from religious beliefs rooted in creationism, given the history of Christian fundamentalism's fight over evolution teaching and the development of the ID movement."[161] The court also felt that an objective student would interpret the statement as an endorsement of religion and an attack on Evolution.[162] Furthermore, the court took note of several specific instances demonstrating the board members' biased attitudes towards the policy, specifically several public statements about incorporating religion into the curriculum,[163] conflicts with teachers concerning biology textbooks,[164] and contact with several pro-Intelligent Design organizations.[165]

B. The Santorum Amendment to the NCLBA

Despite the sound ruling against the Dover policy, the Intelligent Design movement has continued to advance and gain support. As a result of the close scrutiny of the theory, three primary legal arguments have taken shape: (1) the concept of Intelligent Design is science and should be taught in the spirit of teaching both sides of a controversy; (2) the

[159] Bowman, *supra* note 18, at 420.
[160] Brenda Lee, *Kitzmiller v. Dover Area School District: Teaching Intelligent Design in Public Schools*, 41 HARV. C.R.-C.L. L. REV. 581, 583 (2006).
[161] *Id*.
[162] *Kitzmiller*, 400 F. Supp. 2d at 731. The court thought the statement deliberately singled out Evolution and presented Intelligent Design as the only possible alternative theory for the origin of the universe. *Id*. at 724. In addition, the court stated that it viewed Intelligent Design as "a mere re-labeling of creationism, and not a scientific theory," and even went so far as to call the Board's stated purpose of "improving science education and encouraging students to exercise critical thinking skills" a sham. *Id*. at 726, 763.
[163] *Id*. at 750-51.
[164] *Id*. at 754-55.
[165] *Id*. at 750. The Court also took note of the Board's contact with the Discovery Institute and the Thomas More Law Center. *Id*. at 753-54.

theory of Evolution is hostile to religion, thus Intelligent Design should be taught to preserve government neutrality towards religion; (3) a teacher's ability to teach the concept of Intelligent Design is a matter of academic freedom.[166] These three arguments are all embodied in the Santorum Amendment to the NCLBA and its accompanying rationale,[167] although in introducing the amendment to the Senate, any religious mentions were notably omitted.[168] In his introduction, the Senator stated:

> It is the sense of the Senate that—(1) good science education should prepare students to distinguish the data or testable theories of science from philosophical or religious claims that are made in the name of science; and (2) where biological evolution is taught, the curriculum should help students to understand why this subject generates so much continuing controversy, and should prepare the students to be informed participants in public discussions regarding the subject.[169]

The Senator also placed significant emphasis on the need to continue to test scientific theories stating, "Our knowledge [in] science is not absolute . . . . Over the centuries, there were theories that were once assumed to be true and have been proven, through further revelation of scientific investigation and testing, to be not true."[170]

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[166] Bowman, *supra* note 18, at 423. The *Kitzmiller* court explicitly rejected the first of the three arguments, holding that the need for a "supernatural" agent violated the scientific ground rule that requires a theory to be testable. *Kitzmiller*, 400 F. Supp. 2d at 736.

[167] Lofaso, *supra* note 78, at 258.

[168] Bowman, *supra* note 18, at 478. This approach has been reflected and encouraged in critics' opinions on the aftermath of the *Kitzmiller* decision. Lee, *supra* note 160, at 585. With the court taking special notice of the overwhelming evidence of the Dover Board's underlying religious motivations, it is now being suggested that the next attempt to achieve a more balanced presentation of the origins of the universe should be "repackaged" to avoid any mention of religion, thus escaping the implications of the Establishment Clause. *Id*. It has yet to be determined whether such a burying of any religious connotation would be successful, or whether it would be viewed as a mere superficial adjustment to the presentation of the theory. *Id*. at 585 n.40.

[169] 147 CONG. REC. S6147-48 (daily ed. June 13, 2001) (statement of Sen. Santorum).

[170] *Id*. A prime example of this reality is seen in the works of Galileo and Copernicus, who in what is largely considered to be one of the landmarks of Western science, proved false the "scientific" theory that the Earth was at the center of the universe. Howard M. Wasserman, *Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws*, 8 WM. & MARY BILL RTS. J. 323, 388 (2000).

While the Senate included the Santorum Amendment in the initial Bill, in the end Congress chose to exclude it from the final version of the NCLBA.[171] This move resulted in some confusion to those who expected the amendment to pass, especially given the support it received in the almost four hundred page Joint Explanatory Statement of the Committee of Conference that was submitted to both houses with the final legislation.[172] This report reiterated the sentiment of the Santorum Amendment:

> The Conferees recognize that a quality science education should prepare students to distinguish the data and testable theories of science from religious or philosophical claims that are made in the name of science. Where topics are taught that may generate controversy (such as biological evolution), the curriculum should help students to understand the full range of scientific views that exist, why such topics may generate controversy, and how scientific discoveries can profoundly affect society.[173]

Further confusion exists today as to how much significance should be placed on the language of the committee report.[174] Normally, such language would be given great weight as part of a statute's legislative history; however, it is unclear whether this is true in light of the enormity of the NCLBA legislation and the lack of an accompanying statutory provision.[175] The opinions of those who believe the committee report deserves great deference are summed up in a letter written by attorney John Calvert[176] to the Darby, Montana school board:

> The legislative history of No Child Left Behind also makes it clear that Congress considers evolution to be a controversial theory that should be taught objectively. This is evident from the conference committee report . . . . Clearly an official

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[171] Lofaso, *supra* note 78, at 259.
[172] Bowman, *supra* note 18, at 480.
[173] H.R. Rep. No. 107-334, at 703 (2001) (Conf. Rep.).
[174] Bowman, *supra* note 18, at 480.
[175] *Id*.
[176] Missouri attorney John Calvert is a co-founder and managing director for the Intelligent Design Network, which is an organization dedicated to promoting the teaching of Intelligent Design in schools. Intelligent Design Network: Seeking Objectivity in Origins Science, *IDnet Officers* http://www.intelligentdesignnetwork.org/people.htm (last visited Jan. 18, 2009). He is frequently called upon to advise school districts and state boards of education on matters relating to Intelligent Design. *Id*.

> policy that censors or downplays scientific criticisms of "biological evolution" and that does not permit discussion of alternative scientific views is contradictory to this advice.[177]

1. Why was the Santorum Amendment Excluded from the NCLBA?

With its strong showing in the Senate and the support from the conference committee report, the question remains: Why did Congress make the decision to exclude the Santorum Amendment from the NCLBA? There are two possible explanations for the omission: the NCLBA's lack of scientific focus and the reasonably objective observer analysis.[178]

Despite its many provisions and requirements, the NCLBA displays a surprising lack of focus on scientific improvement among the nation's students.[179] The Act defines science as a "core academic subject,"[180] and requires states to adopt science standards by the 2005-2006 school year,[181] and to begin assessing the students' scientific achievement levels by the 2007-2008 school year.[182] However, these limited references to science are almost the extent to which the NCLBA addresses scientific education.[183] While other

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[177] Calvert has offered similar advice to school and state boards of education in Kansas, Missouri, Ohio, West Virginia, North Carolina, Georgia, New Mexico, Nebraska, Iowa, and Minnesota. John H. Calvert, *Letter from John H. Calvert to Darby, Montana School Board*, (Feb. 19, 2004), http://www.intelligentdesignnetwork.org/DarbyBoardOpinion.pdf. Opponents of Intelligent Design say that Calvert's opinions create a false impression and overstate the binding nature of the conference committee report. Bowman, *supra* note 18, at 481.

[178] In *Kitzmiller*, the reasonably objective observer took the form of a reasonably objective student. *Kitzmiller*, 400 F. Supp. 2d at 731. The analysis ties in closely with the endorsement test, and asks whether a reasonably objective observer would interpret a statute or policy as having the effect of creating an apparent endorsement of religion. Bowman, *supra* note 18, at 461. This observer is not limited to evaluating only present circumstances; rather, the reasonable observer "is presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *McCreary County v. Am. Civil Liberties Union of KY*, 545 U.S. 844, 866 (2005).

[179] Bowman, *supra* note 18, at 477.

[180] No Child Left Behind Act of 2001, § 9101(d)(11), 20 U.S.C. § 7801(11) (2002).

[181] No Child Left Behind Act of 2001, § 1111(b)(1)(C), 20 U.S.C. §6311(b)(1)(C) (2002).

[182] No Child Left Behind Act of 2001, § 1111(b)(3)(C)(v)(II), 20 U.S.C. § 6311(b)(3)(C)(v)(II) (2002).

[183] Few additional provisions of the NCLBA relate to scientific education, although the several that do exist promote its instruction. The Act develops advanced placement science programs under section 1705(c)(4), designs alternative certification for science teachers under section 2113(c)(3), institutes merit-based pay for science teachers under section 2113(c)(12), and notes the participation rates of girls and women in science programs in the Women's Educational Equality Act according to sections 5611-5618. For a more comprehensive listing of all science-related provisions contained in NCLB, *see* Bowman, *supra* note 18, at note 262.

areas of study are strictly regulated and districts are subject to sanctions if students fail to make adequate yearly progress in those subjects,[184] there are no statutory sanctions for failure to perform up to a certain level on science tests.[185] This directly contrasts with the NCLBA's extensive regulation of students' performance in reading and mathematics,[186] and seemingly indicates that the federal government does not find scientific instruction and improvement to be as important as the other core subjects.[187] Perhaps upon noticing this distinction, Congress did not feel the need to include the Santorum Amendment on the grounds that other, more important issues needed to be rectified before it was necessary to regulate any aspects of scientific education, such as the competing views of the origins of the universe.[188]

The second possible explanation for the exclusion of the Santorum Amendment from the NCLBA involves the reasonably objective observer analysis that was applied in *Kitzmiller*. While the amendment may contain no references to any religious or spiritual theory, it has been argued that this is merely a superficial "repackaging" of the theory that intentionally buries the religious connotations in order to avoid the Establishment Clause obstacle and get past the reasonably objective observer.[189] This approach might succeed if the observer were appraising individual issues at face value, but as the reasonable observer is presumed to be familiar with prior government action and historical concepts,[190] it is argued that it is unlikely that such an observer would not recognize any manipulation of the theory.[191] Being cognizant of this standard and its elements, it is

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[184] *See supra* text accompanying note 45.
[185] Bowman, *supra* note 18, at 477 n.261.
[186] Bowman, *supra* note 18, at 477 n.262.
[187] Although the NCLBA does not single out science teachers, the "highly qualified teacher provisions" of the Act does include them. *Id*. All teachers hired after the effective date of the NCLBA (January 8, 2002) must be certified by the state to teach in a particular area at the time of hiring. No Child Left Behind Act of 2001, § 1119(a)(1), 20 U.S.C. § 7801(a)(1) (2002). Additionally, all teachers of core subjects hired before the effective date must become highly qualified by the 2005-2006 school year. No Child Left Behind Act of 2001, § 1119(a)(2), 20 U.S.C. § 7801(a)(2) (2002).
[188] Intelligent Design advocates believe that despite the oversight in terms of regulating scientific education, the fact that the NCLBA requires supplemental instruction services and all standardized testing to be conducted in a "secular, neutral, non-ideological" manner suggests the need for alternative origin theories to be presented in order to create the necessary neutrality. No Child Left Behind Act of 2001, § 412(e)(4), 20 U.S.C. § 962(e)(4) (2002).
[189] Lee, *supra* note 160, at 585.
[190] *See supra* text accompanying note 178.
[191] Bowman, *supra* note 18, at 477-81.

possible that Congress did not feel the need to promote legislation that would encourage actions that are likely to face strong judicial opposition, if not be completely struck down as unconstitutional, no matter how much it did or did not support the amendment and its rationale.

2. Should the Santorum Amendment be Included in the NCLBA?

The obstacles that face it notwithstanding, the Intelligent Design movement has an ever-growing host of supporters who believe that the Santorum Amendment should have been included in the NCLBA. It is difficult to argue with some of its proposed benefits, such as the encouragement of academic debate and idea-friendly environments.[192] Public support reflects this idea, as evidenced by a 2005 survey where sixty-four percent of U.S. respondents said they "were open to the idea of teaching creationism in addition to evolution, while thirty-eight percent favored replacing evolution with creationism."[193]

Claims that the amendment should have been included in the NCLBA are also bolstered by a rapidly increasing amount of proposals across the country requiring that students study the theory of Intelligent Design in science class, or that teachers at least present a critical view of evolution, which is the first premise of Intelligent Design.[194] There has also been a recent push to modify state science standards to require schools to teach the "flaws" of evolution, which some claim is the equivalent of inviting schools to teach the concept of Intelligent Design.[195]

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[192] Mark Hilliard, *The Evolution and Misinterpretation of the Establishment Clause: Is Teaching Intelligent Design in Public Schools a Governmental Endorsement of Religion Prohibited by the First Amendment?*, 32 U. DAYTON L. REV. 145, 166 (2006).

[193] Bauer, *supra* note 62. Studies also show that when compared to thirty-two European countries and Japan, the U.S. shows the second-highest percentages of adults who disagree with the statement, "Human beings, as we know them, developed from earlier species of animals." *Id*.

[194] *Id*. at 1020. Between 2002 and 2005, sixteen state boards of education considered such proposals, and in 2005 alone, forty-seven local school boards and fourteen state legislatures followed suit. *Id*. Legislatures in Kansas, Minnesota, New Mexico, and Ohio have passed state statutes permitting, but not requiring, scientific instruction on Intelligent Design. Bowman, *supra* note 18, at 422. Comparable legislation is pending in Georgia, Michigan, Oklahoma, Pennsylvania, South Carolina, and Texas, and is being considered for introduction in Utah and Indiana. *Id*.

[195] *Id*.

Conclusion

It is far too easy to consistently fall back on the broad statement that federal education and religion can never intersect. As the various provisions of the No Child Left Behind Act show, sometimes an intersection cannot be helped, and sometimes such an intersection is even in the best interests of the all parties involved.

It is difficult to justify any sort of government control over parochial schools. No matter what the situation, when funding is involved there will always be the potential for strings to become attached. However, as long as the government preserves its neutrality, there should be no concern over impermissible and improper government influence over parochial schools' practices and students. While at this point it is probably not necessary to seriously consider imparting the assessment requirements of the NCLBA onto religious institutions, if by its target date the Act can live up to the significant improvements in public education that it has been promising, perhaps the issue will then need to be weighed more heavily.

While it was perhaps appropriate to exclude the Santorum Amendment from the final version of the NCLBA, the omission may not stand much longer. No matter what the courts hold, the Intelligent Design – Evolution debate has only grown over the years and will most likely continue to do so. If the dispute keeps escalating at such a rapid rate and more states consider legislation regarding the issue, it will not be long before the federal government is forced to enact official legislation to offer guidance in the matter.