Brown v Board of Education proclaimed that education is perhaps the most important function performed by state and local governments. In the fifty years since Brown, courts have consistently recognized that educational policy is the responsibility of the states and have deferred to state legislature’s educational policy choices. In addressing challenges to accountability systems, courts have respected states’s rights to determine and establish the accountability systems that they believe are in the best interests of the students in their states without interference from the courts. Courts will, however, take action when necessary to protect freedoms and privileges guaranteed by law.

I. A Survey of the Substantive Sources of Legal Challenges to Educational Accountability System - Their Successes and Limitations.

“Accountability systems” is the umbrella phrase used to describe the various mechanisms for evaluating academic performance by schools and students. Accountability systems have two basic elements: 1) academic standards, and 2) standardized tests that measure individual and systemic progress towards meeting those standards. Now, with the implementation of the No Child Left Behind Act, accountability systems are an accepted part of the educational landscape.

While schools have long used tests to measure performance, accountability systems can have more serious consequences. For example, standardized tests are sometimes used to group students in separate academic tracks, determine grade promotion or graduation eligibility, and award funds to schools, students, or teachers. When used in such a capacity, standardized tests are sometimes referred to as “high stakes” exams because of their potential impact on individuals and institutions. Almost immediately upon their introduction, high stakes exams were subject to legal challenges attacking them as unfair and unconstitutional under state and federal law. This

2 Debra P. v Turlington, 644 F. 2d 397, 403 (1981), Brookhart v Ill St Bd of Ed, 697 F2d 179, 182 (7th Cir 1983).
paper surveys the legal theories historically used to challenge and defend high stakes exams and examines some areas in which the future of such challenges may lie.

**The Equal Protection Clause**

The equal protection clause of the Fourteenth Amendment of the United States Constitution dictates that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” In general, this protection only requires that governmental classifications are rationally related to legitimate state interests. However, laws that explicitly impact people because of their race and national origin, for example, are more strictly scrutinized to ensure that they are narrowly tailored to serve compelling state interests. The same is true of laws that affect a fundamental right. However, the United States Supreme Court has held that education is not a fundamental right that requires strict scrutiny.

In *Brown v. Board of Education*, the Court struck down public education segregation laws because they violated the equal protection clause of the Fourteenth Amendment. Specifically, the Court overturned the “separate but equal” doctrine enunciated in *Plessy v Ferguson* with respect to its application to public education, holding that racially segregated public education is inherently unequal:

> We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

---

3 U.S. Const, amend. XIV, § 1.  
8 *Plessy v. Ferguson*, 163 U.S. 537 (1896)  
9 *Brown I, supra* at 495.
Subsequent litigation has relied on *Brown* to challenge isolated educational policies and practices on equal protection grounds. The implementation of high stakes testing programs is one such area of litigation. However, the mere fact that a law or action has a racially disparate impact is insufficient to trigger strict scrutiny review.\(^\text{10}\) Rather, to state a claim of race discrimination in violation of the equal protection clause, a plaintiff must prove discriminatory intent.\(^\text{11}\) This requirement has limited the usefulness of the equal protection clause as a means for attacking the legality of accountability measures.

**The equal protection clause’s intent requirement**

While the Court in *Washington v Davis* held that disparate impact alone is not actionable, it noted that racially disparate impact is relevant in analyzing whether discriminatory intent motivated a facially neutral law.\(^\text{12}\) Specifically, the Court held that the totality of the circumstances surrounding government action, including the fact that the challenged action has a racially disparate impact, may support an inference of discriminatory purpose in some instances.\(^\text{13}\)

In *Arlington Heights v. Metro. Housing Dev. Corp.*, the Supreme Court reiterated this principle, explaining that a plaintiff need not prove that “the challenged action rested solely on racially discriminatory purposes,” only that a discriminatory purpose was “a motivating factor.”\(^\text{14}\) The Court recognized that governmental bodies must balance numerous competing concerns and that “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may


\(^{11}\) *Id.* at 245.

\(^{12}\) *Id.* at 241-242.

\(^{13}\) *Id.* at 242 (“[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”)

be available.”\textsuperscript{15} The Court identified a non-exhaustive list of factors as proper subjects of inquiry in determining discriminatory intent:

1) The impact of the official action and whether it bears more heavily on one race than another.

2) The historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes.

3) The specific sequence of events preceding the challenged decision, especially departures from the normal procedural and substantive considerations.

4) The legislative or administrative history, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.\textsuperscript{16}

Subsequently, the Fifth Circuit Court of Appeals took an arguably more lenient position, holding that:

we do not read \textit{Washington v Davis} and \textit{Arlington Heights} as banishing from the law of racial and ethnic discrimination the venerable common law tort principle that a person intends the natural and foreseeable consequences of his action. When the official actions challenged as discriminatory include acts and decisions that do not have a firm basis in well accepted and historically sound non-discriminatory social policy, discriminatory intent may be inferred from the fact that those acts had foreseeable discriminatory consequences.\textsuperscript{17}

A few years later, in \textit{Personnel Administrator v. Feeney}, the Supreme Court took up the issue raised by the Fifth Circuit.\textsuperscript{18} Specifically, while the \textit{Feeney} Court reaffirmed that discriminatory intent can be proven using circumstantial evidence,\textsuperscript{19} it held that a plaintiff must

\textsuperscript{15} \textit{Id.} at 265-66.
\textsuperscript{16} \textit{Id.} at 266-68.
\textsuperscript{17} \textit{United States v. Texas Educational Agency}, 564 F.2d 162 (5th Cir. 1977).
\textsuperscript{19} \textit{Id.} at 279.
establish that the government took the challenged action “because of” its adverse impact on an identifiable group and not just “in spite of” that impact:

‘Discriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.20

Noting that “an inference is a working tool, not a synonym of proof,” the Feeney Court held that while the unavoidable adverse consequences of the law challenged before it raised the inference of discrimination, that inference “fail[ed] to ripen into proof.” 21 In so ruling, the Court relied on the fact that the challenged law represented a legitimate legislative policy and that all of the available evidence demonstrated that the adverse consequences were not motivating factors in the decision to enact the law.22 This ruling significantly impacted the course of equal protection claims challenging high stakes exams. Under Feeney and its progeny, schools are able to defend testing programs on the basis that they are legitimate educational policies that were not adopted “because of” foreseeable racial impacts, but, rather, were adopted “in spite of” those results in the hopes that the testing programs would motivate students, improve educational performance, and remedy past discrimination.

**Application of the intent requirement to high stakes exams**

Shortly after its decision in Feeney, the Supreme Court applied the equal protection intent requirement in a challenge to educational policies and school board actions in *Dayton Bd of Ed. v. Brinkman (Dayton II).*23 In *Dayton II,* the Court held that a variety of facially neutral policies violated the equal protection clause because they perpetuated the deleterious effects of the school

---

20 Id.
21 Id.
22 Id.
district’s earlier *de jure* segregation.24 A pivotal aspect of this ruling was the Court’s holding that because the schools were segregated at the time of the *Brown* ruling, the school board had a continuing and affirmative duty to eradicate the effects of the dual system, including “the obligation not to take any action that would impede the process of disestablishing the dual system and its effects.”25 Significantly, *Dayton II* rejected the reasoning that no equal protection violation could be found because there was no direct evidence that the school district continued to have a discriminatory purpose when it enacted the challenged facially neutral policies:

The Dayton Board, however, had engaged in many post-*Brown I* actions that had the effect of increasing or perpetuating segregation. The District Court ignored this compounding of the original constitutional breach on the ground that there was no direct evidence of continued discriminatory purpose. But the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system.26

While the foreseeability of segregative consequences will not always make out a prima facie case of intentional race discrimination, the Court held that “proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose, and it may itself show a failure to fulfill the duty to eradicate the consequences of prior purposefully discriminatory conduct.”27

An early and important case that applied the foregoing analyses to high stakes exams was *Debra P. v. Turlington*,28 in which Florida’s policy of not awarding high school diplomas to students who failed a newly instituted exit exam was challenged. The plaintiffs alleged that diploma sanction violated equal protection in two ways: 1) the exam covered

---

24 Id. at 538-39.
25 Id. at 538.
26 Id.
27 Id. at 536, n9.
28 644 F.2d 397 (5th Cir. 1981) ("Debra P. I").
material that was not taught; and 2) the diploma sanction had a disproportionate negative impact on minority students.

With respect to the first allegation, a challenge to the basic fairness and rationality of the exit exam, the Fifth Circuit Court of Appeals recognized a property interest in receiving a diploma if students successfully complete the required number of years and courses. Based on this property interest, the Court held that a state cannot arbitrarily and capriciously deprive students of a high school diploma by conditioning receipt of that diploma on passing an exit exam that is fundamentally unfair. The Court emphasized that “[w]e do not question the right of the state to condition the receipt of a diploma upon the passing of a test so long as it is a fair test of that which was taught.”29 Reasoning that a test that is not fair cannot be said to be rationally related to a legitimate state interest, Debra P. held that “if the test is found to be invalid for the reason that it tests matters outside the curriculum, its continued use would violate the Equal Protection Clause.”30 Notably, in evaluating this allegation the Debra P. Court interchangeably discussed both the due process and equal protection clauses and in some respects conflated those claims into one analysis. Most courts have not followed Debra P. in this regard, instead analyzing the question of curricular validity as a due process concern.

The Debra P. Court’s evaluation of the second equal protection claim, an attack based on the disproportionate racial impact of the test, examined equal protection’s intent requirement. The Court held that while plaintiffs were unable to establish a present intent to discriminate as that concept was defined by Feeney, plaintiffs did establish that the challenged exam and diploma sanction perpetuated past purposeful discrimination.31 The Court also relied upon the defendants’ failure to establish that the diploma sanction was necessary to remedy the effects of

29 Id. at 406.
30 Id. at 404-406.
31 Id.
past intentional discrimination. Consequently, the Court held that “the immediate use of the
diploma sanction would punish black students for deficiencies created by the dual school
system.”

On appeal after remand, the Fifth Circuit upheld the District Court’s ruling that Florida
had subsequently demonstrated that the exit exam was a fair test that passed constitutional
scrutiny. In particular, relying on minority students’ continued improvement on the exit exam
over the prior six years and the fact that over 90% of African-American students passed the exam
at the time of Debra P. II, the Court held that the present effects of past discrimination did not
cause the disproportionately higher failure rates by African-American students. Moreover, the
Court held that to the extent that there were still vestiges of prior discrimination, the exit exam
was necessary to remedy those effects.

Anderson v. Banks is another case that addressed accountability exams in an equal
protection context, influenced by prior de jure segregation. In Anderson, the plaintiffs alleged
two separate equal protection theories: first, that the imposition of a high school diploma
sanction alone violated equal protection, and second, that the disparate racial impact of that
policy perpetuated prior de jure segregation in violation of the Fourteenth Amendment.

With respect to the first claim, the Anderson Court held that the exit exam and diploma
sanction, considered without regard to the school system’s history, did not violate the Fourteenth
Amendment. Specifically, the Court found that the plaintiffs did not prove that those policies
were adopted with actual discriminatory intent. While the racially disparate impact of the exit
exam and diploma policy was foreseeable, the Court found that those policies served the legitimate and important goal of improving student performance and thus held that “[t]his is not a case in which foreseeability can arguably be proof of racial animus due to the total lack of justification for the policy.”

Nonetheless, because of the school district’s past *de jure* segregation and its establishment of a tracking system that continued the deleterious effects of that segregation, the *Anderson* Court held that the exit exam and diploma sanction had to be considered in the context of that history. Like *Debra P.*, the *Anderson* Court held that insofar as poor minority performance is attributable to participation in a dual system, the diploma sanction violated equal protection and the plaintiffs were not required to otherwise establish discriminatory intent.

Significantly, however, the Court held that the equal protection analysis must take into account the fact that minority students’ poor test performance was attributable to both the *de jure* segregation as well as the facially neutral tracking system instituted after desegregation. Although the tracking system had been abandoned at the time of the *Anderson* decision, it was put in place the same year the schools were desegregated and remained in place for approximately ten years. In considering the tracking system’s impact on the equal protection claim, the *Anderson* Court was guided by the Fifth Circuit Court of Appeals’ decision in *McNeal v. Tate County School District*. In *McNeal*, the Fifth Circuit held that a facially neutral tracking system that follows *de jure* segregation and produces racially segregated classrooms violates equal protection unless a unitary system has been established and operated for at least several

---

39 Id. at 499.
40 Id.
41 Id. (“if present facially neutral actions serve to perpetuate past intentional discrimination, there is no requirement that intent be proved again”) (citing *Dayton II*).
42 Id. at 500-501.
43 Id. at 481, 502.
44 Id. at 501 (citing *McNeal v. Tate County School District*, 508 F.2d 1017 (5th Cir. 1975)).
years. McNeal held, however, that a tracking system with racially segregative results does not violate equal protection “if the school district can demonstrate that the assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities.”

Applying that reasoning to the challenge to the exit exam and diploma policy before it, the Anderson Court held that those policies could not be applied to students who had attended the dual school system. The Court held, however, that the school district may be able to reinstate the exit exam and diploma sanction after all such students had graduated if the district could “show that the increased educational opportunities outweigh any lingering causal connection between the discriminatory tracking system and the imposition of the diploma sanction.”

In so ruling, the Court distinguished the facially neutral tracking system from de jure segregation, holding that the former “is not a social evil of such horrible magnitude as the dual system.” Moreover, the Court held that high stakes testing, the subject of the legal challenge before it, is “qualitatively different” from a discriminatory tracking system. Consequently, the Court rejected the position that school districts ought to be required to show that the educational disadvantages caused by a prior discriminatory tracking system have ended before a high stakes exam with racially disparate results may be allowed. Instead, the Anderson Court held that where an intervening period has occurred between the end of a discriminatory tracking system

45 Id.
46 Id. (quoting McNeal, supra, at 1020).
47 Id. at 503.
48 Id.
49 Id. at 502.
50 Id.
51 Id. at 503.
and the institution of a high stakes exam, a school district need only prove that the educational benefits outweigh the lingering effects of that tracking system.52

Here again, the Anderson Court was persuaded by the Fifth Circuit’s reasoning in McNeal that “[s]everal years of operation as a unitary system have a purging effect and allow school authorities to again exercise their best judgment and remedy the learning needs of the students, even if some remnants of the dual system in the form of disparate achievement levels remain.”53 Thus, in Anderson the Court adopted the Fifth Circuit’s two-tiered standard that required schools that had not operated as a unitary system to show that the educational disadvantages caused by de jure segregation had been eliminated in order to defend a policy with a racial impact, but allows school systems that have been operated for several years as an unitary system to defend such policies under the lesser burden of showing that the policy will help to remedy past discrimination by providing better educational opportunities.54

As the foregoing decisions suggest, the efficacy of using the equal protection clause as a basis for challenging high stakes exams relies, in large part, on whether the testing affects students who attended de jure segregated schools. Even when schools continued the deleterious effects of de jure segregation by enacting facially neutral, but racially discriminatory, tracking systems, high stakes exams still survived equal protection scrutiny if the district could establish that it had operated for a few years as a unitary system and that the educational benefits of the exams outweighed the lingering effects of those post-segregation actions.

Consequently, as de jure segregation has become more remote, equal protection challenges to high stakes exams have faced an increasingly difficult battle in the courts. This

52 Id.
53 Id.
54 Id.
battle, of course, centers on the difficulty of establishing that schools that adopt high stakes tests are motivated by racial animus rather than legitimate educational goals. Relying on Washington v. Davis and Arlington Heights, courts faced with equal protection challenges to high stakes exams have rejected claims that have relied solely on disparate racial impact or that were otherwise unable to muster persuasive direct or indirect evidence of discriminatory intent.

An example of such a decision is Larry P v. Riles.55 In Larry P., although plaintiffs established that IQ tests disproportionately wrongly labeled African American students as being educable mentally retarded,56 the Court held that “we cannot, however, sustain the finding of a violation . . . of the equal protection clause . . . on the theory that the pervasiveness of discriminatory effect can, without more, be equated with the discriminatory intent required by Washington v Davis.”57 Similarly, although not in the context of a high stakes exam challenge, in Elston v. Talladega County Bd of Ed., the Eleventh Circuit Court of Appeals rejected claims that various school policies violated the equal protection clause based on the plaintiffs’ failure to adequately establish discriminatory intent.58 Significantly, after carefully considering the plaintiffs’ proffered circumstantial evidence of discriminatory intent and the school’s responses, the Elston Court held that it was just as plausible that the school’s decisions were based on logistical and educational considerations as on any racial animus.59

The requirement to prove discriminatory intent is a severe evidentiary obstacle to prevailing in an equal protection claim against high stakes exams. The paucity of recent

55 Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1986).
56 Id. at 982.
57 Id. at 983-84.
58 Elston v. Talladega County Bd of Ed., 997 F.2d 1394, 1408-09, 1414-1419 (11th Cir. 1993).
59 Id. at 1409, 1411, 1419.
challenges to high stakes exams on equal protection grounds is a strong indication of the limited usefulness of the theory. Consequently, other legal grounds for attack have been used.

**The Due Process Clause**

The due process clause of the 14th Amendment provides that states shall not “deprive any person of life, liberty or property without due process of law.” The Constitution itself does not create the interests protected by the due process clause. Rather, these interests are created and defined by rules or understandings springing from independent sources such as state laws that establish certain benefits and support claims of entitlement to those benefits. To find a due process violation, a court must first find that a litigant has a protected property or liberty interest in that which the state seeks to limit or deny. The United States Supreme Court has held that a student’s legitimate entitlement to a public education is a property interest that may be protected by the due process clause. If a protected property or liberty interest exists, courts then evaluate, from both a procedural and substantive perspective, whether the government abused its power.

Procedural due process requires that a person receive adequate notice and a fair proceeding before being deprived of a property or liberty interest. Substantive due process recognizes that some rights are so inherent in the American system of justice that they cannot be restricted or deprived by government action that is arbitrary, capricious, fundamentally unfair or exercised in a manner that does not achieve a legitimate state interest. As demonstrated by two leading cases challenging high school exit examinations in Florida and Texas, “high stakes” tests can implicate both procedural and substantive due process interests.

---

60 *Bd of Regents v Roth*, 408 U.S. 564, 577 (1972).
Debra P. v Turlington

Seeking to improve the quality of education in Florida, the Florida Legislature enacted the Education Accountability Act of 1976. The Act was intended to provide a system of education accountability and create parity in educational opportunity for all students in the state. Regarding accountability, the Act established three graduation requirements: (1) completion of a minimum number of credits; (2) mastery of certain basic skills; and (3) satisfactory performance in functional literacy as determined by the State Board of Education. The statute also required schools to develop remediation procedures and outlined a statewide testing program. In 1978, the Act was amended to require passage of a functional literacy examination before a student could receive a high school diploma.

As described above, Florida high school students challenged the Act, claiming that the state designed and implemented a testing program that was racially biased and violated the due process and equal protection clauses of the 14th Amendment. In addressing their claim, the Fifth Circuit described the legal issue in terms of due process protections: “The overriding legal issue of this appeal is whether the State of Florida can constitutionally deprive public school students of their high school diplomas on the basis of an examination which may cover matters not taught through the curriculum.”

In answering that question, the Court first recognized a protected property interest. The Court held that by establishing a system of free public education and making attendance mandatory, the state created a legitimate expectation that if students attend school and successfully complete the required number of years and courses, they will receive a high school diploma.

---

64 Debra P. v Turlington, 644 F 2d 397, 400 (5th Cir 1981).
diploma. This state-created expectation of a diploma was a property interest entitled to constitutional protection.65

The court then found that the Act violated the student’s procedural and, possibly, substantive due process rights. First, the Court held that the test’s implementation schedule violated procedural due process because the abbreviated time period between when the examination requirement was announced and when implementation began gave students virtually no warning that graduation requirements had been changed. In essence, the students were deprived of a property right without adequate notice.

Next the court found that the students’ substantive due process rights may have been violated. The court looked at the content of the test and found that the record did not show whether the State tested content taught in Florida’s schools. While the test may have been a good test of what students should know, it was not necessarily a test of what students had an opportunity to learn. The court viewed this issue in terms of fundamental fairness. The Debra P. court emphasized that it was not questioning the right of the state to impose an exit examination. Rather if receipt of the diploma was dependent upon an examination, the examination had to be a fair test of what was taught.

The Court of Appeals remanded the case for factual findings to determine whether Florida’s schools were teaching what they were testing. On remand, the district court acknowledged that the answer to this simple question is extremely complex, for it is impossible to know what happens to every student in Florida’s schools and whether students receive appropriate instruction.66 The court recognized that teaching and learning are individualized processes that are not readily subject to objective treatment. Additionally, preparation for the

65 Id., at 404.
The test is not uniform; no two students have the same academic abilities or experiences and the quality of teachers and administrators will vary. The Court noted that while a student’s interest in receiving a high school diploma is very important, there is a “roughly equal” societal importance to the State to provide a quality public education to all students.67

The district court held that the test was instructionally valid and constitutional because students were afforded an adequate opportunity to learn the skills tested before the test was used as a diploma sanction. Though it was impossible to know what skills students were exposed to, there was evidence that the school districts included the skills in their curriculum and that the teachers taught the skills in their classes. From a constitutional perspective, the fact that students were given five chances to pass the test between the tenth and twelfth grades and received remedial help if they failed alleviated concerns regarding fairness. Students also had the option of staying in school for an additional year and receive specialized instruction designed to remedy identified deficiencies. The Court held that while there may be disparities in remedial programs and teachers, such disparities were not unfair in the constitutional sense. “What is required is that the skills be included in the official curriculum and that the majority of teachers recognize them as being something they should teach”.68 The decision was subsequently affirmed on appeal.69

**G. I. Forum v Texas Education Agency**

The question of fairness was also the focus of the court’s inquiry in *G.I. Forum v. Texas Education Agency*70, a challenge to the Texas high school graduation examination. In *G.I.

---

67 Id., at 184.
68 Id., at 186
69 *Debra P. II*, supra 730 F. 2d 1405 (11th Cir 1984).
70 87 F. Supp 2d 667 (W.D. Texas, 2000)
Forum, minority students alleged that the test unfairly discriminated against them and violated their due process rights.

The Court viewed the essential issue as whether the test was fair. Although the Court acknowledged the wide discrepancy in educational opportunities and financial resources for Texas schools, these factors alone were not a sufficient basis for invalidating the high school exit examination. Further, the Court found that while a recognized, statistically larger percentage of minority students failed to pass the test and earn a diploma, the rigid correlation between the state mandated curriculum and the state tests afforded minority students a reasonable opportunity to learn the tested material. Additionally, if a student failed to pass the test, there were multiple opportunities for targeted educational assistance and remediation. Moreover, no evidence showed that the test, as developed, implemented and used in Texas, was designed to or did in fact impermissibly disadvantage minorities.

The decision ultimately turned on the Court’s deference to the State of Texas’s right to design and implement educational policies aimed at the best interest of students in the State. The Court recognized as legitimate the State’s goals of identifying and eliminating educational disparities. The Court refused to rule on the wisdom of standardized tests, expressly stating that it had no authority to determine the quantity or quality of what students should know when they completed their public school education. While there was evidence that demonstrated that the quality of the education between minority and non-minority students was unequal, the Court noted that the reasons for the inequality are unclear. Factors implicated included socioeconomics, family support, quality of teaching and past discriminatory practices.

The Court specifically did not find due process violations. The Court held that the plaintiffs were not able to demonstrate that the test did not best serve the State’s objectives of
identifying and remediating educational problems. The disparities in test scores were not the result of flaws in the test or the way in which the test was administered.

In short, the Court finds, on the basis of the evidence presented at trial, that the disparities in test scores do not result from flaws in the test or in the way it is administered. Instead, as the Plaintiffs themselves have argued, some minority students have, for a myriad of reasons, failed to keep up (or catch up) with their majority counterparts. It may be, as the TEA argues, that the TAAS test is one weapon in the fight to remedy this problem. At any rate, the State is within its power to choose this remedy.

As the Court has stated in prior orders, it would be fundamentally unfair to punish minority students for receiving an unequal, state-funded education. In other words, it would violate due process if the TAAS test were used as a vehicle for holding students accountable for an educational system that failed them. The Court concludes, however, that the TAAS test is not used in such a manner.71

Debra P. and G.I. Forum are significant decisions because they recognized that the expectation of a high-school diploma represents a property interest and that accountability measures may violate due process in certain circumstances.72 They demonstrated that the courts will strike down accountability systems if necessary to protect constitutional concerns. Thus, issues related to fundamental fairness, such as sufficient advance notice, opportunities to learn tested material, opportunities to retake the examination, and remediation are relevant when accountability systems are scrutinized from a constitutional due process standpoint.73

71 Id, at 683
72 Bd of Ed v Ambach, 436 N.Y.S. 2d 564 (1981). But see Bester v Tuscaloosa City Bd of Ed, 722 F. 2d 1514 (11th Cir. 1984), holding that when State instituted new reading standard for grade promotion, plaintiffs had no protected property right in expectation that lower standard would continue to determine promotion, and Parents Against Testing Before Teaching v Orleans Parish School Board, 273 F.3d 1107 (5th Cir. 2001), cert. den. 122 S.Ct. 1174 (2002), which held that there was no property interest in promotion.
73 States have prevailed in recent challenges to high stakes tests. In Massachusetts, the State Board and Commissioner were directed to develop “academic standards” and “curriculum frameworks” for certain core subjects and to create objective assessments to measure school and student performance. The Massachusetts test was challenged by students in the high school class of 2003 who were required to pass the tenth grade English/language arts and mathematics sections of the Massachusetts Comprehensive Assessment System examination as a condition of graduation from high school. Many of the plaintiffs were students with disabilities. Plaintiffs challenged the facial validity of the implementing regulations and sought a preliminary injunction to enjoin the defendants from enforcing the graduation requirement. On January 27, 2004, the Supreme Judicial Court of Massachusetts affirmed the district court’s refusal to issue the preliminary injunction. The Court held that enjoining the regulations would “hinder education reform”. Student No. 9 et al v Massachusetts Bd of Ed et al, 440 Mass 752; 802 N.E.2d 105 (2004).
Title VI of the Civil Rights Act of 1964 & Implementing Regulations

Given the difficulties in pursuing an equal protection based claim, which necessarily relies on proving intentional discrimination, one might assume that federal regulations prohibiting “disparate impact” discrimination would be an effective alternative to bringing an intentional discrimination claim challenging accountability systems. However, current law does not support this approach.

Title VI of the Civil Rights Act provides that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.\(^74\)

This statutory right is coextensive with the protections afforded by the equal protection clause, and thus, as described above, should not be the foundation for an attack on an accountability system unless intentional discrimination can be shown. However, Section 602 of Title VI, authorizes federal agencies to effectuate Title VI’s ban on discrimination “by issuing rules, regulations, or orders of general applicability.” In addition to promulgating regulations regarding intentional discrimination, various federal agencies have promulgated regulations that,

---

\(^{74}\) 42 USCS 2000d
in addition to banning intentional discrimination, also prohibit federal funds recipients from adopting policies or procedures that have a discriminatory effect, regardless of discriminatory intent.

In the education context, the United States Department of Education’s regulations provide in part that “[a] recipient … may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin ….” Thus, since these regulations do not rely on any showing of discriminatory intent, the disparate impact regulations have been used to attack accountability measures that have an alleged disparate impact on minority groups.

However, a pair of recent United States Supreme Court opinions have effectively neutralized such “disparate impact” claims. The first, *Alexander v Sandoval*, addressed the question of whether individuals were authorized under Title VI to file suits based on the disparate impact regulations. Under the Court’s implied-right-of-action jurisprudence, the answer was no.

Whereas § 601 decrees that "no person … shall … be subject to discrimination," … the text of § 602 provides that "each Federal department and agency … is authorized and directed to effectuate the provisions of [§ 601]," … Far from displaying congressional intent to create new rights, § 602 limits agencies to "effectuating" rights already created by § 601. … So far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create private right of action.

By finding no congressional intent to create private enforcement actions based on disparate impact, the Court shut the door to disparate impact claims nominally brought under Title VI. The *Sandoval* opinion left unanswered, however, the question of whether such claims

---

75 34 C.F.R. § 100.3(b)(2).
77 *Id.* at 288-289 (internal citations omitted).
could be brought under 42 USC § 1983, which is often used as the statutory vehicle for litigating disputed federal “rights.”

That question was resolved the year after the Court’s decision in *Alexander v Sandoval*. In *Gonzaga Univ v Doe*, the plaintiff alleged a violation of the Family Educational Rights and Privacy Act of 1974 (FERPA), but nominally brought suit under 42 USC § 1983. The Court made clear that its implied right of action cases and § 1983 cases should be read together, such that if there is no cause of action under the statute, there is similarly no cause of action under § 1983: "A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context. … Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." The Court concluded that the plaintiff could not bring a claim under § 1983 because Congress had not authorized a cause of action under FERPA.

Consequently, where *Sandoval* explicitly ruled that there is no implied right of action to raise disparate impact claims under Title VI, *Sandoval* and *Gonzaga* in conjunction make clear that there is no cause of action even though the claim is nominally raised under 42 USC 1983. Thus, under existing law, the disparate impact claim is not a viable strategy for challenging educational accountability measures.

Additionally, it must be recognized that the inability of private litigants to bring suit under the federal regulations does not, *a fortiori*, render the disparate impact prohibition

---

78 536 US 273 (2002),
79 20 USCS § 1232g
80 The FERPA neither explicitly nor implicitly creates a private cause of action itself.
82 See *South Camden Citizens in Action v New Jersey Dept of Environmental Protection*, 274 F3d 771, 791 (3rd Cir. 2001) (because "Congress did not intend by adoption of Title VI to create a federal right to be free from disparate impact discrimination … [the EPA's disparate impact regulations] do not create rights enforceable under section 1983"), cert denied, 536 US 939 (2002).
irrelevant. The regulations provide an enforcement mechanism, albeit dependent upon federal agency action,\textsuperscript{83} which could be a significant hurdle to accountability systems that are determined to have a disparate impact on the basis of race, color, or national origin. However, were such agency action instituted, a state would likely challenge the enforceability of the regulations on the grounds that the federal agency exceeded the scope of its authority when it enacted the regulation, and therefore the regulation is of no effect.

The outcome of such a challenge is not clear. In \textit{Sandoval}, the Court touched on the issue but was not required to resolve it. In doing so however, the Court noted that past decisions presented pointed disagreement on this issue. For example, in his dissent in \textit{Guardians Ass'n v. Civil Serv. Comm'n},\textsuperscript{84} Justice Stevens concluded that disparate impact regulations were valid despite exceeding the scope of §601:

\begin{quote}
It is well settled that when Congress explicitly authorizes an administrative agency to promulgate regulations implementing a federal statute that governs completely private conduct, those regulations have the force of law so long as they are "reasonably related to the purposes of the enabling legislation."… By prohibiting grant recipients from adopting procedures that deny program benefits to members of any racial group, the administrative agencies have acted in a reasonable manner to further the purposes of Title VI.\textsuperscript{85}
\end{quote}

However, Justice O'Connor disagreed.

I part company with JUSTICE STEVENS' dissent, however, when it concludes that administrative regulations incorporating an "effects" standard may be upheld notwithstanding the statute's proscription of intentional discrimination only. … JUSTICE STEVENS' dissent argues that agency regulations incorporating an "effects" standard reflect a reasonable method of "[furthering] the purposes of Title VI." If, as five members of the Court concluded in Bakke, the purpose of Title VI is to proscribe only purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by

\textsuperscript{83} See 34 CFR 100.6-100.12.  
\textsuperscript{84} 463 U.S. 582, 643 (1983)  
\textsuperscript{85} Id., at 644.
the recipient having only a discriminatory effect. Such regulations do not simply "further" the purpose of Title VI; they go well beyond that purpose. 86

In sum, the various arguments have been made, but the Court has not decided this particular issue. Consequently, the validity of the disparate impact regulations remains in question and their impact on accountability measures remains unclear.

II. WHAT DOES THE FUTURE HOLD FOR CHALLENGES TO EDUCATIONAL ACCOUNTABILITY SYSTEMS?

Many of the core issues that arise in claims against education accountability systems are well settled by the courts. However, the legal terrain may change due to new legal theories or legislative amendments. One area in which such creativity and proposed legislative amendments has been directed is to the requirement that discriminatory intent be proven in order to establish a violation of Title VI.

The Deliberate Indifference Theory

As examined above, in Sandoval the United States Supreme Court held that individuals do not have a private cause of action to enforce the disparate impact regulations promulgated under § 602 of Title VI of the Civil Rights Act of 1964 and reiterated its prior rulings that proof of discriminatory intent is necessary to state a claim under § 601 of Title VI. In an attempt to resurrect a private cause of action under Title VI to challenge policies with disparate impacts, it has been suggested that the “deliberate indifference” liability standard be imported from its original harassment context to apply to disparate impact claims. 87 Under this theory, it is argued that a federal funding recipient’s continuation of a facially neutral policy after it has been made

86 Id., at 612.
aware that the policy has a disparate impact on a protected group is deliberate indifference to a violation of the regulation that amounts to discriminatory intent.\textsuperscript{88}

**Deliberate indifference and harassment**

Originating in the sexual harassment context, the deliberate indifference standard holds entities liable, under certain circumstances, for intentional discrimination arising out of harassment perpetrated by individuals within their control, e.g., in the context of schools, harassment perpetrated by teachers or other students.\textsuperscript{89} In *Gebser v. Lago Vista Ind. Sch. Dist.* and *Davis v. Monroe County Bd of Ed.*, the United States Supreme Court delineated the following circumstances under which federal funding recipients can be held liable in private actions by students who are sexually harassed by teachers or other students: (1) school officials, with the authority to take corrective action, had actual knowledge of severe and pervasive harassment that denied the victim access to educational opportunities and benefits, and (2) the school unreasonably failed to take action to correct that situation.\textsuperscript{90}

In *Davis* and *Gebser*, the Court noted that Title IX and Title VI are contractual in nature because they attach conditions to the receipt of federal funds.\textsuperscript{91} Given this contractual nature, the Court held that in order for a private cause of action for damages to exist under a federal funding statute, Congress must clearly articulate that recipients would subject themselves to such liability

\textsuperscript{88} Black, supra, at 376-386.

\textsuperscript{89} Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274 (1998) (recognizing private damages action under Title IX against federal funding recipient for sexual harassment of a student by a teacher); Davis v. Monroe County Bd of Ed., 526 U.S. 629 (1999) (recognizing private damages action under Title IX against federal funding recipient for sexual harassment of a student by another student).

\textsuperscript{90} Id. at 640-643, 648-650 (discussing Gebser and reiterating its ruling that liability under a deliberate indifference theory can only attach if the funding recipient had actual knowledge of the harassment and responded in a clearly unreasonable manner that effectively caused the victim to be denied equal access to benefits or participation in education programs receiving federal funding); see also Gebser, supra, at 290-91 (holding that the appropriate person must have actual knowledge and defining deliberate indifference as “an official decision . . . not to remedy the violation.”)

\textsuperscript{91} Gebser, supra, at 287; Davis, supra, at 640.
if they accepted federal funds. Thus, the Court held that “the scope of liability in private damages actions under Title IX is circumscribed by Pennhurst’s requirement that funding recipients have notice of their potential liability.”

In the context of teacher and student sexual harassment, the Court found that funding recipients have sufficient notice of their potential liability for damages because it is the recipient’s own intentional acts that violate Title IX by being deliberately indifferent to known harassment. The Court cautioned, however, that the contractual nature of funding legislation limits liability for damages to discrimination actually caused by the funding recipient.

Additionally, in Davis, the Court held that, despite the fact that a student harasser is not an agent of the school, funding recipients have notice of their potential liability for student-on-student harassment because Title IX regulations notify schools that they may be liable for the discriminatory acts of nonagents and the common law notifies schools that they may be liable under state law for failing to protect students from tortious acts by third parties. Furthermore, in finding that schools had sufficient notice to satisfy Pennhurst, the Court noted that publications issued by the National School Boards Association notified school administrators and their attorneys that they may be liable for student-on-student harassment if they fail to take corrective action after receiving actual notice of that misconduct.

More generally, and perhaps most importantly to the possible application of the deliberate indifference standard to the disparate impact context, the Court held that “[t]he requirement that recipients receive adequate notice of Title IX’s proscriptions also bears on the

---

92 Davis. at 640 (citing Pennhurst, supra, at 17, 24-24).
93 Id. at 641 (citing Gebser, 524 U.S. at 287-288).
94 Id. at 642 (discussing Gebser, 524 U.S. at 290-291).
95 Id. at 643-44.
96 Id. at 647.
proper definition of ‘discrimination’ in the context of a private damages action.”97 Based on the fact that the Court had already “concluded that sexual harassment is a form of discrimination for Title IX purposes and that Title IX proscribes sexual harassment with sufficient clarity to satisfy Pennhurst’s notice requirement and serve as a basis for a damages action,” the Davis Court held that it was “constrained to conclude that student-on-student harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.”98 In other words, the Court held that a necessary predicate for applying the deliberate indifference standard is that recipients have sufficiently clear notice that the underlying conduct to which they are allegedly being deliberately indifferent fits within the definition of conduct proscribed by the funding statute.

**Deliberate indifference and educational accountability**

There are, however, problems with transporting the deliberate indifference standard from the harassment context to claims that challenge facially neutral policies that have disparate impacts on protected groups. While it is clear that racial and sexual harassment fit within the definition of discrimination proscribed by Title IX and Title VI, the Court’s ruling in Sandoval brought the viability of disparate impact regulations into question when it held that “policies with disparate impact may not constitute a level of discrimination toward which a school official could be indifferent.”99 “[I]f section 602 disparate impact regulations do not set a standard or define discrimination, notifying an official of the impact may not constitute notifying her of ‘discrimination’ that she would have a duty to remedy.”100 Additionally, there is a difference between the harassment context, in which a third party intentionally acts to discriminate against

---

97 Id. at 649.
98 Id. at 649-650.
99 Black. at 378.
100 Id. at 379.
an individual, and the situation in which school officials enact a policy with a disparate impact but are not motivated to do so by discriminatory animus:

Because school officials generally are the ones implementing the policies, one could argue that they either enact them with discriminatory intent or they do not. Some might argue that if the recipient did not have discriminatory intent upon enacting a policy, then the policy cannot later be transformed into an intentionally discriminatory one. To suggest that recipients are deliberately indifferent to their own unintentional action may stretch the concept beyond its definition.101

More importantly, the deliberate indifference standard is inapplicable in the disparate impact arena because the Supreme Court has already answered the question of whether an “underlying violation” of Title VI occurs when a funding recipient implements a policy that results in a disparate impact but was not motivated by discriminatory intent to do so. Specifically, in *Sandoval* the Court reiterated its prior rulings that “Title VI itself directly reach[es] only instances of intentional discrimination.”102 The *Sandoval* Court did not rule directly on the validity of disparate impact regulations promulgated pursuant to § 602 of Title VI because the parties did not challenge those regulations.103 Nonetheless, the Court held that those disparate impact regulations reach beyond the intentional discrimination proscribed in § 601 of the Act and “forbid conduct that § 601 permits.”104 Consequently, the Court held that there is no private right of action to enforce § 602 disparate impact regulations.105 In sum, the Court explained that “a failure to comply with regulations promulgated under § 602 that is not also a failure to comply with § 601 is not actionable.”106

101 *Id.* at 378.
103 *Id.* at 281-282.
104 *Id.* at 285.
105 *Id.* at 285, 293.
106 *Id.*
Moreover, in addition to Sandoval’s clear holding that there is no Title VI private cause of action to enforce disparate impact regulations and that discriminatory intent must be proven to state a claim under Title VI, the Supreme Court has definitively held that in order to prove discriminatory intent a plaintiff must prove that the government took the challenged actions **because of**, and not just **in spite of**, the expected adverse impact on protected groups.\(^{107}\) The Supreme Court decision in *Feeney* stands for the proposition that the government can know that its actions will have a disparate impact based on race and not be guilty of intentional discrimination if it was not motivated by the disparate impact (i.e., the challenged governmental action was taken in spite of its disparate impact, not because of that impact). Many courts have relied on *Feeney* to reject Title VI and equal protection challenges to high stakes exams based solely on an alleged disparate impact, holding that absent proof of discriminatory intent courts must defer to educators to make the determination that a policy with a disparate impact is necessary to achieve legitimate and important goals of improving educational performance.

In direct contrast to *Feeney*, the argument that the deliberate indifference theory is capable of satisfying the discriminatory intent requirement creates a legal fiction that a funding recipient was motivated by discriminatory intent based solely on the fact that the recipient was aware that its actions disparately impacted a protected group. *Feeney* instructs, however, that discriminatory intent is not proven by establishing knowledge of disparate impact – proof of discriminatory motivation is required. Expressed another way, the *Feeney* decision and its progeny put funding recipients on notice that they can be **aware** that their actions may

---

\(^{107}\) *Feeney*, supra at 279. While *Feeney* interpreted the discriminatory intent requirement in the context of an equal protection claim, in *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 254 (1978), the United States Supreme Court explicitly held that the nondiscrimination mandate in § 601 of Title VI is coextensive with that of the equal protection clause. *Sandoval*, supra, at 280-281 (holding that “[e]ssential to the Court’s holding [in *Bakke*] . . . was the determination that § 601 ‘proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.’”) (quoting *Bakke*, supra, at 287) (opinion of Powell, J.).
disparately impact protected groups and nonetheless constitutionally and legally take those actions as long as they are not motivated by the potential disparate impact to do so. Therefore, the deliberate indifference model for proving a Title VI violation fails when applied in the disparate impact context because knowledge of disparate impact does not equal discriminatory intent.

Finally, deliberate indifference should not equate to discriminatory intent in claims challenging high stakes tests because the deliberate indifference paradigm does not impose liability unless the defendant has the duty and control to remediate underlying discrimination and yet unreasonably fails to do so. In particular, applying the deliberate indifference liability standard to disparate impact challenges is unworkable because: 1) unlike a school’s authority and power to stop teachers and students from engaging in known illegal harassment, states have limited power to eliminate and fully remediate all the factors that may contribute to racially disparate educational results; and 2) a state may decide that accountability systems may improve performance levels generally. Under these circumstances, subjecting funding recipients to damages liability for continuing a policy that has a disparate impact does not comport with the Court’s requirement in Davis that liability only attaches based on the funding recipient’s own misconduct that causes a discriminatory denial of federally-funded benefits.

In sum, high stakes tests that have disproportionately higher minority failure rates cannot be equated with racial or sexual harassment. Harassment involves an illegal racial or gender animus and schools that knowingly and deliberately tolerate such discrimination are complicit in any denial of federally-funded benefits that ensues. In contrast, absent proof of an actual discriminatory intent, an accountability system is not imbued with an illegal animus merely by virtue of the knowledge that a high stakes exam may result in a disproportionately higher
minority failure rate.\textsuperscript{108} Thus, it seems unlikely that the United States Supreme Court would extend the deliberate indifference theory to recognize a private action to challenge high stakes testing programs or other educational accountability systems based on claims of an illegal disparate impact.

**FAIRNESS – Civil Rights Act of 2004**

In the wake of *Sandoval* and *Gonzaga*, amendments to the Civil Rights Act have been recently introduced to provide a cause of action for claims of disparate impact.

The Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004 (“FAIRNESS Act”), was introduced as Senate Bill 2088 and House Bill 3809 on February 11, 2004. Title I of this proposed legislation, Nondiscrimination in Federally Funded Programs and Activities, responds to the Supreme Court’s decision in *Sandoval*.\textsuperscript{109} Specifically, the proposed findings in support of this legislation assert that:

> the *Sandoval* decision undermines . . . statutory protections by stripping victims of discrimination (defined under regulations that Congress required Federal departments and agencies to promulgate to implement title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d \textit{et seq}))) of the right to bring action in Federal court to redress the discrimination and by casting doubt on the validity of the regulations themselves.\textsuperscript{110}

This proposed legislation asserts that “[t]he Supreme Court had no basis in law or in legislative history in *Sandoval* for denying a right of action under regulations promulgated pursuant to title VI”\textsuperscript{111} and seeks to “reinstat[e] a private right of action under title VI . . . and

\textsuperscript{108} See, e.g., *Larry P.*, 793 F.2d at 983-984 (“we cannot, however, sustain the finding of a violation . . . of the equal protection clause . . . on the theory that the pervasiveness of discriminatory effect can, without more, be equated with the discriminatory intent required by *Washington v Davis*.”).

\textsuperscript{109} S.B. 2088, § 101(1) Findings (“This subtitle is made necessary by a decision of the Supreme Court in *Alexander v Sandoval*, 532 U.S. 275 (2001) that significantly impairs statutory protections against discrimination that Congress has erected over a period of almost 4 decades.”).

\textsuperscript{110} \textit{Id.}, § 101(1).

\textsuperscript{111} \textit{Id.} § 101(8).
confirm[] that right for other civil rights statutes."\textsuperscript{112} In sum, the findings proffered in support of Title I of the FAIRNESS Act assert that an amendment reinstating a private right of action under Title VI and other civil rights statutes to challenge policies with unjustified disparate impacts is necessary to ensure a remedy for persons who are denied equal access to federally funded programs and services:

[a] failure to reinstate or confirm a private right of action would leave vindication of the rights to equality of opportunity solely to Federal agencies, which may fail to take necessary and appropriate action because of administrative overburden or other reasons. Action by Congress to specify a private right of action is necessary to ensure that persons will have a remedy if they are denied equal access to education, housing, health, environmental protection, transportation, and many other programs and services by practices of covered entities that result in discrimination.\textsuperscript{113}

Towards that end, Section 103 of the FAIRNESS Act would amend § 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, to expressly authorize a private cause of action to challenge any violation of Title VI or the regulations promulgated under that statute.\textsuperscript{114} Furthermore, Section 102 of the FAIRNESS Act would amend § 601 of Title VI to expressly define discrimination to include policies or practices that have a disparate impact that cannot be justified by a showing of business necessity and that could be avoided by a less discriminatory alternative policy or practice that the funding recipient refuses to adopt:

Discrimination (including exclusion from participation and denial of benefits) based on disparate impact is established under this title only if - -

(i) a person aggrieved by discrimination on the basis of race, color or national origin . . . demonstrates that an entity subject to this title . . . has a policy or practice that causes a disparate impact on the basis of race, color, or national origin and the covered entity fails to demonstrate that the challenged policy or practice is related to and necessary to achieve the

\textsuperscript{112} Id. § 101(11).
\textsuperscript{113} Id., § 101(12).
\textsuperscript{114} Id., § 103(b) (“Any person aggrieved by the failure of a covered entity to comply with this title, including any regulation promulgated pursuant to this title, may bring a civil action in any Federal or State court of competent jurisdiction to enforce such person’s rights.”).
nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner; or

(ii) the aggrieved person demonstrates (consistent with the demonstration required under title VII with respect to an ‘alternative employment practice’) that a less discriminatory alternative policy or practice exists and the covered entity refuses to adopt such alternative policy or practice.115

Finally, while reinstating a private cause of action to challenge federally funded programs that result in a disparate impact based on race, color or national origin, the FAIRNESS Act would limit recovery in disparate impact actions to equitable relief, attorney’s fees and costs, reserving awards of compensatory and punitive damages to claims in which actual discriminatory intent is proven.116

The fact that the FAIRNESS Act was co-sponsored by 96 legislators indicates that many believe that disparate impact claims are necessary to ensure equal access to federally funded programs and services. Others, however, question this position and advocate against applying the disparate impact model in challenges to high stakes testing programs. It is far from clear what the nature and exact parameters of future litigation challenging educational testing programs will be. What is clear, however, is that as the FAIRNESS Act proceeds through the legislative process, the debate will continue over the propriety of allowing disparate impact claims. Finally, however creative educators and policymakers may be in their future school accountability efforts, that creativity will surely be matched by litigators seeking to challenge and defend those systems.

115 Id., § 102(b)(1)(A).
116 Id., § 104 (proposing that Title VI be amended by adding a § 602(A) to Title VI, Actions Brought by Aggrieved Persons, which would delineate what may be recovered by persons alleging discriminatory intent versus solely discriminatory impact).
III. Conclusion

The cases demonstrate that the paramount concerns in legal challenges to accountability systems are whether the test and the circumstances surrounding the test administration are fundamentally fair. Students must have adequate notice of the test and be taught the material that is tested. Even if the results of the test have a substantial or adverse effect on minority students, the courts acknowledge but have not invalidated a test because of the social, economic or psychological effects on students who fail to pass a high school graduation exit examination. Deference to the state’s right to create accountability systems to benefit students has prevailed as the evidentiary hurdles to legal challenges to those systems have increased. In stark contrast to the desegregation cases that followed Brown v Bd of Ed, courts refrain from using accountability cases as vehicles to tackle the serious social issues in the nation’s schools. While the 14th Amendment offers a potentially broad range of protections, in the era of No Child Left Behind when accountability measures are a necessary and accepted part of a state’s educational program, challenges to states’ accountability systems appear to be limited.