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Nervous Laughter and the High Cost of Equality: Renewing "No Child Left Behind" Will Safeguard a Vibrant Federalism and a Path Toward Educational Excellence

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NERVOUS LAUGHTER AND THE HIGH COST OF EQUALITY:

RENEWING "NO CHILD LEFT BEHIND" WILL SAFEGUARD A VIBRANT FEDERALISM AND A PATH TOWARD EDUCATIONAL EXCELLENCE

I. INTRODUCTION

Presidential candidates called it "unconstitutional," an "unfunded mandate."[1] Its fiercest critics charge its intent is to undermine and dismantle public education itself.[2] National Public Radio betrayed a grievous misunderstanding when it erroneously described a thoughtful proposal in Congress to provide tax credits to non-participating states as a radical

1. Tom Tancredo called No Child Left Behind "intrusive" and "unconstitutional." *Election '08: Talk with the Candidates*, WASH. POST, Oct. 11, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/discussion/2007/10/01/DI2007100101446.html. Bill Richardson and Hillary Clinton both called the law an "unfunded mandate." Transcript, *Hillary Clinton's Caucus Speech*, N.Y. TIMES, Jan. 3, 2008, *available at* http://www.nytimes.com/2008/01/03/us/politics/03clinton-transcript.html?pagewanted=print ("And if you are worried about once and for all taking on global warming, making it clear that we will end the unfunded mandate known as No Child Left Behind, that we will make college affordable again, that we will be once again the country of values and ideals that we cherish so much, then, please, join me in this campaign."); Bill Richardson, Op-Ed., *NCLB Fails Our Schools*, USA TODAY, Sep. 7, 2007, at 10A ("We need to move beyond the empty rhetoric of No Child Left Behind. . . . True education reform requires more than a set of unfunded mandates and a list of failing schools. It requires a vision for success [and] the state and federal funding to match. . .."). On the term "unfunded mandate," see *infra* note 122 and accompanying text.

2. *See* Gerald W. Bracey, *Believing the Worst*, STAN. MAG., July–Aug. 2006, *available at* http://www.stanfordalumni.org/news/magazine/2006/julaug/features/nclb.html ("NCLB aims to shrink the public sector, transfer large sums of public money to the private sector, weaken or destroy two Democratic power bases—the teachers unions—and provide vouchers to let students attend private schools at public expense."); Alfie Kohn, *NCLB and the Effort To Privatize Public Education*, *in* MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS 79, 96 (Deborah Meier & George Wood eds., 2004) (arguing that NCLB, by both design and effect, puts the United States "at risk of abandoning public education altogether").

proposal to allow states not to participate.[3] Yet the No Child Left Behind Act of 2001 (NCLB) is hardly the subversive, far-reaching, and peremptory law that these misconceptions and attacks suggest.[4] Rather, NCLB is divisive because it has raised penetrating questions with profound implications for the future. NCLB is a major example of a federal initiative to respond to a well documented nationwide need, and its success or failure will influence future solutions to stubborn national problems ranging from health care to oversight of the financial industries. As Congress considers the renewal of NCLB, it has a moral and political imperative to get it right.

The greatest support for NCLB continues to come from states, communities, organizations, and families who are sensitive to its central mission: improving the academic achievement and educational opportunities in the poorest-performing schools to match more closely those in high-performing schools.[5] When it was enacted, NCLB enjoyed

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3. *Compare* Claudio Sanchez, *'No Child' Law Picked Apart as Renewal Fight Looms*, MORNING EDITION, Jan. 30, 2008, *available at* http://www.npr.org/templates/story/story.php?storyId=18432881 ("[Representative Scott Garrett of New Jersey] wants to give states the right to opt out of the law. It's an idea that several governors support, but Congress is unlikely to seriously consider."), *with* Press Release, Scott Garrett, Garrett Promotes Overhaul of Education Policy as No Child Left Behind Hits 6 Year Anniversary (Jan. 7, 2008), *available* at http://garrett.house.gov/News/DocumentSingle.aspx?DocumentID=81394 ("My bill allows residents of the states that opt out of NCLB to receive a tax credit equal to the amount that they would have otherwise received in federal funding. So schools won't be penalized with a loss of funding if they choose to exercise control over their own education destiny.").

4. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301–7941).

5. Stephen L. Carter credits NCLB for narrowing the racial gap in test scores. *See* Op-Ed., *Affirmative Distraction*, N.Y. TIMES, July 6, 2008 (Week in Review), at 10. The Connecticut State Conference of the National Association for the Advancement of Colored People (NAACP) intervened in *Connecticut v. Spellings* to defend NCLB. 549 F. Supp. 2d 161, 163 (D. Conn. 2008) (misidentifying NAACP as a plaintiff-intervenor rather than defendant-intervenor); Mem. of Law in Supp. of Second Mot. to Intervene on Behalf of NAACP at 1 (No. 3:05CV1330), 2006 WL 4738705. Coalitions of civil rights organizations and parents have sued (unsuccessfully) to enforce NCLB's provisions, including those requiring notification to parents that their children attend deficient schools and are eligible for supplemental educational services (free tutoring), *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199 (3d Cir. 2008); those requiring highly qualified teachers in every classroom, *Renee v. Spellings*, No. C 07-4299 (N.D. Cal. June 17, 2008), 2008 WL 2468481; and those granting students in failing schools the right to transfer to another school in the district, *Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp. 2d 338 (S.D.N.Y. 2003).

For an example of educators' discussion of positive results from NCLB, see Betsy Hammond, *No Child Left Behind Changes Oregon Education*, PORTLAND OREGONIAN,

broad bipartisan support and recognition of its central, civil rights objectives.[6] Much of the public has grown disenchanted, however—"educators, legislators, and even entire states are in open revolt over NCLB"[7]—and liberal education scholars talk of "laudable goals" and "noble agenda" overrun by inherent flaws and "unintended consequences."[8]

Where a sound and laudable premise meets flawed design and unintended consequences, however, revolt and abandonment are not the normal nor the best response. The countless parodies and puns the name No Child Left Behind has inspired in the press and elsewhere suggest something more than a logical reaction is going on.[9] The protests against NCLB are suffused with nervous laughter, which signals unacknowledged interests and responsibilities. Granted, NCLB has serious structural weaknesses and presents considerable—perhaps unduly burdensome—political and financial challenges for the states; but its central mission and virtues remain unchanged.

There are two elemental objections to NCLB. Although they are inextricably related, the first objection expresses a policy

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Aug. 31, 2008, at A1.

6. *See* Linda Darling-Hammond, *From "Separate but Equal" to "No Child Left Behind": The Collision of New Standards and Old Inequalities*, *in* MANY CHILDREN LEFT BEHIND, *supra* note 2, at 3, 3; George Wood, *Introduction* to MANY CHILDREN LEFT BEHIND, *supra* note 2, at vii, viii–ix. For fuller accounts of the complex motives behind NCLB, see PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965–2005 165–94 (2006); 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).

7. Wood, *supra* note 6, at x. Most recently, the Virginia legislature voted nearly unanimously to study the feasibility of opting out of NCLB. *See* Jeff Mellott, *Bills To Pull Virginia Out of No Child Left Behind Move Through Committees*, DAILY NEWS-REC. (Harrisonburg, Va.), Feb. 4, 2008, *available at* http://www.dnronline.com/details.php?AID=14781&CHID=2; Jeff Mellott, *NCLB Contingency Bill Passes House*, DAILY NEWS-REC. (Harrisonburg, Va.), Feb. 5, 2008, *available at* http://www.dnronline.com/news_details.php?AID=14793&CHID=2; Editorial, *Virginia Left Behind*, WASH. POST, Mar. 6, 2008, at A20. A 2008 Phi Delta Kappan/Gallup poll helps to keep the disenchantment with NCLB in perspective, however. The poll reported that 25 percent of Americans believed NCLB should be allowed to expire and 42 percent believed it should be changed significantly. William J. Bushaw & Alec M. Gallup, *Americans Speak Out—Are Educators and Policy Makers Listening?*, PHI DELTA KAPPAN, Sept. 2008, at 9-10, *available at* http://www.pdkmembers.org/members_online/publications/e-gallup/kpoll_pdfs/pdkpoll40_2008.pdf.

8. Wood, *supra* note 6, at xi; Darling-Hammond, *supra* note 6, at 3, 4.

9. Darling-Hammond, *supra* note 6, at 4 ("The proliferating nicknames emerging as this intrusive legislation plays out across the country give a sense of some of the anger, bewilderment, and confusion left in its wake.").

concern about education (what government should provide and require), while the second expresses a constitutional concern about federalism (how state and federal governments should function and within what limits of control). The two arguments can be summarized as follows:

> 1. Complying with NCLB cripples states and schools with a sterile education policy obsessively focused on annual student testing and other superficial, shortsighted goals.[10]
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> 2. While NCLB is in form a federal spending program, participation in the program is optional for states in theory only—the threat of withholding federal education funds from states that have long relied on them unconstitutionally coerces their participation in NCLB. Furthermore, because the federal funding is inadequate for full compliance with NCLB's requirements, the law unconstitutionally directs states' education policy.[11]

Both arguments sensibly address practical realities, and Congress should learn many essential points from them as it considers NCLB's future—especially as to the rigidity of NCLB's deadlines and benchmarks, the punitive nature of

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10. *See, e.g.*, Darling-Hammond, *supra* note 6, at 9 ("The biggest problem with the NCLB Act is that it mistakes measuring schools for fixing them."); Frederick M. Hess, *Refining or Retreating?: High-Stakes Accountability in the States*, *in* NO CHILD LEFT BEHIND?, *supra* note 6, at 55, 72 ("A tendency exists to recoil from the real costs of high-stakes accountability, thus producing a series of well-intentioned compromises that leave the façade of accountability intact but strip its motive power."); Diane Ravitch, Op-Ed., *Get Congress Out of the Classroom*, N.Y. TIMES, Oct. 3, 2007, at A25 (NCLB "has unleashed an unhealthy obsession with standardized testing"; its threat of sanctions provides "an incentive to show that schools and students are making steady progress, even if they are not"; and its goal of universal proficiency by the year 2014 "is simply unattainable"); *see also* Thomas Sobol, Discussion of NCLB's conceptual flaws in a speech at Columbia University, Nov. 5, 2003, *quoted in* Charles R. Lawrence III, *Who Is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 SUFFOLK U. L. REV. 699 (2006) ("Educating children is like nurturing a garden; things need to be tended steadily and slowly, and it doesn't help to pull them up by the roots and measure them too often.").

11. *See, e.g.*, L. Darnell Weeden, *Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate Under Federal Law?*, 31 T. MARSHALL L. REV. 239 (2006); Gina Austin, Note, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*, 27 T. JEFFERSON L. REV. 337 (2005); Michael D. Barolsky, Note, *High Schools Are Not Highways: How* Dole *Frees States from the Unconstitutional Coercion of No Child Left Behind*, 76 GEO. WASH. L. REV. 725 (2008); Coulter M. Bump, Comment, *Reviving the Coercion Test: A Proposal To Prevent Federal Conditional Spending that Leaves Children Behind*, 76 U. COLO. L. REV. 521 (2005); *but see generally* Regina R. Umpstead, *The No Child Left Behind Act: Is It an Unfunded Mandate or a Promotion of Federal Educational Ideals?*, 37 J.L. & EDUC. 193 (2008).

some of its sanctions, and its neglect of teaching methods.[12]

Nonetheless, these arguments tend toward a negative and counterproductive logic that limits their usefulness. They draw attention to what is missing (time, money, and creative and flexible teaching), but avoid frankly weighing the states' role in presiding over the accretion of unmet need. They present a contradiction by decrying excessive federal interference and insufficient federal funding. They do not point the way forward to correcting the long intractable problem of inequality in educational opportunities, but insist that the flexibility and freedom schools have enjoyed for decades is still the solution.[13]

The policy argument correctly maintains that the testing and data collection NCLB requires cannot effect meaningful reform without a concentrated focus on teaching and curriculum. But the implication that NCLB prevents true teaching reform is a straw man, however grounded it may be in current fiscal realities. Contrarily, the policy argument more often than not incorrectly implies that meaningful education reform can proceed without a basic system of rigorous testing and solid data collection in place.[14] It also obscures the primary objective of equality behind NCLB's requirement that each state adopt uniform educational standards. A thorough system of assessment and accountability is the necessary basis alike of any sound education policy and of any equality measure.

If NCLB is to succeed on its own terms, Congress will indeed have to partner with the states to support their development of programs for teaching and curriculum reform. By their nature, these programs require individualization and resist standardization. In the meantime, though, there is no

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12. NCLB's much discussed punitive sanctions are described with more equanimity by Professor Wood when he says that the focus on achievement measures "ha[s] lead to a quantitative standard of the success or failure of school districts." R. CRAIG WOOD, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES 77 (3d ed. 2007). Perhaps an even more important consideration obscured by criticism is that the sanctions on schools are, from another perspective, remedies guaranteed to students.

13. For example, Professor Ravitch, *supra* note 10, argues that states and school districts, not Congress, have the "competence" "to fix the nation's schools." In the same context, Deborah Meier argues that "[t]he solution to the messiness of democracy is more of it—and more time set aside to make it work." *NCLB and Democracy*, *in* MANY CHILDREN LEFT BEHIND, *supra* note 2, at 66, 72. While the concept of institutional competence may have some relevance, these arguments are essentially arguments to maintain the status quo.

14. In fact, it is argued that testing is positively detrimental to learning. *See infra* note 70.

convincing justification for denying the primacy of assessment and accountability. Those denials are, at worst, part of a uniquely American distaste for governmental discipline that has left us with financial, health care, energy and other industries profoundly neglectful of sustainability.

NCLB's requirement of uniform standards across each state is a direct attack on the inequality inherent in our system of school financing from local property taxes. From the perspective of the Fourteenth Amendment and the perspective of anti-poverty measures, equalizing opportunities should take precedence over individual communities' pursuit of excellence. Connecticut's efforts to escape some of NCLB's requirements provide an especially instructive example of this problem. Connecticut lobbied and sued the Department of Education (DOE) (the agency charged with administering NCLB) for waivers to avoid supplementing its pre-NCLB tests that were nationally recognized for their excellence, even while Connecticut was recognized as the state with the single biggest discrepancy in academic achievement between its high and low performing students.[15] Connecticut is the only state that has lodged a full constitutional attack on NCLB in court.

Congress should remain committed to uniform standards across each state, but the Bush administration's refusal to engage in any substantive negotiation with states requesting waivers of certain provisions of NCLB sent a chilling message that was counterproductive to NCLB's goals.[16] In renewing NCLB, therefore, Congress should pay particular attention to the DOE's discretionary powers in administering the program.

The federalism argument summarized above also has merit, especially in its perception that opting out of NCLB would amount to a politically disastrous forfeit of federal aid that could not be recaptured through other means, such as raising state taxes. There may ultimately be no satisfying answer for this problem—it may simply be a fiscal reality of the modern federal relationship and a function of the federal government's

15. For discussion, see Michael J. Pendell, *How Far Is Too Far?: The Spending Clause, the Tenth Amendment, and the Education State's Battle Against Unfunded Mandates*, 71 ALB. L. REV. 519, 521–23 (2008).

16. *See* Second Am. Compl., at ¶¶ 104–06, 114, 117–26, 133–36, 143–59, Connecticut v. Spellings, 549 F. Supp. 2d 161 (D. Conn. 2008) (No. 3:05CV1330), 2005 WL 4748348 [hereinafter Connecticut Complaint]; *but see* Rudalevige, *supra* note 6, at 46 (discussing a few areas related to test design and highly qualified teachers in which the Bush administration allowed states flexibility in implementing NCLB).

responsibility for equality measures under the Fourteenth Amendment.[17]

Yet, the federalism argument obscures a fact of fundamental importance: NCLB does not determine a participating state's education standards; it merely requires the state to adopt standards of its choosing that are adequate and to document the uniform application of those standards.[18]

If the states' ability to opt out of NCLB is largely impractical and simply a formalism, the federalism argument is as much a rhetorical stance that puts Congress on the defensive as it is a demonstration of NCLB's coercive effects. It is telling that no state has opted out of NCLB since its inception seven years ago.[19] Connecticut's constitutional challenge to NCLB was dismissed as premature, since the DOE had taken no enforcement actions or final decisions against Connecticut.[20] Since it has not withdrawn from NCLB or

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17. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1; "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article," *id.* § 5. The Fourteenth Amendment was the inspiration, rather than the constitutional basis, for the civil rights legislation of the 1960s from which NCLB descends. *See infra* Part II.A.

18. The possibility of promoting national standards and assessments was rejected during the years of discussion and drafting leading up to NCLB. *See* MCGUINN, *supra* note 6, at 130–34. Professor Ravitch, *supra* note 10, suggests that national testing would remove the incentive states have to manipulate their collection of data, but this solution will be even less palatable to NCLB's detractors who are concerned with states' autonomy. Commentators frequently foster the misperception that NCLB imposes national standards through careless argumentation and/or sentence structure, as in the following example: "NCLB now determines what constitutes a failing school and what should be done about it." Kenneth Wong & Gail Sunderman, *Education Accountability as a Presidential Priority: No Child Left Behind and the Bush Presidency*, 37 PUBLIUS 333, 334 (2007). Later in the article, the same writers distinguish more accurately between "[t]he emergence of federally led accountability policy" and the "decision-making process" of state education agencies and local school districts that under NCLB "implement[s] the law's provisions" and "shap[es] their education reform agendas." *Id.* at 341.

19. At least three school districts in Connecticut, Illinois, and Vermont refused funding, although "none had much money at stake." Amanda Ripley, *Inside the Revolt over Bush's School Rules: The Reddest of All States Is Leading the Charge Against No Child Left Behind*, TIME MAG., May 9, 2005, at 30; *see also* Ulrich Boser, *A New Law Is Put to the Test*, U.S. NEWS & WORLD REP., Mar. 22, 2004 (reporting that Somers School District in Connecticut refused "some $45,000 in No Child Left Behind money," "only a small fraction of the [district's] $15 million annual budget"). At least one state has lost Title I funding as a penalty under NCLB: Georgia lost $783,000 in 2003 for delaying implementation of tests required by IASA. Rudalevige, *supra* note 6, at 46. On IASA, see *infra* note 42 and accompanying text).

20. Conn. v. Spellings (*Connecticut I*), 453 F. Supp. 2d 459, 491–94 (D. Conn. 2006).

refused to comply with any of its provisions, it may be said that Connecticut has not put its money where its mouth was. The other constitutional challenge to NCLB, *School District of Pontiac v. Secretary of the United States Department of Education*, was not joined or supported by any of the states in which the plaintiff school districts reside; furthermore, *Pontiac* principally alleges lack of notice rather than the fatal constitutional defect of coercion.[21]

Part II of this comment introduces the background of federal education policy and considers NCLB's requirements and costs in light of the states' constitutional prerogative under the Tenth Amendment to control education. Part III sets forth in detail the constitutional basis for federal education law in the Spending Clause and considers whether the unfunded spending NCLB requires of states is within the scope of Congress's power.

II. NCLB AND THE CIVIL RIGHTS CHALLENGE IN EDUCATION

A. The Federal Role in Education

1. History

The United States Constitution makes no provision for education. Since the Tenth Amendment reserves all unenumerated powers for state government, the federal government has no direct control over education.[22] Early on, the federal government provided a small amount of funding for school construction, vocational and higher education, and some specialized programs like school lunch and impact aid; in 1958, it first provided some funding for academic instruction in

21. *See* 512 F.3d 252 (6th Cir. 2008), *vacated and reh'g en banc granted*, 2008 U.S. App. LEXIS 12121 (May 1, 2008) (No. 05-2708). The case was reargued before the Sixth Circuit *en banc* on December 10, 2008. Editorial, *No Money, No Child: We Can't Afford Education Reform on the Cheap*, PITT. POST-GAZETTE, Dec. 15, 2008, at B6; Mark Walsh, *Full 6th Circuit Weighs NEA Suit Against NCLB*, EDUC. WK., Dec. 10, 2008, *available at* http://blogs.edweek.org/edweek/school_law/2008/12/full_6th_circuit_weighs_nea_su.html. The parties filed supplemental briefs in Feb. 2009. As of this writing (January 2009), the court has not issued its decision.

22. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

regular primary and secondary schools.[23] Federal funding of education began in earnest with the Elementary and Secondary Education Act of 1965 (ESEA), a product of the civil rights and antipoverty agendas of the 1960s.[24] The overwhelming majority of ESEA funds were appropriated under Title I for raising education spending for disadvantaged students.[25] Although not an unconditional grant like most earlier federal education spending, the intended uses of Title I funds were loosely specified.[26]

Funding is not the only role the federal government has in education. The federal judiciary frequently supervised the desegregation of schools after 1954, when the Supreme Court held in *Brown v. Board of Education* that, under the Fourteenth Amendment, an opportunity for education, if provided by a state, was "a right which must be made available to all on equal terms."[27] In 1973, in *San Antonio Independent School District v. Rodriguez*, the Court declined to extend that holding to strike down longstanding school financing laws whereby local property taxes largely supplement state and federal funding in local schools and whereby even state funding may be distributed unequally in favor of wealthier districts.[28] *San Antonio* held that there is no fundamental federal right to an education[29] or, if there is, then not to a particular quality of education beyond a minimally adequate one.[30] Therefore, even greatly unequal local school financing is constitutionally

23. *See* MCGUINN, *supra* note 6, at 25–28.

24. Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. §§ 6301–7941); *see generally* MCGUINN, *supra* note 6, at 25, 28–39.

25. *See* MCGUINN, *supra* note 6, at 32 ("[ESEA] did not provide general federal aid to public schools. Instead, ESEA provided 'categorical' aid that was targeted to a specific student population: disadvantaged students.").

26. *See id.* at 33–35.

27. 347 U.S. 483, 493 (1954).

28. 411 U.S. 1 (1973). In the three years between 1967 and 1970, the discrepancy between Texas's funding of Edgewood and Alamo Heights increased from $3 per pupil to $135 per pupil, partly because state funding levels were tied to school spending on teaching salaries. *See id.* at 12–13, 13 n.35; *id.* at 79–81, 79 n.31 (Marshall, J., dissenting).

29. *Id.* at 37 (majority opinion) ("We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive.").

30. *See id.* at 36–37 ("Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [First Amendment rights or the right to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.").

permissible.[31]

2. Federal enforcement of equality and (under NCLB) of adequacy

San Antonio thus put an end to the "first wave" of school financing litigation that sought a federal remedy for unequal education opportunities.[32] Its holding has never been revisited and most likely never will be.[33]

An enduring implication of *San Antonio*'s holding is the idea that education, despite its great importance to our system of values,[34] is more like police, health, and other social services rendered by state and local governments than it is a fundamental and generative human right like voting.[35] *San Antonio* rejected the view that education is generative of freedom, that is, it rejected the argument that education "is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote."[36] The Court remarked: "[W]e have never presumed to possess either the

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31. *See id.* at 46 (local funding "may far exceed even the total [state basic education funding] grant").

32. *See generally* WOOD, *supra* note 12, at 53–64; Joseph O. Oluwole & Preston C. Green, III, *No Child Left Behind Act, Race, and Parents Involved*, 5 HASTINGS RACE & POVERTY L.J. 271, 289–94 (2008).

33. *But see* Daniel S. Greenspahn, *A Constitutional Right To Learn: The Uncertain Allure of Making a Federal Case Out of Education*, 59 S.C. L. REV. 755, 772 (2008) ("[M]odern advocates pursuing a federal right to education can arguably overcome *Rodriguez*. . . . *Rodriguez* and subsequent Supreme Court decisions have preserved the possibility of a federal right to an education."); WOOD, *supra* note 12, at 64 (although "any reversal" of *San Antonio*'s holding that education is not a fundamental right "is not likely to occur lightly," nevertheless "it is clear the Supreme Court holds an undefined interest in education that may eventually emerge").

34. *See San Antonio*, 411 U.S. at 29–30.

35. *See id.* at 54 ("[I]f local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burden or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live."); *id.* at 30 ("[T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental."). The right to vote is accorded special protection as "a fundamental political right, because preservative of all rights." Reynolds v. Sims, 377 U.S. 533, 562 (1964) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

36. *San Antonio*, 411 U.S. at 35.

ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice. . . . [These] are not values to be implemented by judicial intrusion into otherwise legitimate state activities."[37]

The *San Antonio* Court tempered its holding by stressing the imperfections of the traditional school financing structure and by urging a political fix:

> [T]his Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.[38]

A second and third wave of school financing litigation in state courts took up the Court's challenge.[39] The federal government expanded its funding and oversight of education in the decades following *San Antonio*,[40] spurred in part by the reception of the dire 1983 report on education commissioned by President Reagan, *A Nation at Risk*.[41] Most notably, it required academic achievement standards for all students and tied ESEA's Title I funding of disadvantaged students to those standards in 1994.[42]

But it was only with the enactment of NCLB that the federal government took up where *San Antonio* left off and claimed a truly aggressive and innovative role for itself in reforming education inequalities. NCLB was enacted as the latest reauthorization and amendment of ESEA and was the

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37. *Id.* at 36.

38. *Id.* at 58–59.

39. *See generally* WOOD, *supra* note 12, at 65–77; Oluwole & Green, *supra* note 32, at 291–94.

40. *See* MCGUINN, *supra* note 6, at 51–104; Umpstead, *supra* note 11, at 197–98.

41. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983), *available at* http://www.ed.gov/pubs/NatAtRisk/title.html.

42. *See* Goals 2000: Educate America Act of 1994 (Goals 2000), Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified as amended in scattered sections of 20 U.S.C.); Improving America's Schools Act of 1994 (IASA), Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended in scattered sections of U.S.C.).

first to dispense with ESEA's flexibility and to give its goals real teeth. NCLB is best understood as civil rights legislation that, under contemporary pressures on the federal government, introduced unprecedented vigor in binding states to achieve the goals of the 1965 law.[43] In the pressure that it places on states, it is an attack on the stranglehold over education of the local property tax system of school financing.[44] NCLB thus counteracts *San Antonio*'s tolerance of inequality and is clearly motivated by the concept of equal protection of the laws announced in the Fourteenth Amendment.[45] Although critics have cried foul against the stringent new conditions NCLB placed on the continuation of longstanding Title I funding that states relied on,[46] NCLB's goals are unchanged from ESEA's.[47] Moreover, much of NCLB's framework of uniform academic standards and accountability was put into law in 1994.[48] NCLB simply stepped up the urgency and the stakes of these goals.[49]

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43. *See* MCGUINN, *supra* note 6, at 169–172.

44. For an overview of current school district funding inequalities analyzed by concentration of minority population, see Oluwole & Green, *supra* note 32, at 287–88. There may be renewed efforts to change the local property tax system of school financing on the horizon. In 2006, the National Center on Education and the Economy released a report by the New Commission on the Skills of the American Workforce, *Tough Choices or Tough Times*, which includes a "proposal to abandon local funding of schools in favor of state funding using a uniform pupil-weighting funding formula." *See* Executive Summary at 17, *available at* http://skillscommission.org/executive.htm. The report has been embraced by New Hampshire's education commissioner, and parts of its recommendations are being implemented in three states. *See* Linda Jacobson, *Pilot Projects To Aim at Workforce Issues*, EDUC. WK. (Bethesda, Md.), Nov. 5, 2008, at 13; Cindy Kibbe, *N.H. Plays Key Role in Education Overhaul Report*, N.H. BUS. REV., Nov. 21, 2008, at 35.

45. It has been suggested that under current Fourteenth Amendment law, as applied to education in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), even race-conscious implementation of NCLB would survive judicial review. Oluwole & Green, *supra* note 32, at 296–305.

46. *See* Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 512 F.3d 252, 267 n.4 (6th Cir. 2008) (vacated on other grounds); Bump, *supra* note 11, at 548, 551; *see also* Connecticut Complaint, *supra* note 16, ¶ 67.

47. *But see* MCGUINN, *supra* note 6, at 193 (seeing NCLB's focus on accountability as "fundamentally chang[ing]" ESEA's goals and "creat[ing] a new [federal education] policy regime").

48. Rudalevige, *supra* note 6, at 27.

49. *Cf.* MCGUINN, *supra* note 6, at 182 ("In essence, Goals 2000 *encouraged* states to create standards, testing, and accountability systems but NCLB *requires* it . . . .").

B. NCLB's Requirements

1. Statutory provisions

NCLB requires states to adopt "challenging" and specific academic content standards in language arts, mathematics, and science and to align these with achievement standards for basic, proficient, and advanced levels.[50] These standards must be embodied in student assessments given annually in grades 3 through 8 and once in high school.[51] Most importantly, the standards and assessments must be uniform throughout the state.[52] States are required to develop an accountability system that defines "adequate yearly progress" (AYP) and the methods for calculating it, together with a timeline to track annual progress toward NCLB's end goal of proficiency for all students in 2014.[53] States must submit initial, detailed compliance plans to the DOE.[54] The Secretary of Education has approval power over the compliance plans but is also required to utilize the assistance of a peer review process that includes parents, teachers, and state education officials.[55] School districts and states are then required to publish annual reports of data, broken down to permit tracking of student performance by economic, racial, and other indicators.[56] A number of remedies and sanctions are provided for schools that fail to meet AYP for any two consecutive years, ranging from offering students supplemental educational services (free tutoring) and school transfer privileges to closing and restructuring schools.[57] Finally, NCLB requires "highly qualified teachers" in every classroom.[58] This is an overview of NCLB's most salient requirements.

To demonstrate NCLB's lack of interest in dictating particular standards for states to adopt, the section of the law that defines "challenging academic standards" for the states' purpose of writing the content and achievement standards for

50. 20 U.S.C. § 6311(b)(1) (2006).
51. *Id.* § 6311(b)(3).
52. *Id.* §§ 6311(b)(1)(B), (b)(2)(C)(i), (b)(3)(C)(i).
53. *Id.* § 6311(b)(2).
54. *Id.* § 6311(a).
55. *Id.* § 6311(e).
56. *Id.* §§ 6311(h), 6316(a).
57. *Id.* § 6316(b)–(f).
58. *Id.* §§ 6314(b)(1)(C), 6315(c)(1)(E).

the three core content areas is reproduced here in full:

> (D) CHALLENGING ACADEMIC STANDARDS.—Standards under this paragraph shall include—
>
> (i) challenging academic content standards in academic subjects that—
>
> (I) specify what children are expected to know and be able to do;
>
> (II) contain coherent and rigorous content; and
>
> (III) encourage the teaching of advanced skills; and
>
> (ii) challenging student academic achievement standards that—
>
> (I) are aligned with the State's academic content standards;
>
> (II) describe two levels of high achievement (proficient and advanced) that determine how well children are mastering the material in the State academic content standards; and
>
> (III) describe a third level of achievement (basic) to provide complete information about the progress of the lower-achieving children toward mastering the proficient and advanced levels of achievement.[59]

The requirements here concern administrative specificity and informational transparency, not any particular level of academic mastery, as the subjective descriptors "coherent," "rigorous," and "advanced" indicate. Similarly, the section of the law that sets forth the parameters for defining AYP concerns the state's demonstration of "valid and reliable" statistics, "continuous and substantial academic improvement for all students" and for specific subgroups of disadvantaged students, and high school graduation rates; it does not suggest any particular level or rate of progress.[60] NCLB expressly denies the Secretary of Education "the authority to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the

59. *Id.* § 6311(b)(1)(D).
60. *Id.* § 6311(b)(2)(C).

State's academic content standards or to use specific academic assessment instruments or items."[61]

2. Is NCLB a substitute for excellence, or a basis?

While it is true that NCLB's emphasis on annual testing, elaboration of standards, and collection and dissemination of data are unable to effect real academic improvement without a more profound reform of curriculum, teaching methods, and teacher preparation, it is equally true that education cannot be significantly improved without a solid foundation of assessment, accountability, and tracking, such as NCLB requires. This is especially true for low-performing schools, regardless of immediate negative impacts on passing rates and missed AYP.[62]

In fact, educators have long concentrated their efforts on curriculum and teaching methods, but without concrete and rigorous systems of assessment and accountability in place, those efforts have made little, if any, lasting impact and have often changed with the winds and little other reason.[63] Such efforts have frequently focused on engaging and nurturing students while overlooking and neglecting their actual academic achievement.[64]

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61. *Id.* § 6311(e)(1)(F).

62. *See, e.g.*, Sam Dillon, *Under "No Child" Law, Even Solid Schools Falter*, N.Y. TIMES, Oct. 13, 2008, at A1; David J. Hoff, *More Schools Facing Sanctions Under NCLB*, EDUC. WK., Dec. 19, 2008.

63. Twenty-five years after its publication, what is most remarkable about *A Nation at Risk* is that it springs to commentators' minds less because of an anniversary than because the realities it described have changed so little (and worsened, if anything). Chief among those realities is our internationally "disproportionate share of low-performing students." Edward B. Fiske, Op-Ed., *A Nation at a Loss*, N.Y. TIMES, Apr. 25, 2008, at A27.

64. Howard Gardner's intuitive theory of multiple intelligences has been enthusiastically embraced by educators for many years, but it leads many teachers to neglect—without feeling they have done a disservice to their students—the academic skills like reading and mathematics that are by far the most indispensable and the most difficult to attain. Not so very far from this practice is an educational approach that stresses inspirational curricula and social services over academic skills. Prominent voices with the best intentions have called for just such an approach as a replacement for NCLB and an antidote to the difficulties it has created. *See* Lawrence, *supra* note 10, at 716–18; Sam Dillon, *New Vision for Schools Proposes Broad Role*, N.Y. TIMES, July 14, 2008, at A11 (detailing Randi Weingarten's acceptance speech for her nomination to the presidency of the American Federation of Teachers). This approach is correct in its recognition that the consequences of entrenched racism and poverty obstruct academic achievement—even seemingly fatally. But it is misguided in its assumption that the worse evils must be eradicated first. The ultimate solution simply cannot be an either-or proposition or a first-second priority. Good teachers have always

NCLB's transparency and reporting requirements, however burdensome they may be, are appropriate and necessary in an open society. Students' and parents' educational choices depend on accurate information,[65] and so does the civic purpose of our federation of states. NCLB puts academic achievement and accountability first because they are the cornerstone of any sound education policy. Objections to the high priority NCLB gives them are misconceived.

Critics complain that NCLB's provisions for free tutoring and transfer privileges are ineffective because "only about 1 percent of eligible students take advantage of switching schools and fewer than 20 percent of eligibles receive extra tutoring."[66] The complaint does not seem valid when the depth of the problem and the incipiency of the remedy are taken into account. Similarly, concerns that NCLB's tough requirements lead to the "perverse" results of lowered academic standards and lower graduation rates for the least privileged students are well founded, as is recognition of the obstacles to placing "highly qualified teachers" in every classroom.[67] Nevertheless, it is fair to assume that the transparent reporting instituted by NCLB can lead, over time, to a correction of these problems. NCLB, like any project to change cultural norms, requires a suspension of our demand for decisive results in the short term.

3. Is NCLB an intrusion on state policy or a spur?

Complaints that NCLB directs state education policy are inaccurate.[68] Particularly misleading is any implication that NCLB imposes standards on states. In fact, NCLB requires states to develop their own standards, design their own student

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inspired their students by nurturing their multiplicity of learning styles and their apprehension of their social, physical, and psychological welfare. But teachers who refuse to acknowledge the primary importance of students' achievement in reading and mathematics often leave their students with as little of those resources as they found them. For an eloquent exposition of what is at stake in NCLB's focus on core academic skills and the stark feelings that result, *see* Sam Dillon, *Schools Cut Back Subjects To Push Reading and Math*, N.Y. TIMES, Mar. 26, 2006, at A11.

65. *See* 20 U.S.C. §§ 6301(1), (12); 6311(a)(1); 6311(b)(3)(C)(xii), (xv); 6311(c)(14); 6311(d); *cf.* WOOD, *supra* note 12, at 78 (discussing access to information as relevant to enforcing rights to an adequate education).

66. Ravitch, *supra* note 10.

67. *See* Darling-Hammond, *supra* note 6, at 4, 16, and generally.

68. As noted earlier, this argument is inextricably related to the coercion argument discussed in Part III below. *See, e.g.*, Austin, *supra* note 11, at 365–68, *cited with approval in* Weeden, *supra* note 11, at 242–43.

assessments, define proficiency and AYP, and determine how quickly their AYP will approach the 2014 goal of 100 percent proficiency.[69] By requiring states to develop statewide standards that implement a uniform education policy, NCLB works carefully with the constitutional imperatives. It respects state control of education (as the Tenth Amendment requires), and it preserves local governments' prerogative to supplement education funding (as *San Antonio* requires) and hence to enrich curriculum for local needs. Standards are, after all, only a base for teaching.

The complaint that standardized testing forces teachers to "teach to the test" and to neglect a rich curriculum has entered the commonplace.[70] Research, it is argued, shows that "as a rule, better standardized exam results are more likely to go hand-in-hand with a shallow approach to learning than with deep understanding"; thus, "a rise in scores may be worse than meaningless: it may actually be reason for concern."[71] But the assumption here—that preparing the most disadvantaged and struggling students to pass standardized tests saps all other time and energy for teaching and learning and precludes a rich curriculum fostering critical and imaginative thinking—is a fallacy.[72] The prevalence of the complaint against "teaching to the test" is better interpreted as evidence of the need for radical teaching and curriculum reform.

There is thus no foundation to the idea that NCLB imposes education policy on states. Although the DOE has denied requests for waivers, there is no evidence that states have been penalized for submitting substandard plans or that the plans must meet some unwritten expectations of federal policy.[73] The

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69. On the implications of states' choices to adopt a quicker or slower AYP, see Thomas J. Kane & Douglas O. Staiger, *Unintended Consequences of Racial Subgroup Rules*, *in* NO CHILD LEFT BEHIND?, *supra* note 6, at 152, 154; Dillon, *supra* note 62; Hoff, *supra* note 62.

70. *See generally* Alfie Kohn, *Fighting the Tests: A Practical Guide to Rescuing Our Schools*, PHI DELTA KAPPAN, Jan. 2001, at 348.

71. *Id.* at 350.

72. Kohn himself offers what he calls a "short-term response[]" that seems perfectly judicious: "First, if you are a teacher, you should do what is necessary to prepare students for the tests—and then get back to the *real* learning. Never forget the difference between these two objectives." *Id.* at 350–51. Kohn betrays his own prejudice here in his suggestion that performance on standardized tests is not evidence of "real learning." Nevertheless, his ensuing discussion establishes the practicality (and therefore the effectiveness) of his stated principle. *See id.* at 351.

73. *Cf.* Rudalevige, *supra* note 6, at 46 (the Bush administration "signaled a hands-off stance on judging the quality of state standards and assessments.").

popular misconception allows opponents of the law to obscure their own role in opposing the adoption of state standards.

That is not to say that frictions are avoidable or that NCLB presents no challenge to federalism. Nor is it to say the federal government can do no better than it has done in NCLB. But federal enforcement of equality is necessarily at times inimical to entrenched local interests, as the history of the Fourteenth Amendment, including its application to education pursuant to *Brown*, has amply demonstrated. It is perhaps inevitable that the pursuit of equality in education manifest itself temporarily (again) as a struggle over institutional power and financial resources. ESEA, after all, "was intended to be primarily a redistributive bill."[74] NCLB executes that intention and upsets the status quo of vastly unequal opportunities and outcomes in education.

C. Costs and Funding Under NCLB

1. Facts

Congress's actual annual appropriations have never equaled the amounts authorized under NCLB; they have been between one-half and two-thirds of the amounts originally authorized.[75] Nevertheless, the appropriations represent a significant increase in federal funding of education—in the first year of the program, federal funding increased by 26 percent and, by 2005, the increases in federal funding that had resulted from NCLB accounted for about 2 percent of the total education spending by states,[76] a substantial increase, especially considering that federal funding of education constitutes only about 7 or 8 percent of total education spending.[77] NCLB's

74. MCGUINN, *supra* note 6, at 31.

75. The relevant figures are published by the DOE, teachers' unions, governors' associations, and others. For synthesis and discussion, see Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 512 F.3d 252, 275–77 (6th Cir. 2008) (vacated on other grounds) (McKeague, J., dissenting); Brief for the Governor of the Commonwealth of Pa. as Amicus Curiae Supporting Petitioner, *id.*, at 6–11 (No. 05-2708), 2006 WL 3837407; Oluwole & Green, *supra* note 32, at 295; and Umpstead, *supra* note 11, at 201–2.

76. *See* Umpstead, *supra* note 11, at 201–02 (citing a 2005 report by the National Conference of State Legislatures); *cf.* Stan Karp, *NCLB's Selective Vision of Equality: Some Gaps Count More than Others*, *in* MANY CHILDREN LEFT BEHIND, *supra* note 2, at 53, 64 (estimating 1 percent, without attribution).

77. *See Pontiac*, 512 F.3d at 277 (McKeague, J., dissenting); Rudalevige, *supra* note 6, at 45; Umpstead, *supra* note 11, at 201; Martin R. West & Paul E. Peterson,

critics distort this reality with irresponsible exaggerations and inaccuracies, such as the following: "NCLB places, *without remuneration*, financially and bureaucratically onerous reporting duties on states, districts, and schools. By *contrast*, Title V of ESEA of the 89th Congress in 1965 added funds directly to assist state departments of education to carry out and extend the purposes of the Act."[78]

Total federal appropriations under NCLB have covered only approximately one-third of some states' costs of compliance. Since the amounts originally authorized were only twice or less than twice the actual appropriations, it is clear that even the authorized amounts would have been insufficient to pay for compliance without the need for states to incur costs of their own.[79] Because states design their own assessments and determine their own rates of progress, each state controls the cost of its program, as the Connecticut example demonstrates.

Before the enactment of NCLB, Connecticut Mastery Tests (CMTs) were given in grades 4, 6, and 8 and were nationally recognized as models of high quality, comprehensive testing.[80] To avoid the cost of developing new CMTs for grades 3, 5, and 7, Connecticut requested a waiver of NCLB's annual summative testing requirement.[81] It proposed substituting much less expensive tests individualized by classroom and offered sound rationale for such an education policy.[82] The Bush administration DOE denied the request and suggested that Connecticut use multiple choice tests in grades 3, 5, and 7 to comply with NCLB's requirements while avoiding the great cost of developing and implementing new CMTs.[83] Connecticut viewed this advice as both unsound education policy and

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The Politics and Practice of Accountability, *in* NO CHILD LEFT BEHIND?, *supra* note 6, at 1, 1.

78. Theodore R. Sizer, *Preamble: A Reminder for Americans*, *in* MANY CHILDREN LEFT BEHIND, *supra* note 2, xvii, at xxii (emphasis added).

79. *Pontiac*, 512 F.3d at 276–77 (McKeague, J., dissenting). On the question of whether costs associated with reaching proficiency by 2014 should be considered part of NCLB's compliance costs, see Umpstead, *supra* note 11, at 223–27. It seems unhelpful to exclude these from calculations of NCLB's costs, but Umpstead's point that the actual federal appropriations have covered the narrower administrative costs of complying with NCLB is worth noting.

80. Connecticut Complaint, *supra* note 16, ¶¶ 1–2; *see also* Pendell, *supra* note 15, at 521–23; *see generally Connecticut I*, 453 F. Supp. 2d at 475–78.

81. *See* Connecticut Complaint, *supra* note 16, ¶¶ 105, 112, 143.

82. *Id.* ¶¶ 107–13.

83. *Id.* ¶¶ 120, 137, 139, 153.

financially unworkable.[84] The DOE thus rejected Connecticut's policy preferences in favor of strict compliance with NCLB. Connecticut, for its part, proceeded to develop new CMTs for grades 3, 5, and 7. This sequence of events makes it clear that Connecticut took on the extra cost of developing CMTs as a policy choice, not as a requirement of NCLB or the DOE, and that reality serves to keep in perspective NCLB's true financial effects.

2. NCLB's redistributive economic effects

The direct costs of implementing NCLB, particularly the costs of developing and administering annual tests, are by all accounts high. The charge that funding is inadequate for compliance, though, again discounts the crucial factor of states' policy choices. It would be difficult to understand why the federal government should pay for Connecticut's choice to develop highly sophisticated tests when other states have adopted multiple choice tests to comply with NCLB. Such an outcome would mean that Connecticut's testing program would essentially be subsidized by the federal taxes collected from residents of other states that provide lesser (more basic) educational opportunities to their own residents than Connecticut provided to its residents.[85] That outcome would exacerbate rather than reduce pre-NCLB inequities.

NCLB's reporting requirements and the remedies and sanctions it provides help clarify what is at stake in our attitudes toward school financing. To put it plainly, NCLB exposes the inevitable competition for achievement and funds among and within districts and states. A state's choice to adopt simpler or more elaborate assessments may stem from many considerations: costs; reputation outside the state; and, within the state, more concentrated lobbying efforts and more specific political repercussions from public reporting of which schools and students have achieved what levels of mastery.

NCLB's remedies and sanctions are essentially entitlements to compensate students in failing schools, putting states under further pressure to avoid liability. Districts across

84. *See id.* ¶¶ 140–43.

85. *Cf.* Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1212 (1997) ("If Congress must pay for state or local compliance with federal law, the citizens of states with lower compliance costs will subsidize compliance by states with higher costs.").

the nation report cutting back on non-essential programs, including arts, physical education, and academically challenging elective courses. In many cases, they attribute this to the costs of complying with NCLB.[86] While the complaint of diluted curriculum is a valid and important education policy concern, it also reveals that school districts are "diverting . . . funds from other important educational programs and priorities" in order to teach basic academic skills tested under NCLB.[87] To the extent that is true, NCLB is indirectly effectuating a redistribution of school financing that has eluded decades of other efforts.[88]

The redistributive effects of promoting equality should come as no surprise. The Sixteenth Amendment provides that federally collected income taxes require no apportionment in federal spending among the states[89] and was enacted (in 1913, paradoxically, like NCLB, at the height of an era of restricted federal power) to expand the power of the federal government.[90]

Even if Connecticut's education policy is better than NCLB's, that does not make it the more appropriate policy for Connecticut. Connecticut's policy preferences seek to maximize academic excellence, while NCLB's seek the more mundane (and historically elusive) goal of broadening basic academic achievement.[91] Neither goal excludes the other, although limitations of funds may require focusing on one or the other at a given time. Coming three decades after *San Antonio,* NCLB is an entirely fair swing of the pendulum.

The charge that NCLB is shortsighted is therefore a matter of perspective. NCLB's priorities are democratizing and take a long view of achieving equality. Nevertheless, NCLB in no way impedes the continued supplemental funding of local education with local property taxes. It gives an incomplete and distorted

86. *See, e.g.*, *Pontiac*, 512 F.3d at 259.

87. *Id.* (quoting the plaintiffs in the case and citing the Joint Appendix).

88. For a discussion of some of the implications of this idea for school financing litigation, see WOOD, *supra* note 12, at 77–78.

89. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

90. *See* Adler, *supra* note 85, at 1209–12, 1230.

91. As a bald illustration of this idea, when Connecticut chose to use an additional writing assessment to satisfy a "third academic indicator" required for reporting AYP under NCLB, *see* Connecticut Complaint, *supra* note 16, ¶ 44, the DOE suggested using daily attendance records instead as a cost-saving measure, *id.* ¶ 138.

picture to attribute reduction of academic enrichment programs to the costs of NCLB and not to local communities' fiscal priorities.

III. NCLB AND CONDITIONAL SPENDING

A. Congress's Spending Power

1. Evolution and scope

The Taxing and Spending Clause of the Constitution gives Congress the power to tax and spend for two main purposes: the "common defense" and the "general welfare."[92] Since 1936, the Supreme Court has held that Congress' spending for the general welfare is not limited to its specifically enumerated powers under the Constitution.[93]

The ruling adopting this broad purpose for spending came in *United States v. Butler*, where the Court nevertheless struck down the Agricultural Adjustment Act of 1931 on the grounds that its tax subsidy for farmers who complied with the program by restricting their production "invade[d] the reserved rights of the states" and was "a statutory plan to regulate and control" matters of state law.[94] *Butler* held that the Tenth Amendment barred federal taxation and spending with a "coercive purpose" to "purchase a compliance [from the states] which the Congress is powerless to command."[95] The Court concluded that farmers were nominally but "not in fact" free to "refuse to comply" with the subsidy program, because "the price of such refusal [was] the loss of benefits," and non-participating farmers would be unable to compete on the market and risked "financial ruin."[96] The Court articulated broad warnings against the dangers of coercive spending:

> It does not help to declare that local conditions throughout the nation have created a situation of national concern; for

92. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

93. *See* United States v. Butler, 297 U.S. 1, 65–66 (1936).

94. *Id.* at 68.

95. *Id.* at 70–71.

96. *Id.*

> this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, [the Taxing and Spending Clause] would become the instrument for total subversion of the governmental powers reserved to the individual states.[97]

Although the *Butler* Court removed virtually any restriction on "general welfare," it sought to disempower Congress by preempting justifications based on national crisis and by framing its analysis of federal spending in terms of potential end-runs around the Tenth Amendment. Still, the decision's focus on farmers suggested its real concern lay with free markets as much as with states' autonomy.

In the year after *Butler* was decided, the Court was won over to the New Deal and, in *Steward Machine Company v. Davis*, refused to find coercive spending in the incentives provided by the Social Security Act for states to create unemployment funds.[98] *Steward Machine*'s echo of *Butler*'s language of "national concern" revealed the sea change in the Court's attitude toward the benign use of federal policy:

> The [unemployment] problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare.[99]

Steward Machine remarked that the difference between persuasion and compulsion was "a question of degree, at times, perhaps, of fact,"[100] but the truth of that statement is called into question by the fact that the Court has not struck down an exercise of the spending power since *Butler* in 1936. The historical moment of the decision in *Steward Machine* seems to suggest rather that Congress's power of persuasion is a

97. *Id.* at 74–75.
98. 301 U.S. 548, 589 (1937).
99. *Id.* at 586–87.
100. *Id.* at 590.

question of balance between the states' political and financial leverage and national need.

The Court most recently comprehensively considered the spending power in 1987.[101] *South Dakota v. Dole* upheld legislation requiring states to raise the minimum drinking age to 21 as a condition of receipt of federal funds for highway construction.[102] The Court set forth no new law, but drew on existing law to reiterate four "restrictions" on Congress's use of the spending power: (i) spending must be for the general welfare, (ii) conditions on states' receipt of funds must be unambiguous and (iii) related to a federal interest in a national project, and (iv) neither the spending nor the conditions may transgress any independent bar in another constitutional provision.[103] *Dole* reaffirmed the broad principle that "encouragement to state action . . . is a valid use of the spending power"[104] and Congress may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[105] The Court noted, almost in passing, that placing conditions on receipt of Congress's funding runs a risk of unconstitutional coercion but rejected the argument that coercion was present in the case before it, reasoning that South Dakota stood to lose only 5 percent of its federal highway funding.[106]

2. The renewed threat from federalism

Dissenting in *Dole*, Justice O'Connor argued that Congress's action was "an attempt to regulate the sale of liquor."[107] She further argued under the relatedness restriction that the condition imposed by Congress appeared to be motivated by a desire for highway safety unrelated to the federal interest in highway construction.[108] With these arguments, Justice O'Connor advocated passionately for a

101. South Dakota v. Dole, 483 U.S. 203 (1987).

102. *Id.* at 206.

103. *Id.* at 207–08.

104. *Id.* at 212.

105. *Id.* at 206 (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)).

106. *Id.* at 211.

107. *Id.* at 212 (O'Connor, J., dissenting).

108. *See id.* at 218.

return to the analytical approach of *Butler*:

> The *Butler* Court saw the Agricultural Adjustment Act for what it was—an exercise of regulatory, not spending, power. . . .
>
> . . . If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people . . . ."[109]

Justice O'Connor's position in *Dole* should be understood from the perspective of the federalism revolution that was to come from the Court in the 1990s, when it restricted Congress's powers under the Commerce Clause and the Fourteenth Amendment and applied the Tenth and Eleventh Amendments as limits against Congressional power, in some cases for the first time since the New Deal.[110]

Professor Chemerinsky believes the spending power has a unique role among the federal powers and finds a suggestion of its insulation from the federalism revolution in the fact that Chief Justice Rehnquist authored both the *Dole* decision and several of the later decisions curbing federal power.[111] But that begs the question of whether it will be the sea change in the Court's attitude to federalism that largely determines the outcome of its next spending power case.

Some scholars argue that the Court should place limits on

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109. *Id.* at 216–17 (quoting United States v. Butler, 297 U.S. 1, 78 (1936)).

110. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (in creating a damages remedy against states in the Age Discrimination in Employment Act, Congress exceeded its Fourteenth Amendment enforcement power and unconstitutionally abrogated states' Eleventh Amendment immunity); United States v. Morrison, 529 U.S. 598 (2000) (Congress exceeded its Commerce Clause and Fourteenth Amendment enforcement powers in creating a civil remedy for violent crimes motivated by gender in the Violence Against Women Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (Fourteenth Amendment did not empower Congress to limit states' power to burden the free exercise of religion in the Religious Freedom Restoration Act); Printz v. United States, 521 U.S. 898 (1997) (Congress did not have power to direct states to conduct background checks of prospective firearm purchasers in the Brady Handgun Violence Prevention Act); United States v. Lopez, 514 U.S. 549 (1995) (Congress exceeded its Commerce Clause power in criminalizing possession of firearms in vicinity of schools); New York v. United States, 505 U.S. 144 (1992) (Spending Clause power permits Congress to incentivize states' regulation of hazardous waste disposal, but Tenth Amendment prevents it from compelling such state regulation).

111. *See* Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 95 (2001).

the spending power.[112] In their view, Congress uses its conditional spending, as *Butler* warned, to effect a dubious end-run around the Constitution's restrictions.[113] On the other hand, the Sixteenth Amendment secures the federal government's power to achieve redistributive effects among the states, and its implications for federalism have not been fully appreciated.[114] It is difficult to gauge the extent to which these contrary arguments will shape the Court's views when it next hears a major spending power case.[115] That is all the more so, since the Court has backed off its federalism revolution considerably since the 1990s, and some decisions have newly reaffirmed the supremacy of federal law in regulating activities with little discernible interstate purpose or federal interest.[116]

B. NCLB's Basis Under the Spending Clause

1. NCLB's § 7907(a) and the constitutional requirement of clear notice

It is widely remarked that three of the four restrictions on the spending power discussed in *Dole* carry little real weight.[117] As to one of those three (the relatedness requirement), Justice O'Connor showed how it could be applied with real weight in her dissent in *Dole*. As to the other two of these restrictions (the requirements to serve the general welfare and to respect

112. *See generally* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995); Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459 (2003).

113. *See* Baker & Berman, *supra* note 112, at 499–503 (describing the "loophole" the spending power offers to Congress to "circumvent" and "to effectively overturn Supreme Court decisions that have restricted congressional power").

114. *See* Adler, *supra* note 85, at 1209 & n.337.

115. Professor Adler suggests a constitutional amendment may be needed to change the scope of the spending power. *Id.* at 1209 n.334.

116. *See* Gonzales v. Raich, 545 U.S. 1 (2005) (upholding the application of the Controlled Substances Act to home growth of marijuana not intended for sale as valid exercise of Congress's Commerce Clause power); Tennessee v. Lane, 541 U.S. 509 (2004) (upholding the Americans with Disabilities Act's creation of a damages remedy against states as valid exercise of Congress's Fourteenth Amendment enforcement power and valid abrogation of states' Eleventh Amendment immunity); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (same with respect to the Family and Medical Leave Act). For discussion, see Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 347–49 (2008).

117. *See, e.g.*, Adler, *supra* note 85, at 1204; Baker & Berman, *supra* note 112, at 463–66.

constitutional prohibitions), the Supreme Court itself has noted their lack of forcefulness.[118]

The fourth restriction, however—the unambiguous or clear notice requirement—has frequently been engaged by courts. The idea here is that only unambiguous conditions can "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."[119] The Supreme Court has explained the clear notice requirement by noting that conditional spending is "much in the nature of a contract."[120] Typically, Congress agrees to provide funds in exchange for a state's agreement to further federal policy. The problem of unclear notice is especially acute in situations like that created by NCLB, "where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds."[121] Fairness and the concept of contractual choice require states' knowing agreement to fund programs whose dimensions and costs cannot be foreseen and therefore cannot be confined to particular federal grants. The clear notice requirement is one of the major grounds of the litigation challenging NCLB.

In *Connecticut v. Spellings*, Connecticut claimed that the DOE's denial of its waiver requests (or proposed plan amendments) required it to spend its own funds to comply with NCLB and that this violated § 7907(a), NCLB's so-called unfunded mandates provision.[122] Section 7907(a) states:

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118. The Court "questioned whether 'general welfare' is a judicially enforceable restriction at all" and noted the "unexceptional proposition" of its interpretation of the independent constitutional bar restriction as applying not to "the indirect achievement of objectives which Congress is not empowered to achieve directly" but merely to "activities that would themselves be unconstitutional." South Dakota v. Dole, 483 U.S. 203, 207 n.2, 210 (1987).

119. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

120. *Id.*

121. *Id.* at 17–18.

122. *See* Connecticut v. Spellings (*Connecticut II*), 549 F. Supp. 2d 161, 177 (D. Conn. 2008).
The term "unfunded mandate" grew out of the political movement to limit federal power in the 1980s and 1990s. *See generally* Adler, *supra* note 85. As applied to conditional spending measures (participation in which is by definition voluntary), the term can be misleading. The Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995) (as codified in scattered sections of 2 U.S.C.) (UMA), defined the term "Federal intergovernmental mandate" to exclude "condition[s] of Federal assistance." 2 U.S.C. § 658(5)(A)(i)(I), *noted in Pontiac*, 512 F.3d at 267; *cf.* Adler, *supra* note 85, at 1204 ("Even if considered mandates rather than voluntarily assumed obligations, conditions of federal assistance are supported by independent legal authority under the Spending Clause.").

> Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.[123]

Connecticut claimed that § 7907(a) relieved it of having to spend its own funds beyond those provided by Congress to comply with NCLB's requirements.[124] The district court did not reach the § 7907(a) issue, but ruled that Connecticut's failure to raise the dispute with the DOE prevented jurisdiction.[125]

School District of Pontiac v. Secretary of the United States Department of Education made explicit the connection between the § 7907(a) issue and the clear notice requirement of Spending Clause law.[126] The Court of Appeals for the Sixth Circuit reached the constitutional question of whether, in light of the allegedly contradictory language of § 7907(a), NCLB provided clear notice to states of their obligations to spend their own funds to comply with the law as a condition of receiving federal funds.[127] The plaintiffs argued (as in *Connecticut*) that § 7907(a) means states need only comply with the requirements of NCLB to the extent that federal funds are made available to pay for them.[128] The Bush administration argued that § 7907(a) merely prohibits federal officials from imposing additional requirements beyond those specified in NCLB, and that states participating in NCLB must comply with all its requirements, "even if they must spend non-federal funds to do so."[129]

The Sixth Circuit held in a 2–1 decision that the law did not provide clear notice, although that panel ruling is now vacated

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Section 7907(a) may signal Congress's intention to comply with UMA. It may just as well, however, suggest inattention or avoidance. *See Pontiac*, 512 F.3d at 267 (§ 7907(a) was borrowed wholesale from a 1988 education law that predated UMA); *id.* at 268 ("NCLB makes no reference to the UMA's definition of 'mandate' . . . ."). It is probably futile to seek to resolve the contradictions inherent in the language and purpose of § 7907(a).

123. 20 U.S.C. § 7907(a) (2006).

124. *Connecticut II*, 549 F. Supp. 2d at 177.

125. *Id.* at 180–81.

126. *Pontiac*, 512 F.3d at 254.

127. *Id.*

128. *Id.* at 256–57.

129. *Id.* at 265, 260.

and the Court of Appeals heard reargument *en banc* in December, 2008.[130] The vacated decision concluded that, although NCLB is unambiguous in stating the requirements that are conditions of states' receiving federal funds, § 7907(a) makes it unclear whether states must spend their own funds to meet those requirements.[131] If that view prevails on rehearing, the DOE would be legally unable to enforce penalties for non-compliance based on insufficiency of federal funds (at least in the Sixth Circuit). It would also seriously weaken the DOE's leverage, and it would possibly mean that the remedies NCLB makes available to students in deficient schools such as free tutoring and transfer options would become, for most practical purposes, unenforceable.[132] On the other hand, the victory would be a narrow one, since the ruling would not carry the penetrating force of a finding of coercion. That is, following a declaratory judgment of unconstitutionality under the clear notice restriction of the Spending Clause, Congress would be able to repair the defects caused by the language of § 7907(a) fairly easily, if it chose to do so.[133]

Pontiac's clear notice litigation seems like a temporary distraction from the more profound issues of federalism raised by NCLB.[134] It may effectively highlight the political dimensions of the federalism debate—for example, by demonstrating the haste under which Congress may have acted to pass NCLB or the pressure on states to rise to the challenges and ideals the law poses. It does not, however, provide the basis for a ruling on the fundamental legal question of whether NCLB crosses the absolute (and, since 1937, theoretical)

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130. *Pontiac*, 512 F.3d 252; Walsh, *supra* note 21. No decision has been issued as of this writing (January 2009).

131. *Pontiac*, 512 F.3d at 269.

132. *See* Alexandra Villarreal O'Rourke, Note, *Picking Up the Pieces After PICS: Evaluating Current Efforts To Narrow the Education Gap*, 11 HARV. LATINO L. REV. 263, 274 (2008).

133. *See Pontiac*, 512 F.3d at 272 ("[T]he ball is properly left in [Congress's] court . . . .").

134. *Id.* at 267 ("Plaintiffs' contention is not that NCLB *as a whole* is an unfunded mandate forced upon the States; they appear willing to concede that it is a voluntary program . . . ."); *cf. id.* at 264 ("Indeed, perhaps the Secretary's view of the text is ultimately correct. But the only relevant question here is whether the Act provides *clear notice to the States* of their obligation."); *but see* Bagenstos, *supra* note 116, at 393–409 (arguing that the Supreme Court is likely to invoke the clear notice requirement increasingly in the future as an indirect limitation on Congress's spending power).

constitutional line of coercion.[135]

2. The coercion claim and pre-enforcement declaratory judgment

The fundamental constitutional question is whether (assuming clear notice) NCLB represents a coercive attempt to impose federal education policy on the states. There are a number of considerations that make bringing such a claim impractical, as, again, Connecticut's experience helps illustrate.

First, without exercising its right to opt out of NCLB, any state challenging the law on the grounds of coercion would, like Connecticut before it, be bringing a pre-enforcement claim unlikely to survive a motion to dismiss. Connecticut's facial challenge to NCLB was dismissed for lack of subject matter jurisdiction on the grounds that the penalty to be applied for non-compliance was hypothetical as well as indeterminate.[136] The district court noted that Connecticut was in full compliance with the law, and, because any eventual penalty would be subject to the DOE's discretion, the court would not rely on speculation based on the DOE's responses to other states' inquiries about the consequences of non-compliance.[137] Despite studies commissioned by state legislatures of the consequences of opting out of NCLB, no state has in fact opted out.

Second, courts have regularly found the coercion test, which requires an inquiry into states' financial capabilities, to be both "unworkable" in practice[138] and a political question inappropriate for judicial resolution.[139] Total federal financial

135. In any case, the dissenting judge in the vacated *Pontiac* ruling argued forcefully that the misleading language of § 7907(a) is a negligible aberration in an otherwise coherent and comprehensive statutory scheme consistent with historical practice. *See Pontiac*, 512 F.3d at 277 (McKeague, J., dissenting) ("Plaintiffs' interpretation of the NCLB not only disregards its overall statutory scheme, but it also defies reason and history."). That view likely motivated the judges' vote to rehear the case *en banc*.

136. *See Connecticut I*, 453 F. Supp. 2d at 491–94.

137. *See id.* at 494, 494 n.20; Connecticut Complaint, *supra* note 16, ¶¶ 66–69.

138. Nevada v. Skinner, 884 F.2d 445, 448 n.6 (9th Cir. 1989) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 249 (2d ed. 1988)).

139. *See, e.g., id.* at 448 ("The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments."; "The purpose of the coercion test is to protect state sovereignty from federal incursions.

support of state programs is so extensive that it is difficult to make an effective claim of coercion based on the withholding of only one among many types of funding.[140]

Third, an ultimate finding of coercion in NCLB's conditions is far from assured. Federal funding constitutes approximately 7 or 8 percent of total education spending.[141] Connecticut estimated that if the DOE were to withhold all of its Title I funding, as well as other portions of its education funding, it stood to lose "up to 5%" of its total education budget.[142] These percentage figures, viewed from the perspective of case law (including *Dole*, where 5 percent of highway funds were at stake), strongly suggest that no finding of coercion in NCLB can be sustained without an about-face on spending power law from the Supreme Court.[143]

On the other hand, to the extent that a finding of coercion rests on the facts of a case (as *Steward Machine* maintained), the application of NCLB presents a fairly convincing set of facts.[144] States relied on ESEA funds for nearly 40 years with few strings attached and the addition of substantial new requirements placed as conditions on continued receipt of those very funds can be seen as coercive.[145] Even if those funds represent only 5-8 percent of a state's education spending, in Connecticut that amounted to approximately $300 million annually—not an insignificant amount.[146] A state choosing to opt out of NCLB would, in effect, be forfeiting its share of federal funds raised through federal taxation of its citizens; it

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If this sovereignty is adequately protected by the national political process, we do not see any reason for asking the judiciary to settle questions of policy and politics that range beyond its normal expertise."); *see also* Chemerinsky, *supra* note 111, at 102–03.

140. *See* Adler, *supra* note 85, at 1256 ("Given the complex interrelationship of federal tax, spending, and regulatory policies, it is impossible for federal courts, bound by the narrow constraints of party-defined litigation, to assess the fiscal burdens of individual federal programs in the proper context. . . . The fact that states and cities remain net fiscal beneficiaries of intergovernmental programs suggests that lower levels of government do receive adequate protection and representation in this manner.").

141. *See supra* note 77 and accompanying text.

142. *Connecticut I*, 453 F. Supp. 2d at 493.

143. Since *Dole*, courts have upheld spending conditions where much more than 5 percent of a state's funds were at stake. In *Skinner*, for example, the Ninth Circuit found no coercion, although 95 percent of Nevada's highway funds were to be withheld if it did not adopt the national speed limit. 884 F.2d at 446.

144. *See supra* note 100 and accompanying text.

145. *See Pontiac*, 512 F.3d at 267 n.4; Bump, *supra* note 11, at 548, 551.

146. *See* Connecticut Complaint, *supra* note 16, ¶¶ 63, 65, 67–69.

would face the politically infeasible task of raising state taxes to compensate for the forfeited federal tax funding.[147]

And yet 5 percent is only 5 percent. What this analysis of the strongest case of coercion on the facts of NCLB suggests more than anything else is that the ultimate outcome of a coercion suit would rest principally (as the historical context of *Steward Machine*, rather than its *dictum*, suggests) on the Supreme Court's attitude toward national imperatives and state autonomy.

IV. CONCLUSION

This comment has argued that a sound education policy cannot exist without uniform standards and transparent accountability. It has also argued that historical forces and socio-economic realities make a federal role in education necessary to achieve equal opportunity. Such a federal role is appropriate from the viewpoint of the Fourteenth Amendment, and so is the resulting financial burden on states. Because local school districts retain the prerogative of supplementing state and federal funding of education with local property taxes, the charge that NCLB dilutes their curriculum is unconvincing.

If NCLB has diluted or qualified state control of education, it has also provided considerable new funding and carefully preserved states' choices in education policy. Weighing the proportionality of these factors is a difficult, perhaps impossible endeavor. Unless the full panel of Sixth Circuit appellate judges unexpectedly reverses the district court's holding in *Pontiac*, NCLB litigation appears to have been futile. States should therefore reconcile themselves to NCLB's requirements, and Congress should work with them to reauthorize an improved version that moves beyond standards to encompass teaching reform as well.

Without a sustained effort to build on the foundation of an adequate education, NCLB will lose the high ground it has claimed. Initiatives to reform curriculum and teacher preparation will be much more expensive and difficult to implement than NCLB's current provisions. Congress, too, must put its money where its mouth is.

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147. *See* Baker, *supra* note 112, at 1937, 1937 n.134; Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 169–70 (2004).

Congress' power of conditional spending to address national problems is an enormously effective tool of federal power over the states. Just as importantly, though, federal conditional spending also provides an ideal forum for state and federal cooperation. When Congress spends in an area like education, over which it has no direct constitutional power, it is most dependent on the states' assent, and the states' leverage over Congress is at its maximum.[148] Similarly, negotiation between states and federal agencies is superior to the theoretical concept of clear notice in unambiguous legislation.[149]

The Bush administration, tardily but with laudable responsiveness, showed a greater willingness in its final year to negotiate and to cooperate with states.[150] The 111th Congress and the Obama administration DOE should move in the same direction but guard carefully against the dangers of perfunctorily increasing the use of waivers, watering down NCLB's accountability measures, and increasing funding without expanding NCLB's education goals. It would be a shame if the most pervasive equality measure in decades were to lapse or waste into inconsequentiality before it is fully recognized for what it is. Despite the *San Antonio* Court's formulation,[151] education is generative of all our freedoms.

*Anthony Consiglio**

148. *See* Adler, *supra* note 85, at 1237; David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 500–1 (2007); Galle, *supra* note 147, at 188–89.

149. *See* Galle, *supra* note 147, at 181–83.

150. For example, the Bush administration DOE permitted six states to participate in a pilot program to experiment with a more flexible classification of deficient schools and a more flexible application of sanctions, so that states might focus their resources on their more poorly performing schools. *See* Laura Diamond, *Feds: Tutor Kids Early*, ATLANTA J.-CONST., July 2, 2008, at B1.

151. *See supra* notes 29–30 and accompanying text.

* J.D. candidate (2011), Brooklyn Law School; M.A., University of California, Los Angeles; Maîtrise, Université de Lyon II, France. For uncredited views and arguments pertaining to education policy and teaching practices (particularly in some of the footnotes), I have drawn on ten years of experience as an English teacher in public high schools in New York and Connecticut. I dedicate this comment to (who else?) two of my teachers: Katherine Callen King, whose activism and passion for social justice were my first introduction to the noble achievement and arduous challenge of expanding access to a quality education; and Nelson Tebbe, whose courageous teaching led me to think I could wrestle some truth out of that ferocious and graceful American Proteus, the Tenth Amendment. The conclusions reached here are carefully considered rather than resolute; an open and searching mind is what I ask of myself and my readers.