Note

High Schools Are Not Highways: How *Dole* Frees States from the Unconstitutional Coercion of No Child Left Behind

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Introduction

In early 2007, the Fairfax County, Virginia Board of Education was deciding whether to give recent non-English-speaking immigrant children rigorous reading-level exams designed for their English-speaking peers. The exams, a requirement for receiving federal education funding, included difficult "nuances of a language tes[t] . . . [and] cover[ed] concepts such as metaphor, hyperbole or analogy."[1] Despite the certainty that none of these students could pass the tests, the Board had significant costs to consider. Some costs would have been difficult to measure and did not support giving the exam: the harm to morale, the waste of precious time, and the lack of meaningful results. Then there was the potential cost that was easy to determine: the $2.5 billion in anticipated federal education funding for Virginia in 2007.[2]

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1 Maria Glod, *Va. Urged to Obey 'No Child' on Immigrants' Reading Test*, Wash. Post, Feb. 6, 2007, at B5.

2 U.S. Dep't of Educ., 2007 Virginia Budget Fact Sheet (2006), http://www.ed.gov/about/overview/budget/statefactsheets/virginia.pdf.

On January 25, 2007, the Fairfax County School Board voted to forego giving approximately 4000 recent immigrants the same federally mandated reading exams that they give English-speaking students.[3] Just six days later, the U.S. Department of Education ("DOE") began pressuring Virginia to rein in Fairfax County's conduct under threat of "enforcement action."[4] Federal officials have refused to accommodate Virginia's request to use an alternate test[5] and have insisted that *all* students be tested at grade-level.[6]

On February 12, 2007, Virginia's Superintendent of Public Instruction responded to the DOE with support for Fairfax County's decision and criticism of the DOE's requirements for testing non-English-speaking students.[7] The Superintendent lauded Virginia's success in recent years at increasing the reading proficiency of children learning English and noted in reference to the federal testing obligations that "[he], along with many others, continue[s] to struggle with a requirement that expects students who are just learning English to perform at grade level [within twelve] months after their arrival in the United States."[8]

Shortly after the letter was delivered, the President of Virginia's Board of Education met with DOE representatives to request information about the consequences for Virginia of noncompliance with the federal education provisions.[9] On February 27, 2007, the Deputy Secretary of Education responded to Virginia asserting the Department's authority to "withhold all or a portion of any local educational agency's [federal education funding] allocation" as well as more than two million dollars in funding for overall state administrative efforts.[10]

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3 *See* Maria Glod, *Fairfax Resists 'No Child' Provision: Immigrants' Tests in English at Issue*, WASH. POST, Jan. 26, 2007, at B1.

4 Letter from Raymond Simon, Deputy Sec'y, U.S. Dep't of Educ., to Billy K. Cannaday, Jr., Superintendent of Pub. Instruction, Va. Dep't of Educ. (Jan. 31, 2007), *available at* http://www.doe.virginia.gov/VDOE/nclb/SecondSimonLetter1-31.pdf; *see* Glod, *supra* note 1.

5 Virginia requested to use the Stanford English Language Proficiency ("SELP") test. Letter from Raymond Simon, Deputy Sec'y, U.S. Dep't of Educ., to Billy K. Cannaday, Jr., Superintendent of Pub. Instruction, Va. Dep't of Educ., *supra* note 4.

6 *See id*.

7 *See* Letter from Billy K. Cannaday, Jr., Superintendent of Pub. Instruction, Va. Dep't of Educ., to Raymond Simon, Deputy Sec'y, U.S. Dep't of Educ. (Feb. 12, 2007), *available at* http://www.doe.virginia.gov/VDOE/nclb/SimonLetter2-12-07.pdf.

8 *Id.*

9 Letter from Raymond Simon, Deputy Sec'y, U.S. Dep't of Educ., to Mark Emblidge, President, Va. Bd. of Educ. (Feb. 27, 2007), *available at* http://www.pen.k12.va.us/VDOE/nclb/USED-SELP2-27-07.pdf.

10 *Id.* The allocation referenced in the letter is the Title I, Part A of the Elementary and Secondary Education Act ("ESEA") allocation. For background on Title I, see *infra* Part I.

The Deputy Secretary's letter suggested that if Fairfax County continued to administer the Stanford English Language Proficiency ("SELP") exam to non-English-speaking students, the county could lose as much as $17.5 million.[11] In other words, the county stood to lose *all* of its federal allocation for refusing to give less than one percent of its students a reading test that they would certainly fail. With such a significant penalty at stake, the county superintendent conceded the argument to the DOE and ordered Fairfax County principals to comply with the DOE's requirements.[12]

In 2002, President Bush signed the No Child Left Behind ("NCLB") Act[13] into law, taking unprecedented steps to set and enforce a national education policy for state primary and secondary public school systems.[14] NCLB is the latest revision to the Elementary and Secondary Education Act ("ESEA"),[15] which was first enacted in 1965 to bridge the gap between wealthy and poor school systems.[16] NCLB, however, goes much further than providing needed funding to state school systems. The Act implements a national accountability system, which requires each school to test students in the third through twelfth grades in literacy, mathematics, and science every year.[17] This testing is part of a system designed to statistically measure the effectiveness of each school and penalize those schools failing to make "Adequate Yearly Progress" ("AYP").[18] The penalties vary with the number of years the school fails to show AYP and range from

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11 Letter from Raymond Simon, Deputy Sec'y, U.S. Dep't of Educ., to Mark Emblidge, President, Va. Bd. of Educ., *supra* note 9.

12 Maria Glod, *Fairfax Schools Concede on Testing*, Wash. Post, Apr. 19, 2007, at B1. Attempting to find a compromise position, the superintendent instructed principals to permit students to stop during the examination if the material becomes too difficult. *Id.* In addition to Fairfax County, Arlington and Loudoun Counties faced proportionally similar penalties and were expected to follow Fairfax County's decision. *Id.*

13 No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

14 *See* Philip T.K. Daniel, Commentary, *No Child Left Behind: The Balm of Gilead Has Arrived in American Education*, 206 Educ. L. Rep. 791, 791–92 (2006); Amit R. Paley, *GOP Bills Would Relax Test Requirements of 'No Child' Law*, Wash. Post, Mar. 16, 2007, at A6.

15 Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

16 *See* Judith A. Winston, *Rural Schools in America: Will No Child Be Left Behind? The Elusive Quest for Equal Educational Opportunities*, 82 Neb. L. Rev. 190, 202 (2003).

17 Daniel, *supra* note 14, at 793–94; *see* 20 U.S.C. § 6311(b)(2) (2000) (setting out the requirements for Adequate Yearly Progress).

18 Daniel, *supra* note 14, at 794.

additional obligations, such as developing an improvement plan, to withholding federal education funds.[19]

NCLB is premised on Congress's ability to attach conditions to the funds allocated to states under a contract theory.[20] This power requires states and schools to adhere to every element of the Act to be eligible for federal funding.[21]

This Note examines the components of NCLB in light of constitutional limits on congressional conditional spending. It argues that NCLB is unconstitutionally coercive and violates state sovereignty by forcing states to adopt NCLB's broad, controversial education philosophy or lose billions of dollars in federal education funding. In the face of these coercive measures, this Note proposes modest changes to NCLB that will render it constitutional.

Part I briefly discusses NCLB's main provisions, the Act's history, and the tensions it has created within school districts and states. Part I also introduces the Supreme Court's conditional spending jurisprudence and explains how it has been applied in a variety of contexts. Part II juxtaposes NCLB with the limits of Congress's spending powers and shows why NCLB breaches the constitutional boundaries of that authority. Part III proposes some modest changes to NCLB that will bring it within Congress's constitutional powers and relieve the tension between Congress and the several states.

I. No Child Left Behind Represents the Most Significant Federal Incursion into Education in the Nation's History

Congress's foray into education began in 1965 with the passing of the ESEA,[22] which was designed to address the poorest students' education needs.[23] The crux of the ESEA is Title I, through which Congress allocates funds to the states on the condition that they adopt the ESEA directives, such as providing remedial reading and mathematics instruction to disadvantaged students.[24] Although the ESEA's pri-

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19 *See id.* Other early penalties for failing to make AYP included providing after-school tutoring and permitting students to transfer schools. *See* C. Joy Farmer, Note, *The No Child Left Behind Act: Will It Produce a New Breed of School Financing Litigation?*, 38 COLUM J.L. & SOC. PROBS. 443, 453 (2005).

20 *See* Connecticut v. Spellings, 453 F. Supp. 2d 459, 469 (D. Conn. 2006).

21 *Id.*

22 *See* Winston, *supra* note 16, at 202.

23 *See id.*

24 *See* Gina Austin, Note, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*, 27 T. JEFFERSON L. REV. 337, 339–40 (2005); Winston, *supra* note 16, at 202.

mary focus has been delivering federal funds to alleviate the wealth gap in education, one loosely enforced provision required that each state receiving Title I funds develop testing standards and report aggregate test scores to the federal government.[25]

Even after the DOE's creation in 1980, the ESEA's testing provisions were not strongly enforced, and by 1992 only fourteen states had actually established testing standards in core subjects.[26] In 1994, Congress assumed a more serious posture about the need for standardized testing. In that year's reauthorization of the ESEA, Congress required states to implement scientifically tested educational standards.[27] The government earned compliance from all but one of the states.[28]

Congress's incursion into education grew dramatically with the passing of the No Child Left Behind Act of 2001.[29] NCLB was a major revision of ESEA's Title I program and sought to "ensur[e] that 'high quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards.'"[30] In implementing NCLB, the DOE marketed it as delivering: (1) "[s]tronger [a]ccountability for [r]esults"; (2) "[m]ore [f]reedom for States and [c]ommunities"; (3) "[p]roven [e]ducation [m]ethods"; and (4) "[m]ore [c]hoices for [p]arents."[31] Despite the Department's rhetoric, many teachers and scholars see NCLB's main components as (1) increasing school funding to comply with federal regulations, (2) raising teacher certification standards,[32] and (3) using test scores to hold schools statistically accountable for student progress.[33]

Under NCLB, schools are required to administer annual proficiency examinations in literacy, mathematics, and science to students

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25 *See* Winston, *supra* note 16, at 202; Farmer, *supra* note 19, at 453.

26 *See* Winston, *supra* note 16, at 204.

27 *See id.*

28 *Id.* (noting that Iowa did not implement standardized testing in 1994 because of the state's commitment to local control).

29 No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered Sections of 20 U.S.C.).

30 Connecticut v. Spellings, 453 F. Supp. 2d 459, 469 (D. Conn. 2006) (quoting 20 U.S.C. § 6301(1) (2000)).

31 U.S. Dep't of Educ., Overview: Four Pillars of NCLB, http://www.ed.gov/nclb/overview/intro/4pillars.html (last visited Jan. 11, 2008).

32 *See generally* Kristen L. Safier, *Improving Teacher Quality in Ohio: The Limitations of the Highly Qualified Teacher Provision of the No Child Left Behind Act of 2001*, 36 J.L. & Educ. 65, 67–69 (2007) (reviewing the teacher certification requirements under NCLB).

33 *See* Austin, *supra* note 24, at 340–41.

in the third through eighth grades if the school receives Title I funds—the primary source of federal education funds.[34] In 2002, these obligations fell on the 23,563 schools that received approximately $10.4 billion in Title I funding.[35]

NCLB testing requirements are part of a broad system of accountability that requires schools to report test results and punishes poorly performing schools. Under the Act's terms, each state must have defined state standards in the core curricular subjects and must set achievement targets for each grade.[36] Using these targets, the federal government can determine whether schools are making AYP in improving test scores.[37] NCLB requires that schools report these test scores not only to the federal government, but also to staff, parents, and local and state officials.[38]

One of NCLB's newest parts is its penalty scheme. Schools failing to make AYP for two consecutive years are required to develop an improvement plan and allow students to transfer to other schools.[39] Schools failing to make AYP for four consecutive years can be forced to replace staff, change their curricula, or face penalties including reconstitution or potential loss of federal funding.[40]

A. *NCLB's Incentives Have Unintended Consequences That Are Driving Down Educational Standards in Some States*

Critics of the NCLB have derided the Act for a variety of its components. Despite the NCLB's efforts to improve academic performance in public schools, the Act has resulted in at least twenty states lowering their standards to reduce the risk of failing.[41] For example, to avoid federal sanctions, Texas reduced the number of correct answers needed to pass the state achievement test from twenty-four to

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34 Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 887 (2006). *See generally* Daniel, *supra* note 14, at 793–94.

35 OFFICE OF THE UNDER SEC'Y, U.S. DEP'T OF EDUC., NO CHILD LEFT BEHIND: A DESKTOP REFERENCE 13 (2002), *available at* http://www.ed.gov/admins/lead/account/nclbreference/reference.pdf; Amanda K. Wingfield, Comment, *The No Child Left Behind Act: Legal Challenges as an Underfunded Mandate*, 6 LOY. J. PUB. INT. L. 185, 194 (2005).

36 *See* Daniel, *supra* note 14, at 793–94.

37 *Id*. at 794. ("In order to reach AYP standards at least [ninety-five] percent of every student group, including subgroups, must annually take the tests and if any one group is unsuccessful all groups are deemed to have failed for that year.").

38 *Id.*

39 *See* Farmer, *supra* note 19, at 448.

40 *See id.* at 449.

41 *See* Gershon M. Ratner, *Why the No Child Left Behind Act Needs to Be Restructured to Accomplish Its Goals and How to Do It*, 9 UDC/DCSL L. REV. 1, 14 (2007) (citation omitted).

twenty out of a possible thirty-six.[42] Michigan significantly weakened its standards, some of the highest in the country, by cutting the number of students required to pass the English component of its state exam nearly in half.[43]

There are also reports that states have manipulated their test data by encouraging failing students to drop out of school and underreporting assessment results.[44] In addition, NCLB's critics have condemned its overall methodology:

> "[A]ccountability" in the NCLB[ ] context . . . imposes a uniform philosophy of education that many find troublesome. The NCLB[ ]'s annual testing requirements—combined with the fact that "progress" is defined almost solely in terms of testing—amount not only to a results barometer, but also to a separate *policy* decision that educators should focus on tests.[45]

In short, politicians, scholars, educators, and administrators have expressed concerns about the effect NCLB policies have had on local schools.[46]

B. Historically, Congress's Ability to Inject Such Regulations into the Education Arena Stems from a Liberally Construed Spending Power Doctrine

Congress's ability to influence state programs and policies is extremely broad and derives from a variety of constitutional provisions.[47] When the Framers drafted the Constitution's Spending Clause permitting Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to . . . provide for the . . . general Welfare of the United States,"[48] there was a substantial divide in the populous as to the meaning of the clause.[49] James Madison contended that Congress could only spend money on matters related to the enumerated powers

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42 Ratner, *supra* note 41, at 14; Austin, *supra* note 24, at 342–43.

43 Ratner, *supra* note 41, at 14; Austin, *supra* note 24, at 342–43.

44 Ratner, *supra* note 41, at 14; Daniel, *supra* note 14, at 792.

45 Note, *supra* note 34, at 889.

46 Austin, *supra* note 24, at 337–38 ("The result [of NCLB] has been a significant loss of control over education policy by the states with little to no academic gains by the children.").

47 These constitutional provisions include the Supremacy Clause, U.S. CONST. art. VI, cl. 2; the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; the General Welfare Clause, U.S. CONST. art. I, § 8, cl. 1; the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18; and the Spending Clause, U.S. CONST. art. I, § 8, cl. 1.

48 U.S. CONST. art. I, § 8, cl. 1.

49 Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the* Dole *Loophole*, 4 CHAP. L. REV. 163, 168 (2001).

listed in Article I, Section 8.[50] Alexander Hamilton posited that Congress's power to spend for the "general welfare" was a separate grant of power, unfettered by the enumerated powers.[51]

In 1936, the Supreme Court settled this dispute in *United States v. Butler.*[52] In *Butler,* the Court adopted Hamilton's view and held that Congress has the power to spend money for public purposes beyond those explicitly stated in the Constitution.[53]

1. *The Supreme Court's Early Decisions Extended Congress's Power Beyond Its Enumerated Powers*

The Supreme Court's early decisions on congressional conditional spending granted Congress broad discretion in attaching terms to money given to states. In 1937, in *Steward Machine Co. v. Davis*,[54] the Court broadened Congress's spending power while considering the constitutionality of the Social Security Act ("SSA"),[55] which Congress passed to induce each state to set up its own unemployment system.[56] In holding that the Tenth Amendment bars Congress from "coercing" the states into enacting legislation,[57] the Court found the SSA constitutional by distinguishing "motive" from "coercion"—stat-

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50 *Id.*

51 *Id.*

52 United States v. Butler, 297 U.S. 1, 66 (1936). The Court found the Agricultural Adjustment Act unconstitutional because, even though Congress may have the power to appropriate funds for agricultural production, the Act served as direct regulation of agricultural production, the power over which was reserved to the states. *Id.* at 73–74.

53 *Id.*; *see also* McConville, *supra* note 49, at 168; James V. Corbelli, Note, *Tower of Power:* South Dakota v. Dole *and the Strength of the Spending Power*, 49 U. PITT. L. REV. 1097, 1101 (1988).

54 Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

55 Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

56 *See Steward Mach. Co.*, 301 U.S. at 573, 587, 591. The SSA taxed most employers with at least eight employees on the employees' wages, but credited each employer's account for ninety percent of its balance if the employer contributed to a state unemployment fund approved by the U.S. Secretary of the Treasury. *Id.* at 574. The Court recited statistics from the Government's brief to paint the dire picture of unemployment during the Great Depression and the extensive financial burden placed by it on the federal and state governments. *Id.* at 586–87. The Court suggested that the reason only Wisconsin had enacted an unemployment system prior to the SSA "was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors." *Id.* at 588 (citations omitted).

57 *See id.* at 585–86; *see also* U.S. CONST. amend. X.

ing that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties."[58]

In supporting its conclusion, the Court also acknowledged the power of states to enter into contracts with the federal government, so long as "the essence of their statehood is maintained without impairment,"[59] and thereby created the contractual theory of congressional conditional spending.

In 1987, the Court revisited Congress's conditional spending powers in *South Dakota v. Dole*.[60] In *Dole*, South Dakota challenged the constitutionality of 23 U.S.C. § 158, under which the Secretary of Transportation could withhold part of a state's federal highway funding unless the state had a minimum age of twenty-one to purchase alcohol.[61] The Court reasserted Congress's power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[62] In doing so, the Court set out four limits on that power, requiring that the legislation be:

> (1) in pursuit of the general welfare of the United States, (2) the condition must be unambiguous, (3) the money must be related to the federal interest, and (4) the condition cannot conflict with any other constitutional provision. In addition . . . in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.[63]

Applying the factors to § 158, the Court (1) deferred to Congress in determining what constitutes the "general welfare," (2) found no ambiguity in the statute, (3) concluded that preventing drunken driving was in the federal interest, and (4) found that losing five percent of federal highway grant funding was not too coercive.[64]

The *Dole* criteria gave courts a much needed tool to assess the constitutionality of congressional spending. The factors the Court chose, however, are so unrestrictive in application that no federal court has ever struck down a statute under the test. Only on rare occasions has a federal court sided with a state's argument that, because it did not have adequate notice of a particular cost of a voluntary federal

58 *See Steward Mach. Co.*, 301 U.S. at 589–90.

59 *Id.* at 597; *see* Corbelli, *supra* note 53, at 1101–02.

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

61 *Id*. at 205.

62 *Id*. at 206 (citations omitted).

63 Austin, *supra* note 24, at 353 (citations omitted); *see Dole*, 483 U.S. at 207–08, 211.

64 *Dole*, 483 U.S. at 208–11.

program, the statute was unconstitutionally ambiguous.[65] Moreover, though the Court created the "coercion" limit to congressional spending, no federal court has ever found a statute unconstitutionally coercive, including the statute at issue in *Dole* that threatened to withhold five percent of highway funding[66] and one that threatened up to one billion dollars in Medicaid funds.[67] In fact, since *Steward* in 1937, the Supreme Court has not invalidated a single act of congressional spending.[68]

2. *The Supreme Court Began to Rein in Congress's Conditional Spending Authority as Congress's Influence over State Political Decisionmaking Significantly Strengthened*

Despite the initial broad construction of Congress's conditional spending authority, there is reason to believe that the Supreme Court has not given Congress carte blanche with its spending power. During the 1990s, the Supreme Court decided a handful of cases reasserting the outer limits of Congress's ability to regulate activity in the states.[69] In 1992, the Court held in *New York v. United States* that it was beyond Congress's enumerated power to compel a state to choose between taking title to private radioactive waste or regulating it according to Congress's instructions.[70] After decades of permitting Congress great latitude in asserting its spending power, the Court found Congress had stepped outside its constitutional bounds by incorporating its spending authority into a statute that ultimately compelled state action.

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[65] *See, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459–61 (2006) (denying a plaintiff who filed suit under the Individuals with Disabilities Education Act reimbursement for expert witness fees from the state because the statute failed to clearly indicate whether states were obligated to cover such fees); Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., No. 05-2708, 2008 WL 60187, at *11, *16–18 (6th Cir. Jan. 7, 2008) (holding schools were not responsible for covering the costs of implementing the NCLB requirements in excess of their allocated federal funds because the statute was not clear as to who would cover the additional costs); Va. Dept. of Educ. v. Riley, 106 F.3d 559, 561 (4th Cir. 1997) (reversing the U.S. Department of Education's decision to discontinue federal funding to Virginia under the Individuals with Disabilities Education Act where Virginia did not provide educational services to special education students suspended or expelled for conduct unrelated to their disability because the statute was ambiguous as to such an obligation).

[66] *See Dole*, 483 U.S. at 211.

[67] *See* West Virginia v. U.S. Dep't of Health & Human Servs., 289 F.3d 281, 284, 294 (4th Cir. 2002).

[68] *Id*. at 289.

[69] New York v. United States, 505 U.S. 144, 175–76 (1992); Printz v. United States, 521 U.S. 898, 923–25 (1997).

[70] *New York*, 505 U.S. at 175–76.

Just five years later, in *Printz v. United States*,[71] the Court extended the *New York v. United States* holding to preclude Congress from commandeering state law enforcement officials to implement a federal regulatory scheme governing gun purchases.[72] Despite Congress's findings that a nationwide background-check system was necessary to prevent unlawful gun sales, the Court held that Congress once again exceeded its authority by confusing its Commerce Clause power with an ability to order the state to help enforce federal regulations.[73]

In 2006, the Supreme Court reaffirmed the limits on Congress's spending authority in *Arlington Central School District Board of Education v. Murphy*[74] by requiring Congress to clearly state the terms attached to conditional spending provisions.[75] In *Murphy*, the Court denied a plaintiff who filed suit under the Individuals with Disabilities Education Act ("IDEA")[76] reimbursement for expert witness and consultant fees from the state because Congress had failed to clearly indicate whether states were obligated to cover such fees.[77] In reviewing the clarity of a statute, the Court held that it should examine statutes from the position of the state officer deciding whether to accept conditional federal funds and ask whether such an officer would properly be on notice of the liability.[78]

II. NCLB Exceeds Congress's Constitutionally Limited Spending Power

Lacking independent power to regulate education,[79] Congress has turned to its Spending Clause authority to influence public educa-

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71 *Printz*, 521 U.S. at 898.

72 *Id*. at 933.

73 *Id.*

74 Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006).

75 *Id.* at 2459.

76 Individuals with Disabilities Education Act, Pub. L. No. 91-230, 84 Stat. 121 (1970) (codified at 20 U.S.C. § 1415 (2000)).

77 *Murphy*, 126 S. Ct. at 2462–63.

78 *Id.* at 2459.

79 *See* United States v. Lopez, 514 U.S. 549, 564 (1995) (striking down the Gun-Free School Zones Act as outside of Congress's Commerce Clause authority by rejecting the government's "national productivity" theory, which the Court suggests would make it "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign"); *see also* David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 397 (1996); Robert A. Martinez, Note, *S.O.S.—Saving Our Schools: The Constitutionality of the Gun-Free School Zones Act of 1990*, 22 AM. J. CRIM. L. 491, 497 (1995).

tion.[80] NCLB's extensive regulatory regime exceeds the constraints on Congress's spending authority implicit in the Spending Clause and the Tenth Amendment. Each of NCLB's components, including its testing scheme, teacher training requirements, and reporting obligations, has a coercive impact on state sovereignty.

A. NCLB's Bundled Regulatory Package Leverages States' Pre-Existing Reliance on Title I Funds to Make an "All or Nothing" Offer Impossible to Refuse

Over the past forty years, the federal government has played an increasingly important role in education funding. For the 2004–2005 school year, the federal government's share of K–12 spending was approximately 8.3% of public education expenditures.[81] This figure included more than $13 billion in Title I funding and more than $24 billion in other K–12 education funds.[82]

For thirty-five of those forty years, the federal government only required that schools receiving Title I funds use them to provide remedial reading and mathematics instruction.[83] The conditions under which states received the federal funds were well known, and states could plan to accept the same conditions and the same funds year after year.[84] During that time, schools built an academic infrastructure in reliance on those funds. They designed curricular programs, set budgets, hired staff, and built physical facilities to make use of those federal moneys.

NCLB's extensive changes have placed states in an unfair position. With so much of their education planning relying on federal funds, states are suddenly confronted with the choice of accepting a slew of new and invasive requirements for using those funds or facing the possibility of losing all of them.[85] The all-or-nothing attitude

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80 *See, e.g.*, Stephen C. *ex rel.* Michael C. v. Radnor Twp. Sch. Dist., 202 F.3d 642, 650 (3d Cir. 2000) (noting that IDEA recognized that "education is traditionally a state function," and thus conditioned the receipt of federal funding on the state's compliance with IDEA's requirements as a way of indirectly regulating the schools).

81 U.S. Dep't of Educ., 10 Facts About K–12 Education Funding 2 (2005), *available at* http://www.ed.gov/about/overview/fed/10facts/10facts.pdf.

82 *Id.* at 4.

83 *See* Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

84 Under the ESEA pre-NCLB, states could decline federal funding under specific programs, rather than facing the penalty of losing all education funding for any single decision to decline participation. *See* Austin, *supra* note 24, at 367–68.

85 Connecticut v. Spellings, 453 F. Supp. 2d 459, 473 (D. Conn. 2006) (citing 20 U.S.C. § 6311(g)(2)).

scripted into NCLB is an unconstitutional intrusion into state sovereignty. Although states are not per se entitled to those federal funds, the new components of Title I injected by NCLB must be treated as distinct options in which the states can elect to participate.

B. NCLB Bundles the Funding of Each of the Scheme's Components, Enabling the Federal Government to Unconstitutionally Condition Funds for One Component on Complying with the Terms of an Unrelated Provision

The theory of congressional conditional spending is based on the premise that states can constitutionally contract with the federal government because the states have the sovereign ability to accept or decline the contract's terms. The Supreme Court, however, has made clear that conditional spending by Congress must be related to the federal interest in the targeted program.[86] For example, Congress cannot threaten to withhold federal highway funding for a state's refusal to permit oil and gas exploration. The requirement that the contract's terms be related to the federal interest is necessary because the federal government's unlimited bank account, coupled with the states' frequently precarious financial positions, would enable Congress to easily overtake state legislatures by abusing Congress's power with both the carrot and the stick.[87]

NCLB, despite being proclaimed as a single national effort to improve public education, is really a conglomeration of separate and identifiable obligations for schools, including targets to recruit better qualified teachers, a requirement that states collect and report annual assessment data, and funding for staff and administrator training.[88] Notwithstanding the distinct nature of each component, Congress has forced states to make an all-or-nothing decision: either accept each and every NCLB requirement or risk losing *all* Title I–related funding.[89]

By unconstitutionally bundling the NCLB package, Congress intruded on state sovereignty and linked discrete policies to comman-

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86 South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

87 *See* Farmer, *supra* note 19, at 457.

88 Other distinct programs in NCLB include special programs for disabled students and non-English speaking students.

89 *See* 20 U.S.C. § 6311(g)(2) (Supp. V 2000) (permitting the Secretary to withhold funds from states not in compliance with NCLB testing requirements); *Spellings*, 453 F. Supp. 2d at 473 (discussing the penalty provisions of NCLB). *See generally* General Education Provisions Act, 20 U.S.C. §§ 1221–1234 (2000 & Supp. V 2000) (empowering Secretary of Education to enforce the terms of any program for which she has administrative responsibility).

deer state education. The Supreme Court's implications in its Spending Clause decisions suggest that Congress overstepped its bounds by conditioning funds for disabled students, for example, on meeting criteria for non-English speaking students.[90] Such bundling precludes the states from effectively choosing whether to opt in to federal funding policies, especially given the now built-in reliance on those funds.

C. *The Latitude Given to the Secretary of Education to Determine What Part of Title I Funds to Withhold from a Noncompliant State Violates the Requirement of Clear and Unambiguous Regulations*

Under NCLB, states have not been given fair notice of the penalties for failing to comply with the entire education scheme. The Supreme Court has reaffirmed the requirement that Congress clearly state the conditions attached to federal funding in cases as recent as *Murphy*.[91] The Court assumes the position of the state officer deciding whether to accept federal funding and asks whether that person would have been aware of a certain condition. NCLB provides no clear guidance to states on what they stand to lose for violations.[92] The text of the statute merely directs the Secretary of Education to withhold payment to states upon finding the state noncompliant with any material provision of the Act.[93] Without providing details as to what constitutes a material breach or what amount would be withheld, states are left without notice as to what amount of funding is at risk.

In addition to the lack of notice about the penalties for noncompliance, states are also left without notice regarding their responsibility (or lack thereof) for covering the costs of implementing NCLB's requirements beyond the funding they receive from the federal gov-

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90 *See* New York v. United States, 505 U.S. 144, 167 (1992) ("Such conditions must . . . bear some relationship for the purpose of the federal spending . . . [else] the spending power could render academic the Constitution's other grants and limits of federal authority." (citations omitted)); *Dole*, 483 U.S. at 207 ("[C]onditions on federal grants might be illegitimate if they are unrelated to the federal interest in *particular* . . . programs." (emphasis added) (quotation omitted)); McConville, *supra* note 49, at 170–71.

91 Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459 (2006).

92 *See* 20 U.S.C. § 6311(g)(2) (permitting the Secretary to withhold funds from states not in compliance with NCLB testing requirements); *Spellings*, 453 F. Supp. 2d at 473 (discussing the penalty provisions of the NCLB). *See generally* General Education Provisions Act, Pub. L. No. 90-247, 81 Stat. 814 (codified as amended at 20 U.S.C. §§ 1221–1240 (2000)) (empowering Secretary of Education to enforce the terms of any program for which she has administrative responsibility).

93 *See Spellings*, 453 F. Supp. 2d at 473.

ernment.[94] In *School District of Pontiac v. Secretary of the United States Department of Education*,[95] several school districts and education associations sued the Secretary of Education for "a judgment declaring that they need not comply with the [NCLB's] requirements where federal funds do not cover the increased costs of compliance,"[96] based on a provision of the Act stating that "[n]othing in this Act shall be construed . . . to mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act."[97] In one of the first federal appellate decisions to recognize the DOE's attempt to force all school's to comply with NCLB regardless of the costs, the Sixth Circuit found for the school districts and held that the state officers responsible for deciding whether to participate in NCLB could likely have read the so-called "Unfunded Mandates Provision" to mean that the Secretary could not force them to comply with NCLB's requirements if it meant spending their local and state derived funds.[98] Consequently, the statute failed to provide clear notice of the schools' obligations to cover any shortfalls, and therefore that burden could not be constitutionally placed on the states and schools under the Spending Clause.[99]

This lack of notice has forced several states to accept funding only to find out later what the terms are. For example, Virginia's first effort to decline participation in NCLB's specific testing standards carried an unexpected price tag. In 2004, the Virginia House of Delegates easily passed a resolution criticizing NCLB alongside a bill introduced to reject parts of the scheme.[100] Virginia appeared likely to choose to continue using the SELP test and dismiss NCLB as unneces-

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94 *See* Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., No. 05-2708, 2008 WL 60187, at *11, *16–18 (6th Cir. Jan. 7, 2008).

95 *Id*.

96 *Id*. at *1.

97 *Id.* (citing 20 U.S.C. § 7907(a) (Supp. V 2000)). Although the court quoted the statute as absolving schools from covering "costs not paid for under this *Act*," (emphasis added), the United States Code uses the word "chapter" instead of "Act" to refer to the same set of statutes—the Elementary and Secondary Education Act of 1965, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.). *Compare* 20 U.S.C. § 7907(a) (using "chapter"), *with* No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 3, 115 Stat. 1425, 1426 (2002) ("[W]henever in this Act an amendment . . . is expressed in terms of an amendment to . . . a section or other provision, the reference shall be considered to be made to a section or other provision of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 et seq.)."), *and id.*, tit. IX, sec. 901, § 9527, 115 Stat. 1983 (using "Act").

98 *Sch. Dist. of Pontiac*, 2008 WL 60187, at *11.

99 *Id.*

100 Note, *supra* note 34, at 897.

sary[101] until the federal government's response made the state reconsider. The DOE informed Virginia that if it failed to comply with NCLB requirements, it would lose all NCLB-related funds, which totaled $330 million annually.[102] Other states have faced similar surprises from the DOE and threats of funding cutoffs.[103]

The states' inability to forecast the impact of their decisions to accept funding directly implicates the Court's instructions that conditional spending terms must be clear. In *Murphy* and *School District of Pontiac*, the courts reaffirmed their protection of states from ambiguous provisions by enforcing the clear notice requirement,[104] reflecting the Court's long-standing position on conditional spending. With states such as Virginia testing the DOE's resolve, new disputes over this requirement are increasingly likely.

D. The Obligations NCLB Places on States to Conduct Extensive Testing and Provide Detailed Reporting to a Variety of Interested Parties Is an Unconstitutional Commandeering of State Education Agents

NCLB does much more than provide states federal funds in exchange for setting certain education policies and practices into place. Aside from those funding conditions, the Act unconstitutionally commandeers state legislative and executive officials by forcing them to adopt specific legislation.

In addition to the policies to which states are required to adhere, NCLB directs state educational agencies to create a state plan to meet NCLB requirements,[105] to provide technical assistance to schools struggling to meet achievement standards,[106] to create a statewide curriculum and disseminate it to local schools,[107] to consult with the Governor in developing the state plan,[108] and to eliminate fiscal and accounting barriers to permit schools to consolidate certain moneys from various funding sources.[109] These instructions compel state exec-

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101 *Id.*

102 *Id.*

103 *See id*. 897–99; *see also* Connecticut v. Spellings, 453 F. Supp. 2d 459, 473–74 (D. Conn. 2006).

104 Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459 (2006); *Sch. Dist. of Pontiac*, 2008 WL 60187, at *11.

105 20 U.S.C. § 6311(a)(1) (2000).

106 *Id.* § 6311(b)(8)(B).

107 *Id.* § 6311(b)(8)(D).

108 *Id.* § 6311(c)(3).

109 *Id.* § 6311(c)(10).

utive officials, education agencies, and legislative officials to adopt specific practices and legislation to facilitate the Act's goals. These requirements extend beyond the use of federal funds to administer education programs and are effectively a takeover of state education administration functions.

The commandeering of state legislative acts by Congress, regardless of its incorporation alongside conditional spending programs, is unconstitutional.[110] In *New York v. United States*, the Supreme Court held that a federal statute could unconstitutionally infringe on state sovereignty even when state officials consented to the statute's terms.[111] The Court stated:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.[112]

The Court specifically commented that "powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests."[113] The fact that state and federal officials might support a statute does not permit them to go beyond their constitutional powers.[114]

NCLB strips states of the power to make education policy and uses state reliance on federal education funds to commandeer state education policy decisions. Through its provisions, NCLB dictates the balance of executive, legislative, and local officials in state education systems. By directing state education officials to develop the criteria for running local school systems, NCLB destroys any political systems of local control implemented by the states in favor of a top-down approach to education, where the top is the group least connected to the actual delivery of educational services.[115]

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110 *See* New York v. United States, 505 U.S. 144, 176 (1992) (citations omitted).

111 *Id.* at 181–82.

112 *Id.* at 181.

113 *Id*. at 182.

114 *Id*.

115 Senator Jeff Bingaman noted that his state, New Mexico, vested authority in the board of education and argued that "[t]he Federal Government should not attempt to undo the balance achieved in the State of New Mexico by giving the Governor federally mandated veto power over what a majority of the board decides."

Note, *supra* note 34, at 893–94 (citation omitted); *see also* Joshua J. Bennett, Note, *Using Utah's Children as Collateral in a Gamble for State's Rights: Why House Bill 1001 Is Fundamentally Flawed*, 8 J.L. & FAM. STUD. 225, 227 (2006) (noting the act that admitted Utah into the Union

E. Congress's Power to Influence Noncommerce-Related Fields Is Limited by the Tenth Amendment

NCLB has the ability to reshape the balance of power created and developed under state constitutions, despite the Tenth Amendment's function to protect states from federal intrusions into the core of state sovereignty.[116] When congressional legislation serves to disrupt this balance of power, that legislation must be declared unconstitutional.

NCLB diverges from most of the Court's Spending Clause cases because Congress has no independent constitutional authority to legislate in the realm of education.[117] Education has traditionally been a function expressly reserved to the states. Many states have delegated much of the authority over schools to local school boards.[118] States have developed extensive education policies and agencies to deliver educational services. In fact, education is the only public service that is mentioned in every state's constitution.[119] Although each provision is unique, every state guarantees its citizens the right to some degree of a free public education.[120] Many states have constitutional requirements for teaching certain subjects including reading, writing, mathematics, and science.[121] Some states are specifically required to train

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"promises that Utah's 'schools . . . shall forever remain under the exclusive control of [the] State [of Utah]'" (citation omitted)).

116 U.S. CONST. amend. X; *New York*, 505 U.S. at 177.

117 *See* United States v. Lopez, 514 U.S. 549, 564 (1995) (striking down the Gun-Free School Zones Act as outside of Congress's Commerce Clause authority by rejecting the government's "national productivity" theory, which the Court suggests would make it "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign").

118 *See* Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ." (citation omitted)). *See generally* Michael Barolsky, The Complexities of Developing Successful Strategies to Address Education Finance Reform 41–49 (2003) (unpublished B.A. thesis, Boston University, University Professors Program) (on file with Mugar Library, Boston University).

119 Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814–15 (1985) (citing constitutions of each state except Alabama and Mississippi); ALA. CONST. art. XIV; MISS. CONST. art. VIII. *See generally* Barolsky, *supra* note 118 (discussing several education provisions in state constitutions in the context of their effect on the equitable distribution of education funding).

120 *See* Barolsky, *supra* note 118, at 30.

121 *See e.g.*, Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979). *Pauley* interpreted West Virginia's constitutionally required "thorough and efficient system of schools" as the

> development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge

students to enter the workforce; others require an opportunity to fulfill each student's potential.[122]

One reason education is such a local matter is because each community has different priorities. Though public schools always need to adhere to state constitutions, communities have generally had a great deal of flexibility in deciding matters such as what subjects to teach, what extracurricular opportunities to provide, what hours to hold, and what additional services to deliver. For example, schools have traditionally had the power to decide to add programs focused on agricultural studies, college preparation, vocational training, or the fine arts.[123] Yet none of these programs matter when the federal government measures AYP.

Although the Supreme Court has given Congress wide latitude in applying its conditional spending power, public education is very different from highways and drunk driving—the facts that lead to the decision in *Dole*. As such, the Supreme Court ought to be wary of congressional intrusion into education.

F. NCLB, Through Its Use of the Federal Government's Unlimited Bank Account, Coupled with States' Political and Financial Realities, Breaches the Court's Coercion Threshold

The Supreme Court's coercion limit to congressional spending serves two important functions. First, the coercion factor was created to give the Court flexibility in finding congressional spending unconstitutional if the amount at stake was so significant as to leave the state no choice but to comply.[124] Second, the coercion factor also

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> of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.
>
> Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.

Id.

122 *E.g.*, LA. CONST. art. VIII, pmbl. ("The goal of the public educational system is . . . that every individual may be afforded an equal opportunity to develop to his full potential.").

123 *See generally* Serin Ngai, *Painting over the Arts: How the No Child Left Behind Act Fails to Provide Children with a High-Quality Education*, 4 SEATTLE J. FOR SOC. JUST. 657, 662 (2006) (discussing research studies on the impact of arts programs in schools and the role of arts programs in schools in Washington).

124 South Dakota v. Dole, 483 U.S. 203, 211 (1987) ("Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" (citation omitted)).

doubles as a catchall for striking down congressional conditional spending. If the Court cannot find a conditional spending statute to be unconstitutional under one of the other *Dole* factors but is still troubled by the statute, the Court can use the coercion basket to find that the combination of significant sums of money, state sovereignty concerns, and ambiguity result in legislation that cannot be upheld.

That the Court has never applied the coercion factor to find legislation unconstitutional suggests that the Court had some other use for it. Other federal courts have used this provision to address concerns about the federal government's ability to strip states of significant sums of federal money. For example, in *West Virginia v. U.S. Department of Health and Human Services*,[125] the Fourth Circuit was troubled by the possibility that the federal government could potentially strip West Virginia of more than one billion dollars in Medicaid funds if the state failed to implement an estate recovery program expected to generate just two-tenths of one percent of that amount.[126] The court noted that "it [wa]s certainly possible that, in a given case, the sanction actually imposed by the Secretary [of Health and Human Services] might not be proportionate to the breach and might be constitutionally suspect."[127]

The Fourth Circuit has raised concerns about coercion in education cases as well. In *Virginia Department of Education v. Riley*,[128] the Fourth Circuit, sitting en banc, adopted Judge Luttig's dissenting opinion from the case's earlier appeal.[129] Though the court ultimately sided against the DOE on grounds that the statute's provision was not clearly stated, Judge Luttig suggested that it might otherwise have been based on coercion:

> The withholding of almost $60 million from the State and from the 128,000 disabled students who have responsibly availed themselves of their educational opportunity, simply because the State refuses to yield to the federal demands as to the 126 students who have abused their rights, begins to resemble impermissible coercion . . . if not forbidden regulation in the guise of Spending Clause condition, as well.[130]

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125 West Virginia v. U.S. Dep't of Health & Human Servs., 289 F.3d 281 (4th Cir. 2002).

126 *Id.* at 285.

127 *Id*. at 292.

128 Va. Dep't of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997).

129 *Id.* at 560–61.

130 *Id.* at 569 (citations omitted).

Judge Luttig also noted the contrast between the facts in *Dole*, where the federal government threatened to withhold five percent of highway funds, and those in *Riley*, where the government threatened to withhold one hundred percent of IDEA funding.[131] This strongly implies that *Riley* might have been a much better example for defining coercion.[132]

Concern over the DOE's ability to withhold all Title I funds has pressured states into dropping legislative efforts to opt out of NCLB and spawned additional litigation. In 2006, Connecticut sued the Secretary of Education for refusing to grant a waiver for the requirement that non-English speaking students be required to take standard English-language tests.[133] Among Connecticut's claims were a declaratory challenge to the Secretary's interpretation of NCLB's "Unfunded Mandates Provision,"[134] and a claim that the Secretary's power to withhold all Title I funds for any noncompliance with a NCLB provision violated the Tenth Amendment and the Spending Clause.[135]

As part of Connecticut's challenge to the penalty provisions of NCLB, the state alleged that the amount it stood to lose by opting out of NCLB far exceeded the amount related to the annual testing requirements.[136] Connecticut claimed that it received only three million dollars annually in federal funds to meet the testing requirements, yet the Secretary could withhold all funds for NCLB programs and related funding totaling "hundreds of millions of dollars, comprising [five percent] of overall education spending in the State and as much as [fifteen percent] of spending in the most disadvantaged school districts."[137]

Connecticut was not alone in its concern. In 2004, Utah had inquired about the funding it stood to lose for noncompliance with NCLB.[138] The Secretary of Education told Utah that it would lose both the funds for programs under NCLB as well as twice that amount in other funding calculated by reference to state Title I funds.[139] Utah, Connecticut, and Virginia have all demonstrated that the Secretary's

131 *Id.*

132 *Id*.

133 Connecticut v. Spellings, 453 F. Supp. 2d 459, 478 (D. Conn. 2006).

134 20 U.S.C. § 7907(a) (Supp. V 2000).

135 *Spellings*, 453 F. Supp. 2d at 464.

136 *Id*. at 473–74.

137 *Id.*

138 *Id.* at 473.

139 *Id*. at 474.

power to withhold significant funding coerces states into compliance.[140]

In addition, the rigid, coercive requirements of NCLB's provisions have led states to react in a number of unhealthy ways. For example, some states have had to go to great lengths to set testing standards lower than previous requirements to have at least a chance of having schools succeed at making AYP.[141] Other states have spent countless hours debating whether to stay under NCLB and trying to determine the financial impact of declining to meet each of NCLB's requirements.[142]

It is the combination of all of the above factors—bundled regulatory packaging taking unfair advantage of states' preexisting reliance, ambiguous penalty provisions that fail to give adequate notice of funding conditions, compulsory shifts in the balance of political power in state systems, intrusion into a traditionally local matter, and the threat of cutting enormous sums of money—that proves the coercive effect NCLB has on states' alleged "decisionmaking power" to opt out of the policy scheme.[143] Congress has exploited states' reliance on federal education dollars to strong-arm them into adopting a federal education policy in violation of the Spending Clause and the Tenth Amendment.[144]

III. Modest Changes in the Structure of NCLB Can Bring It Within Congress's Constitutional Authority and Relieve Tensions Among the States

Despite Congress's unconstitutional abuse of power in enacting NCLB, modest changes could make this nationalized education system constitutional and bolster Congress's working relationship with

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140 *See* Nicole Liguori, Note, *Leaving No Child Behind (Except in States That Don't Do as We Say): Connecticut's Challenge to the Federal Government's Power to Control State Education Policy Through the Spending Clause*, 47 B.C. L. Rev. 1033, 1073 (2006). *But cf.* Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., No. 05-2708, 2008 WL 60187, at *11, *16–18 (6th Cir. Jan. 7, 2008) (holding that states and their schools are not obligated to cover the costs of meeting NCLB's requirements beyond the amount of federal funding they receive under the Act).

141 *See* Daniel, *supra* note 14, at 792.

142 *See* Note, *supra* note 34, at 904–05. *See generally Sch. Dist. of Pontiac*, 2008 WL 60187, at *11, *16–18.

143 *See* Corbelli, *supra* note 53, at 1122–23. *But see* McConville, *supra* note 49, at 174 ("Examples of coercion thus would include providing erroneous information regarding the effect of participation in the program, failing to provide relevant information regarding such participation, and directing the states to legislate, administer or enforce federal policies.").

144 *See* Austin, *supra* note 24, at 367–68; *see also* Note, *supra* note 34, at 885 (noting that "within weeks of Secretary Spellings's confirmation, a task force of the National Conference of State Legislatures issued a report deeming the law unconstitutionally coercive").

the states. First, Congress should revise NCLB's main penalty provision to require a relationship between any federal funds withheld from a state for noncompliance with the Act and the amount of federal funds substantially related to implementing the particular provision violated. Second, Congress should obligate the Secretary of Education to respond with specific and binding monetary figures to states' requests for information about the total amount of federal funding they stand to lose for defined instances of noncompliance. Finally, Congress should clarify the "Unfunded Mandate Provision" to protect schools' use of state and local funds when NCLB funds fail to cover the full cost of compliance.

A. *Congress Should Require a Relationship Between Federal Education Funds Withheld and the Particular Provision of NCLB Violated*

Congress should amend NCLB to require that any federal education funds withheld from a state for noncompliance with the Act be "substantially related" to the violated provision. NCLB's main penalty provision provides that "[i]f a State fails to meet any of the [NCLB] requirements . . . then the Secretary may withhold funds for State administration . . . until the Secretary determines that the State has fulfilled those requirements."[145] Revising this provision to tie withheld funds to the violated provision resolves two of NCLB's currently unconstitutional components: bundling[146] and ambiguity.[147]

This amendment recognizes that NCLB incorporates several program components—e.g., statistical accountability reporting, teacher certification requirements—into a national education scheme. Each of the components uniquely contributes to achieving the federal government's desired goals, yet the current structure penalizes noncompliance as if NCLB were a house of cards, where violating one component would ruin the entire system. For example, a state that chooses to set different requirements for hiring teachers than NCLB does not harm its ability to comply with the statute's testing provisions. Despite that state's continuing ability to meet NCLB's other provisions, the current statute would penalize the state as if it had violated *every* provision. This modest change would enable states to continue participating in and benefiting from the federal education scheme while opting out of components the state finds offensive.

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145 20 U.S.C. § 6311(g)(2) (Supp. V 2000).

146 *See supra* Part II.B.

147 *See supra* Part II.C.

While adding the "substantially related" amendment to the Act will bolster states' flexibility in electing whether to adopt the federal government's approach to education, it also enables some states to evade an arguably desirable national scheme for education. Because the nation's public schools prepare students to work and live anywhere in the nation,[148] lack of uniformity among the states can create burdens on a multitude of stakeholders, including teachers, administrators, and textbook and test publishers. Of greatest concern, perhaps, is the reduced ability of parents to compare school systems across county and state lines to identify the best educational opportunities for their children. Those increased costs, however, are significantly outweighed by the benefit of states being more responsive to their constituents' needs rather than the inclinations of a federal administration.

Tying specific penalties to specific provisions would enable states to elect to receive federal education funds to bolster their weak areas without sacrificing their strong ones. Connecticut, for example, has used standardized tests since 1986 to measure students' progress and "[f]or over a decade . . . has also emphasized accountability, profiling and publishing assessment results for its school districts and schools on an annual basis, including breakdowns by demographic groups."[149] Although Connecticut's long-standing use of assessment data may suggest it agrees with NCLB's approach to education, it also suggests that significant time, money, and energy was wasted to convert an established testing system to comply with the federal government's design with little to no gain in academic achievement. Separating NCLB's many elements would give states the opportunity to make a meaningful decision as to which parts of the program they support and need additional funding to achieve.[150] Furthermore, giving states real options would save federal dollars otherwise wasted on reinventing educational functions and would relieve the coercive effects of the current NCLB Act.

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148 Ratner, *supra* note 41, at 30 ("[T]he nation as a whole also has a strong economic, political, and defense interest in producing well educated citizens.").

149 Connecticut v. Spellings, 453 F. Supp. 2d 459, 475 (D. Conn. 2006).

150 "If the NCLB[ ] were disaggregated to attach the requirements only to the more relevant revenue stream, . . . states would each be presented with genuine choice. Utah would reject the testing money and accept the instructional money. Conversely, Maine would reject the instructional money and accept the testing money." Note, *supra* note 34, at 904–05.

B. Congress Should Require the Secretary of Education to Provide States with Specific and Complete Information About Potential Monetary Penalties upon Request

The federal government needs to be clear with states about the penalties they face for noncompliance with various NCLB components. To avoid any ambiguities or veiled threats, Congress should require the Secretary of Education to provide states with specific, binding, and complete details about potential monetary penalties they would face for noncompliance. State legislatures and executives should be able to request such information as needed to properly inform the state decisionmaking process. This change would ensure, under the *Murphy* rule, that states have proper notice about the benefits and consequences of accepting federal funds.[151]

Thus far, the Secretary of Education's response to states such as Utah, Virginia, and Connecticut that have considered declining federal funding has been a threat of withholding *all* Title I and related funds regardless of the scale of the noncompliance in question.[152] But the purpose of the Court's rules against coercion and ambiguity is to make certain that states have a real choice whether to accept or reject federal funding. Such threats and ambiguity as to the consequences of noncompliance strip the states of their sovereign decisionmaking power.

If the DOE were required to give states an accurate assessment of the consequences of specific acts of noncompliance, states could proceed intelligently based on their individual circumstances. This is not to say that the government needs to tie every nickel and dime of NCLB funding to specific provisions in an *à la carte* manner. But the extent to which the federal government has tied together *every* NCLB provision and its unrealistic assertion that noncompliance with *any* provision could destroy the *entire* effort results in unconstitutional coercion and ambiguity. Barring candid information from the DOE, states' only source of accurate data as to the consequences of noncompliance will be from violating the alleged terms of their contract with the federal government and waiting to see how the federal government reacts.

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151 Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459 (2006).

152 *Spellings*, 453 F. Supp. 2d at 473–74; Note, *supra* note 34, at 897–98.

C. *Congress Should Clarify the "Unfunded Mandate Provision" to Protect Schools' Local and State Funds from Being Used for NCLB Requirements*

In addition to giving states clear information about the penalties for noncompliance with NCLB, Congress should reinforce the original "Unfunded Mandate Provision" to ensure that states are not required to use their general funds from state and local revenues to meet the federal government's requirements, including the testing provisions. This move will ensure that schools can dedicate their local funding to their primary mission of educating students, rather than complying with federal rules for accountability and teacher certifications.

To bolster and clarify the "Unfunded Mandate Provision," Congress should expressly adopt the interpretation of the Sixth Circuit in *School District of Pontiac*, which found that state officials could read that provision to mean that schools are not required to use local and state funds to meet the federal program's obligations.[153] Given that many states have previously complained that NCLB is underfunded, Congress should also identify the NCLB's priorities for state use of the federal funds in the event that NCLB is or becomes underfunded. This move will ensure that a lack of full funding does not become an excuse for states to fail to comply with any NCLB provisions and, rather, will direct schools how to best use the federal funds they receive when the funds will not cover every provision.

Conclusion

Though NCLB's current provisions rely on a tough-love, hardline approach to forcing states to adopt the entire education scheme, modest changes to the Act's structure can place it on constitutional ground and resolve federalism conflicts without sacrificing any of the benefits of the Act's policies. Implementing these changes will not only reduce wasted federal education dollars, but it will return to states the flexibility that has historically let them experiment with new ideas in education, including charter schools, vouchers, local control, standardized testing, and other creative solutions.[154] As the Supreme Court stated in *San Antonio Independent School District v. Rodri-*

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153 Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., No. 05-2708, 2008 WL 60187, at *11, *16–18 (6th Cir. Jan. 7, 2008).

154 *See* Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1670–71 (2002); Mayer, *supra* note 79, at 398; Erin G. Frazor, Comment, *"No Child Left Behind" in Need of a New "IDEA": A Flexible Approach to Alternate Assessment Requirements*, 36 GOLDEN GATE U. L. REV. 157, 179, 181 (2006).

guez[155]: "No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education."[156]

Requiring Congress to tie federal education funds to specific NCLB provisions and obligating the Secretary of Education to give states straightforward answers about the penalties for noncompliance will strengthen and inform state political decisionmaking and return to states the power to meet the educational demands of their constituents and fulfill their individual constitutional obligations.

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155 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

156 *Id.* at 50.