

NOTE

National Standards and Tests: The Worst Solution to America's Educational Problems . . . Except for All the Others

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INTRODUCTION

In October 2009, the State of New York released the results of the standardized tests it administered to all students.¹ The results were astonishingly impressive: in just two years, the number of eighth graders deemed proficient in math had risen from only 59% in 2007 to 80% in 2009.² The enthusiasm about the gains made on the state test was quickly tempered, however, by students' scores on the National Assessment of Educational Progress ("NAEP"), a federal test given to a sample of students throughout the country.³ According to the NAEP, only 34% of New York eighth graders were proficient in math, and the number of proficient students had risen only 4% since 2007.⁴ Merryl H. Tisch, chairwoman of the New York State Board of Re-

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¹ Jennifer Medina, *U.S. Math Tests Find Scant Gains Across New York*, N.Y. TIMES, Oct. 15, 2009, at A1.

² *Id.*

³ *Id.*

⁴ *Id.*

gents, noted that the gap between the state and federal test scores was a problem, but that the NAEP was the “gold standard” and did a better job of measuring student achievement than state tests.⁵ Educational historian Diane Ravitch went further, calling the gap “documentation of [the] persistent dumbing down [of the state test] by the State Education Department.”⁶

In Colorado, many students came home disappointed after their scores on the state test categorized them as only “partially proficient.”⁷ At least for purposes of reporting scores to the federal government as part of the No Child Left Behind Act (“NCLB”),⁸ however, these students would have been relieved to know that they were “proficient” according to the State of Colorado.⁹ Colorado deemed these students partially proficient for in-state purposes, but deemed the same students proficient for the purpose of reporting their scores to the federal government.¹⁰ Colorado reported its scores in this fashion because, like all states, it needs to have a certain percentage of its students classified as proficient in order to avoid penalties under NCLB.¹¹

These stories from New York and Colorado elucidate a major problem in the American educational system and NCLB in particular. At present, NCLB requires states to create standards,¹² test those standards, have a certain percentage of students be deemed proficient based on the tests, and show improvement on the tests in order to receive certain federal funds.¹³ These provisions in NCLB should lead to clearer student outcomes and greater accountability for states, school districts, teachers, and, ultimately, students. However, NCLB has major flaws that prevent it from being successful.

⁵ *Id.*

⁶ *Id.*

⁷ Sam Dillon, *Education Standards Likely to See Toughening*, N.Y. TIMES, Apr. 15, 2009, at A12.

⁸ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301–7941 (2006)).

⁹ See Dillon, *supra* note 7.

¹⁰ *Id.*

¹¹ See 20 U.S.C. § 6311(b)(2)(G); Irfan Murtuza, Note, *National Standards and NCLB: The Promise of State Compacts*, 15 GEO. J. ON POVERTY L. & POL'Y 129, 133–34 (2008).

¹² Standards refer to general benchmarks for student achievement established by government entities, such as requirements that students “[k]now and apply the steps of the writing process: prewriting, drafting, revising, editing, evaluating, and publishing,” or that students be able to “multiply and divide positive rational numbers.” See *infra* notes 232–33.

¹³ 20 U.S.C. § 6311(b)(2)(G); Murtuza, *supra* note 11, at 133–34.

NCLB has three major flaws. First, states are allowed to create their own standards and tests and determine what score makes a student proficient.¹⁴ This creates perverse incentives for states to adopt easy standards, develop simple tests, and use low thresholds for proficiency. Second, under the current system, each state bears the financial burden of creating its own standards and tests.¹⁵ Creating standards and tests is expensive; forty states have spent over \$640 million on them from 2007–2008.¹⁶ Although standards and tests differ from state to state,¹⁷ the basic content being tested should be the same.¹⁸ For instance, the scientific method and long division are the same whether they are taught in Texas or Maine. Thus, states waste scarce funding by creating duplicative standards and tests.¹⁹ Third, the test scores of students from different states cannot be quickly or accurately compared. The difficulty of the tests given in each state differs dramatically, so comparing students from different states is like comparing apples and oranges.²⁰ This inability to compare states' results undermines a key purpose of standardized testing: accurate comparison of large student groups in order to determine which states are implementing successful educational strategies.²¹

This Note argues that NCLB must be amended so that the dispensation of federal funds to the states is tied to their willingness to adopt a national standard and assess their students' achievement using a national test. The proposed amendments would fix the three flaws in NCLB discussed above. First, states would no longer have the incentive or the ability to lower standards and create simple tests; instead, students throughout the country would take the same tests based on the same standards. Second, wasteful spending on duplicative tests would stop because all students would take the same feder-

¹⁴ 20 U.S.C. § 6311(b)(3).

¹⁵ *Id.*

¹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-911, NO CHILD LEFT BEHIND ACT: ENHANCEMENTS IN THE DEPARTMENT OF EDUCATION'S REVIEW PROCESS COULD IMPROVE STATE ACADEMIC ASSESSMENTS 13 (2009).

¹⁷ Matthew D. Knepper, Comment, *Shooting for the Moon: The Innocence of the No Child Left Behind Act's One Hundred Percent Proficiency Goal and Its Consequences*, 53 ST. LOUIS U. L.J. 899, 912–13 (2009).

¹⁸ DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN'S GUIDE 27 (1995).

¹⁹ *See id.*

²⁰ Knepper, *supra* note 17, at 912–13.

²¹ Angie McKinsey & John McKinsey, *Education Reform in California and 'STAR': California's New Assessment Law Focuses on Accountability at the Expense of Other Important Purposes of Assessment*, 2 U.C. DAVIS J. JUV. L. & POL'Y 77, 78 (1998).

ally created test. Finally, the amendments would allow meaningful comparison of students around the country, allowing educators to cull the best practices being used in different states.

Part I of this Note addresses the history of federal involvement in education. Part II discusses the purpose of NCLB and why the Act is not fulfilling this purpose. Part III sets forth and explains the proposed amendments. Part IV identifies the possible proposals to fix NCLB, the pros and cons of each, and why creating voluntary national standards and tests is the best solution. Finally, Part V addresses arguments against the adoption of federally created national standards and tests.

I. THE HISTORY OF FEDERAL INVOLVEMENT IN EDUCATION

Historically, the federal government played an insignificant role in education.²² However, a series of Supreme Court rulings during the New Deal era construed the Tenth Amendment narrowly, opening the door to far greater federal involvement in education by allowing Congress to use its spending power to shape policy in areas that were not enumerated in the Constitution.²³ In 1965, President Lyndon B. Johnson, as part of his War on Poverty, proposed federal legislation that strove to improve education and ensure that poor and minority students had an equal opportunity to succeed.²⁴ The Elementary and Secondary Education Act (“ESEA”)²⁵ was the culmination of President Johnson’s efforts, and its Title I provision was the hallmark of federal efforts to improve educational equity and achievement for the next thirty years.²⁶

The goal of Title I was to help disadvantaged students achieve basic reading and math skills.²⁷ Title I funding required schools to give remedial assistance to low-performing students.²⁸ Remedial assistance took the form of “pullout” programs in which low-performing students would receive thirty to forty minutes of remedial instruction

²² See MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 680–81 (3d ed. 1992).

²³ U.S. CONST. amend. X; see, e.g., *United States v. Butler*, 297 U.S. 1, 66 (1936) (ruling that the use of the spending power by Congress is not limited to constitutionally enumerated powers).

²⁴ David Nash, Note, *Improving No Child Left Behind: Achieving Excellence and Equity in Partnership with the States*, 55 *RUTGERS L. REV.* 239, 244 (2002).

²⁵ Elementary and Secondary Education Act (ESEA) of 1965, Pub. L. No. 89-10, 79 Stat. 27.

²⁶ See Nash, *supra* note 24, at 244–45.

²⁷ *Id.* at 245.

²⁸ *Id.*

each day.²⁹ Title I continued relatively unchanged for thirty years and was initially considered a success.³⁰ In the 1980s, however, support for Title I eroded.³¹ In 1983, the federal government published a report entitled *A Nation at Risk*, detailing the failure of America's public schools to properly educate their students to compete in an increasingly competitive world.³² In addition, studies of Title I programs found that "pullout" programs had done little, if anything, to raise students' performance or close the achievement gap.³³ The ineffectiveness of Title I prompted a call for accountability, which resulted in the standards movement of the late 1980s and 1990s.³⁴

In 1989, President George H.W. Bush helped organize a national education summit at which the nation's governors endorsed the creation of standards to clarify the specific content and skills students were expected to master in each subject and grade.³⁵ Then, in 1994, Congress passed the Goals 2000: Educate America Act,³⁶ which provided funds for states to develop challenging standards aligned with tests.³⁷ Accountability for the creation of standards was introduced by the Improving America's Schools Act of 1994 ("IASA").³⁸ Under the IASA, states were given timelines to complete standards and faced corrective action for failing to meet the timelines.³⁹ In addition, the IASA required that minority subgroups, including Hispanics and African Americans, make "adequate yearly progress" ("AYP") toward meeting the state standards.⁴⁰ For a school or state to have made AYP, it must have raised the percentage of students who met the minimum proficiency standard by a certain amount each year.⁴¹ The IASA also required states to report their scores disaggregated by race,

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK* 5, 8–11 (1984) (finding that the American public education system was failing to provide students with basic skills).

³³ Nash, *supra* note 24, at 246.

³⁴ See Murtuza, *supra* note 11, at 130–31.

³⁵ *Id.* at 131; MARIS A. VINOVSIS, NAT'L EDUC. GOALS PANEL, *THE ROAD TO CHARLOTTEVILLE: THE 1989 EDUCATION SUMMIT* 40 (1999).

³⁶ Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994).

³⁷ *Id.*, 108 Stat. at 128.

³⁸ Improving America's Schools Act (IASA) of 1994, Pub. L. No. 103-382, § 1111(a)–(b)(1), 108 Stat. 3518, 3523–24 (codified in scattered sections of 20 U.S.C.)

³⁹ H.R. REP. NO. 103-425, at 7–9 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2807, 2813–17.

⁴⁰ Nash, *supra* note 24, at 247.

⁴¹ *Id.*

ethnicity, gender, national origin, and disability, and to hold Title I students to the same standards as all students.⁴²

These federal requirements and incentives led states to adopt standards and tests throughout the 1990s.⁴³ By the end of the decade, every state in the country had a method of testing students' learning, and all but one state had created some academic standards.⁴⁴ Although federal encouragement led states to adopt standards and tests, the IASA did not hold states to a meaningful level of accountability for their students' performance because no significant punitive action was taken if schools and states failed to meet the goals established by the IASA.⁴⁵

The continued failure of American public schools to improve student achievement caused the development of bipartisan support for education reform.⁴⁶ While “[c]onservatives demanded accountability for failing public schools[,] . . . liberals sought to close the achievement gap” between wealthy and poor students.⁴⁷ The result was the enactment of NCLB, the most comprehensive education reform since the passage of the ESEA nearly forty years earlier.⁴⁸ NCLB sought to fix the loopholes in previous legislation by holding states and schools accountable for their students' achievement on standardized tests.⁴⁹ However, the noble goals of NCLB have not been fulfilled because NCLB fails to hold states accountable for the standards and tests they created, providing a perverse incentive to create lax standards and easy tests.⁵⁰

II. NCLB: ADMIRABLE GOALS BUT FLAWED PROVISIONS

A. *The Purpose and Major Provisions of NCLB*

The overriding purpose of NCLB was to ensure that all students have a “fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assess-

⁴² Improving America's Schools Act of 1994 § 1111(b)(3).

⁴³ Nash, *supra* note 24, at 247.

⁴⁴ *Seeking Stability for Standards-Based Education*, EDUC. WEEK (Annual Report Issue), Jan. 11, 2001, at 8, 8–9.

⁴⁵ Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L. REV. 637, 640 (2006).

⁴⁶ See Murtuza, *supra* note 11, at 132–33.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 134.

⁵⁰ *See id.*

ments.”⁵¹ NCLB also sought to provide greater assistance to low-achieving students, especially those with limited English proficiency, impoverished backgrounds, and disabilities.⁵² Finally, NCLB sought to ensure that all students were taught by competent teachers and that schools were held accountable for the success or failure of their students.⁵³

The hallmark of NCLB is its concentration on holding states accountable for the educational outcomes of their students by requiring that states adopt rigorous standards aligned with assessments.⁵⁴ The standards provisions in NCLB require that states develop content and performance standards in reading, math, and, starting in 2005–2006, science.⁵⁵ NCLB mandates that states test all students on these math and reading standards every year in grades three through eight and at least once between tenth and twelfth grade; schools must also test students on science standards at least three times throughout each student’s education.⁵⁶ Each state must also establish “annual measurable objectives” (“AMOs”), which apply to all schools and require that a certain percentage of students reach a minimum level of proficiency in reading, math, and, eventually, science.⁵⁷ Proficiency is determined by students’ performance on the mandated standardized tests.⁵⁸ Each school must ensure not only that its student body as a whole meets the AMOs, but also that all student subgroups (disabled, low income, etc.) meet the objectives.⁵⁹ Each state’s AMOs must contain a plan to increase the percentage of students who are deemed “proficient” each year, with one hundred percent of students achieving proficiency in reading and math by 2014.⁶⁰ If a school and all its subgroups meet their objectives under a state’s AMOs, the school is deemed to have made AYP.⁶¹

NCLB seeks to hold schools accountable for their students’ performance by providing progressively harsher penalties for failure to

⁵¹ 20 U.S.C. § 6301 (2006).

⁵² *Id.* § 6301(2).

⁵³ *Id.* § 6301(1), (4), (6)–(10).

⁵⁴ *Id.* § 1001; James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 939 (2004).

⁵⁵ 20 U.S.C. § 6311(b)(1)(A), (C).

⁵⁶ *Id.* § 6311(b)(3)(C)(v)(1).

⁵⁷ *Id.* § 6311(b)(2)(G).

⁵⁸ *Id.*

⁵⁹ *Id.* § 6311(b)(2)(C), (G).

⁶⁰ *Id.* § 6311(b)(1)(F), (3)(C).

⁶¹ *Id.* § 6311(b)(2)(C).

achieve AYP.⁶² Initially, if a school fails to meet its AYP requirement, it is required to create a school plan to meet its AYP goals.⁶³ However, if in subsequent years it continues to fail, it faces significant consequences: the school must allow students to transfer to a better school,⁶⁴ must make outside tutoring available to students,⁶⁵ and eventually may be forced to fire underperforming staff⁶⁶ and cede control to the state.⁶⁷ The federal government holds states accountable for students' achievement by withholding Title I funds from states that fail to meet the AYP requirements in their AMOs.⁶⁸ Although the notion of the federal government holding states and schools accountable for their students' performance was a paradigm-shifting idea, the discretion given to states to implement NCLB undermined the Act's accountability provisions.⁶⁹ As a result, NCLB has not accomplished its goals of improving educational equity and achievement.

B. Inherent Flaws in NCLB Prevent It from Achieving Its Goals

NCLB has failed its purpose of raising educational achievement in the United States. The best evidence of this is the continued decline in U.S. test scores relative to students around the world.⁷⁰ By 2006, U.S. students had fallen behind their peers in industrialized countries in math, and even ranked lower than students in some developing countries.⁷¹ For instance, in 2006, U.S. fifteen-year-olds averaged a 474 on an international math test.⁷² Students in the United Kingdom and France averaged a 495 and a 494, respectively.⁷³ Asian countries performed even better: Korea averaged a 547, and Japan averaged a 523.⁷⁴ Even countries far less developed than the United

⁶² Murtuza, *supra* note 11, at 134.

⁶³ 20 U.S.C. § 6316(b)(3).

⁶⁴ *Id.* § 6316(b)(1)(E)–(F), (5)(A).

⁶⁵ *Id.* § 6316(b)(5).

⁶⁶ *Id.* § 6316(b)(7)(C), (8)(B).

⁶⁷ *Id.* § 6316(b)(8)(B).

⁶⁸ Murtuza, *supra* note 11, at 134.

⁶⁹ See Ryan, *supra* note 54, at 941–42 (arguing that the discretion that states receive in creating tests and determining proficiency allows states to seek varying degrees of AYP).

⁷⁰ See Maria Glod, *U.S. Teens Trail Peers Around World on Math-Science Test*, WASH. POST, Dec. 5, 2007, at A7.

⁷¹ NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., No. 2008-016, HIGHLIGHTS FROM PISA 2006: PERFORMANCE OF U.S. 15-YEAR-OLD STUDENTS IN SCIENCE AND MATHEMATICS LITERACY IN AN INTERNATIONAL CONTEXT 12 (2007), available at <http://nces.ed.gov/pubs2008/2008016.pdf>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

States, such as Poland, with an average of 495, and Russia, with an average of 476, surpassed U.S. achievement.⁷⁵ Although the reasons for the continued decline of U.S. student achievement are myriad, NCLB has failed to arrest this decline because it does not hold states accountable for the quality of their standards and tests.

1. *Perverse Incentives and the Race to the Bottom*

NCLB provides states with too much discretion to determine the content and rigor of their assessments and standards. In theory, NCLB requires states to adopt “challenging” standards and tests that measure “higher-order thinking skills” in a “valid and reliable” way.⁷⁶ In practice, however, NCLB provides states with complete discretion to create standards and tests and determine the threshold for proficiency.⁷⁷ If states cannot raise the number of students who meet the proficiency requirements provided in their AMOs, the public will deem the education system a failure.⁷⁸ Failure leads to parent and community outrage and political backlash.⁷⁹ State discretion over the content of standards and the difficulty of tests, combined with the desire to avoid penalties and bad press, creates an environment where states face perverse incentives that undermine the goals of NCLB.⁸⁰ States are given incentives to generate easy standards and tests, set low proficiency thresholds, and backload student achievement gains.⁸¹

States fail to create quality assessments due to a lack of capacity and perverse incentives to produce low-quality tests. The creation of standards and tests is a complicated process, and many states simply do not have the expertise and resources to create rigorous tests that are accurately aligned with standards.⁸² Besides the problem of capacity, states face pressure to create tests that a high percentage of their

⁷⁵ *Id.* As of 2010, Russia and Poland had an estimated GDP per capita of \$15,900 and \$18,800, respectively, compared to the United States’ \$47,400. Country Comparison: GDP—Per Capita (PPP), CIA—THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html> (last visited Feb. 22, 2011).

⁷⁶ 20 U.S.C. § 6311(b)(3)(C)(ii)–(iii), (vi) (2006).

⁷⁷ See Martha Derthick & Joshua M. Dunn, *False Premises: The Accountability Fetish in Education*, 32 HARV. J.L. & PUB. POL’Y 1015, 1019–20 (2009); Ryan, *supra* note 54, at 941–42.

⁷⁸ See Ryan, *supra* note 54, at 945.

⁷⁹ Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 144 (2006).

⁸⁰ *Id.*

⁸¹ See Ryan, *supra* note 54, at 946–48. The terms “backload” and “backloading” refer to the practice of postponing most of the required student improvements until very near the statutory deadline. See *infra* notes 106–09 and accompanying text.

⁸² See Nash, *supra* note 24, at 241; Jennifer Cohen, *Race to the Top Funds and State Spending on Student Assessments*, ED MONEY WATCH BLOG (Sept. 29, 2009, 4:17 PM), <http://>

students will pass.⁸³ As the statutory requirement moves closer to one hundred percent proficiency, this pressure will only increase, because affluent suburban districts, worried about the prospect of being deemed failures, will begin to miss their AYP requirements.⁸⁴ Lack of resources, insufficient expertise in test creation, and pressure for high passage rates leads states to create tests that concentrate on lower-level thinking skills, such as memorization, and measure student performance using multiple-choice questions.⁸⁵ These tests stand in stark contrast to the rigorous tests measuring higher-order thinking skills envisioned by NCLB.⁸⁶ Although simple tests make it easier to teach to the test and to quickly raise the number of proficient students, these tests fail to ensure that students learn the analytical and problem-solving skills they need.⁸⁷ The result: NCLB's push for standards and testing paradoxically has caused a dumbing down of the curriculum, to the detriment of students.⁸⁸

In addition to incentives to create subpar standards and tests, states also have an incentive to set their proficiency thresholds very low.⁸⁹ States with tough proficiency thresholds are more likely to face NCLB sanctions for failure to meet their AYP requirements.⁹⁰ On the other hand, states with weak standards have a better chance of meeting their AYP requirements and avoiding sanctions.⁹¹ As a result, states have set their proficiency thresholds very low and, in some cases, have manipulated scoring systems to achieve AYP.⁹² Therefore, a student's being labeled "proficient" has little correlation to the student's actual academic achievement.⁹³

www.newamerica.net/blog/ed-money-watch/2009/race-top-funds-and-state-spending-student-assessments-14998.

⁸³ See Ryan, *supra* note 54, at 947–48.

⁸⁴ See Andrew Spitzer, Comment, *School Reconstitution Under No Child Left Behind: Why School Officials Should Think Twice*, 54 UCLA L. REV. 1339, 1381–82 (2007).

⁸⁵ Cohen, *supra* note 82.

⁸⁶ 20 U.S.C. § 6311(b)(3)(C)(vi) (2006); see also Cohen, *supra* note 82.

⁸⁷ See Spitzer, *supra* note 84, at 1369–70.

⁸⁸ Cf. Heise, *supra* note 79, at 144 (“NCLB risks transforming a race to the top into a race to the bottom.” (internal quotation marks omitted)); Spitzer, *supra* note 84, at 1369–70 (noting a possible negative correlation between improvement in test scores and gains in “substantive knowledge, critical thinking, [and] analytical skills”).

⁸⁹ See Ryan, *supra* note 54, at 947–48.

⁹⁰ See Heise, *supra* note 79, at 144.

⁹¹ *Id.*

⁹² *Id.*; Ryan, *supra* note 54, at 947–48 (stating that Colorado, Connecticut, Louisiana, and Texas have all lowered their proficiency standards to meet AYP goals).

⁹³ See Heise, *supra* note 79, at 144; Kevin Carey, *Hot Air: How States Inflate Their Educational Progress Under NCLB*, EVIDENCE SUGGESTS OTHERWISE, May 2006, at 3, 3, http://www.educationsector.org/sites/default/files/publications/Hot_Air_NCLB.pdf.

Connecticut provides one example of a state lowering its proficiency requirements in response to NCLB.⁹⁴ Prior to NCLB, students in Connecticut needed to earn at least a “Level 4” score on a state-wide test to be considered “at or above the goal level.”⁹⁵ After NCLB, however, the state board of education changed its policy so that students only needed to earn a “Level 3” score to be deemed proficient.⁹⁶ Board meeting minutes reveal that the decision to use Level 3 as the proficiency threshold was related to the potential consequences of not meeting NCLB requirements.⁹⁷

South Carolina provides an even more egregious example of lowering standards. Prior to 2009, students in South Carolina were assessed using the Palmetto Achievement Challenge Test (“PACT”) standards,⁹⁸ which were considered to be some of the highest standards in the country.⁹⁹ Students performed very poorly on the PACT: for instance, in 2007, only 19.7% of eighth graders were proficient according to the test.¹⁰⁰ In 2009, however, the state adopted a new test, the Palmetto Assessment of State Standards (“PASS”).¹⁰¹ One of the nation’s leading testing authorities, the Northwest Evaluation Association (“NWEA”), deemed PASS to be in the bottom quartile of standards, based on a study of twenty-seven states’ standards.¹⁰² The NWEA report stated that “[u]se of these lower standards would result in dramatic increases in the percentages of students meeting standards in South Carolina schools, even with no actual improvement in student performance.”¹⁰³ Although it is unclear whether student per-

⁹⁴ Heise, *supra* note 79, at 145.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Diette Courrégé & Diane Knich, *New Test Cited in AYP Gains*, POST & COURIER (Charleston, S.C.), Jan. 22, 2010, at B3.

⁹⁹ Paul E. Peterson & Carlos Xabel Lastra-Anadón, *State Standards Rise in Reading, Fall in Math*, EDUC. NEXT, Fall 2010, at 12, 13 (grading the strength of South Carolina’s proficiency standard as an “A” in 2003, 2005, and 2007); MICHAEL P. DAHLIN & JOHN CRONIN, NW. EVALUATION ASS’N, THE IMPACT OF THE NEWLY PROPOSED PASS CUT SCORES ON PROFICIENCY RATES AND SCHOOL AYP OUTCOMES, 8 (2009), <http://eoc.sc.gov/NR/rdonlyres/06B20863-D516-4549-BC12-C5A6AA34A041/29855/ImpactofNewlyProposedPASSCutScores.pdf> (stating that the PACT standards were among the most stringent in the country).

¹⁰⁰ Table 2. Differences Between State Proficiency Standards and Those Set by the National Assessment of Educational Progress in 2007, EDUC. NEXT (Fall 2010), <http://education.next.org/files/ProficiencyData.pdf> [hereinafter Differences Between State Proficiency Standards].

¹⁰¹ Courrégé & Knich, *supra* note 98.

¹⁰² Dahlin & Cronin, *supra* note 99.

¹⁰³ *Id.*

formance improved, PASS certainly raised tests scores¹⁰⁴: the 19.7% of eighth graders proficient in math on the PACT in 2007 rose to 62.7% in 2009, a staggering increase of 300%.¹⁰⁵

Finally, NCLB allows states to set their own rate of progress.¹⁰⁶ As a result, many states have chosen a plan of progression similar to a balloon mortgage: backloading large achievement increases until the final years before all students must be proficient, in 2014.¹⁰⁷ Therefore, schools in these states must make increasingly large gains as 2014 approaches, and these last gains will likely be the hardest to make because the students whose scores must improve are logically the hardest students to educate.¹⁰⁸ The increasingly large gains required to meet AYP requirements will lead to an increasing number of schools failing to meet AYP and reinforce the incentives to lower standards and proficiency thresholds in order to meet AYP and avoid penalties.¹⁰⁹

2. *Costly Duplication and Comparison Problems*

Beyond the perverse incentives to create lax standards, tests, and proficiency thresholds, NCLB also imposes huge costs on the education system, while simultaneously failing to use one of the key benefits of standardized testing: the ability to compare students' scores. NCLB causes resources to be diverted from improving teaching and upgrading facilities to the creation and administration of tests.¹¹⁰ Large state bureaucracies have been built to manage the testing programs and report results to the Department of Education.¹¹¹ In 2007–2008 alone, states spent a combined \$640 million creating new standards and tests, with some states spending as much as \$83 million.¹¹² In addition to state spending, the federal government has provided more than \$350 million to the states to help improve the rigor of standards and tests as part of the newly enacted Race to the Top program.¹¹³ The billions of dollars spent on new tests and standards are

¹⁰⁴ Differences Between State Proficiency Standards, *supra* note 100, at 1.

¹⁰⁵ *Id.*

¹⁰⁶ See Ryan, *supra* note 54, at 940.

¹⁰⁷ *Id.* at 946–47.

¹⁰⁸ *Id.* at 945–47.

¹⁰⁹ See *id.* at 945–48.

¹¹⁰ Liz Hollingsworth, *Unintended Educational and Social Consequences of the No Child Left Behind Act*, 12 J. GENDER RACE & JUST. 311, 325 (2009).

¹¹¹ *Id.*

¹¹² U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 16, at 13.

¹¹³ Press Release, U.S. Dep't of Educ., Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), <http://www.ed.gov/news/press-releases/nine->

essentially wasted, considering that there is widespread agreement on core standards throughout the country.¹¹⁴ Besides creating new tests and standards, simply updating and administering fifty different sets of standards and tests costs millions of dollars every year.¹¹⁵ In contrast, a single set of national standards and tests would immediately stop states from wasting money creating duplicative standards and tests and substantially cut the costs of updating standards and administering tests.

In addition to saving money, national standards and tests would also make testing more informative. The ability to compare different student groups is one of the core purposes of standardized testing.¹¹⁶ Comparison allows administrators to determine which educational strategies are successful and which strategies are ineffective.¹¹⁷ States can then share best practices, ensuring that innovations in one state are replicated in states throughout the country.¹¹⁸ It is essential, however, for standards and tests to be similar in order to allow states to make effective comparisons.¹¹⁹ Sadly, under the current system, interstate comparison is costly and inaccurate because students take different tests aligned to different standards.¹²⁰

This comparison problem is illustrated by a 2007 example, when students in the United States participated in a national math test.¹²¹ Massachusetts students scored the highest on the test, with a proficiency rate of 51%.¹²² Mississippi students had the lowest scores, with a mere 14% deemed proficient.¹²³ However, based on state tests, only

states-and-district-columbia-win-second-round-race-top-grants (stating that the Race to the Top Fund is a voluntary competition between states that awards federal grants to states); *see also* Sam Dillon, *Winners of Aid for Education Mostly in East*, N.Y. TIMES, Aug. 25, 2010, at A3 (discussing the Race to the Top Fund of more than \$4 billion, which has awarded federal funds to eleven states and the District of Columbia based on their willingness to adopt educational reforms, including merit pay for teachers, charter schools, and common standards).

¹¹⁴ *See* Heise, *supra* note 79, at 130–31, 146.

¹¹⁵ U.S. GEN. ACCOUNTING OFFICE, GAO-03-389, TITLE I: CHARACTERISTICS OF TESTS WILL INFLUENCE EXPENSES; INFORMATION SHARING MAY HELP STATES REALIZE EFFICIENCIES 14–17 (2003).

¹¹⁶ *See* McKinsey & McKinsey, *supra* note 21, at 78.

¹¹⁷ *See* Murtuza, *supra* note 11, at 136.

¹¹⁸ *Id.*

¹¹⁹ *See id.* (“Lack of a single standard prevents comparisons between states . . .”).

¹²⁰ *See* Goodwin Liu, *National Citizenship and Equality of Educational Opportunity*, 116 YALE L.J. POCKET PART 145, 146 (2006), <http://www.yalelawjournal.org/images/pdfs/77.pdf> (finding that state standards vary significantly).

¹²¹ Greg Toppo, *U.S. Schoolchildren Are “Middle of the Pack” in Global Terms*, USA TODAY, Nov. 14, 2007, at 9D.

¹²² *Id.*

¹²³ *Id.*

39% of Massachusetts students were proficient in 2005, yet more than 53% of Mississippi students were considered proficient.¹²⁴ The reason the highest-performing state in the country, Massachusetts, had a lower percentage of students classified as proficient than the lowest-performing state in the country, Mississippi, is that Massachusetts has some of the most rigorous tests and standards in the country while Mississippi has low-level tests and standards.¹²⁵ The perverse incentives to create low-quality standards and tests,¹²⁶ the waste of money creating duplicative tests, and the inability to compare test scores highlight the pressing need to reform NCLB.

III. SOLUTION: FEDERAL STANDARDS AND TESTS WILL ALLOW NCLB TO ACHIEVE ITS ORIGINAL GOALS

NCLB must be amended for it to fulfill its purpose of raising educational achievement and equity throughout the country. This Note proposes that Congress amend NCLB to make five changes: (1) eliminate the prohibition on conditioning federal funds on the adoption of federal standards and tests; (2) condition five percent of federal education funding on the adoption of federal standards and tests and stop funding the creation and administration of state standards and tests; (3) empower a board of experts to supervise the creation and approval of new standards and tests; (4) establish a procedure for amending standards and tests; and (5) establish a timeline for states to adopt federal tests and standards. The purpose of these amendments is to force states to adopt federally created national standards and tests.

A. *Amending NCLB's Funding Provisions*

The funding provisions of NCLB should be amended to provide federal funding to states to incentivize the adoption and administration of federally created national standards and tests. Currently, 20 U.S.C. § 7371 prohibits the use of federal funds to encourage states to adopt federal standards and tests.¹²⁷ Yet, conditional funding is the main lever through which the federal government influences educational policy,¹²⁸ and without financial incentives, few states will adopt

¹²⁴ Differences Between State Proficiency Standards, *supra* note 100, at 3.

¹²⁵ See Carey, *supra* note 93, at 3, 7.

¹²⁶ See Spitzer, *supra* note 84, at 1371–72.

¹²⁷ 20 U.S.C. § 7371 (2006).

¹²⁸ See Katherine C. Healy, *Reading First, Federalism Second? How a Billion Dollar NCLB Program Disrupts Federalism*, 41 COLUM. J.L. & SOC. PROBS. 147, 158–59 (2007).

national standards and tests. Therefore, the proposed amendment would eliminate § 7371 in its entirety.

The proposed amendment would also replace current incentives for states to adopt their own standards with incentives to adopt a national standard. As currently written, 20 U.S.C. § 6311 establishes guidelines for states to use in creating and adopting their own standards and tests.¹²⁹ The introduction of national standards and tests would make the creation and administration of state standards and tests unnecessary. As a result, this section should be amended to replace NCLB's requirements that states adopt their own standards and assessments with a requirement that states adopt federal standards and assessments. In addition, this section should be amended to incentivize the adoption of federal standards and tests by withholding five percent of federal education funds from states that choose to retain their own standards and tests. The amended § 6311 would read as follows¹³⁰:

§ 6311. State plans

. . . .

(b) Academic standards, academic assessments, and accountability

The Secretary shall withhold five percent of federal education funding from states that fail to meet the strictures of parts (1) and (3) of this section—

(1) Challenging academic standards

(A) In general

Each State plan shall demonstrate that the State has adopted challenging *federal* academic content standards and challenging *federal* student academic achievement standards that will be used by the State, its local educational agencies, and its schools to carry out this part

. . . .

(3) Academic assessments

(A) In general

Each State plan shall demonstrate that the State educational agency, in consultation with *the Department of Education* and local educational agencies, has implemented a set of high-quality, yearly student academic assessments that include, at

¹²⁹ 20 U.S.C. § 6311(b)(1), (3).

¹³⁰ In the following proposed amendments to NCLB, additions to existing statutory provisions appear in italics, and deletions of existing statutory provisions appear in strikethrough.

a minimum, academic assessments *provided by the Department of Education* in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State”

The proposed amendment would also fund the states’ costs of adopting and administering the national standards and tests. As currently written, 20 U.S.C. § 7301 provides federal funding for the creation and administration of state standards and tests.¹³¹ Under the proposed amendments, state standards and tests would no longer exist and thus would not require funding. However, the federal government would compensate the states for the cost of adopting and administering the federal standards and tests in order to incentivize states to adopt the standards and tests. Therefore, § 7301 would be amended in the following ways:

§ 7301. Grants for State assessments and related activities

The Secretary shall make grants to States to enable the States—

- (1) to pay the costs of *adopting and implementing federal standards and tests* ~~the development of the additional State assessments and standards~~
- (2) if a State has *adopted and implemented federal standards and tests, to administer the standards and tests and report students’ scores to the Department of Education* ~~developed the assessments and standards to administer those assessments~~

B. The Framework for Creating and Amending National Standards and Tests

In addition to the aforementioned changes to the funding structure of the existing statute, an additional section (comprised of four subsections) would be added to NCLB. The first section describes the process that would be used to form a board of experts to craft national standards and tests. The second section explains the procedure the panel would use to create and adopt national standards and tests. The third section establishes procedures for revising the national standards and tests. Finally, the fourth section establishes the time period during which states must adopt and implement the national standards and tests. Together, these four sections would ensure that national stan-

¹³¹ 20 U.S.C. § 7301.

dards and tests are created in a consensual and careful process and that they are implemented in a practical and deliberate manner. The exact language of the proposed sections is provided below and is followed by a discussion of the rationale behind the provisions in each section:

§ 7301c. Creation and amendment of national standards and tests

A board of experts shall be empowered to oversee the production of and approve the final version of new national standards and tests.

(a) Composition of the National Board on Standards and Assessments (“NBSA”)

The NBSA shall be composed of one hundred educational experts. Board members shall be appointed to ten-year terms. Each state shall have one board member appointed by the governor of the state. The remaining fifty board members shall be appointed by the Secretary of Education in consultation with the Department of Education and other federal agencies.

(b) Procedure for adoption of standards and tests

A set of standards and aligned assessments shall be created for reading, math, and science for each grade three through twelve. Each standard and assessment shall be put to an individual vote and must be approved or denied in its entirety. Two-thirds of board members must approve of a standard or assessment for it to pass.

(c) Procedure for amendment of standards and tests

The NBSA will meet biannually for two months to review standards and assessments. Amendments must be approved by two-thirds of board members to pass.

(d) Timeline for adoption of standards and tests

Each state shall adopt the national reading standards and assessments no later than one year after their creation. Math standards and assessments shall be adopted no later than two years after their creation. Science standards and assessments shall be adopted no later than three years after their creation.

1. Forming the NSBA and Creating the Standards and Tests

Under subsections (a) and (b) of this proposed amendment, a joint federal-state board, the National Board on Standards and Assessments (“NBSA”), would be formed to develop national standards and tests. The NBSA would be modeled after Federal Communica-

tions Commission (“FCC”) boards, which were developed to solve issues, such as providing universal telecommunication service, that interest both states and the federal government.¹³² The FCC boards are composed of members from the FCC as well as members from the states appointed by the states’ governors.¹³³ The boards seek to alleviate federalism concerns by including states in the decisionmaking process, while at the same time preventing states from developing policies incompatible with federal objectives.¹³⁴

The NBSA would consist of one hundred educational experts, with the large number of board members ensuring that all views are taken into account. Similar to FCC boards, half of the members would be appointed by the Department of Education and half would be appointed by the governor of each state. This would ensure that federal and state concerns are properly balanced. The ten-year term of board members would ensure that board members are accountable, while at the same time ensuring that they are not too susceptible to political pressure. The two-thirds approval threshold for adopting standards and tests would provide the proper balance of protecting minority viewpoints, while at the same time preventing a few dissenters from holding up the process. In order to promote compromises over content, each standard and assessment must be approved in its entirety. In conclusion, the process used to form the board would ensure a balance between state and federal power, while the process for creating standards and tests would balance the need for efficiency against the need for consensus.

2. *Updating and Implementing the Standards and Tests*

Sections (c) and (d) of the proposed amendment would address the process for reviewing and updating standards and tests as well as the timeframe in which states would need to adopt and implement the national standards and tests. The review process would be simple. Every two years, the NBSA would meet for two months to review the standards and assessments and to adopt any needed changes. Biennial review is the preferred method because it balances the need to make

¹³² See Bob Rowe, *Substance Plus Process—Telecom Regulation Reforms to Protect Consumers, Preserve Universal Service, and Promote Competition*, 71 U. COLO. L. REV. 879, 889–90 (2000).

¹³³ 47 U.S.C. § 410 (2006).

¹³⁴ See Rowe, *supra* note 132, at 890–92.

rapid changes in a fast-paced world against a desire to prevent political expediency from driving the decisionmaking process.¹³⁵

Moreover, the timeline for adopting national standards and tests would also be simple. Each year states would need to adopt national standards and tests for a different subject. Reading standards and tests would be adopted in the first year, math in the second year, and science in the third year. The staggered introduction of standards and tests would ensure that states are not overwhelmed and can effectively implement the new standards and tests.

This proposed amendment would close the loopholes that prevent NCLB from raising student achievement and should help our schools prepare our children for the world of the twenty-first century. Although there are alternatives to national standards and tests, as well as arguments against their adoption, the next Part explains why the introduction of voluntary national standards is the best way to fix NCLB.

IV. WHY VOLUNTARY NATIONAL STANDARDS AND TESTS ARE THE BEST SOLUTION TO THE PROBLEMS WITH NCLB¹³⁶

A. *National Standards and Tests Are Feasible and Effective*

Although America has a tradition of local control over schools, national standards and tests have been an integral part of the American education system for decades.¹³⁷ Students from around the country take the SAT or ACT along with Advanced Placement (“AP”) and SAT II exams to gain admission to colleges and universities.¹³⁸ The existence of these tests proves three things. First, a national set of tests is feasible.¹³⁹ Second, there is widespread agreement on what students need to know in different subject areas.¹⁴⁰ AP and SAT II assessments test a plethora of different topics and cover not only objective subjects, like math and science, but also more subjective topics,

¹³⁵ See CHESTER E. FINN, JR. ET AL., *TO DREAM THE IMPOSSIBLE DREAM: FOUR APPROACHES TO NATIONAL STANDARDS AND TESTS FOR AMERICA’S SCHOOLS* 17 (2006).

¹³⁶ This Note does not argue that standardized testing is the best or only way to measure student performance. However, if standardized tests are likely to be the main vehicle for assessing educational achievement, see Heise, *supra* note 79, at 142, then national standards should be the basis for the tests. Also, due to the size of our education system, standardized tests represent one of the few objective and cost-effective ways to quickly and accurately determine student performance. See Rentschler, *supra* note 45, at 648.

¹³⁷ See Heise, *supra* note 79, at 130–31, 146.

¹³⁸ *Id.* at 146.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

such as English literature; this shows that there can be agreement about what is important even regarding cultural subject areas.¹⁴¹ Finally, the most important aspect of the SAT and ACT is that they are strong predictors of students' future success,¹⁴² which logically means that they are strong predictors of a student's current level of knowledge. For instance, second to high-school grades, the SAT is the strongest predictor of future success in college, and the SAT takes a snapshot of a student's skills in a few hours, whereas a student's GPA takes four years to compile.¹⁴³

In addition to nationally standardized tests used for college admission, a national test for elementary- and middle-school students already exists.¹⁴⁴ The NAEP is a comprehensive test that has been used for more than thirty years.¹⁴⁵ The test is not aligned with a particular state's standards but is a national test that is designed to measure content and skills taught in all states.¹⁴⁶ For most of its thirty-year existence, the NAEP was a voluntary test, and states could disregard it without any repercussions from the federal government.¹⁴⁷ However, NCLB requires that a small sample of fourth- and eighth-grade students take the reading and math portion of the NAEP every two years.¹⁴⁸ In theory, NAEP keeps states honest about their own standards because states will be shamed into making reforms if there is a large gap between the state "proficiency" rate and the NAEP "proficiency" rate.¹⁴⁹ In reality, however, students' scores on the NAEP do not put pressure on states because the scores of individual students and schools are not reported, and low scores on the NAEP carry no penalties for states.¹⁵⁰ Furthermore, any pressure that NAEP scores put on states to raise standards is more than countered by incentives to lower standards to ensure that students and schools in the

¹⁴¹ See *id.*

¹⁴² See BARBARA BLEYAERT, *PRINCIPALS' P'SHIP, ACT AND COLLEGE SUCCESS 1* (2010), <http://www.principalspartnership.com/ACTandCollegeSuccess.pdf>; Eddy Ramírez, *High School Grades and SAT: Still Best Predictor of College Success, Study Says*, ON EDUC. (June 18, 2008, 10:09 EST), <http://www.usnews.com/blogs/on-education/2008/06/18/high-school-grades-and-sat-still-best-predictor-of-college-success-study-says.html>.

¹⁴³ Douglas S. Massey, *Social Background and Academic Performance Differentials: White and Minority Students at Selective Colleges*, 8 AM. L. & ECON. REV. 390, 406 (2006).

¹⁴⁴ Ryan, *supra* note 54, at 943.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ 20 U.S.C. § 6311(c)(2) (2006).

¹⁴⁹ See Ryan, *supra* note 54, at 959.

¹⁵⁰ See *id.* at 959–60.

state are not deemed failures due to poor performance on state tests.¹⁵¹ The NAEP represents an underutilized tool at the federal government's disposal to hold states accountable for their standards, and the NAEP will be the starting point for the creation of national standards and tests. College admissions tests and the NAEP prove that national standards are feasible and effective.

B. Federalism Concerns Should Not Prevent the Creation of National Standards and Tests

Public education has long been the purview of state and local governments.¹⁵² However, there is an important national interest in having well-educated citizens.¹⁵³ In recent times, the economy has shifted from the "simple and stable Industrial Age" to the "complex and fast-changing Information Age," which requires a more sophisticated education system.¹⁵⁴ Therefore, the national interest in education has increased drastically.¹⁵⁵ As jobs disappear and competition from abroad increases, it is imperative that America fix its schools.¹⁵⁶ To this end, many education advocates, including Secretary of Education Arne Duncan, have promoted the creation of national standards and tests to ensure that American students can compete against students from Japan, Korea, and elsewhere.¹⁵⁷ However, there are profound issues of federalism implicated in the enactment of national standards and tests.¹⁵⁸

1. Are National Standards and Tests Constitutional?

Critics of national standards and tests claim that conditioning federal funds on the adoption of national standards and tests is unconstitutional under the Tenth Amendment.¹⁵⁹ However, both past

¹⁵¹ *Id.* at 960.

¹⁵² 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, 30 (2007).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ *See* Arne Duncan, U.S. Sec'y of Educ., Speech at the National Science Teachers Association Conference (Mar. 20, 2009) (transcript available at <http://www.ed.gov/news/speeches/secretary-arne-duncan-speaks-national-science-teachers-association-conference>).

¹⁵⁷ Murtuza, *supra* note 11, at 136; *Education Chief Hopes Stimulus Will Push Standards*, USA TODAY, June 14, 2009, http://www.usatoday.com/news/education/2009-06-14-standard-duncan_N.htm.

¹⁵⁸ *See* Murtuza, *supra* note 11, at 133–34.

¹⁵⁹ Daryl Luna, *National Standards Will Merely Produce National Dominance*, TENTH AMENDMENT CTR., Mar. 14, 2010, <http://www.tenthamendmentcenter.com/2010/03/14/national-standards-will-merely-produce-national-dominance/>.

experience and Supreme Court precedent do not support this viewpoint. The federal government already conditions education funding on states creating their own standards and tests,¹⁶⁰ and no case has found this to be a violation of the Tenth Amendment.¹⁶¹ Further, in the landmark case of *South Dakota v. Dole*,¹⁶² South Dakota claimed that Congress violated the Tenth Amendment by conditioning a portion of federal highway funding on South Dakota's adoption of twenty-one as the legal drinking age.¹⁶³ South Dakota argued that, because under the Tenth Amendment Congress could not force South Dakota to raise its drinking age, it was unconstitutional for Congress to bribe South Dakota to raise its drinking age by conditioning federal highway funds on the adoption of a higher drinking age.¹⁶⁴ In *Dole*, the Court found that the federal government could place reasonable conditions on money dispersed to the states through Congress's spending powers, even regarding issues, such as the drinking age, that Congress could not directly regulate.¹⁶⁵

Although the Court in *Dole* allowed the federal government to condition federal funding on a state's adoption of favored federal policies, it also held that Congress could not coerce states to act, stating 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."¹⁶⁶ In *Dole*, the Court found that conditioning five percent of highway funding on the adoption of twenty-one as the legal drinking age was not coercive and therefore did not violate the Tenth Amendment.¹⁶⁷ Since *Dole*, few federal courts have found conditional congressional spending to be coercive, and it has been decades since any federal court has overturned a law because of its coercive effect on states.¹⁶⁸ In addition, in cases where coercion was found, the federal government's actions went beyond simply withholding funds.¹⁶⁹ For instance, in *New York v. United States*,¹⁷⁰ the Supreme Court ruled

¹⁶⁰ See Knepper, *supra* note 17, at 902–03.

¹⁶¹ See, e.g., *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 494 (2006) (dismissing Connecticut's Tenth Amendment challenge to NCLB on jurisdictional grounds).

¹⁶² *South Dakota v. Dole*, 483 U.S. 203 (1987).

¹⁶³ *Id.* at 205.

¹⁶⁴ *Id.* at 205, 210.

¹⁶⁵ *Id.* at 207–08, 210–11.

¹⁶⁶ *Id.* at 211 (internal quotation marks omitted).

¹⁶⁷ *Id.* at 211–12.

¹⁶⁸ Heise, *supra* note 79, at 137.

¹⁶⁹ See Michael C. Tolley & Bruce A. Wallin, *Coercive Federalism and the Search for Constitutional Limits*, *PUBLIUS*, Fall 1995, at 73, 77–78.

¹⁷⁰ *New York v. United States*, 505 U.S. 144 (1992)

that it was a violation of the Tenth Amendment for the federal government to require states either to regulate radioactive waste according to federal guidelines or to take title over all such waste within their borders.¹⁷¹ In finding the law unconstitutional, the Court focused on the fact that Congress was not merely withholding funds, but forcing an obligation on states.¹⁷²

In light of this precedent, the withholding of five percent of education funds unless states agree to use national standards and tests does not seem like a strong candidate for judicial action. Federal funding as a whole provides approximately seven to eight percent of total education spending.¹⁷³ By contrast, federal funding provides around one-third of total highway spending.¹⁷⁴ Because federal funding makes up a much larger share of total highway spending than total education spending, the loss of the same percentage of federal funding would be more coercive in the highway context than the education context.¹⁷⁵ Therefore, under *Dole*, it is unlikely that withholding five percent of federal education funds unless states adopt national standards and tests would be viewed as coercing the states in violation of the Tenth Amendment.

2. *Are National Standards and Assessments Equitable to the States?*

There are two main reasons people believe national standards and tests are unfair to the states. First, states believe that they should have control over testing because they pay nearly ninety percent of their education expenses.¹⁷⁶ Second, states believe their students have unique backgrounds that only state and local governments can take into account when creating standards and tests.¹⁷⁷ Although they are

¹⁷¹ *Id.* at 188.

¹⁷² *See id.* at 174–75.

¹⁷³ Heise, *supra* note 79, at 136–37; *see also* Liu, *supra* note 120, at 146 (stating that the federal share of total education spending has ranged from six percent to eight percent in recent decades).

¹⁷⁴ FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., HIGHWAY STATISTICS 2007 tbl.HF-10, available at http://www.fhwa.dot.gov/policyinformation/statistics/2007/2007_hwy_statistics.pdf.

¹⁷⁵ *See* Heise, *supra* note 79, at 138. *But see* *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) (suggesting that the amount of funding at stake is not a factor in assessing coerciveness).

¹⁷⁶ *See* Heise, *supra* note 79, at 138 (stating that states pay ninety percent of education expenses); *see, e.g.*, Letter from Rick Perry, Governor of Tex., to Arne Duncan, U.S. Sec'y of Educ. (Jan. 13, 2010), available at <http://governor.state.tx.us/files/press-office/O-DuncanArne201001130344.pdf>.

¹⁷⁷ *See* Murtuza, *supra* note 11, at 138.

salient, these two arguments are not persuasive. In response to the first argument against national standards and tests, national standards and tests interfere very little with the daily operation of schools.¹⁷⁸ The standards are broad guidelines for what needs to be taught and leave states wide discretion as to the materials and methods used to master the standards.¹⁷⁹ In addition, if states do feel that national standards and testing are too invasive, they need only forego five percent of their federal education funds. Finally, the belief that students from different states come from such disparate backgrounds and cultures that there are not enough concepts known universally throughout the country is simply erroneous. In today's world, nearly all students have access to the same print sources, television shows, movies, books, etc., so that there is a large pool of concepts that are known throughout the country.¹⁸⁰ Although federalism concerns need to be taken into account in the process of creating national standards and tests, federalism concerns are not a reason to forego national standards and tests altogether.

C. *Voluntary National Standards and the Alternatives*

National standards will fix three problems with NCLB because they will: (1) introduce standards and tests common to all states, so that no state has an incentive to invent gains by creating easy standards and tests; (2) stop wasteful spending on the creation and maintenance of fifty separate standards and tests; and (3) allow easy comparison of students' scores throughout the country. Therefore, this Note proposes that the federal government create national standards and assessments and provide incentives for states to adopt them. There are three basic alternatives to voluntary national standards: (1) the status quo; (2) the use of state compacts to create regional standards and assessments;¹⁸¹ or (3) a federal government mandate that states use national standards and assessments.¹⁸² Each alternative

¹⁷⁸ See *infra* Part V.A.

¹⁷⁹ Helen A. Moore, *Testing Whiteness: No Child or No School Left Behind?*, 18 WASH. U. J.L. & POL'Y 173, 193, 199 (2005).

¹⁸⁰ Press Release, Ohio Educ. Ass'n, National Governors Association and State Education Chiefs Launch Common State Academic Standards (June 22, 2010), <http://www.ohea.org/gd/templates/pages/oea/OEADetail.aspx?Page=3&TopicRelationID=102&Content=17928> (discussing standards that are effective for all students across states).

¹⁸¹ See, e.g., Murtuza, *supra* note 11, at 138 (arguing in favor of state compacts).

¹⁸² See, e.g., FINN ET AL., *supra* note 135, at 15 (considering, and ultimately rejecting, a system of mandatory national tests).

has its pros and cons, but each is inferior to voluntary national standards.

1. *Voluntary National Standards*

Voluntary national standards provide the correct balance of respecting state sovereignty while ensuring that all states adopt rigorous national standards and tests. First, a uniform federal standard would stop the race to the bottom by taking the power to create standards and tests from the states and introducing a single set of national standards and tests.¹⁸³ Second, the national standards and tests would stop the production of duplicative state standards and tests. Third, the scores of students across the country could be quickly, accurately, and cheaply compared because all students would take the same tests based on the same standards. So, the key questions are (1) whether states would “volunteer” to adopt the national standards and tests and (2) whether federalism concerns would defeat the proposed amendments.

Past experience supports the conclusion that the vast majority of states would adopt voluntary national standards.¹⁸⁴ NCLB is optional, and every state has agreed to follow the guidelines of NCLB.¹⁸⁵ This is especially extraordinary considering that many states have accused the federal government of badly underfunding the implementation of NCLB. For instance, a study prepared for the Ohio Department of Education estimated that the federal government underfunded the implementation of NCLB in Ohio by more than \$1 billion a year.¹⁸⁶ More recent history also suggests that states would adopt voluntary national standards. As part of the American Recovery and Reinvestment Act of 2009,¹⁸⁷ the Department of Education was allocated \$4 billion as part of the Race to the Top Fund.¹⁸⁸ States then had to draw up proposals for improvements to their education systems and compete for the money.¹⁸⁹ However, states had to make sacrifices to compete; for instance, states could not have laws that prevented student test scores from being used as a factor in teachers’ evaluations, and

¹⁸³ *Id.* at 21.

¹⁸⁴ *Id.* at 140.

¹⁸⁵ See Sam Dillon, *Obama to Seek Sweeping Change in ‘No Child’ Law*, N.Y. TIMES, Feb. 1, 2010, at A1.

¹⁸⁶ Amanda K. Wingfield, Comment, *The No Child Left Behind Act: Legal Challenges as an Underfunded Mandate*, 6 LOY. J. PUB. INT. L. 185, 194, 201 (2005).

¹⁸⁷ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

¹⁸⁸ Dillon, *supra* note 185.

¹⁸⁹ *Id.*

states had to promote the opening of charter schools.¹⁹⁰ Both of these issues are divisive,¹⁹¹ but numerous states have changed their laws to comply, and nearly forty states competed for the funds.¹⁹² Although \$4 billion is an incredible amount of money, it pales in comparison to the roughly \$160 billion in education funding states receive from the federal government annually.¹⁹³ Therefore, if the mere possibility of a one-time grant can entice states to change laws, a guarantee of billions of dollars annually should provide a strong incentive to adopt national standards.

The question then becomes whether federalism concerns would make voluntary national standards politically unfeasible. President Clinton tried to introduce a voluntary national test in the late 1990s and failed.¹⁹⁴ However, the political climate has changed since then, and national standards have become more palatable to both the left and the right.¹⁹⁵ Conservatives are upset by the lack of accountability in NCLB, and progressives are worried that low standards are short-changing our students.¹⁹⁶ National standards would address both these concerns. In conclusion, voluntary national standards are the best approach because they provide strong incentives to adopt national standards and assessments, while not forcing standards on states and causing a federalism-fueled backlash.

2. *The Status Quo*

The existing NCLB framework has one major strength: it is well known to states and school districts around the country, and retaining this framework would ensure that schools have stability. Therefore, some say that, although NCLB is flawed, other routes short of creating national standards would sufficiently strengthen the law.¹⁹⁷ These

¹⁹⁰ *Id.*

¹⁹¹ Stacy Teicher Khadaroo, *Linking Teachers and Student Test Scores Gains Some Momentum*, CHRISTIAN SCI. MONITOR, Oct. 14, 2010, <http://www.csmonitor.com/USA/Education/2010/1014/Linking-teachers-and-student-test-scores-gains-some-momentum>; Jay Mathews, *Charter Schools' Big Experiment*, WASH. POST, June 9, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/08/AR2008060802174.html>.

¹⁹² Sam Dillon, *Race to the Top Fund*, N.Y. TIMES, <http://www.nytimes.com/info/race-to-the-top-fund/?scp=1-spot&sq=race%20to%20the%20top%20fund&st=cse> (last visited Jan. 6, 2011).

¹⁹³ U.S. Department of Education Spending: Grand Total Fiscal Year 2009, 51, <http://www2.ed.gov/about/overview/budget/statetables/11stbyprogram.pdf> (last visited Mar. 17, 2011).

¹⁹⁴ Murtuza, *supra* note 11, at 141.

¹⁹⁵ *See id.* at 140–41.

¹⁹⁶ *Id.* at 132–33.

¹⁹⁷ MICHAEL A. REBELL & JESSICA R. WOLFF, MOVING EVERY CHILD AHEAD: FROM NCLB HYPE TO MEANINGFUL EDUCATIONAL OPPORTUNITY 4 (2008).

people point to three things. First, the Obama Administration has pushed hard for common standards and assessments and has provided hundreds of millions of dollars to achieve this end.¹⁹⁸ For instance, the Race to the Top Fund has provided \$350 million to states to improve standards and assessments.¹⁹⁹ Second, the NAEP keeps states honest by shaming states whose state scores are too divergent from their NAEP scores.²⁰⁰ Third, political pressure has caused places such as Los Angeles to strengthen standards voluntarily, and this will very likely continue.²⁰¹

Each argument has some validity, but also major weaknesses. Regarding the first argument, the Obama Administration has recently had significant power over states due to education funding provided by the 2008 stimulus.²⁰² This power has allowed the federal government to achieve significant progress toward states adopting common standards.²⁰³ For instance, thirty-nine states have agreed to adopt common standards in English and math, in part because of incentives built in to the administration's Race to the Top program.²⁰⁴ However, this progress is somewhat fictitious because participating states have adopted common standards without adopting common assessments based on those standards, which does not address the underlying problems with NCLB.²⁰⁵ Namely, common standards alone do not address (1) the incentives of states to make their assessments less rigorous,²⁰⁶ (2) the costs of duplicative assessments,²⁰⁷ and (3) the inability to compare scores from state to state.²⁰⁸ In addition, as current federal funding runs out and the backlash over unsustainable deficits in-

¹⁹⁸ Dillon, *supra* note 185.

¹⁹⁹ Press Release, *supra* note 113.

²⁰⁰ Ryan, *supra* note 54, at 959.

²⁰¹ Charles Taylor Kerchner, *A Ray of Hope*, EDUC. NEXT, Summer 2007, at 55, 57.

²⁰² Press Release, *supra* note 113.

²⁰³ See Tamar Lewin, *States Embrace Core Standards for the Schools*, N.Y. TIMES, July 21, 2010, at A1.

²⁰⁴ *In the States*, COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/in-the-states> (last visited Jan. 2, 2011) (providing a map of the thirty-nine states that have agreed to common standards).

²⁰⁵ See Nick Anderson, *Race to the Top Grants Go to Groups Developing New Student Assessment Strategies*, WASH. POST, Sept. 2, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090202084.html> (noting that while a majority of states joined national standards, there still remain a multiplicity of assessments). In addition, the common standards have not been implemented by the states, and the federal government has not provided any funds to help states implement them.

²⁰⁶ See *supra* Part II.B.1.

²⁰⁷ See *supra* Part II.B.2.

²⁰⁸ See *supra* Part II.B.2.

tensifies, there will no longer be hundreds of millions of dollars of spare cash to lavish on the states for education reform.²⁰⁹ Nonetheless, NCLB's incentives to lower standards and simplify tests would remain, so states might halt reform or fail to implement agreed-upon reforms.

The other two arguments in favor of the status quo are also not persuasive. The second argument fails because the divergence between state test scores and NAEP scores has simply not placed a floor on the quality of states' standards. States rationalize gaps in state scores and the NAEP by claiming their state tests assess different subjects than the NAEP.²¹⁰ Furthermore, gaps between achievement on state tests and the NAEP have not caused major political upheaval because the scores of individual districts and schools are not reported.²¹¹

Finally, the argument that political pressure alone can force states to raise standards is unpersuasive because political pressure is susceptible to the changing winds of politics. Currently, unemployment and the economy dominate the public discourse to the exclusion of all other issues, and although in the future there may be intermittent pressure to raise standards, the constant fiscal incentive to lower standards will more than offset the sporadic political pressure to raise them.

3. *State Compacts*

State compacts are agreements among states to collaborate in the development of common standards and tests.²¹² The hope is that these compacts will eventually combine into de facto national standards and tests.²¹³ State compacts have the major advantage that they do not require federal development of standards or assessments,²¹⁴ which should alleviate state sovereignty concerns. However, the state compact proposal has three substantive weaknesses. First, it does not ensure that the race to the bottom ends; in fact, it could aggravate it by causing states to coalesce around weaker standards and tests.²¹⁵ Second, voluntary compacts will take time to proliferate throughout different regions of the country, and there is no guarantee that compacts

²⁰⁹ Cf. Paul Krugman, Op-Ed., *There Will Be Blood*, N.Y. TIMES, Nov. 22, 2010, at A21.

²¹⁰ See Ryan, *supra* note 54, at 959.

²¹¹ See *id.* at 959–60.

²¹² See Murtuza, *supra* note 11, at 141.

²¹³ *Id.*

²¹⁴ See *id.*

²¹⁵ *Id.*

will ever combine into a single or even a few groups of standards and tests. Third, compacts do not fix the problems of duplicative spending on standards and tests or the inability to compare student scores from different states or among states in a particular compact. In addition to these substantive weaknesses, the belief that state compacts will reduce state sovereignty-based backlash is overstated.

The state compact approach assumes that states do not like the federal government interfering in their affairs but do not mind other states doing so.²¹⁶ However, the long history of interstate animosity shows that this is a fallacy.²¹⁷ Furthermore, states taking part in a compact would have to work with numerous other states, which would create more points of contact for friction to develop. National standards and tests, on the other hand, would involve the federal government interacting with each state and each state only having to worry about its relationship with the federal government. In this way, state compacts intrude on state sovereignty, reducing the advantages of state compacts relative to voluntary national standards and tests.

4. *Mandatory National Standards*

Under the mandatory national standards approach, states would be required to adopt federally created national standards and tests. This method contains all the strengths of voluntary national standards and assessments.²¹⁸ Further, it carries the additional strength of guaranteeing that all states use a uniform, rigorous standard aligned with assessments.²¹⁹ However, the downfall of this approach is political. Even ardent supporters admit it is politically impossible,²²⁰ because the critical support of conservatives could disappear and fears of a federal takeover of school operations could proliferate.²²¹

In addition to raising political concerns, federal implementation of mandatory national standards and tests seemingly violates the Constitution. In *Printz v. United States*,²²² the Supreme Court curtailed the power of the federal government by broadening the scope of the

²¹⁶ *Id.* at 138.

²¹⁷ See Mehmet K. Konar-Steenberg, *One Nation or One Market? Liberals, Conservatives, and the Misunderstanding of H.P. Hood & Sons v. Du Mond*, 11 U. PA. J. CONST. L. 957, 961–62 (2009) (discussing rivalry and retaliation between states).

²¹⁸ See Murtuza, *supra* note 11, at 140.

²¹⁹ *Id.*

²²⁰ FINN ET AL., *supra* note 135, at 21.

²²¹ See Murtuza, *supra* note 11, at 140.

²²² *Printz v. United States*, 521 U.S. 898 (1997).

Tenth Amendment.²²³ The *Printz* Court found that the federal government could not force state officials to carry out federal programs.²²⁴ In that case, the Court held that it was unconstitutional for the federal government to require state policemen to conduct background checks on gun buyers as part of a federal program intended to prevent criminals from buying weapons.²²⁵ The federal intrusion was minimal, considering background checks take only a few minutes and were only to be conducted by state officials temporarily, while federal officers received training.²²⁶ However, the law was still deemed unconstitutional.²²⁷ Forcing teachers and administrators to permanently administer annual federal assessments is a far greater intrusion on state sovereignty than the intrusion in *Printz*, so a law establishing federally mandated standards and tests would likely be declared unconstitutional under the Tenth Amendment. In short, voluntary national standards and tests are the surest way to solve the problems in NCLB without intruding too far on state sovereignty.

V. ARGUMENTS AGAINST NATIONAL STANDARDS AND TESTS, AND WHY THEY ARE UNPERSUASIVE

There are a number of reasons why some parents, organizations, and states oppose national standards and tests. Although these criticisms have some validity, most find flaws in the American educational system as a whole and, in particular, the use of standardized testing to measure student achievement.²²⁸ Basically, the problems identified are systemic issues, which would be alleviated—as opposed to aggravated—by national standards and tests.

A. *National Standards Will Chill Local Participation in Education Policy*

In the last decade, a growing number of parents, students, and community organizations have come together to try to improve education.²²⁹ This work has led to many important improvements, including

²²³ *Id.* at 935.

²²⁴ *Id.* at 929.

²²⁵ *Id.* at 933.

²²⁶ *Id.* at 927–30.

²²⁷ *Id.* at 933.

²²⁸ See 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, 674–64 (2006) (explaining why some oppose standardized testing).

²²⁹ Gordon Whitman, Response, *Making Accountability Work*, 28 N.Y.U. REV. L. & SOC. CHANGE 361, 363 (2003).

increasing resources, creating smaller and more innovative schools, replacing ineffective personnel, and forging bonds of trust between schools and the community.²³⁰ Many people believe that national standards and tests will limit the local role in crafting educational policy.²³¹ This would discourage the participation of parents and teachers in the process of creating educational policy, which would weaken an important source of innovation. These critics, however, misinterpret the role of standards.

Standards are broad prescriptions about student achievement, such as requirements that students “[k]now and apply the steps of the writing process: prewriting, drafting, revising, editing, evaluating, and publishing,”²³² or that students be able to “multiply and divide positive rational numbers.”²³³ These overarching goals, if prescribed by the federal government, would not address curriculum or instructional strategies and would leave wide discretion to states, districts, and schools to determine the appropriate curriculum and instructional strategies needed to meet the federally prescribed standards.²³⁴ Curriculum strategies involve the actual resources used to teach—for instance, the books, stories, and poems that will be used to teach students to read. Instructional strategies deal with how subjects will be taught—for instance, whether teachers will lecture, use small groups, or utilize computers. Federal standards would demand that states teach students certain skills, but leave states free to choose the materials and methods employed to have students master those skills.²³⁵ Parent and community participation in crafting curriculum and instructional strategies would remain an important source of innovation, and national standards would not prevent these groups from having a stake in the process.²³⁶

²³⁰ *Id.* at 364.

²³¹ Sean Cavanagh, *U.S. Common-Standards Push Bares Unsettled Issues*, *EDUC. WEEK*, Jan. 14, 2010, <http://www.edweek.org/ew/articles/2010/01/14/17overview.h29.html>.

²³² TENN. DEP'T OF EDUC., *TENNESSEE ENGLISH LANGUAGE ARTS STANDARDS*, 5, http://www.state.tn.us/education/ci/english/doc/ENG_Grade_5.pdf (last visited Nov. 18, 2010).

²³³ MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., *VERSION 2.0 MATHEMATICS GRADE- AND COURSE-LEVEL EXPECTATIONS*, 6 (2008), http://dese.mo.gov/divimprove/curriculum/GLE/documents/ma_gle_2.0_k8_0408.pdf.

²³⁴ *See* Cavanagh, *supra* note 231.

²³⁵ Kurtis D. Behn, Note, *Finding a Coherent Federal Education Policy Where Adequacy Litigation and No Child Left Behind Meet*, 40 *SUFFOLK U. L. REV.* 439, 458–60 (2007) (stating that states would have discretion in their implementation of federal standards).

²³⁶ *See id.* (arguing that the federal government must embrace local participants as partners).

B. National Standards Will Narrow the Curriculum and Put Undue Emphasis on Reading, Math, and Science

NCLB requires that students be tested in math, reading, and science.²³⁷ However, it does not require testing in other important subjects, such as history, music, and art.²³⁸ As a result, schools struggling to raise test scores concentrate on math, reading, and science to the exclusion of other subjects.²³⁹ For instance, a Center on Education Policy study found that seventy-one percent of schools in 299 surveyed districts had reduced time spent teaching the arts and other subjects to increase the amount of time spent on reading and math because of pressure to meet NCLB mandates.²⁴⁰ The declining importance of noncore subjects is particularly disturbing because studies have found that art and music education are important to cognitive growth and can actually improve students' scores on standardized tests.²⁴¹

Although it is true that standardized testing may narrow the curriculum, it is also true that education cannot be improved without the assessment, tracking, and accountability that standardized testing allows.²⁴² Educators have always concentrated on improving curriculum and developing new teaching strategies as a pathway to higher achievement.²⁴³ Without clear standards, assessments, and accountability, however, those efforts fail to produce consistent and replicable improvement.²⁴⁴ Requiring testing and the reporting of scores is burdensome, but it represents the only way to hold schools and teachers accountable for their students and is rightfully the cornerstone of education policy in the United States.²⁴⁵ In addition, there is no reason why emphasizing standardized testing would preclude an expansive curriculum that fosters critical thinking.²⁴⁶

Furthermore, there are ways to ensure that history, civics, and the arts are not overlooked. For instance, civics can be integrated into

²³⁷ Hollingsworth, *supra* note 110, at 322.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Ngai, *supra* note 228, at 662–64.

²⁴² See Anthony Consiglio, Comment, *Nervous Laughter and the High Cost of Equality: Renewing “No Child Left Behind” Will Safeguard a Vibrant Federalism and a Path Toward Educational Excellence*, 2009 BYU EDUC. & L.J. 365, 379.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *See id.* at 380.

²⁴⁶ *See id.*

other subject areas,²⁴⁷ and incentive programs can be established to reward schools that devote certain amounts of time to the arts.²⁴⁸ Finally, many states require certain amounts of time be spent on history, art, and music.²⁴⁹ Teachers in these subjects have little incentive to emphasize reading, math, or science over their own subject matter because they are not held accountable for their student's scores in math, science, and reading. Without standardized testing, we have no benchmarks for measuring student achievement, and so any narrowing of the curriculum due to testing is more than offset by the gains in accountability regarding the core subjects of reading, math, and science.

C. National Tests Would Demonstrate the Disparities in Educational Achievement Throughout the Country

Severe disparities in educational achievement exist between different school districts within states and among the states themselves.²⁵⁰ These disparities are caused by differences in present education spending as well as the historically uneven development of education throughout the country.²⁵¹ States in the South, Southwest, and West Coast are the lowest-spending states, and the states with the lowest performances.²⁵² These states are also far more ethnically diverse, with less than fifty percent of their students classified as white, whereas in high-spending states, more than seventy percent of students are white.²⁵³ There is a concern that enacting national standards will reinforce stereotypes about the backwardness of certain regions and the academic inferiority of certain minority groups.²⁵⁴ Furthermore, this stigmatization risks aggravating the real disparities that already exist by demoralizing students deemed failures and causing

²⁴⁷ Charles N. Quigley, *Civic Education: Recent History, Current Status, and the Future*, 62 ALB. L. REV. 1425, 1449 (1999).

²⁴⁸ See Ngai, *supra* note 228, at 682–83.

²⁴⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-286, ACCESS TO ARTS EDUCATION: INCLUSION OF ADDITIONAL QUESTIONS IN EDUCATION'S PLANNED RESEARCH WOULD HELP EXPLAIN WHY INSTRUCTION TIME HAS DECREASED FOR SOME STUDENTS 38–39 (2009).

²⁵⁰ Liu, *supra* note 120, at 145.

²⁵¹ See *id.* (finding that the ten highest-spending states spent more than fifty percent more per pupil than ten lowest-spending states).

²⁵² *Id.*

²⁵³ *Id.* at 146.

²⁵⁴ See Monique McMillian, *Is No Child Left Behind 'Wise Schooling' for African American Male Students?*, 87 HIGH SCH. J. 25, 28–29 (2003–2004) (arguing that highlighting disparities between students reinforces stereotypes).

students to drop out because they fear they will not be able to pass standardized tests required for graduation.²⁵⁵

Although national standards and tests would make disparities among states and groups of students clearer, they certainly would not aggravate them, and they may in fact ameliorate them. First, information is already available about state-to-state disparities in NAEP, SAT, and ACT scores.²⁵⁶ Second, state tests already show the egregious disparities between school districts and minority groups within the state.²⁵⁷ Third, the differences in the rigor of current state tests simply mask disparities and hurt students in states with low standards.²⁵⁸

Title I ties federal aid in part to the number of low-performing students in a school.²⁵⁹ Simple state tests categorize failing students as “proficient,” causing a reduction in federal funding and exacerbating disparities.²⁶⁰ Beyond causing the loss of funding, hiding failure prevents communities from realizing the severity of their education problems, and if people do not know there is a problem, then they cannot take action to fix it. In short, national testing would clarify existing interstate disparities and may help to close the achievement gap between states. Furthermore, once these disparities are highlighted, they may spur increased funding for education on a state level and increased federal aid based on the number of lower-performing students.

D. National Tests Are Discriminatory

Testing is supposed to be a gender- and race-neutral process that leads to “fair” results.²⁶¹ However, there is a strong belief that standardized testing is biased against minority groups.²⁶² Many believe that standardized tests measure not only academic achievement, but also cultural background—and that tests are based on a white cultural

²⁵⁵ *Id.*

²⁵⁶ See *supra* text accompanying notes 122–24.

²⁵⁷ Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y. L. SCH. L. REV. 1071, 1107 (2009).

²⁵⁸ See *supra* Part II.B.1.

²⁵⁹ 20 U.S.C. § 6303(g) (2006); see also 2010 Title I School Improvement 1003 (g): STEM and ELA Enrichment, Professional Development in Advanced Coursework and Leadership Academies Grant Application, N.Y. STATE EDUC. DEP'T (Mar. 10, 2010), <http://www.p12.nysed.gov/funding/2010stemela/home.html>.

²⁶⁰ 20 U.S.C. § 6303(g); see also *supra* Part II.A

²⁶¹ See Moore, *supra* note 179, at 184.

²⁶² See *id.* at 181, 184–85.

background.²⁶³ Therefore, the argument goes, white students will perform better on the tests, gaining an advantage over minorities in college admissions and job applications, and thereby perpetuate existing inequalities.²⁶⁴

The issue of bias should not derail national standards for three reasons. First, the bottom line is that, whether one is white or a minority, there is a certain set of educational skills one must have to be successful in academia or business, and these are the skills that should be targeted by standardized tests. Therefore, to the extent that standardized tests are biased against minorities, this is a critique of society, not the tests. Second, abandoning standardized testing will not fix the problem of bias, which already exists in state tests.²⁶⁵ Third, by creating a national test, administrators would have a chance to try to remove as many “culturally” biased test items as possible and include more “abstract and conceptual” questions to ensure that tests measure objective criteria.²⁶⁶ Fourth, a national test would work to fix the problem of bias by taking test creation out of the hands of more parochial state bureaucrats and providing more funding. The federal government has the capacity to spend more money creating tests than individual states, which presumably would allow for more money to be spent on removing biases from tests. Furthermore, the federal government is less susceptible to local pressure to include certain subjects on tests.²⁶⁷

Although the arguments against national standards and tests have some validity, the United States needs rigorous standards and tests immediately in order to help children succeed in an increasingly competitive world. Congress should not let the perfect be the enemy of the good and should act now to amend NCLB to encourage states to adopt voluntary national standards and assessments.

²⁶³ *Id.* at 181, 196.

²⁶⁴ *Id.* at 185.

²⁶⁵ Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 *FORDHAM URB. L.J.* 1009, 1034–35 (2009).

²⁶⁶ *See* Moore, *supra* note 179, at 185.

²⁶⁷ *See* Craig Livermore & Michael Lewchuk, *Centralized Standards and Decentralized Competition: Suggested Revisions for No Child Left Behind to Create Greater Educational Responsiveness Toward Disempowered Minority Groups*, 33 *SETON HALL LEGIS. J.* 433, 483–84 (2009).

CONCLUSION

NCLB currently does not fulfill its purpose of raising student achievement throughout the country. Amending the statute to condition five percent of federal education funding on the adoption of national standards and tests would fix the perverse incentives to lower standards and simplify assessments, allow for the comparison of students from one state to another, and end the wasteful duplication of standards and assessments.